>> FINAL CASE FOR TODAY IS STATE OF FLORIDA VERSUS KACZMAR AND KACZMAR VERSUS DIXON, 221671 AND 23725.
>> MR. CHIEF JUSTICE AND MAY IT PLEASE THE COURT, MY NAME IS JASON RAMIREZ'S ATTORNEY GENERAL FOR THE STATE OF FLORIDA AND I'LL EXPLAIN WHY THIS COURT SHOULD REVERSE THE THIRD COUNTY PHASE AGAINST MR. KACZMAR. THE COURT GRANTED HIM THE THIRD PENALTY PHASE AFTER DETERMINING THE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS COUNSEL AT THE OUTSET OF JURY SELECTION FAILED TO OBJECT WHEN THE RESENTENCING COURTS HELD THE PROSPECTIVE JURORS THAT KACZMAR WAS PREVIOUSLY SENTENCED.
THE STATE OF FLORIDA APPEAL CHALLENGES THE DEFICIENT PERFORMANCE RULE, I APOLOGIZE, THE NO PREJUDICE RULE.
>> THAT WAS JUST A DASH, DASH.
>> SO AT THIS POINT YOU'RE JUST CONCEDING IT WAS DEFICIENT PERFORMANCE.
>> WE HAVEN'T APPEAL THAT SO WE WAVED AND CHALLENGED THAT AT THIS POINT.
NOT SAYING IT'S NOT AN ARGUMENT THAT COULD HAVE BEEN MADE BUT WE DECIDED TO FOCUS ON THE NO PREJUDICE RULE BECAUSE IT'S SO STRAIGHTFORWARD AND SIMPLE TO THIS COURT CASE. THERE WASN'T A NEED TO DELVE INTO DEFICIENCY.
>> LET ME ASK YOU THIS.
I'VE BEEN A TRIAL JUDGE FOR A LONG TIME AND SOMETIMES JUDGES MISSPEAK AND SAY THINGS THEY SHOULDN'T SAY BECAUSE IT JUST SLIPS. BUT LET ME CHANGE THE FACTS A LITTLE BIT. WHAT IF WE HAD REMANDED THE CASE BACK INSTEAD OF FOR A NEW PENALTY PHASE, REMANDED BACK FOR A NEW TRIAL ON GUILT?
AND THE FOLLOWING INSTRUCTION WAS GIVEN TO THE JURY AND THE JUDGE TAKES ADVANTAGE AND HE'S TRYING TO EXPLAIN TO THE BIG PANEL WHY WE'RE HERE. LET'S SAY THE INSTRUCTIONS THE JUDGE GIVES WAS SOMETHING LIKE THIS, I WANT TO DO THIS JUST RIGHT.
LET ME SEE IF I CAN FIND IT.
THE TRIAL JUDGES, HE SAYS THIS CASE THE JUDGE SAYS THIS CASE HAS A LITTLE HISTORY TO IT. SO LET ME EXPLAIN YOUR DUTY TODAY. THE DEFENDANT WAS FOUND GUILTY OF MURDER IN THE 1ST DEGREE ON 8,12,10 HOWEVER THE SUPREME COURT SENT THE CASE BACK HERE WITH INSTRUCTIONS THE DEFENDANT IS TO HAVE A NEW TRIAL ON THE QUESTION OF WHETHER HE IS GUILTY OR NOT.
WOULD YOU NOT CONSIDER THAT TO BE PREJUDICIAL THAT THE JURY IS TOLD HE HAD PREVIOUSLY BEEN FOUND GUILTY?
>> ACTUALLY KNOW. ON DIRECT APPEAL COUNSEL CAN CERTAINLY OBJECT BUT WE ARE DEALING WITH AN INTERESTING ARENA. WE'RE NO LONGER UNDER TRIAL. INSTEAD WE'RE TRYING TO FIGURE OUT WHAT IS THE

REASONABLE HARM THAT THE DEFENDANT SUFFERED FOR AN OBJECT OF ALL REASONABLE JURY FOLLOWING THE LAW. I ASSUME THAT JURY LATER ON IS INSTRUCTED YOU MUST FOCUS ON THE EVIDENCE THAT IS BEFORE YOU IN THIS TRIAL.
>> I'VE READ THOSE INSTRUCTIONS TO AT LEAST HOW MANY JURIES AND YOU'RE TELLING ME HOW TO FOLLOW THE LAW AND HE FAILED TO FOLLOW THE LAW AND OBEY A MISCARRIAGE OF JUSTICE RELYING ONLY ON THE EVIDENCE AND WE'RE SUPPOSED TO PRETEND THAT JURORS ARE LIKE COMPUTERS. THEY ONLY ANSWER AND PLUG IN AND PLUG OUT. THESE ARE PEOPLE AND TELLING SOMEONE THAT YOU'RE ABOUT TO SIT ON THIS MURDER CASE AND GOING BACK TO MY EXAMPLE HE'S GUILTY AND TELLING HIM BY THE WAY HE'S PREVIOUSLY BEEN FOUND GUILTY THAT SEEMS TO ME LIKE A SACRED COW IN THE JUDICIAL SYSTEM. WE DO EVERYTHING FOR A JURY NOT TO HEAR SOMETHING LIKE THAT. HOW IS THAT WHEN DEALING WITH HUMAN BEINGS SITTING ON A JURY AND JUST BECAUSE WE TELL THEM DISREGARD ANYTHING I TELL YOU IN THIS REGARD FOLLOWING THE LAW IF WE GO THAT WAY THEN PROSECUTORS CAN SAY WHATEVER THEY WANT. AND THEN LATER ON WHEN THE JURY HEARS THE INSTRUCTION DISREGARD BACK, JUST FOLLOW WHAT I TELL YOU WE ARE SUPPOSED TO PRETEND THAT HAPPENS. SO IF WE DO IT YOUR WAY THEN ANYONE CAN DO WHATEVER THEY WANT.
>> YOUR HONOR, I DISAGREE. IN THIS CASE WE'RE TALKING ABOUT WHEN IS THE RIGHT TIME TO RAISE IT. DEFENSE COUNSEL CAN RAISE IT AT TRIAL AND HAVE A DISCUSSION ABOUT WHETHER THAT'S HARMLESS ERROR OR NOT ON DIRECT APPEAL BUT THE QUESTION FOR THIS COURT IS ARE WE GOING TO REACH BACK IN HIS CONVICTION AND GET TO THAT SAME MOMENT. THE UNITED STATES SUPREME COURT HAS GIVEN US THE ANSWER TO THAT QUESTION AND IT'S NO.
40 YEARS AGO THE SUPREME COURT CRAFTED THE PREJUDICE PROBLEM WE STILL USED TODAY AND IN MAKING THE DETERMINATION WHETHER SPECIFIED ERRORS RESULT IN PREJUDICE THE COURT SHOULD PRESUME ABSENCE CIRCUMSTANCES NOT RELEVANT HERE THAT A JUDGE OR JURY ACTED IN ACCORDANCE WITH THE LAW AND AN ASSISTANT OF PREJUDICE MUST EXCLUDE THE POSSIBILITY OF ARBITRARINESS AND THE LIKE. MOVING FORWARD THEY MUST PROCEED ON THE ASSUMPTION THE DECISION-MAKER CONSCIENTIOUSLY AND IMPARTIALLY IMPLIED THE STANDARDS GOVERNING THE DECISION.
>> CAN YOU FOCUS ON WHAT YOU THINK ARE THE STRONGEST ARGUMENTS THAT THERE IS NO PREJUDICE HERE BASED ON THE FACTS OF THIS SPECIFIC CASE?
>> I THINK THE STRONGEST AND EASIEST IS THE PRESUMPTION IT'S THE JURIES FALL.
>> THEY WERE GIVEN THE INSTRUCTIONS WHICH IS A BRIEF COMMENT AT

THE BEGINNING, WHAT ELSE?
>> WE DID RAISE TWO OTHER ARGUMENTS AND THE OTHERS IS THERE'S NO PRIOR MENTION OF DEMENTIA, THERE WAS A FREE JURY SELECTION COMMENT THAT WAS NEVER HEATED, THE JURY HAS ISSUED DIRECT INSTRUCTIONS SO THERE'S A MINOR IN TELLER VERSUS STEVE WHERE THERE ARE SIGNIFICANTLY MORE MENTIONS.
>> I THINK WE'VE LOST THE THREAD A LITTLE BIT. ONE CLEAR DISTINCTION BETWEEN THIS CASE THAT JUST LABRAGA IS WE ARE HERE ON STRICKLAND, INEFFECTIVE ASSISTANCE OF COUNSEL. WHERE NOT QUESTIONING ON A DIRECT APPEAL WHETHER FOR EXAMPLE THERE SHOULD HAVE BEEN A MOTION FOR MISTRIAL. THAT'S NOT WHAT'S BEFORE US. WERE TALKING ABOUT WHAT KIND OF JOB DID THE LAWYER DO AND DOES IT AMOUNT TO A TOTAL DEPRIVATION OF COUNSEL UNDER THE SIXTH AMENDMENT. WHY ARE YOU LEANING MORE INTO THAT?
I THINK THAT'S REALLY YOUR BEST ARGUMENT.
>> IT GOES WITH THE PRESUMPTION THAT JURY SAW THE LAW AND THE REASON WE HAVE THAT PRESUMPTION IS WE'RE TRYING TO FIGURE OUT WHAT IS THE REASONABLE HARM THAT HE SUFFERED IN THE FACE OF AN OBJECTIONABLE JURY AND THE REASON WE FOCUSED ON WHAT IS THE OBJECTIONABLE JURY DO IS BECAUSE WE'RE FOCUSING ON COUNSEL.
THESE ARE NOT MISCONDUCT CLAIMS OR JUDGMENTS CONDUCT CLAIMS WERE TRYING TO FIGURE OUT IF THE COUNCIL MADE AN ERROR.
WHAT IS THE REASONABLE IMPACT OF THE ERROR AND SO I THINK THE ARGUMENT ENDS UP GOING HAND IN HAND.
WE FOCUS ON THE PRESUMPTION OF JURY FOLLOWING THE LAW BECAUSE THAT'S WHERE IT COMES TO IN THE CASE.
>> SHOULD WE CONSIDER THE WEIGHT OF THE OTHER FACTORS HERE?
THE WEIGHT OF EVIDENCE AGAINST HIM IN THE WEIGHT OF WHAT THEY WOULD HAVE BEEN LOOKING AT TO DECIDE ON THE DEATH PENALTY.
SHOULD WE LOOK AT THAT IN COMPARISON TO WHAT IMPACT THE STATE MAY HAVE HAD ON THEM?
>> YES.
AND THAT WAS THE STATE'S THIRD ARGUMENT LET'S LOOK AT AGGRAVATION LITIGATION.
THE REASON I THINK IT IS CRITICAL TO REALLY GET BACK TO STRICKLAND AND WHAT IT SAYS ABOUT HOW THE PREJUDICE PRONG IS APPLIED IS BECAUSE AS THE SUPREME COURT SAID THESE KINDS OF CLAIMS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ALLOW DEFENDANTS TO ESCAPE THE RULES OF WAIVER AND FORFEITURE IN A NUMBER OF THINGS WE HEARD SEVERAL ARGUMENTS TODAY HOW THIS WILL JUST COME BACK AND POST CONVICTION.
>> IF WE WENT DOWN THE ROAD THAT THEY ARE SUGGESTING IT SEEMS TO CREATE A PERVERSE INCENTIVE FOR COUNSEL.
YOU SEE A LITTLE PROBLEM WHICH YOU MIGHT PUT THIS IN THE CATEGORY AND YOU MAY ACTUALLY LIKE THE JURY POOL THAT YOU HAVE AN THINK OKAY HE SHOULD NOT HAVE SAID THAT BUT, I WILL KEEP IT IN MY POCKET AND THAT WILL BE DOWN THERE FOR POST CONVICTION AND, SO, THERE IS SOMETHING THERE THAT I WON'T OBJECT TO.
I THINK THE WHOLE THING I THINK CAN TURN A MOLEHILL INTO A MOUNTAIN AND IT ALLOWS GAMING THE SYSTEM.

>> YOUR HONOR I DO THINK THERE IS THAT CONCERN AND THAT IS WHY THESE PRESUMPTIONS HELP.
WHEN WE APPLY STRICKLAND'S PREJUDICE PRONG CORRECTLY IT GETS A LOT OF CHAT RID OF AND FOCUSES ON WHAT REALLY MATTERS WHAT WAS AGGRAVATED MITIGATION IN THE CASE.
>> I THINK THIS IS A GOOD POINT.
I THINK IT PROBABLY GOES TO THE WHICH IS WHY I THANK YOU HEARD FROM A COUPLE OF US QUESTIONING WHY YOU WEIGHT DEFICIENCY.
IS THERE NO UNIVERSE WHERE THE DEFENSE COUNSEL HERE ME A TACTICAL CHOICE.
THE JUDGE MISSPOKE.
I WILL NOT OBJECT.
BECAUSE I DO LIKE THE JURY POOL OR HE IMMEDIATELY CORRECTED HIMSELF FOR IT WAS A STUTTER AND IT'S NOT A BIG DEAL.
WHY ARE WE NOT ENGAGE IN ON THAT ISSUE?
>> I CAN GIVE YOU THE REASON.
COUNSEL DID NOT ACTUALLY SAY THAT'S WHY I OBJECT.
HE SAID I UNDERSTAND.
MY FACTS ARE NOT AS STRONG.
>> I'M SORRY PLEASE GO OVER THAT AGAIN COUNSEL'S EXPLANATION WAS HE OR SHE WAS CAUGHT UNAWARE?
>> I DID NOT UNDERSTAND IT AS TELLING THE JURY.
STRICKLAND'S OBJECTIVE AS I BUT I REALLY THINK THE PREJUDICE PRONG IS THE WAY TO SHAPE A LOT OF OTHER ISSUES.
>> GOT IT.
>> I THINK IT SHOWS THAT THE COUNCIL AND THE WAY THE DEFENDANT TESTIFIED THAT THE JUDGE CAN KIND OF MUMBLE AND THEY DID NOT HEAR IT OR UNDERSTAND IT AND THEN THEY CALLED THE COURT REPORTER TO TESTIFY AND THE COURT REPORTER'S IT'S USUALLY RIGHT THERE AND THE DEFENSE COUNSEL DEPENDING UPON THE SIZE OF THE COURTROOM SITS WHERE YOU ARE SO THE COURT REPORTER IS IN A BETTER POSITION TO HEAR AND SHE BASICALLY TESTIFIED THAT THIS PARTICULAR JUDGE SOMETIMES MUMBLES AND STUMBLES OVER WORDS AND SO SHE IS USED TO THAT AND SHE CATCHES IT BUT THE DEFENSE COUNSEL TESTIFIED THAT IT WAS NOT THEIR UNDERSTANDING THAT THAT IS WHAT HE SAID.
OTHERWISE IT WOULD HAVE STOOD UP AND OBJECTED.
IT CAN WORK RIGHT INTO THE SUGGESTION THAT YOU GAMING THE SYSTEM THAT THEY DID NOT HEAR IT AND SAY THOSE THINGS BUT THAT IS THE TESTIMONY HERE SO THE JUDGE JUST AD LIB. THIS AND SHE WILL FOLLOW THE INSTRUCTIONS WE GAVE THEM TO DO AND HE DIDN'T AND NOW WE CURED EVERYTHING.
BUT THAT IS WHAT THE RECORD SHOWS.
>> THAT IS CORRECT.
THAT IS WHY STRICKLAND'S OBJECTIVE COULD I POSITION THIS EARLIER CERTAINLY BUT THE REASON THE STATE FOCUS ON THE PREJUDICE PRONG HERE IS TO GET US BACK TO THE JURORS CALLED THE LAW AND WHEN WE ARE TRYING TO FIGURE OUT WHAT IS THE IMPACT WE HAVE TO DO THE ANALYSIS WITH ANALYTICAL FRAMEWORK IN ORDER FOR TO FUNCTION AND WORK WE CANNOT JUST TRY TO FIGURE WHAT WAS GOING ON IN JUROR FIVE'S HEAD.
WE HAVE TO DO IT ON THE OBJECTIVELY REASONABLE JUROR AND THIS CASE THE OBJECTIVELY REASONABLE JUROR WAS TOLD HOW TO CONDUCT THE ANALYSIS AND DO SO CORRECTLY AND IF THE JURY FOLLOWING THE LAW AS STRICKLAND REQUIRES US TO PRESUME THEY DID CAME TO THE CONCLUSION THAT THEY DID THIS PRE JURY SELECTION WOULD HAVE HAD ACTUALLY NO IMPACT.

I THINK THE REASON THE STATE IS FOCUSED ON THE PREJUDICE PRONG IS BECAUSE IT HAS SUCH ROCKED APPLICATION TO WEED OUT AND FOCUS ON WHAT MATTERS IN THIS.I WILL- I APOLOGIZE.
>> I'M SORRY TO INTERRUPT YOU BUT THERE WILL BE A LOT OF ISSUES YOU HAVE TO RESPOND TO AND YOU'RE WELL INTO YOUR SECOND 15 MINUTES BUT IT'S UP TO YOU.
>> ABOUT TO CONCLUDE.
U.S. SUPREME COURT STRICKLAND SAID SOMETHING THEY WERE CONCERNED ABOUT IS YOU HAVE A TRIAL OF THE GUILT FOLLOWED BY A TRIAL OF COUNSEL'S EFFECTIVENESS AND THEY GAVE US THIS PREJUDICE PRONG IN PART TO FOCUS ON WHAT MATTERS AND TO WEED OUT ALL THE REST.
THERE IS A LOT OF TRAFFIC AND THIS PREJUDICE PRONG THE CORRECT ANALYSIS WITH THE SUPREME GAVE IN STRICKLAND IS ONE WAY TO FOCUS ON IS NEED AND WHAT IS TRAFFIC.
I WILL RESERVE FOR REBUTTAL.
>> WE CAN PUT IT BACK AT TEN.
>> MAY IT PLEASE THE COURT.
I AM ELIZABETH FOR THE APPELLATE IN THIS CASE.
FIRST I WILL RESPOND TO THE STATES APPEAL AND A SECOND LEAD TIME PERMITTING I WANT TO ADDRESS THE FIRST CLAIM FOR HIM HAY BS PETITION REGARDING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR NOT RAISING THE FAILURE TO HOLD A NELSON HEARING.
AND THIS COURT PREVIOUSLY ON DIRECT APPEAL GRANT THE NEW SENTENCING BECAUSE IT VACATED THE CONTEMPORANEOUS CONVICTION AND FOUND THAT MANY OF THE ACTIVATORS WERE NOT SUPPORTED.
IT WAS SENT BACK AS THE STATE PRESENTED. THE PENALTY PHASE JUDGE INSTRUCTED THE JURY AT THE OUTSET OF JURY INSTRUCTIONS THAT HE PREVIOUSLY HAD BEEN SENTENCED TO DEATH AND THAT THEY WERE HERE FOR ANOTHER PENALTY PHASE.
>> COUNSEL, CAN YOU FOCUS SPECIFICALLY ON THE PREJUDICE?
SINCE THE STATE HAS CONCEDED THAT THERE COULD HAVE BEEN AN ISSUE WITH PERFORMANCE. CAN YOU TELL US WHERE YOU THINK AND WHERE YOU POINTED IN THE BRIEF TO WHAT THE PREJUDICE IS HERE?
>> I WOULD RELY ON THE LOWER COURT'S ORDER WHERE HE FOUND THAT THIS WAS AN INHERENTLY BIASED JURY.
>> WE BASE THAT ON OUR LAW?
>> AT THE ONSET THEY WERE TOLD ABOUT THIS SENTENCE OF DEATH AND THEY ARE TOLD ABOUT IT IN THE CONTEXT OF JURY INSTRUCTIONS.
IT IS DIFFERENT FROM THE CASES THAT THE STATE HAS WHERE THIS COMES IN AS EVIDENCE THROUGH A WITNESS.
I THINK THAT IS THE PROBLEM WITH THE STATE'S ARGUMENT PRESUMING THAT THE INSTRUCTION CURED THIS.
THE INSTRUCTIONS DID NOT CURE THIS BECAUSE THAT INSTRUCTION TELL YOU ONLY TO CONSIDER THE EVIDENCE PRESENTED AT THE PROCEEDING BUT I DON'T THINK THEY UNDERSTOOD THIS AS EVIDENCE.
THE JUDGE TELLS IT TO THEM AND THEN EXPLAINS TO THEM WHAT THEIR ROLE IS IN RESENTENCING AND LATER ASKS DOES EVERYONE UNDERSTAND.
IT SOUNDS TO ME LIKE INSTRUCTIONS.
LIKE JURY INSTRUCTIONS I DON'T THINK THE JURY HAD ANY IDEA THIS WAS SOMETHING THEY WERE SUPPOSED TO DISREGARD AND HONESTLY I THINK IT IS WORSE THAT IT WAS NOT ADDRESSED AGAIN.
MR. TRIAL ATTORNEY COULD HAVE INTERCEDED AND THEY COULD HAVE DONE A BETTER EXPLANATION TO THE JURY AS IT STANDS THE JURY'S ONLY –

>> AND INFERENCE HERE IS THAT BECAUSE THE JURY HEARD THAT THEY WILL CONCLUDE EVEN THAT THAT DECISION WAS OVERTURNED IT WAS DETERMINED TO BE LEGALLY INCORRECT THAT BECAUSE WE KNOW THAT WE WILL BE INCLINED TO DO WHAT WAS DETERMINED TO BE LEGALLY INCORRECT PREVIOUSLY?
I DO NOT UNDERSTAND THE LOGIC OF THAT.
IF YOU ARE ASSUMING THAT THEY WILL FOLLOW THE INSTRUCTIONS THERE SUBSEQUENTLY GIVEN.
I DON'T GET IT.
>> I THINK SINCE IT HAPPENS AT THE VERY BEGINNING AND EVERY JUROR THAT WAS SELECTED WAS IN THE PANEL THAT HEARD THIS COMMENT SINCE IT IS DONE AT THE VERY BEGINNING EVERY BIT OF EVIDENCE THAT THEY ARE HEARING IS COMING THROUGH THE LENS AND THEY WILL BE SOME CONFIRMATION BIAS.
>> BUT THE LENS IT INVOLVES BEING INSTRUCTED THAT THAT WAS DETERMINED TO BE LEGALLY INCORRECT.
>> I DO NOT THINK THAT THEY UNDERSTOOD IT.
>> NOW ARE GETTING INTO SPECULATION.
WERE GETTING INTO SPECULATION AND YOUR ASSUMING THE WORST AND I THINK THAT UNDER STRICKLAND WHICH OPPOSING COUNSEL IS SKILLFULLY FOCUSED ON BUT I THINK UNDER THAT WE DON'T ASSUME THE WORST.
TO THE CONTRARY.
>> I DO NOT UNDERSTAND HOW THE JURY'S RECEIPT OF THIS INFORMATION COULD IN ANY TO END IT.
IT IS ONLY DETRIMENTAL TO HIM.
>> RIGHT BUT IT HAS TO BE DETRIMENTAL TO THE PLEA THAT HE FINDS HE WAS DEPRIVED OF HIS COUNSEL TO SUCH A FACT THAT THE JURY WOULD HAVE IGNORED EVERYTHING.
FIRST OF ALL WE DON'T EVEN KNOW THAT THEY HEARD THIS COMMENT BECAUSE NEITHER ATTORNEY SEEMED TO THAT WAS SITTING THERE.
IT WAS A BRIEF MUMBLE IN THE FIRST COUPLE OF SENTENCES CORRECT.
OF THE INTRODUCTION BY THE JUDGE.
WE DON'T KNOW AND WOULD HAVE TO ASSUME THAT ALL THE AGGREGATORS EVERYTHING THEY HEARD THEY FOCUS SOLELY ON THIS TO SUCH AN EXTENT THAT THEY IGNORED EVERY OTHER INSTRUCTION THEY WERE GIVEN TO REACH THE CONCLUSION THEY DID BASED ON THIS ONE COMMENT.
>> I DISAGREE THAT THEY HAVE TO IGNORE THE OTHER INSTRUCTIONS IN ORDER TO CONSIDER THIS.
I UNDERSTAND THAT LOGIC WE IT COMES IN THROUGH A WITNESS SO IT CLEARLY IS EVIDENT IS EVIDENCE AND IN TELL HER I THINK THE PROSECUTOR FURTHER ADDRESSES IT AND TELLS THEM YOU HAVE BEEN TOLD HE HAD A PRIOR DEATH SENTENCE IT'S NOT TO AFFECT YOUR DECISION.
I THINK EVEN SOME SORT OF INSTRUCTION TO THAT EXTENT WOULD HAVE BEEN HELPFUL AND THE JUDGE DID NOT GIVE ANY OF THE TRADITIONAL PRELIMINARY INSTRUCTIONS ABOUT YOU CAN TO CONSULT WITH ELECTRONICS, YOU CANNOT USE OUTSIDE INFORMATION YOU SHOULD NOT DO YOUR OWN INVESTIGATING.
HE DIDN'T EVEN TELL THEM THAT THEY ARE NOT TO FORM A FIXED OPINION BEFORE THE END OF THE PRESENTATION.
I THINK ALL OF THAT TOGETHER THEY ARE TOLD VERY LITTLE AT THE OUTSET.
THEY ARE TOLD THIS.
>> FROM THE BEGINNING OF TRIAL AND PROCEEDINGS WHEN THIS OCCURRED THIS IS ASSUMING COUNSEL HEARD IT AND STOOD UP AND SAID I OBJECT OBVIOUSLY WENT TO THE BENCH AND I'M

MOVING TO STRIKE THIS ENTIRE PANEL AND GET A NEW PANEL.
IS THAT WHAT WOULD HAVE BEEN DONE?
>> IT WOULD HAVE BEEN A QUICK FIX.
>> THAT'S NOT THE QUESTION BEFORE US.
THE QUESTION IS THAT THE ONLY THING COMPETENT COUNSEL COULD HAVE DONE?
>> AS FAR AS THAT STANDARD IF IT DOESN'T HAVE TO BE A COMPLETE ABANDONMENT OF COUNSEL IT IS WHAT A REASONABLE ATTORNEY WOULD DO.
AND I THINK MR. SHEA CONFIRMED THAT IF THEY HEARD THAT THEY WOULD HAVE OBJECTED BECAUSE THEY DO THINK IT IS PRESIDENTIAL.
THAT IS THE STANDARD OF WHAT COUNSEL WOULD HAVE DONE AND IT DID NOT HAPPEN.
THE LOWER COURT DID NOT PUT A LOT OF STOCK IN THE CREDIBILITY DETERMINATIONS OF THEIR TESTIMONY THAT IT DIDN'T HAPPEN.
IT'S POSSIBLE HE DID NOT HEAR IT.
THEY TRUST THE JUDGE TO PRESENT THE JURY INSTRUCTIONS.
IT IS NOT A PARTICULAR POINT THEY WOULD HAVE BEEN PAYING A LOT OF ATTENTION TO.
ADDITIONALLY, ADDITIONALLY IT'S IMPORTANT TO REMEMBER HOW THE PENALTY PAYS PHASE PROCEEDED.
THERE IS ONE LIVE WITNESS AND TRIAL COUNSEL AND STATE ARE REENACTING THE PREVIOUS PENALTY PHASE BY READING THE TRANSCRIPT.
THE JURY IS PAINFULLY AND ACUTELY AWARE THAT THIS IS A REDO AS THEY HAVE AS HE WAS SENTENCED TO DEATH.
I THINK THAT WOULD BE CONSTANTLY IN THEIR MIND AS THEY HEAR AND EVALUATE IT.
>> DID IT OCCUR ON THE STIPULATION OF COUNSEL?
WAS THERE ANY OBJECTION?
I CAN'T RECALL FROM DEFENSE COUNSEL TO THE MANNER OF PRESENTATION AND READ OF THE PRIOR?
>> NO I THINK IT WAS PARTIALLY MR. KACZMAR CHOICE IN WAIVING MITIGATION.
AND I'M NOT TAKING FAULT WITH IT AS AN INEFFECTIVE ISSUE.
>> BUT DOESN'T THE FACT THAT THAT PLAYED OUT THAT WAY UNDERMINE YOUR POINT THAT YOU'RE RAISING HERE?
BECAUSE IT'S LIKE THE JURY IS GOING TO REASONABLY INFERRED THAT ANYWAY BASED ON THE WAY IT'S PRESENTED TO THEM.
>> I THINK WHAT IS AN IMPORTANT DISTINCTION IS THAT HE DIDN'T WAIVE A JURY.
HE WASN'T OKAY WITH JUST BEING SENSED BY THE JUDGE.
HE STILL WANTED A JURY TO BE THE ONE TO DETERMINE THE SENTENCE.
SO BUT FOR THAT REASON AND BECAUSE THE JURY CAN HEAR AGGRAVATION THAT OUTWEIGHS MITIGATION AND STILL VOTE FOR A LIFE I THINK IT IS VERY PROBLEMATIC.
JUSTICE, TO YOUR ANALOGY WHERE IF SOMEONE WAS TOLD THE DEFENDANT IS GUILTY SORT OF HOW THAT PLAY OUT IF IT WAS A RETRIAL THERE IS A CASE TO THAT POINT WHICH I ONLY DISCOVERED IN RESEARCHING THE STATE SUPPLEMENTAL AUTHORITY AND THAT IS OUR V GORDON WHERE THEY FOUND A CASE THAT IS FROM THE FEDERAL THIRD DISTRICT AND DID YOU FILE IT?
>> I HAVE NOT.
>> I DON'T WANT YOU TO TALK ABOUT IT UNLESS YOU PRESENT IT TO US AND OPPOSING COUNSEL.
YOU CAN DO IT SUBSEQUENTLY.
>> OKAY I WILL DO IT SUBSEQUENTLY I DIDN'T KNOW WHO WAS PROPER TO FILE AN AUTHORITY IF IT WAS NOT A NEW CASE BUT I FOUND IN RESPONSE THE SUPPLEMENT.

>> IF YOU'RE GOING TO TALK ABOUT IT WE NEED TO KNOW ABOUT IT.
>> AND I TALK ABOUT IT AND THEN FILE ON IT?
>> THAT'S THE WAY IT'S SUPPOSED TO ROLL.
>> I THINK IT WOULD CERTAINLY HELP YOUR ANALYSIS.
PART OF THE PREJUDICE ANALYSIS HAS TO SAY THAT HE HAS A RIGHT TO AN IMPARTIAL JURY AND THAT IS WHAT THE LOWER COURT CITED AS BEING THE VIOLATION.
THIS IS A FUNDAMENTAL ERROR SO WE ALSO RAISED IT IN HABUS.
>> HAVE YOU EVER FOUND THIS TO BE A FUNDAMENTAL ERROR?
>> WE HAVE NEVER BEEN PRESENTED WITH THE SITUATION.
>> WHY DO YOU THINK THIS IS A FUNDAMENTAL ERROR?
>> BECAUSE A JUROR IS BEING PRESENTED AS PART OF THE JURY INSTRUCTIONS WHICH THEY ARE SUPPOSED TO FOLLOW THEY ARE BEING TOLD THAT THE DEFENDANT WAS PREVIOUSLY SENTENCED TO DEATH.
>> YOUR ARGUMENT IS THAT THERE IS NO WAY THE JURY DEATH AND DEATH IN THIS CASE BUT FOR THIS COMMENT?
BECAUSE IT'S A FUNDAMENTAL ERROR?
>> I THINK THAT BECAUSE IT AFFECTS THE STRUCTURE UNDER LENS THERE IS NO WAY TO PARSE OUT HOW THE PREJUDICE AFFECTED IT WE JUST HAVE TO ACCEPT THAT IT'S PREJUDICIAL TO HAVE A BIAS JURY.
I THINK I COVERED ALL THE POINTS I WANT TO RELATING TO THAT AND I WILL MOVE ON TO THE HABEAS CORPUS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO RAISE THE NELSON HEARING.
THERE WAS A LETTER WRITTEN TO THE COURT STATING HE THOUGHT THE COUNCIL WAS UNQUALIFIED AND HE HAD MET THE COUNSEL TWO TIMES IN TEN MONTHS AND HE WAS NOT HAPPY WITH THE COMMUNICATIONS AND COUNSEL WAS NOT FILING MOTIONS AND HE WAS NOT INVESTIGATING.
AND NOTHING EVER CAME OF THIS.
IT IS IMPORTANT BECAUSE A NELSON HEARING IMPLICATES SO MANY OTHER RIGHTS THAT WILL BE POSSIBLY EXTENDED TO HIM.
HE WOULD BE EXPLAINED THAT HE COULD REPRESENT HIMSELF, HE COULD RETAIN SOMEONE ELSE, THE OTHER THING HAVE IT THAT AN ELF HEARING IS A LOT OF TIMES THE JUDGE WILL REASSURE THE DEFENDANT ABOUT THE QUALIFICATIONS OF COUNSEL AND MAYBE MAKE COMMENTS TO COUNSEL THAT YOU NEED TO DO IN COMMUNICATING WITH YOUR CLIENTS.
>> WAS THIS ISSUE PRESERVED IN THE LOWER COURT?
>> AGAIN I WOULD SAY THAT THE LETTER RAISES THE ISSUE AND IT IS FUNDAMENTAL ERROR NOT TO HOLD A NELSON HEARING OR ANY KIND OF NELSON HEARING.
THAT IS THE CASE THAT I CITED IN THE BRIEFING I WOULD RELY ON THESE CASES.
>> IT SOUNDED LIKE A REALLY LONG WINDOW.
>> LET'S REPEAT THE QUESTION.
>> WAS IT PRESERVED BELOW?
IT SEEMS LIKE YES OR NO.
>> I THINK THAT IT WAS PRESERVED.
>> THERE WAS NO OBJECTION BY DEFENSE COUNSEL AND IT WAS NOT BROUGHT UP BEFORE THE JUDGE THAT THEY SHOULD HAVE HELD A HEARING CORRECT?
>> I DON'T KNOW HOW YOU CAN EXPECT.
>> WAS THERE A RULING?
HE THERE WAS NO RULING.
IT WAS NEVER ADDRESSED.

I DON'T KNOW HOW YOU CAN EXPECT IN COMPETENT COUNSEL TO PRESERVE ERRORS RAISED BY THE DEFENDANT.
IT IS PREJUDICIAL TO MR. KACZMAR BUT HE DOESN'T KNOW THE RULES OF PRESERVATION OF THE CLAIMS.
>> I'M SORRY IF I'M WRONG BUT ISN'T THAT THE APPELLATE COUNSEL WAS INEFFECTIVE -IT WAS FUNDAMENTAL ERROR?
>> YES.
>> SO IT WOULD NEED TO BE PRESERVED.
>> RIGHT.
>> BUT THIS IS ABOUT THE DEFICIENCY OF APPELLATE COUNSEL IN FAILING TO MAKE AN ARGUMENT ABOUT FUNDAMENTAL ERROR.
WHETHER THAT HAS ANY MERIT TO IT IS A DIFFERENT QUESTION.
>> I THINK THIS COURT HAS FOUND WHEN THERE IS A NELSON HEARING IT IS NOT FUNDAMENTAL ERROR FOR THE NELSON HEARING TO BE IN ADEQUATE BUT I THINK FOR THIS ISSUE NOT TO HAVE BEEN ADDRESSED IN ANY WAY CHANGES THE WAY THIS PROCEEDING PROCEEDS.
IN THAT WAY IT IS A STRUCTURAL ERROR THAT AFFECTS EVERYTHING THAT HAPPENS AFTER THAT AT TRIAL.
THE NEXT ISSUE I WANT TO ADDRESS IS THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.
I BELIEVE THAT IS THE FIRST CLAIM IN OUR BRIEF OF THE COUNCIL NOT OBJECTING TO THE DETECTIVE VOUCHING FOR THE CREDIBILITY OF THE STATE'S STAR WITNESS.
THE GENERAL INFORMANT.
AND I AM INTO MY REBUTTAL TIME?
>> KNOW WE WILL ADD FOUR MINUTES JUST LIKE WE DID TO THE OTHER SIDE.
>> AND AS FAR AS THAT IT SEEMS THAT THE LOWER COURT DID IT PRESUME DEFICIENCY ON THAT BUT ULTIMATELY IT WASN'T OUTLINED AND A LOT OF EVIDENCE THAT WAS INTRODUCED AT TRIAL BASED ON OUR EVIDENTIARY HEARING ON THE REPORTING INTRODUCED BY THE STATE AT THE EVIDENTIARY HEARING SOME OF IT UNDERMINES THE ORIGINAL EVIDENCE OF THE TRIAL.
ONE OF THE THINGS THAT THE COURT POINTED TO AND FINDING IT WASN'T PREJUDICIAL WAS THAT MR. KACZMAR WAS THE LAST PERSON WITH THE VICTIM.
AND HE POINTED TO NEIGHBORS HEARING ARGUMENTS WITH THE MAN IN THE BACKYARD SHORTLY BEFORE THE FIRE AND I THINK POSSIBLY ALSO THAT IS MR. MAUDLIN AND WHO IS ARGUING WITH AND THAT'S EXACTLY WHAT CAME OUT THAT IS WHAT COMES OUT FROM THE REPORTING THAT THE STATE INTRODUCED THAT MR. MAUDLIN WAS THE PERPETRATOR AT THIS TIME AND MR. KACZMAR WAS IN HIS ROOM AND SOME KIND OF DRUG INDUCED STUPOR AND HE DID ASSIST HIM BY PURCHASING THE GAS SO THAT PIECE OF EVIDENCE IS NO LONGER REALLY INCRIMINATING AND ALSO THE VICTIMS OF DNA ON IN REPORTING HE DOES ADMIT TO BEING ON THE SCENE SO PRESUMABLY HE WOULD HAVE HAD THE VICTIMS IN'S DNA ON HIM AND ALL OF THESE –
>> I WANT TO FOLLOW BECAUSE THE ARGUMENT IS THAT THOUGH VOUCHING BY THE DETECTIVE FOR THIS WITNESS WAS SO PREJUDICIAL BECAUSE THERE WAS NOT OVERWHELMING EVIDENCE OF GUILT OTHERWISE?
>> THERE WAS NOT OVERWHELMING EVIDENCE OF GUILT AND THERE WAS ALSO A LOT OF OTHER IMPEACHMENT THAT WE BROUGHT UP.
A LOT OF OTHER INSTANCES OF INEFFECTIVE ASSISTANCE OF COUNSEL THAT UNDERMINES THIS A JAILHOUSE INFORMANT TESTIMONY.
I THINK TOGETHER ALL OF THOSE THINGS ARE PROBLEMATIC.
THERE'S ALSO THE INTRODUCTION OF THE TESTIMONY ABOUT THE POLYGRAPH.
HOW SHOULD I SET IT UP?

COUNSEL HAD ORIGINALLY THE COUNCIL HAD DEPOSED MR. VALENCIA THE JAILHOUSE INFORMANT AND IN THE DEPOSITION HE ASKED WHY WERE YOU SO SURE OF INNOCENCE? AND HE SAID BECAUSE MODEL AND TOOK A LIE DETECTOR TEST AND THEN MR. SHEA AT TRIALS ASK THE SAME QUESTION AND GETS THE SAME RESPONSE AND IT'S AFTER HAVING FILED A MOTION IN LIMINE TO EXCLUDE ALL THIS EVIDENCE EXCLUDE ANY EVIDENCE OF THE POLYGRAPH AND THE LOWER COURT AND THEIR DECISION AND THE REASONING SAID IT WAS REASONABLE FOR MR. SHEA TO PRESUME THE STATE WOULD HAVE INSTRUCTED HIM.
OKAY WILL THAT SEEMS LIKE A PROBLEM ON THE STATE IT SEEMS LIKE THE LOWER COURT ACTUALLY IS UNDERMINING THE RULING OF TRIAL WHERE THE COURT SAID IT IS NOT THE STATE'S FAULT YOU ASK THE QUESTION.
I THINK THESE TWO THINGS CONTRADICT WHAT WE WOULD NORMALLY RELY ON AS THE COMPETENT SUBSTANTIAL EVIDENCE TO DEFER TO THE LOWER COURTS.
THEN THERE IS THE ISSUE OF THE OTHER THING THAT CAME IN WAS THIS WHOLE SCHEME THAT MR. VALENCIA SETUP FOR MR. KACZMAR WHEN HE WAS DISSATISFIED WITH MR. SHEA'S WORK AND HE WAS REALLY GETTING DESPERATE AND CONCERNED THAT THEY'RE GOING TO FIND ME GUILTY OF THIS CRIME THAT I AM INNOCENT OF AND MR. VALENCIA CONVINCED HIM HE HAD A GUY ON THE OUTSIDE WHO CAN DO FAVORS FOR YOU AND HELP INVESTIGATE AND REFOCUS ATTENTION ON TO MR. MAUDLIN AND MR. KACZMAR WENT ALONG WITH THAT BUT THE RECORDINGS THAT ARE INTRODUCED ARE ALL VERY INCRIMINATING.
HE IS TALKING WITH THIS GUY ABOUT POINTED EVIDENCE ON MR. MAUDLIN BUT I THINK IT IS LESS EVIDENCE OF CONSCIOUSNESS OF GUILT AND MORE JUST EVIDENCE OF MR. KACZMAR COMPLETE DESPERATION AND THAT WAS IN THE RECORDINGS TOO.
HE SAID, “I'M INNOCENT, I DON'T THINK MY ATTORNEY IS DOING THE RIGHT THING ABOUT THIS SO THAT'S WHY I'M DOING ALL THIS.”
AND SHEA ATTEMPTED TO GET SOME THE STATEMENTS IN AND THE STATE OBJECTED AND SAID HIS FELLOW THINGS HAVE TO COME IN.
AT THE EVIDENTIARY HEARING, MR. SHEA DID NOT PRESENT A REALLY COHERENT STRATEGY AS TO THAT.
HE TALKED ABOUT CHARACTER EVIDENCE, HE TALKED ABOUT A LOT OF THINGS THAT ULTIMATELY THE COURT RELIED ON.
HE DIDN'T WANT THEM TO HEAR HE WAS A FELON, THAT'S REASONABLE.
AND I WOULD AGREE THAT COULD BE A REASONABLE STRATEGY, EXCEPT THAT MR. SHEA AGREED TO ALL THE EVIDENCE ABOUT MR. KACZMAR USING DRUGS.
SO I DON'T UNDERSTAND THE DISTINCTION BETWEEN HEARING HE IS A CONVICTED FELON AND THAT HE IS A COCAINE USER.
TO ME IT DOESN'T PROMOTE A LOT OF RELIABILITY IN THE REASONING CITED BY THE COURT AND THAT WAS REALLY ALL THE STATE HAD AS FAR AS EVIDENCE WAS THIS ONE GUY PHILANSIA WHO HAD THE WHOLE STORY AND THEN ALSO THE OTHER THING SET UP BY MR. PHILANSIA, THIS ISSUE WITH THE UNDERCOVER DETECTIVE THAT TRIAL COUNSEL HAD NO STRATEGY FOR DEALING WITH OTHER THAN ATTEMPTING TO INTRODUCE THE EXCULPATORY STATEMENTS IN THE NOT REALLY RECONSIDERING ISN'T WORTH IT? SHOULDN'T THEY HEAR HIM PROFESSING HIS INNOCENCE?
ISN'T THAT MORE IMPORTANT THAN MAYBE HEARING, HEARING HE IS A CONVICTED FELON?
>> ARGUABLY, BUT A STRATEGIC DECISION THAT THE ATTORNEY MADE
>> AS I SAID, I WOULD AGREE THAT'S A SOUND STRATEGY IF HE WEREN'T ALREADY

INTRODUCING PREJUDICIAL INFORMATION.
IT SOUNDS MORE LIKE AN AD HOC RATIONALIZATION AT THE EVIDENTIARY HEARING, ESPECIALLY SINCE THAT WASN'T INITIALLY HOW HE TRIED TO EXPLAIN IT.
HE HARP ON IT WOULD OPEN THE DOOR TO CHARACTER EVIDENCE WHICH IS NOT HOW THAT WORKS.
IF I COULD RESERVE THE REMAINING TIME TO GO TO MY REBUTTAL.
>> OKAY, YOU CAN HAVE FIVE MINUTES FOR REBUTTAL.
>> I WILL GET TO THE HIDEOUS ISSUE PROBABLY LAST, BUT I WANTED TO MISTREAT MAYBE WHY THE STATE IS FOCUSED ON PREJUDICE.
ISSUE TWO, THE JURY WAS TOLD IT'S UP TO YOU TO DETERMINE WHO IS CREDIBLE AND WHO IS NOT.
FOR THE ISSUE ABOUT MODLIN'S INNOCENCE IN THE LIE DETECTOR STUFF, THE JURY WAS GIVEN INSTRUCTION YOU ARE NOT TO CONSIDER THAT IN ANY WAY.
THE ONLY ISSUE WHERE THERE WAS EVIDENCE OF THE STATE HAS NOT RAISED EFFICIENT PERFORMANCE ARGUMENT ON WAS ASIDE FROM ISSUE ONE OBVIOUSLY, THE STATES APPEAL.
IT WAS ISSUE SEVEN WHERE THE STATE MADE A NOTE ABOUT IT, LOOKS LIKE THIS WAS PROBABLY SUPPRESSIBLE, THERE'S NO SPACE IN THE OVERWHELMING EVIDENCE OF GUILT.
BUT TWO OF THE ISSUES KACZMAR TALKED ABOUT ARE EASILY DISPENSED WITH BASED ON WHAT THE UNITED STATES SUPREME COURT SAID IN STRICKLAND VERSUS WASHINGTON 40 YEARS AGO.
IN PERFORMING THE PREJUDICE ANALYSIS WE FOCUSED ON WHAT WOULD A JURY FOLLOWING THE LAW WOULD HAVE DONE WITH EVIDENCE HE PRESENTED WITH.
AND IF THE ANSWER IS NOTHING AND THERE IS NO PREJUDICE AS A MATTER OF LAW AND WE CAN SIFT THROUGH AND CAST ALL THESE TWO THE SIDE AND FOCUS TO THE ISSUES THAT REALLY MATTER.
SO MOVING US BACK TO ISSUE ONE, I DO THANK YOU POINTED OUT THE JURY WAS TOLD THE SENTENCE WAS VACATED.
THAT GETS US TO THE VERMONT VERSUS OKLAHOMA OR THE UNITED STATES SUPREME COURT. DIFFERENT CONTEXT TO PROCESS THAT INFORMATION ON THIS GUY HAD A PRIOR DISSIDENTS COULD HAVE SWAYED THE JURY EITHER WAY, IT DEPENDS ON YOUR INTUITION.
THAT'S THE PROBLEM.
>> COUNSEL, COUNSEL FOR MR. KACZMAR HAS DEFINED WHAT THE JUDGE DID AS PART OF THE INSTRUCTIONS TO THE JURY.
DO YOU AGREE WITH THAT?
DO YOU THINK KIND OF EVERY TIME THE JUDGES BEGIN THAT WE SHOULD CONSIDER THAT INSTRUCTIONAL?
OR DO YOU THINK THE SORT OF PART OF THE JUDGE'S DISCUSSION WITH THE JURY IS SOMETHING OTHER THAN INSTRUCTION.
>> I DISAGREE AND I WOULD LOOK FORWARD TO THE FINAL INSTRUCTIONS THAT THEY ARE GIVING AND A QUOTE FROM THEM.
LET ME GET TO THE EXACT PART.

REASONS AND RECORD OF PAGE 165.
YOU MUST FOLLOW THE LAW AS IT IS SET OUT IN THESE INSTRUCTIONS OR YOUR RECOMMENDATION WILL BE A MISCARRIAGE OF JUSTICE.
THE JURY WAS TOLD MULTIPLE TIMES THE LAW THEY ARE GOING TO BE INSTRUCTED ON IS THE LAW IN THE FINAL INSTRUCTIONS.
THE STUFF THE JUDGE MAY HAVE SAID THROUGHOUT THE COURSE OF THE TRIAL, OFTEN COMMENTS, IS NOT INSTRUCTIONAL IN NATURE.
THE INSTRUCTIONS THE MATTER AS FAR AS TELLING THE JURY WHAT LAW YOU ARE BOUND BY ARE GIVEN IN THE FINAL INSTRUCTIONS, NOT THE ONES THAT ARE PRESENTED AND NOT THE STATEMENTS THE JUDGE GENERALLY MAKES.
SO I THINK IT'S CRITICAL.
THE STATE RAISED THREE ALTERNATIVE ARGUMENTS AND I THINK THEY ARE TRUE ALTERNATIVE ARGUMENTS ON ISSUE ONE.
FIRST IS BASED ON THE PRESUMPTION THE JURY FOLLOW THE LAW THERE'S NO PREJUDICE AS A MATTER OF LAW.
THAT ARGUMENT IS A STANDALONE ARGUMENT AND THAT'S REALLY THE ONE THE STATE WOULD URGE THE COURT TO ADOPT STRAIGHTFORWARD BECAUSE OF ITS BROAD APPLICATION TO RENEW THE SECOND ARGUMENT THE STATE MADE WAS THERE'S NO PREJUDICE JUST BECAUSE THIS WAS A MINOR COMMENT.
THAT ALSO IS AN ALTERNATIVE ARGUMENT, CAN STAND ON ITS OWN.
THIS IS AN OFFHAND COMMENT PRE-JURY SELECTION SO THERE'S NO PREJUDICE FROM THAT.
FINAL ARGUMENT IS THE JONES ARGUMENT, WHICH I DID SUPPLEMENT FOR THIS COURT, WHICH IS WHEN WE ARE DOING A STRICKLAND PREJUDICE ANALYSIS, EXCLUSIVELY FOR PENALTY PHASE PURPOSES AT AGGRAVATION MITIGATION.
HERE WE HAD EXTENSIVE AGGREGATION IN THE LITIGATION BECAUSE KACZMAR WANTED A DEATH SENTENCE AND REFUSED LIFE OFFERS FROM THE STATE.
SO ON ANY THREE OF THOSE THIS COURT COULD REVERSE.
THE STATE WOULD URGE THE COURT TO DO SO ON THE FIRST ALTERNATIVE AT LEAST.
>> BUT YOU CAN'T REALLY SEPARATE ISSUE FROM THE DETAILS OF HOW THE STATEMENT WAS MADE, WHETHER IT WAS REPEATED.
OTHERWISE YOU END UP WITH WHAT JUSTICE LABARGE WAS TALKING ABOUT IF YOU ARE GOING TO LET THE PRESUMPTION FOLLOW THE INSTRUCTIONS KIND OF OVERWRITE ANYTHING THAT MIGHT HAPPEN BEFORE THAT, THEN IT REALLY WOULD BE KIND OF OPEN SEASON.
>> I THINK THAT IS WHAT STRICKLAND DOES.
WE ARE GOING TO JUSTIFY THAT PRESUMPTION, THAT IS WHAT THE WHOLE PARAGRAPH.
>> MEANING REBUTTAL.
IT'S REBUTTAL THE MEAN, IT'S ACADEMIC, BUT I DON'T THINK IT WOULD BE WISE TO HANG YOUR HAT COMPLETELY ON THAT AND IGNORE THE OTHER THINGS THAT PUT THIS COMMENT IN CONTEXT.
>> YOUR HONOR, LIKE I SAID, THERE ARE THREE ALTERNATIVE ARGUMENTS FOR THIS COURT BUT IT IS A REBUTTABLE SELECTION BUT YOU CAN'T REBUT IT WITH EXTRA RECORD

EVIDENCE.
THE ONLY THING YOU WOULD REBUT IT WITH IS SOMETHING IN THIS RECORD THAT SHOWS THIS JURY IN FACT HUNG THEIR HAT ON THE FACT THAT JUDGE PREVIOUSLY SAID HE WAS SENTENCED TO DEATH.
>> IT'S NOT HANG YOUR HAT, IT'S WHETHER THERE WAS A REASON FOR PROBABILITY THAT THE PROBLEM COULD COST THE VERDICT INTO DOUBT.
>> REASONABLE PROBABILITY BUT IN PERFORMING REMEMBER, THAT PARAGRAPH IS HOW DO WE DO THAT ANALYSIS, HOW DO WE PERFORM THE REASONABLE PROBABILITY AND INFORM THE ANALYSIS AND PRESUME THEY FOLLOW THE LAW, WE DO ALL THOSE THINGS.
IF THE JURY DID FOLLOW THAT PRESUMPTION THERE IS NO INDICATION, THERE'S NO WAY, THERE'S NO CONTRARY EVIDENCE IN THE RECORD.
THEY RELY ON THAT FACT IT ALSO DOES A REASONABLE PROBABILITY BECAUSE AN OBJECTIVELY REASONABLE JURY FOLLOWING THE LAW WOULD NOT HAVE WEIGHTED THIS COMMENT IN THE SLIGHTEST.
AND THAT IS FROM STRICKLAND ITSELF IT GIVES US THAT.
I DO WANT TO FOCUS A LITTLE BIT ON THE HABEAS ISSUE ABOUT THE NELSON HEARING.
AND I DO THINK THIS IS PROBABLY ANOTHER IMPORTANT POINT FOR CLARIFICATION.
WHERE THIS COURT CAN PROVIDE SOME CLARIFICATION.
AND THAT'S THAT THERE IS A LOT OF CONFUSION SEEMINGLY ABOUT FOUR DIFFERENT DEGREES OF ERROR.
FUNDAMENTAL ERROR, PER SE ERROR UNDER FLORIDA LAW, STRUCTURAL ERROR UNDER THE UNITED STATES SUPREME COURT AND THEN PLAIN ERROR UNDER FEDERAL LAW.
KACZMAR INTO BLENDING THESE TOGETHER.
HE CITES CASES WHERE DISTRICT COURTS OF APPEAL HAVE HEARD IS REVERSIBLE ERROR TO NOT HOLD A NELSON HEARING, BUT NONE THAT HOLD AS FUNDAMENTAL ERROR AS THIS COURT CLARIFIED IN JOHNSON, REVERSIBLE ERROR AND FUNDAMENTAL ERROR ARE TWO DIFFERENT THINGS.
PER SE REVERSIBLE ERROR NEEDS TO BE PRESERVED AND ONCE YOU HAVE PRESERVED IT WELL THEN WE ARE NOT DOING AN ANALYSIS.
WE ARE AUTOMATICALLY REVERSING.
BUT IT DOESN'T GET IT PAST THE PRESERVATION POINTS.
YOU STILL MUST PRESERVE THE ERROR.
SO KACZMAR'S CONCESSION THAT THIS ISSUE IS NOT PRESERVED OR PARTIAL CONCESSION MAY BE THAT THIS ISSUE IS NOT PRESERVED WOULD KILL THAT BECAUSE THIS IS A POTENTIALLY REVERSIBLE ERROR BUT IT WASN'T PRESERVED.
THERE WAS NO RULING, IT WAS NEVER BROUGHT BEFORE THE COURT IN THE FOURTH DISTRICT HAS ROUTINELY FROM WHAT I COULD TELL HELD THAT IF YOU DON'T, EVEN WHEN YOU PUT IN THE HANDWRITTEN REQUEST FOR A NELSON HEARING ARE NOT EVEN REALLY A NELSON HEARING, COMPLAIN ABOUT YOUR COUNSEL IN A LETTER, IF YOU DON'T BRING THEM FORWARD BEFORE THE COURT THEN YOU WAIT.
WE ARE NOT GOING TO REVERSE ON THAT ISSUE.
>> IT IS THE STATES POSITION THIS COURT HAS NEVER FOUND FUNDAMENTAL ERROR FOR FAILURE TO HOLD A NELSON HEARING.

>> NEVER, I COULDN'T FIND A CASE.
>> THEREFORE APPELLATE COUNSEL WOULD NOT BE INEFFECTIVE FOR FAILINGS AND NONMERITORIOUS CLAIM.
>> RIGHT.
IN THIS CASE A NOVEL ARGUMENT BECAUSE NO REAL PRECEDENT BUT EVEN AS A STRAIGHTFORWARD ARGUMENT THIS WOULD BE FUNDAMENTAL ERROR SO THAT DISPENSES WITH THE HAVEY IS ISSUE.
THE ONLY OTHER THING I WANTED TO ADDRESS, AND IT COMES INTO PLAY WITH ISSUE SEVEN, WHICH I WILL GET TO VERY QUICKLY.
THE EVIDENCE OF THE STING OPERATION WITH DETECTIVE COMPANIES WE SENT ASSUMED SUFFICIENT PERFORMANCE AND PREJUDICE ANALYSIS.
THE PREJUDICE ANALYSIS INVOLVES THE FACT KACZMAR WAS ROUTINELY LYING ABOUT WHERE HE WAS.
THAT HE AND THE JURY WAS TOLD TO LAW ENFORCEMENT.
I WAS MILES AWAY FISHING AT THE TIME.
WE KNOW THAT IS NOT THE CASE.
HE WAS CAUGHT GETTING GAS NEAR HIS HOUSE, THE HOUSE WAS SUBSEQUENTLY SET ON FIRE, THERE WAS A TIGHT TIMELINE, HE HAD VENEZIA SAYING HE CONFESSED TO ME.
YOU HAD HIS WIFE IDENTIFYING HIM, HAD THE SHOUTING MATCH THAT OCCURRED BETWEEN KACZMAR.
KACZMAR AND HIS DAD WERE IN AN ARGUMENT.
ALL OF THAT EVIDENCE IS GOING TO BE MORE THAN ENOUGH TO GET US PAST THE IDEA IS A REASONABLE PROBABILITY THAT A JURY HEARING IT WOULD HAVE ACQUITTED KACZMAR INSTEAD OF CONVICTING HIM.
THERE WAS SIMPLY TOO MUCH EVIDENCE.
IT WITHOUT THE STATE WOULD RESPECTFULLY REQUEST THIS COURT REVERSE THE LOWER COURT ON ISSUE ONE AND AFFIRM THE REMAINDER OF THE ISSUES KACZMAR PRESENTED IN THIS APPEAL AND HAVEY IS PETITION.
>> THANK YOU VERY MUCH.
>> I THINK THAT THIS COURT'S INSTRUCTION IN HITCHCOCK LAYS OUT WHAT SHOULD HAVE BEEN TOLD TO THE JURY AND THE WHOLE REASON FOR, I IMAGINE, PROMULGATING THOSE INSTRUCTIONS WAS SO THAT AN ERROR LIKE THIS, A CLEARLY PREJUDICIAL ERROR, DID NOT HAPPEN.
I WANT TO DISTINGUISH FOR NOW AND THE HOLDING IN THAT CASE WAS SPECIFIC TO INEFFECTIVE ASSISTANCE OF COUNSEL FOR NOT PRESENTING MITIGATION.
THE STATE SEEKING TO EXPAND IT TO THIS IS THE TEST FOR INEFFECTIVE ASSISTANCE OF COUNSEL AT A PENALTY PHASE, WHICH I DON'T THINK MOST TWO THINGS ARE EXACTLY SIMILAR OR SHOULD HAVE THE SAME TEST.
THERE ARE OTHER INEFFECTIVE ASSISTANCE CLAIMS THAT COULD POTENTIALLY COME UP IN A PENALTY PHASE LIKE AGREE TO ERRONEOUS OBJECTIONS ARE NOT INJECTING TO INSTRUCTIONS AND I WOULD ARGUE THE TEST FOR THAT HAS TO BE SOMETHING DIFFERENT THAN REWRITING THAT MITIGATION AGGRAVATION.
ANOTHER POINT IT IS NOT SO LEAVE THE JURIES DECISION AND IT'S IMPORTANT TO

REMEMBER THE JUDGE HERE HEARD THAT THE MITIGATION, FOUND 15 NONSTATUTORY MITIGATORS AND GAVE THEM SOME SLIGHT WAY.
HAD HE NOT BEEN PLACING SO MUCH IMPORTANCE ON THE JURY RECOMMENDATION, I THINK THE JUDGE COULD HAVE WEIGHED THIS AND COME OUT WITH A DIFFERENT OUTCOME.
ADDITIONALLY, IN ADDRESSING THE ISSUE OF THE POLYGRAPH TOO, THIS COURT HAS PREVIOUSLY HELD THAT'S NOT SOMETHING A JURY CAN DISREGARD.
I THINK THIS GOES TO JUSTICE LEVARGO'S POINT OF THESE ARE HUMAN BEINGS AND THAT'S EXACTLY WHY WE DON'T ALLOW EVIDENCE OF POLYGRAPH BECAUSE IS NOT RELIABLE BUT THE PUBLIC MAY BE UNDER THE IMPRESSION IT IS.
IT IS VERY PREJUDICIAL THAT INFORMATION TO BE IN FRONT OF A JURY, EVEN GIVING A CURATIVE INSTRUCTION.
IN SENDING THIS CASE BACK FOR ANY PENALTY PHASE, THIS COURT WANTS MR. KACZMAR TO HAVE A REPUTABLE PENALTY PHASE.
THIS WAS NOT THAT.
THIS WAS A MESS ALSO.
WHILE MR. KACZMAR DID WAVE MITIGATION, HIS WHOLE REASONING FOR THAT WAS HE CONTINUED TO DECLARE HIS EVIDENCE AND HE WANTED AN ATTORNEY, HE WANTED TO BE SENTENCED TO DEATH SO HE WOULD HAVE AN ATTORNEY.
HE IS STILL MAINTAINING THAT MR. SHEA DID AN EFFECTIVE JOB, WHICH I THINK BRINGS US BACK TO THE NELSON CLAIM.
ACTUALLY APPELLATE COUNSEL WOULD HAVE THE BENEFIT OF THE LOWER COURTS OF INEFFECTIVENESS, BUT I THINK IT'S SOMETHING THIS COURT SHOULD THINK ABOUT AS IT PLAYED OUT MR. KACZMAR DID HAVE INEFFECTIVE ASSISTANCE OF COUNSEL, RIGHT?
AND HAD THEY GONE THROUGH THE NELSON HEARING, THINGS WOULD HAVE COME OUT VERY DIFFERENTLY.
FOR THE REST OF THE ARGUMENTS I WOULD RELY ON MY BRIEFING.
>> THANK YOU VERY MUCH.
COURTS ADJOURNED.
>> ALL RISE.