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Richard Barry Randolph v. State of Florida

THE NEXT CASE ON THE COURT'S CALENDAR THIS MORNING IS RANDOLPH VERSUS STATE. MR. JACKSON.

MAY IT PLEASE THE COURT. CHIEF JUSTICE WELLS. I REPRESENT MR. RICHARD RANDOLPH. MR. RANDOLPH IS APPEALING THE DENIAL OF POSTCONVICTION RELIEF ISSUED BY THE SEVENTH JUDICIAL CIRCUIT COURT. I HAVE RESERVED FIVE MINUTES FOR REBUTTAL TIME, AND WHAT I WOULD LIKE TO DO IS I WOULD LIKE TO FOCUS THIS COURT'S ATTENTION, IF POSSIBLE, ON CLAIM ONE OF MR. RANDOLPH'S APPEAL. ARGUMENT ONE. MR. RANDOLPH CLAIMS THAT HE WAS DENIED A NEUTRAL AND DETACHED JUDICIARY, WHEN IT CAME TO THE JUDGMENT AND SENTENCE OF DEATH IN HIS CASE, BASED ON IMPROPER EXPARTE COMMUNICATIONS IT BETWEEN THE STATE AND THE JUDGE, BASED ON AN IMPROPER DELEGATION OF THE JUDGE'S DUTY TO INDEPENDENTLY WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES, AND BASED ON BIAS ON THE PART OF THE JUDGE, WHEN HE PREDETERMINED MR. RANDOLPH'S SENTENCE. EITHER OF THESE THREE SUBPARTS OF CLAIM ONE WOULD BE ENOUGH TO ENTITLE MR. RANDOLPH TO RELIEVE. BUT TAKEN TOGETHER, THEY CERTAINLY REQUIRE RELIEF AND REQUIRE A RESENTENCING IN THE CIRCUIT KUMPLT GIVE US AN UNDERSTANDING OF THE FACTS, AS YOU RELIED ON, FOR THESE PREDICATE CLAIMS. ANOTHER UNDERLYING FACTS ARE, IN 1987, AFTER AN EVIDENTIARY HEARING WE HAD HAD IN MR. RANDOLPH'S CASE, ALSO THE EVIDENTIARY HEARING WAS A MOTION TO COMPEL THE STATE ATTORNEY TO TURN OVER THEIR FILE OR PARTS OF THEIR FILE THAT WE BELIEVED WERE MISSING. THE CUSTODIAN FOR THE STATE ATTORNEY DID NOT SHOW UP, AND SO THE CIRCUIT COURT ALLOWED US TO DEPOSE THE CUSTODIAN OF RECORDS REGARDING ANY MISSING DOCUMENTS FROM THE STATE ATTORNEYS' FILE. WHEN THE CUSTODIAN, JOHN STEPHENS, SHOWED UP TO DEPOSITION, HE BROUGHT WITH HIM A FILE WHICH INCLUDED IN EXCESS OF 1400 PAGES OF RECORDS, OF FILE, THAT HAD NOT BEEN TURNED OVER TO MR. RANDOLPH'S POSTCONVICTION TEAM IN 1992, WHEN THEY ORIGINALLY TURNED OVER 1800 PAGES. WHEN WE GOT THE FILE, WE DISCOVERED A DRAFT, A JUDGMENT OF SENTENCE, EXHIBIT 1, IN THE 14 00 PAGE THAT IS WE RECEIVED IN 1997. BASED ON THIS DRAFT OF JUDGMENT SENTENCE, WHICH INCLUDED AN INSERT MARK ON THE FIRST PAGE, AND WHEN WE LOOKED AT WHERE THE INSERT MARK WAS, WE WENT STRAIGHT TO THE JUDGMENT AND DISCOVERED THERE IS LANGUAGE IN THE ACTUAL FINAL, OFFICIAL JUDGMENT AND SENTENCE, THAT WAS NOT IN THE EXHIBIT 1 THAT WE DISCOVERED IN THE STATE ATTORNEY'S FILE. BASED ON THAT, WE PETITIONED THE CIRCUIT COURT TO ALLOW AMENDMENT OF MR. RANDOLPH'S 3.850. WE AMENDED, BASED ON THIS AND, ALSO, ON DISCOVERY OR OUR ATTEMPT TO INVESTIGATE THIS. WE WANTED TO TALK TO THE STATE ATTORNEY WHO HAD WORKED ON THE CASE, ONE OF THE STATE ATTORNEYS WHO HAD PROSECUTED MR. RANDOLPH. HE REFUSED TO TALK TO US. BASED ON THAT FACT, WE FILED A LEWIS MOTION FOR DISCOVERY, SO WE COULD TAKE DEPOSITIONS OF ALL THREE STATE ATTORNEYS WHO WERE INVOLVED IN THE PROSECUTION OF MR. RANDOLPH, WHICH THE CIRCUIT COURT DENIED.

WHAT DID YOU EXPECT TO GET FROM THAT STATE ATTORNEY?

WE WERE HOPING, WE DID NOT SEE HOW TO INVESTIGATE IT --

THIS WAS A STATE ATTORNEY DIFFERENT FROM THE ONE THAT YOU ALLEGE OR HAS BEEN DEMONSTRATED, ACTUALLY, TALKED WITH THE LAW CLERK?

WELL, THE STATE ATTORNEY WHO WAS A STATE ATTORNEY, NOW IS HE A JUDGE, BUT HE WAS A

STATE ATTORNEY AT THE TIME, JOHN ALEXANDER. PROSECUTOR ALEXANDER WAS THE FIRST PROSECUTOR FROM MR. RANDOLPH'S CASE THAT WE APPROACHED TO TALK TO, AND HE REFUSED TO TALK TO US. THUS, BASED ON THAT, OUR KNOWLEDGE OF THE RECORD THAT MR. TANNER, PROSECUTOR TANNER, AS WELL AS MR. ALEXANDER AND PROSECUTOR DAILY HAVING SOME INVOLVEMENT, WE FELT THOSE WERE THE PEOPLE TO TALK TO. THE JUDGE HAD DECEASED, SO WE FILED A MOTION WITH THE CIRCUIT COURT TO ALLOW US TO PROCEED. HOWEVER, THE CIRCUIT COURT, THE ONE PROSECUTOR, THE JUDGE DECIDED WE SHOULD TALK TO A SECRETARY. SHE KNEW NOTHING ABOUT IT. HOWEVER SHE REFERRED US TO THE DECEASED JUDGE'S LAW CLERK, WHO, PAMELA KOHLER WAS, ALSO, AN ASSISTANT STATE ATTORNEY. MISS KOHLER PROVIDED US NEW INFORMATION WHICH WE HAD NOT DISCOVERED. SHE KNEW SOME NOTHING ABOUT THIS, NOTHING ABOUT THE DRAFT, HAD NO IDEA WHY IT WAS THERE. HOWEVER, WHEN SHE WAS DRAFTING THE JUDGMENT AND SENTENCE IN MR. RANDOLPH'S CASE THAT, IS WHERE PROSECUTOR ALEX ABDER WAS STAND -- ALEXANDER WAS STANDING OVER HER SHOULDER, HELPING HER TO ADD IN THE CIRCUMSTANCES, RESULTING IN THE AGGRAVATING AND MITIGATING CIRCUMSTANCES. CLEARLY AN IMPROPER EXPARTE COMMUNICATION, CLEARLY SOMETHING THAT, BY STATUTE AND BY LAW, SOMETHING THAT THE JUDGE WAS REQUIRED TO DO ON HIS OWN, BUT INSTEAD PROSECUTOR ALEXANDER WAS OVER HER SHOULDER AND THEY ADDED LANGUAGE. THAT WAS MISS KOHLER'S TESTIMONY AT THE EVIDENTIARY HEARING. IT WAS UNREBUTTED TESTIMONY. IN FACT, THE CIRCUIT COURT, HIMSELF, FOUND IT WAS AIM PROPER COMMUNICATION AND PUT IT IN HIS ORDER. HOWEVER, THE CIRCUIT COURT DID, THEN, MAKE AN ERRONEOUS DETERMINATION OF LAW, WHICH IS SOMETHING THAT THIS COURT MUST REFUSE DE NOVO.

CLEAR UP FOR US WHAT YOU ARE SAYING THERE. ARE YOU SAYING THAT THE RECORD SHOWS THAT THE JUDGE DIRECTED THE LAW CLERK TO DRAFT A SENTENCING ORDER? AND THAT THE LAW CLERK AND -- AND DIRECTED THE LAW CLERK WHAT TO PUT IN THE SENTENCING ORDER, AND THEN, WHILE THE LAW CLERK WAS DRAFTING THE SENTENCING ORDER, THAT THE PROSECUTOR ASSISTED IN THE DRAFTING OF THE SENTENCING ORDER AND THAT, LATER, THAT SENTENCING ORDER WAS ISSUED IN THIS CASE?

ALL THOSE FACTS ARE CORRECT, INCLUDING, AND IN ADDITION TO THOSE FACTS, THE TESTIMONY OF THE LAW CLERK AT THE EVIDENTIARY HEARING, UNREBUTTED TESTIMONY, I MIGHT ADD, WAS THAT SHE COULD NOT GIVE US SPECIFICS OF HOW SHE KNEW THIS. SHE JUST KNOWS THAT SHE WOULD NOT HAVE ALLOWED THE STATE ATTORNEY TO BE INVOLVED IN THE DRAFTING WITH HER, STANDING OVER HER SHOULDER, ADDING LANGUAGE, IF THE JUDGE HAD NOT GIVEN PERMISSION TO DO SO. THE ONLY WAY THAT WAS POSSIBLE WOULD HAVE BEEN THROUGH AN EXPARTE --

WAS THERE ANY DISPUTE ABOUT THAT EVIDENCE? THE DISTINCTION THAT I JUST GAVE AS A SUMMARY, I AM ASKING IF THAT IS YOUR CONTENTION. WAS THERE ANY DISPUTE ABOUT THOSE CIRCUMSTANCES?

.

NO. THERE IS NO DISPUTE THAT THE CONVERSATION TOOK MACE LAST.

DID THE -- TOOK PLACE.

DID THE TRIAL JUDGE -- IN OTHER WORDS THE TRIAL JUDGE THAT PROCEED OVER THESE PROCEEDINGS, DID THE TRIAL JUDGE FIND THAT, AS A MATTER OF FACT, THE ORIGINAL SENTENCING JUDGE HAD DIRECTED HIS LAW CLERK TO DRAFT SENTENCING ORDER, TELLING THE LAW CLERK WHAT TO PUT IN IT --

I AM SORRY.

I AM TRYING TO ESTABLISH THE FACTUAL PREDICATE OF YOUR CLAIM HERE, SO IT IS IMPORTANT THAT WE STATE, WITH SOME PRECISION, BOTH WHAT OCCURRED AND WHAT YOU CLAIM OCCURRED AND WHAT THE TRIAL COURT, IN THESE PROCEEDINGS, NOW, HAS FOUND. ANOTHER LOWER COURT FOUND THAT, IN ITS ORDER THAT, IT WAS AN IMPROPER COMMUNICATION. HOWEVER, THE LOWER COURT --

WHAT FACTS DID THE TRIAL COURT FIND?

WELL, THE TRIAL COURT DID NOT ISSUE ANY FACTS, I BELIEVE, YOUR HONOR, IN THE ORDER. NO FACTS REGARD WHETHER OR NOT MISS KOHLER WAS TOLD, BY THE JUDGE, TO DO THIS, WHETHER OR NOT THERE WAS DEFINITELY A COMMUNICATION BETWEEN JUDGE ALEXANDER --

BUT THAT WAS HER TESTIMONY?

HER TESTIMONY WAS THAT SHE WOULD NOT HAVE ALLOWED PROSECUTOR ALEXANDER TO ASSIST HER IN DRAFTING OF THE JUDGMENT AND SENTENCE, IF SHE -- SHE COULD NOT POINT TO ANYTHING SPECIFIC, BUT SHE WOULD NOT HAVE ALLOWED IT. IF NOT, IT WAS BY THE JUDGE'S ORDER TO DO SO OR TO ALLOW HIM TO DO SO.

I AM A LITTLE CONFUSED. YOU PORTRAY THIS AS THOUGH HE PARTICIPATED IN THE DRAFTING OF THE JUDGMENT IN A BROADER SENSE. I GOT THE FEELING, FROM GOING THROUGH ALL OF THE MATERIALS, THAT IT WAS THE ADDITION AFTER SENTENCE THAT HAD -- TO A JUDGMENT, THAT HAD ALREADY BEEN PREPARED BY THE JUDGE AND THE JUDGE'S STAFF. IS THAT INCORRECT?

WELL, NONE OF THE TESTIMONY FROM THE HEARING BELOW TELLS US EXACTLY WHAT STATE THE ORDER WAS IN, AT THE POINT THAT JUDGE ALEXANDER WAS ADDING THE LANGUAGE WITH LAW CLERK KOHLER.

BUT IT WAS AN ADDITION OF LANGUAGE, WASN'T IT? THAT IS CLEAR, ISN'T IT?

IT WAS CLEARLY THE ADDITION OF LANGUAGE THAT GOES TO THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES.

BUT THAT WASAL JUDGMENT FORM IN THE SENTENCE. AM I CORRECT --

THERE IS NO RECORD OF HOW THE JUDGMENT OF SENTENCE WAS IN AT THAT POINT, WHEN THAT HAPPENED. THERE IS NO EVIDENCE OF. THAT BUT BESIDES THRASH, REGARDLESS, IT WAS STILL AN EXPARTE COMMUNICATION. THE LOWER COURT FOUND. THAT THE LANGUAGE, ITSELF, DEALT WITH THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES. NOW, THE LOWER COURT FOUND, WHICH WE CLAIM IS AN ERRONEOUS LEGAL CONCLUSION, THE LOWER COURT FOUND THAT IT WAS AN ADMINISTERIAL TASK. UNFORTUNATELY IT DOES NOT MEET ANY DEFINITION OF WHAT A MINISTERIAL TASK WOULD BE. A MINISTERIAL TASK IS ONE THAT HAS NO DISCRETION ON THE PART OF THE PERSON DOING IT. NO DISCRETION. NO JUDGMENT CALL.

IN THE JUDGMENT, ITSELF, IS THERE AN AGREEMENT AS TO WHAT SENTENCE WAS ADDED BY -- WITH THE ASSIST AFTERNOONS OF THE ASSISTANT STATE ATTORNEY?

YES. THE LOWER COURT EVEN FOUND THE SENTENCE, AND IF I COULD READ IT TO YOU, YOUR HONOR, IT SAID, IN FACT, ANY OF THE AGGRAVATING FACTORS TO EXIST WOULD OUTWEIGH ALL MITIGATING FACTORS, STATUTORY AND NONSTATUTORY.

WHERE IS THAT IN THE JUDGMENT?

I DON'T KNOW.

THIS IS A SEVERAL-PAGE JUDGMENT WITH SOME VERY, VERY SPECIFIC FINDINGS, AND IT WAS THIS SORT OF ONE OF THESE CONCLUDE OTHER END SENTENCING -- CON COLLUSION OTHER -- CONCLUSORY --

THE THERE FOR SENTENCE.

THERE FOR THE COURT HAVING -- THE STATE HAVING PROVEN THE FACTS AND WITH ALL REMEMBER RELEVANT TESTIMONY, THEY FIND THAT THE MITIGATING FACTORS DO NOT OUTWEIGH THE AGGRAVATING FACTORS.

IN FACT.

DOES A DEPENDENT HAVE A DUTY TO -- DOES A DEFENDANT HAVE A DUTY TO ON OBLIGATION, OR A BURDEN, RATHER, TO SHOW THAT THE JUDGE DID NOT, INDEPENDENTLY, WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES, WHEN YOU BRING THIS TYPE OF A CLAIM, OR IS THERE A BURDEN, BECAUSE THE JUDGE, THE ORDER IS SORT OF -- THERE WAS NO EVIDENCE PRESENTED THAT JUDGE PERRY FAILED TO INDEPENDENTLY WEIGH. IT IS SORT OF A NEGATIVE RADIO NUMBER ONE, I BELIEVE THE FACTUAL FINDING WAS AN ERROR ON THE PART OF THE LOWER COURT, BUT THE DETERMINATION ABOUT THE ORDER, ONE PARTICULAR CASE THAT I REMEMBER, IS THE NAME OF A CASE BY THE NAME OF SPENCER, WHERE IT WAS SENT BACK AS ERROR, BECAUSE THE JUDGE, THE JUDGE'S LAW CLERK, AND THE PROSECUTOR WERE FOUND SITTING AROUND TOGETHER, JUST PROOFREADING THE ORDER, AND THAT WAS ENOUGH TO SEND THE CASE BACK, AND IN THIS CASE, WE HAVE A DEFINITE EXPARTE COMMUNICATION THAT WAS IMPROPER, AS THE LOWER COURT FOUND, AND WE HAVE A JUDGE OR, EXCUSE ME, A PROSECUTOR, WHO IS WORKING WITH THE LAW CLERK, ADDING LANGUAGE TO THE ACTUAL ORDER. THE LAW CLERK'S TESTIMONY IS THAT SHE WOULD NOT HAVE ALLOWED THE PROSECUTOR TO ASSIST HER IN DRAFTINGS OF IT, IF -- IN DRAFTING OF IT, IF IT WAS NOT THE JUDGE'S WISHES. BUT WE HAVE AN UNREBUTTED EXPARTE COMMUNICATION AND A FINDING BY THE LOWER COURT THAT IT WAS IMPROPER.

BUT ONCE YOU HAVE THIS FINDING THAT IT WAS AN IMPROPER COMMUNICATION, THEY BE IT IS YOUR POSITION THAT THE CASE MUST GO BACK AT THAT POINT. THAT IS ALL OF THE SHOWING THAT HAS TO BE MADE?

IT IS OUR POSITION, YOUR HONOR. IN FACT, IF YOU LOOK, THERE IS A CASE THAT CAME OUT OF THIS COURT, SOME YEARS PAST, BY THE NAME OF ROSE, AND IF I COULD QUOTE SOMETHING FROM THAT CASE, I BELIEVE THAT IT, REALLY, DOES SUM EVERYTHING UP PROPERLY, AS THE PROBLEM WITH THIS EXPARTE COMMUNICATION. NOTHING IS MORE DANGEROUS AND DESTRUCTIVE OF THE IMPARTIALITY OF THE JUDICIARY, EXCUSE ME, THAN AN ONE-SIDE COMMUNICATION BETWEEN A JUDGE AND SANK HE WILL LITIGANT. EVEN THE MOST VIGILANT AND CONSCIENTIOUS OF JUDGES CAN BE INFLUENCED BY CONTACT, NO MATTER THE INTENT OF THE PARTY ENGAGED IN THIS CONDUCT, NO MATTER THE JUDGE IS PUT IN A POSITION OF BEING SWAYED BY UNDUE REMARKS ABOUT THE OTHER SIDE'S CASE.

DO WE GET TO HARMLESS ERROR ANALYSIS AT ALL?

THIS IS NOT AN ERROR THAT IS SUBJECT TO ANY KIND OF A PREJUDICE FINDING OR STANDING. THIS IS AN AUTOMATIC REVERSAL THIS. HIS CASE THAT GOES BACK, WHEN YOU HAVE AN EXPARTE COMMUNICATION INVOLVING A JUDGMENT AND SENTENCING OR SOMETHING THAT IS SUPPOSED TO BE AN INDEPENDENT DUTY OF THE JUDGE THERE, IS NO VIOLATION OF THE SIXTH AMENDMENT, IT HAS -- THERE IS A VIOLATION OF THE SIXTH AMENDMENT, IT HAS TO BE PLEDGED AND PROVEN. IT GOES BACK AND THAT IS WHAT HAS TO BE DONE HERE.

WHAT IS THE CASE THAT SAYS THAT.

THE ONLY CASE THAT I THINK OF, OFF THE TOP OF MY HEAD, IS THE CASE OF ARIZONA VFURMANI, AND THAT IS THE ONLY -- THE CASE OF ARIZONA VERSUS FURMANI. THAT IS THE ONLY CASE THAT I HAVE, OFF THE TOP OF MY HEAD, YOUR HONOR UMPBS.

-- YOUR HONOR. LET'S GO BACK TO WHAT HAPPENED IN THE FIRST PLACE WAS THE DISCOVERY OF A JUDGMENT OF SENTENCE IN THE PROSECUTOR'S FILE. THERE IS ABSOLUTELY NO TESTIMONY AT THE TRIAL THAT THE DEFENSE WAS AWARE THAT THE STATE WAS ASSISTING THE JUDGE IN DRAFTING ANY PART OF THE ORDER N FACT, THE TRIAL ATTORNEY'S TESTIMONY AT THE EVIDENTIARY HEARING BELOW, WAS THAT HE KNEW NOTHING ABOUT IT AND WOULD HAVE OBJECTED STRENUOUSLY, IF HE HAD KNOWN.

WAS THE DETERMINATION OF THE HEARING IN THE DRAFT ORDER OF WHAT THE JUDGE WAS?

NO. THERE WAS NEVER A DETERMINATION MADE.

WHAT WAS THE PROOF? WAS THEIR TEST MONEY ABOUT WHAT THAT WAS AND WHERE IT CAME FROM?

WELL, THE TESTIMONY WAS, THE ONLY TESTIMONY WE HAD, BECAUSE THE STATE PRESENTED NO TESTIMONY WHATSOEVER AT THE HEARING BELOW, SO THE ONLY TESTIMONY WE HAD WAS THE LAW CLERK'S TESTIMONY. THE LAW CLERK WOULD KEEP FINAL DRAFTS OF ORDER THAT SHE PREPARED FOR THE JUDGE. SHE WOULD MARK THEM FO, MEANING FINAL ORDER, ON THE TOP. SHE WOULD KEEP THESE DRAFTS, AND THAT IS ALL SHE WOULD KEEP. IN THIS CASE, MR. RANDOLPH'S CASE, THIS IS CERTAINLY ALL SHE KEPT WAS A FINAL ORDER DRAFT THAT SHE STILL HAD WITH HER, WHEN WE WENT TO SPEAK WITH HER. IT IS TRUE THAT SHE HAD WENT TO THE STATE ATTORNEYS OFFICE TO WORK THERE AND SHE TOOK HER FILE WITH HER. HOWEVER, NO TESTIMONY FROM THE EVIDENTIARY HEARING INDICATES THAT, FOR SOME UNKNOWN REASON,SHE DECIDED TO MIX FILES THAT SHE BROUGHT OVER FROM A PREVIOUS JOB WITH FILES ON A CASE THAT SHE WAS NOT INVOLVED WITH WHATSOEVER, AND FURTHERMORE, THE JUDGE, IN THE LOWER COURT, DID NOT, REALLY, SPECIFICALLY MAKE ANY FINDING AS TO HOW THIS ORDER OR THIS DRAFT COULD HAVE GOTTEN INTO THE STATE ATTORNEYS BOX, ALTHOUGH THE LOWER COURT DOES MAKE A SENTENCE, WITHOUT ANY DETERMINATION, IT IS CLEAR THAT PAMELA KOHLER IS NOW AN ASSISTANTANT STATE ATTORNEY IN PALATKA AND TOOK TO THAT OFFICE WITH HER FINAL COPIES OF JUDGMENTS THAT SHE PREPARED FOR JUDGE PERRY, WHEN SHE WAS A LAW CLERK. THE JUDGE GOES FURTHER WITH THIS STATEMENT. I DON'T KNOW IF THE LAW CLERK DID NOT. TO SUGGEST THAT SHE MIXED THE FILE AND MIXED WITH A PREVIOUS FILE THAT SHE HAD AND HAD NOTHING TO DO WITH THIS, THERE IS NOTHING FACTUAL ON THAT STATEMENT, HOWEVER, THE STATEMENT THAT WE HAVE FROM MS. KOHLER IS THAT SHE NEVER DID THAT, NEVER MIXED CASES IN HER JOB.

ARE YOU SAYING THAT THE STATE DID THAT?

ABSOLUTELY.

BECAUSE THAT IS, AT THIS POINT, JUST SPECULATION.

SPECULATION, MAYBE, BUT YOU HAVE GOT TO KEEP IN MIND THAT, WHERE THIS, WHAT I THINK IS A CARROT, THIS ADD -- A CARET, THE ADDITION MARK, WHERE YOU ARE GOING FOR ADD SOMETHING TO SOMETHING THAT IS ALREADY DRAFTED, AND THERE APPEARS LANGUAGE IN THE FINALORDER THAT IS NOT THERE THE. THERE IS NO DRAFT JUDGMENT ANYWHERE BUT IN THE STATE ATTORNEYS' BOX.

YOU ARE INTO YOUR REBUTTAL TIME.

YES. THANK YOU.

IS THERE -- BEFORE YOU SIT DOWN, IS THERE ANY REASON THAT THE STATE ATTORNEY WAS NOT CALLED AT THE EVIDENTIARY HEARING?

I HAVE NO IDEA. THE STATE THOSE CHOSE NOT TO CALL HIM.

IS THERE ANY REASON THE DEFENSE DIDN'T CALL HIM?

WE DIDN'T NEED TO CALL HIM, YOUR HONOR.

YOU ARE MAKING AN ARGUMENT, HERE THAT, THE TRIAL JUDGE FAILED TO ALLOW YOU TO DEPOSE THEM, BUT, IF I REMEMBER CORRECTLY, THE TRIAL JUDGE SAID THAT YOU COULD CALL THEM AS WITNESSES AT THE EVIDENTIARY HEARING.

BUT, ONCE THE TRIAL JUDGE DENIED US A CHANCE TO DEPOSE THESE WITNESSES, ON THE TRIAL JUDGE -- EXCUSE ME, ON THE LOWER JUDGE'S ADVICE, WE ULTIMATELY LOCATED MS. KOHLER, AND MS. KOHLER'S TESTIMONY AND WHAT MS. KOHLER PROVIDED FOR US IS DEFINITE. IT IS A SLAM DUNK. THAT IS WHAT IT IS. AND, I MEAN, IF WE WANT TO TALK ABOUT STRATEGY, WHICH I DON'T REALLY LIKE TO DO AND I DON'T THINK YOU ARE GETTING ME THAT WAY OR TAKING ME DOWN THAT ROAD, BUT I DON'T BELIEVE IN PUTTING WITNESSES ON THE STAND THAT I HAVEN'T HAD A CHANCE TO TALK TO FIRST. YOU DON'T KNOW WHAT IS GOING TO HAPPEN. THANK YOU.

MISS RUSH.

MAY IT PLEASE THE COURT. MY NAME IS JUDY TAYLOR RUSH. I AM AN ASSISTANT ATTORNEY GENERAL, REPRESENTING THE STATE OF FLORIDA IN THIS CASE. THE ISSUE THAT MR. RANDOLPH HAS RAISED, REGARDING THE ALLEGED EXPARTE COMMUNICATION BETWEEN THE PROSECUTOR AND THE TRIAL JUDGE'S LAW CLERK IS NOT ONE THAT MERITS ANY KIND OF RELIEF FOR MR. RANDOLPH.

IS YOUR OPPONENT CORRECT THAT THEY HAD A DRAFT OF THE SENTENCING ORDER FOUND IN THE PROSECUTOR'S FILE?

YES, YOUR HONOR. THAT IS MY UNDERSTANDING.

IS THERE ANY EXPLANATION OF WHY THE PROSECUTOR WAS PROVIDED WITH A DRAFT OF THE SENTENCING ORDER AND THE DEFENSE WAS NOT?

NO. MR. RANDOLPH DID NOT PRESENT EVIDENCE ON THAT POINT. HE DID ASK MISS KOHLER ABOUT IT. SHE DIDN'T KNOW HOW IT GOT THERE, BUT SHE DID SAY THAT THE INITIALS ON THE DRAFT WERE JUDGE PERRY'S NOW, THAT IS DISOUTED BY -- IS DISPUTED FROM ANOTHER WITNESS AT THE EVIDENTIARY HEARING, BUT SHE DIDN'T KNOW HOW IT GOT THERE.

WHAT DO WE FIND IF THE DRAFT IN THE PROSECUTOR'S FILE, IF NOT THAT THERE HAD BEEN AN IMPROPER COMMUNICATION, THAT IS THE FINDING OF THE DRAFT ORDER, ITSELF, BEING AN I AM PROMISEER -- AN IMPROPER COMMUNICATION?

I DON'T BELIEVE THAT THE FINDING OF THE DRAFT ORDER IS AN IMPROPER COMMUNICATION. YOU NEED TO KNOW THE CIRCUMSTANCES.

PROVIDING THE PROSECUTION WITH A COPY OF A DRAFT ORDER AND NOT WITH THE OTHER SIDE OR THE KNOWLEDGE OF THE OTHER SIDE WOULDN'T BE AN IMPROPER COMMUNICATION?

I DON'T THINK THAT THEY PROVED ALL OF. THAT THEY NEVER PROVED THAT THE JUDGE PROVIDED THE PROSECUTION WITH COPY OF A DRAFT ORDER.

HOW DID THE DRAFT ORDER GET IN THE PROSECUTOR'S FILE?

THEY NEVER APPROVED HOW THE DRAFT ORDER GOT IN THE PROSECUTOR'S FILE.

BUT IT WAS IN THE PROSECUTOR'S FILE.

THEY DID PUT EVIDENCE ON THAT THEY RECEIVED IT IN THE FILES AND RECORDS TURNED OVER FROM THE PROSECUTOR IN '97, IN CONNECTION WITH THE '97 PUBLIC RECORDS DISCOVERY.

WHOSE DRAFTORDER THAT?

ACCORDING TO MISS KOHLER, IT WAS PREPARED ON HER COMPUTER, AS WERE ALL OF THE DRAFTS AND THE FINAL JUDGMENT AND SENTENCE.

SO IT IS THE JUDGE'S DRAFT ORDER.

IT WAS PREPARED BY -- IT WAS NOT PREPARED BY THE STATE. THAT'S CORRECT. AND THAT IS WHAT SHE TESTIFIED TO, THAT THE ORDER WAS NOT PREPARED BY THE STATE.

WHY DID THE JUDGE NOT PERMIT THE DEPOSITION OF THE PROSECUTOR IN WHOSE FILE THIS WAS FOUND?

WELL, THE MOTION FOR TAKING THE DEPOSITION, FIRST OF ALL, ASKED THE JUDGE TO PROSECUTE DEPOSITIONS OF TANNER, DAILY AND ALEXANDER, AND THE REASON GIVEN WAS BECAUSE THEY WERE THE PROSECUTORS OF RANDOLPH AT TRIAL. IT WAS THAT BROAD. THERE WAS NO ZEROING IN ON ANY PARTICULAR ISSUE. IT WAS JUST A FISHING EXPEDITION AT THAT POINT.

THERE WAS NO INDICATION ABOUT THIS ORDER, IN THE FILE BROUGHT TO THEALITY EVENINGS OF THE JUDGE? -- TO THE ATTENTION OF THE JUDGE?

NOT AT THE TIME THE MOTION WAS FIRST FILED.

WHAT ABOUT AT THE HEARING?

NOW, AFTERWARDS, AFT MOTION WAS FILED AND DENIED, THEY FILED A MOTION -- AFTER THE MOTION WAS FILED AND DENIED, THEY FILED A MOTION FOR REHEARING OF THE JUDGE'S DISCOVERY ORDER, AND AT THAT POINT THEYAL EDGED MORE INFORMATION ABOUT WHAT THEY HAD FOUND. BUT THEY DID NOT ALLEGE THAT MISS KOHLER HAD BEEN FOUND, AND THAT, AS THEY SAY ON APPEAL, THAT SHE WAS UNABLE TO GIVE THEM ALL OF THE INFORMATION. THEREFORE IT WAS NECESSARY THAT THEY HAVE THESE ADDITIONAL WITNESSES. THEY NEVER ALLEGED THAT IN THEIR MOTION FOR REHEARING. NOT ONLY THAT, THEIR MOTION FOR REHEARING ASKED THAT THEY BE ALLOWED TO TAKE THE DEPOSITIONS THESE THREE PROSECUTORS ON APRIL 22. THE EVIDENTIARY HEARING WAS SCHEDULE FOR APRIL 24. THE TRIAL JUDGE SAID BRING THEM AT THE HEARING. BRING THEM TO THE EVIDENTIARY HEARING. YOU HAVE GOT THE POWER TO DO. THAT THEY ACKNOWLEDGE THAT THEY HAD THE POWER TO DO THAT, IN THEIR REHEARING MOTION. THEY SIMPLY SAID THAT, WELL, IT IS OUR PREFERENCE THAT WE GET TO TALK TO THEM FIRST. IN THIS CASE IT IS THE JUDGE'S PREFERENCE. IT IS HIS DISCRETION AND HE FELT THAT THERE HAD NOT BEEN GOOD CAUSE SHOWN WHY HE SHOULD ORDER DEPOSITIONS OF THESE THREE. THEY COULD COME TO THE HEARING AND GET THE TESTIMONY AT THAT TIME, AND AS MY OPPONENT CONCEDED, THEY DIDN'T FEEL LIKE THEY NEEDED ALEXANDER. THAT IS WHAT HE JUST TOLD THE COURT.

HOW ABOUT SPEAKING TO THAT POINT? AS I UNDERSTAND, APPELLANT'S ARGUMENT HERE, THIS MORNING, IS THAT, IF THERE IS EVIDENCE OF AN EXPARTE COMMUNICATION BETWEEN THE

JUDGE'S LAW CLERK AND THE STATE, THAT, THEN, THAT IS AN AUTOMATIC BASIS FOR REVERSAL, PER SE. WHAT IS THE STATE'S POSITION?

THE STATE STRONGLY DISAGREES WITH THAT.

WHAT IS THE CASE LAW ON IT?

WE RECENTLY FILED A SUPPLEMENTAL AUTHORITY. THIS COURT'S DECISION IN STATE VERSUS REICHMAN. IN THAT CASE, THE STATE WAS APPEALING AN EVIDENTIARY HEARING JUDGE'S DECISION THAT REVERSIBLE SENTENCING ERROR HAD OCCURRED BECAUSE OF AN EXPARTE COMMUNICATION, WHERE THE JUDGE TOLD THE PROSECUTOR TO WRITE UP A SENTENCING ORDER, AND THIS COURT SAID, WELL, WE ARE GOING TO GO AHEAD AND AFFIRM WHAT THE EVIDENTIARY HEARING JUDGE DID THERE, AND THE REASON WE ARE GOING TO DO IT IS BECAUSE, QUOTE, THERE IS NO EVIDENCE IN THE RECORD THAT THE TRIAL JUDGE SPECIFICALLY DETERMINED THE AGGRAVATING OR MITIGATING CIRCUMSTANCES OR WEIGHED THE EVIDENCE, BEFORE DELEGATING THE AUTHORITY TO WRITE THE ORDER. THAT IS OBVIOUSLY NOT WHAT WE HAVE HERE. JUDGE PERRY, CONGRESS TO MISS KOHLER'S TESTIMONY, SAID TO HER, AND I -- LET ME BACKTRACK JUST A LITTLE THERE, SHE DID TESTIFY THAT, AT THIS POINT, THAT THE CONVERSATION OCCURRED, BETWEEN HER AND THE JUDGE, SHE HAD ALREADY PREPARED THE JUDGMENT AND SENTENCE. IT WAS ALREADY ON HER COMPUTER. THE JUDGE HAD ALREADY LOOKED AT IT, AND HE SAID TO HER I WANT YOU TO ADD THIS TO THE JUDGMENT AND SENTENCE YOU HAVE ALREADY PREPARED AND SHOWED ME. I WANT YOU TO PUT IN THERE THAT, IF ANY AGGRAVATORS ARE DETERMINED TO BE INVALID, I WANT THE SUPREME COURT TO KNOW THAT I WOULD STILL IMPOSE THE DEATH PENALTY, BECAUSE ANY ONE OF THE AGGRAVATORS I FOUND FAR OUTWEIGH ALL OF THE MITIGATION. AND HE WENT ON TO TELL HER THERE ARE SOME FLORIDA SUPREME COURT CASES THAT, YOU KNOW, THAT HOLD THIS. WELL, MISS KOHLER ENDED UP GETTING THE LANGUAGE FROM PROSECUTOR ALEXANDER. EXACTLY HOW THAT CAME ABOUT, THEY NEVER PROVED. IT IS UNCLEAR EXACTLY HOW IT CAME ABOUT THAT SHE GOT THE LANGUAGE FROM ALEXANDER. BUT SHE DID GET IT.

ARE YOU IMPLYING THAT DEFENSE COUNSEL HAD A COPY OR WAS FURNISHED A COPY OF THIS TENTATIVE ORDER?

NO, SIR. I AM NOT. I AM NOT IMPLYING THAT AT ALL.

ARE YOU CONCEDING THAT DEFENSE COUNSEL DID NOT HAVE A COPY OF IT?

I DON'T RECALL WHETHER THAT WAS CONCLUSIVELY PROVED. I BELIEVE THAT HOWARD PEARL, WHO WAS THE DEFENSE ATTORNEY, TESTIFIED THAT HE DID NOT REMEMBER ANYTHING LIKE THIS. I WOULD HAVE TO LOOK BACK AT THE RECORD, TO BE SURE AS TO WHETHER IT WAS I DON'T REMEMBER OR I NEVER KNEW ABOUT IT, BUT THERE WAS SOME EVIDENCE ON THAT ISSUE THAT CAME FROM HOWARD PEARL.

DID THE LAW CLERK TESTIFY THAT SHE WAS THE ONE THAT GAVE THE STATE A COPY OF THE DRAFT?

NO, SIR. SHE DIDN'T KNOW HOW THE STATE GOT A COPY OF THE DRAFT.

DID SHE TESTIFY AFFIRMATIVELY "I DID NOT GIVE THEM A COPY OF THE DRAFT"?

I DON'T BELIEVE THAT QUESTION WAS ASKED. I DON'T BELIEVE SHE TESTIFIED ON THAT ISSUE DIRECTLY.

YOU SAY, IN THE MOTION FOR REHEARING, THAT SHE SUBMIT ADD AFFIDAVIT?

WHICH MOTION FOR REHEARING?

YOUR OPPONENT REFERRED TO A MOTION FOR REHEARING, IN WHICH AN AFFIDAVIT WAS SUBMITTED BY THE LAW CLERK, SAYING THAT SHE DID NOT MIX FILES, ONCE SHE BECAME A PROSECUTOR.

YES. I BELIEVE THAT IS ACCURATE. YES. SHE DID SAY THAT SHE DID NOT MIX HER FILES.

DID SHE SAY ANYTHING ABOUT HER KNOWLEDGE OF THE SOURCE OF THE COPY OF THE DRAFT THAT THE STATE HAD IN ITS FILES?

IT IS MY RECOLLECTION SHE SAID SHE DID NOT KNOW HOW THE STATE GOT A COPY OF THE ORDER. THAT IS MY RECOLLECTION OF WHAT SHE HAS TESTIFIED TO.

WHAT IS THE STATE'S POSITION, AS FAR AS THE SOURCE OF THAT COPY OF THAT DRAFT, IF IT WASN'T HER? IF IT WASN'T THE LAW CLERK, HOW DID THE STATE GET A COPY OF A DRAFT?

I DON'T KNOW HOW THE STATE GOT A COPY OF THE DRAFT. MR. RANDOLPH NEVER PROVED IT.

DID THE STATE PUT ANY TESTIMONY ON AS TO HOW THAT COPY OF THE DRAFT GOT ABOUT INTO ITS FILE?

NO. THE STATE DID NOT PUT ON TESTIMONY AT THE HEARING. MR. LAND OFFER PUT ON THE WITNESSES AT THE HEARING.

SO THE STATE -- MR. RANDOLPH PUT ON THE WITNESSES AT THE HEARING.

SO THE STATE HAS OFFERED NO EXPLANATION ABOUT HOW THAT DRAFT GOT INTO ITS FILE.

NOT TO MY KNOWLEDGE, THERE HAS BEEN NO EXPLANATION OFFERED.

IN REICHMAN, WE UPHELD THE TRIAL COURT'SORDER THAT REMANDED FOR NEW TRIAL.

THAT'S CORRECT.

SO HOW DOES THAT FIT YOU, AS FAR AS YOUR CLAIM, HERE, THAT THERE HAVE NO -- THAT THE MERE FACT OF THERE BEING OR THE FACT OF THERE BEING EXPARTE COMMUNICATION AND ASSISTANCE BY -- FROM THE STATE, IN DRAFTING THE SENTENCING ORDER, IS NOT GROUNDS FOR REVERSAL?

BECAUSE THE BASIS FOR UPHOLDING THAT ORDER. THIS COURT SAID, QUOTE, NO EVIDENCE IN THE RECORD THAT THE TRIAL COURT SPECIFICALLY DETERMINED THE AGGRAVATING OR MITIGATING CIRCUMSTANCES OR WEIGHED THE EVIDENCE BEFORE DELEGATING AUTHORITY TO WRITE THE ORDER. WELL, IN THIS CASE, THE EVIDENCE IS THAT THE TRIAL JUDGE HAD DONE ALL OF THAT. HE ALREADY TOLD MISS KOHLER, BEFORE HE SAID GET THE LANGUAGE, HE SAID THIS IS EXACTLY WHAT I WANT. I WANT THIS TO BE CRYSTAL CLEAR THAT I HAVE DECIDED THAT, EVEN IF THERE IS ONLY ONE VALID AGGRAVATOR LEFT, IT OUTWEIGHS ALL OF THE MITIGATION. I WOULD, ALSO, LIKE TO POINT OUT THAT THERE IS NO SERIOUS CHALLENGE TO ANY OF THE AGGRAVATORS, SO WE ARE TALKING ABOUT LANGUAGE HERE, BUT THE STATE'S POSITION IS THAT HARMLESS ERROR DOES APPLY TO THIS ISSUE, AND WE HAVE CITED THE RUSSIAN CASE, WHICH IS A UNITED STATES SUPREME COURT CASE THAT SPEAKS DIRECTLY TO THAT. HE HAS TO ESTABLISH PREJUDICIAL EFFECT HERE. WE DON'T HAVE ANY AGGRAVATORS THAT ARE IN DANGER IN THIS CASE, AND, ALSO, IN CARD VERSUS STATE, THIS COURT SAID IT IS THE NATURE OF THE CONTACT BETWEEN THE JUDGE AND THE PROSECUTOR, THAT IS CRITICAL, IN DETERMINING WHETHER ANY REVERSIBLE ERROR OCCURRED.

ARE WE CONCERNED, HERE, THOUGH, THAT WE HAVE REPEATEDLY SAID THAT THE DANGER, THE MOST DANGEROUS THING THAT CAN OCCUR IS EXPARTE COMMUNICATION BETWEEN A JUDGE AND ONE PARTY OR THE OTHER, AND THAT IT IS -- WE HAVE -- ACTUALLY THE STATEMENT IS THAT IT IS THE MOST DANGEROUS AND -- THE MOST DANGEROUS AND DESTRUCTIVE OF THE IMPARTIALITY OF THE JUDICIARY, AN ONE-SIDED COMMUNICATION, BETWEEN A JUDGE AND A LITIGANT. FROM IS NO QUESTION, HERE, THAT THIS WAS -- THERE IS NO QUESTION, HERE, THAT THIS WAS A STUB ESTABLISHMENT I HAVE PART OF THE SENTENCING -- SUBSTANTIVE PART OF THE SENTENCING ORDER, CORRECT?

I BELIEVE IT GOES TO THAT. THE MERITS OF THE DECISION, THE POINT OF GETTING THE LANGUAGE, DID NOT-.

THIS WAS A SUBSTANTIVE PART OF THE SENTENCING ORDER?

GETTING THE LANGUAGE WAS SIMPLY AN ADD MINISTERIAL ACT THAT THE LAW CLERK NEEDED TO DO. THERE WAS NO EVIDENCE THAT THE TRIAL JUDGE DISCUSSED, WITH ALEXANDER OR ANYONE ELSE, WHETHER HE SHOULD INCLUDE THIS PROVISION. HE MADE THE DECISION FIRST.

YOU WOULD, THEN, GO AND TELL STATE ATTORNEYS AROUND THE STATE THAT IT IS REALLY OKAY, THAT 2 IS NOT -- THAT IT IS NOT I AM PERMISSIBLE EXPARTE COMMUNICATION FOR THERE TO BE DISCUSSION ABOUT PORTIONS AFTER SENTENCING ORDER IN A DEATH CASE?

I DON'T THINK WHAT WAS PROVED HERE WAS DISCUSSIONS ABOUT PORTIONS OF A SENTENCING ORDER IN A DEATH CASE. I THINK THIS IS MORE COMPARABLE TO THE JUDGE SAID THIS IS WHAT I HAVE DECIDED. THIS IS WHAT I WANT YOU TO GET THE LANGUAGE FOR. AND YOU CAN FIND IT IN FLORIDA SUPREME COURT CASE LAW. THIS LAW CLERK, AS FAR AS WHAT THE EVIDENCE SHOWS, TOOK IT UPON HERSELF TO GET THAT LANGUAGE FROM THE PROSECUTOR INSTEAD. SHE PROBABLY SHOULDN'T HAVE DONE. THAT THAT IS WHAT THE TRIAL COURT SAID. THERE MAY HAVE BEEN AN IMPROPER COMMUNICATION IN THAT REGARD, BUT THERE WAS NO PREJUDICE TO THE DEFENDANT HERE. THE -- IT WAS NO DIFFERENT THAN IF SHE HAD GONE TO THE LAW LIBRARY, TAKEN THE CASE LAW OFF THE SHELF AND WROTE THE LANGUAGE IN. AND THERE HAS BEEN NO CLAIM THAT THE STANDARD WAS NOT WHAT WAS IN THE CASE LAW JUDGE PERRY REFERRED TO. THERE HAS BEEN NO CLAIM THAT THE LANGUAGE ALEXANDER GAVE WAS NOT WHAT JUDGE PERRY SPECIFICALLY SAID I WANT AND I WANT PUT IN HERE. SO THERE HAS BEEN ABSOLUTELY NO PROOF OF ANY KIND OF A PREJUDICE, EVEN ASSUMING THAT THE TRIAL JUDGE, WHEN HE SAID THERE MAY HAVE BEEN AN IMPROPER EXPARTE COMMUNICATION HERE, THAT TECHNICALLYSPEAKING, THERE WAS, BUT IT WASN'T THE KIND THAT MERITS REVERSAL. IT WASN'T THE KIND OF A COMMUNICATION THAT WENT TO THE MERIT OF WHAT THE JUDGE HAD TO DECIDE. HE HAD, ALREADY, DECIDED. HE HAD, ALREADY, DECIDED THAT ANY ONE OF THE AGGRAVATORS OUT WEIGHED ALL OF THE MITIGATION. HE JUST WANTED HIS LAW CLERK TO PULL THE BOOK OFF THE SHELF AND WRITE IT DOWN IN THE LANGUAGE THIS COURT HAD USED.

WHAT ABOUT THE TESTIMONY, AS I UNDERSTAND THE APPELLANT IS SAYING, THAT MISS KOHLER TESTIFIED THAT SHE WOULD NOT HAVE TALKED WITH THE STATE ATTORNEY OFFICE, THAT EVIDENTLY SHE HAD SOME DIRECTION TO DO THAT. OTHERWISE SHE WOULD NOT HAVE TALKED TO ANYONE AT THE STATE ATTORNEY'S OFFICE.

I DON'T BELIEVE THAT THE EVIDENCE THEY PUT ON AT THE EVIDENTIARY HEARING SUPPORTS THAT AT ALL. AS THE PERSON WHO -- YOU KNOW, THE TRIAL JUDGE FOUND IN FAVOR OF IT NOT BEING A PREJUDICIAL EXPARTE COMMUNICATION, THE STATE IS TRYING TO HAVE THAT UPHELD, SO WE ARE ENTITLED TO THE REASONABLE INFERENCES FROM THE FACTS TO LOOK AT THEM IN THE BEST LIGHT AVAILABLE, TO UPHOLD WHAT THE TRIAL JUDGE DID HERE. THE TESTIMONY THERE, REFERRING TO, IS -- THE TESTIMONY THEY ARE REFERRING TO IS ON PAGE 130 OF THE TRANSCRIPT AND OF MISS KOHLER'S TESTIMONY. REPEATEDLY, BOTH BEFORE AND AFTER THIS

POINT, SHE HAS BEEN ASKED, OVER AND OVER AGAIN, ARE YOU AWARE OF ANY EXPARTE COMMUNICATION BETWEEN JUDGE PERRY AND ALEXANDER, IN THIS CASE, AND THE ANSWER WAS ALWAYS NO. HOWEVER, IN THIS PART, THEY ARE ASKING HER A QUESTION THAT I BELIEVE IS SOMEWHAT UNCLEAR. THEY ASK HER WHETHER SHE IS AWARE THAT HE HAD DISCUSSED THIS ISSUE WITH JUDGE PERRY. AND HER ANSWER IS "I GUESS I ASSUMED SO. I DON'T THINK I WOULD HAVE AMEND THE ORDER, WITHOUT, AND THERE IS A BREAK, AT SOME POINT JUDGE PERRY WOULD HAVE GIVEN ME PERMISSION TO DO SO." SO IT SEEMS THAT KOHLER IS INTERPRETING THIS ISSUE, IN THE QUESTION THAT SHE WAS ASKED, AS TO WHETHER SHE HAD THE PERMISSION OF THE JUDGE TO USE THE LANGUAGE THAT SHE GOTTEN FROM ALEXANDER. THERE IS NO INDICATION WHETHER SHE SOUGHT THAT PERMISSION BEFORE OR AFTER. AS A MATTER OF FACT SHE DIDN'T EVEN TESTIFY THAT SHE DID HAVE IT. SHE JUST SAID I ASSUMED THAT I HAD IT. THE LONG AND SHORT OF IT IS THEY DIDN'T PROVE WHAT THEY HAD TO PROVE, IN ORDER TO ESTABLISH THAT THERE WAS A PREJUDICIAL EXPARTE COMMUNICATION THAT OCCURRED IN THIS CASE, AND IT IS THEIR BURDEN OF PROOF. THEY DIDN'T MEET IT. AND THE STATE WOULD RESPECTFULLY REQUEST THAT THE ORDER OF THE EVIDENTIARY HEARING, JUDGE MATHIS, BE AFFIRMED. UNLESS THERE IS ANY OTHER QUESTIONS, WE WILL RELY ON OUR BRIEF. THANK YOU.

THIS HAS TO DEAL WITH THE ISSUE OF JUDGE PERRY HAVING BEEN A DEPUTY --

SPECIAL DEPUTY?

SPECIAL DEPUTY SHERIFF?

WHAT EVIDENCE DO WE HAVE IN THE RECORD THAT SUPPORTS THAT CLAIM?

WELL, I, REALLY, DIDN'T SEE ANY EVIDENCE IN THE RECORD, YOUR HONOR. AS A MATTER OF FACT, OUR POSITION IS THAT THE -- I THINK THERE WAS ABOUT A THREE THREE-SENTENCE PHRASING OF THE ISSUE OR RAISING OF THE ISSUE, IN THE OFFICIAL BRIEF. THERE WASN'T ANYTHING, OTHER THAN AT THE 1992 PROCEEDING, WHERE THE HOWARD PEARL ISSUE, AS TO WHETHER HOWARD PEARL, BEING A SPECIAL DEPUTY SHERIFF, HAD, I GUESS, PREJUDICED ANY OF HIS CLIENTS. JUDGE PERRY TESTIFIED. IN CONNECTION WITH THAT PROCEEDING. AND IT WAS MENTIONED THAT HE, ALSO, HAD THE STATUS. YOU WILL RECALL THAT THE --

DID HE TESTIFY CONCERNING HAVING -- THIS TRIAL TOOK PLACE IN PUTNAM COUNTY?

YES, MA'AM.

AND WAS THERE ANY DISCUSSION AS TO HIM BEING A SPECIAL DEPUTY IN PUTNAM COUNTY?

I AM NOT SURE WHETHER THERE WAS, ABOUT WHETHER JUDGE PERRY WAS OR NOT. NOW, HOWARD PEARL WAS A SPECIAL DEPUTY IN MARION COUNTY. THE PROBLEM THAT WE HAVE HERE IS THEIR PLEADING IS SO BARE BONES AND CONCLUDE OTHER, THEY DON'T -- AND CON COLLUSION OTHER, THEY DON'T -- CONCLUSORY, IS THEY DON'T TELL US WHAT EVIDENCE THEY HAVE TO PROVE THIS CLAIM. THEY DON'T TELL US WHAT EVIDENCE THEY HAVE THAT WOULD SUPPORT THIS BARE ALLEGATION THAT THEY HAVE MADE, AND SO THEY ARE NOT ENTITLED TO RELIEF ON THAT CLAIM. THEY HAVEN'T EVEN MET THE MINIMUM STANDARD FOR STATING THAT THE CLAIM FOR RELIEF COULD HAVE BEEN GRANTED UPON, MUCH LESS HAVING PROVED IT. ANY FURTHER QUESTIONS?

THANK YOU.

WOULD YOU ADDRESS THAT PARTICULAR CLAIM REGARDING JUDGE PERRY BEING A DEPUTY?

THERE ARE THE HOWARD PEARL HEARINGS, WHICH I MUST CONFESS TO NOT BEING COMPLETELY UP ON THE FACTS TO THE HOWARD PEARL HEARINGS. AS A MATTER OF FACT IT WAS A CASE

WHEN I WAS NOT OUT OF LAW SCHOOL, BUT IN FACT ATTORNEY RANDOLPH WAS A DEPUTY AND HE DID NOT REVEAL THAT AS A SPECIAL CONFLICT. SEVERAL CLIENTS REPRESENTED BY THE ATTORNEY ALL CAME TOGETHER ON THE HOWARD PEARL HEARINGS, AND --

I UNDERSTAND THAT, BUT WHAT DOES THAT RECORD SHOW ABOUT THE TRIAL JUDGE?

I AM KNOW THE SAME POSITION AS OPPOSING COUNSEL. THE JUDGE ADMITTED, DURING THAT HEARING, AT ONE POINT WHEN HE WAS ON THE STAND, THAT HE WAS A SPECIAL DEPUTY, BUT I CANNOT TELL BECAUSE COUNTY HE SAID HE WAS A SPECIAL DEPUTY IN. WHAT I WOULD LIKE TO DO, JUST AS QUICKLY AS POSSIBLE, IF I CAN, HERE --.

LET ME ASK YOU THIS, COUNSEL. IS IT -- MY UNDERSTANDING CORRECT THAT YOUR CONTENTION IS NOT THAT JUDGE PERRY DID DIDN'T -- HADN'T INDEPENDENTLY, HIMSELF, WEIGHED THE AGGRAVATING AND MITIGATING CIRCUMSTANCES, PRIOR TO THE TIME THAT WE GOT INTO THE BUSINESS ABOUT THE ORDER? I MEAN, THE ORDER WAS PRETTY WELL CONCLUDED, AT THE TIME THAT THIS OCCURRED. ISN'T THAT THE TESTIMONY?

I DON'T EXACTLY READ MISS KOHLER'S TESTIMONY AS THAT WAY. I MEAN, HOWEVER, WHAT WE DO KNOW, FOR CERTAIN, IS THAT THE LANGUAGE THAT WAS BEING ADDED BY PROSECUTOR ALEXANDER, DOES GO INTO THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES.

BUT IS A SUMMARY TYPE OF STATEMENT, ISN'T IT?

FOR THIS ORDER, IT IS A SUMMARY TYPE OF STATEMENT.

A SUMMARY TYPE OF STATEMENT IS WAY TOO GENERAL AFTER WAY TO DESCRIBE IT, BECAUSE WHAT WE ARE AUCKING ABOUT IS THE WEIGH -- WHAT WE ARE TALKING ABOUT IS THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES. THE WAY OPPOSING COUNSEL DESCRIBED IT IS WHAT THE JUDGE KNEW ABOUT THE LAW WAS BASED ON THE LAW CLERK'S TESTIMONY TOE EVIDENTIARY HEARING, WHICH -- AT THE EVIDENTIARY HEARING, WHICH IS BASICALLY HE KNEW OF SOME CASE LAW OUT THERE AND HE WANTED THIS CASE UPHELD.

BECAUSE HE HAD, BY THAT POINT, WEIGHED THE AGGRAVATING AND MITIGATING CIRCUMSTANCES --

THE TESTIMONY --

-- AND CAME TO THE CONCLUSION, IN HIS MIND THAT, DEATH WAS THE APPROPRIATE SENTENCE. ISN'T THAT WHERE WE CENTER.

IN FACT, IT LOOKS LIKE HE CAME TO THE CONCLUSION THAT DEATH WAS THE APPROPRIATE SENTENCE BEFORE THE HEARING EVER BEGAN, BUT THERE IS NO TESTIMONY, ANYWHERE IN THE EVIDENTIARY HEARING, THAT WE KNOW FOR CERTAIN HOW DEVELOPED THE ORDER WAS OR HOW FAR JUDGE PERRY HAD GONE, BUT IT IS NOT A CONCLUSORY STATEMENT, BECAUSE THE STATEMENT, ITSELF, FOUND THAT ANY AGGRAVATORS FOUND TO EXIST WOULD OUTWEIGH ANY FACTORS, MITIGATING OR NONMIGHTING, STATUTORY OR NONSTATUTORY. IF THE TRIAL JUDGE KNEW THE LANGUAGE WAS OUT THERE, YOU DON'T GRAB THE LANGUAGE AND TLOI THROW IT IN, BECAUSE IF THE JUDGE KNEW THERE WERE OTHER CONSIDERATIONS THAT THE JUDGE HAD TO MAKE, BEFORE HE COULD PUT THAT STATEMENT IN, I DON'T ENKNOW WHAT THE CASE LAW IS, BUT IF THE JUDGE DOESN'T KNOW THE CASE AWE LAW -- THE CASE LAW BUT SENDS SOMEONE OUT TO THROW THE LANGUAGE IN, IT MAKES IT HARDER FOR THIS COURT AND THESE COURTS TO PROPERLY REVIEW THE FACTS OF THIS CASE, SO WE DON'T CLEARLY KNOW THAT. BUT THERE WAS IMPROPER EXPARTE COMMUNICATION. IT WAS NOT REBUTTED BY THE LOWER FINDING BY THE CIRCUIT COURT OR THE PARTIES. IT HAPPENED HAPPENED TO GO WITH -- IT HAPPENED TO GO WITH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

THANK YOU. YOU ARE OUT OF TIME. THANK YOU VERY MUCH, COUNSEL. THE COURT WILL BE IN RECESS FOR 15 MINUTES. THE MARSHAL: PLEASE RISE.