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Manuel Adriano Valle v. State of Florida

NEXT CASE OLT COURT'S CALENDAR -- NEXT CASE ON THE COURT'S CALENDAR IS VALLE VERSUS STATE. MR. SCHER.

THANK YOU. MAY IT PLEASE THE KOUST. MY NAME IS TODD SCHER. WITH ME AT COUNSEL TABLE IS SUZANNE MYERS, HERE ON BEHALF OF THE APPELLANT, MANUEL VALLE. THIS CASE IT IS BEFORE THE COURT, FOLLOWING A REMAND ON EVIDENTIARY HEARING. THE THAT IS BEFORE THE -- THE CLAIM THAT IS BEFORE THE COURT, FILED IN THE BRIEFS, IS AN UNIQUE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, BROUGHT PURSUANT --

AS I UNDERSTAND IT, THE CLAIM THAT WAS OF CONCERN TO ME, AT THE TIME THIS ACTION WAS LAST HERE, ON THE ALLEGATION THAT -- CONCERNING THE CON DUBT OF THE TRIAL JUDGE IN THE PRESENCE OF THE JURY -- THE CONDUCT OF THE TRIAL JUDGE IN THE PRESENCE OF THE JURY, WAS DROPPED WHEN IT WENT BACK. IS THAT CORRECT?

THAT'S CORRECT. THAT'S CORRECT.

THE CON DUBT OF THE CCR -- THE CONDUCT OF THE CCR, IN THIS MATTER, GREATLY DISTURBS ME, INSOFAR AS THAT PARTICULAR CLAIM IS CONCERNED, BECAUSE I AM CONCERNED ABOUT THE ALLEGATION, AS TO THE CONDUCT OF A JUDGE BEING MADE, WHICH WAS ACTUALLY STATED WHEN IT WAS QUESTIONED AS TO WHO WAS GOING TO SUPPORT THAT ALLEGATION, THAT THERE WAS A LAWYER WHO WAS GOING TO TESTIFY TO THAT, AND THAT IS THE REASON THAT I VOTED TO SEND THIS CASE BACK, AND THEN THAT TESTIMONY WAS NOT PRESENTED. NOW, THAT, TO ME, IS A VERY DISTURBING MANNER IN WHICH THESE CASES ARE CONDUCTED, MR. SCHER.

WELL, THE ONLY RESPONSIVE, IN TERMS OF THAT ARGUMENT, YOUR HONOR, WAS, ONCE THE CASE WAS REMANDED, THE JUDGE DID ORDER ADDITIONAL DISCOVERY. AND SEVERAL OF MR. VALLE'S FAMILY MEMBERS WERE DEPOSED, THE ATTORNEYS WERE DEPOSED AND, OF COURSE, JUDGE GURSTEN WAS DEPOSED.

DID THE JUDGE STATE, UNDER OATH, TO SUPPORT THE REPRESENTATION THAT WAS MADE BY CCRC, THAT THE JUDGE WAS SEEN KISSING THE VICTIM'S WIFE IN THE PRESENCE OF THE JURY?

I DON'T RECALL WHETHER THAEDZ OR NOT. THE DEPOSITIONS WERE NOT PUT IN THE RECORD, AND I, CERTAINLY, DIDN'T READ OF THOSE, IN PREPARATION FOR THE ARGUMENT, SINCE THAT IS NOT ONE OF THE ISSUES BEFORE THE COURT, BUT IT WAS CLEAR, WHEN THIS CLAIM WAS ABANDONED IN THE TRIAL COURT, THAT EVEN THE STATE HAD ACKNOWLEDGED THAT THERE WAS SOME EVIDENCE TO SUPPORT THE CLAIM, AND, IN FACT, SORT OF THANKED US FOR ABANDONING THAT CLAIM, BECAUSE THEY DIDN'T THINK IT, OBVIOUSLY, HAD ANY MERIT,, TO BEGIN WITH, SO CERTAINLY THERE WERE WITNESSES THAT DID INDICATE THAT THEY HAD OBSERVED. AT TO -- AS TO WHO SAID WHAT, I DID PREPARE FOR THAT TODAY, AND SO THAT CLAIM HAS BEEN ABANDONED. IN ADDITION, OF COURSE, THE COURT HAD REMANDED, EXCUSE ME, FOR THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, REGARDING THE UNREASONABLE DECISION TO PREVENT THE SKIPPER EVIDENCE ON MR. VALLE'S RESENTENCING.

ON THE RESENTENCING, WHAT ROLE DID WHAT OCCURRED IN THE PAST, AS TO THE RESENTENCING, PLAY, AS TO WHETHER COUNSEL DECISION TO PUT ON CERTAIN EVIDENCE WAS

REASONABLE OR NOT? DO WE TOTALLY IGNORE WHAT HAD HAPPENED IN THE PREVIOUS SENTENCING PROCEEDING? IS THAT SOMETHING THAT THE TRIAL COUNSEL IS SUPPOSED TO IGNORE? HOW DOES THAT PLAY INTO THE EVENT -- INTO THE EVALUATION?

IT PLAYS INTO MY ARGUMENT, ONLY TO THE EXTENT THAT, IN TERMS OF PREJUDICE, I THINK THE COURT, OBVIOUSLY, NEEDS TO LOOK AT THE RESENTENCING THAT OCCURRED IN 1988. PART OF MY ARGUMENT IS THAT THE TRIAL COURT, AT THE URGING OF THE STATE, ESSENTIALLY BASED ITS PREJUDICE FINDING OR LACK OF PREJUDICE SOLELY ON THE FACT OF WHAT WAS PRESENTED AT MR. VALLE'S 1981 RESENTENCING.

I WAS ASKING YOU ABOUT THE FIRST PRONG, HOW THAT WOULD PLAY INTO SOMEONE'S REASONABLE TRIAL STRATEGY, TO LOOK AT -- DON'T YOU HAVE TO LOOK AT THE WHOLE PICTURE?

SURE. SURE.

ON THE PREJUDICE ISSUE, WHY ISN'T IT REASONABLE -- THE ULTIMATE CONCLUSION IS AS TO WHETHER THE TRIAL COURT IS COMPETENT. DID MR. VALLE GET A FAIR SENTENCING, THE SECOND TIME AROUND? WHY ISN'T WHAT OCCURRED IN THE WHOLE HISTORY OF THIS CASE AND WHY THE RESENTENCING WAS ORDERED, WHY ISN'T THAT APPROPRIATE, IN WHETHER WE, AS A COURT, FEEL THAT WE HAVE CONFIDENCE IN THE OUTCOME OF THIS.

SPECIFICALLY IN TERMS OF THE PREJUDICE, I THINK IT IS CLEAR, BASED FROM SUPREME COURT PRECEDENT, MOST RECENTLY THE WILLIAMS VERSUS TAYLOR DECISION, WHICH I REALIZED LAST NIGHT I HAD NOT SUPPLEMENTED THE BRIEFS WITH. I THINK THAT CAME OUT THIS SUMMER, AFTER MY REPLY BRIEF, THAT IN TERMS OF PREJUDICE, THE COURT NEEDS TO FOCUS ON THE TOTALITY OF MITIGATION AND THE PRESENTATION AT THE PROCEEDING THAT IS BEING CHALLENGED FORM I THINK THE PROBLEM THAT -- CHALLENGED. I THINK THE PROBLEM THAT THE TRIAL COURT HAD WHICH I ARGUED WAS ERROR, IS THAT THE TRIAL COURT COMPARED THE MITIGATION PRESENTED IN 1981 AND THE MITIGATION PRESENTED IN 1988, AND SAID BUT FOR THIS MODEL PRISONER STUFF, THEY WERE ESSENTIALLY THE SAME. THE FIRST SENTENCING JURY CAME BACK 9-3 AND THIS JURY CAME BACK WITH 8-4, AND SO THEREFORE THERE IS NO PREJUDICE.

THAT IS NOT ALL THE TRIAL JUDGE SAID.

OBVIOUSLY HE INDICATED THAT THERE WERE AGGRAVATING CIRCUMSTANCES, WHICH HE CLASSIFIED AS VERY STRONG, WHICH I WOULD TAKE ISSUE WITH.

IS YOUR POSITION THAT, GLENN, THAT THAT -- POSITION THAT, AGAIN, THAT THAT SHOULD BE IGNORED, WHAT HAPPENED IN 1981, THAT IS THAT WHAT EVIDENCE WAS PRESENTED, THE NATURE OF THE AGGRAVATING CIRCUMSTANCES, THE NATURE OF MITIGATING CIRCUMSTANCES?

SURE. BECAUSE THAT PROCEEDING HAS BEEN VACATED. NOW WE ARE DEALING WITH A 1988.

IS IT RELEVANT TO THIS COURT'S CONSIDERATION ABOUT WHETHER THERE WAS A FAIR AND RELIABLE PENALTY PHASE PROCEEDING IN 1988?

I CAN'T IMAGINE HOW IT WOULD BE RELEVANT, OTHER THAN THE FACT THAT IT HAPPENED. THAT SOME OF THE PLAYERS WERE THE SAME AND SOME OF THE MITIGATION WAS THE SAME, BUT, CERTAINLY, THE 1988 PROCEEDING WAS SUBSTANTIALLY DIFFERENT FROM THE 1981 PROCEEDING, AND SO ANY RELIANCE ON WHAT HAPPENED IN '81, OF COURSE, IN '81, THEY WERE GOING, THE DEFENSE WAS PROCEEDING WITH THE ASSUMPTION THAT THEY WERE GOING TO BE ABLE TO PRESENT THIS EVIDENCE, WHICH WAS SUBSEQUENTLY EXCLUDED, AND SO ANY RESULT OR ANY OUTCOME OR ANY OF THE DECISIONS THAT WERE MADE REGARDING '81, SIMPLY DON'T HOLD ANY

WATER, AND I POSE THAT THEY ARE NOT RELEVANT AT THIS POINT. WHAT THE FOCUS OF THIS COURT'S PREJUDICE ANALYSIS AND PERFORMANCE WHICH, OF COURSE, IS PLENARY IN DE NOVO, NOT DEFERENTIAL, IN TERMS OF THE LEGAL COURT'S CONCLUSION REGARDING PRENK DISAND IN EFFICIENT PERFORMANCE, IS, AS SET FORTH IN THIS COURT'S 1997 OPINION, WHICH WAS WHETHER COUNSEL WERE LABORING UNDER THE MISTAKEN BELIEF THAT THEY HAD TO PRESENT THE SKIPPER EVIDENCE AND IN THE ABSENCE OF THE STATE'S REBUTTAL, WHETHER PREJUDICE HAS BEEN ESTABLISHED, AND I CLEARLY THINK THAT BOTH OF THOSE PRONGS HAVE BEEN ESTABLISHED, AND ONE MATTER I DID WANT TO POINT OUT, REGARDING PREJUDICE, BEFORE I TURN BACK TO IN EFFICIENT PERFORMANCE, IS THE PREJUDICE IS NOT A PREPONDERANCE OF THE EVIDENCE, ACTUALLY LESS THAN THE PREPONDERANCE OF THE EVIDENCE, WHICH THE SUPREME COURT CLARIFIED EARLIER THIS SUMMER, IN THE WILLIAMS DECISION. REGARDING UNREASONABLE PREPARATION IN THE SKIPPER EVIDENCE, THE UNHE EQUIVOCAL TESTIMONY BELIEVE, -- THE UNEQUIVOCAL TESTIMONY BELOW, WHICH MR. VALLE TESTIFIED THAT, ONCE THE COURT REMANDED FOR FOLLOWING SKIPPER, WAS THAT HE HAD NO REMAND. HE HAD NO OPTIONS. THERE IS SOME LANGUAGE IN THE COURT'S ORDER WHICH, OF COURSE, WAS WRITTEN BY THE STATE, WAS THAT THERE WAS A STRATEGIC DECISION MADE HERE. THAT IS SIMPLY NOT THE CASE. THERE IS NO SUPPORT IN THE RECORD FOR A FINDING THAT THERE WAS A STRATEGIC DECISION MADE BY MR. SHERBER VIS-A-VIS EVIDENCE. HE CLEARLY TESTIFIED AND THE OTHER ATTORNEYS AGREED THAT WE DO NOT HAVE TO SPRENT THE SKIPPER EVIDENCE. -- TO PRESENT THE SKIPPER EVIDENCE. WHAT ARE THE PROS AND CONS. IT IS IN THE STATE'S EVIDENCE THAT MR. SHERBER WAS NOT PRESENTED WITH THE EVIDENCE AND WHETHER OR NOT TO GO FORWARD WITH THE DISPUTE OR NOT. THE TESTIMONY OF MR. SHERKER AND MR. ZELMAN WAS OVER WHETHER OR NOT THEY HAD TO PRESENT THE SKIPPER EVIDENCE. WE ARE TALKING SEMANTICS, BUT IT IS CERTAINLY IN SUPPORT OF THE CLAIM. MR. ZELL MAN LEFT THE TEAM. NOW, MIND YOU, THIS IS DURING JURY SELECTION, BECAUSE HE DISAGREED WITH MR. SHERCKER'S DECISION TO GO FORWARD WITH THE EVIDENCE. THAT IS NOT THE CASE. MR. ZELMAN LEFT THE CASE, WITHDREW FROM THE CASE, BECAUSE MR. VALLE WAS NOT PROVIDED THE OPPORTUNITY WHETHER TO MAKE A DECISION AS TO WHETHER OR NOT TO GO FORWARD WITH THE MODEL PRISONER EVIDENCE, BECAUSE IT WAS CLEAR, AND EVEN MR. SHERCKER KNEW, THAT IT WAS GOING TO BE DEVASTATED. HE FELT THAT HE SIMPLY HAD NO CHOICE BUT TO GO AHEAD AND PUT THAT ON, OR OTHERWISE I FEARED THAT -- OR OTHERWISE HE FEARED THAT THERE WOULD BE A RECALL OF THE COURT'S MANDATE.

WERE THERE A NUMBER OF WITNESSES THAT WERE CALLED TO TEST MY TO OTHER THAN -- TO TESTIFY -- I USE THE TERM SKIPPER, THE MODEL TESTIMONY, LEAVE THE DOOR OPEN TO THE STATE THAT WHETHER OR NOT THE MODEL PRISONER, ON CROSS-EXAMINATION, WAS THE SAME COLLATERAL --

THAT IS CERTAINLY AIN'T RESTING POINT. THAT IS ONE OF THE INTERESTING THINGS THAT THE STATE PUT IN THE ORDER SIGNED BY THE LOWER COURT, AND, CERTAINLY, THE ARGUMENT IS, NOW, THAT MR. SHERCKER KNEW THAT THIS WOULD COME OUT IN TRADITIONAL OR FAMILY BACKGROUND INFORMATION. IT DIDN'T. FOR EXAMPLE, THERE IS AN INDICATION IN THE LOWER COURT'S ORDER THAT EVELYN MILLAGE, WHO WAS THE SOCIAL HISTORIAN, I GUESS THE MITIGATION SPECIALIST THAT TESTIFIED AT THE RESENTENCING THAT THE DOOR WAS OPENED BY HER, AS TO SOME OF THIS MODEL PRISONER OR SKIPPER EVIDENCE. HOWEVER, IF YOU LOOK AT THE TRANSCRIPT, SHE WAS NEVER QUESTIONED ABOUT THAT BY THE STATE, AND SO IT IS SORT OF AD HOC OR POST HOC, I SHOULD SAY, SPECULATION, NOW, IN TRYING TO DEFEND THIS CLAIM, THAT THE STATE WOULD SAY, THIS WOULD OPEN THE DOOR. THE FACT OF THE MATTER IS THAT THIS WOULD NOT OPEN THE DOOR, AND EVEN MR. SHERCKER ACKNOWLEDGED --

WERE THESE WITNESSES THAT COULD TESTIFY TO HIS CONDUCT IN PRISON?

ACTUALLY THAT I DON'T REMEMBER. ACTUALLY THE MODEL PRISONER, FIRST, BECAME THE TRADITIONAL MITIGATION WITNESSES.

THE JURY ALREADY HEARD THE EVIDENCE.

THE JURY HEARD THE EVIDENCE, BUT, AGAIN, MISS MILLAGE, CERTAINLY, THEY DIDN'T HESITATE WITH THE THREE OR FOUR WITNESSES THAT WERE PREVIOUSLY CALLED ON THAT ISSUE, TO QUESTION THEM ABOUT. AND, OF COURSE, THEY ALSO ASKED DR. TUMOR, WHO TESTIFIED LATER.

IN PRESENTATION ABOUT MR. VALLE'S PASS THE CONDUCT AS WELL. -- KPOOCHBT DUCT.

ANDS -- CONDUCT.

AND HE WAS NOT QUESTIONED ON THAT?

YES, HE WAS.

WHAT WAS HE THERE TO --

DR. TUMOR DID TESTIFY ON MENTAL MITIGATION, BUT THE STATE DID BRING UP, ON CREATION, AS TO SOME OF THIS.

WAS YOUR QUESTION AS TO DR. TUMOR, WHO WAS A MENTAL HEALTH MITIGATION EXPERT, WHY WOULDN'T THAT EVIDENCE HAVE COME IN THROUGH DR. TUMOR, ON CREATION? -- ON CROSS-EXAMINATION?

WITH DR. TUMOR, WHAT THIS REFLECTS, AND WE HAVE TO LOOK AT WHAT THEY USED TO CROSS-EXAMINE DR. TUMOR. THEY DIDN'T USE THE PRISON STUFF. THEY USED THE PRIOR INCIDENT REGARDING MR. VALLE THAT OCCURRED BEFORE HE WAS ARRESTED. THEY DIDN'T QUESTION DR. TUMOR, TO MY RECOLLECTION, ABOUT THE PRISON BEHAVIOR STUFF. THAT WAS JUST RELATED TO THE PRISON REHABILITATION EXPERTS THAT WERE PUT ON FIRST, AND SO THERE IS A DISTINCTION BETWEEN THAT AND, CERTAINLY, AS INDICATED, MR. SHERCKER SAID THAT, ABSENT HIS FEELING THAT HE WAS COMPELLED TO PRESENT THE SKIPPER EVIDENCE, THAT THERE WAS NO WAY IN THE WORLD HE WOULD HAVE PUT ON WITNESSES WHO WOULD HAVE OPENED THE DOOR TO THIS KIND OF INFORMATION, BECAUSE IT WAS CLEARLY OTHER THAN TO REFUTE THE SKIPPER TYPE OF EVIDENCE, WOULD HAVE BEEN INADMISSIBLE, AND HE WOULD HAVE DONE EVERYTHING --

MY UNDERSTANDING THAT ALL OF THIS, QUOTE, BAD ACT COLLATERAL CONDUCT OCCURRED AFTER THE 1981 -- YES.

-- PROCEEDINGS.

CORRECT.

BEFORE 1981, HE WAS A MODEL PRISONER, AND THEN AFTER 1981 -- NOT THAT YOU WERE ALLEGING THAT HE WAS A MODAL PRISONER.

THAT'S RIGHT. AND THAT IS, IN FACT, WHY THEY WANTED TO PRESENT THIS BACK IN 1981, BECAUSE AT THAT POINT THEY HAD THAT KIND OF EVIDENCE TO PRESENT, AND MR. SHERCKER SIMPLY, BASED ON THE BELIEF THAT THE SKIPPER REMAND, THAT HE HAD TO PRESENT IT. I THINK IT IS VERY IMPORTANT TO FOCUS ON THE FACT, AS I INDICATED BEFORE, THAT THERE WAS NO STRATEGIC WEIGHING OF THE PROS AND CONS, AND THAT MR. VALLE, HIMSELF, WAS NEVER PRESENTED WITH THESE VARIOUS OPTIONS. HE JUST WITH WENT ALONG WITH THE ATTORNEY WHO HE HAD FELT CLOSER, TO AND IN FACT MR. SHERCKER TESTIFIED, ON POSPOSTCONVICTION RECORD 1984, WAS THAT IT WAS MR. SHERCKER'S DECISION, ON HIS OWN, AND NOT MR. VALLE, AND SO WE HAVE A SITUATION HERE THAT THE DEFENDANT, HIMSELF, TIME AND TIME AGAIN, HAS HAD TO CONTROL HIS OWN DESTINY, AS TO WHICH DEFENSES TO GO WITH, WAS NOT

PRESENTED WITH THAT OPTION HERE.

NOW, I UNDERSTAND THAT YOU SAID THAT THERE IS A PROBABILITY OF A DIFFERENT OUTCOME IN THIS SITUATION, BUT YOU ACKNOWLEDGE THAT THERE ARE SEVERAL VERY, VERY STRONG AGGRAVATORS IN THIS CASE. ARE THERE NOT?

WELL, THERE ARE SEVERAL AGGRAVATORS. I CERTAINLY DISPUTE THE STRENGTH OF THEM. WHAT IS IMPORTANT TO REMEMBER IS THAT THERE WERE FIVE AGGRAVATORS FOUND. THREE OF THEM WERE MERGED. OF COURSE THE JURY WAS NEVER INFORMED THAT THEY WERE TO BE VERGED. THE DISRUPTING OF LAW ENFORCEMENT, AGGRAVATING ARREST, AND THE AGGRAVATING FACTOR THAT THE VICTIM WAS A LAW ENFORCEMENT OFFICER, AND THEY WERE ALL, IN FACT, MERGED BY THE TRIAL COURT.

NOW, THE TRIAL COURT, IN 1988, FOUND NO STATUTORY MITIGATION.

NO MITIGATION AT ALL.

NO MITIGATION AT ALL. SO HOW, IN TERMS OF LOOKING AT THIS, EVEN IF THIS COLLATERAL CONDUCT HAD NOT COME IN, HOW DID THAT AFFECT THE LACK OF OTHER STRONG MITIGATION? IN OTHER WORDS THIS IDEA THAT, LISTEN, THEY HAD TO TRY SOMETHING, BECAUSE THERE, REALLY, WAS SO LITTLE IN THE WAY OF MITIGATION IN THIS CASE, THAT IT WAS A WORTHWHILE GAMBLE TO TRY TO PUT ON SOME EVIDENCE THAT HE WAS A PRETTY GOOD GUY IN PRISON?

WELL, I DON'T -- I DISPUTE THE FACT THAT THERE WAS LITTLE -- SO LITTLE, IN TERMS OF THE OTHER TRADITIONAL MITIGATION. IN FACT, THERE WAS A RATHER STRONG CASE OF THE TRADITIONAL KIND OF MITIGATION, AND THAT IS WHAT THE ATTORNEYS FEST TIED -- TESTIFIED TO, AND IN FACT, AT THE 1988 PROCEEDING, IT WAS MUCH MORE AMPLIFIED THAN IT HAD BEEN EARLIER ON. WHAT THE COURT NEEDS TO LOOK AT IS THE TEN OR OF THE -- THE TENOR OF THE WAY THIS PENALTY PHASE PROCEEDED, ONCE MR. SHERCKER HAD MADE HIS DECISION. AS WE ARGUED IN THE BRIEFS AND AS WE ARGUED BELOW, MR. SHERCKER TESTIFIED THAT HE WAS IN THE UNHEARD OF POSITION OF HAVING TO INFORM THE JURY, UP-FRONT, THAT MR. VALLE HAD SPENT TEN YEARS ON DEATH ROW,, WHICH OF COURSE, AUTOMATICALLY READS INTO THE JUROR'S MINDS THAT THIS IS OBVIOUSLY A DANGEROUS GUY. HE HAS BEEN ON DEATH ROW BEFORE AND WAS CERTAINLY SOMEHOW, IN EFFECT, THERE, WEIGHING DELIBERATIONS, AND WHAT THE COURT NEEDS TO LOOK AT IS NOT NECESSARILY WHAT THE TRIAL COURT FOUND BUT WHAT THE EFFECT THAT THIS WOULD HAVE HAD ON THE JURY. ONE OF THE OTHER ISSUES THAT I THINK IS IMPORTANT --

YOU ARE WELL INTO YOUR REBUTTAL TIME, MR. SCHER.

OKAY. I WILL FINISH WITH THIS POINT, THAT IN MATERIALS OF ARGUING THE STRENGTH OF THE AGGRAVATING CIRCUMSTANCES, THE PROSECUTOR, DURING THE CLOSING ARGUMENT, USED PRISON CONDUCT EVIDENCE TO SUPPORT THE STRENGTH OF THE AGGRAVATING CIRCUMSTANCES, AND CERTAINLY THE -- PROBABLY THE STRONGEST OF THE AGGRAVATORS THAT WERE FOUND WAS THE COLD, CALCULATED AND PREMEDITATED, AND, OF COURSE, THAT WAS HOTLY DISPUTED BY COUNSEL, BY THE DEFENSE AT THE PENALTY PHASE, AND, CERTAINLY, THERE WASN'T A -- THERE WAS A 8-4 DEATH RECOMMENDATION HERE, WHICH SHOWS THAT THERE WERE OBVIOUSLY FOUR MEMBERS OF THE JURY WHO BELIEVED THAT EITHER THE MITIGATION WAS SUFFICIENT TO JUSTIFY LIFE OR THAT, POSSIBLY, IN THE BALANCE, THE AGGRAVATORS WERE NOT AS STRONG. THE OTHER THING THAT I THINK THE COURT NEEDS TO CONSIDER, IN TERMS OF EVALUATING PREJUDICE, IS THE FACT THAT THIS COURT PREVIOUSLY FOUND ERROR AT THE PENALTY PHASE, ALTHOUGH IT FOUND IT HARMLESS. THE COURT PREVIOUSLY FOUND THAT THERE WAS IMPROPER ELICITATION OF LACK OF REMORSE BY THE STATE AND THAT THERE WAS, ALSO, IMPROPER VICTIM IMPACT, AND ALL OF THAT, IN CONJUNCTION WITH THE PREJUDICE THAT WE ARE ALLEGEING AT THIS POINT, CERTAINLY IS

MORE THAN A REASONABLE PROBABILITY THAT THE OUTCOME WOULD HAVE BEEN DIFFERENT, IN LIGHT OF THE FACT THAT WE ARE TALKING ABOUT TWO JURORS. I WILL SAVE THE REST OF MY TIME FOR REBUTTAL. THANK YOU.

GOOD MORNING, YOUR HONORS. MY NAME IS KIM HOPKINS. I REPRESENT THE STATE OF FLORIDA IN THIS MATTER. FIRST OF ALL, WITH RESPECT TO JUSTICE WELLS' COMMENTS ON THE ABANDONED CLAIM, IT IS TRUE THAT THERE IS NO DISCOVERY IN THIS PARTICULAR RECORD, WITH REGARD TO THAT ABANDONED CLAIM, SO I CANNOT SAY THAT I READ THE DEPOSITIONS OR ANY OF THE EVIDENCE THAT WAS PURR PORLTED TO SUPPORT THAT CLAIM. HOWEVER, I WOULD REFUTE THE STATEMENT THAT THE STATE AGREED, SOMEHOW, THAT THIS OCCURRED, OR THAT THE EVIDENCE EXISTED ON THE RECORD. THEY TALKED ABOUT THE ABANDONMENT OF THIS CLAIM AT THE EVIDENTIARY HEARING, AND DEFENSE COUNSEL STATED THAT THEY COULD NOT SUPPORT THE CLAIM, AND THAT IS WHY THEY WERE NOT GOING FORWARD WITH IT, AND THIS RECORD BEFORE THE COURT ON THIS PARTICULAR ORDER, THERE IS NOTHING THAT TALKS ABOUT THE STATE AGREEING THAT ANY EVIDENCE EXISTED TO SUPPORT THAT CLAIM. THE ORDER CURRENTLY UNDER REVIEW, OBVIOUSLY, IS AN ORDER DENYING THE MOTION FOR POSTCONVICTION RELIEF, AND BRIEFLY WITH RESPECT TO ISSUE ONE, WHICH WAS NOT ADDRESSED IN DEFENDANT'S ARGUMENT, I WOULD JUST LIKE TO STATE THAT IT IS NOT THE SAME TYPE OF ORDER AS A DEATH SENTENCE ORDER, AND FOR THAT REASON, SECTION 921.141 DOES NOT APPLY, AND THE PATTERSON LINE OF CASES DOES NOT APPLY, WITH RESPECT TO THE FACT THAT THE COURT ADOPTED THE STATE'S PROPOSED ORDER, WITH HIS OWN MODIFICATIONS. INSTEAD DUE PROCESS CONCERNS ARE WHAT ARE AT ISSUE, AND THAT WAS RECOGNIZED BY THIS COURT IN THE PATTON DECISION, WHICH CAME OUT LAST WEEK AND IN WHICH WE FILED A NOTICE OF SUPPLEMENTAL AUTHORITY, FOR AND BASED UPON THAT, OBVIOUSLY THERE WAS NO ERROR INVOLVED IN THE TRIAL COURT'S ADOPTION OF THE STATE'S PROPOSED ORDER, WITH RESPECT TO THE FACTS THAT WERE PUT FORTH, WHERE THE DEFENDANT WAS GIVEN AN OPPORTUNITY TO PRESENT HIS OWN PROPOSED ORDER, AS WELL AS OBJECTIONS TO THE ORDER THAT WAS PROPOSED BY THE STATE, SO DUE PROCESS CONCERNS WERE MET, WITH RESPECT TO ISSUE ONE. GOING TO THE MORE IMPORTANT ISSUE, INEFFECTIVE ASSISTANCE OF COUNSEL, OBVIOUSLY, THE COURT LOOKS AT WHETHER -- EXCUSE ME -- THE COURT LOOKS AT WHETHER THERE IS DEFICIENT PERFORMANCE OF COUNSEL AND WHETHER OR NOT THAT PERFORMANCE PREJUDICED THE PROCEEDINGS. CLEARLY HERE THE '81 SENTENCING PROCEEDING IS IMPORTANT TO THE COURT'S CONSIDERATION. THEY TALKED ABOUT IT. EACH ONE OF THE DEFENSE ATTORNEYS TESTIMONY AT THE RECENT EVIDENTIARY HEARING, THEY TALKED ABOUT THE COMPARISON BETWEEN THE '81 SENTENCING AND THE '88 SENTENCING. THEY TALKED ABOUT THE FACT THAT THE MITIGATION EVIDENCE, ASIDE FROM THE MODEL PRISONER TESTIMONY, WAS SUBSTANTIALLY SIMILAR, AND THAT IS WHAT ULTIMATELY THE COURT FOUND IN ITS ORDER, THAT IT WAS, IN FACT, NO DIFFERENT, OTHER THAN THIS TESTIMONY NARROWLY FOCUSED ON THE BEHAVIOR OF THE DEFENDANT IN PRISON.

IF MR. SCHERCKER, THOUGH, PUT ON THIS EVIDENCE, BECAUSE HE BELIEVED THAT HE WAS REMEMBERED TO -- REQUIRED TO BY THE REMAND, WOULD THAT, UNDER THE LAW OF THIS CASE, SUPPORT A FINDING OF DEFICIENT PERFORMANCE?

FIRST, I WOULD SAY THAT THE RECORD DOES NOT REFLECT THAT HE DID BELIEVE THAT HAD HE TO PUT IT ON IN THE MANNER THAT THEY ARE PRESENTING TO THE COWER TODAY. HOWEVER, IF HE FELT THAT IT -- TO THE COURT TODAY. HOWEVER, IF HE FELT THAT IT WAS A MANDATE THAT HE PUT ON --.

YOU SAY THAT MR. SHERCKER SAID THAT THE REASON HE DIDN'T DIDN'T PUT IT ON WAS BECAUSE HE DIDN'T THINK HE WAS REQUIRED TO PUT IT ON BY THE PRIOR --

HE SAID THAT, BUT THE COURT'S CASE WOULD SHOW THAT THAT IS NOT DEFICIENT. IN FACT, THE TESTIMONY SHOWS THAT THEY WEIGHED THE BALANCE OF GOING ON WITHOUT IT AND GOING

ON WITH IT, WHICH MR. SHERCKER FELT IT WAS HIS RESPONSIBILITY, AND HE DID NOT PUT ON MODEL TESTIMONY, WHICH WAS PROFFERED IN THE '81 SENTENCING. HE PROFFERED WHAT HE PUT ON. ACCORDING TO THE MANDATE, IN REALITY THAT IS NOT WHAT HE DID, SO THOSE TWO THING RESPECT DIFFERENT. I WOULD SAY THAT, INSTEAD, HE LOOKED AT THE STRATEGIES, FIRST, IN TERMS OF THERE WAS A BALANCING IN TERMS OF MR. ZELMAN'S POSITION VERSUS MR. SHERCKER'S POSITION. THIS WAS ON THE RECORD AND THEY TALKED AT LENGTH AS TO HOW THEY FELT ABOUT IT. NOWHERE DID THE STATE CONCEDE THAT THIS WAS NOT PRESENTED TO THE DEFENDANT. SIMPLY PUT, IN OUR ANSWER BRIEF, WE TALK ABOUT THE FACT THAT MR. ZELL MAN'S RECOLLECTION AT THE EVIDENTIARY HEARING WAS THAT HE TALKED ABOUT THE FACT THAT HE DID NOT FEEL THAT THIS WAS LEGALLY MANDATED. INSTEAD MR. SHERCKER TALKED ON A MORE NONLEGAL PLAIN WITH THE DEFENDANT ABOUT HOW HE FELT THAT THEY HAD TO GO FORWARD WITH THIS, AND WHETHER OR NOT THERE WAS A LEGAL MANDATE OF THIS COURT, REQUIRING HIM TO DO SO, THE PRACTICAL REALITY WAS THAT IT WOULDN'T HAVE BEEN ANY DIFFERENT THAN THE '81 SENTENCING, IF HE DIDN'T DO SO, AND THAT WAS WHAT HE WAS TRULY BASING HIS DECISION UPON, BECAUSE OTHERWISE YOU HAVE THE SAME EXACT MITIGATING EVIDENCE WITH RESPECT TO TRADITIONAL MITIGATING CIRCUMSTANCES, SO IF HE DOES NOT PUT ON ANYTHING TO DO WITH THE BEHAVIOR OF THE DEFENDANT IN PRISON, NOTHING IS CHANGED.

THERE WERE NO ADDITIONAL MENTAL HEALTH EXPERTS THAT WERE PUT ON IN '88, STRENGTHENING THE POSSIBILITY OF THE MENTAL MITIGATORS?

NO, YOUR HONOR. DR. TUMOR TESTIFIED, IN BOTH '81 AND '88, THERE WERE DIFFERENT MEMBERS OF THE FAMILY AND DIFFERENT FAMILY BACKGROUND WITNESSES, IN TERMS OF ACTUAL IDENTITY OF THE WITNESSES, BUT THE GIST OF THEIR TESTIMONY WAS THE SAME, AND DEFENSE COUNSEL ADMITTED THAT IN EVIDENTIARY HEARING. ALL THREE OF THE DEFENSE ATTORNEYS ADMITTED THAT THERE WAS, REALLY, NO DIFFERENCE BETWEEN THE MITIGATING, TRADITIONAL MITIGATING EVIDENCE THAT WAS PUT ON ON. SO WHEN THEY GET TO THAT, AND I THINK IT IS IMPORTANT FOR THE COURT TO KNOW THAT THERE IS A DIFFERENCE BETWEEN '81 AND '88. IN '81, THEY WERE ENTITLED TO PUT ON TESTIMONY FROM THE DEPARTMENT OF CORRECTIONS EMPLOYEE, THAT THE DEFENDANT WAS A MODEL DEFENDANT IN THE PAST. WHAT THEY WERE NOT ALLOWED TO PUT ON IS EXTRAPOLATE INTO THE FUTURE THEIR PREDICTIONS AS TO HOW HE WOULD BEHAVE. HOWEVER, THEY DID PROFFER THE TESTIMONY OF THE THREE EXPERTS, AND THEY ARE THE SAME THREE EXPERTS THAT TESTIFIED IN '88. SO WHEN THIS COURT DECIDES THAT IT HAS TO COME BACK IN '78 8 -- IN '88, THEY DIDN'T WANT TO PUT ON THAT HE TRIED TO ESCAPE, SO THEY WEIGHED THE FACTORS, OBVIOUSLY IN TERMS OF THE EGREGIOUS TESTIMONY THAT WOULD COME OUT ON REBUTTAL, AND YOU COMPARE THE PROFFER IN 1981 TO THE WAY THAT THESE EXPERTS ACTUALLY TESTIFIED IN '78 -- IN '88, MR. SHERCKER AND THE DEFENSE TEAM BALANCED THE STRATEGY AND HOW THEY WERE GOING TO PROCEED, AND THEY DID NOT PUT ON MODEL TESTIMONY AS IS DEFINED IN SKIPPER. INSTEAD THEY RESTRICTED IT TO NONVIOLENT BEHAVIOR. THEY HAD THE EXPERTS TESTIFY ABOUT THE FACT THAT THE ESCAPE ATTEMPT WAS MERELY A FANTASY THAT ALL DEATH ROW INMATES HAVE ESCAPE FANTASIES, AND THAT THIS WAS NOT A REALISTIC ESCAPE ATTEMPT, AND THEY TURNED THEIR TESTIMONY TO THE FACT THAT, ALTHOUGH THERE WERE DISCIPLINARY REPORTS, THERE WAS NOTHING NONVIOLENT IN HIS HISTORY AND THAT HE WOULD REMAIN NONVIOLENT IN THE FUTURE. IN COMPARISON, IN '81, THEY USED THE TERM "MODEL PRISONER". THAT WAS NEVER USED IN THE '88 PROCEEDING. INSTEAD, THEY, ALSO, TALKED ABOUT THE FACT THAT HE WOULD BE OF HELP TO AUTHORITIES IN CONTROLLING THE PRISON FACILITY, AND ESSENTIALLY HE WOULD BE A ROLE MODEL AND A LEADERSHIP ROLE AND WOULD BE VERY, VERY HELPFUL IN -- IN HELPING THE AUTHORITIES CONTROL THE INSTITUTION, AND SO, CLEARLY, WHEN YOU COMPARE, THEY ARE MAKING DIFFERENT STATEMENTS. THEY ARE CHOOSING A COURSE OF STRATEGY WHICH IS DIFFERENT THAN THAT WHICH THEY HAD OBVIOUSLY CONSIDERED, WHEN THEY WERE TRYING TO PUT IT ON IN '81, SO THEY ARE NOT BLINDLY GOING FORWARD AND PUTTING ON MODEL PRISONER EVIDENCE AS A RESULT OF THE MANDATE. SO WITH THAT REGARD, WE WOULD SUBMIT THAT IT WAS NOT DEFICIENT PERFORMANCE, BECAUSE A STRATEGY WAS CONSIDERED, BOTH BETWEEN MR.

ZELMAN AND MR. SHERCKER, AND MR. SHERKER'S OPTIONS AS TO HOW HE WAS GOING TO GO FORWARD WITH THE TESTIMONY AND PRESENTING IT, HIMSELF. PARTICULARLY AS TO THE STRATEGY AND WHETHER OR NOT THIS INFLUENCED THE OUTCOME OF THE PROCEEDINGS, AND THIS COURT HAS TO LOOK AT BETWEEN 1981 AND '88. YOU HAVE A PROCEEDING WITH IT AND YOU HAVE A PROCEEDING WITHOUT IT, AND SO THE COURT KNOWS THAT THE OUTCOME IS A DEATH SENTENCE IN EACH INSTANCE. IN FACT, THE JURY THAT HEARD THAT HE HAD ATTEMPTED ESCAPE ACTUALLY GAVE HIM A MORE FAVORABLE VOTE. IT WAS A 9-3 VOTE IN '81 AND A 8-4 VOTE IN '88, AND ALTHOUGH DEFENSE COUNSEL WOULD SAY THAT THAT IS NOT RELEVANT, THEY USE THAT SAME VOTE, IN THEIR BRIEF, TO ARGUE THAT SOMEHOW THEIR EVIDENCE WAS BETTER, AND IF THEY HAD BEEN ABLE TO GET AROUND IT, THAT THEY WERE ON THEIR WAY TO AN EVEN BETTER VOTE, IF THEY WEREN'T FORCED TO DO THAT, SO IT IS RELEVANT, IN TERMS OF COMPARISON. WHAT YOU ARE LEFT WITH, THEN, IS THE TWO SENTENCING PROCEEDINGS AS THEY WENT FORWARD. IF HE SOMEHOW IS ALLOW TO GO BACK AND HAVE A THIRD SENTENCING PROCEEDING, IT IS ACTUALLY GOING TO BE ON THE SPECTRUM WORSE THAN WHAT HAPPENED IN '81, BECAUSE HE WON'T BE ABLE TO PUT ON EVIDENCE, IN TERMS OF THE FACT THAT HE HAD BEEN A MODEL PRISONER IN THE PAST, WHICH IS WHAT HE WAS ALLOWED TO DO IN '81, SO WITH THREE OPTIONS, WHAT HE WOULD ASK FOR AS AN ALTERNATIVE FOR RELIEF AT THIS POINT WOULD ACTUALLY BE THE WORST OF THE THREE, BECAUSE HE WOULDN'T GET INTO, TO BE ABLE TO TALK ABOUT ANY OF HIS BEHAVIOR IN PRISON, AND HE WOULD BE LEFT WITH THE SAME MITIGATION TESTIMONY THAT HE PUT ON IN BOTH THE '81 AND '88 SENTENCING PROCEEDINGS. SO WITH RESPECT TO THE PREJUDICE PRONG, WE WOULD SIMPLY STATE THAT IT IS IMPORTANT WHAT THE VOTE WAS. IT IS IMPORTANT TO COMPARE BETWEEN '81 AND '88 AND IT IS, ALSO, IMPORTANT TO LOOK AT THE AGGRAVATING AND MITIGATING CIRCUMSTANCES, WHICH IS WHAT THE COURT DOES IN HIS TRIAL COURT ORDER N REALITY, THE COURT FOUND THAT THERE WERE LITTLE OR NO MITIGATING EVIDENCE. IN CONTRAST TO THAT, HE GAVE NO WEIGHT TO THE MITIGATING EVIDENCE THAT WAS PRESENTED. IN CONTRAST TO THAT, HE FOUND THREE POWERFUL AGGRAVATORS. THOSE AGGRAVATORS INDICATE THAT THIS DEFENDANT MURDERED A LAW ENFORCEMENT OFFICER, IN AN EXECUTION OF HIS LAWFULLY DUTIES. HE DID IT TO AVOID ARREST FOR A STOLEN VEHICLE. HE DID, AND BUT FOR THE GRACE OF A BULLETPROOF VEST, HE WOULD HAVE MURDERED A SECOND OFFICER. SO THOSE WERE THE THREE AGGRAVATING CIRCUMSTANCES THAT WERE FOUND IN THIS CASE, WHICH OUT WEIGHED ANY OF THE MITIGATING EVIDENCE THAT WAS PUT ON, REGARDLESS OF WHAT WAS SAID ABOUT WHETHER HE WAS A NONVIOLENT PRISONER. UNDER THOSE CIRCUMSTANCES, WE WOULD ASK YOU TO AFFIRM THE TRIAL COURT'S RULING.

THANK YOU. MR. SCHER.

JUST VERY BRIEFLY, ON ARGUMENT ONE, IN TERMS OF THE PATTON CASE, I DON'T THINK THE PATTON CASE, CLEARLY AS IT IS STATED, WAS RELATED TO ITS FACTS, AND I THINK THAT THE ORDER THAT IS BEFORE YOU FROM THE COURT THAT WAS PROPOSED BY THE STATE IS VASTLY DIFFERENT FROM THE ORER THAT WAS AT ISSUE IN -- THE ORDER THAT WAS AT ISSUE IN PATTON, AND WHAT I WANT TO SAY ON THAT ISSUE, WITH RESPECT TO THE TRIAL COURT, THE TRIAL COURT SPECIFICALLY SAID I AM NOT GOING TO SIGN OFF ON ANYBODY'S ORDER. WHAT HE WANTED WAS GUIDANCE, WHEN, IN FACT, WHAT HE DID WAS SIGN OFF ON THE STATE'S ORDER. IN TERMS OF 1981 AND 1988 BEING THE SAME AND SO THEREFORE I GUESS WHAT WE WOULD HAVE TO DO IS EXCISE OUT THIS SKIPPER, NONVIOLENT, WHATEVER YOU WANT TO CALL IT, EVIDENCE, AND IPSA FACT-, HE WOULD GET A DEATH -- IPSA FACTOR -- IPSA FACT-, HE WOULD NOT GET ON ANY OF THAT EVIDENCE. THERE WERE DIFFERENT JURORS INVOLVED, A DIFFERENT JURY INVOLVED, A DIFFERENT JUDGE INVOLVED, SIDE BAR ARGUMENTS, ALL OF THESE THINGS THAT YOU CAN NOT TELL FROM A COLD RECORD, DIFFERENT WITNESSES, WHICH IS WHY YOU CANNOT TELL THE TEST THAT IS BEYOND A REASONABLE DOUBT A REASONABLE OUTCOME. I DON'T HAVE TO SHOW BEYOND A PREPONDERANCE OF THE EVIDENCE OR A YARD THAT THOSE TWO JURORS WOULD HAVE MEAN BEEN UNDERMINED. WHAT WE WOULD ATTEMPT TO SHOW IS THAT THEIR CONFIDENCE WOULD BE UNDERMINED IN THIS PENALTY PROCEEDING. THE STATE WANTS TO SAY

IT WAS THE FAMILY MITIGATION THAT WAS THE SAME, BUT THERE WERE NUMEROUS FAMILY MEMBERS WHO TESTIFIED IN 1988 AS OPPOSED TO '81, AND THERE WAS ADDITIONAL MITIGATING FACTORS THAT WERE PROPOSED IN 1988. I SEE MY TIME IS UP. I WOULD ASK THE COURT TO REMAND FOR RESENTENCING. THANK YOU.