Marbel Mendoza v. State of Florida

MR. CHIEF JUSTICE

GOOD MORNING AND I SEE THAT WE HAVE BEEN JOINED BY THE PI SIGMA ALPHA NATIONAL HONOR SOCIETY FROM PASCO COUNTY. WE ARE CERTAINLY WELCOMING YOU AND WE ARE GLAD THAT YOU HAVE JOINED US FOR THIS MORNING'S ORAL ARGUMENT. I UNDERSTAND THAT YOU ARE LED BY THE PRESIDENT OF THE SOCIETY, MS. RUBY McGEEHAN. THE FINAL CASE ON THE MORNING'S ORAL ARGUMENT CALENDAR IS THE CASE OF MENDOZA VERSUS STATE AND MENDOZA VERSUS MOORE. MR. HALLENBERG, I BELIEVE.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS DAN HALLENBURG. I AM FROM THE CAPITAL COLLATERAL SOUTHERN REGION. I AM HERE TODAY FOR MR. MARBEL MENDOZA, WHO IS HERE ON A 3.850 SUMMARY DENIAL FOR RELIEF AND ALSO HERE ON A PETITION FOR WRIT OF HABEAS CORPUS. MR. MENDOZA WAS CONVICTED IN THE CIRCUIT COURT OF DADE COUNTY FOR FIRST-DEGREE MURDER AND SEVERAL OTHER OFFENSES. FOLLOWING HIS CONVICTION, THE JURY RECOMMENDED THAT THE COURT IMPOSE THE DEATH PENALTY, ON A RECOMMENDATION OF 7-TO-5. AND THEREAFTER, THE DEATH PENALTY WAS INDEED IMPOSED. WHAT I WANT TO START WITH IS POINT OUT THAT IT IS VERY SIGNIFICANT THAT THIS COURT KEEP IN MIND THAT THE BASIS FOR MR. MENDOZA'S CONVICTION BELOW WAS PREDICATED ENTIRELY UPON THE THEORY OF FELONY MURDER. WHILE THE INDICTMENT HAD ORIGINALLY CHARGED ALTERNATIVE, THE ALTERNATIVE THEORY OF PREMEDITATION --

THE UNDERLYING FELONY IN THIS CASE WAS ATTEMPTED ROBBERY. CORRECT?

ATTEMPTED ROBBERY OR, AND/OR ATTEMPTED BURGLARY, YOUR HONOR.

OKAY. NOW, IN THE, WOULD YOU POINT OUT WHICH, AS YOU GO THROUGH THIS, ARGUMENT, WHICH OF THE CLAIMS IN THE MOTION YOU ARE BASING YOUR ARGUMENT UPON, THE MOTION 3.850.

YES, YOUR HONOR. WE ARE, WE ARE, WHAT I MAINLY WANT TO TALK ABOUT IS MR. MENDOZA'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN THE GUILT/INNOCENCE PORTION OF HIS TRIAL, FOR FAILING TO PRESENT TO THE JURY AVAILABLE EVIDENCE THAT THIS, INDEED, WAS NOT AN ATTEMPTED ROBBERY. AND THAT THIS IS VERY SIGNIFICANT, IN THE GUILT GUILT/INNOCENCE -- IT IS SIGNIFICANT FOR THE ENTIRE CASE.

YOUR ARGUMENT IS THAT HE WAS ATTEMPTING TO COLLECT A DEBT.

YES, YOUR HONOR.

OKAY. NOW, WHAT, WHICH CLAIM IN YOUR MOTION WAS THAT?

THAT WAS CLAIM TWO, YOUR HONOR.

CLAIM TWO IN THE MOTION. ALL RIGHT.

AND AS A MATTER OF FACT, THE SPECIFICS OF THE CLAIM IS THAT OBVIOUSLY THE STATE'S THEORY WAS THAT THERE WERE THREE CODEFENDANTS BASICALLY INVOLVED IN THIS CASE. THE STATE'S ARGUMENT WAS THAT THEY PLANNED THIS ROBBERY OF THIS PARTICULAR VICTIM.

I AM SORRY TO INTERRUPT YOU, BUT WE ARE DEALING WITH A PLEADING HERE, CORRECT?

CORRECT.

AND WHAT YOU ARE ASKING IS FOR AN EIDENTIARY HEARING.

YES, SIR.

AND THE REASON IWANT YOU TO TELL ME IN THE MOTON, BECAUSE IT WAS UNCLEAR IN MY READING YOUR BRIEF, WHAT SPECIFICALLY THE ALLEGATIONS WERE IN YOUR MOTIN, THAT WAS PRESENTED TO THE TRIAL JUDGE, THAT THE TRIAL JUDGE SHOULD HAVE GIVEN YOU AN EVIDENTIARY HEARING UPON. I WILL NEED TO KNOW WHICH, CLAIM TWO IN THE MOTION WAS THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL. I APOLOGIZE, YOUR HONOR. I CAN CITE TO THE RECORD. IN MY MOTION, THE RECORD CITE, THE RECORD ON APPEAL, WOULD BE AT SEVERAL PAGES, THAT REFERENCE THAT MR. MENDOZA'S COUNSEL WAS INEFFECTIVE FOR NOT PRESENTING, FAILING TO PRESENT EVIDENCE THAT HE DID NOT COMMIT OR ATTEMPT TO COMMIT A ROBBERY, AND I HAVE CITED PAGE 242 AND 43, PAGE 251, AND SPECIFICALLY, LAZARO QUALAR, WHO WAS ONE OF THE CODEFENDANTS, TESTIFIED IN HIS DEPOSITION THAT THIS WAS NOT AN ATTEMPTED ROBBERY, AND THAT AS A MATTER OF FACT, THE MEN WAENT WENDT TO CONFRONT THE -- THE MEN WENT TO CONFRONT THE VICTIM, IN ORDER TO TALK TO THE VICTIM OF THE MONEY OWED, AND IN THAT DEPOSITION, I DID SUPPLEMENT THE RECORD WITH THAT DEPOSITION, AND HIS TESTIMONY IS A PART OF THIS RECORD, SO IT IS OUR CONTENTION THAT THAT IS WHAT TRIAL ATTORNEY WHAT TRIAL COUNSEL FILED TO -- FAILED TO PRESENT, AND HAD --

JUST LAZARO? BECAUSE ISN'T THERE SOMETHING IN THE RECORD THAT SHOWS, ACTUALLY IN THE RECORD ON THE TRIAL COURT THAT THERE WAS A STRATEGIC REASON FOR NOT CALLING LAZARO? ISN'T THAT --

I WOULD DISAGREE WITH THAT, YOUR HONOR. I MEAN, THERE IS NOTHING IN THE RECORD THAT ESTABLISHES WHAT THE BASIS FOR TRIAL CONSEL'S DECISION WAS, NOT TO CALL LAZARO.

THERE WAS NOTHING, NO COLORADO QUESTION IN THE RECORD ABOUT -- NO COLLOQUY IN THE RECORD ABOUT NOT CALLING LAZARO?

THERE WAS A COLLOQUY. I BELIEVE IT CONSISTED OF COUNSEL STATING, ON THE RECORD, THAT THEY HAD DECIDED NOT TO CALL LAZARO. BUT THERE IS NO, THERE IS O STRATEGY, OBVIOUSLY ARTICULATED IN THAT COLLOQUY. SO WE ARE MAINTAINING THAT, GIVEN AN EVIDENTIARY HEARING, WE CAN ESTABLISH THAT, GIVEN THE, THAT THIS IS A FIRST-DEGREE MURDER CASE PREDICATED SOLELY ON FELONY MURDER, THATHETHER OR NOT THIS WAS AN ATTEMPTED ROBBERY, OF COURSE, IS THE RIMARY ISSUE THAT THE JURY HAD TO DETERMINE, AND BY TRIAL COUNSEL'S COMPLETE FAILURE TO PRESENT THAT AVAILABLE EVIDENCE, HE DENIED MR. MENDOZA HIS RIGHT TO EFFECTIVE COUNSEL.

ARE THERE ANY OTHER WITNESSES THAT CCRC IS SAYING WOULD HAVE BEEN AVAILABLE TO TESTIFY THAT THIS WAS THE THEORY, THAT, ON WHICH MENDOZA HAD GONE OUT THAT DAY? IN OTHER WORDS IT WASN'T TO ROB THE VICTIM, BUT IT WAS TO COLLECT A DEBT OWED. ANY OTHER WITNESSES THAT HE WOULD OFFER IN THE EVIDENTIARY HEARING?

THERE WAS, YOUR HONOR.

ON THE ISSUE OF THE DEBT COLLECTION?

YES, YOUR HONOR, THAT WE CAN, THAT WE WOULD PRESENT IN THAT CAPACITY.

SO WHAT YOU ARE SAYING IS THAT, EVEN THOUGH IS CLEAR ON THE RECORD THAT THEY KNEW OF LAZARO. OBVIOUSLY THERE WAS A DEPOSITION AND THAT THEY SAID ON THE RECORD THAT OBVIOUSLY THEY WEREN'T CALLING LAZARO, YOU FEEL THAT YOU ARE ENTITLED TO AN EVIDENTIARY HEARING, TO SHOW THAT THAT WAS AN UNREASONABLE DECISION, GIVEN THAT THIS WAS, THAT THE FELONY MURDER COULD HAVE BEEN WIPED OUT, IF THE JURY BELIEVED THAT IT WAS --

THAT'S CORRECT, AND THEN THERE WOULD HAVE BEEN NO BASIS TO FIND FELONY MURDER, SO THE PREJUDICE IS OBVIOUS.

LET ME ASK YOU THIS. IN THE FACTS OF THIS CASE, IT IS INDICATED THAT MR. MENDOZA AND MR. CUBERTO?

YES.

WERE GOING TO PLAN, PLAN A ROBBERY, AND MR. HUBERTO WAS GETTING HIS BROTHER TO BE THE WHEEL GUY, AS IT WERE, CORRECT?

THAT IS THE TESTIMONY OF MR. HUBERTO.

AND WE HAVE THAT TESTIMONY THAT THEY WERE ACTUALLY PLANNING A ROBBERY. IS THAT RIGHT?

THAT'S CORRECT.

WHO ELSE WOULD HAVE TESTIFIED THAT IT WAS NOT IN FACT A ROBBERY?

LAZARO, WHO IS THE BROTHER, ORIGINALLY A CODEFENDANT.

I THOUGHT YOU SAID TO JUSTICE PARIENTE THAT THERE WERE OTHER PEOPLE, OTHER THAN LAZARO, WHO COULD TESTIFY TO THAT.

THERE ARE OTHER PEOPLE WHO CAN, ACTUALLY, WHAT I SHOULD HAVE SAID WAS THERE ARE PEOPLE WHO CAN CORROBORATE THAT THERE WAS A DEBT OWED, BUT LAZARO, WHO WAS AN ACTUAL CHARGED CODEFENDANT, AND WHO WAS, IN FACT, UNDER THE THUMB OF THE STATE, IN THAT HE HAD ENTERED INTO HIS PLEA AGREEMENT, TO GET A TEN-YEAR SENTENCE ON A MANSLAUGHTER CHARGE FOR THIS CASE, AND HE HAD AGREED TO TESTIFY AGAINST MR. MENDOZA.

WAS THAT KNOWN TO EVERYONE?

THAT S KNOWN TO EVERYONE, AND FOUR MONTHS AFTER THAT, IS WHEN HE GIVES HIS DEPOSITION, AND SO --

FOUR MONTHS AFTER THE TRIAL?

I AM SORRY. FOUR MONTHS AFTER HE ENTERED INTO THE PLEA. AND WHAT IS SIGNIFICANT, IN TERMS OF THE PLEA AGREEMENT, IS THAT THE PLEA AGREEMENT SPECIFICALLY SAID THAT, IF LAZARO, IF THE STATE FELT THAT LAZARO WAS NOT GIVING TRUTHFUL TESTIMONY AND COOPERATING WITH THE STATE, THAT THEY WOULD BE EMPOWERED TO ATTEMPT TO REVOKE MR. LAZARO'S SENTENCE, REQUEST THE COURT TO REVOKE IT AND IMPOSE A SENTENCE FOR 27 YEARS, SO HE WAS UNDER THE REQUIREMENTS OF THIS PLEA AGREEMENT, IN WHICH IF THE STATE FELT HE WASN'T COOPERATING, THEY COULD TRY TO REVOKE HIS SNTENCE OF TEN YEARS AND GIVE HIM A 27-YEAR SENTENCE, AND EVEN UNDER THE PRESSURE OF THAT AGREEMENT, HE GIVES HIS DEPOSITION TESTIMONY, AND HE SAYS, WELL, THIS WASN'T A ROBBERY. THEY WERE

GOING THERE TO JUST SEE ABOUT MONEY OWED. SO THAT MAKES LAZARO'S POTENTIAL TESTIMONY VERY CREDIBLE IN THAT SENSE. LIKE I SAID, HE WAS UNDER THE THUMB OF THIS PLEA AGREEMENT, AND YET HE STILL MAINTAINED THAT THIS WAS NOT A ROBBERY, AND, OF COURSE, IN THAT, IT DIRECTLY CONTRADICTS THE TESTIMONY OF HIS BROTHER, UMBERTO, WHO WAS THE STATE'S MAIN WITNESS, WHO TESTIFIED THAT THIS WAS CORROBORATING.

LET ME, SINCE YOUR TIME IS GOING BY HERE, LET ME SWITCH TO YOU THE FAILURE ALLEGED TO PRESENT MITIGATION EVIDENCE. WHAT, SPECIFICALLY, ARE YOU ALLEGING THERE?

WE ARE ALLEGING THAT TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PRESENTING EVIDENCE THAT MR. MENDOZA SUFFERED FROM POST-TRAUMATIC STRESS DISORDER, DUE TO HIS TRAUMATIC ORDEALS WHEN HE ESCAPED CUBA AND HAD TO LIVE IN A PERUVIAN REFUGEE CAMP FOR TWO YEARS WHEN HE WAS A YOUNG TEENAGER.

THE TRIAL COURT POINTS OUT THAT DR. TUMER TESTIFIED AT THE TRIAL, AND PRESENTED BACKGROUND INFORMATION.

WELL, AS A MATTER OF FACT, YOUR HONOR, WHAT HAPPENED WAS, YES, DR. TUMER TESTIFIED, AND --

AND HIS MOTHER TESTIFIED.

-- AND HIS MOTHER TESTIFIED, AND THE MOTHER DID GIVE A BASIC BARE BONES FACTUAL RUN DOWN OF THE TIME FRAPS AS TO WHAT TE FAMILY DID. YES, WE LEFT CUBA AND WE WERE SENTTO THE PERUVIAN CAMP, BUT SIGNIFICANTLY, SHE VERY MUCH DOWN PLAYED, FOR WHATEVER REASON THE CONDITIONS AND HORRIFIC ORDEAL THAT HER AND HER FAMILY WENT THROUGH, AND AS A MATTER OF FACT, I BELIEVE IN HER TESTIMONY SHE BASICALLY LEFT THE IMPRESSION THAT THE LIFE IN THE PERUVIAN CAMP WAS NO BIG DEAL, AND WE MAY NOT OBTAIN THAT THERE IS SIGNIFICANT EVIDENCE, AND WE CAN PRESENT IT AT AN EVIDENTIARY HEARING, THAT THE COMPLETE OPPOSITE IS TRUE, THAT THESE CAMPS, THIS CAMP WHERE MR. MENDOZA LIVED FOR TWO YEARS, BASICALLY THEY WERE LIVING IN TENTS WITH 15-TO-18 PEOPLE IN A TENT WITH NO RUNNING WATER, NO ELECTRICITY,, SCARCE FOOD. THE CHILDREN, MANY CHILDREN WERE MALNOURISHED. MEDICAL CARE WAS ALSO VERY SCARCE. IT WAS A VERY TRAUMATIC TWO YEARS -- TRAUMATIC TWO YEARS THAT MR. MENDOZA ENDURED AS A YOUNG TEENAGER. THAT EVIDENCE IN THAT GREAT DETAIL, WAS ABSOLUTELY NOT PRESENTED AT TRIAL, AND, BUT, WE WOULD MAINTAIN UNDER THE FREEMAN CASE, WE ARE ENTITLED TO AN EVIDENTIARY HEARING, BECAUSE WHAT WE HAVE DONE ISAL END SOME VERY SPECIFIC DETAILED, AND, WE THINK, SUBSTANTIAL EVIDENCE.

WHICH CLAIM IN YOUR MOTION ARE YOU SAYING THAT YOU MADE THAT ALLEGATION?

I APOLOGIZE, YOUR HONOR. I HAVE MY, IT WOULD BE THECLAIM WHERE WE ARE ALLEGING INEFFECTIVENESS IN THE PENALTY PHASE. MY BELIEF --

FAILED TO PROVIDE. FAILED TO RETAIN MENTAL HEALTH EXPERTS OR OTHER EXPERS AND FAILED TO PROVIDE THEM WITH THIS MITIGATION AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE?

THAT'S CORRECT, YOUR HONOR.

THAT IS WHAT YOU ARE RELYING UPON?

YES, YOUR HONOR.

WAS THAT ELABORATED ON IN THE HUFF HEARING? WERE YOU MORE SPECIFIC AS TO THE

NATURE OF THE MITIGATION YOU WANTED TO SHOW WASN'T PRESENTED, OR IS THERE, IN OTHER WORDS IS THERE MORE THAN --

I BELIEVE IT WAS ELABORATED ON THE HUFF HEARING. I MEAN, THE MOTION, I QUOTE, IN MY BRIEF, I ACTUALLY QUOTE FROM MY MOTION, AND THERE IS A SUBSTANTIAL QUOTE DETAILING THE MITIGATION THAT WAS NOT PRESENTED, AND I CAN REFER IN MY BRIEF, MY INITIAL BRIEF, STARNG ON GE 29, THAT THE QUOTE THAT GOES ALL THE WAY THROUGH TO PAGE 33, WHICH IS A DIRECT QUOTATION OUT OF THE 3.850 MOTION, AND THAT IS THE EVIDENCE THAT WE, WE ARE, WE CAN SHOW IN AN EVIDENTIARY HEARING THAT THAT WAS NOT PRESENTED. BRIEFLY --.

WHAT MITIGATING FACTOR WAS TO SUPPORT? WAS THERE A MITIGATION FACTOR FOUND, CONCERNING A DEPRIVED CHILD CHILDHOOD OR BACKGROUND?

NO, THAT IS -- A DEPRIVED CHILDHOOD OR BACKGROUND?

NO, THERE WAS NOT, YOUR HONOR AND SPECIFICALLY THE TRIAL COURT RULED THAT, BASED UPON THE MOTHER'S LIMITED TESTIMONY ABOUT THE BACKGROUND IN THE PERUVIAN REFUGEE CAMP AND ESCAPING FROM CUBE, A THE TRIAL COURT FOUND THAT THERE WAS ZERO MITIGATION. SO IT HIGHLIGHTS THE NEED OR IT HIGHLIGHTS THE IMPORTANCE OF THIS EVIDENCE THAT IT WAS NOT PRESENTED AND THAT WE CAN PRESENT IT AT AN EVIDENTIARY HEARING. WE THINK WE CAN ESTABLISH EVIDENCE THAT WOULD HAVE ESTABLISHED MITIGATING FACTORS THAT THE TRIAL COURT DID NOT FIND. MR. CHIEF JUSTICE

YOU ARE INTO YOUR REBUTTAL TIME.

THANK YOU. MR. CHIEF JUSTICE

THANK YOU, COUNSEL.

MAY IT PLEASE THE COURT. SANDRA JAGGARD, ASSISTANT ATTORNEY GENERAL ON BEHALF 6 THE STATE. WITH -- ON BEHALF OF THE STATE. WITH REGARD TO THE GUILT PHASE CLAIM, COUNSEL OBVIOUSLY KNEW ABOUT LAZARO. HE HAD TAKEN THE DEPOSITION. AFTER BOTH SIDES HAD RESTED THEIR CASES, FROM THE DIRECT APPEAL TRANSCRIPT AT PAGE 1213, COUNSEL SAYS AS YOU KNOW, YOUR HONOR, WHEN WE CONCLUDED THIS TRIAL WE ASKED CORRECTIONS IF WE COULD SPEAK WITH THE DEFENDANT. WE WENT INTO THE JURY ROOM AND SPOKE TO THE DEFENDANT. THE PURPOSE OF THAT WAS TO DISCUSS THE POSSIBILITY OF CALLING LAZARO QUAYR, AND AFTER HEARING THE STATE'S CASE, THE DEFENSE MADE THE STRATEGIC DECISION THAT IT WOULD BE NOT IN MR. MENDOZA'S BEST INTEREST TO CALL MR. LAZARO AND WE MADE THE DECISION, BASED ON THE STATE'S CASE-IN-CHIEF, NOT TO CALL HIM.

WHAT DOES LAZAROSAY IN HIS DEPOSITION, ABOUT HOW ELABORATE WAS HE IN HIS DEPOSITION, ABOUT THIS, WE WENT THERE TO COLLECT A DEBT WITH GUNS DRAWN.

I BELIEVE IT WAS JUST WE WENT THERE TO COLLECT A DEBT. WHICH, BY THE WAY, WHEN ONE SHOWS UP AT SOMEBODY'S HOUSE AT 5:30 IN THE MORNING AND ATTEMPTS TO COLLECT A DEBT AT GUNPOINT, WE HAVE A NAME FOR IT. IT IS ROBBERY. WE DON'T ALLOW PEOPLE TO COLLECT DEBTS AT GUNPOINT. SO EVEN IF THIS EVIDENCE HAD COME IN, IT WOULD NOT HAVE BEEN A DEFENSE, AND WOULD NOT HAVE AFFECTED THE OUTCOME. AND BESIDES WHICH COUNSEL MADE A STRATEGIC DECISION NOT TO PRESENT IT. THE REASON WHY COUNSEL WOULD MAKE UCH A STRTEGIC DECISION? HE SPENT THE ENTIRE CASE CALLING THE QUAYAR BROTHERS LIARS.

NORMAL, IN A -- NORMALLY, IN AN EVIDENTIARY HEARING, THERE MAY BE ENOUGH HERE TO REFUTE IT, BUT SAYING IT IS STRATEGIC, THE QUESTION IS WHETHER IT IS A REASONABLE STRATEGIC DECISION, AND WHY SHOULDN'T THE DEFENDANT, IN CONJUNCTION WITH ALL OF THE CLAIMS, THIS IS A SUMMARY DENIAL OF THE CLAIMS, SHOULDN'T HE BE ABLE TO HEAR FROM

TRIAL COUNSEL AS TO THEIR REASONING FOR THAT OR NOT CALLING ADDITIONAL WITNESSES IN MITIGATION?

FIRST OF ALL, I DISAGREE THAT IT A PERSONAL OBJECTIVE BASIS OF STRATEGIC DECISION. IT IS THE BASIS OF WHETHER THE REASONABLE ATTORNEY COULD HAVE MADE THIS STRATEGIC DECISION, AND A REASONABLE ATTORNEY COULD HAVE MADE THIS STRATEGIC DECISION, PARTICULARLY WHEN YOU HAVE MADE THE ENTIRE CASE ALONG THE LINES THAT THE QUAYAR BROTHERS ARE LYING TO GET THE PLEA AGREEMENTMENT THEY ARE THE ONES WHO COMMITTED THIS MURDER AND THEY ARE BLAMING ME FOR IT.

ORIGINALLY THEY EXPECTED THE STATE WOULD CALL LAZARO AND THEN LAZARO WASN'T CALLED. IS THAT WHAT HAPPENED?

THEY DIDN'T KNOW WHICH ONE OF THE QUAYAR BROTHERS THEY WOULD CALL.

THE STATE MADE THE DECISION NOT TO CALL THE BROTHERS AND NOT TO CALL LAZARO, AND THEN THE QUESTION WAS WHETHER THEY WERE GOING TO CALL LAZARO, WHO COULD CORROBORATE THAT MENDOZA WAS THE SHOOTER?

YES. HE WAS NOT AT THE SCENE. HE DOESN'T SEE THE SHOOTING, BUT THE GUN SHOTS WERE HEARD AFTER HUMBERTO'S RUNNING BACK TO THE CAR, SO, YES, HE WOULD HAVE CORROBORATING DETAILS, AND THEY MADE A STRATEGIC DECISION NOT TO PRESENT IT, AND IT IS A REGROEN ONLY STRATEDGE IKE -- AND IT IS A REASONABLE STRATEGIC DECISION THAT THESE TWO ARE LIARS, AND IT IS A REASONABLE STRATEGIC DECISION. NOW, AS FAR AS THE --

LET ME ASK YOU ABOUT THAT. COUNSEL POINTS TO THE MOTION WHICH HE SAYS IS RECITED BEGINNING AT BEGINNING AT PAGE 29 IN HIS BRIEF, AND ALLEGES THAT THERE WAS EVIDENCE THERE CONCERNING CRACK COCAINE, CONCERNING MARIJUANA, DAILY USE, WE DO KNOW DR. TUMER TESTIFIED THAT THERE WAS, THAT THIS DEFENDANT WAS 99, ON THE 99 PERCENTILE FOR DRUG USE. NOW, WHERE THERE IS THIS ALLEGATION THAT THIS EVIDENCE WAS AVAILABLE BUT WAS NOT PRESENTED, AND THERE IS, ALSO, A FINDING OF NO, OF NOTHING CONCERNING DRUG USE IN MITIGATION, ISN'T THAT SUFFICIENT TO WARRANT AN EVIDENTIARY HEARING, AS TO WHAT THIS IS ALL ABOUT?

NO, YOUR HONOR. I DON'T AGREE, SIMPLY BECAUSE THIS EVIDENCE WAS PRESENTED AT THE TRIAL COURT, HEARD ALL ABOUT HIS DRUG ABUSE. YES, DR. TUMER COULD ONLY SAY IT IS SIGNIFICANT DRUG ABUSE AND 99 PERCENT BECAUSE THE DEFENDANT COULDN'T GIVE HIM SPECIFIC AMOUNTS AND TIMES AND FREQUENCY.

THEY ARE SAYING COUNSEL COULD HAVE GOTTEN THIS EVIDENCE FROM OTHER WITNESSES AND WAS INEFFECTIVE FOR FAILING TO DO IT.

BUT WHEN YOU ALREADY HAVE IN THE RECORD THAT HE IS IN THE 99th PERCENTILEAND THAT HE HAS SIGNIFICANT DRUG ABUSE, THE FACT THAT YOU DON'T HAVE TESTIMONY ABOUT EXACTLY HOW OFTEN HE DID IT, WHEN IT IS ALL THESE DRUGS ARE IN THERE. THEY KNOW ABOUT IT. THE JURY HEARD IT. THE JUDGE HEARD IT. HE FACT THAT THE JUDGE CHOSE TO REJECT IT DOESN'T SHOW THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT IT.

WELL, YOU WOULD AGREE THAT ALL OF THIS IS ALLEGED IN THEIR MOTION.

YES, IT IS ALLEGED IN THEIR MOTION.

AND SO THE BURDEN, HERE, THEN SHOULD BECOME ON THE TRIAL JUDGE TO PUT IN THE ORDER, SPECIFICALLY THE DETAILED IN THE RECORD, HOW THIS HAS BEEN --

WELL, IT IS THE TRIAL JUDGE'S JOB TO REFER TO THE RECORD. HE DOESN'T HAVE TO WRITE IT ALL BACK OUT, AND THIS IS IN THE RECORD. THIS IS IN DR. TUMER'S TESTIMONY. THIS IS IN THE MOTHER'S TESTIMONY, ALL ABOUT THE HORRIBLE IMMIGRATION FROM PERU, THAT INSTEAD OF CALLING IT POST-TRAUMATIC STRESS SYNDROME, HE CALLS IT A DECOMPENSATION DISORDER THAT CAUSES HIM TO HALLUCINATE AND HAVE MALL ADAPTIVE BEHAVIOR -- AND TO HAVE MALADAPTIVE BEHAVIOR. THIS IS ALL IN THE RECORD, AND COUNSEL ISN'T INEFFECTIVE FOR FAILING TO PRESENT SOMETHING HE PRESENTED!

WHAT WE HAVE GOT HERE IS A SENTENCINGORDER THAT DOESN'T FIND DRUG USE AS A -- SENTENCING ORDER THAT DOESN'T FIND DRUG USE AS A NONSTATUTORY MITIGATOR, AND THERE IS THE, THESE ALLEGATIONS THAT THERE WAS THIS EVIDENCE THAT WAS AVAILABLE THAT WAS NOT PRESENTED, AND PUTTING THOSE TWO ITEMS TOGETHER, WE, THEN WE END UP IN POSTCONVICTION, NOT GIVING AN EVIDENTIARY HEARING TO DETERMINE WHY COUNSEL EITHER DIDN'T GET THIS INFORMATION OR DIDN'T PRESENT THE INFORMATION CONCERNING THIS DRUG USE, AND THAT IS, I MEAN, THAT IS VERY MUCH MY CONCERN HERE.

THE POINT IS THE DRUG USE IS PRESENTED. THE FACT THE TRIAL COURT DIDN'T FIND IT, I BELIEVE THAT THIS COURT ADDRESSED THAT ON DIRECT APPEAL ABOUT NOT FINDING MITIGATORS.

I THOUGHT THERE WERE TWO ASPECTS TO THE DRUG USE. ONE WOULD HAVE MAYBE BEEN AS A MITIGATE OR, BUT ISN'T THERE ALSO ALLEGATIONS FROM WITNESSES, THAT THIS HAPPENED EARLY IN THE MORNING, THAT THERE WAS DRUG USE IN CONNECTION AT THE TIME OF THE CRIME? IS THAT CONCLUSIVELY REFUTED IN THE RECORD AND WHAT IS YOUR RESPONSE TO THAT?

MY RESPONSE TO THAT IS THEY WERE AWARE THAT THE DEFENDANT HAD MADE SELF-SERVING STATEMENTS THAT HE WAS INTOXICATED AT THE TIME AND CHOSE NOT TO PRESENT THAT, PARTICULARLY IN LIGHT OF THE FACT THAT THIS CRIME WAS PLANNED FOR SEVERAL WEEKS IN ADVANCE. THE CONCEPT OF INTOXICATION IS THAT YOU ARE SO INTOXICATED YOU CAN'T IMPORT INTENT, AND THEY FORMED INTENT FOR SEVERAL WEEKS BEFORE THEY WENT THERE.

WELL, THE CRIME, AGAIN, DEPEND WHAT THE CRIME WAS, THERE WAS NO EVIDENCE THAT THE CRIME THAT THEY WERE INTENDING TO COMMIT WAS TO KILL THE VICTIM. CORRECT? THAT, YOU AGREE, AND CCP WASN'T FOUND IN THIS CASE.

NO. THIS --

THAT THEY WERE PLANNING TO GET MONEY, WHETHER IT WAS TO COLLECT A DEBTOR JUST TO ROB THE GUY -- A DEBT OR JUST TO ROB THE GUY, AND THEY WERE BRINGING FIREARMS WITH THEM. AS FAR AS A JURY, THOUGH, HEARING WHAT HAPPENED, AND THIS IS MORE OF A ROBBERY GONE BAD, WHY WOULDN'T IT BE SIGNIFICANT, IF THERE WERE WITNESSES TO TESTIFY AS TO WHAT HIS STATE WAS THAT MORNING, IN TERMS OF USE OF DRUGS? AND THAT, THEY ARE ALLEGEING THEY WERE WITNESSES THAT COULD HAVE TESTIFIED NOT JUST TO, NOT TO SELF-REPORT, TO ACTUAL USE OF DRUGS AT THE TIME OF THE CRIME, WHICH IN THE JURY'S MIND MAY HAVE LEFT, A 7-TO-5 SITUATION MAY HAVE LESSENED --

KEEPING IN MIND THE JURY HEARD ALL ABOUT HOW HE IS A HABITUAL DRUG USER AND COULD HAVE, BUT THE POINT IS WE HAVE THE FELONY MURDER RULE FOR A REASON. WE HAVE THE FELONY MURDER AGGRAVATOR FOR A REASON, BECAUSE WE WANT TO KEEP PEOPLE FROM GOING OUT AND COMMITTING THESE ROBBERIES. TISRBERY WAS PLANNED. THIS ROBBERY WAS PLANNED FOR WEEKS IN ADVANCE. IT IS NOT LIKE HE DIDN'T FORM THE INTENT. THEY ROBBED AN ARMED PERSON. YOU GO UP TO ROB AN ARMED PERSON YOU ARE TAKING A SGNIFICANT RISK THAT THE ROBBERY IS, QUOTE, GOING TO GO BAD. ROBBERIES ARE ALWAYS BAD.

I WOULD LIKE TO ASK YOU SOMETHING ABOUT THE MOTION TO RECUSE THE TRIAL JUDGE. THERE WAS SOME, WHAT I FOUND TO BE SOMEWHAT DISCONCERTING COMMENTS THAT THE TRIAL JUDGE MADE, NOT REALLY TO DO WITH SAYING THAT THE TWO LAWYERS THAT REPRESENTED THIS DEFENDANT DID A GREAT JOB, BECAUSE THEY ALMOST PULLED OFF A 6-TO-6 DETERMINATION JURY RECOMMENDATION, BUT HIS SEEMING CHASTISEMENT OF CCR, SAYING THAT ISN'T IT IRONIC PEOPLE ARE PASSING JUDGMENTS ON TRIAL LAWYERS WHO HAVE BEEN DOING IT FOR 15 OR 20 YEARS? I FIND THAT IRONIC. IF I AM SITING THERE AND I AM MR MR. MEND OZARKS HEARING THE TRIAL JUDGE -- MR. MENDOZA, HEARING THE TRIAL JUDGE SAYIG WHY DO YOU HAVE LAWYERS THAT ARE ONLY PRACTICING LAW FOR LIMITED PERIODS OF TIME, THAT WOULD CONCERN ME, AS A LITIGANT, AS TO WHETHER THIS JUDGE COULD BE FAIR IN JUDGING THE, THO CLAIMS. WHY WOULDN'T THAT BE AN APPROPRIATE BASIS TO DISQUALIFY THIS TRIAL JUDGE?

WELL, SIMPLY THE LENGTH OF TIME SOMEBODY HAS BEEN PRACTICING LAW IS A MATTER OF FACT. IT IS NOT REALLY ANY KIND OF OPINION OR BIAS. IF YOU READ THAT TRANSCRIPT, HE CHASTISED THE STATE, TOO. IT IS NOT LIKE HE IS PICK ON ONE SIDE AND NOT THE OTHER, AND UNDER THESE CIRCUMSTANCES, THAT IS INSUFFICIENT TO CREATE A REASONABLE FEAR THAT YOU WON'T RECEIVE A FAIR HEARING, NOT A SUBJECTIVE FEAR. AND THE ONE LAST POINT I WOULD LIKE TO BRING UP IS THAT, WITH REGARD TO THE PUBLIC RECORDS, IN THIS CASE, THE DEFENSE SAT ON THEIR HANDS FOR A YEAR, NOT LOOKING FOR THE PUBLIC RECORDS AT ALL, AND THEN DESPTE THAT, THE TRIAL COURT DID ALLOW THEM TO HAVE PUBLIC RECORDS, AND THEN THEY WENT AFTER PUBLIC RECORDS FROM A PRIOR THAT WAS DISCUSSED IN THE LAST ARGUMENT, THEY ARE NOT EVEN SUPPOSED TO BE CHALLENGING, AND THE STATE WOULD THERE FOR RESPECTFULLY REQUEST THAT YOU AFFIRM THE SUMMARY DENIAL. MR. CHIEF JUSTICE

THANK YOU, COUNSEL. REBUTTAL?

THANK YOU. I THINK IT IS IMPORTANT TO, GOING BACK TO THE GUILT SLRB INNOCENCE ISSUE, THE -- THE GUILT/INNOCENCE ISSUE, THE SIMPLE FACT THAT TRIAL COUNSEL AT TRIAL WAS ATTACKING THE CREDIBILITY OF THE QUALAR BROTHERS, I DON'T THINK THAT THAT CAN STAND TO ESTABLISH A STRATEGIC BASIS FOR NOT CALLING LAZARO QUALAR. WE DON'T KNOW WHEN TRIAL COUNSEL MADE THE DECISION NOT TO CALL LAZARO. MAYBE HE MADE THAT DECISION WEEKS BEFORE TRIAL, SO HE COULD, WE JUST DON'T KNOW. THAT IS WHY WE NEED AN EVIDENTIARY HEARING.

WE HAVE TO MAK A DETERMINATION AS TO WHETHER THE COLLECTING OF DEBT BY THE USE OF FORCE IS A DEFENSE TO ROBBERY?

I DON'T THINK THE COURT NEEDS TO REACH THAT ISSUE, BECAUSE I THINK THERE IS NO QUESTION, AND I DON'T THINK THE COURT WOULD DISAGREE THAT SPECIFIC INTENT IS STILL AN ELEMENT OF ROBBERY OR ATTEMPTED ROBBERY. AND --

WELL, TAKING, IT IS TAKING THE PROPERTY BY FORCE, CORRECT? ROBBERY.

YES, BUT STILL, IN ORDER TO PROVE THE OFFENSE, YOU HAVE TO PROVE THAT HE HAD SPECIFIC INTENT TO COMMIT A THEFT. AND I DON'T THINK YOU HAVE TO REACH THE ISSUE AS TO WHETHER OR NOT COLLECTING A DEBT IS AN ABSOLUTE DEFENSE TO ROBBERY, BECAUSE CERTAINLY TRIAL COUNSEL COULD HAVE ARGUED TO THE JURY THAT THE FACT THAT MR. MENDOZA, IN HIS, MR. MENDOZA BELIEVED THAT HE WAS COLLECTING A DEBT, RIGHTLY OR WRONGLY. THE TRIAL COUNSEL COULD ARGUE TO THE JURY THAT THAT GOES TO RENEGE DEBATE -- TO NEGATE HIS SPECIFIC INTENT, TO I DON'T THINK --

IS ROBBERY, YOU DEFINE ROBBERY AS THE SPECIFIC INTENT TO COMMIT A THEFT, OR IS IT THE INTENT TO DEPRIVE SOMEONE OF PROPERTY THAT COULD BE THE SUBJECT OF A DEBT? ISN'T THERE A DIFFERENCE BETWEEN HAVING THE SPECIFIC INTENT TO COMMIT A THEFT AND THE

INTENT TO DEPRIVE SOMEONE OF PROPERTY THAT COULD BE THE SUBJECT OF A THEFT?

I THINK THAT READING THE STATUTES TOGETHER AS A WHOLE, I THINK YOU HAVE TO ASSUME AND YOU HAVE TO TAKE THE POSITION THAT THE LEGISLATURE INTENDED THAT SPECIFIC INTENT TO TALE IS AN ELEMENT OF -- THAT INTENT TO STEAL IS AN ELEMENT OF ROBBERY, SO THAT WOULD BE MR. MENDOZA'S POSITION. WITH RESPECT TO MITIGATION, I THINK IT IS IMPORTANT, ALSO, TO KEEP IN MIND, NOT ONLY WAS THIS A 7-TO-5 JURY RECOMMENDATION, THIS COURT, ON DIRECT APPEAL, WHEN IT WAS DECIDEDING THE ISSUE OF PROPORTIONALITY, SPECIFICALLY FOUND SIGNIFICANT, THE FACT THAT THE TRIAL COURT FOUND ZERO MITIGATION. SO WHEN YOU CONSIDER THAT THE PROPORTIONALITY ANALYSIS THAT THE MAJORITY OF THIS COURT MADE FOUND IT IMPORTANT THAT THERE WAS ZERO MITIGATION FOUND AT TRIAL --

WASN'T THERE ALSO AN ISSUE ON DIRECT APPEAL CONCERNING WHETHER OR NOT THE TRIAL JUDGE HAD, IN FACT, GIVEN PROPER WEIGHT TO, AND CONSIDERATION TO THE MITIGATION, OR WASN'T THERE?

I BELIEVE THAT WAS AN ISSUE ON DIRECT APPEAL, YOUR HONOR.

WHAT DID WE SAY ABOUT THAT?

YOU CNCLUDED THAT THE TRIAL COURT DID, INDEED, GIVE PROPER CONSIDERATION, BUT OUR, OUR POSITION IS THAT BECAUSE TRIAL COUNSEL DIDN'T PRESENT THE EVIDENCE THAT WE ALLEGE THAT WAS NOT PRESENTED, HAD TRIAL COUNSEL DONE SO, THE TRIAL COURT WOULD HAVE FOUND MITIGATION, AND THEREFORE NOT ONLY WOULD IT HAVE LIKELY AFFECTED THE 7-TO-5 JURY RECOMMENDATION, IT COULD HAVE ALSO AFFECTED TIS COURT APARTMENTS PROPORTIONALITY ANALYSIS ON -- THIS COURT'S PROPORTIONALITY ANALYSIS ON DIRECT APPEAL, BECAUSE THAT WAS SIGNIFICANT THAT THE TRIAL COURT FOUND ZERO MITIGATION.

IT YOUR POSITION THAT IT IS NOT SUFFICIENT FOR THE RECORD TO SHOW THAT DEFENSE COUNSEL DELIBERATED OVER WHETHER OR NOT TO CALL A WITNESS, AND AS A TRIAL STRATEGY, DECIDED NOT TO CALL THE WITNESS, BUT THE RECORD MUST ARTICULATE THE REASON WHY, OR IF IT DOESN'T, THEN YOU ARE ENTITLED TO AN EVIDENTIARY HEARING?

YES, THAT WOULD BE OUR POSITION. I MEAN, THE FACT THAT TRIAL COUNSEL PUT SOMETHING ON THE RECORD THAT WE HAVE DECIDED NOT TO CALL LAZARO, IN AND OF ITSELF SIMPLY DOES NOT CONCLUSIVELY REFUTE MR. MENDOZA'S CLAIM THAT THAT WAS NOT A STRATEGIC DECISION. WE DON'T KNOW THE BASIS FOR TRIAL COUNSEL'S DECISION NOT TO CALL LAZARO. THAT IS WHY WE NEEDED AND WHY WE NEED AN EVIDENTIARY HEARING. SO IT LOOKS LIKE MY TIME IS UP. MR. CHIEF JUSTICE

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