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**Anthony Joseph Farina v. State of Florida Docket Number: SC04-1610 | SC05-935**

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CHIEF JUSTICE: THE NEXT CASE ON THE COURT'S D O C K E T I S FARINA VERSUS T HE STATE OF FLORIDA . ALL RIGHT. COUNSEL ARE READY . MISS PAR ME R ?

M AD AM CHI EF JUS TICE , JUSTICES, MAY IT PLEASE THE COURT. MY NAME IS MAR IE L OUIS E P AR ME R AND I R EPRESENT THE A PP ELLANT PETITIONER IN THIS MATTER.

CHIEF JUSTICE: JUS T FOR THE RECORD BECAUSE I KNOW IT IS NOT MR. GRU BE R S IT TING H ER E. WE'VE HAD , IF YOU C AN J US T INTRODUCE C O-COUNSEL WHO IS ALSO HERE.

ABSOLUTELY. THIS IS RICHE Y K IL EY ALS O , COLLATERAL COUNSEL . YOU R H ONORS , MR. F ARIN A I S BEFORE THIS COURT ON AN APP EAL OF THE DENIAL OF HIS 3 .8 51 M OTION AND ALSO O N A P ET ITION FOR STATE HAB YAS R EL IE F. I W OULD - - HAB EA S R EL IEF. I WOULD LIKE TO FOC US O N T HE ISSUE OF PRO SECU TO RI AL M ISCONDUCT RAI SE D I N T HE STA TE HABEAS.

I'M SORRY , I F YOU C OULD SPEAK UP A LITTLE BIT I'M H AVING TROUBLE HEARING Y OU . Y OU ARE GOING T O C ONCE NT RATE ON WHAT?

T HE I SSUE R AISE D I N THE STATE H ABEA S WHEN THE PROSECUTOR INT RO DU CED EVI DE NC E OF B IBLICAL AUT HO RI TY T O SUPPORT IMP OSITION OF T HE DEATH PENALTY. A S TO ALL O THER ISSUES I S TAND ON THE MERITS OF THE BRIEF BUT I'M H APPY TO ANS WER QUE STIONS AS TO ANY OF THE O TH ER I SS UE S. A NTHONY FARINA W AS DENIE D D UE P ROCESS AND A F AI R TRIAL WHEN THE PROSECUTOR INVOK ED T HE BIBLICAL AUTHORITY I N S UP PO RT OF A J UR Y V ER DICT O F D EATH . APPELLATE COUNS EL 'S FAILU RE T O RAISE THIS ISSUE TO THIS COURT ON DIRECT APPEAL CONST ITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

CHIEF JUSTICE: THIS WAS N OT RAISED, NOT O BJ EC TED T O AT THE TRIAL COURT LEVEL?

OH, NO , IT WAS O BJ EC TE D TO.

CHIEF JUSTICE: T HE CRO SS-EXAMINATION WAS OBJECTED TO ALSO?

ABSOLUTELY, YES. THERE WAS AN OBJ ECTION. THE A CTUAL OBJ ECTI ON WAS A REL EVANCE OBJECTION.

FROM WHAT I CAN TELL O F THE RECORD - -.

CHIEF JUSTICE: YOU S AID THE ACTUAL OBJECTION WAS A RELEVANCE OBJECTION, NOT THAT IT WAS I MP ROPE R CROSS-EXAMINATION?

NO , THE W AY I T W AS P HRAS ED AT THE TRIAL COU RT WAS RELEVANCE .

CHIEF JUSTICE: JUSTICE C AN T EAR - - CANTE RO ?

IT SEE MS TO M E T HERE W AS A RELEVANCE OBJECTION AND THEN AFTER A FEW MIN UT ES ' DISCUSSION THE COURT SAID CONNECT IT UP A ND MR. H ATHA WA Y IF IT IS N OT P ROPE RL Y

CONNECTED UP RENEW YOUR OBJECTION AND THERE WAS NO RENEWAL OF THE OBJECTION.

OH, NO, HE DID RENEW THE OBJECTION YOUR HONOR AND THERE IS A CITE IN THE BRIEF, IN THE PETITION TO THE RECORD WHERE HE RENEWED IT. IT WAS AT THE CLOSE OF THE EVIDENCE, THE TRIAL COURT MADE A SPECIFIC FINDING.

AT THE CLOSE OF THE EVIDENCE?

YES.

I'M TALKING ABOUT DURING THE TESTIMONY ITSELF WHEN HE DIDN'T CONNECT IT UP THE COURT SAID IF IT DOESN'T CONNECT IT UP YOU CAN RENEW YOUR OBJECTION AND THAT WAS NEVER RENEWED DURING THE TESTIMONY.

THAT'S CORRECT. IT WAS NOT RENEWED DURING THE TESTIMONY BUT IT WAS RENEWED LATER AND THE TRIAL COURT MADE A SPECIFIC FINDING.

DON'T YOU HAVE TO OBJECT AT THE TIME CONTEMPORANEOUSLY WITH THE TESTIMONY, NOT LATER ON IN THE TRIAL? THE WHOLE POINT IS THAT YOU DON'T ADMIT THE TESTIMONY, NOT THAT TESTIMONY THAT'S ALREADY BEEN ADMITTED IS LATER STRICKEN. THE WHOLE POINT IS YOU OBJECT AT THE TIME SO THAT IT IS NOT ADMITTED?

CORRECT, BUT THE ATTORNEY DID MAKE A CONTEMPORANEOUS OBJECTION, YOUR HONOR, AND IF YOU LOOK AT WHAT IS THE PURPOSE OF THE CONTEMPORANEOUS OBJECTION RULE IT IS TO PUT THE TRIAL COURT ON NOTICE THAT OBJECTIONABLE EVIDENCE IS ABOUT TO BE PRESENTED. AND IF YOU LOOK AT THE CONTEXT OF THE OBJECTION, WHAT WAS HAPPENING AT THAT TIME IS THE PROSECUTOR HAD ASKED REVEREND DAVIS ON CROSS-EXAMINATION, ARE YOU FAMILIAR WITH THE BOOK OF ROMANS? WHAT IS THE BOOK OF ROMANS? AND THE WITNESS SAID, YES, I'M FAMILIAR WITH IT. WHAT IT SAYS IS THAT GOD CREATED THE AUTHORITIES AND THE AUTHORITIES ARE HERE TO DO GOD'S WORK. HE THEN HANDS THE WITNESS THE PROSECUTOR THEN HANDS THE WITNESS A COPY OF ROMANS AT WHICH POINT DEFENSE COUNSEL SAYS I DON'T KNOW WHAT HE IS HANDING THE WITNESS. WHAT IS HE HANDING THE WITNESS, YOUR HONOR? THE WITNESS SAYS IT IS A COPY OF ROMANS. AND THE DEFENSE COUNSEL MAKES AN OBJECTION, RELEVANCE. AT THAT POINT THE TRIAL COURT WAS PUT ON NOTICE AS TO THE NATURE OF THE TESTIMONY. IT WAS CLEARLY NOT RELEVANT TESTIMONY. THERE WAS NOTHING THAT COULD HAVE BEEN RELEVANT ABOUT THAT TESTIMONY.

WELL HELP ME OUT. WHO WAS THE WITNESS AND WHAT HAD HE TESTIFIED TO ON DIRECT?

YES, YOUR HONOR, THE WITNESS WAS REVEREND DAVIS. HE WAS A DEFENSE WITNESS. HE HAD BEEN CALLED BY THE DEFENSE COUNSEL AND QUESTIONED BY BOTH ANTHONY FARINA'S COUNSEL AND ALSO JEFFREY FARINA WHO IS THE CODEFENDANT, THE ACTUAL KILLER WHO GOT LIFE IN THIS CASE, AND HE WAS CALLED TO TESTIFY TO A COUPLE OF THINGS. ESSENTIALLY IT WAS SKIPPER VERSUS SOUTH CAROL IN A TESTIMONY AND ALSO LOCKETT V OHIO. THE TESTIMONY WAS THAT SINCE ANTHONY FARINA HAD BEEN INCARCERATED HE HAD BECOME A RELIGIOUS PERSON AND HE HAD ACCEPTED JESUS CHRIST INTO HIS LIFE AND HE HAD ACTUALLY BEEN BAPTIZED AND THAT HE HAD JOINED THE STEPHENSON ROAD BAPTIST CHURCH AND THAT HE WAS A SERIOUS STUDENT OF THE BIBLE AND THAT HE WANTED TO MINISTER TO OTHER INMATES. THE REVEREND DAVIS ALSO TESTIFIED, REVEREND DAVIS APPARENTLY HAPPENED TO BE HAVING GONE TO PRISON HIMSELF ALTHOUGH HE HAD SUBSEQUENTLY BEEN PARDONED BUT HE HAD GONE TO PRISON HIMSELF AND HE ALSO TESTIFIED ABOUT THE NATURE OF LIFE BEHIND BARS AND HOW DIFFICULT PRISON LIFE WOULD BE.

SO THE DEFENSE IS A CTUALLY THE ONE WHO HAS INITIATED THIS WHOLE IDEA OF BRINGING IN RELIGION INTO THIS PROCEEDING?

NO, NOT A CTUALLY AND LET ME EXPLAIN WHY. YES, THEY DID PUT THIS MINISTER ON. THIS ENTIRE TRIAL WAS INFUSED WITH RELIGION FROM THE VERY BEGINNING. IN JURY SELECTION, UNOBTAINED COMMENTS BY THE PROSECUTOR.

THAT'S ANOTHER ISSUE YOU RAISE.

WELL, I THINK I DON'T MEAN TO CUT YOU OFF, YOUR HONOR, BUT THE REASON WHY I THINK THAT IS RELEVANT IS BECAUSE IN TERMS OF LOOKING AT A PREJUDICE ANALYSIS AND LOOKING AT WHAT WAS THE INTENT OF THIS PROSECUTOR, WAS THIS INTENTIONAL BEHAVIOR, HOW PERSUASIVE WAS THIS, AND IT WAS AND IF YOU LOOK AT WHAT HE TOLD THE JURORS TELLING THEM, EVEN IF YOU ARE SELECTED AS A JUROR, IT IS OKAY IF YOUR RELIGIOUS BELIEFS DISAGREE WITH THE LAW YOU DON'T HAVE TO FOLLOW THAT. YOU CAN FOLLOW YOUR RELIGIOUS BELIEF. HE ELICITED FROM ANOTHER JUROR.

IS THAT INAPPROPRIATE? AS IT WAS OCCURRING, IF A PERSPECTIVE JUROR MAKES A COMMENT AND SAY THAT MY FUNDAMENTAL SPIRITUAL OR RELIGIOUS BELIEFS WILL NOT PERMIT ME TO FOLLOW OR IMPOSE A DEATH PENALTY, IS IT INAPPROPRIATE COMMENT FOR A LAWYER TO SAY THAT THE COURTS RESPECT YOUR VIEWS AND THAT YOU ARE NOT REQUIRED TO VIOLATE YOUR SPIRITUAL OR RELIGIOUS VIEWS?

NO, NO.

IS THERE ANYTHING WRONG WITH THAT?

HE SAID MORE THAN THAT. HE SAID IF YOU ARE SEATED AS A JUROR, YOU HAVE TO -- AND EVEN THOUGH THE JUDGE TELLS YOU TO FOLLOW THE LAW BUT YOU CAN'T BECAUSE YOU HAVE A RELIGIOUS OR MORAL OBJECTION TO THE LAW, THEN THAT'S OKAY. ESSENTIALLY HE IS TELLING THEM YOU CAN LET YOUR RELIGIOUS BELIEFS USURP THE INSTRUCTIONS OF THE COURT AND THE QUOTE IS CITED IN THE PETITION, THE ACTUAL QUOTE AND I WOULD BE HAPPY TO GET IT FOR YOU IN REBUTTAL IF YOU WOULD LIKE. SO, YES, THERE WAS GOING BACK TO JUSTICE QUINCE, YES, THEY DID PUT ON TESTIMONY ABOUT RELIGION. BUT THAT TESTIMONY WAS PERMISSIBLE TESTIMONY AND YOU SKIPPER VS SOUTH CAROLINA AND LOCKETT VS SUSSOHO.

WHEN THE DEFENDANT BRINGS IN AND PARADES RELIGION AND DID THEY INTRODUCE THIS WITNESS AS A REVEREND?

YES.

AND PARADES RELIGION AROUND THE COURTROOM AS AN ATTEMPT TO INFLUENCE WHAT A JURY IS GOING TO DO, WHAT IS THE PERMISSIBLE SCOPE OF EXAMINATION? CAN A CROSS-EXAMINATION NOT ASK ABOUT BIBLICAL TERMS WHEN THEY HAVE INVOKED THE BIBLICAL REPRESENTATIVE ON EARTH?

WELL, THE PROPER SCOPE IN LIGHT OF THEIR, I THINK THERE ARE TWO ANSWERS TO THAT AND IF I COULD ADDRESS THAT IN TWO POINTS. FIRST, IF ANTHONY FARINA'S ATTORNEY HAD PUT THE REVEREND ON AND HAD THE REVEREND ARGUE THE TEACHINGS OF WHAT EVER RELIGION IN THIS CASE CHRISTIANITY, THE TEACHINGS OF CHRISTIANITY TELL YOU THAT YOU HAVE TO, THAT THE DEATH PENALTY IS WRONG AND IT SHOULDN'T BE IMPOSED THEN, YES, THE CROSS-EXAMINATION THAT THE STATE -- THAT THE PROSECUTOR ENGAGED IN WOULD HAVE BEEN APPROPRIATE, BUT THAT'S NOT WHAT THEY DID. THEY PUT ON TESTIMONY THAT JUST SHOWED THE SPIRITUAL GROWTH OF THIS PARTICULAR INDIVIDUAL WHICH IS PERFE

CTLY ACCEPTABLE UNDER THE UNITED STATES CONSTITUTIONAL LAW AND UNDER FLORIDA STATUTE AND FLORIDA CONSTITUTIONAL LAW.

HE ALSO TESTIFIED THAT THE DEFENDANT HAD BECOME A CHRISTIAN PERSON AND E SPOUSE D CHRISTIAN BELIEFS AND JOINED A CHRISTIAN CHURCH?

YES.

SO WHY ISN'T IT PROPER CROSS-EXAMINATION TO SAY, WELL, THIS IS WHAT THE BIBLE SAYS WHICH IS WHAT CHRISTIANS BELIEVE IN?

BECAUSE CROSS-EXAMINATION, THE ESSENCE OF WHAT THIS PROSECUTOR TOLD THE JURY CAN BE SUMMED UP AS THIS: I AM THE PROSECUTOR. I'M APPOINTED BY GOD. I AM AN AUTHORITY TO DO GOD'S WORK, AND BECAUSE I AM SEEKING DEATH IN THIS CASE BECAUSE I AM --

YOU ARE TALKING ABOUT CLOSING ARGUMENTS?

I'M TALKING ABOUT THE TESTIMONY THAT THEY ELICITED FROM REVEREND DAVIS AND BECAUSE I HAVE BEEN APPOINTED BY GOD TO SEEK DEATH IN THIS CASE THEN YOU AS JURORS MUST SUBMIT TO WHAT I AM SEEING IN THIS CASE.

WHERE DID HE SAY THAT DURING CROSS-EXAMINATION? WHERE WAS THAT?

IF YOU LOOK AT THE TESTIMONY OF REVEREND DAVIS AND THERE IS AN EXTENSIVE CITE IN THE STATE HABEAS, YOUR HONOR, AND I'M PAIR A PHRASING BUT IF YOU LOOK AT THE ESSENCE IT IS THE ESSENCE.

I DON'T WANT THE ESSENCE. I WANT SPECIFIC STATEMENTS ON CROSS-EXAMINATION WHERE HE MADE THE STATEMENTS THAT YOU ALLEGE HE MADE.

OKAY. HE ASKED HIM AND IT IS ON PAGE 13, STARTING ON PAGE 13 OF THE BRIEF, GOING TO PAGE 14 AND I WILL START AT 14 BECAUSE IT IS A LENGTHY, LENGTHY QUOTE, YOUR HONOR. ARE YOU FAMILIAR WITH THE FIRST OF 7 VERSES OF ROMANS 13? YES, ABOUT HONORING AUTHORITY, SUBMITTING TO AUTHORITY? THE JUDGE AND THE PROSECUTOR AND THE DEFENSE ATTORNEYS ALL WORK FOR GOD AND ARE ORDERED BY GOD AS BEING THE AUTHORITY IN THE POSITIONS THAT THEY ARE AND IF THEY -- GOD IS THE ONE THAT ALLOWS THEM TO BE THE RE. STATE: WELL, I DON'T WANT TO SAY THAT DEFENSE ATTORNEYS AREN'T SAVED BUT THEY ARE NOT THE AUTHORITIES, ARE THEY? THEY ARE THE DEFENSE LAWYERS VERSUS THE PROSECUTOR SO TO INTERJECT THAT'S AN INAPPROPRIATE QUOTATION OF DEFENSE COUNSEL. DAVIS, RIGHT. STATE: YOUR HONOR, MAY I HAND HIM SOMETHING TO HELP WITH HIS MEMORY AS WELL? HERE COMES THE OBJECTION AND I WILL SKIP TO THAT TO GET TO YOUR QUESTION. OKAY. THE PROSECUTOR TELLS THE WITNESS, READ VERSE 1 AND 2. THE WITNESS SAYS, HE STARTS READING.

CHIEF JUSTICE: NOW AGAIN AND THERE WASN'T ANOTHER OBJECTION AT THAT POINT WHEN HE STARTS READING FROM THE BIBLE?

THE OBJECTION COMES RIGHT BEFORE THAT.

CHIEF JUSTICE: TO RELEVANCE.

AND THAT'S WHEN THE OBJECTION, THE PROSECUTOR HANDS THE WITNESS THE COPY OF ROMANS, THAT'S WHEN THE OBJECTION COMES. THE OBJECTION IS OVERRULED AND THEN THIS IS THE FOLLOWING TESTIMONY THAT JUSTICE CANTERO ASKED ABOUT.

THE OBJECTION IS TO RELEVANCE THEN THE CONTEXT IN WHICH WE HAVE TO REVIEW THIS ISSUE IS WHETHER THE JUDGE A BUSSED SDR EPTION IN A LLOW IN G IN T HI S C RO SS- EXAMINATION ON RELEVANCE GROUNDS ? > > CORRECT , BEC AUSE THE INTRODUCTION OF E VI DE NC E I S A STANDARD, CORRECT, BUT T HE EVIDENCE CAN'T BE RELEVAN T BECAUSE FLORIDA STATUTES DEFINES RELEVAN T E VIDENCE AS ANY EVIDENCE TENDING TO PROVE OR D ISPROVE A M AT ERIAL FACT.

BUT THIS IS CROSS-EXAMINATION?

CORRECT.

SO YOU CAN USE CROSS-EXAMINATION NOT TO PROVE OR DISPROVE A FACT BUT TO IMPEACH THE WITNESS ?

YES . BUT THIS DIDN' T IMP EACH THE WITNESS BECAUSE THE WITNESSED NEVER RAISED ANY OF THESE ISSUES. IT HAD NEVER BEEN RAISED IN DIRECT EXAMINATION SO IT WAS NOT RELEVANT IMPEACHMENT . SDPLOOT DEFENDANT HAS NOW CONVERTED TO CHRISTIANITY. HE BELIEVES IN THE BIBLE. HE BELIEVES IN THE CHRISTIAN BELIEVES. HE HAS JOINED A CHRISTIAN CHURCH?

CORRECT.

HE IS INVOLVED IN CHRISTIAN ORGANIZATIONS?

YES, BUT NOTHING ABOUT SAYING CHRISTIAN TEACHINGS SAY THE DEATH PENALTY IS WRONG. IF I COULD, IF I COULD READ THE ACTUAL QUOTES , BECAUSE I THINK IT WILL HELP. THIS IS WHAT HE HAS THE WITNESS READ. REVEREND DAVIS. EVERYONE MUST SUBMIT HIMSELF TO THE GOVERNOR OF A U T H O R I T I E S , FOR THERE IS NO A U T H O R I T Y EXCEPT FOR WHICH G O D H A S ESTABLISHED. THE A U T H O R I T I E S T H A T E X I S T H A V E B E E N ESTABLISHED BY G O D . CONSEQUENTLY, HE WHO REBELS AGAINST THE A U T H O R I T Y IS REBELLING AGAINST WHAT GOD HAS INSTITUTED. AND THOSE WHO DO SO , W I L L BRING JUDGMENT O N T H E M S E L V E S . THAT'S A KEY PHRASE BECAUSE THE PROSECUTOR LINKS THAT UP IN HIS CLOSING ARGUMENT. THAT'S HIS FINAL SENTENCE TO THE JURY. THE PROSECUTOR THEN SAYS THE NEXT VERSE DEALS WITH THE PROSECUTOR, DOES IT NOT ? WHAT DOES IT SAY ? > > WELL, IS YOUR ARGUMENT HERE THAT THIS IS FUNDAMENTAL ERROR?

MY ARGUMENT IS THAT IT IS PROPERLY PRESERVED SO THIS COURT SHOULD ENGAGE IN A HARMLESS ERROR ANALYSIS OR ALTERNATIVELY IT IS FEDERAL CONSTITUTIONAL ERROR WHICH WOULD ALSO REQUIRE THIS COURT TO ENGAGE IN A HARMLESS ERROR ANALYSIS BUT EVEN IF YOU DON'T FIND THAT, THIS IS SO BAD , YES , THIS IS FUNDAMENTAL ERROR .

YOUR ARGUMENT IS THAT APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE ON APPEAL?

ABSOLUTELY. IT WAS NOT RAISED AT ALL. THIS COURT NEVER HAS ISSUES.

GIVE US THE BROADER CONTEXT OF THE APPELLANT'S ARGUMENTS ON APPEAL. HOW MANY ARGUMENTS DID THE APPELLATE COUNSEL MAKE ON APPEAL?

YOU MEAN HOW MANY ISSUES ARE RAISED IN HIS BRIEF ?

CORRECT .

I'M NOT SURE.

ISN'T THAT CRUCIAL FOR US TO DETERMINE WHETHER THERE WAS ACTUAL INEFFECTIVE ASSISTANCE BECAUSE WE HAVE HELD THAT COUNSEL IS NOT NECESSARILY REQUIRED TO RAISE EVERY MERITORIOUS ISSUE ON APPEAL THAT APPELLATE COUNSEL MAKES JUDGMENT CALLS ALL OF THE TIME, THEY HAVE PAGES LIMITATIONS EVEN THOUGH WE HAVE RAISED IT TO 100 ON DIRECT APPEAL THERE IS STILL A 8-PAGE LIMITATION AND COUNSEL NEEDED TO MAKE JUDGMENT CALLS ABOUT WHAT ISSUES HAVE THE GREATEST LIKELIHOOD TO SUCCEED ON APPEAL.

A COUPLE OF POINTS I WOULD LIKE TO MAKE IN RESPONSE TO THAT. I THINK THE COURT'S ANALYSIS SHOULD BE QUALITATIVE NOT QUANTITATIVE, AND I THINK WHILE YOU CERTAINLY, THE COURT CAN TAKE INTO ACCOUNT THE NUMBER OF ISSUES RAISED, YOU HAVE TO LOOK AT THE QUALITY OF THE ISSUES.

AND QUALITY, ISN'T THAT A STRATEGIC DECISION BY COUNSEL?

WELL, IT MAY OR MAY NOT BE.

ARE WE HERE TO --

THE PROBLEM IS WE DON'T KNOW BECAUSE THERE IS NO MECHANISM IN THE STATE OF FLORIDA WHETHER COUNSEL DIDN'T RAISE THIS ISSUE BECAUSE HE DIDN'T READ THE BRIEF SUFFICIENTLY, I MEAN THE RECORD SUFFICIENTLY, OR IF HE DIDN'T KNOW THE LAW, BECAUSE THIS COURT HAS SAID TEN YEARS AGO SAID DON'T BRING RELIGIOUS BIBLICAL TEACHINGS.

BUT I DON'T SEE YOUR RAISING IN YOUR BRIEF THAT THERE WAS ANOTHER ISSUE THAT COUNSEL DID RAISE THAT WAS A FRIVOLOUS ISSUE THAT SHOULD NOT HAVE BEEN RAISED AND THIS ONE REPLACES THAT ISSUE?

I'M NOT -- AND THAT MAY BE AN ERROR ON MY PART I AM NOT AWARE OF A REQUIREMENT THAT IN RAISING INEFFECTIVE ASSISTANCE OF COUNSEL THAT I HAVE TO POINT TO ISSUES THAT SHOULDN'T HAVE BEEN RAISED BUT CERTAINLY AS I READ, AS I READ THE RECORD ON APPEAL THIS TYPE OF ISSUE LEFT OUT AND I HAVEN'T EVEN FINISHED THE QUOTES.

CHIEF JUSTICE: WE HAVE THAT BEFORE US.

THIS IS PIGEON-HOLED, THOUGH, HERE, AS A CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AS OPPOSED TO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

CORRECT, YES. IT IS RAISED. AND I SEE I AM IN MY REBUTTAL TIME.

CHIEF JUSTICE: YOU CAN SAVE THE REMAINDER OF YOUR TIME FOR REBUTTAL.

THANK YOU.

MAY IT PLEASE THE COURT, KEN NUNNELLEY, I REPRESENT THE STATE OF FLORIDA IN THIS APPEAL. THIS CLAIM IS PROPERLY PLEADED -- PIGEON-HOLED AS ONE OF INEFFECTIVE ASSISTANCE OF COUNSEL. THERE IS NO CLAIM ON THE PART OF TRIAL COUNSEL AND THE STATE'S POSITION IS ASSSET OUT IN THE RESPONSE FOR THE WRIT OF HABEAS CORPUS THAT THIS IS NOT PROPERLY PRESERVED. BECAUSE THIS CLAIM OR THIS ISSUE IS NOT PROPERLY PRESERVED BY A CONTEMPORANEOUS OBJECTION, APPELLATE COUNSEL CANNOT UNDER THE LAW OF THIS COURT HAVE BEEN INEFFECTIVE FOR NOT RAISING IT ON DIRECT APPEAL.

CHIEF JUSTICE: UNLESS IT IS FUNDAMENTAL ERROR.

MA'AM?

CHIEF JUSTICE: UNLESS IT WOULD AMOUNT TO FUNDAMENTAL ERROR.

IT IS STILL NOT INEFFECTIVE. BUT --

HE COULD RAISE IT IF IT WAS FUNDAMENTAL ERROR.

UNPRESERVED, HE COULD HAVE RAISED IT AND NOT CONCEDE THAT THIS IS FUNDAMENTAL ERROR AND NOW I GUESS BACK TO JUSTICE CANTERO'S QUESTIONS OR COMMENTS, WHAT IS APPROPRIATE COUNSEL SUPPOSED TO DO? HE HAS FILED A BRIEF WITH TEN SEPARATELY DENYING OMINATED CLAIMS, 12 TOTAL CLAIMS THAT DID CONSIST OF 96 PAGES. THE PAGE LIMIT IS 100.

SHE STATES, I MEAN HER ARGUMENT IS THAT THE STATE HAS KNOWN FOR OVER TEN YEARS THAT THIS IS TOTALLY INAPPROPRIATE THAT THIS IS OUTRAGEOUS, THAT'S THE POSITION SHE IS TAKING, AND SO I THINK THAT'S WHAT YOU NEED TO RESPOND TO IS IT IS JUST SO CLEARLY WRONG THAT A NOVICE FIRST YEAR LAW STUDENT WOULD KNOW THAT YOU CAN'T BRING THE BIBLE IN AND CROSS-EXAMINE A MINISTER WHO IS BROUGHT IN TO TESTIFY UNDER THESE CIRCUMSTANCES. I MEAN, THAT'S A FUNDAMENTAL POINT. THIS HAS JUMPED OFF THE PAGES AT HER. WHY IS THAT --

I THINK I HAVE TO ANSWER THAT IN A COUPLE OF DIFFERENT WAYS.

HOW ABOUT JUST ONE THAT IS SATISFACTORY?

I THINK THEY ARE ALL GOOD, JUDGE. FIRST OF ALL, YOU DO NOT HAVE AN OBJECTION RAISED AT TRIAL. YOU HAVE A RELEVANCE OBJECTION.

A RELEVANCE OBJECTION.

UNDER RODRIGUEZ FROM THIS COURT, THAT DOESN'T PRESERVE THE CLAIM THAT THEY ARE RAISING HERE. I THINK THAT'S PRETTY CLEAR THAT AN OBJECTION BASED ON RELEVANCY DOES NOT PRESERVE A CLAIM OF INHERENT UNFAIRNESS. NOW, WITH THAT AS THE STARTING POINT, THE FACT THAT YOU DON'T HAVE AN OBJECTION THAT GOES SQUARELY TO THE HEART OF THE BIBLICAL ARGUMENT IF YOU WILL, AND THE FACT THAT YOU DON'T HAVE A RENEWED OBJECTION SUGGESTS UNDER THE PRECEDENT OF THE 11TH CIRCUIT AND I BELIEVE OF THIS COURT ALSO, THAT IT DIDN'T PLAY IN THE COURTROOM THE SAME WAY IT LOOKS ON PAPER. I THINK YOU HAVE TO TAKE -- WELL, I DON'T THINK, UNDER THE STATUTE, THAT'S TWO, YOU HAVE TO TAKE INTO ACCOUNT THE FACT THAT EXPERIENCED TRIAL COUNSEL DID NOT RENEW THAT OBJECTION. THERE MUST BE A REASON FOR IT, AND I WOULD SUGGEST THAT THE REASON HE DIDN'T RENEW THAT OBJECTION IS BECAUSE IT WASN'T HURTING HIM BECAUSE IT DIDN'T COME OUT IN THE SAME WAY THAT LOOKING AT A COLD RECORD LOOKS.

OKAY. SO NONE OF THOSE GO TO THE SUBSTANCE OF HER CLAIM THAT THIS IS SO OUTRAGEOUS AND THAT EVERYBODY KNOWS BETTER? YOU'VE NOT IN ANY WAY HINTED THAT THIS IS APPROPRIATE?

I'M GETTING THERE.

IN ANY OF THOSE?

I THINK, JUSTICE LEWIS, THAT THIS ARGUMENT, WHILE PERHAPS EXTREME OR THIS CROSS-EXAMINATION, THIS IS NOT A CLOSING ARGUMENT. IT IS CROSS-EXAMINATION.

EXACTLY.

FIRST OF ALL I THINK IT IS LEGITIMATE CROSS-EXAMINATION UNDER THE CONTEXT OF THIS CASE. THIS DEFENDANT BROUGHT IN A MINISTER TO TESTIFY ABOUT HOW HE HAD REFERENCED HIS LIFE AND HAD BECOME RELIGIOUS AND THIS AND THAT AND I THINK YOU HAVE TO LOOK AT THE WHOLE THING IN FAIRNESS AND IN THE CONTEXT OF THE CASE.

IN THE CONTEXT OF THE CASE, THEY ALSO ARGUE THAT, YOU KNOW, THE PROSECUTOR ACTUALLY STARTED THIS AND IN VOIR DIRE OF THE POTENTIAL JURORS, THAT THEY STARTED THIS DOWN THIS PATH OF RELIGIOUS KINDS OF ARGUMENTS, AND SO WHAT IS YOUR TAKE THE NON-THE PROSECUTOR STARTING THIS OUT IN VOIR DIRE EXAMINATION AND THE HOW THAT PLAYS INTO WHAT WENT ON DURING THE CROSS-EXAMINATION OF THE MINISTER?

MY TAKE ON THE CLAIM THAT THIS STARTED IN VOIR DIRE IS THAT THAT'S BASED ON AN OUT OF CONTEXT AND MISLEADING SUGGESTION OR INTERPRETATION OF WHAT ACTUALLY HAPPENED HERE IN VOIR DIRE. WHAT ACTUALLY HAPPENED IS FOUND AT PAGE 882 OF THE RECORD, AND IT IS SET OUT IN A FOOTNOTE THAT APPEARS ON PAGE 17 OF THE PETITION. I DON'T WANT TO PARAPHRASE IT AND READ THE WHOLE THING, BUT THE BOTTOM LINE IS THE STATE IN VOIR DIRE IS TELLING PERSPECTIVE JURORS THAT YOU ARE NOT DOING ANYTHING IMPROPER OR DISRESPECTING THE COURT BY TELLING THE COURT WHAT YOUR RELIGIOUS BELIEFS ARE WITH RESPECT TO THE DEATH PENALTY. THAT'S A FAR CRY FROM SAYING THAT SOMEHOW WE CAN TRANSFORM THIS INTO SOME SORT OF AN ARGUMENT THAT THE BIBLE REQUIRED ANTHONY FARINA TO BE SENTENCED TO DEATH. THAT'S NOT THE ARGUMENT THAT WAS MADE AND IT IS AN IMPROPER AND INACCURATE INTERPRETATION.

LET ME GET TO MY CONCERN. MY CONCERN IS HERE YOU'VE GOT THIS SITUATION IN THIS CAPITAL CASE WHERE THE PROSECUTOR IS ASKING THIS QUESTION, THE NEXT VERSE DEALS WITH THE PROSECUTOR, DOES IT NOT? WHAT DOES HE SAY? ANSWER FOR THE RULERS HOLD NO TERROR FOR THOSE WHO DO IS RIGHT BUT FOR THOSE WHO DO WRONG. DO YOU WANT TO BE FREE FROM FEAR THAT THE ONE IN AUTHORITY AND DO WHAT IS RIGHT YOU WILL, HE WILL COMMEND YOU IN THE NEXT VERSE. QUESTION. WHERE HE IS GOD'S SERVANT TO DO YOUR GOOD, BUT IF YOU DO WRONG, BE AFRAID. HE IS GOD'S SERVANT, A GENTLE WRATH, TO BEING PUNISHED TO THE WRONGDOER. NOW, I THINK IT SEEMS TO ME THAT IF AN OBJECTION WAS MADE THAT THAT WOULD CLEARLY BE ERROR TO ALLOW THAT TO COME IN FOR ALL SORTS OF BASES. SO THE NEXT QUESTION IS, IS DOES THAT -- THAT STATEMENT BY THE PROSECUTION, WHICH THE PROSECUTION BRINGS OUT ABOUT HIS POWER, DOES THAT -- IS THAT SO -- REACH DOWN TO THE VERY BEDROCK OF THIS PROCEEDING TO CAUSE YOU TO BE CONCERNED ABOUT WHETHER IT IS RELIABLE? I MEAN, ISN'T THAT WHAT WE HAVE GOT TO FIGURE OUT?

YES, JUSTICE WELLS, IT IS, AND, NO, IT DOES NOT CORRUPT THE PROCEEDING TO THE POINT THAT MR. FARINA IS ENTITLED TO ANY RELIEF. THIS IS ONE OF THOSE ARGUMENTS CERTAINLY THAT I WOULD RATHER THE PROSECUTION HAVE NOT MADE.

CHIEF JUSTICE: AND I WANT TO MAKE SURE WE ARE CLEAR ON THIS BECAUSE I'M VERY CONCERNED, AGAIN, AND IN DEATH CASES IT IS ENTIRELY APPROPRIATE TO ALLOW PEOPLE TO GET ON THE STAND TO TALK ABOUT SOMEONE FINDING RELIGION AND CERTAINLY YOU CAN CROSS-EXAMINE THEM ABOUT THIS IS KIND OF A, YOU KNOW, JAILHOUSE CONVICTION, BUT I HAVE NEVER SEEN A WITNESS BEING CROSSEXAMINED ABOUT THE BIBLE, AND THIS, YOU KNOW, AND IT GOES ON ABOUT, YOU KNOW, WHEN CHRIST WAS ON THE CROSS THERE WAS A CONDEMNED FELON BEHIND HIM THAT REPENTED AND ACCEPTED CHRIST BUT HE SAID HE WOULD SEE HIM IN PARADISE AND TO ME IT IS BASICALLY THE WAY I READ THIS IS THAT HE IS USING RELIGION TO SHOW THAT, IN FACT, CHRISTIAN RELIGION WOULD SAY YES, LET'S IMPOSE THE DEATH PENALTY AND YOU WILL GET YOUR FORGIVENESS.

VENESS IN THE AFTER LIFE AND I DON'T SEE HOW THAT POSSIBLY COULD HAVE RELATED TO ANY THING THAT OCCURRED ON DIRECT EXAMINATION.

JUSTICE PARIENTE, IN RESPONSE TO THAT, A COMMENT I WAS GOING TO MAKE OR WAS LEADING UP TO A FEW MOMENTS AGO IS THE DEFENDANT CANNOT AND SHOULD NOT BE ALLOWED TO INTRODUCE RELIGIOUS TESTIMONY IN THIS COURT OF -- SORT OF TESTIMONY AND I'M TALKING ABOUT THE DIRECT EXAMINATION OF THIS MINISTER NOW, BUT IF THE DEFENDANT IS GOING TO GO DOWN THAT ROAD, THE STATE HAS TO BE ALLOWED TO FOLLOW.

WELL, WHAT IN THAT TESTIMONY WAS -- WHAT WAS SAID DURING THE DIRECT EXAMINATION OF THIS MINISTER BEYOND THAT MR. FARINA HAD, IN FACT, GOTTEN RELIGION, CONVERTED TO CHRISTIANITY, WAS A MEMBER OF SUCH AND SUCH CHURCH? I MEAN, DID THE DIRECT EXAMINATION GO INTO ANY SPECIFICS ABOUT THE BIBLE? >> I DON'T RECALL THAT IT DID. JUSTICE QUINCE, AND I'M NOT GOING TO -- THE RECORD SAYS WHAT IT SAYS. I DO NOT RECALL THAT IT DID GO INTO THAT DEGREE OF SPECIFICITY.

OKAY. IF IT DIDN'T GO INTO THE DEGREE OF SPECIFICITY OF GOING INTO VERSES OF THE BIBLE, WHAT WAS SAID THAT WOULD LEAD ONE TO GO INTO SPECIFIC VERSES OF THE BIBLE? IF THE CROSS-EXAMINATION IS PROPER, BASED ON WHAT WENT ON IN DIRECT EXAMINATION, THEN THERE SHOULD BE SOMETHING IN A DIRECT EXAMINATION THAT WOULD LEAD, NATURALLY LEAD TO WHAT HAPPENED. >> I AM UNSURE ABOUT WHY THE PROSECUTOR CHOSE TO CROSS-EXAMINE HIS WITNESS IN THE WAY THAT HE DID. THERE HAS BEEN NO HEARING AND I HAVE NOT SPOKE WITH THE PROSECUTOR AND I HAVE NO KNOWLEDGE OR WHATEVER ABOUT WHY THE PROSECUTOR CHOSE THIS PARTICULAR CROSS-EXAMINATION TACTIC. HOWEVER, I KEEP COMING BACK TO THE POINT THAT IT IS FUNDAMENTAL TO THIS COURT'S DISPOSITION OF THE CLAIM AND THAT IS THAT THERE WAS NO ERROR -- I'M SORRY, THERE WAS NO OBJECTION PRESENTING ANY ALLEGED ERROR.

CHIEF JUSTICE: WELL, RELEVANCY, THERE MIGHT BE FOUR OR FIVE OTHERS, BUT RELEVANCY IS ONE THAT MIGHT BE THE FIRST ONE THAT COMES TO MY MIND. WHAT'S WRONG WITH THE OBJECTION RELEVANCY? HOW IS IT RELEVANT TO THE DECISIONS THAT THIS JURY WAS GOING TO BE ASKED TO MAKE THAT THERE SHOULD BE CROSS-EXAMINATION ABOUT WHAT THE BIBLE --

IS SOMEBODY TRYING TO TELL US SOMETHING, JUSTICE PARIENTE?

AFLY OVER.

CHIEF JUSTICE: IT IS A MILITARY FLY OVER, BUT A GAIN IN CASE THIS IS BEING WATCHED WE JUST HEARD SOMETHING FROM ABOVE, BUT WE THINK IT WAS --

WE THINK IT WAS A JET.

CHIEF JUSTICE: IN ANY EVENT TO BRING THE BIBLE AND ACTUALLY CROSS-EXAMINE. WHAT'S WRONG WITH THE RELEVANCY OBJECTION BECAUSE YOU ARE SAYING IT WASN'T PROPERLY PRESENTED? I MIGHT GO ON TO SAY ANY PREJUDICIAL, YOU KNOW, OUTWEIGHS THE PROBATIVE VALUE BUT WHAT IS WRONG WITH RELEVANCY? >> RELEVANCY IS CERTAINLY A LEGITIMATE OBJECTION TO MAKE. IT DOES NOT PRESERVE THE CLAIM THAT IS BEFORE THIS COURT. IF THE CLAIM --

CHIEF JUSTICE: THE QUESTION IS ONCE IT IS THERE, WHY ON EARTH WOULD N'T A PPELLATE COUNSEL RAISE THIS? I MEAN, THIS IS PRETTY OUTRAGEOUS STUFF HERE AND I GUESS WE'LL HAVE TO LOOK AT THE TEN ISSUES THAT WERE RAISED WITH THE FIVE SUBCLAIMS TO SEE WHETHER THEY WERE EQUALLY, YOU KNOW, REALLY MERITORIOUS CLAIMS OR WHETHER

THIS WAS JUST -- OR DO WE REMAN THIS FOR SOME KIND OF HEARING TO FIND OUT WHY THE APPELLATE COUNSEL DIDN'T RAISE IT?

JUSTICE PARIENTE, A GAIN, I DON'T WANT TO INVENT STRATEGY FOR THE APPELLATE COUNSEL IN THIS CASE, BUT I WOULD POINT OUT, AND I THINK IT BEARS REPETITION THAT THE PROPORTIONALITY ISSUE WAS EXTREMELY, WAS VERY HOTLY CONTESTED ON THE RESENTING APPEAL, THAT WAS THE FOCUS OF MR. DEE'S ARGUMENT AS I RECALL IT, AND I THINK WE HAD OTHER ISSUES THAT CAME UP, BUT MY MEMORY OF THIS ARGUMENT IS THAT PROPORTIONALITY WAS THE ISSUE AND THAT HE FOCUSED ON THAT, AND I KEEP, AGAIN, COMING BACK TO THE COMMENTS THAT WERE MADE DURING THE OPENING ARGUMENT THAT THIS COURT, THE U.S. SUPREME COURT, THE 11TH CIRCUIT, EVERY COURT TO CONSIDER THE ISSUE HAS SAID THAT PICKING ISSUES IS WHAT APPELLATE LAWYERS DO, AND IF THIS WAS AN ISSUE LIKE HEATH, LIKE THE HEATH V JONES CASE FROM THE 11TH CIRCUIT WHERE THERE WAS ONE ISSUE, THAT WAS TAKEN UP, AND ULTIMATELY MR. HEATH WAS EXECUTED, THERE WAS A FINDING CITED IN MY BRIEF WITH JUDGE EDMONDSON'S CONCURRING OPINION IN THE DENIAL OF RELIEF, BUT IF JEFF DEE HAD RAISED ONE OBJECTION ON APPEAL FOR THE RESENTING TO THIS COURT HAD HAD A BUNCH OF PAGES LEFT OVER AND HADN'T RAISED THIS CLAIM WE WOULD HAVE SOMETHING TO TALK ABOUT. IN THIS PARTICULAR SITUATION, HOWEVER, WE HAVE A LAWYER WHO PICKED WHAT HE THOUGHT WERE THE WINNERS. HE WAS ONLY A COUPLE OF VOTES SHORT FROM HAVING A WINNER ON PROPORTIONALITY, TOO, BY THE WAY. AND, AGAIN, THIS IS NOT FUNDAMENTAL ERROR UNDER FARRELL THIS IS NOT FUNDAMENTAL ERROR, IT IS ONE OF THOSE THINGS I KNOW I MADE A COMMENTS A COUPLE OF TRIPS UP HERE A GO, IT IS ONE OF THE THINGS I WISH THEY WOULDN'T DO. I WOULD RATHER THE PROSECUTOR NOT DO THIS. BUT HE DID, AND WE ARE ALL STUCK WITH IT. BUT IN THE FINAL ANALYSIS, THIS IS NOT FUNDAMENTAL ERROR UNDER THE FACTS OF THIS CASE THAT REACHES DOWN INTO THE HEART OF THIS SENTENCE AND REQUIRES ANY SORT OF RELIEF WHATSOEVER.

CHIEF JUSTICE: LET'S GO BACK TO WHETHER IT WAS ERROR, BECAUSE, AGAIN, IF -- I'M NOT SURE I S TILL UNDERSTOOD WHY IT WASN'T PRESERVED BY THE OBJECTION TO RELEVANCY.

WELL, JUSTICE PARIENTE, A SPECIFIC OBJECTION IS NECESSARY IN ORDER TO PRESERVE A CLAIM FOR APPELLATE REVIEW. WE ALL KNOW THAT. THERE IS NO DEDUCTIBLE ABOUT THAT.

CHIEF JUSTICE: AND YOU KNOW THE NUMBER OF CASES WHERE THE CLAIM IS RAISED, AND THE Y SAY, WELL, THAT WASN'T THE RIGHT ARGUMENT. SOMETIMES WE SAY YES, SOMETIMES WE SAY NO BUT RELEVANCY IS NOT LIKE IT IS TOTALLY OUTSIDE THE MARK FOR WHAT THE PROPER OBJECTION WAS.

IF HE WAS GOING TO PRESERVE THE ISSUE THAT HE HAS BROUGHT UP TO THIS COURT, I WOULD SUGGEST THAT THE PROPER OBJECTION WOULD BE THE OBJECTION AND ISSUE CONTAINED IN THIS PETITION, NOT A NEBULOUS NON SPECIFIC OBJECTION TO RELEVANCY THAT'S A GENERAL OBJECTION. THIS WAS NOT A SPECIFIC OBJECTION.

IF HE HAD JUST PRESENTED THIS MINISTER TO SAY HE HAD REFORMED WHO HE WAS AS A PERSON DURING THE PENALTY PHASE THAT WAS APPROPRIATE AND A RELEVANT ISSUE FOR THE JURY'S CONSIDERATION, IN THE PENALTY PHASE, AND DID NOT RAISE THE ISSUE BUT SAY, WELL, HE HAS REPENTED AND BECOME A CHRISTIAN. I FORGIVE HIM. WE SHOULD ALL FORGIVE HIM. IF THE REVEREND DID NOT MAKE A STATEMENT SOMEWHAT TO THAT EFFECT, WHAT RELEVANCE DID THIS CITATION TO ROMANSHAVE TO ANY ISSUE RAISED IN THE DIRECT EXAMINATION OF THE PASTOR? AND IF NOT, THEN AS JUSTICE PARIENTE SAYS, WHY ISN'T THE RELEVANCY OBJECTION SUFFICIENT?

WELL, JUSTICE BELL, A GAIN I HAVE TO GO BACK TO THIS BEING CROSS-EXAMINATION, AND

CROSS-EXAMINATION IS, AS WE KNOW, A TIME WHEN A WITNESS' KNOWLEDGE, BASE OF KNOWLEDGE, AUTHORITY AND SUCH AS THAT IS TESTED. I WOULD SUGGEST THAT, A GAIN, WHILE I SAID I WISH HE HADN'T DONE THIS.

HE WASN'T PRESENTED AS AN EXPERT WITNESS?

NO, NO, I DIDN'T MEAN TO IMPLY THAT. BUT, AGAIN, WHAT I WOULD SUGGEST IS THAT THIS IS INSUFFICIENTLY PRESENTED UNDER THE CONTEXT OF THIS CASE. ALTERNATIVELY IT IS NOT FUNDAMENTAL ERROR AND LET'S DON'T FORGET WE'VE GOT TO KEEP COMING BACK TO THE NOTION THIS IS AN APPELLATE INEFFECTIVENESS OF COUNSEL CLAIM. THIS IS NOT A SUBSTANTIVE CLAIM LIKE WE WOULD SEE ON DIRECT APPEAL.

IN THAT VEIN, TO GET THE BROADER CONTEXT IS THIS A CLAIM THIS IS APPELLATE COUNSEL ON APPEAL ON THE RESENTENCING?

YES, SIR.

WAS THAT THE SAME COUNSEL THAT REPRESENTED THE DEFENDANT ON THE ORIGINAL APPEAL?

NO, DEFENDANT COUNSEL. I BELIEVE TOMMOTT REPRESENTED MR. FARINA AT TRIAL IN THE ORIGINAL PROCEEDING.

SO THIS IS A RESENTENCING NO GUILT ISSUES?

CORRECT.

AND THERE WERE 10 OR 12 ISSUES PRESENTED ON APPEAL ANYWAY?

IT DEPENDS ON HOW YOU COUNT THEM. 10 NUMBERS, AND THERE WERE ACTUALLY A COUPLE OF STRAYS THAT WERE IN THERE AS WELL. SO 12 ISSUES I BELIEVE THE BRIEF WAS 96 PAGES, AND I WOULD AGAIN COME BACK TO THE POINT THAT APPELLATE COUNSEL IS RESPONSIBLE FOR COMING TO THIS COURT WITH THE BEST ISSUES THAT HE COULD PRESENT.

LET ME ASK YOU THIS BECAUSE WE HAVEN'T DISCUSSED PREJUDICE AT ALL. THIS IS -- WE'VE ALL BEEN, I THINK, DISCUSSING THE DEFICIENT PERFORMANCE PRONG. IF WE HOLD DEFICIENT PERFORMANCE ON APPELLATE COUNSEL WHAT ARE THE STANDARDS IN DETERMINING THE PERFORMANCE PRONG? FOR APPELLATE COUNSEL?

IT WOULD BE THE SAME AS IN THE CONTEXT OF A TRIAL WHICH WOULD BE A REASONABLE PROBABILITY OF A DIFFERENT RESULT AND I WOULD SUGGEST THAT UNDER THE FACTS OF THIS CASE, WHICH ARE HEAVILY, HEAVILY AGGRAVATED, THE REASONABLE PROBABILITY OR REASONABLE POSSIBILITY.

SO WE WOULD HAVE HELD IF COUNSEL WOULD HAVE RAISED THE ISSUE THAT IT WOULD HAVE BEEN HARMLESS ERROR?

THIS IS WHERE WE ARE GETTING -- THE PART I AM GETTING CROSSED UP HERE.

COUNSEL WOULD HAVE RAISED THE ISSUE OF INTRODUCTION OF THIS TESTIMONY ON CROSS-EXAMINATION, SO WE WOULD HAVE HAD TO HOLD THAT IT WAS HARMLESS ERROR TO INTRODUCE IT BECAUSE THE OTHER EVIDENCE WOULD HAVE LED TO OR DOESN'T UNDERMINE OUR CONFIDENCE IN THE SENTENCE OF DEATH?

YES, YOUR HONOR. AS FAR AS, WELL, I'M OUT OF TIME.

CHIEF JUSTICE: YOU SAID SOMETHING I JUST WANT TO MAKE SURE YOU SAID THAT WE'VE HELD THAT APPELLATE COUNSEL ISN'T OBLIGATED TO RAISE EVERY MERITORIOUS ISSUE. IT SEEMS TO ME I REMEMBER THAT WE'VE SAID THAT COUNSEL CERTAINLY SHOULDN'T JUST RAISE EVERY ISSUE WHETHER IT IS MERITORIOUS OR NOT. SO WE GO BACK TO THIS QUESTION OF DO WE, IF WE HAVE A CONCERN AND WE DON'T THINK IT CAN BE RESOLVED AS A MATTER OF LAW DO WE REMAIN THIS FOR AN EVIDENTIARY HEARING? YOU CAN ANSWER THAT.

I WAS HOPING I WAS GOING TO GET TO ANSWER THAT.

I HAVE ONE MORE QUESTION.

I AM NOT ENTIRELY SURE, JUSTICE PARIENTE, ABOUT WHAT THE ANSWER IS IN THE 12 YEARS I HAVE BEEN HERE I HAVE NOT SEEN IT. I SUPPOSE THAT WOULD CERTAINLY BE WITHIN THIS COURT'S PURVIEW TO DO. I HAVE NEVER SEEN AS LONG AS I HAVE BEEN PRACTICING IN THIS STATE AN EVIDENTIARY HEARING ON APPELLATE INEFFECTIVENESS IN THE STATE COURTS SYSTEM.

CHIEF JUSTICE: BECAUSE WE USUALLY LOOK AT IT AND SEE WHETHER THIS WOULD HAVE RESULTED IN A REVERSAL IF IT HAD BEEN RAISED ON APPEAL THAT WOULD BE WHAT WE LOOK TO?

YES, MA'AM, AND THIS IS ONE OF THOSE KIND OF UNUSUAL CIRCUMSTANCES WHERE WE HAVE PERHAPS OR WHERE WE HAVE ISSUES OF COUNSEL'S THOUGHT PROCESSES AND SUCH AS THAT THAT PLAY INTO THIS THAT WE DON'T TYPICALLY HAVE.

EACH TIME THAT WE'VE GONE TO THE SUBSTANCE OR WHETHER THIS WAS ERROR, IT SHIFTED BACK TO PROCEDURAL ERROR. HAVE YOU HAD THE OPPORTUNITY TO ADVISE US OF EVERYTHING FROM THE SUBSTANCE STANDPOINT AS TO WHY THIS WAS NOT ERRONEOUS? LET'S MAKE SURE YOU HAVE.

I DIDN'T UNDERSTAND THE LAST PART OF YOUR QUESTION, JUSTICE.

HAVE YOU HAD THE OPPORTUNITY TO SAY TO US WHY THIS WAS NOT ERRONEOUS FROM A SUBSTANTIVE STANDPOINT, WHAT OCCURRED HERE? HAVE YOU HAD THE OPPORTUNITY?

I THINK I'VE COVERED EVERYTHING I'VE GOT TO COVER.

OKAY.

CHIEF JUSTICE: THANK YOU. NOW YOU ARE RELIEVED FROM THE REST OF THE QUESTIONS. ALL RIGHT. MISS PARMEER? VERY SHORT REBUTTAL TIME.

YES, THANK YOU, YOUR HONOR. A COUPLE OF POINTS I WANT TO PICK UP. NUMBER ONE ON THE RELEVANCE OBJECTION, OPPOSING COUNSEL REFERRED TO THE RODRIGUEZ DECISION THAT CASE IS DISTINGUISHABLE BECAUSE IN READING, FACTUALLY READING THAT THE OBJECTION WAS A RELEVANCE OBJECTION TO AN IDENTIFICATION. IDENTIFICATION IS ALWAYS RELEVANT, AND SO THAT CASE IS DISTINGUISHABLE.

LET ME ASK YOU THE SAME QUESTION I ASKED THE STATE, WHICH IS WE'VE REALLY BEEN TALKING ABOUT THE DEFICIENT PERFORMANCE PRONG, ASSUMING WE PASS THAT AND YOU DISCUSS THE PREJUDICE PRONG AND YOU HAVE TO SHOW THAT HAD COUNSEL RAISED IT, THAT WE WOULD HAVE REVERSED ON THAT ISSUE, AND WOULD HAVE FOUND IT NOT TO BE HARMLESS ERROR.

ABSOLUTELY, JUSTICE. THIS CASE IS PARTICULARLY COMPELLING CASE FOR THE DEFENSE

AND IT IS NOT AN OVERWHELMING DEATH CASE. FIRST OFF, A S JUSTICE ANSWERED POINTED OUT IN HIS DISSENT ON THE APPEAL, ANTHONY FARINA WAS ONLY 18 YEARS OLD AT THE TIME OF THE CRIME. PROBABLY MOST COMPELLING HE IS NOT THE ACTUAL KILLER. IT IS UNDERSTOOD THAT THE ACTUAL KILLER WAS HIS BROTHER, WHO NOW HAS A LIFE SENTENCE BECAUSE HE WAS 16 AT THE TIME OF THE CRIME. >> WASN'T THE EVIDENCE, THOUGH, THERE IS A CONTRARY VIEW THAT THIS INDIVIDUAL WAS THE ONE WHO WORKED AT THIS LOCATION, THE ONE THAT KNEW EVERYTHING ABOUT THIS LOCATION, THE ONE THAT SET ALL OF THIS UP AND HE WAS THE OLDER BROTHER AND THE WHOLE EVENT? IS THAT THE OTHER SIDE OF THE COIN?

THAT WOULD BE THE OTHER SIDE OF THE COIN, BUT IT IS STILL UNDISPUTED HE IS NOT THE KILLER, AND IN DECISION, THERE WAS EXTENSIVE MITIGATION TESTIMONY, ANTHONY FARINA --

BEFORE WE GET TO THE MITIGATION, WHAT ABOUT THE AGGRAVATORS, THERE WERE FIVE AGGRAVATORS FOUND?

I BELIEVE THAT THERE WERE FIVE, YES.

AND TWO OF THEM OR HAD A AND CCP?

CORRECT.

CORRECT? AND HAVEN'T WE HELD THAT THOSE ARE TWO OF THE MOST HEINOUS AGGRAVATING CIRCUMSTANCES?

YES.

AND THERE IS NOTHING IN THE CROSS-EXAMINATION OR THE TESTIMONY OF THE MINISTER THAT WOULD BE RELEVANT TO THOSE SPECIFIC AGGRAVATORS OR ANY?

I DON'T THINK THE ISSUE IS THE TESTIMONY OF THE MINISTER, THE CRUX IS THAT IN TERMS OF -- AS IT RELATES TO AGGRAVATORS, THE POINT IS THE TESTIMONY OF THE MINISTER BASICALLY IS THAT THE PROSECUTOR IS APPOINTED TO DO GOD'S WORK AND SEEK VENGEANCE ON BEHALF OF GOD BUT LOOKING AT THE PREJUDICE THERE IS SO MUCH MITIGATION IN THIS CASE, EXTENSIVE POVERTY, HE HAD THE EMOTIONAL MATURITY OF A 14-YEAR-OLD. THERE WAS TESTIMONY AT THE POST-CONVICTION HEARING BY JEFFREY FARINA WHERE HE INDICATED THAT ANTHONY FARINA COULD NOT GO FORWARD WITH THE SHOOTINGS, AND JEFFREY SAID I'M GOING TO DO IT. >> DIDN'T THE TRIAL JUDGE FIND ALL OF THIS INCREDIBLE? HE IS ALREADY NOW OUT OF JEOPARDY. THE AGE THING HAS PASSED SO WHAT DO WE DO WITH THAT?

HE DID, BUT IT IS IRONICALLY, EVERYTHING THAT JEFFREY TESTIFIED TO WAS CONSISTENT TO WHAT HE TOLD HIS LAWYER WHEN HE WAS IN JEOPARDY AND IT IS ALSO CONSISTENT WITH THERE WERE SURVIVING VICTIMS IN THIS CASE AND WHILE THEY TESTIFIED THAT ANTHONY DID MOST OF THE TALKING SO HE APPEARED TO BE THE LEADER, THERE WAS OTHER TESTIMONY THAT JEFFREY WAS A MORE MATURE, WAS THE MORE MATURE OF THE BROTHERS.

CHIEF JUSTICE: WHAT WAS THE JURY VOTE IN THIS CASE?

IT WAS 12-0 BUT IN THE FIRST TRIAL BEFORE ALL OF THIS RELIGIOUS TESTIMONY CAME IN, IT WAS 7-5. IT WAS A 7-5 VOTE AND THAT WAS ON THE CASE, ON THE TRIAL THAT THIS COURT REVERSED.

THERE WERE SERIOUS ERRORS IN THE FIRST TRIAL.

CORRECT . AND SO IN ASSESSING PREJUDICE THIS IS NOT A CASE THAT IS OVERWHELMING DEATH CASE.

CHIEF JUSTICE: WELL, WITH OUR HELP YOU HAVE USED YOUR TIME. YOU KNOW, BOTH THIS CASE AND THE PRIOR CASE WITH HCCRC ADMITTAL AND IT SEEMS LIKE YOU ARE HEEDING OUR WORDS TO NARROW THE FOCUS OF YOUR ARGUMENTS AND I THINK THAT HELPS THE COURT IN KNOWING WHERE YOU SEE YOUR STRENGTH AND NOT ARGUING THE WEAKER ARGUMENTS . WITH THAT , WE WILL TAKE , WELL , WE WILL BE IN RECESS UNTIL 9:00 TOMORROW MORNING .

THE MARSHAL: PLEASE RISE . , , , , , , ,