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**Henry Garcia v. State of Florida & Henry Garcia v. James R. McDonough, etc.
SC04-866 & SC05-1316**

AND CALL THE NEXT CASE OF GARCIA VERSUS STATE OF FLORIDA. GARCIA VERSUS THE STATE OF FLORIDA. MR. HENNIS .

GOOD MORNING , CHIEF JUSTICE PARI ENTE AND MEMBERS OF THE COURT. I AM WILLIAM HENNIS , CAPITAL COLLATERAL COUNSEL AND MY CO-COUNSEL ROS ANDRA ECKERD IS ALSO SEATED . WE HAVE A SITUATION HERE IN WHICH A KEY ISSUE IN THE CASE THAT I BRIEFED IS WHETHER OR NOT THE ALLEGED WAIVER OF PENALTY PHASE MITIGATION CLAIMS AT THE EVIDENTIARY HEARING BEFORE JUDGE CARNY WAS APPROPRIATE.

CHIEF JUSTICE: DID GARCIA WAIVE HIS ORIGINAL PENALTY PHASE MITIGATION?

NO. THERE WAS NO EXPLICIT WAIVER OF THE ORIGINAL PENALTY PHASE. IT WAS SIMPLY THERE WERE NO WITNESSES PRESENTED BY TRIAL COUNSEL AT THE PENALTY PHASE.

CHIEF JUSTICE: OKAY. SO THIS WASN'T A SITUATION WHERE HE WAIVED PENALTY PHASE.

NO. THE STATE PUT ON THE MEDICAL EXAMINER AT THE ORIGINAL TRIAL. HE WAS CROSSED BY DEFENSE COUNSEL , AND THAT WAS ESSENTIALLY IT.

CHIEF JUSTICE: WAS THERE SOMETHING WHERE HE CHOSE NOT TO TELL HIS DEFENSE LAWYER NOT TO PUT ON PENALTY MITIGATION?

I DON'T BELIEVE THERE IS ANY ACCOUNT OF THAT ON THE RECORD.

CHIEF JUSTICE: ALL RIGHT.

IN ANY CASE --

JUSTICE: THE PROBLEM YOU HAVE HERE IS THAT AT THE BEGINNING OF THE EVIDENTIARY HEARING OPPOSE THE CONVICTION, HE WAIVES ALL HIS CLAIMS CONCERNING TRIAL COUNSEL'S PENALTY PHASE PERFORMANCE .

THAT'S RIGHT. THERE WERE PORTIONS OF CLAIMS, AT LEAST SEVEN TO NINE, IN THE POSTCONVICTION MOTION , THAT HE , DURING THE COLLOQUY WITH THE JUDGE , ALLEGEDLY MADE A COMPLETE WAIVER OF . NOW , THERE WERE SIGNIFICANT OTHER CLAIMS AS I PUT IN THE BRIEF, AS TO BOTH PENALTY PHASE AND GUILT PHASE , THAT HAD BEEN SUMMARILY DENIED , THAT HE DIDN'T WAIVE , AND HE MADE IT VERY CLEAR DURING THE CONVERSATION WITH THE JUDGE THAT HE WAS NOT TRYING TO, QUOTE , DROP HIS APPEALS , END QUOTE , OR TO WAIVE THE OTHER CLAIMS , OTHER THAN THOSE PORTIONS OF CLAIMS 7 AND 9, HAVING TO DO AS YOU SAID WITH INEFFECTIVE ASSISTANCE OF COUNSEL IN PENALTY PHASE.

JUSTICE: IT SEEMS PRETTY CLEAR THAT HE INTENDED TO DROP ALL OF HIS PENALTY PHASE

CLAIMS. HE SAYS I WOULD LIKE TO DROP OR NOT CONTINUE WITH THE PENALTY PHASE CLAIMS THAT I HAVE. HOW , AND THEN AFTER , THAT JUST BEGINS A SEVERAL-PAGE COLLOQUY WITH THE COURT, IN WHICH THE COURT WAS VERY INSISTENT THAT HE BE CLEAR ABOUT WHAT HE WANTED TO DROP. HE SEEMS PRETTY CLEAR AND -- TO DROP, AND HE SEEMS PRETTY CLEAR AND WHY IS THAT NOT SUFFICIENT TO WAIVE HIS CLAIMS?

I THINK THERE WERE DUAL PARTIES AT FAULT AND THE DEFENDANT WASN'T ONE OF THEM. THE CAPITAL COLLATERAL COUNSEL WAS AT FAULT. I BELIEVE THE JUDGE WAS AT FAULT BECAUSE I BELIEVE THAT THERE WAS AN ABUSE OF DISCRETION IN THE WAY THAT THE COLLOQUY WAS UNDERTAKEN, THAT REALLY GOES BACK TO THE FACT THAT JUDGE CARNY WAS THE TRIAL JUDGE, THAT THERE WAS NO MITIGATION PRESENTED AND HERE AT THE TIME OF THE EVIDENTIARY HEARING, HE WAS STILL NOT AWARE OF ANY MITIGATION OTHER THAN WHAT HAD BEEN PLED AND ALSO THE STATE, BECAUSE OF THEIR RESPONSIBILITY TO DO JUSTICE , WHO WAS WELL AWARE OF WHAT HAD BEEN DEVELOPED.

JUSTICE: EVERYBODY EXCEPT THE DEFENDANT WAS AT FAULT FOR HIM WAIVING HIS PENALTY PHASE CLAIMS. THE ONLY ONE WHO HAS NO FAULT IS THE DEFENDANT HERE WHO WAIVED THE CLAIM.

HE DIDN'T KNOW , JUSTICE CANTERO WHAT HE WAS WAIVING. THAT IS WHAT I POINT OUT IN MY BRIEF. THE DEVELOPMENT OF THE CLAIM WAS FILED IN 2000, WHICH IS ESSENTIALLY CLAIM 7 AND CLAIM 9 LITIGATED AT THE EVIDENTIARY HEARING. THERE WAS AN AMEND IN 2003 BUT THAT SIMPLY HAD TO DO WITH A RING CLAIM AND ALSO LETHAL INJECTION CLAIM THAT DIDN'T REALLY IMPACT THE 2000 PLEA. A CONSIDERABLE AMOUNT OF THE MENTAL HEALTH WORK THAT WAS DONE ON THE CASE , ALL THREE OF THE DEFENSE EXPERTS AS WELL AS THE STATE'S EXPERT, SAW MR. GARCIA , DID THEIR EVALUATION AFTER THAT.

JUSTICE: I WOULD LIKE TO TALK ABOUT THE ISSUE THAT YOU RAISED ABOUT THE FERETTA INQUIRY AND WHY THAT WASN'T SUFFICIENT. CAN YOU POINT IN THE RECORD AS TO THE COLLOQUY , WHY THE JUDGE ABUSED HIS DISCRETION IN CONDUCTING THE FERETTA INQUIRY. WHY WASN'T IT A VALID WAIVER , THOSE ISSUES.

CERTAINLY. JUST TO LOOK AT THE COLLOQUY , ITSELF, THERE IS LANGUAGE IN WHICH THE JUDGE CLEARLY MISSTATING EXACTLY WHAT THE SITUATION, HE TALKS WITH MR. GARCIA ABOUT THE FACT THAT YOU REALIZE IF YOU WAIVE THESE INEFFECTIVE ASSISTANCE CLAIMS , AND YOU DON'T GET RELIEF ON YOUR GUILTY PHASE CLAIMS, THEN YOU ESSENTIALLY GOING TO BE EXECUTED WITH IN A COUPLE OF YEARS. NOW , I AM NOT REALLY SURE , I AM CERTAIN THAT IS NOT A CORRECT STATEMENT OF THE LAW.

CHIEF JUSTICE: FIRST OF ALL JUST TO CLARIFY , IT IS NOT FERETTA. IT IS FERETTA , HE WASN'T ASKING TO REPRESENT HIMSELF ON THE PENALTY PHASE.

THAT IS A VERY GOOD POINT , YOUR HONOR.

CHIEF JUSTICE: HE WAS, THE ISSUE YOU ARE RAISING WAS IN A KNOWING AND VOLUNTARY WAIVER OF HIS PENALTY PHASE CLAIMS. EVEN THOUGH IT WAS AN EXTREME STATEMENT, THE COURT WAS TRYING TO GET IN FRONT OF HIM , TO UNDERSTAND THAT IF HE DIDN'T PREVAIL ON HIS GUILTY PORTION CLAIMS , THEN HE WOULD BE EXECUTED. IN OTHER WORDS THERE WOULD BE NO RELIEF FROM THE DEATH PENALTY . WHETHER THAT IS A MIS REPRESENTATION, BECAUSE IT MIS TAKE A FEW MORE YEARS , IT IS STILL GETTING TO UNDERSTAND THE EFFECT OF HIS STATEMENT IN THE PENALTY PHASE CLAIMS .

BUT THE FACT THAT IF THE COURT HAD DENIED ALL OF THE CLAIMS THAT HE WAS DENIED , CLEARLY NOT COMMUNICATING WHAT HE WAS SAYING TO MR . GARCIA, AS WELL AS THOSE OTHER CLAIMS THAT WERE ON THE TABLE, THE GUILTY PHASE CLAIMS AND THE OTHER

PENALTYPHASE CLAIMS WHICH WERE NOT A PART OF CLAIM 7 AND CLAIM 9 --

JUSTICE: WHAT BE TTER WAY TO DEMONSTRATE THE DANGER TO THE DEFENDANT OF WAIVING THIS GR OUP OR CATEGORY OF CLAIMS THAN TO SAY DO YOU REALIZE BY DOING THIS , YOU IN ES SENCE ARE TAKING YOUR OWN SE LF TO THE DEATH CHAMBER. THAT IS THAT IT A LOGICAL CONCLUSION, A FTER YOU DO THIS , IS THAT YOU ARE P UTTING YOUR SELF, NOW, AT THE NATURAL RI SK OF BEING EXECUTED, I N OTHER WORDS I N T ERMS OF BRINGING THE SERIOUSNESS OF WHAT THE DEFENDANT IS DOING , WHAT F URTHER, LET'S APPROACH IT FROM A DIFFERENT WAY , ARE YOU CLAIM ING E RROR IN THE ADEQUACY OF THE COURT 'S COLLOQUY WITH THE DEFENDANT?

YE S, YOUR HO NOR .

JUSTICE: WHAT FURTHER WOULD YOU HAVE HAD THE TRIAL COURT DO IN THAT REGARD?

WELL , I HAVE ARGUED IN THE BRIEF THAT THE RU LES PURSUANT TO COON THAT WERE NOT NECESSARY AT A -- THAT WERE NECE SSARY AT A TRIAL IN ORDER TO WAIVE MITIGATION, SHOULD HAVE BEEN USED IN THIS STEP. CERTAINLY A PU BLIC POLICY KIND OF ARG UMENT.

JUSTICE: THERE HAS BEEN NO CASE THAT APPLIES COON OR THOSE CASES THAT H OLD THAT, EVEN IF A DEFENDANT IN THE INITIAL CASE DECIDES TO WAIVE MITIGATION , THAT COUNSEL HAS TO PROVIDE A PROPER MITIGATION . THERE HAS BEEN NO CASE TRANSFERRING THAT TO THE POSTCONVICTION PROCESS HASTHERE?

NO, THERE HASN'T BEEN , AND THAT IS EXACTLY WHAT I AM HIM ASKING THIS COURT TO L OOK AT AND DO, PARTICULARLY IN THE CIRCUMSTANCE WHERE YOU HAVE A JUDGE WHO FOUND NO MITIGATION , STATUT ORY OR NONSTATUTORY, AT THE TRIAL, WHERE THE TRIAL COUNSEL PRESENTED NO MITIGATION AT THAT TRIAL , NOW THAT SAME JUDGE KNOW INGLY IS NOT G ETTING INTO WHAT EXACTLY IT IS THAT THIS CLIENT IS WAIVING , THAN IS WHAT I THINK IS MISSING HERE. THERE NE EDS T O BE MORE A FFECTION PLAN ATION OF WHAT IS ACTUALLY BEING WAIVED , AND THAT IS WHAT MR . GARCIA DIDN'T DO, AND THAT IS WHAT HE DIDN'T KNOW , I N FA CT.

JUSTICE: I F I M AY ASK A QUESTION, ARE YOU SAYING THAT I N E VERY POSTCONVICTION PROCEEDING THERE, MUST BE S OME POSTCONVICTION CLAIMS ABOUT INEFFE CTIVE NESS OF COUNSEL IN THE PENALTY PHASE , REGARDLESS OF WHETHER THE DEFENDANT WANTS TO ASSERT THEM AND REGARDLESS OF WHETHER THEY ARE V IABLE ?

NO. I THINK OBVI OUSLY THAT HIS CASE SPECIFIC. I MEAN , ANY G IVEN CASE DEPENDING ON WHAT THE INTERSECTION OF THE FACTS AND THE LA W ARE , ARE GOING TO DETERMINE WHAT THE CLAIMS ARE THAT YOU MAKE. AND IN THIS SITUATION, MR . G ARCIA HAD THREE T IMES VERIFIED HIS 3.85 0. THE INVESTIGATION HAD BEEN DONE, UN LIKE I N MOR A, LIKE ICITED I N MY BRIE F, WHERE IT IS A SI TUATION LIK E I N THE PENALTY PHASE AND THERE IS DISCUSSION GOING ON BETWEEN THE CLIENT LAWYER AS TO WHETHER OR NOT FU RTHER INVESTIGATION ABOUT FA MILY MEMBERS OVERSEAS NEEDS TO BE DONE SO THOSE WITNESSES CAN BE PRE SENTED , AND A S JUSTICE ANSTEAD WAS TALKING ABOUT BEFORE, THE CIRCUMSTANCE COMES UP ABOUT WHETHER OR NOT COUNSEL IS GOING TO CONTINUE TO REP RESENT THE CLIENT I N MOR A. IT IS LIKE , W ELL , I DON'T WANT MY COUNSEL I F HE I S GOING TO MAKE ME PRESENT THESE WITN ESSES . THIS IS A SITUATION I N WHI CH THE INVESTIGATION HAD BEEN DONE , COMPLETED . THE WITNESSE S ON THE WITNESS LIST. THE INFORMATION WAS I N THE RECORDS. THE STATE HAD ALL OF THE ROTS. THEY HAD THE DEPOSITIONS -- ALL THE REPORTS. THEY HAD THE DEPOSITIONS OF ALL FOUR ME NTAL HEALT H EXPERTS.

CHIEF JUSTICE: HOW DOES THAT HELP YOUR CASE? IT SOUNDS LIKE THERE FOR IT IS EVEN MORE AFTER KNOWING WAIVER SINCE HE HAD AL L THAT INFORMATION.

HE HAD NEVER SEEN ANY OF THE DEPOSITIONS. HE HAD NEVER BEEN COMMUNICATED ABOUT WHAT THE REPORTS WERE THAT THE EXPERTS HAD SEEN .

CHIEF JUSTICE: NOW YOU ARE ASSUMING INEFFECTIVE ASSISTANCE OF HIS COLLATERAL COUNSEL?

NO, YOUR HONOR, I AM SAYING THAT IS WHAT HAPPENED. OBVIOUSLY IN FLORIDA --

CHIEF JUSTICE: WHY DIDN'T THE LAWYER JUMP IN THERE AND SAY HE DOESN'T KNOW HOW GREAT MY CASE IS. I HAVE GOT TO GO TALK TO HIM?

MY QUESTION IS , MY ANSWER IS I DON'T WANT AN ANSWER ANSWER TO THAT BECAUSE -- MY ANSWER IS I DON'T KNOW THE ANSWER TO THAT BECAUSE I WASN'T IN THE COURTROOM THAT DAY. MY ANSWER IS WHY DIDN'T THE COURT INSIST ON A PROFFER PURSUANT TO MORA AND PURSUANT TO COON?

JUSTICE: SO WHAT IS THE SUBSTANTIVE DIFFERENCE BETWEEN WHAT IS IN THE MOTIONS AS VERIFIED AND SIGNED AS TO WHAT AN ATTORNEY WOULD HAVE PROFFERED ?

GREAT QUESTION JUSTICE BELL . THE DEPOSITIONS ARE IN THE RECORD NOW. THE REPORTS ARE IN THE RECORD, BUT SPECIFICALLY LET ME JUST GO THROUGH QUICKLY WHAT I CAN SAY ABOUT THAT . AS TO THE NEUROPSYCHOLOGIST THERE. SCHREPPLAND , HE SPECIFICALLY IDENTIFIED DISORDERS , ANTISOCIAL PERSONALITY AND ALCOHOL SUBSTANCE ABUSE AND ANTISOCIAL PERSONALITY DISORDER, AND HE FOUND BOTH STATUTORY MENTAL HEALTH MITIGATORS. DR . HYDE THE NEUROLOGIST, DID A NEUROLOGICAL EVALUATION. HE FOUND SPECIFIC ABNORMALITIES ON HIS NEUROLOGICAL EVALUATION THAT WERE INDICATIVE OF FRONTAL LOBE DYSFUNCTION. HE ACTUALLY MADE RECOMMENDATIONS FOR MEDICATION THAT THE CLIENT COULD BE PUT ON TO HELP REMEDY THEM.

JUSTICE: WHAT WERE THESE EXPERTS --

VERY GENERIC SORT OF ISSUES ABOUT MENTAL HEALTH PROBLEMS. IT WAS PLED GENERALLY AS POSSIBLE IN 3.850 UNDER THE OLD RULE. THAT IS THE WAY IT WAS PLED. IT WAS A FAIRLY SPECIFIC SOCIAL HISTORY, BUT IT WAS FLESHED OUT IN THE SALTON DEPOSITION REPORT. SHE WENT TO TEXAS AND INTERVIEWED SIX FAMILY MEMBERS WHO HAD NEVER BEEN INTERVIEWED BEFORE, AND HER REPORT SPECIFIES AND SPECIFICALLY SUPPORTS THE FAMILY HISTORY THAT WAS PLED GENERALLY.

CHIEF JUSTICE: FIRST OF ALL , I WANT TO MAKE SURE YOU GET TO, IF YOU WANT TO ARGUE ANY OF YOUR GUILT CLAIMS , BUT AFTER THIS WAIVER OCCURRED, THEN, THERE WAS AN EVIDENTIARY HEARING ON THE GUILT PHASE CLAIMED.

THERE WAS A VERY BRIEF EVIDENTIARY HEARING ON THE GUILT PHASE IN WHICH THE ONLY WITNESS WAS TRIAL COUNSEL.

CHIEF JUSTICE: AND WE ARE SUPPOSED TO ASSUME THAT THE LAWYER REPRESENTING MR. GARCIA DURING THAT TIME NEVER SAID, YOU KNOW I WOULD REALLY LIKE YOU TO REEVALUATE YOUR WAIVER, BECAUSE WE HAVE GOT SOME GREAT INFORMATION HERE THAT CAN SAVE YOU FROM THE DEATH PENALTY. I JUST FIND THIS , I GUESS , I DON'T FIND THIS A VERY COMPELLING SITUATION , AND I DON'T SEE THAT THE , IF ANYONE WAS IN EXCUSEABLE , IT IS THE CLIENT , AS JUSTICE CANTERO SAID, SO I WOULD SUGGEST THAT YOU MOVE ON TO DISCUSS YOUR OTHER CLAIMS ON THE GUILT PHASE .

I AM GOING TO RESERVE MOST OF THE REST OF MY TIME, YOUR HONOR, BUT I DO WANT TO BRIEFLY

RESPOND TO. THAT I THINK IT IS IMPORTANT FOR THE COURT TO RECOGNIZE THAT COUNSEL IN THIS CASE AT THE EVIDENTIARY HEARING WAS THE SAME LAWYER WHO REPRESENTED MR. COON IN THE COON CASE, AND I BELIEVE THAT HE WAS RE LYING ON THE RESULTS OF COON FOR POTENTIAL RELIEF IN THIS CASE, AND THAT IS ONE OF THE REASONS THAT HE DOESN'T DO WHAT I BELIEVE HE SHOULD HAVE DONE. IT IS NOT A QUESTION OF INEFFECTIVE ASSISTANCE. IT IS A QUESTION OF HAVING A STATUTORY RIGHT IN FLORIDA , POSTCONVICTION REPRESENTATION, AND HE DIDN'T DO WHAT A LAWYER SHOULD HAVE DONE.

CHIEF JUSTICE: THEN WHY DIDN'T HE SAY , JUDGE, I NEED TO PROF ER THIS UNDER COON? THAT EVEN MAKES I T MORE IN EXCUSEABLE. HE WAS THINKING THIS IS GOING TO BE AWAY TO GET A REVERSAL?

YOUR HONOR , I THINK THAT MAY WELL BE TR UE, AND I THINK TO THE EXTENT THAT THAT IS T RUE, I CAN'T IMAGINE THAT THE CLIENT WAS INFORMED ABOUT THAT , AND THE CLIENT DIDN'T KNOW IF ABOUT THIS INFO RMATION .

JUSTICE: I WOULD LIKE TO GULF YOU AN OPPORTUNITY, I WOULD LIKE YOU TO ADDRESS THE ISSUE ABOUT COUNSEL'S FAILURE TO BRING OUT IN TRIAL , THE RELATIONSHIP BETWEEN THE WITNESSES FELICIANO , ELIZABETH AND ADRIANO PEREZ .

JUDGE CARNY'S REPORT SAID THAT THE EVI DENCE ESTABLISHED BY THE DETECTIVE OF MS. CRUZ IN '93 WAS NOT A CREDIBLE AC COUNT.

JUSTICE: THAT WAS NOT THE--

THE WAY THAT FITS INTO THIS BO RDER IS I DON'T BELIEVE THE FACTS SUPPORT THAT AND THE FINDINGS ABOUT THE RELEVA NCE OF THE RELATIONSHIP OR MR . DIAZ'S TESTIMONY AT THE EVID ENTIARY HEARING, BECAUSE MS. PEREZ SAID IN HER MEMORIZATION OF TESTIMONY WHICH WAS LONGER THAN THE REST OF THE EVIDENTIARY HEARING , WERE SEVERAL THIN GS , COMPLETELY CONTRADICTED HER PREVIOUS TESTIMONY. SHE ADMITTED THAT SHE WAS RELATED TO MR . AGUAYO, THAT HE WAS MARR IED TO HER SISTER LINDA , THAT THE CODEFENDANT ENRIQUE HERNANDEZ , HIS M OTHER WAS ONE OF HER BEST FRIENDS AND SHE HAD KNOWN HIM FOR Y EARS AND J OSE AND JORGE FELICIANO WERE RELATED TO HER MOTHER-IN-LAW. ALL OF THIS WAS UNKNOWN, THE STATE DE NIED RELATIONSHIPS A T ALL AND IT WAS CL EARLY B IAS AND HER TE STIMONY B ASED UPON THESE RELATI ONSHIPS AND IN FACT IT TURNED UP IN OUR DISCOVERY D URING POSTCONVICTION THAT SHE, THAT IS MS. PEREZ-CRUZ WAS ACTUALLY VIS ITING THE CODEFENDANT AT UNION CORRECTIONAL INSTITUTION IN THE TWO YEARS THAT SHE TESTIFIED BEF ORE I N 1990 AND '91 , AND APPARENTLY WITHOUT THE KNOWLEDGE OF THE STATE AND CERTAINLY WITH OUT THE KNOWLEDGE OF THE DEFENSE, AND SHE SI MPLY SAID SHE NEVER TOLD ANYBODY ABOUT THAT, AND FIN ALLY, SHE, ALSO , SAID THAT ENRIQUE FERNANDEZ , WHO SHE I DENTIFIED IN HER 1983 STATEMENT AS BEING SOMEBODY WHO IS PRESENT AT THE DISCUSSION OUT IN THE FIELDS , IN WHICH MR . G ARCIA SUPPOSEDLY INCULPATE ED HIMSELF IN THE CRIME, SHE TESTIFIED IN HER MEMORIZATION OF TESTIMONY THAT SHE NEVER SAID THAT . IN FACT SHE TEST IFIED THAT SHE NEVER SAID MOST OF THE THING THAT IS SHE SAID IN HER 1983 STATEM ENT, AND BASED ON THAT THE JUDGE FOUND THAT THE 1983 POLICE REPORT WAS NOT CREDIBLE.

CHIEF JUSTICE: WHAT ABOUT THE TRIAL COUNSEL SAID HE WOULDN'T HAVE EMPHASIZED THE WITNESSES ' RELATIONSHIP AT TRIAL. WHAT WAS --

I FRAN KLY DON'T UNDERSTAND THAT TESTIMONY, YOUR HONO R. IT IS SIMPLY HE DIDN'T UNDERSTAND IN THE CONTEXT OF HIS TESTIM ONY, THE RELEVANCE OR THE MATERIALITY OF THE FACT THAT THE THREE MAIN WITNESSES AGAINST MR . GA RCIA , A LONG WITH MS. PEREZ, WERE ALL RELATED TO EACH OTH ER. HE NEVER KNEW THAT. HE NEVER TRIED TO EXPL OIT THAT ON CROSS-EXAMINATION, BECAUSE HE NEVER INVESTIGATED AND NEVER FOUND IT OUT. I

BETTER HOLD THE REST OF MY TIME FOR REBUTTAL.

CHIEF JUSTICE: THANK YOU.

MAY IT PLEASE THE COURT. SANDRA JAGGARD ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE. THE COLLOQUY WITH THE STATE WAS MORE THAN SUFFICIENT, PARTICULARLY CONSIDERING THAT THE DEFENDANT IN ORDER TO EVEN BE IN A POSITION --

CHIEF JUSTICE: MS. JAGGARD, YOU ARE A LITTLE QUICK THIS MORNING.

IN ORDER FOR THE DEFENDANT TO EVEN BE IN A POSITION TO BE AT AN EVIDENTIARY HEARING WHERE THIS ISSUE COULD COME UP, SUCH THAT HE WOULD BE WAIVING THE CLAIM, HE HAD TO APPLY ON A FACIALLY SUFFICIENT MOTION. HE HAD TO HAVE SIGNED AND VERIFIED THAT MOTION. HE HAD TO HAVE KNOWN WHAT THE SITUATION WAS.

CHIEF JUSTICE: THIS IS A VERY UNUSUAL SITUATION. USUALLY WE HAVE DEFENDANTS THAT ARE WAIVING EVERYTHING, AND THEN WE HAVE THEM GO THROUGH A COLLOQUY AND MAKE SURE THEY ARE COMPETENT TO WAIVE THEIR POSTCONVICTION CLAIMS.

YES.

CHIEF JUSTICE: I JUST HAVEN'T SEEN ONE WHERE SOMEBODY IS JUST PICKING TWO CLAIMS THAT APPARENTLY THERE WERE EXPERTS FOR, AND WITNESSES AVAILABLE, AND SAYING I AM GOING TO PICK AND CHOOSE AND WAIVE THOSE TWO CLAIMS. DOES --

DEFENDANTS ON OCCASION DON'T WANT TO PRESENT MITIGATION EVIDENCE, AND AS FAR AS THE STATEMENT THAT THE DEFENDANT, WHETHER OR NOT THERE WAS A WAIVER OF MITIGATION AT TRIAL, WE DON'T KNOW. THIS IS A PRE-COON CASE, AND SO WE DON'T KNOW WHAT INSTRUCTIONS, BECAUSE THE DEFENDANT WAIVED THE CLAIM, AND WE DIDN'T HEAR FROM TRIAL COUNSEL ABOUT WHAT INSTRUCTIONS THE DEFENDANT GAVE TRIAL COUNSEL ABOUT PRESENTING MITIGATION.

CHIEF JUSTICE: SO THERE WAS A WAIVER OF PENALTY, THAT IS WHAT I WANT -- AT TRIAL?

WE DO KNOW --

CHIEF JUSTICE: AT TRIAL.

WE WE AT TRIAL THAT COUNSEL CHOSE NOT TO PRESENT PRISONER EVIDENCE BECAUSE HE WAS AFRAID OF THE REBUTTAL OF THAT AND HE DIDN'T WANT THE JURY TO KNOW THE HISTORY OF THE CASE, AND THAT HE CHOSE NOT TO PRESENT EVIDENCE ABOUT THE CODEFENDANT'S FAMILY. WITH REGARD TO MITIGATION BECAUSE THIS IS A PRE-COON, WE DON'T KNOW WHAT HAPPENED BETWEEN COUNSEL AND THE DEFENDANT ABOUT WAIVING MITIGATION.

CHIEF JUSTICE: DID THE DEFENSE LAWYER SAY I INSTRUCTED NOT TO PUT ON MITIGATION?

NO, YOUR HONOR. IT IS A PRE-COON CASE. WE DON'T KNOW THAT WITHOUT THE EVIDENTIARY HEARING. THAT IS WHY WE NOW HAVE COON, SO WE KNOW THAT.

CHIEF JUSTICE: DOES THE TRIAL LAWYER IN THE CASE NOT SAY IN FACT WHAT HAPPENED?

I BELIEVE HE SPOKE TO THE STATE PRIVATELY AND SO THE STATE DOES KNOW WHAT HE SAID BUT THAT IS NOT IN THE RECORD.

JUSTICE: SO AT THE ACTUAL PENALTY PHASE OF THIS CASE, THERE WAS NO MITIGATORS FOUND,

CORRECT?

THERE WAS NO TRADITIONAL MITIGATION PRESENTED TO THE JURY.

JUSTICE: AND SO NO MITIGATION WHATSOEVER WAS PRESENTED. WAS THERE ANY ARGUMENT MADE BY COUNSEL? WHAT ACTUALLY WAS THE DEFENSE POSTURE AT THE ACTUAL PENALTY PHASE?

I BELIEVE THEY WERE ARGUING FOR THE MENTAL MITIGATORS, BASED ON THE EVIDENCE ABOUT THE INTOXICATION FROM THE TRIAL, AND HIS STATE AT THE TIME, BASED ON WHAT THEY HAD PRESENTED IN MITIGATION AT THE TRIAL.

CHIEF JUSTICE: WAS THERE AN ISSUE OF HIS COMPETENCY TO WAIVE THE DISCREET CLAIMS? NORMALLY, A GAIN, THAT IS WHY I ASKED, WHEN WE ARE SITTING, IS THERE A QUESTION OF MR. GARCIA'S COMPETENCY?

NO. NO QUESTION OF MR. GARCIA'S COMPETENCY HAS EVER BEEN RAISED.

CHIEF JUSTICE: I GUESS WHAT I AM CONCERNED ABOUT, WHEN WE HAVE A WAIVER OF ALL OF THE CLAIMS, WE REQUIRE THERE TO BE A COMPETENCY EVALUATION.

IF FERETTA - TYPE INQUIRY, IF THE DOZIER INQUIRY ROSES A COMPETENCY HEARING, WE REQUIRE IT UNDER DEROACH A. WHEN YOU READ THE COLLOQUY RAISED, THIS ISN'T A YES/NO COLLOQUY. HE IS HAVING AN EXTENDED DISCUSSION WITH THE TRIAL COURT EXPLAINING THAT HE HAS GONE BACK AND FORTH, SOMETIMES GOING TO PRESENT -- STIPULATIONS WILLING TO PRESENT MITIGATING EVIDENCE AND SOME TIMES HE HASN'T, BUT NOW HE IS PRESENTING MITIGATING EVIDENCE AND HE DOESN'T WANT TO DO IT. IT IS NOT A BRIEF DO YOU UNDERSTAND THIS CLAIM? IT GOES ON FOR PAGE WHERE HE IS ACTUALLY TALKING BACK AND FORTH WITH THE TRIAL COURT.

CHIEF JUSTICE: HE SAYS THERE HAVE BEEN TIMES WHEN I WANT TO GO FORWARD AND TIMES WHEN I JUST COULDN'T STAND IT, BUT I TOLD HIM LAST WEEK THAT I WANTED TO DO THIS. I WAS SURE. SEEMS TO BE MORE OF A STATEMENT OF SOMEBODY THAT JUST WANTS TO GET THIS OVER WITH.

WELL, BUT HE CHREEFERL DIDN'T WANT TO GET IT OVER WITH -- HE CLEARLY DIDN'T WANT TO GET IT OVER WITH, BECAUSE HE CONTINUED ON WITH HIS GUILTY PHASE CLAIM.

JUSTICE: HE HAD BEEN THERE FOR 20 YEARS, IN PRISON FOR 20 YEARS, BY THE TIME THIS ALL TOOK PLACE. RIGHT?

WELL, I DON'T BELIEVE THAT IS TRUE, BECAUSE HE WASN'T ARRESTED UNTIL '85.

HE HAD BEEN THERE FOR 18 YEARS.

YEAH.

CHIEF JUSTICE: WHAT ABOUT, ON THE KBLT PHASE, I AM GOING -- ON THE GUILT PHASE, CLEARLY THIS IS A HORRENDOUS CRIME. THE, WAS THERE ANY PHYSICAL EVIDENCE TYING HIM TO THESE MURDERS?

PHYSICAL EVIDENCE, NO. AT THE CRIME SCENE. WHAT TIED HIM TO THE MURDERS WAS HE LEFT OFF IN THAT NEIGHBORHOOD THAT PREVIOUS EVENING. HE SHOWS UP, THE MURDERS OCCURRED AROUND 6:30 IN THE MORNING. HE SHOWS UP -- HE SHOWS UP, THE MURDERS OCCURRED AT 6:30 IN THE MORNING. HE SHOWS UP BLOODY AT SEVEN.

CHIEF JUSTICE: WHO TESTIFIED TO THAT?

THE MOTHER AND SON AND THE JURY KNEW THAT.

CHIEF JUSTICE: THE JURY KNEW THAT THEY WERE MOTHER AND SON. THE BLOODY CLOTHES WERE NEVER RECOVERED?

I DON'T BELIEVE SO.

CHIEF JUSTICE: SO HE IS TESTIFYING, THE MOTHER AND THE SON.

AND THEN MS. PEREZ, WHO--

CHIEF JUSTICE: IS THIS THE SISTER-IN-LAW?

AS IT TURNS OUT IS THE SISTER-IN-LAW OF MR. AGUAYO.

CHIEF JUSTICE: DOES THE STATE KNOW THAT?

THERE IS NO EVIDENCE THAT THE STATE KNOWS THAT. THERE IS ONE POLICE REPORT THAT DOESN'T LIST HER AS MS. PEREZ. IT CALLS HER MS. CRUZ.

CHIEF JUSTICE: THE STATE THOUGHT IT WAS VERY, VERY IMPORTANT TO EMPHASIZE THAT THERE WAS NO RELATIONSHIP. THEY SAY THAT SEVERAL TIMES. I DON'T UNDERSTAND, I GUESS, HOW IN A CASE WHERE THERE ARE, IS NO PHYSICAL EVIDENCE, IS HOW THEY SAY THAT THEY WOULDN'T HAVE BROUGHT OUT THE RELATIONSHIP BETWEEN THE THREE WITNESSES IF THEY HAD KNOWN IT. I MEAN, ISN'T THAT GROUNDS FOR IMPEACHING, AND THEY KNOW THE CODEFENDANT, WHO GETS A LIFE SENTENCE?

WELL, THE LAST THING DEFENSE COUNSEL WANTED TO DO WAS TALK ABOUT THE CODEFENDANT.

CHIEF JUSTICE: WHO WAS THE CODEFENDANT?

HIS NAME IS ENRIQUE FERNANDEZ, AN OTHER MIGRANT WORKER.

CHIEF JUSTICE: WHAT WAS HIS ROLE IN THE CRIME?

I BELIEVE HE DROVE THE DEFENDANT TO THE SCENE OF THE CRIME AND THEN DROVE HIM AWAY OR WAS THERE. AND HE CONFESSED.

CHIEF JUSTICE: DID HE CONFESS?

HE CONFESSED AND IMPLICATED THE DEFENDANT, AND DEFENSE COUNSEL DID -- AND IMPLICATED THE DEFENDANT AND DEFENSE COUNSEL DID NOT WANT TO TALK ABOUT MR. FERNANDEZ AT ALL, BECAUSE SOMEONE MENTIONED AS TO WHY HE TURNED AGAINST THE DEFENDANT, AND IT WAS BECAUSE HE HAD IMPLICATED THE DEFENDANT. HE WANTED TO STAY AS FAR AWAY FROM MENTIONING MR. FERNANDEZ AS HUMANLY POSSIBLE.

CHIEF JUSTICE: THAT WOULDN'T MEAN THAT HE WOULDN'T WANT TO EMPHASIZE THE RELATIONSHIP BETWEEN ALL THREE OF THEM. ANOTHER STATE NEVER SAID THAT THEY WEREN'T RELATED. WHAT THEY SAID IS WE HAVE WITNESSES WHO ARE UNRELATED IN TIME AND CIRCUMSTANCE. MS. PEREZ HEARD THE STATEMENT IN THE FIELDS AFTER THE CRIME. MS. FELICIANO AND MR. AGUAYO SAID IT UNRELATED AT THE TIME OF THE CRIME. THEY DIDN'T KNOW THEY WERE FAMILY MEMBERS. THEY KNEW THAT TWO WERE FAMILY MEMBERS, SO THERE IS NO WAY THAT THE JURY TOOK THAT STATEMENT AS THESE PEOPLE DON'T KNOW ONE

ANOTHER AT ALL.

CHIEF JUSTICE: DURING CLOSINGS THE PROSECUTOR SAID THAT THE CIVILIAN WITNESSES WERE NOT RELATED IN ANY WAY TO EACH OTHER OR TO ANY OF THE OTHER WITNESSES IN THE CASE.

AND CLEARLY WITH THE JURY KNOWING THAT AGUAYO AND FELICIANO ARE MOTHER AND SON. THEY DON'T MEAN THAT THEY DON'T HAVE A FAMILIAL RELATIONSHIP WITH ONE ANOTHER. COUNSEL SAID IF I HAD SOMETHING THAT SHOWED THAT THEY HAD SOME BAD BLOOD IN THE RELATIONSHIP THAT, THEY WERE CONSPIRING, DOING SOMETHING ELSE, I WOULD HAVE USED THE FACT THEY ARE FAMILY MEMBERS BUT NONE OF THAT IS TRUE, AND WHILE MY OPPONENT REFERS TO --

CHIEF JUSTICE: DO YOU THINK SOMEBODY WOULD ARGUE, ISN'T IT A LITTLE STRANGE THAT THE ONLY THREE WITNESSES THAT PUT HIM AT THE SCENE ARE ALL RELATED TO ONE ANOTHER?

AND COUNSEL SAID NO, BECAUSE IN THIS PARTICULAR COMMUNITY IN SOUTH DADE IN THE MIGRANT WORKER COMMUNITY, A LOT OF THESE PEOPLE ARE RELATED TO ONE ANOTHER DIFFERENTLY, AND THEREFORE HE DIDN'T FEEL THE NEED TO PRESENT ANYTHING ABOUT THIS. HE DIDN'T THINK IT WOULD HAVE ANY ATTRACTION -- ANY TRACKS. -- ANY TRACTION.

AND ELIZABETH --

-- FELICIANO IS AGUAYO'S MOTHER, AND THEN THE SISTER-IN-LAW BETWEEN AGUAYO AND PEREZ, AND PEREZ SAYS BASICALLY, YEAH, THAT IS MY SISTER'S HUSBAND BUT I DIDN'T REALLY ASSOCIATE WITH HIM. I DIDN'T DO, BECAUSE THE THEORY WAS IF YOU INVESTIGATED ALL OF THIS YOU WOULD FIND OUT THAT THEY ALL CONSPIRED -- CONSPIRED, BUT MS. PEREZ SAID THAT DIDN'T HAPPEN. SHE DIDN'T SOCIALIZE WITH THESE PEOPLE. SHE NEVER SOCIALIZED WITH THEM.

JUSTICE: WAS THERE A REWARD?

THERE WAS A REWARD AND THE WITNESSES' TESTIMONY WAS THAT NONE OF THEM WERE LOOKING FOR IT AND THE ONLY ONE THAT KNEW ABOUT IT WAS FELICIANO.

JUSTICE: DID HE EVER ATTEMPT TO GET THE REWARD?

NO. THEY NEVER ATTEMPTED TO GET THE REWARD. THERE HAS NEVER BEEN A SUGGESTION THAT THEY ATTEMPTED TO GET THE REWARD. THERE IS A CLAIM THAT THE FAMILIAR RELATIONSHIP IS GOING TO LEAD TO THIS EVIDENCE, BUT WHEN YOU HAD THE EVIDENTIARY HEARING, THAT DIDN'T HAPPEN.

CHIEF JUSTICE: HE DIDN'T COME FORWARD RIGHT AWAY. YOU SAID HE WASN'T ARRESTED UNTIL '85 FOR THIS CRIME AND IT OCCURRED IN '83?

NO. THEY WERE INTERVIEWING PEOPLE DOWN THERE. WE DIDN'T HAVE PHYSICAL EVIDENCE AT THE CRIME SCENE. MS. PEREZ DENIED MAKING THAT STATEMENT IN THE POLICE REPORT. IT WAS FOUND WRONG. A WRONG NAME, A WRONG ADDRESS. IT ATTRIBUTES THE STATEMENTS MADE TO MS. FELICIANO AND NOT MS. PEREZ. THE NAME IS CRUZ IN THE REPORT AND IT IS PEREZ. IT IS WRONG, WRONG, WRONG, WRONG, AND THE TRIAL COURT HAVING LISTENED TO THE EVIDENCE -- LISTENED TO THE EVIDENCE AND READ THE PERPETUATED TESTIMONY, SHE SAID IT WAS CREDIBLE AND CONSISTENT WITH MS. PEREZ'S TESTIMONY.

JUSTICE: A 1983 REPORT THAT WAS MADE AT OR AROUND THE TIME THAT THE MURDER ACTUALLY TOOK PLACE, SO IT SEEMS PRETTY INCREDIBLE --

YES.

JUSTICE: -- TO ME ANYWAY THAT ALL OF THIS STUFF IN THIS REPORT NEVER TOOK PLACE OR SOMEONE ELSE WAS THE PERSON THEY WERE INTERVIEWING?

SHE SAYS SHE DID TALK TO THE POLICE BUT NONE OF THE DETAILS IN THE STATEMENT ARE CORRECT ABOUT WHAT SHE SAID TO THEM. IT DOESN'T HAVE HER NAME IN IT. IT HAS THE OTHER IMAGINARY PERSON'S NAME IN IT. THE STATEMENTS THAT WE ARE TALKING ABOUT ARE ATTRIBUTED TO MS. FELICIANO. THE POLICE OFFICER MADE NUMEROUS MISTAKES IN THAT REPORT, AND, YES, THE FACT THAT MS. PEREZ DIDN'T COME FORWARD WITH THE CONVERSATION WAS BROUGHT BEFORE THE JURY AT TRIAL IMMEDIATELY. ALL OF THAT CAME OUT AT TRIAL. THE REPORT IS SIMPLY INCORRECT.

JUSTICE: WHEN DID SHE MAKE HER FIRST STATEMENT?

SHE DID SPEAK TO THE POLICE, THEN SHE DENIES MAKING ANY OF THE STATEMENTS IN THERE. SHE SAYS SHE DIDN'T TELL THEM ABOUT HAVING OVERHEARD THE STATEMENT IN THE FIELD, BECAUSE THEY NEVER ASKED HER AND SHE DIDN'T, SHE THOUGHT IT WAS A JOKE ORIGINALLY. SHE COMES FORWARD SOME TIME LATER, AND I DON'T RECALL EXACTLY WHEN. BUT IT WAS MUCH LATER IN TIME. UNLESS THE COURT HAS ANY OTHER QUESTIONS, THE STATE RESPECTFULLY REQUESTS YOU AFFIRM.

CHIEF JUSTICE: MR. HENRY -- MR. HENNIS, REBUTTAL.

TO CORRECT A STATEMENT THAT I MADE, COUNSEL ON THE MORA CASE NOT COON, HE WAS COUNSEL. I APOLOGIZE FOR THAT.

JUSTICE: CAN YOU HELP US WITH OBVIOUSLY WHAT WE ARE SEARCHING FOR HERE IS SOMETHING IN THE RECORD THAT WOULD DEMONSTRATE EXACTLY WHAT WAS GOING ON, OTHER THAN WHAT THE STATE SUGGESTIONS AND THAT IS THAT AT THE ORIGINAL TRIAL, THAT THERE IS SOME INDICATION THAT HE DIDN'T WANT TO PUT ON MITIGATION, AND THAT THIS IS JUST A CONTINUATION OF THAT ADDED TO, HERE, THAT, IN THIS NEW FORM. IS THERE ANYTHING ELSE ON THE RECORD, ANY SUGGESTION ON YOUR PART OF A COMPETENCY ISSUE?

WHAT I WOULD SUGGEST TO THE COURT TO DO IS LOOK CLOSELY AT THE DEPOSITION OF FAY SULTAN, IN WHICH THE STATE ATTORNEY SITTING IN ON THE DEPOSITION, ENGAGED DR. SULTAN IN A FAIRLY LONG DISCUSSION ABOUT THE MENTAL STATE OF MR. GARCIA.

CHIEF JUSTICE: I DON'T THINK WE SHOULD BE, YOU SHOULD BE SUGGESTING WHAT WE LOOK AT. THE QUESTION IS -- SUGGESTING WHAT WE LOOK AT. THE QUESTION IS YOU HAVEN'T RAISED AN ISSUE OF MR. GARCIA'S COMPETENCY. SO WE HAVE TO ASSUME THAT IN GOOD FAITH YOU LOOKED AT THAT AND THAT YOU DO NOT HAVE CONCERNS ABOUT HIS COMPETENCY.

I THINK THAT THE DEPOSITION OF DR. SULTAN DOES ADDRESS THE COMPETENCY ISSUE, AND JUST VERY BRIEFLY, THE COLLOQUY --

CHIEF JUSTICE: MR. HENNIS, YOU ARE AN EXPERIENCED LAWYER HERE.

I APPRECIATE THAT, JUSTICE PARIENTE.

CHIEF JUSTICE: I WOULD APPRECIATE THERE FOR A STRAIGHTFORWARD ANSWER.

SURE.

CHIEF JUSTICE: YOU DO NOT RAISE, YOU DID NOT RAISE IN THE BRIEF A COMPETENCY ISSUE AS

TO MR . GARCIA'S ABIL ITY TO WAIVE THE RIGHT , BUT YOUHAVE ONLY STATED THAT YOU DON'T FEEL IT WAS A KNOWING WAIVER , BECAUSE HE WAS NOT AS AWARE OF ALL OF THE MITIGATION THAT COULD HAVE BEEN PRESENTED AT THE EVIDENTIARY HEARING. CORRECT?

AS A PRACTITIONER , THERE WAS NO COMPETENCY ISSUE RAISED ANYWHERE IN THE RECORD. NOW , AS TO WHETHER OR NOT ON APPEAL FR OM A POSTCONVICTION DENIAL , I WOULD BE IN A POSITION BEFORE THIS COURT TO RAISE A COMPETENCY ISSUE NOW , FRANKLY I AM NOT REALLY SURE, YOUR HONOR , SUE RESPONSIBILITY'.I CAN'T PO INT TO -- SUE A SPONTE. I CAN'T POI NT TO YOU ANYWHERE IN THE RE CORD THAT THAT HAS BEEN DONE. I CAN POINT T O M OR A , WHERE COMPETENCY IS R A ISED PRETRIAL AND IN BETW EEN.

CHIEF JUSTICE: I DON'T FIND THAT A VERY SATISFACTORY ANS WER. YOU HAVE HAD TIME TO RAISE ISSUES THAT WEREN'T RAISED BELOW AND SOMEONE'S COMPETENCY, I THI NK WOULD BE AN OBLIGATION TO RAISE, IF THERE WAS A GENUINE CONCERNABOUT A DEFENDAN T'S COMPETENCY.

I GUESS MY QUESTION WOULD SIMPLY BE AT WHAT POINT CAN THAT BE RAISED , ONCE THE EVIDENCE YAEFER HEARING IS OVER -- ONCE THE EVIDEN TIARY HEARING IS OVER AND YOU AREAN APPEAL. I AM NOT SURE I T CAN B E RAISED NO W. L ET ME POINT OUT IN THE 1993 REPORT THAT WE WERE TALKING ABOUT AS WELL , THE PEREZ REPORT. JOSEPHINA CR UZ , THE NAME INTHE REPORT IN THE MEMORLANDOIZATION OF HER TESTIMONY, THE WITNESS DID ADMIT THAT SHE USED THE NAME FINA CRUZ , AND THE ADDRESS THAT THE POLICE OFFICER INTERVIEWED HER AT , SHE ADMITTED THAT WAS HER FATHER'S ADDR ESS, SO IN FACT THAT REPORT IS NOT CONTRADICTED AT ALL AND ONE FINAL THOUGHT ABOUT COMPETENCY, THE RE ASON FOR ASKING FOR THE CASE T O BE REMANDED BACK TO THE CIRCUIT COURT FOR AN APPROPRIATE WAIVER, WOULD BE IN MY OPINION, THAT IS PRECISELY THE PLAC E FOR A COMPETENCY TO BE RAISED. IT CAN'T , I DON'T BELIEVE IT C AN BE , I HAVE NO INDICATION THAT IT CAN B E RAISED SP ONTE BY ME , E ITH ER IN THIS -- RAISED SUA SPONTE B Y ME I N THIS COURT OR BY BRIEF IN O RAL ARGUME NT, AND THAT MIGHT BE AN ISSUE IF WE GO BACK TO CIRCUIT COURT AND HAVE WHAT I CONSIDER TO BE A PROPER WA IVER IN WHICH THE COURT ME ETS ITS RESPONSIBILITY TO ACTUALLY TRY AND GE T ON THE RECORD WHAT THE MITIGATION IS , SO THAT THERE IS A RECORD SHOWING WHAT IS WAIVED, SO THAT THE STATE CAN SEE THAT JUSTICE IS DONE AND SO THAT POSTCONVICTION COUNSEL CAN MEET ITS RESPONSIBILITY TO ITS CL IENT , IF IN FACT THEREIS A COMPETENCY ISSUE, SO IT COULD BE RAISED.

CHIEF JUSTICE: THANK YOU. YOUR TIME IS EXPIRED. THE COURT WILL TAKE THIS CASE UNDER CONSIDERATION AND T AKE ITS MO RNING RECESS OF 15 MINUTES.

MARSHAL: PLEASE RI SE.