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**Michael A. Tanzi v. State of Florida**

**SC05-457**

> LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT.  
PLEASE BE SEATED.

>> THE FINAL CASE ON OUR  
DOCKET THIS MORNING AND FOR  
THIS WEEK IS TANZI VERSES  
THE STATE OF FLORIDA.

>> GOOD MORNING MAY IT  
PLEASE THE COURT, IF UNDER  
RULE 3.1070 THERE'S MORE  
LENIENT STANDARD THAT FAVORS  
THE DEFENDANT THEN WHETHER  
THERE'S EVIDENCE OF CAPITAL  
DEFENDANT WAS CONFUSED ABOUT  
THE MEANING OF HIS PLEA THEN  
GOOD CAUSE IS SHOWN.

AND THAT IS WHAT THE  
EVIDENCE SHOWED IN THIS CASE.  
MICHAEL TANZI HOURS AFTER  
ENTERING HIS PLEA AND WEEKS  
BEFORE THE COMMENCEMENT OF  
THE PENALTY PHASE JURY  
SELECTION IN THIS CASE  
EXPRESSED CONFUSION ABOUT  
HIS UNDERSTANDING OF THE  
JURY LABOR IN THIS CASE  
SAYING TO THE COURT IT'S  
CONFUSING TO ME.

I'M NOT SAYING I DON'T  
UNDERSTAND IT AND THE  
CONTEXT OF WHEN HE WAS  
MAKING THE PER SE ATTEMPT TO  
WITHDRAW HIS PLEA, IT'S  
CONFUSING TO ME.

I'M NOT SAYING I DON'T  
UNDERSTAND.

BECAUSE SOMETIMES I DO AND  
SOMETIMES DO STPHEPBT I  
DON'T UNDERSTAND.

I DON'T KNOW.

>> THE TYPE WORD PICTURE  
HERE OF THE TIME FRAMES  
INVOLVED.

YOU SAY WITHIN HOURS.

GIVE US REALLY THE TIME  
FRAME AND WHAT WENT ON  
DURING THE COURSE OF THAT  
TIME FRAME AND ESPECIALLY  
EMPHASIZING WHAT HE WAS OR  
WASN'T TOLD WITH REFERENCE  
TO THE WAIVER OF THE PENALTY  
PHASE JURY.

SO WOULD YOU -- .

>> WOULD VERY MUCH LIKE  
TO --

>> DETAIL THAT A LITTLE BIT.  
SOME TIMES ARE MORE VAGUE  
THAN OTHERS.

WE HAVE A SITUATION WHERE  
THIS IDEA OF ENTERING A  
GUILT PLEA AND GETTING A  
JURY WAIVER WAS UNDER  
DISCUSSION FOR A PERIOD OF  
AT LEAST TWO MONTHS.

WE KNOW THIS FROM THE NOTES  
OF BILL KUYPERS ONE OF THE  
DEFENSE ATTORNEYS HIS  
TESTIMONY AT THE SENTENCE ON  
THE PRESENTENCE MOTION.

AND HE DISCUSSED WITH  
MICHAEL AS APPARENTLY DID  
COCOUNSEL THE PLAN THAT IT  
WOULD BE IN MICHAEL'S  
INTEREST TO GET A JURY  
WAIVER IN THE PENALTY PHASE.  
HIS ATTORNEYS FELT THAT WAS  
HIS BEST CHANCE OF A LIGHT  
SENTENCE.

MICHAEL BELIEVED HIM.

SO HE DISCUSSED THIS FOR  
ABOUT TWO MONTHS.

HOWEVER, THEY DIDN'T  
RESEARCH THE LAW IN THIS  
POINT UNTIL THE EVE OF  
TRIAL.

THE NOTES INDICATE ON THE  
29th OF JANUARY, 2003, HIS  
PLEA WAS ENTERED ON THE 31st  
OF JANUARY 2003.

MR. KUYPERS DID THE RESEARCH  
ON THIS.

ON THE 30th HE HAS A MEETING  
WITH MICHAEL TANZI AND  
MR. TANZI ULTIMATELY AGREES  
THAT HE IS GOING TO ENTER  
THE PLEA.

ON THE 31st IN THE MORNING  
BEFORE COURT STARTS AND I

BELIEVE THAT THE CLERK'S DOCKET INDICATE -- OR AT LEAST THE TRANSCRIPT INDICATES THE COURT OPENED SOMETIME AROUND 11:20 OR 11:30.

SOMETIME PRIOR TO THE COURT BEGINNING MICHAEL TANZI AND MR. KUYPERS MEET IN THE JURY ROOM IN THE COURTHOUSE.

ALSO PRESENT THE MR. MADRUA ONE OF THE PROSECUTORS.

MR. KUYPERS PRESENTS MICHAEL TANZI WITH SOME DOCUMENTS TO SIGN.

ONE OF THE DOCUMENTS IS A STANDARD PLEA FORM USED IN ANY CASE.

ANOTHER IS A SPECIAL PLEA FORM FOR THIS CASE.

THE AFFIDAVIT AS ITS REFERRED TO IN THE RECORD.

THIS AFFIDAVIT GOES THROUGH THE SPECIAL CONDITIONS OF THE PLEA IN THIS CASE AND IT'S A VERY CAREFUL DOCUMENT IN A LOT OF WAYS.

IT TALKS ABOUT THE FACT THAT MICHAEL WISH TO CHANGE HIS PLEA OF GUILT.

IT REFERENCES THE FACT THAT HE WANTED TO WAIVE HIS JURY, THAT HE IS CHOOSING --

>> WAIVE HIS JURY IN THE PENALTY PHASE?

>> IN THE PENALTY PHASE.

>> WHO PREPARED THAT DOCUMENT?

>> MR. KUYPERS.

>> THE PROSECUTOR?

>> NO HE'S THE DEFENSE COUNSEL.

>> HEED PREPARED IT AND HAD MILE SIGN IT.

IF YOU READ THAT DOCUMENT. I RETURN THE COURT TO READ THAT DOCUMENT CAREFULLY. IT'S IN THE RECORD.

AND IT'S EXCERPTED IN MY BRIEF.

BECAUSE THE EFFECT OF THE DOCUMENT ON

ARRAIGNMENT -- ON MANY EMPLOYERS IS TO CONVEY AN

IDEA THAT THERE ARE NO  
CAVEATS ABOUT THE JURY  
WAIVER.

IT SAID MICHAEL TANZI WISHES  
TO CHANGE HIS PLEA TO NOT  
GUILTY TO GUILT IN HIS BEST  
INTEREST.

IN THE COURT ACCEPTS HIS  
PLEA, IT RAISES DOUBT AS TO  
WHETHER OR NOT THE COURT  
WILL ACCEPT THE CHANGE OF  
PLEA BUT NEVER SAYS ANYTHING  
ABOUT THERE BEING DOUBT  
ABOUT THE COURT ACCEPTING  
THAT, THAT HE HAD A RIGHT IN  
THE PENALTY PHASE JURY  
DOESN'T AND HIS -- IT SAID  
HE'S CHOOSING.

HE ALSO GOES ON IN DETAIL TO  
GO OVER SOME FAIRLY  
TECHNICAL STUFF IF HE DOES  
BY DOING THIS HE IS WAIVES  
HIS RIGHT.

THERE'S A GREAT DEAL OF CARE  
BEING TAKEN TO MAKE SURE  
THAT MICHAEL TANZI KNOWS --  
>> SO GIVEN THE WORDING OF  
THE AFFIDAVIT WHAT IS THE  
REMEDY HERE?

YOU'RE ASKING TO WITHDRAW  
THE PLEA BUT ISN'T CERTAINLY  
AN ALTERNATIVE REMEDY A  
PENALTY PHASE JURY?

>> HE HAD A PENALTY PHASE  
JURY.

>> RIGHT.

I'M AFRAID WE CAN'T GET THAT  
JEANIE BACK IN THE BOTTLE.  
THERE'S ALREADY A PENALTY  
PHASE RECOMMENDATION.

>> YOU ARE NOT RAISING ON  
APPEAL THAT THE JUDGE ABUSED  
DISCRETION IN NOT GRANTING  
THE WAIVER OF THE PENALTY  
PHASE JURY.

>> NO.

>> BECAUSE WE HAVE CASE LAW  
THAT SAYS --

>> IT'S CLEAR -- CLEAR THE  
JUDGE HAD THAT OPTION.  
BUT UNFORTUNATELY THE RECORD  
IS SUCH THAT IT'S CLEAR  
THERE WAS SOME CONFUSION  
THAT IN MICHAEL'S MIND AS TO

WHETHER OR NOT HE WAS  
GETTING THE --

>> NOW, LET'S GO OVER AND I  
WILL ASK THE STATE THIS  
QUESTION.

MY CONCERN IS -- AS I LOOK  
AT HILL VERSUS LOCKNER THAT  
WE'RE ABOUT TO GRANT RELIEF  
IN THIS CASE IN A  
POST-CONVICTION ARGUMENT  
THAT HIS COUNSEL WAS  
INEFFECTIVE AND I KNOW YOU  
WILL MAKE THAT  
ARGUMENT -- OR SOMEBODY  
WILL.

>> SOMEBODY MAY.

>> IF WE DON'T REALDY IT  
HERE.

YOU WERE GIVING THIS SORT OF  
WORD PICTURE SO THEY FIND  
OUT, THOUGH, AT LEAST THE  
NIGHT BEFORE THE PLEA THAT  
IT'S NOT AN AUTOMATIC WAIVER  
OF THE PENALTY PHASE.

SO WHAT IS THE -- IN THIS  
RECORD, THE TESTIMONY THEN  
OF COUNSEL AS TO WHETHER  
THEY THEN ADVISED HIM THAT  
IT ISN'T AUTOMATIC OR  
WHETHER IT OVERRODE THAT  
DOCUMENT THAT SEEMS TO  
COMPLY THAT IT WAS.

THE TESTIMONY OF MR. KUYPERS  
IS THAT HE GAVE MICHAEL  
ACCURATE ADVICE ON THIS  
QUESTION.

AND IT'S NOT CLEAR WHAT THE  
ADVICE WAS PRIOR TO THAT.

HE DID ON THE NIGHT IN  
QUESTION GIVE HIM THE  
ACCURATE ADVICE THAT THIS  
WAS IN THE DISCRETION OF THE  
COURT.

HE ALSO SAYS THAT HE DID NOT  
GIVE MICHAEL ANY PROBABILITY  
AS TO WHAT THE COURT WOULD  
DO.

DID THE TRIAL JUDGE THEN  
MAKE -- BY NOT WITHDRAWING  
THE PLEA, DID THE TRIAL  
COURT MAKE FINDINGS OF THE  
CREDIBILITY, THEN OF THE  
MR. TANZI'S REASON FOR  
WANTING TO WITHDRAW THE PLEA

AND THEN THE CREDIBILITY OF THE LAWYER AND THAT THE LAWYER DID GIVE ACCURATE ADVICE?

>> THE TRIAL COURT'S ORDER CAN FAIRLY BE SAID TO MAKE CREDIBILITY.

THE PROBLEM IS I DON'T THINK THEY ARE ENTITLED TO DEFERENCE BY THIS COURT FOR THREE REASONS.

ONE IS THAT THE CREDIBILITY FINDING SUCH AS THEY ARE ARE BASED ON INCORRECT STATEMENT OF THE RECORD WHICH I POINT OUT TO THE COURT.

A MOMENT.

TWO, IT IGNORES CRITICAL EVIDENCE THAT WAS ALSO AVAILABLE IN THE RECORD. AND THREE IT'S NOT APPLYING THE CORRECT STANDARD TO THAT.

>> TAKE THE -- TO SAY THAT THERE WAS THE NIGHT BEFORE THE PLEA, THERE WAS THIS SOMETHING IN THE RECORD ABOUT SOMETHING THAT HAPPENED BETWEEN THE DEFENDANT AND THE DEFENDANT'S COUNSEL. BUT THEN THEY WENT BEFORE THE JUDGE IN NEXT DAY; RIGHT?

>> THAT'S RIGHT.

>> WHAT HAPPENED THERE?

>> WELL, WHEN THEY GET TO THE JUDGE -- AFTER THEY HAD THE CONVERSATION OR WHATEVER TRANSPIRED THERE, ONE OF THE THINGS THAT HE SAID HE MAY HAVE DONE IS GIVEN HIM REASONS WHY THE JUDGE MAY DO ONE THING OR ANOTHER.

THE AFFIDAVIT SAYS THAT THEY FELT THAT THE JUDGE WAS LIKELY TO GRANT THE WAIVER BECAUSE WHAT THEY KNEW ABOUT THE JUDGE.

BUT THEN THEY PRESENTED HIM WITH THIS AFFIDAVIT.

THERE'S NO INDICATION THAT THE JUDGE MIGHT NOT.

THEN HE GOES TO THE JUDGE.

HERE'S THE PROBLEM.

THE JUDGE DOESN'T KNOW THAT  
THE WAIVER IS ISSUED AT ALL.  
AND HE HAS NO REASON TO DO A  
COLLOQUY AT THIS POINT.

MICHAEL TESTIFIED IN POST  
TRIAL EVIDENTIARY HEARING  
THAT THE LAWYERS TOLD HIM,  
LOOK, WE'RE GOING TO DEAL  
WITH THE WAIVER AFTER THE  
PLEA.

DON'T SAY ANYTHING ABOUT THE  
JURY WAIVER UNTIL THEN.

THAT'S NOT SKEWED.

I DIDN'T TELL

HIM -- TRUTHFUL I DIDN'T

TELL HIM TO LIE --

>> BUT WHAT DOES THE RECORD  
REFLECT HAPPENED?

AT THE TIME OF THE PLEA?

>> THE JUDGE GOES THROUGH  
COLLOQUY AND IS VERY CAREFUL  
ABOUT THINGS NOBODY TOLD YOU  
YOU WILL GET LENIENCE OUT OF  
THIS.

THE ONLY THING SAID ABOUT  
THE JUROR WAIVER IS THAT  
AFTER THIS THERE WILL BE A  
PENALTY PHASE AND WE WILL  
HANDLE THE JURY.

>> BUT IF WE SEPARATE IT THE  
JURY WAIVER AND THE PENALTY  
PHASE PART OF IT FROM WHAT  
THE JUDGE ASKED THE  
DEFENDANT IN THE PRESENCE OF  
THE DEFENDANT'S COUNSEL AT  
THE TIME OF ACCEPTING THE  
PLEA OF GUILT ON THE  
CONVICTION, DID HE  
ACKNOWLEDGE THAT HE HE WAS  
GUILT AND GO THROUGH THAT  
WHOLE ROUTINE?

>> OH, ASSUREDLY HE ENTERED  
A GUILT PLEA.

IT WAS IN OUR CLIENT BEST  
INTEREST GUILT PLEA.

HE WENT THROUGH THE ROUTINE  
BUT THE THING WAS THAT IT  
WAS DONE ON A PHGS  
APPREHENSION THAT OUT OF  
THIS -- MISAPPREHENSION THAT  
OUT OF THIS HE WOULD BE ABLE  
TO WAIVE THE JURY SOMETHING  
WHICH HE WOULD NOT BE ABLE

TO DO.

THERE'S NO STATEMENT MADE  
DURING THE COLLOQUY ABOUT  
THAT.

>> NO.

>> OF COURSE THEY --

>> WELL THE DEFENDANT DIDN'T  
MAKE A STATEMENT ABOUT THIS;  
CORRECT?

>> HE DID NOT.

AND HE WAS INSTRUCTED NOT TO  
BY HIS COUNSEL.

>> ON THIS THING BECAUSE IT  
IS IMPORTANT TO ME THAT HE  
TRY TO WITHDRAW HIS PLEA  
BEFORE THE JUDGE -- BEFORE  
THE PENALTY PHASE JURY.

SO HE -- WHAT IS -- HOW DOES  
THE GOOD CAUTION  
JURISPRUDENCE APPLY IN THIS  
CASE.

IN OTHER WORDS IF -- DO WE  
HAVE TO FIRST MAKE A  
CREDIBILITY DETERMINATION  
ABOUT WHETHER HE TRULY WAS  
CONFUSED ABOUT THE PLEA,  
WHERE DOES THAT FALL INTO  
THE SPECTRUM OF THE  
ANALYSIS?

>> WELL, YOUR HONOR, I HAVE  
TO SAY THAT THE GOOD CAUSE  
JURISPRUDENCE HAS NOT REALLY  
ADDRESSED I THINK THE  
STANDARD.

>> WELL, IF THE RULE OF LAW  
WAS IF A DEFENDANT IS  
CONFUSED ABOUT THE EFFECT OF  
HIS GUILT PLEA AND WHETHER  
HE'S ALSO IN A CAPITAL CASE  
GOING TO BE ABLE TO WAIVE  
HIS PENALTY PHASE JURY, SAY  
THAT'S THE RULE OF LAW THAT  
WE ALREADY CAME OUT WITH.  
THAT'S GOOD CAUSE.

BUT THE RECORD HERE IS NOT  
CLEAR THAT, THAT -- THAT, IN  
FACT -- YOU ARE SAYING HE  
WAS CONFUSED ABOUT IT BUT  
THE JUDGE APPARENTLY  
REJECTED THAT AND IN  
REJECTING THE WITHDRAWAL.  
SO HOW DOES THAT -- THOSE  
TWO PLAY TOGETHER?

>> I WOULD SAY IN THE FIRST

INSTANCE THAT IF THE RECORD WAS CLEAR AND THIS IS WHERE I FIND THE WRONG STANDARD. IF THE RECORD WAS CLEAR THAT BEYOND A DOUBT THAT MICHAEL WOULD BE -- REGARDING THE PENALTY PHASE WAIVER THEN MANIFEST JUSTICE WOULD BE ESTABLISHED.

IF HE ENTERED -- IF WE PARADED THE LAWYERS AND EVERYONE SAID YOU KNOW WHAT, I GUESS WE MISLED HIM AND MADE HIM THINK THE JUDGE WOULD GIVE HIM THIS WAIVER, END OF STORY.

THAT WOULDN'T MANIFEST JUSTICE.

THAT WOULD BE COSTELLO.

>> IN THE STANDARD OF GOOD CAUSE REALLY MEANS SOMETHING.

IF THERE IS A MORE LIBERAL STANDARD FOR A MOTION THAT'S MADE PRESENTENCE, THEN I THINK IT HAS TO MEAN THAT YOU DON'T NEED TO REACH THAT MANIFESTING JUSTICE.

I THINK WHEN YOU HAVE A RECORD AS REplete WITH EVIDENCE OF INFUSION AS THIS ONE, I THINK YOU'VE MET GOOD CAUSE.

HAVE WE OR OTHER COURTS DEFINED GOOD CAUSE?

I THERE -- I THINK THERE ARE CASES THAT SAY WHILE I DOESN'T REACH THE LEVEL OF MANIFEST AND JUSTICE, GOOD CAUSE IS A HIGHER STANDARD THAN CAUSE.

>> THE COURT IS -- I THINK IS RIGHT THERE.

THE COURT DID NOT SPECIFICALLY CLAIM GOOD WHERE GOOD CAUSE LAWS EXCEPT FOR REFERENCE OF WHAT IT IS NOT.

>> AS OTHER COURTS SAID --

>> I THINK IT WOULD PROBABLY HAVE TO BE MORE THAN CAUSE. BUT I WHAT THE COURT HAS SAID IS IT IS A LIBERAL STANDARD TO BE APPLIED IN

FAVOR OF THE DEFENDANT FOR THE TRIAL AND THE MERITS. I'M HAVING A LITTLE BIT OF DIFFICULTY WITH YOUR ACTUALLY MAKING OUT A CASE FOR GOOD CAUSE HERE AND IT IS BOLSTERED BY YOUR OUTLINE.

AND I APPRECIATE YOUR CANDOR IN RESPONDING TO MY QUESTION.

IF I UNDERSTAND YOUR RESPONSE IT REALLY SAID THAT THIS WAS ALL DONE VERY CAREFULLY AND THAT THERE WERE MUCH ABOUT THIS. AND THEN THAT ALTHOUGH THOSE MONTHS WERE ALL DEVOTED TO THE ISSUE WITH REFERENCE TO THE LEGALLITIES OR TK WAIVER OF THE PENALTY PHASE JURY, THAT AT LEAST A MONTH THEN BEFORE THE PLEA WAS ENTERED THERE WAS VERY MUCH OF A FOCUS ON THAT.

AND THEN THAT THERE WAS THIS DETAILED DISCUSSION WITH YOUR CLIENT IN BY THE TESTIMONY IS THAT HE WAS ADVISED IN GREAT DETAIL THAT THE JUDGE DID NOT HAVE TO WAIVE THE PENALTY PHASE JURY AS PART OF THIS PLEA THING. YOU KNOW, THAT DON'T TALK ABOUT THIS NOW WHEN YOU ENTER THE PLEA, BECAUSE WE'LL DEAL WITH THAT AFTERWARDS IN OUR HOAX THAT WITH THIS PARTICULAR JUDGE THAT HE WILL GO IN THAT DIRECTION.

YOU'VE LAID OUT A SCENARIO WHERE LAWYERS -- IT APPEARS COULD NOT HAVE DONE A BETTER JOB OF INFORMING THEIR CLIENT OF WHAT WAS GOING ON AND THEN INCLUDING DRAWING THE PLEA.

SO HELP ME WITH AFTER ALL OF THAT AS OPPOSED TO GOING TO THE JUDGE, FOR INSTANCE, AND SAYING YOU KNOW THAT WE REALLY IT LOOKS LIKE THAT MY CLIENT PROBABLY WILL PLEA,

BUT JUDGE A CRITICAL PART SF  
THE WAIVER OF THE PENALTY  
PHASE AND, WOULD YOU -- ARE  
YOU WILLING YOU KNOW TO GIVE  
US YOUR INFORMAL VIEWS ABOUT  
THIS BECAUSE THIS IS  
OBVIOUSLY A CRITICAL  
DECISION FOR, YOU KNOW --  
THAT.

HERE THEY LAID THIS OUT AND  
WENT FORWARD THE PLEA WITH  
THE CLIENT KNOWING THIS IS  
SOMETHING THAT THE JUDGE  
COULD MAKE THE CALL ABOUT.  
SO HELP ME WITH WHEREAS  
OPPOSED TO A SITUATION WE  
MIGHT SEE WHERE THE LAWYER  
GOING INTO THE CHAMBERS OR  
WHATEVER TALKS TO HIM AND  
SAYS, YOU KNOW, I THINK WE  
OUGHT TO CHANGE THE PLEA,  
YOU KNOW, AND THEY DIDN'T  
HAVE TIME TO ANSWER ALL HIS  
QUESTIONS OR YOU KNOW AND  
THEREFORE THEY WENT IN AND  
HE'S A NERVOUS WRECK AND  
SAID WELL I JUST DID WHAT  
THE LAWYERS TOLD ME.  
THEN HE COMES BACK HOURS  
LATER AND SAYS WE NEVER HAD  
THE TIME.

>> I'M AFRAID I MISLED THE  
COURT IF THAT'S THE  
IMPRESSION I'VE GIVEN YOU.  
BECAUSE IN FACT WHAT  
HAPPENED HERE THEY STARTED  
TESTING THE POSSIBILITY OF  
ENTERING A PLEA AND GETTING  
A JURY WAIVER WHICH IS DONE  
APPARENTLY IN A LEGAL  
VACUUM.

BECAUSE HE DIDN'T START  
DOING THE RESEARCH UNTIL TWO  
DAYS BEFORE THE ENTRY OF THE  
PLEA.

AND THEN --

>> I UNDERSTOOD YOU TO SAY  
THAT IT WAS MONTHS BEFORE --

>> THEY BEGAN TO DISCUSS IT.  
THE TESTIMONY -- IN NOVEMBER  
THEY BEGAN TO DISCUSS THE  
POSSIBILITY.

AND WE HAVE SUBMITTED IN THE  
RECORD OF THE EVIDENTIARY

HEARING AND THROUGH THE  
TESTIMONY OF MR. KUYPERS,  
THE RECORDS THAT HE MADE  
SOME CONTEMPORANEOUS NOTES  
OF THIS DISCUSSION.

NOTES ABOUT HOW HE WOULD  
GIVE UP THE ISSUE THIS AND  
THAT.

NEVER NOTATION AS TO WHAT  
THE CONSEQUENCES --

>> WHAT WAS LEFT OUT HERE  
THAT YOU WERE FOCUSING ON TO  
SAY TO SAY THAT HE REALLY  
DIDN'T HAVE --

>> A POSSIBILITY THAT HE  
WOULDN'T GET THE JURY  
WAIVER.

>> MR. KUYPERS TESTIFIED  
THAT HE RESEARCHED THAT  
QUESTION TWO DAYS BEFORE THE  
PLEA.

HE DID HAVE A MEETING WITH  
MR. TANZI THE NIGHT BEFORE.  
HE SAID THEY TOLD MR. TANZI  
WHAT THE LAW WAS AT THAT  
MEETING.

THE LAW --

>> THE LAW BEING THAT,  
THAT'S A JUDGE'S CALL.

>> I DON'T MEAN TO CONVEY HE  
GAVE A VERY CAREFUL  
EXPLANATION OF.

MR. KUYPERS SAID HE  
EXPLAINED.

HE ADMITTED THAT HE DIDN'T  
THINK THAT WOULD HAPPEN.

HE SUPPOSE IT WAS POSSIBLE.

THE ORDER OF THE TRIAL COURT  
SAYS THAT MR. KUYPERS -- GET  
THE LANGUAGE OF THE ORDER  
CORRECTLY -- SAYS THAT HE  
NEVER AT ANYTIME DISCUSSED  
WITH THE DEFENDANT OR  
ENTERED ANY OPINIONS AS TO  
WHETHER THE COURT WOULD  
GRANT THE REQUESTED WAIVER  
AND TOLD THE DEFENDANT THAT  
ANY SUCH OPINION WOULD BE  
PURE SPECULATION ON HIS  
PART.

THAT NEVER HAPPENED HE NEVER  
TESTIFIED TO THAT.

HOW ABOUT GOING TO -- YOU  
SAID THERE WERE THREE THINGS

TO UNDERMINE THE JUDGE'S  
DECISION HERE.

WOULD YOU DETAIL THOSE  
THREE.

>> YEAH.

SO WITH REGARD TO THE FACTS  
ONE OF THE FACTS THAT WE  
RELY ON IS NONEXISTENT  
TESTIMONY OF MR. CUP PERS.  
IN FACT, MR. KUYPERS SAID  
THAT ESSENTIALLY THEY WOULD  
NOT PREDICT WHAT THE COURT  
WOULD DO BUT HE MIGHT HAVE  
TOLD MR. TANZI REASONS WHY  
THE COURT MAY DO ONE THING  
OR MAY NOT DO ANOTHER.  
THAT'S CONSISTENT WITH THE  
AFFIDAVIT OF NANCY ROSSEL  
WHICH SAID WE TOLD -- WE  
TOLD MICHAEL WE WERE  
CONFIDENT THE WAIVER WOULD  
BE GRANTED BECAUSE WE KNEW  
THE JUDGE.

WE KNEW THAT LEAVES NOT AN  
ADVOCATE FOR THE DEATH  
PENALTY IN OUR OPINION, THAT  
HE WAS --

>> KUYPERS SAID THAT HE TOLD  
YOUR CLIENT HE WAS  
CONFIDENT.

>> HE SAID HE DENIED SAYING  
HE WAS COMPETENT.  
WHAT'S INTERESTING.

YOU CAN GET A SPECTRUM OF  
UNDERSTANDING -- MR. KUYPERS  
SAYING I MIGHT TELL HIM  
REASONS WHY HE MIGHT DO ONE  
THING OR MIGHT DO ANOTHER  
OTHER.

MR. ROSSEL SAYING WE WERE  
CONFIDENT --

>> WHERE WAS MISS ROSSEL AT  
THIS TIME?

SHE HAD KIND OF BACKED OFF A  
LITTLE BIT BECAUSE HE HAD --

>> HER TESTIMONY IS THAT SHE  
ATTENDED ONE OF THE MEETINGS!!!!!!!!!!!!!!  
MEETINGS -- ONE OR TWO OF  
THE MEETINGS DISCUSSING THE  
REASON WHY --

>> WHERE WAS SHE IN THIS  
CRITICAL -- ONE OR TWO DAYS  
BEFORE HAND AND IF SHE WAS  
NOT THERE AT THE MEETING

RIGHT BEFORE -- ON THE DAY  
OF THE 31st; CORRECT?

WITH THE STATE ATTORNEY?

>> ON THE 31st, NO SHE

WASN'T.

THERE WAS NO DISCUSSIONEN

THE 31st.

>> WAS SHE WITH HIM THE

NIGHT BEFORE?

>> IT'S NOT PERFECT I WILL

LEER TO ME.

I DON'T THINK SO.

>> WAS SHE THERE THE DAY

BEFORE?

>> I DON'T SNOWE.

JUSTICE CANTERO HAD A

QUESTION.

ALSO REMEMBER YOU HAVE THE

THREE POINTS YOU WANT TO ADD

AND YOU ARE MOVING THROUGH

YOUR TIME.

>> YES.

AS FAR AS I WAS ASKING ABOUT

THE GOOD CAUSE REQUIREMENT.

CAN YOU POINT TO CASES THAT

HAVE REVERSED FOR ABUSE OF

DISCRETION A TRIAL COURT'S

DENIAL OF A MOTION

WITHDRAWAL FOR GOOD CAUSE.

>> YOUR HONOR, I CAN, BUT AS

I NOTED IN MY BRIEF

VIRTUALLY ALL OF THE ONES

THAT I FOUND FROM THE

DISTRICT COURT ARE ONES THAT

IN FACT WOULD AMOUNT TO THE

MANIFEST OF JUSTICE

STANDARD.

>> I KNOW YOU CITED

COSTELLO --

>> THE MANIFESTED JUSTICE

CASE.

>> OKAY.

WITH -- IN MY RESEARCH THE

CASES ARE BROKEN DOWN TO IS

YOU THEN HAVE A SECOND

CATEGORY OF CASES WHERE

EITHER IT'S BEING DISCUSSED

IN INDICTA LIKE PART WHERE

THE DISCUSSION -- THEY SAID

THIS WOULD HAVE BEEN

PROBABLY GOOD CAUSE, BUT IT

WAS RAISED POST SENTENCE OR

WHERE THEY SAID THIS LOOKS

LIKE GOOD CAUSE BUT THERE'S

PROCEDURAL REASONS WE WOULD REVERSE THIS ANY WAY. WHAT ABOUT ALIAS THAT YOU CITED.

>> IT WAS A CASE MANIFEST OF JUSTICE.

THAT WAS THE ONE WHERE -- THEY ESTABLISH THE DEFENDANT'S MISUNDERSTANDING. EVEN THOUGH EVERYONE EXPLAINED WHAT THE CONSEQUENCES OF THE PLEA WERE.

THE RECORD ALSO ESTABLISHED THAT HE SAID THERE WAS A DIFFERENT UNDERSTANDING ON THE RECORD.

>> YOUR PAIR THEORETICAL CITES AS A STATE REVERSING DENIAL OF A MOTION UNDER SUBSECTION F WHICH SEEMS TO ME WOULD NOT BE --

>> WHAT I MEAN TO CONVEY BY THAT IS THAT IS A CASE WHERE IT WOULD HAVE CLEARLY SATISFIED THE MANIFEST OF JUSTICE.

BECAUSE THE RECORD ABSOLUTELY UNDERSTOOD THAT HE THOUGHT HE WAS PLEASE -- PLEADING TO SOMETHING COMPLETELY DIFFERENT THAN WHAT HE WAS PLEADING TO.

I THINK THERE COULD BE NO DOUBT THAT WOULD BE MANIFEST OF JUSTICE.

>> I WANT TO MAKE SURE YOU CAN RESPOND TO JUSTICE ANSTEAD'S QUESTION AND HIS CONCERN THAT I BELIEVE THAT PERCEPTION VERY THOROUGHLY EXPLAINED TO YOURSELF.

>> AS DO I.

IF I CAN HIT BRIEFLY ON THE OTHER BIG FACTUAL MISTAKE JUST TO FINISH WHERE I WAS WITH MR. KUYPERS TESTIMONY. THERE'S NOTHING FROM MR. KUYPERS SAYING WAS PEER PHRAEUGS AS TO WHAT THE JUDGE WOULD -- PURE SPECULATION AS TO WHAT THE

JUDGE WOULD DO.

THE JUDGE SAID IN HIS ORDER SAID THAT MICHAEL TANZI TESTIFIED -- HIS LAWYERS NEVER TOLD HIM ANYTHING TO LEAD HIM TO BELIEVE THAT THE JUDGE WOULD GRANT THE WAIVER.

HIS OWN TESTIMONY THAT THE DEFENDANT ADMITTED THE COUNSEL NEVER ADVISED HIM DIRECTLY OR INDIRECTLY THAT IT WOULD END UP IN THE COURT GRANTING THE MOTION.

IN FACT, MICHAEL'S TESTIMONY WAS SOMETHING VERY DIFFERENT.

HE SAID, LOOK, I CAN'T REMEMBER THE EXACT WORDS. I CAN TELL YOU WHAT THE EFFECT OF THOSE WORDS WERE ON ME.

WHAT I UNDERSTOOD THEM TO BE.

AND MR. CUP PERS SAID HE COULDN'T REMEMBER THE EXACT WORDS HE USED EITHER.

BUT ON 2368 MR. CUP PERS SAID HE WOULD GIVE -- GET ME A JURY WAIVER.

THAT'S MY UNDERSTANDING.

HE SAID I DON'T KNOW THE EXACT WORDS, QUESTION, HIS WORDS TO YOU.

WHAT WAS YOUR UNDERSTANDING?

I THOUGHT I WOULD GET THE JURY WAIVER.

THERE'S NO BASIS FOR THIS JUDGE TO HAVE CONCLUDED THAT HE WAS MAKE THING UP, NOT BASED ON WORDS.

AND THAT WAS CRUCIAL TO THE ORDER AND THAT'S WHY YOU CAN'T DEFER TO THE FACTUAL FINDING IN THIS ORDER.

IN TERMS OF IT HAVING BEEN CAREFUL, WHAT WE -- THE RECORD SHOWING THERE AND LACK OF UNDERSTANDING.

WE THEN HAVE MICHAEL GOING AND GETTING THIS AFFIDAVIT WHICH WHILE BEING CAREFUL ABOUT EVERYTHING IS NOT CAREFUL ABOUT WHAT WILL

HAPPEN WITH THE JURY WAIVER.  
HE GO THROUGH A COLLOQUY  
WHICH -- BECAUSE THE TRIAL  
JUDGE COULDN'T HAVE KNOWN.  
THEY DON'T COVER WHAT WILL  
HAPPEN WITH THE JURY WAIVER.  
TO CLOSE UP THE TIME GAPS,  
THAT HAPPENED A SHORT TIME  
BEFORE LUNCH.

THE HEARINGS ARE BEGUN.  
EVERYBODY COMES BACK AFTER  
LUNCH -- I THINK THE RECORD  
SHOWS IT'S CLOSING AROUND  
2:00 AT THIS POINT.

AND THERE'S SOME CROSS  
MOTIONS DONE.

MR. KUYPERS HAS BEEN PUTTING  
UP THE JURY WAIVER,  
PRETENDING IT'S SOMETHING  
THAT CAME UP DURING LUNCH.  
AND THE JUDGE SAYS WELL, YOU  
KNOW I THINK IT'S A WAITING  
DECISION.

I WOULD LIKE TO HAVE A JURY.  
>> YOU'RE WELL INTO YOUR  
REBUTTAL.

THEREAFTER, THERE ARE MORE  
PROCEEDINGS MICHAEL  
TESTIFIES HE APPROACHES THE  
LAWYERS THEY TELL HIM TO  
WAIT.

AND AT THE END OF THE DAY  
HE'S PRESENTED TO THE COURT  
AND HE TELLS THE COURT THAT  
HE WANTS TO WITHDRAW HIS  
PLEA.

HE GOES INTO HIS  
DISSATISFACTION WITH COUNSEL  
STARTING WITH MISS ROSSEL  
AND THE SEXUAL ALLEGATIONS  
AND HE EVENTUALLY GETS TO  
THE PART I JUST QUOTED TO  
YOU AND I WOULD LIKE TO  
RESERVE SOME TIME FOR  
REBUS -- REBUTTAL.

>> MAY IT PLEASE THE COURT,  
MARGARITA CIMADEVILLA ON THE  
BEHALF OF THE STATE.

I THINK JUSTICE CANTERO  
QUESTION AS -- AS FAR AS THE  
GOOD PORTION OF THE GOOD  
CAUSE STANDARD IS REALLY AN  
ESSENTIAL THING TO FOCUS ON  
BECAUSE THAT'S ESSENTIALLY

WHAT THE TRIAL COURT FOUND  
AFTER AN EVIDENTIARY HEARING  
IN THIS CASE.

IT FOUND THAT IN THIS CASE  
MR. TANZI HAD TAKEN ON A  
STRATEGY, A STRATEGY THAT  
WAS EXTREMELY REASONABLE  
GIVEN THE OVERWHELMING  
EVIDENCE AGAINST HIM.

NOT ONLY OF GUILT, BUT OF  
ALMOST EVERY AGGRAVATOR  
UNDER THE STATUTE.

SO NOT ONLY THE EVIDENCE  
PRESENTED AT THE HEARING BUT  
THE RECORD WHICH IS CRUCIAL  
OF WHAT OCCURRED AT THE TIME  
OF THE PLEA, AT THE TIME OF  
THE ATTEMPTED WAIVER, AT THE  
TIME OF THE ATTEMPTED ORAL  
MOTION TO WITHDRAW AND THEN  
SUBSEQUENTLY AT NELSON  
INQUIRY THAT FOLLOWED IS  
CRUCIAL TO THE CREDIBILITY  
DETERMINATION THAT THE  
DEFENDANT WAS NOT, IN FACT,  
UNDER THIS MISIMPRESSION.

>> WE'VE

ALREADY -- ESSENTIALLY  
THERE'S ALREADY BEEN A  
DETERMINATION ON THE  
INEFFECTIVE ASSISTANCE OF  
COUNSEL BY THE TRIAL JUDGE  
FINDING THAT THIS WAS TRIAL  
STRATEGY.

IS THAT WHAT YOU ARE --

>> THAT'S STRATTY.

SHRUM WHAT I HAVE A PROBLEM  
WITH.

IS THERE ARE MANY -- NOT  
MANY -- THERE ARE JUDGES  
ACROSS THE STATE THAT ARE  
WILLING TO DO THE PENALTY  
PHASE AND ALLOW THE WAIVER  
TO OCCUR.

I AM TRY -- I'M HAVING  
TROUBLE UNDERSTANDING WHY IT  
THAOD BE A SECRET FROM THE  
JUDGE AND THE STATE -- YOU  
KNOW HERE YOU APPROACH THE  
STATE AND SAY MY CLIENT IS  
WILLING TO PLEAD GUILT, SAVE  
THE STATE A TRIAL, BUT WHAT  
HE WANTS IS HE WANTS US TO  
THEN GO BEFORE THE JUDGE.

BECAUSE HE KNOWS THAT THIS IS -- THIS CRIME IS SO HORRIFIC AND THE AGGRAVATORS ARE SO SUBSTANTIAL THAT HIS ONLY CHANCE IS MAYBE BEFORE A JUDGE, IF A JURY GETS AHOLD OF THIS THERE'S NO WAY.

I JUST -- IN THAT -- AT LEAST IT'S CLEAR TO ME THAT THIS DEFENDANT THOUGHT THE TWO WERE GOING TOGETHER. NOW WHETHER HE WAS CONFUSED ABOUT IT -- WHY WOULDN'T THAT -- WHY IS IT THAT THEY TESTIFIED THAT THEY DIDN'T TELL THE JUDGE THAT YOU KNOW THE GUILT PLEA THAT THEY WOULD LIKE TO ALSO HAVE HIM CONSIDER A WAIVER.

WHY DID THEY WAIT UNTIL AFTER THE GUILT PLEA.

>> I THINK THEY WOULDN'T HAVE BEEN ABLE TO -- THEY DIDN'T THINK THEY COULD BE PERSUASIVE IF THEY MADE IT CONDITIONAL UPON THAT.

>> BUT WHY NOT?

HERE'S A SAVE THE STATE A SUBSTANTIAL AMOUNT OF TIME IN TRYING A CASE.

IT'S NOT THE WAIVER OF THE JURY TRIAL PENALTY PHASE.

THERE MIGHT BE A LOT OF STATE ATTORNEYS OR JUDGES THAT WOULD SAY, SURE, WILL BUY THAT PACKAGE.

I DON'T -- THAT'S WHY I HAVE TROUBLE SEEING THIS AS A STRATEGY MOVE THAT WILL KEEP IT FROM EVERYBODY AND THEN AFTER THEY'VE ACCEPTED THE PLEA AS IF THEY ARE GOING TO MAYBE NOT ACCEPT THE PLEA, THEN WE'LL SAY BUT NOW WE WOULD LIKE THE WAIVER.

>> I THINK IT'S CLEAR FROM THE RECORD THAT THEY DID NOT THINK THE PROSECUTION WOULD EVER AGREE TO THE WAIVER OF THE PENALTY PHASE JURY. HOWEVER, IT IS IMPORTANT TO FOCUS ON THAT ALLEGED SECRECY CAMPAIGN BECAUSE IN

FACT IT GOES TO DISPROVE THE  
ALLEGATIONS THAT MR. TANZI IS  
MAKING NOW  
THAT -- ALLEGATION THAT  
MR. TANZI IS MAKING NOW THAT  
HE THOUGHT IT WAS A DONE  
DEAL.

BECAUSE LOGICALLY IF YOU  
THINK IT'S A DONE DEAL  
THERE'S NO NEED FOR SECRECY.  
THE ONLY NEED FOR SECRECY  
IS TO BE PERSUASIVE.

AND IF YOU NEED TO BE  
PERSUASIVE IT'S BECAUSE  
THERE'S A DECISION TO MAKE.  
IF THERE IS A DECISION TO BE  
MADE BY THE JUDGE IT'S NOT A  
DONE DEAL.

THAT'S WHY HIS TESTIMONY WAS  
REJECTED AT THE EVIDENTIARY  
HEARING.

>> WELL, WHAT WAS THE POINT  
OF THE DOCUMENT AFFIDAVIT  
THAT MR. TANZI ENDED UP  
SIGNING THAT TALKS ABOUT THE  
FACT OF THE WAIVER OF THE  
JURY?

WHAT WAS THE PURPOSE OF  
THAT?

>> I'M NOT SURE WHAT THE  
PURPOSE OF PUTTING IT IN  
WRITING WAS.

THAT SOMETHING THAT TRIAL  
COUNSEL DECIDED TO DO.

BUT I THINK IT'S IMPORTANT.  
BECAUSE MY APPOINTMENT DOES  
FOCUS ON THAT QUITE A BIT.

I THINK IT'S IMPORTANT TO  
PUT IN THE CONTEXT OF THE  
RECORD.

THIS WAS A -- AFFIDAVIT WAS  
SUBMITTED TO THE COURT AT  
THE TIME WHEN THE ATTEMPTED  
JURY WAIVER OCCURRED AND THE  
RECORD AND WHAT WAS STATED  
TO THE COURT, IN FACT, WAS  
THE CORRECT STANDARD.

AND IT WAS IN FACT  
MR. KUYPERS, NOT THE  
PROSECUTION WHO STARTED  
RIGHT OFF THE BAT AND SAID,  
YOUR HONOR, THIS IS THE  
STATE OF THE LAW IT'S IN  
YOUR DISCRETION.

WE'RE ASKING YOU AND THE  
AFFIDAVIT IS INTENDED TO BE  
PERSUASIVE.

AND AS I STATED IN MY BRIEF  
THE WORD "WISH" WHICH IS ALL  
OVER THAT AFFIDAVIT IS  
INTENDED TO PERSUADE THE  
COURT.

YOUR HONOR, LOOK YOU HAVE  
THIS DECISION TO MAKE.

BUT IT'S MY RIGHT AND I'M  
GIVING IT UP.

YOU HAVE NO REASON NOT TO  
ALLOW ME TO GIVE US WHAT IS  
MY RIGHT.

THAT WAS THE LANGUAGE OF THE  
AFFIDAVIT.

BUT AT THE TIME IT WAS  
PRESENT TO THE COURT, THE  
STANDARD WAS ACTUALLY  
RECITED IN AT LEAST SIX  
DIFFERENT TIMES BECAUSE THE  
COURT WAS A BIT HESITANT AS  
TO WHETHER TO DO THIS OR  
NOT.

THERE WAS IN FACT A  
DIFFERENT FROM THE TRIAL  
ATTORNEY WHO FIRST STATED  
YOUR HONOR, IT'S THE  
DISCUSSION.

WE'RE -- WE'VE RESEARCHED  
THIS ISSUE AND IT'S NOT ONLY  
IMPORTANT HE WAS THE FIRST  
ONE TO STATE THE CORRECT  
STANDARD.

THEN THE PROSECUTION JUMPED  
IN AND SAID YOUR HONOR WE  
AGREE ENTIRELY WITH COUNSEL.  
THIS IS STANDARD.

IT'S ENTIRELY UP TO YOU.

WE CANNOT OPPOSE IT.

WE'RE NOT AGREEING TO IT.

BUT WE CANNOT OPPOSE IT.

AND IT WAS REPEATED IN AT  
LEAST THREE DIFFERENT PARTS.

>> BUT, IS THERE TESTIMONY,  
THAT AGAIN THIS IS SORT OF  
THIS CAREFUL STRATEGY ABOUT  
WHAT THEY WILL DO AND PLEAD  
GUILT HAVING PLEAD FELT.

BUT THAT IT WASN'T UNTIL TWO  
DAYS BEFORE THAT THEY  
ACTUALLY REALIZED THE LAW  
WAS THAT IT WAS TOTALLY

WITHIN THE JUDGE'S  
DISCUSS -- DISCRETION.  
IS THAT IN THE RECORD?  
>> I'M NOT SURE -- WELL,  
THERE IS MISS ROSSEL  
INDICATES SHE WAS PRESENT AT  
THE MEETING ON THE 28th OF  
JANUARY AND NOT PRESENT AT  
THE MEETING AT ANOTHER  
MEETING.  
WHERE MR. KUYPERS DISCUSSED  
THIS WITH THE DEFENDANT.  
I THINK IN THE TWO MONTH  
PERIOD THERE'S A LOT OF  
DIFFERENT SCENARIOS THAT CAN  
OCCUR.  
>> THIS IS A VERY SIMPLE  
THICK.  
WE CAN GO BACK IN THE  
RECORD.  
THERE'S AN ASSERTION THAT  
THEY DIDN'T REALIZE OR  
DIDN'T RESEARCH UNTIL TWO  
DAYS OR THE DAYS BEFORE THE  
PLEA THAT IT WAS WITHIN THE  
JUDGE'S DISCRETION.  
IS -- DID THEY VERIFY THAT  
OR NOT?  
IS THAT NOT CORRECT?  
>> I THINK IT WAS FAIRLY  
SHORTLY BEFORE THAT -- IT'S  
NOT THAT THEY DIDN'T  
REALIZE.  
I DON'T THINK THEY CON  
TESTIMONY PHRAEULTED IT.  
THERE WERE OTHER DISCUSSIONS  
THAT DIDN'T CONTEMPLATE THE  
SCENARIO.  
I THOUGHT THE LIFE OFFER OR  
SOME OTHER ALTERNATIVE TO  
SOME PLEA THAT DID  
NOT -- AGAIN, TO ME I'M  
VISIONING THAT THE SCENARIO  
IS AND IT'S PRETTY CLEAR  
FROM THE AFFIDAVIT IS,  
LISTEN, YOUR BEST BET  
IS -- THEY WOULDN'T HAVE  
TALK ABOUT THE RING IN THIS  
THING THE WHOLE PACKAGE.  
YOU PLEAD GUILT.  
YOU WILL HAVE A JUDGE DECIDE  
THIS.  
THE A JUDGE THAT'S NOT  
RUNNING FOR REEKELEN OUTION.

HE'S RETIRING.

HE WILL GIVE YOU YOUR  
AMBASSADOR CHANCE OF A LIFE  
SENTENCE.

YOU WANT TO GO WITH THE  
DEAL.

AND THEN TWO DAYS BEFORE  
THEY GO, OOPS -- I MEAN, WE  
REALIZED THAT NO, IT'S NOT  
AN AUTOMATIC THING BUT WE  
BETTER NOT BRING IT UP TO  
THE JUDGE YET.

WE WILL TWO STEP IT.

I WOULD THINK THAT SOMEONE  
IN THIS DEFENDANT'S STATE OF  
MIND THAT IF HE HAD BEEN  
TRAVELING UNDER ONE SET OF  
CIRCUMSTANCES AND THEN ALL  
OF A SUDDEN THE NIGHT BEFORE  
HE'S TOLD SOMETHING  
ADDITIONAL HE PROBABLY HAVE  
A GOOD REASON TO BE  
CONFUSED.

>> I DON'T THINK THE RECORD  
SHOWS THAT, THAT IS WHAT  
OCCURRED.

I DON'T THINK THAT THE FACT  
THAT THERE IS DISCRETION ON  
THE PART OF THE JUDGE MEANS  
THAT IT'S NOT IN HIS BEST  
SHOT.

EVEN IF THE LAW IS WHAT IT  
IS.

IT'S IN THE DISCRETIONS OF  
THE JUDGE TO ACCEPT THE WAYER  
OR NOT.

THE FACT THAT IT'S NOT A  
CONDITION ON THE PLEA.

THAT'S NOT FORTH COMING FROM  
THE OTHER SIDE.

THERE'S NOTHING HE COULD  
HAVE DONE TO MAKE THAT  
HAPPEN.

IT WAS IN HIS OPINION THAT  
WAS NOT FORTHCOMING.

IT WAS HIS ASBESTOS, STILL.

-- IT WAS HIS BEST BET  
STILL.

WAS THERE EVEN AN ATTEMPT TO  
SEE IF THE STATE WOULD AGREE  
TO A WAIVER OF A -- IN THAT  
SECTION.

YOU SAY THAT WASN'T  
FORTHCOMING HOW DO WE KNOW

THAT?

>> I THINK FROM COUNSEL'S  
TESTIMONY.

OKAY.

HE DID NOT THINK THE  
PROSECUTOR WOULD EVER AGREE  
TO THE WAIVER OF THE JURY.

>> BASED ON WHAT?

>> I DON'T THINK THE RECORD  
IS CLEAR THAT HE  
SPECIFICALLY TESTIFIED ABOUT  
ANY DISCUSSION.

BUT THAT IS WHAT HE BELIEVED  
AND THAT'S WHAT HE TOLD --

>> WHY WOULDN'T THE FIRST  
THING BE, YOU KNOW WHAT MY  
CLIENT WILL PLEAD GUILTY.  
CONTEMPLATING IT.

I WOULD -- WE WOULD LIKE THE  
PACKAGE.

WE WOULD LIKE YOU TO AGREE  
TO IT.

THAT'S WHY I'M TRYING TO  
HAVE -- I'M HAVING TROUBLE  
WITH WHY THE DEFENSE  
WOULDN'T HAVE BEEN  
FORTHRIGHT ABOUT IT AND IT'S  
JUST NOT RINGING TRUE TO ME  
THAT THEY WOULD BE SAYING  
WE'LL SPRING IT ON THEM  
AFTERWARDS AS IF THE  
STATE --

>> YOUR HONOR WE  
CONTEMPLATED.

>> WITH THE COURT, NOT THE  
CONFIDENT.

>> WITH THE COURT.

AND WITH THE STATE TO ASK ON  
HIS BEHALF FIRST, ARE YOU  
WILLING TO CONSIDER WAIVING  
THE JURY TRIAL -- MY CLIENT  
IS CONSIDERING GIVING UP HIS  
RIGHT TO TRIAL.

EVEN THOUGH THIS LOOKS LIKE  
A PRETTY YOU KNOW  
SUBSTANTIAL CASE OF GUILT  
THAT'S SOMETHING THAT WILL  
SAVE THE STATE TIME AND  
MONEY AND HAVING THE -- IN  
HAVING TO PROSECUTE.

>> AGAIN, I DON'T KNOW THE  
QUESTION WAS ASKED OR NOT AT  
THE EVIDENTIARY HEARING.  
IT'S IMPORTANT TO POINT OUT

HE WAS CALLED BY THE STATE  
AT THE EVIDENTIARY HEARING.  
PERHAPS IF IT WASN'T  
SOMETHING BROUGHT UP ON  
DIRECT IT WAS NOT CROSSED  
ON.

BUT IT WAS CLEAR FROM A  
MR. KUYPERS'S TESTIMONY THAT  
HE WAS FAIRLY CERTAIN THAT,  
THAT THE PROSECUTOR WOULD  
NOT AGREE.

CAN WE GO BACK -- I THINK  
THERE'S A QUESTION THAT'S  
NOT BEEN ANSWERED.

I THINK THAT INHERENT IN THE  
QUESTION WAS THAT, THAT THE  
DEFENDANT COUNSEL DIDN'T  
KNOW WHAT THE LAW WAS AT THE  
TIME THIS DISCUSSION WAS  
UNDER WAY WITH REGARD TO A  
PLEA OR NOT.

IS IT THAT -- IS THAT THE  
ATTORNEY THE NIGHT BEFORE  
PULLED THE CASES ON THAT  
ISSUE OR IS THERE  
TESTIMONY -- HE HAD NO IDEA  
WHAT THE LAW WAS IN THIS  
AREA?

BEFORE THE MORNING OF THE?

>> I THINK IT IS CLEAR THAT  
HE KNEW WHAT THE LAW WAS  
WITH RESPECT TO THE  
DISCRETION OF THE COURT TO  
NOT --

>> THAT'S THE ISSUE WE'RE  
TALKING ABOUT, YEAH.  
SO IT WAS CLEAR THAT HE KNEW  
WHAT THE LAW WAS AND ALL  
THIS RESEARCH WE'RE TALKING  
ABOUT HE JUST PULLED THE  
CASES TO BE CERTAIN.

IS THAT WHAT YOU ARE -- IS  
THAT WHAT THIS RECORD SHOWS?

>> ABSOLUTELY.

AND NOT ONLY THAT BUT THE  
RECORD ITSELF THE DISCUSSION  
OF THAT MORNING HE STATES  
THE TRUE STANDARD AND THE  
PROSECUTOR ACTUALLY --

>> THE CONCERN I THINK YOU  
ARE HEARING FROM THE  
QUESTIONS WAS THIS PART OF  
THE DISCUSSION OVER THIS  
PERIOD OF TIME.

YOU'VE HEARD IT FROM SEVERAL JUSTICES THAT WAS THIS LAURA WHEREOF THE LAW AT THE TIME THEY WERE DISCUSSING ALL OF THIS THAT IT WAS UNDER DISKUGS NO MATTER WHAT HAPPEN.

>> I THINK IT WAS CLEAR HE WAS.

I THINK THE ONLY ALLEGATION IS THAT THE DEFENDANT HAS THIS MISIMPRESSION.

I THINK IT'S IMPORTANT TO THE POINT THAT THE COURT SAID IF THERE'S A MISIMPRESSION IT CANNOT JUST BE BECAUSE IT IS.

IT HAS TO BE BASED ON SOME REASONABLE BASIS.

I THINK THAT THERE'S ALSO IMPORTANT TO FOCUS ON WHAT IS SAID BY THE DEFENDANT ON THE RECORD AT THE TIME THAT HE ATTEMPTS TO WITHDRAW THIS PLEA ORALLY.

AND HE NEVER SAID MY ATTORNEY TOLD ME THE WRONG STANDARD.

HE NEVER SAYS "MY ATTORNEY TOLD ME THAT THERE WAS NO WAY YOU WOULD NOT ACCEPT THIS WAIVER.

MY ATTORNEY PROMISED ME."

>> WHICH BRINGS UP AN INTERESTING QUESTION HERE. HE MADE THIS A SORT OF ORAL MOTION TO WITHDRAW HIS PLEA PRIOR TO THE JURY BEING PICKED AND ALL FOR THE PENALTY PHASE.

>> YES.

>> SO SHOULD THE TRIAL JUDGE HAVE DEALT WITH THAT AT THAT POINT?

I MEAN, THERE WAS NOTHING TO LOSE AT THE POINT WHEN HE MADE HIS ORAL MOTION. NOTHING FURTHER HAD GONE ON. IT WOULD HAVE BEEN A SIMPLE MATTER OF SAYING, OKAY. YOU DIDN'T UNDERSTAND WHAT WAS GOING ON.

SO WHY DON'T WE LET YOU WITHDRAW THE PLEA AT THAT

POINT.

>> I BELIEVE THE RECORD  
SHOWS THAT HE DID.

ND -- AND THE RESPONSES FROM  
THE DEFENDANT -- HE DID  
ADDRESS IT.

HE ASKED -- MR. TANZI  
ADDRESSED THE COURT ON THE  
RECORD.

WHEN MR. TANZI -- OR IT WAS  
ASKED WHAT HE WANTED TO SAY  
HE SAID WELL I WASN'T  
ENTIRELY TRUTHFUL WITH THE  
COURT EARLIER TODAY AND WHAT  
HE POINTS OUT IS NOT THE FACT  
THAT HE ASSUMED OR HAD THIS  
IMPRESSION THAT THE WAIVER  
WAS A DONE DEAL.

IF HE LATER TESTIFIED AT THE  
EVIDENTIARY HEARING BUT HE  
FOCUSES ON HIS -- BING  
DISPLEASED WITH HIS  
ATTORNEYS.

>> DIDN'T HE SAY SOMETHING  
TO THE EFFECT THAT, YOU KNOW,  
I THOUGHT IT WOULDN'T HAVE  
TO HAVE A JURY AT THE  
PENALTY PHASE BUT IF I WILL  
HAVE ONE AT THE PENALTY  
PHASE I MAY AS WELL GO ON  
AND HAVE A JURY DETERMINE  
GUILT OR INNOCENCE ALSO.

>> CERTAINLY.

NOT THOSE WORDS BUT  
SOMETHING TO THAT EFFECT?

>> BECAUSE HE CERTAINLY  
HOPED THAT WOULD BE THE  
RESULT.

THAT'S PRECISELY THE KIND OF  
SECOND BITE OF THE APPLE  
THAT IN COSTELLO THAT THIS  
COURT WARNED --

>> AT THAT POINT THERE WAS  
NOTHING TO LOSE IN THIS WAS  
SAME DAY HE HAD ENTERED THE  
PLEA SEVERAL HOURS LATER.  
SO I'M HAVING SOME PROBLEMS  
TRYING TO UNDERSTAND WHY IT  
WASN'T DEALT WITH AT THAT  
POINT INSTEAD OF GOING  
THROUGH THE WHOLE MOTION OF  
DOING A JURY SELECTION,  
GOING THROUGH THE PENALTY  
PHASE AND THEN COUNSEL

FILING A MOTION TO WITHDRAW  
THE PLEA.

>> BUT IT WAS DEALT WITH.  
HE WASN'T ALLOWED TO  
WITHDRAW HIS PLEA JUST  
BECAUSE.

AND I DON'T THINK THAT CAN  
EVER POSSIBLY BE THE  
STANDARD.

>> DOES THE JUDGE MAKE A  
RULING HE COULDN'T AT THAT  
POINT OR WAS NO RULING MADE?

>> THE TRIAL COURT MADE A  
RULING DENYING THE MOTION  
AND -- BUT IT IS IMPORTANT  
TO FOCUS ON WHAT THE  
ALLEGATIONS WERE AT THAT  
POINT IN TIME.

MR. TANZI BEGINS TO TALK  
ABOUT BEING DISPLEASED WITH  
HIS ATTORNEYS.

HE THEN -- THE COURTS ASKED  
ABOUT WHAT ABOUT YOUR  
ATTORNEY CAUSES YOU TO BE  
DISPLEASED.

HE NEVER ONCE SAID THEY TOLD  
ME YOU WOULD ACCEPT  
THISWAYER.

HE THEN GOES ON TO TALK  
ABOUT MISS ROSSEL AND THE  
PROBLEMS OF WHATEVER SEXUAL  
IMPROPRIETIES HAD OCCURRED  
BEFORE.

>> IT SEEMS THERE WERE TWO  
THINGS GOING ON.

HE WAS ASKING TO WITHDRAW  
HIS PLEA AND ASKING TO  
CHANGE HIS ATTORNEY.

AND SO THE COURT SEEMED TO  
HAVE FOCUSED ON THE SECOND  
ASPECT OF IT VERSUS THE  
FIRST ASPECT OF WITHDRAWING  
THE PLEA.

>> BECAUSE WHEN HE ASKED WHY  
HE WANTS TO WITHDRAW THE  
PLEA HE STARTS TALKING ABOUT  
HOW HE IS DISPLEASED WITH  
HIS ATTORNEY THERE.  
THEY ARE INTERTWINED.

>> DO YOU THINK THERE WAS  
CONFUSION GOING ON HERE  
MISAN PREHEPBGS ON  
MR. TANZI'S PART AS TO WHAT  
THE WHOLE CONSEQUENCE IS OF

THIS --

>> ABSOLUTELY NOT YOUR HONOR.

I BELIEVE WHAT HAPPENED HE TOOK HIS BEST SHOT AND THE RESULT THAT HE WISHED FOR WAS NOT WHAT OCCURRED.

THAT'S PRECISELY THE STANDARD THAT CANNOT POSSIBLY BE --

>> DID YOU SAY THAT THE STATE DIDN'T OBJECT TO THE MOTION TO WITHDRAW THE PLEA?

>> AT THE TIME THAT IT WAS MADE ORALLY.

>> THERE WAS NO OBJECTION FOR THE STATE -- WHEN THE MOTION WAS THEN FILED IN WRITING FOR IT TO RELATE BACK TO THE TIME PRESENTENCE.

YEAH.

YOU HAD SAID SOMETHING ABOUT THE STATE SAID IT WASN'T GOING TO OPPOSE THE MOTION OR SOMETHING.

>> I'M SORRY IF I SAID THAT.

>> I THINK YOU WERE TALKING ABOUT THE -- HE GOING TO WAIVE THE JURY.

>> THE STATE DID OPPOSE IT. BUT IT DID STATE TO THE COURT ON SEVERAL OCCASIONS STATING THE CASE LAW.

TWO OF THE COURTS THAT THE COURT WOULD BE CLEAR THAT IT IT WAS WITHIN THE COURT'S DISCRETION DESPITE THE STATE NOT --

>> WHAT YOU SAID THERE WAS A SUBSEQUENT WRITTEN MOTION AND THE STATE DIDN'T IMPOSE IT RELATING BACK TO THE ORAL --

>> THAT'S CORRECT.

AND THEY PUT IT UNDER THE MORE LIBERAL GOOD CAUSE STANDARD PRESENTENCE STANDARD.

>> WHAT DID THE STATE STAY WITH REFERENCE TO THE WAIVER OF THE JURY FOR THE PENALTY PHASE?

>> AT THE TIME THE WAIVER IS

PRESENTED TO THE COURT THE STATE STATED ON THE RECORD CONSENTING TO IT BUT IT WAS IN THE COURT'S DISCRETION AND CITED THE CASES THAT STOOD FOR THAT PROPOSITION. >> MOREOVER, WE HAVE -- THE EVIDENTIARY HEARING THE TESTIMONY OF MR. KUYPERS WHICH WAS BELIEVED BY THE COURT.

AND THAT IS A SUBSTANTIAL BURDEN FOR MR. TANZI TO OVERCOME. BECAUSE IT IS A FINDING OF CREDIBILITY. AND IT IS AN ABUSE OF DISCRETION STANDARD AND THEY SIMPLY HAVEN'T ESTABLISHED THAT.

>> WHAT ABOUT HIS STATEMENT -- ESPECIALLY ON FOURTH PAGE OF THE ORDER SAYS IN HIS OWN STATEMENT THE DEFENDANT ADMITTED THE COUNSEL NEVER ADVISED HIM DIRECTLY OR INDIRECTLY THAT HIS GUILT PLEA WOULD LIKELY RESULT IN THE COURT GRANTING HIS MOTION TO WAIVE.

AND HE CITED TO THE RECORD A 2368 AND I WOULD HAVE TO GO BACK AND LOOK TO SAY THAT, THAT PARAGRAPH ABOUT WHAT THE DEFENDANT ACTUALLY SAID TO THE COURT IS INCORRECT.

>> RIGHT.

WELL WHAT OCCURRED WAS THAT HE WAS ASKED REPEATEDLY TO PLEASE STATE WHAT IT IS THAT MR. KUYPERS HAD SAID THAT LED HIM TO THIS IMPRESSION. HE COULD NOT UTTER A SINGLE WORD THAT MR. KUYPERS HAD SAID TO HIM.

HE COULD NOT SAY THAT WHAT THIS REASONABLE BASIS FOR HIS IMPRESSION WAS AND HIS JAN -- ANSWER TO I THINK ABOUT --

>> BUT THE -- SO WHAT HE SAID WAS I WAS CONFUSE ABOUT MY PLEA.

I THOUGHT THAT I WAS GOING

TO BE ABLE TO HAVE THE JUDGE  
SENTENCE ME.

CORRECT?

THAT'S WHAT HE -- THIS  
DEFENDANT, WHO WE KNOW IS  
SERIOUSLY FROM ALL THE BOTH  
AGGRAVATION AND MITIGATION  
THIS IS A TERRIBLE, TERRIBLE  
MURDER CASE.

BUT THERE'S ALSO IN READING  
THIS DEFENDANT'S HISTORY HE  
WAS INSTITUTIONALIZED AS A  
CHILD AND HE WAS ABUSED FOR  
SEVERAL YEARS.

SO WE'RE NOT EXACTLY PLAYING  
WITH SOMEBODY THAT HAS GOT  
YOU KNOW HIS Ph.D.

IF HE IS ASKED HE SAID I  
UNDERSTAND THAT.

A FEW HOURS AFTER HE SAID I  
UNDERSTAND THAT THESE TWO  
WERE GOING TOGETHER.

WHAT EXACTLY DID YOU COUNSEL  
SAY -- HE SAID I CAN'T  
REMEMBER EXACTLY.

HOW IS THAT NOT -- I MEAN  
HE'S STILL SAYING THAT HE  
GOT THAT IMPRESSION FROM  
EVERYTHING.

HOW DO YOU EXPECT THE  
DEFENDANT I THEY DON'T HAVE  
A TAPE RECORDER TO KNOW  
LET'S -- ON THE NIGHT OF  
THIS DAY HE TOLD ME THIS.  
ISN'T THAT ALL HE'S REALLY  
SAYING?

>> HE SAYING THAT AT THE  
EVIDENTIARY HEARING MUCH  
LATER.

I THINK IT'S IMPORTANT HE  
DOESN'T SAY THAT AT THE  
TIME.

AND YET IT'S NOT THAT HE  
DOESN'T SAY ANYTHING.  
HE SAYS LOTS OF THINGS.  
HE GOES ON, ON PAGE AFTER  
PAGE AFTER PAGE.

>> YOU MEAN ON THE DAY.

>> OF THAT DAY.

>> YOU WOULD HAVE TO LOOK AT  
THAT.

>> ABSOLUTELY.

>> AND COMPARE HIS TESTIMONY  
THERE WITH THE TESTIMONY OF

THE EVIDENTIARY HEARING.

>> HE GOES ON TO SAY AND I  
THINK IT'S IMPORTANT TO TALK  
ABOUT HIS MENTAL L  
DEFICIENCIES.

THERE'S MENTAL DEFICIENCY  
AND THERE'S MENTAL  
DEFICIENCIES.

IT'S CLEAR WE'RE DEALING  
WITH A PERSON WITH WHATEVER  
MENTAL PROBLEMS HE MAY NOT  
HAVE THEY DON'T EFFECT HIS  
ABILITY TO UNDERSTAND THE  
PROCEEDINGS AGAINST HIM.

I THINK THAT'S NOT ONLY  
EVIDENCE BY HIS PRIOR  
COMPETENCY EVALUATION BUT  
ALSO BY WHAT HE STATES ON  
THE RECORD.

HE STATED DURING THE INQUIRY  
HE KNOWS HOW TO GET HIS  
ATTORNEY OFF HIS CASE.  
HE HAS PREVIOUSLY THREATENED  
HIS ATTORNEYS TO GET THEM  
OFF HIS CASE.

HE'S NOT A PERSON THAT'S NOT  
UNDERSTANDING OF THE SYSTEM.  
WHO IS NOT UNDERSTANDING OF  
GREAT DETAIL OF WHAT IS  
SYSTEM IS.

ON THIS RECORD THAT THIS  
DEFENDANT MASTER BAITED IN  
FRONT OF ONE OF  
HIS -- THAT'S CORRECT  
COUNSEL.

>> HOW DID THAT COME UP IN  
THIS RECORD THAT, THAT IN  
FACT HAD HAPPENED?

>> HE DISCUSSES IT AT LENGTH  
DURING THE INITIAL -- THE  
ORAL MOTION TO WITHDRAW  
BECAUSE WHEN HE IS ASKED BY  
THE COURT WHAT ARE YOUR  
PROBLEMS WITH THE ATTORNEY  
HE SAID WHAT HAPPENED THESE  
ALLEGATIONS HAD OCCURRED IN  
FRONT OF A DIFFERENT JUDGE  
IN THE CASE HAT BEEN  
REASSIGNED TO A NEW JUDGE IN  
THIS JUDGE WAS NOT ENTIRELY  
FAMILIAR WITH EVERYTHING  
THAT HAPPENED.

AND PRETTY MUCH YOU HAVE  
BEEN DEALT WITH ATTORNEY WAS

REMAINING ON THE CASE.  
EVERY TIME SHE MET WITH THE  
DEFENDANT WOULD COME  
ACCOMPANIED BY SOMEONE ELSE.  
SO THIS JUDGE WAS NOT  
ENTIRELY FAMILIAR WITH THE  
FACTS OF ALL THOSE  
ALLEGATIONS.

BUT THE DEFENDANT FREELY  
ADMITS TO THEM AND THAT'S  
WHAT HE FOCUSES ON WHEN HE  
IS SKA -- ASKED WHAT ARE  
YOUR PROBLEMS WITH YOUR  
ATTORNEYS.

THAT'S ONE OF THE REASONS  
WHY HIS TESTIMONY ABOUT THE  
EVIDENTIARY HEARING IS NOT  
BELIEVEABLE BECAUSE WHEN HE  
IS ASKED DIRECTLY BY THE  
COURT, DO YOU HAVE A PROBLEM  
WITH MR. KUYPERS WHO EVEN  
MISS ROSSEL IN HER AFFIDAVIT  
ADMITS WAS THE ONE WHO WAS  
DEALING WITH HIM BECAUSE OF  
THESE PROBLEMS, HE WAS  
DEALING MORE CLOSELY WITH  
THE DEFENDANT.

SO SO WHEN HE WAS ASKED  
SPECIFICALLY IF HE HAD A  
PROBLEM WITH MR. KUYPERS I  
HAVE ABSOLUTELY NO PROBLEM.  
IF NATURAL THING TO SAY IF  
YOU ATTORNEY MISADVISED YOU  
OR GIVE YOU AN IMPRESSION  
WOULD BE TO SAY THAT.

SO AND I JUST WANT TO  
BRIEFLY SAY THAT'S ONE OF  
COUNSEL'S ARGUMENTS THAT THE  
COMPETENCY WAS NOT A  
STANDARD TO BE USED BUT WHEN  
THAT IS THE ARGUMENT THAT  
THIS PERSON'S -- IF THAT IS  
THE ARGUMENT ALTHOUGH HIS  
DIDN'T MAKE IT HERE BUT HE  
MAKES KNIT THE BRIEF THAT  
BECAUSE OF HIS  
MENTAL -- MENTAL STATUS THIS  
MISIMPRESSION IS  
UNDERSTANDABLE THEN  
COMPETENCY IS ENTIRELY  
RELEVANT.

BECAUSE HE WAS NOT ONLY  
BECAUSE OF THE EVALUATION  
BUT THE RECORD ITSELF THE

COLLOQUY ITSELF AND EVERY  
DETAIL OF THE DISCUSSIONS AT  
THOSE FOUR CRITICAL POINTS  
IN TIME --

>> TELL ME WHAT THE RECORD  
SHOWS WITH REFERENCE TO THIS  
ISSUE OF HIM BEING ADVISED  
IF HE WAS IN OTHER WORDS  
THAT'S WHY IT'S AN  
OPEN-TENDED QUESTION THAT  
DURING THE PLEA DON'T SAY  
ANYTHING ABOUT THE JURY FOR  
THE PENALTY PHASE.

DON'T MAKE AN ISSUE OF THAT.  
THAT WILL ALL -- WHATEVER -- WE  
ARE ENLIGHTENED AS TO  
WHETHER THE LAWYERS  
INSTRUCTED HIM TO THAT  
EFFECT OR YOU KNOW -- TELL  
ME -- WHAT'S THE RECORD  
SHOWS ABOUT THAT ASPECT.

>> HIS TESTIMONY IS CLEARLY  
THAT, THAT WAS THE SECRECY  
CAMPAIGN WAS WHAT WE WERE  
DOING.

MISS ROSSEL'S AFFIDAVIT  
POINTS TO THAT BEING THE  
STRATEGY AND EVEN  
MR. KUYPERS IN HESS  
TESTIMONY AGREE THEY'D WERE  
TRYING TO CATCH THE STATE.

>> IS THERE A PROBLEM WITH  
THAT, THAT IS THE IDEA YOU  
KNOW OF SOMETIMES THAT THE  
LAWYERS SAY DON'T OPEN YOUR  
MOUTH.

>> YEAH.

>> AND THEN DAY ARE JOINING  
THE COURSE OF THE PLEA  
COLLOQUY IF THE DEFENDANT  
WANTS TO SAY WELL OF COURSE  
I'M EXPECTING YOU KNOW THAT  
THEY THERE NOT BE A JURY  
DURING -- IN ESSENCE THE  
LAWYERS HAVE SAID --

>> RIGHT.

>> YOU KNOW DON'T RAISE  
ANYTHING BECAUSE THEY ARE SO  
FRIGHTENED THAT THE JUDGE  
WON'T ACCEPT THE PLEA TO  
BEGIN WITH.

WELL THE PROBLEM IS THAT YOU  
WAS THERE AN ISSUE LIKE THAT  
HERE?

>> I UNDERSTAND THAT MIGHT EXPLAIN SOME OF THE ANSWERS IN THE COLLOQUY. BUT THE FACT OF THE MATTER IS THAT WE DON'T JUST HAVE THE COLLOQUY. ALTHOUGH THE COLLOQUY IS IMPORTANT. WE HAVE THE COLLOQUY. WE HAVE THE EXPRESSION FROM THE RECORD IMMEDIATELY AFTER SHORTLY AFTER WHEN THE ATTEMPTED JURY WAIVER IS PRESENTED TO COURT. WE HAVE THE DEFENDANT SPEAKING ON THE RECORD WHEN HE MAKES HIS ORAL MOTION AND AN INQUIRY SUBSEQUENT TO THAT. AT NONE OF THOSE OTHER TIMES IS THIS BROUGHT OUT AND SPECIFICALLY THE DEFENDANT SAYS WHEN HE FIRST ADDRESSES THE COURT HE SAID I WASN'T TRUTHFUL BEFORE TO THE COURT. WELL THE FIRST THING OUT OF YOUR MOUTH WOULD BE I WASN'T TRUTHFUL ABOUT THE FACT THAT I WAS PROMISED ANYTHING. I WAS PROMISED YOU WOULD ACCEPT THIS. HE SAID I WAS NOT TRUTHFUL TO YOU ABOUT MY PROBLEMS WITH MY ATTORNEY. SO NOT ONLY THAT, THE SECOND POINT THAT IS IMPORTANT TO MAKE ABOUT THE SECRECY CAMPAIGN IS THAT IT -- BELIES HIS TESTIMONY MR. TANZI'S TESTIMONY AT THE EVIDENTIARY HEARING. IF IN FACT HE UNDERSTOOD THERE TO BE A DONE DEAL THERE'S NO REASON TO MAKE -- HAVE A SECRECY CAMPAIGN. IF YOU WERE TRYING TO CATCH THE PROSECUTION OFF GUARD, WHICH EVEN MR. ROSSEL ADMITS IN HER AFFIDAVIT WAS NOT SUCCESSFUL BUT THEY HAD THE CASES STATING THE APPROPRIATE STANDARD.

BUT IF THERE A NEED FOR  
SECRECY CAMPAIGN YOU NEED TO  
BETTER SUEDE THE JUDGE.  
IF YOU NEED TO PERSUADE THE  
JUDGE THERE WAS A CHANCE  
THAT THE JUDGE WAS NOT GOING  
TO ACCEPT THE WAIVER.  
AND MR. TANZI AND EVERYTHING  
IN THE RECORD SUPPORTS THE  
TRIAL COURT'S FINDING THAT  
HE UNDERSTOOD THAT AND  
UNDERTOOK THIS STRATEGY  
BECAUSE IT WAS HIS BEST SHOT  
WHEN FACED WITH AN  
OVERWHELMING EVIDENCE NOT  
ONLY OF GUILT BUT OF 7  
SEPARATE AGGRAVATORS.  
AND THAT IS WHY THIS COURT  
NEEDS TO AFFIRM THE TRIAL  
COURT'S DECISION TO DENY  
THIS --

>> SPEAKING OF 7  
AGGRAVATORS.

>> YES.

THE TRIAL JUDGE IN THIS CASE  
FOUND THAT THIS MURDER WAS  
COMMITTED DURING THE COURSE  
OF A KIDNAPPING AND DURING  
THE COURSE OF SEXUAL  
BATTERY.

AND IS THAT -- IS THAT  
PROPER THAT HE WOULD FIND  
AND WEIGH AND I THINK HE  
GAVE SUBSTANTIAL WEIGHT THAT  
IT WAS COMMITTED DURING A  
SEXUAL BATTERY AND COMMITTED  
DURING THE KIDNAPPING?

>> WELL, FRANKLY, YOUR HONOR  
THE STATUTE DOESN'T EXPRESSLY  
ADMIT IT OR PROHIBIT IT.

I DON'T THINK THERE'S ONE  
CASE THAT MR. TANZI'S  
COUNSEL HAS STATE FORD THE  
PROPOSITION THAT IS NOT  
ALLOWED UNDER THE STATUTE.

>> MOST OF THE CASES WE SEE  
EVEN WHEN THEY ARE MULTIPLE  
FELONIES COMMITTED YOU SORT  
OF TAKE ONE AND KIND OF GO  
WITH IT AND HERE THE TRIAL  
JUDGE SPECIFICALLY DELINEATES  
USES THE TWOING A A GREAT  
SRAEUTOR AND GIVES BOTH  
SUBSTANTIAL WAY.

>> IN MOST INSTANCES WHEN  
TWO OR MORE  
FELLY -- FELONIES ARE  
COMMITTED TOGETHER THEY  
THOUGH THE SENTENCE.  
THAT'S NOT CASE HERE AND  
THAT'S PLEASE SIZELY WHAT  
THE CASE FOCUSES ON.  
AND IN ANY EVENT THE STATE  
ADMIT --

>> WHY AREN'T THEY  
INTERTWINED HERE?

>> BECAUSE HE DISTINCTLY  
COMMITTED A KIDNAPPING FOR  
THE PURPOSE OF GETTING  
HEFL -- HIMSELF TO  
KEY WEST.

AND THEN SUBSEQUENT TO THAT  
HE SEPARATELY FORMED THE  
IDEA OF THE SEXUAL BATTERY.

>> SO YOU ARE ARGUING THAT  
THESE ARE ALL -- WE HAVE  
DIFFERENT CRIMINAL EPISODES  
HERE.

THIS ISN'T ONE THAT JUST --

>> THE KIDNAPPING IS  
CERTAINLY CONTINUING.  
BUT THE SEXUAL BATTERY YOU  
MAY NOT MISS IN HIS CON  
TPEBGS IS AN AFTER THE FACT  
THOUGHT.

WHEN HE HAD THE VICTIM BOUND  
AND GAGGED IN THE BACK OF  
THE CAR.

HE MIGHT AS WELL ASSAULT  
HER.

>> I THINK HIS CONFESSION  
FAIRLY CLEARLY LAYS OUT THAT  
IT WAS A SEPARATE CRIME ALL  
TOGETHER.

I WANT TO GO BACK TO JUST  
SOMETHING AND SEE  
JUST -- I'M LOOKING AT  
COLLOQUY FROM PAGES 2045 AND  
2046 OF THE RECORD.

WHEN YOU SAID THAT RIGHT  
AFTER HE -- THE JUDGE  
WOULDN'T WAIVE THE PENALTY  
PHASE THAT ALL HE DID WAS  
COMPLAIN ABOUT HIS COUNSEL  
NOT ABOUT THIS ISSUE.

BUT HE SAYS IN THERE I WANT  
COMPETENT COUNSEL.  
I DON'T WANT A COUNSEL TO

LIE TO ME AS WHO HE OR SHE  
THINKS ABOUT WHAT IS  
HAPPENING OR NOT HAPPEN.  
WE WENT THROUGH PROCESS TO  
GET A JURY.

THEN WE WILL PICK A JURY WHY  
NOT HAVE A GUILT PHASE.

AS I READ THIS, IT SEEMS TO  
ME PRETTY CLEAR THAT WHAT HE  
IS SAYING RIGHT OFF THE BAT  
IS THEY MISREPRESENTED TO ME  
WHAT THE EFFECT OF MY PLEA  
WAS GOING TO BE.

DO YOU NOT READ IT THAT WAY.

>> I DON'T READ THAT IT WAY.

I WANT TO POINT OUT WHEN HE  
SAYS I'M GOING TO GET NO  
FINALITY TO THIS CASE.

THAT'S CLEARLY AN EXPRESSION  
OF THE DISAPPOINTMENT THAT  
THE COURT DID NOT ACCEPT THE  
JURY WAIVER NOT THAT HE  
BELIEVES THAT THERE WAS NO  
DISCRETION IN THE COURT'S  
PART.

NOW THE STATEMENT ABOUT HIS  
COUNSEL'S MISADVISING HIM  
FURTHER SHORTLY AFTER THAT  
THERE WAS AN INIR -- INQUIRY  
WHERE H SPECIFICALLY ASK  
WHAT THE MISADVICE.

I DON'T HAVE THE REPORT TO  
CITE.

HE IS SPECIFICALLY ASKED  
WHAT MISADVICE AND HE STATES,  
HE TALKS ABOUT A PRIOR TIME  
WHEN WE WERE DISCUSSING HIS  
ABILITY TO -- HE DISCUSSES  
TWO SEPARATE ISSUE.

THE ABILITY TO WAIVE THE  
JURY THE GUILT PHASE JURY.  
IN OTHER WORDS HAVING A  
BENCH TRIAL.

AND IT IS CLEAR IN HE ADMITS  
WHEN THE COURT THEN ASKED  
ISN'T THAT IN FACT WHAT  
HAPPENED AND HE AGREES THAT  
THAT WAS NOT MISADVICE.

>> IF THERE ARE NO OTHER  
QUESTIONS I WOULD ASK THE  
COURT TO AFFIRM THE LOWER  
COURT ORDER AFFIRMING RATHER  
DENYING THE MOTION TO  
WITHDRAW MR. TANZI'S PLEA

AND AFFIRM HIS DEATH  
SENTENCE.

>> THANK YOU.

>> JUST TO GO BACK TO THAT  
ISSUE THERE IS AN ENTER  
RELATIONSHIP WITH THE NELSON  
INQUIRY IN THAT PORTION THAT  
JUSTICE PARIENTE WAS  
REFERRING TO AND IT'S A  
CLEAR REFERENCE TO ADVICE  
REGARDING THE WAIVER OF THE  
PENALTY PHASE.

>> BUT IT DOES SAY THAT A  
2066 STATED HIS ATTORNEY HAD  
INCORRECTLY ADVISED HIM THAT  
HE -- WAS IT  
INCORRECTLY -- DID HE SAY HE  
WOULD BE ABLE TO WAIVE?

>> THE JURY PART -- WOULD BE  
ABLE TO WAIVE THE JURY PART  
IN THE FILE OF THE PENALTY  
PHASE.

>> HE -- THAT'S CORRECTED  
BY.

SO ISN'T THAT --

>> WELL THE STATE  
THOUGHT -- HE SAID, WELL HEY  
IT TURNS OUT THAT WAS  
CORRECT.

THIS WAS EARLIER ON THAT HE  
RECEIVED THIS.

AND ACTUALLY THERE'S A MEMO  
IN THE RECORD THAT THERE  
SEEMS TO BE REFERRING TO  
THAT ACTUALLY DOES RELATE TO  
THE GUILT PHASE JURY.

>> SO WITH ALL OF THIS --

>> EVIDENCE AT LEAST IN  
MICHAEL TANZI'S MIND HE  
EXPRESSES CONFUSION ABOUT  
THE ADVICE THAT HE RECEIVED  
WITH RESPECT TO THE WAYER OF  
THE PENALTY PHASE JURY.

>> WHY ISN'T AGAIN OTHER  
THAN WHAT YOU SAID, WELL WE  
WILL HAVE TO COMPARE THE  
TESTIMONY WITH -- WHAT THE  
JUDGE FOUND WHY THE  
DETERMINATION THAT THE  
JUDGE'S CALL AS TO WHAT THE  
DEFENSE ATTORNEYS TOLD  
MR. TANZI AND WHETHER HE WAS  
REASONABLE IN NOT  
UNDERSTANDING THE EFFECTS OF

HIS PLEA.

>> WELL, OBVIOUSLY BECAUSE HE GOT IT WRONG BASED ON THE RECORD.

ALSO THE COURT IGNORED OTHER EVIDENCE IN THE RECORD HE DIDN'T LOOK TO WHAT HAPPENED AT THE TIME IN THE RECORD AND HE DIDN'T LOOK TO TO THE AFFIDAVIT.

HE DIDN'T LOOK AT THE WAS A PRY -- PREPARED AND SIGNED BY MR. KUYPERS.

AND ALSO WE HAVEN'T HAD AN OPPORTUNITY TO TOUCH ON IT IT EXCLUDED THE EVIDENCE OF DR. WHICH WOULD HAVE EXPLAINED WHY IT'S POSSIBLE FOR SOMEONE LIKE MICHAEL TANZI EVEN IF HE RECEIVED THE ADVICE TO NEVERTHELESS BE UNDER A MISAPPREHENSION. THAT WAS RELEVANT EVIDENCE. THE STATE SAYS WELL CON TENCE COULD BE RELEVANT. SURE IT'S RELEVANT.

WHAT IT IS RELEVANT IS THE MENTAL STATE IS.

HE WAS MENTALLY RETARDED.

>> AND THE MAIN ISSUE HERE IS ATTENTION DEFICIT.

THEY CLAIMED HE HAS ATTENTION DEFICIT DISORDER.

>> WHAT PERCENTAGE OF THEIR PEOPLE IN OUR SOCIETY PROFESS ARE DIAGNOSED WITH ATTENTION DEFICIT DISORDERER?

>> YOUR ON -- YOUR HONOR I'M GLAD YOU ASK THE SKWE.

THE CLAIM ISN'T SOMEONE CAN'T ANSWER A PLEA BUT THAT SOMEBODY WITH MICHAEL TANZI'S PROFOUND DISTURBANCE OF ATTENTION COULD HAVE SPECIFIC PROBLEMS OF UNDERSTANDING AND THAT EVIDENCE WOULD BE RELEVANT TO UNDERSTANDING HOW HE YOU COULDN'T MADE THE MISTAKE THAT HE DID IN THIS CASE.

AND YOUR HONOR --

>> IF YOU WANT TO MAKE ONE PORE POINT.

YOU USED UP YOUR TIME.

>> I WANT TO ASK A QUESTION  
THAT CAME UP.

ANSWER A QUESTION WITH  
REGARD TO THE RESEARCH OF  
MR. KUYPERS TESTIFIED RECORD  
2422 TO 23 THAT HE DID THE  
RESEARCH TO -- TWO NIGHTS  
BEFORE THE LEE.

IT'S IN HIS NOTES 2269 AND  
TESTIFIED ON DIRECT TO THE  
STATE AT THE HEARING THAT HE  
ADVISED MICHAEL OF THE THIS  
AFTER HE DID THE RESEARCH.  
NOT BEFORE.

HE SAID SO AT 2400ED A 2401  
AS THE STATE SAYING THERE  
WAS A RULING ON THE  
PRESENTENCING MOTION WHEN  
MICHAEL WAS FORCED TO DO A  
PRO SE.

THERE WAS NO RULING THAT THE  
JUDGE TOLD HIM TO SIT DOWN.

>> WE THANK YOU BOTH FOR  
YOUR RESPONSIVENESS TO OUR  
QUESTIONS AND YOU -- YOUR  
PRESENTATION TO COURT.

WE'LL TAKE IT UNDER  
ADVISEMENT.

THE COURT WILL STAND IN  
RECESS FOR THIS DOCKET.

>> PLEASE RISE