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Thomas J. Morgan v. State of Florida

SC06-2350

>>> ALL RISE, O YE, O YE, O YE,
THE SUPREME COURT OF FLORIDA
IS NOW IN SESSION.

ALL THOSE
HAVING BUSINESS BEFORE THIS
COURT -- GIVE ATTENTION AND
YE SHALL BE HEARD, GOD SAVE
THE UNITED STATES THE GREAT
STATE OF FLORIDA AND THIS
HONORABLE COURT.

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

>> GOOD MORNING, FRIENDS.
WELCOME TO THE FLORIDA
SUPREME COURT, OUR ORAL
ARGUMENT CALENDAR MONDAY
OCTOBER 8.

THE FIRST CASE
ON CALENDAR THIS MORNING
MORGAN VERSUS STATE OF
FLORIDA.

MR. ROGOW, READY TO PROCEED?

>> MAY IT PLEASE THE COURT.
BRUCE ROGOW FOR
THOMAS MORGAN.

THE THIRD DISTRICT COURT OF APPEAL
HELD THAT A LAWYER, WHO
TELLS A CLIENT, THAT THEY
WOULD -- IN THE CASE
THEREFORE OFFER SHOULD --
OFFER SHOULD BE REJECTED
WILL CONSTITUTE, CAN
CONSTITUTE INEFFECTIVE
ASSISTANCE OF COUNSEL, THE
FOURTH DISTRICT COURT OF
APPEAL, HAS HELD JUST THE
OPPOSITE, THAT IN THE WORDS
OF -- THE STATE THAT -- IT
IS TOO UNPREDICTABLE, THE
OUTCOME OF A CRIMINAL TRIAL.
WHAT A LAWYER SAYS WITH REGARD
TO ACCEPTING OR REJECTING
A PLEA OFFER DOESN'T RISE

TO A LEVEL OF INEFFECTIVE ASSISTANCE OF COUNSEL UNDER.
>> ISN'T THAT A LITTLE TOO SIMPLISTIC, AS FAR AS, THAT COULD BE A CONFLICT ISSUE, ISN'T THAT A THING, MY LAWYER TOLD ME TO GO TO TRIAL, OR -- STRONGLY -- DISCOURAGED ME FROM TAKING A PLEA OFFER, AND I WENT TO TRIAL, AND I WAS UNSUCCESSFUL, SORT OF THE SAME AS, A LAWYER, SAYING YOU KNOW, I THINK WE HAVE A GOOD -- THERE IS NO PLEA OFFER I THINK WE HAVE A GOOD CHANCE OF WINNING, AND THEN THEY LOSE.

DON'T YOU HAVE TO ALLEGING SOMETHING MORE LIKE THE SECOND DISTRICT HAS STATED, SUCH AS, THEY -- MADE THAT RECOMMENDATION WITHOUT HAVING CONDUCTED A REASONABLE INVESTIGATION ALL THE DIFFERENT THINGS THAT AT LEAST THE SECOND DISTRICT SAID TO BE A BARE ASSERTION AS YOUR CLIENT ASSERTED RECOMMEND GOING TO TRIAL, UNSUCCESSFUL, DOESN'T SEEM TO STATE A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

>> TWO THINGS, THE SECOND DISTRICT CASE IS A KIND OF ADVICE, DID NOT ACCEPT, PLUS, -- IN THE SITUATION, BUT, I THINK THAT THIS IS SUCH A CRITICAL STAGE, WHEN ONE, IS DECIDING WHETHER OR NOT TO ACCEPT A PLEA AND HERE, OF COURSE, WE HAD A PLEA THAT WAS OFFERED FIVE YEARS, THE LAWYER SAID. IN THE -- BASED UPON THAT REJECTED THE PLEA OFFER GOT TEN YEARS BOTH THE SECOND THE 6TH AND THE SECOND, 6TH AND 8TH HAVE FOUNDED.

>> WHEN THE STATE COMES TO YOU, WITH A PLEA OFFER, YOU HAVE TO GO -- TO MAKE AN IMPORTANT DECISION, THERE AND YOU CANNOT MAKE THAT DECISION UNLESS TRIAL COUNSEL HAS BEEN ABSOLUTELY

CANDID WITH YOU, AND ABA
RULES, WITH REGARD TO THE
DEFENSE FUNCTION MAKE THAT
CLEAR, YOU CANNOT OVERSTATE.
>> WHAT WAS HE NOT -- WHAT WAS
COUNSEL SHE NOW I BELIEVE IN
THIS CASE, NOT CANDID ABOUT?
AND IN THIS PARTICULAR
CASE, YOUR CLIENT HAS MADE
NO ALLEGATIONS OF ANY
MISADVICE EXCEPT OF COURSE
THEY DID NOT WIN, DIDN'T SAY
COUNSEL WAS NOT PREPARED, TO
GIVE THIS ADVICE, NONE OF
THOSE KINDS OF ALLEGATIONS,
AND SO, WHAT -- WHERE IS THE
LITTLE HOOK, HERE, THAT
COUNSEL DID SOMETHING WRONG
OTHER THAN THE MERE FACT THAT
THEY -- HE WANTED TO GO TO
TRIAL, SHE SAID, YOU KNOW WE
CAN WIN THIS OR AT LEAST,
GET IT, DOWN TO A DOMESTIC
VIOLENCE, I BELIEVE IT WAS.
SO WHAT -- WHERE IS THE MISSTEP
HERE?

>> THE MISSTEP IS IN NOT
BEING CANDID NOT SAYING TO
THE CLIENT LOOK WE CAN LOSE
THIS TOO IF WE LOSE THIS YOU
COULD GET 20 YEARS IN
PRISON --

>> SEEMS TO BE SERVING
PRETTY MUCH PER SE RULE -- I
-- IT APPEARS RATHER THAN
ANALYSIS IT IS A PER SE RULE
IF YOU DON'T, IF YOU DON'T
GIVE THE THIS IS WHAT THE
PLEA IS DON'T TAKE IT BUT
THIS IS WHAT COULD HAPPEN,
BUT THAT IS NOT EVEN
ALLEGED, IS IT?

>> NO -- WHAT IS ALLEGED,
SHE TOLD HAVE HIM SHE
THOUGHT SHE WOULD WIN, OR
THAT IT WOULD BE A LESSER --
BUT WHAT I'M SAYING THE
OTHER PART OF THE EQUATION
YOU HAVE TO SAY THAT --
WRONG ABOUT THIS YOU COULD
END UP GOING TO PRISON FOR
TEN YEARS, OR 20 YEARS, AND
THAT IS WHAT TO ME IS THE
CRITICAL FAILURE, ONCE --

>> BUT YOUR CLIENT DOESN'T SAY THAT HE WAS NOT TOLD HAPPEN IN THERE COULD BE A GREATER -- SENTENCE HE, IF HE IN FACT LOST.

>> -- TRUE TEST, SAID -- THIRD DISTRICT ANALYSIS HE SAID, AT LEAST TRIGGER -- -- THE ISSUE THAT IS ALL WE ARE TALKING ABOUT HERE WE ARE NOT SAYING, THAT --

>> BUT, TO STATE A CLAIM, FOR INEFFECTIVE ON DEFICIENT PERFORMANCE PRONG DON'T YOU HAVE TO ALLEGING THAT THE COUNSEL DID NOT GIVE YOU ALL THE FACTS, DID NOT GIVE YOU, THE OTHER SIDE OF THE EQUATION, AND SAY, THIS IS WHAT YOU'RE LOOKING AT IF YOU LOSE A TRIAL -- HOWEVER -- I DON'T THINK WE ARE GOING TO LOSE?

>> I DON'T THINK YOU HAVE TO ALLEGE THAT -- TO STATE THE CLAIM, WE TALKING ABOUT -- FILED IN -- 250 -- --

>> THE FOURTH DISTRICT HAS READ THE DECISION, AND -- COUNSEL -- THAT IS WHY TURNED DOWN THE PLEA OFFER, AND, REALLY I THINK THAT THIS --

>> WHY DOESN'T THERE AT A MINIMUM HAVE TO BE AN ALLEGATION THAT THERE IS NO REASONABLE BASIS FOR COUNSEL'S ADVICE?

THAT IS, THAT THERE IS NO -- NO REASONABLE BASIS FOR COUNSEL TO GIVE THAT ADVICE IT IS ONE THING FOR A LAWYER TO SAY PROSECUTOR ALREADY TOLD ME, SINCE WE WON OUR MOTION TO SUPPRESS -- THAT THEY DON'T HAVE THE -- YOU KNOW MAIN EVIDENCE IN THE CASE, AND, THEY ARE PRETTY MUCH WINGING IT NOW, AND, THEREFORE, THERE IS A REASONABLE BIAS TO SAY WE WILL PROBABLY WIN, BECAUSE THE EXPECTATION IS THAT STATE YOU DIDN'T HAVE ANY EVIDENCE, AGAINST THE

CLIENT.

YOU KNOW OF COURSE, THERE IS JUST A VARIETY WHY SHOULDN'T THERE AT I NEAB HAVE TO BE AN ALLEGATION THERE IS NO REASONABLE BASIS FOR COUNSEL'S ADVICE.

>> -- I GUESS -- RULE -- WOULD BE -- -

>> LET'S JUST STOP AT REASONABLE BASIS, OKAY? WHY SHOULDN'T, IS THERE BE AN OBLIGATION TO ALLEGE THERE IS NO REASONABLE BASES FOR COUNSEL TO SAY WE ARE GOING TO WIN THIS CASE?

>> WELL, I THINK IN -- IMPLICIT IN WHAT -- IS ALLEGED HERE IS THAT KIND OF MOTION, I THINK IT IS YOU ADD THAT, AS ONE OF THE ELEMENTS -- THERE -- ALLEGATION CAN BE 3.850 -- WITHOUT A FACTUAL -- I DON'T THINK WE GAIN MUCH -- IN TERMS OF TRYING TO DEVELOP AN ISSUE OF WHEN CAN SAY -- MY LAWYER TOLD ME I'M GOING TO WIN THE CASE I TURNED DOWN -- A OFFER, AND -- AMD I WAS -- NO BASIS FOR HIM TO TELL THAT I AM.

>> BECAUSE HE HAD -- HOW ABOUT THIS, NO REASONABLE BASIS BECAUSE HE HAD NEVER INVESTIGATED --

>> THAT WOULD BE -- THE SITUATION, THEN THAT IS THAT IS KIND OF -- THAT ALLEGATION BECAUSE THE LACK OF INVESTIGATION -- COUNSEL EVEN -- WENT TO TRIAL --

>> SO WE IF WE ACCEPT YOUR ARGUMENT IF HE SIMPLY SAID, MY ATTORNEY TOLD ME WE HAD A GOOD CHANCE OF WINNING, AND WE LOST THE WE HAVE AN EVIDENCE HEARING WHETHER A GOOD CHANCE OF WINNING.

>> --

>> [INAUDIBLE]

I DON'T THINK -- I THINK THAT -- FOR SURE, WE WOULD -- TALKING ABOUT --

>> WELL IS THAT DOES THAT,
IS THE END RESULT HERE THAT
IF THE LAWYER SAYS THAT WE
WILL WIN, OR WHAT YOU JUST
SAID THE LAWYER WOULD SAY,
DOES THAT MEAN IN COMES OUT
THAT THE LAWYER SAID THAT
THAT -- REGARDLESS OF
ANYTHING ELSE, THAT THE
FELLOW GETS A NEW TRIAL?

>> NOT A NEW TRIAL, TALK
ABOUT -- [INAUDIBLE]

>> BUT I'M TALKING ABOUT
WHAT IS THE END RESULT HERE?
YOU HAVE THE EVIDENTIARY
HEARING WHAT YOU -- AND,
WHAT YOU HAVE ALLEGED IS
PROVEN WHAT IS THE END
RESULT?

>> NEW TRIAL.

>> NEW TRIAL SO IT IS A PER
SE TYPE THING.

>> IT IS IN -- [INAUDIBLE]
TRYING TO -- HAVE SPECIFIC
PERFORMANCE OF A PLEA, BUT I
THINK.

>> WELL LET ME GO BACK TO
THAT POINT, YOU HAVE AGREED
ONLY THING THAT DEFENDANT
WOULD BE ENTITLED TO A NEW
TRIAL THERE WOULD BE NO
BASIS FOR THE STATE TO
OFFER A PLEA THAT HAD ALREADY
BEEN REJECTED.

>> DEPENDS UPON THIS CASE,
HOW IT UNFOLDS, ONE OF THE
-- [INAUDIBLE]

-- BECAUSE OF A NEW TRIAL
OFFERS 20 YEARS OFFERED TWO
YEARS BEFORE -- [INAUDIBLE]
SHOULDN'T HAVE TURNED IT
DOWN, AND THEN, SAY, 20
YEARS, THE QUESTION WAS --
-- GENERATE -- CERTAINLY HE
IS ENTITLED TO A NEW TRIAL,
AT THAT POINTP.

>> WHAT HE GOT HERE, WAS
REQUIRED BY THE CONSTITUTION
WAS A FAIR TRIAL, THERE IS
NO QUESTION HERE ABOUT THE
FAIRNESS OF THE TRIAL OR
EFFECTIVENESS OF COUNSEL AT
TRIAL, YOU AGREE WITH THAT;
CORRECT?

>> CORRECT.

>> WHAT DO YOU SEE AS BEING -- I'M ACTUALLY INTERESTED IN THE REMEDY PART, LET ME GO BACK TO FOLLOW-UP WITH JUSTICE BELL ASKED YOU NOW YOU GET YOUR EVIDENTIARY HEARING, WHAT IS IT THAT YOU HAVE TO PROVE NOW WE ARE GETTING INTO -- FACTS, WHAT -- YOU ASKED THE LAWYER, WHY DID YOU TELL MY CLIENT THAT -- HE HAD A VERY GOOD CHANCE OF OF WINNING AT TRIAL? AND HE SAYS WELL DID MY INVESTIGATION, AND MY INVESTIGATION REVEALED THERE WERE NO WITNESSES, BUT, EYE WITNESSES TO THE CRIME AND YOU SAY DIDN'T YOU REALIZE THERE WAS WITNESS SO AND SO?

>> WELL THAT WITNESS ONLY CAME UP, YOU KNOW AFTER THE PLEA -- YOU KNOW, WE HAD A RICHARDSON HEARING, AT WHAT POINT IN OTHER WORDS, WHAT IS IT THAT IF THE TRIAL JUDGE FINDS THAT YES, THE -- THE LAWYER HAD A TO GIVE A PRETTY GOOD ASSURANCE THAT THEY COULD WIN THE LAWYER, THOUGH, HAD GIVEN THAT ASSESSMENT BASED ON A REASONABLE INVESTIGATION, THE ADVICE WAS REASONABLE UNDER THE CIRCUMSTANCES, THEN, DOES YOUR CLIENT STILL WIN BECAUSE NO WON OUGHT TO GIVE A GUARANTEE OF SUCCESS, AT -- IN A CRIMINAL CASE?

>> I BELIEVE THAT -- THIS CASE -- I THINK THAT -- REMEDY -- THIS -- TO THE CLIENT, HERE IS -- THE STATEMENT, I WILL TAKE CARE OF THE ISSUE, SO WHEN YOUR ADVICE PLEA OFFER, THAT THEY REJECTINGED -- HERE IS -- TO BE, IN YOUR --

>> -- [INAUDIBLE]

.
>> ALL RIGHT, SO WHAT YOU ARE SAYING, THOUGH NOW THIS

IS -- SEE IF YOU HAD SAID
THAT THEY DIDN'T THEY SHOULD
SAID THEY COULD WIN BUT
THEY DIDN'T GIVE THE OTHER
SIDE OF THE EQUATION, THAT
IS TO ME NOW A DIFFERENT
CASE.

BECAUSE NOT TELLING THE
CLIENT OKAY, BUT IF YOU LOSE
YOU COULD FACE 100 YEARS, SO
-- BUT I DIDN'T SEE THAT AS
BEING THE FOCUS OF THE
CONFLICT ISSUE, OR WHAT HAS
BEEN ALLEGED.

>> HE DID NOT ALLEGE THAT.
>> SHOULD THAT BE PART OF
THE IT THAT IS, THAT IF YOU
ALLEGE IF YOU DON'T --
ADVISE YOUR CLIENT, ON ALSO
THE SENTENCE CONSEQUENCES,
THEN YOU ARE STARTING TO
TALK ABOUT THE DEFECTIVE
UNREASONABLE ADVICE, SIMILAR
TO A MISADVICE CASE?

>> I THINK -- [INAUDIBLE]
A PERFECT -- IN THIS WOULD
HAVE HAVE BOTH SIDES OF THE
EQUATION, I WOULD ASSURED
THAT I WAS -- AND I WAS NOT
TOLD WHAT THE CONSEQUENCES
WOULD BE --

>> BUT THAT IS NOT THE A
THAT IS NOT THE CONFLICT
ISSUE THE CONFLICT ISSUE YOU
WERE I THOUGHT ASKING FOR
PER SE THAT IF THERE IS
ASSUANCE OF WINNING A
TRIAL, YOU -- ARE ENTITLED
TO EVIDENTIARY HEARING NOW
IF YOU ARE SAYING ASSURANCE
OF WINNING, BUT NO -- ADVICE
ON THE CONSEQUENCES OF
LOSING, NOW TO ME YOU HAVE A
DIFFERENT, PERHAPS, A
DIFFERENT CLAIM.

>> I THINK IT IS A STRONGER
KIND OF PICTURE OF
INEFFECTIVE ASSISTANCE OF
COUNSEL BUT BETWEEN GOMEZ
AND GONZALEZ THE TWO CASES
HERE THAT ARE IN CONFLICT,
THE -- BASED UPON THE GOMEZ
SAYS SAYING IF YOU PROMISE
YOU WIN TURNS OUT PLEA AUFR

YOU GET MORE TIME YOU HAVE
GOT A 6TH AMENDMENT -- AT
LEAST FOR PRIORS.

>> DOES THIS OPEN UP THE
CONVERSE CLAIM AS WELL?
THAT IS, IF -- COUNSEL SAYS
THIS IS THE PLEA OFFER, I
THINK WE SHOULD TAKE IT,
THERE IS NO WAY YOU ARE
GOING TO WIN AT TRIAL, YOU
ARE CLEARLY GUILTY, GUILTY
DEFENSE COMES BACK LATER
SAID I PLED GUILTY WOULD I
HAVE BEEN FOUND INNOCENT AT
TRIAL THIS WAS INEFFECTIVE
ASSISTANCE OF COUNSEL FOR
SAYING THAT I SHOULD SAKE
THIS PLEA?

>> -- WELL, THINK THAT IS
MUCH HARDER IN PLEA COLLOQUY
EVERYTHING THE COURT WOULD
BE ASKING THE DEFENDANT IN
OPEN WOURT WHETHER OR NOT HE
OR SHE UNDERSTANDS THEIR
RIGHT TO A TRIAL, RIGHT TO A
JURY TRIAL ET CETERA, ET
CETERA.

SO I THINK THAT WOULD CHANGE
THE WAY THAT IS -- OUT
THERE, BECAUSE IF YOU --
KNOWING INTELLIGENT WAIVER.

>> THE WAIVER WAS BASED ON
THE -- THE ADVICE OF
COUNSEL, THAT YOU THERE IS
NO WAY THAT YOU COULD BE
EXONERATED YOU ARE GOING TO BE
FOUND GUILTY HIS ALLEGATION I
HAD AN ALIBI WITNESS I
WASN'T THERE PURELY
CIRCUMSTANTIAL.

>> JUDGE -- LOTS OF OF
PEOPLE PLEAD GUILTY THINK
THEY ARE INNOCENT KNOWING
INTELLIGENT PLEA -- INQUIRY.

>> LET ME FOLLOW -- FOLLOW
UP ON JUSTICE PARIENTE'S
QUESTION AS I UNDERSTAND
YOUR ARGUMENT, THE YOU SAY
THAT THERE IS AN ENTITLEMENT
TO EVIDENTIARY HEARING WHERE
THERE IS AN ASSUANCE OF
WINNING, SHE ASKED YOU, IS
THERE -- IS THAT DIFFERENT
THAN THERE BEING A

ALLEGATION THAT THERE IS A REASONABLE CHANCE OF WINNING, I MEAN ARE WE DEALING HERE IN THAT TYPE OF SEMANTIC DIFFERENCE?

>> YOU KNOW, IT -- THIS WHOLE AREA JUSTICE WELLS -- STRICKLAND, IT IS WHETHER OR NOT A REASONABLY OBJECTIVE LAWYER WOULD HAVE GIVEN THIS ADVICE I'M NOT SURE WE CAN STATE THAT, THERE ARE SOME SEMANTICS INVOLVED HERE BUT THE BOTTOM LINE AND THE FOURTH DISTRICT AND THIRD DISTRICT HAS STATED -- THAT THERE IF YOU ARE TOLD THAT YOU WILL WIN THE CASE, AND THAT IS WHY YOU TURNED DOWN THE PLEA AGREEMENT AND YOU END UP IN A MUCH GREATER SENTENCED, YOU AT LEAST STATED THE CLAIM, THAT IS ALL WE ARE TALKING ABOUT -- THE HEARING --

>> GETTING PAST SEMANTICS THOUGH ISN'T IT ALWAYS IMPLIED WHETHER A LAWYER SAYS WE WILL WIN AT WHILE OR WE SHOULD WIN OR I GUARANTEE WE WILL WIN, OR POSSIBLE WE WILL WIN, YOU HAVE A GREAT CHANCE OF WINNING WHATEVER THE DEFENDANT HAS TO KNOW THAT THIS IS JUST AN OPINION.

THAT THERE IS NOT STATEMENT OF FACT.

THAT THE COUNSEL MAY BELIEVE THAT THEY ARE WIN AT TRIAL BUT THAT THERE ARE NO GUARANTEES WHEN YOU GO TO TRIAL IT WILL IS GOING BE UP TO THE JURY BASED ON ALL THE EVIDENCE.

>> AND THAT IS WHY IT IS SO MUCH BETTER APPROACH TO HAVE IT LAID OUT TO THE CLIENT, SO THAT THE CLIENT CAN SEE IT IN BLACK AND WHITE AT THE ASSESSMENT -- AT THE ADVANTAGESS OF GOING TO TRIAL AREN'T PLEA OFFERS MADE SOMETIMES EVEN ON THE

EVE OF TRIAL, AND, YOU GO BACK, AND YOU DISCUSS, THIS WITH YOUR CLIENT, YOU MAKE WHATEVER, YOU GIVE THE CLIENT WHATEVER INFORMATION YOU GIVE THEM, AND THEY SORT OF MAKE THESE DETERMINATIONS ON SPUR OF THE MOMENT I DON'T THINK WE CAN JUST MAKE THAT KIND OF RULE, TO COVER THESE KIND OF SITUATIONS, CAN WE?

>> --

>> EVEN HANDWRITTEN NOTICE I UNDERSTAND THE PLEA IS I'M REJECTING IT, I UNDERSTAND WHAT THESE CONSEQUENCES --
>> YOUR -- YOUR REMEDY I APPRECIATE IT, MR. ROGOW THAT IS A BROADER ONE WHICH IS THAT WE ALWAYS LOOK TO MAKE SURE WHATEVER A CLIENT DOES OR DEFENDANT HAS DONE INTELLIGENTLY, YOU MENTIONED -- I THOUGHT FAR GREATER HARM IN CRIMINAL JUSTICE SYSTEM IS A LOT OF LAWYERS PUSHING CLIENTS TO TAKE A PLEA, WHEN YOU KNOW, MAYBE THEY HAVE A CHANCE AT SUCCESS THAT IS THE INNOCENT PERSON WHO PLEADS GUILTY, BUT WE ARE REALLY YOU ARE TALKING ABOUT A PROCESS YOU WERE HERE FOR A RULE CHANGE, SAID WE SHOULD HAVE THESE I WRITING, BUT FILE LIKE WHAT WE ARE TRYING TO DO HERE IS LOOK AT WHEN THIS -- THERE IS ENOUGH HERE, THAT ALLEGES THAT THIS LAWYER WAS NOT PERFORMANCING AS A REASONABLY CONFIDENT LAWYER WOULD DO THAT IS WHERE WE GET INTO THIS -- OF BEING I THINK UNCOMFORTABLE WITH IS WE DON'T KNOW WHAT THE YOU KNOW THE FOUR ELEMENTS OF SUCCESS AT TRIAL NOT ADVISING OF THE OTHER SIDE OF THE EQUATION AND SOMETHING ELSE AND YOU ARE SAYING NO, IT JUST HAS TO BE THE ONE, WHICH IS ADVISING

YOU HAVE A GOOD CHANCE OF
SUCCESS AT TRIAL, OR --
AGAIN, A WIN AT TRIAL, AND
THAT IS GOING TO GIVE YOU AN
EVIDENTIARY HEARING.

>> WELL, I THINK THAT --
THAT -- THE RULE THAT I'M
ADVOCATING I DON'T MEAN RULE
IN TERMS OF GETTING THE
THING IN WRITING, I UNDERSTAND
THAT COULD BE SOME OTHER KIND OF
PROCESS TO GET THERE BUT I'M
SAYING THAT IF A LAWYER
TELLS SOMEBODY WE WILL WIN
THE CASE, TURN DOWN THE PLEA
OFFER, I THINK THAT IS
ENOUGH TO SHOW THAT IT IS
INEFFECTIVE ASSISTANCE OF
COUNSEL THAT IS BAD ADVICE
WE WILL WIN THE CASE.
YOU CANNOT SAY WE WILL WIN
THE CASE.

THAT TO ME, IS -- JUST
COMPLETELY I THINK A LACK OF
CANDOR, ABOUT THE WHOLE
TRIAL PROCESS.

>> WHAT IF THEY SAY, WE HAVE
A SUBSTANTIAL LIKELIHOOD OF
WINNING THE CASE IS THAT
LEGALLY DIFFERENT THEN?

>> IT IS LEGALLY
DIFFERENT --

>> DOESN'T WE WILL WIN THE
CASE -- REALLY MEAN WE HAVE A
SUBSTANTIAL LIKELIHOOD OF
WINNING BECAUSE THE DEFENDANT
KNOWS THAT THE COUNSEL
CANNOT GUARANTEE, A VICTORY
THAT IT IS NOT A STATEMENT
OF FACT, ABOUT WHAT OCCURRED
IN THE PAST THAT IT IS
PREDICTION WHAT MAY OCCUR IN
THE FUTURE AND THAT THOSE
ARE NECESSARILY NOT
COMPLETELY ACCURATE?

>> BUT THAT A DEFENDANT IS
IN THE HANDS OF HIS OR HER
LAWYER, GENERAL, THE
DEFENDANTS ARE NOT AS
SOPHISTICATED AS A LAWYER
WILL BE IN TERMS OF THE
EXPERIENCE, IT IS KIND OF A
LIKE GOING TO THE DOCTOR THE
DOCTOR SAYS, HERE ARE TWO

CHOICES THAT YOU HAVE, FOR
TREATMENT -- AND, THERE IS
TREATMENT A, TREATMENT B.
AND DOES THE DOCTOR SAY YOU
CHOOSE WELL MAYBE THE DOCTOR
DOES BUT WOULD I SAY THE
DOCTOR YOU TELL ME YOU
HAVE --

>> LET'S NOT GET INTO ABSTRACT
THIS GUY WAS HAS
HABITUALIZED, HE HAD
EXPERIENCE.

>> WE ARE TALKING ABOUT A
CASE THAT WILL AFFECT
OBVIOUSLY MORE THAN HIM.

>> WITH OUR ASSISTANCE YOU
HAVE EXHAUSTED NOT ONLY
ARGUMENT TIME BUT ALSO ALL
REBUTTAL TIME, THANK YOU
VERY MUCH FOR THE ARGUMENTS.
MR. HAMEL.

>> MAY IT PLEASE THE COURT
MARK HAMEL FOR THE STATE OF
FLORIDA IN THIS CASE, IT WAS
NOT EVEN A PLEA OFFER
EXTENDED, PAGES 158 THROUGH
160 OF THE RECORD, SHOW THAT
THERE WAS A DISCUSSION,
AFTER THE JURY HAD BEEN
SELECTED, AND DEFENSE
ATTORNEY SAID YOUR HONOR, NO
PLEAS NO OFFER HAS BEEN MADE
IN THIS CASE, AND THEN THE
STATE ATTORNEY SAID, WELL,
THE BEST -- WOULD IT HAVE TO
BE LEAST FIVE YEARS BUT
WOULD HAVE TO CHECK WITH TWO
VICTIMS IN THIS CASE, AND
THE DEFENSE ATTORNEY SAID WE
ARE NOT INTERESTED IN
THAT -- AND --

>> EVEN THE PROBLEM IS --
WE'VE GOT A -- A COURT
THATTER SO CERTIFIED
CONFLICT WITH THE THIRD
DISTRICT IF THEY SAID THIS
CLAIM FAILED THERE WASN'T
PLEA OFFER ACCEPTED WE
WOULDN'T BE HERE, IT SEEMS
WOULD YOU AGREE THAT ON THE
BROADER ISSUE, THAT THERE
APPEARS TO BE, THE FOURTH
DISTRICT SAYING A CLAIM
ADVISING AGAINST TAKING A

PLEA FOR WHATEVER REASON,
YOU KNOW, IS CAN'T BE A
CLAIM OF INEFFECTIVE
ASSISTANCE OF COUNSEL AND SO
WE'VE GOT PER SE RULE THERE
OR DO YOU SEE THAT THERE
ISN'T A CONFLICT THAT THERE
ACTUALLY LOOKING AT
DIFFERENT KINDS OF CASES?

>> THEY ARE LOOKING AT
DIFFERENT KIDS OF CASES YOUR
HONOR DO I AGREE IF YOU LOOK
AT LANGUAGE OF THE OPINION
OF THE FOURTH THERE ABEARS
TO BE CONFLICT BUT IF YOU
LOOK FURTHER IN THIS COURT
SHOULD, IN THIS CASE, THERE
WAS NEVER A A FIRM OFFER --
OF.

>> IT SAYS WE CERTIFY
CONFLICT -- CERTIFY, MORGAN
ALLEGES COUNCIL ASSURED HIM
AT TRIAL ASSURED HIM, A WIN
AT TRIAL, THIS COURT
AFFIRMED THE SUMMARY
IN GONZALEZ SO ISN'T THERE
WHATEVER WE RESOLVED IN THIS
CASE I MEAN WOULD IT BE, YOU
KNOW IF WE SAY WELL THAT
ASSURANCE, UNDER CERTAIN
CIRCUMSTANCES CAN CONSTITUTE
AT LEAST ENOUGH, FOR
EVIDENTIARY HEARING SOUNDS
LIKE WOULD YOU WIN IN
EVIDENTIARY HEARING BECAUSE
OF WHAT YOU JUST SAID, THERE
WASN'T EVEN A PLEA OFFER WE
OFTEN GET THIS,
UNFORTUNATELY I GUESS
MR. GOMEZ OR MR. MORING ON
AN WAS PRO SE, BELOW, SO, IS
THERE OR ISN'T THERE NOT --
NOT -- IN THIS CASE -- BUT
IS THERE A CONFLICT BETWEEN
THE THIRD AND THE FOURTH AND
THE SECOND, AND THE FIRST?
ON THIS ISSUE?

>> THERE -- THERE IS A
CONFLICT BETWEEN FOURTH AND
THIRD APPROACH.

>> THE QUESTION DO YOU SEE
EITHER MAYBE BEING TOO
EXTREME, AS TO THEIR
APPROACHES?

WHICH IS THAT WHAT IF THE --
IF THE CLAIM HERE WAS HE
ASSURED SHE ASSURED A WIN,
WITHOUT A REASONABLE
INVESTIGATION, AND DID NOT
EXPLAIN THE CONSEQUENCES OF
WHAT HE WOULD FACE IF HE
LOST WOULD THAT BE ENOUGH,
TO -- WARRANT AN EVIDENTIARY
HEARING.

>> YOUR HONOR CERTAINLY
WOULD BE IN THE FOURTH
DISTRICT THE FOURTH DISTRICT
REALLY IS NOT INCONSISTENT WITH
SECOND.

>> YOU ARE SAYING ENOUGH FOR
EVIDENTIARY HEARING THERE
HAS TO BE ALLEGATION OF
DEFICIENCY IF A MATTER OF
MERE ADVICE NOTHING MORE
THAT IS --

>> -- WOULD IT BE ENOUGH TO
SAY, THAT THEY DIDN'T
EXPLAIN THE CONSEQUENCES OF
IF YOU LOST AT TRIAL, AND IS
THAT WOULD THAT A BE ENOUGH
IN OTHER WORDS MR. ROGOW
SAID OTHER SIDE OF EQUATION
WOULD THAT BE INCOMPETENT
FOR SOMEONE TO TELL SOMEONE
THEY ARE GOING TO WIN AND
NOT EXPLAIN, EVEN THOUGH IT
IS PREDICTION BUT, ISSUE
THAT YOU ARE GOING TO WIN
BUT -- IF YOU LOSE EVEN I
THINK IT IS A YOU KNOW NOT
LIKELY -- YOU KNOW, YOU WILL
FACE, SENTENCE OF FOUR TIMES
THE AMOUNT THAT IS BEING
OFFERED?

>> YOUR HONOR ANY TIME I
THINK THAT THERE IS A DEFICIENCY
ALLEGED -- COULD
ORDER EVIDENTIARY HEARING
DEPENDING UPON THE FACTS.

>> WOULD THAT BE DEFICIENCY
THAT IS THE QUESTION, WOULD
FAILING TO ADVISE OF THE
CONSEQUENCES, SHOULD THE
JURY COME BACK WITH A
VERDICT OF GUILTY?

>> -- ARE VERIED OF GUILTY
THIS IS WHAT WOULD YOU BE
FACING IN PRISON WITH

FAILURE TO ADVISE OF THAT,
THE DEFICIENT PERFORMANCE?

>> I THINK, YOUR HONOR WOULD
IT DEPEND WHAT OTHER ADVICE
WAS GIVEN, CERTAINLY SOUNDS
LIKE SOMETHING IS THAT WOULD
BE A REASONABLE ATTORNEY
WOULD TALK TO A CLIENT
ABOUT, BUT.

>> SEEMS TO ME TO ME, THAT
-- THE VERY -- I MEAN IF YOU
IF YOUR ATTORNEY DOESN'T
ADVISE YOU WHAT HAPPENS IF
YOU LOSE AT TRIAL THAT IS
LIKE NOT HAVING AN ATTORNEY.

>> CORRECT YOUR HON BUT
THERE MAY BE A SITUATION THE
CLIENT SAYS I'M INNOCENT WANT
A TRIAL DON'T WANT TO HEAR
ABOUT PLEA AGREEMENT, THAT
MIGHT BE REASONABLE UNDER
THOSE CIRCUMSTANCES, SO, I
THINK EVERY CASE, IS KIND OF
DIFFERENT YOU HAVE TO TAKE A
LOOK AT IT, AND SEE -- IS
THERE SOMETHING ALLEGED,
THAT WOULD -- AMOUNT TO
DEFICIENT PERFORMANCE UNDER
THESE CIRCUMSTANCES I THINK
INDIVIDUAL DETERMINATION
EACH CASE HERE WE DON'T HAVE
ANY -- WE DON'T HAVE A PLEA
OFFER BUT WE ALSO DON'T HAVE
ANY ALLEGATION OF A
DEFICIENCY OF PERFORMANCE.

>> IF HE ALLEGES UNDER
OATH THAT AND HE WAS PRO SE
AGAIN AS THE FIRST START TO
ALLEGING THAT THERE WAS A
BONA FIDE PLEA OFFER;
CORRECT?

>> HE DID YOUR HONOR IN THE
MOTION.

>> WHAT YOU ARE SAYING THIS
COULD HAVE BEEN SUMMARILY
DENIED JUST ON THE FACT THAT
IT IS THAT CONCLUSIVELY REFUTED BY
THE RECORD.

>> CORRECT YOUR HONOR.

>> WHO WOULD THE RECORD
REFUTE NEGATIVE LIKE THAT?
THAT -- THE RECORD
WOULDN'T SHOW WHEN A PLEA
WAS OFFERED OR NOT.

>> IN THIS CASE, IT WOULD
THERE WAS A DISCUSSION ON
THE RECORD THE DEFENSE
ATTORNEY SAID NO OFFER HAS
BEEN -- BEEN MADE, AND THE
STATE ATTORNEY TALKED ABOUT
FIVE YEARS, BUT NEEDING TO
GET PERMISSION FROM THE
VICTIMS, AND THEN, HE SAID
I'M NOT INTERESTED AND THE
JUDGE SAID THE OFFER HAS
BEEN REJECTED THE STATE
SAID WAIT, WAIT A SECOND
THERE WAS NEVER -- NEVER
FIRM OFFER NEVER FIRM OFFER
IT KIND OF GOES AROUND AT
LEAST TO REMEDY IN THIS CASE
IF WE ARE TALKING ABOUT ANY
KIND OF A REMEDY, ABOUT
SPECIFIC PERFORMANCES --
>> RESULT, THOSE KINDS OF
DISPUTES WOULD AN -- WITH
EVIDENTIARY HEARING DO WE
NOT --

>> YOU ARE ARGUEING
WHETHER OR NOT THERE WAS --
ARGUING WHETHER OR NOT THERE
WAS A FIRM OFFER A, AND NOW
WE LOOK AT SORT OF AN
AMBIGUOUS RECORD, AS FAR AS
WHAT THE LET ME COME BACK
YOU ARE FAMILIAR WITH JUDGE
KOPP'S OPINION IN SHARP ARE
YOU NOT.

>> YES YOUR HONOR.

>> DO YOU HAVE ANY
DISAGREEMENT WITH THAT
OPINION GRANT THERE HAD WAS
EVIDENTIARY HEARING THERE
BASED ON THE TESTIMONY AT
THE EVIDENTIARY HEARING, IT
ENDED UP, RELIEF WAS DENIED,
BUT HE STATES IN THAT
OPINION THAT AT LEAST HIS
EVALUATION OR THE THIRD
DISTRICT EVALUATION, OF WHAT
THE FOURTH DISTRICT IS
SAYING, IS THAT THIS IS JUST
SOMETHING OFF LIMITS, THAT
YOU CAN NEVER STATE A PROPER
CLAIM WITH REFERENCE TO THE
ADEQUACY OF ADVICE ABOUT
PLEA OFFERS WHEN HE IS
TALKING ABOUT THE FOURTH

DISTRICT, DO YOU AGREE WITH HIS DISCUSSION THERE?
>> NO, NO YOUR HONOR --
>> YOU DON'T AGREE -- WHAT PART OF THAT OPINION DON'T YOU AGREE WITH I DON'T AGREE YOUR HONOR BECAUSE HE IS REALLY MISUNDERSTANDING THE FOURTH DISTRICT'S POSITION, THE FOURTH CERTAINLY DOES ORDER EVIDENTIARY HEARINGS WHEN THERE ARE ALLEGATIONS OF DEFICIENT PERFORMANCE IN CONNECTION WITH PLEA OF OUR RECENTLY THERE WAS A CASE --
>> YOU AGREE THIS IS NOT SOMETHING THAT IS -- OFF LIMITS FROM A STRICKLAND ANALYSIS.
>> NO YOUR HONOR.
>> JUST GOING TO DEPEND, ON THE CIRCUMSTANCES, AND IF COUNSEL UNREASONABLY, ASSESSES, THE CASE, AND URGES HIM NOT TO TAKE PLEA OFFER UNDER WHATEVER PREVAILING STANDARDS ARE IT COULD BE SUBJECT TO A STRICKLAND CLAIM.
>> CORRECT YOUR HONOR I THINK I CAN CLEAR THIS UP WITH WHAT FOURTH POSITION IS FOURTH HAD A DECISION -- DECISION OUT THREE MONTHS AGO THE DECISION IS -- 32 FLORIDA LAW WEEKLY 1643, THEY MADE A DISTINCTION BETWEEN --
>> THAT CITED BACK AND TO RTH.
>> NO I APOLOGIZE YOUR HONOR HAS NOT.
>> PLEASE DON'T REFER TO CASES THAT YOU HAVE NOT BROUGHT TO THE COURT'S ATTENTION --
>> SUPPLEMENTAL AUTHORITY.
>> I WILL, YOUR HONOR.
>> ARTICLE ARGUMENT SO WE CAN GET THE BENEFIT OF THAT.
>> I WILL WILL YOUR HONOR THE POINT I'M TRYING TO MAKE THE FOURTH DOES MAKE A DISTINCTION BETWEEN PROMISES

OF A CERTAIN OUTCOME, VERSUS
PREDICTIONS OF RESULTS.

PP AND THAT IS SOMETHING
THAT --

>> WHAT DISTINCTION IS THAT?

>> WELL WHAT THE --

>> MADE -- IN THOSE -- THE
SOUNDS LIKE THE SAME THING
TO ME.

>> WELL, BECAUSE, OI
OUTCOMES OF TRIALS ARE
UNPREDICTABLE, COUNSEL
SHOULD NOT BE PROMISING
RESULTS OF TRIAL.
PROMISING WINS.

>> THAT IS EXACTLY WHAT
MR. -- IS SAYING YOU ARE
SAYING HIS ARGUMENT RIGHT
NOW.

>> IN THIS CASE THERE WAS NO
PROMISE TALKING ABOUT AN
ATTORNEY SAYING I FELT LIKE,
I COULD WIN THE CASE.

>> THE ALLEGATION, IN THE
WE'VE GOT WRITTEN OPINION
THAT SAYS, SHE ASSURED HIM
WOULD HE WIN AT TRIAL.

BUT THE --

>> RIGHT.

>> CORRECT YOUR HONOR.

>> OKAY, IS THAT A -- ISN'T
THAT A PROMISE OF AN
OUTCOME.

>> IT IS NOT YOUR HONOR
ASSURANCE IS EITHER
PROMISING SAYING SOMETHING
CONFIDENTLY OR CAN ALSO BE A
GUARANTEE, THE WORD ASSURE IS
NOT THE MOST PRECISE WORD.

>> AGAIN WE DO HAVE -- THIS
MR. MORGAN IS PRO SE WE ARE
TRYING TO GET AT A, IS THERE
YOU KNOW BECAUSE ALL WE WILL
DO IF WE SAY THEY HAVE TO
SAY THIS, THE NEXT 20
MOTIONS THAT ARE FILED WILL
SAY THAT, JUST LIKE
MR. ROGOW IS SAYING WE KNOW
THAT, AND -- THEY GET
EVIDENTIARY HEARING WHAT I'M
TRYING TO DO IS -- I HOPE WE
ARE TRYING TO DO HERE IS
REALLY DECIDE WHAT WOULD IT
BE THAT WE YOU KNOW IF THERE

WAS AN EVIDENTIARY HEARING AS WE GET THE PRISONER TO SAY, YOU KNOW SPECIAL ROGS, HAS TO BE, SPECIFIC PLEA OFFER BEFORE THERE CAN BE REJECTION I THINK YOU KNOW THAT IS -- A GIVEN, THEN THERE HAS TO BE, A -- SOME ASSUANCE OF WHAT THE OUTCOME IS GOING TO BE WHETHER CALL IT PROBABLY GOING TO WIN YOU ARE GOING TO WIN, BUT, BASED ON IT WAS AN UNREASONABLE PREDICTION, BECAUSE OF SOMETHING. BECAUSE THEY HADN'T DONE, INVESTIGATION THEY DIDN'T KNOW ABOUT KEY WITNESSES HADN'T DEPOSED EYEWITNESS WHATEVER IT MIGHT BE, AND THEN, AND THEY DIDN'T TELL THEM THAT THEY WERE GOING TO THAT IF THEY DIDN'T IF THEY WENT TO IF THEY LOST THEY WOULD HAVE THIS SENTENCE. SO THAT MIGHT BE THREE COMPONENTS, IS THAT ISN'T THAT BETTER TO -- TO SORT OF FERRET IT OUT THAT WAY THAN SAY YOU HAVE DEBATE TO USE MAGIC WORDS -- ASSURANCE GUARANTEE, HUNDRED PERCENT CHANCE, I MEAN, BECAUSE -- WE WILL GET TO THE EVIDENTIARY HEARING THEN THAT WON'T BE THE CASE DON'T WE WANT -- SOMETHING MORE SPECIFIC THAN JUST MAGIC WORD?

>> SURE YOUR HONOR THIS CLIENT WAS NOT PRO SE, THIS BRIEF WAS PREPARED BY AN ATTORNEY.

>> WELL IT SAID IN THE IT SAYS PRO SE ON THE I GUESS IN THE FOURTH DISTRICT OPINION.

>> IT WAS BUT IN HIS FILING WITH THE TRIAL COURT, HE WAS REPRESENTED BY A PRIVATE ATTORNEY, AND HE SPECIFICALLY SETS OUT LANGUAGE THAT HIS ATTORNEY USED WHEN HE GAVE THE ADVICE

IN THIS CASE.

>> WHICH WAS?

>> WHICH WAS SHE FELT SHE WOULD WIN A TRIAL THAT AT WORSE THE CHARGES SHOULD BE DOMESTIC VIOLENCE, IF THAT. SO WE ARE NOT TALKING ABOUT A GUARANTEE IN THIS CASE. IF A GUARANTEE COULD AMOUNT TO DEFICIENT PERFORMANCES THAT IS NOT EVEN THIS CASE THAT COULD BE ANOTHER CASE THE FOURTH MAY, MIGHT HAVE REVERSED IT, IF THAT WAS THE CASE BUT, HERE WE DON'T HAVE THAT, HERE WE DON'T EVEN HAVE AN OFFER, AND WE CERTAINLY DON'T HAVE A PROMISE THAT WAS FROM -- THEIR MOTION, THEY DID A SPECIFIC SECTION ON DEFICIENT PERFORMANCE SET OUT WORD SPECIFICALLY WE USE IN THIS CASE YOUR HONOR WORDS ARE IMPORTANT I DON'T KNOW HOW WE GET AWAY FROM WHAT THE WORDS WERE IF, IF EVERY CLIENT, PAYS ATTENTION, AND KNOWS WHAT TO ALLEGE, WOULD I SAY THEY DO THAT ANYWAY THEY KNOW WHAT THEY NEED, HAVE TO DO TO GET AN EVIDENTIARY HEARING, BUT THE REALLY THE FACTS OF THIS CASE, DEFINITELY DON'T WARRANT AN EVIDENTIARY HEARING.

>> DO YOU AGREE, WITH THE SECOND DISTRICT ENUNCIATION OF A STRICKLAND CLAIM UNDER THESE ARE CIRCUMSTANCES IN DE --

>> YES YOUR HONOR SO IF THAT WAS THAT YOU HAVE GOT TO BE AN ALLEGATION, SOME DEFICIENCY -- ADVISE THE CLIENT TO REJECT THE PLEA WITHOUT PREPARING OR KNOWING THE OPERATIVE FACTS OF THE CASE OR COUNSEL NEGLECT TO DO IDENTIFY THE MATERIAL LEGAL ISSUES, OR, OTHERWISE DID NOT FULLY PERFORM, AS A LAWYER?

>> CORRECT YOUR HONOR.
>> ALL RIGHT, SO WOULD IT
AGAIN WOULD IT WANT TO MAKE
SURE, WOULD SAYING YOU ARE
GOING TO WIN, AND NOT
ADVISING OF THE CONSEQUENCE
OF LOSING, BE DEFICIENT
PERFORMANCE I MEAN
ALLEGATION SUFFICIENT TO GET
AN EVIDENTIARY HEARING.
>> IT COULD BE YOUR HONOR
DEPENDING UPON OTHER
CIRCUMSTANCES.
>> WHAT OTHER -- AGAIN NOW WE
ARE JUST TALKING ABOUT
PLEADING.
WHAT OTHER CIRCUMSTANCES IN
THE BLEEDING WOULD THERE
HAVE TO BE?
OTHER THAN NOT HAVING
ADVISED OF THE OTHER SIDE OF
THE EQUATION?
>> WELL, THE PLEADINGS ARE
ONLY STOPPED THE EXTENT THEY
ARE NOT REFUTED BY THE
RECORD I'M SIMPLY SAYING
THERE COULD BE SOMETHING IN
THE RECORD LIKE IN THIS
CASE.
>> OKAY.
>> THAT REFUTES THE
ALLEGATION SO THEY DON'T
HAVE TO BE ACCEPTED YOU LOOK
AT ALLEGATION YOU LOOK AT
THE RECORD TO EXTENT MAY
REFUTED ALLEGATIONS, THEN YOU
ACCEPT THAT AS TRUE.
>> IN THIS INSTANCE, THE
RECORD OR THE ALLEGATION, IN
THE TRIAL COURT WAS I FELT
MY COUNSEL TOLD ME SHE FELT
LIKE I WAS GOING TO WIN.
>> CORRECT YOUR HONOR.
>> SO WE ARE DEALING, IN
THIS WHOLE CASE WITH A
MATTER OF SEMANTICS AREN'T
WE?
YOU -- SEMANTICS.
>> ISN'T THERE A DIFFERENCE
BETWEEN ALLEGATION THAT MY
CLIENT MY LAWYER TOLD ME SHE
FELT LIKE I WAS GOING TO
WIN, AND SHE ASSURED ME I
WAS GOING TO WIN SEEMS TO ME

A QUALITATIVE DIFFERENCE.

>> THERE IS YOUR HONOR,
BECAUSE AS DEFENDANT WOULD
YOU WANT YOUR ATTORNEY TO
TELL YOU THAT THEY THOUGHT
THE PROSPECTS WERE THAT IS
WERE A THEY ARE THERE FOR
BUT AS FAR AS MAKING
GUARANTEES OR PROMISES, WE
ARE TALKING ABOUT A LOT OF
INTANGIBLES, SOMETHING YOU
CAN'T REALLY PREDICT, WITH
CERTAINTY, SO WHEN YOU GET
INTOES A PROMISE YOU REALLY
TALKING ABOUT A DIFFERENT
AREA THAN WHAT WE ARE
DEALING WITH HERE.

>> I WOULD LIKE TO CAN --
TWO -- TWO AREAS, ONE IS --
MR. ROGOW SAYS YOU KNOW
REALLY OUGHT TO BE PART AND
PARCEL OF WHAT HAPPENS WITH
THE DEFENDANT -- LAWYER BUT
-- THEY PUT THIS IN WRITING
YOU KNOW I ADVISED YOU OF
THIS OFFER AND YOU --
REJECTED IT OR YOU -- OR I
ADVISE YOU THAT -- AND I
KNOW IN PERSONAL INJURIES
CASES FROM YEARS BACK YOU
WOULD NEVER -- YOU KNOW IF
OFFER WAS CONVEYED, YOU
WOULD DEFINITELY WANT TO GET
YOUR CLIENT TO PROTECT
YOURSELF, I ADVISE YOU HAD
TO TAKE THIS OR NOT TAKE IT,
THE -- YOU AREP CAPTAIN OF
THE SHIP BUT THIS IS MY
ADVICE, IS THAT A AS FAR AS
HIS PRACTICE, WHEN STATE
CONVEYS THE PLEA OFFER DO
THEY GENERALLY TRY TO CONVEY
IT IN WRIING OR IS THERE SO
MANY VARIETIES WHAT MIGHT
HAPPEN TO PROTECT HIM FOR
THE STATE OFFER BECAUSE IF
THE STATE WANTS THE PLEA
WANT TO MAKE SURE THAT IT IS
CONVEYED YOU MIGHT HAVE A
LAWYER WHO IS DOING 20 CASES
AT ONE TIME WHAT IS THE
PRACTICE OUT THERE?

>> IT VARIES WIDELY YOUR
HONOR I DON'T THINK ANY SET

PRACTICE, MAYBE THERE SHOULD BE.

>> WE HAVE SUCH A THING WHEN THEY GIVING UP THEIR RIGHTS AT TRIAL YOU KNOW, PLEA COLLOQUY ALL THAT, STRIKES ME THAT IT WOULD BE, SIMILAR SIMPLE THING TO HAVE AN -- YOU ARE SAYING IT HAPPENED HERE WHICH IS THE JUDGE CONFIRMED THAT THERE WAS OFFER THERE WASN'T OFFER BUT THE JUDGE WAS TRYING TO FIND OUT JUDGE CERTAINLY DONATES WANT TO GO THROUGH A TWO WEEK TRIAL UNLESS YOU KNOW, IF THERE WAS GOOD OFFERS OUT THERE, SO -- THAT IS USUALLY IN THE RECORD?

THAT IS THAT THE JUDGE ASKED WERE THERE ANY PLEA OFFERS.

>> IT IS OFTEN ON THE RECORD WOULD I HAVE TO SAY PROBABLY JURIST OF THE TIME IT IS NOT THERE.

-- MAJORITY OF THE TIME NOT THERE THE STATE COULD PREPARE IN WRITING A LOT OF THESE ISSUES COME UP JUST SOMETHING BETWEEN THE DEFENSE ATTORNEY, AND THE DEFENDANT, SOMETHING THE STATE REALLY CAN'T REMEDY JUST BY PRESENTING ALL OFFERS IN WRITING.

>> IF NO FURTHER QUESTIONS THAT I WILL COMPLETE MY ARGUMENT.

>> MR. ROGOW I'M GOING TO GIVE YOU A COUPLE OF MINUTES HE YOU USED ALL UP ALL YOU HAVE MAYBE YOU CAN GET OUT A COUPLE OF POINTS.

>> JUSTICE WELLS YOUR POINT WELL TAKEN ABOUT ALLEGATION I INCLUDE IN PAGE TWO OF OUR BRIEF SHE FELT SHE WOULD WIN AT TRIAL BUT THEN IT GOES ON TO SAY AND IN AT A WORSE AT THE CHARGES WOULD BE DOMESTIC VIOLENCE AND THAT IS -- NOT PROCEEDED BY SHE FELT IF ONE READS THIS ONE HAS TO READ IT, AS --

>> BUT DOES APPEAR A DIFFERENCE BETWEEN WHAT WAS ALLEGED, AND WHAT THE FOURTH DISTRICT WROTE WAS THE SITUATION IN THIS CASE, WHERE FOURTH DISTRICT SAYS RATHER BOLDLY THAT SHE THE LAWYER ASSURED A WIN.

>> IT IS TRUE.

THERE IS A DIFFERENCE. THEY USE THE WORD ASSURED, HE DOESN'T USE THE WORD ASSURED IN THERE BUT THE AT A WORST PARSE -- PART I THINK BRINGS IT ALL TOGETHER I RECOGNIZE THAT DIFFERENCE, I THINK AN IMPORTANT POINT, HAS BEEN MADE, BY THE STATE AND THAT IS THAT THE DIFFICULTIES IN THESE CAUSE ABOUT HAVING THIS KIND OF PROCESS, THAT HAPPENS ON THE EVE OF TRIAL ON THE MORNING OF TRIAL A MOMENT BEFORE TRIAL, AND THEN IT GETS US INTO ALL OF THESE PROBLEMS, LATER ON.

>> --

>> JURY IS OUT --

>> IT COULD HAPPEN WHILE THE JURY IS OUT TOO AT LEAST IN THAT POSITION, YOU KNOW YOU ARE -- HERE IS THE SITUATION WHICH THE FELLOW IS SAYING, I WAS TOLD THAT SHE TOLD ME SHE WOULD WIN THE CASE, FELT SHE WOULD WIN THE CASE WHATEVER -- HOWEVER.

>> WHEN COULD YOU EVER WHEN COULD AN ATTORNEY EVER ADVISE A CLIENT NOT TO TAKE A PLEA?

I MEAN IF ATTORNEY HONESTLY -- YOU KNOW EVALUATES A CASE, AND DECIDES, THAT WE COULD POSSIBLY WIN ON THIS, OR WE COULD GET THIS KNOCKED DOWN TO A -- REDUCED CHARGE, AND THEY MAKE AN HONEST ASSESSMENT OF THAT, WHY SHOULDN'T YOU BE ABLE TO TELL YOUR CLIENT THAT DON'T TAKE THIS PLEA, THAT HERE IS THE SITUATION, LET'S TAKE

OUR CHANCES AT TRIAL?

>> YOU SHOULD BE ABLE TO DO THAT, JUSTICE QUINCE AS LONG AS THE CLIENTS CAN MAKE THAT DECISION KNOWINGLY AND INTELLIGENTLY REQUIRES A FULLER ASSESSMENT MY CONCERN THESE HAPPEN HAPHAZARDLY NOT TALKING MONEY LIKE CIVIL CASE.

>> THERE IS NO -- THERE IS NOTHING IN THE ALLEGATION HERE, THAT DEMONSTRATES, THAT THE THAT THERE WAS NO KNOWING AND INTELLIGENT DECISION MADE, THAT IS THAT IS THE PROBLEM I HAVE HERE, SHOULDN'T THERE BE, SOME ALLEGATION, THAT THERE THAT ATTORNEY DID SOMETHING WRONG, SO THAT NOW POSSIBLY, THIS PLEA IS INVOLUNTARY.

>> I THINK IT WOULD BE BETTER IF SUCH ALLEGATION BUT I DON'T THINK IT IS CRITICAL FOR THE 6TH AMENDMENT ANALOGY -- [INAUDIBLE]

>> THANK YOU VERY MUCH, WE'LL TAKE THE CASE UNDER ADVISEMENT.

>> THANK YOU BOTH FOR YOUR ARGUMENTS THIS MORNING.