We now move to the second case
on our docket, Krawczuk versus
the State of Florida.
>> Good morning.
May it please the court.
I'm here on behalf of Anton
Krawczuk.
We are here on the appeal of the
denial of 3.8550 released after
an evidentiary hearing and the
central issue before this court
is whether or not Mr. Krawczuk's
waiver of mitigation was knowing
and intelligent.
>> Could you fill me in on the
credible delay in this case?
Win was his death sentence
affirmed?
>> The death sentence was
affirmed in 1994.
Your Honor, yes.
>> And when was the first
postconviction?
We are here today 17 years after
his conviction was affirmed.

When was his first

postconviction?

>> Yes, Your Honor.

That is correct.

>> Do you have any

information -- this is a terrible

delay.

If your client is entitled to --

it is terrible but for the state

of Florida this is terrible.

>> I understand Your Honor.

I don't know that I have a

specific answer for you.

I came into this case in 1998

when I first started working at

CCRC, I know there were

extensive public records

investigations.

>> You said 1998?

>> Right.

>> I understand Your Honor.

I'm just saying from my

perspective, there was extensive

public records litigation going

on.

>> He pled guilty.

>> What is not in this record is he did not at any time prior to that waiver instruct his attorney not to investigate.

In fact, he was participating --

>> Didn't he tell the attorney he couldn't talk with defense?

>> Your Honor that is not there in the record and in fact the lower court found that he made no unequivocal direction to his attorney to that effect.

The evidence that is in the record is his trial attorney indicated he wasn't big on having his family involved, but in fact never said did not speak to them, never instructed his family not to speak to the attorney.

In fact, two of his family members, his mother and his grandmother, prior to the waiver, sometime prior to the

waiver I believe shortly after
she was appointed, contacted the
defense attorney and spoke to
her.
She had their information.
She had their telephone numbers.
And at that time because they
were simply acting on access to
visit them at the jail she did
not speak to him about any other
information.
It was a very short
conversation, and believe less
than six minutes and never
contacted them again and.
>> Is the standard here because
he waived mitigation, whether,
if the investigation was taking
place, whether he still would
have waived mitigation?
Is that how we evaluated?
>> I don't think this court has
ever imposed a standard on the
defendant.
>> Again, you can't -- he waived

mitigation and now you say there
is other mitigation.
You don't just get a new penalty
phase.
Don't you have to show that the
waiver would have been different
if he had this information?
>> I think you certainly have to
show the evidence has now been
presented that should've been
investigated would have been
prejudicial and would have made
a difference to the jury.
>> No, no, no.
I don't think so.
If somebody is waiving
mitigation, and I thought we had
some cases on this, that you
don't get another bite on
mitigation unless you can show
that your waiver was not
knowing.
This was a pre-case, was it not?
So did he testify that he now
would like to have a penalty

phase where he would be put on

mitigation?

>> Didn't testify but I think

the recitation and

postconviction.

I don't think there was a

requirement that he testify to

that.

>> You think we would give new

penalty phase and have somebody

go, I still don't want to put

mitigation on?

>> No, I understand that

concern.

I think however, I don't think

there is a requirement that he

testify however, if this court

is looking at this which is not

clear .

>> Does he want to be presented

in this appeal?

>> Yes, Your Honor.

He was willing in

postconviction.

Like I said he never instructed

his trial attorney not to
investigate.
Certainly there is information
in the record without his
testimony, that he would go
forward with this at this point.
I also think it is clear the
record the actual penalty phase,
he wavered on not presenting.
He allowed, after instructing
her not to do anything, he then
allowed his trial counsel to
cross examine one of the
witnesses.
Interestingly the
cross-examination that he
allowed I think went to the
culpability of the co-defense
and he was cross-examining
someone about items found in the
codefendants room in the
residence where they both lived.
Also on the record of the
penalty phase, he was not
opposed to mitigation.

The doctor's report was with
respect to --
However he did indicate with
respect to that report, he would
agree to having portions of it
come in because everything else
was against him.
So there are indications in this
record that he would have been
amenable to the presentation had
he been fully and appropriately
advised of what was available to
him.
>> In State v. Lewis, said
your best case?
>> I think they're a line of
cases.
>> We have cases where we allow
a defendant to waive mitigation.
You did not argue on direct
appeal that the inquiry of the
trial judge was inadequate, did
you?
>> During direct appeal I think
there was a challenge made to

his waiver based on the fact
that he was taking medication
for depression.
>> And that was affirmed?
>> Correct.
>> So now, what you have to
establish in postconviction is
to show that the waiver was not
knowing?
>> To show the waiver was not
knowing -- we have to show that
counsel failed to investigate
possible mitigation presented to
Mr. Krawczuk next explained to
him what was available.
THERE WAS A CHALLENGE MADE
TO HIS WAIVER BASED ON THE
FACT, I THINK THAT HE WAS
TAKING MEDICATION FOR
DEPRESSION AT ONE TIME.
>> AND THAT WAS AFFIRMED.
>> CORRECT.
>> WHAT DO YOU HAVE TO
ESTABLISH IN POST-CONVICTION
TO SHOW THAT THE WAIVER WAS

NOT KNOWING.

>> WE HAVE TO SHOW THAT THE

COUNSEL FAILED TO NEGOTIATE

LITIGATION AND EXPLAIN TO

HIM WHAT WAS AVAILABLE.

>> AND IF YOU SHOW THERE IS

A DEFICIENCY IN THEM NOT

FULLY INVESTIGATING THEN HOW

HOW IS THE PREJUDICE PRONG

EVALUATED IN THIS SITUATION?

ISN'T IT LOGICALLY THAT WITH

A GUILTY PLEA HE WOULD NOT

HAVE WAIVED MITIGATION IF HE

HAD KNOWN WHAT WAS OUT

THERE?

SO WOULDN'T THAT BE THE

TEST?

>> I'M ASKING THAT --

THIS COURT RECENTLY DECIDED

A LITTLE OVER A YEAR AGO,

NOWHERE IN THAT OPINION DO I

SEE THIS COURT MADE A

DECISION AND IF THERE WAS

EVIDENCE HE WOULD HAVE GONE

FORWARD.

THIS SAYS IF PREJUDICE

PRESENTED FROM COUNSEL'S

FAILURE TO PRESENT THE

MITIGATING EVIDENCE.

IF THIS COURT IS SAYING THAT

THERE HAS TO BE A SHOWING,

THAT MR. KRAUSHAW WOULD HAVE

PRESENTED, AS I SAID, I

THINK THE RECORD ON THIS

CASE IS THAT HE WOULD HAVE

>> ISN'T THAT A LOGICAL WAY

FOR US TO EXAM IFEN IN --

IF YOU WERE TRYING TO

OVERTURN A GUILTY PLEA IN

THIS CASE.

YOU CAN'T JUST SAY THEY

INVESTIGATED --

WOULDN'T YOU SHOW THEY HAD

TO PLEASE GUILT FOR AN

INVESTIGATION TO HAVE BEEN

DONE?

I CAN'T ARGUE WITH YOUR

LOGIC, I'M JUST GOING BY

WHAT CASES THIS COURT HAS

DONE.

>> ISN'T IT INHERENT IN THE

PROCESS, IN THE ANALYSIS --

THAT'S JUST PART OF IT?

I MEAN THAT'S THE WHOLE

POINT.

THE ONLY REASON THIS PERSON

DID THIS IS BECAUSE THERE

WAS INEFFECTIVE ASSISTANCE

IN COUNSEL.

IS NOT THAT OBVIOUS ENOUGH?

THE DIFFERENCE IS WE WOULD

HAVE GONE FORWARD OR WE

WOULD NOT HAVE I'M --

>> I'M SAYING THAT NOW IT

HAS BEEN DONE IN

POSTCONVICTION, AND

MR. KRAWCZUK HAS ALLOWED

THAT.

AN I THINK YOU HAVE TO LOOK

AT ALL OF THE CIRCUMSTANCES

IN THIS CASE, THIS IS A

SITUATION WHERE MR. KRAWCZUK

WAS OBSTRUCTING HIS COUNSEL

FROM INVESTIGATING.

AND I MENTION IT BECAUSE IT

DOES GO TO WHAT HE WOULD

HAVE BEEN WILLING TO PRESENT

HAD HE KNOWN THE

INFORMATION.

>> NOW, LET'S GO --

THERE WERE TWO EXPERTS THAT

THE ORIGINAL DEFENSE LAWYER

HAD HIRED, CORRECT?

>>, YOUR HONOR, THERE WAS

ONE.

>> DID THEY DO A MENTAL

HEALTH EXAMINATION OF THE

DEFENDANT?

>> THE REPORT IS UNCLEAR AS

TO WHAT HIS CHARGE WAS.

.

I THINK THE ONLY DEFINITIVE

FINDINGS THAT WERE MADE THAT

WAS MR. KRAWCZUK WANTS TO

PROCEED AND THERE WAS NO

ASSUMPTIONS OF INSANITY.

THEY WERE ASKING FOR A

DOCTOR FOR COMPETENCY AND

SANITY.

THIS WAS NOT DONE WITH A

PROCESS TO EXTRACT

INFORMATION.

THE INFORMATION TOUCHED ON,

AS I SAID, TOUCHED ON.

IT WAS VERY BRIEF.

IT SHOULD HAVE PROVIDED

TRIAL COUNSEL WILL FLAGS OF

WHAT TO INVESTIGATE FURTHER.

>> WHAT IS IT THAT --

GIVE ME JUST A PICTURE OF

WHAT DID THE DEFENSE

LAWYER DO BEFORE THE

MITIGATION IN THIS CASE.

>> I WOULD SAY NOTHING.

.

>> THERE WAS THE COMPETENCY

AND SANITY DOCTOR.

>> DID NOT CONTACT ANY

RELATIVES.

>> DID THE JUDGE MAKE A

FINDING THAT --

WHAT DID THE JUDGE SAY FOR

THE IDEA THAT THE

DEFENDANT'S OWN WISHES WILL

NOT BE --

AS WELLTIVE WILL NOT BE

CONTACTED.

>> THEY FOUND THAT HE DID

NOT, UNEQUIVOCALLY STRUCK

HIM NOT TO PURSUE.

>> WHAT WAS HER EXPLANATION

FOR WHY SHE DIDN'T?

>> HER EXPLANATION IS SHE

DOESN'T DO IT UNTIL CLOSER

TO TRIAL.

SHE SAID THERE WAS

INDICATION THAT HE WAS

RELUCTANT TO INVOLVE FAMILY,

BUT THERE'S NO DEMOCRAT --

TESTIMONY THAT HE PROHIBITED

HER FROM DOING SO.

THEY WERE LOCAL AND

AVAILABLE TO HER.

IF WE KNEW THE STANDARD,

DOES THAT GIVE YOU A NEW

PENALTY PHASE OR WOULD IT

HAVE TO BE LIKE THE

TRADITIONAL SECOND PRONG OF

STRICTLAND THAT IT

UNDERMINES CONFIDENCE IN THE

OUTCOME.

>> THE TWO STEPS ARE TWO

PRONGS, ONE THAT HE WOULDN'T

HAVE WAIVED MITIGATION IF HE

HAD KNOWN, AND TWO THAT IT

WAS PREJUDICE AND THE

PENALTY PHASE WITH THIS IN

THERE WOULD UNDERMINE WHAT

HAPPEN.

>> YES, AND I THINK

CERTAINLY --

I WANT TO POINT OUT THAT THE

LOWER COURT DID FIND THAT

TRIAL COUNSEL WAS DEFICIENT

FOR NOT INVESTIGATING THE

FAMILY HISTORY.

MR. KRAWCZUK'S CHILDHOOD WAS

HORRIFIC.

AND THE IMPACT THAT MAY HAVE

HAD ON THE JURY, THE LOWER

COURT DISCOUNTED THAT

MITIGATION, SIMPLY TOOK IT

HAS A SENTENCING ORDER, AND

--

>> I HAVE A PROBLEM, AND

THIS IS A INCREDIBLY

UNREASONABLE DELAY.

THIS ISN'T ABOUT FINDING NEW

WITNESSES THAT COULD

EXONERATE HUM.

THIS IS ABOUT WHAT WAS --

THERE WAS A LOT OF PUBLIC

RECORDS.

THIS IS ALL ABOUT HAVING

DONE AN INVESTIGATION, THAT

SHOULD TAKE 6 MONTHS OR A

YEAR, AND I STILL CAN'T

CONCEIVE THAT IF A CERTAIN

PERSON IS ON DEATH ROW

BECAUSE OF OVERWHELMING

MITIGATION, THAT WE WOULD

SUBJECT HIM AND THE SYSTEM

TO A 17 YEAR DELAY.

>> ALL I CAN SAY, IS FROM

THE STANDPOINT, I DON'T

BELIEVE THE RECORD REFLECTS

THAT WE ASKED FOR ANY, YOU

KNOW, EXTENSION FOR

CONTINUANCE OR TIME.

I THINK AT ONE TIME WHEN

EVIDENCE SHARE HEARING HAD

BEEN SET, I ASKED FOR ONE

CONTINUANCE.

>> IT'S HARD FOR ME.

THIS KIND OF DELAY IS

UNACCEPTABLE AND I DO NOT

UNDERSTAND IT.

>> FROM THE TIME OF THE

EVIDENTIARY HEARING UNTIL

THE ORDER WAS ISSUED, WAS AN

ORDINANCE THAT TOOK 6 YEARS,

I BELIEVE.

YOU KNOW, I DON'T KNOW THE

REASONING FOR THAT.

I CAN'T SPEAK TO THAT.

I CAN ONLY SPEAK THAT I

BELIEVE THAT THE RCA SOUTH

WAS DILIGENT IN PURSUING THE

CLAIMS.

IT INVESTIGATED THE CLAIMS,

ALL I CAN RECALL IS THERE

WAS A DELAY WITH PUBLIC

RECORD --

I DON'T RECALL SEEKING

EXTENSIVE CONTINUANCES.

>> THE DATE FROM WHEN WE

COMPLETED THE EVIDENTIARY

HEARING --

>> DOES THE SAME HERE FOR

THE CASE.

>> YES, >> THE JUDGE IN THE

HEARING --

>> NOT AT THE TIME HE HEARD

THE HEARING, I DON'T

BELIEVE.

I THINK SUBSEQUENT TO THAT

--

>> I WANT TO ASK YOU ABOUT

THOMPSON, BECAUSE THE FIRST

CLAIM IS THAT HE SHOULD HAVE

BEEN QUALIFIED.

SO HE APPARENTLY TOOK THE

EXPERT AND DID HIS OWN

RESEARCH ON LAW FOR HOW MANY

TIMES EXPERTS HAD TESTIFIED

FOR THE PLAINTIFF OR THE

DEFENDANT.

>> CORRECT.

>> AND THE FIRST TIME YOU

KNOW ABOUT THIS IS WHEN HE

--

IS IT 6 YEARS LATER WHEN THE

ORDER CAME OUT?

>> CORRECT.

>> I READ THE ORDER, THE

FIRST TIME I SAW THAT, HE

LOOKED AT INDIVIDUAL CASES

ON WESTLAW, COMPARED

DR. CROWN'S --

TESTIMONY, AND DISCREDITED

HIS TESTIMONY ON THAT.

>> CAN IS THAT WHEN YOU MOVE

TO DISQUALIFY.

>> I MOVED TO DISQUALIFY HIM

AND A MOTION FOR REHEARING.

SO I DID BOTH.

>> COUNSEL, YOU'RE DOWN TO

ABOUT 2 MINUTES.

>> I RESERVE THE REST OF MY

TIME FOR REBUTTAL, THANK

YOU.

>> MAY IT PLEASE THE COURT

--

>> I MEAN, YOU MIGHT WANT TO

START WITH, JUST --

LET'S START WITH THE 6-YEAR

DELAY BETWEEN A JUDGE TAKING

SOMETHING UNDER

CONSIDERATION.

WHAT'S THE STATE'S

EXPLANATION?

>> I HAVE NO EXPLANATION,

YOUR HONOR, EXCEPT THEY DO

BELIEVE THE JUDGE WAS

SUFFERING HEALTH PROBLEMS IN

THAT PERIOD OF TIME.

I GOT ASSIGNED THE CASE

AFTER THE EVIDENTIARY

HEARING BY A YEAR AFTER IT

HAD BEEN OVER, AND IT GOT

ASSIGNED TO ME AND I

REALIZED IT WAS OVER A YEAR

SINCE THE CLOSING ARGUMENTS

--

AND I WROTE A LETTER SAYING

IT APPEARS THIS CASE IS

RIGHT FOR YOUR DECISION.

I FILED TWO FORMAL MOTIONS

FOR THE JUDGE TO RULE AND

NOTHING CAME OUT OF THAT.

AFTER THE SECOND HE DID

INDICATE TO OUR OFFICE HE

WAS WORKING ON THE ORDER.

AND THEN QUITE SOME TIME

PASSED AGAIN AND HE ISSUED

ANOTHER ORDER SAYING I'M

STILL WORKING ON THE ORDER.

IT WAS A VERY LENGTHY DELAY.

>> WELL 2006 --

>> 04 I THINK.

>> WHAT YEAR WAS THE DEATH

PENALTY IMPOSED?

>> SO 12 YEARS, AND THIS

SHOULD BE AN EMBARRASSMENT

TO EVERYBODY INVOLVED IN

THIS CASE.

AND IT MAKES ME WANT TO GO

TO THE NEXT POINT THAT WAS

RAISED ABOUT THE

DISQUALIFICATION.

THE FIRST TIME THAT ANYONE

KNOWS THAT A JUDGE OVER THE

6 YEARS HAS DONE HIS OWN

RESEARCH TO FURTHER

DISCREDIT DR. CROWN IS WHEN

THE ORDER COMES OUT?

>> CORRECT.

>> AND YOU'RE SAYING AT THAT

POINT THE ONLY REMEDY THAT I

HAVE IS TO FILE A WRIT OF

PROHIBITION?

>> NO, YOUR HONOR --

>> NO, NOT THE CASE LAW, IT

SAYS IF YOU PURSUE IT AND

IT'S DENIED, IT SAYS YOU

MUST ONLY PURSUE THIS BY A

WRIT OF PROHIBITION.

AND IT CERTAINLY CAN'T BE

SOMETHING THAT HAPPENS AFTER

THE EVIDENTIARY HEARING AND

THE EXACT TIME THAT THE

ORDER COMES OUT WHERE THE

DEFENDANT HAS NO OPPORTUNITY

TO REBUT WHAT JUDGE PUT IN

THE ORDER.

>> WE STILL SUBMIT THAT THE

JUDGE PROPERLY DID THE ORDER

TO DISQUALIFY.

THE FACT THAT HE DID LEGAL

RESEARCH BY TYPEING IN A

NAME >> THIS IS NOT LEGAL

RESEARCH, LEGAL RESEARCH IS

FINDING CASES ON POINT.

FINDING A WAY TO FURTHER

DISCREDIT AN EXPERT BECAUSE

YOU LOOK AT OTHER CASES THAT

MAY OR MAY NOT ACCURATELY

REPORT WHAT HE SAID, AND USE

THAT TO DISCREDIT THE

EXPERT, AND NOT GIVE, IF YOU

HAVE DONE IT AT THE TIME OF

THE TRIAL OR THE EVIDENTIARY

HEARING, AND SAY I JUST

FOUND THIS ABOUT DR. CROWN,

WHAT DO YOU SAY ABOUT IT,

IT'S A CLEAR ERROR THAT MAY

UNDERMINE WHAT THE JUDGE DID

IN THIS CASE.

>> I DISAGREE WITH YOU THAT

HE WAS DISCREDITING BASED ON

THAT LEGAL RESEARCH HE DID.

I THINK HIS ORDER IS CLEAR

FOR WHY HE DIDN'T FIND --

>> WHY DID HE PUT IT IN

THERE IF IT HAD NOTHING TO

DO ABOUT THE TESTIMONY FOR

DR. CROWN.

>> HE TESTIFIED THAT HE

TESTIFIED IN A NUMBER OF

CASES, AND HE COULDN'T

RECALL IF HE HAD EVER

TESTIFIED FOR THE STATE.

HE RAN HIS NAME THROUGH

WESLAW, AND IT SAID HE HAD

ALWAYS BEEN FOR THE DEFENSE.

>> IF THEY HAD CASES FOR THE

STATE, THEY WOULD NOT SHOW

UP ON WESLAW.

AND THE DATA BASE, TO REACH

THAT CONCLUSION ON --

>> I DON'T THINK HE WAS

SPECIFICALLY, HE JUST SAID

HE TURNED IN A DEFENSE

EXPERT BASICALLY.

AND I DON'T THINK THAT'S OUT

OF THE REALM OF WHAT COURTS

DO, ESPECIALLY APPELLANT

COURTS.

>> THIS TO ME IS A

SIGNIFICANT ISSUE.

I DON'T KNOW HOW IT ENDS UP

BECAUSE NOW THAT WE HAVE,

IPADS AND INSTANT RESEARCH,

IT'S A CONCERN THAT A JUDGE,

CERTAINLY LEGAL RESEARCH IS

DIFFERENT.

BUT WE WOULDN'T WANT A JUDGE

GOING AND TALKING TO

COLLEAGUES ABOUT SO WHAT DO

YOU HEAR OR KNOW ABOUT

DOCTOR CROWN AND THEN USING

THAT.

SO IF HE IS USING FACTUAL

INFORMATION, THAT ARE IN

CASES, AND HE IS NOT GIVING

THE DEFENDANT A CHANCE TO

RESPOND TO IT.

NOW I DON'T KNOW IF THAT

CALLS FOR HIS

DISQUALIFICATION, BUT HOW IS

THAT --

AND HOW IS THAT NOT ERROR,

THAT WE SHOULD SAY THIS IS

NOT --

IF THIS IS GOING TO BE DONE,

IT HAS TO BE DONE WHERE HE

PRESENTED TO THE PARTIES,

THEY FOUND THIS, AND GIVE

THEM A CHANCE TO EITHER

EXPLAIN IT AWAY OR GIVE THE

DR. A CHANCE TO EXPLAIN IT

AWAY.

>> DURING THE QUESTIONING OF

DR. YOU, IN --

DOCTOR CROWN, IN A WAY IT

DID COME OUT, THE JUDGE

DIDN'T HAVE THE BENEFIT OF

THIS COURT'S OPINION, BUT I

THINK IT FALLS BACK TO WHAT

ORDER SAYS, AND I THINK IF

YOU LOOK AT THE ORDER IT'S

CLEAR.

DR. CROWN'S OPINION WAS

DISCREDITED BECAUSE HE

DIDN'T REVIEW ANYTHING IN

THIS CASE AND HIS OPINIONS

WERE CONTRARY TO THIS CASE

--

>> I UNDERSTAND WHAT YOU'RE

SAYING, BUT MY CONCERN IS A

TRIAL JUDGE --

LET'S SAY YOU'RE DOING A FRY

HEARING AND THE STATE WANTS

TO BRING SOMETHING IN, AND

THERE'S AN EXPERT ON THE

STAND, WHAT'S TO STOP THE

TRIAL JUDGE FROM JUST

GOOGLING THAT EXPERT AND

FINDING OUT ALL OF HIS

INFORMATION THAT THE PARTIES

HAVEN'T INTRODUCED.

>> I DON'T THINK THERE IS

ANYTHING TO INTRODUCE.

IF A JUDGE DID THAT WOULD

THAT BE IMPROPER IN YOUR

MIND?

>> I DON'T THINK THE TRIAL

JUDGES SHOULD BE DOING

RESEARCH OUTSIDE OF WHAT'S

TAKING PLACE --

>> WHEN JUDGES DO THAT, WHAT

SHOULD BE DONE?

>> WELL, I THINK THIS COURT

HAS ADDRESSED THAT SITUATION

AND BINDING IN SOME OTHER

CASES WHERE IT'S BEEN MADE

PART OF THE RECORD FOR WHAT

TOOK PLACE.

IF THE JUDGE PUTS IT IN HIS

ORDER LIKE THIS THIS CASE,

THEN YOU HAVE TO REVIEW IT

AND SEE IF THAT HAS GIVEN

RISE TO FEAR --

>> DON'T WE WANT TO HAVE A

CLEAR STATEMENT THAT JUDGES

SHOULD NOT BE DOING THEIR

INDEPENDENT FACTUAL

RESEARCH, FACTUAL, NOT

LEGAL, ON THE INTERNET.

>> I THINK THAT'S WHERE YOU

GET INTO DIFFICULTY FOR WHAT

IS FACTUAL OR NOT >> WHEN

YOU HAVE TO CONCEDE --

>> I MOVE TO CONCEDE.

WHETHER THIS PARTICULAR

EXPERT HAS TESTIFIED FOR THE

STATE OR FOR THE DEFENSE,

AND IF HE IS EXCLUSIVELY A

DEFENSE EXPERT OR NOT, IS A

FACTUAL QUESTION.

NOW, THERE ARE THESE CASES

THAT MAY HAVE SOME FACTS,

AND YOU FIND THAT WESLAW MAY

HAVE QUESTIONS, BUT IT'S A

FACTUAL QUESTION, ISN'T IT?

IT'S NOT A LEGAL QUESTION.

>> I AGREE, AND IT'S ALSO

DONE ON WESLAW, PUBLIC

RECORD, I MEAN --

>> IT'S AN INTERESTING

QUESTION BECAUSE OBVIOUSLY

WE GO TO WESLAW ALL THE

TIME.

THAT'S JUST PART OF WHAT WE

DO, AND WE CERTAINLY --

WE HAVE TO DO IT WITH THE

DEFENDANT'S LEGAL RESEARCH.

>> AND I NOTE THAT THIS

COURT HAS DONE A VERY

SIMILAR TYPE OF THING IN

OTHER CASES.

>> WHAT HAVE WE DONE?

>> WE HAVE DISCUSSED SO AND

SO AND EXPERTS TESTIFIED IN

OTHER CASES BEFORE.

>> AND I THINK YOU'RE RIGHT,

WE WILL SAY THAT IN CASES,

BECAUSE I HAVE SEEN THAT

KIND OF THING.

BUT CANDIDLY, I QUESTION THE

PROPRIETY OF THAT FOR THE

SAME REASON THAT I AM

CONCERNED ABOUT A JUDGE

DOING WHAT HE DID HERE.

BECAUSE YOU KNOW, IT SEEMS

LIKE THOUGH ME WE SHOULDN'T

GO ON ABOUT PERSONAL

KNOWLEDGE ABOUT WHAT AN

EXPERT DID IN OTHER CASES.

BUT AGAIN, THE PARTIES TO

THE CASE HAVEN'T HAD AN

OPPORTUNITY TO RESPOND TO

THAT.

>> CORRECT, YOUR HONOR, I

FIND IT DIFFICULT FOR A

JUDGE TO PURGE HIS PRIOR

KNOWLEDGE.

AND THAT WAS NOT THE CASE

HERE.

BUT WHEN WE'RE ANALYZING A

SPECIFIC ISSUE ON RULING ON

A MOTION FOR

DISQUALIFICATION, I THINK IF

THE COURT REVIEWS THE ORDER,

HE WILL SEE WHY HE WAS

DISCREDITED DR. CROWN'S

OPINION AND IT WAS NOT

BECAUSE HE TESTIFIED FOR

OTHER CASES FOR THE DEFENSE.

>> LET'S GO TO THE INITIAL

QUESTION I HAD HERE.

I WANT YOU TO ASSUME THAT WE

AGREE, THAT THERE ARE

SUFFICIENCY IN THE

INVESTIGATION, AND NOT

UNCOVERING OR PER SUING

MITIGATION, AND LET'S LEAVE

OUT WHATEVER, YOU KNOW, HE

MIGHT HAVE SAID, I WOULD

RATHER HAVE YOU NOT CONTACT

MY FAMILY.

WHAT IS, UNDER STRIKELAND,

WHEN YOU HAVE A WAIVER OF

MITIGATION, HOW IS THE

PREJUDICE PRONG LOOKED AT

IT.

IS IT SIMILAR TO THE GUILTY

PLEA?

>> I THINK THE U.S. SUPREME

COURT CASE --

SUPREME COURT CASE TALKS

ABOUT THAT WHERE THE

DEFENDANT DOES NOT WANT TO

PURSUE MITIGATION.

THEY SAY YOU CAN'T ESTABLISH

PREJUDICE IF THEY SAY YOU

WOULD HAVE PRESENTED THAT

HAD YOU HAVE KNOWN ABOUT IT.

WITHOUT EVEN MAKING THAT

ALLEGATION OR ANY PROOF OF

THAT, I THINK HE FAILS ON

THE PREJUDICE PROBLEM.

I THINK YOU ARE DISCUSSING

WITH COUNSEL, TO THE END OF

THE ARGUMENT, AND MAKE

TWO-PRONGED APPROACH, WOULD

YOU FIRST HAVE TO ADDRESS,

WOULD HE HAVE DONE IT, WOULD

HE HAVE CHANGED HIS MIND AND

PRESENTED IT, AND YOU HAVE

TO ADDRESS WOULD IT HAVE

MADE A DIFFERENCE,

REASONABLE PROBABILITY >> SO

IT LOOKS LIKE THEY'RE ALL --

THEY CITING TO THE U.S.

SUPREME COURT CASE --

>> LET'S GO BACK, WHERE ARE

WE SAYING FERRAL.

>> THAT'S A DIFFERENT CASE,

YOUR HONOR, THAT'S ONE WHERE

THE TRIAL COURT GRANTED A

NEW PENALTY PHASE, AND IN

THAT CASE, THE DEFENDANT

WENT TO TRIAL AND THE

ATTORNEYS DID NOTHING IN

PREPARATION FOR MITIGATION.

AND THIS COURT JUST SAID,

FACT SUPPORT THE TRIAL

COURT'S ABILITY FOR THE

PENALTY FAZE, THERE'S

NOTHING IN THERE WHERE IT

DISCUSSES THE SPECIFIC

QUESTION.

>> IT SEEMS TO ME, AND I'LL

LOOK AT MAJORITY OPINION,

THAT I AGREE WITH YOU, THERE

HAS GOT TO BE SOME

INDICATION THAT THEY WOULD

HAVE DONE SOMETHING

DIFFERENT.

I'M ASSUMING, THE DEFENDANT

DID NOT TESTIFY?

>> NO, YOUR HONOR, BUT

UNLIKE OTHER CASES, THE

DEFENDANT IS APPARENTLY NOW

COOPERATED?

HE WANTS TO PRESENT

MITIGATION?

>> THAT'S ALL SPECULATION,

YOUR HONOR, GRANTED HE WENT

THROUGH EVIDENTIARY HEARING,

BUT AS YOU POINTED OUT, THIS

IS MANY, MANY YEARS LATER.

I THINK WHAT THE RECORD

SHOWS AND I TOTALLY DISAGREE

WITH COUNSEL FOR WHAT DIRECT

APPEAL RECORDS SHOW AT THE

TIME THAT HE PLEAD GUILTY,

AT THE PENALTY FAZE, AND HE

NEVER WAIVERRED ON

PRESENTING MITIGATION.

THE ONLY REASON HE ALLOWING

COUNSEL TO DO ANYTHING IS HE

WANTED HIS CONFIRMED ON

APPEAL.

>> IS IT FIRM?

>> RIGHT, HE WANTED DEATH

PENALTY.

>> BUT HE IS NOT A

VOLUNTEER.

LET ME ASK YOU ABOUT HIS

MENTAL STATUS, BECAUSE THAT

IS THE MOST --

FAMILY MEMBER CHILD ABUSE,

ABUSE IN CHILDHOOD --

WHAT IS IT THAT WAS

ESTABLISHED IN THIS RECORD

ABOUT THE DEFENDANT HISTORY

OF MENTAL ILLNESS, IQ, THE

WHOLE --

EVERYTHING ABOUT THAT.

>> I WOULD LIKE TO START AND

BEGIN WITH WHAT TRIAL

COUNSEL DID, COUNSEL PAINTS

IT AS NOTHING, LIKE SHE DID

NOTHING, AND THAT IS WRONG.

THE VERY FIRST THING SHE DID

AFTER INTERVIEWING THE

CLIENT WAS GET THE MILITARY

RECORDS THAT INCLUDED A

PSYCHIATRIC REPORT.

SHE MADE A MOTION --

POSITION TO GET --

MOTION TO GET A DOCTOR TO

HELP HER.

AND THEN HE DID A ANALYSIS

ON THE DEFENDANT.

>> THE TRIAL COURT HAD IT --

>> BUT YOU'RE --

THE PURPOSE OF THAT FOR

COMPETENCY AND --

>> I WILL CONCEDE THAT THAT

IS WHAT THE MOTION SAID ON

THE FASHION OF IT AT THE

TIME SHE FILED IT.

SHE SUBSEQUENTLY HAD THAT

SHE HAD IT --

SAYING THAT I'M DOING THIS

TO ASSIST YOU IN YOUR CASE.

GRANTED THOSE CONCLUSIONS

ARE GOING TO COMPETENCY.

>> YOU HAVE THE ABUSE OF

CHILDHOOD.

YOU HAVE THE MILITARY

INFORMATION CONTAINED IN

THIS DISCHARGE.

AND HE WAS A-WALL OR

WHATEVER, AND THAT WAS IN

THIS REPORT ALSO.

YOU HAVE A DISCUSSION OF

MINIMAL DRUG AND BARELY ANY

ALCOHOL.

>> HOW DOES THAT REPORT BE

USED AT THE PENALTY PHASE?

IT WAS WAIVED BECAUSE THERE

WAS SOME --

THAT'S THE ONE TIME THE

DEFENDANT WENT BACK AND

SAID, COUNSEL I WANT YOU TO

PRESENT THIS REPORT TO THE

JURY, I WANT MAY CASE

AFFIRMED AND IF I'M AFRAID I

DON'T HAVE IT, AND THEN I

DECIDE NOT TO PRESENT IT TO

THE JURY.

BUT THEY DID HAVE THE REPORT

PRIOR TO SENTENCING

MR. KRAWCZUK.

AND THEY HAVE THE PSI THAT

WAS PERFORMED.

>> IT WAS PRESENTED IN THAT

--

IN THE INFORMATION PRESENTED

IN THAT REPORT --

>> NOT IN DEPTH, YOUR HONOR,

NO.

>> THE JUDGE FOUND THE

STATUTORY MITT --

MITT GATOR --

MITT --

>> INTERESTING AFTER THE

POSTCONVICTION HEARING, THE

JUDGE SAID NOW IN LIGHT OF

ALL OF THE EVIDENCE THAT HE

HAD, HE WOULD NOT FIND THAT.

AT THE TIME THE STATE WAS

NOT --

THEY HAD THE PSI THAT SHOWED

THAT HE HAD JUST A VERY

MINOR CRIMINAL --

>> IF, IN TERMS OF, AGAIN,
WHAT HAS TO BE SHOWN IN THIS
SITUATION, IS IT TWO
DIFFERENT PREJUDICES THEY
HAVE TO SHOW?
THAT THEY WOULD NOT HAVE
WAIVED IT, AND THEN IF --
>> RIGHT, THAT IS MY
POSITION, YOUR HONOR, THAT
IS EXACTLY WHAT THEY NEED TO
SHOW.
>> BUT IF YOU HAVE A
SITUATION WHERE NOTHING IS
PRESENTED TO THE JURY, LIKE
A 12-0 FINDING.
ISN'T IT THE SAME AS IF
SOMEBODY JUST SAT THERE AND
HAD AN ACTIVE PENALTY PHASE
AND DID NOTHING, AND
CERTAINLY I UNDERSTAND --
UNDER UNDERMIND INSIDE.
>> HE REWEIGHED EVERYTHING
AND HOW IT WOULD HAVE HAD A
REASONABLE EFFECT ON THE
JURY.

>> THEY CAN SAY --

WELL WHAT THE JURY MIGHT

HAVE DONE, YOU HAVE NO

MITIGATION, AND THEN WHAT

YOU HAVE THROUGHOUT IS

MITIGATION, IT'S REALLY --

I THINK THAT'S PROBABLY WHY

THAT FIRST PRONG IS THE MOST

IMPORTANT.

THERE HAS TO BE SOMETHING

THAT SAYS HE WOULD NOT HAVE

WAIVED THE MITIGATION.

>> I THINK BASED ON THE

RECORD IT WAS CLEAR-HE KNEW

WHAT WAS IN THE REPORT, HE

KNEW ABOUT HIS OWN

CHILDHOOD, AND COUNSEL

INDICATED AT THE TIME SHE

WAS WILLING TO CALL THE

DOCTOR AND ANOTHER WITNESS

THAT WAS FRIENDS WITH

KRAWCZUK FOR ABOUT TEN YEARS

AND HE WAIVED THEM.

SO THE TRIAL COURT IN THIS

CASE I THINK PROPERLY

ANALYZED THE CASE AND WENT
THROUGH THE PROBLEMS AND
TREATED IT AS INDICATING A
TWO-STEP PREJUDICE PROBLEM.
HE DID FIND DEFICIENCY AS TO
FAMILY ONLY, AND THAT WAS
THE ONLY PRONG OF HIS
MITIGATION.
AND THAT WAS BASED ON THE
DEFENDANT'S STATEMENTS TO
HIS ATTORNEY THAT HE DIDN'T
WANT HIS FAMILY INVOLVED.
HE SAID THAT WAS NOT AN
EQUIVOCAL HEY, DON'T CONTACT
HIM TIME OF THING.
ANOTHER THING I WANT TO
POINT OUT IS THE
REASONABLENESS OF TRIAL
COUNSEL LITIGATION IN THIS
CASE, THEY FILED A CHARGE TO
DISMISS AN ATTORNEY AND ONE
OF THE REASONS FOR THAT IS
COUNSEL WANTED TO CONDUCT
MITIGATION EVIDENCE, AND
TALK TO HIM.

SHE INDICATED TO HIM IF A

CONFESSION WASN'T SIR --

SUPPRESSED IT DIDN'T LOOK

GOOD FOR HIM, AND SHE WANTED

TO ALIENATE THE CLIENT.

SHE STARTED WITH MILITARY

RECORDS AND MENTAL HEALTH

EVALUATION.

SHE HAD A MOTION FOR A

MITIGATION SPECIALIST

PREPARED, AND KRAWCZUK

WAIVED THAT, SO SHE WAS

DOING THINGS, BUT SHE WAS

RUNNING INTO PROBLEMS FROM

HER CLIENT THAT WAS

HAMPERING HER.

SHE WOULD HAVE DONE MORE HAD

HE NOT PLEAD GUILTY.

SO I THINK WHEN THEY REVIEW

THE POSTCONVICTION ORDER,

THERE IS SPORT FOR THE ORDER

THAT COUNSEL WAS

INEFFECTIVE.

>> ANY OTHER QUESTIONS?

THANK YOU.

>> I WANT TO CLARIFY SINCE

COUNSEL JUST SPOKE ABOUT

EARLY ON, THE MOTION TO

DISCHARGE COUNSEL, AND THAT

WAS PREMISED ON SOME SORT OF

FALLING OUT OVER HER

INVESTIGATION MITIGATION.

THAT'S COMPLETELY INCORRECT.

I UNDERSTAND THAT IN THE

TRIAL COURT, THE LOWER

COURT'S ORDER, HE SAYS THERE

WAS SOME DISAGREEMENT OVER

THE INVESTIGATING

MITIGATION, BUT THAT'S NOT

WHAT THE RECORD REFLECTS.

THAT'S NOT WHAT IT REFLECTS

WHEN THERE'S A HEARING ON

MOTION'S COUNSEL TO

DISCHARGE.

WHAT COUNSEL SAYS AT THAT

HEARING IS THAT THERE WAS A

--

SOME DISAGREEMENT OVER THE

MOTION TO SUPPRESS THE

HEARING, AND SOMETHING THAT

HE WANTED HER TO LOOK INTO,

AND THERE WAS A

MISUNDERSTANDING ABOUT IT.

THEN SHE SAYS SHE WAS

SPEAKING TO HIM ABOUT

BIFURCATION, AND WHAT THAT

MEANS IN TERMS OF WITNESSES

AND INVESTIGATION, AND HE

TOOK THAT TO MEAN THAT SHE

WAS ALREADY FINDING THAT HE

WAS GUILTY AND THEY WOULD

WORK THAT OUT.

NOT THAT THERE WAS A FALLING

OUT OVER THE INVESTIGATION.

>> OUTLINE FOR US THE

MITIGATING FACTORS THAT YOU

SAY EXIST TO DETERMINE THE

EVIDENCE THAT YOU PUT ON AS

COMPARED TO WHAT WAS KNOWN

AT THE TIME THE DECISIONS

WERE PURPORTEDLY MADE.

>> THERE CERTAINLY NOW IS

DETAILS UPON DETAILS ABOUT A

VERY SEVERELY ABUSIVE

CHILDHOOD.

EMOTIONALLY --

>> WAS THE ISSUE OF AN

ABUSIVE CHILDHOOD KNOWN AT

THE TIME OF THE INITIAL

EXPERTS OPINION BACK WHEN

THE DECISION WAS MADE?

>> IT WAS MENTIONED TO HIM

THAT THE MOTHER --

>> I DON'T WANT TO TAKE UP

ALL YOUR TIME.

MENTION --

>> SO THERE'S NO DETAIL?

>> NO DETAIL.

>> AND THERE'S NO FINDINGS.

>> WHAT WERE THE OTHER

ITEMS, THERE CERTAINLY IS

THE CULPABILITY OF THE

CO-DEFENDANT, NO EVIDENCE

PRESENTED WITH RESPECT TO

THE CULPABILITY.

I THINK IN ADDITION TO THE

CULPABILITY THERE IS

INDICATION OF WHO THE

PREDOMINANT DEFENDANT HERE

WAS, AND THERE IS NOW

EVIDENCE THAT MR. KRAWCZUK

WAS MORE EVIDENCE OF --

>> WHAT EVIDENCE?

THE PERSON WHO DID THE

INITIAL EXAMINATIONS DID NOT

KNOW ANYTHING ABOUT AND DID

NOT CONVEY INFORMATION ABOUT

MENTAL HEALTH?

>> HE DID NOT HAVE ANY

FINDINGS IN THAT REGARD.

>> I THOUGHT THE COUNSEL HAD

THE PSYCHOLOGICAL RECORDS

FROM THE MILITARY, SO HE

MUST HAVE SOMETHING.

THE MISREPRESENTATION --

>> NO HE DID HAVE THE

MILITARY RECORDS AND --

>> I'M TRYING TO GET.

>> MENTIONED THAT HE HAD A

PERSONALITY DISORDER.

BUT THE PROBLEM WITH THE

REPORT FROM DR. KEON IS THAT

THESE WERE NOT TOUCHED ON,

AND THE TRIAL COURT SAID

THAT HE FOUND NO STATUTORY

EVIDENCE THERE.

>> WE CAN DEBATE ALL DAY

ABOUT PURPOSE.

BUT YOU CAN'T DETERMINE

COMPETENCY --

COMPETENCY WITHOUT MENTAL

HEALTH ISSUES.

SO THEY HAVE TO BE EVALUATED

TO MAKE A DECISION, BUT THEY

WEREN'T DISCLOSED.

>> HE KNEW THERE WAS A

PERSONALITY DISORDER.

HE ALSO HAVE

OBSESSIVE-COMPULSIVE

DISORDER WHICH IMPACTS IT

THINKING AND HIS MIND, AND

THE COGNITIVE DISORDERS THAT

HE HAS AND THAT IMPACTED HIS

STATE OF MIND.

I THINK I OUTLINED ALL OF

THIS, BECAUSE I KNOW I'M

RUNNING OUT OF TIME.

>> YOU ARE OUT OF TIME, BUT

IF YOU WOULD SUM UP.

>> THERE IS EVIDENCE THAT HE

WOULD HAVE ALLOWED, IF THIS

COURT WILL IMPOSE THAT

BURDEN, WHICH I DON'T

BELIEVE IT DID, AND THERE'S

NO WAY TO DISTINGUISH --

THE PREJUDICE HERE TO

MR. KRAWCZUK IS BASED ON THE

OUTCOME.

WE HAVE SUBSTANTIAL

MITIGATION THAT COULD BE

BEEN PRESENTED.

I WANT TO QUICKLY POINT OUT

SOMETHING THAT I THINK IS

VERY IMPORTANT TO THIS CASE

AND IMPORTANT TO THE

CULPABILITY THAT CONSIDERED

IS THE NOISE IN THE BACK OF

THIS CASE HERE.

HIS CO-DEFENDANT IS OUT.

THESE WERE EQUALLY CULPABLE

CO-DEFENDANTS AND --

>> THE CO-DEFENDANT PLEAD

GUILTY TO SECOND-DEGREE

MURDER.

>> I THINK IN PART BECAUSE

HE WOULDN'T TESTIFY AND THEY

DID NOT HAVE EVIDENCE

AGAINST --

>> BUT THERE IS EVIDENCE OF

EQUAL CULPABILITY.

>> IN TERMS OF A JURY --

I'M SORRY?

>> HAVE WE CROSSED THE

BRIDGE ON THAT ANALYSIS AND

WE HAVE OPINIONS, HAVE WE

NOT?

>> I THINK THAT WHAT --

>> OKAY, BUT --

>> BUT WHAT I'M REFERRING TO

IS THE CULPABILITY THAT

SHOULD BE VN PRESENTED TO

THE JURY HERE, AND I THINK

THAT INFORMATION CAN'T BE

OVERLOOKED AT THIS POINT.

>> NOT THE CHARGE AND THE

PLEA BECAUSE THAT DIDN'T

HAPPEN UNTIL THE LAST,

CORRECT?

>> NO, BUT THERE WAS

CERTAINLY EVIDENCE OF BOTH

DEFENDANTS PARTICIPATING

EQUALLY IN THIS CRIME.

THAT THE PARTICIPATION IN

EACH OF THE DEFENDANT,

CAUSING THE DEATH OF THIS

VICTIM, CANNOT BE SEPARATED.

THANK YOU.

>> I THANK YOU BOTH FOR YOUR

ARGUMENT, AND THE COURT WILL

NOW TAKE A 10 MINUTE RECESS.

.

>> ALL RISE.