

>> ALL RISE.
>> SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
PLEASE BE SEATED.
>> OUR THIRD AND FINAL CASE IS
NUMBER 21-1070, FIGUEROA V. THE
STATE OF FLORIDA.
>> MAY IT PLEASE THE COURT, I'M
STEVE BOLTEN FROM THE PUBLIC
DEFENDER'S OFFICE IN BARTOW, I
REPRESENT THE APPELLANT.
I WOULD LIKE TO ARGUE, FIRST,
PHASE ISSUES ONE AND TWO AND
PENALTY ISSUES THREE, FIVE AND
SIX.
BUT EXPERIENCE TELLS ME THERE
WON'T BE NEAR ENOUGH TIME, SO
ANY ARGUMENT --
[LAUGHTER]
OF COURSE, THAT I DON'T GET TO
WILL REVIEW ON MY INITIAL AND
REPLY BRIEFS.
ALSO IDEALLY, I WOULD LIKE TO
ARGUE PENALTY ISSUE EIGHT
BECAUSE THE COURT'S MISREADING
RESULTED IN THE ABANDONMENT OF
PROPORTIONALITY REVIEW IN THE
LAWRENCE CASE WHICH IN TURN
LEAVES FLORIDA'S CAPITAL
SENTENCING SCHEME WITHOUT
ADEQUATE SAFEGUARDS AGAINST
ARBITRARINESS.
IS SO IT NO LONGER COMPLIES WITH
THE CONSTITUTIONAL FLAGSHIP
DECISION.
BUT THIS COURT HAS SUMMARILY
REJECTED THAT CONSTITUTIONAL
ARGUMENT IN THE MICHAEL GORDON
CASE --
>> IF WE WERE GOING TO
RE-EXAMINE THE PROPORTIONALITY
ISSUE, WOULD THIS BE A REALLY
GOOD CASE FOR THAT?
>> NOT THE BEST.
[LAUGHTER]
>> OKAY.
>> NOT THE BEST, BUT I STILL
THINK THE COURT SHOULD DO IT.
>> I UNDERSTAND.
>> OKAY.
FOR A PERIOD OF FIVE YEARS
BEFORE TRIAL SPANNING THREE
PRESIDING JUDGES AND A

SUCCESSION OF PROSECUTORS, THERE WAS AN INTRACTABLE CONFLICT BETWEEN FIGUEROA AND HIS FIRST PHASE ATTORNEY.

I WANT TO MAKE IT CLEAR BECAUSE, THAT I AM NOT, IN THIS DIRECT APPEAL, I AM NOT ARGUING INEFFECTIVE ASSISTANCE OF COUNSEL EITHER ON THE FACE OF RECORD OR OTHERWISE BECAUSE UNDER THE BLANCO AND STEIGER DECISIONS I CAN'T.

I AM ALSO NOT ARGUING FAILURE TO HOLD A NELSON INQUIRY.

PROBLEM HERE IS THERE WAS NELSON INQUIRY AFTER NELSON HEARING, NELSON HEARING, NELSON HEARING, AND THEY ALL RESULTED IN KICKING THE CAN DOWN THE ROAD.

AND THE PROBLEM IS AT SOME POINT GIVEN THE HIGHLY -- THIS IS NOT A TYPICAL CASE WHERE THE DEFENDANT COMES IN THERE AND SAYS I DON'T LIKE MY LAWYER, I DON'T TRUST MY LAWYER, MY LAWYER DOESN'T COME HOLD MY HAND ENOUGH.

IT IS NOT A CASE LIKE THAT AT ALL.

PRETTY MUCH EVERYTHING FIGUEROA SAID WAS SECONDED BY THE ATTORNEY.

I MEAN, HE OFTEN AGREED WITH WHAT FIGUEROA WAS SAYING THAT BASICALLY MADE EXCUSES HAVING TO DO WITH THE -- OF HIS SMALL PRIVATE PRACTICE.

>> CAN WE TALK ABOUT JACKSON THOUGH?

>> SURE.

>> HOW IS THIS CASE DIFFERENT FROM JACKSON?

BEFORE WE GET TO THE MERITS OF THEIR RELATIONSHIP, LET'S TALK ABOUT PRESERVATION FIRST.

>> OKAY.

>> HOW IS THIS CASE DIFFERENT FROM JACKSON?

>> ARE WE TALKING ABOUT THE BERTHA JACKSON CASE --

>> I'M TALKING ABOUT JACKSON V. STATE, OUR 2008 DECISION.

>> YEAH.

I BELIEVE IT'S THE SAME CASE.

PRESERVATION --

>> SO IN THAT CASE, THERE WAS A DEFENSE COUNSEL WHO WAS ABSENT FOR A SIGNIFICANT PIECE OF A VICTIM IMPACT STATEMENT. AND WHEN COUNSEL CAME BACK ON THE PHONE, NO OBJECTION WAS FILED CONCERNING HIS ABSENCE. AND WHEN DEFENSE COUNSEL COULD HAVE OBJECTED AND ASKED FOR MORE TIME AND DID NOTHING, WE REVIEWED FOR FUNDAMENTAL ERROR ONLY.

APPLY THE SAME RULE HERE.

>> OKAY.

NOW I'M A LITTLE BIT CONFUSED, BECAUSE I DISCUSS THE JACKSON CASE IN A LOT OF DEPTH, THE THIRD ISSUE, THE ONE ABOUT THE WAIVER OF COUNSEL. AND I'LL BE HAPPY TO ADDRESS THAT IN TERMS OF THAT ISSUE, BUT THEN I'M MOVING OFF THE ONE I STARTED --

>> WELL, IT SEEMS TO ME THOUGH YOU KIND OF HAVE -- BEFORE WE GET TO THE DIFFICULTY IN THE RELATIONSHIP, THE REAL QUESTION IS, WAS HE ABSENT?

FROM A SIXTH AMENDMENT STANDPOINT AS TO ISSUE ONE AND ISSUE THREE, THE QUESTION IS WHAT'S DEPRIVATION OF COUNSEL THAT MR. FIGUEROA ULTIMATELY SUFFERED.

LET'S ASSUME THAT COUNSEL WAS PHYSICALLY ABSENT FROM THE ROOM, PHYSICALLY ABSENT FROM THE PROCEEDINGS.

HELP ME UNDERSTAND FROM A SIXTH AMENDMENT STANDPOINT HOW WE ARE COMPELLED TO FIND FUNDAMENTAL OR EVEN OTHER ERROR HERE.

>> OKAY.

WELL, AGAIN, I MEAN, ON THE WAIVER OF COUNSEL ISSUE, HE WAS ABSENT AND I DON'T MEAN PHYSICALLY ABSENT, HE WAS DOING NOTHING, AS HE SHOULD HAVE DONE NOTHING, THROUGHOUT THE ENTIRE PENALTY PHASE UP UNTIL THE MIDST OF JURY DELIBERATIONS.

ALL OF THESE ISSUES INTERSECT. THEY ALL DOVETAIL WITH EACH

OTHER, BUT HE WAS ABSENT AS COUNSEL THROUGHOUT THE ENTIRE PENALTY PHASE UNTIL A PART OF THE WAY THROUGH DELIBERATIONS. ON THE FIRST ISSUE, IT'S NOT A QUESTION OF WHETHER HE WAS ABSENT.

I MEAN, HE WAS THERE.

HE WAS NOT, ACCORDING TO HIS OWN ONGOING STATEMENTS, HE WASN'T REALLY DOING MUCH UNTIL TOWARD THE END.

THE FIRST ISSUE WAS NOT AN ABSENCE CASE.

THE ISSUE HAS TO DO WITH WHEN THE ATTORNEY-CLIENT RELATIONSHIP COMPLETELY BREAKS DOWN, THAT IS AN ABUSE OF DISCRETION AND A SIXTH AMENDMENT VIOLATION NOT TO APPOINT SUBSTITUTE COUNSEL WHEN THAT OCCURS.

AND THAT'S A RARE OCCURRENCE, BUT IT OCCURRED IN THIS CASE.

>> YOUR POSITION IS AS TO ISSUE ONE NOW THE RELATIONSHIP WAS SO DETERIORATED THAT WE SHOULD FIND THAT HE HAD NO COUNSEL AND THAT HE DIDN'T CHOOSE THAT.

>> THAT HE CAN CHOOSE -- HE COULDN'T CHOOSE WHO HIS NEW COUNSEL WOULD BE --

>> OR TO HAVE NO COUNSEL AT ALL.

>> WELL, HE -- ALL RIGHT.

THE WAY THIS WENT DOWN, I'LL TRY TO DO A, LIKE, A SEQUENCE OF EVENTS HERE.

VERY EARLY ON A SPAN OF THREE JUDGES, IN FRONT OF THE JUDGE MR. HAMMOND SAID IN FRONT OF HIS CLIENT, I HAVE AN ETHICAL PROBLEM HERE.

AND HE WAS TALKING ABOUT I HAVE THIS SMALL PRIVATE PRACTICE. THIS BECOMES A THEME THROUGHOUT THE WHOLE THING.

I HAVE SMALL PRIVATE PRACTICE, AND I HAVE AN IMPORTANT STAFF MEMBER WHO'S OUT SICK, AND I'M IN THE OFFICE AT NIGHT.

I'M MAKING COPIES, I'M FILING --

I'VE GOT AN ETHICAL PROBLEM.

AND THE JUDGE SAYS, WELL, WE'LL SEE HOW THIS TURNS OUT.

THERE WAS NOTHING WRONG WITH

THAT RULING AT THAT POINT.
THIS IS, YOU KNOW, I TALK IN THE
BRIEF ABOUT WHERE WAS THE
TIPPING POINT WHERE IT BECAME AN
ABUSE OF DISCRETION NOT TO GIVE
HIM A NEW LAWYER.

NOW, THE CASE LAW, AND VERY
LITTLE OF IT IS THROUGH FLORIDA.
I STUDY CASES FROM, I BELIEVE,
NINE OR TEN STATES, NINE FEDERAL
CIRCUITS THAT ALL HAVE
VARIATIONS ON THE SAME THREE OR
FOUR-PART TEST.

AND THE TEST IN THAT SITUATION
IS, NUMBER ONE, TIMELINESS OF
THE REQUEST.

NUMBER TWO, ADEQUACY OF THE
INQUIRIES.

NUMBER THREE IS THE EXTENT OF
THE CONFLICT, AND NUMBER FOUR
IS, WELL, WAS THE DEFENDANT

LARGELY, SUBSTANTIALLY
RESPONSIBLE FOR THE CONFLICT.
ALL FOUR OF THOSE FACTORS WEIGH
HEAVILY IN MR. FIGUEROA'S FAVOR
AS TO WHY A NEW ATTORNEY SHOULD
HAVE BEEN APPOINTED.

IN TERMS OF TIMELINESS, I CITED
THE YOUNG CASE OUT OF NEVADA FOR
THIS.

HE VERY EARLY ON, ALMOST FROM,
YOU KNOW, FIVE YEARS BEFORE THE
TRIAL EVENTUALLY TOOK PLACE, HE
WAS SAYING MY LAWYER IS TOO
BUSY.

HE DOESN'T HAVE TIME TO WORK ON
MY CASE, HE'S NOT WORKING ON MY
CASE, HE DOESN'T TELL ME
ANYTHING.

RIGHT TO HIM I HAVE FAMILY
MEMBERS CALL, AND HE DOESN'T
RESPOND TO MY REQUEST --

>> WELL, COUNSEL, AREN'T THOSE
KIND OF COMPLAINTS PRETTY
COMMON?

>> VERY COMMON.

>> AND I UNDERSTAND THAT YOU'RE
SAYING THIS WAS RAISED TO A
DIFFERENT LEVEL THAN THE
ORDINARY, BUT YOU ALSO, I THINK,
STARTED OUT BY ACKNOWLEDGING YOU
CAN'T POINT TO ANY SPECIFIC
DEFICIENCY IN THE WAY COUNSEL
ACTUALLY PERFORMED IN PREPARING

FOR THE TRIAL OR AT THE TRIAL.
THERE'S SOMETHING THAT COUNSEL
SHOULD HAVE DONE THAT COUNSEL
DIDN'T DO THAT'S RELATED TO THIS
POINT, ISN'T THAT CORRECT?
>> THAT WOULD BE AN IAC CLAIM.
AND I HOPE THAT POSTCONVICTION
COUNSEL DOESN'T HAVE TO DO --
>> YOU'RE TRYING TO HEAD THAT
OFF --
>> RIGHT.
WHAT COULD HAVE BEEN DONE
DIFFERENTLY, WHAT HE DIDN'T DO
THAT HE SHOULD HAVE DONE, I
MEAN, I CAN LOOK AT THE RECORD
AND --
>> BUT ISN'T THAT WHERE WE
REALLY, THESE KINDS OF ISSUES
TYPICALLY GET DEALT WITH?
>> TYPICALLY, YES.
BUT AGAIN, THIS IS NOT A
TYPICAL --
>> SO WE WOULDN'T REALLY BE
MAKING NEW LAW IN FLORIDA IF WE
WENT YOUR WAY ON THIS ISSUE.
>> YOU WOULDN'T BE OVERRULING --
>> I UNDERSTAND, BUT WE'D BE
MAKING NEW LAW.
>> THE COURT IN -- AND I WANT TO
SAY, TRYING TO REMEMBER THE
NAMES OF THESE CASES.
I CITED IN MY BRIEF, I THINK
THIS IS WALKER.
THERE ARE CASES THAT SAY IT'S AN
ABUSE OF DISCRETION STANDARD
WHETHER SUBSTITUTE COUNSEL
SHOULD HAVE BEEN APPOINTED.
SO IT IS AN ISSUE THAT HAS BEEN
RECOGNIZED AS SOMETHING THAT CAN
BE RAISED.
THERE IS NOT ANY FLORIDA CASE
LAW THAT I FOUND OR THAT MY
OPPONENT FOUND THAT SPECIFICALLY
RULES ON IT ONE WAY OR THE
OTHER.
BUT LIKE I SAY, I HAVE CASES
FROM NINE FEDERAL CIRCUITS IN
NINE OR TEN STATES THAT DO TALK
ABOUT IT.
THE MAIN ONES THAT I RELY ON ARE
MORE OUT OF THE 9TH CIRCUIT,
HENDERSHOT OUT OF MONTANA AND
YOUNG OUT OF NEVADA,
PARTICULARLY THOSE LAST TWO,

BUT -- I'M SORRY.

>> I DON'T, I JUST MOVED THE MICROPHONE.

>> THE THING THAT TAKES THIS -- YOU KNOW, JUSTICE CANADY, YOU SAID ISN'T THIS COMMON.

YEAH, IT'S EXTREMELY COMMON. WHAT'S NOT COMMON IS FOR THE ATTORNEY TO BASICALLY NOT DISPUTE THE ALLEGATIONS AND, IN FACT, MOST OF THE TIME AGREED WITH THE ALLEGATIONS.

I MEAN, HE --

>> WELL, THAT MIGHT NOT BE REAL COMMON, BUT IT'S NOT, IT'S NOT UNHEARD OF.

>> WELL, AGAIN, I SUSPECT YOU MIGHT FIND SOME CASES WHERE, THAT DON'T MAKE THEIR WAY UP HERE WHERE JUDGES HAVE GRANTED IT.

BUT IN THIS PARTICULAR SITUATION, THERE WOULD HAVE BEEN, YOU KNOW, IN OTHER WORDS A UNDERCURRENT THAT RUNS THROUGHOUT THIS ENTIRE THING IS SOMETHING I USED TO HEAR WHEN I WAS 8 YEARS OLD; IF WE LET YOU DO IT, EVERYBODY'S GOING TO WANT TO DO IT.

>> WE HAVE RULED THAT WE RESERVE ALL INEFFECTIVE COUNSEL ONCE WE GET THERE.

BUT WE HAVE RULED IN THAT REGARD.

SO I'M JUST, I DON'T WANT TO USE UP ALL YOUR TIME, BUT THERE IS ONE ISSUE THAT I'M VERY INTERESTED IN YOU WANT TO GET THERE.

I DON'T WANT TO DISTURB --

>> WELL, I DO HAVE A NUMBER OF ISSUES THAT I WANT TO ARGUE, AND THE CLIENT, THE CLIENT, YOU KNOW, THE COURT MAY NOT KNOW THIS BECAUSE OF WHAT OCCURRED IN THE PENALTY PHASE.

MR. FIGUEROA IS INTERESTED IN ALL THE ISSUES, BUT I GAVE HIM THE CHOICE OF WHETHER I WOULD LEAD WITH THE FIRST PHASE ISSUES BECAUSE I THOUGHT THAT BOTH WERE WORTH ARGUING, AND THAT WAS HIS PREFERENCE.

SO I WILL ARGUE -- BUT ON THE
ISSUE OF SUBSTITUTION OF
COUNSEL, I'LL MOVE ON UNLESS ANY
JUSTICE HAS ANY SPECIFIC
QUESTIONS THEY'D LIKE TO ASK ME.
OKAY, THEN MOVING ON TO THE
SECOND ISSUE.

AND THIS IS THE THEME OF THIS
ENTIRE CASE WHICH IS THAT THERE
WAS CONTROLLING LAW THAT THE
JUDGE DIDN'T KNOW.

THAT'S TRUE ON ISSUE TWO WITH
THE CELL TOWER SEARCH WARRANT.
IT'S TRUE ON ISSUE THREE, THE
WAIVER OF MITIGATION WHICH
RESULTED IN AN INVALID WAIVER OF
COUNSEL.

AND IT'S TRUE ON ISSUE FIVE
WHICH IS THAT THE JUDGE COULD
HAVE APPOINTED INDEPENDENT
COUNSEL TO PRESENT THE
MITIGATION TO THE JURY OR COULD
HAVE CALLED THE WITNESSES WHO
WERE THERE AND LINED UP AND
READY TO GO AS COURT WITNESSES.
BUT IT'S CLEAR FROM HIS OWN
STATEMENTS, A, THAT HE THOUGHT
THE JURY SHOULD KNOW THE
MITIGATION BUT, B, THAT HE
DIDN'T KNOW THAT THE LAW ALLOWED
HIM TO DO THAT.

NOW I'LL MOVE TO ISSUE TWO
BECAUSE IT CAME UP EARLIER.

>> COUNSEL, COULD YOU FOCUS ON
THE WAIVER OF MITIGATION, THE
MISADVICE REGARDING THE IMPACT
OF THE WAIVER OF MITIGATION ON
YOUR CLIENT'S ACCESS TO COUNSEL?

>> YES.

>> BECAUSE AS YOU DESCRIBED
EARLIER DURING THE WHOLE PENALTY
PHASE UNTIL THE DELIBERATIONS
YOUR CLIENT WAS WITHOUT COUNSEL
BECAUSE HE HAD BEEN PRESENTED
WITH WHAT IS ACKNOWLEDGED TO BE
A FALSE DILEMMA THAT -- BASED ON
A MISUNDERSTANDING OF THE LAW.

>> COULD YOU FOCUS ON THAT?

>> YES, I WILL.

>> I THINK THAT MIGHT BE
PRODUCTIVE.

>> AS I SAY --

>> AND THAT'S THE POINT I WANTED
TO HEAR.

>> OKAY.

WELL, LIKE I SAY --

>> IF YOU CAN TAKE A HINT.

>> RIGHT.

[LAUGHTER]

I'M TAKING A HINT.

BUT ON THE OTHER HAND, THAT WILL GET MR. FIGUEROA A NEW PENALTY PHASE WHICH WOULD BE GREAT, BUT IT'S NOT EVERYTHING THAT HE WOULD LIKE TO GET.

AND I AM IN NO WAY BACKING OFF THE ISSUE OF THE CELL TOWER, AND I'LL GET BACK TO THAT IF I CAN.

BUT, ALL RIGHT.

SO WHAT HAPPENS, AND I THINK READING BETWEEN THE LINES THIS PLAYS IN WITH HIS FRUSTRATION WITH HOW THE ENTIRE CASE WAS GOING WITH MR. HAMMOND BECAUSE MR. FIGUEROA HAD COOPERATED WITH, HE LIKED DANNY HERNANDEZ, HIS PENALTY COUNSEL.

HE COOPERATED WITH DR. EISENSTEIN.

HE MET WITH HIM, I BELIEVE, 15 TIMES FOR A TOTAL OF 30 HOURS WHICH IS PROBABLY WAY MORE THAN HE MET WITH HAMMOND, AND HE COOPERATED WITH THE PET SCAN AND THE MRI WITH DR. WU.

MR. HERNANDEZ HAD WITNESSES LINED UP AND READY TO GO.

HE HAD THE TWO DOCTORS, HE HAD FAMILY MEMBER WITNESSES WHO WOULD HAVE TESTIFIED ABOUT HIS ABUSE, NIGHTMARES AND OTHER ASPECTS OF HIS LIFE.

THEY WERE READY TO GO.

AND MONDAY MORNING ROLLS AROUND RIGHT AFTER THE GUILTY VERDICT, AND MR. HERNANDEZ, THE PENALTY ATTORNEY, SAYS I'VE RUN INTO A PROBLEM HERE, HE DOESN'T WANT THE MITIGATION PRESENTED.

I HAVE OUR WITNESSES LINED UP AND PREPARED TO TESTIFY, BUT OBVIOUSLY I'M NOT SEEKING TO DO SOMETHING AGAINST HIS -- BUT I SUSPECT THAT THE COURT WOULD REQUIRE ME TO DO SO.

THE JUDGE TRIES TO TALK HIM OUT OF IT.

HEART'S IN THE RIGHT PLACE.

IT'S WHAT HE SHOULD HAVE DONE.
AND, YOU KNOW, I UNDERSTAND THE
JURY MAKES THE DECISION THAT
THEY SHOULD MAKE THAT DECISION
WITH FULL KNOWLEDGE OF ALL THE
MITIGATING FACTORS.

SO MR. HERNANDEZ -- I'M GETTING
BACK TO YOUR QUESTION, JUSTICE
CANADY.

SO IF MR. HERNANDEZ WANTS TO
CALL THEM, I'M GOING TO LET HIM
CALL THEM SO THEY CAN DO WHAT'S
NECESSARY.

FIGUEROA RESPONDS TO THIS WITH A
CONDITIONAL, OKAY?

I MEAN, I JUST, I MEAN, I DON'T
WANT TO GO THROUGH THE
MITIGATION.

THEN IF YOU ARE GOING TO LET HIM
DO IT, THEN I WOULD LIKE TO
DISMISS MR. HERNANDEZ, AND I
WOULD REPRESENT MYSELF, AND I
DON'T WANT NO MITIGATION, YOUR
HONOR, OKAY?

JUDGE ASKS HERNANDEZ FOR HIS
INPUT.

HERNANDEZ SPECIFIES WHAT THE
MITIGATION WITNESSES WOULD TALK
ABOUT.

PROSECUTOR SAYS EVEN THOUGH THE
CLIENT WILL NOT COOPERATE WITH
THE STATE'S DOCTOR, HE'S NOT
TRYING TO EXCLUDE ANY DEFENSE
MITIGATION WITNESSES.

AND IF THEN SUBJECT SYRACUSE
SAYS THIS TO FIGUEROA: NOW,
YOU'RE SAYING THAT YOU'RE
WILLING TO REPRESENT YOURSELF.
IF I'M GOING TO ORDER
MR. HERNANDEZ TO PRESENT THINGS
ON YOUR BEHALF, YOU'LL REPRESENT
YOURSELF SO YOU WON'T PRESENT
ANYTHING BECAUSE I MAY HAVE TO
ORDER MR. HERNANDEZ TO PRESENT
THINGS ON YOUR BEHALF.

THAT'S WHAT I SAY, YOUR HONOR,
YES.

OKAY, AND IT IS BRIEF RECESS,
AND HE'S STILL TRYING TO
PERSUADE FIGUEROA TO PRESENT
MITIGATION.

COMES OUT A COUPLE TIMES, IT'S
REAL CLEAR -- AND THIS IS
IMPORTANT -- FIGUEROA IS NOT A

DEAF VOLUNTEER, HE IS NOT
WAIVING A JURY.

THE JUDGE ASKS HIM, DO YOU WANT
ME TO DECIDE?

SO THE STATE'S RELIANCE ON THE
HAMLIN CASE IS COMPLETELY
MISPLACED.

OKAY, SO HERE WE ARE AGAIN.
THIS IS THE THIRD TIME NOW.

IT'D ALREADY BEEN DONE TWICE.

OKAY, IF YOU TELL ME YOU DON'T
WANT MITIGATION PRESENTED, I
CAN'T HAVE MR. HERNANDEZ GO
FORWARD REPRESENTING YOU.

HE HAS MITIGATION READY TO BE
PRESENTED INCLUDING THE DOCTORS,
INCLUDING YOUR FAMILY MEMBERS.

SO IF HE REPRESENTS YOU, HE'S
GOING TO PRESENT MITIGATION ON
YOUR BEHALF.

ON THE OTHER HAND, THE -- IF YOU
WISH TO REPRESENT YOURSELF, I
HAVE TO HAVE YOU TALK TO
DR. FORMAN TO MAKE SURE YOU'RE
COMPETENT.

OKAY, SUBJECT TO THAT COMPETENCY
DESIGNATION, THIS IS THE FOURTH
TIME NOW, DO YOU WISH TO
REPRESENT YOURSELF UNDERSTANDING

IF I ALLOW MR. HERNANDEZ TO
CONTINUE TO BE YOUR ATTORNEY,
THAT I'M GOING TO DIRECT HIM TO
DO HIS BEST TO PREVENT YOU FROM
GETTING THE DEATH PENALTY, WHICH
IS GOING TO REQUIRE MITIGATION.

ALSO JUST TO MAKE 100% CLEAR, I
COULD ORDER NOT TO PUT ON YOUR
FAMILY MEMBERS, BUT HE WOULD
STILL PUT ON THE DOCTORS TO
TESTIFY ON YOUR BEHALF.

DO YOU UNDERSTAND THAT?

I UNDERSTAND THAT.

WITH THAT IN MIND, DO YOU WANT
TO REPRESENT YOURSELF OR LET
MR. HERNANDEZ PRESENT THE
MITIGATION AGAINST YOUR WITNESS?
BINARY CHOICE, EITHER/OR.

IF YOU DON'T WANT MITIGATION,
YOU'VE GOT TO WAIVE COUNSEL.

FIGUEROA: I DON'T WANT NO
MITIGATION.

OKAY.

COURT SAYS, OKAY, SO YOU WANT TO
REPRESENT YOURSELF AND NOT PUT

ON ANY MITIGATION.

YES, YOUR HONOR.

OKAY.

LET'S SEE IF THERE'S ANY MORE --

>> COUNSEL, YOU'RE SPENDING SO MUCH TIME ON THIS, AND THE COURT HAS THIS PART OF THE RECORD.

YOU HAVE A GOOD LEGAL ARGUMENT, I THINK YOU SHOULD --

>> MOVE ON.

>> NOT MOVE ON FROM THE ISSUE --

>> RIGHT, I UNDERSTAND.

I JUST WANT TO MAKE IT VERY CLEAR --

>> NOTHING AMBIGUOUS ABOUT IT.

>> NOTHING AMBIGUOUS ABOUT IT, AND THAT IS IMPORTANT.

I RELIED VERY HEAVILY ON THE VERY WELL-REASONED DECISION OF THE LOUISIANA SUPREME COURT IN STATE V. DAVID BROWN, 7-1 DECISION, OKAY?

WHICH IS ALMOST IDENTICAL TO OUR CASE HERE EXCEPT THAT IT WAS NOT AS CLEARLY, FOUR TIMES REPEAT BINARY CHOICE, DO YOU WANT TO WAIVE MITIGATION?

DO YOU WANT HIM TO PUT ON MITIGATION AGAINST YOUR WISHES OR DO YOU WANT TO REPRESENT YOURSELF?

THAT HAPPENED IN BROWN AS WELL BUT NOT AS OVERWHELMINGLY.

NOW, THE STATE HAS TO SAY ABOUT BROWN IN THEIR ANSWER BRIEF.

NOTHING, BUPKIS.

THEY DON'T UNDERSTAND IT'S WRONGLY DECIDED, THEY DON'T ARGUE THAT THERE ARE CONTRARY CASES IN FLORIDA OR ANYWHERE ELSE.

THEY JUST IGNORE IT, OKAY?

BUT THAT CASE IS TO THE CONSTITUTIONAL CASE ON ALL 3.997s, AS I SAID, THAT AS A MATTER OF CONSTITUTIONAL LAW SAYS THIS WAS NOT A VALID WAIVER.

THIS WAS AN INVALID WAIVER, THIS WAS A COERCED WAIVER, THIS WAS A MISADVISED WAIVER.

AND THAT IS AN ERROR OF CONSTITUTION.

IT'S FUNDAMENTAL AND IT'S

STRUCTURAL.

I, TO GET BACK TO JUSTICE
CURIEL'S QUESTION HERE, I CITED
SEVEN OR EIGHT CASES, MAYBE
CLOSER TO A DOZEN IN THE BRIEF
THAT SAYS THIS IS STRUCTURAL
ERROR.

AND I DID, ABOUT A WEEK AGO I
DID A NOTICE OF SUPPLEMENTAL
AUTHORITY WITH FIVE MORE CASES
INCLUDING A U.S. SUPREME COURT
DECISION THAT SAYS THIS IS
STRUCTURAL ERROR.

THE STATE COMES BACK WITH THEIR
OWN NOTICE OF SUPPLEMENTAL
AUTHORITY CITING UNITED STATES
V. ROY WHICH IS A CASE THAT I
ARGUED EXTENSIVELY IN MY REPLY
BRIEF AND A CASE CALLED
MIDDLETON WHICH HAS NOTHING TO
DO WITH THE ISSUE, OKAY IN NOW,
ROY IS VERY SIMILAR TO THE
BERTHA JACKSON CASE.
THEY'RE BOTH LATE FROM LUNCH
CASES.

AND IN ROY THE ATTORNEY MISSED I
BELIEVE IT WAS 7 MINUTES OUT OF
A 39-HOUR TRIAL.

HE MISSED 18 QUESTIONS TO THE
12TH OUT OF 13 WITNESSES, AND
THOSE ANSWERS WERE REPEATED IN
EVEN MORE DETAIL WHEN THE
ATTORNEY GOT BACK, OKAY?
AND ROY TALKS ABOUT BASICALLY
WHETHER IT WAS A SUBSTANTIAL
PORTION OF THE --

[INAUDIBLE]

NOW, WE'RE NOT TALKING ABOUT A
LATE FROM LUNCH CASE.

WE'RE NOT TALKING ABOUT A UNITED
STATES V. ROY, INADVERTENT FOR
NEGLIGENT ABSENCE.

WE'RE TALKING ABOUT NOT ONLY AN
INVALID WAIVER OF COUNSEL, BUT A
MISADVISED AND COERCED WAIVER OF
COUNSEL.

>> AND SO YOU JUST, YOU KIND OF
CONFLATED OR SPOKE OF STRUCTURAL
ERROR AND FUNDAMENTAL ERROR
WITHOUT DISTINGUISHING BETWEEN
THOSE.

COULD YOU CLARIFY WHAT YOUR
ARGUMENT IS ON THE STANDARD OF
REVIEW FOR THIS?

IF WE ASSUME THAT IT WAS NOT --
[INAUDIBLE]

THAT IT WAS COERCED, THAT IT WAS
INVOLUNTARY, ETC., WHAT'S THE
TEST FOR US?

>> I ADMIT THAT I CONFLATED THE
TWO, BECAUSE I THINK THE REASONS
FOR IT BEING FUNDAMENTAL AND THE
REASONS FOR IT BEING STRUCTURAL
ARE SIMILAR.

THE JACKSON CASE TALKS ABOUT
BOTH OF THOSE AS WELL.

IN TERMS OF STRUCTURAL, YOU
KNOW, LIKE I SAY, THE
OVERWHELMING CASE LAW FROM
EVERYWHERE INCLUDING THE U.S.
SUPREME COURT SAYS IT'S
STRUCTURAL.

LOGICALLY, IT'S STRUCTURAL.
IT AFFECTS THE ENTIRE CRITICAL
STAGE OF A CAPITAL PENALTY --

>> SHOULD WE TREAT THIS AS A
PRESERVED ERROR?

BECAUSE THAT SEEMS LIKE IT MAKES
A HUGE DIFFERENCE.

>> WELL, IT RAISES THE QUESTION
WHO WOULD PRESERVE IT --

>> CAN YOU ELABORATE?

>> RIGHT.

THE CLIENT DID WHAT HE COULD.
THE CLIENT WHO, BY THE WAY, IS
STILL PRO SE WHEN THIS IS GOING
ON, HE'S REACTING TO WHAT THE
JUDGE IS SAYING.

THE COURT HAS DECIDED CASES
BASICALLY SAYING YOU CAN'T HOLD
POE SAY DEFENDANTS TO THE SAME
HIGHEST STANDARD OF KNOWING THE
LAW AS YOU MIGHT WITH AN
ATTORNEY.

BUT THERE'S SOME, BUT THE
THING -- JUDGE SYRACUSE WAS NOT
AWARE OF GRIMM, BOYD, BELL
AND --

[INAUDIBLE]

HOW CAN YOU EXPECT HIM TO BE
AWARE OF THAT?

FROM HIS VANTAGE POINT, THE
JUDGE IS TELLING HIM I'M GOING
TO HAVE HIM PUT ON THE
MITIGATION WHETHER YOU LIKE IT
OR NOT.

HE OBJECTS TO THAT, AND HE
OBJECTS THE ONLY WAY YOU KNOW

HOW.
THEN IF YOU'RE GOING TO DO THAT,
THEN I GUESS I HAVE TO --
>> COUNSEL, WOULDN'T IT -- MAYBE
I MISUNDERSTOOD THE TIMELINE.
WAS IT MR. -- WAS HIS COUNSEL
STILL REPRESENTING HIM WHEN THIS
MISADVICE WAS HAPPENING?
>> YES.
>> AND DID COUNSEL OBJECT TO THE
JUDGE'S MISINFORMATION OR
MISADVICE?
>> WELL, AS WAS THE THEME --
FIRST OF ALL, I DON'T THINK
COUNSEL KNEW ANY BETTER THAN THE
JUDGE DID.
BUT IN ADDITION TO THAT, HE HAD
NO REASON TO OBJECT BECAUSE THE
JUDGE WAS DOING WHAT COUNSEL
WANTED HIM TO DO.
COUNSEL WAS BASICALLY SAYING,
JUDGE, ORDER ME TO PUT ON THE
MITIGATION.
THAT'S WHAT I WANT TO DO.
AND, AGAIN, HIS HEART WAS IN THE
RIGHT PLACE.
I MEAN, YOU DO ALL THIS WORK TO
MARTIAL THE MITIGATION, AND YOU
GENUINELY BELIEVE, YOU KNOW,
THAT THERE ARE REASONS WHY YOUR
CLIENT SHOULD BE SPARED THE
DEATH PENALTY.
AND OUT OF THE BLUE, HE SAYS I
DON'T WANT ANY MITIGATION NOW
EVEN THOUGH HE'S COOPERATED WITH
IT ALL UP TO NOW.
I MEAN, MR. HERNANDEZ WANTED THE
JUDGE TO DO WHAT HE DID, SO HE
WOULDN'T --
>> DO YOU CONCEDE --
[INAUDIBLE]
>> COULD YOU REPEAT THE
QUESTION?
>> DO YOU CONCEDE THAT
MR. FIGUEROA WOULD HAVE DIRECTED
MR. HERNANDEZ NOT TO PRESENT
EVIDENCE EVEN IF HE HAD NOT BEEN
DISCHARGED?
>> I THINK HE PROBABLY WOULD
HAVE DONE THAT UNLESS HIS
CONCERN WAS HE WANTED TO GET ON
WITH HIS APPEAL, YOU KNOW, AS
QUICKLY AS POSSIBLE.
>> ALL RIGHT.

SO --

>> SO HE ULTIMATELY DID RELENT
IN THE SPENCER HEARING, AND HE
ALLOWED --

>> SO IF YOU CONCEDE THAT, WHERE
ARE WE?

YOU KNOW, IF NOTWITHSTANDING THE
MISADVICE AND NOTWITHSTANDING --
[INAUDIBLE]

THAT WAS NONETHELESS GOING TO BE
HIS INSTRUCTION TO COUNSEL,
WHERE ARE WE?

HOW DOES THIS CONSTITUTE --

>> WHERE WE ARE IS A REVERSAL
FOR YOUR PENALTY PHASE BECAUSE A
WAIVER OF MITIGATION, WHICH I
CONCEDE HE MOST LIKELY WOULD
HAVE WAIVED MITIGATION ANYWAY,
BUT A WAIVER OF MITIGATION IS
NOT A WAIVER OF THE LAW.

IT'S NOT A WAIVER OF THE RIGHT
TO COUNSEL, IT'S NOT A WAIVER OF
A JURY, IT'S JUST A WAIVER OF
MITIGATION.

THE TRIAL COURT MADE IT CLEAR
THAT THE JURY COULD CONSIDER
MITIGATION ANYWAY, MITIGATION
MAYBE THAT THEY HEARD IN THE
FIRST PHASE.

AND I'LL GET TO ONE PARTICULAR
ASPECT OF THAT.

>> DOESN'T THIS GO TO THE HEART
THOUGH OF THE STANDARD OF REVIEW
QUESTION?

IF IT'S STRUCTURAL AND WE TREAT
IT AS PRESERVED, THEN ALL OF
THIS SPECULATION ABOUT WHAT
WOULD HAVE HAPPENED DOESN'T
MATTER.

>> THAT'S CORRECT.

>> IF IT'S FUNDAMENTAL ERROR,
THEN IT DOES BECOME APPROPRIATE
TO CONSIDER THE FACT THAT THE
DEFENDANT DIDN'T WANT MITIGATION
AT THE SPENCER HEARING,
MITIGATION WAS PRESENTED, ETC.,
ETC.

IT BECOMES MUCH MORE OF A, YOU
KNOW, IS THIS SOME SORT OF
FUNDAMENTALLY UNFAIR PROCEEDING
OR WHATEVER.

SO IT SEEMS LIKE IT REALLY DOES
COME DOWN TO WHETHER WE TREAT IT
IN THE PRESERVED/STRUCTURAL BOX

ON WHETHER WE GO THROUGH THIS
KIND OF HOLISTIC ANALYSIS.

>> CORRECT.

AND THE JACKSON CASE ITSELF
BASICALLY SAYS -- AND, AGAIN, I
CAN'T EMPHASIZE THIS TOO MUCH,
JACKSON IS A LATE FOR LUNCH
CASE, NOT AN INVALID WAIVER
CASE.

BUT JACKSON MAKES IT CLEAR THAT
ISSUES LIKE THIS ARE ORDINARILY
STRUCTURAL AND ORDINARILY
FUNDAMENTAL.

IT JUST WASN'T IN JACKSON
BECAUSE WHAT HAPPENED IN JACKSON
WAS IT WAS A LATE FOR LUNCH CASE
WHERE THEY WERE DOING VICTIM
IMPACT.

THE JUDGE EVENTUALLY CALLS IN
THE -- NOT A CAPITAL VICTIM
PACK.

THE LAWYER CALLS IN, THE JUDGE
KIND OF RECAPS FOR HIM WHAT'S
BEEN SAID SO FAR.

THE LAWYER THEN CONTINUES TO
PARTICIPATE DURING THE VICTIM
IMPACT AND THE ENTIRE REST OF
THE SENTENCING PROCEEDING,
POINTS OUT THAT THE VICTIM DID
NOT -- THOUGHT THAT THE BOTTOM
OF THE GUIDELINES WAS TOO
LENIENT BUT THAT A 30-YEAR
SENTENCE WAS TOO HARSH AND HE
WAS EVENTUALLY -- BERTHA JACKSON
WAS EVENTUALLY GIVEN FIVE YEARS.

>> YOU'RE TWO AND A HALF MINUTES
INTO YOUR REBUTTAL.

[LAUGHTER]

>> OKAY.

I FIGURED THIS WOULD HAPPEN.
I CERTAINLY WILL RELY ON MY
BRIEF ON THE OTHER INCREDIBLY
EGREGIOUS ISSUE WHICH IS
STRUCTURAL AND FUNDAMENTAL WHICH
IS THE ABSOLUTELY INEXPLICABLE,
BOLLUXED NONVERDICT IN THIS CASE
WHICH BASICALLY SAID THREE TIMES
THE AGGRAVATORS ARE SUFFICIENT,
THE AGGRAVATORS ARE SUFFICIENT,
THE AGGRAVATORS ARE SUFFICIENT,
SAID NOT A WORD ABOUT
MITIGATION, NOT A WORD ABOUT
WEIGHING.

WE KNOW THE JURY WAS CONFUSED

BECAUSE THEY SAID SO.
WE KNOW THAT THE JUDGE'S ANSWER
TO THE JURY'S CONFUSION, IF
ANYTHING, ONLY PERPETUATED IT.
I WILL SIT DOWN.
>> ARE YOU TALKING ABOUT THE --
[INAUDIBLE]
>> [INAUDIBLE]
>> THANK YOU.
>> MAY IT PLEASE THE COURT,
TIMOTHY FREELAND ON BEHALF OF
THE STATE OF FLORIDA.
THIS IS A HORRIFIC CASE IN TERMS
FOUR COURTS FOUND A FUNDAMENTAL
ERROR FOR 5 CASES.
THEY TALK ABOUT IF THE STATE
COULD -- DON'T HEAR THEM DO
THIS, THEY COULD HAVE SAID IT
WASN'T A COMPLETE DEPRIVATION OF
COUNSEL BECAUSE THEY CAME IN
DURING DELIBERATIONS, ONE JUDGE
TO DO WHAT THE JUDGE NEEDED TO
DO BUT JACKSON SITES MANY CASES
CITED IN MY BRIEF THE TALK ABOUT
WHETHER IT WAS A SUBSTANTIAL
PORTION OF A CRITICAL STAGE OF
THE PROCEEDINGS IN THE PENALTY
PHASE, THE JUDGE TO THE JURY'S
PENALTY VERDICT, YOU CAN'T HEAD
THAT OFF.
I USED ALL MY TIME.
>> THANK YOU VERY MUCH, WE ARE
ADJOURNED.