THE NEXT CASE OF THE COURT'S TO CONTRACT, IS MICHAEL GIVEN VERSUS THE STATE OF FLORIDA. MR. BRINGINGS?

MAY IT PLEASE THE COURT. MY NAME IS KEVIN BRIGGS. I REPRESENT THE PELL APARTMENT IN THIS MATTER, MICHAEL GIVEN. MR. GIVE I KNOW IS BEFORE THIS COURT FOLLOWING HIS CONVICTIONS OF TWO COUNTS OF FIRST-DEGREE MURDER. THE DEATH PENALTY WAS IMPOSED IN BOTH COUNTS. THIS CASE IS NOT A COMPLEX CAPITOL CASE. IT, PROCEDURALLY, IS FAIRLY SIMPLE. MR. GRIFFIN ENTERED A GUILTY PLEA TO BOTH CHARGES, SO THERE WERE NO PLEA ARRANGEMENTS. AT THE TIME THAT HE APPEARED FOR THE PENALTY PHASE, HE WAIVED THE JURY ADVISORY SENTENCE. HE, ALSO, WAIVED THE CLOSING ARGUMENT AND HE WAIVED THE HEARING UNDER SPENCER HEARING. THE COURT CONDUCTED A SENTENCING HEARING, AND AT THAT HEARING, THE DEFENSE COUNSEL, ALSO, WAIVED DSI. TRIAL COURT SENTENCED MR. GRIFFIN TO DEATH IN BOTH COUNTS. IT IS THE WAIVER OF THE ADVISORY SENTENCE, THAT IS THE PRIMARY SUBJECT OF THIS APPEAL, WHETHER THAT WAIVER WAS CONDUCTED VOLUNTARILY AND INTELLIGENTRY. THIS COURT, IN A NUMBER OF CASES, PRIMARILY HERNANDEZ AND LEMADLIN, THIS COURT HAS NOT PRESUMED THAT THE WAIVER OF THE ADVISORY SENTENCE WAS VOLUNTARILY AND INTELLIGENTLY ENTERED, THAT THAT HAS TO BE AFFIRMATIVE SHOWN BY THE RECORD. IF I COULD READ THE PERTINENT PARTS OF THE PLEA COLLOQUY, NOT THE PLEA BUT THE WAIVER OF THE ADVISORY SENTENCE, THIS IS THE COURT. YOU UNDERSTAND, SIR, THAT A PRESENTATION OF EVIDENCE AND TESTIMONY TO THE JURY WOULD BE FOR THE PURPOSES OF THE STATE ATTORNEY TO PROVE THE AGGRAVATING CIRCUMSTANCES, THAT THEY FEEL ARE PRESENT IN THE CASE, FOR THE JURY TO HEAR THAT TESTIMONY AND THEN TO MAKE A RECOMMENDATION TO ME AS TO WHAT THEY FEEL THE PROPER SENTENCE WOULD BE. DO YOU UNDERSTAND THAT THAT IS THE PURPOSE OF THE PENALTY PHASE? THE DEFENDANT: YES, SIR. THE COURT: OKAY. YOU UNDERSTAND THAT THERE ARE RECOMMENDATIONS OF, EITHER, IMPOSING THE DEATH SENTENCE OR EITHER IMPOSING A LIFE SENTENCE NEED NOT BE UNANIMOUS? THAT IT JUST TAKES A MAJORITY VOTE OF 7 TO 5, FOR THE JURY TO RECOMMEND THE IMPOSITION OF THE DEATH SENTENCE. DO YOU UNDERSTAND THAT? THE DEFENDANTS, YES, SIR. OKAY. AND DO YOU UNDERSTAND, BY GIVING UP YOUR RIGHT TO HAVING THIS EVIDENCE PRESENTED TO THE JURY, THAT IN ESSENCE, THIS EVIDENCE WOULD BE PRESENTED TO ME, AND THAT I WOULD MAKE THE FINAL RECOMMENDATION AND DECISION AS TO WHAT SENTENCE WOULD BE IN THIS CASE? DO YOU UNDERSTAND THAT? THE DEFENDANT. YES, SIR. THERE ARE -- THERE WAS FURTHER DISCUSSION OF THE -- I WOULD MAINTAIN THAT THIS IS THE PRIMARY POINT THAT IS TO BE ADDRESSED HERE. MOST NOTABLE, FROM THE COURT'S INQUIRY, IS ANY ABSENCE THAT THE DEFENDANT ACTUALLY HAS A RIGHT TO PRESENT MITIGATING TESTIMONY TO THE JURY. THE COURT, ALSO --

BUT THE FACT OF THE MATTER IS THAT THE DEFENDANT DID HAVE MITIGATING TESTIMONY, DIDN'T HE?

YES, HE DID, FOLLOWING THE WAIVER OF THE JURY FOR THE PENALTY PHASE.

SO WHERE IS THE PREJUDICE? IF HE DID PUT IT IN. TO PUT IN.

THIS COURT, IN CASES THAT STRESS THE IMPORTANCE OF THE ADVISORY SENTENCE, THAT THIS IS THE RIGHT TO HAVE THE JURY, DURING THE PENALTY PHASE, IT IS AN IMPORTANT --

I GUESS WHAT I AM ASKING, WOULDN'T IT BE -- WHY IS IT NOT ON THIS ERROR -- HARMLESS ERROR, IN LIGHT OF THE FACT THAT HE DID PUT IN MITIGATING? ALTHOUGH THE JUDGE DIDN'T ADVISE FORM THAT -- ADVISE HIM THAT THIS IS AN OPPORTUNITY FOR YOU TO PUT IT N I

RECOGNIZE YOUR POINT THERE.

I DON'T THINK THAT WHAT SUBSEQUENTLY OCCURRED DURING THE TRIAL PORTION CAN CURE THE WAIVER OF THE SQUR JURY. I THINK THAT THIS -- OF THE JURY. I THINK THAT THIS COURT HAS HELD THAT THE INQUIRY NEWS MUST, AND THE COLORADO ILL QUESTION MUST -- AND THE COLLOQUY MUST SHOW THAT IT WAS FREE AND VOLUNTARILY REPRESENTED. -- GIVEN.

WEREN'T THERE REPRESENTATIONS MADE BY COUNSEL AND WEREN'T THEY MADE IN THE PRESENCE OF THE DEFENDANT?

YES, THERE WERE. MR. DWIGHT WELLS WAS THE COUNSEL IN THIS CASE, AND HE DID REPRESENT TO THE COURT THAT HE HAD GONE OVER THE WAIVER WITH THE DEPARTMENT.

AND HOW -- WITH THE DEFENDANT.

AND HOW DETAILED WAS THAT REPRESENTATION TO THE COURT?

I DON'T THINK HE WENT INTO DETAIL, AS TO WHAT, EXACTLY, HE WENT OVER WITH MR. GRIFFIN, BUT HE JUST MADE A GENERAL ASSERTION THAT HE HAD GOTTEN GONE OVER THE RAMIFICATION -- HAD GONE OVER THE RAMIFICATIONS OF WAIVING THE JURY.

AND MR. GRIFFIN WAS PRESENT WHEN THIS WAS --

YES, HE WAS, YOUR HONOR.

-- THIS REPRESENTATION WAS MADE?

I DON'T THINK, HOWEVER, THAT, ONCE AGAIN, IF I COULD REFER THE COURT TO THE DECISION IN LE MADELINE, THIS COURT SAID THAT IT CANNOT PRESUME THAT THE WAIVER WAS VOLUNTARILY AND INTELLIGENTLY ENTERED, BASED ON SOMETHING THAT IT MAY OR MAY NOT HAVE IN THE RECORD. IN THIS CASE, WE ONLY HAVE MR. WELLS' ASSERTION. IT WOULD BE A PRESUMPTION TO SAY, I BELIEVE, THAT THAT NECESSARILY MAKES THE WAIVER VOLUNTARILY INTELLIGENTLY ENTERED.

DOES IT HELP, AT ALL, THAT THERE WAS A MEMORANDUM GIVEN TO THE COURT BY DEFENSE COUNSEL, WHERE IT IS SPECIFICALLY STATED, IN THE MEMORANDUM, THAT THE DEFENDANT IS CHOOSING NOT TO PRESENT MITIGATION TO A JURY BUT SIMPLY TO THE COURT?

I WOULD -- THAT STATEMENT WAS MADE. HOWEVER, THAT, AGAIN, IS REPEATING DEFENSE COUNSEL'S SAERTION, AND THAT -- ASSERTION, AND THAT DOESN'T FOLK OUST WHAT SHOULD BE THE SUBJECT OF THE ISSUE -- FOCUS ON WHAT SHOULD BE THE SUBJECT OF THE ISSUE HERE, AND THAT DOESN'T AFFIRMATIVELY SHOW THAT THE WAIVER WAS VOLUNTARILY AND --

I THINK WE CAN ALL AGO GROW -- AGREE THAT IT WOULD BE THE BETTER PRACTICE, THE BEST PRACTICE, FOR THE COURT TO TELL THE DEFENDANT THAT, LOOK, BY DOING THAT, YOU ARE NOT ONLY WAIVING THE JURY HEARING, WHAT THE STATE IS PRESENTING BUT, ALSO, WHAT YOU WOULD PRESENT IN MITIGATION. BUT DO THESE OTHER THINGS HELP US TO -- CAN WE LOOK AT THEM, TO DETERMINE WHETHER OR NOT THE WORD ADEQUATELY DEMONSTRATES ITS VOLUNTARINESS?

I THINK THEY ARE RELEVANT, JUSTICE QUINCE. HOWEVER, I DON'T THINK THEY ARE DISPOSITIVE. IF THE TRIAL COURT'S INQUIRY WERE MERELY INADEQUATE, THEN, PERHAPS, THAT WOULD BE MORE PERSUASIVE, BUT IN THIS CASE THE TRIAL COURT'S INQUIRY IS ACTUALLY MISLEADING TO THE DEFENDANT, IN TELLING HIM THAT THE PURPOSE OF THE PENALTY PHASE IS FOR THE STATE TO PRESENT AGGRAVATING FACTORS, WITHOUT MENTIONING THAT PART OF THAT PURPOSE IS,

ALSO, TO PRESENT MITIGATING FACTORS.

WAS THERE ANY ATTEMPT MADE TO WITHDRAW THIS WAIVER, IN THE TRIAL COURT, ITSELF?

NO. THERE WAS NO NOT NOT.

SO WE ARE REALLY NOT -- NO. THERE WAS NOT.

SO WE ARE REALLY NOT TALKING WHAT FACTUAL INQUIRY, NOW, AS TO WHETHER THE PLEA WAS VOLUNTARY. WE ARE TALKING ABOUT WHETHER OR NOT THERE IS A ABSOLUTE RULE, WITH REFERENCE TO THE CONTENTS OF THE EXCHANGE BETWEEN THE COURT AND THE DEFENDANT, BEFORE A WAIVER IS ACCEPTED, BELOW WHICH THE WAIVER IS INVALID. THAT IS REALLY WHAT YOU ARE ADVOCATING HERE. IS THAT NOT RIGHT?

THAT'S CORRECT, JUSTICE ANSTEAD.

WHY SHOULDN'T WE REQUIRE A DEFENDANT, IN A SITUATION LIKE THIS, TO HAVE TO ASK THAT HIS PLEA BE WITHDRAWN? I MEAN THAT HIS WAIVER BE WITHDRAWN, AND TO ACTUALLY, THEN, DEMONSTRATE THAT THIS WAS NOT A VOLUNTARY WAIVER, BECAUSE HE DIDN'T KNOW THAT HE HAD THE RIGHT TO PRESENT MITIGATING EVIDENCE TO THE JURY AND THEN HAVE IT RESOLVED IN THAT CONTEXT.

WELL, IN THIS CASE, THAT WOULD BE A RULE THAT WOULD BE ESTABLISHED AFTER THE FACT. I MEAN, IF THAT TIME OF THE -- HE WAIVED THE JURY, I MEAN, HE WASN'T AWARE OF THAT REQUIREMENT. IF --

WHAT -- DON'T WE HAVE A, ACTUALLY A CRIMINAL RULE OF PROCEDURE, THAT GOES TO MOTIONS TO WITHDRAW A PLEA, FOR INSTANCE?

THAT'S CORRECT.

AND --

BUT THAT --

WHAT ARE THE REQUIREMENTS OF THAT RULE?

THAT RULE REQUIRES FOR THE ENTRY OF A PLEA OF GUILTY OR NO CONTEST, THAT A MOTION ARE FILED FOR THAT PROCEDURALLY, TO BE PRESERVED. THAT'S CORRECT. BUT THAT RULE HAS NOT BEEN ESTABLISHED IN THIS INSTANCE.

ISN'T THAT, IN ESSENCE, THE SAME THING THAT YOU ARE TALKING ABOUT HERE?

THERE ARE SIMILIARITIES. EYE GUESS I AM DISTURBED BY THE FACT -- I GUESS I AM DISTURBED BY THE FACT THAT THIS IS SOMETHING THAT APPEARS, AND WHEN I SAY DISTURBED, IT IS JUST CONTEXT THAT IT IS PRESENTED IN, IS THAT WE HAVE, FIRST OF ALL WE HAVE A DECISION TO PLEAD GUILTY TO THE CHARGES. SO THAT THE -- THERE IS A WAIVER OF JUDGE AND JURY. REALLY. WITH REFERENCE TO THE GUILT.

CORRECT.

AND OF COURSE WE HAVE A COLLOQUY WITH THAT, AND SO WE HAVE, AND THEN, APPARENTLY, THE SUBSEQUENT DECISION IS MADE TO ACTUALLY WAIVE A JURY, WITH REFERENCE TO THE PENALTY PHASE. PART OF IT. IT APPEARS TO BE A WAIVER THAT IS ENTERED INTO, COMPLETELY WITH THE ADVICE OF COUNSEL AND THE DEFENDANT'S FAMILY. IN OTHER WORDS A FULLY-INFORMED SITUATION, AND THEN WE HAVE, IN ADDITION TO THAT, WE HAVE THE COLLOQUY

WITH THE COURT, AND THEN WE HAVE THE LAWYER REPRESENTING, IN THE SENTENCING MEMORANDUM, THAT THE DEFENDANT DOES KNOW ABOUT HIS RIGHT TO PRESENT, YOU KNOW, MITIGATING EVIDENCE. AND SO IT SEEMS TO CONTRAST SHARPLY, IF WE JUST HAVE SOMEONE, THEN, EXAMINE THE RECORD, AS THE RESPONSIBILITY OF APPELLATE COUNSEL AND JUST FIND, WELL, ON EXAMINATION OF THE RECORD, I SEE THE COURT DIDN'T TELL HIM SOMETHING THAT, MAYBE, THE COURT SHOULD HAVE TOLD HIM, AND THAT ACTUALLY COULD HAVE BEEN A MISREPRESENTATION, THAT THAT IS NOT THE ONLY PURPOSE OF THE PENALTY PHASE IS THAT, TO ALLOW THE STATE TO PRESENT AGGRAVATING CIRCUMSTANCES, BUT, ALSO, AN OPPORTUNITY FOR THE DEFENDANT TO DO THAT. BUT WE HAVE THAT DONE, AS I SAY, IN THESE CIRCUMSTANCES, THAT ALMOST OVERWHELMINGLY SUGGEST THAT EVERYBODY WAS AWARE OF THAT, THAT THERE IS NO -- THERE DOESN'T SEEM TO BE ANY QUESTION ON THAT ON THE RECORD THAT IS MADE HERE, AND I AM CONCERNED ABOUT, THEN, TREATING THAT AS AN APPELLANT ISSUE.

SURE.

WHEN IT HASN'T BEEN RAISED BEFORE. USUALLY WE ARE UP HERE, REVIEW REVIEWING WHAT MISTAKES TRIAL JUDGES HAVE MADE, AFTER SOMEBODY HAS CALLED THE MISTAKE TO THE ATTENTION OF THE TRIAL JUDGE. AND SAID, JUDGE, YOU KNOW, WAIT A MINUTE OR SOMETHING. AND THAT IS WHY I ASKED ABOUT WHETHER THERE WAS ANY ADEPT TO WITHDRAW THIS PLEA -- ATTEMPT TO WITHDRAW THIS PLEA OR WAIVER, AT THE TRIAL COURT LEVEL. IS THERE ANY CASE, GETTING BACK TO IS THERE ANY CASE THAT SETS OUT A MINIMUM SUFFICIENT WAIVER COLLOQUY THAT MUST BE CONDUCTED, EITHER WRITTEN BY US OR WRITTEN BY SOME OTHER COURT, LIKE THE U.S. SUPREME COURT? IS THERE A CASE THAT SETS OUT A MINIMUM COLLOQUY?

THIS COURT IS ONLY PASSED UPON THE ISSUE IN SEVERAL CASES, I BELIEVE, HERNANDEZ, LE MADELINE. THE ONE CASE THAT I FOUND THAT WAS MOST ON POINT WAS A SOUTH CAROLINA IB A CASE. I RECING ON -- CAROLINA CASE. I RECOGNIZE THAT THAT IS NOT CONTROLLING, OBVIOUSLY. BUT IN THAT CASE, THERE WERE APPROXIMATELY FOUR DEFENSE ATTORNEYS, AND ALL OF THEM HAD REPRESENTED THAT THEY HAD DISCUSSED THE CONSEQUENCES OF THE WAIVER TO THE APPELLANT. HOWEVER, THE SOUTH CAROLINA SUPREME COURT HELD THAT THAT WAS NOT SUFFICIENT, AND IF I COULD QUOTE WHAT THE COURT SAID, DECIDED ON THAT MATTER, THIS IS THE SOUTH CAROLINA COURT. WE HOLD THAT ACCEPTANCE OF A JURY TRIAL WAIVER MUST BE BASED UPON A WRITTEN RECORD CLEARLY DEMONSTRATING, EXCUSE ME, THAT IT WAS MADE KNOWINGLY AND VOLUNTARILY. THIS CAN BE ACCOMPLISHED ONLY THROUGH A SEARCHING ENTERING ENTERINGRATION -- ENTERINGGATION OF THE ACCUSED BY THE TRIAL -- INTERROGATION BY THE TRIAL COURT, ITSELF, OF THE ACCUSED, AND I WOULD SUGGEST THAT THIS WAS NOT ONLY THE TRIAL JUDGE CONDUCT AGO SEARCHING ENTERINGGATION. IT WAS A MISLEADING INTERROGATION.

WAS THAT THE GUILT PHASE OR THE PENALTY PHASE?

THAT WAS THE PENALTY PHASE, WITH WAIVER OF THE ADVISORY SENTENCE.

ARE THERE REQUIREMENTS FOR WAIVER OF A TRIAL BST JURY? YOU CAN -- OF A TRIAL BEFORE THE JURY?

YOU CAN HAVE A TRIAL BEFORE JUST A COURT, CORRECT?

THAT'S CORRECT.

AND WHAT IS THE REQUIREMENT TO DO THAT?

ONLY THAT IT BE VOLUNTARILY AND INTELLIGENTLY WAIVED. THAT IS THE ONLY REQUIREMENT.

ARE THERE SPECIFIC, AS JUSTICE ANSTEAD JUST ASKED YOU ABOUT THE PENALTY PHASE, ARE THERE A SPECIFIC COLLOQUY, WHEN YOU WAIVE A JURY IN THE GUILT PHASE, THAT THE COURT MUST GO THROUGH?

TO MY KNOWLEDGE, THERE ARE NO CASES THAT SPECIFICALLY SET OUT THE REQUIREMENTS, AS THE RULE OF PROCEDURE DOES WITH REGARDS TO THE ENTRY OF A PLEA OF GUILTY OR NO CONTEST. THERE IS NO CASE THAT SPECIFICALLY SETS OUT THE REQUIREMENTS. I WOULD SUBMIT TO THIS COURT THAT THE REQUIREMENTS ARE NOT UNDULY COMPLEX. I MEAN, THE DEFENDANT SHOULD BE APPRISED, OBVIOUSLY, THAT THEY HAVE A RIGHT TO PRESENT MITIGATING EVIDENCE, THAT AGGRAVATING FACTORS MUST BE PROVED BEYOND A REASONABLE DOUBT. THAT THE JUDGE IS NOT THE -- I AM SORRY, THE JURY IS NOT THE FINAL DETERMINE OR OF THE SENTENCE OF THE CASE, THAT THE JUDGE, INSERT CIRCUMSTANCES, CAN OVERRIDE THE JURY'S RECOMMENDATION. ALL OF THOSE --.

DID THE SOUTH CAROLINA COURT GO ON TO LIST WHAT WOULD HAVE TO BE IN THIS SEARCHING INQUIRY, OR --

IT DID NOT, UNFORTUNATELY, IN THAT CASE.

SO IN THIS INSTANCE, IF THE TRIAL JUDGE HAD ADDED TO THAT STATEMENT THAT, AND THIS IS, ALSO, YOUR OPPORTUNITY TO PRESENT MITIGATION, EVIDENCE IN MITIGATION, THEN WE WOULDN'T HAVE THIS PROBLEM.

YES, JUSTICE QUINCE. I AGREE WITH THAT. IF I COULD TURN TO THE SECOND ISSUE, THIS ISSUE CONCERNS THE TRIAL COURT'S FAILURE TO CONSIDER MITIGATING CIRCUMSTANCES, THAT, EXCUSE ME, IN THE DEFENSE'S MEMORANDUM, SENTENCING MEMORANDUM, THE TRIAL COUNSEL CITED THE APPELLANT'S EMPLOYMENT HISTORY AND SUPPORTED HIS CHILDREN. SHOW, AND I QUOTE, THE POTENTIAL FOR REHABILITATION AND PRODUCTIVITY WITHIN THE PRISON SYSTEM. THIS WAS A MITIGATING CIRCSTABS ON -- CIRCUMSTANCE THAT THE TRIAL COURT IGNORED. THERE IS NO REFERENCE TO IT IN THE SENTENCING ORDER.

THE TRIAL COURT DOESN'T TALK ABOUT HIS EMPLOYMENT HISTORY OR SUPPORT OF HIS FAMILY?

THE TRIAL COURT DOES DISCUSS. THAT HOWEVER, THERE IS NO REFERENCE TO HIS FUTURE CONDUCT OR I WOULD CITE TO SKIPPER V SOUTH CAROLINA, WHICH STANDS, IN PART, FOR THE PROPOSITION THAT THE DEFENDANT'S POTENTIAL FOR REHABILITATION IS SOMETHING TO BE STRONGLY CONSIDERED, BECAUSE IT IS AN ASPECT OF THE DEFENDANT'S CHARACTER. AND I WOULD SUGGEST TO THIS COURT THAT THAT WAS NOT CONSIDERED BY THE TRIAL COURT.

AND WHAT WAS OFFERED TO DEMONSTRATE THAT?

WAS OFFERED. THIS COURT HAS HELD THAT WORK HISTORY --.

IN THIS SPECIFIC CASE, WHAT EVIDENCE WAS OFFERED IN SUPPORT OF THE POTENTIAL FOR REHABILITATION AND --

THERE WAS TESTIMONY BY MR. GRIFFIN'S WIFE THAT HER CHILDREN AND HIS CHILDREN HAD, THAT HE HAD -- THAT THEY VISITED MR. GRIFFIN WHILE IN JAIL, AND THAT SHE, IN HER OPINION, THAT THIS CONTACT WAS GOOD, AND IF IT WERE TO CONTINUE, THAT IT WOULD BE BENEFICIAL TO THE CHILD, AS WELL AS MR. GRIFFIN. THERE WAS, ALSO, EVIDENCE SHOWING THAT, PRIOR TO THE DRUG ADDICTION, THAT CERTAINLY CONTRIBUTED TO THESE OFFENSES, MR. GRIFFIN WAS A GOOD WORKER, THAT HE HAD -- THERE WERE NO PRIOR ARRESTS, NO PRIOR CONVICTIONS. THAT HE WAS AN EXCELLENT STUDENT. AND GRADUATED FROM HIGH SCHOOL, AND I WOULD SUBMIT THAT THOSE, ALSO, SHOW THE POTENTIAL FOR REHABILITATION.

DIDN'T THE TRIAL COURT, THOUGH, DISCUSS THOSE CIRCUMSTANCES, THAT IS THE CIRCUMSTANCES THAT COUNSEL POINTED OUT MIGHT SUPPORT A CONCLUSION THAT HE WAS A GOOD CANDIDATE FOR REHABILITATION? THE TRIAL COURT DID DISCUSS THOSE THINGS, DID HE NOT?

IT DID DISCUSS HIS PRIOR EMPLOYMENT AND EDUCATION HISTORY. HOWEVER, HOW THAT MANIFESTED ITSELF IN HIS FUTURE BEHAVIOR WAS NOT DISCUSSED AND WHETHER HE COULD BE REHABILITATED WAS, ALSO, NOT MENTIONED.

IT WASN'T DISCUSSED IN DETAIL, IN THE SENTENCING MEMORANDUM, BY DEFENSE COUNSEL, EITHER, WAS IT?

NO. IT WAS NOT, JUSTICE ANSTEAD. MY TIME IS ABOUT UP. THANK YOU.

VERY WELL. MS. SAAB HE WILL A MAY IT PLEASE THE -- MS. SABELLA.

MAY IT PLEASE THE COURT. I AM CANDACE SABELLA. SHE WAIVED PRESENTATION AND MITIGATION OF THIS JURY AND THIS COURT SAID THAT SHE WAS NOT SUFFICIENTLY AND PRIZED OF HER -- APPRISED OF HER RIGHTS, IN ENTERING THIS PLEA, AND WHAT THIS COURT SAID IS SHE HAS TO SHOW PREJUDICE, AND IN THAT CASE, WHETHER, ALTHOUGH THE COURT WASN'T SUFFICIENTLY ARTICULATE IN ACCEPTING THE GUILTY PLEA, HER COUNSEL SAYS I HAVE THOROUGHLY GONE OVER THIS WITH HER AND THOROUGHLY EXPLAINED EVERYTHING TO HER, THAT IS SUFFICIENT TO SHOW THAT THERE WAS NO PREJUDICE, THAT SHE KNEW WHAT SHE WAS DOING WHEN SHE ENTERED THE PLEA.

WHY WOULDN'T IT BE A BETTER RULE OR A RULE TO REQUIRE, AT A MINIMUM, THAT THE JUDGE EXPLAIN THE TRUE CIRCUMSTANCES OF THE PENALTY PHASE. THAT IS THAT YOU HAVE AN OPPORTUNITY TO PRESENT AGGRAVATING -- THE STATE HAS THAT OPPORTUNITY, AND THAT DEFENSE HAS AN OPPORTUNITY TO PRESENT MITIGATING. THAT SEEMS LIKE, AT LEAST, A MINIMAL REQUIREMENT.

THERE CERTAINLY IS NO REASON WHY THAT COULD NOT BE DONE, AND IT CERTAINLY WOULD BE INFORMATIVE AND SUFFICIENT, BUT THERE IS NO REQUIREMENT, AT THIS TIME, TO DO THAT, IF THIS COURT WANTS TO MAKE THAT A RULE, THAT WOULD BE FINE, BUT THERE IS NO REQUIREMENT AT THIS POINT. AT THIS POINT, WHAT WE HAVE IS THE RULE SAYS THAT THE WAIVER JUST HAS TO BE ON THE RECORD. THIS WAIVER IS CLEARLY ON THE RECORD. THIS COLLOQUY GOES FOR EIGHT PAGES, AND IN THIS EIGHT PAGES, COUNSEL REPRESENTS, AFTER THEY HAVE, ALREADY, GONE THROUGH EVERYTHING, MR. WELLS SAYS I WANT THE COURT TO KNOW THIS DECISION HAS BEEN MADE WITH THE CONSULTATION WITH MR. GRIFFIN'S PARENTS. WE HAVE SPENT A LOT OF TIME, YESTERDAY, DISCUSSING THE FACTS OF THE CASE, THE REASONS WE WOULD DO THIS. ALSO PRESENT IN THE COURTROOM IS MS. WELLS, WHO WAS GOING TO HELP PICK A JURY. SHE LOOKED AT THE CASE YESTERDAY, AND I TALKED TO MR. GRIFFIN THIS MORNING HERE, IN COURT, SO I BELIEVE THIS IS CERTAINLY DONE WITH A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO HAVE A JURY MAKE THIS DECISION.

BUT DOESN'T THE STATE HAVE TO CONCEDE THAT THE COLLOQUY WAS MISLEADING, IN THAT IT DIDN'T INFORM THE DEFENDANT THAT HE HAD AN OPPORTUNITY TO PUT ON MITIGATING?

I DON'T THINK IT WAS MISLEADING AT ALL. I THINK IT MAY NOT HAVE BEEN AS THOROUGH AS IT MAY HAVE BEEN, BUT I DON'T THINK IT WAS MISLEADING, AND ESPECIALLY WHEN YOU CONSIDER THIS WAS MADE ON THE DAY THAT THEY WENT INTO PENALTY PHASE. THEY HAD MITIGATION WITNESSES LINED UP, SO CLEARLY THE DEFENDANT KNOWS HE HAS THE RIGHT TO PRESENT MITIGATION.

THE JUDGE, AS YOU SAY, GOES ON FOR EIGHT PAGES OF PELLING -- TELLING HIM WHAT THIS

HEARING IS ABOUT. AND HE SAYS IT IS FOR THE STATE TO PUT ON ITS AGGRAVATING, BUT THEN HE SAYS NOTHING ABOUT THE DEFENDANT. YOU CAN PUT IN MITIGATING. AND THAT IS NOT MISLEAD SOMETHING.

HE OBVIOUSLY LEFT OUT THAT PART. THERE IS NO DOUBT ABOUT IT, AND IT WOULD HAVE BEEN BETTER, HAD HE DONE SO, BUT IT IS NOT MISLEADING. IT IS JUST NOT AS SUFFICIENT AS IT MIGHT HAVE BEEN, BUT THE PART, WHAT HE GOES THROUGH, HE SAYS, OKAY, NOW, DOES THIS COMPLY WITH THIS CASE, AND DOES THIS COMPLY WITH IT. THE JUDGE WAS BENDING OVER BACKWARDS, TO TRY TO DO EVERYTHING HE NEEDED TO DO, AND HE WAS DOING IT UPON THE ADVICE OF COUNSEL, ALLOWING THE STATE AND DEFENSE COUNSEL TO, BOTH, COME IN AND TO SAY, NOW, THIS IS WHAT YOU NEED TO DO. THIS IS WHAT YOU NEED TO DO. IF THIS COURT WOULD LIKE TO MAKE A RULE, AS IT DOES FOR THE ENTRY OF A GUILTY PLEA, TO SAY THAT YOU NEED TO DOT THESE I'S AND CROSS THESE T'S, THEN THAT IS FINE. LE MADELINE SIMPLY SAYS THAT THAT WAIVER HAS TO BE ON THE RECORD.

LET'S SAY THAT THE COURT DISAGREES WITH YOU THAT IT IS ERROR. WHY WOULD IT BE HARMLESS ERROR?

BECAUSE, AS IN WAURNOS, THIS RECORD SHOWS THAT THIS DEFENDANT WAS ABLY REPRESENTED BY COUNSEL, WHO THOROUGHLY EXPLAINED IT TO HIM, AND AS THIS COURT HAS NOTED, THERE IS NOTHING IN THIS RECORD THAT SUGGESTS THAT MR. GRIFFIN WANTS TO RETRACT THAT. YOU HAVE A SUBSEQUENT MEMORANDUM, AFTER THE PENALTY PHASE, AFTER HE SAT THROUGH HIS MITIGATION WITNESSES, THAT CONTINUES TO ASSERT THAT WE HAVE WAIVED THIS. OBVIOUSLY THIS WAS SOMETHING THAT WAS DONE WITH THE ADVICE OF COUNSEL. THEY THOUGHT IT WAS A STRATEGIC REASON TO GO FORWARD WITHOUT A JURY'S RECOMMENDATION. WHEN YOU HAVE THE FACTS OF THIS CASE, IT WAS A DOUBLE HOMICIDE, WHERE, AFTER THE HOMICIDE, THE DEFENDANT GOES OUT AND BUYS CHAMPAGNE AND PARTIES AND LAUGHS AND DRINKS. THIS IS NOT GOING TO PLAY WELL WITH THE JURY. AND BALANCED AGAINST THAT YOU HAVE RELATIVELY INSIGNIFICANT MITIGATION, BASED ON THE FACT OF THAT HISTORY OF CRIME, WHERE HE HAS BEEN SELLING DRUGS AND ALL SORTS OF DRUG ACTIVITY DURING THE PAST YEAR. CLEARLY UNDER THESE CIRCUMSTANCES, COUNSEL LOOKED AT THE FACTS AND SAID WE STAND A BETTER CHANCE OF JUST GOING BEFORE THE JUDGE, WITHOUT A 12-0 RECOMMENDATION FOR DEATH, AND HOPEFULLY TO CONVINCE THE JUDGE THAT THIS DEFENDANT IS REMORSEFUL AND SHOULD BE GIVEN A LIFE SENTENCE. THIS RECORD SUPPORTS THAT HE WAS ADVISED BY COUNSEL. THERE IS NOTHING IN THIS RECORD THAT SUPPORTS THAT HE WAS MISLED. I WOULD, ALSO, LIKE TO POINT OUT, IN THIS COURT'S DECISION IN HUNT, WHERE HUNT HAD, ALSO, ENTERED A PLEA OF GUILTY AND WAIVED A PENALTY-PHASE JURY, THAT THERE WAS A RELATIVELY MINOR DISCUSSION ABOUT, ALL RIGHT, YOU HAVE -- YOU RESPECT YOU ARE WAIVING YOUR RIGHT TO A JURY RECOMMENDATION, AND THAT WAS IT. THERE WAS NO FURTHER EXPLANATION AT ALL. AND THAT WAS FOUND TO BE SUFFICIENT BY THIS COURT. CLEARLY, IF YOU WANT TO MAKE A RULE THAT SETS OUT FURTHER THINGS, YOU CAN DO SO, BUT THERE IS NO REQUIREMENT THAT THIS TRIAL JUDGE DO SO. AS FOR THE SECOND ISSUE, AS THIS COURT HAS NOTED, THE SENTENCING MEMORANDUM, WITH REGARD TO REHABILITATION, WAS RELATIVELY INSIGNIFICANT REFERENCE. WHAT, IN FACT, HE STATED WAS THE FACT THAT THE DEFENDANT HAD A GOOD EMPLOYMENT HISTORY AND IS A GOOD PROVIDER TO HIS FAMILY HAS BEEN CONSISTENTLY HELD TO BE VALID MITIGATION. THOSE FACTS DEMONSTRATE POSITIVE CHARACTER TRAITS AND SHOW THE POTENTIAL FOR REHABILITATION AND PRODUCTIVITY WITHIN THE PRISON SYSTEM. THE TRIAL COURT FOUND BOTH THAT HE HAD HAD A GOOD EMPLOYMENT HISTORY, PRIOR TO BECOMING INVOLVED WITH DRUG ACTIVITY, AND, ALSO, THAT HE HAD SUPPORTED HIS CHILDREN AND HAD BEEN EMPLOYED. THE FACT THAT HE FAILED TO MENTION THE WORD "REHABILITATION" IS CLEARLY HARMLESS. HE REVIEWED THE FACTS AND MADE THAT ASSESSMENT. THIS COURT, EN VOGUE HE WILL, CONSIDERED A SIMILAR -- IN VOGEL, CONSIDERED A SIMILAR ALLEGATION, WHETHER IT WAS FAILED TO MENTION HIS EMPLOYMENT HISTORY AND ARTISTIC TALENTANT SAID, WHERE THAT WAS DISCUSSED BY THE COURT THERE, IS

NO ERROR. FINALLY COUNSEL DID NOT MENTION HIS THIRD ISSUE, WHICH IS WHAT HE ALLEGED TO BE A DOUBLING OF AGGRAVATING FACTORS DURING THE COURSE OF THE KIDNAPPING AND PECUNIARY GAIN. THIS COURT, IN GREEN AND HARTLEY, HAS SAID THAT, WHERE THEY ARE BASED ON DIFFERENT FACTS, WHERE THE SOLE PURPOSE FOR THE KIDNAPPING IS NOT THE ROBBERY THAT, BOTH FACTORS CAN EXIST.

WHAT IS THE STATE'S POSITION, ASSUMING THAT WE FIND THAT THERE WAS AN IMPROPER DOUBLE HAD GONE?

THAT THERE ARE STILL THREE REMAINING VALID AGGRAVATING FACTORS BALANCED AGAINST INSIGNIFICANT MITIGATION, AND WHEN YOU COMPARE THIS CASE WITH JENNINGS, WHICH ARE VIRTUALLY IDENTICAL FACTS, EXCEPT YOU HAVE ONE MORE VICTIM. YOU HAVE A DEFENDANT WHO IS IN MISS MIDTWENTIES, WITH AN ACCOMPLICE, THAT -- IN HIS MIDTWENTIES, WITH AN ACCOMPLICE. THEY GO TO A RESTAURANT AND LOCK THE EMPLOYEES IN A KEELER AND ROB THE RESTAURANT AND THEN GO BACK AND KILL THE EMPLOYEES. UNDER VIRTUALLY IDENTICAL FACTS, MITIGATION FOR MR. GENING WAS NONSIGNIFICANT HISTORY OF CRIMINAL ACTIVITY PLUS THE EMPLOYMENT AND FAMILY S.U.V.,-AND FAMILY STUFF, SO THIS COURT AFFIRMED IN THAT CASE. YOU WOULD STILL HAVE, IF ONE IS STRUCK, THREE SIGNIFICANT FACTORS BALANCED AGAINST THE MITIGATION.

DON'T WE HAVE THE FACTOR HERE THAT THIS GUY WAS INTO DRUGS AND USED DRUGS ON A REGULAR BASIS AND DOES THAT ADD -- DOESN'T THAT ADD TO THE MITIGATION SIDE OF THE CASE?

I DON'T RECALL THAT JENNINGS DID NOT HAVE THE DRUG ACTIVITY. WE HAVE A NUMBER OF OTHER CASES WHERE YOU HAVE THE DRUGS ADDED, AND THIS COURT HAS AFFIRMED THE DEATH SENSE, UNDER THESE TYPE OF CIRCUMSTANCES, WHERE YOU HAVE A DOUBLE HOMICIDE AND YOU HAVE RELATIVELY INSIGNIFICANT MITIGATION.

ANY EVIDENCE IN THIS CASE THAT THE DEFENDANT WAS UNDER THE INFLUENCE OF DRUGS AT THE ACTUAL TIME OF THE COMMISSION OF THE CRIMES?

NEW YORK CITY YOUR HONOR. IN FACT, THERE IS A SPECIFIC FINDING BY THE TRIAL COURT, IN HIS ORDER, THAT THE DEFENDANT WAS NOT. AND FINALLY, AS I JUST MENTIONED, ALTHOUGH THEY HAD NOT RAISED PROPORTIONALITY, WE ASSERT THAT, BASED UPON JENNINGS AND SIMILAR CASES, THAT THIS COURT AFFIRM THE DEATH SENTENCE IN THIS CASE. THANK YOU.

THANK YOU. REBUTTAL?

IT IS HARD FOR ME TO UNDERSTAND THE ARGUMENT THAT THE TRIAL COURT'S INQUIRY WASN'T MISLEADING IN THIS CASE, WHEN, IN FACT, WHAT WAS SAID WAS THAT THE PURPOSE OF THE PENALTY PHASE WAS FOR THE STATE TO PRESENT AGGRAVATING CIRCUMSTANCES. THAT WOULD SEEM, IT IS HARD TO IMAGINE FROM THE DEFENSE PERSPECTIVE, A WORSE STATEMENT OF THE PURPOSE OF THE PENALTY PHASE. AS FAR AS THE CONCERN --

WHAT DO WE GET, IF WE SEND THIS BACK? WHAT HAPPENS NEXT?

I WOULD ASK THAT THIS COURT SEND IT BACK FOR A NEW PENALTY PHASE, BEFORE A JURY, UNLESS THE -- MR. GRIFFIN, AFTER BEING ADEQUATELY APPRISEED OF OF THE PURPOSE OF THE PENALTY PHASE AND THE JURY'S ROLE IN IT, THAT IT BE SENT BACK BEFORE A JURY, UNLESS HE WAIVES IT, AND THAT WAIVER IS VOLUNTARY AND INTELLIGENTLY GIVEN.

WON'T THE FACTS OF THIS SITUATION, AS TO WHAT COUNSEL TOLD HIM, COUNSEL WAS STANDING THERE, AND WE HAVE IT ALL UNFOLDING, AFTER THEY HAVE BEEN APPARENTLY WRESTLING WITH THIS MATTER FOR A COUPLE OF DAYS, WITH THIS DEFENDANT, AND WON'T THIS, THE FACTS

OF WHAT THE DISCUSSION WERE BETWEEN COUNSEL AND THE DEFENDANT COME OUT ON THE 3.850 PROCEEDING?

THAT IS TRUE. I MEAN I WOULD ANTICIPATE THAT THERE WOULD BE SOME INQUIRY BY POST-CONVICTION COUNSEL AS TO VOLUNTARINESS OF THAT WAIVER.

THE THING THAT STRIKES ME HERE IS THAT, IN THE WHOLE DYNAMICS OF WHAT WAS GOING ON, IT IS TRUE THAT THERE IS THIS OMISSION OF THE STATEMENT THAT THERE IS, ALSO, GOING TO BE MITIGATING EVIDENCE PUT ON. THEN THE MITIGATING EVIDENCE IS PUT ON. THERE ISN'T ANY ATTEMPT, AT THAT POINT, TO SAY WAIT A MINUTE. BY COUNSEL OR BY THE DEFENDANT, SAYING WAIT A MINUTE. I DIDN'T THINK I COULD PUT ON ANY MITIGATING EVIDENCE HERE, BECAUSE YOU MISLED ME, AND SO I WITHDRAW MY PLEA. NOW, IF WE HAD THAT SITUATION, IT WOULD BE A DIFFERENT CAN OF WORMS, BUT HERE WE HAVE GOT A SITUATION IN WHICH EVERYTHING APPEARS ON THE RECORD, DOESN'T IT? THAT EVERYBODY WAS PROCEEDING PRETTY MUCH ON THE SAME PAGE, AS TO WHAT WAS GOING TO HAPPEN, THAT THEY WANTED THIS JUDGE TO MAKE THE DETERMINATION AS TO THE PENALTY PHASE, RATHER THAN PRESENTING IT TO A JURY.

THAT WORD PRESUMED COMES TO MIND. I THINK THAT IT IS PRESUMPTION TO THINK THAT THAT WAS EVERYTHING -- EVERYONE WAS ON THE SAME PAGE. I THINK THE PORT -- THE IMPORTANT THING IS TO LOOK AT THE MATTER FROM A LEGAL STANDPOINT, ASIDE FROM THE FACTUAL STANDPOINT. IF MR. GRIFFIN HAD ENTERED A GUILT PLEA AND THERE WAS NO INQUIRY OR THE INQUIRY INTO THE GUILTY PLEA WAS MISLEADING, AND THE DEFENSE COUNSEL SAID, WELL, WE DISCUSSED THIS MATTER WITH MR. GRIFFIN. HE IS AWARE OF THE CONSEQUENCES OF THE GUILTY PLEA. AND HE WANTS TO DO SO. AND THEN THAT HAD BEEN IT, I DON'T THINK THAT THAT WOULD BE AN ADEQUATE INQUIRY, UNDER THE CRIMINAL RULES OF PROCEDURE, AND JUST GENERAL RULES OF FAIRNESS, THAT THAT SHOULD BE PERMITTED. I DON'T SEE THE DISTINCTION, HERE, IN THIS INSTANCE, WHERE THE JURY'S ADVISORY SENTENCE IS AN IMPORTANT ASPECT OF THE PENALTY PHASE.

WHAT DOES THE CASE LAW TELL US ABOUT THAT, BY THE WAY, IN TERMS OF WHETHER THE APPELLATE COURT WILL TREAT THAT, EVEN THOUGH IT IS NOT RAISED AS AN ISSUE, AND THE TRIAL COURT, IS IT RECORDED -- IS IT REGARDED AS FUNDAMENTAL ERROR, OR IS IT WITH REGARD TO THE MOTION IN A FUNDAMENTAL PLEA. DOES THE TRIAL COURT TELL US ANYTHING ABOUT THAT, WITH REFERENCE TO A GUILTY PLEA?

A GUILTY OR NO CONTEST PLEA? YES. THE CASE LAW WILL SAY THAT -- THERE HAS TO BE A SHOWING OF THE VOLUNTARINESS --

MY QUESTION IS WHAT DOES THE CASE LAW TELL US ABOUT CAN YOU RAISE THAT ON APPEAL? AND DO YOU RAISE IT ON APPEAL AS FUNDAMENTAL ERROR, OR DO YOU HAVE TO MAKE A MOTION TO WITHDRAW THE PLEA? DOES THE CASE LAW TELL US ANYTHING ABOUT WHAT HOOPS YOU HAVE TO JUMP THROUGH, IT TO PROPERLY --

THE CASE LAW SAYS THAT THERE HAS TO BE A MOTION TO WITHDRAW THE PLEA. IT HAS GOT TO BE PRESERVED.

SO THE CASE LAW DOESN'T SAY THAT YOU CAN RAISE IT FOR THE FIRST TYPO APPEAL.

THAT'S CORRECT. -- FOR THE FIRST TIME, ON APPEAL.

THAT IS CORRECT.

HOW DO WE TREAT IT ON APPEAL HERE, THEN?

IN THAT INSTANCE, THAT RULE IS WELL ESTABLISHED HERE. I MEAN, WE ARE FORGING NEW

TERRITORY. THIS IS SOMETHING THAT THERE IS NO CASE LAW ON IT, AND I WOULD --

WELL, I MEAN, YOU HAVE TOLD ME THAT APPARENTLY THE CASE LAW IS -- OBVIOUSLY A PLEA OF GUILTY IS JUST AS OR MORE SIGNIFICANT THAN A WAIVER OF THE JURY, BUT YOU ARE TELLING ME THAT, WITH REFERENCE TO A PLEA OF GUILTY, THAT YOU CAN'T RAISE IT FOR THE FIRST TIME ON APPEAL. THAT YOU HAVE TO FILE -- IS THAT THE QUESTION THAT I ASK, AND I APPRECIATE YOUR CANDOR, IF THAT IS WHAT -- SO WHY SHOULD WE BE TREATING IT, NOW, IF ALL OUR LAW IS THAT NO, WE WON'T TREAT IT?

I WOULD REFER TO THE GREAT DEAL OF SCRUTINY THAT SHOULD BE GIVEN IN A CAPITOL CASE, AND I DON'T THINK THAT MR. GRIFFIN SHOULD HAVE THAT ISSUE WAIVED ON -- BY PROCEDURAL PITFALLS.

BUT ARE YOU SUGGESTING WE HAVE ONE RULE, WITH REFERENCE TO GUILTY PLEAS BEING SET ASIDE IN FELONY CASES, AND FOR INSTANCE THAT THE DISTRICT COURTS OF APPEAL CAN SAY, NO, WE ARE NOT GOING TO -- EVEN THOUGH YOU HAVE CALLED TO OUR ATTENTION A PROBLEM ON THE RECORD THERE, WE ARE NOT GOING TO TREAT IT ON APPEAL? THAT YOU HAVE TO, FIRST, GO BACK TO THE TRIAL COURT AND SEEK TO SET ASIDE THAT PLEA, BEFORE WE WILL TREAT IT, BUT WE ARE GOING TO HAVE A DIFFERENT RULE, WITH REFERENCE TO DEATH PENALTY CASES?

I DON'T THINK THE ISSUE SHOULD BE WAIVEABLE. IN THE ABSENCE OF AN OBJECTION OR A MOTION TO WITHDRAW.

I AM NOT TALKING ABOUT THE WAIVEABILITY OF THE ISSUE. I AM TALKING ABOUT HOW IT IS TO BE PROPERLY PRESENTED AND PRESERVED. YOU SEEM TO INDICATE TO ME THAT IF THIS WAS JUST A REGULAR FELONY CASE AND A GUILTY PLEA HAD BEEN ENTERED AND SOMETHING HAD BEEN LEFT OUT OF THE COLLOQUY, THAT A DEFENDANT COULDN'T RAISE THAT AS AN ISSUE ON APPEAL, THAT HE WOULD, FIRST, HAVE TO GO TO THE TRIAL COURT JUDGE.

THAT IS THE ESTABLISHED LAW. THAT'S CORRECT. JUSTICE ANSTEAD.

ALL RIGHT. THANK YOU.

DO YOU AGREE THAT, IF WE AGREE WITH YOU THAT IT WAS ERROR FOR THE JUDGE NOT TO GIVE A MORE COMPLETE INSTRUCTION, THAT YOU HAVE TO SHOW PREJUDICE? I DON'T KNOW, JUSTICE SHAW, I DON'T AGREE WITH THAT, THAT PREJUDICE HAS TO BE SHOWN. I THINK IT IS ONLY -- IT IS A RELATIVELY BASIC REQUIREMENT THAT THE TRIAL COURT ADEQUATELY ADVISE THE DEFENDANT OF WHAT HE IS GIVING UP, AND THAT WASN'T DONE. I MEAN, IT IS NOT A COMPLEX MATTER, AND IT IS SOMETHING THAT SHOULD HAVE BEEN ADDRESSED BUT WASN'T.

YOU HAVE NOT ARGUED -- I AM SORRY.

DO YOU SEE IT AS FUNDAMENTAL ERROR? ARE YOU ARGUING THIS IN TERMS OF FUNDAMENTAL ERROR?

I WOULD ARGUE, IN THE ALTERNATIVE, THAT IT IS FUND PRESIDENTIAL ERROR THAT, THE JURY'S ROLE DURING THE PENALTY PHASE IS SO SIGNIFICANT THAT INVOLUNTARY OR UNINTELLIGENTLY WAIVER OF THE JURY WOULD BE A VIOLATION OF DUE PROCESS AND A FUNDAMENTAL ERROR.

HOW DO WE REACH IT, IF IT IS NOT FUNDAMENTAL ERROR?

I WOULD -- THERE IS NO MOTION TO WITHDRAW --

PRESENTED TO THE TRIAL COURT.

THAT'S CORRECT.

SO THERE WOULD HAVE TO BE SOME DETERMINATION THAT WE COULD -- THAT WE COULD REACH IT IN SOME WAY.

THAT'S CORRECT. I WOULD, THEN, ARGUE THAT IT IS FUNDAMENTAL ERROR.

YOU HAVEN'T MADE AN ARGUMENT ABOUT PROPORTIONALITY HERE. BUT WOULD YOU RESPOND TO THE STATE'S ARGUNIT ABOUT, EVEN IF IT WAS ERROR FOR THE TRIAL COURT TO -- ARGUMENT, ABOUT EVEN IF IT WAS ERROR FOR THE TRIAL COURT TO DOUBLE, AS YOU SUGGEST IN ONE OF YOUR ISSUES, WHY WOULDN'T THAT BE HARMLESS ERROR, IN THE CONTEXT OF THE AGGRAVATION AND MITIGATION, AS FOUND IN THIS CASE BY THE TRIAL COURT JUDGE?

WELL, THE STATE ARGUES THAT MITIGATION, IN THIS CASE, IS SLIGHT, AND AS I STATED BEFORE, I DON'T THINK IS SLIGHT AT ALL. I THINK THAT THIS IS AN EXAMPLE OF WHAT WOULD EVERYONE, FROM ALL APPEARANCES, WAS A GOOD PERSON AND THEN, BECAUSE OF COCONTAIN, CRACK COCAINE, THAT HE BECAME WHAT HE WAS AT THE TIME -- BECAUSE OF COCAINE, CRACK COCAINE, THAT HE BECAME WHAT HE WAS AT THE TIME OF THESE TRAGIC MURDERS, AND I DON'T THINK THAT THE LACK OF ANY PRIOR ARRESTS, ANY PRIOR CONVICTIONS, GOOD STUDENT. I DON'T THINK THAT THOSE ARE INSIGNIFICANT AT ALL. THE FACT THAT HE NEVER MISSED A CHILD SUPPORT PAYMENT PRIOR TO HIS COCAINE USE. JUST ANOTHER EXAMPLE OF THE MITIGATION IN THE CASE.

THANK YOU.

THANK YOU.

THANKS TO BOTH OF YOU.