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Frank A. Walls v. State of Florida

MARSHAL: HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE STATE OF FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED. KIEF

CHIEF JUSTICE: GOOD MORNING AND WELCOME TO THE FLORIDA SUPREME COURT. THE FIRST CASE ON THIS MORNING'S DOCKET IS WALLS VERSUS THE STATE OF FLORIDA. ARE THE PARTIES READY? MR. BRODY, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. GOOD MORNING. MR. HAZE AND I REPRESENT MR. HAYES AND I REPRESENT FRANK WALLS, ON DEATH ROW OUT OF VOLUSIA COUNTY. WE ARE APPEALING THE DENIAL OF OUR 3.850 MOTION. A HEARING WAS HELD IN OKALOOSA COUNTY ON SEVERAL CLAIMS, AND SEVERAL CLAIMS WERE SUMMARILY DENIED. REGARDING THE APPEAL ON THE HEARING ON THE CLAIMS FOR WHICH THE HEARING WAS GRANTED, WE CONTEND THAT THE LOWER COURT HEARD, WHEN DENYING US RELIEF ON OUR CLAIM, THAT COUNSEL WAS INEFFECTIVE FOR ALLOWING EVIDENCE OF AN UNCHARGED CRIME, SEXUAL BATTERY, INTO THE CASE, NOT TAKING STEPS TO EITHER EXCLUDE IT BY MOTION OR OBJECTION.

WHAT EVIDENCE OF SEXUAL BATTERY WAS INTRODUCED?

THERE WAS A WITNESS, JULIUS BOROS, TESTIFIED DURING THE TRIAL, THAT HE HAD A RAPE-TESTING KIT, SEXUAL BATTERY TESTING KIT. MORE IMPORTANTLY, THERE WAS A TAPE OF THE DEFENDANT, GIVING A STATEMENT, AND IN IT, THE DEFENDANT WAS ASKED, YOU RAPED HER, FRANK, DIDN'T YOU, YOU RAPED HER! TO WHICH MR. WALLS REPLIED I DON'T KNOW. NOW, THE COURT HAS OVERLOOKED THE FACT THAT HE DID NOT DENY IT. HE SAID I DON'T KNOW. THIS WAS A TERRIBLE MURDER. THIS WAS A BAD MURDER. THERE WAS A COUPLE IN A TRAILER AND IT WAS AN UGLY CASE, AND THE ONLY THING THAT I THINK COULD POSSIBLY HAVE MADE IT WORSE, IS IF YOU PUT A SEXUAL BATTERY OR RAPE CHARGE.

NOW, HE WAS NOT CHARGED WITH SEXUAL BATTERY, WAS HE?

NO. HE WAS NOT, YOUR HONOR.

AND AS I UNDERSTAND THE DEFENSE ATTORNEY TESTIFIED BASICALLY, THAT EVERYONE UNDERSTOOD THAT THIS WAS NOT A RAPE CASE, AND THAT HE WAS NOT CHARGED WITH RAPE, AND THAT THIS RAPE KIT THAT YOU WERE TALKING ABOUT, WAS ONLY USED TO GET DNA OF THE VICTIM, OF THE DEFENDANT. SO WHERE DOES THAT LEAVE US? IS THIS REALLY A HARMLESS ERROR SITUATION?

NO. I DON'T BELIEVE IT IS HARMLESS ERROR, YOUR HONOR, BECAUSE I AM NOT SURE WHEN THEY TESTIFIED, THAT EVERYBODY KNEW THAT IT WAS NOT CHARGED. I DON'T THINK THAT THE JURY KNEW THAT AT ALL. THERE MAY, THE STATE MAY NOT HAVE BEEN ARGUING FOR A CONVICTION, BUT THE POINT IS, IT WAS NOT CHARGED, SO WHY WAS EVIDENCE ABOUT IT

WAS IT ARGUED AS A RAPE CASE? I MEAN, DID THE PROSECUTOR ARGUE THAT THE VICTIM HAD BEEN RAPED, AND DID THE DEFENSE, THEN, HAVE TO COUNTER THAT THERE HAD BEEN NO RAPE?

ACTUALLY COUNSEL TESTIFIED THAT IT WAS THEIR STRATEGY TO INTRODUCE THIS , IN ORDER TO BE ABLE TO ARGUE AS MITIGATION IN THE PENALTY PHASE , THAT AT LEAST HE DIDN'T RAPE HER. SO THEY ACTUALLY TESTIFIED AT THE EVIDENTIARY HEARING, THAT IT WAS GOING TO B E THEIR STRATEGY , THAT THEY THOUGHT IT WAS GOOD THAT HE DIDN'T RAPE HER , AND THAT THAT WAS THE MITIGATION THEY WERE PURSUING .

THERE ARE TWO DIFFERENT THINGS. ONE IS THE USE OF THE SEXUAL BATTERY KIT TO GET HIS BLOOD, AND THAT SEEMS TO BE FAIRLY EXPLAINED AWAY AND IT WASN'T MADE A DEAL. THE OTHER IS THE ISSUE OF THE STATEMENTS WITHIN THE CONFESSION, AND WHETHER THE DEFENSE LAWYER SHOULD HAVE MADE A MOTION TO REDACT THE STATEMENT THAT YOU REFER TO. NOW , THERE , WHAT I UNDERSTOOD THE STRATEGY REASON THAT THEY DID I T , IS I ASSUME THAT WE HAVE THE TAPE ITSELF, IN EVIDENCE , THAT THE TAPE SHOWS , GOES ALONG WITH THE STRATEGY THAT THIS WAS SOMEBODY THAT HAD A LOT OF REMORSE , WAS REALLY CRYING, WAS UPSET , AND THAT THEY DIDN'T FEEL THEY COULD REDACT A SPECIFIC PORTION , WITHOUT LOSING THE WHOLE TENOR , SO THAT TENOR, S O THAT THE JUDGE THEN FOUND IT TO BE A REASONABLE STRATEGY DECISION. NOW , YOU WOULD HAVE TO ARGUE THAT BASICALLY AS A MATTER OF LAW , THAT IT COULDN'T EVER BE A REASONABLE STRATEGY DECISION , IS THAT WHAT YOUR ARGUMENT IS?

ACTUALLY I D O ARGUE THAT , THAT IN THIS CASE , IT COULD NOT BE. I DON'T THINK , AND CERTAINLY NOT WITHOUT THE CLIENT AGREEING THAT YOU ARE ACTUALLY GOING TO ARGUE BEFORE THE JURY. YOU ARE GOING TO ALLOW EVIDENCE ABOUT A TERRIBLE CRIME , RAPE. RAPE IS AS TERRIBLE A CRIME AS YOU CAN GET.

WELL , NOW, THE ONLY EVIDENCE, THE EVIDENCE WAS THE QUESTION AND THE ANSWER THAT YOU REFERRED TO. WOULD THAT BE WHAT YOU WOULD CONSIDER THE WORST PART OF THE STATEMENT THAT CAME INTO EVIDENCE ?

THAT IS THE WORST PART, YES, YOUR HONOR.

AND WAS THERE , ANSWER TO JUSTICE QUINCE , WAS THERE ANYTHING ELSE THAT THE PROSECUTOR DID, IN FOLLOW-UP HAD, IN CLOSING ARGUMENT , THAT HIGHLIGHTED THAT PORTION OF THE STATEMENT AND IMPLIED THAT MAYBE THERE WAS A RAPE BUT THEY , YOU KNOW , COULDN'T PROVE IT?

NO. THE PROSECUTOR DIDN'T CAPITALIZE IT , BUT THEY DIDN'T HAVE TO, BECAUSE THE DEFENSE WAS USING IT. THAT IS WHAT WE ARE SAYING. HIS OWN LAWYERS WERE USING IT.

WELL , HOW DID HE , SO THE LAWYER USED IT AFFIRMATIVELYIN WHAT WAY , AFTER ALLOW ING PART OF THE STATEMENT TO COME IN? WHAT ELSE DID THE LAWYER DO TO HIGHLIGHT THAT HE MAY HAVE RAPED HER?

THEY WERE ARGUING THAT WAS PART OF THE MITIGATION , PART OF THE MITIGATION CASE THAT HE DID NOT RAPE HER, SO IT IS AN INDICATES - - SO ITIS A CASE OF ALLOWING EVIDENCE OF A TERRIBLE CRIME IN AND THEN ARGUING TO THE JURY ON AN UNCHARGED MATTER THAT AT LEAST HE DIDN'T DO THAT AND THEN PRESENT THAT AS MITIGATION. THAT WAS WHAT HIS STRATEGY WAS , WHAT HE TESTIFIED T O .

HOW WAS THAT DONE?IN OTHER WORDS, IN THE

IT WAS JUST IN CLOSING ARGUMENT, HE ADDRESSED IT.

I N CLOSING ARGUMENT IN THE PENALTY PHASE?

IN THE GUILT PHASE. I BELIEVE , YOUR HONOR. I AM NOT SURE ABOUT THAT .

WELL , TELL ME, THEN , WHAT HE SAID ABOUT THAT IN CLOSING ARGUMENT IN THE GUILT PHASE.

I THINK H E SAID THAT, H E DENIED THAT IT HAPPENED. HE DENIED , THE COUNSEL JUST SIMPLY DENIED THAT IT HAD OCCURRED. A RAPE HAD OCCURRED . YOU HEARD HIM DENY IN THE TAPE , THAT A RAPE HAD OCCURRED, SOMETHING TO THAT EFFECT, IS WHAT I BELIEVE HE TOLD THE JURY.

AND THEN WAS THERE ANY REFERENCE TO THIS , DURING THE PENALTY PHASE?

I DON'T BELIEVE SO , YOUR HONOR , AND I WOULD HAVE TO DEFER TO THE RECORD ON THAT , BUT HE MAY HAVE ARGUED IT AGAIN, I N THE PENALTY PHASE. I AM JUST , I AM NOT CLEAR RIGHT NOW , WHETHER HE ARGUED IT ONCE OR TWICE.

ARE YOU, WHICH OTHER POINTS ARE YOU GOING TO ARGUE ?

I AM GOING TO TALK ABOUT THE KNICKS ONE CLAIM AND THE ABOUT THE KNICKS ONECLAIM AND THE PROSECUTOR - - ABOUT THE NIXON CLAIM AND THE PROSECUTORIAL COMMENTS BRIEFLY. ICON FUSED AS TO THE STATE OF THE RECORD AS TO CLAIMTHREE , THE MITIGATION, WHERE THE JUDGE ALLOWED PART OF IT TO BE PRESENTED BUT PART NOT , BUT IT DOESN'T SEEM THAT YOU ARE ARGUING THAT ANY OF THE FINDINGS REGARDING THE MITIGATION , OTHER THAN AS IT RELATES TO THE RITALIN , ISAN ISSUE . IS THAT CORRECT?

WELL , THERE WAS A LOT OF , WELL , THERE WAS A LOT OF MITIGATION . WE WERE NOT ALLOWED TO HAVE A HEARING ON OR PRESENT EVIDENCE ON , YOUR HONOR , AS WELL , BUT I THINK THAT I S CORRECT IN REGARDS TO WHAT WE WERE ALLOWED TO HAVE A HEARING O WE WERE GRANTED A HEARING ON THE CLAIM OF FAILING TO PROVIDE EXPERTSWITH PROPER DOCUMENTS, AN EIGHT CLAIM, BUT WE WEREN'T ALLOWED TO WORK ON THE PREJUDICE PRONG. I AM SORRY .

BUT YOU ARE NOT RAISING , I DON'T SEE THAT AS BEING CLEARLY RAISED AS A SEPARATEISSUE ON APPEAL.I AM HAVING DIFFICULTY HOW THE UNDERSTANDING HOW THE MITIGATION WAS HANDLED IN THIS CASE.

WE WERE NOT GRANTED A HEARING ON THAT. WE WERE GRANTED A HEARING ON WHETHER THEY WERE ALLOWED TO CONDUCT, WHY THEY DIDN'T GET EXPERTS , WHY THEY DIDN'T GET A MEDICAL EXPERT OR DO MEDICAL

YOU ARE NOT APPEALING THAT PART WHERE THE JUDGE GRANTED AN EVIDENTIARY HEARING AND DENIED RELIEF. YOU ARE NOT APPEALING THAT ASPECT .

OH, NO. YES. WE ARE APPEALING THE JUDGE FOUND THERE WAS NOT IAC , BY COUNSEL , IN THEIR REASON FOR DOING, IT AND W E DON'T AGREE WITH THAT .

I DON'T SEE THAT AS A SEPARATE POINT THAT WASRAISED ON APPEAL.

WELL, I APOLOGIZE I F WE DIDN'T MAKE THAT CLEAR , BUT I BELIEVE WE DID , THAT IT IS IN THERE .

WELL , THE CLOCK IS MOVING.

OKAY.WELL , LET ME QUICKLY SAY ONETHING ABOUT THE TAPE , IS THAT THE PROSECUTOR ACTUALLY REDACTED SOME OF THE TAPE , AND BEFORE THE FIRST TRIAL HAD OFFERED , HAD SENT A LETTER TO COUNSEL, OFFERING TO ASK FOR , REDACT OTHERPARTS , SO COUNSEL WAS AWARE THAT THE STATE WOULD HAVE BEEN GLAD TO REDACT THE PARTS OF THE TAPE REGARDING THE RAPE, AND I DON'T THINK THE STATE HAS EVER DISPUTED THAT .

WELL , WAS THAT BROUGHT OUT AT THE EVIDENTIARY HEARING HERE? WAS THE PROSECUTOR ASKED , DID THAT INCLUDE AN AGREEMENT TO REDACT THAT PORTION?

YEAH. WE HAD THE LETTER , BUT THE PROSECUTOR WAS , FROM THE FIRST TRIAL , WAS NOT ASKED THAT, YOUR HONOR. I DON'T THINK THAT THE LAWYER ARGUED THAT THEY COULDN'T HAVE REDACTED IT IF THEY WANTED TO. THEY JUST SAID THEY DIDN'T WANT TO.

ALL RIGHT.

I FORGOT T O MENTION THAT WE DO HAVE A MENTAL RETARDATION CLAIM IN THIS CASE. WE WERE NOT GRANTED A HEARING ON . WE BELIEVE WE DESERVE A HEARING. WE PLED ONE. WE THINK OUR PLEADINGS ARE CONSISTENT WITH THE NEW RULE THE COURT HAS PROPOUNDED .

THERE IS NOTHING THAT WOULD PREVENT YOU NOW , FROM RAISING THAT CLAIM IN THE POST-OCTOBER RULE?

NO, YOUR HONOR. WE THINK WE HAVE DONE THE SAME THING, AND WE COULD DO IT THAT WAY , AS WELL , AND WILL, PROBABLY. THE , WE , AND WE D O THINK THAT THERE WAS TESTIMONY THAT , O F MENTAL RETARDATION. THE JUDGE JUST RULED ON RETROACTIVITY GROUND THAT HE WASN'T ENTITLED TO A HEARING ON IT, AND I THINK HE HAS BEEN, THIS COURT HAS RULED THAT THAT IS NOT CORRECT. SO I THINK WE ADEQUATELY PLED. THAT I THINK WE ADEQUATELY PLED THE MEDICAL TESTING CLAIM AS WELL . THE CONCESSION CLAIM , THE KNICKS ONE CLAIM THE NIXON CLAIM.

THE JUDGE FOUND AFFIRMATIVE WITH WALLS . WALLS'S OWN TESTIMONY SAID, NO , HE DIDN'T AGREE TO THAT STRATEGY. WHAT HE SAYS AND HE CONFESSED TO THE BURGLARY , SOUNDS LIKE HE UNDERSTOOD THAT THAT WAS EXACTLY WHAT THEY WERE GOING TO BE ARGUING. WASN'T THAT DISTINGUISHED AS PRETTY SIGNIFICANTLY FROM NIXON ?

IT WOULD, IF THAT WERE, IF THOSE WERE UNDER THOSE FACTS, IF I ACCEPTED THOSE, IT WOULD DISTINGUISH IT FROM NIXON , BUT I THINK MR . WALLS TESTIFIED HE THOUGHT HE WAS PROCEEDING ON AN INSANITY DEFENSE , AND THE SUBSTANCE OF HIS TESTIMONY WAS HE JUST KIND OF RELIED ON HIS LAWYERS, BUT THE LAWYERS TESTIFIED HE NEVER KNEW IF , HE NEVER KNEW WHAT THEY WERE SAYING EXACTLY.

MY UNDERSTANDING IS THAT BOTH LAWYERS TESTIFIED THAT THEY REPEATEDLY SPOKE TO HIM ABOUT THIS AND ABOUT, REALLY, CONCEDED THE FELONY MURDER ASPECT OF THE TRIAL .

THEY DID TESTIFY TO THAT AT ONE POINT, YOUR HONOR. THEY, ALSO, SAID HE NEVER REALLY UNDERSTOOD WHAT THEY WERE SAY ING CLEARLY . AND I THINK THEY WERE TRY ING

ISN'T THAT A FACT ISSUE THEN?

YES. YOUR HONOR , IT IS DEFINITELY A FACT ISSUE. I WOULD CONCEDE. THAT.

ISN'T THERE EVIDENCE T O SUPPORT THE TRIAL COURT'S RESOLUTION OF THAT?

THERE IS , ALTHOUGH I DO THINK THEIR STATEMENT, THEY DO SAY SOME OTHER THINGS. THEY SAY THAT PARTICULARLY ON CROSS-EXAMINATION VERY CLEARLY , THOUGH , YOUR HONOR. I DON'T WANT TO MISREPRESENT ANYTHING. BUT I THINK THERE ARE CONFLICTING STATEMENTS ON THAT , AND

I APPRECIATE YOUR CANDOR .

BUT , AND I DON'T THINK THAT TOTALLY TAKES INTO CONSIDERATION , HIS LACK O F MENTAL

ABILITY , IN GIVING KNOWING AND VOLUNTARY CONSENT. IT IS A MAN WHERE THERE IS A HISTORY OF EVIDENCE , ONE OF THE , PART OF THE EVIDENCE WE WANTED TO INTRODUCE AND TO HAVE AN EXPERT TESTIFY ABOUT , WAS HIS HISTORY, HE HAD A HISTORY OF, I CAN'T PRONOUNCE THE MEDICAL TERM , IT IS MENINGITIS , BUT THERE IS A MEDICAL DOCUMENTATION OF THAT LEADING TO VIOLENCE , OF, WHEN YOUR BRAIN AS WELL AS UP , SHORTLY THEREAFTER , BECOMING VIOLENT , SO THERE IS A LONG HISTORY OF MEDICAL PROBLEMS THAT ARE PRETTY WELL DOCUMENTED , THAT WE

WAS THAT , ANY OF THAT TESTIFIED TO? THERE WERE, IN FACT, MENTAL HEALTH EXPERTS WHO TESTIFIED AT THE PENALTY PHASE, WERE THERE NOT? THERE WAS A PSYCHIATRIST AND A COUPLE OF PSYCHOLOGISTS , AND THEY TESTIFIED ABOUT MR . WALLS'S PREVIOUS MEDICAL PROBLEMS, DID THEY NOT?

THERE WAS TESTIMONY AT THE TRIAL. WE PLED THAT THERE IS A LOT THAT WAS NOT TESTIFIED TO , EITHER THE EXPERTS WEREN'T GIVEN INFORMATION ON , OR DIDN'T KNOW ANYTHING ABOUT , AND THAT IS , WE THINK WE WOULD HAVE PRESENTED, WHAT WE WOULD HAVE PRESENTED , A LOT MORE TESTIMONY THAT WOULD HAVE BEEN MORE CONVINCING, AND CERTAINLY WE WOULD HAVE PRESENTED MEDICAL TESTING. THE COURT IN ITS SENTENCING ORDER , DISCOUNTED THE TESTIMONY THAT WAS PRESENTED , BECAUSE NO TESTING HAD BEEN DONE . SO, AND THE PROSECUTOR DID ARGUE

WHAT KIND OF TESTING ARE YOU TALKING ABOUT?

BRAIN DAMAGE. IN MR . WALLS'S CASE , THAT IS NOT

AS I RECALL , THE DEFENSE ATTORNEYS TESTIFIED THAT THEY HAD TALKED TO THE EXPERTS ABOUT A PT SCAN AND WERE TOLD BY THE EXPERTS THAT THEY DIDN'T REALLY NEED ONE, THAT THEIR TESTING HAD DEMONSTRATED THE BRAIN DAMAGE, AND SO THEY DIDN'T REALLY NEED A PT SCAN. IS THAT NOT CORRECT ?

SOMEWHAT CORRECT. I DON'T BELIEVE , I DON'T THINK , ONE , THEY WERE QUALIFIED. COUNSEL WAS AWARE OF THE PT SCAN. HE SAID HE DIDN'T THINK HE NEEDED ONE. HE THOUGHT THE TESTIMONY WOULD BE ADEQUATE. THE TESTIMONY WOULD BE CONVINCING, BUT IT TURNS OUT THE TESTIMONY WAS NOT CONVINCING TO THE JUDGE !

I JUST WANT TO REMIND YOU , YOU SAVED QUITE A LOT OF TIME FOR REBUTTAL , BUT YOU ARE SUBSTANTIALLY IN YOUR REBUTTAL . JUSTICE QUINCE HAD AN ADDITIONAL QUESTION. PLEASE RESPOND.

I WAS GOING TO ASK YOU, DIDN'T IN FACT , THE TRIAL JUDGE FIND AS A MITIGATING CIRCUMSTANCE, THAT MR . WALLS WAS , DID HAVE BRAIN DAMAGE ?

HE DID FIND THAT HE WAS PARTIALLY , MILDLY IMPAIRED , YOUR HONOR , FOUND HE WAS MILDLY IMPAIRED , AND SUBSTANTIALLY IMPAIRED !!!!-CEREBRALLY IMPAIRED AND ALSO MILDLY RETARDED , WHICH IS ONE OF THE REASONS WE WANT TO PRESENT EVIDENCE ON THE RETARDATION CLAIM. THANK YOU.

GOOD MORNING , YOUR HONORS . CHARLENE MILLSAPS HEALTHING THE STATE.

COULD YOU PAINT A PICTURE FOR US REGARDING THIS SEXUAL BATTERY ISSUE THAT HAS BEEN RAISED?

YES.

GIVE US A

IT IS GOING TO BE A LITTLE DIFFERENT FROM THE OTHER PORTRAYAL . TO BEGIN WERE ON THE TAPE , WHEN THE OFFICER , OFFICER VINCENT IS TALKING TO WALLS , HE DOES NOT SAY ACCUSINGLY , AND YOU RAPED HER , DIDN'T YOU ? HE ASKED , WHEN DID YOU HAVE SEX WITH HER, AND WHEN WALLS RESPONDED , I DON'T EVEN KNOW IF I DID THAT OR NOT , IT WAS NOT , THE WHOLE TONE OF THE CONVERSATION ISN'T LIKE THATTHE.

BUT WHEN YOU SAY, WHEN DID YOU HAVE SEX WITH HER , WOULDN'T SOMEBODY HEARING THAT QUESTION ASKED , ASSUME THAT THE QUESTIONER KNEW THAT THE PERSON THAT IS BEING ASKED , ALREADY ASSUMED THAT H E DID HAVE SEX WITH HER?

YES. I THINK THAT IS A FAIR INFERENCE . I AM NOT SAYING NOT , BUT IT WAS NOWHERE NEAR THE TONE OF RAPE.

DID THE STATE OFFER TO REDACT THAT PORTION?

NO. WE WERE OFFERING TO REDACT A MURDER INVESTIGATION , BEGINNING WITH THE G , THE NAME OF THE INVESTIGATION , AND

BUT THERE IS NO , I MEAN,IT THAT QUESTION AND ANSWER , IF THE DEFENSE HAD ASKED FOR IT TO BE TAKEN OUT OF THE TAPE , IT WOULD , IT IS ENTIRELY IRRELEVANT. I MEAN THERE , IS NO EVIDENCE , CORRECT , OF THERE BEING SEX BETWEEN THE

YOUR HONOR , I AGREE . IF THEY HAD MADE A MOTION TO REDACT, BASED ON THE PREJUDICE OUTWEIGHING THE PROBATIVE VALUE, I THINK A TRIAL COURT WOULD HAVE GRANTED. THAT I AM NOT SAYING THAT. BUT , SO , I DO THINK A TRIAL COURT WOULD HAVE GRANTED IT,BUT THIS IS A TACTICAL DECISION. REMEMBER WHY HE DID THIS. IT WASN'T TO ARGUE NO RAPE , BECAUSE AS A MITIGATE OR SOMUCH, IT WAS TO SHOW HIS REMORSE , AND THEN TO ESTABLISH HIS CREDIBILITY. THE DEFENDANT SAYS I DIDN'T RAPE HER , AND THE STATE - -

W HAT WAS THE QUESTION ANDANSWER? IT SAYS I DON'T REMEMBER. WHAT DID HE SAY TO I T ? SO DID YOU HAVE SEX WITH HER? AND WHAT DOES HE SAY?

I DON'T EVEN KNOW IF I DID THAT.

SO , BUT , HOW IS THAT DENYING THAT HE DID IT. I MEAN THAT, IS WHAT MR . BRODY IS SAYING. IT SOUNDS LIKE IT IS OUT THERE AS A SUGGESTION THAT , AN ADDITION T O THIS TERRIBLE CRIME, THAT THERE WAS SEX . I CAN'T SEE HOW THAT COULD BE PART OF THIS STRATEGY . NOW , HELP ME WITH THAT.

THE QUESTIONING CONTINUES ON THE TAPE , AND BY THE END, HE SAYS I DON'T THINK SO .

I DON'T THINK SO. BUT THAT DOESN'T RULE IT OUT .

NO, BUT, THEN , BUT , YOURHONOR , IF YOU ARE TRYING TO SHOW THAT THIS WAS , THEIR DEFENSE WAS A BURGLARY GONE BAD , RIGHT?

BURGLARY GONE BAD , IMIGHT HAVE HAD SEX WITH HER?

I AM SO CONFUSED , I CAN'T EVEN REMEMBER WHETHER I DIDOR NOT. AND THEN HE SAYS I DON'T THINK SO . THAT INCREASES THE DEFENDANT'S CREDIBILITY , AS THE TRIAL COURT FOUND .

WE HAVE A QUESTIONER. WHO WAS DOING THE QUESTIONING?

AN OFFICER NAMED VINCENT .

WELL , WOULDNT A JURY HEARING A POLICE OFFICER WHO WAS INVESTIGATING THIS CRIME , ASK A QUESTION O F THE DEFENDANT , WHEN DID YOU HAVE SEX WITH HER , ASSUME THAT THAT POLICE OFFICER ALREADY KNEW THAT HE HAD HAD SEX WITH HER?

HE, WELL , YOUR HONOR, TO BEGIN , WITH THAT IS GOING T O ARISE FROM THE FACTS OF THE CRIME. HE RIPPED HER SHIRT OFF. SHE WAS FOUND NAKED IN THE FRONT BEDROOM. SO WE FOUND HER NAKED. THAT IS WHY THE OFFICERTHOUGHT THAT .

COULDN'T, IN THIS CASE , EVIDENCE BE PRESENTED TO THE JURY, THAT IN ADDITION T O THESE HORRIBLE MURDERS , THAT THERE ALSO WAS A SEXUAL BATTERY, AND LEAVE THAT HIGHLY INFLAMMATORY SUGGESTION THERE BEFORE THIS JURY, AND DO THAT PROPERLY?

BUT WE DIDN'T LEAVE THAT BEFORE. WE DIDN'T CHARGE. WE DID NOT

BUT HELP ME. THERE IS A QUESTION THAT SAYS , WHEN DID YOU HAVE SEXWITH HER, AND THEN THIS DEFENDANT SAYS , I DON'T KNOW.

BUT THEN THE OFFICER GOES ON AND SAYS , DURING THE TAPE, NOW, THINK VERY CAREFULLY ABOUT IT. HE I S EVEN ACCEPTING WALLS 'S STATEMENT THAT I DON'T KNOWIF I DID . HE SAID , OKAY , NOW , LET'STHINK ABOUT IT. THINK ABOUT IT VERY , VERY CAREFULLY.DID YOU OR DID YOU NOT, AND THEN WHEN HE SAYS, NO , IDON'T THINK SO, THE OFFICER STOPS.

THE DEFENSE LAWYER HERE, IF I UNDERSTAND IT, THEN , TESTIFIED THAT EVERYBODY KNEW THAT THERE WAS N O SEX , AND WOULD YOU EXPLAIN THEBASIS FOR HIS STATEMENTABOUT THAT.IN OTHER WORDS, WHAT IS THERE IN THE RECORD , THAT WE COULD READ , THAT WOULD DEMONSTRATE THAT EVERYBODY, i.e. THE JURY ESPECIALLY , KNEW THAT THERE WAS N O RAPE?

OKAY. THE STATE DID NOT CHARGE IT. IT DID NOT ARGUE IT. THERE IS NO , THE PROSECUTOR AT NO POINT , HINTS OR IMPLIES. THERE IS NOTHING OUT OF THE PROSECUTOR ON THAT.

WHAT IS THE RELEVANCE OF THE STATE INTRODUCING IT? THAT IS WHAT I AM HAVING TROUBLE WITH.

IT WAS PART OF THE CONFESSION, YOUR HONOR .

MS. MILLSAPS , RATHER THAN BATTLING THIS AND TRYING TO JUSTIFY THE QUESTIONS, ITSEEMS TO ME IN LOOKING AT WHAT OCCURRED BELOW , IS THAT IF JUSTIFIED , WAS NOT ON THE FACT OF THE SUBSTANCE BUT WAS ON THE NATURE OF THE ENTIRE CONVERSATION. WAS THERE ANYTHING ABOUT THE ANSWERS THAT THIS INDIVIDUAL , I HAVE NOT HEARD THE TAPE , ANYTHING ABOUT THE ANSWERSTHAT THIS PERSON WAS SCREAMING OH, MY GOD AND CRYING AND GOING THROUGH THAT KIND OF THING , OR IS THIS JUST A DISCUSSION AS YOU ARE HAVING THIS MORNING? IT SEEMS FAR DIFFERENT , IS OUR POINT.

WALLS WAS TEARY-EYED.

ONLY TEARY-EYED?

THOSE ARE THE TERMS USED IN THE TRANSCRIPT , YOUR HONOR.I HAVE READ THE TRANSCRIPT .

THE INDIVIDUAL DWRO IS IT A VIDEO CONFESSION?

NO. IT IS ON TAPE. NOW , I HAVE NOT LISTENED TO THE TAPE. I HAVE READ THE TRANSCRIPT.

DID THE JURY LISTEN TO THE TAPE?

I THINK THE TRANSCRIPT WAS READ TO THEM.

USUALLY THEY WILL PLAY THE TAPE AND MAYBE PROVIDE THE JURY WITH A TRANSCRIPT. YOU ARE NOT SURE WHICH WAY

NO , I AM NOT SURE WHICH WAY, BUT

NOW , WAS THERE A FULL CONFESSION TO THE CRIMES?

YES, YOUR HONOR.

WERE THERE CRIME SCENE PHOTOGRAPHS?

YES. THERE WERE CRIME SCENEPHOTOGRAPHS.

AND DID THOSE PHOTOGRAPHS SHOW A NAKED VICTIM?

YES. THE REASONABLE INFERENCE IS THE JURY IS GOING TO WONDER ABOUT THAT, ANYWAY , JUST LIKE THE OFFICER DID . MOREOVER, YOUR HONOR , THERE IS NO PREJUDICE HERE.

SO IN THE CONTEXT , SO IF YOU HAVE A CRIME SCENE WHERE THE DEFENDANT ADMITS TO THE MURDERS AND YOU HAVE A NAKED VICTIM.

AND ADMITS TO RIPPING HER SHIRT OFF. THAT IS HOW SHE BECOMES NAKED.

SO HOW DOES THIS PLAY IN THIS CONTEXT , GIVEN THE QUESTIONS , AS FAR AS HOW IT WAS USED THROUGH THE TRIAL , OTHER THAN WHAT THE TRIAL COURT

I THINK THE JURY IS LIKELY TO ASK EXACTLY THE QUESTION THE OFFICER DID. DID YOU RAPE HER WHEN THEY SEE THE DEAD BODY , ESPECIALLY ON THE TAPE , WALLS ADMITS HE RIPPED THE SHIRT OFF OF HER.

BUT DOES THE STATE HAVE AN OBLIGATION AN OBLIGATION, IF THERE IS NO EVIDENCE OF SEXUAL CONTACT OR RAPE, TO AFFIRMATIVELY TELL THE JURY , NOT LEAVE THEM WITH THIS HALF ANSWER, BUT JUST SAY , AND THERE WAS NO , THERE IS NO RAPE

WHEN DEFENSE COUNSEL SAYS THERE IS NO RAPE, WE DIDN'T ARGUE THERE WAS. THERE WAS NO CHARGE HERE, AND NO ARGUMENT BY THE PROSECUTOR AT ALL THAT THERE WAS A RAPE HERE. AND THEN THIS WAS USED MORE FOR REMORSE. IT WAS USED TO ARGUE CREDIBILITY , OKAY. HE WAS TRYING TO ARGUE NO PREMEDITATION , AND YOU CAN BELIEVE WALLS ABOUT NO PREMEDITATION , BECAUSE YOU CAN BELIEVE HIS CREDIBILITY . HE IS BEING TRUTHFUL WITH US , COMPLETELY TRUTHFUL.

TO ME , IT IS, IF HE HAD SEX WITH HER, THEN IT UNDERMINES THE WHOLE THING OF THIS WAS A BURGLARY GONE BAD. THAT IS THE WHOLE THING THAT I AM LISTENING TO. IF THE GUY DOESN'T EVEN KNOW HE MIGHT HAVE HAD SEX , IT IS, THEN , NOT A BURGLARY GONE BAD. IT IS SOMETHING WHERE HE MUST BE , HE WOULD HAVE TO KNOW THAT HE HAD SEX OR NOT WITH SOMEBODY . IT IS NOT A PERSON HE KNEW. WAS IT SOMEONE HE KNEW?

YES . WELL , VAGUELY, YES, HE DID KNOW HER. HE LIVED, THEY LIVED NEAR EACH OTHER .

WAS THERE A TYPED CONFESSION IN THIS CASE?

I AM SORRY , YOUR HONOR.

A WRITTEN CONFESSION THAT HE SIGNED?

IF THERE WAS , I DON'T REMEMBER INTRODUCING IT. WE PLAYED THIS, IT WAS THE TRANSCRIPT THAT WAS INTRODUCED. I AM GETTING EVERYTHING FROM THE TRIAL TRANSCRIPT THAT WAS A TRANSCRIPT OF THIS TAPE.

NO. I UNDERSTAND. SOMETIMES THEY, THEN , SIGN A WRITTEN CONFESSION.

I KNOW HE SIGNED A MIRANDA , BUT I DON'T REMEMBER, NO, IT WAS ORAL , AND PART OF IT , PART OF THE TAPE , THE TAPE THEY DIDN'T CATCH THE WHOLE CONFESSION , AND SO THEN WE, ALSO , INTRODUCED EVIDENCE FROM THE OFFICERS, ABOUT WHAT DIDN'T MAKE IT TO THE TAPE.

SINCE THE JURY SAW THE PHOTOGRAPHS OF THE NUDE BODY , HOW DID THE DEFENSE DEFEND ON THE REASON THAT THE BODY WAS NUDE , WHEN THIS IS A BURGLARY GONE BAD?

WELL , THEY EXPLAINED EXACTLY WHAT WALLS SAID , THAT DURING THEIR STRUGGLE WITH HER, HE HAD RIPPED THE SHIRT OFF. MOREOVER, YOUR HONOR , THERE WAS, IT WASN'T JUST PHOTOGRAPHS. THERE WAS TESTIMONY REFERRING TO HER , THERE WAS TESTIMONY REFERRED THAT BOTH VICTIMS WERE FOUND NUDE , BUT HE WAS FOUND NUDE BECAUSE THAT SEEMS , WHEN WALLS BROKE INTO THE TRAILER , THAT IS THE WAY HE WAS SLEEPING. THEY WERE SLEEPING. HE DIDN'T HAVE ANY CLOTHES ON. SHE HAD HER SHIRT ON.

SHE JUST HAD A SHIRT ON , SO IT WASN'T AS IF HE WOULD HAVE HAD TO TAKE OFF CLOTHES.

NO. YOUR HONOR, SOME SORT OF NIGHTSHIRT LIKE THING. SHE HAD ON A SHIRT. THEY WERE BOTH SLEEPING , AND DURING THE FIGHT, THIS GETS RIPPED OFF, SO, YOU KNOW, I THINK WHEN THE STATE ENDS UP NOT DISPUTING AT ALL THAT THERE IS NO RAPE , I THINK THAT INFERENCE IS RATHER NATURAL FROM TESTIMONY THAT YOU FOUND THE VICTIM NAKED, AND THAT HE HAD RIPPED THE SHIRT OFF. I MEAN , THE JURY IS GOING TO WONDER WHY HE RIPPED THE SHIRT OFF. DID IT JUST HAPPEN AS PART OF THE FIGHT , OR THE RAPE , BUT

HIS ANSWER IS HE DOESN'T KNOW IF HE HAD SEX WITH HER. THAT IS HOW THE JURY IS LEFT, WITH THE IMPRESSION

NO. THE JURY IS LEFT WITH AN ADMISSION FROM THE STATE THAT THERE WAS NO RAPE. WE NEVER TRIED, WE NEVER

THAT IS WHAT I AM TRYING TO SAY.

WE NEVER CHARGED IT, AND WHEN THEY SAID NO RAPE , WE DIDN'T DISPUTE THAT.

THAT IS THE SAME THING IN YOUR MIND AS AN ADMISSION ?

YEAH. THAT IS PRETTY CLOSE TO IT.

WHAT IS , ON THE MITIGATION , YOU KNOW , THE JUDGE GRANTED AN EVIDENTIARY HEARING. A LOT OF THE CLAIMS, YOU KNOW, IF THIS WAS POST THE NEW RULE , HE WOULD HAVE JUST GIVEN THE EVIDENTIARY HEARING ON ALL THE MITIGATION THAT THEY WANTED TO PRESENT , BUT I AM HAVING TROUBLE UNDERSTANDING WHY THAT YOU HAD DOCTORS WHO WERE READY TO TESTIFY AS TO CERTAIN ASPECTS OF MITIGATION, AND THE JUDGE JUST SAID I WILL LET THIS DOCTOR TESTIFY BUT NOT THIS.

BECAUSE HE FOUND IT CUMULATIVE. I DON'T EVEN THINK UNDER THE NEW RULE, THAT A JUDGE HAS TO SIT THROUGH TESTIMONY HE HAS ALREADY HEARD. THAT IS NOT

HOW DOES THE JUDGE KNOW

THAT IS NOT THE NEW RULE , EITHER.

HOW DOES THE JUDGE KNOW SOMETHING IS CUMULATIVE? THERE IS TWO WORDS T MIGHT BE COVERING THE SAME AREA , BUT WORDS. IT MIGHT BE COVERING THE SAME AREA , BUT THERE IS QUALITATIVE DIFFERENCES . NOW , HOW DO YOU KNOW IT IS QUALITATIVE LY DIFFERENT , UNLESS YOU GET , WAS THERE A REPORT INTRODUCED?

YES , THERE WAS. HE READ THE REPORT AND SAID , AND I CAN'T PRONOUNCE HIS NAME, BUT H E READ THAT DOCTOR'S REPORT.

WE HAVE THE REPORT TO LOOK AT AND TO PUT NEXT TO THE PENALTY PHASE TESTIMONY, TO SEE THAT IT WAS THE IDENTICAL , SAME QUALIFICATIONS , THE EXPERT, I MEAN , I S IT A NEUROLOGYIVITY , NEUROPSYCHO-A NEUROLOGIST , A NEUROPSYCHOLOGIST ? IS THERE A DIFFERENCE IN THE TYPE O F EXPERT THIS WAS?

NO.

THE DEFENSE SAID WE HAVE A DIFFERENT EXPERT THAT W E WANT TO CALL. THEY SHOULD HAVE JUST SHOWNA DIFFERENT EXPERT?

IT WAS CUMULATIVE AS TO WHAT WAS ALREADY PRESENTED. YOUR HONOR, JUDGES UNDER THENEW RULE , DON'T HAVE TO LISTEN T O C OMPLETELY CUMULATIVE EVIDENCE. EVEN UNDER THE NEW RULE , IF THEY HAVE A REPORT THAT IS SUBSTANTIVE CUMULATIVE TO WHAT THEY ALREADY SATTHROUGH AND HEARD DURING THE PENALTY PHASE, NO , THEY SHOULDN'T

I CAN TELL FROM YOU THIS JUDGE'S POINT OF VIEW, THAT MY HOPE IS THAT, TO AVOWED TO AVOID THIS KIND OF SPECULATION THAT, WHEN YOUARE HAVING AN EVIDENTIARY HEARING OF A CERTAIN LENGTH,TO ALLOW ONE OR TWO MORE WITNESSES JUST TO MAKE SURE WE HAVE GOT THAT RECORD CLEAR, WITH WOULD CERTAINLY BE HELPFUL.

YOUR HONOR , THEY HAD FIVE OR SIX ADDITIONAL CLAIMS HERE. WE ARE GOING TO HAVE EVIDENTIARY HEARINGS THAT LOOK LIKE SECOND TRIALS , MORE THAN , YOU KNOW, SO

WHEN YOU HAVE GOT AN EXPERT, DOESN'T IT MAKE A DIFFERENCE , WHETHER OR NOTYOU HAVE THE LEADING EXPERT IN THE COUNTRY THAT TEACHES AT HARVARD UNIVERSITY OR WHATEVER AND HAS BEEN RECOGNIZED BY WHATEVER , AS OPPOSED TO, PERHAPS , A , SOMEBODY THAT IS ALWAYS IN COURT AND THAT HAS DEVELOPEDA TRACK RECORD O F THE LACK OF CREDIBILITY WITH TRIAL COURT JUDGES , BECAUSE ALWAYS SEEMS TO SAY THE SAME THING OR SOMETHING , SO WHAT DO YOU MEAN WHEN YOU SAY TAP CUMULATIVE WHEN YOU SAY CUMULATIVE? YOU JUST MEAN THEY ASKED THE SAME QUESTIONS OR WHATEVER , OR ARE YOU PLUGGING IN ACCOUNTABILITY FOR DIFFERENT CIRCUMSTANCES AND DIFFERENTQUESTIONS.

FIRST OF ALL , YOUR HONOR , THAT I S NOT MY TERMINOLOGY T THAT IS THE JUDGE'S TERMINOLOGY, HIMSELF. HE FOUND IT

YOU ARE SAYING THAT THE TRIAL

TO BE CREDIBLE .

JUDGE , WHAT I AM HEARING YOU SAYING IS THAT , AS LONG AS IT IS ON THE SAME SUBJECT MATTER, IT DOESN'T MATTER WHETHER ONE EXPERT IS WELL MORE QUALIFIED THAN THE OTHER OR THAT ANY OF THAT STUFF, NOW, DOES ANY OF THAT STUFF MATTER?

YES, YOUR HONOR THE. IF A JUDGE DID NOT YES, YOUR HONOR. IF A JUDGE DID NOT FIND THE FIRST EXPERT CREDIBLE AND THERE IS SOMETHING ABOUT THE SECOND EXPERT THAT HE WOULD

FIND MORE CREDIBLE, THEN THAT IS THE DIFFERENCE , YES , IF THE CREDIBILITY WAS DIFFERENT , BUT THERE IS NO ALLEGATION HERE OF INCREDIBILITY ON THE PART OF, THEY DIDN'T ATTACK THE QUALIFICATIONS OF THE EXPERTS, THE THREE EXPERTS THAT WERE PRESENTED AT THE PENALTY PHASE , BY DEFENSE COUNSEL.

SO THE TRIAL JUDGE ACCEPTED THAT TESTIMONY , HOOK , LINE AND SINKER .

BY AND LARGE, HE FOUND MULTIPLE, HE FOUND SEVERAL MITIGATORS, BASED , AND WAS QUOTING DEFENSE COUNSEL'S EXPERTS , MENTAL EXPERTS , TO FIND THOSE MITIGATORS , .

BUT DO WE LOOK AT WHAT THE JUDGE MIGHT HAVE DONE DIFFERENTLY OR WHAT THE ADDITIONAL OR DIFFERENT EXPERTS , AGAIN, IN TRYING TO UNDERSTAND THIS ON A CONCLUSIVELY DENYING RELIEF, AS OPPOSED TO AFTER AN EVIDENTIARY HEARING , THAT , WHAT WAS THE PRECISE CLAIM THAT THE DEFENDANT MADE , AS TO WHY HE WANTED TO PUT ON , IN AN EVIDENTIARY HEARING , EVIDENCE TO SHOW THAT THE , THERE WAS NEVADA HE CAN'T I HAVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE ?

HE HAD MULTIPLE CLAIMS. MULTIPLE.

AS TO THE MITIGATION.

HE HAD MULTIPLE .

THE CLAIMS THAT WERE DENIED.

OF THE ONES THAT WERE DENIED.

THERE WERE MULTIPLE ONES OF THOSE - - MULTIPLE ONES OF THOSE. THERE WAS A FAILURE TO DO A PT SCAN.THERE WAS A FAILURE TO PRODUCE MORE EVIDENCE ON RITALIN.IT WAS PRESENTED AT THE FIRST TRIAL.THERE ARE NUMEROUS , ALLSORTS , FAILURE TO PRESENT EXPERT DRUG TESTIMONY.

IT SOUND LIKE WHAT HAPPENED WAS THIS WAS A VERY SPECIFICALLY-PLED MOTION. SOMETIMES WE HAVE MOTIONS THAT SAY, YOU KNOW , THEY WERE INEFFECTIVE IN THE PENALTY PHASE AND I HAVE EXPERTS NOW , THAT WOULD BE MORE CREDIBLE . IS A DEFENSE LAWYER , BY BEING SO SPECIFIC , PUTTING THEMSELVES IN A POSITION THAT A JUDGE IS GOING TO PICK AND CHOOSE , WELL , I WILL TAKE THIS PART OF THE SUBCLAIM OF FAILURE TO PRESENT MITIGATION BUT NOT THAT PART ? IN OTHER WORDS , THESE ARE JUST VERY SPECIFIC - -

VERY SPECIFIC CUMULATIVE ONES.

ASPECTS.

RITALIN WAS PRESENTED. YOUR HONOR , I DON'T THINK A NEW JUDGE , A JUDGE UNDER EVEN THE NEW RULE, IS REQUIRED TO LISTEN TO THE EXACT SAME TESTIMONY PRESENTED IN PENALTY PHASE, YET AGAIN AT THE EVIDENTIARY HEARING. I DON'T THINK THAT IS WHAT THE RULE WAS DESIGNED , THE RULE WAS DESIGNED TO ENCOURAGE TRIAL COURTS TO HOLD EVIDENTIARY HEARINGS. THIS COURT HELD AN EVIDENTIARY HEARING.

ARE YOU SAYING THE HUFF HEARING , THAT THEY MADE NO BASIS FOR SAYING WHY IT WAS , WHY THE JUDGE NEEDED TO HEAR THAT, IN ORDER TO EVALUATE COUNSEL'S PERFORMANCE ? AND MAYBE WE WILL HEAR FROM MR. BRODY ON REBUTTAL ON THIS , THAT THEY, WHEN THE JUDGE SAID THIS IS CUMULATIVE, THEY DIDN'T GIVE ANY REASON TO EXPLAIN WHY IT WOULDN'T BE AN EXACT MIRROR IMAGE OF WHAT WAS PRESENTED.

NO. THEY ALWAYS SAID THEY WANT TO GO DEEPER AND MORE , BUT THE POINT I AM MAKING IS , UNLESS IT IS TRULY SUBSTANTIVELY DIFFERENT, THEY DON'T GET TO GO DEEPER AND MORE. I MEAN , HE WAS TRYING TO SAY HE WAS GOING TO PRESENT MORE ON RITALIN .

I WAS JUST , I THINK MOST OF THE CASES WHERE WE SAY THAT , IS AFTER AN EVIDENTIARY HEARING AND IT HAS BEEN DENIED. I THINK IT IS HARDER WHEN YOU ARE AT THE HUFF STAGE , TO SIMPLY MAKE THAT STATEMENT .

THERE WAS AN EVIDENTIARY HEARING HELD IN THIS CASE, A MULTI-DAY EVIDENTIARY HEARING ON MULTIPLE CLAIMS. I THINK WHAT THE MORAL HERE IS , THEY NEED TO PICK THEIR TWO , FOR INSTANCE , IF I WERE A JUDGE , I WOULD SAY I AM GOING TO GIVE YOU AN EVIDENTIARY HEARING ON YOUR TOP THREE CLAIMS. THAT IS IT. YOU PICK THEM.

I THINK THE JUDGE WOULD PROBABLY GET DENIED, THEN , BASED ON THE RULE AS IT CURRENTLY EXISTS, I MEAN , REVERSED, BECAUSE THAT IS NOT WHAT THIS COURT ANTICIPATED. WE WERE TRYING - -

I DON'T THINK THIS COURT MEANT TO HOLD MONTH-LONG EVIDENTIARY HEARINGS.

NOW , THE DR . BRAGANS, WHO IS THE DOCTOR THAT THEY NOW ALLEGE WOULD TESTIFY ABOUT THE RITALIN . WE HAVE HIS REPORT , IS THAT CORRECT?

YES, YOUR HONOR.

WHAT DOES HE SAY IN THE REPORT, ABOUT THE RITALIN , AND WHAT IS SAID ABOUT IT AT THE PENALTY PHASE? CAN YOU CONTRAST OR COMPARE THOSE TWO .

OKAY. AT THE PENALTY PHASE , THE FACT THAT HE WAS DIAGNOSED AS A HYPERACTIVE CHILD ABOUT THE FIRST GRADE AND PUT ON RITALIN AND KEPT ON RITALIN , THROUGH APPROXIMATELY 13 YEARS OF AGE, YOUR HONOR , THIS IS BIG PICTURE. I AM NOT SURE. I AM PRETTY SURE IT WAS THE FIRST GRADE BUT I AM NOT SURE , THROUGH , ALMOST THROUGH HIS ENTIRE CHILDHOOD , UP TO MIDDLE , ABOUT 13 YEARS OLD. THAT WAS ALL PRESENTED. THAT HE WAS HYPERACTIVE TO THE EXTENT THAT THEY WANTED TO AND DID.

WAS THE IMPACT COVERED?

EXCUSE ME?

THE IMPACT OF THE ADMINISTRATION OF THAT DRUG , WAS THAT COVERED?

WELL , NOT , I AM NOT , I DON'T REMEMBER AT THE PENALTY PHASE, WHETHER THEY , REMEMBER, RITALIN AND HYPERACTIVITY IS SOMETHING THAT A LOT OF JURORS DO HAVE A FAMILIARITY WITH .

I UNDERSTAND , BUT WAS THERE EXPERT TESTIMONY? IS THAT THE DIFFERENCE?

I DON'T REMEMBER EXTENSIVE EXPERT TESTIMONY ON WHAT RITALIN WAS AND WHAT HYPERACTIVITY WAS. TALKED ABOUT MUCH MORE GENERAL, WHAT HYPERACTIVITY WAS. HE HAS TROUBLE BEHAVING .

IS THAT SOMETHING THEY WANTED TO DO, TO DEMONSTRATE THE INEFFECTIVE ASSISTANCE, IS DEMONSTRATE THE IMPACT THAT EFFECTIVE COUNSEL WOULD HAVE DEMONSTRATED , THE IMPACT, WHAT DOES THIS DO? NOT JUST THAT YOU TAKE IT BUT HERE IS THE IMPACT OF IT. DID THEY GO THROUGH THAT? IS THAT WHAT THEY WANTED TO DO?

YES. THEY WANTED TO PRESENT MORE ON RITALIN, ON HOW IT WOULD INTERACT WITH SOME OF THE OTHER THINGS. THE OTHER PROBLEM

BUT THAT WAS NOT, THEN, COVERED DURING THE TRIAL ITSELF.

RITALIN, I DON'T REMEMBER EXTENSIVE TESTIMONY ABOUT HYPERACTIVITY OR RITALIN'S INTERACTION. NOW, THE OTHER THING WAS

CHIEF JUSTICE: YOU HAVE USED UP YOUR TIME. THANK YOU.

THANK YOU. THE STATE ASKS YOU TO AFFIRM THE TRIAL COURT'S DENIAL FOLLOWING AN EVIDENTIARY HEARING.

CHIEF JUSTICE: MR. BRODY, YOU HAVE FOUR MINUTES REMAINING.

VERY BRIEFLY, JUST ONE SENTENCE

WHAT MITIGATION WAS FOUND BY THE ORIGINAL TRIAL JUDGE, MENTAL MITIGATION?

FOUND THAT THERE WAS SOME, I BELIEVE IT IS SOME SLIGHT CEREBRAL DAMAGE, SOME SLIGHT MENTAL RETARDATION. MR. WALLS HAD HAD A HISTORY OF BEING IN TROUBLE.

THAT IS IN THE SENTENCING ORDER?

I BELIEVE SO, YOUR HONOR.

MAYBE I DON'T HAVE THE RIGHT ONE. I HAVE ONE THAT DOESN'T SEEM

I DON'T THINK THEY FOUND MUCH, IS WHAT I AM TRYING, I DIDN'T WANT TO LEAVE SOMETHING OUT.

DID THEY FIND HE WAS EMOTIONALLY HANDICAPPED AND THAT HE WAS BRAIN DAMAGED? MAYBE I HAVE THE WRONG ONE, BUT I SEEM TO FIND BOTH OF THOSE IN THE TRIAL JUDGE'S ORDER HERE.

I BELIEVE HE DID. I THOUGHT HE SAID IT WAS MILD BRAIN DAMAGE, BUT I BELIEVE HE FOUND BRAIN DAMAGE. HE DID.

THIS COURT SAID HE DID.

YES, YOUR HONOR.

AND

IN ITS OPINION, YES, YOUR HONOR.

MR. BRODY, YOU HAVE BEEN HERE ENOUGH TIMES AND READ ENOUGH OF THESE CASES, TO KNOW THAT WHEN YOU DO, WANT TO PRESENT ADDITIONAL TESTIMONY, THAT IT NOT BE, COVER THE SAME GROUND THAT HAS BEEN PLOWED DURING THE TRIAL.

RIGHT. THIS DOES NOT. I CAN TELL YOU

WHY DON'T YOU TELL US PRECISELY WHY IT DOES NOT.

RITALIN, THERE WAS ONE SENTENCE ABOUT RITALIN IN THE ORIGINAL TRIAL, AND IT WAS JUST THAT HE HAD BEEN PRESCRIBED IT WHEN HE WAS YOUNG. THAT WAS ALL IT WAS. WE WANTED TO

PRESENT EVIDENCE ABOUT RITALIN 'S LINK TO VIOLENCE AND AS WE SET OUT ON PAGE 40 OF OUR BRIEF , DR . BRAGAN ACTUALLY SAYS HOW HE REVIEWED THE TRIAL, AND HE SAYS HOW THE INFORMATION WOULD DIFFER FROM THE TRIAL COURT. NONE OF THIS WAS CUMULATIVE IN THE SENSE IT WAS ALREADY PRESENTED .

WHAT ELSE BESIDES THE ASPECT OF THIS DRUG?WHAT ELSE? YOU HAVE ONLY GOT A SHORT PERIOD OF TIME.

MENINGITIS . THERE IS MITIGATION, ANDTHEN THERE IS THE TESTING ISSUE , THE TEST S. WE THINK THEY WOULD HAVE SHOWN BRAIN DAMAGE.

THAT IS THE PT SCAN. THE PT SCAN , I THINK YOU ARE HAVING TROUBLE W WHAT JUSTICE LUTZ IS WHAT JUSTICE LEWIS IS ASKING YOUAND THIS IS WHAT I WAS ASKING YOU BEFORE , THIS IS THE MITIGATION AND THIS IS WHAT WE WERE PREPARED TO SHOW THEY SHOULD HAVE DONE. OTHER THAN THE RITALIN , ISTHERE ANYTHING ELSE THAT YOU HAVE, THAT SHOWS A DIFFERENT QUALITATIVE OR QUANTITATIVE DIFFERENCE IN WHAT WAS PRESENTED AT THE TRIAL?

YES. WE HAVE INFORMATION THAT I THINK SHOWS THE RETARDATION WAS MUCH MORE SEVERE , THAT THE INFORMATION ON DRUGS ANDALCOHOL WAS NOT PRESENTED AT ALL. THAT IS ENTIRELY NEW. THE NEUROPHARMACOLOGIST WAS JUST TO TESTIFY ABOUT THAT SPECIFICALLY. NONE OF THAT WAS PRESENTEDAT THE ORIGINAL TRIAL. THE NEUROPHARMACOLOGIST ABOUT DRUGS. THERE IS ALSO, WE ALSO HAD EVIDENCE OF SEXUAL ABUSE AS A CHILD .

AT THE ORIGINAL TRIAL, A PSYCHIATRIST TESTIFIED THAT HE WAS ON THE DRUG LITHIUM CARBONATE , T O CONTROL HIS BIPOLAR DISORDER , RIGHT?

IS YOUR HONOR REFERRINGTO THE '88 OR THE '92 TRIAL? BECAUSE THERE WAS EXPERT TESTIMONY PRESENTED AT THE FIRST TRIAL, THAT WAS THROWN OUT BECAUSE THE PROSECUTOR IA L MISCONDUCT. HE WAS THEN GRANTED A SECOND TRIAL AT WHICH THOSE EXPERTSWERE NOT ALLOWED TO BE USED.

WAS THAT TESTIMONY IN THE TRIAL THAT WE ARE DEALING WITH HERE?

I DON'T BELIEVE SO, YOUR HONOR .

WELL

I GET CONFUSED , BUT I DO KNOW THAT, IN OUR PLEADINGS , WE SPECIFICALLY PUT IN NEW THINGS. WE DON'T JUST , DON'T JUST REPEAT WHAT WAS ALREADY PRESENTED, AND WE FELT THEY WERE PREJUDICIAL .

COULD YOU GET BACK , REALLY, TO THE QUESTION, WHAT IS THE QUALITATIVE DIFFERENCE, BECAUSE A LONG LINE OF CASES SAY JUST BECAUSE YOU CAN FIND A DIFFERENT EXPERT, IS NOT THE CRITERIA , SO PLEASE , IN THE SHORT TIME , MAKE SURE WE KNOW WHAT THOSE ARE.

RIGHT . THEY WOULD RELATE HIS PROBLEMS TO VIOLENCE. THEY WOULD SHOW , THEY WOULD CONNECT THE PROBLEMS HE HAD, TO WHAT , TO HIS VIOLENCE, TO WHAT HAPPENED IN THESE, IN THIS TERRIBLE CASE . THAT WAS NOT DONE .

OKAY. SO YOU ARE , AND YOU ARE OUT OF TIME.YOU ARE SAYING IT WOULD HAVE ALLOWED THE JURY TO CONSIDER AND FIND THE STATUTORY MITIGATORS?

YES, YOUR HONOR.

AND THOSE WERE NOT FOUND .

WE WOULD HAVE PRESENTED EVIDENCE. THE EVIDENTIARY HEARING WAS HALF A DAY IN THIS CASE. IT WAS NOT LONG.

AND HOW LONG , THE OTHER, HOW MANY WITNESSES DID YOU HAVE THAT COULD NOT BE CALLED BECAUSE OF THE JUDGE'S RULING?

ALL OUR , FOUR OR FIVE AT LEAST. IT WOULD NOT , ANOTHER DAY, IT WOULD HAVE TAKEN .

CHIEF JUSTICE: ALL RIGHT. THANK YOU FOR YOUR TIME.

THANK YOU.