Robert Morris v. State of Florida

[LOST AUDIO CONNECTION AT THE BEGINNING OF THIS CASE.]

HE KNEW HE HAD A RIGHT TO TESTIFY.

JUDGE, THAT IS NOT OBVIOUS IN THE PENALTY PHASE OF THE TRIAL.

CHIEF JUSTICE: IT IS OBVIOUS THAT HE WAS GIVEN THE RIGHT, IN FACT EXERCISED THE RIGHT TO TESTIFY IN THE GUILT PHASE.

IN THE GUILT PHASE, AND IT WAS OBVIOUS BECAUSE HE WAS SO ADVISED BY THE GUILT PHASE TRIAL COURT. HE WAS NOT ADVISED AND IT IS NOT OBVIOUS THAT HE WAS AWARE OF HIS RIGHT TO TESTIFY IN THE PENALTY PHASE.

CHIEF JUSTICE: THERE IS NO REQUIREMENT THAT, HERE WE WERE TALKING ABOUT WAIVERS IN THE LAST ARGUMENT. THERE IS NO REQUIREMENT THAT THE JUDGE INQUIRE AS TO WHETHER IT BE KNOWINGLY WAIVED OR NOT.

BUT THIS COURT, IN PEREZ V STATE, 524 SO.2D 403 FLORIDA 1988 AT FOOTNOTE 2 ON PAGE 411, CLEARLY STATED THAT, AT THE CLOSE OF THE DEFENSE CASE, IT WOULD BE ADVISABLE FOR THE COURT TO CONDUCT AN INQUIRY.

CHIEF JUSTICE: SO IT IS NOT, I ASKED YOU WHETHER THE COURT HAS EVER HELD THAT THE TRIAL COURT WAS OBLIGATED TO INFORM THE DEFENDANT.

NO. THEY ARE NOT OBLIGATED TO. MR.^CHIEF JUSTICE

OF COURSE DEFENSE COUNSEL HAS AN OBLIGATION TO INFORM.

YES. MR.^CHIEF JUSTICE

LET'S JUST ASSUME IN THIS CASE THAT, FOR WHATEVER REASON, THAT, ALTHOUGH THEY MAY HAVE DISCUSSED STRATEGY ISSUES, THAT THEY DIDN'T SPECIFICALLY SAY ANYTHING. YOU DO HAVE THIS RIGHT TO TESTIFY IN THE PENALTY PHASE. LET'S JUST GO TO THE PREJUDICE. DOES THERE HAVE TO BE PREJUDICE SHOWN?

NO. JUDGE, FIRST OF ALL I WOULD CITE FOR AUTHORITY DOUGLAS, 635 SO.2D PAGE 4, FLORIDA 1993, THE POSTCONVICTION COURT SET ASIDE THE DEATH SENTENCE AND ORDERED A NEW SENTENCING PROCEEDING, BASED ON THE TOTALITY OF THE CIRCUMSTANCES PRESENTED AT THE EVIDENTIARY HEARING. NOW, THE COURT DID NOT FIND THAT THE EVIDENCE PRESENTED BY THE DEFENDANT, WOULD HAVE BENEFITED HIM AT PENALTY PHASE. RATHER, THE COURT FOUND THAT THE DEFENDANT WAS NOT GIVEN AN OPPORTUNITY TO KNOWINGLY AND INTELLIGENTLY MAKE THE DECISION AS TO WHETHER OR NOT TO TESTIFY TO CALL WITNESSES. NOW, THIS COURT JUST HEARD FROM SEVEN LAWYERS, HOW IT IS IMPORTANT FOR THE LAWYER, A LAWYER IN A CIVIL MATTER, TO UNDERSTAND AND NEED TO UNDERSTAND THE CONDITIONS OF WAIVER.

NOW, THE TRIAL COURT IN THIS FACE SAID IT WAS DECIDED AMONG THEM THAT MR. MORRIS WOULD TESTIFY ONLY DURING THE GUILT PHASE.

JUSTICE THAT, IS NOT CLEAR AND I WOULD RESPECTFULLY SUBMIT THAT THE TESTIMONY AT THE EVIDENTIARY HEARING, MS.^GARRETT, COUNSEL TESTIFIED THAT SHE KNEW IT WAS HIS PERSONAL RIGHT, A FUNDAMENTAL RIGHT. SHE KNEW SHE COULDN'T WAIVE IT ON BEHALF OF HER CLIENT, ONLY HE COULD WAIVE IT, AND SHE TESTIFIED THAT SHE COULD NOT RECALL EVEN DISCUSSING IT WITH MORRIS THAT HE COULD OR COULD NOT TESTIFY DURING HIS CASE. ANOTHER CONCERN ABOUT WAITING UNTIL THE PENALTY PHASE TO TESTIFY AND AS OPPOSED TO THAT, PRESENTING HIS TESTIMONY THAT MIGHT HAVE PRESENTED IN THE PENALTY PHASE, IN THE GUILT PHASE?

JUSTICE, NO. I AM CONFUSED WITH THE COURT'S QUESTION. WOULD YOU MIND REPEATING IT.

HE SAID THE REASON WAS COUNSEL WANTED EVERY POTENTIAL AGGRAVATING CIRCUMSTANCE THAT COULD BE RELIED UPON, TO BE PRESENTED IN THE GUILT PHASE.

IN THE GUILT PHASE. NOW, IN THE PENALTY PHASE, GARRETT TESTIFIED THAT SHE COULDN'T RECALL WHETHER SHE TALKED TO MR. MORRIS OR NOT, THE POSSIBILITY OF HIM TESTIFYING IN THE PENALTY PHASE. THIS CONTENTION IS, BY BOTH PENALTY PHASE AND GUILT PHASE TESTIMONY, THAT THE RELATIONSHIP BETWEEN THE ATTORNEYS AND THEIR CLIENT BECAME STRAINED, AND I WOULD SUBMIT TO THE COURT, AGAIN, DEATON V DUGGER, IT IS IRRELEVANT WHAT MORRIS WOULD HAVE TESTIFIED TO AT THE PENALTY PHASE. IN THE EVIDENTIARY HEARING, WHAT HE WOULD HAVE SAID MAY OR MAY NOT HAVE BENEFITED HIM. HOWEVER, JUSTICE CANTERO IN THE LAST ARGUMENT, STRESSED THE IMPORTANCE THAT THERE HAS TO HAVE A KNOWING AND VOLUNTARY, INTELLIGENT WAIVER. NOW, IN DEATON, THIS COURT, IN AFFIRMING --

WITH INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM HERE, CORRECT, YOU ARE SAYING COUNSEL WAS INEFFECTIVE FOR FAILING TO --

ADVISE --

-- ADVISE MORRIS OF HIS RIGHT TO TESTIFY.

IN THE PENALTY PHASE.

HOWEVER, ANY INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM HAS TO HAVE, BOTH THE DEFECTIVE PERFORMANCE PRONG AND THE PREJUDICE PRONG, CORRECT?

BUT, JUDGE, I AM ALSO SAYING IT VIOLATES --

WHAT IS THE PREJUDICE PRONG HERE. I THINK THAT WAS AN EARLIER QUESTION THAT WAS ASKED OF YOU, WHAT IS THE PREJUDICE PRONG OF THE STRICKLAND STANDARD?

THE PREJUDICE PRONG IS THEY VIOLATED A FUNDAMENTAL RIGHT THAT WAS VIOLATED BY COUNSEL. IT WAS MORRIS'S DECISION TO MAKE. FURTHERMORE --

WHAT IS THE PERFORMANCE PRONG THEN? THE PERFORMANCE PRONG IS THAT HE DID NOT, THE DEFICIENT PERFORMANCE IS HE DID NOT TELL HIM OR GET A WAIVER FROM HIM OF HIS RIGHT TO TESTIFY? THAT IS THE DECISION CONDUCT.

YES.

SO I AM STILL ASKING THE PREJUDICE.

HAD MORRIS TESTIFIED AS HE DID IN THE EVIDENTIARY HEARING, HE WOULD HAVE DETAILED THE CHILD ABUSE HE SUFFERED, HOW IT FELT, WHAT CAUSED HIM TO HAVE ULCERS AND HE

WOULD HAVE ANSWERED ANY QUESTION THAT HIS ATTORNEYS WOULD HAVE ASKED HIM.

WAS THAT INFORMATION BROUGHT OUT THROUGH THE OTHER WITNESSES WHO DID, IN FACT, TESTIFY IN THE PENALTY PHASE?

NOT MORRIS'S PERSONAL OBSERVATIONS. THEY DID DISCUSS THE ABUSE THAT MORRIS'S MOTHER AND MORRIS SUFFERED AT THE HANDS OF A BRUTAL MAN NAMED SANTE, BUT THEY DID NOT ASK MORRIS HOW DID YOU FEEL ABOUT THAT? THEY DIDN'T ASK MORRIS ABOUT HIS HEAD INJURY. HOWEVER, I WOULD SUBMIT THAT THE COURT IS DISTRACTED FROM THE MAIN ISSUE OF THE CASE AT BAR. IN DEATON V DUGGER, THIS COURT STATED THAT THE RECORD, WITH EMPHASIS, THE RECORD MUST SUPPORT THAT A WAIVER WAS KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY MADE. NOW, NEITHER THE TRIAL RECORD NOR THE POSTCONVICTION RECORD CAN SHOW THIS. THERE WAS NO COLLOQUY GIVEN BY THE TRIAL COURT FOR PENALTY PHASE, CONTRARY TO THE COURT'S ADVICE IN ABELEA.

COUNSEL, IN THE RECORD IT DOES SHOW THAT TRIAL COUNSEL DISCUSSED MORRIS'S RIGHT TO TESTIFY AT TRIAL, CORRECT? AT TRIAL. RIGHT?

ONLY --

RIGHT? JUST AT TRIAL. DID COUNSEL SAY WE TALKED TO YOU ABOUT TESTIFYING GENERALLY OR JUST AT TRIAL?

THE TRIAL ATTORNEY AT GUILT PHASE TESTIFIED THAT AT GUILT PHASE, GARRETT WAS THE TRIAL ATTORNEY FOR PENALTY PHASE. SHE SAID I DON'T RECALL EVEN TALKING TO HIM ABOUT WHETHER OR NOT TO TESTIFY IN THE PENALTY PHASE.

HOW LONG AFTER THE PENALTY, AFTER THE GUILT PHASE WAS THE PENALTY PHASE?

ALMOST IMMEDIATELY.

ALMOST IMMEDIATELY.

THIS WAS A TOTAL THREE-WEEK TRIAL WITH A WEEK OF JURY SELECTION, SO IT WAS A TWO-WEEK TRIAL AND THEY WENT RIGHT FROM GUILT.

SO THIS WAS A TRIAL T MAY HAVE HAD TWO PHASES BUT IT WAS ONE TRIAL.

YES!

SO IF A DEFENDANT KNOWS HAZY A RIGHT TO TESTIFY AT TRIAL, WHY WOULDN'T THAT INCLUDE KNOWLEDGE THAT IT IS THE PENALTY PHASE AS WELL AS THE GUILT PHASE. IT IS ALL PART OF THE SAME TRIAL.

BUT AS THE COURT RECALLS, IN EVERY DEATH CASE BEFORE THEY START THE PENALTY PHASE, THE TRIAL COURT GETS UP AND TALKS TO THE JURY AND EVERYBODY PRESENT, HOW THERE IS GOING TO BE DIFFERENT STANDARDS OF PROOF. THERE IS GOING TO BE A DIFFERENT EVIDENCE BROUGHT IN. THEY ARE GOING TO BE DECIDING DIFFERENT ISSUES, WHETHER THE MAN LIVES OR DIES. THERE IS GOING TO BE AGGRAVATORS, MITIGATORS, IT HAS GOT -- MORRIS WASN'T A LAWYER! HE DOESN'T KNOW THAT, HE KNOWS IT IS A SEPARATE PROCEEDING BUT HE DOESN'T KNOW HE HAS A RIGHT TO TESTIFY IN THAT. FOR ALL MORRIS KNEW, HE HAD A SHOT. HE TESTIFIED IN GUILT PHASE AT TRIAL. NOW, JUDGE, THE COURT, IN DELUCA V LORD, 858 FED SOUTH 1330, A 1994 CASE, DELUCA WAS A {PROIFER}.

WHAT DISTRICT IS THAT FROM?

SOUTHERN DISTRICT OF NEW YORK. DELUCA WAS A POLICE OFFICER. SHE HAD TESTIFIED IN COURT THOUSANDS OF TIMES, ACCORDING TO THE CASE, AND THE FEDERAL COURT HELD THAT, SINCE THE PETITIONER WAS, I AM SORRY, THE FEDERAL COURT DID NOT HOLD THAT, BECAUSE THE PETITIONER WAS A POLICE OFFICER, SHE WAS AWARE OF HER RIGHTS. NOW, MORRIS IN THE HEARING THE PROSECUTOR MADE A BIG DEAL THAT MORRIS WAS YUKING IT UP WITH HIS ATTORNEY BEFORE THE HEARING AND HAD A GOOD RELATIONSHIP WITH TONY MALONEY AND WITH GARRETT, AND DID MORRIS EVER SAY, HEY, I WANT TO TEST MY PENALTY PHASE? NO, HE DID NOT. IT WAS CLEAR THAT HE HAD THE RIGHT, IN THE GUILT PHASE, BUT IT HAS TO BE CLEAR THAT HE WAS GIVEN THE RIGHT TO TESTIFY IN THE PENALTY PHASE, BUT IT WAS FOUND --

ANYWHERE IN THE COUNTRY, FROM THE CALIFORNIA OR U.S. SUPREME COURT, ANYWHERE WHERE THE DEFENDANT KNOWS IF HE HAS THE RIGHT TO TESTIFY IN THE GUILT PHASE THAT, HE HAS THE RIGHT TO TESTIFY IN THE PENALTY PHASE.

JUSTICE, NO. IT HAS TO BE DONE AT THE END OF THE DEFENSE CASE.

ACCORDING TO THE COURT'S RULING IT SAYS ADVISEABLE, CORRECT?

ADVISEABLE. THE DEFENSE CASE WAS NOT OVER. IT WAS A BIFURCATED PROCEDURE. THE COURT GETS UP THERE AND TELLS EVERYBODY THIS IS A WHOLE DIFFERENT SHOW, FOLKS. DIFFERENT PROOF. DIFFERENT STANDARDS OF PROOF. AGGRAVATION. WE ARE GOING TO BE TAKING DIFFERENT PROOF AND DIFFERENT TESTIMONY. HOW IS MORRIS TO KNOW THAT THIS IS HIS ONLY SHOT? WAS THERE SOME RECORD TESTIMONY?

IS THERE SOME OWN US WHERE A DEFENDANT KNOWS THAT HE HAS THE RIGHT TO DECEMBER TESTIFY IN A GUILT CASE.

NO. JUST SAID.

IS THERE ANY OWN US ON THE DEFENDANT WHERE HE KNOWS HE HAS THE RIGHT TO TESTIFY IN A GUILT PHASE, IT TO ASK THE ATTORNEY, HEY, I WANT TO TESTIFY. IS THERE ANY OBLIGATION ON THE DEFENDANT TO ASK TO TESTIFY?

NO. IN THE LAST CASE, THE WAIVER MUST BE KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY MADE. THERE IS NO EVIDENCE DEDUCED THAT THE 3.508 OR AT TRIAL, THAT THE WAIVER OF MORRIS TO TESTIFY, WAS KNOWINGLY VOLUNTARILY AND INTELLIGENTLY MADE. IN FACT, THERE IS EVIDENCE TO THE CONTRARY IN THE POSTCONVICTION RECORD. THAT EVIDENCE IS FOUND IN VOLUME 3 PAGE 425, PAGE 427, PAGE 428, AND PAGE 431.

IS THIS RAISED AS AN ISSUE ON APPEAL, ON DIRECT APPEAL? ASSUMING THAT WHAT YOU ARE SAYING IS THE COURT, ACCORDING TO OUR CASE THAT YOU KEEP QUOTING, THAT IS ADVISEABLE FOR THE COURT TO INFORM HIM. THEREFORE YOU HAD AN ISSUE ON DIRECT APPEAL TO SAY THE COURT DIDN'T INFORM OF MY RIGHT TO TESTIFY IN THE PENALTY PHASE. THERE IS A DIFFERENCE HERE. IT IS NOT WHETHER THE COURT HAD AN OBLIGATION. IT IS WHETHER THE ATTORNEY HAD AN OBLIGATION, AND IF HE DID HAVE AN OBLIGATION AND DIDN'T FULFILL IT, WHAT WAS THE PREJUDICE, AND I DON'T SEE THAT YOU HAVE IDENTIFIED ANY PREJUDICE IN THE RECORD WHERE THE DEFENDANT, HIMSELF, ONLY SAID I WOULD HAVE ANSWERED ANY QUESTIONS THEY WOULD HAVE ASKED ME. HE DIDN'T IDENTIFY ANY SPECIFIC TESTIMONY THAT HE WOULD HAVE GIVEN IN THE PENALTY PHASE THAT HE DIDN'T GIVE.

YES, HE DID.

WHAT WAS THAT?

HE WOULD HAVE DISCUSSED THE EFFECT YOU OF THE CHILD ABUSE THAT HE SUFFERED AND THE

EFFECT OF HIS MOTHER FORCING HIM TO STEAL, AND HE WOULD HAVE GIVEN HIS OWN PERSONAL VIEW ON THE EVENT TO THE JURY, THAT HAPPENED HERE. JUDGE, I AM IN MY REBUTTAL TIME HERE.

CHIEF JUSTICE: YOU ARE NOT GOING TO DISCUSS THE FIRST POINT AND LEAVE IT WITH YOUR BRIEF?

I WOULD LIKE TO DO IT IN REBUTTAL.

CHIEF JUSTICE: YOU CAN'T. IF YOU ARE NOT GOING TO BRING IT UP NOW, YOU CANNOT BRING IT UP ON REBUTTAL.

JUDGE, I WILL DO IT NOW. 1-B, TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO PROPERLY PREPARE AND INVESTIGATE THE GUILT PHASE AT TRIAL. AT THE EVIDENTIARY HEARING, COUNSEL TESTIFIED THAT HE WAS ATTEMPTING TO DEVELOP AN ALTERNATIVE SUBJECT. HE SAID THAT THERE WAS DEFINITELY NOT A BLACK MAN CLOSELY, THERE WAS A WITNESS THAT WAS GOING TO COME IN THERE AND SAY THERE WAS A MAN LURKING AROUND THE APARTMENT WHO WAS DEFINITELY NOT A BLACK MAN. AT TRIAL, THE WITNESS SAID THE MAN SEEN LURKING WAS NOT A WHITE MAN. A COMPLETE 180-DEGREE TURN.

CHIEF JUSTICE: RIGHT AFTER THAT, THEY PUT ON AN EMPLOYER THAT SHOWED CONCLUSIVELY THAT MR. MORRIS AT THAT TIME, WHICH WAS NOT THE TIME OF THE MURDER, WAS WORK AT TACO BELL.

YES.

CHIEF JUSTICE: SO YOUR ARGUMENT ON THIS ONE AND I THINK WE UNDER IT FROM THE BRIEF, IS THAT THEY SHOULD HAVE DEPOSED THE, LAVENTURE OR GOTTEN A STATEMENT SO THAT THEY COULD HAVE IMPEACHED HERE?

THEY SHOULD HAVE DONE AND/OR THERE WAS AN INVESTIGATOR NAMED BARFIELD WHO CALLED AND TALKED TO THIS WOMAN EXTENSIVELY. THAT WAS BROUGHT OUT BY THE STATE.

CHIEF JUSTICE: ALL YOU COULD HAVE DONE, HE TESTIFIED, WAS TO IMPEACH MS.^LAVENTURE AND NOT --

IT WOULD HAVE BEEN SUBSTANTIVE EVIDENCE.

IT WOULDN'T HAVE COME IN AS SUBSTANTIVE EVIDENCE, WOULD IT?

WHEN THIS WOMAN HAD ACCUSED A PUBLIC DEFENDERS OFFICE OF ACCUSING HER OF LYING, ALL CREDIBILITY WAS LOST IN THE CASE.

BARFIELD DIDN'T TESTIFY TO THAT. IT WAS MALONEY, AND THERE WAS A STIPULATION THAT WAS DEGREED TO AND THE STATE AGREED TO IT, THAT THE PUBLIC DEFENDER DID NOT ENGAGE IN THAT CONDUCT, IS THAT CORRECT?

YES, THAT IS TRUE AND WITH ALL DUE RESPECT, I WOULD RATHER REBUT.

CHIEF JUSTICE: NOW YOUR TURN, MR. BROWNE.

SCOTT BROWNE FOR THE STATE OF FLORIDA. YOUR HONORS, MR. MORRIS DID, IN FACT, AS THIS COURT HAS RECOGNIZED, TESTIFY DURING THE GUILT PHASE.

CHIEF JUSTICE: I WAS TRYING TO LOOK THROUGH OUR CASE LAW. IS THERE, JUST IF WE WERE HERE ON A DIRECT APPEAL ISSUE, IS, AND THERE WAS AN ISSUE ABOUT IT, A KNOWING WAIVER

ON THE GUILT PHASE, DOES THE STATE OF THE LAW REQUIRE, AT LEAST ON THE PART OF THE ATTORNEY, THAT THE DEFENDANT, ALSO, KNOW OF HIS OR HER RIGHT TO TESTIFY IN THE PENALTY PHASE, OR IS THE LAW THAT DEFINED?

YOUR HONOR, THE LAW IS NOT THAT DEFINED. I THINK THERE IS BASICALLY ONE RIGHT TO TESTIFY, BUT HE ALSO HAS A RIGHT TO TESTIFY IN BOTH PHASES, BUT I HAVE NOT FOUND A CASE THAT BREAKS THE TWO PARTS OUT AS COLLATERAL COUNSEL SUGGESTS. NOW, WE DO KNOW FROM DAVIS V STATE IN A 2003 CASE OUT OF THIS COURT, THAT A TRIAL JUDGE DOES NOT NEED TO MAKE AN INQUIRY OF THE DEFENDANT AS TO WHETHER OR NOT HE WANT DEFENSE TO FIND DURING THE PENALTY PHASE, AND WE ALSO KNOW FROM A 2004 CASE OUT OF THIS COURT, WHICH IS DIRECTLY ON POINT, THAT A DEFENDANT CLAIMING THAT HIS ATTORNEY FAILED TO ADVISE HIM OF THE RIGHT TO TESTIFY, HAS TO MEET BOTH PRONGS OF STRICKLAND, IN ORDER TO MERIT ANY RELIEF, AND IN THIS CASE THE EVIDENCE IS PRETTY CLEAR THAT MORRIS INSISTED THAT HE TESTIFY DURING THE GUILT PHASE AND HE DID TESTIFY. THE DIRECT RESULTS ARE CLEAR THAT MR. MORRIS NEVER ASKED HIS ATTORNEYS TO TESTIFY AGAIN DURING THE PENALTY PHASE. HE NEVER NUDGED THEM ONCE, TO SAY THAT SOMETHING INACCURATE WAS BROUGHT OUT AND I WANT TO TALK ABOUT THAT ON THE STAND, SO THE RECORD SUPPORTS THE FACT THAT THIS WAS SIMPLY A REASONABLE TACTICAL DECISION NOT TO OFFER MORRIS TO TESTIFY YET AGAIN.

WHAT IS THE EVIDENCE THAT SHOWS THIS IS A TACTICAL DECISION? SHOULD THE ATTORNEY, SHOULD MORRIS'S ATTORNEY HAVE SAID SOMETHING TO HIM TO THE EFFECT OF, YOU KNOW, YOU CAN TESTIFY DURING THIS PHASE, BUT I SUGGEST YOU DON'T OR SOMETHING TO THAT EFFECT? DOESN'T THE ATTORNEY HAVE SOME OBLIGATION TO TALK TO HIM ABOUT TESTIFYING DURING THE PENALTY PHASE?

WHAT MRS.^GARRETT TESTIFIED TO, AND I THINK YOU CAN FIND THAT BASED ON THIS RECORD. MRS.^GARRETT TESTIFIED THAT SHE DID NOT RECALL ANY SPECIFIC CONVERSATIONS WITH THE APPELLANT, REGARDING WHETHER OR NOT HE WOULD TESTIFY OR HIS RIGHT TO TESTIFY, BUT SHE KNOWS IT WAS PART OF THEIR STRATEGY AND THEY TALKED AT GREAT LENGTH, ABOUT HOW BEST TO PRESENT THE DEFENSE CASE HERE, AND THE DEFENSE IN THIS CASE PRESENTED ALL OF THAT INFORMATION ABOUT THE APPELLANT'S BACKGROUND, THROUGH 11 WITNESSES. THEY TALKED ABOUT HIS CHILDHOOD, HIS ABUSE, MENTAL INFIRMITIES. THEY HAD TEACHERS, SISTERS, MOTION, AND ALL OF THAT CAME OUT THROUGH WITNESSES WHO THIS HAD CREDIBILITY THROUGHOUT JURY. IN OTHER WORDS, MR. MORRIS HAD ALREADY TESTIFIED THAT HE DIDN'T COMMIT CRIME AND HIS TESTIMONY WAS SIMPLY INCREDIBLE, BASED ON THE EVIDENCE OF HIS GUILT, AND THE TRIAL ATTORNEY GARRETT HAD ALREADY TESTIFIED THAT, LOOK, THE JURY HAD ALREADY FOUND THAT HE WASN'T TELLING THE TRUTH, AND IN FACT IF YOU LOOK AT THE TESTIMONY WHICH MR. MORRIS TESTIFIED TO DURING THE COLLATERAL HEARING, HE DIDN'T OFFER ANYTHING KNEW FROM WHAT WAS PRESENTED BELOW, AND IN FACT HE DID NOT ARGUE OR OFFER ANYTHING COMPELLING. ALL HE SAID WAS, IN RESPONSE TO LEADING QUESTIONS FROM COLLATERAL COUNSEL, WAS COULD YOU HAVE TALKED ABOUT YOUR CHILDHOOD? YES, I COULD HAVE. SO THAT IS HARDLY THE KIND OF EVIDENCE THAT COULD HAVE MADE A DIFFERENCE IN THIS CASE.

WOULD YOU ADDRESS THAT HEAD ON? THAT IS, AS I UNDERSTAND THE ARGUMENT OF YOUR OPPONENT, IT SAID THAT THE DEFENDANT HAS THIS RIGHT AND THE DEFENDANT IS UNIQUE IN THE SENSE OF BEING ABLE TO TELL THE JURY ABOUT HIS BACKGROUND, WHATEVER, AND THAT THAT IS WHY PREJUDICE HAS BEEN ESTABLISHED IN THE CASE. WOULD YOU GIVE US AN ARTICULATION OF THE STATE'S VIEW OF WHY HE HAS NOT BEEN ABLE TO ESTABLISH PREJUDICE ON THIS RECORD? WOULD YOU ELABORATE?

YES, YOUR HONOR. IN FACT I WILL. HE SAYS THAT ALL OF THE TESTIMONY REGARDING THE DEFENDANT'S BACKGROUND WAS BROUGHT OUT. ANYTHING THAT HE OFFERED WAS SIMPLY

CUMULATIVE AND FAR LESS COMPELLING THAN THE EVIDENCE ACTUALLY PRESENTED BY HIS TRIAL ATTORNEYS IN THIS CASE. MR. MORRIS WAS SIMPLY ASKED A LEADING QUESTION. HOW DID IT FEEL TO BE ABUSED? WOULD YOU HAVE BEEN IN THE POSITION -- WITNESSES CANNOT ACTUALLY SAY HOW DID IT FEEL TO BE ABUSED. SO IF YOU LOOK AT HIS TESTIMONY, IF YOU GIVE HIM THE BENEFIT OF THE DOUBT THAT HIS ATTORNEYS NEVER TOLD HIM AND HE NEVER KNEW THAT HE COULD TESTIFY DURING THE PENALTY PHASE, AND I SUGGEST THAT THAT IS AN INCREDIBLE STRAINING OF CREDULITY IN THIS CASE, BUT LOOK AT HIS TESTIMONY DURING THE COLLATERAL HEARING. HE DIDN'T OFFER A SINGLE NEW ITEM OF EVIDENCE FOR THE JUDGE OR JURY TO CONSIDER, AND SO EVEN IF YOU, YOU CAN SKIP THE DECISION PERFORMANCE PRONG IF YOU WANT, BASED ON THIS RECORD, AND GO RIGHT TO PREJUDICE. THERE IS CLEARLY NO PREJUDICE, AND IN ADDITION WHAT MR. MORRIS TESTIFIED TO AT HIS COLLATERAL HEARING WAS, AT THE END OH, I DIDN'T DO IT AND THE TRIAL ATTORNEY SAID YOU WOULDN'T WANT TO PRESENT MORRIS WITH A DEFIANT ATTITUDE AGAIN. THEY HAD JUST FOUND HIM GUILTY AND JUST FOUND THAT HE WAS NOT TELLING THEM THE TRUTH, AND YOU ARE GOING TO PUT HIM ON AND SAY, JURY, YOU HAVE GOT IT WRONG, AND, AGAIN, YOU HAVE TO REMEMBER HOW OVERWHELMING EVIDENCE WAS IN THIS CASE. DNA, AT THE POINT OF ENTRY, HIS FINGERPRINT ON A LIGHT BULB, SO THIS IS A CASE WHERE THERE COULDN'T BE ANY RESIDUAL DOUBT ABOUT HIS GUILT, SO THE BENEFIT OF THE JURY HEARING HIM TESTIFY HAD ALREADY BEEN OBTAINED. THERE WAS NO TACTICAL OR STRATEGIC REASON TO PUT HIM ON THE STAND AGAIN.

HOW ABOUT WHEN THE TACTICAL DECISION OF WHETHER THE DEFENDANT SHOULD TESTIFY IN THE PENALTY PHASE OF THE HEARING, HOW DOES THAT RELATE TO THE DEFENSE ATTORNEY'S TESTIMONY THAT THEY WANTED HIM TO COME IN AND GIVE OTHER AGGRAVATING CIRCUMSTANCES AS TO THE PENALTY PHASE CIRCUMSTANCES. TELL US HOW IT WAS SHOWN ON THAT.

MR. MORRIS SAID THAT HE THOUGHT IT WAS IMPORTANT TO TESTIFY, AND THAT WAS PART OF THEIR STRATEGY ALL ALONG WAS TO OFFER HIS TESTIMONY. NOW, THE JURY WAS GOING TO LEARN IN THE PENALTY PHASE ABOUT HIS PRIOR ARMED ROBBERY CONVICTIONS, HIS BACKGROUND, SO THEY WOULD HAVE KNOWN THAT IN THE GUILT PHASE, SO I THINK BOTH FACES DOVETAILED INTO ONE ANOTHER. MR. MORRIS HUMANIZED IN FRONT OF THE JURY AND THEN YOU DON'T RUN THE RISK OF ALIENATING THEM, BY AGAIN PRESENTING HIM DURING THE PENALTY PHASE. SO ALL OF THESE PEOPLE WITH CREDIBILITY WITH THE JURY WERE PUT ON, RATHER THAN MR. MORRIS BEING PUT ON YET AGAIN.

SO FROM THE STANDPOINT OF THE DEFENSE, HOW INVOLVED WAS HE IN THE STRATEGY WITH THE JURY?

HE WAS INVOLVED IN THE GUILT PHASE, BUT IN THE PENALTY PHASE, MRS.^GARRETT TESTIFIES THAT SHE DOES NOT RECALL, ONE WAY OR THE OTHER, BUT THEY WOULD HAVE DISCUSSED THIS IS THE PENALTY PHASE.

CHIEF JUSTICE: BUT MRS.^GARRETT, WHO JUST GAVE A LICK AND A PROMISE TO THE PENALTY PHASE, THERE WERE, WHAT, 11 FAMILY MEMBERS THAT DETAILED IN GREAT DETAIL, CHILDHOOD, THE ABUSE. THEY HAD A MENTAL HEALTH EXPERT TESTIFY.

YES, YOUR HONOR.

CHIEF JUSTICE: AND AT LEAST IN HER MIND, IT WOULD NOT HAVE BEEN A GOOD IDEA TO PUT HIM ON. I GUESS THE ONLY MISSING LINK HERE IS WHETHER, AS FAR AS ON PERFORMANCE, WHETHER SHE FAILED TO DISCUSS ADEQUATELY WITH MR. MORRIS, THAT IT WOULD NOT BE TO HIS ADVANTAGE TO PUT HIM ON IN THE PENALTY PHASE. SHE DIDN'T HAVE THAT SPECIFIC RECOLLECTION.

YES, YOUR HONOR. IN FACT THIS IS WHAT DISTINGUISHES THIS CASE FROM DEATON V DUGGER,

WHICH COLLATERAL COUNSEL CITES IN DEATON, THE DEFENSE COUNSEL NOT ONLY WAIVES THE RIGHT OF DEFENDANT TO TESTIFY, HE PRESENTED NO MITIGATION WHATSOEVER. THERE WERE NO WITNESSES PRESENTED WHATSOEVER ON BEHALF OF DEATON, AND IN THAT CASE THE TRIAL COURT FOUND THAT THEY FAILED TO INVESTIGATE A WEALTH OF MITIGATING CIRCUMSTANCES AND THAT CASE CAME TO THE STATE ON APPEAL, SO HIS REAL ANSWER ON DEATON IS CLEARLY MISPLACED. MOVE ON TO THE SECOND ISSUE RAISED BY THE APPELLANT. DEFENSE COUNSEL, HAD OVER 20 YEARS' EXPERIENCE AS A DEFENSE ATTORNEY AT THE TIME OF MR. MORRIS'S TRIAL. HE TESTIFIED THAT HE HAS NEVER DEPOSED HIS OWN WITNESSES NOR DID HE KNOW OF ANY DEFENSE ATTORNEYS WHO OPPOSED HIM.

CHIEF JUSTICE: AND YOU ARE GOING TO HEAR FROM A PERSON WHO SAYS THE PERSON SHE SAW WAS NOT BLACK. THAT WAS VERY SPECIFIC. YET AT THE SAME TIME APPARENTLY MALONEY, THEY DIDN'T KNOW THAT SHE WAS GOING TO NOT TELL THE TRUTH OR VARY HER TESTIMONY, BUT THEY HAD SOME NOTION THAT SHE WAS NOT A WILLING WITNESS. WASN'T THAT IN THERE? THAT CONCERNS ME, THAT, AGAIN, YOU ARE STAKING YOUR CREDIBILITY, WHEN YOU IN OPENING STATEMENTS SAY I AM GOING TO PUT A WITNESS ON AND THIS IS WHAT SHE IS GOING TO SAY, AND THEN RIGHT OUT OF THE BOX, YOU PUT ON YOUR CASE. THE WITNESS DOES A 180. WHAT, SO ISN'T THERE SOME CONCERN, NOT THAT EVERY WITNESS NEEDS TO BE DEPOSED BUT WHERE YOU HAVE SOMEBODY WHO IS A RELUCTANT WITNESS AND YOU ARE GOING TO PUT THIS WITNESS ON, MAYBE YOU HAD BETTER GET SOMETHING THERE BEFOREHAND, AT LEAST A STATEMENT IN WRITING, TO MAKE SURE THAT YOU ARE CLEAR ON WHAT SHE IS GOING TO SAY.

THERE WAS NO CONCERN WHETHER SHE CHANGED OR ALTERED WHAT SHE TOLD DEFENSE. NOW, YOUR CONCERN ABOUT CREDIBILITY, YOUR HONOR, WAS A VERY DETAILED STIPULATION THAT WAS AGREED UPON.

NOT THE CREDIBILITY ABOUT THE PUBLIC DEFENDER PROCURING THE TESTIMONY, BUT THE CREDIBILITY THAT, WHEN A LAWYER GETS UP AND SAYS A WITNESS IS GOING TO SAYING IN SOMETHING AND THEN THEY DON'T, THEY, IN THAT WAY YOU CAN END UP LOSING ALL CREDIBILITY ON EVERYTHING, BECAUSE YOU HAVE NOW REPRESENTED TO THE JURY, SOMETHING THAT DID NOT OCCUR.

YOUR HONOR, I SUGGEST THAT THAT HAPPENS IN MANY TRIALS, AND IF WE FOUND DEFENSE COUNSEL OR PROSECUTORS INEFFECTIVE FOR THAT MATTER, WHEN THAT OCCURS, THEN I THINK WE ARE, MOST OF US ARE GUILTY OF THAT. WE CAN ARTICULATE AND PLAN A CASE, BUT YOU KNOW, WITNESSES SAY DIFFERENT THINGS SOMETIMES.

WHAT WAS THE EVIDENCE HERE, IN TERMS OF WHETHER THERE WERE ANY WRITTEN OR AUDIO TRANSSCRIBED STATEMENTS? OTHER THAN DEPOSITIONS, WAS THERE ANY EVIDENCE THAT ANYTHING HAD BEEN REDUCED TO A WRITTEN OR RECORDED FORM, IN TERMS OF THE INTERVIEW OF THIS WITNESS?

NO, YOUR HONOR, NOTHING THAT WAS INTRODUCED, BUT THERE WAS TESTIMONY BELOW THAT SHE WAS FOUND IN A NEIGHBOR CANVASS BY THE POLICE, AND WHETHER OR NOT SHE GAVE A WRITTEN STATEMENT TO POLICE, NO ONE WOULD EVER KNOW, BUT WE WOULD ONLY SPECULATE THAT THERE WAS A WRITTEN STATEMENT SOMEWHERE, BUT, AGAIN, IT WAS NOT PRODUCED DURING THE EVIDENTIARY HEARING, BUT WHAT HAPPENED IN THIS CASE WAS THE DEFENSE ATTORNEY WAS PRETTY NIMBLE, AND HE DEFTLY HANDLED THIS ON CLOSING ARGUMENT, BECAUSE THE WITNESS STATED THAT, WHEN SHE ACKNOWLEDGED THIS INDIVIDUAL, WHETHER HE WAS WHITE OR BLACK, WALKING OUTSIDE THE APARTMENT, IT WAS ESTABLISHED THAT MR. MORRIS WAS WORKING AT TACO BELL FROM TWO TO FIVE, AND THIS INDIVIDUAL, BEING WHITE OR BLACK, WAS OBSERVED SOMETIME AFTER TWO O'CLOCK, SO THE IMPORTANCE TO THIS DEFENSE STRATEGY WAS THAT, SOMETIME AFTER MR. MORRIS WAS AT WORK, SOMEBODY WAS SEEN LURKING AROUND THE APARTMENT T DIDN'T MATTER WHETHER HE WAS WHITE OR BLACK

AND WHITE DEFENSE COUNSEL USED THAT TO MR. MORRIS'S BENEFIT, BECAUSE IN CLOSING THERE WAS EVIDENCE FROM THEIR OWN GENETIC EXPERT THAT THE POPULATION OF DNA AMONG AFRICAN-AMERICANS WAS MORE FREQUENT, SO IT WAS SHOWN THAT THE ATTACKER WAS AFRICAN-AMERICAN. I BELIEVE THERE WERE AFRICAN-AMERICAN BODY HAIRS FOUND IN THE APARTMENT, SO WHAT DEFENSE COUNSEL DID, I BELIEVE THERE WAS A CHANGE IN TESTIMONY, BUT HE USED IT TO WORK FOR THEM. HE ARGUED TO THE JURY THAT THERE WAS NO REASON TO BELIEVE THAT COUNSEL WAS INEFFECTIVE SIMPLY BY DEPOSING HIS OWN -- SIMPLY BY FAILING TO DEPOSE HIS OWN WITNESS THIS THIS CASE.

CHIEF JUSTICE: YOU ARE SAYING THAT DEFENSE COUNSEL NOTED IT WAS INCONSISTENT.

THERE IS A NOTE, THAT'S RIGHT, YOUR HONOR, IN THE FILE SAYING THE WITNESS WAS RELUCTANT. THERE WAS NO EVIDENCE THAT HE WAS GOING TO CHANGE HIS STORY AND THERE IS NO EVIDENCE THAT SHE WOULD HAVE IN THIS CASE AND, AGAIN, THE DEFENSE COUNSEL USED THAT TO MR. MORRIS'S BENEFIT, AND EVEN IF WE WERE TO ASSUME THAT COUNSEL WAS INEFFECTIVE, AGAIN, WE HAVE OVERWHELMING EVIDENCE OF MR. MORRIS'S GUILT. THERE IS NOT A CHANCE THAT THE OUTCOME WOULD HAVE BEEN DIFFERENT, HAD DEFENSE COUNSEL SIMPLY DEPOSED WITNESS LAVENTURE AT TRIAL. THANK YOU.

FIRST OF ALL, REGARDING WHAT MR. MORRIS TESTIFIED TO AT THE EVIDENTIARY HEARING AND REGARDING THE PENALTY PHASE ISSUES, IT IS CONTRARY TO THE HOLDING OF DEATON V DUGGER. IT IS COMPETENT, RELEVANT TESTIMONY AT THE EVIDENTIARY HEARING THAT MORRIS TESTIFIED TO, THAT SHOULD BE CONSIDERED BY THIS COURT, IS I DIDN'T KNOW I COULD! NOBODY TOLD ME I COULD TESTIFY IN THE PENALTY PHASE OF THE TRIAL! NOW, THE COURT SPENT AN HOUR WITH SEVEN LAWYERS TALKING ABOUT WAIVER. HOW IT SHOULD BE KNOWING AND HOW IMPORTANT IT IS FOR PEOPLE TO UNDERSTAND WHAT THEY ARE WAIVING. SHOULD A DEATH-ROW INMATE, SOMEONE ON TRIAL FOR HIS LIFE, BE AFFORDED LESS TREATMENT? AND MORRIS WAS NOT A LAWYER!

APPARENTLY TO GIVE THE JUDGE AN IDEA THE IMPACT HIS PERSONAL TESTIMONY WOULD HAVE GIVEN.

IT WAS A LEADING QUESTION ANSWERED, BECAUSE THAT IS NOT THE ISSUE. WHAT THE ISSUE WAS, WAS WAIVER. DID GARRETT ADVISE HIM HE COULD TESTIFY IN THE PENALTY PHASE? HE COULD NOT.

I APOLOGIZE. I WAS TRYING TO SPEAK TO THE ISSUE OF PREJUDICE. FOR THE TRIAL JUDGE TO DETERMINE WHETHER OR NOT THE IMPACT OF MR. MORRIS TESTIFYING OR NOT, WHETHER HE WAS PREJUDICED BY HIM NOT TESTIFYING, IT WOULD HAVE SEEMED THAT THAT SHOULD HAVE BEEN PRESENTED TO THE TRIAL JUDGE. ANOTHER TRIAL COURT IN THE 3.850 DID NOT ADDRESS PREJUDICE. IT DENIED THE CLAIM SIMPLY ON STRATEGIC GROUNDS. NOW, I WOULD CITE FOR AUTHORITY THAT THIS WAS A FUNDAMENTAL ERROR AND FUNDAMENTAL RIGHT.

NOW, ARE YOU ARGUING FOR A PER SE RULE? IF A DEFENSE ATTORNEY DOES NOT INFORM A CLIENT OF THE RIGHT TO TESTIFY DURING THE PENALTY PHASE, THAT EVEN IF THERE IS NO PREJUDICE, THAT MERE FACT IS INEFFECTIVE ASSISTANCE OF COUNSEL?

I AM SAYING IF HE DOES NOT INFORM HIS CLIENT AND THE CLIENT DOES NOT KNOWINGLY AND INFORMATIVELY WAIVE HIS RIGHT TO TESTIFY, HE IS ENTITLED TO A NEW PENALTY PHASE, MADAM JUSTICE.

ANSWER THE QUESTION DIRECTLY, THOUGH, THAT JUSTICE QUINCE ASKED. THAT IS IN THE SENSE OF SAYING, IT SEEMS TO ME THAT IS WHAT YOU ARE ARGUING, THAT THERE IS NO PREJUDICE PRONG, REALLY, THAT THIS CASE, THIS ISSUE FALLS IN THE CATEGORY WHERE THERE IS PRESUMED PREJUDICE, THAT IT IS SO FUNDAMENTAL, IN TERMS OF ENTITLEMENT TO TESTIFY, I

JUST WANT TO BE SURE AND CLEAR ABOUT THE LEGAL POSITION YOU ARE TAKING, AND IS THAT THE LEGAL POSITION YOU ARE TAKING?

THE COURT WANTS ME TO ARGUE THE PREJUDICE. I WILL, BASICALLY. THIS WAS AN 8-TO-4 VOTE, WITHOUT MORRIS TESTIFYING. HAD MORRIS TESTIFIED AND PROVIDED PERSONAL INSIGHT ON HOW IT FELT TO BE ABUSED, AND HOW IT FELT, OR ANSWERED ANY QUESTION THAT THE DEFENSE WOULD ASK HIM REGARDING HIS PERSONAL ABUSE, HOW DID IT FEEL TO WATCH YOUR SISTER BEING --

I AM ASKING YOUR POSITION AS FAR AS WHAT THE LAW IS, AND ARE YOU SAYING THAT THE LAW IS, IF HE IS NOT SEPARATELY ADVISED OF HIS RIGHT TO TESTIFY AT THE PENALTY PHASE, THEN THERE IS A PRESUMPTION OF PREJUDICE WHEN HE DOES NOT, OR ARE YOU SAYING, YES, THERE IS A PREJUDICE PRONG, AND WE SUFFERED PREJUDICE HERE. SO WHAT IS YOUR POSITION, AS FAR AS WHAT THE LAW IS ON THAT ISSUE?

AS FAR AS WHAT THE LAW IS, MY POSITION IS A DENIAL OF A FUNDAMENTAL RIGHT DOES NOT REQUIRE A PROOF PREJUDICE.

SO IT IS A CRONIC STANDARD.

YES. I WOULD SAY IT IS CRONIC.

CHIEF JUSTICE: AND YOU HAD A CASE YOU WANTED TO CITE, THEN YOUR TIME IS UP.

UNITED STATES V TEAGUE, 953 F. 2D 1525, A 1992 CASE, ROCK V ARKANSAS, 483 U.S. 44, 1987, UNITED STATES V SCOTT, 909 F.2d 488 ELEVENTH CIRCUIT, 1990.

CHIEF JUSTICE: I ASSUME THOSE ARE ALL IN YOUR BRIEF.

THEY ARE BUT DELUCA IS NOT.

CHIEF JUSTICE: THANK YOU. THE COURT WILL TAKE ITS MORNING BREAK. WE WILL BREAK FOR 15 MINUTES.

MARSHAL: PLEASE RISE.