Burley Gilliam vs State of Florida

MR. CHIEF JUSTICE: THE FINAL CASE ON THE COURT'S ORAL ARGUMENT CALENDAR THIS MORNING IS GILLIAM VERSUS STATE. MR. HALLENBERG.

MAY IT PLEASE THE COURT. MY NAME IS DAN HALLENBERG, HERE ON BEHALF OF MR. BURLY GILLIAM. MR. GILLIAM WAS CONVICTED BY A JURY OF FIRST-DEGREE MURDER AND SEXUAL BATTERY. THREE DAYS AFTER THE JURY RETURNED ITS VERDICT OF GUILTY, THE PENALTY PHASE WAS HELD. AT THE PENALTY PHASE, THE STATE ARGUED FOR THE JURY TO CONSIDER THREE AGGRAVATING CIRCUMSTANCES, HEINOUS, ATROCIOUS AND CRUEL. THE STATE ARGUED THAT THIS WAS APPROPRIATE, BASED UPON THE MEDICAL EXAMINER'S TESTIMONY THAT THE VICTIM HAD BEEN SEVERELY INJURED PRIOR TO HER DEATH. THE REMAINING AGGRAVATORS THE STATE ASSERTED WERE THE PRIOR VIOLENT FELONY AGGRAVATOR, BASED UPON MR. GILLIAM'S 1969 TEXAS CONVICTION FOR RAPE, AND IN THE COURSE OF THE FELONY, BASED UPON THE SEXUAL BATTERY. AT THE PENALTY PHASE OF THIS TRIAL, DEFENSE COUNSEL PRESENTED NO EVIDENCE AND CAUSED NO WITNESSES WHATSOEVER. IN HIS CLOSING STATEMENT, DEFENSE COUNSEL ESSENTIALLY OR SPECIFICALLY ASKED THE JURY TO RETURN A RECOMMENDATION OF LIFE, BASED UPON THE JURY'S, QUOTE, PERSONAL, RELIGIOUS, AND MORAL BELIEFS. DEFENSE COUNSEL, ALSO, ASKED THE JURY TO BASE THEIR DECISION, BASED UPON THEIR OPINION OF HOW BEST TO PROTECT SOCIETY, AND ALSO ASKED THE JURY TO CONSIDER THAT LIFE IN PRISON MEANT THAT MR. GILLIAM COULD NOT BE RELEASED FOR 25 YEARS.

WAS THERE ANY PART OF THE ARGUMENT, SINCE YOU SAY THAT THIS WAS IN THE GUILT PHASE, THERE WAS TESTIMONY FROM FAMILY MEMBERS, AND THERE WAS PSYCHIATRIC TESTIMONY. WAS THERE ANY EFFORT TO TAKE THAT TESTIMONY AND USE THAT IN ARGUMENT TO THE JURY, AS TO WHY THERE SHOULD BE A LIFE RECOMMENDATION?

VIRTUALLY NONE, YOUR HONOR. DEFENSE COUNSEL, AT PENALTY PHASE CLOSING, DID MAKE WHAT I WOULD CONSIDER, WHAT WE CONTEND IS JUST A VAGUE REFERENCE TO WHAT THE FAMILY TESTIFIED TO. I THINK COUNSEL'S REFERENCE WAS -- DID NOT SPECIFICALLY GO OVER WHAT INFORMATION CAME OUT FROM THE FAMILY MEMBERS IN THE PSYCHIATRIC TESTING, AS THOSE ISSUES WENT TO MITIGATION. ESSENTIALLY WHAT DEFENSE COUNSEL DID IN CLOSING ARGUMENT WAS BASICALLY THROW HIMSELF ON THE MERCY OF THE JURY. AND LIKE I SAID, HE DIDN'T CONTEST ANY OF THE AGGRAVATORS AND SPECIFICALLY WHAT IS IMPORTANT FOR THE ISSUE THAT I WANT TO TALK ABOUT IS THAT HE DID NOT ADDRESS OR ATTACK, AT ALL, THE HAC AGGRAVATOR THAT THE STATE ASSERTED. THE JURY RETURNED A VERDICT, I AM SORRY, RETURNED A RECOMMENDATION OF 10-2, AND THEN SEVERAL MONTHS LATER, WHEN THE SPENCER HEARING WAS HELD, DEFENSE COUNSEL PRESENTED TWO EXPERTS TO TRY AND CONVINCE THE COURT TO IMPOSE A LIFE SENTENCE. FIRST OF ALL, COUNSEL PRESENTED THE TESTIMONY OF DR. MARKET, WHO WAS A CLINICAL PSYCHOLOGIST, WHO HAD DONE AN EVALUATION OF MR. GILL RAM AND HAD -- GILLIAM AND INTERVIEWED MR. SFWIL GIL A.M. AND INTERVIEWED -- MR. GILLIAM AND INTERVIEWED FAMILY MEMBERS. AND DR. MARK KET TESTIFIED THAT, BASED UPON THE SEVERITY AND THE TRAUMA OF MR. GILLIAM'S CHILDHOOD, THAT THESE THINGS AFFECTED, PSYCHOLOGICALLY, MR. GILLIAM, AND AFFECTED THE WAY THAT HE VIEWED HIS LIFE AND HIS OUTLOOK ON LIFE. AGAIN, NONE OF THAT WAS PRESENTED TO THE JURY AT THE PENALTY PHASE.

WOULDN'T THAT HAVE BEEN RATHER INCONSISTENT WITH HIS DEFENSE THAT HE INITIALLY PUT FORTH OR HIS STATEMENT, HIS INITIAL STATEMENT, THAT HE ACCIDENTALLY DROWNED HER?

THAT TESTIMONY?

AS FAR AS MITIGATION, WELL, ESSENTIALLY IT MIGHT HAVE BEEN, BUT THE DEFENSE AT TRIAL WAS NOT THAT IT WAS AN ACCIDENT. THE DEFENSE AT TRIAL WAS THAT MR MR. GILLIAM WAS SUFFERING AN EPILEPTIC SEIZURE, AND IN FACT MR. GILLIAM PRESENTED EXPERT TESTIMONY TO SUPPORT THAT DEFENSE.

THERE WAS TESTIMONY FROM THE STATE THAT REFUTED THAT.

THAT'S CORRECT. IT WAS A HOTLY-CONTESTED ISSUE. THERE IS NO DOUBT. THE STATE HAD THEIR EXPERTS CONSIDERING THAT, BUT MR. GILLIAM HAD THE TESTIMONY OF DR. STILLMAN, WHO DID, IN FACT, TESTIFY THAT, IN HIS OPINION, MR MR. GILLIAM WAS SUFFERING A PSYCHO MOTOR SEIZURE, THAT PREVENTED HIM FROM BASICALLY, IT IS MY UNDERSTANDING OF -- IT IS MY UNDERSTANDING -- IT IS NOT UNDERSTANDING THE EVENTS.

WHY WOULDN'T THIS DEFENSE TO BE TO WAIVE A JURY ENTIRELY, SINCE THERE ARE STATEMENTS OUT THERE THAT HOLD POLICY BEHIND THE SCHEME OF THE JURY AND THEN THE JUDGE'S PARTICIPATION IS BECAUSE THE JUDGE IS SUPPOSED TO BE A CHECK ON, PERHAPS, THE EMOTIONAL REACTION OF THE JURY. THAT NOT HAVING A JURY AT ALL AND JUST GOING TO THE JUDGE WOULD BE MORE PROFESSIONAL OR OBJECT I HAVE OR ABLE TO HANDLE THE TERRIBLE CIRCUMSTANCESANT EMOTIONAL -- AND THE -- CIRCUMSTANCES AND THE EMOTIONAL IMPACT THAT THEY HAVE, AND WHY WOULDN'T, UNDER THE TESTIMONY OF THE LAWYER HERE, WE ALLOW THAT TO HAPPEN, RIGHT? THAT IS WE ALLOW JURIES TO BE WAIVED AT THE PENALTY PHASE, AND FOR THE CASE TO BE PRESENTED JUST TO THE JUDGE ALONE. WHY ISN'T THIS ANALOGOUS TO THAT? BECAUSE OF THE CIRCUMSTANCES?

WELL, FIRST OF ALL, MR. GILLIAM DIDN'T WAIVE PRESENTING PENALTY-PHASE EVIDENCE BEFORE A JURY. AND IT IS OUR CONTENTION THAT DEFENSE COUNSEL PERFORMANCE, NOT PRESENTING ANY OF THIS AVAILABLE EVIDENCE, MOST SIGNIFICANTLY DR. MARQUETTE, AND DR. REEVES ADDRESSED THEM TO CHALLENGE THE STATE'S HAC AGGRAVATOR, IT IS OUR CONTENTION THAT HAVING THAT EVIDENCE AVAILABLE AND CHOOSING A COURSE OF ACTION AND THOUGHT PRESENTING IT TO THE PENALTY PHASE JURY SIMPLY WAS NOT A REASONABLE STRATEGY. IN THE CONTEXT, ESPECIALLY, OF THIS CASE.

BUT IT WAS A STRATEGY, AND THIS IS DIFFERENT FROM A LOT OF OTHER CASES, WHERE THE DEFENSE LAWYER HAS NO MITIGATION AVAILABLE, AND THEN YEARS LATER, YOU FIND, WELL, THEY SHOULD HAVE BEEN ABLE TO PUT ON THIS. HERE IS SOMEONE WE KNOW MADE A DECISION. NOW YOU ARE SAYING THE WRONG DECISION, BUT WASN'T THERE SOME PROBLEM WITH HIS TESTIMONY, BECAUSE THERE WAS CROSS-EXAMINATION ABOUT THE ABUSE THAT THE DEFENDANT HAD VISITED ON HIS SON AND ON HIS EX-WIFE, AND SO THAT THAT WOULD BE A REASON NOT TO PRESENT IT TO THE JURY?

WELL, I DISAGREE THAT JUST PRESENTING, HAD DEFENSE COUNSEL PRESENTED THE TESTIMONY OF DR. MARKET TO THE JURY -- DR. MARQUETTE TO THE JURY, FIRST OF ALL, AND SECOND OF ALL, THAT WAS NOT THE REASON FOR PRESENTING THE EVIDENCE THAT HE HAD. THE ONLY REASON THAT HE ARTICULATED FOR NOT PRESENTING THAT EVIDENCE WAS ESSENTIALLY BECAUSE THE TRIAL JUDGE WAS THE FINAL ARE A BIT OR OF WHAT -- ARBITOR OF WHAT SENTENCE TO IMPOSE. OF COURSE I AM NOT CONCEDING THAT THIS WAS A STRATEGY. I PROBABLY SHOULDN'T HAVE USED THAT WORD. I MEAN, YES, IT WAS A COURSE OF ACTION THE DEFENSE COUNSEL TOOK. IT IS OUR CONTENTION THAT IT WAS NOT A REASONABLE COURSE OF ACTION, AND THAT IT CONSTITUTED DEFICIENT PERFORMANCE, AND THIS IS ESPECIALLY TRUE, IN THE CONTEXT OF DR. REEVES' TESTIMONY THAT COUNSEL PRESENTED AT THE SPENCER HEARING. NOW, THE STATE, AT THE GUILT PHASE, PRESENTED THE TESTIMONY OF THE MEDICAL EXAMINER, WHO TESTIFIED THAT THE VICTIM DID NOT HAVE A BRAIN INJURY AND DID NOT HAVE A TISSUE

INJURY, AND DURING CLOSING ARGUMENTS AT THE GUILT PHASE, THE PROSECUTOR MADE IT A POINT TO TELL THE JURY THAT ANY SUGGESTION THAT THE VICTIM WAS UNCONSCIOUS IS ABSOLUTELY NOT SUPPORTED BY THE EVIDENCE. THE PROSECUTOR BASICALLY SAID THAT IT WAS NOT POSSIBLE THAT THE VEHICLE -- THAT THE VICTIM COULD HAVE BEEN UNCONSCIOUS DURING THE TIME THAT THE INJURIES WERE INFLICTED, SO THAT WAS WHAT THE STATE PRESENTED AT THE GUILT PHASE AND THAT THE PROSECUTOR HAMMERED ON THAT POINT OR TALKED ABOUT IT AND MADE A FEATURE OF IT DURING HIS OR HER CLOSING ARGUMENT. SO NOW HERE WE ARE AT THE PENALTY PHASE, AND COUNSEL, DEFENSE COUNSEL, HAS THIS TESTIMONY FROM DR. REEVES IN HIS POCKET, SO TO SPEAK. DR. REEVES TESTIFIED OR COULD HAVE TESTIFIED, AS HE DID LATER IN THE SPENCER HEARING, THAT IN HIS EXPERT OPINION, IN FACT, THE VICTIM DID SUFFER A SEVERE HEAD INJURY, AND THAT THEREFORE, IT IS POSSIBLE THAT SHE WAS UNCONSCIOUS AT THE TIME THAT THE INJURIES WERE INFLICTED. SO IT IS OUR POSITION THAT THERE WAS NO REASONABLE STRATEGY FOR DEFENSE COUNSEL NOT TO PRESENT DR. REEVES TO THE PENALTY PHASE JURY, IN LIGHT OF THE FACT THAT THE STATE HAMMERED HOME, IN THE GUILT PHASE CLOSING, THAT IT WAS NOT POSSIBLE THAT THE VICTIM WAS UNCONSCIOUS DURING THE TIME OF THE INJURIES INFLICTED.

BUT THE STATE PUT ON EVIDENCE ACCORDING TO THE BITE MARK, THAT IF THE BITE MARKS INDICATE ON THE BREAST INDICATE THAT THE VICTIM WAS CONSCIOUS AT THE TIME. THERE WAS TESTIMONY FROM SOMEBODY ELSE THAT HEARD HER SCREAMING IN THE AREA, SO THERE SO IS IT CONCEIVABLE THAT DEFENSE COUNSEL DIDN'T WANT TO GO THROUGH THE GRUESOMENESS OF THIS AT THE TIME BEFORE THE JURY AND THEN TO HAVE THE STATE COME RIGHT BACK BEHIND THEM AND SAY, WELL, IT IS A QUESTION, BECAUSE THE STATE, WE HAVE GOT EXPERT TESTIMONY TO SAY THAT SHE WAS CONSCIOUS, BECAUSE OF THE BITE MARKS AND BECAUSE OF THIS WIT THEY SAY THAT HEARD ALL OF THE SCREAMING DURING THIS TIME. ISN'T IT CONCEIVABLE THAT THAT WAS THE STRATEGY, NOT TO HAVE IT RUN BEFORE THE JURY AGAIN?

AGAIN, YOUR HONOR, THAT WAS NOT THE TESTIMONY OF DEFENSE COUNSEL AT TRIAL. THAT WAS NOT A STRATEGY OR THAT WAS NOT WHAT DEFENSE COUNSEL WAS THINKING. THAT DID NOT COME IN TO HIS DECISION. HE WAS VERY CLEAR, AT THE EVIDENTIARY HEARING, THE ONLY REASON HE DIDN'T PRESENT THIS EVIDENCE WAS BECAUSE THE TRIAL COURT WAS THE FINAL ARE A BIT OR AND -- WAS THE FINAL ARBITOR, AND HE HAD ALL OF THIS EVIDENCE AND HE HAD TO PRESENT IT TO SOMEONE.

COULD YOU EXPLAIN WHAT THE REASONS WERE THAT HE DIDN'T FEEL THE JURY WAS GOING TO BUY THIS EVIDENCE AND MAKE A LIFE RECOMMENDATION, SO HE WAS SAVING IT FOR A PRESENTATION TO THAT HE THOUGHT WOULD BE MORE RECEPTIVE?

THAT WAS IT, YOUR HONOR. A PRESENTATION THAT HE THOUGHT WOULD NOT BE ACCEPTED, BUT HE EMPIZED THAT THE -- EMPHASIZED THAT THE JUDGE WAS THE FINAL ARBITER, AND IN VIEW OF THE LIGHT OF HIS ENTIRE TESTIMONY, WHAT DEFENSE COUNSEL BASICALLY DID WAS GIVE UP WHAT IS ANESENTIAL PART OF THE -- AN ESSENTIAL PART OF THE FLORIDA SENTENCING SCHEME. THAT IS THAT THE JURY IS THE COSENTENCER. THE JURY MAKES, WEIGHS THE AGGRAVATORS AND MITIGATORS AND THE TRIAL JUDGE THEN MAKES A DETERMINATION AND REWEIGHS IT INTO THE MIX, BECAUSE DEFENSE COUNSEL BASICALLY DID AWAY AND WAIVED THAT PORTION OF THE SENTENCING EQUATION THAT MR. GILLIAM'S SENTENCING PROCEEDINGS WERE NOT FAIR AND THAT HE DESERVES A NEW SENTENCING.

SO YOU ARE FAMILIAR WITH MOHAMMED.

YES, I AM, YOUR HONOR.

DEFENSE COUNSEL CHOSE NOT TO PUT ON ANY EVIDENCE. IS A TETTER OVERRIDE INVOLVED HERE? DID DEFENSE COUNSEL AVOID HAVING TO OVERCOME A TETTER OVERRIDE, WHEN HE

TOOK THE CASE BEFORE THE JUDGE? WAS HE PUT INTO A MORE FAVORABLE POSITION, BECAUSE NOTHING CAME IN, SO THERE WAS --

I AM SORRY. I AM NOT UNDERSTANDING THE QUESTION, YOUR HONOR.

SINCE NO EVIDENCE WAS PUT ON IN MITIGATION, THEN IT DOES NOT COME AS A PURE TETTER CASE, WHERE THE JURY HAS CONSIDERED MITIGATING AND AGGRAVATING EVIDENCE, SO DOES THE JUDGE, IN HIS EVALUATION, HAVE TO GIVE IT THE TETTER PRESUMPTION, OR IS THE JUDGE FREE TO JUST GO AHEAD AND DO WHATEVER HE CHOOSES TO DO SINCE NO MITIGATING EVIDENCE WAS PUT ON?

WELL, I THINK UNDER TETTER, HE IS REQUIRED TO GIVE THE JURY JURY'S RECOMMENDATION GREAT WEIGHT. AND THAT IS THE POINT HERE, IS THAT THE DEFENSE COUNSEL APPARENTLY DID NOT UNDERSTAND THAT CONCEPT OR MISCONSTRUED IT, BY ESSENTIALLY THINKING THAT THE JURY'S RECOMMENDATION REALLY WAS NOT SIGNIFICANT, AND THAT HE COULD PUT ALL HIS EGG IN HIS THE BASKET IN FRONT OF THE TRIAL COURT. I SEE I AM IN MY REBUTTAL TIME. I WILL SAVE THE REST OF MY TIME FOR REBUTTAL. MR. CHIEF JUSTICE: THANK YOU.

GOOD MORNING. MAY IT PLEASE THE COURT. LISA RODRIGUEZ ON BEHALF OF THE ATTORNEY GENERAL'S OFFICE.

WOULD YOU EXPLAIN TO ME WHAT WENT ON IN THE TRIAL COURT THAT GAVE THE DEFENSE ATTORNEY THE IMPRESSION THAT PRESENTING THIS MITIGATION TO THE JURY, THAT THE JURY WOULD NOT BE RECEPTIVE TO THIS MITIGATION AND WOULD NOT RETURN A LIFE SENTENCE.

DEFENSE COUNSEL SPECIFICALLY ADDRESSED THIS ISSUE, BOTH AT THE SPENCER HEARING AND AT THE EVIDENTIARY HEARING. HE TESTIFIED THAT IT WAS A LONG AND EXHAUSTIVE TRIAL, THAT HE HAD A PALPABLE SENSE FROM THE JURY THAT THEY WERE NOT RECEPTIVE, THEY WOULD NOT BE RECEPTIVE ON --

PALPABLE ACCEPTS BASED ON WHAT? -- PALPABLE SENSE, BASED ON WHAT?

BASED ON THE SUBSTANTIAL EVIDENCE OF HAC, WHICH HAS ALREADY BEEN ADDRESSED BEFORE, BUT THERE WERE NUMEROUS INJURIES TO HER ARMS AND SHINS. SHE WAS AND ALLY AND VAGNATURALLY ASSAULTED. IN THE WORDS OF THE MEDICAL EXAMINER, SHE WAS LITERALLY TORN APART AND BITTEN SEVERAL TIMES. ONE OF HER LIMBS WAS SEVERED AND STRANGULATION WAS THE CAUSE OF DEATH. WE KNOW THAT THE STRANGULATION WAS THE LAST THING TO OCCUR, BECAUSE SHE DIED. SHE WAS UNCONSCIOUS WHEN SHE WAS STRANGLED AND SHE DIED, IT DOESN'T MAKE SENSE THAT SHE WAS UNCONSCIOUS WHEN THE OTHER INJURIES WERE INFLICTED UPON HER AND THIS COURT SPECIFICALLY REJECTED DR. REEVES'S TESTIMONY THAT THE STATE FAILED TO PROVE THAT SHE WAS CONSCIOUS WHEN THE INJURIES WERE INFLICTED UPON HER. THE LOWER COURT SPECIFICALLY REJECTED DR. REEVES'S TESTIMONY, FINDING THAT THE STATE PRESENTED SUBSTANTIAL EVIDENCE THAT THE VICTIM WAS CON SHUINGS, IN CON JUST WITH THE TEST -- CONSCIOUS, IN CONJUNCTION WITH THE TESTIMONY OF THE SCREAMS HEARD, AND THERE WAS OTHER SUBSTANTIAL EVIDENCE TO SUPPORT THAT SHE WAS CONSCIOUS ON HAC, AND THIS COURT ON DIRECT APPEAL, HAD THE FINDING OF HEINOUS, ATROCIOUS AND CRUEL AND SPECIFICALLY REJECTED THE DEFENSE CONTENTION THAT THE STATE WAS NOT ABLE TO PROVE THAT.

IF THE DEFENSE LAWYER GOT A SENSE FROM THE JURY THAT THEY WOULD NOT BE RECEPTIVE TO HEAR ANYTHING OF A MITIGATING NATURE, AND THAT THE AGGRAVATORS WERE A FOREGONE CONCLUSION, WHY WOULD YOU NOT, THEN, WAIVE A JURY'S RECOMMENDATION AND GO STRAIGHT TO THE JUDGE, SINCE HIS DECISION WAS THE JUDGE WOULD BE RECEPTIVE TO IT? ISN'T THERE -- IF YOU ARE ASSUMING THAT THE JURY IS A LOST CAUSE, WHICH IS WHAT IT SOUNDS LIKE THIS DEFENSE LAWYER FELT, THEN HOW CAN IT BE REASONABLE TO PROCEED WITH THE

JURY PART OF THE SENTENCING SCHEME?

WHEN YOU READ THE TRANSCRIPT AT DEFENSE COUNSEL'S CLOSING ARGUMENT, HE RELYIES AND HE EFFECTIVELY CONVATION -- CON -- CONVEYS THE THEME OF HE WILL SPEND HIS LIFE IN PRISON AND WON'T EVEN BE ELIGIBLE FOR PAROLE UNTIL HE IS 6 A. HE DIDN'T GIVE THAT -- UNTIL HE IS 65. HE DIDN'T GIVE THAT UP. HE ESSENTIALLY TOOK AWAY FROM THE JURY THE PIECE THEME THAT THE LIFE SENTENCE, AND HE CONVEYED THAT THEME OF EVIDENCE THAT REALLY DIDN'T MAKE SENSE DURING THE GUILT PHASE. THE DEFENDANT NOW COMPLAINS THAT THE JURY ESSENTIALLY DIDN'T HEAR THE PENALTY PHASE, THAT HE HAD A POOR CHILDHOOD, THAT HE HAD AN ALCOHOL PROBLEM. THAT HE WAS ABUSED AS A CHILD, AND THIS HAS DR. REEVES'S TESTIMONY THAT NOBODY REALLY KNOWS WHAT HAPPENED EXCEPT THE VICTIM AND THE DEFENDANT, WHO WERE PRESENT, BUT IF YOU BREAKDOWN EACH OF THOSE INDIVIDUALLY, THE DEFENSE COUNSEL PRESENTED TO THE JURY, DURING THE GUILT PHASE, THE TESTIMONY OF HIS SISTERS, HIS MOTHER, FRIENDS AND OTHER LAY WITNESSES, THAT THE DEFENDANT SUFFERED FROM A VERY POOR AND ABUSIVE CHILDHOOD.

THE JURY WOULDN'T KNOW HOW TO USE THAT FOR THE PENALTY PHASE, UNLESS THE DEFENSE LAWYER THEN EXPLAINED THAT THAT IS THE KIND OF MITIGATION THAT THEY SHOULD CONSIDER AND REVIEW, IT THEN, IN THE CLOSING ARGUMENT. I GUESS THAT IS WHY, IF THAT WERE THE STRATEGY, WELL, THEY HEARD IT ALREADY. THEY DON'T NEED TO HEAR IT AGAIN THEN YOU WOULD AT LEAST ARGUE IT TO THE JURY, SO THEY WOULD UNDERSTAND HOW THAT TESTIMONY THAT THEY HEARD IN THE GUILT PHASE WOULD BE RELEVANT FOR THE PENALTY PHASE.

WELL, THE STATE WOULD SUBMIT, AND I THINK THAT, ASAP LEE, OR AS -- AS APPELLEE, OR AS DEFENDANT CONCEDES, IT THAT THE DEFENSE COUNSEL DID ARGUE IN CLOSING TO CONSIDER ALL OF THE TESTIMONY THAT YOU HAVE HEARD. HE DID REFERENCE THE TESTIMONY THAT YOU HEARD FROM DEFENDANT STANLEY. HE DID DIRECT THE ATTENTION TO THAT. HE DID DIRECT THE ATTENTION TO THE OVERALL PICTURE OF DEFENDANT'S LIFE.

WHAT MITIGATING INSTRUCTIONS WERE GIVEN?

OKAY. THEY HAD -- THERE WAS -- THEY WERE INSTRUCTED ON STATUTORY AND NONSTATUTORY. IT WAS I BELIEVE IT WAS THE STANDARD INSTRUCTION AND THAT THE JURY MAY CONSIDER ALL EVIDENCE THAT THEY HAVE HEARD AND CONSIDER AS MITIGATION.

BUT I GUESS I AM ASKING YOU WAS THERE ANYTHING SPECIFIC IN THE PENALTY PHASE INSTRUCTIONS THAT SAID YOU CAN CONSIDER EMOTIONAL DISTURBANCE, FAILURE TO CONFORM MISCONDUCT. THAT YOU CAN CONSIDER HIS POOR CHILDHOOD. THAT YOU CAN CONSIDER WHATEVER THOSE THINGS ARE THAT WERE PRESENTED DURING THE GUILT PHASE.

I KNOW THAT THE INSTRUCTIONS SAID THAT THE JURY MAY CONSIDER ANY EVIDENCE THAT THEY HEARD.

ANY ASPECT OF HIS CHARACTER?

YES. BUT I WOULD HAVE TO -- I WOULD HAVE TO GO BACK AND LOOK AT THE RECORD, TO REMEMBER EXACTLY WHETHER IT ENUMERATED WHETHER THEY CAN CONSIDER HIS POOR AND ABUSIVE BACKGROUND. I KNOW THAT IT SAID THAT THEY CAN CONSIDER ANYTHING THAT THEY HEARD AS MITIGATION.

IF YOU COULD ADDRESS THE FACT THAT THE JUDGE, IN THIS EVIDENTIARY HEARING, HAD AN EVIDENTIARY HEARING AS TO WHY THE DEFENSE COUNSEL DID NOT PRESENT THE TESTIMONY THAT HE PRESENTED TO THE JUDGE, TO THE JURY, BUT DID NOT ALLOW THE PRESENTATION OF THE OTHER EVIDENCE THAT WAS PROFFERED, AS TO WHETHER THAT, ALSO, WAS THE TYPE OF

EVIDENCE THAT SHOULD HAVE BEEN PRESENTED. SO THERE WAS NO EVIDENTIARY HEARING ON THAT, AND, ALSO, ON THE DEFENSE LAWYER STATING, IN OPENING STATEMENTS, ABOUT THE PRIOR RAPE, THAT, THEN, OPENED THE DOOR TO THESE, ALSO, THERE WAS NO EVIDENTIARY HEARING ON WHY IN THE WORLD A LAWYER IN OPENING STATEMENT, IF YOU ARE NOT SURE IT IS GOING TO COME IN, WOULD TALK ABOUT A PRIOR RAPE THAT, AND SAY IT WAS CONSENTUAL, WHEN THE RECORD WAS CLEAR IT WASN'T CONSENTUAL. WHY DON'T WE NEED AN EVIDENTIARY HEARING, TO STRAIGHTEN THOSE THINGS OUT AND UNDERSTAND WHETHER THOSE WERE STRATEGY OR FURTHER REFLECT ON WHETHER THIS LAWYER REALLY, JUST, SORT OF GAVE UP ON HIS CLIENT, BEFORE HE EVEN STARTED.

ADDRESSING YOUR HONOR'S FIRST QUESTION, DR. 'SSTEINENBERG, THE PSYCHIATRIST AND PSYCHOLOGIST, THERE WAS NO --

WOULD YOU SPEAK INTO THE MIKE.

SORRY. THE EVIDENCE ADDITIONAL TO THAT WHICH THE JUDGE HEARD THROUGH THE TESTIMONY OF DR. MARQUETTE AND DR. STILLMAN, AND DR. STILLMAN, I WOULD REMIND THE COURT, DID TESTIFY DURING THE GUILT PHASE, SO THE JURY DID HAVE THE BENEFIT OF POTENTIAL MENTAL MITIGATION FROM DR. STILLMAN, WHEN HE ADVISED THE JURY THAT THE DEFENDANT WAS UNABLE TO DISCERN RIGHT FROM WRONG AND UNABLE TO UNDERSTAND THE CONSEQUENCES OF HIS ACTIONS. THE DOCTORS' TESTIMONY WERE MERELY CUMULATIVE TO THE TESTIMONY THAT HAD ALREADY BEEN PRESENTED TO THE JURY, AND FROM DR. STILLMAN'S TESTIMONY, AND TO THE JUDGE, IN THE FORM OF DR. MARQUETTE'S TESTIMONY, DURING THE SENTENCING HEARING. AGAIN, HE HAD A POOR UPBRINGING, ABUSED BY AN ALCOHOLIC FATHER AND STEPFATHER. HE HAD A SUBSTANCE ABUSE PROBLEM. HAD HE AN ADDICTION PROBLEM. THIS TESTIMONY WAS PUT FORTH.

NORMALLY, WHEN WE CONSIDER AN EVIDENTIARY CONTEXT, THE JUDGE HAD MADE THE DECISION, BASED ON THE QUALITY OF THEIR TESTIMONY, AS TO WHETHER, IN FACT, IT WAS CUMULATIVE, BUT I UNDERSTAND THAT DR. STILLMAN WAS ESSENTIALLY IMPEACHED ON HIS BACKGROUND BEING FAIRLY INADEQUATE, SO I DON'T UNDERSTAND HOW CAN WE, ON A COLD RECORD, JUST SIMPLY SAY, WELL, THERE MUST HAVE BEEN CUMULATIVE, AND THAT IS WHY THE JUDGE DIDN'T HAVE AN EVIDENCIARY HEARING TO EVALUATE THAT TESTIMONY?

FROM THE PROFESSOR, YOU CAN TELL WHAT THE -- FROM THE PROFFER, YOU CAN TELL WHAT THE DEFENDANT'S'S TESTIMONY WHAT THEY WOULD BE ABLE TO SAY, AND WHAT THEY WOULD BE ABLE TO SAY IS ESSENTIALLY THE TESTIMONY OF DR. STILLMAN AND DR. MARQUETTE. WHAT THEY ARE CLAIMING ON POSTCONVICTION WAS NOT PRESENTED THAT HE WAS PREJUDICED BY, SO THE STATEMENT THAT, AS THE LOWER COURT PROPERLY FOUND, DEFENSE COUNSEL'S REPRESENTATION WAS NOT DEFICIENT. HE MADE A REASONABLE JUDGMENT, BUT EVEN PUTING THAT ASIDE, THERE WAS NO PREJUDICE DIRESPECT -- PREJUDICE, BECAUSE THE EVIDENCE THAT WAS PRESENTED WAS CUMULATIVE, WITH REGARD TO THE EVIDENCE HEARD AT TRIAL. WITH REGARD TO THE SECOND ISSUE, OPENING THE DOOR TO THE PRIOR RAPE, THE PRIOR RAPE WAS GOING TO BE ADMITTED AS AN AUTOMATIC AGGRAVATING FACTOR, I MEAN AS A PRIOR VIOLENT FELONY.

WAS THIS NOT IN HIS GUILT PHASE? WAS THIS IN THE OPEN SOMETHING.

OPENING STATEMENT?

HE DID THE PENALTY PHASE OR THE GUILT PHASE?

HE MENTIONED DURING THE OPENING OF THE PENALTY PHASE, THE PRIOR RAPE, BECAUSE IT SERVED AS THE REASON FOR HIS EPILEPSY, WHICH WAS THE FOUNDATION OF HIS DEFENSE OF INSANITY.

IT WAS IN THE OPENING STATEMENT BEFORE THE -- OF THE GUILT PHASE OR THE PENALTY PHASE?

BUILT PHASE. I DO BELIEVE DEFENSE COUNSEL REFERENCED THE PRIOR RAPE AND, IN THE OPENING OF HIS GUILT PHASE, I MEAN PENALTY -- GUILT PHASE.

THOUGH IT MIGHT BE AN AGGRAVATOR IN THE PENALTY PHASE, WHY WOULD YOU PUT IT IN IN THE GUILT PHASE? DEFENSE LAWYER PUT IT IN.

TWO REASONS. HE IS GOING TO HAVE TO EXPLAIN THAT HE ACCRUED THIS EPILEPTIC CONDITION THROUGH HIS PRIOR INCARCERATION FOR RAPE. TO PROVIDE THE CONTEXT OF BEING INCARCERATED, HE GOT AN INJURY FROM AN INMATE GUARD WHILE IN PRISON.

IT WOULD HAVE TO COME OUT WHILE HE WAS INCARCERATEED?

IT WOULDN'T NECESSARILY. HOWEVER, IT IS GOING TO COME IN AS AN AGGRAVATOR, ANYWAY, AND DEFENSE COUNSEL CAN SOFTEN THE IMPACT OF THAT PRIOR RAPE, BY ADDRESSING IT IN THE CONTEXT OF IT BEING CONSENTUAL. IT WASN'T FORCIBLE RAPE. IT WAS MERELY CONSENTUAL RAPE BETWEEN A 14-YEAR-OLD AND THE DEFENDANT, WHO WAS 21 AT THE TIME, SO HE GAINED THE SOFTENING IMPACT OF THAT RAPE.

I AM ASKING YOU NOW HOW CAN WE DETERMINE THIS, WITHOUT AN EVIDENTIARY HEARING? TO ME, IT SOUNDS THAT IF I HEARD THAT A DEFENSE LAWYER WAS GOING TO PUT IN A PRIOR VIOLENT FELONY THAT THERE IS EVIDENCE, ALREADY, OF YOU SAYING IT IS CONSENTUAL, AND THAT IT IS ACTUALLY DEVASTATING RAPE, TERRIBLE RAPE, I WOULD BE SAYING WHY IN THE WORLD WOULD HE DO IT? NOW YOU ARE GIVING ME POSSIBLE REASONS. THE PROBLEM IS THIS LAWYER, WHO WAS THERE TO TESTIFY AT THE PENALTY PHASE, BECAUSE THE JUDGE DID NOT GIVE AN EVIDENTIARY HEARING ON THE GUILT PHASE, WE DON'T KNOW WHY HE DID THAT. WE ARE SUPPOSING WHY HE MIGHT HAVE DONE IT.

OKAY. SUPPOSING THAT WE CAN'T DEFINITELY DETERMINE YEAH OR -- DETERMINE THAT IT IS A DEFICIENT PROBLEM. WHY IT IS. WE CAN'T DEMONSTRATE THIS. THE FACT IS THAT THIS PRIOR RAPE WOULD HAVE PROPERLY COME IN AS EVIDENCE.

WAS THERE THE CASE, AS THIS CASE BEGAN, A PROFFER OF THE WILLIAMS RULE EVIDENCE?

WE WEREN'TABLE TO GET IN TOUCH WITH WITNESSES. THE PROSECUTOR WASN'TABLE TO GET AHOLD OF THIS WITNESS BEFORE TRIAL AND THE FACTS OF THAT ISSUE, BUT IT COULD HAVE BEEN WILLIAMS' RULE EVIDENCE.

I THOUGHT THE STATE WAS PUTTING IT IN AS REBUTTAL.

IT WAS PUT IN AS REBUTTAL, TO REBUT HIS INSANITY DEFENSE AND TO IMPEACH, BUT THEN, ALSO, IT WAS CONSENTUAL SEX. THE STATE IMPEACHED THE DEFENDANT'S TESTIMONY THAT IT WAS CONSENTUAL SEX WITH THE TESTIMONY OF THE DETECTIVE WHO INTERVIEWED THE VICTIM AND DETERMINED THAT IT WAS FORCIBLE, BUT DEFENDANT CANNOT DEMONSTRATE PREJUDICE, BECAUSE IT WOULD HAVE BEEN PROPERLY ADMISSIBLE AS WILLIAMS RULE EVIDENCE, AND DEFENSE COUNSEL DID GAIN SOMETHING, BY PRESENTING IT. HE DID MANAGE TO LESSEN THE IMPACT OF THE RAPE, WHICH WOULD HAVE EVENTUALLY COME IN, BY PRESENTING IT AS CONVENT SENTULE SEX, RATHER THAN -- AS CONSENSUAL SEX, RATHER THAN THAT IT WAS FORCIBLE SEX, WHICH WAS THE REALITY, AND FURTHERMORE I DON'T THINK THAT DEFENSE COUNSEL CAN BE REDEEMED. IT WAS HIS CLIENT WHO TOOK THE STATEMENT AND LINED. COUNSEL CANNOT BE DEFICIENT FOR PRESENTING IT IN OPENING STATEMENT. THEY HEARD IT IN OPENING. THEY WEREN'T GOING TO DO ANYTHING WITH IT, BUT WHEN THE DEFENDANT TOOK

THE STAND AND TESTIFIED THAT IT WAS CONSENTUAL SEX, THAT IS WHEN THEY LOCATED DETECTIVE MERIT AND PRESENTED THE TESTIMONY OF DETECTIVE MERIT TO REBUT THAT, SO THE DEFENDANT IS THE ONE THAT OPENED THE DOOR BY LYING, AND HIS COUNSEL CAN'T BE PUNISHED FOR DEFENDANT'S LIES AND DECEPTION ON THE STAND. SO THE STATE WOULD SUBMIT THAT NOT ONLY CAN HE NOT PROVE DEFICIENT, HIS DEFENSE COUNSEL DEFICIENT, BUT HE CAN'T PROVE THAT HE SUFFERED ANY PREJUDICE, BECAUSE THE RAPE WOULD HAVE COME IN. IT WAS PROPERLY ADMISSIBLE AS WILLIAMS RULE EVIDENCE, AND PRESENTING IT IN THE MANNER HE DID, HE -- DEFENSE COUNSEL MANAGED TO SOFTEN THE IMPACT OF IT. SO UNLESS THIS COURT HAS ANY OTHER QUESTIONS, THE STATE WILL REST ON ITS BRIEF AND ASK THIS COURT TO RESPECTFULLY --

ARE THERE REALLY POINTS OF SIMILARITY TO GET THE PRIOR RAPE IN AS A WILLIAMS RULE?

YES, JUSTICE SHAW.

THE RAPE INTO EVIDENCE?

YES, JUSTICE SHAW. THE DEFENDANT, AS THIS IF THIS CASE, IN THE -- AS IN THIS CASE, AS IN THE PRIOR RAPE CASE, HE ABDUCTED THE VICTIM AND TOOK HER TO AN ABANDONED FIELD. HE SEXUALLY BATTERED HER. THERE WERE BRUISES AND INJURIES FROM PHYSICAL STRUGGLE, AND HE STRANGLED HER AND ABANDONED THE VICTIM AND LEFT HER FOR DEAD IN THE FIELD, AS OCCURRED IN THIS CASE. SO THERE WERE STRIKINGLY SIMILAR CIRCUMSTANCES TO GET IT IN AS PROPER WILLIAMS RULE EVIDENCE, AND THEN IN THE REPLY BRIEF, DEFENDANT CONTENDS THAT IT WOULDN'T BE PROPER WILLIAMS RULE EVIDENCE, NAMELY BECAUSE THE SAME DEFENSE WAS NOT PUT FORWARD IN BOTH THE CASE, IN THE WILLIAMS RULE CASE AND IN OUR CASE. WILLIAMS RULE IS NOT LIMIT TO DO THAT. THIS IS CLEARLY PROPER WILLIAMS RULE EVIDENCE, BECAUSE IT GOES TO HIS MODE OF APPREHEND EYE, HOW HE RAPED BOTH -- OF OPERANDI HOW HE RAPED BOTH VICTIMS.

IT SEEMS TO ME THAT YOU GET BACK TO THE WHOLE IDEA OF HOW COUNSEL WAS INEFFECTIVE FOR BRINGING THIS UP AND EVEN TALKING ABOUT IT BEING A CONSENTUAL RAPE, WHEN YOU -- I MEAN A CONSENTUAL SEXUAL ENCOUNTER, IF YOU ARE TALKING ABOUT ALL THE SIMILARITIES BETWEEN THAT EVENT AND THIS MURDER AND THE RAPE THAT ACCOMPANIED THIS MURDER.

WELL, AGAIN, TO THE EXTENT THAT DEFENDANT OPENED THE DOOR BY TESTIFYING AND LYING ON THE STAND, I DON'T THINK HIS COUNSEL CAN BE DEFICIENT.

YOU SAID THAT COUNSEL STARTED OUT, IN HIS OPENING STATEMENT AT THE GUILT PHASE, TALKING ABOUT THIS BEING A CONSENTUAL SEXUAL ENCOUNTER.

BASED UPON DEFENDANT'S TELLING OF THE STORY. BUT SETTING ASIDE DEFICIENCY, HE CANNOT MEET THE PREJUDICE PRONG, BECAUSE THE EVIDENCE WOULD PROPERLY BE ADMITTED AS WILLIAMS RULE.

WAS THERE ANY NOTICE OF INTENT TO USE WILLIAMS RULE EVIDENCE? I DON'T THINK THAT THE CASE HAD PROGRESSED TO THAT POINT, HAD IT IT? THE STATE NEVER FILED A WILLIAMS RULE NOTICE, DID THEY?

NO, BUT THAT WOULD BE INEFFECTIVE ASSISTANCE OF THE -- NO. IT HADN'T, BUT THE FACT IS THAT IT PROPERLY WOULD HAVE BEEN ADMISSIBLE AS WILLIAMS RULE EVIDENCE.

BUT WASN'T THIS REALLY DONE OUT OF IGNORANCE? HE DID NOT -- COUNSEL DID NOT, EVEN THOUGH HE WAS IN THE STATE WHERE THIS FIRST RAPE TOOK PLACE THERE WAS NO CHECKING OF THAT. HE TOOK HIS CLIENT'S WORD THAT IT WAS STATUTORY RAPE AND WENT WITH THAT, DIDN'T HE? WASN'T THAT HOW IT CAME OUT? AND THEN COUNSEL TRIED TO SAY, WELL, I WILL,

THE STATE IS GOING TO PUT IT IN. THE STATE IS GOING TO GET IT IN AS WILLIAMS RULE, SO I WILL PUT IT IN AND LESSEN IT, BUT HE WAS WRONG, BECAUSE HE HADN'T CHECKED CHECKED. ISN'T THAT HOW, REALLY WHAT HAPPENED HERE?

WELL, THE STATE --

IF HE WOULD HAVE CHECKED, HE WOULD HAVE KNOWN IT WAS NOT A STATUTORY RAPE.

RELYING ON WHAT HIS CLIENT TOLD HIM, ALSO THE RECORD CLEARLY DEMONSTRATES THAT THERE WERE NO WITNESSES LISTED BY THE STATE TO REBUT, AT THAT POINT, WHETHER THE RAPE WAS CONSENTUAL OR NOT, SO DEFENSE COUNSEL HAD NO REASON TO BELIEVE THAT THE STATE WOULD BE ABLE TO REBUT THE CONTENTION THAT THE RAPE WAS CONSENTUAL.

I THOUGHT THE INFORMATION WAS RIGHT IN THE STATE'S FILE THAT IT WAS A VIOLENT RAPE.

IT WAS A FORCIBLE RAPE. HOWEVER, THE STATE HAD NOT LISTED ANY WITNESSES THAT WOULD BE ABLE TO REBUT THE DEFENDANT'S CONTENTION.

YOU AGREE THE STATE NEVER, EVER, IN ITS RECORD, IN THE TRIAL, TRIED TO GET THIS INFORMATION, THIS EVIDENCE IN AS WILLIAMS RULE EVIDENCE?

YES.

WE ARE NOW SUPPOSED TO, THIS MANY YEARS AFTER, SUPPOSE, EVEN THOUGH THERE HAS BEEN NO EVIDENTIARY HEARING, THAT THIS DEFENSE LAWYER THOUGHT MAYBE THEY ARE GOING TO GET THIS IN AS WILLIAMS RULE EVIDENCE. I AM GOING TO PUT FORTH AN OPENING STATEMENT AND TELL THIS JURY SOMETHING THAT I KNOW IS, YOU KNOW, A LIE, BUT I JUST WANT TO SOFTEN THE IMPACT, SO THE JURY -- I MEAN IT SEEMS TO ME IT WOULD MAKE THE JURY EVEN ANGRIER AT WHAT WAS GOING ON, TO HAVE THE DEFENSE LAWYER LOSE ALL CREDIBILITY, BY GIVING THIS IN OPENING STATEMENT.

DEFENSE COUNSEL DID KNOW THE RAPE WAS GOING TO COME IN AS AN AGGRAVATOR. HE HAD KNOWN SINCE THE FIRST TRIAL THAT THIS PRIOR RAPE WAS USED AS --

SO THERE AGAIN IT WAS LESS EXCUSEABLE, SINCE THIS WAS A RETRIAL, AND ALL YOU HAVE TO DO IS LOOK AT THE RECORD OF THE PRIOR TRIAL, TO KNOW WHAT KIND OF RAPE THIS WAS.

HOWEVER, FROM DEFENSE COUNSEL'S POSITION, THERE WERE NO WITNESSES AVAILABLE, FROM THE STATE'S SIDE, TO PROVIDE --

WOULD THE OFFICER'S REPORT HAVE SHOWN HOW IT HAPPENED?

YES, BUT THERE --

IF HE HAD LOOKED THAT UP.

BUT THE STATE ONLY MANAGED TO GET IN CONTACT WITH ONE OF THE DETECTIVES WHO HAD KNOWLEDGE OF THAT PRIOR RAPE, IN THE MIDDLE OF THE TRIAL. THERE WAS NO INDICATION THAT ANYBODY FROM THE PRIOR RAPE WAS GOING TO BE ABLE TO TESTIFY, TO SHED ANY LIGHT ON WHAT HAPPENED, WITH REGARD TO THAT FIRST RAPE. SO WHEN DEFENSE COUNSEL MADE A JUDGMENT TO EXPLAIN, TO SOFTEN THE IMPACT OF THE FIRST RAPE, BUT PUTTING IT INTO THE CONTEXT OF IT WAS CONSENTUAL SEX, HE HAD NO WAY OF KNOWING THAT THE STATE WOULD BE ABLE TO PROVIDE WITNESSES LATER THAT WOULD BE ABLE TO REBUT THAT CONTENTION.

THANK, COUNSEL. YOUR TIME IS UP.

THE STATE BELOW ADMITTED THAT DEFENSE COUNSEL KNEW OR SHOULD HAVE KNOWN ABOUT THE FACTS OF THIS PRIOR RAPE, AND THERE WAS A HEARING, DEFENSE COUNSEL RAISED THE ISSUE THAT ALL OF THESE FACTS ABOUT THE PRIOR RAPE WERE DISCOVERY VIOLATIONS. DURING THE HEARING ON THE DISCOVERY VOILINGS VIOLATIONS, THE -- VIOLATIONS, THE PROSECUTOR WENT THROUGH THE REASONS WHY DEFENSE COUNSEL EITHER DID KNOW THAT -- OF THESE FACTS OF THE PRIOR RAPE OR AT LEAST SHOULD HAVE KNOWN, FOR THE REASONS THAT I THINK JUSTICE SHAW NOTED THAT DEFENSE COUNSEL DID GO TO TEXAS, AND PROSECUTORS SAID THAT INFORMATION WAS EASILY AVAILABLE. WITH RESPECT TO MY FINAL POINT IS THAT THE STATE'S ARGUMENT NOW AS TO WHY COUNSEL WAS NOT EFFECTIVE, THESE ARE THE THINGS THAT REALLY AREN'T IN EVIDENCE. WE HAVEN'T HAD AN EVIDENTIARY HEARING. WE DON'T KNOW WHAT MR. GILLIAM TOLD HIS COUNSEL. WE DON'T KNOW WHAT COUNSEL KNEW OR SHOULD HAVE KNOWN. THAT IS WHY WE NEED AN EVIDENTIARY HEARING.

ON THAT, ON THE PREJUDICE PRONG, THOUGH, WE HAVE GOT A SITUATION WHERE HE IS NOT DENYING THAT THIS MURDER, THAT HE MURDERED THIS VICTIM. THESE CIRCUMSTANCES ARE PARTICULARLY GRUESOME AND AGGRAVATING, AND HOW CAN YOU REALLY ESTABLISH THE PREJUDICE PRONG?

BECAUSE THE CRUX OF MR. GILLIAM'S DEFENSE WAS HIS EPILEPSY AND HIS EPILEPSY CONDITION. IN ORDER TO CONVINCE THE JURY OF THAT DEFENSE, THE JURY HAD TO, REALLY, BELIEVE THAT MR. GILLIAM WAS CREDIBLE, BECAUSE HE TESTIFIED, AND HE TESTIFIED THAT HE WAS DRINKING AT THE BAR, AND THAT AFTER HE LEFT WITH THE VICTIM, HE DIDN'T REMEMBER WHAT HAPPENED. THAT WAS A CRUCIAL PART OF HIS DEFENSE, BECAUSE DR. STILLMAN TESTIFIED THAT WHAT HAD HAPPENED WAS, DURING THIS EPILEPTIC EPISODE, MR. GILLIAM WOULD NOT REMEMBER WHAT HAPPENED. MR. GILLIAM TESTIFIED I DON'T REMEMBER WHAT HAPPENED. SO THIS EVIDENCE THAT COUNSEL HANDED TO THE STATE ON A SILVER PLATTER JUST TOTALLY TORPEDOED MR. GILLIAM'S CREDIBILITY, AND THEREFORE HIS DEFENSE WAS SHOT.

GO AHEAD.

CHIEF, GO AHEAD.

WELL, IF YOU WENT BACK AND GOT A NEW TRIAL ON THE GUILT PHASE, THERE WOULD, IN FACT, THIS EVIDENCE WOULD COME IN, THE WILLIAMS RULE EVIDENCE, CORRECT?

I AM NOT CONCEDING THAT POINT.

I MEAN THAT IS THE PROBABILITY.

RIGHT. BUT I DON'T THINK THAT ESTABLISHES THAT THERE IS NO PREJUDICE, BECAUSE THE PREJUDICE IS THIS, THAT -- I LOST MY TRAIN OF THOUGHT. HAD COUNSEL NOT BEEN DEFICIENT AND HAD COUNSEL NOT BROUGHT THIS ON, MR. GILLIAM, BY HIS MISTAKE, THE STATE WOULD HAVE NEVER GONE OUT TO TEXAS AND GOT DETECTIVE POE. THE ONLY REASON THEY DID THAT WAS, AND I CITE TO IT, I BELIEVE IN MY BRIEF, THE RECORD PART, WHERE THE STATE BASICALLY SAYS THE ONLY REASON THAT I DID THAT WAS TO REBUT MR. GILLIAM'S STATEMENT THAT THE PRIOR RAPE WAS A STATUTORY RAPE. THEY WEREN'T GOING TO PRESENT IT AS A WILLIAMS RULE.

BUT AS I UNDERSTAND IT, THE DEFENSE HERE WAS THAT, WELL, THIS MAY HAVE OCCURRED, BUT BECAUSE OF THE BEATING THAT I SUSTAINED IN THE PRISON, THAT I HIM SUBJECT TO SEIZURES, AND THAT IS MY DEFENSE, BUT EVERYBODY KNEW, AS I READ THIS, THAT THIS PRIOR EVENT HAD OCCURRED, SO HE KNEW HE WAS GOING TO HAVE TO DEAL WITH IT, BECAUSE HE WAS NOT SUBJECT TO THE SEAS YOUR OF -- TO THE SEAS YOUR DISORDER BACK WHEN -- TO THE SEIZURE DISORDER BACK WHETHER THESE EVENTS OCCURRED. AM I MISSING SOMETHING HERE? IT SEEMS AS THOUGH THAT IT WAS NECESSARY TO ADDRESS IT IN SOME WAY BY THE DEFENSE, WAS IT NOT?

AS COUNSEL STATED, THE STATE HAD NOT LISTED ANY WITNESSES, APPARENTLY, ALTHOUGH WE REALLY DON'T KNOW, BECAUSE YOU HAVEN'T HAD AN EVIDENTIARY HEARING, BUT ACCORDING TO COUNSEL REPRESENTATION, THERE WERE NO STATE WITNESSES LISTED THAT WOULD HAVE INDICATED THAT THEY COULD TESTIFY TO THOSE FACTS, SO DEFENSE COUNSEL, YOU KNOW, HAD NO -- THERE WAS NO STRATEGIC REASON FOR DEFENSE COUNSEL TO PRESENT AND HAVE MR. GILLIAM TESTIFY THAT THIS WAS A STATUTORY RAPE. AND I JUST -- WITHOUT EVIDENTIARY HEARING, THERE WAS -- THERE IS JUST NO WAY TO DECIDE THE ISSUES.

THANK YOU, COUNSEL. YOUR TIME IS UP.

THANK YOU.