IN THE SUPREME COURT OF FLORIDA

CASE NO. SC95370

BURLEY GILLIAM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Gilliam's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"PC-R" -- record on instant 3.850 appeal to this Court;

"PC-SR" -- supplemental record on instant 3.850 appeal to this Court;

"PC-SR2" -- separately bound transcripts of supplemental record on instant 3.850 appeal to this Court.

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ARGUMENT II

DEFENSE COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE WHEN COUNSEL FAILED TO PRESENT CERTAIN MITIGATION EVIDENCE AND EVIDENCE CHALLENGING THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE THAT COUNSEL LATER PRESENTED AT THE SENTENCING HEARING.

Family Testimony

Appellee first argues that defense counsel was not ineffective for failing to present to the jury the testimony of family members and Dr. Marquit that counsel subsequently presented to the court because this evidence, according to Appellee, was cumulative to the testimony of witnesses presented during the guilt-innocence phase. Specifically, Appellee cites to testimony of family members presented during the guilt-innocence phase of the trial that Mr. Gilliam was physically abused as a child by his alcoholic father and by his stepfather, that as a child he missed school frequently due to stomach aches and headaches, and that he suffered seizures. Appellee takes the position that, in light of such testimony, Dr. Marquit's testimony would have been cumulative and, therefore, defense counsel was not ineffective for not calling Dr. Marquit during the penalty phase (R. Answer Brief at 22-5). Contrary to Appellee's claim, Dr. Marquit's testimony was not cumulative to the guilt-innocence phase testimony of the family members. Moreover, as Appellee does not dispute, the evidence of Mr. Gilliam's good character and his positive impact on the lives of others was never presented to the jury.

A meaningful review of Dr. Marquit's testimony reveals that

this evidence was far from being merely cumulative to the guilt-innocence phase testimony of the family members. Dr. Marquit testified that he was a clinical psychologist with fifty (50) years of experience (R. 2841). He performed a psychological evaluation of Mr. Gilliam which included a battery of psychological tests (R. 2842-3). As part of this evaluation, Dr. Marquit interviewed Mr. Gilliam, interviewed relatives and family members, and reviewed reports of previous psychological evaluations of Mr. Gilliam conducted by three other doctors (R. 2843-5).

Dr. Marquit testified to the following significant facts concerning Burley Gilliam's life: Burley was abused by his father who was an alcoholic (R. 2846); his mother was a "nervous-type" of person who could not control her children and was out of the house for long periods of time (R. 2846); as a result of his mother's inability to act as a parent, Burley, the oldest child, was forced to take care of the rest of the children, a responsibility for which he was not prepared to handle (R. 2847, 2855); when something went wrong involving the other children, Burley was punished (R. 2847, 2855); he had very little parental nurturing (R. 2847); he was a "very sickly child" who suffered a myriad of health problems (R. 2848); he had a learning disability (2848-9); his learning disability was neglected by his mother because she provided nothing in terms of parenting other than physical necessities (R. 2849); in addition to his father, his mother also was an alcoholic (R. 2849); he was beaten

"considerably" by his step-father (R. 2850); he is not sadistic (R. 2860-1); and he does not hold a grudge against his mother or father for the fact that they were not good parents (R. 2860).

Based on Dr. Marquit's clinical evaluation of Burley Gilliam, Dr. Marquit concluded that Burley is a very direct, cooperative, and simple person who is not sophisticated (R. 2850-1). He is friendly, relates to, and is sympathetic towards, people (R. 2851). Dr. Marquit further concluded that Burley was raised without any guidance and, as a result, does not understand "the whole civilized process" (R. 2852). Put another way, Dr. Marquit concluded:

> Throughout his whole life I feel that [Burley] did not get the benefit of what normal children do in getting parental direction in ways to guide him, to live better, to do things that would be better for him; that you go through details that you learn in life and which you are able to serve you (sic) better and to continue and to enhance your lifestyle.
>
> There was no one, it seems to me, who was available to help him, to give him an appreciation of schooling, and to give him an appreciation of the benefits of education, and who would be able to direct him towards a career or anything like that.

(R. 2854). Dr. Marquit concluded that, had Burley been provided adequate guidance as a child, he would have been more behaved and responsible (R. 2856). He did not have any guiding influence that would have taught him to engage in healthy behavior (R. 2856-7).

Dr. Marquit also gave his expert opinion on the nature of Burley's personality and current outlook on life. Dr. Marquit noted how Burley's outlook had changed since being on death row

"with regard to doing things for other people, to try to help them, and to do things that are healthy" (R. 2856-7). Dr. Marquit provided insight into positive aspects of Mr. Gilliam's personality by revealing that Burley reported that he was deeply in love with his wife and, because of her, Burley had changed (R. 2856). Dr. Marquit also testified that Burley was very close to his son, who he regarded as the "apple of his eye" (R. 2857) and that Burley reported that he sent almost all the money he earned as a truck driver back home to provide for him (R. 2857). In Dr. Marquit's expert opinion, Burley is a very sensitive person who empathizes with people and thus is not a fighter (R. 2856-7). He likes music, books, cars, chess, reading, swimming, working, driving a truck, and his family (R. 2959). He identifies with the downtrodden and dislikes prejudice (R. 2959).

Dr. Marquit concluded his testimony as follows:

> In my report I put it this way:
> "Burley Gilliam is a man who never had a chance for a decent life.
> "He is of an unimpressive statute (sic), and his weaknesses are health, and he is a product of a broken family, continually being exposed to people of alcoholic abuse, and cruelty; he had a significant lack of civilized experiences, a victim of an early learning disability.
> "He has had many strikes against him from the start and to his early development.
> "With a life of no encouragement, lacking in basis, he could not withstand his abilities to achieve normal achievement.
> "As a result, Burley Gilliam has felt an inferior complex all of his life."
> Now, I feel that this individual raised in a different environment, with a nurturing environment, with a decent opportunity, as I stated previously, from my own viewpoint, the fact this man has never had a chance--here we

> are striving to do something else to him again, and to me, to my way of thinking, what are we going to do, hit him again? [P]ush him down further?
>
> . . . .
>
> . . . my feeling in this case is that somewhere along the line he could not get what he needed to be a good member of society.

(R. 2864-5).

The jury, by a 10 to 2 vote, recommended that Mr. Gilliam be put to death without the benefit of Dr. Marquit's expert analysis and opinion. While Dr. Marquit certainly echoed and repeated some of the significant facts of childhood abuse that were testified to by the family during the guilt-innocence phase of the trial, it cannot be credibly argued that his testimony was merely cumulative of the family-member testimony. The family members simply testified to certain facts of Mr. Gilliam's childhood. On the other hand, Dr. Marquit, a clinical psychologist with fifty years of experience provided expert opinion as to Mr. Gilliam's psychological characteristics and personality and the effect his traumatic childhood had on his psychological development. Moreover, as illustrated above, Dr. Marquit provided facts that were not presented to the jury, including facts related to Mr. Gilliam's current positive psychological perspective and personality. While the family member testimony certainly substantiated Dr. Marquit's expert analysis, and corroborated Mr. Gilliam's own reports to Dr. Marquit, a proper reading of the record reveals that Appellee's argument that Dr. Marquit's expert

psychological testimony was merely cumulative is not persuasive. In terms of establishing mitigation, the family-member testimony presented at the guilt-innocence phase is not cumulative, in terms of both quality and quantity, to Dr. Marquit's expert testimony.[1] Dr. Marquit's testimony was made even more critical due to the fact that Dr. Stillman, the defense expert who testified concerning Mr. Gilliam's seizure disorder, gave uniformed and totally incorrect testimony that Mr. Gilliam had an "unremarkable" childhood (R. 1977).

Appellee next argues that defense counsel's admitted failure to present to the jury the evidence of Mr. Gilliam's good character, including his positive influence on his family, was a reasonable strategic decision because, had defense counsel presented this evidence to the jury, the prosecutor could have asked the family members if they were aware of the allegations of alleged domestic violence (Answer Brief at 25-6).

Appellee's argument is belied by the record of the evidentiary hearing. Defense counsel never testified that he did not present this evidence to the jury because he feared he would open the door to the domestic violence issue. Defense counsel

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[1]It should be noted that defense counsel made absolutely no mention of Burley's abusive childhood during the penalty phase closing argument but for counsel's cryptic remark, "[M]uch of what we want to present to you was presented to you through the testimony of some of Burley's family members, who testified earlier" (R. 2690). Defense counsel never argued to the jury that Burley's horrible childhood of severe physical abuse should be considered as a mitigating circumstance. And, as discussed, supra, the jury did not have the benefit of Dr. Marquit's expert opinion and analysis of Burley's mental state.

unequivocally testified that the reason he did not present this evidence to the jury was because the court makes the final sentencing decision and he did not believe it likely that the jury would recommend a life sentence (R. 69-71). Appellee on appeal now postulates an alternative theory of a possible strategic reason for defense counsel not to present this evidence. Appellee's theory has no evidentiary support and is not a proper basis to affirm the lower court's ruling.

Even if Appellee is correct that this evidence would have allowed the prosecutor to ask the family members about alleged domestic violence, contrary to Appellee's suggestion, and as the record of the evidentiary hearing establishes, this was not a concern defense counsel had in deciding not to present the evidence to the jury. It therefore cannot be grounds to conclude that defense counsel's failure to present this evidence was within the realm of sound trial strategy.

While defense counsel presented limited mitigation testimony during the guilt-innocence phase, this case is similar to Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995), where the Court found prejudice despite a unanimous death recommendation and that "Hildwin's trial counsel did present some evidence in mitigation at sentencing" that was "quite limited." Id. at 110 n.7. This Court has often found prejudice despite the presentation of limited mitigation. See e.g. State v. Lira, 581 So. 2d 1288 (Fla. 1991)(affirming lower court's grant of penalty phase relief when the evidence presented by defendant at evidentiary hearing was

"quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase").

Dr. Reeves

With respect to Dr. Reeves, Appellee argues that, in light of Burrough's testimony that he heard a woman screaming and Dr. Rao's testimony regarding the nature of the victim's injuries, there is no reasonable probability that, had defense counsel called Dr. Reeves to testify before the jury during the penalty phase, the jury's recommended sentence would have been different (Answer Brief at 27). Pointing to the findings of both the trial court and this Court's decision on direct appeal relating to the trial court's finding of the HAC aggravator, Appellee argues that Mr. Gilliam "cannot establish a reasonable probability that the jury would have" recommended a life sentence (Answer Brief 29-30).

The jury never learned of Dr. Reeves' opinion that, based on his review of the forensic evidence, the victim suffered head trauma (R. 2792, 2794-5, 2798-2801), that she could have been rendered unconscious as a result of the infliction of that trauma (R. 2804-7), and that there was no way to determine if the victim was conscious when she sustained the injuries to her genitalia (R. 2825-6)

The only evidence presented on this matter to the jury was Dr. Rao's testimony that there was no injury to the victim's brain or surrounding tissue and that the injuries were inflicted while she was alive. Dr. Reeves's opinion that the victim indeed

suffered head trauma conflicted with Dr. Rao's. Yet, the jury was not made privy to Dr. Reeves's testimony.

Appellee's argument that there is no reasonable probability that the jury would have recommended a life sentence had defense counsel presented Dr. Reeves' testimony to the jury should be rejected. While agreeing it was an "interesting theory", the prosecutor emphasized to the jury that "there is the total absence of any evidence to suggest that" the victim was unconscious at the time the other injuries were inflicted (R. 2679-80)(emphasis added). In fact, defense counsel had such evidence to present to the jury, but failed to do so. Had defense counsel presented to the jury Dr. Reeves' expert opinion that the victim suffered head trauma that could have rendered her unconscious (which contradicted Dr. Rao's testimony) and that it was possible that the victim was rendered unconscious before the other injuries were inflicted, the jury would have had a reasonable basis to reject he HAC aggravator.

That the trial court concluded otherwise even after having the benefit of Dr. Reeves' testimony, along with this Court's affirmance of the trial court on direct appeal, is not determinative of this issue. The jury is a co-sentencer and the trial court must give the jury's recommendation "great weight" See Espinosa v. Florida, 505 U.S. 1079, 1082 (1992); Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Certainly the jury may have been persuaded by Dr. Reeves' testimony. Because the jury's recommendation that Mr. Gilliam be executed was rendered without

the benefit of this significant evidence, the ultimate sentence imposed by the trial court, which necessarily placed "great weight" on the jury's recommendation, resulted from a break down of the sentencing scheme. Cf. Muhammad v. State, 2001 WL 40365 (Fla. Jan. 18, 2001)(jury's ability to meaningfully fulfill its statutory role in sentencing hindered when jury heard no evidence in mitigation even though mitigation evidence was available).

The fact the Burroughs heard screaming lends no support to Appellee's argument. Appellee can point to no evidence indicating at what point during the attack the screaming occurred. Because the victim screamed at some unknown point in time relative to her death does not even circumstantially suggest that she was conscious at the time the injuries were inflicted. Appellee's argument that the fact that the victim screamed "certainly provides evidence that she suffered" (Answer Brief at 27) is without merit. Nor does it follow that she screamed as a result of physical pain or suffering. It is not unreasonable that the victim may have screamed before she was attacked, or, at least, before the serious injuries were inflicted.

Appellee's reliance on "Dr. Rao's extensive testimony regarding the graphic and horrific nature of the victim's injuries" (Answer Brief at 27) ignores the question at issue. The issue is not the nature and extent of the injuries. The issue is whether or not the victim was conscious at the time the injuries were inflicted. Dr. Rao's testimony regarding the severity of the injuries does not address this point.

Appellee further points to the lower court's finding giving Dr. Reeves's testimony "very little weight" and argues that "the lack of credibility and import of Dr. Reeves' testimony directly bears on the determination of whether defense counsel's conduct was deficient in not presenting such testimony to the jury". (Answer Brief at 28). Again, such theoretical argument is not supported by the record. Defense counsel never testified that the reason he did not call Dr. Reeves' to testify before the sentencing jury was any perceived lack of credibility or import of Dr. Reeves' testimony. As the transcript of the evidentiary hearing clearly shows, defense counsel did not present any evidence to the sentencing jury simply because he thought it would be futile to do so and for no other reason (R. 69-71). Appellee's suggestion that defense counsel decided not to present this evidence to the jury because defense counsel feared the jury would find Dr. Reeves incredible or not persuasive is unsupported by the record.

Appellee's argument that defense counsel was not deficient is premised on the incorrect notion that the testimony of both Dr. Marquit and Dr. Reeves was cumulative. (Answer Brief at 31-2). Because this evidence was not cumulative, Appellee's argument should be rejected. Had defense counsel presented this compelling evidence, there is a reasonable probability that the outcome would have been different.

ARGUMENT III

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT DEFENSE COUNSEL FAILED TO INVESTIGATE AND PRESENT ADDITIONAL MITIGATION EVIDENCE.

Appellee argues that defense counsel presented at trial all the evidence Mr. Gilliam asserts in rule 3.850 motion that defense counsel failed to present and, therefore, any evidence not presented would have been cumulative. However, a thorough reading of the record reveals that Mr. Gilliam has alleged significant and substantial additional evidence that defense counsel failed to investigate, discover, and present which was not cumulative of the evidence presented at trial. Thus, this claim is not conclusively refuted by the record and Mr. Gilliam is entitled to an evidentiary hearing.

As a preliminary matter, Appellee does not even attempt to defend the lower court's reason for summarily denying this claim. The lower court denied Mr. Gilliam an evidentiary hearing on this claim because the court incorrectly believed that Mr. Gilliam was seeking relief based on "present" mitigation and did not allege that the mitigation evidence defense counsel failed to discover and present was available at the time of the proceedings (PC-SR 365-6). Appellee does not argue that the lower court's reason for denying Mr. Gilliam an evidentiary hearing was not erroneous.

Substance Abuse/Addiction

While certainly there was testimony at trial concerning Mr. Gilliam's drug and alcohol use, for the purpose of establishing meaningful mitigation, the evidence presented cannot be compared

in either quality or quantity to the proffered testimony of Dr. Burglass, an expert in addiction. Mr. Gilliam asserts in his proffer that Dr. Burglass would have testified that he is a psychiatrist with "extensive educational and practical experience in the field of psychiatry and addictive medicine" and that he is a member of the Clinical and Research Faculty at the Zinberg Center for Addiction Studies (PC-SR 379)(emphasis added). As an expert in "addiction medicine" (PC-SR 379), he would have also testified that, at the time of his arrest in 1982, Mr. Gilliam was dependent - as that term is defined by the American Society of Addiction Medicine, the American Psychiatric Association, Alcoholics Anonymous, and Narcotics Anonymous - on speed, cocaine, alcohol and marijuana (PC-SR 379). He also would have testified in detail that Mr. Gilliam had an extensive history of drug and alcohol abuse which started in his teens and increased in intensity until his arrest in 1982 (PC-SR 380). The minimal testimony cited by Appellee, while suggesting substance use and abuse, pales in comparison to Dr. Burglass' proffered testimony, especially considering Dr. Burglass' experience in the field of addiction. See State v. Lira, 581 So. 2d 1288 (Fla. 1991)(affirming lower court's grant of penalty phase relief when the evidence presented by defendant at evidentiary hearing was "quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase").

Dr. Stillman, who testified at trial regarding Mr. Gilliam's seizure disorder, in fact refuted the notion that Mr. Gilliam was

an alcoholic within a year-and-a-half leading up to the date of the offense. Dr. Stillman testified that Mr. Gilliam had not been "a drinker" for the last three years prior to October, 1993. (R. 1970, 1974). This three-year period of not drinking would have encompassed approximately a period of a year-and-a-half prior to and including the date of the offense. This is simply incorrect and conflicts with Dr. Burglass' proffer that Mr. Gilliam was drinking and using drugs up until the time of the offense.

Appellee also points to what Appellee describes as Mr. Gilliam's trial testimony regarding "his use of medication and drugs" (Answer Brief at 34)(emphasis added). While Mr. Gilliam did indeed testify that he had taken 400 milligrams of Dilantin and 320 milligrams of Phenobarbital on the day of the incident (R. 1926), this was prescribed medication for his seizure disorder (R. 1928). He at no time testified that he either took drugs, other than his prescribed medication, or was addicted to drugs, as Appellee attempts to imply.

Organic Brain Damage

Appellee points to Dr. Stillman's testimony that Mr. Gilliam "suffers from some organic change in his brain with scarring which has led him to have epileptic seizures of most (sic) important kind" (R. 2001-2)(emphasis added) to support its argument that testimony from Dr. Eisenstein that Mr. Gilliam indeed suffers from "organic brain damage" would have been cumulative. Appellee's argument should be rejected. Dr. Stillman's was an expert in psychiatry (R. 1969-70) and based his

opinion exclusively upon Mr. Gilliam's reported history (R. 1970-1986). On the other hand, the proffer of Dr. Eisenstein indicates he is an expert in neuro-psychology (PC-SR 378-80) who has concluded that Mr. Gilliam is brain damaged based on neuropsychological testing (PC-SR 378-80). Dr. Stillman conducted no actual tests and did not profess to be an expert in neurology. The substantive quality of the proffered evidence of Dr. Eisenstein that Mr. Gilliam suffers organic brain damage renders such evidence far from cumulative to the evidence presented at trial. Additionally, Dr. Eisenstein's testimony would have rebutted the testimony of Dr. Dinkla, one of Appellee's experts, who suggested that, based on his examination of Mr. Gilliam, Mr. Gilliam did not suffer from brain damage (R. 2256).

Psychological and Emotional Problems

Appellee argues that the jury "in fact" heard evidence that Mr. Gilliam suffered from "psychological problems" (Answer Brief at 35). Appellee makes this statement in order to attempt to argue that Dr. Eisenstein's testimony that Mr. Gilliam suffered "a host" of emotional and psychological problems (PC-SR 378-9) would have been cumulative to the evidence presented at trial. Appellee's argument is not supported by the record. There was absolutely no testimony or evidence presented to the jury even remotely suggesting that Mr. Gilliam suffered emotional and psychological problems. (While Dr. Marquit's testimony to an extent addressed these issues, defense counsel failed to call him to testify in front of the jury. See Argument II.) Appellee's

argument that Dr. Eisenstein's proffered testimony on this issue would have been cumulative to the evidence presented at trial is baseless and should be rejected.

Childhood Abuse/Poverty

Appellee argues that defense counsel presented "all such evidence" that Mr. Gilliam was beaten as a child. For the same rationale set forth under Argument II, supra, Appellee's contention lacks merit. While there was evidence presented to the jury at trial of the child abuse Mr. Gilliam suffered, the jury was not privy to any expert testimony regarding the relationship between this abuse and Mr. Gilliam's mental condition both prior to and at the time of the offense. Like Dr. Marquit's testimony (which the jury never heard), the proffer of Dr. Eisenstein's testimony indicates that he would have linked this horrible physical abuse to causing emotional and psychological problems which, in conjunction with the organic brain damage, placed Mr. Gilliam under the influence of an extreme mental or emotional disturbance and substantially impaired his capacity to appreciate the criminality of his conduct or confirm his conduct to the requirements of law (PC-SR 378-80). Dr. Eisenstein's testimony was made even more critical due to the fact that, as previously pointed out, Dr. Stillman incorrectly stated that Mr. Gilliam had an unremarkable childhood (R. 1977). Moreover, in addition to the beatings, Dr. Eisenstein would have also found significant that Mr. Gilliam as a child was abandoned and poverty stricken "to the point of starvation" (PC-SR 378-80). No such evidence was

presented at trial to the jury.

While Dr. Stillman did in fact testify that, in his opinion, Mr. Gilliam was not capable of telling the difference between right and wrong at the time of the crime and did not know the nature and the consequences of his actions (R. 2002), this was based on Dr. Stillman's conclusion that Mr. Gilliam was suffering from a psychomotor epileptic occurrence at the time of the offense. On the other hand, according to the proffer, Dr. Eisenstein concluded that Mr. Gilliam at the time of the crime was under the influence of extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired as a result of Mr. Gilliam's emotional and psychological problems and his organic brain damage. This is significantly different than Dr. Stillman's opinion. Dr. Stillman never suggested that Mr. Gilliam suffered any type of emotional or psychological problems. Nor did any other witness who testified before the jury. Thus, Dr. Eisenstein's opinion is not, as Appellee argues, cumulative of Dr. Stillman's. Certainly Mr. Gilliam should have been permitted to present this evidence at the evidentiary hearing. Because the record does not conclusively refute this claim, the lower court should have granted an evidentiary hearing.

ARGUMENT IV

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR OPENING THE DOOR TO ALLEGED FACTUAL CIRCUMSTANCES OF PRIOR RAPE CONVICTION.

Appellee first argues that the lower court properly denied this claim without a hearing because Detective Poe's testimony, according to Appellee, would have been admissible to rebut Mr. Gilliam's defense that he was suffering a psychomotor epileptic seizure before, during, and after the offense. This argument fails because Detective Poe's testimony would not have been admissible for this reason.

As preliminary matter, Appellee falsely suggests that Detective Poe's testimony in fact was admitted for the purpose of rebutting Mr. Gilliam's defense of insanity. This is simply not true. Appellee argues, "Moreover, Defendant cannot demonstrate that there exists a reasonable probability that the verdict would have been different had Detective Poe's testimony not been admitted **to rebut Defendant's claim of insanity**" (Answer Brief at 39)(emphasis added). As discussed infra, the record establishes that the only purpose for admitting Detective Poe's testimony was to impeach Mr. Gilliam's testimony that the 1969 Texas conviction was the result of consensual sex with the victim. Appellee incorrectly argues otherwise.

Contrary to Appellee's suggestion, Detective Poe's testimony would not have been admissible to rebut Mr. Gilliam's defense in the instant case. This is because Mr. Gilliam never asserted that

the incident giving rise to the 1969 Texas conviction was the result of him suffering a seizure. Only if Mr. Gilliam had asserted the same defense of a seizure disorder to explain the 1969 conviction could the prosecution have properly used Detective Poe's testimony to rebut his defense in the instant case. Both cases relied upon by Appellee, Williams v. State, 110 So. 2d 654 (Fla.) cert. denied, 361 U.S. 847 (1959) and Jackson v. State, 538 So. 2d 533 (Fla. 5th DCA 1989), involved defendants who asserted the same defense for both the prior crime and the allegation for which the defendant was being tried. See Williams(in both instances, defense was that defendant had crawled into victim's car in order to sleep based on mistaken belief that it was his brother's car); Jackson(in both instances, the defense was that the defendant paid money to victims in exchange for consensual sex). It is the fact that the defendants asserted the same defense in each case that made the facts of the prior case relevant and admissible.

Mr. Gilliam did not assert that the 1969 conviction was the result of his seizure disorder. Therefore, the facts alleged in that case would not have been properly admissible under the Williams doctrine to rebut his defense that he was suffering a seizure disorder around the time of the offense.

At Mr. Gilliam's trial, Appellee never even suggested that the lower court admit Detective Poe's testimony in order to rebut Mr. Gilliam's defense. The record establishes that the lower court did not admit the evidence for that reason. The lower court

permitted extensive argument on the issue of whether or not the prosecution could properly present Detective Poe's testimony (R. 2385-2419). Appellee sought to introduce the evidence based upon a single theory of admissibility: to impeach Mr. Gilliam's testimony that the 1969 incident involved nothing but consensual sex. Appellee explained at the hearing, "Only after [Mr. Gilliam testified that the 1969 conviction was based on consensual sex] was the door opened to allow the admission of evidence to what actually happened in Texas" (R. 2394)(emphasis added). Appellee at trial argued that the "trigger" for admissibility of this evidence was any evidence put on by Mr. Gilliam suggesting that the 1969 conviction arose out of consensual sex between Mr. Gilliam an the victim (R. 2399). Appellee did not even seek out this evidence until defense counsel in opening statement stated that the 1969 conviction was for "statutory" rape (R. 2395). The record contradicts Appellee's incorrect assertion that the lower court admitted Detective Poe's testimony on the grounds that it rebutted Mr. Gilliam's defense.

Appellee next argues that, even if this evidence was not admissible to rebut Mr. Gilliam's insanity defense, defense counsel's decision to elicit the testimony at issue "was reasonable because that is what the Defendant had told him" and "[c]ounsel's performance cannot be deficient when it is based on information provided by his client. . . ." (Answer Brief at 39). Appellee's argument not only has no basis in fact in the record, but also illustrates exactly why the lower court erred by not

granting Mr. Gilliam a hearing on this issue.

Nothing in the record indicates what, if anything, Mr. Gilliam told defense counsel about the 1969 conviction. The lower court summarily denied the claim, foreclosing any inquiry into the substance of any attorney-client discussions on the matter. At trial, the lower court specifically, and properly, avoided the substance of any attorney-client discussion (R. 2413). Appellee provides no citation to the record indicating defense counsel based his performance on what Mr. Gilliam told him. Appellee's argument is not substantiated by the record and therefore should be rejected.

The record is devoid of important information required to properly decide Mr. Gilliam's claim. Most significant is the fact that, on this record, it is not known (a) whether or not defense counsel knew of the factual allegations that the 1969 conviction was the result of a violent rape; (b) what Mr. Gilliam told defense counsel concerning the facts surrounding 1969 conviction; (c) what defense counsel did, or could have done, to investigate the facts surrounding the prior conviction; (d) what information surrounding the prior conviction Appellee made available to the defense (i.e. what information defense counsel <u>should</u> have known about). These are important questions that must be answered in order to make a proper ruling on the claim. Only through an evidentiary hearing can these questions be answered.

Considering the present record, there is a strong indication that defense counsel was ineffective. At trial, Appellee argued

that defense counsel "knew that there was evidence to dispute" that the 1969 conviction was based upon consensual sex (R. 2402) and that a document detailing the factual allegation of a violent rape "has not only been in the custody of the State but in the custody of the Defense since the early stages of the first trial" (R. 2403). In his defense, defense counsel argued at trial that he "personally" did not receive the report until that day and that "nothing in the record . . . indicates that any Defense counsel or the defendant received a copy of [the] report until today" (R. 2404-5). Obviously, these are factual disputes that need to be presented at the trial level before this claim can be properly resolved. The lower court should have held an evidentiary hearing.

In a related argument, Appellee contends that defense counsel was not deficient because, at the time defense counsel elicited the testimony that the 1969 conviction was the result of consensual sex, there were no listed State witnesses "who could testify to the contrary" (Answer Brief at 39). Appellee attempts to imply that defense counsel had no reason to question the truth of Mr. Gilliam's testimony on this issue because none of the State's listed witnesses could have rebutted his testimony. Again, in its attempt to argue that the lower court did not err by failing to grant an evidentiary hearing, Appellee effectively illustrates why such a hearing is required.

Appellee's contention that "there is no indication from the State's witness list that such information may be rebutted"

(Answer Brief at 39) does not conclusively refute Mr. Gilliam's claim that defence counsel was deficient. First of all, the salient question is whether or not defense counsel knew or should have known that Mr. Gilliam could be impeached with the allegations of a violent rape. The mere "fact" that the State's witness list did not "indicate" that such information could be rebutted does not answer the question. As Appellee argued at trial, the defense had a copy of a detailed report of the alleged violence since the time of the first trial (R. 2403) and defense counsel made several trips to Texas and he therefore "had to know" the matter was in serious dispute (R. 2401-2). In other words, even if none of the State's listed witnesses could have testified to impeach Mr. Gilliam's testimony, its entirely possible that competent counsel still would have known about the allegation of violence.

Moreover, Appellee cannot credibly argue that the mere existence of the witness list which did not list Detective Poe refutes the claim of deficient performance. Certainly it is possible that someone listed by the State knew or had learned of the allegations that the 1969 conviction was the result of violence and would have told defense counsel had defense counsel asked. Appellee claims as a fact that defense counsel had no reason, at least based on the State's witness list, to believe Mr. Gilliam's testimony could be rebutted. Again, this is not established by the record. This is yet another factual matter that should be addressed at an evidentiary hearing.

Finally, Appellee argues that the lower court did not err by summarily denying Mr. Gilliam's claim because the outcome would not have been different had Detective Poe's testimony not been admitted. According to Appellee, Mr. Gilliam cannot establish that the outcome would have been different because the testimony of the defense's expert, Dr. Stillman, was "tested and rebutted" by Appellee's expert witnesses (Answer Brief at 40). The record reveals that, on the issue of whether or not Mr. Gilliam was suffering a psychomotor epileptic seizure before, during, and after the time of the offense, the guilt-innocence phase of the trial was a battle of experts. Contrary to Appellee's contention, the evidence countering Dr. Stillman's opinion was not "overwhelming" (Answer Brief at 39).

Dr. Stillman testified that Mr. Gilliam suffered from a seizure disorder which caused Mr. Gilliam to suffer both generalized, or tonic/clonic seizures (grand mal) and psychomotor, or complex partial seizures (R. 1999). These psychomotor seizures could last for mere minutes up to several days (R. 1995, 1999). Following such a seizure, a person generally cannot remember what happened before, during, and after the seizure (R. 1993). Dr. Stillman also reported that psychomotor seizures can be accompanied by periods of furor or rage (R. 1995, 1998).

Dr. Stillman reached his conclusion based upon the history as reported by Mr. Gilliam, records from numerous hospitals who treated Mr. Gilliam, and statements from family members who over

the years observed some of Mr. Gilliam's seizures (R. 1970, 1773, 1974, 1977, 1979, 1982, 1984-5, 1985-6, 1999). Based upon this information, including Mr. Gilliam's account of the incident in question, Dr. Stillman concluded that, during the periods before, during, and after the offense, Mr. Gilliam was undergoing a psychomotor seizure (R. 1986-7, 2002).

Appellee argues that its own expert, Dr. Dinkla, conducted a physical examination of Mr. Gilliam, including three electroencephalograms ("EEG's"), and "found no indication or corroboration of Defendant's alleged seizure disorder" (Answer Brief at 40). Yet, Dr. Dinkla also agreed that a negative EEG reading, like Mr. Gilliam's test yielded, does not mean that the person does not have a seizure disorder (R. 2303). In fact, Dr. Dinkla agreed that Mr. Gilliam has had seizures and could not say that Mr. Gilliam was not suffering from a seizure at the time of the offense (R. 2261, 2318-9). He further conceded that, in reaching his conclusion, he did not review Mr. Gilliam's multiple hospital records (R. 2314-15).

Dr. Dinkla acknowledged that there is continuing debate on whether there is link between seizure disorder and violence (R. 2297). He further acknowledged that there was authority recognizing several cases of apparent seizure-related violence, including a case in which a man suffering a seizure strangled his pregnant wife and then attempted suicide and had no memory of the event, a case in which a person violently attacked three people with no subsequent memory of the event, and a case in which a

person suffering a seizure caught an orderly by the throat and threatened to kill him and acted violently toward a doctor (R. 2305-11).

Dr. Wilder, who never examined or interviewed Mr. Gilliam (R. 2341-2), agreed that Mr. Gilliam has epilepsy (R. 2366). Dr. Wilder believed Mr. Gilliam suffers from general seizures and simply saw nothing to indicate a history of him suffering psychomotor seizures (R. 2366, 2369). On the subject of psychomotor seizures, Dr. Wilder agreed that, while suffering such a seizure, a person can "perform skilled acts and planned events" and may be able to "carry out a complex act" (R. 2348, 2367). As an example, he reported that one of his own patients completed a bank transaction while suffering a psychomotor seizure (R. 2368).

Contrary to Appellee's suggestion (Answer Brief at 41), Dr. Wilder did not testify that there is no indication that Mr. Gilliam had a psychomotor seizure at the time the crime was committed. He simply stated that the records he reviewed did not indicate that Mr. Gilliam had ever had that particular type of seizure (R. 2366). Appellee's contention that the evidence countering Dr. Stillman's opinion was overwhelming is not supported by the record.

The prejudice to Mr. Gilliam caused by Detective Poe's testimony results from the fact that Mr. Gilliam's entire case hinged on his defense as laid out by Dr. Stillman. Yet, whether or not the jury accepted Dr. Stillman's testimony that Mr.

Gilliam was suffering from a psychomotor seizure directly depended on Mr. Gilliam's credibility. Mr. Gilliam testified that he could not remember what happened. Dr. Stillman testified that this was consistent with Mr. Gilliam suffering from a psychomotor seizure. In order to accept Dr. Stillman's testimony, the jury had to believe Mr. Gilliam when he described that he could not remember what happened. The admission of Detective Poe's testimony destroyed Mr. Gilliam's credibility in the eyes of the jury and virtually assured that, even if the jury believed Dr. Stillman's testimony regarding the existence and possible manifestations of psychomotor seizures, the jury did not believe Mr. Gilliam suffered such a seizure at the time of the offense. Absent Detective Poe's testimony, there is a reasonable probability that the outcome would have been different.

ARGUMENT VI

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT DEFENSE COUNSEL WAS INEFFECTIVE BY FAILING TO INVESTIGATE AND DISCOVER EVIDENCE OF VOLUNTARY INTOXICATION.

Appellee argues that Mr. Gilliam cannot show that defense counsel was deficient for failing to fully develop and present available evidence that Mr. Gilliam was intoxicated at the time of the offense. Appellee reasons that, because defense counsel presented some evidence that Mr. Gilliam was intoxicated at the time of the offense (mostly through Mr. Gilliam's own testimony), Mr. Gilliam "cannot show" at an evidentiary hearing that defense counsel's performance was deficient (Answer Brief at 50).

Mr. Gilliam contends in his Rule 3.850 motion that defense

counsel failed to adequately investigate, develop, and present available lay testimony that he was intoxicated at the time of the offense (PC-SR 195-7). (He also alleged that this evidence was not made available to Mr. Gilliam's mental health expert). Contrary to Appellee's argument, the mere fact that defense counsel presented some evidence of intoxication, as well as evidence that Mr. Gilliam had a substance abuse problem, does not conclusively establish that counsel was not deficient. This is especially so when Appellee presented several witnesses who testified Mr. Gilliam was not intoxicated at the time of the offense (R. 2475, 2476).

Appellee argues that defense counsel presented "extensive testimony regarding Defendant's drug and alcohol use" (Answer Brief at 49). Appellee points to the testimony of Dr. Mutter, a State witness, and Dr. Stillman (Answer Brief at 49-50). However, while these experts testified to Mr. Gilliam's reported history of substance abuse, neither had any personal knowledge of how much Mr. Gilliam had been drinking on the night in question, save for Dr. Stillman's re-telling of Mr. Gilliam's own reported alcohol use.

Finally, Appellee contends that, even if counsel was deficient, Mr. Gilliam cannot show prejudice (Answer Brief at 50). Because intoxication at the time of the offense is a valid mitigating circumstance even if the jury rejects the defendant's defense of insanity and voluntary intoxication, see Knowles v. State, 632 So. 2d 62 (Fla. 1994), there is a reasonable

probability that defense counsel's deficient performance affected the outcome of the penalty phase.

ARGUMENT VII

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. GILLIAM'S CLAIM THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBTAIN A COMPETENT MENTAL HEALTH EXPERT TO CONDUCT A PROFESSIONAL AND COMPETENT MENTAL HEALTH EVALUATION.

Mr. Gilliam asserts in his Rule 3.850 motion that defense counsel failed to seek out and provide to a mental health expert information relevant to Mr. Gilliam's mental health - information that would have provided substantial and compelling statutory and non-statutory mitigation evidence (PC-SR 311-12). The lower court summarily denied this claim based on the erroneous conclusion that this claim should have been raised on direct appeal (PC-SR 337; PC-SR2 200). Appellee argues that the lower court was correct because defense counsel "provided ample information regarding Defendant's medical and personal history" to the defense experts (Answer Brief at 51).

Appellee's conclusion is not supported by this record. The record does not disclose what information was available to defense counsel, what information defense counsel knew about, or the extent any of this information was provided to the defense experts by defense counsel.

As discussed in Argument III, supra, the lower court permitted Mr. Gilliam to proffer the significant and compelling testimony of Dr. Burglass and Dr. Eisenstein, which were each grounded on facts that far exceeded the type, quantity and

quality of information relied upon by Dr. Stillman and Dr. Marquit. See Argument III, supra. This is the specific information that was available but not provided or discovered. Additionally, Mr. Gilliam specifically alleged that Dr. Stillman was not competent due to his lack of experience in and limited knowledge of epilepsy (PC-SR 311-12). The lower court erred by summarily denying this claim since the files and record do not conclusively rebut it.

ARGUMENT VIII

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. GILLIAM'S CLAIM THAT HE WAS DENIED THE USE OF MATERIAL EXCULPATORY EVIDENCE THROUGH EITHER STATE MISCONDUCT OR DEFENSE COUNSEL'S INEFFECTIVENESS.

Appellee argues that the lower court properly refused to grant a hearing because Mr. Gilliam failed to "make the requisite showing that he did not possess the alleged exculpatory evidence prior to trial or could not have done so through the exercise of due diligence" (Answer Brief at 54). Appellee relies on defense counsel's testimony at the evidentiary hearing (held on Mr. Gilliam's claim that defense counsel was ineffective for failing to present to the jury the testimony of Drs. Marquit and Reeves and the family members. See Argument II) in which defense counsel stated he attempted to show that the victim was a prostitute who "picked up" Mr. Gilliam but that the lower court refused to permit him to present this evidence (Answer Brief at 54-5).

Appellee's argument establishes that the lower court erred in summarily denying this claim. Appellee relies on evidence

adduced at an evidentiary hearing to argue that the lower court properly denied Mr.Gilliam an evidentiary hearing. Appellee's reliance on defense counsel's post-conviction, evidentiary hearing testimony demonstrates that an evidentiary hearing was indeed warranted.

Additionally, the lower court issued its order summarily denying Claims III and XXII of Mr. Gilliam's post-conviction motion before defense counsel testified at the evidentiary hearing. The lower court therefore did not and could not have relied on this testimony to support its ruling. Furthermore, Appellee should not be permitted to rely on this testimony as support for the lower court's summary denial when, pursuant to the court's order, Mr. Gilliam was precluded from presenting evidence on this issue.

As Claims III and XXII and the record of the trial make clear, the evidence defense counsel possessed was the order by the Florida Department of Business Regulation Division of Alcoholic Beverages and Tobacco revoking the Orange Tree Lounge's beverage license (R. 1515-23) and the medical examiner's statement made pursuant to her investigation that the victim was indeed a prostitute (R. 2217-21). Nothing in the record indicates that defense counsel knew about the Metro-Dade Police reports that directly implicated the victim as a prostitute.

Appellee ignores the fact that Mr. Gilliam in his rule 3.850 motion also argues that, <u>if</u> defense counsel knew or should have known of the police reports implicating the victim as a

prostitute, defense counsel was ineffective for failing to use this evidence to impeach witnesses and to corroborate Mr. Gilliam's testimony. (PC-SR. 199). The bottom line is that the motion plainly alleged that Mr. Gilliam was denied the use and benefit of the exculpatory evidence of the Metro-Dade Police reports. Whether this was the result of State misconduct or ineffective assistance of counsel is a matter that should have been addressed by the lower court after an evidentiary hearing.

Appellee also argues that, because the lower court ruled that evidence that the victim was a prostitute was inadmissible, the evidence was not material. This argument should be rejected because the lower court's ruling that the evidence was inadmissible was wrong. At trial, Mr. Gilliam attempted to present evidence that the victim was a prostitute in order to corroborate his own testimony. Appellee objected and the lower court ruled such evidence inadmissible. Appellee then argued to the jury that Mr. Gilliam's failure to present such evidence was significant: "Did you ever hear any testimony in this case that the victim ran away from home? No. Just like you didn't hear any testimony that she was a prostitute . . . ." (R. 2563)(emphasis added). Thus, Appellee was allowed to keep relevant evidence corroborating Mr. Gilliam's testimony from the jury and then argue that since no evidence to corroborate Mr. Gilliam's testimony was presented, no such evidence existed (R. 2558). By prohibiting the presentation of evidence that the victim was a prostitute, the lower court denied Mr. Gilliam his right to

present a defense and to confront and cross-examine the witnesses against him. See Olden v. Kentucky, 109 S.Ct. 480 (1989); Pointer v. Texas, 380 U.S. 400 (1965).

The lower court's application of the "Rape Shield Law" to limit the presentation of evidence prevented Mr. Gilliam the opportunity to present a complete defense. State rules of procedure cannot override a defendant's right to elicit evidence in his defense, as Olden specifically holds. Appellee was permitted to urge that the failure to present such evidence meant that no such evidence existed. The lower court's ruling limiting the defense's ability to defend precluded a "meaningful adversarial testing." United States v. Cronic, 466 U.S. 648 (1984). This violation of the Sixth Amendment allowed the jury to assess the evidence without the knowledge that a full presentation would have revealed. See Taylor v. Illinois, 108 S.Ct. 646 (1988); Rock v. Arkansas, 107 S.Ct. 2704 (1987).

Appellee's argument that evidence that the victim was a prostitute was irrelevant and not prejudicial (Answer Brief at 55-6) ignores the import of Mr. Gilliam's credibility with the jury. Had the jury found Mr. Gilliam credible regarding his inability to remember the events before, during, and after the offense, there is a reasonable probability that the jury would have accepted Dr. Stillman's opinion and that the outcome of the guilt-innocence and penalty phases of the trial would have been different.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Lisa Rodriguez, Assist. Attorney General, Office of the Attorney General, Rivergate Plaza, Ste. 950, 444 Brickel Ave., Miami, FL 33131 on February 14, 2001.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the font requirements of rule 9.210(a)(2), Fla. R. App. P.

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