

>> ALL RISE.
SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
>> PLEASE BE SEATED.
NEXT CASE FOR THE DAY IS HAYWARD
VERSUS STATE OF FLORIDA.
YOU MAY PROCEED.
>> GOOD MORNING,
MAY IT PLEASE THE COURT.
I'M PAUL KALIL AND I REPRESENT STEVE
HAYWARD ON THE 38.51 RELIEF.
I'D LIKE TO FOCUS ON THE PENALTY PHASE
AND INEFFECTIVENESS CLAIM,
SPECIFICALLY THE PREJUDICE
PRONG.
I WANTED TO BRIEFLY TO ADDRESS
THE DEFICIENT PERFORMANCE PRONG.
I BELIEVE THIS CASE SHOWS TRIAL
COUNSEL DID ALMOST NOTHING IN
PREPARATION FOR THIS PENALTY
PHASE.
TRIAL COUNSEL SPOKE TO THE
FAMILY MEMBERS FOR AN HOUR, FOR,
SIX OR SEVEN FAMILY MEMBERS ALL
AT THE SAME TIME ABOUT ONE HOUR
ABOUT A MONTH BEFORE THE TRIAL.
THAT WAS THE EXTENT OF THE
INVESTIGATION.
>> CAN I ASK A QUESTION ABOUT
BEFORE YOU ARE GOING TO FOCUS ON
DEFICIENCY AND I WENT BACK AND
NOW THERE ARE TWO CASES THIS
MORNING.
IS THIS, DID YOUR CLIENT, HE HAD
JUST GOTTEN OUT OF PRISON A
SHORT TIME BEFORE?
>> CORRECT.
>> HE GOT OUT A MONTH BEFORE
AFTER SERVING HOW MUCH?
>> HE HAD BEEN SENTENCED I
BELIEVE TO, HE HAD SERVED ABOUT
18 YEARS I THINK.
>> 18 YEARS FOR, FOR MURDER?
>> FOR A PRIOR MURDER, CORRECT.
>> WHEN THE JUDGE ENUMERATING
HIS SENTENCING ORDER, IT WAS
SORT OF LIKE, THIS CASE AND
AGREE WITH IT, WHEN YOU THINK OF
AGGRAVATED CASES WHERE THE DEATH
PENALTY IS APPROPRIATE, THE FACT

THAT SOMEBODY AFTER BEING IN PRISON WITHIN 80 DAYS, GETS OUT, AND KILLS SOMEBODY ELSE.

SO THE IDEA OF WHAT HAPPENED TO HIM BEFORE THE 18 YEARS IN PRISON, WHAT, WHERE IS THERE, I GUESS GOING TO, HOW IS OUR CONFIDENCE UNDERMINED BY ANYTHING THAT THIS, ASSUMING THAT THEY HADN'T PROPERLY INVESTIGATED MITIGATION, EVEN THOUGH NOBODY IS TALKING, NOBODY REALLY TALKED ABOUT THIS, THESE BEATINGS AS BEING SOMETHING, HOW IS THAT PREJUDICED IN THIS CASE?

>> WE HAVE TO REMEMBER THAT IN THIS CASE THE JURY DIDN'T NECESSARILY AGREE WITH YOU.

THE VOTE WAS 8-4.

FOUR MEMBERS OF THAT JURY FELT MR. HAYWARD DESERVED LIFE. IN ADDRESSING PREJUDICE THE COURT BELOW NEVER EVEN MENTIONED THE JURY.

NEVER MENTIONED WHAT EFFECT THE ADDITIONAL MITIGATION WOULD HAVE HAD ON THE JURY AS IT WOULD BE REQUIRED TO DO.

SO WE'RE, WE'RE LEFT HERE WHERE THIS COURT NOW HAS TO SPECULATE WHAT THE EFFECT ON THE JURY WOULD HAVE BEEN AND THE ANSWER TO THAT QUESTION IS, THERE IS A PLETHORA OF MITIGATING INFORMATION THAT DIDN'T GO TO THE JURY.

YOU MENTIONED THE BEATINGS. IT IS NOT JUST THE BEATINGS. THERE WAS SOME DISCUSSION AT THE EVIDENTIARY HEARING ABOUT WHAT IS A BEATING AND WHAT IS ABUSE. I SUBMIT THE PERSON TO ASK ABOUT THAT WOULD HAVE BEEN DR. RIORDAN, WHO TESTIFIED THAT THAT THE BEATINGS IN THIS CASE, OR THE ABUSE IN THIS CASE WAS NORMALIZED.

AND WE HAD THE TESTIMONY OF MR. HAYWARD'S MOTHER WHO EXPLAINED HOW SHE HAD GROWN UP

IN A, IN AN ATMOSPHERE WHERE THIS WAS NORMAL TO HER. AND THE VIOLENCE, THE NEGLECT, WERE NORMALIZED SO THAT WHEN STEVEN WAS BEING RAISED THAT IS WHAT WAS EXPECTED.

THE SIBLINGS, MR. HAYWARD'S SIBLINGS TESTIFIED THEY THOUGHT THIS WAS NORMAL.

THE EFFECT OF UNDERSTANDING. THAT THIS WAS ABUSIVE, THIS WAS -- NEGLECT AND SO ON, THIS IS ABOVE MENTIONING TO THE JURY THAT DAD WAS AN ALCOHOLIC AND IN EFFECT MINIMIZING THE ABUSE BY SUGGESTING TO THE WITNESSES AS TRIAL COUNSEL DID AND THE BEATINGS WEREN'T SEVERE AND THIS WAS JUST SPANKINGS.

AND AGAIN THIS HAS TO BE VIEWED FROM THE PERSPECTIVE OF THE JURY.

I MEAN IT'S, CERTAINLY THE PRIOR VIOLENT FELONY, THE PRIOR MURDER, THAT IS A WEIGHTY AGGRAVATOR BUT FOUR MEMBERS OF THIS JURY FELT THAT THIS WAS NOT SO WEIGHTY AS TO IMPOSE A LIFE SENTENCE AS OPPOSED TO DEATH. WITH REGARD TO THE DEFICIENT PERFORMANCE, I JUST, I NEED TO STRESS THAT TRIAL COUNSEL HERE BASICALLY DID NOTHING.

HE DIDN'T LEARN ABOUT ANY OF THIS BECAUSE OTHER THAN SOME, ONE INTERVIEW WITH THE FAMILY WHICH LASTED AN HOUR AND THEN SENDING CO-COUNSEL WHO HAD NO EXPERIENCE IN POST-CONVICTION, EXCUSE ME IN DEATH PENALTY CASES, OR IN DEATH PENALTY MITIGATION, SENDING HIM IN TO TALK TO THE CLIENT ON A FEW OCCASIONS, THERE WAS NO INVESTIGATION HERE.

THERE WAS, EFFECTIVELY NO INVESTIGATOR.

BECAUSE THE INVESTIGATOR THAT THEY HAD RETAINED SIMPLY DID PAPERWORK, COPIED PAPERS,

SUMMARIZED DISCOVERY.

>> THE TENOR, YOU USE THAT AS THE WORD OF YOUR POSITION SEEMS TO BE THAT DEFENSE COUNSEL AFTER SUFFERING THE DEFEAT IN CALIFORNIA, JUST SUFFERED A MENTAL BREAKDOWN?

>> I --

>> THAT SEEMS TO BE THAT ON, STARTED TAKING MEDICATION. WAS THAT REALLY DEVELOPED IN THE PROCEEDINGS BELOW?

>> I WOULDN'T USE NECESSARILY THE TERM A MENTAL BREAKDOWN BUT I THINK --

>> WHAT ARE YOU SAYING?

HE WAS IN A FUNK?

YOU'RE TRYING TO SAY THEY'RE MESSED UP IN SOME WAY.

WHAT IS IT?

IS HE OH, HE IS JUST UPSET OR IS THERE SOMETHING THAT IS REALLY THERE?

>> HE TESTIFIED THAT AT THE TIME OF THIS TRIAL, THIS STEVEN HAYWARD TRIAL, HE WAS, HE WAS, WELL, HIS INVESTIGATOR TESTIFIED HE WAS IN A FUNK.

HE TESTIFIED THAT HE WAS EXPERIENCING ANXIETY AND DEPRESSION AS A RESULT OF WHAT HAD HAPPENED IN THE TRIAL IN CALIFORNIA.

>> DID YOU, IS THERE MEDICAL INFORMATION PRESENTED ABOUT THIS LAWYER AND THE MEDICATIONS THAT THE LAWYER WAS TAKING AT THE TIME OF THIS?

>> I ATTEMPTED TO ELICIT THAT AND THERE WAS AN OBJECTION BUT TRIAL COUNSEL EVENTUALLY DID TESTIFY THAT HE WAS, ON MEDICATION AT THE TIME OF THE TRIAL AND AT THE TIME THAT HE TESTIFIED AT THE EVIDENTIARY HEARING.

>> WHAT?

ASPIRIN?

WHAT --

>> I'M SORRY.

THEY ARE LISTED IN THE BRIEF,
KLONOPIN WAS ONE OF THEM AND I'M
SORRY I DON'T REMEMBER --

>> ANY MEDICAL TESTIMONY AS TO
WHAT THAT WOULD MEAN IN THE
CASE?

>> WEALTH INVESTIGATOR, WHO WAS
A --

>> IS THERE MEDICAL TESTIMONY AS
TO HOW THIS WOULD AFFECT THE
DEFENSE LAWYER'S BEHAVIOR?

>> WE DIDN'T CALL A DOCTOR, NO.
BUT THE INVESTIGATOR WHO IS A
NURSE AND WHO HAS DONE A LOT OF
MEDICAL MALPRACTICE WORK AND
THAT SORT OF THING DID TESTIFY
TO THE EFFECT THAT NOT JUST THE
DRUGS BUT THE PSYCHOLOGICAL
CONDITION THAT HE WAS IN AT THE
TIME, AND WHAT HE WAS GOING
THROUGH.

BUT, YOU KNOW, THE --

>> DO YOU REALIZE YOU JUST TOLD
ME NOTHING WHEN YOU SAID THAT?

>> I'M SORRY.

>> I'M TRYING TO UNDERSTAND.

>> YOU'RE ASKING ME IF --

>> IS THERE SOMETHING THAT WE
CAN LOOK TO OF A MEDICAL NATURE
IN THIS RECORD THAT DEMONSTRATES
THAT THE LAWYER WAS, IS MORE
THAN JUST THESE WORDS THAT ARE
CONCLUSIONS, THAT YOU KNOW, THAT
HE COULDN'T FUNCTION?

THAT HE DIDN'T COME TO A TRIAL
ONE TIME?

DIDN'T, WHATEVER, WHATEVER MAY
HAVE BEEN, FROM AN EXPERT, FROM
SOMEBODY WHO KNOWS WHAT THEY'RE
TALKING ABOUT OTHER THAN JUST,
WELL HE JUST WASN'T RYE, HE JUST
WASN'T HIMSELF, HE WAS UPSET?
REALLY DOESN'T TELL A COURT OF
LAW REALLY ANYTHING THAT YOU CAN
HANG YOUR HAT ON, WOULDN'T YOU
AGREE?

WHAT DO I WRITE IN THE OPINION?
OH, HE WAS UPSET AND WASN'T JUST
HIMSELF.

DO WE HAVE SOMETHING THERE WE

CAN HANG OUR HAD HAT ON?
>> THERE WAS NO EXPERT TESTIMONY
BELOW IF THAT ASSISTS.

>> OKAY.

>> AGAIN THE INVESTIGATOR
TESTIFIED, BASED ON HER
EXPERIENCE AS A NURSE, THAT SHE
WITNESSED CERTAIN BEHAVIORS AND
THAT HE APPEARED TO BE IN A FUNK
AND HE WAS DEPRESSED AND
ANXIOUS.

BUT AT THE END OF THE DAY, I
MEAN THE PROOF IS IN WHAT WAS
DONE AND WHAT WASN'T DONE AND I
THINK THE STATE WOULD AGREE WITH
ME ON THAT, REGARDLESS OF THE
REASONS FOR WHY HE NEGLECTED TO
CONDUCT AN INVESTIGATION, THE
FACT REMAINS THERE WAS NO
INVESTIGATION DONE HERE.

OR EXTREMELY MINIMAL
INVESTIGATION.

AND AS A RESULT THE, THE PICTURE
THAT THE JURY AND THE SENTENCING
JUDGE HAD WAS INCOMPLETE.

THERE WAS NO EXPLANATION OF ANY
OF THE FACTS OF THE, OR EXCUSE
ME THE EXTENT OF THE ABUSE, THE
NEGLECT.

MR. HAYWARD'S CHILDHOOD WAS
APPALLING AND TO HAVE IT
PRESENTED AS HE GREW UP IN A
WONDERFUL CIRCUMSTANCE AND, AS
THE SISTER SAID, IT WAS
PRESENTED AS THOUGH THEY WERE
THE HUXTABLES OR THE CLEAVERS.

>> SHE THEN TESTIFIED, AT THE
SPENCER HEARING --

>> WAS TERMED THE SPENCER
HEARING, CORRECT.

>> YOU KNOW, THERE IS ALWAYS
THIS FINE LINE, FIRST OF ALL,
YOU SAID THERE WAS A LAWYER WHO
WASN'T DEATH QUALIFIED BUT
WASN'T THERE AN INVESTIGATOR IN
THIS CASE?

>> THERE WAS BUT SHE DID NO WORK
ON PENALTY PHASE ISSUES.

>> OKAY.

DID THE, WERE THE FAMILY

MEMBERS, THERE WAS A DECISION MADE, THERE WERE MANY FAMILY MEMBERS.

SOME OF THEM WERE PRETTY OUTSTANDING, AT LEAST TWO OF THEM.

ONE WAS AT LEAST A DEPUTY AND THE OTHER WAS, HAD BEEN IN THE MILITARY AND NOW HAD A BUSINESS. THEN THERE WERE SEVERAL FAMILY MEMBERS THAT WERE IN PRISON AND YOU'RE NOT FAULTING PICKING THE FAMILY MEMBERS THAT THEY PICKED?

>> WELL, WHAT, LET ME FIRST POINT OUT THAT THE BROTHER THAT WAS IN THE MILITARY HIMSELF SUFFERED FROM DRUG ADDICTION AND WAS IN REHAB AND SO FORTH.

SO EVEN THERE, WHILE HIS MILITARY SERVICE IS LAUDATORY, THERE WERE PROBLEMS.

>> I GUESS IT GOES BACK TO THIS. MANY TIMES UNTIL AFTER THE DEATH PENALTY IS IMPOSED FAMILIES DO NOT WANT TO REVIEW -- REVEAL WHAT WOULD BE THE EXTENT OF ABUSE.

AND, THAT, THIS SEEMS TO BE IN THIS CASE A LOT OF THAT AND THEN THE, ONCE THE JURY COMES UP WITH A RECOMMENDATION THEN THE SISTER IS SAYING, WELL, WE WEREN'T REALLY LIKE, YOU KNOW, LEAVE IT TO BEAVER FAMILY.

WE HAD A GREAT DEAL OF DYSFUNCTION.

AND SO, WHAT RESPONSIBILITY DOES THE FAMILY BEAR IN THESE CASES INCLUDING THE DEFENDANT, TO NOT SAY, LISTEN, YOU HAVE TO UNDERSTAND, I REALLY REGRET WHAT I DID.

OF COURSE HE DID NOT, HE IS DENIED IT BUT I WAS BEATEN EVERY DAY OF MY LIFE BY MY MOTHER OR MY STEPFATHER, WHOEVER, OR MY TWO BROTHERS?

>> MY ANSWER IS THAT THE RESPONSIBILITY IS NOT ON THE FAMILY.

THE RESPONSIBILITY IS ON TRIAL
COUNSEL TO CONDUCT AN
INVESTIGATION.

>> IT IS ONE THING IF IT HAS TO
DO WITH RECORDS LIKE JUVENILE
RECORDS OR SCHOOL RECORDS, THOSE
KINDS OF THINGS.

BUT WHEN IT COMES, IF THE
DEFENDANT, DID HE TESTIFY THAT
HE WAS EXPLAINED THE
SIGNIFICANCE OF MITIGATION AND
THAT HE JUST, THAT, OR HE WASN'T
EXPLAINED IN DID HE TESTIFY IN
THE EVIDENTIARY HEARING?

>> NO, HE DID NOT.

>> SO WHAT DID MR. UDALL SAY
WHAT HE KNEW OR DIDN'T KNOW
ABOUT WHAT YOU'RE NOW SAYING WAS
THIS EXTENSIVE ABUSE?

>> MR. UDELL SAID THAT HE DIDN'T
KNOW OF ANY ABUSE.

WHAT HE --

>> AND WHY ARE YOU.

WHAT WAS DEFICIENT ABOUT HIM NOT
FINDING OUT BIT?

WAS HE -- WAS THERE ANY ABUSE?

NO.

LISTEN, I JUST WANT YOU TO KNOW
THAT I REALLY NEED TO KNOW IF
THERE WAS ABUSE?

>> THE ABA GUIDELINES ARE CLEAR
AND I THINK AT THIS POINT, THIS
ISN'T A PENALTY PHASE THAT
HAPPENED IN 1981.

THIS HAPPENED IN 2007.

AND BY 2007 I THINK THE STANDARD
WAS PRETTY CLEAR.

THE TRIAL COUNSEL CAN'T GO INTO
THE JAIL AND ASK YOU A
DEFENDANT, WERE YOU ABUSED AND
THAT IS THE INQUIRY.

>> HERE IS MY OTHER PROBLEM WITH
IT THOUGH AND THIS IS THE
TWO-EDGED SWORD IN THIS CASE
WITH THE PRIOR MURDER.

SO THEY PRESENT THIS FULL
PICTURE.

THIS FAMILY IS COMPLETELY
DYSFUNCTIONAL.

COMPLETELY DYSFUNCTIONAL.

IT LED TO SEVERAL FAMILY MEMBERS.

CYCLE OF VIOLENCE.

THE MOTHER WAS SUBJECT TO IT.

>> THAT'S A BIG PART OF IT.

AND THIS DEFENDANT ENDED UP

BEING PART OF THIS CYCLE OF

VIOLENCE THAT HE

NEVER OVERCAME.

THEN HE IS IN PRISON FOR 16

YEARS AND HE LEARNS NOTHING

DURING THAT 16 YEARS.

HE IS OUT 89 DAYS AND HE KILLS

AGAIN.

I JUST DON'T SEE HOW THAT

BECOMES IN THIS CASE COMPELLING

MITIGATION THAT UNDERMINES

CONFIDENCE IN THE OUTCOME?

AND MAYBE YOU'VE TOLD ME BUT,

SEE THAT WHOLE PICTURE BECOMES,

YOU GOT TO SHOW THAT ALL OF THE

FAMILY MEMBERS, WHO IS IN PRISON

WHO, IS NOT IN PRISON WHO, DID

WELL, WHO DIDN'T DO WELL AND

THEN THE STATE SAYS, LISTEN,

THIS PERSON DID WELL, THAT

PERSON DID WELL.

THAT STILL DOESN'T EXCUSE THE

ACTIONS AS FAR AS, THIS ISN'T

STATUTORY MITIGATION, RIGHT?

IT IS NOT STATUTORY MITIGATION.

>> THAT ASPECT, NO.

>> RIGHT.

SO IT STILL GOES BACK, I DON'T

SEE HOW PREJUDICE IS REALLY

ESTABLISHED BY YOU.

>> AND AGAIN, THE ISSUE IS, WHAT

THE IMPACT WOULD HAVE BEEN ON

THE JURY.

AND WITH AN 8-4 RECOMMENDATION

IT, I THINK IT IS UNREASONABLE

TO THINK THAT ADDITIONAL

MITIGATION AND EXPLAINING THE

MITIGATION THAT WAS PRESENTED,

IN A BETTER WAY, WOULD NOT HAVE

MADE A DIFFERENCE.

IT IS NOT AS THOUGH TRIAL

COUNSEL PUT FORTH AN ARGUMENT

THAT EVERYTHING IN THE FAMILY

WAS, YOU KNOW, 100% FINE.

HE DID PRESENT EVIDENCE THAT THE STEPFATHER WAS AN ALCOHOLIC FOR INSTANCE.

HE DID TOUCH ON THE FACT THAT THERE WAS SOME VIOLENCE IN THE HOME.

BUT LEAVING IT AT THAT, IT DOESN'T GIVE THE JURY ANY FLAVOR OF WHAT WAS GOING ON.

I SEE THAT I HAVE FOUR MINUTES. I WOULD LIKE TO RESERVE THE REST FOR REBUTTAL.

>> THANK YOU.

>> MAY IT PLEASE THE COURT.

LESLIE CAMPBELL WITH THE ATTORNEY GENERAL'S OFFICE. LET'S LOOK AT WHAT MR. UDELL ACTUALLY DID.

HE GOT THE SCHOOL RECORDS.

HE GOT THE DOC RECORDS.

HE GOT THE HEALTH RECORDS.

HE DID INTERVIEW FAMILY MEMBERS.

HE HAD THE CO-COUNSEL INTERVIEW AND TALK TO THE DEFENDANT.

WHAT DO WE HAVE FROM THE DEFENDANT?

WE HAVE THE DEFENDANT DENYING ANY ABUSE.

NOT ONLY TO MR. UDELL AND TO MR. STONE.

HE DENIED IT TO MR. RIORDAN, DR. RIORDAN AND HE ALSO DENIED IT TO HIS MENTAL HEALTH EXPERT, DR. HYDE UP UNTIL 2011.

WHAT DO WE HAVE THE TRIAL COURT FINDING?

WE HAVE THE TRIAL COURT FINDING THAT THE FAMILY MEMBERS WERE ASKED WHETHER OR NOT THERE WAS ANY ABUSE IN THE FAMILY.

WE HAVE THE FAMILY, WE HAVE THE TRIAL COURT FINDING THAT THE FAMILY MEMBERS WITHHELD INFORMATION UNTIL AFTER THERE WAS A DEATH RECOMMENDATION.

THEN IT CAME OUT SLOWLY.

AND, THE TESTIMONY AT THE EVIDENTIARY HEARING IS REplete WITH EXAMPLES WHERE SOME INFORMATION WAS GIVEN, OTHER

INFORMATION WAS WITHHELD.
SO AND NOW WE'RE BEING ASKED TO
FIND MR. UDELL AND MR. STONE
INEFFECTIVE BECAUSE THEY
COULDN'T CONVINCED THE FAMILY
MEMBERS TO TELL THEM WHAT MAY OR
MAY NOT BE THE TRUTH NOW.
WE DO NOT NECESSARILY KNOW AND
THE FAMILY HAS BEEN INCONSISTENT
THROUGHOUT.

SO WE ARE ASSUMING THAT THERE
WAS MORE ABUSE IN THE FAMILY
THAN WHAT WAS TOLD.
BUT THAT'S NOT THE STANDARD.
WE CAN'T SAY THAT MR. UDELL WAS
INEFFECTIVE BECAUSE HE COULDN'T
CONVINCE FAMILY MEMBERS TO
DISCLOSE INFORMATION THAT THE
FAMILY MEMBERS DIDN'T WANT TO
DISCLOSE.

>> WHAT WERE THE ADVERSE PARTS
OF THE INFORMATION ABOUT THE
FAMILY THAT WAS ACTUALLY
PRESENTED AT THE PENALTY PHASE?

>> AT THE PENALTY PHASE IT WAS,
THERE WAS, IT WAS A
DYSFUNCTIONAL FAMILY.

YOU HAD THE FATHER AND THE
STEPFATHER IN THE HOME AT
DIFFERENT TIMES.

THE, MR. HAYWARD'S FATHER WAS
THE ALCOHOLIC.

MR. HAYWARD'S STEPFATHER LEFT
THE HOUSE WHEN MR. HAYWARD WAS
ABOUT FIVE.

THERE WAS TESTIMONY OF THE
CHILDREN OVERHEARING ARGUMENTS.
THERE WAS TESTIMONY THAT THERE
WAS DISCIPLINE --

>> ARGUMENTS BUT NOT VIOLENCE.

>> NO VIOLENCE WAS SEEN.

FIGHTS, BUT NOTHING WAS SEEN.

SO WAS IT, WAS IT PHYSICAL
VIOLENCE?

THERE ISN'T TESTIMONY.

>> WHAT ABOUT, DID THEY, AGAIN
THIS IS FROM WHAT THE APPELLANT
PETITIONER SAYS, THAT HIS
BROTHERS BEAT HIM THREE OR FOUR
TIMES A WEEK.

HIS STEPFATHER, WITH THE ENCOURAGEMENT OF THE MOTHER AND LATER JUST HIS MOTHER WOULD BEAT THE CHILDREN WITH BELTS, EXTENSION CORDS, HOSE, WASHING MACHINE BELTS AND OAK TREE BRANCHES CAUSING BRUISES AND OPEN SORES.

>> THAT'S WHAT THE ULTIMATE TESTIMONY WAS.

BUT AGAIN, IT WAS A PROGRESSION OF, WE HAVE DISCIPLINE INITIALLY AT PENALTY PHASE.

WE HAVE THEN A CHANGE DURING, NOT THE FIRST SPENCER HEARING BUT THEY HAD TO HAVE A SECOND SPENCER HEARING WHERE THIS INFORMATION COMES OUT.

THAT THERE WAS MORE ABUSE BUT NOT FROM THE MOTHER.

AND THEN TO THE PENALTY, TO THE EVIDENTIARY HEARING WHERE NOW THERE IS ABUSE FROM EVERYONE, SIBLINGS, PARENTS, STEPPARENTS, EVERYONE ABUSED MR. HAYWARD.

BUT THE MOTHER STILL TESTIFIED, MR. HAYWARD'S MOTHER STILL TESTIFIED THAT WHAT SHE DID, SHE FELT WAS MORE DISCIPLINE, NOT ABUSE.

>> CAN I, ON THAT, THERE WAS AN EVIDENTIARY RULING THAT HER HISTORY OF VIOLENCE IN HER FAMILY CAN NOT COME IN THIS POST-CONVICTION.

AND WE KNOW IN THE LITERATURE ABOUT CYCLES OF VIOLENCE.

IN TERMS OF THE CREDIBILITY OF WHAT IN FACT HAPPENED, WHY ISN'T THAT RELEVANT TO SAY, YOU KNOW, IF YOU WERE, SAY, YOU'RE THE MOTHER AND YOU WERE SEXUALLY ABUSED THAT YOU THEN DID SOMETHING TERRIBLE TO YOUR CHILD?

IT EXPLAINS IT AS TO THE CREDIBILITY.

I DON'T GET WHAT'S NOT, WHY THE JUDGE WOULD HAVE EXCLUDED IT IN THIS, NOW, AGAIN, WHETHER IT WAS

STILL, YOU KNOW, SOMEWHAT, A FAIRLY STRONG ABOUT THIS, ABOUT NO PREJUDICE AND ALSO ABOUT THAT THEY DIDN'T, THAT THEY WERE NOT FORTHCOMING BUT JUST ON THAT EVIDENTIARY RULING I DON'T UNDERSTAND WHY THAT IS NOT RELEVANT TO KNOW THAT INSTEAD OF THIS BEING JUST, YOU KNOW, A SPANKING, THAT IT WAS ABUSE AND, HERE IS HOW SHE GREW UP?

>> BECAUSE THE FOCUS IS ON THE DEFENDANT.

WHY HE WAS ABUSED, HOW HE CAME TO BE ABUSED, DOESN'T MATTER.

>> EXCEPT, MISS CAMPBELL, YOU HAVE SPENT THE LAST SEVERAL MINUTES GOING, WE DON'T REALLY KNOW IF WHAT HAPPENED REALLY HAPPENED, DIDN'T YOU?

THAT'S WHY IT IS RELEVANT TO KNOW THAT IT'S MORE LIKELY THAT IT IS NOT, WHY IS, WE'RE NOT ACCEPTING NECESSARILY THAT IT HAPPENED TO HIM.

ONCE YOU KNOW HOW THE MOTHER GREW UP, YOU UNDERSTAND MORE ABOUT THIS CYCLE OF VIOLENCE. SO I DON'T, AND OF COURSE THE ABA STANDARD IS NOT, BUT THAT IS THE THING, SUGGESTS THAT THAT THE PICTURE, IS RELEVANT FOR A JURY.

IT IS CERTAINLY WOULD MAKE A DIFFERENCE TO ME AS A JUROR. SO HOW IS, AND AGAIN, I DON'T THINK IT MAKES ANY DIFFERENCE IN THIS CASE BUT I JUST THINK THAT THE IDEA THAT IT IS NOT AT ALL RELEVANT, IT IS NOT ATTENUATED. IT DIRECTLY IMPACTS WHETHER SHE'S CREDIBLE OR THEY'RE CREDIBLE ABOUT WHAT THE MOTHER WAS DOING TO THE CHILDREN.

>> AND YOU CAN LOOK AT THE MOTHER'S CREDIBILITY BASED ON WHAT THE CHILDREN ARE SAYING. AGAIN, THE FOCUS IS ON THE DEFENDANT.

WAS THE DEFENDANT ABUSED AS A

CHILD?

DO YOU BELIEVE THE SIBLINGS?
THEN YOU BELIEVE THE SIBLINGS.
AND THAT'S WHAT, THE TRIAL COURT
FOUND, POST-CONVICTION TRIAL
COURT FOUND.

HE SAID, THEY WEREN'T
FORTHCOMING WITH MR. UDELL,
HOWEVER, I'M GOING TO FIND THAT
THERE WAS ADDITIONAL ABUSE THAT
COULD HAVE BEEN PRESENTED AND
I'M GOING TO TAKE THAT INTO
ACCOUNT.

SO, AGAIN, LOOK AT THE OTHER
EVIDENCE THAT WOULD HAVE BEEN
SEEN BY MR. HAYWARD TO JUDGE THE
MOTHER'S CREDIBILITY.

AND, FURTHER, WHERE IS IT GOING
TO STOP?

ARE WE GOING TO STOP WITH THE
GRANDMOTHER BEATING THE MOTHER?
ARE WE GOING TO GO BACK TO THE
GREAT GRANDMOTHER?

HOW FAR BACK DO YOU HAVE TO GO?
THE DEFENDANT WAS NOT ALIVE AT
THAT TIME.

THE DEFENDANT DIDN'T EXPERIENCE
THAT.

WHAT THE DEFENDANT EXPERIENCED
WAS WHAT HIS MOTHER DID TO HIM,
WHAT HIS SIBLINGS DID TO HIM,
WHAT HIS FATHER AND STEPFATHER
DID TO HIM.

THAT IS WHAT CREATED THE PERSON
THAT THEN WENT OUT AND COMMITTED
NOT ONE, BUT TWO MURDERS.

AND WE ALSO HAVE TO RECALL THAT
HE WAS IN PRISON FOR 16 OR 17
YEARS THINKING ABOUT THE
SECOND-DEGREE MURDER AND ROBBERY
THAT HE COMMITTED.

AND, YES, CAME OUT AND 87 DAYS
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LATER DID THE SAME THING.
THERE'S A LONG SPAN OF TIME
BETWEEN LEAVING THE HOUSE AT 14
AND COMMITTING THE SECOND
MURDER.

SO, AGAIN, MR. UDELL GOT

DOCUMENTS, GAVE THEM TO HIS
EXPERT, LOOKED AT THOSE
DOCUMENTS, SAW NOTHING OF A
PSYCHOLOGICAL NATURE THAT NEEDED
TO BE LOOKED AT FURTHER.

DR. REARDON DID THE SAME THING
AND FOUND THAT THERE WAS NO --
THERE WAS NO PSYCHOLOGICAL
PROBLEM.

MAYBE THERE WAS A PERSONALITY
PROBLEM.

NOTHING -- MR. UDELL DIDN'T WANT
TO EXPLORE THAT BECAUSE HE
DIDN'T WANT TO GO INTO THE
ANTISOCIAL PERSONALITY.

AND THAT WAS INITIALLY
COMMUNICATED TO HIM BY
DR. REARDON IN AN EMAIL.

SO HE MADE THAT CHOICE.

HE MADE THE CHOICE WITH THE
FAMILY MEMBERS NOT WANTING TO
PUT ON FAMILY MEMBERS THAT HAD A
VERY NEGATIVE BACKGROUND.

HE WANTED TO PUT ON FAMILY
MEMBERS THAT APPEARED BETTER TO
THE JURY.

HE MADE THAT DECISION.

AND THERE'S NOTHING IN THIS
RECORD THAT EITHER FAULTS THE
DECISION HE MADE WITH THE FAMILY
MEMBERS OR THE DECISION HE MADE
WITH THE MENTAL HEALTH --

>> I HAVE ONE OTHER EVIDENTIARY
ISSUE.

UDELL ON CROSS-EXAMINATION,
WHICH I ASSUME WAS BY THE STATE,
UTILIZED HIS BILLING RECORDS TO
REFRESH HIS RECOLLECTION ON
VARIOUS MATTERS.

THE BILLING MATTERS REFLECTED
CALLS TO HAYWARD'S MOTHER.

THEY ATTEMPTED TO IMPEACH THE
TESTIMONY REGARDING THE ACCURACY

OF THE BILLING RECORDS AND THE
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STATE OBJECTED BECAUSE IT WOULD
RAISE THE ISSUE OF UDELL'S
DISBARMENT FOR FALSIFYING HIS
BILLING RECORDS IN A DIFFERENT

CASE OR CASES.

AGAIN, THIS IS POSTCONVICTION
EVIDENTIARY HEARING, TRYING TO
ASSESS THE CREDIBILITY OF
MR. UDELL.

WHY ISN'T THAT RELEVANT, THAT HE
FALSIFIED HIS RECORDS?

>> FOR IMPEACHMENT PURPOSES, IT
HAS TO BE A CONVICTION OR --
FELONY CONVICTION OR MISDEMEANOR
CONVICTION THAT DEALS WITH
DISHONESTY.

THIS IS NEITHER.

>> NO.

IT WASN'T FOR -- SO YOU'RE
SAYING THAT IT'S REALLY JUST A
PRIOR -- THAT THERE'S NO
EVIDENCE THAT HE FALSIFIED THEM
IN THIS CASE, SO IT'S IRRELEVANT
REALLY.

>> THAT IS CORRECT.

THERE'S NOTHING LINKING WHAT
HAPPENED AFTER MR. HAYWARD'S
TRIAL TO --

>> THERE'S NOTHING TO SHOW THAT
HIS BILLING RECORDS IN THIS CASE
WERE NOT ACCURATE.

>> THAT'S CORRECT.

>> OKAY.

>> UNLESS THERE ARE ANY OTHER
QUESTIONS I WOULD ASK THE COURT
TO AFFIRM AND DENY THE HABEAS
PETITION.

>> THANK YOU.

REBUTTAL?

>> THANK YOU, YOUR HONOR.
JUST BRIEFLY ON THE EVIDENTIARY
QUESTION, MR. UDELL'S CONDUCT
THAT GOT HIM DISBARRED DIDN'T
OCCUR AFTER MR. HAYWARD'S TRIAL.
IT OCCURRED SEVERAL YEARS BEFORE
MR. HAYWARD'S TRIAL.

I JUST NEEDED TO CORRECT THAT.
A LOT OF THE STATE'S POSITION

HERE DEALS WITH HOW WE DEFINE

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ABUSE AS OPPOSED TO DISCIPLINE
OR WHIPPING AS OPPOSED TO

SPANKING.

THE PERSON TO ASK ABOUT THAT IS THE EXPERT, BE IT A SOCIAL WORKER WHO DEALS WITH THE CYCLE OF VIOLENCE AND THE ABUSE OR A PSYCHOLOGIST WHO DEALS WITH THESE SORTS OF DYNAMICS.

THE PERSON TO ASK IS NOT THE PERSON WHO SUFFERED THE ABUSE OR THE PERSON WHO INFLICTED THE ABUSE, BECAUSE THOSE PEOPLE, AS DR. REARDON EXPLAINED, NORMALIZE THAT KIND OF BEHAVIOR.

THEY DON'T HAVE AN APPRECIATION NECESSARILY FOR WHAT IS ABUSE AND WHAT ISN'T.

SO IF YOU GO TO SOMEBODY WHO'S BEEN ABUSED AND YOU SAY WERE YOU ABUSED, CHANCES ARE THAT THE NORMALIZED RESPONSE, THE RESPONSE FROM SOMEONE WHO'S NORMALIZED THAT BEHAVIOR WILL BE, NO, I WAS NOT ABUSED OR, NO, I DIDN'T ABUSE SOMEBODY.

I ASK THAT THE COURT KEEP THAT IN MIND WHEN EVALUATING WHETHER OR NOT OR TO WHAT DEGREE MR. HAYWARD SUFFERED ABUSE AND NEGLECT.

I THINK IT'S ALL WELL AND GOOD FOR US TO SAY BASED ON OUR OWN BACKGROUNDS THAT THESE PEOPLE SAID THAT THEY WEREN'T ABUSED OR THAT THEY WERE, BUT THE REALITY IS THE PEOPLE TO ASK WERE THE EXPERTS.

WITH REGARD TO THE WITHHOLDING OF INFORMATION, AGAIN, THE POINT IS TRIAL COUNSEL HAS A RESPONSIBILITY TO INVESTIGATE THIS INFORMATION AND THAT INVESTIGATION DOES NOT STOP WITH TRIAL COUNSEL JUST ASKING WERE YOU ABUSED.

THIS IS WHY WE HAVE MITIGATION EXPERTS.

THIS IS WHY WE HAVE

SOCIOLOGISTS, PSYCHIATRISTS AND

PSYCHOLOGISTS.

THIS IS WHY IT'S UNREASONABLE FOR TRIAL COUNSEL TO TELL THE TRIAL COURT A YEAR AND A HALF BEFORE THE TRIAL THAT HE INTENDS TO NOT GET A PSYCHOLOGIST ONBOARD AND THEN WAIT UNTIL THE EVE OF TRIAL TO DO SO AND THEN WAIT UNTIL THE TRIAL HAD ALREADY BEGUN BEFORE THE EXPERT CAN EVEN BEGIN DOING AN EVALUATION, WHICH IS WHAT OCCURRED IN THIS CASE. HAVING SENT AN EXPERT OR SOCIAL WORKER AND SEVERAL EXPERTS TO INTERVIEW THESE FAMILY MEMBERS, PEOPLE WHO HAVE TRAINING AND EXPERTISE IN THIS AREA, A WEALTH OF INFORMATION IS UNCOVERED AND THAT IS WHY THE ABA GUIDELINES SPEAK TO THE STANDARDS OF THE NECESSITY FOR A MITIGATION SPECIALIST, FOR EXPERTS. AGAIN, THIS IS 2007 WE'RE TALKING ABOUT.

THIS IS NOT 1981 OR '83.

THE STANDARD WAS DEFINITELY NOT MET IN THIS CASE.

AND JUST BRIEFLY WITH REGARD THE EVIDENTIARY ISSUE OF THE MOTHER'S HISTORY, I THINK JUSTICE PARIENTE TOUCHED ON THIS AND I WANT TO EMPHASIZE THE POINT, THAT IT GOES TO THE NORM NORMALIZATION OF THE VIOLENCE. IT'S ALL WELL AND GOOD TO SAY MR. HAYWARD WAS NOT ALIVE WHEN THE MOTHER EXPERIENCED WHAT SHE D. THE ONLY WAY TO UNDERSTAND THE NORMALIZATION OF THE ABUSE AND NEGLECT IS TO HEAR WHAT SHE EXPERIENCED.

THERE'S NO WAY ANYBODY CAN MAKE A DETERMINATION ABOUT HER REPRESENTATION OF HOW SHE TREATED HER CHILDREN WITHOUT HAVING AN APPRECIATION FOR HOW SHE HERSELF WAS TREATED. AND THE TESTIMONY AT THE EVIDENTIARY HEARING DEMONSTRATES

THAT SHE HAD LITTLE OR NO

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PARENTING SKILLS.

THAT IS DEFINITELY RELEVANT TO
THE INQUIRY OF HER UNDERSTANDING
OF WHAT WAS NORMALIZATION OF
BEHAVIOR.

AND THAT'S THE POINT THAT WE
MADE AT THE EVIDENTIARY HEARING
WITH THAT TESTIMONY.

WITH REGARD TO WHERE THE INQUIRY
STARTS, THE ABA GUIDELINES RELY
ON AUTHORITIES THAT SAY THE
INQUIRIES SHOULD STOP AT THREE
GENERATIONS.

THERE ARE OTHER AUTHORITIES THAT
MAY OR MAY NOT BE CITED IN THE
BRIEF, AND I DON'T WANT TO GO
OUTSIDE THE RECORD, BUT I WILL
 SAY THAT THERE ARE OTHER
AUTHORITIES THAT SUGGEST IT
SHOULD GO BACK FIVE GENERATIONS.
THIS IS NOT SOMETHING THAT IS
JUST MADE UP.

THESE ARE AUTHORITIES IN THIS
AREA THAT SUGGEST THAT THIS IS
THE STANDARD.

I'VE SUBMITTED ALL ALONG IN THIS
CASE THAT THREE GENERATIONS IS
WHAT THE ABA RECOMMENDS IS
APPROPRIATE.

AND I DON'T THINK THAT THAT'S
UNREASONABLE, AGAIN, GIVEN THAT
THIS IS 2007.

AND THAT IS WHAT IS EXPECTED.
IF THERE ARE NO OTHER QUESTIONS,
I'LL ASK THAT YOU REVERSE.

>> THANK YOU.