

>> WE'LL MOVE TO THE SECOND
CASE ON OUR DOCKET WHICH IS
NELSON VERSUS THE STATE OF
FLORIDA.

>> MAY IT PLEASE THE COURT.
YOUR HONOR, I'M BAYA HARRISON,
COURT-APPOINTED COUNSEL FOR JOSH
NELSON.

IN THIS PARTICULAR CASE THE
MURDER THAT TOOK PLACE WAS
UTTERLY SENSELESS AND --

>> I'M SORRY, WOULD YOU KEEP
YOUR VOICE UP.

UTTERLY WHAT?

>> WAS SENSELESS.

AND WHAT CAUGHT MY ATTENTION
WHEN I FIRST READ YOUR OPINION
AFFIRMING THE JUDGMENT AND
SENTENCE, I WAS VERY CAUGHT BY
JUSTICE PARIENTE CONCURRING
THOUGHTS.

SHE SAID IN THAT OPINION IN
PART, ONE HAS ONLY TO CONSIDER
THE UNEMOTIONAL MATTER OF FACT
WAY THAT NELSON CONFESSED TO

THE MURDER ON VIDEOTAPE TO
REALIZE THAT SOMETHING IN THIS
18-YEAR-OLD'S LIFE HAD GONE
SERIOUSLY WRONG LONG BEFORE HE
COMMITTED THE BRUTAL MURDERS IN
THIS CASE.

THAT BRINGS US TO OUR FIRST
POINT THAT I WOULD LIKE TO
ARGUE HERE TODAY WHICH IS POINT
THREE IN OUR BRIEF.

THAT THE CLAIM THE TRIAL COURT
ERRED IN REJECTING NELSON'S
CLAIM THAT HE WAS DENIED
EFFECTIVE ASSISTANCE OF COUNSEL
DURING THE PENALTY PHASE
BECAUSE HIS ATTORNEY FAILED TO
CALL HIS MOTHER AND STEPFATHERS
AS WITNESSES

>> ON THAT, DIDN'T THEY,
WEREN'T THEY THERE AND TOOK
OFF?

>> ABSOLUTELY, YOUR HONOR.

>> DOESN'T THAT PRESENT THE
DEFENSE COUNSEL WITH A RATHER
DIFFICULT SITUATION AND THE

VERY FACT THAT THEY TAKE OFF
WOULD SEEM TO THEN CALL INTO
QUESTION HOW WELL THEY WILL
PERFORM IF THEY'RE THERE AND
SOMEHOW COMPELLED TO BE THERE.

>> YOUR HONOR, ESPECIALLY
JOSHUA'S MOTHER MADE IT CLEAR
SHE HAD IMPORTANT EXCULPATORY
TESTIMONY OR AT LEAST
MITIGATING TESTIMONY
VIS-A-VIS --

>> WOULDN'T, THE POINT I WAS
TRYING TO GET TO, WOULDN'T A
REASONABLE DEFENSE ATTORNEY
CONFRONTED WITH A WITNESS WHO
ABSCONDED REASONABLY BE
CONCERNED ABOUT THE WAY THAT
WITNESS WOULD TESTIFY?

>> YOUR HONOR, NOT NECESSARILY.
AND HERE'S THE PROBLEM.
DEFENSE COUNSEL DID NOT
SUBPOENA JOSHUA'S MOTHER.
HE DID NOT SUBPOENA
MR. ^PERCIFELD.

SO WHAT HAPPENED WAS DURING THE

GUILT INNOCENCE PHASE, THERE
WAS AN INDICATION THAT THE
DEFENSE WAS GOING TO GO AFTER
MR. ^PERCIFELD BECAUSE HE HAD
SEXUALLY ABUSED JOSHUA.

SO --

>> WASN'T THAT THEIR THEORY?

WASN'T THAT ONE OF THE
MITIGATING CIRCUMSTANCES THEY
WERE PRESENTING?

BECAUSE, DIDN'T OTHER WITNESSES
IN FACT TESTIFY ABOUT THIS
ABUSE?

>> YES, YOUR HONOR, YOU'RE
ABSOLUTELY RIGHT.

BUT AS I THINK THIS MAY BE FAIR
TO SAY, THAT ONE MOTHER IS
WORTH 10 EXPERTS ON AN ISSUE
LIKE THIS.

>> THIS WASN'T THE MOTHER'S
HUSBAND, CORRECT?

>> IT WAS THE MOTHER'S HUSBAND,
ABSOLUTELY.

>> SO WHEN FACED WITH THE
REALITY IN COURT, WHEN THE

DEFENSE ATTORNEY SAYS, WE'RE
GOING TO PRESENT EVIDENCE TO
YOU THAT SAYS THAT THIS
STEPFATHER SEXUALLY ABUSED THIS
CHILD, THE MOTHER AND THE
STEPFATHER THEN FLEE THE
COURTROOM AS IT WERE AND --
>> YES, YOUR HONOR.

BUT JUST HAVING DONE THIS FOR
YEARS ON THE TRIAL LEVEL, I CAN
TELL YOU THAT IF A PERSON IS
UNDER SUBPOENA, AND AT THE
BEGINNING OF THE TRIAL THAT
PERSON IS BROUGHT INTO COURT
AND THE JUDGE SAYS, NOW, WE'RE
GOING TO INVOKE THE RULE.

YOU'RE UNDER SUBPOENA.
YOU BETTER BE HERE WHEN
YOU'RE --

>> BUT IF YOU HAVE TO SUBPOENA
SOMEBODY'S MOTHER WHO IS FACING
THE DEATH PENALTY, DOESN'T THAT
IN ITSELF TELL YOU PERHAPS THIS
IS SOMEONE I MAY NOT WANT TO
CALL BECAUSE I CAN'T TRUST HER?

>> YOUR HONOR, THERE IS NOTHING
IN THE RECORD TO INDICATE THAT
JOSHUA'S MOTHER WAS GOING TO BE
ANYTHING OTHER THAN A GOOD
MITIGATING WITNESS UNTIL THIS
HAPPENED.

BUT AGAIN, HAD SHE BEEN
SUBPOENAED, THAT'S WHAT
NORMALLY IS DONE FOR ALL
WITNESSES IN A CAPITAL --

>> BUT YOU SUBPOENA HER AND
MAKE HER STAY IN THE COURTROOM,
ASSUMING SHE WOULDN'T ABSCOND
JUST BECAUSE SHE WAS
SUBPOENAED.

I MEAN PEOPLE DO THAT.
SO YOU GET HER ON THE STAND AND
THEN SHE DOESN'T GIVE YOU THE
FAVORABLE TESTIMONY THAT YOU
THOUGHT SHE WAS GOING TO GET?

>> YOUR HONOR, THAT IS, IT IS
VERY SPECULATIVE.

SHE WAS JOSHUA'S MOTHER.
SHE NEVER INDICATED ANYTHING
OTHER THAN BEING THERE TO

SUPPORT HIM.

SHE GOT --

>> ALL SHE HAD TO DO WAS STAY

THERE TO SUPPORT HIM.

SHE OBVIOUSLY WAS NOT GOING TO

SUPPORT HIM BECAUSE SHE LEFT.

>> I CAN TELL YOU IF SHE HAD

BEEN SUBPOENAED, THE DEFENSE

LAWYER COULD THEN SENT THE

SHERIFF OUT TO FIND HER.

>> YOU KNOW, I THINK YOU'RE

HEARING WHAT, YOU KNOW, YOU'VE

BEEN DOING THIS FOR A LONG TIME

BUT, WE ALSO HAVE BEEN DOING

THESE FOR A LONG TIME AND AS

FAR AS THE STEPFATHER, I REALLY

DON'T SEE HOW PUTTING A

STEPFATHER ON TO SAY I ABUSED

MY SON WOULD HAVE BEEN

COMPELLING TESTIMONY.

WHAT DID THE MOTHER SAY AT THE

EVIDENTIARY HEARING AS TO WHY

SHE LEFT?

>> WE WERE NEVER ABLE TO FIND

THE MOTHER. SO SHE --

>> SO THERE'S, WHAT ARE YOU,
YOU CAN'T EVEN ESTABLISH YOUR
CLAIM.

IN OTHER WORDS, FIRST OF ALL,
YOU CAN'T ESTABLISH THAT SHE
WOULD HAVE BEEN AVAILABLE OR
GIVEN FAVORABLE TESTIMONY.

RIGHT?

>> YOUR HONOR, I'M NOT GOING TO
BEAT A DEAD HORSE.

>> IF THIS IS YOUR BEST
CLAIM --

>> IT IS NOT MY BEST CLAIM.

>> LISTEN, THIS IS NOT A
LAUGHING MATTER.

WHAT I SAID AT THE TIME OF MY
CONCURRENCE IS, THIS IS A
TRAGEDY.

THE MENTAL HEALTH EXPERT DID A
VERY GOOD JOB OF EXPLAINING IT
TO THE JURY.

IT'S JUST THAT WITH, AND HE IS
18 YEARS OLD.

BUT WITH THESE FACTS THIS IS
STILL A PROPORTIONATE SENTENCE.

AND A MOTHER, YOU SAY A MOTHER
IS WORTH 1,000 OTHER WITNESSES
BUT WHAT WE KNOW FROM OUR CASES
IS THAT MOTHER'S ALWAYS GOING
TO, EXCEPT FOR THIS TIME,
SUPPORT HER SON, AND SO THAT'S
NOT GOING TO GET, YOU KNOW A
LOT OF CREDIBILITY.

SO I THINK THAT YOU CAN NOT,
UNFORTUNATELY, FOR YOU OR FOR
MR. ^NELSON, BE ABLE TO
DEMONSTRATE, EITHER DEFICIENCY
OR PREJUDICE ON THIS CLAIM.

>> MOVING ON TO POINT 2, THEN,
YOUR HONOR --

>> IS THIS THE TATOO CLAIM
YOU'RE GETTING INTO NOW?

>> THE TATOO CLAIM.

>> THIS IS ONE I FIND A LITTLE,
MORE COMPELLING BECAUSE MY
QUESTION WOULD ARGUE, DO YOU
EVEN MAKE THE ARGUMENT THAT
DEFENSE ATTORNEY, EVEN THOUGH
THE TATOOING TOOK PLACE AFTER
THE GUILT PHASE AND BEFORE THE

PENALTY PHASE, THAT THE DEFENSE
ATTORNEY EVER REQUEST THAT A
NEW JURY BE SEATED?

>> NO. AND, EVEN WORSE, THE DEFENSE
LAWYER AT THE CONCLUSION OF THE
GUILT INNOCENCE PHASE, HE
WASN'T PREPARED TO GO FORWARD.
HE WASN'T PREPARED AND HE FAILED
TO ASK THE COURT --

>> I THOUGHT --

>> I'M SORRY.

>> I THOUGHT HE SAID THAT THE
REASON HE WANTED THIS TIME
PERIOD IS FOR THE JURY TO SORT
OF COOL DOWN OR SOMETHING TO
THAT EFFECT BECAUSE THIS TRIAL
REALLY HAD BEEN KIND OF MESSY
AND --

>> YOUR HONOR, I THINK, HE MAY
HAVE SAID THAT IN PART.

HE ALSO SAID THAT HE HAD TO GET
WITNESSES DOWN FROM
OUT-OF-STATE AND THINGS OF THIS
NATURE.

BUT AT LEAST HE COULD HAVE DONE

A MINIMUM, AT LEAST HE COULD HAVE
ASKED THE JUDGE, YOUR HONOR,
WOULD YOU PLEASE INSTRUCT THE
JURY, YOU KNOW THIS IS A PRETTY
HIGH-PROFILE CASE.

IT IS A NOT THE BUNDY CASE BUT
IT IS HIGH-PROFILE.

WOULD YOU PLEASE INSTRUCT THE
JURY TO MAKE SURE YOU DON'T
READ ANYTHING, LISTEN TO ANY
NEWS ACCOUNTS.

YOU KNOW A LOT OF THESE LOCAL
NEWS RADIO STATIONS WERE
TALKING ABOUT THIS CASE.

DON'T WATCH TELEVISION WITH
REGARD TO THIS PARTICULAR
CASE.

>> NOW WAS THAT TATTOO, MY
UNDERSTANDING FROM THE RECORD
AND CORRECT ME, IF I'M WRONG,
BUT THE DEFENSE LAWYER, THAT
DIDN'T OCCUR AT THE POINT OF
THE GUILT PHASE?

>> NO.

>> IT OCCURRED SOME TIME AFTER

THAT AND HE DIDN'T EVEN KNOW
ABOUT IT UNTIL A DAY OR TWO
BEFORE.

AND THEN THE TRIAL JUDGE, THEY
DID INTERROGATE THE JURORS, DID
THEY NOT?

>> THEY DID.

>> THE JURORS SAID WE COULDN'T
EVEN COMPREHEND ALL THE STUFF
THAT WAS GOING ON.

THERE WAS AN INTERROGATION OF
THOSE JURORS.

NOW, NO QUESTION YOU CAN ALWAYS
ASK FOR A NEW JURY PANEL BUT
HERE, DID THEY NOT MAKE AN
ATTEMPT TO SEE THE EFFECT, OR
IF THERE WAS AN EFFECT, OF THE
POST-GUILT PHASE PUBLICITY THAT
WOULD IMPACT THE JURORS SO THEY
COULD NOT FOLLOW THE LAW?

>> THE JUDGE DID ASK THE JURORS
AFTER THEY CAME BACK FROM THE
PENALTY, FACE, LOOK, CAN YOU BE
FAIR?

LOOK, HOW IN THE WORLD CAN YOU

NOT TAKE INTO ACCOUNTING IS

LIKE THIS?

>> THAT MAY BE AND I HAVE

PROBLEMS WITH THE LAW IN

FLORIDA IN SOME AREAS WHERE A

JUROR SAYS, I'M SO COMMITTED

BUT THEN REHABILITATED WHICH IS

TRUE THE FIRST STATEMENT OR THE

SECOND?

BUT OUR LAW, DOES IT NOT, AS WE

LOOK AT JURORS, TELL US WHAT WE

HAVE TO DO AS JUDGES, YOU'RE

SUPPOSED TO MAKE SURE THEY WILL

FOLLOW THE LAW AND SET ASIDE

ANY OF THEIR -- BECAUSE

EVERYBODY WALKS IN THERE WITH

SOME KIND OF BACKGROUND.

SO ISN'T THAT WHAT FLORIDA LAW

REQUIRES?

>> THAT IS A --

>> THAT'S WHAT THIS TRIAL JUDGE

DID.

>> YES, SIR.

AND I'M JUST SAYING YOU HAVE TO

TAKE THAT WITH A GRAIN OF SALT.

BUT YOU GET BACK TO JUSTICE
PARIENTE'S QUESTION.
YOU KNOW ASK WHY, WHAT IN
THE WORLD COMPELLED THIS YOUNG
MAN TO COMMIT SUCH A BRUTAL ACT
ON A FRIEND?

AND JOSHUA NELSON ANSWERED IN
THE JAIL.

HE SAT THERE IN THE JAIL AND HE
ANSWERED THE QUESTION.

BECAUSE I'M A NATURAL BORN
KILLER. AND IF --

>> EVERY TIME THERE IS A
CAPITAL CASE THAT COMES HERE,
LOOK AT IT AND SAY, WHAT IN THE
WORLD WERE THEY THINKING? I
MEAN IT IS JUST NOT, WE DON'T
BELIEVE I THINK IN THIS SOCIETY
THAT IT IS A NORMAL THING TO
BRUTALLY MURDER PEOPLE.

YOU KNOW THE NUMBER OF CASES
THAT COME THROUGH.
IT DOES HAPPEN.

>> IT DOES.

>> AND THERE'S NOT ALWAYS A

EXPLANATION THAT IS CLEAR-CUT
OR PRECISE.

THIS IS A YOUNG LIFE GONE AWRY.

>> RIGHT.

BUT ALL I'M SAYING IS THIS.

IF TRIAL COUNSEL HAD TAKEN
ACTION HE COULD HAVE MADE SURE
THAT THOSE JURORS DID NOT KNOW
ABOUT THAT NATURAL BORN KILLER
BUSINESS.

AND HERE'S HOW IT KIND OF
WORKED OUT.

NOW WE HAD A SITUATION WHERE
THE STATE HAS THIS INFORMATION.

THE STATE'S GOING TO PUT ON
EVIDENCE ABOUT THIS TATTOO.

SO THE DEFENDANT HAD THE, THE
DEFENSE LAWYER HAD TO ENTER
INTO A DEAL WITH THE PROSECUTOR.

IF YOU WON'T BRING UP THE
INFORMATION ABOUT THE TATOO, WE
WILL NOT LET JOSHUA NELSON
BACK ON THE STAND DURING THE
PENALTY PHASE TO DO --

>> WELL, COULD THE STATE HAVE

PROPERLY PUT ON EVIDENCE ABOUT THIS
TATTOO AND THE NATURAL BORN
KILLER STATEMENT?

>> THE DEFENSE LAWYER --

>> COULD THE STATE HAVE
PROPERLY DONE THAT?

AS A PART OF THE PENALTY PHASE?

>> THE DEFENSE LAWYER THOUGHT
HE COULD AND THAT'S THE
PROBLEM.

>> SO IS THERE ARGUMENT THAT HE
COULD NOT HAVE AND THAT --

>> NO, MY ARGUMENT IS, BY
ALLOWING THE JURORS TO LEARN
ABOUT THIS AND ALLOWING THIS TO
HAPPEN, THAT MEANT THAT A DEAL
HAD TO BE CUT AND WHAT THE
DEFENSE HAD TO GIVE UP WAS
SOMETHING THAT I THINK IS
CRUCIAL.

WHAT ABOUT THE SECOND MOST
IMPORTANT THING YOU CAN HAVE IN
A CASE LIKE THIS, WHERE YOU
DON'T HAVE THE MOM THERE TO
TESTIFY, AT LEAST THE DEFENDANT

CAN --

>> I THOUGHT THE DEFENDANT DID
TESTIFY.

>> DURING THE GUILT INNOCENCE
PHASE.

BUT HE WANTED TO TESTIFY DURING
THE PENALTY PHASE AND HE LOST
THAT ABILITY IN THIS DEAL THEY
HAD TO CUT.

AND I MEAN, THESE JURORS, THEY
-- I'M SORRY.

>> WASN'T THERE SOME INDICATION
THAT, I MEAN, DURING THE GUILT
PHASE, SEEMS TO ME HE TESTIFIED
ABOUT A LOT OF THINGS THAT
REALLY WERE NOT THAT RELEVANT
TO THE GUILT PHASE.

BUT WASN'T THERE SOME
TESTIMONY THAT, WHAT HE, HE
WOULD NOT HAVE TESTIFIED TO
ANYTHING DIFFERENTLY IN THE
PENALTY PHASE THAN WHAT HE
TESTIFIED TO IN THE GUILT
PHASE?

>> YOUR HONOR, THAT'S CORRECT,

IN THAT HE DID EVINCE SOME
REMORSE DURING HIS GUILT PHASE
TESTIMONY.

>> PART OF THE REMORSE IF I'M
READING THE RECORD CORRECTLY,
HE WAS REMORSEFUL FOR THE
PREDICTMENT HE WAS IN AS WELL
AS, FOR THE MURDER HE
COMMITTED? SO A DOUBLE-EDGED
SWORD. IS THAT REALLY REMORSE?

>> THAT IS VALID ARGUMENT

BUT --

>> DIDN'T HE SPECIFICALLY USE
THE WORD, SLIGHT FEELINGS OF
REMORSE?

>> YOUR HONOR, THAT IS DURING
THE POST-CONVICTION PHASE.

>> OKAY.

>> THAT YOU'RE ABSOLUTELY
RIGHT. THAT IS TRUE.

WHEN YOU SIT WITH THIS YOUNG
MAN HE IS DEAD EMOTIONALLY.

THAT IS WHAT HE SAID -- I

DIDN'T WANT HIM TO SAY THAT AT
THE POST-CONVICTION PROCEEDING

BUT THAT'S EXACTLY WHAT HE

SAID.

YOU KNOW, I'M TRYING TO GET THE

KID TO SAY I'M DEEPLY

REMORSEFUL. THAT IS WHAT I WOULD

HAVE SAID.

>> WHY DO YOU THINK IT WOULD

HAVE BEEN ANY DIFFERENT

EARLIER?

WHY WOULD WE THINK IT WOULD

HAVE BEEN ANY DIFFERENT

EARLIER?

>> SUPPOSEDLY THE COUNSEL HAD

THIS KID PREPPED SO HE WOULD

MAKE A COMPELLING APOLOGY AND

EXPRESS SERIOUS REMORSE.

>> DIDN'T YOU HAVE HIM PREPPED

TOO?

>> YES. I THOUGHT I DID.

I THOUGHT I DID.

>> DON'T YOU THINK, REALLY,

MR. ^HARRISON, THAT SAYS VOLUMES

BECAUSE USUALLY THESE

DEFENDANTS THAT THINK THEY'RE

NOT REALLY GOING TO GET THE

DEATH PENALTY AND SO THEY HAVE

AN UNREALISTIC VIEW OF THINGS.

ONCE THEY HAVE THE DEATH

PENALTY, USUALLY YOU HAVE, I'LL

SAY JUST ABOUT ANYTHING.

HERE THE DEFENDANT, YEARS

LATER, CAN'T EVEN GET IT UP TO

SAY I FEEL AWFUL.

AND SO WE NOW SPECULATE IF HE

HAD BEEN CALLED AT THE POST,

AT THE PENALTY PHASE, I'M STILL

NOT, I WANT TO HEAR THIS, OKAY?

HE WOULD HAVE SAID, I REALLY

FEEL BADLY BUT I REALLY HATE

BEING IN JAIL.

THEN THE CROSS-EXAMINATION

WOULD BE, LET'S SEE, DID YOU,

AFTER THE GUILT PHRASE, DID YOU

HAVE A TATTOO PLACED ON YOU?

YES.

AND WHAT DOES THAT SAY?

NATURAL BORN KILLER.

AND WHY, MR. ^NELSON, DID YOU

HAVE THAT TATTOO PUT ON?

WHAT DID MR. ^NELSON SAY ABOUT

WHY HE HAD THE TATOO PUT ON?

>> HE JUST SAID THAT IT WAS,
TOOK AWAY SOME OF THE BOREDOM.

HE WAS VERY MATTER OF FACT
ABOUT ALL THIS.

>> THAT IS WHAT HE SAID IN
POST-CONVICTION?

>> RIGHT.

>> JUST IMAGINE, JUST IMAGINE,
THE IMPACT THAT WOULD HAVE HAD
ON THE JURY. THE MOVIE HAD JUST
COME OUT, "NATURAL BORN
KILLERS"?

>> IT HAD BEEN OUT FOR A LITTLE
BIT, YES.

>> NOW YOU HAVE TO START TO
SAY, WHAT IS THE JURY GOING TO
BE THINKING?

THAT IMAGE OF "NATURAL BORN
KILLERS" IS ONE OF THE MOST
DEVASTATING MOVIES.

SO HE PUT HIMSELF, NOT ONLY DID
HE PUT HIMSELF IN THE
PREDICTMENT, OF KILLING THE
PERSON THAT HE KILLED, AN

INNOCENT LIFE BUT HE PUT
HIMSELF IN THE PREDICTMENT OF
BOXING IN THE DEFENSE LAWYER
NOT TO BE ABLE TO CALL HIM.
THAT IS HIS DOING.

>> TO SOME EXTENT IT IS, BUT,
YOUR HONOR, AGAIN IF YOU COULD
JUST, AND I THINK YOU CAN, IF
YOU CAN TRY TO UNDERSTAND, THIS
KID HAS NO EMOTIONS.
BUT LET ME DO THIS.

>> HOW COULD, I GUESS BOTTOM
LINE IS HERE, HOW CAN WE REALLY
FAULT TRIAL COUNSEL FOR NOT
FORESEEING THAT HE WAS GOING TO
GET A TATTOO LIKE THAT AND
CREATE THIS PROBLEM?
THAT JUST SEEMS TO BE REALLY
HOLING TRIAL COUNSEL TO A
PRETTY HIGH STANDARD.

>> IT IS BUT, IT'S NOT A HIGH
STANDARD TO EXPECT COUNSEL TO
SAY, HEY, JUDGE, WE ARE GOING
TO HAVE A THREE-WEEK LAYOVER
HERE, PLEASE TELL THE JURY

DON'T READ ANYTHING ABOUT THE
CASE.

THAT IS DONE BY EVERYBODY.

>> I WANT TO LET YOU KNOW
YOU'RE DOWN TO YOUR FOUR
MINUTES.

>> I WANTED TO GET TO POINT 4
BUT I WILL, I WILL JUST WAIT
UNTIL MY REBUTTAL.

>> YOU NEED TO DISCUSS IT SOME
BEFORE --

>> YOU NEED TO, NEED TO DEAL
WITH IT NOW.

>> I THINK COUNSEL IS GOING TO
ADDRESS IT FROM THE AG'S
OFFICE.

SO I THINK I WILL BE ALL RIGHT.

THANK YOU.

>> GOOD MORNING, YOUR HONORS,
MAY IT PLEASE THE COURT.

I'M CAROL DITTMAR FROM THE
ATTORNEY GENERAL'S OFFICE IN
TAMPA.

I DON'T WANT TO DISAPPOINT
MR. HARRISON BUT I WASN'T

INTENDING TO FOCUS ON ISSUE 4

AT ALL.

I WILL BE HAPPY TO ADDRESS

ISSUES 2 AND 3 THAT HAVE BEEN

DISCUSSED ABOUT THIS MORNING.

FIRST AS FAR AS ISSUE 3 WITH

THE PRESENTATION OF THE MOTHER

AND THE BOYFRIEND, A COUPLE OF

THINGS I DID WANT TO POINT OUT

WAS THAT COUNSEL TESTIFIED AT

THE EVIDENTRY HEARING AND

POST-CONVICTION THAT HE DID NOT

REQUEST ANY KIND OF CONTINUANCE

TO TRY TO FIND THE MOTHER AND

THE STEPFATHER WHEN THEY

DISAPPEARED BECAUSE HE WAS

CONCERNED AT THAT POINT THAT

THEY WOULD NOT TESTIFY

FAVORABLY TO THE DEFENSE IN

LIGHT OF THE CIRCUMSTANCES.

SO HE DID HAVE THAT CONCERN

ONCE THEY HAD TAKEN OFF.

YET BEFORE THAT TIME THE MOTHER

HAD BEEN COOPERATIVE.

>> WAS THERE ANYTHING PROFFERED

OR TESTIFIED TO BY ANYONE THAT
THE MOTHER AND STEPFATHER WOULD
HAVE SAID ANYTHING DIFFERENT
FROM WHAT THE OTHER WITNESSES
SAID ABOUT THE ABUSE OF THE
DEFENDANT?

>> TO THE CONTRARY, THE
EVIDENCE WAS THEY WOULD NOT
HAVE ANYTHING IN ADDITION TO
WHAT HAD ALREADY BEEN SAID
BEFORE THE JURY.

NOW THE DEFENSE ATTORNEY
TESTIFIED THAT THE MOTHER HAD
BEEN COOPERATIVE WITH WHIM.
THAT SHE KNEW THAT HE WAS
RELYING ON HER TO BE A DEFENSE
WITNESS FOR MITIGATION
PURPOSES.

THE THING THAT HE RECALLED THE
MOST VALUABLE THING THAT HE
THOUGHT SHE WOULD HAVE ADDED TO
PENALTY PHASE, SHE RECALLED
HAVING PUT LIQUOR IN JOSHUA
NELSON'S BOTTLE WHEN HE WAS A
BABY.

THE FATHER, THE NATURAL FATHER,
DID TESTIFY AT THE PENALTY
PHASE ABOUT THAT EXACT FACT.
WHEN HE WAS COLICKY AS A BABY
THEY PUT VODKA IN HIS BOTTLE.
THAT WAS THE ONLY SPECIFIC
TESTIMONY THAT THE DEFENSE
ATTORNEY RECALLED HE WAS GOING
TO ASK THE MOTHER ABOUT HAD SHE
BEEN A WITNESS.
AND THE PENALTY PHASE JURY DID
HEAR THAT TESTIMONY FROM THE
FATHER.
SO WHEN THE DEFENSE ATTORNEY
WAS ASKED IN POST-CONVICTION,
DID YOU HAVE ANY OTHER
INFORMATION THAT YOU INTENDED
TO BRING OUT THAT DID NOT COME
BEFORE THE JURY, HE DID NOT
HAVE ANYTHING AND I BELIEVE
THAT MR. HARRISON'S
INVESTIGATOR ALSO TRIED TO FIND
ANY OTHER ADDITIONAL
INFORMATION THAT COULD HAVE
COME FROM THE MOTHER.

>> LET ME JUST UNDERSTAND
SOMETHING ABOUT THE, THE
DEFENSE ATTORNEY WAS PLANNING
TO PUT ON BOTH THE MOTHER AND
THE STEPFATHER?

HE ANNOUNCED THAT TO THE JURY?

>> HE WAS INTENDING TO PUT ON
THE MOTHER BECAUSE HE KNEW SHE
HAD GOOD MITIGATING THINGS TO
SAY.

THE STEPFATHER HE SAID, DENIED
THE ABUSE THAT THEY HAD ACCUSED
HIM OF AND HE HAD NO BASIS TO
BELIEVE THAT THE STEPFATHER HAD
ANY MITIGATING TESTIMONY AT
ALL.

>> WHAT DID HE TELL THE JURY?

>> HE WAS CONCERNED THAT HE WAS
HOPEFUL THAT THE STEPFATHER
WOULD COME IN AND COME CLEAN
AND LOOK THE JUDGE IN
THE EYE AND UNDER OATH HE WOULD
ADMIT HE HAD BEEN ACTUALLY THE
HORRIBLE PERSON THAT JOSHUA --

>> DIDN'T HE TELL THE JURY THAT

YOU'RE GOING TO HEAR FROM THE
MOTHER AND THE STEPFATHER?

>> I DON'T KNOW THAT HE TOLD
THEM THAT BECAUSE BASICALLY
WHAT HE TOLD THEM WHEN IT CAME
OUT AT GUILT PHASE, IT ACTUALLY
CAME OUT AT THE OPENING
STATEMENTS IN THE GUILT PHASE
OF THE TRIAL THAT THEY WERE
RELYING ON THE FACT THAT JOSHUA
HAD BEEN SEXUALLY ABUSED AND
HIS HORRIBLE HOME LIFE BECAUSE
THEY WERE BASICALLY MAKING AN
ARGUMENT THAT THIS WASN'T
PREMEDITATED MURDER.

I THINK THEY WERE JUST HOPING
TO GET SOME SYMPATHY FROM THE
JURY FOR JOSHUA NELSON.

SO HE DID TESTIFY IN THE GUILT
PHASE ABOUT HIS HOME LIFE.

ABOUT THE SEXUAL ABUSE.

IT WAS AFTER THAT HE HAD MADE
THOSE OPENING STATEMENTS IN THE
GUILT PHASE THAT THE MOTHER AND
STEPFATHER DISAPPEARED.

>> HE DIDN'T SAY WHO WOULD
TESTIFY TO IT?

>> HE JUST SAID YOU'LL BE
HEARING ABOUT THIS BECAUSE
JOSHUA DID TESTIFY TO IT IN THE
GUILT PHASE.

>> AND THE MOTHER AND THE STEP
FATHER WERE IN THE --

>> APPARENTLY THEY WERE IN THE
COURTROOM AT THAT TIME FOR THE
OPENING STATEMENT AND LEFT
RIGHT AFTER THE OPENING
STATEMENT.

>> I MEAN THEY LEFT AND
THEY HAVE NEVER BEEN HEARD FROM
SINCE?

>> WELL, --

>> -- THE OPENING STATEMENT OF THE
GUILT PHASE?

>> THE GUILT PHASE OPENING
STATEMENT. THE GUILT PHASE.

>> SO DURING THE SIX WEEKS
BETWEEN THE GUILT PHASE AND THE
PENALTY PHASE WAS THERE ANY
ATTEMPT TO FIND THE MOTHER?

>> HE SAID THAT HE LOOKED, AS FAR AS THE IDEA OF HAVING THEM UNDER SUBPOENA, ACCORDING TO THE TRIAL COUNSEL THAT WOULD NOT HAVE MADE ANY DIFFERENCE AT ALL HE FELT LIKE THE MOTHER WAS COMPLETELY DOMINATED BY THE STEPFATHER AND HE SAID, YOU KNOW, TO THE EXTENT THAT HE WOULD CALL HOME TO TALK TO THE MOTHER.

IF HE CALLED HOME IT WOULD BE THE STEPFATHER THAT CALLED BACK AND KIND OF WAS THE, WAS IN CHARGE OF MAKING SURE THE MOTHER WAS EVEN COMMUNICATING WITH THE DEFENSE ATTORNEY.

EVERYTHING WHEN THROUGH THE STEPFATHER.

SO HE SAID THAT HAVING HER UNDER SUBPOENA WOULD NOT HAVE MADE ANY DIFFERENCE.

ONCE THE STEPFATHER SAID WE'RE GOING TO GO AND WE'RE GOING TO LEAVE THEY WERE.

AND THEY WOULDN'T HAVE STOPPED
BECAUSE THEY HAD A SUBPOENA.
THAT WOULDN'T HAVE BEEN A
REASON FOR THEM TO STOP, ONCE
THEY HEARD WHAT WAS COMING OUT.

THERE WAS OTHER EVIDENCE BY
SOME OF THE OTHER PENALTY PHASE
WITNESSES.

SOME OF THE AUNTS THAT
TESTIFIED THAT THE MOTHER HAD
ACTUALLY CALLED THEM AND SAID,
DON'T BOTHER COMING AND
TESTIFYING AS A PENALTY PHASE
WITNESS.

YOU KNOW, THIS IS, MADE
OUTRAGEOUS STATEMENT THIS IS
AN ELECTION YEAR.

THEY'RE GOING TO FRY HIM
ANYWAY.

THERE IS NO REASON FOR YOU TO
BE HERE.

SO THE JURY ACTUALLY HAD THAT
ASPECT OF THE MOTHER ALSO THAT
SHE NOT ONLY ISN'T COMING TO

TESTIFY IN HER OWN SON'S
PENALTY PHASE, SHE IS CALLING
OTHER WITNESSES, FATHERS,
SISTERS, WITNESSES THAT HAD
KNOWLEDGE OF THE HOME LIFE
TELLING THEM DON'T COME BECAUSE
THEY'RE JUST TRYING TO MAKE ME
LOOK LIKE A BAD MOTHER.

THAT ALL COMES OUT IN THE
PENALTY PHASE TESTIMONY.

SO AGAIN THE JURY, THE JURY
HEARD ALL THAT.

SO THERE REALLY, I BELIEVE THAT
JOSHUA NELSON TESTIFIED AT THE
EVIDENTIARY HEARING THAT HIS
MOTHER HAD DECEASED AND WAS, I
DON'T KNOW, HOW HE GOT THAT
INFORMATION OR --

>> HAD BEEN WHAT?

>> HAD DIED.

WAS NO LONGER AVAILABLE.

>> OKAY.

>> AT THE TIME OF THE
EVIDENTIARY HEARING.

>> I SEE.

WHATEVER IT IS, I CAN NOT
IMAGINE IN THIS CASE THAT, IT
SOUND LIKE THE DEFENSE LAWYER
HAD ORIGINALLY PLANNED TO CALL
THE MOTHER AND THE STEPFATHER,
THAT TALKING ABOUT HOW THE
MOTHER ALLOWED THE STATE TO
CROSS-EXAMINE, HOW THE MOTHER
DID NOT PROTECT HER SON FROM
ABUSE.

>> RIGHT.

THIS HAD BEEN AN EXTENDED
SEXUAL ABUSE THAT HAD GONE ON
FOR AN EXTENDED PERIOD OF TIME
THAT JOSHUA CONSISTENTLY, HE
HAS SAID HE WENT TO HIS MOTHER
ABOUT IT REPEATEDLY AND SHE WAS
AWARE OF IT AND, YOU KNOW, SHE
DID NOT STICK UP FOR HER SON AT
ALL. AND SHE ALLOWED IT TO CONTINUE.

>> THE STATE NEVER TRIED TO,
SOMETIMES WHEN, AT THE TIME OF
A TRIAL, SOMEONE MAKES AN
ALLEGATION OF SEXUAL ABUSE THE
STATE QUESTIONS WHETHER IT

HAPPENED.

IN THIS CASE DID THE STATE
QUESTION WHETHER HE HAD BEEN
SEXUALLY ABUSED?

>> NOT TO MY KNOWLEDGE.

I DON'T THINK THERE WAS ANY
SUGGESTION THAT WAS NOT
SOMETHING THAT WAS
LONG-STANDING AT THAT POINT.

>> AND THEY HAD A PSYCHOLOGIST
THAT TESTIFIED ALONG.

>> YES, DR. ^MERIN TESTIFIED
EXTENSIVELY ABOUT THE ABOUT
FAMILY DYNAMICS
ABOUT MR. ^NELSON'S MENTAL
HEALTH.

THERE WAS ANOTHER MENTAL HEALTH
EXPERT AT TIME OF TRIAL,
DR. ^BORSTEEN, AND WHO HAD
EVALUATED JOSHUA NELSON AND HOW
THE TRIAL ATTORNEY MADE THE
DECISION TO PUT DR. ^MERIN ON AS
THEIR PRIMARY MENTAL HEALTH
EXPERT AT THE PENALTY PHASE.

>> THAT WASN'T THEIR THRUST TO

QUESTION THE MENTAL HEALTH --

>> THEY DIDN'T REBUT WHEN DR. ^MERIN

BROUGHT ABOUT HIS HISTORY

AND BACKGROUND AND SUBSTANCE

ABUSE ISSUES.

HE HAD PRIOR MENTAL HEALTH

COUNSELING THAT THE JURY WAS

AWARE OF.

THEY KNEW ALL THAT.

DR. ^MERIN HAD ALL THE RECORDS

AVAILABLE, ALL THE SCHOOL

RECORDS, ALL THE MEDICAL

RECORDS.

>> HERE WE HAVE ALMOST, SEEMS

LIKE A STELLAR, FOR THE TIME, A

STELLAR PRESENTATION OF

MITIGATION?

>> I THINK IT WAS VERY

WELL-INVESTIGATED.

THE DEFENSE ATTORNEY TESTIFIED

AT THE POST-CONVICTION

EVIDENTIARY HEARING HE THOUGHT

THIS WAS THE FIRST TIME IN LEE

COUNTY THAT A DEFENSE ATTORNEY

HAD BEEN ABLE TO SECURE FUND

FOR A MITIGATION SPECIALIST.

SO SHE PUT A GREAT PACKAGE
TOGETHER.

THERE WAS, THERE WERE SOME
ISSUES BECAUSE THE TRIAL JUDGE
WAS NOT ANXIOUS TO SPEND A LOT
OF MONEY DOING THE MITIGATION
INVESTIGATION EVEN BEFORE THE
GUILT PHASE.

THAT WAS PART OF THE REASONS
THEY HAD THE DELAY WHICH KIND
OF TAKES ME INTO TATTOO ISSUES
BECAUSE HAL STEVENS, THE TRIAL
ATTORNEY, TESTIFIED ABOUT THE
DELAY BETWEEN THE GUILT PHASE
AND PENALTY PHASE WHERE SHE
FELT WAS A GREAT ADVANTAGE FOR
THE DEFENSE.

HE FELT LIKE THEY REALLY NEEDED
THAT TIME.

THEY WERE STILL PUTTING THEIR
PENALTY PHASE CASE TOGETHER.

THEY WERE STILL TRYING TO
LOCATE THE DEFENDANT'S FATHER
WHO WAS HOMELESS AND LIVED IN

THE WOODS IN ORLANDO.

THEY WERE ABLE TO FIND HIM.

THEY DIDN'T HAVE HIM FOR THE
GUILT PHASE.

BUT THEY WERE ABLE TO GET HIM
DOWN AND HE DID TESTIFY AT THE
PENALTY PHASE.

IN ADDITION HAL STEVENS TALKED
ABOUT THE HOW HE THOUGHT THE
JURY REALLY NEEDED A
COOLING-OFF PERIOD BECAUSE THEY
HAD HEARD INCREDIBLY BRUTAL
EVIDENCE.

AS MR. HARRISON SAID, JOSHUA
NELSON IS A VERY, VERY COLD
DEFENDANT AND HE GAVE, HE
VIDEOTAPED BASICALLY A
REENACTMENT OUT AT THE CRIME
SCENE WHERE VERY COLDLY
OUTLINES EVERYTHING THAT
HAPPENS AND OBVIOUSLY THIS
COURT AND IN YOUR DIRECT APPEAL
OPINION RECOUNTS MUCH OF HIS
CONFESSION BUT IT CERTAINLY
MADE HIS ATTORNEY'S JOB MORE

DIFFICULT.

MADE EVERYBODY'S JOB MORE

DIFFICULT TO TRY TO PORTRAY HIM

AS ANY SYMPATHETIC CHARACTER TO

THE JURY.

THEY HAD SEEN THAT VIDEOTAPE.

SO HAL STEVENS VERY MUCH WANTED

A BREAK FROM THAT.

HE WANTED AN EXTENDED TIME.

HOPED THE JURY, SOME OF THAT

WOULD LESSEN THE IMPACT WITH

HAVING TIME IN BETWEEN IT AND

BEING ABLE TO BRING IN ALL THE

FAMILY MEMBERS AND BUILD UP A

LOT OF SYMPATHY FOR JOSHUA

NELSON.

THAT WAS TO HIS ADVANTAGE.

HE OBVIOUSLY DID NOT FORESEE

THE DEFENDANT GOING AND GETTING

THE TATTOO.

HE FELT LIKE THE WORST, EVERYTHING

COME OUT AT TRIAL, AS BAD AS IT

WOULD GET.

THERE WOULD NOT BE ANYTHING

NEWSWORTHY ANYTHING THAT WOULD

HAPPEN.

SO HE DIDN'T CONSIDER ASKING
THE JURY TO ADMONISH, I'M
SORRY, ASKING THE JUDGE TO
ADMONISH THE JURY NOT TO READ
THE PAPER.

NOW THE JUDGE DID TELL THE JURY
DON'T SPEAK TO EACH OTHER OVER
THE BREAK.

COMMON THINGS LIKE THAT.

>> BUT YOU DO, JUST AS A MATTER
OF GOOD POLICY AND I DON'T KNOW
IF WE HAVE THE STANDARD
INSTRUCTIONS, WHEN YOU'VE GOT
SUCH A BREAK BETWEEN THE GUILT
AND THE PENALTY PHASE, IT WOULD
SEEM TO BE PRUDENT AS PART OF
THE STANDARD
INSTRUCTION IF THERE IS GOING
TO BE MEDIA ABOUT A
HIGH-PROFILE MURDER LIKE THIS
YOU WOULD ASK THAT THEY DO NOT
READ THE PAPER.

I MEAN THEY WOULD HAVE TO DO
THAT, WOULDN'T THEY?

>> YOU COULD SAY THAT IN LIGHT
OF THIS CASE WE KNOW THAT
THINGS HAPPENED.
I THINK, ONE THING YOU HAVE,
ALMOST A WHOLE MONTH AND THERE
ARE SOME PEOPLE WHO, EVEN
JURORS, WHO REALLY ARE VERY
MUCH WANT TO KNOW WHAT'S GOING
ON IN THE WORLD.

THEY DON'T WANT TO COMPLETELY
REMOVE THEM SERVICE FROM THE
MEDIA FOR THAT EXTENDED PERIOD
OF TIME.

I THINK, YOU KNOW, I DON'T
THINK THERE IS ANY PROBLEM WITH
THE JUDGE CAUTIONING THEM
AGAINST IT WHEN THEY KNOW THERE
IS GOING TO BE A BREAK AND THIS
CASE MAY BE A REASON TO SAY WHY
IT'S A GOOD REASONABLE CAUTIONARY
THING BUT --

>> BUT UNDER ORDINARY
CIRCUMSTANCES IT WOULD SEEM
TO ME THAT ANY NEWS ABOUT THIS
CASE WOULD HAVE BEEN ABOUT THE

GUILT PHASE, WHICH WAS ALREADY
OVER. BUT, YOU KNOW --
>> TYPICALLY I KNOW THERE'S A
LOT OF CONCERN, IF, FOR
EXAMPLE, THERE HAD BEEN
SOMETHING THAT HAD BEEN
SUPPRESSED.
IF THE CONFESSION HAD
BEEN SUPPRESSED OR
SOME PREJUDICIAL
INFORMATION DIDN'T COME OUT THE
A TRIAL THAT THE JURY DIDN'T
HEAR ABOUT THAT MIGHT HAVE BEEN
IN THE PRESS I THINK THAT WOULD
HAVE BEEN MORE CONCERNING.
HAL STEVENS TESTIFIED HERE THAT
THEY HAD HEARD EVERYTHING THEY
COULD HEAR.
I REALLY DIDN'T THINK THIS
COULD GET ANY WORSE THAN THAT.
HE GETS UP THE MORNING OF PENALTY
PHASE AND READS IN THE
NEWSPAPER ABOUT THE TATOO.
>> GO TO THE LEGAL ISSUE
INVOLVED AND THAT IS, WHETHER

THE TRIAL COURT, ONCE THESE
EVENTS TRANSPIRED, DID FOLLOW
THE, OUR PRECEDENT AND WHAT
SHOULD HAPPEN?

BECAUSE THERE WERE, SOME OF
THEM THAT MENTIONED THAT
THEY HAD BEEN EXPOSED TO
THAT PUBLICITY.

COULD YOU SEE BOLLING BEING THE
BEST CASE OR WHAT YOU SEE AS
BEING THE BEST CASE FOR HOW
THIS WAS HANDLED,
ASSUMING EVERYTHING WENT
EXACTLY AS IT DID?

>> I'M NOT SURE I CAN COME UP
WITH A SPECIFIC CASE.

THERE WAS A FULL INQUIRY.
AND THERE WAS, YOU KNOW, MY
IMPRESSION OF READING THE
MOTION FOR MISTRIAL IS THAT
THIS ALSO WAS ENCOMPASSED, IF
YOU LOOK AT THE BACK IN THE
ORIGINAL TRIAL RECORD IN VOLUME
9 IS THE MOTION FOR MISTRIAL
AND THEY ATTACHED, YOU KNOW,

PART OF IT WAS THERE HAD BEEN
PREJUDICIAL MEDIA INFORMATION
AND THEY ATTACHED THE ARTICLES
TO THE MOTION FOR MISTRIAL.

THERE IS TRANSCRIPT ON THAT
MOTION IS IN VOLUME 9.

AND IN VOLUME 10, THE JUDGE
AGREES IN THAT HEARING ON
MOTION FOR MISTRIAL TO QUESTION
ALL THE JURORS ABOUT WHAT THEY
HAD HEARD, WHAT THEY HAD BEEN
EXPOSED TO.

HOW IT WOULD AFFECT THEM.
HOW IT WOULD IMPACT THEIR
DECISION.

THAT INQUIRY IS IN VOLUME 10 OF
THE TRIAL RECORD.

>> SO THE TRIAL JUDGE FOLLOWED
THAT APPROACH?

>> YES, HE DID.

>> IT IS NOT A MOTION FOR A
MISTRIAL.

THE GUILT IS ALREADY OVER.

IT IS A QUESTION --

>> HE WANTED TO EMPANEL

A NEW JURY FOR THE

PENALTY PHASE.

>> THAT IS NOT MISTRIAL --.

>> THERE WERE GUILT PHASE

ARGUMENTS AS WELL BUT IT WAS

KIND OF A MIXED BAG BUT THE

ISSUE WAS THERE.

>> HE DID ASK FOR A NEW JURY

FOR THE PENALTY PHASE.

>> THAT WAS MY IMPRESSION

READING MY NOTES ON THE MOTION

FOR MISTRIAL THIS WAS PART OF

THE ARGUMENT AND CERTAINLY WAS

DISCUSSED AT THE HEARING ON THE

MOTION FOR MISTRIAL.

THERE WAS ALSO A MOTION IN

LIMINE THAT THE DEFENSE

ATTORNEY FILED TO KEEP OUT,

ATTEMPTING TO KEEP OUT ANY

EVIDENCE OF THE TATOO.

SO HE FILED A MOTION IN LIMINE

ASKING THE STATE TO AVOID ANY

MENTION OF THE TATOO ALONG WITH

A MOTION FOR MISTRIAL.

THIS WAS DISCUSSED, THAT WAS A

JOINT HEARING ON BOTH OF THOSE
MOTIONS.

THE ISSUE WAS DISCUSSED AT THAT
TIME.

AND THAT'S WHEN THE, I THINK
THE STATE AGREED THAT THEY
WEREN'T GOING TO BRING OUT THE
TATOO UNLESS THE DEFENSE
ATTORNEY, UNLESS THE DEFENDANT,
JOSHUA NELSON, TOOK THE STAND
AND STARTED TESTIFYING TO
REMORSE.

>> IS THERE A, IS THE STANDARD
THE SAME OR IS THE STANDARD
DIFFERENT WITH REGARD TO JURORS
BEING EXPOSED TO INFORMATION
ABOUT A CASE PRETRIAL, START OF
TRIAL, BECAUSE THAT HAPPENS
FROM TIME TO TIME, AND, WHAT
OCCURRED IN THIS CASE BETWEEN
GUILT AND PENALTY?

IS THERE A DIFFERENT STANDARD
TO BE APPLIED?

IF SO, WHY SO AND IF NOT, WHY
NOT?

>> I'M NOT SURE THERE IS A
DIFFERENT STANDARD.
I THINK YOU'RE LOOKING AT
WHETHER OR NOT THE JUROR IS SO
IMPACTED BY WHAT THEIR OWN
KNOWLEDGE AND WHAT THEY ALREADY
KNOW THAT IT IS GOING TO
HAVE AN IMPACT ON THEIR
DECISION AND I DON'T THINK IT
MATTERS WHETHER IT IS GUILT,
VERDICT OR WHETHER IT IS A
PENALTY PHASE RECOMMENDATION.
I THINK THEY STILL NEED TO COME
UP WITH THEIR DECISION BASED
SOLELY ON THE EVIDENCE THEY
HEARD FROM THE COURTROOM AND
NOT ON ANY OTHER FACTOR.
SO THAT'S WHAT THEY DID HERE.

>> ONE OF THE PIECES THAT MAY
HAVE ADDRESSED THAT ISSUE WOULD
BE APPLICABLE IN THIS
POST-GUILT PHASE POSTURE AS
YOUR VIEW?

>> RIGHT. RIGHT.

>> BUT YOU DON'T HAVE A CASE

YOU WOULD SAY WOULD ADDRESS

THAT ABSOLUTELY?

>> I DON'T OFF THE TOP OF MY

HEAD, NO.

THAT WOULD HAVE BEEN AVAILABLE

OBVIOUSLY, IT WAS ALL IN THE

DIRECT APPEAL RECORD.

>> BUT I'M LOOKING AT THE

DIRECT APPEAL.

WAS ANY ISSUE RAISED BY DEFENSE

COUNSEL THAT THE TRIAL COURT

ERRED IN NOT GRANTING A

MISTRIAL OR ANYTHING?

>> NO. AS PART OF ONE OF THE

DIRECT APPEAL ISSUES?

NO.

>> SO NOW THE QUESTION IS, IF

DEFENSE LAWYERS HAD DONE

SOMETHING DIFFERENTLY THERE

WOULD HAVE BEEN WHAT?

I MEAN, I'M ASKING YOU TO HELP

ME FIGURE OUT HOW --

>> COULDN'T BE IAC I WOULD

ASSUME BECAUSE THEY ASKED FOR,

EXACTLY WHAT THEY'RE

COMPLAINING ABOUT.

>> IT WASN'T EVEN, OBVIOUSLY
THEY, UNLESS THERE IS A HABEAS
CLAIM, APPELLATE COUNSEL
THOUGHT IT WAS HANDLED
APPROPRIATELY AND WASN'T EVEN A
BASIS TO RAISE THIS ON APPEAL.

IS THAT CORRECT?

>> I THINK THE JURORS'S
RESPONSES SUPPORTS THE JUDGE'S
DETERMINATION THAT THIS JURY
SHOULD GO AHEAD AND HEAR THE
PENALTY PHASE.

SO THERE WAS NO BASIS FOR
CONCERN BASED ON WHAT THEY WERE
SAYING AT THE TIME.

>> WE DON'T HAVE A HABEAS HERE?

>> NO.

>> DON'T WE, HAVEN'T WE
REQUIRED THAT ANY HABEAS BE
FILED ALONG WITH THE
POST-CONVICTION MOTIONS?

>> YES.

IT SHOULD HAVE BEEN FILED.
IF IT WAS GOING TO BE FILED,

WITH THE DIRECT APPEAL, WITH
THE INITIAL BRIEF FROM THE
POST-CONVICTION APPEAL.
OBVIOUSLY IN THIS CASE THERE
WAS A, I BELIEVE IT WAS
100-PAGE DIRECT APPEAL BRIEF
FILED BY A VERY EXPERIENCED
PUBLIC DEFENDER WHO RAISED BOTH
GUILT AND PENALTY PHASE CLAIMS.
HE CHALLENGED THE FINDING OF
HAC.
HE CHALLENGED THE FINDING OF
CCP.
I KNOW THERE WAS A DNA ISSUE.
THERE WAS AN ISSUE ABOUT THE
CODEFENDANT'S STATEMENTS BEING
ADMITTED IN GUILT PHASE.
IT WAS A VERY, IT WAS A, A VERY
THOROUGHLY DONE APPEAL WHERE HE
TRIED TO IDENTIFY THE ISSUES
THAT HE REALLY WANTED TO BRING
TO THE COURT'S ATTENTION.
>> BUT BASICALLY WHAT WE HAVE
IS A SITUATION WHERE THE TRIAL
JUDGE APPARENTLY DID EVERYTHING

RIGHT THAT WAS ASKED ABOUT,
THAT WAS ASKED FOR.

DEFENSE LAWYERS TRIED TO
ACTUALLY GET A MISTRIAL.

WASN'T EVEN, BECAUSE IT WAS
HANDLED RIGHT, THERE WAS NO
BASIS OR ISSUE TO APPEAL IT.

>> RIGHT.

>> AND MR. ^NELSON ESSENTIALLY
DID THIS TO HIMSELF AS FAR AS
NOT BEING ABLE TO TAKE THE
STAND AGAIN.

BUT EVEN IF HE TOOK THE STAND
AGAIN, GOT TO ASSUME HE
WOULDN'T HAVE TESTIFIED ANYMORE
COMPELLINGLY THAN HE HAS NOW
WHICH IS, BASICALLY NOT
COMPELLING AT ALL?

>> RIGHT.

AND OF COURSE HE DID TELL THEM
WHEN HE TESTIFIED IN THE GUILT
PHASE HE WAS SORRY.

SO TO THE EXTENT THAT HE WANTED
TO GET THAT OUT BEFORE THE JURY
HE DID.

AND WHEN HE WAS ASKED AT THE
POST-CONVICTION HEARING, WELL
WHAT WOULD YOU HAVE SAID, IF
YOU HAD ALSO TESTIFIED IN
PENALTY PHASE THAT YOU DIDN'T
ALREADY SAY IN GUILT PHASE, HE
DIDN'T COME UP WITH ANYTHING?
HE DIDN'T KNOW OF ANYTHING TO
SAY.

SO I THINK, WHERE THEY'RE
LOOKING FOR DEFICIENT
PERFORMANCE HERE IS JUST A
FAILURE TO PREVENT, PROTECT THE
DEFENDANT FROM HIMSELF.
TO PREVENT SOMETHING THAT
WASN'T REALLY REASONABLY
FORESEEABLE THAT THIS DEFENDANT
WOULD GO OUT AND GET THIS
TATTOO.

SO IF COURT HAS NO FURTHER
QUESTIONS I WOULD ASK YOU TO
AFFIRM THE ORDER ENTERED BELOW
DENYING POST-CONVICTION RELIEF.
THANK YOU.

>> THANK YOU, YOUR HONOR.

JUST VERY BRIEFLY.

COUNSEL CHARACTERIZES MY

COMMENTS ABOUT THE MR. ^NELSON

AS HIM DOING THINGS IN A

COLDLY --

THAT WAS NOT MY INTENT IF THAT

IS WHAT CAME ACROSS.

THIS YOUNG MAN'S RECORD I THINK

CLEARLY SHOWS SOMETHING TO HIS

MORAL STRUCTURE WAS STRIPPED

AWAY FROM HIM AT ABOUT THIS

TIME AS A RESULT OF HIS

CHILDHOOD AND OTHER PROBLEMS

THAT HE HAS.

IT IS NOT THAT HE IS MALICIOUS.

IT IS JUST THERE IS AN ABSENCE

OF EMOTION.

>> WHAT IS HIS MENTAL HEALTH

STATUS?

WHAT DOES THE EXPERT SAY WAS

HIS MENTAL DEFICIENCIES?

>> WELL, DR. ^MERIN EXAMINED

HIM.

HE FOUND HIM TO BE COMPETENT.

HE FOUND HIM TO BE SANE.

AND HE DID SUFFER FROM A VERY,
VERY BAD CHILDHOOD WHICH
INCLUDED SEXUAL ABUSE BUT YOU
CAN REST ASSURED WHEN WE GOT
THE CASE, WE INVESTIGATED THAT
ISSUE TOO AND THERE WAS FRANKLY
NOTHING THAT WE COULD FIND
TO --

>> BECAUSE YOU KNOW, QUITE
FRANKLY, MR. HARRISON, WE SEE
PEOPLE WITH THESE KIND OF
BACKGROUND ALL THE TIME IN
THESE CASES.

AND OFTEN SOME OF THESE
DEFENDANTS HAVE, WHATEVER YOU
CALL, ALL THESE LETTERS, HC,
DC, AND THEY HAVE SOME OTHER
KIND OF MENTAL ILLNESSES BUT
THIS DEFENDANT DOES NOT SEEM TO
HAVE ANY OF THAT.

>> NO, YOUR HONOR, I AGREE, HE
DOESN'T FALL WITHIN THOSE
CATEGORIES BUT I JUST, I WAS
ASKED ABOUT WHAT DO YOU
ACTUALLY DO IN A SITUATION LIKE

THIS.

WHEN WE QUESTIONED THE
EFFECTIVENESS OF COUNSEL AND
YOU HAVE GOT TO PLAY THE CARDS
YOU'RE DEALT.

IN THIS PARTICULAR CASE I WILL
AGREE THAT MR. ^STEVENS DIDN'T
GET A GOOD HAND WHEN HE TOOK ON
THIS CASE.

IT WAS A VERY, VERY TOUGH CASE.
I TELL YOU THAT CANDIDLY.

BUT YOU'VE GOT TO GO WITH THE
FEW CARDS THAT YOU HAVE.

>> HE DID THAT AND GOT, I'M, I
THINK HAVING THE FATHER WHO IS
LIVING IN A TENT, MOVED FROM A
BOX TO A TENT MUST HAVE BEEN
PRETTY, YOU KNOW, COMPELLING.
CERTAINLY BETTER THAN PUTTING
ON THE STEPFATHER THAT ABUSED
HIM.

SO I'M STILL AT A LOSS TO SEE
WHAT ELSE, HAVING BEEN DEALT
THE HAND THAT THIS DEFENSE
LAWYER WAS DEALT AND THEN YOU

WERE DEALT THE HAND YOU'RE
DEALT WITH, IT LOOKS TO ME LIKE
THERE IS NO WAY TO ESTABLISH
EVEN A SCINTILLA OF EITHER
DEFICIENT PERFORMANCE OR
PREJUDICE.

>> WELL, I THINK HAD HIS MOTHER
TESTIFIED, HAD SHE BEEN
SUBPOENAED I THINK THERE IS A
GOOD LIKELIHOOD THAT SHE WOULD
HAVE BEEN VERY SUPPORTIVE.

ALSO, IF --

>> YOU CAN'T, THAT IS TOTALLY
BASED ON SPECULATION.

EITHER SHE'S GONE OR SHE'S
REALLY GONE IF SHE IS DEAD, SHE
IS CERTAINLY GONE.

SO, JUST SPECULATION.

>> MR. ^STEVENS.

>> WHAT WOULD SHE HAVE SAID?

>> YOUR HONOR?

>> WHAT WOULD SHE HAVE SAID?

YOU'RE SAYING IF HE HAD THE
MOTHER UNDER SUBPOENA AND
GOTTEN OWN THE STAND WHAT WOULD

SHE HAVE SAID WOULD HAVE BEEN
SO COMPELLING?

>> SHE WOULD HAVE CONFIRMED THE
SEXUAL ABUSE THAT THE DEFENDANT
SUFFERED AT THE HANDS OF
MR. ^PERCIFELD.

ONE OF THE THINGS THAT COULD
WELL HAVE HAPPENED THAT
MR. ^PERCIFELD HAD BEEN UNDER
SUBPOENA AS WELL, HE COULD HAVE
BEEN PUT UP THERE ON THE STAND
AND THEN IF HE TOOK THE FIFTH,
IF HE TOOK THE FIFTH, THAT
WOULD BE A GREAT EMOTIONAL
BOOST FOR THE DEFENDANT AND
GIVE HIM A SHOT.

>> BUT SEE, YOU LOOK AT THIS
RECORD AND THERE'S NO COUNTER
EVIDENCE.

I MEAN WHAT WE HAVE IN THIS
RECORD IS THAT THE STEPFATHER
IN FACT SEXUALLY ABUSED THIS
CHILD.

AND SO, THERE IS NO COUNTER
EVIDENCE TO THAT.

SO I'M NOT SURE THAT, I GUESS
IT MAY HAVE BEEN OF MORE IMPACT
IF THE STEPFATHER HAD ACTUALLY
CONFESSED THAT HE HAD DONE IT.

>> HE WOULD HAVE --

>> YES HE.

>> MAYBE.

>> HE WOULD HAVE AT LEAST DONE
THAT AND OR AT LEAST TAKEN THE
FIFTH AND I THINK THAT WOULD
HAVE A STRONG IMPACT ON THE
JURY.

YOUR HONOR, THANK YOU VERY
MUCH. I'M OUT OF TIME.

>> WE THANK BOTH OF YOU FOR
YOUR ARGUMENT AND THE COURT
WILL NOW TAKE A TEN MINUTE
RECESS.

>> PLEASE RISE.

COURT IS IN RECESS FOR 10
MINUTES.