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Kenneth Allen Stewart vs State of Florida

FINAL CASE THIS MORNING ON THE COURT'S CALENDAR IS STEWART VERSUS STATE. JUSTICE QUINCE IS RECUSED. MR. BRODY, YOU MAY PROCEED.

MAY IT PLEASE THE COURT, WE ARE REPRESENTING KENNY STEWART ON HIS APPEAL OF HIS DENIAL OF HIS 3850 MOTION AFTER AN EVIDENTIARY HEARING ON FOUR OF HIS CLAIMS. WE CONTEND MR. STEWART RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE OF HIS TRIAL IN THE TRIAL COUNSEL FAILED TO CALL LAY WITNESSES WHO HAD SUBSTANTIAL KNOWLEDGE OF CHILDHOOD ABUSE. THAT COUNSEL FAILED TO PRESENT EVIDENCE OF DRUG AND ALCOHOL, LONG-TERM DRUG AND ALCOHOL ABUSE OF INTOXICATION AT THE TIME OF THE CRIME. AND THAT COUNSEL FAILED TO PROPERLY PREPARE THE EXPERT. THIS CASE IS QUITE STRIKING IN THAT AT TRIAL, BRUCE SCARPO, THE DEFENDANT'S STEPFATHER, TESTIFIED WAS THE PRIMARY WITNESS. HE TESTIFIED THAT THE DEFENDANT'S CHILDHOOD WAS LIKE THAT OF THE WALTONS. HE WAS THE PRIMARY GUARDIAN OF MR. STEWART FROM THE TIME MR. STEWART WAS 18 MONTHS UNTIL HE WAS 17 YEARS OLD. THERE WAS NO EVIDENCE AT TRIAL OF CHILDHOOD ABUSE OTHER THAN SOME EVIDENCE THAT MR. STEWART WAS MADE TO STAND IN THE CORNER.

IS THERE ANY PA BASIS IN THIS RECORD THAT MR. STEWART GAVE TO COUNSEL, ANY INFORMATION THAT WHAT MR. SCARPO -- THAT MR. SCARPO HAD COMMITTED ANY ABUSE OF HIM?

THERE IS, YOUR HONOR. THERE IS A NOTE IN THE TRIAL ATTORNEY'S FILE AND WAS IN THE INVESTIGATORS' FILE AND IT LISTS SUBSTANTIAL ABUSE. IT'S SET OUT IN OUR REPLY BRIEF, BUT IT IS CLEAR THAT THE TRIAL COUNSEL HAD THIS NOTE IN HIS FILE, INVESTIGATORS HAD THE NOTE.

I THOUGHT THAT THERE WAS SOME INDICATION THAT WAS IN THE INVESTIGATOR'S FILE. BUT IT WAS OF UNKNOWN ORIGIN. IS THAT NOT CORRECT?

THE HEARING COURT FOUND THAT THE NOTE CAME FROM THE INVESTIGATOR'S FILE BUT IT WAS IN MR. BARBOS' FILE AND THE INVESTIGATOR ALSO HAD IT.

WHAT DID MR. BARBOS TESTIFY ABOUT?

HE DIDN'T REMEMBER IT. HE TESTIFIED HE SURELY WOULD HAVE PUT THIS EVIDENCE ON. THIS EVIDENCE WAS COMPELLING AND EXACTLY THE TYPE OF EVIDENCE THAT HE WAS LOOKING FOR. HE DENIED KNOWING ABOUT IT.

DID HE ASK THE DEFENDANT ABOUT ANY OF HIS CHILDHOOD?

HE DENIED ASKING HIM -- WELL, HE SAID HE TALKED TO THE DEFENDANT. THE FACT IS THE DEFENDANT WAS NOT VERY COMMUNICATIVE.

SO THE DEFENDANT SHOULD NOT CONVEY CONVEY ANY OF THIS INFORMATION?

IT APPEARS THE DEFENDANT CONVEYED THE INFORMATION IN THE NOTE BUT I'M NOT SURE IT MATTERS WHERE.

WE DON'T KNOW WHERE THAT INFORMATION CAME FROM. YOU SAID IT WAS FROM AN AUN

KNOWN SOURCE.

I THINK THE IMPORTANT THING IS THAT THE TRIAL ATTORNEY KNOWS ABOUT ATE AND HAS A RESPONSIBILITY TO INVESTIGATE IT. TO PURSUE IT AND TO PRESENT IT. AND IT'S COMPELLING MITIGATION. THERE WAS NO -- MR. BARBUS HAD NO REASON FOR NOT PRESENTING THIS OTHER THAN HE SAID --

ANY MEMBERS OF THE DEFENDANT'S FAMILY EVER CONTACT COUNSEL?

YES, YOUR HONOR. MR. -- WELL, THE DEFENDANT'S FAMILY, MR. SCARPO TESTIFIED OF COURSE HE HAD A VERY GREAT CHILDHOOD. AND MR. SCARPO SPECIFICALLY DENIED AT TRIAL, DENIED ANY A- BOOZE.

-- ABUSE SGLA NONE OF THE OTHER FAMILY MEMBERS THAT CAME FORTH LATER THAT WOULD TESTIFY TO ABUSE WERE AROUND AT THE TIME OF THE --

THE TWO SISTERS -- WELL THEY HAD FLED SCARPO. SUSAN MOORE RAN AWAY FROM HOME FOR A SHELTER WHEN SHE WAS 15 YEARS OLD. SHE ALSO BEATEN, SEXUALLY ABUSED. AND MENTALLY ABUSED BY SCARPO. SHE'D RUN AWAY AT 15. HER DEPOSITION WAS INTRODUCED BUT SHE WAS NEVER ASKED ABOUT MITIGATION EVIDENCE, ABOUT BEATINGS.

IS THIS THE WOMAN THAT WAS LIVING IN NORTH CAROLINA?

YES, I THINK SHE WAS IN NORTH CAROLINA. SHE'S THE STEPSISTER THAT APPROXIMATELY MR. STEWART'S AGE. THERE'S ANOTHER SISTER THAT WAS 12 WHEN --

BUT SHE WAS LIVING APART FROM SCARPO AT THE TIME OF THIS TRIAL?

SHE RAN AWAY TO AN ABUSE SHELTER WHEN SHE WAS 15.

SHE NEVER GAVE THE INFORMATION TO THE TRIAL LAWYER AS TO THE FACT THAT SCARPO ABUSED THE CHILD? NOW WE'VE GOT A SITUATION WHICH SCARPO'S DEAD APPARENTLY, CORRECT?

MR. SCARPO'S PASSED AWAY A. YES.

SO MR. SCARPO CANNOT REBUTT ANY -- ANYTHING THAT'S BEING SAID ABOUT HIM.

I'D NOTE THE HEARING COURT FOUND THE EVIDENCE VERY CREDIBLE ACTUALLY. I'M NOT SURE THAT WHAT HE'S GOING TO REBUTT. THE QUESTION IS WHETHER THE ATTORNEY SHOULD HAVE PRESENTED THIS EVIDENCE. THIS WAS MR. STEWART'S TRIAL, NOT MR. SCARPO'S TRIAL.

WELL, HOWEVER --

WHETHER THE STATE COULD HAVE USED MR. SCARPO TO --

THE CONCERN I HAVE IS THAT IN THIS PO POST-CONVICTION IT DOES APPEAR MR. SCARPO HAS TURNED OUT TO BE UPON TRIAL AND BY REASON OF ALLEGED STATEMENTS THAT ARE BEING NOW MADE WHICH DID NOT, WERE NOT MADE BY THESE SAME WITNESSES WHEN THEY WERE CONTACTED AT TIME OF TRIAL. THAT'S OF CONCERN TO ME.

YES, YOUR HONOR. AND I UNDERSTAND THAT. AND I THINK THE IMPORTANT THING IS TO REMEMBER THESE WERE -- WHEN AN INVESTIGATOR OR ATTORNEY CALLS SOMEBODY WHO LIVES IN ANOTHER STATE AND IS TALKING ABOUT A BY FUR KATD MITIGATION CASE IN FLORIDA, SURELY THE ATTORNEY HAS SOME OBLIGATION TO EXPLAIN OR TO LOOK FOR THE INFORMATION.

THE EVIDENCE AS I UNDERSTOOD IS THAT THE INVESTIGATOR MADE THE CONTACT, AND THAT THIS WAS PART OF WHAT THIS INVESTIGATOR DOES. THAT THE ONLY REASON TO CONTACT THIS PERSON, IS IT NOT, TO FIND OUT ABOUT THE BACKGROUND? BECAUSE THEY KNOW NOTHING ABOUT I WOULD ASSUME THE EVENTS. THAT'S THE ONLY PURPOSE, ISN'T IT? WHAT IS THE OTHER PURPOSE TO CONTACT FAMILY IF IT'S NOT TO FIND OUT ABOUT THIS PERSON'S HISTORY AND WHERE THEY COME FROM WHAT THEY DO? SOME I'M A LITTLE CONFUSED. IF THEY DON'T TALK ABOUT THAT, WHAT DO THEY TALK ABOUT?

THERE ARE NOTES AS TO WHAT THEY TALKED ABOUT. SOMEBODY CALLED LINDA ARNOLD AND IT WAS IN THE MIDDLE OF THE TRIAL. THERE IS NO NOTE ABOUT ANY ASKING ABOUT ANY MITIGATION. THE INVESTIGATOR'S WHOLE MITIGATION FILE IS IN THE RECORD AS IS THE TRIAL ATTORNEY'S WHOLE SECOND PHASE FILE. THE TRIAL ATTORNEY TESTIFIED THAT -- IN FACT, THERE WAS A COMPETENCY HEARING IN THIS CASE. THERE WAS A MOTION TO CONTINUE PRIOR TO THAT AT WHICH TIME MR. BARBUS SAID MR. FERNANDEZ IS RESPONSIBLE FOR THE SECOND PHASE OF THE TRIAL, THE INVESTIGATOR. MR. FERNANDEZ HAD A HEART ATTACK BEFORE THE TRIAL STARTED AND --

YOU WERE ABOUT TO TELL US WHAT WAS IN THE INVESTIGATOR'S FILE WITH REGARD TO THE CONVERSATION WITH THESE FOLKS.

YES, YOUR HONOR. THERE IS NOTHING ABOUT ASKING ABOUT A DENIAL OF ABUSE.

JUST WHAT'S THERE? I'VE NOT HAD A CHANCE TO LOOK AT THE EXACT NOTE. IS THERE SOMETHING THERE ABOUT BACKGROUND?

NO. IT'S JUST THAT SHE CAN'T COME. THERE APPEARS TO HAVE BEEN SOME EFFORT BY MR. SCARPO TO ESTABLISH THIS LINE ABOUT AT 13 HE SUFFERED THIS TRAUMA OF FINDING OUT MR. SCARPO WASN'T HIS FATHER. AND AS REGARDING SUSAN MOORE, AND I NOTE SHE'S THE ONE THAT HAD RUN AWAY AT 15 AND BEEN MARRIED ABOUT FOUR OR FIVE TIMES BY THE TIME SHE WAS 21. AS REGARDING HER, SHE WAS CALLED I THINK AND GAVE A DEPOSITION THAT WAS ACTUALLY INTRODUCED IN THE PENALTY PHASE. SHE WAS NOT ASKED IN THAT DEPOSITION ABOUT ANY ABUSE. IT'S OF RECORD. SHE WAS NOT -- IT WAS JUST NEVER EXPLAINED TO THESE WITNESSES -- THESE WITNESSES WERE VICTIMS OF HORRIBLE CHILDHOOD ABUSE. THE GIRLS WERE TOO AND MR. STEWART WITNESSED THAT. BUT MR. SCARPO TESTIFIED EVERYBODY HAD DONE WELL. YOU KNOW, HE SAID LINDA ARNOLD WAS A DOCTOR. IN FACT SHE WAS A NURSE. SUSAN MOORE RAN TWO JEWELRY STORES AND HAD -- HE EXAGGERATED AND LIED ABOUT EVERYTHING. AND THE QUESTION IS --

THE TRIAL COURT HERE AFTER THIS EVIDENTIARY HEARING, ENTERS AN ORDER WHICH SAYS THAT THE DEFENDER NEVER TOLD MR. BARBUS THAT HE EVER SUFFERED ANY TYPE OF ABUSE BY MR. SCARPO. IS THERE EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT ON THAT?

YOUR HONOR, IF YOU'LL REVIEW THE NOTE -- THERE'S NO EVIDENCE AS TO WHAT THE COMMUNICATIONS -- MR. BARBOUS DENIED HE WAS TOLD BY MR. STEWART. MR. STEWART -- DR. AFIELD TESTIFIED MR. STEWART DID NOT COMMUNICATE WITH EITHER HIM, AFIELD. AFIELD TESTIFIED MR. STEWART DID NOT COMMUNICATE WITH MR. BARBOUS. MR. STEWART WAS NOT COMMUNICATIVE. BUT MR. STEWART DID TELL JOY INGLE --

THERE'S NO CONTENTION IN THE POST-CONSTRUCTION PROCEEDING THAT MR. STEWART WAS INCOMPETENT.

AT THIS -- THERE'S IS A CONTENTION THAT THE RECORDS OF HIS TWO SUICIDE ATTEMPTS WHILE HE WAS IN JAIL PROBABLY SHOULD HAVE BEEN PROVIDED BY THE STATE FOR THE COMPETENCY HEARING, BECAUSE THEY HAVE A COMPETENCY HEARING, THE GUY'S TRIED TO KILL HIMSELF TWICE IN THE JAIL, THAT DIDN'T EVEN COME UP.

IT WAS DETERMINED HE WAS COMPETENT.

YES, IT WAS.

IT APPEARS THAT THE TRIAL COURT DENIED THE CLAIM AS TO THIS ISSUE ON THE PREJUDICE PRONG OF STRICKLAND, AND DIDN'T REALLY DWELL ON THE PERFORMANCE PRONG. AND AS YOU SAY, SEEMS TO HAVE ACCEPTED AS TRUE AT LEAST FOR PURPOSES OF THE ORDER, THAT THERE WAS THIS ADDITIONAL MITIGATING EVIDENCE OF HORRIBLE CHILD ABUSE. BUT HE ALSO FOCUSES ON DR. AFIELD REALLY SAYS IT WOULDN'T HAVE CHANGED HIS CONCLUSIONS WHICH -- SO COULD YOU ADDRESS HOW I ASSUME WE AGREE THERE WAS SOME DEFICIENCY IN THE PERFORMANCE -- HOW YOU OVERCOME THE ISSUE THAT THIS WOULD HAVE CHANGED THE OUTCOME OF THE PENALTY PHASE? AND IN THAT REGARD YOU'VE GOT TO ESTABLISH THAT IT WOULD HAVE MOST PROBABLY PRODUCED A LIFE SENTENCE.

I THINK WE HAVE TO ESTABLISH THERE'S A REASONABLE PROBABILITY THE OUTCOME WOULD HAVE BEEN DIFFERENT IN THAT I THINK THAT THE BALANCE OF THE -- REMEMBER, I MEAN, THERE WOULD HAVE BEEN SUBSTANTIALLY MORE MITIGATION PRESENTED. AND THE TEST I THINK OF THIS COURT IS WHETHER THE BALANCE OF THE AGGRAVATION AND MITIGATION WOULD HAVE BEEN DRAMATICALLY CHANGED. THE NEW MITIGATION THAT IS ADD ADD IS THAT MR. STEWART SUFFERED FROM HORRIBLE CHILD ABUSE FOR HIS WHOLE CHILDHOOD. THERE WAS NOT AN INCIDENT WHEN THE MOTHER RAN AWAY WITH A THUG WHEN HE WAS 3 AND HE WAS MADE TO STAND IN A CORNER, OR THEY DIDN'T FEED HIM. HE WAS BEAT WITH HIS FISTS ON A ROUTINE BASIS FOR MOST OF 17 YEARS. HE WAS A WITNESS TO THE HORRIBLE ABUSE OF THE SISTERS AND THE STEPMOTHER. STEPMOTHER'S JAW WAS BROKEN. RIBS WERE BROKEN. THEY WERE NOT ALLOWED --

WHERE WAS SHE AT THE TIME OF TRIAL?

SHE TESTIFIED AT THE TRIAL AS WELL THAT KENNY WAS A JOVIAL LITTLE BOY P. VERY HAPPY CHILDHOOD. THERE IS NEW MITIGATION THAT MR. SCARPO WAS ALCOHOLIC. KENNY GREW UP IN AN ALCOHOLIC HOUSEHOLD. THAT WAS NOT PRESENTED IN THE ORIGINAL SENTENCING ORDER. THERE IS SUBSTANTIALLY MORE CATCH-ALL MITIGATION.

HOW DID DR. AFIELD THOUGH SAY THAT -- HOW WOULD IT HAVE AFFECTED HIS OPINION? AGAIN, THERE WERE STATUTORY MITIGATORS FOUND IN THIS CASE.

RIGHT, SO IT COULD NOT INCREASE HIS OPINION OBVIOUSLY.

THEN THEREFORE SINCE THOSE STATUTORY MITIGATORS WERE FOUND AND YET THERE WERE STRONG AGGRAVATING CIRCUMSTANCES, I'M JUST NOT SURE HOW YOU OVERCOME THE FACT -- HE HAD CHILDHOOD ABUSE BUT HE MURDERED ONE INDIVIDUAL IN I GUESS A FAIRLY METHODOICAL WAY AND THEN INJURED SOMEBODY ELSE.

IN THIS CASE, THE QUESTION IS NOT THE METHODOICAL CASE. - BUT PF -- DR. AFIELD DID FIND THING A VA ORS BUT THERE IS THE OTHER MITIGATION.

WHAT I'M SAYING IS THE NATURE OF THE CRIME. HE WAS HITCHHIKING AND HE WENT BACK AND HE SHOT THESE PEOPLE. IT DOESN'T -- OH RELATING CHILDHOOD ABUSE TO THIS CRIME IT SEEMS LIKE WHAT'S THE RELATIONSHIP BETWEEN THE TWO?

WELL, WHAT WE'RE TRYING TO SHOW IS AS IN ALL THE CASES THAT AT LEAST THE SENTENCING JURY SHOULD KNOW THE DEFENDANT. THE RELATIONSHIP IS IF -- THERE'S ALSO SUBSTANTIAL EVIDENCE OF DRUG AND ALCOHOL ABUSE BEGINNING AT AGE 12 THAT WAS NOT PRESENTED TO THE JURY. I'M NOT SURE WHAT -- FAYE TESTIFIED THE CAUSAL RELATIONSHIP WAS THAT MR.

STEWART HAD BEEN DAMAGED NEUROLOGICALLY. THAT HE WAS ACTUALLY ON SORT OF A CULMINATION OF A SUICIDE MISSION. BE BUT IF THE COURT WILL REVIEW THE ORIGINAL SENTENCING ORDER, THEY'LL FIND THAT SLIGHT WEIGHT WAS GIVEN TO THE EXTREME DISTURBANCE FACTOR. THAT NO WEIGHT WAS GIVEN TO THE CAPACITY TO CONFORM FACTOR. THE COURT ACTUALLY THEN FINDS ONLY IN THE CATCH-ALL THAT HE SUFFERED SOME FORM OF TRAUMA AT 13. WELL, THE REALITY OF THE SITUATION IS THAT THE TRIAL ATTORNEY WAS ON NOTICE ABOUT MR. STEWART HAVING BEEN ABECAUSED HORRIBLY. -- BEEN ABUSED HORRIBLY. I WON'T LIST THAT OFF. THE HEARING COURT FOUND IT WAS BAD ABUSE.

WHAT IS THE RESPONSIBILITY OF THIS COURT IN THIS CASE IF I UNDERSTAND IT, THE TRIAL COURT PASSED ON THE INEFFECTIVENESS CLAIM AS FAR AS THE PERFORMANCE OF COUNSEL AND WENT TO THE PREJUDICE PRONG? SAID EVEN IF HE WAS INEFFECTIVE, THERE WASN'T SUFFICIENT PREJUDICE HERE? WHAT IS THE PROPER ACTION OF THIS COURT IF WE WERE TO FIND THAT NOW WE DON'T AGREE WITH HIM ABOUT THAT. WE THINK PREJUDICE HAS BEEN DEMONSTRATED. DO WE SEND IT BACK TO THE TRIAL COURT TO DETERMINE WHETHER OR NOT COUNSEL WAS INEFFECTIVE? OR DO WE DO THAT OURSELVES? TELL ME ABOUT THAT?

THIS IS I BELIEVE THIS COURT HAS HELD IT'S A DENOEF VO PLENARY REVIEW AND THAT'S A LAW UNDER STRICKLAND THIS COURT WOULD DECIDE AND YOU'D REMAND THIS TO THE TRIAL COURT FOR A NEW PENALTY PHASE, VACATING AND SETTING ASIDE THE DEATH SENTENCE.

WITHOUT THE TRIAL COURT HAVING DECIDED WHETHER OR NOT HE FOUND COUNSEL'S PERFORMANCE TO BE ADEQUATE OR INADEQUATE?

I BELIEVE THAT THIS COURT CAN FIND THAT. I BELIEVE IT -- I BELIEVE THE RECORD DEMONSTRATES THAT.

BUT ISN'T THAT ORDINARILY THE RESPONSIBILITY OF THE TRIAL COURT? FOR INSTANCE, JUSTICE WELLS READ YOU A PART OF THE ORDER THERE THAT SAID THAT THE DEFENDANT NEVER TOLD THE LAWYER ABOUT THIS ABUSE. I REALIZE THAT CAN BE EXPLAINED OR WHATEVER IN ALL KINDS OF WAYS BUT I'M JUST TALKING ABOUT, ISN'T IT THE TRIAL COURT THAT HAS TO DO A FACTUAL EXAMINATION OF WHAT OCCURRED AND MAKE SOME FINDINGS ABOUT THAT? AND THEN DRAW PROPER LEGAL CONCLUSIONS AS OPPOSED TO THIS COURT MAKING FACTUAL DETERMINATIONS ON WHETHER COUNSEL'S CONDUCT FELL BELOW THE PROPER STANDARD?

I READ THE COURT'S CASES ON THIS, AND I DON'T WANT TO BE ARGUMENTATIVE, BUT I BELIEVE THAT THIS COURT, THAT IT'S A QUESTION OF LAW IN FACT THAT THIS COURT CAN DETERMINE THERE WAS DEFICIENT PERFORMANCE AND REMAND FOR A NEW TRIAL.

I'M NOT TALKING ABOUT WHETHER WE HAVE THE AUTHORITY TO DO THAT. I'M TALKING ABOUT WHAT THE PROPER PROCEDURE WOULD BE.

I THINK --

YOU THINK PROPER PROCEDURE WOULD BE FOR THIS COURT TO EVALUATE THE EVIDENCE THEN O OF WHETHER COUNSEL WAS EFFECTIVE OR NOT, FELL BELOW THE STANDARD OR DIDN'T? AND MAKE A DETERMINATION?

I THINK IN THIS CASE, THE DIFFERENCE BETWEEN WHAT COULD HAVE BEEN PRESENTED AND WHAT SHOULD HAVE BEEN PRESENTED IS SO DRAMATIC THAT MR. STEWART IS ENTITLED TO A NEW PENALTY PHASE. I DON'T BELIEVE THAT THE COURT SENTENCED HIM TO DEATH AND THE JURY THAT RECOMMENDED DEATH HEARD ANYTHING AT ALL ABOUT THE CHILDHOOD AND ABOUT THE MITIGATION THAT SHOULD HAVE BEEN PRESENTED IN THE CASE. AND I DON'T BELIEVE THE COURT CONSIDERED THAT.

YOU'RE INTO YOUR REBUTTAL TIME, MR. BRODY.

THANK YOU, YOUR HONOR.

WELL INTO IT. MS. DITTMAR?

GOOD YOUR HONORS. MAY IT PLEASE THE COURT, CAROL DITTMAR FROM THE ATTORNEY GENERAL'S OFFICE REPRESENTING THE APPELLEE THE STATE OF FLORIDA. BEFORE I JUMP INTO MY ARGUMENT I WANT TO CLARIFY A MINOR POINT FROM THE BRIEFS RELATING TO THE PRIOR VIOLENT FELONY CONVICTION AGGRAVATING FACTOR AND THAT IS ON THE FACE OF THE SENTENCING ORDER IT DOES NOT APPEAR THAT THE TRIAL JUDGE RELIED ON EITHER THE PRIOR MURDER CONVICTION THAT HAS BEEN OBTAINED OR ON THE CONTEMPORANEOUS CRIMES IN THIS CASE. HE CITES THE CASE NUMBERS AND HE TALKS ABOUT ANOTHER ATTEMPTED MURDER WHICH OCCURRED AFTER THIS OFFENSE AND ALSO AN AGGRAVATED ASSAULT THAT WAS AN ENTIRELY SEPARATE OFFENSE. HE LISTS THREE DIFFERENT CASE NUMBERS. AND IN THIS CASE BECAUSE THE WAY THE CHARGES AROSE, THERE WAS AN INFORMATION AND THEN THERE WAS LATER AN INDICTMENT. SO THERE ARE TWO DIFFERENT CASE NUMBERS THAT ACTUALLY BOTH GO TO THIS CASE. AND ONE OF THEM IS TO THE ATTEMPTED MURDER OF ME SELL ACOSTA WAS CITED BY THE TRIAL COURT IN RELIANCE ON THAT AGGRAVATING FACTOR IN ADDITION TO OTHER CONVICTIONS. I THINK MY BRIEF SUGGESTS THERE WAS NO RELIANCE ON THE CONTEMPORANEOUS CRIMES FOR THAT FACTOR AND THERE WAS. IT'S JUST A DIFFERENT CASE NAME SO IT DOESN'T SOUND LIKE IT. BUT THERE WAS NO RELIANCE ON THE PRIOR MURDER THAT OCCURRED. THAT WAS NOT CITED FOR WHATEVER REASON BY THE TRIAL COURT IN HIS SENTENCING ORDER AS A BASIS FOR THE PRIOR VIOLENT FELONY CONVICTION. THERE WERE TWO OTHER SEPARATE INCIDENTS OF AN ATTEMPTED MURDER AND ANOTHER AGGRAVATED ASSAULT. I WANTED TO CLARIFY THAT BEFORE GETTING INTO THE FACTS.

WHAT ABOUT THAT? IN OTHER WORDS, HELP ME WITH THAT IN TERMS OF WHEN WAS THE PRIOR MURDER? WHEN WAS THE PRIOR MURDER CONVICTION? AND IS THERE AN EXPLANATION FOR WHY THE TRIAL COURT DIDN'T CITE THAT?

I DON'T BELIEVE SO. BUT I'M NOT SURE WHEN THE TRIAL WAS ACTUALLY HELD ON THAT. THE FIRST MURDER THAT OCCURRED WAS IN DECEMBER OF 1984, THE VICTIM'S NAME WAS RUBIN DIAZ. IN THAT CASE, THAT WAS THE ONE THAT VERY METHODOICAL ABOUT HE WAS MARCHED OUT OF HIS CAR AND EXECUTED. AND THIS CASE OCCURRED IN APRIL OF 1985, SEVERAL MONTHS LATER. AND THEN A FEW DAYS VERY SHORTLY AFTER THIS CRIME OCCURRED, THERE WAS ANOTHER INSTANCE WHERE MR. STEWART WENT INTO A CONVENIENCE STORE, WAS ROBBING A CONVENIENCE STORE AND SHOT THE CLERK IN THE HEAD. THAT CLERK SURVIVED AND SO THAT WAS AN ATTEMPTED MURDER CONVICTION. AND I DON'T KNOW WHEN THE DIAZ TRIAL OCCURRED IN REFERENCE TO THIS TRIAL HAVING OCCURRED, BECAUSE I'M NOT FAMILIAR WHEN THAT TRIAL ACTUALLY TOOK PLACE. AND I DON'T KNOW IF THAT'S WHY. CERTAINLY IT HAD OCCURRED BY THE TIME THIS COURT REMANDED FOR THE WRITTEN ORDER BUT I DON'T KNOW IF IT HAD OCCURRED PREPARE TO THE INITIAL TRIAL.

SO YOU'RE NOT SURE WHETHER THE ACTUAL LEGAL CONVICTION HAD BEEN OBTAINED.

CORRECT.

AND WHETHER THAT WAS THE BASIS.

THIS INITIAL SENTENCING. THAT TRIAL EVEN THOUGH CRIME WAS EARLIER IT MAY BE THE TRIAL WAS LATER. BUT OBVIOUSLY THE CONVICTION IS THERE TODAY SO IF FOR ANY REASON IT WENT BACK, THAT CONVICTION IS ANOTHER CONVICTION THAT COULD BE ALSO CONSIDERED FOR THE PRIOR VIOLENT FELONY CONVICTION AGGRAVATEOR.

WAS THERE A LIFE SENTENCE OR DEATH SENTENCE?

THERE WAS A DEATH SENTENCE IMPOSED. RIGHT NOW IN PURSUING POST CONVICTION ON THAT DEATH SENTENCE THERE WAS AN AGREEMENT BY THE STATE ATTORNEYS OFFICE TO HAVE A NEW SENTENCING PROCEEDING AND I'M NOT SURE IF THERE'S A DATE THAT HAS BEEN SET FOR THAT RESENTENCING BUT THAT IS CURRENTLY BEING LITIGATED JUST AS TO THE SENTENCE.

IS THAT A NEW SENTENCE? I MEAN, SINCE YOU BRING THAT UP, IS THAT NEW SENTENCING PROCEEDING BASED ON THE FACT OF THIS NEW MITIGATION OR SOME OTHER ISSUE?

IT WAS BASED ON I BELIEVE THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THAT PARTICULAR TRIAL. NOT SO MUCH -- AND I'M NOT THAT FAMILIAR WITH WHAT THE CLAIMS WERE -- BUT MY UNDERSTANDING IS AND THAT WAS A COMPLETELY DIFFERENT ATTORNEY THAT REPRESENTED HIM IN THAT OTHER TRIAL AND THERE WERE ALLEGATIONS THAT THAT ATTORNEY WAS ON DRUGS DURING THE TIME O OF THE TRIAL A AND DURING THE TIME OF THE SENTENCING.

I GUESS WHAT YOU'RE BRINGING UP, IF THERE WAS A DEATH CASE BEFORE THIS ONE AND MITIGATION WAS DEVELOPED IN THAT CASE, SHOULD IT BE RELEVANT TO KNOW WHAT THE MITIGATION WAS AT TA OTHER TRIAL ?

I THINK IT CAN BE RELEVANT IN TERMS OF ASSESSING PREJUDICE. THIS COURT IN ITS OPINIONS ON THE DIRECT APPEAL FROM THAT CASE TALKS ABOUT SOME OF THE MITIGATION INCLUDING AN AUNT THAT TALKED ABOUT CHILDHOOD ABUSE AND ALSO DR. MARAN TALKING ABOUT THE STATUTORY MENTAL MITIGATION. WHAT HE SAID WAS THE STATUTORY MITIGATORS DON'T APPLY WHEN MRS. NONSTATUTORY MENTAL MITIGATION.

THIS TESTIMONY OF THIS CHILD -- WHAT I'M SEEING IS WE HAVE TWO DIFFERENT PICTURES OF A CHILDHOOD. A PICTURE AT THE ORIGINAL TRIAL OF THIS CASE, WHICH WAS THAT SCARPO KIND OF RESCUES THE DEFENDANT FROM SOME TERRIBLE EARLY TRAUMA AND THEN HELPS HIM ALONG AND EVERYTHING WAS GOING GREAT UNTIL HE GOT TO AGE 13 AND THEN HE FLIPPED OUT WHEN HE FOUND OUT HE WASN'T HIS REAL FATHER. THEN WE HAVE THE - PICTURE THAT'S DRAMATICALLY DIFFERENT PICTURE AT THE EVIDENTIARY HEARING WHICH IS OF A CHILD THAT WAS TRAUMATIZED VIRTUALLY HIS WHOLE CHILDHOOD WHICH IS A DRAMATICALLY DIFFERENT PICTURE. SO WHAT PICTURE WAS PRESENTED AT THE OTHER CASE?

ACCORDING TO THIS COURT'S OPINION IT WAS AN AUNT THAT TESTIFIED ABOUT THE CHILDHOOD ABUSE. AND I ASSUME THAT IT WAS VERY SIMILAR TO THE TESTIMONY THAT WAS PRESENTED IN THIS CASE ONLY NOT AS EXTENSIVE BECAUSE THEY HAD THE AUNT BUT THEY DIDN'T HAVE SCARPO AND HIS WIFE. AND THE FACT THAT YOU'RE SAYING IT'S DRAMATICALLY DIFFERENT PICTURE, MOST OF THE THINGS I NEED TO TAKE TO ISSUE WITH THIS MORNING ARE THE FACTS THAT HAVE BEEN PRESENTED. ONE THING MR. BRODY SAID WAS SCARPO TALKED ABOUT THE DEFENDANT HAVING A TERRIFIC CHILDHOOD. HE HAD CUSTODY FROM THE TIME HE WAS 18 MONTHS UNTIL HE WAS 17 YEARS OLD AND HE HAD THIS BEAUTIFUL UPBRINGING. AND THAT IS TOTALLY OPPOSITE OF THE PICTURE THAT SCARPO PAINTED. HE DID TALK ABOUT THE TIMES THAT HE HAD CUSTODY WHICH HE DIDN'T HAVE CUSTODY OF STEWART TILL HE WAS FIVE YEARS OLD. HE MET THE MOTHER, STEWART WAS ABOUT 18 MONTHS OLD AT THAT TIME AND HE WAS WITH THE MOTHER FROM THAT TIME UNTIL STEWART WAS AROUND 3. HE TESTIFIED THAT DURING THAT TIME, STEWART WAS HORRIBLY ABUSED BY THE MOTHER, BY THE MOTHER'S FAMILY. THERE WAS A LOT OF VIOLENCE IN THE FAMILY. THERE WAS A LOT OF ALCOHOL ABUSE IN THE FAMILY. WHEN STEWART WAS 3, HIS MOTHER TOOK OFF ON A CROSS-COUNTRY TREK WITH A GUY WHO ROBBED CONVENIENCE STORES FOR A LIFG. STEWART WAS WITH HER. AT SOME POINT WHEN HE GETS TO BE AROUND 5 OR 6 YEARS OLD HE GETS DUMPED WITH SCARPO OR SCARPO IS THE ONLY ONE WILLING AT THAT POINT TO TAKE STEWART IN AND TAKE CARE OF HIM AND SCARPO HAD HIM AT THAT POINT UNTIL HE WAS ABOUT 13 YEARS OLD AND STARTED

GETTING INTERESTED IN HIS BIOLOGICAL FAMILY AND CAME DOWN TO FLORIDA.

WHAT DOES SCARPO SAY OCCURRED BETWEEN AGE 5 AND 13?

HE SAYS BETWEEN 5 AND 13 HE HAD A NORMAL CHILDHOOD.

TALKING ABOUT THE DRAMATICALLY DIFFERENT PICTURE --

IS THAT WINDOW OF TIME.

WHICH IS EIGHT YEARS, FROM 5 TO 13.

RIGHT. BUT IF YOU LOOK AT DR. AFIELD'S TESTIMONY PARTICULARLY WHAT AFIELD SAID WAS BECAUSE THIS CHILD HAD BEEN SO HORRIBLY ABUSED BY THE TIME HE WAS 5 YEARS OLD, IT DIDN'T REALLY PLATTER WHAT HAPPENED AFTER THAT POINT. THAT HE WAS PROGRAMMED ALREADY TO BE A KILLER BECAUSE OF THE WAY HE WAS RAISED IN HIS EARLY YEARS. AND THAT THERE WAS REALLY NOTHING THAT ANYBODY COULD DO FOR HIM BY THE TIME HE WAS 5 YEARS OLD THAT WAS GOING TO REALLY HELP HIM.

WHAT DOES DR. AFIELD SAY WITH THIS ADD INFORMATION WHAT THAT DID TO HIS OPINION?

HE SAID IT REINFORCES HIS OPINION. HE REALLY DIDN'T THINK IT MADE A MATERIAL CHANGE IN WHAT HE HAD TESTIFIED TO EARLIER, BECAUSE HE SAYS HE WAS AWARE THAT HIS CONCLUSION AT THE TIME OF TRIAL WAS THIS WAS A HORRIBLY ABUSED PERSON WHO BECAUSE OF CIRCUMSTANCES COMPLETELY BEYOND HIS CONTROL IS NOW A SOCIOPATH BECAUSE HE JUST PAUSE OF THE WAY HE WAS RAISED IN THOSE EARLY YEARS. AND ACCORDING TO WHAT AFIELD TESTIFIED AT THE EVIDENTIARY HEARING, ALL OF THAT IS STILL TRUE. HE WOULD NOT REALLY CHANGE ANYTHING THAT HE SAID.

DO YOU THINK A JURY HEARING THAT, SOMEHOW ALTHOUGH WE MAY KNOW IN TERMS OF KNOWLEDGE OF PSYCHOLOGY, THAT MUCH OF WHAT HAPPENS TO A CHILD HAPPENS BETWEEN 0 TO 5 BUT THEN HEARING THAT FROM 5 THROUGH 13 THINGS ARE FINE IS ONE PICTURE. WHEREAS HEARING THAT SOMEBODY CONTINUES TO BE THROUGHOUT HIS CHILDHOOD -- I MEAN YOU AGREE THAT THE TESTIMONY WAS HORRIBLE ABUSE BETWEEN 5 AND 13?

WELL, NO I DON'T ACTUALLY AGREE WITH THAT.

HOW WOULD YOU CHARACTERIZE IT?

I WOULD SAY THAT HIS STEP SISTERS DID TALK ABOUT THERE BEING ABUSE, THERE BEING SEVERE DISCIPLINE IN THE HOME. THERE'S CERTAINLY A NUMBER OF QUESTIONS ABOUT THAT TESTIMONY BECAUSE OF THE OTHER TESTIMONY ADMITTED AT THE EVIDENTIARY HEARING. I THINK THERE'S A CONFLICTING QUESTION AS TO THE CERTAINLY THE DEGREE AND THE NATURE OF ANY ABUSE GOING ON WHILE IN THE SCARPO HOUSEHOLD. THE SISTERS DID TALK ABOUT SOME ABUSE AND THEY TALKED ABOUT THEY HAD BEEN SEXUALLY ABUSED BUT THEY BOTH SAID THAT STEWART WAS NOT AWARE OF THAT SEXUAL ABUSE. IN FACT THEY DIDN'T EVEN AT THE TIME OF THIS TRIAL IN 1986 THEY HAD NOT EVEN ADMITTED OR THE ONE SISTER LINDA SAID SHE HAD NOT EVEN TOLD HER HUSBAND ABOUT HAVING BEEN ABUSED. SO IT WAS SOMETHING, THEN YOU HAVE THE TESTIMONY OF THE DEFENSE INVESTIGATOR SAYING HE CALLED THESE PEOPLE PRIOR TO TRIAL, THAT HE ROUTINELY ASKED ABOUT ABUSE. THAT WAS ONE OF THE THINGS HE WOULD BE VERY INTERESTED IN AND CERTAINLY SOMETHING HE WOULD PURSUE AND THAT THEY DID NOT GIVE HIM ANY INDICATION OF ABUSE OR IT WOULD HAVE BEEN IN HIS NOTES.

THAT GOES TO THE FIRST PRONG.

RIGHT.

I'M USING THE TERM HORRIBLE CHILD ABUSE, I WAS USING THE TERM THE TRIAL JUDGE USED IN CHARACTERIZING THE STEP SISTERS AND AUNT'S TESTIMONY.

I THINK WHAT YOU HAVE TO LOOK AT IS WHEN YOU GO BACK TO THE INITIAL TRIAL AND READ THE PENALTY PHASE, THE PICTURE YOU GET IS THE PICTURE OF A HORRIBLY ABUSED CHILD. THEY DID NOT FOCUS ON THESE GLORIOUS YEARS BETWEEN 5 AND 13 AND DEVELOP THAT AS POSITIVE CHARACTER TRAITS. THAT WAS NOT THE FOCUS, THAT TIME PERIOD WAS NOT AT ALL THE FOCUS OF THE INITIAL PENALTY PHASE. THE INITIAL PENALTY PHASE FOCUSED ON ABUSE HE HAD SUFFERED AS A CHILD, AND THE TRAUMA THAT HE WENT THROUGH AT AGE 13 UPON LEARNING THAT HIS MOTHER HAD COMMITTED SUICIDE AND THAT SCARPO WAS NOT HIS REAL FATHER AND THERE WAS A LOT OF TESTIMONY. IN FACT ONE OF THE SISTERS THAT TESTIFIED AT THE EVIDENTIARY HEARING HAD TESTIFIED AT THE INITIAL TRIAL IN A DEPOSITION, HER DEPOSITION WAS ADMITTED INTO EVIDENCE. AND SHE SAID THAT STEWART WAS GRIEF-STRICKEN WHEN HE LEARNED AT AGE 13 THAT SCARPO WAS NOT HIS REAL FATHER AND THAT WAS ANOTHER ONE OF THE SEVERAL THINGS THAT OCCURRED AT AGE 13 TO TRAUMATIZE HIM. SO YOU DON'T GET THE PICTURE PAINTED FROM THE PENALTY PHASE. IF YOU JUST SAT DOWN AND READ THROUGH THE ENTIRE PENALTY PHASE OF THE TRIAL, YOU DON'T GET THIS PICTURE OF A CHILD WHO HAD A TERRIFIC CHILDHOOD OR A GREAT FAMILY LIFE. MAYBE FOR SOME SLICE OF TIME BUT THAT'S NOT -- THAT'S CERTAINLY NOT WHAT ANYBODY FOCUSED ON. WHAT THEY FOCUSED ON WAS THE ABUSE AND ALL THE TRAUMAS THAT OCCURRED AT AGE 13. THAT AGAIN WAS IN REINFORCED BY DR. AFIELD'S TESTIMONY BECAUSE HE WAS ASKED EXTENSIVELY ABOUT THE EFFECTS OF THIS KIND OF ABUSE AND THIS TERRIBLE UPBRINGING AND I DON'T THINK THE JURORS WOULD HAVE COME AWAY FROM THAT PENALTY PHASE THINKING THAT HERE'S A KID THAT HAD A GREAT CHILDHOOD. BECAUSE THAT CERTAINLY WASN'T THE PICTURE THAT WAS PRESENTED. AND THAT'S WHY IT'S NOT DRAMATICALLY DIFFERENT TO HEAR ABOUT ABUSE IN THE SCARPO HOUSEHOLD. BECAUSE IT REALLY IS CONSISTENT WITH THE PICTURE THEY WERE PAINTING AT PENALTY PHASE, WHICH WAS THIS MAN HAD SUFFERED TERRIBLE CHILD ABUSE.

WHEN DID HE GO WITH SCARPO?

HE APPARENTLY STARTED LIVING WITH SCARPO WHEN HE WAS 5 AS FAR AS BEING LEFT THERE. NOW, SCARPO AND THE MOTHER WERE TOGETHER FROM THE TIME STEWART WAS ABOUT 18 MONTHS OLD UNTIL HE WAS 3. AND AT 3 IS WHEN THE MOTHER TOOK OFF AND SHE TOOK STEWART WITH HIM, WITH HER. THEN AT SOME POINT WHEN HE WAS AROUND 5 OR 6, HE WAS -- HE ENDED UP BACK WITH SCARPO. AND STAYED THERE.

ALL THE TESTIMONY WAS THE TESTIMONY OF SCARPO RELATIVE TO HIS CHILDHOOD, IS THAT CORRECT?

THERE WAS --

AND SCARPO SAID HE WAS HAPPY WITH HIM AND HE WAS NEVER ABUSED FROM 5 YEARS, I GATHER, ON.

WELL, HE DID TALK ABOUT SOME OF THE DIFFICULTIES.

THE FACTS AT THE EVIDENTIARY HEARING AND IT NOW COMES OUT THAT THE SISTER-IN-LAWS NOW TESTIFY THAT HE WAS TERRIBLY ABUSED O IF OR HIMSELF. THIS IS SOMETHING THE JURY NEVER HEARD. IS THIS THE PICTURE I'M GETTING?

THE JURY NEVER HEARD HE WAS ABUSED BETWEEN THE AGES OF 5 AND 13. THE JURY HEARD HE WAS HORRIBLY ABUSED PRIOR TO AGE 5 AND SENATE HE SUFFERED A GREAT DEAL OF TRAUMA

AT AGE 13 AND WAS NEVER QUITE THE SAME AFTER THAT, STARTED HAVING PROBLEMS WITH THE LAW, STARTED HAVING PROBLEMS WITH SUBSTANCE ABUSE. A NUMBER OF OTHER PROBLEMS NOT ONLY FROM SCARPO BUT ALSO FROM DR. AFIELD. AND, YOU KNOW, AGAIN I THINK YOU HAVE TO GET BACK TO --

WHAT ABUSE DID SCARPO TESTIFY TO THAT HE SUFFERED BEFORE HE CAME WITH HIM?

HE TALKED ABOUT EXTENSIVE ABUSE COMMITTED BY THE MOTHER AND HER FAMILY. AS FAR AS JUST BEATING HIM, BEING DRUNK, PHYSICAL ABUSE. I BELIEVE THERE WAS SEXUAL ABUSE BY SOMEONE IN THE MOTHER'S FAMILY OF STEWART WHEN HE WAS YOUNGER. THE SISTERS TALKED -- OR THE MOTHER'S SISTER, THE AUNT, TALKED ABOUT THAT HE WAS NOT ALLOWED TO DO THINGS THAT A NORMAL CHILD COULD DO. SO THERE WAS -- I DON'T KNOW WHAT SPECIFICALLY YOU'RE LOOKING FOR BUT HE DESCRIBED THOSE EARLY YEARS. AND HIS TESTIMONY WAS THEN REPEATED WHEN DR. AFIELD TESTIFIED BECAUSE IT WAS USED BY THE DEFENSE ATTORNEY AS A HYPOTHETICAL TO SAY WHAT ABOUT A KID WHO'S BEEN THROUGH ALL THIS? HE WENT THROUGH ALL THE EXPOSURE TO VIOLENCE AND DRUNKENNESS FROM THE MOTHER'S FAMILY. SO THEY WERE FULLY AWARE OF THAT AT THE TIME.

DID THE STATE ATTEMPT TO USE SCARPO'S TESTIMONY AGAINST THE DEFENDANT IN THE PENALTY PHASE ORIGINALLY? THAT IS, EITHER TO DISCREDIT ANY CLAIMS OF CHILDHOOD ABUSE --

NO, THE STATE --

-- OR TO DISCREDIT THE DOCTOR'S EXPERT TESTIMONY? IN OTHER WORDS, DID THE STATE AT ANY TIME ARGUE TO THE JUROR THE TRIAL COURT THAT, WELL, THAT MAY BE THE DOCTOR'S OPINION BUT PREELLY WHAT WE'VE HEARD HERE IS THE TESTIMONY OF THE ACTUAL STEPFATHER THAT RAISED HIM AND SAID WHILE HE HAD HIM, HE HAD A GOOD CHILDHOOD AND THEREFORE YOU SHOULDN'T ACCEPT DR. AFIELD'S TESTIMONY?

NO. THE STATE NEVER ARGUED THAT. THE STATE ARGUED THIS CASE WAS SO HIGHLY AGGRAVATED THAT DESPITE THE FACT HE HAD A HORRIBLE CHILDHOOD AND DESPITE THE FACT THAT DR. AFIELD SAID THE MENTAL MITIGATORS APPLIED BECAUSE HE WAS CHRONICALLY DEPRESSED, THAT THE DEATH PENALTY WAS STILL APPROPRIATE.

BUT THE STATE NEVER USED SCARPO'S POSITIVE TESTIMONY, IF WE -- THE TESTIMONY THAT HAS BEEN ATTEMPTED TO BE DISCREDITED HERE, AGAINST THE DEFENDANT.

RIGHT. BECAUSE AGAIN, THE TESTIMONY ABOUT THOSE YEARS THAT HE WAS WITH SCARPO WAS JUST A KIND OF IN PASSING THING. IT REALLY WAS NOT ANYTHING THAT ANYBODY WAS TRYING TO MAKE A POINT ABOUT IN THE INITIAL PENALTY PHASE.

LET ME ASK YOU ABOUT GOING BACK TO THE POINT OF THIS WHETHER THERE WAS INEFFECTIVE ASSISTANCE IN THE PERFORMANCE -- IN THE INVESTIGATION. MR. BARBOUS DELEGATED TO THE INVESTIGATOR RESPONSIBILITY FOR OBTAINING INFORMATION ABOUT MR. STEWART AND HIS BACKGROUND, CORRECT?

WELL, HE DID -- HE HIRED THE INVESTIGATIVE FIRM FOR THAT PURPOSE. HOWEVER, MR. BARBOUS ALSO DID HIS OWN INVESTIGATION. HE TALKED TO ALL THE WITNESSES HIMSELF. TALKED TO THE SISTERS. TALKED TO AN AUNT, A GRANDMOTHER GRANDFATHER. TALKED TO SCARPO, TALKED TO STEWART. AND ALTHOUGH -- I HEARD A COUPLE OF TIMES THIS MORNING STEWART WAS NOT VERY COMMUNICATIVE, STEWART TOLD BARBOUS ALL ABOUT THE DETAILS OF THE OFFENSE OF THE CRIME. HE RELATED TO THE MENTAL HEALTH EXPERTS ALL ABOUT --

SO IS IT YOUR POSITION THEN THAT WHAT REALLY HAPPENED HERE IS THAT THE FAMILY MADE A

DECISION AMONG THEMSELVES DURING THIS FIRST TRIAL NOT TO REVEAL THIS INFORMATION TO MR. BARBOUS, AND ONLY AFTER THIS ONE PICTURE OF MR. STEWART DIDN'T WORK TO AS FAR AS THE STRATEGY DIDN'T WORK, THEY THEN DECIDED TO COME FORWARD OR THAT THEY'RE JUST NOT TELLING THE TRUTH NOW AND THEY'RE MAKING UP THE STORY OF THE ABUSE?

I THINK IT'S PROBABLY SOMEWHERE IN THE MIDDLE. I DON'T THINK THERE WAS ANY COLLABORATIVE EFFORT AT THE TIME OF THE TRIAL NOT TO REVEAL ANYTHING ABOUT THE ABUSE. I THINK AT THAT TIME, IT JUST WASN'T CONSIDERED ANYTHING OUT OF THE ORDINARY.

THEY SAID THEY WOULD HAVE TALKED ABOUT IT IF IT HAD BEEN ASKED. THE INVESTIGATOR SAID, OR MR. BARBOUS SAID, HE WOULD HAVE -- THAT'S SOMETHING HE WOULD HAVE ASKED ABOUT. SO THERE'S A CONFLICT IN WHAT GONE ON I GUESS GOING A BACK TO WHAT JUSTICE ANSTEAD ASKED INITIALLY. IF WE AGREE ON THE PREJUDICE PRONG IT'S NOT GOING TO MAKE A DIFFERENCE.

RIGHT.

BUT THERE'S A CONCERN ABOUT THE PERFORMANCE PRONG AND THE JUDGE TO MAKE SOME FINDINGS ON THIS WHETHER THERE WAS --

THERE WAS CONFLICTING EVIDENCE AND THE JUDGE DID NOT MAKE SPECIFIC FINDINGS. I THINK STEWART HAS TAKEN THE POSITION THAT THE JUDGE FOUND THESE SISTERS TO BE VERY CREDIBLE AND THEY BASE THAT ON HIS RECITING THEIR TESTIMONY IN HIS ORDER. HE DOES NOT MAKE A FINDING THEY'RE CREDIBLE IN HIS ORDER. HE RECITES WHAT THEIR TESTIMONY WAS. HE ALSO RECITES THE TESTIMONY OF THE DEFENSE INVESTIGATOR SAYING HE WOULD HAVE ASKED THESE PEOPLE ABOUT THIS IF THEY HAD REVEALED ANYTHING. AND THIS WAS EXACTLY THE TYPE OF THING HE WAS LOOKING FOR, HE WOULD HAVE PUT IT IN HIS NOTES AND IT WAS NOT THERE. I DON'T THINK YOU CAN SAY HE FOUND THE SISTERS CREDIBLE AND HE COMPLETELY FOUND THE TESTIMONY OF BARBOUS AND THE DEFENSE INVESTIGATOR TO BE --

WHAT IS THE STATE'S POSITION TO BE -- IF WE SHOULD DISAGREE WITH THE TRIAL COURT ABOUT THE PREJUDICE DIFFICULT ASPECT OF IT DO WE OURSELVES MAKE SOME DETERMINATION ABOUT WHETHER COUNSEL'S PERFORMANCE FELL BELOW THE STANDARD? OR SHOULD WE SEND IT PACK TO THE TRIAL COURT TO DO THAT AS I USE THE WORD ORDINARY, AS WE WOULD ORDINARILY CONTEMPLATE, THAT A TRIAL COURT WHO HEARD THE EVIDENCE WOULD MAKE.

WELL, I THINK THAT SINCE IT IS A FACTUAL QUESTION, IT WOULD BE BETTER MADE BY THE TRIAL JUDGE. HOWEVER, STRICKLAND CLEARLY SAYS YOU DON'T HAVE TO MAKE A DECISION ABOUT DEFICIENCY IF THERE'S NO QUESTION ABOUT PREJUDICE AND IF IT EASIER --

MY QUESTION, THAT'S WHAT I'M GIVING YOU THE PREDICATE. THAT IF WE END UP DISAGREEING ON THE PREJUDICE SIDE AND WE SAY THIS MAY HAVE MADE A DIFFERENCE OR WHATEVER, THEN WHAT DO WE DO THOUGH WITH THE ISSUE ABOUT THE CONFLICTING EVIDENCE ABOUT THE --

I THINK IT WOULD MAKE MORE SENSE TO SEND IT BACK TO THE JUDGE WHO OBSERVED THE WITNESSES AND HEARD THE TESTIMONY TO MAKE THOSE FACTUAL FINDINGS IF THOSE FACTUAL FINDINGS NEED TO BE MADE. I THINK THAT THE FINDING OF NO PREJUDICE HERE IS VERY, VERY MUCH SUPPORTED BY THE RECORD AND PARTICULARLY IF YOU READ THE PENALTY PHASE AND YOU READ THE NEW EVIDENCE AND IT'S JUST NOT THAT DIFFERENT. AND WHEN YOU LOOK AT THE STUFF. IN FACT, THERE WAS SO MUCH EVIDENCE OF CHILD ABUSE IN THE INITIAL PENALTY PHASE THAT IT WAS AN ISSUE ON APPEAL THAT THE JUDGE DID NOT FIND CHILD ABUSE AS NONSTATUTORY MITIGATION. WHAT THIS COURT SAID WAS WELL ALTHOUGH IT WAS THERE WE THINK IN TALKING ABOUT THE CHILDHOOD TRAUMA AT AGE 13 THAT IT WAS CONSIDERED BY THE JUDGE AND MAYBE IT SHOULD HAVE BEEN A LITTLE CLEARER IN THE SENTENCING ORDER BUT THIS COURT WASN'T TROUBLED ENOUGH TO SEND IT BACK AND GET MORE INFORMATION ON

IT. BUT THERE WAS ENOUGH EVIDENCE THAT WAS RAISED AS AN ISSUE IN THE APPEALS. THAT THE TRIAL COURT SHOULD HAVE GIVEN MORE WEIGHT TO THE CHILDHOOD ABUSE.

YOU WOULD AGREE THAT THE PERFORMANCE PRONG OF STRICKLAND IS A MIXED QUESTION OF LAW AND FACT.

YES.

AND IS A PREFERRED DENOVO REVIEW.

I WOULD AGREE WITH THAT.

WOULD YOU DESCRIBE FOR ME WHAT WE'RE GOING TO FIND WITH REGARD TO THE INVESTIGATOR'S CONTACT WITH THESE TWO STEP SISTERS IN THE INVESTIGATOR'S FILE?

THE -- I KNOW THAT HIS NOTES TALK ABOUT AGAIN THE THINGS THAT HAPPENED AT 13. AND THE WAY THAT THOSE EVENTS AFFECTED HIM. THE ONE THING THAT THE INVESTIGATOR'S NOTES SAY IS HE DISCUSSED WHETHER THESE SISTERS WOULD BE WILLING TO COME TO TAMPA AND TESTIFY IN A PENALTY PHASE AND BOTH SAID THEY WOULD NOT DO THAT.

DOES IT DISCUSS TRAUMA? DOES IT DISCUSS ANYTHING ABOUT TRAUMA, TRAUMATIC E-VEBTS T VENTS.

AT AGE 13. THEY DON'T DISCUSS --

NO DISCUSSION ABOUT PHYSICAL ABUSE. YES, NO, NOTHING AT ALL ABOUT THAT.

NO NOTES AT ALL ABOUT THAT. WHAT THE INVESTIGATOR TESTIFIED TO WAS THAT THAT'S CERTAINLY THE SORT OF THING HE LOOKS FOR AND PUTS IN HIS NOTES IF HE GETS ANY INFORMATION ABOUT IT. SO THE CLEAR IMPLICATION IS HE WOULD HAVE ASKED ABOUT IT. HE WAS TOLD THERE WAS NOTHING THERE. AND AGAIN, THEE ARE SISTERS THAT TOLD TESTIFIED AT THE EVIDENTIARY HEARING, NOBODY CONTACTED ME. I WOULD HAVE LOVED TO TALKED TO SOMEBODY. I WOULD HAVE BEEN GLAD TO COME TO TAMPA. THAT IS DIRECTLY REFUTED BY NOT ONLY SONNY FERNANDEZ'S TESTIMONY BUT BY THE NOTES IN HIS FILE.

IN SOME CASES, LIKE THE POLICE AND INVESTIGATORS, TOO, YOU HAVE WHEN THEY TAKE A STATEMENT IT'S SORT OF A NARRATIVE STATEMENT. I INTERVIEWED MRS. JONES FOR THE PURPOSE OF DETERMINING WHAT SHE KNEW ABOUT TOM BROWN. AND SHE SAID THAT I'M TOM BROWN'S SISTER AND LIVED WITH HIM HIS WHOLE LIFE UNTIL HE LEFT HOME AT AGE 17. AND DURING THAT TAME HERE'S WHAT HAPPENED OR WHATEVER. DO WE HAVE ANYTHING LIKE THAT FROM THE INVESTIGATORS HERE?

THEY'RE NOT THAT EXTENSIVE. I THINK THE NOTES ARE MORE CRYPTIC AND THEY'RE MORE THINGS HE WAS JUST WRITING TO HIMSELF, GOOD POINTS THESE WITNESSES THAT MAYBE THE DEFENSE ATTORNEY NEEDED TO TALK TO THESE WITNESSES ABOUT. BARBOUS ALSO TESTIFIED HE TALKED TO THE SISTERS. I THINK HE USED THOSE NOTES.

THANK YOU.

THANK YOU VERY MUCH.

REBUTTAL.

VERY BRIEFLY, YOUR HONOR, I WOULD NOTE TO THE COURT THAT THE INVESTIGATOR'S TOTAL FEE FOR THE INVESTIGATION OF THIS WAS \$870. AND MR. BARBOUS REPRESENTED MR. STEWART

ON THIS CASE NINE MONTHS OR SOMETHING.

DO YOU AGREE THAT THERE'S NO NARRATIVE TYPE STATEMENT THAT THE INVESTIGATOR TOOK FROM THESE SISTERS?

THERE'S A HANDWRITTEN STATEMENT. THERE'S NO NARRATIVE STATEMENT. THERE IS A NARRATIVE STATEMENT OF JOYCE INGLE. THAT'S THE ONLY ONE.

WHEN YOU SAY A HANDWRITTEN STATEMENT, YOU MEAN BY THE INVESTIGATOR?

I BELIEVE IT'S IN HIS FILE AND I BELIEVE IT'S IN HIS HAND.

NOT A HANDWRITTEN STATEMENT BY THE SISTER.

THAT IS CORRECT, YOUR HONOR.

WOULD YOU ALSO ADDRESS THE CONTENTION HERE THAT AT THE ORIGINAL PENALTY PHASE, THAT SCARPO WAS NOT PUT ON TO PAINT PICTURE OF AN IDYLIC CHILDHOOD. THAT HE WAS PUT ON IN MITIGATION TO TELL WHAT HE KNEW ABOUT THE ABUSE, AND THAT THAT WAS REALLY THE THRUST OF HIS TESTIMONY AND THAT THE STATE DID NOT THEN TAKE THE PART WHERE HE SAID, "WHILE I HAD HIM THAT HE HAD A GOOD CHILDHOOD," AND USE IT AGAINST THE DEFENDANT.

WELL, I DISPUTE THAT AND I GUESS I'M CONFIDENT WHEN THIS COURT REVIEWS BOTH RECORDS, THAT IT WILL AGREE WITH US. IT WILL FIND THAT MR. STEWART WAS WITH SCARPO FROM THE TIME HE WAS 18 MONTHS OLD TILL HE WAS 17 WITH THE BRIEF EXCEPTIONS OF WHEN THE MOTHER RAN OFF WITH THE THUG FOR SIX MONTHS AND WHEN HE WAS 13 HE RAN AWAY TO TAMPA FOR SIX MONTHS BUT MOST OF HIS LIFE WAS WITH SCARPO FROM THE AGE OF 18 MONTHS. IT ALSO SAYS I REPRESENTED MR. STEWART IN THE OTHER CASE WHERE A NEW PENALTY PHASE HAS BEEN GRANTED. THIS EVIDENCE HAS BEEN TAKEN PREPARE TO THE AGREEMENT WITH THE STATE TO GRANT A NEW PENALTY PHASE. THE THRUST OF THAT WAS A CHRONIC CLAIM OF DRUG ABUSE BY THE ATTORNEY BUT THIS WAS GOING TO BE THE PENALTY PHASE EVIDENCE THAT WE PRESENTED AT THAT HEARING, AS WELL. I WOULD ALSO NOTE THAT AT MR. DIAZ'S TRAIL, LILLY BROWN DID TESTIFY, THE AUNT. SHE WAS ALSO KNEW ABOUT SCARPO'S ABUSE. SHE'S TESTIFIED AT THE EVIDENTIARY HEARING SHE NEVER WAS CONTACTED. SCARPO ACTUALLY TOLD HER AT THE TIME OF TRIAL THAT HE HE'D BEEN BRUTAL WITH KENNY BECAUSE KENNY HAD BAD GENES. THAT HE HAD BEATEN KENNY AS AN ADULT EVEN. AND THAT HE HAD --

SHE'S THE ONE MENTIONED IN THE CASEWORKER'S NOTE?

THAT'S CORRECT. THE L.A. NOTE OF THE INVESTIGATOR IS CALL LILLY BROWN AND SHE'S NEVER CALLED.

THANK YOU, MR. BRODY. THE COURT WILL BE IN RECESS.

PLEASE RISE.

THANK YOU, COUNSEL.