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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-1386

STEVEN DOUGLAS HAYWARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR
SAINT LUCIE COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Steven Hayward's motion for post-conviction relief following an evidentiary hearing. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

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

"T.___" -- trial transcripts on direct appeal to this Court;

"PCR.___" – postconviction record on appeal to this Court;

"PCR.-T___" – evidentiary hearing transcripts of postconviction record on appeal to this Court;

Additional citations will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Steven Hayward has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Hayward, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF CASE AND FACTS

The Circuit Court for the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, entered the judgments of conviction and death sentence at issue in this case. On March 22, 2005, Hayward was charged by information with one count of second-degree murder, robbery with a firearm, burglary of a conveyance while armed and possession of a firearm or ammunition by a convicted felon. (R. 1) Those charges were *nolle prosed* (R. 48) and Hayward was subsequently indicted on charges of first-degree murder, robbery with a deadly weapon, burglary of a conveyance while armed and possession of a firearm or ammunition by a convicted felon. (R. 3) The charges arose from the February 1, 2005 early morning robbery and shooting death of Daniel Destefano, was delivering newspapers to a Fort Pierce convenience store. Hayward was arrested several days later.

The Honorable Burton Conner, Circuit Judge, appointed the Office of the Public Defender to represent Hayward. (R. 10) Hayward, through the Public Defender, filed a Written Plea of Not Guilty. (R. 27) The Public Defender's Office moved to withdraw due to conflicts of interest regarding several individuals listed by the prosecution as potential witnesses. (R. 40) The court granted the motion to withdraw and appointed attorney Robert Udell to represent Hayward. (R. 52, 54) Through Attorney Udell, Hayward filed a written waiver of arraignment, plea of not guilty, and demand for jury trial. (R. 55) On May 11, 2005, the State filed its

Notice of Intent to Seek the Death Penalty. (R. 63)

Udell moved for the appointment of co-counsel (R. 66) and an investigator. (R. 69) Judge Connor *sua sponte*, ordered the transfer of Hayward's case to the Honorable James W. McCann. (R. 75) Judge Connor granted Hayward's motion to appoint co-counsel and motion for an investigator, and appointed attorney Jerome Stone, Jr., and investigator Venus Oleyourryk. (R. 76, 77) Stone was primarily appointed to do the penalty phase. (Supp. R. 102)

The Motion to Suppress

At the suppression hearing, police officers testified that they went to Hayward's rooming house in response to a tip. (T. 69) There were multiple police officers present, at least one of whom was carrying a shotgun. (T. 51-55) Officer Mace testified that when police arrived, Hayward exited from a common bathroom. (T. 29) His left hand was bandaged. Hayward said his girlfriend, Dorothy Smith (who was also present at the rooming house) had stabbed him during an argument. Smith confirmed Hayward's story. Mace asked to see the wound and Hayward complied. (T. 31) Mace then asked Hayward to go to the station with him, ostensibly to talk to him about the injury to his hand. (T. 33) Mace assured Hayward that he was not under arrest, but he would have to handcuff him because it was the police department's policy to handcuff anyone who rode in the backseat of the police car, for officer safety. (T. 33-34) While being handcuffed,

Hayward stated, "I'm not gonna lie to you, but I did get shot in the hand." (T. 39) Officer Mace immediately communicated this statement to Detective Flaherty, who was still speaking with Smith. When she heard that Hayward had admitted being shot, she changed her story and told police that Hayward had been robbed and shot. (T. 49-50)

Mace testified that when they arrived at the detective bureau, he uncuffed Hayward and brought him to an interrogation room. (T. 36) At that point, Mace secured Hayward to the floor with an ankle bracelet to prevent him from trying to run. Detective Coleman and Detective Flaherty then read him *Miranda* and interrogated him, and he made several statements. (T. 37-38) He explained that he had been robbed by two men while trying to sell marijuana at the convenience store, and that he had been shot when he tried to take the gun away from one of the robbers. Then he said he had witnessed the victim, Destefano, being robbed and shot by a lone gunman. He said that he tried to pick up a gun left at the scene but it went off, shooting him in the hand. After giving this statement, Hayward was arrested for murder.

Mace testified that when they arrived at the detective bureau, he brought Hayward to an 8 x 10 interrogation room, uncuffed him, and secured him to the floor with an ankle bracelet to ensure that he would not flee. (T. 36-38) Detective Coleman read from the *Miranda* form which was signed by Hayward but not

introduced into evidence at the hearing. (T. 1737) Coleman asked, "Are you willing to answer some questions?" Hayward's response was recorded by the court reporter as "(inaudible)." (T. 1745) The detectives asked Hayward how he was doing, and he said he was cold. Detective Coleman said they would do something about it, after they "[g]et this stuff out of the way." (T. 1743) Hayward told the officers multiple times that he was in pain throughout the interrogation, and although they were well aware that he was in pain, they did nothing to help him. (T. 1751, 1782, 1821) A few minutes into the interrogation, Detective Flaherty commented that it looked like the bullet might still be in Hayward's hand. (T. 1821-22) When Hayward asked to make a telephone call ("I need to call . . . somebody, man."), Flaherty replied, "Okay. All right. But…just let's get through this first." (T. 1784) Hayward repeated his requests multiple times, and the officers replied by saying, "I want to hear your story first though, and then I'll let you use the phone." (T. 1784-1787) Later, Hayward asked for a pain pill, to which the police responded, "we'll take care of you . . . Get this off your shoulders, man." (T. 1821)

On cross-examination, defense counsel questioned the officer about the department's policy regarding handcuffing anyone who rides in a police vehicle:

UDELL: And that policy comes to you how, how do you know about that policy?

MACE: It's written in our POP, our policy from police

department. Anybody that travels in our vehicle in the back seat will be secure.

UDELL: If one reviewed that, that would be in there?

MACE: Yes, sir.

UDELL: Okay. I believe you.

(T. 40-1)

The Guilt Phase

The crime occurred before dawn on February 1, 2005. Roosevelt McDowell, a tenant at a nearby rooming house, testified that he heard two small gunshots and someone hollering "I don't have no more. I don't have no more" at around 3 or 4:30 a.m. (T. 1518-20) About 10 or 15 minutes later he heard one big gunshot. (T. 1519-20) McDowell looked outside and saw a car (identified as Destefano's) at a convenience store with the driver's door and the hood open. (T. 1521-23) A "Mexican guy" was standing or down on one knee, and a black man with dreadlocks was standing nearby. (T. 1523-25) The black man then walked by the Mexican to the light, looking at his hand. (T. 1526) The Mexican got up and walked across the street, limping a little bit and holding his side, and McDowell did not see him again. (T. 1526, 1529) The black man tried to wrap his own hand, which was leaking something, and went around behind a building. (T. 1528, 1535) The black man was wearing a hat and not a stocking cap. (T. 1537, 1539)

Officer Grecco testified that he received a dispatch at 4:15 and arrived two

minutes later. (T. 1483) He encountered Destefano about 200 yards from the crime scene. (T. 1484) Destefano looked hurt. He breathing shallow, almost like a pant, was bleeding, and looked afraid. (T. 1513) Destefano said he had been shot and where. (T. 1486) EMTs arrived and began treating him. (T. 1487) They shooed Grecco away as they worked on Destefano, but, before they took him away, Grecco got a statement about what he had been doing. (T. 1487-88) Grecco asked Destefano what had happened and Destefano said he was delivering newspapers and a black male with a black stocking cap over his face had run up and attempted to rob him; the man shot him and he attempted to shoot back; he didn't believe he shot the man; Destefano had a .357 and didn't know what happened to it. (T. 1513-14) Destefano's fiancée testified he had a silver pistol for protection when delivering papers. (T. 1462-63)

Police recovered several items apparently taken from the car, and a trail of blood around the car and away from the scene. (T. 1580- 1608, 1618-26, 1674) A criminalist testified that the items and blood on Destefano's pants and Hayward's hooded jacket contained DNA which matched Hayward. (T. 1939-52) The criminalist said that it was just as good a hypothetical as any other that Hayward's blood got on Destefano when Hayward contacted Destefano's body after seeing somebody else shoot and rob him. (T. 1957) Officers found no gun or casings at the scene, which was consistent with use of a revolver. (T. 1609-11)

The medical examiner testified that Destefano died from a gunshot to the chest. Destefano also had a gunshot to the left thigh; the bullet traveled horizontally and lodged against the femur. (T. 1628) The medical examiner could not tell the sequence of the shots. (T. 1620)

Officer John Robinson testified that, a few months after Hayward's arrest, when the common laundry room in Smith's rooming house was renovated, a black .22 caliber revolver was found behind a board covering a vent in the wall. (T. 1976-78, 2012) Hayward's blood was discovered inside the gun's firing chambers. (T. 2030-31) This gun was identified as this as the murder weapon.

The penalty phase

At the penalty phase, the State presented evidence and testimony regarding Hayward's 1988 convictions for second-degree murder and two counts of armed robbery. (T. 2389-2438) Destefano's mother, sister and fiancée gave victim impact testimony.

The defense presented four family witnesses at the penalty phase. Terrence Hayward told the jury that Steven was about five years younger than him and that Steven had five older siblings. Steven had a different father than the other children but they were all raised together under the same roof, in the same environment. (T. 2463) The children were raised by Terrance's father, Harold Hayward. Terrance and Steven were close and did things together as brothers. (T. 2467) When Steven

was five, Harold Hayward left the family and Tony Johnson, Steven's alcoholic biological father, moved in. (T. 2465-6)

Theresa Williams testified that she is Steven's older sister. (T. 2469) Theresa testified that Harold Hayward was not Steven Hayward's father. Although a father figure to Steven, "he wasn't there all the time because he worked out of town." (T. 2471) Theresa stated that her parents did not physically or sexually abuse Steven. Steven's biological father was an alcoholic. Because her father and Steve's father were not around, their mother had to work two jobs and Theresa had to take care of the kids. Theresa explained she punished Steven, but that she "didn't break his bones." (T. 2475)

Debra Fluery testified that Harold Hayward was unable to provide parental support. Her mother worked two jobs to support the family and that she provided a good clean home. (T. 2477-8) Fleury agreed with trial counsel Udell's characterization that "once in a while [Theresa] had to give him [Steven] a whooping. Sounds about right?" (T. 2479) Fleury left the house to join the military when Steven was about 13 or 14. She remembered Steven as a hard headed boy who ran in the streets. She explained that she was not in the same situation as Steven because she liked school and set goals for herself. (T. 2481)

Barbara Johnson, Steven's mother, testified that Steven was her youngest of six children, though she also raised a nephew. The family first lived in a rental

home and later in a home Johnson purchased. (T. 2484) Barbara's first husband, Harold, loved Steven. Harold and Barbara separated when Steven was five years old. Tony Johnson, Steven's biological father, then moved in with the family. Steven left the house when he was 14 years old. (T. 2487) He did not do well in school and Barbara tried to get help for him but she "couldn't afford to get him the help he needed." (T. 2487) Barbara confirmed that Tony was an alcoholic. (T. 2488) Barbara confirmed that most of her children were successful but that "there was something about Steven that you just couldn't get there." (T. 2489)

Psychologist Dr. Michael Reardon testified that Hayward had the potential to be rehabilitated because he had shown an ability to focus on learning despite his low average IQ (91), as exemplified by his attainment of a GED while in prison for the first murder. In prison, Hayward had made license plates and worked in other areas. (T. 2450-54)

The jury, by vote of 8-to-4, recommended that Hayward be sentenced to death. (T. 2601) At the conclusion of the penalty phase of the trial the court scheduled a *Spencer*[1] hearing for April 27, 2007. (PCR. 2704) However, on the day of the *Spencer* hearing, Udell informed the court that "we don't intend to present any evidence additional to that which you heard at the penalty phase." (T. 2617) Instead, Hayward argued *pro se* his own "motion for new trial." (T. 2626-2664)

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[1] *Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993).

On May 3, 2007 the court conducted a hearing whereby the court expressed concern regarding the status of the *Spencer* hearing. (T. 2705) Both parties then advised the court that they intended on conducting the *Spencer* hearing on the day of the sentencing, immediately before the court announced the sentence. (2714, 2719) After the court expressed concern again about conducting a *Spencer* hearing on the actual day of sentencing, Udell explained that he did not plan on calling any witnesses to testify: "It will just be Mr. Hayward's mom and sister pleading to the court. It's not testimony. It's not going to be evidence. It's not offered in mitigation. It's elocution." (T. 2719-20, 2734) Udell then assured the court that he knew what the witnesses were going to say, which would be limited to "we love our son, we love our brother," and "[d]o not give Steven the death penalty." (T. 2721) Out of caution, the court again rescheduled the hearing, for a third time, as a "supplemental" *Spencer* hearing to be conducted on May 16, 2007. (T. 2737)

At the May 16, 2007 hearing, Udell advised the court that Hayward's family members were present, and:

> [T]they're going to be very brief, and the truth is, Judge, I don't even consider it a Spencer Hearing. I know you – you're calling it a subsequent [sic] Spencer Hearing.
>
> It's just like the victim's family is going to have some words to say. This is the person who's about to be sentenced, mom and daughter – mom and sister who are going to say, Judge, don't kill our son, don't kill our brother.
>
> I understand you're just trying to make sure all of his, meaning

> Steven's rights have been protected, so let's do it in the sense of formal testimony.

(T. 2757) The court again expressed concern, explaining to counsel the purpose of the *Spencer* hearing. (T. 2757-2758)

At the *Spencer* hearing Debra Fleury testified:

> When we were here and my sister and brother was here and they testified as to what they had to say, things were not said. They're embarrassed. But the Court need to know that my family was not the Huxtables and weren't the Cleavers. We were totally different. We were I would say dysfunctional.
>
> When I say that, my oldest brother, his name is Derrick, he's 46, he's in prison in Waycross, Florida – I mean Waycross, Georgia, for armed robbery. This is my oldest brother.
>
> And then my baby brother, he's here now facing the murder charges. Both of them have different fathers from the kids that are in the middle which is just my brother Terrence, my sister Theresa, and my brother Leon and myself.
>
> My brother Leon is somewhere in the State of Florida, he's also in prison. He has a drug problem. On more occasions than I want to open up to, he has written checks, he's wiped out my mother's account at least twice.
>
> My sister who is here, she's also recovering drug addict. She can't live here in Fort Pierce because of her drug problems.
>
> My brother that was here that we talked about that's in the military, he was doing good when he went in the military and then he went to Saudi Arabia, and when he came back he was not the same. And then we found out that he was on drugs, and then he was discharged from the military and it got worse, he ended up being on crack, so he's been arrested.
>
> So out of the six of us that my mother had, five of my brothers and sisters, all of them have been in jail or – or are in prison

> right now, or are in a drug rehab where they cannot function as normal people in society. When I say that, I mean they don't have their homes, they don't have their kids. They're doing the best they can with what they have to do.
>
> When Bakkedahl was saying that he was making bad decisions, I'm sure they were bad decisions, but growing up as we did you had to either fight or run, and I was the knee baby, the child between my brother and the rest of them so I didn't have many problems because I was a girl and I'm four years difference in age than him. But my older brothers and sister, they were a little rougher. Heavy handed. They would fight. My sister and my brother would fight.
>
> *.*.*
>
> We had a hard life. As my mother said, she did the best she could, and we tried to raise each other. Our father was not there the ma—our real father was not there the majority of our life.
>
> But my brother's father, Steven's father was there more than my real father, and he was not a model figure to raise children. I mean, he had his own issues, and he had some anger problems and he was an alcoholic. So he didn't bond with us, but he didn't give us any problems, but he wasn't a father figure. So we didn't have a figure and our mother who refused to put us on – on welfare, she worked those two jobs to keep from being that way.
>
> So that's one of the – I don't know if that's a mitigating factor for my brother, but he didn't have a normal – when Bakkedahl was saying he made bad decisions, that everybody in our family was so great, that was not true. That's not the truth. That statement of my family, the true statement is that we are very dysfunctional."

(T. 2763-67) Barbara Johnson, Hayward's mother, also testified at the *Spencer* hearing. (T. 2758-61)

The trial court followed the jury's recommendation and sentenced Hayward

to death. (T. 2880-2884) Hayward timely appealed[2] to this court, which affirmed the conviction and death sentence. *Hayward v. State*, 24 So. 3d 17 (2009), *cert. denied, Hayward v. Florida*, 130 S. Ct. 2385 (Fla. 2010).

Postconviction Proceedings

The Office of the Capital Collateral Regional Counsel–Southern Region ("CCRC-South") was appointed to represent Hayward in postconviction proceedings upon the issuance of the Mandate December 30, 2009. On March 15, 2010, Hayward filed a Motion to Disqualify the Office of the State Attorney for the Nineteenth Judicial Circuit alleging that the Office of the State Attorney's misconduct violated Hayward's rights to attorney-client confidentiality and

[2] On direct appeal, Hayward raised the following issues: (1) the statements of the murder victim to police describing his attacker were improperly admitted under the excited utterance and dying declaration exceptions to the hearsay rule, and in violation of the Confrontation Clause; (2) introduction of statements to police at the rooming house and their observations while there violated his Fourth Amendment rights; (3) introduction of the recorded jail conversations between Hayward and his girlfriend were more prejudicial than probative due to the vulgarity of the language used, affecting both the guilt and penalty phases; (4) comments made by the prosecutor in closing argument during the penalty phase comparing the life choices made by the victim and Hayward constituted prosecutorial misconduct requiring resentencing; (5) there was insufficient evidence concerning the identity of the shooter; (6) there was insufficient evidence as to whether a robbery was actually accomplished; (7) there was insufficient evidence establishing premeditation; (8) the standard jury instruction on premeditation is insufficient; (9) Florida's sentencing scheme is unconstitutional under the United States Supreme Court's decision in *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002); and (10) imposition of a death sentence based on an 8-to-4 jury recommendation is unconstitutional.

jeopardized his rights to due process and effective representation in postconviction. Hayward further alleged that the State's violation of Hayward's rights to attorney-client confidentiality resulted in actual prejudice. (R. 129) Hayward sought, and was granted, the opportunity to take depositions of the parties involved and make further argument upon completion of discovery. (R. 173-74) After considering written memoranda (R. 194, 350), the court denied Hayward's motion to disqualify the Office of the State Attorney. Hayward filed his initial Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend on April 21, 2011. (PCR. 557-678) After resolving outstanding public records issues, with leave of the court, Hayward filed an amended rule 3.851 motion. (PCR. 842, 963) The court conducted a case management conference and granted an evidentiary hearing limited on Hayward's claim that counsel were ineffective at the pretrial motion to suppress, that trial counsel failed to effectively challenge the State's guilt phase case, that counsel failed to challenge the admission of hearsay, and that trial counsel failed to adequately prepare and present mental health and lay witness testimony at the penalty phase. The court summarily denied the remaining claims. (PCR. 2223-2246)

The postconviction evidentiary hearing

Robert Udell testified via videoconference from Hawaii, where he now resides. (PCR-T. 495-593) Prior to moving to Hawaii, he was an attorney in Florida

for about 30 years where he practiced criminal defense. (PCR-T. 497) Udell no longer practices law, having lost his license in 2009. (PCR-T. 501) During his career Udell worked on about 20 death penalty cases. (PCR-T. 499)

Udell explained that was lead counsel for Hayward, however because he was "having a rough time in [my] life" during Hayward's case "….little by little I asked Jerome [Stone] to do some things that lead counsel would normally do." (PCR-T. 502-03) Udell believed that Stone must have been qualified to handle death penalty cases or he wouldn't have been appointed to the case.

For the guilt phase investigation, Udell claimed he went to crime scene, drove around in his car, and tried to locate people in the discovery materials. (PCR-T. 506) He also claimed he spoke to family members and to the original suspect. (PCR-T. 506) He recalled trying to find the black lady sitting on the chair at the time of the incident but he couldn't find her. (PCR-T. 506) Udell did not take depositions and instead spoke to witnesses informally, however he did not remember recording any statements from any witnesses he spoke with. (PCR-T. 507) According to Udell, witness would not want much to do with him so he relied on his investigator, Venus Oleyourryk, because people responded to her. (PCR-T. 507-08) Oleyourryk, a registered nurse, initially worked on Udell's personal injury cases and eventually worked on his capital cases as well. (PCR-T. 504-05) Udell did not know if Oleyourryk had training in conducting criminal investigations,

mental health issues, psychology, or in the mental health field. According to Udell she may have worked with Hayward's family at times and also met with Steven at times. (PCR-T. 504) Oleyourryk would take notes which would be in their files. (PCR-T. 508)

To prepare for penalty phase, Udell claimed to have read medical records – "if there were any." (PCR-T. 508) He also thought "maybe" there were some social history records and some psychological history records, educational history records and physical health records which he would have gotten from the State in discovery. (PCR-T. 509) Udell recalled meeting with "numerous family members in my office on one occasion . . . I met with a very nice lady who worked at the jail on a number of occasions. We may have kibitzed about Steven's case, we may not have." (PCR-T. 509-10) Udell said the family told him they were "somewhat dysfunctional, they were poor, but they were a loving family." The father had a drinking problem and "would lay his hand on Steven once in a while but it was described as not beatings, it was described as discipline." Hayward ran the streets when he was young, they loved him, and he was a good brother. (PCR-T. 510-11) According to Udell, the defense theory of mitigation was the lack of additional aggravators. (PCR-T. 510)

Udell also testified that he was counsel on the Cynthia Sommer case in California during the same time he had Hayward's case. Udell traveled to San

Diego about 6 to 10 times before the trial, sometimes for the weekend, sometimes for 4 to 5 days at a time. At one point he was traveling to California every 2 weeks, then every month. (PCR-T. 514-15) The Sommer case was a case that ". . . I put my heart into, was totally convinced of my client's innocence, was sure she would be found innocent. She was found guilty and I went into a deep funk." (PCR-T. 513) As a result of the Sommer case, Udell became deeply depressed eventually taking antidepressants and anti-anxiety medications. At the time of his testimony Udell was taking Ambien and Citalopram for depression and Lorazepam for anxiety. (PCR-T. 515-16)

Udell also testified that he had received written correspondence from the Assistant State Attorney Ryan Butler in preparation for his testimony. (PCR-T. 520) When he was asked about the contents of the letter he received the State objected, claiming that the letter is privileged work product. (PCR-T. 520) At the court's request, the State produced for in-camera inspection a document ASA Butler represented to be a copy of the letter he sent to Udell. (PCR-T. 525) Upon review of the document and argument, the circuit court sustained the State's objection and entered the document, under seal. (PCR-T. 526)

Jerome Stone testified that he has practiced law in Florida since 1995. His practice includes criminal defense, family, personal injury, sports and entertainment law. (PCR-T. 391) Prior to private practice, Stone worked for the

State Attorney's Office for the Nineteenth Judicial Circuit. As assistant state attorney he prosecuted all levels of misdemeanors and felonies except for death cases. (PCR-T. 392)

Stone became involved in the Hayward case when he approached Robert Udell and asked him if he could second chair. (PCR-T. 394) At the time, Stone was not certified to be a first chair attorney on the case but had attended a death penalty conference once or twice. (PCR-T. 393-94) Stone was familiar with ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases and understood that the Guidelines are to be considered as guidance for defense attorneys in death penalty cases. (PCR-T. 395)

Stone testified that Udell was responsible for pretrial motions, including motion to suppress. Stone's "goal at the time was to be involved with as much as I can, in every aspect, even through he [Udell] may have been the lead on it. If I can contribute something, whether it was a motion, a witness preparation, yeah, I was involved in almost every phase." (PCR-T. 397)

Udell and Stone talked about the facts based on what they received in discovery and other witness statements. (PCR-T. 398) He could not recall if they conducted independent investigation for the motion to suppress. (PCR-T. 398) They talked to a number of people related to the case but Stone could not say he specifically went out and interviewed someone for the motion to suppress. He did

not know if Udell did. (PCR-T. 398-99)

Stone identified the two boxes of files generated by the team on the case. Although all of his work should have been reflected in his box, Stone confirmed that the boxes did not contain any notes concerning witness interviews. (PCR-T. 400-04) Stone recalled that Venus Oleyourryk was the investigator on the case but he could not clearly identify her role. (PCR-T. 404-05)

Venus Oleyourryk testified by telephone from her current residence in South Carolina. (PCR-T. 1139) Oleyourryk earned a Bachelors Degree in nursing and was employed as a registered nurse. (PCR-T. 1139) She had previously lived and worked in Florida as a registered nurse and investigator. Oleyourryk started investigating medical malpractice cases and later got into different types of cases, mostly first degree murder and death penalty cases. She worked on 50 to 100 cases with Udell over 9 years. (PCR-T. 1141) Oleyourryk became involved in the Hayward case in June, 2005 while working for Udell. (PCR-T. 1140) Oleyourryk did not know Jerome Stone at the time of the Hayward case, she never met with Stone or discussed case with him. (PCR-T. 1141-42)

Oleyourryk worked with Udell on the Cynthia Sommer case from March, 2006 until January, 2007 - during the time they had Hayward's case. (PCR-T. 1142-43) While she and Udell were working in California, they were not working on Hayward's case. (PCR-T. 1147) Sommer was found guilty but was granted a new

trial on appeal. (PCR-T. 1151) Oleyourryk recalled that Udell seemed to be in "a haze" after the Sommer trial, during his preparations for Hayward's trial. (PCR-T. 1156)

According to her billing, Oleyourryk worked 100 hours between June 2005 and May 2006. (PCR-T. 1148) Of that, 30 hours were spent meeting with Hayward, 10 hours meeting with Udell, and 12 hours copying discovery at State Attorney's Office. (PCR-T. 1148) Oleyourryk did not do a lot of the work on Hayward's case, given her workload on the Sommer case. (PCR-T. 1148-49)

Michael Riordan, Psy.D., testified that he is a licensed psychologist in the State of Florida. (PCR-T. 942) He earned his doctorate at from the Florida Institute of Technology, completed an internship at Nova Southeastern University and one-year residency at the Savannas Hospital, and completed a forensic examiner training course. (PCR-T. 943) Dr. Riordan was retained twenty-four days before his penalty phase testimony, which was unusual for him, given he is typically retained one to two years before trial. (PCR-T. 957) His communication with the legal team was primarily through email correspondence with Udell. (PCR-T. 963) He was asked to put together a report, assessment or examination for penalty phase mitigation. Riordan did not know of any mitigation specialist involved in the case and had no contact with any investigator, though in his experience it is common to get a report from one as part of mitigation assessments. (PCR-T. 959, 961-2)

Typically, in a death penalty mitigation case, Dr. Riordan reviews the Florida statutes, completes forms he developed regarding non-statutory mitigators, and reviews all available records provided by the attorney in case. (PCR-T. 958) Riordan reviewed Hayward's statements, school records, forensic records, DOC records, and Coleman records provided by ASA Bakkedahl, which he received from Udell. He also reviewed jail records. (PCR-T. 960-61)

Dr. Riordan was concerned about the number of delays in the case. Despite repeated requests Udell did not initially provide him with Hayward's records or his order appointing him as an expert. Because of delays Riordan was unable to begin Hayward's examination as planned. (PCR-T. 964-68) Riordan eventually examined Hayward on March 12, 2007. (PCR-T. 961) After the examination Riordan advised Udell that he recommended additional testing. "I indicated that while he may possess characteristics of antisocial personality disorder, that an alternate diagnosis may be appropriate, and that to illuminate his personality functioning I recommended that he undergo a personality – personality testing at my office." (PCR-T. 971) However, Udell never responded to his request and Riordan never conducted the additional tests. (PCR-T. 974)

Riordan testified that it is the generally accepted practice in forensic psychology to corroborate information provided by the defendant. Riordan expected to conduct a second interview with Hayward as well as speak with his

family and friends. (PCR-T. 978) However, because of the time constraints he did not have time to conduct the additional interviews. (PCR-T. 979) Riordan did not remember anything about Hayward being beaten or abused by any of his family members. However, Hayward's not endorsing the abuse is consistent with victims of abuse and neglect normalizing the behavior. (PCR-T. 983, 988, 1024) Had Riordan known about the abuse at the time of the trial he would have sought corroboration from family member. Hayward's history of childhood abuse makes sense in terms of his anxious mannerisms reported by school. (PCR-T. 989398)

Riordan did not know that his role in the case was "merely a conduit for historical information" about Hayward. To the contrary, Riordan believed Hayward's case to be a psychologically complex case and that there was more to be learned about Hayward. (PCR-T. 1031) He was concerned that Udell did not have an understanding of psychological principles at issue:

> I did not get the impression that he fully grasped the psychological information that I was trying to provide to him. He used the word psycho babble twice, which indicated to me that he had a limited understanding of the psychological information that was being provided to him.

(PCR-T. 1028) Udell's use of incorrect terms during the trial was "an indication that may reflect Udell's limited understanding of the information that's being provided to him." (PCR-T. 1029)

Cecilia Alfonso testified that she is a forensic social worker who has worked

as a mitigation specialist in capital cases for 27 years in both federal and state courts, primarily at the trial level, but also at the postconviction stage. (PCR-T. 1165) Alfonso testified that the role of the mitigation specialist in a capital case is primarily to consult with the attorney, to conduct a biopsychosocial assessment, analyze their findings, share that information with the attorney and, if necessary, present those findings in the courtroom. (PCR-T. 1184-85)

Alfonso explained that a biopsychosocial assessment considers the biological condition of the individual, the psychosocial factors that contributed to individual's development, and the social components of an individual. As part of the biopsychosocial analysis Alfonso considers intergenerational dynamics, including facts prior to the defendant's life. (PCR-T. 1123-25)

In addition to interviewing Hayward for over three hours, Alfonso reviewed school records, juvenile records, jail records and Florida Department of Corrections records. (PCR-T. 1190, 1192-94) She also interviewed Hayward's mother, Barbara Johnson, and his siblings including, Debra Fleury, Theresa Williams, Terrance Hayward, Derrick Green and Samuel Leon Hayward. Alfonso also interviewed Hayward's cousin, Samuel Peaks, and ex-girlfriend, Pamela Clark. (PCR-T. 1202-03)

Alfonso reviewed the transcripts of Hayward's penalty phase proceedings. She found that the mitigation she uncovered during her mitigation workup differed

substantially from the mitigation that was presented at trial. (PCR-T. 1267) As an experienced mitigation specialist, Alfonso recognized ten mitigating factors relevant to Hayward's case: 1) Hayward was born and raised in an environment without nurturance and guidance; 2) Hayward inherited a propensity for substance abuse given alcoholism in family; 3) Hayward was subjected to repeated chronic physical abuse by his siblings, and parents; 4) Hayward lived in a constant state of anxiety and flight because the violence and the unpredictable nature of the violence; 5) Hayward has a 91 IQ, low average range, and because of this did not have the cognitive tools to develop survival strategies for coping with living in battle zone; 6) Hayward did not receive the cognitive support and stimulation that would have helped him develop a sense of competence. His only sense of competence was "in fighting and being able to tolerate physical and emotional abuse"; 7) Hayward was significantly impacted by his position of birth, as he was the youngest and most vulnerable to physical and emotional abuse by his siblings, mother and father; 8) Hayward lived in great poverty despite incomes of both parents, and nothing was done to support him academically, socially, emotionally; 9) Hayward lived in an isolated community with limited resources available; and 10) Hayward suffered from significant identity issues regarding his paternity. (PCR-T. 1261-66)

Barbara Johnson, Hayward's mother, testified at the evidentiary hearing.

Steven Hayward is the youngest of six children. (PCR-T. 624) In addition to her children, Mrs. Johnson also raised her first husband's nephew, Samuel Peaks, after he was taken into State custody as an infant. Johnson was married twice, first to Harold Hayward, and later to Tony Johnson. (PCR-T. 625)

Johnson testified that she met with Udell one time prior to her penalty phase testimony. The meeting took place in Udell's office in Stuart, Florida, during the weekend. Mrs. Johnson, her daughters, Theresa Williams and Debra Fleury, her son Terrance Hayward, Hayward's godmother Shirlene Jones, and her grandchildren Bobby and Dontavious attended the meeting. (PCR-T. 708-10) Udell was the only member of the defense team at the meeting which lasted a little over an hour. Udell explained the purpose of her testimony was "[j]ust – but because he's my son and what I knew about the charge." (PCR-T. 715) During the meeting Barbara Johnson told Udell about Hayward's paternity, Tony Johnson's drinking and her children's drug problems. Udell did not ask about any violence or abuse that might have occurred in the Hayward household during Hayward's childhood. (PCR-T. 711-13)

Johnson testified that prior to her son's trial she did have phone contact with Udell but those conversations were limited to the status of her son's case. (PCR-T. 709) At the trial Mrs. Johnson testified twice, once before the jury and once before the judge. (PCR-T. 714) She asked Udell if she could testify the second time before

the judge because she “just didn’t see the things that – that the State’s attorney was saying about him, I didn’t see that in him … I thought if I could tell him what kinda person Steve was, he would know that Steve didn’t deliberately go out there and kill somebody.” (PCR-T. 715) Udell did not prepare Johnson for her second testimony and was not aware of what she was going to say prior to her testimony. (PCR-T. 716)

Johnson testified that as a young child she was left by her parents in the care of the Green family in South Carolina. (PCR-T. 646) In proffered testimony she testified that she was raised on the Green’s farm where she worked in the cotton and tobacco fields. (PCR-T. 650-1) Johnson was not free to leave the Green’s farm. The Greens verbally and physically abused her on a daily basis to the extent that Johnson eventually normalized the violence. “When I was a kid I thought it was just the way of life.” (PCR-T. 648) Daisy Green, the family matriarch, would whip Johnson daily with a tree branch and rope. However, there were also incidents where Daisy Green kicked her in the head, tied her to a tree at night, beat her while she hung naked from a tree by her feet, and forced her hand into her vagina as a young child. (PCR-T. 647-48, 650, 652) At the age of 20 Johnson gave birth to her first son, Derrick Green. (PCR-T. 652) She later married Harold Hayward through an arrangement by Daisy Green. After her marriage she moved to Fort Pierce with her husband. However, the Greens forced her to leave her young son to replace her

as laborer on the farm. (PCR-T. 655)

Johnson testified that after leaving the farm she had six other children: Samuel Leon, Theresa, Terrance, Debra, and Steven. The family moved to Fort Pierce, Florida, where Debra and Steven were born. (PCR-T. 655-662) Barbara Johnson worked fulltime after Steven Hayward was born. Her husband, Harold Hayward, also worked fulltime out of town in Boca Raton during the week. (PCR-T. 662-63) Johnson's oldest daughter, Theresa Hayward, took care of the children and the house in her absence. (PCR-T. 665)

Johnson drank daily during Steven's childhood and both of her husbands drank heavily when they were home, often leading to verbal and physical altercations. (PCR-T. 666-67) Barbara testified that the money she and Harold earned during the week was spent on drinking on the weekend. "We had to go in the grove and Saturday and Sunday and make the money back." (PCR-T. 669) Barbara, Harold and the children would work in the groves picking fruit almost every weekend to support the family as well as supplement their drinking. Steven was just a toddler when they first took him to the groves. (PCR-T. 669)

Johnson admitted that she and Harold beat their children regularly. She permitted, and encouraged, her husband to physically abuse her children in the same manner that she was abused as a child. She would also beat her children in the same manner Daisy Green beat her. She used the switch when she beat her

children because it was used on her when she was a child. (PCR-T. 668) When she beat her children with the switches she would leave welts on her their bodies. Steven was about one year old when she began to beat him and he was two to three years old when Harold started beating him with the rest of the children. Her older children beat Steven when she was away from the house. (PCR-T. 697)

As a child, Hayward was in trouble all the time and Johnson was often contacted by the school. (PCR-T. 678) She knew something was wrong with him, but was unable to find help for him. (PCR-T. 679)

Debra Fleury testified that she is Steven's older sister by four years. Fleury is currently employed by the Saint Lucie County Sheriff's Department. Fleury has five other siblings. (PCR-T. 750-51) Fleury recalled meeting with Udell once at his office in Stuart, Florida, with her mother, her sister Theresa, brother Terrance, Shirlene Jones and her two nephews. (PCR-T. 787) The meeting occurred about three to four weeks before Hayward's trial and lasted about 1-1/2 hours. (PCR-T. 788) Fleury did not discuss her brother's case at any other time with Udell or any with any expert in the case. (PCR-T. 789) She spoke with Jerome Stone at the courthouse during the trial, but not regarding details of the case. (PCR-T. 789) She also does not recall any phone calls with Udell. Udell told her at the meeting that the purpose of her testimony at Hayward's trial was to "try to help him." (PCR-T. 791) He asked her about her profession, what her siblings did for a living, her

siblings' drug habits, and her brother's military service. (PCR-T. 791)

Fleury testified twice at her brother's trial. The first time she testified, Udell asked her the same questions he asked her in his office. After the end of the trial she asked Udell if, "we could go back and talk before the judge came back." (PCR-T. 793) Fleury testified that she wanted another opportunity to speak after she heard the State imply at closing argument that Steven had a normal childhood home. (PCR-T. 792) Fleury testified that "[i]t was never a normal home, but that wasn't asked of us. They didn't ask us how we was raised." (PCR-T. 792)

Fleury testified that the family was instructed by Udell prior to their initial testimony to just answer the questions he asked and that Udell "didn't ask us what my mother's life was like, what my father's life was like, what our life was like, what Steve's life was like, he didn't ask us those questions." (PCR-T. 793) Fleury testified the second time "[b]ecause I –I want to see if I can – if there was any mitigating circumstances to where they wouldn't give my brother the death penalty. I wanted to speak and let the judge know what did not come out in the trial." (PCR-T. 793) Udell did not ask Fleury what she was going to testify to the second time. (PCR-T. 794)

According to Fleury, all of the Hayward children were physically abused by her mother and father during. Harold beat the children with branches and "belts, extension cords and sometimes the water hose in the yard." (PCR-T. 756) The

children would have and open sores from the beatings. (PCR-T. 655-757) Harold began beating Steven when he was 2-3 years old and he would beat Steven more than the other children. (PCR-T. 758) Johnson did not try to stop Harold from hurting the children. Instead, "[s]he told him to beat us." Johnson also beat the children, especially when she drank. (PCR-T. 760) Johnson would use a switch from an oak tree; however, like her husband she also used extension cords and water hoses. (PCR-T. 760) The children suffered welts and broken skin from her beatings. (PCR-T. 763)

She testified that as a child her parents were not home during much of the week and she and the other children were raised primarily by her older sister, Theresa, who was a child herself. (PCR-T. 754) When her parents were home they were drunk for most of the time and fought violently. (PCR-T. 766) Johnson drank everyday. After her mother left Harold and moved in with Tony Johnson the drinking and fighting continued. Tony was nice to her mother when he wasn't drunk; however, he was drunk everyday. (PCR-T. 777) When he was drunk he fought with Johnson and verbally abused her and the kids. During arguments, Tony threatened to burn the house down and kill Johnson and the children. (PCR-T. 777)

Steven was also regularly beaten by his older siblings. (PCR-T. 781) During these sessions the older boys would body slam Steven, throw him against walls in the house, hit him with their fists, and at times put holes in the walls of the house.

(PCR-T. 782-83)

Terrance Hayward testified at the evidentiary hearing that he is Steven Hayward's brother by five years. Terrance testified that he met with Udell twice during his brother's trial, once at his office and once at the courthouse. (PCR-T. 1074) He did not meet with anyone else from the defense team. (PCR-T. 1074) The one time he met Udell at his office he was with his mother and sisters, Theresa and Debra. The meeting lasted for about an hour and a half. (PCR-T. 1075) During the meeting Udell did not ask any of the family members about physical abuse or violence during Hayward's childhood. (PCR-T. 1076-77) Terrance spoke to Udell only about the Department of Corrections failing to prepare Hayward from his release from prison. Terrance testified that all of the Hayward children were physically abused by his mother and father during his childhood. Terrance described being hit with switches, water hoses, extension cords, a Mattel racetrack, and tree branches. Harold would hit them "anywhere" – arms, legs, thigh, back, head." (PCR-T. 1055-56) The children would suffer welts and torn skin where the switch would rip the skin, as well as bruises from water hose and switches. His mother would beat them in the same way Harold did. (PCR-T. 1057-58)

Their parents were not home during much of the week and he and the other children "pretty much raised ourselves." (PCR-T. 1054) When his parents were home they were drunk for most of the time and fought violently. (PCR-T. 1060)

Because the children often went hungry Terrance would bring home expired food left over from feeding the hogs to feed the family. (PCR-T. 1062-63) After his mother left Harold, she moved in with Tony Johnson and the drinking and fighting continued. Tony threatened to kill them and their mother. (PCR-T. 1066)

Terrance described "initiation" sessions the brothers had with Steven throughout his childhood. (PCR-T. 1071) During these sessions the Hayward boys would throw Steven against the ground, furniture, walls and floor. They would punch and body slam him. Although Steven would cry the older boys would continue to hit him until he stopped. (PCR-T. 1073-73)

Terrance admitted that he was dishonorably discharged from the army for his drinking. Terrance has a felony conviction from 1989, and his brother Leon and Derrick, and his cousin Sam, have all served time in prison. (PCR-T. 1077)

Derrick Green, Steven's oldest brother, testified at the evidentiary hearing. Derrick Green was incarcerated in Georgia at the time of Steven's trial. (PCR-T. 850) He was never contacted by anyone from Hayward's defense team to testify on his brother's behalf. In proffered testimony Derrick testified about his childhood on the Green farm. Derrick was left by his mother as a baby with the Greens. Daisy and Lawrence Green had an agreement with his mother that she would leave the first born child with Greens in South Carolina to help on the farm. (PCR-T. 852) Derrick was four or five years old when he saw his mother again during her visit to

the farm. In total he saw his mother 3-4 times during the 11 years he lived with the Greens. (PCR-T. 854) Derrick began working on the farm "whenever I was able to drag a sack of cotton behind me." During his childhood he picked cotton, cucumbers, tobacco, crop tobacco, and corn, and was responsible for feeding the animals. (PCR-T. 856-57) While on the farm Derrick was beaten regularly with switches from oak trees and "whatever they can get." (PCR-T. 854-55)

At the age of 11 Johnson kidnapped him and brought him back to Fort Pierce because "she wasn't allowed to take me from there." (PCR-T. 857-58) Derrick testified that living with the Hayward's was not much better than living with the Greens because received the same type of beatings from Harold and his mother. Harold would beat them with a switch, or water hose or piece of car tire. "Daisy Green used to whip me, so Harold whipped me too, so it was about the same beatings." (PCR-T. 866) All of the children were beaten regularly with switches, water hoses, and parts of machinery. (PCR-T. 867) Both parents worked away from the home and when they were home they drank and fought. The older siblings raised the younger siblings in the Hayward household.

Derrick explained that his mother eventually left Harold because he pulled a gun on Derrick. However, when she left Harold she left Derrick and Sam at the house with Harold to protect the house. Eventually the boys went to live with their mother in Vero Beach because Harold pulled a gun on them. (PCR-T. 874) They

lived in Vero Beach for about a year. During that time Tony Johnson moved in with the family. Derrick explained that the family was afraid of Harold. They were "so afraid that they didn't know where Harold was, that any time they would hear anything outside, Tony would get up and he would have his gun in his hand and he would go through the house and look outside, you know, thinking that Harold might have been out there or something." (PCR-T. 878) Johnson and Tony drank often and when they were drunk they would also fight violently. (PCR-T. 880-81) During one fight Johnson stabbed Tony with a knife.

Derrick testified that he was responsible for "toughening up" Steven as a child. Derrick and his brothers used wrestling moves on Steven to make him tough. (PCR-T. 884) They jumped on Steve, did "belly to back flips" on him, and threw him against the floors, walls and furniture. (PCR-T. 885) When Steven was fourteen years old Derrick threw him through the wall in the kitchen. Steven got away and got his mother's gun – trying to protect himself from Derrick. (PCR-T. 886) The beatings started when Steven was seven years old and continued until Derrick left the house at seventeen. Although Derrick testified that he never considered what he did to Steve as abuse, he "never seen other kids do what we was doing." (PCR-T. 887)

Pamela Clark testified that she dated Steven when she was sixteen years old. (PCR-T. 834) She has a son, Steven Antonio Hayward, with Steven. (PCR-T. 835)

At the time of Hayward's trial she was living in Orlando and was on probation but would have been able to travel and testify at his trial if subpoenaed. (PCR-T. 840) Clark was never contacted by Hayward's defense team prior to his trial but would have been willing to testify on his behalf. (PCR-T. 840)

Clark testified that she had a great relationship with Steven. She met Hayward when she was sixteen years old and he was seventeen and they dated for about seven months. (PCR-T. 835) Hayward was very loving and made her laugh. He taught her how to swim. Although Hayward was in jail at the time his son was born his family was very supportive. (PCR-T. 836-37) Clark and Barbara Johnson would travel to the prison with the baby to visit with Hayward. Hayward was a loving father to his son and a big part of his son's life. Clark took the baby to visit Hayward for three years and his mother continued to take his son for visits for the next five. Clark testified that Steven Antonio is very close to his father and "loves his dad." (PCR-T. 841) Clark testified that she and Hayward made plans to live together after his release from prison.

Thomas Hyde, M.D., Ph.D., testified that he is a behavioral neurologist and is board certified in neurology. (PCR-T. 1325) A behavioral neurologist is a neurologist who studies the diseases of the brain that affect behavior. Neurology is a medical subspecialty that studies brain diseases and a behavioral neurologist focuses on those aspects of diseases that affect the brain and manifest themselves

as abnormal behavior.

In April, 2011 Dr. Hyde met with Hayward to conduct a neurological examination, including a neuropsychiatric history, to reach some general conclusion about his neuropsychiatric status. Dr. Hyde performed a standardized procedure including an interview to obtain educational background and history, history of behavioral issues, drug, alcohol and tobacco abuse, mental health issues, neurological history, past medical history, past surgical history, medication at the time of the evaluation, drug allergies, social history and family history. (PCR-T. 1332-1333)

Dr. Hyde also performed a Mini Mental State Examination, sometimes known as a Folstein Mental State Exam. Dr. Hyde also conducted cranial nerve, motor, gate and sensory examinations and a limited general physical examination. (PCR-T 1335) Dr. Hyde did not perform neuropsychological tests because he is a neurologist, not a neuropsychologist. (PCR-T 1364)

Dr. Hyde opined that Hayward suffers from right frontal lobe dysfunction. The etiology of that dysfunction may have been due to in-utero factors, a prenatal or perinatal environmental factor, or a genetic factor. (PCR-T. 1339-40, 1345) Hayward also meets the diagnostic criteria for depression not otherwise specified based on a history that is consistent with depression dating back into childhood. There is a strong possibility of residual Attention Deficit Disorder in adulthood, but

Dr. Hyde did not reach a formal diagnosis. He did diagnose Attention Deficit Hyperactivity Disorder in Childhood by history. Dr. Hyde diagnosed Hayward with a Frontal Lobe Syndrome, probably due to developmental and/or genetic factors. (PCR-T. 1342, 1344, 1347)

The State presented psychologist Michael Riordan, Psy.D., who testified for the prosecution that he disagreed with Dr. Hyde's findings, though he is neither a neurologist nor a medical doctor. (PCR-T. 1444)

The State also presented Captain Gregory Kirk of the Fort Pierce Police Department. Kirk testified to the agency's policies and procedures regarding the transportation of both prisoners and non-prisoners. Kirk explained that Fort Pierce Police does not have a written policy that governs the transportation of people in police cars who are not actually prisoners. Kirk testified that if officer testified that there was a written policy then he would not be telling the truth. (PCR-T. 738)

After the parties submitted written closing memoranda, the circuit court issued an order denying Hayward's motion for postconviction relief on June 8, 2012. (PCR. 2223-46) Hayward timely initiated this appeal. (PCR. 2249)

Relinquishment to Correct Record On Appeal

On November 15, 2012, Hayward filed a motion to supplement the record on appeal with several necessary items, including Court Exhibit 1, which the court had ordered be entered under seal during Udell's postconviction testimony. This

Court granted the motion to supplement. Upon receipt and examination of the supplemental record, counsel discovered that the clerk had included in Volume 10 a document identified in the Index as “Court Exhibit #1 – Copy of Letter from ASA R. Butler to Jerome Stone,” which was not sealed. Hayward sought relinquishment to perfect the record, which this Court granted. Upon motion of the State, the Court returned Volume 10 of the record on appeal to the circuit court clerk.

At a hearing on relinquishment, representatives of the clerk’s office and ASA Butler gave sworn testimony. The clerk’s office indicated that it had received Volume 10 and sealed Court Exhibit 1. (Supp. PCR-T. 8) Upon unsealing by the court, ASA Butler identified the Exhibit 1 as the same letter he had given the court for in-camera review. (Supp. PCR-T. 10) ASA Butler testified under oath that Exhibit 1 was not the letter he sent to Udell, it was an unsigned copy of the letter he sent to Stone. (Supp. PCR-T. 11) Butler characterized the two letters as “identical” except for the addresses and the fact that “there was a reference in this letter to Mr. Stone, the very last sentence was unique to Mr. Stone because he's the one who did the motion to suppress.” (Supp. PCR-T. 11) When asked if his misrepresentation about which letter it he gave to the court was an oversight, Butler insisted they were “the same letter.” (Supp. PCR-T. 11)

The circuit court determined that the letter now presented to the court was privileged work product. (Supp. PCR-T. 14) The court further ordered that the

Clerk of the Court of St. Lucie County prepare "a written report that explains the error in unsealing Court Exhibit Number 1, and any corrective action that is planned to prevent any future occurrence of this kind." (Supp. PCR-T. 18-19)

The clerk of courts filed the Record on Appeal on September 6, 2013.

SUMMARY OF THE ARGUMENTS

I. Hayward was denied effective assistance of counsel at the penalty phase of his capital trial, rendering the death sentence unreliable. Trial counsel failed to adequately investigate and prepare a mitigation case. As a result of trial counsel's deficient performance, a wealth of mitigating evidence went unpresented. Had trial counsel conducted a reasonable investigation and presented the available mitigating evidence, the result of the penalty phase would have been different.

II. Trial counsel were ineffective at the motion to suppress for failing to adequately investigate the circumstances surrounding Hayward's statements to police and failing to adequately cross-examine and impeach police officers regarding a purported written policy requiring anyone transported in a police vehicle be hand cuffed where no such policy exists. Had trial counsel conducted a reasonable investigation, and effectively challenged police testimony, the result of the proceeding would have been different.

III. The trial court abused its discretion in denying an evidentiary hearing on several of Hayward's sufficiently plead postconviction claims requiring factual

development.

IV. Hayward's postconviction proceedings were fraught with errors that, individually and collectively, denied him due process and a full and fair adjudication of his postconviction claims. The trial court erred in failing to grant Hayward's motion to disqualify the Office of the State Attorney, and failed to consider relevant evidence, and failed to conduct a full and fair postconviction proceeding.

STANDARD OF REVIEW

Ineffective assistance of counsel claims present mixed questions of law and fact subject to plenary review. *Occhicone v. State,* 768 So. 2d 1037, 1045 (Fla. 2000). This Court independently reviews the trial court's legal conclusions and defers to the trial court's findings of fact.

A postconviction court's decision whether to grant an evidentiary hearing is subject to *de novo* review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

ARGUMENT

ARGUMENT I

MR. HAYWARD WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

An analysis of an ineffective assistance of counsel claim proceeds under *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a showing of both

deficient attorney performance and prejudice to the defendant. In order to properly determine whether a new trial is warranted, counsel's errors must be "considered collectively, not item-by-item." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). While it is clear that "strategic choices [by trial counsel] made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *id.* at 690, it is equally clear that "'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" *Wiggins v. Smith*, 539 U.S. 510, 532 (2003).

Prejudice is shown, and relief is necessary, when the defendant establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

a. Deficient Performance

In the instant case, trial counsel simply did not conduct a reasonable investigation of Steven Hayward's background. Trial counsel failed to timely obtain the assistance of a qualified mental health expert, failed to provide that expert with necessary records, information and access to the client, and failed to adequately investigate and lay witnesses.

Trial counsel's lack of preparation is demonstrated by the lack of any

cohesive theory of mitigation. Both Udell and Stone testified to what they considered the defense theory for the penalty phase. According to Stone, the theory was:

> That basically Hayward had spent some time in prison before; he had no real issues in prison. He was, for lack of a better term, he was a model citizen in prison. He came from a fairly decent background in that his – his sister, brother, were all very productive people in the community or in the country because I think the brother was in the military. And that he could survive in prison without creating much of a problem for the Department of Corrections.

(PCR-T. 419-20) Stone felt that Hayward came from a good and loving family and he was "cut from same cloth" as the rest of his successful family members. (PCR-T. 452) In contrast, Udell believed that the defense team's theory of mitigation was the lack of additional aggravators:

> That it was not heinous, atrocious or cruel, and it was not cold, calculated and premeditated. I took the two aggravating factors and turned them into mitigating factors.
>
> * * *
>
> The rest of it would have been, you know, loving family, and everything Dr. Riordan – Riordan would have had to say.

(PCR-T. 510-11)

1. Failure to investigate and prepare a mental health mitigation defense.

At a pretrial Status Conference on September 30, 2005, trial counsel Udell informed the court that he did not anticipate presenting any mental health

mitigation. (Sup. R. 22) At a December 22, 2005 Status Conference, the Court inquired of trial counsel if he was sure he wanted to go straight into the penalty phase after the verdict. (Sup. R. 31) Udell responded that he had experience in the area and had worked with the State before; he assured the court he would not likely present any mental health mitigation and the time he had scheduled would suffice. (Sup. R. 32) At that time, he had not yet consulted with a mental health expert. At a February 16, 2007 pre-trial conference the court again inquired about the preparation of mental health mitigation. Udell confirmed that there "would be no mental health testimony whatsoever" presented. (T.109) As of that date, Hayward *still* had yet to be examined by a mental health expert for the purposes of developing mitigation. (PCR-T. 961)

Counsel did not request leave to hire mental health expert until February 28, 2007. In his motion, counsel represented that he had "reason to believe that the Defendant may be incompetent to proceed or that the Defendant may have been insane at the time of the alleged offense." (R. 378) The Court granted the motion for psychologist Michael Riordan, Psy.D., "to assist counsel in the preparation of the defense." (R. 380)[3]

At the postconviction hearing, Dr. Riordan explained that, in such a case, he

[3] Neither counsel's motion, nor the order granting it, provided an expert for the purposes of conducting a mental health mitigation evaluation.

is usually retained one to two years before he is expected to testify. (PCR-T. 957) Indeed, adherence to the ABA Guidelines requires that, in a capital case, all necessary experts be requested "as soon as possible." *See* Commentary on Guideline 11.4.1(c), ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003). In this instance, Dr. Riordan was retained a mere 24 days before his testimony. (PCR-T. 957) Because of trial counsel's failings, Riordan was not able to evaluate Hayward until March 12, 2007 - after Hayward's capital trial had already begun and the night before Hayward would himself testify.

After conducting his evaluation, Dr. Riordan informed Udell that based on his review of records and the interview, Hayward may possess characteristics of antisocial personality disorder, however an alternate diagnosis may be appropriate. Dr. Riordan recommended that Hayward undergo a personality testing to "illuminate his personality functioning". (PCR-T. 971) Udell did not respond to his request for additional testing. (PCR.-T. 374)[4]

Because of the delay in seeking Dr. Riordan's appointment, he was unable to

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[4] At the evidentiary hearing, Udell attempted to excuse this deficiency by claiming that the he made a "strategic decision." He did not want testing that would have "confirmed" that Hayward is an Anti-Social Personality Disorder. (PCR.-T. 188) However, Dr. Riordan testified that did not reach a diagnosis of anti-social personality disorder. Indeed, the purpose of the testing was to rule out ASPD, not to confirm it. In any event, Hayward could not have been diagnosed with ASPD because he had no history of conduct disorder as a child. (PCR-T. 974)

corroborate the information he obtained from his records review and interview. (PCR-T. 978) As Riordan explained, it is the generally accepted practice in forensic psychology to corroborate information provided by the defendant. However, he did not have an opportunity to speak with Hayward's family or friends. (PCR-T. 978-9) As a result, Dr. Riordan knew nothing about Hayward having been beaten and abused by any of his family members, or the neglect and rejection he suffered. Dr. Riordan explained that Hayward's not endorsing the abuse is consistent with family members not recognizing that neglect was actually neglect. (PCR-T. 983, 988, 1024) If he knew about abuse at the time of Hayward's trial, Dr. Riordan would have sought corroboration from family members.

As a result of trial counsel's failings, Dr. Riordan did not conduct a mitigation investigation worthy of a capital case. Trial counsel's decision to present Dr. Riordan merely as a "conduit for personal information about Mr. Hayward" was not a reasonable strategy decision. Rather, it was the result of complete lack of preparation. Dr. Riordan could have offered compelling mental health testimony that was available, had counsel sought a timely evaluation and provided necessary information. Instead, Dr. Riordan was reduced to presenting relatively trivial facts without substance. For the most part, the State did not even bother with cross-examination given the content of his initial testimony.

Counsel's preparation and presentation of mental health testimony was

clearly deficient performance.

2. Failure to investigate and prepare lay witnesses.

The evidentiary hearing testimony demonstrates that Udell, who was responsible for the penalty phase, did not meet with any of Hayward's family members until a mere *four weeks* before the trial. Even then, trial counsel's interviews consisted of a *single* one-and-a-half-hour meeting with Hayward's family.[5] Although trial counsel sought funds for, and retained, investigator Venus Oleyourryk, her work was limited to 100 hours, most of which was copying discovery, meeting with Hayward, and speaking with the attorneys. Oleyourryk did not conduct any penalty phase investigation. (PCR-T. 1148-49)

In preparation for the penalty phase Udell received medical records "if there were any," available school records, and any criminal records - all of which he obtained from the State in discovery. (PCR-T. 508) He could not recall if he had requested any additional records. (PCR-T. 509) Udell also conducted one group meeting with several members of Hayward's family a few weeks before the trial.

[5] On cross-examination, Udell stated that his billing, which was obtained and provided to him by the State, indicated he had spoken with numerous family members on numerous occasions. However, Udell had no recollection of where, when, how or why those purported discussions took place or what was purportedly discussed. There are no notes in his files reflecting conversations with these family members, indicating that, if they did occur, they were brief and insubstantial. In any event, Udell's testimony is contradicted by the testimony of Hayward's family and Udell's history of filing false fee affidavits.

They generally discussed the each member's life, how Hayward got along with the family and Tony Johnson's drinking. (PCR-T. 509-11)

In assessing the reasonableness of an attorney's investigation, "a court must consider not only the quantum of evidence already known to counsel; but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 532 (2003). Obtaining general information, without corroboration or further inquiry, did not end counsels' obligation to investigate. Rather, it was merely a beginning point. Each member of the Hayward family gave Udell a window or opportunity to delve into what really went on in the Hayward household during Steven's childhood. They all mentioned Tony Johnson's alcoholism, and yet Udell did not investigate how frequently Tony drank or about Tony's behavior towards his family when he drank. Nor did he investigate how Tony as an alcoholic supported the family and how he supported his drinking habits. Similarly, Udell knew that Harold Hayward was the father figure until Steven was five, however, Udell did not ask anything about Harold, his relationship with the family and the reasons and circumstances around his departure. Counsel also learned that Barbara Johnson raised six children without much support from her two husbands, and that she did so while working two jobs. This information should have been a starting point into the investigation of how specifically the children were raised, the extent of poverty the children lived in, as

well as specific issues regarding Barbara's ability to parent and protect her children. While Udell was aware that Hayward's older siblings had to take care of him, he did not investigate the circumstances around how they cared for him, or if Hayward was nurtured and protected by his older siblings. Inexplicably Udell failed to further enquire into any of these potential leads.

Trial counsel's penalty phase investigation, to the extent that there was any at all, was clearly deficient. "[A]ny reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Wiggins v. Smith*, 539 U.S. 510, 532 (2003).

b. Prejudice

Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of showing a reasonable probability. *See Kyles v. Whitley*, 115 S. Ct. 1555 (1995) (discussing identity between *Strickland* prejudice standard and *Brady* materiality standard). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of

confidence." *Id*.

The search for that reasonable probability must be conducted in a particular manner. Courts must "engage with [mitigating evidence]," *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009) in considering whether that evidence might have added up to something that would have mattered to the jury. Courts have a "'[] duty to search for constitutional error with painstaking care [which] is never more exacting than it is in a capital case.'" *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (citing *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). In performing the duty to search with painstaking care for a constitutional violation by engaging with mitigating evidence, courts must "'speculate' as to the effect" of non presented evidence. *Sears v. Upton*, 130 S. Ct. 3266, 3266-67 (2010).

The *Porter/Kyles/Sears* conception of the *Strickland* prejudice inquiry requires courts to engage with mitigating evidence and painstakingly search for a constitutional violation by speculating as to how the mitigating evidence might have changed the outcome of the penalty phase. It is clear that the focus of a court's prejudice inquiry must be to try to find a constitutional violation. The duty to search for a constitutional violation with painstaking care is a function of the fact that a constitutional violation in a capital case is a matter of such profound repugnance that it must be sought out with vigilance. Courts must search for it carefully, not dismiss the possibility of it based on information that suggests it isn't

there. And looking for a reasonable possibility that a violation did not occur reverses the standard of the inquiry, because if a court simply focuses on all the ways the non presented evidence might reasonably have not mattered, it is not answering the question of whether it reasonably may have. If a court simply speculates as to how a constitutional violation might not have occurred, it is avoiding its duty to engage with mitigating evidence to painstakingly speculate as to how a violation might have occurred.

Hayward was prejudiced by trial counsels' numerous failings. In this case, "the mitigation evidence presented in postconviction proceedings 'paints a vastly different picture of his background' than the picture painted at trial." *Cooper v. Sec'y, Dept. of Corr.*, 646 F.3d 1328, 1355 (11th Cir. 2011).

At the postconviction hearing, Barbara Johnson testified to the pervasive violence and neglect in the Hayward home during Steven Hayward's childhood. Johnson's testimony demonstrated that she, as an orphaned child effectively enslaved throughout her own childhood, had no idea how to parent, protect or nurture her own children. The violence, cruelty and neglect Johnson suffered throughout her childhood and early adult years clearly manifested in they way she "raised" her own children, particularly her youngest child Steven.

As very young children Barbara Johnson and her brothers were abandoned by their parents and left in the care of distant relatives on a farm in South Carolina.

(PCR-T. 646) The children lived with the Green family and worked on their farm until they were young adults. During the time Johnson spent with the Greens she was neither nurtured nor parented. Instead, Johnson and her brother were terrorized by Green's, matriarch, Daisy Green, on a daily basis to the extent that Barbara eventually normalized the violence. (PCR-T. 647-49) As a child, she "thought it was just the way of life." (PCR-T. 648)

Barbara Johnson testified on proffer that she was beaten "all the time" (PCR-T. 647) Although Daisy Green would whip her daily with a tree branch and rope, there were also incidents where Green kicked her in the head, tied her to a tree at night, beat her while she hung naked from a tree by her feet, and forced her hand into her vagina as a young child. (PCR-T. 647-48, 650, 652) Johnson had little value to the Green's other than the manual labor she provided on the farm, and later, when she was old enough, the income she would bring in when she was hired out to other farms and businesses. As a child, and later as an adult Johnson was not free to leave the Green's farm. It was only as a young bride and mother that the Greens allowed Johnson to leave the farm with her husband, Harold Hayward, and even then, she was told she could not take her young son, Derrick Green, with her. (PCR-T. 655) Despite her own history of violence and terror on the Green farm, Johnson left her toddler with the Greens.

Barbara Johnson's children, Debra Fleury, Terrance Hayward and Derrick

Green, testified at the evidentiary hearing about their parent's absence during much of their childhood. Terrance described, "[w]e pretty much raised ourselves." (PCR-T. 1054) Fleury and Terrance are the closest in age to their younger brother, Steven, and were present during Steven's early years before Derrick Green moved in with the Hayward family. Johnson, Terrance and Fleury testified that Harold Hayward worked full time during their childhood and their mother went back to work full time while Steven was still a baby. Steven and the other children were left in the care of the older siblings. Steven's primary caregiver was Theresa Hayward who was about seven years old when her mother returned to work. (PCR-T. 754) Johnson testified that despite Theresa's young age she was the oldest girl, and therefore "the little lady" and responsible for all of the children in the house. (PCR-T. 665) Not only was young Theresa responsible for feeding and changing Steven, she supervised Fleury and Terrance and also bore the brunt of the household responsibilities, such as cleaning and cooking for the family. (PCR-T. 665) According to Debra Fleury the responsibilities bore a heaving burden on Theresa making her "mean," and "heavy-handed," particularly with young Steven. (PCR-T. 763) Theresa's resentment towards her wards was expounded after her mother brought Sam Peaks, Harold's nephew, into the home. Sam Peaks was an infant at the time he was left in Theresa's care. In turn, Theresa took out her frustrations on young Steven. According to Fleury, Theresa would punch Steven,

hit him in his head. Theresa was not concerned about where she hit Steven. Eventually Steven learned to fight back. (PCR-T. 769-70)

Even when Johnson and Harold were not working outside of the home, Theresa unwillingly remained the children's full time caregiver. Johnson and Harold were heavy drinkers. (PCR-T. 766) Their children testified that after discussing bills and beating the children after Harold's return from his work week, Harold and Johnson would drink and party for the rest of the weekend. (PCR-T. 867) Derrick Green testified that they would get "sloppy drunk to where when they did get home, they were like staggering around." (PCR-T. 870) Johnson testified that she and Harold would get drunk on the weekends and would only stop drinking on Sunday evenings in preparation for the work week ahead. (PCR-T. 669) They would drink malt beer and liquor and when they got drunk they would fight violently. (PCR-T. 1060) The children would avoid their parents for fear of getting caught up in their parent's drunken violence.

Not only were the children emotionally neglected by their parents there was also very little financial support for the children, despite both parents working. Johnson testified that the money she and Harold earned during the week was spent on drinking on the weekend. "We had to go in the grove and Saturday and Sunday and make the money back." (PCR-T. 669) Johnson, Harold and the children would work in the groves picking fruit almost every weekend to support the family as

well as supplement their drinking. Steven was just a toddler when they first took him to the groves. (PCR-T. 669)

Terrance and Derrick testified that while there was an abundance of alcohol in the house, the children often went hungry. As a child Terrance worked with a man who raised hogs and fed the hogs expired food from the various local stores. Terrance would bring home the leftover hog food to feed the family. (PCR-T. 1062-63) On occasion Harold also provided for the family in the same manner. (PCR-T. 873)

The complete absence of parental supervision is nowhere more evident than in the occurrence of the daily "initiation" sessions conducted by the three eldest boys throughout Steven's childhood. (PCR-T. 1071) Barbra testified that she only learned of these session from a neighbor who lived directly across the street from the family, and by that time the damage was done. (PCR-T. 697) According to Derrick he conducted the "initiation" sessions along with his younger brothers Samuel and Terrance. Derrick and his brothers started "toughing up" Steven when he was just seven years old because Steven was the youngest and the boys believed he had a "gay" walk. (PCR-T. 884) The beatings would occur three to four times a week for approximately four years starting from when Steven was around seven years old until Derrick left the house at seventeen. (PCR-T. 887)The older boys used wrestling moves on Steven, including the "Dusty Rose," "Ernie Lamb," and

"Figure 4." (PCR-T. 885) They would "[d]o what they used to call a belly to back flip play where we would like put his head on your shoulder and stand his legs straight up in the air and just fall backwards with him." (PCR-T. 885) Derrick explained that Steven was "our little guinea pig, we tried all of that on Steve." During these "wrestling" sessions Steven was thrown against the floor, walls and furniture. Terrance testified that when Steven cried his brothers continued to beat him up until he stopped. (PCR-T. 1073-73) During one incident, Steven was so terrified of his brothers that he ran away from them and got his parent's gun in order to protect himself. (PCR-T. 886)

The jury never knew that Hayward was raised in an environment of violence and cruelty. Johnson testified at the postconviction hearing that she permitted and encouraged her husband, Harold, to systematically beat her children in the same manner that she was beaten as a child by the Greens. (PCR-T. 760) The Hayward children confirmed the extent of the excessive physical violence suffered at the hands of their parents. Fleury testified that the children did not look forward to Harold's weekly return to the home. Upon his return Harold would consult with his wife about the children's various wrongdoing in the week and then go outside and "cut down some trees and then come in and whip us." (PCR-T. 756) Fleury testified that the beatings began when she was five or six and when Steven was one or two. (PCR-T. 758)According to the children, Harold would beat them with belts,

extension cords, a water hose, the washing machine belts, pieces of car tire, and oak tree branches. (PCR-T. 756) Harold would fly into a rage during the beatings and hit the children anywhere, including arms, legs, back, face and head. The children that tried to run from the beatings were caught and held down by the other children upon instruction from Harold. (PCR-T. 757-59)

Derrick described Harold as a sadist who enjoyed whipping the children, who beat the boys more than the girls, and beat the young Steven more than the other children. (PCR-T. 868, 758) Derrick described an incident where Harold "whipped Steve one time so bad that Steve couldn't cry no more, Steve was just like hollering." (PCR-T. 869) Fleury testified that as a child she hated her father for the way he hurt them and tried to "hide or disappear" in order to avoid further violence. (PCR-T. 763) Harold's beatings were so severe that the children would try to layer their clothes before Harold came home to protect them from the anticipated injuries, only to have Harold check the clothes and remove the extra clothes prior to the beatings. (PCR-T. 867) The children sustained welts, bruises and open sores from Harold's beatings; however, they sustained similar injuries from their mother's punishment as well. (PCR-T. 763)

Not only did Johnson permit and encourage Harold's beating of her children, she also beat her children in the same manner she had been beaten by Daisy Green as a child. (PCR-T. 668, 760) The children testified that while Harold beat them

while in a frenzy, Johnson was much more methodical. (PCR-T. 760-1) According to Fleury, Derrick and Terrence, Barbara beat the children often, especially when she drank. She would beat the children primarily with a belt or a switch from an oak tree, and as they got older with extension cords and water hoses. (PCR-T. 760) Steven was about one year old when she began to punish him and he was two to three years old when Harold started beating him with the rest of the children. (PCR-T. 668-9) Johnson's beatings increased after she moved in with Tony Johnson because Tony didn't whip the kids, Johnson took over from Harold. When she beat her children with the switches she would leave welts on her children's bodies. (PCR-T. 763)

There is no question that violence was pervasive in the Hayward household. Although Steven bore the brunt of his parent's violence, he also witnessed the systematic violence against other members of the household. According to Fleury, if the house was not clean when Johnson came home at night she would wake the girls up by whipping them in their sleep. Fleury testified that as a girl she stopped sleeping through the night for fear of waking up to her mother's switch. (PCR-T. 762-63) The Hayward children also witnessed the domestic violence between their mother and her two husbands. Johnson and Harold would return home drunk on the weekends and engage in extremely violent arguments. Although the children tried to avoid the fights, they could hear the verbal and physical violence through

the walls of the house (PCR-T. 766, 1060) The children were present during the weekly fights between Harold and Johnson. Derrick Green testified that during one fight his mother stabbed Harold with a knife. (PCR-T. 870) During another incident Johnson shot Harold with gun. At one point Derrick Green did intervene to protect his mother when she was bleeding from her ear. (PCR-T. 871)

Barbara Johnson and her children testified that she finally left Harold and moved to Vero Beach to escape the violence. Yet, again, Johnson left some of her children unprotected in the care of her abuser. According to Derrick Green the three oldest boys were left with Harold and eventually fled to their grandfather house after Harold pulled a gun on them. . (PCR-T. 874) They conveyed this to their mother and siblings when the arrived in Vero Beach and family lived in fear of Harold until he eventually left for South Carolina. According to Derrick the family was in hiding from Harold and “all of us was afraid of Harold.” (PCR-T. 878) During this period Tony would patrol the house at night armed with a gun.

Despite Harold’s absence, the violence in the Hayward household escalated. (PCR-T. 880-81) Johnson testified that Tony Johnson moved in with the family after they moved to Vero Beach and eventually moved back to Fort Pierce once Harold left town. Tony was a chronic alcoholic and came home drank everyday. Barbara Johnson continued to drink daily, buying a six pack of beer every day. The couple fought violently in the evenings in the presence of the children. (PCR-T.

766) The police were called several times because Tony was out of control. Tony would threaten Johnson with guns and knives and at one point she attacked him with a knife and Tony was hospitalized. (PCR-T. 880-81) Fleury and Derrick testified that although Tony was nice to their mother when he wasn't drunk, he was drunk everyday, and when was drunk he was mean and verbally abusive to Johnson and the children. Tony would not hit the children, but he would curse at the kids. He argued with Johnson in the presence of the children and he threatened to burn the house down and kill all of the children in spite of her. (PCR-T. 777) The police were called several times because Johnson cut Tony with a knife. The family had to take Tony to the hospital after one such incident.

The jury knew almost nothing about this history of violence and neglect in the Hayward family. Rather than present the compelling mitigation information that was available, trial counsel chose "[take] the two aggravating factors and turned them into mitigating factors." (PCR-T. 510) As the sentencing court recognized, "It is illogical, at best, to suggest that the failure to prove additional aggravating circumstances should be mitigating." (Sentencing Order, R. 1261) To the limited extent that trial counsel offered additional non-statutory mitigation through the testimony of Hayward's family, neither the sentencing judge or jury gave it the appropriate weight because it was devoid of substance or evidentiary support.

The jury also never heard the compelling mental health testimony that was available, had trial counsel timely sought the assistance of a qualified mental health expert. At the postconvcition hearing, Dr. Riordan recognized that more could - and should - have been done to investigate Hayward's background. Indeed, contrary to Udell's understanding and repeated assertions to the court that there was no mental health evidence to be presented, Dr. Riordan believed that this is a psychologically complex case and there's more that could be learned about Hayward:

> Now knowing about the abuse history, the domestic violence, the trauma, together with information in the records having to do with – information in the records having to do with nervous mannerisms, poor academic functioning that's not attributed to attention deficit disorder, for instance, or any other disorder, I suspect that there was an anxiety disorder and that that's something that should be pursued further, and was not.

(PCR.-T. 1034)

Behavioral Neurologist Thomas Hyde, M.D., Ph.D., testified at the postconviction hearing that Hayward had a history of mental health and neurological impairments, including depression, attention deficits and right frontal lobe brain damage. Because trial counsel failed to adequately investigate, the jury did not know that Hayward had a history of Attention Deficit Hyperactivity Disorder as a child and there is a strong possibility of residual Attention Deficit Disorder in adulthood. The jury was not aware that Hayward suffers from Frontal Lobe Syndrome, probably due to developmental and/or genetic factors.

c. The trial court erred in denying relief

In dismissing the mental health expert testimony of Dr. Hyde, the court found “no evidence was presented describing the degree of neurological impairment or specifically linking the diagnoses to Hayward’s adult functioning and behavior. And in rebuttal, Dr. Riordan reviewed the results of Dr. Hyde’s examination and concluded that Hayward did not exhibit any signs of frontal lobe dysfunction.” (PCR. 2243) These findings are flawed in several respects.

Firstly, the court’s reliance on Dr. Riordan, a psychologist with a Psy.D. degree, to rebut the testimony of a behavioral neurologist, with both Ph.D. and medical doctor degrees, is misplaced. Dr. Riordan lacks the expertise to question Dr. Hyde’s neurological findings for the simple reason that he is not a neurologist. Even if he was qualified to dispute Dr. Hyde’s medical conclusions, having not performed any of the medical testing that Dr. Hyde performed, he is without any basis to refute Dr. Hyde’s medical findings.

Furthermore, contrary to the court’s finding, Dr. Hyde described with specificity Hayward’s degree of neurological impairment, and their impact on his behavior and development. Dr. Hyde explained that Hayward’s academic/school records indicated that he was a very poor student throughout, despite psychological testing indicating that he had a full scale IQ of 91. (PCR.-T. 1341) This suggests that Hayward has either a learning disability or some other type of developmental

neurological dysfunction that impaired his academic performance. In addition, his behavioral problems noted by one psychologist form the basis of Attention Deficit Hyperactivity Disorder. (PCR-T. 1342) Residuals of that problem are probably present today and manifests itself by visual attentional deficit. (PCR.-T. 1342)

With regard to Mr. Hayward's background, the postconviction court agreed that "there are mitigating circumstances of childhood abuse and parental neglect that were not presented at trial." (PCR-T 2245) However, the court dismissed this additional evidence:

> The weight of this evidence is undercut by: the evolution of detail through the penalty phase, two Spencer hearings, and the postconviction evidentiary hearing; the sworn postconviction motion asserting that family members lied at trial because they were embarrassed; the inconsistent testimony that family members were not asked about the abuse and neglect; the earlier perception of family members that the corporal punishment was normal discipline; the failure of Hayward to report physical abuse to counsel; and the testimony of Hayward's trial and postconviction mental health experts that Hayward did not disclose any physical abuse during mental health interviews.

(PCR-T. 2245) The trial court erred in several respects.

First, the court failed to recall that Hayward was not given two *Spencer* hearings. Rather, trial counsel tried to waive the first *Spencer* hearing and it was reset. At the subsequent proceeding, trial counsel was again unprepared. The court reminded Udell of the purpose and importance the *Spencer* hearing. Udell then dismissed the testimony he reluctantly presented, telling the court that he was only

going to present "mom and sister who are going to say, Judge, don't kill our son, don't kill our brother." (T. 2757)

At the postconviction hearing, Debra Fleury explained why she felt compelled to testify at the *Spencer* hearing after she had testified to the jury:

> Q: [S]o how did it happen that you testified the second time, did Udell ask you to or did you ask Udell?
>
> FLEURY: I asked him could we go back in and talk, can we talk before the judge came back.
>
> Q: And why did you do that?
>
> FLEURY: Because I -- I want to see if I can -- if there was any mitigating circumstances to where they wouldn't give my brother the death penalty. I wanted to speak and let the judge know what did not come out in the trial.
>
> Q: And why did it not come out in the trial? Was it because you withheld information?
>
> FLEURY: No, it was never asked. He didn't ask us about our -- the way we was raised. He didn't -- he didn't ask us what my mother's life was like, what my father's life was like, what our life was like, what Steve's life was like, he didn't ask us those questions.
>
> Q: And when you testified again before the judge without the jury, did Udell know what you were going to talk about?
>
> FLEURY: No.
>
> Q: Did he ask you what you were gonna testify to?
>
> FLEURY: Not really. I don't think he did.

(PCR-T. 792-94) As Mrs. Fleury noted, the prosecutor ultimately used the

defense's theory - evidence of Hayward's seemly stable background and loving and functional family - against him during closing argument. Fleury felt that her penalty phase testimony was so limited that it was necessary to testify at the *Spencer* hearing without preparation by trial counsel. And her subsequent testimony was compelling:

> When we were here and my sister and brother was here and they testified as to what they had to say, things were not said. They're embarrassed. But the Court need to know that my family was not the Huxtables and weren't the Cleavers. We were totally different. We were I would say dysfunctional.
>
> When I say that, my oldest brother, his name is Derrick, he's 46, he's in prison in Waycross, Florida – I mean Waycross, Georgia, for armed robbery. This is my oldest brother.
>
> And then my baby brother, he's here now facing the murder charges. Both of them have different fathers from the kids that are in the middle which is just my brother Terrence, my sister Theresa, and my brother Leon and myself.
>
> My brother Leon is somewhere in the State of Florida, he's also in prison. He has a drug problem. On more occasions than I want to open up to, he has written checks, he's wiped out my mother's account at least twice.
>
> My sister who is here, she's also recovering drug addict. She can't live here in Fort Pierce because of her drug problems.
>
> My brother that was here that we talked about that's in the military, he was doing good when he went in the military and then he went to Saudi Arabia, and when he came back he was not the same. And then we found out that he was on drugs, and then he was discharged from the military and it got worse, he ended up being on crack, so he's been arrested.
>
> So out of the six of us that my mother had, five of my brothers

> and sisters, all of them have been in jail or – or are in prison right now, or are in a drug rehab where they cannot function as normal people in society. When I say that, I mean they don't have their homes, they don't have their kids. They're doing the best they can with what they have to do.
>
> Then Bakkedahl was saying that he was making bad decisions, I'm sure they were bad decisions, but growing up as we did you had to either fight or run, and I was the knee baby, the child between my brother and the rest of them so I didn't have many problems because I was a girl and I'm four years difference in age than him. But my older brothers and sister, they were a little rougher. Heavy handed. They would fight. My sister and my brother would fight.
>
> * * *
>
> We had a hard life. As my mother said, she did the best she could, and we tried to raise each other. Our father was not there the ma—our real father was not there the majority of our life.
>
> But my brother's father, Steven's father was there more than my real father, and he was not a model figure to raise children. I mean, he had his own issues, and he had some anger problems and he was an alcoholic. So he didn't bond with us, but he didn't give us any problems, but he wasn't a father figure. So we didn't have a figure and our mother who refused to put us on – on welfare, she worked those two jobs to keep from being that way.
>
> So that's one of the – I don't know if that's a mitigating factor for my brother, but he didn't have a normal – when Bakkedahl was saying he made bad decisions, that everybody in our family was so great, that was not true. That's not the truth. That statement of my family, the true statement is that we are very dysfunctional."

(T. 2763-67) Fleury's testimony at the *Spencer* hearing not only demonstrates that trial counsel's investigation and preparation were deficient, it was compelling

mitigation which should have been presented to Hayward's sentencing jury.

Moreover, the mitigating evidence presented in postconviction has not "evolved" from that at presented at the penalty phase and S*pencer* hearing. To the extent that the postconviction evidence is different, it is attributable only to trial counsel's ineffectiveness. As demonstrated at the postconviction hearing, the penalty phase witnesses did not discuss their childhood during the penalty phase because they were not asked about it, either in their meeting prior to trial or at the trial, and they were never informed of its relevance. Instead, they were asked limited questions about themselves and their family members and were instructed to just answer counsel's questions at trial and nothing more. (PCR-T. 793, 804) Fleury testified at the evidentiary hearing that "I wasn't told I could say anything that I wanted to, I was told to answer what the question was put to me." (PCR. 825) "Udell asked us questions, we asked -- he told us only ask -- answer what they ask us, so he didn't ask us those questions, so we only answered whatever he asked of us." (PCR-T. 804)

The trial court also erred in faulting Hayward for failing to report physical abuse to counsel or his mental health expert. Trial counsel's failure to learn of Hayward's abusive upbringing is attributable to trial counsel's failure to investigate, not Hayward's failure to report it. Similarly, the "earlier perception of family members that the corporal punishment was normal discipline" does not

excuse trial counsel’s failings. As Fleury explained, trial counsel “didn't ask me to go into the details of how the whipping took place. They just asked me did it take place and I said yes, it did.” (T-PCR. 820) This should not have been the end of the inquiry. It is hardly surprising that victims of abuse would not recognize or characterize it as such. As Dr. Riordan testified, victims of abuse and neglect often don’t report it, they normalize the behavior. (PCR-T. 983, 988, 1024) This is why the ABA Guidelines recognize that

> . . . much of the information that must be elicited for the sentencing phase investigation is very personal and may be extremely difficult for the client to discuss. Topics like childhood sexual abuse should therefore not be broached in an initial interview. Obtaining such information typically requires overcoming considerable barriers, such as shame, denial and repression, as well as other mental or emotional impairments from which the client may suffer.

Commentary to Guideline 10.7, ABA Guidelines (2003). It is not the fault of Hayward or his family that mitigation went unpresented. Trial counsel simply failed in their obligation to conduct a reasonable mitigation investigation. The court’s finding of no deficient performance is error.

In finding that Hayward had not established prejudice, the court determined:

> Even if counsel was deficient, there is no evidence to explain how the unperceived and unreported childhood abuse and parental neglect negatively impacted Hayward’s adult life. Accordingly the court assigns little weight to the totality of the mitigating evidence of childhood abuse and parental neglect presented at the evidentiary hearing.

(PCR. 2245) This was error.

The U.S. Supreme Court has made clear that mitigation includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586 (1978). The Eleventh Circuit Court of Appeals has explained:

> In the penalty phase of a trial, '[t]he major requirement ... is that the sentence be individualized by focusing on the particularized characteristics of the individual.'" *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987)). Therefore, "[i]t is unreasonable to discount to irrelevance the evidence of [a defendant's] abusive childhood." *Porter v. McCollum*, __ U.S. __, 130 S. Ct. 447, 455 (2009). Background and character evidence "is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse." *Johnson*, 2011 WL 2419885, at 27 (collecting cases).

Cooper v. Sec'y, Dept. of Corr., 646 F.3d 1328, 1354 (11th Cir. 2011). In *Cooper*, the Eleventh Circuit found that Cooper's case was "strikingly similar" to its decision in *Johnson v. Sec'y, Dept. of Corr.*, 643 F.3d 907 (11th Cir. 2011), wherein "[t]he description, details, and depth of abuse in [Cooper's] background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told." *Cooper*, 646 F.3d at 1353. *Cooper* and *Johnson* highlight that even in cases where some mitigation is presented at trial, when the description, detail, and depth of mitigation presented in postconviction far exceeds what the jury heard, prejudice exists. As the Eleventh Circuit explained in *Johnson*:

> The picture Jones painted for the jury was of Johnson having cold and uncaring parents, something in the nature of the 'American Gothic' couple. With a reasonable investigation, though, he could have painted for the jury the picture of a young man who resembled the tormented soul in 'The Scream.' There is nothing wrong with a Grant Wood approach, if that is all one has to use, but an Edvard Munch approach would have been far more likely to sway the jury to sympathy for Johnson.

Johnson v. Sec'y, Dept. of Corr., 643 F.3d 907, 936 (11th Cir. 2011).

As in *Johnson*, the jury in Hayward's case heard very little that would humanize him. In contrast, "the mitigation evidence presented in postconviction proceedings 'paints a vastly different picture of his background' than the picture painted at trial." *Cooper v. Sec'y, Dept. of Corr.*, 646 F.3d 1328, 1355 (11th Cir. 2011).

The jury recommendation at Hayward's trial was eight to four and yet the jury knew nothing about the man they sentenced to death. They did not know that Hayward's childhood was devoid of parental care and affection, in fact, the jury was informed of the complete opposite. The jury was not aware that everyday of Steven Hayward's childhood, starting from infancy, he suffered physical torment, neglect and abandonment by the very people who were supposed to care and protect him. Nor was the jury aware that, coupled with this horrific childhood, Hayward suffered from cognitive delays and challenges as a result of childhood depression, Attention Deficit Hyperactivity Disorder, and Frontal Lobe Syndrome. Had trial counsel properly investigated and presented the available evidence, the

sentencing judge and jury would have had a greater appreciation for these aspects of his conduct and character there is a reasonable probability that two or more jurors would have voted for life.

ARGUMENT II

MR. HAYWARD WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PRETRIAL MOTION TO SUPPRESS, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

At the suppression hearing, Officer Mace testified that he handcuffed Hayward after he agreed to come to the police station to make a statement. Mace assured Hayward he was not under arrest, but stated he would have to handcuff him because it was the police department's policy to handcuff anyone who rode in the backseat of the police car, for officer safety. (T. 33-34) While being handcuffed, Hayward stated, "I'm not gonna lie to you, but I did get shot in the hand." (T. 39) Officer Mace immediately communicated this statement to Detective Flaherty, who was still speaking with Smith. When she heard that Hayward had admitted being shot, she changed her story and told police that Hayward had been robbed and shot. (T. 49-50) These events led to the incriminating statements Hayward gave to police.

At trial, Mace testified that it was a written police department policy to handcuff everyone they transported, even if the person is not under arrest. (R. 40-1) Udell specifically asked if this was a *written policy*, demonstrating his doubt that

Mace was telling the truth. However, having not obtained the written policy, trial counsel simply conceded "I believe you." (R. 41) As a result, the court was left to believe that there was such a written policy. More significantly, trial counsel was not able to impeach Mace's credibility after he lied to the court about the written policy.

At the evidentiary hearing, Stone testified that he was aware of the police policy regarding transporting people in the back of police cars but he had not read the policy. If he wanted to obtain the written policy, Stone would "simply do a public records request from the Fort Pierce Police Department of all of their policies and procedures." (PCR-T. 107) He believed that impeaching Officer Mace about the written policy would not make a difference to the Fourth Amendment issues, but would have challenged the officer's credibility if it were shown that he was lying:

> STONE: Yeah, if you can prove that and the officer is flat out lying about it, sure, I think that you can question the officer's credibility, sure.

(PCR-T. 106) Udell also readily admitted that he made no effort to investigate the purported written police policy.

Fort Pierce Police Department Policy #71.100 (Defense Exhibit 10, PCR-T. 688) states "It is the policy of the Police Department, when arresting, transporting, or detaining prisoners, to utilize effective methods to ensure the safety of the

public, the prisoner, and the officer; and to prevent escape and the destruction of evidence." The policy outlines several concerns with regard to transporting prisoners, including escape from custody and threats to officers. The policy distinguishes "prisoners" from the vehicle "operators" and "passengers," for whom the policy *does not apply*. In no way does the policy indicate that "anyone" who travels in a police department vehicle is to be handcuffed. Indeed, the policy is specific to the "arrest, transportation, and detention of prisoners." Clearly, Mace was not telling the truth when he testified to the judge and jury that Hayward was handcuffed pursuant to a written police department policy.

Trial counsel's failure to impeach Mace was inexcusable. Moreover, the State had an obligation to prevent Officer Mace from testifying falsely and failed to do so. *Giglio v. United States*, 405 U.S. 150 (1972). There can be no dispute that Officer Mace's testimony regarding a written policy and procedure is false. It is presumed that the State has knowledge of police policies and procedures. Moreover, the prosecuting authority has a duty to learn of any favorable evidence, including impeachment evidence, known to others acting on its behalf. *Strickler v. Greene* 527 U.S. 263 (1999). It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the withholding of favorable evidence, including impeachment evidence. *Rogers v. State*, 630 So. 2d 513 (Fla. 1993).

Mace's false testimony was material, and Hayward prejudiced, because it was used by the State to establish that Hayward was not under arrest for the purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966) when he made the incriminating statement that "I'm not going to lie to you, I was shot in the hand." This statement was not only incriminating in its own right, but also lead Smith to make incriminating statements against Hayward. There is at least "a reasonable likelihood that the false testimony could have affected the court's judgment as the factfinder in this case" at the suppression hearing. *Guzman v. State*, 868 So. 2d 498 (2003).

Although the police repeatedly told Hayward that he was not under arrest, he was confronted by multiple police officers, taken from his home, handcuffed, placed in the back of a police car, and brought to the police station for questioning. Had counsel adequately investigated and impeached Mace's testimony, the result of the motion to suppress and trial would have been different. The incriminating statements elicited by police would have been suppressed, and the resulting statements by Smith would have been inadmissible under *Miranda v. Arizona*, 384 U.S. 436 (1966).

ARGUMENT III

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SEVERAL MERITORIOUS CLAIMS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

An evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. Fla. R. Crim. P. 3.851(f)(5)(A)(i), *see also Amendments to Fla. R. Crim*. P. 3.851, 772 So. 2d 488, 491 n.2 (Fla. 2000) (endorsing the proposition that "an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis") *See also Allen v. Butterworth*, 756 So. 2d 52, 66-67 (2000); *Gonzales v. State*, 990 So. 2d 1017, 1024 (Fla. 2008). To the extent there is any question as to whether the movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required. *Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007).

Hayward's rule 3.851 motion pled facts regarding the merits of his claim which must be accepted as true. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). When these facts are accepted as true, it is clear that the record does not positively refute Hayward's claims and that an evidentiary hearing was required and relief is warranted.

a. Mr. Hayward Was Deprived Of His Right To A Reliable Adversarial Testing Due To Ineffective Assistance Of Counsel At the Penalty Phase of His Trial When Counsel Failed Object To Prosecutorial Misconduct In Closing Argument.

Steven Hayward alleged that defense counsel's failure to raise proper objections during his penalty phase was deficient performance, which denied Hayward effective assistance of counsel. The circuit court denied this claim without an evidentiary hearing, finding that Hayward had failed to claim prejudice. This was error.

On direct appeal, this Court found the State improperly used victim impact evidence to compare the life choices of the victim to the choices made by Hayward. The Court found these remarks were "clearly improper." *Hayward*, 24 So. 3d at 43. However, because trial counsel failed to timely object, and the circuit court had not ruled on such an objection, this Court applied the rigid "fundamental error" analysis to determine whether Hayward was entitled to relief. Having found that the State's remarks did not constitute fundamental error, this Court denied relief.

Had trial counsel objected to the prosecution's clearly improper arguments, any subsequent rulings by the court would have been subject to a "harmless error" analysis on direct appeal. Thus, but for trial counsel's failure to object, and the Court's failure to insure the fairness of Hayward's trial, the State would have had to prove beyond a reasonable doubt that there is no possibility that their clearly

impermissible closing arguments contributed to the jury's 8-to-4 recommendation of death.

In his postconviction motion, Hayward plead specific facts that, once proven, would entitle him to relief. During penalty phase closing argument made clearly impermissible arguments to Hayward's sentencing jury, despite previously agreeing to not make such arguments. Without any strategic reason, and despite the obvious impropriety of the State's argument, trial counsel failed to object.

An evidentiary hearing, and thereafter relief, is proper.

b. Mr. Hayward Was Deprived Of His Right To A Reliable Adversarial Testing Due To Ineffective Assistance Of Counsel At The Motion To Suppress Hearing And The Guilt Phase Of His Capital Trial.

i. The Motion to Suppress

Hayward alleged that defense counsel's failure to properly plead and argue the motion to suppress Hayward's statements was deficient performance, which denied Hayward effective assistance of counsel. Trail counsel failed to adequately investigate and prepare for the motion to suppress. But for counsel's failings, the motion to suppress would have been granted. The circuit court denied this claim without an evidentiary hearing, finding that Hayward had failed to claim prejudice. This was error.

Defense counsel did not investigate or develop evidence of coercion or deception by the police at the station. The detectives repeatedly informed Hayward

that he was not under arrest, despite being chained to a floor of a police station. This Court held that this type of deception is inappropriate and impermissible. *Ramirez v. State*, 739 So. 2d 568, 577 (Fla. 1999). The officers' deception in telling the suspect that he was not under arrest – despite the fact that they had more than enough probable cause to arrest him – was impermissible. Their assurances lulled the suspect into a false sense of security, which made him say things he might not otherwise have said, had he been properly informed as to his situation.

Defense counsel failed to argue that Hayward's waiver of *Miranda* was coerced and therefore invalid. "Evidence concerning the defendant's mental status is relevant to numerous issues that arise at various junctures during the proceedings, including . . . the ability to comprehend *Miranda* warnings . . ." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003), Commentary to Guideline 11.5.1; Guideline 4.1. Because of the conduct of the police, in addition to Hayward's mental and emotional impairments which counsel never investigated even for the purposes of penalty phase, Hayward did not have the capacity to fully comprehend the *Miranda* warnings. Hayward's compromised mental condition, rendered him susceptible to the coercive techniques used by the police officers interrogated him. As such, trial counsel should have sought suppression on this basis alone.

Only if "the totality of the circumstances surrounding the interrogation

reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Id*. at 575, *quoting Moran v. Burbine*, 475 U.S. 412 (1986); *Traylor v. State*, 596 So. 2d 957 (Fla. 1992). The state bears a heavy burden to show that the waiver was knowingly, intelligently, and voluntarily made. *Id*. Factors to be considered include: (1) the manner in which the *Miranda* rights were administered, including any cajoling or trickery; (2) the fact that the questioning took place in a station house; (3) the fact that investigators did not secure a written waiver of the *Miranda* rights at the outset. *Id*. at 575-576.

The detectives' administration of *Miranda* was cursory at best. Detective Flaherty said, "Before we talk about that we got to do the Miranda and Officer Coleman's going to give you the Miranda." (T. 1744) Detective Coleman read from the *Miranda* form then he asked if Hayward understood the rights. Hayward replied, "yeah." (T. 1745) Next, and most importantly, Detective Coleman asked, "Are you willing to answer some questions?" Hayward's response was listed by the court reporter as "(inaudible)." (T. 1745) After that, Detective Coleman tells Hayward, "just sign right here." (T.1745) The state bears a heavy burden to prove a knowing, voluntary, and intelligent waiver where a confession is obtained after the administration of *Miranda* warnings. *Ramirez*, 739 So. 2d at 575. Hayward's mumbled, unclear response falls far short of the proof necessary to show a proper

waiver. Defense counsel was deficient for failing to make these arguments.

Several other factors indicate that the confession was coerced. At the very beginning of the session, the detectives asked Hayward how he was doing, and he said he was cold. (T. 1743) Detective Coleman said they would do something about it, after they "[g]et this stuff out of the way." (T. 1743) They never got him anything else to wear, or adjusted the temperature in the room. Hayward was freezing throughout the long session, as indicated by his complaints to the officers.

Additionally, Hayward was in a great deal of pain as he had sustained a serious injury to his hand. He told the officers multiple times that he was in pain throughout the interrogation, and although they were well aware that he was in pain, they did nothing to help him. (T. 1751, 1782, 1821) A few minutes after they began the interrogation, Detective Flaherty commented that it looked like the bullet might still be in his hand, saying, "It looks pretty bad, man." Then he repeated, "it don't look real good. You know that." A few lines later, he said, "That looks pretty nasty." (T. 1789) Then they continued to question him, without providing medical attention or giving him so much as an aspirin. Later, Detective Flaherty mentioned again how bad the wound looked. Despite his obvious pain and discomfort, the police continued questioning him. (T. 1821)

A few moments later, Hayward asked to make a telephone call. He said, "I need to call…somebody, man." And Detective Flaherty replied, "Okay. All right.

But…just let's get through this first." Hayward repeated his requests multiple times, saying, "I need to talk to, I need a phone call," "I want to talk to my mama, I want to get a phone call, man," "I get one phone call, man," "I ain't calling my mom, I want to call somebody else." (T. 1784-1787) The police replied by saying, "I want to hear your story first though, and then I'll let you use the phone." (T. 1787) Hayward repeatedly requested a phone call, to call either his mother or possibly an attorney, and the police would not allow him to do so. Much later, Hayward asked for a pain pill and the police ignored him, once again saying, "we'll take care of you…. Get this off your shoulders, man." (T. 1821)

The Florida Constitution provides that if a suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop. *Traylor v. State*, 596 So. 2d 957 (Fla. 1992). Hayward clearly indicated to the police that he did not wish to be questioned further, yet the police pushed him to continue and withheld medical treatment and access to the telephone for several hours.

Defense counsel's legal argument at the suppression hearing was virtually nonexistent. Defense counsel did not present a single case to support its arguments, nor did it make any attempt to distinguish the cases the State presented. Further, the state attorney misstated the facts of several of the cases, which the defense failed to point out. Defense counsel failed to effectively challenge the police

officers' unsupported conclusions regarding the nature of crime scene blood spatter evidence and the cause of Hayward's wounds, for which none of the officers had the necessary knowledge or expertise to offer any opinion. Trial counsel failed to challenge the officers' testimony about contrary and conflicting descriptions by other witnesses of the shooter, how he was dressed and what he did.

Trial counsel's performance in the motion to suppress was constitutionally deficient and resulted in prejudice to Hayward. Had the defense properly investigated, presented, and argued the facts and law in Hayward's motion to suppress, the statements would have been excluded. Contrary to the lower court's conclusion, Hayward plead specific facts that, if true, would entitle him to relief. The denial of this claim without an evidentiary hearing was error.

ii. The Guilt Phase

Hayward alleged that Trial counsels' failure to vigorously advocate on behalf of their client by challenging State witnesses during the guilt phase of the trial was deficient performance, which denied Hayward effective assistance of counsel. Numerous witnesses presented by the State were not effectively challenged either through cross-examination, or through motions to disqualify them and exclude their testimony due to their incapacity. But for counsel's failings, the motion to suppress would have been granted. The circuit court denied this claim without an evidentiary hearing, finding that Hayward had failed to claim

prejudice. This was error.

Roosevelt McDowell gave numerous statements to the police and testified at Hayward's guilt phase. With each statement McDowell's story changed. According to police reports, and the motion to suppress testimony of Officer Coleman, McDowell initially told police that he witnessed a black male flee the crime scene wearing "dark clothing and some type of a ski cap or mask." However, in his own words, McDowell testified at trial that he saw a man with dreadlocks with nothing on his head – "just hair." (T. 1524) Later, he insisted that the "I didn't see no stocking cap" (T.. 1529), but redirect examination, he testified the suspect was wearing a hat. (T. 1539) According to the police, he initially told Officer Grecco that he saw the victim leaving with a gun in his hand, trying to reload it. However, when he testified pre-trial and at trial, McDowell was emphatic that he did not see a gun.

Most significantly, McDowell was not able to consistently, or even logically, recall the sequence of events he purportedly witnessed. At first, McDowell indicated that he was awoken by two gunshots, then went to the bathroom, and then heard a third, louder shot. Then, he gave a sworn statement that he was awake, went to the bathroom, came back and then heard shots. Later, McDowell testified that he got up to go to the bathroom, then heard the shots. His recollections changed several times, even during the same proceedings. At trial, he insisted that

it was 10 to 15 *minutes* between shots, despite the State's efforts to point out how long that would have been. (T. 1520)

Clearly, McDowell was infirm when the State called him to testify. During his deposition he told trial counsel that he was suffering from cancer and other ailments, and that he was taking medications for blood pressure. His inconsistent testimony and inability to recall even the most basic details of the events he purportedly witnessed put counsel on notice that he should be disqualified as a witness because he lacked to capacity to accurately observe, recall and narrate facts to Hayward's jury at his capital trial. *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000). Similarly, trial counsel failed to adequately cross-examine McDowell regarding his inability to accurately recall facts.

Trial counsel similarly failed to challenge the testimony of Dorothy Smith, despite the fact that Smith has a history of mental illness, including schizophrenia. In Smith's case, her mental illness not only affected her ability to recall and narrate facts, it also left her more susceptible to police coercion and suggestion. Trial counsel's cross-examination of Smith was barely more than one page. While he did point out that Smith was a convicted felon (T. 1568), trial counsel, without reasonable strategy, failed to elicit the fact that she suffers from a major mental illness that would affect her ability to accurately perceive, recall and narrate facts she purportedly witnessed. In fact, Smith had been hospitalized for mental illness

on at least one occasion, and was taking medications for schizophrenia when she purportedly witnessed what she testified to.

Trial counsel was well aware that Smith had a history of mental illness and arrests. Trial counsel also was aware, from written correspondence, that Smith had been coerced to change her story in Hayward's case after she had been arrested on separate charges. Smith wrote in August, 2005, that she had been called out of her cell and interrogated on numerous occasions by the same men who had arrested Hayward. At the time, she was heavily medicated by the jail staff. When she returned to her jail cell, she was told that officers had searched for correspondence to or from Hayward. In the same correspondence, she admitted that she lied to police about Hayward's whereabouts the night of the crime. Despite knowledge of the police tactics being used on her, and the fact that she was not truthful in her statements to the police or at trial, counsel failed to cross-examine Smith on any of these crucial facts.

Trial counsel's failures to challenge aspects of the State's case, individually and collectively, prejudiced Hayward. Had they vigorously defended their client, the jury would have seen Hayward's case in an entirely different light than that offered by the prosecution. Had the jury been aware that these witnesses lacked credibility, that their stories were inconsistent, and that there were other reasonable explanations for facts offered by the State, there is at least a reasonable probability

that the State would not have met the high burden of proving Hayward's guilt beyond a reasonable doubt. Contrary to the lower court's conclusion, Hayward plead specific facts that, if true, would entitle him to relief. The denial of this claim without an evidentiary hearing was error.

c. Conclusion

This Court must consider the cumulative effect of all the evidence not presented to the jury, whether due to trial counsel's ineffectiveness, the State's misconduct or because the evidence is newly discovered. *Kyles v. Whitley*, 514 U.S. 419 (1995); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1994). As the jury did not hear the evidence, confidence is undermined in the outcome of Hayward's trial. The trial court's summary denial of these claims was error.

ARGUMENT IV

MR. HAYWARD'S POSTCONVICTION PROCEEDINGS WERE FRAUGHT WITH ERRORS THAT, INDIVIDUALLY AND COLLECTIVELY, DENIED HIM DUE PROCESS AND A FULL AND FAIR ADJUDICATION OF HIS POSTCONVICTION CLAIMS, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

a. The Circuit Court Erred In Denying Mr. Hayward's Motion To Disqualify The Office Of The State Attorney.

On February 2, 2010, CCRC-South contacted trial counsel Udell, to request that he turn over his files pursuant to Fla. R. Crim. P. 3.851(c)(4). Udell agreed to

search for the files and provide them to CCRC-South the following week. CCRC-South sent a written follow-up request letter to Udell the following day. (PCR. 138)

On March 3, 2010, Court Staff Attorney Sharon Robson sent an e-mail to Assistant State Attorney Ryan Butler, Assistant Attorney General Leslie Campbell, and undersigned postconviction counsel, requesting a stipulation in lieu of a 90-day status conference pursuant to Fla. R. Crim. P. 3.851(c)(2). In response to Robson's e-mail, ASA Butler informed the parties that "Bob Udell turned over his file, consisting of one banker's box, to our office. I will submit it to the Records Repository." (PCR. 140) Postconviction counsel voiced opposition, and requested that the files immediately be sent to Hayward's attorney. (PCR. 140)

On March 15, 2010, Hayward filed a Motion to Disqualify the Office of the State Attorney for the Nineteenth Judicial Circuit alleging that the Office of the State Attorney's misconduct violated Hayward's rights to attorney-client confidentiality and jeopardized his rights to due process and effective representation in postconviction. Hayward further alleged that the State's violation of Hayward's rights to attorney-client confidentiality resulted in actual prejudice. Hayward sought, and was granted, the opportunity to take depositions of the parties involved and make further argument upon completion of discovery. (PCR. 173-75)

Trial counsel Udell stated in deposition that he represented Hayward at trial

but had since been disbarred. (PCR.285) Assistant State Attorney Ryan Butler contacted Udell shortly after it became known that he was facing disbarment (PCR.287) At that time, ASA Butler offered to store Hayward's case files, but Udell declined (PCR.288) There was no discussion about concerns with any other of Udell's clients' files, including the *Eugene McWatters* case, a capital case which was in a similar posture (PCR.291) February 2, 2010, CCRC-South contacted Udell and requested that he send Hayward's files to CCRC-South pursuant to Fla. R. Crim. P. 3.851(c)(4). Udell subsequently contacted Butler to inform Butler that he wished to retain a copy of the Hayward files but was without the funds to copy the files. Butler suggested that Udell provide the files to Jerome Stone, who would combine Udell's files with his own and provide the entire Hayward file to the State Attorney's Office to be copied (PCR.288).

Udell stated in his deposition that it is not his practice to retain such files in every case, however he was unable to articulate specific reasons for doing so in Hayward's case (PCR. 289, 299) At no time did Udell contact the CCRC-South office regarding his concerns or need for assistance with copying the files.

Assistant State Attorney Ryan Butler testified in deposition that upon reading online that Udell was facing disciplinary proceedings with the Florida Bar, he called Udell to ensure that Udell would be maintaining his files (PCR.307) Butler did not hear back from Udell for several weeks or months. After CCRC-

South contacted Udell to obtain Hayward's files, Udell contacted Butler and asked if the State Attorney's Office would copy the files as Udell could not afford to do it himself. Udell was in financial and emotional distress at that time (PCR.307) There was no discussion as to whether CCRC-South, rather than the State Attorney, should make the copies (PCR.308), nor did the parties consider the requirement of Rule 3.851 that Hayward's files remain confidential (PCR.307) Butler did not consider the possibility of contacting CCRC-South to advise successor counsel of the situation (PCR.308) From the time he received the files until they were provided to the Court, the State Attorney made no effort to copy the files (PCR.311)

Chief Assistant State Attorney Thomas Bakkedahl, who prosecuted the case at trial, stated in deposition that Butler handles all postconviction matters for the State in the Nineteenth Circuit (PCR.207) Bakkedahl is not involved in any Rule 3.851 proceedings (PCR.214), and denied having any interest in examining Hayward's files once they were delivered to the State Attorney's Office (PCR.218) He could not recall whether he and Butler had any discussions regarding obtaining Hayward's files from Udell, but that it was a possibility (PCR. 210-212). Bakkedahl explained that his office is located on the fourth floor of the State Attorney's Office building in Fort Pierce. Butler's and State Attorney Bruce Colton's offices are directly adjacent to his own (PCR.208) Bakkedahl does not

believe that Butler locks his office, and anyone with access to the fourth floor of the State Attorney's Office would have had access to Hayward's files while they were kept there (PCR.222-223)

Bakkedahl confirmed that he, along with other assistant State Attorneys and other attorneys practicing in the Nineteenth Circuit, has given money to Udell (PCR.215). Udell experienced financial difficulties since being disbarred in October, 2009 and had contacted various attorneys for assistance, although he had not personally contacted Bakkedahl. (PCR.215). Udell confirmed in deposition that he had received financial contributions from attorneys at the State Attorney's Office during the period from when he was disbarred to the time the files were turned over to the State Attorney's Office (PCR.296). The total amount of the contributions was between $300 to $500 (PCR.297).

According to Butler, Udell's conduct in the *Travis Goble* case, which led to his disbarment, is the subject of a criminal investigation conducted by an agency other than the State Attorney's Office. Butler testified further that he was not at liberty to discuss the matter because it is "an ongoing criminal investigation" (PCR.310). Udell is not aware of any criminal investigation into his conduct in the *Travis Goble* matter, but the possibility of criminal sanctions concerns him "absolutely" (PCR.294)

After considering written memoranda (R. 194, 350), the court denied

Hayward's motion to disqualify. This was error.

"To disqualify the State Attorney's Office, a defendant must show substantial misconduct or 'actual prejudice'." *Downs v. Moore*, 801 So. 2d 906 (Fla. 2001) (citing *Farina v. State*, 679 So. 2d 1151 (Fla. 1996)); *see also State v. Clausell*, 474 So. 2d 1189, 1191 (Fla. 1985). Actual prejudice is "something more than the mere appearance of impropriety." *Kearse v. State*, 770 So. 2d 1119, 1129 (Fla. 2000) (quoting *Meggs v. McClure*, 538 So. 2d 518, 519 (Fla. 1st DCA 1989)).

It is axiomatic that criminal defendants have a constitutionally protected right to privileged communications with their counsel. The attorney-client privilege survives in postconviction and must be maintained by trial counsel:

> [W]ithin 45 days of appointment of postconviction counsel, the defendant's trial counsel shall provide to postconviction counsel all information pertaining to the defendant's capital case which was obtained during the representation of the defendant. *Postconviction counsel shall maintain the confidentiality of all confidential information received*.

Fla. R. Crim. P. 3.851(c)(4) (emphasis added).

As the prosecutor assigned to all capital postconviction cases in the Nineteenth Circuit, ASA Butler is presumably well-versed in Florida rules of procedure governing postconviction proceedings and aware of trial counsel's responsibilities to deliver all information to postconviction counsel while maintaining confidentiality. Yet, in this instance, ASA Butler chose to forego the requirements of the rules of criminal procedure by seeking out, and then obtaining

Hayward's confidential files from Udell without Hayward's knowledge.

Prior to Hayward learning of the disclosure, the State was in possession of Hayward's privileged and confidential files for almost a month. Butler and Bakkedahl stated that the files were not inspected by the State, however, the fact remains that the files were in possession of the State Attorney, located in Butler's office, and were not sealed or secured in any way. Bakkedahl and Porter confirmed that anyone having access to the State Attorney's Office could have had access to Butler's office.

Further, the parties' deposition testimony demonstrates that this is not merely a situation where trial counsel inadvertently disclosed confidential materials or the State unknowingly received them. Rather, the State facilitated the disclosure by actively seeking out Hayward's files once they learned that Udell was facing disciplinary action and was in financial distress.

The State's assertions that it obtained the file merely to copy it in anticipation of a rule 3.851 motion is belied by their conduct. It remains unclear what the purpose of copying the file would be. The State was either going to copy the file for its own use, as understood by Butler, or the copy would be provided to Udell for his future reference. In either circumstance, the State's possession of the files is grossly improper. Moreover, the State had possession of the files for almost a month, with no effort being made to copy them for any purpose. Even assuming,

arguendo, that the disclosure of Hayward's files was inadvertent, the State Attorney still acted improperly, warranting disqualification. Upon receipt of an "accidental" disclosure of confidential or privileged information, the State had an affirmative duty to immediately ensure the confidentiality of the files and either return them to trial counsel or forward them to postconviction counsel.

Furthermore, Chief Assistant State Attorney Bakkadahl and Udell have both confirmed that agents of the Office of the State Attorney, including Bakkadahl himself, made financial contributions to Udell after he was disbarred. Surely they were aware that Udell was a potential witness in Hayward's postconviction proceedings. Regardless of the reasons for the contributions, the fact that State gave money to a potential witness is a significant conflict of interest. The existence of this relationship alone jeopardized Hayward's right to fair postconviction proceedings, warranting the State Attorney's disqualification.

The Office of the State Attorney, Nineteenth Judicial Circuit, has engaged in substantial misconduct by acquiring and retaining Hayward's confidential and privileged trial attorney's files. Hayward has been prejudiced because the State has had access to privileged and confidential materials created by his attorneys while representing him at trial. Allowing the State Attorney, Nineteenth Judicial Circuit, to continue to prosecute Hayward after having obtained privileged and confidential information denied Hayward due process in his pursuit of postconviction remedies.

Disqualification of the State Attorney and a new postconviction proceeding are warranted.

b. Mr. Hayward Did Not Receive A Full And Fair Hearing Because He Was Precluded From Calling A Necessary Mitigation Witness, In Violation Of His Right To Due Process.

On January 30, 2012, on Defendant's petition, the circuit court issued a Writ of Habeas Corpus Ad Testificandum for Witness Samuel Peaks. Peaks is incarcerated at FCI Coleman, a federal correctional institution. Counsel diligently sought to secure Peak's presence through communication with FCI Coleman and the Bureau of Prisons, but was thwarted at every attempt.[6] On February 12, 2012, counsel requested in writing to request that Peaks be permitted to give testimony On February 17, 2012, counsel was informed by telephone that the request for Peaks to appear in court had been denied. No reason or explanation was given for the denial, however the memorandum certified that the paperwork submitted by counsel, that it was in order, and prepared in compliance with applicable requirements. (PCR. 1582-85)

Before and during the evidentiary hearing, counsel made numerous further attempts to secure Peaks's testimony, either by video conference or, preferably, videotaped perpetuation. For its part, the State provided contact information to

[6] When counsel first contacted the administration at FCI Coleman, it was suggested that Peaks could "just write a letter."

assist counsel in arranging video testimony, but objected to videotaped perpetuation, claiming they would be prejudiced because they would not be able to present rebuttal witnesses and would incur travel expenses. Eventually, counsel was informed by FCI Coleman's counsel that there's no way Peaks's perpetuated testimony was going to happen.

The touchstone of due process is notice and reasonable opportunity to be heard. The right to due process entails "notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment). Counsel has made every attempt to comply with the court's orders and the requirements of the Sheriff's Department and Bureau of Prisons to have Peaks appear, and yet the warden arbitrarily denied those requests, without explanation. Hayward was not given the opportunity to present Peaks, a valuable mitigation witness, in support of his claims. The warden's arbitrary denial, without reason or explanation, resulted in a denial of due process.

c. Mr. Hayward Did Not Receive A Full And Fair Hearing Because The Trial Court Refused to Consider Admissible Mitigation Evidence.

In is now well-established that, "[i]n capital cases the fundamental respect for humanity underlying the Eighth Amendment. . . .requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Lockett v. Ohio*, 438 U.S. 536, 604 (1978) (citing *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990)(citing *Lockett*, 438 U.S. 586 (1978)).

At the postconviction hearing, Hayward presented his mother, Barbara Johnson, to testify to the abuse she suffered as a child which, ultimately, led to the abuse that she inflicted on Hayward. The court determined that it would not allow counsel "to go into the entire family history of Ms. Johnson and what – what violence she experienced in her life, as sad as it may be. I just has no relevance in mitigation in this case." (PCR-T. 642). Hayward later presented Cecilia Alfonso, a mitigation specialist and social worker with expertise in domestic violence, to testify about the cycle of violence in the Hayward family that began with the abuse

suffered by his mother. The State again objected. (PCR-T. 1223) The court determined that this family history was "not mitigating as relates to Steven Hayward and the crime that he was found guilty of in this case." (PCR-T. 1223) Similarly, Hayward presented his brother, Derrick Green, to testify that he suffered abuse at the hands of their mother, who lacked adequate parenting skills. Again, the court sustained the State's objections and refused to consider the testimony. (PCR-T. 853)[7] The court's refusal to consider the testimony of these witnesses was an abuse of discretion and a denial of due process.

Alfonso testified at the evidentiary hearing that, when performing a biopsychosocial assessment, "[y]ou can look not only at the individual, but you also look at generational components, whatever the things that contribute and shape and contribute to the development of a human bring and how those factors shape that person's perspective, behavior, life-style." (PCR-T. 1173) Part of the biopsychosocial analysis "absolutely" includes considering intergenerational dynamics prior to the defendant's own life. (PCR-T. 1173) She explained:

> [N]o one is born in a vacuum and if your parents, they're the ones who raise you, develop you, inject you with values and perspective and so you need to look at the family and how those parents were developed and what influenced their life, because in my field what you get is what you give, so if you're looking at a client, you look at their parents and you look at their

[7] The court permitted Hayward to present these witnesses' testimony under proffer.

parents, their grand – the child's grandparents.

(PCR-T. 1174)

This perspective is widely understood amongst mitigation specialists. *See* Lee Norton, Mitigation Investigation, in FLORIDA PUBLIC DEFENDER ASS'N, DEFENDING A CAPITAL CASE IN FLORIDA 25 (2001) FN 180, at 3 (counsel should "investigate at least three generations" of the client's family). The ABA Guidelines stress the importance of a "multi-generational" mitigation investigation:

> A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. The collection of corroborating information from multiple sources – a time-consuming task – is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.

Commentary to ABA Guideline 10.7, ABA Guidelines (2003).

Alfonso explained the importance of intergenerational information in mitigation in cases, like Hayward's, involving intergenerational violence:

> [T]he closer that violence is subjected to you by someone who's supposed to love you, respect you, protect you, the harder it is. And the younger you are when you're subjected to that kind of violence, the more insidious and there is a higher probability that you will also develop that style of coping and so it is not inconsistent or surprising that you see individuals who have been subjected to abuse abusing others.

(PCR-T. 1179-80) Clearly this information is relevant to any consideration of Hayward's background or character. Indeed, they form the foundation of it. The

circuit court's refusal to hear any evidence of Hayward's family background was an abuse of discretion which denied Hayward a full and fair evidentiary hearing.

d. Mr. Hayward Was Denied A Full And Fair Postconviction Proceeding Because He Was Prevented From Cross-Examining Trial Counsel About Communications Between Trial Counsel And The State In Preparation For The Evidentiary Hearing.

At the postconviction evidentiary hearing, trial counsel Udell testified that he had received written correspondence from the Assistant State Attorney Ryan Butler in preparation for his testimony. (PCR-T. 520) When asked about the contents of the letter he received the State objected, claiming that the letter is privileged work product. (PCR-T. 520) At the court's request, the State produced for in-camera inspection a document ASA Butler represented to be a copy of the letter he sent to Udell. (PCR-T. 525)

Upon review of the document and argument, the circuit court, relying on *Kearse v. State*, 969 So. 2d 976 (Fla. 2007), sustained the State's objection and entered the document under seal. This was error.

Under Florida Statute § 119.07(l)(1), a public record prepared by an agency attorney which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney, and which was prepared exclusively for litigation, is exempt from disclosure as attorney work product. The letter received by Udell is not privileged "work product." The letter was prepared by the State with the knowledge that Hayward would be calling Udell to testify at the evidentiary

hearing, and to prepare Udell for his testimony. Udell is neither a public employee, officer of the State Attorney, nor an attorney "consulted" by an agency attorney. Nor is Udell a "party" to this litigation.

Hayward respectfully submits that the circuit court's reliance on *Kearse* is misplaced, as the fact circumstances here are materially distinguishable. *Kearse* involved the prosecutor's objection to disclosing a (presumably) similar memorandum to Udell in response to public records demand pursuant to Florida Rule of Criminal Procedure 3.852. Here, Hayward requested that Udell describe the letter he received on the witness stand. This is a legitimate inquiry, relevant to establishing Udell's bias and credibility.

This is especially so where Udell's bias is evident. Despite the fact that he (presumably) owes no debt of loyalty to the State, Udell refused to discuss the contents of the letter even when discussing the case with postconviction counsel privately, unless "authorized" to do so by the prosecutor. This cannot be attributed to any legal or ethical obligation. Hayward submits that, even though Udell is no longer authorized to practice law in Florida, any legal or ethical obligation of loyalty that he might have would only be to Hayward.[8]

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[8] Udell's conduct in response to successor counsel's request for his files is further evidence that his loyalty lies not with his former clients but with the State. So, too, is the revelation that, after his disbarment, Udell received monetary gifts (described as Publix gift cards) from prosecutors, the parties knowing full well that Udell was a material witness in several pending postconviction cases.

The prosecutor's letter to Udell is clearly not privileged work product. Depriving Hayward the opportunity to examine the State's letter and examine Udell regarding its contents is an unseemly practice,[9] which deprived Hayward of due process.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Steven Hayward respectfully urges this Court to reverse the lower court, grant a new trial and/or penalty phase proceeding, a new postconviction proceeding, and such other relief as the Court deems just and proper.

Respectfully Submitted,

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[9] This practice is even more questionable where, as here, the State presents for in-camera inspection a document purported to be a copy of the privileged letter to Udell, and we later learn that it was not. (Supp. PCT-T. 11).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided to Leslie T. Campbell, AAG, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, by electronic mail to *capapp@myfloridalegal.com*, this 17th day of September, 2013.

/s/ Paul Kalil
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CERTIFICATE OF FONT

I HEREBY CERTIFY that the foregoing Initial Brief has been reproduced in 14 Times New Roman type, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

/s/ Paul Kalil
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