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Ronald McLean v. State of Florida

NEXT CASE ON THE COURT'S DOCKET THIS MORNING IS RONALD McCL EAN VERSUS STATE OF FLORIDA.

GOOD MORNING, YOUR HONORS. I AM RH IN E KLAWIKOFSKY , PRO BONO ATTORNEY FOR THE RESPONDENT . I AM RHINE TRUSKOSKI , PRO BONO ATTORNEY ON BEHA LF O F THE PETITIONER.

CHIEF JUSTICE: WHAT I S THE DECISION?

FEDERAL.

WHAT IS THE T EST FOR WHETHER IT WOULD BE UNCONSTITUTIONAL?

WELL - -

CHIEF JUSTICE: WHAT IS THE STANDARD THAT WE WOULD ALY ?

FROM THE DEFENDANT AFTERNOONS PERS ONAL PERSPECTIVE FROM THE DEFENDANT'S PERSONAL PERSPECTIVE , IT WOULD B E W HETHER THE TRIAL IS FUNDAMENTALLY FAIR. I BELIEVE WHAT YOU ARE GETTING AT IS I THINK THE STATE IS ARGU ING THAT I SSUETO BE A RATIONAL BASI S FOR THE LAW.

CHIEF JUSTICE: WELL, BUT, IF IT IS AN ISSUE AS TO WHETHER IT IS SO PREJUDICIALTHAT IT VIOLATES THE DEFENDANT'S FUNDAMENTAL RIGHTS.

CORRECT.

CHIEF JUSTICE: SO WHY ISN'T IT THAT , IF THE BALANCING TEST OF 403 I S ALIED , AROPRIATELY , WITH SOME LIMITATIONS FROM T HIS COURT , THAT , AS IT WAS BY THE TRIAL, YOU ARE GOING TO SAY IT IS AS ALIED, BUT THE TRIAL COURT DID LIM IT THE TESTIMONY AND G AVE A LIMITING INSTR UCTION , THEN HOW IS IT UNCONSTITUTI ONAL?

BECAUSE WHAT THE LEGISLATURE DID WAS , THEY SPECIFICSLY ELIMIN ATED THE SIMILARITY REQUIREMENTS.THEY TELL US THAT, NOW, NO MATTER HOW OLD OR HOW DISSIMILAR THE ACT IT, IT IS NOW IRRELEVANT.

CHIEF JUSTICE: EXCE PT THAT, AGAIN , B UT AS ALIED , IF, SINCE ALL OF THE COURTS , INCLUDING ALL OF THE FEDERAL COURTS, HAVE BEEN READING THESE STATUTES IN CONJUNCTION WITH THE BALANCING TEST, SO IT IS NOT AN ISSUE THAT NO MATTER WHAT THE ACT IS , IT AL WAYS COMES IN, THEN IT CAN BE ALIED CONSTITUTIONALLY.

WELL , IF 403 ST ILL ALIES AND THAT IS ALL W E NEED, THEN WHY DID WE EVER HAVE 40 4 TO BEGIN WITH , AND THE REASON IS BECAUSE THESE ACTS ARE S U CH A N ATURE THAT THEY NEED SP ECIAL RULE S TO GOVERN THE M, AND THAT IS REALLY WHAT IT COMES DOWN TO. THIS IS NOT THE TY PICAL , Y OUKNOW, RUN-OF-THE-MILL 403 , 403 IS THE CATCHALL FOR ALL EVIDENCE. 404 COMES UNTHIS AND THIS - - UNDER THIS, AND IT HAS ITS OWN SUBSECTION FOR A REA SON.

CHIEF JUSTICE: BUT IT W ASALWAYS A SI TUATION , FROM MY PAST, I FULLY UNDERSTAND THAT, WHEN PR IOR ACTS OF MISCONDUCT COME IN , AND IT IS CERT AINLY DEVAST ATING TO A

DEFENDANT'S , TO THE DEFENDANT'S CASE, AND I THINK THAT, YOU KN OW , I THINK IT HAS GOT TO BE ALIED V ERY CAREFULLY , BUT IT SEEMS TO ME THAT THE ISSUE OF WHETHER IT CAN BE USED TO CORROBORATE THE DEFENDANT'S TESTIMONY, W HICH IS WHAT HAENS IN A SITUATION WHERE IDENTITY IS NOT AN ISSUE, IT C OMES I N NOW, THAT IS THE BIG CHANGE , IS IT COMING IN FOR CORROBORATION , THAT, I F T HEJUDGE ALIES IT CAREFULLY , THEN I AM NOT SURE HOW I T ENDS UP BEING A CONSTITUTIONAL VIOLATION. IT MAY NOT BE THE WAY, IF WE WERE WRITING THE RULES O F EVIDENCE THAT WE WOULD WRITE THEM, BUT HOW IS IT UNCONSTITUTIONAL?

I UNDERS TAND EXACTLY WHAT YOU ARE SAYING. WHAT HAS HAENED HERE , WHAT THE LEGISLATURE HAS DONE IS , EVEN THOU GH WE STILL HAVE THE 403 BALANCING , THE LEGISLATURE IS SAYING T HAT SIMILARITY SHOULD KNOWLONGER BE A PART OF THAT BALANCING , SO IT IS REMO VING , YOU KNOW , THE MOST SIGNIFICANT PART OF - -

CHIEF JUSTICE: BUT THERE ARE MANY TIME S THAT SIMILARITY HASN'T BEEN AN ISSUE, YOU KNOW WHEN IT I S INTERTWINED WITH THE ACT. YOU KNOW , WE HAVE NOT REQUIRED SI MILARITY IN O THERSITUATIONS, CORRECT? YOU KNOW, IF IT IS PART OF AN ON GOING , , HAVE TO EX PLAIN THE MO TIVE. THERE IS NO SIMILARITY REQUIREMENT. IT IS , SO THAT HASN'T BEEN A STRICT ISSUE, THAT SIMILARITY IS ALW AYS THE CASE, AND I N THE FA MILIAL SETTING , WE HAVE A RELAXED STANDARD OF SIMI LARITY .

CORRECT. BUT I WOULD STILL SAY THAT IT DOES DESTROY THE PRESUMENTS OF - - THE PRESUMPTION OF INNOCE NCE , AND THAT, WELL, IN THIS CASE , WELL, LET ME K IND O F S WITCH POSITIONS AND KIND OF FOLLOW-UP ON THAT. THE REAS ON WHY IT IS UNCONSTITUTIONAL AS ALIED IN THIS CASE, IS BECAUSE THE COLLATERAL ACTS WERE TWO DIS WERE TOO DIS SIMILAR .

BEFORE YOU GET AWAY FROM YOUR OTHER CONSTITUTIONAL ARGUMENT, I WOULD AG A S SUME THAT YOUR I WOULD AS SU METHAT YOUR POSITION IS THAT THE FEDERAL RULE IS UNCONSTITUTIONAL .

WELL, THEY ARE INTERPRETING THE FEDERAL CONSTITUTION THERE, AND, OF COURSE, THOSE

I THOUGHT YOU SA ID IT WAS UNCONSTITUTIONAL UNDER THEFEDERAL AND STATE CONSTITUTION.

CORRECT. YES.ABSOLUTELY BOTH . MY ARGUMENT

SO IS THERE A MA TERIAL DIFFERENCE BETWEEN FLOR IDA RULE AND THE FEDERAL RULE?

NO , NOT IN THE LANGUAGE OF IT, ITSELF.

SO WE ARE ONLY DEA LINGWITH SOMETHING THAT CONG RESS ADOPTED AS WELL AS THE FLORIDA LEGISLATURE .

BY ANALOGY , YES.

WELL , BY ACTUAL FACT.

I AM N OT SURE IF

CONGRESS ADOPTS THE RULES.

IT IS ESSENT IALLY T HESAME. MY PO INT IS I AM NOT SURE IF CONGRESS MADE THE SAME FINDINGS OF FACT OR WHAT THE UNDERLYING LEGISLATIVE HISTORY IS OF THE CONGRESS , BUT OBVIOUSLY IT IS ESSENTIALLY THE SAME THING. SO I AM ARGUING THAT EVEN IF THE, EVEN IF , ARGUING THAT IT IS UNCONSTITUTIONAL IN THE FEDERAL CON STITUTION , OFCOURSE THAT HAS

BEEN PERMITTED UP YOU MEAN THIS POINT, BUT WE HAVE THE U P UNTIL THIS POINT , BUT WE HAVE THE FLORIDA CONSTITUTION, AND I WOULD ARGUE THAT OUR DUE PROCESS SHIELD WOULD PROTECT.

NOW, YOU SAID EARLIER , THAT IT IS UNCONSTITUTIONAL , BECAUSE 90.401-2-B TAKES AWAY THE REQUIR EMENT OF ANY SIMILARITY, ET CE TERA. WHERE DOES , HOW DO YOU GE T, WHAT IS THE LANGUAGE OF THAT SECTION THAT WOULD DO THAT?

IT IS IN THE LEGISL ATIVE HISTORY . IN THE LEGISLATIVE HIST ORY.

BUT WE HAVE SAID THAT, WHEN LOOKING AT ANY OF THESE THINGS, YOU HAVE TO LOOK AT 403 , ALSO , TO DETERMINE THOSE KINDS OF FAC TORS , S O IF YOU READ THESE TWO IN PARI MATERIA , ARE THEY , DON'T YOU GET THE SAME EFFECT, THAT IN FACT , WHEN YOU LOOK AT THIS SIMILAR ACTS, THAT YOU HAVE TO LOOK AT THEM WITH 403 IN MIND?

YOU DO, BUT WHAT IT SEE MS TO AL LOW NOW , THE DIFFERENCE , IS THAT IT IS O KAY TO PROVE PROPENSITY AND BAD CHARACTER.IT SEEMS THAT THAT IS WHAT IT IS ALL OWING NOW. THAT IS WHAT ESSENTIALLY THE 404-B PRIOR TO THIS , IN MOTIVE, INTENT , THOSE WERE SPECIFICALLY L I STED , SO WOULD THE EVIDENCE , WOULDN'T GO TO PROVE BAD CHAR ACTER OR PROPOSE ESITY. NOW WE DON'T HAVE PROPENSITY. NOW WE DON'T HAVE THAT SAFEGUARD.

WHAT ABOUT THE M O DUS PRAND HI?

IF IT HAS THE - - MODUS APERANDI?

NOW IT HAS THE UNI QUE SIGNATURE OF THE PERSON, A NDTHERE WAS NO UNIQUE SIGNATURE. THE COLLATERAL ACT WAS NOT SUFFICIENTLY SIMILAR.

CHIEF JUSTICE: BUT SEE , THAT IS WHERE , I AM , AG AIN, SYMPATHETIC TO YOUR ARGUMENT , BUT I, ALSO , ARECIATE WHAT THE TRIAL COURT DID IN LIMITING IT , BECAUS E IF YOU HAVE SOMEBODY, AGAIN, IT IS NOT ALLOWING ANY BAD PRIOR ACTS. YOU KNOW, IF A G UY USED TO FIGHT PE OPLE OR DO OTHER THINGS TO SHOW THE GUY IS JUST A BAD GUY , S HOWING WHETHER HE IS , IN THE WORDS OF THE LEGISLAT URE , SOMEONEWHO IS MOST LI KELY TO BE OR MORE LIKELY TO BE A SE XUAL PREDATOR, SO YOU HAVE TO BE VERY CAREFUL AB OUT WHAT THOSE PRIOR ACTS ARE, BUT AS TO WHETHER IT HAS TO BE , YOU KNOW , FINGERPRINT-TYPE EVIDENCE, IS , SE EMS TO BE, HAVE BEEN RELAXED FIRS T OF ALL BY US , AND NOW , REALLY , LEGISLATURE SAYS THAT IS NOT THE SINEQUONON INTO ALLOWING THIS KIND OF EVI DENCE .

AND THAT IS IN A SIMILAR VEIN. THAT IS WHY IT I S UNCONSTITUTIONAL AS ALIEDON ITS FACE .

CHIEF JUSTICE: WHY DON'T YOU TELL US HERE SPECIFICALLY IN THE FEW MINUTES BEFORE YOUR REBUTTAL TIME, WHAT MADE IT UNCONSTITUTIONAL AS ALIED IN THIS CASE, OR , I GUESS , HOW THE TRIAL COURT E RRED IN INTRODUCING THE LIMITED EVIDENCE.

BECAUSE THE COL LATERAL ACTS WERE TOO DISSIMILAR AND THEREFORE UNDULY PREJUDICIAL.IN THE CRIME AT ISSUE

SO I SN'T THIS NOT REALLY AN UNCONSTITUTIONAL AS ALIED ARGUMENT THAT YOU ARE MAKING HERE BUT SIMPLY THAT THE TRIAL COURT AB USED ITS DISC RETION IN DETERMINEHAD GONE THAT IT WAS NOT UNDULY PREJUDICIAL.

I AM TRYING TO M AKE IT BOTH.

ABOUT BUT FOR OUR PURPOSES , THEY ARE V ERY DIFFERENT, BECAUSE ONE WE DETERMINE DE NO VO AND WE DETERMINE WHETHER IT IS CONSTITUTIONAL AS ALIED AND THERE ARE A SET OF

FACTORS THAT GO INTO THAT AND THE OTHER ONE IS A WH OLE DIFFERENT THING AND DISCRETION AND THERE ARE FACTORS THAT ALY TO THAT , SO WE HAVE TO BE CLE AR AT WHAT WE ARE LOOKING AT.

I WOULD SAY THAT IT IS CONSTITUTIONALLY ALIED , AND AS A FALLB ACK IF T HIS COURT WOULD UP HOLD ITS CONSTITUTIONALITY, THAT YOU WOULD LOOK AT THE 403 BALANCING THAT WAS DONE AND AT THAT POINT IT WAS AN ABUSE OF DISC RETION AND W HYTHAT IS , IS THE CRIME AT ISSUE, THE VICTIM WAS E IGHT YEARS OLD AND THE CRIME WAS COMMITTED IN THE FA MILIAL CONTEXT. IN THE COLLATERAL CRIME , T HEPERSON, IT DID NOT MAP E N.IT WAS - - IT DID NOT HAEN. IT WAS A NONFAMILIAL CONTEXT. THE VICTIM WAS A G REAT DEAL OLDER, 13 0R 14 WHE N THE TWO ACTS OCCURRED , AND THE - - 13 OR 14 WHEN THE TWO ACTS OCCURRED, AND THE ACTUAL TYPE OF CONDUC T THAT DID OCCUR WAS M UCH DIFFERENT .

CAN'T WE INFER FROM WHAT THE TRIAL JUD GE DID , THAT THERE WAS SOME BALA NCING OF THESE FACTORS GOING ON, BECAUSE THE TRIAL JUDGE HEARD ALL OF THIS AND DECIDED THAT ONLY CERTAIN PORTIONS OF THE TESTIMONY FROM MR. CHAMBERS WAS GOING TO BE AD MITTED .

HE CL EARLY ADD RESSED IT , 403. I MEA N, IT IS NOT LIKE HE IGNORED IT, SO, YES , HE DID ADDRESS IT. MY FALLBACK PO SITION WOULD BE THAT THAT IS ABUSE OF DISCRETION.

SO THE QUESTION, THEN , BECOMES IN MY M IND, I MEAN WE HAVE A CASE HERE, WHERE THERE ARE SOME SIMILARITIES, AND THERE ARE SOME DIFFERENCES. AND SO WHEN YOU LOOK AT 403 AND THOSE ARE THE THIN G THAT IS YOU ARE LOOKING AT , HOW DO YOU COME OU T ON IT? DO YOU HAVE TO HAVE MORE O N ONE SIDE OR CER TAIN PERCENTAGE ON ONE SIDE? IT SEEMS TO ME THAT THE TRIAL JUDGE DID EX ACTLY WHAT WE REQUIRE HIM OR HER TO DO , AND SO WHER E IS THE ABUSE OF DISCRETION? WAS THERE S O MA NY DISSIMILARITIES THAT THEY WOULD OUTWEIGH THE SIMILARITIES?

I MEAN, THERE A RE ANUMBER OF FACTORS T O CONSIDER. IT IS NOT A BRIGHT-LINE R ULE , BUT I WOULD SAY THAT, W ITH REGARD TO HOW MANY THERE WERE ON EACH SIDE , THE DISSIMILARITIES WERE S O SIGNIFICANT ON THE ONES T HAT THEY DID HAVE , THAT THE TRIAL COURT WAS W RONG .

CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL. YOU HAVE A LOT OF REBUTTAL TIME.

THANK YOU.

MAY IT PLEASE THE COURT. I AM J O HN KLAWIKOFSKY. I REPRESENT THE STATE OF FLORIDA.

CHIEF JUSTICE: THE EVIDENCE IN THIS CASE CAMEIN FOR WHAT PURP OSE?

SEVERAL PURPOSES. THE JUDGE DID GIVE A LIM BING INSTRUCTION . A LIMITING INSTRUCT ION. I THIN K IT WAS MISTA KE. THE ABSENCE OF THE VIC TIM

CHIEF JUSTICE: IF WE HAVE ABS OF MISTAKE AND ASSUME , BECAUSE THAT RECE IVE ENU NDER THE OLD RULE, ALLOWED. I AM THAT WAS EVEN UNDER THE OLD RULE , ALL OWED. I AM INTERE STED I N CORROBORATION. CALL IT CORROBOR ATION. THAT IS REALLY AN OTHER N AME FOR SAYING PRO PENSITY OR CHARACTER.

I WOULD DISAGREE WITH THAT. CORROBORATION, AND I W OULDPOINT OUT JUSTICE ANSTEAD'S CONCURRENCE IN SA FFER, WHERE HE SAID IN SAFFER IT WAS NOT TO PROVE PROP ENSITY BUT WHETHER WHERE YOU S HARED SUCH UNIQUE FACTORS THAT SIMILARITY WAS RELEVANT , THAT THIS CH ILD DID NOT FABRICATE.SO IT IS FOR PROPE NSITY . IT IS NOT FABRICATE. THERE IS A DIFFERENCE.

CHIEF JUSTICE: SIMILAR IS NOT SIMILAR IN THIS CASE. AGAIN , THIS WAS AO INTED OUT. ISN'T IS REALLY COM ING IN TO SAY THAT THIS GUY DID BAD THING INS THE PAST, AND THEREFORE IT IS PROBABLE THAT HE, YOU KNOW , THAT WHAT THE CHILD IS SAYING IS TRUE.

CORR ECT, AND THAT IS WHAT JUSTICE ANSTEAD DID FIND IN SAFFER.

CHIEF JUSTICE: HOW IS IT DIFFERENCE, JUST SO WE UNDERSTAND, SOMEBODY IS CHARGED IN A TRAFFICACCIDENT, A FA TALITY W ITH RUNNING A RED LIGHT AND GOING AT HIGH R ATES OF S PEED , AND THE DEFE NDANT DISP UTES THAT HE DID THAT . AND THE STATE WA NTS TO PUT IN THE FACT THAT, IN THE PAST, H E HAS DRIVEN AT HIGH RATES OF SPEED, AND HE HAS RUN RED LIGH TS . IT IS COMING IN FOR PROPENSITY.

CORRECT, AND I WOULD , I MEAN AS A PROSECUTOR WE WOULD PROBABLY TRY TO G ETTHAT IN, BUT I WOULD ASSUME THE TRIAL JUDGE IS PRO BABLY GOING TO EXCL UDE THAT EVIDENCE. THE LEGISLATURE AND THIS COURT HAVE SEEN THAT CHILD VICTIMS DESE RVE SPE CIAL PROTECTION. THAT IS WHAT THIS COURT DID INITIALLY. IT DID IT URANICK AND IT DID IT IN SAFFER.

CHIEF JUSTICE: BUT IN OUR COLLECTIVE DESIRE TO PRO TECT CHILD VICTIMS, THAT WE DON'T END UP ELIMINATING OR SERIOUSLY COMPROMISING THE PRESUMPTION OF INNOCENCE.

CORRECT.

CHIEF JUSTICE: DO YOU AGREE ON THE PART OF THE STATE, THAT THERE HAS TO BE A BAL ANCING TEST?

ABSOLUTELY , AND I THINK THIS CASE S HOWS, THIS CASE ADDRESSES THE CONCERNS OF THE DISSENT IN 20 02 AMENDMENT CASE. I KNOW CHIEF JUSTICE AND JUSTICE ANST EAD , B OTH, DISSENTED IN THE 2 002 AMENDMENT CASE , AND THERE WERE VALID CONCERNS IN THAT DISSENT, AND THIS CASE SH OWS THAT THOSE CONCERNS WERE ADDRESSED, BECAUSE THERE I S STILL A GATEKEEPER HERE. THE TRIAL JUDGE IS STILL THE GATEKEEPER.

CHIEF JUSTICE: IS THE GATEKEEPER, YOU KNOW WE T ALK ABOUT DISCRETION AND JUDGES HAVE DISCRETION AS TO HOW LONG A WITNESS TEST IFIES OR WHETHER AN EX PERT COM ES IN OR OUT. MY CONCERN IS THAT , IF WE UPHOLD THIS CONSTITUTIONAL , DO WE NEED TO GUIDE THE DISCRETION IN THIS CASE AS THE TE NTH CIRC UI T , SAY IN ENUMERATING FACTORS AND THE FEDERAL THIN G, FOR JUDGE TO SAY CONSIDER , BEC AUSE THE DISCRETION HAS A CONSTITUTIONAL DIMENSION. IF SOMETHING COMES IN

AT A CERTAIN POINT , YES. AT A CERTAIN POINT, YES.

CHIEF JUSTICE: YOU DON'T WANTON JUDGE IN ONE PART OF THE STATE TO SAY I W ILL CONSIDER THESE TWO FAC TORSAND ANOTHER JUDGE IN ANOTHER PART OF THE STATE SAYIN G I AM JUST, IT SEEMS LIKE IT SHOULD COME IN , THAT WE FOR REVIEW PURPOSES

THAT WAS PA RT OF THE PROBLEM WITH THE CHILD MOLESTATION WILLIAMS RULE EVIDENCE, BECAUSE THERE WERE DISPART RESU LTS RESULTING , AND DISP ARATE R UTS RESULTING, AND TRYING TO FIG FIGURE OUT WHAT THIS COURT WAS SAYING , TRIAL COURTS WERE GI VING DISPA RATE RESULTS , AND IT WAS ALMOST LIKE THROWING A DART A GAINST A DART B O ARD AND THERE WERE RANDOM RESU LTS , AND I DO THINK THE TRIAL COURTS AND DCA'S DO NEED SOME D IED ANSWER FROM THIS COURT ONTHIS ISSUE, BUT THE BOTTOM LINE IS THE TRIAL COURT HAS TO BALANCE , AND THAT IS WHAT THIS TRIAL COURT DID HERE. THIS TRIAL COURT MA DE IT VERY CL EAR THIS WAS N OTGOING TO BE A FEAT URE. THERE WAS NO WAY THAT THIS WAS MADE A FEATURE OF THISTRIAL.THE LIMITING INSTRUCT ION IS VERY IMPORT ANT, AND THIS TRIAL COURT ACT UALLY CONCLUDED - -

CHIEF JUSTICE: BUT HE SAID THE LIMITING INSTRUCTIONS SAID CORROBORATION.IT CA N COME IN AS IT S AID YOU CAN USE IT TO CORROBORATE, SO I AM BACK THERE IN THE JURY R OOM , AND I AM SAYING, WELL , I A M REALLY NOT SURE WHETHER THE, THIS CHILD VICTIM IS TRUTHFUL, BUT , B OY , THIS GUY, LOOK WHAT THE GUY DID IN WHATEVER YEAR IT WAS. I JUST, NOW WE HAVE GOT A BAD ACT OR. I AM GOING TO E RR ON T HESIDE OF KEE PING

THIS COURT ALLOWED IT IN URANICK AND SAFFER AND THIS COURT SAID IT IS NOT PERMISSIBLE HERE, AND IT I S NOT PERMIS SIBLE HERE PER SE , BECAUSE ZR OF THE ACTS WERE EXCLUDED. IT IS ST ILL SUB JECT TO BALANCING TEST, AND WHAT THIS COURT DID I N UR ANICK IS SAID WE DON'T NEED STRIKE SIMILARITY. WHAT THIS STAT UTE IS DOING IS WHAT THIS COURT SAID IT WAS GOING TO D O IN RECALLS. IS IT I N RAW LS. IT DOES NOT MA TTER I F I T I S FAMILIAR. IT IS CUSTODIAL IF I HAD FIX IS NOT AN ISSUE, THE STANDARD SHOULD BE RELA XED .

CHIEF JUSTICE: WOULD YOU SAY THAT SIMILARITY IS SOMETHING THAT SHOULD BETAKEN INTO CONSIDERATION CONSIDERA TION?

I WOULDN'T SAY THAT IT MUST TAKE PLACE BUT I N DETERMINING BALANCING AND RELEVANCY.

CHIEF JUSTICE: ARE YOU SAYING THAT THIS COURT SHOULD NOT LOOK A T SIMILARITY?

IT WOULD BE HARD PRESSED IF THERE WERE NO SIMILARITIES.

CHIEF JUSTICE: THAT IS A IMPORTANT POINT TO ME, AND THEREFORE, FOR EXAM PLE , IF THIS WAS A TO UCHING IN CIDENT , AND THE PR IOR ACT OF AB EIN A PRIOR ACT HAD BEEN SOMET HING THAT OCCURRED WHEN THE PERSON WAS 18 , AND IT W ASWITH A 14-YEAR-OLD ENGAGED IN SOME KIND OF SEX UA L ACT , I MEAN, WHERE THERE WOULD BE NO SIMILARITY, YOU WOULDSTART TO SAY HOW I S THAT CORROBORATING ANYTHING.

AND THAT COU LD BE A FACTOR. UNFORTUNATELY FOR THE TRIAL JUDGES, THIS STILL HAS TO BE ON A CASE-BY-CASE ANALYSIS . THEY ARE GOING TO HAVE TO GO THROUGH EACH CASE BECAUSE EACH CASE HAS ITS O WN INDIVIDUAL FACTS.

CHIEF JUSTICE: BUT YOU AGREE THE IMPLICATIONS FOR THE DEFE NDANT OF PRIOR B ADACTS, COMP ARED TO ALMOST ANY OTHER RU LING OF A JUDGE ABOUT EXPERT TESTIM ONY COMING IN , IS POTENTIALLY DEVASTATING.

YES, IT IS.

CHIEF JUSTICE: WHICH IS , IT IS DEVASTATING IN THE PRESENT SI TUATION .

THE S E COND DIS TRICT UNDERSTOOD THAT IN THIS CASE AND JUDGE ALTENBERND, HE CAREFULLY, HE RA ISED THIS ISSUE , AND , AGAIN , IT DOES NOT AMOUNT TO A DUE PRO CESSVIOLATION.IT COULD BE AN ABUSE OF DISCRETION. THEY ARE TO TALLY DIFFERENT THINGS AS JUSTICE CAN TERO SAID, TOTALLY DIF FERENT STANDARDS, AND THE DCA'S

CHIEF JUSTICE: AG AIN , WHEN WE USE ABUSE OF DISCRETION WE SAY ESSENTIALLY, IF ANY REASONABLE PERSON, YOU KNOW, IT IS ALMOST LIKE IF SOMEON E IS NOT INSANE , IT IS OKAY , AND THAT IS WHAT I AM TRYINGTO GE T TO, WHE THER WE H AVE TO HAVE GU IDED DIS CRETION HERE BY FACTORS AS ENUNCIATED IN THE TE NTH CIRCUIT COURT OF AEAL, S O THAT JUDGES HAVE SOME GUIDANCE ON HOW THEY ARE GOING TO EXER CISE DISCRETION.

I WOULD THINK THE TRIAL COURTS DO NEED GUIDANCE O N THIS ISSUE, AND TO TE LL YOU THE TR UTH, THE STATE OF THE LAW IN CHILD MOLESTATION H ASNOT REALLY CHANGE D THAT MUCH , BECAUSE TRIAL COURTS ARE STILL DOING A BALANCING ANALYSIS. THEY ARE STILL DOING A SIMILARITY ANALYSIS. AND THAT IS NOT NECESSARILY WRONG FOR THE TRIAL COURT T

O DO THAT , BECAUSE THE BEST WAY TO DETERMINE RELEVANCE AND BALANCING , IS PROBABLY SIMILARITY ANALYSIS. I, AND I THINK THE TRIAL JUDGES ARE MORE COMFORTABLE WITH THAT, IF THIS COURT COULD PRO VIDE GUID ANCE. I DON'T THINK, SIMILARITY IS NOT REQUIRED UNDER THE STATUTE.

CHIEF JUSTICE: WOULD YOU JUST SAY THAT, YOU ARE SAYING THAT THE SAFFER CASE DIDN'T HE LP , KEPT THE TRIAL COURTS CONFUSED .

RAWLS AND SAFFER BOTH GOT TRIAL COURTS CONF USED BECAUSE WE KNOW THAT IS WHAT SAFFER WAS AB OUT, BUT RAWLS HAD SAID YOU DON'T NEED STRIKING SIMILARITY , WHEN FAMILIAL IS NOT AN ISSUE . WHAT HAENED A FTER THAT IS

WHEN YOU USE THAT TE RM , JUST FOR A MOMENT , W HEN YOU SAY YOU DON'T NEED STR IKING SIMILARITY, ARE YOU SAYING THAT THEY DON'T HAVE TO BE IDENTICAL , O R ARE YOU SAYING THAT IT DOES N'T HAVE TO BE ANY SIMILARITY? WHAT , I AM NOT EXACTLY SURE WHAT YOU ARE SAYING WHEN YOU SAY STRI KING .

I AM NOT SAY HAD GO NE THERE HAS TO BE ANY SIMILARITY. PRIOR TO THE STAT UTE, THIS COURT WAS REQUIRING STRIKING SIMILARITY. IN RAWLS, THIS COURT SAID WE CAN LESSEN THE STRIKING SIMILARITY, AND THAT IS WHAT THIS STATUTE IS TRYING TO DO.

SO YOU ARE SAYING THAT, UNDER THIS STATU TE, YOU CAN BRING IN A PRIOR MOLESTATION ACT THAT HAS NO SIMILARITY WHATSOEVER TO THE PRESENT CASE.

IN THEORY, YE S, YOU CAN. I WOULD SUB MIT THAT A TRIAL JUDGE DOING A PROPER BALANCING, IS GOING TO HAVE A HARD TIME GETTING SUCH EVIDENCE IN, IF THERE ARE NO SIMILARITIES. IT HAS TO GO TO SOMETHING ELSE THEN. AND I CA N'T THINK OF A WAY TO BALANCE BETTER THAN WITH A SIMILARITY ANALYSIS , AND THE DCA'S STILL DO IT.

CHIEF JUSTICE: I THOUGHT YOU DID SAY THAT, ALTHOUGH THE STATUTE, WE SAY FOR IT TO BE ALIED CONSTITUTIONALLY, OR THAT THE BALANCING TEST TO INCLUDE SIMILARITY, AND ESPECIALLY IF IT IS NOT GOING TO ANYTHING ELSE , OTHER THAN CORROBORATION.

I DON'T BELIEVE THE BALANCING TEST REQUIRES SIMILARITY. I THINK SIMILARITY ASSIS TS IN THE BALANCING TEST , AND THAT IS WHAT MOS T OF THE TRIAL JUDGES AND THE DCA'SARE STILL DOING .

BALANCING, IF YOU ARE NOT BALANCING SIMILARITIES , I N THE BALANCING TEST , IF IT DOESN'T REQUIRE A SIMILARITY, WHAT DOES IT REQUIRE?

IT WOULD HAVE TO BE IN A DIFFERENT SITUATION OTHER THAN CORRO BORATING THE VICTIM. I CAN'T THINK OF ANOTHER SITUATION, TO TELL YOU THE TRUTH.

CHIEF JUSTICE: WELL , AGAIN, HOW DOES IT CORROBORATE? IF THERE IS NO SIMILARITY I N THE AC T.

IT WOULD GO TO PROPEN SITY THEN, AND OUR CASE LAW AND OUR STATUTES ARE STILL CLEAR THAT, IF YOU ARE SUB MITTING IT JUST FOR PROPENSITY ALONE , YOU ARE GOING TO HAVE A HARD TIME MAKING A 4 03 BALANCING. THE STATE IS GOING TO HAVE A HARD TIME IF PROPENSITY I S COMING IN, SOLE PROPENSITY , 404.2-A IS STILL VALID. YOU CAN'T B RING IT IN JUST FOR PROPENSITY , AND T HE STATE IS GOING TO HAVE A HARD TIME JUSTIFY ING PROPENSITY ALONE. YOU NEED SOMETHING EL SE .

IN ADO PTING THIS STATUTE, DID THE LEGISLAT URE MAKE A NY FINDINGS IN THE ENACTING LAW , ABOUT WHY IT WAS EN ACTING THIS RULE?

YES. IN THE WHEREAS CLAU SE, THE LEGISLATURE DID FI ND THAT W E FIND THAT CHILD VICT IMS NEED SPECIAL PROTECTIONS AND CORROBORATION US UALLY BECOMES A CENT RAL ISSUE IN A CHILD MOLESTATION CASE.

WAS THERE ANYTHING IN THESTATUTE THAT , IN THE LAW THAT I THINK WAS IN THE "JIMMY RYCE" ACT , ENA CTING LAW, WHICH SAID THAT THERE IS G REAT RECIDIVISM RATE FOR CHILD MOLEST ERS AND THAT THEY DO HAVE A PROPENSITY TO CONTINUE .

THAT IS BEYOND THIS RECORD, BUT I DO KNOW THAT JIMMY RYCE RECORDS DO CONTAIN THE RECIDIVISM , BUT THAT IS BEYOND THIS REC ORD AND THAT WAS NOT IN THE STAFF ANALYSIS FOR THIS CASE .

WHAT, IN THE ENACTING LAW , IN THE WHEREAS CLAUSE?

IT DOES SAY THAT CHILD VICTIMS NEED S PECIAL CONSIDERATION, AND THAT CORROBORATION BECOME AS CENTRAL FO CUS.

CHIEF JUSTICE: IN THE WAY THAT THE JUDGE DOES THE BALANCING TEST, THERE IS SUGGESTION THAT THERE, Y OUKNOW, AGAIN , WE ARE TALKING ABOUT PROPENSITY , AND AS I RECALL IF SOME ONE IS A PEDOPHILE , THEN THEIR PROPENSITY MA Y BE TO , Y OUKNOW, FOR YOUNG VICTIMS , BUT IS THERE ANY PROV ISION OR SHOULD THERE BE ANY PROVISION THAT THERE BE S OME T YPE A FTER EVIDENTIARY HEARING T YP E OF AN EVIDENTIARY HEARING BEFORE THIS COMES IN, IF THE DEFENDANT RAISES THAT THERE IS REALLY, THAT ALTH OUGH COMMON SENSE MI GHT SAY, WELL , IF SOMEONE IS A BAD ACTOR WITH CHILDREN , THAT , WHAT WOULD YOU SAY TO THAT?

I KNOW MY O ONENT M AKESA GREAT DE AL IN HIS BRIE F OF SAYING THAT THE FE DERAL RULES REQUIRE AN EVIDENTIARY HEARING . THE , I CAN'T THINK AFTER CASE THAT HAS COME BEFORE OUR OFFICE THAT THERE WASN'T AT LE AST AT PROFFER , SO I THINK IT IS REASON ABLE TO REQUIRE AT LEAST A PRET RIAL PROFFER, SUBJECT TO THE DEFENSE OBJE CTING TO THAT AND REQUIRING IT , AND THE STATUTE DOES REQUIRE NOTICE , TEN-DAY NOTICE REQUIREMENTTHE STATUTE REQUIRES.

CHIEF JUSTICE: WHAT IS THE REQUIREMENT FOR THE PRIOR ACT? HAS IT CHA NGED? IN OTHER WORDS, DOES THE PRIOR ACT HAVE TO HAVE BEEN PROVEN BEYOND A REASONABLEDOUBT?

NO. THE PRIOR ACT STILL HAS TO BE PROVEN BY CLEAR AND CONVINCING EVIDENCE.IT IS NOT MERE PREPONDERANCE.IT IS CLEAR AND CONVINCING , BUT THERE IS NO REQUIREMENTTHAT THE PRIOR ACT BE PROVEN BEYOND A REASONABLE DOUBT .

CHIEF JUSTICE: SO THAT I S WHERE THE REAL CONCERN IS , THAT SOMEONE ENDS UP BEING CONVICTED FOR AN OFFENSE THAT MAY NOT HAVE OCCURRED BEYOND A REASONABLE DOUBT?

WELL, THAT IS - -

CHIEF JUSTICE: THAT I S ALWAYS THERE, BUT THAT IS SORT OF EVEN , LOOMS EVEN GREATER.

THIS COURT HAS REQUIRED THAT, IN THE PRIOR CASE LAW DATING BACK TO THE 19 59 WILLIAMS CASE , SAYS CLEAR AND CONVINCING EVIDENCE OF PRIOR ACTS. A CONVICTION IS NOT REQUIRED. IT IS UN LIKE ARENDI, WHERE ARENDI WAS ACTUALLY DEALING WITH ELEMENTS OF THE CRIME. THIS ISN'T GOING TO THE ELEMENT OF THE CRIME.

CHIEF JUSTICE: I UNDERSTAND BUT WHAT I A M ASKING IS NOW SI NCE WE DID WILLIAMS, IT WAS TO COME I N MORE THAN AS THE FINGERPRINTEVIDENCE, AND THAT IS WHAT YOU ARE LOOKING AT , AND N OWIF THERE IS A RELA XED STANDARD FOR CORRO BORATION , ISN'T THERE A

CONSTITUTIONAL PROBLEM WITH NOT HAVING THE PRIOR ACT BE HAVING TO B E PROVEN BEYOND A REASONABLEDOUBT BY THE STATE?

NO, BECAUSE THIS IS N OTAN IDENTIFICATION CASE . AND JUDGE ALTENBERND DOES ADDRESS WHEN IDENTI FICATIONIS AN ISSUE AND IT IS IN A FOOTNOTE IN THERE, AND HE DOES SUGGEST THAT POSSIBLY A JURY INSTRUCTION OR A N INSTRUCTION TO THE JUDGE REQUIRING A STRIKING SIMILARITY IN IDENTI FICATION CASES. REMEMBER, WILLIAMS C ASE WAS AN IDENTIFICATION CASE. THIS COURT HAS AL WAYS REQUIRED FINGERPRINT-TYPE UNIQUE ACTS WHEN IDENTIFICATION IS AN ISSUE . WHAT THIS STATUTE IS SAYING IS, IDENTIFICATION IS NOT AN ISSUE. THIS VICTIM KNOWS HIS MOLESTER. HE KNOWS HI M. THE FACT THAT

CHIEF JUSTICE: IF I HAD FIX WAS AN ISSUE IF I HAD FIX WAS AN ISSUE IN THE - - IF I HAD FIX WAS AN ISSUE IN THE PRIOR CASE, AND IT HAENED AND IT WASN'T HIM, THEN HOW DO YOU

A BALANCING ACT WOULD REQUIRE A MORE STRIKING SIMILARITY, WHEN IDENTIFICATION IS DISPUTED .

WE K EEP T ALKING ABOUT 403. I MEAN, I SN'T THERE , STILL , WITH THIS STATUTE , AN UNDERLYING ISSUE OF RELEVANCE ?

RELEVANCY IS ALW AYS THE FIRST THING A JU DGE HAS TO LOOK AT.

RIGHT, AND SO WHY ISN'T SIMILARITY WITHIN THE PREDICATE OF RELE VANCE ?

SIMILARITY CAN , SURE , I THINK MOST TRIAL JUDGES LOOK TO SIMILARITY FIRST. THAT IS WHAT THEY HAVE BEEN TRAINED TO DO. THAT IS WHAT THEY DO AND I THINK THEY STILL WOULD DO IT.

IF IT IS A PRIOR MOLESTATION , THAT IS TO TALLY DISSIMILAR IN 50 Y EARS AGO, THEN IT WOULD HAVE , IT W OULD BE DEALT WITH ON THE MATTER OF RELEVANCE , WOULD IT NOT?

SURE , AND ALSO ON A BALANCING LEVEL , THE SCALE IS GOING TO TURN. THE OLDER , CLOU DIER THAT THE COLLATERAL ACT EVIDEN CE IS , THE HA RDER IT IS TO GET IT ADMITTED AND THE BALANCING STILL GOES IN TO THAT , AND THE STATE IS GOING TO HAVE , GOING TO BE HARD-PRESSED TO ADMIT EVIDENCE THAT IS TOTALLY DISSIM ILAR THAT LACKS CLARITY, THAT LACKS A DEFINITIVENESS AS TO WHO COMMITTED THIS COLLATERAL ACT. THE STATE IS G OING TO BE HARD PRESSED TO DO THAT. THE RULES , REALLY , HAVE NOT CHANGED THAT DRASTICALLY. WHAT THIS STATUTE HAS NOW ALLOWED, AND I WOULD, A LSO , SUBMIT INITIALLY , I WOULD SUBMIT THAT THIS JUDGE ALSO SAID, ON P AGE 84 OF THE TRANSCRIPT, THAT ALTHOU GH HE WAS FOLLOWING THE STATE'S ARGUMENT IN THE NEW STATUTORY AMENDMENT , HEWOULD HAVE AD MITTED IT U NDER THE OLD-LINE OF CASES , TOO , AND UNDER THE RAWL S CASE , THE SECOND DISTRICT EVEN DISCUSSED THAT THEY ARE NOT EVEN SU RE THIS CASE MAY HAVE BEEN ADMI SSIBLE UNDER RAWLS ALONE, UNDE R THE OLD CASE LAW, BECAUSE THIS WAS AN OVERNIGHT GU EST. BOTH CASES HE WAS AN OVERNIGHT GUEST, AND IN RAWLS , RAWLS WAS AN OVERNIGHT GUEST AND THERE IS SUFFICIENT SIMILARITY TO RAWLS ALONE.

CHIEF JUSTICE: IF THAT I S SO, THEN DO WE NEED TO REA CH THE CONSTITUTIONAL ISSUE IN THIS CASE, IF WE FIND THAT IT WOULD HAVE BEEN ADMISSIBLE ANYWAY , THEN ISN'T ANYTHING ABOUT WHAT WE SAY AB OUT THE NEW STATUTE , DICTA ?

I DO N'T THINK THIS C OURTNEEDS TO AD DRESS THAT.

CHIEF JUSTICE: OF COURSE IT CAME UP A CER TIFIED QUESTION.

RI GHT. THE SECOND DISTRICT DID CERTIFY THE QUESTION, AND I THINK THE REAL PROBLEM W

HICHJUDGE ALTENBERND DID TRY TO ADDRESS , IS WHEN IDENTIFICATION DOES BECOM E AN ISSUE, AND HE DID ADDRESSTHAT, BECAUSE I KNOW WHAT , THE CASE THAT IS GOING TO FOLLOW UP IS GOING TO BE A CASE THAT SAYS, OK AY, IDENTIFICATION IS BEING DISPUTED NOW . JUDGE ALTENBERND ADDR ESSES THAT AND THE SECOND DISTRICT PANEL ADDRESSES THAT , BY SAYING IDENTI FICATION IS AN ISSUE . STRIKING SIMILARITY MAY BE A V ALID REQUIREMENT FOR A TRIAL JUDGE IN BALANCING IT , BUT , A GAIN , THE CHARTS ARE GONE. NO MORE CHARTS. BECAUSE A LO T OF THE CHARTS WERE SUBJECTIVE ANALY SIS BY A TRIAL JUDGE , AND A LOT O F THE DIFFERENCES - -

CHIEF JUSTICE: WHEN YOU SAY THE CH ARTS, WHAT CHARTS? I KNOW SH OWING

THE MOORE CASE.

CHIEF JUSTICE: SH OWING WHAT?

SIMILARITIES THAT PROSECUTORS WOULD GET IN FRONT OF A TRIAL JUDGE AND YOU WOULD MA RK , X , THEY WERE SIMILAR, BECAUSE B OTH OCCURRED AT MIDNIGHT AND THEY, BOTH, WERE MALES , AND THEY, BOTH, HAD ORAL SE X.

CHIEF JUSTICE: ISN' T THAT STILL HELPFUL?

BUT THEY ARE NOT NECESSARY ANYMORE. IT CAN BE HELPFUL.

CHIEF JUSTICE: AS FAR AS THE CHAR TS, WE DON'T WANT T O STOP THE PROSEC UTORS FRO M USING THEIR CHARTS TO SHOW AND ALSO HAVE

THE DE FENSE IS USING IT ALOT MORE THAN THE PROSECUTORS TO SHOW DIFFERENCES, AND A LOT OF TIMES DIFFEREN CES WERE A RESULT OF OORTUNI TY , AND IN THIS CASE THE ONLY DIFFERENCE PROBABLY WAS THAT JN STOED THE AB USE. HE DIDN'T ALLOW THE ABUSE TO CONTINUE . OTHERWISE WE PROBABLY WOULD HAVE IDENTICAL ACTS.

BUT IF WE LIS T FAC TORS A S WE SUGGESTED, THAT IS GOING TO LEAD TO CHARTS.

CHARTS. THIS STATUTE SAYS CHARTS AREN'T NECESSARY ANYM ORE.

CHIEF JUSTICE: BUT IF WE ARE GOING TO MAKE SURE IT IS ALIED CONSTITUTIONALLY, S O THAT A TRIAL DOESN'T BECOME FUNDAMENTALLY UN FAIR , BECAUSE WHAT IS HA ENING ISTHAT THE P ERSON IS BEING , REALLY, H UNG ON THE PRIOR ACT , BECAUSE THE PRES ENT ACT IS NOT V ERY STR ONG , THEN WE , IT, WE REALLY ARE IN A DIFFERENT SI TUATION , T RYING TO MAKE SURE WE K EEP THIS WITHIN CONSTITUTIONAL BOUNDS.

IT STILL WOULD NOT MAKE IT UNCONSTITUTIONAL. IT WOULD MAKE IT A N ABUSE OF DISCRETION.

CHIEF JUSTICE: THAT I S WHERE, MAYBE, WE ARE DIFFERING. IN MY VI EW , THIS HAS, AND IT HAS BEEN RECOGNIZ ED THAT THIS TYPE OF EVIDENCE CAN , AS TO CONSTITU TIONAL DIMENSIONS, IF IT COMES IN IN A WAY THAT COULD VIOLATE DUE PROCESS RIGH T.

AND THE U.S. SUPREME COURT HAS NOT ADDRESSED THE DUE PROCESS AR GUMENT I N THIS. THE CLOSEST IT CAME WAS IN THE MUD DLE SON CASE, A '88 CASE, WHERE IT SAYS THIS PASSES ABUSE OF DISCRETION BECAUSE OF THE LI MITING INSTRUCTION, THE FED ERAL 403 BALANCING AND NOT MAKING I T A FEAT URE.

CHIEF JUSTICE: U SUALLY WHEN WE THINK OF DISC RETION IT IS SOMETI MES USED AS ANYTHING GOES, AND THAT IS , I WANT TO MAKE CLEAR AS W E SIT HERE, WE ARE TALKING ABOUT A VERY

TIGHTLY-REGULATED DISCRETION.

BUT DISCRETION IS A MUCH DIFFERENT STAND ARD THAN A DUE PROCESS VIOLAT ION, AND I WOULD JUST SAY THAT THIS IS AN ABUSE OF DISCRETION RULE NOT A DUE PROCESS VIOLATION.

CHIEF JUSTICE: USER TIME IS UP BUT JUST TEST - - YOUR TIME IS UP, BUT JUSTICE BELL HAS A QUESTION.

IN ADD ITION TO THE BALANCING TEST, DO YOU AG REE OR DISA GREE THAT THE LIM ITING INSTRU CTION AND NONCENTRALALITY, NOT MAKING IT CENTRAL TO THE ISSUE OF THE CASE, ARE ALL NECESS ARY?

THEY ARE NECESSARY BUT , AGAIN , SUBJECT TO CONTEMPORANEOUS OBJECTION, SHOULD COUN SEL REQUEST A LIMITING INSTRUCTION, THAT IS STILL SUBJECT TO COUNSEL REQUESTING THAT , BUT I WOULD SAY THEY ARE STILL IN THE WHOLE A BALANCING ACT.

ARE YOU SUGGESTING THAT IS BY DEFENSE COUNSEL , ALS O?

ON DIRECT AP PEAL , YES , I WOULD.I WOULD, ALSO, JUST POINT OUT BRIE FLY THAT MY COUNSEL HAS NOT RA ISED THE OTHER SIX ISSUES THAT I WOULD O BTO HIM RAISING THEM ON HIS REP LY .

CHIEF JUSTICE: WE WILL RELY ON THE BRIEFS ON THE ISSUES.

THANK YOU. WELL, THE BOO KER ISSUE DID JUST COME UP . NOW , W ITH REGA RD , ONE THIN G I WAS NOT ABLE TO F ULLY GET OUT WAS WHY THE COLLAT ERAL ACT IN THIS CASE WAS DIFFERENT.I WANT TO GO BACK AND DO THAT VERY BRIEFLY.

CHIEF JUSTICE: DO Y OUWANT A CHART?

WELL . I GUESS SO. NO. IN THE COLLATERAL CASE , THE ALLEGED VICTIM WAS MUCH OLDER. THE COLLATERAL ACT OCCURRED 15 YEARS IN THE P AST . AND THE TYPE OF SEXUAL ACTS WERE DONE , WERE ALSO DIFFERENT. AND IT WAS IN THE COLLATERAL ACT WAS IN THE NONFAMILIAL CONTEXT. AND THAT REQUIRES G REATER UNIQUENESS AND SIMILARITY.

BUT WE D O AGREE THAT THEY WERE BOTH MALE CHILDREN , ONE NINE AND ONE BETWEEN 12 A ND14.

CORR ECT.

CORRECT.

IT WAS AT NIGHT IN THE BEDROOM IN THE HOME , BEC AUSE THE JUDGE LIMITED THE INCIDENT IN THE CHAM BERS TO THE TWO INCIDENTS S THAT ALLEGEDLY OCCURRED IN THE CHILD'S HOME.

YES.

AND THIS INC IDENT BE FORE OCCURRED IN THE CHILD'S HOME.

YES.

WH ILE BOTH CHI LDREN WERE IN BED.

YES.

AND IT WAS ANAL TOUCHING OR PE NAL TOU CHING OF AN US.

I BELIEVE IN THE C RIME CHARGED, IT WAS TOUCHING AND IN THE COLLATERAL ACT IT WAS PENETRATION .

OK AY . THERE WASN'T DIG ITAL PENETRATION?

IN THE COLLATERAL ACT

ALLEGED UNDERLYING HERE IN THIS CASE. THAT HE FELT HIS FI NGER ON HIS ANUS. IT MAY NOT HAVE BEEN PENETRATION BUT IT WAS THE FINGER.

YES. THE SIMILARITY I AM TRY ING TO DRAW IS THE CR IME CHARGED USED HIS FIN GER. IN THE COLLATERAL ACT HE USED HIS PENIS , AND THAT ISTHE DISTINCTION I AM TRYING TO MAKE.

CHIEF JUSTICE: THAT M IG HTGO TO WHETHER IT BECOMES UNDULY PREJUDIC IAL , BECAUSEALL OF A SUDDEN YOU H AVE SOMETHING THAT IN THE JU RY'S MIND IS O H , MY GOOD NESS , HE DID THIS. AND THAT IS , BUT THAT , THE JUDGE CAN HAVE SEP ARATION.

CORRECT, AND I WOULD LOO K TO CONCLUDE THAT, BECAUSE THE JURY WASN'T INSTR UCTED TO FIND THIS COLLATERAL A CTBEYOND A REASONABLE DOUBT,IT IS A FUNDAMENTAL STRUCTURAL ERROR.

YOU WERE TALKING PREVIOUSLY THAT THIS WAS NOT A FAMILIAL ADD MOST FEAR . ATMOSPHERE. AFTER ENAC TMENT OF THIS RULE , DOES THAT FAM ILIAL , NONFAMILIAL DISTINCTION STILL ALY ?

I GUESS IT DEPENDS ON HOW THE COURT RULE S AS TO WHETHER THE STATUTE IS UPHELD OR NOT. I MEAN, IF THE STATUTE STA YS AS EXISTED, I WOULD, IF IT IS ALLOWED BY THIS COURT , I WOULD HOPE THAT THAT W OULDBE PART OF THE SIMILARITY , A PART OF THE BALANCING REQUIREMENT IN WHI CH IT WOULD BE FOCU SED ON THE SIMILARITY.

I UNDERSTAND IF YOU P UT IT AS PART OF A BALANCING EQUATION, BUT WHAT IS THE PURPOSE BE HIND REQUIRING LESS SIMILARITY, WHEN IT I S A FAMI LIAL CON TEXT THAN WHE N IT IS NOT?

WELL , WE ARE GOING BACK TO THE COURT'S PRIOR C ASE LAW.

YES. RIGHT .

ON THAT . I DON 'T HAVE A LI ST. IT IS PROBABLY ADDRESSED IN SAFF ERROR HERRING . MAYBE NOT THE PAST C ASES , BUT BASICALLY , I DON'T HAVE IT AT THE TIP OF MY TONG UE AS I STAND HERE, BUT ESSENTIALLY WHEN IT IS A NONFAMILIAL ACT , IT IS PROBABLY MORE RI SK OF ER ROR, MORE RISK OF THAT ACT NOT OCCURRING, MORE RISK OF A CHILD LYING POSSIBLY.WE WOULD HAVE TO GO AND LOOK BACK AT THE COURT'S PAST LOGIC ON. THAT I HAVE NOTHING FURT HER.

CHIEF JUSTICE: BEFORE YOU SIT DO WN , YOU SA ID YOU W ERE PRO BONO COUNSEL D THE COURT AOINT?

NO. I AM REPRESENTING MR . McCLEAN FREE ON MY OWN BEHALF, ON MY OWN VOLITION.

CHIEF JUSTICE: WE THA NK YOU FOR THAT AND THANK , THIS IS A EXAM PL E , I THINK , OF AN ORAL AR GUMENT THAT MAKES THE COURT VERY PROUD OF BOTH ADVOCATES , BEING VERY RESPONSIVE TO OUR QUESTI ONS , AND GOOD BRIEFING, AND W E THANK BOTH THE STATE AND T HEDEFENDANT FOR THAT .

THANK YOU.

CHIEF JUSTICE: COURT WILL TAKE ITS MOR NING RECESS OF 15 MINUTES , RETUR N FOR THE LAST TWO CASES.

MARSHAL: P LEASE RISE.