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**Theodore Rodgers, Jr. V. State of Florida
Docket Number: SC04-1425**

MARSHAL: PLEASE RISE. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT S PLEASE BE SEATED.

CHIEF JUSTICE: THE LAST CASE ON THIS MORN ING'S DOCKET IS A DIRECT DEATH APPEAL OF THE ODORE RODG ERS VERSUS THE STATE OF FLORIDA. PARTIES READY?

YES, YOUR HONOR.

CHIEF JUSTICE: ALL RIGH T. MR. WULCHAK , YOU CAN PRO CEED.

MAY IT PLEASE THE COURT. MY NAME IS JA MES WU LCHAK , ASSISTANT PUBLIC DEFENDER FROM DAYTONA BEACH, AND WE REPRESENT THE APPE LLANT THEODORE RODGERS J R., I N THIS APPEAL FROM HIS CONVICTION FOR THE FIRST-DEGREE MURDER OF HIS WIFE AND THE RESULTING DEATH SENTENCE UPON THIS MILDLY RETARDED 64-YEAR-OLD MAN. WE DO NOT ACTION CUTE THE MENTALLY RETARDED , SO SAID THE UNITED STATES SUPREME COURT? ATKINS VERSUS VIR G, IN 200 2.

CHIEF JUSTICE: I WA NT TO MAKE SURE. YOU HAVE SE VERAL ISSUES. CAN YOU TELL THE COURT WHICH ISSUES YOU INTEND TO ARGUE AND IN WHICH OR DER.

YES, YOUR HONOR. WE WOULD LIKE TO FO CUS THIS MORNING ON THE MENTAL RETARDATION ISSUE , P OINT NUMBER 4, AND REST ON THE BRIEFS ON THE REMAINDER ISSUES .

JUSTICE: IF IT IS OKA Y WITH YOU, I WOULD LIKE YOU TO ALSO ADDRESS THE CRAWFORD ISSUE.

JUSTICE: AND PROPORTIONAL

CHIEF JUSTICE: YOU HAVE TO UNDERSTAND THERE ARE MULTIPLE ISSUES IN THIS CASE. I AM NOT SURE THAT MENTAL RETARDATION IS YOUR STRONGEST ISSUE BURKES STA RTWITH THAT IF THAT IS WHAT YOU WANT .

THANK YOU, YOUR HO NOR. WE WOULD LIKE TO FOCUS ON AT LEAST INIT IALLY , POINT NUMBER FOUR , THEO DORE RODGERS JR. IS IS NOT ELIGIBLE FOR THE DEATH SENTENCE , SINCE EVEN AS T HETRIAL JUDGE FOUND, HE WAS MILDLY MENTALLY RET ARDED .

JUSTICE: WELL , T HEEVIDENCE AT TRIAL WAS , ASSUMING THE IQ LE VEL , THERE WAS CERTA INLY , WAS THERE NOT COMPETENT SUBSTANTIAL EVIDENCE ABOUT HIS ABIL ITY TO AC T IN THE COMMUNITY, AND THAT IS O NE OF THE THINGS THAT YOU HAVE TO SHOW , WH IC H IS THE SE COND PRONG, AND THEN THE THIRD PRONG, WHICH IS ON SET BEFORE AGE 1 8. WHOSE BURDEN IS IT TO DEMONSTRATE THAT PRONG , BECAUSE APPARENTLY THERE WAS NO EVIDENCE INTROD UCED EITHER WA Y, SO IS THAT THE DEFENDANT'S BURDEN TO S HOW AS PART OF MENTAL RETARDATION, OR IS THAT THE STATE'S?

UNDER THE STATUTE , ITSAYS THAT IT IS THE DEFENDANT'S BURDEN TO S H OW.

JUSTICE: SO IF THE DEFENDANT PRESENTS NO EVIDENCE OF ONSET BEFORE 18 , HASN'T HE AUTOMATICALLY FAILED TO DEMONSTRATE ONE OF THE PRONGS OF MENTAL RETARDATION?

TWO THINGS. FIRST OF ALL WE ALSO ARGUE THAT THE STATUTE IS UNCONSTITUTIONAL, IN THAT IT DOES SHIFT THE BURDEN TO THE DEFENSE, AND THE BURDEN UNDER RING AND APPRENDI , SHOULD BE ON THE STATE , BEYOND, TO SHOW HE IS NOT MENTALLY RETARDED BEYOND A REASONABLE DOUBT. SECONDLY --

JUSTICE: IF WE WERE TO ACCEPT THAT ARGUMENT , COULD YOU NOT ALSO APPLY THE SAME ARGUMENT TO MENTAL ILLNESS , THAT THE STATE WOULD HAVE TO PROVE THAT SOMEBODY IS COMPETENT INSTEAD OF HAVING THE PRESUMPTION OF COMPETENCY?

I --

JUSTICE: WHY SHOULD THERE NOT BE A PRESUMPTION OF NONMENTAL RETARDATION?

IF THE ISSUE IS RAISED BY THE DEFENDANT, IF IT IS NOT CONCEDED BY THE DEFENDANT , THE BURDEN OF PROOF SHOULD STATE TO PROVE THAT HE IS NOT. IF THE DEFENDANT DOES NOT RAISE THE ISSUE , PRESENTS NO TESTIMONY ON IT , THEN THE BURDEN IS NOT ON THE STATE. GETTING BACK TO JUSTICE CANTERO'S QUESTION , TWO THINGS , FIRST OF ALL REGARDING THE ONSET PRIOR TO THE AGE OF 18 , THROUGH NO FAULT OF THE DEFENDANT, THE RECORDS FROM RURAL ALABAMA, WHERE HE GREW UP IN THE '40s AND '50s WERE SIMPLY NOT AVAILABLE. WHEN HE GREW UP, THEY DIDN'T KEEP RECORDS FOR BLACK CHILDREN IF THAT IS WRONG AND IF IT IS UNCONSTITUTIONAL FOR PLACING THE BURDEN ON THE DEFENDANT, THAT IS SOMETHING NOT FOR NOW.

HOW CAN YOU BE FAULTED FOR NOT --

JUSTICE: I AM NOT SAYING FAULTED. I AM SAYING HE HAS TO PROVE.

FIRST OF ALL, WE HAVE TESTIMONY FROM DR . MING AND ALSO --

JUSTICE: WAIT A MINUTE. EVEN IF THE RECORD HAD BEEN DESTROYED, COULDN'T THE DEFENDANT HAVE BROUGHT IN SOMEONE, HIS FAMILY OR FRIENDS OR TEACHERS OR WHATEVER, WHO MAY HAVE BEEN ABLE TO TALK ABOUT HIS LIFE DURING THAT TIME , TO DEMONSTRATE ? ONSET BEFORE THE AGE OF 18?

AS THE EXPERTS STATED AND ALSO THE DFM- 4 ALSO STATES , LAY PEOPLE ARE NOT QUALIFIED TO GIVE THIS OPINION. WHEN YOU ARE DEALING WITH MILDLY MENTALLY RETARDED PEOPLE AS OPPOSED TO --

JUSTICE: SO WHAT YOU ARE ASKING US TO DO IS JUST ACCEPT, THEN, THE FACT THAT LAY PEOPLE CAN'T DISCUSS IT THERE IS NO RECORDS TO DISCUSS IT, SO WE HAVE TO ASSUME THAT HE IS --

NO, MA'AM.

JUSTICE: EXCUSE ME. THAT WE ARE TO ASSUME , WITHOUT ANY EVIDENCE TO SUPPORT IT, THAT HE IS, THAT THERE WAS AN ONSET OF MENTAL RETARDATION PRIOR TO AGE 18.

NO, YOUR HONOR. WE ARE NOT SAYING THAT. WE HAVE TESTIMONY FROM DR . MING THAT SAYS IN THIS SITUATION WHERE THERE ARE NO RECORDS AVAILABLE, YOU HAVE TO EXTRAPOLATE BACKWARDS , AND SEE , DETERMINE WHETHER THE DEFENDANT HAS ALWAYS BEEN FUNCTIONING AT THIS LEVEL, AND IF THERE IS NO EVIDENCE OF ANY BRAIN INJURY AFTER AGE 18 , THEY , THE EXPERTS --

JUSTICE: WHAT DO YOU DO TO EXTRAPOLATE BACK?

IF YOU SHOW , ARE AB LE TO DETERMINE THAT THERE HAVE BEEN NO TRA UMAS TO THE HEAD , BRAIN INJURIES, EVENTS THAT OCCURRED AFTER 18 TO CHA NGE HIS MENTAL CAPA CITY , THEN YOU CAN ASSUME THAT HE HAD THIS PRIOR TO AGE 18. DR. MINGS STATED THAT. ALSO DR. PRI CHARD AND PARNELL, ALSO , INDICATED THAT THERE WAS NO EVIDENCE HERE, THAT HE HAD ANY BR AIN INJURY .

JUSTICE: MY RECOLLECTION OF THE RECORD IS THAT MINGS SAID THAT THE PRONG WAS MET BECAUSE THERE WAS NOEVIDENCE TO THE CONT RARY.

CORRECT, YOUR HONOR.

JUSTICE: BUT --

SO THIS IS AN AC CEPTED THING THAT THEY HAVE TO EXTRAPOLATE BACKWARD.THERE ARE NO RECORDS. IF YOU CAN SHOW THAT THERE HAS BEEN NO BRAIN INJURY , ANYTHING THAT OCCURRED AFTERTHE AGE OF 18 TO CHAN GE THE DEFENDANT'S FUNC TIONING AND ALL THE EX PERTS AG REE , YOUR MENTAL FUNCTI ONING PRETTY MUCH STAYS THE SAME THROUGHOUT YOUR LIFE , UN LESS YOU HAVE DEMENT IA OR SOME TYPE OF BRA WN INJURY.

JUSTICE: S O WAS THERE THAT AFFIRMATIVE SHOWING OF NO SUBSTANTIAL SUB STANCE USE OR BRAIN TRAU MA OR WHATEVER?

YES , YOUR HO NOR. THERE WAS A SHOWING. THERE WAS NO EVIDEN CE OF ANY TYPE OF BRAIN INJURY AFTER THAT DR . OLANDER TESTIFIED FOR THE STATE , INDIC ATED INCORRECTLY THAT THE ME DICAL RECORDS FROM THE DEFENDANT'S SELF? CONFLICTED GUNSHOT WOUND IMMEDIATELY AFTER THIS CR IME , SHE STATED THAT THERE WAS EVIDENCE THAT THERE WAS BRAIN INJURY. HOWEVER , DR . MINGS READ INTO THE RECORD THE REPO RTS OF THE MRI AND THE TREA TING PHYSICIAN, SAYING THAT THERE WAS NO BRAIN INJURY. THE GUN SHOT WOUND WENT INTO HIS MOUTH AND EX ITED THROUGH HIS NAVAL.

WAS THERE TESTIM ONY TO THE CONTRARY, THAT FROM THE TIME OF THE TESTIMONY TO THE TIME OF THE OFFENSE , THATTHERE WAS NO OTHER BRAIN TRAUMA OR SUBS TANCE ABUSE THAT CA USED DAMA GE TO T HEBRAWN?

YES. HE SPOKE TO THE FAMILY FRIENDS AS MUCH AS W ERE AVAILABLE.HE REVIEWED ALL OF THE RECORDS THAT WERE AVAI LABLE AND THERE WAS NO BRAIN INJURY THAT HE WAS ABLE T O FIND AFTER THAT .

CHIEF JUSTICE: WELL, LET'S GO TO THE 18-YEAR-OLD SITUATION OR ONSET BEFORE 18. I GU ESS IF WE WERE , F ELT COMFORTABLE TO , THAT HE MET TWO OF THE OTHER PRONGS , AT LEAST WE WOULD BE GO ING, WE MIGHT LOOK AT THAT IN A DIFFERENT LIGHT. GIVE ME YOUR BEST ARGUMENT ABOUT THE ADAPTIVE BEHAVIOR SKILLS. IT LO OKS TO ME LIKE THIS , THE PIC TURE THAT I HAVE AND COMES OUT FROM JUDGE SUPER I'SORD ARE AS WELL, I S -- JUDGE PERRY'S ORDER AS WELL , IS A PERS ON WITH A VERY , VERY Y IS LIMITED ED UCATION THAT GR EW UP IN THE SEGREGATED SOUTH AND DID NOT GO VERY FA R IN SCHOOL, BUT THAT FOR ALL INTENDS S ANPURPOSES, FUNC TIONED LIKE ESSENTIALLY -- INTE NTS AND PURPOSES, FUNCTIONED ESSENTIALLY AS, QU OTE , A NORMAL PERSON, SO TELL ME THE BEST ISSUE ON WHY THE COURT'S FINDINGS AS FAR A S THE ADAPTIVE SKILLS AND THAT PRONG , WAS CLEARLY MET IN THIS CASE .

AGAIN, DR . MENT ION WAS THE ONLY ONE -- DR . MINGS WAS THE ONLY ONE THAT CONDUCT ADD THOR OUGH INVESTIGATION INTO THIS, REVIEWING ALL OF -- CONDUCTED A THOROUGH INVESTIGATION INTO THIS , REVIEWING ALL OF THE INFORMATION AND RECORDS THAT WERE AVAILABLE. THE OTHER DOCT ORS TESTI FIED THERE WAS A PRO BLEM WITH A SECOND PRONG

OF FUNCTIONING. DR. PRICHARD AND PARNELL USED THE VINELAND TEST, WHICH IS DESIGNED TO SCORE CHILDREN UNDER THE AGE OF 18. AS DOCTORS TESTIFIED AT TRIAL AND AS THE DSM-4 CLEARLY STATES, IT REFERS TO HOW EFFECTIVELY AN INDIVIDUAL CAN COPE WITH COMMON LIFE DEMANDS AND HOW WELL THEY MEET THE STANDARDS OF PERSONAL INDEPENDENCE, EXPECTED OF IS SOMEONE IN THEIR PARTICULAR AGE GROUP, SOCIOCULTURAL BACKGROUND, AND COMMUNITY SETTING.

JUSTICE: BUT DON'T WE HAVE EVIDENCE HERE THAT THIS MAN RAN A BUSINESS? DIDN'T HE HAVE SOME KIND OF, WAS IT AN IRRIGATION BUSINESS?

YES, YOUR HONOR. THERE WAS.

JUSTICE: AND THEN HE, PRIOR TO EVEN THAT, HE RAN SOME OTHER KIND OF BUSINESS, MAYBE A -- RAN SOME OTHER KIND OF BUSINESS, MAYBE A RESTAURANT, I BELIEVE, THAT THIS MAN GAVE PEOPLE QUOTES FOR THE JOBS THAT HE ACTUALLY -- THAT HE DID. HE ACTUALLY PERFORMED THE WORK THAT WAS DONE, AND ALL OF THIS, ALL OF THESE THINGS APPLY TO THE EVALUATION OF THE ADAPTIVE FUNCTIONING.

DOCTOR PRICHARD UTILIZED THREE INAPPROPRIATE PEOPLE TO GATHER THIS INFORMATION. THEY WERE NOT FAMILIAR WITH THE DEFENDANT'S LOW SKILL LEVEL WITH SUFFICIENT DETAIL. HE USED THE VEHICLE SOMETIME'S DAUGHTER -- HE USED THE VICTIM'S DAUGHTER WHO HAD A GRUDGE AGAINST THE DEFENDANT AND WHO TOLD DR. PRICHARD THE EXACT OPPOSITE OF WHAT SHE STATED IN HER DEPOSITION.

THERE IS NO EVIDENCE IN THE RECORD THAT HE RAN AN IRRIGATION SYSTEM THEN?

THERE WAS EVIDENCE IN THE RECORD THAT HE WORKED IN AN IRRIGATION BUSINESS, BUT HE HAD A BUSINESS PARTNER WHO RAN THE BUSINESS END OF THE DEAL. HE HAD NO CHECK ACCOUNT. HE WAS UNABLE TO WRITE A CHECK.

DEMAKE THE ACTUAL QUOTES, FOR WORK THAT WAS TO BE DONE, TO THE CUSTOMERS?

HE WENT OUT AND LOOKED AT THE WORK AND DID SEE HOW MUCH IT WOULD COST. THERE WAS TESTIMONY THAT THIS WAS, AND AS WELL AS HE RAN, ALSO, A LUNCH COUNTER, AND THAT, THE TESTIMONY INDICATES HE WAS ONLY ABLE TO DO THESE THINGS BY MEMORIZATION. FOR EXAMPLE IN THE RESTAURANT BUSINESS, HE COULD NOT PLAN A MENU. HE COULD ONLY -- A MENU. HE COULD ONLY MEMORIZE MENUS FROM HIS WORK AT MORSE'S AND REGURGITATED IT IN THE BUSINESS. HE DID NOT RUN THE BUSINESS ASPECTS OF IT.

JUSTICE: THE DIFFICULTY WE GET INTO AT THIS LEVEL AND OF COURSE WE NEED YOUR HELP, IS THAT WE APPEAR HERE, ON APPEAL, NOW, TO BE RETRYING FACTUAL ISSUES, AND THAT THERE IS EVIDENCE ON BOTH SIDES OF IT, SUBSTANTIAL EVIDENCE ON ONE SIDE THAT, SO HELP ME WITH THAT, IN TERMS OF THAT PERHAPS YOU WOULD CONCEDE THAT THERE APPEARS TO BE AT LEAST, LAY TESTIMONY THAT WOULD CONFLICT WITH THE DETERMINATION THAT HE COULDN'T FUNCTION AT AN APPROPRIATE AGE LEVEL HERE, THAT THE TRIAL COURT COULD RELY ON, THEN, AND SAY, WELL, YOU KNOW, BASED ON WHAT I HAVE HEARD AND THE EVIDENCE, YOU KNOW, DO YOU UNDERSTAND MY --

YES.

JUSTICE: SO HELP ME WITH THAT, BECAUSE ORDINARILY WE COME OUT IN THIS ROUTINE EVALUATION OF SAYING, WELL, SINCE THERE IS EVIDENCE ON THIS SIDE, IT WAS UP TO THE --

WE SUBMIT AND THE LAW STATES THERE HAS TO BE COMPETENT SUBSTANTIAL EVIDENCE, BECAUSE OF THESE DEFECTS THAT I HAVE MENTIONED, THE INAPPROPRIATE TESTING, THE

INAPPROPRIATE NORPS THEY COMPARED IT TO -- NORMS THEY COMPARED IT TO , ONE OF THE TESTS GIVEN IT BY -- GIVEN BY ONE OF THE DOCTORS WAS USING AN INSTRUMENT USED FOR INSTITUTIONALIZED MENTALLY RETARDED PEOPLE.

JUSTICE: WHAT I AM ASKING IS ABOUT THE EVIDENCE FROM THE EXPERTS , i.e. TESTIMONY BEFORE THE JUDGE BY LAY PEOPLE, EITHER EVIDENCE OR OTHER, THAT HE WAS FUNCTIONING .

THERE WAS EVIDENCE FROM TWO WITNESSES , ONE THE VICTIM'S DAUGHTER AND THE SECOND ONE FROM THE VICTIM 'S FORMER GIRLFRIEND THAT PART ODD BAD TERMS. THEY BOTH GAVE INACCURATE INFORMATION TO THE DOCTORS. FOR EXAMPLE , THE DAUGHTER SAID THAT HE HAD HIS OWN CHECKING ACCOUNT. THE EX-GIRLFRIEND SAID HE PAID THE BILLS FROM A CHECK ACCOUNT. DR. PRICHARD SAID I DIDN'T KNOW HE DIDN'T HAVE A CHECKING ACCOUNT. I DIDN'T KNOW HE COULDN'T WRITE A CHECK. THAT WOULD HAVE MADE A DIFFERENCE, PER HAPS, IN MY DIAGNOSIS .

CHIEF JUSTICE: BUT IT DOES SOUND LIKE THAT IS GOING TO THE WEIGHT. THIS GOES INTO YOUR, I JUST WANT YOU TO TOUCH ON THE CRAWFORD ISSUE AS IT PERTAINS TO THESE TESTS THAT ACTUALLY BOTH EXPERTS PERFORMED , THE VINE LAND ADAPTIVE BEHAVIOR SCALE AND THE INTERVIEWS THAT MINGSPERFORMED. ARE YOU SAYING THAT , UNDER CRAWFORD, THAT NO LONGER CAN AN EXPERT TESTIFY , BASED ON HIS OR HER INTERVIEWS WITH OTHER INDIVIDUALS?

NO. AS LONG AS THE STATUTE SAYS AS LONG AS THE DEFENDANT HAS THE ABILITY TO CONFRONT THESE WITNESSES .

CHIEF JUSTICE: SO DOES THAT MEAN THAT EVERY WITNESS WHO IS RELIED ON HAS TO TESTIFY AT TRIAL?

NO. THEY JUST HAVE TO BE AVAILABLE TO BE CONFRONTED BY THE DEFENSE. WE WOULD SUBMIT .

CHIEF JUSTICE: WASN'T THAT DONE IN THIS CASE WITH REGARD TO THE INTERVIEWS?

YES , AND THAT IS WHEN IT WAS APPOINTED OUT , AND WE SUBMIT THAT IT IS NOT JUST WEIGHT OF THE EVIDENCE ARGUMENT BUT IT IS WHETHER THERE IS COMPETENT , SUBSTANTIAL EVIDENCE. THESE TWO WITNESSES LIED, ESSENTIALLY, TO THE PHYSICIANS, AND THESE PHYSICIANS BASED THE IR REPORTS ON THESE LIES .

JUSTICE: DIDN'T MOST OF THESE WITNESSES, ALSO , TESTIFY IN THESE PROCEEDINGS? WERE THEY , WEREN'T THE GIRLFRIENDS AND THE DAUGHTER AND ALL THESE PEOPLE PENALTY-PHASE WITNESSES HERE?

NO. THE ONE GIRLFRIEND DID NOT TESTIFY, THE ONE THAT RAN THE LUNCH COUNTER WITH HIM DID NOT TESTIFY. THE VICTIM'S DAUGHTER TESTIFIED IN THE BUILT GUILT PHASE AND ONLY -- IN THE GUILT PHASE, AND ONLY AT PENALTY PHASE GAVE A VICTIM IMPACT STATEMENT, SO SHE DID NOT TESTIFY TO THESE THINGS DURING THE TRIAL .

JUSTICE: AS FAR AS THE CRAWFORD ISSUE IS CONCERNED, THEN, ARE YOU CONCEDING THAT IT WAS ALL RIGHT FOR THE MEDICAL EXPERTS TO CONSIDER THESE REPORTS OF THESE LAY WITNESSES?

AS LONG AS THE WITNESSES ARE AVAILABLE FOR CONSULTATION.

JUSTICE: ARE YOU CONCEDING THAT THEY WERE AVAILABLE, ALSO?

YES.

JUSTICE: SO THERE REALLY ISN'T A C RAWFORD ISSUE. IT IS A CREDIB ILITY ISSUE.

NOT AS TO T HESE WITNESSES , BUT WE SUBMIT , AGA IN, IT IS NOT COMPETENT SUBST ANTIAL EVIDENCE, WHERE THESE WITNESSES LIED TO THE PHYSICIANS.

JUSTICE: ORDINARILY I T WOULD BE VERY DIFF ICULT FOR US AFTER AN EVALUA TION HAS BEEN MADE BY THE TRIAL COURT , TO SECOND-GUESS , AND TO SAY , WELL, I AM DETERMINED -- I HAVE DETERMINED THAT THIS WAS ALL RIGHT FOR THE EXPERTS TO EVALUATE THESE STATEMENTS AND REPORTS OF THE RELATIVES OR --

BUT THERE WERE DE POSITION TESTIMONY REFERRED TO , INTRODUCED, OF THE VICTIM'S DAUGHTER, SAYING THE EXACT OPPOSITE OF WHAT SHE T OL D THE PHYSIC IAN, SO HOW CAN THIS COURT CONDONE A WITNESS LYING TO A PHY SICIAN, IN ORDER TO GET THEM TO GIVE THE DIAGNOSIS THEY WA NT?

CHIEF JUSTICE: I AM V ERY CONCERNED ABOUT THIS WHOLE ISSUE, THAT THIS IS THE FIRST TIME OR ONE OF THE FIRST TIME WE ARE CONFRONTING ON DI RECT APPEAL , RETARDATION.WE HAD HOPED AND I WOULD THINK THAT THE U.S. SUPREME COURT WOULD HOPE , YOU HAVE AGE, AND YOU KNOW, I F THEY ARE UNDER 18 , THEY CAN'T B E EXECUTED. MENTAL RETA RDATION IS C LEAR , IT IS NOT GOING TO BE AS BRIGHT A LI NE. THE OTHER HAND , THIS I DEA THAT IT IS GO ING TO B E COME A BATTLE OF THE EXPERTS BASED ON INTERVIEWS WITH WITNESSES , ISN'T VERY COMFOR TABLE ING -- COMFORT ING, E ITHET , A S TO THE LINE OF WHO IS GOI NG TO LIVE OR WHO IS GOING TO DIE , AND IT LOO KS LIKE DR . MINGS DID HIS OWN INTERVIE WS, A NDBECAUSE HE SAID HE HADN'T LIVED INDEPENDENTLY FOR ANY SIGNIFICANT PERIOD OF HIS LIFE, WITH FA MILY , GIRLFRIENDS AND HIS WI FE. OF COURSE HE ALSO LI VED IN PRISON FOR A PERIOD OF TIME , KILLED HIS , CONVICTED OF MANSLAUGHTER FOR A PRIOR GIRLFRIEND. HOW CAN THAT BE ? MANY PEOPLE DON'T LIVE ALONE FOR PERIODS OF THEIR LIFE. THEY GET MARRIED AFTER THEY GROW UP , THEN THEY LIVE WITH WIVES AND GIRLFRIE NDS OR BOYFRIENDS .

THE FACT THAT HE WAS LIVING WITH THEM ISN'T WHAT WE ARE CONCERNED AB OUT. IT IS WHAT CONDITIONS HE LIVED IN WHEN HE WAS THERE. HE DID NOT PAY THE BILLS. HE DID NOT HAVE A CHE CKING ACCOUNT .

CHIEF JUSTICE: BUTDOESN'T THAT GO T O SOMEBODY WHAT LIMITED EDUC ATION, AS OPPOSED TO MENTAL RETARDATION? AS JUSTICE QUINCE POINTED OUT, TO ME I T IS VERY STRONG THAT A PERSON HAS HIS OWN BUSINESS, AND IT IS NOT JUST LIKE HE MODE LAWNS. IT IS AN IRRIGATION BUSINESS, WHICH --

AGAIN, IRRIGATION BUSINESS. HE WAS LAYING PIPES. HE HAD A PART NER THAT TOOK CARE OF THE BUSINESS ASPECT OF IT, PA ID FOR THINGS.

CHIEF JUSTICE: WHAT D IDHIS PAR TNER SAY ABOUT HOW HE FUNCTIONED AND WHETHER HE IS A SEEMED LIKE A NO RMAL FUNCTIONING PERS ON.

HE COULD DO THE JOB T HAT HE WAS ASSIGNED TO DO.

CHIEF JUSTICE: DID HE NOTICE ANY DEFICIT IN H ISABILITIES TO PERFORM T HETASKS OF DA ILY L IVE SOMETHI NG.

HE DID NOT KNOW THE DEFENDANT'S DAILY LIVING SKILLS. HE NOT ONLY KNEW THAT HE WAS ABLE TO LAY PIPE ESSENTIALLY , A MENIAL JOB S

JUSTICE: BE YOND LAYING PIPE, HE WAS AB LE TO GO OUT AND MEASURE THE DISTANCESAND

THE PAT TERNS THAT WOULD HAVE TO BE DONE , IN ORDER TO IN IS A STALL THESE SYSTEMS. SOMETHING MORE THAN -- I N ORDER TO IN STALL THESE SYSTEMS, SOMETHING MORE THAN MANUAL LABOR.

AG AIN, HE DIDN'T DEAL WITH THE BUSINESS ASP ECT OF IT. HE DIDN'T DEAL WITH PAYING THE BILLS. CHIEF THERE ARE SO MANY PEOPLE IN SOUTO-

CHIEF JUSTICE: THERE ARE SO MANY PEOPLE IN THIS SOCIETY, I MEAN , I DON'T PAY THE BILLS. I DON'T SEE THAT A SIGN O F MENTAL RETARDATION. AGAIN, SOMEBODY WHO IS HAS ONLY GONE TO SECOND OR THIRD GRADE IS GOING GOODING TO HAVE MORE LIMITED ABILITY TO DO -- IS GOING TO HAVE MORE LIMITED ABILITY TO DO CERTAIN THINGS THAN AN EDUCATED PERSON.

AGAIN, HE WASN'T ABLE TO READ, W RITE , HE WASN 'T ABLE TO LIVE ON HIS OW N.

HOW COULD HE BE A HEAD CHEF AT A MORSE ONES CAFETERIA -- AT A MOR RISON 'S CAFETERIA, IF HE IS MENTALLY RETARDED AS YOU ARE POR TRAYSOMETHING.

DR. PR UCH ARRE STED ASSUMED THAT -- DR . PRICHARD ASSUMED, AFTER HEA RING FROM HUSBROTHER THAT HE WAS THE HEAD CHEF.HE ASSUMED THAT HE WAS MORE RESPONSE CYBILL THAN HE WAS , WHEN ALL THAT THE HEAD CHEF -- RESPON SIBLE THAN HE WAS , WHEN ALL THAT THE HEAD CHEF DID WAS COOK THE MEAT. HE WAS NOT IN CH ARGE OF ORDERING SUPPLIES , SE TTING THE MENU. HIS ONLY JOB WAS TO PRE PARE THE MEAT.

JUSTICE: DIDN'T HE H AVE PEOPLE THAT HE SUPERVISED?

AS FAR AS HOW TO COOK THINGS BUT NOT AS FAR AS ANY PLANNING OR BUSINESS PART OF IT.

JUSTICE: THAT IS A PART OF RESPONSIBILITY.YOU ARE NOT T ALKING ABOUT ONE TYPE OF MEAT. IN MORRISON 'S CALF TERIA -- CAFETERIA , THERE ARE NUMEROUS MEATS ARE A NUMEROUS VOL UMES A NDPARTICIPATING IN ACTI VITY THAT IS ABOVE MENTALLY RETARDED.

HE WAS THE COOK , BUT AS FAR AS ANY SUPERVIS ORY CAPACITY THAT HE HAD OVER THEM, OTHER THAN BEING ABOV E THEM IN RANK, THE RE WAS NO TESTIMONY TO THAT .

JUSTICE: WOULD YOU MOVE TO THE ISSUE THAT JUSTICE LEWIS BROU GHT UP, PROPORTIONALITY , AND AS JUSTICE PARIENTE JUST ALLUDED TO, IT APPEARS THAT HE WAS PREVIOUSLY CONV ICTED OF MANSLAUGHTER .

YES, YOUR HO NOR.

JUSTICE: WHEN WAS THAT? HOW LONG BE FORE THIS MURDER?

I --

CHIEF JUSTICE: WASN'T IT IN 1979?

I BELIEV E THAT W ASCORRECT, AND HE HAD A PRIOR ROBBERY IN 19 63 A

JUSTICE: HE WAS IN PRISON FOR A PERIOD OF TIME.

THERE IS NO TESTIMONY TO THAT, AS I UNDERSTAND IN T HERECORD, SO I DO NOT KNOW HOW LONG HE WAS IN PRISON. ON PROPORTIONALITY RE VIEW , THIS CASE INVOLVES ONE SINGLE AGGRAVATING CIRCUMSTANCE , PRIOR CONVICTION.

JUSTICE: ISN'T THIS VERY SIMILAR TO FARRELL? FARRELL INV OLVED , J AC K DEMPSEY FARRELL, A CASE OVER IN OR LANDO , HAD TO DO WITH SHOOTING OF A GIRL FRIEND , AND FARRELL HAD A

PRIOR SECOND-DEGREE MURDER OF ANOTHER GIRLFRIEND . IT SEEMS TO ME THAT IT IS VERY SIMILAR.

YES . THERE WAS THE SI NGLE AGOGREAT V AITING CIRCUMSTANCE -- AGGRAVATING CIRCUMSTANCE , THE PRIOR MANSLAUGHT ER. LOOK ING AT THE FACTS OFTHAT CASE , HE WAS CHAR GED WITH SECOND-DEGREE MURDER, CONVICTED OF MANSLAUGHTER. THERE WAS EVIDENCE THAT HIS GIRLFRIEND HAD STABBED HIMON THAT O C CASION , HAD STABBED HIM PREVIO USLY , HAD SHOT HIM PREVIOUSLY , SO ESSENTIALLY THAT COULD HAVE BEEN THE JU RY FIN DING AN IMPERFECT SELF-DEFENSE HA RKS HE WENT TO O FAR IN IT , SO -- SELF-DEFENSE, THAT HE WENT TOO FAR . SO WE WOULD AS K THIS C OURTTO TAKE THAT INTO CONSIDERATION.

CHIEF JUSTICE: I ASSUME YOU WEREN'T THE TRIAL ATTORNEY, BUT SOMEHOW THEAMOUNT OF TIME HE S PENT I N PRISON FOR THAT , YOU SAID A JURY ALMOST LET HIM OFF , BUT MANSLAUGHTER, W E DON'T K NOW ANYTHING ABOUT WHETHER HE SPENT A YEAR, TEN YEARS , FIVE YEARS, 20 YEARS?

CORRECT, YOUR HONOR .

JUSTICE: CAN YOU ADDR ESS, BECAUSE YOU ARE RAPI DLY RUNNING INTO YOUR REBUTTAL TIME, THE CRAWFORD ISSUES, AND ON THE PRIOR FELONY CONVICTION, THE FORMER POLICE OFFICER AND PROSECUTOR TESTIFIED TO STATEMENTS MADE BY AN EYEWITNESS T O THAT , TE RESA CALDWELL. WAS SHE AVA ILABLE TO TESTIFYAT THE TRIAL?

THERE WAS NO SHOWING BY THE STATE WHETHER SHE WAS AVAILABLE OR UNAVAILABLE, YOUR HONOR.

JUSTICE: SO YOU ARE ARGUING THAT THAT IS A CONFRON TATI ON CLAUSE VIOLATION?

YES, YOUR HONOR. WE ARE. FLOFS TESTIMONY GIVEN TO THE DEFENSE OF HER PRIOR TRIAL TESTIMONY. THEY PROVIDED HER PRIOR DEPOSITION TESTIMONY , BUT NOT THE FULL CROSS-EXAMINATION AT TRIALFROM THE PRIOR OFF ENSE .

JUSTICE: WE STILL HAVE TO DETERMINE WHETH ER IT WAS HARMLESS ERROR, DO WE NOT ?

YES, YOUR HONOR .

JUSTICE: AND DIDN'T THE STATE ALSO INTRODUCE RODGERS ' OWN STATEMENTS ABOUT THAT CRIME AND THEY WERE PRE TTY MUCH CONSISTENT WITH CALDWELL'S?

NO. I BELIEVE THEY WERE INCONSISTENT WITH CALDWELL .

JUSTICE: HOW SO?

CALDWELL WAS SAYIN G THAT THE DEFENDANT WAS THE AGGRESSOR IN THE CASE AND THE DEFENDANT WAS MAINTAINING THAT HE WAS MERELY ACTING TO -- RE ACTING TO HIS GIRLFR IEND , HER VIOLENCE.

CHIEF JUSTICE: BUT IT SEEMS LIK E IT WAS PRETTY , OVERALL IT SEEMED LIKE PRETTY HELP FUL TESTIMONY TO THE DEFENDANT, IN TERMS OF MITIGATING THE PRIOR VI OLENT FELONY.

EX CEPT HE WASN'T FOOT BALL MITIGATE IT FU LLY LIE -- HE WASN'T ABLE TO MITIGATE IT FULLY BY BR INGING OUT EVIDENCE THAT MAY HAVE COME OUT AT THE TRIAL. HE DIDN'T PRY PROI THAT TRANSCRIPT. IT WAS -- HE DIDN'T PROV IDE THE PRIOR TRANSC RIPT. IT WAS UNAVAILABLE. THIS WITNESS IS NOT UNAVAILABLE. THIS TESTIMONY SHOULD NOT HAVE COME IN UNDER CRAWFORD.

YOU ARE SAYING THAT THE MOST DAMAGING ASPECT OF THAT IS THAT HE WAS THE AGGRESSOR AND THAT SHE DID NOT PROVOKE HIM IN ANY WAY . IS THAT IT?

YES, YOUR HONOR. UM-HUM.

JUSTICE: AS TO THE EXPERT TESTIMONY, I JUST WANT TO BE CLEAR , BECAUSE DR . PRICHARD RELIED ON SEVERAL STATEMENTS , AND YOU CONCEDE THAT , AS TO EACH OF THOSE STATEMENTS , THE WITNESS WAS AVAILABLE AT TRIAL TO TESTIFY?

THEY DID NOT TESTIFY. AS I SAID , THE VICTIM'S DAUGHTER TESTIFIED AT THE GUILT PHASE ONLY TO THE EVENTS SURROUNDING THIS AND NOT TO THE BACKGROUND INFORMATION OF THE DEFENDANT, BUT, YES, SHE WAS DEPOSED --

JUSTICE: NOT ONLY HER BUT EVERYBODY THAT HE SPOKE WITH. I WANT TO MAKE CLEAR THAT YOU ARE CONCEDING THAT EVERYBODY WAS AVAILABLE, OR ARE YOU CLAIMING THAT THERE WAS A CRAWFORD VIOLATION AS TO DR. PRICHARD?

NO , WE NOT CLAIMING THAT, BUT WE -- NO, WE ARE NOT CLAIMING THAT , BUT WE ARE CLAIMING IN REGARDS TO THAT, THAT THIS COURT OUGHT TO LOOK AT THE INFORMATION PROVIDED BY DR . PRICHARD AND DETERMINE WHETHER IT WAS ACCURATE OR INACCURATE, WHETHER IT WAS A TRUTH OR A FALSITY .

JUSTICE: HOW DOES THIS COURT DO THAT? I HAVE TROUBLE FINDING HOW THE TRIAL COURT DOES, IT MUCH LESS OUR REVIEW OF THE TRIAL COURT ANSWER FINDINGS. HOW ARE WE SUPPOSED TO GO BEYOND --

THERE IS SWORN TESTIMONY , SWORN DEPOSITIONS BY THE VICTIM 'S DAUGHTER THAT SPECIFICALLY SAID THE EXACT OPPOSITE OF WHAT SHE TOLD DR . PRICHARD , AND ASHLEIGH , THAT IS NOT COMPETENT SUBSTANTIAL EVIDENCE ON WHICH DO BASE THE TRIAL COURT FINDING. IT IS NOT COMPETENT SUBSTANTIAL EVIDENCE FOR THIS COURT TO AFFIRM THAT FINDING.

JUSTICE: SO WHENEVER A WITNESS TESTIFIES TO SOMETHING ON DEPOSITION AND THE EXPERT IS SAYS THAT THAT WITNESS TOLD THAT EXPERT SOMETHING ELSE, WE AUTOMATICALLY HAVE TO CREDIT THE DEPOSITION TESTIMONY AND NOT WHAT THE EXPERT SAID . IS THAT IT?

THEY SAID IT UNDER OATH. DURING THE DEPOSITION TESTIMONY. WHEN THEY WERE TALKING TO THE EXPERT. THEY DID NOT GIVE IT UNDER OATH. THAT IS A CONSIDERATION , AND I BELIEVE THIS COURT NEEDS TO MAKE IN DETERMINING WHETHER IT IS COMPETENT OR SUBSTANTIAL EVIDENCE.

JUSTICE: DOES THE TRIAL COURT NEED TO AUTOMATICALLY SAY THE DEPOSITION GOVERNS?

WHEN YOU HAVE SOMEBODY TESTIFYING UNDER OATH , FACT A , FACT B , AND FACT C , AND THEY HAVE A BIAS AGAINST THE DEFENDANT. THEREFORE THEY TELL THE DOCTOR -- A BIAS AGAINST THE DEFENDANT -- A BIAS AGAINST THE DEFENDANT, THERE FOR -- A BIAS AGAINST THE DEFENDANT , THERE FOR THEY TELL THE DOCTOR INFORMATION THAT IS NOT SUBSTANTIAL OR COMPETENT.

CHIEF JUSTICE: THANK YOU. YOU ARE IN YOUR REBUTTAL.

THANK YOU. ASK THE COURT TO REMAND FOR A LIFE SENTENCE.

MAY IT PLEASE THE COURT. MY NAME IS BARBARA DAVIS. I REPRESENT THE STATE OF FLORIDA . ADDRESSING --

CHIEF JUSTICE: WOULD YOU JUST START WITH PROPORTIONALITY I GUESS YOUR BEST CASE IS ON PROPORTIONALITY, WOULD BE DUNCAN AND FARRELL?

YES, MA'AM.

CHIEF JUSTICE: AND SO THE IDEA IS THAT THIS COURT HAS HELD IS SENTENCES PROPORTIONAL, WHERE THERE IS NOT SIGNIFICANT MITIGATION, SUCH AS STATUTORY MITIGATION, WHERE THE PRIOR IS VIOLENT FELONY WAS A PRIOR MURDER COMMITTED IN A SIMILAR SITUATION, OR IS IT JUST THAT IT IS A PRIOR MURDER?

I --

CHIEF JUSTICE: OR A PRIOR KILLING, I GUESS, BECAUSE THIS ENDED UP BEING NOT MURDER BUT MANSLAUGHTER.

MR. DUNCAN WAS THE PRIOR KILLING AND MR. FARRELL WAS SIMILAR, LIKE A GIRLFRIEND. CHIEF DO WE KNOW HOW LONG, I MEAN, IT APPEARS THAT THIS PRIOR FELONY IN 1979, ALMOST MORE THAN 20 YEARS BEFORE THIS OFFENSE, THAT THERE WAS A PRETTY SUBSTANTIAL SELF-DEFENSE ARGUMENT, AND THAT THE JURY REDUCED THE CHARGE FROM SECOND-DEGREE MURDER TO MANSLAUGHTER. IS THERE ANYTHING IN THIS RECORD ABOUT HOW LONG HE IS SERVED IN THE, HE WAS IN CARDS RATED FOR THAT CRIME?

IT WAS FEW OF YEARS, AND MR. WOODARD TESTIFIED ABOUT THAT IN HIS TESTIMONY. HE WAS THE PROSECUTOR. AND I AM PRETTY SURE IT CAME OUT THROUGH HIS TESTIMONY THAT HE SERVED FIVE YEARS.

CHIEF JUSTICE: HE SERVED A FIVE-YEAR SENTENCE, THE FULL FIVE YEARS. WAS THAT THE IS SENTENCE, OR DID HE HAVE A LONGER SENTENCE?

THE TESTIMONY WAS JUST THAT HE SERVED FIVE YEARS.

CHIEF JUSTICE: SO HE WAS RELEASED IN 1984, AND FROM 1984 UNTIL THE TIME OF THIS CRIME, HE, HE WAS NOT INVOLVED? ANY OTHER CRIMINAL ACTIVITY?

NOT THAT WE KNOW OF. HE LIVED ON HIS OWN. HE WORKED AT MORRISON'S FOR 19 YEARS, AND THEN HE WAS IN THE IRRIGATION BUSINESS WITH MR. CORBETT.

CHIEF JUSTICE: HE WORKED FOR MORRISON'S FOR 19 YEARS, AND I GUESS THIS GOES TO YOUR MENTAL RETARDATION ISSUE. HE DID LIVE ON HIS OWN FOR SOME PERIOD OF TIME?

HE LIVED WITH DIFFERENT WOMEN. AS THE EXPERTS FOUND, HE ALWAYS HAD SIGNIFICANT WOMEN, HE WAS KIND OF A LADIES MAN, I GUESS, AND ALWAYS LIVED WITH WOMEN, BUT THERE WAS TWO YEARS THAT HIS BROTHER ARTHUR, SAID THAT HE HAD LIVED ON HIS OWN.

CHIEF JUSTICE: WHAT I AM CONCERNED ABOUT HERE, BECAUSE WHEN I, FARRELL AND DUNCAN ON THE PROPORTIONALITY ISSUE, IS THAT ALTHOUGH I GUESS THE FACT THAT, WE KNOW THERE IS NO EXCEPTION, BUT THIS APPEARS IT TO BE A MAN THAT HAD BEEN LIVING FAIRLY NORMALLY, IF YOU TAKE THIS, NOT MENTAL RETARDED, THAT HAD, HOW LONG HAD HE BEEN MARRIED TO HIS WIFE?

TWO YEARS TO TERESA.

CHIEF JUSTICE: AND THAT MORNING HE HAD TAKEN THE STEPCHILD TO THE JUVENILE -- HAD GONE WITH THE STEPCHILD TO COURT.

YES.

CHIEF JUSTICE: AND SOMETHING HAPPENED, AND THAT MORNING , WHERE HE FELT THAT HIS WIFE WAS CHEATING ON HIM , BUT HE WAS , CORRECT?

THAT IS WHAT HE SAID.

CHIEF JUSTICE: HOW, THAT HE WENT ANYWAY AND IT WAS VALUE BE TINES DAY THAT HE WENT AND -- VALENTINE'S DAY THAT HE WENT AND BOUGHT A CARD AND FLOWERS FOR HIS WIFE. IS THAT SUBSTANTIATED?

HE TESTIFIED TO THAT. THERE WAS NOTHING FOUND IN THE HOUSE , AS FAR AS THE CARD OR FLOWERS, BUT HE HAD GONE TO THE HOUSE. THE HOUSE WAS RIGHT DOWN THE STREET FROM THE DAYCARE CENTER. HE HAD GONE TO THE HOUSE AND TAKEN EVERYTHING OUT OF HIS SAFE. HE HAD HIS OWN SAFE. HE KEPT ALL OF HIS MONEY THERE, AND HE LIKED TO PAY CASH FOR THINGS , AND HE HAD GONE AND TAKEN ALL OF HIS PAPER OUT OF THERE. WHEN THE INCIDENT HAPPENED IN THE MORNING , HE HAD JUST SAID THAT HE WAS LEAVING. HE WENT BACK TO WORK. HE WORKED ON A JOB WITH THE JACKSONS , AND THEN HE WAS ON HIS WAY TO AN OTHER JOB. MR. CORBETT HAD CALLED HIM. HE NEEDED TO GO DO AN ESTIMATE. HE HAD GONE TO KISSIMMEE , ABOUT A TWO-HOUR --

CHIEF JUSTICE: HE ACTED NORMALLY THAT DAY BUT HE HAD TOLD CERTAIN PEOPLE THAT HE WAS GOING TO KILL HIS WIFE IS?

HE , AT SIX THIRTY -- AT SIX-THIRTY, HE CALLED HIS BUSINESS PARTNER AND SAID I AM TIRED OF THIS AND HE USED A LOT OF PROFANITY. I AM GOING TO KILL HER. I AM GOING TO TAKE CARE OF THIS PROBLEM . NOW, IN THE REPLY BRIEF, THEY BROUGHT UP ABOUT ON CROSS-EXAMINATION, HE WAFFLED A LITTLE ON WHAT CONTACT HE HAD SAID , THEN IN REDIRECT HE CAME BACK AND HE SAID, NO, HE SAID , I AM GOING TO KILL HER.

CHIEF JUSTICE: BUT I AM INTERESTED, WITH THAT BEING A CIRCUMSTANCE , DID THE STATE ATTEMPT TO GET CCP IN THIS CASE?

NO. BUT THERE IS CCP.

CHIEF JUSTICE: WE CAN'T CONSIDER AGGRAVATION THAT HASN'T BEEN FOUND OR EVEN ARGUED, SO FOR SOME REASON THE STATE, IN THE COURSE OF THIS, DIDN'T FEEL THAT THERE WAS ENOUGH TO SHOW THAT THIS WAS SOME INTENTIONAL ACT , UNTIL HE ENDED UP GOING OVER TO AND THEN ENOUGH PREMEDITATION, I GUESS I AM TRYING TO FIGURE OUT WHETHER THIS IS ENOUGH LIKE FARRELL AND DUNCAN TO SAY THAT IT IS PROPORTIONAL, BUT IT TROUBLES ME , BECAUSE IT DOES SEEM THAT THE PRIOR MANSLAUGHTER CONVICTION WAS SO MUCH A SELF-DEFENSE POSSIBILITY, THAT HE SERVED HIS TIME , 20 YEARS HAD PASSED, AND THEN YOU HAVE THIS CRIME, BUT IS THERE ANY OTHER CASES BESIDES FARRELL AND DUNCAN , THAT YOU SAY MAKES IT PROPORTIONAL ?

THERE ARE SEVERAL CASES WHERE THERE WAS A PRIOR MURDER, WHICH WAS THE AGGRAVATING CIRCUMSTANCE , BUT LET ME POINT OUT THAT , IN SLIMY , THIS COURT SAID THAT -- IN SLIMY , THIS COURT SAID THAT YOU CONSIDER ALL THE CIRCUMSTANCES AS FAR AS THE PROPORTIONALITY ANALYSIS, AND THE STATE HAD CCP AND GREAT RISK OF HARM, ALSO. HE SHOT FOUR SHOTS IN A SMALL ROOM, WHERE THERE WERE THREE CHILDREN UNDER THE CRIB AND A BABY IN THE OTHER ROOM. SO WHEN YOU CONSIDER THESE AND IT IS BASICALLY HE HAD COMPLETE -- HE HAD PLEADED SELF-DEFENSE AND TESTIFIED AT THE TRIAL OF BETTY CALDWELL AND GOT MANSLAUGHTER WITH A FIVE-YEAR SENTENCE . HE DID THE SAME EXACT THING HERE. CAME IN AND TESTIFIED TO SELF-DEFENSE . THIS IS NOT A MAN WHO , HE JUST COLDLY WENT AND MURDERED HER. I AM GOING TO GO TAKE CARE OF THE PROBLEM, AND THEN

THINKS HE CAN JUST SAY SELF-DEFENSE AND HAVE ANOTHER FIVE-YEAR SENTENCE .

WAS THE , W AS THERE ANY QUESTIONING OF WHETHER THE EVENT EARLIER IN THE MORNING ACTUALLY OCCURRED OR NOT, OR WAS THAT CONCEDED BY THE STATE, ABOUT THE PRIOR HUSBAND BEING THERE AND RUNNING DOWN THE H A LLWAY CARRYING HIS CLOTHES?

THE CHIL DREN SAID THAT WILLIE B CAME THERE . DeSHAWN AND LIND SEY C AME THERE, THE DA UGHTER, HAD CALLED WILLIE B TO COME P ICK HER UP TO GO GET VALENTINE S , AND SHE WAS WITH HIM WHEN SHE CAME DOWN THE STREET A NDHEARD THE SHOTS IN T HEHOUSE. SHE WAS TALKING TO HER MOM ON THE PHONE, SO I DON'T THINK THERE IS ANY QUESTION THAT SOME THING HA PPENED BETWEEN WILLIE B AND TE RESA .

JUSTICE: HOW WAS WILLIE B DRESSED, ACCORDING TO THE TESTIMONY OF THE OTHER WIT SNEZ? -- WITNESSES?

THE OTHER WITNES SES D IDNOT TALK ABOUT HIM HAVING HIS SHIRT AND SHOES OF F. ONLY MR . RODG ERS TALKED ABOUT HIM COMING OUT OF THE HOUSE AND BU MPING INTO HIM WITH HIS SHIRT AND SH OES OFF. BUT THAT WAS ABOUT NO NE. THIS HAPPENED AT AR OUND 6: 30 OR SIX O'CLOCK AT NIG HT .

JUSTICE: THAT SORT O F FILLS IN THE BLANK, BUT WHAT WE ARE TALKING ABOUT IS THE DEFENDANT IN THE CASE CORROBORATED THAT THE FORMER HUSBAND WAS THERE, AND W HEN HE GOT THERE, THE FORMER HUSBAND RAN OUT OF THE H OUSEWITH JUST HIS PANT S ON A NDCARRYING HIS SHOES SA N HIS OTHER CLOTHES. IS THAT CORRECT?

THERE IS REALLY NO CORROBORATION FOR THAT.

JUSTICE: THAT IS WHAT I WANTED TO ASK YOU. WHAT, THE WHIRN THAT -- THE CHILDREN THAT WERE THERE, AND HOW OLD WERE THE CHILDREN?

AT THE TIME OF THE EVENT, FIVE, SIX SAN EIGHT. AT THE TIME OF TRIAL -- -- FIVE, SIX AND EIGHT. AT THE TIME OF TRIAL - -

JUSTICE: DID ALL OF TH OSE CHILDREN TESTIFY TO THE FORMER EVENTS ? WHAT DID THE FORMER H USBAND , WHAT DID THEY SAY, I F ANYTHING?

JUST THAT HE WOULD COME IN. HE WOULD BE THERE.HE WAS THE EXHUSBAND, AND HE WAS VERY CLOSE WITH ALL OF HER CHILDREN, SO HE WOULD BE THERE AT THE DAYCARE , AND THE DAUGHTER , DESHAWNDA , ALSO SAID THEY HAD A VERY CLOSE RELA TION. HE WOULD COME TO THE DAYCARE .

JUSTICE: AND HOW WAS THEWIFE, WHEN SHE WAS FOUND , HOW WAS SHE FOUND?

FULLY CLOTHE D. THIS WAS SEVEN O' CLOCK AT NIGHT THO UGH. THE EVENT THAT MR . RODGERS SAID HAPPENED WAS AT NOON .

JUSTICE: I AM TALK ING. EARLIER THAT MORNING, H OWDID HE DESCRIBE HOW SHE WAS CLOTHEED?

HE SAID SHE ONLY I N A BRASSIERE ON AND OTHERWISE NOTHING, AND SHE WAS IN THE BATHROOM.

JUSTICE: DID THE CHILDREN COMMENT ON THAT?

NO.NO.

JUSTICE: THEY HAD NO INFORMATION ABOUT THAT .

AND DESHAWNDA DIDN'T SEE HER . AFTEDZ --

JUSTICE: THE STATEMENTS THAT WERE ALL MADE ABOUT NOT TAKING CARE OF HER -- ABOUT TAKING CARE OF HER OR NOT PUTTING UP WITH THIS OR WHATEVER, THEY WERE ALL MADE THAT MORNING, IS THAT CORRECT?

AFTER 6:45.

JUSTICE: AND HE WAS APPARENTLY AL LEWDING TO WHAT HAPPENED EARLIER .

YES , AND AFTER WHAT HAPPENED AND HE SHOT HER AND LEFT, HE W ENT TO THE POOL HALL AND TOLD TWO FRIENDS, I JUST KI LLED TER ESA BECA US E SHE WAS FOOLING AROUND , BUT IN MORE GRAPHIC TER MS .

JUSTICE: WAS THERE ANY AFFIRMATIVE EFFORT BY THE STATE TO DISPRO VE WHAT THE DEFENDANT WAS SAYING HE SAW WHEN HE WENT THERE AROUND NOON HARKS THAT WILLIE B WAS NOT THERE OR HE MAY HAVE BEEN THERE BUT WAS NOT I N THE BATHROOM WITH HER , O R ANY SIGNIFICANT DISPUT ING OF THAT EVENT WHICH ALLEGEDLY SET ALL THIS OFF?

NO. NO. BUT THE TRIAL JUDGE FOUND THAT, IN HIS ORDER , AS FAR AS THE MITIGATION , THAT HE WENT BACK TO WO RK. HE CA LLED HIS OLD FRIEND VERNON AND SAID , OK AY , I WANT TO COME LIVE WITH YOU. AND HE JUST WENT BACK TO WORK, AS H E NO RMALLY DID , AND THEN ACCORDING TO HIS TESTIMONY, WHEN TERESA CALLED HIM, THAT IS WHEN HE WENT BACK TO THE HOUSE. BUT IN THE MEANTIME, HE CALLED MR . COR BETT AND SA ID I AM GOING TO GO TAKE CARE OF THIS PROBLEM. I AM TI RED OF THE INFLAMMATORY, AND I AM GOING TO KILL HER , WHIC H HE DID, AND THEN HE JUST SUBPOENA STEPPED OVER HER WHI LE SHE WAS STILL ALIVE , AND DROWNING IN HER OWN BLOO D, DID NOT CALL 91 1, LEFT IN HIS JEEP AND THEN TOLD HIS TWO FRIENDS, I KILLED H ER BECAUSE SHE WAS FOOLING AROUND WITH WILLIE B.

CHIEF JUSTICE: WHAT A BOUT THE CRAW FORD ISSUE? THAT IS THE , AS PERTAINS TO THE PRIOR VI OLENT FELONY.

FIRST OF ALL , THE TESTIMONY THAT CAME IN , THERE WAS INVESTIGATOR BOTTOMLY, AND HE HAD , THIS IS THE BE TTY CALDWELL M URDER , THE PRIOR VIO LENT FELO NY. I MEAN THERE, IS NO QUESTION THAT THERE WAS A PRIOR VIOLENT FELONY. WE HAD THE JUDGMENT AND SENTENCE AT WHICH TIME WAS ESTABLISHED BEYOND AREASONABLE DOUBT. THIS COURT HAS HELD THAT THE PEOPLE MAY TESTIFY SO THAT THE JU RY MAY AS SESS THE FACTS OF THE PRIOR AND THE CHARACTER OF THE DEFEND ANT.

CHIEF JUSTICE: WHEN WE CAME OUT WITH RODRIGUEZ BEFORE CRAWFORD.

YES. AND --

CHIEF JUSTICE: I MEAN, YOU AGREE THAT CRAWFORD HAS SOME SIGNIFICANT POTEN TIAL EFFECT ON PENALTY PHASE I N THIS, IN DEATH CASES IN THIS STATE .

WELL , I THINK THE ISS UE IS OUR STATUTE PROV IDES FOR HEARSAY IN THE PENALTY P H ASE , AND IS CRAWFORD GOING TO IMPACT THAT? NOW, IN THIS CASE IT DOES NOT, AND I WANT TO POINT OUT THAT THE MOTION TO VACATERATION THE CRAWFORD ISSUE --

JUSTICE: I AM NOT SU RE THAT I UNDERSTAND YOUR ARGUMENT, IS THAT IF THE UNITED STATES SUPREME COURT SAYS THERE IS A CONSTITUTIONAL PROHIBIT ION AGAINST CERTAIN THINGS, THAT SHALL SOMEHOW OUR STATUTE WOULD TRUMP THAT.

NO. WELL, THAT IS THE ISSUE . JUST IS JUST THAT IS WHAT YOU SAID BUT WE HAVE A STATUTE, SO I AM TRYING T O UNDERSTAND, IS SI MPLY BECAUSE WE HAVE A STATUTE, DOES NOT SATISFY THE REQUIREMENTS OF CRAWFORD, DOES IT , ALTHOUGH IT S AYS STATES ARE FREE T O ADDRESS WHAT HE ARSAY IS BUT NOT AS TO HOW IT IS APP LIED , IS IT?

NO, SIR, AND I THINK T HAT IS THE ISSUE, S O WE HAVE A STATUTE THAT ALLOWS HEAR IS SAY, AND THEN THERE I S CRAWFORD. HOWEVER, IN THIS CASE , WE DON'T HAVE A PROBLEM. BECAUSE NUM BER ONE , T HEY KEEP TALKING ABOUT WE DIDN'T SHOW UNAVAILABILITY . THE CRAWFORD ISSUE , OUR TRIAL FINI SHED, OUR PENALTY PHASE FIN ISHED OCT OBER 20 00 , AND -- O C TOBER 2003, AND THE MOTION TO V ACATE , RE LYING O N CRAWFORD, WAS FILED IN MA RCH OF 20 04 , SO CRAWFORD HAD N OTBEEN IS DECIDED AT THE TIME OF OUR PENALTY PHASE .

JUSTICE: BUT EVEN THOUGH CRAWFORD HAD NOT BEEN DECIDED , DIDN'T THEY ST ILL MAKE A CLAI M THAT IT VIOLATE ADD CONFRO NTATION CLAUSE SPOO THEY DID. IN THEIR PRE TRIAL MOT ION --

THE QUESTION IS ISN'T WHETHER CRAWFORD HAD BEEN DECIDED . THEY STILL RAISED THE ISSUE.

THAT IS A GO OD QUESTION, BECAUSE IN THEIR PRETRIAL MOTION, THEY FILED BOILERPLATE MOTI ONS SAYING THAT OUR STATUTE, OUR PENALTY PHASE STATUTE ALLOWING HEARSAY WAS UNCONSTITUTIONAL AND THAT NO HEARSAY SHOULD BE ALLOWE D IN THE PENALTY PHASE.

CHIEF JUSTICE: THAT IS PRETTY GOOD PRESERVATION , SOUNDS TO ME.

BUT THE ONLY OBJECT ION AT TRIAL, WAS I T TO INVESTIGATOR BOTTOM LY AS TO HEARSAY.

IS ISN'T THERE A STATUTE THAT SAYS , AS L ON G AS YOU HAVE PRESERVED IT BY PRETRIAL MOTION , YOU ARE NOT REQUIRED TO REASSERT THE ISSUE AT TRIAL ?

BUT THERE IS ALSO CASE LAW THAT SAYS YOU HAVE TO MAKE A SPECIFIC OBJECTION. THEY WERE JUST S Aying NO HEARSAY AT ALL IN THE PENALTY PHASE, AND THEN WHEN WE PRESENTED, THE RE WAS NO OBJECTION TO MR. WOOD ARD . THERE WASN'T A SPEC IFIC OBJECTION AS TO HEAR IS SAY AS TO INVESTIG ATOR BOTT OMLY.

CHIEF JUSTICE: LET'S JUST ASSUME THAT A VA LID CRAWFORD CLAIM HAS BEEN RAIS ED. CAN YOU ADDRESS THE HARMLESS-ERROR ANALYSIS ?

YES . THAT THERE WAS SOME TESTIMONY THAT , ABOUT WHAT TERESA CALDWELL HAD TESTIFIED ABOUT. SHE WAS T HERE WHEN I T HAPPENED, BUT THE BU LK OF THE TESTIMONY WAS WHAT M R . RODGERS 'S STATEMENT AND TESTIMONY WAS , AND BETTY CALDWELL HAD SHOT HIM TWICEPRIOR.SHE HAD CUT HIM WITH A RAZOR. THE N IGH T OF THE EVENT , SHE HAD COME , SHE HAD BEEN OUT PARTYING WITH SOME GIRLFRIENDS, AND HE GOT UPSET WITH HER. SHE CUT HIM WITH A R A ZOR BLADE, AND HE WENT AND GOT A GUN . NOW , RIG HT THERE INSTEAD OF WALKING AWAY WHEN SHE CUTS HIM WITH A RAZOR BL ADE , G OES AND GETS A GUN , AND HE C OMESBACK IN AND SHE WAS GOING TO THROW A CRYSTAL DISH AT H IMA ND HE SHOT HER . O NE SHOT.

JUSTICE: I S THERE A CONFLICT BETWEEN HER TESTIMONY AS REPORTED BY T HEPOLICE OF FICER AND HIS ACCOUNT OF HOW THAT C RIMEOCCURRED?

NO.

JUSTICE: IN OTHER W O RDS , HER STATEM ENTS AS RECOUN TED BY THE POLICE OFF ICER AND THE PENALTY PHASE HERE , WAS COMPLETELY CONSISTENT WITH WHAT HIS VERS ION OF HOW THAT HAD HA PPENED.

YES. YES .

JUSTICE: IN OTHER WORDS SHE ADMITTED CUTTING HIM AND SHOOTING HIM AND ALL T HOSEKINDS OF THINGS .

NO. THE VI CTIM WAS DE AD. BETTY CALDWELL WAS DEAD AND TERESA CALDWELL --

JUSTICE: NO. NO. AND PRIOR EVENTS THAT LED UP TO HER BEING MUR DERED WAS BROUGHT OUT AND DEFINITELY HARMLESS.

JUSTICE: WITH REGA RD TO THE PROPOR TIONALITY , WOULD YOU SHARE WITH US YOUR INTERPRETATION AND ANALYSIS OF THOSE CASES, FARRELL AND DUNCAN AND THE OTHERS , OF THE SIMILARITIES BETW EEN THE INDIVIDUAL DEFEND ANTS AND THE MITIGATION PRESENT IN THOSE CASES, BECAUSE I S CERTAINLY WE RECOGNIZE THAT IT HAD SIMI LAR AGGRA VATING , ONE AGGRAV ATING F A CTOR. HOW ABOUT THE ME NTAL STATUS , THE BACK GROUND OF THOSE INDIVIDUALS, HOW WOULD YOU ANALYZE THAT AND COMPARE THEM OR DRAW DISTINCTIONS?

WELL , NOW , DON D UNCAN HAD KILLED SOMEBO DY IN PRI SON, AND THEN HE KILLED A GIRLFRIEND, AND MR. FARRELL KILLED TWO SIGNIF ICANT OTHERS. AS FAR AS MI TIGATION , THERE , AND ON MR . DUNC AN, I HAVE TO NOTE THAT THAT HAS GONE BACK FOR A NEW PENALTY PHASE O N INEFFECTIVE ASSISTAN CE OF COUNSEL , SO, BUT, I MEAN IT IS STILL SPRO PORTIONALITY THERE.

ON -- STILL PROPOR TIONAL ITY THERE.

JUSTICE: STILL OPEN.

YES, AND THERE WAS MITIGATION WITH MR . DUNCAN ABOUT DRUGS AND ALL OF THE DIFFERENT MENTAL ISSUES. MR. FARRELL , J ACK DEMPSEY FARRELL , A LOT OF MENTAL ISSUES, BECAUSE YOU REMEMBE R ON THE 3.850, THEY W ERE TALKING ABOUT THE PET SCAN TO EXPL ORE THE MENTAL ISSUES. HE HAS GONE THROUGH 3 .850 NOW, SO THOSE CASES ARE V ERY SIMILAR TO THIS, IN THAT THIS IS A VERY SIMILAR INCIDENT THAT, HE DOES NOT WALK AWAY FROM THE SITUATION WHEN HE CAN. HE GOES AND GETS A GUN , AND HE COMES BACK, AND JUST LIKE HE TOLD MR. CORBETT , HE TAKES CARE OF THE PROBLEM. HE GOT AWAY WITH IT ONCE CLAIMING SELF-DEF ENSE .

JUSTICE: THAT ADD RESSES THE AGG RAVATION FAC TOR. I AM REALLY INTER ESTED IN THE BACKGROUND MITIGATION AND WHETHER THEY TRULY ARE SIMILAR, WHETHER THERE IS SOME DISTINCTIONS , BECAUS E I THINK EVEN THE MOST AR DENT ADVOCATES WOULD RECOGN IZE THAT THERE ARE SOME V ERY SIGNIFICANT ISSUES WITH THIS DEFENDANT, WITH OUT REG ARD TO THE AGGRAVATION.I AM NOT SPEAKING ON E WAY OR THE OTHER , BUT IT CERTAINLYSEEMS TO ME WITH THIS BACKGROUND AND SOME OF THEISSUES WITH REGARD TO EDUCATION AND THOSE KINDS OF THINGS , ARE VERY WELL DOCUMENTED HERE.

NO , NO, SIR. AND REMEMBER THAT MR . REYNOLDS IS 63 YEARS O LD. HOWEVER , AS THE TRIAL JU DGE FOUND IN HIS ORDER , THE , IN THE PENALTY PHASE , THERE WERE MANY, MANY WITN ESSES WHO KNEW HIM THROUGHOUT THE ENTIRE SP AN OF HIS L IFE , AND THE DEFENSE B ROUGHT HIM IN TO SHOW WHAT A GOOD PERS ON HE WAS, AND THEN THE STATE WERE TURNED IT AROUND AND IS SAID HE IS A WONDERFUL PERSON. DID YOU EVER THIN K HE WAS RETARDED. WELL, NO, NO NE OF THEM SAID THAT. THE D A UGHTER SU PRENA --

JUSTICE: I THINK YOU HAVE IS DISCUSSED THAT AND AIRED ABOUT THE ADAP TIVE BEHAVI OR, BUT STILL IS THE ADAPTIVE BEHAVIOR DOESN'T TAKE H IMBEYOND AND OUT FIT INTELLECTUAL CAPACITY WHERE ONE IS OPERATING. IT IS JUST A DIFFERENT FEATURE OF IT .

YES, SIR , BUT THE TRIAL JUDGE FOUND THAT HE WAS NOT MENTALLY RETARDED U NDER O URSTATUTE.

CHIEF JUSTICE: BUT HE D IDFIND HIM TO BE M I LDLY MENTALLY RETARD ED.

THERE IS NO SOME LANGUAGE IF THERE, MIL DLY MENTALLY RETARDED, UN DER THE D SM , WHICH WOULD GO TO THE INTELLECTUAL FUNCTIONING, THE IQ ONLY , BUT WE HAVE THE THREE PRONGS.

CHIEF JUSTICE: I UNDERSTAND BUT WHAT I AM HEARING WHAT JUSTICE L E WIS IS AS KING YOU ABOUT , OFCOURSE YOU SAID PROPORTI ONAL IT Y INVOLVES LOOKING AT THE TOTALITY OF THE CIRCUMSTANCES. ONE OF THE CIRCUMSTAN CES OF THIS MAN'S LIFE IS A VERY LIMITED EDU CATION , AND A , AT LEAST FOR PURPOSES OF IQ , MILDLY MENTALLY RETARDED . CORRECT?

YES , AND HE DID A THOROUGH DISCUSSION OF THE MILDLY MENTALLY , AND WHEN YOU READ HIS ORDER , UNDERSTAND THAT HE SAID INTHE ORDER , I AM PHRASING THESE EXAC TLY LIKE DEFENSE COUNSEL D HE IS MILDLY MENTALLY RETARDED OR AT LEAST BORDER LINE . THAT WAS THE CAPTION FROM THEIR SENTEN CING MEMO. HE PUT THEIR CAP TIONS IN AND THEN HE DISCUSSED IT. HE G AVE A LENGTHY DISCUSSION OF WHY HE WAS NOT A S DEFICIENT.I MEAN , A LOW IQ SCORE WITHOUT ADAP TIVE BEHAVIOR , MEANS NOTHING. SO I MEAN , I F YOU HAVE , AND THAT IS RIGHT THERE IN THE DSM. IT SAYS THAT. AND AS DR . PAR NELL SAID , THE IQ SCORES HAVE TO DO WITH HE WAS ILLITERATE. HE COULDN'T READ OR W RITE , EXCEPT JUST BA RELY , BAR ELY . READ AND WRITE ,

CHIEF JUSTICE: AND T HEN THEREFORE , AG AIN, IN T ERMS OF LOOK ING AT THIS , ONE OF HIS PRIOR BU SINESS VENT URES WAS RUNNING THIS SO DA SHO P, AND WHEN THE GIRLFR IEND AND PARTNER LEFT WITH THE OCCUPATIONAL LICE NSE, HE WAS NOT CAPABLE O F APP LYING , HIMSELF, FOR AN OCCUPATIONAL LICENSE , CORRECT?

SHE FUDGED THOUGH. HE SAID IT WAS TOO M UCH TROUBLE. ONCE SHE HAD GONE TO GO GET THE LIC ENSE AND KE EP RUN NING THE SODA SHOP , SO HE DID SOMETHING ELSE, AND HE WAS , NOW , MR . CORBETT AND MR . RODGERS HAD DIFFERENT BUSINESS CARDS. THEY DID SEPA RATE JO BS. THEY WOULD HELP EACH OTHER. THEY WORKED TOGETHER ON SOME JOBS, BUT MR . RODG ER S WAS COMPLETELY INDEPENDENT.

CHIEF JUSTICE: LE T ME ASK, WHAT IS STILL TROU BLING ME, AND THIS COURT AS YOU KNOW , WE HEAR MANY 3.851SS AND WE SEE MANY DEATH-PENALTY CASE S , AND IN THE LAST SEVERAL YEARS IT SEEMS THAT THE CASES WE SEE ARE SO DIFFERENT THAN THIS CASE. SEVERAL MURDERS TOGETHER , HAC, TAKING OF MO NEY , JUST TORTUROUS MURDERS , AND SO THERE IS SOMETHING ABOUT THIS, AS I FIR ST, AS I READ IT, I GO , THIS IS , DIDN'T APPEAR TO BE A DEATH-PENALTY CASE. AND I GU ESS IT IS HARD , IN TERMS OF LOOKING AND SA YING, WELL, DOES IT COM PARE WITH OTHER CASES WE HAVE UP HELD , BUT WOULD YOU A G REE THAT , AT LEAST IN THE LAST SEVERAL YEARS THAT, THIS IS FA IRLY DIFFERENT THAN THE OTHER CASES THAT WE HAVE E ITH ER FOUND PROPOR TIONATE OR NOT DISTURBED ON AP PEAL ?

I WOULD AGREE THAT THE CRIME IS ESCALATING AND THAT WE ARE SEEING TRIPLE , QUADRUPLE AND, NOW , IN VOLUSIA COUNTY WE HAVE A 6-PERSON HOMICIDE. HOWEVER, PROPORTIONAL IT Y ANALYSIS, YOU LOOK A T ALL OF THE DEATH PENALTY CASES AND YOU COMPARE --

CHIEF JUSTICE: I UNDERSTAND THAT, AND I UNDERSTAND THAT, BUT YOU WERE VERY FR ANK IN CONCEDINGTHAT DUNCAN NOT ONLY IS NOW IN A NEW PENALTY PHASE BUT THAT THERE WERE TWO MURDERS , INCLUDING ONE IN PRISON , AND I GUESS YOU SAID MURDERS, SO WE HAVE TO LOOK BACK , BECAUSE MURDER VER SUS MANSLAUGHTER, AND FARRELL , YOU SAID, WERE THERE T WOMURDER IN FAR SNEL L.

YES. NOW , BUT , MR . DUNCAN , THAT WASN'T A MURDER IN PRISON LIKE A USUAL COM BAT. THE GUY WAS ON THE T O ILET AND HE CAME WITH A CONC RETE BLOCK AND SMASHED HIM ON THE HEAD, SO I MEAN --

JUSTICE: YOU SAID SOMETHING IN ANSWER T O JUSTICE LEW IS'S QUES TION A MOMENT AGO ABOUT HE GOT AWAY WITH IT ONCE. WHAT WERE YOU ALLUDING TO?

WHEN HE SHOT BETTY CALDWELL, HE WENT TO TRI ALAND TESTIFIED JUST LIK E HE DID HERE THAT, IT WAS SELF-DEFENSE. HE TESTIFIED HERE THAT I T WAS SELF-DEFENSE WHEN HE SHOT HER IN THE BACK THREE TIMES.

JUSTICE: SO YOU AREAL LEWDING TO THE FACT THAT HE -- IS SO YOU ARE ALLUDING TO THE FACT THAT HE ONLY HAD A MANSLAUGHTER CON SFRO IX THIS PRIOR OFFENSE AND THAT IT REALLY WAS MUCH WORSE THAN THAT?

NO.I AMAL LEWDING TO THE FACT THAT -- I AM ALLUDING TO THEFACT THAT , WHEN YOU AS SESS HIS CHARACTER AND THE FACTS IN THIS CASE, WHEN HE GOT A FIVE-YEAR SENTENCE IN CASE ONE AND SO FOR HIM TO GO TO MR. CORB ETT AND SAYS I A M GOING TO TAKE CARE OF T HEPROBLEM , AND THEN AS THE JUDGE NOT ED, HE GET S UP A NDSAYS IT W AS IS SELF-DE FENSE . I KNEW EX ACTLY EVERY THING THAT WAS GOING ON. WE WERE TUSS LING WITH THE GUN.

JUSTICE: I THOUGHT YOU SAID EARLIER WITH REFERE NC E TO THE POLICE OFFICER WITH WHAT THE WITNESS SAID WITH REGARD TO THE PRIOR OFFENSE THAT LED TO A MANSLA UGHTER CONVICTION AS COMPARED T O MURDER, WAS THE V ICTIM 'S BEHAVIOR, WITH REGARD TO T HECUTTING AND SHO OTING , AM I HEAR ING AN ANSWER IN THAT?

NO.

JUSTICE: SO I AM HEARING THAT THE STATE IS TAKING THE FORM OF THE MANSLAUGHTER CONVICTION, STRICTLY FROM THE DEFENDANT'S VERSION OF HOW IT OCCURRE D. THAT WOULD HAVE TO FOLL OW, IF YOU ARE SAYING THAT THE TESTIMONY THAT WAS PRESENTED ABOUT THAT , WAS ALL CONSISTENT WITH HIS VERSION OF I T .

WELL , THE RE IS NO FACT - -

JUSTICE: AM I COR RECT ABOUT THAT, THAT THAT IS WHAT YOU ARE SAYI NG?

WELL , NOT EXA CTLY ABOUT THE STAT E'S PO SITION A BOUTTHIS. WE ARE TA LKING ABOUT THE CALDWELL ISSUE THAT IS THE TESTIMONY CONSISTENT. YES, IT WAS. HERE IS EXACTLY WHAT HAPPENED.

JUSTICE: WE WERE TALKING ABOUT THE HARM LESS E RROR ISSUE, YOU KNOW , WITH REFERENCE TO THE ADMISSIONOF THIS HEAR IS A SA Y.

YES.

JUSTICE: AND WHETHER WE HAVE A CONFRONT ATION ISSUE. AND IF I UN DER IS ST OOD Y OUR POSITION, YOU WERE -- IF I UNDERSTOOD YOUR PO SITION , YOU WERE SAYING IN ANY CASE IT WAS HARMLESS, BE CAUSE WHAT THE PO LICE OFFI CER RECOUNTED WAS COM PLETELY CONSISTENT WITH THE DEFENDANT'S VERSION OF WHAT THAT SITUATION WAS THAT LED TO THE MANSLAUGHTER CONVICTION.

I AM NOT MINIMI ZING THAT HE KILLED ANOT HER WOMAN. I AM ONLY SAY ING THAT ONLY GOT FIVE YE ARS FOR THAT BY GETTING UP AND TESTIF YING TO SELF-DEFENSE, WHI CH THE JURY DID NOT BELIEVE , AND THEN IN THIS ONE - -

JUSTICE: HOW IS IT THAT HE, QUOTE, GOT AWAY WITH IT?

BECAUSE IN THIS CASE HE DIDN'T SAY ANY THING TO ANYBODY ABOUT SELF-DEFENSE, AND HE CAME IN AT TRIAL AND TESTIFIED THAT THERE WAS A STRUGGLE OVER THE GUN, THAT IT WAS SELF-DEFENSE, THAT IT WAS, BUT HE, ALL OF THE THREE BULLETS WERE FROM THE BACK, IS SO I MEAN, IN HIS MIND, HE IS TELLING MR. CORBETT, I AM JUST GOING TO TAKE CARE OF THIS, AND THEN HE GOES AHEAD -- CHIEF HE GOES AHEAD AND TRIES TO KILL HIMSELF?

THAT WAS A HALF-HOUR LATER. HE WENT AND TOLD HIS FRIEND, I JUST KILLED MY WIFE BECAUSE SHE WAS FOOLING AROUND WITH ANOTHER MAN AND I AM NOT GOING ON BACK TO JAIL.

CHIEF JUSTICE: AND THEN HE TRIES TO KILL HIMSELF.

YEAH. AT THAT POINT, HE APPARENTLY REALIZED THAT SHE WAS DEAD, EVEN THOUGH HE IS A SHOOTER. HE SHOTS FOUR TIMES IN, WITH CHILDREN IN THE ROOM, STEPS OVER HER WHILE SHE IS STILL ALIVE AND DROWNING ON HER OWN BLOOD, DOESN'T CALL 911, AND DRIVES HIMSELF TO THE LOCAL POOL HALL. SO AS FAR AS PROPORTIONALITY, I WOULD ASK THIS COURT TO LOOK AT ALL OF THE FACTORS, THE CIRCUMSTANCES SURROUNDING THIS CASE. AS FAR AS THE MENTAL RETARDATION, THE JUDGE FOLLOWED THE STATUTE. IT IS THE DEFENSE BURDEN BY CLEAR AND CONVINCING EVIDENCE, THAT, AND THE BEFORE-18, SOMETIMES YOU HAVE TO LOOK AT THE BEST YOU HAVE. THEY HAD HIS BROTHER CLEMY AND ANOTHER FRIEND, WILLIAM BLUE WHO TESTIFIED BY VIDEOTAPE, WHO HAD KNOWN HIM ALL HIS LIFE. HAD HE -- THEY ALSO HAD HAD HE PENALTY PHASE, PEOPLE WHO HAD KNOWN HIM ALL HIS LIFE, DAUGHTER SHARON, FRIEND ELOISE, FRIEND VERNON, AND THE ISSUE IS YOU CAN'T JUST FOCUS ON THE LOW IQ, BECAUSE HE IS ILLITERATE, AS DR. PARNELL SAID. IF YOU DON'T HAVE ADAPTIVE BEHAVIOR, AND AS DR. PRICHARD SAID, THERE IS SOME CRITICISM OF DR. PRICHARD. HOWEVER, REMEMBER THAT DR. OLANDER AND DR. PARNELL AND DR. PRICHARD ALL DID THE ADAPTIVE BEHAVIOR. THEY ALL FOUND, AS DR. PRICHARD, DID AND DR. PRICHARD DIDN'T JUST TALK TO THE DAUGHTER TASHAWANDA. HE TALKED TO THE GIRLFRIEND OF 15 YEARS, MARIE, JAMES CORBETT AND VERNON FUNNELL, IN DOING HIS ADAPTIVE BEHAVIOR. IF YOU DON'T HAVE ADAPTIVE BEHAVIOR, YOU DO NOT HAVE MENTAL RETARDATION, SO THE JUDGE WEIGHED THAT PROPERLY. HIS FINDINGS ARE PRESUMED CORRECT.

CHIEF JUSTICE: BUT THE ADAPTIVE BEHAVIOR TEST, THIS I WORRY ABOUT NOT JUST IN THIS CASE BUT OTHER CASES, IS IT GOING TO BE THIS THING WHERE IT BECOMES AS A TITLE OF THE EXPERTS, THAT THEY COME UP WITH THIS ADAPTIVE BEHAVIOR DEFICIT BY JUST TALKING TO INDIVIDUALS, THEN DECIDING IF THEY HAVE A, HOW THEY LIVE THEIR LIFE? IS THAT WHAT WE ARE GOING TO BE LOOKING AT?

THERE ARE THREE ADAPTIVE BEHAVIOR SCALES, AND THE ONLY CRITICISM OF THE VINELAND IS NOT THAT YOU CAN'T DO IT. I MEAN AM IN THEIR BRIEF THEY SAY YOU CAN'T DO IT TO SOMEONE WHO IS 19 OR OLDER. IT IS THAT THE STANDARDIZED NORM WAS DONE ON PEOPLE WHO ARE IN RESIDENTIAL FACILITY, 18 YEARS 11 MONTHS AROUND THEN THERE ARE SUPPLEMENTAL -- MONTHS, AND THEN THERE ARE SUPPLEMENTAL AREA NORMS -- SUPPLEMENTARY NORMS THAT ARE DONE ON PEOPLE WHO ARE OLDER AND THEN PEOPLE WHO ARE INSTITUTIONALIZED, NOT FUNCTIONING LIKE MR. RODGERS, WHICH IS SIGNIFICANT, ALSO, IN THAT IT IS SIMPLY NOT OF ANY DEFICIT IN ADAPTIVE BEHAVIOR. HE IS ILLITERATE. THAT IS THE ONLY DEFICIT THAT HE HAS, AS FAR AS HIS IQ SCORES, BUT JUST BECAUSE HE HAS A LOW IQ SCORE, DOESN'T MEAN YOU CAN SAY, WELL, HE IS MENTALLY RETARDED. HE -- HE IS MENTALLY RETARDED. HIS ADAPTIVE BEHAVIOR IS AVERAGE TO ABOVE AVERAGE.

CHIEF JUSTICE: BEFORE YOU SIT DOWN, I WANTED TO ASK A QUESTION. THE TRIAL JUDGE IN THIS CASE, AS THE TRIAL JUDGE HAS DONE IN OTHER CASES AFTER RING, HAD A DETAILED

VERDICT FORM , WHERE THERE WERE 12 PEOPLE. THE JURY FOUND BEYOND A REASONABLE DOUBT THAT HE HAS BEEN PREVIOUSLY CONVICTED AFTER FELONY, AND THEN THERE IS AN UNDERSTANDING THE FIRST TIME , OF HOW THE 8-TO-4 VERDICT CAME ABOUT , BECAUSE FOUR -- VERDICT CAME ABOUT -- CAME ABOUT, BECAUSE THE CRIME TO OK PLACE WHILE HE WAS UNDER THE INFLUENCE OF A DRUG , EMOTIONAL OR MENTAL DISTURBANCE. THIS IS SAID TO BE A DEPARTURE FROM THE ESSENCE REQUIREMENT OF THE ELEMENTS OF LAW, SO HOW CAN THAT VERDICT , WHAT DOES IT STAND?

JUDGE, THIS CASE IS THE SAME JUDGE AND THE SAME PUBLIC DEFENDER AS HUGGINS , AND WHAT HAPPENED IS THEY FILED A LOT OF DIFFERENT, DIFFERING PRETRIAL MOTIONS , ASKING FOR SPECIAL JURY VERDICT FOR MS. WHEN THEY , THE DAY OF THE PENALTY PHASE, THEY CAME IN, AND THEIR OBJECTION NOT TO THE VERDICT FORMS BUT WAS THAT THEY WANTED TO LIST OUT ALL OF THE AGGRAVATING CIRCUMSTANCES AND ALL THE NONSTATUTORY MITIGATION. NOW, EVEN THOUGH THIS COURT SAID THAT THE JUDGES SHOULD NOT BE DOING INTRUSING MOTIONS, THIS HAPPENED -- INTERROGATORIES. THIS HAPPENED BEFORE STEELE AND THIS COURT DID IN HUGGINS YOUR HONOR. THERE WAS CONFLICTING MOTIONS -- IN HUGGINS . THERE WAS CONFLICTING MOTIONS .

JUSTICE: THIS COURT?

THERE IS CONFLICTING MOTIONS, JUST LIKE IN HUGGINS. THERE IS CONFLICTING MOTIONS ABOUT THE JURY FOUND IT UNANIMOUSLY.

DID THE COURT OBJECT TO USING THESE IN -- DID HE OBJECT TO THE COURT USING THESE INSTRUCTIONS?

HE OBJECTED TO THE INSTRUCTIONS IS , BUT HE DIDN'T OBJECT TO THE VERDICT FORMS, HAVE YOU JUST WANTING ALL OF THE MITIGATION LISTED AND NONMITIGATION LISTED .

JUSTICE: SO HE IS ARGUING IT IS NOT , DID NOT GO FAR ENOUGH.

YES. AND THEY WERE SAYING UNDER RING THAT THE JURY HAS TO FIND THE AGGRAVATING CIRCUMSTANCES UNANIMOUSLY AND RECOMMEND THE DEATH PENALTY UNANIMOUSLY, SO WE HAVE THE SAME THING IN HUGGINS , THE SAME LIST OF CONFUSING MOTIONS. THE JUDGE DID WHAT HE THOUGHT WAS RIGHT. THERE IS NO HARM TO HIM , BECAUSE THE AGGRAVATING CIRCUMSTANCES , THERE WAS ONE , WAS IS 12 -0 , AND THE MITIGATION , WENT BOTH WAYS. SO I JUST SAY THAT , THIS IS LIKE HUGGINS , AND YOU KNOW , AFTER STEELE IT HAS BEEN CLARIFIED , BUT THIS IS NOT REVERSIBLE ERROR. I WOULD ASK THIS COURT TO AFFIRM THE CONVICTIONS AND SENTENCE HIM TO DEATH.

CHIEF JUSTICE: THANK YOU. MR. WULCHA K.

DURING THE STATE'S PRESENTATION, I LOOKED THROUGH THE TESTIMONY OF THE POLICE OFFICER AND THE FORMER PROSECUTOR , AND I FOUND NO TESTIMONY INDICATING HOW LONG HE SERVED, AND I BELIEVE THERE WAS THE JUDGMENT AND SENTENCE IN THERE WHICH SAID THAT HE WAS SENTENCED TO FIVE YEARS BUT NO INDICATION HOW LONG HE SERVED.

JUSTICE: CAN YOU READDRESS THE ISSUE OF PRESERVATION, BECAUSE THE STATE CLAIMS THAT THE DEFENSE FILED A PRETRIAL MOTION SAYING THAT THE STATUTE IS UNCONSTITUTIONAL , BUT IT WAS UNCONSTITUTIONAL BECAUSE IT ALLOWED HEARSAY TO BE INTRODUCED IN THE PENALTY PHASE, AND EVEN IN CRAWFORD, THE COURT SAID THERE IS SOME HEARSAY THAT IS ALLOWED. IT IS THE TESTIMONIAL HEARSAY THAT WOULD VIOLATE THE CONFRONTATION CLAUSE, SO WAS THERE A PARTICULAR CLAIM MADE THAT THE , TO THE EXTENT THAT IT ALLOWS HEARSAY TO BE INTRODUCED FOR TESTIMONY THAT IT VIOLATE THE CONFRONTATION CLAUSE?

YES, YOUR HONOR , TH ER E WAS A SPECIFIC PRETRIAL MOTION, SPECIFIC ALLY REFERENCING THE CONFRONTATION CLAUSE.

JUSTICE: YOU SAY THE RECORD DOES SHOW THAT HE WAS SENTENCED TO FIVE YEARS ON THE MANSLAUGHTER .

YEAH. THE JUDGMENT AND SENTENCE WAS INTRODUCED. ALSO THERE WAS NO STATE TESTIMONY TO DISPROVE THE WILLIE B EVENT. THERE WAS NO SHOWING THAT THOSE CHILDREN, THAT T HECHILDREN WERE THERE ON APPARENTLY A LATE SH IFT, T HEEVENING SHIFT. IT WAS THE 24-HOUR DAYCARE CENTER. THERE WAS NO SHOWING THAT THEY WERE THERE EAR LIER A NDCOULD HAVE TESTIF IED T O THAT. THERE WAS NO STATE TESTIMONY TO DISPROVE THAT THE DEFENDANT LEFT A VALENTINE AND FLOWER S AT THE HO USE. HE TESTIFIED HE DID THIS DESPITE THE FACT THAT THEYWERE HAVING PROBLE MS, BECAUSE THAT IS WHAT YOU DO ON VALENTINE'S DAY. THE IS STATE IS ARG UING - -

JUSTICE: ALSO NOTED , THERE IS ALSO NO DISPUTEHERE THAT THIS DINS -- THIS INCIDENT OCCURRED AL MOST SIX OR SE VEN HOURS BEFORE THE ACTUAL MURD ER, THIS CONFRONTATION WITH WI LLIE B.

YES. THERE WAS TESTIMONY FROM - - JUST JAUNS WHEN HE CAME BAC K TO THE DAY - -

JUSTICE: AND WHEN HE CAME BACK TO THE DAYCARE C ENTER , HE HAD A GUN WITH HIM.

YES, YOUR HONOR, AND HE HAD TESTIMONY FROM THE MENTAL HEALTH EXPERTS THAT THIS KNOT HIM THROUGHOUT THE DAY GOT -- THIS KNAWED ON HIM THROUGHOUT THE DAY AND GOT WORSE AND WORSE A NDBECAUSE OF HIS MENTAL DEFICIENCY, HE WAS NOT ABLE TO CONTROL THAT .

JUSTICE: T HERE WAS NO TESTIMONY FROM THE CHILDREN THAT THERE WAS NO SELF-DEFENSE INVOLVED HERE?

THERE WAS NO TESTIMONY FROM THEM REGA RDING A SELF-DEFENSE CLAI M, YES . CHIEF PRETTY HARD TO SAY , BEING SHOT IN THE - -

CHIEF JUSTICE: PRETTY HARD TO SAY , BEING SHOT I N THE BACK.

THE CHILDREN WERE IN A DIFFERENT ROOM WHERE T HECRIBS WERE AND STU FF.

JUSTICE: I THOUGH HT THEY TALKED ABOUT HIM KICKING HER AND THAT KIND OF DINTS . -- OF INC IDENT.THEY DID SE E.

THERE WAS SOME EVI DENCE OF IT, BUT THEY COULD NOT SEE IN THE BACK R O OM. THEY WEREN'T IN THE S AME ROOM WH EN THE ACTUAL KILLINGTOOK PLACE. THE STATE IS ALSO ARGUING THIS MORNING , THAT BEC AUSETHERE WERE OTHER CH ILDREN INVOLVED, THIS IS SOMEHOW -- THIS SHOULD SOMEHOW WAY , THERE WERE CHILD REN THERE , THIS SHOULD SOMEHOW WE IGH ON YOUR PROPORTIONAL ITY REVIEW. THE STATE DID NOT SUBM ITTHAT AGGR AVATING CIRCUMSTANCE, DID NOT RE LY ON IT BEL OW AND HAS WAI VE D IT HERE AND CA NNOT RESURRECT IT HERE UNDER PROPORTIONAL ITY REVIEW.

CHIEF JUSTICE: IS THAT THE SAME FOR CC P?

YES, AND ALSO THE CC P WAS NOT FOUND BELOW.

CHIEF JUSTICE: NOT ADVANCED.

NOT PRESENTED.

CHIEF JUSTICE: I THINK YOU ARE OUT OF YOUR TIME. IF YOU WANT TO, DID YOU NOT PRESERVE THE VERDICT FORM ISSUE?

MY UNDERSTANDING THEY DID NOT OBJECT TO THE VERDICT FORM. THEY DID FILE A PRETRIAL MOTION, OBJECTING TO ANY INTERROGATORY VERDICTS, HOWEVER.

CHIEF JUSTICE: BUT THAT THEY ACTUALLY WANTED MORE SPECIFIC FINDINGS.

WELL, THEY WANTED A JURY INSTRUCTION THAT SAID IT HAD TO BE UNANIMOUS, YES, YOUR HONOR. WE SUBMIT THAT IT SHOULD BE REVERSED AND SENT BACK FOR A LIFE IS SENTENCE. THANK YOU.

CHIEF JUSTICE: THANK YOU. THE COURT WILL BE IN RECESS UNTIL NINE O'CLOCK TOMORROW MORNING.

MARSHAL: PLEASE RISE.