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Randy Schoenwetter v. State of Florida

MARSHAL: PLEASE RISE . HEAR YE.HEAR YE.HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW IN SESSION. GOD SA VE T HESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COUR T. ALL WHO HAVE CAUSE TO PLEA , DRAW NEAR , G IVE ATTENT ION AND YOU SHALL BE HEARD. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT.PLEASE BE SEATE D.

CHIEF JUSTIC E: GOOD MORNING, LADIES AND GENTLEMEN, AND WELC OME TO THE FLORIDA SUPREME COURT. THE FI RST CASE ON TODAY'S DOCKET IS SCHOENWETTER VERSUS STATE OF FLORIDA. PARTIES ARE READY ? OKAY.

MAY IT PLE ASE THE COURT. GOOD MORNING. I AM CHRIS QUAR LES , AND I REPRESENT RANDY SCHOENWETTER FROM HIS T WO CONSECUTIVE SENTENCES OF D EATH AND TWO CONSECUTIVE LIFE SENT ENCES OUT OF BREVARD COU NTY A FTER HE PL EADED GUILTY TO TWO COUNTS OF FIRST-DE GREE MURDER, ONE CO UNT OF ATTEMPTED MURDER AND ONE COUNT OF AR MED BURGLA RY OF A DWELLING. DURING THE BURGLARY OF HIS BEST FRIEND'S HOUSE , MR . SCHOENWETTER KILLED VIRGINIA FRISK K EY , THE -- FRISKEY, THE TEN-YEAR-OLD C ENTER , AND HE AL MOST K ILLED THE MO THER , AND HE KILL ED THE FAT HER.

YOU HAVE ISSUES IN THI S CASE. WHICH ONE DO YOU PLAN TO FOCUS YOUR ATTENTION ON TODAY?

I THOUGHT I WOULD START WITH ONE. IF THE COURT HA S A PREFERENCE TO HEAR AB OUT SOMETHING ELSE, LET ME KNO W. INITIALLY THE CONFESSION ISSUE , I WOULD LIKE TO ADDRESS THAT THE TRIAL COURT CLEARLY CONCLUDED ERRONEOUSLY THAT THAT ISSUE WAS WAIVED BECAUSE MR . SCHOENWETTER PLEADED GUILTY. AS THIS COURT HE LD IN ROLLING, THAT IS NOT THE CASE WHEN AN UNCONSTITUTIONALLY -OBTAINED CONFESSION IS USED TO ESTABLISH AGGRAVAT ORS AT THE PENALTY PHASE, IT IS SUBJECT TO REVIEW, S O THAT ISSU E HAS BEEN PRESERVED . THE FACTS ON THE CONF ESSION ISSUE, THE FOCUS IS WHETHER OR NOT HE WAS IN CUS TODY AT THE TIME THAT HE DAVE HIS STATEMENT.THERE WAS -- THAT HE GAVE HIS STATE MENT. THERE WAS A BLOOD TRAIL ON THE TRAIL BETWEEN THE HOUSE AND WHERE MR . SCHOENWETTER LIVED. IT APPEARED L EFT BY SOMEBODY RIDING A BICYCLE .

WHAT W OULD LEAD YOU TO BELIEVE THAT HE WAS IN CUSTODY, BEC AUSE I UNDERSTOOD IT HE VOLUNTAR ILY WENT TO THE POLICE STATION WITH THE OFFICERS.HE WAS NOT HANDCUFFED D URING THE RIDE TO THE POLICE STATION.THEY NEVER INDICATED THAT HE WAS U NDER AR REST. HE INDICATED THAT HE HAD TO GET BACK AT A CERTAIN TI ME, SO THAT WOULD LEAD ONE TO BELIEVE THAT HE WAS , UNDER THE IMPRES SION THAT HE WAS , IN FACT, FREE TO LEA VE AT SOME PO INT.

CERTAINLY THAT IS ARGUABLE. I DO MAKE AN ARGUMENT T HAT THERE IS A ARGUMENT TO BE MADE THAT, WHEN THEY FIRST STARTED QUESTIONING HI M AT THE AP ARTMENT COMPLEX THAT, THERE IS A CASE THAT I C ITE IN THE BRIEF , THAT IN ESSENCE, HE WAS IN CUSTODYTHEN, BUT CERTAINLY MY ARGUMENT IS BETTER --

IN ESSENCE HE WAS IN CUSTODY, THEN, BECAUSE --

BECAUSE HE WAS , THEY WERE FOCUSING ON HIM , AND IN REALITY , HE, ALTHOUGH HE DID SAY, I HAVE TO BE AT WORK , HE KNEW THAT THESE WERE POLICE OFFICERS , THEY WERE CONCERNED THAT HE HAD CUT HIS HAND. THEY KNEW THAT , HE KNEW THAT THEY WERE FOCUSING ON HIM .

CHIEF JUSTICE: WAIT . NOW , BUT THAT IS NOT QUITE THE CASE. THEY DIDN'T COME TO THE APARTMENT COMPLEX TO FIND HIM.

NO.

CHIEF JUSTICE: IN FACT, THE POLICE OFFICERS WERE TALKING TO HIS MOTHER.

CORRECT.

CHIEF JUSTICE: AND HE APPROACHED .

THAT'S CORRECT .

CHIEF JUSTICE: SO TO ME THAT IS A VERY SIGNIFICANT FACT. NOW, WHETHER THEY AT THAT POINT MAY HAVE HAD THEIR SUSPICIONS AROUSED , BUT -- AROUSED , BUT I DO N'T SEE ANYTHING IN THIS CASE AS OPPOSED TO SOME OF THE OTHER CASES, THAT, REALLY, GIVE RISE TO , THAT A REASONABLE PERSON IN HIS POSITION WOULD HAVE THOUGHT THAT HE WAS IN CUSTODY . ESPECIALLY WITH THAT INITIAL , THE FACT THAT , NOW, IF THEY HAD GONE TO HIS HOUSE.

WELL , SUBSEQUENTLY THEY DID SAY, WHEN HE MENTIONED THE BICYCLE, HE HAD BEEN RIDING HIS BICYCLE THAT NIGHT EARLIER. HE KNEW THE FAMILY. THEY SAID LET US SEE YOUR BIKE, AND HE THEN TOOK THEM INTO HIS APARTMENT, WHERE HE SHOWED THEM THE BICYCLE , AND THERE WAS, ALSO , SOME MENTION OF SOME SHOES , AND HE SAID HE HAD THROWN THEM AWAY A WEEK EARLIER BECAUSE THEY GOT RUINED FISHING. HIS MOTHER SAID, NO , YOU DIDN'T. I SAW THEM THE OTHER DAY.

CHIEF JUSTICE: THE TEST FOR WHETHER HE IS IN CUSTODY IS NOT WHETHER AT A PARTICULAR POINT IN TIME , THE POLICE WOULD HAVE HAD PROBABLE CAUSE TO ARREST HIM , IS IT?

NO. IT IS FOR THE REASONABLE - -

CHIEF JUSTICE: CHIEF SO GOING BACK TO THIS ISSUE , THEY ASK HIM, HE APPROACHES THEM , HE VOLUNTARILY SHOWS THEM THE BIKE. YOU ARE NOT SAYING THAT THAT WOULD HAVE BEEN A SUPPRESSED , IF I, YOU KNOW , THAT THEY HAD SEIZED THE BIKE.

CORRECT .

CHIEF JUSTICE: THEY TAKE HIM TO THE POLICE STATION ON THE WAY. THEY STOP , GET SOMETHING TO EAT , AND HE IS NOT EVEN , HE HAS BEEN LEFT THERE BY HIMSELF.

THAT'S CORRECT. NOW, I CONCEDE THAT MY ARGUMENT CERTAINLY GETS BETTER, ONCE THEY ENTER THE POLICE STATION, GO THROUGH A LOCKED DOOR, GO INTO A SIX BY SIX SMALL INTERVIEW ROOM WITH NO WINDOWS AND THEN PUT HIM IN THE CORNER AND SIT IN ESSENCE, BLOCKING THE EXIT, AND PROCEED TO ENGAGE IN SOPHISTICATED INTERROGATION TECHNIQUES .

WASN'T THIS INTERROGATION VIDEOED, THOUGH?

YES, IT WAS .

AND THE TRIAL JUDGE HAD THE BENEFIT OF ACTUALLY SEEING EXACTLY WHAT HAPPENED , UNLIKE MANY OTHER CASES.

THAT'S TRUE, BUT I THINK IF YOU LOOK AT THE VIDEO TAPE , I THINK IT CONFIRMS AND SUPPORTS OUR ARGUMENT. WHEN YOU LOOK AT THE FACTORS THAT THIS COURT CONSIDERED IN RAMIREZ , WHICH I THINK IS CONTROLLING , RAMIREZ WAS 17. THE AGE OF THE DEFENDANT IS CRITICAL. MR. SCHOENWETTER WAS 18. HE HAD NO PRIOR EXPOSURE TO THE CRIMINAL JUSTICE SYSTEM -- TO THE CRIMINAL JUSTICE SYSTEM. THE MANNER IN WHICH THE POLICE SUMMONED THE SUSPECT FOR QUESTIONING, THEY WEREN'T IN UNIFORM. THEY DID HAVE POLOSHIRTS WITH INSIGNIA , WITH SIDE ARMS ON THEIR HIPS, AND THEY DROVE HIM IN A POLICE CAR , TO --

THERE IS NO DOUBT THAT HE KNEW THAT THEY WERE POLICE OFFICERS.

CORRECT.

SO THAT IS NOT REALLY AN ISSUE. WHY DOESN'T THIS FALL IN THE CATEGORY OF BEING A FACTUAL DETERMINATION , IN WHICH WE GIVE THE BENEFIT OF THE DOUBT TO THE TRIAL JUDGE, IN TERMS OF ESPECIALLY IN SEEING THE VIDEO AND ALL OF THE FACTUAL CIRCUMSTANCES THAT EVOLVED HERE, IN MAKING THE JUDGMENT CALL THAT THE TRIAL JUDGE MADE IN THIS CASE, SO WHY WOULDN'T IT FALL UNDER THE RULE THAT, IF WE DO THAT AND GIVE ALL THE INFERENCES , THE CREDIBILITY OF THE POLICE OFFICERS IN TERMS OF THE WAY THAT THEY PRESENT IT , SAYING THE VIDEO -- SEEING THE VIDEO, YOU EVEN STARTED OUT AND WE APPRECIATE THE CANDOR IN WHICH YOU STARTED OUT SAYING , CERTAINLY THIS APPEARS TO HAVE STARTED OUT AS A COMPLETELY VOLUNTARY ACT ON HIS PART, SO WHY SHOULDN'T THE RULE THAT, WITH REFERENCE TO RESOLUTION OF ISSUES OF FACT , THAT WE GIVE GREAT DEFERENCE TO THE TRIAL COURT JUDGE?

I DON'T HAVE A PROBLEM WITH GIVING GREAT DEFERENCE TO THE TRIAL COURT'S CONCLUSION ON THE FACTS. HOWEVER , ON THE LAW, THIS COURT, IT IS A MIXED QUESTION OF FACTS AND LAW , AND THIS COURT CAN REVIEW WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS .

THE DIFFICULTY IS THAT , WITH YOUR ACKNOWLEDGMENT THAT THIS IS REALLY A FACT-INTENSIVE ISSUE, AND THAT WHAT YOU ARE REALLY SAYING IS THAT YOU BELIEVE OR YOUR POSITION IS THAT AT SOME POINT IN THIS SEQUENCE OF EVENTS, ALL RIGHT , THAT A REASONABLE PERSON WOULD HAVE DETERMINED -- WOULD HAVE CLEARLY , YOU ARE SAYING , AT THAT POINT IT REALLY BECOMES A MATTER OF LAW THAT A REASONABLE PERSON WOULD HAVE FELT THAT THEY WERE IN CUSTODY AND HAD NO OPTION TO LEAVE. TELL US WHEN THAT CRITICAL POINT OCCURRED IN THIS CASE AND HOW WE CAN DETERMINE THAT THAT WAS SUCH A STRONG CIRCUMSTANCE THAT WE WOULD RULE AS A MATTER OF LAW , THAT A REASONABLE PERSON WOULD FEEL THAT THEY WERE IN CUSTODY.

WELL, IT IS A FOUR-PART TEST, AS THIS COURT SAID IN RAMIREZ, AND THE ATTORNEY GENERAL HAS FILED A NOTICE OF SUPPLEMENTAL AUTHORITY WITH A CASE THAT THIS COURT DECIDED LAST THURSDAY, PEREZ , WHICH I THINK IS , ALSO , HELPFUL TO MY CASE. THIS COURT DISTINGUISHED PEREZ FROM RAMIREZ , BECAUSE PEREZ WAS 23 YEARS OLD INSTEAD OF 17 , LIKE RAMIREZ , AND THAT WAS A BIG FACTOR IN RAMIREZ .

WASN'T THERE SOME FINDINGS BY THE TRIAL JUDGE IN THIS PARTICULAR CASE , THAT THIS GUY WAS, EVEN THOUGH HE MAY HAVE BEEN 18 , THAT HE REALLY ANSWERED QUESTIONS IN A PRETTY SOPHISTICATED MANNER , THAT HE WAS PRETTY SAVVY FOR AN 18 YEAR-OLD?

WELL , HE WAS INTELLIGENT. I WOULDN'T SAY SAVVY. THE JUDGE WAS CONTINUOUSLY PUTTING ON THE RECORD HOW IMPRESSED HE WAS WITH MR . SCHOENWETTER'S INTELLIGENCE

ANIMATEURTY AND ARTICULATE , AND THAT TIES INTO MY OTHER POINT IN THE BRIEF AND ALSO THE AMICUS BRIEF THAT, THE JUDGE SHOWED A BASIC MISUNDERSTANDING OF ASPERGER SYNDROME, BUT HE HAD NO ENCOUNTER, PREVIOUS ENCOUNTERS WITH THE CRIMINAL JUSTICE SYSTEM AT ALL. HE HAD NO PRIOR RECORD. AND THE FOUR -PART TEST --

WASN'T THERE SOMETHING IN HERE ABOUT A PETTY , RETAIL THEFT OR PETITE THEFT OR SOMETHING?

YES . -- OR PE PETTY THEFT OR SOMETHING?

YES. THERE WAS A SHOPLIFTING POINT IN HIS LIFE. NOBODY IS SURE WHAT HAPPENED WITH THAT OR WHETHER HE WAS FORMALLY ARRESTED , EVEN. THE DISPOSITION NOBODY SEEMED TO KNOW. PEREZ WAS DIFFERENT . PEREZ MET THE POLICE AT THE POLICE STATION, DRIVING HIS OWN CAR. SCHOENWETTER WAS BASICALLY --

HE DIDN'T HAVE A CAR .

RIGHT. WE WILL GIVE YOU A RIDE TO THE POLICE STATION , GOING BEHIND LOCKED DOORS IN THE INTEGRATION ROOM. THE PURPOSE, PLACE, MANNER OF INTERROGATION. THE MANNER OF INTERROGATION WAS VERY COERCIVE . THE EXTENT --

I THOUGHT THE ADMISSIONS WERE MADE IN THE FIRST 15 OR SO MINUTES. DOES THE VIDEO, REALLY , SHOW THAT, LEADING QUESTIONS OR ABUSIVE TECHNIQUES WERE APPLIED?

YES.

YOU BELIEVE THAT?

YES , I REALLY DO. HE INITIALLY DENIED. HE DID ADMIT, AS HE DID AT THE APARTMENT COMPLEX, THAT HE HAD BEEN RIDING HIS BIKE THAT NIGHT. AND THEN THE , USING THE COERCIVE TECHNIQUES WHICH ARE ON VIDEO , THE DETECTIVE CONTINUOUSLY SAYS , I REALLY BELIEVE THAT THE PERSON WHO COMMITTED THOSE MURDERS WAS THE ONE THAT LEFT THAT BLOODTRAIL. YOU KNOW AND I KNOW HOW EASY IT IS TO DO A BLOOD TEST , DNA THESE DAYS. YOU WATCH THE TV SHOWS , AND THEN HE STARTS GETTING INTO , WELL, DO YOU HAVE BLACKOUTS , AND MR. SCHOENWETTER SAID I HAD A BLACKOUT IN THE SIXTH GRADE ONE TIME. THE DETECTIVE LEAPS ON THAT AND SAYS NOW WE ARE MAKING PROGRESS. YOU KNOW, THAT COULD BE SOMETHING WRONG. THAT IS A SERIOUS MEDICAL CONDITION. HOW ABOUT INSOMNIA ? DO YOU EVER HAVE TROUBLE SLEEPING? YES, I DO. OH, WELL, THAT IS REALLY BIG. THAT IS HUGE. NOW, THERE ARE TWO- WAYS WE CAN PRESENT THIS , AND I -- PRESENT THIS , AND I QUOTE IN THE BRIEF , YOU ARE BEING COOPERATIVE, BUT HE STILL HASN'T MADE ADMISSIONS. HE SAID HE CAN PRESENT IT ONE OF TWO-WAYS. IN YOUR CASE THE BOY HAD A PROBLEM SLEEPING. HE HAS A SERIOUS MEDICAL CONDITION. HE MAY HAVE THOUGHT HE WAS DREAMING.

WHAT ARE YOU ALLEGING THAT HE IS DOING BY ASKING THOSE QUESTIONS?

HE IS DECEIVING HIM AS TO HIS -- DECEIVING HIM AS TO HIS TRUE POSITION. HE IS BASICALLY SAYING INTENT IS HUGE. HE IS BASICALLY SAYING IF YOU WENT IN THERE WITHOUT INTENT TO HURT ANYBODY INITIALLY , THEN IT IS O.K. WE CAN GET YOU HELP.

ARE YOU GOING , NOW, TO THE VOLUNTARINESS OF THE STATEMENT OR ARE YOU ARGUING THE PERCEPTION OF WHETHER OR NOT HE WAS IN CUSTODY?

I THINK IT IS PART AND PARCEL ONE AND THE SAME.

IT SEEMS TO ME WHAT YOU ARE REALLY DOING NOW IS YOU ARE SORT OF SWITCHING TO A

VOLUNTARINESS ARGUMENT THAT HE WAS DECEIVED HERE, KIND OF THING, AND THEREFORE THAT THE STATEMENT MIGHT NOT HAVE BEEN VOLUNTARY. I DIDN'T UNDERSTAND YOU TO BE RAISING THAT AS AN ISSUE.

I AM SO SORRY THAT I DIDN'T MAKE THAT CLEAR. THE PROBLEM THAT THE STATE AND THE JUDGE SEEMED TO BE HAVING BELOW WAS THAT HE WAS NOT IN CUSTODY. THEREFORE ANYTHING GOES, SO I HAVE TO GET BY THE FIRST PRONG THAT HE WAS IN CUSTODY, AND I THINK --

I THOUGHT THAT YOUR MAIN POINT HERE, THE WAY THAT YOU ARE MAKING THIS ARGUMENT RESPECT WAS THE FAILURE TO GIVE MIRANDA WARNINGS.

RIGHT. WELL, IN THAT, FROM THAT, IT THERE FOR WAS INVOLUNTARY, BECAUSE OF THE FAILURE TO GIVE MIRANDA.

YOUR MOTION IN THE TRIAL COURT WAS MULTIFACETED, THAT IS THAT YOU CONTENDED, FIRST OF ALL, THAT IT WAS DEFECTIVE BECAUSE OF THE FAILURE TO GIVE MIRANDA WARNINGS.

YES.

AND THEN THAT IT WAS NOT VOLUNTARY, BECAUSE OF THE IMPROPER TECHNIQUES OF THE INTERROGATORS?

YES. I BELIEVE THAT --

AND THAT IS WHAT YOU ARE ARGUING ON APPEAL.

YES. YES. AND JUSTINING, THE GUY DIDN'T KNOW, AND THEN WE -- AND JUST CONTINUING -- AND JUSTIN EWING. THE GUY DIDN'T KNOW. WE CAN PRESENT IT, I AM GOING TO BE MONDAY WITH YOU, A COLD -- I AM GOING TO BE HONEST WITH YOU, A COLD, HARD CRIMINAL.

CHIEF JUSTICE: WE DO HAVE THOSE IN YOUR BRIEF AND JUST TO REMIND YOU OF YOUR TIME, YOU DO HAVE OTHER ISSUES THAT YOU WANTED TO ADDRESS. ONLY BECAUSE WE HAVE THE VIDEOTAPE OF THE CONFESSION, AND THAT IS SOMETHING THAT, YOU HAVE SET IT OUT IN YOUR BRIEF.

ALL RIGHT. YES. JUST TO SORT OF SUM UP, I THINK THAT THE VIDEO WILL SUPPORT THE CONCLUSION THAT, WITHOUT MILES AN HOUR AND, EVEN THOUGH HE WAS IN CUSTODY -- WITHOUT MIRANDA, EVEN THOUGH HE WAS IN CUSTODY, EVEN THOUGH THE POLICE COERCED THE STATEMENT, ADMISSIONS FROM MR. SCHOENWETTER.

WHAT ABOUT THE STATEMENTS, QUESTION AND ANSWER WITH DETECTIVE BUTLER, WHERE HE SAID, DID YOU COME TO THE STATION VOLUNTARILY TODAY? YES. DID ANYONE FORCE YOU? NO. DID ANYONE HE WILL YOU YOU WAS UNDER ARREST? NO. AND WERE YOU WILLING TO COME DOWN HERE AND TALK TO ME? YES. AT ANY TIME DID ANYONE FORCE YOU TO TELL ME WHAT HAPPENED? NO. YOU ARE DOING THIS ON YOUR OWN, FREE WILL?

YES, SIR, I AM. HAS ANYONE THREATENED YOU OR ANYTHING LIKE THAT? NO, SIR. AND YOU JUST WANTED TO GET THIS OFF YOUR CHEST, IS THAT A YES OR NO? YES. YES, SIR.

THAT WAS ALL AFTER THE FACT. ONCE HE SECURED THE ADMISSIONS, THEN HE MIRANDIZED HIM AND THEN -- THEN HE MIRANDIZED HIM AND THEN HE EXTRA CTED THE CONFESSION AGAIN.

I UNDERSTAND THAT, BUT IN THE STATEMENT HE IS ACKNOWLEDGING THAT HE WAS NOT FORCED TO COME DOWN THERE AND THAT EVERYTHING HE WAS DOING WAS OF HIS OWN, FREE WILL.

I THINK THE TAPE AND THE FACTS IN EVIDENCE WOULD BELIEVE THAT AS AN 18 YEAR-OLD WITH ASPERGER 'S SYNDROME, THAT HE WAS ACTING VOLUNTARILY.

YOU ARE SAYING THAT WE HAVE TO GO BEHIND AND LOOK AT EVERYTHING ELSE , EVEN THOUGH HE ADMITTED THAT HE DID THIS VOLUNTARILY.

ABSOLUTELY. I THINK THOSE SUMMARY TYPE OF STATEMENTS THAT HE ELICIT FROM DEFENDANTS -- THAT THEY ELICIT FROM DEFENDANTS , ESPECIALLY UNDER THOSE CIRCUMSTANCES, ARE WORTHLESS. WELL, ADDRESSING THE ISSUES THAT ARE RAISED IN THE AMICUS BRIEF , THERE WAS AN AMICUS BRIEF FILED IN THIS CASE BY MAAP SERVICES FOR AUTISM AND ASPERGER 'S SYNDROME, FEATURING THE PROFESSOR OF CHILD PSYCHIATRY AT YALE AND --

THIS IS A PART OF YOUR ARGUMENT THAT THE MITIGATING CIRCUMSTANCES WERE NOT PROPERLY EVALUATED?

THAT'S CORRECT, YOUR HONOR . TO SUMMARIZE THAT RANDY HAS AN ORGANIC BRAIN SYNDROME , SPECIFICALLY ASPERGER'S SYNDROME AND THE CHARACTERISTIC MANIFESTATIONS -- MANIFESTATIONS ARE CERTAINLY IN THE BRIEF .

THEY WERE IN THE BRIEF?

THAT'S CORRECT.

AND ONE OF THE ASSERTIONS WAS THAT THE DEFENDANT WAS OPERATING UNDER EXTREME EMOTIONAL DISTURBANCE?

YES.

SO HE DID ASK HIM TO FIND WHAT YOU ASKED HIM TO FIND. YOUR ONLY DISPUTE IS AS TO THE WEIGHT OF THE MITIGATING CIRCUMSTANCES?

CORRECT.

AND ISN'T THAT WITHIN THE PROVINCE OF THE TRIAL COURT AND WE RARELY, IF EVER I CAN REMEMBER, HAVE REVERSED THE WEIGHT THAT A TRIAL JUDGE GIVES TO A PARTICULAR MITIGATING CIRCUMSTANCE.

TRUE. HOWEVER, THE WEIGHT, ALTHOUGH THE WEIGHT TO BE GIVEN MITIGATION , MITIGATING CIRCUMSTANCES NORMALLY IS COMMITTED TO THE SOUND DISCRETION OF THE TRIAL COURT, IT THIS COURT HAS MADE CLEAR THAT A SENTENCER MAY NOT DISREGARD SUBSTANTIAL UNCONTROLLED MITIGATING EVIDENCE.

HE DIDN'T DISREGARD IT IN FACT, HE FOUND IT.

WELL, HE FOUND IT BUT THEN HE COMPLETELY IGNORED IT . AGE. HE GAVE NO WEIGHT. AGE OF 18 WITH A DEVELOPMENTAL AGE OF 11 OR 12. NO WEIGHT .

DIDN'T HE BASICALLY SAY THAT THAT WAS REALLY NOT FOUND , THAT HE WAS DEVELOPMENTALLY 11 OR 12, BECAUSE HE GOES THROUGH , AGAIN, THE WHOLE INTELLIGENT AND SOPHISTICATED , THIS DEFENDANT, REALLY --

AGAIN, SHOWING HIS BASIC MISUNDERSTANDING OF ASPERGER 'S SYNDROME .

CHIEF JUSTICE: WOULD YOU TELL ME , HE WAS 18 AT THE TIME OF THIS TRIAL. HOW FAR DID HE

GO IN SCHOOL?

I BELIEVE HE GRADUATED FROM HIGH SCHOOL. I DON'T THINK HE GRADUATED FROM HIGH SCHOOL. I THINK HE GOT HIS G. E.D. .

CHIEF JUSTICE: AND WAS HE IN PUBLIC SCHOOL?

YES.

AND IS THERE , WAS THERE A DIAGNOSIS OF ASPERGER'S SYNDROME DURING HIS SCHOOL AGE?

NO. THERE WAS A DIAGNOSIS OF ATTENTION DEFICIT DISORDER.

CHIEF JUSTICE: PRETTY , TOTALLY DIFFERENT DIAGNOSIS.

IT IS DIFFERENT BUT IT IS FREQUENTLY FOUND. MR. CHIEF JUSTICE

BUT IT IS FREQUENT , ATTENTION DEFICIT DISORDER IS PROBABLY ONE OF THE MOST EITHER DIAGNOSED OR OVER DIAGNOSED SYNDROMES.

YES.

CHIEF JUSTICE: SO NOTHING , HERE IS WHAT YOU ARE SAYING , SOMEBODY WAS ESSENTIALLY AN AUTISTIC CHILD AND THERE IS NOTHING IN THE RECORD , UP UNTIL THE TIME HE IS ARRESTED FOR DOUBLE HOMICIDE , TO INDICATE THAT HE HAD THIS SIGNIFICANT DISABILITY .

NO , BUT THERE IS A PET SCAN THAT SHOWS PHYSICAL EVIDENCE OF BRAIN ABNORMALITY, WHICH THEY DIAGNOSED AS ASPERGER 'S SYNDROME. IT IS NOT SOMETHING THAT HE CAN CONCOCT AT A LATE AGE. IT IS A CHRONIC ORGANIC CONDITION.

CHIEF JUSTICE: BY WATCHING THE VIDEOTAPE , WOULD WE BE ABLE TO TELL THAT THERE IS A LACK OF AFFECT OR THAT HE DOESN'T ENGAGE?

NO. NO.

SO EXPLAIN HOW THE TRIAL JUDGE MISINTERPRETED THE SYNDROME.

WELL , BECAUSE FOR EXAMPLE , ALTHOUGH HE FOUND EXTREME EMOTIONAL OR MENTAL DISTRESS, THE STATUTORY MITIGATOR RELATING TO THAT, HE GAVE IT LITTLE WEIGHT. HE SAYS , YES , IT IS THERE BUT IT DOESN'T EXPLAIN HIS CONDUCT .

SO HOW DOES IT EXPLAIN , AND THE TRIAL JUDGE GOES THROUGH A LIST , HOW DOES HE EXPLAIN THE DELIBERATE ACTIONS PRIOR TO BEING INTERRUPTED BY THE PARENTS ? HOW DOES THE SYNDROME, AS OPPOSED TO THE PREOCCUPATION OF SEX OR SATANISM OR OTHER ASPECTS , HOW DOES THE SYNDROME EXPLAIN ALL OF THE INTENTIONAL ACTIVITY PRIOR TO THE CONTACT OF THE PARENTS?

BASED ON HIS INTENSE PREOCCUPATION WITH PORNOGRAPHY AND FINDING A GIRL TO HAVE SEX WITH, HE MADE A DECISION TO ACT ON THAT PREOCCUPATION, BY ENTERING HIS BEST FRIEND'S HOUSE IN THE MIDDLE OF THENIGHT , AND THEN THE VIOLENT PANIC REACTION WHEN HE WAS DISCOVERED, IS ALSO EXISTENT WITH THE SYNDROME, ITSELF .

SO ARE YOU REALLY SAYING THAT THE SYNDROME MADE HIM GO INTO THIS PANIC MODE?

YES.

THAT HE WAS ACTING .

POOR IMPULSE CONTROL IS ONE OF THE FACTORS.

BUT THE ACTIONS PRIOR TO THE PANIC WERE PRETTY DELIBERATE AND THOUGHT OUT.

IN A FLAWED WAY. VERY FLAWED WAY. THE ENTIRE SCENARIO WAS -- 6.

MOST OF THE SCENARIOS IN THIS CIRCUMSTANCE ARE FLAWED.

IF YOU HAVE GOT A SYNDROME LIKE RANDY SCHOENWETTER, THAT IS AN ESSENTIAL DECISION, BUT HE TURNED AROUND AND SAID HE SEEMS FINE TO ME.

NONE OF THESE DOCTORS SAID THAT HE DID NOT HAVE THE ABILITY TO THOUGHT OUT WHAT HE WAS WILLING TO DO.

NO, BUT THEY DID AGREE THAT HE COULD NOT CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW.

ONCE HE GOT INTO IT AND REACHED THAT PANIC STAGE.

WELL, BURGLARY, ITSELF, I MEAN, THE BURGLARY OF THE HOUSE, ITSELF, WAS SOMETHING THAT HE COULD NOT, HE WAS, HAD THIS PREOCCUPATION THAT HE WAS, FELT THIS INTERNAL FOCUS THAT, TO ACT ON.

CHIEF JUSTICE: BUT WAIT. JUST WHAT JUSTICE BELL WAS SAYING, I AM HAVING TROUBLE, SOMETHING LIKE A FORM OF AUTISM IS CERTAINLY NOTHING TO BE TAKEN LIGHTLY, AND I DON'T REALLY SEE, READING THE JUDGE'S DETAILED ORDER THAT HE TOOK IT LIGHTLY. THE QUESTION IS, HOW DOES IT FIT. AS JUSTICE BELL SAID, FROM THE TIME THE DEFENDANT STOPPED TAKING RITALIN IN THE SEVENTH GRADE TO THE DATE OF THE OFFENSES, THERE WAS NO REPORTED BEHAVIORAL ISSUES OF THE DEFENDANT, OTHER THAN, PERHAPS, SHOPLIFTING, IT SOUNDS LIKE HE WAS JUST DOING FINE. GOING BACK TO THIS THING OF THIS PREOCCUPATION WITH SEX, WHICH I DON'T KNOW, THAT IS NOT A, IS THAT A SYMPTOM -- A SYMPTOM OF AUTISM, OR THAT IS AN OTHER --

IT CAN BE DIFFERENT THINGS. PREOCCUPATION. I MEAN, HIS MOTHER TESTIFIED THAT HE WAS CALLING 900 SEXLINES WHEN HE WAS TEN YEARS OLD, I BELIEVE, AND VERY INAPPROPRIATE FOR --

CHIEF JUSTICE: CHIEF THEN, BUT OF COURSE, ALTHOUGH HE MIGHT HAVE -- HE WASN'T CLEAR WHY HE WENT IN THERE BUT THERE WAS NO SEXUAL INVOLVEMENT IN THESE CRIMES, SO EVEN THE PREOCCUPATION DOESN'T REALLY, IN OTHER WORDS WE ARE LOOKING AT WHETHER YOU WANT US TO REWEIGH HIS MITIGATION AND SAY THIS WAS MUCH MORE SIGNIFICANT IN THE COMMISSION OF THIS CRIME THAN THE JUDGE GAVE IT CREDIT FOR, AND I AM STILL HAVING KRUHL LINKING THE TWO THINGS UP -- HAVING TROUBLE LINKING THE TWO THINGS UP, AND IT SEEMS LIKE MAYBE IT SHOULD HAVE BEEN GIVEN MODERATE WEIGHT, BUT EVEN IF IT WAS GIVEN MODERATE WEIGHT, GIVEN THE NATURE OF THESE CRIMES AND THE DOUBLE HOMICIDE AND THE CONTEMPORANEOUS FELONY, IT IS PRETTY HARD TO FIND THAT THAT WOULD OVERCOME THE, BE OVERCOME BY THIS PARTICULAR DISORDER.

WELL, I DON'T KNOW. IT IS VERY RARE TO HAVE A CAPITAL APPEAL IN MY EXPERIENCE THAT THE DEFENDANT HAS NO PRIOR CRIMINAL HISTORY AS A MITIGATOR AND HAVE BOTH MENTAL MITIGATORS FOUND BY THE TRIAL JUDGE, ALTHOUGH AS WE CONTEND, GIVEN INAPPROPRIATE WEIGHT.

CHIEF JUSTICE: NOW , YOU COULD SAY , I THINK THE PART WHERE IT WOULD BE INTERESTING, IS THAT YOU HAVE, AND AGAIN HE IS 18 YEARS OLD, SO HE JUST MISSED THE CUTOFF FOR , , 17 BECOME 18.

RIGHT.

YOUR EXPERTS SAY HE HAD A DEVELOPMENTAL AGE OF?

11 OR 12.

BUT HOW, IN REALITY , WAS THAT MANIFESTING ITSELF IN HIS EVERYDAY LIFE ? HOW WAS HE ACTING LIKE A 11 OR 12-YEAR-OLD? WHAT THE JUDGE OBSERVED WAS SOMEBODY WHO WAS ACTING MATURE. NOW, YOU ARE SAYING IT IS BECAUSE HE IS AUTISTIC, BUT IF SOMEBODY IS ACTING LIKE A 11 OR 12-YEAR-OLD, BEFORE THIS CRIME WHAT WAS IT THAT HE WAS DOING THAT SHOWS THAT HE WASN'T ABLE , DID HE NOT HOLD A JOB? DID HE HOLD A JOB?

HE WORKED AT KRYSTAL'S .

CHIEF JUSTICE: WHERE?

KRYSTAL'S BURGERS.

WHAT DID HE DO THERE?

COUNTER. CLEANUP .

DID HE LIVE WITH HIS MOTHER?

HIS WHOLE GOAL WAS TO JOIN THE MARINES WITH HIS FRIEND BUT HIS EYESIGHT KEPT HIM OUT. THERE WAS A LOT OF ANECDOTAL TESTIMONY ABOUT HOW HE NEVER FIT IN. HE GOT BEAT UP ALL OF THE TIME BY HIS CONTEMPORARIES. HE WAS SO CIALLY INEPT, AND ALL OF THAT IS CONSISTENT, AND HIS DECISIONS , ESPECIALLY AS HE MADE THAT NIGHT THERE, IS UNCONTESTED EVIDENCE THAT HIS FRONTAL LOBE DYSFUNCTION AFFECTED THE EXECUTIVE FUNCTION OF HIS BRAIN, AND BECAUSE OF THAT, HE WAS UNABLE TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW. ALL OF THE EXPERTS THAT TESTIFIED, AGREED WITH. THAT THEY SAID THAT THIS DOES EXPLAIN HIS CONDUCT. HE WAS FOCUSED WITH HIS OBSESSION. INAPPROPRIATE PROBLEM-SOLVING.

CHIEF JUSTICE: BUT AS JUSTICE CANTERO POINTED OUT IN HIS REBUTTAL , THE JUDGE FOUND THE MITIGATOR. IF HE HADN'T FOUND THE MITIGATOR. THE QUESTION IS THE WEIGHT HE GAVE TO THE MITIGATOR .

I AGREE , BUT I THINK THAT I AM SEEING MORE AND MORE AND I THINK THIS COURT IS SEEING MORE AND MORE, AFTER THIS COURT'S DECISION IN TRIESE, ESPECIALLY WHICH AND DICK EIGHT SPOKE -- ABDICATE S THE RESPONSIBILITY , ESPECIALLY VALID MENAL MITIGATORS, ET CETERA, I THINK YOU SEE MORE AND MORE TRIAL JUDGES SIMPLY GIVING LIP SERVICE TO MITIGATORS THAT ARE SUBSTANTIAL , VALID MITIGATORS, AND AS A RESULT, IT SORT OF MAKE S IT A P P EAL - PROOF INAPPROPRIATELY SO. I DON'T THINK --

HE REALLY GIVES THIS LIP SERVICE. HE GOES THROUGH A COUPLE HE WILL OF PAGES -- A COUPLE OF PAGES OF WHAT THE DOCTORS ACTUALLY SAID ABOUT HIS MEDICAL CONDITION . I MEAN, HE GOES ON AT LENGTH ABOUT THIS, AND THAT IS NOT REALLY GIVING LIP SERVICE TO IT.

BUT THEN HIS CONCLUSION , THOUGH, THAT THE AGE OF 18 , AND A DEVELOPMENTAL AGE OF 11

OR 12 , W HICH HE DOES REJECT THAT. HE SAYS I HAVE SEEN HIM I N COURT , THE BRIEF EXPOSURE I HAVE HAD TO HIM AND HOW INTELLIGENT AND ARTICULATE HE IS , I AM CONVINCED THAT IS HE MORE THAN 11 OR 12. YOUNG IT IS APPROPRIATE - - I DON'T THINK IT IS APPROPRIATE OR VALID FOR HIM TO MAKE --

NOT ONLY THE OBSERVATION OF THIS DEFENDANT BUT AS WE POINTED OUT THERE , IS REALLY NO ONE ELSE WHO TALKS ABOUT THIS DEFENDANT ACTING IN A CHILD LIKE MANNER , AS A 11 OR 12-YEAR-OLD WOULD ACT .

WELL , IS HE ONLY 18 TO BEGIN WITH , AND THE , I THINK HE HAD A FIGHT WITH HIS GIRLFRIEND AT KRYS TAL'S WHO REALLY WASN'T HIS GIRLFRIEND , AND THAT WAS, THAT REEKED OF IMMATURITY .

HOW SO? THESE KINDS OF THINGS HAPPEN ALL THE TIME.

BUT THE WAY HE PERCEIVED THE RELATIONSHIP , FOR ONE THING, I THINK IT WAS CLEAR.

CHIEF JUSTICE: I WANT TO MAKE SURE THE DEFENDANT , AS A DEATH CASE YOU ONLY RESERVED FIVE MINUTES FOR REBUTTAL. I DON'T KNOW HOW MUCH YOU HAVE LEFT, BUT YOU MAY WANT TO SAVE A FEW MINUTES .

OKAY. JUST TO CONCLUDE ON THAT , I JUST THINK THAT THE TRIAL JUDGE GIVING NO WEIGHT TO HIS AGE OF 18 AND LITTLE WEIGHT TO THE TWO STATUTORY MENTAL MITIGATORS WITH THIS RECORD, IS COMPLETELY INAPPROPRIATE. THANK YOU.

CHIEF JUSTICE: SEEMS LIKE YOU HAVE A BUSY WEEK THIS WEEK, MS. DAVIS.

MAY IT PLEASE THE COURT. MY NAME IS BARBARA DAVIS , AND TO BEGIN WITH , I WOULD LIKE TO POINT OUT THAT, ON THE TRIAL JUDGE'S ORDER , PAGE 26 OF 34 , WHICH IS 813 OF THE RECORD , HE DID GIVE LITTLE WEIGHT TO THE AGE. HE, HE FOUND FOUR STATUTORY MITIGATING CIRCUMSTANCES , AND HE GAVE LITTLE WEIGHT TO EACH OF THOSE, SO IT WASN'T NO WEIGHT. IT WAS LITTLE WEIGHT , AND HE WENT THROUGH THAT DISCUSSION . ALSO , DR . REEVES SAYING VIEW THE VIDEOTAPE. ONE OF THE QUESTIONS WHEN DR . REIBSEIN WAS TESTIFYING WAS HAD YOU VIEWED THE VIDEOTAPE, AND THEY STOPPED AND HE VIEWED THE VIDEOTAPE, AND HE SAID, NO, I DID NOT SEE ANY SIGNS OF ASPERGER 'S SYNDROME . ALSO , DOCTOR --

WHERE WAS THIS?

THE EXPERT FOR THE DEFENSE , DR . REIBSAIN.

CHIEF JUSTICE: YOU ARE SAYING HE WATCHED THE VIDEOTAPE AND HE SAW --

HE SAW NO SIGNS OF ASPERGER SYNDROME. HOWEVER , DR . REIBSAIN DID FIND THAT, THROUGH HIS TESTING THERE WERE SIGNS OF ASPERGER 'S SYNDROME AND HE IS THE ONE WHO ASKED FOR THE TESTING WITH DR . WOO. HE OPINED THAT IT WOULD BE EXTREME EMOTIONAL DISTURBANCE BUT NOT INABILITY TO APPRECIATE. DR. PRICHARD , NONA PRICHARD RESPECT WHO WAS AN EXPERT -- KNOWN PRACH ARRESTED, WHO WAS AN EXPERT -- NONA PRICHARD, WHO WAS AN EXPERT ON ASPERGER 'S SYNDROME , THEY DIDN'T AGREE ABOUT --

WHAT ABOUT GREENBERG AND PLOMOS?

THEY DID THE COMPETENCY EVALUATION AND NEITHER ONE OF THEM SAW SIGNS OF ASPERGER'S SYNDROME.

WAS THIS COMPETENCY DONE AT A TIME WHEN THEY WOULD HAVE KNOWN TO LOOK FOR THAT

ASPERGER'S SYNDROME?

NO. THEY WERE NOT ASKED TO LOOK FOR ASPERGER 'S. THERE WERE TWO COMPETENCY EVALUATIONS, ONE AF TE R HE WROTE THE LETTER TO THE JUDGE AND ONE WANTING TO PLEA, AND DR . REIBSAIN DID THAT ONE, AND THERE W ASANOTHER ONE WHEN HE HAD A DISTURBANCE WITH H ISATTORNEYS ABOUT --

THERE WERE TWO, WERE N' T THERE, TWO, AFTER HIS CONFRONTATION WITH THE JUDGE, SAYING THAT HE DID NOT AGREE WITH CERTAIN OBJECTION THAT IS HIS ATTORNEYS W ERE MAKING.

YES. AND THAT , ON THE VICTIM IMPACT. HE WANT ED, HE THOUGHT EVERYONE WAS UN IQUE AND THE VICTIM IMPACT SHOULD COME IN. HE DISAGREED WITH HIS ATTORNEYS , OBJ ECTING TO VICTIM IMPA CT, AND THEN HE , ALSO, OBJE CTED TO THEM PUTING IN EVIDENCE THAT HE HAD MENTAL PROBLEMS.

YOU ARE GOING TO ADDR ESS THE MITIGATING CIRCUMSTANCES ISSUE FIRS T? WE NEED TO SEE WHERE WE ARE HERE ON --

I WOULD LIKE TO CLEAR UP THOSE PARTS OF THE RECORD.

CHIEF JUSTICE: WHIL E WE ARE ON THE MITIGATORS, THOUGH, I HAVE A QUESTION, AND IT, REALLY, GOES TO A LITTLE BIT OF WHAT MR . QUARRELS IS IMPLY -- MR . QUARLES IS IMPLY ING ABOUT AFTER TRIESE AND ABOUT HOW WE WERE APPLYING , WE DIDN'T WANT TO SECONDIES GUESS, BUT THERE WERE TWO MITIGATORS , THAT HE WAS AN EMPLOYED TEENAGER AND HE LPED HIS MOTHER FINANCIALLY , REMA INED EMPLOYED UNTIL HE WAS ARRESTED , SWITCHING JOBS , ALSO TESTIFIED T HAT DEFENDANT HEL PS HER BY GIVING HER MONEY WHEN SHE SNEED KNEADED T FIND T HAT THE -- WHEN SHE N E EDED IT, FIND THAT THE MITIGATOR IS GIVEN THE GR EATER WEIGHT OF THE EVIDENCE AND FIND NO STATUTORY WEIGHT OF THE MITIGATOR.I THINK IF THE JUDGE, IN TRIESE WAS GOING TO FIND THE MITIGATOR BUT GIVE IT NO WEIGHT, WE WOULD WO NDER WHY HE WOULDN'T GIVE A MITIGATOR , IT SEEMS LIKE WHAT YOU ARE REALLY PAINT AGO PICTURE OF IS THAT THIS WAS A GOOD KID , MAYBE A LITTLE ODD BUT A GOOD KID, UP UNTIL THE TIME OF THESE HORRIBLE MUR DERS. AND THEN AN OTHER ONE , WHICH SORT OF STRUCK ME A S , TAUBS ABOUT THE MOTHER , THAT THE -- TALKS ABOUT THE MOTHER , THAT THE DEFENDANT HAS A CLOSE, LO VING RELATIONSHIP WITH HIS MOTHER AND YOU NGER SISTER, TALKS HOW HELPFUL HE WAS , WASHING DISHES , GIVING HER MONEY. THE YOUNGER SI STER LOVED VERY MUCH. SHE TESTI FIED THE SISTER MISSES HIM. THE SISTER IS ST ILL V ERY CLOSE , FINDS THIS MITIGATE OR HAS BEEN PROVEN AND GIVES THAT NO WEIGHT. SO WHAT IS THAT , I MEAN , HOW DO WE , IN TER MS OF TRYING TO GET A PIC TURE OF T HIS DEFENDANT , E ITHET THIS IS A DEFENDANT THAT IS , HAS SOME SERIOUS EMOTIONAL IS SUES THAT IS ASPERGER 'S SYNDROME, IF CO RRECT , OR THIS I S BASICALLY A GOOD K ID UP UNTIL THE TIME THAT THIS HAPPENED, AND THEN SOM ETHING THAT IS OUT OF CHAR ACTER FOR HIM OCCURS. HE HAS ACCE PTED RESPONSIBILITY, PLEA DS GUILTY, AND HE EVEN WANTS , HE, THAT IS WHAT SO IMPRESSED THE JUDGE , SO HOW DO WE DEAL WITH , IN CON TEXT , WHEN A JUDGE IS JUST SAY ING I AM NOT GIVING THAT WEIGHT OR GIVING THAT LITTLE WEIGHT , THAT WE JUST DEFER TO IT, WITHOUT AN EXPL ANATION AS TO THE JUDGE'S THOUGHT PROCESS ?

WELL , PERHAPS HE COU LD HAVE GIVEN A BE TTER EXPLANATION ON THIS , BUT A JUDGE CAN CONSIDER A MITIGATOR THAT IS PROPOSED BUT GIVE IT NO W EIGHT , AND, REMEMBER THAT SCHOENWETTER , ALSO, HIS MOTHER HAD T O PUT A JAMMER ON THE COMP UTER BECAUSE HE K EPT ACC ESSING ALL THESE PORNOGRAPHIC SI TES , AND THE SISTER DID NOT LIVE WITH THEM. SO HE G AVE A LOT OF HEARTACHE TO THIS MOTHER , BECAUSE HE WOULD DO EXACTLY WHAT HE WANTED TO DO. I MEAN , HE IS OUT O N HIS BIKE AT THREE IN THE MORNING. SHE HAD TO PUT THESE JAM MERS ON. SHE ACTUALLY AT ONE POINT , TOO T OOK A DISC TO THE POLICE DEPARTMENT BECAUSE HEWAS ACCESSING PORNOGRAPHICSITES AND SHE WAS AFRAID HE WAS

IN CHILD PORNOGRAPHY, SO YOU HAVE TO LOOK AT ALL OF THE TESTIMONY, AND BECAUSE OF WHAT THE JUDGE PROPOSED, THEY DID SAY HE HELPED HIS MOTHER AROUND THE HOUSE. IN THE NIGHTTIME HE IS ACCESSING THE WEBSITE TO THE POINT WHERE SHE IS HAVING TO GO TO THE POLICE AND HAVING TO JAM HER COMPUTER AND EVERYTHING ELSE.

DON'T WE HAVE, THOUGH, I AM CONCERNED ABOUT THE ARGUMENT OF THE DEFENDANT THERE, THAT AFTER OUR DECISION IN TRIESE, THAT AFTER WHATEVER, TRIAL JUDGES, IT LOOKS, NOW, REPEATEDLY THROUGH THIS SENTENCING ORDER, THE TRIAL JUDGE FINDS THE MITIGATOR BUT THEN GIVES IT LITTLE OR NO WEIGHT, JUST REPEATEDLY. JUST, YOU KNOW, AND SO IS THERE A DANGER, NOW, THAT WE HAVE SENT A SIGNAL OUT THERE, WELL, IF YOU JUST USE, IN EARLIER DECISIONS, WE HAD SAID THAT THE JUDGE COULD NOT, IN EFFECT, NOT FIND A MITIGATOR BY GIVING IT NO -- A MITIGATOR BY GIVING IT NO WEIGHT OR LITTLE WEIGHT, SO DO WE HAVE AN ISSUE OUT THERE, WHERE THERE IS THE APPEARANCE OF A FINDING OF SUBSTANTIAL MITIGATION, IF YOU ADD UP THE NUMBERS, BUT THE NET EFFECT IS, BY USING THE MAGIC WORD OF FINDING IT, THAT, BUT THEN GIVING IT LITTLE OR NO WEIGHT, THAT WE IN EFFECT, HAVE GIVEN SORT OF A BLANK CHECK TO THE TRIAL COURTS, NOW, IN TERMS OF BEING ABLE TO IGNORE MITIGATION. LET ME USE AS AN EXAMPLE, THERE, WE HAVE SAID THAT AGE SHOULD BE A MITIGATOR, ESPECIALLY IF IT IS COMBINED WITH OTHER CIRCUMSTANCES, AND NOW HERE, WE HAVE SORT OF A CONFLICTING IMAGE. WE HAVE A, APPARENTLY A HIGH IQ, BUT THEN WE HAVE THIS CONDITION THAT THE DEFENDANT SUFFERS, AND THEN SUBSTANTIAL TESTIMONY ABOUT SORT OF HIM BEING TREATED ABUSIVELY BY HIS PEERS AND OTHERS, YOU KNOW, FOR VARIOUS REASONS, BUT BOTTOM LINE, HE ENDS UP BEING, HE IS ONLY 18. HOW MANY MONTHS, HOW LONG DID HE COME TO BEING UNDER, DO YOU KNOW?

HE WAS 18 YEARS AND TEN MONTHS.

THE, YOU KNOW, HE IS LESS THAN A YEAR AWAY FROM ESCAPING THE EFFECT OF THE LAW HOLDING THAT WE JUST HOLD AS A MATTER OF LAW, SOMEBODY THAT YOUNG AND IMMATURE. WHY SHOULDN'T THE TRIAL JUDGE, REALLY, GIVE THAT, IN THAT CIRCUMSTANCE, GREAT WEIGHT, AS OPPOSED TO SOMEBODY THAT WAS 21, MAYBE SEVERAL YEARS PAST THAT LEGAL AGE WHERE WE HAVE DETERMINED OR THE U.S. SUPREME COURT HAS, AS A MATTER OF LAW, THAT THE IRREMMATURITY SHOULD NOT SUBMIT THEM TO THAT? SO WHY SHOULDN'T THE TRIAL JUDGE, IN ESSENCE, IN OTHER WORDS, HAVE GIVEN MORE WEIGHT TO THESE THINGS?

FIRST OF ALL, I WANT TO POINT OUT THAT HE DID GIVE MODERATE WEIGHT TO THE FACT HE ACCEPTED RESPONSIBILITY. SECONDLY, I MEAN, IF WE ARE TALKING ABOUT SEMANTICS OF LITTLE WEIGHT.

DID HE GIVE MODERATE WEIGHT TO ANY OF THE OTHERS?

NO, HE DID NOT.

SO HE GAVE LITTLE OR NO WEIGHT TO ALL OF THE OTHERS AND HE GAVE MODERATE WEIGHT TO THE ONE THING ABOUT, YOU KNOW, THAT HE HAS CONFESSED, AND DIRECTLY PLED GUILTY TO A TRIAL COURT.

HISTORICALLY, IT IS THIS COURT'S JOB NOT TO REWEIGH THIS. HOWEVER, IF THE JUDGE NEEDS, IS GOING TO BE SECOND-GUESSED, HE MADE COMPLETE FINDINGS AS TO EACH ONE OF THESE ASPECTS. ON THE AGE, HE NOTED THAT THIS IS THE DEFENDANT WHO DOES NOT ACT IMMATURELY. THERE -- IMMATURE. DR. -- IMMATURELY. DR. REEVES, CERTAINLY AS TO THE ASPECT, AUTISM DOESN'T HAVE TO -- ASPERGER'S SYNDROME DOESN'T HAVE TO DO WITH YOUR ABILITY TO REACT. NOT SO MUCH AS TO YOUR ABILITY TO CALCULATE MATH OR HAVE A JOB, WHICH HE FOUND THAT HE COULD DO. HE NOTED THAT THERE WAS CONFLICTING EVIDENCE ON THE ASPERGER'S. WHERE THERE IS CONFLICTING EVIDENCE, IT IS THE TRIAL JUDGE WHO RESOLVES THOSE CONFLICTS, WHO JUDGES THOSE WITNESSES, AND IT IS THIS COURT'S JOB NOT

TO REWEIGH, BUT IF THOSE ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE, THEN THAT IS THE SCOPE OF THE REVIEW.

HOW DOES OUR OTHER CASE, THERE IS ALSO CASE LAW FROM THIS COURT WHICH INDICATES THAT WHEN A DEFENDANT IS PRESENTING MITIGATING EVIDENCE, THE TRIAL JUDGE HAS TO LOOK AT THAT EVIDENCE, AND IF IT IS SHOWN BY THE GREATER WEIGHT OF THE EVIDENCE THAT IT HAS BEEN PROVEN, YOU HAVE TO FIND IT AS A MITIGATOR, BUT YOU, ALSO, HAVE TO LOOK AT THIS EVIDENCE IN CONTEXT AND SEE IF IT IS ACTUALLY MITIGATING, AND IN THE CONTEXT OF THIS CRIME, SO HOW DOES THAT PLAY INTO THE TRIAL JUDGE'S EVALUATION OF MITIGATING? HE HAS PRESENTED THIS EVIDENCE. IS IT ACTUALLY MITIGATING? WHAT KIND OF PROCESS DOES A TRIAL JUDGE HAVE TO GO THROUGH, TO DETERMINE WHETHER OR NOT IT IS, IN FACT, MITIGATING IN THE CIRCUMSTANCES OF THIS CRIME?

WELL, THAT IS INTERESTING, BECAUSE, YOU SEE, BAD THINGS CAN BE MITIGATING AND GOOD THINGS CAN BE MITIGATING. ASPERGER'S SYNDROME CAN BE MITIGATING, AND HIS FASCINATION AS DR. REIBSTAIN SAID, WITH DEATH, SATANISM, AND SEXUALITY, SO THAT CAN BE BIT MITIGATING AND TURN AROUND -- CAN BE MITIGATING AND THEN TURN AROUND AND GO, YES, BUT HE IS GOOD TO HIS MOTHER, AND MEANWHILE VISITING THESE WEB SITES WITH SEX, SATANISM AND DEATH. IT IS TOUGH TO RESOLVE, A LOT OF THAT EVIDENCE. THERE WAS A LOT OF NEGATIVE THINGS PRODUCED THROUGH DR. REIBSAIN'S TESTIMONY, AND UNDERSTAND THAT HE CONFESSED EVERY DETAIL TO DR. REIBSAIN.

BUT IS THERE EVER A POINT WHERE WE CAN LOOK AT A RECORD AND SAY, WELL, THE EVIDENCE WAS ACTUALLY PRESENTED. THE TRIAL JUDGE, REALLY, SHOULD HAVE GIVEN IT MORE WEIGHT.

I DON'T THINK THIS COURT CAN REWEIGH. I THINK THIS COURT COULD SAY THIS EVIDENCE WAS PRESENTED, AND HE FAILED TO RECOGNIZE IT. I THINK THAT IS THE LIMITATION.

CHIEF JUSTICE: DO YOU THINK THE THINGS LIKE HE HELPED HIS MOTHER, WORKED CONTINUOUSLY AND HADN'T BEEN INVOLVED IN ANY CRIMINAL CONDUCT. IS THAT MINIMIZED BECAUSE HE HAD THIS, AS YOU CHARACTERIZED IT, LIFE LONG OBSESSION WITH PORNOGRAPHY?

THAT WAS DR. REIBSAIN'S WORD, HIS EXPERT. YES. BECAUSE YOU HAVE TO LOOK AT EVERYTHING AS A WHOLE. IF THE DEFENSE ATTORNEY SAYS, OH, HE WAS A WONDERFUL CHILD. HE WAS GREAT TO HIS MOTHER, AND IN THE MEAN TIME HE IS OUT HERE STALKING SMALL CHILDREN --

CHIEF JUSTICE: CHIEF BUT THAT IS NOT WHAT HE WAS DOING.

NO, JUST AS AN EXAMPLE. THAT IS NOT WHAT.

CHIEF JUSTICE: BUT WHAT WAS THE CAUSE OF THE PORNOGRAPHY. A SEVEN-YEAR-OLD TO BE OBSESSED WITH PORNOGRAPHY IS NOT THE NORMAL THING. WHAT WOULD THE EXPERTS SAY WAS THE REASON FOR THAT?

THEY SAID THAT WAS HIS FIXATION.

CHIEF JUSTICE: COMING FROM WHAT?

THAT CHILDREN WITH ADHD OR ASPERGER'S SPECIFICALLY, WILL BECOME FIXATED. IT COULD BE, THE EXAMPLE THEY USED, HE COULD BECOME FIXATED ON A PART OF A TRIAL OR GARRAGED DOORS. SCHOENWETTER JUST HAPPENED TO BE FIXATED ON SATANISM, DEATH, PORNOGRAPHY, DR ESSING GOTH.

CHIEF JUSTICE: SO THEY TOOK THAT FIXATION AND LINKED IT TO SOMETHING HE CAN'T CONTROL, WHICH IS HAVING ASPERGER'S SYNDROME. IS THAT CORRECT?

WELL, I THINK YOU WOULD HAVE TO SAY IT AGAIN.

CHIEF JUSTICE: THAT THE REASON FOR THE FIXATION WAS NOT SOMETHING THAT HE JUST, YOU KNOW, I THINK I WILL JUST, TODAY I AM GOING TO BECOME, COLLECT TRUCKS OR WHATEVER, THAT IT IS, COMES AS A RESULT OF THIS UNDERLYING DISORDER THAT HE -- NO. IT COMES MORE AS A CONSCIOUS DECISION THAT I AM GOING TO COLLECT TRUCKS, AND THEN HE WILL JUST KEEP COLLECTING TRUCKS.

CHIEF JUSTICE: BECAUSE HE HAS THIS DIAGNOSED --
THE SYNDROME.

NOW, BUT, I THOUGHT THAT THE STATE DISPUTED, THOUGH, THAT HE HAD HIS THAT SYNDROME.

THEY CROSS-EXAMINED THE EXPERTS. THEY DID NOT PRESENT THEIR OWN EXPERT ON THIS.

DOES THE SYNDROME MAKE IT IMPOSSIBLE, OR HOW DIFFICULT DOES IT MAKE IT FOR THE CHILD TO MAKE A MORAL CHOICE, TO CHOOSE SOMETHING TO FIXATE ON THAT IS GOOD, AS OPPOSED TO BAD? -- TO FIXATE ON -- TO FIXATE ON THAT IS GOOD AS OPPOSED TO BAD.

THAT IS WHAT THEY SAID IS A CONSCIOUS DECISION, AND THAT IS WHAT THE EXPERTS FOCUSED ON AND THAT IS WHAT THE TRIAL COURT FOUND. HE MADE A CONSCIOUS DECISION TO ENTER THAT HOUSE, TO TAKE A BOX CUTTER TO THAT HOUSE.

I GUESS MAKE THE CONSCIOUS DECISION TO FIXATE ON SOMETHING ELSE.

YES. YES. ACTUALLY ASPERGER'S IS COMPLETELY TREATABLE WITH MEDICATION AND THERAPY, AND THEY SAW SIGNS OF ASPERGER'S WAY BACK, WITH THE ADHD, AND HE WAS ON RITALIN, BUT THEN HE REFUSED TO TAKE IT, SO IT IS ALSO A CONSCIOUS DECISION TO NOT TAKE MEDICATION, WHICH HE STOPPED TAKING MEDICATION. CHIEF

CHIEF JUSTICE: SO HE HAD A DIFFERENT, IF HE GREW UP IN A DIFFERENT HOUSEHOLD WHERE HE HAD A CONCERN, NOT TO SAY MS. ROBERTS, I DON'T KNOW WHAT HER CAPACITY WAS ALTHOUGH SHE WAS, SHE MOVED HIM IN, WHAT, TENTH GRADE TO, AFTER SHE MOVED HIM WITH SOMEONE SHE MET ON THE INTERNET, BUT SOME OTHER PARENT COULD HAVE SAID, LISTEN, I AM GOING TO TAKE YOU TO SEE A PSYCHIATRIST. WE ARE GOING TO SEE THE BEST EXPERTS IN THE WORLD. WE ARE GOING TO GET THIS SOLVED. AGAIN, STILL NOT, I DON'T KNOW HOW ANY OF THIS, AND IN THE END UNLESS YOU HAVE GOT PRETTY STRONG AGGRAVATORS IN THIS CASE, AND IT MIGHT, EVEN IF THESE WERE FOUND AND GIVEN MODERATE WEIGHT, IT LOOKS LIKE IT STILL WOULD BE A PROPORTIONAL SENTENCE, SO SOME OF THIS, TRYING TO UNDERSTAND YOU ALWAYS TRY TO UNDERSTAND THE CONTEXT OF THIS CASE, THAT THEY ARE NOT ALL THE SAME, AND THIS ONE LOOKS LIKE IT HAD SOME UNUSUAL FEATURES TO IT, YOU WOULD AGREE, I MEAN, THIS IS A LITTLE DIFFERENT THAN SOME OF THESE OTHER CASES.

YES, AND THIS IS AN OTHER COLLABORATION, ANOTHER SYNDROME. IT DOESN'T MEAN THAT, JUST BECAUSE IT HAS GOT AN ODD NAME OR AN AMICUS BRIEF, IT SHOULD BE TREATED DIFFERENTLY FROM ANY OTHER SYNDROME.

WOULD YOU GO THROUGH IN A LIGHT MOST FAVORABLE TO THE DEFENDANT IN THIS CASE, EXPLAIN FOR US AS YOU SEE IT, IN THE LIGHT MOST FAVORABLE TO HIM, THE IMPACT ON HIS DAILY LIFE. YOU HAVE DONE THE FIXATION. WHAT ELSE IS THERE, AS YOU SEE IT FROM THE TOTALITY OF THIS EVIDENCE, WITH REGARD TO THIS SYNDROME?

THE.

THERE ARE VARYING DEGREES OF ANY SYNDROME .

TAKE AN EXAMPLE .

HIS FIXATION WITH A LITTLE GIRL. HE WENT INTO KRystal'S AND HE WANTED TO TALK TO THE LITTLE GIRL AND THE FELLOW SAID YOUR BOYFRIEND IS HERE. HE WOULD NOT BE ABLE TO LAUGH AT THAT, HIS SOCIAL RELATIONSHIPS, BUT HIS DECISION TO FIND A GIRL THAT NIGHT , THAT WAS A CONSCIOUS DECISION. NOW, HE GOES TO WORK. HE RIDES HIS BIKE TO WORK. HE FUNCTIONS , I MEAN , HE HAS AN IQ OF 130. HE FUNCTIONS WELL IN EVERYDAY LIFE . BUT THERE ARE TIMES WHEN , LIKE IF YOU HAVE A UTISM , THAT YOU WILL FIXATE ON -- FIXATE ON SOMETHING AND IT IS LIKE BEING IN A RUT. YOU CAN NOT GET OUT OF THE RUT. BUT YOU PUT YOURSELF IN THE RUT .

IN THIS CASE THE ONLY ONE WAS WITH REGARD TO THE SATANIC INCLINATIONS AND THE PORNOGRAPHY? IS THAT WHAT WE ARE DEALING WITH HERE ?

HE FIXATED ON DEATH, AND HE PLAYED WEIRD GAMES AND DRESSED GOTH, BUT YOU KNOW , A LOT OF THE KIDS DID THAT, AND LIKE HIS LITTLE FRIEND THAT TESTIFIED AT THE PENALTY PHASE, SAID, WELL , YOU KNOW , WE ACCESS PORNOGRAPHY TOGETHER AND IT WASN'T ANYTHING UNUSUAL FOR TEENAGED BOYS. HE DIDN'T SEE IT AS INITIAL ANYTHING UNUSUAL, SO THERE IS -- SEE IT AS ANYTHING UNUSUAL, SO THERE ARE VARYING DEGREES. ASPERGER'S CAN CAUSE MENTAL PROBLEMS, BUT SOME OF THE THINGS THAT TEENAGED BOYS ARE GOING TO BE DOING , ARE EXACTLY WHAT HE WAS DOING. AND YOU CAN'T ATTRIBUTE THAT TO ASPERGER 'S.

CHIEF JUSTICE: GOING , THOUGH, TO THE ACTUAL CRIME, HE DECIDES, AS YOU SAID, CONSCIOUSLY, HE IS GOING INTO THIS HOUSE, EITHER TO TRY TO HAVE SEX WITH ONE OF THE GIRLS.

YES .

CHIEF JUSTICE: BUT HE SAYS SORT OF JUST FOR THE THRILL OF IT. ALL RIGHT. I THINK THAT IS WHAT HE SAID IN HIS CONFESSION. OKAY. SO NOW, FOLLOWING WHAT JUSTICE LEWIS IS ASKING , WHAT ABOUT HIS SYNDROME AFTER HE IS CONFRONTED BY THE PARENTS? HOW DOES THE , HAVING ASPERGER'S SYNDROME AFFECT WHAT HIS REACTION IS GOING TO BE AT THAT POINT ?

WELL , THE INTERESTING PART IS, OKAY , AND THE JUDGE WENT THROUGH THIS, EVERY LEVEL OF DECISION, YOU SEE , WAS VERY PLANNED OUT. IT WASN'T RANDOM. IT WASN'T PANICED. IT WASN'T I AM FIXATED , I CAN'T STOP MYSELF . HE GOT THE KNIFE IN THE KITCHEN. HE WENT BACK , AND HE WAS WITH VIRGINIA UNTIL SHE STARTED CRYING OUT. HE TURNED .

CHIEF JUSTICE: HE WAS WITH HER BUT NOT TOUCHING, I MEAN JUST WATCHING HER?

WELL, HE SAYS HE WASN'T TOUCHING HER. THE MOTHER SAYS HE WAS TOUCHING HER. THEN THE MOTHER COMES IN AND STARTS SAYING WHAT ARE YOU DOING IN HERE IN KOREAN. HE TURNED TO LEAVE , AND AT THAT POINT HE REMEMBERED VIRGINIA HAD SAID , WHY ARE YOU HERE , RANDY ? WHY ARE YOU HERE? SHE HAD RECOGNIZED HIM. HE SPENT THE NIGHT IN THIS HOUSE. HE WAS VERY FAMILIAR WITH THE HOUSE. HE WAS BEST FRIENDS WITH THE SON , KNEW THE FAMILY .

CHIEF JUSTICE: AGAIN , THINKING LIKE AN INTELLIGENT PERSON, HE DOESN'T COME IN , HE COMES IN JUST LIKE HIMSELF.

YES .

CHIEF JUSTICE: WOULDN'T HE BE THINKING THAT SOMEBODY IS GOING TO RECOGNIZE HIM WHEN HE GOES INTO THIS HOUSE? I MEAN , ISN'T THAT ALREADY A FAULTY DECISION-MAKING PROCESS , THAT SOMEBODY --

NOT AT ALL. NOT AT ALL. BECAUSE HE GOT THE KNIFE TO DEFEND HIMSELF, SO AT THAT POINT HE KNEW , IF ANYBODY SAW HIM , HE WAS DEFENDING HIMSELF .

BUT DIDN'T HE SAY AT SOME POINT , I SEE ME TO RECALL THAT HE SAID AT SOME POINT THAT THE PARENTS DID NOT RECOGNIZE HIM , WHICH BRINGS UP IN MY MIND , THE AGGRAVATED, WAS THE AGGRAVATING CIRCUMSTANCE OF -- CIRCUMSTANCE TO A VOID ARREST, FOUND AS FAR AS THE FATHER IS CONCERNED ?

YES.

AND SO WHAT EVIDENCE DO WE HAVE , THAT INDICATES THAT THE MURDER OF THE FATHER WAS COMMITTED TO A VOID ARREST ? BECAUSE AT SOME POINT , HE DOES SAY THAT HE DIDN'T THINK EITHER THE MOTHER OR THE FATHER HAD RECOGNIZED HIM , BUT HE REALIZED THAT VIRGINIA HAD, BECAUSE SHE ACTUALLY SAID HIS NAME .

I DON'T KNOW IF SCHOENWETTER SAID THAT OR IF THEY SAY THAT IN THE BRIEF , BECAUSE THE FATHER SAID IT WAS A WHITE MALE , BUT IN ANY CASE, HE WAS -- A WHITE MALE , BUT IN ANY CASE --

IT SEEMS TO ME DOING THE QUESTIONING , THE QUESTIONING OF THE POLICE OFFICERS, HE SAYS AT SOME POINT THAT THE FATHER DID NOT RECOGNIZE HIM OR THE MOTHER .

OKAY. SO EITHER WAY , SO , HE SAID HE MADE THE CONSCIOUS DECISION AT THAT POINT , THAT SHE HAD RECOGNIZED HIM. SHE TURNED AROUND , AND STABBED HER TWICE TO HER HANDS , AND THEN THE MOM WAS STILL YELLING IN KOREAN. HE STILL COULD HAVE LEFT. BUT, AND THEN THE DAD COMES IN, AND HE WAS STABBING THEM FRANTICALLY, I MEAN, THE NUMBER OF STAB WOUNDS ON BOTH THE MOTHER AND THE FATHER, AND HE SAYS , I WAS NOT GOING TO GET CAUGHT. HE SAYS THAT IN MY STATEMENT , I WAS NOT GOING TO GET CAUGHT . AND SHE IDENTIFIED HIM AT TRIAL. SHE LOOKED HIM RIGHT IN THE FACE. SHE WALKED AROUND THAT CORNER AND HE COULD HAVE WALKED OUT, AS SOON AS HE HEARD HER YELLING BUT HE DIDN'T. HE TURNED AND STABBED THE CHILD TWICE, AND THEN THERE WAS THE , EVERYBODY AND SCHOENWETTER STABBING A NDEVERYBODY TRYING TO GET AWAY AND THE DAD YELLING FOR THERESA TO CALL 911 , BUT HE KEPT STABBING , AND ONE THING THE JUDGE FOUND IS THAT THE MANNER OF THE STAB WOUNDS , THE REPEATED , DEEP STAB WOUNDS , SHOWED THAT HE MEANT TO KILL NOT JUST TO GET AWAY .

AT SOME POINT IN THE TRIAL JUDGE'S ORDER , HE FINDS THAT THE DEFENDANT IS EXCEPTIONALLY MATURE FOR HIS AGE, AND HE CITES , AS SUPPORT FOR THAT , THAT THE DEFENDANT INSISTED ON PLEADING GUILTY , DESPITE HIS LAWYERS ' ADVICE TO THE CONTRARY HELP ME WITH THAT CONNECTION. WOULDN'T MOST PEOPLE SAY THAT THAT WAS NOT A RATIONAL DECISION, AND WOULD NOT SHOW EXCEPTIONAL MATURITY TO INSIST ON PLEADING GUILTY , OVER THE ADVICE OF YOUR LAWYER, AND HERE WE ARE, OF COURSE, NOW HE HAS BEEN SENTENCED TO DEATH. SO HELP ME WITH THE TRIAL JUDGE'S CONNECTION OF THESE TWO THINGS. HE WAS 18 YEARS OLD, BUT HE IS EXCEPTIONALLY MATURE FOR HIS AGE , AND THE REASON I FIND HE IS EXCEPTIONALLY MATURE IS BECAUSE HE INSISTS , OVER THE OBJECTION OF HIS LAWYER , ON PLEADING GUILTY .

AND I , THIS IS KIND OF AN INFERENCE, BUT IF YOU LOOK AT THE SPENCER HEARING , AND YOU LOOK AT THE FACT THAT HE WROTE TO THE PASTOR WHO HAD BEEN COUNSELING HIM IN

PRISON FOR TWO AND-A-HALF YEARS, HE WROTE HIM A LETTER AT THE SAME TIME HE WROTE THE JUDGE A LETTER, AND THE PASTOR SAID THAT THIS, MR. SCHOENWETTER WAS ONE OF THE MOST DEEPLY INTO SATANISM THAT HE HAD EVER SEEN, BUT THAT HELPED TO BOND HIM WITH THE PASTOR, AND THAT HE TRULY ACCEPTED GOD THROUGH HIS COUNSELING, AND HE WAS THE BEST SCHOLAR AND REALLY WAS NOT USING RELIGION AS A CRUTCH OR AN EXCUSE OR ANYTHING, AND THE PASTOR SAID HE ACCEPTED THAT RESPONSIBILITY FOR HIS ACTS, AND YOU KNOW, HE WROTE THE PASTOR. HE WROTE THE JUDGE, AND HE SAID, I, BASICALLY I WANT TO ACCEPT THE RESPONSIBILITY. I DID IT. I NEARLY KILLED THEM, AND --

I AM HAVING DIFFICULTY MATCHING UP SOME OF THE POINTS THAT YOU ARE MAKING A MINUTE AGO, IN RESPONSE TO ANOTHER QUESTION, YOU KNOW, YOU ARE CITING, NOW, TESTIMONY THAT HE WAS DEEPER INTO THIS SATANISM THAN ANYBODY, WAY BEYOND ANY, AND THEN A MINUTE AGO, WHEN THERE WAS TALK ABOUT HIM DRESSING GOTHIC OR WHATEVER, YOU ALLUDED TO THAT AS BEING THAT IS WHAT ALL OF THE TEENAGERS DO AT SCHOOL OR WHATEVER.

SOME DO.

I AM HAVING TROUBLE MATCHING UP. HE IS EITHER DEEPER INTO SATANISM THAN MOST OTHERS OR HE IS NOT, WHICH IS IT?

SATANISM AND DRESSING GOTH ARE NOT, I MEAN, JUST --

NO CONNECTION.

THERE MAY BE, BUT A LOT OF KIDS DRESS GOTH AND THEY ARE NOT INTO SATANISM. A LOT OF PEOPLE THAT ARE IN SATANISM DON'T DRESS GOTH, BUT WHAT THIS LETTER SAID IS I WANT TO ACCEPT RESPONSIBILITY FOR WHAT I DID AND ONLY BY THE GRACE OF GOD DID I NOT KILL HEISUN. AND WHEN HE CAME INTO THE JUDGE AND THE JUDGE SAW HIM ON TWO OCCASIONS AND CONFRONTED HIM WITH THE LETTER AND SAID DO YOU, IS THIS WHAT YOU WANT, AND HE SAID -- WHAT YOU WANT, AND HE SAID, YES, I AM ACCEPTING RESPONSIBILITY FOR THIS.

ONE LAST QUESTION ABOUT THE MITIGATION, THEN I AM, THERE IS REFERENCE THROUGHOUT HERE OF TESTIMONY OF FRIENDS AND FAMILY, THAT ONE OF THE WAYS THAT HE APPARENTLY WAS MENTALLY ABUSED BY HIS PEERS AND OTHERS, WAS BY BEING CALLED A BED WETTER. -- BED WETTER. WAS THERE TESTIMONY THAT STILL AT 18 YEARS OF AGE, THAT HE WAS WETTING THE BED?

NO.

IS THAT EXPLAINED ANYWHERE?

NO, IT WASN'T, AND I DON'T THINK THERE WAS ANY TESTIMONY ABOUT HIM WETTING THE BED. I THINK THEY CALLED HIM BED WETTER JUST BECAUSE IT RHYMED WITH SCHOENWETTER AND IT WAS A TEASING THING AT THE CHILDHOOD LEVEL.

NO CONNECTION TO THE REALITY OF IT.

I DON'T KNOW OF ANY TESTIMONY AS TO WHY. THAT IS JUST ONE OF THOSE CHILDISH THINGS WHERE THEY TEASE ANOTHER CHILD.

CHIEF JUSTICE: YOU HAVE, PROBABLY WITH OUR HELP WE HAVE ALMOST USED THE WHOLE ORAL ARGUMENT ON THIS POINT. I JUST WANT, MAYBE, IF YOU COULD SPEND A FEW MINUTES ON THE FIRST ISSUE ON THE MIRANDA WARNINGS. I AM ALWAYS CONCERNED. I THINK THAT WHEN YOU HAVE SOMETHING WHERE IT DOES LOOK LIKE, THE BLOOD IS, HAS LED A TRAIL TO THIS PLACE,

TO THE APARTMENT BUILDING. HE HAS GOT A BI KE. HE DIDN'T HAVE THE SHOES , THE BOAT SHOE S THAT HIS MOTHER SAID HE HAD THE DAY BEFORE. HE HAS GOT A CUT ON HIS HAND . THEY, WHEN THEY ARE AS KING HIM TO COME DO WN TO THE STATION, THEY PRE TTY WELL ARE SORT OF LOOK ING AT HIM AS A SUSPECT. AND THEN EVEN IF IT IS SEND AS VOLUN TARY AT THAT POINT , THEY GET HIM IN A S IX BY S IX ROOM, AND THE KIN DS OF QUESTIONS THAT THEY ARE ASKING HIM, CLE ARLY ARE , IF THEY WERE POST MI RANDA , I DON'T THINK THEY WOULD BE ANY PROBLEMS, BUT I ALW AYS , I AM ALWAYS CON CERNED THAT WHEN, AFTER A CONFESSION OCCURS, IS WHEN THEY ADMINISTER MIRANDA WARNINGS.IT IS SORT OF LIKE WA IT A SECOND. THE PURPOSE OF MIRANDA IS TO MAKE SURE THAT SOMETHING IS VOLUNTARY . YOU HAVE GOT AN 18 YEAR-OLD THAT HAS NEVER , WHY ISN'T IT THAT, A T THE POINT THAT HE IS BROUGHT TO THE POLICE STATION , THEY ARE ASKING HIM QUESTIONS, THAT IS CL EARLY FOCUSED ON HIM A S A SU SPECT , CLEARLY FROM THE QUESTIONSTHAT ARE BEING AS KED. WHY SHOULD N'T THEY HAVE GIVEN HIM THE MIRANDAWARNINGS, AT THE TIME THAT THEY BR ING HIM INTO THIS SIX BY SIX ROOM AND STA RT TO VIDEOTAPE HIM?

I WI LL HAVE TO DEFER TO THE TRIAL JUDGE FI NDINGS , BECAUSE I THINK YOU AREASKING ME MO RE OF A POL ICY QUESTION, BUT HE WAS NOT IN CUSTODY UNTIL HE STARTED GIVING INCRIMINATING RESPONSES , AND AS SOON AS HE DID THAT, THEY STOPPED. THEY SAID WE WANT TO GIVE YOU YOUR MIRANDA RIGH TS . HE SAYS, I K NOW , I HAVE THE RIGHT TO REMAI N SILENT.I HAVE THE RIGHT TO SPEAK TO AN ATTORNEY. THIS CAN AND WILL BE U SED AGAINST US. THEY SAID , NO , WE NEED TO RECITE THESE TO YOU AND M AKE SURE THAT YOU UNDERS TAND EVERYTHING.

CHIEF JUSTICE: CHIEF HEHAD ALREADY CONFESSED AT THAT POINT.

HAD HE GIVEN SOME OF THE FACTS , AND THEN THEY WENT THROUGH AF TER HE DID THAT AND THEY READ THE COLLO QUY WHICH IS IN THE OR DER.

HAD HE ALR EADY CONFE SSED AT THAT POINT OR NOT?

HE HAD GIVEN THEM ENOUGH INFORMATION FOR THEM TO K NOW THAT, OKAY , IS HE NO W IN CUSTODY .

HAD HE CONFESSED AT THAT POINT OR HAD HE NOT? YOUR CHARACTERIZATION OF WHAT HE HAD SAID , IS N'T IT A FAIR CHARACTERIZATION T HAT HE HAD ALREADY CONFESSED?

HE HAD CONFESSED TO MANY ITEMS, YES, BUT I WOULD LIKE TO POINT OUT THAT THE LETTER , HIS EVEN TUAL STATEMENTS TO HIS PSYCHIATRI STS . HE TOLD EVERYBODY ABOUT EVERYTHING. THE INEVIT ABLE DISCOVERY O F ALL OF THE IT EMS , BE CAUSE THE BLOOD TR AIL LED RI GHT TO THE APARTMENT.

TELL US HOW YOU BE LIEVE WE CAN AVOID PRO VING THE RESULT HERE BUT AV OID SENDING OUT A SI GNAL THAT IT IS PERFECTLY ALL RIG HT TO BRING ST RONG SUSPECTS IN A NDQUESTION THEM UN TIL YOU ESSENTIALLY GET A CONFESSION , WITHOUT GIV ING THE MIRANDA RIGHTS. TELL HOW WOULD WE WALK THAT LINE IN THIS CA SE?

WELL , THIS CASE IS A LOT LIKE DA VIS , AND YOU , IT IS GOING TO BE A CASE-BY-CASE BASIS , AS TO WHAT POINT T HEY ARE IN CUST ODY . I DON'T THINK THAT THERE CAN BE A , YOU KNOW WHEN THEY WALK OVER THE THRESHOLD OF THE POLICE STATION OR WHEN THEY WALK INTO THE POLICE STATION.YOU HAVE SAID MANY T IMES JUST BEING IN THE POL ICE STATION.

BUT DON'T WE WANT TO PRACTICE, THOUGH, AND DOESN'T THE U.S. SUPREME COURT WANT A PR ACTICE THAT ENCOURAGED THE GIVING OF THE MIRANDA RIGHTS. WHEN IN DOUBT, GIVE THEM , NOT THE OTHER WAY AR OUND . ISN'T THAT THE RULE?

YES . AND I THINK YOU CAN'T MAKE A BLANKET RULE, BECAUSE EVERY CASE IS DIFFERENT. IT IS IN CUSTODY , SUBJECT TO INTERROGATION , AND THERE IS SO MANY NUANCES IN THAT , THAT IT IS HARD TO JUST MAKE A BLANKET RULE LIKE , OKAY , YOU ARE SUPPOSED TO GIVE MIRANDA THEN. THAT IS THE RULE. WHEN YOU ARE IN CUSTODY AND SUBJECT TO INTERROGATION , AND THE JUDGE FOUND HE WAS NOT IN CUSTODY AT THAT POINT , AND IT IS AT THE POINT THAT HE GOT IN CUSTODY , THAT IS WHEN HE STARTED SAYING INCRIMINATING THINGS, AND THAT IS WHEN THEY GAVE HIM MIRANDA.

CHIEF JUSTICE: BUT AGAIN IT IS SORT OF, AND I SEE THAT WE DO SEE THIS MORE AND MORE, WHICH IS THAT THEY WAIT UNTIL THE PERSON CONFESSES AND THEN GIVE THEM THE MIRANDA RIGHTS, SO IT IS SORT OF LIKE, YOU KNOW , THE WHAT IS IT OUT OF THE BARN?

THE HORSE IS OUT OF THE BARN.

CHIEF JUSTICE: WITH OUR HELP, YOU HAVE USED UP YOUR TIME.

THANK.

CHIEF JUSTICE: THANK YOU VERY MUCH.

JUST BRIEFLY , I APOLOGIZE ABOUT THE AGE. IT CERTAINLY , I THINK I MUST HAVE CONCLUDED THAT FROM THE AMICUS BRIEF. IT CERTAINLY READS , IN THE CONSIDERATION OF AGE AS MITIGATOR , FINDINGS OF FACT , IT SURE READS , UP UNTIL THE POINT THAT HE SAYS AT THE VERY END HE WRITES , LITTLE WEIGHT, HE TALKS ABOUT HIS MATURITY AND INTELLIGENCE AND IT READS AS IF HE GAVE IT NO WEIGHT.

BUT THAT IS TRULY WITHIN THE DISCRETION I MEAN, THERE IS A COMMENT HERE THAT WE DID SOMETHING DIFFERENT IN TREES. -- IN TREASE . -- TREASE. TREASE, REALLY , IS A RECOGNITION THAT THERE IS A NECESSITY FOR TRIAL JUDGE TO SAY CONSIDER ITEMS WHICH ARE MITIGATING IN NATURE , BUT THAT IT IS WITHIN THE POWER OF THE TRIAL JUDGE, WHO HAS THE CREDIBILITY OF ALL OF THESE PEOPLE IN FRONT OF THAT TRIAL JUDGE , TO ASSESS THE WEIGHT THAT IS TO BE GIVEN. I MEAN, THAT IS WHAT OUR LAW IS! ISN'T THAT RIGHT?

IT IS RIGHT. THAT IS WHAT, BUT IN TREASE, THIS COURT DID REcede SOMEWHAT, FROM CAMP BELL AND NYBERT, WHERE, WHEN JUDGES WERE SIMPLY IGNORING VALID MITIGATION, BY IN ESSENCE , GIVING IT NO WEIGHT OR LITTLE WEIGHT.

TREASE WAS THE CASE IN WHICH WE ARE DISCUSSING THE LANGUAGE, LITTLE OR NO WEIGHT , CORRECT?

RIGHT.

AND IN THAT INSTANCE , WE RECOGNIZED THAT THERE CAN BE , THERE SHOULD BE A RECOGNITION OF WHAT IS MITIGATING IN NATURE , BUT THAT THE TOTAL SPECTRUM ACROSS THE BOARD OF WEIGHT , IS FROM ZERO TO TOTAL . ISN'T THAT WHAT WE DID IN TREASE?

YES, BUT I DON'T THINK THAT A TRIAL COURT CAN INSULATE HIS OR HER DECISIONS ON THE AMOUNT THAT A FINDING THAT A MITIGATOR HAS NOT BEEN PROVEN, BY PURPORTING TO FIND A FACTOR AND THEN OFFERING NO SUFFICIENT EXPLANATION FOR GIVING IT LITTLE OR NO WEIGHT. IN ESSENCE, IT IS SORT OF A CIRCULAR REASONING THAT , AND YOU SEE IT MORE AND MORE IN THE FINDINGS OF FACT , THAT TRIAL JUDGES ARE WRITING AFTER THIS COURT'S DECISION IN TREASE. I THINK THIS COURT WAS CORRECT IN CAMPBELL AND NYBERT THAT CERTAIN THINGS ARE CLEARLY MITIGATING AND THEY ARE ENTITLED TO WEIGHT, AND BY GIVING THEM LITTLE OR NO WEIGHT , THE JUDGES ARE SIMPLY AVOIDING THAT CONCLUSION, WHEN IN ESSENCE THEY SHOULD HAVE WEIGHT.

BUT SHOULDN'T THERE BE A POINT WHERE AN ITEM MAY BE MITIGATING BUT YOU HAVE TO DEMONSTRATE THAT IT IS MITIGATING UNDER THE CIRCUMSTANCES OF THIS CASE ?

TRUE. BUT THIS RECORD IS A WONDERFUL RECORD TO REACH THE CONCLUSION THAT THE TRIAL JUDGE HERE , BASICALLY IGNORED SUBSTANCE VAILID MITIGATION BY GIVING IT LITTLE OR NO WEIGHT.

CHIEF JUSTICE: WITH OUR HELP, MR. QUARLES , WE HAVE USED UP YOUR TIME. THANK YOU FOR PRESENTING THE ARGUMENTS ON BOTH SIDES.