

>>> THE NEXT CASE FOR THE DAY IS
MARTIN VERSUS STATE OF
FLORIDA.

>> MAY IT PLEASE THE COURT,
WILLIAM MCLAIN REPRESENTING
ARTHUR MARTIN.

MR. †MARTIN WAS CONVICTED OF
FIRSTDEGREE PREMEDITATED
MURDER FOR THE SHOOTING DEATH
OF JAVON DANIELS.

HE ALSO HAD A CODEFENDANT
FRANKLIN BATIE WHO PLED GUILTY
TO SECONDDGREE MURDER

>> CAN YOU SPEAK UP A LITTLE
BIT?

>> I'M SORRY.

AND I'M MUMBLING.

I'M SORRY.

MR. †BATIE ENTERED A PLEA TO
SECONDDGREE MURDER IN
EXCHANGE FOR HIS TESTIMONY
AGAINST MR. †MARTIN.

THE FACTS OF THIS CASE
ESSENTIALLY WERE AS FOLLOWS.

>> COULD YOU GO TO THE I AM
TROUBLED BY THE DESTRUCTION OF
RECORDS AND THE DIFFICULTY
THAT THAT MAY POSE.

CERTAINLY WE KNOW WHAT THE
STANDARD IS FOR THE
INTELLECTUALLY DISABLED, BUT
THIS BEFORE AGE OF 18 AND THE
SCHOOL RECORDS, YOU KNOW, I
UNDERSTAND YOUR ARGUMENT
SAYING THAT IT WAS IMPOSSIBLE
TO PRODUCE, BUT, I MEAN, AS WE
LOOK AT ALL THESE CASES, IS
THERE SOME OTHER WAY?

IT WOULD SEEM TO ME THAT OTHER
TYPES OF TESTIMONY OTHER THAN
THE EXACT SCHOOL RECORDS COULD
BE UTILIZED TO ESTABLISH THOSE
ELEMENTS.

AND IF I'M WRONG, HELP ME
UNDERSTAND WHY I'M WRONG.
BECAUSE THAT'S ONE TROUBLING
ASPECT HERE.

>> THIS WAS THE EXPERT'S
TESTIMONY IN THIS CASE, THAT
HE DID NOT HAVE ADEQUATE

INFORMATION TO DO THE TWO
THE SECOND PRONG, SECOND AND
THIRD PRONG OF THE MENTAL
RETARDATION ASSESSMENT BECAUSE
HE HAD NO INADEQUATE
INFORMATION.
APPARENTLY THE SCHOOL RECORDS

>> THE PROBLEM BUT GOING
BACK TO THIS IS THAT DOES THAT
MEAN THAT IN CASES WHERE
THERE'S NO THE SCHOOL
RECORDS ARE THERE, THAT AN
EXPERT CAN'T RECONSTRUCT WHAT
GOES ON IN THE CHILDHOOD TO
SEE THAT HE IS THROUGH HIS
FAMILY AS TO WHETHER HE IN
FACT WAS MENTALLY RETARDED?

>> WELL, IN THIS CASE DR.
BLOOMFIELD DID THE ONLY
FAMILY MEMBERS HE COULD
CONTACT WAS THE WHO COULD
GIVE HIM ANY INFORMATION ABOUT
HIS MR. †MARTIN'S YOUTH WAS
HIS MOTHER AND HIS SISTER.
AND READING THEIR TESTIMONY AT
PENALTY PHASE, HE SAID I WAS
UNABLE TO GET ADEQUATE
INFORMATION FROM THEM.

DUE TO THEIR OWN INCAPACITIES.
>> YOU'RE DEALT THE RECORD YOU
HAVE, BUT THE QUESTION ON THIS
IQ SCORE AS TO WHETHER THERE'S
A THRESHOLD OF MENTAL
RETARDATION, HE DOES THE
WAISIV AT 54.

THAT'S THE MOST RECENT VERSION
AND SUPPOSEDLY THE MOST
ACCURATE.

>> CORRECT.

>> BUT IN 2008 WHO RAN THE WAI
SI THAT GAVE HIM A 94?
I'VE NEVER SEEN IF YOU HAVE
TWO RELIABLE TESTS ONE
ATTORNEY GENERAL SAYS YOU
CAN'T FAKE SMART.

WHERE'S THE 94?

>> THE DIFFERENCE IS IS DR.
BLOOMFIELD WAS TALKING ABOUT
THE RECORDS THAT HE HAD.

THE RECORDS HE HAD WERE FROM THE DEPARTMENT OF CORRECTIONS, WHERE THEY GAVE IQ SCREENING TESTS JUST FOR PURPOSES OF PLACEMENT OF AN INDIVIDUAL WITHIN THE INSTITUTION, WHAT KIND OF JOB ARE WE GOING TO ASSIGN TO HIM, WHAT HE CAN AND CAN'T DO.

THOSE TYPICALLY HAVE PERHAPS TWO I MEAN THREE OR FOUR SUBTESTS THAT THEY USE FOR A SCREEN, NOT

>> SO ARE YOU SAYING THE 94 IS NOT A RECOGNIZED TEST?

>> IT WAS NOT A FULLSCALE IQ TEST.

IT WAS A SCREENING TEST.

>> SO WE'RE CLEAR, THAT'S THE POINT I WANTED TO MAKE.

THE ONLY FULLFLEDGED IQ TEST CONDUCTED WAS THE WAISIV IN 2011.

>> THAT'S THE ONLY ONE.

>> EVERYTHING ELSE IS PARTIAL TESTING DONE THROUGH THE DEPARTMENT OF CORRECTIONS THROUGHOUT THE YEARS.

>> THAT'S CORRECT.

>> INCLUDING THE 1992 THAT WAS THE 71.

>> THERE WAS A 71, A 94, BUT THEN THERE WERE THREE OR FOUR SCORES IN THE 50s AND 60s FROM THESE SCREENING TESTS.

>> I JUST WANT TO MAKE CLEAR THAT YOU'RE SAYING THAT EACH OF THESE TESTS, THE ONE IN 1992, 2002 AND 2008, WERE ALL DONE IN THE DEPARTMENT OF CORRECTIONS.

>> AND THEY WERE AS SCREENING TESTS.

>> AND THEY WERE ALL PARTIAL TESTS.

>> YES.

DR.†BLOOMFIELD'S TESTIMONY WAS HE FOUND NO OTHER FULLSCALE IQ TEST ANYWHERE IN THE RECORDS.

HE DIDN'T HAVE SCHOOL RECORDS.
ONLY THING HE HAD WERE DOC
RECORDS, ALL SCREENING TESTS
AND THEY WERE PERFORMED BY WE
DON'T KNOW WHO.

>> WHAT I DON'T UNDERSTAND IS
YOU STILL GOT AN IQ OF 54.
AGAIN, IT'S NOT YOU DIDN'T
ARGUE THE CASE.

WASN'T THERE EVIDENCE THAT THE
MOTHER SAID THAT HE, MARTIN,
HELPED PAY HER BILLS?

IN OTHER WORDS, THERE HAS A
GUY DOESN'T JUST HAVE AN IQ
OUT OF LIKE IN THIN AIR.

THE ISSUE IS THAT'S WHY HOW
YOU FUNCTION IS SO IMPORTANT
TO THE WHOLE PICTURE.

>> EXACTLY.

>> WAS HE EVER LIVING ON HIS
OWN?

WORKING?

WHAT'S THE RECORD SAY?

>> HE WAS NEVER LIVING ON HIS
OWN.

HE WAS IN AND OUT OF PRISON.
HE WAS IN PRISON FOR A NUMBER
OF YEARS.

>> THAT DOESN'T MEAN BUT IT
DOESN'T MEAN MENTALLY RETARDED
PEOPLE CAN'T BE IN AND OUT OF
PRISON.

>> SHE SAID, WELL, HE WAS IN
SPECIAL CLASSES IN SCHOOL.
APPARENTLY DR. †BLOOMFIELD
COULD FIND SOME MAYBE 1ST
GRADE SCHOOL RECORDS, BUT ALL
THE REST OF THEM HAD BEEN
DESTROYED PURSUANT TO THE
STANDARDS SCHOOLS USED.

>> WHAT DID SHE SAY ABOUT HIM
HELPING HER PAY BILLS?

>> I THINK WHEN HE HAD MONEY,
HE HANDED HER MONEY TO HELP
PAY.

>> DID DR. †BLOOMFIELD ADDRESS
THE ADAPTIVE FUNCTIONING
ELEMENT WITH RESPECT TO THE
DEFENDANT WHEN HE WAS AN
ADULT, AT LEAST?

>> HE DID HIS ADDRESS WAS THAT HE HAD INADEQUATE INFORMATION TO DO THAT BECAUSE THE EXPERTS DID NOT USE FUNCTIONING WITHIN AN INSTITUTION FOR THE ADAPTIVE FUNCTIONING TEST.

IN OTHER WORDS, IT'S A DIFFERENT STRUCTURED ENVIRONMENT.

>> WELL, AGAIN, THIS MAY BE A QUESTION FOR ANOTHER DAY, BUT WHY WOULDN'T HE GET THE BEST INFORMATION HE COULD BASED ON HIS FUNCTIONING OUTSIDE OF THE INSTITUTIONAL CONTEXT TO MAKE THAT DETERMINATION?

AND I SAID THAT MAY BE A QUESTION FOR ANOTHER DAY BECAUSE HE'S DONE WHAT HE'S DONE HERE.

>> AND I CAN'T SPEAK FOR THE EXPERT BECAUSE I'M NOT AN EXPERT, BUT HE SAID I DIDN'T GET ADEQUATE INFORMATION TO DO AN ASSESSMENT ON THOSE SECOND AND THIRD PRONGS AND

>> NOW, I UNDERSTAND, THOUGH, YOU'RE NOT SAYING ARGUING ON APPEAL THAT THIS IS AN ATKINS CASE, THAT HE'S NOT ELIGIBLE FOR EXECUTION, BECAUSE BASED ON THE 54 HE SHOULD HAVE BEEN FOUND MENTALLY RETARDED.

I DON'T SEE THAT AS YOUR ISSUE.

>> WELL, I DON'T HAVE AN EXPERT GIVING ME THE SECOND PRONG.

>> SO NOW THEN THEREFORE WITH THE TRIAL JUDGE HAVING THE 54 IN A VACUUM, WHAT IS THE TRIAL JUDGE SUPPOSED TO DO WITH THAT?

WE'RE SAYING MAYBE INADEQUATE INFORMATION TO WEIGH THE IQ SCORE HIGHER?

I MEAN WEIGH THE LOW IQ SCORE HIGHER AS A GREATER AS A

MITIGATOR.

>> THERE'S A COUPLE THINGS GOING ON WITH THE WAY THE TRIAL JUDGE TREATED THIS. NUMBER ONE, AS I POINTED OUT IN THE SENTENCING ORDER SHE ACKNOWLEDGED, OKAY, HE HAS LOW FUNCTIONING.

SHE ACKNOWLEDGED THAT MARTIN WAS IN THE LOW 2% OF THE POPULATION, WHICH IS WHAT DR. BLOOMFIELD TESTIFIED ABOUT WITH THE 54IQ.

HOWEVER, SHE NEVER REFERENCED THE IQ SCORES IN HER ORDER. AND THEN SHE DROPPED A FOOTNOTE AND THE ONLY IQ SCORE SHE REFERENCES ARE TWO FROM THE SCREENING TEST.

HE DID HAVE A 1 AND 94. THAT ORDER DOESN'T LEND ANY CONFIDENCE THAT THE TRIAL JUDGE REALLY UNDERSTOOD THE TESTIMONY.

>> THE TRIAL JUDGE DID FIND AS MITIGATING CIRCUMSTANCES THAT HE WAS FUNCTIONALLY ILLITERATE.

>> YES.

>> THAT HE HAD LEARNING DISABILITY, THAT HE HAD LOW COGNITIVE FUNCTIONING AND IT SEEMS TO ME THAT THOSE FINDINGS HAVE TO BE BASED ON THE FACT THAT AT LEAST IN PART THAT HE HAD THIS LOW IQ SCORE. IS THAT NOT CORRECT?

>> THAT IS CORRECT.

SHE DID FIND THOSE THINGS IN THE ORDER.

SHE GAVE THEM SLIGHT WEIGHT. SHE GAVE SOME WEIGHT TO THE LOW FUNCTIONING OR LOW COGNITIVE FUNCTIONING.

BUT I'M SAYING THAT WE CAN'T REALLY GIVE THE TRIAL JUDGE'S ASSESSMENT OF THIS THE KIND OF CONFIDENCE THAT WE MIGHT WANT TO BASICALLY BECAUSE, NUMBER ONE, IT WAS A VERY CURSORY

STATEMENT IN A SENTENCING ORDER SAYING LOW COGNITIVE FUNCTIONING BECAUSE OF THE 2%, BEING IN THE LOWER 2%.

BUT THEN THAT FOOTNOTE WHERE SHE SAYS DR. †BLOOMFIELD GAVE HIM A WAIS I THINK HE SAID IT WAS A WAISR AND HE GOT A 71, WHICH IS TOTALLY INACCURATE.

DR. †BLOOMFIELD DIDN'T GIVE A WAISR.

THERE WAS ONE USED AS A SCREENING TEST AT DOC AND HE GOT A 71 SOMETIME EARLIER.

>> SO ARE YOU SUGGESTING THIS SHOULD GO BACK TO THE TRIAL JUDGE TO REEVALUATE BASED ON THERE BEING A 54†IQ?

>> AT A MINIMUM BECAUSE WE DON'T HAVE THE CONFIDENCE THAT THE TRIAL JUDGE FULLY UNDERSTOOD BLOOMFIELD'S TESTIMONY AS IT WAS BASED UPON

>> DID ANYONE RELATE BECAUSE YOU'VE ALSO RAISED POINTS OF CCP AND HAC AND SORT OF SAYING THIS IS A GUY THAT WAS LOW FUNCTIONING AND THERE WAS, YOU KNOW, YOU CAN EITHER SAY THOSE AGGRAVATORS IF THEY EXIST SHOULD REALLY BE GIVEN LESS WEIGHT.

BUT DID ANYONE RELATE HIS LOW IQ TO THE WAY THE CRIME OCCURRED?

DID ANY EXPERT DO THAT?

>> NOT AS EXPLICITLY AS I WOULD HAVE LIKED, YOUR HONOR, BUT THERE WAS TESTIMONY YOU KNOW, THERE IS IN THE RECORD HIS INABILITIES TO DO FOLLOW THROUGH WITH THINGS, IMPULSIVE BEHAVIORS AND

>> GOING BACK TO JUSTICE QUINCE'S POINT, THE TRIAL JUDGE DID THERE WAS COMPETENT, SUBSTANTIAL EVIDENCE OF THE DEFENDANT'S

LOW COGNITIVE FUNCTIONING.
AND THAT INCLUDED HE WAS
IMPULSIVE AND HE HAD TROUBLE
CONTROLLING HIS ANGER.

>> YES.

>> THOSE ARE THINGS THE TRIAL
JUDGE CONSIDERED AFTER HEARING
COMPETENT, SUBSTANTIAL
EVIDENCE ABOUT IT.

BUT WHY WASN'T THAT WHY
DOESN'T THAT SOLVE THE
SITUATION YOU'RE CLAIMING?

>> I'M SORRY.

I DIDN'T

>> WHY DOESN'T THAT SOLVE IT?
I MEAN, YOU'RE SAYING THAT THE
JUDGE DIDN'T HAVE ENOUGH
INFORMATION OR YOU DON'T FEEL
COMFORTABLE WITH THE JUDGE'S
FINDINGS AS TO THIS MITIGATOR.
SEEMS LIKE THE JUDGE DID HEAR
EVIDENCE ABOUT IT, MADE
FINDINGS ABOUT IT AND
CONSIDERED IT.

>> THE JUDGE DID MAKE FINDINGS
AND DID DO SOME CONSIDERATION
OF IT, BUT THEN AGAIN WE'RE
TALKING ABOUT WE'RE
ARGUABLY HERE HAVE A MAN WITH
A 54 IQ WHO MAY OR MAY NOT
QUALIFY FOR THE MENTAL
RETARDATION BAR TO EXECUTION.
WE DON'T KNOW BECAUSE THE
SECOND TWO PRONGS WERE NEVER
EVALUATED ON THE ANALYSIS.

>> BUT IT SEEMS TO ME THAT
YOUR ARGUMENT REALLY
ESSENTIALLY IS THE TRIAL JUDGE
SHOULD HAVE GIVEN MORE WEIGHT
TO THOSE FACTORS.

NOW, HE DID GIVE SLIGHT WEIGHT
TO THE FUNCTIONAL ILLITERATE
AND SLIGHT WEIGHT TO THE
LEARNING DISABILITY AND SOME
WEIGHT TO THE LOW COGNITIVE
FUNCTIONING.

AND SO YOUR ARGUMENT
ESSENTIALLY, HE SHOULD HAVE
GIVEN THOSE MORE WEIGHT.

>> SHE SHOULD HAVE GIVEN MORE

WEIGHT.
>> SHE.
>> YEAH.
>> AND
>> THAT IS ESSENTIALLY THE
ARGUMENT.
>> DOESN'T OUR CASE LAW SAY
THAT IT'S THE TRIAL JUDGE WHO
GIVES THE WEIGHT TO THESE
MITIGATORS AND AGGRAVATORS AND
THAT AND WE'RE NOT GOING TO
GO BEHIND DO WE GO BEHIND
THAT?
>> BUT THAT'S A DISCRETIONARY
CALL AND DISCRETIONARY RULINGS
HAVE TO BE BASED UPON A
CONFIDENCE THAT THE TRIAL
COURT HAS IN FACT EVALUATED
THE FACTS CORRECTLY.
AND HERE THERE'S A QUESTION OF
WHETHER SHE EVALUATED THE
FACTS CORRECTLY.
>> BECAUSE SHE SAID HE HAD THE
71 IQ.
>> THE DEFERENCE REALLY WE
DON'T HAVE CONFIDENCE IN THE
ORDER THAT SHE EVALUATED THE
FACTS AND THEREFORE DEFERENCE
TO THE FINDING OF WEIGHT IS
CALLED INTO QUESTION.
AND, YES, I THINK IT SHOULD
HAVE BEEN MORE WEIGHT.
I SUGGESTED THAT EVEN EVEN
WITHOUT THE FULL FINDING OF
MENTAL RETARDATION, YOU KNOW,
PRIOR TO THE ATKIN DECISION WE
HAD THOMPSON AND PENRY WHERE
THIS TYPE OF TESTIMONY IS
SUPPOSED TO BE GIVEN A
SIGNIFICANT WEIGHT IN
MITIGATION AND THE LOWER THE
IQ, THE MORE WEIGHT.
THAT WAS PRE THAT WAS A
STANDARD FOR EVALUATING MENTAL
RETARDATION TYPE EVIDENCE
BEFORE THE CONSTITUTIONAL BAR.
>> WELL, WHAT WAS WHAT WAS
HER REASONING FOR FOR
GIVING IT SOME WEIGHT.
YOU WOULD SAY THAT IT SHOULD

HAVE BEEN SINCE HE'S IN THE
LOWEST 2%, EVEN THOUGH HE'S
NOT GOING TO QUALIFY FOR
EXEMPTION FROM THE DEATH
PENALTY, IT SHOULD HAVE BEEN
GIVEN SIGNIFICANT WEIGHT
BECAUSE 54 IS A VERY LOW IQ.

>> YES.

>> SO HOW DID THE TRIAL JUDGE
EVALUATE THE IQ TO ONLY COME
UP WITH SOME WEIGHT?

>> THAT'S WHAT WE DON'T KNOW
BECAUSE

>> SHE DOESN'T EXPLAIN IT?

>> IT'S NOT EXPLAINED IN THE
ORDER.

>> WELL, IS THERE SUFFICIENT
EVIDENCE THIS IS IT'S
ALMOST AS THOUGH YOU'RE
ASKING, OKAY, HERE WE HAVE X,
BUT THE WAY THAT THE LAW IS
DEVELOPED, THAT THERE ARE
OTHER FACTORS THAT IMPACT X
AND HAVE TO BE CONSIDERED IN
CONJUNCTION WITH X, HOW DO YOU
FUNCTION, ONSET BEFORE CERTAIN
AGES.

BUT THE SLATE IS CLEAN WITH
THAT.

SO GIVEN X, YOUR VIEW IS THAT
THE TRIAL COURT MUST TAKE JUST
X WITHOUT ANY OTHER
INFORMATION AND REACH A
CERTAIN CONCLUSION?

>> WELL, THERE WAS OTHER
INFORMATION OTHER THAN JUST
THE RAW SCORE.

>> BUT NOT THOSE THINGS THAT
HAVE NOW BEEN DEVELOPED AS
BEING DIRECTLY RELATED TO THAT
DETERMINATION.

CORRECT?

I MEAN, THAT'S THESE DIDN'T
COME OUT OF THIN AIR.

THESE CAME OUT OF
SCIENTIFICALLY DEVELOPED
STANDARDS AS TO WHAT YOU LOOK
AT TO DETERMINE WHAT IMPACT
DOES THE SCORE THAT WE HAVE
COME UP WITH WHAT DOES THAT

MEAN.

HAVEN'T WE?

>> AGAIN, THE QUESTION I DON'T WANT TO I DON'T WANT TO CONFLATE THE FINDING THE LEGAL FINDING OF MENTAL RETARDATION WHERE THE TWO PRONGS WERE FULLY EVALUATED

>> ISN'T IT NECESSARILY RELATED, THOUGH, BECAUSE THAT'S HOW IT DEVELOPED, IS THAT YOU HAVE A SCORE AND YOU SAY WHAT DOES THAT SCORE MEAN? AND IT MEANS SOMETHING BY WHEN WAS ITS ONSET AND WHAT EFFECT DOES IT HAVE ON THE PERSON.

>> WE DID HAVE THE ADDITIONAL INFORMATION SHOWING ABOUT HE WAS FUNCTIONALLY ILLITERATE, HE HAD ANGER ISSUES, IMPULSIVITY ISSUES AND THOSE KINDS OF THINGS WERE IN THE RECORD.

>> DID HE EVER HAVE A JOB?

>> HE HAD I THINK HE WORKED AS LIKE SOME LABOR HE DID SOME LABORING, GENERAL LABOR.

>> WE DON'T HAVE ANY REALLY CLEAR INFORMATION ABOUT AN EMPLOYMENT HISTORY, DO WE?

>> NO, WE DON'T.

>> IT'S ALMOST LIKE A NONEXISTENT RECORD.

>> THERE WAS TESTIMONY THAT HE WENT TO JOB CORPS. IN HIS YOUTH AND HE EARNED A, QUOTE, CERTIFICATE IN PLUMBING, WHICH WAS NOTHING MORE THAN A BASIC INTRODUCTION TO PLUMBING SKILLS AND APPARENTLY HE DID WORK HELPING LAY PIPE OR SOMETHING FOR A BRIEF PERIOD OF TIME AT SOME POINT IN HIS LIFE.

AND APPARENTLY ODD JOBS, LABOR POOL STUFF.

>> THERE WAS A STATEMENT HE HAD BEEN ON SSI HIS WHOLE LIFE?

>> APPEARS HIS WHOLE ADULT LIFE.
>> DID ANYONE PULL THE RECORDS TO SEE IF IT WAS BASED ON PHYSICAL OR INTELLECTUAL
>> IT WAS BASED ON PHYSICAL. THAT WAS WHAT BLOOMFIELD'S TESTIMONY WAS.
>> YOU RAISED AN ISSUE ABOUT HIS OR THERE'S SOME EVIDENCE OF SUBSTANCE ABUSE.
>> YES.
>> THE ONLY EVIDENCE THAT WAS PRESENTED I THINK WAS THE PSI AND DR. †BLOOMFIELD'S REPORT MADE SOME REFERENCE TO THE FACT THAT HE DRANK 24 BEERS A DAY?
>> WELL, THAT WAS THE PSI HAD AN INTERVIEW WITH MR. MARTIN WHERE HE REPORTED HIS SUBSTANCE ABUSE HISTORY. NOW, THERE WAS ALSO IT WAS CORROBORATED TO THE EXTENT THAT HE DID HAVE PRIOR ARRESTS FOR DRUG POSSESSION. HE DID GO AND GET HE WAS PLACED IN DRUG TREATMENT PROGRAMS WHEN HE WAS IN PRISON.
>> BUT YOUR POSITION IS YOUR CLIENT PRESENTED THE COURT WITH A SENTENCING MEMORANDUM WHEREIN HE PRESENTED THE COURT WITH THE MITIGATORS THAT HE THOUGHT WERE APPROPRIATE IN THIS CASE.
>> YES.
>> SUBSTANCE ABUSE WAS NOT ONE OF THEM.
>> IT WAS NOT ONE OF THEM.
>> AND YOUR POSITION IS THAT IT IS A TRIAL COURT'S BURDEN TO RAISE THAT MITIGATOR OR CONSIDER IT WHEN THERE'S EVIDENCE OF IT PRESENTED?
>> IT WAS PRESENTED IN THE RECORD.
I THINK THE TRIAL JUDGE HAS SOME OBLIGATION TO CONSIDER

THOSE KINDS OF MITIGATING FACTORS, WHETHER OR NOT IT'S RAISED OR NOT IN THE SENTENCING.

>> WE HAVE YOU KNOW, THE CASES WHERE WE'VE HELD THAT IS WHERE THE DEFENDANT CHOOSES NOT TO PRESENT ANY PENALTY PHASE.

SO WE'RE IMPOSING THIS ADDITIONAL BURDEN ON THE JUDGE BECAUSE WE'RE TRYING THIS COURT IS TRYING TO ENSURE THAT THE DEATH PENALTY IS ONLY GIVEN TO A SMALL SUBSET OF CRIME.

BUT TO SAY THAT IT'S UP TO THE TRIAL JUDGE AFTER HE'S GOT A SENTENCING MEMORANDUM, GO BACK AND SAY, YOU KNOW, I THINK BLOOMFIELD TALKED ABOUT THIS AND I WOULD HAVE PUT THAT IN AND THEN SAY IT'S ERROR FOR HIM NOT HER NOT TO DO THAT? WHERE DO YOU WHERE IS THAT IN THE CASE LAW?

>> IN THIS CASE, I THINK THE I UNDERSTAND THAT CASE LAW, YOUR HONOR.

I'M AWARE OF THAT DISTINCTION. IN THIS CASE, GIVEN THE FACT OF THE LOW INTELLIGENCE, THE FACT THAT BLOOMFIELD REFERENCED THAT NOW, DR. BLOOMFIELD SAID HE DID NOT ATTRIBUTE THE LOW FUNCTIONING TO SUBSTANCE ABUSE.

BUT THAT DOESN'T MEAN IT WASN'T A VARIABLE IN AFFECTING HIS BEHAVIOR.

AND IT WAS BROUGHT UP AT THE SPENCER HEARING AS WELL AS IN THE PSI AND IT WAS AT LEAST REFERENCED DURING THE SPENCER HEARING.

>> YOU RAISE THAT THERE SHOULD NOT BE EITHER HAC OR CCP, AND I WAS LOOKING AT CASES THAT COULD BE SIMILAR, AND I'D LIKE YOU TO AT LEAST ADDRESS

WHETHER WHY IN YOUR VIEW
THE FACTS DO NOT SUPPORT
EITHER AGGRAVATOR BASED ON
DID THEY GO TO THE CRIME SCENE
DID THEY GO TO THIS PLACE
WITH THE IDEA THAT THEY WERE
GOING TRY TO FIND THE PERSON
THAT SHOT

>> NO.

>> SO WHAT HAPPENED?

>> WHAT HAPPENED WAS MR. †BATIE
WAS ACTUALLY FRIENDS, HAD
ACTUALLY ATTENDED COLLEGE WITH
MR. †MARTIN'S NEPHEW AND HE WAS
GIVING MR. †MARTIN A RIDE.
MR. †MARTIN WANTED TO SPEAK TO
SOMEONE AT THIS APARTMENT
COMPLEX AND SO THEY STOPPED AT
THIS APARTMENT COMPLEX.
MR. †MARTIN WENT TO TALK TO
WHOMEVER HE WAS GOING TO TALK
TO.

AND WHILE MR. †BATIE WAS
SITTING THERE, ANOTHER VEHICLE
DROVE UP, JAVON DANIELS WAS IN
THAT VEHICLE AND MR. †BATIE
THREE DAYS EARLIER HAD BEEN
SHOT, A GRAZING WOUND TO THE
HEAD.

HE DIDN'T KNOW WHO DID IT, BUT
HE HAD BEEN TOLD THAT HE'D
BEEN GIVEN A NAME AND HE
SUSPECTED THAT IT WAS DANIELS
AND THEN HE JUST HAPPENED TO
SEE HIM AT THE SAME APARTMENT
COMPLEX SITTING IN THE OTHER
VEHICLE.

MR. †BATIE REACHES INTO HIS
KNAPSACK, PULLS OUT HIS
FIREARM, HIS .45 PISTOL WITH
AN EXTENDED CLIP, CHAMBERS A
ROUND, PLACES IT ON THE
PASSENGER SEAT OF THE CAR.
MR. †MARTIN RETURNS AND HE SAYS

>> RETURNS FROM DOING WHAT?

>> TALKING TO ANOTHER
INDIVIDUAL.

NOTHING TO DO WITH THIS.
HE WAS JUST TALKING TO SOMEONE

AT THE APARTMENT COMPLEX.
MR.†BATIE WAS WAITING IN HIS
CAR FOR MR.†MARTIN TO RETURN.
WHEN HE RETURNED TO HIS CAR,
THE PISTOL WAS LAYING ON THE
PASSENGER SEAT AND HE TOLD MR.
MARTIN, HEY, I THINK THAT'S
THE GUY OVER THERE WHO SHOT
ME.

AND ACCORDING TO BATIE'S
TESTIMONY MR.†MARTIN JUST
GRABBED THE GUN, WALKED OVER
THERE AND STARTED FIRING.
>> WAS MR.†DANIELS THE PERSON
WHO SHOT MR.†BATIE?

>> WE DON'T KNOW.
THERE'S NOTHING IN THE RECORD
ABOUT THAT.

>> WELL, IT CERTAINLY YOU
DON'T HAVE YOU'VE GOT
CERTAINLY COLD.

THE ISSUE I HAVE AND I'M GOING
TO ASK IS YOU NEED TO HAVE FOR
CCP A CAREFUL PLAN OR A
PREARRANGED DESIGN TO COMMIT
FURRED BEFORE THE FATAL
INCIDENT.

WHAT DID THE JUDGE FIND ABOUT
THE CAREFUL?
SOMETIMES WE PUT ALL THESE
TOGETHER.

>> YOU KNOW, THE JUDGE'S ORDER
WAS PRETTY MUCH JUST A
RECITATION OF WHAT HAPPENED,
AND, YOU KNOW, OUR POSITION IS
THAT IT WAS YOU'VE GOT MR.
MARTIN, WHO'S GOT IMPULSE
CONTROL ISSUES BECAUSE OF HIS
LOW FUNCTIONING.

HE IMPULSIVELY PICKS UP THE
PISTOL AND SHOOTS.

THERE WAS NO TIME FOR
REFLECTION.

THERE WAS NO PREPLANNING THAT
HE WAS GOING TO PARTICIPATE IN
A SHOOTING.

>> BUT APPARENTLY WHAT THE
JUDGE FOCUSES ON IS NOT IF
HE HAD BEEN A GOOD SHOT AND
HAD SHOT KILLED HIM WITH

THE FIRST SHOT, MAYBE THEN
THERE SOMEHOW THERE
WOULDN'T BE CCP.

BUT WHAT THE JUDGE IS RELYING
ON I GUESS FOR BOTH CCP AND
HAC

>> IS THE MULTIPLE SHOTS.

>> IT WAS MULTIPLE SHOTS.

SO WE HAVE CASE LAW THAT
SUPPORTS THAT IF SOMEBODY
THAT EVEN IF SOMETHING OCCURS
WITHIN THIS VERY SHORT TIME OF
A SHOOTING, THAT IT WOULD
STILL BE THE FACT OF WHAT'S
GOING ON DURING THE CRIME WHEN
THERE WAS WHEN OBVIOUSLY
MR. DANIELS IS TRYING TO
ESCAPE, THEN THAT THE
HEIGHTENED OR CAREFUL PLAN
DEVELOPS BETWEEN THE FIRST
SHOT AND THE FOURTH SHOT.

>> WELL, YOU KNOW, CCP ALSO
HAS TO TAKE THE DEFENDANT'S
STATE OF MIND.

>> IT SPECIFICALLY DOES.

>> SUBJECTIVE STATE OF MIND OF
THE DEFENDANT.

WE HAVE A DEFENDANT HERE WITH
IMPULSE ISSUES.

WE HAVE A DEFENDANT HERE WITH

>> WELL, THAT'S A GOOD
ARGUMENT FOR YOU TO MAKE, BUT
THAT'S WHY I'D ASKED ABOUT AN
EXPERT TESTIMONY TO KIND OF
RELATE HOW THIS CRIME OCCURRED
TO WHAT HIS BACKGROUND WAS AND
THAT DIDN'T HAPPEN.

>> WE DID NOT HAVE THAT TYPE
OF TESTIMONY.

>> OF COURSE, IT'S NOT YOUR
OBLIGATION.

IT IS THE STATE'S.

>> YEAH.

>> BUT YOU'RE SAYING THIS, BUT
I DON'T KNOW THAT WE HAVE TO
NECESSARILY ACCEPT THAT THAT'S
WOULD ELIMINATE CCP.

>> IT WAS THE WALKING AROUND
THE VEHICLE, HAVING THE

VEHICLE TO WITHDRAW FROM THE CIRCUMSTANCES AND THEN SHOOTING AGAIN.

I MEAN, I'M NOT SAYING THAT EITHER FAVORABLY OR UNFAVORABLY.

>> RIGHT.

>> THAT SEEMS TO ME TO BE WHAT HE RELIED UPON.

>> YES.

THAT IS ESSENTIALLY WHAT WAS RELIED UPON AND, AGAIN, OUR POSITION IS THAT WAS ALL PART OF THIS IMPULSIVITY ON THE PART OF THE DEFENDANT.

WE DID NOT HAVE DR. BLOOMFIELD DID NOT ADDRESS THIS IN HIS TESTIMONY.

>> BUT AND HOW WAS IT ARGUED?

I WOULD ASSUME THAT THE STATE ARGUED WHY THIS IS A CCP CASE AND THEY WENT THROUGH THE SHOOTING AND THE VICTIM TRYING TO ESCAPE AND YOUR CLIENT MOVING FROM ONE AREA TO THE OTHER TO SORT OF BLOCK HIS ESCAPE.

AND SO ISN'T THAT HOW THIS WOULD HAVE BEEN ARGUED?

>> THAT WAS ESSENTIALLY THE STATE'S ARGUMENT, IS OUR UNDERSTANDING.

>> AND WHAT WAS THE COUNTER ARGUMENT?

WAS THE COUNTERARGUMENT THAT HE WAS SO IMPULSIVE THAT

>> IT'S AN IMPULSIVITY ISSUE.

>> THE TRIAL JUDGE FOUND THE EVIDENCE PRESENTED AT TRIAL PROVED BEYOND A REASONABLE DOUBT THE EXISTING OF THIS CIRCUMSTANCE.

THE DEFENDANT'S ACTIONS WERE A PRODUCT OF COOL AND CALM REFLECTION AND THAT NO EVIDENCE WAS PRESENTED WHICH INDICATED HIS ACTIONS WERE PROMPTED BY EMOTIONAL FRENZY, PANIC OR A FIT OF RAGE.

WHERE IS THAT IN THE EVIDENCE?

>> THERE WAS NO EVIDENCE OF A PANIC OR FIT OF RAGE, BUT THERE WAS ALSO NO EVIDENCE THAT HE COLDLY AND CALCULATED THIS MURDER.

HE PICKED UP THE FIREARM AND WENT AND SHOT.

>> WHEN WE'RE TALKING ABOUT THIS HEIGHTENED PREMEDITATION THAT IS REQUIRED FOR CCP, AS OPPOSED TO THE PREMEDITATION FOR JUST FIRSTDEGREE MURDER, HE'S TALKING TO PEOPLE, HE WALKS BACK TO THE CAR, BATIE SAYS, YOU KNOW, THE GUY OVER THERE, THAT'S THE GUY THAT SHOT ME.

AND WITH THAT, HE REACHES IN THE SEAT, GRABS THAT EXTENDED CLIP GUN, WALKS OVER THERE AND STARTS SHOOTING.

I GUESS THE HEIGHTENED PREMEDITATION WOULD HAVE TO BEGIN WHEN HE LEARNED FROM BATIE THAT THAT'S THE GUY OVER THERE AND HE THOUGHT ABOUT IT, PICKED UP THE GUN AND DECIDED TO GO KILL HIM.

NOW, IS THAT THE HEIGHTENED PREMEDITATION?

I WANT TO HEAR YOUR ARGUMENT ON THIS AND I'LL HEAR FROM THE STATE THAT IS REQUIRED FOR CCP?

>> WELL, THAT WAS THE STATE'S POSITION ON IT.

NOW, OUR POSITION IS THAT THIS WAS THE PRODUCT OF A MENTALLY DEFICIENT MAN WHO MAY HAVE BEEN SWAYED BY HIS FRIEND TO TAKE ACTION AS WELL.

SO COUPLE THAT WITH WHAT JUSTICE

>> THE FACT THAT HE WALKED AROUND THIS CAR.

>> AT ANY ONE OF THOSE TIMES HE COULD HAVE EXTRICATED HIMSELF FROM THIS SITUATION AND STOPPED IT.

ISN'T THAT THE HEIGHTENED
PREMEDITATION THAT CCP REQUIRES?

>> I THINK THE HEIGHTENED
PREMEDITATION REQUIRES THE
ABILITY AND THE TIME FOR THE
DEFENDANT TO REFLECT ABOUT WHAT
HE'S DOING.

>> THERE WAS NO TIME FOR
REFLECTION HERE, DO YOU THINK?

>> I DON'T THINK -- GIVEN THE
DEFENDANT AND HIS COGNITIVE
ABILITIES AT THE TIME AND THE
FACT THAT HE JUST STARTED THIS
ACT IMMEDIATELY WHEN HIS FRIEND
SAID, HEY, THAT'S THE GUY OVER
THERE, THERE WAS NO PLAN, THERE
WAS NO TALKING ABOUT HUNTING
ANYBODY DOWN OR ANYTHING LIKE
THAT.

>> THIS WAS A SEMIAUTOMATIC
WEAPON WHERE HE WOULD HAVE TO
PULL THE TRIGGER EACH TIME TO
FIRE IT.

>> CORRECT.

>> IT'S NOT LIKE YOU PULL THE
TRIGGER LIKE AN UZI --

>> IT WASN'T A FULLY AUTOMATIC
WEAPON, NO.

AGAIN, IT GOES BACK TO WE'RE
DEALING WITH A DEFENDANT WITH
THIS COGNITIVE INABILITY, AND SO
LOOKING THROUGH -- LOOKING AT
THE FACTS THROUGH THAT PRISM
WHICH CCP, I THINK, REQUIRES US
TO DO THAT HE DIDN'T HAVE
ADEQUATE TIME TO REFLECT WHAT HE
WAS DOING.

>> YOU'RE IN YOUR REBUTTAL.

>> OKAY.

I WOULD SAVE MY TIME FOR
REBUTTAL AND RELY ON THE BRIEF
FOR THE REMAINING ARGUMENTS.

>> MAY IT PLEASE THE COURT,
ASSISTANT ATTORNEY GENERAL
CHARLENE MILLSAPS FOR THE STATE.
I'M GOING TO TALK ABOUT THE
STATE ISSUES THAT WE TALKED
ABOUT.

I'D LIKE TO START WITH THE LOW
COGNITIVE ABILITY.

AND THE CLAIM BEING PRESENTED
HERE IS NOT AN ADKINS CLAIM,
IT'S THAT THE TRIAL JUDGE DID
NOT GIVE THIS ONE NONSTATUTORY
MITIGATOR SUFFICIENT WEIGHT.
AND I WOULD FIRST LIKE TO POINT
OUT, AS JUSTICE QUINCE, DID THAT
THIS TRIAL COURT REALLY
CONSIDERED THIS TESTIMONY --
DR. BLOOMBERG'S TESTIMONY --
FINDING THREE NONSTATUTORY
MITIGATORS.

NOT JUST LOW COGNITIVE ABILITY,
BUT ALSO THAT HE WAS
FUNCTIONALLY ILLITERATE AND THAT
HE HAD A LEARNING DISABILITY.
HIS LOW MENTAL CAPACITY WAS
FOUND THREE WAYS AND GIVEN
WEIGHT THREE WAYS.

>> WELL, BUT IN FAIRNESS TO THE
DEFENDANT, IF SOMEBODY IS
ACTUALLY FUNCTIONING AT A 54 IQ
REALIZING THERE'S GOT TO BE SOME
OUTWARD SIGNS OF WHAT'S GOING
ON.

HE'S FUNCTIONALLY ILLITERATE,
READS AT A SECOND GRADE LEVEL
AND GIVES -- THAT WAS GIVEN
SLIGHT WEIGHT BY THE JUDGE, THE
FIRST TWO, AND THE OTHER WAS
SOME WEIGHT.

YOU KNOW, IT GETS TO BE A LITTLE
GAME HERE AS TO, WELL, THE JUDGE
WEIGHED ALL THESE OTHER THINGS
LIKE HE'S A LOVING SON, GAVE
THAT SLIGHT WEIGHT.

I THINK WHAT THE QUESTION REALLY
IS WITH SOMEBODY WITH AN IQ
THAT'S IN THE LOWER 2% OF THE
COUNTRY, I MEAN, IF WE'RE
ACCEPTING THAT THAT IS,
THEREFORE, NOT ABLE TO LEARN,
NOT ABLE TO REALLY CONTINUE IN
SCHOOL, WHAT IS THE -- WHERE
DOES THE JUDGE GET, WELL,
THAT'S, I'M GOING TO GIVE THAT
SLIGHT WEIGHT?

YOU KNOW, IF I WERE THE JUDGE,
I'D SAY I'D GIVE THAT GREAT
WEIGHT.

WE'VE GOT TO HAVE SOME STANDARD AS TO HOW DO YOU COME UP WITH AFTER YOU FIND IT THAT YOU'RE GOING TO SAY THIS IS AN IMPORTANT FACTOR.

IF THIS PERSON IS INTELLECTUALLY DISABLED, THAT IS ENTITLED TO GREAT WEIGHT.

NOW, WHETHER THAT CHANGES ANYTHING ABOUT WHETHER HE STILL IS A DEATH PENALTY CASE, BUT I THINK THAT'S WHERE THEY'RE GETTING.

YOU CAN'T JUST SAY, WELL, SHE WAITED BECAUSE SHE FOUND IT WHICH THERE WASN'T ANY CONTRARY EVIDENCE.

SO WHAT DO YOU SAY ABOUT THE FACT I REALIZE WE ACCEPT THE WEIGHING FOR A LOT OF THESE CASES, BUT THAT IT SEEMS LIKE THERE'S JUST A LAUNDRY LIST OF FACTORS THAT THE JUDGE GAVE SLIGHT WEIGHT TO AND REALLY DIDN'T DO ANYTHING WITH THEM. JUST SAID I FIND THIS SLIGHT WEIGHT.

WE'VE GOT TO AT SOME POINT SAY WHEN THERE'S UNCONTROVERTED EVIDENCE OF A 54 FULL SCALE IQ, THAT THAT AT LEAST SHOULD BE WEIGHED UNLESS YOU'RE FINDING SOME REASON LIKE, YOU KNOW, SAY SOMEONE'S 18.

THEY'RE 18, SOME JUDGE GIVES IT, I'LL GIVE THAT SLIGHT WEIGHT, SOMEONE ELSE GIVES THAT GREAT WEIGHT.

THEY'RE THE SAME, YOU KNOW, A NUMBER, BUT THEY'RE 18 VERSUS 40 YEARS OLD.

I MEAN, THERE'S GOT TO BE SOME STANDARDS.

>> OKAY, BUT I'D LIKE TO EXPLAIN WHAT I THINK THE JUDGE DID WITH -- MY POINT WAS JUST THREE WAYS AS TO MENTAL.

BUT I'D LIKE TO EXPLAIN WHAT THE JUDGE DID WITH HOW I READ THIS SENTENCING ORDER REGARDING THIS

ONE PARTICULAR LOW COGNITIVE
FUNCTIONING.
WHAT SHE'S SAYING IS, YES, THERE
WAS TESTIMONY.
SHE'S GIVING IT SOME WEIGHT.
SHE'S LOWERING THE WEIGHT FOR A
REASON.
HOW I READ HER ORDER IS THIS:
YES, DR. BLOOMBERG TESTIFIED
HE'S IN THE LOWER 2%.
THEN SHE DROPS A FOOTNOTE TO
THAT.
AND WHAT SHE'S REALLY SAYING IS
THAT NUMBER ITSELF WAS NOT
FIRMLY ESTABLISHED.
OKAY?
BECAUSE WHAT SHE'S SAYING IN
THAT FOOTNOTE IS THAT THERE WERE
OTHER SCORES, AND I'D LIKE TO
EXPLAIN WHAT THESE SCREENING
TESTS ARE, OKAY?
AND WHAT THE JUDGE IS SAYING IS
NOT ONLY IS HE NOT MENTALLY
RETARDED, BUT STICKING JUST WITH
THE 54, SHE'S SAYING I DO NOT --
THAT THERE'S OTHER EVIDENCE THAT
UNDERMINES EVEN THAT 54.
AND HER OTHER EVIDENCE IS THIS.
LET ME EXPLAIN WHAT THESE
SCREENING TESTS ARE THAT D.O.C.
DOES.
THEY'RE NOT JUST SCREENING TESTS
TO SEE WHERE TO PUT YOU.
THAT'S NOT WHAT THESE SCREENING
TESTS ARE.
THESE ARE IQ SCREENING TESTS TO
DETERMINE WHETHER AN INMATE IS
MENTALLY RETARDED.
THEY GO DOWN A LIST THEY GIVE
YOU, THEY'RE GIVING YOU AN
ABBREVIATED IQ TEST.
IF THERE'S A PROBLEM, THEY GIVE
ANOTHER ABBREVIATED TEST, THEN
THEY DO AN ADAPTIVE FUNCTIONING.
IF YOU FAIL ALL THREE OF THOSE,
THEY GIVE YOU A FULL SCALE IQ,
OKAY?
SO UNDERSTAND WHAT THESE TESTS
ARE.
THESE ARE FOR THE PURPOSE -- AND

IF THEY FIND YOU TO BE MENTALLY
RETARDED, THEY CLASSIFY YOU.
THEY ARE TRULY LOOKING FOR
MENTALLY RETARDED PEOPLE.
THAT'S WHAT THESE SCREENING
TESTS ARE.

DON'T DISCOUNT THIS OR -- THAT'S
WHAT THE JUDGE IS SAYING HERE,
IS THAT EVIDENCE WAS
CONTRADICTION ON EITHER --

>> SO WE HAVE, IS IT IN THE
RECORD WHAT THESE TESTS WERE FOR
AND HOW THEY WERE ADMINISTERED
AND ALL OF THAT?

>> WELL, THEY'RE MORE -- YES,
IT'S IN THE RECORD THAT THEY'RE
FROM D.O.C.

YES, IT'S IN THE RECORD THAT
THESE ARE ABBREVIATED TESTS.
AND BY THAT DR. BLOOMFIELD,
UNFORTUNATELY ONLY
DR. BLOOMBERG -- BLOOMFIELD
TESTIFIES.

THE STATE DIDN'T HAVE ITS OWN
EXPERT TO EXPLAIN MORE OF THIS.
BUT LET ME EXPLAIN --

>> BUT CAN YOU ANSWER THAT
QUESTION?

YOU GAVE A VERY COMPREHENSIVE
IDEA THAT THE D.O.C. KNOWS HOW
TO FIND SOMEBODY MENTALLY
RETARDED, AND THIS IS WHAT THEY
GO THROUGH, AND THEY DO THAT.
IS THAT IN OUR RECORD?

>> NO.

I MEAN, BUT THESE ARE IQ TESTS,
YES, THEY ARE.

LET ME TRY TO DIRECTLY ANSWER
THE QUESTION.

HE EXPLAINS WHAT THESE SCREENING
TESTS ARE, THAT THEY ARE
ABBREVIATED VERSIONS OF IQs.
INSTEAD OF HAVING ALL 12 TO 14
SUBPARTS OF THE FULL IQ, THEY'RE
ABBREVIATED IN THE SENSE THAT
THEY HAVE TWO TO FOUR PARTS OF
THEM AND THAT THEY'RE DIFFERENT
KINDS.

NOW, YOUR HONOR, YES, IT IS IN
YOUR RECORD.

DO YOU HAVE TO KNOW WHAT HE'S --
IS THAT TESTIMONY BRUTALLY CLEAR
IF YOU DON'T HAVE A BACKGROUND?
I'M NOT SURE.

THAT TESTIMONY IS IN THIS
RECORD, YES, THAT THEY ARE
ABBREVIATED, THAT THEY'RE GIVEN
BY D.O.C. AND THAT THEY ARE
PARTIAL OR ABBREVIATED TESTS
WITH -- HE DOES SAY 14 VERSUS --
>> WHAT YOU SAID WAS THE D.O.C.
REALLY, REALLY WANTS TO KNOW AND
BE ABLE TO HELP PEOPLE THAT ARE
MENTALLY RETARDED.

NOW, THAT'S WHAT I HEARD YOU
SAY.

THIS WASN'T REALLY SOMETHING
THAT THEY DO THIS, AND THAT'S
WHAT I'M WONDERING, WHERE THAT
WAS IN THE RECORD, THAT THAT'S
WHAT THE D.O.C. IS THE AGENCY
THAT IS ABLE TO HELP US FIND OUT
IF PEOPLE ARE MENTALLY RETARDED.
I JUST NEVER HAVE HEARD THAT IN
ANY OF THESE OTHER CASES, SO I
WONDERED IF IT WAS IN OUR
RECORD.

>> WELL, WHAT THESE IQ SCREENING
TESTS ARE, YES.

THEY DID NOT GO FULL, THE FULL
PURPOSE AND WHY BOTH BETAS AND
-- ARE, BUT HE DOES DESCRIBE
WHAT THEY ARE.

YOUR HONOR, OPPOSING COUNSEL
SAID THAT THEY WERE JUST GIVEN
FOR PLACEMENT, AND THAT'S, AND I
WANTED TO CLEAR UP THAT THESE
TESTS ARE IN THE RECORD FOR A
REASON.

D.O.C. GIVES THESE TO DETERMINE
MENTAL RETARDATION.

AND, YES, IF YOU KNOW WHAT HE'S
TALKING ABOUT IN THE SUBTEXT,
THAT IS WHAT EVEN DR. BLOOMFIELD
IS ADMITTING.

WELL, NOT ADMITTING, HE'S
EXPLAINING THAT D.O.C. DOES GIVE
THESE -- THEY'RE ABBREVIATED
INSTEAD OF FULL SCALE ONES, ALL
RIGHT?

AND THE JUDGE HERE IS HEARING THIS CONTRADICTIONARY EVIDENCE ABOUT EVEN WHAT HIS IQ IS. YES, THE ONE DR. BLOOMFIELD GIVES THE ONE FULL IQ TEST THAT IS IN THIS RECORD, OKAY? AND THAT COMES BACK AT 54. BUT THE JUDGE IS ALSO SAYING THAT THAT'S NOT ROCK SOLID BECAUSE THERE ARE OTHER ABBREVIATED IQ TESTS THAT, WITH DIFFERENT NUMBERS INCLUDING ONE AS HIGH AS 94.

SHE REFERS TO THE 71. YOUR HONOR, THESE NUMBERS ARE ALL OVER THE BOARD, AND THE JUDGE IS ALLOWED TO TAKE CONSIDERATION THAT THE NUMBERS SHE'S HEARING VARY FROM 54 TO 91 -- 94.

>> DID DR. BLOOMFIELD ADMINISTER ANY TESTS TO DETERMINE WHETHER THE DEFENDANT WAS MALINGERING?

>> NO, HE DID NOT DETERMINE TESTS.

THAT ISSUE DID COME UP.

HE DID NOT DO IT.

HE HAD EXPLANATIONS FOR NOT DOING IT.

ONE OF HIS EXPLANATIONS WAS THE SHEER NUMBER OF ABBREVIATED TESTS GIVEN.

OKAY?

BUT, NO, HE DID NOT TEST FOR MALINGERING.

>> WHAT DO YOU MEAN THE SHEER NUMBER OF ABBREVIATED TESTS?

WHAT DO YOU MEAN?

HE WAS SAYING THAT THOSE ABBREVIATED TESTS WERE ALL INDICATIVE OF THAT IF YOU DO THE ABBREVIATED BUT THAT THE FULL SCALE IQ, THAT THEY'RE CONSISTENT WITH A FULL SCALE IQ OF 54?

IS THAT WHAT HE WAS SAYING?

>> NO.

WHAT I READ THAT TESTIMONY TO MEAN IS I DON'T -- BECAUSE SOME OF THE BETAS AND THE ABBREVIATED

ONES, LET ME JUST CALL THEM THE ABBREVIATED IQs, WERE 71 AND NUMBERS LIKE THAT.

HE WAS SAYING THAT THAT WAS, YOUR HONOR, THAT WAS HIS TESTIMONY, THAT THAT WAS ENOUGH --

>> BUT ISN'T THAT A REASON FOR THE TRIAL, A FURTHER REASON EVEN THOUGH IT MAY NOT BE ARTICULATED, BUT THAT KIND OF RAISES A QUESTION ABOUT THE 54. IF YOU'VE GOT THESE OTHER TESTS OUT THERE THAT ARE ONE REMARKABLY HIGHER, BUT THE OTHERS HIGHER AND THERE'S NO TEST FOR MALINGERING, IT ALL JUST KIND OF LIKE -- IT JUST DOESN'T ALL QUITE ADD UP.

>> AND, YOUR HONOR, WHEN IT DOESN'T ALL ADD UP, IT'S PERFECTLY APPROPRIATE FOR THE JUDGE TO GIVE IT SOMETHING LESS THAN GREAT WEIGHT.

THAT'S MY ENTIRE POINT.

THE EVIDENCE HERE WAS VERY AMBIGUOUS.

EVEN FORGET -- IT WASN'T AMBIGUOUS ON MENTALLY RETARDED BECAUSE NEITHER ONE OF THE OTHER TWO PRONGS WERE EVEN ADDRESSED. I'M TALKING ABOUT THE FIRST PRONG ONLY.

AND EVEN ON THAT FIRST PRONG THE EVIDENCE WAS VERY AMBIGUOUS. AND UNFORTUNATELY, WE DID -- UNFORTUNATELY, UNLESS YOU KNOW WHAT IQ TESTS ARE AND WHAT THESE SCREENING TESTS, THAT WAS NOT FULLY EXPLORED EITHER.

BUT SHE WAS HEARING ALL KINDS OF DIFFERENT NUMBERS, YOUR HONOR. FOR EVEN THAT FIRST PRONG.

SO THERE'S NOTHING WRONG WITH A JUDGE SAYING, YES, I RECOGNIZE THE ONLY FULL SCALE SCORE WAS 54, FINDING IT IS SET TO BE EVIDENCE OF LOW COGNITIVE FUNCTIONING AND GIVING IT SOME WEIGHT.

BUT DROPPING A FOOTNOTE -- YOUR HONOR, WE'RE REALLY FIGHTING ABOUT THE FOOTNOTE HERE -- AND SAYING I DO RECOGNIZE THERE WERE OTHER SCORES INCLUDING A 71. SO I'M GIVING IT SLIGHT WEIGHT IN REFLECTION OF THE FACT THAT THESE NUMBERS ARE ALL OVER THE BOARD, OKAY?

BUT, YOUR HONOR, I DON'T THINK YOU CAN READ TESTIMONY AND DISCOUNT THESE SCREENING TESTS. THAT'S REALLY WHAT HIS ARGUMENT BOILS DOWN TO, IS THAT THE TRIAL JUDGE SHOULD HAVE DISCOUNTED THE SCREENING TEST AND ONLY GONE WITH THE 54.

AND IF YOU UNDERSTAND WHAT DR. BLOOMBERG WAS TESTIFYING AS, I THINK IT'S PERFECTLY REASONABLE FOR A TRIAL JUDGE, ESPECIALLY IN LIGHT OF MALINGERING CAME UP THREE TIMES DURING THE EXPERT'S TESTIMONY AND ESPECIALLY IN LIGHT OF THE FACT THAT THERE WAS NO TESTIMONY THAT HE DEFINITELY WASN'T MALINGERING, TO TAKE ACCOUNT THAT THAT NUMBER RANGES LITERALLY FROM 54 TO 94.

>> BUT IT SEEMS TO ME --

>> WE HAVE A 71 --

>> COULDN'T THOSE DIFFERENCES BE EXPLAINED IN THE FACT THAT HE WAS ONLY, THOSE OTHERS WERE ONLY PARTIAL TESTS?

I MEAN, WHEN YOU PUT TOGETHER, YOU KNOW, IF YOU'RE DOING 14 PARTS VERSUS 4 PARTS -- AND I DON'T KNOW IF YOU AVERAGE THEM OR WHATEVER IT IS YOU DO WITH THEM -- IT SEEMS TO ME THAT CERTAINLY THE DIFFERENCE COULD BE ACCOUNTED FOR IN THE FACT THAT YOU HAVE PARTIAL VERSUS FULL.

ISN'T THAT SO?

>> NO, I DON'T THINK YOU CAN --

>> THAT CANNOT EXPLAIN WHY --

>> NO.

BECAUSE HIS TESTIMONY WAS THAT THAT IN EACH OF THE SUBTESTS HE GOT A LOW SCORE.

AND YOU COULD NOT, I MEAN, ONCE AGAIN YOU CAN'T, YOU CAN'T FAKE SMART.

AND ONE OF THESE ABBREVIATED TESTS CAME BACK 94.

ACCORDING TO DR. BLOOMBERG, NONE OF THE SUBTESTS WERE THAT KIND OF NUMBER.

WHAT YOU'RE SAYING IS IF YOU ONLY HAVE 2-4 AND 4 IS PART OF IT, IS THAT SOMEHOW THE OTHER REMAINING 8 WOULD DROP YOUR SCORE DOWN.

BUT THAT'S NOT THE KIND OF RESULTS DR. BLOOMBERG HIMSELF GOT ON ALL THE SUBTESTS.

NOW, HE DIDN'T GIVE ME A NUMBER ON EVERY SINGLE SUBTEST, BUT HE DID TESTIFY THAT NONE OF THEM WERE THAT KIND OF HIGH.

SO, NO, YOUR HONOR, IT'S NOT LIKE THE INFERENCE FROM DR. BLOOMBERG'S TESTIMONY -- NOT HIS DIRECT TESTIMONY, BUT THE INFERENCE FROM IT -- IS THAT THERE'S NO PARTICULAR AREA WHERE THIS DEFENDANT IS VERY GOOD AND THEN OTHER AREAS WHERE HE'S VERY BAD GIVING YOU AN AVERAGE DOWN. THERE'S NOTHING LIKE THAT.

>> IT SEEMS TO ME LIKE FOLLOWING UP ON YOUR ARGUMENT THAT FROM ALMOST A PHYSICAL STANDPOINT IF YOU WOULD THROW OUT THE HIGH SCORE AND THE LOW SCORE, THE REMAINING THREE SCORES SEEM TO BE MORE OR LESS IN LINE.

THE 71, 68 AND 64.

IT'S THE HIGH SCORE THAT'S AN OUTLIER AND THE LOW SCORE APPEARS TO BE AN OUTLIER.

>> ALL RIGHT.

BUT THEN SOME OF THOSE, FOR EXAMPLE, THE 71 ARE OVER.

BUT THAT'S NOT WHAT OUR JUDGE DID, YOUR HONOR.

I MEAN, COULD YOU HAVE MAYBE

DONE THAT?

SURE.

THROW THEM OUT?

BUT WHAT THE JUDGE DID WAS FIND THE 54 AND GIVE IT WEIGHT AND JUST DROPPED A FOOTNOTE SAYING, IN EFFECT, I'M GIVING IT SLIGHT, I'M GIVING IT SOME WEIGHT INSTEAD OF MUCH GREATER WEIGHT BECAUSE THE EVIDENCE IS AMBIGUOUS.

THERE'S NO CASE THAT THE JUDGE ABUSES DISCRETION BY TREATING AMBIGUOUS TESTIMONY IN A MANNER THAT THIS JUDGE TREATED AMBIGUOUS TESTIMONY.

>> WHAT EVIDENCE IS THERE IN THE RECORD ON HIS FUNCTIONALITY?

JUSTICE LEWIS ASKED EARLIER, WHAT HAS HE BEEN DOING?

DOES HE HAVE A JOB?

IS THERE ANYTHING IN THE RECORD AT ALL?

>> YES, THERE IS, THAT HE WORKED IN CONSTRUCTION AND PIPE AND PLUMBING.

HE WAS A PIPE WORKER.

DR. BLOOMBERG TESTIFIED THAT HE WAS EMPLOYED.

THE REASON HE BECAME UNEMPLOYED AND WENT ON SSI WAS NOT MENTAL, IT WAS BOTH HIS DIABETES AND HIS ASTHMA.

SO THAT'S WHAT KEPT HIM FROM WORKING.

NOW --

>> WELL, BUT WASN'T HE A DEACON IN HIS CHURCH?

>> YES.

HIS MOTHER TESTIFIED THAT HE HAD HAD, WAS A DEACON IN THE CHURCH.

>> SO WHAT DOES THAT MEAN?

BEING A DEACON IN THE CHURCH?

>> WHAT?

>> WHAT DOES THAT MEAN?

DOES IT MEAN HE HAS SOME KIND OF FUNCTION IN THE CHURCH?

>> USUALLY, YOUR HONOR.

IT'S NOT IN THE RECORD WHAT A DEACON MEANS, BUT USUALLY A

DEACON IS SOMEONE WHO IS ON THE BOARD AT THE CHURCH.

>> OKAY.

>> NOW, SOMETIMES PEOPLE CAN USE THAT A LOT MORE COLLOQUIALLY IN THE SENSE.

MAYBE SHE MEANT HE HAS SOME OTHER KIND OF LEADERSHIP ROLE. SHE SAID DEACON, YOUR HONOR. AND USUALLY DEACON, YOU KNOW, THEY'RE PART OF THE COMMITTEE THAT SELECTS THE NEW MINISTER, THE, YOU KNOW, THEY DO THE FINANCES, THEY CAN DO ALL KINDS OF THINGS LIKE THAT.

HIS MOTHER DID TESTIFY TO THAT, BUT HE DID HAVE --

>> DOES HE READ AT A SECOND GRADE LEVEL, IS THAT CONTESTED? OR IS --

>> NO, YOUR HONOR.

I'M NOT TRYING TO SAY -- I SUSPECT THAT HE DOES HAVE LOWER THAN 100%.

I KNOW, I THINK HE PROBABLY HAS SOME LOWER FUNCTIONING.

BUT NOT ANYWHERE NEAR, NOT ANYWHERE NEAR WHAT YOU WOULD THINK OF AS SOMEBODY WHO'S 54 --

>> WELL, IT DOESN'T REALLY, FRANKLY, AND YOUR RECORD FOR THE DEFENDANT IS, DOESN'T GIVE US -- THIS IS A FRIENDLY QUESTION -- IT DOESN'T GIVE US WHAT WE NEED TO UNDERSTAND THAT THE, WHATEVER THE IQ WAS WHETHER IT WAS 54 OR 64 OR 71 WHAT HE DID DURING HIS LIFE THAT WOULD SHOW THAT HE WAS ACTING AS A LOW FUNCTIONING INTELLECTUALLY AND ADAPTIVELY. WE REALLY DON'T KNOW THAT.

SO --

>> OH, I AGREE THERE IS NO --

>> I FIGURED EVEN WHEN I ASK YOU A QUESTION THAT'S HELPFUL, YOU'RE GOING TO DEBATE ME, SO I GIVE UP.

>> NO.

I'M TRYING TO ASK -- I AGREE WITH THAT, YES, YOUR HONOR, THAT

THERE IS A BIG HOLE IN THIS RECORD.

I THINK WE ALL ARE ON THAT PAGE. WE ALL KNOW THERE IS A BIG HOLE IN THIS RECORD.

BUT I THINK I CAN EXPLAIN SOME OF THOSE HOLES TO YOU.

YOUR HONOR, THIS DEFENDANT SPENT A GREAT DEAL OF HIS ADULT LIFE IN PRISON.

AND SO SOME OF THE HOLES, IN FACT, ARE D.O.C. RECORDS.

THAT'S WHY WE'RE TALKING SO MUCH ABOUT --

>> BUT THE HOLES HERE ARE NOT THE STATE'S FAULT.

I THINK THAT'S PART OF THE POINT HERE TO THE EXTENT THAT THIS EVIDENCE ABOUT HIS MENTAL CONDITION IS NOT FULLY DEVELOPED, THAT'S THE DEFENSE'S FAILURE.

ISN'T THAT CORRECT?

>> ABSOLUTELY.

>> BUT I'M NOT SO -- OKAY.

AND THANK YOU, BECAUSE THAT'S WHAT I WAS TRYING TO -- THIS IS NOT YOUR PROBLEM HERE.

THIS IS A MITIGATOR.

IT'S THEIR PROBLEM.

SO AGAIN, WE'RE TALKING A LOT ABOUT WHETHER IT'S 54 OR 64.

I DON'T THINK, I DON'T THINK IT MATTERS THAT MUCH IN THIS CASE UNLESS THEY CAN TIE IT TO HOW HE FUNCTIONS DURING HIS LIFE, WHETHER THE, YOU KNOW, THE SUPREME COURT REQUIRES IT OR NOT, THAT'S WHY THE IQ SCORE'S SIGNIFICANT.

AND I, YOU KNOW, WHETHER -- I DOUBT HE WAS A DEACON IN THE CHURCH MANAGING FINANCES, BUT IT DOESN'T SEEM LIKE HE WAS JUST SITTING AT HOME, YOU KNOW, HAVING PEOPLE GUIDE HIM THROUGH LIFE EITHER.

>> YES, YOUR HONOR.

THIS IS A MITIGATOR, AND IT WAS -- IT IS THEIR BURDEN TO

PROVE IT AND, YES, THERE ARE GREAT MANY HOLES.
NOW, HE WAS ON SSI, AND SO HE -- AND HE WAS CURRENTLY NOT WORKING, AND HE WAS GETTING DISABILITY, BUT THIS RECORD DOES ESTABLISH THAT WAS BASED ON HIS DIABETES AND HIS ASTHMA.

>> LET ME ASK YOU --

>> COULD YOU -- I'M SORRY, GO AHEAD.

>> COULD WE MOVE OFF THIS? WE'VE REALLY SPENT, I THINK, AN INORDINATE AMOUNT OF TIME.

LET ME GIVE YOU THE SCENARIO THAT I'M LOOKING AT THIS.

A DEFENDANT'S RIDING IN THE CAR WITH A FRIEND, THEY STOP.

THE DEFENDANT GETS OUT, SPEAKS TO SOMEONE, COMES BACK TO THE CAR.

THE OPERATOR SAYS THAT'S THE GUY THAT SHOT ME, AND THE DEFENDANT PROCEEDS TO IMMEDIATELY PICK UP A WEAPON AND GO AFTER THE PERSON WHO ALLEGEDLY HAD DONE THE SHOOTING.

BUT WHY IS THAT NOT MORE IN THE NATURE OF AN EMOTIONAL RESPONSE, A RAGE RESPONSE AS OPPOSED TO A CAREFULLY CALCULATED PLAN TO EXECUTE?

>> WELL, I DON'T SEE THAT IT'S RAGE AT ALL.

FIRST OF ALL, NOBODY'S SHOOTING AT HIM --

>> WELL, IT'S CERTAINLY NOT DONE OUT OF LOVE.

>> NO.

>> I MEAN, HE'S RESPONDING TO CIRCUMSTANCES THAT HE'S TOLD THAT SOMEONE SHOT, THAT'S THE GUY THAT SHOT ME, HIS FRIEND, HIS DEAR FRIEND AS I INTERPRET IT.

AND YOU DON'T THINK THAT THAT INDICATES THAT SOME EMOTIONAL RESPONSE TO IT IS AS OPPOSED TO CALCULATING ALL MORNING WE'RE GOING OUT LOOKING FOR THIS GUY?

>> WELL, THERE WAS NO EVIDENCE
THAT THEY WERE OUT LOOKING --
>> THAT'S WHY I WANT YOU TO
ADDRESS THAT.
BECAUSE I AM CONCERNED IN THE
LINE OF OUR JURISPRUDENCE AS TO
WHETHER THIS REALLY IS WHAT WAS
INTENDED FOR THE CCP AGGRAVATOR.
>> ALL RIGHT.
BUT NOW I DO -- THERE WAS NOT A
CONFRONTATIONAL SITUATION AT THE
MOMENT.
AND BEATTY, WHO WAS THE DRIVER
AND WHOSE GUN --
>> AGAIN, THAT'S JUST A
PERSPECTIVE WHETHER IT'S YOUR
HEAD OR SOMEONE ELSE'S, YOU
KNOW?
[LAUGHTER]
>> OKAY.
BUT THAT WAS DAYS EARLIER, WAS
MY POINT, OKAY?
THAT WAS DAYS EARLIER.
>> GOTCHA.
UNDERSTAND.
>> OKAY?
THAT WAS DAYS EARLIER.
THERE WAS NO CONFRONTATION
THERE.
AND INCIDENTALLY, THAT'S THE
FRIEND, NOT EVEN YOU, YOUR
HONOR.
THERE WAS NO EVIDENCE OF RAGE
HERE.
THERE REALLY WASN'T.
>> YOU'RE NOT HELPING ME BY
CONCLUDING THAT.
COULD YOU EXPLAIN WHY AND IN OUR
CASE LAW WHY THIS IS NOT MORE OF
AN EMOTIONAL RESPONSE THAN A
CALCULATED RESPONSE?
>> WELL, WE DON'T REALLY DO
EMOTIONAL RESPONSE.
WE TALK -- IN TERMS OF CCP WHAT
WE LOOK AT IS PROVOCATION.
AND WHAT I'M TRYING TO TELL YOU
IS THAT THERE WAS NO PROVOCATION
FROM THIS INCIDENT.
YOU CAN'T GO BACK THREE DAYS
WITH SOMEBODY ELSE AND SAY

THAT'S PROVOCATION.
WE LOOK FOR PROVOCATION.
THERE ABSOLUTELY WAS NONE.
BEATTY SAID HE DIDN'T EVEN SEE
THE OTHER PEOPLE HAD FIREARMS
UNTIL THE SHOOTING STARTED.
MARTIN, NOBODY -- THEY WERE
JUST, THEY WERE TWO PEOPLE
VISITING DIFFERENT, TALKING TO
DIFFERENT GROUPS OF PEOPLE.
>> WHAT --
>> PLEASE.
>> ONE OF THE THINGS THAT THE
TRIAL JUDGE FOUND TO BE
IMPORTANT IN DEALING WITH THIS
HEIGHTENED PREMEDITATION IS THE
FACT AND I READ FROM HER ORDER,
BASICALLY IT SAID THE DEFENDANT
WHO HAD LEFT MR. DANIELS AFTER
FIRING THE FIRST SHOT INTO THE
DRIVER'S SIDE.
INSTEAD HE TRACKED
MR. McDANIELS AROUND THE CAR
AS HE ATTEMPTED TO ESCAPE THE
VEHICLE FIRING ONCE INTO THE
WINDSHIELD, FIRING SEVERAL TIMES
INTO THE PASSENGER SIDE.
THE DEFENDANT ULTIMATELY FIRED
AT LEAST 13 SHOTS AND DID NOT
STOP FIRING UNTIL AFTER HE
COMPLETED HIS OBJECTIVE.
NOW, THE CLOSEST CASE THAT WE
FOUND TO THIS IS SWAFFORD V.
STATE WHICH WE DECIDED BACK IN
1998.
IN THAT CASE WE FOUND CCP WHERE
THE DEFENDANT HAD FIRED NINE
SHOTS.
BUT THE CRUCIAL FACTOR WAS THE
FACT THAT THE DEFENDANT STOPPED
TO RELOAD AND THEN CONTINUED
FIRING.
AND WE FOUND THAT RELOADING
ASPECT OF IT TO HAVE AFFORDED
HIM MORE THE REFLECTION THAT WE
FELT WAS NEEDED FOR THE
HEIGHTENED PREMEDITATION.
HERE WE HAVE NO RELOADING.
IN FACT, WE HAVE NO SPACING OF
TIME IN BETWEEN THE SHOTS.

HE FIRED 13 SHOTS, PULLING THE TRIGGER EACH TIME, BUT HE KEPT FIRING.

THERE WAS NO TIME FOR REFLECTION, AND THAT'S WHAT COUNSEL'S ARGUING.

HOW IS THAT HEIGHTENED PREMEDITATION HERE?

>> LET ME EXPLAIN SOME MORE OF THE CRIME.

MARTIN STANDS AT THE PASSENGER -- AT THE DRIVER'S SIDE WHERE THE VICTIM WAS ORIGINALLY SEATED.

HE'S IN THE DRIVER'S SIDE.

HE SHOOTS MULTIPLE TIMES.

HE GOES AROUND THE FRONT, SHOOTS THERE AS THE VICTIM -- HE'S TRACKING, MY ANSWER'S GOING TO BE TRACKING, YOUR HONOR.

HE'S TRACKING THIS VICTIM AS THE VICTIM IS TRYING TO GET OUT THE PASSENGER SIDE.

THE OVERWHELMING MAJORITY OF THE BLOOD IF YOU LOOK AT THE EXHIBITS IS ON THE PASSENGER SIDE AS THE VICTIM'S TRYING TO GET OUT.

THERE IS BLOOD LITERALLY STREAMING DOWN THE OUTSIDE OF THE PASSENGER DOOR.

SO THIS DEFENDANT IS LITERALLY TRACKING SOMEBODY IN A CAR AS HE TRIES TO GET OUT.

AND ONE OF THE WITNESSES TESTIFIED HE THEN TRACKS HIM AROUND THE FRONT AND GOES TO THE PASSENGER SIDE AND SHOOTS HIM BACK INTO THE CAR.

>> AND THAT'S WHY THERE IS PREMEDITATION.

IT'S NOT SECOND DEGREE.

BUT JUSTICE LEWIS WAS ASKING YOU ABOUT THE FIRST PRONG WHICH IS WHERE IS IT THE PRODUCT OF COOL AND CALM REFLECTION AS HE STARTS TO COMMIT THIS CRIME.

THE SECOND PRONG, TO ME, IS SORT OF THE MOST IMPORTANT THAT SEEMS LACKING HERE IS THAT THE

DEFENDANT HAD A CAREFUL PLAN OR
PREARRANGED DESIGN TO COMMIT THE
MURDER BEFORE THE INCIDENT.
CCP IS FOR EXECUTION-STYLE
MURDERS.

PEOPLE, THEY'RE BOUND OR, YOU
KNOW, OR THE CONTRACT KILLINGS.
AS YOU AGREE, THIS DEFENDANT HAD
NO -- THEY DON'T GO TO PLACE
WITH THE IDEA THEY'RE GOING TO
TRACK THIS DEFENDANT.

THEY DON'T EVEN -- WE HAD A CASE
THIS WEEK WHERE THE STATE DIDN'T
ASK FOR CCP WHERE THEY GO TO THE
HOUSE TO START SHOOTING IN
THERE.

THE STATE DIDN'T EVEN ASK FOR
CCP.

WHERE'S THE CAREFUL PLAN OR
PREARRANGED DESIGN TO COMMIT THE
MURDER?

>> THE CCP HERE, THE HEIGHTENED
PREMEDITATION AND THE PLANNING
IS INVOLVED, I WOULD SAY THERE
ARE TWO ASPECTS TO IT.

FIRST OF ALL, HE HEARS THAT, HE
HEARS FROM BEATTY THAT THE
VICTIM WAS THE ONE HE THINKS
SHOT AT HIM.

AND IN RESPONSE TO THAT, HE
PICKS UP A GUN AND WALKS OVER
THERE.

THAT'S A PLAN RIGHT THERE.

YOU HEAR THAT --

>> WELL, THAT IS PREMEDITATED
MURDER, I -- NOBODY'S -- I DON'T
THINK THEY'RE ARGUING THIS
SHOULD HAVE BEEN SECOND DEGREE.
OKAY, NO QUESTION THIS IS FIRST
DEGREE.

BUT IN TERMS OF TAKING MURDERS
THAT SORT OF SET THEM APART FROM
OTHER CAPITAL MURDERS, YOU KNOW,
WE'RE TALKING ABOUT MURDERS,
THIS SEEMS TO ME TO BE SIMILAR
TO CASES, THIS IS A MURDER CASE,
BUT I'M NOT SURE WHERE THE CCP
IS UNLESS OUR CASE LAW HAS GONE
TO SUCH AN EXTREME THAT IT
REALLY IS, YOU KNOW, IF YOU

DON'T KILL 'EM AND YOU'RE NOT A GOOD SHOT, YOU DON'T GET THEM ON THE FIRST SHOT AND YOU HAVE TO SHOOT MULTIPLE TIMES, THAT THAT'S GOING TO BE CCP.

AND THAT'S WHAT, THAT'S WHAT YOU HAVE, THAT'S THE STATE'S, HAS TO BE THE STATE'S ARGUMENT THAT THE CCP DEVELOPED DURING THE COURSE OF THE, BETWEEN THE FIRST SHOT AND THE 13TH SHOT.

>> NO.

I HAVE -- YES, BETWEEN THERE BUT ALSO THE PLAN -- WHEN YOU, WHEN SOMEBODY TELLS YOU THAT SOMEBODY SHOT AT SOMEONE AND YOUR REACTION IS TO PICK UP A GUN AND WALK OVER THERE AND START SHOOTING, FROM THE PICKING UP THE GUN TO WALKING OVER THERE IS ALSO -- AND THEN IT'S, THAT'S INTENTIONAL CONDUCT.

AND INCIDENTALLY, YOUR HONOR, I DON'T THINK THIS WAS HIS ARGUMENT.

I TOOK HIS ARGUMENT TO BE THAT SOMEBODY WITH A LOW IQ COULD NOT, COULD NOT BE, COULD NOT ENGAGE IN THE PLANNING NECESSARY FOR CCP.

>> NO.

I THINK WHAT HE SAID WAS THE EVIDENCE OF HIS IMPULSIVE TYPE OF BEHAVIOR IS CONSISTENT WITH THE IMPULSIVE ARGUMENT THAT'S BEING MADE HERE THAT THIS WAS NOT HEIGHTENED PREMEDITATION.

>> WELL, I TOOK, I TOOK THE -- IN THE BRIEF THE ARGUMENT WAS MORE THAT HIS LOW IQ LED TO IMPULSIVITY WHICH NEGATED PREMEDITATION.

SO I WASN'T EVEN TAKING THE ARGUMENT HERE TO BE THAT THERE WASN'T SUFFICIENT PLAN.

BUT TO ME, THE PLANNING IS TWOFOLD IN THE SENSE THAT HE PICKS UP THIS GUN AND GOES OVER TO THE CAR AND THEN TRACKS HIM AND LITERALLY, YOUR HONOR, THIS

KILLING REALLY OCCURS AT THE END FROM THE BLOOD BECAUSE THAT, THIS VICTIM IS TRYING TO GET OUT OF --

>> WHAT IS THE TIME BETWEEN WHEN THE FIRST SHOT'S FIRED AND THE 13TH SHOT?

ARE WE TALKING ABOUT, AGAIN, JUSTICE LABARGA WAS TALKING ABOUT SWAFFORD, AND, AGAIN, WE'RE FAMILIAR WITH THE SWAFFORD CASE.

THERE WERE THINGS INVOLVED APPARENTLY BEFORE, AND THEY WERE SHOOTING, HE WAS FIRST STARTING TO SHOOT AT THE TORSO AND THE LOWER EXTREMITIES SORT OF TO MAYBE START TO -- AND THEN RELOAD.

SO IS THE ARGUMENT THAT, I MEAN, HOW MANY SECONDS EXPIRED?

>> WELL, YOUR HONOR, THERE WASN'T MUCH TESTIMONY.

IT WASN'T, THERE WASN'T ANY TESTIMONY.

IT WAS A CONTINUOUS FIGHTING, IT WAS A CONTINUOUS SHOOTING WALKING AROUND TRACKING HIM DOWN --

>> IF THERE'S NOT MUCH TESTIMONY JUST LIKE WE SAID MITIGATION, THEY'VE GOT TO DO IT.

ISN'T THE BURDEN ON THE STATE BEYOND A REASONABLE DOUBT TO PROVE THIS AGGRAVATOR?

>> YES.

BUT -- NO, THERE'S A WHOLE BUNCH OF GUESSES AS TO WHAT HAPPENED. I MEAN AS TO TIMING ONLY, OKAY? SO THE STATE DEFINITELY, WE HAD EYEWITNESSES INCLUDING AN EYEWITNESS WHO KNEW BOTH THE PERPETRATOR AND THE VICTIM.

>> THAT DOESN'T ESTABLISH, THE KNOWLEDGE OF EACH OTHER DOESN'T ESTABLISH THE ELEMENTS BEFORE THE CCP.

THAT'S WHAT JUSTICE PARIENTE IS TRYING TO GET YOU INTO TO ADDRESS THAT, WHAT EVIDENCE,

WHAT'S THE EVIDENCE THAT THEY --
THE WORDS THAT THEY SAID THAT
MADE THIS THE HEIGHTENED
PREMEDITATION KIND OF SITUATION.

>> WELL, IT WOULD BE THE
TRACKING OF THE VICTIM AND GOING
AROUND AND SHOOTING HIM AND
MAKING SURE -- IN EFFECT, THIS
CAR BECAME A CAGE, BECAME, HE
BECAME TRAPPED IN THIS.

AND ONE OF OUR EYEWITNESSES
SAID, AND AS HE WAS TRYING TO
ESCAPE OUT OF THE WINDOW OR OUT
OF THE PASSENGER SIDE THAT HE
WALKED AROUND AND SHOT THE GUN
TO PUT HIM BACK INTO THE CAR.
SO IT'S THE SHEER NUMBER, THE
HAVING TO TRACK HIM LIKE THAT,
THE FACT THAT MOST OF THE BLOOD
IS, IN FACT, ON THE OUTSIDE --
IS ON THE PASSENGER SIDE AS HE'S
TRYING TO ESCAPE.

SO THAT WOULD BE THE HEIGHTENED
PREMEDITATION WOULD BE THE --
THIS IS THE GUN ITSELF WHICH IS
A 30-ROUND CLIP, A .45, A BIG
GUN.

AND THE LACK OF PROVOCATION, AND
YOU GO TO THIS CAR, AND YOU
TRACK THIS VICTIM AS HE'S
SHOOTING 13 TIMES GOING AROUND
AND ENDING UP TRAPPING HIM IN
THIS CAR WITH THIS GUN.

BY SHEER -- AND NOT STOPPING
UNTIL IT'S VERY CLEAR THAT HE'S
DEAD TOO.

THAT'S THE OTHER THING OF
HEIGHTENED PREMEDITATION.
IT'S NOT JUST A MATTER OF
SHOOTING AND SHOOTING MULTIPLE
TIMES, BUT YOU SHOOT UNTIL
YOU'RE SURE SOMEBODY'S DEAD.
AND YOU TRACK THEM DOWN UNTIL
YOU'RE SURE THEY'RE DEAD.

>> IF WE ACCEPT THAT THERE'S
CCP, THE JUDGE GAVE IT GREAT
WEIGHT WHICH TO ME MEANS THAT OF
ALL -- WHEN YOU TAKE CCP AND YOU
GO NOW YOU'VE REALLY GOT, THIS
IS REALLY A BAD CCP, AND WE TALK

ABOUT CCP AS MAKING IT THE MOST SERIOUS, HERE'S MY QUESTION TO YOU: LET'S ASSUME THAT WE EITHER DO NOT FIND CCP OR HAC OR SAY GIVING IT GREAT WEIGHT UNDER THE CIRCUMSTANCES OF THIS CRIME REALLY DOESN'T MAKE SENSE. I'M -- THIS -- HE'S GOT A PRIOR VIOLENT FELONY OF SECOND-DEGREE MURDER.

HAVE WE EVER, ASSUMING THAT THERE'S NO HAC/CCP FOUND THAT BECAUSE OF THE FACT THAT THIS IS A PERSON, AS YOU SAID, THAT'S BASICALLY BEEN IN PRISON HIS WHOLE LIFE AND COMMITTED A PRIOR MURDER WOULD BE STILL, WOULD THAT BE PROPORTIONATE AS A CASE FOR THE IMPOSITION OF THE DEATH PENALTY?

>> YES, YOUR HONOR, I DO THINK IT WOULD BE HARMLESS.

>> WELL, NOT -- I'M NOT SURE IT WOULD BE HARMLESS, BUT IF WE KNOCK OUT TWO OF THE THREE AGGRAVATORS, I DON'T KNOW THAT -- IT STILL HAS TO, I WOULD THINK IT WOULD HAVE TO GO BACK. BUT AS FAR AS IF WE, YOU'RE SAYING IF WE WEIGHT THESE LESS, HAVING THAT THIRD AGGRAVATOR WHICH IS THE PRIOR VIOLENT FELONY, THAT HE SERVED PRISON TIME, AND THIS IS BASICALLY A 40-YEAR-OLD THAT SHOULD HAVE LEARNED HIS LESSON, THAT THAT IS ENOUGH TO IMPOSE THE DEATH PENALTY IN THIS CASE.

>> YES, I DO THINK SO, AND HERE'S WHY.

THE PRIOR VIOLENT FELONY REALLY DEPENDS ON WHAT THE PRIOR VIOLENT FELONY IS, ALL RIGHT? SO A PRIOR VIOLENT FELONY FOR A BURGLARY OR SOME OTHER OR KIND OF CRIME, THIS IS A PRIOR VIOLENT FELONY FOR HOMICIDE, FOR MURDERING A PERSON.

HE GETS OUT OF JAIL JUNE 1ST, AND NOT EVEN SIX MONTHS LATER

THIS IS WHAT I SEE AS ABSOLUTELY
NO PROVOCATION IS NOW KILLING
ANOTHER HUMAN BEING.

>> I MEAN, THAT REALLY, TO ME,
SHOULD BE WHAT WE'RE LOOKING AT.
SO THANK YOU.

>> YES.

SO I WOULD SAY, I WOULD SAY THIS
IS STILL PROPORTIONAL GIVEN THE
NATURE OF AND THE FACTS
SURROUNDING THIS PARTICULAR
PRIOR VIOLENT FELONY WHICH IS A
PRIOR CONVICTION FOR MURDER.
AND HIS AGE, HE GETS OUT AND
LITERALLY WITHIN SIX MONTHS HE,
FOR NO REASON, HAS KILLED
ANOTHER HUMAN BEING.

>> THANK YOU FOR YOUR ARGUMENT.

>> THANK YOU.

>> REBUTTAL?

>> JUST BRIEFLY, AND I DON'T
WANT TO BELABOR THESE SCORES,
BUT EVEN THE PRESCREENING SCORES
IN THE RECORDS RANGE FROM 58 TO
THE 71 AND THE 94, AND I THINK
IT'S ALSO TELLING THAT SHE
ATTRIBUTED THE 71 SCORE TO THE
TEST THAT BLOOMFIELD
ADMINISTERED, WHICH HE DID NOT
ADMINISTER THAT TEST.
SO THE MALINGERING ISSUE WAS
BROUGHT UP.

AS I RECALL DR. BLOOMFIELD'S
TESTIMONY, HE SAYS THE FULL
SCALE IQ HAS SO MANY TESTING
FACTORS AND CONTROLS IN IT THAT
IT, IN EFFECT, CONTROLS FOR
MALINGERING.

>> SO YOU CAN NEVER DO -- IS
THIS THAT YOU CAN NEVER, IT
NEVER MAKES ANY SENSE TO DO A
TEST FOR MALINGERING IN
CONNECTION WITH A FULL SCALE IQ
TEST?

>> I DON'T WANT TO, I DON'T WANT
TO SPEAK FOR THE EXPERT, BUT AS
I RECALL THE TESTIMONY, THAT
THAT WAS A FACTOR IN AN IQ TEST
BECAUSE OF THE FULL SCALE IQ IS
SUCH THAT THEY'RE GOING TO BE

ABLE TO DETERMINE WHETHER IT WAS MALINGERING.

>> THEY WON'T BE ABLE TO CONSISTENTLY -- MALINGER WITHOUT DEMONSTRATING THE ISSUE.

>> PARTICULARLY IN THIS INSTANCE WHERE HE'S OBVIOUSLY GOT DEFICIENCIES.

AS TO THE CCP, YES, INDEED, WE DID ARGUE THAT THERE WAS NO PREPLANNING OR ABILITY TO CALCULATE THE MURDER AS WELL AS TIME TO REFLECT AND ALL THOSE OTHER ISSUES.

THE AG WAS SUGGESTING WE HAD NOT ARGUED THAT IN THE BRIEF, BUT WE DID.

>> WHERE DOES IT LEAVE US IF WE --

>> IF YOU FIND NO CCP, I THINK YOU'VE GOT TO SEND THIS CASE BACK BECAUSE, AGAIN, GIVEN THE WEIGHT -- WE CAN'T DIVORCE THIS CASE FROM MITIGATION.

AND GIVEN THE PROBLEMS WITH THE MITIGATION AND THE TREATMENT OF THE LOW COGNITIVE FUNCTIONING TO ELIMINATE A MAJOR AGGRAVATING CIRCUMSTANCE, I THINK A MINIMUM HAS TO GO BACK TO --

>> WHAT WAS THE VOTE IN THIS CASE?

>> I'M SORRY?

>> THE VOTE?

>> 9-3.

>> 9-3?

>> 9-3, I BELIEVE.

>> OKAY.

WOULD YOU ARGUE THAT IT SHOULD GO BACK BECAUSE THE JURY WAS INSTRUCTED ON CCP, AND YOU DON'T KNOW WHERE THAT PLAYS, BUT IT SHOULD GO BACK FOR A NEW PENALTY PHASE, OR SHOULD IT GO BACK FOR A RESENTENCING BY THE JUDGE?

>> AS I RECALL, THERE WAS AN ARGUMENT ON THE INSTRUCTION ON THE HAC.

I DON'T KNOW IF THEY, FRANKLY, I DON'T KNOW IF THE DEFENSE

COUNSEL RAISED AN ARGUMENT TO
THE INSTRUCTION ON CCP.
I WOULD HAVE TO DOUBLE CHECK THE
RECORD ON THAT.
BUT I WOULD THINK BOTH THE HAC
AND THE CCP FACTORS AREN'T
SUPPORTED IN THIS RECORD.
AND IN THAT CASE, YOU WOULD HAVE
TO GO BACK OR YOU'D GO BACK FOR
ANOTHER JURY BECAUSE OF THE
INSTRUCTION ON THE BAD
AGGRAVATOR.
BUT CERTAINLY, AT A MINIMUM IT'S
GOT TO GO BACK TO THE JUDGE TO
EVALUATE ALL THESE ISSUES AGAIN.
THE, BOTH THE MITIGATION AND THE
ELIMINATION OF AGGRAVATORS.
NOW, THE PRIOR VIOLENT FELONY WE
DON'T -- UNFORTUNATELY, WE DON'T
HAVE A LOT OF DETAIL ABOUT HOW
THIS OCCURRED, BUT IT WAS BOTH A
ROBBERY AND A MURDER SITUATION.
WE DON'T KNOW WHETHER, AGAIN,
NEITHER SIDE SAW FIT TO FLESH
OUT THE CIRCUMSTANCES OF THAT
PRIOR.
>> WELL, HE PLED GUILTY, AND HE
WAS OUT ONLY SIX MONTHS.
THAT'S NOT CONTROVERTED.
HE MURDERED THE FIRST TIME, COMES
OUT AND WITHIN SIX MONTHS
MURDERED SOMEBODY ELSE.
>> YES.
YES, THAT HAPPENED.
I HAVE NOTHING ELSE.
>> THANK YOU FOR YOUR ARGUMENTS.
COURT IS ADJOURNED.
>> ALL RISE.