

>> THE CASE OF DAVIDSON V.
THE STATE.
COUNSEL?

>> THANK YOU, CHIEF JUSTICE,
YOUR HONORS.

I'M BARBARA BUSHARIS HERE
REPRESENTING DONALD DAVIDSON.
I DON'T ANTICIPATE USING ALL THE
TIME THE COURT HAS ALLOTTED,
YOUR HONOR, BUT I'D LIKE TO
RESERVE FIVE MINUTES TO BE SAFE
FOR REBUTTAL.

THANK YOU.

MR. DAVIDSON IS ASKING THE COURT
TO REVERSE HIS DEATH SENTENCE,
AND IN TODAY'S ARGUMENT I'M
GOING TO CONCENTRATE ON THE
SECOND ARGUMENT THAT WE'VE REACH
BRIEFED WHICH HAS TO DO WITH
MITIGATING EVIDENCE.

THERE WERE OTHER ARGUMENTS THAT
WERE MADE FOR THE-- THAT I'M
NOT GOING TO ADDRESS THIS
MORNING.

THE FIRST THING I'D LIKE TO TALK
ABOUT IS THE REJECTION OF THE
STATUTORY MITIGATING FACTOR THAT
THE DEFENDANT DID NOT CONFORM
HIS CONDUCT TO THE REQUIREMENTS
OF LAW.

IF YOU LOOK AT SECTION 921.1417
WHERE THE MITIGATORS ARE FOUND,
THE FACTOR THAT INVOLVES
CONFORMING YOUR CONDUCT TO THE
REQUIREMENTS OF LAW IS SET OUT
IN THE DISJUNCTIVE WITH THE
CAPACITY TO APPRECIATE THE
CRIMINALITY OF ONE'S CONDUCT.

AND WHAT HAPPENED IN THE TRIAL
COURT'S ORDER HERE IS THAT
BECAUSE THE TRIAL COURT FOUND
EVIDENCE THAT MR. DAVIDSON
APPRECIATED THE CRIMINALITY OF
HIS CONDUCT AND PARTICULARLY
TOOK STEPS TO AVOID IMMEDIATE
DETECTION AFTER THE CHARGED
OFFENSES, THAT HE ALSO COULD
CONFORM HIS CONDUCT TO THE
REQUIREMENTS OF THE LAW.

INTERPRETING THAT FACTOR, WHICH
IS SUBPART F OF THE STATUTE IN
THAT WAY IGNORES THE FACT THAT
IT IS WRITTEN IN THE

DISJUNCTIVE, THAT THE LEGISLATURE HAS PROVIDED FOR A SITUATION LIKE THIS WHERE SOMEBODY COULD APPRECIATE THE CRIMINALITY OF HIS OR HER CONDUCT BUT STILL AT THE MOMENT THAT A CRIME WAS COMMITTED BE UNABLE TO CONFORM THAT CONDUCT TO THE REQUIREMENTS OF LAW.

THE TWO PARTS OF THAT TEST ARE SIMPLY NOT SYNONYMS FOR EACH OTHER.

AND IF YOU LOOK AT SOME OF THE OTHER MITIGATING CIRCUMSTANCES, YOU SEE THAT IN SUBPART D THERE'S A SUBPART THAT'S WRITTEN IN THE CONJUNCTIVE.

THE DEFENDANT WAS AN ACCOMPLICE AND HIS OR HER CONDUCT WAS RELATIVELY MINOR.

SO FOR THAT MITIGATOR TO COMPLY, BOTH PARTS OF THAT PHRASE WOULD HAVE TO BE DEMONSTRATED--

>> I UNDERSTAND THE ARGUMENT FROM THE STATUTORY PERSPECTIVE. ISN'T YOUR PROBLEM HERE THOUGH THAT THE SPECIFIC CONDUCT OF THE DEFENDANT IN, FOR EXAMPLE, PHYSICALLY ARE REMOVING HIS GPS BRACELET DEMONSTRATES NOT JUST AWARENESS, BUT A POSITIVE DECISION ON HIS PART TO SUBVERT THE LAW THAT SORT OF GIVES THE LIE TO THE IDEA THAT HE DIDN'T UNDERSTAND, FOR EXAMPLE, THAT THERE WERE LIKELY CONSEQUENCES TO HIS ACTIONS, THAT BY JUST DOING NOTHING, BY NOT TAKING THE POSITIVE ACTION HE WOULD BE EXPOSED TO?

>> YOUR HONOR, THE PROBLEM WITH THAT IS THAT WHEN ONE PHRASES IT AS, YOU KNOW, APPRECIATING THAT THERE WERE CONSEQUENCES TO WHAT HE DID, YOU'RE REALLY TALKING ABOUT APPRECIATING THE CRIMINALITY OF WHAT HE HAD DONE. AND THE RECORD SHOWS THAT DURING THE APPROXIMATELY FIVE HOURS THAT THE DEFENDANT WAS AT THE VICTIM'S HOUSE BETWEEN THE TIME HE ARRIVED WHEN THE VICTIM WAS THERE ALONE AND HE LEFT WITH HER DAUGHTER, THAT HE, THAT HE DID

BEGIN TO APPRECIATE THE
CRIMINALITY OF WHAT HE HAD DONE.
BUT THAT ISN'T DISPOSITIVE OF
WHETHER HE WAS ABLE TO CONFORM
HIS CONDUCT TO THE REQUIREMENTS
OF LAW AT THE TIME HE WENT TO
THE HOUSE AND BEGAN THE
ASSAULT-- I'M SORRY, YOUR
HONOR, WERE YOU GOING TO SPEAK?

>> YEAH, THAT'S EXACTLY MY
QUESTION.

ISN'T THE ACTION HE TOOK TO
REMOVE THE BRACELET
DEMONSTRATIVE NOT JUST OF HIS
KNOWLEDGE OF THE WRONGNESS OF
HIS ACTIONS, BUT A PURPOSEFUL
CHOICE AND AFFIRMATIVE DECISION
ON HIS PART NOT TO CONFORM
HIMSELF OR HIS ACTIONS TO THE
LAW?

>> NO, BECAUSE THAT HAPPENED,
YOUR HONOR, SEVERAL HOURS AFTER
THE INITIAL OFFENSE BEGAN.

WE DON'T HAVE A GOOD TIMELINE--

>> HIS POSITION IS THAT HE LATER
GAINED THAT.

>> YES.

AND I THINK THAT'S CONSISTENT
WITH THE STATEMENT THAT HE GAVE
POLICE AS SOON AS HE WAS
APPREHENDED BUT ALSO CONSISTENT
WITH THE EXPERT TESTIMONY ABOUT
HIS BRAIN FUNCTION AND THE WAY
THAT HE WOULD HAVE BEEN IMPEDED
IN HIS IMPULSE CONTROL ON THE
DAY OF THE OFFENSES.

THAT WE HAVE A PERIOD OF TIME
THAT HE WAS AT THE HOUSE, AND
WE-- FOR PART OF THAT TIME HE
IS THE ONLY PERSON WHO KNOWS
WHAT HAPPENED AT THE HOUSE.
FOR PART OF THAT TIME, WE HAVE
THE ACCOUNT OF THE CHILD VICTIM
AFTER SHE CAME HOME FROM SCHOOL.
BUT WHAT WE DO KNOW IS THAT
THERE'S A PERIOD OF ABOUT FIVE
HOURS BETWEEN WHEN HE ARRIVED AT
THE HOUSE AND INTENDED TO
SEXUALLY ASSAULT THE FIRST
VICTIM AND WHEN HE BEGAN TAKING
THOSE LATER STEPS TO AVOID
DETECTION OR TO TRY TO, YOU
KNOW, GET AWAY FROM THE HOUSE
WITH THE CHILD VICTIM.

SO THERE'S A SEPARATION, A TEMPORAL SEPARATION. AND I'M NOT SAYING THAT THERE WOULD ALWAYS HAVE TO BE A TEMPORAL SEPARATION, BUT I'M SAYING HERE YOU HAVE A SEPARATION BETWEEN THE POINT IN TIME IN WHICH HE WAS UNABLE TO CONTROL HIS BEHAVIOR, TO CONFORM HIS BEHAVIOR AND THE POINT IN TIME WHEN HE BEGINS TO TAKE AFFIRMATIVE STEPS THAT SHOW THAT HE APPRECIATES WHAT HE HAS DONE IS WRONG.

AND CERTAINLY, THOSE AFFIRMATIVE STEPS CONTINUED AFTER THAT FOR SEVERAL HOURS.

HE LEFT AT ABOUT 5:00 WITH THE CHILD VICTIM, HE DROVE AROUND FOR A CERTAIN PERIOD OF TIME. AND, AGAIN, THE RECORD SHOWS THAT DURING THAT PERIOD HE BECAME REMORSEFUL AND DECIDED TO TAKE HER BACK HOME AND LET HER GO NEAR WHERE HE HAD ORIGINALLY TAKEN HER FROM, NEAR HER HOUSE. AND THEN HE INITIALLY TRIED TO DRIVE AWAY, DROVE TO GEORGIA AND THEN TURNED AROUND AND DROVE BACK.

HIS STATEMENT TO POLICE WAS THAT HE WAS COMING BACK TO TURN HIMSELF IN BECAUSE HE KNEW WHAT HE HAD DONE WAS WRONG.

I BELIEVE THE POLICE STOPPED HIM BEFORE HE DID THAT, BUT I THINK IT'S IN THE RECORD THAT HE WAS APPREHENDED WITHOUT INCIDENT. SO ONCE HE TURNED AROUND AND CAME BACK FROM GEORGIA, HE DIDN'T TAKE FURTHER STEPS TO AVOID EITHER DETECTION OR APPREHENSION.

SO YOU HAVE SEVERAL HOURS THERE WHERE, YES, THERE ARE POSITIVE INDICATORS THAT THE DEFENDANT KNEW WHAT HE HAD DONE WAS WRONG, THAT HE FELT REMORSEFUL, THAT HE FELT AFRAID, THAT HE KNEW THAT HE WAS GOING TO BE PUNISHED, PROBABLY SEVERELY, AND TOOK STEPS TO TRY TO AVOID THAT. BUT THAT DOES NOT DETERMINE WHETHER HE COULD CONFORM HIS

CONDUCT TO THE REQUIREMENTS OF LAW WHEN THIS WHOLE TRAGIC SERIES OF EVENTS BEGAN TO UNFOLD.

AND THAT'S WHERE WE HAVE THE UNCONTROVERTED EXPERT TESTIMONY FROM THE NEUROPSYCHOLOGIST WHO EVALUATED THE DEFENDANT, TESTED HIS COGNITIVE FUNCTIONING, PERFORMED NUMEROUS TESTS ON HIM, REVIEWED EXTENSIVE DOCUMENTATION ABOUT HIS HISTORY AND CONCLUDED NOT ONLY THAT HE WAS OPERATING UNDER AN EXTREME MENTAL OR EMOTIONAL DISTURBANCE, BUT ALSO THAT AT THE TIME OF THE EVENTS AGAINST MS. WELSH THAT HE COULDN'T CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THOUGHT. AND THAT INABILITY TO CONFORM WAS PROBABLY IN THE EXPERT OPINION EXACERBATED BY COCAINE USE.

WE DON'T HAVE FORENSIC EVIDENCE OF THE COCAINE USE, WE DON'T HAVE ANY TESTING THAT WAS DONE. WE HAVE THE DEFENDANT'S STATEMENT THAT AT ABOUT 10:00 ON THE MORNING OF THE EVENTS HE INGESTED SOME COCAINE.

AND THEN AT NOON, WHICH WOULD HAVE BEEN IMMEDIATELY BEFORE GOING INTO THE VICTIM'S HOUSE AND BEGINNING THE INITIAL ASSAULT, THAT HE INGESTED THE REST OF THE COCAINE THAT HE HAD. SO THAT WHEN HE FIRST WENT THERE, HE WAS, YOU KNOW, STRONGLY UNDER THE INFLUENCE. AND THEN AS THAT WORE OFF, I THINK THAT'S CONSISTENT WITH HIS ABILITY LATER IN THE DAY TO START TAKING PURPOSEFUL ACTION, AS YOU POINTED OUT.

BUT THE TWO PARTS OF THAT MITIGATOR ARE STILL SEPARATE, AND HERE THE FACTS SHOW THAT THEY ARE STILL SEPARATE. I KNOW THAT THERE ARE CASES WHERE COURTS HAVE BASICALLY HELD THAT BECAUSE THE DEFENDANT DEMONSTRATED AN APPRECIATION FOR THE CRIMINALITY OF THIS CONDUCT, HE WAS ABLE TO CONFORM HIS

CONDUCT TO THE REQUIREMENTS OF LAW, AND I WOULD SAY THAT THAT'S NOT ONLY CONFLATING THOSE TWO PARTS OF THE TEST, BUT DEPENDING ON THE EVIDENCE IN A PARTICULAR CASE IT'S NOT GIVING APPROPRIATE WEIGHT TO EVIDENCE.

AND HERE WE HAVE UNCONTROVERTED EVIDENCE--

>> COUNSEL, LET ME ASK YOU THIS, COUNSEL.

SO WHAT IS THE UNCONTROVERTED EVIDENCE?

WHAT'S THE SOURCE OF THAT?

>> THE DEFENSE EXPERT, DR. LAO--

>> IS IT JUST HIS TESTIMONY, JUST THAT TESTIMONY?

>> IT WAS THE, WHICH WAS SUPPORTED BY TESTIMONY--

>> BUT WAS IT JUST THAT, WAS IT JUST THAT EXPERT'S TESTIMONY?

>> IT IS THE EXPERT TESTIMONY I WOULD SAY COMBINED WITH THE DEFENDANT'S OWN STATEMENT.

>> OKAY.

LET ME ASK YOU THIS.

WHAT DO YOU SAY TO THE TRIAL COURT'S FINDING THAT SEEMS TO DISCREDIT THE EXPERT'S TESTIMONY WITH RESPECT TO THE DEFENDANT'S ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW BEING SUBSTANTIALLY IMPAIRED WHERE THE TRIAL COURT SAYS THAT THE EXPERT NEVER QUESTIONED THE DEFENDANT ABOUT THE CRIMES IN THIS CASE, HIS FEELINGS ABOUT THE CRIMES IN THE CASE OR WHAT HE WAS FEELING LEADING UP TO THE CRIMES IN THIS CASE?

>> I WOULD POINT YOUR HONOR TO THE EXPERT'S OWN RESPONSE TO THAT QUESTION UNDER CROSS-EXAMINATION WHICH WAS THAT HE HAD THE DEFENDANT'S LENGTHY AND VERY DETAILED CONFESSION. AND THAT IS ALSO IN THE RECORD. IT GOES ON FOR PAGES AND PAGES, AND IT DESCRIBES THE DEFENDANT'S STATE OF MIND THAT MORNING, IT DESCRIBES AS BEST AS THE DEFENDANT COULD REMEMBER WHEN HE WAS INTERVIEWED BY POLICE WHAT

HE HAD BEEN THINKING ALONG THE WAY, IT DESCRIBES HIS FEELINGS ABOUT WHAT HE HAD DONE. AND SO I DON'T THINK, I DON'T THINK THE TRIAL COURT GAVE APPROPRIATE WEIGHT TO THE FACT THAT THE EXPERT IN ADDITION TO ALL OF THE OTHER VOLUMINOUS DOCUMENTATION HE HAD AND THE TESTING THAT HE DID, THAT HE ALSO HAD THAT NEARLY CONTEMPORANEOUS STATEMENT FROM THE DEFENDANT OF WHAT THE DEFENDANT HAD BEEN THINKING AND EXPERIENCING THAT MORNING. SO, YOUR HONORS, I WOULD, I WOULD ARGUE THAT THIS CASE SHOULD BE TREATED MORE LIKE THE CASE OF NYBERG, A CASE THAT RECOGNIZED THAT A DEFENDANT CAN APPRECIATE THE CRIMINALITY OF HIS OR HER CONDUCT WITHOUT BEING ABLE TO CONTROL IT AT A PARTICULAR MOMENT IN TIME. AND IN ADDITION, RECOGNIZED THAT IT WAS ERROR TO REJECT UNREFUTED EXPERT TESTIMONY FROM AN EXPERT IN BRAIN DYSFUNCTION. JUSTICE CANADY, I THINK THE TRIAL COURT'S POINTING TO THAT FACT THAT THE EXPERT DIDN'T PERSONALLY ASK MR. DAVIDSON WHAT WERE YOU THINKING WHEN YOU WERE DOING THIS DOESN'T REFUTE THE EXPERT'S CONCLUSION WHICH WAS EXPLAINED AT LENGTH AND BASED ON, YOU KNOW, TESTING AND REVIEW OF THE DEFENDANT'S HISTORY AS WELL AS HIS STATEMENT. AND SO THERE'S NO REAL EVIDENCE IN THE RECORD THAT REFUTES THAT EXPERT TESTIMONY. IF WE WERE TALKING SEPARATELY ABOUT THE ABILITY TO APPRECIATE CRIMINALITY OF THE CONDUCT BY ITSELF, THAT MIGHT BE DIFFERENT BECAUSE THERE ARE PIECES OF EVIDENCE THAT WE CAN POINT TO THAT MIGHT REFUTE THAT. BUT HERE THE EXPERT'S OPINION ABOUT HIS ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS NOT REFUTED. AND IF SO, IT WAS ERROR TO

REJECT THAT SIMPLY BY COMBINING IT INTO THAT MITIGATOR AND TREATING IT AS ONE, AS SORT OF ONE BIG INQUIRY.

THE OTHER TWO EXPERTS WHO TESTIFIED ALSO PROVIDED INFORMATION THAT SUPPORTED THE EXPERT OPINION ON HIS ABILITY TO CONFORM.

DR. BIGLER, WHO TESTIFIED ABOUT CHANGES IN THE AREA OF MR. DAVIDSON'S BRAIN INVOLVING REGULATING BEHAVIOR, THE AREAS OF THE BRAIN THAT REGULATE BEHAVIOR, AND DR. GOLD WHO TESTIFIED ABOUT THE EXTENSIVE HISTORY OF ADD VERSE CHILDHOOD EXPERIENCES THAT THE DEFENDANT HAD EXPERIENCED INCLUDING PHYSICAL ABUSE, SEXUAL ABUSE, PHYSICAL NEGLECT, EMOTIONAL NEGLECT, DIVORCE OR SEPARATION, ABANDONMENT BY HIS FATHER AND OTHER FACTORS ALL OF WHICH ARE KNOWN, AND DR. GOLD EXPLAINED THIS IN THE TESTIMONY, TO CAUSE ADVERSE EFFECTS TO THE DEVELOPING BRAIN.

SO WHEN YOU HAVE THE FACT THAT THE EXPERT'S OPINION ON HIS ABILITY TO CONFORM IS SUPPORTED BY SO MUCH EVIDENCE, THERE WAS NO STATE EXPERT REFUTING THAT THAT INFORMATION ABOUT MR. DAVIDSON'S IMPAIRMENT, THAT IT WAS ERROR FOR THE JUDGE TO REJECT THAT MITIGATOR.

REGARDING THE SECOND ISSUE RELATING TO MITIGATION, IT'S THE ASSIGNMENT OF LITTLE WEIGHT TO A NUMBER OF ITEMS OF NONSTATUTORY MITIGATION.

AND THE, THE STANDARD OF REVIEW OF THIS IS A DEFERENTIAL ONE. IT'S ABUSE OF DISCRETION.

THE TRIAL COURT HAS WIDE DISCRETION TO USE IN WEIGHING EVIDENCE THAT'S WELL ESTABLISHED, AND WE'RE NOT CHALLENGING THAT THAT'S THE STANDARD.

BUT WHEN YOU LOOK AT WHAT THE STANDARD MEANS, AMONG OTHER THINGS IT MEAN AN UNREASONABLE

USE OF THAT DISCRETION.
AND THE DEFENDANT'S POSITION
HERE IS THAT IT'S SIMPLY
UNREASONABLE TO WEIGH CERTAIN
THINGS AS HEAVILY AS OTHERS
GIVEN THE UNIQUE SET OF FACTS
AND CIRCUMSTANCES IN THIS CASE.
THE STATE SUGGESTED THAT WE'RE
ARGUING THAT THERE HAS TO BE
SOME MANDATE OF COMPARING AND
WEIGHING ALL OF THE DIFFERENT
MITIGATORS AGAINST EACH OTHER,
AND I DON'T THINK THAT'S THE
CASE.
BUT THE CASE LAW DOES REQUIRE
THAT WEIGHING OF THE MITIGATORS
HAS TO BE BASED ON THE UNIQUE
FACTS OF THE CASE.
ONE OF THE CASES THAT TALKS
ABOUT THAT, AND SO THE WAY THAT
YOU GIVE A PROPER ACCOUNT OR A
PROPER VALUE TO THE UNIQUE
CIRCUMSTANCES OF EACH CASE IS BY
REALIZING THAT SOME MITIGATORS
ARE GOING TO BE WORTH MORE THAN
OTHERS.
OTHERWISE YOU'RE NOT RECOGNIZING
THE UNIQUENESS OF THAT CASE,
YOU'RE BASICALLY JUST SAYING,
YOU KNOW WHAT?
ALL OF THIS IS WORTH THE SAME,
AND NONE OF IT IS GOING TO
OUTWEIGH THE AGGRAVATORS.
AND THAT'S, THAT'S WHAT HAPPENED
WITH A NUMBER OF THE MITIGATORS
HERE.
WE HAVE MITIGATORS HAVING TO DO
WITH ABANDONMENT, NEGLECT,
ABUSIVE SURROUNDINGS THAT WERE
GIVEN LITTLE WEIGHT.
AND WHEN YOU LOOK AT THE FACTS
THAT OTHER THINGS THAT WERE
GIVEN LITTLE WEIGHT WERE THINGS
LIKE MR. DAVIDSON BEING ABLE TO
CONTROL HIMSELF IN COURT, THAT'S
WHERE THE UNREASONABLENESS COMES
IN.
IT'S SIMPLY UNREASONABLE TO LOOK
AT THE HISTORY THAT THIS
DEFENDANT EXPERIENCED, THE
CONDITIONS THAT HE GREW UP IN,
THE FAMILY DYNAMIC THAT HE GREW
UP IN, THE SEXUALLY
DYSFUNCTIONAL FAMILY HISTORY

THAT HE GREW UP IN AND SAY,
WELL, THIS IS ONLY AS WEIGHTY AS
THE FACT THAT HE WAS ABLE TO
CONTROL HIMSELF AND BEHAVE
RESPECTFULLY IN THE COURT
SEVERAL YEARS LATER WHEN HE'D
BEEN REMOVED FROM THAT SITUATION
AND BEEN IN A CONTROLLED PRISON
ENVIRONMENT FOR A LENGTHY PERIOD
OF TIME.

SO WHEN YOU HAVE AN UNREASONABLE
USE OF DISCRETION AND ABUSE OF
THAT DISCRETION AND THE FACTORS
IN THIS CASE SHOULD BE
REWEIGHED, AT LEAST THE FACTORS
THAT WERE IDENTIFIED IN THE
INITIAL BRIEF AS RELATING TO
MR. DAVIDSON'S HISTORY OF ABUSE
THAT WERE GIVEN LITTLE WEIGHT
SHOULD BE REWEIGHED.

IF THERE ARE NO OTHER QUESTIONS,
YOUR HONOR, I'LL RESERVE MY
REMAINING TIME.

>> THANK YOU, COUNSEL.

>> THANK YOU.

>> COUNSEL FOR THE STATE.

>> GOOD MORNING.

I'M ASSISTANT ATTORNEY GENERAL
DAVID CHAPPELL, AND I REPRESENT
THE STATE OF FLORIDA IN THIS
MATTER.

MOVING RIGHT TO ISSUE TWO, I
THINK JUSTICE COURIEL AND
JUSTICE CANADY ACCURATELY
DESCRIBED THE SITUATION IN THIS
PARTICULAR CASE AS TO THE STATE
OF THE LAW.

I THINK AT THE OUTSET IT'S VERY
IMPORTANT TO REMEMBER THAT WE
ARE DEALING WITH ABUSIVE
DISCRETION STANDARD HERE WHICH
IS DEFERENTIAL TO THE TRIAL
COURT'S FINDINGS.

AND THIS COURT HAS PRECEDENT
GOING BACK SEVERAL YEARS THAT
ANTICIPATE THAT A TRIAL COURT IS
PERMITTED TO REJECT FINDING A
STATUTORY MITIGATING
CIRCUMSTANCE IF THERE IS
COMPETENT THE SUBSTANTIAL
EVIDENCE IN THE RECORD THAT
ANTICIPATES THAT EXPERT
TESTIMONY IS CONTRADICTED BY
THAT EVIDENCE.

HERE IN THIS CASE OF THE THREE EXPERTS THAT THE DEFENSE PUT ON TO TRY TO PROVE THIS PARTICULAR STATUTORY MITIGATING CIRCUMSTANCE, ONLY ONE OF THE EXPERTS ACTUALLY OPINED THAT THE DEFENDANT WAS SUFFERING FROM SOME TYPE OF IMPULSE CONTROL ISSUE AT THE TIME THAT THAT THESE CRIMES TOOK PLACE. DR. WOE, AS JUSTICE CANADY POINTED OUT, DID NOT SPECIFICALLY SPEAK TO THE DEFENDANT ABOUT HIS THOUGHTS AND FEELINGS AT THE TIME THAT THE MURDER OCCURRED OR EVEN THE SUBSEQUENT SEXUAL ASSAULT ON THE VICTIM'S DAUGHTER THAT IT OCCURRED.

IMPORTANTLY HERE, THERE IS COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD THAT THE DEFENDANT DID HAVE SOME TYPE OF A PLAN IN PLACE TO FURTHER HIS CRIMINAL CONDUCT.

THE FACTS OF THE CASE, QUITE SIMPLY, WOULD LEAD ONE TO THINK THAT CONSIDERING HE WENT TO THE VICTIM'S HOME, PROCEEDED TO ATTEMPT TO ENGAGE IN SEXUAL INTERCOURSE WITH HER.

WHEN SHE REFUSED HIS ADVANCES, HE THEN STRANGLERED HER AND STABBED HER IN THE NECK REPEATEDLY.

AT THAT POINT IN TIME HE COMES INTO THE LIVING ROOM WHERE THE VICTIM'S DAUGHTER HAS JUST COME HOME FROM SCHOOL.

HE THEN PROCEEDS TO SEXUALLY ASSAULT THE DAUGHTER UNTIL THE SON COMES HOME.

WHEN THE SON COMES HOME, HE THEN LIES TO THE SON, TELLS HIM THAT HIS MOTHER AND SISTER ARE OVER AT A NEIGHBOR'S HOUSE SO THAT HE CAN CONTINUE HIS SEXUAL ASSAULT ON THE DAUGHTER.

HE REMOVES HIS GPS MONITOR.

HE KIDNAPS THE DAUGHTER.

HE TAKES THE VAN THAT BELONGED TO THE VICTIM, TRAVELS FURTHER DOWN THE ROAD TO CONTINUE TO SEXUALLY ASSAULT THE DAUGHTER.

THIS IS EVIDENCE THAT THE DEFENDANT HAD A PARTICULAR GOAL IN MIND THAT HE WANTED TO ACCOMPLISH.

HE TOOK THE STEPS NECESSARY IN ORDER TO ALLOW HIM TO COMPLETE HIS DESIRES AND HIS MISSION AT THAT POINT IN TIME.

THIS IS NOT A CASE WHERE THE DEFENDANT LACKED ANY TYPE OF IMPULSE CONTROL ISSUE.

HE KNEW WHAT HE WAS DOING, HE HAD THE CAPABILITY TO DO THAT, AND HE TOOK SPECIFIC, CONCRETE STEPS IN ORDER TO INSURE THAT HE WOULD BE ABLE TO ACHIEVE HIS DESIRED GOAL.

ACCORDINGLY, THERE WAS SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD THAT DEMONSTRATES NOT ONLY DID THE DEFENDANT KNOW THAT HE WAS ENGAGING IN MULTIPLE FELONY OFFENSES, BUT THAT HE DID SO INTENTIONALLY AND WILLINGLY, AND HE WOULD HAVE BEEN ABLE TO STOP HIMSELF BECAUSE OF SPECIFICALLY THE PLAN THAT HE HAD IN PLACE.

MOVING TO THE NEXT POINT THAT OPPOSING COUNSEL RAISED, SHE ARGUED SPECIFICALLY THAT THE TRIAL COURT ERRED IN ASSIGNING LITTLE WEIGHT TO VARIOUS NONSTATUTORY MITIGATING CIRCUMSTANCES, SPECIFICALLY WITH RESPECT TO THE DEFENDANT'S UPBRINGING.

THE WAY THAT HER ARGUMENT IS CRAFTED, SHE'S ESSENTIALLY ASKING THIS COURT TO CREATE NEW LAW IN WHICH ALL TRIAL COURTS WOULD BE REQUIRED TO EVALUATE MITIGATING CIRCUMSTANCES AGAINST ONE ANOTHER IN EVERY CASE TO DETERMINE WHAT WOULD THE APPROPRIATE LEVEL OF WEIGHT WOULD BE.

AND THAT GOES AGAINST DECADES OF THIS COURT'S PRECEDENT WHICH REQUIRES INDIVIDUALIZED ORDERS FOR A TRIAL COURT TO EVALUATE EACH INDIVIDUAL MITIGATING CIRCUMSTANCES ON ITS OWN MERITS AND ASSIGN WEIGHT TO THAT

PARTICULAR MITIGATING
CIRCUMSTANCE.

THERE IS NO FURTHER REQUIREMENT
UNDER THIS COURT'S PRECEDENT OR
UNDER THE LAW THAT WOULD FORCE A
TRIAL COURT TO ENGAGE IN SUCH A
PROCESS.

AND, IN FACT, THAT PROCESS WOULD
BE ENTIRELY UNWIELDY WHEN YOU
HAVE CASES WHERE DEFENDANTS ARE
PRESENTING COURTS WITH DOZENS IF
NOT A HUNDRED OR MORE MITIGATING
CIRCUMSTANCES THAT WOULD REQUIRE
A TRIAL COURT TO APPARENTLY
EVALUATE ALL OF THESE MITIGATING
CIRCUMSTANCES IN CONTRAST WITH
ONE ANOTHER.

FINALLY, ALTHOUGH THE TRIAL
COURT ASSIGNED LITTLE WEIGHT TO
SOME OF THE CHILD UPBRINGING
NONSTATUTORY MITIGATING
CIRCUMSTANCES, THE TRIAL COURT
DID LOOK AT THE CHILD ABUSE
ALLEGATIONS AND THE EVIDENCE OF
CHILD ABUSE THAT THE DEFENDANT
SUFFERED AND ASSIGNED SEVERAL OF
THOSE FACTORS SOME WEIGHT UNDER
THE CHILD ABUSE HEADING IN THE
SENTENCING ORDER.

SO THE COURT CLEARLY LOOKED AT
EACH OF THE INDIVIDUAL
MITIGATING CIRCUMSTANCES AND
ASSIGNED WEIGHT TO THEM IN
ACCORDANCE WITH THE TRIAL
COURT'S DISCRETION.

AS A FINAL POINT ON THIS
PARTICULAR ISSUE, ALTHOUGH THE
COURT ASSIGNED LITTLE WEIGHT TO
SOME OF THESE CIRCUMSTANCES,
THERE IS NO SPECIFIC NUMBER THAT
IS ASSIGNED TO A PARTICULAR
MITIGATING CIRCUMSTANCE.

SO OPPOSING COUNSEL SEEMS TO
INDICATE THAT LITTLE WEIGHT
MEANS LITTLE WEIGHT ACROSS THE
BOARD.

HOWEVER, THERE'S NO INCLINATION
HERE THAT THE TRIAL COURT
THOUGHT LITTLE WEIGHT TO THE
DEFENDANT'S BEHAVIOR IN THE
COURTROOM WAS THE EXACT SAME AS
LITTLE WEIGHT TO THE CHILDHOOD
UPBRINGING, AND THERE'S JUST NO
WAY TO ARTICULATE THAT IN A

REASONABLE FASHION TO HAVE COURTS ENGAGE IN SOME TYPE OF MATHEMATICAL PROCESS WHERE THEY ASSIGN A SPECIFIC NUMBER OF BOUGHT TO EACH INDIVIDUAL MITIGATING CIRCUMSTANCE AND WHAT THAT WOULD ENTAIL.

IF THERE ARE NO QUESTIONS FROM THE COURT, THE STATE JUST RESPECTFULLY REQUESTS THAT THIS COURT UPHOLD AND AFFIRM THE DEFENDANT'S CONVICTION AND DEATH SENTENCE IN THIS CASE.

>> THANK YOU, COUNSEL.

WE'LL NOW HEAR REBUTTAL.

>> THANK YOU, YOUR HONOR.

AS TO THE FIRST POINT, THE EXPERT OPINION ON MR. DAVIDSON'S ABILITY TO CONFORM HIS CONDUCT, I WOULD JUST, AGAIN, URGE THE COURT TO LOOK AT THE TIMELINE INVOLVED HERE AND NOT TO CONFLATE THE FACTORS OF APPRECIATING THE CRIMINALITY OF ONE'S CONDUCT WITH THE ABILITY TO CONFORM ONE'S CONDUCT.

AND WE HAVE EXAMPLES, AS I SAID, LIKE WHERE THE DEFENDANT WAS UNDER THE INFLUENCE OF NUMEROUS CIRCUMSTANCES SIMILAR TO THE DEFENDANT HERE.

I THINK IN NYBERG THERE WAS INTOXICATION WHERE HERE WE HAVE COCAINE CONSUMPTION.

THE DIFFERENT BRAIN ABNORMALITIES THAT WERE ESTABLISHED.

AND ALL OF THOSE GO TO THE FACT THAT THE DEFENDANT LACKED IMPULSE CONTROL.

THE FACT THAT AFTER LACKING IMPULSE CONTROL YOU CAN THEN TAKE PURPOSEFUL ACTION IS NOT MUTUALLY EXCLUSIVE.

AND, IN FACT, IS OFTEN A PROBLEM IN AND OF ITSELF.

BUT LACKING IMPULSE CONTROL IS THE ABILITY TO CONFORM CONDUCT, NOT THE ABILITY TO UNDERSTAND I JUST DID SOMETHING HORRIBLE.

AND THEN REGARDING THE SECOND PART OF THE MITIGATION ARGUMENT, THE WEIGHT ASSIGNED TO THE FACTORS, I HAVE TO RESPECTFULLY

DISAGREE WITH HOW THE STATE IS CHARACTERIZING OUR ARGUMENT. AND I DON'T REALLY UNDERSTAND HOW, HOW YOU CAN HAVE A REQUIREMENT THAT A COURT ASSIGN WEIGHT TO MITIGATORS WHICH IS A WELL-ESTABLISHED REQUIREMENT IN OUR CASE LAW, BUT NOT SAY THAT THE WORDS USED TO DO THAT HAVE SOME MEANING.

THE REVIEW OF THESE MITIGATORS IS DIFFICULT ENOUGH WITHOUT HAVING TO AGREE THAT SAYING LITTLE WEIGHT HERE MEANS SOMETHING DIFFERENT THAN SAYING LITTLE WEIGHT HERE.

AND I THINK IF WORDS ARE TO BE GIVEN THEIR NORMAL MEANING, THEN GIVING SOMETHING LITTLE WEIGHT VERSUS GIVING IT SOME WEIGHT OR GIVING IT MODERATE WEIGHT OR WHATEVER TERMS THE TRIAL COURT ASSIGNS, THOSE TERMS HAVE TO BE INTERPRETED CONSISTENTLY.

MEANING, I'M NOT WEIGHING THIS VERY MUCH OR I'M WEIGHING IT SOME OR I'M WEIGHING IT A MEDIUM AMOUNT.

SO WE'RE NOT ASKING FOR THE COURT TO MAKE NEW LAW ON HOW THESE MITIGATORS ARE WEIGHED, BUT WE ARE SAYING BASED ON THE COURT'S PRECEDENT THAT THE MITIGATORS HAVE TO BE WEIGHED IN THE CONTEXT OF EACH CASE AND THE FACTS APPROVED IN EACH CASE THAT THERE HAS TO THEN BE SOME INDIVIDUALIZATION OF THE WEIGHT THAT'S GIVEN THOSE MITIGATORS.

AND IF YOU'RE ASSIGNING THE SAME WEIGHT TO TWO SUCH DRAMATICALLY DIFFERENT MITIGATORS AS CHILDHOOD ABUSE AND THE ABILITY TO BEHAVE RESPECTFULLY IN COURT, THEN YOU'RE NOT REALLY PERFORMING THAT FUNCTION.

AND THAT'S WHERE THE HARM IN THIS ERROR COMES IN, IT'S BECAUSE IF YOU'RE NOT REALLY PERFORMING THAT FUNCTION, WHAT YOU'RE DOING IS YOU'RE TIPPING THE SCALE FROM THE VERY BEGINNING OF THE BALANCING. UNTIL BE PERFECTLY POSSIBLE, AND

I WOULD AGREE WOULD BE IN THE COURT'S DISCRETION OF TO HAVE A SITUATION WHERE YOU ASSIGNED HEAVY WEIGHT TO MITIGATING FACTORS BUT STILL FOUND THAT THEY WERE OUTWEIGHED BY EQUALLY OR GREATER WEIGHTED AGGRAVATORS. BUT TO JUST LOOK AT MITIGATORS ACROSS THE BOARD AND CLASSIFY A HUGE LIST OF THEM THE AS GETTING LITTLE WEIGHT WHEN THERE'S COMPETENT EVIDENCE OF THE HISTORY OF ABUSE AND DYSFUNCTION THAT WAS IN THIS DEFENDANT'S BACKGROUND IS AN ABUSE OF DISCRETION AND, BASICALLY, PREDETERMINES THE OUTCOME OF THAT BALANCING BEFORE YOU EVEN GET TO THE FINAL STEP. EVALUATING A MITIGATOR ON ITS OWN MERITS DOESN'T MEAN EVALUATING IT IN A VACUUM. THE LAW IS CLEAR THAT THE PROCESS OF EVALUATING THESE MITIGATORS IS SUPPOSED TO REFLECT THE UNIQUE FACTS AND CIRCUMSTANCES OF EACH CASE, AND THAT'S WHAT THE TRIAL COURT'S ORDER, HOWEVER DETAILED, DID NOT DO IN THIS CASE. FOR THAT REASONS-- FOR THOSE REASONS WE ASK THAT YOU REVERSE THE DEATH SENTENCE. IF THERE ARE NO FURTHER QUESTIONS? I'M FINISHED. THANK YOU, YOUR HONORS. >> THANK YOU, COUNSEL. WE THANK YOU BOTH FOR YOUR ARGUMENTS IN THIS CASE TODAY. THAT IS THE FINAL CASE ON TODAY'S DOCKET, AND SO THIS SESSION OF THE SUPREME COURT.