ALL RIGHT. THE NEXT CASE ON THE COURT'S CALENDAR IS KEVIN DON FOSTER VERSUS THE STATE OF FLORIDA. MR. MOELLER.

MAY IT PLEASE THE COURT. GOOD MORNING. MY NAME IS ROBERT MOELLER. I AM AN ASSISTANT PUBLIC DEFENDER FOR THE TENTH JUDICIAL CIRCUIT. I AM HERE ON BEHALF OF THE APPELLANT, KEVIN DON FOSTER. MR. FOSTER AND THREE OTHER YOUNG PEOPLE WERE INDICTED FOR THE FIRST-DEGREE MURDER OF A BAND TEACHER AT RIVERDALE HIGH SCHOOL IN LEE COUNTY. MARK S. CHWEEBEZ, I BELIEVE IT WAS PRONOUNCED, AND MR. FOSTER WAS CONVICTED, AFTER A JURY TRIAL, OF PREMEDITATED MURDER, AND WAS SENTENCED TO DEATH, AFTER A JURY RECOMMENDATION THAT HE BE SO SENTENCED. IN AGGRAVATION, THE TRIAL COURT FOUND THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING AN UNLAWFUL ARREST OR ESCAPING FROM CUSTODY AND COLD, CALCULATED AND PREMEDITATED, THOSE TWO AGGRAVATE ORS. I WOULD LIKE TO BEGIN BY TALKING ABOUT THE FIRST TWO ISSUES IN THE BREESTS, WHICH HAS -- IN THE BRIEFS, WHICH HAS TO DO WITH THE DENIAL THAT WERE MADE BY THE APPELLANT, THROUGH HIS COUNSEL. I BELIEVE THERE WERE APPROXIMATELY PRETRIAL MOTIONS FOR CHANGE OF VENUE AND THE MOTIONS CONTINUED, EVEN DURING THE TRIAL. THE MOTIONS WERE BASED UPON THE EXTENT AND PREJUDICIAL NATURE OF THE PUBLICITY SURROUNDING THIS CASE, PUBLICITY WHICH, IN FACT, WENT NATIONWIDE, INCLUDING PROGRAMS ON "INSIDE EDITION", AND THERE WAS AN ARTICLE IN "SPIN" MAGAZINE, HAVING TO DO WITH THIS CASE, WHICH SHOWS, SOMEWHAT, THE TEXAS TENT OF THE PUBLICITY THAT THIS -- THE EXTENT OF THE PUBLICITY THAT THIS MATTER GENERATED.

WHY ISN'T RECALLING THE CONTROLLING MATTER IN -- WHY ISN'T RAWLING THE CONTROLLING MATTER IN THIS CASE? FOR EXAMPLE, IN ROLLING THE PUBLICITY WAS GENERATED SOME THREE AND-A-HALF YEARS AFTER THIS CASE WENT TO TRIAL. OF COURSE MR. ROLING HAD A PENALTY PHASE. HE DIDN'T HAVE A GUILT PHASE, AS WELL. ANOTHER DIFFERENCE IS THAT THERE WERE NO PRETRIAL MOTIONS FOR CHANGE OF VENUE IN ROLLING. DEFENSE COUNSEL WAITED, I BELIEVE, UNTIL THE SIXTH DAY OF JURY SELECTION, EVEN, TO RAISE THE ISSUE, AND FURTHERMORE THIS COURT FOUND AND THE TRIAL COURT FOUND THAT THE COVERAGE IN ROLLING WAS ESSENTIALLY BALANCED. IT WAS PRIMARILY FACTUAL AND INCLUDED THE DEFENSE POINT OF VIEW, AS WELL AS THE PROSECUTOR'S POINT OF VIEW, SO I BELIEVE THERE ARE SUBSTANTIAL DIFFERENCES BETWEEN THIS CASE AND ROLLING. IN THIS CASE THE PUBLICITY THAT WAS GENERATED WENT FAR BEYOND FACTUAL ACCOUNTS. THE DEFENSE METICULOUSLY DOCUMENTED THE EXTENT OF THE PUBLICITY, INCLUDING NOT ONLY COPIES OF THE NEWSPAPER ARTICLES THAT CAME OUT ABOUT THE CASE BUT TRANSCRIPTS, AS WELL, OF THE TV PROGRAMS ABOUT THE CASE AND RADIO PROGRAMS ABOUT THE CASE. THEY ARE ALL DOCUMENTED IN THE RECORD. WE HAVE CITED A FEW EXAMPLES IN THE BRIEF, OF SOME OF THE MORE EGREGIOUS AND THE MORE PREJUDICIAL TYPES OF PUBLICITY THAT WERE GENERATED ABOUT THIS CASE, AND I WON'T GO THROUGH THEM ALL, AGAIN, DURING THE BRIEF, AND -- THROUGH THEM ALL AGAIN. THEY ARE IN THE BRIEF, AND I WOULD ENCOURAGE THE COURT, AGAIN, TO READ THE WHOLE GAMUT OF RECORDS THAT HAVE BEEN PRODUCED.

THE MORE INFLAMMATORY ONES CAME OUT HOW LONG ABOUT -- HOW LONG BEFORE THE TRIAL?

THERE WAS ONE PARTICULAR PIECE THAT WAS PARTICULARLY INFLAMMATORY THAT CAME OUT JUST A COUPLE OF DAYS BEFORE THE JURY SELECTION BEGAN. THAT WAS A PIECE BY, I BELIEVE IT WAS A MAN NAMED SAM COOKE, AND WE HAVE CITED A FEW QUOTES FROM IT IN THE BRIEF, WHERE HE REFERRED TO THE APPELLANT AS, MAKE SURE I HAVE GOT THE RIGHT ONE HERE.

WHERE HE IS REFERRING TO THE APPELLANT AS, WITH VERY INFLAMMATORY LANGUAGE. THAT ONE CAME OUT, THE SAM COOKE PIECE, HE DESCRIBED THE PELL APARTMENT AS ONE TWISTED KID, A REDNECK RACIST, PYROMANIAC, GUN-CRAZED AND ON AND ON, WITH CRAZED GREEN EYES AND MANSON-LIKE TENDENCIES. IT IS HARD TO IMAGINE ANYMORE INFLAMMATORY TYPE OF RHETORIC COMING OUT ON THE VERY EVE OF THE JURY SELECTION IN THIS CASE.

WHAT CONSIDERATION SHOULD WE GIVE TO THE FACT THAT THERE IS NO CHALLENGE IN THIS APPEAL, NOW, TO THE COMPOSITION OF THE JURY. THAT IS THAT A JURY, OBVIOUSLY, WAS SELECTED AND TRIED THE CASE, AND NOW THERE ARE NO ASSERTIONS, ON APPEAL, THAT A BIAS JUROR SAT ON THIS CASE, SO IN A SENSE, IT IS APPARENT THAT A JURY WAS SELECTED. WHAT WEIGHT SHOULD WE GIVE TO THAT?

WELL, I THINK, FIRST OF ALL, THE DEFENSE ATTORNEY DID OBJECT TO THE JURY. HE ESSENTIALLY REFUSED TO ACCEPT THE JURY, ALTHOUGH, OF COURSE, THE TRIAL DID CONTINUE, BUT HE OBJECTED TO THE JURY ON THE GROUNDS OF THE PERVASIVE AND PREJUDICIAL PUBLICITY -- AND I MIGHT MENTION THAT SOME OF THE JURORS THAT ACTUALLY DID SIT IN THIS CASE THAT KIND OF SHOW WHAT THE PUBLICITY WAS ABOUT, FIRST OF ALL OUT OF THE 12 JURORS WHO ACTUALLY DECIDED APPELLANT'S FATE, EIGHT OF THE 12 HAD BEEN EXPOSED TO PRETRIAL PUBLICITY. ONE OF THE JURORS, MARJORIE WARRING, WHO ACTUALLY SAT ON THE JURY, SAID DURING VOIR DIRE THAT SHE HAD BEEN EXPOSEED TO UP IN AND TV COVERAGE, INCLUDING COVERAGE THAT CAME OUT RECENTLY BEFORE THE TRIAL, AND THIS COVERAGE HAD CAUSED HER TO HAVE A FIXED OPINION, BUT SHE THOUGHT SHE COULD PUT IT ASIDE AND WOULD "HOPE" THAT SHE COULD MAKE HER DECISION BASED ON WHAT SHE HEARD IN THE COURTROOM. SHE WENT ON TO SAY THAT SHE RECALLED THAT THIS WAS, QUOTE, JUST A HORRIBLE CRIME, AND THE OTHER ACTS THAT THEY HAD DONE, UNQUOTE. A LOT OF THE PUBLICITY DEALT WITH OTHER CRIMES THAT SUPPOSEDLY WERE COMMITTED BY THIS GROUP, THE LORDS OF CHAOS.

DIDN'T THE JUDGE GIVE ADDITIONAL PRESENT OTHER CHALLENGES TO THE DEFENSE? -- PREEMPT OR I CHALLENGES TO THE -- PREEMPTORY CHALLENGES TO THE DEFENSE?

YES, HE DID GIVE TWO OR THREE, CORRECT. AND THE DEFENSE ASKED FOR ME, WHICH WAS REFUSED. BUT AS I WAS SAYING, A LOT OF THE PUBLICITY HAD TO DO WITH OTHER CRIMES THAT WERE SUPPOSEDLY COMMITTED BY THE LORDS OF CHAOS, THUS ADDING TO THE CLIMATE OF FEAR IN THE COMMUNITY.

BUT GOING BACK TO JUSTICE ANSTEAD'S QUESTION, IF YOU ARE NOT RAISING A GROUND, NOW, ON APPEAL, THAT A PARTICULAR JUROR SHOULD HAVE BEEN EXCUSED FOR CAUSE AND THAT THEY WERE WRONGFULLY -- THAT THE DEFENDANT WAS WRONGFULLY DENIED A CAUSE CHALLENGE, THEN AREN'T WE TO ASSUME THAT FOR BIASED JUROR THE SAT ON THIS JURY? DON'T YOU HAVE TO SHOW SOMETHING ABOUT JURORS THAT ACTUALLY SAT, THAT YOU COULD SAY THAT AT LEAST TWO, THREE OF THEM WERE BIASED AND RAISE THAT AS AN ISSUE?

WELL, I THINK THAT IS WHERE THE PRESUMPTION OF PREJUDICE COMES IN, BASED UPON THE CLIMATE THAT WAS GENERATED BY THE NEWS COVERAGE. LET ME JUST GO ON TO TALK ABOUT A FEW MORE OF THE VOIR DIRE RESPONSES OF A FEW OF THE JURORS THAT ACTUALLY SAT. I WAS TALKING ABOUT THIS MISS WARRING. SHE, ALSO, RECALLED THAT THE COCA-COLA BUILDING WAS SAT ON FIRE, THE ARSON OF THE COCA-COLA BUILDING WAS ANOTHER CRIME ALLEGEDLY COMMITTED BY THE LORDS OF CHAOS THAT WAS BEGIN EXTENSIVE UP IN COVERAGE. THERE WAS, EVEN, COVERAGE ABOUT A SUPPOSED PLAN TO GO TO DISNEY WORLD AND KILL AFRICAN-AMERICAN PERSONS, AND IT INCLUDED RACIAL SLURS, ALLEGEDLY, SPOKEN BY THE APPELLANT, MR. FOSTER. THE JUROR THAT I WAS TALKING ABOUT, MS. WARRING, INDICATED UNCERTAINTY THAT SHE COULD SEPARATE WHAT SHE HEARD FROM THE MEDIA FROM WHAT SHE HEARD IN THE COURTROOM AND RELY ONLY ON WHAT SHE HEARD IN COURT. ANOTHER JUROR WHO ACTUALLY

SAT WAS RAYMOND SERNEY, WHO HAD READ AND HEARD A LOT ABOUT THIS CASE AND HE HAD FORMED AN OPINION ABOUT THE APPELLANT'S GUILT. HE WAS ALSO EQUIVOCAL ABOUT WHERE -- WHETHER HE COULD PUT THE PUBLICITY OUT OF HIS MIND. HE THOUGHT HE COULD DO IT, IF THE JUDGE SO INSTRUCTED HIM, AND ANOTHER JUROR, MS. TRAMMELL, HAD HEARD ABOUT THE CASE ON TV NEWS, AND TO HER IT SOUNDED LIKE, QUOTE HE WAS GUILTY, UNQUOTE, BUT SHE THOUGHT SHE COULD SET ASIDE HER OPINION. THESE ARE THE ISSUES IN THE CASE.

WHAT IS THE TEST FOR A CHANGE OF VENUE, IN YOUR OPINION, AND HASN'T IT BEEN MET, IN THE SENSE THAT A JURY WAS EMPAN HE WOULD? -- EMPANELED.

WHAT WE HAVE TALKED ABOUT IN THE BRIEF WAS THE JURY BEING PRESUMED, AS WE TALKED ABOUT IN THE BRIEF, WHERE THE DEFENSE MUST SHOW PRETRIAL PUBLICITY WHICH WOULD RENDER A FAIR TRIAL BY AN IMPARTIAL JURY DRAWN FROM THE COMMUNITY, AND WE HAVE GOT A QUOTE FROM A CASE, THERE, ON PAGE 24 OF THE BRIEF.

WELL, A JURY WAS DRAWN, AND, WELL, I GUESS TO FOLLOW-UP ON JUSTICE AND STANDARD'S QUESTION -- ANSTEAD'S QUESTION, APPARENTLY IT WAS AN IMPARTIAL JUROR, FROM ALL EFFECTS. HE HASN'T CHALLENGED IT AS BEING IMPARTIAL.

THE DEFENSE CHALLENGED, OBJECTED TO THE JURY ON THE GROUNDS OF THE PUBLICITY. AS FAR AS ANY SPECIFIC JURORS THAT HE WANTED EXCUSED, I CAN'T -- THERE WEREN'T ANY THAT I KNOW OF THAT -- HE MOVED FOR CAUSE TO BE EXCUSED, THAT THE JUDGE DIDN'T EXCUSE, ON THE GROUNDS OF THE PRETRIAL PUBLICITY. HE MAY HAVE WANTED TO EXCUSE SOME OF THEM PREEMPTORILY FOR CAUSE FOR CHALLENGE, AND HE DID, IN FACT, MENTION ONE JUROR THAT HE WANTED TO CHALLENGE, MR. QUIELET, I BELIEVE IT WAS, AND ALTHOUGH HE WANTED TO CHALLENGE, HE HAD RUN OUT OF CHALLENGES AND THE COURT WOULDN'T GIVE HIM ANOTHER ONE. IF I COULD, I WOULD LIKE TO MOVE ON, NOW, DUE TO TIME CONSIDERATIONS, FOR THE MOMENT, SKIPPING OVER ISSUE TWO AND GO ON TO ISSUE THREE. I WILL COME BACK TO ISSUE TWO, TIME PERMITTING. ISSUE THREE HAS TO DO WITH THE APPEARANCE THAT THE JUDGE HAD PREJUDGED THE CASE AND DID NOT PRESIDE OVER THE TRIAL WITH AN OPEN MIND. THIS IS BASED, PRIMARILY, UPON REMARKS OF THE JIM, AFTER HE RULED -- OF THE JUDGE, AFTER HE RULED THAT THE STATE COULD PRESENT A CONSISTENT PRIOR STATEMENT BY ONE OF THE STATE WITNESSES, DERRICK SHIELDS, WHO WAS, ALSO, CHARGED WITH THE INSTANT HOMICIDE. MR. SHIELDS CUT A DEAL WITH THE STATE AND TESTIFIED AGAINST APPELLANT AT HIS TRIAL, AND THE STATE WAS ALLOWED IT PLAY A PORTION OF MR. SHIELDS' TAPE-RECORDED STATEMENT THAT HE GAVE TO LAW ENFORCEMENT, APPARENTLY ON THE NIGHT THAT HE WAS ARRESTED, WHICH, I BELIEVE, WAS MAY 3, 1996. THERE WAS AN OBJECTION TO THE STATE BEING ALLOWED TO DO THIS. IT WAS OVERRULED, AND WHEN THE DEFENSE WAS COMPLAINING TO THE COURT ABOUT THE RULING, THE JUDGE SAID, QUOTE, TELL IT TO THE SUPREME COURT. YOU WILL GET AN OPPORTUNITY, I BELIEVE. AND THIS GOES ALONG WITH THE PORTER CASE THAT WAS CITED NOT THAT LONG AGO BY THIS COURT, IN THAT THE JUDGE MUST PRESIDE OVER THE TRIAL WITH AN OPEN MINE AND MUST NOT -- WITH AN OPEN MIND AND MUST NOT HAVE PREJUDGED THE PENALTY OR ANY OTHER ISSUES, FOR THAT MATTER, BUT PARTICULARLY WITH THE ISSUE OF THE DEATH PENALTY. HERE IT APPEARS THAT THE JUDGE HAD ALREADY DECIDED THAT THE APPELLANT WOULD NOT ONLY BE CONVICTED BUT THAT, WHEN HE WAS CONVICTED, THE COURT WOULD SENTENCE HIM TO THE ELECTRIC CHAIR. OTHERWISE THE COURT, THE CASE WOULD NOT BE GOING TO THE SUPREME COURT, TO THIS COURT, AND THERE WOULD BE NO REASON FOR THE JUDGE TO MAKE THIS REMARK. GOING TO THE NEXT ISSUE, WHICH HAS TO DO WITH THE FINDING OF THE "AVOID ARREST AGGRAVATING CIRCUMSTANCE." APART FROM THE QUESTION OF WHETHER IT IS SUPPORTED BY THE EVIDENCE THAT WAS PRESENTED AT TRIAL, PROBABLY THE MOST DISTURBING ASPECT OF THIS ISSUE, TO ME, IS THAT THE COURT APPARENTLY USED MATTERS THAT DIDN'T COME OUT AT TRIAL. AT THE SPENCER HEARING, THE STATE WAS PERMITTED TO INTRODUCE, INTO EVIDENCE, OVER OBJECTION, A SEPARATE INFORMATION CHARGING THE APPELLANT WITH A NUMBER OF CRIMES. THEY CHARGED CHARGED NOT ONLY --

THEY CHARGED NOT ONLY THE APPELLANT BUT SOME OTHER MEMBERS OF THE SO-CALLED LORDS OF CHAOS AS WELL. THIS WAS ADMITTED AT THE SPENCER HEARING, OVER THE OBJECTION OF DEFENSE COUNSEL. OF COURSE THE EVIDENCE THAT WAS ADMITTED WAS KNOLL ALLEGATION OF GUILTY WHATSOEVER. IT WAS MERE EVIDENCE --

IS THAT REFERRED TO?

I BELIEVE IT WAS REFERRED TO, ALTHOUGH OBLIQUELY. HE DIDN'T REFER TO THE INFORMATION, ITSELF, BUT HE DID REFER TO OTHER CRIMES THAT THE LORDS OF CHAOS HAD COMMITTED, AT LEAST IN A GENERAL WAY.

THIS IS A CASE WHERE THE NUMBER OF OTHER PARTICIPANTS IN THIS CRIME TESTIFIED AGAINST YOUR CLIENT. IS THAT CORRECT?

THAT'S CORRECT. YES.

DIDN'T THEY GIVE EXPLICIT TESTIMONY THAT THE MOTIVE FOR THIS KILLING WAS BECAUSE THEY WOULD ALL BE CAUGHT AND THAT THAT WAS THE REASON THAT THEY THOUGHT IT WAS NECESSARY TO KILL THIS GENTLEMAN? ISN'T THERE EXPLICIT TESTIMONY BY A NUMBER OF WITNESSES THAT THIS WAS THE MOTIVE FOR THE KILLING?

THEY SUGGESTED THAT THAT MAY HAVE BEEN ONE OF THE REASONS, IN ADDITION TO THEIR ANGER AT HAVING BEEN CAUGHT. HOWEVER, WE WOULD LIKE TO POINT OUT THAT, WITH REGARD SPECIFICALLY TO THE APPELLANT, THERE WAS NO EVIDENCE THAT THE VICTIM COULD IDENTIFY THE APPELLANT. HE MAY HAVE SEEN SOMEBODY RUN AWAY, BUT THE APPELLANT WAS NOT ONE OF THE TWO INDIVIDUALS THAT MR. SCHWEBEZE CAUGHT THERE, IN FRONT OF THE SCHOOL AND WAS TALKING TO. THE APPELLANT HAD, ACCORDING TO TESTIMONY, GONE ACROSS THE STREET. THE APPELLANT WAS NOT EVEN ATTENDING THE SCHOOL AT THE TIME, AND THERE IS NO ALLEGATION THAT MR. SCHWEBEZE COULD IDENTIFY OR WOULD IDENTIFY HIM.

IT IS LOGICAL THAT TWO OF THE MEMBERS AFTER TWO-PART GROUP OR THREE-PART GROUP OR FOUR-PART GROUP OR WHATEVER WERE CAUGHT, THAT THAT WOULD RAISE THE SUBSTANTIAL POSSIBILITY THAT THE REST OF THE GROUP WOULD BE IDENTIFIED. ISN'T THAT A LOGICAL INFERENCE TO DRAW?

I THINK IT IS SOMEWHAT SPECULATION THAT MAYBE ONE INFERENCE THAT COULD BE DRAWN, BUT, AGAIN, I WOULD LIKE TO POINT OUT THAT THERE WAS NO EVIDENCE TO SUPPORT THE COURT'S CONCLUSION THAT THE LORDS OF CHAOS HAD COMMITTED ALL THESE OTHER CRIMINAL ACTS THAT WOULD BE EXPOSED, IN THE EVENT THAT MR. --

THAT IS A SEPARATE ISSUE NOW. I AM JUST TALKING ABOUT -- WHICH ISSUE ARE WE TALKING ABOUT NOW? THE FINDING WITH REFERENCE TO THIS AGGRAVATE. ORELON: THE ADMISSION OF THIS EVIDENCE AT THE SPENCER HEARING?

I THINK IT IS. ORELON: OR THE ADMISSION OF THIS EVIDENCE AT THE SPENCER HEAR SOMETHING.

YOU ASKED WHETHER THE JUDGE WOULD REFER TO THE EVIDENCE IN THE SPENCER ORDER, AND I THINK HE DID IN AN IN DIRECT WAY. WE HAVE QUOTED FROM PAGE 39 FROM THE BRIEF ON THE ORDER, AND AT THE BOTTOM HE DOES TALK ABOUT THE OTHER, THAT THE LORDS OF CHAOS WOULD SUPPOSEDLY BE FACING SIGNIFICANT CHARGES BEYOND THOSE, WHICH MIGHT BE OR THAT WOULD BE EXPOSED AND SO FORTH AND SO ON, SO HE DOES REFER, AT LEAST IN AN OBLIQUE WAY, TO THE INFORMATION THAT WAS ADMITTED INTO EVIDENCE AT THE SPENCER HEARING.

DID THAT COME OUT IN ANY OTHER FORM? THAT IS DID THE OTHER WITNESSES THAT WERE

MEMBERS OF THIS GROUP GIVE ANY TESTIMONY ABOUT OTHER CRIMINAL ACTS OF THE GROUP?

NO, NOT SPECIFICALLY. THERE WERE SOME ALMOST OFFHAND REFERENCES THAT THEY PLED TO SOME OF THEM HAD PLED TO THIS MURDER AND TO SOME OTHER CRIMES, BUT WHETHER THOSE CRIMES WERE PART OF THEIR CONNECTION WITH THE LORDS OF CHAOS, WHETHER THE APPELLANT WAS INVOLVED IN THOSE CRIMES WHEN THEY TOOK PLACE, THERE WAS NO SPECIFICS THAT WERE TESTIFIED AT TRIAL WHATSOEVER.

NONE OF THOSE OTHER WITNESSES TESTIFIED TO WHAT THIS GROUP WAS OR DID?

WELL, THEY TESTIFIED IN A GENERAL WAY TO WHAT IT WAS, THAT IT WAS SUPPOSED TO BE GOING OUT THE AREA, CAUSING CHAOS AND DESTRUCTION, THAT SORT OF THING BURKES AS FAR AS ANY SPECIFICS, SPECIFIC CRIMES THAT THEY HAD COMMITTED, APART FROM THE MURDER, NONE OF THAT CAME IN, AND OF COURSE IT PROBABLY WOULD HAVE BEEN IN ADMISSIBLE AND PREJUDICIAL AND SHOULDN'T HAVE COME IN, ANYWAY.

IF IT IS, IN FACT, ERROR, IS IT SUBJECT TO A HARMLESS ERROR?

THE ADMISSION OF THE INFORMATION INTO EVIDENCE?

RIGHT.

I BELIEVE IT WOULD BE SUBJECT TO A HARMLESS ERROR TEST. YES.

WHY WOULD IT NOT BE HARMLESS ERROR, IN THIS INSTANCE?

AGAIN, I THINK THAT WAS -- THE STATE'S WHOLE THEORY, INPUTING THIS PARTICULAR DOCUMENT INTO EVIDENCE, WAS TO SUPPORT THE "AVOID ARREST, AGGRAVATING CIRCUMSTANCE", AND IT CERTAINLY APPEARS TO ME, IN THE SENTENCING ORDER THAT, THE JUDGE DID RELY UPON THIS, FAIRLY HEAVILY IN MAKING THIS FINDING, AND THE CASES THAT WE CITED IN THE BRIEF, OF COURSE MR. SCHWEBEZE WAS NOT A LAW ENFORCEMENT OFFICER, AND YOU HAVE TO HAVE VERY STRONG PROOF TO ADMIT THIS AGO GRATE VAIT OR. IF I COULD -- THIS AGGRAVATE OR. IF I COULD MOVE ON, NOW, TO THE COURT'S FINDINGS OMITGATION, IF I CANLARLY HIS -- PARTICULARLY THE OUTRIGHT REJECTION OF THE AGE OF THIS CLIENT, AS 18, AS A MITIGATING CIRCUMSTANCE. THE JURY WAS INSTRUCTED ON AGE, BUT FOR SOME REASON THE COURT REFUSED TO FIND IT A MITIGATING CIRCUMSTANCE.

DID THE COURT EXPLAIN HIS REASONS?

HE GAVE SOME REASONS, WHICH DIDN'T SEEM TO BE VERY COMPELLING. I BELIEVE HE MENTIONED THE FACT THAT THE APPELLANT HAD GOTTEN HIS GED AND --

DROPPED OUT OF SCHOOL FOR TWO YEARS?

BEEN A DROP OUT FOR TWO YEARS? GOT HIS GED?

RIGHT. THAT HE HAD NOT ATTENDED SCHOOL FOR TWO YEARS BEFORE THE MURDER. THAT HE HAD TRAVELED OVERSEAS, AN EXCHANGE STUDENT AND COMPLETED HIS GED REQUIREMENTS AND TAKEN OTHER COURSES IN PREPARATION FOR LIFE AS ADULT, AND PERHAPS THE MOST CURIOUS PART ABOUT THE COURT'S REJECTION OF THIS WAS HE SAID THAT APPELLANT HAD LOST HIS RIGHT TO HAVE AGE TAKEN INTO CONSIDERATION BECAUSE OF HIS LEADERSHIP OF A GROUP OF CRIMINALS AND HAD METICULOUSLY PLANNED AND CARRIED OUT THE SHOTGUN SLAYING OF SCHWEBEZE.

SO IS IT YOUR POSITION THAT 18, IN AND OF ITSELF, IS A MITIGATING CIRCUMSTANCE?

I DON'T BELIEVE THIS COURT HAS EVER SAID THAT 18 IS, PER SE, A MITIGATING CIRCUMSTANCE, ALTHOUGH THE COURT HAS INDICATED THAT A YOUTHFUL AGE BELOW THE AGE OF MAJORITY, 17 OR LOWER, CERTAINLY, SHOULD BE A MITIGATING CIRCUMSTANCE. APPELLANT WAS BARELY ABOVE THAT, AND THE COURT, THIS COURT HAS, ON OCCASION, FOUND THAT THERE WAS AN ABUSE OF DISCRETION BY THE TRIAL COURT, IN FAILING TO FIND AGE AS A MITIGATING CIRCUMSTANCE. WE HAVE CITED THE MONN CASE, IN PARTICULAR, WHERE THE COURT --

SHOULDN'T THAT AGE BE COUPLED WITH SOMETHING ELSE THAT DEMONSTRATES A LACK OF MATURITY?

PERHAPS, BUT I THINK IN THIS CASE IT WAS, BY THE GENERAL -- WHAT EVIDENCE THERE WAS OF THE LIFESTYLE THAT THE APPELLANT WAS PURSUING, THE FACT THAT HE HAD DROPPED OUT AND HE, APPARENTLY, WAS LEADING A FAIRLY AIMLESS EXISTENCE AND DIDN'T HAVE ANY PARTICULAR GOALS, ALTHOUGH HE WAS MOTIVATED TO HELP HIMSELF, IN THAT HE DID GET HIS GED AND WAS TAKING SOME COLLEGE COURSES.

BUT ISN'T THAT EVIDENCE JUST AS CONSISTENT WITH HE EXERCISED A GREAT DEAL OF MATURITY? HE ASSUMED LEADERSHIP OF THIS ENTER PRIZE AND -- ENTERPRISE AND THE LORDS OF CHAOS? ISN'T THAT WHAT THE JUDGE IS REALLY SAYING, THAT BEYOND HIS YEARS?

THAT IS WHAT HE IS SAYING, BUT I DON'T THINK THE FACT THAT HE WAS THE LEADER OF THIS GROUP OF, ALLEGEDLY THE GROUP OF THESE SO-CALLED CRIMINALS, SHOWS PARTICULAR MATURITY. AGAIN, I THINK IT SHOWS THAT HE WAS AN AIMLESS YOUTH WHO WAS CASTING ABOUT FOR SOME TYPE OF MEANING IN HIS LIFE. I THINK THAT IS CERTAINLY A MORE REASONABLE INTERPRETATION, WHEN YOU LOOK AT ALL OF THE EVIDENCE.

WE FIND PEOPLE 40, 50 DOING THAT, TOO.

WELL, YOU KNOW, JUST BECAUSE THEY ARE 40 OR 50, I DON'T THINK THAT THAT SHOWS THAT THEY ARE PARTICULARLY MATURE. I DON'T THINK THAT LEADING A GANG OF THIS NATURE SHOWS MATURITY.

BUT WOULD THAT AGE, THEN, BE CONSIDERED AS A MITIGATING FACTOR?

I AM SORRY?

SHOULD THEIR AGE BE CONSIDERED A MITIGATING FACTOR?

IF THEY ARE 40 OR 50?

AND THAT THEY ARE I AM MATURE.

PERHAPS IT SHOULD. THAT IS NOT WHAT WE HAVE IN THIS CASE. HE WAS ONLY 18.

WAS HE LIVING AT HOME?

YES. YES. HE WAS LIVING WITH HIS MOTHER AND HIS SISTER. YES, HE WAS.

AND WHEN DID HE TAKE THE TRIP AS AN EXCHANGE STUDENT. IS THAT WHEN HE WAS STILL IN HIGH SCHOOL?

I BELIEVE IT WAS, YES. I AM NOT SURE THAT THE RECORD REFLECTS EXACTLY WHEN THAT WAS, BUT I BELIEVE THAT WAS PROBABLY WHEN HE WAS STILL IN HIGH SCHOOL, BUT I AM NOT CERTAIN OF THAT.

WHAT DOES THE RECORD REFLECT ABOUT HIS INTELLIGENCE LEVEL?

IT APPEARS THAT HE IS OF AVERAGE OR POSSIBLY ABOVE-AVERAGE INTELLIGENCE. AT LEAST THIS IS WHAT THE DEFENSE ASSERTED. I DON'T RECALL ANY SPECIFIC IQ TYPE OF TESTIMONY.

THE DEFENSE, IN THE PENALTY PHASE, SEEMED TO FOCUS ON THIS WAS REALLY A GREAT GUY. NOW, IF THE JUDGE, AFTER LISTENING TO EVERYTHING, REALIZED THIS WAS A PERSON THAT, IN FACT, WAS A LEADER OF A CRIMINAL GANG THAT HAD ENGAGED IN CRIMINAL ACTIVITY OVER A PERIOD OF TIME, DID THE DEFENSE OFFER AN ALTERNATIVE AS TO WHAT LED THIS SUPPOSEDLY WELL-MANNERED, GOOD-NATURED, WANT TO HELP OTHER PEOPLE, INTO THE LIFE THAT HE WAS LEADING AT THE TIME OF THIS MURDER?

NO. THERE WASN'T REALLY ANY SPECIFIC DEFENSE THEORY ON THAT. THERE WAS A REFERENCE TO THE FACT THAT THE APPELLANT'S NATURAL FATHER DID LEAVE HIM WHEN HE WAS, I BELIEVE, ABOUT A MONTH OLD, AND HE GOT IN TROUBLE.

BUT YOU BELIEVE THAT IT WOULD BE VERY HARD FOR, IN TERMS OF YOUR ISSUE, THAT THE JUDGE SORT OF REJECTED THESE NONSTATUTORY MITIGATE ORS. IF THE JUDGE FOUND THAT THIS PERSON WAS THE LEADER AFTER CRIMINAL GANG THAT DID THE KINDS OF THINGS THAT THIS GANG APPARENTLY DID, WOULDN'T THAT JUDGE BE FREE TO REJECT THE EARLIER EVIDENCE THAT, WHEN HE WAS YOUNGER, WAS HELPFUL TO OTHER PEOPLE?

WELL, THE EVIDENCE WASN'T ALL FROM WHEN HE WAS MUCH YOUNGER. I THINK SOME OF IT WAS CLOSER, FAIRLY CLOSE IN TIME, TO THE INCIDENT IN QUESTION.

IT WOULD BE DIFFICULT FOR A JUDGE, THOUGH, TO FIND THAT THIS WAS A NICE GUY, AS MANY OF THOSE WITNESSES TESTIFIED TO, WOULD IT NOT? IN THE FACE OF ALL OF THIS OTHER TESTIMONY?

WELL, I DON'T KNOW. I MEAN, NICE GUY IS KIND OF A GENERAL TERM. THERE WERE SPECIFIC THINGS.

ISN'T THAT A SENSE OF A GREAT DEAL OF THE MITIGATING TESTIMONY?

SOME OF IT, YES, BUT THERE WERE SPECIFICS INVOLVED, AS TO THING THAT IS HE DID TO HELP OTHER PEOPLE. THE GENTLEMAN THAT WAS CONFINED TO THE WHEELCHAIR, FOR EXAMPLE, AND THE YOUNG BOY WHO WAS DYING OF, I BELIEVE IT WAS, LEUKEMIA AND SO FORTH, SO IT WASN'T JUST ALL GENERAL NICE-GUY TYPE. IT WAS SPECIFICS.

GOING BACK TO THE QUESTION ABOUT AN EXPLANATION AS TO HOW THIS CAME ABOUT?

NO. THERE REALLY WASN'T. THERE WAS NO EXPERT TESTIMONY OF THAT NATURE, AND VERY NLTHS THE WAY OF ANYTHING IN THAT NATURE. THE CLOSEST -- THAT THE CLOSEST, PERHAPS, WOULD BE THAT HE WAS A BANNED OBJECTED BY -- ABANDONED BY HIS FATHER AS A YOUTH AND HAD A SPECIFIC CHILDHOOD, BUT AS TO MITIGATING EVIDENCE, THERE WASN'T ANY.

IN HIS ATTEMPT TO PRESENT MITIGATION, THAT THE STATE HAD OFFERED A PLEA OF LIFE, AND THE COURT REJECTED THAT.

RIGHT.

DO WE KNOW ANYTHING ABOUT THAT, THOUGH, WHETHER OR NOT IT WAS BECAUSE OF THE AGE OR WHATEVER? FIRST OF ALL, WAS THAT ESTABLISHED, THAT THE STATE HAD OFFERED A PLEA OF LIFE, IN EXCHANGE FOR A GUILTY PLEA?

YES. THAT IS IN THE RECORD. IT HAPPENED, I BELIEVE, RIGHT BEFORE THE JURY SELECTION BEGAN.

AND HOW WAS THAT HANDLED? DID THE INDIVIDUAL DEFENDANT MAKE THAT DECISION? OR WAS THAT ON THE ADVICE OF COUNSEL, OR HOW DID THAT --

WELL, IT APPEARS THAT THE DEFENDANT MADE THE DECISION. THERE IS A COLLOQUY, A FAIRLY BRIEF ONE, WHERE THE STATE PRESENTS THE OFFER, AND THE APPELLANT IS ASKED IF HE WANTS TO ACCEPT IT AND HE DOESN'T.

I MEAN WAS THERE AN OPPORTUNITY TO CONSULT WITH COUNSEL?

THE -- YES, I BELIEVE THERE IS A REFLECTION THAT HE DID HAVE A CHANCE TO CONSULT WITH COUNSEL. NOW, WHETHER THE REJECTION OF THE PLEA WAS ON THE ADVICE OF COUNSEL OR WAS HIS OWN DECISION, I DON'T BELIEVE THAT IS REALLY REFLECTED IN THE RECORD.

ANY INDICATION WHETHER THAT WAS OFFERED ON THE BASIS OF HIS AGE OR WHAT HAD HAPPENED TO THE OTHER CODEFENDANTS OR THE PREDICATE FOR THAT?

NO. I DON'T BELIEVE THERE IS ANY INDICATION IN THE RECORD AS TO WHY THE OFFER WAS EXTENDED. IT JUST WAS EXTENDED AND REJECTED, AND THERE IS NOT REALLY MUCH BEYOND THAT IN THE RECORD.

IF YOU WISH TO SAVE SOME REBUTTAL, YOU MAY, OR IF YOU WISH TO CONTINUE.

I WILL SAVE SOME TIME FOR REBUTTAL. THANK YOU.

MR. LANDRY.

IF THE PLEAS THE COURT, MY NAME IS BOB LANDRY APPEARING BEFORE THE COURT TODAY. I WANT TO TOUCH ON ONE QUESTION THAT JUDGE ANSTEAD WAS ASKING AS TO WHETHER THERE WAS MENTAL HEALTH TESTIMONY AND THERE WAS NOT, OF COURSE, AND THE RECORD IS REFLECTED, ALMOST AT THE BEGINNING OF INITIATION OF THE CRIMINAL PROCESS IN THIS CASE, THE COURT DID APPOINT DR. WALD AND DR. MASTERSON, AND I BELIEVE THAT CAN BE FOUND IN VOLUME ONE, PAGES 2 AND 3 OF THE RECORD, SO THEY WERE THE EXPERT PSYCHIATRISTS THAT AIDED AND ASSISTED THE DEFENSE IN THE DEFENSE THE CASE AND THEY WERE NOT CALLED, SO WE WOULD PRESUME THAT THEY DID NOT HAVE ANYTHING TO OFFER, EITHER AT GUILT PHASE OR PENALTY PHASE OF MITIGATING INNATE. THE QUESTION AS TO MOTION FOR CHANGE OF VENUE, BASED ON PRETRIAL PUBLICITY, THE STATE'S VIEW, OF COURSE, IS THAT THE DEFENDANT HAS FAILED, IN HIS PRELIMINARY BURDEN, REALLY, TO DEMONSTRATE THAT THERE WAS ANY KIND OF UNFAIR OR PARTIAL JURY. HE POINTS TO NO PARTICULAR PERSON, JUROR, THAT WAS BIASED. HE POINTS TO NO PARTICULAR PERSON THAT HE WOULD HAVE ASKED OR DID ASK BELOW TO BE EXCUSED FOR CAUSE. AND THE RECORD SHOWS THAT THE DEFENDANT WAS GIVEN, I THINK, AT LEAST TWO OR THREE ADDITION AEL PREEMPT OR I -- ADDITIONAL PREEMPTORY CHALLENGES, IN ADDITION TO THOSE THAT WERE GIVEN TO HIM.

HAVE YOU EVER RAISED THAT QUESTION ON APPEAL IN RAISING A DENIAL FOR A MOTION ON PRETRIAL PUBLICITY, THAT THERE HAS TO BE AT LEAST SEVERAL JURORS THOUGH WHO SAT ON THE JURY WHO WERE CHALLENGED FOR CAUSE, THAT THE CAUSE CHALLENGES WERE OVERRULED?

I THINK THAT HAS BEEN THE STANDARD OF THIS COURT IN A NUMBER OF CASES. I DON'T KNOW IF I HAVE QLIT ARED ALL OF THEM -- IF I HAVE CITED ALL OF THEM IN MY BRIEF. I POINT OUT THAT I AM NOT AWARE OF ANY CASE THAT THIS COURT HAS REVERSED A JUDGMENT AND SENTENCE OF DEATH OR JUDGMENT OF GUILT, ANYWAY, BASED ON THE MERE FACT OF PRESUMED PREJUDICE

OF THE COMMUNITY. AND THAT IS ESSENTIALLY WHAT THE DEFENDANT IS ARGUING HERE, TODAY, AND IN HIS BRIEF, THAT WE HAVE TO PRESUME THAT THERE WAS PREJUDICE, SIMPLY BECAUSE OF THE FACT OF A NUMBER OF CART KELS IN THE NEWSPAPER. WE HAVE RELIED ON AND STILL CONTINUE TO RELY ON THE ROLLING CASE. WE SUBMIT THAT THAT CASE IS DECEMBER POSI HAVE -- DECEMBER POSITIVE ON THIS HERB -- DESPOSITIVE ON THIS ISSUE. THAT CASE HAD FAR MORE DIFFICULT ANY SELECTING A JURY. IT TOOK ABOUT THREE AND-A-HALF WEEKS, AS I RECALL, TO SELECT A JURY IN THAT CASE. THIS WAS A VERY SIMPLE CASE TO SELECT A JURY ON. IT ONLY TOOK ABOUT THREE OR FOUR DAYS.

WAS THERE INDIVIDUAL VOIR DIRE?

THERE WAS INDIVIDUAL VOIR DIRE, FOR PURPOSES OF PRETRIAL PUBLICITY AND CAPITOL PUNISHMENT -- AND CAPITAL PUNISHMENT VIEWS, SO WE DON'T HAVE THE CASE, AS IN SOME OTHER CASES, OF DENYING THE INDIVIDUAL THE RIGHT TO --

MR. GURNEY, WHO SAT ON THE JURY, WAS NOT CHALLENGED FOR CAUSE, WHO SAID THAT HE THOUGHT --

ALL OF THE PEOPLE WHO SAT ON THE JURY WERE NOT CHALLENGED FOR CAUSE. AS WE POINTED OUT IN OUR BRIEF, ALL OF THOSE WHO DID SIT AND SATISFIED THE STANDARDS-THIS COURT AND THE U.S. SUPREME COURT, THAT WHATEVER THEY HAD BEEN EXPOSED TO, THEY COULD SET THAT ASIDE AND HEAR THE CASE BASED ON THE EVIDENCE THAT WAS PRESENTED TO THEM. AS WE POINTED OUT, ALSO, IN OUR BRIEF, OF COURSE, SOME JURORS WERE, OF COURSE, EXCUSED, BECAUSE THEY HAD FORMED OPINIONS. THAT IS NOT UNUSUAL IN ANY CASE. I MEAN THESE WERE ALL PEOPLE WHO HAD PERSONAL VIEWS, INDIVIDUAL VIEWS, EITHER SOME BELIEVED IN AN EYE FOR AN EYE AND THEY WERE THROWN OFF. OTHER PEOPLE WERE EXCUSED FOR OTHER REASONS. ONE JUROR, I THINK, ANNOUNCED THAT SHE WAS -- HE WAS THE PARENT OF A DEATH ROW INMATE. SO THERE WERE ALL KINDS. WE HAVE CITED THEM. A NUMBER OF JURORS WHO WERE EXCUSED FOR VALID AND MULTIPLE DIFFERENT REASONS, UNRELATED TO PUBLICITY OF A COMMUNITY-WIDE NATURE, IN OUR BRIEF. BOTH THE STATE AND FEDERAL COURT CASES THAT WE HAVE CITED IN OUR BRIEF INDICATED, CERTAINLY WITH THE PASSAGE OF TIME TWO YEARS AFTER THE CRIME HAD COMMITTED, CERTAINLY THAT THERE WAS A TIME FOR THE PAIN IN THE COMMUNITY TO BE ATTENUATED. THE NEXT ISSUE THAT HAS BEEN ARGUED HERE, ON APPEAL, CONCERNED WHETHER OR NOT THERE WAS THE TRIAL COURT HAD INDICATED A PREJUDICIAL ATTITUDE OR AN IDEA THAT THE JUDGE HAD MADE UP HIS MIND AHEAD OF TIME AS TO WHAT SHOULD HAPPEN. WE SUBMIT THAT THAT IS TOTALLY UNSUPPORTED ON THE RECORD. WE NOTE, FOR EXAMPLE, THAT THERE WAS NO MOTION TO DISQUALIFY THE JUDGE, AS I BELIEVE THIS COURT HAS REQUIRED IN THE ROGERS CASE, THERE HAS TO BE A WRITTEN MOTION TO DISQUALIFY THE JUDGE.

WHAT ABOUT THE STATEMENT THAT SEEMS PRETTY OBVIOUS, WHEN HE SAYS TELL IT TO THE SUPREME COURT. YOU WILL GET AN OPPORTUNITY. I BELIEVE. ISN'T THAT SOME INDICATION THAT HE BELIEVES, AT THAT POINT, THAT THIS IS, IN FACT, A DEATH PENALTY CASE AND WILL BE REVIEWED BY THIS COURT?

I THINK WHAT HE WAS SAYING WAS THAT, FIRST OF ALL, IN CONTEXT, HE HAD IMMEDIATELY BEFORE THIS HAD RULED IN FAVOR OF THE STATE IN ALLOWING PRIOR CONSISTENT STATEMENT TESTIMONY OF ONE OF THE LORDS OF CHAOS MEMBERS, MR. SHIELDS, I BELIEVE. IN RELY INS ON THIS COURT'S PRECEDENCE, IN RELY INS ON CHANDLER -- IN RELINES ON CHANDLER, RELY ANSWER ON A NUMBER OF OTHER CASES, IT APPEARS THAT THE STATE WAS BATTLING THE COURT, IN TRYING TO GET IT TO OVERTURN ITS RULING, BY SAYING YOU ARE NOT TAKING THIS SERIOUSLY, JUDGE. THE JUDGE WAS RESPONDING, SIMPLY, TO SAY, HEY, I AM FOLLOWING THE SUPREME COURT MANDATES, AND IF THERE IS A PROBLEM WITH THEM, OBVIOUSLY THE NEXT COURT WOULD BE THE FLORIDA SUPREME COURT TO RAISE THAT.

IS THIS BEFORE OR AFTER THE TRIAL JUDGE'S GOING THROUGH WHAT THE AGGRAVATING CIRCUMSTANCES WERE GOING TO BE PRESENTED?

NO. THE FIRST INCIDENT OF THE COMMENT ABOUT THE SUPREME COURT OCCURRED DURING THE STATE'S CASE-IN-CHIEF, WHEN THE STATE WAS PUTTING ON DARYL SHIELDS. SUBSEQUENTLY ABOUT MIDWAY THROUGH THE DEFENSE CASE, THE -- THERE WAS A RECESS. THERE WAS APPARENTLY A RECESS, AND THERE WAS A CONVERSATION, APPARENTLY, AT THE BENCH, IN WHICH THE TRIAL JUDGE WAS INDICATING TO THE PROSECUTOR, DO YOU HAVE ANY INDICATION AS TO WHAT YOU MIGHT BE PURSUING, IN TERMS OF AGO GRAINGSVATION? -- IN TERMS OF AGGRAVATION?

WAS THAT OUTSIDE THE PRESENCE OF THE DEFENDANT'S ATTORNEY?

MY READING OF THE RECORD IS THAT BOTH SIDES WERE IN THE COURT.

BUT THE DEFENSE ATTORNEY WAS NOT THERE.

HE DOES NOT IMMEDIATELY RESPOND. HE COMES FORWARD, APPARENTLY, THREE PAGES LATER.

HE ASKED WHAT WERE YOU DOING? WERE YOU REVIEWING THE RULES? ANYTHING ISSUED CARE ABOUT? AND THE COURT SAYS I DON'T WANT TO SHARE IT WITH YOU?

WELL, IT WAS APPARENTLY, YOU KNOW, AN IMMEDIATE COMMENT IN RESPONSE. HE, THEN, FOLLOWS THAT UP WITH IN SAYING, BEFORE YOU APPROACH THE BENCH, WHAT I WAS ASKING WAS, YOU KNOW, WHAT AGGRAVATE ORS AND WHAT MITIGATION. THE COURT WAS CONCERNED ABOUT DOING ALL THE MINISTERIAL ACTIONS THAT ARE REQUIRED FOR A JUDGE. HE DID NOT WANT TO BE SURPRISED BY THE JURY COMING BACK WITH A VERDICT AND THEN AUTOMATICALLY BEING FACED WITH WHAT TO DO ABOUT THE PENALTY PHASE.

YOU MEAN HE WOULD HAVE -- IS THERE A IMMEDIATE PENALTY PHASE AFTER THE GUILT PHASE? IT STARTS THE SAME DAY?

SOMETIMES, IN SOME INSTANCES, THERE ARE. I MEAN SOME COURTS JUST PROCEED.

IS THAT WHAT HAPPENED HERE?

I DON'T THINK THAT HAPPENED HERE. I THINK THERE WAS A RECESS PERIOD AFTER THAT.

AREN'T YOU A LITTLE CONCERNED WHETHER A MOTION TO DISQUALIFY SHOULD HAVE BEEN FILED, I GUESS, AS A SECOND ISSUE, ABOUT A JUDGE ENGAGING IN A COLLOQUY ABOUT WHAT AGGRAVATE ORS OR MITIGATEORS, OUTSIDE OF THE PRESENCE OF DEFENSE COUNSEL?

I DON'T THINK IT WAS, IT IS MY READING OF THE RECORD, ANYWAY, I DON'T THINK IT WAS OUTSIDE THE PRESENCE. I THINK THE DEFENSE COUNSEL WAS AT THE TABLE, AND THE PROSECUTOR WAS, THE COURT MADE A QUESTION TO THE PROSECUTOR. THE PROSECUTOR APPARENTLY RESPONDED AND SAID, YOU KNOW, I DON'T WANT TO HAVE ANY SUPERSTITION ON MY CASE, AND BE DECIDING THIS NOW, AND THE JUDGE SAYS, WELL, I HAVE GOT CONCERNS ABOUT HOW TO PROCEED AND, YOU KNOW, I DON'T WANT TO BE LEFT UP IN THE AIR AS TO WHAT TO DO NEXT. FOR EXAMPLE -- ANOTHER PROSECUTOR SAID THE RIGHT THING, DIDN'T HE? THAT IS HE SAID I DON'T WANT TO, IN ESSENCE, JINX MY CASE ON BUILT GUILT, BY STARTING TO TALK ABOUT --

-- ON GUILT, BY STARTING TO TALK ABOUT THE -- WHEREAS THE TRIAL COURT IS, EVEN BEFORE THE DEFENDANT HAS BEEN FOUND GUILTY, HE IS ALREADY FOCUSING ON THE AGGRAVATEORS IN THE CASE. COME BACK TO JUSTICE QUINCE'S QUESTION TO YOU ABOUT YOU ARE GOING TO

GET AN OPPORTUNITY TO ARGUE BEFORE THE SUPREME COURT. THE STATE IS NOT CONCERNED THAT THAT IS A SHOWING OF BIAS ON THE PART OF THE TRIAL COURT AND, PERHAPS, A VERY DANGEROUS SUGGESTION THAT THE TRIAL COURT HAS, ALREADY, MADE UP ITS MIND IT IS GOING TO IMPOSE THE DEATH PENALTY IN THE CASE, BECAUSE THAT IS THE ONLY WAY THAT THE DEFENDANT WOULD HAVE AN OPPORTUNITY TO ARGUE IN THIS COURT. ISN'T THAT CORRECT?

WELL, DEPENDING, THE DEFENSE, OF COURSE, WAS CERTAINLY SAYING YOU HAVE MADE AN ERRONEOUS RULING, WE SUBMIT, IN TERMS OF YOUR PRIOR CONSISTENT STATEMENT ADMISSIONIBILITY. OBVIOUSLY ANY QUESTIONS AFTER THAT WOULD, IF IT DID NOT RESULT IN THE DEATH VERDICT, WOULD GO TO THE D.C. -- TO THE DCA'S AND BE AN OPPORTUNITY FOR THIS COURT --

YOU DON'T THINK A FAIR INTERPRETATION OF THIS REMARK IS THAT YOU ARE GOING TO HAVE AN APPEAL TO THE SUPREME COURT AFTER THIS CASE IS OVER, AND, OF COURSE, THE WAY THAT YOU GO TO THE SUPREME COURT IS IF THE DEATH PENALTY IS IMPOSED.

I GUESS THAT IS POSSIBLE.

THE STATE HAS NO CONCERN ABOUT THAT?

I GUESS THAT IS A POSSIBLE INTERPRETATION. IT SEEMS TO ME THAT, WHAT THE JUDGE WAS REALLY SAYING WAS, YOU KNOW, YOU ARE CRITIZING ME FOR RELYING ON SUPREME COURT PRECEDENCE, AND, YOU KNOW, YOUR PROBLEM IS REALLY WITH THEM, AND, YOU KNOW, I AM FOLLOWING THE LAW AS BEST I CAN DO IT. AND --

IS THAT WHAT THE JUDGE SAID?

WELL, THAT IS THE WAY I INTERPRET HIS -- WHEN YOU PUT THE WHOLE THING IN CONTEXT.

WHAT WERE THE ACTUAL WORDS THAT THE JUDGE USED? DO YOU HAVE THOSE THERE BEFORE YOU?

NOT IMMEDIATELY, YOUR HONOR. IT WAS SOMETHING ALONG THE LINES OF THE CONTEXT OF IT WAS THAT THE COURT HAD JUST MADE A RULING IN FAVOR OF THE STATE, ALLOWING PRIOR CONSISTENT STATEMENTS TO COME IN, UNDER THE CHANDLER OPINION, AND THEN THE DEFENSE INITIATED AND SAID, JUDGE, YOU DON'T SEEM TO BE TAKING THIS SERIOUSLY. WE THINK THIS IS WRONG. WE THINK THE STATE COULD GET AWAY WITH THIS IN EVERY CASE, IN EVERY WITNESS, ET CETERA, ET CETERA, AND THE JUDGE'S RESPONSE WAS SOMETHING ALONG THE LINES OF TELL IT TO THE SUPREME COURT. YOU MAY GET A CHANCE TO DO. THAT SOMETHING ALONG THAT LINES.

YOU AGREE THAT IT IS ABSOLUTELY ESSENTIAL IN ANY CRIMINAL CASE AND CERTAINLY IN A DEATH PENALTY CASE, THAT THE COURT NOT MAKE UP ITS MIND ABOUT AN ISSUE OF PENALTY, UNTIL AFTER EVERYTHING IS IN.

CERTAINLY. CERTAINLY. AND I DON'T BELIEVE THAT THE JUDGE DID MAKE UP HIS MIND OR INDICATE IN ANY FASHION THAT HE HAD DONE SO. I THINK HE WAS CONCERNED, FOR EXAMPLE, PRIOR TO TRIAL, THE JUDGE HAD MADE A RULING, OR AT LEAST THE STATE WAS TRYING TO GET THE COURT, THE PROSECUTION WAS TRYING TO THINK ABOUT WHETHER OR NOT, AS TO ONE OF THE AGGRAVATEORS, AS TO WHETHER OR NOT THE NEW AGGRAVATEORS OF GANG-RELATED ACTIVITY, WHICH HAD RECENTLY BEEN ADDED BY THE LEGISLATURE, WOULD BE APPROPRIATE, AND I THINK EITHER THE PROSECUTOR OR THE COURT DECIDED THAT IT WOULD BE AN EXPOSE FACTOR, TO CONSIDER THAT AN AGGRAVATE OR, SO I THINK WHAT THE COURT'S CONCERN WAS TO TRY TO GET SOME IDEA AS TO WHAT AGGRAVATEORS AND WHAT KINDS OF MOTIONS AND THINGS THAT HE WOULD HAVE TO BE CONSIDERING, AGAIN, IN THE EVENT THAT THE JURY

RETURNED A GUILTY VERDICT. AS A MATTER OF FACT, THAT IS, I GUESS, HE ASKED, WHEN THE DEFENSE CAME IN AND JOINED THE CONVERSATION, THEN, THE JUDGE WAS ASKING HIM, YOU KNOW, WHAT ARE YOU THINKING ABOUT IN TERMS OF MITIGATION? I DON'T THINK THERE WAS ANY INDICATION AT ALL THAT THE JUDGE HAD PREJUDGED OR INDICATED AHEAD OF TIME WHAT IT WAS THAT HE WAS GOING TO DO OR WAS GOING TO DO IN THE FUTURE. I SUBMIT --

WHEN SOMETHING LIKE THIS HAPPENS DURING THE COURSE OF A TRIAL, AS OPPOSED TO PRETRIAL, I THINK, ORDINARILY, UNDER THE RULES, AS FAR AS FILING A MOTION FOR RECUESAL, THERE IS A PERIOD OF, I GUESS, TEN DAYS TO DO SOMETHING. WHAT IS A LAWYER, IN THE MIDDLE OF A TRIAL, WHERE THERE IS A STATEMENT THAT THAT LAWYER CONSIDERS TO BE A STATEMENT OF BIAS, ARE THEY REQUIRED, IN THE MIDDLE OF TRIAL, TO STOP, ASK TO STOP THE PROCEEDINGS, FILE ORALLY A MOTION TO RECUES OR FILE A WRIT OF PROHIBITION? WHAT HAS TO BE DONE?

AS I UNDERSTAND THE LAW UNDER THE ROGERS CASE, I BELIEVE JUSTICE SHAW WROTE THAT OPINION, THE DEFENDANT, THE ATTORNEY IS REQUIRED TO FILE A WRITTEN MOTION TO DISQUALIFY, AND AS A MATTER OF FACT HE IS ENTITLED TO ASK FOR A RECESS OR A CONTINUANCE OR A BRIEF PERIOD OF TIME, SO THAT HE CAN PREPARE SUCH A MOTION AND MEMORANDUM OF LAW, AND HE IS ENTITLED TO AND REQUIRED TO DO THAT. THERE WAS NO ATTEMPT TO DO THAT. AS I RECALL, THERE WAS NO, EVEN, MOTION MADE TO DISQUALIFY THE JUDGE, YOU KNOW, EVEN AFTERWARDS, EVEN AFTER THE, FOR EXAMPLE, AFTER THE CONCLUSION OF THIS TESTIMONY WITH THE CONCLUSION OF THE GUILT PHASE. AS A MATTER OF FACT, WITH RESPECT TO THE SECOND COMPLAINT ABOUT THE JUDGE'S TALKING TO THE PROSECUTOR AND THE DEFENSE ABOUT WHAT AGGRAVATEORS ARE YOU THINKING ABOUT, IT WAS NOT EVEN AN OBJECTION MADE BY THE DEFENSE. HE DIDN'T EVEN OBJECT TO IT. I MEAN, THAT WAS JUST PART OF THE COLLOQUY THAT WAS GOING ON. SO WE SUBMIT THAT THAT, CERTAINLY, WE HAVE NOTHING IN HERE TO INDICATE A REQUEST FOR A MISTRIAL OR SOMETHING OF THAT SERIOUS A NATURE THAT HAD TAKEN PLACE. WITH RESPECT TO THE FOURTH AGGRAVATE OR ABOUT -- THE FOURTH ISSUE RAISED ON APPEAL, AS TO WHETHER OR NOT THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY IN SUBMITTING THE ARREST AGGRAVATE OR, WE SUBMIT THAT THE TRIAL COURT'S ORDER WAS VERY CLEAR IN THAT REGARD. IT WAS PROPER. THE TESTIMONY WAS OVERWHELMING THAT THE PURPOSE OF THIS KILLING BY MR. FOSTER WAS SO THAT THE ENTIRE GANG, THE LORDS OF CHAOS, WOULD NOT BE DISCOVERED. I MEAN, MEMBER AFTER MEMBER AFTER MEMBER OF THE GROUP GOT UP AND TESTIFIED THAT FOSTER HAD TOLD PEOPLE, EVEN BEFORE THIS, THAT, IF ANYONE MENTIONED THE GROUP'S ACTIVITIES, THEY WOULD HAVE TO BE KILLED. AND THERE IS ABSOLUTELY NO CONNECTION. THERE WAS NO ROBBERY MOTIVE IN THIS CASE. THE VICTIM WAS FOUND, I THINK, WITH MONEY IN HIS WALLET. THE PROPERTY THAT HE HAD SEIZED, FOLLOWING HIS CONFRONTATION WITH THE GROUP AT THE SCHOOL, THAT MATERIAL IS STILL IN HIS PARKED VEHICLE. AND VIRTUALLY EVERY MEMBER OF THE GROUP WHO TESTIFIED IN THIS TRIAL, TESTIFIED THAT THE PURPOSE OF THIS KILLING WAS BECAUSE FOSTER WAS UPSET THAT THE GROUP COULD, THE LIGHT OF DAY WOULD COME TO THE GROUP'S ACTIVITIES.

SO IT WOULDN'T, IF THE "AVOID ARREST" SPECIFICALLY AS TO VANDALISM IN THE SCHOOL WOULD REALLY BE AVOID ARREST FOR THE OTHER GANG MEMBERS WHO WERE NOT PROSECUTED IN THIS CASE, IS THAT ENOUGH, IF THAT WAS FOSTER'S MOTIVE TO PREVENT THE ARREST OF HIS FELLOW GANG MEMBERS, DOES THAT, UNDER THE LAW, QUALIFY FOR FINDING THE AVOID ARREST FACTOR?

THAT WOULD HAVE BEEN ENOUGH, BUT WE SUBMIT THAT THAT IS NOT ALL THERE IS. THE VARIOUS MEMBERS FESTFIED, SHIELDS AND MAG -- TESTIFIED, SHIELDS AND MAGNOTTI AND THEY ALL TESTIFIED THAT THEY HAD ENGAGED IN OTHER ACTIVITY. THE REASON FOR THE GANG'S BEING TOGETHER OR THE GROUP BEING TOGETHER WAS TO CREATE ACTS OF VANDALISM, AND SO OBVIOUSLY MR. FOSTER HAD TO BE CONCERNED THAT, NOT ONLY IF THE LAW WERE TO

COME INTO AND TO START INVESTIGATING THE GROUP'S ACTIVITIES, NUMBER ONE, FROM THE AUDITORIUM, IT WOULD LEAD, CERTAINLY, IMMEDIATELY TO BLACK AND TO RONEY, WHO HAD THE CONFRONTATION WITH THE TEACHER, AND THAT WOULD UNDOUBTEDLY LEAD TO THE DISCOVERY OF THEIR OTHER CRIMINAL ACTIVITIES THAT THEY HAD PERFORMED, BUT AS I UNDERSTAND YOUR CORRECTLY, IF I UNDERSTAND IT CORRECTLY, I THINK THAT, YES, THE DISCLOSURE OF FOSTER AND THE OTHER PEOPLE'S ACTIVITIES AT THE AUDITORIUM THAT NIGHT WOULD BE SUFFICIENT REASON. THERE WAS TESTIMONY THAT FOSTER WAS CARRYING A PLASTIC BOTTLE OF GASOLINE. I MEAN HE INTENDED TO COMMIT ARSON OF THAT SCHOOL THAT NIGHT. SO I THINK HE HAD VERY SOUND REASON, AS ALL OF THE MEMBERS WHO TESTIFIED, MEMBERS OF THE LORDS OF CHAOS.

WOULD YOU AGREE, THOUGH, THAT IT WAS NOT PROPER EVIDENCE TO ESTABLISH THAT AGGRAVATEOR TO ADMIT AN INFORMATION, A CHARGING DOCUMENT THAT SIMPLY MAKES THE ALLEGATION OF SPECIFIC OTHER OFFENSES?

YEAH. I AGREE THAT AT THE SPENCER HEARING, THE PROSECUTOR APPARENTLY INTRODUCED THE, WANTED THE COURT TO CONSIDER THE CHARGING DOCUMENT, THE 27-COUNT INFORMATION. IN SUPPORT, I THINK HE STATED THAT HIS PURPOSE WAS TO FURTHER CORROBORATE THE WITNESS ELIMINATION FACTOR. I WOULD SUBMIT THAT ANY ERROR IN THAT REGARD IS CLEARLY HARMLESS, BECAUSE ALL OF THE PEOPLE WHO TESTIFIED, IN TERMS OF LORDS OF CHAOS MEMBERS, TESTIFIED AS TO THAT THEY HAD, THEIR GROUP WAS COMMITTING ACTS OF VANDALISM AND CHAOS, CAUSING CHAOS IN THE COMMUNITY, AND THAT THEY HAD TESTIFIED, MOST OF THEM, AS TO THAT THEY HAD ENTERED PLEAS OF GUILTY TO VARIOUS NONHOMICIDAL OFFENSES. MANOTTI HAD PLED GUILTY TO CONSPIRACY TO COMMIT MURDER AND GOT 32 YEARS. I DON'T KNOW WHAT THE PERSONALITY WAS FOR THE TANGENTIAL MEMBERS OF THE GROUP. BLACK HAD --

IS BLACK THE ONE THAT ORIGINALLY CAME BACK TO THE REST OF THE GROUP AND SAID THAT THE VICTIM WOULD HAVE TO BE KILLED?

HE SAID SOMETHING ALONG THAT LINE, THAT HE HAS TO DIE, WHICH WAS A DMENT COMMENT -- -- WHICH WAS A COMMENT --

BLACK ENTERED INTO A PLEA ARRANGEMENT AND RECEIVED LIFE IMPRISONMENT?

LIFE IMPRISONMENT FOR FIRST-DEGREE MURDER.

WHAT WERE THE AGES OF THE OTHER DEFENDANTS THAT RECEIVED LIFE IMPRISONMENT?

THE DEFENDANT WAS OVER 18. I THINK HE WAS IN HIS -- JUST SHORT OF HIS 19th BIRTHDAY. MY UNDERSTANDING IS THAT BLACK AND SHIELDS WERE BOTH 18. I AM NOT CERTAIN IF THEY TESTIFIED TO THAT OR HOW --

THEY WERE ALL WITHIN THE SAME AGE GROUP.

THEY WERE STILL IN SCHOOL. RIGHT. THEY WERE STILL SENIORS AT RIVERDALE HIGH SCHOOL. I HAVE AN IMPRESSION THAT MAGNOTTI WAS 17, BUT WHERE I GOT THAT FROM, I HAVE NO IDEA AT THE MOMENT. WE SUBMIT, WITH RESPECT TO THE COMPLAINT OF THE APPELLANT, AS TO THE TRIAL JUDGE'S SENTENCING ORDER, THAT THE TRIAL JUDGE DID TAKE INTO ACCOUNT VIRTUALLY EVERYTHING THAT WAS SUBMITTED ON HIS BEHALF. AS WE POINTED OUT, THERE WAS NO MENTAL HEALTH EVIDENCE OR THAT WOULD MITIGATE THIS CRIME. THE TRIAL COURT WAS WELL WITHIN HIS DISCRETION IN DETERMINING THAT THE AGE OF 18 SHOULD BE -- SHOULD NOT BE CONSIDERED AS MITIGATING. MY UNDERSTANDING OF THE LAW IS THAT, UNDER ELLIS, IT IS ONLY IF A DEFENDANT HAS NOT RECEIVED, RECEIVES HIS MAJORITY, THAT UNDER 17 OR SO, THAT YOU HAVE TO FIND AGE AS A MITIGATE OR. -- MITIGATEOR. CLEARLY HE WAS THE LEADER

OF THIS GANG. HE WAS LIKE MR. DUGAN, WHO THIS COURT FOUND IN THE PAST, IN AN OPINION TALKING ABOUT WHERE A DEFENDANT IS A LEADER AND ARTICULATE MEMBER AND IS THE ONE WHO GETS TOGETHER CODEFENDANTS TO PARTICIPATE IN CRIMINAL ACTIVITIES. IT WAS FOSTER'S PLAN TO KILL. IT WAS FOSTER'S SHOTGUN THAT WAS USED. IT WAS FOSTER WHO WAS THE TRIGGER MAN. IT WAS FOSTER WHO ARRANGED THE PLAN AND INSISTED TO SOME OF THE RECALL TRANT MEMBERS OF THE -- OF THE RECAL CITRA NT MEMBERS OF THE GANG THAT THEY GO FORWARD THAT NIGHT. CLEARLY THERE WAS NO EMOTIONAL I AM MATURITY AT ALL, UNLIKE SOME OF THE CASES IN WHICH THIS COURT HAS EITHER REDUCED ON PROPORTIONALITY GROUND OR FOUND THAT DEATH WAS NOT APPROPRIATE, FOR ONE REASON OR ANOTHER. WE HAVE NONE OF THOSE FACTORS HERE. WE HAVE NO MENTAL RETARDATION. WE HAVE NO DRUG AND ALCOHOL ABUSE. WE HAVE NO ABUSE AS A CHILD. ALL OF THE FACTORS THAT WERE INTRODUCED BY FAMILY MEMBERS AND FRIENDS WAS THAT THEY HAD A WARM AND LOVING FAMILY, AND WHILE THE DEFENDANT'S FATHER APPARENTLY HAD LEFT AT AN EARLY AGE, THE DEFENDANT'S MOTHER TESTIFIED THAT SHE HAD REMARRIED, AND THAT HE WAS SURROUNDED BY LOVE FROM HIS MOTHER AND SISTER AND EVERYONE WHO KNEW HIM.

WHAT WAS THE LENGTH OF TIME THAT THIS GANG, THAT THE DEFENDANT HAD BEEN ENGAGING IN THIS GANG-RELATED ACTIVITY, DURING TO THE RECORD PRESENTED AT THE PENALTY PHASE HEARING?

I DON'T KNOW THAT THE PENALTY-PHASE TESTIMONY WENT INTO THAT IN DETAIL. I THINK, DURING THE GUILT PHASE, WHEN SOME OF THE GANG MEMBERS WERE TESTIFYING, THAT THEY HAD TALKED ABOUT JOINING THE GROUP OR THAT THE GROUP HAD FORMED IN EARLY APRIL, I THINK IT WAS, WHICH WOULD HAVE BEEN, I THINK, ABOUT TWO WEEKS BEFORE THE MURDER. SUBSEQUENTLY I THINK THE STATE ARGUED, IN ITS MEMORANDUM, WHICH WAS CONSIDERED BY THE TRIAL JUDGE AT THE SPENCER HEARING, THAT THE GROUP HAD BEEN GOING -- HAD BEEN DOING, PERFORMING ACTS FOR A MONTH OR TWO.

SO WAS IT AN ONGOING, LENGTHY SERIES OF GANG ACTIVITIES IN THIS CASE?

WELL, THERE HAD BEEN A SERIES OF ACTS OF VANDALISM, ARSON, PETTY THEFT, THINGS OF THAT NATURE. PREVIOUSLY. PREVIOUS TO THIS GROUP, BECAUSE THE OTHER MEMBERS OF THE GROUP --

DID THE JURY HEAR THAT? I AM TRYING IT UNDERSTAND. THIS IS WHAT -- WE HAVE GOT A 18 YEAR-OLD DEFENDANT, AND I THINK -- I AM NOT SURE THAT WE COULD CATEGORIZE WHERE THE LAW IS, BUT MY UNDERSTANDING IS, WHEN YOU HAVE A RELATIVELY YOUTHFUL PERSON, THAT WE WOULD WANT TO FIND SIGNS OF UNUSUAL MATURITY, RATHER THAN, YOU KNOW, IF THEY ARE A LITTLE OLDER, MAYBE YOU GO BACK THE OTHER WAY, SO I AM TRYING TO UNDERSTAND WHAT MAY THIS PARTICULAR DEFENDANT -- WHAT MADE THIS PARTICULAR DEFENDANT EMOTIONALLY MATURE, AND APPARENTLY THE JUDGE FOUND THAT HIS ABILITY, I GUESS, LEADERSHIP SKILLS IN THIS GANG WAS SORT OF THE CRITICAL FACTOR, SO I JUST --

PRIMARILY, BUT HE WAS, ALSO, I THINK HE, ALSO, REFERRED TO THE FACT THAT, EVEN THOUGH HE HAD DROPPED OUT OF SCHOOL, HE HAD GOTTEN HIS GED EQUIVALENCY. HE WAS EMPLOYED, DOING SOME CARPENTRY WORK OR SOMETHING OF THAT NAY, SO HE HAD -- OF THAT NATURE, SO HE HAD BEEN EMPLOYED FOR A NUMBER OF YEARS. HE HAD THE ADVANTAGE OF TRAVELING OVERSEAS AND APPARENTLY HAD WON SOME KIND OF AWARD FOR TAKING FRENCH OR SOME OTHER COURSES IN SCHOOL, AT THE TIME THAT HE HAD DONE THAT.

DO WE KNOW WHY HE DROPPED OUT OF SCHOOL?

THERE IS NO TESTIMONY IN THE RECORD ABOUT ALL OF THAT.

SO WE DON'T HAVE HIS SCHOOL RECORDS IN THE RECORD?

NO. THERE WAS NO -- NOTHING -- THERE WAS NO PSI IN THE RECORD. I CAN UNDERSTAND WHY THE DEFENDANT MIGHT NOT HAVE, DEFENSE COUNSEL MIGHT NOT HAVE WANTED TO HAVE A PSI CALLED FOR, BECAUSE, AS WE SAY, THERE WAS, LIKE, PENDING INFORMATION OF 27 COUNTS. IT WAS STILL OUTSTANDING, AND OBVIOUSLY 9 DEFENSE MIGHT WELL -- AND OBVIOUSLY THE DEFENSE MIGHT WELL CHOOSE NOT TO HAVE ALL KINDS OF DAMAGING INFORMATION COME IN THAT MIGHT RELATE TO THOSE KINDS OF ACTIVITIES, BUT, AGAIN, WHAT THE TRIAL COURT, I THINK THE TRIAL COURT'S ORDER IS QUITE CLEAR THAT THAT WHICH HAD BEEN PRESENTED TO HIM WAS MERELY SHOWING, YOU KNOW, THROUGH FAMILY, FRIENDS AND RELATIVES AND PEOPLE WHO HAD KNOWN HIM PRIF REALLY IN -- PERIPHERALLY, IN A CERTAIN NONFOCUSED WAY, THAT HE WAS A POLITE YOUNG MAN WHO CUT THE GRASS FROM TIME TO TIME AND DID THINGS OF THAT NATURE, BUT MANY OF THOSE PEOPLE, INDEED, HAD NOT SEEN THE DEFENDANT IN, YOU KNOW, SEVERAL MONTHS OR YEARS AT A TIME, AND IT IS QUITE CLEAR THAT THIS DEFENDANT, REALLY, SHOWED TWO PERSON AS, ONE OF AN EXTREMELY COLD AND CALCULATED NATURE, WHICH THIS CRIME AND ALL OF THE OTHER CONDUCT DEMONSTRATES, AND WE SUBMIT THAT THIS COURT SHOULD FIND THAT THE DEATH PENCIL IS PROPORTIONATE TO HIM.

-- THAT THE DEATH PENALTY IS PROPORTIONATE TO HIM.

YOU SAID THAT HE WAS A COLD AND CALCULATED MURDERER, BASED ON THIS CRIME AND ALL THE OTHER CRIMES. AGAIN, EXPLAIN TO ME WHAT OTHER CRIMES CAME INTO EVIDENCE IN THIS CASE.

WELL, KNOW, I MEANT THE CONDUCT THAT CAME OUT IN THIS TRIAL, WHICH WAS THIS COLD AND CALCULATED, PREMEDITATED KILLING. I MEAN, HE HAD ADJUSTED THE PLAN THROUGHOUT, DURING THIS TWO OR THREE-HOUR PERIOD LEADING UP TO THAT. YOU KNOW, I GUESS MY OTHER ARGUMENT AS TO WHATEVER ERROR THERE MAY HAVE BEEN IN THE TRIAL COURT'S CONSIDERATION OF THE INFORMATION AT THE SPENCER HEARING, IT SEEMS TO ME TO BE HARMLESS ERROR, IF THE COURT WERE TO DETERMINE, FOR EXAMPLE, THAT YOU NEEDED TO HAVE A REMAND OR A RESENTENCING PROCEEDING. IT IS MY UNDERSTANDING THAT MR. FOSTER HAS SQAENT SQENTLY ENTERED A PLEA -- HAS SUBSEQUENTLY ENTERED A PLEA TO ROBBERY WITH A FIREARM, BASED ON ONE OF THOSE COUNTS AND THAT INFORMATION. CERTAINLY, THEN, WE WOULD HAVE THIRD AGGRAVATE OR -- AGGRAVATEOR, CHLS BE CHALLENGEABLE. BUT I DON'T SEE THAT THE TRIAL JUDGE, HAVING ACCEPTED THE INFORMATION AT THE SPENCER HEARING, WHEN REFERRING TO HIS FACTS IN THE ORDER, HE WAS CLEARLY REFERRING TO ALL OF THE TRIAL TESTIMONY, THE WITNESSES OF THE MEMBERS OF THE LORDS OF CHAOS, WHICH WAS AMOUNTLY-A.M.BLY SUPPORTED BY THE EVIDENCE -- WHICH WAS AMPLY SUPPORTED BY THE EVIDENCE AT TRIAL. WE WOULD ASK THE COURT TO SUPPORT THIS CASE. I THINK IT WAS THE NELSON CASE WHERE THE COURT FOUND THAT THE DEFENDANT WAS 18 YEARS OLD IN THAT CASE AS WELL. WE SUBMIT THAT CERTAINLY THE DEATH PENALTY WAS CALLED FOR IN THIS CASE AND THERE SHOULD NOT BE A REDUCTION IN THE SENTENCE OR A REVERSAL OF A JUDGMENT OF GUILT. IF THE COURT HAS QUESTIONS, I WOULD BE HAPPY TO ANSWER THEM, BUT OTHERWISE I WILL STAND ON THE BRIEF.

THANK YOU, MR. LANDRY.

THANK YOU.

MR. MOELLER.

BRIEFLY, WITH REGARD TO THE AGE OF THE PEOPLE INVOLVED IN THIS, I BELIEVE JUSTICE PARIENTE ASKED ABOUT THAT. MR. FOSTER WAS 18. BLACK AND SHIELDS WERE ALSO 18. MAGNOTTI WAS 17. THE REASON THAT MR. FOSTER DROPPED OUT OF SCHOOL WAS BECAUSE HE ACCIDENTALLY SHOT HIMSELF AND COULDN'T CONTINUE. THERE WAS TESTIMONY WITH REGARD TO THAT. AS FOR WHEN THE GROUP, THE SO-CALLED LORDS OF CHAOS, WAS FORMED, THERE WAS

TESTIMONY THAT IT WAS FORMED EITHER ON APRIL 12, APRIL 13 OR APRIL 16. THE INCIDENT OFFENSE OCCURRED ON APRIL 30.

WHAT DO YOU MEAN HE ACCIDENTALLY SHOT HIMSELF? WAS HE INJURED? HE WAS INJURED?

YES. THAT IS WHY HE COULDN'T CONTINUE WITH SCHOOL, ACCORDING TO THE TESTIMONY.

WHERE WAS HE SHOT?

I BELIEVE IT WAS IN THE ABDOMEN, THE STOMACH AREA.

WAS THERE SOME PERMANENT DISABILITY?

I DON'T BELIEVE THE RECORD --

IS THERE SOME EVIDENCE ABOUT THAT?

I DON'T BELIEVE THE RECORD REFLECTS THAT. THERE WASN'T EVIDENCE ABOUT THAT.

YOUR OPPONENT IS CORRECT, IS HE NOT, THAT THERE WAS NO MOTION MADE TO DISQUALIFY THE TRIAL COURT JUDGE AT ANY TIME IN THE TRIAL COURT PROCEEDINGS?

THAT'S CORRECT. THERE WAS NO MOTION. WITH REGARD --

DO YOU AGREE THAT THAT IS NECESSARY TO PRESERVE THIS ISSUE?

I CERTAINLY WOULD LIKE IT BETTER IF HE WOULD HAVE MADE THE MOTION, BUT I THINK IN A CASE LIKE THIS, IT COULD BE CONSIDERED FUNDAMENTAL ERROR, WHERE THE JUDGE SHOWS THAT HE HAS ALREADY DECIDED NOT ONLY IS MR. FOSTER GOING TO BE FOUND GUILTY BUT HE IS, ALSO, GOING TO BE SENTENCED TO THE ELECTRIC CHAIR.

HAVE WE HAVE DONE A RECUES ALOE FUNDAMENTAL ANALYSIS OF THAT INFORMATION?

THAT I DON'T KNOW. WITH REGARD TO THE PENALTY PHASE AND WHETHER IT WAS HELD IMMEDIATELY AFTER THE TRIAL, IT WAS NOT. THE GUILT PHASE ENDED ON MARCH 1 1, AND THE PENALTY PHASE WAS NOT HELD UNTIL APRIL, SO THERE WAS NO NEED FOR THE COURT TO BE DISCUSSING AGGRAVATING CIRCUMSTANCES DURING THE MIDDLE OF THE DEFENSE CASE DURING THE GUILT PHASE. I BELIEVE JUSTICE ANSTEAD ASKED COUNSEL ABOUT THE EXACT LANGUAGE THAT THE TRIAL COURT USED IN HIS "TELL IT TO THE SUPREME COURT" REMARK, AND IT WAS EXACTLY THAT. "TELL IT TO THE SUPREME COURT. YOU WILL GET AN OPPORTUNITY ARE, I BELIEVE." AND THAT IS THE LANGUAGE THAT WAS USED, AND IT MIGHT BE FAIR FOR THIS COURT TO TAKE A LOOK AT THE ENTIRE LANGUAGE SURROUNDING THAT. WE HAVE GOT IT IN THE INITIAL BRIEF AT PAGES 34 AND 35. I WON'T READ THE WHOLE THING HERE.

IT IS TRUE THAT THAT STATEMENT CAME AS A PART OF A COLLOQUY THAT TOOK PLACE CONCERNING THE ADMISSION OF SOME PRIOR CONSISTENT STATEMENT, I BELIEVE, EVIDENCE, WHERE THE STATE DID REFER TO THIS COURT'S OPINION IN CHANDLER AND ANOTHER CASE, CONCERNING THE ADMISSIONIBILITY OF THAT KIND OF EVIDENCE?

YES. BUT I DON'T BELIEVE IT IS ANYWHERE NEAR A REASONABLE INTERPRETATION, TO SAY THAT THE TRIAL COURT MEANT THAT THE DEFENSE COULD CHALLENGE PRIOR PRECEDENCE OF THIS COURT. THAT JUST DOESN'T -- THAT IS NOT A REASONABLE INTERPRETATION OF WHAT THE COURT SAID. TRUE, THEY HAD BEEN TALKING ABOUT OTHER CASES THAT JUSTIFIED THE ADMISSION OF THIS PRIOR CONSISTENT STATEMENT.

WHY ISN'T THAT A POSSIBLE INTERPRETATION OF THAT STATEMENT?

THEY HAD MOVED, FOR ONE THING, THEY HAD MOVED BEYOND A DISCUSSION OF THE PRECEDENCE. THE COURT HAD ALREADY RULED, AND I THINK WHEN HE SAYS DIRECTLY --

THE STATEMENT JUST BEFORE THAT IS YOU DON'T SEEM CONCERNED, BUT I THINK IT IS HIGHLY IMPROPER, AND HE IS STILL, THIS IS THE DEFENSE ATTORNEY, AND ISN'T HE STILL REFERRING TO THE ADMISSIONIBILITY OF THE PRIOR CONSISTENT STATEMENT EVIDENCE?

YES, OF COURSE. IT ALL REFERS TO THE ADMISSIONIBILITY OF THAT, BUT I DON'T THINK IT IS REASONABLE TO SAY THAT, WHEN THE TRIAL COURT SAID TELL IT TO THE SUPREME COURT, YOU WILL GET AN OPPORTUNITY, I BELIEVE, THAT HE WAS SUGGESTING THAT THE DEFENSE SHOULD CHALLENGE PRIOR PRECEDENCE OF THIS COURT OR SOMETHING, IS MY -- AS MY OPPONENT HAS INDICATED. THAT IS JUST NOT A REASONABLE INTERPRETATION, IN CONTEXT OF WHAT THE COURT SAID AND THE EXACT LANGUAGE THAT HE USED. I BELIEVE MY TIME HAS EXPIRED.

THANK YOU VERY MUCH. THANK YOU TO BOTH OF YOU.