

IN THE SUPREME COURT OF FLORIDA

Case No. SC04-53

RANDY SCHOENWETTER,

Defendant-Petitioner,

v.

STATE OF FLORIDA,

Plaintiff-Respondent.

On Appeal from the Circuit Court of the 18th Judicial Circuit

**BRIEF OF MAAP SERVICES FOR AUTISM AND ASPERGER SPECTRUM,
DR. FRED VOLKMAR AND PROFESSOR ANTHONY BAILEY AS
AMICI CURIAE IN SUPPORT OF PETITIONER,
FILED WITH THE CONSENT OF ALL PARTIES**

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INTEREST OF *AMICI CURIAE*

MAAP Services for Autism and Asperger Spectrum (“MAAP”) advocates for individuals and families affected by Asperger’s Syndrome and other pervasive developmental disorders. MAAP serves nearly 10,000 families of individuals with autism, Asperger’s Syndrome and pervasive developmental disorder and hundreds of professionals throughout the United States and 44 other countries. MAAP’s mission includes educating the public and decision-makers about the nature of Asperger’s Syndrome.

Dr. Fred Volkmar and Professor Anthony Bailey are leading experts in the study of Asperger’s Syndrome and other Autism-related developmental disorders. Dr. Volkmar is a Professor of Child Psychiatry, Psychology and Pediatrics at Yale University and the Director of the Yale Child Study Center. Professor Bailey is a Professor in the Department of Psychiatry at Oxford University. Dr. Volkmar and Professor Bailey have written numerous articles and books on Asperger’s Syndrome.

SUMMARY OF ARGUMENT

Randy Schoenwetter committed terrible acts. There is no question that society must take steps to protect itself from any recurrence. The record also shows, however, that Schoenwetter has an organic brain condition—Asperger’s Syndrome—whose characteristic manifestations include obsessive preoccupations; emotional immaturity; lack of empathy and social judgment; and poor impulse control. Those characteristics

are directly relevant to Schoenwetter's harmful actions: His intense preoccupation with pornography and finding a girl to have sex with; his decision to act on those preoccupations by entering a neighbor's (indeed, his best friend's) house in the middle of the night to have sex with either of the neighbor's daughters; and his violent, panicked reaction when the girl he found made a noise and her parents ran into the room. Asperger's does not "excuse" Schoenwetter's acts. It does, however, raise serious questions about how the criminal justice system should respond to those acts.

The criminal law generally addresses such questions in one of three ways: In determining an individual's competence to stand trial, the nature of the crime that may be charged, or at sentencing. *Amici* respectfully submit that it might have been most appropriate to take account of Schoenwetter's brain disorder by pursuing incapacitation through civil commitment and treatment, or through a lesser criminal charge than intentional murder. At a minimum, however, courts imposing a criminal sentence must take appropriate account of evidence of a medical condition that relates to the defendant's culpability. Here, the sentencing judge was at best dismissive of the evidence concerning Asperger's Syndrome and its relation to Schoenwetter's acts. According that evidence proper weight, this Court cannot conclude that Schoenwetter falls into the category of those with unmitigated, personal culpability for the most serious of crimes. The sentence of death should therefore be reversed.

ARGUMENT

I. The Relevant Characteristics of Asperger's Syndrome.

Asperger's Syndrome is an organic, neurologically-based, pervasive development disorder on the same spectrum as autism. Thus, "the mind and the brain of the person with Asperger syndrome [are] different from the mind/brain of the ordinary person and not so different from the person with autism." Uta Frith, *Emanuel Miller Lecture: Confusions and Controversies About Asperger Syndrome*, 45 *J. Child Psychol. & Psychiatry* 672, 683 (2004). Individuals with Asperger's tend to have normal to high intelligence, but also obsessive tendencies and pervasive deficits in social interaction, empathy and impulse control. Commonly described clinical features of the syndrome include:

(a) paucity of empathy; (b) naïve, inappropriate, one-sided social interaction, little ability to form friendships, and consequent social isolation; (c) pedantic and poorly intonated speech; (d) poor nonverbal communication; (e) intense absorption in circumscribed topics, . . . [which] are learned in rote fashion and reflect poor understanding, conveying the impression of eccentricity¹

¹ A. Klin et al., *Validity and Neuropsychological Characterization of Asperger Syndrome: Convergence with Nonverbal Learning Disabilities Syndrome*, 36 *J. Child Psychol. & Psychiatry* 1127, 1127-1128 (1995). See also Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 77 (4th ed. 1994) ("DSM-IV") (describing Asperger's as characterized by "[q]ualitative impairment in social interaction . . . impaired use of nonverbal behaviors to regulate social interaction, failure to develop age-appropriate peer relationships, lack of spontaneous interest in sharing experiences with others, and lack of social or emotional reciprocity").

In particular, four aspects of Asperger's Syndrome are directly relevant to the facts of this case and the psychological evidence introduced at sentencing: emotional and developmental immaturity; lack of social judgment; lack of empathy; and poor impulse control.

A. Emotional and Developmental Immaturity

Individuals with Asperger's often have an emotional and developmental age significantly lower than their chronological age or intelligence would suggest. *See* Frith, *supra*, at 682 (Asperger's subjects assessed for ability to identify and communicate feelings scored significantly lower than IQ- and age-matched controls, and half the Asperger's group obtained such extreme scores that they would have been classified as severely impaired); Fred R. Volkmar et al., *Quantifying Social Development in Autism*, 32 J. Am. Acad. Child & Adolescent Psychiatry 627, 631 (1993) (autistic children exhibited "lower than expected" social, communicative, and daily living skills "when predictions were made on the basis of either [mental age] or [chronological age]").²

This is true even though people with Asperger's often have normal to above-average IQs. High IQ, success in school, or extensive vocabulary are not inconsistent

² *See also* Mohammad Ghaziuddin et al., *Brief Report: Thought Disorder in Asperger Syndrome: Comparison with High-Functioning Autism*, 25 J. Autism & Developmental Disorders 311, 315 (1995) ("[T]he [Asperger] group's cognitive activity overall was less sophisticated or complex than normal age controls.").

with emotional and developmental immaturity. *See e.g., Ami Klin, Asperger Syndrome: An Update, 25 Revista Brasileira de Psiquiatria 103, 103 (2003) [hereinafter Klin, Asperger Syndrome]* (“Universally, there is a considerable discrepancy between a person’s cognitive potential (i.e., their IQs) and their ability to meet the demands of everyday life (or adaptive skills).”). As one researcher explains: “[I]ndividuals with Asperger syndrome can be denied recognition and help because they are intellectually bright and may be able to give the impression of a near normal competence in routine interactions. The appearance of normality is deceptive, however, and breaks down when novel or stressful situations arise.” Frith, *supra*, at 683.

B. Lack of Social Judgment

Asperger’s is also “associated with particular deficits in social judgment.” Digby Tantam, *Characterizing the Fundamental Social Handicap in Autism*, 55 *Acta Paedopsychiatrica* 83, 86 (1992). This is due in large part to abnormalities in the parts of the brain that control “executive functions.” The executive functions of the brain refer to

a range of specific neuropsychological abilities, including . . . cognitive flexibility, inhibition of prepotent but irrelevant responses, adjustment of behavior using environmental feedback, extracting rules from experience, selection of essential from nonessential information, and upholding in one’s mind both a desired goal and the various steps required to accomplish it

Ami Klin et al., *Assessment Issues in Children and Adolescents with Asperger Syndrome*, in *Asperger Syndrome* 309, 321 (Klin et al. eds., 2000).

One significant consequence of deficits in social judgment is that individuals with Asperger's are often unable to cope with novel situations or problems in socially acceptable ways. See Shelley Channon et al., *Real-Life-Type Problem-Solving in Asperger's Syndrome*, 31 J. Autism & Developmental Disorders 461, 466 (2001) (“Although [AS individuals] did not differ significantly in the number of solutions initially generated [to real-life problems], the quality of these solutions was lower for each measure, problem appreciation, social appropriateness, and practical effectiveness. The quality of their final solutions was also poorer, especially for the social appropriateness measure.”).

C. Lack of Empathy

In addition, individuals with Asperger's often lack empathy—the capacity to place themselves in someone else's shoes and deduce the other person's emotional reaction. See Frith, *supra*, at 676; David Mawsom et al., *Violence and Asperger's Syndrome: A Case Study*, 147 Brit. J. Psychiatry 566, 566 (1985) (noting “profound lack of empathy for others”). While they desire friendships, “their wishes are invariably thwarted by their awkward approaches and insensitivity to the other person's feelings, intentions, and nonliteral and implied communications.” Klin, *Asperger Syndrome*, at 104.

The vast majority of individuals with Asperger's are not violent. Nonetheless, studies have found that “[a] small minority have a history of rather bizarre antisocial

acts, perhaps because of their lack of empathy.” Lorna Wing, *Asperger’s Syndrome: A Clinical Account*, 11 Psychol. Med. 115, 116 (1981). For example, in a case study of a 17-year-old with Asperger’s syndrome and a history of firesetting, researchers noted that “[he] appeared to understand the meaning of right and wrong, but his explanation for the firesetting was self-centered with limited understanding of its consequences and little empathy for the distress he might have caused.” Ian Paul Everall & Ann LeCouteur, *Firesetting in an Adolescent Boy with Asperger’s Syndrome*, 157 Brit. J. Psychiatry 284, 286 (1990).

This disconnect with others can become particularly pronounced and problematic among boys with Asperger’s when they reach puberty and develop sexual urges. See Rebecca Landa, *Social Language Use in Asperger Syndrome and High-Functioning Autism*, in *Asperger Syndrome* 131 (Klin et al. eds., 2000) (noting “particular problem for teenage and adult individuals who express their fondness or desire to be near someone of the opposite sex in an offensively direct way”). Although they may be able to conceptualize the idea of friendship or marriage, they are often unable to have relationships that are socially appropriate. See Jonathan Green et al., *Social and Psychiatric Functioning in Adolescents with Asperger Syndrome Compared with Conduct Disorder*, 30 J. Autism & Developmental Disorders 279, 291 (2000). In a study of one adolescent male with Asperger’s, a psychologist found that

[o]n the basis of his verbal IQ alone, one would expect a normal understanding of violence. However, despite his intellectual level, he shows remarkably little awareness of what [his girlfriend] might be thinking about him during the violent attacks, or of her feelings as a victim, and he has very few non-violent skills for solving interpersonal problems. . . . He appears to have some norms of what is good or bad (e.g. hitting a vulnerable person is bad), but this does not appear to curb his violence toward [his girlfriend].

Simon Baron-Cohen, *An Assessment of Violence in a Young Man with Asperger's Syndrome*, 29 *J. Child Psychol. & Psychiatry* 351, 358 (1988).

D. Poor Impulse Control

Although people with Asperger's are often able intellectually to describe emotions and the difference between right and wrong, researchers have found an inability to integrate this understanding into their behavior. *See, e.g.,* Klin, *Asperger Syndrome, supra*, at 104 (individuals with Asperger's may "be able to describe correctly, in a cognitive and often formalistic fashion, other people's emotions, expected intentions and social conventions; yet, they are unable to act upon this knowledge in an intuitive and spontaneous fashion"); Green et al., *supra*, at 292 ("AS individuals can often represent a good abstract knowledge of relationships and emotions in conversation that mask a profound lack of practical social ability in everyday life.").

These deficiencies have been connected to increased anxiety and an inability to tolerate surprise, which leads to panicked and ill-reasoned reactions to stressful situations. *See id.* at 279 ("The AS group showed severe impairments in practical

social functioning despite good cognitive ability and lack of significant early language delay. High levels of anxiety and obsessional disorders were found in AS.”); Digby Tantam, *Adolescence and Adulthood of Individuals with Asperger Syndrome*, in *Asperger Syndrome* 367, 391 (Ami Klin et al. eds., 2000) (“Most people with AS are anxious much of the time, and their behavior may be motivated by the desire to avoid anxiety. Panic is a variant of anxiety.”); Shelley Channon, *Frontal Lobe Dysfunction and Everyday Problem Solving: Social and Non-Social Contributions*, 115 *Acta Psychologica* 235, 246 (2004) (“[I]mpaired executive skills potentially lead to poor judgments . . . such as impulsive decisions with an inadequate exploration of the pertinent issues, fixation on a single solution . . . or judgment based on the immediate but not the longer-term consequences of the solution.”).

The same deficits can inhibit an individual’s ability to keep his conduct within appropriate bounds. One study notes that “some people with Asperger’s Syndrome commit crimes related to their circumscribed interests (e.g. the chemistry of poisons).” Baron-Cohen, *supra*, at 352. Such crimes may be unusual or bizarre, such as “attempting to drive away an unattended railway engine because of a fascination with trains, or causing explosions and fires because of an all-absorbing interest in chemical reactions.” *Id.* See also Peter Scragg & Amitta Shah, *Prevalence of Asperger’s Syndrome in a Secure Hospital*, 165 *Brit. J. Psychiatry* 679, 682 (1994) (“Although

violence may not be common in AS patients, when violent behaviour does occur it may be linked to the deficits found in the disorder,” including “[l]ack of empathy”).

As a result, Asperger’s individuals have difficulty generating acceptable solutions to everyday problems, including sexual attraction or being caught doing something wrong, and often impulsively choose an inferior solution when under stress. *See Green, supra*, at 285-286 (“[S]everal parents of AS teenagers described their son’s feelings towards a girl as a problem because of the consequent behavior (e.g., intrusive following of the girl) or the lack of understanding that their feelings were not reciprocated.”); *Wing, supra*, at 116 (“Relations with the opposite sex provide a good example of the more general social ineptitude. A young man with Asperger’s Syndrome . . . has no idea how to indicate his interest and attract a partner in a socially acceptable fashion. . . . If he has a strong sex drive he may approach and touch or kiss a stranger, or someone much older or younger than himself, and, as a consequence, find himself in trouble with the police.”).

II. The Law Should Take Account of Diminished Capacity in Determining the Appropriateness of Criminal Proceedings.

An organic brain disorder such as Asperger’s affects a defendant’s ability to conform to social norms and therefore the type of personal, moral responsibility he may justly be held to bear for his actions. Such a disorder would most logically be taken into account in deciding whether unacceptable behavior, and the resulting need to protect the public, should be dealt with by the criminal courts or, instead, by some

incapacitation-and-treatment regime such as civil commitment. Since 1989, however, this Court has refused to recognize any “diminished capacity” defense short of legal insanity. *See Chestnut v. State*, 538 So. 2d 820, 825 (Fla. 1989).

The Court’s analysis in *Chestnut* rested largely on an assertion that assessing evidence of “psychiatric abnormality” “demands a sophistication . . . that jurors (and officers of the court) ordinarily have not developed.” *Id.* at 823 (internal quotations and citations omitted). *Amici* respectfully suggest that *Chestnut* overstates the difficulties associated with presenting and analyzing medical evidence and reflects an outmoded view of both organic mental disorders and the public’s general understanding of, and ability to assess claims involving, such disorders. This Court should reconsider its judgment on the diminished capacity defense in light of the significant medical evidence that individuals with organic conditions such as Asperger’s may be able to articulate the difference between right and wrong sufficiently to be considered legally sane, while having abnormal mental processes that may make it unjust to attribute their actions to the sort of conscious, malevolent intent that is required for capital murder.

III. At a Minimum, Evidence of Asperger’s Must Be Given Substantial Weight in Capital Sentencing.

If evidence of a relevant brain disorder is not taken into account in determining whether an impaired individual may be convicted of capital murder, then at a minimum it must be given serious weight at sentencing. *Chestnut*, 538 So.2d at 825 (“If mitigation is appropriate, it may be accomplished through sentencing.”). The deficits

associated with Asperger's, for example, relate directly to questions of culpability and just punishment.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court considered the similar question of how mental retardation relates to the propriety of the death penalty. It reasoned that although the mentally retarded typically “know the difference between right and wrong and are competent to stand trial,”

[b]ecause of their impairments . . . by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

Id. at 318. The Court concluded that these “deficiencies do not warrant an exemption from criminal sanctions, but they do diminish . . . personal culpability.” *Id.* Similarly, this Court in *Crook v. State*, 813 So. 2d 68, 76 n.5 (Fla. 2002), recognized that mental retardation is a significant mitigating factor “that manifests itself in several ways, including poor communications skills, impaired impulse control, overrating one’s own skills, short memory, short attention span, and immature or incomplete concepts of blameworthiness and causation.”

The similarity between the deficits in Asperger's and in mental retardation highlights the need to treat Asperger's as a substantial mitigating circumstance. It is highly doubtful whether either of the two recognized interests in imposing the death penalty—retribution and deterrence—can be served by executing individuals whose

wrongful acts are explained in part by Asperger's. *See* 536 U.S. at 318-321 (holding that retribution is not served by executing defendants whose lesser culpability removes them from the narrow category of those who are most deserving of execution, and that deterrence is not served where individuals' diminished capacities "make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information"). In addition, as with mentally retarded defendants, the reduced capacity of offenders with Asperger's "to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors" or "to give meaningful assistance to their counsel," combined with the fact that "their demeanor may create an unwarranted impression of lack of remorse for their crimes," creates an enhanced risk of wrongful execution. *Id.* Consequently, as in *Crook*, "this case highlights the importance of properly evaluating the statutory mental mitigators in light of the uncontroverted evidence" of the defendant's mental condition. 813 So. 2d at 77.

IV. The Trial Judge Did Not Give Sufficient Weight to Schoenwetter's Asperger's as a Mitigating Circumstance.

Defense counsel introduced substantial evidence at sentencing showing that Schoenwetter has Asperger's Syndrome and that the condition helps explain his behavior on the night of the killings. Several expert neuropsychologists, including an expert on Asperger's, reviewed a variety of measurements (including a PET scan, a neurology report, interviews with his mother, and school records) and testified that

Schoenwetter clearly has Asperger's. *See e.g.*, Test. of Dr. Nona Prichard, Tr. at 840-844 (Vol. XIV). This evidence was largely undisputed.

The experts noted that Schoenwetter has an “abnormal brain pathology with a decreased frontal and temporal cortex metabolism that is frequently seen in psychiatric disorders, such as brain injuries, psychotic disorders, or autistic disorders” and that “[t]hose particular parts of the brain are known to be directly related to decision making.” Test. of Dr. William Riebsame, Tr. at 732-733 (Vol. XIII). Individuals with this type of abnormal brain pattern often “act[] very impulsively, failing to consider the consequences of their actions.” *Id.* *See also* Test. of Dr. Joseph Wu, Tr. at 932-938 (Vol. XIV) (describing the organic abnormalities in Schoenwetter's brain and explaining how these abnormalities are associated with poor impulse control).

Schoenwetter also displayed an impaired understanding of other people's feelings, understanding “the logic of it without the content.” Test. of Dr. Prichard, Tr. at 850 (Vol. XIV). According to Dr. Wu, some individuals with Asperger's, like Schoenwetter, have virtually no empathic ability—“People are a mystery to them.” Test. of Dr. Wu, Tr. at 916-917, 973 (Vol. XIV).³ In addition, two of the experts

³ *See also* Test. of Dr. Riebsame, Tr. at 763 (Vol. XIII) (“Intellectually, [Asperger's patients] might recognize that this is painful to an individual, but they're not going to compassionately become involved in those feelings or feel for that individual. That's socially, something that an Asperger's individual is not capable of doing. . . . They live in a world of their own.”).

testified that Schoenwetter's developmental age was well behind his chronological age. Dr. Riebsame testified that "Schoenwetter's maturity around the time of this offense might be comparable to a prepubescent individual of eleven or twelve years" (Tr. at 761-762 (Vol. XIII)), and Dr. Prichard testified that his "social comprehension is very young, eight to ten years old." Tr. at 855 (Vol. XIV).

Defendant's expert witnesses described a clear connection between Schoenwetter's mental condition and his behavior on the night of the murders. Dr. Riebsame testified that Schoenwetter's Asperger's Syndrome was "evident . . . when he entered the Friskey household." Tr. at 738 (Vol. XIII). In his opinion, Schoenwetter was "an individual with extreme emotional disturbance at the time of the offense" (Tr. at 761 (Vol. XIII)), who made a "frenzied, impulsive decision" that night, *id.* at 764. Similarly, Dr. Prichard testified that Schoenwetter's "capacity to conform his conduct to requirements of law was substantially impaired." Tr. at 854 (Vol. XIV). His actions, in her expert opinion, were not "planned," "calculated" or "premeditated," but were typical of "straight line" behavior found in individuals with Asperger's: Once "he started, he just kept going . . . rather than thinking." Tr. at 853-855 (Vol. XIV).

This evidence concerning Schoenwetter's Asperger's was directly relevant to at least three statutory mitigating circumstances: (1) the defendant's age; (2) that he was operating under extreme emotional and mental distress at the time of the crime; and (3) that he was unable to appreciate the criminality of his conduct or to conform his

conduct to the requirements of the law. The trial judge stated that he accepted each of these as proven. He then proceeded, however, to give each mitigator little or no weight. His stated reasons for discounting the Asperger's evidence were contradicted by uncontested evidence and suggest that the court actually treated each mitigator as if it had not been established at all.

A. Schoenwetter's Emotional and Developmental Age

Where the defendant is not a minor, there must be some additional characteristic of the defendant or the crime that renders his age a mitigating circumstance, such as significant emotional immaturity or mental problems. *See Hurst v. State*, 819 So.2d 689, 698 (Fla. 2002). Here there was substantial evidence that even though Schoenwetter had a chronological age of 18 at the time of the crimes, his emotional and developmental age was closer to eleven or twelve. The trial court gave this factor no weight because it found that Schoenwetter "was not immature for his age at the time he committed this crime." Sentencing Tr. at 47. This conclusion was based not on any credibility finding or conflicting expert testimony, but rather principally on the judge's observation that Schoenwetter has an IQ of 130 and appeared "mature beyond his years." *Id.* at 46-47.⁴ The judge also mentioned Schoenwetter's appropriate in-court

⁴ Indeed, the court seems to have accepted the prosecution's completely unsupported assertion that an eighteen-year-old who has an IQ of 130 must have a mental age of twenty-two or twenty-three. Spencer Hearing Tr. at 308-309 (Vol. II).

behavior, his articulateness, and his firm convictions. Thus, a factor that should have been a mitigating circumstance appears to have been treated as, if anything, an aggravating circumstance.

As the literature on Asperger's demonstrates, however, a high IQ and "articulateness" are completely consistent with having a twelve year old's capacity to exercise judgment and control impulses. *See Frith, supra*, at 683; *Klin, Asperger Syndrome, supra*, at 103.

B. Extreme Emotional or Mental Distress

The sentencing judge also agreed that Schoenwetter was suffering from an extreme emotional or mental disturbance at the time of the crime, but then concluded that the evidence of Asperger's did not explain the defendant's conduct. Sentencing Tr. at 357 (Vol. III). According to the court, "Asperger's may explain why he could not see other options once he decided on a course of action," but it did not explain his decision to go to the Friskey's residence, break in, arm himself with a knife and stab Virginia Friskey. *Id.* at 359. The trial judge gave the disturbance factor little weight. *Id.* at 360.

Extreme emotional distress is a statutory mitigator. Once it has been established, the defendant does not have to demonstrate any further specific nexus between the disturbance and the crime. *See Ford v. State*, 802 So.2d 1121, 1134-1135 and n.28 (Fla. 2001). Moreover, the uncontested evidence here established that Asperger's *does*

help explain Schoenwetter's conduct. The fact that he consciously went over to the Friskeys' house and even armed himself with a knife is not inconsistent with panicking when Virginia Friskey made a noise and her parents ran into the room. The whole course of conduct is consistent with a focused obsession on finding someone to have sex with, with inappropriate "problem solving," with poor impulse control, and with an inability to select appropriate options or to empathize with others. *See* Channon, 115 *Acta Psychologica* at 246; Channon, 31 *J. Autism & Developmental Disorders* at 466.

C. Inability to Conform Conduct to the Requirements of Law

The trial court likewise gave little weight to the statutory mitigator that Schoenwetter was unable to appreciate the criminality of his conduct or to conform to the requirements of law. Sentencing Tr. at 360-361 (Vol. III). In addition, the court pointed to Schoenwetter's lack of a criminal history as evidence that he could conform his conduct when he wanted—once again turning a mitigating circumstance (the absence of a criminal record) into a mark against him. *Id.* at 361.

In giving this mitigator little weight, the court disregarded uncontested evidence that Schoenwetter's organic brain deficiency is characterized by frontal lobe dysfunction that directly affects the "executive functions" of the brain. *See* Test. of Dr. William Riebsame, Tr. at 732-733 (Vol. XIII). Indeed, the experts specifically testified that on the night in question Schoenwetter was not able to conform his conduct to the requirements of the law. *See* Test. of Dr. Nona Prichard, Tr. at 854 (Vol. XIV).

V. A Capital Sentence Cannot Be Upheld in This Case.

Amici recognize that the weight given to particular mitigating circumstances is normally committed to the sound discretion of the sentencing court. This Court has made clear, however, that the sentencer may not disregard substantial, uncontroverted mitigating evidence. *See Crook*, 813 So.2d at 76; *Harris v. State*, 843 So. 2d 856, 868-869 (Fla. 2003). Moreover, a sentencing court's conclusions may be sustained only if they are "supported by sufficient evidence in the record." *Hurst*, 819 So. 2d at 700. Here, the sentencing court disregarded substantial, uncontroverted mitigating evidence of Schoenwetter's mental deficiencies, and its conclusions about the weight to be given to proven mitigators are not supported by the record. The trial court may not insulate decisions that amount to finding that a mitigating circumstance has not been proven by purporting to find a factor, but then offering no sufficient explanation for giving it little or no weight.

Finally, this Court itself must engage in a searching proportionality review. *Larkins v. State*, 739 So. 2d 90, 92-93 (Fla. 1999). It must ensure that the death penalty is "limited to the most aggravated and least mitigated of first-degree murders." *Id.* Its review "must consider the totality of the circumstances in the instant case in comparison to the facts of other capital cases and in light of those other decisions." *Id.* In light of the substantial mitigating evidence presented concerning Asperger's Syndrome and its relationship to Schoenwetter's conduct on that tragic night, *amici*

respectfully submit that this case cannot fall within the category of the least mitigated of intentional murders, for which the death penalty may be a proportional punishment.

See Cooper v. State, 739 So.2d 82, 84-86 (Fla. 1999).

CONCLUSION

In light of the evidence concerning Asperger's Syndrome and its relation to Schoenwetter's criminal culpability, this Court should reverse the sentence of death.

Respectfully submitted,

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Dated: January 6, 2005

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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the Brief of *Amici Curiae* MAAP Services for Autism and Asperger Spectrum, Dr. Fred Volkmar and Professor Anthony Bailey in Support of Petitioner were sent by overnight courier on January 6, 2005, to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of *Amici Curiae* MAAP Services for Autism and Asperger Spectrum, Dr. Fred Volkmar and Professor Anthony Bailey in Support of Petitioner complies with the formatting, font size, and page limit requirements of Florida Rule of Appellate Procedure 9.210.

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