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Gerhard Hojan v. State of Florida

SC05-1687

>> THE NEXT CASE ON THE AGENDA IS
HOGAN V. STATE OF FLORIDA.
>> TALK ABOUT A SITUATION WHERE
YOUR CLIENT, AND ME, READING THE
RECORD AND TOTALLY CLEAR THAT
THE WAIVER MITIGATION, EVEN YOUR
ARGUMENT THAT THERE WAS NOT A
PROPER PROFFER, NEVERTHELESS THE
JUDGE FOLLOWED MY VIEW.
MUHAMMAD AND KOON WANTED A
SPECIAL COUNSEL FOR HIM FOR
LITIGATION AND WE ALWAYS HAVE
THIS PROBLEM IN MANY CASES WHEN
A DEFENDANT SAYS ABSOLUTELY NOT,
I DON'T WANT TO DO IT.
ON THIS RECORD, I DON'T SEE HOW
YOU CAN SAY THAT THOSE
REQUIREMENTS WERE VIOLATED.
I MIGHT AGREE WITH YOU
PHILOSOPHICALLY THAT MAYBE WE
SHOULDN'T HAVE THEM.
LET HIM BE THE CAPTAIN OF HIS
OWN SHIP.
THAT IS WHAT WE HAVE SAID TIME
AND AGAIN SO SORT OF REPEATING
FORMER PRECEDENCE, HOW CAN YOU
SAY THAT THE JUDGE DIDN'T FOLLOW
OUR CASE LAW ALMOST TO THE
LETTER, INCLUDING SPECIAL
COUNSEL?
>> HE DID, BUT THE SYSTEM FAILED
AND THE PROCESS THAT WAS USED
ALSO FAILED.
BECAUSE WE ALLOWED MR. HOJAN, MY
CLIENT, TO DICTATE EXACTLY WHAT
THE COURT WAS CAPABLE OF DOING.
>> AND THERE WAS A COMPETENCY
EVALUATION.
>> RESPECTFULLY YOUR HONOR
COMPETENCY DOES NOT DEAL WITH
THIS ISSUE PROPERLY.
COMPETENCY IS IN THE EXAMINATION
IN WHICH WE DETERMINE THE MENTAL
CAPACITY OF A PERSON TO
UNDERSTAND HIS SURROUNDINGS.
WHEN SOMEONE ATTEMPTS TO COMMIT

SUICIDE ITIS NOT A COMPETENCY
ISSUE BUT WE HOSPITALIZE HIM FOR
THE UNDERLYING ISSUE TO MAKE A
RATIONAL JUDGEMENT.
>> THE ISSUE OF WHETHER SOMEONE

OUGHT TO BE ABLE TO WAIVE
MITIGATION ARGUES YOUR POSITION
FOR THE PRESENTATION OF
MITIGATION BEING REJECTED AND
SHORT OF PROCEEDING FROM
PRECEDENCE DOES NOT AGREE--
NUMEROUS TIMES OVER THE LAST
SEVERAL YEARS.
>> SINCE 1993, THE PROCESSES AND
PROCEDURES THAT SHOULD BE
UTILIZED IN A SITUATION WHERE AN
INDIVIDUAL WAIVES MITIGATION.
THE MOST CRUCIAL PART OF THAT
THREE-PRONGED TEST THAT THE
COURT PUT ON OR THREE-PRONG
REQUIREMENT THAT THE COURT PUT
IN WAS THAT AFTER THE SECOND
PRONG IN WHICH THE ATTORNEY
EXPRESSES TO THE COURT THAT
AFTER INVESTIGATION, YOU MUST
QUOTE WHAT THAT MITIGATION IS
AND THAT IS WHERE THE SYSTEM
STOPPED.
>> MR. HOJAN SAYS THAT, I DON'T
WANT YOU TO GIVE SPECIFICS SO
WHAT THAT MITIGATION WAS--
>> RESPECTFULLY SHOULD BE MR.
HOJAN DECISION BECAUSE THE STATE
WILL EXECUTE HIM.
HE IS SEEKING ASSISTANCE TO KILL
HIMSELF AND THAT IS NOT THE
PROVINCE OF THE COURT.
THE COURT IS UNDER A STATUTORY
MANDATE TO EVALUATE WHETHER NOT
IT THE DEATH PENALTY IN THIS
SITUATION IS WARRANTED, WHETHER
THE FACT EXISTS AND UNDER THOSE
CIRCUMSTANCES FOR YOU TO DO THAT
COMPETENTLY YOU CANNOT ALLOW THE
DEFENDANT TO DICTATE WHAT IT IS
YOU NEED TO EVALUATE.
>> LET ME ASK YOU THIS.
DOES THE RECORD BEFORE US
INDICATE WHETHER OR NOT YOUR
CLIENT WANTED YOU TO PRESENT THE
ISSUE YOU ARE PRESENTING HERE
TODAY?
>> I DON'T KNOW IF YOUR RECORD

DOES BUT I HAD A MOTION EARLY ON
BECAUSE I RECEIVED WORD THAT HE
DID NOT WANT AN APPEAL FILED AND
THE COURT GAVE ME LEAVE TO GO
VISIT WITH HIM AND SPEAK WITH
HIM ABOUT DOING THE APPEAL.
HE WANTED THIS APPEAL FOUND.
HE WANTED THESE ARGUMENTS MADE
AND I REPORTED THAT TO THE
COURT.
AND I MOVED FORWARD WITH THAT.
>> WHAT OTHER QUESTION IS THERE?
A PSI WAS ORDERED?
>> CORRECT.
>> THE PSI IS NOT IN OUR RECORD.
>> NOT IN OUR RECORDS EITHER.
NO ONE KNOWS WHERE IT IS AND TO
THE EXTENT IT WAS CONSIDERED BY
THE TRIAL COURT, IT IS UNKNOWN.
THAT IS ANOTHER TROUBLING
PROBLEM BECAUSE IN THE JUDGE'S
SENTENCING ORDER THERE IS NO
MENTION OF A PSI CONSIDERATION.
DURING THE HEARING IT IS
SUPPOSED TO PROVIDE AN
OPPORTUNITY FOR THE DEFENSE
COUNCIL AND THE COURTS COUNSEL
TO EVALUATE THE PSI AND MAKE A
DETERMINATION IF IT IS ACTUALLY
ACCURATE, IF ANYTHING NEEDS TO
BE ADDED OR CHANGED.
IT IS NEVER BROUGHT UP.
GOING BACK TO THE ORIGINAL
ARGUMENT, THE THREE-PRONGED OF
KOON VERSUS DUGGER WAS TO
PROVIDE THE COURT WITH THE
MITIGATING EVIDENCE.
THE COURT OFFERED TO PUT IT IN
THE RECORD AND SEAL IT SO A JURY
WOULD NOT SEE IT.
AND MR. HOJAN ORIGINALLY AGREED
TO IT.
IT WAS HIS ATTORNEY THAT TALKED
HIM OUT OF IT BY SAYING, THEY
ARE CONFLICTING WITH WHAT ISSUES
HE HAD, HIS DESIRE TO WAIVE
MITIGATION.
THEN HE CHANGED HIS MIND AND
SAID I DON'T WANT ANYBODY TO SEE
IT.
THAT WAS NOT A DECISION FOR HIM
TO MAKE.
THE COURT THEN GOES ON AND I
KNOW EVERYBODY THAT WAS INVOLVED

IN THIS.
THE TRIAL ATTORNEY IS
CONTROLLING THE-- ARE EXCELLENT
LAWYERS, VERY METICULOUS IN
THEIR WORK ON CAPITAL CASES.
THE COURT APPOINTED A WELL-
RESPECTED CRIMINAL DEFENSE
LAWYER IN BROWARD COUNTY TO
CONDUCT LITIGATION AND HE DID
NOT.
HE ACTUALLY CONDUCTED
MITIGATION.
THE STATE PUT INTO THE RECORD A
WHOLE NUMBER OF ISSUES, A WHOLE
NUMBER OF MITIGATION MATERIAL.
MR. MALDOFF NEVER INVESTIGATED
ANY OF THAT.
>> THE THINGS THAT WERE PUT IN
BY THE STATE WHAT I WAS TRYING
TO UNDERSTAND HERE WAS, THIS IS
ONE OF THESE, THIS SEEMS LIKE
THEY WENT TO THE WAFFLE HOUSE TO
HAVE SOME WAFFLES AND THEY
KILLED THREE PEOPLE, THE
DECISION OVER BREAKFAST LATE IN
THE AFTERNOON.
IS THERE ANYTHING IN THE RECORD
THAT WE DO HAVE THAT SHOWS WHAT
THE STATE OF MIND OF THIS
DEFENDANT WAS, WHAT HIS MENTAL
CAPACITIES ARE, SO WE HAVE THAT
BECAUSE THERE WERE THESE --
SOMEHOW SCHOOL RECORDS ARE
MENTIONED.
DO WE KNOW ANYTHING ABOUT THAT?
>> THESE WERE INVESTIGATED.
HE HAD SUFFERED HEAD INJURIES AS
A CHILD.
IT DIDN'T SEEM TO AFFECT HIS
MENTAL STATUS, BUT THOSE RECORDS
WERE NEVER PRODUCED AND THOSE
RECORDS WERE NEVER EXAMINED OR
EVALUATED.
>> HE WAS A 26-YEAR-OLD WHO HAD
NOT BEEN INVOLVED IN CRIMINAL
ACTIVITY?
>> THIS WAS HIS FIRST CRIME.
IT WAS A HECK OF A CRIME
CONSIDERING IT WAS HIS FIRST AND
THE RESULT IS THE ULTIMATE
PENALTY.
THE CO-DEFENDANT WAS CONVICTED
OF THE ARMED ROBBERY AND NOT
CONVICTED OF THE MURDER UNDER

THE PRINCIPLE OF INDEPENDENT
ACTS.
YOU HAVE TO RESPECT THAT
VERDICT.
IT APPEARS IT IS SOMEWHAT
DISINGENUOUS CONSIDERING THAT
MR. HOJAN'S COMPASSION, IF YOU
WILL, SAID HE ACTED UNDER-- AND
SO DID MR. MICKEL IN THIS CASE.
>> I GUESS GOING TO THE
SUBSTANTIVE ISSUE ON THE SIDE OF
UTTERANCE, YOU WANT TO ARGUE
THAT?
>> I CAN ARGUE IT.
I AM MORE CONCERNED WITH THE
SENTENCING BASICALLY.
IT WAS EXTREMELY LACKING IN
TERMS OF SECURING MITIGATION
THAT WOULD ALLOW YOU TO MAKE THE
COMPETENT EVALUATION OF
PROPORTIONALITY.
>> BUT YOU WOULD AGREE THAT IF
YOU LOOK BACK ON OUR OTHER CASES
IN WAIVING MITIGATION THAT IT
LOOKS TO ME LIKE IN THIS CASE,
BOTH THE STATE IN THE JUDGE WENT
ABOVE AND BEYOND WHAT HAPPENED
IN OTHER CASES WHERE WE HAVE
AFFIRMED THE DEATH PENALTY.
>> THE JUDGE ATTEMPTED TO FOLLOW
YOUR CASE LAW, THE OPINIONS OF
THIS COURT TO THE LETTER AND HE
DID A YEOMAN'S JOB IN TRYING TO
DO THAT.
BUT THAT DID NOT MEAN HE DID IT
CORRECTLY-- WHERE KOON SAYS THE
MITIGATION EVIDENCE DISCOVERED
BY DEFENSE COUNSEL MUST BE
PLACED INTO THE RECORD.
IT DOESN'T SAY THE DEFENDANT CAN
CONTROL THAT.
IT DOESN'T SAY THE DEFENDANT'S
WAIVER ELIMINATES THAT.
KOON IS SPECIFIC THAT ONCE IT IS
DISCLOSED AS A RESULT OF THE
ATTORNEY'S INVESTIGATION THE
ATTORNEY MUST DISCLOSE--
>> YOU ARE SAYING WE COULDN'T
EVALUATE PROPORTIONALITY FOR
THAT?
HOW MANY--
>> SIX.
>> I BELIEVE THE RECORD IS
CLEAR.

>> WE HAVE A DOUBLE MURDER.
WE HAVE A SURVIVING VICTIM,
ATTEMPTED MURDER.
SHORT OF THE FIRST ONE, EITHER
BEING IMMENSELY RETARDED, WHICH
WOULD PREVENT THE DEATH PENALTY
FROM BEING PROPOSED OR SOME
BIZARRE THING THAT HAPPENED AT
THE TIME OF THE MURDER, WHERE
WOULD THERE EVEN BE, LOOKING NOT
AT-- IN TERMS OF
PROPORTIONALITY, THIS IS
CIRCUMSTANTIAL AND THE MURDERS
ARE SO EXTREMELY AGGRAVATED
BASED ON ALL OF OUR CASE LAW
WHEN THEY FIND A MITIGATION.
IT IS STATUTORY MITIGATION.
SO I AM ALWAYS TROUBLED WITH
MITIGATION.
IN THIS CASE, IT IS THE NATURE
OF THIS MURDER, IT IS SUCH THAT,
AND IT IS NOT-- WE HAVE HAD
MURDERS BEFORE, IN AN
EXECUTION-STYLE, KILLED AND HAVE
MITIGATION.
TELL ME, IF YOU SAY
HYPOTHETICALLY IF YOU-- HE HAD
BRAIN DAMAGE AS A CHILD THAT
WOULD NOT CHANGE IT SO I GUESS
WE ARE SORT OF LOOKING AT THIS
EVEN IF IT WAS A PROFFER, HOW
WOULD YOU CHANGE SOMETHING GIVEN
THE NATURE OF THIS?
>> FOR ONE THING HOW DO WE KNOW
HE IS NOT?
THOSE EVALUATIONS WERE NEVER
DONE.
WE TEND TO INCLUDE COMPETENCY,
TO ENCOMPASS THE ENTIRE SCALE OF
MENTAL ILLNESSES AND IT DOESN'T.
COMPETENCY IS A SPECIFIC EXAM
THAT FOCUSES ON A SPECIFIC AREA.
>> IF YOU HAVE LAWYERS WHO ARE
REPRESENTING HIM, FOUND EVIDENCE
THAT HE WAS MENTALLY --
[INAUDIBLE]
CLEARLY AS YOU SAID THEY ARE
EXCELLENT LAWYERS.
>> INDICATION OF RETARDATION
WOULD BE EVIDENCE FROM THE
SCHOOL RECORDS AND THE SCHOOL
RECORDS WERE NEVER EVALUATED.
>> WHAT DO WE KNOW ABOUT HIM?
>> HE WAS MARRIED.

HE WAS DIVORCED AND WORKING AT A
NIGHTCLUB.
[INAUDIBLE]
>> HE WAS NOT LIVING AT HOME.
>> I KNOW YOU ARE SAYING-- OTHER
THAN MENTAL RETARDATION.
>> OTHER THAN SHOOTING EVERY
ARGUMENT I MADE DOWN, THIS IS
WITHOUT QUESTION A HORRIBLE
CRIME AND I'M NOT DELUDING
MYSELF TO THE CONTRARY, OKAY?
AND BESIDES MY FEELINGS THAT THE
DEATH PENALTY WAS NEVER
WARRANTED THAT IS NOT THE ISSUE
AND IT SHOULDN'T BE THE ISSUE.
BY THE SAME TOKEN NO MATTER HOW
HORRIBLE THE CRIME IS, THERE
WILL BE OTHER CASES BEFORE THIS
COURT IN WHICH THESE HAVE TO BE
FOLLOWED.
IF THEY ARE NOT FOLLOWED, IT
DOESN'T MATTER HOW HORRIBLE THE
CRIME IS.
THE COURT MUST LOOK AT IT FROM
THE PERSPECTIVE, THAT THE
PROCEDURES WERE NOT PROPERLY
FOLLOWED.
IN THIS CASE THERE ARE
OPPORTUNITIES TO FIND MITIGATION
SO THE COURT, THE TRIAL COURT
COULD MAKE A JUSTIFIABLE
EVALUATION OF BOTH MITIGATION
AND AGGRAVATORS, TO SATISFY THE
HUMAN CONSCIOUS THAT THE PROPER
SENTENCE WAS BEING IMPOSED.
>> KOON IS NOT THERE IN ORDER TO
MAKE SURE THERE IS MITIGATION.
KOON IS THERE SO THAT IT IS
CLEAR THAT THE DEFENDANT HAS AN
INVOLUNTARY WAIVER.
>> BUT IT STILL REQUIRES--
>> IN OTHER WORDS EVEN IF THE
PROFFER-- IT STILL WOULD NOT
HAVE BEEN PART OF SEARCHING THE
RECORDS.
>> BUT THE PLACES IN THE RECORD,
THE MITIGATION THAT THE DEFENSE
COUNSEL FOUND FOR THE COURTS
EYES.
ALSO THERE WAS NEVER--
[INAUDIBLE]
>> IT DOES SAY THAT JUDGE --
RESPECTFULLY I WOULD DISAGREE.
KOON SAYS THE COUNCIL MUST TELL

THE COURT WHETHER OR NOT THERE
IS MITIGATION BASED ON HIS
INVESTIGATION.
>> I CERTAINLY APPRECIATE YOUR
POSITION, BUT-- AND YOUR
ARGUMENT BUT IT SEEMS TO ME THAT
THIS COURT HAS, FOR ONE, STATED
THAT IT FOLLOWS BARRETTA AND
THAT THE DEFENDANT COULD NOT
ONLY ORDER HIS COUNSEL NOT TO
PUT ON CERTAIN EVIDENCE.
THE DEFENDANT COULD DO WITHOUT
COUNSEL ENTIRELY, AND IN THIS
KIND OF CASE.
AND SO, THE DEFENDANT IS UNDER
THE UNITED STATES SUPREME COURT
LAW, WHICH IS FOLLOWED BY THIS
COURT, THAT IS THE CAPTAIN OF
THE SHIP.
AND, I JUST THINK THAT WE HAVE,
WE ARE BOUND BY THAT.
AND I JUST DON'T UNDERSTAND AN
ARGUMENT THAT SAYS THAT THE
COURT DOES NOT.
>> RESPECTFULLY YOUR HONOR, THIS
COURT IS SET UP BY PROCEDURES,
INCLUDING AT THE SUGGESTION OF A
PUBLIC COUNCIL IN HAMDEN, THAT
THE TRIAL COURT CAN APPOINT ITS
OWN DESPITE WHAT THE DEFENDANT
WANTS.
ON THIS CASE--
>> WE DID NOT GO DOWN THAT ROAD
IN MUHAMMAD.
>> NO WE DIDN'T BUT SUBSEQUENTLY
YOU DID.
THE COURT IN THIS CASE DID
APPOINT PUBLIC COUNSEL,
APPOINTED MALDOFF--
>> IN THIS COURT IT FOLLOWED
THAT PATH OF HAVING STANDBY
COUNSEL.
THIS COURT HAS ATTEMPTED TO
PROVIDE AS MEANINGFUL A PROCESS
AS WE CAN FOLLOW, BUT WE ARE
BOUND AND IT WOULD MEAN I-- IT
WOULD BE MY VIEW RIGHTFULLY, SO
THAT THIS DEFENDANT WHO IS AS
JUDGE BACKMAN WENT THROUGH AND
STATED, BEEN EXAMINED, IS
COMPETENT TO MAKE DECISIONS.
IS THE DECISIONMAKER IN THIS
INSTANCE, AS FAR AS THE FATE
THAT THIS DEFENDANT HAS DECIDED,

THE ROAD HE HAS GONE DOWN, NOT
THE FATE, BUT THE ROAD IN
DEFENDING WHAT THE STATE IS
PROSECUTING THE DEFENDANT FOR?
>> IF I MAY RESPOND.
IF THAT WAS TRULY THE SITUATION,
THEN IT WOULD HAVE BEEN NO NEED
FOR ALL OF THE OTHER ACTION
TAKEN BY THE TRIAL COURT TO TRY
TO PROVIDE SUFFICIENT LITIGATION
PRESENTATION BY ITS OWN COUNSEL.
THE COURT HAS SUBPOENA POWER
OVER THE OBJECTIONS OF THE
DEFENDANT TO OBTAIN THESE
RECORDS THROUGH ITS OWN COUNSEL.
THE COUNSEL REPRESENTS THE COURT
AND DOES NOT REPRESENT THE
DEFENDANT.
IN THIS CASE MR. MALDOFF WAS
APPOINTED TO DO THAT.
MR. MALDOFF HAD RECORDS IN THE
FILE THAT HE COULD HAVE EXAMINED
THE SCHOOL RECORDS, THE
DEPOSITIONS OF THE EX-WIFE.
HE COULD HAVE INTERVIEWED THE
EX-WIFE, COULD INTERVIEWED THE
PARENTS, COULD HAVE INTERVIEWED
TEACHERS, COULD HAVE INTERVIEWED
EMPLOYERS.
NONE OF THAT WAS DONE BUT MR.
MALDOFF, IF YOU READ THE RECORD
CLEARLY, ON SEVERAL OCCASIONS
BELIEVED AND IN ONE INSTANCE HE
SAID REPRESENTING THE DEFENDANT
OF SORTS, AND THE COURT HAD TO
CORRECT HIM AND SAY NO YOU
REPRESENT THE COURT.
AT THE SPENCER HEARING THE ONLY
WITNESS PRESENTED WAS A
DR. MICHAEL BRANNON WHO WAS A
PSYCHOLOGIST WHO NEVER EXAMINED,
NEVER WENT TO SEE HIM, NEVER
WENT TO TALK TO HIM.
PART OF HIS TESTIMONY WAS
SUBJECTED TO-- AND MUCH OF IT
STRICKEN, WAS THAT HE LOOKED AT
THE EVALUATION OF ANOTHER
PSYCHOLOGIST AND FOUND THAT
TESTING WAS INADEQUATE.
IN ADDITION TO THAT ANOTHER
PSYCHOLOGIST WAS NEVER CALLED
DURING THE SPENCER HEARING SO
WHILE THE MITIGATION WAS
AVAILABLE, HAD SOMEONE TAKEN THE

TIME TO EXPLORE IT-- IT WAS NOT
DONE AND IF WHAT YOU ARE SAYING
IS TRUE, THEN THE COURT DID NOT
HAVE THE AUTHORITY TO APPOINT
PUBLIC COUNSEL.
IT WAS A WASTE OF MONEY, TIME
ENERGY AND EFFORT TO DO SO.
SIMPLY BECAUSE, ONCE THE
DEFENDANT SAYS I WAIVE
MITIGATION AND THE COURT FINDS
THAT TO BE A CONFIDENT WAIVER,
OKAY THEN IN ESSENCE THE PROCESS
SHOULD STOP.
THE JUDGE CAN RENDER HIS
SENTENCING WITHOUT THE NECESSITY
OF GOING TO AN ADVISORY JURY
BECAUSE AS JUDGE BACKEN STATED
IN THE RECORD, HE INSTRUCTED THE
JURY THAT ONLY UNDER THE RAREST
CIRCUMSTANCE IN THE COURT CHANGE
WHAT IT IS YOU DECIDE.
IF YOU DECIDE ON THAT, IT IS
ONLY IN RARE CIRCUMSTANCES THAT
YOU COME UP WITH SOMETHING
DIFFERENT.
IN THIS CASE THE CASE WAS
PRESENTED TO THE JURY WITHOUT
MITIGATION.
IT WAS ONLY THE AGGRAVATED THAT
WERE PRESENTED AND THEY CAME
BACK 9-3 FOR DEATH.
THEY HAD NOTHING TO CONSIDER IN
TERMS OF MITIGATION AND THAT MAY
HAVE CHANGED HAD MITIGATION BEEN
PROVIDED, MAY HAVE CHANGED IF
THE COURT WAS ALLOWED TO HEAR
WHAT THE MITIGATION WAS.
IF ANYONE HAS DONE A THOROUGH
INVESTIGATION.
I UNDERSTAND THE TWO ATTORNEYS
THAT REPRESENTED HIM WERE
PROHIBITED FROM PUTTING IT INTO
THE RECORD BECAUSE THAT WAS WHAT
KOON SAYS, AND SECOND OF ALL THE
COURT WAS NOT PROHIBITED FROM
REVIEWING MITIGATION FROM ITS
OWN COUNSEL.
HIS OWN COUNSEL DIDN'T DO IT.
I KNOW MUHAMMAD SAYS A SENTENCE
CANNOT CLAIM FOUL WHEN THE
COURTS' COUNSEL DOES NOT DO A
PROPER JOB, BUT IN THIS CASE
WHEN YOU ARE DEALING WITH
SOMEONE, LIFE-AND-DEATH, WE KEEP

SAYING DEATH IS DIFFERENT.
IF IT IS REALLY DIFFERENT WE
HAVE TO BE SURE THE PROCESS IS
FOLLOWED COMPLETELY NO MATTER
HOW HEINOUS THE CRIME IS.
THAT ONLY SETS FORTH THE CASES
IN WHICH THE CRIME IS NOT
HEINOUS, ATROCIOUS AND CRUEL.
IT IS NOT AS COLD AND CALCULATED
AS THIS WAS IN THE PROCESS AND
RULES NEED TO BE FOLLOWED.
I KNOW THE COURT AND THE
ATTORNEYS BELOW DID THEIR BEST
TO TRY TO DO IT, BUT THEIR
PROCESSES WERE FLAWED.
>> I JUST WANT TO MAKE SURE, IF
YOU ARE SAYING THAT THE PROCESS,
THE DEFENSE LAWYERS WERE FLAWED
BECAUSE WHEN THEY ATTEMPTED TO
PROFFER AND THE -- SAID NO THAT
THEY STILL HAD AN OBLIGATION TO
OVERRIDE THE CLIENT STATEMENT.
I KNOW WHAT YOU-- I ALREADY KNOW
IT AND I DON'T WANT YOU TO
PRESENT IT.
>> ORIGINALLY I AGREED FOR ITTO
BE PRESENTED.
HIS ATTORNEY TALKED HIM OUT OF
IT AND HIS ATTORNEY SAYS WELL
YOU KNOW THE JUDGE WANTS IT DOWN
THE ROAD.
IT DOESN'T MEAN IT WON'T
EVENTUALLY GET REVIEWED BY A
JUDGE AND THAT CONTRADICTS WHAT
YOU SAID BEFORE.
HE SAID OKAY, THEN NO, I DON'T
WANT IT.
HE ORIGINALLY AGREED BUT THE
JUDGE SPECIFICALLY ASKED HIM, SO
THAT THE JURY WILL NOT SEE IT,
IS THAT OKAY WITH YOU?
AND HE SAID YES, AS LONG AS THE
JURY DOES NOT SEE IT.
AND THEN HIS LAWYERS TALKED HIM
OUT OF IT.
AND THAT IS A CONTRADICTION
THAT-- I DON'T KNOW IT JUST
DOESN'T CALCULATE WITH ME.
YOU HAD MENTIONED THE ISSUE ON
EXCITED UTTERANCE.
EXCITED UTTERANCE ISSUE HAS TO
DO WITH THE INTERVENING.
BETWEEN THE TIME SHE MADE THE
STATEMENT TO THE POLICE OFFICER

AND THE AMBULANCE AND THE THINGS
THAT OCCUR TO HER BEFORE.
SHE WAS SERIOUSLY UNDER THE
EFFECT OF A GUNSHOT WOUND TO THE
HEAD, BUT DURING THE COURSE OF
FIRST DAY AT THE GAS STATION, AS
THE COURT RECALLS, THERE WERE
TWO TELEPHONE CALLS THAT WERE
PLACED FOR HER AND SHE SPOKE TO
HER MOTHER AND HER SISTER.
THEY WERE NOT HYSTERICAL
CONVERSATIONS.
>> DID SHE THINK SHE MIGHT BE
DYING?
>> I DON'T RECALL ANYWHERE IN
THE RECORD WHERE DEATH WAS SAID.
>> WASN'T THERE REASONABLE
INFERENCE?
>> I DON'T KNOW IF THAT IS A
REASONABLE INFERENCE OR NOT
BECAUSE SHE CALLED HER MOTHER--
>> THE PERSONNEL THAT WERE
CALLED THERE BELIEVE SHE MIGHT
BE.
>> BUT NO ONE INDICATED TO HER
THAT SHE WAS IN THAT CONDITION.
MEDICAL PERSONNEL DID NOT TELL
HER THAT AND HER CONVERSATIONS
DID NOT REFLECT THAT THOUGHT
PROCESS.
>> A WOMAN SHOT IN THE HEAD, IS
BLEEDING, IS GROANING AND AS I
UNDERSTAND YOU ARE NOT
CHALLENGING HER STATEMENT TO THE
GAS STATION ATTENDANT.
>> THE GAS STATION ATTENDANT,
SHE DOES NOT MENTION--
HE IS A TALL MEXICAN.
THAT IS AFTER THE THIRD TIME SHE
IS ASKED BY THE GAS STATION
ATTENDANT.
>> WHAT ARE THE STATEMENTS YOU
THINK WERE IRRELEVANT--
ERRONEOUSLYINTRODUCED?
>> THE STATEMENTS IN THE
AMBULANCE.
IT WAS NOT HER STATEMENT.
IT WAS THE STATEMENT THAT THE
POLICE OFFICER MADE TO HER THAT
SHE AFFIRMS.
THE STATEMENT WAS--
[INAUDIBLE]
>> THAT IS NOT AN EXCITED
UTTERANCE.

THAT IS NOT YOUR STATEMENT.
THAT IS A RESPONSE.
>> TO ME WHAT YOU MIGHT BE
ARGUING IS THAT WHEN POLICE ARE
IN THE PROCESS OF INTERROGATION,
WHEN SOMEBODY IS SHOT, THE
INTERROGATION CHANGES INTO
EXCITED UTTERANCE.
>> THE INTERVENING FACT IS
EXCITED UTTERANCE.
[INAUDIBLE]
I MIGHT SEE THAT, BUT I DON'T
SEE HOW, WITH EVERYTHING ELSE IN
THIS CASE, ALL OF THE OTHER
STATEMENTS THAT WERE MADE, HOW
IS ANYTHING OTHER THAN--
>> I GUESS THAT IS WHY I FOCUSED
ON THE SENTENCING PROCEDURE
OTHER THAN A SUBSTANTIVE ISSUE,
BUT THE CONFESSION, SHE BROUGHT
IT UP, IS ANOTHER SERIOUS
CONCERN BECAUSE OF THE FACT THAT
THERE IS NO EVIDENCE OF MIRANDA
WARNING.
>> THERE ARE--
>> WARNINGS WERE READ TO HIM.
>> HE DID NOT TESTIFY TO THE
CONTRARY, SO WOULDN'T THE
JUDGE'S FINDINGS--
[INAUDIBLE]
>> THE PROBLEMS WITH THE JUDGE'S
FINDINGS WERE THAT HE SAID THE
WARNINGS WERE READ ON THE RECORD
AND THEY WERE NOT.
NOWHERE IN THE RECORD, NOWHERE
IN-- THE COURT RECALLS THAT IN
2000, UP TO ABOUT 2004 WHEN, IN
ROBERTS VERSUS STATE, THERE IS A
SERIOUS PROBLEM WITH THE MIRANDA
WARNING IN BROWARD COUNTY.
THE SUPREME COURT ADDRESSED IT
REGARDING THE FLORIDA POLICE
DEPARTMENT MIRANDA WARNING.
IT WAS THEIR POLICY NOT TO PUT
IT ON THE RECORD.
>> WOULDN'T IT BE YOUR
OBLIGATION, IF IT WAS A
SUFFICIENT WARNING, TO PUT WHAT
THEIR-- WERE IN THE RECORD AND
WE DON'T HAVE THAT.
>> IT WAS THEIR POLICY.
>> TO MAKE AN ASSUMPTION THAT IT
DID NOT FOLLOW THE PROPER
WARNINGS, IF THERE IS NO

EVIDENCE TO THE CONTRARY, AND
THEY SAY THEY READ THEIR RIGHTS?
>> BUT THIS IS A DEATH PENALTY
CASE AND YOU ARE MAKING AN
ASSUMPTION THAT IT WAS.
DEATH IS DIFFERENT, IT CAN'T BE
BASED ON ASSUMPTION.
[INAUDIBLE]
TODAY INSERT A SPECIFIC--
>> THEY CHALLENGE THE WARNINGS
THEMSELVES.
THEY CHALLENGE THE POLICY THAT
THAT POLICE WENT OUT.
>> DID THEY CLAIM THAT THE
MIRANDA WARNINGS THAT WERE GIVEN
WERE A DECISION IN SOME
PARTICULAR INSTANCE?
>> THEIR CLAIM WAS THAT THEY
DIDN'T KNOW WHAT THE MIRANDA
WARNINGS WERE.
THAT IS WHAT THEY CLAIMED IN THE
TRIAL COURT BECAUSE THERE WAS NO
RECORD OF WHICH MIRANDA WARNINGS
WERE GIVEN AND THE CONTENTS.
THE CARD THAT THEY READ IN THE
COURTROOM AT THE TIME WAS
ACCURATE BUT DURING THE COURSE
OF THE INTERROGATION NONE OF
THAT WAS EVER PUT ON THE RECORD.
THEY TESTIFIED THAT WAS THEIR
POLICY AND PREFERENCE, NOT TO
RECORD THEIR PRELIMINARY
INTERVIEW BEFORE THE TAPED
INTERVIEW AND NOT TO HAVE A
WAIVER FORM SIGNED BECAUSE THEY
DIDN'T WANT TO CREATE THIS
COMBATIVE ATMOSPHERE WITH THE
DEFENDANT.
>> BUT THAT ASPECT OF THEIR
PROCEDURE--
>> IF THE COURT CAN GLEAN FROM
MY OFFICIAL BRIEF, THAT WHOLE
ISSUE REGARDING THE INTERVIEWS,
ESPECIALLY IN HOMICIDE CASES AND
THE NOTORIOUS HISTORY OF THE
COUNTY WITH REGARD TO
POST-ARREST INTERVIEWS IN
HOMICIDE CASES AND FALSE
CONFESSIONS AND COERCED
CONFESSIONS, IT IS SOMEWHAT
ASTOUNDING AND IT WAS SINCE
ADOPTED WHERE EVERY INTERVIEW IS
NOW VIDEOTAPED AND ALL RIGHTS
ARE READ ON TAPE AND ALL RIGHTS

ARE RECORDED SO THESE ARGUMENTS
DON'T COME UP.
THAT IS ANOTHER PROCEDURE THAT
HAS FAILED IN THIS CASE.
>> YOU ARE WELL INTO YOUR
REBUTTAL TIME.
YOU ONLY HAVE ABOUT A MINUTE AND
A HALF LEFT.
>> MAY IT PLEASE THE COURT,
LISA-MARIE LERNER FROM THE
ATTORNEY GENERAL'S OFFICE AND
I'M GOING TO START WITH THE
DEATH PENALTY WITH MIRANDA
WAIVER.
DURING THE SUPPRESSION HEARING
DETECTIVE ANTON TESTIFIED THAT
HE READ MR. HOJAN HIS RIGHTS
FROM A FORM.
HE BROUGHT SPECIFIC FORMS INTO
COURT AND READ THE RIGHTS INTO
THE RECORD.
THE COURT MADE A FINDING BASED
ON THAT.
>> THE TRIAL COURT, HE READ THE
FORM INTO THE RECORD, AND WAS
THERE ANY OBJECTION THEN MADE TO
WHAT WAS ACTUALLY ON THE FORM?
>> NO, THERE WAS NOT.
>> THIS IS THE ONE OF THOSE
FORMS-- TO THE BROWARD COUNTY
SHERIFF'S OFFICE.
LIKE YOU SAID, IF WHAT WAS READ
BEFORE WAS WHAT WAS READ TO
HIM--
>> YES THEY WERE AND DETECTIVE
ANTON WENT THROUGH THEM AND THEY
SPECIFICALLY WERE NOT WHAT ROAR
TRADITIONALLY DID, WHICH WAS NOT
MENTIONING THAT THEY HAVE THE
RIGHT TO AN ATTORNEY DURING THE
QUESTIONING.
>> COULD YOU RAISE YOUR VOICE A
LITTLE?
>> YOU HAVE A RIGHT TO AN
ATTORNEY BEFORE QUESTIONING.
YOU HAVE RIGHTS FOR AN ATTORNEY
TO BE PRESENT DURING THE
INTERVIEW AND IF YOU WANT TO
STOP AT ANY TIME TO SPEAK TO AN
ATTORNEY, WE WILL STOP.
>> THAT IS WHAT WAS SAID?
>> THAT IS WHAT WAS SAID.
AS I MENTIONED DETECTIVE ANTON
READ THOSE RIGHTS INTO THE

RECORD AND THE TRIAL COURT BASED
ITS FINDINGS ON ANTON'S
TESTIMONY.
HE SAID HE READ THE MIRANDA
RIGHTS APPROXIMATELY AT 1:40 IN
THE MORNING AND AT APPROXIMATELY
2:15, 35 MINUTES LATER, HE DID
THE CASE STATEMENT AND THE
STATEMENT THAT HOJAN GAVE TO
HIM, THE SAME BOTH BEFORE THE
TAPE AND AFTER THE TAPE.
I JUST WANTED TO CLARIFY THAT HE
DID IN FACT READ WHAT HE TOLD
HOJAN INTO THE RECORD.
I DON'T THINK IT WOULD REQUIRE
ANY KIND OF PERSONAL-- THE
JUDGE'S FINDING THAT THE WARNING
WAS GIVEN.
>> THAT IS INCORRECT.
ANTON JUST REFERRED BACK SAYING,
I READ YOUR RIGHTS, IS THAT
CORRECT AND HOJAN SAID YES.
HE STILL WANTED TO TALK AND HE
STILL WAIVED, AND HE SAID YES.
[INAUDIBLE]
>> THAT IS CORRECT.
IN TERMS OF THE KOON WAIVER.
>> MY QUESTION IS, THERE IS A
LOT OF FOCUS IN THE BRIEF AND
THE STATE BRINGS UP WILLIAMS.
THE ONLY THING THAT CONCERNS ME
IS THAT WHEN YOU ARE TALKING,
THERE IS NO QUESTION IN MY MIND
IT IS RELIABLE BUT WHETHER AFTER
THE PERSON HAS UTTERED WHAT YOU
HAVE SAID, THE GAS STATION
ATTENDANT, WHICH IS NOT
CHALLENGED HERE, THE MEXICAN DID
THE SHOOTING, AND I THINK THERE
IS SOME OTHER EXCITED UTTERANCES
OR SPONTANEOUS STATEMENTS, BUT
THEN WHEN THE OFFICER, WHAT I
UNDERSTAND TO BE THE OBJECTION
HERE, IS THAT THE OFFICER THEN
SAYS, OKAY NOW I NEED YOU TO
TELL ME WHAT HAPPENED TONIGHT,
STAY WITH ME.
WE OBVIOUSLY KNOW THAT--
[INAUDIBLE]
[INAUDIBLE]
I NEED YOU TO TALK TO ME ABOUT
THE MEXICAN.
SHE NEVER, IT IS ALWAYS THE
MEXICAN AND THE OFFICER SAID THE

MEXICAN DID THE SHOOTING.
>> YES IT IS, SO HOW WAS THAT IN ANY OF OUR PIECES FIT INTO, THE QUESTION AND ANSWER, HOW ARE THOSE EXCITED UTTERANCES, WHEN THEY ARE RELATED BY AN OFFICER TO ESSENTIALLY BEING THE ONE THAT IS TELLING THE QUESTION, THAT SHE IS IN A STATE OF EXTREME DISTRESS.
SHE SAYS YEAH, YEAH JUST GET ME TO THE HOSPITAL, WHY ARE YOU ASKING THESE QUESTIONS?
THE FACT TO ME IT IS HARMLESS BECAUSE SHE KNEW WHO THIS GUY WAS.
SHE IDENTIFIED HIM IN COURT.
THERE ARE ALL OF THESE OTHER STATEMENTS I WOULD BE CONCERNED WITH, BUT CAN YOU TELL ME WHAT THE STATE'S POSITION IS WITH THE INTERROGATION THAT OCCURRED AFTER SOMEONE HAS BEEN SHOT, AND THEIR QUESTIONS AND ANSWERS, HOW DO THOSE BECOME DECIDED?
>> THIS WAS NOT INTERROGATION.
>> LET ME JUST SAY, QUESTION AND ANSWER.
>> BECAUSE BEFORE THE STATEMENT OF CONSENT IS HIGHLIGHTED IN THEIR BRIEF, THERE WAS A PARAGRAPH OR SO ON THE TAPE SAYING, NOW YOU SAID THAT THESE TWO MEN CAME IN.
IT WAS THE GUY THAT USED TO WORK THERE AND A BIG MEXICAN.
WHICH ONE DID THE SHOOTING?
THEN SHE RESPONDED, THE BIG MEXICAN.
IT WAS ONLY AFTER THAT THAT THE OFFICER SAID, SO THE BIG MEXICAN DID THE SHOOTING?
SHE SAID YES.
>> THE FIRST QUESTION, DID SHE EVER SAY SPONTANEOUSLY-- I DON'T KNOW IF IT MATTERS IF IT IS A BIG MEXICAN OR A MEXICAN.
I AM NOT SURE THAT MAKES A DIFFERENCE BUT WAS JIMMY MEXICAN?
>> NO.
>> SO IT WAS A MATTER OF WHETHER HE WAS A BIG MEXICAN OR A MEXICAN?

>> THOSE WERE HER WORDS.
[INAUDIBLE]
>> THAT AS IT MAY, LET ME JUST
GIVE YOU THE TIMELINE AND LET ME
TELL YOU WHAT HAPPENED.
THE 911 CALL WAS AT 4:48 A.M..
THAT IS WHEN SHE WENT OVER TO
THE SHELL STATION.
DONNELLY ARRIVED AT
APPROXIMATELY 4:50 A.M..
THEY CHOSE THIS TIME.
IT IS IN THE MORNING.
>> THEY WATCHED TELEVISION UNTIL
ABOUT 3:00.
>> YES, SO THE 911 CALL WAS AT
4:48.
SHE WENT TO THE SHELL STATION.
WHEN SHE WENT TO THE SHELL
STATION, SHE SAID, DON'T LET A
WHITE GUY AND A MEXICAN IN.
THAT WAS THE FIRST THING SHE
SAID.
SHE THEN TOLD THE SHELL
ATTENDANT THAT JIMMY DID THIS
AND THE MEXICAN.
THEN THE PARAMEDICS COME.
DONNELLY COMES AT APPROXIMATELY
4:50.
SHE SAYS THE SAME THING TO
DONNELLY.
SHE IS JUST SAYING, THEY DID IT,
DON'T LET THEM IN.
THEN THE PARAMEDICSCOME AT 4:15.
WE ARE TALKING ABOUT A
SEVEN-MINUTE PERIOD.
SHE KEEPS REPEATING THIS BECAUSE
SHE IS CONCERNED THEY ARE GOING
TO COME BACK.
SHE IS CONCERNED SHE IS GOING TO
DIE.
SHE ASKED THE PARAMEDICS ON THE
TAPE, AM I GOING TO MAKE IT?
THIS IS HER CONCERN, SO IT IS IN
THAT CONTEXT SHE HAS TOLD THREE
SEPARATE PEOPLE WITHIN A SPAN OF
LESS THAN TEN MINUTES THAT THIS
JIMMY AND THE MEXICAN DID THE
SHOOTING.
SHE TOLD THE SHELL ATTENDANT,
SHE TOLD THE PARAMEDICS AND SHE
TOLD THE OFFICER.
THE OFFICER WAS WITH HER THE
ENTIRE TIME.
THE PARAMEDICS WERE WITH HER.

HE FOLLOWED HER ON A STRETCHER.
THIS WAS ALL WITHIN A SHORT
AMOUNT OF TIME AND SHE WAS
MUMBLING, AND THEY COULD NOT
HEAR EXACTLY WHAT SHE SAID.
WITHIN THAT CONTEXT THIS TAPE
WAS MADE.
IT WAS IN NO WAY AN
INTERROGATION AND IN FACT THE
TRIAL COURT IN RELYING--
[INAUDIBLE]
THAT WAS NOT DIFFERENT THAN WHAT
SHE HAD ALREADY SPONTANEOUSLY
SAID, THE SAME THING OVER AND
OVER.
>> THAT IS TRUE.
[INAUDIBLE]
>> SHE SOUNDED LIKE SHE WAS
DYING.
[INAUDIBLE]
>> RIGHT, BUT THIS IS AN EXCITED
UTTERANCE AND UNDER CONNELLY,
WHICH WAS THE CASE THE TRIAL
COURT RELIED ON IN ALLOWING THE
TESTIMONY, THE VICTIM WAS ON THE
STREETS CRYING AND UPSET AND A
POLICE OFFICER WENT LOOKING FOR
PEOPLE AND CAME BACK AND STARTED
ASKING HER QUESTIONS, AND THE
COURT HELD EVEN IN THAT QUESTION
AND ANSWER SESSION, WHICH WAS A
HALF-HOUR LATER, AND SHE WAS NOT
PHYSICALLY INJURED TO THE EXTENT
THAT THIS WOMAN WAS, THAT WAS--
CERTAINLY THIS WOMAN CALLED 911
AND WITHIN A TEN-MINUTE PERIOD
TELLS THREE PEOPLE THE SAME
THING, REPEATING IT,
INTERSPERSED WITH AM I GOING TO
DIE AND WANTING TO SAY GOODBYE
TO HER MOTHER, CLEARLY AN
EXCITED UTTERANCE.
AS JUSTICE PERIENTE SAID EVEN IF
YOU HOLD THAT IT IS HARMLESS
BECAUSE THERE WAS TESTIMONY FROM
MR. KAHN AT THE SHELL STATION
AND THE PARAMEDIC, THE SAME
SUBSTANCE.
>> MOVING ON TO THE KOON WAIVER,
I SUBMIT THAT JUDGE BACKMAN DID
EVERYTHING THE COURT ASKED UNDER
KOON AND MUHAMMAD AND TO
GUARANTEE THAT MR. HOJAN KNEW
WHAT HE WAS DOING, BUT THAT

THERE WAS MITIGATION, VERIFIED
THAT THE ATTORNEY WAS NOT JUST
WAIVING MITIGATION TO BE LAZY
AND NOT DO HIS JOB.
>> THE ATTORNEYS AT THAT POINT,
HAD THEY DONE ANY MITIGATION AND
INVESTIGATION?
>> YES AND THE STATE PUT IT ON
THE RECORD.
>> THEY ACTUALLY PUT IT ON THE
RECORD?
NOT THE SUBSTANCE, JUST THAT
THEY INVESTIGATED IT?
>> THIS IS WHAT HAPPENED.
THE ATTORNEY TOLD THE COURT WE
HAVE SUBSTANTIAL MITIGATION,
HERE IT IS AND SHOWED MR. HOJAN
THE PROFFER AND HE READ IT IN
COURT.
>> IN WHAT FORM WAS IT AT THAT
TIME?
>> THEY DID A SUMMARY PROFFER, A
WRITTEN PROPER THAT HOJAN AND
THE COURT READ IN FRONT OF JUDGE
BACKMAN.
AND THEN THE ATTORNEY WENT TO
HAND IT TO HIM AND A LITTLE
COLLOQUY ENSUED WHERE HOJAN
REVENGEFULLY SAID, NO YOU CAN'T
HAVE IT.
THE NEXT DAY.
[INAUDIBLE]
THE WRITTEN ONE?
>> THE WRITTEN PROFFER BUT THE
ATTORNEY SAID WE HAVE
SUBSTANTIAL MITIGATION.
THE STATE, AFTER THAT, PROVIDED
THE TRIAL COURT WITH ALL OF ITS
INFORMATION.
THE STATE HAD SCHOOL RECORDS,
THE STATE HAD JAIL RECORDS, THE
STATE HAD THE EMPLOYMENT
RECORDS, CREDIT REPORTS, THERE
IN THE TRIAL COURT RECORDS.
>> I GUESS THEY PROFFERED ON THE
RECORD.
THEY HAVE THE EDUCATION RECORD
AND THE EMPLOYMENT RECORD,
DEPOSITIONS FROM THE WIFE, SO
CAN THE RECORD, IF IT WAS IN THE
TRIAL COURT, IS THERE ANY REASON
WHY THIS COURT HASN'T BEEN
SUPPLEMENTED SO WE CAN LOOK AT
THESE RECORDS?

>> NO, BUT MAY I CONTINUE?
THE STATE ALSO HAD THE
DEPOSITION.
MR. SATZ HAD DONE TWO
DEPOSITIONS, INCLUDING HIS IQ
TESTS AND EVERYTHING.
THE STATE PROVIDED THE COURT
WITH THAT AND PROVIDED THE
COURT-APPOINTED ATTORNEY WITH
THAT.
>> CAN I ASK, IT SOUNDS LIKE
THERE MUST BE SOME MITIGATION IN
THE RECORD.
WHERE IS THAT AND SINCE-- THIS
IS DIFFERENT FROM KOON BECAUSE I
THINK THE INTENT WITH KOON WAS
PRIVATE, BUT ON THE ISSUE, AND
MAYBE THIS HAS BEEN RAISED ABOUT
HOW DO WE EVALUATE FOR
PERSONALITY-- IS THAT IF THERE
WERE THINGS IN THE RECORD THAT
MIGHT BE MITIGATED AND THE JUDGE
HAS AN OBLIGATION TO LOOK AT
THOSE RECORDS?
>> YES, I BELIEVE THAT THE COURT
DID, BASED ON THE SENTENCING
MEMORANDA.
I ALSO WANTED TO POINT OUT THAT
THE STATES LISTED DURING THE
KOON WAIVER, WHICH AGAIN THE
COURT HAD AND THE ATTORNEY THEN
HAD, A LIST OF A DOZEN WITNESSES
THAT DEFENSE HAD PROVIDED TO THE
STATE.
SO, WE MAY GET TO THE SENTENCING
HEARING AND THE COURT AND ALL
PARTIES KNOW THAT THERE ARE A
DOZEN WITNESSES OUT THERE,
FAMILY MEMBERS, FRIENDS AND SO
ON.
THERE IS THE DEPOSITION OF
DR. RIBBLER, HIS IQ TEST AND ALL
OF THAT.
>> IS IT IN THE RECORD WHAT HIS
IQ IS?
>> NO IT IS NOT.
WHAT IS IN THE RECORD IS
DR. BRANNEN REVIEWED ALL OF THAT
AND BASED ON HIS REVIEW OF THE
RECORD, HE FOUND NO MITIGATION.
[INAUDIBLE]
>> DR. RIBBLER DID AN IQ TEST.
AND DR. BRANNEN WHO HAS USED
THOSE RECORDS, AND IN HIS

TESTIMONY HE SAID IN HIS REVIEW
OF THE RECORDS, WHATEVER RECORDS
HE HAD BEEN PROVIDED, THE
DEPOSITION DR. RIBBLER HAS DONE
AS WELL AS HIS RAW DATA, AS WELL
AS HIS SCORING ON THE TEST, DR.
BRANNEN FOUND NO STATUTORY
MITIGATION.
>> IS THERE ANY INVESTIGATION OF
FRIENDS, FAMILY OR ASSOCIATES?
>> WHO?
>> EITHER THE ATTORNEYS OR THE
EXPERTS?
>> THE ORIGINAL DEFENSE ATTORNEY
APPARENTLY DID AN INVESTIGATION.
THEY HAD THESE 12 WITNESSES,
APPARENTLY SINCE THEY WERE
SUBPOENAED.
THEY WERE STANDING IN COURT
READY TO TESTIFY.
IF HOJAN CHANGES HIS MIND AT THE
PENALTY PHASE THEY WERE STANDING
IN THE HALLWAY READY TO TESTIFY.
PRESUMABLY THEY HAD BEEN
INTERVIEWED.
>> DO YOU AGREED THAT THE KOON
WAIVER, THE DEFENDANT KNOWS WHAT
IS BEING WAIVED?
BUT THEN A SEPARATE ISSUE OF THE
INTEGRITY OF THE DEATH PENALTY
IN THE PROCESS, WHY WE HAVE--
HOW FAR WE SHOULD'VE GONE, THE
WHOLE IDEA TO TRY TO GET AT
LEAST WHATEVER WE CAN GET OF
THIS DEFENDANT.
SINCE IN THIS CASE, THE JUDGE
TOOK THE STEP OF APPOINTING A
SPECIAL COUNSEL AND SINCE THESE
RECORDS WERE AVAILABLE, THE ONLY
THING I'M HAVING TROUBLE
UNDERSTANDING IS WHY THE SPECIAL
COUNSEL WHO WAS SECURING A
DEFENSE LAWYER, HE IS NOT UNDER
THE APPLICATION OF THE
DEFENDANT, SAYING HE CAN PRESENT
IT.
WHY DIDN'T THEY PUT THE
DEPOSITION INTO THE RECORD SO WE
WOULD HAVE THE ABILITY TO REVIEW
IT, TO BE ABLE TO DECIDE IF
THERE IS SOMETHING REALLY THAT
IS STICKING OUT HERE THAT WOULD
BE UNUSUAL.
SO WHAT WAS HIS EXPLANATION IF

ALL OF THIS EXISTED AND ALL THE
DEPOSITIONS WERE THERE AND ALL
THE SCHOOL RECORDS WERE THERE
AND ALL OF THE EMPLOYMENT
RECORDS WERE THERE, FOR NOT
DOING MORE?
>> WELL WHAT HE DID DO IS HE HAD
HIS EXPERT, DR. BRANNEN REVIEW
THE RECORD.
THE ONLY SUPPOSITION I CAN MAKE
IS, EVEN THOUGH THEY HAD ALL OF
THESE RECORDS, ONE THERE WAS NO
MITIGATION IN THE RECORD AND
TWO, THE WITNESSES TO THE
ORIGINAL DEFENSE ATTORNEYS HAD
PREPARED TO TESTIFY ON
MITIGATION.
THERE WAS SOME ALLEGATION OF
CHILDHOOD VIOLENCE AND ABUSE BY
THE FATHER OR THE MOTHER AND
SOME ISSUES OF PERHAPS SENDING
HIM TO GERMANY, TO FAMILY
MEMBERS AND SORT OF THE
ABANDONMENT, EVEN THOUGH HE WAS
NOT ABANDONED.
AND SOME INDICATION OF
DISCIPLINARY BEHAVIOR PROBLEMS
DURING ELEMENTARY AND JUNIOR
HIGH SCHOOL IN TERMS OF HOJAN
HAVING AN EXPLOSIVE TEMPER.
THAT AND THE INDICATION THAT HE
MAY HAVE HAD SOME BRAIN DAMAGE
FROM BRAIN INJURY.
HE HAD TWO CAR ACCIDENTS AS A
CHILD.
THESE ARE THE THINGS THAT
DR. BRANNEN SAW IN THE RECORD
THAT HE SAID POSSIBLY MIGHT BE
MITIGATION.
HOWEVER, WHAT THE TRIAL COURT
AND WHAT WE ARE STUCK WITH HERE
IS THE FACT THAT EVEN WHEN THIS
COURT-APPOINTED ATTORNEY
ATTEMPTED TO PUT ON MITIGATION
FOR THE SPENCER HEARING, FROM
THE TIME BETWEEN OCTOBER AND
MARCH, THAT IS HOW LONG THIS MAN
IS WORKING ON IT.
HOJAN DID EVERYTHING HE COULD
DURING THAT FIVE MONTH PERIOD TO
PRESENT HIM FINDING MITIGATION.
HOJAN SPECIFICALLY TOLD HIS
FAMILY, HIS FRIENDS AND ALL OF
THE WITNESSES, DO NOT SPEAK TO

THIS MAN.
DO NOT SPEAK TO HIS
INVESTIGATOR, DO NOT SPEAK TO
DR. BRANNEN.
HOJAN REFUSED TO SPEAK TO THEM.
[INAUDIBLE]
I AM LOOKING AT THE SENTENCING
REPORT.
THEY SAY HE HAD HIS OWN AGENDA
REGARDING THE ATTORNEYS'
MITIGATING EVIDENCE.
DUE TO HOJAN'S-- WHAT CAN WE
GATHER FROM HIS RECORD?
WHAT I DID MAKES ME NOT WORTHY
OF LIVING.
[INAUDIBLE]
WHAT DO WE KNOW FROM THIS RECORD
THAT HOJAN DID NOT WANT
MITIGATION EVIDENCE AT THE TIME?
DO WE KNOW?
>> I DO NOT KNOW.
I HAVE MY OWN FEELINGS BUT I AM
NOT HOJAN'S ATTORNEY AND BASED
ON THE RECORD, HE JUST VERY
CALMLY AND POLITELY OVER THE
FIVE MONTH PERIOD, EVERY TIME
THE JUDGE SAID WOULD YOU LIKE TO
CHANGE YOUR MIND, HE SAID NO
SIR.
I AM A STUBBORN GERMAN MAN.
I DO NOT WANT TO CHANGE MY MIND.
IT IS MY DECISION.
I HAVE INSTRUCTED EVERYONE NOT
TO COOPERATE WITH YOU, THE
ATTORNEYS OR THE EXPERTS, AND
THAT IS WHY HE ENDED UP WITH THE
POSSIBILITY THAT MITIGATION
MIGHT BE DEVELOPED, BUT THERE
WAS NO MITIGATION BASED ON THE
EVIDENCE BECAUSE THEY COULD NOT
GET ANY ADDITIONAL INFORMATION
TO PRESENT MITIGATION.
>> HELP ME AGAIN, HE SAID HE IS
A STUBBORN GERMAN MAN?
>> THAT IS WHAT HOJAN SAID.
>> WHAT WE KNOW OF THE RECORD--
>> I BELIEVE SO, YES.
>> HE IS RAISED BY?
>> HIS FATHER AND MOTHER.
HIS FATHER WAS OF GERMAN ORIGIN.
>> HIS MOTHER WAS HISPANIC?
>> I BELIEVE SHE WAS JAMAICAN.
I BELIEVE SO.
>> SO, THE IDEA-- THAT REALLY

MEANS THE IDENTIFIER KNEW WHO IT
WAS, SO WHETHER IT WAS A MEXICAN
OR A GERMAN, SHE IDENTIFIED HE
WAS THE SHOOTER IN COURT.
>> RIGHT, AND WHEN SHE SAW HIM,
MS. NUNN KNEW HIM FROM PRIOR
OCCASIONS WHERE HE WOULD VISIT
THE RESTAURANT WITH MICKELS.
>> I JUST WANTED TO GO BACK--
AND I GOT CONFUSED.
>> I BELIEVE SHE WAS IDENTIFYING
HIM.
BUT WHAT WE HAVE HERE IS WE HAVE
A SITUATION WHERE THE TRIAL
COURT WAS TRYING TO WALK A VERY
FINE LINE BETWEEN FOLLOWING THE
DICTATE OF KOON AND MUHAMMAD IN
GETTING AS MUCH MITIGATION AS IT
COULD WITH THE SPENCER HEARING
WHILE RESPECTING HOJAN'S
ATTORNEY CLIENT-PRIVILEGES WITH
HIS ATTORNEY AS WELL AS HIS
RIGHT TO DETERMINE HOW MUCH TO
COOPERATE AND WHAT TO DO IN
TERMS OF THE TRIAL.
FOR EXAMPLE, HOJAN TOLD HIS
PARENTS, DO NOT TESTIFY IN A
COURT CASE.
THE COURT-APPOINTED ATTORNEY
GAVE THEM AN ADDITIONAL MONTH.
I WILL ISSUE A BENCH WARRANT IF
THAT WILL HELP, AND HE DID BUT
THEY CAME INTO COURT.
HIS FATHER DID TESTIFY ON THE
SECOND DAY OF THE SENTENCE
HEARING WHICH WAS A MONTH LATER,
AND FABRICATED HIS CHILDHOOD.
HE WAS PUT IN A POSITION OF
SAYING, IS IT TRUE THAT YOU ARE
WRONG ABOUT THIS AND YOU ARE
WRONG ABOUT THAT?
THE MOTHER GOT UP AND SAID--
TOLD ME NOT TO.
THAT WAS THE SITUATION THE TRIAL
COURT WAS IN.
THE TRIAL COURT DID EVERYTHING
IT COULD, GIVEN HOJAN'S WISHES
AND THE WAY HE WAS ORCHESTRATING
THE MITIGATION OUTSIDE OF THE
COURT, THAT IT COULD PRESENT IT
AND BASED ON THE EVIDENCE BEFORE
THE COURT ONLY FOUND TO BE
MITIGATED, ONE, STATUTORY, NO
PRIOR RECORD AND, TWO,

NON-STATUTORILY.
HE WAS A GOOD FAMILY MEMBER AND
BEHAVED WELL IN JAIL AND COURT
AND, FROM THE RECORDS, HE SAID
HE DID.
HE WAS VERY RESPECTFUL AND BASED
ON THAT I BELIEVE THAT THE COURT
PROPERLY SENTENCED MR. HOJAN TO
DEATH.
>> THANK YOU VERY MUCH.
ANY REBUTTAL?
>> THAT BEING SAID, FIRST OF ALL
WHEN SHE INITIALLY WENT TO THE
GAS STATION, SHE TOLD THE GAS
STATION ATTENDANT NOT TO LET
JIMMY AND A BIG MEXICAN GUY IN.
SHE SAID JIMMY DID IT.
SHE SAID IT TWICE IN THE GAS
STATION BEFORE SHE MADE THE
TELEPHONE CALLS AND, WHEN
PARAMEDICS ARRIVED SHE DESCRIBED
THE BIG MEXICAN AS THE SHOOTER,
SO HER INITIAL STATEMENT WAS NOT
THAT THE MEXICAN SHOT HER.
IT WAS JIMMY DID IT, JIMMY DID
IT AND THE MEXICAN DID IT, AFTER
SHE MADE HER PHONE CALL.
IN CONNELLY, THE REASON IT WAS
CONSIDERED EXCITED UTTERANCE IS
INITIALLY THE STATEMENT MADE BY
THE WOMAN, SHE WAS HYSTERICAL
AND SCREAMING, AND THE POLICE
OFFICER RETURNED 35 MINUTES AND
SHE WAS STILL HYSTERICAL AND
SCREAMING, AND THE COURT FOUND
THAT HER EMOTIONAL CONDITION HAD
NOT CHANGED AND SHE WAS STILL
UNDER THE INFLUENCE OF THE
INCIDENT AT THE TIME.
AND THAT'S WHY IS IT WAS AN
EXCITED UTTERANCE.
THE NEAREST THAT I COULD
ASCERTAIN THAT THOSE RECORDS
WERE THERE WAS THE COURT HAD
GIVEN THEM TO ITS COUNSEL TO
EXAMINE, TO DEVELOP FURTHER
MITIGATION.
I DID NOT FIND RECORDS.
>> THE PROBLEM WE HAVE RIGHT NOW
IS THAT THE PROFFER THE STATE
MADE, WHAT YOU ARE SAYING IS YOU
WANT TO BE ABLE TO PUT IT ON AS
PART OF THE RECORD.
>> OKAY, MALDOFF TOLD ME HE

BELIEVED HE GAVE THEM TO
DR. BRANNEN AND DR. BRANNEN DOES
NOT RECALL, SO WE HAVE NO IDEA
WHERE THEY ARE.
THE ISSUE HERE IS THAT YES,
JUDGE BACKMAN TRIED TO WALK A
FINE LINE, TO FOLLOW THE CASE
BUT BACKMAN DID NOT DO THAT
BECAUSE HE ACQUIESCED HOJAN'S
DESIRE.
EVERYONE DID, INCLUDING THE CORE
COUNSEL.
NO MATTER HOW EGREGIOUS THIS
CRIME WAS, THOSE RULES WERE PUT
IN PLACE FOR A REASON AND A CASE
WILL COME UP THAT WILL NOT BE
THIS EGREGIOUS AND WE WILL LOOK
TO THOSE RULES AGAIN.
RESPECTFULLY, I ASK THAT YOU
REVERSE THE SENTENCE OF DEATH
AND FOR A NEW SENTENCING
PROCEDURE.
>> THANK YOU BOTH FOR YOUR
ARGUMENTS.
THE COURT WILL BE IN RECESS FOR
TEN MINUTES.
>> THE SUPREME COURT IS NOW IN
RECESS.