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Robert J. Bailey v. State of Florida

SC07-748

>> THE NEXT CASE ON THE COURT'S DOCKET IS BAILEY V. STATE.

>> MR. McLAIN.

>> MAY IT PLEASE THE COURT, MY NAME IS WILLIAM MCLAIN REPRESENTING ROBERT BAILEY. HE WAS CONVICTED OF THE SHOOTING DEATH OF A PANAMA CITY BEACH POLICE OFFICER, KEVIN KIGHT, DURING A TRAFFIC STOP AT SPRING BREAK OF 2005.

THE TRIAL COURT IMPOSED THE DEATH SENTENCE, AND THE ISSUE I WANT TO ADDRESS THIS MORNING IS WHETHER THAT SENTENCE IS PROPORTIONALLY WARRANTED. I THINK AN EVALUATION OF THE NATURE OF THE OFFENSE, THE AGGRAVATION, THE MITIGATION INDICATES THAT THIS IS NOT A DEATH PENALTY CASE.

FIRST, THE FACTUAL SCENARIO SHOWING THE NATURE OF THE OFFENSE.

YOU HAVE TO UNDERSTAND THAT ROBERT BAILEY AND TWO OF HIS FRIENDS, TORI CRAWFORD AND ROBERT BRAZ, DROVE DOWN FROM WISCONSIN TO GO TO SPRING BREAK. THEY ENDED UP IN PANAMA CITY, THEY HAD DRIVEN THROUGH UNTIL NIGHT, PROBABLY HADN'T SLEPT FOR 36 HOURS.

THEY END UP BEING -- HAVE A TRAFFIC STOP BECAUSE THEY WERE SORT OF INTERFERING WITH TRAFFIC WHEN THEY STOPPED IN THE STOP-AND-GO TRAFFIC ON PANAMA CITY BEACH.

AS OFFICER KIGHT WAS DOING A LICENSE CHECK ON MR. BAILEY, HE WAS DRIVING THE VEHICLE, BAILEY FOR THE FIRST TIME INFORMS HIS FRIEND CRAWFORD THAT HE WAS AFRAID OF BEING ARRESTED, THAT

HIS DRIVER'S LICENSE WAS
INVALID, AND HE HAD A PAROLE
VIOLATION OUTSTANDING FOR NOT
KEEPING UP WITH HIS PAROLE
OFFICER FROM WISCONSIN.

>> CAN I ASK YOU SOMETHING
DIRECTLY RELATED TO THIS FACTUAL
PART OF THE SCENARIO?

>> YES.

>> HOW LONG WAS IT FROM THE TIME
THE CAR WAS STOPPED AND THE TIME
WHEN THE SHOTS WERE FIRED?

>> IT WAS A NUMBER OF MINUTES,
BECAUSE THE OFFICER TOOK THE
LICENSE AND --

>> DID THE RECORD REFLECT THE
LENGTH OF TIME?

>> I WOULD HAVE TO CHECK TO SEE
THE LENGTH OF TIME.

HE DID HAVE TO DO A LICENSE
CHECK WHICH INCLUDED A COMPUTER
CHECK.

HE DIDN'T HAVE A COMPUTER IN HIS
OWN CAR, AND ANOTHER OFFICER
ACTUALLY WAS HELPING HIM GET THE
COMPUTER CHECK DONE VIA RADIO.
SO THERE WAS A FEW MINUTES THAT
HAD PASSED.

DURING THAT TIME CRAWFORD, WHO
BECAME STATE WITNESS, TESTIFIED
TO THE DISTRAUGHT NATURE OF
MR. BAILEY'S MENTAL STATE.
HE WAS PANICKY, HE WAS SCARED,
HE HAD --

>> ISN'T THIS CASE JUST ALMOST,
I MEAN, IT IS ACTUALLY WORSE
THAN OUR BURNS CASE WHICH WAS
THE SHOOTING OF A POLICE
OFFICER, HIGHWAY PATROLMAN DOWN
IN MANATEE COUNTY, AND HERE
THERE ARE TWO AGGRAVATORS.
IN BURNS THERE WAS ONE
CONSOLIDATED AGGRAVATOR.
THERE WAS MORE MITIGATION IN
BURNS.

I JUST -- IT SEEMS TO ME IT'S
HARD TO SAY THAT THIS CASE IS
NOT PROPORTIONAL TO WHAT WE DID,
WHAT WE UPHELD AS A DEATH
SENTENCE IN THE BURNS CASE.

>> YOUR HONOR, I WOULD TAKE
ISSUE WITH THE ISSUE THERE'S
LESS MITIGATION IN THIS CASE.

THAT IS A DISTINGUISHING FACTOR
BETWEEN THIS CASE AND BURNS IS
IF THERE IS -- THERE WAS NO
MENTAL MITIGATION AT ALL IN
BURNS.

NONE.

MINIMAL NONSTATUTORY MITIGATION.

IN THIS CASE WE HAVE SOME

SIGNIFICANT MENTAL MITIGATION.

EVEN THOUGH THE TRIAL COURTS --

>> BURNS THERE WERE STATUTORY
MITIGATION AND THERE WAS NO

PRIOR CRIMINAL --

>> NO MENTAL MITIGATION.

>> I UNDERSTAND THAT.

>> YEAH.

HE HAD --

>> THERE'S NO MENTAL, THERE'S NO
STATUTORY MITIGATION HERE.

>> LOOKING AT THE COMPLETE FACTS
OF BURNS, BURNS WAS STOPPED
WHILE HE WAS IN THE PROCESS OF
TRAFFICKING COCAINE EVEN THOUGH
HE HAD NO PRIOR CRIMINAL
HISTORY.

HE WAS TRAFFICKING COCAINE AT
THE TIME OF THE STOP WHICH
PROMPTED HIM TO SHOOT THE
OFFICER --

>> LET ME GO BACK --

>> BECAUSE THE COCAINE WAS
DISCOVERED.

>> LET ME GO BACK TO THE
AGGRAVATION IN THIS CASE.

>> UH-HUH.

>> I'M HAVING A HARD TIME WITH
YOUR ARGUMENT IN THIS RESPECT.

HERE IS A -- HOW OLD IS HE AT
THE TIME?

>> MR. BAILEY WAS 22 AT THE
TIME.

>> A 22-YEAR-OLD THAT IS ON
PAROLE FOR ARMED BURGLARY.

HE IS, HE IS STOPPED, AND OR,
YOU KNOW, STOPPED IN TRAFFIC.

THERE'S A CELL PHONE CALL TO
HIS -- HE'S GOT HIS GUN ON HIM.

HE SAYS IN HIS CELL PHONE CALL
TO HIS GIRLFRIEND ABOUT, YOU

KNOW, BASICALLY HE'S GOING TO
NEED TO POP THIS LAW

ENFORCEMENT, POLICE, AND THEN HE
DOES THAT.

AND HE DOES IT TO AVOID ARREST,

AND HE DOES IT ALTHOUGH THE CCP AGGRAVATOR WASN'T FOUND, BUT IT WASN'T EVEN, IT'S NOT LIKE THERE -- HE KNEW HE WAS GOING TO DO IT BEFORE THE OFFICER EVEN APPROACHES THE VEHICLE. AND, YOU KNOW, IN TERMS OF WE ALWAYS TALK ABOUT WHAT AGGRAVATORS ARE WORSE, WELL, YOU KNOW, THERE ARE THESE -- AVOID ARREST SOMETIMES, IN MY VIEW, HAS BEEN USED IN AN ATTENUATED WAY.

WHEN YOU'RE TALKING ABOUT THAT IT IS A LAW ENFORCEMENT OFFICER THAT IS, YOU KNOW, TRYING TO MAKE A LEGITIMATE STOP, AND THIS MAN WHO IS ON PAROLE FOR ARMED BURGLARY MAKES A DECISION THAT HE'S GOING TO KILL THIS POLICE OFFICER, TO ME THIS IS A VERY AGGRAVATED CASE.

NOW, SO I'M NOT SURE I UNDERSTAND WHETHER IT'S LIKE BURNS OR NOT LIKE BURNS HOW THIS SENTENCE IS NOT PROPORTIONAL TO OTHER CASES WHERE WE HAVE IMPOSED THE DEATH PENALTY.

>> I WOULD DRAW THE COURT'S ATTENTION TO THE HARDY CASE, WHICH I'VE CITED --

>> WELL, YOU KNOW, HARDY WAS 18 AT THE TIME?

>> YES, YOUR HONOR.

>> HARDY WAS -- HE TRIED TO KILL HIMSELF BEFORE HE KILLED THE POLICE OFFICER.

I DON'T -- AND, HARDY, WAS HE ON PAROLE FOR ARMED BURGLARY?

>> HE WASN'T ON PAROLE FOR ARMED BURGLARY.

>> WHAT WAS HIS -- HE DIDN'T WANT TO BE ARRESTED FOR WHAT REASON?

>> BECAUSE HE HAD BEEN INVOLVED IN TWO PRIOR SHOOTING INCIDENTS WHICH THAT CAME INTO EVIDENCE DURING THE PENALTY PHASE, AND HE --

>> SO HARDY IS YOUR CLOSEST CASE AS TO WHY THIS IS NOT PROPORTIONAL.

>> YES, YOUR HONOR, THAT IS OUR CLOSEST CASE BECAUSE EVEN THOUGH

HE DIDN'T HAVE A PRIOR CONVICTION, THE MOTIVATION FOR HIS WANTING TO AVOID ARREST WAS ACTUALLY MORE AGGRAVATING -- >> [INAUDIBLE] CONSIDERED THE FACT THAT BEFORE HE -- THAT HE ATTEMPTED TO KILL HIMSELF AS A -- JUST THE TOTALITY OF THE CIRCUMSTANCES?

I MEAN, HE ENDED UP SIGNIFICANTLY BRAIN DAMAGED AS A RESULT OF HIS SELF-INFLICTED WOUNDS.

>> YES, YOUR HONOR.

THERE IS -- LOOKING BACK AT THE CONTEXT, I THINK WE HAVE TO LOOK AT THE MITIGATION THAT'S AVAILABLE --

>> AND LET ME ALSO SAY YOU DON'T THINK THERE'S A HUGE DIFFERENCE BETWEEN COURT LOOKING AT AN 18-YEAR-OLD AND A 24-YEAR-OLD?

>> 22-YEAR-OLD, YOU KNOW YOUR HONOR, AND I THINK LOOKING AT THE CONTEXT OF HIS MENTAL STATE, THE MENTAL MITIGATION THAT WAS PRESENT, THAT HAS TO BE TAKEN IN CONTEXT BECAUSE THE BEHAVIORAL DIFFICULTIES AND FUNCTIONING PROBLEMS THAT HE HAS WAS DIRECTLY RELATED TO THE IMPULSIVE NATURE OF THIS KILLING.

EVEN THOUGH HE WAS MAKING THE DECISION -- HE WAS MAKING THE POOR DECISION, OBVIOUSLY, TO SHOOT THE OFFICER, BUT HIS MENTAL IMPAIRMENTS, LOW IQ, IQ OF 75 --

>> AND HE OBTAINED HIS GED --

>> HE MANAGED TO OBTAIN HIS GED --

>> AND DONE PRETTY WELL ON THOSE TESTS.

>> ACTUALLY HE PASSED BY SIX POINTS, HE HAD A 236.

SO THAT WASN'T A STERLING PASSING RATE ON HIS GED.

HE WAS DIAGNOSED WITH ADHD WHEN HE WAS 11 --

>> YOU KNOW, YOU THROW AROUND THESE -- I MEAN, THEY'RE NOT LABELS, THEY'RE GENUINE ISSUES, BUT OBVIOUSLY HE MADE A BAD

DECISION AS EVERY SINGLE DEFENDANT ON DEATH ROW OTHER THAN THOSE THAT MAYBE ARE THESE CONTRACT KILLERS THAT ARE REALLY SORT OF SOPHISTICATED IN THE WAY THEY DO IT.

EACH OF THESE MURDERS THAT WE SEE INVOLVE INDIVIDUALS THAT EITHER HAVE POOR REASONING SKILLS OTHERWISE THEY WOULDN'T BE IN BROAD DAYLIGHT SHOOTING A POLICE OFFICER.

SO THAT SPEAKS FOR ITSELF, BUT HE WAS ON PAROLE, HE ENDED UP -- HE MADE A CONSCIOUS DECISION, IF WE BELIEVE THE STATE -- HE MADE A CONSCIOUS DECISION TO HAVE A GUN WITH HIM, HE MADE A CONSCIOUS DECISION TO SHOOT THIS POLICE OFFICER, AND -- ANYWAY, BUT, YOU KNOW, I'M JUST NOT CONVINCED THAT THIS IS REMOTELY LIKE HARDY.

>> WELL, THAT'S THE --

>> AND THAT'S YOUR BEST CASE.

>> THAT'S THE BEST COMPARABLE CASE THAT I HAVE, AND I DO THINK IT'S COMPARABLE BASED UPON IF YOU REALLY LOOK AT THE MITIGATION IN THIS CASE.

IT WAS MORE THAN ADHD, BORDERLINE PERSONALITY DISORDER, PTSD, BIPOLAR DISORDER SYMPTOMS, SUBSTANCE ABUSE FROM A YOUNG AGE WHICH INCLUDED DRINKING GASOLINE.

>> WHEN YOU SAY, YOU KNOW, AGAIN -- AND I THINK IT DOES DISSERVICE TO THOSE THAT ARE DIAGNOSED AS MENTALLY ILL. WHEN YOU SAY HE HAS BIPOLAR SYMPTOMS, WAS HE DIAGNOSED AS BEING A -- WITH BIPOLAR?

>> THE DIAGNOSIS WASN'T COMPLETE, BUT BOTH THE DEFENSE EXPERT AND THE STATE EXPERT NOTED THE BIPOLAR SYMPTOMS AND THAT, AND THAT THROUGH FAMILY HISTORY HE MAY VERY WELL HAVE BEEN BIPOLAR ALTHOUGH THEY DID NOT COMPLETE THE DIAGNOSIS ON THAT MATTER.

THEY DID DIAGNOSE MAJOR DEPRESSION, SUBSTANCE ABUSE, HIS

LOW IQ LEVEL, HIS PROBLEMS WITH FUNCTIONING, MAKING DECISIONS -->> ISN'T THIS A MAJOR PROBLEM, THOUGH, THAT YOU HAVE WITH MITIGATION, AND THAT IS THAT THE TRIAL JUDGE, IN ESSENCE, REJECTED THE CASE [INAUDIBLE] IS THAT COMBINED WITH RELIANCE ON THE STATE'S EXPERT, THE TRIAL JUDGE EITHER REJECTED OR GAVE VERY, VERY MINIMAL WEIGHT TO THE CLAIMS OF MITIGATION.

IN OTHER WORDS, I READ THE TRIAL JUDGE'S EVALUATION OF THE CASE FOR MITIGATION AS EITHER REJECTING IT OR GIVING IT VERY, VERY MINIMAL WEIGHT.

AND ISN'T THAT WHERE WE HAVE TO GO WITH THAT?

THAT IS THAT IF IT WAS THE TRIAL JUDGE THAT HAD TO EVALUATE, APPARENTLY HE CONCLUDED THAT ONE OF THE EXPERTS FOR THE DEFENDANT JUST REALLY WAS OVER THE TOP IN TERMS OF TRYING TO STATE A CASE OF MITIGATION FOR THE DEFENDANT. AND THEN HE FOUND SOME THINGS, FOR INSTANCE, APPARENTLY -- AND I'M NOT SURE, MAYBE YOU CAN HELP US -- WHERE THE DEFENDANT WAS EITHER REPORTED OR WHATEVER OF ESSENTIALLY MAKING STATEMENTS THAT, WELL, YOU KNOW, I'M GOING TO AVOID --

>> THERE WASN'T --

>> THE DEATH PENALTY IN THIS --

>> THERE WAS A MALINGERING ISSUE.

>> -- MENTAL ILLNESS, AND SO THE JUDGE APPARENTLY HAD PLENTY OF MATERIAL IN WHICH TO REALLY QUESTION THIS.

SO WHAT DO WE DO WITH THAT, WHERE IT LOOKS LIKE IF THE, IF THE TRIAL JUDGE HAD ACCEPTED THAT, THAT YOU CERTAINLY WOULD HAVE A STRONG CASE HERE.

BUT THE TRIAL JUDGE DIDN'T DO THAT.

>> WELL, BUT THE TRIAL JUDGE DID MAKE FINDINGS OF MENTAL MITIGATION WHICH WAS CONSISTENT WITH THE STATE EXPERTS WHO ALSO CONCLUDED HE HAD A LOW IQ OF

ABOUT 75, HE HAD BIPOLAR DISORDER, I MEAN, BIPOLAR SYMPTOMS.

HE HAD BORDERLINE PERSONALITY DISORDER, AND ALL OF THESE DOVETAIL DIRECTLY INTO THE FACT THAT HE WAS IN A -- HIS POOR DECISION MAKING, AND HE WAS IN A PANICKED, FEARED STATE IN THE CONTEXT OF THE OFFENSE.

SO --

>> THE JUDGE FOUND AT ONE POINT CONSISTENT WITH THE STATE'S EXPERT THAT SOME OF THESE SCORES COULD HAVE WELL BEEN FROM MALINGERING.

IN OTHER WORDS, FROM INTENTIONALLY TRYING TO MAKE THE SCORES.

AND THEN IF WE COMBINE THAT WITH THE ACTUAL RECORDING OF THE DEFENDANT, YOU KNOW, MAKING THESE STATEMENTS THAT, NO, HE'S GOING TO BEAT THIS AND END UP IN A MENTAL HOSPITAL, HE SEEMED TO BE VERY KNOWLEDGEABLE AND ARTICULATE.

BECAUSE, IN ESSENCE, AS I RECALL HE SAID, YOU KNOW, LOOK, I CAN BEAT THIS.

AND THEN, YOU KNOW, ALL THEY'RE GOING TO DO IS SEND ME AWAY FOR FIVE YEARS TO A MENTAL PLACE, AND THEN THEY'RE GOING TO HAVE TO LET ME OUT AFTER THAT.

AND, YOU KNOW, INCREDIBLE STATEMENTS REALLY, BUT NEVERTHELESS, MY PROBLEM WITH IT IS THAT THE JUDGE EITHER -- AS I SAID BEFORE, THE WAY I VIEW IT EITHER REJECTED OR GAVE VERY MINIMAL WEIGHT TO WHAT COULD HAVE POTENTIALLY, YOU KNOW, BEEN A VERY STRONG CASE FOR MITIGATION.

SO WHAT DO WE DO WITH THAT?

>> I THINK YOU HAVE TO LOOK AT -- I UNDERSTAND THAT THERE WAS A QUESTION OF MALINGERING, BUT EVEN IF YOU JUST LOOK AT WHAT THE TWO STATE EXPERTS TESTIFIED TO, HE STILL HAD THESE CONSTELLATION OF MENTAL PROBLEMS.

THIS IS NOT -- IT WASN'T AN ISSUE BETWEEN THE EXPERTS AS TO DOES THIS PERSON SUFFER FROM MENTAL PROBLEMS OR NOT, IT WAS A MATTER OF HOW MUCH DID IT IMPACT HIS FUNCTIONING.

I THINK THE COURT'S ORDER WENT OFF ON TALKING ABOUT THE AXIS FIVE NUMBERS WHICH DEALS WITH GLOBAL FUNCTIONING OF AN INDIVIDUAL, THAT TESTING SCORE BEING THE REAL SUBJECT OF THE DEBATE.

IT WASN'T A DEBATE OVER DOES HE OR DOES HE NOT HAVE THIS CONSTELLATION OF MENTAL PROBLEMS, IT WAS A QUESTION OF DEGREE OF IMPAIRMENT OF HIS FUNCTIONING.

BUT ANYBODY WITH THESE KINDS OF IMPAIRMENTS AS EVEN THE STATE EXPERTS, DR. McCLAREN IN PARTICULAR, TESTIFIED TO, THEY'RE GOING TO BE PRONE TO, AGAIN, POOR DECISION MAKING, IMPULSIVE BEHAVIOR, THEY CAN'T SEEM TO MAKE RATIONAL DECISIONS GIVEN THEIR IQ OF 75 IN THIS CASE, AND THAT WAS FROM THE STATE'S EXPERT'S EVALUATION WHICH TOOK INTO ACCOUNT MALINGERING.

NO ONE CAME UP WITH MORE THAN MID 70s FOR THIS INDIVIDUAL. YOU LOOK AT THAT ENTIRE CONSTELLATION OF THINGS, AND THE FACT THAT THE SYMPTOMS OF THOSE DOVETAIL RIGHT INTO HOW THIS CRIME OCCURRED, I.E. PANICKED, POOR JUDGMENT, IMPULSIVE, KIND OF NONTHINKING REACTIONS, CAN'T -- WHAT THESE INDIVIDUALS DON'T KNOW IS THEY DON'T KNOW HOW TO MAKE DECISIONS, OR KNOW THERE'S ALTERNATIVES TO DECISIONS TO BE MADE.

IN OTHER WORDS, THERE WAS AN ALTERNATIVE TO HIS NOT BEING ARRESTED AND FEAR OF GOING BACK TO PRISON.

OBVIOUSLY, KILLING A POLICE OFFICER IS NOT A WAY TO INSURE THAT.

BUT YOU LOOK AT THAT

CONSTELLATION OF MENTAL PROBLEMS, THE SYMPTOMS THAT IT IMPOSES AND HOW THAT DOVETAILS TO THE OFFENSE, AND I THINK THERE'S STILL A SIGNIFICANT CASE FOR MITIGATION HERE.

AND I, AGAIN, I THINK IT COINCIDES WITH WHAT HAPPENED WITH HARDY IN THE HARDY CASE. AGAIN, I HAVE RAISED THE ISSUE OF THE IMPROPER ARGUMENTS BY THE PROSECUTOR IN THIS CASE.

I THINK I'VE ADDRESSED THOSE IN THE BRIEF, AND I KNOW THIS COURT WILL SIMPLY HAVE TO READ THE ARGUMENT TO MAKE THE ASSESSMENT.

IT WAS UNOBJECTED TO, BUT THERE WAS A CONTINUUM THROUGH THE ARGUMENT OF A KIND OF A CHARACTER ASSASSINATION ON THE DEFENDANT ASCRIBING HIM AS EVIL IN THE COMMUNITY, AND ALSO AT ONE POINT OF THE END OF THE ARGUMENT PHASE SUGGESTED THAT THIS DEFENDANT WAS NOT EVEN WORTHY OF THE MITIGATION --

>> AND SO ON THAT ONE, ON THESE ARGUMENTS WERE ANY OF THEM OBJECTED TO?

>> NO, THEY WERE NOT.

>> SO AS YOU'RE WELL AWARE WE WOULD HAVE TO LOOK AT THESE ARGUMENTS AND DECIDE THAT INDIVIDUALLY AND COLLECTIVELY THAT THEY MEET THE REQUIREMENT FOR FUNDAMENTAL ERROR.

>> YES.

>> AND WE WOULD LOOK AT IT BOTH SEPARATELY FOR THE GUILT-PHASE PART AND THE PENALTY.

WE WOULDN'T PUT THEM TOGETHER. SO IS YOUR BEST ARGUMENT THAT THE -- IF WE FIND ANY OF THEM TO BE ERRONEOUS HAPPENED IN THE GUILT PHASE, PENALTY PHASE, OR BOTH?

I DIDN'T LOOK BACK TO SEE WHERE THEY WERE.

>> IT STARTED IN THE GUILT PHASE.

>> WHEN YOU SAY IT STARTED IN THE GUILT PHASE, DON'T WE NEED TO LOOK AND SAY -- DON'T WE NEED TO LOOK AT THE GUILT PHASE

ARGUMENTS?

>> YES, YOUR HONOR.

>> NONE OF THEM WERE OBJECTED TO, YOU AGREE?

>> I AGREE.

>> OKAY.

SO IN THE GUILT PHASE, WHAT WERE THE -- HOW MANY ARGUMENTS THAT YOU SAY WERE IMPROPER WERE MADE IN THE GUILT PHASE?

>> OH, I HAVE TO --

>> BUT THAT'S IMPORTANT TO US, WE DON'T LOOK COLLECTIVELY AT THE --

>> I AGREE.

>> IN THE PENALTY PHASE.

>> I AGREE.

AND IT STARTED IN HIS OPENING STATEMENT WHERE HE DREW -- LET ME HAVE JUST A MOMENT.

>> WELL, IF YOU WANT -- I DON'T WANT TO WASTE -- YOU CAN TAKE A LOOK AND DO THAT ON REBUTTAL, IF YOU'D LIKE.

>> OKAY, THANK YOU.

>> YOU WERE SAYING IT ENDED IN THE PENALTY PHASE, AND I WAS JUST THINKING WE DON'T EVER COLLECTIVELY LOOK AT BOTH GUILT AND PENALTY PHASE TO DECIDE A FUNDAMENTAL ERROR ISSUE.

>> I UNDERSTAND.

I WOULD SUGGEST FOR THE PENALTY PHASE QUESTION YOU COULD LOOK AT THE GUILT PHASE ARGUMENT IN COMBINATION WITH WHAT HAPPENED --

>> HAVE WE EVER DONE THAT IN A CASE?

>> WELL, IT WAS A THEMATIC APPROACH.

>> HAVE WE EVER DONE THAT IN ANY OF OUR FUNDAMENTAL ANALYSIS?

>> I'M NOT AWARE OF THAT.

>> I'M NOT EITHER.

>> I'LL SAVE WHAT TIME I HAVE FOR REBUTTAL.

THANK YOU.

>> GOOD MORNING, CHIEF JUSTICE QUINCE.

MAY IT PLEASE THE COURT,
CHARMAINE MILLSAPS REPRESENTING

THE STATE.

JUSTICE KENNEDY, I WANTED TO ANSWER YOUR QUESTION ABOUT TIMING.

ONE OF THE EXHIBITS THAT WAS INTRODUCED THAT WAS VERY GOOD ON WITH THE TIMELINE, AND IT'S EXHIBIT NUMBER 24, AND YOU'LL SEE A TIMELINE.

WHAT HAPPENED WAS CLAYTON JORDAN, WHO WAS THE CASE AGENT, PREPARED A TIMELINE BASED ON, FOR INSTANCE, WE HAVE CELL PHONE RECORDS HERE.

WE HAVE NOT TIME TO SECONDS, BUT WE HAVE TIME INVOLVED IN THIS CASE TO MILLISECONDS BECAUSE WE HAVE BOTH POLICE OFFICERS TALKING TO DISPATCH, AND THE -- WE HAVE CELL PHONE RECORDS WHERE THE DEFENDANT CALLED HIS GIRLFRIEND.

AND SO YOU'LL SEE THIS ENCOUNTER STARTED AT 10:20.

I'M NOT GOING TO USE THE MILLISECONDS.

AND OFFICER -- SERGEANT KIGHT RADIOED AND IDENTIFIED HIMSELF, NUMBER 18, THAT'S HIS -- AND SAID, "I'M SHOT."

AND THAT HAPPENED AT 10:30 P.M. SO WE'VE GOT 10:20-10:30.

THIS IS A TEN-MINUTE WINDOW. BUT THIS TIMELINE IS VERY DETAILED.

IN THE BLACK BOXES ARE THE MILLISECONDS.

ACROSS THE TIMELINE IS JUST THE MINUTES.

BUT ANYWAY, WE ARE TALKING FROM 10:20 P.M. TO 10:30 P.M. WHEN THE ENCOUNTER FIRST -- HE PULLS MR. BAILEY OVER.

AND WHAT HAPPENS IS BAILEY, ON MARCH 9TH ABOUT 18 DAYS BEFORE THIS CRIME, IS PUT ON HOUSE DETENTION BY HIS PAROLE OFFICER. HE IS ON PAROLE UP IN WISCONSIN. AND HE IS PUT ON HOME DETENTION, AND THAT'S HOUSE ARREST.

WISCONSIN PAROLE OFFICER STAFFORD TESTIFIES IN PENALTY PHASE AND SAYS HE'S NOT SUPPOSED TO LEAVE HIS HOUSE.

NOT SUPPOSED TO STEP OUTSIDE HIS HOUSE.

THAT WAS WHAT HE WAS ON.

AND INSTEAD OF DOING THAT, THREE DAYS BEFORE THIS CRIME THE DEFENDANT'S GRANDFATHER RENTS A WHITE DURANGO, DODGE DURANGO, AND THIS DEFENDANT GOES DOWN FIRST TO PANAMA -- PENSACOLA, AND THEN OVER TO PANAMA CITY.

>> CAN I JUST GO BACK, HE WAS ON -- HAD HE SERVED TIME IN PRISON?

>> YES, YOUR HONOR.

>> OKAY.

AND I NOTE THAT THE AGGRAVATOR WASN'T THE PRIOR VIOLENT FELONY, SO THE ARMED BURGLARY WAS NOT A PRIOR VIOLENT FELONY?

>> YOUR HONOR, I WOULD SAY NO. I DON'T KNOW --

>> I MEAN, THE STATE --

>> THE STATE DID NOT SEEK THAT, AND THE STATE DID NOT DO ANYTHING OTHER THAN INTRODUCE THE CONVICTION THROUGH THE PAROLE OFFICER, SO I KNOW NO DETAILS OF THE ARMED BURGLARY. CONVICTION.

>> WELL, SEE, HAVE THERE BEEN PAROLE VIOLATION WARRANTS OR SOMETHING?

I THOUGHT IN ADDITION TO HIM HAVING BEEN PUT ON HOUSE ARREST THAT HE ACTUALLY HAD AN OUTSTANDING WARRANT.

HE KNEW HE HAD AN OUTSTANDING WARRANT, AND THAT WAS REALLY THE MOTIVATION OF HIM SAYING TO HIS FRIEND, I'M NOT GOING BACK TO JAIL.

I KNOW I HAVE AN OUTSTANDING WARRANT, SO ISN'T THAT THE MOTIVATION FOR THE MURDER?

>> WELL, HE DOES -- PAROLE OFFICER STAFFORD FROM WISCONSIN DOES TESTIFY THAT HE ISSUED A WARRANT FOR HIS ARREST, YES. BAILEY HAD A WARRANT FOR HIS ARREST.

NOW, OFFICER -- SERGEANT KIGHT DID NOT HAVE A COMPUTER IN HIS, IN HIS PATROL TRUCK, SO HE --

THERE WAS NO FROM THE DISPATCH,
THEY DON'T SEEM TO HAVE -- THE
OFFICER DOES NOT SEEM TO HAVE
BEEN AWARE OF THE WARRANT, THE
OUTSTANDING WARRANT.

BUT BAILEY KNOWS HE'S IN TROUBLE
NO MATTER WHAT THEY FIND OUT.
REMEMBER, HE'S NOT ONLY, HE'S
NOT ONLY SUPPOSED TO BE IN
WISCONSIN UNDER HOUSE ARREST,
HE'S A THOUSAND MILES AWAY.
HE DRIVING ON A REVOKED LICENSE.
WHAT HE GIVES THE OFFICER IS NOT
A DRIVER'S LICENSE, IT'S A
WISCONSIN ID CARD, AND WE HAVE
THAT AS ONE OF THE EXHIBITS.
SO THE OFFICER IS WRITING TWO
TICKETS.

HE FILLS OUT ONE FOR THE LICENSE
BEING REVOKED, AND SOMETHING
HAPPENS WHILE HE'S FILLING OUT
THE SECOND TICKET AND ONLY PUTS
THE NAME THERE.

BUT WE FIND THE DEFENDANT --
BAILEY'S WISCONSIN ID IS STILL
IN THE SERGEANT'S CITATION
WRITING --

>> [INAUDIBLE] ON THE TIMELINE
THAT WHEN THE CALL TO THE
GIRLFRIEND WAS MADE.

>> OKAY.

THERE WERE TWO CALLS TO THE
GIRLFRIEND.

ONE FOR ONE SECOND, AND THEN
BAILEY GETS CRAWFORD TO CALL THE
GIRLFRIEND, AND THAT PHONE CALL
LASTS ONE -- IT LASTS ABOUT TWO
MINUTES, A THOUSAND AND TWO
SECONDS, AND THAT IS AT
10:26.50.

AND YOU'LL SEE ALL THIS FROM
THE -- ON THE TIMELINE.
SO THAT'S AT 10:26, YOUR HONOR.
HE TALKS TO HIS GIRLFRIEND.

>> [INAUDIBLE]

>> EXCUSE ME?

>> YOU SAID A THOUSAND AND TWO
SECONDS.

>> NO, 102 SECONDS.

IT'S A TWO-MINUTE PHONE CALL.

A LITTLE UNDER --

>> OKAY.

[INAUDIBLE] HAS BASICALLY ARGUED THE PROPORTIONALITY ISSUE, SO WHY DON'T YOU TELL US WHY THIS CASE IS PROPORTIONAL. IT SEEMS TO ME WE DO HAVE A LOT OF MITIGATION HERE. ALTHOUGH WE DON'T HAVE THE STATUTORY MENTAL MITIGATOR, WE DO HAVE THE FACT THAT THIS IS A GUY WHO HAS A LOW IQ, THIS IS A GUY WHO HAS ADHD AND A NUMBER OF OTHER BACKGROUND FACTORS TO COME INTO PLAY HERE. SO WHY IS THIS CASE NOT DISPROPORTIONATE? IS IT THE LEAST MITIGATED AND MOST AGGRAVATED OF MURDER CASES? >> WELL, YOUR HONOR, I THINK THIS COURT HAS SPECIFICALLY REJECTED THIS IN GONZALEZ. THIS WAS THE EXACT ARGUMENT MADE IN GONZALEZ, THAT THE BRAIN DAMAGE CAUSED IMPULSIVITY OF THE POLICE OFFICER IN GONZALEZ, AND THAT SOMEHOW WAS AUTOMATICALLY DISPROPORTIONATE. AND THIS COURT SAID NO. YOUR HONOR, THIS ARGUMENT WOULD BE QUITE -- THIS ARGUMENT WOULD HAVE SOME LEGS IF THE STATE HAD SOUGHT CCP. THEN HE COULD USE THE TEARFUL AND THE EMOTION BEING FACED WITH GOING BACK TO PRISON. HE WAS TEARFUL AND PALE AND NERVOUS. ONE WITNESS DESCRIBED HIM AS A LOOSE CANNON. AND THAT WOULD BE A LEGITIMATE ATTACK ON THE COLD PART OF A CCP AGGRAVATOR, BUT THERE WAS NO CCP -- >> SO YOU AGREE THIS WAS AN IMPULSIVE KILLING, BUT IT WAS NOT, IT WAS CERTAINLY NOT DONE IN ANY KIND OF AN ACCIDENTAL WAY. IT WAS DONE AT LEAST ENOUGH TO BE PREMEDITATED, CORRECT? >> YOUR HONOR, YES. I THINK THE TRIAL COURT FOUND THAT. >> ALL RIGHT. >> THE TRIAL COURT SPECIFICALLY

ACCEPTED THE DEFENDANT'S
DEMEANOR, THE EVIDENCE ABOUT THE
DEFENDANT'S DEMEANOR.
BUT THEN HE RELIED ON OUR STATE
MENTAL HEALTH EXPERT,
DR. McCLAREN, THAT SAID A LOT
OF THIS EMOTION WOULD BE
PERFECTLY NORMAL.
HE IS IN A DIFFICULT SITUATION.
HE'S NOT SUPPOSED TO BE IN
PANAMA CITY.

>> ONE QUESTION I HAVE, AND YOU
MAY HAVE ANSWERED IT, AND IT MAY
BE IN THE FACTS, SO FORGIVE ME,
WAS HE -- HE WAS IN THIS -- THEY
WERE IN THIS LINE OF TRAFFIC
THAT WAS SLOW MOVING, AND THEY
WERE TALKING TO GIRLS.

>> SPRING BREAK.

>> SPRING BREAK, WHERE WAS IT?

>> PANAMA CITY BEACH.

>> THEY HAD LEFT PENSACOLA.

>> THEY HAD LEFT PENSACOLA.

>> WAS THERE A TRAFFIC LAW
VIOLATION --

>> HE WAS BLOCKING TRAFFIC.

>> HE WAS BLOCKING TRAFFIC
BECAUSE HE WAS TALKING TO THE
GIRLS.

>> YES, YES.

>> SO THE POLICE, PRESUMABLY THE
MOST THE POLICE OFFICER WOULD
HAVE BEEN DOING WAS SAYING, GO
OVER AND GET MOVING.

>> PROBABLY BUT THEN HE RUNS THE
DRIVER'S LICENSE, OKAY?

HE ASKS HIM -- ALL OFFICERS WHEN
THEY DO THAT --

>> OKAY.

SO IT WASN'T LIKE THE POLICE
OFFICER SAYING, PLEASE, MOVE ON.
HE WAS ACTUALLY GOING TO -- IT
LOOKED LIKE HE WAS GOING TO
AFFECT SOME KIND OF ARREST FOR A
TRAFFIC VIOLATION.

>> WELL, WE DON'T KNOW WHAT IT
STARTED WITH, HE DEVELOPED --
THEY RUN DRIVER'S LICENSES NO
MATTER WHAT.

>> NO, I'M SAYING IF YOU'RE --
IN A NORMAL SITUATION A POLICE
OFFICER -- I MEAN, I THINK, IF
I'M GETTING THIS PICTURE RIGHT,
YOU KNOW, YOU GOT A LOT OF KIDS

AROUND, AND I WOULD THINK AN OFFICER'S JUST GOING TO GO, YOU KNOW, PLEASE MOVE ALONG.

>> IF HE HAD --

>> NO, WITHOUT ASKING FOR THE DRIVER'S -- JUST SAY MOVE ALONG.

>> WELL, YOUR HONOR, THEY'RE CERTAINLY ENTITLED TO ASK --

>> NO, I'M NOT SAYING IT WAS A ILLEGAL STOP.

SO, AGAIN, THERE WAS MORE OPPORTUNITY FOR CONTEMPLATION OF WHAT WAS GOING TO HAPPEN IN THIS PERIOD OF TIME BECAUSE HE WAS BEING STOPPED.

NOW, COULD YOU ANSWER THE, YOU KNOW -- I THINK I HAVE DISTINGUISHED HARDY, BUT DO YOU WANT TO GIVE THE STATE'S OPINION OF, OF COURSE, THE STATE FOUGHT AGAINST -- THEY THOUGHT HARDY SHOULD HAVE GOTTEN THE DEATH PENALTY.

>> HARDY WAS 18, THIS DEFENDANT WAS 22, ALMOST 23.

AND HARDY THEY -- THE REPORTED OPINION ITSELF TALKS ABOUT THE SEVERE BRAIN DAMAGE THAT HARDY SUFFERED WHEN HE -- SO THAT'S IN YOUR OPINION, YOUR HONOR.

IN THE HARDY OPINION.

THAT'S WHERE I GOT THAT.

I DON'T KNOW THE HARDY FACTS.

SO HARDY, YOU CLASSIFIED HIM AS SEVERELY BRAIN DAMAGED.

REMEMBER --

>> WASN'T THAT -- DIDN'T THAT OCCUR AFTER THE ACTUAL MURDER? I MEAN, HE SHOT HIMSELF AND CAUSED THAT BRAIN DAMAGE AFTER THE MURDER.

SO IF YOU TAKE THAT OUT OF THE EQUATION, I MEAN, OBVIOUSLY, THE COURT CONSIDERED IT, BUT AT THE TIME OF THE ACTUAL SHOOTING, HE WAS NOT BRAIN DAMAGED.

DID HE HAVE ANY OTHER KIND OF MENTAL PROBLEMS PRIOR TO THE ACTUAL SHOOTING?

>> NOT THAT I KNOW OF.

THE OTHER DIFFERENCE WITH HARDY IS HARDY IS A SINGLE AGGRAVATOR CASE.

THIS IS NOT.

WE HAVE TWO AGGRAVATORS HERE,
TWO VERY WEIGHTY AGGRAVATORS.
THE AVOID ARREST AGGRAVATOR WAS
WHY WE DIDN'T SEEK VICTIM WAS A
LAW ENFORCEMENT OFFICER
AGGRAVATOR BECAUSE WE WERE
WORRIED ABOUT DOUBLING RIGHT
BEFORE THE PENALTY PHASE.
WE SAY WE'RE NOT GOING TO DO
THAT.

THIS AVOID ARREST AGGRAVATOR IS
REALLY -- TAKE INTO THE FACT
THAT HE WAS A POLICE OFFICER.

>> AND ISN'T THAT -- I DON'T
KNOW IF WE'VE SAID IT IN THE
CASE, BUT TO ME AVOID ARREST
WHEN IT'S A LAW ENFORCEMENT
OFFICER MAKES IT A MUCH MORE
WEIGHTY AGGRAVATOR THAN IF IT'S
YOUR STANDARD, YOU KNOW,
SOMEBODY'S AVOIDING WITNESS
ELIMINATION KIND OF AVOID
ARREST.

THIS SEEMS TO BE THE KIND OF
SITUATION THAT WAS REALLY
INTENDED BY THE LEGISLATURE WHEN
WE TALK ABOUT AVOID ARREST.

>> YES, YOUR HONOR.

I MEAN, WE THINK THAT,
OBVIOUSLY, YOUR HONOR, THE
STATE'S POSITION IS THE KILLING
OF A POLICE OFFICER IS A VERY
WEIGHTY AGGRAVATOR WHICH --

>> [INAUDIBLE]

>> F, G, OR E, WHICHEVER
AGGRAVATOR --

>> BUT HARDY WAS ALSO -- THAT'S
WHY WE'RE GOING BACK TO --

>> [INAUDIBLE] THIS DEFENDANT
HERE WAS ALSO UNDER SENTENCE OF
IMPRISONMENT.

WE HAVE A RECIDIVIST OFFENDER
HERE, SO THAT DISTINGUISHES AS
WELL.

AND, YOUR HONOR, GONZALEZ, THIS
ARGUMENT HAS BEEN MADE TO THIS
COURT, AND THIS COURT REJECTED
IT IN GONZALEZ.

>> THIS COURT, THE TRIAL COURT
IN HARDY [INAUDIBLE] FOUND TO BE
SUBSTANTIAL MITIGATION, BUT IN
GOING BACK TO JUSTICE QUINCE'S
QUESTION, MY RECOLLECTION OF
THIS RECORD IS THAT THE STATE'S

EXPERTS HAD EXAMINED THE JAIL RECORDS AND SCHOOL RECORDS, PROBATION RECORDS FROM WISCONSIN, IS THAT CORRECT?

>> YES, YOUR HONOR.

WE PRESENTED --

>> WHAT DID THE, THOSE RECORDS INDICATE CONCERNING THIS DEFENDANT'S GETTING HIS GED AND HIS MENTAL CAPACITY?

>> YOUR HONOR, WE ALSO PUT ON THE SCHOOLTEACHER FROM, FROM THE PROGRAM IN WHICH HE GOT HIS GED. SO WE HAD THE SCHOOLTEACHER WHO SAID, YES, HE GOT HIS GED.

I WOULD LIKE TO DISPUTE THE IQ THAT'S BEEN QUOTED HERE.

YES, DR. PRICHARD, OR THE STATE'S EXPERT, SAID THEY GAVE HIM A FULL-SCALE IQ OF 75.

HOWEVER, HE SAID THAT WAS AN UNDERESTIMATE.

HE DID NOT BELIEVE -- HE THOUGHT THE DEFENDANT'S IQ WAS HIGHER THAN THAT.

THAT WAS MINIMUM.

DR. PRICHARD SAID THAT WAS AN UNDERESTIMATE.

OKAY?

>> WHAT WAS THE SCHOOLTEACHER'S TESTIMONY?

>> THE SCHOOLTEACHER TESTIFIED THAT WHEN HE ATTENDED SCHOOL -- IT WAS ATTENDANCE -- HE GOT Bs AND Cs WHEN HE ATTENDED.

HIS PROBLEM IN SCHOOL, SHE TESTIFIED HE WAS NOT A SPECIAL EDUCATION PERSON, STUDENT. THEY CALL IT SOMETHING DIFFERENT UP THERE, EED OR SOMETHING, BUT SPECIAL EDUCATION IS WHAT SHE'S TALKING ABOUT.

BAILEY WAS NOT IN SPECIAL EDUCATION, AND WHAT SHE DID WAS SHE WENT THROUGH HIS SCHOOL RECORDS COMPARED TO WHAT SHE KNEW.

HE WAS HER STUDENT FOR FIVE OR SIX MONTHS, SOMETHING LIKE THAT, AND WHEN HE ATTENDED, SHE LITERALLY COORDINATED HIS ATTENDANCE WITH HIS PERFORMANCE. SO STATE'S POSITION WAS HE DID,

YOU KNOW, NOT As, BUT Bs AND Cs IN SCHOOL WHEN HE WOULD ATTEND.

THE PROGRAM SHE WAS PART OF IT WAS MUCH EASIER TO GET THEIR ATTENDANCE.

SO THE STATE DISPUTES THAT, THAT THE 75 WAS THE STATE'S EXPERT'S NUMBER.

HE SAID IT WAS 75, BUT THAT WAS AN UNDERESTIMATE.

THE STATE DISPUTES THAT, THAT OUR EXPERT AGREED HE HAD AHD DIAGNOSIS FROM 10 OR 11.

OUR EXPERTS SPECIFICALLY, DR. PRICHARD, DISPUTED THE BIPOLAR, AND REMEMBER WE HAVE SOMETHING ELSE HERE, WE HAVE MALINGERING.

AND I WANT TO -- FIRST OF ALL, THE TRIAL COURT REJECTED THEIR EXPERT.

I'M GOING TO QUOTE

DR. KUBIAK, THAT'S THEIR EXPERT.

DR. PRICHARD AND DR. McCLAREN WERE THE STATE'S MENTAL HEALTH EXPERTS.

DR. KUBIAK WAS THE SOLE WITNESS PRESENTED IN THE PENALTY PHASE.

HE WAS THE DEFENSE EXPERT, AND HERE'S WHAT THE TRIAL COURT SAYS.

THE STATE, HE DEMONSTRATED THAT DR. KUBIAK'S OPINION ON THIS MATTER IS NOT RELIABLE.

DR. KUBIAK'S DIAGNOSIS, HALF THE DIAGNOSIS THAT OPPOSING COUNSEL TALKS ABOUT WERE FROM DR. KUBIAK.

THE TRIAL COURT REJECTED THAT TESTIMONY.

HE WENT EVEN FURTHER.

HE TALKS ABOUT -- AND THESE ARE QUOTES FROM THE TRIAL COURT AT THE SENTENCING.

"DR. KUBIAK STUBBORNLY ADHERED TO HIS OPINION, AND HE WOULD NOT RECEDE FROM HIS OPINION THAT THE DIAGNOSTIC RESULTS WERE VALID EVEN THOUGH HE KNEW THE DEFENDANT HAD MADE THAT PHONE CALL IN THE JAIL," AND I'D LIKE TO TELL YOU WHAT THE PHONE CALL IN THE JAIL IS.

BAILEY CALLS HIS FRIEND, BRAZ,
WHO WAS ONE OF THE THREE PEOPLE
WHO DROVE DOWN.

AND HE LITERALLY SAYS IN THE
RECORDING, YOU KNOW, IF YOU GET
A CRAZY LETTER FROM ME, PAY NO
ATTENTION TO IT.

I'M GOING TO TRY TO FAKE THE
STATE OUT.

AND WHAT DR. PRICHARD TESTIFIES
TO AT THE PENALTY PHASE IS HE
THINKS BAILEY HAS SUCCEEDED IN
FOOLING SOME OF THESE PEOPLE,
THAT THERE'S NEVER BEEN A
HISTORIC DEFINITION OF BIPOLAR,
AND DR. PRICHARD SAYS THERE
ISN'T ONE.

HE JUST DISAGREES WITH THAT
DIAGNOSIS.

HE SAYS IT'S NEVER HISTORICALLY
BEEN MADE, IT'S ALWAYS BEEN
RULED OUT OR SOMETHING LIKE
THAT.

SO THE EVIDENCE OF BIPOLAR THE
STATE'S EXPERT REJECTS.

>> SO THE ONLY THING WE REALLY
HAVE THAT IS LONG TERM THAT WE
REALLY HAVE IN THIS RECORD IS
THAT HE WAS ADHD?

>> YES.

AND -- NO.

THE TRIAL COURT FOUND AND THE
STATE AGREES THAT HE IS OF LOWER
IQ.

DR. McCLAREN ESTIMATED, YOU
KNOW, IN THE 80s, LOW 80s,
SOMETHING LIKE THAT.

AND SO NOBODY'S -- THERE WERE
SOME INDICATIONS OF AVERAGE
INTELLIGENCE, BUT THE STATE'S
EXPERTS WERE WILLING TO GO MORE
INTO BORDERLINE, WHAT THE DSM4
NOW REFERS TO BORDERLINE
INTELLECTUAL FUNCTIONING.
THAT'S LOW IQ.

>> WHAT ELSE WAS PUT ON AT THE
MITIGATION PHASE OF THE PENALTY
PHASE OTHER THAN THE DOCTOR?

>> BY THE DEFENSE OR BY --

>> YES, AT THE MITIGATION --

>> THERE WAS ONE WITNESS
PRESENTED AT PENALTY PHASE, THAT
WAS DR. KUBIAK.

>> NO FAMILY MEMBERS?

WE DON'T KNOW WHY THERE WERE NO FAMILY MEMBERS?

>> NO, YOUR HONOR, I CAN ONLY READ THE RECORD, AND WHAT THE RECORD SHOWS IS THE DEFENSE CALLED ONE EXPERT, ONE PERSON, ONE WITNESS, AND THAT WAS DR. KUBIAK.

THE STATE STARTED OUT WITH JUST --

>> AND SO JUST TO MAKE CLEAR HERE, SO DR. KUBIAK IS THE ONE WHO TALKS ABOUT THE DEFENDANT'S USE OF INTOXICANTS, TALKS ABOUT HIS BROKEN HOME, AND THOSE OTHER BITS OF BACKGROUND INFORMATION THAT WE HAVE.

WE DON'T HAVE ANY BACKUP, THIS IS JUST DR. KUBIAK, AND DO WE KNOW IF DR. KUBIAK TALKED TO ANY OF THE FAMILY, OR IS THIS ALL JUST SELF-REPORTING FROM THE DEFENDANT?

>> NO, YOUR HONOR, THE STATE'S EXPERTS AGREE WITH THAT PART. IT'S THE BIPOLAR I'M DISPUTING AND THE POSTTRAUMATIC STRESS DISORDER.

OKAY?

THAT'S WHAT I'M SAYING.

YES, THEY AGREE THAT HE HAD, YOU KNOW -- DR. McCLAREN AND DR. PRICHARD DO USE THE DEFENDANT'S SCHOOL RECORDS. WE HAVE ELEMENTARY SCHOOL RECORDS, WE HAVE MENTAL HEALTH FROM THE 10 AND 11 YEARS OLD, AND THEY DO FIND HIM TO BE ATTENTION DEFICIT DISORDER. BOTH OF THEM AND THE DEFENSE EXPERT FIND HIM ALSO TO BE ANTISOCIAL.

NOW, THEY AGREE THAT THERE'S POLYSUBSTANCE ABUSE AS WELL. BUT THEY DISPUTE BIPOLAR AND POSTTRAUMATIC STRESS DISORDER. THAT'S WHAT THE STATE'S EXPERTS -- AND THE STATE'S EXPERTS TESTIFIED NEITHER OF THE STATUTORY MENTAL MITIGATORS APPLIED, AND THAT'S WHAT THE TRIAL COURT RELIED ON TO REJECT THE STATUTORY MENTAL MITIGATORS.

WHAT HAPPENED HERE IS VERY CLEAR, THERE WERE -- DR. KUBIAK WAS CROSSED, AND THAT WAS A PRETTY GOOD CROSS-EXAMINATION BY THE STATE.

AND HE -- THE TRIAL COURT JUST FOUND IT TOTALLY UNBELIEVABLE. DR. KUBIAK'S OPINION THAT HIS GLOBAL FUNCTIONING, THAT BAILEY'S GLOBAL FUNCTIONING WAS IN THE 20s.

OUR EXPERT PUT IT AT 78, AND SO HE REJECTED IN TOTAL DR. KUBIAK AND WENT WITH THE STATE'S EXPERT, DR. PRICHARD AND DR. McCLAREN, ALL RIGHT? AND YOU CAN SEE, NOW, HE DID FIND EIGHT NONSTATUTORY MITIGATORS, AND WHAT OPPOSING COUNSEL IS REALLY DOING IS EXACTLY WHAT YOU SAID, JUSTICE ANSTEAD, THIS ARGUMENT WAS MADE ABOUT THE PANIC HAVING TO DO WITH THE MURDER, THAT HE WAS PALE, THAT HE WAS UNDER STRESS. ALL THAT WAS MADE TO THE TRIAL COURT AS A MITIGATOR, AND THE TRIAL COURT REJECTED IT SAYING THAT THAT IS A NORMAL -- I'LL QUOTE FROM IT.

"WHILE THE COURT ACCEPTS THE WITNESS'S DESCRIPTION OF THE DEFENDANT'S OVERALL DEMEANOR, THE BEHAVIOR WAS CONSISTENT WITH NORMAL HUMAN EXPERIENCE, THE FEAR, AGITATION, NERVOUSNESS, AND SADNESS WHEN CONTEMPLATING BEING ARRESTED AND RETURNED TO PRISON."

SO THIS MITIGATING CIRCUMSTANCE HAS NOT REASONABLY BEEN ESTABLISHED.

THAT WAS A DIRECT QUOTE FROM PAGE 4810 AND 4811.

WHAT HE'S REALLY TRYING TO GET YOU TO DO IS WHAT YOU ALL HAVE TRIAL COURTS TO DO, HE WANTS YOU TO REWEIGH THE MITIGATION.

AND HE HASN'T PRESENTED A PARTICULARLY GOOD CASE OF -- DR. KUBIAK'S TESTIMONY IS UNRELIABLE.

SO, NO, YOU SHOULDN'T, YOU SHOULD NOT LOOK BEHIND THE TRIAL

COURT.

THERE ARE, THERE'S COMPETENT SUBSTANTIAL REASONING TO SUPPORT THE TRIAL COURT, AND WHAT'S MORE IS THIS WAS, BY AND LARGE, A CREDIBILITY FINDING.

THIS TRIAL COURT FOUND THE DEFENSE EXPERT TO BE CREDIBLE, AND THE STATE'S EXPERTS TO BE CREDIBLE, AND HE FOLLOWED MITIGATION BASED ON THE STATE'S EXPERTS, DR. McCLAREN AND DR. PRICHARD.

AS TO THE, AS TO THE PROSECUTORIAL COMMENTS, THE OVERWHELMING MAJORITY OF THEM HAPPENED AT GUILT PHASE.

FIRST OF ALL, SOME OF THEM ARE NOT ERROR AT ALL, AND THIS COURT HAS SO HELD.

A LOT OF WHAT HE IS RELYING ON IS COMMENTS WHERE THE PROSECUTOR SAYS, "I REPRESENT THE COMMUNITY," OR "THIS HAPPENED IN OUR COMMUNITY."

AND THIS COURT IN COX HAS DIRECTLY SAID THAT WHAT WE OBJECT TO, YOU SAID, "WHAT WE OBJECT TO IS TO SEND A MESSAGE TO THE COMMUNITY."

WE DON'T OBJECT TO YOU USING THE WORD "COMMUNITY."

SO A PROSECUTOR USING THE WORD "COMMUNITY" IS NOT ERROR AT ALL. THERE'S NO ERROR, MUCH LESS FUNDAMENTAL ERROR.

NONE OF THESE COMMENTS WERE OBJECTED TO, BUT EVEN AN OBJECTION WOULD HAVE BEEN PROPERLY OVERRULED REGARDING THE PROSECUTOR'S USE OF THE WORD "COMMUNITY."

SO THAT SHOULD NOT BE TAKEN INTO THE CALCULUS AT ALL.

THE COMMENT ABOUT "I SUBMIT EVIL," THE PROSECUTOR SAID DURING CLOSING GUILT PHASE, THIS COURT IN LUGO SAID THAT WAS PUSHING THE BALANCE, USING THE WORD "EVIL," BUT IT WAS NOT FUNDAMENTAL ERROR.

THIS COURT HAS DIRECTLY HELD THAT IS NOT FUNDAMENTAL ERROR. YOU SAID THE EXACT SAME THING ON

A MUCH CLEARER GOLDEN RULE VIOLATION.

THE GOLDEN RULE VIOLATION THAT HE POINTS TO COULD ALSO BE REASONABLY LOOKED AT AS THE PROSECUTOR JUST DESCRIBING THE DISTANCE.

THEIR DEFENSE REALLY AT GUILT PHASE WAS LACK OF PREMEDITATION. WHAT THEY WERE SAYING WAS BECAUSE THE BULLETS WENT THROUGH THE UPPER CHEST THAT AT THE ANGLE -- AND IF THE OFFICER HADN'T BEEN LEANING DOWN THAT, NORMALLY, BULLETS TO THE UPPER CHEST IN THAT AREA WOULD NOT BE FATAL IF THEY WERE STRAIGHT THROUGH.

UNFORTUNATELY, WHAT THEY DID WAS THEY WENT THROUGH THE OFFICER DOING AN EXTRAORDINARY AMOUNT OF DAMAGE TO THE INTERNAL ORGANS OF THIS OFFICER BECAUSE OF THE WAY HE WAS LEANING.

THEY WENT THROUGH -- ONE OF THE BULLETS WENT THROUGH HIS LIVER AND ENDED IN HIS KIDNEY.

BUT WHAT THEY DID WAS THEY CROSSED THE MEDICAL EXAMINER AND SAID NORMALLY IF THEY WENT STRAIGHT THROUGH, THERE WOULD NOT HAVE BEEN THIS KIND OF DAMAGE TO THIS OFFICER.

AND THEN WHAT DEFENSE COUNSEL DID WAS HE WAS MAKING AN ARGUMENT FOR SECOND-DEGREE MURDER.

THEY HELD A COLLOQUY, A NIXON-LIKE COLLOQUY, WITH THE DEFENDANT BECAUSE DEFENSE COUNSEL WAS BASICALLY GOING TO ARGUE FOR SECOND-DEGREE MURDER. AND HE WAS GOING TO DO IT USING, BASICALLY, AN ATTACK ON THE STATE'S PREMEDITATION.

SO THE 18-24 INCHES COMMENT, THE STATE SUBMITS IS TO PROVE OUR PREMEDITATION.

WE WERE SAYING LOOK AT HOW SHORT THAT DISTANCE IS, AND THIS -- BAILEY SHOT THREE TIMES, AND TWO OF THE BULLETS HIT THE OFFICER. EVEN IF YOU LOOKED AS IT AS A GOLDEN RULE VIOLATION, A MUCH

CLEARER GOLDEN RULE VIOLATION
YOU SAID WAS NOT FUNDAMENTAL
ERROR.

ONE OF THESE COMMENTS IS NOT
ERROR AT ALL, THE USE OF THE
WORD "COMMUNITY," AND TWO HAVE
BEEN DIRECTLY HELD BY THIS COURT
NOT TO BE FUNDAMENTAL ERROR, SO
THIS DEATH SENTENCE SHOULD BE
AFFIRMED.

YOU SHOULD NOT DO THE TRIAL
COURT'S JOB.

THE TRIAL COURT DID A FINE JOB
HIMSELF, AND SO YOU SHOULD NOT
REWEIGH THE MITIGATION AND
AGGRAVATION AND MAKE FINDINGS
YOURSELF.

AND YOU HAVE REJECTED THIS TYPE
OF PROPORTIONALITY ARGUMENT, AND
YOU DID IT IN GONZALEZ.

THANK YOU.

>> THANK YOU, MS. MILLSAPS.
MR. McLAIN?

>> JUST A COUPLE OF POINTS.
THE QUESTION OF THE BIPOLAR
SYMPTOMS WHICH HAS ARISEN, THERE
WAS NO, THERE WAS NO INDICATION
THAT A COMPLETION OF A BIPOLAR
DIAGNOSIS WAS MADE.

BIPOLAR SYMPTOMS IN QUESTIONING
CAME THROUGH ASSESSMENTS,
EVALUATIONS THAT WERE MADE
DURING HIS -- WHEN HE WAS IN
PRISON.

HOWEVER, THE STATE'S EXPERT,
DR. McCLAREN, ACKNOWLEDGED THE
BIPOLAR SYMPTOMS.

THERE'S NO SPECIFIC --
DR. PRICHARD NEVER REALLY
ADDRESSED THEM ONE WAY OR THE
OTHER IN HIS TESTIMONY.

HE ONLY TESTIFIED TO PRIMARILY
THE INTELLECTUAL FUNCTIONING
ISSUE, AND HE SAID ANTISOCIAL
AND SUBSTANCE ABUSE WAS HIS
PRIMARY DIAGNOSIS.

>> WHAT EXACTLY DOES THAT MEAN
ANYWAY, BIPOLAR SYMPTOMS?

>> THERE WAS EVIDENCE OF BIPOLAR
DISORDER, BUT THEY DID NOT DO A
COMPLETION OF, TO MAKE A
COMPLETE MEDICAL DIAGNOSIS OF

IT.

THAT WAS NEVER FINISHED.

>> SO DID THEY SAY THAT IT WAS ACTUALLY EVIDENCE OF BIPOLAR OR THAT THERE WAS SYMPTOMS, YOU KNOW --

>> WELL, EVIDENCE, SYMPTOMS --

>> -- MIGHT BE A DIFFERENT THING THAT YOU COULD HAVE ACTIONS SIMILAR TO SOMEONE WHO HAS BIPOLAR MIGHT HAVE WITHOUT --

>> WELL, THE EXPERT SAW SUFFICIENT SYMPTOMS, THEY WERE RAISING THE POSSIBILITY HE WAS BIPOLAR, BUT THAT ISN'T A DIAGNOSIS THAT WAS COMPLETED, IF YOU WILL.

I MEAN, THERE WAS A RED FLAG, AND, IN FACT, BY HISTORY THEY SAY HE MAY VERY WELL HAVE BIPOLAR, AND THAT WAS FROM DR. McCLAREN, THE STATE'S EXPERT.

HE ALSO DIAGNOSED -- DR. McCLAREN -- MAJOR DEPRESSION.

HE SAID THE IQ SCORE WAS AROUND 75, NOT IN THE 80s.

THIS WAS DR. McCLAREN.

ADHD, ALSO INDICATION OF BRAIN DAMAGE OF SOME KIND.

I THINK THE REAL ISSUE WAS HOW MUCH.

I THINK THAT WAS THE REAL DISPUTE BETWEEN KUBIAK AND THE OTHER EXPERTS, HOW MUCH BRAIN DAMAGE, HOW SEVERE IT WAS, SUBSTANCE ABUSE, ALCOHOL AND DRUGS FROM AN EARLY AGE, AND BORDERLINE PERSONALITY DISORDER AND ANTISOCIAL WHICH IS A TOTALLY DIFFERENT AND VERY COMPLEX AND SIGNIFICANT DISORDER.

ALL OF THIS, AGAIN, ALL OF THIS CONSTELLATION OF PROBLEMS THAT HE HAS TIES RIGHT INTO THE IMPULSIVE BEHAVIOR, INABILITY TO MAKE DECISIONS, INABILITY TO, YOU KNOW, FORM RELATIONSHIPS, INABILITY TO DO A NUMBER OF THINGS.

SO WE ARE NOT DEALING WITH A PERSON -- EVEN THOUGH THE TWO

STATUTORY MENTAL MITIGATORS WERE NOT FOUND, WE ARE NOT DEALING WITH A PERSON WHO IS ANYWHERE NEAR MENTALLY WHOLE.

AND THE TRIAL --

>> [INAUDIBLE] REALIZE THERE WAS SOME EVIDENCE OF HIM GETTING HIS GED, BUT WHAT WAS THE EVIDENCE ABOUT THE HIGHEST GRADE THAT HE HAD COMPLETED IN SCHOOL? DO YOU KNOW?

>> AGAIN, I'D HAVE TO LOOK AT THAT.

HOW FAR HE GOT THROUGH SCHOOL SPECIFICALLY --

>> THAT'S IN THERE, ISN'T IT?

>> I BELIEVE IT'S IN THE RECORDS.

>> HE DIDN'T COMPLETE --

>> HE DID NOT COMPLETE HIGH SCHOOL, HE COMPLETED THE GED PROGRAM THEY HAD.

IT WAS DESIGNED FOR --

>> WAS THERE --

>> -- PROBLEMATIC JUVENILES.

I'M SORRY?

>> WAS THERE AN EMPLOYMENT HISTORY?

>> THEY ONLY MINIMALLY REFERENCED THAT HE'D WORKED MAKING PIZZAS BEFORE, AND HE HAD WORKED DOING SOME OTHER SIMILAR TYPE OF JOB.

HE HAD NO EMPLOYMENT HISTORY.

>> WHEN DID HE GO TO PRISON?

>> I'M SORRY?

>> HOW OLD WAS HE WHEN HE WENT TO PRISON?

>> LOOKING AT THE RECORDS, HE MUST HAVE BEEN SHORTLY AFTER HE WAS 18.

HE SPENT TWO-AND-A-HALF YEARS ON A THREE-YEAR SENTENCE WHEN HE WAS PAROLED.

>> SO HE WAS PAROLED --

>> -- 22 AT THE TIME OF THIS.

>> SO HE WAS PAROLED AT A LITTLE OVER 20 YEARS OLD?

>> YES.

>> AND THEN IS IT CORRECT THAT HE WAS THEN PLACED ON HOUSE ARREST?

>> I DON'T RECALL THERE BEING A HOUSE ARREST, BUT HE WAS UNDER A VIOLATION FOR NOT MAINTAINING HIS RESIDENCE APPROPRIATELY.

>> BUT WAS HE SUPPOSED TO REMAIN IN HIS HOME?

>> I'M NOT CLEAR ABOUT THAT. HE WAS NOT SUPPOSED TO LEAVE THE JURISDICTION, THAT WAS FOR SURE, AND HE HAD NOT BEEN, HE HAD NOT BEEN KEEPING UP WITH HIS PAROLE OFFICER.

>> AND THE POINT, I GUESS, EITHER WAY IS HE DIDN'T HAVE A LOT OF TIME TO GET ANY KIND OF EMPLOYMENT HISTORY, YOU KNOW, BETWEEN BUSY LEAVING WISCONSIN TO GO TO FLORIDA TO GO PARTY.

>> YEAH.

HE'D BEEN ON PAROLE ABOUT FIVE MONTHS.

>> FIVE MONTHS.

I WANTED TO ASK JUST A QUESTION, AND IT WAS RAISED IN YOUR BRIEF ABOUT A CASE THAT WE HAVEN'T TALKED ABOUT IN A WHILE, RING.

>> OKAY.

>> AND I HATE TO, YOU KNOW, THINKING ABOUT THAT CASE, BUT HAVE WE RULED ALREADY THAT WHEN YOU HAVE -- I KNOW WE'VE SAID THE PRIOR VIOLENCE, FIRST OF ALL, I THINK A MAJORITY OF THIS COURT HAS ALREADY SAID RING MAY NOT APPLY, BUT ASSUMING SOMETHING APPLIES WE RECOGNIZE EXCEPTIONS SUCH AS THE PRIOR VIOLENT FELONY AGGRAVATOR.

WOULDN'T THIS ALSO FALL, NOT THE AVOID ARREST, BUT THE FACT THAT HE IS ON PAROLE FOR A PRIOR FELONY BE THE SAME KIND OF THING THAT WOULD EXEMPT IT FROM ANY KIND OF A SEPARATE JURY FINDING?

>> YOU'RE TALKING ABOUT THE AGGRAVATOR THAT HE WAS ON --

>> CORRECT.

>> UNDER IMPRISONMENT --

>> CORRECT.

HAVE WE NOT RULED ALREADY ON THAT ISSUE?

>> I AM NOT SURE WHETHER THAT SPECIFIC ISSUE'S BEEN --

>> BUT IT'S THE SAME KIND OF
THING.

>> IT IS.

>> IT'S NOT -- YOU DIDN'T
DISPUTE THAT AT TRIAL.

>> I DID NOT DISPUTE --

>> SO REALLY WOULD BE SUBJECT TO
HARMLESS ERROR.

>> IN FACT, YOUR HONOR, I THINK
IT WAS STIPULATED TO AT TRIAL AS
I RECALL.

>> OKAY.

>> I HAVE NOTHING FURTHER.

>> THANK YOU.

THANK YOU BOTH FOR YOUR
ARGUMENTS, AND WITH WITH THAT,
THE COURT WILL BE IN RECESS FOR
TEN MINUTES.

>> PLEASE RISE.

>> SUPREME COURT'S NOW IN
RECESS.