>> HEAR YE, HEAR YE, HEAR YE,
SUPREME COURT OF FLORIDA IS NOW
IN SESSION.
ALL WHO HAVE CAUSE TO PLEA, DRAW
NEAR, GIVE ATTENTION, YOU SHALL
BE HEARD.
GOD SAVE THESE UNITED STATES,
GREAT STATE OF FLORIDA AND THIS
HONORABLE COURT.
>> LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> OUR FIRST CASE FOR THE DAY IS
CANNON VERSUS STATE OF FLORIDA.
YOU MAY PROCEED.
>> MR. CHIEF JUSTICE, MAY IT
PLEASE THIS HONORABLE COURT,
MR. DELANEY, I'M MR. HARRISON,
THE COURT-APPOINTED ATTORNEY FOR
THE APPELLANT IN THIS CASE,
MARVIN CANNON.
I'D LIKE TO RESERVE, IF I MAY,
EIGHT MINUTES FOR REBUTTAL.
OUR POINT ONE ON APPEAL HAS TO
DO WITH THE ISSUE OF DOUBLE
COUNTING.
DOUBLE COUNTING IS WHEN THE
TRIAL COURT FINDS MORE THAN ONE
STATUTORY AGGRAVATING
CIRCUMSTANCE BASED UPON THE SAME
ASPECT OF THE CRIME OR THE
DEFENDANT'S BACKGROUND.
AND IN THIS PARTICULAR CASE --
AND I WANT TO FRAME THIS
CAREFULLY, BECAUSE IT IS A
LITTLE TECHNICAL -- THE TRIAL
COURT DOUBLE COUNTED WHEN IT
GAVE GREAT WEIGHT TO THE CAPITAL
FELONY COMMITTED WHILE ON FELONY
PROBATION AGGRAVATOR UNDER
SUBSECTION 921.141(5) BASED UPON
THE VERY SAME ASPECT OF THE
CRIME FOR WHICH THE COURT GAVE
GREAT WEIGHT TO THE PRIOR FELONY
AGGRAVATOR.
>> IT WASN'T JUST BASED ON THE
PRIOR CARJACKING.
IT WAS ALSO BASED ON THE
CONTEMPORANEOUS CONVICTION FOR
ATTEMPTED MURDER, CORRECT?

>> YOUR HONOR, I DO NOT THINK
THAT IS CORRECT.
IT WAS--
>> THERE WEREN'T TWO FELONIES
INTO THAT AGGRAVATOR?
>> THAT'S CORRECT, BUT THE COURT
CONCENTRATED ON THE CARJACKING.
>> I UNDERSTAND WHAT THE COURT
DID, BUT AS FAR AS OUR LOOKING
AT THIS, -- AND MAYBE I'M JUST
JUMPING AHEAD AS TO WHETHER IT
WAS -- WHETHER THE COURT
MISUNDERSTOOD THE LAW, WHICH WAS
THAT WITH TWO PRIOR FELONIES, A
CONTEMPORANEOUS AND PRIOR
FELONY, THAT'S GIVEN GREAT
WEIGHT.
THAT'S NOT THE SAME AS A PRIOR
VIOLENT FELONY.
>> YOUR HONOR, IT WAS THE
CARJACKING THAT THE COURT GAVE
WEIGHT TO, NOT THE OTHER FELONY
CONVICTION.
>> OKAY.
SO LET'S JUST SAY THAT THAT MAY
BE -- THAT -- WHAT DO WE DO WITH
THE FACT, THOUGH, IN REVIEWING
THIS AND DECIDING WHETHER IT
MAKES ONE BIT OF DIFFERENCE,
THAT THERE WAS ALSO A
CONTEMPORANEOUS CONVICTION THAT
COUNTS AS A PRIOR VIOLENT FELONY
FOR ATTEMPTED MURDER OF MR. --
OF THE OTHER VICTIM?
>> JUSTICE PARIENTE, YOU DON'T
DO ANYTHING.
AND THE REASON YOU DON'T IS
BECAUSE THE TRIAL COURT GAVE NO
WEIGHT, SPECIFICALLY SAID I'M
NOT REALLY GOING TO CONSIDER
THAT.
I'M CONSIDERING THE CARJACKING
AS THE PRIOR VIOLENT FELONY
OFFENDER--
>> BUT HE COULD DO THAT -- WHAT
IS IT -- AS FAR AS FOR
PROPORTIONALITY OR FOR WHETHER
THIS SHOULD BE REVERSED, IT
MAKES NO DIFFERENCE.
>> IT MAKES ALL THE DIFFERENCE.

THIS IS NOT A COULD HAVE/WOULD HAVE SITUATION.
THE WEIGHT -- GREAT WEIGHT WAS GIVEN TO THE CARJACKING.
THAT'S WHAT THE JUDGE DID.
HE DIDN'T GIVE WEIGHT BECAUSE HE DECIDED TO CONCENTRATE ON THE CARJACKING.
THAT WAS WHAT WAS SO IMPORTANT TO THE JUDGE.
I'M NOT SAYING THAT THE COURT COULD NOT GIVE WEIGHT TO BOTH OF THESE AGGRAVATORS.
THE AGGRAVATOR HAS TO DO WITH THE FACT HE WAS ON PROBATION.
B IS THE FACT THAT HE WAS PREVIOUSLY CONVICTED OF A VIOLENT FELONY.
BUT IN THIS CASE WHAT IS REALLY PARTICULAR -- AND IF YOU LOOK AT PAGE 21 OF THE SENTENCING ORDER, BECAUSE THE TRIAL COURT USED THE VERY SAME ASPECT OF THE CRIME, THAT BEING THE VIOLENT NATURE OF THE PRIOR ARMED CARJACKING OFFENSE FOR WHICH MR. CANNON WAS ON PROBATION, AS HIS JUSTIFICATION FOR GIVING GREAT WEIGHT TO THAT AGGRAVATOR.
HE THEN TURNS RIGHT AROUND AND GIVES VERY GREAT WEIGHT TO THE PRIOR FELONY AGGRAVATOR FOR THE VERY SAME REASON.
ON PAGE 21 HERE'S WHAT THE JUDGE SAID.
>> WE KNOW WHAT THE JUDGE SAID.
DO YOU WANT TO SPEND ALL YOUR TIME ON THIS PARTICULAR ISSUE?
HOW MANY AGGRAVATORS ARE THERE IN THIS CASE?
>> THERE ARE ABOUT FIVE AGGRAVATORS.
I AGREE.
I WILL GO ON.
BUT I DEFINITELY DON'T WANT TO GIVE UP ON THAT AGGRAVATOR.
>> I THINK YOUR BRIEF SETS IT FORTH ADEQUATELY.
I THINK IT'S REALLY -- YOU'VE SAID WHAT THE JUDGE DID AND I

JUST GAVE YOU MY ISSUE; THAT IS,
THAT THERE'S TWO PRIOR VIOLENT
FELONIES AND THAT I WOULD GIVE
THAT GREAT WEIGHT EVERY DAY OF
THE WEEK.
>> I KNOW, YOUR HONOR.
I'LL STICK TO THE BRIEF.
I GET YOUR MESSAGE.
POINT TWO HAS TO DO WITH WHAT WE
SAY IS THE MISAPPLICATION OF THE
HAC AGGRAVATOR.
THIS IS VERY IMPORTANT AND AGAIN
I WANT TO BE SURE I DON'T
DEVIATE FROM THE RECORD.
OUR POSITION IS THAT THE TRIAL
COURT ERRED IN APPLYING THE
AGGRAVATOR VICARIOUSLY.
HE APPLIED IT VICARIOUSLY ABSENT
ANY PROOF THAT CANNON DIRECTED
MCMILLAN TO ESTABLISH MR. MORGAN
30 TIMES OR THAT HE EVEN KNEW
THAT MR. MCMILLAN WAS GOING TO
ACT IN SUCH A HEINOUS FASHION.
>> THERE ARE TWO PEOPLE INVOLVED
IN A MURDER.
AND ONE DOES THE SHOOTING, BUT
THE OTHER IS THERE PARTICIPATING
IN ALL THE UNDERLYING ISSUES
THAT ONLY ONE OF THEM IS
ENTITLED TO THE HAC AGGRAVATOR.
I MEAN, THAT'S BASICALLY WHAT
YOUR ARGUMENT BOILS DOWN TO.
>> WELL, I'M ARGUING NOT BASED
ON MY OPINION, BUT ON THIS
COURT'S OPINION.
FOR EXAMPLE, IN WILLIAMS VERSUS
STATE, 622 SOUTHERN 2nd 456
WHERE YOU HAVE A SITUATION WHERE
MR. CANNON WAS NOT THE PERSON
THAT DID THE STABBING.
THAT'S WHAT THE JUDGE FOUND.
HE FOUND MR. CANNON DID NOT DO
THE STABBING.
MR. MCMILLEN DID.
THEN THE ONLY WAY THAT HAC
AGGRAVATOR CAN BE APPLIED TO MR.
CANNON--
>> OBVIOUSLY IN THIS SITUATION,
HOWEVER, BOTH OF THEM MUST HAVE
COME TO THE SCENE WITH KNIVES.

DID MR. CANNON STAB MR. NEIL?
>> YES.
>> LET'S ASSUME THAT
MR. MCMILLEN DID THE STABBING OF
MR. MORGAN.
BUT THEY BOTH HAD KNIVES.
MR. CANNON WAS THE ONE WHO IN
FACT HAD A MOTIVE FOR
PARTICIPATING IN THIS BECAUSE HE
WAS THE ONE WHO WAS SUPPOSED TO
BE SUPPLYING THE DEER CORN AND
HAD BEEN PAID FOR IT, DIDN'T
HAVE IT, OBVIOUSLY.
IT WASN'T ANYWHERE AT THE SCENE.
DOESN'T THIS SEEM LIKE A COMMON
SCHEME, THAT THESE DEFENDANTS
ARE PARTICIPATING IN?
>> THIS COURT DOES NOT USE A
COMMON SCHEME ANALYSIS IN A
SITUATION WHERE YOU HAVE
MR. MCMILLEN CLEARLY ESTABLISHED
TO HAVE BEEN THE PERSON THAT DID
THE STABBING, NOT MR. CANNON.
UNDER THOSE CIRCUMSTANCES, YOU
HAVE TO GO TO YOUR BODY OF LAW
DEALING WITH VICARIOUS
RESPONSIBILITY.
AND THE ONLY WAY MR. CANNON CAN
BE SUBJECTED TO THAT HAC
AGGRAVATOR IS IF YOU FOUND -- OR
IF THE TRIAL JUDGE HAD A BASIS
FOR FINDING ONE OF TWO THINGS.
>> WASN'T MR. MCMILLEN
INCOMPETENT TO STAND TRIAL?
>> HE WAS INCOMPETENT TO STAND
TRIAL, YES, YOUR HONOR.
>> BUT NOT MR. CANNON?
DIDN'T HE PLAN THIS WHOLE THING?
HE WAS THE MAJOR PLANNER?
HE WAS THE MAJOR PARTICIPANT?
IT WAS HIS SHOW?
IS THAT NOT THE FACTS SHOW THAT?
>> YOUR HONOR, THAT'S AN
ASSUMPTION THAT WAS MADE, BUT
WE'RE DEALING WITH A
FIRST-DEGREE MURDER CASE AND THE
STATE OF FLORIDA HAS THE BURDEN
OF PROOF OF PROVING THAT KIND OF
THING AND THAT WAS NOT
ESTABLISHED.

NOW--
>> THE CIRCUMSTANCES HERE REALLY ESTABLISH THAT BEYOND A REASONABLE DOUBT.
I MEAN, HE'S THE ONE WHO HAD THE MOTIVE.
HE STARTED THIS WHOLE EPISODE OF CARNAGE WHEN HE STARTED STABBING --
>> MR. NEIL.
>> MR. NEIL, WHO WAS FORTUNATE ENOUGH TO ESCAPE.
THAT'S WHAT GOT THIS WHOLE -- THIS SERIES OF ACTS OF VIOLENCE STARTED.
WASN'T IT?
>> I THINK THAT'S FAIR TO SAY.
AND IF YOU WANT--
>> ISN'T THAT HIGHLY RELEVANT TO THE WAY WE ANALYZE WHAT FOLLOWED LATER?
>> THAT'S RELEVANT, BUT IT'S NOT CONTROLLING.
THIS HAC AGGRAVATOR CANNOT BE APPLIED TO MY CLIENT, MR. CANNON, UNLESS THE COURT HAD A BASIS FOR FINDING VICARIOUS LIABILITY.
TWO THINGS HAVE TO BE SHOWN -- OR ONE OF TWO, THAT MY CLIENT DIRECTED, DIRECTED MR. MCMILLEN TO DO THIS STABBING.
AND JUSTICE PERRY, ONE MIGHT THINK THAT, ASSUME THAT, BUT NOBODY CAN PROVE THAT.
MR. NEIL, HE DIDN'T SAY, HEY, WHEN ALL OF THIS STARTED, I HEARD MR. CANNON SAY TO MR. MCMILLEN STAB THE VICTIMS IN THE CASE.
THAT DID NOT HAPPEN.
>> WELL, YOU SAY THAT DIDN'T HAPPEN BY SOME DIRECT TESTIMONY, BUT I THINK WHAT IS BEING SAID IS THAT ALL THE CIRCUMSTANCES OF A CODEFENDANT WHO IS, YOU KNOW, OF SUCH LOW IQ THAT IS COMPLETELY INCOMPETENT, HAS NO MOTIVE TO KILL EITHER OF THEM.
THE DEFENDANT'S THE ONLY ONE

WITH THE MOTIVE.
THEY COME WITH THE MEANS TO
KILL, NOT A GUN, BUT KNIVES,
WHICH ARE -- BEEN TRADITIONALLY
THE WEAPON THAT IS GOING TO
CAUSE SOMEBODY TO SUFFER.
AND THEN IN ADDITION -- AND THEY
CO-PARTICIPATE.
SO I AGREE THAT IN CASES WHERE
THERE'S NO EVIDENCE THAT SOMEONE
KNOWS THAT THIS IS HOW THEY'RE
GOING TO BE KILLED OR THEY'RE
NOT PRESENT, YOU CAN'T JUST
IMPOSE HAC VICARIOUSLY.
BUT WHAT THE JUDGE DID ON THIS
ANYWAY IS HE GAVE IT LESS WEIGHT
THAN THE OTHER AGGRAVATORS IN
CONSIDERATION OF THE
CIRCUMSTANCES.
SO I DON'T SEE HOW -- WHEN YOU
SAY THAT THERE IS NO EVIDENCE
THAT MR. CANNON DIRECTED THIS,
ALL OF THE CIRCUMSTANCES THAT
HAVE BEEN SET FORTH SHOW
STRONGLY THAT HE DID DIRECT
THIS.
>> CIRCUMSTANCES, MAYBE.
SPECULATION, MAYBE.
BUT THIS--
>> NO.
NO.
WAIT.
CIRCUMSTANCES ARE DIFFERENT THAN
SPECULATION.
>> WELL,--
>> THE EVIDENCE OF WHO HAD THE
MOTIVE, DO YOU AGREE THAT IT WAS
THE DEFENDANT THAT HAD THE
MOTIVE?
>> MOTIVE IS NOT AN ELEMENT OF

FIRST-DEGREE MURDER, BUT, YES,
YOUR HONOR, I AGREE THAT THAT'S
SOMETHING THAT CAN BE CONSIDERED
AND MAYBE THAT JUSTIFIES A
CONVICTION FOR MURDER.
BUT DOES IT ELEVATE IT, DOES IT
ELEVATE IT TO A DEATH CASE BASED
UPON YOUR BODY OF LAW REGARDING
VICARIOUS LIABILITY?

I'M JUST ASKING YOU ALL WHEN YOU REVIEW THIS TO STICK TO YOUR OWN RULES AND COURT DECISIONS ON THESE PARTICULAR ISSUES.
THERE'S ANOTHER POINT THAT I KNOW MR. DELANEY IS GOING TO EMPHASIZE.
THAT HAS TO DO WITH THE CONVICTION FOR ARMED ROBBERY OF MR. MORGAN BY MR. CANNON.
AND I THINK I BETTER DEAL WITH THAT.
WHAT I TRIED TO DO IN THIS BRIEF WAS TO CONVINCE YOU TO ABANDON MANY OF THE AGGRAVATORS THE TRIAL JUDGE FOUND.
I'VE HEARD, JUSTICE PARIENTE, YOU SAY BEFORE THAT YOU HAVE TO HAVE CONFIDENCE IN THESE DEATH SENTENCES.
JUSTICE LEWIS HAS SAID THAT SO MANY TIMES.
I'M TRYING TO CONVINCE YOU YOU SHOULD NOT HAVE CONFIDENCE BECAUSE FAR TOO MANY OF THESE AGGRAVATORS WERE FOUND WHEN THEY SHOULDN'T HAVE BEEN.
AND I'VE GOT TO DEAL WITH THIS ROBBERY AGGRAVATOR.
AND I WILL WATCH MY TIME.
BUT LET ME JUST ASK YOU TO TAKE A REAL HARD LOOK AT THE CONVICTION FOR ROBBERY OF MR. MORGAN BY MR. CANNON BECAUSE THE TRIAL JUDGE GAVE THAT AGGRAVATOR SUBSTANTIAL WEIGHT.
THAT'S SOMETHING, YOU KNOW, WE'RE REALLY CONCERNED ABOUT.
AND OUR POSITION IS THAT THE STATE ATTORNEY IN PROSECUTING THIS CASE MADE A MISTAKE, FRANKLY, MADE A MISTAKE DURING THE PROSECUTION OF THE ARMED ROBBERY COUNT BECAUSE THE STATE ATTORNEY FORGOT TO PRESENT ANY PROOF OF THE VALUE OF THE WALLET THAT WAS SUPPOSEDLY STOLEN BY MR. CANNON FROM MR. MORGAN.
THERE WAS NO PROOF THAT THAT WALLET HAD ANY VALUE.

AND WHY IS THAT IMPORTANT?
EVEN THE ATTORNEY GENERAL ADMITS ON PAGE 43 OF THIS BRIEF THAT ROBBERY DOES REQUIRE THE STATE TO PROVE THE PROPERTY TAKEN WAS OF SOME VALUE, AND THIS COURT SAID IN UTSY--
>> WAS OF SOME VALUE?
IS THAT WHAT YOU SAID?
>> YES, MA'AM.
THERE'S GOT TO BE PROOF THAT SOMETHING WAS TAKEN FROM THE VICTIM AND THAT SOMETHING HAD VALUE.
AND IN THIS CASE, FRANKLY, THE STATE ATTORNEY JUST WENT TOO FAST AND DID NOT PRESENT ANY EVIDENCE OF VALUE OF THE WALLET OR ANYTHING IN IT.
>> DOESN'T THE WALLET ITSELF PRESENT A VALUE?
>> YOUR HONOR, YES, IF SOME TESTIMONY--
>> LET'S SAY THE WALLET IS 50 YEARS OLD, BUT IT'S WORTH AT LEAST ONE PENNY.
IS THAT OF VALUE?
>> IT IS NOT BECAUSE YOU SAID AND THE DISTRICT COURTS OF APPEAL HAVE SAID THERE MUST BE SOME TESTIMONY.
FOR EXAMPLE, IN ONE CASE THAT WE CITED, THE PERSON WHO LOST THE WALLET SAID I PAID $10 FOR THAT WALLET.
SO THAT WAS VALUE.
THEY PRESENTED SOMETHING OF VALUE.
OR THE PERSON SAID I HAD A RING IN THERE AND I PAID $50 FOR THAT RING.
>> DID THE WALLET HAVE A CREDIT CARD IN IT?
>> COULD THAT GUY GO TO THE --
AND USE THAT CREDIT CARD?
>> THEY DO IT ALL THE TIME.
>> DID IT HAVE ANY VALUE?
LOOK--
>> WELL, THAT'S WHY IF I LOSE MY CREDIT CARD, I MAKE SURE I CALL

THE COMPANY, SAY CANCEL, BECAUSE
SOMEBODY MIGHT USE IT.
>> ABSOLUTELY, YOUR HONOR.
ABSOLUTELY.
BUT IN THIS CASE THE STATE
ATTORNEY FORGOT TO TAKE CARE OF
-- PRESENT EVIDENCE AS TO VALUE.
THAT MEANS THAT THIS ROBBERY
COUNT HAS TO GO OUT.
THAT IS A THIRD AGGRAVATOR THAT
FAILS IN THIS CASE.
THAT AGGRAVATOR IS GONE.
BUT LOOK.
IN THE TIME THAT I HAVE LEFT, I
WANT TO DEAL WITH WHAT I THINK
IS REALLY BOTHERSOME TO
EVERYBODY.
AND JUSTICE PARIENTE ALREADY
MENTIONED THIS, AND THIS HAS TO
DO WITH PROPORTIONALITY.
I THINK THAT'S A BIG ISSUE IN
THIS CASE.
AND I WANT TO ASK YOU TO PLEASE
TAKE A HARD LOOK AT HOW THE
TRIAL COURT HANDLED THIS,
BECAUSE I THINK THE TRIAL COURT
MADE A VERY BIG MISTAKE.
>> WELL, IT'S REALLY OUR -- UP
TO THIS COURT TO MAKE A
PROPORTIONALITY ANALYSIS OF THIS
CASE.
AND SO WHAT IS YOUR MAIN POINT?
THAT THIS IS NOT PROPORTIONAL TO
OTHER CASES OF A SIMILAR NATURE.
>> YOUR HONOR, IN MANY OF YOUR
CASES YOU POINT OUT THAT A
PROPORTIONALITY REVIEW NORMALLY
INCLUDES AN ANALYSIS OF THE
RELATIVE CULPABILITY OF EACH
CODEFENDANT.
>> OKAY.
WAIT A MINUTE.
>> OKAY.
I'M SORRY.
YES, MA'AM.
>> LET'S JUST START FROM THE
BEGINNING HERE.
THE CODEFENDANT IN THIS CASE--
>> YES, MA'AM.
>> MR. MCMILLEN.

>> MCMILLEN.
>> HAS NOT BEEN TRIED.
>> CORRECT.
>> MR. MCMILLEN HAS BEEN FOUND INCOMPETENT TO STAND TRIAL.
>> YES, MA'AM.
>> IS THAT CORRECT?
SO WE HAVE NO RECORD EVIDENCE OF WHAT -- OF MR. MILLER -- MCMILLEN'S CULPABILITY, RIGHT?
>> WRONG.
HERE'S WHY, YOUR HONOR.
THIS IS NOT A CASE WHERE YOU'RE DEALING, FOR EXAMPLE, WITH CODEFENDANTS, ONE OF WHOM IS A MINOR.
IN THAT SITUATION, THAT'S CUT AND DRY.
THE MINOR CAN'T BE SENTENCED TO DEATH.
I MEAN, THERE'S NO QUESTION ABOUT HIS AGE.
THEREFORE, YOU CAN DRAW A RED, BRIGHT LINE AND NOT CONSIDER THE CULPABILITY OF THE TWO.
>> HOW ABOUT SOMEONE WHO IS -- BEEN FOUND MENTALLY RETARDED?
>> ABSOLUTELY RELEVANT AND THE ANSWER--
>> WHAT ABOUT SOMEONE WHO HAS BEEN FOUND MENTALLY RETARDED?
CAN THEY BE SENTENCED TO DEATH?
>> NO, MA'AM.
BUT -- AND THIS IS CRITICAL BECAUSE WE KNOW THAT MR. MCMILLEN WAS FOUND TO BE MENTALLY RETARDED.
BUT HERE'S WHAT I WANT TO ASK YOU TO CONSIDER.
WAS MR. MCMILLEN FOUND TO BE INSANE?
WAS HE FOUND TO BE INSANE?
NO.
HE WASN'T EVEN LOOKED AT BY A PSYCHIATRIST.
HE KNEW RIGHT FROM WRONG.
HE KNEW WHAT HE WAS DOING WAS WRONG.
AND HE WENT AHEAD AND HE COMMITTED THIS HEINOUS CRIME.

NOW, MR. CANNON WAS NOT THE
SHARPEST PENCIL IN THE BOX.
THIS WHOLE THING ABOUT MENTAL
RETARDATION, THIS IS SOFT
SCIENCE.
THIS IS -- PSYCHOLOGISTS GET
INVOLVED IN THE THING.
AND THE POINT IS THAT
MR. MCMILLEN, YES, HAD REAL
ISSUES WITH INTELLIGENCE.
BUT SO DID MR. CANNON.
AND HERE'S WHAT HAPPENS WHEN YOU
ADOPT THAT RED LINE POLICY.
YOU TAKE OUT OF THE MIX, YOU
DON'T CONSIDER WHAT IS SO COMMON
SENSE--
>> WHAT RED LINE POLICY ARE YOU
TALKING ABOUT?
>> RED LINE POLICY IS YOU CAN'T
-- YOU CAN'T USE
PROPORTIONALITY, FOR EXAMPLE, IN
DEALING WITH A MINOR AS A
CODEFENDANT IN A CASE LIKE THIS.
BUT HERE, WHERE IT'S JUST A
DIFFERENCE AS TO THE PEOPLE'S
INTELLIGENCE, THAT SHOULD NOT BE
AN ALL OR NOTHING THING.
REMEMBER THIS.
WHERE IS MR. MCMILLEN NOW?
WHO STABBED POOR MR. MORGAN 33
TIMES?
MR. MCMILLEN DID.
WHERE IS MR. MCMILLEN?
HE'S AT A STATE FACILITY.
HIS LIFE -- ALL OF HIS EXPENSES
ARE PAID FOR BY THE TAXPAYERS OF
THE STATE OF FLORIDA.
HE'S THERE TO BE REHABILITATED.
HE'S THERE TO BE TREATED KINDLY,
TO INCREASE HIS INTELLIGENCE SO
THAT SOMEDAY HE CAN BE A GOOD
CITIZEN.
HE'S THE ONE THAT KILLED THE
MAN, THAT STABBED THE MAN 33
TIMES?
WHERE'S MR. CANNON?
>> QUESTION ON MR. MCMILLEN.
IS THAT HIS STATUS; THAT IS,
THAT HE'S MENTALLY RETARDED AND
HE'S NEVER GOING TO BE TRIED?

HAS THAT BEEN FINALLY
DETERMINED?
>> YOUR HONOR, IN THIS RECORD,
YOU'LL FIND IN THIS RECORD FOUR
PSYCHOLOGISTS EXAMINED
MR. MCMILLEN.
AT LEAST ONE, I BELIEVE IT WAS
DR. DORIKO, SAID THAT HE
PROBABLY WOULD NEVER ATTAIN A
STATUS WHERE HE WOULD BE
MENTALLY COMPETENT.
BUT MY POINT IS THIS.
>> BUT I GUESS YOU DIDN'T ANSWER
MY -- IT HAS NOT BEEN FINALLY
DETERMINED.
>> IT'S NOT BEEN FINALLY
DETERMINED.
>> BUT ISN'T THE ISSUE HERE --
YOU MAKE AN INTERESTING POINT.
IF THERE WAS ANY EVIDENCE THAT
IT LOOKED LIKE MR. MCMILLEN?
IS THAT HIS NAME?
>> MCMILLEN.
YES, MA'AM.
>> YOU SAID HE WASN'T -- MR.
CANNON WASN'T THE SHARPEST TACK.
BUT WHO WAS THE PERSON WHO SOLD
THE CORN TO THE DECEDENT AND
THEN GOT MONEY FOR IT AND THEN
WAS CALLED AND THEN WAS DRIVING
THE TRUCK TO TAKE THEM TO A
REMOTE LOCATION, WITH NO
INFORMATION PRESENTED IN A
DEFENSE THAT IT WAS MR. MCMILLEN
WHO HAD -- AND YOU SAID MOTIVE
DOESN'T MATTER.
BUT, YES, IT DOES MATTER.
WHO'S MORE CULPABLE.
SO EVEN IF IT'S -- YOU SAY THE
RECORD'S CLEAR IT WAS
MR. MCMILLEN THAT ACTUALLY
STABBED THE DECEDENT.
THE DOMINANT ACTOR IN THIS CASE
IS MR. CANNON.
>> THE DOMINANT ACTOR IS THE MAN
THAT TOOK A KNIFE AND STABBED
MR. MORGAN 33 TIMES.
THE JUDGE FOUND THAT HE COULDN'T
SAY THAT MR. CANNON DID
ANYTHING.

AND HERE'S ALL I'M ASKING YOU TO DO.
AT LEAST SEND THIS BACK TO THE TRIAL COURT AND SAY, LOOK, THIS IS NOT AS SIMPLE AS YOU'VE MADE IT.
THIS IS NOT AS CUT AND DRY.
HOW CAN THE MAN WHO DID THE MURDER, WHO WAS THE PERSON ACTING SO HEINOUSLY, HOW CAN HE BE TAKEN CARE OF AT TAXPAYER EXPENSE AND MY CLIENT, WHO DIDN'T DO THE STABBING, IS ON DEATH ROW.
>> YOU'RE MAKING THAT ARGUMENT TO US, BECAUSE WE DETERMINE PROPORTIONALITY.
>> WELL, YOUR HONOR, THIS RECORD WILL SHOW THAT -- A WONDERFUL JUDGE OVER THERE IN GASTON COUNTY, HE DID A PROPORTIONALITY EXAMINATION HIMSELF AND HE DETERMINED IT WAS A BRIGHT LINE THING.
IT WAS APPLES AND ORANGES.
YOU CANNOT CONSIDER MR. MCMILLEN.
I'M JUST SAYING THIS IS SOFT SCIENCE.
INTELLIGENCE -- YOU KNOW, THIS IS DEBATABLE.
DON'T EXCLUDE THE -- WHAT EACH ONE OF THESE PEOPLE DID.
I THINK THE PEOPLE OF THE STATE OF FLORIDA WANT OUR DEATH PENALTY STATUTE TO BE APPLIED WITH COMMON SENSE AND FAIRNESS.
>> WHAT DID THE JURY -- WHAT ARGUMENT WAS PERMITTED TO THE JURY?
DID THEY -- WERE THEY -- WAS THE DEFENSE LAWYER ALLOWED TO ARGUE THAT IT REALLY IS MR. MCMILLEN THAT OUGHT TO BE GIVEN -- SUBJECT TO THE DEATH PENALTY?
IN OTHER WORDS, DID THEY HEAR ABOUT MR. MCMILLEN?
>> I WANT TO BE ABSOLUTELY CANDID.
YES, YOUR HONOR.

THEY HAD TWO REALLY TOP FLIGHT
TRIAL LAWYERS.
AND, YES, I THINK THEY MADE THAT
ARGUMENT.
MY TIME IS UP.
THANK YOU.
AND I'LL TURN IT OVER TO THE
ATTORNEY GENERAL.
THANK YOU VERY MUCH, YOUR HONOR.
>> WHETHER THE COURT APPLIED THE
AGGRAVATOR, IT DID SO DIRECTLY
TO MARVIN CANNON BASED ON HIS
ACTIONS AND HIS INVOLVEMENT IN
THE MURDER OF ZACHARY MORGAN.
THE CIRCUMSTANTIAL EVIDENCE AND
THE DIRECT EVIDENCE ESTABLISH
THAT FIRST MARVIN CANNON
AMBUSHES THE SURVIVING VICTIM BY
STABBING HIM IN THE NECK TWICE.
MR. NEIL MANAGES TO ESCAPE THE
TRUCK.
AS HE'S RUNNING, HE HEARS THE
TRUCK HIT A TREE.
AND WE KNOW FROM MR. MORGAN'S
INJURIES THAT HE HAS A NUMBER OF
STAB WOUNDS TO THE UPPER PORTION
OF HIS RIGHT TORSO, INCLUDING
HIS NECK, AND TO HIS FACE,
SPECIFICALLY IN HIS CHEEK AND IN
HIS HEAD.
AND THE CIRCUMSTANTIAL EVIDENCE
--
>> BUT DID THE EVIDENCE INDICATE
AT ALL WHETHER OR NOT ANY OF THE
STABBING OF MR. MORGAN TOOK
PLACE IN THE TRUCK OR WHETHER
ALL OF IT TOOK PLACE OUTSIDE?
>> THE TESTIMONY FROM THE
MEDICAL EXAMINER WAS THAT
MR. MORGAN WAS UPRIGHT FOR PART
OF THE ATTACK.
AND FROM THERE THEY DIDN'T
REALLY GO INTO WHETHER OR NOT
THAT MEANT HE WAS SITTING UP IN
THE TRUCK OR WHETHER HE WAS
OUTSIDE STANDING UP AND THEY
ATTACKED HIM FROM THERE.
HOWEVER, WHAT WE KNOW IS THAT
ONCE NEIL ESCAPES, THAT TRUCK
CONTINUES TO FISHTAIL AND THEN

HITS A TREE.
SO WHAT WAS INFERRED WAS THAT
AFTER STABBING MR. NEIL, MR.
CANNON THEN TOOK THE KNIFE AND
IMMEDIATELY STABBED MR. MORGAN,
WHICH CAUSED THE TRUCK TO CRASH
INTO THAT TREE.
>> DID THE MEDICAL -- AS I
RECALL, THE MEDICAL EXAMINER,
THERE WERE A NUMBER OF STAB
WOUNDS ON MR. MORGAN AND SO DID
THE MEDICAL EXAMINER SAY THAT
THEY WERE ALL MADE BY THE SAME
KNIFE?
OR WERE SOME OF THEM MADE BY
DIFFERENT KNIVES?
THERE WAS SOMETHING ABOUT TWO
KNIVES.
AND I'M NOT SURE EXACTLY WHAT
THAT WAS.
>> THERE WERE TWO KNIVES THAT
WERE BROUGHT.
THE FIRST ONE BROUGHT BY THE
DEFENDANT, THE ONLY WEAPON THAT
WAS BROUGHT BY MARVIN CANNON.
AND MCMILLEN, THERE'S NO
EVIDENCE THAT HE BROUGHT ANY
KNIFE, WAS A BLACK-HANDLED
KNIFE.
>> THAT WAS THE ONE THAT WAS
BROKEN, CORRECT?
>> CORRECT.
THE PIECE OF KNIFE WAS BROKEN
OFF IN THE VICTIM'S HEAD.
THE TESTIMONY WAS THAT KNIFE
COULD HAVE MADE EVERY SINGLE
WOUND ON MR. MORGAN.
>> WAS THAT THE SAME KNIFE THAT
MR. NEIL WAS STABBED WITH?
>> YES.
YES.
THE SECOND KNIFE--
>> WAS THAT THE SAME KNIFE THAT
WAS FOUND IN -- THAT MCMILLEN
SAID WAS IN THE PATROL CAR?
>> CORRECT.
THAT'S THE SAME KNIFE.
THE SECOND KNIFE WAS THE
VICTIM'S.
AND THAT KNIFE WAS MOVED FROM

THE BACK PART OF THE PICKUP
TRUCK TO THE FRONT CENTER
CONSOLE WHEN THEY HAD TO MOVE A
WHOLE BUNCH OF MATERIAL IN ORDER
TO MAKE ROOM FOR CANNON AND
MCMILLEN TO GET INTO THE TRUCK.
THAT KNIFE, THE MEDICAL EXAMINER
SAID, COULD HAVE MADE SOME OF
THE WOUNDS, BUT IT DEFINITELY
COULD NOT HAVE--
>> AS I UNDERSTAND, MR. NEIL HAD
THAT -- WENT FOR THAT KNIFE AT
SOME POINT AND HE DROPPED IT?
>> YEAH.
HE -- THE TESTIMONY IS THAT
AFTER HE GETS STABBED, HE SAYS
HE MAY GO TO REACH FOR IT OR AS
THE KNIFE IS COMING INTO HIM, HE
MAY HAVE REACHED OVER FOR IT,
BUT IT REMAINS IN THE TRUCK AND
IT REMAINS AT THE CRIME SCENE.
AND THERE WAS THE PRESENCE OF
BLOOD AND DNA ON THAT KNIFE.
SO IT COULD HAVE BEEN USED TO
COMMIT SOME OF THE WOUNDS.
>> WELL, WHOSE BLOOD WAS ON IT?
>> THE VICTIM'S.
NOT ON ANY GRAND SCALE TO THE
EXTENT WE HAVE THE VICTIM'S
BLOOD ON MARVIN CANNON'S SHIRT
AT ONE IN 420 BILLION
POSSIBILITIES.
>> DID THE DNA HAVE FINGERPRINTS
ON THE KNIFE?
>> NO FINGERPRINTS.
THERE IS DNA.
THERE IS THE VICTIM'S BLOOD ON
THE KNIFE.
NEITHER OF THE DEFENDANTS DNA IS
ON EITHER OF THE KNIVES.
>> BUT THE JUDGE FOUND THAT IT
WAS MR. MCMILLEN THAT KILLED THE
VICTIM, CORRECT?
>> NO.
NOT--
>> I THOUGHT THAT'S WHAT
MR. HARRISON SAID.
I THOUGHT IN LOOKING AT THE HAC
STATEMENT.
>> THE JUDGE DID NOT MAKE A

SPECIFIC FACTUAL FINDING AS TO
WHO PRECISELY KILLED MR. MORGAN.
HE DOES HYPOTHESIZE THAT EVEN IF
MCMILLEN WAS THE ONLY PERSON
THAT STABBED MR. MORGAN, THEN
THIS COURT'S CASE LAW ISN'T
APPLICABLE BECAUSE MARVIN CANNON
HAD MOTIVE, MARVIN CANNON HAD
THE PLAN.
IT WAS HIS FATHER'S LAND.
IT WAS MARVIN CANNON WHO BROUGHT
THE KNIFE AND PROCEEDED TO USE
IT.
IT'S THE VICTIM'S BLOOD ON
MARVIN CANNON'S SHIRT AND MARVIN
CANNON FLED AND ELUDED LAW
ENFORCEMENT FOR TWO DAYS.
MCMILLEN, WHO WAS MENTALLY
RETARDED AND INCOMPETENT AT THE
TIME, WASN'T EVEN -- DIDN'T HAVE
HIS WITS ABOUT HIM TO FLEE THE
SCENE.
HE IS COMPLETELY SUBMISSIVE TO
LAW ENFORCEMENT, TO ANY SHOW OF
AUTHORITY AND SUSCEPTIBLE TO
DIRECTION.
>> WAS THERE ANY EVIDENCE OF THE
RELATIONSHIP BETWEEN
MR. MCMILLEN AND THE DEFENDANT?
YOU KNOW, IN OTHER WORDS, HAD HE
ENDED UP WITH HIM THAT DAY AND
ANY REASON THAT HE WOULD HAVE
BEEN THERE TO HELP KILL?
WAS HE GOING TO GET MONEY FOR
IT?
ANYTHING LIKE THAT?
>> THE TESTIMONY THAT THE JURY
HEARD WAS THAT MCMILLEN WAS
INTRODUCED TO SEAN NEIL AND
ZACHARY MORGAN AS BEING HIS
COUSIN FROM NEW YORK.
THERE WERE STATEMENTS THAT WERE
SUPPRESSED THAT INDICATED A
DIFFERENT RELATIONSHIP THAT THE
JURY NEVER HEARD.
BUT THOSE WERE NOT HEARD AND
THEY WERE SUPPRESSED BECAUSE MR.
CANNON HAD INVOKED HIS RIGHT AND
THAT QUESTIONING CONTINUED.
SO IN -- IN LOOKING AT THE ARMED

ROBBERY OF ZACHARY MORGAN, I
WANT TO BE CLEAR THAT THE STATE
DID NOT CONCEDE THAT VALUE IS AN
ELEMENT OF ROBBERY IN ITS BRIEF.
WHAT I POINTED OUT SPECIFICALLY
WAS THAT THE JURY INSTRUCTIONS
FOR ROBBERY SEEM TO SUGGEST THAT
THE MAGIC WORDS "OF VALUE" NEED
TO BE SAID.
HOWEVER, THE STATUTORY
DEFINITION OF ROBBERY DOES NOT
REQUIRE VALUE AT ALL.
WHAT'S REQUIRED IS AN
INTENTIONAL TAKING WITH THE USE
OF VIOLENCE.
IN THIS CASE, THE VICTIM'S
WALLET COMPLETE WITH CREDIT
CARDS AND BANK CARDS WAS TAKEN
AND IT WAS FOUND ALONG THE PATH
THAT WAS USED BY MARVIN CANNON
TO ELUDE LAW ENFORCEMENT AND
THAT WAS TRACKED BY THE DOGS
WHERE THEY FOUND THAT.
TO SUGGEST THAT VALUE NEEDS TO
BE SAID IS SILLY, IN MY OPINION.
THE JURY CAN INFER VALUE FROM
THE PRESENCE OF THE WALLET.
AND IN THE CASE--
>> ROBBERY IS ACTUALLY DEFINED
AS THE TAKING OF PROPERTY FROM
ANOTHER THROUGH VIOLENCE OR
SOMETHING TO THAT EFFECT.
>> CORRECT, BY THE USE OF FORCE
OR VIOLENCE.
THE JURY INSTRUCTION DOES SAY
THAT THAT PROPERTY NEEDS TO BE
OF SOME VALUE.
BUT THE STATUTORY DEFINITION
DOESN'T LINE UP WITH THAT
SPECIFIC JURY INSTRUCTION.
THE JURY CAN INFER THAT A WALLET
HAS VALUE, THAT CREDIT CARDS
HAVE VALUE, THAT A SUN TRUST
DEBIT CARD HAS VALUE TO THAT
IMMEDIATE HOLDER.
AND WE KNOW THAT THAT WALLET WAS
TAKEN.
THERE WASN'T ANYBODY ELSE AT THE
FARM.
AND IT WAS FOUND ON THAT PATH

THAT MARVIN CANNON USED TO FLEE
LAW ENFORCEMENT AND ESCAPE THE
CRIME SCENE.
>> WAS THERE DNA ON IT?
>> THERE WAS NO DNA ON THE
WALLET, NO.
>> DO YOU CONCEDE THAT THERE WAS
INSUFFICIENT EVIDENCE OF
ATTEMPTED ROBBERY OF MR. NEIL?
>> THE RECORD DOESN'T SEEM TO
INDICATE ANY PRESENCE OF AN
INTENDED OR ATTEMPTED TAKING
FROM MR. NEIL.
AND IF THIS COURT WERE TO STRIKE
THAT CONVICTION, IT WOULD HAVE
ABSOLUTELY NO EFFECT ON MR.
CANNON'S FIRST-DEGREE MURDER
CONVICTION AND SENTENCE OF
DEATH.
>> HOW ABOUT THE ARSON
CONVICTION?
>> THE ARSON CONVICTION AS WELL.
THE TESTIMONY WAS THAT A HUMAN
WAS INVOLVED IN LIGHTING THAT
FIRE.
>> BUT I GUESS WHAT I FOUND
INTERESTING IS I DON'T RECALL
THAT THERE WAS ANYTHING ABOUT
EVEN A MATCH BEING AT THE SCENE
OR ANY -- SO I'M NOT -- IT'S A
MYSTERY TO ME HOW THIS FIRE EVEN
GOT STARTED.
>> AND THE FIRE MARSHAL SEEMED A
LITTLE BIT PERPLEXED BY IT AS
WELL.
WHAT HE TESTIFIED TO WAS BECAUSE
THOSE TRUCKS ARE MADE WITH FIRE
RETARDANTS MATERIAL, MEANING YOU
CAN'T JUST DROP A MATCH ON IT
AND IT WILL LIGHT UP IN FLAMES.
HE SAID YOU WOULD HAVE TO REALLY
HOLD A LIGHTER TO THAT PIECE OF
FOAM OR SOMETHING IN ORDER TO
GET IT TO LIGHT UP AND COMBUST.
>> WAS A LIGHTER FOUND?
>> A LIGHTER WAS NOT FOUND AND
NO ACCELERANTS WERE FOUND AS
WELL.
AFTER THE FACT WE DO KNOW THAT
MARVIN CANNON DOES PURCHASE A

LIGHTER AND CIGARETTES AT THE
SHELL STATION THAT HE'S SEEN AT
MOMENTS AFTER THE MURDER.
>> WELL, IF IT WAS -- IF WE FIND
INSUFFICIENT EVIDENCE OF ARSON,
THAT DOESN'T AFFECT ANYTHING.
>> IT DOES NOT AFFECT ANYTHING
AS WELL.
>> THIS IS JUST A SEPARATE
CONVICTION.
>> IT'S A SEPARATE CONVICTION.
THE AGGRAVATOR WAS PRESENT.
THE TRIAL JUDGE GAVE IT NO
WEIGHT.
SO IT DOES NOT AFFECT ANYTHING.
>> AND THE JURY WOULD STILL HEAR
ABOUT THE ARSON BECAUSE IT'S
PART OF THE CIRCUMSTANCES OF THE
MURDER AND THE AFTERMATH.
>> YES.
>> SO IT WOULD STILL COME INTO
EVIDENCE.
>> CORRECT.
YES.
THERE WAS INDEPENDENT EVIDENCE
OF THAT.
>> THIS ISSUE -- WHAT DID THE
JURY HEAR ABOUT MR. MCMILLEN AND
WHAT WAS ARGUED TO THE JURY
ABOUT MR. MCMILLEN'S INVOLVEMENT
AND CULPABILITY?
TO THAT I WANT TO JUST
UNDERSTAND WHAT WE KNOW NOW AND
WHAT'S IN THE RECORD ABOUT
MR. MCMILLEN'S STATUS AND
WHETHER THAT SHOULD FIGURE IN AT
ALL INTO WHAT THE JUDGE DID OR
WHAT WE SHOULD DO CONCERNING THE
PROPRIETY OF THE DEATH SENTENCE.
>> DURING THE GUILT PHASE, THE
JURY HEARD THE DEFENSE ARGUMENT
THAT MCMILLEN WAS THE
PERPETRATOR OF THE MURDER OF
ZACHARY MORGAN.
DURING THE PENALTY PHASE THEY
WERE MADE AWAY THAT MCMILLEN WAS
BOTH INCOMPETENT AND MENTALLY
RETARDED AND WOULD NOT STAND
TRIAL AT THAT POINT IN TIME.
THAT'S WHAT THEY HEARD AND

THAT'S WHAT THEY WERE ALLOWED TO CONSIDER.
>> WELL, ARGUING AGAINST THE DEATH PENALTY, WERE THE DEFENSE ATTORNEYS ALLOWED TO MAKE AN ARGUMENT THAT REALLY THIS IS NOT FAIR BECAUSE HE REALLY SHOULD BE THE ONE GETTING THE DEATH PENALTY, NOT MR. CANNON?
>> THEY WEREN'T PROHIBITED FROM IT, BUT THEY DIDN'T REALLY PRESENT THAT ARGUMENT, THAT THIS IS AN INADEQUATE SENTENCE BECAUSE WE HAVE A MENTALLY RETARDED CODEFENDANT WHO IS NOT GOING TO BE TRIED.
>> WELL, WHAT IS THE LAW RIGHT NOW -- EVEN IF AT SOME POINT MR. MCMILLEN GETS TRIED.
LET'S JUST SAY HE GETS TRIED AND DOESN'T GET THE DEATH PENALTY.
WHAT IS THE STATE'S ARGUMENT ABOUT NO MATTER WHAT, WHY THIS WOULD BE PROPORTIONATE FOR MR. CANNON.
IN OTHER WORDS, SO WE DON'T HAVE TO GET INTO, WELL, HE'S MENTALLY RETARDED NOW, BUT MAYBE -- AND NOT -- MAYBE HE REALLY ISN'T MENTALLY RETARDED BECAUSE WE DON'T KNOW IT BEFORE ON THIS RECORD.
WHEN WE DECIDE THIS CASE, EVEN ASSUMING MR. MCMILLEN GETS A LESSER SENTENCE.
>> MR. CANNON'S CASE AND MR. MCMILLEN'S CASE ARE PER SE INCOMPARABLE AND THEY CANNOT EVER BE REVIEWED ON A RELATIVE CULPABILITY ANALYSIS SPECIFICALLY BECAUSE MR. MCMILLEN IS MENTALLY RETARDED.
HE'S BEEN MENTALLY RETARDED SINCE HE WAS SEVEN.
>> SO THE STATE -- BECAUSE I ALWAYS WONDERED IF THERE WAS EVER A CASE SAID SOMEBODY'S MENTALLY RETARDED.
NOW WE HAVE ONE.

BUT LET'S JUST -- THAT'S WHAT IS
BEING SAID NOW.
AGAIN, I'M THINKING FOR THE
FUTURE AND NEWLY-DISCOVERED
EVIDENCE.
LET'S SAY THAT THE LAW BECOMES
AND THERE'S SOMETHING AND HE'S
NOT MENTALLY RETARDED.
ISN'T MR. -- I GUESS I WANT TO
HEAR FROM THE STATE.
ISN'T MR. CANNON STILL MORE
CULPABLE?
>> MOST DEFINITELY, BECAUSE IT
WAS HIS PLAN AND HE BROUGHT THE
MURDER WEAPON AND HE HAD THE
MOTIVE AND MR. MCMILLEN HAPPENS
TO BE THERE.
HE HAPPENS TO GET WRAPPED UP IN
THE SCENARIO.
AND HIS ENTIRE ACTIONS AFTER THE
CRIME, WHAT WE HAVE, THE DIRECT
EVIDENCE TESTIMONY OF SEEING HIM
AIMLESSLY RUNNING LEFT AND RIGHT
AT THE MURDER SCENE, BEING
COMPLETELY SUBMISSIVE TO LAW
ENFORCEMENT, LETTING THEM KNOW
WHERE THE MURDER WEAPON IS, JUST
VOLUNTEERS THAT INFORMATION.
THIS IS MR. CANNON'S CRIME.
THIS IS -- THE REASON THE TRIAL
JUDGE GAVE THE PRIOR VIOLENT
FELONY SO MUCH WEIGHT -- HE
ACTUALLY GAVE IT VERY GREAT
WEIGHT.
I WANT TO BE CLEAR ON THAT.
WAS BECAUSE THE CRIME THAT HE
WAS ON PROBATION FOR, THAT PRIOR
VIOLENT FELONY, THAT CARJACKING,
MIRRORED THIS CRIME TO THE
LETTER, WITH ONE EXCEPTION.
THIS CRIME HAD ESCALATING
VIOLENCE.
HERE WE HAVE AN ATTEMPTED MURDER
AND A MURDER.
IN THAT PRIOR VIOLENT FELONY HE
LURED SOMEONE TO THE PROPERTY
FOR THE PURPOSE OF ROBBING THEM
VIOLENTLY.
HERE HE DOES THE SAME THING
EXCEPT NOW HE ATTEMPTS TO KILL

ONE PERSON AND HE SUCCEEDS IN
KILLING ANOTHER PERSON.
SO EVEN ASSUMING THAT
MR. MCMILLEN COULD BE DEEMED NOT
MENTALLY RETARDED IN THE FUTURE,
WHICH IS HIGHLY UNLIKELY GIVEN
HIS MENTAL STATUS SINCE HE WAS A
YOUNG BOY, IT'S STILL A
PROPORTIONAL CRIME.
WE HAVE FIVE AGGRAVATORS OF CCP,
HAC, PRIOR VIOLENT FELONY AND
UNDER PROBATION AND MURDER IN
THE COURSE OF ROBBERY.
THE TRIAL JUDGE IN REVIEWING THE
DEFENDANT'S LOW IQ CONDUCTED HIS
OWN ADAPTIVE FUNCTIONING
ANALYSIS.
HE NOTED THAT MARVIN CANNON DID
RECEIVE A G.E.D. EVEN THOUGH HE
DROPPED OUT OF HIGH SCHOOL.
HE WAS ABLE TO REPAY AUTO LOANS
AND REPAY LEASES.
HE MADE USE OF FEDERAL FARMING
GRANTS THAT WERE PROVIDED--
>> HOW OLD IS THE DEFENDANT?
>> MR. CANNON.
I'M SORRY, JUDGE.
I DON'T KNOW HIS AGE OFF THE TOP
OF MY HEAD.
>> I GOT THE IMPRESSION THAT
THEY WERE RELATIVELY YOUNG, BUT
I CAN'T TELL FROM THE RECORD IF
THAT'S TRUE OR NOT.
>> NO.
MR. CANNON WAS -- NO AGE
MITIGATOR WAS ASKED BY THE
DEFENSE AND MR. CANNON HAD
PREVIOUSLY DONE AT LEAST FIVE
YEARS IN THE DEPARTMENT OF
CORRECTIONS, WHICH IS THE CRIME
HE WAS ON PROBATION FOR.
SO HE'S OF ADEQUATE AGE.
AND ALTHOUGH HE DID HAVE A
COMPOSITE IQ SCORE OF 77, THE
TRIAL COURT NOTED THAT HIS
NONVERBAL IQ SCORE WAS A 88.
SO HE KNOWS THE CRIMINALITY OF
HIS CONDUCT.
HE KNOWS EXACTLY WHAT HE'S
DOING.

>> LET ME ASK YOU SOMETHING
THAT'S TOTALLY IRRELEVANT.
WHAT IS DEER CORN?
>> IT'S PROBABLY BETTER
CLASSIFIED AS DEER FEED, YOUR
HONOR.
THEY PUT IT OUT FOR -- TO
ATTRACT DEER, TO FEED DEER FOR
PURPOSES OF HUNTING.
>> OH, YOU USE IT TO LURE THE
DEERS.
>> YES.
>> OH.
OKAY.
>> I THINK THAT WAS AN IMPORTANT
QUESTION, BECAUSE I DIDN'T KNOW
THE ANSWER EITHER.
>> I HAD TO LOOK IT UP AS WELL.
>> IT OBVIOUSLY HAD VALUE.
>> IT DID.
IT HAD VALUE.
THEY WERE SELLING IT AT A VERY
REASONABLE RATE, BUT IT DID HAVE
VALUE.
IT WAS VALUABLE TO MR. MORGAN
AND MR. NEIL.
>> HOW MUCH HAD HE PUT OUT
PREPAID?
>> $120.
IT WAS NOT A SIGNIFICANT AMOUNT.
$30 A BARREL.
AND ALTHOUGH THAT SEEMS VERY
INSIGNIFICANT, MARVIN CANNON'S
MOTIVE WAS TO AVOID GOING BACK
TO PRISON FOR POTENTIALLY THE
REST OF HIS LIFE BECAUSE HE WAS
ON PROBATION FOR A LIFE FELONY.
AND HERE HE IS TAKING MONEY, NOT
DELIVERING AND HAS POTENTIAL
THEFT CHARGES.
>> THAT BRINGS JUST UP A POINT
ABOUT THE HEARSAY STATEMENTS.
MR. HARRISON DIDN'T MENTION IT.
BUT THERE'S THOSE SERIES OF
STATEMENTS THAT COME IN THROUGH
MR. NEIL, CORRECT?
>> YES.
>> ABOUT WHAT -- AND WAS HE
PRESENT WHEN THOSE PHONE CALLS
OCCURRED?

>> YES.
>> SO HE WAS ABLE TO BE CROSS-EXAMINED ABOUT THOSE.
>> YES.
>> AND THE STATE'S THEORY ON THOSE STATEMENTS IS THAT THEY'RE NOT -- THEY WERE HEARSAY, BUT ADMITTED REALLY FOR STATE OF MIND?
>> NO, YOUR HONOR.
THEY WERE NOT HEARSAY STATEMENTS BECAUSE THEY WERE NOT BEING OFFERED FOR THE TRUTH OF THE MATTER ASSERTED.
THEY WERE BEING OFFERED TO SHOW THE DEFENDANT'S MOTIVE IN COMMITTING THE STATEMENTS.
THE DETAILS OF THEM, WHETHER OR NOT THERE ACTUALLY WAS A SECOND TRANSACTION OF DEER CORN IS IRRELEVANT.
>> THE CONCERN IS -- I ALWAYS THINK WITH THESE THINGS THAT ARE NOT HEARSAY, ADMITTED FOR NOT THE TRUTH, THE QUESTION IS WHEN MR. NEIL OVERHEARD THE CONVERSATION BETWEEN MR. MORGAN AND MR. CANNON, WAS IT ACTUALLY MR. CANNON HEARING THIS ON THE OTHER LINE?
WAS THAT EVER CONTESTED?
THAT HE ACTUALLY WAS THE PERSON WHO WAS BEING CALLED?
>> THAT WAS NOT CONTESTED, BUT WHAT WAS CONTESTED WAS WHETHER OR NOT HE ACTUALLY HEARD IT.
BECAUSE THE TESTIMONY IS THAT MARVIN CANNON LEAVES A VOICE MAIL MESSAGE.
AND THE CASE LAW IS CLEAR THAT THE ASSUMPTION IS THAT THAT MESSAGE IS ACTUALLY HEARD.
BECAUSE WHAT WE HAVE IS THE DEFENDANT ACTING IN RELIANCE ON THAT STATEMENT.
WHAT HAPPENS AFTERWARDS IS THAT HE PLACES A PHONE CALL AND Z, HEY, THE DEER CORN IS READY.
SO WE ASSUME HE DID HEAR THAT STATEMENT.

THE 4TH DISTRICT COURT OF
APPEALS HAD A SIMILAR CASE WHERE
THE ALLEGED HEARSAY STATEMENTS
WERE EMAILS AND THERE WAS NO
EVIDENCE PUT INTO THE RECORD
THAT THE DEFENDANT HAD ACTUALLY
READ THOSE EMAILS.
BUT IN RELYING ON THIS COURT'S
CASE LAW IN BLACKWOOD, NOTING
THAT WHEN A THIRD-PARTY
DEFENDANT IS ASSUMED TO HAVE
HEARD THOSE STATEMENTS, THEN
THOSE STATEMENTS COME IN NOT FOR
THE TRUTH OF THE MATTER
ASSERTED, BUT TO PROVE MOTIVE
AND STATE OF MIND IS PROBABLY
BETTER CLASSIFIED AS NOTICE.
THE DEFENDANT IS PUT ON NOTICE
OF THAT STATEMENT BEING MADE AND
NOW HE GOES AND ACTS.
>> THE MORE CRITICAL QUESTION
WOULD BE DID HE HEAR THE VOICE
MAIL.
>> CORRECT.
>> BUT WAS THERE ANY INDEPENDENT
VERIFICATION THAT THIS DEER CORN
TRANSACTION HAD OCCURRED IN THE
PAST AND THAT MR. CANNON HAD IN
FACT PREPAID?
OR DID THAT ONLY COME IN FROM
MR. NEIL?
>> IT ONLY CAME IN FROM
MR. NEIL.
AS FAR AS THE FIRST TRANSACTION,
MR. NEIL'S TESTIMONY DOES TELL
US THAT THAT OCCURRED, BECAUSE
HE DID RECEIVE -- HE GAVE MONEY
AND DID RECEIVE CORN.
AS FAR AS THE SECOND
TRANSACTION, IT'S MR. NEIL'S
TESTIMONY THAT WAS NOT OFFERED
FOR THE TRUTH.
>> I'M SORRY.
THE FIRST TRANSACTION WENT TO
MR. NEIL OR TO MR. MORGAN?
>> BOTH.
THEY SPLIT IT.
>> OKAY.
SO HE KNOWS THAT THERE WAS --
AND WAS HE PART OF WANTING MORE

OF THE DEER CORN?
>> IT WAS PRIMARILY MR. NEIL
THAT WANTED THE MORE DEER CORN.
>> OKAY.
>> HE'S THE ONE THAT BEGINS
THAT, SAYS I'D LIKE MORE, I NEED
MORE.
MR. NEIL WAS MORE INTO HUNTING
AND MR. MORGAN WAS MORE INTO
FISHING.
>> MR. MORGAN WAS ACTUALLY THE
ONE WHO KNEW MR. CANNON.
>> CORRECT.
>> HE WAS LIKE THE CONTACT
PERSON.
MR. MORGAN WAS THE CONTACT
PERSON TO MR. CANNON TO GET THIS
PRODUCT.
>> YES.
THAT'S CORRECT.
>> IF THERE ARE NO FURTHER
QUESTIONS, FOR THE
AFOREMENTIONED REASONS, THE
STATE RESPECTFULLY REQUESTS THIS
COURT AFFIRM.
>> REBUTTAL.
>> VERY BRIEFLY, YOUR HONOR, I
JUST WANT TO BE SURE THAT WE'RE
CLEAR ON WHO THE ACTUAL
PERPETRATOR -- THE ACTUAL
STABBER WAS.
ON PAGE 28 OF THE SENTENCING
ORDER HE SAYS SUBSTANTIAL
EVIDENCE IS CONSISTENT WITH
MR. MCMILLEN STABBING
MR. MORGAN.
DNA UNDER MR. MORGAN'S
FINGERNAILS EXCLUDED MR. CANNON,
BUT COULD NOT EXCLUDE
MR. MCMILLEN.
JUST WANT TO MAKE SURE THAT IS
CLEAR.
THANK YOU VERY MUCH FOR HEARING
US, YOUR HONOR.
>> THANK YOU FOR YOUR ARGUMENTS.