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Marc James Asay v. Michael W. Moore

NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS ASAY VERSUS MOORE. MS. BREWER. GO AHEAD.

MAY IT PLEASE THE COURT. MY NAME IS HEIDI BREWER. I AM WITH JENNIFER BLAKE MAN HAD, WHO IS ASSISTING ME ON THIS CASE FOR THE CAPITAL COLLATERAL NORTHERN REGION. WE REPRESENT MACK SAYS A SAY -- WE REPRESENT MARC A SAY, WHO IS THE PETITIONER. I AM GOING TO SPEAK TO CLAIM ONE IN THE PETITION AND THIS ISSUE WAS NOT RAISED ON DIRECT APPEAL AND THE ISSUE HERE AS I HAVE CLAIMED IT IS MR. ASAY WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE PRESENT DURING A CRITICAL STAGE OF HIS TRIAL PROCEEDINGS. HE WAS INVOLUNTARILY ABSENT FROM THAT STAGE.

WAS THIS ON THE 3.850? I AM SURE THERE WAS A 3.850 CLAIMING IN EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

THERE WAS A 3.850 ADDRESSING INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. HOWEVER, IT DID NOT ADDRESS THIS ISSUE.

ARE YOU CLAIMING THAT APPELLATE COUNSEL WAS INADEQUATE?

YES, YOUR HONOR. I AM CLAIMING THAT --

WOULD YOU PROCEED. WOULD YOU, ALSO, GIVE US A SCENARIO, BECAUSE THERE SEEMS TO BE SOME DIFFERENCE BETWEEN THE FACTORS THAT YOU ARE DEALING WITH AND MANY OF THE CASES THAT WE HAVE REVIEWED, SO COULD YOU KIND OF SET THAT UP FOR US AS WELL.

YES. YES, YOUR HONOR, IT CAN GET CONFUSING, IO ADMIT, SO I WANT TO BE PRECISE ABOUT FACTORS THAT HAPPENED IN THIS CASE. SPECIFICALLY I AM ALLEGING A DUE PROCESS VIOLATION, BECAUSE MR. ASAY DID NOT HAVE THE OPPORTUNITY TO CONSULT WITH HIS ATTORNEY DURING THE PROCESS WHERE PREEMPTORY AND CHALLENGE STRIKES WERE BEING HELD DURING HIS TRIAL. AT TRIAL, THE JURY WAS QUESTIONED IN OPEN COURT. HOWEVER, WHEN IT CAME TIME FOR THE CHALLENGES, THE ATTORNEYS WOULD GO UP TO THE BENCH AND MAKE THEIR CHALLENGES, AND I REALIZE THAT THIS HAPPENS IN MANY CASES. HOWEVER, IN MR. ASAY'S CASE, DURING THE FIRST ROUND OF CHALLENGES, IT IS CLEAR ON THE RECORD THAT HIS TRIAL ATTORNEY CONFERRED WITH MR. ASAY. I THINK THAT IS AT 313, AND BASICALLY IT IS PAGE 313 OF THE RECORD. THE RECORD SPECIFICALLY STATES, I WANTED TO CONFER WITH MY CLIENT ABOUT THESE, AND SO THEN THEY GO INTO THE --

JUST SO, AGAIN, SETTING THE STAGE, SO MR. ASAY IS IN THE COURTROOM DURING THE ENTIRE QUESTIONING OF THE JURY.

THAT IS CORRECT.

AND WHAT WE HAD, AND THIS WAS A PRECONEY CASE, IS THAT CORRECT?

THAT'S CORRECT.

THAT AS WAS COMMON AT THAT TIME, THAT THE CHALLENGES WOULD TAKE PLACE AT THE SIDE BAR AND THAT IS WHAT HAPPENED IN THIS CASE.

CORRECT.

AND YOU AGREE, AT LEAST FOR THE VARIOUS, MOST OF THE CHALLENGES, THERE IS RECORD EVIDENCE THAT, IN FACT, MR. ASAY WAS CONSULTED AS TO THE CHALLENGES.

THE FIRST ROUND. YES.

SO THEN THE SECOND ROUND BEGINS, AND THAT IS IN OPEN COURT AGAIN. THE SECOND ROUND. THEY GO UP TO THE BENCH, AND THEY START THE CHALLENGES OF ANOTHER GROUP OF JURORS, APPROXIMATELY TEN OR SO, I BELIEVE, AND THIS TIME, HOWEVER, THEY GO INTO THE CHALLENGES, AND THERE IS NO MENTION AT ALL THAT TRIAL COUNSEL GOES BACK TO MR. ASAY AND CONFERS AS THE RECORD SHOWS HAPPENED DURING THE FIRST ROUND OF CHALLENGES.

IS THERE ANYTHING IN THE RECORD THAT WOULD DEMONSTRATE THAT HE WAS PREVENTED FROM DOING SO, HAD HE WANTED TO?

NOTHING SHOWING THAT HE WAS PREVENTED FROM DOING IT, SO ALTHOUGH I DON'T KNOW THAT --

AND WOULD THERE BE ANYTHING THAT INDICATED WHETHER OR NOT THERE MAY HAVE BEEN ANY DISCUSSION BETWEEN COUNSEL AND MR. ASAY, AT COUNSEL TABLE, DURING THE PROCESS OF THE QUESTIONING OF JURORS?

THE RECORD DOES NOT SHOW OR REFLECT TRIAL COUNSEL LEAVING THE BENCH OR GOING TO THE TABLE TO DISCUSS WITH MR. ASAY, ANY OF THAT.

BUT ISN'T THAT THE FIRST PROBLEM THAT YOU HAVE? AND THAT IS THAT WHAT YOU ARE SAYING IS THAT, SINCE THE RECORD IS SILENT, AFTER THIS AFFIRMATIVE FIRST ROUND INDICATION OF THE BACK AND FORTH THAT AFTER THAT, THE RECORD IS SILENT, AND THAT YOU ARE AG ASSUMING THAT YOU CAN ONLY DRAW ONE INFERENCE FROM THAT, THE INFERENCE BEING THAT, AFTER STARTING OUT AND CONSULTING MODE THAT, AFTER THAT, THERE WAS NO CONSULT IVE MODE, AND ISN'T THAT A FAIR INFERENCE TO DRAW, BECAUSE CAN'T YOU JUST AS EASILY DRAW THE INFERENCE OF HAVING STARTED OUT THAT WAY, AND WITH THERE BEING NO INDICATION THAT THE COURT, THEN, SAID, WELL, NO, YOU CAN'T DO THAT ANYMORE, AND SO AREN'T WE LEFT, THEN, WITH A RECORD THAT APPELLATE COUNSEL WOULD SEE THAT DOES NOT ESTABLISH THAT THERE WAS A BAR ON THE CONSULTATION, AND AN INFERENCE THAT WOULD HAVE BEEN ALLOWED?

I UNDERSTAND EXACTLY WHAT YOU ARE SAYING, YOUR HONOR. WHAT DO WE MAKE OF THIS RECORD, WHERE AT ONE POINT IT SAYS HE WAS CONSULTED, AND AT THE OTHER POINT, IT IS SILENT AS TO THAT? I THINK, IF YOU CONSIDER ALL OF THE FACTS, ALL OF THE PARTICULAR FACTS IN MR. ASAY'S CASE, AS TO HOW THIS HAPPENED, AND HOW IT CAME UP, THAT MIGHT BE INSTRUCTIVE, TO, BUT TO THE EXTENT THAT ONE INFERENCE COULD BE DRAWN JUST AS WELL AS ANOTHER INFERENCE, WHETHER IT FAVORS MR. ASAY OR GOES AGAINST MR. ASAY, I THINK THEN THIS COURT, IF THAT IS THE CASE THAT THERE IS A QUESTION ABOUT WHAT HAPPENED, THEN A REMAND WOULD BE A PROPER --

WHY WOULD THAT, WHAT YOU ARE TALKING ABOUT, SEE, AND WE ADD ON THE NEXT LAYER THAT WE ADD ON WE ARE NOT TALKING ABOUT THIS BEING A DIRECT ISSUE FOR US TO LOOK AT. WE ARE TALKING ABOUT YOU CLAIMING THAT AN APPELLATE LAWYER SHOULD HAVE RAISED THIS AS AN ISSUE ON THIS KIND OF RECORD, AND WHY WOULDN'T A REASONABLE APPELLATE LAWYER HAVE DRAWN THE INFERENCE THAT, THERE CLEARLY BEING THIS FREEDOM TO VISIT WITH THE CLIENT, THAT THERE WAS, IT WAS NEVER CUT OFF, AND THEREFORE THAT A REASONABLY COMPETENT APPELLATE LAWYER WOULD NOT HAVE RAISEDED THIS ISSUE IN THE

COURT, BECAUSE IMMEDIATELY THE COURT WOULD HAVE SAID, WELL, YOUR RECORD DOESN'T SUPPORT WHAT YOU ARE ASSERTING, SO GIVEN THAT WE HAVE TO GIVE PRETTY BROAD RANGE TO THE REASONABLENESS OF APPELLATE LAWYER'S TASK, WITH A RECORD LIKE THIS, ISN'T IT ALMOST IMPOSSIBLE TO SHOW THAT APPELLATE COUNSEL WAS INADEQUATE IN NOT RAISING IT?

YOUR HONOR, WITH THAT I WOULD RESPOND I THINK APPELLATE COUNSEL WOULD HAVE THEN BEEN POINTED TO THE RECORD WHERE MR. ASAY, HIMSELF, ADDRESSES THE COURT WHEN THE JURY IS OUT. NOW, I HAVE TO NOTE THAT THIS IS THE SAME DAY JURY SELECTION TOOK PLACE. ONE OF THE DAYS WAS SEPTEMBER 27. MR. ASAY APPROACHED THE COURT, TOLD THE COURT, BASICALLY, HE WAS UNSATISFIED WITH HIS TRIAL ATTORNEY DETAILING SEVERAL REASONS, AND ONE OF THOSE REASONS THAT HE WAS DISSATISFIED WITH THE TRIAL COUNSEL WAS THAT, BECAUSE HE WANTED JUROR SANDS OFF OF THE PANEL, BECAUSE JUROR SANDS KNEW MR. ASAY'S BROTHER-IN-LAW AND GOT INTO A CONFLICT.

I REALIZE THAT THAT MATCHED THE JUROR THAT EVENTUALLY WAS DISQUALIFIED THAT DIDN'T SERVE ON THIS JURY, AND NOW YOU ARE GETTING INTO ANOTHER ISSUE, AND THAT ISSUE HIS LAWYERS AND THEIR CLIENTS, WHEN THEY ARE CONSULTING WITH THEM ABOUT SHOULD WE LEAVE MRS. BROWN ON THE JURY, YOU KNOW, IS SHE WEARING HER HAIR TOO LONG OR WHATEVER, AND THE CLIENT SAYS, WELL, I DON'T KNOW. YOU ARE THE LAWYER. AND THE OTHER ONE SAYS, WELL, IT IS YOUR LIFE ON THE LINE. ALL RIGHT. ANYBODY THAT WEARS THEIR HAIR LOWER THAN -- AND THAT IS NOT THE KIND OF THING THAT WE ARE GOING TO END UP PENALIZING THE APPELLATE LAWYER FOR SEEING IN THE RECORD AND RAISING OR NOT RAISING. ARE WE?

WELL, NO. I MEAN, I UNDERSTAND WHAT YOU ARE SAYING, BUT I DO THINK MR. ASAY HAD THENSTTIOL AND FUNDAMENTAL RIGHT TO BE HEARD WITH COUNSEL, REGARDING THE STRIKE AND WHO WILL BE ON THIS JURY, AND I UNDERSTAND THE RECORD --

THAT IS WHY I SAY THAT, IF WE START WITH THE PROPOSITION THAT THIS WAS THE KIND OF PROCEEDING THAT CLEARLY THE COURT WAS ALLOW ALLOWING COUNSEL TO CONSULT WITH HIS CLIENT AND THAT IS ACTUALLY DEMONSTRATED ON THE RECORD. WHY WOULD WE ASSUME THAT A REASONABLE APPELLATE LAWYER WOULD READ THAT, THAT SOMEHOW A LAWYER WAS NOW BARRED FROM DOING THAT, BECAUSE YOU KNOW, WE MAY HAVE RECORDS WHERE A JUDGE SAYS YOU STAY UP HERE AT THE BENCH OR I GUESS IT IS DIFFICULT FOR ME TO IMAGINE A TRIAL JUDGE THAT WOULD TAKE SUCH A HARSH POSITION BUT I AM JUST, YOU HAVE GIVEN US YOUR BEST SHOT, WITH REFERENCE TO WHAT THE RECORD SHOWS, I TAKE IT.

ACTUALLY, YOUR HONOR, NO. I WOULD SAY JUST TO FOLLOW UP ON THAT, I AM NOT SAY HAS GONE THAT THE TRIAL COBARRED IT, I AM JUST SAYING THAT IS, BECAUSE OF THE WAY THINGS HAPPENED, DURING HIS TRIAL, HE WAS PREVENTED, W HE DIHAVE THE OPPORTUNITY TO CONSULT WITH HIS LAWYER, FROM MY ARGUMENT OF THE RECORD, BECAUSE IT IS CLEAR ON THE RECORD, THAT TRIAL COUNSEL, WHEN HE WAS AT BENCH DURING THE FIRST STRIKE, DURING THE FIRST ROUND OF STRIKES, THAT I WOULD LIKE TO GO CONFER WITH MY CLIENT HE DID. THAT DID NOT HAPPEN DURING THE SECOND ROUND, WHEN YOU READ THE, WELL, THE RECORD DOESN'T SAY THAT, AND I DON'T THINK THAT WE SHOULD READ THE RECORD TO THE DEBT TRIMENT OF MR. ASAY, WHEN IT CONCERNS A FUNDAMENTAL RIGHT LIKE THIS.

BUT REALLY WHAT YOU HAVE GOT -- DEBT TRIMENT OF MR. ASAY, WHEN IT CONCERNS A FUNDAMENTAL RIGHT LIKE THIS.

BUT REALLY WHAT YOU HAVE GOT TO BE ABLE TO ESTABLISH ON THE RECORD IS THAT A REASONABLEBLY -- IS THAT A REASONABLY COMPETENT APPELLATE LAWYER WOULD HAVE SEEN THIS FRANCIS-TYPE CONSTITUTIONAL VIOLATION, AND WOULD HAVE BEEN, WOULD HAVE RAISED IT, AND THAT IT WOULD HAVE BEEN SUCCESSFUL, AND WHAT YOU ARE ARGUING INSTEAD, IS

THAT, NO, BECAUSE THIS RECORD REALLY IS SILENT, WHAT WE WOULD HAVE TO DO WOULD TO BE REMAND IT TO SEE, IN FACT, WHAT DID HAPPEN AND THERE IS NO PRECEDENT FOR THAT IN LOOKING AT AN APPELLATE INEFFECTIVE ASSISTANCE OF COUNSEL, TO HAVE TO GO BACK AND RECONSTRUCT IT. I MEAN, THAT WOULD HAVE BEEN SOMETHING, MAYBE, YOU COULD HAVE DONE IN THE 3.850, WHAT THE TRIAL COUNSEL DID, BUT I GUESS I AM HAVING TROUBLE WITH HOW, AGAIN, IF IT IS NOT CLEAR AND UNEQUIVOCAL IN THIS RECORD THAT HE WAS PREVENTED FROM CONSULTING WITH HIS ATTORNEY FOR THE LAST ROUND, HOW THERE WOULD BE A CONSTITUTIONAL VIOLATION. IF THERE IS NOT A CONSTITUTIONAL VIOLATION, THEN I DON'T SEE HOW YOU CAN SAY THAT, ON THIS RECORD APPELLATE COUNSEL WAS DEFICIENT IN FAILING TO RAISE IT, AND MOREOVER THAT IT WOULD UNDERMINE OUR CONFIDENCE IN THE RESULT OF THIS PROCEEDING.

WELL, YOUR HONOR, I THINK THAT, FROM READING THE RECORD AND LOOKING AT WHAT MR. ASAY TOLD THE COURT, THE TRIAL COURT, HOW UNHAPPY HE WAS WITH HIS TRIAL ATTORNEY, SPECIFICALLY ONE OF THE THINGS WAS I DIDN'T GET A CHANCE TO TALK TO MY LAWYER ABOUT THIS JUROR, SO I WOULD THINK THAT THAT SHOULD BE TAKEN INTO CONTEXT, WHEN YOU ASSESS THE ENTIRE, WHAT HAPPENED IN THE ENTIRE CASE. IT IS NOT --

ON THAT POINT, WE HAVE ALREADY ESTABLISHED THAT MR. ASAY WAS THERE IN COURT, NEXT TO HIS ATTORNEY, DURING THE WHOLE QUESTIONING OF THE POTENTIAL JURORS. CORRECT?

CORRECT.

AND MR. ASAY, THEN, AT SOME POINT LATER ON, COMES BEFORE THE COURT AND ASKS THEM, THE COURT, ABOUT GETTING ANOTHER ATTORNEY.

YES, YOUR HONOR.

IS THERE ANYTHING IN THE RECORD THAT ESTABLISHES WHEN MR. ASAY HAD INFORMATION ABOUT THE JUROR SANDS AND WHY HE NEVER SAID ANYTHING TO HIS ATTORNEY ABOUT IT AT THAT POINT.

YES, YOUR HONOR. I DO WANT TO CLEAR THAT UP AND JUST TAKE A MOMENT TO DO THAT. MR. ASAY COMPLAINED ON THE SAME DAY THAT JURY SELECTION INITIALLY STARTED, THE 27th.

WHEN?

AFTER THE TESTIMONY OF BOB GWYNN, ONE OF THE STATE'S -- BOB QUINN, ONE OF THE STATE'S WITNESSES.

AFTER FIVE WITNESSES?

I DO NOT REMEMBER THE NUMBER OF WITNESSES. BUT HE HAD A CONFLICT AND JUROR SANDS' ISSUE CAME UP AND HE MENTIONED AT THAT TIME HAD HE A CONFLICT. THE NEXT DAY IS WHEN THE DEFENSE ATTORNEY BRINGS IT UP AND ACTUALLY MAKES THE MOTION IN FRONT OF THE TRIAL COURT, TO STRIKE THIS PARTICULAR JUROR, SO MR. ASAY MADE IT CLEAR, AT THAT, AS SOON, I BELIEVE AS SOON AS HE COULD, THAT HE HAD A PROBLEM WITH THIS, AND THEN JUSTICE PARIENTE, YOU ADDRESSED SOME OTHER ISSUES OR MANY ISSUES ARE IMPLICATED IN WHAT YOU SAID ABOUT HOW TO ASSESS THIS. I WILL TRY TO ADDRESS THOSE IN MY REBUTTAL. MR. CHIEF JUSTICE

THANK YOU. MR. FRENCH.

>Y IT PLEASE THE COURT. CURTIS TRENCH, ASSISTANT ATTORNEY GENERAL REPRESENTING THE STATE OF FLORIDA IN THIS CASE. ADDRESSING CLAIM ONE, I WOULD LIKE TO JUST FIRST, TO

POINT OUT THAT, AT THE TIME OF THIS TRIAL, TO MY KNOWLEDGE, NO ONE, NO APPELLATE COUNSEL HAD EVER MADE ANY KIND OF DUE PROCESS CLAIM, BASED UPON A DEFENDANT'S ABS, WHERE, IN FACT, UN -- ABSENCE, UNLIKE FRANK EARLIER, WHERE THE DEFENDANT WAS ACTUALLY OUTSIDE THE COURTROOM DURING PART OF THE JURY SELECTION PROCESS. NO ONE, AT THE TIME OF THIS TRIAL, TO MY KNOWLEDGE, HAD ARGUED ON APPEAL, THAT DUE PROCESS WAS VIOLATED BECAUSE THE DEFENDANT, WHO WAS IN THE COURTROOM AT THE TIME, MERELY WAS NOT PRESENT AT BENCH CONFERENCES, SO MY FIRST RESPONSE WOULD BE, UNDER THOSE CIRCUMSTANCES, I DON'T SEE HOW ASAY CAN SAY DEFICIENT ATTORNEY PERFORMANCE.

DO YOU SEE THE RECORD IN THE SAME LIGHT AS DEFENSE COUNSEL? IS THERE ANYTHING ELSE ON THIS RECORD DEMONSTRATING WHAT WENT ON BETWEEN MR. ASAY AND HIS ATTORNEY?

THE RECORD EXPLICITLY AND CLEARLY SHOWS, FIRST OF ALL, THAT THE TRIAL JUDGE TOLD THE PARTIES THAT, AND TOLD MR. ASAY AND COUNSEL FOR MR. ASAY, THAT THEY COULD CONVERSE AT ANY TIME AND DEFENDANT COULD CONSULT WITH HIS ATTORNEY. LET ME JUST READ EXACTLY WHAT HE SAID. HE SAID BEFORE WE START, MR. DAVIS WAS TRIAL COUNSEL, IF YOU NEED TO CONFER WITH YOUR CLIENT AT ANY TIME, YOU ARE FREE TO CONVERSE WITH HIM AT ANY TIME. FOR THE RECORD, YOU HAVE ALREADY CONFERRED WITH HIM. THE RECORD EXPLICITLY SHOWS THAT AT SOME POINT THEREAFTER, DURING THE JURY SELECTION PROCESS AND THE EXERCISE OF CHALLENGES, THAT IN FACT, COUNSEL DID CONFER WITH MR. ASAY, AND THIS WAS AT THE POINT WHICH I THINK THE 11th JUROR HAD BEEN SELECTED. THE RECORD SUBSEQUENT TO THAT IS NOT --

LET ME STOP YOU RIGHT THERE.

OKAY.

AT THAT POINT WAS MR. SANDS BEING CONSIDERED OR HAD HE BEEN PASSED OVER, AND WAS A PART OF THE ELEVEN JURORS THAT WERE SELECTED OR NOT?

I DON'T REMEMBER FOR SURE. I BELIEVE HE WAS ALREADY ON THE JURAT THAT POINT. I DON'T THINK HE WAS THE TWELFTH JUROR SELECTED. I AM ALMOST POSITIVE OF THAT. THE RECORD DOES NOT EXPLICITLY SHOW THAT HE CONSULTED WITH COUNSEL AFTER THAT, BUT IT DOESN'T SHOW THAT HE DID NOT, AND CERTAINLY IT DOESN'T SHOW THAT THE COURT PRECLUDED HIM FROM DOING THAT. AS FAR AS JUROR SANDS IS CONCERNED, AFTER FIVE WITNESSES TESTIFIED, ASAY MOVED TO DISMISS HIS COUNSEL. HE HAD VARIOUS SORTS OF COMPLAINTS ABOUT HIM. HE THOUGHT THAT HE HIS COUNSEL SHOULD HAVE CROSS-EXAMINED THE WITNESSES TO A GREAT ERECTION TENT THAT THAN HE DID -- TO A GREAT ERECTION TENT THAN HE DID -- A GREATER EXTENT THAN HE DID AND SOME OTHER MATTERS. PLUS JUROR SANDS, HE HAD LEARNED AFTER THE JUROR HAD BEEN SELECTED, THERE WAS SOME SORT OF RELATIONSHIP BETWEEN MR. SANDS AND, I BELIEVE, THE DEFENDANT'S BROTHER-IN-LAW OR SOMETHING TO THAT EFFECT. AGAIN, THE COURT DENIED THE MOTION TO DISMISS TRIAL COUNSEL BUT TOLD ASAY THAT, IF HE WANTED TO DEAL WITH THE QUESTION OF ANY OF THE JURORS, WE CAN DO THAT AT ANY TIME DURING THE TRIAL. AND LATER, AS A MATTER OF FACT, IN EFFECT, ASAY MADE A CHALLENGE FOR CAUSE AND THE JUDGE IN EFFECT GRANTED IT JUST TO RESOLVE THE ISSUE, REMOVED HIM AS A JUROR, REPLACED HIM WITH ONE OF THE ALTERNATES. MR. ASAY EXPLICITLY AGREED TO THIS PROCEDURE, AND I ALSO --

DID THE LAWYER AGREE TO THAT OR DID ASAY, HIMSELF, AGREE TO THAT?

ASAY EXPLICITLY, HIMSELF, EXPLICITLY AGREED TO THAT, AFTER CONFERRING WITH HIS ATTORNEY, AND I AM REFERRING TO PAGE 903 OF THE TRANSCRIPT. I WOULD ALSO POINT OUT THAT COUNSEL, AS THEY WERE DISCUSSING THIS ISSUE, NOTED THAT THE BELATED REQUEST FOR CAUSE WAS BASED UPON INFORMATION LEARNED BY THE DEFENDANT ABOUT THAT PARTICULAR JUROR, AFTER THE JURY HAD BEEN SELECTED AND SWORN. AND OUR POSITION IS THAT NONE OF

THIS COLLOQUY BY MR. ASAY WAS ANY COMPLAINT ABOUT NOT BEING PRESENT AT BENCH CONFERENCES DURING THE SELECTION OF THE JURY. IT WAS SIMPLY A COMPLETELY SEPARATE AND UNRELATED ISSUE. IN FACT, NEITHER TRIAL COUNSEL NOR MR. ASAY ATTEMPTED TO INVOKE ANY KIND OF RIGHT FOR HIM TO BE PRESENT AT THE BENCH CONFERENCES. AND, OF COURSE, IT IS ALSO IMPORTANT TO NOTE THAT, AT THE TIME OF THIS TRIAL, CONEY HADN'T BEEN DECIDED, AND LOOKING AT THIS COURT'S RECENT DECISION IN MOHAMMED V STATE, WHICH PROPOSING -- WHICH OPPOSING COUNSEL CITES IN THEIR REPLY, YOU ALL STATE THAT, IN CARMICHAEL VERSUS THE STATE, THIS COURT MADE IT CLEAR THAT THE CONEY DECISION WAS BASED ON OUR INTERPRETATION OF THE PROCEDURAL RULE, RATHER THAN AN ABSOLUTE CONSTITUTIONAL RIGHT TO BE PRESENT AT THE BENCH CONFERENCE WHEN PREEMPTORY CHALLENGES ARE EXERCISED. THE DUE PROCESS ISSUE THAT THIS COURT ADDRESSED IN MOHAMMED, INVOLVED THE SITUATION WHERE SOME OF THE JURORS WERE EXAMINED ON THE VOIR DIRE, AT BENCH CONFERENCES WHICH THE DEFENDANT, HIMSELF, DID NOT ATTEND, AND THIS COURT FOUND THAT DUE PROCESS WAS IMPLICATED BUT NOT VIOLATED, AND IN THIS CIRCUMSTANCE, I AM NOT SURE THAT, EVEN NOW, THAT THERE IS A DUE PROCESS RIGHT TO BE AT THE BENCH, WHEN A PREEMPTORY CHALLENGES ARE EXERCISED, BUT IF THERE IS, IT WASN'T VIOLATED IN THIS CASE, GIVEN MR. ASAY'S PRESENCE IN THE COURTROOM, THE OPPORTUNITY THAT HE HAD TO CONSULT WITH TRIAL COUNSEL, AND HIS FAILURE TO INVOKE HIS RIGHT TO BE PRESENT, IF SUCH RIGHT HE HAD.

SO YOU ARE SAYING, BASICALLY HERE, IF THERE WOULD BE ANY CLAIM, IT WOULD BE A CLAIM TO SAY THAT HE WASN'T PREVENTED BY THE TRIAL COURT FROM CONSULTING WITH THE ATTORNEY. THAT IT WOULD BE THAT HIS TRIAL COUNSEL WAS SOMEHOW INEFFECTIVE OR NOT IN EFFICIENT, INEFFECTIVE FOR NOT CONSULTING WITH HIM, AND WE HAVE NO RECORD OF THAT.

CORRECT. AND IF THAT IS THE CLAIM, IT SHOULD HAVE BEEN BROUGHT UP ON 3.850. HE SHOULD HAVE CLAIMED THAT TRIAL COUNSEL IS INEFFECTIVE BECAUSE HE FAILED TO CONSULT WITH HIM AND/OR FAILED TO PRESERVE ANY POSSIBLE CONEY OR DUE PROCESS ISSUE.

YOU WOULD AGREE IF THERE WAS A CONSTITUTIONAL VIOLATION, SUCH AS IN FRANCIS, THAT COULD HAVE BEEN RAISED ON DIRECT APPEAL, WITHOUT THEIR HAVING BEEN A RECORD PRESERVING IT. FRANCIS DIDN'T --

I AM NOT SURE I WOULD CONCEDE THAT. IT WOULD BE A DIFFERENT CASE.

FRANCIS WAS A FIRST-TIME ON APPEAL CASE.

OKAY. JUST ADDRESSING THE OTHER CLAIMS BRIEFLY I WOULD JUST POINT OUT THAT, ALTHOUGH IN HIS, MR. ASAY'S REPLY, AT NUMBER FIVE HE CLAIMS THAT 2-A IS A DIFFERENT CLAIM THAN HE RAISED ON DIRECT APPEAL. IN HIS PETITION AT PAGE 20, HE ACKNOWLEDGED THAT THIS CLAIM WAS, QUOTE, PRESENT ODD DIRECT APPEAL AND ASKED THIS COURT TO RECONSIDER THE ISSUE. CLAIM 5 IS NOT EVEN A CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BUT JUST AN ATTACK ON THREE AGGRAVATORS, INCLUDING CCP, UNDER SENTENCE OF IMPRISONMENT AND PRIOR VIOLENT FELONY CONVICTION. THAT IS NOT PROPER ON HABEAS TO RAISE SUCH A CLAIM FOR THE FIRST TIME ON HABEAS. NONE OF THE OTHER ISSUES, NONE OF THE OTHER CLAIMS, LET ME SAY THE CLAIMS WERE NOT PRESERVED BY TRIAL COUNSEL, AND APPELLATE COUNSEL WAS NOT EFFECT HE CAN'T I HAVE FOR -- WAS NOT INEFFECTIVE FOR FAILING TO RAISE THEM ON APPEAL, AND WITH THAT I WOULD RAISE MY RESPONSE. THANK YOU.

BRIEFLY MR. ASAY WAS NOT DENIED A CONSTITUTIONAL RIGHT BECAUSE HE WASN'T AT THE BENCH WHEN THIS WAS HAPPENING. THE ASSERTION IS THAT HE WAS NOT ABLE TO CONSULT WITH HIS LAWYER REGARDING THE STRIKES THAT OCCURRED.

AGAIN, MAYBE GO FULL CIRCLE AGAIN.

SURE.

THERE IS NOTHING IN THE RECORD THAT SAYS HE WAS PREVENTED FROM CONSULTING WITH HIS ATTORNEY. IF HIS ATTORNEY DID NOT CONSULT WITH HIM AND THERE WAS SOME INFORMATION HE HAD THAT HE DIDN'T PASS ON, WOULDN'T THAT HAVE BEEN MORE PROPERLY, THAT PARTICULAR ACT HAVE BEEN AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, BUT THERE IS NOTHING IN THIS RECORD THAT SHOWS THAT HE WAS PREVENTED BY THE TRIAL COURT FROM CONSULTING WITH HIS ATTORNEY.

I THINK, YOUR HONOR, FIRST OF ALL, EITHER, IF HE IS PREVENTED FROM DOING IT OR IF HE DOESN'T -- IF IT DOESN'T HAPPEN, IS HE NOT ASKED BY HIS LAWYER REGARDING THE CHALLENGES. EITHER WAY, IT DIDN'T HAPPEN, SO HE WAS DENIED THE RIGHT -- WELL, HE WAS DENIED THE RIGHT TO CONSULT WITH HIS ATTORNEY, REGARDING THE CHALLENGES, WHETHER SPECIFICALLY HE WAS PREVENTED FROM IT OR TRIAL COUNSEL DIDN'T TAKE THAT OPPORTUNITY TO DO IT, AND I THINK THAT THAT IS A FUNDAMENTAL RIGHT, A FUNDAMENTAL RIGHT THAT WE CAN RAISE ON STATE HABEAS, FOR THE FIRST TIME.

DID CONEY, WOULD YOU AGREE THAT CONEY, WAS BASED ON THE RULE OF PROCEDURE AND NOT BASED ON ON THE CONSTITUTION?

ABSOLUTELY, YOUR HONOR.

DO YOU ALSO AGREE WITH MR. FRENCH THAT, BACK WHEN THIS APPEAL WAS GOING ON, THAT THESE TYPES OF CLAIMS SUCH AS A CONEY CLAIM, WERE NOT -- WERE NOT BEING RAISED BY APPELLATE COUNSEL?

WHEN I SAY CONEY, I THINK IT IS JUST A PROCEDURAL RULE, BUT SUBSTANTIVE ISSUES REGARDING THE PRESENCE, WHETHER YOUR CLIENT IS PRESENT, WHETHER IT IS DURING PREEMPTORY CHALLENGES OR, SAY, ANOTHER ASPECT EVER MOTIONS, THOSE ISSUES WERE BEING --

ASPECT OF MOTIONS, THOSE ISSUES WERE BEING RAISED IN THIS COURT, I THINK I SITE CITE -- I THINK I CITED THE PRESENCE ISSUE IN GENERAL AND FRANTZIES WAS IN 1982, AND THE MEANINGFUL OPPORTUNITY TO CONSULT WITH YOUR ATTORNEY REGARDING THE PREEMPTORY CHALLENGES, I THINK, IS EXTREMELY SIGNIFICANT, AND I BELIEVE MOHAMMED CITES TO, OBVIOUSLY, DEFINITELY CITES TO FRANCIS AND RECOGNIZES OR STATES THAT IN FRANCIS THIS COURT FOUND FUNDAMENTAL ERROR IN FRANCIS, FOR HOW IT HAPPENED THERE, AND SO I BELIEVE I CAN BRING IT UP HERE AS FUNDAMENTAL ERROR FOR THE FIRST TIME, BECAUSE ULTIMATELY, I MEAN, THE CONSULTATION DID NOT HAPPEN, AND I WOULD POINT --

YOU KEEP SAYING THAT THIS WAS FUNDAMENTAL ERROR, THAT CONSULTATION DID NOT TAKE PLACE. WHAT IS IT THAT WOULD HAVE HAPPENED AT ACONSULTATION, HAD IT TAKEN PLACE, THAT DID NOT HAPPEN IN THIS CASE?

YES, YOUR HONOR, AND I THINK THAT GETS INTO A WHOLE OTHER ISSUE IS DO WE HAVE TO PROVE THAT? DO WE HAVE TO SHOW WHAT ACTUALLY WOULD HAVE HAPPENED, OR IS IT FUNDAMENTAL ERROR -- UM-HUM?

WHEN WE HAVE TALKEDABOUT THIS CASE, WHEN YOU HAVE ARGUED THIS CASE, YOU TALKED ABOUT THIS JUROR SANDS. THE ONLY NAME THAT I HAVE SEEN THAT HAS BEEN DEMONSTRATED THERE WAS SOME PROBLEM WITH, WITH JUROR SANDS, DID NOT PARTICIPATE IN THE DELIBERATIONS OF THIS CASE, BECAUSE AT SOME POINT THE TRIAL JUDGE ALLOWED A SUBSTITUTION OF THAT JUROR, SO WHAT IS IT THAT WE SHOULD BE LOOKING AT THAT COULD

HAVE TAKEN PLACE IN THIS CASE?

THAT IS A VERY GOOD QUESTION, AND I THINK WHAT I AM TRYING TO PUT FORTH IS THAT THE JUROR SANDS ISSUE IS WHAT BROUGHT THIS WHOLE THING TO LIGHT, WHICH IS WHAT DEMONSTRATES THAT MR. ASAY DIDN'T GET TO CONSULT WITH HIS LAWYER. IT IS NOT JUST JUROR SANDS. THAT IS ILLUSTRATIVE OF WHAT HAPPENED HERE. ON THE RECORD HE STATES I HAVEN'T HAD A CHANCE TO TALK TO MY LAWYER ABOUT THESE THINGS, SO THE POINT IS --

ABOUT THESE THINGS, THESE THINGS BEING NOT EXAMINING THE WITNESSES THE WAY HE WANTED THE WITNESSES EXAMINED AND NOT ABOUT THIS JUROR SANDS KNOWING HIS BROTHER-IN-LAW. THESE THINGS, THAT ASAY IS REFERRING TO?

WHEN I SAY "THESE THINGS", I MEAN THE FACT THAT HE WAS NOT ABLE TO TALK TO HIS LAWYER ABOUT CHALLENGES THAT WERE EXERCISED ON HIS BEHALF.

DID HE EVER SAY THAT IN THAT STATEMENT TO THE COURT?

WHAT HE SAYS AT 538 IS THAT HE IS FILING HIS PRO SE MOTION TO DISMISS THE LAWYER, HIS LAWYER, AND SAYS FOR THE FACT IS THAT IT IS AGAINST MY CONSTITUTIONAL RIGHTS NOT TO HAVE HAD AN OPPORTUNITY TO TALK TO MY ATTORNEY AND TO SEEK OUT WITNESSES IN MY DEFENSE, AND THEN HE SAYS, TOO, A MAN ON THE JUROR, MR. SANDS, IS A CLOSE FRIEND OF MY BROTHER-IN-LAW, WHO IN FACT, ME AND MY BROTHER-IN-LAW HAD A CONFLICT. I CAN'T -- THEN HE TALKS ABOUT HOW HE CAN'T TRUST THAT HE WOULD BE IMPARTIAL, SO HIS COMPLAINT IS, THIS IS A LAY PERSON, A CRIMINAL DEFENDANT TRYING IT TO TELL THE COURT I HAVEN'T HAD AN OPPORTUNITY TO TALK TO MY LAWYER ABOUT CERTAIN, ABOUT PREEMPTORY STRIKES. JUROR SANDS BEING THE ONE THAT HE MENTIONED. BUT WHAT, MY POINT IS THAT THAT IS JUST ONE OF THE OTHER JURORS DURING THE SECOND ROUND, ABOUT WHOM HE WAS NOT ABLE TO TALK TO HIS LAWYER ABOUT, WHETHER --

WHAT DO YOU BASE THAT ON? THAT SEEMS TO BE THE DIFFICULTY. THERE IS SOMETHING IN THIS RECORD THAT SUGGESTS THAT COUNSEL WAS NOT SEATED AT THE TABLE WITH HIS CLIENT? IT APPEARS AS THOUGH THIS IS ALMOST A ONE PROCESS AND THEN A SECOND PROCESS. IS THERE SOMETHING THAT WE ARE MISSING FROM THE RECORD THAT DEMONSTRATES, BECAUSE YOU KEEP SAYING THIS, AND THAT IS WHERE WE ARE LOOK.

YES, YOUR HONOR. I THINK WHEN YOU READ WHAT HAPPENED IN ITS ENTIRETY, HOW IT OCCURRED DURING THE FIRST ROUND. THEY GO UP TO THE BENCH. THE LAWYER COMES BACK AND TALKS TO MR. ASAY. THAT IS CLEAR. THE SECOND ROUND, THE QUESTIONING OCCURS. THEY GO UP TO THE BENCH. HE GOES UP TO THE BENCH. THE LAWYER --

BUT, AGAIN, IS THERE ANY INDICATION THAT HE IS NOT WITH HIS CLIENT BEFORE HE GOES TO THE BENCH TO TALK ABOUT THE SECOND ROUND, WHICH APPARENTLY WAS ONLY TO GET ONE MORE JUROR.

WELL, THERE IS, THE ANSWER TO THE FIRST QUESTION, THERE IS NO INDICATION THAT HE WASN'T WITH HIS CLIENT SITTING AT THE TABLE.

RIGHT.

BUT, OKAY, THEN THAT IS DURING THE QUESTIONING OF THE JURORS, AND THEN THEREAFTER, HE ACTUALLY, WHEN YOU READ THE RECORD, HE HAS SOME QUESTIONS, HE EXPRESSES QUESTIONS ABOUT CERTAIN JURORS THAT THE ATTORNEY DOES, AND THEN, I AM SORRY. I MISSED THE SECOND POINT OF YOUR QUESTION. AND I SEE THAT I AM OUT OF TIME. BUT I THINK THE IMPORTANT THING IS TO SAY HERE, IS THAT HE WASN'T CONSULTED, REGARDING THE PREEMPTORY CHALLENGES, AND I DON'T THINK THAT WE HAVE TO SHOW THAT THE PREJUDICE

PRONG THING, OKAY, JUDGE SANDS ULTIMATELY DIDN'T SERVE ON THE JURY. THEREFORE IT IS OKAY. MR. CHIEF JUSTICE

THANK YOU. YOUR TIME IS UP, MS. BREWER. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THE CASE. THE COURT WILL TAKE ITS MORNING RECESS AND WILL BE IN RECESS FOR 15 MINUTES.