# Anthony Mungin v. State of Florida

THE NEXT CASE ON THIS MORNING'S DOCKET IS MU NGIN VERSUS STATE OF FLORIDA , AND WHILE THE COUNSEL ARE APPROACHING , I WOULD LIKE TO WELCOME, IN THE B ACK OF THE AUDIENCE WE HAVE 40 P ALM BAY HIGH SCHOOL SOPH OMORE S, WHO ARE STUDENTS IN THE LAW AND CRIMINAL PROGRAM OF B R EVARD COUNTY, AND THEY ARE HERE TODAY , ACCOMPANIED B Y THEIR TEACHERS, JIM MORR ISON AND ROBERT DONLDZ SON. WELCOME TO THE -- DONALDSON. WELCOME TO THE FLO RIDASUPREME COURT.WHICH S IDE ARE YOU ALL ON? ALL THE RE. OKAY. WELCOME.WE USUALLY SEE PEOPLE HIG HER UP IN THE AUDIENCE, SO G OOD TO SEE YOU . PARTIES RE ADY FOR MUN GIN ?

GOOD MORNING. MAY IT PLEASE THE COURT. TODD SCHER ON BEHALF OF MR . MUNGIN. THIS CASE IS BEFORE THE COURT ON A CONSOL IDATED 3.851 APPEAL, FOLL OWING A LIMITED EVIDENTIARY HEARINGON A FEW ISSUES AND PE TITION FOR HA BEAS CORP US. GIVEN THE SHORT AMOUNT OF TIME I HAVE THIS MORNING, I AM GOING TO FO CUS ON S OME OF THE ISSUES THAT ARE INVOLVED IN A 3. 851 APPEAL, A ND IWOULD LIKE TO FOCUS SPECIFICALLY AND BRIE FLY ON ARGUMENTS ONE AND TWO AND THEN FOCUS IN ON ONE ASPECT OF ARGUMENT FOUR, W HICHRELATES TO THE IMPROPER SUMMARY DE NIAL OF NEIL SLAPPY ISSU E AND IF TIME PERMITS, AN AS PE CK OF ARGUMENT FI VE, RE LATING T O TRIAL COUNSEL'S G UILT P HASE INVESTIGATION, REGARDING FAILURE TO INVESTIG ATE WITH RESPECT TO AN AL IBI. JUST BRIEFLY AS TO ARG UMENT ONE , AS I ACKNOWLEDG ED IN THE BRIEF , THIS ISSUE IS NOT ONE THAT WAS RAI SED BE LOW REGARDING WHAT WE SU BMIT I S FUNDAMENTAL ERROR BY THE LOWER COURT'S F AILURE TO RECUSE ITSELF AND , IN FACT , THE ENTIRE CIR CUIT, FOR THE FOURTH JUDICIAL CIRCUIT , FROM PRES IDING OVER THESE POSTCONVICTION PROCEEDINGS. TRIAL COUNSEL IN THIS CASE , CHARLES CO FER WAS AT THE TIME OF THE EVIDENCE DWRAER HEARING, A SI TTING COUNTY COURT JUDGE IN DU VAL COUNTY.

CHIEF JUSTICE: JUSTICE LEWIS.

WHAT ARE THE PARAME TERS , BECAUSE WE SEE THIS DIFFERENT VARI ETY OF THIS TYPE OF ISSUE COME UP, MANY , MANY TIMES, BECAUSE OF THE NATURAL FLOW THAT OCCURS. SHARE WITH US THE PARAMETERS OF THIS. YOU SEE M TO BE SEE KING A PER SE K IND OF R ULE FLOWING FROM THIS SCENARIO.

WELL , I DON'T KNOW THAT I AM SEEKING ANYTHING OTHER THAN THIS , THE FACTS OF THIS PARTICULAR CAS E. I SUBMIT CERTAINLY THIS DOES HAPPEN ON OCCASION, AND A LOT OF TIMES THESE DON'T EVEN R ISE TO THIS LEVEL, BECAUSE IT IS DE AL T WITH BELOW. THERE HAVE BEEN A FEW T IMESWHERE THIS COURT HAS ADDRESSED IT, SOMETIMES IN RITZ WRITS, SO WE DON'T KNOW WHAT -- IN WR ITS, SO WE DON'T KNOW WHAT THE UNDERLYING REASONS WERE , BUT IN THE HODGE S CASEY CITED , THE COURT NOTED THAT CIRC UIT JUDGE AND TRIAL COUNSEL WERE RECUSED BY H E WAS A SIT TING JUDGE AT THE TIME.I THINK IN SITUATIONS WHERE PARTICULARLY AN EVIDENTIARY HEARING IS GRA NTED, THERE SHOULD BE R E CUSAL B Y THE, IF TRIAL COUNSEL IS A SIT TINGJUDGE IN THAT SAME CIR CUIT.

CHIEF JUSTICE: WE ARE NOT DEALING WITH A "SHOULD" HERE. FIRST OF ALL, AND I THI NK THAT YOU WOULD AGREE , THAT THERE WAS NO MOTION TO RECUSE.

CORRECT .

CHIEF JUSTICE: -- FILED. WHICH TO ME WOULD B E PRETTY SIGNIFICANT , BECA USE IF THIS HAD BEEN SOM ETHING THAT COUNSEL BELOW WAS CONCE RNED WITH , TIMELY MOTION TO RECUSE COULD HAVE BEEN F ILED , AND EVEN THOUGH THE CANONS DO NOT REQUIRE, IT A PROCEDURE COULD HAVE BEEN PUT INTO PLACE AT THAT TIME, SO WHAT IS IT ABOUT, IFTHERE IS NO RULE AG AINST OR PRECLUDING JUDGES FROM SITTING WHEN OTHER JUDGES WHO HAD PREVIOUSLY BEEN COUNSEL WOULD BE A WITN ESS , THEN WHAT WOULD , A GAIN , GOING BA CK TO WHAT JUSTICE LEWIS IS SAYING, AREN'T YOU , HOW ARE YOU NOT URGING A PER SE RUL E?

WELL , A GAIN , PROBABLY IT WOULD DEPEND ON THE CIRCUMSTANCES OF EACH CASE.I MEAN , IF THERE WAS AN EVIDENTIARY HEARING G RANTED ON A VERY MI NOR ISSUE THAT PERHAPS DIDN'T INV OLVE THE TESTIMONY OF TRIAL COUNSEL OR THE COURT HAS TO , I AM NOT SAYING INITIALLY ON T HEFILING OF A MOTI ON, T HECIRCUIT HAS TO RECUSE ITSELF.

CHIEF JUSTICE: WOULDN'T THAT BE THE VERY LE AST INITIAL OBLIGATION ON COUNSEL, IT TO FI LE A TIMELY MOTION TO RECU SE?

I AGREE AND UNFORTUNATELY WE DON'T HAVE A PROCEDURE AT THIS POINT WHERE WE CAN ALLEGE THAT POSTCONVICTION COUNSEL SHOULD HAVE FIL ED THE MOTION TO RECUSE. PART OF THE PROBLEM HERE , OFCOURSE WE D ON'T KNOW , IS THAT THIS C ASE WENT THROUGH A NUMBER OF ATTOR NEYS, VARIOUS REGI STRY LAW YERS APPOINTED AND THEN GOT OFF AND ANOTHER ONE WAS APPOINTED AND THEN GOT OFF . OF COURSE IT STARTED OFF WITH THE CCR-NORTH OFFICE FILING THE MOTION , THEN M R. OLIVE WAS APP OINTED AND THAT BECAME WRAPPED UP IN THE LITIGATION.

YOU HAVE TO AGREE THAT THIS COURT HAS BEEN VERY STRICT, IN TER MS OF REQUIRING THE FILING O F SOMETHING.

I DO .

IN A TIMELY MAN NER. I RECALL , PER HAPS , THE MOST SERIOUS CASE IN WHICH I DISSENTED, WAS ONE WHERE THE JUDGE PRESIDED OVER THE POSTCONVICTION PROCEEDINGS , HAD ACTUALLY REPRESENTED T HEFAMILY OF THE V I CTIM AT SOME POINT , BUT NO ACTION WAS , THERE WAS A PROCEDU RAL DEFAULT INVO KED , AND THIS COURT APPROVED THAT, AND SO WE HAVE A R ATHER STRICT RULE FOR GOOD REAS ONS, AS TO REQUIRING SOME ACTION BE TAKEN BELO W.

NO , AND I UNDERSTAND THAT. I WOULD POINT OUT, HOWEVER , FOR EXAMPLE IN THE MAH ARAJCASE, WHERE THIS C OURT ULTIMATELY RE VERSED FOR A HEARING ON SOME OTHER ISSUE S, THE COURT DID ADD RESS IN T HEFIRST INSTANCE , AN ISSUE RAISED FOR THE FIRST TIME IN APPEAL, THAT THE COURT SHOULD HAVE DISQUALI FIED ITSELF BECAUSE OF AN ALLE GED RELATIONSHIP , PROFESSIONAL RELATIONSHIP BETWEEN THE SIT TING JUDGE AND THE PROSECUTOR IN THAT CASE, A NDSO THERE IS --

CHIEF JUSTICE: IN THAT CASE THE CANON, THERE WAS A SPECIFIC CANON 3- E, THAT THIS WAS, WAS N'T HE THE SUPERVISING AT TORNEY OF THE ASSISTANT STATE ATTORNEY WHO HAD PROSECUTED T HEDEFENDANT?

BUT IN EVERY CASE WHERE THAT ISSUE, I MEAN , I HAD ANOTHER CASE. ARBELIAZ, WHERE IT WAS --

CHIEF JUSTICE: THAT IS TOTALLY DIFFERENT. THERE YOU HAD A JUDGE THAT WAS INVOLVED IN THE CASE BELOW. HERE THIS JUNK -- NO?

I DON'T BELIEVE IN MAHARAJ THE JUDGE WHO PRESIDED OVER THE 3. 850 W ASINVOLVED IN THE ACTUAL --

HE SUPERVISED THEM , RIGHT?

CHIEF JUSTICE: HE WAS THE SUPERVISING ATTORNE Y OF THE ASSISTANT STATE ATTORNEY.

R IGHT . CORRECT.

CHIEF JUSTICE: BUT THE CANON SPECIFICALLY TALKS ABOUT THAT, CON TEMPLATES THAT. TO ME THAT IS A PRETTY BIG DIFFERENCE.

BUT IT STILL WASN'T RAISED IN THE TRIAL COURT, AND SO YOU ARE STILL DEALINGWITH, REALLY , AN ISSUE OF WHETHER IT IS FUNDAMENTAL ERROR OR NOT, AND SO I AM HERE.

WE COULD SPEND 20 MIN UTES --

I UNDERSTA ND.

CHIEF JUSTICE: JUSTICE QUINCE, YOU HAD A QU ESTION.

THIS ISSUE CONCERNS ME , BECAUSE HE REALLY NEED TO SEE WHAT KIND OF LIMI TS WE CAN PLACE ON THIS , BECAUSE EARLIER THIS WEEK , WE HAD A SITUATION WHERE THE PROSECUTOR WAS NOW A JUDGE , AND THESE KINDS OF THINGS G O ON ALL OF THE TIME , AND S O WHAT KIND OF LIMITATIONS WOULD YOU PUT ON THIS KIND OF ISSUE? YOU ARE GOING TO GET RID O F THE WHOLE CIRCUIT EVERY TIME THERE IS SOMEONE WHO WAS A PROSECUTOR OR IS NOW A JUDGE IN THAT C IRCUIT , AND IS CALLED TO TEST MY -- TESTIFY?

I AM NOT SURE WHAT C AME UP EARLIER THIS WEEK. I KNOW FOR EXA MPLE SOMETIMESIT DOES HAPPEN, AND I AM AWARE OF A CASE FROM D ADE COUNTY WHERE THERE HAD B EEN A BR ADY ALLE GATION M ADE AGAINST THE PROSECUTOR. THAT PROSECUTOR HAD SINCE BECOME A SITTING JUDGE I N DADE COUNTY . AND THE VENUE WAS MO VED.

THERE AG AIN , YOU HAVE SOMEBODY WHO WAS REALLY INVOLVED IN THE CASE, CORRECT?

RI GHT , BUT THE , CORRE CT. WELL, RIGHT , THE PROSEC UTOR , BUT SHE WASN'T, THE PROSECUTOR DIDN'T BECOME THE JUDGE ASSIGNED TO THAT PARTICULAR CASE , BUT BECAUSE OF THE PROBLEM WITH ONE SITTING JUDGE EVAL UATING THE TESTIMONY AND CREDIBILIT Y OF ANOTHER SITTING JUDGE , EVEN THOUGH THE JUDGE THAT IS PRESIDING OVER THE CASE HAD NO DI RECT INVOLVEMENT IN THE CASE , WARR ANTED , IN T HAT CASE, THE CIRCUIT WAS RECUSED IN THE CASE AND IT MOVED TO BROWARD COUNTY. I THINK HERE W E CERTAINLYHAVE A REASONABLE LIMIT CERTAINLY IF AN EVIDEN TIARY HEARING WAS GRANTED AND THE TESTIMONY OF TRIAL COUNSEL WHO IS NOW A SITTING JUDGEIN THAT CIRCUIT IS N EEDED , AND THE CREDIBILITY OF THAT TESTIMONY HAS TO BE EVALUATED, AND TH AT IS A CIRCUMSTANCE WHERE I THINK CERTAINLY WOULD BE A REASONABLE PRO SE RULE , PER SE RULE . EXCUSE ME.

CHIEF JUSTICE: HOW AB OUT , YOU SA ID YOU WERE ALSO GOING TO ADDRESS THE SE COND POINT.

YES .

CHIEF JUSTICE: NOW , MY CONCERN WITH THAT SEC OND POINT WHICH IS ABOUT THE FAILURE OF THE JUDGE TO REVIEW RECORDS, WHICH IS , IN THIS, MAYBE PART OF IT IS UNFORTUNATELY AS YOU SAI D, IT WENT THROUGH A LOT O F ATTORNEYS , THAT THIS W ASDURING THE TRAN SITION OF THE, YOU KNOW , DISINTEGRATION OF CCR-NORTH, BUT IT DOESN'T APPEAR THAT THERE WAS ANY ATTEMPT TO , ON THE PA RT OF THE , ANY ATTORNEY , INCLUDINGTHE LAST ONE WHO HAD B EEN INVOLVED, TO, REALLY , PURVIEW THE ISSUE OF THE RECORDS OF THE -- PU RSUE THE ISSUE

OF THE RECORD S OF THE SHERIFFS OFFICE AND THE STATE ATTORNEYS OFFICE.

IT DEPENDS ON WHAT Y OUMEAN BY PURSUE. I DISAGREE. THERE WAS AN IN ITIAL IN CAMERA INSPECTION, THE TRANSCRIPT OF WHICH ISSEALED BEFORE THIS COURT SO WE DON'T KNOW EXACTLY WHAT WAS REVIEWED DUR ING.THAT ALL WE KNOW IS THAT , FOLLOWING THAT INI TIAL I N CAMERA INSPECTION, THERE WAS AN UPHOLDING EXEMPTIONS BY THE DEPAR TMENT OFCORRECTIONS.THERE WERE SUBSEQUENT STATUS HEARINGS AND CONFEREN CES, DURING WHICH TIME THE ISSUE WAS RAISED TO THE COURT ABOUT ADD ITION WILL - - ADDITIONAL PUBLIC RECORDS AND WHAT HAD HAPPENED T O THEM. THE TRIAL COURT THEN , THE JUDGE CONSULTED WITH H ISCLERK AND THEY DISCOVERED THAT APPARE NTLY O R DER S HADN'T BEEN E NTERED TO ACTUALLY HAVE THE EXEMPTED MATERIAL SENT FROM HERE IN THE TALLAHASSEE REPOSITORY TO THE CLE RK FOR JUDGE SOUTHWARD TO REV IEW, AND THOSE BEING THE STATE ATTORNEY FILES AND DU VAL COUNTY SHERIFFS OFF ICE FILES, SO TH OSE ORDERS WERE ISSUED TO HAVE THOSE SENT. AT THAT POINT THE RECORD I S STYLE ZILEENT AS TO WHETHER THE IN -- IS SI LENT AS T O WHETHER THE IN CAMERA REVIEW OCCURRED. WHAT NE XT HAPP ENED IS SUBSEQUENT COUNSEL, I T HINKAT THIS POINT TALKING ABOUTMR. WESTLING , DID FILE A MOTION, ASKING AGAIN FOR THESE PUBLIC RECORDS. THE RECORDS WERE, TEN THEN, SENT. WE DO KNOW THAT THEY WERE FORWARDED TO THE COURT AND AT THAT POINT THE RECORD IS SILENT AS TO WHAT HAPPENED .

CHIEF JUSTICE: AND THE ATTORNEY STARTS THE EVIDENTIARY HEARING.

CORRECT.

CHIEF JUSTICE: ANDDOESN'T SAY, WAIT A SECOND , I NEED TO, IF I DON'T HAVE A RULING ON THE SHERIFFS OFFICE AND STATE ATTORNEYS OFFICE RECORDS, I CAN 'TPROCE ED. DON'T WE EXPECT SOME, Y OUKNOW, THERE TO BE SOME AFFIRMATIVE OBLIGATION, IF THIS IS SO IMPORTANT TO AN ISSUE IN THE CASE , AS OPPOSED TO JUST, YOU KNOW , GENERALIZEED FIS HING EXPEDITION, THAT THERE BE AN ATTEMPT TO S AY I CAN'T START THE EVIDENTIARY HEARING.

O KAY.FIRST OF ALL IT IS NOT A GENERALIZE ED FIS HING EXPEDITION WHEN YOU ARE ASKING FOR EXEMPT MATERIALS FROM THE STATE ATTORNEY AND SHERIFFS OFFICE.AS THIS COURT IS A WARE , IT HAS SEEN A NUMBER OF C ASESWHERE THE BR ADY VI OLATION ISN'T FOUND, SO THIS ISN'T SOMETHING WHERE THESE WERE REQUESTS THAT WERE MADE FOR RECORDS THAT REALLY WERE QUESTIONBLY RELEVANT. I MEAN , THESE WER E NOTES FROM THE SHERIFF AND THE STATE ATTORNEYS OFFICE .

DIDN'T M R . MEL N ICK G IVE SOME INDICATION THAT HE WANTED TO LOOK AT THESE RECORDS, AND IT SEEMS TO ME THAT WHAT WE HAVE HERE IS WE DON'T KNOW WHET HER OR NOT HE, IN FACT , GOT AN OPPORTUNITY TO SEE THEM. WE KNOW THAT THE RECORDS WERE EVE NTUAL LY SENT OVE R. WE DON'T KNOW IF THE TRIAL JUDGE LOOKED AT THEM, AND WE DON'T KNOW IF THE N EWATTORNEY, THE FI NAL ATTORNEY ON THIS CASE ACT UALLY G O T AN OPPORTUNITY TO SEE THEM.HE SAID HE DIDN'T.

WE FINALLY GOT AN OPPORTUNITY AT A HEAR ING, THIS IS ARGUMENT THREE IN THE BELIEF, THE STATE -- IN THE BRIEF, THE STATE ATTORNEY CA LLED A BOUT SOME MATTERS THAT THERE WERE GOING TO BE A HEARING ON, AND IN THE MATTER OF CROSS , THE DETECTIVE DISC LOSED T HAT HE HAD HIS NOTES FROM HIS INTERVIEWS WITH MR. MUNGIN , WHEN MR. MU NGIN HAD BEEN ARRESTED. MR. MALNIK , COLLATERAL COUNSEL , THEN ASKED TO SEE THE NOTES.THE STATE OBJECTED.

IS THERE SOME IND ICATION THAT THESE NOTES WERE A PART OF THE RECORDS THAT HAV E PREVIOUSLY BEEN ASKED FOR?

WELL , ALL WE KNOW , THE REQUEST WAS MADE FOR ANY AND ALL RECORDS FROM THE

SHERIFFS OFFICE , AND SO WE CAN ONLY, I ME AN, WE D ON'T KNOW WHAT THEY WOULD HAVE PUT IN THERE OR WHAT THEY WOULD HAVE EXEMPTED. MAYBE THAT IS PART OF T HEPROBLEM, BUT CERTAINL Y WE CAN PRESUME THAT THEY WOULD HAVE COMPLIED FULLY WITH T HE REQUEST, AND SO WE HAVE TO PRESUME THAT THE LEAD DETECTIVE'S NOTES OF AN INTERVIEW WITH THE DEFENDANT ABOUT HIS INVOLVEMENT IN THE CASE, WOULD HAVE BEEN PARTOF THAT COMPLIANCE WITH PUBLIC RECORDS , SO WE HAVE THE STATE OBJ ECTING TO MR . MALNIK 'S W A NTING TO LOO K AT THE NOTES . MR. MALNIK SAYS I WAN T TO LOOK AT THE NOTES. I HAVE NEVER SEEN THEM BEFORE.

CHIEF JUSTICE: AREN'T THE NOTES, THOU GH, WOULDN'T THOSE BE EXEMPT MATERIALS UNDER JERROLDS?

JERROLDS, I BE LIEVE , I S A DIRECT APPEAL , THE ONE THAT THEY CITE, THE STATE CITES IN THEIR BRI EF. I FRANKLY DON'T SEE HOW NOTES AND WRITTEN NOTES OF THE LEAD DETECTIVE'S INTERVIEW WITH THE DEF ENDANTWOULD BE EX EMPT. THIS IS NOT A SITUATION WHERE THE INTERVIE WS, THE INTERROGATIONS BY THE DETECTIVE WITH MR. MUNGIN WERE TAPE-RECOR DED O R A UDIOTAPES, SO THE NOTES WOULD ESSENTIALLY B E --

BUT, AGAIN, WE ARE LARGELY LE FT TO SPE CULATE, ARE WE NOT, BECAUSE THERE HASN'T BEEN A PRES SING AS TO EXACTLY WHAT IS IN THOSE RECORDS OR AS TO WHAT HAPPENED, WHEN THE RECORDS WERE SENT B ACK.

WELL, I THINK WHAT WE KNOW IS THAT AN IN CAMERA INSPECTION DID NOT TA KE PLACE.THERE IS NO DISPUTE ABOUTTHAT, AND SO I SUBMIT , I GUESS AGAIN WE GO BAC K TO , AGAIN , WHAT DO YOU MEAN BY PURSUE. THEY ASK FOR THE RECORDS. THE RECORDS WERE SENT TO THE COURT.IT IS THE TRIAL COURT , UN DER 3.852 THAT HAS THE AFFIRMATIVE OBLIGATION TO CONDUCT THE IN CAMERA INSPECTION, AND WHEN H E DOESN'T DO THAT --

WE KNOW HE DIDN'T BECAUSE THE TRIAL JUDGE SAID HE NEVER LOOKED AT THEM? HOW DO WE KNOW THAT THAT IN CAMERA INSPECTION DID NOT TAKE PLACE?

THERE IS A ORDER -- THERE IS NO ORDER . NO ORDER FOLLOW ING THE F IRSTIN CAMERA INSP ECTION AND NO ORDER FOLLOWING THE BRIEFS , AND IN FACT I CONTACTED MR . FRENCH.

MR. MALNIK NEVER BROUGHT THAT TO THE COURT'S ATTENTION.

THE CO URT HAD THE RECORDS.MAYBE MR. MALNIK DIDN'T K NOW THAT THE COURT , I D ON'TKNOW. ALL I KNOW IS THAT THE COURT --

ARE YOU GOING TO HIT A LICK ON THE DISQUALIFICATION ?

YES. AND THIS IN SOME ACTION RESPECTS RELA TES T O - - I N SOME RESPECTS RELATES T O ARTICLE I , BECAUSE PARTICULARLY AS TO THE HEARING ON THE NEIL SLA PPY VIOLATION. AS THIS COURT IS PROB ABLY AWARE ON DI RECT APPEAL THERE WAS AN ISSUE R AISED ABOUT TRIAL COUNSEL'S OBJ ECTIONS TO THE STATE'S ST RIKING OF JUROR GALL OWAY FOR RA CIAL REASONS. THE ISSUE WAS FULLY PRESERVED BELOW. THE ISSUE WAS RAISED ON DIRECT APPEAL. THE STATE ARGUED AND THI S COURT FOUND THAT THE ISS UE--

CHIEF JUSTICE: THE ISSUE WAS NOT FULLY PRESERVED BELOW. ISN'T THAT THE ISSUE?

I MEANT FULLY , THEY ARTICULATED ALL OF T HEREASONS.

CHIEF JUSTICE: THEY JUSTSEND THE JURY.

THEY SEND THE JURY , CORRECT, AND THIS ISSUE WAS PRESERVED ON APPEAL.

CHIEF JUSTICE: I WANT TO ASK A QUESTION THAT HAS T O DO WITH MR . FREN CH AND REALLY AS TO WHET HER, HOW THE PREJUDICE PRONG IS LOOKED AT WHEN WE HAVE THIS TYPE OF CHALLENGE AND I H AVE THOUGHT ABOUT IT A LOT. NORMALLY IT IS A QUESTION OF WHETHER IT WOULD UNDERMINE OUR CONFIDENCE IN THE OUTCOME, AND IF WE HAVE A C ASE WHERE THERE IS NO ALLE GATION THAT A RACIAL LY-BIASED JURY SET, AND WE KNOW THAT THE PURPOSE OF THE NEIL SLAP I IS REALLY AS MUCH TO VINDICATE THE RIGHTS OF THOSE WHO -- NEIL SLAPPY VINDICATE THE RI GHTS O F THOSE WHO ARE BEING EXCLUDE, WHAT IS THE PRO PER TES T FOR THE PREJUDICE PRONG AS IT APPLIES TO SOMETHING LIKE THIS, THE VOIR DIRE AND FAILURE TO PRESERVE A CHALLENGE TO A JUR OR THAT HAD BEEN STRICK EN?

WELL , IN MY MY VIEW , I MEAN, BECAUSE THE INEFFECTIVE NESS CL AIM , REALLY, S O RT OF PRECE DE S THE UNDERLYING SUBSTANT IVE CLAIM, AND SO I THINK THE REAL ISSUE IS WHETHER TRIAL COUNSEL PERFORMED DEFICIENTLY IN FAILING TO PRESERVE OR -- CLEAV

CHIEF JUSTICE: LE T'S ASSUME THAT HE DID. THEN --

I THINK THE PREJUDICEPRONG IS REALLY HAD THE ISSUE BEEN RA ISED AND PRESERVED , WHETHER THERE WASA REASONABLE PROBABILITYTHAT THIS COURT WOULD HAVE GRANTED RELIEF ON THE NEIL SLAPPY ISSUE THAT WAS RAISED.

CHIEF JUSTICE: DON'T WE LOOK AT IT IF IT UNDERM INES OUR CONFIDENCE IN THE TRIAL COURT PROCEEDING S, NOT WHETHER YOU COULD HAVE GOTTEN A REVERS AL ON WHAT SOME PEOPLE THINK WOULD BE A TECHNICALITY.

I AM NOT SU RE I WOULD CALL A NEIL SLAPPY VIOLATIONA TECHNICALITY .

CHIEF JUSTICE: YOU ARE NOT SAYING SOMEBO DY SAT T HAT SHOULDN'T HAVE SAT. Y OU HAVE GOT A RACIAL LY -DIVERSE JURY.

RIGHT, BUT THE L AW SAYS AND IS PLAIN IF THERE WAS ONE STRUCK FOR RACIAL REASONS, THAT I S SUFFICIENT.

ISN'T THERE A SH OWING PRELIMINARILY OF A PAT TERN OF MISCONDUCT OR A PAT TE RNOF STRIKING RACIAL -- MY UNDERSTANDING IS FOUR AFRICAN-AMERICANS SET .

CORRECT.

TH REE WERE STRICKEN PREEMPT OR I LLLY -- PREEMPTORY , AND THE OTHER WAS STRUCK.

YES AND JUST BECAUSE OTHER AFRICAN-AMER ICANS SET ON THE JURY DOES NOT ALLEGE --

RIGHT. YOU ARE NOT ALLEGE ING THERE WAS A PATTER N. THE ONLY THING YOU ARE ALLEGING IS OF THE SE VEN OR EIGHT , FOUR SERVED , THREE WERE STRICKEN, ONE WAS NOT PROPERLY PRESERVED FOR APPEAL. THE STRIKING OF ONE .

CO RRECT. CORRECT. AND THE PROBLEM HERE IS T HAT --

YOU ARE NOT EVEN ALLEGE IN G THERE WAS NO OBJECTION, BECAUSE THERE WAS AN IN ITIAL OBJECTION, AND THEN THE STATE GAVE THE RACE NEUTRAL REASON.

RIGHT AND THEY FOUND TN WAS RACE NEUT RAL. THE SIMPLE PROBLEM IS THE ACCEPTING OF THE JURY AND WE KNOW FOR EXAMPLE THERE WASN'T A STRATEGIC REASON HERE, BECAU SE THERE ARE SOME CASES FROM THIS COURT T HAT TALK ABOUT THE FACT THAT PERHAPS TRIAL COUNSEL ULTIMATELY BECAME SATISFIED WITH THE JURY AS J URY SELECTION WENT ON , BUT W HAT WE HAVE HERE IS A MOT ION FOR NEW TRIAL IN THE DOCU MENT ITSELF AND AT THE

MOTION FOR A NEW TRIAL AT THE HE ARING , THERE WAS EXTENSIVE ARG UMENT BY COUNSEL.

CHIEF JUSTICE: ON THIS POINT HOW WOULD THE JUDGE EVALUATE IT? CAN 'T WE LOOK AT IT AS A QUESTION OF LAW, IF YOU A RESAYING IT HAD TO BE DEFICIENT DON'T - - DE FICIENT CONDUCT, AND ALL WE W OULDNEED TO LOOK AT THIS IS I F IT NE EDED -- IF I T WAS PROPERLY PRESER VED, RI GHT?

IF THAT IS SO , BUT I CITED A NUM BER OF CASES FROM THE DISTRICT COURT WHERE I T WAS SENT BACK AND WE DON'T KNOW WHETHER THERE WAS A STRATEGY REASON, AND ALL W E NEED TO DO IS HAVE TRIAL COUNSEL EX PLAIN , GIVE TESTIMONY IF HE DIDN'T UNDERSTAND THE LA W AND IF HE DIDN'T PRESERVE THAT OBJECTION PRIOR TO THE JURY BEING ACCEPTED, I ALSO SUBMIT THAT THAT REALLY CALLS INTO QUESTION WHAT THE LOWER COURT FOU ND TO BE HIS ULTIMATE COMPETENCE OVER ALL, IN THE CASE, BECAUSE I THINK NOT KNOWING TO OBJECT WHENYOU HAVE A NEIL SLAPPY VIOLATION THAT YOU THINK I S SO STRONG, A FA IRLY FUNDAMENTAL PRINCIPLE .

HE DID OB. THE QUESTION IS WHETHER HE PRESERVED .

I MEAN PRESERVED IT.

THE QUESTION IS WHETHER IT WAS INEFFECTIVE ASSISTANCE FOR AM NOT TO STATE A RACE NEUTRAL REA SON AND THEN OBJECT TO THE JURY 'S EMPANELMENT.

THE REAL ALLEGATION IS THAT HE FAILED TO KNOW THE LAW WITH RESPECT TO --

HOW DO WE KNOW HE F AILED TO KNOW THE LAW?

THAT IS THE HEARING ALLEGATION.

CHIEF JUSTICE: YOU ARE SAYING HE BROUGHT IT U P AGAIN O PPOSE THE TRIAL.

CORRECT.

CHIEF JUSTICE: WHICH WAS ALREADY WEIGHED. I THINK WITH OUR HELP , YOU ARE VERY WELL INTO YOUR REBUTTAL. YOU MIGHT WAN T TO SAVE SOME TIME. MR. FREN CH.

MAY IT PLEASE THE COURT. CURTIS FRENCH REPRES ENTING THE STATE OF FLORIDA IN THIS CAUSE.

CHIEF JUSTICE: J UST FORWARD, HOW MA NY ATTORNEYS AFTER C CR GOT OFF THIS CASE , DID MR. MU NGIN GO THROU GH?

THERE WAS AN ATTORN EY NAMED HENDERSON AND THEN DALE WESTLING WAS HI RED, AND THEN -- AND THEN. DALE WE STLING WAS HIR ED OR APPOINTED AND THEN KEN NETH MALNIK WAS HIRED, SO THERE WERE THREE.

CHIEF JUSTICE: THREE FROM THE REGISTRY?

YES. WELL, NOT ACTUALLY REG ISTRY BECAUSE MR . MALNIK WAS RETAINED, BUT THE OTHER TWO , I ASSU ME, WERE . SINCE YOU HAVE ASKED ABO UT THAT, ILL ADD RESS THAT ONE FIRST. INITIALLY -- I WILL ADD RESSTHAT ONE FIRST. INITIALLY THE STATE DOES NOT AGREE THAT NO IN CAMERA INSPECTION TOOK PLACE . I DON'T KNOW IF IT DID OR NOT. THE RECORD DOESN'T SA Y, ONE WAY OR ANOTHER. WHAT WE KNOW I S --

CHIEF JUSTICE: JUDGE THAT IS DO IN CAMERA INSP ECTION KEEP A RECORD.WE HAVE GOT UNDE R SEAL , AN IN CAMERA INSPECTION THATWAS DONE . YOU ARE NOT SAYING THAT WE HAVE

SITUATIONS WHERE JUDGES DO IN CAMERA INSPEC TIONS AND DON'T ISSUE ORDERS AND WE DON'T --

WELL, IN THIS CASE THE JUDGE MAY HAVE TURNED THESE EXEMPT DOCUMENTS OVER TO COUNSEL, WHICH IS W HAT COUNSEL ASKED FOR. ACTUALLY NONE OF THESE ATTORNEYS EVER ASKED FOR AN IN CAMERA INSPECTION. HENDERSON STATED THAT HE W ASGOING TO ASK FOR AN IN CAMERA INSPECTION AND NEVER ACTUALLY FILED THE MOTION.THE JUDGE DECIDED TO DO AN IN CAMERA INSPECTION ON HIS OWN MOTION. FOR SOME REASON APPARE NTLY HE ONLY INSPECTED THE THE D.O.C. EXEMPT DOCUMENTS AND NOT THE OTHER TWO. THERE IS SOME DISCUSSIONABOUT THAT. SUBSEQUENT TO THAT TIME HENDERSON GOT OFF THE C ASE AND MR. WEST LING WAS APPOINTED AND MR. WESTLING JUST ASKED THAT THESE EXEMPT DOCUMENTS BE TU RNED OVER TO HIM. WE HAVE AN ORDER SHOWINGTHAT THE JUDGE RE QUESTED THAT THE REPOSITORY SEND THOSE EXEMPT DOCUMENTS TO THE COURT.WE DON'T KNOW WHAT HAPPENED TO THEM AF TER. THAT THERE WERE NO FU RTHER MOTIONS BY MR. WESTLING ON THAT SUBJECT. MR. WESTLING GOT OFF THE CASE AND MR. MALNIK , RETAINED COUNSEL , GOT INTO THE CASE A YEAR AND-A- HALF BEFORE THE EVIDEN TIARY HEARING AND MADE NO MOTION WHATSOEVER, ABOUT ANY EXEMPT DOCUMENTS, AND I THINK T HI S CASE IS CONTR OLLED BY PACE WHICH I C ITED IN MY BRI EF, WHICH BASICALLY SAYS IF YOU SIT FOR A YEAR AND- A-HALF AND DON'T INVOKE ANY SORT OF RULING FOR THE COURT AND DON'T MAKE ANY COMPLAINTS OR MOTION TO SAY COMP EL OR ANYTHING, THAT YOU WAIVE THE ISSUE ABOUT IT. FOR ISSU E ONE , I CAN IT IS QUITE -- I THINK IT IS QUITECLEAR THAT OPP OSING COUNSEL IS, IN FACT , ASKING FOR A PER SE RULE. THE ONLY G ROUND FOR DISQUALIFICATION PRO FFEREDIS THAT THE TRIAL COUNSEL IN THIS CASE IS NOW A SITTI NG JUDGE IN THE FOURTH CIRCUIT, A SITTING COUN TY JUDGE. HE HAS ALLEGED NOT HING EL SE. THERE IS NO SH OWING OF ANY CLOSE PERSONAL OR PROFESSIONAL RELATIONSHIP. THE FOURTH CIRCUIT IS BASICALLY DU VAL COUNT Y AND ANOTHER COUNTY OR TWO , SO I T IS A V ERY LA RG E METROPOLITAN AREA. I DON'T KNOW HOW MANY CIRCUIT JUDGES ARE IN THIS CIRCUIT OR COUNTY JUDGES , BUT I WOULD IMAGINE IT IS QUITE A NUMBER.THERE HAS JUST BEEN S I MPLY , I DON'T KNOW IF THEY HAVE ANY RELATION SHIP WHATEVER.

CHIEF JUSTICE: I THINK , AGAIN , THE ISSUE HERE TO ME , IS I DON'T KNOW HO W WE WOULD REVERSE SOMETHING WHERE I T WASN'T BROUGHT UP BY COUNSEL , AND CL EARLY COUNSEL MUST HAVE BEEN COMFORTA BLE , AT LEAST WE HAVE GOT TO PRES UME THAT COUNSEL IS COMFOR TABLE , BUT IT IS A , IT IS A MA TTER OF SOME CON CERN , WHEN YOU D O HAVE THE JUDGES ARE OBVIOUSLY HAVING TO MAKE RULINGS ON THE CREDIBILITY OF SOMEBODY AS A SITTINGJUDGE, AND IT SAYS HERE ON PAGE 4 OF HIS ORDER IT WAS CLEAR TO THIS JUDGE BASED ON THE CRED IBLE TESTIMONY PRESENTED BY JUDGE COFFER THAT THIS CL AIM IS MERI TLESS . IT WOULD BE SOME WHAT DIFFICULT FOR A JUDGE TO BE SAYING I DO NOT FIND JUDGE COFFER 'S TEST IMONY TO BE CREDIBLE. THAT IS THE FACTS OF LIFE.

YOU JUST REPRIMAND A JUDGE THIS MORNING SO I DON'T KNOW THAT THAT WOU LD BE DIFFICULT. I DON'T KNOW THAT THERE WAS ANY PARTICULAR CREDIBILITYWITH REGARD TO COVER ANYWAY. THERE WAS NO -- TO COF FER ANYWAY . WE HAVE OPPOSED AND CERTAINLY PRESERVED OUROBJECTION ON THE BASIS OR ON THE GROU ND THAT THIS ISSUE CERTAINLY WASN'T RA ISED BELOW AND IS RAISED FOR THEFIRST TIME ON APPEAL, AND OF COURSE THERE IS A STATUTE THAT SAYS THAT THAT IS NOT A REASONABLE GROUND.

CHIEF JUSTICE: THAT IS YOUR BEST --

BUT AT ANY RATE WE DO THINK, ALSO , THAT YOU WOULD HAVE TO ALLEGE SOMETHING BESIDES MERELY THAT A SITTING COUNTY, OR THAT THE ORLINGAL TRIAL COUNSEL IS NOW A -- ORIG INAL TRIAL COUNSEL IS NOW A JUDGE IN THE CIRCUIT. THIS COURT HAS ADDR ESSED THE ISSUE BEFORE AND I CI TED TWO CASES , ONE OF WHICH WAS MELTON, IN WHICH THE PETITION WAS DENIED FOR PREJUDICE, VERY SIM ILAR CIRCUMSTANCES, AND BY THE WAY THE COMP LAINT I S ALSO UNTIMELY, BECAUSE MR . COFFER WAS APPOIN TED A JUDGE IN THE FOURTH CIRCUIT,

BEFORE JUDGE SOUTHWOOD WAS PRES IDED TO -- WAS APPO INTED TO PRESIDE OVER THIS CASE AND NO BODY SAID ANYTHING ABOUT JUDGE SOUTHWOOD BEING DISQUALIFIED. IN ANY CASE , THE JUDGE RUL EDIT DID NOT RISE TO AN OPINION BUT THIS COURT HAS ADDRESSED THE ISSUE AND REJECTED IT.

CHIEF JUSTICE: ON THE ROUGH NOTES USED TO MEMORIALIZE THE REPORT, ARE THOSE, UNDER OUR CASE LAW , WOULD THOSE NOTES BE DISCOVERABLE? THEY ARE THE NOTES THAT THE SHERIFFS DEPUTY IS USING T O MEMORIALIZE THE REPORT?

MY UNDERSTAND ING OF THE CASE LA W IS IT IS NOT DISCOVERA BLE.NOW, OPPOSE THE CON VICTION , PERHAPS IF T HERE WE RE A BRADY CLAIM , W HICH IN THIS CASE THERE WAS NOT, THE COURT MIGHT HAVE TO RE VIEW THE NOTES FOR BR ADY MATERIAL, BUT JUST AS A MATTER OF ARE THEY DISCOVERABLE , THE ANSWER WOULD BE NO.

CHIEF JUSTICE: MAY IT BECOME RELEVANT, I MEAN , CERTAINLY IF THERE IS ANISSUE ABOUT THE REPORT AND WHETHER THERE IS SOMETHING--

THERE AT L EAST HAS TO B E A CLAIM TO WHICH THESE NOTES WOULD BE RELE VANT AND LET ME POINT OUT THAT TRIAL COUNSEL WAS AWARE THAT THESE NOTES EXISTED. THERE WAS TESTIMONY ABOUT THESE NOTES , IN THE PRETRIAL DEPOSITION OF DETE CTIVE G ILL BREATH , AND JUDGE COFFER NEVER SO UGHT THOSE NOTES , AND SE VERAL YE ARS OF POSTCONVICTION LITIGATION , NO ONE EVER SOUGHT T HOSENOTES. DETECTIVE GILBREATH TESTIFIED THAT HE DID NOT TURN THEM OVE R TO THE SHERIFF AND THEY WERE NOTPART OF ANY FILE S THAT W OULDHAVE BEEN SE NT TO ANY REPOSITORY OR CON TAINED WITHIN SOME EXEMPT DOCUMENTS.

CHIEF JUSTICE: SO WHAT WOULD HAVE BEEN, ALL RI GHT, BUT ONCE HE IS USING THEM TO TESTIFY , DIDN'T HE USE THEM TO TESTIFY?

I AM SO RRY . HE DID NOT US E THEM TO TESTIFY. ON CROSS-EXAMINATION , APPELLATE COUNSEL OR POSTCONVICTION COUNSEL A SKEDIF HE HAD THE NOTES AND HE SAID YES. BUT HE DIDN'T TESTIFY. HE DIDN'T USE THEM TO TESTIFY ABOUT ANYTHING . THE ONLY REASON THE DETECTIVE WAS CALLED TO TESTIFY WAS JUST TO ESTABLISH THAT THE PRELIMINARY REPORT THAT H E GAVE TO MR. COFFER BEFORE TRIAL WAS IDENTICA L TO THE F INAL REPORT , AND THE ONLY DIFFERENCE BETWEEN THE TWO , IS THAT THE FINAL REPORT WAS APPROVED BY THE SUPERVISOR.

CHIEF JUSTICE: WHAT W ASTHE RELEVANCE OF THAT TO ANY CLAIM?

PART OF THE STATE 'S PRESENTATION WAS THAT, IN TERMS OF WHAT COFFER'S STRATEGY WAS WITH REGARD TO THE AL IBI HAD TO FIT WITHIN THE INFORMATION HE KN EW , AND MUNGIN HAD GIVE N A STATEMENT TO POLICE , SE TTING OUT HIS WHEREABOUTS, IN WHICH HE ADMITTED THE FIRST T WOCRIMES IN MONTICELLO AND TALLAHASSEE BUT DE NIED HAVING COMMIT TED THE MURD ER OF MS. WOODS I N JACKSONVILLE AND GA VE AN ACCOUNT OF HIS WHEREABOUTS AT THAT TIME.

CHIEF JUSTICE: SO IF, S O THE FACT THAT IF COFFER DIDN'T HAVE THOSE NOTES , THEN IT REALLY DOES N'T GO TO ANY ISSUE OF COFFER'S --

STRATEGY. AND THAT IS WHAT THE T RIALJUDGE RULE SAYS , THAT THIS DOESN'T GO TO ANY ISSUE THAT YOU HAVE PENDING , AND HE WAS ASKED TO ID ENTIFY WHAT ISSUE DOES IT GO FOR AND COUNSEL COULDN'T -- GO TO AND COUNSEL COULDN'T SAY AT THIS POINT, ANY ISSUE THAT HE COULD IDENTIFY THAT THIS WOULD BE RELEVANT TO. KIEF

CHIEF JUSTICE: LET'S GO TO THE ISSUE OF THE NEIL SLAPPY QUESTION, AND I HAVE BEEN TROUBLED BY THIS I SSUEFOR SOME TIME , ALTH OUGH I DON'T KNOW IF WE HAVE HAD A

CHANCE TO RULE DIRECTLY ON IT AND JUST LET'S ASSUME THE TRIAL COUNSEL WOULD SAY, YOU KNOW WHAT? I SCRE WED U P. I THOUGHT I PRESERVED IT. I DIDN'T. I CERTAINLY INTENDED TO BECAUSE I FILED POST TRIAL AND I KNEW THE LAW BUT I JUST FORGOT, AND LET'S ASSUME THAT I F I T HAD B EEN PROPERLY PRESERVED , THAT THIS COWER WOULD HAVE FOU ND IT WAS -- THAT THIS C OURTWOULD HAVE FOUND IT IS PROTECTURAL.DOES THAT JUST GIVE MR . MUNGIN A NEW TRIAL, OR IS THERE SOME OTHER STANDARD THAT APPLIES, WHE N IT IS, BECAUSE IT IS ON A STRICKLAND POSTCONVICTION , AS TO WHAT THE PREJUDICE MEANS IN THE CONTEXT O F SOMETHING LIKE THAT?

OUR POS ITION WOULD HAVE TO BE THAT THE STRICKLAND STANDARD APPL IES AND THAT I S A DI FFERENT RESU LT AT T RI ALAND NOT ON APPEAL. HOWEVER , IN THE ALTERNATIVE , I CERTAI NLY THINK --

CHIEF JUSTICE: WHAT WOULD IT BE?

A REAS ONABLE PROBABILITY OF A DIFFERENT VERDICT BY THE JURY.

BUT DON'T YOU, WHEN YOU DEAL WITH JURY CONCE PTS , AREN'T YOU T R YING TO DETERMINE WHETHER YOU EVER HAVE A PROPERLY CONSTITUTED DECISION-MAKING BODY , NOTWHETHER THAT BODY M A DE THE RIGHT DECISION OR THAT THE DECISION IS SUPPOR TED BY THE EVIDENCE, AND IN MOST THIN GS, DEALING WITH THE COMP POSITION OF A -- COMPOSITION OF A JURY THAT , IS THE FUNDAMENTAL MENTAL PROCESS.

THAT WOULD BE TRUE ON DIRECT APPEAL BUT AT THIS POINT WE ARE TALKING ABOUT IN HE HAVE HE HE CA N'T I HAVE ASSI STANCE -- INEFFECTIVE ASSISTANCE OF COUNSEL.

BUT YOU ARE ST ILL TALKINGABOUT THE COMPOSITION OF THE DECISION-MAKING BODY AND IT CHANGES THE DYNAMI C.

Y ES.

WHAT IS THE DIFFER ENCE HERE BE TWEEN IF WE WERE CONSIDERING THIS AS APPELLATE COUNSEL'S FAILURE , WHEN THE ISSUE WAS PRESERVED , WE APPARE NTLY JUST DO A PRETTY STRAIGHTFORWARD ANALYSIS AS TO WHE THER OR NOT IF THE ISSUE, THEN , HAD BEEN RAISED , AS TO WHAT THI S COURT WOULD HAVE DECI DED ON THE MERITS . WHY SHOULDN'T THE SAME TEST APPLY AND , OF COURSE , WITH APPELLATE COUNSEL WE DO THE STRICKLAND ANALYSIS, SO WHY WOULDN'T WE DO THE SAME THING WHERE THERE , ASSUMING THAT, AND I NOTICE YOU SAID YOUR OTHER POSI TION WOULD BE, AND I WA NT TO HE AR ABOUT THAT, BUT WHY WOULDN'T THE SAME ANALYSIS APPLY TO COUNSEL , WHERE THERE I S A MERITORIOUS ISSUE BUT HE DOESN'T DO ONE OF THE THINGS REQUIRED TO PRESERVE IT HERE , BY FAILING TO OBJE CT, Y OUKNOW, WHEN THE JURY IS FINALLY EMPANELED. WHY SH OULDN'T WE TR EAT IT THE SAME WAY W E TREAT APPELLATE COUNSEL?

THE EASIER WAY TO ANS WER THE QUESTION IN THIS CASE MIGHT JUST BE WHETHER T HIS COURT WOULD HAVE AFFIRMED IT ON APPEAL AND I THINK THE COURT CLEARLY WOULD HAVE , BECAUSE --

IN OTHER WORDS THAT THE ISSUE HAS NO MERIT, IS YOUR--

THAT IS OUR POSITION ABSOLUTELY. YOU KNOW, WE ARE O NLY TALKING ABOUT ONE CHALLE NGED JUROR , JUROR GALLOWAY. THERE WERE FOUR BLACK JURORS THAT SAT ON THE JURY. THE PROSECUTOR OF FERED --

WE HAVE AL WAYS SAI D THAT IT DOESN'T REALLY M A TTER H OWMANY AC TUALLY SET ON THE JURY. IT IS WHETH ER OR NOT THIS PARTICULAR JURY WAS IMPROPERLY EXCLUDED.

TRUE. I AM SO RRY.

CORR ECT? I MEAN, WE REALLY HAVE SAID , REALLY, THE QUESTION IS WHETHER THIS PARTIC ULAR JUROR WAS IMPROP ERLY EXCLUDED.

CORRECT.

AND NOT THE COMPOSITION OF THE JURY.

IF THE PROSECUTOR STR UCK ONE JUROR FOR RACIAL REASONS, THAT WOULD BE ENOUGH.THERE IS NO QUESTION ABOUT IT. IN THIS CASE, THE PROSE CUTOR OFFERED A, WHAT ON ITS FACE APPEARED TO BE A NEUT RA L EXPLANATION FOR T HIS CHALLENGE, AN ACCEPTABLE EXPLANATION , AND WHAT HE IS REALLY ARGUING IS THAT EXPLANATION IS SUSPECT , LOOKING AT OTHER CIRCUMSTANCES. OUR POSITION IS, IF YOU LOOK AT THE TOTALITY OF CIRCUMSTANCES IN THIS CASE, THERE IS NOTHING THAT NEGATES THE IN ITIAL NEUTRALITY OF THE PROSECUTOR'S RESPONSE.

BUT YOUR ARG UMENT THATTHERE WAS A SI MILAR SITU ATED WHITE MALE JUROR WHO MADE THE --

CORRECT.

-- SAME KIN D OF ANSWERSTO THE QUES TIONS AND Y E T THE PROSECUTOR DID NOT CHALLENGE THAT JUROR PREEMPTORILY.

Y ES. HE ACTUALLY SAYS THERE WERE TWO SIMILARLY-SITUATED JURORS, AND I WILL ADDRESS THE SECOND ONE FI RST , JUROR GOODMAN, SELE CTED AS A N ALTERNATE.HOWEVER, THE STATE CHALLENGED THIS JUROR FOR CAUSE , AND IN THIS CASE THE JUROR'S ANSWER WAS NOT O NLY SIMILAR IN THAT SHE SAID SHE HAD MI XED EMOT IONS ABOUT THE DEATH PENALTY BUT SHE ALSO SAID SHE WASN'T SURE SHE COULD IM POSE THE D EATHPENALTY, EVEN IF THE FACTS WARRANTED IT. THE STATE MOVED TO CHALPASSENFOR CAUSE AND THE STATE WAS DENIED , AND AT THAT T IME CHALLENGED PREEMPTORILY, AND THE STATE DID EVERYTHING THE STATE COULD DO TO GET HER OFF THE JURY AND IT F AILED TO DO SO AND THE OTHER JUROR SAID IN TOTALITY, IT DEPENDS ON THE CIRCUMSTANCES AND IF THE EVIDENCE OF HIS GUILT IS STRONG AND HE HAS COMMITTED A VIOLENT CRIME , I AM FOR THE DEATH PE NALTY, AND I WOULD SUGGEST THAT JUROR IS NOT COMP ABLE TO ONE WHO HAS -- COMP ARABLE TO ONE WHO HAS MIXED EMOTIONS ABOUT THE DEATH PEN ALTY.

BUT DIDN'T DIDN'T SHE SAY THAT, UNDER THE PROPER CIRCUMSTANCES, THAT SHE COULD FIND --

THAT IS WHAT SHE SAID .

" GUIL T AND IMP OS E THE DEATH SE NTENCE ? SO SHE WAS JUST L IKE HE EXPLAINED HIS STATEMENT, EVEN THOUGH HE HAD MIXED FEELINGS, SHE IN FACT, WE NT ON TO SAY THAT SHE COULD PROPERLY FOLLOW THE LAW , ALSO.

SHE WAS NOT CHALLENGEABLE FOR CAU SE. THAT IS ABSOLUTELY TRUE. JUROR ANATAZI NEVER SAID HE HAD MIXED FEELINGS ABOUT IT AND I READ HIS ANSWERS AND I THINK THE PROSECUTING ATTORNEY COULD REASON ABLY HAVE READ HIS ANXIOUSS IT THAT SAID BASI CALLY WHETHER OR NOT HE WOULD VOTE ON THE DEATH PENALTY WOULD DEPEND ON THE FACTS OF THE CASE AN D I THINK HIS ANSW ERS WERE CLEARLY MORE STRONGLY IN FAVOR OF THE DEATH PENALTY THAN JUROR GAL LOWAY WHO WAS CHALLENGED PREEMPTORILY BY THE STATE.

BACK TO JU STICE LE WIS 'S QUESTION , IT , AREN'T WE , WHEN WE GET TO POSTCONVICTION, AS

OPP OSED TO WHERE WE ARE ON DIRECT APPEAL , DEA LING WITH AN ISSUE OF PRE JUDICE IN WHICH MR. SCH ER, IF HE IS REPRESENTING THE DEFEND ANT, HAS TO CARRY A BU RDEN O F DEMONSTRATING THAT THIS ERROR , REGARDLESS OF WHERE IT OC CURS D URING THE TRIAL , IS SO GRIEVOUS THAT IT WOULD UNDERMINE CONFIDENCE IN THE OUTCOME? I MEAN, I S N'T THAT THE STRICKLAND TEST?

THAT IS OUR POSITION , YES.

SO YOU WOULD LO OK AT THE WHOLE TRIAL, RATHER THAN AS YOU WOULD ON DIRECT APPEAL , JUST AT THE IS OLATED MATTER OF THE JURY SELECT ION.

THAT'S CORRECT, AND I WOULD POINT OUT, TOO, HIS MERITS ARGU MENT IS EXA CTLY SAME AS THE MERITS ARGUM ENT THAT HE MADE ON APPEAL A NDIN FACT IT IS LI FTED VERBATIM IN HIS RESP ONSE AND MY IS LIFTED VERBATIM FROM MINE IN THE BRIE F.

CHIEF JUSTICE: BUT WE DIDN'T RESPOND BECA USE IT WASN'T PRESERVED.

THAT IS THE ARGUMENT AND IT WAS AL LEGED , WE THINK IT IS PROCED URALLY BA RRED , BUT EVEN IF IT IS NOT, I JUS T HAVE TO SAY I REALLY DON'T SEE HOW HE CAN ESTABL ISH A NEIL SLAPPY VIOLATION IN THIS CASE , WHEN YOU LOOK AL AT ALL OF THE CIRCUMSTAN CES OF THIS CASE, THE PATTERN OF STRIKES IN THIS CASE , THE TOTALITY OF CIRCUMSTANCES I N THIS CASE , THEY SIMPLY DON'T REBUT THE OFFICIALLY NEUTRAL EXPLANATION OFFERED BY THEPROSECUTOR IN THIS CASE . IF THE COURT HAS N O FUR THERQUESTIONS, THANK YOU.

I WOULD JUST VERY BRIEFLY AS TO THE JUROR ISSUE , FI RS T OF ALL I DON'T SEE HOW THE CLAIM COULD BE PROCED URALLY BARRED. I THINK I HAVE ADDRESSED THAT SUFFICIENTLY IN T HEBRIEFS.

HOW DO YOU RESPOND TO THE STATE'S ASS ERTION THAT, AS TO MS. GOODMAN WHO DID GIVE SIMILAR RESPONSES ON VOIR DIRE, THE STATE DIDN'T HAVE ANY MORE PREEMPTORY CHALLENGES, SO IT IS NOT THAT THE STATE CH OSE NOT T O STRIKE HER. IT COULDN'T.IT TRIED TO STRIKE HER FOR CAUSE AND IT FAIL ED.

I THINK THAT PARTIC ULAR JUROR WAS MORE THE FOCUS OF SOME OF THE ARGUMENTS T HAT WERE MADE ON DIRECT APPEAL. I REALLY FOCUS, AND I THINK THE LOWER COURT, IN 3.8 50 WAS MORE FOCUSE D ON THE COMPARISON BET WEEN GALLOW AY AND BENITAZI AND I THINK AS JUSTICE QUINCE POINTED OUT, IF YOU LOOK AT BO TH OF THE COLLOQUYS OF BOTH OF THESE JURORS, AS I SET OUT IN MY REPLY BRIEF , THERE REALLY IS NO DIFFERENCE WITH RESP EC T TO THE RESPONSES, AND WHAT IS INTERESTING IS THAT THE PROSECUTOR NEVER FO LLOWED U P , EITHER, WITH JUROR ANATAZI. IT WAS DEF ENSE COUNSEL WHO PUSHED BOTH OF THE JURORS AND GOT BOTH OF THEM TO SAY ESSENTIALLY THE SAME THING.

AS TO JUROR ANATAZI , T HEOTHER JUROR, THE STATE SAID THAT LATER IN VOIR DIRE , IF THE PERSON IS GUILTY AND IT WAS A VIO LENT , MAL ICIOUSKRIRJS I BELIEVE IN THE DEATH PENALTY. THEREFORE IT DEPE NDS ON THE CIRCUMSTANCES AND NOT THAT HE HAD MIXED EMO TIONS.

THAT IS WHAT THEY SAY.

IS THAT WHAT HE SAID , THAT IF IT WAS VIOL ENT AND MALICIOUS , THAT I BELIEVE IN THE DEATH PENALTY?

HE S AYS IF THEY PRO VE THAT THE PERSON IS GUILTY, IF YOU ALL PROVE TO ME T HAT HE WAS GUILTY AND IT WAS VIOLENT AND MALI CIOUS , I BELIE VE IN THE DEATH PENALTY. I DON'T NECESSARILY FEEL THAT DEATH GOES WITH THE GUILTY CHARGE. DEFENSE COUNSEL. OKAY.

DOUBTFUL AS THOUGH THERE WOULD BE SOME CIRCUMSTANCE S WHERE YOU WOULD WE IGH MITIGATION AGAINST ANY POTENTIAL AGGRAV ATION? JUROR , YES, SIR , AND DEFENSE COUNSEL AND VOT E FOR A LIFE SENTENCE? VON SIRE -- V E NIRE PER SON, YES. EVEN IF IT WAS GIVEN TO YOU? THE JUROR, YES.

SO YOU DON'T THINK IT IS DIFFERENT?

YES. I THINK IT IS FUN CTIONALLY THE SAME. I SEE I I HAVE R UN OUT OF TIME SO I REQUEST THAT THE COURT REVERSE AND RE MAND FOR EVIDENTIARY HEARINGCONSISTENT WITH MY BRIEF. THANK YOU VERY MUCH.

CHIEF JUSTICE: THANK Y OUVERY MUCH.