Cedrick Jones v. State of Florida

MARSHAL: PLEASE RI SE. PLEASE BE SEATED. CHOOEF CHIEF WE HAVE GOT ASECOND GROUP FROM PALM BEACHCOUNTY AND THE SECOND GROUP IS JONES VERSUS STATE OFFLORIDA.

GOOD MORNING, CHIEFJUSTICE PARIENTE ANDJUSTICES. I AM MARGARET G OOD -ERNEST FROM WEST PALM BEACH . THE CONFLICT HERE IS JUST WHAT HAS T O BE SHOWN O N A MISSING TRANSCRIPT BEFORE AN APPEAL FOR CONVENTION , BEFORE THE LAST OF I TS PROGENY IS ALLOWE D FROM THIS COURT.

THE CONTROVERSY SEEMS T O ARISE FROM VOIR D IRE . ARE YOU GOING TO RESTRICT?

I AM GOING TO REST RICT MYSELF MOSTLY V OIR DIRE , B UTSOME OF THE OTHER C ASES , TALK AB OUT SIGNIFICANT PORTIONS, LIMITE D PORT IONS . THERE ARE SOME CASE L AW PROVIDING OTHER KIND OF OMISSIONS, BUT ALSO , SI NCE THIS, I DID P UT IN MY RE PLY BRIEF THAT THE THIRD DISTRICT HAS NOW CERTIFIED CONFLICT WITH THE CED RICK JONES CASE, AND THEIR V ARGAS DECISION OF DECEMBER 29 , ' 04 , WHEN THEY RE VERSED YET ANOTHER CASE FOR MISSINGVOIR DIRE , YET N O ONE K NEW WHAT WAS IN THE VOIR DIRE. THE STANDARD THAT CA ME UP IN MR. JONE S IS RE ALLY PUT TING THE DEFENDANT IN A CATCH-22 . DEFENDANT IS ENTITLED TO APPELLATE REVIEW O F HIS CRIMINAL CONVICTION, AND TO HAVE AN APPE LLATE REVI EW , YOU NEED AN APPE LLATE TRANSCRIPT, BUT IN CEDRICK JONES THE FOURTH DISTRICT SAYS THAT , AT LA ST WE C ANSHOW WHAT IS IN THE MIS SING TRANSCRIPT. WE CAN SHOW A SPECIFIC DECISION BY THE TR IAL C OURTTHAT WE WOU LD USE T O SHOW REVERSIBLE ERROR THAT WE ARE NOT ENTITLED TO A REVERSAL .

LET ME ASK YOU THI S. LET'S GO B ACK SO THAT T HEBASICS OF THIS VOIR DIRE AND PREEMPTORY CHALLENGES AND CHALLENGES FOR CAUSE, W HAT D O YOU HAVE TO DEMONS TRATE , TO PRESERVE FOR APPEAL , A PREEMPTORY CHALLENGE OR EVEN A CHAL LENGE FOR CAU SE? DOESN'T THE DEFEND ANT, IF THE DEFENDANT BELIEVES THAT A CHALLENGE IS IMPROPER , YOU HAVE TO MA KE SOME KIND OF OBJECTION, SO T EL L M E W HAT YOU DID TO PRESERVE IT , BECAUSE MY QUESTION , MY PROBLEM IS THIS . SHOULDN'T THERE BE SOMETHING ON THE TRANSCRIPT , WE DON'T HAVE THE VOIR DIRE , RIG HT?

NONE OF IT .

NONE OF IT. DO WE HAVE THE SWEARING OF THE JURY?

NO. YOU DO N'T HAVE THAT. SO WE , AND DO WE HAVE ANYTHING AT THE END OF THE TRIAL , WHERE THERE IS ANY RENEWAL OF ANY KIND OF MOTIONS OR ANYTHI NG?

YOU HAVE, IN THIS CASE, THE ENTI RE VOIR DIRE IS MISSING. THERE IS A JURY CHA RGE I N THE RE CORD THAT SHOWS T HA T THE STATE USED T WO PREEMPTORY CHALLE NGES AND THE DEFENDANT USED TH REE PREEMPTORY CHALLENGES DURING THE COURSE O F THIS VOIR DIRE. THIS WAS THE THIRD T IME THIS CASE HAD A VOID DIRE. THE F IRST CASE IN THE TRIAL WAS A HUNG JURY. THE SE COND CASE WAS A MISTRIAL THE DAY BEFORE THIS CASE WAS TRIED AGAIN, AND IN THIS PARTIC ULAR CASE, WE DID HAVE AN EXTENS IVE HEA RING TO TRY AND RECONSTR UCT THE RECORD. THE STATE SPECIFIC HI A SKEDTHE TRIAL JU DGE TO MAKE A FINDING THAT, BASED ON THE PROSECUTOR'S TESTIMONY, HER RECOLLECTION OF VOIR DIRE IS THAT IT WAS LI

KELY , THAT N O NEAL FLAPPY OBJECTIONS OCCURRED, BASED ON THE DEFENSE TESTIMONY AND IT WAS LIKELY THE OBJE CTIONS WO ULD OCCUR BUT THE JUDGE COULDN'T MAKE RECONSTRUCTION , IN HIS FINDING , WE CAN'T REMEMBER. BUT CERT AIN REQUIREMENTS YOU HAVE TO GO THROUGH TO PRESERVE A CAUSE CHALLENGE . THERE WOULDN'T BE ANY PRESERVED CAUSE CHALLENGES IN THIS CASE PAW THE DEFENDANT DID NOT EX HAUST HIS PREEMPTORY CHALLENGES . WE CAN SE E THAT JUST BY THE NUMBER. HOWEVER, THE STATE DID EXERCISE TWO PREE MPTORY CHALLENGES, AND THE STATE IS NOT ENT ITLED TO ANY PRESUMPTION THAT THEY EXERCISE THEIR PREEMPT OTHERS IN A NONDISCRIMINATORY -- PEREMPTORY IN A NONDISCRIMINATORY MANNE R , UNLESS IT IS SHOWN ON THE RECORD OR CONVIN CED IN THE TRIAL. THAT IS WHAT THIS COURT S AID IN ITS CASE FROM DO RSEY , A 2004 CASE IN DORSEY , WHEREYOU ARE TALKING ABOUT WHAT HAS TO BE SHOWN, WHEN SOMEONE OBJ ECTS.

NOW YOU ARE HERE , POINTING TO A POSS IBLE AREA OF ER ROR, BECA USE IN THE FOURTH DISTRICT CASE AND WERE THE APPELLATE LAWYER INTHE FOURTH DISTRICT CASE?

NO.

SI NCE JONES CON CEDE HE DOES NOT KN OW IF ANY ERRORS OCCURRED IN VOIR DIRE , W HICH IS SORT OF A BLAN KET STATEMENT, WE NOW KNOW THATWE CAN ELIMINATE THAT ANYERRORS FOR CAUSE OR PREEMPTORY CHALLENGES , W OULD NOT BE PRESERVED , SO EVEN IF ERRORS OCCURRED, THEY COULDN'T HAVE BEEN R AISED , CORRECT?

I DO NOT KNOW WHETHER OBJECTIONS REMAIN TO PREEMPTORY CHALLENGES OR NOT.

I AM TALK TAL KING ABOUT THE ISSUE THAT THERE WAS , I GUESS FOR CAUSE , SO NOW YOU ARE FO CUSING ON WHETHER YOU MIGHT HAVE HAD AN AR GUMENT AND I JUST WA NT TO MAKE S URE THAT I AM CLEAR, THAT , THE DEFENSE ARE YOU SA YING IT BOTH WAYS , THAT THE STATE EXERCISES PREEMPT OTHERS IN POSSIBLY A SDRIM TORY MANNER OR PREVENTED THE DEFENDANT FROM EX ERCISING A PREEMPTORY , EITHER OF TH OS E TWO POSSIBILITI ES?

I AM SAYING T HAT IS A POSSIBILITY, BUT I AM ASKING ALSO SAYING THAT I D ON'T KNOW WHAT HAPPENED. I TRIED TO PROVE THAT IT WAS LIKELY SOMETHING HAPPENED PAW THIS WAS AN EXTREM ELY SKILLED , VIGOROUS ADVO CATE , EMANNUAL SIMON THAT VIGOROUSLY REPRESENTED MR . JONES IN THE ORIG INAL TRIAL. IT IS POSSIB LE THAT HE MA DE THESE CASES, BUT --

HOW LONG WAS THE TRIAL, IN ORDER TO BU ILD UP T HEVOIR DIRE ?

IT WAS QUITE A WH ILE AFTERWARDS, ABOUT 18 MONT HS AFTERWARD.IT WOULD HAVE BEEN REALLY HELPFUL IN THIS CASE , IF T HECOURT REPORTER , AT THE INSTANT SHE KN EW THAT HER COMPUTER HAD CRASHED AND COULDN'T PROVIDE THAT P ART OF THE TRANSCRIPT , HAD T OLD SOMEBODY ABOUT IT , INST EAD OF, O H, WELL - -

WAS THE RECORD REQUES TED?

YES, IT WAS REQU ESTED B Y MR. SIMON IN HIS DESIGNATION TO THE COURT REPO RTER . HE REQUESTED THAT THE ENTIRE TRIAL BE TRANSSCRIBED BEGINNING ON JULY 25 , THE DAY THAT THE VOIR DIRE B E GAN .

MY QUESTION, ONCE THE NOTICE OF APPEAL WAS TA KEN, WHEN WAS THE TR ANSCRIPT REQUESTED AND WHEN WAS DEFENSE COUNSEL FI RST NOTIFIED THAT THE TRANSCRIPT WAS NOT AVAILABLE?

THE NOTICE OF APPEAL W ASFILED THE SA ME DAY AS THE DESIGNATION TO THE COURT

REPORTER, IN SEPT EMBER , AFTER THE VERDICT CAME IN IN JULY. IT WAS TI MELY, BECAUSE THERE WAS SOME POST TRIAL MOTIONS . THE COURT REPORTER BEGAN TO TRANSSCRIBE THE RECORD. OUR OF FICE IS THE APPELLATE DEFENDER. WE RECEIVED THE APPELLATE TRANSCRIPT IN DECE MBER OF '01 AND REM OVED FOR RELINQUISHMENT TO SUPP LEMENT THE REPORT IN MA RCH OF ' 02. THERE WAS SOME MISCOMMUNICATION ABOUT THE FIRST RELINQUISH MENT HEARING. WE THOUGHT THE STATE WAS PRESENT. THE STATE DID NOT APPEAR ON THE RECORD AND DID NOT AGREEON THE RECORD . IT WAS A ONE-SIDED RELINQUISH MENT HE ARING, SO HE HELD IT AGAIN IN , AND I DON'T KNOW WHEN IT TOOK PLACE, BUT I N JANUARY AND FEBRUARY OF 2003 AND THE TRIAL WAS IN ' 01.

YOUR POSITION IS THAT THERE SHOULD BE A BRIGHT LINE TYPE OF R ULE . VOIR DIRE IS NOT THERE AUTOMATICALLY. THERE IS REVERSAL .

MY POSITION IS THAT , YES,SIR , THAT VOIR DIRE IS A NECESSARY PART OF THE APPELLATE TRANSCRIPT , IN ORDER FOR THE DEFT TO EXERCISE ITS ---FOR THE DEFENDANT TO EXE RCISE ITS FLORIDA CONSTITUTION AREA APPEAL FROM HIS CONVICTION , AND MY FURTHER POSITION IS THAT HE DID NOT HAVE T O SHOW OR ALLEGED ANY ERROR THAT OCCURRED IN THE TRANSCRIPT OR ANYWHERE EL SE IN THE TRIAL , AS A MATTER OF FACT, IN ORDER TO B E ENTI TLED TO HIS RIGHT TO APPELLATE REVIEW.

WOULD THIS H O LDING CONFLICT WITH THE DECISIONIN DAR LING THAT WEISH UED JUST THREE Y EARS A G O? I REALIZE THAT DA RLING CONCERNED PRETRIAL HEARINGS,BUT IT DID REQUIRE PREJU DICE , AND IT DIDN'T DISTINGUISH BETWEEN PRET RIAL HEARINGS AND OTHER TY PES OF PROCEEDINGS .

THIS IS TR UE. AND IN T HIS PARTICULAR CASE , THIS COURT HAS AN EXCE LLENT OPPORTUNITY TO DIS CUSS DISTINGUISHED AND GIVE SOME GUIDANCE TO THE BE NCH AND BAR AS TO EXACTLY WHAT KIND OF PREJ UDICE HA S TO BE S HOWN. WHAT I AM ARGYAU ING HERE IS --

YOU JUST SAID THAT WE SHOULD HAVE A BRIGHT-LINE RULE REGA RDING NO PREJUDICE. MY QUESTION IS , WOULD THAT REQUIRE US TO REC EDE FROM DARLING?

WELL , I A M ARGYAUING PREJUDICE, AND THE PREJUD ICE I AM ARG UING IS A PROCEDURAL PREJUDICE , THAT THE PREJUDICE IS A MEANINGFUL RIGHT TO APPEAL.

I G UESS DARLING SEEMS TO HAVE S POKEN OF PREJUDICE AS MORE THAN JUST THAT BECAUSE IT WOULD HAVE FOUND THAT PREJUDICE , AS A REQUIREMENT OF THE PRETRIAL HEARINGS , WASN'T THERE, SO THE FACT THAT YOU CAN'T FIND THE TRANSCRIPTS OR THEY OTHERWISE DO NOT EXIST , SEEMS TO HAVE THAT YOU HAVE AN ARGUMENT BASE ED ON THAT THAT .

DARLING SAYS YOU HAVE TO SHOW SPECIFIC PREJUDICE , BUT IT DO ESN'T SAY WHAT KIND OF PREJUDICE. IT DOESN'T SAY THAT YOU HAVE TO SHOW WHAT THE IS SUE WAS , AND IT IS E AS Y - -

BUT U NDER YOUR DEFINITI ON, THE PREJUDICE IS SIM PLY MISSING THE TRANSC RIPTS.

NO, AND I DON'T MEAN ANY MISSING TRANSCRIPT, BECAUSEI CAN SEE WHERE SOME TRANSCRIPTS DON'T REQUIRE A REVERSAL, BUT THE VOIR DIRE IS SUCH A CRITI CAL PART OF THE TRIAL , SO IMPORT ANT.

THAT IS WH Y I WAS ASKING YOU ORIGINALLY , W HETHER THE CONFLICT ISSUE IN THIS CASE INVOLVES VOIR DIRE AS OPPOSED TO GENERALLY PART OF A TRANSCRIPT.

GE NERALLY , BECAUSE I C ANUNDER IN DARLING HOW THAT VERY LI MITED PART OF THE RECORD WAS NOT REVERS IBLE ERROR. YOU HAVE TO RE NEW YOUR OBJECTIONS , YOUR PRETRIAL MOTIONS TO SUPPRESS AT TRIAL ANYWAY, BE FORE IT IS PRESERVED FOR APPEAL.

DON' T YOU IN ANY BRIGHT-LINE RULE , OBVIOU SLY , HAS ITS DRAWBACKS , AND Y OUHAVE GOT SITU ATIONS WH ICH YOU HAVE VOIR DIRE THAT TAKES A HA LF A MO RNING IN A CRIMINAL CASE . NO PREEMPT OTHERS USED. YOU KNOW THAT , B Y LOOKING AT THE NEWSPAPERS . BOTH COUNSEL I N GOOD FAITH , THERE WERE NO OBJECT IONS . NOW , AND , THE COMPUTER LO SES THAT TRANSCRIPT. THAT MEANS THAT CASE IS GOING TO HAVE T O BE RE TRIED .

NO. NO. YOU ARE ENTIRELY CORRECT. THAT CASE WOULD NOT HAVE TO BE RETRIED . BUT WHEN THE DEFEND ANT, T HIS IS A CONTESTED PART OF THE TRIAL. DOES .

DOESN'T THAT CONTRADICT WHAT YOU SAID JUST TWO MINUTES EARLIER?

IT PROBABLY DOES CONTRADICT WHAT I SAID. IT CHANGED WHAT I S AID.BUT THIS WAS CONT ESTED AT THE VOIR DIRE . IT WAS CONTE STED AT THE RECONSTRUCTION HEARING , WHETHER THERE WERE OR THERE WEREN'T OBJE CTIONS , WHETHER EVERYTHING IS DEFINED EA SILY , AND WHERE THERE IS A CON TESTLIKE THAT AND THE DEFENDANT DOES NOT WITHDRAW, IT THE DEFENDANT I S ENTITLED T O A REQUEST ON APPEAL .

THERE ARE NO PREEMPT OTHERS AND THE LAW YERS TESTIFIED THAT NOTHING OCCURRED, YOU WOULD HAVE RECONSTRUCTED THE RECORD .

CORRECT. BECAUSE YOU HAVE T O AL WAYS CONSIDER RECONSTR UCTING MISSING PO RTIONS OF A RECORD , BECAUSE MANY TIME S THE LAWYERS CAN AND DO K NOW.

BUT THEN YOU HAVE GOT T HEPROBLEM THAT THE STATE SAYS , JUDGE, I CAN TELL YOU EXACTLY WHAT HAPPENED D URING THIS VOIR DIRE , AND LA YS IT OUT JUST LI KE WE HAVE CASES. THERE IS ONE CA LLED JOTSON THAT HAPPENED DO WN IN THE NINTH CIRCUIT, IN WHICH THEY HAD TO RECONSTRUCT MOST OF THE WITNESSNESS TESTIMONY , BUT THEY HAD IT , AT L EAST TO THE SATISFACTION OF THIS COURT , BUT THE OTHER LA WYER JUST SAYS I AM NOT GOING TO AGREE TO ANY THING. SO I GU ESS ONE LAWYER TOTALED V ET O OVER WHETHER THERE IS OR IS N'T.

EXISTING CASE LAW DOES SEEM TO GIVE ONE LAURA TO TAL VETO, BECAUSE A RECONSTRUCTED RECORD, A STIPULATED STATEMENT IS TO CORRECT THE RECORD AND APPELLATE RULES PROVIDE THAT THAT HAS TO BE AG REED TO BY THE PARTIES. I HAVE ALSO CITED IN MAY REPLY BRIEF , THE CASE THAT WENT TO THE UN ITED STATES SUPREME COURT CALLED DR APER VERSUS WASHINGTON, WHERE AN INDIGENT DEFENDANT WAS NOT ENTITLED TO A TRANSCRIPT TO TAKE HIS APPEAL , UN LESS HE COULD SHOW THAT THERE W ERE ERRORS, AND HE HAD TO FIRST CONVINCE THE TRIAL JU DGE THAT THERE WERE ERRORS .

OKAY. A HE COU LDN'T CONV INCE THEM UNTIL HE DIDN'T GET A TRANSCRIPT, AND THE SUPREME COURT SAID YOU ARE ENTITLED TO MUCH MORE THAN THE TRIAL JUDGE'S RECO LLECTION , SUMMARY STATEMENT ABOUT THIS WAS THE EVIDENCE AND THIS I S WHY HE WAS CONVICTED , IT I S OVERWHELMING AND THERE ARE NO ERRORS, SO IN THE AB SENCE OF A COURT REPORTER , AN IMPARTIAL TRANSCRIPT OF T HEPROCEEDINGS OF EVERYTH ING THAT WENT ON AS THE PARTIES CAN'T AGREE , YES, YOU HAVE TO HAVE A REVERSAL .

SO IN THIS CASE , THE DEFENSE ATTORNEY, TRIAL ATTORNEY TEST IFIED .

HAD NO RECOL LECTION .

HE HAD NO RECOLLECTI ON.

BUT WE HAVE THE STATE ATTORNEY, WHO HAD A RECOLLECTION , B ASED ON NOTES THAT WERE , HE OR SHE T OOK FROM THE COURSE OF THE TRIAL. CORRECT?

YES.

AND SO THE DEFENSE ATTORNEY DID NOT NE GATE OR OBOR SAY THAT DIDN'T HAPPEN.WHAT THE STATE ATTORNEY SAID TOOK PLACE DU RING THE COURSE OF THE VOIR DIRE.

MOST IMPORTANTLY T HETRIAL COURT DID NOT CR EDIT HER TESTI MONY. HE DID NOT MAKE A FI NDING PACED ON HER TESTIMON Y THAT THAT IS WHAT HAPPENED IN VOIR DIRE. THE DEFENDANT RECALL ED THERE WERE SOME NEAL SLAPPY OBJECTIONS TO HER OBJECTIONS.

HOW WAS THAT WORDED? HOW DID THE ATT ORNEY SAY THAT IN?

HOW DID THE ATTORNEY SAY THAT? YOU MEAN THE DEFENDAN T?

THE DEFENSE ATTORNEY.

THE DEFENSE ATTORNEY H ADNO RECOLLECTION. BUT THE DEFENDANT TESTIFIED AT THE RECONS TRUCTION HEARING, THAT HE BELIEVES THERE WERE SOME OBJECTIONS MADE. THE QUESTION FROM DEFENSE COUNSEL WAS , DID YOUR LAWYER MAKE ANY OBJECTIONS WHEN THE STATE USED THEIR PREEMPT OTHERS, AND THEN THE DEFENDANT ANSWERED , I BELIEVE THERE WAS SOMETHING A BOUT NEAL SLAP I , W HEN THE STATE WAS -- NEAL SLA PPY, WHEN THE STATE WAS STRIKING SOME WITNESS. THAT WAS ON PAGE ONE. THAT WAS NOT EX ACTLY WHAT WAS SAID BUT THAT WAS PRE TTY CLO SE. THAT IS ABOUT PAGE 1. I DIDN'T W RITE THAT DOWN. ABOUT PAGE 1 44 O F THE THING , SOMETHING , HE SAID VOI DED THE THING, SOMETHING LIKE NEAL SLAPPY WHEN THE STATE WAS STRIKING A WITNESS O R SOMETHING, BUT YOU ALSO HAVE TO LOOK AT THE Q UESTION OF THE LAWYER , T OO , TO THE DEFENDANT , AT THE TIME THAT THE QU ESTION WAS AS KED , BECAUSE THE QUE STION SPECIFICALLY WAS, DID YOUR LAWYER OBJECT TO THE STATE'SUSE OF PREEMPT OTHERS.

LET ME GET BACK TO YOUR REVISED ARGU MENT HERE , WH ICH IS THAT SOME PREJUDICE SHOULD BE REQUIRED , AND IF THAT IS TRUE, SHO ULDN'T WE REQUIRE, IN O R DER TO REVERSE A TRIAL, AT LE AST THAT THE DEFENSE COUNSEL STATE UNDER OATH , E ITHER ON AFFIDAVIT OR AT A HEARING OR SOMEWHERE, THAT THERE WAS SOME PRO BLEM WITH VOIR DIRE , THA T THERE WAS SOME OBJECTION MADE , AND THAT THE DEFENSE COUN SEL WHAT HAVE USED THIS AS AN ISSUE ON APPEAL , IF THEREWAS A TRANSCRIPT V AN L - - AVAILABLE.

NO, SIR, AND THE REASON I SAY THAT IS BASED ON THIS COURT'S DECI SION IN TROW EL. IN TROWEL, THIS COURT SAID THAT A DEFENDANT IS PILINGTS ED TO A BELATED APPEAL , BUT IT DOES NOT REQUIRE THE DEFENDANT TO STATE T HAT THERE ARE ANY ERRORS TO B E FOUND.

HOW OLD IS THE DARLING?

THE TRIAL WAS IN 1999. BEFORE DARLING. AND DARLING DOES STATE THAT YOU HAVE TO SHOW SOME KIND OF PREJUDICE , BUT I CITED AS SUPPLEMENTAL AUTHORITY ON MONDAY, AN OLD LEGENDARY CASE FROM THE FIRST DISTRICT , COLORADO AS MOORE , WHERE HE NEVER -- COLLACE MOORE , WHERE HE NEVER COULD GET A TRANSCRIPT BECAUSE THERE WASAN ERROR, AND IT SHO WS THE LONG HISTORY OF THIS CASE THAT HE WAS NOT ALLO WE D T O GET A TRANSCRIPT UN TIL HE ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL FOR NOT FIND ING ERRORS.

WHY IS THAT A BURDEN OF THIS WHOLE CASE SIMPLY TO RETRY THE WHOLE CASE , TO FIND OR HAVE AN ATTORNEY ATTEST UNDER OATH THAT THERE WAS AN ISSUE FOUND O R MADE ON APPEAL HERE , SIMPLY FOUND. IT IS NOT A BURDEN , IS IT?

WE NO LO NGER H AVE ASSIGNMENTS OF ERROR. WE USED TO HAVE THEM UNDER APPELLATE RULES BUT WE NO LONGER HAVE THEM, AND MA NY TIMES IN VOIR DIRE APPEAL , THE

ATTORNEYS DON'T RECALL AND IT IS UP TO THE ATTORNEY TO SEARCH THE RECORD FOR REVERSIBLE ERROR.

ISN'T THAT NOT GO OD T HAT THERE IS NO ISSUE ON APPEAL?

I DON'T THINK SO. BECAUSE A LOT OF T IMES LAWYERS TALK A BOUT AN APPELLATE CASE AND WHAT THEYTHINK ARE THE ISSUES OR NOT THE ISSUES AND IT HAS BEEN RECOGNIZED BY THE J ONESDECISION AND IN MANY TIMES THE STATEM ENT OF JUDICIA L ACTS TO BE REVI EWED , THERE ARE NO CONNECTIONS TO THE ACTS RAISED ON APPEAL. THAT IS WHY WE HAVE APPELLATE DEFEND ERS THAT ARE SEPARATE FROM THE TRIAL DEFENDERS. YOU HAVE SOMEONE NEW AND FRESH TO LOOK O VER THE TRANSCRIPT. THAT IS THE WAY OUR PU BLIC DEFENDER SYSTEM IS STRUCTURED, AND IT DOES NOT REQUIRE ASSIGNMENT OF ERROR OR THE ATTORNEY S' IDENTIFICATION OF ANY ERROR BEFORE YOU ARE ENTITLED TO YOUR RIGHTS OF APPEAL.

WHAT PREJUDICE STA NDARD ARE YOU GOING TO USE. YOU SAID THAT YOU NE EDED DIED ANSWER FROM OUR COURT.

I THINK IT HAS TO BE IN DARLING , THE COURT CITED TO VALEZ AND THEY CITED THE FOURTH DISTRI CT'S DECISION IN VA LEZ , AND THEY TALK ABOUT A LIMI TED PORT ION. IT HAS TO BE A SIGNIFICANT PORTION OF THE TRIAL THAT I S MISSING. IT HAS TO BE IMPORT ANT, AND I AM ARGUING THAT VOIR DIRE IS VERY IMPORTANT. THAT VOIR DIRE IS A DRIT WILL -- IS A CRIT ICAL P ART OF THE PROCEEDI NGS . YOU DON'T HAVE THE RIGH T FOR THE STATE TO SAY WE JUST ASSUME NOTHING PREJUDICIAL HAPPENED.

IF THAT IS THE CASE , ISTHERE ANY PART OF THE TRIAL THAT WOULD NOT BE IMPORTANT?

THERE ARE SOME PART S OF THE TRIAL , LIKE IN DARLING , THE PRETRIAL HEARINGS DON'T --

HOW ABOUT THE TRIALTHOUGH, THE TR IAL?

THE TRIAL. I THINK IF YOU ARE M ISSING SEVERAL WITNESS HE'S TESTIMONY, YOU WOULD PROBABLY HAVE TO HAVE A REVERSAL, IF I T COULD NOT BE RECONSTRU CTED.

WHAT IF YOU HAVE THE ENTIRE TESTIM ONY OF ONE WITNESS MISS HAD G ONE?

THAT IS IN BLOCK IN THE THIRD DISTRICT. NOW IT IS ENOUGH.

WHAT IF WE HAVE THE PER SE RULE THEN. NOW IF THERE IS ANY PART OF THE TRIAL THAT IS MISSING, NOW WE HAVE THE PER SE --

IT IS NOT IMPORTANT OR CRITICAL.

YOU HAVEN'T FOUND ANY PORTION OF THE TRIAL THAT WAS IMP ORTANT OR CRIT ICAL .

DARLING'S WERE IMPO RTANT OR CRITICAL --

I HIM TALKING ABOUT T HETRIAL.

NO , NOT THE TRIAL.

SO ANY PART THAT I S MISSING --

IF YOU HAVE A RECORD .

WHAT IF YOU HAVE A RECORD CUSTODIAN THERE TO TESTIFY AND EVERYBODY AGR EED THAT THE RECORDS CUSTODIAN WAS THERE ONLY TO AUTHENTICATE RECORDS BUT YOU DIDN'T HAVE

THAT PART OF THE TRANSCRIPT.

THEN PROBABLY IT COULD BE RECONSTRUCTED, IF IT W ASSOMETHING THAT YOU ARE MENTIONING AND THAT IS WHY YOU AL WAYS T O RECONSTRUCTFIRST, BEFORE YOU GET AN APPELLATE REVERSAL .

SO YOU WOULD AGREE THA T THAT WOULD BE PART OF THE ANALYSIS, THE ATTE MP T TO RECONSTRUCT.

THANK YOU.

CHIEF JUSTICE: MR . VALUE ENEZ .

-- MR . VALENTES.

MAY IT PLEASE THE COURT. MY NAME IS RICH ARD VALE NTES , AND IF IT PLE ASE THE C OURT , WE BELIEVE THAT THIS CITES ON CASES TO CITE JURISDICTION. WHAT WE HAVE IN THIS CASE IS EVERY JURISDICTION THAT THE JUDGE HAS CITED. THE TRIAL COURT FOUND, AS HAS POINTED OUT TO THE COURT IN THIS CASE , THAT THERE COULDN'T BE A PROBLEMPOINTED OUT WITH THE JUR ORS THAT ACTUALLY SET ON THIS TRIAL, AND THE RE ASON I S BECAUSE THE DEFENDANT ST ILL HAD HIS TH REE PREEMPTORY CHALLENGES LE FT , WHEN T HEJURY WAS SWOR N.

EXCE PT IF YOU TA KE NEAL SLAPPY, IF THE STATE EXERCISES THE CHALLENGE ON A DISCRIMINATORY PA CES , I T WOULD NOT MA TTER THAT THERE WERE PREEMPTORY CHALLENGES LEFT. DO YOU AGREE WITH THAT?

RI GHT. AS FAR AS , BUT I AM TALKING ABOUT THE ACTUAL JURORS THAT SAT ON THE TRIAL. EVERY SINGLE CASE THAT THE DEFENDANT CITES TO TRY TO CLAIM CONFL ICT JURISDICTION , WE DO NOT KNOW LIKE WE KNO W IN THIS CASE BEYOND ANY SHADOW OF A DOUB T, THAT THE DEFENDANT DID NOT HAVE AN OBJECTIONABLE JUROR SIT TINGON THAT TRIAL , AND TO ME THAT IS WHY THERE IS A BIG DIFFERENCE BETWEEN THIS CASE THAT WE HAVE HERE AND ALL OF THE OTHER CASES WHERE T HESTATE JUST DIDN'T KNOW OR , YES , WE HAVE CONCEDED T HAT WE HAVE TO REVERSE AND ARGUE FOR A NEW TRIAL.

IS THAT PART O F HARMLESS-ERROR ANALYSIS ?

I G UESS AND HOO KING AT THE ENTIRE CONTEXT OF THE CASE, TO ME IT IS HARMLESS AND TO ME INDICATIVE OF THAT IS WITHIN A WEEK THE DEFENDANT FILED A 1 4- PO INT MOTION FOR NEW TRIAL , CLAIMING AL MOST EVE RYTHING IMAGINABLE WENT WRO NG AT TRIAL EXCEPT FOR THE FACT THAT HE DIDN'T SAY ANYTHING WENT WR ONG DUR ING VOIR DIRE AND AT THE HEARING ON T HEMOTION, NEVER CLAIMED THAT ANYTHING WENT WRONG DURING THE VOIR DIRE.

BUT WE DO KNO W THAT THE REALITY TODAY , SINCE THIS CHANGE IN THE RULE SOME TIME AGO, IS THAT WHEN AN APPELLATE SPECI ALIST GOES OVER THE RECORD , MANY, MANY TIMES , THAT THEY SP OT ISSUES THAT, THEN, ARE R AISED ON APPEAL, WH ICH THE TRIAL ATTORNEY NEVER WOULD HAV E THOUGHT OF , AND WE HAVE NO RULE THAT REQUIRES AN ISSUE TO, FIRST , BE RAIS ED IN A MOTION FOR NEW TRI AL.

NO.

SO , BUT YOU ARE SAYING THAT, ON THIS RECORD , THAT IF WE APPLY SOMETHING HIKE A HARMLESS ERROR , EXAMINATION HERE, THAT THERE IS NO WAY TO SHOW PREJUDICE AS WE HAVE BEEN DISCUSSING. IS THAT WHAT YOU ARE SAYI NG?

IN ESSENCE BUT AT THE FIRST DISTRICT , CAN'T COME IN AND SAY LIKE THE DEFENDANT DID IN THIS CASE. THE DEFENDANT ON DIRECT APPEAL, N EVER ALLEGED NEAL SLAPPY HAPPENED. NEVER ALLEGED ANY ERROR WHATSOEVER. THEY PO SITION WAS I A M THROWING UP MY HAN DS. I DON'T HAVE A RECORD OF THE VOIR DIRE EXC EP T THIS LIMITED RECONSTRUCTION. A LET'S GO B ACK TO WHER E THE BURDENS ARE , AND OBVIOUSLYWITH THE FULL RECORD, IT IS THE DEFENDANT'S BURDEN T O SHOW THAT THERE WAS AN ERRORMADE, AND THEN IF THERE IS AN ERROR , IT DEPE NDS IF IT IS SUBJECT TO HARMLESS ERROR , BUT WE HAVE HERE A SITUATIONWHERE, THROUGH NO FA UL T ANDI THINK YOU WOULD AGREE THROUGH NO FAULT OF THE DEFENDANT, THERE IS NO TRANSCRIPT OF THE COMPLETE VOIR DIRE PROCEEDINGS.

WHAT THE TRANSCRIPT , I WOULD AGREE. WITH RECONSTR UCTION , I WOULD DISAGREE BECAUSE THE DEFENSEATTORNEY IN THIS CASE FAILED TO MAINTAIN HIS NOTES A NDCAME IN AS A BLANK SLATE SAYING I NO L ONGER KNOW WHAT WAS HAPPEN ING. HE CAME IN WITH HIS NOTES , AND I THINK THERE SHOULD BE AN OBLIGATION ON THE DEF ENSECOUNSEL TO MAINTAIN T HOSENOTES. HE DIDN'T GIVE A REASON THAT HE DIDN'T MAINTAIN THEM.

NO W WE ARE GE TTING INTO A SITUATION WHERE , THRO UGH N O FAULT OF THE DEFENDANT THERE , IS A PART OF THE TRIAL RECORD AVAILABLE, AND WE KNOW THAT THE REALIT Y IS THAT, WHEN AN APPELLATE PUBLIC DEFENDER COMES IN , THEY DO THEIR O WN INDEPENDENT REVIEW OF THE RECORD, AND SO IT IS POINTED OUT THERE IS NO REQUIREMENT OF PUT TING TO GETHER ASSIGNMENTS OF ERROR, S O M Y CONCERN IS , REALLY , THE FOURTH DISTRICT STATEMENT THAT A NEW TRIAL WOULD B E REQUIRED, ONLY IF J ONES COULD POINT TO A SPEC IFIC DECISION BY THE TRIAL JUDGE THAT HE WOULD USE TO SHOW REVERSIBLE ERROR THAT WERE THERE FOR PU TTING ADDI TIONAL BURDENS IN A SITUATION WHERE THERE IS NO TRANSCRIPT , THAT THEN WE ARE PUTTING ON WHERE THERE IS A TRANSCRIPT , AND I JUST AM NOT SURE WHY THAT DOESN'T DEP RIVE THIS DEFENDANT OF A MEANINGFUL APPEAL , UNLESS WE ARE GOING TO PROSPECTIVELY SAY THAT WEHAVE GOT TO REQUIRE DEFENSEATTORNEYS TO TAKE CARE FUL NOTES DURING VOIR DIRE. I AM A G O OD NOTE TAKER , SO I WOULD BE, REALLY , F INE WITH THIS RULE. MY HUS BAND IS A TERRIBLE NOTE TAKER, AND HE WOULD JUST BE GOING I DON'T H AVE ANY NOTES BECAUSE I DON'T TAKE NOTES , SO HOW DOES THAT REALLY, IN TERM S OF REALLY LOOKING AT THE POLICY BEHIND WHAT WE ARE TRYI NG TO DO IN THESE LIMITED SITUA TIONS , I DON'T KNOW HOW OF TEN IT HAPPENS , WHERE THERE IS A SIGNIFICANT PART OF THE TRANSCRIPT.

I AM NOT SUGGESTING THAT THERE BE A NOTE TAKER , GOOD NOTE TAKER REQUIREM ENT. WHAT I AM SUGGESTING IS , WHEN YOU ARE LOOKING AT THE CONTEXT OF TRYING TO RECONSTRUCT VOIR DIRE , WHICH IS WHAT WE HAD IN THIS CASE , DEFENSE COUNSEL , WHO CAN ALLEGE ANY ERROR OCCURRED , WHO FAILS TO MAINTAIN THE NOTES THAT THIS IS A SITUATION WHERE HE DIDN'T TAKE NOTES THIS.IS A SITUATION WHERE H E OBVIOUSLY HAD NOTES A NDFAILED TO MAINTAIN THEM. TO MAE THAT , AND I THINK THE ENTIRE WAY THAT THE RECORD WAS ATTE MPTED TO BE RECONSTRUCTED IN THIS CASE IS DISENGEN WAS , BECAUSEFIRST IT WENT BA CK FOR AN EXPARTE HEARING WHERE THE STATE WASN'T PRESENT. THE STATE GO T AN OR DER WHERE THE RECORD COU LDN'T BE CONSTRUCTED. WAIT A MINUTE. NO ONE TALKED TO THE COURT REPORTER UNDER OATH OR TALKED TO THE COURT REPOR TE R WHO WAS THERE THAT DA Y. NO ONE TALKED TO THE PROSECUTOR. THERE WAS A LOT OF ST UFF THAT WASN'T DONE. WHY CAN'T W E S END THIS BAC K TO SEE WHAT WE CAN DO AND DEFENSE COUNSEL CAN RECONSTRUCT IT AND DEFENSE COUNSEL SAID, WE DON'T WANT TO D O.THAT WE DON'T WANT TO GO IN AND RETRIEVE THIS DATE FR OM THE COURT REPO RTER 'S COMPUTER AND TO ME THAT SHOWS THAT THERE REALLY WASN'T ANYTHING.

THAT IS NOT AN ISSUE IN THIS CASE IS WHE THER OR NOT ANYTHING, ARE YOU SAYI NGTHAT THIS CASE HAS PRECEDED WITHOUT ANY DETERMINATION , WHETHER OR NOT THIS RECORD OF THE VOIR DIRE COULD BE RETRIEVED FROM THE COURT REPORTER 'S COMP UTER?

NO , BUT THE DEFENDANTNEVER REALLY WANTED IT.

LET STOP RIGHT THERE. IS THAT WHAT HAPPENED IN THIS CASE ? NERD WE HAVE A BIG Q UESTION MARK AROUND WHETHER OR NOT THIS TRANSCRIPT CAN BE RETRIEVED FROM THE COURT REPORTER 'S COMPUTER?

SHE TESTIFIED AT THE RECONSTRUCTION HEARING. THAT IT COULDN'T.NO. YOUR HONOR. I DON'T THINK THAT REMAINS .

IT IS AN ISSUE OR IT IS NOT AN ISSUE?

I DON'T BELI EVE THAT IT IS AN ISSUE AT THIS POINT , NO, YOUR HONOR , BECAUSE WE ASKED FOR A F URTHER RECONSTRUCTION HEARING, NOT BECAUSE THE DEFENDANT ACTUALLY WANTED TO FIND OUT WHETHER OR NOT THERE WAS A TRANSCRIPT.

THAT TO ME IS PRIVRAL TO WHETHER SOMEONE IS ACTING I N GOOD FAITH OR NOT. HELP ME WITH THE RULE IN TRYING TO GO VERN THESE THINGS, I AM CONCERNED THAT THE RULE THAUR ADVOCATING FOR, AND THAT IS -- THAT YOU ARE ADVOCATING FOR, AND THAT IS THE SHOWING OF SOME TH ING,THAT IF WE MOVE INTO THAT PURPOSE, AND MOVE I NTO THE FURTHER PARTS OF THE TRIAL , IT WOULD REALLY BE V ERY HARMFUL TO THE SYSTEM , AND LET'S SAY THERE WAS AN EYEWITNESS TO THE CR IME. THE EYEWITNESS TESTIF IED , BUT LATER THE COURT REPORTER 'S NOTES, WHATEVER HAPPENED , THE COURT REPORTER REALLY GOOFED, AND WE DO NOT HAVE THE TESTI MONY OF THE EYEWITNESS. EVERYBODY AGREES THE MOST IMPORTANT WITNESS IN THE CASE. BUT WE D O HAVE THE EYEWITNESS 'S DE RNTION AND SO A TRIAL JUDGE SAYS , HAY , YOU KNOW, MY RECOLLECTION WAS THAT THE WITNESS JUST TESTIFIED THE SAME AS THEY SEE IN THE DEPOSITION, SO W E DON'T NEED THE TRIAL TRANSCRIPT. NOW , IT SEEMS TO ME THAT IS A VERY DANGEROUS RULE TO FOLLOW, THAT I F IT WAS THE TESTIMONY OF THE EYEWITNESS AND THE CROSS-EXAMINATION OF THE EYEWITNESS , THAT THERE , THERE WOULD AND PER SE RULE , THAT IS THAT NO W YOU ARE INTO THE SUBSTANTIVE PART OF THE TRIAL , AND IF THAT TRANSCRIPT IS NOT THERE , WOULD YOU AGREE THAT THERE OUGHT TO BE A PER SE R ULE ABOUT THAT ?

NOT AT ALL , YOUR HONOR.

SO IN THAT CASE , YOU WOULD SAY THAT, EVEN THOUGH THE PARTY COULDN'T AGREE , THAT IF THERE WAS A DEPOSITION OF THE EYEW ITNESS , THAT THAT WOULD BE ENOUGH.

IF THE TRIAL COURT'S FACTUAL FINDI NG WAS THAT T HEDEPOSITION, I WAS AT THE TRIAL.I HEARD HER TESTIMON Y OR THE VICTIM'S TESTIMONY, AND IT WAS THE SAME AS I T WAS AT TRIAL. EVERYTHING WAS EX ACTLY S AME.I BELIEVE THAT THAT RECORD HAS BEEN RECONSTRUCTED AS WELL AS COULD BE.

IS THAT WHAT HAP PENED WITH THE TRIAL JUDGE HER E?

AS FAR AS SPARSELY HE DID. HE LOOKED AT THE RECORD AND S AID THE DEFENSE PARTIALLY CHALLENGED THE THEE PREEMPT OTHERS BUT HE DIDN'T ALLOW THAT.

WHAT WOULD WITH YOUR APPROACH AS LOOKING TO THIS CASE?

I WOULD LOOK AT A 14-POINT MOTION FOR NEW TRIAL THAT DIDN'T ALLEGE A NYVOIR DIRE . I WOULD LOOK TO THE 19-POINT STATEMENT OF JUDICIAL ACTS TO BE REVIEWED , WHICH DID INCLUDE JURY SELECTION FROM THE FIRST TRIAL ANALOGY ASIANS THERE BUT NONE OFTHIS, AND I KNOW NONE OF THESE ARE DISPOSITIVE BUT WE HAVE TO LOOK AT IT FROM THE ENTIRE CONT EXT OF WHAT WE HAVE IN THIS CASE.

THAT DOESN'T TELL US WHAT HAPPENED DURING VOIR DIRE AT ALL.

IT REALLY INDICATES THAT NOTHING PREJUDICIAL HAPPENED AT VOIR DIRE AT ALL, AND IF YOU WH O AT THE CLE RK'S NOTES WHICH THERE ARE CL ERK 'S MINUTES IN THE RECORD IN THIS CASE, THAT ARE IN LO CK STEP WITH THE REPORT ORS JURY CHARGE ENTERED INTO EVIDEN CE, SO THIS ISN'T SOME NOTES COMING OUT OF LE FT FI ELD BUT THINGS THAT HAVE BEEN CORROBORATED BY OTHER EVIDENCE IN THE RECORD AND IT HAS BEEN THERE AT THE SIDE BAR , LISTE NING TO DISCUSSION WITH COUNSEL ANDTHE COURT ON THE NEAL SLAPPY OBJECTIONS AND WHATEVER . THE RECORD HERE I S THE C OURTFOUND THAT THE APPE LLATE COURT FOUND AT LE AST , FOU ND THAT THE CLERK'S M INUTES WERE NOT SUFFICIENT?

I DON'T AR GUE E W THAT THE CLERK'S MINUTES WERE SUFFICIENT BUT IF YOU L OOK AT THE CLERK'S MI NUTE AS CORROBORATING THE PROSECUTOR'S TESTIMONY AND THE JURY CHARGE THAT SHE ENTERED -- THE JURY CHAR TS THAT SHE ENTERED AND ALL OF THE OTHER THING IN S THIS RECORD.

YOU SEEM TO BE ARGUING THAT DEFENSE COUNSEL, WHAT IF DEFENSE COUNSEL IN THIS CASE WAS NOT AVAILABLE A NDALL WE HAD WAS NEW APPELLATE COUNSEL AND NOTHING IN ANY OF THE , ARE WE MI SSING --

SAME FACT S HERE BUT YOU DON'T HAVE THE ATTORNEY. YOU JUST HAVE A DEFENDANT WHO HAS ABSOLUTELY NO I DEA ABOUT THE LAW , THE LE GAL TRAINING.

I WOULD ARGU E THE SAME. I MEAN, YOU CAN'T IM POSE A PER SE REV ERSE IBLE ERROR PIE SAYING OK AY , BECAUSE WE ARE MISSING VOIR DIRE AND IF THAT IS THE CASE, THEN THIS COURT WOULDN'T HAVE DECI DE D ARMSTRONG THE WAY IT DID, WHERE THE VOIR DIRE ST RIKE CONFERENCES WERE MISSING. NO ONE KN EW WHAT WENT ONTHEM AND THIS COURT HELD THAT THE ABSENCE OF THOSE VOIR DIRE STRIKE CONFERENCES FROM HIS DIRECT APPEAL , DID NOT DEPRIVE HIM OF EFF ECTIVE ASSISTANCE OF COUNSEL , AND WE ALL AGREE. I DON'T THINK THE STATE DOES NOT WANT THE DEFENDANT NOT TO HAVE ANYTHING HE I S ENTITLED TO. HE SHOULD HAVE GOT EN VOY DIRE TRANSCRIPT S IN THIS CASE, BUT THROUGH NO FAULT OF THE DEFENDANT AND TH ROUGH NO FAULT OF THE STATE , THEY AREN'T AVAILABLE. THE QUESTION IS WHAT DO W E DO NOW, WHEN NOTHING IS AVAILABLE?

CRIM INAL CASE , ISN 'T IT THE STATE'S OBLI GATION AND RESPONSIBILITY TO PROVIDE THE COURT REPORTER AS OPPOSED TO A CI VIL CASE?

YES. WE HAD A COURT REPORTER THERE , YOUR HON OR, AND FOR NOTHING THE STATE COULD HAVE DONE, THE C OURT REPORTER 'S TRANSCRIPTS AND BACK UP AND COMPUTER CR ASHING , EVERYTHING WAS UNAVAILABLE , SO THERE IS NOTHING THAT THE STATE COULD HAVE DONE IN THIS CASE, TO PRO VIDE THE VOI TIRE TRANSCRIPT, BUT IT SHOULDN'T -- THE VOIR DIRE TRANSCRIPT, BUT IT SHOU LDN'T BE JUST BECAUSE THE DEFENDANT CLAIMS PAGE 3 17 O F VOIR DIRE IS MISSING AND WE DON'T KNOW WHAT HAPPENED ON IT , REVERS IBLE ERROR WOULD SAY HAY!

SO YOU HAVE A FIVE - DAY JURY SELECTION AND YOUR VOIR DIRE CASE WOULD B E THAT APPELLATE COUNSEL AND NOT TRIAL COUNSEL CAN P O INT TO SOMETHING SPECIFIC, AND OTHERWISE THERE SHOULD BE NOREVERSIBLE ERROR.

WE HAD A HUGE VOI DIRE -- A HUGE VOIR DIRE ERROR. WE DO HAVE ENTITI ES. WE HAVE THE TRIAL COURT JUDGE AND WE HAVE THE STATE ATTORNEY, AND THE FACT AND YOU POINTED OUT V ARGAS , I BELIEVE IT IS ST ILL NOT FINAL BUT I N VA RGAS T HEY POINT OUT THAT IT WOULD B E CONTRARY TO HU MAN UNDE RGO THAT ANY OF THESE THINGS WE ARE SPEC ULATING ABOUT NOW WOULD HAVE TR ULY HAPPENED AND NOBODY WOULD H AVE REMEMBERED.

IN VARGA S , THEY SAY THAT IN A FOOT NOTE .

CORRECT.

BUT NEVERTHE LESS THEY WOULD REVERSE BECAUSE THEY SAY THAT THERE IS NO TRANSCRIPT OF VOIR DIRE AND I RETURN TO MY CONF LICT WITH JONES.

AND I NOTE AG AIN THAT I DO NOT BELIEVE THERE IS CONFLICT WITH J ONES BECAUSE OF THE ISSUE THAT WE KNOW THE DEFENDANT WASN'T FORCED TO HAVE JURIES SIT ON THIS TRIAL THAT HE DIDN'T WANT , AND VARGAS IS NOT FINAL.

LET'S GO OVER THERE. I WANT TO M AKE SU RE THAT I UNDERSTAND YOUR PO SITION BECAUSE THAT WOULD BE A HARMLESS ERROR POSITI ON. THE JUDGE SAID FROM THE PROCEEDINGS WE CANNOT RECONSTRUCT VOIR DIRE AND THE THREE PREEMP TORY CHALLENGE S AND THE COURT ADHERES TO THIS O RDER THAT THE VOIR DIRE DID CANNOT BE RECONSTRUCTED, BUT THE JUDGE WHO SAT ON THIS CASE , WE CAN SAY WHY DIDN'T THE JUDGE SAY WHAT HE O R SHE SAY WHAT HAPPENED. AND THE JUDGE SAYS IT CAN'T BE RECONSTR UCTED. THERE IS ALLEGATION THAT, I F YOU HAVE A NEAL SLA PPY OBJECTION AND EVEN IF THERE ARE PREEMPT O THERS REMAINING, THAT THAT MAY STILL B E REVERSIBLE ERROR. DO YOU AGREE WITH THAT?

YOU MEAN IN THIS CASE OR JUST IN GENERAL? YES , IN GENE RAL.

SO HOW DO WE KNOW IN T HIS CASE, AND LET'S GO TO WHAT MS. GOOD-EARNEST SAID AS AN OFFICER OF THE COURT, THAT THAT IS SOMETHING THE PU BLIC DEFENDERS OF FICE LOOKS AT , WHETHER THERE IS A NEAL SLAPPY AND OFTENTIMES YOU LOOK AT THAT BECAUSE THERE ARE QUESTIONS RAISED ON VOIR DIRE. HOW CAN SHE REV IEW THI S RECORD ON, TO DETERMINE I F THERE WAS IMP ROPER EXER CISE OF PREEMPTORY CHALLENGES BY THE STATE OR THAT THE DEFENDANT DID NOT GET T O EXERCISE THE PREEMPTORY CHALLENGE THAT HE WANTED , BECAUSE THE STATE RA ISED NEAL SLA PPY.

I WOULD HAVE SAID THAT ONCE YOU LOOK ED AT THE JURY CHARGE THAT WAS ENTERED INTO EVIDENCE BELIEVE THAT WAS UNCONTESTED, SO THAT THE STATE'S TWO PREEMPTORY CHALLENGES IS WRI TTEN ON HER JURY CHARGE, THE NAME OF THE PERSON THAT WAS STRICKEN AND A LI TTLE BU YING GRAPHICAL INFORMATION ABOUT THEM. NOW, BOTH OF THOSE STRI KES BY THE STATE , THERE IS RAISED NE UTRAL ISSUES ON THE JURY CHAR T, ONE BE HAD GONE THAT THE JUROR OR POTENTIALJUROR WAS A VIC TIM OF CRIME , ROBBED TWICE, AND THE OTHER ONE WAS AFFILI ATED WITH LAW ENFORCEMENT OFFICERS AND THIS WAS THE CASE WHERE THE DEFENDANT BEAT UP A COUPLE OF LAW ENFORCEMENT OFFI CERS, SO I THINK THERE WAS THE EVIDENCE THAT WE COULD H AVE LOOKED TO.

WHY DIDN'T THE STATE AS K THAT THAT BE A PART OF THE RECONSTRUCTED RECORD?

IT WAS ENTERED INTO EVIDENCE, BUT I GUESS THE JUDGE DIDN'T LOOK AT IT CLOSE EN OUGH OR LOOK AT IT AND THE ISSUE RAISED BELOW WAS THAT WE CAN'T RECONSTRUCT SO I G ET A NEW TRIAL. IT WASN'T LET US TRY TO RECONSTRUCT THIS AS BE ST I CAN FROM WHAT WE HAVE, A NDTHAT IS ONE OF THE PROBLEMS THAT WE HAVE WITH T HEPROCEEDING. I THINK THERE SHOULD AND EFFORT TO T RY TO FIND OUT WITH A LOT OF CASES AND A LOT OF THEM FROM THE THIRD DCA , WHERE THE STATE HAS AGREED THAT , YES , LOOK ING AT THE CONTEXT OF THIS CASE , WE HAVE TO PERCEIVE THAT THIS GOES PACK AND THIS ISN'T WON OF THE CASES. WE DON'T KNOW ALL OF THE CASE S AND ALL OF THE FACTS AND IT SEEMS TO ME THAT NOTHING COULD BE VOIR DIRE OR PREJUDICIAL.

I HAVE A CONCERN THAT I WOULD LIKE TO GO BACK AND VISIT IF WE M AY.

OK AY.

YOUR ARGUMENT THAT DEFENSE COUNSEL MUST BE FAULTED FOR NOT COMING FORWARD WITH NOTE , AND IT SEEMS TO ME THAT THIS WOULD PUSH THIS CASE OV ER TO AN INEFFECTIVE ASSI STANCE OF COUNSEL AREN A. WE ARE SHIF TING IT FROM ONE ARENA TO THE OTH ER AND WHAT IS THE AVAI LABLE OR -- THE VIABLE OR GOOD PO LICY FROM APPROACHING A PROB LEM LIKE THIS, TO SAY THIS IS A N INDICATION OF COUNSEL W HODIDN'T HAVE HIS NOTES AND AGAIN WE ARE SEEI NG IT , A ND WHAT I AM SAYI NG IS WHAT IS A POLICY R OB E TO ADDRESS IT AND THAT KIND OF THING?

I THINK AS MEMBERS OF T HEBAR , WE SHOULD MAIN TAIN OUR TRIAL NOTES, BECAUSE AS WE HAVE IN THIS CASE AND ANYTHING ELSE, IF WE HAVE THE RECORD OF IT , THAT, IN CASE SOMETHING LIKE THIS COMES UP, WE LL HAVE OUR NOTES ABOUT WHAT OCCURRED AND WE CAN HE LP IN THE RECONSTRUCTION PROCESS , WHICH WE DON'T HAVE --

SO YOU TAKE IT OUT OF A DIRECT APPEAL AND THROW IT INTO FULL LITI GATION . AND THEN HE GETS RE LIEF IN ANOTHER FARM.

I COULDN'T AND DEGREE THAT HE GETS RELIEF. WE DON'T KNOW WHY DEFENSE COUNSEL DO ESN'T HAVE HIS RECORD ANYMORE. IT WAS STATED AT THE EXPARTE HEARING THAT HE NO LO NGER HAS HIS NOTES WITH RE SPECT TO THE CASE. THE STATE WASN'T PRE SENT WHEN THAT STATEMENT WAS MA DE, AND WE DON'T HAVE A CHANCE TO CROSS-EXAMINE IT N O W.

IS THE DE LAPP STILL GOOD LAW?

IT I S STILL GOOD LAW. BUT IT WAS MISSING THE ENTIRE HAVE I DIRE OF WHY WE ARE HERE -- ENTIRE VOIR DIRE OF WHY WE ARE HERE , AND THERE WAS NO ME NTION OF RECONSTRUCTION OF VOIR DIRE JUST THAT THERE IS AV OID DIRE.

YOU WOULDN'T MAINTAIN THAT IT IS NOT THE RESPONSIBILITY OF A DEFENSE LAWYER TO K EEP AND MAINTAIN NOTES OF A TRIA L.

BUT THEY WERE CHAR GED WITH RELI VING THE ENTIRE PROCEEDINGS, WHEREAS IN BURGESS, THE DISTRICT POINTED OUT THAT SUCH AN OBLIGATION DOESN'T EX IST IN A CASE SUCH AS THIS , BUT I THINK ULTIMATELY , THIS COURT'S DECISION IN DAR LING AND ARMSTRONG , ARE CONTROLLED IN G , AND --

NOW, IN ARMSTR ON G I JUST WENT BACK TO LOOK AT THAT. THAT WAS POSTCONVICTION , AND IN POSTCONVICTION , THE DEFENDANT WOULD HAVE TO SHOW PREJUDICE THAT IS UNDERMINE OF AN HO UR -- O F OUR CONFIDENCE IN THE OUTCOME. THAT IS NOT NECESSARILY SAYING WHAT IS NECESSARY ON DIRECT APPEAL THERE. IS A DIFFERENT STANDA RD.

I WOULD DISA GREE WITH THAT, YOUR HO NOR , BEC AUSE AS DEFENDANT ARGUES, THIS IS REVERSIBLE ERROR TO NOT HAVE THAT PORTION OF THE TRANSCRIPT AND THE PREJUDICE IS REVERSIBLE , SO SAY IN A POSTCONVICTION CONT EXT , ALL THE DEFENDANT WOULD HAVE TO SAY IS VOIR DIRE IS MISSING , PERIOD. IT IS PER SE REVERSIBLE ERROR. HE WAS INEFFECTIVE BY NOT HAVING IT, SO I SEE THE T IME IS UP AND IF THE COURT DOESN'T HAVE ANY QUES TIONS , THE STATE REQU ESTS YOU AFFIRM.

THANK YOU