

>> AND NOW WE MOVE TO THE FINAL CASE OF TODAY'S DOCKET, CANNON VERSUS THE STATE OF FLORIDA.

>> CHIEF JUSTICE, ASSOCIATE JUSTICES, MAY IT PLEASE THE COURT, MY NAME IS JAMIE AND I REPRESENT APPELLANT PETITIONER MR. MARVIN CANNON IN 2 MATTERS BEFORE THE COURT, MR. CANNON FILED A PETITION FOR HABEAS CORPUS, APPELLATE COUNSEL ALONG SIDE APPEAL OF THE PARTIAL DENIAL OF HIS 3851 CLAIMS. I HAVE SAVED 5 MINUTES FOR REBUTTAL AND I WOULD LIKE TO SPEAK TO THE PETITION OF HABEAS CORPUS AND IF COURT ALLOWS ISSUES SUBSECTIONS 2 AND 3. THIS COURT SHOULD GRANT MR. CANNON A NEW GUILT PHASE TRIAL BECAUSE COUNSEL RENDERED IN EFFECTIVE ASSISTANCE, STRIKING 3 AFRICAN AMERICAN JURORS, I WOULD LIKE TO PREFACE MY ARGUMENT REMINDING THE COURT STATED IN THE BRIEF THAT THE FLORIDA LEGISLATORS OFFICE OF ECONOMIC.

>> THEY HAVE A MAJORITY OF 56% OF AFRICAN-AMERICAN POPULATION, WHEN WE COMPARE THAT STATEWIDE WE SEE THAT AFRICAN AMERICANS MAKE UP 16% OF THE POPULATION, THE COURT WOULD BE REMISS NOT TO KEEP THAT IN MIND AS I GO THROUGH THE ARGUMENT.

TRIAL COUNSEL MADE OBJECTIONS IN REALTIME AS THE STATE ATTEMPT TODAY STRIKE THE JURORS AND THEN THEY DID MAKE AN OBJECTION BEFORE THE JURY WAS SWORN, BECAUSE OF THAT THE STANDARD HERE FOR THIS CLAIM IS CLAIM WHICH SAYS THAT I MUST PROVE THAT SPECIFICALLY --

>> CAN YOU SHOW ME WHERE IN THE RECORD THERE WAS THE RENEWAL OF THE OBJECTION?

>> YES, SIR, I CAN, IT IS ON

PAGE -- RECORD OF APPEAL VOLUME
8, IF YOU LOOK AT PAGES 12
THROUGH 22, THAT IS DEFENDANT
COUNCIL RAISING NUMEROUS
OBJECTIONS TO THE STRIKES, IF
YOU LOOK THEN AGAIN, PARDON ME
PAGE 22, THE COURT DENIES, THE
DEFENSE MOTION AND THEN ON PAGE
29 THE JURY IS SWORN, SO WE ARE
LOOKING AT A MATTER OF PAGES 12
TO 29 BETWEEN THE OBJECTIONS AND
THE JURY BEING SWORN.

>> SO WOULD I UNDERSTAND AND
CORRECT ME IF I'M WRONG, THERE'S
LITIGATION ON THE DAY BEFORE
EARLIER IN JURY SELECTION, TWO
JURORS ARE -- THERE'S A THIRD
ONE AND THE TRIAL JUDGE SAYS NO,
I'M FORESEEING THE JUROR.
THE NEXT DAY COMES, PROSECUTOR
SAYS, JUDGE, I HAVE THE FILE
FROM THE PRIOR SELECTION, I WANT
TO RELITIGATE THIS AND I WANT
THIS JUROR -- I WANT TO BE ABLE
TO EXERCISE AND LITIGATED AGAIN
AND THE TRIAL JUDGE SAYS, I'M
RECONSIDERING MY RULING AND I AM
NOW ALLOWING THE -- TO BE DONE
AND THEY STRIKE THE ALTERNATE
AND THEN THERE'S LEGAL
DISCUSSION ABOUT SOME OTHER
STUFF AND THEN THE JURY IS
SWORN.

>> THAT'S CORRECT.

>> DO I HAVE ANY OF THAT WRONG?

>> THAT'S CORRECT SO FAR.

>> YOUR HONOR, I PRESERVE ALL OF
MY OBJECTIONS AND ALL OF MY
STRIKES AND EVERYTHING THAT WAS
DONE IN JURY SELECTION RIGHT
BEFORE JURY IS SWORN?

>> YOU DO OFTEN HEAR THAT AND IN
THIS CASE WE DON'T HAVE IT IN
THE SAME WAY WITH NICE BOW.

>> HOW IS THAT NOT VITAL THAT
THERE NEEDS TO BE RENEWAL?

>> YOUR HONOR, THE ONLY
DIFFERENCE THAT I WOULD SAY IS
HE DIDN'T SAY IT IN THE SAME WAY
MAYBE THAT MOST PEOPLE DO, HE

OVER, WHAT 10 PAGES OF RECORD
OBJECTING --

>> IS THERE ARGUMENT THAT
OBJECTION ITSELF IS THE RENEWAL?

>> PARDON?

>> IS YOUR ARGUMENT THAT THE
INITIAL OBJECTION CONSTITUTE A
RENEWAL?

>> NO, SIR.

>> SO WHAT ELSE WAS SAID?

>> THE DEFENSE COUNSEL HAD
REQUESTED TO BE OPENED VODOIR
AND REMOVING AFRICAN AMERICAN
JURY AND ASKED TO REOPEN IT AND
HE'S VERY CONCERNED THAT WE HAVE
ONE AFRICAN-AMERICAN JUROR, OPEN
THIS BACK UP, LET'S BRING IN NEW
JURORS AND WE NEED TO START THIS
OVER AGAIN.

HE --

>> THE TRIAL COURT DENIES THAT.

>> THAT IS CORRECT.

THAT'S IT?

>> THAT IS CORRECT.

ALTHOUGH HE DOESN'T SAY THE
WORDS, I'M MAINTAINING MY
OBJECTION THE ENTIRE OBJECTION
THROUGHOUT HAS BEEN ABOUT THIS
ISSUE.

>> SO THE REOPEN -- WHAT YOU'RE
SAYING THE REOPEN IS RENEWAL,
WHAT WE WOULD, YOUR HONOR, I
RENEW OBJECTIONS AND STRIKES AND
EVERYTHING FROM JURY SELECTION?

>> YES, SIR, AND UNFORTUNATELY
THE TRIAL WAS LAPSE IN THAT, THE
JUDGE NEVER ASKED, PARTIES
DIDN'T REALLY STATE ON RECORD
THAT THEY WERE PRESERVING, BUT
THAT IS MY ASSERTION, YOUR, THAT
-- YOUR HONOR, THAT THAT WAS --

>> IF WE DISAGREE WITH YOU ON
THAT, COUNSEL DO TO REBUT THE
RACE REASON THAT THE STATE PUT
FORWARD.

>> WHAT DID THE STATE DO?

>> WHAT DID YOUR CLIENT'S
COUNSEL DO TO REBUT IT BECAUSE,
I MEAN, THE REASONS GIVEN WERE
OBVIOUSLY RAISED NEUTRAL AND YOU

WOULD STILL HAVE TO SHOW THAT THAT WAS PRETEXTUAL, RIGHT?

>> RIGHT.

THE REASONS GIVEN FOR, YOU KNOW, DEFENSE COUNSEL, I'M NOT RECALLING RIGHT, YOU KNOW, IMMEDIATELY, I DO KNOW THAT THE STATE PUT FORTH PRETEXTUAL, THAT WAS THE ARGUMENT, THAT THE STATE'S REASONS WERE PRETEXTUAL AND THEY WEREN'T RACE NEUTRAL.

>> THE QUESTION WAS THAT ARGUMENT MADE BY DEFENSE COUNSEL, DID THEY ARGUE IT WAS PRETEXTUAL SO THAT I'M ASKING FOR RACE NEUTRAL REASON, ONE WAS GIVEN, IT WAS RACE NEUTRAL, WAS THERE ANY ADDITIONAL ARGUMENT AS TO WHY THAT WAS NOT A GENUINE --

>> I DON'T RECALL IF THERE WAS MORE ARGUMENT, YOUR HONOR.

>> THAT WOULD BE SIGNIFICANT, CORRECT?

>> THAT WOULD BE.

>> NECESSARY, ISN'T IT?

>> I'M SORRY, THE TRIAL COURT HAS TO BE, ONCE THE TRIAL COURT HEARS REASON WHICH CLEARLY THERE WAS HERE, THEN THE BURDEN IS ON THE PERSON WHO HAS A PROBLEM WITH THE --

>> YOU'RE ASKING IF THEY DID INQUIRY?

>> DID THE BURDEN SHIFT TO DEFENSE COUNSEL TO SAY, NO, THAT'S NOT REASON BECAUSE OF X?

>> CORRECT, THE -- WELL, ACTUALLY I'M NOT SO SURE THE DEFENSE COUNSEL RAISED THE SAME OBJECTIONS THAT I'M RAISING.

I ASSERT THAT IF YOU LOOK AT JURORS JONES, BYRD AND MARTIN, WE SEE THAT WHEN THE BURDEN SHIFTS AND THE STATE IS ASKED TO GIVE RACE NEUTRAL REASONS WE SEE THAT THE STATE POINTS OUT THAT JONES HAS A BROTHER THAT WAS SENT TO PRISON, BYRD HAS A DAUGHTER WHO WAS SENTENCED TO PRISON AND ALSO NEW THE

DEFENDANT, I BELIEVE, IT WAS --
>> COUNSEL DOESN'T THE STATEMENT
THAT YOU'VE JUST MADE THAT
DEFENSE COUNSEL DID NOT MAKE THE
SAME ARGUMENTS THAT I'M MAKING
NOW, ISN'T THAT -- I THINK
THAT'S WHAT MY COLLEAGUES ARE
ASKING ABOUT.

ISN'T THAT PROBLEMATIC?

>> IT'S NOT PROBLEMATIC, THE
ISSUE IS THAT THE ISSUE HAD TO
BE PRESERVED WHICH MY ARGUMENT
IS THAT IT IS.

>> SO YOUR ARGUMENT, I THINK
YOUR ARGUMENT IS UNDER HAZE
WHICH WE HAVE NOT QUITE
OVERRULED YET THAT UNDERSTAND,
MAKING THE MELBOURNE CHALLENGE,
PRESERVES THE ISSUE AND THE
TRIAL COURT HAS TO INDEPENDENTLY
EVALUATE --

>> YES.

>> HOW CAN WE THE JUDGE WAS OFF,
IF NOBODY SAID, JURY IS ONE,
TWO, HOW IS THE JUDGE SUPPOSE TO
REMEMBER THOSE THINGS?

>> I DON'T HONESTLY KNOW.

>> LET'S ASSUME THAT THE JUDGE
IS SUPPOSED TO DO THOSE THINGS.
AS I UNDERSTAND IT THE JURORS
THAT YOU MENTIONED WHILE THERE
WAS PRIOR CONVICTIONS NONE WAS A
FELONY, NONE WAS THE SERIOUS AS
THE ONES THAT THE 3 THAT WERE
STRUCK AND 3 WERE OUT OF STATE
OR JURISDICTION HERE BECAUSE
PART OF THE ISSUE WAS NOT ONLY
DO THESE PEOPLE HAVE RELATIVES
THAT WERE PRIOR FELONS,
CONVICTED BY THE VERY OFFICE
THAT WAS PROSECUTING THIS
DEFENDANT?

>> THAT IS CORRECT, THE STATE
DID PUT FORTH THAT ONE OF THE
REASONS WAS THESE CONVICTIONS
AND BECAUSE THEY CAME OUT OF
THEIR OFFICE.

>> RIGHT.

>> THEY DID SEEM CONCERN WITH
CONVICTIONS OVERALL, BUT THEY

DIDN'T SEEM CONCERNED WHEN IT CAME TO DUI'S AND EXPERIENCED PROSECUTOR IS DUI'S ACCOMPANY WITH BODILY INJURY, MANSLAUGHTER, THERE'S A CHANCE THAT DUI'S STATE BID THE NONAFRICAN-AMERICAN JURORS COULD VERY WELL HAVE BEEN INVOLVING INCARCERATION.

>> DUI -- FIRST OF ALL, WE ALL AGREE THAT THEY'RE GENERALLY MISDEMEANORS ONLY IF THEY INCLUDE THOSE THINGS.

>> I BELIEVE FIRST TIME IS A MISDEMEANOR AND NOT --

>> AND THE SECOND TIME AND THIRD TIME AND ONLY THE FOURTH TIME ARE THEY FELONIES.

>> IT'S BEEN A WHILE --

>> WHICH RESULTED IN A 25-YEAR SENTENCE, DRUG TRAFFICKING OFFENSE WHICH RESULTED IN A 5-YEAR MANDATORY MINIMUM, AREN'T THEY CATEGORICALLY DIFFERENT THAN THE 3 THAT WERE NOT STRUCK?

>> THEY ARE, THEY ARE IN FACT, DUI'S, THEY DIDN'T CARE ENOUGH TO EVEN ASK, CERTAIN JURORS I BELIEVE IT WAS BENTLEY AND ORIANA, THEY WEREN'T ASKED NAME OF RELATIVES, YOU CAN TELL THAT PROSECUTORS ARE GOING AND LOOKING AS WE ARE GOING ALONG CHECKING TO SEE IF THEY HAVE A FILE IN THESE PEOPLE, WE GET TO THESE WHITE JURORS AND THEY'RE NOT ASKING THE NAMES OF RELATIVES TO LOOK UP OFFENSES TO SEE IF THEY WERE, IN FACT, ADJUDICATED IN THEIR JURISDICTION OR IF THEY WERE FELONIES OR WHAT NOT.

>> LET ME ASK IT THIS WAY, THERE'S NO EVIDENCE TO SUGGEST THAT THE OTHER ONES WERE PROSECUTED IN THE JURISDICTION, RIGHT?

>> ONE OF THEM.

>> YEAH, THE DUI.

>> CORRECT.

>> BUT THE OTHER TWO, THERE'S NO EVIDENCE OF THAT, RIGHT?

>> THAT'S CORRECT.

>> YET WE HAVE EVIDENCE OF THE 3 THAT WERE STRUCK?

>> THAT IS CORRECT.

>> ISN'T SUBSTANTIVELY DIFFERENT?

>> I DON'T BELIEVE IT IS.

I BELIEVE THAT THE FACT THAT THEY DID NOT TAKE THE TIME TO ASK THESE NONAFRICAN AMERICAN JURORS THE FACTS OF THEIR FAMILY MEMBERS EITHER INCARCERATION -- CONVICTIONS, THAT SHOWS THAT THEY WERE RACIALLY MOTIVATED IN THEIR SELECTION OF THE JURY.

TURNING TO ISSUE ONE, SUBSECTION 2, MR. CANNON MOVES FOR IN EFFECTIVE ASSISTANCE OF COUNSEL FAILURE FOR FAILURE TO OBJECT AND MISTRIAL FOR LAW ENFORCEMENT IDENTIFICATION OF THE DEFENDANT. DURING THE TRIAL INVESTIGATOR ROBERT MAXWELL TESTIFIED THAT HE WAS A LAW ENFORCEMENT OFFICER FOR APPROXIMATELY 20 YEARS, HE TALKED AT LENGTH ABOUT THE INVESTIGATION, THEN HE SAID HE HAD KNOWN THE DEFENDANT FOR YEARS AND PROCEEDED TO IDENTIFY THE DEFENDANT IN A VIDEO.

IN CLOSING ARGUMENTS WE HEAR REITERATED AGAIN WHERE MAX -- PARDON ME THE PROSECUTOR REMINDS THE JURY IN A VIDEO.

I KNOW YOU'RE THINKING WHERE IS THE HARM THERE WITH ALL OF TESTIFIED, BUT WHAT THEY DO IN HAVING THE OFFICER IDENTIFY THE -- THE APPELLANT, MR. CANNON, IS TWO THINGS, WE HAVE THE -- THE INVADING THE PROVINCE OF THE JURY, WE ALSO HAVE AN IMPROPER --

>> THERE'S TONS OF CASE LAW WHICH SAYS IF THEY HAVE INDEPENDENT KNOWLEDGE OF WHAT SOMEONE LOOKS LIKE, SOMEONE IS ABLE TO IDENTIFY UNDER THEIR LAY

OPINION, I MEAN, THERE'S TONS OF IT.

>> THEY ARE NOT ALLOWED TO IDENTIFY THEMSELVES AS LAW ENFORCEMENT UNLESS THAT'S GOING TO HELP THE JURY, IT DIDN'T HELP THE JURY WHEN THEY CAN SEE THAT HE'S WEARING THE SAME CLOTHES THAT HE'S ARRESTED IN, SO THEREBY THEY HAVE INVADDED THE PROVINCE OF THE JURY, YOUR HONOR.

>> HOW IS THAT POSSIBLE? IF THE EVIDENCE IS -- I'VE WATCHED THE VIDEO, I INVESTIGATED THIS CASE, AND I'VE KNOWN THAT GUY FOR 20 YEARS AND I'M ABLE TO SAY THAT'S JOHN SMITH, HOW IS THAT NOT RELEVANT AND NOT APPROPRIATE EVIDENCE, IS THERE CASE LAW STATING THAT THAT'S APPROPRIATE?

>> NO, YOUR HONOR, THAT'S THE OTHER SIDE OF THIS IS THAT CHARACTER EVIDENCE BAN VIOLATION THAT HE GIVES THE INFERENCE THAT HE KNOWS THE DEFENDANT WHEN HE SAID I'VE KNOWN HIM FOR 20 YEARS, THAT'S HIM IN THE VIDEO.

>> YOU HAVE STATISTICS THERE IN GASTON COUNTY.

>> HOW LONG IS GASTON COUNTY?

>> I KNOW THE POPULATION.

>> NOT LARGE?

>> EVERYBODY KNOWS EVERYBODY.

>> THE JURY SELECTION THERE ARE A LOT OF PEOPLE WHO KNOW MOMS AND DADS AND BROTHERS AND SISTERS, RIGHT?

>> THE ONLY RECORD I READ WHERE THERE'S A RELATIVE OF THE VICTIM AND THE DEFENDANT AND CODEFENDANT ON THE PANEL.

>> RIGHT, GIVEN THAT CONTEXT, HOW CAN WE INFER THAT THE STATEMENT OF I'VE KNOWN HIM FOR YEARS IS HE'S A BAD GUY AND I'VE ARRESTED HIM 20 TIMES WHICH CLEARLY WOULD BE WRONG VERSUS I'VE KNOWN HIM BECAUSE WE ALL

KNOW EACH OTHER, IT'S A SMALL COMMUNITY.

>> WELL, WE DON'T NECESSARILY -- NOT EVERYBODY KNOWS EVERYBODY, WE'VE GOTTEN TO THE POINT WHERE WE CUT THE JURY DOWN TO 12 PEOPLE WHO DON'T KNOW EVERYBODY. AND THAT WAS THE POINT OF THE JURY SELECTION TO TRY TO GET ALL OF THE PEOPLE OUT, SO WE ARE DOWN HERE WITH A PANEL OF 12 PEOPLE THAT DON'T KNOW

MR. CANNON, AND THEY -- THEY -- I DON'T BELIEVE EVERYBODY KNEW MR. MAXWELL AS WELL OR THEY WERE STRUCK, SO WHAT WE ARE LEFT WITH JURY THAT DOESN'T KNOW THE DEFENDANT, DOESN'T KNOW THE INVESTIGATOR AND THEY HEAR THE INVESTIGATOR SAY I'VE KNOWN HIM FOR 20 YEARS, THAT'S HIM IN THE VIDEO, THEY ARE LEFT WITH A REASONABLE PROBABILITY, I WOULD ALSO LIKE TO BRIEFLY ADDRESS ISSUES, SUBSECTION 3.

>> OTHER THAN THE FACT THAT THE OFFICER SAID THAT HE KNEW HIM FROM PRIOR CONTACT, IS THERE ANYTHING ELSE IN THE TESTIMONY THAT WOULD INDICATE THAT THAT PRIOR CONTACT WAS BASED ON CRIMINAL CONDUCT BY THE DEFENDANT?

>> NO, YOUR HONOR, JUST THE FACT --

>> IF WE ACCEPT YOUR ARGUMENT IT WOULD BE -- A RULE OF EVIDENCE THAT A LAW ENFORCEMENT OFFICER COULD NEVER BE USED TO IDENTIFY ANY ONE IF THE BASIS FOR THE PRIOR KNOWLEDGE WAS THEIR CRIMINAL CONDUCT?

>> AND THAT MAY WELL BE TRUE, YOUR HONOR, IN THIS CASE WE HAVE MR. MAXWELL WHO TESTIFIES AT LENGTH ABOUT HIS -- ABOUT THE INVESTIGATION, HE WAS THE LEAD INVESTIGATOR, HE TALKS ABOUT HIS WORKING IN LAW ENFORCEMENT FOR 20 YEARS, THIS IS PRETTY MUCH

THE GAMUT OF THE TESTIMONY, HE GOES INTO IDENTIFYING THE ELEMENT IN THE VIDEO.

>> ANYTHING THAT HE COULD HAVE DONE TO IDENTIFY THE DEFENDANT?

>> NOT IDENTIFY THE DEFENDANT BECAUSE HE WAS WEARING THE SAME CLOTHES IN THE VIDEO WHEN HE WAS ARRESTED, EVERYBODY COULD MAKE THAT MATCHUP THEMSELVES.

>> BUT YOU'RE NOT SUGGESTING THAT THE EVIDENCE WASN'T RELEVANT SO THAT IT WOULDN'T OTHERWISE BE ADMISSIBLE?

>> THAT IS CORRECT.

IF THERE ARE ENOUGH QUESTIONS ON THE ISSUE I WOULD TURN TO ISSUE 3 REAL QUICK, FAILURE TO OBJECT AND MOVE FOR MISTRIAL AND BURDEN SHIFTING, WHAT WE HAVE IS THE SITUATION WHERE THE STATE SAYS IN CLOSING, I ALSO THOUGHT IT WAS INTERESTING THAT THE DEFENSE PRESENTED MR. JOHNNY CANNON, DID YOU HEAR MR. JOHNNY CON NONTESTIFY, OH, YEAH, THERE WAS CORN OUT THERE, THEY JUST DIDN'T SEE IT, THAT'S WHERE I PUT THE CORN, DID MR. CANNON SAY ANYTHING LIKE THAT.

YOUR HONORS IS MY ASSERTION WHEN THE PROSECUTION SAID THAT THEY IMPROPERLY SHIFTED THE BURDEN.

>> BUT WHERE THE DEFENSE PUT ALTERNATE THEORY, THE STATE'S THEORY THERE WAS NO CORN THERE, THEY BROUGHT HIM TO BE MURDER AND THE THEORY THERE WAS CORN THERE BUT THE REASON THEY DIDN'T SEE ANY CORN WHEN THE POLICE GOT THERE IT WAS DAYS LATER UNTIL THEY ACTUALLY DID INSPECTION AND THE CORN COULD HAVE BEEN TAKEN OR SOLD OR ANYTHING COULD HAVE HAPPENED TO IT?

>> THAT'S CORRECT, THAT WAS THE DEFENSE'S THEORY AND WHAT THEY TRIED TO POINT OUT.

>> WHY CAN'T THE PROSECUTION POINT AT LACK OF EVIDENCE FOR

THE THEORY?

>> BECAUSE WHAT --

>> ALTERNATIVE THEORY.

>> WELL, WE ARE GETTING INTO A DOUBLE NEGATIVE.

THE DEFENSE HAD POINTED OUT LACK OF EVIDENCE AS TO --

>> RIGHT.

>> AS TO ELEMENT FOR THE STATE AND THE STATE COMES IN --

>> THERE WAS SOME TESTIMONY THAT THERE HAD BEEN A SEARCH BY THE OFFICER, OFFICER WHO WENT TO THE CRIME SCENE AND NO CORN WAS FOUND.

>> CORRECT, LATE AT NIGHT AND IT WAS DARK.

>> THERE WAS TESTIMONY, RIGHT?

>> YES.

>> AND WASN'T OFFICER MAXWELL'S TESTIMONY THAT HE ARRIVED DURING THE DAYTIME HOURS, HE WAS THERE 8 TO 10 HOURS, HE DID THE SEARCH AND NEVER SAW CORN AT ANY POINT WHEN HE WAS THERE, THERE WERE -- THERE WAS ANOTHER OFFICER THAT WAS ONLY THERE AT NIGHT BUT OFFICER MAXWELL'S TESTIMONY WAS ABOUT A LONG PERIOD OF TIME INCLUDING DAYLIGHT, HOURS, CORRECT?

>> IT'S CORRECT BUT ALSO AFTER THE EVENT, IT'S MY UNDERSTANDING THAT THE --

>> AFTER THE EVENT WAS THAT THE SCENE WAS DISCOVERED IMMEDIATELY AFTER THE MURDER.

>> ISN'T THE STATE ALLOWED TO SAY, THERE'S NO EVIDENCE, YOU HEARD THE TESTIMONY OF THIS WITNESS, THERE'S NO EVIDENCE TO SUPPORT THE ALTERNATIVE THEORY? THE MOST IDENTICAL THING HAPPENED.

>> SCOTT V. STATE, ONE MOMENT, LET ME PULL THAT UP.

>> IT WAS A RECORDING WHERE HE ADMITTED IN JAILHOUSE RECORDING AND THE DEFENSE IS THEY SCRIPTED IT AND DIDN'T SAY N CLOSING WHAT

THEY SAID IS, ANY EVIDENCE TO SUPPORT THAT ALTERNATIVE THEORY?

>> YOUR HONOR, I RECALL SCOTT NOW, THAT IS A CASE OF INVITED RESPONSE IF I REMEMBER CORRECTLY BUT THIS IS NOT A SITUATION OF INVITED RESPONSE.

>> THE DEFENSE SAID IT WAS PROBABLY -- SOMETHING HAPPENED TO THIS CORN, THAT'S NOT THE NEGATIVE THERE'S NO EVIDENCE TO SUPPORT IT, SOMETHING HAPPENED TO THE CORN.

>> MY POINT IS THE DEFENSE IS POINTING OUT THE LACK OF EVIDENCE FROM THE STATE, THE STATE CANNOT THEN COME IN AND SAY THE DEFENSE DIDN'T PROVE ONE OF THESE THINGS THAT IS SHIFTING THE BURDEN ON TO THE DEFENSE.

>> COUNSEL, YOU HAVE USED ALL BUT A MINUTE OF REBUTTAL TIME NOW, YOU CAN KEEP GOING.

>> I WOULD JUST TAKE -- I KNOW IT'S LATE IN THE DAY.

>> MR. NEIL TESTIFIED THAT THERE WAS NO CORN, ONE OF THE VICTIMS WHO SURVIVED.

>> YEAH, THAT MAY BE TRUE, YOUR HONOR, BUT I DON'T KNOW THAT HE WOULD KNOW, UNFORTUNATELY HE ARRIVED AT THE PROPERTY AND HE'S IMMEDIATELY ATTACKED, I DON'T KNOW THAT HE HAD TIME TO GO OUT AND LOOK OVER THE PROPERTY ONCE HE WAS ATTACKED AND JUMPED OUT OF THE TRUCK.

>> CAN I -- I'M SORRY TO INTERRUPT YOU, THE -- THE ALLEGED PROBLEM WITH THE JURORS HAD TO DO SEEMED TO ME MORE WITH PENALTY PHASE ISSUE, ARE YOU STILL STICKING WITH THAT CLAIM OR DO YOU ACKNOWLEDGE THAT THAT'S MOVED?

>> YOUR HONOR, I WOULD JUST -- I WOULD POINT TO THE BRIEF FOR THAT, YOUR HONOR.

>> OKAY, BUT YOU DIDN'T REALLY ADDRESS -- THE QUESTION I'M

ASKING YOU IN THE BRIEF, THE PROBLEM THAT YOU IDENTIFY WITH THE JURORS IS THAT THEY, YOU KNOW, ONCE THEY FOUND THAT SOMEONE HAD COMMITTED A MURDER IT WOULD BE PREDISPOSED TO RECOMMEND DEATH AND SINCE YOU'RE GETTING A NEW PENALTY PHASE HERE, WHY IS THAT ISSUE, WHY DO WE NEED TO ADDRESS THAT?

>> I FEEL THAT THE PREJUDICE THAT WE SAW THAT AFFECTED DEFENDANT'S PENALTY PHASE DIRECTLY FLOWS OVER INTO THE TRIAL PHASE, USUALLY THINGS, IF A PERSON IS BIAS, THEY ARE NOT DOING TO LEAVE THAT ASIDE IN DIFFERENT PHASES, SO THAT WOULD BE MY ANSWER, YOUR HONOR, THANK YOU.

>> YOU'VE USED UP ALL YOUR TIME. I WILL NONETHELESS AFFORD YOU 2 MINUTES FOR REBUTTAL IF YOU WANTED TO.

>> I DON'T THINK THAT'S GOING TO BE NECESSARY.

>> OKAY.

>> I WOULD ASK THAT THIS COURT GRANT MR. CANNON A NEW GUILT PHASE TRIAL FOR THE REASONS STATED, THANK YOU.

>> MAY IT PLEASE THE COURT, MY NAME IS LISA HOPKINS, I'M REPRESENTING THE STATE IN THIS MATTER, FIRST I WOULD LIKE TO ADDRESS THE HABEAS PETITION, THE STANDARD IS SYNONYMOUS WITH STRICKLAND STANDARD, PREJUDICE AND EFFICIENT PERFORMANCE, THE STATE'S POSITION THAT APPELLATE COUNSEL DID NOT RENDER -- SORRY, DID NOT RENDER PERFORMANCE FOR FAILING TO RAISE A MERITLESS CLAIM.

IN THIS CASE WHEN A RACE NEUTRAL REASON IS REQUESTED FOR CHALLENGE AND REGARDING TO JONES AND MARTIN, JONES AND BYRD, REGARDING MR. JONES, THEY HAD SENT HIS BROTHER TO PRISON AND

THERE WAS A CLAIM THAT THE BROTHER WAS NOT GUILTY, REGARDING BYRD, THEY SENT HER DAUGHTER TO PRISON AND ADDITIONALLY HER DAUGHTER WAS RELATED TO THE DEFENDANT.

>> BUT WASN'T THERE EVIDENCE TO SUGGEST THAT IF YOU WERE TO GO THROUGH FACTORS ON THE GENUINE SIDE OF THINGS THAT THERE WAS PEOPLE AT LEAST SOMEWHAT SIMILAR SITUATED WHO WERE NOT STRUCK AND THOSE PEOPLE WERE WHITE AND THE JURORS THAT WERE STRUCK WERE AFRICAN AMERICAN?

>> THE STATE ACTUALLY PUT ON THE RECORD THAT THERE WERE AFRICAN-AMERICAN JURORS THAT THEY HAD ACCEPTED.

>> ONE FACTOR THAT'S THERE AND THE DEFENSE HAD STRUCK I AGREE, ULTIMATELY WERE NOT JURIES BECAUSE THERE WERE OTHER PROBLEMS WITH THEM.

THE POINT AT LEAST ON SIMILARLY SITUATED INDIVIDUALS, THOSE THAT WERE WHITE WERE NOT STRUCK BY THE STATE, THOSE THAT WERE AFRICAN AMERICAN WERE STRUCK, DOESN'T THAT GO TO THE GENUINENESS OF THE FINDING?

>> IT CAN GO TOWARD GENUINENESS FINDING AND THAT'S THE VANTAGE POINT OF TRIAL COURT TO DETERMINE WHETHER IT WAS GENUINE, REGARDING THE WHITE JURORS, MENTIONED THE DUI, THAT'S A MISDEMEANOR, IT IS NOT, IN FACT, A SERIOUS -- HER SON HAD BEEN SENTENCED TO 25 YEARS FOLLOWED BY LIFETIME PROBATION. AND THE STANDARD -- THE ARGUMENT THAT IS WERE MADE WENT MORE TOWARDS A FOR CAUSE CHALLENGE WHICH IS NOT THE SAME STANDARD AS CHALLENGE.

THE COURT ULTIMATELY LOOKED AT THE CASE LAW THAT WAS PROVIDED WHEN THEY RENEWED THEIR CHALLENGE REQUESTING THAT MARTIN

BE STRUCK AND THE COURT WAS ABLE TO DETERMINE -- MADE THE DETERMINATION THAT IT WAS A GENUINE RACE NEUTRAL REASON AND THAT --

>> WHAT DO WE MAKE OF THE FACT THAT THE COURT AT LEAST INITIALLY LOOKING AT IT PAUSED AND THOUGHT THE OTHER WAY, DOESN'T THAT INDICATE THAT THERE'S SOME --

>> I THINK THE COURT WAS APPLYING A CAUSE STANDARD BECAUSE THE COURT'S ANALYSIS DISCUSS, WELL, YES, THE SON WAS SENT TO PRISON BUT THE DAUGHTER'S CASE WAS RESOLVED IN A WAY THAT MS.-- I'M SORRY, MS. MARTIN FOUND FAVORABLE, THAT'S AN SEASONAL HIS FOR DETERMINING WHETHER THERE'S CAUSE ABOUT WHETHER SOMEONE COULD BE FAIR AND IMPARTIAL, CHALLENGES ARE PRESUMED TO BE RACE NEUTRAL UNLESS THERE'S REASONS GIVEN THAT SHOW THAT IT WAS PRETEXT OR THAT IT WAS EXERCISED IN A WAY THAT'S IN DISCRIMINATORY MANNER, IN THIS CASE THAT DID NOT --

>> DO YOU AGREE OR DO YOU AGREE WITH YOUR COLLEAGUE ON THE OTHER SIDE THAT THE MOTION TO REOPEN WAS IN THE NATURE OF RENEWAL OF OBJECTIONS?

>> I WOULD DISAGREE WITH THAT. I WOULD SAY THAT IT WAS NOT PRESERVED AND THAT --

>> DID THE STATE MAKE THE PRESERVATION ISSUE IN ITS RESPONSE TO THE PETITION?

>> NO, YOUR HONOR.

BUT EVEN APPLYING -- EVEN LOOKING -- HAD THIS CLAIM BEEN RAISED IN THE DIRECT APPEAL IT WOULD HAVE BEEN MERITLESS, IT WOULD HAVE EVEN IF IT WAS NOT PRESERVED IT WOULD HAVE BEEN ADDRESSED UNDER FUNDAMENTAL ERROR STANDARD AND NOT RAISED --

THIS WOULD NOT HAVE RISEN TO
FUNDAMENTAL ERROR.

>> HOW IT WOULD HAVE BEEN
FUNDAMENTAL ERROR?

>> IF IT WASN'T PRESERVED THAT
WOULD BE THE STANDARD THAT
APPLIES AND IF IT WAS PRESERVED
IT'S STILL A MERITLESS CLAIM
GIVEN THAT THE COURT WAS ABLE TO
DETERMINE THAT THIS WAS NOT
PRETEXT AND THERE WERE RACE
NEUTRAL REASONS.

>> LET ME ASK YOU ONE QUESTION
ABOUT THAT, WITH RESPECT TO
MELBOURNE OR NEIL INQUIRY,
THERE'S CONFUSION IN OUR CASE
LAW, I THINK, HAYES ON ONE SIDE
OF WHAT'S REQUIRED OF OPPONENT
IN CHALLENGE IN ORDER TO
PRESERVE THAT ISSUE, DO WE NEED
TO RESOLVE THAT CONFLICT IN
ORDER TO DECIDE WHETHER THIS
ISSUE WAS PRESERVED ON THE
HABEAS QUESTION?

>> I THINK IT SHOULD BE RESOLVED
JUST CLARIFIED NOT NECESSARILY
CONFLICT BUT JUST CLARIFIED THAT
WHAT EXACTLY IS NEEDED TO
PRESERVE THIS TYPE OF CLAIM
BECAUSE IT WAS REOPENED THE
FOLLOWING DAY BEFORE THE JURY
HAD BEEN SWORN, THERE IS SOME
QUESTION ABOUT WHETHER OR NOT
THIS ACTUALLY WAS PRESERVED.

>> BUT, AGAIN, YOU DIDN'T MAKE
THE PRESERVATION ARGUMENT IN THE
RESPONSE?

>> THAT'S CORRECT, YOUR HONOR.

>> OKAY.

>> I THINK HE WAS ASKING AND I
THOUGHT ABOUT THE ISSUE NOT
ABOUT THE --

>> RIGHT.

>> ABOUT THE ISSUE OF WHETHER
THERE'S A BURDEN ON THE OPPONENT
OF THE STRIKE TO ACTUALLY GIVE
THE JUDGE TO REASONS FOR WHY
IT'S PRETEXTUAL AS OPPOSED TO
REQUIRING THE JUDGE HIM OR
HERSELF TO KIND OF FIGURE OUT

WHY IT MIGHT BE PRETEXTUAL?

>> I THINK THERE IS A BURDEN THAT ONCE THE STATE GIVES A RACE NEUTRAL REASON, THAT THERE IS A BURDEN TO OVERCOME THAT BECAUSE THERE IS A PRESUMPTION IN FAVOR OF BEING EXERCISED AND RAISED IN NONDISCRIMINATORY MANNER.

>> THE ANSWER TO THE QUESTION, HE'S ASKING IF THAT'S ALREADY THE LAW OR NEEDS TO BE CLARIFIED?

>> I MEAN, I -- I'M NOT SURE, YOUR HONOR, I WILL BE HONEST.

>> I WANT TO BE CLEAR THAT PRESERVATION ARGUMENT, THAT SEPARATE ONE OF WHETHER --

>> CORRECT, YOUR HONOR.

>> WAS LITIGATED IN THE CASE?

>> THAT'S CORRECT, YOUR HONOR.

AND ADDRESSING IN THE ACTUAL APPEAL CLAIM ONE SUBSECTION 2, REGARDING INVESTIGATOR MAXWELL, INVESTIGATOR MAXWELL TESTIFIED THAT HE PERSONALLY KNEW MR. CANNON FOR A NUMBER OF YEARS, HE DIDN'T ACTUALLY STATE A NUMBER OF YEARS, THERE WAS NO TESTIMONY AS TO HOW HE KNEW HIM AND WHAT CONTEXT THEY HAD COME IN CONTACT BEFORE.

MR. GARCA, DEFENSE COUNSEL, TESTIFIED THAT IT WAS COMMON IN THE COMMUNITY KNEW EACH OTHER, GASTON COUNTY IT IS A SMALLER COUNTY, MUCH SMALLER POPULATION AND COMMON FOR PEOPLE TO KNOW EACH OTHER AS THE RECORD CLEARLY REFLECTS MANY OF THE PROSPECTIVE JURORS KNEW OFFICERS, KNEW THE DEFENDANT, NEW THE CODEFENDANT, KNEW THE VICTIMS AND WHILE MANY OF THOSE PROSPECTIVE JURORS WERE REMOVED, IT IS STILL COMMON FOR PEOPLE IN THE COMMUNITY TO KNOW EACH OTHER, THAT'S COMMON KNOWLEDGE.

IT'S THE STATE'S POSITION THAT WHEN THE TRIAL COURT -- POST CONVICTION COURT WAS CORRECT IN

FINDING THAT THERE WAS NO PREJUDICE REGARDING THAT IN EFFECTIVE ASSISTANCE OF COUNSEL CLAIM GIVEN THAT IT IS COMMON AND THAT THE FACT THAT INVESTIGATOR MAXWELL IDENTIFIED -- WAS ABLE TO PERSONALLY RECOGNIZE HIM DID NOT CAUSE PREJUDICE BECAUSE MR. CANNON WAS ARRESTED A FEW DAYS LATER WEARING THE EXACT SAME CLOTHES SEEN ON THE VIDEO, THERE WAS OVERWHELMING EVIDENCE --

>> IS COVICTIM IDENTIFIED --

>> THAT'S CORRECT, THE PERSON WHO STABBED HIM AND AS A PERSON BEING INVOLVED IN THE MURDER. SO WHEN LOOKING AT THE WHOLE INVESTIGATOR MAXWELL'S TESTIMONY, THERE WAS NO HIGHLIGHTING THAT, WELL, THIS CAME FROM PRIOR BAD ACTS, THERE WAS NO CHARACTER EVIDENCE, IT WAS JUST I PERSONALLY KNOW HIM, I KNOW WHO HE IS, THEY ALREADY HAD AN IDEA OF WHO THEY WERE LOOKING FOR AT THAT POINT BASED ON WHERE THE INCIDENT AND HAPPENED ON THE CANNON'S PROPERTY, THE FACT THAT MR. NEIL WAS ABLE TO IDENTIFY MARVIN CANNON AS THE PERSON WHO WAS BEING INVOLVED IN THIS CASE, AND ULTIMATELY THE VICTIM'S BLOOD WAS FOUND ON MR. CANNON'S CLOTHES, MR. MORGAN'S BLOOD WAS FOUND ON MR. CANNON'S CLOTHES WHEN HE WAS ARRESTED A FEW DAYS AFTER.

SO THE POSTCONVICTION COURT WAS CORRECT IN DENYING THIS CLAIM AND ADDRESSING THE BURDEN SHIFT IN CLAIM, CLAIM 1, SUBSECTION 3, THIS WAS A PERMISSIBLE COMMENT ON THE EVIDENCE, THE COMMENTS ABOUT JOHNNY CANNON DID NOT COME IN UNTIL THE STATE'S REBUTTAL AND IN THAT CASE, IN THIS CASE IT WAS A RESPONSE TO THE CLOSING ARGUMENT THAT WAS -- THAT WAS

MADE BY DEFENSE COUNSEL IN WHICH HE ARGUED THAT WELL, WE DON'T KNOW WHAT HAPPENED TO THIS CORN, IT COULD HAVE BEEN TAKEN, WE DON'T KNOW AND THAT WAS A FEATURE OF THE DEFENSE'S CASE, IS THAT WE DON'T KNOW WHAT HAPPENED, WE ARE NOT SURE, THEY PUT ALL THE BLAME ON THE CODEFENDANT ANTIJUAN MCMILLAN AND IN THIS CASE THE CORN, THAT WAS MOTIVE TO GET THE VICTIMS ON TO THE PROPERTY BUT ULTIMATELY DOES NOT PROVE OR DISPROVE WHETHER OR NOT MR. CANNON IS THE ONE WHO IN FACT, COMMITTED THE MURDER AND IT'S BASED ON MR. NEIL'S TESTIMONY, THE FINDING OF THE VICTIM'S BLOOD ON MR. CANNON'S CLOTHES.

MR. MORGAN'S WALLET BEING FOUND ON THE TRAIL WHEN THE CANINE WAS TRACKING HIM, ALL OF THAT TESTIMONY, WHETHER OR NOT THERE WAS CORN ON THE PROPERTY DOES NOT GO TOWARDS WHETHER OR NOT MR. CANNON IS THE ONE WHO, IN FACT, COMMITTED THIS MURDER EVEN UNDER -- SO THEY WERE ABLE TO RECOVER THE KNIFE WHICH PART OF -- WHICH WAS FOUND IN THE VICTIM'S HEAD.

IF THERE ARE NO OTHER QUESTIONS, I'M ASKING THAT YOU AFFIRM THE POST CONVICTION COURT'S ORDER AND DENY THE HABEAS, THANK YOU.

>> ALL RIGHT.

WE -- WE THANK YOU BOTH FOR YOUR ARGUMENTS AND COURT IS NOW ADJOURNED.