ALL RISE.
HEAR YE, HEAR YE, HEAR YE.
THE SUPREME COURT OF FLORIDA
IS NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEA,
DRAW NEAR, GIVE ATTENTION,
AND YOU SHALL BE HEARD.
GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA
AND THIS HONORABLE COURT.
LADIES AND GENTLEMEN,
THE FLORIDA SUPREME COURT.
>> WELCOME TO THE FLORIDA
SUPREME COURT OUR FIRST CASE
TODAY IS FRANCES VERSUS THE
STATE OF FLORIDA.
>> GOOD MORNING IN MAY IT PLEASE
THE COURT.
MY NAME IS DAVID HENDRY AND WE
ARE FROM CCRC MIDDLE REGION AND
WE REPRESENT THE APPELLATE IN
THIS MATTER, DAVID SYLVESTER
FRANCES.
LET ME START FIRST BY SAYING
THAT THE STATE SHOULD NOT BE
ABLE TO A GAIN AND RETAIN
CONVICTION IN A CASE WHERE THERE
IS A VERY CLEAR VIOLATION AND AS
THIS COURT STATED IN 2004 IN THE
HENRY DAVIS CASE WHICH I'VE
CITED IN MY BRIEF --
>> IT'S VERY CLEAR THAT'S A
VIOLATION BUT WAS THIS ACTUALLY
A GRAND JURY CHALLENGE OR A
CHALLENGE OF CAUSE?
>> THIS WAS, THE STATE HAS
CLASSIFIED THIS IN THEIR BRIEFS
AS A CAUSE CHALLENGE SO IT
WASN'T STATED SPECIFICALLY AS TO
WHAT TYPE OF CHALLENGE IT WAS
BUT IT IS CLEAR THAT THE COURT
ACTUALLY GRANTED A CAUSE
CHALLENGE SO AS FAR AS WHAT DID
THE STATE AND 10 FOR THE
CHALLENGE TO BE THE STATE HAS
CLASSIFIED THIS AS A CAUSE
CHALLENGE.
>> IN A CAUSE CHALLENGE, IS THE
STANDARD DIFFERENT FROM WHAT YOU
WOULD DO IF YOU HAD A BATSON

CHALLENGE.
UNDER BATSON YOU ARE TALKING ABOUT A PREEMPTORY CHALLENGE BASED ON GENERALLY RACE OR ETHNICITY OR GENDER OR SOMETHING.
BUT A CAUSE CHALLENGE REALLY IS, YOU ARE SAYING THAT THERE IS A REASON THIS JUROR SHOULD BE OFF OF THE JURY BECAUSE THIS POTENTIAL JUROR IS OFF OF THE JURY BECAUSE THE STATE HAS A GOOD REASON OUTSIDE OF ANYTHING ELSE TO GET RID OF THIS POTENTIAL JURORS SO ARE WE IN A DIFFERENT STATE AS TO WHETHER OR NOT IT'S A CAUSE CHALLENGE OR A PREEMPTORY CHALLENGE?
DON'T WE HAVE DIFFERENT STANDARDS TO LOOK AT?
>> WE DON'T HAVE DIFFERENT STANDARDS BUT I WILL SUBMIT TO THE COURT THAT FOR A JUROR TO BE EXCUSE FOR A CAUSE AS OPPOSED TO A PREEMPTORY IS A MUCH MORE EGREGIOUS CASE.
WHAT WE HAVE HERE IS NOT A PREEMPTORY CASE OF A CAUSE CASE WHICH MAKES IT THAT MUCH MORE EGREGIOUS.
>> HOW DO YOU APPLY CARRATELLI? IN OTHER WORDS I CAN THINK OF A LOT OF REASONS THAT I THINK THIS POINT HAS FAILINGS BUT ON THE EFFICIENCY PART BUT ON THE PREJUDICE PART, DON'T YOU HAVE TO ESTABLISH THAT THE JURY THAT SAT, THAT THERE WAS ACTUAL PREJUDICE IN TERMS OF THE BIASED JURORS HAVING SAT?
>> WELL, CARRATELLI IS COMPLETELY INAPPLICABLE TO THE CASE IN HERE IS WHY.
THE HOLDING OF CARRATELLI IS COMPLETELY INAPPLICABLE IN THIS CASE BECAUSE THE HOLDING OF CARRATELLI SAYS WHERE POST-CONVICTION MOTION ALLEGES THE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE

A PRESERVE AND CAUSE CHALLENGE
THE DEFENDANT MUST DEMONSTRATE
THE JUROR WAS ACTUALLY BIASED.
CARRATELLI INVOLVED A CASE WHERE
THERE WERE ALLEGATIONS BY
DEFENSE THAT THERE WAS A BIASED
JUROR BECAUSE THIS PARTICULAR
JUROR SAID HE WAS IN A
BARBERSHOP AND WAS
TALKING IN THE BARBERSHOP ABOUT
THIS MANSLAUGHTER CASE.
WHAT HAPPENED WAS --
>> I UNDERSTAND THE UNDERLYING
FACTOR HERE BUT THE IDEA THAT IN
JURY SELECTION ON
POST-CONVICTION, IN ORDER TO GET
RELIEF, YOU HAVE TO SHOW
SOMETHING MORE THAN THERE WAS
ERROR IN GRANTING THE CHALLENGE.
AND YOU TALKED ABOUT BATSON.
BATSON WAS A DIRECT APPEAL SO
I'M NOT SURE, WHAT STANDARD
WOULD YOU ENUNCIATE THAT WOULD
BE APPROPRIATE FOR SOMETHING
THAT YOU ARE SAYING WAS AN ERROR
DURING JURY SELECTION AND STILL
DIDN'T RESULT IN THE JURY PANEL
BEING IMPROPER PANEL.
>> WE WOULD SUGGEST THAT THIS
COURT FOLLOW THE REASONING OF
DAVIS AND IN THE DAVIS CASE
WHICH I CITED IT LOOKED AT THE
RESULT ON THE APPEAL AND THE
DAVIS CASE SAID THE ONLY THING
YOU CAN REALLY LOOK AT IT IS TO
ANALYZE THE EFFECT THE ERROR
WOULD HAVE ON THE APPEAL BECAUSE
IN THE CARRATELLI CASE IT'S A
QUESTION OF IS THIS JURY THAT
SAT ON THE JURY ARE THEY
ACTUALLY BIASED?
THAT'S FINE IN THE CARRATELLI
SETTING WHERE YOU ARE
CHALLENGING THE JURY BUT IN THIS
CASE WE HAVE THE COMPLETE
OPPOSITE.
SEE WHAT YOU'RE SAYING IS PER SE
REVERSIBLE.
>> I'M SORRY?
>> YOU ARE SAYING IS PER SE

REVERSIBLE ONCE YOU DEMONSTRATE
IT AND IT'S AN APPROPRIATE FOR
THAT TO HAVE OCCURRED WHICH DID
OCCUR, THAT YOU HAVE NO
PREJUDICE, NOTHING FURTHER, THAT
IT'S PER SE REVERSIBLE.
IF THAT'S WHAT YOU ARE ARGUING.
>> YES, YOUR HONOR.
THE SENSE OF THE WORD
PREJUDICE --
>> THERE ARE TWO DIFFERENT
THINGS.
MAYBE IT'S PER SE AND PREJUDICE
IF IT'S FAIR BUT YOUR
CO-MINGLING THE TWO AND
SEARCHING FOR A TEST.
SEARCHING FOR WHAT IS THE ANSWER
TO THE SECOND STEP.
>> YOUR HONOR IF THE DEFENDANT
IS ABLE TO SHOW IT WAS A CLEAR
BATSON VIOLATION IN THE TRIAL,
UNMITIGATED WHICH HAPPENED IN
THE FRANCES CASE THAN IF THE
DEFENSE IS ABLE TO SHOW THERE IS
A REASONABLE PROBABILITY THAT HE
WOULD HAVE OBTAINED RELIEF ON
THE BATSON CLAIM ON DIRECT
APPEAL THEN THE DEFENSE SHOULD
BE ENTITLED TO A TRIAL BASED ON
THE CLEAR BATSON VIOLATION.
>> WE HAVE DIFFERENT STANDARDS
AND WE ARE TALKING ABOUT A
CHALLENGE VERSUS A
POST-CONVICTION WHICH WE ARE IN.
WE ARE IN POST-CONVICTION.
YOU ARE CLAIMING IN EFFECT THE
ASSISTANCE OF COUNSEL IN THIS
CASE, CORRECT?
ON THIS ISSUE?
>> YES.
>> INEFFECTIVE ASSISTANCE OF
COUNSEL YOU HAVE TO SHOW NOT
ONLY THAT THERE WAS DEFICIENCY.
YOU'VE GOT TO SHOW A PREJUDICE
UNDERMINING OUR CONFIDENCE.
SO LET'S ASSUME WE HAVE THE
PREJUDICE AND THE DEFICIENCY
BECAUSE THERE IS NO OBJECTION
HERE, IS THERE?
WAIT A MINUTE, WAS THERE AN

OBJECTION BY DEFENSE COUNSEL TO
THE DISMISSAL OF THIS JUROR?
>> THERE WAS NOT.
>> SO THERE WAS NO OBJECTION AT
THE TIME AND THEY WERE CERTAINLY
NO OBJECTION BEFORE THE VIEWING
THIS MORNING, CORRECT?
[INAUDIBLE]
>> LET'S ASSUME THERE IS A
DIVISION PERFORMANCE.
WHAT WE ARE TRYING TO GET TO IS
WHAT IS THE STANDARD FOR NOW THE
PREJUDICE PORTION OF INEFFECTIVE
ASSISTANCE UNDER THE
CIRCUMSTANCES?
>> THE PREJUDICE, THE QUESTION
THAT THIS COURT SHOULD ASK IS
WHAT WAS THE RESULT, WHAT WAS
THE PREJUDICE TO MR. FRANCES IN
THE TRIAL COUNSEL FAILED TO
RAISE OBJECTION PRIOR TO THE
JURY BEING SWORN.
>> SO ON A DIRECT APPEAL WE
WOULD HAVE HAD TRIAL COUNSEL,
APPELLATE COUNSEL RAISING A
BATSON AND AN UNPRESERVED BATSON
CLAIM.
THEN WHAT?
>> I WAS QUITE SURPRISED IN
READING THIS RECORD THAT THE
BURDEN DID NOT READ THIS ON
DIRECT APPEAL AND I THOUGHT WELL
IF HE HAD RAISED ITS THIS COURT
PROBABLY WOULD HAVE SAID THAT
THIS WAS AN UNPRESERVED ERROR
BECAUSE THAT IS WHAT HAPPENED IN
THE DAVIS CASE WHICH WAS THE
11th CIRCUIT CASE.
THAT CASE ORIGINATED OUT OF THE
THIRD DISTRICT APPEAL OUT OF
FLORIDA IN THE SAME EXACT THING
THAT HAPPENED IN FRANCES
HAPPENED IN THE DAVIS CASE IN
THE COURT OF APPEAL.
THE THIRD DCA SAID THE TRIAL
COUNSEL FAILED TO PASS OBJECTION
AND DIDN'T MAKE THE APPROPRIATE
OBJECTION AND THE CLAIM WAS
PROCEDURALLY BARRED.
ON HABEAS RELIEF DAVIS WAS

GRANTED RELIEF BY THE U.S.
CIRCUIT COURT OF APPEALS AND
THEY SAID THAT DAVIS WOULD HAVE,
HAD IT BEEN PRESERVED AND HAD HE
DONE WHAT HE WAS SUPPOSED WAS
TRIAL COUNSEL THE CLAIM WAS
MERITORIOUS.
>> YOU ASSUMED THERE HAD US
ASSUMED THERE WAS SOMEHOW A
RACIST MOTIVE IN WHAT THE STATE
DID.
ON THIS CHALLENGE AND I KNOW YOU
HAVE RAISED IT ON YOUR OTHER
POINT, I THOUGHT THIS WAS A
SITUATION WHERE MAYBE THE STATE
RATHER THAN BEING MOTIVATED BY
SOMETHING INAPPROPRIATE SIMPLY
DID NOT RECALL CORRECTLY WHAT
THIS JUROR HAD SAID ABOUT HER
VIEWS ON THE DEATH PENALTY.
IS THAT THIS ISSUE?
IS THAT THIS ISSUE ABOUT WHAT
MAY HAVE BEEN A MISTAKE AND WHAT
WAS REPRESENTED BY THE DEFENDANT
OFFERING CASH?
IS THAT THIS ISSUE?
>> THAT'S CORRECT YOUR HONOR.
>> SO IN THAT WHEN YOU SAY THERE
IS RACISM WE HAVE TO USE A
DIFFERENT STANDARD, WHERE IS THE
EVIDENCE THAT THE MOTIVATION OF
THIS STATE WAS RACISM?
TO ME, THAT'S A SERIOUS CHARGE
AND IF IT'S PRESENT, PERHAPS
THERE ARE DIFFERENT STANDARDS
THAT YOU ARE ALLEGING THAT
PREJUDICE HAS A DIFFERENT
MEANING.
BUT I JUST TAKE ISSUE WITH THE
VERY FIRST ASSUMPTION YOU HAVE.
>> WELL YOUR HONOR BATSON SAYS
WE ARE TOO INFERRED THAT THERE
IS REASON THAT THE STATE IS
UNABLE TO PROVIDE A REASON AS
FOR WHY THEY SELECTED AN
AFRICAN-AMERICAN JUROR WHICH
THEY WERE UNABLE TO DO WITH THE
TRIAL LEVEL AND THEY ARE STILL
UNABLE TO DO.
THERE IS NO LEGITIMATE REASON

WHY THE STATE HAS STRUCK THIS
JUROR.
MR. WIXTROM ADDRESS THIS.
>> YOU KEEP TALKING ABOUT BATSON
BUT THIS IS NOT A PREEMPTORY
CHALLENGE.
THIS IS AN ERRONEOUS FOR CAUSE
AND IS THERE ANYTHING IN THE
RECORD THAT WOULD LEAD US TO
BELIEVE THAT THIS IS ANYTHING
OTHER THAN A MISTAKE, A MISTAKE
ON THE PART OF THE STATE AND A
MISTAKE ON THE PART OF DEFENSE
COUNSEL?
>> YOUR HONOR EVEN IF THIS IS A
MISTAKE AND I WILL ADDRESS WHY I
THINK IT WAS NOT A MISTAKE, EVEN
IF THIS WAS A MISTAKE AND THEY
CAUSE FOR CHALLENGE THAN RELIEF
SHOULD BE GRANTED BECAUSE THE
ALT CASE INVOLVES A CAUSE
CHALLENGE AND BASICALLY THE
STATE THOUGHT THAT THE JURORS
SAID THEY WERE OPPOSED TO THE
DEATH PENALTY AND THAT IS WHY
THE STATE SAID WE STRUCK THAT
JUROR.
>> THERE WAS IN FACT AN
OBJECTION BY THE DEFENSE
ATTORNEY?
ON DIRECT APPEAL, AS WAS THE
CASE IN ALT, THAT BECAUSE THE
DEFENSE ATTORNEY --
[INAUDIBLE]
>> YES YOUR HONOR BUT HERE IS
WHY ALL THAT IS VERY APPLICABLE
TO THESE SETS OF FACTS BECAUSE
IT WAS AN ERRONEOUS CAUSE
CHALLENGE AND IT MIGHT HAVE BEEN
BUT BASICALLY THE STATE WAS
ARGUING THAT THE COURT SHOULD
GIVE RELIEF BECAUSE THE STATE
HAD PREEMPTORY CHALLENGES
REMAINING AND IT'S IN OUR
HARMLESS AIR HERE BECAUSE EVEN
IF THIS JUROR SHOULD HAVE
BEEN -- THE STATE HAD PREEMPTORY
CHALLENGES REMAINING AND
COULD'VE STRICKEN THIS JUROR AND
THEY SAID IN ALT THEY WOULD NOT

GIVE THE STATE THE BENEFIT OF
THE HARMLESS ERROR ANALYSIS
BECAUSE YOU CAN'T WRONGFULLY
STRIKE JURORS FOR CAUSE AND ALL
THIS INVOLVES ISSUES OF RACISM.
MR. WIXTROM QUESTIONED THE JUROR
SIX TIMES, SIX TIMES THIS JUROR
SAID AND SHE WAS IN NO WAY
OPPOSED TO THE DEATH PENALTY AND
IF YOU LOOK AT MR. JEFF ASHTON
WHAT HE DID IN HIS VOIR DIRE HE
ADDRESSED THE AFRICAN-AMERICAN
JUROR AND STRUCK DOWN.
THAT WAS DORSEY AND INDEED THEY
MAY HAVE SAID THAT THEY COULD
NOT IMPOSE THE DEATH PENALTY BUT
THIS JUROR NEVER EVER SAID SHE
WAS OPPOSED TO THE DEATH
PENALTY.
NOW THERE IS NEW EVIDENCE THAT
MR. WIXTROM WAS PART OF THE
HEARING AND THERE WAS NO
EVIDENCE THAT THE JUROR WAS --
MR. HOOPER THE TRIAL ATTORNEY
SAID I WANT TO MAKE SURE I
UNDERSTAND YOUR RESPONSES.
ARE YOU OPPOSED TO THE DEATH
PENALTY IN THE JURORS SAID NO
AND IF YOU LOOK AT THE TRIAL
FILES AND IT'S IN THE RECORD OF
MR. WIXTROM'S SEATING CHART
THERE ARE SOME STRANGE SCRIPT
THINGS AND THE TYPE OF THINK
WHERE THE JUROR WAS IDENTIFIED
AS QUOTE OPPOSED UNDERLINED AND
HE SAID IT LOOKS LIKE THAT MIGHT
HAVE BEEN WRITTEN THERE LATER.
THIS RECORD IS VERY PECULIAR AND
THIS CASE IS UNPRECEDENTED
BECAUSE IN NO CASE THAT I HAVE
SEEN HAS THERE HAVE BEEN A
McCLESKEY VIOLATION.
IN THE HENRY DAVIS CASE THIS
COURT SAID IN GRANTING RELIEF
THAT THE FOUNDING PRINCIPLE UPON
WHICH THIS NATION WAS
ESTABLISHED IS THAT ALL PERSONS
WERE INITIALLY CREATED EQUAL AND
ENTITLED TO HAVE THEIR
INDIVIDUAL HUMAN DIGNITY

RESPECTED.
THIS GUARANTEE OF EQUAL
TREATMENT HAS BEEN CARRIED
FORWARD IN EXPLICIT PROVISIONS
OF OUR FEDERAL AND STATE
CONSTITUTION AND THIS IS THE
LAST TIME THIS COURT HEARD THE
POST-CONVICTION RELIEF WHEN THE
CLAIM WAS NEARLY 10 YEARS AGO IN
THE HENRY DAVIS CASE, CASE THAT
INVOLVED RACISM LIKE THIS.
THEY SAID, THIS COURT SITTING
DAVIS SAID WE DON'T CARE IF THE
DEFENSE ATTORNEY IS RACIST OR
NOT BUT WE ARE NOT GOING TO
TOLERATE, WE ARE NOT GOING TO
TOLERATE THESE KINDS OF RACIAL
SENTIMENT TO AFFECT THEIR
CRIMINAL JUSTICE SYSTEM.
NOW I WANT TO SUBMIT THAT THE
BATSON INQUIRY INVOLVES THREE
STEPS AND IN THIS CASE THE LOWER
COURT TOOK A GIANT STEP
BACKWARDS.
THIS COURT SAID IT WAS NOT IN
EFFECT FOR THE DEFENSE TO STRIKE
THIS AFRICAN-AMERICAN JUROR.
THIS COURT SHOULD GIVE
ABSOLUTELY NO DEFERENCE TO THE
LOWER COURTS RULED BECAUSE OF
WAS UNABLE TO EVEN IDENTIFY THE
PARTY WHO MADE THIS STRIKE.
THE DEFENSE MADE A PRIMA FACIE
CASE AND THERE WAS A PRIMA FACIE
CASE THAT THERE WAS RACISM WHEN
THEY TARGETED AND STRUCK THE
AFRICAN-AMERICAN JUROR AND THEY
WERE UNABLE TO PROVIDE A
LEGITIMATE --
>> THERE IS A POINT WHERE YOU
HAVE GOT TO EXPLAIN TO ME ON AN
INEFFECTIVE ASSISTANCE OF
COUNSEL, WHERE THE PREJUDICES.
EXPLAIN TO ME IN CLEAR SUCCINCT
WAYS WHAT THE STANDARD IS FOR
PREJUDICE AND HOW THAT IS MET.
>> IS THERE A REASONABLE
PROBABILITY OF A DIFFERENT
OUTCOME IN THE PRECEDING?
WE WOULD SUBMIT THAT THE

PROCEEDINGS INCLUDE THE APPEAL,
NOT JUST THE TRIAL AND AS DAVIS
SAYS YOU CAN'T LOOK AT THE
AFFECTED THE OUTCOME ON THE
TRIAL.
TO DO SO WOULD NEED TO CREATE AN
IMPOSSIBLE STANDARD.
CARRATELLI AS IT STANDS NOW --
>> BUT I THOUGHT I HEARD YOU SAY
EARLIER THE APPELLATE COUNSEL
HAD RAISED THIS ISSUE ON APPEAL
WE WOULD PROBABLY HAVE SAID THAT
THIS WAS NOT PRESERVED BECAUSE
THERE WAS NO OBJECTION AT THE
TIME.
IN FACT IF I REMEMBER CORRECTLY
THE DEFENSE ATTORNEY AGREED WITH
WHAT THE PROSECUTOR SAID AND
THERE WAS CERTAINLY NO OBJECTION
MADE AT THE TIME THAT THE JURY
WAS SWORN.
[INAUDIBLE]
>> LET'S SAY IT WAS DEFICIENT
AND PREJUDICE.
THAT'S WHAT I WANT.
>> THE PREJUDICE IS THAT AN
AFRICAN-AMERICAN JUROR WAS
STRICKEN FROM THIS JURY THROUGH
NO GOOD REASON AT ALL.
THAT WAS THE PREJUDICE.
THE COMPOSITION OF THIS JURY,
THE EQUAL PROTECTION VIOLATION,
THAT IS THE PREJUDICE HERE.
THE PREJUDICE ALSO EXTENDS TO
MR. FRANCES RIGHT TO TRIAL BY
JURY IN THAT RIGHT TO TRIAL BY
JURY INCLUDES A RIGHT TO TRIAL
BY JURY OF A FAIR CROSS-SECTION
OF THE COMMUNITY, ONE WHICH IS
VIOLATED.
>> DOES THE RECORD SHOW WHAT THE
RACIAL COMPOSITION WAS?
>> YES.
THERE WERE 10 WHITES AND ONE
AFRICAN-AMERICAN AND THE OTHER I
BELIEVE MIGHT HAVE BEEN MIXED
RACE.
GOING BACK TO MR. WIXTROM OR
GOING BACK TO MR. ASHTON FIRST
HE STRUCK DORSEY AND THEN HE

STRUCK --
>> WAS THERE ANY CHALLENGE TO
THE STRIKING OF THOSE JURORS?
>> NOW BECAUSE THEY CLEARLY
STATED THEY OPPOSED THE DEATH
PENALTY.
MR. ASHTON WAS THE MOST MORE
EXPERIENCED TRIAL ATTORNEY AND
MR. WIXTROM I DON'T BELIEVE HAD.
I SAW MR. ASHTON STRIKING
AFRICAN-AMERICAN JURORS.
>> YOU ARE INFERRING THAT AND
THAT IS PURELY AN INFERENCE, AN
ACCUSATION OF GREAT MISCONDUCT
THAT IS BASED ON NOTHING MORE
THAN SURMISE ON YOUR PART.
ISN'T THAT CORRECT?
>> UNDER THE CASE LAW BATS AND
IN A LINE OF CASES WHICH FOLLOW
BATSON.
I DIDN'T COME UP WITH IT.
IT'S IN THE CASE LAW AND I STATE
THAT RAISED HER MEETS THIS
HIGHER PRECEDING.
>> YOU HAVE SAID THAT THE TWO
JURORS TO KEEP REFERRING TO IN
FACT SAID THEY COULD NOT BE FAIR
AND IMPARTIAL.
WHERE OTHER PEOPLE WHO SAID
THAT, DID THEY SIT ON THE JURY?
>> IF THEY SAY THEY CANNOT
IMPOSE THE DEATH PENALTY THEY
WOULD HE STRICKEN BECAUSE THAT
IS BASED ON --
>> OKAY BUT YOU STILL CAN USE
THE NOTE TO SHOW RACISM WHEN YOU
HAVE ACKNOWLEDGED THAT THESE
PEOPLE SAID, THEY SHOULD HAVE
BEEN STRICKEN.
>> BUT JUROR ROBERTS AND BATSON
SAY ONLY ONE CASE OF STRIKING AN
AFRICAN-AMERICAN JUROR FOR NO
REASON IS A VIOLATION.
IN KEMP THEY SAID THEY WEREN'T
GOING TO OFFER MR. FRANCES LIFE.
THIS WAS A BLACK-ON-BLACK CRIME
AND THEY HAVE BEEN ACCUSED OF
BEING SOFT ON BLACK-ON-BLACK
CRIME IN THE PAST.
MCCLESKEY SAID YOU NEED TO

PRESENT NOT JUST MARRIAGE DESIST SIX.
YOU NEED TO SHOWN A SPECIFIC EXAMPLE OF THE CASE AT HAND THAT THERE WAS RACE CONSIDERATION.
>> YOU ARE ALMOST OUT OF TIME. DO YOU WANT TO SAVE TIME FOR REBUTTAL?
>> JUST ON McCLESKEY ONE MORE THING YOUR HONOR.
IN THE FRANCES CASE, WE PRESENTED AT THE EVIDENTIARY HEARING THE EVIDENCE WHICH McCLESKEY WOULD BE REQUIRED TO SHOW A McCLESKEY REQUIREMENT AND THAT IS RACE-BASED CONSIDERATION IN THIS CASE BECAUSE IT WAS A BLACK ON BLACK CRIME AND IT WAS NEGATIVE PRESS AND THIS IS VERY POLITICAL AND I WOULD SUBMIT THAT WE HAVE MET THE STANDARD FOR McCLESKEY AND I WILL SAVE THE REMAINING TIME FOR REBUTTAL.
>> YOU DON'T HAVE ANY REMAINING TIME BUT I WILL GIVE YOU AN EXTRA MINUTE FOR REBUTTAL.
STEAM MAY IT PLEASE THE COURT, I AM KENNETH NUNNELLEY AND I REPRESENT THE STATE OF FLORIDA IN THIS APPEAL.
WE HAVE BEEN REFERRING TO THE JURY SELECTION ISSUE IS THAT BATSON ISSUE AND THAT PERHAPS IS A CONVENIENT SHORTHAND FOR IT BECAUSE IT DOESN'T HAVE ANOTHER NAME THAT BUT THIS IS NOT A BATSON CLAIM.
>> I WOULD SUGGEST THE 11th CIRCUIT HAS DECIDED IT AND HOW WOULD YOU APPROACH THAT AND WHAT IS YOUR RESPONSE TO THAT ARGUMENT?
>> DAVIS, THERE IS NOT CONTROL IN THIS CASE.
DAVIS DOES NOT DEAL WITH THE CIRCUMSTANCE OF A CAUSE CHALLENGE IN A DEATH CASE WHERE DEFENSE COUNSEL AND THE STATE MADE A MISTAKE.

THAT IS WHAT THIS CASE IS, NO
MORE AND NO LESS.
>> WHAT DO YOU SEE THE PRINCIPLE
IN THE DAVIS CASE IS BEING?
IT'S NOT AT DEATH CASE BUT A
POST-CONVICTION.
DOESN'T ADDRESS THE STANDARD
THAT NEEDS TO BE APPLIED IF USE
ESTABLISHED INEFFICIENCY?
>> NO AND NO.
THE BEST ANALOGY I CAN GIVE
IS --
LET ME BACK UP.
IF THIS WAS A BATSON CASE,
ASSUMING IT WAS JUST SO WE GOT
SOME BASELINE TO START FROM, A
MISTAKEN REASON, IF IT IS A
RACE-NEUTRAL REASON, WHICH
OPPOSITION TO THE DEATH OF THE
WOULD BE, THAT WOULD NOT BE A
BATSON VIOLATION.
IN THE FIRST PLACE.
NOW, WITH THAT SAID, WHAT WE ARE
TALKING ABOUT HERE CAN PERHAPS
BE ANALOGIZED TO CARRATELLI
BECAUSE OF HER SIEGE WILL
CONTEXT IN WHICH THIS CLAIM
PRESENTS ITSELF IN THIS COURT.
THAT IS INEFFECTIVENESS OF
COUNSEL CLAIM, NOT A SUBSTANTIVE
CLAIM.
IN CARRATELLI PROVIDES A
CONVENIENT REASON AND STARTING
POINT FOR DISCUSSION WHICH IS TO
ESTABLISH RELIEF OR A BASIS FOR
RELIEF ON INEFFECTIVE CLAIM IN
THIS CONTEXT, THERE HAS TO BE
PREJUDICE.
UNLESS THEY BIASED JUROR SERVED,
THIS COURT HAS SAID THERE IS NO
PREJUDICE AND WE CERTAINLY DO
NOT HAVE A BIASED JUROR SITTING
ON THIS CASE.
WE JUST DON'T.
AND AT THE END OF THE DAY, WHILE
AGAIN IT'S NOT A SQUARE
CARRATELLI CIRCUMSTANCE,
CARRATELLI IS AT LEAST GIVING US
A STARTING POINT.
>> AGAIN IT'S AMAZING THAT WE

ARE SPENDING ALL THIS TIME ON
THIS.
THIS.
>> I AGREE WITH THAT JUSTICE
PARIENTE.
>> I REALLY THINK THIS POINT WAS
WELL TAKEN FOR LOTS OF REASONS
BUT I GUESS THE FIRST QUESTION
IS IF THE DEFENDANT HAD OBJECTED
AND SAID THE PROSECUTION
MISSTATED THE RECORD, THE JUDGE
WOULD HAVE NOT ALLOWED IT,
RIGHT?
>> SURE, PROBABLY.
THEY PROBABLY WOULD HAVE LOOKED
AT THE RECORD AND SAID
[INAUDIBLE]
>> IF THE DEFENDANT HAD DID AND
THE JUDGE STILL SAID REMOVING
THIS JUROR FOR CAUSE AND IT HAD
BEEN PROPERLY PRESERVED, THEN
WHAT THEY ARE ARGUING UNDER THIS
DAVIS FROM THE 11TH CIRCUIT IS A
COMBINATION THAN ON APPEAL THERE
WOULD HAVE BEEN --
IT WOULD HAVE REVERSED BECAUSE
IT WAS AN INVALID CAUSE
CHALLENGE.
THAT IS WHERE YOU WERE GOING ON
THIS.
THAT IS WHERE YOU HAVE TO GO,
RIGHT?
>> YOU WOULD HAVE TO GET TO THAT
POINT AND STACK THAT SERIES OF
INFERENCES MADE BY THE DEFENSE
IN ORDER TO GET TO RELIEF AND I
DON'T THINK WE HAVE DONE THAT
HERE.
>> YOU WOULD HAVE TO SHOW, WELL,
THINK YOU WOULD HAVE TO GO
THROUGH ALL THOSE STEPS WHICH IS
IF THE LAWYER HAD PERFORMED
PROPERLY AND ASSUMING THAT IS
THE TRIAL LAWYER SAID I WOULD
HAVE LIKED TO HAVE KEPT THE
JUROR.
WAS THERE ANYTHING LIKE THAT
BECAUSE AGAIN THIS IDEA THAT
MAYBE THIS WAS IN A GREAT JUROR
FOR THE DEFENDANT ANYWAY.

>> THAT MAY BE THE CASE.
>> WAS THERE ANYTHING IN THE RECORD DEVELOPED ON THAT?
WE ASSUME THAT THE STATE, BOOKS LIKE THE STATE MADE A MISTAKE MAYBE.
BUT DID THE DEFENDANT -- DO WE KNOW IF THE DEFENDANT HAD ANY STRATEGY REASONS FOR NOT CARING WHETHER THIS JUROR WAS REMOVED OR NOT?
>> THAT IS UNCLEAR.
THE TRIAL COURT AND THE POST-CONVICTION COURT MADE THE FINDING THAT THE DEFENDANT DID NOT EXERCISE A FALSE CHALLENGE AND I'M NOT SURE EXACTLY WHAT THAT MEANS.
>> IT WASN'T THE DEFENDANT'S CHALLENGE.
>> I'M NOT SURE EXACTLY WHAT THAT MEANS BUT AT THE END OF THE DAY WHAT YOU COME BACK TO IS THE DEFENDANT AGREED WITH A PROSECUTOR.
>> THEY HAD MISTAKEN WHAT HAD BEEN SAID?
>> YES MA'AM AND THIS WAS AN OVERNIGHT ISSUE OR CHALLENGE BY THE WAY.
AS I UNDERSTAND THE RECORD, VOIR DIRE THAT PLACE IN THE EVENING AND THE COURT RECESSED FOR THE NIGHT IN THE NEXT MORNING THEY CAME BACK AND THAT IS WHEN THE CHALLENGE WAS EXERCISED.
IT'S MY UNDERSTANDING AND THE RECORD SPEAKS FOR ITSELF BUT WHAT YOU HAVE IS THE PROSECUTOR SAYING I AM CHALLENGING AND THE COURT SAYS LOOKS AT DEFENSE COUNSEL AND WHAT YOU REMEMBER.
I BELIEVE SO AND.
[INAUDIBLE]
EVERYBODY MAKES A MISTAKE IS WHAT YOU HAVE.
>> ANYTIME YOU HAVE A POST-CONVICTION YOU'VE GOT A LAWYER FOR THE DEFENDANT WHO MADE THE MISTAKE.

THAT'S NOTHING UNUSUAL.
>> EXACTLY.
>> IN EVERY CASE.
>> THAT IS WHY WE ARE HERE.
>> WE HAVE TO BE ABLE TO AGREE
ON WHAT THE STANDARD IS AN
COUNCIL HAS DID THE CARRATELLI
STANDARD THAT IMPLIES UNDER
STRAIGHT BATSON ANNOUNCES UNDER
CIRCUMSTANCES.
>> CARRATELLI IS --
>> I'M SAYING THAT'S HIS
ARGUMENT.
AND HE IS SAYING THAT IS WHAT
THE CASES.
>> THAT IS NOT WHAT THE CASE IS
BECAUSE IT'S NOT HIS CASE.
INEFFECTIVENESS CASE AND WE ALL
KNOW THIS, BUT INEFFECTIVENESS
CASES ARE ALL INDIVIDUALS --
SPECIFIC INDIVIDUALIZE CASES.
UNDER THIS CASE CARRATELLI IS A
STARTING POINT BECAUSE YOU HAVE
TO PROVE UNDER INEFFECTIVENESS
THAT THERE IS PREJUDICE.
>> AGAIN I DON'T WANT TO READ
THIS TO DEATH HERE BUT YOU HAVE
GOT A SITUATION AND DAVIS IS
CITED IN THE DEFENDANT'S BRIEF.
THEY DID REVERSE IT BECAUSE IT
HAD BEEN BROUGHT UP ON APPEAL
PROPERLY THERE WOULD HAVE BEEN A
REVERSAL ON APPEAL.
BECAUSE YOU HAVE A COMBINATION
OF A HABEAS CASE AND YOU LOOK AT
IT DIFFERENTLY AS TO THE
STANDARD FOR HABEAS SO THE I
DEAL WITH THE IT WOULD BE A
DOUBLE DEFICIENCY IN NOT
PRESERVING IT AND THEN IF IT HAS
BEEN PRESERVED THAN DEFICIENCY
FOR NOT RINGING IT UP ON APPEAL
AND WE HAVE REVERSED ON APPEAL
IS PRESERVED AND THOSE ARE ALL
THE STEPS WOULD HAVE TO GO
THROUGH.
>> HAS TO TROT DEFICIENCY OR
TRIAL INEFFECTIVENESS, HE CANNOT
PROVE STRICKLAND AS TO TRIAL
BECAUSE, AND I'M KIND OF GIVING

THE DEFENDANT THE BENEFIT OF THE DOUBT THAT THE CARRATELLI BATSON STANDARD WOULD COME INTO PLAY. THE FIRST STEP FAILS BECAUSE HE CANNOT PROVE PREJUDICE AND THE CONSTITUTION DOESN'T REQUIRE PERFECTION AND WE ALL KNOW LAWYERS MAKE MISTAKES ALL THE TIME.
THE BEST IDEAS COME ON THE BACKS OF THE COURTHOUSE AND WE ALL KNOW THAT.
ON DIRECT APPEAL YOU'VE GOT TO ASSUME THAT FIRST OF ALL DEFENSE COUNSEL WOULD TAKE HIS CLAIM TO THE EXCLUSION OF SOME OTHERS WHICH WAS NOT PRESERVED AND CERTAINLY AS TO APPELLATE COUNSEL, SELECTING AN UNCLAIMED, I'M PRESERVED THAT DOES NOT PRESERVED AN OBJECTION IN FAVOR OF SOME OTHER CLAIM THAT HE DID RAISE THERE ARE ALL KINDS OF ASSUMPTIONS AND IT JUST DOESN'T WORK.
JUSTICE PARIENTE I WHOLEHEARTEDLY AGREE WITH YOU THAT WEEK HAVE SPENT FAR TOO MUCH TIME ON THIS CLAIM.
I WOULD SUGGEST THAT THIS CLAIM IS NOT A BASIS FOR RELIEF BECAUSE EITHER IN APPEAL OR THE STATE HABEAS THE CAUSE CANNOT SHOW INEFFECTIVENESS OF COUNSEL.
>> JUST UNDER ONE ISSUE, THE ISSUE OF A CHARGE OF RACISM THAT IT PERMEATED JURY SELECTION AND I THINK THE U.S. SUPREME COURT IN THE APPELLATE COURT IN AND THE FEDERAL COURT HAS BEEN VERY STRONG EVEN YEARS LATER GRANTING RELIEF WHEN THERE IS A PERVERSE PATTERN OF RACIST CONDUCT.
WHAT DOES THIS RECORD SHOW ABOUT WHAT THE STATE DID OVERALL?
DO WE HAVE AND APPEAR TO SAY THAT THIS ISOLATED INCIDENT REALLY WAS SIMPLY, IT WAS A MISTAKE?
BECAUSE THE CASE OF HENRY DAVIS

WAS IN 2004, IT WAS ABOUT A
TRIAL LAWYER ACTUALLY BEING
RACIST, SHOWING RACISM AND THAT
WAS THE FINDING THAT THEY BASED
THE REVERSAL ON SO WHAT IS THE
STATUS OF THE PROSECUTION,
SUPPOSE THAT RACISM OR LACK OF
IT?
>> THE REMAINING JURY THAT WE
KEPT HEARING DURING MY OPPONENTS
OPENING WERE THAT THE JURORS
WERE REMOVED.
THERE IS NO QUESTION AND HAS
NEVER BEEN ANY QUESTION
WHATSOEVER ABOUT THE PROPRIETY
OF THOSE TWO JURORS BEING
REMOVED FROM THE JURY.
THOSE JURORS ARE NOT IN PLAY IN
AN ANALYSIS OR ANY OTHER JURY
SELECTION/RACISM ANALYSIS.
NOW WITH RESPECT TO THE
McCLESKEY AND KEMP CLAIM WHAT
YOU HAVE IN THIS CASE, I WOULD
SUGGEST BASED ON A READING OF
THE TESTIMONY BY THE PROSECUTOR
WHO IS CHARGED WITH RACISM, AND
SEDGWICK, IS NO MORE THAN SHE
WAS AWARE THAT THERE WAS SUCH A
THING AS A McCLESKEY CLAIM
POSSIBLE AND THAT THIS CASE
CRIED OUT FOR A PROSECUTION.
>> NOW WE ARE TALKING ABOUT THE
FACT THAT THE VICTIMS WERE
BLACK, IS THAT WE ARE TALKING
ABOUT?
>> YES MAíAM THAT IS WHERE I'M
GOING.
I AM SHIFTING TO THE McCLESKEY
AND KEMP CLAIM BECAUSE THE STATE
HAS BEEN ACCUSED OF RACISM.
>> IN TERMS OF JURY SELECTION,
THE TWO AFRICAN-AMERICANS THAT
WERE REMOVED HAD OPPOSITION TO
THE DEATH PENALTY.
>> THEY WERE PROPERLY REMOVED.
>> WAS THERE ONE?
>> IF THERE WAS ONE MORE
AFRICAN-AMERICAN ON THE JURY
THAT IS UNCLEAR TO ME.
WE HAVE THIS KIND OF SHOTGUN

SCATTER-GUN APPROACH OF RACISM
BEING LEVELED THROUGHOUT THE
WHOLE COURSE OF THIS CASE AND I
WOULD SUGGEST AS A STARTING
POINT THIS COURT SHOULD USE --
>> WAS THERE AN OBJECTION TO THE
SEATING OF THE AFRICAN-AMERICAN
JURORS WHO WERE ON THE JURY?
>> NO.
>> AND THIS CLAIM OF, THIS WOULD
BE, THIS IS A DIFFERENT ISSUE
BECAUSE THE CLAIM HAS BEEN OVER
THE YEARS, THE PROSECUTION, THE
PROSECUTOR OFTEN HAS CHARGED,
HAVE SOUGHT THE DEATH SENTENCE
WHERE THE VICTIM IS WHITE AND
THE DEFENDANT IS BLACK AND THEY
HAVE IGNORED SITUATION WHERE
THERE'S A BLACK DEFENDANT.
>> THAT IS THE UPSHOT OF
McCLESKEY.
>> THIS IS SAYING I SHOULD HAVE
THE BENEFIT OF A RACIST POLICY
WHERE THEY DON'T WANT TO SEEK
THE DEATH PENALTY FOR THAT BUT
THEM WHO IS BLACK AND I THINK
WHAT YOU'RE SAYING IS THEY HAVE
EVERY REASON IN THIS CASE THAT
IT'S A DEATH PENALTY CASE AND
I'M NOT EVEN SURE I SEE WHAT THE
VIOLATION COULD NEED.
>> I DON'T KNOW JUSTICE
PARIENTE.
I REALLY DON'T QUITE FOLLOW IT.
>> IN ALL FAIRNESS WE DO HAVE IN
THE RECORD EVIDENTLY, AS I
UNDERSTAND IT, PLEADING TO A
LIFE SENTENCE AND THERE WAS SOME
TALK ABOUT, I DON'T KNOW IF SHE
SAID I'M NOT GOING TO DO THAT
BECAUSE OF THE PUBLICITY THAT
OUR STATE ATTORNEYS OFTEN HAVE
BECAUSE THERE IS AT LEAST ONE
NEWSPAPER ARTICLE THAT I SAW
THAT WAS IN THIS RECORD THAT
TALK ABOUT THE PROSECUTORS NOT
GOING OR GOING FOR THE DEATH
PENALTY WHEN THE VICTIMS ARE
WHITE AND NOT GOING FOR IT IF
THE VICTIMS ARE BLACK.

SO THERE IS SOMETHING IN THIS
RECORD THAT THE PROSECUTOR TALKS
ABOUT BUT AS I ALSO UNDERSTAND
THAT IT WAS THE FIRST PROSECUTOR
THAT WAS ON THIS CASE AND SHE
WAS NOT THE ONE WHO ACTUALLY
PROSECUTED THIS CASE.
>> THAT IS CORRECT.
>> SO YOU SAY THERE IS NOTHING
IN THEIR RECORD.
THAT IS THE QUESTION.
>> MS. SEDGWICK'S STATEMENT AND
I'M PARAPHRASING IT BECAUSE THEY
CAN'T REMEMBER EXACTLY WORD FOR
WORD WAS THAT I WOULD BE ACCUSED
OF BEING A RACIST IF I DIDN'T
PROSECUTE THIS CASE CAPITALLY.
THIS CASE IS A DEATH CASE AND IT
DOESN'T MATTER WHAT RACE ANYBODY
IN THIS CASE IS.
THIS IS A DOUBLE STRANGULATION
MURDER.
THAT IS A DEATH CASE UNDER ANY
POSSIBLE DEFINITION.
AND THIS IS THE KIND OF CASE
THAT SHOULD BE PROSECUTED
CAPITALLY AND DESERVES TO BE
PROSECUTED CAPITALLY AND THIS
COURT HAS ALREADY SAID, THERE
WAS A DEATH CASE WHEN YOU IF
DEFERRED ON DIRECT APPEAL.
NONE OF THE DISPERSIONS THAT
HAVE BEEN CAST CHANGE ANY OF
THOSE FACTS ONE BIT.
>> I GUESS MY POINT ABOUT IT IS
FROM THAT FIRST CONVERSATION
IT'S THE DEFENDANT IS SAYING I
WANT TO TAKE ADVANTAGE OF WHAT I
THOUGHT WAS A RACIST POLICY THAT
YOU USED TO HAVE WHICH IS NOT
SEEKING THE DEATH PENALTY WHEN
THE VICTIM IS BLACK, I WANT TO
TAKE ADVANTAGE OF THAT BECAUSE
HERE THE VICTIM IS BLACK AND I
SHOULDN'T GET THE DEATH PENALTY
AND THAT IS HOW I DON'T SEE
WHERE THAT CLAIM COMES FROM.
>> THERE WAS A REAL DISCONNECT
YOUR HONOR AND I WOULD SUGGEST
THAT TRYING TO TAKE ADVANTAGE IF

YOU WILL OF A PERCEIVED RACIST POLICY.
I'M ASSUMING IT WAS AND THE DEFENDANT THOUGHT THAT IT WAS, I AM NOT SO SURE THAT THAT IS NOT RACIST ITSELF BUT AT THE END OF THE DAY, THERE IS NO EVIDENCE TO SUPPORT ANY IMPROPRIETY IN THE CHARGING DECISIONS THAT WERE MADE IN THIS CASE.
THIS IS A DEATH CASE AND IT ALWAYS HAS BEEN AND NONE OF THE RACIAL ALLEGATIONS THAT HAVE BEEN FIRED AT THE STATE STICK.
ALL OF THOSE CLAIMS OF RACISM ARE MERELY THAT, THEY ARE CLAIMS THAT ARE NOT SUPPORTED BY ANY EVIDENCE IN THIS RECORD.
I WOULD SUGGEST THAT THE TRIAL COURT'S ORDER ON POST-CONVICTION RELIEF SHOULD BE CONFIRMED.
THANK YOU.
>> YOU HAVE ONE MINUTE.
>> WHAT WAS NOT SAID IN THIS PARTICULAR CASE IS JUST AS IMPORTANT AS WHAT WAS SAID IN THE HENRY DAVIS CASE.
WHAT WAS NOT SAID IN THIS CASE WAS A LEGITIMATE REASON.
AS FAR AS THE STATE GOES IT, A MISTAKE SHOULD STILL BE --
CARRATELLI IS INAPPLICABLE.
CARRATELLI MAY HAVE BEEN PLACED IN THE SET OF FACTS BUT THIS IS THE COMPLETE SQUARE OPPOSITE OF FACTS, STRICT ADHERENCE TO CARRATELLI WOULD PRECLUDE ANY MEANINGFUL POST-CONVICTION REVIEW.
CARRATELLI IS A SQUARE PEG TO THIS PARTICULAR PECULIAR ROUND HOLDBACK.
CARRATELLI DIRECTS THIS COURSE TO OVERLOOK A CLEAR BATSON.
TO SHOW SCRUTINY AS THEY DID IN THE HENRY DAVIS CASE.
AS FAR AS WHAT PROBABLY MIGHT'VE HAPPENED, MIGHT THIS HAVE BEEN CURED HAD THE DEFENSE ATTORNEYS ATTORNEY SAID WHAT HE WAS

SUPPOSED TO HAVE SAID, WE DON'T KNOW.
WE CAN'T SAY WHAT PROBABLY MAY HAVE HAPPENED.
HE SAID HE MADE A MISTAKE AND HE SAID HE DID NOT CATCH IT SO AND LASTLY I WOULD JUST SAY THAT THE LOWER COURT WAS UNREASONABLE TO SAY THAT RACE WAS NOT THE REASON FOR CHOOSING THIS CASE FOR DEATH.
IT WAS A REASON AND THAT IS UNDER McCLESKEY FOR HIM TO PREVAIL.
I WOULD JUST SAY ON BEHALF OF MR. FRANCES WE THANK YOU FOR YOUR TIME AND CONSIDERATION IN THIS CASE.
>> THANK YOU FOR YOUR ARGUMENTS.