

THE NEXT CASE WILL BE  
HOJAN V. STATE.  
DID I PRONOUNCE THAT CORRECTLY?  
THANK YOU.

[BACKGROUND SOUNDS]

>> GOOD MORNING, MAY IT PLEASE  
THE COURT, TODD SCHERR FROM CCRC  
SOUTH ON BEHALF OF MR. HOJAN.  
WE'RE ON APPEAL FOR THE RULE OF  
A SUMMARY OF DENIAL, AND ALSO  
BEFORE THE COURT IS A PETITION  
FOR HABEAS CORPUS ALLEGING  
SEVERAL INCIDENCES OF  
INEFFECTIVE ASSISTANCE OF  
MR. HOJAN'S APPELLATE COUNSEL.  
I'D LIKE TO FOCUS ON A IF BUT OF  
THE ASPECTS, MAINLY ONE OF THE  
ASPECTS OF ARGUMENT ONE OF THE  
INITIAL BRIEF RELATING TO THE  
ISSUES ABOUT THE JURY SELECTION  
IN THIS CASE.

AND, AGAIN, REGRETTABLY, THIS  
CLAIM COMES BEFORE THE COURT ON  
A SUMMARY DENIAL, SO THERE'S NO  
EVIDENTIARY RECORD HERE, SO ALL  
OF THE ALLEGATIONS MUST BE  
ACCEPTED AS TRUE.

WHAT HAPPENED AT THE JURY  
SELECTION WAS, IN MY  
EXPERIENCE-- AND I'VE BEEN  
DOING IN THE FOR OTHER 20  
YEARS-- UNORTHODOX AND  
UNPRECEDENTED.

JURY SELECTIONS BEGAN I THINK ON  
THE SECOND DAY THE PANEL WAS  
STRUCK BECAUSE ONE OF THE  
POTENTIAL JURORS MADE A  
DISPARAGING COMMENT ABOUT ONE OF  
MR. HOJAN'S LAWYERS, SO THEY  
STRUCK THE ENTIRE PANEL, BEGAN  
ANEW WITH AN ENTIRELY NEW PANEL.  
AFTER FOUR DAYS OF JURY  
SELECTION, VOIR DIRE, THAT ENDED  
ON A FRIDAY AFTERNOON.

WHAT THE RECORD REFLECTS IS THAT  
COURT WASN'T GOING TO BE IN

SESSION THE FOLLOWING MONDAY.  
EVERYBODY AGREED AT THE END OF  
THAT FRIDAY AFTERNOON SESSION  
THAT THEY WOULD COME BACK  
TUESDAY MORNING, CONTINUE THE  
QUESTIONS.

I BELIEVE THERE WERE STILL 28  
JURORS WHO HAD YET TO BE  
QUESTIONED.

SO THEY WERE GOING BACK TUESDAY  
MORNING.

WHEN TUESDAY MORNING COMES, THE  
FIRST THING THAT HAPPENS-- AND  
THIS IS ON PAGE 1209 OF THE  
TRIAL WORD RECORD-- IS THAT ONE  
OF MR. HOJAN'S LAWYERS SAYS TO  
THE COURT AFTER WE BROKE ON  
FRIDAY, WE HAD AN OPPORTUNITY TO  
MEET WITH THE STATE AND DISCUSS  
WHERE WE WERE AT IN JURY  
SELECTION.

WE WERE ON THE FOURTH DAY AND  
THEN GOES ON TO SAY THAT HE,  
THAT THE DEFENSE LAWYERS AND THE  
STATE MET AND CHOSE THE 12  
JURORS AND CHOSE FOUR  
ALTERNATES.

>> WHERE--

>> THIS IS--

>> I'M SORRY.

>> THE THING THAT TROUBLES ME IS  
THAT YOU ALL AT THIS POINT DON'T  
SEEM THE EVEN AGREE WHAT THE  
RECORD SHOWS WITH REGARD TO WHAT  
THE LIMITED AMOUNT IT SHOWS.

I MEAN, YOU TAKE THE POSITION  
THAT THE DEFENDANT WAS NOT  
PRESENT DURING THAT PROCESS, IS  
THAT CORRECT?

>> THAT'S OUR POSITION, AND  
THAT'S MY UNDERSTANDING OF THE  
STATE'S POSITION.

>> WELL, I SEEM TO BE DIFFERENT.  
I THOUGHT THE STATE WAS TAKING  
THE POSITION THAT THE DEFENDANT  
WAS PRESENT AND AGREED TO ALL

THIS.

>> WELL, THEY TAKE THE POSITION THAT THE DEFENDANT AFTER THE FACT AGREES--

>> USUALLY THERE'S NO DISAGREEMENT ON THAT POINT. I'M SURE THE STATE WILL LET US KNOW IF THERE IS. PLEASE GO AHEAD.

>> THE TRIAL COURT NEVER RESOLVED THAT DISPUTE, OBVIOUSLY--

>> OH, NO, I UNDERSTAND. I UNDERSTAND.

>> I MEAN, MY UNDERSTANDING OF THE STATE'S POSITION BECAUSE THEY'RE ARGUING THAT HIS ABSENCE FROM THIS PROCEEDING, WHATEVER IT WAS, DIDN'T RISE TO THE LEVEL OF A CONSTITUTIONAL VIOLATION OR--

>> YOU SAYING THE OVER THE WEEKEND PROCEEDING WHERE THIS STATE ATTORNEY AND HIS LAWYER GOT TOGETHER AND AGREED ON THE 12 JURORS?

>> WHETHER IT WAS OVER THE WEEKEND--

>> WELL, THAT'S WHAT IT WAS, IT WAS OUT OF COURT.

>> CORRECT.

>> SO I WOULD THINK BOTH SIDES AGREE THAT IN THAT REGARD THAT IT WASN'T, HE WASN'T PRESENT WHEN--

>> CORRECT.

>> BUT THEN ON THE RECORD THE DEFENDANT AGREES TO THESE JURORS.

>> WHAT HAPPENED IS THAT AFTER, WHEN THE DEFENSE COUNSEL'S INFORMING THE COURT AND THE COURT, OBVIOUSLY, IT'S IMPOSSIBLE TO TELL FROM THE RECORD, BUT THE COURT-- WHETHER HE EXPRESSED SURPRISE OR

WHATEVER--

>> WELL, I WOULD THINK SO.

>> WHO ARE THESE JURORS, JUST TELL ME THE NAMES.

THE LAWYERS KEEP TALKING, AND THE JUDGE IS TELL ME WHO YOU PICKED.

>> WELL, AFTER FOUR DAYS OF JURY SELECTION AND THINKING HE WAS GOING TO HAVE ANOTHER FOUR DAYS, PROBABLY THE JUDGE WAS PLEASANTLY SURPRISED THAT THEY HAD AGREED.

>> LOOK, I DON'T KNOW--

>> I MEAN, DIDN'T THE DEFENDANT ON THE RECORD AGREE TO WHAT HAPPENED?

>> WHAT HAPPENED IS THAT AFTER THE ATTORNEYS INFORMED THE COURT OF WHAT HAD GONE ON, THE ATTORNEYS ALSO SAID THAT THEY HAD MET WITH MR. HOJAN BEFORE COURT THAT DAY K AND MR. HOJAN SAID HE WANTED THE LAWYERS TO CONTINUE TO QUESTION THE POTENTIAL JURORS.

THEN, WHICH TO ME INDICATES THAT WHATEVER HAD TRANSPIRED BETWEEN MR. HOJAN AND HIS LAWYERS, MR. HOJAN WAS NOT SATISFIED.

SO THEN THE COURT SAID-- I THINK IT WAS THE ATTORNEY SAID LET ME TALK TO HIM AGAIN.

IS THERE WAS ANOTHER, I THINK, 20-MINUTE BREAK, AND WE KNOW THE 20 MINUTES BECAUSE SOMEBODY SAID YOU'VE BEEN TALKING FOR 20 MINUTES.

THEN HE COMES BACK WITH WHETHER YOU CALL IT AN AGREEMENT OR WHATEVER.

WHEN YOU LOOK AT THE COLLOQUY, WHAT IT IS IS MR. HOJAN JUST ANSWERING YES TO A SERIES OF QUESTIONS--

>> WHY WOULDN'T THAT BE A

DIRECT-- YOU SEE, WHAT I DON'T UNDERSTAND HERE IS WHY WASN'T THAT RAISED, IS THAT WHAT YOU'RE SAYING, ONE OF THE ISSUES--

>> THAT IS ONE OF THE ISSUES--

>>-- ON DIRECT APPEAL?

>> CORRECT.

>> OKAY.

LET'S JUST ASSUME FOR THE INEFFECTIVE ASSISTANCE OF COUNSEL, DON'T YOU HAVE TO SHOW THAT UNDER OUR CASE LAW THAT A BIASED JUROR SAT?

I MEAN, YOU JUST CAN'T-- EVEN IF THIS IS AN UNUSUAL PROCEDURE, I'M STILL, AGAIN, AND YOU'RE TALKING ABOUT A SUMMARY DENIAL, SO WHAT IS-- DON'T YOU--

WHAT'S YOUR BURDEN?

AND ARE YOU SAYING YOU WERE DEPRIVED OF BEING ABLE TO SHOW THAT YOU KNOW A PREJUDICED JUROR SAT AND THAT'S WHAT YOU WANT TO BE ABLE TO PRESENT?

>> IN MY VIEW, IT'S NOT AND I DON'T THINK IT WAS ALLEGED AS A BIASED JUROR ISSUE.

>> WELL, WHAT IS THIS?

>> IT'S ALLEGED AS A DEPRIVATION OF THE CONSTITUTIONAL RIGHT TO BE PRESENT AT A CRITICAL STATE--

>> SO THEN YOU WOULD BELIEVE THAT WOULD HAVE TO BE RAISED, SO YOU WOULD SAY, YOU'RE NOW TALKING ABOUT IT'S THE HABEAS.

>> WELL, I RAISED IT IN BOTH BECAUSE IT WAS RAISED IN THE 3850 BECAUSE THIS COURT HAS SAID THAT THIS TYPE OF ERROR, I MEAN, IN FRANCIS GOING BACK

A NUMBER OF DECADES

WHICH IS ONE OF THE

FIRST SORT OF ABSENCE FROM

CRITICAL STAGES OF THE JURY

SELECTION CASE, THE THE COURT

SAID THAT WAS FUNDAMENTAL ERROR.  
THE COURT-- AND THAT WAS AN  
ABSENCE FROM THE COURTROOM TYPE  
OF SITUATION WHICH I SUBMIT IS  
MORE AKIN TO WHAT WE HAVE HERE  
THAN THE COPENY, CARMICHAEL,  
MOHAMED SITUATION WHERE YOU HAVE  
EVERYBODY'S IN COURT, EVERYBODY  
KNOWS WHAT'S GOING ON, AND  
THERE'S SOME QUESTIONING OR  
SELECTION OF THE JURORS AT A  
BENCH CONFERENCE OR A SIDEBAR.  
IN THAT SITUATION THE COURT HAS  
SAID THAT CAN'T BE RAISED FOR  
THE FIRST TIME ON APPEAL AS AN  
OBJECTION.

UNDER FRANCIS, CERTAINLY, I  
THINK THE CONSTITUTIONAL PART OF  
THAT, THE ABSENCE PART, THE DUE  
PROCESS PART, THE COURT  
HAS ALREADY SAID THAT'S  
FUNDAMENTAL ERROR.

SO WE SUBMIT THAT EITHER WAY THE  
CLAIM SHOULD BE HEARD.

PART OF THE PROBLEM HERE IS THAT  
WE JUST DON'T KNOW BECAUSE OF  
WHAT THE TRIAL COURT SAID WAS,  
WELL, I QUESTIONED HOJAN ABOUT  
IT, AND HE SAID HE WAS FINE, HE  
WAS FINE WITH IT.

WHICH IS NOT REALLY WHAT HE  
SAID.

NUMBER ONE, YOU HAVE TO REMEMBER  
WE'RE DEALING WITH SOMEBODY WHO  
HAS ABSOLUTELY NO CONTACT WITH  
THE CRIMINAL JUSTICE SYSTEM.

SO WE DON'T KNOW WHETHER THE  
ATTORNEYS EXPLAINED TO HIM WITH  
A PEREMPTORY OR CHALLENGE WAS.

SO WE DON'T KNOW WHAT THE  
ATTORNEY HAS EXPLAINED TO HIM.

>> HE WAS PRESENT THE WHOLE WEEK  
BEFORE, WASN'T HE?

>> HE WAS PRESENT IN COURT,  
CERTAINLY, AND THERE WERE CAUSE  
CHALLENGES CONDUCTED.

>> TWO QUESTIONS.

FIRST ONE, I'M A LITTLE CONFUSED EXACTLY AS TO WHETHER THIS MEETING BETWEEN THE PROSECUTORS AND YOUR CLIENT TOOK PLACE.

WHERE DID THAT HAPPEN?

WAS THAT IN A COURTHOUSE, COURTROOM--

>> THE MEETING BETWEEN THE PROSECUTORS AND THE DEFENSE LAWYERS YOU MEAN?

>> THE DEFENSE LAWYERS, I'M SORRY.

>> WE DON'T KNOW.

IT JUST SAYS "WE MET."

>> WE MET.

SO I TAKE IT FROM HEARING YOUR POSITION, YOUR POSITION IS THAT THERE SHOULD BE A BRIGHT LINE TEST FOR THE DEFENDANT OR A BRIGHT LINE RULE THAT THE DEFENDANT HAS TO BE PRESENT FOR ALL PROCEEDINGS WHERE JURY SELECTION IS BEING DISCUSSED, THAT'S WHAT YOU'RE SAYING?

>> WELL, THAT'S WHAT THE LAW SAYS.

>> OKAY.

HE OBVIOUSLY WASN'T PRESENT WHEN THE LAWYERS GOT TOGETHER AND DECIDED WHO THE JURY PANEL WAS GOING TO BE.

>> CORRECT.

>> SO RATIFICATION OF IT LATER, IN YOUR MIND, DOES NOT QUALIFY, DOES NOT I ALLOW IT?

>> WELL, THIS IS WHY I THINK IT WAS RAISED INITIALLY IN THE 3850 AS WELL BECAUSE THE UNDERLYING-- WE HAVE ALLEGED THAT HE DIDN'T UNDERSTAND WHAT HE WAS WAIVING.

AND EVEN THE RECORD SUPPORTS THAT BECAUSE, AS I INDICATED EARLIER--

>> BUT NOW YOU'RE GETTING INTO

ANOTHER ISSUE.

MY QUESTION IS YOUR POSITION IS DEFENDANT HAS TO BE PRESENT DURING ALL ASPECTS OF JURY SELECTION, INCLUDING WHEN THE DISCUSSION IS MADE ABOUT, YOU KNOW, CUTTING A DEAL AS TO WHO THE JURY PANEL'S GOING TO BE. YOUR POSITION IS HE HAS TO BE PRESENT.

>> THAT'S CORRECT.

>> AND IF HE'S NOT PRESENT, THEN REGARDLESS OF HOW WELL THE RATIFICATION OR THE COLLOQUY'S DONE AFTERWARDS, THAT DOESN'T COUNT.

>> NO.

I MEAN, I CAN'T TELL YOU THAT CASE LAW DOESN'T DISCUSS THAT, BUT WHAT WE HAVE HERE IS, NUMBER ONE, RATIFICATION IS DIFFERENT FROM AN AFFIRMATIVE WAIVER OF HIS PRESENCE.

THERE HAS TO BE EITHER AN AFFIRMATIVE WAIVER OF HIS PRESENCE WHICH THERE WASN'T HERE AT THE TIME.

HE DIDN'T EVEN KNOW WHAT WAS GOING ON.

AT LEAST THAT'S WHAT OUR ALLEGATION IS AND HAS TO BE ACCEPTED AS TRUE.

AND THE AFTER-THE-FACT RATIFICATION CALLS INTO QUESTION WHAT WAS DISCUSSED BETWEEN THE ATTORNEYS AND MR. HOJAN.

WE HAVE SOMEBODY HERE WITH NO PRIOR INVOLVEMENT WITH THE CRIMINAL JUSTICE SYSTEM.

CERTAINLY, SOMEBODY WITH NO PRIOR KNOWLEDGE OF THE CRIMINAL JUSTICE SYSTEM AS MANY PEOPLE WHO ARE INVOLVED DON'T REALLY UNDERSTAND THE CONCEPT OF PEREMPTORY CHALLENGES.

HERE YOU HAVE A DEFENDANT WHO'S

NEVER BEEN IN A COURTROOM BEFORE  
IN HIS LIFE, NEVER BEEN IN  
TROUBLE BEFORE IN HIS LIFE.  
MAYBE HE THINKS THIS IS HOW  
THINGS ARE DONE.

THAT'S THE PROBLEM HERE, IS WE  
JUST DON'T KNOW PRECISELY WHAT  
HAPPENED HERE.

>> ARE YOU SAYING THAT, ARE YOU  
SAYING THAT IT COULD HAVE BEEN  
OKAY THAT HE SHOULD HAVE HAD A  
HEARING?

>> WELL, HE SHOULD HAVE--

>> WELL, SO THAT YOU COULD  
DEVELOP YOUR THEORY?

>> CERTAINLY, YES, THAT'S PART  
OF IT.

AND, OF COURSE, WE HAVE THE  
HABEAS ASPECT WHICH IS JUST THE  
MERE FACT THAT HE BUDGET, HE  
WAS-- HE WASN'T, HE WAS ABSENT  
FROM A FUNDAMENTAL STAGE.

SO I DO THINK WE NEED FURTHER  
DEVELOPMENT.

AND ONE OF THE ISSUES THAT GOES  
INTO THIS RATIFICATION IF I CAN  
JUST EMPHASIZE AGAIN IS THE FACT  
THAT THE ATTORNEYS THEMSELVES  
ACKNOWLEDGED TO THE COURT THAT  
MR. HOJAN WANTED THEM TO  
CONTINUE TO QUESTION THE  
WITNESSES.

AND I THINK THAT THAT'S A REALLY  
CRITICAL ASPECT OF WHAT HAPPENED  
HERE, PARTICULARLY WHERE WE ALSO  
KNOW THAT FOR EXAMPLE, ONE OF  
THE JURORS WHO ACTUALLY SAT  
AFTER THE STATE'S OPENING  
ARGUMENT WHERE THEY MENTION A  
NUMBER OF THE WITNESSES WHO WERE  
GOING TO BE TESTIFYING INCLUDING  
LAW ENFORCEMENT, ONE OF THE  
JURORS ACTUALLY SAID I KNOW ONE  
OF THOSE LAW ENFORCEMENT  
OFFICERS.

THAT WAS NEVER, HE NEVER

QUESTIONED THE JUROR ABOUT THAT.

>> WHAT WOULD HAVE HAPPENED IF BEFORE THEY HAD THE DISCUSSION THE PROSECUTOR AND THE DEFENSE LAWYERS BEFOREHAND IF COUNSEL HAD GONE TO HIS CLIENT AND SAID, LISTEN, WE'RE GOING TO GET TOGETHER WITH THE PROSECUTOR THIS WEEKEND, AND WE'RE GOING TO TRY AND COME UP WITH A JURY FOR YOU HERE?

IS THAT OKAY WITH YOU?

AND THAT TESTIMONY CAME OUT AFTERWARDS THAT HE OKAYED THAT AHEAD OF TIME.

WOULD THAT HAVE BEEN OKAY?

>> IT DEPENDS ON WHAT HAPPENED DURING THAT CONVERSATION.

I MEAN, IT DEPENDS ON WHETHER HE HAD ANY MISGIVINGS, IT DEPENDS ON WHAT THE ATTORNEY'S REASONS WERE.

I MEAN, THIS IS LIKE HAVING PART OF A TRIAL CONDUCTED DOWN THE STREET SOMEWHERE.

>> WELL, IT'S NOT QUITE LIKE-- WAIT A MINUTE, IT'S NOT QUITE LIKE THAT.

>> WELL, THIS IS--

>> AGAIN, I UNDERSTAND ABOUT-- BUT WE'RE TALKING, THERE IS NO ISSUE.

IF WE SAID, WELL, WE FOUND OUT LATER THAT REALLY THE DEFENSE LAWYER WAS DEFICIENT BECAUSE ONE OF THESE PEOPLE COULD HAVE BEEN STRUCK FOR CAUSE, AND THAT'S WHAT WE WANT TO DEVELOP IN THERE.

AND, AGAIN, I SEE A BIASED JUROR SAT, THIS GUY HAD BEEN-- AND I WAS TOO FAST TO DO IT.

THAT'S WHAT YOU WANT THE EVIDENTIARY HEARING ON.

GOING TO THE HABEAS, IF-- AND I'VE ALWAYS WONDERED ABOUT THIS,

BUT SINCE WE MIGHT BE QUESTIONING WHETHER THIS SHOULD GO BACK FOR AN EVIDENTIARY HEARING-- THE QUESTION OF WHETHER THE APPELLATE LAWYER IN LOOKING AT THIS UNUSUAL PROCESS MAKES A DECISION BASED ON FRANCIS, CONEY, ALL OF THAT, THAT WHAT HAPPENED IS NOT A INSTITUTIONAL VIOLATION AND MAKES A DECISION-- BECAUSE I HAVEN'T LOOKED AT WHAT THE APPELLATE BRIEF LOOKS LIKE AND WHETHER THIS APPELLATE LAWYER AND SAYS I DON'T THINK THAT WOULD HAVE HAD MERIT. IS THAT SOMETHING THAT SHOULD BE SUBJECT, THE APPELLATE INEFFECTIVE ASSISTANCE OF COUNSEL IN A SITUATION LIKE THAT TO ALSO, TO AN EVIDENTIARY HEARING ON THE APPELLATE? I DON'T KNOW IF YOU'VE EVER HAD THAT CIRCUMSTANCE, BUT I'VE ALWAYS WONDERED HOW DO WE JUST MAKE A DECISION YES OR NOWHERE THERE'S SOME-- NO WHERE THERE'S SOME CHANCE THAT THE ISSUE WOULD HAVE HAD MERIT, BUT ISN'T THE-- SO WHAT'S YOUR, JUST WHAT'S YOUR RESPONSE ON THAT? >> A COUPLE THINGS. PART OF IT IS YOU'RE SORT OF PREACHING TO THE CHOIR. I'VE ALWAYS WONDERED IN TERMS OF, I MEAN, TO MY KNOWLEDGE IN THE 20-SOMETHING YEARS I'VE, THERE'S NEVER BEEN A STATE HABEAS GRANTED IS ONE THING, BUT CERTAINLY REMANDED FOR ANY KIND OF EVIDENTIARY DEVELOPMENT. SOMETIMES IT HAPPENS IN FEDERAL COURT. FARINA, I BELIEVE, WAS ONE. BUT CERTAINLY, YOU KNOW, THE COURT DOES THAT ALL THE TIME

WHEN THEY--

>> BUT HE ENDED UP DECIDING THAT  
IF THIS HAD BEEN RAISED TO US,  
WE WOULD NOT HAVE REVERSED.  
AND, AGAIN, THEN THAT, DOESN'T  
THAT SORT OF ANSWER AT THAT  
POINT?

WE DON'T CONCLUDE IT'S LIKE THE  
CASES WHERE WE FOUND IT  
FUNDAMENTAL ERR OR RECORD.  
ERROR.

AND, AGAIN, THIS IS ALL  
DIFFERENT BECAUSE IT'S ACTUALLY  
AN AFFIRMATIVE AGREEMENT BY THE  
DEFENSE LAWYER.

DOESN'T THAT END THE,  
EVERYTHING?

IN OTHER WORDS, IF WE SAY NO  
MATTER WHAT MAYBE THIS IS NOT  
THE BEST WAY TO DO IT, IT'S--  
WE DON'T FIND IT CONSTITUTIONAL  
EFFICIENCY HERE, AND THERE'S NO  
ALLEGATION OF A BIASED JUROR  
HAVING SAT?

IT IS NOT LIKE TESTIMONY OF A  
KEY WITNESS TAKING PLACE OUTSIDE  
THE COURTHOUSE IN ALL DUE  
DEFERENCE TO OUR ANALOGY.  
DOESN'T THAT END THE  
CONVERSATION?

>> WELL, NO, BECAUSE THEY'RE  
REALLY TWO DIFFERENT CLAIMS.  
AND TO GO BACK TO YOUR--

>> WELL, WHAT CAN BE THE  
PREJUDICE?

IF IT'S NOT REVERSIBLE ERROR AND  
THE DEFENDANT THERE'S A  
QUESTION, OKAY, DEFENSE LAWYER  
SAYS HE AGREED TO IT, NOW  
OBVIOUSLY THE DEFENDANT'S GOING  
TO SAY I DIDN'T AGREE TO IT  
BECAUSE-- BUT HE'S AGREED TO  
IT, WHAT'S THE REASON FOR THE  
EVIDENTIARY HEARING?

WHAT HAS TO BE SHOWN ON  
PREJUDICE TO GET YOU TO RELIEF

ON THIS ISSUE?

>> A COUPLE THINGS.

NUMBER ONE, THE STATE AND THE JUDGE RELIED ON THIS ALLEGED RATIFICATION, AND SO PART OF THE REASON FOR THE HEARING IS TO GO BEHIND WHAT HAPPENED ON THE RECORD WHICH IS WHAT HAPPENS ALL THE TIME TO FIGURE OUT EXACTLY WHAT THE CONTEXT AND THE CONTENT OF THE PURPORTED DISCUSSION THAT--

>> IF YOU ALLEGE, HAVE YOU ALLEGED WHAT THAT CONTENT WAS?

>> NO.

>> WELL, MR. HOJAN WOULD KNOW THAT.

>> THAT'S-- WE ALLEGED WHAT WE ALLEGED THAT--

>> WELL, I UNDERSTAND THAT. BUT IF IT'S BASICALLY A MISADVICE OF COUNSEL CLAIM, THEN IT SEEMS TO ME IT'S INCUMBENT UPON YOU TO EXPLAIN WHAT THE MISADVICE OF COUNSEL WAS. AND YOU'VE GOT TO MAKE AN AFFIRMATIVE ALLEGATION BASED ON THINGS THAT WOULD BE WITHIN THE KNOWLEDGE OF MR. HOJAN OF WHAT COUNSEL TOLD HIM.

HAVE YOU MADE THOSE KIND OF ALLEGATIONS?

>> NO, AND WE'RE NOT REQUIRED TO.

WHAT WE'RE REQUIRED--

>> WELL, WHY RESPECT YOU REQUIRED TO?

>> WE FOLLOWED THE RULE, WE ARE REQUIRED TO--

>> HAVE YOU PROFFERED ANYTHING LIKE THAT?

>> NO, WE DIDN'T.

WE DID NOT PROFFER-- AND THAT WAS NEVER AN ISSUE MENTIONED BY THE STATE BELOW--

[INAUDIBLE]

>> I DON'T KNOW HOW YOU CAN MAKE A CLAIM LIKE THAT WITHOUT SAYING WHAT IT IS.

>> BECAUSE THE ISSUE WAS THAT HE WASN'T THERE.

>> WELL, I UNDERSTAND THAT.

>> THAT'S THE ISSUE.

>> THAT IS, THAT'S ONE, THAT IS, I UNDERSTAND, ONE ISSUE.

AND I CAN UNDERSTAND THAT THERE COULD BE A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON MISADVICE, THAT COUNSEL TOLD HIM SOMETHING THAT WASN'T SO, AND THEN YOU COULD MAKE THE CLAIM. BUT YOU ARE NOT MAKING A CLAIM LIKE THAT, AND I JUST WANTED TO CLARIFY THAT WAS THE CASE.

NOW, ON THIS QUESTION OF THE HABEAS--

>> YES.

>> I AM STRUNG TO UNDERSTAND IN A HABEAS WHICH HERE IS AN INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL THERE COULD EVER BE THE NEED OR, IT COULD EVER BE APPROPRIATE FOR THERE TO BE AN EVIDENTIARY HEARING.

BECAUSE IT SEEMS TO ME THAT APPELLATE COUNSEL'S PERFORMANCE HAS TO BE BASED UPON WHAT IS ON THE RECORD, THAT THE APPELLATE COME COULD SEE ON THE FACE OF THE RECORD.

NOW, ISN'T THAT SO?

>> THAT'S SO, AND PRESUMABLY THAT'S WHY CERTAINLY IN THIS STATE I'M NOT AWARE OF A STATE HABEAS THAT'S HAD A HEARING N. FEDERAL COURTS THERE HAS BEEN HEARINGS HELD.

I THINK THE QUESTION FROM JUSTICE PARIENTE MORE WENT TO, YOU KNOW, WHEN WE'RE LOOKING AT A CLAIM LIKE THIS, HOW DO WE

LOOK AT THE LAWYER?  
YOU KNOW, DO WE ASSUME THAT THE  
ERROR WAS SO APART FROM THE  
RECORD THAT ANY REASONABLE  
LAWYER WOULD HAVE RAISED IT AND  
THE LAWYER JUST MISSED IT?  
DID THEY HAVE A REASON FOR NOT  
RAISING IT?  
WAS IT BECAUSE THEY FELT IT  
WASN'T PRESERVED OR MERITORIOUS?  
THOSE ARE GOING INTO THE  
STRATEGIC DECISIONS OF THE  
APPELLATE LAWYER.  
WHAT THIS COURT HAS  
TRADITIONALLY DONE IS LOOK AT  
THE CLAIMS THAT IN A HABEAS ARE  
ALLEGED SHOULD HAVE BEEN RAISED  
ON DIRECT APPEAL AND THE COURT  
ANALYZES THOSE.  
THE APPELLANT SAYS THIS CLAIM  
SHOULD HAVE BEEN RAISED ON  
DIRECT APPEAL, WE DISAGREE  
BECAUSE MAYBE IT WASN'T  
PRESERVED, AND IT'S NOT  
FUNDAMENTAL BE ERROR OR THE  
OTHER ISSUES WERE STRONGER.  
THE COURT ENGAGES IN THAT TYPE  
OF ANALYSIS.  
>> YOU'RE INTO YOUR REBUTTAL  
TIME.  
>> CERTAINLY, I DO THINK PERHAPS  
IT'S APPROPRIATE IN SOME  
CIRCUMSTANCES TO HAVE SOME SORT  
OF EVIDENTIARY DEVELOPMENT.  
BUT IN THIS CASE I THINK BECAUSE  
IT'S REQUIRED, IN MY VIEW, TO  
SEND THIS BACK FOR A HEARING ON  
THIS ISSUE AND SOME OTHERS THAT  
DEVELOPING THAT RECORD WOULD  
SATISFY AT LEAST, I THINK, PART  
OF THE PROBLEM WITH WHAT YOUR  
HONOR WAS TALKING ABOUT.  
>> I KNOW YOU'RE ABOUT USING UP  
YOUR REBUTTAL, BUT I'M NOT SURE  
YOUR ANSWERED.  
THE QUESTION I HAD WAS THE

PREJUDICE AS INEFFECTIVE ASSISTANCE OF COUNSEL ON THAT.

>> YES.

>> HOW DO YOU-- YOUR CLIENT SAYS I DIDN'T RATIFY IT.

WHAT'S THEN THE PREJUDICE STANDARD?

BECAUSE YOU SAY IT'S NOT THE CARATELLI.

>> THE PREJUDICE STANDARD IS WHEN YOU'RE ABSENT FROM A CRITICAL STAGE AND YOU DON'T-- THERE'S NOT A VALID RATIFICATION OR A WAIVER--

[INAUDIBLE]

THAT'S HARMFUL ERROR, PER SE. THERE'S NO PREJUDICE.

ONE THING I DID WANT TO BRIEFLY POINT OUT IN THE TEN SECONDS I HAVE IS IN THE BRIEF WE ALSO DO DISCUSS THE FACT IN TERMS OF THE BIASED JUROR, WE DON'T HAVE A SPECIFIC ALLEGATION, BUT THAT'S PART OF WHAT WE WANT TO FIND OUT.

WHAT EXACTLY-- WERE THERE DISCUSSIONS WITH THE STATE AND THE DEFENSE ABOUT STRIKES. THIS WAS SORT OF A HORSE-TRADED JURY.

>> DID THE JUDGE LOG THE JURORS INDIVIDUALLY IN YOUR CLIENT'S PRESENCE?

>> YEAH.

THERE WAS VOIR DIRE DONE IN THE COURTROOM, CORRECT, AND CAUSE CHALLENGES WERE EXERCISED. NO PEREMPTORIES.

>> SO, BASICALLY, YOU'RE TALKING ABOUT PEREMPTORY CHALLENGES.

>> WELL, WE DON'T KNOW.

THERE MAY HAVE BEEN OTHER DEALS GOING ON THAT CERTAIN JURORS, WE WON'T TAKE THIS ONE IF YOU WON'T TAKE THIS ONE, SO WE JUST REALLY DON'T KNOW.

AND THERE WERE, AGAIN,  
ADDITIONAL JURORS THAT REMAIN TO  
BE QUESTIONED, NUMBER ONE, AND  
NUMBER TWO, MR. HOJAN WANTED  
THAT--

>> YOU'RE OUT OF TIME, BUT I  
WILL GIVE YOU TWO MINUTES FOR  
REBUTTAL SINCE WE HELPED YOU USE  
UP YOUR TIME.

>> MAY IT PLEASE THE COURT,  
LISA-MARIE LERNER WITH THE  
ATTORNEY GENERAL'S OFFICE.  
ADDRESSING THIS ISSUE, I WANT TO  
POINT OUT TO THE COURT THAT THE  
TRIAL COURT HAD DONE FOUR DAYS  
OF VOIR DIRE.

THE COURT ITSELF HAD QUESTIONED  
THE JURORS.

THE PROSECUTOR HAD QUESTIONED  
THE JURORS, AND THE DEFENSE,  
BOTH DEFENSE ATTORNEYS FULLY  
QUESTIONED ALL 27 OF THESE  
JURORS.

THE QUESTIONING WAS DONE.  
THEY WERE COMING BACK ON TUESDAY  
NOT TO DO MORE QUESTIONING, BUT  
TO START THE PEREMPTORY  
CHALLENGES.

SO MR. HOJAN WAS PRESENT FOR ALL  
OF THE QUESTIONING, AND HE WAS  
PRESENT FOR ALL OF THE CAUSE  
CHALLENGES.

THE CAUSE CHALLENGES WERE  
FINISHED BEFORE THAT WEEKEND.  
SO THEY HAD GONE THROUGH ALL 27  
OF THE REMAINING JURORS, AND  
NONE OF THESE WERE EXCUSED FOR  
CAUSE.

THEY HAD SURVIVED THE CAUSE  
CHALLENGES.

THE ONLY THING THAT HAPPENED  
OUTSIDE OF THE PRESENCE OF THE  
COURT AND MR. HOJAN WAS THE  
PEREMPTORY CHALLENGES.

>> DON'T YOU THINK THAT'S AN  
IMPORTANT ASPECT OF A TRIAL,

DECIDING WHO THE JURY'S GOING TO BE THAT'S GOING TO THE DECIDE YOUR FATE?

>> YES, OF COURSE IT'S IMPORTANT.

BUT IN FLORIDA IT'S A PROCEDURAL RIGHT.

AND THE U.S. SUPREME COURT IN TWO CASES WHICH I CITED, MARTINEZ, SALAZAR AND ROTH, HAS SAID THAT PEREMPTORY CHALLENGES ARE NOT FUNDAMENTAL CONSTITUTIONAL RIGHTS.

THEY ASSIST THE ATTORNEYS AND THE PARTIES IN PICKING A JURY, BUT THEY ARE NOT A CONSTITUTIONALLY-GUARANTEED RIGHT.

SO FIRST OF ALL--

>> YOU'RE SAYING THAT THERE WAS NO MORE QUESTIONING TO THE, THE QUESTIONING WAS FINISHED, THERE WAS NO-- THAT THEY COULDN'T HAVE ASKED ON TUESDAY FOR MORE QUESTIONING?

>> I SUPPOSE THEY COULD HAVE ASKED FOR MORE, BUT THEY HAD COMPLETED THE QUESTIONING, AND AFTER THEIR QUESTIONING THEY DID THE CAUSE CHALLENGES.

AND THEY HAD GONE THROUGH ALL OF THESE 27 JURORS FOR CAUSE.

SO ALL OF THE QUESTIONING WAS ESSENTIALLY DONE.

>> WELL, BUT AGAIN, I MEAN, I'M NOT SURE THAT'S RESPONSIVE TO THE QUESTION.

AS YOU'RE GOING THROUGH, YOU MAY HAVE A LARGE PANEL OF JURORS THAT YOU'RE DOING GENERAL QUESTIONING WITH.

BUT ONCE IT STARTS GETTING DOWN TO THE POINT THAT THE LAWYER HAS THE OPPORTUNITY TO VIEW THE JURY PANEL THAT WILL BE SITTING ON THE CASE, SHOULDN'T THE LAWYER

HAVE AN OPPORTUNITY TO ASK  
QUESTIONS, TO MAKE DECISIONS  
BASED ON THAT?

>> YES, YOUR HONOR.

BUT THE ATTORNEYS DID HAVE THE  
OPPORTUNITY TO ASK THOSE  
QUESTIONS.

THESE--

>> OKAY.

SO THEN, SO YOU ALL DO DIFFER.  
YOU'RE SAYING THAT THE DEFENDANT  
WAS PRESENT FOR THAT PROCESS  
WHERE THEY COULD HAVE ASKED  
QUESTIONS.

MR.SCHERR SAYS, NO, HE WAS NOT  
PRESENT.

>> YES, HE WAS PRESENT.

AND THE DEFENSE ATTORNEYS DID  
QUESTION EACH OF THESE JURORS.  
IT'S IN THE TRANSCRIPT.

>> WELL, BUT AGAIN, AT WHAT  
POINT WAS-- WAS IT ON THE  
FRIDAY BEFORE THEY STARTED  
MAKING THE CHALLENGES OR AFTER  
THEY HAD FINISHED CAUSE  
CHALLENGES?

THEY STILL DIDN'T HAVE A JURY,  
DID THEY?

>> NO, THEY DIDN'T HAVE A JURY,  
BUT THEY DID THE CAUSE  
CHALLENGES AFTER THE ATTORNEYS  
HAD DONE THE QUESTIONING.

>> OKAY.

BUT THEN YOU HAD A PROCESS TO  
GET IT DONE TO THE ACTUAL PANEL.

>> YES.

BUT GENERALLY--

>> OKAY.

JUST A MINUTE.

LET'S WALK THIS THROUGH.

I'M TRYING TO SEE WHAT YOU ALL  
AGREE TO AND DISAGREE WITH.

IT DEPENDS ON WHICH POINT IN  
TIME WHEN YOU ASK WHETHER THE  
DEFENDANT WAS THERE.

SO WE GET DOWN TO A POINT IN

TIME THAT YOU HAD 27 PEOPLE  
LEFT--

>> YES.

>>-- TO SIT ON THE JURY, AND  
SOMETHING HAPPENED THAT WE DON'T  
KNOW WHAT HAPPENED TO GET IT  
DOWN TO A JURY OF 12.  
PLUS SOME ALTERNATES.

>> YES.

>> AND THAT'S, I MEAN, THAT'S  
THE STATUS OF THIS RECORD.

>> YES.

>> AND DURING THAT PERIOD IF A  
QUESTION OR THE NEED FOR A  
QUESTION HAD ARISEN, WOULDN'T  
THE PARTIES HAVE HAD THE  
OPPORTUNITY TO ASK FURTHER  
QUESTIONS AS THE LAWYERS VIEW  
THE PANEL IS GOING TO BE  
ACTUALLY SITTING?

>> YES, HYPOTHETICALLY--

>> BUT THAT DIDN'T HAPPEN HERE  
ABUSE WE DON'T KNOW.

>> NO, IT DIDN'T HAPPEN HERE,  
BUT HYPOTHETICALLY THEY COULD  
ASK MORE QUESTIONS.

GENERALLY, WHEN I'VE  
PARTICIPATED IN TRIAL WHEN IT  
COMES TO THE PEREMPTORY  
CHALLENGES, THEY GENERALLY ARE  
ONE AFTER ANOTHER BECAUSE THE  
QUESTIONING HAD ALREADY CEASED.  
IT'S-- THE STATE EXCUSES ONE  
AND THE DEFENSE AND THE STATE,  
AND GENERALLY DURING THAT  
PROCESS THERE'S NO MORE  
QUESTIONING.

HYPOTHETICALLY, IF SOMETHING HAD  
COME UP, THEY COULD, OF COURSE,  
ASK THE COURT TO DO MORE  
QUESTIONING.

AND THAT WAS NOT DONE HERE  
BECAUSE THE PEREMPTORIES WERE  
ESSENTIALLY EXERCISED OUTSIDE  
THE COURT.

WHAT I WANTED TO POINT OUT TO

THIS COURT AGAIN WAS THAT  
MR. HOJAN WAS PRESENT FOR ALL OF  
THE QUESTIONING BY ALL OF THE  
ATTORNEYS AND THE COURT.

HE GOT TO SEE THIS JURY FOR FOUR  
FULL DAYS.

AND GOING INTO THE EVENING, THIS  
IS NOT JUST WORKING--

>> NO, I'M SORRY.

YOU KEEP MAKING A STATEMENT HE  
GOT TO SEE THE JURY.

NO, HE DIDN'T.

HE GOT TO SEE THE PANEL THAT HAD  
BEEN SUMMONED TO BECOME THE  
JURY.

THE JURY PANEL IS DIFFERENT THAN  
THE BROAD PANEL THAT COMES TO  
THE COURTROOM TO BEING  
QUESTIONED.

>> THAT IS CORRECT.

>> SO HE DID NOT SEE THE JURY  
PANEL SITTING THERE, THE 12 WHO  
WERE GOING TO BE HIS JUDGES.

>> HE SAW THE 27 PEOPLE--

>> RIGHT.

>>-- FROM WHICH THE JURY WAS  
SELECTED.

>> SO WE'RE CLEAR.

>> YES, YES.

>> OKAY.

>> I JUST WONDER, IF WE ALLOW  
THIS TYPE OF THING, HOW DOES A  
JUDGE HANDLE LAMPE TYPE OF  
SITUATION?

PARTIES GO BACK THERE AND AGREE  
TO EXCUSE MEMBERS OF--

[INAUDIBLE]

GENDER BIAS AND GENDER ETHNIC  
RACE WITHOUT THE DEFENDANT BEING  
CONSULTED OR HAVING SEEN HOW  
THAT WAS DONE?

HOW DOES THAT WORK?

>> WELL, AND THE COURT DOES NOT  
HAVE TO ACCEPT THIS PROCESS.

IN THIS PARTICULAR INSTANCE  
THERE ARE NO ALLEGATIONS, AND

THERE WERE NO ALLEGATIONS MADE THAT ANY SORT OF BIAS WAS EXERCISED BY EITHER PARTY IN THIS JURY.

AND THERE WAS NO ALLEGATION THAT THIS JURY, THE PANEL WHICH WAS ACTUALLY SEATED--

>> BUT, SEE, THAT'S THE PROBLEM IS THAT THIS WHOLE CONCEPT OF YOU HAVE TO PROVE THAT A PARTICULAR JUROR WAS BIASED, BUT YOU DON'T EVEN KNOW WHAT HAPPENED DURING THE PROCESS TO GET THERE.

>> WELL, WE--

>> THAT'S WHAT I, YOU KNOW, I'M NOT SURE I UNDERSTAND HOW WE'RE GOING TO DO THAT.

THIS, TO ME, SEEMS LIKE A REALLY DANGEROUS WAY TO PROCEED IN CASES IN SELECTING JURIES.

>> WELL, IT MAY NOT BE THE OPTIMAL WAY TO PROCEED, BUT THERE WAS NO DANGER IN THIS CASE X. THIS IS THE CASE THAT WE'RE FOCUSED ON.

AGAIN, THIS COURT HAS SAID THAT--

>> WHY?

I MEAN, YOU MAKE THAT BROAD STATEMENT, BUT WHY?

BECAUSE WE DON'T KNOW WHO THE-- WHAT FURTHER JURORS WERE EXCUSED, WE DON'T HAVE A RECORD OF WHAT KIND OF ISSUES WERE DISCUSSED OR RAISED WITH REGARD TO ANY OF THE JURORS.

>> WELL, WE DO KNOW ALL THE QUESTIONING AND THE ISSUES RAISED BECAUSE THAT'S ALL ON THE RECORD.

>> NO, NO, MY POINT IS AS THEY'RE BEING EXCUSED AND YOU'RE PUTTING TOGETHER OTHERS, AND IF THERE'S SOME KIND OF AGREEMENT BETWEEN THE PARTIES THAT SHOULD

NOT HAVE BEEN AN AGREEMENT, I MEAN, ISN'T THAT THE REASON THAT WE DO IT ON THE RECORD?

IN THIS CASE IT MIGHT AS WELL LET THE COURT REPORTER DO WHAT THEY WANT TO DO, FORGET BEING THERE, REALLY.

THE WHOLE PURPOSE IS TO PRESERVE SO WE CAN SEE.

>> YES, YOUR HONOR.

I ALSO WANT TO POINT OUT A CASE IS LOST DURING THIS ARGUMENT ON TUESDAY WHEN THEY CAME BACK, ALL 27 POTENTIAL JURORS WERE SITTING IN THE COURTROOM.

SO MR. HOJAN AND THE TRIAL COURT SAW 27 PEOPLE, AND THE ATTORNEY SAID THIS IS OUR PROPOSED JURY PANEL.

IF THAT IS ACCEPTABLE, THE COURT CAN TURN AROUND AND LOOK AND MR. HOJAN COULD TURN AROUND AND LOOK TO SEE IF HISPANICS OR ASIANS OR AFRICAN AMERICANS WERE BEING EXCLUDED BECAUSE THEY WERE SITTING THERE.

>> AND THE TRIAL JUDGE KNEW WHICH ONE OF THOSE 27 WOULD BE ON THE PANEL?

>> YES.

>> AND HOW WOULD THAT BE DONE?

>> HE GAVE THE PROPOSED NAMES. HE CALLED THEM UP.

THEY WERE STILL SITTING IN THE COURTROOM.

MR. HOJAN WAS THERE.

MR. HOJAN HAD BEEN ADVISED BY HIS ATTORNEYS BEFORE HE WENT INTO COURT THAT MORNING AND TALKED TO HIM ABOUT WHAT THEY DID.

AND THEN IN THE COURTS--

>> YOUR POINT IS HE DID SEE THE 12 THAT WOULD BE THERE WHILE ALL OF THEM WERE STILL THERE AND HAD THE OPPORTUNITY TO ASK ANY

QUESTIONS.

SO THE QUESTION COMES DOWN TO  
COMMUNICATION BETWEEN THE  
DEFENDANT AND HIS LAWYERS.

>> YES.

>> I UNDERSTAND.

A HYBRID OF EVERYTHING.  
IT IS NOT ALL ONE WAY OR THE  
OTHER.

>> YES.

WHAT WAS GOING ON, THEY WERE IN  
DANGER OF HAVING CALL AN  
ENTIRELY NEW VENEER PANEL AND  
START THE QUESTIONING OVER,  
WHICH AS YOUR JUSTICES KNOW,  
COULD TAKE DAYS.

SO THEY SORT OF SHORT CUT IT.  
THE COURT ALSO GAVE THE  
ATTORNEYS 45 MINUTES IN THE  
COURTROOM, WHICH IS ON THE  
RECORD, 12:18, 12:19, 45 MINUTES  
TO TALK TO MR. HOJAN, AND AFTER  
THAT SECOND DISCUSSION, A VERY  
LONG COLLOQUY TOOK PLACE FOR THE  
COURT ITSELF EXPLAINED WHAT THE  
CHALLENGE WAS TO MR. HOJAN.

THE COURT SAID YOU UNDERSTAND  
THIS IS WHAT WE DO?

AND WE CAN EXCUSE THEM FOR  
WHATEVER REASON WE WANT.

YOUR SITE GETS ONE, THE STATE  
GETS ONE, 10 IN ALL, SO THAT  
WOULD BE 20, AND THAT IS WHAT  
YOU ARE GIVING UP.

AND MR. HOJAN SAID YES, I  
UNDERSTAND.

>> LET ME STEP BACK THE  
APPELLATE IN THIS COUNCIL.  
THE WORD INITIATIVE BEEN RAISED  
ON APPEAL.

LET'S GO OVER OUR CASE LAW, IF  
YOU COULD COME AS TO WHAT THE  
APPELLATE COUNSEL HAD RAISED  
THIS AND SAID THIS SHOULD HAVE  
BEEN A WAIVER OF HIS RIGHTS BE  
PRESENT, NOT A RATIFICATION

BASED ON OUR WHOLE SERIES OF CASES, WE HAVE A CASE THAT IS A HYBRID, WHAT WOULD BE THE LAW THAT WOULD BE APPLIED TO THIS SITUATION?

IT SEEMS TO ME THAT IS WHERE SHOULD HAVE BEEN RAISED WAS ON APPEAL RATHER THAN POSTCONVICTION IF IT IS TO BE RAISED AT ALL.

WHAT IS YOUR ARGUMENT AS TO WHY THIS WOULDN'T BE, WHY THIS ISN'T A FUNDAMENTAL ERROR?

>> TO FIND RELIEF WHEN THERE WAS NO OBJECTION MADE AT THE TRIAL LEVEL--

>> THAT IS WHAT I SAID, WHY IS IT A FUNDAMENTAL ERROR?

>> BECAUSE THE SUPREME COURT HAS SAID THESE CHALLENGES ARE NOT A CONSTITUTIONAL GUARANTEE.

>> ARE YOU SAYING IF THERE'S A CASE WHERE A DEFENDANT WAS ABSENT FOR THE ENTIRE CHALLENGING, THE ENTIRE QUESTIONING, AND AFTER THE CAUSE OR WHATEVER WAS ONLY PRESENT FOR THE CAUSE AND HAD NO ROLE IN WHO IS GOING TO SIT ON HIS JURY IN A DEATH CASE THEN WE WOULD SAY THAT WAS NOT CONSTITUTIONALLY DEFICIENT?

>> WOULD NOT SAY THAT AT ALL.

>> THOUGHT YOU SAID THE SPRINKLER SAID IT IS UNCONSTITUTIONAL THEREFORE THERE IS NO FUNDAMENTAL ERROR.

>> THE SUPREME COURT SAID IF THERE ARE ABSENCES, THEY CAN WAVE IT OR SUBSEQUENTLY RATIFIED.

>> YES, BUT IT IS CONSTITUTIONALLY PROTECTED, THE DEFENDANT HAS A RIGHT TO BE THERE FOR THE QUESTIONING OF THE JURY AND FOR THE CAUSE

CHALLENGES.

THIS CASE IN MOHAMMED SAID WINDY DEFENDANT WASN'T PRESENT BUT HAD HEARD THE QUESTIONING, THAT WAS CONSTITUTIONALLY PROTECTED, THE CAUSE CHALLENGES.

BUT IT WAS CARED WHEN MOHAMMED LATER RATIFIED IT.

>> THE DIFFERENCE BETWEEN RATIFICATION AND WAIVER.

I WAS ON THE FOURTH DISTRICT THERE WAS AN ISSUE IF THEY COULD GO WITH FIVE JURORS VERSUS SIX, AND MY VIEW DIDN'T PREVAIL IN THE WAIVER VERSUS RATIFICATION. SO YOUR ARGUMENT WOULD BE THAT HE COULD NOT PREVAIL ON THE MERITS EVEN IF IT WAS RAISED.

>> CORRECTED.

>> UNDER THOSE MERITS.

WHAT WOULD AN EVIDENTIARY HEARING SAYING THE HAS TO BE AN EVIDENTIARY HEARING TO SEE WHAT EXACTLY HAPPENED OVER THE COURSE TRADING WEEKEND AND WHAT MR. HOJAN WAS TOLD.

HE SAYS MY LAWYER DIDN'T TALK TO ME AT ALL, AND THEN I'M IN ON TUESDAY MORNING.

YEAH, I SAID THAT ON THE RECORD, BUT I WAS MISLED AS TO THIS, WHAT WOULD BE THE STANDARD FOR IN THAT CASE PREJUDICE IF HE SAYS THAT HE DIDN'T REALLY CONSENTS TO THIS?

>> WELL, YOUR HONOR, THERE IS NOTHING, THERE IS NO NEED FOR AN EVIDENTIARY HEARING BECAUSE ALL OF THIS WAS BROUGHT OUT ON THE RECORD ITSELF.

>> WHAT THEY'RE SAYING IS NO, WE DON'T KNOW WHAT HAPPENED OVER THE WEEKEND BETWEEN THE DEFENSE LAWYER AND THE PROSECUTOR, WE DON'T KNOW WHAT THE CONVERSATIONS WERE BETWEEN THE

DEFENSE LAWYER AND MR. HOJAN.  
DID HE HAVE A DISCUSSION WITH  
HIM?

HOW OLD IS MR. HOJAN?

>> HE WAS IN HIS LATE 20S.

>> HE HASN'T HAD EXPERIENCE IN A  
JURY TRIAL EVER, AND THIS IS NOW  
FOR HIS LIFE.

LET'S JUST ASSUME HE SAYS MY  
LAWYER SAYS THIS IS THE BEST WAY  
TO GO AND I DIDN'T KNOW ANY  
BETTER, AND I SAID OKAY, THAT I  
WANTED TO HAVE MORE QUESTIONING.  
SO LET'S ASSUME THAT LAWYER  
DIDN'T PROPERLY ADVISE.

NOW WE GO TO FIGURE OUT WHAT IS  
THE STANDARD FOR PREJUDICE IN  
THAT SITUATION.

>> WELL, ASSUMING FOR ARGUMENT  
SAKE HE WASN'T PROPERLY ADVISED  
ALTHOUGH THE RECORD NEGATES THAT  
-- THE ONLY THING THAT HE  
ALLEGES AS PREJUDICE WAS I  
BELIEVE THE JUROR HAD A BATTERY  
CHARGE AND THAT HOJAN WANTED  
MORE QUESTIONING ON THAT,  
HOWEVER AS I POINT OUT IN MY  
BRIEF, THE BATTERY CHARGE WAS  
DISMISSED BEFORE HE EVER WAS  
PROSECUTED, AND FRANKEL HAD  
ALREADY BEEN QUESTIONED  
ABOUT IT.

SO HE CAN'T SHOW PREJUDICE  
FROM THAT.

HE ALSO CAN'T SHOW THAT A  
BIASED JUROR SAT.

HE DOESN'T EVEN MAKE  
THAT ALLEGATION.

I BELIEVE THE IAC CLAIM FAILS  
BOTH ON DEFICIENCY AS WELL AS  
THE PREJUDICE.

>> SEEMS TO ME IF IT ISN'T  
REVERSIBLE FUNDAMENTAL ERROR, IT  
IS A HARD ISSUE TO SAY THAT WHAT  
IS IT DURING THE INEFFECTIVE?  
THIS IS AN UNUSUAL CLAIM BUT

THIS IS AS MS. LEWIS WAS SAYING NOT IN ANY JURY SELECTION I'VE EVER SEEN DONE, BUT OTHERS MAY HAVE EXPERIENCE WITH IT.

IT'S NOT ANYTHING THAT I WOULD WANT TO ENCOURAGE.

YOU'RE SAYING IT IS NOT OPTIMAL, BUT YOU'RE STILL SAYING THEY CAN'T BE PREJUDICE UNDER EITHER EFFECTIVE ASSISTANCE OF TRIAL COUNSEL OR APELLET.

>> CORRECTED I WANT TO MAKE ONE LAST COMMENT WAS AN ELECTED TO DO BEFORE.

HE MADE A COMMENT OF ONE OF THE JURORS SAYING HE KNEW A POLICE OFFICER.

I WANTED TO POINT OUT THAT POLICE OFFICER NEVER TESTIFIED AT TRIAL AND HE WAS A PERIMETER OFFICER, HE WAS INVOLVED IN THE INVESTIGATION AND NEVER TESTIFIED SO THERE WAS NO POSSIBILITY THAT WOULD HAVE AFFECTED THE JUROR THE FACT HE KNEW THIS ONE INDIVIDUAL. BASED ON THAT I ASKED THIS COURT TO CONFIRM THE DENIAL OF THE CONVICTION RELIEF.

>> THANK YOU.

CHAIR, TWO MINUTES.

>> VERY BRIEFLY I WANT TO CLARIFY ONE THING.

THE CONSTITUTIONAL RIGHT TO EXERCISE THE CHALLENGE IS A DIFFERENT ISSUE THAN THE CONSTITUTIONAL RIGHT TO BE PRESENT.

SO JUST BECAUSE THE STATE IS ARGUING YOU DON'T HAVE ANY CONSOLATION WILL RIGHTS TO EXERCISE OF APPROPRIATE CHALLENGE, THAT DOESN'T ANSWER THE QUESTION PRESENTED HERE.

>> THE ARGUMENT AS I SEE IT THE STATE IS MAKING HERE IS OKAY WE

HAVE THESE PROCEDURES, THE TRIAL HAS PROGRESSED TO X POINT.

AT THAT POINT, THE ONLY THING LEFT WAS ADDRESSING CHALLENGES. THERE WERE NONE EXERCISE FOR THE WEEKEND.

THE PARTIES I HAVE TALKED ABOUT IT, THE LAWYER SLANT TALKED ABOUT IT, BUT EVERY JUROR CAME BACK ON THE NEXT DAY, AND WHEN THEY CAME BACK THE CAUSE IT IS JUST AS THOUGH THEY HAD LEFT WHEN THEY LEFT THE COURTHOUSE ON FRIDAY OTHER THAN THE DISCUSSIONS.

AND IF THEY HAD WANTED, NO ONE HAD BEEN STRICKEN BY THE COURT UNDER THE PRESENCE OF THE DEFENDANT, THE DEFENDANT WAS THERE AND COULD HAVE DEMANDED MORE QUESTIONS.

HE WAS GOING TO SEE FOR THE FIRST TIME THE JURY, AND HE WAS GOING TO SEE THE ONES WHO WERE STRICKEN JUST AS IF THEY HAD CONTINUED ON FRIDAY, BUT THERE WAS SOMETHING THAT OCCURRED IN DIRECTIONS ABOUT THE QUESTIONING OF THE JURY BEFORE THE LAWYERS JUST DISCUSSED IT.

ARE YOU SAYING THAT YOU WANT TO SEE IF MORE QUESTIONS WERE ASKED OF THE JURY?

BECAUSE I'M NOW SEEING THIS PICTURE THE JURY HAS GONE HOME, THE PROSPECTIVE JURY.

>> CORRECT.

>> THEY'VE GONE HOME, TWO LAWYERS SITTING THERE AT THE COUNSEL TABLE TALKING ABOUT WHAT THEIR THOUGHTS ARE ON PREEMPTORY.

>> NOBODY WAS EXCUSE BECAUSE THE JUDGE WAS CALLED TOO.

>> I AGREE WITH PART OF WHAT YOU SAID.

PART OF WHAT MY UNDERSTANDING IS  
WAS THERE WAS NO AWARE THERE WAS  
ANY ADDITIONAL QUESTIONING OF  
THE JURORS BECAUSE COURT HAD  
BEEN COMPLETED FOR THE DAY.  
WHAT I DON'T AGREE WITH IS THAT  
THERE WERE 27, 28 PEOPLE, THE  
NEXT THING THE RECORD SHOWS IS  
THAT THERE WAS THIS MEETING THAT  
JURORS HAD BEEN SELECTED.  
WE DON'T KNOW THE BASIS OF THAT.  
DID THEY THROW A THING IN THE  
AIR?

WE DON'T KNOW IT NOT BY THE  
COURT, BY THE LAWYERS.

>> BUT THE RECORD SHOWS ALL THE  
27 WERE PRESENT WHEN THE RECORD  
STOPPED--

>> RIGHT.

>> AND WERE PRESENT AGAIN WHEN  
THE RECORD CONTINUE TO.

>> WHAT THE RECORD SHOWS IS  
THERE WAS A DISCUSSION, THE  
DISCUSSION BEGAN WITH THE  
BACK-AND-FORTH WITH THE LAWYER,  
AND THEN THERE IS DISCUSSION  
WITH CERTAINLY ONE POINT THE  
JUDGE SAID MAYBE IF THERE WAS  
ADDITIONAL DISCUSSION ABOUT DID  
ANY OF THE 12 PEOPLE YOU PICKED  
HAVE TRAVEL PROBLEMS, PROBLEMS  
WITH TRAVEL THIRD HAVE TO TAKE  
OFF THE MIDDLE OF THE TRIAL.  
SO AT THAT POINT LATER ON WHEN  
THIS TRANSPIRED, THEN THE COURT  
BROUGHT IN THOSE PEOPLE, BUT  
DON'T FORGET MR. HOJAN THROUGH  
HIS LAWYER AT THE BEGINNING SAID  
I WANT THE QUESTIONING OF THESE  
PEOPLE, SO THE PROCESS WAS  
TRUNCATED.

>> WAIT A MINUTE.

THE COURT IN OPEN COURT ASKED  
ARE YOU AWARE AS OF THE DAY 27  
INDIVIDUALS HAVE NOT BEEN  
STRICKEN FOR CAUSE.

AND SAID YES, YOUR HONOR.

>> THIS IS THE COLLOQUY?

>> YES.

>> RIGHT.

>> SO THE 27 WERE THERE.

>> THAT MIGHT HAVE BEEN IN THE COURTHOUSE, I DON'T EVER SHOWS THERE IN THE COURTROOM AT THAT POINT.

THEY WERE NOT IN THE COURTROOM AT THAT POINT, SO ALL OF A SUDDEN 12 PEOPLE GET TROTTED IN, ACTUALLY 16 PEOPLE GET TROTTED IN, AND HERE IS HIS JURY AND HE HAS NOT BEEN PRESENT DURING THE PROCESS BY WHICH ANY CHALLENGES--

>> SO THERE IS A FACTUAL DISPUTE AS TO WHAT OCCURRED.

MY COLLEAGUES MAY NOT THINK THAT IMPORTANT, BUT TO ME IT IS THAT IMPORTANT IF IT IS MERELY A DELAY, A TIME SEQUENCE OR SOMETHING HAS REALLY HAPPENED THAT HAS MATERIAL DURING THAT PERIOD WHEN OTHER PEOPLE ARE AWAY.

THAT KIND OF THING, THAT REPRESENTS THE DIRECTORIES HAD BEEN EXERCISED.

>> IT SHOULDN'T HAVE BEEN UNDERTAKEN, THESE LAWYERS WENT THROUGH THE 27, 28, OFF THE RECORD WITHOUT ANY JUDICIAL INVOLVEMENT, WITHOUT MR. HOJAN BEING PRESENT AND SELECTED THIS JURY.

>> WHAT MS. LERNER IS SAYING IS ALL OF THE JURORS, ALL 27 IN ANSWER TO JUSTICE LEWIS' QUESTION WERE IN THE COURTROOM.

>> THEY CAME TO COURT.

>> IN THE COURTROOM WHERE MR. HOJAN WAS PRESENT.

>> THEY WERE BROUGHT IN AFTER THIS DISCUSSION HAD HAPPENED.

>> I UNDERSTAND.

>> AND SAID THESE ARE THE 12.

>> HE SAW THE 12 THAT HAD BEEN  
AGREED TO WITH HIS LAWYER, IS  
THAT RIGHT?

SO IT WASN'T JUST THAT THE 12  
GOT TROTTED IN ANY OTHER 15 WERE  
OUTSIDE.

>> TO BE HONEST, I DON'T KNOW  
GOOD I DON'T KNOW IF THE 16 WERE  
BROUGHT IN OR ALL 27.

MY POINT IS IT DOESN'T MAKE A  
DIFFERENCE BECAUSE HE WAS NOT A  
PARTICIPANT IN THIS SELECTION  
PROCESS SO WHETHER THEY WERE  
PRODDED OUT LATER OR NOT, WE  
DON'T HAVE ANY IDEA.

IF YOU LOOK AT MY BRIEF, IN  
TERMS OF THE PREJUDICE, I DO  
DISCUSS THAT WE DON'T KNOW,  
CERTAINLY NOBODY EVER APPRISED  
MR. HOJAN OF THAT NATURE, SO WE  
DON'T KNOW.

>> THANK YOU VERY MUCH.

WE ARE IN RECESS FOR 10 MINUTES.

>> ALL RISE.