

>> READY WHEN YOU ARE, COUNSEL.

>> MAY IT PLEASE THE COURT, MY NAME IS RICHARD KURTZ, I AM IN PRIVATE PRACTICE.

I WAS APPOINTED TO REPRESENT RASHEEM DUBOSE ON TWO DIFFERENT LEVELS.

FIRST ONE RESULTED IN A HUNG JURY, AND MISTRIAL WAS DECLARED.

WE WENT TO TRIAL AGAIN IN ANOTHER TWO WEEK TRIAL THAT RESULTED IN THE CONVICTION AND THE ULTIMATE SENTENCE OF DEATH THAT WE'RE HERE UPON.

I WAS ALSO APPOINTED TO REPRESENT HIM ON APPEAL TODAY.

>> BE SURE TO TALK INTO YOUR MIC, PLEASE.

>> THANK YOU.

I'LL TRY TO DO THAT.

YOU MAY HAVE SEEN, I'M SURE YOU'VE SEEN THROUGHOUT THE COURSE OF THE BRIEFS IS THAT AFTER THE PENALTY PHASE RECOMMENDATION AND BEFORE THE SENTENCE OF DEATH, I WAS CONTACTED BY A JUROR IN THIS CASE, AND THAT JUROR -- WHO APPARENTLY HAD BEEN TRYING TO REACH THE JUDGE -- SHE REACHED A PRIVATE LAWYER, SHE REACHED THE PUBLIC DEFENDER, SHE WENT ON TWO DIFFERENT OCCASIONS TO ADVISE THAT SHE BELIEVED THERE WERE MISCARRIAGES OF JUSTICE AND/OR JUROR MISCONDUCT THROUGHOUT THE COURSE OF THE TRIAL AND THE PENALTY PHASE.

WHILE I'M GOING TO ASK THE COURT TO ULTIMATELY REVERSE FOR A NEW TRIAL AND PENALTY PHASE, BUT I'D LIKE TO START MY POSITION ON WHAT I BELIEVE SHOULD BE THE EASIEST OF MY ARGUMENTS BY LEADING THE FOCUS ON WHY I BELIEVE THERE SHOULD BE A NEW PENALTY PHASE IN THIS CASE.

>> HOW ABOUT IF YOU START ONE STEP BEFORE THAT.

IT'S MY UNDERSTANDING THAT THE

TRIAL JUDGE HERE DID NOT ACCEPT THE CREDIBILITY OF THIS JUROR'S TESTIMONY.

>> HE ULTIMATELY, JUDGE, HE ULTIMATELY DID MAKE THAT DECISION --

>> I MEAN, I LOOK AT IT, AND I SEE THESE THINGS ARE THERE. IF THESE HAPPENED, THEN CERTAINLY IT'S ONE VIEW. BUT IF I'VE GOT A JUDGE SAYING THIS DIDN'T HAPPEN, I DON'T BELIEVE THIS, I MEAN, HOW DO WE DISCUSS THAT?

IT'S LIKE HE EITHER DOES OR DOESN'T EXIST AT ALL.

>> IT'S AN ABUSE OF DISCRETION STANDARD, YOUR HONOR, AND IF AS IT PERTAINS TO THAT JUROR, THE JUDGE MADE FINDINGS THAT SHE WAS HYSTERICAL, AND THERE'S NOTHING LIKE THAT WHATSOEVER IN THE RECORD.

THERE'S NO AGREEMENT OF COUNSEL BY THAT.

>> WHAT ARE THE INCONSISTENCIES MADE BETWEEN STATEMENTS MADE IN HER AFFIDAVIT AND HER TESTIMONY BEFORE THE COURT?

>> MINUSCULE.

AND I READ THAT THIS MORNING. I'M SORRY, IN MY HUMBLE OPINION. [LAUGHTER]

AND I'LL TELL YOU, JUSTICE CANADY, ONE OF THE ISSUES WAS WHETHER OR NOT THE JUROR WAS RESEARCHING A TEARDROP TATTOO AND WHETHER OR NOT THAT WAS GOOGLED AND FOUND A GANG-RELATED ACTIVITY.

AND I LOOKED AT PAGES 24 AND 25 THIS MORNING, AND THERE'S TWO OR THREE QUESTIONS WHERE IT'S CLEAR WHAT THE JURORS ARE TALKING ABOUT.

THE JUDGE IS FINDING OUT TALKING ABOUT DURING DELIBERATIONS OR NOT, BUT THEY ARE TALKING ABOUT IT.

IT'S CLEAR SHE'S TALKING ABOUT

IT WITH OTHER JURORS.  
THEY DIDN'T ASK THE FOLLOW-UP  
QUESTION WHICH I ASKED THE COURT  
TO ASK BECAUSE THE COURT ASKS US  
QUESTIONS, AND HE DID NOT ASK MY  
WRITTEN QUESTIONS WHICH I WAS  
FOCUSING ON THINGS THAT ARE  
EXTRINSIC TO THE VERDICT.

>> ON THAT POINT, YOU SAID HE  
DID NOT ASK SOME OF THE  
QUESTIONS THAT YOU HAD GIVEN  
HIM.

DID YOU MAKE ANY OBJECTION TO  
THE TRIAL JUDGE ABOUT NOT ASKING  
ANY SPECIFIC QUESTIONS?

>> YES, JUDGE.

THE STATE WAS BOTH GIVEN AN  
OPPORTUNITY --

>> NO, I'M TALKING ABOUT AFTER  
THE JUROR HAD BEEN QUESTIONED  
AND THE JUDGE, I BELIEVE, SAID  
AT SOME POINT THERE ARE SOME OF  
THESE THINGS THAT ADHERE TO THE  
JURY'S VERDICT, AND I'M NOT  
GOING TO ASK THEM.

THE JUDGE PROCEEDED TO ASK THE  
QUESTION.

AFTER THAT QUESTIONING WAS OVER,  
DID YOU MAKE ANY STATEMENT TO  
THE JUDGE, ANY OBJECTION TO THE  
JUDGE OR DID THE JUDGE TELL YOU  
TO ASK ANY PERTINENT QUESTIONS?

>> I BELIEVE I DID.

I'LL LET THE RECORD REFLECT UPON  
THAT, BUT ONE OF THE QUESTIONS I  
ASKED WAS EXTRINSIC.

I JUST WANTED TO PAINT THE WHOLE  
PICTURE.

BUT THE EXTRINSIC ISSUES THAT  
WERE REQUESTED WAS DID THE JUROR  
MEMBERS RESEARCH THE CASE ON  
THEIR PHONES.

DIDN'T ASK THAT.

DID THEY SEARCH, THE JURY,  
TATTOOS.

HE DIDN'T ASK THAT.

HE ASKED IF THEY DISCUSSED IT,  
AND THE ANSWER WAS IN THE  
AFFIRMATIVE.

NOT DURING DELIBERATIONS, BUT IF

THEY'RE RESEARCHING THE CASE DURING THE COURSE OF THE CASE, THAT'S IN VIOLATION OF COURT'S ORDERS THAT EVERY TIME THEY LEAVE THE ROOM AND COME IN THEY'RE TOLD NOT TO DISCUSS THE CASE WITH ANYONE AMONGST THEMSELVES OR START REACHING CONCLUSIONS.

AND SHE SAYS AFFIRMATIVELY WE HAVE BEEN DISCUSSING NOT ONLY THE TEARDROP TATTOO, BUT WE'VE ALSO BEEN DISCUSSING BETWEEN THE KILL PHASE AND THE PENALTY PHASE -- HOUSE HAS BURNT DOWN THREE DAYS AFTER THE VERDICT, AND WE DIDN'T KNOW IF THAT WAS RELATED TO THE VERDICT.

>> YOU'RE TALKING VERY FAST HERE, AND I UNDERSTAND YOU HAVE LIMITED TIME, BUT LET'S TALK ABOUT THE RESEARCH AND THE USE OF THE CELL PHONE --

>> YES, YOUR HONOR.

>> -- TO DO THIS RESEARCH. BECAUSE I THOUGHT THE RECORD INDICATES THAT DURING HER QUESTIONING SHE INDICATED THAT THERE WERE NO PHONES THAT WERE BEING USED DURING THE GUILT PHASE AND THAT --

>> DURING THE GUILT PHASE DELIBERATIONS, YES.

>> OKAY.

THE GUILT -- I'M SORRY?

>> GUILT PHASE DELIBERATIONS.

>> OKAY.

THEN AT THE PENALTY PHASE I THOUGHT SHE SAID THAT TWO PEOPLE HAD A CELL PHONE, ONE MADE A PHONE CALL AND SHE DIDN'T KNOW WHAT THE OTHER PERSON WAS DOING. SO IF THAT IS TRUE, WHEN DID THE RESEARCH TAKE PLACE?

>> THE ANSWER TO THAT IS IT PROMOTES THROUGHOUT THE PROGRESS OF THE CASE BECAUSE THERE'S THINGS I TALKED TO YOU IN THE GUILT PHASE OR I'LL JUST MENTION NOW SINCE YOU ASKED.

DURING THE GUILT PHASE WHEN THEY WERE MAKING CONVERSATIONS -- OH, TO ANSWER FOR THE RESEARCH, THERE'S AN AFFIRMATIVE STATEMENT BY HER THAT THEY WERE RESEARCHING THE LOCATIONS OF THE HOUSES, THE APARTMENT COMPLEX AND LOCATION TO THE PROXIMITY OF THE SHOOTINGS.

THAT IS SOMETHING THEY'RE NOT SUPPOSED TO DO.

THEY'RE SUPPOSED TO CONSIDER ONLY EVIDENCE --

>> AND WHEN DID SHE SAY THIS TOOK PLACE?

>> PARDON ME?

DURING THE COURSE OF THE TRIAL. DURING THE COURSE OF THE GUILT PHASE.

DURING THE COURSE OF THE GUILT PHASE IS WHERE THEY WERE TRYING TO FIGURE OUT WHERE THE HOUSES WERE, WHERE THE SHOOTING TOOK PLACE.

AND THE OTHER PORTION OF THE GUILT PHASE THAT I WAS GOING TO GET TO IS THAT WHEN THEY WERE PLAYING MY CLIENT'S INTERVIEW WHERE THEY WERE MAKING RACIAL REFERENCES --

>> WELL, THAT'S -- I WANT TO ASK YOU SPECIFICALLY ABOUT THAT.

UNDER G IN HER AFFIDAVIT, THAT STOOD OUT AS SOMETHING THAT WAS OF GREAT CONCERN TO ME.

I LISTENED TO THE JURY LAUGH AND MAKE FUN OF THE DEFENDANT, THE POLICE INTERVIEW MAKING RACIAL REFERENCES, AND THE VIDEO NEEDED SUBTITLES SO THEY COULD UNDERSTAND THE ENGLISH.

WHEN I WENT TO POINT OUT THAT RASHEEM DID NOT HAVE DREADS, THEY TOLD ME I WAS NOT OF THAT CULTURE.

THERE'S NOTHING IN THE ORDER DENYING THE NEW TRIAL THAT REFERS TO THAT.

WAS SHE QUESTIONED ON THOSE SPECIFIC THINGS?

>> NOT AT ALL.

AND --

>> WELL, DID YOU ASK FOR IT TO BE?

>> ABSOLUTELY.

MY WRITTEN QUESTIONS ARE AT PAGE 150 OF THE RECORD ON APPEAL SUBSEQUENT TO VOLUME 3 --

>> BUT GOING BACK TO WHAT JUSTICE QUINCE SAYS, BECAUSE THIS SEEMS TO BE, YOU KNOW, I MEAN, IF THERE'S RACIAL PREJUDICE GOING ON, THIS IS BEYOND EVERYTHING ELSE.

DID YOU AFTER THE JURY, AFTER THE JUROR WAS ASKED QUESTIONS, DID YOU SAY, BUT, JUDGE, YOU'VE GOT TO -- I'M NOT TALKING ABOUT -- THIS AREA, SHE WAS NOT QUESTIONED ON THIS?

YOU'VE GOT TO DO THAT?

>> CERTAINLY.

I DIDN'T PICK AN ARGUMENT OR A FIGHT WITH THE JUDGE, BUT AT THE END OF THAT, THE JUDGE HAS INDICATED THAT I RECEIVED YOUR LIST OF QUESTIONS, AND I AM NOT ASKING YOUR SPECIFIC QUESTIONS. THAT DIALOGUE DID TAKE PLACE IN THE RECORD WHERE HE SPECIFICALLY SAID, "I AM NOT ASKING THE QUESTIONS THAT YOU'VE ASKED."

>> AND THEN WHAT DID YOU SAY?

>> WELL, I MEAN --

>> YOU SEE, THE PROBLEM AS I SEE IT IS THAT IF YOU HAVE SPECIFIC AREAS THAT THE JUDGE DOES NOT COVER, THEN YOU SHOULD HAVE SAID, JUDGE, THESE ARE SOME QUESTIONS THAT REALLY FOCUS IN ON WHATEVER THE ISSUE IS, THE RACIAL PREJUDICE OF THE JURORS. I NEED YOU TO ASK THOSE QUESTIONS.

>> AND I DID ASK THOSE, AND THOSE ARE CITED AT 150, AND THE SPECIFIC QUESTION THAT I ASKED WAS NUMBER 21; "DID THE MEMBERS OF THE JURY MAKE ANY RACIAL COMMENTS ABOUT THE DEFENDANT OR

HIS SPEECH."

AND THE JUDGE REFUSED MY  
REQUEST.

THAT WAS MY REQUEST.

HE DID THAT.

IF I LOOK AT THE CASE, THIS  
STATE, THE SUPREME COURT'S  
DECISION IN MARSHALL V. STATE  
WHICH WAS AN ALLEGATION OF  
RACIAL BIAS IS PERHAPS THE MOST  
SERIOUS OF JUROR MISCONDUCT AND  
MANY CASES BASED ON RACIAL BIAS,  
IT WOULD BE REASONABLE TO  
CONCLUDE THAT THE TRIAL JUDGE IF  
IT USED HIS DISCRETION, IF IT  
FAILED TO INQUIRE THE ACCUSED  
JUROR OF THIS MATTER.

I SPECIFICALLY ASKED FOR IT, THE  
JUDGE DIDN'T DO IT, AND IT'S  
REASONABLE TO CONCLUDE THAT HE  
ABUSED HIS DISCRETION --

>> WHAT WAS THE RACIAL  
COMPOSITION OF THIS JURY?

>> I'M SORRY?

>> THE RACIAL COMPOSITION OF  
THE --

>> I WAS REFLECTING ON THAT AND  
LOOKING AT MY CHART.

IT WAS MY RECOLLECTION --

>> NO, I DON'T WANT YOUR -- IS  
IT IN THE RECORD?

>> IT SHOULD BE IN THE RECORD, I  
BELIEVE IT WAS 9-3.

>> WHAT WAS THIS JUROR'S, WHAT  
WAS HER RACE?

>> THE JUROR WHO CAME FORWARD?  
THERE WAS -- HER LAST NAME WAS  
CHAVEZ, BUT TURNS OUT SHE'S  
ITALIAN.

>> [INAUDIBLE]

>> HER LAST NAME IS CHAVEZ WHICH  
SOME PEOPLE THOUGHT IT WAS --

>> SHE WASN'T AFRICAN-AMERICAN.

>> NO.

SHE WAS THE ONE WHO SAID THOSE  
AREN'T DREADLOCKS, AND THEY'RE  
TELLING HER YOU'RE NOT FROM THAT  
CULTURE WHICH TIES BACK INTO THE  
RACIAL PREFERENCES THAT WE HAVE  
THAT THIS COURT HAS RULED THAT

THAT IS ABSOLUTELY AN ABUSE OF DISCRETION IF HE DOES NOT INQUIRE.

SO I REQUESTED IT, THE JUDGE AT THE END OF IT SAID I'VE GOT YOUR REQUEST, I'M NOT DOING THOSE REQUESTS.

WHETHER I SAID I OBJECT OR WENT FURTHER, I DON'T KNOW, BUT I CLEARLY FIND THAT TO BE FUNDAMENTAL ERROR.

IT WAS SPECIFICALLY ASKED BY ME. IN THE STATE'S QUESTION, THEY DON'T ASK THAT QUESTION.

I AM ASKING ABOUT THE EXTRINSIC THINGS IN THIS VERDICT, AND I ASKED THE JUDGE TO FIND OUT --

>> SO WHAT WERE THE SPECIFIC THINGS THAT YOU BELIEVE INDICATED RACIAL PREJUDICE?

>> WELL, I WANTED THE COURT TO DELVE DEEPER, BUT WHAT SHE SAID IN HER AFFIDAVIT WAS THAT THEY WERE MAKING RACIAL SLURS, THEY WERE MAKING --

>> DID SHE, WAS IT --

>> SLURS OR RACIAL REMARKS, WAS HER PHRASE, I BELIEVE, IN HER AFFIDAVIT.

SHE OBSERVED THE JURY MAKING RACIAL REMARKS ABOUT THE CLIENT. REFERENCES --

>> JUST MAKE SURE THAT ONE OF THE DEFENDANT'S POLICE INTERVIEWS THEY NEEDED SUBTITLES SO THEY COULD UNDERSTAND THE ENGLISH.

NOW, I HAVEN'T LISTENED TO THE INTERVIEW, BUT IT MAY HAVE BEEN HARD TO UNDERSTAND.

BUT THAT'S STILL AN AREA I CERTAINLY THINK YOU SHOULD HAVE BEEN, THERE SHOULD HAVE BEEN INQUIRY ABOUT.

>> AND I AGREE, YOUR HONOR.

AND IT'S ON THE RECORD.

THAT SPECIFICALLY WAS ONE OF MY QUESTIONS FOR HIM.

I UNDERSTAND THERE'S EXTRINSIC AND INTRINSIC, SO THE THINGS I



ASKED THE COURT TO DO WAS SIMPLY  
WHAT I JUST SAID.

EXCEPT I ALSO WANTED TO KNOW  
ABOUT THIS GRANDMOTHER'S HOUSE  
BURNING DOWN THREE DAYS AFTER  
THE VERDICT.

THEY OBVIOUSLY HAVE TO BE  
THINKING TO THEMSELVES THAT HAD  
SOMETHING TO DO WITH OUR  
VERDICT.

I'M GOING TO A PENALTY PHASE  
WHERE THIS TIES INTO SOME OF THE  
OTHER CASE LAW THAT INDICATES A  
JUROR MAY HAVE SOME CONCERN  
ABOUT THEIR OWN SAFETY IN THIS  
CASE, BUT THEY OPENLY DISCUSSED  
IT DURING THE BREAKS.

SO THEY'RE DISCUSSING THE FACT  
THAT THE GRANDMOTHER'S HOUSE HAD  
BURNT DOWN, THEY ARE OPENLY  
DISCUSSING THAT A TEARDROP --  
EXCUSE ME, THEY CALLED IT A  
TEARDROP TATTOO WHICH IF YOU  
LOOK AT THE STUFF THAT SHE SAYS  
IN HER THING INDICATES  
GANG-RELATED ACTIVITY OR SOMEONE  
COULD ACTUALLY KILL SOMEONE, BUT  
IN REALITY IT'S A DOLLAR SIGN  
TATTOO.

SO THEIR THOUGHT WAS EVEN WRONG,  
AND THEY WENT DOWN A PREJUDICIAL  
LINE, AND THERE WAS NO EVIDENCE  
WHATSOEVER AT THIS TRIAL TO  
SUGGEST ANY GANG ACTIVITY.

>> LET ME ASK --

>> YES, SIR.

>> LET ME ASK YOU ABOUT THE  
JUROR'S EFFORTS TO BRING THESE  
MATTERS TO THE ATTENTION OF THE  
TRIAL JUDGE.

MY UNDERSTANDING IS THAT, FIRST,  
SHE WENT TO THE PUBLIC  
DEFENDER'S OFFICE?

>> YES, SIR.

>> THE PUBLIC DEFENDER WAS NOT  
REPRESENTING --

>> CORRECT.

>> IT WAS YOU, CORRECT?

>> I WAS APPOINTED.

>> THEN SHE WENT TO THE CHIEF

JUDGE?

>> NO, YOUR HONOR.

IT WENT PROCEDURALLY --

[INAUDIBLE]

DURING THE COURSE OF THE GUILT PHASE, SHE FELT THAT THINGS WERE GOING IMPROPER, SO SHE REACHED OUT TO THE PUBLIC DEFENDER'S OFFICE THINKING PERHAPS I WAS IN THE PUBLIC DEFENDER'S OFFICE. SHE WAS PLACED WITH AN ATTORNEY WHO TOLD HER SIMPLY GO FIND THE JUDGE, SO SHE MADE EFFORTS TO FIND THE JUDGE.

WHEN SHE WAS REBUFFED THERE, SHE HAD A FRIEND WHO WAS A PARALEGAL WITH ANOTHER ATTORNEY NAMED MITCH STONE, PRIVATE PRACTICE IN JACKSONVILLE.

AND HE, AFTER LEAVING HER TELLING HER TO GO TO THE CHIEF JUDGE, HE HIMSELF -- THE PRIVATE LAWYER -- GOES TO SEE THE CHIEF JUDGE, ADVISES HIM OF THE SAME, AND NOBODY TELLS US.

THE CHIEF JUDGE DOESN'T, THE TWO OTHER LAWYERS DON'T, NOBODY TELLS THE TRIAL LAWYERS OR THE TRIAL JUDGE THAT THIS WOMAN IS TRYING TO DO EVERYTHING SHE CAN TO BRING THIS TO OUR ATTENTION ON POSTCONVICTION.

>> LET ME JUST ASK YOU THIS, AND I JUST WANT TO KEEP IT IN PROPER CONTEXT.

THIS IS HAPPENING, WHAT YOU JUST DESCRIBED, IS HAPPENING DURING PHASE TWO, PENALTY PHASE?

>> ACTUALLY, IT'S HAPPENING BEFORE WE GET TO PHASE TWO.

>> SO IT'S BETWEEN -- HAS HE BEEN FOUND GUILTY YET?

>> AS I UNDERSTAND IT, IT BEGAN DURING THE COURSE OF THE GUILT PHASE, AND SHE WAS TOLD TO GO SEE THE JUDGE AND THAT SHE WENT TO THE JURY ROOM -- EXCUSE ME, SHE WENT TO TALK TO THE BAILIFF OUTSIDE THE ELEVATORS, AND HE SAID, NO, YOU'RE WITH THE JURY,

STAY OVER THERE.  
COULD NOT MAKE IT.  
SHE THEN, THEN THE GUILT PHASE  
WAS OVER, AND THEN SHE WENT TO  
CONTACT THE PRIVATE LAWYER,  
MITCH STONE, WHICH WAS JUST  
DISCUSSED.  
>> RIGHT.  
AND THAT'S WHEN THE PUBLIC  
DEFENDER CONVERSATION BEGAN  
AND --  
>> THE CONVERSATION WITH THE  
PUBLIC DEFENDER HAD ENDED DURING  
THE GUILT PHASE.  
AFTER GUILT PHASE SHE SEEKS OUT  
PRIVATE COUNSEL.  
>> RIGHT.  
>> PRIVATE COUNSEL SEEKS OUT THE  
CHIEF JUDGE, AND THEN  
ULTIMATELY, SEEKS OUT THE STATE  
AND MYSELF TO ADVISE US OF THESE  
THINGS.  
BUT IN THE INTERIM, I DIDN'T  
EVEN KNOW THAT SHE WAS TRYING TO  
REACH ME.  
>> WELL, WHAT EVENTUALLY  
PROMPTED THE TRIAL JUDGE TO  
CONDUCT THE HEARING?  
>> WHAT HAPPENED WAS AFTER, WHEN  
IT CAME BACK TO THE PENALTY  
PHASE, SHE WENT TO THE COURTROOM  
TO FIND THE BAILIFF AS SHE'S  
REQUIRED TO DO OUTSIDE THE  
COURTROOM, AND THE BAILIFF --  
SHE SAID I'M ON THIS JURY, I  
NEED TO SPEAK TO THE JUDGE.  
AND THE BAILIFF SAID YOU'VE GOT  
TO GO BACK TO THE OTHER JURORS.  
SHE'S, LIKE, I DON'T WANT TO BE  
WITH THOSE OTHER JURORS ANYMORE.  
HE SAID, I'M SORRY, GO OVER  
THERE.  
NOBODY ADVISED THE JUDGE, NOBODY  
ADVISED THE TRIAL LAWYERS.  
SHE COMES BACK INTO PENALTY  
PHASE.  
DURING THE EVIDENCE PRESENTATION  
BY THE STATE AND THE DEFENSE,  
SHE THEN TEXT MESSAGES THE  
PUBLIC DEFENDER DURING THE

PROCEEDINGS TO SAY THAT THEY'RE STILL DOING IT, NOBODY'S PAYING ATTENTION, THEY'VE ALREADY MADE UP THEIR MINDS, EVERYBODY'S DISRESPECTING THEIR OATHS, THEY'RE NOT DOING ANYTHING. THAT'S THE CHAIN OF EVENTS OF WHAT THIS JUROR DID.

SO THE ANSWER TO THE QUESTION IS, WE FINALLY HAVE THE DEATH RECOMMENDATION.

I GO OUT TO DINNER THAT EVENING, I'M GETTING PHONE CALLS, E-MAILS AND TEXT MESSAGES ON MY PHONE, AND I'M, LIKE, WHO IS THIS? AND SHE SAYS, A JUROR.

AND I TEXTED BACK A NUMBER, AND I GOT THE WRONG NUMBER BECAUSE I WAS TYPING ON MY PHONE.

DIDN'T HEAR FROM HER.

THE VERY NEXT MORNING I HAD THREE DIFFERENT E-MAILS, TWO TEXT MESSAGES AND A VOICEMAIL FROM HER INDICATING THAT THINGS WERE AWRY.

SHE TRIED TO GO TO THE JUDGE, SHE TRIED TO CORRECT THESE THINGS, AND SHE FEELS IT WAS A MISCARRIAGE OF JUSTICE, AND THAT'S HOW --

>> YOU FILED A MOTION.

>> SO I REFERRED HER BACK TO THE PRIVATE ATTORNEY, MITCH STONE. SO THEN SHE AND HE BEGAN -- SHE HAD SOME NOTES.

I MET WITH HER.

SHE HAD SOME NOTES, I SAID GET BACK WITH MITCH STONE, YOU GUYS WORK THIS THING OUT, GET AN AFFIDAVIT TOGETHER.

I'M GOING TO WASH MY HANDS OF THIS, YOU GUYS DO IT.

HE WAS IN A FEDERAL TRIAL AT TIME, BUT THEY ULTIMATELY PUT TOGETHER AN AFFIDAVIT.

IT WAS E-MAILED BACK AND FORTH FOR HER TO CORRECT.

IT WAS SENT TO ME.

I MET WITH HER TO HAVE HER SIGN IT.

I WENT IMMEDIATELY AT 5:00 ON WHATEVER DAY AND FILED IT, AND THAT'S HOW WE GOT THERE.

>> I'M CONCERNED THAT IT TOOK THIS MUCH EFFORT ON THE PART OF A JUROR TO BRING ANYTHING MINOR OR MAJOR TO THE ATTENTION OF THE TRIAL JUDGE.

I MEAN, SHE WENT TO THE PUBLIC DEFENDER'S, WENT TO THE CHIEF JUDGE, AND DID ANYONE COMMUNICATE ANYTHING TO THE TRIAL JUDGE?

>> NO, YOUR HONOR.

NO.

>> AND YOU'VE GOT THIS JUROR WALKING AROUND THE COURTHOUSE --

>> SHE'S SEEING PUBLIC DEFENDERS, A PRIVATE LAWYER, SHE'S GOING TO THE CHIEF JUDGE, SHE'S GONE TO THE BAILIFF AT THE COURTHOUSE, AT THE DOOR, AT THE PODIUM, AND NOBODY IS GIVING ANY RELIEF.

SHE'S E-MAILING ME, AND WHEN WE FINALLY SPEAK, I'M LIKE --

>> AND THEN WHAT DID THESE PEOPLE SAY ABOUT HER EFFORTS? AS I RECALL, THE JUDGE SAID HE NEVER GOT THIS SUPPOSED E-MAIL SHE SENT THAT NEVER SAID WHO SHE WAS OR ANYTHING.

WHAT DID THE -- WAS THE CHIEF JUDGE ASKED ABOUT ANY COMMUNICATION WITH HIM?

>> NO.

>> OKAY.

SO WHAT IS THE STATE OF THE RECORD ABOUT WHO ACTUALLY GOT ANY INFORMATION FROM HER ABOUT THIS?

>> THE JUROR IN HER AFFIDAVIT, IN HER TESTIMONY ELUCIDATED EVERYTHING THAT I JUST LAID OUT FOR YOU.

HER TESTIMONY EITHER IN THE AFFIDAVIT -- IN THE AFFIDAVIT I'M NOT POSITIVE ABOUT THE PRIVATE ATTORNEY ADVISED THE STATE, AND I DON'T REMEMBER IF

IT'S IN WRITING OR NOT THAT HE  
WENT TO THE CHIEF JUDGE.  
BUT EVERYTHING ELSE THAT I JUST  
TOLD YOU ABOUT HER GOING TO THE  
PRIVATE LAWYER, THE PUBLIC  
DEFENDER'S AND THE BAILIFFS ARE  
IN THE RECORD THROUGH HER  
AFFIDAVIT OR TESTIMONY.

>> AT THE EVIDENTIARY HEARING  
THAT WAS PRESENTED --

>> YES, SIR.

>> -- IN THIS CASE, WHO  
TESTIFIED?

>> HER.

>> THAT'S IT?

>> YES.

AND IT'S MY UNDERSTANDING, AND  
THE CASE LAW IN HAMILTON IS ALL  
I HAVE TO DO AS DEFENSE IS  
ESTABLISH A PRIMA FACIE ARGUMENT  
FOR PREJUDICE.

BURDEN GOES TO THE STATE.

IT'S PURELY UP TO THEM.

THAT AFFIDAVIT WAS SUFFICIENT  
FOR A PRIMA FACIE ARGUMENT.

IT WAS PURELY UP TO THE STATE AT  
THAT POINT.

STATE DID ZERO.

THEY DID NOT CALL A SINGLE  
WITNESS, THEY DID NOTHING IN  
THIS CASE.

THEIR QUESTIONS DON'T EVEN GO TO  
THE EXTRINSIC FACTORS THAT WERE  
INVOLVED IN THIS CASE IF YOU  
READ THROUGH THEIR QUESTIONS.  
THEY DID NOTHING TO SHOULDER THE  
BURDEN.

THAT'S WHY THIS COMES BACK FOR A  
NEW PENALTY PHASE BECAUSE -- WE  
HAVEN'T TALKED ABOUT THE FACT  
THAT THERE ARE PHONES WHETHER WE  
STARTED TALKING ABOUT WHETHER  
THEY'RE RESEARCHING OR NOT  
RESEARCHING, THE CASE LAW'S  
CLEAR.

YOU CAN'T HAVE A JURY  
INSTRUCTION IN THERE, AN  
iPHONE CAN HAVE JURY  
INSTRUCTIONS AND A DICTIONARY  
AND THAT --

>> ARE YOU ASKING FOR JUST A  
NEW -- NOT JUST, BUT A NEW  
PENALTY PHASE?

>> I WANTED TO START WITH MY NEW  
PENALTY PHASE, AND THAT'S ONE OF  
THE REASONS I DESERVE A NEW  
PENALTY PHASE.

BUT I DO HAVE ARGUMENT TO GUILT  
PHASE AS WELL.

THAT IS THE RACIAL EPITHETS AND  
THE RACIAL COMMENTS WERE DURING  
THE COURSE OF THE GUILT PHASE.  
HIS POLICE INTERVIEW WAS NOT  
PLAYED DURING HIS PENALTY PHASE.  
THE RACIAL REMARKS AND THE  
MAKING FUN OF HIM AND NEEDING  
SUBTITLES --

>> WHAT WERE THESE REMARKS?  
WHAT WERE THEY?

>> SHE DIDN'T -- WE DID THE  
AFFIDAVIT.

IT WAS MULTIPAGES.

HE JUST SAID "THOSE THINGS."

WE DIDN'T GET INTO EXACTLY WHAT  
THEY WERE, SO I ASKED THE COURT  
TO INQUIRE.

THE COURT DID NOT INQUIRE.

AND MATTER OF FACT, THE CASE LAW  
THAT WE TALKED ABOUT, I THINK IT  
WAS IN THE MARSHALL CASE, IS  
BASICALLY -- OH, I KNOW WHAT IT  
IS, IT'S ACTUALLY JUSTICE  
QUINCE'S OPINION THAT WHEN SHE  
WAS WITH THE DISTRICT COURT OF  
APPEALS AT THE LAST PAGE, PAGE  
1235, "THE JUDICIARY CAN DO  
LITTLE ABOUT THOSE INDIVIDUALS  
WHO SILENTLY BRING BIASES AND  
PREJUDICES TO THE SANCTITY, BUT  
THE PROCESS OF THE JUDICIARY,  
SHOULD AND, INDEED, MUST TAKE  
ACTION TO INSURE THE INDIVIDUALS  
DO NOT FREELY AND OPENLY EXPRESS  
BIASES AND PREJUDICE."

SO I ASKED THE COURT TO DO SO,  
AND THE COURT DECLINED TO ASK MY  
QUESTIONS AS THE CASE LAW  
INDICATES.

THIS IS SOMETHING THAT SHOULD  
NOT BE COMING INTO THE JURY

ROOM.

THE FACT --

>> WELL, IF WE AGREE THAT THOSE, THERE WERE QUESTIONS THAT THE JUDGE SHOULD HAVE ASKED THAT HE DIDN'T ASK, THEN SHORT OF A PENALTY PHASE, WOULDN'T IT JUST -- IT WOULD MEAN GOING BACK FOR FURTHER, A JURY INTERVIEW.

>> WELL, THE PENALTY PHASE IS WHAT WE'VE BEEN DISCUSSING ABOUT WITH THE PHONE --

>> BUT WHAT I'M ASKING YOU OR WHATEVER, WOULDN'T THE REMEDY BE THERE HAS TO BE FURTHER INQUIRY OF THIS JUROR AND OTHER JURORS?

>> THAT'S THE STATE'S BURDEN.

>> WHAT I'M ASKING YOU IS WHY -- IF THE JUDGE DIDN'T ASK QUESTIONS, IT SHOULD HAVE. THERE'S NOTHING IN THE RECORD THEN THAT SUPPORTS THE AFFIDAVIT.

WOULDN'T THE REMEDY BE FOR THE JUROR INTERVIEW?

>> THE JUROR WAS INTERVIEWED, AND SHE SUPPORTED HER AFFIDAVIT, REAFFIRMED HER AFFIDAVIT --

>> BUT ON THE AREAS THAT I'M TALKING ABOUT --

>> THEY DIDN'T EXPAND.

>> THEY WEREN'T -- SHE WASN'T ASKED ABOUT IT, IS WHAT YOU SAID.

YOU ASKED --

>> RIGHT.

>> -- YOU SAID THAT YOU WANTED INQUIRY ON WHETHER THERE WERE RACIAL REFERENCES.

>> YES.

>> AND THE JUDGE DID NOT --

>> CORRECT.

>> -- ALLOW IT.

SO WHAT I'M ASKING YOU, JUST SAY IF WE FIND ERROR ON THAT.

>> YES.

>> WON'T THE REMEDY BE TO ALLOW FOR IT TO GO BACK FOR THE JUDGE TO INQUIRE FURTHER?

>> MY RESPONSE WOULD BE, NO.



MY RESPONSE WOULD BE THAT I RAISED THE PRESUMPTION OF PREJUDICE, THE BURDEN SHIFTED TO THE PROSECUTION TO DO SOMETHING AT THAT TIME.

WE KNEW WHO ONE OF THEM WAS, WE KNEW WHO THE FOREMAN WAS.

SHE WAS DESCRIBING SOMEONE SITTING RIGHT BEHIND HER AND OVER HER LEFT SHOULDER OR RIGHT SHOULDER, THE JUDGE EVEN INQUIRED WHAT ROW WE WERE ON.

WE COULD HAVE IDENTIFIED THAT. THE STATE --

>> BUT ISN'T THE PROBLEM THAT THE JUDGE DISCREDITED THIS WITNESS?

HE DETERMINED THAT SHE WAS NOT CREDIBLE?

>> TRUE.

>> AND MAYBE YOU CAN ARGUE HE DIDN'T HAVE AN ADEQUATE BASIS FOR THAT, BUT HE'S DONE THAT ON THE BASIS OF WHAT HE HAD.

AND FOR US JUST TO SAY, WELL, WE'RE GOING TO GO BEYOND THAT AND THE STATE HAD THE BURDEN TO MAKE HER CREDIBLE OR DO WHATEVER ELSE, I DON'T SEE HOW THE STATE'S BURDEN AFFECTS THE JUDGE'S DETERMINATION THAT SHE WAS NOT CREDIBLE.

>> I TOTALLY UNDERSTAND THAT. I READ THAT BRIEF THIS MORNING. I READ THE TESTIMONY AT 4:30 IN THE MORNING, AND I ENCOURAGE THE COURT TO DO THAT.

THERE IS NOTHING WHATSOEVER IN THERE THAT WOULD SUGGEST THAT THAT JUDGE COULD MAKE THAT FINDING.

SHE TESTIFIED ABOUT EVERYTHING VERY ARTICULATEDLY, EVERYTHING WAS FINE.

THE ONLY ISSUES THAT EVER CAME UP IS WHEN HE STARTED TO CONCERN HER WITH PERJURY OR WHEN SHE WAS CONCERNED ABOUT HER CHILDREN AND WHEN THEY WERE POLLING HER AND SHE SAID THIS IS A HIGH PROFILE

CASE, THESE PEOPLE ARE -- I HAVE KIDS AT HOME, THERE'S ALL THESE TELEVISION PEOPLE HERE.

IT WAS THOSE TWO TIMES WHERE SHE BECAME EMOTIONAL.

THERE'S NOTHING TO SUPPORT THE COURT'S FINDING IN THAT REGARD.

THAT'S WHY I SAY -- I CAN UNDERSTAND WHY THE JUDGE RULED THAT BUT JUST CAN'T

RESPECTFULLY --

>> PART OF THE PROBLEM HERE IS WE'RE LOOKING AT A COLD TRANSCRIPT.

>> I UNDERSTAND.

>> AND THE JUDGE IS ACTUALLY SEEING HER TESTIFY AND ANSWER THE QUESTIONS.

AND IT WAS JUST WE'RE REALLY IN A VERY DIFFICULT POSITION TO SECOND GUESS A JUDGE'S DETERMINATION ABOUT A WITNESS' CREDIBILITY BASED ON A COLD RECORD.

>> I TOTALLY UNDERSTAND THAT. THAT'S WHY I BELIEVE IF YOU READ JUST THE BLACK LETTER OF THE LAW AND HOW IT FLOWED, YOU WILL SEE THERE WAS NO BREAKS FOR HER TO WHINE AND CRY, THERE WAS NO NEED FOR HER TO RECESS.

SHE SPOKE VERY FLUENTLY, SHE HAD NO ISSUES, NO QUALMS, THERE WAS NO HYSTERICS.

IT WAS -- IF YOU READ JUST THE RECORD, YOU'LL SEE NOTHING WHERE THE JUDGE GOES I SEE YOU'RE HAVING A HARD TIME OR I SEE YOU'RE EMOTIONAL.

NO.

I WAS THE FIRST ONE TO SAY SHE SEEMED EMOTIONAL WHEN YOU PUSHED HER ON THE PERJURY ISSUE.

YES, YOUR HONOR.

>> HER AFFIDAVIT SAID THAT JURORS WERE NOT --

[INAUDIBLE]

AND THE JUDGE IS AUDITING, HE DIDN'T THINK THEY WERE -- WERE THEY POLLED OR --

>> THEY WERE, THEY WERE.  
>> THEY WERE?  
>> YES.  
>> THEN THE OTHER  
INCONSISTENCIES IN TERMS OF THE  
AFFIDAVIT AND THE JUDGE'S ORDER.  
THE JUDGE SEEMED TO BE SAYING  
THAT, I MEAN, AT THE POINT THAT  
SHE INDICATED SHE DIDN'T KNOW  
WHERE THE INFORMATION IN THE  
AFFIDAVIT CAME FROM.  
>> THAT'S NOT ACCURATE, YOUR  
HONOR.  
IF YOU READ THE TESTIMONY OF IT  
WHICH SHE SAYS --  
>> I MEAN, I'M SAYING IS THAT  
WHAT THE JUDGE --  
>> THE JUDGE MAY HAVE SAID THAT,  
BUT IF YOU READ THE TRANSCRIPT  
OF IT, WHAT SHE WILL TELL YOU IS  
SHE MET WITH ME, SHE HAD  
NOTES --  
>> NO, I DON'T MEAN IT AS -- I'M  
TALKING ABOUT THE FACTUAL  
CONTEXT ABOUT THE TEARDROP.  
SHE TESTIFIED THAT THE --  
[INAUDIBLE]  
COMMENT MADE AFTER THE DEFENDANT  
DRASTICALLY CHANGED HIS  
APPEARANCE BETWEEN THE GUILT  
PHASE AND THE PENALTY PHASE BY  
CUTTING OFF HIS VERY LONG  
DREADLOCKS.  
SHE TESTIFIED THAT ONE OF THE  
JURORS NOTICED HIS TATTOO AFTER  
HE CUT HIS DREADLOCKS OFF AND  
DISCUSSION OF THE TATTOO NEVER  
TOOK PLACE AFTER DELIBERATION.  
>> ABSOLUTELY.  
>> IS THAT TRUE?  
>> ACTUALLY, HER AFFIDAVIT TALKS  
ABOUT THEM RESEARCHING.  
THERE WAS NOT A SINGLE QUESTION  
BY THE JUDGE ASKING DID ANYBODY  
RESEARCH THIS.  
HE DIDN'T ASK THAT.  
WHICH IS THE QUESTION  
SPECIFICALLY, MY QUESTION AT  
PAGE 150, "DID THE JURY MEMBERS  
RESEARCH TATTOOS?"

AND THE JUDGE DID NOT ASK MY QUESTION.

I WANTED ISSUES THAT WERE EXTRINSIC TO THE VERDICT. IF YOU READ THAT AGAIN, HIS ONLY QUESTION WAS WHETHER IT WAS DELIBERATIONS OR DURING THE PHASE, IT DOESN'T MATTER WHEN IT'S DONE.

THEY'RE TALKING ABOUT MATTERS THAT ARE NOT SUPPOSED TO BE DISCUSSED ABOUT, AND I'M OUT OF TIME, SO I'LL BE BACK IN JUST A FEW MINUTES IF I COULD SIT DOWN. THANK YOU.

>> THANK YOU.

>> MAY IT PLEASE THE COURT, LISA-MARIE LERNER FOR THE ATTORNEY GENERAL'S OFFICE REPRESENTING THE STATE. IN TERMS OF THE JUROR MISCONDUCT, I WANTED TO CLEAR UP A POINT.

THE JUROR BECAME UPSET DURING THE GUILT PHASE DELIBERATIONS PRIMARILY BECAUSE SHE FELT BULLIED AND ABUSED BY THE OTHER JURORS, BECAUSE SHE INITIALLY DID NOT WANT TO VOTE GUILTY, AND SHE FELT PRESSURED INTO VOTING GUILTY.

>> WELL, NOW, THAT'S CLEARLY THE CASE LAW ON THAT ABOUT, YOU KNOW, CHANGING YOUR VOTE BECAUSE THE OTHER JURORS ARE PRESSURING YOU.

THAT'S SOMETHING THAT ADHERES TO THE VERDICT AND NOT SOMETHING THAT WE NORMALLY LOOK AT.

BUT I GUESS WE ARE REALLY MORE INTERESTED IN THOSE ALLEGATIONS THAT SHE HAS MADE THAT WOULD BE THINGS THAT ARE EXTRINSIC TO THE VERDICT SUCH AS ANY RACIAL PREJUDICE.

AND THAT SEEMS TO BE ONE OF HIS MAJOR ISSUES HERE, IS THAT THE JURORS EVIDENTLY MADE -- IT IS ALLEGED THAT THE JURORS MADE RACIAL REMARKS AND THAT THE

JUDGE FAILED TO QUESTION HER ABOUT THAT.

>> WELL, FIRST OF ALL, THE ONLY PERSON WHO CHARACTERIZED THE REMARKS AS "RACIAL" WAS THIS JUROR.

NOTHING SPECIFIC CAME OUT EITHER TO THE ATTORNEYS OR IN HER AFFIDAVIT THAT ANY JUROR WAS HAVING DISCUSSIONS WHERE THEY WERE APPEALING TO THE BIAS OF OTHER JURORS.

WHAT SHE SAID IN HER AFFIDAVIT WAS THAT THEY MADE RACIAL COMMENTS ABOUT HIS ACCENT.

I WENT AND LISTENED TO THE DVDS OF MR. DUBOSE'S STATEMENTS TO THE POLICE.

HE HAS AN ACCENT AND HE MUMBLED. HE IS VERY HARD TO UNDERSTAND.

>> IS THAT WHAT -- THIS -- THAT MAY BE, BUT THE QUESTION REALLY IS DOESN'T THAT SUBSECTION G IN ITSELF RAISE A QUESTION THAT WHETHER THEY WERE MAKING FUN OF THE DEFENDANT WHO WAS AFRICAN-AMERICAN, AND WHY WOULDN'T THE JUDGE, I MEAN, OF ALL THE TYPES OF ALLEGATIONS, THIS IS WHAT I SAY, YOU KNOW, I CAN GO THROUGH EVERYTHING THAT HAPPENED IN THE JURY ROOM OR THE BULLYING, BUT WHEN YOU GET TO THE ISSUE OF WHETHER THERE MAY BE RACIAL BIAS JUST -- AND IT'S THE TIP -- WHY WOULDN'T THE JUDGE INQUIRE ABOUT IT?

I MEAN, YOU'RE SAYING MAYBE THE JUDGE MIGHT NOT HAVE FOUND THAT THIS WAS A RACIAL REMARK, BUT THERE WASN'T ANY INQUIRY.

>> BUT HER STATEMENTS FROM WHAT I UNDERSTAND, THOSE COMMENTS WERE MADE DURING THE BREAKS, NOT DURING JURY DELIBERATION. AND THEY WERE NOT ONGOING DISCUSSIONS.

IT WAS A COMMENT --

>> WAIT, WAIT, WAIT, WAIT. I'M A LITTLE, I'M A LITTLE

CONFUSED.

I DIDN'T KNOW THAT YOU COULD  
MAKE RACIAL SLURS DURING BREAKS,  
YOU JUST COULDN'T MAKE THEM  
DURING -- IS THAT WHAT YOU'RE  
ARGUING?

>> NO, SIR.

ON -- FIRST OF ALL --

>> WHAT DIFFERENCE DOES IT MAKE  
WHETHER IT'S DURING THE ACTUAL  
DELIBERATION OR WHEN THE JURY IS  
IN THE ROOM TALKING TO ONE  
ANOTHER BEFORE THE DAY BEGINS?

>> THERE'S NO INDICATION THAT  
ANY RACIAL SLUR WAS EVER MADE.  
THEY WERE --

>> WAIT A MINUTE, THAT'S NOT --  
YOU KNOW, THAT DOES NOT HELP TO  
TRY TO DIVERT THE QUESTION.

>> I'M SORRY, YOUR HONOR.  
UM, NO.

YOU CANNOT HAVE --

>> AT ANY POINT.

IT DOESN'T MAKE A DIFFERENCE  
WHETHER IT'S IN A DELIBERATION  
OR WHEN THEY'RE HAVING COFFEE  
WITH ONE ANOTHER, DOES IT?

>> NO, IT DOES NOT.

>> OKAY.

SO REALLY THE FOCUS IS GOING TO  
BE ON THE CONTENT OF WHAT WAS  
SAID.

>> YES.

>> OKAY.

>> AND THERE'S NO RACIAL SLUR  
MADE.

SHE NEVER EVEN IN HER AFFIDAVIT  
HAD AN ALLEGATION OF RACIAL  
SLURS.

>> SEE, I GUESS MAYBE WE LOOK AT  
THIS DIFFERENTLY.

IT JUMPED OUT AT ME, AND IT  
CONCERNED ME GREATLY THAT WHEN  
SHE SAID THAT THE JURY LAUGHED  
AND MADE FUN OF THE DEFENDANT'S  
POLICE INTERVIEW MAKING RACIAL  
REFERENCES, I AS A JUDGE, I WANT  
TO KNOW WHAT SHE -- WHAT  
HAPPENED.

I'M ASKING -- ARE YOU SAYING

THAT'S NOT ENOUGH TO CAUSE THE JUDGE TO INQUIRE ABOUT THAT AREA?

THAT'S WHY I'M HAVING, YOU KNOW, I'M HAVING TROUBLE UNDERSTANDING YOUR ANSWER.

IT'S NOT LIKE IT WAS INQUIRED AND THEN THEY FOUND OUT, OH, NO, IT WAS REALLY THAT THEY JUST COULDN'T UNDERSTAND HIM.

IT WASN'T A RACIAL SLUR. RACIAL SLURS ARE SOMETIMES IN THE EYES OF, YOU KNOW, THERE'S DIFFERENT VIEWS OF WHAT IT WOULD BE.

THAT, TO ME, SHOWS SOMEBODY THAT IS, THAT THERE'S COMMENTS BEING MADE THAT ARE INDICATIVE OF A PREJUDICE TOWARDS THIS DEFENDANT.

THAT'S IN THIS ONE LIGHT. I'D WANT TO KNOW WHAT IT IS. I'M TRYING TO UNDERSTAND WHY WOULD THE JUDGE NOT HAVE INQUIRED ABOUT THAT AREA?

>> I DON'T KNOW, YOUR HONOR. THE --

>> BUT ISN'T THAT -- OKAY, SO YOU DON'T KNOW.

MY NEXT QUESTION IS, ISN'T IT ERROR THAT HE DIDN'T INQUIRE?

>> NOT NECESSARILY.

BECAUSE, AS I SAID, THE JUROR NEVER SAID THAT IT WAS FOCUSED ON RACE, JUST ON HIS ACCENT. AND SHE IS THE ONLY ONE WHO SAID IT WAS --

>> SHE DOES USE THE WORD "RACIAL."

I MEAN, ISN'T THAT IN THE AFFIDAVIT?

>> YES.

BUT SHE DIDN'T GIVE ANY SPECIFICS.

AND ADDITIONALLY, AS JUSTICE QUINCE POINTED OUT DURING MY COLLEAGUE'S ARGUMENT, THE COURT DURING THE EVIDENTIARY HEARING WITH MS. CHAVEZ DISMISSED HER INTO THE COURTROOM TO WAIT WHILE

HE DISCUSSED WHAT SHE HAD SAID TO THE, WITH THE ATTORNEYS. THE COURT THEN ASKED BOTH SIDES, "ARE THERE ANY OTHER AREAS YOU WISH ME TO INQUIRE IN?" THE ONLY THING THAT THE ATTORNEYS DISCUSSED WAS HER ANSWER TO THE QUESTION ABOUT THE POLLING.

THE DEFENSE ATTORNEY NEVER AT THAT POINT SAID WE NEED TO GET INTO THE RACIAL ASPECTS CONCERN. >> I THOUGHT YOU SAID, WELL, WE'D HAVE TO LOOK AT THIS WHOLE THING.

IT SOUNDED TO ME FROM WHAT MR. CARTER SAID HE ADEQUATELY PRESERVED THIS ISSUE. BUT THE OTHER -- BUT MAYBE AS WE LOOK AT THIS WHOLE THING, YOU'LL SAY, WE'LL AGREE THAT IT WASN'T PRESERVED.

WHAT ABOUT THE -- THAT WAS G. WHAT ABOUT H WHERE THEY -- WAS THERE INQUIRY ABOUT WHETHER THEY HAD DISCUSSED EVEN THOUGH THEY TOLD THE JUDGE, NO, THAT THE GRANDMOTHER OF THE VICTIM'S HOUSE HAD BURNED DOWN, AND THEY WONDERED WHETHER THAT WAS ON PURPOSE?

WAS THAT AN AREA INQUIRED INTO?

>> NO, IT WAS NOT.

AND THAT HAPPENED, AGAIN, DURING BREAKS.

BUT THE JUDGE DID -- AND ALSO HAPPENED, THE FIRE HAPPENED BETWEEN THE GUILT AND PENALTY PHASE.

>> I'M NOT SURE, AGAIN, TIMING WISE WHETHER IF JURORS ARE DISCUSSING THE CASE OR DISCUSSING NEWS STORIES OR DISCUSSING THAT THIS WAS -- THIS PARTICULAR CASE WAS VERY HIGH PROFILE IN JACKSONVILLE BECAUSE OF THIS TRAGIC DEATH OF THE 8-YEAR-OLD, AND SO I DON'T -- AGAIN, IS THAT -- YOU'RE SAYING THAT, AGAIN, IF IT DOESN'T OCCUR



IN THE DELIBERATION BUT IT OCCURS DURING BREAKS WHERE THEY'RE DISCUSSING MATTERS THAT THEY ARE NOT SUPPOSED TO BE DISCUSSING OR CONTRARY TO THE JUDGE'S INSTRUCTIONS, THAT THAT IS THEN NOT TO BE INQUIRED INTO IN A JURY INTERVIEW?

>> WELL, IT COULD BE INQUIRED INTO, BUT IT DID NOT AFFECT THE VERDICT.

THE COURT DID ASK MS. CHAVEZ DID ANYTHING OF, YOU KNOW, OF THE CELL PHONE USE COME INTO YOUR DISCUSSIONS DURING DELIBERATION. AND SHE SAID, NO.

WE ONLY FOCUSED ON WHAT WAS TALKED ABOUT IN THE COURT. SO SHE -- THE JUDGE DID COVER IT TO A SMALL EXTENT, BUT HER ANSWER PRESERVES THE JURY'S RECOMMENDATION DURING THE PENALTY PHASE.

BECAUSE SHE SAID THAT NOTHING EXTRINSIC TO THE TRIAL CAME INTO THE DELIBERATION.

AND THAT IS THE JUROR MISCONDUCT THAT THIS COURT IS, NEEDS TO LOOK AT.

NOT WHETHER OR NOT THEY'RE TALKING ABOUT A NEWS STORY ABOUT A HOUSE BURNING DOWN.

IF IT DID NOT COME INTO THE DELIBERATIONS, IT'S NOT JUROR MISCONDUCT TO THE EXTENT THAT THE COURT NEEDS TO GO --

>> SO THAT'S DIFFERENT THAN THE FACT THAT THE JUDGE SAYS I DON'T EVEN FIND HER CREDIBLE.

NOW YOU'RE SAYING YOU COULD FIND EVERYTHING SHE SAID CREDIBLE, AND IT STILL WOULD BE THAT NONE OF THIS AFFECTED THE VERDICT. IS THAT AN ALTERNATIVE ARGUMENT?

>> YES, YOUR HONOR.

UM, THE COURT DID FIND THAT IT'S NOT SO MUCH THAT HE FOUND EVERYTHING SHE SAID INCREDIBLE. HE FOUND HER BIASED TOWARD THE DEFENSE AND FOUND THAT HER

AFFIDAVIT AND HER ACTIONS SHOWED HER BIAS TOWARD THE DEFENSE.

>> WELL, AGAIN, NOW HERE'S THE SITUATION THOUGH.

WE'VE GOT A CASE, AND I'M GOING TO ASK ABOUT A PROPORTIONALITY ISSUE WHERE YOU'VE GOT HIS TWO BROTHERS WHO GET LIFE RECOMMENDATIONS.

YOU'VE GOT NOW WE'RE TALKING ABOUT EMOTIONAL DURING THE PENALTY PHASE WHERE THERE'S AN 8-4 RECOMMENDATION.

THERE IS -- SO HER FEELING EMOTIONAL THAT THERE IS THE DEATH PENALTY WAS IMPOSED IF HE THOUGHT IT SHOULDN'T HAVE BEEN IS CERTAINLY NOT, IT DOESN'T MAKE HER INCREDIBLE, CORRECT?

>> CORRECT.

>> OKAY.

SO ARE YOU SAYING THAT THE -- AND BEING BIASED TOWARDS THE DEFENSE, IF SHE FELT THAT HE DESERVED LIFE VERSUS DEATH, DOES THAT MAKE HER BIASED TOWARDS THE DEFENSE?

I MEAN, ARE THE OTHER EIGHT JURORS BIASED TOWARDS THE STATE BECAUSE THEY VOTED FOR DEATH?

>> NO.

I THINK -- I CAN ONLY SURMISE, BUT BASED ON THE COURT'S ORDER AND THE WAY MS. CHAVEZ CONDUCTED HERSELF AND IN TERMS OF ATTEMPTING TO BRING HER INFORMATION TO LIGHT SHOWED THAT SHE WAS BIASED TOWARD THE DEFENSE.

SHE NEVER APPROACHED THE STATE. AND WHEN SHE APPROACHED THE BAILIFF AT THE DOOR, SHE DID NOT TELL HIM THAT SHE WAS A JUROR, AND SHE DID NOT TELL HIM WHAT SHE WANTED TO TALK TO THE JUDGE ABOUT.

SHE JUST SHOWED UP AS IF SHE WERE A REGULAR CITIZEN AND SAID I WANT TO TALK TO THE JUDGE, AND THE BAILIFF SAID YOU NEED TO

MAKE AN APPOINTMENT.

>> I THOUGHT THE BAILIFF TOLD HER TO GO BACK TO WHERE THE OTHER JURORS WERE.

>> ON, BASED ON HER AFFIDAVIT.

>> I DON'T --

>> I GUESS THE ONLY THING THAT CONCERNS ME, YOU KEEP SAYING THAT NONE OF THESE CONVERSATIONS TOOK PLACE DURING DELIBERATIONS. BUT WHEN DID THEY TAKE PLACE? AND, I MEAN, THEY WERE NEVER SUPPOSED TO HAVE TAKEN PLACE DURING THE COURSE OF THE TRIAL, WERE THEY?

>> IT DEPENDS ON WHAT CONVERSATIONS YOU'RE TALKING ABOUT.

IF YOU'RE TALKING ABOUT THE FACT THAT THEY COMMENTED ON THE DRASTIC CHANGE IN HIS APPEARANCE, YES.

THAT'S NOT IMPROPER.

IF YOU'RE TALKING ABOUT RESEARCHING THE GRANDMOTHER'S HOUSE BURNING DOWN, THAT IS IMPROPER AND SHOULD NOT HAVE TAKEN PLACE.

>> NOW, THESE RACIAL REFERENCES, WHERE DO THEY TAKE PLACE?

>> SHE SAID THAT THEY TOOK PLACE DURING BREAKS.

>> SO ALL THE JURORS WERE PRESENT WHEN THIS HAPPENED, OR IT WAS JUST HER OR WHAT?

>> I DON'T KNOW, YOUR HONOR. SHE -- BECAUSE WHAT SHE SAID IS THEY TOOK PLACE DURING BREAKS OR WHEN THERE WERE SIDEBAR --

>> SO WHEN THEY TAKE PLACE DURING BREAKS, IT DOESN'T CARRY BACK INTO THE DELIBERATION ROOM.

>> THEY DIDN'T --

>> THERE'S A WALL THERE, RIGHT?

>> WELL, YES.

>> OKAY.

>> TO A CERTAIN EXTENT.

BUT SHE ALSO INDICATED THESE WERE JUST COMMENTS IN HER TESTIMONY IN FRONT OF THE JUDGE.

HE DID GET INTO THE TATTOO A LITTLE BIT, AND SHE SAID IT WAS JUST A COMMENT ONE PERSON MADE BECAUSE OF THE SUDDEN CHANGE FROM HAVING LONG DREADS TO GOING TO ALMOST BALD.

>> I GUESS THE TOTALITY OF WHAT SHE'S SAYING, THOUGH, IS THAT THE ATTITUDES OF THE JURORS AS EXPRESSED IN EXTERNAL COMMENTS SHOWED A BIAS AGAINST THE DEFENDANT.

THE DEFENDANT ISN'T SUPPOSED TO START OUT BEHIND THE 8 BALL EVEN AFTER THE GUILT PHASE.

IT'S STILL UP TO THE STATE TO PROVE -- CORRECT.

SO MY CONCERN IS NOT YOU CAN TAKE THIS APART OR THIS APART, THIS APPEARS TO BE SOMETHING WHERE THE, THERE WAS A ONGOING UNDERMINING OF THE DEFENSE CASE. NOW, AND THAT'S MY CONCERN.

I MAY LOOK AT EVERYTHING AGAIN AND SAY, NO, IT'S ALL INNOCENT, AND IT WAS JUST, THEY WERE JUST HAVING FUN BACK THERE MOCKING THE DEFENDANT OR ON A BREAK FOR NOT SPEAKING PROPER ENGLISH.

IT MAY BE THAT.

BUT IT'S, IT'S TROUBLESOME.

AND WE'RE TALKING ABOUT A DEATH CASE WHERE, AGAIN, AN 8-4 RECOMMENDATION WAS MADE, AND HIS BROTHERS GOT LIFE.

SO IT'S TROUBLESOME IF WE'RE LOOKING NOW, NOT 30 YEARS FROM NOW WHEN, YOU KNOW, HE -- THAT THIS WAS -- WAS THIS TRIAL REALLY THE KIND OF TRIAL AND THE JURORS ACTING IN A WAY THAT WE WANT IN OUR SYSTEM OF JUSTICE? THAT'S MY CONCERN.

SO HOW CAN YOU ASSURE ME THAT I SHOULDN'T BE WORRIED ABOUT THAT?

>> WELL, TWO COMMENTS.

FIRST, I THINK THAT IF YOU GO BACK AND LOOK AT THE RECORD BETWEEN HER AFFIDAVIT AND HER TESTIMONY IN CAMERA, YOU CAN SEE

THAT THESE WERE ISOLATED  
COMMENTS.

THEY MAY HAVE BEEN IMPROPER.  
I'M NOT ARGUING THAT, BUT THEY  
WERE ISOLATED, AND THEY DID NOT  
GO INTO THE JURY ROOM.

>> WELL, WE DON'T REALLY KNOW  
THAT, THOUGH, BECAUSE THEY  
DIDN'T INQUIRE ABOUT THOSE TWO  
AREAS THAT I JUST ASKED YOU  
ABOUT.

HE DIDN'T INQUIRE.  
WOULDN'T THAT BE THE FIRST ONE  
YOU'D THINK THAT THE JUDGE WOULD  
INQUIRE ON; THAT IS, YOU KNOW,  
WE'RE TALKING ABOUT THE TATTOO.  
I'M STILL CONCERNED ABOUT THE  
RACIAL REFERENCES.  
SO HOW DO WE KNOW IT WASN'T MORE  
EXTENSIVE?

>> THAT WAS MY SECOND POINT  
COMING UP, IS THE REMEDY TO THIS  
IS TO SEND IT BACK TO HAVE JUROR  
INTERVIEWS, NOT TO OVERTURN THE  
VERDICTS RIGHT NOW.

IF THEY EVER WOULD BE.  
I'M NOT SAYING THEY SHOULD.  
BUT THE REMEDY WOULD BE TO SEND  
IT BACK AND HAVE THE JUDGE MAKE  
INQUIRIES NOT JUST OF THIS  
JUROR, BUT OF THE JURORS TO FIND  
OUT IF THERE WERE RACIAL,  
IMPROPER RACIAL COMMENTS AND  
BIAS.

>> LET ME ASK YOU THIS, LET ME  
ASK YOU THIS QUESTION BECAUSE  
THIS REALLY CONCERNS ME.  
I HAVE NEVER SEEN ANYTHING LIKE  
THIS.

I'VE BEEN IN TRIAL COURTS SINCE  
THE DAY I GRADUATED FROM LAW  
SCHOOL.

WHAT I'VE SEEN ALWAYS IF A JUROR  
EVER RAISES ANY ISSUE, I MEAN,  
DOWN FROM THE FACT THAT THE  
TEMPERATURE IS TOO COLD IN THE  
COURTROOM ALL THE WAY TO OTHER  
JURORS MAKING RACIAL COMMENTS,  
ANYTHING THAT SHE OR HE TELLS  
THE BAILIFF, THE BAILIFF TELLS

THE JUDGE, THE JUDGE TAKES THE BENCH BEFORE HE BRINGS THE JURY OUT AND SAYS I GOT THIS FROM A JUROR, I NEED TO TALK TO HER OR HIM.

IT IS ADDRESSED IMMEDIATELY. THIS JUROR IS GOING EVERYWHERE IN THE DUVAL COUNTY COURTHOUSE TRYING TO FIND SOMEONE TO LISTEN TO HER.

WAS THE STATE AWARE THAT THIS IS GOING ON?

>> NO, YOUR HONOR.

AND I ALSO WANT TO POINT OUT AS THE JUROR SAID DURING HER TESTIMONY, SHE REFUSED TO GIVE HER NAME OR SAY THAT SHE WAS ON THE CASE BECAUSE SHE DID NOT WANT TO BE SINGLED OUT, AND SHE DID NOT WANT TO DRAW ATTENTION TO HERSELF.

SO EVEN WHEN SHE WAS CONTACTING THE PUBLIC DEFENDER'S OFFICE, SHE SAID SHE WAS A FRIEND OF THE JUROR.

SHE NEVER TOLD THE JUDGE HER NAME OR THE CASE WAS INVOLVED WHEN SHE ATTEMPTED TO E-MAIL HIM.

WHEN SHE WENT TO THE BAILIFF AT THE DOOR, I GOT THE IMPRESSION -- AND THIS IS JUST MY IMPRESSION -- IT WASN'T THE USUAL COURT BAILIFF.

AND SHE DID NOT SAY HER NAME, AND SHE DID NOT TELL HIM THAT SHE WAS A JUROR ON THE CASE THAT THE JUDGE WAS HEARING.

>> BUT WHAT -- AREN'T BAILIFFS TRAINED TO BRING TO THE JUDGE'S ATTENTION ANY ISSUE THAT DEVELOPS DURING THE TRIAL INVOLVING A JUROR?

>> BUT SHE DIDN'T TELL THE BAILIFF SHE WAS A JUROR ON THE CASE.

THAT'S THE PROBLEM.

I MEAN, I AGREE WITH YOU THIS SHOULD HAVE BEEN ADDRESSED AT THE TIME.

>> ARE YOU SAYING SHE DIDN'T TELL THE BAILIFF THAT WAS ON DUTY IN THAT PARTICULAR COURTROOM?

>> THE COURTROOM WAS CLOSED WHEN SHE WENT, AND THE BAILIFF WHO WAS STANDING, YOU KNOW, IN THE COURTROOM SAID --

>> WAS THAT BAILIFF THAT WAS ON DUTY IN THE COURTROOM DURING THE PROCEEDINGS?

>> I GOT THE IMPRESSION -- I DON'T KNOW.

I GOT THE IMPRESSION HE WAS NOT. BECAUSE SHE IN HER TESTIMONY SAID THAT SHE DID NOT TELL HIM HER NAME OR THAT SHE WAS A JUROR ON THE CASE.

FROM THAT COMMENT I GATHERED THAT SHE DIDN'T RECOGNIZE HIM, AND HE DIDN'T RECOGNIZE HER. BUT THAT'S NOT ON THE RECORD. THAT'S JUST WHAT I READ FROM HER ANSWER.

>> WHEN SHE WENT TO SPEAK WITH THE CHIEF JUDGE, WAS THAT DURING THE COURSE OF THE TRIAL?

>> FROM -- I DON'T KNOW ABOUT THAT BECAUSE THAT'S NOT IN THE RECORD.

FROM WHAT MY OPPOSING COUNSEL SAID, SHE DIDN'T SPEAK WITH THE CHIEF JUDGE.

IT WAS MR. STONE, I BELIEVE, THE -- A PRIVATE ATTORNEY.

>> OKAY.

AND STILL NO COMMUNICATION WITH THE TRIAL JUDGE -- AS SOMETHING GOING ON IN THE COURTROOM?

>> AS I SAID, THAT'S NOT IN THE RECORD.

I TAKE IT AS GOSPEL THAT IT HAPPENED, BUT, YOU KNOW, IT'S NOT IN THE RECORD.

SO I CAN'T ADDRESS WHY THE CHIEF JUDGE DIDN'T CONTACT THE TRIAL COURT.

IT IS, THE RECORD IS NOT COMPLETE IN TERMS OF WHAT MR. STONE DID OR DID NOT DO.

UM, BUT I DID WANT TO ALSO POINT OUT THAT IN BOTH THE GUILT AND PENALTY PHASE NO EXTRINSIC INFORMATION CAME INTO THE JURY DELIBERATIONS.

DOES THE COURT WISH TO ADDRESS ANY OTHER ISSUE?

>> YEAH.

I WOULD LIKE THE ISSUE ON THE BROTHERS GETTING LIFE SENTENCES. IF, IF THE JURY FINDS -- THIS IS A SEPARATE JURY GAVE THEM LIFE. THE STATE WAS SEEKING DEATH FOR ALL THREE DEFENDANTS?

>> YES.

>> OKAY.

AND THIS JURY WAS TOLD THAT THE TWO BROTHERS HAD GOTTEN LIFE. THAT'S, AT LEAST -- YES OR NO?

>> I DON'T RECALL THAT, YOUR HONOR.

>> OKAY.

[INAUDIBLE]

I THOUGHT THAT WAS IN THIS RECORD, THAT THEY HAD BEEN TOLD. WHAT IS THE, WHAT IS THE LAW ABOUT, I MEAN, NORMALLY YOU WOULD SAY IF SOMEONE'S THE SHOOTER, THAT MAKES THEM MORE CULPABLE.

BUT WHAT I UNDERSTAND HERE, AND JUST HELP ME ON THAT, IS THAT THE, I MEAN, THE VICTIM IN THIS CASE ACTUALLY ENDED UP GETTING CONVICTED OF A CRIME WHERE SHE'S SERVING 30 YEARS.

THIS IS SORT OF A -- THE ORIGINAL VICTIM WHO ASSAULTED --

>> YES.

>> -- THE DEFENDANT.

HE IS UPSET.

HE GOES TO HIS BROTHERS, AND THEN THERE'S A TWO-HOUR GAP WHERE THE BROTHERS ARE TOGETHER. HE COMES BACK, THE GUN'S GIVEN TO HIM.

IS THERE ENOUGH EVIDENCE THAT HE IS JUST EQUALLY CULPABLE WITH THE TWO BROTHERS, OR WHAT IS IT THAT THE STATE POINTS TO THAT



SAYS, THAT MAKES HIM MORE  
CULPABLE EVEN THOUGH THEY ALL  
WERE GOING IN SHOOTING?

>> WELL, FIRST OF ALL, IT WAS  
ABOUT AN HOUR, NOT TWO HOURS.  
IT WAS ABOUT AN HOUR.

BUT THE TRIAL COURT MADE  
FINDINGS THAT MR. RASHEEM DUBOSE  
WAS THE ONE CULPABLE BECAUSE,  
ONE, THERE WAS TESTIMONY DURING  
THE PENALTY PHASE AND DURING THE  
PENALTY PHASES OF THE TWO  
BROTHERS THAT RASHEEM WAS THE  
DOMINANT ONE OF THE FAMILY.  
HE WAS THE ELDEST BROTHER, AND  
HE -- THE OTHER TWO BROTHERS  
WOULD DO ANYTHING THAT HE ASKED  
THEM TO DO.

THEY WERE --

>> ALSO I BELIEVE THAT IT WAS  
RASHEEM WHO ACTUALLY POINTED THE  
GUN INSIDE AN OPEN WINDOW AND  
SHOT ACTUALLY INSIDE THE HOUSE  
WHEREAS THE BROTHERS WERE JUST  
SPRAYING THE HOUSE RANDOMLY.

AM I CORRECT?

>> YES, YOU ARE.

IN FACT, THE EVIDENCE SHOWS THAT  
THE OTHER TWO BROTHERS STAYED IN  
THE BACK OF THE HOUSE, TOWARD  
THE BACK OF THE FENCE.

THAT'S WHERE THEIR CARTRIDGES  
CAME OUT.

>> NOW YOU'RE SAYING "THEIR  
CARTRIDGES."

I THOUGHT THAT ONLY TWO TYPES OF  
BULLETS WERE ACTUALLY RECOVERED  
FROM THE SCENE.

DIDN'T ONE OF THE BROTHERS' GUNS  
JAM, I GUESS IS THE TERM YOU USE  
OR SOMETHING?

>> YES.

THERE WERE TWO TYPES OF BULLETS,  
A .9 MM AND A .45 MM, BUT THREE  
GUNS WERE USED.

THE .9 MM, I BELIEVE, FIRED TWO  
SHOTS, AND THE .45 FIRED FOUR.

I COULD BE WRONG.

>> AND MR. RASHEEM DUBOSE HAD --

>> THE GLOCK.

>> AND SHOTS WERE FIRED FROM THE GLOCK?

>> 23.

>> A TOTAL OF HOW MANY?

>> 29.

>> HE HAD AN EXTENDED CLIP, RIGHT?

>> RIGHT.

>> ON EXHIBIT 23 THE COURT CAN SEE THE CAR'S RIGHT HERE, AND THE WINDOW IS RIGHT HERE. THERE ARE CARTRIDGES FOUND RIGHT HERE NEXT TO THE HOUSE.

SO LESS THAN 6 FEET, 3-6 FEET FROM THAT WINDOW RASHEEM DUBOSE WENT HERE, RIGHT HERE NEXT TO THE WINDOW AND WAS FIRING IN THE WINDOW TO WHERE PSYCHO, THE VICTIM OF THE --

>> AND WHERE WERE THE TWO BROTHERS?

>> IN THE BACKYARD BY THE FENCE.

>> NOT SHOOTING INTO THE HOUSE?

>> THEY WERE SHOOTING, THEY WERE SHOOTING THE HOUSE, YES.

>> SHOOTING THE HOUSE.

SO THE IDEA -- DID THEY, I MEAN, I GUESS BECAUSE WE DON'T HAVE THEIR TRANSCRIPT OF THEIR APPEAL, BUT SINCE THEY GOT LIFE, IT WENT TO THE FIRST DISTRICT. THEY WERE JUST TRYING TO SCARE THIS GUY THAT WAS -- IS THAT THEIR TESTIMONY?

>> I DON'T BELIEVE THAT THEY TESTIFIED, BUT THAT WAS THE DEFENSE THAT WAS PUT FORWARD.

>> RASHEEM, JUST SO I'M CLEAR BECAUSE JUSTICE PARIENTE RAISES AN INTERESTING POINT ABOUT THREE PEOPLE GOING TO THIS HOUSE, TWO GETTING LIFE AND ONE GETTING DEATH.

RASHEEM WALKED AROUND THE HOUSE AND ACTUALLY SHOT INTO AN OPEN WINDOW, AND THAT'S WHAT KILLED THE CHILD.

THE OTHER TWO, THE BROTHERS, THEY STAYED PRETTY MUCH OUT FRONT, AND THEY WERE SHOOTING AT

THE HOUSE DRIVE-BY STYLE.

>> YES.

>> OKAY.

SO IT WAS RASHEEM THAT WALKED  
AROUND THE HOUSE AND SHOT IN,  
AND HE HAD THE EXTENDED CLIP,  
AND HE SHOT THE MOST ROUNDS.

>> RIGHT.

SO HE FIRED THE MOST SHOTS, AND  
HE WAS THE KILLER.

AND FINALLY --

>> WELL, I THINK JUSTICE  
LABARGA'S ANSWERED MY QUESTION.  
IF YOU'RE RATIFYING IT, THAT'S  
FINE, BECAUSE TO ME THAT'S VERY  
DIFFERENT THAN WHAT I HAD AN  
IDEA THEY WERE ALL FIRING INTO  
THE HOUSE.

I THINK IT'S CLEARLY, THAT'S THE  
FACTS AS THE JUDGE FOUND IT, I  
THINK.

I DO THINK IT MAKES HIM MORE  
CULPABLE, SO I'M --

>> OKAY.

AND JUST ONE MORE FACTOR IN  
THAT.

DURING HIS STATEMENT TO THE  
POLICE, THE OFFICER SPECIFICALLY  
ASKED HIM WHY DID YOU GO OVER TO  
THAT HOUSE?

AND RASHEEM SAID, "TO GET  
PSYCHO."

NOT TO SCARE HIM, NOT TO SHOOT  
UP THE CAR, BUT TO "GET PSYCHO."  
SO HIS INTENT WAS TO SHOOT  
PSYCHO.

>> AND WHERE WAS DAVIS?

BECAUSE HE, OBVIOUSLY, DIDN'T  
GET TO --

>> HE WAS SITTING ON THE COUCH  
RIGHT IN FRONT OF THE WINDOW.

>> HOW DOES THE SHOT NOT, IF HE  
WAS TRYING TO GET HIM, HOW COULD  
THAT NOT KILL HIM?

>> DAVIS WENT TO THE FLOOR.

AND --

>> WHAT?

WENT TO THE FLOOR OR THE DOOR?

>> THE FLOOR.

HE DROPPED.

AND THE GIRL WASN'T DIRECTLY ON THE FLOOR BECAUSE SHE WAS COVERING HER TWO SMALLER COUSINS.

>> SO ALL OF THESE PEOPLE WERE IN THE FRONT OF THE HOUSE. BECAUSE AS I UNDERSTAND IT, THERE WERE, LIKE, SEVEN PEOPLE IN THE HOUSE, AND THE YOUNG LADY WHO -- THE YOUNG GIRL WHO WAS KILLED WAS THERE WITH A COUPLE OF OTHER CHILDREN, CORRECT?

>> YES.

>> SHE WAS SORT OF HOVERING OVER THEM TRYING TO PROTECT THEM, AS I UNDERSTAND THE RECORD.

SO THEY WERE IN THE FRONT OF THE HOUSE ALSO, OR WERE --

>> THEY WERE IN A FRONT BEDROOM. SO THERE'S A FRONT BEDROOM, THE LIVING ROOM, THE WINDOW WHERE THE SHOTS WERE COMING THROUGH. SO THE SHOT WENT THROUGH THE LIVING ROOM, THROUGH THE WALL INTO HER BEDROOM.

SO SHE WASN'T EVEN ON THE SIDE OF THE HOUSE THAT WAS BEING SHOT.

SHE WAS ON THE OPPOSITE SIDE OF THE HOUSE.

AND SO I THINK THERE IS COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT RASHEEM WAS MORE CULPABLE THAN HIS TWO BROTHERS, AND I THINK THE CASE LAW SUPPORTS THAT THIS IS NOT -- THAT HE IS -- THAT IT'S APPROPRIATE TO GIVE HIM DISPARATE TREATMENT.

>> AND JUST AS ANOTHER ISSUE IN THIS, WHAT IS THE EVIDENCE THAT DEMONSTRATES -- HE WAS CONVICTED OF BOTH PREMEDITATED MURDER AND FELONY MURDER, CORRECT?

>> YES.

>> AND WHAT EVIDENCE IS THERE OF THE PREMEDITATION?

>> THE PREMEDITATION, WELL, HIS COMMENT THAT HE WAS GOING OVER

TO --

>> YOU KNOW, WE HAVE SOME CASE LAW WHERE WE HAVE THIS KIND OF DRIVE-BY SHOOTING SIMILAR TO THIS, AND WE'VE FOUND THAT THAT WAS NOT FIRST-DEGREE MURDER. AND SO WHAT, WHAT IS DIFFERENT ABOUT THIS CASE FROM, LET'S SEE, WAS IT CUMMINGS?

>> YES.

>> AND FISHER?

>> YES.

>> OKAY.

>> WELL, GOING BACK, IT'S THE SAME SET OF FACTS THAT SHOWS THAT HE'S MORE CULPABLE. HE MADE THE STATEMENT BOTH IN FRONT OF HIS COUSIN AND BROTHERS THAT HE WAS --

>> IN FRONT OF WHAT?

I'M SORRY.

>> RASHEEM MADE A STATEMENT IN FRONT OF HIS BROTHERS AND HIS COUSIN, MR. WILSON. HE WAS ON THE PHONE. HE THREW THE PHONE DOWN, AND IT BROKE.

AND HE SAID I'M GOING TO KILL THAT, YOU KNOW, PERSON.

AND HE ALSO TOLD MR. DAVIS THAT "I'M GOING TO GET YOU, I'M GOING TO GET YOU."

AND THEN IN HIS POLICE STATEMENT HE SAID THAT HE WENT TO THE HOUSE "TO GET PSYCHO."

>> LET ME -- I JUST, I'M HESITANT TO CLASSIFY THIS AS A DRIVE-BY SHOOTING.

TO ME, A DRIVE-BY SHOOTING IS WHERE THEY STAY IN THE CAR, DRIVE BY AND SHOOT AT PEOPLE, AND USUALLY A CHILD GETS KILLED. HERE THESE GUYS GOT OUT OF THE CAR, AND RASHEEM WAS WALKING AROUND THE HOUSE AND SHOT INTO AN OPEN WINDOW, AND HIS STATEMENT WAS THAT HE WANTED TO GET THIS GUY.

>> YES.

>> SO I'M HESITANT TO CLASSIFY

THIS AS YOUR TYPICAL DRIVE-BY SHOOTING.

>> I AGREE WITH YOU, YOUR HONOR. BECAUSE THIS IS NOT A RANDOM, RANDOMIZED FIRING OF BULLETS. THIS IS TRYING TO DELIBERATELY HIT SOMEONE.

>> WELL, IF THAT'S THE CASE, WAS CCP FOUND?

>> NO.

>> DID THE STATE --

>> THE STATE DID NOT ASK FOR CCP.

>> FROM WHAT YOU'RE SAYING, THIS WOULD BE HEIGHTENED PREMEDITATION.

THAT IS THAT IT STARTED -- AND, AGAIN, NOT THAT HE HAD A MOTIVE TO KILL, BUT HE CERTAINLY HAD A MOTIVE FOR REVENGE.

I MEAN, THIS DAVIS HAD ROBBED HIM, MADE HIM TAKE HIS CLOTHES OFF.

NOT THAT THAT, AGAIN, IS AN EXCUSE, BUT IT'S CERTAINLY MORE OF A PRECIPITATING FACTOR.

SO IF HE'S GOING OVER TO THE HOUSE TO SHOOT HIM BUT THE STATE DOESN'T, I MEAN, THERE IS ALSO A THEORY, I GUESS, THAT WHAT HE WAS DOING STILL WAS GOING OVER TO SCARE THE GUY.

AND THAT'S CERTAINLY FELONY MURDER BECAUSE YOU'VE GOT THE BURGLARY, AND HE'S RIGHT THERE INSIDE.

SO WAS IT A GENERAL VERDICT?

>> NO, IT WAS A SPECIAL VERDICT.

>> AND THEY FOUND BOTH?

>> THE JURY SPECIFICALLY FOUND BOTH.

AND, AGAIN --

>> BUT EITHER WAY IF THEY FOUND FELONY MURDER --

>> IT'S STILL FIRST DEGREE.

>> RIGHT.

>> BUT, AGAIN, HE WALKED UP TO THE WINDOW.

NO SHOTS IN THE CAR, NOT, YOU KNOW, HE WAS FOCUSING HIS FIRE

ON THAT LIVING ROOM WHERE HE  
KNEW PEOPLE WERE.

THERE WERE PEOPLE IN THE LIVING  
ROOM/DINING ROOM AREA AND THEN  
THE CHILDREN IN THE OTHER  
BEDROOM.

HIS FIRE WAS FOCUSED ON THE  
PLACE --

>> THERE'S NO QUESTION HIS  
INTENT WAS NOT TO KILL THIS  
LITTLE GIRL.

>> NO, BUT HIS TRANSFERRED  
INTENT --

>> NO, I UNDERSTAND THAT.  
BUT THERE'S NO -- I MEAN, THAT'S  
WHY THE AGGRAVATOR OF GREAT RISK  
OF HARM IS PROPERLY FOUND HERE.

>> YES.

IF THERE ARE NO OTHER QUESTIONS,  
I ASK THAT YOU AFFIRM BOTH THE  
GUILT AND PENALTY PHASE.

>> THANK YOU.

REBUTTAL?

>> THANK YOU.

A COUPLE OF THINGS REAL QUICK TO  
TRY TO GO THROUGH.

THERE WAS A QUESTION ABOUT  
WHETHER SHE CONTACTED THE  
BAILIFF DIRECTLY OR ADVISED --  
IT'S NOT REAL CLEAR IN HER  
TESTIMONY.

BUT IN HER AFFIDAVIT IT IS ON  
SUPPLEMENT 2 OF 2, VOLUME 12 AND  
13.

12 SHE TALKS ABOUT GOING TO SEE  
JUDGE HADDOCK.

"I WAS TOLD BY THE BAILIFF I HAD  
TO MAKE AN APPOINTMENT WITH THE  
ASSISTANT, I COULD SEE THE JUDGE  
IN THE COURTROOM, BUT I WAS TOLD  
TO LEAVE BY THE BAILIFF" --

>> AND WHEN WAS THIS?

THIS WAS AT THE PENALTY PHASE?

>> RIGHT.

>> OKAY.

>> IN TWO PARAGRAPHS, 12 AND 13,  
SHE GOES TO TWO DIFFERENT  
BAILIFFS ON THAT DAY AND TELLS  
THEM SHE IS ON THE DUBOSE JURY  
AND NEEDS TO SPEAK TO THE JUDGE,

AND NOBODY TELLS THE JUDGE THAT.  
AS FAR AS THE FIRING SET-UP, IT  
WAS NOT A SITUATION WHERE HE WAS  
FIRING INTO AN OPEN WINDOW,  
JUSTICE LABARGA.

WHAT HAPPENED IS THE TESTIMONY  
IS CLEAR, THEY ALL THREE JUMPED  
OVER THE FENCE IN THE BACKYARD,  
AND THEY BEGAN IMMEDIATELY  
SPRAYING AND ALL AROUND THROUGH  
THE BUILDING, AND THEY CAME  
AROUND THE SIDE.

THERE WAS NO OPEN WINDOW.

THERE WAS NO OPEN WINDOW.

THERE WAS A WINDOW THAT SHOT  
INTO THE HOUSE WHERE THEY WERE  
ALL SHOOTING.

ONE OF THE BROTHERS' GUN JAMMED  
AFTER TWO OR THREE SHOTS.

THE OTHER BROTHER SHOT HIS TWO  
OR THREE SHOTS, AND THEY WERE  
ALL SHOOTING THAT WAY.

THAT BULLET HAD TO TRANSFER  
THROUGH TWO WALLS BECAUSE THE  
LITTLE GIRL WAS NOT IN THAT OPEN  
AREA.

THE LITTLE GIRL -- THE FAMILY  
WAS THERE.

IT HAD TO GO THROUGH THAT WALL,  
A LIVING ROOM WALL, AND THEN IT  
HAD TO GO THROUGH ANOTHER  
BEDROOM ON THE OTHER SIDE OF THE  
HOUSE.

PHYSICAL EVIDENCE SHOWS NOT A  
SINGLE BULLET ENTERED HER  
BEDROOM THROUGH THE EXTERIOR OF  
THE HOUSE.

IT TRAVELED THROUGH TWO OR THREE  
WALLS TO GET THERE.

NOBODY EVEN KNEW THE CHILD WAS  
THERE, MUCH LESS --

>> WELL, I DON'T KNOW HOW -- IF  
HIS INTENT WAS TO GET DAVIS, IT  
DOESN'T MATTER, SO WHY DOESN'T  
IT SHOW BASED ON WHAT JUSTICE  
LABARGA POINTED OUT, THAT THE  
OTHER PEOPLE BEHIND THE FRONT OF  
THE HOUSE AND IT'S HIM THAT  
COMES TO THE FRONT AND SHOOTS  
THROUGH THE WINDOW.



>> THAT'S INCORRECT.  
THE RECORD WILL REFLECT THEY ALL  
CAME AROUND THE HOUSE.  
THEY DIDN'T JUST STAY IN THE  
BACKYARD.  
THEY ALL CAME AROUND THE SIDE OF  
THE HOUSE.  
IT IS NOT -- RESPECTFULLY,  
THAT'S NOT ACCURATE.  
THE RECORD WILL REFLECT THAT --  
>> AND THEY ALL SHOT IN THE  
WINDOW.  
>> THEY ALL SHOT IN THE HOUSE,  
AND THEY TRACKED ONE BULLET,  
THAT UNFORTUNATELY, CAME BACK  
TO --  
>> DOES THE EVIDENCE SHOW THAT  
THEY ALL SHOT IN THAT WINDOW IN  
THE FRONT?  
>> THEY ALL SHOT FROM THAT SIDE  
OF THE HOUSE.  
>> WHAT ABOUT SHOOTING IN THE  
WINDOW?  
WHAT DOES THE RECORD SHOW ABOUT  
WHO SHOT IN THE WINDOW?  
>> IT'S LIKE A CHEESECAKE.  
I MEAN, LIKE SWISS CHEESE.  
THE ONLY THING THAT THEY FOCUSED  
ON WAS THAT ONE BULLET  
TRAJECTORY THAT WENT TO HER.  
THEY DIDN'T FIND SPECIFICALLY  
EVERY OTHER BULLET BECAUSE THERE  
WERE SO MANY OF THOSE.  
>> WELL, MOST OF THOSE THAT THEY  
FOUND WERE BULLETS SHOT BY THE  
DEFENDANT IN THIS CASE, CORRECT?  
>> HE HAD THE MOST BULLETS, OF  
COURSE, SO THERE WAS MORE THERE.  
BUT IT WASN'T JUST THAT HE WAS  
STANDING AT THAT WINDOW SHOOTING  
THERE.  
THE WINDOWS CAME IN THROUGH THE  
BACK OF THE HOUSE, GOING UP  
THROUGH THE KITCHEN, IT WAS  
CLEARLY A SPRAY.  
AND TO THE ISSUE OF GOING BY TO  
SCARE THEM, EVEN THE TWO  
WITNESSES SAID THEY WERE GOING  
BY THERE SIMPLY TO SCARE HIM.  
THEY WERE GOING TO SHOOT UP THE

CAR.

AND ONE OF THE MEMBERS IN THE CAR SAID, NO, NO, NO, NO, NOT WHILE I'M IN THE CAR.

THE PLAN WAS TO SHOOT UP THE CAR.

THE COUSIN --- KEY WITNESS IN THE CASE, IT'S IN THE TESTIMONY --- SAYS I DIDN'T THINK ANYBODY WAS GOING TO GET HURT.

EVEN THE OTHER WITNESS IN THE CAR SAID WE NEVER THOUGHT ANYBODY WAS GOING TO GET HURT.

THAT'S THE UNCONTRADICTED EVIDENCE, THAT THEY WENT OVER THERE TO SCARE THEM.

SO IT IS NOT FIRST-DEGREE MURDER BASED ON ---

>> WELL, BUT DOESN'T THAT JUST FLY IN THE FACE OF WHAT HAPPENED?

THEY RIDDLED THIS HOUSE WITH BULLETS, AND THE NOTION THAT THAT'S JUST TO SCARE SOMEBODY AND THE DEFENDANT, I BELIEVE THE RECORD SHOWS, IS SHOOTING IN THE FRONT WINDOW INTO THE AREA WHERE THE OBJECT OF HIS WRATH IS SEATED OR HUGGING THE FLOOR WHEN THIS, AFTER THIS STARTS.

SO THE NOTION THAT THIS SEEMS TO --- WHY IS IT CREDIBLE?

>> BECAUSE THERE'S NO EVIDENCE THAT HE KNEW THAT PERSON WAS THERE.

HE COULDN'T.

THERE'S NOBODY THAT TESTIFIED THAT HE LOOKED IN THE WINDOW AND SAW PSYCHO.

THERE'S NOTHING LIKE THAT IN THE RECORD.

IT'S PURELY SPECULATION.

THEY ALL SHOT AT THE HOUSE.

JUST LIKE WITH CUMMINGS AND FISHER, THEY SHOT THROUGH THE WHOLE HOUSE, AND THIS COURT SAID IT'S NOT ENOUGH FOR

PREMEDITATION FOR DEATH PENALTY WHICH LEADS ME REAL QUICK TO THE PREMEDITATIVE MURDER BUT ALSO ON

THE FELONY MURDER ON THE  
STRUCTURE ISSUE.  
THIS COURT IN HAMILTON LAID OUT  
A VERY WELL-REASONED ANALYSIS IN  
THIS CASE, AND I SUBMIT IT  
DOESN'T RISE TO THE LEVEL OF  
FELONY MURDER IF WE FOLLOW THIS  
COURT'S DECISION IN HAMILTON.  
I THINK YOU'D HAVE TO REVERSE  
HAMILTON, WHICH IS AN EXTREMELY  
LONG, AND WELL THOUGHT OUT --  
>> YOU'RE SAYING THERE WAS NOT A  
BURGLARY HERE?  
>> MY ARGUMENT IN ONE OF THE  
ISSUES IS THERE WAS NOT A  
BURGLARY.  
IT HAS TO BE AN ENCLOSURE --  
>> THEY CAME OVER --  
>> THEY JUMPED THE FENCE.  
>> -- THE BACK FENCE --  
>> YES, MA'AM.  
>> -- OF A STRUCTURE, A HOUSE.  
>> YES.  
>> AND THAT'S NOT A BURGLARY?  
>> BASED ON HAMILTON, IT'S NOT  
AN ENCLOSURE.  
WHAT THE CASE LAW TALKS ABOUT IS  
SOME FORM OF AN ENCLOSURE.  
SOME FORM, I WOULD RESPECTFULLY  
SAY --  
>> A FENCE IS NOT AN ENCLOSURE?  
>> IT CAN BE, BUT THE WORD  
"ENCLOSURE" INSINUATES ENCLOSED.  
>> YOU MEAN --  
>> YOU MEAN BECAUSE THERE  
WASN'T, THERE WAS A PART IN THE  
FRONT --  
>> RIGHT.  
>> -- THAT DIDN'T HAVE THE  
FENCE, THAT MAKES IT NOT AN  
ENCLOSURE?  
>> RIGHT.  
I'M JUST SAYING THE SUPREME  
COURT IN HAMILTON -- MAYBE IT'S  
NOT MY STRONGEST ARGUMENT, BUT I  
WOULD SUBMIT --  
>> THE PART IN THE FRONT THAT  
DID NOT HAVE THE ENCLOSURE, WAS  
THAT THE DRIVEWAY INTO THE HOUSE  
SO CARS CAN GET IN AND OUT?

>> YES, SIR.

>> A LOT OF PEOPLE HAVE FENCES AROUND THEIR HOUSES AND DON'T HAVE -- GET IN AND OUT. THE MERE FACT THAT YOU DON'T HAVE A GATE IN THE DRIVEWAY, THAT RENDERS IT NOT AN ENCLOSURE?

IS WHETHER BASE --

>> BASED ON THIS COURT'S DECISION IN HAMILTON, RESPECTFULLY, YES.

I THINK THE DCA'S STARTED TO RECEDE FROM IT, BUT IF YOU READ THE HAMILTON DECISION -- AND IT'S WELL THOUGHT OUT AND REFLECTS ON COMMON LAW, AND IT GOES THROUGH AND IT SAYS, IT SAYS -- I'LL FIND IT, I CAN ACTUALLY REMEMBER THE QUOTE OF WHAT IT SAYS.

THIS COURT SAID: WE ACKNOWLEDGE THAT THE LEGISLATURE IS WITH THE FULL AUTHORITY TO AMEND THE STATUTE.

HOWEVER, WE SIMPLY DO NOT HAVE THE PREROGATIVE TO REDEFINE CARTILAGE AS IT WAS TREATED UNDER COMMON LAW AND EFFECT JUDICIALLY AMEND THE BURGLARY STATUTE.

AND THAT'S WHAT YOU WOULD NEED TO DO BASED ON MY ANALYSIS OF HAMILTON.

>> WHAT HAPPENS IF SOMEBODY LEAVES A GATE OPEN?

I MEAN, DOES THAT RENDER IT NOT AN ENCLOSURE ANYMORE?

>> HAMILTON SAID WE START GETTING INTO A CASE-BY-CASE BASIS, THEN ALL OF A SUDDEN WE'RE OPENING A PANDORA'S BOX. SO WE'RE GOING TO BASICALLY TELL THE LEGISLATURE IF YOU DON'T LIKE THE WAY IT IS, CHANGE THE LAW, AND THE LEGISLATURE HASN'T CHANGED IT.

AND HAMILTON POINTS OUT THAT WE ARE THE ONLY STATE IN THE UNITED STATES THAT HAS GONE THIS FAR IN

TRYING TO GO THAT DIRECTION AND  
TRYING TO CRIMINALIZE  
BURGLARIES.

>> THIS WAS THE FIRST DISTRICT  
ANALYZED THIS EXACT CASE AS TO  
THE CO-DEFENDANTS AND FOUND  
THERE WAS A BURGLARY?

>> THEY DID.

>> AND SO YOU WOULD SAY THAT'S  
IN CONFLICT, THEIR DECISION'S IN  
CONFLICT WITH HAMILTON?

>> WE KNOW DISTRICT COURTS OF  
APPEAL ARE IN CONFLICT ALSO.  
I WOULD SUBMIT THERE ARE CASES  
THAT HAVE FOLLOWED HAMILTON AND  
RECENTLY A COUPLE OF CASES THAT  
ARE STARTING TO RECEDE FROM IT.  
I THINK THE COURT IN THIS CASE  
WOULD HAVE TO OVERRULE OR  
SERIOUSLY RECEDE FROM HAMILTON  
IN THIS CASE.

>> THANK YOU FOR YOUR ARGUMENTS.

>> THANK YOU, YOUR HONORS.

>> COURT IS ADJOURNED.

>> ALL RISE.