

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

THE PEOPLE OF THE STATE
OF MICHIGAN

Plaintiff,
vs

Case No. 10-0011495

DERRICO SEARCY (01)
DARRELL EWING (02)

Defendants.

_____ /

EVIDENTIARY HEARING

BEFORE THE HONORABLE MICHAEL HATHAWAY - CIRCUIT JUDGE

Detroit, Michigan - Monday, August 26, 2019

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E X H I B I T S

18		<u>Offered</u>	<u>Received</u>
19	None.		

19 None.

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1 Detroit, Michigan

2 Monday, August 26, 2019

3 At approximately 9:48 a.m.

4 - - -

5 THE CLERK: Case number 10-1495-01. The
6 People versus Derrico Searcy, and case number
7 10-1495-02, the People versus Darrell Ewing. These
8 matters are before the Court for a motion hearing.

9 MR. WOJTALA: Good morning, your Honor.
10 John Wojtala for the People.

11 MR. COMORSKI: Your Honor, good morning.
12 Phillip Comorski on behalf of Mr. Darrell Ewing.

13 MS. SWANSON: Good morning, your Honor.
14 Casey Swanson from the Federal Community Defender
15 Office on behalf of Mr. Searcy, also with me at
16 counsel table is Colleen Fitzharris who is not
17 licensed to practice in Michigan but practices in
18 Federal Court and is Mr. Searcy's lead habeas
19 attorney.

20 THE COURT: Okay. And she's going to be
21 sitting with you at counsel table?

22 MS. SWANSON: Yes, if that's okay with the
23 Court?

24 THE COURT: All right. So I'm ready to
25 proceed. You know, I'm not sure who has the burden

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1 here. You had the burden, the People had the
2 burden, of setting this up and --

3 MR. WOJTALA: I did, your Honor. Based on
4 People versus Budsen and Nevers it set forth what
5 the burdens are and they're initially three burdens.
6 There are two burdens that the defense have, which
7 is to first show that there was some type of
8 extraneous evidence that was exposed to the jury,
9 then the next burden is to show that that extraneous
10 evidence was material to the particular case. Once
11 those two burdens are met by the defense then the
12 burden shifts to the Prosecution to show that it was
13 harmless error.

14 THE COURT: Okay. So do I understand the
15 People pretty much concede the first two burdens?

16 MR. WOJTALA: In no way shape or form,
17 your Honor.

18 THE COURT: Okay. All right so.

19 MR. WOJTALA: And that was sort of the
20 point of the 6th Circuit was that before any new
21 trial could be granted by the Federal Courts, before
22 habeas relief can be granted, there needed to be a
23 hearing where the defendants have shown that there
24 was extraneous evidence and that they were -- was
25 something material.

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1 THE COURT: All right. I thought that you
2 had conceded that there was extraneous evidence at
3 some point along the way and the only reason I ask
4 is because then, you know, I guess if everything is
5 at play, if all those issues are at play, the
6 testimony that you're going to be producing today is
7 going to have to be a little broader than just
8 outcome determination I guess, right?

9 MR. WOJTALA: Correct.

10 THE COURT: Okay. Now let me ask you
11 this, which four jurors? You've got or I'm sorry.
12 You've got three today?

13 MR. WOJTALA: Today we have -- there's two
14 in the witness room right now. There's a third
15 juror who is available and is upstairs, and then
16 there's a 4th juror who was subpoenaed for today but
17 is unavailable today.

18 THE COURT: All right. And that's one of
19 the jurors that was here when we had the hearing
20 last time that had to be aborted because one of the
21 defendants hadn't been writted down here, right?

22 MR. WOJTALA: Exactly.

23 THE COURT: And I ordered that juror to be
24 here today but that juror is not here?

25 MR. WOJTALA: Correct.

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1 THE COURT: That juror has since
2 communicated with you that he had a prepaid trip to
3 Hawaii or something?

4 MR. WOJTALA: Correct.

5 THE COURT: For all we know he's in
6 Hawaii.

7 MR. WOJTALA: He did indicate to me that
8 if the Court does need him in the next two days,
9 because we do have two days, two more days until,
10 which is another matter which I'll address, is that
11 we could, if possible, arrange for a video with him
12 to testify.

13 THE COURT: Okay. Counsel, anything you
14 want to add or say about this?

15 MR. COMORSKI: Well, I think Mr. Wojtala
16 is incorrect in what has to be established today.
17 The district Court originally granted Mr. Ewing, the
18 District Court being Judge Denise Page Hood,
19 originally granted Mr. Ewing a new trial on the
20 basis of the extraneous influences. The issue that
21 was taken up on appeal is whether or not a new trial
22 could be granted given the fact the hearing was
23 never conducted in the first place. Now all of the
24 parties, including the state Court of Appeals,
25 agreed that extraneous information or influences did

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1 make it to the jury room. The only question was
2 whether prejudice was established; that's what the
3 basis of the 6th Circuit ruling is, and so the 6th
4 Circuit sent it back to Judge Denise Page Hood with
5 instructions to amend her grant of a habeas petition
6 contingent on holding the hearing. Now I am quoting
7 directly from Judge Hood's amended grant of a habeas
8 petition where she states as follows: "The 6th
9 Circuit affirmed in part this Court's decision
10 agreeing that extraneous information had been used
11 to convict petitioner", petitioner being Mr. Ewing,
12 that's on page 4 of her amended habeas grant.

13 And then on page 5 under sub-B she
14 indicates, "The grant is conditioned upon the State
15 Court conducting an evidentiary hearing on
16 petitioner's juror misconduct claim within 120 days
17 of this Court's order and making a determination as
18 to whether the extraneous information had a
19 prejudicial affect on the jury's verdict. If the
20 Judge so finds, he or she shall order a new trial
21 for petitioner.

22 THE COURT: Yeah, that's what I recall
23 reading.

24 MR. COMORSKI: Now with respect to the
25 question of who should be held responsible for

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1 jurors that are either not here or can't be present,
2 I think that was addressed in the 6th Circuit
3 opinion in footnote 4 where, I think, the Court
4 alluding to the State conceding. The Attorney
5 General at oral argument did, in fact, concede that
6 if these jurors can't be found, or if they're dead,
7 or combination thereof that that should be held
8 against the State; that's right in footnote four.

9 MR. WOJTALA: Your Honor, just for one
10 purpose, your Honor, there are people speaking
11 behind me and so could I ask that the audience be
12 instructed to remain silent.

13 THE COURT: I can't hear it, but if any of
14 you think you can't sit quietly in a courtroom and
15 just watch these proceedings without making a
16 disturbances or distracting the lawyers then please
17 leave. All right. Well, Mr. Comorski, I'm not sure
18 quite what to do about this particular issue because
19 it wasn't the People's fault that it's been almost
20 ten years since the verdict. I mean, they conceded
21 in front of Judge Youngblood that there has been
22 extraneous influences and they actually, I
23 understand it, asked for, or conceded, to a hearing
24 and Youngblood denied it any way.

25 MR. COMORSKI: That's correct.

1 THE COURT: So the unavailability of
2 jurors really shouldn't be held against the People.
3 I don't remember reading that footnote but, okay, if
4 you say it's there, and I'll look at it again of
5 course, but so you're saying that in a footnote the
6 6th Circuit said that the People's inability to
7 roundup all 12 of these jurors from 12 years ago has
8 to be held against the People?

9 MR. COMORSKI: I'll quote the footnote,
10 your Honor. It says, "At oral argument counsel for
11 the State agreed that to the extent juror testimony
12 has become unavailable a burden or presumption
13 "might well" be placed on the State, and then they
14 quote --

15 THE COURT: Might, okay.

16 MR. COMORSKI: Yeah. Then they quote
17 directly from the oral argument:

18 "QUESTION: Do you know if these jurors
19 are alive?" And the person answering is the
20 Attorney General.

21 "ANSWER: I don't know, your Honor. I
22 don't know if they're not. I mean, these things
23 that the Court can take into account and can say,
24 you know, we've tried to have a hearing. We
25 couldn't get these jurors here because they're

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1 missing or they're dead and we can make inferences
2 and we can hold that against the State perhaps and
3 we can say, you know", and then a question pops up.

4 That's the question. Suppose
5 hypothetically that these jurors are inaccessible,
6 either dead or can't be found, so against whom would
7 any burden or presumption be placed? You just said
8 it would placed against the Government, the State?

9 ANSWER: I think it would depend on and I
10 think it might well be placed against the State.

11 QUESTION: What would it depend on?

12 ANSWER: I think it would depend on whose
13 fault it is. I think, unfortunately, the fault lies
14 mainly with the Wayne Circuit Court because in the
15 Wayne Circuit Court both parties agree let's have a
16 hearing, it's fresh, let's do it now and the Wayne
17 Circuit Court said we don't need a hearing.

18 THE COURT: Okay. Basically what I just
19 said.

20 MR. COMORSKI: Yes, but I think that the
21 fact of the matter is when this was originally
22 appealed to the State Court of Appeals there was no
23 concession that he was entitled to a hearing. They
24 totally opposed it. When this was sent to Judge
25 Hood on habeas the Attorney General originally

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1 opposed holding a hearing saying they can't enlarge
2 the record. It was only after Judge Hood granted
3 habeas relief that the Attorney General suddenly
4 decided, okay, well, he's entitled to a hearing.
5 Now we're nine years after the fact.

6 THE COURT: Well, the Attorney General may
7 have only just decided that after Hood but that was
8 because the law of the case, you might say, was that
9 no hearing needed to be held but at the trial court
10 level initially, right after the trial, didn't the
11 People concede the need for a hearing?

12 MR. COMORSKI: Yes, yes.

13 THE COURT: Well, okay. All right. Well,
14 we'll see. I mean that footnote is not a definitive
15 statement about the burden and the consequences of
16 jurors not being found. It's contingent on, I
17 guess, the broader context of why certain juror are
18 not available, and it's quite possible that I could
19 make a finding, one way or the other, with just
20 four, well, four jurors is a third of the jury. I
21 mean, if all four of those jurors are in lockstep,
22 you know, in terms of whether there was extraneous
23 influences and what it was, and what they remember
24 about the influences and how it effected jury
25 deliberations I may very well be able to make a

1 decision. Now let's see how this goes, I guess
2 that's the best thing to do. So anyway, you have
3 three out of the four people that were here last
4 time, Mr. Wojtala?

5 MR. WOJTALA: Yes.

6 THE COURT: And that includes the whistle
7 blower, Ms. Burns?

8 MR. WOJTALA: Yes, she's here. There's
9 also Ms. Chesney who was one of the people who was
10 accused in Ms. Burns' affidavit. The other one that
11 was accused, Ms. James, I did make an attempt to
12 subpoena her. The subpoena wasn't issued but I have
13 had contact with her.

14 THE COURT: I wasn't issued?

15 MR. WOJTALA: We sent out a subpoena. It
16 was unable to be served upon her. She now lives out
17 of state. The address that we tried to serve it
18 upon was here in Michigan. I've had contact with
19 her. I have received an affidavit from her as to
20 what her testimony is and so that is available.

21 THE COURT: You've seen that affidavit?

22 MR. COMORSKI: Yes.

23 MS. SWANSON: Yes, your Honor.

24 THE COURT: All right. Well, okay. I
25 guess you've done everything that can be done about

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1 her. She said she was unwilling to come back here
2 voluntarily?

3 MR. WOJTALA: She is. She had indicated
4 that she had some health problems. She lives out of
5 state. She would require, I believe, she said she
6 needed a comfort animal to travel with her. It's a
7 very arduous process, she had indicated to me, and
8 so that is the reason why that she was unwilling to
9 return but she did indicate that, you know, if
10 circumstances require that she could find her way
11 back here or at least have some type of video
12 testimony with the Court.

13 THE COURT: All right. It doesn't, I
14 guess, there's a controversy here about who has the
15 burden to show what at this stage. I'm not sure we
16 have too get deeply into that issue. One of you can
17 call the first witness. It doesn't matter to me
18 which one. The People, I mean, you're the one that
19 did the work getting them here so why don't you call
20 the first witness.

21 MR. WOJTALA: Sure.

22 THE COURT: That doesn't necessarily mean
23 you have the burden, I'm not sure about that, but
24 let's see.

25 THE CLERK: Please raise your right hand.

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1 Do you solemnly swear or affirm that the testimony
2 you're about to give will be the truth?

3 MS. BURNS: Yes.

4 KATHLEEN BURNS

5 (At 10:02 a.m., sworn as a witness, testified as follows)

6 THE CLERK: Thank you.

7 COURT OFFICER: Have a seat please.

8 THE COURT: Okay. You may began.

9 MR. WOJTALA: Thank you, your Honor.

10 D I R E C T E X A M I N A T I O N

11 BY MR. WOJTALA:

12 Q Good morning.

13 A Good morning.

14 Q And could you state your name one more time for the
15 record.

16 A Kathleen Burns.

17 Q And, Ms. Burns, you were a juror that sat during the
18 trial or Mr. Ewing and Mr. Searcy, correct?

19 A Yes.

20 Q And you were particularly you were juror number
21 four, if you remember?

22 A Yes, I think so.

23 Q All right. Now shortly after reaching a verdict in
24 this particular case, and you were present for the
25 actual giving of the verdict, correct?

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1 A Yes.

2 Q And you had joined in with the other jurors in that
3 verdict, correct?

4 A Yes.

5 Q Shortly after that verdict you did produce a
6 affidavit, correct?

7 A Yes.

8 Q And in that affidavit who did you present that
9 affidavit to?

10 A Mr. Cripps.

11 Q Okay. How exactly did it come about that Mr. Cripps
12 was able to get this affidavit from you?

13 A He had called to ask about my experience on the jury
14 and, you know, just to see how things went, how I
15 felt about being a juror and so I just started to
16 tell him.

17 Q Okay. So this was like a cold call from Mr. Cripps?

18 A Yes.

19 Q Inquiring how was your experience as a juror?

20 A Yes.

21 Q Had you, prior to Mr. Cripps contacting you, had you
22 had any contact with anyone about what's contained
23 in your affidavit outside of the other jurors?

24 A Outside of the jurors?

25 Q Well, it's a bad question. Let me see if I can fix

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1 it a little bit better. So after the verdict is
2 entered and you go home for the day, between the
3 time that you left for the day that day and Mr.
4 Cripps calling you had you contacted anyone about
5 the allegations contained in your affidavit?

6 A No. There were some emails that went back and forth
7 between the jurors but we were just nothing like
8 that.

9 Q Okay. So you had somehow got the email addresses
10 from your fellow jurors after the verdict and you
11 kind of contacted each other?

12 A Yes.

13 Q And do you know how Mr. Cripps decided to call you
14 about how your experience was on the jury?

15 A No. He said he often reaches out to people on the
16 jury. I didn't feel that I was the only person he
17 was calling.

18 Q When Mr. Cripps called you and asked how your
19 experience was on the jury, what exactly did you
20 tell him?

21 A I told him that I was still having a very hard time
22 with it; that I wasn't sure I had made the right
23 decision based on everything that I had heard and
24 that, you know, I was having a hard time day to day.

25 Q Okay. More specifically what did you tell Mr.

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1 Cripps about any type of extraneous or extraneous
2 information getting into the jury room?

3 A I guess I just started talking and telling him how
4 the deliberations went and that there were other
5 things introduced which I wasn't sure if that was
6 right or wrong but they, you know, those things
7 should have been brought in once the case was over
8 just to be discussed among us, I wasn't sure if that
9 was right or wrong and just told him about those
10 things and then he said, well, you know, why don't
11 you come down to my office and talk about it
12 further.

13 Q So you did do that?

14 A I did.

15 Q You went down to see Mr. Cripps at his office?

16 A I did.

17 Q And then after speaking to him you did produce an
18 affidavit as we've addressed, correct?

19 A Yes.

20 Q I'm going to show you and I think it's a document.
21 Do you recognize that document, ma'am?

22 A Yes. I think there's -- oh, yeah.

23 Q It's three pages.

24 A Yes, I do.

25 Q And what exactly is that document, ma'am?

1 A It's just a statement of what I said happened in the
2 jury room during deliberations.

3 Q Okay. And I want to go through some of the things
4 you have in here that we're here to address. The
5 first thing that you indicate is that there was some
6 information from one of your other jurors, Ms.
7 Michelle Chesney, correct?

8 A Yes.

9 Q And do you recall what the information was that Ms.
10 Chesney had that made you think that extraneous
11 information was being considered?

12 A It was just that I recalled that she had looked the
13 defendants up on Facebook to learn more.

14 Q And so how did you discover that information from
15 Ms. Chesney?

16 A I believe she just told us.

17 Q Okay. And do you recall was this in a conversation
18 outside or was this during the actual deliberations
19 in the jury room?

20 A During the deliberations.

21 Q Okay. So during deliberations in the jury room Ms.
22 Chesney made some comment about her looking up
23 someone?

24 A Yes.

25 Q And did she indicate who exactly she looked up?

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- 1 A Mr. Ewing.
- 2 Q Okay. And what specifically did she look up, if you
- 3 recall?
- 4 A Just, you know, how you can look up on Facebook,
- 5 punch someone's name in and see what comes up. I
- 6 remember her saying that there were pictures of
- 7 defendant with guns and I think it's probably in
- 8 that affidavit that it said something like there was
- 9 a picture of him maybe with a girl and it said, "Mr.
- 10 and Mrs. Nasty" or something.
- 11 Q Okay. But you had indicated something along the
- 12 lines of that she had indicated that she saw
- 13 pictures of Mr. Ewing with guns?
- 14 A Yes.
- 15 Q Did you put that in your affidavit?
- 16 A I think so.
- 17 Q I'm going to show you, once again, the affidavit
- 18 which you indicated was yours.
- 19 A Okay.
- 20 Q Could you point out to me where exactly it says in
- 21 there that Ms. Chesney referred to pictures of Mr.
- 22 Ewing with guns?
- 23 A Okay. I don't see it in here. That's just my
- 24 memory I guess.
- 25 Q Okay. That's just your memory of it?

1 A Yes.

2 Q And this was nine years ago, correct, when this
3 happened?

4 A Yes, yes.

5 Q Now I know I indicated this was nine years ago but
6 do you remember specifically what Ms. Chesney said
7 in reference to the Facebook? What she saw on
8 Facebook?

9 A Just, you know, basically that she had looked it up
10 and what it said about the nasty, Mr. and Mrs. Nasty
11 or something. I do remember the quote because it
12 sounded kind of silly to me but and then people just
13 discussed it.

14 Q Okay. Let's go back. You said that you remember
15 something specific of her saying she saw a
16 photograph of Mr. Ewing and some caption of Mr. and
17 Mrs. Nasty?

18 A Yes, I remember that.

19 Q And then you said there was a general discussion?

20 A I don't think it was terribly long. It was just,
21 you know, people talking about it.

22 Q Okay. And when you say "people" are you referring
23 to the jurors?

24 A The jurors, right.

25 Q Was this all the jurors?

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1 A I don't remember if every single juror made a
2 comment, you know. As I recall, it may not be in
3 there, but as I recall a lot of people were sort of
4 doing their own research.

5 Q Okay. Now you say that but in your affidavit you
6 only refer to two people, Ms. Chesney and Ms. James,
7 correct?

8 A Right.

9 Q Are you now saying that more than Ms. Chesney and
10 Ms. James were doing internet research?

11 A Well, when one person would say, "Oh, I looked this
12 up" others might say, "Oh, I saw that too", things
13 like that. When I made the affidavit it wasn't --
14 Mr. Cripps and I were just having a discussion and
15 then he produced that like, do you agree with this,
16 so I wouldn't say that everything we discussed is in
17 that affidavit. If that make sense.

18 Q Okay. But you certainly had the opportunity to
19 review this before you signed it?

20 A I did.

21 Q And you did sign it?

22 A I did.

23 Q And you were able to make some type of corrections
24 on here if something was missing?

25 A I suppose I could have.

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1 Q And if something was incorrect you could have made
2 that amendment also?

3 A Yes.

4 Q Okay. So did Ms. Chesney produce any type of
5 printout from what she saw?

6 A Not that I recall.

7 Q Okay. So the extent of her commenting about going
8 on Facebook was it?

9 A Uh-huh, yes.

10 Q I'm sorry. You just have to say --

11 A Yes.

12 Q I know you did say yes, but was that she had gone on
13 there and she saw this photograph of Mr. Ewing with
14 the caption "Mr. and Mrs. Nasty"?

15 A Right.

16 Q And you said there was some general discussion
17 about, yes, I saw that too, correct?

18 A Yes.

19 Q How long did that discussion last?

20 A I'm not sure. I mean it wasn't an all day thing.
21 It wasn't hours. It was probably brief.

22 Q Okay. Did Ms. Chesney make reference to anything
23 else? Any other research that she conducted
24 independently?

25 A Not that I recall.

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1 Q Okay. Now you, of course, were present during Judge
2 Youngblood's instructions to the jury as to only
3 consider things involved that were presented to you,
4 the evidence that was presented to you as jurors and
5 in trial, correct?

6 A Yes.

7 Q Okay. Upon hearing that Ms. Chesney had conducted
8 some type of outside research into things, what did
9 you do at that point?

10 A I guess I just listened. It got a little confusing
11 as to -- I know that during the trial we weren't
12 supposed to discuss things or talk to anyone, even
13 at home, about what was being said but I think once
14 we got into the jury room it sort of became as
15 though we were free to say whatever we wanted to
16 say.

17 Q Okay. And when you say "free to say whatever we
18 wanted to say" you mean among each other?

19 A Among the jurors.

20 Q So I guess my question is you didn't -- did you at
21 that time indicate, you know, say hey we're not
22 supposed to consider any of that information?

23 A I can't say for sure that I did.

24 Q And did you indicate to the foreman that, hey, this
25 is, again, this isn't something that we shouldn't be

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1 considering?

2 A I can't say that for sure either.

3 Q And you certainly didn't write a note to the judge
4 saying hey --

5 A No, I didn't.

6 Q -- Ms. Chesney was doing some outside research?

7 A No.

8 Q Now as to this information that Ms. Chesney spoke
9 about, this going on Facebook and then seeing the
10 photographs, did that impact your deliberations at
11 all?

12 A I don't think the Facebook thing did, no.

13 Q Okay. And certainly in saying that you don't think
14 it did, it didn't affect the verdict that you
15 reached because Ms. Chesney -- let me --

16 THE COURT: Are you asking her that
17 question in terms of her own opinion? Her own point
18 of view or are you asking her for sort of a
19 collective opinion?

20 MR. Wojtala: Right now I'm asking as to
21 her own specific.

22 THE COURT: Her own vote?

23 MR. Wojtala: Her own particular vote,
24 correct.

25 THE COURT: Okay.

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1 BY MR. WOJTALA, continuing:

2 Q As to your own vote did the fact that Ms. Chesney
3 had gone, had indicated that she went on Facebook
4 and saw a photograph of Mr. Ewing did that affect
5 your verdict in this case?

6 A No.

7 Q Are you aware of that information affecting anyone
8 else's verdict in this particular case?

9 A I can't answer for that.

10 Q Okay. But you were present during the deliberations
11 when the verdict was actually reached by the jury
12 inside the jury room, correct?

13 A Yes.

14 Q And did you hear anything among the jurors where
15 they indicated, well, I would have ruled a
16 particular had but now that I know this information
17 from Ms. Chesney I'm going to rule differently?

18 A I don't think anyone actually said that, no.

19 Q And do you recall any jurors saying, well, I think
20 he's guilty because there's a photograph of Mr. and
21 Mrs. Nasty on the Facebook?

22 A No.

23 Q Okay. So moving forward to you had also indicated
24 in your affidavit that another juror, Karen James,
25 do you remember her?

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- 1 A Yes.
- 2 Q Okay. You had also indicated that she had also did
3 some internet research, correct?
- 4 A That's right.
- 5 Q Okay. How exactly did that come up during a
6 conversation or did that come up during
7 deliberations?
- 8 A Deliberations.
- 9 Q Okay. So while you're in there and you're
10 deliberating on the verdict Ms. James makes an
11 indication that she also had gone on the internet
12 and did some research, correct?
- 13 A Right.
- 14 Q And what exactly, specifically, did she say that she
15 did?
- 16 A She had looked up information about gangs.
- 17 Q Okay.
- 18 A And can I just talk freely about what had happened
19 to kind of lead to that or?
- 20 Q What did -- let me ask the question.
- 21 A Okay.
- 22 Q What exactly did she say specifically about --
- 23 A Okay.
- 24 Q -- what she found on gangs?
- 25 A She said that all gangs have like a pecking order.

1 Q Okay.

2 A And that certain people are more important in the
3 gang so they would be at the top of the list and
4 then some people maybe a new member in the gang
5 wouldn't be as important, sort of disposable, or I
6 don't know if that's the right word but.

7 Q Okay. And you, of course, as being a member of the
8 jury you were present during closing arguments by
9 Mr. Cripps, correct?

10 A Yes.

11 Q Okay. And you heard what his arguments were?

12 A Yes.

13 Q Okay. And do you recall that Mr. Cripps, in fact,
14 also argued that there's a pecking order to gangs?

15 A I actually don't recall his arguments that clearly.

16 Q Okay. That's fine.

17 A Yeah.

18 Q So she had indicated, Ms. James, I'm sorry. Ms.
19 James had indicated that she found on the internet
20 that there's a pecking order involving gangs?

21 A Yes.

22 Q Did she indicate anything else specifically that she
23 found during her research?

24 A I think that was the primary point that she brought
25 back after looking that up.

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- 1 Q Okay. So she makes mention of doing this research,
2 correct?
- 3 A Yes.
- 4 Q And then she says this in the presence of all the
5 other jurors?
- 6 A Yes.
- 7 Q What exactly is the reaction of the other jurors to
8 that?
- 9 A Basically just uh, you know, just a shrug of the
10 shoulder. I guess they weren't too affected.
- 11 Q Okay. So this was basically something that she made
12 mention of? It was maybe acknowledged and there
13 wasn't further discussion about it?
- 14 A I think she made mention of it for my benefit.
- 15 Q Okay. So for your benefit, once you received this
16 information from Ms. James as to the pecking order
17 of gangs, did that affect your deliberations in any
18 way?
- 19 A Yes.
- 20 Q Okay. And I'm speaking specifically for the
21 information and not for any other pressure or
22 anything placed on by other jurors?
- 23 A Yes.
- 24 Q How exactly did that affect your deliberations?
- 25 A Prior to Ms. James bringing that information in I

1 was, at least I don't want to speak for anyone else,
2 so I would say I was the holdout on the jury. I was
3 feeling that there was -- that things hadn't been
4 proven beyond a reasonable doubt and a lot of that
5 my feeling was based on the fact that another person
6 had confessed to the murder and she brought that
7 information in to show me. I kept saying, "Why
8 would anyone else confess to a murder they didn't
9 commit", and she brought that in to show me why that
10 this other person, Mr. Washington I believe was his
11 name, that he would have confessed because the gang
12 told him to.

13 Q Let me, I guess, take a half step back here. As far
14 as did she bring in any printouts as far as what she
15 had found or heard?

16 A I don't necessarily recall that she had a printout.

17 Q Okay. And the extent of what she told you about
18 this pecking order was what? Just that there was a
19 pecking order?

20 A Yes, and she went onto explain everything she had
21 read. It's hard to recall after all these years but
22 I remember that discussion went on for, you know, a
23 longer period of time than the information about the
24 Facebook.

25 Q Okay.

1 THE COURT: Let me jump in here and ask a
2 question. Do I understand you to say that it was
3 Ms. James who told the rest of the jurors during
4 deliberations that someone else had confessed to the
5 crime and that she had discovered that in her
6 internet research?

7 THE WITNESS: No, no, that was brought up
8 during the trial.

9 THE COURT: Okay. I was going to say,
10 okay. So there was trial evidence that somebody
11 else had confessed to the crime?

12 THE WITNESS: Yes.

13 THE COURT: All right. So Cripps
14 obviously knew that somebody else had confessed.
15 Was that confessor called as a witness?

16 THE WITNESS: No. As I recall, we were
17 told that he couldn't be brought into the courtroom
18 because it would affect his case. He was in jail
19 for something else but they brought in another --

20 THE COURT: How did that evidence come in
21 Mr. Wojtala?

22 MR. WOJTALA: There was a -- my memory was
23 that there was another witness, and let me just
24 refresh my memory as to --

25 THE COURT: Was his actual confession a

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1 written confession?

2 MR. WOJTALA: No, your Honor. My memory
3 was is that there was another person who,
4 Christopher Richardson was his name. He was a
5 witness a the trial. He testified as to he spoke to
6 this person a number of times and --

7 THE COURT: Washington.

8 MR. WOJTALA: Washington a number of times
9 and during those discussions Washington indicated
10 some -- I don't remember exactly what he said but
11 it's something --

12 THE COURT: So that would have come in as
13 a statement against penal interest?

14 MR. WOJTALA: I believe so.

15 THE COURT: Was that part of the People's
16 case?

17 MR. WOJTALA: It came in for the defense.

18 THE COURT: Oh for the defense?

19 MR. WOJTALA: Yes.

20 THE COURT: All right. So they presented
21 a witness who said Washington told the witness that
22 he had committed the crime or?

23 MR. WOJTALA: That he laid Isaiah down.

24 THE COURT: Okay

25 MR. WOJTALA: Is what he specifically --

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1 and then gave details about it occurred. It
2 alternated between Harper and Van dyke and I believe
3 there was another location that he had indicated;
4 Harper and Gratiot.

5 THE COURT: Well did he exculpate the two
6 defendants or did he just, I mean, he could have
7 been a third perpetrator I guess? I don't know.

8 MR. WOJTALA: His testimony, your Honor,
9 was that --

10 THE COURT: Wait a minute. Not testimony.
11 You're talking about -- I'm talking about the
12 declarant. What did the declarant say?

13 MR. WOJTALA: The declarant had indicated,
14 so Richardson said that the declarant, Washington.

15 THE COURT: Yes.

16 MR. WOJTALA: Had said that he and someone
17 named William Bills and an Adrienne Jackson were all
18 in a car and that he, that Washington was the one
19 who got out of the car and shot.

20 THE COURT: So the witness' testimony
21 about what the declarant said to the witness
22 exculpated these two defendants?

23 MR. WOJTALA: It did, your Honor.

24 THE COURT: Okay. So that would have been
25 offered under the penal interest exception I guess.

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1 Was that argued? Did the People object to it do you
2 remember?

3 MR. WOJTALA: My memory was that there was
4 an objection to it and Judge Youngblood allowed --

5 THE COURT: She allowed it in.

6 MR. WOJTALA: She allowed it in to
7 testify.

8 THE COURT: Okay. And then, of course,
9 the jury could decide whether or not Richardson was
10 a credible witness or not about what he claimed
11 Washington told him. Washington was not brought in,
12 right?

13 MR. WOJTALA: Correct.

14 THE COURT: So now my question here to Ms.
15 Burns is, what revelations did juror James make
16 about Washington's confession that you didn't
17 already now anyway through trial evidence?

18 THE WITNESS: It wasn't -- I don't know
19 how to say it. It wasn't necessarily about his
20 actual words in his confession. It was more that an
21 explanation given to me of why anyone else would
22 confess to a crime if they didn't commit it, you
23 know. I kept saying, "Why would" --

24 THE COURT: Yeah, but okay. That's an
25 issue that can be battled around, I guess, during

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1 deliberations with or without improper influences,
2 but what was it about what she said that, I don't
3 know, tipped the scales for you? I guess in the end
4 you didn't believe Richardson's account of what
5 Washington said, is that fair? I mean the jury
6 unanimously decided not accept Richardson's
7 testimony about what Washington said, right?

8 THE WITNESS: Yes, based on the fact of
9 this pecking order.

10 THE COURT: Okay. And it would have been
11 Richardson's credibility that the jury would have
12 had to assess, right? I mean was he telling the
13 truth about what Washington told him, right?

14 THE WITNESS: Whether he was telling the
15 truth or whether -- he may have been telling the
16 truth about what Washington told him but was --

17 THE COURT: Maybe Washington wasn't --

18 THE WITNESS: Why would Washington said
19 that?

20 THE COURT: Why would Washington confess
21 to a crime that he didn't commit? You've never
22 heard of that phenomenon of people confessing to
23 crimes that they didn't commit, okay. All right.
24 Go ahead

25 BY MR. WOJTALA, continuing:

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1 Q Well as long as we're on the testimony of Mr.
2 Richardson, do you recall Mr. Richardson testifying
3 at trial that Washington was a flunkey for Mr.
4 Bills?

5 A That seems familiar. I don't remember the actual
6 words.

7 Q And that Washington would do whatever Bills told him
8 to do, do you remember that testimony?

9 A Whatever Bills told him to do?

10 Q Correct.

11 A I don't remember those names. Bills?

12 Q And do you recall, going back to closing argument,
13 do you recall Mr. Cripps arguing that there are gang
14 members that Bills directed Washington to do this
15 because he was the flunkey? Do you recall the
16 arguments from Mr. Cripps going along with that
17 testimony of Washington did or was taking the wrap
18 for Bills because he was his flunkey?

19 A Washington taking the wrap? I'm trying to keep
20 everything straight.

21 Q Yeah, I'm sorry. I apologize.

22 A I suppose I do.

23 Q Okay. And so, so you said that Ms. James gave you
24 this information with the intent to convince you, I
25 guess, that there's a pecking order?

1 A Yes.

2 Q Once again, at that point did you say, hey, we
3 shouldn't be discussing this?

4 A No. I like I said, I think we all believed that we
5 had to discuss everything and I don't recall
6 everyone thinking that that was wrong to bring that
7 in or maybe I just felt that if everyone else seemed
8 to think that was okay that maybe I misunderstood.

9 Q And, again, you didn't bring this to the attention
10 of the foreman that we're not supposed to be doing
11 this, correct?

12 A Honestly I believe that I said something about it
13 that, you know, is this okay and everyone seemed to
14 agree, yes.

15 Q And you didn't send out a note the judge saying that
16 there's extraneous information also?

17 A No.

18 Q Now you said that this did have some impact on your
19 deliberations, correct? This information?

20 A It did.

21 Q And in reaching a verdict, and I'll speak in general
22 as to all the jurors, did you feel as though that
23 information affected any of the other juror's final
24 verdict?

25 MR. COMORSKI: I'm going to object, your

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1 Honor. I don't know if she can answer that. That's
2 speculation, Judge.

3 THE COURT: Well, it may not be
4 speculation. I mean there may have been an open
5 conversation around the table about that or maybe
6 not, so if she can't say I guess she can tell us
7 that.

8 BY MR. WOJTALA, continuing:

9 Q I'm not asking you to speculate on what was going on
10 in other people's minds. I'm asking was there a
11 discussion of we're going to find him guilty because
12 there is this pecking order based upon what Ms.
13 James had said?

14 A My honest recollection is that there wasn't like a
15 lot of around the table discussion. Primarily I
16 would say how I felt or what I believe and then
17 someone would, one person would try to, you know, at
18 a time would try to convince me why I was wrong.

19 Q Okay. So I guess, once again, my question is is
20 that, so was there any discussion as to any of the
21 jurors stating that I'm going to rule this
22 particular way because of what Ms. James found on
23 the internet?

24 A Can I give more than a yes or no answer to that?

25 THE COURT: Yeah.

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1 BY MR. WOJTALA, continuing:

2 Q Sure.

3 A I would say, no. There wasn't a discussion of that
4 but there was the fact that some of the jurors had
5 come in to deliberate and they didn't want to
6 discuss anything.

7 Q Okay.

8 A Their minds were made up and they didn't speak.

9 Q And so but these would be, I mean, was this the only
10 jury you've ever sat on?

11 A That was the first.

12 Q The first, okay. Now as far as your own verdict in
13 this particular case, did the information that Ms.
14 James gave you that there's a pecking order that she
15 found on the internet, did that specific information
16 affect your verdict?

17 A Yes.

18 MR. WOJTALA: Your Honor, once again can I
19 ask the audience to just be quiet instead of --

20 THE COURT: Okay. Who is babbling back
21 there? I didn't hear it. I'm sorry.

22 MR. WOJTALA: I'm apologizing, your Honor,
23 but before she even had a chance to answer the
24 someone from the audience has already said an
25 answer.

1 THE COURT: All right. Are we going to
2 have to have everybody leave? Is that what we're
3 going to have to do? Who talked? Who talked up
4 just now?

5 MR. EWING: That was me, your Honor. I
6 told my attorney what I wanted him to ask.

7 THE COURT: You told your attorney what?

8 MR. EWING: What I wanted to ask.

9 THE COURT: What you wanted to ask?

10 MR. EWING: Yeah.

11 THE COURT: But I think it's an answer
12 that Mr. Wojtala is talking about.

13 MR. WOJTALA: Exactly, your Honor. Before
14 she had a chance to answer I plainly heard someone
15 say, yes, and I've heard it from the audience and it
16 may have been --

17 THE COURT: Well, there's about 30 people
18 out there. I can't tell which one it is. I mean if
19 I have to clear the courtroom I'll clear it. Go
20 ahead.

21 MR. WOJTALA: Once again, your Honor.

22 THE COURT: Ms. Burns, I don't know if you
23 can hear what I cannot hear but --

24 MR. WOJTALA: I'm a little --

25 THE COURT: Yeah, all right. Go ahead.

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1 BY MR. WOJTALA, continuing:

2 Q So my question is, is the information that Ms. James
3 said she found on the internet about a pecking
4 order, did that information affect your verdict in
5 this case?

6 A Yes.

7 Q Okay. And how did it affect your verdict in this
8 case?

9 A It made me feel as though I had a misunderstanding
10 based on, you know, on this confession by another
11 person that that was the part of it I didn't
12 understand that even though another person confessed
13 it's like I couldn't consider that because here's
14 why.

15 Q Okay. So that one piece of information in itself is
16 what convinced you that you had a misunderstanding
17 as to someone else confessing?

18 A I would say, yes, that was the main.

19 Q Now you say it affected your verdict in this
20 particular case. Now did it cause you to convict
21 one of or both of these defendants when you would
22 have found not guilty?

23 A Yes.

24 Q Okay. Is it one or both?

25 A That's hard to answer because all of that discussion

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1 had taken place around one defendant.

2 Q Okay. Which defendant?

3 A Mr. Ewing.

4 Q Okay. So this information -- the information that
5 you received from Ms. James it involved the
6 deliberation as to Mr. Ewing, correct?

7 A Yes.

8 Q Okay. And not as to Mr. Searcy?

9 A Correct.

10 Q Okay. And so did that information affect your
11 verdict as to Mr. Searcy then?

12 A When we begin to deliberate on Mr. Searcy it really
13 didn't last too long. Everyone felt that they were
14 being tried together so if we were finding one
15 guilty we had to find the other one guilty.

16 Q So, once again, did that information affect your
17 verdict as to Mr. Searcy?

18 THE COURT: You're talking the pecking
19 order?

20 MR. WOJTALA: The pecking order, correct.

21 THE WITNESS: I don't know how to answer
22 that because we didn't discuss any of that. We were
23 like, okay, now we've made a decision now we'll move
24 to the next defendant and, as I recall, it was only
25 a few minutes of discussion. It was like, well --

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1 THE COURT: If Cripps argued something
2 about pecking order I assume there had to be some
3 trial evidence about a pecking order?

4 MR. WOJTALA: Again, your Honor, there was
5 testimony from Mr. Richardson as to Mr. Washington,
6 the person who supposedly made these statements to
7 Richardson about Washington being a flunkey for Mr.
8 Bills who was another person that supposedly was in
9 this --

10 THE COURT: So, in essence, Richardson
11 provided pecking order testimony so to speak? Maybe
12 that term wasn't used.

13 MR. WOJTALA: Correct. And that's what
14 was found by the Court of Appeals is that this was
15 information that if it was true that Ms. James had
16 the evidence already was presented.

17 THE COURT: All right. Go ahead.

18 BY MR. WOJTALA, continuing:

19 Q Now after Ms. James brought this information to you
20 to try to influence you, as I think you indicated,
21 was trying to influence you to go along with the
22 other jurors, correct?

23 A Correct.

24 Q Okay. Was there, aside from just presenting this
25 evidence, was there other efforts made to persuade

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1 you to go along with the rest of the jurors?

2 A Yes.

3 Q Okay. It wasn't just that this information was
4 presented? That wasn't the only thing that was used
5 by the other jurors to try to make you see their
6 way?

7 A No, it was like the only factual thing.

8 Q Okay. And, again, you didn't bring this up to the
9 Court after the verdict or before the verdict,
10 correct?

11 A No, I assumed it was okay.

12 Q Okay. And so the first time that this ever came up
13 or is mentioned by you was when Mr. Cripps called
14 you, made a cold call indicating how was your
15 experience as a juror?

16 A Yes.

17 MR. WOJTALA: I don't think I have any
18 further questions.

19 THE COURT: All right. You may
20 cross-examine the witness, Mr. Comorski?

21 MR. COMORSKI: Thank you, your Honor.

22 C R O S S - E X A M I N A T I O N

23 BY MR. COMORSKI:

24 Q Ms. Burns, good morning.

25 A Good morning.

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1 Q My name is Phillip Comorski. I'm the attorney for
2 Mr. Ewing. I'm going to ask you a few questions and
3 follow-up questions based on what you said to Mr.
4 Wojtala, okay.

5 A Okay.

6 Q Now you indicated that you were a hold out juror, is
7 that your testimony?

8 A Yes.

9 Q Now when you say "hold out" does that mean you were
10 holding out for a not guilty or an acquittal?

11 A Yes.

12 Q Okay. Now do you recall all of you jurors sending
13 the judge out of a note that you were hopelessly
14 deadlocked?

15 A Yes.

16 Q And if you remember, was this note sent out before
17 this internet research came in? If you recall?

18 A I'm just -- it was a long time ago.

19 Q Nine years.

20 A I think it was because then I think we came back the
21 next day and discussed things further.

22 Q Okay. Now you specifically mentioned that this
23 term, pecking order, was discussed based on Ms.
24 James' internet research, is that right?

25 A Yes.

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1 Q Do you recall her also discussing concepts called
2 gang codes?

3 A That sounds familiar. I don't remember anything
4 what the codes, what that means exactly but.

5 Q Okay. Do you recall that she specifically indicated
6 that she had goggled gang information? Used the
7 term goggle?

8 A Yes.

9 Q And that it was about gang codes and gang activity
10 involved in killing people, do you recall her saying
11 that?

12 A I remember her saying that gangs are involved in
13 killing people.

14 Q And certain gang codes meaning certain codes that
15 they adhere to, do you recall that discussion?

16 A I would kind of link that, I guess to the pecking
17 order like.

18 Q Okay. Do you recall her also mentioning that she
19 had looked up a eulogy online concerning the victim
20 in the case?

21 A I know somebody looked it up. I'm not clear who.

22 Q All right. I apologize. Somebody not specifically
23 Ms. James?

24 A At this point I can't say that it was her.

25 Q Okay.

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1 A I don't know if it's that in my old affidavit there.

2 Q Okay. But, in any event, somebody brought up the
3 eulogy involving the victim during deliberations?

4 A Yes.

5 Q Do you recall if that was read to the other jurors?

6 A I don't recall them having it in their hand to read
7 it.

8 Q Do you recall what the subject of the eulogy
9 concerned?

10 A No.

11 Q Okay. And again, just so we're clear, this was
12 based on the internet research as well?

13 A Yes.

14 Q Now when you said the discussion concerning the
15 Facebook postings came in, you specifically
16 referenced pictures of Mr. Ewing with guns, is that
17 right?

18 A That's what I recall being said. We didn't see the
19 pictures. No one had a phone or printout or
20 anything like that.

21 Q Understood. But the discussion centered around Mr.
22 Ewing in a picture with guns?

23 A Yes.

24 Q Okay. Do you recall it being discussed that the
25 guns was important because then it showed that they

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1 were criminals or confirmed that they were
2 criminals? Do you recall any of those types of
3 discussions taking place?

4 A Yes, I recall. Can I say more than yes?

5 Q Yes.

6 A I recall people saying, I hate to even repeat it,
7 but people, some of the jurors said "You're know
8 they're guilty of something", so there would be no
9 problem with finding them guilty of this.

10 Q And this was pursuant to the discussion involving
11 Facebook photos of Mr. Ewing with guns, is that
12 right?

13 A That was part of it, yes.

14 THE COURT: Was there any Facebook
15 evidence introduced during the trial? Pictures of
16 either of the defendants brandishing guns?

17 MR. COMORSKI: Not that I'm aware of, your
18 Honor.

19 THE COURT: None?

20 MR. WOJTALA: I believe there was, your
21 Honor. I believe there were photographs of both
22 defendants. Their source was Facebook and I don't
23 know specifically but I think there is reference in
24 the Court of Appeals opinion that specifically
25 address that.

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1 THE COURT: All right. Do you remember
2 such evidence being introduced at trial?

3 THE WITNESS: I remember pictures but I
4 don't recall whether I don't know if it was stated
5 where they came from.

6 THE COURT: Pictures of the defendants
7 with guns?

8 THE WITNESS: Not with guns just like with
9 each other maybe to show that they knew each other;
10 that type of thing.

11 THE COURT: Okay.

12 MR. COMORSKI: Your Honor, if I may
13 clarify as well? That subject was brought up
14 pursuant to a pretrial motion and Judge Youngblood
15 specifically excluded those photos including photos
16 of Mr. Ewing with guns.

17 MR. WOJTALA: And I'm not -- I'm sorry.
18 Just to clarify what I had said. I'm not saying
19 that there were photographs from Facebook that
20 showed them with guns. I'm indicating there were
21 photographs from Facebook showing the defendants
22 together and there was also with these two other
23 individuals, "The twins", as they were referred to
24 during trial also with these particular individuals.
25 My recollection wasn't that these were the source

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1 for those photographs were from Facebook

2 THE COURT: Okay. Go ahead.

3 MR. COMORSKI: Thank you.

4 BY MR. COMORSKI, continuing:

5 Q Now getting back to the discussion involving guns,
6 you said other jurors stated to you or amongst
7 yourselves that they had also saw those on Facebook?

8 A Yes.

9 Q Do you know how many jurors said that approximately?

10 A A few at least. I don't know.

11 Q More than one?

12 A Yes.

13 Q And that was in addition to Ms. James, correct?

14 A Yes.

15 Q I'm sorry Ms. Chesney. I'm getting jurors mixed up
16 here. Now just so we're clear when you came back
17 after sending out the deadlock note you were still
18 the holdout juror for lack of a better word; is that
19 correct?

20 A Yes.

21 THE COURT: You were the only hold out at
22 that point?

23 THE WITNESS: I think at that point, yes.

24 BY MR. COMORSKI, continuing:

25 Q And it was at that time you said you felt the jurors

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1 were trying to prove you wrong?

2 A Oh, yes.

3 Q Including Ms. James?

4 A Sure, yes.

5 Q If I understand your testimony, you felt that you
6 were in fact proven wrong based on this information
7 that Ms. James obtained from the internet, is that
8 right?

9 A That's right.

10 Q And it was after that information came in that's
11 when the jury came back with a guilty verdict, isn't
12 that true?

13 A Right. When we sent a note out saying we were
14 deadlocked then a note came back, or somehow the
15 information came back, and the foreman said we had
16 to reach a verdict.

17 Q Okay. But my question is, it was only after you
18 were confronted with this internet research from Ms.
19 James that you then decided --

20 A That made me doubt my verdict.

21 Q Your --

22 A Yeah.

23 Q How you were leaning towards?

24 A Right.

25 Q All right. And it was after that that you decided

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1 to join the other jurors and a verdict was rendered,
2 correct?

3 A Yes.

4 MR. COMORSKI: Thank you. I have nothing
5 further.

6 THE COURT: Okay. Counsel.

7 MS. SWANSON: Can I have just one moment,
8 your Honor?

9 C R O S S - E X A M I N A T I O N

10 BY MS. SWANSON:

11 Q Hi, Ms. Burns.

12 A Hi.

13 Q I just want to clarify about the pecking order
14 conversation. Was the idea that convinced you that
15 Washington, because he was a low ranking member of
16 the Hustle Boys Gang, would be willing to take the
17 fall for Mr. Searcy?

18 A Yes.

19 Q And is that why you discredited his confession?

20 A Yes.

21 Q But prior to that you believed that his confession,
22 at least, didn't bring you to the conclusion that
23 that People had proven beyond a reasonable doubt
24 that Mr. Searcy and Mr. Ewing were responsible for
25 this?

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1 A That's right.

2 Q So do you remember what sort of evidence was
3 presented against Mr. Searcy specifically? I know
4 that you said that there's wasn't much discussion
5 about it in the jury room?

6 A Right.

7 Q So do you recall there being an identification of
8 Mr. Searcy as being involved in this case?

9 A You mean by a witness or something?

10 Q Yes.

11 A No, no, I don't recall.

12 Q Okay. Do you recall any conversation about a
13 witness who observed something through his rearview
14 mirror?

15 A Yes.

16 Q Okay. What do you remember about that?

17 A I remember that he and his wife both testified and
18 he said that he was stopped at a red light and he
19 saw someone walking with a gun and he leaned over
20 into the passenger seat so that he wouldn't be seen
21 and then he watched whatever happened through his
22 rearview mirror.

23 Q Okay. Did he ever indicate that he saw the driver?

24 A No, I think he just described a car.

25 Q Okay. Do you recall whether Mr. Searcy was

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1 allegedly the driver after the shooting?

2 A Yes, that's what we were told, yes.

3 Q Okay. So do you recall any testimony about shell
4 casings?

5 A I remember something about shell casings being found
6 in part of the car like by the windshield wipers.

7 Q Do you know which car that was?

8 A It was the car that was somehow connected to Mr.
9 Searcy.

10 Q Okay. And do you remember -- so there were some
11 photos presented at trial, right?

12 A Yes.

13 Q Do you remember if there were any photos of Mr.
14 Searcy and Mr. Ewing together?

15 A I believe there were.

16 Q Did those photos include guns?

17 A Not that I recall.

18 Q Okay. So was the link between Mr. Searcy and Mr.
19 Ewing essentially the photo and the fact that shell
20 casings were found in his vehicle?

21 A Yes.

22 Q Do you recall there being any other evidence
23 presented against Mr. Searcy?

24 A No.

25 Q So the deliberations do you remember how long they

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1 lasted for?

2 A Not long. An hour if that.

3 Q For the trial I mean?

4 A Oh, you mean our deliberations as a jury?

5 Q Yes.

6 A Yes, it was very short.

7 Q You don't recall deliberating for a few days after
8 the trial?

9 A Not just about Mr. Searcy.

10 Q No. I'm talking about the whole case?

11 A Oh all together, yes, yes. We were there for a
12 couple days.

13 Q Okay. So the conversation was about whether Mr.
14 Ewing was the person who committed this crime?

15 A Yes.

16 Q As opposed to Mr. Washington, which is what you had
17 been given the impression of because you credited
18 his confession?

19 A Right.

20 Q Okay. So then once it was decided that Mr. Ewing
21 was guilty, after you learned about the pecking
22 order and why Mr. Washington's confession might not
23 be credible, then the conversation turned toward the
24 verdict for Mr. Searcy, right?

25 A Yes.

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1 Q Right?

2 A Yes.

3 Q Do you remember any evidence being presented at
4 trial about any gang affiliations for Mr. Ewing or
5 Mr. Searcy?

6 A Any evidence or any discussion?

7 Q Any testimony or evidence?

8 A I remember right from the start we were told that
9 they were members of a gang.

10 Q Okay. In opening statement?

11 A I believe, yes.

12 Q Do you remember hearing follow-up testimony from any
13 gang expert or anything talking about some of the
14 pecking order stuff that you were talking about in
15 your verdict or in the deliberations?

16 A I can't recall any about the pecking order. I know
17 that there were several experts that came in but I
18 remember them talking about bullets and things like
19 that.

20 Q Okay. So prior to hearing about this pecking order
21 information you credited Robinson's story about
22 hearing Mr. Washington confess to this crime?

23 A Yes.

24 THE COURT: Was it Richardson?

25 THE WITNESS: Yes, I think it was.

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1 MS. SWANSON: Yes, sorry.

2 THE COURT: Well, I heard it before it was
3 Richardson. Was it Richardson?

4 THE WITNESS: I think it was.

5 BY MS. SWANSON, continuing:

6 Q Mr. Richardson. So throughout after the trial and
7 throughout the deliberations you did not believe
8 that the prosecutor had proven her case beyond a
9 reasonable doubt as to either Mr. Ewing or Mr.
10 Searcy?

11 A That's right.

12 Q Do you remember anyone doing any experiments at home
13 with their rearview mirrors to see whether or not
14 they could see details?

15 A Yes.

16 Q Okay. Could you tell us a little bit more about
17 that?

18 A I think, honestly, I think we all did that or, you
19 know, after Mr. Love testified how he had leaned
20 over into where his wife was sitting and watched in
21 the rearview mirror everyone, when they got in their
22 car, tried to do that to see if you could actually
23 see someone walking up beside your car if you were
24 leaned over in the other seat.

25 Q Did you do that?

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1 A I did.

2 Q Could you see?

3 A No.

4 Q Okay. Did you do that with the mirror next to the
5 passenger in your car?

6 THE COURT: The side view mirror in other
7 words.

8 THE WITNESS: I did it with the rearview
9 mirror. I believe that's what he said he did where
10 he watched it.

11 BY MS. SWANSON, continuing:

12 Q Okay. So --

13 A I mean I wouldn't have been able to adjust a mirror
14 from leaning down like that.

15 Q Sure. So you did that at home?

16 A I did.

17 Q And you heard others talking about how they did it
18 at home as well?

19 A Yes.

20 Q Do you remember how many people or who?

21 A I don't remember who because honestly I don't know
22 remember a lot of the juror's names. I know that
23 there were several because that was the topic of
24 conversation in the jury room when we came back the
25 next day not during deliberations but during the

1 trial.

2 Q Okay. So this was before you guys even went back
3 for deliberations?

4 A Oh, yes. This was right after Mr. Love testified.

5 Q Were people talking about the case throughout the
6 trial prior to deliberations?

7 A In some ways like when we'd go back into the room
8 people would say, well, right now what do you think?
9 Show of hands who thinks guilty. Yeah.

10 Q So was it every time the jury had a break they would
11 take a quick poll who thought guilty and who thought
12 not guilty so far?

13 A Not every time. I remember it clearly because at
14 one point they said who thinks guilty and only a
15 couple of hands went up and then the very next time
16 we did it a lot more hands went up and I questioned
17 why, you know, what had happened to change their
18 minds and I didn't really get an answer other than I
19 think they're guilty.

20 Q Okay. But those votes happened during the trial?

21 A Yes.

22 Q Did the experiments that you did in the rear view
23 mirror impact your decision or your vote in this
24 case?

25 A It made me question the witness' testimony. The Mr.

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1 Love's testimony.

2 Q Okay. Do you remember whether other jurors said
3 that they could see things out of their rear view
4 mirror?

5 A They said no when they first did it and then later
6 when we got to really, you know, arguing more about
7 it then some said, "Oh I could see it" so.

8 THE COURT: Well, what was the importance
9 of that witness' testimony anyway? He didn't
10 identify either of the defendants, right?

11 THE WITNESS: He did.

12 THE COURT: Oh, he did?

13 THE WITNESS: He said he recognized Mr.
14 Ewing.

15 THE COURT: Oh, I'm sorry. Okay. I
16 thought he just identified a car. Did he say he
17 looked out of his rearview mirror or his side view
18 mirror?

19 THE WITNESS: I thought he said rear view
20 mirror because that's what we all did when we went
21 home that same day.

22 THE COURT: Yeah, of course you couldn't
23 see anything out of it. Okay. Go ahead.

24 MS. SWANSON: I believe what the testimony
25 was was from Mr. Love at trial.

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1 THE COURT: Right.

2 MS. SWANSON: Who looked in his rearview
3 mirror and saw the car behind him and saw who he
4 later identified as Mr. Searcy driving that car.

5 MR. WOJTALA: That's incorrect, you Honor.
6 The testimony is he identified Mr. Searcy prior to
7 even reaching the intersection because there was a
8 near collision that occurred on Harper Avenue. He
9 looked at the car that almost hit him and saw Mr.
10 Searcy driving that vehicle so there was an
11 identification direct.

12 THE COURT: Just not through a mirror?

13 MR. WOJTALA: Not through a mirror. He
14 looked over, saw Mr. Searcy driving this particular
15 vehicle.

16 THE COURT: I see.

17 MR. WOJTALA: Then recognized, then later
18 on recognized that vehicle as being the one that the
19 shooter got into and then left the scene.

20 THE COURT: I see. Okay. Is that
21 correct?

22 MS. SWANSON: I'm sorry, your Honor. Can
23 I have a minute? I do believe that he identified
24 Mr. Ewing by leaning over and looking in the
25 rearview mirror.

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1 THE COURT: Well, that may be but did he
2 identify Mr. Searcy by making a direct
3 identification not through a mirror as what Mr.
4 Wojtala just said? I mean the record would --

5 MS. SWANSON: The transcript will speak
6 for itself on that.

7 THE COURT: All right. Well, I've heard
8 one version from the People about what the
9 transcript says. Do you refute that?

10 MS. SWANSON: I'm sorry, your Honor.

11 THE COURT: I don't have the trial
12 transcript in front of me.

13 MS. SWANSON: So the testimony, I do
14 believe, is that he looked over.

15 THE COURT: He? Love?

16 MS. SWANSON: He, Mr. Love.

17 THE COURT: Yes.

18 MS. SWANSON: Looked over, not in a
19 mirror, and saw a heavy set dark skinned black man
20 wearing glasses. Later he identified Mr. Searcy
21 when shown a photo lineup.

22 THE COURT: Okay.

23 BY MS. SWANSON, continuing:

24 Q So I'm sorry if I'm repeating myself, but did you
25 tell us whether or not the experiments that others

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1 did at home seemed to impact their decision to vote
2 guilty?

3 A I'm not sure because, like I said, the first time
4 that they did the experiment they said they couldn't
5 see anything but then later some said they could.

6 Q Do you remember seeing photos of William Bill or
7 Tyree Washington at trial?

8 A Yes.

9 Q Was the theory under Mr. Washington's confession and
10 the defense at trial that William Bill was the
11 driver and that Tyree Washington was the shooter?

12 A I definitely remember the theory being that Tyree
13 Washington was the shooter.

14 Q Do you remember whether you had any conclusions
15 about whether or not Tyree Washington looked
16 anything like Mr. Ewing?

17 MR. WOJTALA: Well, we're sort of
18 approaching into the area where the Supreme Court
19 has specifically said we can't get into. The only
20 thing that is at issue is whether extraneous
21 evidence had some affect on this not what was the
22 actual deliberations that occurred based upon the
23 evidence that was presented.

24 THE COURT: I think the People are right
25 except that one of the -- what I am going to have to

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1 perhaps decide is whether or not the extraneous
2 evidence was outcome determinative and to a degree,
3 I guess, I have to know in a general way what the
4 trial evidence was to make that decision. I mean,
5 if the trial evidence against these defendants was
6 overwhelmingly clear in every other respect then
7 that sort of undercuts even if this witness says it
8 made a difference, you know, I'm not sure that that
9 necessarily drives the decision here, so I'm going
10 to let her answer the question. I mean since we've
11 been ordered to have a hearing anyway we might as
12 well keep it about as open as we can so, okay.
13 Overruled. Go ahead.

14 BY MS. SWANSON, continuing:

15 Q Do you remember making any determinations about
16 whether or not Tyree Washington looked like Mr.
17 Ewing?

18 A Yes.

19 Q What was your conclusion on that?

20 A I felt that they looked similar when they held up
21 the photo in court and they said that was Tyree
22 Washington I remember doing kind of a double take
23 and thinking, no. You're pointing to the wrong guy,
24 you know, I mean it was just a photo from here but
25 then I thought later that would be the same as

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1 catching a glimpse of someone in your rearview
2 mirror.

3 Q Did that lead you to have doubts about the Love's
4 identification of Mr. Ewing?

5 A Yes.

6 Q So did you see a photo of William Bills as well?

7 THE COURT: When you say the Loves, were
8 there two Loves?

9 MS. SWANSON: I'm sorry, yes. There was a
10 Mr. and a Mrs. Love.

11 THE COURT: They both identified one or
12 both of the defendants?

13 MS. SWANSON: I believe they both
14 identified Mr. Ewing and only Mr. Love identified
15 Mr. Searcy.

16 THE COURT: I see. Were they African
17 American by the way?

18 THE WITNESS: Yes.

19 THE COURT: Okay. Go ahead.

20 THE WITNESS: I'm sorry. I forgot the
21 question.

22 BY MS. SWANSON, continuing:

23 Q So did you see a photo of William Bills as well?

24 A I can't say yes. I remember of I think there were
25 three young men in it and one of them was definitely

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1 Mr. Washington because that's when I focused on that
2 and though oh that looks so much similar.

3 Q I guess what I'm asking is did you have any thoughts
4 like that regarding Mr. Searcy as the driver; oh,
5 this other person looks like Mr. Searcy that could
6 have also been a problem with the identification of
7 Mr. Searcy?

8 A I don't recall that picture.

9 Q Okay. So if you had to name why you had reasonable
10 doubt in this case, what would you say?

11 A I would say I questioned the identification based on
12 the rearview mirror and that picture of someone who
13 looked so similar and also based on the fact that
14 someone else confessed.

15 Q And you had those doubts until you heard about the
16 pecking order and the reason that Washington might
17 have for falsely confessing to the murder?

18 A Yes.

19 MS. SWANSON: Can I have just one moment,
20 your Honor? I don't have anything further right
21 now.

22 THE COURT: I have a couple questions and
23 then I'm going to give the lawyers another
24 opportunity to ask some questions. Let me just make
25 a note here. What was the racial composition of the

1 jury if you recall or to the best of your
2 recollection?

3 THE WITNESS: I would say about 50 percent
4 Caucasian and 50 percent African American. I don't
5 know if that's exact but.

6 THE COURT: Okay. More or less evenly
7 divided?

8 THE WITNESS: Yes.

9 THE COURT: Who was the foreman of the
10 jury?

11 THE WITNESS: His first name is Brian I
12 think.

13 THE COURT: Was he among those who brought
14 in any extraneous information?

15 THE WITNESS: No.

16 THE COURT: Was he African American?

17 THE WITNESS: No, he was white.

18 THE COURT: So I gather from your
19 description of the racial composition of the jury
20 you were, and for the record you're Caucasian
21 obviously. You were the only hold out in the end?

22 THE WITNESS: Yes.

23 THE COURT: And the two defendants are
24 African American. Was the victim, or the
25 complainant, African American? The deceased?

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1 THE WITNESS: Yes.

2 THE COURT: And the Loves, Mr. and Mrs.
3 Love, is that right?

4 THE WITNESS: Yes.

5 THE COURT: They were African American and
6 they identified the defendants in the ways that they
7 did, I mean, as being at the scene?

8 THE WITNESS: Yes.

9 THE COURT: Okay. So you weren't asked
10 about this but to some extent is why I just asked
11 the questions I asked. In your affidavit you claim
12 that some of the other jurors were, you think,
13 inferred that you were a racist or did they imply
14 that? Do you mean implied or do you mean inferred?
15 I'm not sure exactly what you meant by that. What
16 did you mean by that?

17 THE WITNESS: When I mentioned that the
18 photograph of Mr. Washington that he looked a lot
19 like Mr. Ewing there was like a groan went through
20 the room and everyone said, you know, oh, well, you
21 know, and I said, "What", and nobody wanted to say
22 it and so I said, "Are you saying that because I'm
23 white I think everybody looks alike who is not
24 white", and they said, "Yes" and those were, I would
25 say, black and white jurors said, "Yes".

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1 THE COURT: Okay. Nobody actually said
2 you're a racist? I'm not even quite sure what sense
3 that would make under these circumstances.

4 THE WITNESS: Right. Nobody said the word
5 but.

6 THE COURT: Well, the implication -- let
7 me make sure I understand what you're sort of
8 implying here, is that your ability to identify
9 African Americans in a photograph is less acute than
10 some other African American making those
11 identifications and those distinctions? Is that
12 kind of roughly what some of the other jurors were
13 suggesting?

14 THE WITNESS: Yes, yes.

15 THE COURT: Okay. That's an argument that
16 I think has been made in some time in the past on
17 other cases by defendants so it's one that we can't
18 ignore. All right. That's all I have. The People
19 have anything further?

20 MR. WOJTALA: Thank you, your Honor

21 R E D I R E C T E X A M I N A T I O N

22 BY MR. WOJTALA:

23 Q Now you had indicated there was some information
24 about someone looking at the eulogy for the victim,
25 correct?

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1 A Yes.

2 Q And do you remember specifically as to what
3 information from eulogy was shared with the other
4 jurors?

5 A I don't really. I think that was brought up to Mr.
6 Cripps as something else that was brought in or
7 talked about.

8 Q Okay. And did whatever information from the eulogy
9 did that bear any, have any affect upon your
10 deliberations in this case?

11 A I don't think so.

12 Q Now refresh my memory. The information from Ms.
13 James as to gangs was revealed to you, was this
14 before or after the jury had sent out the deadlock
15 jury note?

16 A I believe it was after.

17 Q Okay. And do you recall how long after?

18 A I think once we got the -- once the foreman said
19 that we have to reach a verdict, we can't be dead
20 locked, we have to reach a verdict then that
21 discussion began.

22 Q Okay. So your recollection was is that the
23 instruction that was given to you is that you were
24 required to reach a verdict?

25 A That's what we were told. I didn't see the note

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1 that came back from the Judge but that was mentioned
2 several time.

3 Q You were instructed by the judge to continue
4 deliberating and if you reach a continued impasse to
5 let the Court know?

6 A That's not what I heard.

7 Q Okay. So your recollection was is that you were
8 specifically instructed you're going to stay there
9 and reach a verdict one way or another?

10 A Yes.

11 Q Okay?

12 THE COURT: What was the record show about
13 that? Is there anything on the record that's
14 revealing one way or the other, I mean, the judge's
15 comments?

16 MR. WOJTALA: My memory is is that there
17 was a reference to the note being sent out. I
18 believe Judge Youngblood indicated -- did not give
19 the deadlock jury instruction but instead told them
20 to deliberate further. I think one of the defense
21 counsel, if I remember correctly, had indicated, or
22 had requested the deadlock jury instruction, and
23 Judge Youngblood said, well, we're just going to
24 have them continue and if it continues to be an
25 issue; that's my memory of what happened.

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1 THE COURT: What time of the date did the
2 jury began their deliberations?

3 MR. WOJTALA: That I cannot recall, your
4 Honor.

5 THE COURT: Dod they have to come back
6 another day?

7 MR. WOJTALA: I believe they --

8 THE COURT: Or did they reach a verdict
9 the same day they got the case? Do either of you
10 note what the records show there?

11 MS. SWANSON: There's multiple days that
12 they deliberated. I have a Register of Actions
13 here.

14 THE COURT: Okay. So they were -- and
15 then when was it that they came out with a note that
16 they were hopelessly deadlocked and, by the way, is
17 that really what the note says? I mean I assume the
18 notes are in the Court file.

19 MR. COMORSKI: Your Honor, I do have a
20 xerox copy of the note, if I could read it into the
21 record?

22 THE COURT: Is that the only note they
23 sent out?

24 MR. COMORSKI: With respect to the
25 deadlock issue, I believe so.

1 THE COURT: Okay. What does it say?

2 MR. COMORSKI: It says, "We have a
3 question. We have a serious difference of opinion
4 on the verdict that we do not believe can be
5 overcome. Can we declare a hung jury? Thank you".

6 THE COURT: And what was the day and time
7 of that note?

8 MR. COMORSKI: I don't have that noted on
9 here.

10 THE COURT: It's probably written on the
11 pack back of the note. And then Judge Youngblood
12 responded. I'm sorry. Do you have an answer to
13 that question?

14 MR. COMORSKI: Yes, I believe so. I think
15 the record reflects that this deadlock note was sent
16 out the last day of deliberations coming up to the
17 weekend. They were sent home. They came back the
18 following Monday and that's when the verdict was
19 rendered.

20 THE COURT: Okay. So the note they sent
21 out was on a Thursday or Friday then?

22 MR. COMORSKI: November 15, 2010 whatever
23 the day that falls.

24 THE COURT: Okay. So Judge Youngblood did
25 not read the deadlock jury instruction to them but

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1 she told them to continue their deliberations?

2 MR. COMORSKI: That is correct.

3 THE COURT: Now can you tell me about what
4 time of day that was? I'm really interested in
5 knowing how much longer they deliberated that day
6 before they --

7 MR. COMORSKI: According to my client,
8 they deliberated the entire day.

9 THE COURT: After they sent the note out?

10 MR. COMORSKI: Apparently, yes. Again, I
11 don't have the transcripts I can confirm with.

12 THE COURT: So they came back Monday?

13 MR. COMORSKI: Yes.

14 THE COURT: And indicated that they had a
15 verdict and what time on Monday?

16 MR. COMORSKI: I don't have the exact time
17 but they did continue deliberations on Monday.

18 THE COURT: And no further notes?

19 MR. COMORSKI: Not that I'm aware of but,
20 again, I don't have the transcripts in front of me
21 so I want to confirm that. I don't want to say yes
22 or no.

23 THE COURT: Okay.

24 MR. COMORSKI: I apologize, your Honor.
25 It appears that they came back on Tuesday, November

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1 16, 2010, that's when the verdict was rendered.

2 THE COURT: They deliberated all day
3 Monday?

4 MR. COMORSKI: I don't know how long they
5 deliberated.

6 MR. SEARCY: Seven hours according to my
7 client. Again, I'll confirm that with the
8 transcripts of course.

9 THE COURT: And that was not their first
10 day. The case went to the jury the proceeding week?

11 MR. COMORSKI: Yes, two days before.

12 THE COURT: All right. So then on Tuesday
13 they had a verdict and, again, do you have a sense
14 of what time that was.

15 MR. SEARCY: 2:50 p.m., sir.

16 THE COURT: Okay. I'll accept his. I'm
17 sure he has all of those facts in mind. All right.
18 Do you have further questions of the witness?

19 MR. WOJTALA: Yes, your Honor. Thank you.

20 BY MR. WOJTALA, continuing:

21 Q Now you had indicated during your testimony that
22 after Ms. Chesney had indicated that she had looked
23 at the Facebook page that other jurors said, "Oh I
24 saw that too"?

25 A Yes.

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1 Q Yes, okay. What specifically did the other jurors
2 indicate that they also saw?

3 A I believe the same things, you know, if you go to
4 someone's Facebook page you see if you're not their
5 friend, you know, you can't always see too much but
6 you can see at least their profile picture and maybe
7 a couple of other photograph so from my recollection
8 they, you know, they agreed they saw the same things
9 on Facebook.

10 Q I guess I need some clarification. So you're
11 indicating that they stated that they saw the same
12 thing? Do you know, in fact, that other jurors did
13 go on Facebook?

14 A I can only say yes because they said they had gone
15 on Facebook and seen the same things.

16 Q Okay. So that's not what you had first -- you said
17 that they said, "I saw that also"?

18 A Where else would you see it though?

19 Q Okay. So my question is, did the other jurors
20 specifically say I also went on Facebook and saw
21 those pictures?

22 A I don't remember if they said those exact words.
23 They said they had seen those pictures, those
24 Facebook pictures so.

25 Q Okay. And when you say "Those Facebook pictures"

1 what specifically what pictures did they say that
2 they also saw?

3 A The pictures of Mr. Ewing with guns and a picture of
4 him with a young woman.

5 Q And did they actually say I also saw him with
6 pictures of the Mr. and Mrs. Nasty that saying?

7 A Yes.

8 Q Okay. What other jurors said that?

9 A I'm trying to remember. I don't can't even remember
10 the jurors names and we didn't always, in the
11 deliberation room we didn't always sit in the same
12 seats so, you know, sometimes it's just voices
13 coming from this way or that way saying oh, yes, I
14 saw that too.

15 Q Okay. And, again, I hate to split hairs on this.

16 A Yeah.

17 Q Was it, I saw that too or I also went on Facebook
18 and saw Mr. and Mrs. Nasty?

19 A I can't honestly say their exact words.

20 Q Okay. So your testimony today as to -- you're sort
21 of -- forget it. I won't ask that question. Now
22 obviously it's been nine years since you took part
23 in these deliberations, correct?

24 A Yes, yes.

25 Q And you certainly have had nine years to think about

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1 all these things, correct?

2 A Sort of.

3 Q Sort of, okay.

4 A I spent a year trying to get it out of my mind
5 because it --

6 Q But nine years after the fact you don't remember
7 everything that occurred during the trial, correct?

8 A Not every word, no.

9 Q Well, specifically, you had indicated during
10 testimony today that you did not recall that Mr.
11 Love identified Mr. Searcy as the driver, correct?

12 A Correct.

13 Q And you also had indicated that his identification
14 of Mr. Searcy was through a rear view mirror,
15 correct?

16 A I know that his identification of Mr. Ewing, he
17 said, was through the rear view mirror.

18 Q But specifically you don't -- nine years after the
19 fact, and I'm not faulting you for it. It's been
20 nine years after the fact. You didn't remember that
21 Mr. Love had actually identified Mr. Ewing as the
22 driver of this vehicle even prior to arriving at the
23 intersection, correct?

24 A You mean Mr. Searcy.

25 Q Mr. Searcy. I apologize. You're right.

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1 A I don't recall mostly because I guess because we
2 didn't discuss that the deliberations. We didn't
3 discuss much of that.

4 Q Okay.

5 A In relation to Mr. Searcy.

6 Q And you recall everything that you discussed during
7 deliberations nine years after the fact, correct?

8 A Not every word. I remember what I felt were the
9 most important things; the things that made me
10 question the verdict and the things that the other
11 jurors did and said that made me agree to the
12 verdict.

13 Q Okay. And so you don't recall that there was any
14 discussion during deliberations as to Mr. Love
15 identifying Mr. Searcy as the driver of the vehicle?

16 A I don't recall discussing that much during the
17 deliberations, no.

18 Q Okay. Would you agree with me that's sort of a big
19 piece of evidence?

20 A Of course it is, yes.

21 Q But you don't recall specifically that that was a
22 big piece of the discussion?

23 A No. What I recall was that the jurors felt that
24 they were a pair and if we found one guilty we'd
25 find the other one guilty.

1 Q Okay. Now you also don't remember that there was
2 any discussion about a pecking order in gangs other
3 than the information that Ms. James provided you?

4 A There may ave been some mention, like you said, of
5 somebody being a flunkey or whatever, but it was
6 when she said and spelled it out in the jury room
7 after everything else had been said and after I had
8 brought up the fact of the second person confessing
9 and when she sat there and spelled it out it began
10 to sort of make sense to me that maybe I am reading
11 this wrong. Maybe I --

12 Q Okay. So when you showed doubt, you expressed doubt
13 to the other jurors as to whether or not you should
14 believe Mr. Richardson's testimony involving Mr.
15 Washington's alleged confession to the crimes?

16 A Uh-huh.

17 Q Is that a yes? Do you remember this?

18 A Yes.

19 Q When that discussion occurred the only effort made
20 to convince you differently was Ms. James saying,
21 hey, I went on the internet and found out this
22 information?

23 A I don't know. That may have been the only thing
24 like positive solid, you know, statement from
25 another juror but there were people telling me that

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1 they had children and if we released these
2 defendants and something happened to their children
3 it would be my fault and things like that.

4 Q So for my clarification, so you do or do not recall
5 that there were other efforts made to convince you
6 differently other than Ms. James' saying that I went
7 online and found this information?

8 A No, that was just sort of the final straw.

9 Q Okay. Now, ma'am, do you recall speaking to an
10 investigator from the Wayne County Prosecutor's
11 Office in the last few months?

12 A No. Few months?

13 Q Right. Specifically on July 19, 2019 -- I'm sorry.
14 Yes. July 19, 2019 a person by the name of Rick
15 Pomorski?

16 A Oh, right. He's the one who -- I didn't think of
17 him as an investigator. He brought me my subpoena.

18 Q Okay. And did he also discuss this case with you?

19 A He just asked me a couple of brief questions.

20 Q Okay. Among those questions he asked you what do
21 you recall -- what information do you recall being
22 presented, extraneous information being presented to
23 you? Did he ask that question of you?

24 A He may have. He knew my husband's family. We were
25 just having a conversation.

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1 Q Okay. And do you also recall him asking you if this
2 extraneous information specifically caused you to
3 cast your vote as guilty?

4 A I don't recall what he asked me.

5 Q Okay. And you don't recall --

6 A I didn't think of it as a question, you know, I
7 thought of it as just like maybe he was trying to
8 make sure I was the right person that he was
9 delivering the subpoena to really.

10 Q Okay. So you don't recall any conversation between
11 you and Mr. Pomorski as to whether this information
12 had an affect on your verdict?

13 A He may have. I don't know. Like I said, I thought
14 it was just a conversation.

15 Q Okay. And you don't recall answering to Mr.
16 Pomorski when he asked you if this caused you to
17 cast -- caused you to cast your vote as guilty? You
18 said, "No" but you were worn down by the whole
19 deliberation progress? You don't recalling saying,
20 "No, it did not"?

21 A If I said that, if that's what he quoted me as
22 saying then I must not have quite followed his
23 question. I was worn down. I was worn down by the
24 other jurors and then this additional information.
25 I mean, at some point if you're going to change your

1 mind you do get, you know, gradually worn down into
2 that position where you're willing to change your
3 mind.

4 Q Okay. So my question is that, based on what you
5 just said, is that you stated that you were worn
6 down by the whole process, right?

7 A Yes.

8 Q And that wearing down process is what caused you to
9 go from having a reasonable doubt to entering a
10 verdict of guilty?

11 A I guess my question would be what when you say worn
12 down it's not like I was just I'd go I'm tired of
13 all this; whatever you guys want to do. It wasn't
14 that kind of worn down. It was, you know, I mean
15 there were days and days of deliberation and when
16 that final information came in I began to think
17 that, you know, well, maybe I'm just stupid or
18 something or maybe I'm not understanding this
19 process and also I had made a remark in the jury
20 room where I said something I used the expression
21 like I don't feel 100 percent about this and then
22 that become an issue, you know, well, you're not
23 supposed to feel 100 percent, so that kind of thing
24 is what I guess I meant by wearing down, you know,
25 where everything I said was --

1 Q Okay. So when you indicated to Mr. Pomorski that it
2 was the wearing down that -- well, strike that.

3 THE COURT: What's the spelling of is it
4 Pormorski?

5 MR. WOJTALA: It's P-O-M-O-R-S-K-I.

6 THE COURT: I want to make sure the record
7 doesn't confuse Mr. Pomorski with Mr. Comorski.

8 MR. WOJTALA: Comorski, correct. Yeah.

9 BY MR. WOJTALA, continuing:

10 Q Okay. So here today, nine years after the fact, you
11 are indicating that the piece of information that
12 Ms. James gave you was the final straw that caused
13 you to go from having reasonable doubt to reaching a
14 verdict to convict both Mr. Ewing and Mr. Searcy,
15 correct?

16 A Yes.

17 Q At that time that you reached a verdict, obviously
18 you knew that that was the reason you reached that
19 verdict, correct?

20 A Yes.

21 Q Okay. You also had been told by Ms., I'm sorry, by
22 Judge Youngblood, that you're only to consider, in
23 reaching your verdict, you're only to consider the
24 evidence that was presented in court, correct?

25 A Yes.

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1 Q And so you knew, based upon that instruction, that
2 the information given to you by Ms. James was not
3 something that you were supposed to consider,
4 correct?

5 A I suppose I did. There was so much discussed of,
6 you know, things that weren't stated in court but it
7 all blended together after a few days.

8 Q All right. So contrary to the instruction that was
9 given to you to not consider anything extraneous you
10 still something extraneous in reaching your verdict,
11 correct?

12 A We all did, yes.

13 Q Okay. Well, not -- I'm just talking specifically
14 for you?

15 A Okay, yes.

16 Q Okay. And knowing full -- after being instructed
17 that you weren't supposed to consider this, as
18 you've already indicated, you did not bring that to
19 the attention of the foreman of your jury, correct?

20 THE COURT: We've been through this
21 already.

22 THE WITNESS: Yeah, he was there. He was
23 hearing it too. I didn't.

24 BY MR. WOJTALA, continuing:

25 Q And even when you spoke to Mr. Cripps did you

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1 indicate to Mr. Cripps at that time that this is
2 whole reason why I decided this case?

3 A I don't know if I did or not. I only answered what
4 he asked me.

5 MR. WOJTALA: Okay. Nothing further, your
6 Honor.

7 THE COURT: All right. We'll take a break
8 when we're done with this witness but any further
9 questions, Mr. Comorski? Comorski.

10 MR. COMORSKI: Thank you, your Honor.
11 Comorski. Judge, just for the record to make it
12 clear, I did consult the transcripts and the
13 deadlock note, the juror deadlock note came out on
14 November 15, 2010 which was a Monday at 9:36. The
15 deadlock instruction was not given but the judge
16 instructed the jury that differences of opinion can
17 occur and that they should continue deliberations;
18 that's the end of that transcript so it appears the
19 jury deliberated the next of the day.

20 On the 16th of November 2010, which is a
21 Tuesday, at 9:30 a note came out about an aiding and
22 abetting question they had; that was addressed and
23 then, as Mr. Ewing indicated earlier, at 2:50 p.m.
24 was when the verdict was announced.

25 THE COURT: Okay. Thank you. Do you have

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1 any for this witness?

2 MR. COMORSKI: Yes, I do. Just a couple.

3 R E C R O S S E X A M I N A T I O N

4 BY MR. COMORSKI:

5 Q I'll try to make this as brief as possible, Mr.
6 Burns.

7 A Okay.

8 Q You indicated that this whole discussion about
9 pecking order and gang codes is what affected your
10 verdict, is that right?

11 A Yes.

12 Q Do you recall Ms. James actually applying the
13 information she obtained from the internet to Mr.
14 Ewing in particular?

15 A Yes.

16 Q And isn't it true that she said according to the
17 internet research she had conducted that Mr. Ewing
18 was at the top of the hierarchy of this gang?

19 A Yes, I mean, based on her opinion.

20 Q Yes.

21 A She didn't see his name on the internet.

22 Q Of course, but this was based on her internet
23 research?

24 A Yes.

25 Q And that the other individual who had supposedly

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1 confessed, the Tyree, T-Y-R-E-E, Washington, was at
2 the bottom of the gang?

3 A Yes.

4 Q And do you recall her also indicating that the gang
5 had decided to sacrifice Washington for Mr. Ewing
6 based on her internet research?

7 A Yes.

8 Q And was part of this information along with the
9 other information she gave to you about this pecking
10 order and gang codes that was basically Ms. James,
11 as you indicated, spelling it out for you? Is that
12 what you meant by that?

13 A Yes.

14 Q And again, this is what ultimately made you decide
15 to change your decision of not guilty to guilty, is
16 that right?

17 A Yes.

18 MR. COMORSKI: Okay. Thank you.

19 THE COURT: Counsel.

20 R E C R O S S E X A M I N A T I O N

21 BY MS. SWANSON:

22 Q Did you believe at the beginning of your
23 deliberations that Mr. Searcy was in a gang?

24 A I believe so. We were told during the trial that
25 they were both members of the same gang.

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1 Q Did you hear any testimony about Mr. Searcy being
2 affiliated with a gang or was that just in the
3 opening argument?

4 A From what I can recall it was mostly during the
5 arguments.

6 Q Okay. Is it fair to say that the whole issue in
7 this case is about whether, for you, was about
8 whether Mr. Ewing was the shooter or whether Mr.
9 Washington was the shooter?

10 A Yes.

11 Q And so when you say you were worn down by that do
12 you mean hearing this information from Ms. James
13 about how the gang hierarchy works and why Mr.
14 Washington might take the fall for a high level gang
15 member like Mr. Ewing was what pushed you over the
16 edge?

17 A Yes.

18 Q And ultimately what led you to believe that maybe
19 the doubts that you were having weren't reasonable?

20 A Yes.

21 Q And so do you remember the verdict for both Mr.
22 Ewing and Mr. Searcy?

23 A The verdict of beyond guilty you mean?

24 Q Correct.

25 THE COURT: Any of the crimes they were

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1 convicted of?

2 THE WITNESS: I think that Mr. Ewing, I
3 believe, was charged or convicted of first degree
4 murder and Mr. Searcy of second.

5 BY MS. SWANSON, continuing:

6 Q Do you remember why that was?

7 A Well, from what I recall everyone said, not everyone
8 but some people, most of them, said if one is guilty
9 the other one is guilty. They're on trial together
10 and so they should both be convicted of 1st degree,
11 and then I gave a scenario of -- because they said,
12 you know, if he was the driver and he saw his friend
13 get out and shoot someone and he wasn't involved he
14 should have taken off and left his friend there, and
15 I said, well, I think if I had a good friend in the
16 car with me and they stop the car and I did, and
17 they got out and did something crazy, anything, I
18 would probably sit there and wait and then when they
19 jumped back in I'd say what the bleep did you just
20 do, you know, so I didn't feel that that necessarily
21 meant a driver would know what the other person was
22 going to do. I hope that's clear.

23 Q So --

24 A And so then people said, well, yeah, maybe he wasn't
25 as guilty.

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1 Q So what were your doubts about Mr. Searcy and
2 whether or not he was as guilty as Mr. Ewing?

3 A I think, you know, just what I just said. I mean
4 there wasn't a lot, I felt, like there wasn't a lot
5 presented about Mr. Searcy during the trial. There
6 wasn't as much testimony or defense so I felt like
7 we didn't have as much to work with there.

8 Q And can you tell us why you remember the details of
9 this case so well?

10 A Sorry. Just because it's haunted me. I've just
11 been wondering if I did something terribly wrong and
12 even thought, like I said before, I spent a lot of
13 time trying to put it all out of my mind it's never
14 gone away. I was on another jury after this and I
15 had no problem saying guilty in that and I didn't
16 question myself at all after that one but this trial
17 really bothered me.

18 Q It was different?

19 A Yeah.

20 Q So you had reasonable doubt about whether Mr. Searcy
21 was the driver here?

22 A Right, about the whole case.

23 Q About the whole case. Did you -- were you the only
24 one with reasonable doubt in the beginning.

25 A In the beginning I think there was another young

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1 man. I don't recall his name or jury number who
2 when I -- he didn't speak out a lot but when I would
3 say something he kind of say, "That's, yeah, that's
4 possible", but then I think later he just kind of
5 agreed to go with the flow.

6 Q And throughout the course of the trial when people
7 would tally the votes before it went to
8 deliberations the numbers for not guilty got smaller
9 and smaller?

10 A Yes.

11 MS. SWANSON: I think that's all I have.

12 THE COURT: I have a couple more questions
13 for you and then I think we're virtually done. I
14 think I know the answer to this but I just want to
15 make sure. During the course of the trial, and
16 especially your deliberations, did any of the jurors
17 have cell phones or electronic devices with them?

18 THE WITNESS: No.

19 THE COURT: Okay. So the conversation
20 that jurors had with you during deliberations about
21 what they saw online was based on their memory of
22 what they saw at home?

23 THE WITNESS: Yes.

24 THE COURT: When they went online or
25 wherever they went online, right?

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1 THE WITNESS: Yes.

2 THE COURT: None of them actually brought
3 anything in and showed it to you?

4 THE WITNESS: No, we wouldn't be allowed
5 to bring in --

6 THE COURT: Nobody printed anything off
7 and brought it into the --

8 THE WITNESS: Not that I recall, no.

9 THE COURT: Okay. And then the only other
10 thing I wanted to ask it came out that you were
11 interviewed by somebody from the Prosecutor's Office
12 here a short time ago. At any other time after you
13 provided Mr. Cripps with this affidavit in early
14 2011, I think it was, have you been interviewed or
15 talked to anybody else in connection with this case?
16 Any advocate or any representative of a advocacy
17 group or?

18 THE WITNESS: Yes.

19 THE COURT: Media representatives?

20 THE WITNESS: One private investigator.

21 THE COURT: A private investigator who was
22 engaged by whom?

23 THE WITNESS: I believe by Mr. Ewing's
24 mother.

25 THE COURT: And when did that conversation

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1 take place?

2 THE WITNESS: I remember because I had
3 just had knee surgery and so I remember that. I had
4 the surgery in February of 2018 so it was --

5 THE COURT: Oh, so it was recently?

6 THE WITNESS: Yeah, it was like within the
7 last within that first half of 2018.

8 THE COURT: But nobody else has reached
9 out to you or nobody from the media or from other
10 advocacy groups?

11 THE WITNESS: No.

12 THE COURT: Okay. Did I understand when
13 you said earlier I think at the beginning of your
14 testimony that you and some of the other people on
15 the jury were exchanging emails that was after the
16 verdict?

17 THE WITNESS: After everything was over,
18 you know, someone sent out an email. We had made an
19 email list and someone sent one out just saying, you
20 know, how is everybody doing or something like that.

21 THE COURT: All right. If any of you have
22 anymore questions for this witness just based on the
23 questions I just asked you may. You do?

24 MS. SWANSON: So briefly. Just wanted to
25 clarify.

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1 R E - R E C R O S S E X A M I N A T I O N

2 BY MS. SWANSON:

3 Q Have you spoken to anyone from our office regarding
4 this case prior to testifying here today?

5 A Yes.

6 Q Was that Ms. Colleen Fitzharris?

7 A Yes.

8 Q And Greg Morris our investigator?

9 A Yes.

10 THE COURT: Okay. Anything else?

11 MR. WOJTALA: Nothing, your Honor.

12 THE COURT: All right. You may step down.
13 We'll take about a ten minute recess and then we'll
14 try to get through these other witnesses.

15 (At 11:46 a.m. off the record)

16 (At 12:03 p.m. back on the record)

17 THE COURT: All right. Back on the record
18 in the Searcy Ewing matter. I assume you got the
19 two other jurors waiting?

20 MR. WOJTALA: I do, your Honor.

21 THE COURT: Let me ask you a couple
22 questions before they're brought out. Have you
23 found out what we're doing about that other juror?

24 MR. WOJTALA: Well, the one juror that I
25 will be asking for a continuance in order to have

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1 his testimony which is the one you referred to as
2 the foreman, Mr. Tubbs. The continuance wouldn't
3 really affect our deadline on Mr. Searcy because we
4 have an additional month on that case.

5 THE COURT: Yeah, but it does on Ewing.

6 MR. WOJTALA: On Ewing.

7 THE COURT: Right now the deadline is the
8 28th. I don't know if that means we have to finish
9 the hearing by the 28th but.

10 MR. WOJTALA: But what the order says,
11 your Honor, is after 56 days if the People have not,
12 I don't know the specific language, have not made
13 efforts to have this hearing conducted then the
14 defendant can petition for his release. I imagine
15 that petition would go to the Federal Court and
16 there would be some discussion about that in the
17 Federal Court, so I just was asking Mr. Comorski,
18 who is Mr. Ewing's attorney, whether he had heard
19 anything from the Federal Courts and he hasn't also
20 I believe.

21 THE COURT: All right. Are the defendants
22 being represented by somebody there just for this
23 limited purpose? The adjournment or the extension
24 of the --

25 MR. COMORSKI: Your Honor, if I may

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1 clarify that?

2 THE COURT: There's only one defendant.

3 MR. COMORSKI: Yeah, if I may clarify
4 that. The Attorney General has petitioned Judge
5 Hood in Federal Court to extend the time period
6 beyond the August 28th day. She called and asked me
7 for a concurrence, which I did not agree to, so she
8 filed it as an a emergency petition and as of this
9 morning I told Mr. Wojtala I had not seen anything
10 that's been filed by the Federal Courts in regard to
11 that by Judge Hood in particular.

12 THE COURT: Where would you see that? It
13 would be on our Odyssey?

14 MR. COMORSKI: No, no, no. It's in
15 Federal Court.

16 THE COURT: Right.

17 MR. COMORSKI: It comes through the ECF
18 and gets automatically served on me through Gmail.

19 THE COURT: Okay.

20 MR. COMORSKI: And I've checked that this
21 morning and nothing, as of my last checking, has
22 been found.

23 THE COURT: All right. And then last, but
24 not least, this is perhaps more curiosity than
25 anything but just to get a better sense of the

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1 context here, what became of the Mr. Washington the
2 guy that confessed? Was he charged?

3 MR. WOJTALA: Right. I don't believe he
4 was ever charged in this particular case. I know
5 that the issue of Mr. Washington and I think there
6 was post conviction. There was some affidavit, or I
7 can't remember exactly, involving Mr. Washington but
8 there was an issue that went up and the State Courts
9 and obviously the State Courts didn't grant any type
10 of relief on that.

11 THE COURT: Well, does he have other
12 issues? I mean is he in custody somewhere?

13 MR. WOJTALA: I believe he was at the time
14 of this. I believe he was in custody. I'm not
15 exactly certain whether he is still in custody.

16 MS. SWANSON: He is still in Federal
17 Prison, your Honor.

18 THE COURT: He's in Federal custody?

19 MS. SWANSON: Yes.

20 MR. COMORSKI: And if I may, your Honor?
21 Mr. Washington has reached out on his own to Judge
22 Hathaway, I believe, Cynthia Hathaway back in 2017.

23 THE COURT: He reached out to her?

24 MR. COMORSKI: A handwritten letter that
25 he signed and was notarized indicating that he was

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1 the one that committed the crime. Judge Hathaway
2 sent Mr. Tyree Washington the response stating,
3 "I've received your letter regarding information you
4 have about a murder. Perhaps you should give this
5 information to Mr. Darrell Ewing and Mr. Derrico
6 Searcy and or their attorneys. I've also sent a
7 copy of your letter, with my response, to the Wayne
8 County Prosecutor's Office". That's dated January
9 30, 2017.

10 THE COURT: All right. And further in the
11 category of extraneous evidence, I got a text a
12 couple of days ago on my cell phone from somebody
13 name Brientia Howard, I think. Somebody you guys
14 know? Is she related to one or both of the
15 defendants or something?

16 MR. COMORSKI: Brientia Howard?

17 THE COURT: I think the last name was
18 Howard. I remember the first name was Brientia.
19 She sent me an email of a polygraph test result that
20 was conducted back in 2010 of Mr. Ewing but the
21 report that she sent me just had the questions the
22 examiner asked, not the answers. I looked at it. I
23 thought, I mean, since this whole issue is about
24 extraneous evidence I found it somewhat ironic that
25 one of the defendants, somebody associated with one

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1 of the defendants was emailing extraneous evidence
2 but anyway there is it.

3 MR. WOJTALA: I also received an email
4 with that exact same information, your Honor.

5 THE COURT: All right. So you can call
6 your next witness.

7 MR. WOJTALA: Thank you. Michelle
8 Chesney.

9 THE CLERK: Please raise your right hand.
10 Do you solemnly swear or affirm the testimony you're
11 about to give will be the truth?

12 MS. CHESNEY: I do.

13 MICHELLE CHESNEY

14 (At 12:09 p.m., sworn as a witness, testified as follows)

15 THE CLERK: Please be seated.

16 D I R E C T E X A M I N A T I O N

17 BY MR. WOJTALA:

18 Q And good afternoon. Can you state your name one
19 more time for the record.

20 A Michelle Chesney.

21 THE COURT: Can you speak up a little
22 please.

23 THE WITNESS: I'll try.

24 THE COURT: Michelle Chesney?

25 THE WITNESS: Michelle Chesney.

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1 BY MR. WOJTALA, continuing:

2 Q And, Ms. Chesney, you were a member of the jury that
3 heard the case involving Mr. Ewing and Mr. Searcy,
4 correct?

5 A Correct.

6 Q And do you recall another juror by the name of
7 Kathleen Burns?

8 A I do.

9 Q Okay. And do you recall another juror by the name
10 of Karen James?

11 A I think I know which one she is.

12 Q So my first question is, following your verdict in
13 this particular case did you ever receive a phone
14 call from either of the defense counsel's attorneys?

15 A Say that one more time.

16 Q You reached a verdict in this particular case,
17 correct?

18 A Correct.

19 Q I'm sorry. Correct?

20 A Correct.

21 Q Following that verdict, in the months following you
22 going home --

23 A No, I did not.

24 Q -- did you ever receive a phone call from either --

25 A I did not.

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- 1 Q Okay. No attorney called you to ask how was your
2 jury experience?
- 3 A Not that I recall.
- 4 Q Okay. Now going you stated that you do recall Ms.
5 Burns, correct, as another juror?
- 6 A I do.
- 7 Q And did you discuss with Ms. Burns during
8 deliberations about you doing any type of internet
9 research?
- 10 A Not that I recall.
- 11 Q Okay. Specifically, do you recall telling Ms. Burns
12 that you went on Defendant Ewing's Facebook page?
- 13 A I don't remember telling her that specifically, no.
- 14 Q Okay. Do you recall yourself, nine years after the
15 fact, do you recall going on Mr. Ewing's Facebook
16 page during deliberations?
- 17 A It seems like I recall pictures so I'm going to say,
18 yes, that's possible.
- 19 Q Okay. So you recall some type of pictures?
- 20 A I do.
- 21 Q And, specifically, do you recall if they were
22 actually on a Facebook page?
- 23 A I believe so.
- 24 Q Okay. And these were pictures that were not
25 admitted during the trial?

- 1 A Correct.
- 2 Q Okay. And during the time of this trial in 2010
- 3 were you a member of Facebook, if you recall?
- 4 A Probably.
- 5 Q And were you Facebook friends? Are you familiar
- 6 with that term?
- 7 A I am.
- 8 Q Were you Facebook friends with Mr. Ewing?
- 9 A No.
- 10 Q Now you mentioned that you recall some type of
- 11 pictures, what pictures do you recall?
- 12 A Just your usual pictures with your friends.
- 13 Q Okay. Do you recall any pictures of Mr. Ewing
- 14 displaying firearms?
- 15 A Not that I recall.
- 16 Q Do you recall any photograph of Mr. Ewing with a
- 17 female that was captioned Mr. and Mrs. Nasty?
- 18 A Not that I recall. I mean you scroll through
- 19 Facebook and see pictures. I don't recall anything
- 20 specific about his profile, no.
- 21 Q Okay. And, again, do you recall that these pictures
- 22 were actually on Mr. Ewing's Facebook page?
- 23 A I believe so.
- 24 Q And you saw those during your deliberations?
- 25 A If I had to guess I would say, yes.

1 Q Okay. Do you also recall going on the internet and
2 looking up the obituary or the eulogy for the victim
3 in this case?

4 A I do not.

5 Q Do you recall any discussion among the jurors as to
6 the contents of an obituary or eulogy for the
7 victim?

8 A Not that I recall, no.

9 Q Now the pictures that you saw on Facebook, excuse
10 me, did you discuss those pictures that you saw with
11 the other jurors during your deliberations?

12 A Not that I recall. I mean what's there to discuss?

13 Q Okay. Do you recall making any type of comments of,
14 well, I saw these pictures of him with guns so he
15 must be guilty of something?

16 A Not that I recall, no.

17 Q And do you recall any of the other jurors indicating
18 that if you saw pictures of -- well, let me ask this
19 question. Did you reveal to the other jurors, if
20 you recall, that you saw pictures of him with a gun?

21 A I don't recall that conversation, no.

22 Q And you don't even recall if you saw pictures of Mr.
23 Ewing?

24 A I do not.

25 Q Okay. Now you also indicated that you remember that

1 you think you remember the juror, Ms. Karen James,
2 correct?

3 A I think. I think I know who she is.

4 Q Do you recall at any time her indicating that she
5 also went online and did some research during
6 deliberations?

7 A Not -- I don't recall.

8 Q Do you recall any discussion during deliberations in
9 regards to a pecking order in gangs?

10 A Not specifically, no.

11 Q Okay. Do you recall any discussion about gang codes
12 involved in this case?

13 A No.

14 Q Okay.

15 A I -- no.

16 Q Now did the information that you saw on Mr. Ewing's
17 Facebook page, do you recall if that had any impact
18 on your deliberations? Your personal deliberations?

19 A It did not.

20 Q Do you -- and refresh my memory once again. Did you
21 share with any of the other jurors or do you recall
22 sharing with the other jurors that you had found
23 these photos?

24 A I don't recall specifically, no.

25 Q And do you recall any of the other jurors having a

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1 discussion about the content of the photos that you
2 saw?

3 A No, not that I recall.

4 Q Okay. And did the fact that you saw these
5 photographs, did that change your verdict in any
6 way?

7 A No.

8 Q Did -- strike that. Now as to Ms. Burns, Kathleen
9 Burns, do you recall her showing hesitance to
10 convict either Mr. Ewing or Mr. Searcy?

11 A Yes.

12 Q And do you recall, at some point, she did reach an
13 agreement with the rest of the jurors?

14 A Correct.

15 Q Okay. And do you recall if there any discussion as
16 to why she changed her mind?

17 A Not that I remember.

18 Q Do you recall Ms. Burns making an indication that
19 she changed her mind because of information about a
20 pecking order in gangs?

21 A No, I do not remember that, no.

22 Q Okay. Do you recall any of the other jurors
23 indicating that they were finding either the
24 defendant, Mr. Ewing or Mr. Searcy, guilty based
25 upon an alleged pecking order?

1 A Not in any of the conversations that I was a part
2 of.

3 Q And you were a part of the entire deliberations,
4 correct?

5 A Correct.

6 MR. WOJTALA: I don't think I have any
7 further questions.

8 THE COURT: Mr. Comorski.

9 MR. COMORSKI: Thank you.

10 C R O S S - E X A M I N A T I O N

11 BY MR. COMORSKI:

12 Q Ms. Chesney, good afternoon.

13 A Good afternoon.

14 Q Do you recall how many days the jury, which you sat
15 on, deliberated in this case?

16 A I think three and a half.

17 Q Okay. And you were not the foreperson, is that
18 right?

19 A Correct.

20 Q Do you recall certain notes being sent out to the
21 judge when your collective juror members had a
22 question?

23 A Not, no. Not that I recall.

24 Q Do you recall you, as the jury, informing the judge
25 through a note that you were deadlocked, do you

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1 recall that happening?

2 A I do not.

3 Q Do you recall the jury ever being hopelessly
4 deadlocked in your mind?

5 A No.

6 Q Do you recall ever asking the judge for
7 clarification on certain instructions or
8 definitions, things like that, being sent out via a
9 note?

10 A Through the foreman?

11 Q Yes.

12 A Yeah, maybe that one on clarification on the
13 sentencing or whatever the charges. Is that what
14 you're talking about?

15 Q Well, do you recall any note being sent out through
16 the foreman to the judge?

17 A Maybe once.

18 Q Okay. Do you know who drafted that note? In other
19 words, who wrote out the actual words?

20 A I do not.

21 Q But you do not remember an note being sent out
22 conveying to the judge that you, as the jury, were
23 deadlocked?

24 A Not that I'm aware of.

25 Q Now you indicated that you recalled looking at

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1 pictures of Mr. Ewing on facebook, is that right?

2 A Yes.

3 Q Now was this something that you did on your own or
4 was this done in the jury room?

5 A Well, we wouldn't have been able to do it in the
6 jury room so I would have done it later.

7 Q So you did that on your own when you weren't
8 deliberating with the other jurors?

9 A Correct.

10 Q Do you recall what is it that prompted you to look
11 Mr. Ewing up on Facebook?

12 A Somebody made a comment about it.

13 Q And somebody? That would be somebody in the jury
14 room?

15 A Correct.

16 Q And do you recall what the comment was?

17 A Just that he's on there and there's pictures.

18 Q So somebody in the jury room stated -- was it
19 directly to you, may I should ask you that? Was
20 this comment directed solely to you or to the jury
21 as a whole?

22 A Probably to the jury as a whole.

23 Q Okay. And this comment consisted of a statement
24 that there were -- that Mr. Ewing was on Facebook
25 and there are pictures of him on Facebook, is that

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1 what your testimony was?

2 A Yes.

3 Q Okay. Do you recall what stage of the deliberating
4 process this occurred? Was it day one? Day two?
5 Day three if you recall?

6 A I don't recall.

7 Q Now this person that stated there were pictures, did
8 that person state what type of pictures were on
9 Facebook?

10 A Just him and his friends.

11 Q Okay. Was it suggested that each juror should go
12 look up Mr. Ewing on Facebook?

13 A No, not specifically.

14 Q So why did you decide to do that?

15 A Curiosity.

16 Q What were you curious about?

17 A Just to see pictures of him and his friends.

18 Q Why would that make you curious?

19 A Because that's what Facebook is for.

20 Q You weren't looking for anything in particular?

21 A No.

22 Q And if I recall what you just testified to, you said
23 you did not recall a picture of Mr. Ewing with the
24 phrase Mr. and Mrs. McNasty, you don't recall seeing
25 that?

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- 1 A I don't specifically, no.
- 2 Q Now you testified that you did not specifically
3 state that you looked up a eulogy, is that right?
- 4 A Correct.
- 5 Q Do you recall that being mentioned during the
6 deliberation process? The eulogy?
- 7 A I really don't.
- 8 Q Do you recall anything being mentioned about gangs
9 during the deliberation process being looked up via
10 the internet?
- 11 A I don't.
- 12 Q Do you recall stating to an investigator for the
13 Prosecutor's Office that you recalled somebody in
14 the group saying they did look on the
15 internet/Facebook about gangs but you couldn't
16 remember what was said?
- 17 A I don't recall specifically.
- 18 Q What is it that you don't recall? Stating that to
19 their investigator or that being done at all?
- 20 A I said it's possible. I don't recall it
21 specifically.
- 22 Q Did you, in fact, tell him that somebody said
23 something about looking up gangs on the internet?
24 Do you recall stating that to the investigator?
- 25 A Say that one more time please.

1 Q Do you recall stating to the Prosecutor's
2 investigator that you recall somebody stating,
3 during deliberations, that they did look up on the
4 internet about gangs and Facebook?

5 A No, not specifically I do not. It's possible. I
6 don't remember specifically that somebody did.

7 Q When you say it's possible, are you saying it's
8 possible you said that to the investigator or it's
9 possible that somebody said it during deliberations?

10 A Both.

11 Q Okay. And it's your testimony you don't recall
12 anything about a eulogy ever being discussed?

13 A I do not.

14 Q Okay. Now you recalled juror Burns having doubts,
15 is that true?

16 A That is true.

17 Q Was she the only one that appeared to be having
18 doubts initially if you recall?

19 A Initially?

20 Q Yes.

21 A Depends on what you're asking. I mean doubts as far
22 as what?

23 Q Whether Mr. Ewing and Mr. Searcy were guilty or not
24 guilty?

25 A No.

1 Q Did you describe the deliberations as a rough three
2 days?

3 A It was a rough three days.

4 Q What was rough about it?

5 A Well, the whole process is rough.

6 Q Well, okay. Maybe you can describe to us what is
7 rough. Was there a lot of arguing? Were there
8 certain things that people couldn't agree on?
9 Describe that for us.

10 A To the level of the charges is where there was
11 contention.

12 Q Okay. And was there a point in time when Ms. Juror
13 Burns was a sole hold out for not guilty?

14 A Yes.

15 Q Do you recall what may have changed her mind?

16 A I have no idea.

17 Q Do you remember stating to the investigator for the
18 Prosecutor that although you remembered the case you
19 are not the person that accessed the internet during
20 deliberations? Did you say that to their
21 investigator?

22 A Not that I recall.

23 Q Okay. So if he said otherwise that would be wrong
24 or what are you telling us today?

25 A Well, I'm telling you that it was nine years ago and

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1 do he brought -- I mean I talked to him ten minutes.

2 Q I see.

3 A So of course then you start thinking back to nine
4 years ago when all of this happened.

5 Q I understand. So is it fair to say that it's very
6 difficult to really recall what happened nine years
7 after the fact, is that fair to say?

8 A Some things, sure.

9 Q How about the things that happened during the
10 deliberations in this case? Difficult to remember
11 exactly what happened?

12 A Some things. You have a long table of people
13 talking so you're got people on this side, and
14 you've got people in the middle so you're not apart
15 of all of the conversations at all of the time.

16 Q I understand.

17 MR. COMORSKI: Can I have a moment, your
18 Honor?

19 THE COURT: Yes.

20 BY MR. COMORSKI, continuing:

21 Q Do you recall being instructed by the judge, when
22 you were being questioned as a potential juror,
23 about what it is that you could and could not
24 consider as evidence?

25 A Yes.

1 Q Do you recall at the end of the case before you
2 started to deliberate being instructed by the judge
3 as to what it is you could and could not consider?

4 A Yeah.

5 Q Did you understand that to mean that you could still
6 go on Facebook and look up Mr. Ewing despite those
7 instructions?

8 A It had nothing to do with the deliberations or my
9 decision.

10 Q That wasn't the question. Did you believe that you
11 still had the right to go look up things online
12 about Mr. Ewing despite the fact that you were
13 deliberating juror? Do you think that was proper?

14 A I didn't think it was a problem.

15 MR. COMORSKI: Okay. Thank you.

16 C R O S S - E X A M I N A T I O N

17 BY MS. SWANSON:

18 Q Do you remember trying to look up Mr. Searcy on
19 Facebook?

20 A I don't.

21 Q Do you remember what convinced you, in this case,
22 that Mr. Searcy was guilty beyond a reasonable
23 doubt?

24 A I recall the trial, yes.

25 Q Okay. Do you recall what evidence was presented

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1 against Mr. Searcy?

2 A There's eye witnesses. I don't recall all of the
3 stuff, no.

4 Q Do you recall anything about an individual named
5 Tyree Washington?

6 A I believe. I think it came up on the stand.

7 Q Do you remember during your deliberations having
8 separate conversations about whether or not Mr.
9 Searcy was guilty?

10 A Yeah, we were told that it had to be a separate --
11 that it's a separate case.

12 Q So in your deliberations how much time, if you could
13 give me a percentage, do you think was spent
14 discussing whether Mr. Searcy was guilty as opposed
15 to whether Mr. Ewing was guilty.

16 A I could not answer that question.

17 Q Did you come to a decision on Mr. Ewing before you
18 came to a decision on Mr. Searcy?

19 A Probably.

20 Q Do you know whether it was after you came to your
21 decision on Mr. Ewing that you began to discuss
22 whether or not Mr. Searcy was guilty?

23 A I would say probably, yes.

24 Q Do you recall what each of them were found guilty
25 of?

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1 A Say that again. I'm sorry.

2 Q Do you remember what you found each of them guilty
3 of specifically the crime?

4 A I do. Murder, of course, and I don't remember the
5 other ones. I mean I know there were several
6 charges but.

7 Q Sure. Do you think you found them guilty of the
8 same offenses?

9 A As we were told, yes.

10 Q When you say, "As we were told"?

11 A We were told that if, if Mr. Searcy was aware of
12 what was going on that he's as guilty as if he had
13 the gun in his hand.

14 MS. SWANSON: Can I have just a moment,
15 your Honor? I don't have anything else right now.

16 THE COURT: All right. I don't have any
17 questions for the witness. Anything further?

18 MR. WOJTALA: Yes, your Honor.

19 R E D I R E C T E X A M I N A T I O N

20 Q Did you convict Mr. Searcy solely because you also
21 found Mr. Ewing guilty?

22 A No, there was evidence provided so not solely, no.

23 Q Okay. And you had indicated that Ms. Burns was a
24 hold out?

25 A Correct.

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1 Q Correct. And that she had some doubts, correct?

2 A Correct.

3 Q And were those doubts as to the guilt of either of
4 the defendants or was it doubts as to the degree of
5 the crime?

6 A Both.

7 Q Both. And do you recall was it specific for one of
8 jurors or, I'm sorry, one of the defendants or both
9 of the defendants as far as a doubt as to guilt? It
10 it's a terrible question. I apologize. Do you
11 recall if she had doubt with regard to Mr. Ewing as
12 to his guilt?

13 A I don't recall.

14 Q And do you recall if she had doubt as far as the
15 guilt of Mr. Searcy?

16 A I can tell you what it came down to. It was more
17 the difficulty with a process of saying that a
18 driver who doesn't have a gun in his hand is as
19 guilty as a person that does have a gun in their
20 hand.

21 Q Okay. So to sort of reiterate what you're saying,
22 was there a question as to, at least in your mind,
23 as to whether Mr. Searcy was the driver of the
24 vehicle?

25 A No.

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1 Q But what you've indicated is that whether, as the
2 driver of the vehicle, whether he was guilty of a
3 particular crime, is that what you're saying?

4 A Well, our instructions were that if he's driving the
5 car and he's aware of that a crime is going to be
6 committed he's as guilty as if he has the gun in his
7 hand.

8 Q Okay.

9 A That was our instruction. That's still hard to wrap
10 your head around.

11 Q Okay. And do you recall if that was Ms. Burns had
12 indicated that that was something that she was
13 having trouble with?

14 A I believe so.

15 Q And do you recall her expressing what doubts she had
16 as to the guilt of Mr. Ewing?

17 A I don't recall a specific conversation.

18 Q Okay. Do you recall if she made any mention, during
19 deliberations, that her doubt was based upon whether
20 she thought it was Mr. Ewing that was the shooter or
21 Mr. Washington, and Mr. Washington was testified by
22 another witness as being the actual shooter?

23 A Okay. I know who you're talking about.

24 Q Okay.

25 A Yes, she had doubt.

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1 Q Okay. And how that doubt was resolved you don't
2 know?

3 A I don't.

4 MR. WOJTALA: Thank you very much.

5 THE COURT: All right. Mr's. Comorski

6 MR. COMORSKI: Nothing further. Thank you
7 very much, Judge.

8 MS. SWANSON: Just one quick question.

9 R E - R E C R O S S E X A M I N A T I O N

10 BY MS. SWANSON:

11 Q Was the fact that you found that Mr. Ewing was
12 proven guilty beyond a reasonable doubt something
13 that motivated you in finding Mr. Searcy guilty?

14 A Well, it was based on the evidence that was given to
15 us and the instruction that we were given.

16 THE COURT: That is one of the elements of
17 aiding and abetting.

18 THE WITNESS: So based on those two things
19 that's how we came to the verdict that we did.

20 MS. SWANSON: Can I have just one moment?

21 BY MS. SWANSON, continuing:

22 Q Did you consider it to be possible that if Mr. Ewing
23 was the shooter perhaps someone different was the
24 driver? Someone other than Mr. Searcy?

25 A Not based on the testimony that we were given, no.

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1 MS. SWANSON: Okay. I don't have anything
2 further.

3 THE COURT: Okay. I think we're done with
4 you. Thank you. You can step down and I think you
5 can leave. All right. Do you have one more juror
6 today?

7 MR. WOJTALA: I do, your Honor. I just
8 need to call her. She's upstairs on the 11th floor.
9 She is available.

10 THE COURT: Okay. Well, I don't mean to
11 shortcut this hearing in any way at all. I know
12 that whichever way I rule Judge Hood is obviously
13 going to be scrutinizing the record carefully but
14 you can call all 11 other jurors and they can all
15 say that they felt the trial evidence proved beyond
16 a reasonable doubt that the defendants were guilty
17 and that they were not influenced at all by any
18 extraneous or improper information and it doesn't
19 matter. I mean what really matters is if this one
20 juror, Burns, was inappropriately influenced in her
21 decision making. I mean, you have to get a
22 unanimous verdict, of course, and run into hung
23 juries all the time and whether or not Ms. Burns has
24 an over abundance of naivety or an overabundance of
25 anxiety is hardly important now. The fact of the

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1 matter is, and it seems to be irrefutable, that she
2 had some doubts, whether they were reasonable in my
3 view or not doesn't matter, but she had doubts that,
4 in her view, were reasonable based on the
5 identification evidence and the alleged confession
6 of witness Washington and that she was worn down
7 really by some of the other jurors bringing in
8 obviously improper illegal information and evidence.

9 MR. WOJTALA: I don't know if that's what
10 she testified to, your Honor.

11 THE COURT: Well, she did.

12 MR. WOJTALA: She said she was worn down
13 by the process. I don't know if she testified that
14 she was worn down.

15 THE COURT: She changed her mind because
16 her doubts, her reasonable doubts, were as to
17 identification and the alleged confession of
18 Washington, that was why she had doubt, and she
19 changed her mind based, or she came off those
20 doubts, based on the extraneous information brought
21 into the deliberation process. She was very clear
22 about that and, you know, I can't avoid that
23 testimony. It is what it is. Now, I mean, the only
24 way you could talk me down here from ordering a new
25 trial, I suppose, is to show that what she claimed

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1 was inappropriate outside influences brought in by
2 the other jurors. There doesn't seem to be any
3 question that even this witness admitted that she
4 went on Facebook, she got information, she brought
5 it into the deliberation process in total
6 contravention of the judge's instructions but, you
7 know, if everything that juror Burns claims
8 motivated her to change her mind was part of the
9 trial evidence any way then maybe I could discount
10 her making the connection between extraneous,
11 improper, illegal influences and her changing her
12 mind and that would be about the only way that I
13 could think of, unless you can --

14 MR. WOJTALA: Well, that was already a
15 ruling by our Court of Appeals, your Honor.

16 THE COURT: Well, that's been -- it
17 doesn't matter any more.

18 MR. WOJTALA: Well, it does because that's
19 the law of this case that this Court is bound to
20 follow.

21 THE COURT: Well, I've got an order from
22 Judge Denise Paige Hood that I've got to follow.

23 MR. WOJTALA: And she is not your superior
24 Judge, your Honor.

25 THE COURT: Well, okay. Easy for you to

1 say.

2 MR. WOJTALA: On that point, your Honor,
3 and I understand the Court's point on that.

4 THE COURT: I have to make a responsible
5 decision based on her remand order.

6 MR. WOJTALA: Right.

7 THE COURT: She said we have to have a
8 hearing. I suppose I could revert in my hearing. I
9 could ignore all of the concerns she has and I could
10 ignore Burns' testimony and, in essence, adopt the
11 Michigan Court of Appeals' decision from several
12 years ago, which of course ruled that there didn't
13 have to be a hearing, but now we're having a
14 hearing, so why am I bound by what the Michigan
15 Court of Appeals said seven or eight years ago?

16 MR. WOJTALA: Because it's the law of the
17 case.

18 THE COURT: Well, it's the law of the case
19 only --

20 MR. WOJTALA: In that you're bound by it.

21 THE COURT: We've had a hearing now.

22 MR. WOJTALA: Right.

23 THE COURT: And hearing is also part of
24 the case and it's a hearing by order of a judge
25 ruling of a habeas petition. You know, if there

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1 hadn't been these improper influences you would have
2 had a hung jury and the case would have been retried
3 by now, and I don't know what the result would have
4 been, but maybe the judge would have had some
5 inkling of the inappropriate influence on the jury
6 deliberation process and would have warned the
7 second jury. I'm not sure that the revelation of
8 those improper influences came at a time that we can
9 assume before the second trial would have occurred,
10 it's hard to say, but there would have been a second
11 trial with a different jury. I don't know how I can
12 ignore what this witness said. I've been ordered to
13 have a hearing and we're having a hearing. If she's
14 not my superior judge then I could easily just say,
15 well, okay, no hearing and then, of course, the
16 defendants would have been released pursuant to her
17 order so you asked for the hearing, you got it, and
18 I'm stuck with what I've heard here. How am I going
19 to assume that the inappropriate illegal influences
20 that occurred in this case, you know, unquestionably
21 occurred, did not affect the outcome? If one of the
22 jurors said it did and now she's persisted in that
23 view for the last almost ten years, what am I going
24 to do?

25 MR. WOJTALA: Well, a number of things,

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1 your Honor. First of all, is that it's going to be
2 our contention that certainly there was, and it's
3 been shown by the testimony today, that certainly
4 there was some extraneous information got into the
5 jury room.

6 THE COURT: I think that's pretty clear.

7 MR. WOJTALA: Okay. The question is, was
8 the extraneous, included in that extraneous
9 information, was this evidence information as to a
10 pecking order, which is what she testified was the
11 straw that broke the camels back on this; that there
12 was extraneous information on a pecking order and an
13 opinion from one of the other jurors that because
14 there is this pecking order that this Washington was
15 taking the fall? Now, first of all, the Court in
16 making this ruling the fact that this juror, during
17 the deliberation process, had made a opinion as to
18 this is why I think this information is important
19 for another person --

20 THE COURT: Wait. I'm not following you
21 now. Don't use pronouns.

22 MR. WOJTALA: I'm sorry.

23 THE COURT: Say that all again.

24 MR. WOJTALA: Okay. Once again, we're
25 dealing with matters that are apart of the

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1 deliberating process which this Court cannot touch
2 based upon this. The U.S. Supreme Court has said
3 things that are inherent in the deliberative process
4 are things that cannot be brought in with testimony
5 or affidavit or second guess.

6 THE COURT: Well, we're passed that now,
7 Mr. Wojtala.

8 MR. WOJTALA: I understand that, your
9 Honor. I'm just -- so in doing so, and as the Court
10 of Appeals has already --

11 THE COURT: The Michigan Court? Please
12 say which Court of Appeals. We're dealing with two.

13 MR. WOJTALA: The Michigan Court of
14 Appeals. I apologize. The Michigan Court of
15 Appeals has already addressed that particular
16 aspect; the opinion supposedly by Ms. James that
17 this pecking order shows XY and Z. The Michigan
18 Supreme Court has ruled, the law of the case in this
19 particular case, has determined that that deals with
20 the deliberative process and not with the extraneous
21 information. The extraneous information is the
22 information itself as to whether there was a pecking
23 order that was discovered on the internet, okay. So
24 we're dealing with only that and not with Ms. James'
25 opinion where she tries to convince Ms., supposedly

1 tries to convince Ms. Burns that this is why you
2 should find this of relevance.

3 Now so the question becomes did, in fact,
4 this information was it discovered and was it shared
5 to Ms. Burns and to the other jurors? Now what the
6 purpose of my other witnesses are going to be that,
7 no, this never came up during deliberations; that
8 this was not something that was discussed. This was
9 not something that was mentioned during the
10 deliberation process so that's part of my part is
11 that what she believes was the basis of her decision
12 and I also would note that multiple times since then
13 this is the first time she said this is what caused
14 me to rule differently.

15 THE COURT: Well, her affidavit pretty
16 much says that.

17 MR. WOJTALA: But it doesn't, your Honor,
18 but it doesn't. And she also had indicated to our
19 investigator, and I'm going to bring him in too,
20 that she said that did never happened. This did not
21 happen. This did not change her verdict in this
22 particular case.

23 THE COURT: So she's lying? I mean
24 really?

25 MR. WOJTALA: I'm not saying she's lying

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1 your Honor. I'm saying that perhaps very much, I'm
2 not discounting right now that maybe there was some
3 discussion as to gang code, pecking order so on and
4 so forth. Part of that came from the actual trial
5 itself, okay, and the record supports that.

6 THE COURT: I understand. If the jurors
7 were simply reminding her of the trial evidence then
8 there wouldn't be a problem and maybe she could be,
9 you know, you could say that she's confusing what
10 she heard during a trial with what she heard from
11 other jurors that went online and came back to the
12 process with other information, I mean that's
13 possible, but I don't -- you're going to have to
14 show me what the trial evidence was really.

15 So here's another issue: She's got a
16 problem with the identification. She doesn't
17 believe the Love's identification testimony. She
18 has questions about that. We all know that
19 identification testimony is, you know, not the best.
20 It's fragile. Same race identification is probably
21 better than, you know, opposite race identifications
22 but still she had questions about the identification
23 and, of course, I'm sure the judge read the
24 instruction about identification and how much doubt
25 the jury should have about it so she had doubts

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1 about it. She testified that what flipped her on
2 the identification was the extraneous information
3 that was brought in going to the defendant's
4 culpability, sort of general culpability, not
5 necessarily their having committed this crime but,
6 you know, stuff that's online they put it out there
7 so why they would complain about it now, but anyway,
8 jurors aren't supposed to read, know about it, so
9 she said pretty clearly that that was what changed
10 her mind.

11 MR. WOJTALA: Was the pecking order.

12 THE COURT: Well, yes, the pecking order
13 and everything else.

14 MR. WOJTALA: I don't think that's what
15 she said, your Honor. What she's testified to was
16 as far as the information -- and, again, your Honor,
17 right now I'm not trying to change your mind. I'm
18 just asking that the Court allow me the opportunity
19 which --

20 THE COURT: Well, we're not done

21 MR. WOJTALA: -- is to continue with this
22 to make my record that I could then present further
23 on.

24 THE COURT: I don't have a problem with
25 that. What I'm trying to do is narrow to your

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1 focus, I guess, because we don't need to spend time
2 with these other jurors about their having been
3 convinced beyond a reasonable doubt that the
4 defendants are guilty. It just doesn't matter.

5 MR. WOJTALA: Right. My focus was going
6 to be as to whether this actually occurred, whether
7 there was this discussion, whether you were aware
8 that someone went online and found out pecking order
9 information, gang code information.

10 THE COURT: Well, this last witness
11 doesn't remember anything.

12 MR. WOJTALA: Right.

13 THE COURT: Or at least claims not to and
14 so she wasn't really very helpful in that regard
15 although she admitted going online herself and
16 bringing some of that information to the process
17 apparently thinking that that judge's instructions
18 didn't mean that she couldn't do what she did so,
19 yeah, you can call as many jurors as you think you
20 can find but their testimony, well, I don't need to
21 repeat myself. Their being convinced beyond a
22 reasonable doubt doesn't matter. Their immunity or
23 impervious attitude toward extraneous information
24 brought into the process, and the irrelevance of
25 that to their decision making process it doesn't

1 really play much of a role on the decision that I
2 have to make. You've got one problem juror here,
3 Burns, and she said what she said. She's been
4 saying it for ten years.

5 MR. WOJTALA: Again, your Honor, she has
6 not been saying that for ten years.

7 THE COURT: Well, you can nitpick what she
8 said --

9 MR. WOJTALA: I'm not nitpicking, your
10 Honor.

11 THE COURT: I just read her affidavit.
12 It's pretty clear what she's trying to tell us there
13 but, okay. And then you can order the record from
14 today. I won't make a decision until you've had a
15 chance to look at that and quote from it. I took
16 pretty extensive notes and I remember what she said.
17 Okay. We can call this one last juror.

18 MR. WOJTALA: And I do have it's the last
19 juror and I'm sorry. There's the other juror who
20 was the foreman that I also wanted to call. He was
21 here present here last time by subpoena, as we
22 discussed previously, and then I also have our
23 investigator, Mr. Pomorski to testify too, but I
24 will --

25 THE COURT: All right. I don't think

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1 we're going to finish this. We're going to have to
2 take a lunch break fairly soon. Let's get this
3 other juror out of the way and then we'll talk about
4 when we're going to continue this.

5 MR. WOJTALA: Give me one moment to call
6 her down.

7 (At 1:00 p.m. off the record)

8 (At 1:03 p.m. back on the record)

9 THE CLERK: Please raise your right hand.
10 Do you solemnly swear or affirm the testimony you're
11 about to give will be the truth?

12 MS. HALL: Yes.

13 JOYCE HALL

14 (At 1:03 p.m., sworn as a witness, testified as follows)

15 THE CLERK: Thank you.

16 COURT OFFICER: Step right here, me'am.
17 Have a seat.

18 D I R E C T E X A M I N A T I O N

19 BY MR. WOJTALA:

20 Q Good afternoon, ma'am.

21 A Hi.

22 Q Could you state your name once again for the record?

23 A Joyce Hall.

24 Q And, Ms. Hall, you were a juror on the in the trial
25 of Mr. Ewing and Mr. Searcy, correct?

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1 A Correct.

2 Q And just for to be perfectly clear about this, you
3 presently are an employee of the Wayne County
4 Prosecutor's Office, correct?

5 A Correct.

6 Q And in fact you are apart of the Appellate Division
7 of the Wayne County Prosecutor's Office?

8 A Correct.

9 Q And so you and I know each other quite well,
10 correct?

11 A Yes.

12 Q Okay. And have I had any discussion with you about
13 the details of your testimony today?

14 A No.

15 Q Have I indicated in any way shape or form how your
16 testimony should be today?

17 A No.

18 Q Is your testimony today based upon your memory of
19 what occurred during the deliberations in this case?

20 A Yes.

21 Q Okay.

22 MR. WOJTALA: We'll go right to it, your
23 Honor.

24 BY MR. WOJTALA, continuing:

25 Q Do you recall during the deliberations of any other

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1 juror conducting internet research into gang codes
2 or pecking order involving gangs?

3 A I don't understand what you're saying or asking.

4 Q Okay. Do you recall during deliberations any of the
5 jurors conducting internet research during
6 deliberations?

7 A Yes.

8 Q Did you take part in any of that?

9 A No.

10 Q Okay. Do you recall any juror specifically doing
11 internet research on gang codes or gang pecking
12 orders?

13 A Yes.

14 Q And do you recall who that was?

15 A I don't recall.

16 Q And do you recall that being during the deliberation
17 time?

18 A Yes, it was.

19 Q And do you recall that being discussed during
20 deliberations?

21 A Yes.

22 Q And do you recall who was discussing it during
23 deliberations?

24 A I don't remember her name.

25 Q Okay. But it was another juror?

1 A Yes.

2 Q Do you recall the specifics of that discussion?

3 A I remember saying that she looked on Facebook and
4 seen the pictures, seen the Facebook stuff. All I
5 remember is just then is she was on their pages look
6 at the Facebook.

7 Q Okay. So that's sorts of different than what my
8 question was. So your recollection is that someone
9 indicated that they looked at one juror or one
10 defendant or both defendant's Facebook?

11 A I think it was just the one. I'm not too sure. I
12 think it was just the one.

13 Q And do you recall which of the two defendants?

14 A Ewing.

15 Q Ewing, okay. And do you recall her expressing that
16 in looking at the Facebook page that there was some
17 type of gang information she received?

18 A I remember her just saying something about the fam
19 and there were just pictures of stuff. I don't
20 remember exactly all of that but I know she was
21 saying something about them, the pictures.

22 Q Okay. And when you say, "The pictures", is there
23 anything specifically about the pictures?

24 A He and his girlfriend how they were hugging or
25 whatever, the hand signs in the picture on the

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1 Facebook.

2 Q Okay. So I'm going back to an earlier question. I
3 had asked you about if there was information about
4 gang pecking order and you had indicated that you do
5 recall that there was some discussion about that?

6 A Yes, but I don't remember her saying anything about
7 the Facebook. She was just talking just in random
8 talking.

9 Q Okay.

10 A Like I said, I don't remember all of it. It was so
11 long ago.

12 Q Do you recall any specific question or discussion as
13 to -- let me go back. Do you recall testimony from
14 someone regarding a Mr. Washington being the actual
15 shooter?

16 A I can't remember.

17 Q Okay. Do you recall any juror making the comment
18 that it had to have been Mr. Ewing that was the
19 shooter because he was high up in the gang?

20 A I remember some of that, yes. Vaguely, yes.

21 Q Okay. Do you recall any discussion during
22 deliberations as to -- strike that question. Do you
23 recall another juror by the name of Kathleen Burns?

24 A I'm not too good with names but faces I am.

25 Q Okay. Do you recall during the deliberations if

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1 there was a hold out juror?

2 A It was.

3 Q Okay. And do you recall if that hold out juror
4 expressed the reason why she was a hold out?

5 A I think she said that she couldn't make a decision.
6 She was real hesitant about making a decision.

7 Q Okay. At some point that juror changed her mind,
8 correct?

9 A Correct.

10 Q And she did, in fact, reach a verdict with the
11 remainder of the jurors, correct?

12 A Correct.

13 Q Do you recall that particular juror expressing the
14 reason why she had changed her mind?

15 A I don't know.

16 Q Okay. The discussion regarding the Facebook that
17 you indicated, do you recall at what point during
18 deliberations that discussion occurred, and I'll
19 give you a point of reference? At some point there
20 was a deadlock juror note sent out from the jurors,
21 do you recall that?

22 A Say that again.

23 Q Do you recall at one point a note was sent from the
24 jurors indicating that you couldn't reach a verdict?

25 A I remember that, yes.

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1 Q Okay. Was the information about someone going on
2 Facebook, on Mr. Ewing's Facebook, and finding
3 information did that occur prior to or after?

4 A I think it was prior to deliberations.

5 Q Prior to the note?

6 A Prior to the note, I think.

7 Q Because you said prior to deliberations?

8 A It was just so long ago. I know we were in the
9 delivery room. I can't remember if it was when we
10 got the instructions or not but I know it was
11 discussed.

12 Q Okay.

13 MR. WOJTALA: I don't have any further
14 questions then.

15 THE COURT: Mr. Comorski.

16 C R O S S - E X A M I N A T I O N

17 BY MR. COMORSKI:

18 Q Good afternoon, Ms. Hall.

19 A Hi.

20 Q So if I understand your testimony today you
21 indicated that when the jurors were deliberating in
22 that room behind you, not necessarily that one but
23 the jury room, was when this discussion about gang
24 codes and pecking orders came up, is that right?

25 A Correct.

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1 Q And it was also during that time in the jury room
2 that a discussion came up about Mr. Ewing being high
3 up in the gang, is that right?

4 A Correct.

5 Q And you also testified that a juror stated that he
6 or she looked up, was it a he or a she?

7 A She.

8 Q That she looked up Mr. Ewing's information on
9 Facebook, correct?

10 A Correct.

11 Q And that was during deliberation in the jury room?

12 A In the jury room.

13 Q Okay. And you indicated that she mentioned
14 something about pictures of hand signs, is that
15 right?

16 A Correct.

17 Q Was that hand signs associated with gang activity?

18 A I'm assuming so.

19 Q Did she also mention pictures of Mr. Ewing and a
20 female holding guns?

21 A I don't remember that.

22 Q You don't remember that? Do you remember telling an
23 investigator on August 1st that that is, in fact,
24 what was discussed? A picture of Mr. Ewing and a
25 female depicted as holding guns?

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- 1 A No.
- 2 Q Okay. Now you said there was pictures of stuff,
3 other than the hand signs what other pictures were
4 discussed?
- 5 A Just he and his girlfriend they were hugging each
6 other or whatever.
- 7 Q Was there ever any discussion about a picture that
8 depicted him and his girlfriend with the caption,
9 ""Mr. and Mrs. McNasty"?
- 10 A I think so, yes.
- 11 Q Okay. Now was this the same juror that brought in
12 the information concerning gang codes and pecking
13 orders?
- 14 A Yes.
- 15 Q Did you, yourself, do any internet research or look
16 up Mr. Ewing on Facebook?
- 17 A No.
- 18 Q Why not?
- 19 A I didn't have internet at home.
- 20 Q Would you have done it had you had internet?
- 21 A No.
- 22 Q Why not?
- 23 A They said not to.
- 24 Q Who is they?
- 25 A The judge. She said no talking outside the

1 courtroom and no outside information, no internet or
2 anything.

3 Q So you were instructed not to do those things,
4 correct?

5 A Correct.

6 Q Correct? Yes?

7 A Yes.

8 Q So you knew that this particular juror who was
9 bringing in this information was violating that
10 instruction, did you not?

11 A I did.

12 Q Did you report that to the judge?

13 A No.

14 Q Did you report that to anybody?

15 A No.

16 Q Why not?

17 A I just didn't.

18 Q Do you have any reason why you didn't?

19 A No.

20 Q You also indicated you recalled the deadlock note,
21 the jurors are hopelessly deadlocked, do you
22 remember a note being sent out in that regard?

23 A Vaguely, yes.

24 Q Was that deadlock note sent out before or after this
25 internet research was discussed?

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1 A I can't remember if it was before or after. I don't
2 remember.

3 Q I understand.

4 MR. COMORSKI: Thank you. I have nothing
5 further.

6 C R O S S - E X A M I N A T I O N

7 BY MS. SWANSON:

8 Q Do you remember thinking that Mr. Searcy was in a
9 gang?

10 A No.

11 Q Do you remember that being discussed during
12 deliberations?

13 A Yes.

14 Q Do you remember spending time discussing Mr.
15 Searcy's guilt separate from discussing Mr. Ewing's
16 guilt?

17 A We did it both together.

18 Q Both together.

19 MS. SWANSON: Can I have just one minute?
20 I don't have anything else.

21 THE COURT: All right. Are we done?

22 MR. WOJTALA: No questions.

23 THE COURT: All right. You can step down.
24 Thank you. All right. It's 1:20. I think we may
25 have to suspended operations here at least for a

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1 while. You have what other witnesses?

2 MR. WOJTALA: I do have one more juror who
3 will be available next week and then I also have our
4 investigator who is available whenever.

5 THE COURT: So, I mean, as far as I'm
6 concerned you've moved expeditiously to hold this
7 hearing and conclude it. There's certainly no fault
8 of the People's that there's been this delay but I
9 don't have any power over how Judge Hood may see
10 this. I take it, Mr. Comorski, your view is that if
11 we don't conclude the hearing by Wednesday, the
12 28th, or is it your client that's -- your client is
13 the one that we have to supposedly, I don't remember
14 exactly what Judge Hood's language was but initiate
15 the hearing on or before the 28th of August? That
16 was your client, right, not --

17 MR. COMORSKI: That was my client,
18 correct, your Honor.

19 THE COURT: Well, are you going to take
20 the position that they didn't move expeditiously and
21 ask for --

22 MR. COMORSKI: That is correct, your
23 Honor. I can read what the language states: "The
24 conditional grant of a writ habeas corpus dated
25 November 20, 2017 is amended. The petition for writ

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1 of habeas corpus is granted on petitioner's second
2 claim. Unless the State of Michigan takes action to
3 afford petitioner an evidentiary hearing on his
4 juror misconduct claim in the County Circuit Court
5 within 120 days of this Court's order he may apply
6 for release from custody", which is what I would do
7 on the 28th. I understand the Court's position and
8 I understand Mr. Wojtala's position.

9 THE COURT: Well, Mr. Wojtala, is there
10 anything else I can do between now and the 28th to
11 -- I mean I guess I could let you call your
12 investigator. I can't do much about the jurors.

13 MR. Wojtala: Right. I mean the important
14 witness for me is the foreman for the jury and,
15 obviously, he wouldn't be available until the 28th
16 so, you know, my interpretation of the order is that
17 we afford petitioner an evidentiary hearing. I
18 think, obviously we're here today.

19 THE COURT: We've afforded him.

20 MR. WOJTALA: We have afforded him that.
21 We are seeking the extension from Judge Hood right
22 now. I'm hoping to get an order on that and, you
23 know, it would be up to the AG then to argue against
24 release of Mr. Ewing if that motion is made or when
25 that motion is made on the 28th, so as far as what

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1 this Court can do right now I don't think we can
2 complete it today. Obviously, this is not much of
3 an issue with Mr. Searcy but, as far as the 28th, I
4 think there's no other option but to go pass the
5 28th to complete this hearing.

6 THE COURT: All right. Well, I've got a
7 few other matters I've got to take care of now soon.
8 It's getting to be late but I'll let you -- I'll
9 reconvene tomorrow, if you'd like, and you can at
10 least call your investigator. I mean, tomorrow is
11 the 27th, obviously, and I want to try to avoid this
12 matter being decided on a technicality. Are the
13 defendants going to call any witnesses? Do you have
14 any idea about calling witnesses?

15 MR. COMORSKI: No, your Honor.

16 MS. SWANSON: No, your Honor.

17 MR. WOJTALA: And it wouldn't be a -- what
18 would happen is is if we're unsuccessful on the 28th
19 against Mr. Comorski's motion it would just be
20 defendant's release which would cure the
21 Constitutional issue of the habeas involved. It
22 would not -- it wouldn't be an automatic granting of
23 a new trial based on the 28th.

24 MR. COMORSKI: That's correct, your Honor.

25 THE COURT: All right. Well, then who --

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1 do you have the view, Mr. Wojtala, that if I were
2 to, well, whatever decision I make about the new
3 trial is then reviewable by the Michigan Court of
4 Appeals?

5 MR. WOJTALA: No. My position is, is that
6 whatever opinion you reach it would I believe
7 jurisdiction is still with Judge Hood.

8 THE COURT: Yes.

9 MR. WOJTALA: And Judge Berg, on the other
10 on Mr. Searcy's case, so my position is this was
11 sent down for a hearing that, Judge, you do the
12 hearing and make your determination. It would then
13 go to Judge Hood to make a determination as to
14 whether to grant habeas or not.

15 THE COURT: So the decision that I would
16 make is what? Is it just a finding of fact or is it
17 a decision that the defendants are entitled to a new
18 trial?

19 MR. WOJTALA: My belief is it's basically
20 a finding of fact so, let's say for instance, that
21 you decide that the defendants are entitled to,
22 based on testimony that was presented, that they
23 should get a new trial then it would be the Court's
24 finding that I find that there was extrinsic
25 evidence that was presented to the jurors which

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1 caused prejudice and it wasn't harmless error and
2 based upon that that they were denied a fair trial
3 and then, my understanding is --

4 THE COURT: And then she takes it from
5 there?

6 MR. WOJTALA: Yes.

7 THE COURT: And then whatever decision she
8 makes is appealable to the 6th Circuit?

9 MR. WOJTALA: U.S., yes.

10 THE COURT: Not the Michigan Court of
11 Appeals.

12 MR. WOJTALA: Right.

13 MR. COMORSKI: If I may chime in, your
14 Honor? That's a little bit inaccurate and I can
15 read directly from the Judge's condition grant of
16 the writ. It says on page five, "The grant is
17 conditioned upon the State Trial Court conducting an
18 evidentiary hearing on petitioner's juror misconduct
19 claim within 120 days of this Court's order and
20 making a determination as to whether the extraneous
21 information had a prejudicial affect upon the jury's
22 verdict. If the Judge so finds, he or she shall
23 order a new trial for petitioner".

24 THE COURT: Right. I read that and I
25 underlined it. That is exactly what she said.

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1 That's what she said in her opinion and then in the
2 remand part of the order it's different. I don't
3 know. Did Berg say the same thing? I mean, I don't
4 have Berg's opinion. Did he say essentially the
5 same thing?

6 MS. SWANSON: I believe so, your Honor,
7 but I don't have his opinion on me.

8 MR. WOJTALA: He stated, "Derrico Searcy's
9 petition for writ of habeas corpus is conditionally
10 granted on his third claim unless the State of
11 Michigan takes action to afford Mr. Searcy an
12 evidentiary hearing on his 6th Amendment jury
13 misconduct claim in the Wayne County Circuit court
14 within 120 days of this order. He may apply for
15 release from custody. All proceedings related to
16 Mr. Searcy's remaining claims are stayed pending
17 resolution of the jury misconduct claim.

18 THE COURT: I don't see how she's
19 retaining jurisdiction in that the last couple
20 sentences on page five she doesn't seem to be
21 retaining jurisdiction.

22 MR. WOJTALA: I'll clarify that, in the
23 meantime, with the Court of Appeal or, I'm sorry,
24 with the Attorney General on this.

25 MR. COMORSKI: I think if -- if I may,

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1 your Honor? The reason this is being sent back is
2 because there has been a finding there was a Federal
3 Constitutional violation i.e. the decisions that
4 were initially done in State Court were done without
5 holding a hearing that should have been held in the
6 first place; that's why we're back here to do this
7 but, again, as I reiterated, the Judge is specific
8 in her opinion and order that if this Court so finds
9 the extraneous influences affected the jury verdict
10 this Court must order or shall order a new trial.

11 THE COURT: That's what it says. All
12 right. And I don't think my decision is then
13 reviewable by the Michigan Court of Appeals.

14 MR. COMORSKI: I don't think so.

15 THE COURT: But even -- all right. I can
16 just imagine what they would do with that decision
17 if it went against the defendants anyway's. All
18 right. Well, we can reconvene tomorrow if you'd
19 like. I can make that happen.

20 MR. WOJTALA: You know, my preference
21 is --

22 THE COURT: That isn't going to conclude
23 it.

24 MR. WOJTALA: No, I mean my preference is,
25 as I said, we're going to go passed the 28th any way

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1 is we just set a date for next week and we have both
2 of them testify at the same hearing.

3 THE COURT: If that's the way you want it
4 that's fine with me. You're the one running a risk
5 here so, all right. That means I can try a case
6 that I have up tomorrow so I'm okay with that. I
7 was just trying to give you some air here. Well,
8 Monday we're closed obviously. If we're going to
9 blow pass the 28th about the only other time that I
10 can fit this in next week would be Friday afternoon
11 the 6th.

12 MR. WOJTALA: And that's a fine time for
13 the People, your Honor.

14 THE COURT: Are you okay with that?

15 MR. COMORSKI: Yes.

16 THE COURT: At 1:30.

17 MS. SWANSON: We are also okay with that
18 for Mr. Searcy.

19 THE COURT: And I guess that gives you
20 some time to try to find additional jurors if you
21 think that would be helpful but not just to say they
22 were convinced.

23 MR. WOJTALA: Right.

24 MR. COMORSKI: I wonder if we should put
25 this on the record by way of stipulation?

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1 Apparently, it's been discovered that two of the
2 jurors have deceased, are deceased.

3 THE COURT: Oh, is that right?

4 MR. WOJTALA: I'll stipulate to that.

5 THE COURT: Okay. And then so that
6 leaves, ten. Six you could not find or get a hold
7 of or?

8 MR. WOJTALA: I believe there was one or
9 two that we were able to get a hold of but there was
10 going to be difficulty in having them produced due
11 to their location is my understanding. I think we
12 can check on that but.

13 THE COURT: Okay. I guess we're done.
14 See you on the 6th at 1:30.

15

16 (At 1:28 p.m. proceedings concluded)

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C E R T I F I C A T E

STATE OF MICHIGAN)

) ss

COUNTY OF WAYNE)

I, Bromeaica McBride, certify that this transcript consisting of 152 pages is a complete, true and correct transcript of the proceedings and testimony taken in this case on August 26, 2019.

9-23-19/s/ Bromeaica McBride

Date

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION
THE PEOPLE OF THE STATE OF MICHIGAN,
vs Case No. 10-001495-01-FC
10-001495-02-FC
DERRICO DEVON SEARCY &
DARRELL EWING,
Defendants.

_____ /

MOTION

BEFORE THE HONORABLE MICHAEL HATHAWAY, CIRCUIT JUDGE,
Detroit, Michigan - Friday, September 6, 2019

APPEARANCES:

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T A B L E O F C O N T E N T S

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WITNESSES: DEFENDANT
None.

<u>EXHIBITS:</u>	<u>IDENTIFIED</u>	<u>ADMITTED</u>
None.		

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Detroit, Michigan

Friday, September 6, 2019

1:52 p.m.

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THE CLERK: Calling case number 10-1495-01, the People versus Derrico Searcy, and case number 10-1495-02, the People versus Darrell Ewing, these matters are before the Court for a motion hearing.

MR. WOJTALA: Good afternoon.

Jon Wojtala for the People.

MR. COMORSKI: Good afternoon, your Honor.

Phillip Comorski on behalf of Mr. Ewing.

MS. SWANSON: Good afternoon, your Honor.

Casey Swanson on behalf of Mr. Searcy from the Federal Community Defender Office. Also present with me at counsel table is Colleen Fitzharris who is his lead attorney on his habeas case.

THE COURT: Okay. As far as I'm concerned we are ready to continue. Mr. Wojtala.

MR. WOJTALA: Correct, your Honor. We have -- I have one witness today, it is Mr. Tubbs, who was the foreman on the jury.

THE COURT: Okay. You may call him.

MR. TUBBS: Brian Tubbs.

THE CLERK: Raise your right hand.

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1 Do you solemnly swear or affirm that the
2 testimony you are about to give will be the truth?

3 MR. TUBBS: I do.

4 THE CLERK: Thank you.

5 DEPUTY SHERIFF: Have a seat.

6 **B R I A N T U B B S,**

7 called as a witness at 1:54 p.m., testified as follows:

8 **DIRECT EXAMINATION**

9 BY MR. WOJTALA:

10 Q Good afternoon, sir.

11 Could you state your name one more time for the
12 record?

13 A Brian Tubbs.

14 Q Mr. Tubbs, you were a juror on the case involving
15 Mr. Searcy and Mr. Ewing, correct?

16 A Yes.

17 Q And you were actually the foreman of that jury?

18 A Correct.

19 Q Did you take your job serious as foreman?

20 A Yes.

21 Q And as foreman you were present during the entire extent
22 of the deliberations in this case, correct?

23 A Correct.

24 Q So getting right to it, are you aware of or do you
25 remember another juror that sat there, a Ms. Karen James?

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1 A Yes.

2 Q Okay. And do you also remember a juror by the name of
3 Kathleen Byrnes?

4 A Yes.

5 Q Do you recall at some point there was an indication from
6 the jury that you were unable to reach a decision in this
7 case, do you recall that?

8 A Yes.

9 Q And do you recall that Ms. Byrnes was the holdout,
10 basically, on the jury?

11 THE COURT: Please say yes or no.

12 THE WITNESS: Yes.

13 BY MR. WOJTALA:

14 Q You will have to keep your voice up a little bit.

15 A Yep, okay.

16 Q Do you recall during your deliberations whether Ms. Byrnes
17 had indicated her reasons why she was unconvinced on guilt
18 in this particular case at that time?

19 A I don't recall the specifics but she was not convinced.

20 Q Okay. At some point though Ms. Byrnes did change her
21 mind, correct?

22 A Yes.

23 Q Do you recall -- do you know the reason why she changed
24 her mind?

25 A I don't recall the specifics.

1 Q You don't recall whether she had indicated to the rest of
2 the jury why she changed her mind or anything like that?

3 A No.

4 Q That's a no, right?

5 A That's a no.

6 Q Sorry, you just have to make sure you speak up and answer.

7 A Yep.

8 Q Now also during deliberations do you recall Ms. James
9 indicating that she had done some Internet research on her
10 own, some independent Internet research?

11 A No.

12 Q You don't recall that?

13 A I do not.

14 Q Do you recall during deliberation any discussion about a
15 hierarchy in gangs?

16 A No.

17 Q Okay. Do you remember Ms. James putting any pressure on
18 Ms. Byrnes to change her mind?

19 A No.

20 Q As a whole was there any discussion with the jurors, and
21 maybe as a whole among the jurors, was there any
22 discussion about gang hierarchy being an influence in your
23 decision?

24 A No.

25 Q During your deliberations do you recall the jury reaching

1 their verdict in this particular case, do you recall any
2 discussion about any information that was gleaned through
3 Internet searches, any other research that was not
4 conducted inside this courtroom?

5 A No.

6 Q Do you recall what the basis for the jury's verdict was?

7 THE COURT: Well, are you asking him to tell us
8 what every single of the twelve jurors?

9 MR. WOJTALA: No, no, no.

10 BY MR. WOJTALA:

11 Q Other than the facts that were presented at trial, do you
12 recall anything that influenced any of the jurors verdicts
13 in this case?

14 A No.

15 MR. COMORSKI: Objection, your Honor,
16 speculation.

17 THE COURT: How would he know what influence
18 each -- what the jury's verdict ultimately was is obvious,
19 but what influenced each person to vote the way they did?

20 MR. WOJTALA: Well, I guess my question goes
21 to, your Honor, as foreman, as being present throughout
22 the deliberation, my question, I guess, goes to, was there
23 when the -- was there discussion as to what the verdict
24 would be, was the discussion -- did any juror indicate
25 that their outside -- whether they did outside research,

1 whether any outside research had got into the courtroom,
2 whether that bore any effect when they were in there.

3 THE COURT: Okay.

4 MR. WOJTALA: Whether that was a matter of
5 discussion during the deliberations.

6 THE COURT: Do you remember?

7 THE WITNESS: No.

8 MR. WOJTALA: I don't think I have any further
9 questions.

10 THE COURT: Mr. Comorski.

11 MR. COMORSKI: Thank you, your Honor.

12 **CROSS-EXAMINATION**

13 BY MR. COMORSKI:

14 Q Good afternoon, Mr. Tubbs.

15 A Good afternoon.

16 Q Ask you to keep your voice up if you could, okay?

17 A Yes.

18 Q Now as the jury foreman, were you also the one responsible
19 for writing notes to the Judge?

20 A Yes.

21 Q So all of the notes that came to the attention of the
22 Judge were in your handwriting; is that right?

23 A Yes.

24 Q Do you recall sending out a note to the Judge about a
25 possible deadlock situation in the jury room?

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1 A Yes.

2 Q Do you recall exactly what the note said?

3 A No.

4 Q Do you remember phrasing the note as being a serious
5 difference of opinion on the verdict, do you recall
6 putting that in the note?

7 A Possibly, yeah.

8 Q Do you also recall asking whether the Judge could declare
9 a hung jury?

10 A Yes, we did.

11 Q Do you recall that?

12 A Yep.

13 Q So suffice it to say there was a serious difference of
14 opinion; is that right?

15 A Yes.

16 Q And this came out after there had already been some
17 deliberations going on for a day or two; isn't that right?

18 A I can't recall exactly how long but there had been some
19 deliberations, yes.

20 Q I guess the question is did this come out the same day
21 that you started deliberations?

22 A I don't recall.

23 Q You don't recall? Okay.

24 Do you recall Karen James and Kathleen Byrnes;
25 is that right?

1 A Yes.

2 Q Do you recall a juror by the name of Joyce Hall?

3 A Yes.

4 Q Do you recall another juror by the name of Michelle

5 Chesney?

6 A Yes.

7 Q Do you recall any discussions about looking up Mr. Ewing

8 on Facebook?

9 A No.

10 Q That never happened?

11 A I don't recall any discussions about that.

12 Q Do you recall any pictures being brought in to the jury

13 room that were taken from Facebook specifically?

14 A I don't recall.

15 Q Now you also testified that Ms. Byrnes was a holdout; is

16 that right?

17 A Yes.

18 Q Was she the sole holdout?

19 A I don't recall. At the end I think so, but may have been

20 earlier as we were discussing things and people were not,

21 you know, immediately making up their mind when we began,

22 so.

23 Q Do you recall whether the juror Byrnes's concern had to do

24 with an individual by the name of Tyree Washington?

25 A I don't remember.

1 Q When discussions were held in the jury room, did you
2 discuss all together or were there groups of people
3 discussing together or how did that work?
4 A It was all around the table together.
5 Q It is your testimony that nobody mentioned anything about
6 Internet research?
7 A I don't recall any testimony or any mention of Internet
8 research.
9 Q You don't recall seeing any pictures from Facebook?
10 A No.
11 Q You don't recall Ms. James saying she had done Internet
12 research?
13 A No.
14 Q Do you recall Ms. Chesney indicating she had done Facebook
15 research on Mr. Ewing?
16 A No.
17 Q You don't recall?
18 A I do not recall.
19 Q All right. After you sent out the note indicating the
20 jury was deadlocked, did you and the other jurors
21 deliberate further that day?
22 A I don't remember. I think the Judge indicated that she
23 wanted us to keep talking. I don't remember if it was
24 that -- I know we did. I don't know if it was that same
25 day or if it was the end of the day. I don't remember

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1 what time of the day it was.

2 Q Do you know if you came back with a guilty verdict the
3 same day you sent out the deadlocked note?

4 A I don't recall.

5 Q Were you ever contacted by an investigator for either
6 side, either the prosecutor or the defense?

7 A During what time period? During the trial?

8 Q Afterwards? I should have asked that.

9 THE COURT: Immediately after the trial.

10 BY MR. COMORSKI:

11 Q Immediately after the trial.

12 A No. I was contacted by two different parties within the
13 last month but nothing after the trial.

14 Q Okay. Who contacted you a month ago?

15 A There was some representative on behalf of the defense. I
16 don't remember their name because it came out of the blue
17 from nine years later. And then a detective retained by
18 the Wayne County prosecutor's office.

19 Q So when you spoke or had contact with these two
20 representatives, that was the first time you had thought
21 about this case in nine years; is that right?

22 A Correct.

23 Q Did you give a statement to either of those
24 representatives?

25 A I had a conversation. It wasn't any sort of a formal

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1 written statement or anything like that.

2 Q With both or one?

3 A With both.

4 Q At the same time or on separate occasions?

5 A Separate. They were both phone calls. They each
6 contacted me and I talked back with them.

7 MR. COMORSKI: Nothing further. Thank you.

8 THE COURT: Ms. Swanson.

9 **CROSS-EXAMINATION**

10 BY MS. SWANSON:

11 Q So when you and the rest of the jurors were in the jury
12 room deliberating, do you remember whether there was ever
13 more than one person talking at a time?

14 A It's very possible. I don't remember.

15 Q Okay. Do you remember any evidence presented at trial
16 about gang hierarchies?

17 A I don't recall.

18 Q Do you recall any conversation among the jurors about
19 conducting experiments to see whether they could identify
20 people in their rearview mirrors in their own cars at
21 home?

22 A I don't remember that.

23 Q Do you remember hearing about a man named Tyree Washington
24 at trial?

25 A I think so, yeah. The name sounds familiar.

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1 Q Do you remember the context of the name?

2 A No.

3 Q Do you remember hearing the name William Beal at trial?

4 A Sorry, I don't.

5 Q Do you remember whether during deliberations you guys

6 dedicated a specific amount of time or particular

7 conversations to Mr. Searcy individually?

8 A I don't remember, I'm sorry.

9 MS. SWANSON: Can I have just one moment, your
10 Honor?

11 I don't have anything further.

12 THE COURT: Anything further, Mr. Wojtala?

13 MR. WOJTALA: Nothing, your Honor.

14 THE COURT: You may step down. Thank you, sir.

15 MR. WOJTALA: That's all the witnesses I have,
16 your Honor.

17 THE COURT: You were going to call an
18 investigator I think.

19 MR. WOJTALA: Yeah, I was hoping to.
20 Unfortunately he is unavailable today and the Court has
21 already been gracious enough to give me an extension until
22 today. I didn't want to impose upon the Court any
23 further.

24 THE COURT: All right. Let me ask you a couple
25 of questions here. I'm a little confused by my mandate.

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1 I was looking at the Sixth Circuit opinion on this case
2 and then I went back and reread Judge Hood's order
3 remanding the case. The majority of the panel on the
4 Sixth Circuit ruled that -- right now I'm just reading
5 from my head notes but it is also contained in the
6 opinion.

7 When a trial court is presented with evidence
8 that extrinsic influence has reached the jury that has
9 reasonable potential for tainting that jury, due process
10 requires that trial court takes steps to determine what
11 effect of such extraneous information actually was on that
12 jury.

13 Then the opinion goes on to say essentially
14 that the district court, the US District Court that is,
15 should not, without a hearing, have determined that there
16 had been a due process violation here.

17 The circuit court writes that the State has
18 made a reasonable concession on this appeal that it was
19 contrary to established law for the state court to deny
20 Ewing, and the other Defendant as well, an opportunity to
21 show the actual effects that the information had on the
22 jury.

23 They go on to say at page 1031, the district
24 court's own findings compel the conclusion that, without a
25 hearing, there is too much that is unknown about the

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1 deliberations to hold that Ewing has proven such
2 prejudice. The court found that the Byrnes affidavit is
3 "void of information pertaining to the extent of
4 discussions regarding the eulogy," and then they go on to
5 discuss some of the other issues raised in the opinion.

6 But the court then quoting the Remmer decision,
7 I guess which has become the case that has given us the
8 title for this kind of a hearing. There the Court of
9 Appeals, I mean it was actually the US Supreme Court, I
10 guess, remand the case to the District Court with
11 directions to hold a hearing to determine whether the
12 incident complained of was harmful to the petitioner, and
13 if after hearing it is found to have been harmful, to
14 grant a new trial.

15 So in Remmer the case was remanded to the
16 district court. Now did the as you district court have
17 Remmer on a habeas petition, do you know, or was that a
18 federal court case?

19 MR. WOJTALA: My memory was that this was a
20 federal case, I believe.

21 THE COURT: Remmer was?

22 MR. WOJTALA: I believe it was US v Remmer, so
23 yes, the trial court would have been the district court in
24 that matter.

25 THE COURT: Yeah, so the trial court would have

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1 been the US district court.

2 And then at the end of the opinion they
3 conclude that the majority in our case in the sixth
4 circuit concludes that, "for these reasons," and I am
5 quoting, "we reverse and remand to the district court with
6 instructions to issue an amended order conditionally
7 granting habeas relief unless the State takes steps to
8 conduct a proper evidentiary hearing on Ewing's claim of
9 juror misconduct within a reasonable period of time to be
10 set by the district court's order."

11 That's what has been done by the district court
12 in this case.

13 "We leave it to the district court to determine
14 whether the two additional claims presented in Ewing's
15 petition should be resolved."

16 She did that and I guess that's now a nonissue.

17 So what the Sixth Circuit did was they sent the
18 case back to Judge Hood with a mandate that the State take
19 steps to conduct a proper evidentiary hearing on the juror
20 misconduct issue.

21 And then Judge Hood, after getting the case
22 back, writes, "The Sixth Circuit, however, concluded that
23 the proper remedy" -- and I am quoting from page four of
24 her order, the last order -- "concluded that the proper
25 remedy for this constitutional violation would not be a

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1 new trial but would be granting a writ of habeas corpus
2 conditioned upon state trial court conducting an
3 evidentiary hearing pursuant to Remmer."

4 They didn't actually say that the state was to
5 conduct this hearing. That's what Judge Hood said. And I
6 guess you could sort of infer that that might be what the
7 Sixth Circuit meant.

8 And then Judge Hood goes on to say on the next
9 page that, the grant is conditioned upon the state court
10 conducting an evidentiary hearing, et cetera, and if the
11 judge so finds, he or she shall order a new trial for
12 petitioner. Which suggests to me that Judge Hood's view
13 is that if I find the misconduct has fundamentally
14 effected the Defendant's right to a fair trial that I am
15 the Judge that would order a new trial. That's what she
16 says.

17 How do I have that jurisdiction? Do you think
18 I have that jurisdiction to do that?

19 MR. COMORSKI: Absolutely, your Honor. That's
20 what the order says.

21 THE COURT: Well, yeah, that's what the order
22 says, but I wonder if that's what the -- that's not what
23 the Sixth Circuit says.

24 MR. COMORSKI: The Sixth Circuit said, and
25 again, the Sixth Circuit did say that your Honor can

1 conduct a hearing because as it --

2 THE COURT: Conduct a hearing, yes. Oh, yes.
3 No question about it. We've done that.

4 MR. COMORSKI: I thought you were unclear as to
5 whether or not this court or the district court and the
6 federal court was supposed to --

7 THE COURT: Who orders the new trial? Judge
8 Hood says I do.

9 MR. COMORSKI: Absolutely.

10 THE COURT: But I wonder if that's really --
11 that's not what the Sixth Circuit said. The Sixth Circuit
12 didn't say that I grant the new trial. They said I have
13 the hearing. I wonder if the proper procedure here would
14 be for me to write a report to Judge Hood with my
15 conclusions of law and fact.

16 MR. COMORSKI: If I may?

17 THE COURT: Maybe with a recommendation but I
18 don't know how I have the ability to order a new trial at
19 this point just because a federal judge sends it to me and
20 says I have the authority to do it.

21 MR. COMORSKI: Well, if I may read from the
22 Sixth Circuit, cocounsel just handed this to me. It says
23 quote, in any event, the Michigan --

24 THE COURT: What are you reading from so I'm on
25 the same page with you?

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1 MR. COMORSKI: It's the second to last
2 paragraph from the majority opinion.

3 THE COURT: Okay.

4 MR. COMORSKI: And I'm on the last sentence
5 actually.

6 "In any event, the Michigan courts" -- that
7 would be this court -- "are well equipped to provide
8 appropriate relief should the passage of time prevent the
9 court from affording Ewing a constitutionally-meaningful
10 Remmer hearing, and Ewing is free to seek habeas relief if
11 he finds the State's process constitutionally inadequate."

12 One of the arguments we're going to be making
13 is given the passage of time and the fact that two of the
14 jurors we know of have deceased and others cannot be
15 contacted that we really don't know what the effect of
16 this extraneous information had on all of the jurors.

17 THE COURT: No, we don't need to know that.

18 MR. COMORSKI: Well I think --

19 THE COURT: I think we need to know what effect
20 it had on one.

21 MR. COMORSKI: That's true. That's true.

22 But I think in order to make sure that this was
23 a verdict that we could rely on, we need to know what all
24 of the jurors were exposed to and how that may have
25 affected his or her decision. And given the passage of

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1 time, I think that is impossible.

2 That was really what the big stumbling block
3 was when this was at the Sixth Circuit, is how can you
4 hold a meaningful hearing nine years after the fact.

5 Again, your Honor, I think given the fact that
6 this Court has been ordered to hold the Remmer hearing is
7 free to grant the new trial if this Court believes that
8 the extraneous influences did, in fact, affect the verdict
9 in this case, at least.

10 THE COURT: So where does the People go with an
11 appeal?

12 MR. COMORSKI: Well, that's the question that
13 the People have to answer.

14 MR. WOJTALA: I have discussed this with both
15 my supervisor and also with the Attorney General's office.
16 Their position, and I concur with this position, is if
17 this court as a state court grants a new trial in this
18 particular case then the appeal would go to the Michigan
19 Court of Appeals because they are your superior court.

20 So the situation that would have occurred would
21 have been if the Court, I guess maybe I'm anticipating
22 things, is if the Court were to comply with the order that
23 Judge Hood had that you are to decide whether there should
24 be, if the evidence supports it to grant a new trial, if
25 the Court was to do that, that's a state court decision

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1 that we would appeal to the Court of Appeals.

2 If the Court was to deny a new trial, that
3 would be a matter that was ended in the state court and
4 then it would still be, because it is a conditional habeas
5 grant, it would then go back to Judge Hood to determine
6 whether based on the existing evidence she would find
7 under federal law that a constitutional violation
8 occurred.

9 THE COURT: So what would the -- would it be
10 plain error? What would be her standard of review of my
11 decision?

12 Let's say I denied the motion for a new trial.
13 I mean, she would then what, look at the transcript and
14 say, well, I would have given them it, therefore, Hathaway
15 is reversed?

16 MR. WOJTALA: I would have to imagine it would
17 probably be much as it is in state court, an abuse of
18 discretion, whether your determination is outside the
19 realm of principal outcomes.

20 THE COURT: Reasonable outcomes, yeah.

21 Well, it is a constitutional issue. It is
22 plain error I think, at least in state court when state
23 appellate court's are dealing with -- well, unpreserved
24 constitutional error. Yeah, it is plain error. Isn't
25 that the standard for review?

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1 MR. COMORSKI: I don't think so because what we
2 are talking about is a federal writ.

3 THE COURT: Yeah.

4 MR. COMORSKI: And in order to get jurisdiction
5 to review state cases, a federal judge has to be presented
6 with two things. One, a federal constitutional violation.
7 And, two, an unreasonable application of existing federal
8 law in whatever that issue is.

9 In other words, I can't go to the feds on a
10 writ on any and all issues that are raised in the state
11 courts. They have to be violations of federal
12 constitutional law. So I don't think it is an abuse of
13 discretion necessarily, it is whether it is an
14 unreasonable application of federal law.

15 Again, I have to disagree with Mr. Wojtala. I
16 don't think this is something that's appealed to the Court
17 of Appeals. All this is, is sending it back to hold the
18 Remmer hearing and with instructions to grant a new trial
19 if this Court concludes that there was a violation.

20 THE COURT: I don't know how the Michigan Court
21 of Appeals would be in a position to review if I have the
22 power or authority now to grant a new trial. That would
23 be because the case was sent back for fact-finding
24 essentially.

25 MR. COMORSKI: Right.

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1 THE COURT: By a federal judge who is holding
2 the writ case, the habeas case.

3 So what is there for the Michigan Court of
4 Appeals to even review under the circumstances?

5 MR. WOJTALA: This would be a state court order
6 so --

7 THE COURT: Yeah, maybe. We'll see.

8 MR. WOJTALA: Because there would be the --
9 what this Court would be doing, what is being asked of
10 this Court is under existing state court law whether
11 Defendant, Defendants are entitled to a new trial. Then
12 it is up to the determination of Judge Hood on the federal
13 side to determine whether the judge's determination of
14 state law is contrary to established US constitutional
15 law.

16 Before we get to that point, though, your
17 Honor, is that because this is a state court, this is a
18 state court order, this is a state court making an order
19 vacating a state court conviction, it is the position of
20 both the Wayne County prosecutor's office, it is the
21 position of the Michigan Attorney General's office, that
22 we would be free to then appeal the state court order, the
23 state court decision, the state court's determination to
24 the superior state court, that being the Court of Appeals.

25 And we will do that, either way. I mean, if

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1 this Court should rule and grant a new trial, we will be
2 making an application to the Court of Appeals. And if the
3 Court of Appeals then determines that they don't have the
4 determination, that's up to them. But we do feel they
5 have the jurisdiction to do so and we will be doing so.

6 THE COURT: The last time we were together you
7 said, you alluded to the Court of Appeals decision from
8 several years ago where they affirmed the trial court's
9 denial of a motion for a new trial. That was the "law of
10 the case," which is, obviously, no longer the case.

11 MR. WOJTALA: I disagree, again.

12 THE COURT: Well, yeah. But I'm wondering if
13 the most efficient way of handling this would be to think
14 of myself as sort of a special master for Judge Hood and
15 to send my report to Judge Hood. And she may not be
16 willing to handle it this way, I don't know, but with my
17 conclusions of fact and law and with a recommendation
18 even, or maybe not, to let her make that decision.
19 Because, really, the only thing she sent it back here for
20 was for a hearing, although she did say if the state court
21 finds that the petitioner is correct, that he or she shall
22 order a new trial. But this is really still a federal
23 case. I mean she has not invested herself in
24 jurisdiction. This is still her case really, isn't it?

25 MR. COMORSKI: Well, I don't know. Let's say

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1 hypothetically way back when this started Judge Youngblood
2 did hold the Remmer hearing and then it goes to the Court
3 of Appeals and they affirm. And then Judge Hood steps in
4 and says, nope, this was a violation of federal
5 constitutional law and sends it back with a condition that
6 either Mr. Ewing be granted a new trial within X amount of
7 days or be unconditionally released. That's essentially
8 what she is doing here but for the fact that the hearing
9 was never held in the first place.

10 Now that the hearing has been held and that
11 this Court is going to conclude that Mr. Ewing's
12 constitutional rights were violated, I don't see that
13 Judge Hood would reverse this court because Judge Hood has
14 already ruled in a previous grant of the writ.

15 THE COURT: Right, it is unlikely she would
16 reverse.

17 MR. COMORSKI: Which is why I think she put
18 that in her order. This thing just keeps going on and on
19 and on adnauseam and at some point we just have to, you
20 know, concede that --

21 THE COURT: Yeah, I don't want it to go on and
22 on more than it needs to either.

23 MR. COMORSKI: I know.

24 THE COURT: And actually what I am concerned
25 about is, you know, not creating additional error.

1 MR. COMORSKI: That's fair.

2 THE COURT: So if Judge Youngblood had held the
3 Remmer hearing when it should have been held, I guess, and
4 she would have ruled, yes, it influenced the jury, new
5 trial or not, and then it would have gone to the Court of
6 Appeals. The record of the Court of Appeals would have
7 been very different than what they had because it would
8 have been a hearing.

9 MR. COMORSKI: Right.

10 THE COURT: It might have been all twelve
11 jurors. I don't know. And I frankly don't know what
12 value the testimony from all of the other jurors would
13 have been anyway other than if some of them or one of them
14 impugn the credibility of Byrnes. Really all it takes to
15 get over this hump is one juror who says essentially that
16 she changed her mind because of illicit influences during
17 deliberations. And then a couple of other jurors who
18 admitted that they brought unlawful extraneous evidence
19 into the deliberation process.

20 All of the others, you know, it almost does not
21 matter what they say. Most of them will probably say they
22 don't remember or they might, you know, on one or two
23 points verify some of what we've heard already. It is
24 really one juror that makes all the difference here.

25 I am just concerned about my authority to

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1 issue, just because Judge Hood said in her opinion that I
2 could order a new trial, that concerns me a little bit
3 because that's not quite what the Sixth Circuit said. And
4 I don't see in any of the cases they cited where the case
5 was sent back to state court to determine whether or not
6 there had been an unconstitutional violation of integrity
7 of the jury.

8 Well, Budzyn -- no, I don't think -- no Budzyn
9 didn't -- what happened with Budzyn and Nevers again?
10 Refresh me.

11 MR. WOJTALA: I think Nevers was able to get
12 habeas relief.

13 THE COURT: How so, on extraneous information?

14 MR. WOJTALA: Yes.

15 MR. COMORSKI: Yes.

16 THE COURT: And how did that come about then?

17 MR. COMORSKI: Affidavits came in from jurors
18 after the fact, much like in this case. And I think it
19 was Judge Steeh from the district court took those
20 affidavits at face value and granted a new trial. He did
21 not send it back for a Remmer hearing.

22 That was one of the things I was arguing on
23 appeal was Nevers.

24 THE COURT: And then there was no appeal to the
25 Sixth Circuit on Steeh's opinion or it was unsuccessful

1 or?

2 MR. COMORSKI: I don't recall. But I know that
3 it's --

4 THE COURT: Okay. So Budzyn and Nevers, I
5 guess just Nevers, was it?

6 MR. COMORSKI: Yes, Nevers. I think that the
7 Michigan Supreme Court reversed Budzyn's case but not
8 Nevers. Nevers case was the one that had to take the
9 extra step to the feds.

10 THE COURT: What we don't have with Nevers is
11 the history like we have with us here where the district
12 court sent the case back to the state trial court.

13 MR. COMORSKI: That's true, yes.

14 And it just occurred to me that Nevers case was
15 appealed to the Sixth Circuit. That's the case I was
16 relying on.

17 THE COURT: The Sixth Circuit affirmed Steeh?

18 MR. COMORSKI: Correct.

19 MS. FITZHARRIS: If I may, your Honor?

20 I believe this is part of the concern and what
21 is causing confusion is that this case is sort of one of a
22 kind. There has never been this sort of situation where
23 in a habeas case there's been a concession of error and
24 then the remedy ordered by the federal court was a
25 conditional writ with instructions to hold a Remmer

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1 hearing. So we are kind of in novel territory.

2 THE COURT: So what would have prevented Judge
3 Hood from holding the Remmer hearing? She would have had
4 authority to do it, I guess, right?

5 MR. COMORSKI: Well, I guess the only thing I
6 can state on that regard is the Sixth Circuit specifically
7 identified the state as holding the hearing.

8 THE COURT: Well they said that we're in a
9 better position.

10 MR. COMORSKI: It says right here. Unless the
11 State takes steps to conduct a proper evidentiary hearing
12 on Ewing's claim within a reasonable time set by the
13 district court's order.

14 MR. WOJTALA: But I think when they say State,
15 I think they mean --

16 THE COURT: They might mean you.

17 MR. WOJTALA: Or the AG for that matter. The
18 AG is also the state.

19 MR. COMORSKI: Yeah, I guess that is true. But
20 I think in context, the way this is read, I think it
21 refers to the circuit court.

22 THE COURT: They say, in any event, the
23 Michigan courts are well equipped to provide appropriate
24 relief should the passage of time prevent the court from
25 affording Ewing a constitutional-meaningful Remmer

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1 hearing. What do they mean by that?

2 MR. WOJTALA: How I interpret that, your Honor,
3 is that the state courts have the ability to conduct the
4 Remmer hearing. Now I think it is still silent as to
5 whether the Court has the ability to either grant or deny
6 a new trial.

7 THE COURT: That's exactly the concern I was
8 expressing.

9 MR. COMORSKI: I think when they say relief,
10 that's a pretty open-ended term, which I think could
11 include but not limited to granting a new trial.

12 MR. WOJTALA: Well I think relief has to be
13 taken in the context of the opinion, which speaks to the
14 constitutional violation being that no hearing was
15 conducted.

16 THE COURT: Yeah.

17 MR. COMORSKI: All right. If we take that at
18 face value, then what would be the relief that your Honor
19 could impose?

20 THE COURT: Hold a hearing.

21 MR. COMORSKI: Well let's say none of the
22 jurors could be found, now what?

23 THE COURT: Well, yeah, they didn't answer that
24 question for us.

25 MR. COMORSKI: I think they left it open to

1 this Court to grant appropriate relief including but not
2 limited to granting a new trial. They don't say it
3 specifically, I agree, but Judge Hood does.

4 MR. WOJTALA: I think also the quoted portion
5 does address this. Is that if the court, if it is sent
6 down for a Remmer hearing and the Defendant feels as
7 though the Remmer hearing was inadequate to fully flesh
8 out everything, the Defendant -- so it says, should the
9 passage of time prevent the court from affording Ewing a
10 constitutionally-meaningful Remmer hearing, Ewing is free
11 to seek habeas relief if he finds the State's process
12 constitutionally inadequate.

13 So I think it does speak to --

14 THE COURT: So he can go back for a second bite
15 at the habeas apple.

16 MR. WOJTALA: Right, if he feels as though the
17 Remmer hearing was inadequate.

18 THE COURT: So if I were to deny the motion for
19 a new trial he would obviously claim then that the Remmer
20 hearing is inadequate. Of course he claims that and you
21 would be right back in front of Judge Hood.

22 MS. FITZHARRIS: Your Honor, I litigate a lot
23 of habeas cases and so I have been in positions before
24 where we have actually stayed federal habeas proceedings
25 in order to file 6500 motions in state court. Then they

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1 are resolved by the state trial court, appealed to the
2 Michigan Court of Appeals, and then we return to federal
3 court with an amended habeas petition adding the exhausted
4 claim. Which is my understanding of what would be going
5 on here.

6 So it is all part of the same habeas petition
7 but that habeas petition right now in federal court is
8 closed. It is not an active case on the federal docket.

9 THE COURT: Oh, so she has not retained
10 jurisdiction.

11 MS. FITZHARRIS: Correct, because relief has
12 been granted.

13 THE COURT: So your position is I have got the
14 last word on a new trial?

15 MS. FITZHARRIS: Correct.

16 THE COURT: Not Judge Hood?

17 MS. FITZHARRIS: Yeah, well, subject to.

18 THE COURT: Yeah, subject to.

19 That's interesting. I'm not sure I'm quite
20 ready to make that decision yet.

21 It is fairly apparent to me from Byrnes's
22 testimony that there was a huge volume of extraneous
23 information that improperly got into the jurors discussion
24 and that Cathleen Byrnes vote was affected, her last vote
25 anyway, was deeply affected by that information. That

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1 together with the jurors who brought that extraneous
2 information into the process, doing that to bring pressure
3 on her and succeeding in bringing pressure on her to
4 change her vote. If she had persisted in voting not
5 guilty, then it would have been a hung jury and they would
6 have tried the case again, I guess, and probably all of
7 this would have been over.

8 I know, Mr. Wojtala doesn't agree that is quite
9 what Byrnes's testimony was but I don't know how you can
10 avoid it. This is somebody who is better than all of the
11 other jurors, certainly better than the other three that
12 we heard from. Lived with this for nine or ten years and
13 has a very good memory of the discussions and the
14 extraneous evidence that was brought in, how that affected
15 her, why it affected her, what her original doubts were.
16 She was very specific about the evidence presented at
17 trial was not enough to convince her. She was concerned
18 about the statement against penal interest that came in
19 and identification testimony and then she changed her
20 mind.

21 So the main problem I have right now is how do
22 we go about doing this efficiently.

23 Well I guess if the habeas case is closed -- so
24 she did not stay the habeas case as you've mentioned some
25 federal judges have done.

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1 MS. FITZHARRIS: Right.

2 THE COURT: She also said she didn't -- nothing
3 in her order that says this court does not retain
4 jurisdiction.

5 MS. FITZHARRIS: Right. Because I represent
6 Mr. Searcy and was involved in Judge Berg's order, he says
7 that he is administratively closing it. And part of that
8 has to do with the fact that there are some unresolved
9 claims that may not be relevant to pending --

10 THE COURT: Those are the one's that's Hood
11 denied you mean?

12 MS. FITZHARRIS: Well, Mr. Searcy has separate
13 claims. So we're just -- they're not addressing those
14 issues because it would be unnecessary if a new trial was
15 granted and he is entitled to a new trial under this
16 claim.

17 So in that order I believe that it specifically
18 says that it is administratively closed because relief had
19 been granted in the form of a conditional habeas grant.

20 THE COURT: So what I would like you both to
21 do, is two things. Have you ordered Byrnes's testimony?

22 MR. WOJTALA: I have not yet, no.

23 And I would also like to have the opportunity
24 to, even accepting your findings on that, your Honor, is
25 to argue my point on why even that does not allow for a

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1 new trial in this particular case.

2 THE COURT: Well you can do that next time but
3 why do you think that?

4 MR. WOJTALA: That is based upon Budzyn and
5 Nevers, your Honor. In Budzyn and Nevers, and I'll give
6 you the argument in sort of --

7 THE COURT: Which Budzyn and Nevers opinion?

8 MR. WOJTALA: I'm sorry, this is the Budzyn and
9 Nevers from the Michigan Supreme Court.

10 Wherein that they state, any error may be
11 deemed harmless if it is determined that the extraneous
12 influence was duplicative of evidence produced at trial or
13 the evidence of guilt was overwhelming.

14 Certainly I can make a case as to why the guilt
15 was overwhelming but I'll speak specifically to the
16 duplicitous of the evidence that was relied upon.

17 Ms. Byrnes stated that she changed her opinion
18 based upon Ms. James informing her that this is the reason
19 why this person would have taken the fall for these other
20 people is because of gang hierarchy, et cetera, et cetera.
21 She stated that once she heard she was holding out until
22 she got this type of information, she stated that this
23 information was extraneous information that Ms. James had
24 discovered on the Internet by researching gang hierarchy.
25 And then after hearing that information, after it being

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1 explained to her by Ms. James, that's when she finally
2 changed her opinion.

3 The Court of Appeals in this particular case,
4 in the Ewing and Searcy case, addressed the duplicatus
5 part of this evidence and stated that James allegedly
6 learned through the Internet research that gangs have a
7 pecking order. The information is duplicative of an
8 inference to be drawn from Christopher Richardson's
9 testimony.

10 THE COURT: Yeah, I saw that sentence. The
11 evidence is duplicatus or duplicative of an inference.
12 That's an interesting collection of words. Anyway, go
13 ahead.

14 MR. WOJTALA: Nonetheless, your Honor, my
15 argument again is that this is the law of the case from
16 the higher court. That it is duplicative of an inference
17 to be drawn from Christopher Richardson's testimony, in
18 which he opined that Washington's assertions that he was
19 the perpetrator amounted to bragging and an attempt to
20 prove himself. Richardson also characterized Washington
21 as a flunkey, intimating a hierarchical relationship in
22 gang membership. Hence, any error would be harmless error
23 because the information regarding gang structure was
24 duplicative and Ewing failed to demonstrate that the
25 information is substantially related to a material aspect

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1 of the case and that there is a direct connection between
2 the extrinsic material and the adverse verdict.

3 THE COURT: And that is the court that didn't
4 think we needed a Remmer hearing, too.

5 MR. WOJTALA: Correct, your Honor. But they
6 are making a finding of law.

7 THE COURT: They are saying that the extraneous
8 evidence that Byrnes says affected her was the same as an
9 inference that could be drawn from the trial evidence.
10 Think about that.

11 MR. WOJTALA: I would go even further because
12 there was an actual argument from both Mr. Cripps and
13 Mr. Culpepper about --

14 THE COURT: I know but it didn't convince
15 Byrnes. It didn't convince her.

16 MR. WOJTALA: So it doesn't matter, your Honor.
17 It does not matter if James said to her I went out and
18 researched this information and I found this information
19 and if it is duplicative of the information that had
20 already been presented, the determination is, is that it
21 was, and even though she testified differently, the
22 determination of the law is that it was the properly
23 introduced evidence that relies upon the jury and we are
24 unable to go beyond that and determine what exactly
25 occurred.

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1 So, to continue on with the Court of Appeals
2 opinion.

3 Finally, James's alleged hypothesis regarding
4 gang hierarchies and the positions of Ewing and Washington
5 within that structure comprised part of the deliberative
6 process in determining witness credibility and the weight
7 to be given to particular testimony. As such, it cannot
8 be used to impeach the jury's verdict.

9 Based on that, your Honor, there was
10 duplicative evidence, as the Court of Appeals found. If
11 you look at the record we have the testimony of
12 Richardson, we have the argument of Cripps, we have the
13 argument of Culpepper, all about gang hierarchy and why it
14 would be that Washington would do this particular thing on
15 the direction of someone higher up in a gang.

16 So for that, your Honor, so thumbnail of what
17 my argument would be on that, even if you make the
18 findings of fact you've already indicated.

19 THE COURT: Mr. Comorski.

20 MR. COMORSKI: There is an inherent flaw in
21 that argument, Judge, because if this Court is bound by
22 the conclusions of the Court of Appeals previous opinion,
23 what's the point in holding a hearing ?

24 THE COURT: Yeah, of course.

25 Well, okay. I think I'm not prepared to make a

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1 final decision right now. So we'll say the hearing is
2 closed. I guess we can say that, both sides, correct?

3 MR. WOJTALA: Correct.

4 MR. COMORSKI: Correct.

5 THE COURT: I think what I need to see from
6 both sides or all three sides I guess, are proposed
7 findings of fact and conclusions of law.

8 Now, that's not to say that that's the way I'm
9 ultimately going to report this case but that is what I
10 would like, at least for now.

11 And I would like to read Byrnes's testimony. I
12 don't need the testimony of the other witnesses but I
13 would like Byrnes's testimony. I'll order it,
14 Mr. Wojtala, or you can order it, I guess. If you order
15 it, I'll take a copy. You'll want a copy. Are you going
16 to order it?

17 MR. WOJTALA: I will order it.

18 THE COURT: Today?

19 MR. WOJTALA: Yes, I will fill out the -- we
20 have the paperwork that we use internally, I'll do that
21 today.

22 THE COURT: My current court reporter was not
23 the reporter that was here before. Well, we'll figure
24 that out and so that I'm not sure who that was and how
25 quickly that record can be produced.

1 Is it unrealistic for me to schedule a hearing
2 in about two weeks? Can we have all of that, that I have
3 just asked you about in two weeks.

4 MR. WOJTALA: Both Defendants are being held on
5 other charges anyway, your Honor.

6 I would think that I probably would need more
7 than two weeks. I'd imagine once we figure out who the
8 court reporter was and get the transcript.

9 THE COURT: Let's say October 4th, that's four
10 weeks from today. How does that look for everybody?

11 MR. COMORSKI: That's good.

12 MS. SWANSON: That's good.

13 MR. WOJTALA: Just to clarify, your Honor, that
14 would be the date that we need to have the proposed
15 findings of fact to the Court?

16 THE COURT: No, I'm sorry. I should be more
17 clear. I would like those a week before the 4th. Three
18 weeks from today if you can do it.

19 Now if you have trouble with this transcript
20 then we will have to adjust the date but I am guessing
21 that by Monday you might be able to tell us. We can tell
22 you who the reporter is but then I don't know if that is
23 somebody who is in the building everyday.

24 DEPUTY SHERIFF: Do we want the Defendants kept
25 here for the month?

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1 THE COURT: Okay. So we would keep them here
2 because if we release them, they're here on a writ, right,
3 so if we release the writ, they'll go back up north and
4 then they'll have a hard time getting them back. My
5 inclination would be to hold them here.

6 MS. SWANSON: We have no objection. We prefer
7 Mr. Searcy stay.

8 THE COURT: All right. They'll be held here.

9 Let me have your proposed findings of fact and
10 law the Friday before, that would be the 27th, if I may.
11 And if you feel obligated to e-file, that's fine, but also
12 bring a hard copy to the courtroom here. And hopefully
13 you'll have the Byrnes transcript.

14 I am guessing that you probably won't want to
15 write this until you have the transcript?

16 MR. WOJTALA: Correct, your Honor. Just for
17 further clarification, your Honor, did you also want us to
18 address the jurisdictional issue that you brought up?

19 THE COURT: Sure, why don't you do that. I
20 might seek guidance from Judge Hood. I want to be clear
21 on how she would expect us to be handling Byrnes, too,
22 maybe.

23 So we'll see you back here assuming everything
24 goes smoothly on the transcript order, et cetera, four
25 weeks from today, October 4th. We could -- I think that

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1 is something we could probably do in the morning call,
2 because we're not going to be calling witnesses.

3 MS. FITZHARRIS: Thank you.

4 MR. COMORSKI: Thank you.

5 (Record concluded at 2:48 p.m.)
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R E P O R T E R ' S C E R T I F I C A T E

I do hereby certify that I have recorded
stenographically the proceedings had and testimony taken
in the above-entitled matter at the time and place
hereinbefore set forth, and that the foregoing is a full,
true, and correct transcript of proceedings had in the
above-entitled matter; and I do further certify that the
foregoing transcript has been prepared by me, or under my
direction.

/S/ *Melissa Harding*

Melissa Harding, CSR 7138
Court Reporting Services
1441 St. Antoine
Detroit, Michigan 48226
(313) 224-6950

Dated: November 4, 2019

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION
THE PEOPLE OF THE STATE OF MICHIGAN,
vs Case No. 10-001495-01-FC
10-001495-02-FC
DERRICO DEVON SEARCY &
DARRELL EWING,
Defendants.

_____/

MOTION

BEFORE THE HONORABLE MICHAEL HATHAWAY, CIRCUIT JUDGE,
Detroit, Michigan - Thursday, October 24, 2019

APPEARANCES:

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T A B L E O F C O N T E N T S

WITNESSES: PEOPLE

PAGE

None.

WITNESSES: DEFENDANT

None.

EXHIBITS:

IDENTIFIED

ADMITTED

None.

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Detroit, Michigan

October 24, 2019

9:35 a.m.

-- --- --

THE CLERK: Calling case number 10-1495-02, the People versus Darrell Ewing, this matter is before the Court for a review date. And case number 10-1495-01, the People versus Derrico Searcy, this matter is before the Court for a review date.

MR. WOJTALA: Good morning, your Honor.

John Wojtala for the People.

MR. COMORSKI: Good morning, your Honor.

Phillip Comorski on behalf of Mr. Ewing.

MS. SWANSON: Good morning, your Honor.

Casey Swanson from the Federal Defender Office on behalf of Mr. Searcy. Also with me at counsel table is Colleen Fitzharris, an attorney from our office who is Mr. Searcy's lead habeas attorney.

THE COURT: Okay. So I think we have come to the moment of truth here. You can be seated.

I have reviewed everything that I think I need to review and I've reviewed some things that I reviewed earlier and I am prepared to make some decisions here.

I don't really need any further argument. I've had enough of that. All three parties have filed very

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1 helpful proposed findings of fact and conclusions of law.
2 I thank you for that.

3 And I think that the first thing I should do is
4 address some concerns that I had the last time we were on
5 the record when I expressed it the last time we were on
6 the record about whether or not I really even had
7 jurisdiction to grant or deny a new trial in this case.

8 I had been concerned about that because this
9 case really was sort of done in the state court system and
10 as a result of a petition for habeas relief, found its way
11 into federal court and was pending there for a while and
12 then came back here, as you both know, on orders from
13 Judge Denise Page Hood and Judge Terrance Berg with an
14 order to conduct a Remmer hearing, a so-called Remmer
15 hearing which we have now done.

16 Based on -- well, first of all, all three sides
17 in this controversy are apparently of the opinion that it
18 is my obligation to either grant or deny a motion for a
19 new trial. And that the federal court's obligation here
20 has been met from their point of view by ordering the
21 Remmer hearing.

22 In other words, their concern there, the basis
23 for the conditional writ was that a Remmer hearing be
24 conducted. I don't think the federal court on reflection
25 really has much of a stake in the question of what the

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1 outcome of the Remmer hearing is, as long as the hearing
2 was conducted constitutionally and fairly. Whether the
3 hearing results in a new trial or not is simply not their
4 immediate concern. It is a decision that I have to make
5 as the jurist that conducted the Remmer hearing.

6 Now do any of you have any comments or
7 corrections to make on that issue, Mr. Wojtala?

8 MR. WOJTALA: No, your Honor.

9 MR. COMORSKI: No, your Honor.

10 MS. SWANSON: No, your Honor.

11 THE COURT: Okay. So the hearing has been
12 conducted. We spent a couple of days, parts of two days
13 and we heard testimony from Kathleen Byrnes. She's the
14 what you might call whistleblower juror who got the ball
15 rolling here and was the juror who had remorse about her
16 vote.

17 We also heard from Michelle Chesney, Joyce Hall
18 and then on another date Brian Tubbs, who is the foreman
19 of the jury. So we heard from four out of the twelve
20 jurors.

21 For reasons that I have stated on the record in
22 the past, I don't -- four is enough. Actually, one was
23 enough here.

24 Kathleen Byrnes was the juror who changed her
25 vote as a result of what she claimed in the initial

1 affidavit and also her testimony in this hearing to an
2 inappropriate extraneous influences or information brought
3 into the jury deliberation process.

4 There doesn't seem to be much question that
5 extraneous information came into the deliberation process.
6 The People virtually conceded that and that's just not
7 even subject to reasonable reputation.

8 In their testimony here during the hearing, the
9 four jurors who testified gave us fuller information about
10 what it was and what it amount to and the effect that it
11 may have had, at least in Byrnes's case, on her vote. The
12 other three witnesses remember that extraneous information
13 was brought into the deliberation process but they didn't
14 really have a clear memory of much of anything else.

15 The question initially is whether the evidence
16 had an influence or an impact on the jury's verdict in the
17 end, which was to convict. And that question rests
18 largely on the testimony of Byrnes who was the juror who
19 initially was holding out for acquittal for reasons that
20 she stated.

21 Byrnes's testimony was pretty clear and
22 convincing and amazingly vivid. She had a remarkable
23 memory. And I believed her. She was a woman who
24 obviously has lived with this verdict for years and has
25 had doubts about it for various reasons. The information

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1 or the evidence that seemed to have changed her mind most
2 clearly was -- well, there was a lot of things but most
3 clearly was the evidence about gang culture, gang
4 hierarchy, gang nomenclature or signing. And there was
5 apparently a fair amount of information brought into the
6 deliberations about that from at least one other juror who
7 actually went on the Internet and did some Internet
8 research on that and talked about it during deliberations.
9 In the opinion of Byrnes that seemed to be the issue that
10 most effectively changed her mind about her verdict.

11 There were other factors. It would be hard to
12 identify them as outcome determinative based on Byrnes's
13 testimony but Byrnes did indicate that, maybe she didn't
14 use the word cumulative effect, but there were a number of
15 elements of extraneous information brought into the
16 process that sort of piled on to one another and some of
17 the jurors who were anxious to convict put a fair amount
18 of pressure on Byrnes to change her vote she said.

19 There were things like the victim's obituary
20 that was brought into the discussions, there was
21 apparently a sort of an experiment carried out by Byrnes
22 herself, and I think she said some of the others, to
23 determine whether or not the identifier was telling the
24 truth about what he saw and how he saw it and the vantage
25 point from which he saw it.

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1 But it is just inescapable from Byrnes's
2 testimony that the outside influences, the inappropriate
3 influences caused her to change her mind. There is just
4 no way to get around that based on her testimony. And
5 that the information, particularly about gang culture,
6 gang hierarchy, gang signs, et cetera, were highly
7 prejudicial. And in terms of whether or not the
8 evidence -- or that information, I couldn't call it
9 evidence -- whether or not that information was just
10 superfluous as duplicated trial evidence, I think that,
11 you know, a couple of comments have to be made.

12 The trial evidence, whatever it was, was
13 insufficient to convince Byrnes beyond a reasonable doubt
14 that the Defendant's were guilty. It was the extraneous
15 information that did so. It wasn't -- one can't say it
16 was just duplicative. There was some evidence that
17 dribbled into the trial about gang signs and gang culture
18 and hierarchy. But I think it is very important to note
19 that pretrial, the trial Judge disallowed evidence from a
20 People's so-called expert witness that was purposed, a
21 witness by the name of Terry Graves who apparently is a
22 police officer who fancies herself to be an expert in gang
23 culture and in a pretrial hearing to determine the
24 admissibility of Graves's testimony the trial Judge
25 excluded the testimony, wouldn't let her testify as an

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1 expert. In the course of this, I gather was what we call
2 a Daubert hearing, Graves testified that much of the
3 information that she has acquired to arm herself with
4 expert's credentials comes from the Internet. We can
5 imagine much of the same information that juror Byrnes was
6 exposed to inappropriately or improperly during the course
7 of jury deliberations.

8 So the evidence was not directly duplicative of
9 evidence hat was introduced at the trial.

10 Then, of course, some of these other, you know,
11 collateral pieces of information, like the victim's
12 obituary, for example, which, you know, is an emotional
13 potentially prejudicial piece of evidence which would
14 never come in at a trial but which is, you know, designed
15 to tug at the heart strings of the juror and was designed
16 undoubtedly to add pressure to the descending juror during
17 the course of the deliberations, pressure to change her
18 vote, which she ultimately did.

19 So in addition to finding that there was
20 extraneous evidence that came into the deliberation
21 process, that it was outcome determinative, that it
22 changed the vote of at least one of the jurors, namely
23 juror Byrnes, and it was not -- it can't be described
24 merely as duplicative of trial evidence. I also am
25 obligated to observe under the Budzyn case whether or not

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1 the evidence of guilt was otherwise overwhelming.

2 As is sadly the fact in many of these gang
3 related slayings with highly imperfect witnesses or
4 witnesses who don't come forward or testify, the trial
5 evidence in this case was certainly not what I would call
6 overwhelming. There was an identification made by a
7 witness who claims to have seen the Defendant through a,
8 he says a rearview mirror, I mean, while he was crouched
9 down to the floor of the car. That is virtually
10 impossible to imagine. Knowing how witnesses misuse the
11 English language in the courtroom and use the wrong words
12 frequently, I imagine that he meant the side view mirror
13 but it is not for me to reimagine what a witness meant
14 when he testified. He said what he said. You know, that
15 plus a lot of other circumstantial evidence still does not
16 add up to a case of where the evidence of guilt is what I
17 would say overwhelming.

18 Then, of course, you have the statement against
19 penal interest that came in with Washington having
20 supposedly confessed to the crime. So it wasn't an
21 ironclad case by any means.

22 Given all of these factors and for reasons that
23 I have mentioned today and on the record on other
24 occasions, I am granting both Defendants a new trial.

25 DEPUTY SHERIFF: Quiet in the audience.

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1 THE COURT: That will be all. Thank you.

2 Now, I am not issuing a written opinion. I am
3 going to sign an order today granting a new trial for each
4 of these Defendants on each case. I will forward copies
5 of the order to the federal judges involved. And my order
6 will simply state for the reasons stated on the record the
7 new trial is ordered.

8 The People have, of course, appeal rights to
9 the Michigan Court of Appeals. 56 days, Mr. Wojtala, or
10 is it 35?

11 MR. WOJTALA: Since this is a nonfinal, I
12 believe I have 28 days to file our claim, our application.

13 THE COURT: It's by application?

14 MR. WOJTALA: Yes.

15 THE COURT: 28 days, all right.

16 MR. WOJTALA: We'll file it.

17 THE COURT: All right. So there is no point in
18 keeping the Defendants in Detroit. So we'll release the
19 writ, the writ that brought them here, that writ, and
20 they'll go back to MDOC.

21 If the People file their application within 28
22 days, it's -- I don't know, you give me an idea of the
23 timeline here. We can set a review date and have these
24 guys back, when? You tell me.

25 MR. WOJTALA: You can set a date to determine,

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1 in the 28 days to determine whether we have filed it.
2 Once we have filed it, then obviously the ball goes into
3 the Court of Appeals. And how long that is going to take
4 is, I can't address it. But you can certainly, if you
5 wish to set it --

6 THE COURT: All right. Here's what we can do.
7 We can set a review date 28 days from today for the
8 lawyers to come in and give me an update where we are. We
9 don't have to have the Defendants writted down here for
10 that. But then we will get a better idea of when we need
11 to see them again.

12 So today is the 24th, the 28th day is November
13 21, so let's see you back here on the 22nd, Friday the
14 22nd we'll have the lawyers here. I'm not even sure we
15 need to go on the record but we'll see you all here and
16 you'll have a consensus of where we're going on this.

17 MR. WOJTALA: You said the 22nd?

18 THE COURT: Friday the 22nd. So that's 29 days
19 from today's date.

20 Anything further?

21 MS. SWANSON: No, your Honor.

22 MR. COMORSKI: No, your Honor.

23 (Record concluded at 9:53 a.m.)
24
25

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R E P O R T E R ' S C E R T I F I C A T E

I do hereby certify that I have recorded
stenographically the proceedings had and testimony taken
in the above-entitled matter at the time and place
hereinbefore set forth, and that the foregoing is a full,
true, and correct transcript of proceedings had in the
above-entitled matter; and I do further certify that the
foregoing transcript has been prepared by me, or under my
direction.

/s/ *Melissa Harding*

Melissa Harding, CSR 7138
Court Reporting Services
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(313) 224-6950

Dated: October 25, 2019

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