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IN THE SUPREME COURT OF FLORIDA

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CASE NO.: SC10-2363
LT CASE NO.: 2006-CF-018285

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RASHEEM DIQUOINE DUBOSE
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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ON APPEAL FROM THE CIRCUIT
COURT OF THE FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

# REPLY BRIEF OF PETITIONER-APPELLANT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:**



**Statutes:**



**Persuasive Sources:**

## SUMMARY OF THE ARGUMENTS

I. The trial court committed reversible error by allowing Jurors to research material issues not presented at trial using smart phones. The use of Wi-Fi enabled smart phones created a reasonable possibility of prejudice within the jury and constitutes reversible error from jury misconduct under Florida law. In considering a juror's use of unauthorized materials, Florida law requires the application of the *harmless error analysis* ultimately leading to a determination whether the extrinsic objective material(s) created a *reasonable possibility of prejudice.* Likewise, federal law requires an analysis that similarly leads to a determination of a reasonable possibility of prejudice. Using either the Florida or federal analysis, the record illustrates that a reasonable possibility of prejudice did in fact result from the introduction of outside materials. Consequently, both the death penalty sentence and the guilty verdict itself must be set aside and the case remanded for new trial.

II. The trial court committed reversible error by failing to make necessary inquiries after a juror affiant alleged other jurors made expressions of racial bias. In considering racial bias, Florida adopted both Connecticut and Illinois standards for evaluation of potential racial bias in juries. Once a juror brings allegations of racial bias by affidavit to the attention of the court, Florida law then requires the trial court, at minimum, to (1) conduct an extensive inquiry of the person reporting the conduct; (2) inquire as to the context of the remarks; (3) interview any person likely to have been a witness to the alleged conduct; and, (4) interview the juror(s) alleged to have made the remarks. Because the trial court failed to make any inquiries regarding racial bias despite having been informed jurors expressed racial bias toward Mr. Dubose, the trial court committed reversible error. Consequently, both the death penalty sentence and the guilty verdict itself must be set aside and the case remanded for new trial.

## ARGUMENTS

### ISSUE I

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED THE JURY ACCESS AND USE OF SMART PHONES WHERE OBJECTIVE OUTSIDE INFORMATION BOTH IN AND OUT OF DELIBERATIONS WAS INTRODUCED AND THAT SUCH EXTRINSIC INFORMATION CREATED AN OBJECTIVE REASONABLE POSSIBILITY OF PREJUDICE DENYING THE APPELLANT'S RIGHTS TO STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS PROTECTIONS.

Any juror guilty of misconduct establishes grounds for new trial. Fla. R. Crim. P. 3.600. The rules are clear, the court shall grant a new trial if grounds are established, providing the defendant's rights were prejudiced. Fla. R. Crim. P. 3.600(b). "Under the rules of Florida Criminal Procedure, if the jury received any evidence outside the court . . . resulting in prejudice to the substantial rights of the defendant, a new trial must be granted." 11B Fla. Pl. & Pr. § 97:6 (citing, Fla. R. Crim. P. 3.600(b)(2)). "A defendant is entitled to a new trial if it can be established that *any* of the jurors were guilty of misconduct which resulted in substantial prejudice to the rights of the defendant." Id. at § 97:8 (citing Fla. R. Crim. P. 3.600(b)(4)) (emphasis added). "A new trial must be granted where it is shown that the defendant did not receive a fair and impartial trial, through a cause not due to the defendant's fault, resulting in substantial prejudice to the defendant." Id. at § 97:12 (citing Fla. R. Crim. P. 3.600(b)(8)).

In considering claims of juror misconduct, a court must initially determine if the facts alleged are inherent in the verdict (and are therefore subjective), or if the facts alleged are extrinsic (and are therefore objective) to the verdict. Marshall v. State, 854 So.2d 1235, 1240 (Fla. 2003) (holding that the trial court erred in denying plaintiff's juror misconduct claim based on racial bias); See also Devoney v. State, 717 So.2d 501, 502 (Fla. 1998).

Upon inquiry into the validity of a verdict, a juror may not testify as to inherent (subjective) matters of verdict deliberation; however, jurors may testify to overt (objective) acts that have prejudicial effect upon the jury in reaching a verdict. Fed. R. Evid. 606(b)(1)-(2); Marshall, 854 So.2d at 1240. "It is a well-settled rule that a verdict cannot be subsequently impeached by conduct which inheres in the verdict." Marshall, 854 So.2d at 1240. Meaning that a juror cannot impugn a verdict based upon matters associated with the jury's reasoning process, even if erroneous or improper, as these matters naturally inhere within the jury verdict. Maler v. Baptist Hosp. of Miami, Inc., 559 So.2d 1157, 1159 (Fla. 3d DCA 1989). Jurors are not permitted to submit affidavits to show what was in another juror's mind. Id. A court inquiring into the reasoning processes of a jury in arriving at their final verdict is impermissible as it seeks to impeach the verdict by the very (subjective) matters that inhere within it. Id. at 1160.

However, affidavits of jurors may be received to avoid a verdict in any matter occurring *during the trial or in the jury room* not inherent in the verdict itself. Marshall, 854 So.2d at 1240 (emphasis added) (citing Marks v. State Road Dept., 69 So.2d 771, 771 (Fla. 1954)). Examples include: (1) a juror improperly approached by a party, his agent, or attorney; (2) conversations by witnesses or others as to the facts or merits of the cause out of court and in the presence of jurors, or; (3) where the verdict was determined by aggregation, game of chance, or other improper means. Id.

Affidavits not permitted to be received report matters inherent in the verdict. Id. Examples include: (1) occasions where a juror did not assent to a verdict; (2) the juror misunderstood the instructions of the court, the statements of a witness, or pleadings in the case; (3) that the juror was unduly influenced by statements or otherwise by his fellow jurors or made mistaken calculations, or; (4) some other matter, "resting alone in the juror's breast." Id.

In considering legal inquiry into alleged jury misconduct, the trial court must determine exactly what type of information will be elicited from jurors. Baptist Hosp. of Miami, Inc. v. Maler, 579 So.2d 97, 99 (Fla. 1991). This frames the policy interests in balancing the defendant's constitutional protections of a fair trial and unbiased jury and the sanctity and finality of the jury process. State v. Hamilton, 574 So.2d 124, 126 (Fla. 1991). The introduction of unauthorized

materials could have an unknown and powerful impact on a verdict leading to a violation of the right to fair trial. Id. Therefore, the granting of a mistrial should be allowed in the event of a specified fundamental or prejudicial error sufficient to vitiate the result. Id. (See also Smith v. State, 95 So.2d 525, 528 (Fla. 1957) (holding that the *mere presence* of a dictionary in the jury room required reversal of the verdict because all definitions must pass through the medium of the trial judge) (emphasis added); (see also Tripp v. State, 874 So.2d 732, 734 (Fla. 4th DCA 2004) (holding the trial court erred by not conducting juror interview following allegations of jury misconduct rising from nondisclosure during voir dire).

The United States District Court for the Middle District of Florida instructs, "[i]t is the responsibility of the trial judge to ensure that the jury verdict is in no way tainted by improper outside influences." United States v. Gaffney, 676 F.Supp. 1544, 1550 (M.D. Fla. 1987). As a threshold matter, defendants must establish extraneous material did in fact make its way into the jury room. Id. (See also Robinson v. State, 438 So.2d 8, 9 (Fla. 5th DCA1983) (holding that the trial court erred when jurors were exposed to newspaper accounts of the trial and the judge failed to make even a threshold inquiry to the *possibility of prejudice*) (emphasis added). If a defendant carries this burden, the court must then determine whether there was a reasonable possibility of prejudice. Id. In the event the court

finds the existence of prejudice a possibility, it must then examine the nature, content, and extent of the material. Id. at 1551. Next, and importantly, the court must then decide if the government has rebutted the showing of prejudice. Id. If the government's rebuttal fails, the defendant must be granted a new trial. Id. In cases involving multiple instances where review by the court found no possibility of prejudice exists, it is possible that the cumulative effect of each instance will compel the court to grant a new trial, even despite findings in each individual matter. Id. at 1553.

Florida common law requires, "[t]hey [the jury] must get their instructions as to the law of the case from the court, and not from their own personal use of books." Johnson v. State, 9 So.2d 208, 213 (1891). The doctrine applied in Smith *supra* is not a per se rule, rather, it has precipitated the application of *harmless error analysis* by Florida courts. Hamilton, 574 So.2d at 127 (emphasis added). The analysis requires close scrutiny of (1) the type of unauthorized material at issue, (2) its relation to the issue at trial, and (3) the extent to which jurors actually consulted the material. Id. (See generally Yanes v. State, 418 So.2d 1247, 1248 (Fla. 4th DCA 1982)) (holding a new trial was warranted when the trial court sent into the jury its entire book of jury instructions concluding the jury may have been prejudiced having access to a number of irrelevant jury instructions); (See generally Grissinger v. Griffin, 186 So.2d 58, 59 (Fla. 4th DCA 1966)) (holding in

an action in torts, the court committed reversible error when a dictionary was delivered by the court to the jury reasoning the jury may have "tortured words in the court's charge from their true meaning")[1]; (See Kelly v. State, 360 So.2d 77, 77 (Fla. 4th DCA 1978) (denying retrial after a composite sketch was sent to the jury after being rejected as evidence reasoning the sketch dealt with factual issues that had some minor connection to the case); (See Beard v. State, 104 So.2d 680, 681 (Fla. 1st DCA 1958) (denying retrial after a letter was mistakenly sent to the jury describing an illicit affair of one of two defendants reasoning the letter had no bearing on the law or the facts of the case).

Efforts to devise a precise test for gauging errors caused by introduction of unauthorized materials to jurors is complicated by Florida's Evidence Code, which absolutely forbids any judicial inquiry into mental processes, emotions, or beliefs of jurors. Hamilton, 574 So.2d at 128. However, jurors are allowed to testify about "overt acts which might have prejudicially affected the jury reaching their [sic] own verdict." Id. Any test requiring proof or disproof that jurors were actually prejudiced, would create a conflict in the balance between objective external prejudice and subjective internal juror reasoning process protected by Florida Evidence Code. Id. Therefore, since Florida jurors may not testify about

[1] The Grissinger trial involved questions of negligence, proximate cause, and contributory negligence. Thus, in considering these terms, the jury may have relied upon the common dictionary definitions that were contrary to the law in Florida.

their own thought processes, the party carrying the burden of proof would never be able to prove a case. Id.

To address this conflict under Florida law, harmless error analysis always places the burden of proof on the state as the recipient of the error. Id. at 129; (See also State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986)). Despite this, circumstances could arise where the state is unable to rebut a presumption without conflicting with a juror's mental processes. Id. In Paz v. United States, 462 F.2d 740, 745 (5th Cir. 1972), the court held that defendants are entitled to a new trial unless it can be said that there is *no reasonable possibility that unauthorized materials effected the verdict* (emphasis added). Additionally, at the evidentiary hearing, counsel must not inquire into matters relating to the jurors' thought process. United States v. Howard, 506 F.2d 865, 869 (5th Cir. 1975). In its wisdom, the Florida Supreme Court adopted, as a matter of Florida law, the test used in Paz and Howard and held that the DiGuilio analysis should be used in gauging the state's burden of proving harmless error. Hamilton, 574 So.2d at 130.

Judicial inquiry must be limited to objective demonstration or factual matter. Hamilton, 574 So.2d at 129. Having determined the precise quality of the jury breach, the trial court must determine whether there was a reasonable possibility that the breach was prejudicial to the defendant. Id. In this determination, prejudice is assumed in the form of rebuttable presumption, and the burden is on

the government to demonstrate the harmlessness of any breach to the defendant. Id. Conversely, trivial misconduct, taken on true face value, will render a hearing unnecessary. Id. at 130. There can be no bright line test on this question, rather, the courts must balance two competing interests: the right of a defendant to a fair trial and the policy that jurors must be shielded from needless prying. Id.

Here, Ms. Chavez provided sworn affidavit and testimony that she personally observed jurors' unauthorized use of smart phones during trial and while in penalty phase deliberations and that, contrary to the Court's instruction, these jurors possessed and used their smart phones to conduct their own internet research on matters pertaining to material issues at trial. Chavez Aff. p. 17 (C)-(E). Ms. Chavez testified jurors used their smart phones to research the physical location of real property in relation to the shooting, as well as the meaning of a specified "gang tattoo" the jury erroneously believed Mr. Dubose had below his eye. Chavez Aff. p. 17(C)-(E); Tr. of Proceedings, 17:1-8, 12-20. Ms. Chavez specifically named Mr. Phillips (a member of the Florida Bar), the jury foreperson, as one of two jurors engaging in smart phone use during penalty phase deliberations. Tr. of Proceedings, 17:13-16, 19-21; 18:11-25; 19:1-9. Although she did not hear the conversation, Ms. Chavez further witnessed Mr. Phillips engaging in conversation using his smart phone during penalty phase deliberation. Tr. of Proceedings, 19:2-6.

Applying Florida's harmless error analysis[2], the Court must make close scrutiny of (1) the type of unauthorized material at issue; (2) its relation to the trial; and, (3) the extent to which jurors consulted the material. Hamilton, 574 So.2d at 127. The result of which must lead the court to conclude that there is *no reasonable possibility that unauthorized materials affected the verdict.* Id. (emphasis added); (see also Robinson, 438 So.2d at 9) (holding if any jurors have been exposed to outside material, they must be questioned to determine prejudicial effect).

The type of unauthorized material at issue was the introduction of smart phones (iPhone) into jury deliberations. Tr. of Proceedings, 17:10-11, 13, 17-19. Central to the efficacy of a smart phone used as a research tool is the availability of a Wi-Fi network enabling access to the worldwide web.[3] The record indicates that network access was available to jurors while in deliberations. Tr. of Proceedings, 22:23-24; 23:1-3. Furthermore, the trial court acknowledged that some jurors did in fact use smart phones and that such use could involve a broad span of activities including "texting Russia" or "anything without me [the court] knowing." Tr. of Proceedings, 21:18-19; 22:16-18. The court, in dialogue contained within the transcript of proceedings, suggests that as long as jurors only used smart phones to play games (possibly inferring a network is not needed for gaming), or did not use

[2] This is the same test adopted from Paz, Howard, and DiGuilio

[3] There are many smart phone applications that can be used without requiring connection to a network.

their phones for conversation, the impact of using their phones is trivial. Tr. of Proceedings, 22:12-14, 25. But, Ms. Chavez testified that at least one member of the jury did indeed use his phone for conversation with an unknown third party during penalty phase deliberations. Tr. of Proceedings, 18:25; 19:1-4, 8-9.

Simultaneously considering the unauthorized smart phone use and the extent to which jurors relied on such material, Ms. Chavez testified that jurors used their smart phones throughout the penalty phase to "research" material issues at trial, including physical characteristics of the real property where the shooting took place and the "meaning" of a teardrop tattoo. Chavez Aff. p. 17(C)-(E); Tr. of Proceedings, 17:1-8, 12-20, 19-21; 18:11.

Astonishingly, and with no basis, the trial court concluded that any discussion by jurors concerning the teardrop tattoo took place outside of deliberations and further characterized these discussion(s) as "innocent." Court's Order Denying Motion for New Trial and Motion for Mistrial, at 167. The trial court is silent in its Order on the issue of jurors researching characteristics of real property where the shooting took place. Id.

According to Marshall *supra*, "affidavits of jurors may be received to avoid a verdict in any matter occurring *during the trial* ***or*** in the jury room . . . ." Marshall, 854 So.2d at 1240 (emphasis added). In so saying, the Florida Supreme Court, by using the disjunctive "or," suggests, contrary to the trial court's view,

that the physical location where outside materials are used to prejudice the jury may occur in or out of deliberations. Id. Even if this Court were to strictly construe its comments in Marshall restricting outside material exclusively form the four corners of the jury room, the fact remains that this is precisely what occurred when Mr. Phillips and the other unnamed juror introduced their Wi-Fi enabled smart phones into the jury room during deliberations. The fact that juror(s) later engaged in telephone conversations and research is incidental to the breach of the trial court's directive to ensure phones were barred from the jury room. This fact supports the existence of a *reasonable possibility* that unauthorized materials did affect the jury in imposing Mr. Dubose's death sentence. Id.; Chavez Aff. p. 17(C)-(E); Tr. of Proceedings, 24:2-9; Court's Order Denying Motion For New Trial and Motion for Mistrial, at 167; Robinson, 438 So.2d at 9; Tripp, 874 So.2d at 734.

Therefore, like in Smith, Yanes, and Grissinger, *supra* the trial court, in accordance with adopted Florida law under *harmless error analysis*, should have granted a new trial because (1) smart phones (possessing not just a single book like a single dictionary, but intrinsically possessing the powerful ability to access incalculable volumes of information from sources spanning the globe) were not authorized to be used by jurors in deliberations per the trial court's established directive; (2) that despite the directive, some jurors did indeed use smart phones;

(3) jurors using smart phones did so both during trial and in the jury room while in deliberations; (4) at least one juror had a phone conversation with outside unknown parties and some jurors affirmatively accessed material information not presented at trial while in penalty phase deliberations; (5) access and assimilation of such information was highly prejudicial to Mr. Dubose; and, (6) accessing information pertaining to characteristics of real property and the contextual meaning of a tattoo Mr. Dubose does not have affirmatively established a *reasonable possibility* that these unauthorized extrinsic objective reference materials tainted the intrinsic subjective reasoning inherent in the conviction of Mr. Dubose and his sentence of death, denying Mr. Dubose both federal and state constitutional protections for a fair and unbiased jury.

Applying the federal precedent under Gaffney *supra*, overt acts to introduce unauthorized materials must be sufficient to vitiate the result where (1) the Defendant is able to prove extraneous materials did indeed enter into the jury room; (2) the Court properly determined a *reasonable possibility of prejudice*; (3) where the Court properly examined (a) the nature, (b) content, and (c) extent of the material; and, (4) where the state adequately rebutted any showing of prejudice. Gaffney, 676 F.Supp. at 1550.

Ms. Chavez testified under oath that she personally observed jurors' unauthorized use of smart phones while in penalty phase deliberations. Chavez

Aff. p.17(C)-(E). The Court acknowledged that some jurors used smart phones and that such use could involve a broad span of activities including "texting Russia" or "anything without me [the Court] knowing." Tr. of Proceedings, 21:18-19; 22:16-18.

The Court attempted to trivialize the juror research as "innocent" based upon the location of where jurors conducted their investigations into the meaning of a tattoo Mr. Dubose does not have. Court's Order Denying Motion For New Trial and Motion for Mistrial, at 167. Further, the Court is silent regarding any impact of research conducted pertaining to characterizations of real property where the shooting took place. Either of these issues possesses the potential to vitiate the jury's result in determining sentence. For example, if a juror has conducted unauthorized internet research on the meaning of gang tattoos leading the juror to make specific conclusions regarding the wearer of such tattoos, by definition, the juror's subjective reasoning has been tainted by extrinsic objective information (regardless if the information is accurate or not). This certainly serves as the policy basis for prohibition of extrinsic outside objective material. As such, it is likely that the Court failed to find a *reasonable possibility of prejudice* in its analysis of the circumstances surrounding the jury's unauthorized research into material facts at trial when such possibility actually existed.

Since the Court downplayed the use and impact of smart phones by the jury; remained silent on research pertaining to characterizations of real property where the shooting took place and generally underplayed the extent of "research" by emphasizing that the jury was actually under instruction to not use phones in deliberation; that Ms. Chavez could not name members of the jury using phones other than Mr. Phillips; that Ms. Chavez was nervous and emotional during her interview (following the Court's warning to Ms. Chavez regarding penalty of perjury); and that Ms. Chavez could not specify the nature of Mr. Phillips' phone conversation or the nature of what other jurors were actually doing on their smart phones respectively; it is not possible that the Court properly examined (a) the nature, (b) content, and (c) extent of the reviewed material thereby committing reversible error for failing to make inquiries of not only Ms. Chavez, but also the actual juror(s) who engaged in the misconduct of using smart phones to evaluate material not presented at trial.

Lastly, the state failed to adequately rebut the showing of prejudice as it simply set forth an assertion that the Defense failed to meet the initial threshold of determining that outside materials were actually introduced into jury deliberations. Appellee's Answer. 42-43; Tripp, 874 So.2d at 734; Robinson, 438 So.2d at 9. The state contends the court was correct in determining Ms. Chavez was not credible and therefore, sufficiency of the claim is not met. Appellee's Answer. 42-

43. However, according to both Florida's harmless error analysis under Hamilton and the federal test under Gaffney, the standard of determining threshold is not witness credibility (at least initially), rather, it is proof of the existence of extrinsic unauthorized material enabling the possibility of prejudicing a jury present within the jury room. Hamilton, 574 So.2d at 130; Gaffney, 676 F.Supp. at 1550; Robinson, 438 So.2d at 9. The fact that smart phones were used in deliberations supplies this proof. Chavez Aff. p. 17(C)-(E). The state acknowledges the proper applicability of the harmless test required under Hamilton, but then misapplies it by failing to recognize that the unauthorized presence of smart phones within deliberations alone constitutes a breach under the rule. Appellee's Answer. 42-43. Because the state never recognized the threshold breach, the state failed to rebut the *reasonable possibility of prejudice* resulting from the breach. Id.

Because jurors used smart phones while in penalty phase deliberations, using either the state or federal analysis, the record clearly indicates a *reasonable possibility of prejudice*. Therefore, this Court should reverse and remand for a new trial based on jury misconduct.

## ISSUE II

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO INVESTIGATE EXPRESS INDICATIONS OF RACIAL BIAS WITHIN THE JURY THEREBY CONSTITUTING OVERT ACTS OF JURY MISCONDUCT

Whether certain jurors expressing racially oriented ridicule and derision of the defendant including "laughing at and making fun of" Mr. Dubose, making racial references, references to "that culture," and derisively expressing the "need for subtitles" in order to understand the Defendant's communications during his video interview with police, resulted in prejudice of the remaining jurors, thereby, creating reversible error by the Court.

A juror spreading racial, ethnic, religious, or gender bias fatally infects the deliberation process in a unique and opprobrious way. Devoney, 717 So.2d at 504. In discussing overt acts of jury misconduct, the Florida Supreme Court distinguished, under Hamilton and Maler *supra*, that although it is improper to inquire into the thought processes of a juror's mind, as a juror's thoughts, both good and bad, truly inhere in the [determination of sentence] *"but when appeals to racial bias are made openly among the jurors, they constitute overt acts of misconduct."* Marshall, 854 So.2d at 1241 (emphasis in original); (citing Powell v. Allstate Ins. Co., 652 So.2d 354, 354 (Fla. 1995)). In adopting the rule, the court thereby expressed its intent to prevent such bias from being expressed. In doing so,

the Court remained cognizant that the rule may not deter such improper bias from remaining a silent factor with a particular juror. Id. "The issue of racial, ethnic, and religious bias in the courts is not simply a matter of 'political correctness' to be brushed aside by a thick-skinned judiciary." Id. At the very least, appellants must have the opportunity to determine the truth or falsity of allegations in an affidavit that racial slurs and comments were made during deliberations. Id. In concurring with the Connecticut Supreme Court and with the Illinois Supreme Court in Marshall, the Florida Supreme Court described an illustrative example of a noteworthy Connecticut case where the Connecticut Supreme Court concluded that in all future cases in which a defendant alleges that a juror has made racial epithets, the trial court should conduct, at minimum, "an extensive inquiry of the person reporting the conduct, to include the context of the remarks, and interview with any person likely to have been witness to the alleged conduct, and the juror alleged to have made the remarks." Id. at 1243; (quoting State v. Santiago, 715 A.2d 1, 1 (Conn. 1998)). The Florida Supreme Court further elucidated its opinion in concurrence with the Connecticut Supreme Court in noting that an allegation of racial bias is perhaps the most serious of juror misconduct allegations. Id. at 1244. As such, a court must err on the side of caution in the thoroughness of the inquiry. Id. "It would be reasonable to conclude that the trial court abused its discretion if it failed to inquire of the accused juror or others who might have heard the alleged

racists remarks." Id. "The majority opinion discounts any consideration of factors that weigh in favor of the state, and instead tips the balance wholly in favor of the defendant, irrespective of the unbelievability of the allegations or the harm that might result from the unnecessary recall of jurors." Id. (See also Taylor v. R.D. Morgan & Assoc., Ltd., 563 N.E.2d 1186, 1194 (Ill. 1990) (holding considerations to jurors do not outweigh the need to ensure a trial is untainted by bias or extraneous information).

Here, Ms. Chavez avers in her affidavit that "the jury" overtly expressed racial bias. Chavez Aff. p. 17(G). Upon notification to the trial court via affidavit, the court then had an obligation to engage in an investigation to determine if racially charged comments acted to extrinsically bias the jury, thereby, constituting jury misconduct under Florida common law. Marshall, 854 So.2d at 1244 (holding that the trial court erred in dismissing the defendant's juror misconduct claim).

It is clear from the Record that the trial court did not attempt any investigation into the affiant's allegations on this topic. Tr. of Proceedings; Court's Order Denying Motion For New Trial and Motion for Mistrial. Furthermore, the court also failed to ask any questions whatsoever regarding allegations of racial bias of the affiant during her interview. Tr. of Proceedings.

Because the trial court did not engage in "an extensive inquiry," nor did it include the context of the remarks; nor did it conduct any interview with any

person other than the affiant (and then made no inquiries during the affiant interview regarding this topic); made no inquiries or investigation into the affiant's claims of juror(s) likely to have witnessed racial bias and subsequent misconduct; the court's lack of action constitutes a reversible error. Marshall, 854 So.2d at 1244.

Florida case law supports actionable causes for jury misconduct pertaining to both the introduction of unauthorized materials and allegations of overtly expressed racial bias by jury members. Although analysis of these issues is different, both are (at heart) examples of extrinsic and objective influences that may conspire to prejudice a jury in their intrinsic and subjective reasoning, that could ultimately be a component in final determinations in both the guilt and penalty phases of a trial.

In considering unauthorized materials, Florida law, under Hamilton, requires analysis be conducted using the *harmless error analysis,* ultimately leading to a determination whether the overt act(s) created a *reasonable possibility of prejudice.* Likewise, there is a federal law analysis under Gaffney that similarly leads to a determination of *a reasonable possibility of prejudice,* but also requires the state to rebut such a possibility. Using either analysis, the record points to a *reasonable possibility of prejudice* resulting from introduction of outside materials – namely, juror use of smart phones during both trial and penalty deliberations. Specifically,

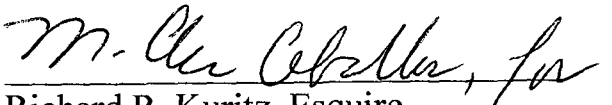
jurors used smart phones while in penalty phase deliberations and the affiant, Ms. Chavez, witnessed other jurors using them in deliberations, creating the genesis of a *reasonable possibility of prejudice*. Even if the Court were to conclude instances of phone use or the purpose of their use separately did not create *reasonable possibility of prejudice*, this Court should reverse and remand under a cumulative theory afforded by Gaffney.

In considering racial bias, Florida law, under Marshall, adopted both Connecticut and Illinois standards for evaluation of potential racial bias in juries. Here, once allegations are set forth, Florida law requires a trial judge to conduct, at minimum, an extensive inquiry of the person reporting the conduct, to include the context of the remarks, and interview any person likely to have been witness to the alleged conduct, including the juror alleged to have made the remarks. Therefore, because the record does not reflect any such inquiry by the trial court, this Court should reverse.

## CONCLUSION

For the aforementioned reasons, the Petitioner-Appellant requests this honorable Court reverse and remand for new trial.

Respectfully submitted,



Richard R. Kuritz, Esquire
Attorney for Appellant

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a copy of the foregoing has been furnished via e-file with the Clerk of Court, Florida Supreme Court; e-mail and U.S. Mail to the Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050, via U.S. Mail to the Office of the State Attorney, Duval County, 220 East Bay Street, Jacksonville, FL 32202; and via U.S. mail to the Appellant, Mr. Rasheem Dubose, DC# 133428, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32026 on this 24th day of July, 2013.

## CERTIFICATE OF COMPLIANCE

**I HEREBY CERTIFY** that this Brief is typed in Times New Roman font, and it is in size 14 font.

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