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**Samuel L. Smithers v. State of Florida**

**SC07-2258 | SC08-868**

>> PLEASE RISE.

>> LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> OUR LAST CASE FOR TODAY IS  
SUBMITTERS THIS VERY SMITHERS  
VERSUS STATE.

ARE THE PARTIES READY TO  
PROCEED?

>> GOOD MORNING.

MAY IT PLEASE THE COURT.

MY NAME IS ALI A, SHAKOOR.

I REPRESENT THE APPELLANT.

SAMUEL L. SMITHERS.

IF -

>> WHAT WAS YOUR NAME?

>> ALI A. SHAKOOR.

I REPRESENT THE APPELLANT.

SAMUEL SMITHERS.

I SHOULD JUMP IN AND PLAN ON  
ARGUING CLAIM ONE-B OF THE  
GUILT PHASE.

TRIAL COUNSEL WAS INEFFECTIVE  
AND ALLOWING RACIAL BIAS TO BE

INJECTED IN THE CASE.

INJECTED BY THE STATE ATTORNEY

THROUGH USE OF LEADING

QUESTIONS, EXCUSE ME, DURING

THE DIRECT EXAMINATION OF THE

DETECTIVE.

THESE LEADING QUESTIONS SERVED

AS A NON-STATUTORY AGGRAVATOR

AND, MR. SMITHERS WAS

PREJUDICED AS A RESULT.

>> WAS BEFORE THE TRIAL

STARTED, WAS THERE A TRANSCRIPT

OF HIS CONFESSION?

>> ACTUALLY WAS IN A POLICE

REPORT.

>> SO, THE TRIAL LAWYER KNEW

THAT THAT STATEMENT, I MEAN

THIS WASN'T JUST SOMETHING CAME

OUT AT TIME OF TRIAL THAT IS?

SO DID HE SAY HE UNDERSTOOD IT

WAS THERE AND INTERTWINED WITH

THE MURDER AND DIDN'T THINK IT

WOULD BE SUCCESSFUL KEEPING IT

OUT.

>> YOU'RE CORRECT, YOUR HONOR.

THAT IS WHAT HE TESTIFIED AT

EVIDENTIARY HEARING.

>> IF WE MAKE A DECISION, AND

WE SAY, IF IT HAD BEEN RAISED  
PROBABLY ALTHOUGH CERTAINLY IT  
WAS PREJUDICIAL, THE PROBATIVE  
VALUE WOULD OUTWEIGH THE  
PREJUDICE, ANY FAILURE OF HIM  
TO RAISE IT WOULD BE, WOULD BE  
BECOME MOOT BASICALLY?

>> ACTUALLY, NO.

I BELIEVE THE LOWER COURT WAS  
MISGUIDED AND MISPLACED AND  
TRIAL COUNSEL WAS MISTAKEN BY  
BELIEVING THAT THE STATEMENT  
WAS INEXTRICABLY INTERTWINED.

>> IN OTHER WORDS, WE LOOK  
INDEPENDENT, LET'S ASSUME HE  
RAISED BELOW, I MEAN IN THE  
TRIAL.

>> YES.

>> AND THE JUDGE, THEN I KNOW,  
YOU KNOW, HE SAYS, HE MIGHT  
HAVE IN PART BEEN INFLUENCED BY  
RACE, BUT I THINK IT'S RELEVANT  
BECAUSE IT IS ALL PART OF HIS  
CONFESSION.

I CAN'T EXTRICATE IT, MADE THAT  
DECISION, WE WOULD LOOK AT THAT  
AND SAY, IS THAT A, WOULD THAT  
BE AN ABUSE OF DISCRETION OR  
WOULD THAT BE ERRONEOUS FOR

THAT EVIDENCE TO COME IN THIS  
CASE?

>> ACTUALLY, AS YOU KNOW RIGHT  
NOW WE'RE DEALING WITH  
INEFFECTIVE ASSISTANCE OF  
COUNSEL.

>> I UNDERSTAND THAT WE STILL  
AS A MATTER OF LAW NEED TO LOOK  
AT IT AND IF WE AGREE WITH YOU  
IT SHOULD BEEN KEPT OUT IT IS A  
MUCH MORE SIGNIFICANT ISSUE.  
IF WE LOOK, SAYING NO QUESTION,  
IF IT HAD BEEN RAISED IT WOULD  
HAVE BEEN KEPT OUT AND, --

>> IF IT WOULD HAVE BEEN, IF  
THERE HAD BEEN A MOTION IN  
LIMINE FILED OR WOULD HAVE BEEN  
PROPERLY OBJECTED TO AT TRIAL  
IT WOULD HAVE BEEN KEPT OUT AND  
JURY WOULD NEVER HEARD IT AND  
THE JURY'S PASSIONS WOULD NOT  
HAVE BEEN INFLAMED AND JURY'S  
VERDICT WOULD NOT HAVE BEEN  
TAINTED.

>> IT IS YOUR BURDEN TO  
ESTABLISH THAT IN  
POST-CONVICTION, CORRECT?

>> YES, YOUR HONOR.

>> AND SO, WHAT IS, THE REASON THAT SOMETHING THAT IS PART OF THIS CONFESSION, IS GOING TO BE KEPT FROM THE TRIER OF FACT?

>> BECAUSE THE ISSUE OF RACE WAS NOT RELEVANT TO THE REST OF THE CONFESSION.

WAS NOT RELEVANT TO THE FACTS OF THE CASE.

MR. SMITHERS WAS NOT CHARGED WITH A HATE CRIME.

HE WAS NOT CHARGED WITH MURDERING A BLACK WOMAN.

RACE WAS IRRELEVANT IN THIS CASE.

SO, COUNSEL WAS DEFICIENT AND INEFFECTIVE FOR ALLOWING THIS LANGUAGE TO COME BEFORE THE JURY.

THIS IS SIMILAR TO ROBINSON v. STATE CITED IN OUR BRIEF, A 1988 CASE.

AS YOU KNOW IN ROBINSON THE STATE ATTORNEY ELICITED --

>> I WAS UNDER THE IMPRESSION HERE THAT, THIS PART OF THIS CONFESSION WAS, THAT, THIS DEFENDANT WAS SAYING, THAT PART OF MY MOTIVATION, FOR WHAT I

DID, WAS BASED UPON THE FACT  
THAT THIS WOMAN WAS, WAS BLACK?  
ISN'T THAT, I MEAN THAT'S WHAT  
HE SAID.

>> YES, YOUR HONOR.

WHAT HE SAID WAS, SOME  
PREJUDICE MIGHT HAVE KICKED IN,  
SO I HIT HER A FEW MORE TIMES.

AND, MOTIVE IS IRRELEVANT IN A  
FIRST-DEGREE MURDER CASE.

>> MOTIVE IS IRRELEVANT IN --

>> PREMEDITATION IS RELEVANT.

MOTIVE IS NOT RELEVANT IN A  
FIRST-DEGREE MURDER CASE.

AND BECAUSE, THE REST OF  
MR.^SMITHERS CONFESSION WAS  
THOROUGH AND, TALKED ABOUT HOW  
HE BEAT HER SEVERELY, HOW HE  
THREW HER AGAINST THE WALL AND  
HOW HE PUNCTURED HER SKULL, THE  
FACT THAT HE MURDERED A BLACK  
PERSON AND HE WAS PREJUDICED  
WAS COMPLETELY IRRELEVANT AND  
IT TAINTED JURY AND INFLAMED  
THEIR PASSIONS.

>> MOTIVE, GOING BACK TO  
MOTIVE, PREMEDITATED  
FIRST-DEGREE MURDER YOU HAVE TO

HAVE THE INTENT TO KILL SOMEONE  
AND, TO DEVELOP THAT INTENT  
THERE HAS TO BE THAT REASON WHY  
YOU ARE KILLING SOMEONE.

THAT IS MOTIVE.

NOW, IF IT IS IN HERE THAT HE  
SAID THAT REASON I HIT HER  
AGAIN IS BECAUSE SHE'S BLACK,  
HOW IS THAT NOT RELEVANT?

>> BECAUSE, SERVING AS SILENT  
AGGRAVATOR.

THIS CASE WAS NOT ABOUT RACE.

THIS CASE WAS ABOUT  
PREMEDITATION.

THE STATE DIDN'T MAKE A POINT  
OF MAKING THIS CASE A RACE  
TRIAL OR A HATE CRIME TRIAL.

WHAT THE STATE DID WAS, CHARGE  
HIM WITH TWO COUNTS OF  
FIRST-DEGREE MURDER OF TWO  
WOMEN.

>> RIGHT.

BUT THE STATE HAS TO PROVE, THE  
STATE HAS TO PROVE THERE WAS  
PREMEDITATED AND THAT HE  
INTENDED TO KILL HER AND ONE OF  
THE REASONS HE WANTED TO KILL  
HER, HE HIT HER AGAIN, BECAUSE  
SHE IS BLACK, DON'T THEY HAVE

TO PROVE THAT.

>> ACTUALLY WHAT HE SAID HE HIT  
HER A FEW MORE TIMES BECAUSE  
PREJUDICE SET IN.

HIS MOTIVE FOR KILLING HER WE  
DON'T KNOW TO THIS DAY BECAUSE  
IT IS NOT RELEVANT.

PREMEDITATION CAN BE  
ESTABLISHED AT THE BLINK OF AN  
EYE.

>> AT THE POINT HE ACTUALLY  
ALREADY HIT HER AND THEN HE  
SAYS THAT HIS PREJUDICE KICKED  
IN AND THEN HE STARTED HITTING  
HER SOME MORE, SO, AT THAT  
POINT, SHE MAY NOT HAVE BEEN  
DEAD OR EVEN INJURED FATALLY.

>> RIGHT.

>> AND SO WHY ISN'T THEN  
RELEVANT THAT, YOU KNOW, I HIT  
HER, AND THEN, ALL THIS OTHER  
STUFF COMES INTO MY MIND, AND  
SO I CONTINUED AND CONTINUE,  
UNTIL I'VE GOT THE FATAL BLOW  
HER HERE.

>> ALL HE SAID WAS HE HIT HER A  
FEW MORE TIMES.  
NOT THAT HE DECIDED TO KILL HER

BASED ON HIS PREJUDICE.

>> HITTING HER A FEW MORE

TIMES, WASN'T SHE, WHAT WAS,

WHAT WAS THE CAUSE OF DEATH?

>> THE CAUSE OF DEATH WAS

STRANGULATION AND BLUNT FORCE

TO THE HEAD.

>> BLUNT FORCE TO THE HEAD.

>> AND ALSO A SHARP OBJECT

CALLED A PICK AXE OR

SCREWDRIVER WAS PLACED THROUGH

HER SKULL.

AS YOU KNOW, YOUR HONOR, HE

KILLED TWO WOMEN, AND PRIOR TO

HIS CONFESSION OF MISS ROACH HE

CONFESSED TO CINDY COWAN.

THE STATE ALREADY HAD ENOUGH AS

FAR AS PROVING THEIR

AGGRAVATORS.

RACE WAS IRRELEVANT.

RACE WAS SIMPLY INJECTED THIS

TRIAL TO PREJUDICE THE

DEFENDANT AND INFLAME THEIR

PASSIONS.

>> EVEN IF WE AGREE, IT SEEMS

TO ME THIS IS NOT ONE OF THOSE

CASES WHERE, ANYTHING EVEN

CLOSE, AND SO, EVEN IF YOU, IF

HE SHOULD NOT HAVE ALLOWED THE

STATEMENT IN ABOUT THE RACE, I  
DON'T THINK IT GETS YOU VERY  
FAR.

>> WELL, THERE IS PREJUDICE IN  
THIS CASE BECAUSE, FIRST OF  
ALL, THIS COURT HAS LONG-HELD  
THAT RACE, RACIAL PREJUDICE,  
RACIAL ANIMOUS HAS NO PLACE IN  
THE CRIMINAL JUSTICE SYSTEM.  
IF I MAY QUOTE BRIEFLY FROM  
STATE v. DAVIS.

-- RACIAL PREJUDICE IS  
PARTICULARLY ACUTE WHEN THE  
JUSTICE SERVES AS MECHANISM  
WHICH THE LITIGANT IS REQUIRED  
TO FORFEIT HIS OR HER LIFE.  
ESSENTIALLY RACE IS DIFFERENT  
AND DEATH IS DIFFERENT.

>> TELL ME HOW THIS WAS  
HIGHLIGHTED.  
THIS WAS BASICALLY A, ONE  
STATEMENT, THAT WAS MADE DURING  
THE COURSE OF THE EXAMINATION  
OF THE --

>> DETECTIVE.

>> THE DETECTIVE.

WAS IT REITERATED ON CROSS?

>> NO.

>> WAS IT ARGUED IN THE CLOSING ARGUMENTS?

>> NO.

>> SO, YOU KNOW, BASICALLY IS ONE STATEMENT THAT COMES OUT AND SO, I'M JUST TRYING TO FIGURE OUT HOW IT IS SO PERVASIVE THAT WE WOULD SAY, THIS IS REVERSIBLE ERROR?

>> WELL, BECAUSE WE'RE TALKING ABOUT RACE, PERVASIVE, THE PERVASIVENESS IS NOT AS RELEVANT, BECAUSE IF WE GO BACK TO ROBINSON v. STATE, ONE, IT WAS JUST A FEW LINES OF DIALOGUE JUST LIKE IN THIS CASE.

THE STATE ATTORNEY PARTICULARLY PURPOSEFULLY INJECTED RACE IN THIS CASE DURING THE DIRECT EXAMINATION THROUGH LEADING QUESTIONS.

>> YOU'RE SAYING IN THIS CASE, THAT'S WHY I ASKED YOU THE FIRST QUESTION.

ARE YOU SAYING BEFORE THE TRIAL STARTED, THE FACT THAT THE DEFENDANT HAD SAID THAT SOMETHING ABOUT, THAT WHILE I

WAS STARTING TO HIT HER, THAT  
I, SOME PREJUDICE MAY HAVE SET  
IN, SO I HIT HER AGAIN, THAT  
WASN'T ANYTHING THAT HAD COME  
OUT OF THE DEFENDANT'S OWN  
MOUTH?

>> IT DID COME OUT OF THE  
DEFENDANT'S MOUTH.

>> IT WAS A, WAS IT A TAPED  
CONFESSION?

>> IT WAS NOT TAPED, NO.

>> BUT THERE WAS DEPOSITION --  
THERE WAS NO QUESTION THAT THE  
DEFENSE LAWYER KNEW ABOUT IT?

>> YES.

>> SO NOW WHAT YOU'RE SAYING  
HERE, WE'RE HERE ON  
POST-CONVICTION, IT WASN'T  
CHALLENGED ON DIRECT APPEAL.

>> NO.

>> WHICH IS ANOTHER ISSUE,  
WOULD YOU SAY SINCE, WOULD YOU  
SAY THAT IT SHOULD HAVE BEEN  
CHALLENGED ON DIRECT APPEAL?  
THAT IT IS SO FUNDAMENTAL EVEN  
THOUGH IT WASN'T OBJECTED TO IT  
SHOULD HAVE REQUIRED A REVERSAL  
OF THE TRIAL?

>> WELL, PURSUANT TO  
U.S. v. MASSARO, A SITUATION LIKE  
THIS, IC CLAIM LIKE THAT ONLY  
BE DEVELOPED IN POST-CONVICTION  
WE DON'T KNOW WHAT WAS IN  
TRIAL --

>> YOU'RE SAYING SOMETHING LIKE  
THIS, AS SOON AS RACE IS  
INJECTED IT IS SO PREJUDICIAL,  
HAVE TO ALWAYS BE EXCLUDED EVEN  
IF IT IS RELEVANT?

AND THEREFORE, SINCE THIS WAS  
ON THIS RECORD, WE SHOULD HAVE,  
IT SHOULD HAVE BEEN REVERSED?

>> WELL, I GO BACK TO ROBINSON.  
THAT WAS A DIRECT APPEAL CASE.  
ROBINSON HELD ESSENTIALLY THAT  
EVEN IF IT WAS NOT OBJECTED TO,  
EVEN IF IT THERE WAS A REBUKE  
FROM THE JUDGE, EVEN IF THE  
STATEMENT WAS RETRACTED, I TAKE  
TO YOU PAGE 7 OF ROBINSON --

>> WHAT WAS ROBINSON, WHAT WAS  
THE RACIAL IN ROBINSON?

>> IN ROBINSON DURING THE  
PENALTY PHASE THE STATE  
ATTORNEY CROSS-EXAMINED THE  
DEFENSE EXPERT AND ESSENTIALLY  
ASKED WHETHER OR NOT

MR. ROBINSON HAD A PROPENSITY  
FOR MURDERING WHITE WOMAN OR  
PREYING ON WHITE WOMAN.

>> THAT'S WHY I ASKED.

HERE'S THE DIFFERENCES.

THIS IS A CONFESSION OF THE  
DEFENDANT, WHICH IS, PART OF  
WHAT HAPPENED DURING THIS  
MURDER IS THAT, HE, THAT HE HAD  
SOME PREJUDICE THAT MAY HAVE  
KICKED IN.

SO HE HIT HER AGAIN.

AND SO, HOW, AND SO THE DEFENSE  
LAWYER SAYS, I KNEW THAT WAS  
THERE.

IT IS NOT LIKE YOU WERE  
IMPLYING THAT THE PROSECUTION  
IS THE ONE THAT INJECTED RACE  
INTO THIS CASE.

THE DEFENDANT'S OWN STATEMENT  
INJECTED RACE.

>> RIGHT.

BUT IT WAS NOT RELEVANT TO THE  
CRIME CHARGED.

AND THE PROSECUTION INJECTED  
RACE DURING LEADING QUESTIONS  
DURING THE DIRECT EXAMINATION  
OF HER DETECTIVE AND TRIAL

COUNSEL WAS AWARE BEFORE TRIAL.  
FAILED TO FILE A MOTION IN  
LIMINE.

>> YOUR ARGUMENT REALLY HINGES  
ON WHETHER WE WOULD CONSIDER IT  
TO BE RELEVANT, A RELEVANT  
FACT?

>> WELL, YOUR HONOR, ALSO MUST  
ADMIT EVEN IF IT IS RELEVANT WE  
MUST WEIGH WHETHER OR NOT THE  
PREJUDICIAL IMPACT OUTWEIGHS  
THE PROBATIVE VALUE.

IN THIS CASE LET'S SAY IT IS  
RELEVANT, LET'S SAY IT'S  
RELEVANT THE ISSUE MISLEADS THE  
JURY.

IT CONFUSES THE ISSUES BECAUSE  
THIS CASE WASN'T ABOUT RACE AND  
IT IS PREJUDICIAL, BECAUSE THE  
WHAT THE JURORS ARE HEARING IS  
THAT, OKAY HE IS MURDERER.

HE MURDERED TWO WOMEN.  
HE MURDERED DENISE ROACH WITH  
HEINOUS, ATROCIOUS AND CRUEL,  
FACTORS.

AND HE ALSO HAD A  
CONTEMPORANEOUS FELONY  
CONVICTION WITH THE OTHER  
MURDER.

SO, THEY HAD THE PROBATIVE

VALUE ESTABLISHED.

THEY DIDN'T HAVE TO BRING RACE

INTO IT.

RACE WAS SOLELY BROUGHT INTO

IT, THAT ONE TIME, THAT THOSE

FEW BITS OF TESTIMONY, SIMPLY

TO SLIME THE TRIAL AND INFLAME

THE PASSIONS OF THE JURY.

I BELIEVE I'M IN MY REBUTTAL

TIME, IF I MAY COME BACK.

>> DID YOU SAY SLIME THE TRIAL?

>> PERHAPS I SHOULD REPHRASE,

TO INFECT THE TRIAL WITH RACIAL

ANIMOUS.

>> BUT YOU AGREE THAT,

PROSECUTOR IN THIS CASE DID NOT

MAKE IT A FEATURE IN CLOSING

ARGUMENT, OPENING STATEMENT, ON

UNDULY EMPHASIZED IT?

>> RIGHT.

BUT IT WAS A SNEAK ATTACK BY

DOING IT STRICTLY THAT ONE TIME

DURING THE DIRECT EXAMINATION

OF A WITNESS THROUGH LEADING

QUESTION.

>> OWN REASONABLY I'M SMILING

OBVIOUSLY IF THE PROSECUTOR HAD

EMPHASIZED IT WE HAD A

DIFFERENT SITUATION.

HERE THE PROSECUTOR, TO ME,

USED IT, THE WAY, IF IT WERE,

AT ALL RELEVANT, AT LEAST

LIMITED ITS IMPACT AND WE

SHOULD COMMEND THE PROSECUTOR

AS OPPOSE TODD SAYING THERE WAS

SOME SNEAK ATTACK.

>> WELL, --

>> THIS WAS IN THE PENALTY

PHASE?

>> THIS WAS IN THE GUILT PHASE.

>> IN THE GUILT PHASE.

>> RIGHT.

BACK TO ROBINSON, IT WAS ONLY

BROUGHT UP IN A LITTLE BIT.

LITTLE BITS OF TESTIMONY.

IT WAS NEVER BROUGHT UP AGAIN.

IT WAS NEVER BROUGHT UP IN

CLOSING ARGUMENT.

>> AS JUSTICE PARIENTE POINTED

OUT THE DIFFERENCE THERE, THAT

WAS SOME EXPERT'S CONCLUSION

ABOUT THE PROCLIVITIES OF THE

DEFENDANT AND THE RACE AND

TARGETING VICTIMS BASED ON RACE

WHEREAS HERE, WE HAVE, A

STATEMENT OF MOTIVATION BY THE

DEFENDANT HIMSELF.

LET ME ASK YOU ABOUT, OUR DAVIS  
CASE WHERE WE SAID THAT  
INJECTIONING RACIAL BIAS INTO  
THAT CASE WAS IMPROPER WHERE,  
WE SPECIFICALLY SAID THE  
DEFENDANT WAS BLACK AND THE  
VICTIM WHITE AND THERE WAS NO  
APPARENT RACIAL MOTIVATION FOR  
THE CRIME.

AND HERE, WE HAVE AN APPARENT  
RACIAL MOTIVATION, BASED ON  
WHAT THE DEFENDANT HIMSELF  
SAID, AT LEAST FOR THESE  
ADDITIONAL BLOWS THAT HE IS  
INFLICTING WHICH COULD  
HAVE BEEN THE CAUSE  
OF DEATH.

>> YES, YOUR HONOR, BUT --

>> WHY DOESN'T DAVIS REALLY  
TELL US MORE ABOUT THIS THAN  
ROBINSON.

>> ROBINSON IS MORE FACTUALLY  
ON POINT BECAUSE WE'RE DEALING  
WITH A STATE ATTORNEY INJECTING  
RACE INTO THE CASE.

DAVIS WAS MORE ABOUT, THE  
DEFENDANT'S OWN TRIAL COUNSEL

INJECTING RACE INTO THE CASE.

I BELIEVE ROBINSON IS MORE ON  
POINT.

ALSO ROBINSON DEALS WITH JUST A  
LITTLE BIT OF TESTIMONY AND  
STILL THIS COURT HELD THAT, YOU  
CAN'T DO THAT.

AND THIS COURT ALSO MENTIONED  
IN ROBINSON EVEN IF IT WASN'T  
OBJECTED TO, IT STILL, RACE HAS  
NO PLACE IN THE CRIMINAL  
JUSTICE SYSTEM.

>> WHAT IF THE DEFENDANT HAS  
KILLED HER BECAUSE SHE WAS  
BLACK?

IS THAT ERROR FOR THAT TO BE  
ADMISSIBLE?

>> IF THE DEFENDANT SAID, I  
KILLED HER, BECAUSE SHE WAS  
BLACK, I'M NOT SURE BUT THAT'S  
NOT WHERE WE ARE RIGHT NOW.  
I WOULD HAVE TO THINK ON THAT  
ONE TO BE HONEST WITH YOU.

>> IT INJECTS RACE.

THAT'S WHAT YOUR ARGUMENT IS.

>> IT INJECTS RACE BUT IT IS  
ALSO, PERHAPS HE WOULD HAVE  
BEEN CHARGED WITH SOMETHING  
ELSE?

EVERYTHING ELSE BEING EQUAL IF  
HE SAID I KILLED HER BECAUSE  
SHE WAS BLACK, ALL THE FACTS  
BEING THE SAME, STILL MOTIVE IS  
IRRELEVANT AND IN THIS CASE, WE  
DON'T EVEN HAVE THAT.

HE JUST SAYS SOME PREJUDICE SET  
IN.

>> IT CERTAINLY SOUNDS LIKE IN  
DAVIS WE DIDN'T THINK  
MOTIVATION WAS IRRELEVANT.  
IN WHAT WE SAID THERE.  
MAYBE WE WERE WRONG BUT IS IT  
YOUR CONTENTION WE WERE WRONG  
WHEN WE SUGGESTED THAT  
MOTIVATION COULD BE RELEVANT?

>> I BELIEVE IN A LONG LINE OF  
CASES BEFORE THIS COURT WHEN WE  
LOOK AT FIRST-DEGREE MURDER,  
WE'RE TALKING ABOUT  
PREMEDITATION, NOT THE MOTIVE.

>> THEN AGAIN, IT SEEMS TO ME  
THAT YOUR, THE HABEAS PETITION  
AT LEAST HERE SHOULD HAVE SAID,  
AND WE LOOK AT IT, WHETHER  
APPELLATE COUNSEL WAS  
INEFFECTIVE IN FAILING TO RAISE  
THIS AS FUNDAMENTAL ERROR,

BECAUSE IF IT IS SO PER SE, YOU  
CAN'T, MENTION RACE, EVEN IF IT  
IS FROM THE DEFENDANT'S OWN  
MOUTH, THEN, WE SHOULD HAVE,  
YOU SHOULD SAY IT SHOULD HAVE  
BEEN REVERSED ON APPEAL.  
DOESN'T MATTER WHAT THE DEFENSE  
LAWYER THOUGHT.  
IT'S REVERSEABLE.

>> I WILL SAY VERY BRIEFLY  
BECAUSE I'M WAY INTO MY  
REBUTABLE TIME.

IT IS NOT JUST A MENTION.

IT IS INFLICTION OF RACIAL  
PREJUDICE AND BIAS.

BASICALLY THEY'RE SAYING  
MR. SMITHERS WAS A RACIST, A  
BIGOT.

EVERYTHING ELSE BEING EQUAL HE  
COMMITTED THESE HEINOUS MURDERS  
HE IS ALSO A BIGOT.

THAT WAS ALSO IT IN HAD CASE.

MAY I PLEASE SIFT DOWN AND COME  
BACK FOR MY REBUTTAL?

THANK YOU VERY MUCH.

>> THANK YOU.

MISS SABELLA.

>> MAY IT PLEASE THE COURT.

I'M CANDACE SABELLA

REPRESENTING THE STATE OF  
FLORIDA.

COUNSEL IS RIGHT.

THIS TRIAL WAS NOT ABOUT RACE.

OTHER THAN THIS ONE STATEMENT,  
THAT CAME FROM THE DEFENDANT'S  
OWN CONFESSION, RACE WAS NEVER  
MENTIONED AGAIN.

THE STATE DIDN'T ARGUE IT IN  
CLOSING ARGUMENT.

IN FACT THE ONLY REFERENCE TO  
THE CONFESSION AT ALL WAS DONE  
BY TRIAL COUNSEL WHO ARGUED  
THAT THE DEFENDANT'S CONFESSION  
WAS IN FACT, EVIDENCE AT MOST  
AS SECOND-DEGREE MURDER.

>> I CAN'T, THE ONLY THING I  
WOULD SAY IS IF IT HAD BEEN  
RAISED AS MOTION IN LIMINE THE  
TRIAL JUDGE WOULD LOOK AT IT  
SAY, LISTEN HE HAS GIVEN THIS  
WHOLE CONFESSION.

IF THE ISSUE WASN'T IT WAS A  
RACIALLY MOTIVATED CRIME, YOU  
ALMOST ARE SAYING WELL THEN,  
WHY IS THE, PREJUDICIAL VALUE,  
I MEAN THE PREJUDICE, NOT,  
OUTWEIGHING THE PROBATIVE VALUE

BECAUSE IT IS THIS ONE

SENTENCE.

WE ALL, WHAT COUNTY DID THIS

CRIME OCCUR IN?

>> HILLSBOROUGH.

>> THANK YOU.

>> HILLSBOROUGH.

YOU KNOW, WHETHER IT IS 2008 OR

WHENEVER THIS CRIME OCCURRED,

THE YOU KNOW THE THOUGHT THAT

SOMEONE IS KILLING A, SOME

WHITE MAN KILLING A BLACK

WOMAN, IS SORT OF THE REVERSE,

BUT THAT HE IS PREJUDICE IS, IT

CAN SICKEN PEOPLE'S MINDS.

MY QUESTION TO YOU IS, ARE YOU

SAYING IF, THE DEFENSE LAWYER

HAD RAISED THIS BY A MOTION IN

LIMINE, THAT A JUDGE COULDN'T

HAVE EXERCISED DISCRETION TO

SAY, I'M NOT GOING TO ALLOW IT?

>> NO, I'M NOT SAYING THAT AT

ALL.

I'M SAYING THAT HIS, HE HAS TO

SHOW THAT NO REASONABLE COUNSEL

WOULD NOT HAVE FILED A MOTION

IN LIMINE TO EXCLUDE THIS

EVIDENCE, AND THAT IT WOULD

HAVE BEEN KEPT OUT, AND THAT IT

WAS PREJUDICIAL.

HE HASN'T SHOWN ANY OF THOSE THINGS.

COUNSEL TESTIFIED, I DO NOT FILE FRIVOLOUS MOTIONS.

I FILED ALL THE MOTIONS AND HE DID FILE A BUNCH OF MOTIONS THAT I THOUGHT WERE NECESSARY TO REPRESENT MY CLIENT.

I THOUGHT THIS EVIDENCE WAS INEXTRICABLY INTERTWINED AND I THOUGHT IT WOULD HAVE BEEN FRIVOLOUS TO RAISE SUCH A MOTION.

FURTHERMORE, THIS DEFENDANT'S DEFENSE WAS, I DIDN'T DO IT.

MR.^X DID IT AND HE MADE ME HELP.

THIS STATEMENT VERY CLEARLY SHOWS, I DID IT AND I DID IT FOR MY OWN REASONS.

SO CLEARLY, IT WAS RELEVANT AND, THE PROBE TIFF VALUE FAR OUTWEIGHS THE PREJUDICE.

>> BECAUSE, WHEN YOU SAY IT WAS NEVER MENTIONED AGAIN, IT WASN'T TIED TOGETHER BY THE PROSECUTION, SUGGESTIONS TO ME,

I WOULDN'T CALL IT A SNEAK  
ATTACK.

WE PUT IT IN.

IT'S IN, WITH ONCE YOU HEAR IT,  
THERE ARE CERTAIN THINGS YOU  
HEAR AND THEY DON'T GO OUT OF  
YOUR MIND.

YOU DON'T NEED TO ARGUE IT  
ANYMORE.

IT IS SOMETHING THERE FOR THE  
JURY TO CONSIDER.

NOW, THE FACT, THAT THE,  
PROSECUTION, THE FACT THAT, IS  
THAT THE DISTURBING YOU?

>> YEAH.

>> YOUR COLIQUY.

THE FACT THAT, THE PROSECUTION  
DOESN'T TIE IT TOGETHER, YOU'RE  
SAYING SHOWS, WHAT?

THAT --

>> I'M SAYING THAT ANY  
PREJUDICIAL VALUE THAT THEY ARE  
ASSERTING WAS MINIMIZED BY THE  
FACT THAT, HIS CONFESSION WAS  
PUT IN, IT WASN'T MADE A  
FEATURE.

IT WASN'T CARRIED ON, IT WASN'T  
IN SUPPORT OF ANYTHING.

BUT THE FACT IS, IT WAS

RELEVANT, IT WAS PROBATIVE AND  
I CAN NOT ESTABLISH THAT NO  
REASONABLE COUNSEL WOULD NOT  
HAVE FILED THIS MOTION AND HE  
CAN NOT ESTABLISH AND WAS NOT  
FOUND BY THE TRIAL COURT THAT  
THE MOTION WOULD HAVE BEEN  
GRANTED AND HE WAS PREJUDICED.

>> ALL CONFESSIONS ARE  
PREJUDICIAL, RIGHT?

>> ABSOLUTELY.

THE STATE, MOST OF THE EVIDENCE  
THAT WE PRESENT IN A TRIAL IS  
PREJUDICIAL.

SO THAT BECOMES THE POINT.

BUT IN THIS PARTICULAR CASE,  
COUNSEL NOT ONLY SAID, I DIDN'T  
THINK I COULD KEEP IT OUT BUT I  
ALSO COULD USE IT TO SUPPORT  
SECOND DEGREE.

AND HE DID INDEED ARGUE AT MOST  
THE DEFENDANT'S CONFESSION  
SHOWED SECOND DEGREE BECAUSE --

>> I'M -- HOW DOES THAT HELP  
SECOND DEGREE?

>> IT SHOWS THAT A RAGE.

THE STATEMENT THAT MY PREJUDICE  
KICKED IN AND I KIND OF LOST

IT, SHOWS RAGE.

AND WHICH WOULD GO TO SECOND

DEGREE.

>> SO TO THE DEFENSE LAWYER YOU SAY

I CONSIDERED IT, I THOUGHT IT

WAS INEXTRICABLY INTERTWINED, I

THOUGHT IT WOULD HELP ME?

>> I WON'T GO THAT FAR.

DEFENSE COUNSEL AT EVIDENTIARY

HEARING WAS ASKED, ON

CROSS-EXAMINATION, AND DID IT

NOT ALSO HELP YOU ARGUE SECOND

DEGREE?

AND HE SAID YES, I SUPPOSE IT

WOULD.

HE DID SAY, HE DID IN HIS

CLOSING ARGUMENTS DURING THE

TRIAL HOWEVER, SPECIFICALLY SAY

AT MOST THIS CONFESSION SHOWS

SECOND-DEGREE MURDER.

BUT YOU HAVE TO REMEMBER, THAT

THE DEFENSE WAS NOT A LESSER

CRIME.

HIS DEFENSE WAS, I DIDN'T DO

IT.

MR.^X DID IT.

I ONLY CAME BACK AND CLEANED UP

AFTERWARDS.

SO COUNSEL'S HANDS WERE KIND OF

TIED BY THE SUDDEN CHANGE IN  
THE DEFENSE PRIOR TO TRIAL AS  
TO WHAT HE COULD ARGUE BUT HE  
DID ARGUE THAT.

>> DO WE KNOW ANYTHING ABOUT  
THE RACIAL COMPOSITION OF THE  
JURY?

>> I DON'T KNOW ANYTHING ABOUT  
THE RACIAL COMPOSITION OF THE  
JURY.

THERE ARE SEVERAL OTHER ISSUES  
COUNSEL DID NOT ARGUE THEM.

SO UNLESS THIS COURT HAS  
QUESTIONS.

THANK YOU.

>> REBUTTAL?

>> THANK YOU.

SPECIFICALLY, THE POLICE REPORT  
CONFESSION STATED SOME  
PREJUDICE SET IN.

THAT'S IT.

>> DO WE HAVE A WRITTEN  
CONFESSION?

I MEAN WAS IT REDUCED TO  
WRITING AT ANY POINT?

>> THE OFFICER, THERE IS NO,  
THERE IS NO WRITTEN CONFESSION  
BY THE DEFENDANT ON THE RECORD.

>> I DON'T MEAN THAT THE  
DEFENDANT MAY HAVE WRITTEN IT.  
BUT THAT, IT WAS REDUCED TO  
WRITING AND, ACTUAL INTRODUCED  
INTO EVIDENCE?

>> POLICE REPORT, YES.

THE POLICE REPORT IS PART OF  
THE RECORD.

AND THE POLICE REPORT STATED  
THAT THE DEFENDANT SAID SOME  
PREJUDICE SET IN.

THE STATE ATTORNEY TOOK THAT  
AND RAN WITH IT DURING THE  
DIRECT EXAMINATION BY STATING,  
SPECIFICALLY, CITED ON PAGE 35  
OF OUR BRIEF, SHE ASKED, MR.^,  
I'M SORRY, DETECTIVE FLAIR DID  
ANYTHING KICK IN THAT MADE HIM  
HIT HER AGAIN? DETECTIVE FLAIR  
SAID SOME PREJUDICE SET IN SO  
HE HIT HER AGAIN.

THEN MADAM STATE ATTORNEY ASKS,  
IS THAT BECAUSE SHE WAS BLACK?

THE DETECTIVE ANSWERED, YES.

SO A LINE IN THE POLICE REPORT  
ABOUT SOME PREJUDICE SET IN.

SO I HIT HER AGAIN.

THE DETECTIVE PSYCHOLOGICALLY  
STARTS ASSUMING THAT MEANS HE

MUST HIT HER AGAIN BECAUSE HE  
IS BLACK AND STATE ATTORNEY RAN  
WITH IT.

>> SO I GUESS THAT'S -- NOW  
YOU'RE REALLY SAYING WHAT THE  
DEFENSE LAWYER SHOULD HAVE  
DONE, IS NOT MOVED IN LIMINE  
BEFOREHAND BUT AT THE TIME THAT  
THE STATEMENT WAS MADE, SHOULD  
HAVE MOVED FOR A MISTRIAL?

>> ABSOLUTELY.

WE CITED THAT IN OUR BRIEF.  
MOTION IN LIMINE IT SHOULD HAVE  
BEEN FILED TO BE ON THE SAFE  
SIDE.

HOWEVER DURING THE TRIAL,  
ABSOLUTELY, WE ARGUED THAT IN  
OUR BRIEF.

HE SHOULD HAVE OBJECTED AND  
MOVED FOR A MISTRIAL.

>> WHICH WOULD HAVE, AND THEM  
TRIAL STANDARD IS, THAT IT HAS  
RENDERED THE TRIAL  
FUNDAMENTALLY UNFAIR?

>> YES, YOUR HONOR.

>> THEREFORE I GO BACK TO THE  
QUESTION I ASKED YOU BEFORE,  
WHICH IS THAT, IF A SINGLE

STATEMENT LIKE THIS CAN RENDER,  
WITHOUT, AND WAS UNHAPPY  
BECAUSE IT WENT BEYOND WHAT WAS  
IN THE POLICE REPORT, WHY  
WOULDN'T THAT BE A DIRECT  
APPEAL ISSUE THAT COULD BE  
RAISED FOR THE FIRST TIME AND,  
LOOKED AT AS FUNDAMENTAL ERROR?

>> BECAUSE, YOUR HONOR, I DON'T  
BELIEVE ENOUGH WAS ON THE  
RECORD TO FLESH OUT THE FULL  
MAGNITUDE OF WHAT HAPPENED.

WE HAD, WE HAVE TO TALK TO THE  
DEFENSE ATTORNEY TO FIGURE OUT  
WHAT'S GOING ON IN HIS HEAD,  
WHAT DOES SEE FROM THE POLICE  
REPORT.

WHAT IS HE THINKING.

THAT CAN ONLY BE FLESHED OUT  
THROUGH A EVIDENTIARY HEARING  
PURSUANT TO --

>> HOW DO YOU RESPOND TO, HOW  
DO YOU RESPOND TO, THE ARGUMENT  
THAT WAS MADE THAT THE PERHAPS,  
IT HELPED WITH REDUCED CHARGE  
OF SECOND-DEGREE MURDER?

THAT THE FACT THAT I BELIEVE  
THE RACIAL SITUATION CAME ABOUT  
IN THE SECOND BLOW, WHEN HE HIT

HER A SECOND TIME? HOW, HOW  
DOES THAT, HOW DOES THAT NOT  
COME UNTIL PLAY WITH THAT  
SECOND-DEGREE MURDER?

>> I JUST --

>> RAGE, YOU KNOW.

>> I GUESS, IT DOESN'T MAKE A  
LOT OF SENSE, THE TACTICAL  
JUDGMENT MUST ALSO BE  
REASONABLE AND, ALLOWING  
SOMETHING IN THAT YOU BELIEVE  
MIGHT BE PREJUDICIAL, BECAUSE  
YOU THINK IT MIGHT HELP A  
SECOND-DEGREE MURDER  
CONVICTION, IS SPECULATIVE AT  
BEST.

WHAT HE DOES KNOW IS THAT, IT  
IS PREJUDICIAL TESTIMONY.

>> DO WE KNOW WHAT THE  
COMPOSITION OF THE JURY WAS?

>> WE DO NOT KNOW THAT.

>> WELL, AND I'M SURE THIS  
WASN'T ASKED BUT THIS IS A  
WHITE DEFENDANT AND A BLACK  
VICTIM.

>> YES.

>> THE JURY WAS ALL WHITE.

>> YES.

>> AND WOULDN'T BE, TALKED ABOUT, BUT MAYBE THE DEFENSE LAWYER THOUGHT IT COULD HELP HIS CLIENT BECAUSE WE ALL KNOW THAT UNFORTUNATELY RACIAL PREJUDICE STILL EXISTS AND THEY NOT BE AS SYMPATHETIC. WE'RE SPECULATING.

BUT IT COULD GO EITHER WAY.

>> HE DIDN'T ARGUE THAT IN THE EVIDENTIARY HEARING.

AND ALSO --

>> WELL, NOBODY WOULD ASK HIM ABOUT THAT.

YOU DON'T KNOW THE COMPOSITION OF JURY.

>> NO, WE DON'T.

WE ALSO SHOULDN'T ASSUME WHITE JURORS IN 1999 WOULDN'T BE DISGUSTED AND FIND REPUGNANT AND RACIAL ANIMOUS ON THE PART OF A BLACK VICTIM.

MY LIGHT IS FLASHING SO --

>> SUM UP.

>> THE RACE CARD WAS PLAYED IN CASE.

THE STATE ATTORNEY INJECTED RACE UNNECESSARILY.

IT WASN'T PLAYED FROM THE

BOTTOM OF THE DECK.

IT WAS PLAYED OPEN FACE, WIDE

OPEN FOR TRIAL COUNSEL TO SEE.

TRIAL COUNSEL IGNORED IT PRIOR

TO TRIAL.

OPEN FACED COULD HAVE OBJECTED.

MOVED FOR A MISTRIAL OR MOVE TO

STRIKE.

PURSUANT TO CASE LAW I WOULD

ASK THIS COURT TO RESPECTFULLY,

GRANT MR.^SMITHERS A NEW TRIAL.

OR AT LEAST GRANT HIM A NEW

PENALTY PHASE.

I BELIEVE THAT'S ALL I HAVE.

THANK YOU VERY MUCH.

>> THANK YOU.

THANK YOU BOTH FOR YOUR

ARGUMENT.

THE COURT WILL NOW BE IN

RECESS.

>> PLEASE RISE.

SUPREME COURT IS NOW ADJOURNED.