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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 174

CALVIN L. HARRIS,

Appellant.  
-----

20 Eagle Street  
Albany, New York 12207  
September 11, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

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1 CHIEF JUDGE LIPPMAN: People v. Calvin  
2 Harris.

3 Counselor, you want any rebuttal time?

4 MR. EASTON: Two minutes, if I may, Your  
5 Honor.

6 CHIEF JUDGE LIPPMAN: Sure. Go ahead,  
7 counselor.

8 MR. EASTON: William Easton along with  
9 Brian Shiffrin for Mr. Harris.

10 Before arguing the sufficiency point, I'd  
11 like to address two legal issues, if I may.

12 CHIEF JUDGE LIPPMAN: Yes, sure.

13 MR. EASTON: First would be the jury  
14 selection issue in point 2.

15 CHIEF JUDGE LIPPMAN: Yeah, let's hear  
16 about that. Go ahead.

17 MR. EASTON: The record shows that juror  
18 number 11 stated, when pressed, that she harbored a  
19 pre-formed opinion as to the guilt or innocence as to  
20 Mr. Harris. She also expressed this opinion to  
21 others. She then responded to a general question in  
22 the questionnaire that she could be fair. Then voir  
23 dire occurred. She was given legal instructions, as  
24 a juror she must face her verdict solely on the  
25 evidence.

1 JUDGE CIPARICK: Had she never made that  
2 unequivocal statement that she could be fair - - -

3 MR. EASTON: She never made - - -

4 JUDGE CIPARICK: - - - and set aside  
5 whatever biases she might have had?

6 MR. EASTON: She never made it. She never  
7 made it after being instructed as to the law. She  
8 never made it at all. She made a general assurance  
9 of fairness before being instructed - - -

10 JUDGE CIPARICK: And defendant was  
11 compelled to use a preemptory?

12 MR. EASTON: What's that?

13 JUDGE CIPARICK: Was defendant compelled to  
14 use a preemptory?

15 MR. EASTON: Yes, and exhaust it.

16 CHIEF JUDGE LIPPMAN: So what is - - -

17 JUDGE GRAFFEO: Neither counsel asked her  
18 what the predisposition was; at least I couldn't find  
19 it in the record.

20 MR. EASTON: It wasn't in the record, Your  
21 Honor. We were instructed at that time not - - - the  
22 jurors and counsel were instructed not to inquire as  
23 to the basis of the opinions of the jurors, a group  
24 voir dire.

25 CHIEF JUDGE LIPPMAN: But basically, your

1 view is if it's not totally unequivocal that's the  
2 end of the story.

3 MR. EASTON: Certainly, Your Honor. This -  
4 - - there was - - -

5 JUDGE SMITH: Does the trial judge have any  
6 leeway in judging whether it's unequivocal or not?

7 MR. EASTON: The actual statement of a  
8 juror - - - I suppose, I don't think if a juror says  
9 - - -

10 JUDGE SMITH: I guess what I'm saying is  
11 could he have been within his discretion to say, this  
12 is - - - she said a lot of things, not everything  
13 seems to be in English, it's a little confusing, but  
14 I, on the whole, think she's assured me that she can  
15 be fair?

16 MR. EASTON: I don't think so, Your Honor,  
17 especially in the face of an assertion by the jury, I  
18 will base a portion of my verdict on my opinion - - -  
19 not my whole verdict, a portion of it.

20 CHIEF JUDGE LIPPMAN: A small part, right?

21 MR. EASTON: Yeah, a slight part. At that  
22 point - - -

23 JUDGE GRAFFEO: Are you suggesting - - -

24 MR. EASTON: - - - at the minimum, I  
25 submit, the judge has to elicit an unequivocal

1 assurance. I don't know if it - - -

2 JUDGE GRAFFEO: That was my question. You  
3 think the judge had to ask her a couple more  
4 questions, specifically, as opposed to making a  
5 general inquiry - - -

6 MR. EASTON: Yes.

7 JUDGE GRAFFEO: - - - of the panel?

8 MR. EASTON: And at least pose it to her at  
9 least - - -

10 CHIEF JUDGE LIPPMAN: Once she says - - -

11 MR. EASTON: - - - as a member of the  
12 panel.

13 CHIEF JUDGE LIPPMAN: Once she says, at  
14 least in part or small or whatever she said?

15 MR. EASTON: Yeah, she says a slight part  
16 of my verdict - - -

17 CHIEF JUDGE LIPPMAN: Right.

18 MR. EASTON: - - - will be based - - -

19 JUDGE SMITH: Wouldn't - - -

20 MR. EASTON: - - - on my opinion.

21 JUDGE SMITH: Wouldn't any - - - wouldn't  
22 almost any juror with real insight and self-knowledge  
23 have to say that? Of course - - - all our  
24 preconceived notions always have some effect on us.

25 MR. EASTON: She's a candid juror, Your

1 Honor, and I - - -

2 JUDGE SMITH: Wouldn't you rather have  
3 somebody with that much self-knowledge rather than  
4 the typical one that says, oh, no, I don't care about  
5 everything. I can be totally fair; it doesn't bother  
6 me a bit.

7 MR. EASTON: Perhaps, but she responded to  
8 the repeated inquiries that it was going to be a  
9 portion. And Mr. Harris was entitled to a jury  
10 composed of jurors that would base its - - -

11 CHIEF JUDGE LIPPMAN: So it's poss - - -

12 MR. EASTON: - - - verdict solely on it.

13 CHIEF JUDGE LIPPMAN: It's possible that if  
14 the judge went further, she still might have been all  
15 right on the theory, again, that Judge Smith has just  
16 asked you, that people do have preconceived opinions  
17 and sometimes they can put them aside, sometimes they  
18 can't, and kind of an intelligent juror might say,  
19 gee, I have it there, whatever. The judge would have  
20 had to go further in order to make her an acceptable  
21 juror, is that - - -

22 MR. EASTON: At the very - - -

23 CHIEF JUDGE LIPPMAN: - - - what you're  
24 saying?

25 MR. EASTON: At the very least, the judge

1 had to elicit that unequivocal assurance.

2 JUDGE GRAFFEO: But that would have singled  
3 her out somehow. Would that have caused a problem?

4 MR. EASTON: I don't think so.

5 JUDGE GRAFFEO: I guess I'm - - - I guess  
6 I'm asking you what is it that the judge would have  
7 asked her.

8 MR. EASTON: He - - -

9 JUDGE GRAFFEO: You know, I'm looking at  
10 your questionnaire and I have a problem with one of  
11 your answers. I mean, you don't want to antagonize a  
12 prospective juror.

13 MR. EASTON: Well, after she had said in  
14 voir dire that I will base my verdict - - - a portion  
15 of my verdict will be based on my preconceived  
16 opinion, the judge at that point has to elicit an  
17 unequivocal assurance - - -

18 CHIEF JUDGE LIPPMAN: So if he had said to  
19 her - - -

20 MR. EASTON: - - - that she'll base it  
21 solely on the evidence.

22 CHIEF JUDGE LIPPMAN: - - - I hear you, but  
23 you understand that you have to - - - in order for  
24 you to serve on this jury, you have to tell me  
25 unequivocally that you can be fair. In light of

1 that, what you just said, can you unequivocally be  
2 fair? That kind of thing - - -

3 MR. EASTON: Yes.

4 CHIEF JUDGE LIPPMAN: - - - would be what  
5 he'd have to do?

6 MR. EASTON: Yes. And it's a simple  
7 extrapolation from this court's rulings from Culhane  
8 on that that bright line has to be - - -

9 CHIEF JUDGE LIPPMAN: But if she says yes  
10 at that point, it might have been okay.

11 MR. EASTON: That might be necessary, not  
12 sufficient, she's saying yes, and then we could look  
13 at the whole record of - - -

14 CHIEF JUDGE LIPPMAN: Right.

15 MR. EASTON: - - - what - - -

16 CHIEF JUDGE LIPPMAN: But it's conceivable  
17 if she said, yeah, I'm just saying that I did have an  
18 opinion but yeah, absolutely I could - - - that might  
19 be okay.

20 MR. EASTON: If she says yes, despite - - -  
21 I'll set that aside, there won't be any question - -  
22 -

23 CHIEF JUDGE LIPPMAN: Right, okay.

24 MR. EASTON: - - - and what I said before  
25 ignore - - -

1                   JUDGE SMITH: Is it relevant - - - I mean,  
2 as I read the discussion of this juror on the record,  
3 it was a little while after the actual questions and  
4 answers and it seemed like nobody was perfectly or  
5 correctly recalling what she had said. The argument  
6 that you're now making, you didn't make it absolutely  
7 - - - I mean, as no one ever has - - - you didn't  
8 make it quite as clearly then as you do now. Does  
9 that - - - I mean, suppose the judge had just - - -  
10 he didn't have a transcript in front of him, didn't  
11 remember it precisely and you didn't either, is it  
12 really fair to reverse this case because of that?

13                   MR. EASTON: Well, the judge had the option  
14 then of - - - the juror was still out, we were in an  
15 anteroom. The judge could have brought the juror in  
16 or questioned the juror. The district attorney could  
17 have asked him to do it. But at that point, the  
18 cause challenge is pretty clear.

19                   JUDGE SMITH: And I guess what I'm saying  
20 is, I mean, I see this judge sitting there; in his  
21 recollection he thought she was pretty unequivocal.  
22 Nobody is quoting to him verbatim the words which you  
23 are now quoting. Why should he be - - - you know,  
24 why is he bound now by the fact that now when you  
25 read it over with a beady eye, it's a little tougher.

1 MR. EASTON: Well, I mean, she said it four  
2 times that it was - - - it was a slight portion. I  
3 think the - - -

4 JUDGE SMITH: That was under your  
5 questioning, wasn't it?

6 MR. EASTON: It was under my questioning,  
7 Your Honor.

8 JUDGE SMITH: You did it very well, I've  
9 got to tell you, but - - -

10 MR. EASTON: But Your Honor, it was - - - I  
11 think what was drawing the judge away from it was her  
12 insisting it would be a slight portion. And that, I  
13 think, colored the judge's perception. She just said  
14 slight. He - - -

15 JUDGE SMITH: I'm making, perhaps, a picky  
16 point. You did not quote those words to the judge at  
17 the moment that you were arguing this.

18 MR. EASTON: I certainly didn't, Your  
19 Honor, and if I had a better memory I would have.  
20 But I didn't have a transcript in front of me,  
21 either. But I did make that cause challenge clear  
22 and I renewed it again.

23 CHIEF JUDGE LIPPMAN: What about the  
24 hearsay issue with the sisters?

25 MR. EASTON: Oh, Your Honor, that - - -

1           there's - - - the hearsay issue with the sisters  
2           leads into the other argument I have. The hearsay  
3           issue with the sisters was there was hearsay. The  
4           sisters-in-law relayed a conversation that occurred  
5           in March, word-for-word, and that was concededly  
6           hearsay. We'd had a first trial. We'd had pre-trial  
7           rulings. It was hearsay. At the second trial, that  
8           March conversation came into evidence over objection.  
9           And it was certainly hearsay. It came in to provide  
10          context to the defendant's reaction to being  
11          confronted with what he said his sister said he - - -

12                        CHIEF JUDGE LIPPMAN: Well, what should  
13          have the judge done in that circumstance?

14                        MR. EASTON: Well, the judge should have  
15          said - - -

16                        CHIEF JUDGE LIPPMAN: Could he have let it  
17          in and limited it? What could he have done?

18                        MR. EASTON: I think he should have let out  
19          the March - - - I mean, excluded the March - - - the  
20          conversation had nothing to do with the defendant's  
21          reaction to being confronted. If he was confronted  
22          with "Isn't it a fact you killed someone else in  
23          March?", something that was his fault, it didn't  
24          matter whether it was true or false, his reaction was  
25          in front of the jury, not the truth or falsity of the

1 hearsay statement months earlier.

2 JUDGE SMITH: But what practical difference  
3 - - - I mean, if I say to you, Judge Jones says you  
4 killed somebody last - - - says you admitted to him  
5 killing somebody last week, and you say to me, well,  
6 I said that but I didn't mean it, doesn't that sort  
7 of - - - yeah, no doubt Judge Jones' statement is  
8 hearsay, but isn't the impact pretty much the same as  
9 if the hearsay didn't come in?

10 MR. EASTON: There's an impact. I don't  
11 think it's quite the same as Judge Jones coming in  
12 and testi - - - or Judge Jones saying, as a matter of  
13 fact, I told Judge Jones that. It's isn't it a fact  
14 Judge Jones said - - - being confronted to it is a  
15 fundamentally different proposition than actually - -  
16 - it actually occurring. And when you're asked isn't  
17 it true that this conversation occurred in March,  
18 which was a pivotal statement, and that comes in for  
19 its truth, despite the limiting instructions, that is  
20 certainly a hearsay violation.

21 JUDGE SMITH: Why do you mean it came in  
22 for its truth despite the limiting instruction?

23 MR. EASTON: Because the limiting  
24 instruction was you can consider it in context of the  
25 - - -

1 JUDGE SMITH: You're saying the limiting  
2 instruction wasn't good enough?

3 MR. EASTON: Right, and it was the repeated  
4 - - - repeated requests to say it's not coming in for  
5 its truth that were denied.

6 I think the hearsay issue involving the  
7 March statement, I think gains additional  
8 significance and irony; certainly bitter irony for  
9 Mr. Harris, is the exclusion of the affidavit of John  
10 Steele, which was excluded as hearsay. And the  
11 exclusion of Mr. Steele's statements, and as the  
12 affidavit in our - - - it's our position, violated  
13 New York evidentiary rules and denied Mr. Harris his  
14 fundamental right to present a defense. And the  
15 initial statement of Steele was a letter to the Judge  
16 saying I - - - it was seeing Michele Harris at a  
17 place where it at least severely compromises, if not  
18 eliminated the prosecution's case; she was seen about  
19 5 or 6 in the morning - - -

20 JUDGE SMITH: And - - -

21 MR. EASTON: - - - outside of where - - -

22 JUDGE SMITH: - - - at the end of a  
23 driveway in this rather lonely wooded area, right?

24 MR. EASTON: On a public road, but at the  
25 end of a - - -

1                   JUDGE SMITH: I guess what I'm - - - am I  
2 being too cynical to say weren't there a rather  
3 startling number of passers by wandering by just at  
4 that moment?

5                   MR. EASTON: Well, Your Honor, it's a car -  
6 - - I mean, it's a road, it's early morning hours.  
7 There's four witnesses that testified for the  
8 prosecution as driving down that road.

9                   JUDGE PIGOTT: What was Tubbs doing at that  
10 time? I forget. Was he - - -

11                   MR. EASTON: He was hauling hay.

12                   JUDGE PIGOTT: He was hauling hay. So he -  
13 - -

14                   JUDGE READ: Yeah.

15                   JUDGE PIGOTT: He made some sense. I guess  
16 he was going to feed the cows or something.

17                   JUDGE READ: Would you - - -

18                   MR. EASTON: He was hauling hay back. I  
19 mean, one of the extraordinary - - - one of the many  
20 extraordinary facts about this case was it was 9/11,  
21 it was a day - - - it was 9/11, the evening of 9/11.  
22 People knew where they were. And this case was of  
23 such high publicity and high - - -

24                   JUDGE READ: Are you going to talk about  
25 your sufficiency argument a little bit?

1 MR. EASTON: No, I'm talking - - - well, I  
2 think we're talking about the reliability of the  
3 Steele affidavit.

4 JUDGE READ: Steele affidavit?

5 JUDGE SMITH: I think she wants you to get  
6 off of that, but may I keep you on it for one more  
7 second? Oh, I'm sorry, you've only got a minute. Go  
8 ahead.

9 CHIEF JUDGE LIPPMAN: Well, do them both.  
10 Go ahead, Judge Smith, and then Judge Read will get  
11 this.

12 JUDGE SMITH: Okay. The point I was trying  
13 to make is can't the judge, in deciding that he's  
14 going to let in this hearsay under the hearsay  
15 exception, pretty much everything is fair game. And  
16 if he says, gee, you know, this just doesn't smell  
17 right to me, doesn't look good, these strangers who  
18 show up years after the trial to say, oh, yeah, I  
19 just happened to be there at the time of the murder,  
20 I don't think it's reliable enough to get in. Can he  
21 do that?

22 MR. EASTON: If there's reasons why it's  
23 not reliable, certainly. It's - - - I think to  
24 implicate a defendant's right to present a defense  
25 has to be highly relevant, go to a material element

1 and bear assurances of reliability. But I think  
2 reliability, as this Court's made clear in Robinson,  
3 is a different concept than credibility.

4 JUDGE SMITH: What's - - - tell me the  
5 difference in thirty seconds.

6 MR. EASTON: Reliability, I believe, would  
7 attach to the issue - - - the circumstances of the  
8 utterance. Was a statement issued? Did the  
9 declarant have competent knowledge? Is it what it  
10 purports to be? And in this case it certainly is.  
11 It's a sworn affidavit, there was a letter to the  
12 judge, and he did have a basis for competent  
13 knowledge, driving down a highway, and it was  
14 corroborated by the - - -

15 CHIEF JUDGE LIPPMAN: Okay, counsel, let's  
16 have Judge Read - - -

17 JUDGE READ: No, I just - - -

18 JUDGE PIGOTT: Judge Read, yeah.

19 JUDGE READ: Yeah, I - - - you've run out  
20 of time, but I just wanted to know what you  
21 considered to be a few strongest points on the  
22 insufficient evidence - - - the insufficiency of the  
23 evidence. I mean, there was DNA evidence, right?

24 MR. EASTON: There was DNA evidence from  
25 blood, but that was blood of an extremely small

1 volume and of indeterminate age in the residence of  
2 the victim.

3 JUDGE READ: And what else was there?

4 MR. EASTON: There was - - -

5 JUDGE READ: You said that's not enough, so  
6 - - -

7 MR. EASTON: Well, there was motive and  
8 intent and there was blood. And we would say the  
9 motive and intent would not be enough in this case  
10 without a body or an explanation as - - -

11 JUDGE SMITH: Okay, but you've - - -

12 JUDGE GRAFFEO: But could the jury not  
13 consider his behavior after the crime?

14 MR. EASTON: It could, but I think that's  
15 consciousness of guilt evidence and it's very weak  
16 evidence as a genre, and in this case it's  
17 particularly weak.

18 CHIEF JUDGE LIPPMAN: Okay, counselor,  
19 let's hear from your adversary and then we'll have  
20 you back on the griddle for the rebuttal.

21 MR. EASTON: Thank you.

22 CHIEF JUDGE LIPPMAN: Okay. Counsel?

23 JUDGE CIPARICK: This was a purely  
24 circumstantial case, counsel - - -

25 MR. KEENE: Pardon me, ma'am?

1 JUDGE CIPARICK: Purely circumstantial,  
2 this case. I mean - - -

3 MR. KEENE: Oh, the case is definitely  
4 purely circumstantial.

5 JUDGE CIPARICK: You're asking the jury to  
6 draw inferences - - -

7 CHIEF JUDGE LIPPMAN: What's enough that  
8 they can do that? What evidence is there that allows  
9 them - - -

10 MR. KEENE: The evidence - - -

11 CHIEF JUDGE LIPPMAN: I think that's what  
12 Judge Ciparick is asking.

13 JUDGE CIPARICK: Yes.

14 MR. KEENE: I think that the people are  
15 entitled to the benefit of every reasonable inference  
16 to be drawn from the evidence, and the evidence - - -

17 CHIEF JUDGE LIPPMAN: So what is the - - -

18 JUDGE CIPARICK: What is the - - -

19 CHIEF JUDGE LIPPMAN: - - - high points of  
20 - - -

21 MR. KEENE: Okay.

22 CHIEF JUDGE LIPPMAN: - - - what gives them  
23 that - - -

24 MR. KEENE: Strong evidence - - -

25 CHIEF JUDGE LIPPMAN: - - - ability to

1 infer here.

2 MR. KEENE: Strong evidence of motive;  
3 intent, a threat that he had made to her that was  
4 overheard by her hairdresser; opportunity, they live  
5 out in the middle of nowhere. She had just told her  
6 boyfriend that she was going home, and in fact, her  
7 car was found there at the end of her driveway; a  
8 consciousness of guilt evidence; and the blood  
9 evidence in this case was just - - -

10 CHIEF JUDGE LIPPMAN: Well, it's very thin,  
11 the blood evidence - - -

12 MR. KEENE: Well, no, it was - - -

13 CHIEF JUDGE LIPPMAN: - - - literally and  
14 figuratively, no?

15 MR. KEENE: It was very strong evidence,  
16 Judge, because what all the experts agreed on was  
17 that it was blood spatter, that there were fourteen  
18 DNA matches to Michele Harris, that the blood was red  
19 and - - -

20 JUDGE READ: Did they?

21 MR. KEENE: - - - the expert witnesses  
22 testified that blood changes from red to a darker red  
23 to a brown to a black, and the forensic man from the  
24 state police, Steve Anderson, testified that the  
25 blood that he observed was red. And the testimony -

1 - -

2 JUDGE SMITH: That - - - as I understand  
3 it, it was not fresh but it was recent at the time  
4 they observed it - - -

5 MR. KEENE: That's correct.

6 JUDGE SMITH: - - - which was September 14,  
7 or something like that.

8 MR. KEENE: And that's what Dr. Henry Lee's  
9 testimony was, that the blood would look like this  
10 after - - -

11 JUDGE SMITH: Yeah, he also said, and it  
12 puzzled me, that the blood on the rug was not recent,  
13 that it was old, except for the one one-square inch  
14 stain. I couldn't make sense out of it, what  
15 inference - - -

16 MR. KEENE: What happened - - -

17 JUDGE SMITH: - - - could you draw from  
18 that?

19 MR. KEENE: What happened there, Judge, was  
20 that when the state police went in, the first few  
21 investigators in didn't see anything. It wasn't  
22 until September 14th that they first saw blood, went  
23 and got a search warrant, came back on September  
24 15th, and started gathering evidence. Because this  
25 throw rug was in the area where they saw blood, they

1 just gathered up the rug and sent it off to the crime  
2 lab, so no one really looked at the rug - - -

3 JUDGE SMITH: Oh, so it was old by the time  
4 they looked at it.

5 MR. KEENE: It was old by the time they  
6 looked at it.

7 JUDGE SMITH: But the transfer stain was  
8 still recent, he said, or did I misread that?

9 MR. KEENE: No, the transfer stain was not  
10 still recent, Judge. It was - - -

11 JUDGE PIGOTT: Mr. Keene, I don't know if  
12 this is the record or not, but it was troubling to  
13 me. When Mr. Steele wrote to the court, why wouldn't  
14 he have given that to you and to the defense, as  
15 opposed to just mailing it back - - - I mean, you had  
16 somebody there that, it seemed, had some pretty  
17 important evidence with respect to a very high  
18 profile case.

19 MR. KEENE: Right.

20 JUDGE PIGOTT: And if I'm understanding  
21 this right, without telling anybody, he just mailed  
22 it back to this witness.

23 MR. KEENE: He - - -

24 JUDGE PIGOTT: Because if you had gotten it  
25 - - - as I read it, he said "we" in many spots, so it

1           wasn't just him, who subsequently died, but whoever  
2           was in the vehicle with him would have been a  
3           witness.

4                       MR. KEENE:   Right.

5                       JUDGE PIGOTT:   And you would have had an  
6           opportunity, regardless of whether they say they want  
7           to keep it secret or not, to subpoena them and order  
8           them to disclose.

9                       MR. KEENE:   Yes, it was very strange the  
10          way that happened, Judge.  He sent a letter to the  
11          first judge in the case, Judge Sgueglia, and Judge  
12          Sgueglia forwarded it on to Judge Smith, who actually  
13          sat on the case and later vacated the verdict.  We  
14          became aware of that letter, asked for a copy of it,  
15          and Judge Smith refused to provide it to us.  And so  
16          yes, we would have been very interested in talking to  
17          this witness.  In the first letter that he sent to  
18          the court he didn't say anything about the fact that  
19          this person that was with him had died, and then  
20          later on, he - - -

21                      JUDGE PIGOTT:   Yeah, that was later on,  
22          right?

23                      MR. KEENE:   - - - he said in an affidavit,  
24          oh, by the way, that person is dead.  So there were  
25          all kinds of things about his - - -

1 JUDGE SMITH: Weren't you offered some kind  
2 of opportunity to talk to him on an anonymous basis?

3 MR. KEENE: They did - - - yes, they did  
4 offer that opportunity, Judge, but we didn't see what  
5 benefit there would be in a telephone conversation  
6 talking to some anonymous person when we couldn't  
7 really check it out.

8 JUDGE SMITH: What harm? I mean, the  
9 benefit, obviously, is you find out - - - is that you  
10 talk to him and get an impression as to whether he's  
11 a real witness or a three-dollar bill. Why not do  
12 it?

13 MR. KEENE: Yeah, I guess maybe in  
14 hindsight we could've done it and we should've done  
15 it, but we - - -

16 JUDGE GRAFFEO: Could you have asked for a  
17 deposition with him with - - -

18 MR. KEENE: I don't think there's anything  
19 under the criminal procedure law that would allow for  
20 something like that, Judge.

21 JUDGE PIGOTT: No, but you could have sent  
22 a cop - - - I mean, you could have sent somebody and  
23 said, you know - - -

24 MR. KEENE: Oh, yeah, I could have - - -

25 JUDGE PIGOTT: Yeah.

1 MR. KEENE: I could have had an  
2 investigator.

3 JUDGE CIPARICK: An investigator.

4 MR. KEENE: But they wouldn't identify him  
5 so there was no way that we could do any kind of a  
6 deposition or even a statement from him.

7 JUDGE GRAFFEO: You couldn't send anybody  
8 out to get a statement?

9 JUDGE PIGOTT: But isn't that - - - I mean,  
10 that's evidence. I mean, they can't hide evidence.  
11 I mean, I would think you'd send a trooper to Mr.  
12 Easton's - - -

13 MR. KEENE: Well, you know, that's what I -  
14 - -

15 JUDGE PIGOTT: - - - office.

16 MR. KEENE: - - - that's what I said to  
17 Judge Smith. I said, you know, Your Honor, this is  
18 ex parte communication.

19 JUDGE PIGOTT: Yeah.

20 MR. KEENE: We should be aware of this, we  
21 would like to investigate this. And the response was  
22 that he had no responsibility to give me this  
23 information - - -

24 JUDGE PIGOTT: That being - - -

25 MR. KEENE: - - - and wouldn't.

1                   JUDGE PIGOTT: That being the case, I  
2                   didn't - - - it seemed to me that the cross-  
3                   examination of Tubbs about this money - - -

4                   MR. KEENE: Right.

5                   JUDGE PIGOTT: - - - which everybody says  
6                   was a joke, didn't that open the door to somehow  
7                   attempting to show that he was telling the truth, and  
8                   whether this was a joke or not, the jury heard that  
9                   there was some talk about bags of money, that this  
10                  wouldn't have come in as some evidence that Tubbs was  
11                  telling the truth, whether this one is true or not,  
12                  but it was a second person who claims the same thing.

13                  MR. KEENE: Yeah, I think that the  
14                  affidavit from Mr. Steele was so unreliable, Your  
15                  Honor, that there's - - - I just can't imagine - - -

16                  JUDGE PIGOTT: Doesn't that go to weight?

17                  MR. KEENE: Pardon me?

18                  JUDGE PIGOTT: Doesn't that go to weight?  
19                  In other words, you've got Tubbs; Tubbs says I saw  
20                  what I saw. You say, yeah, but isn't it true that  
21                  you were being told you were going to get money and  
22                  then that comes out that that was just a big joke by  
23                  the police chief.

24                  MR. KEENE: Right.

25                  JUDGE PIGOTT: All right. So that probably

1           should have been asked. I'm not blaming you - - -

2                   MR. KEENE: Okay.

3                   JUDGE PIGOTT: - - - but I mean, it's clear  
4           that that was a subter - - - not a subterfuge, but it  
5           shouldn't have been there. So now you've got Tubbs  
6           undermined by that kind of questioning. What's wrong  
7           with saying and by the way, there's somebody else who  
8           made a similar statement, whether you believe it or  
9           not, as - - -

10                   MR. KEENE: Because I - - -

11                   JUDGE PIGOTT: - - - people say where  
12           there's smoke there's fire sometimes.

13                   MR. KEENE: Because I think it's just  
14           absolute rank hearsay, Your Honor, that doesn't come  
15           under any exceptions to the hearsay rule. Mr. Easton  
16           acknowledged that when - - -

17                   JUDGE PIGOTT: Right.

18                   MR. KEENE: - - - Judge Smith asked him  
19           that.

20                   JUDGE PIGOTT: But I mean, I'm trying to  
21           get you to think for me.

22                   MR. KEENE: Yeah.

23                   JUDGE PIGOTT: It just seems to me that if  
24           you undermine a fact witness by - - - forgive me, by  
25           extraneous evidence, I mean, evidence that never



1 MR. KEENE: Yeah, I guess it is. I guess  
2 that goes more to, you know, what we - - -

3 JUDGE SMITH: What is the judge allowed to  
4 - - - your opponent's relying on basically a hearsay  
5 or - - - either a hearsay exception or a  
6 Constitutional rule that says if it's really, really  
7 good, important stuff the hearsay rule doesn't count.  
8 I mean, is the judge allowed to basically weigh  
9 everything in trying to assess that or is there some  
10 distinction between reliability and credibility?

11 MR. KEENE: I don't know - - - I don't  
12 think there was anything reliable about this  
13 statement.

14 JUDGE SMITH: Is there - - - I mean,  
15 suppose - - - I can understand you saying there's  
16 nothing credible about it. Is it the same thing to  
17 say there's nothing reliable or is there a  
18 difference, and what's the difference?

19 MR. KEENE: I'm not sure what that  
20 difference is, Judge. To be honest with you, I'm not  
21 following you.

22 CHIEF JUDGE LIPPMAN: Counselor, switch  
23 gears. What about the juror?

24 MR. KEENE: The juror is - - -

25 CHIEF JUDGE LIPPMAN: Do you want an



1 Judge, if that's the way that the procedure works in  
2 a criminal trial, I was unaware of that, because I  
3 thought the prosecution goes first, you ask your  
4 questions, you sit down, the defense asks their  
5 questions, they sit down. If the judge has any  
6 questions, he can ask questions afterwards, but I  
7 wasn't aware that I could get up and ask that juror  
8 any more questions.

9 JUDGE PIGOTT: They don't let you do that?

10 MR. KEENE: I'm glad I learned it.

11 CHIEF JUDGE LIPPMAN: Don't you think the  
12 judge should have asked more questions - - -

13 MR. KEENE: I don't - - -

14 CHIEF JUDGE LIPPMAN: - - - in any event?

15 MR. KEENE: I don't think so, Judge,  
16 because - - -

17 CHIEF JUDGE LIPPMAN: But we know there has  
18 to be an unequivocal statement of fairness.

19 MR. KEENE: Yeah, and here's what I - - -

20 CHIEF JUDGE LIPPMAN: But I can be fair - -  
21 -

22 MR. KEENE: Here's what I think about - - -

23 JUDGE CIPARICK: Unless you're sort of  
24 trying to - - -

25 MR. KEENE: - - - about that, Judge.

1 JUDGE CIPARICK: - - - rehabilitate.

2 MR. KEENE: The cases break down into  
3 basically two categories. You have one category of  
4 cases where a potential juror says that I want to  
5 hear from the defendant or I have a problem with the  
6 presumption of innocence or I'm biased towards blacks  
7 and this defendant is black.

8 CHIEF JUDGE LIPPMAN: Or I have a pre-  
9 opinion on this case and it's going to stay with me  
10 and I can't get it out of my head.

11 MR. KEENE: But the cases talk about a  
12 predisposition as to the defendant's guilt, and in  
13 this case - - -

14 JUDGE SMITH: Well, the word - - - you're  
15 right, the word "verdict" isn't there. The word  
16 "consider" is there. It's the juror says:

17 "I'm saying that how I feel opinion-wise  
18 won't be all of what I consider if I'm on the  
19 jury.

20 "MR. EASTON: It's not all of what you'll  
21 consider?

22 "A JUROR: No.

23 "MR. EASTON: Is it a part of what you'll  
24 consider?

25 "A JUROR: A slight part.

1                   "MR. EASTON:  So it's there and you know  
2                   it's there?

3                   "A JUROR:  Right."

4                   The question is, doesn't that require  
5                   somebody to come back and say look, you've got to  
6                   promise me you can be fair?

7                   MR. KEENE:  I don't think so, Judge,  
8                   because - - -

9                   JUDGE GRAFFEO:  Isn't our case law pretty  
10                  clear that you need to get the unequivocal assurance?  
11                  I mean, I think we've used that phrase dozens of  
12                  times - - -

13                  MR. KEENE:  You do - - -

14                  JUDGE GRAFFEO:  - - - in our cases.

15                  MR. KEENE:  - - - but the way I under - - -  
16                  the way I read your decision in Chambers and in some  
17                  of the other cases is that there has to be a serious  
18                  doubt as to the ability of that juror to be  
19                  impartial, and I don't think that conversation  
20                  between Mr. Easton and the juror really raises a  
21                  serious doubt.  I know it's splitting hairs but - - -

22                  CHIEF JUDGE LIPPMAN:  Why, because she said  
23                  - - -

24                  JUDGE GRAFFEO:  Partial?

25                  CHIEF JUDGE LIPPMAN:  - - - small or

1 partial, whatever she said or slim or whatever the  
2 word was? Is that why it doesn't raise a serious  
3 doubt?

4 MR. KEENE: I think it's because she never  
5 - - -

6 CHIEF JUDGE LIPPMAN: If she had said,  
7 well, most of my decision would be on that, but I  
8 could be fair otherwise, but that, you'd agree, is  
9 another case.

10 MR. KEENE: Right.

11 CHIEF JUDGE LIPPMAN: Is it because she  
12 said "slight" or "small" or whatever it was?

13 MR. KEENE: I think that's part of it,  
14 Judge, but I think what it really goes to is that in  
15 order for her to be challenged for cause she has to  
16 have a state of mind that is likely to preclude her  
17 from rendering an impartial verdict based upon the  
18 evidence introduced at the trial, and I don't think  
19 that that exchange between Mr. Easton and that juror  
20 showed - - -

21 JUDGE JONES: How would you know that  
22 without further inquiry? That's the point.

23 MR. KEENE: Pardon me, Judge?

24 JUDGE JONES: How would you know that  
25 without asking additional questions?

1 MR. KEENE: You wouldn't - - - you wouldn't  
2 know, you would - - - but what the statute says is  
3 that it's likely to preclude her, and that doesn't  
4 show - - - I think it's his responsibility - - -

5 JUDGE SMITH: Are you saying that - - -

6 MR. KEENE: - - - if he wants to make a  
7 record for the fact that this juror should be  
8 challenged for cause, the defense should make a  
9 record for that and not just plant a few little seeds  
10 and then move on - - -

11 JUDGE SMITH: Aren't you really saying that  
12 some of our cases, like maybe Cahill, go beyond the  
13 statute, that we should back off on some of this,  
14 that it's - - -

15 MR. KEENE: Yes - - -

16 JUDGE SMITH: - - - asking too much of a  
17 judge to do every one perfectly?

18 MR. KEENE: Yes, I think they do, Judge. I  
19 think - - - and in this case you had the juror saying  
20 twice in her sworn questionnaire that she could be  
21 fair and impartial. And like the judge said, he  
22 didn't hear anything from her that would indicate  
23 that she could not be fair - - -

24 CHIEF JUDGE LIPPMAN: But yet our - - -

25 MR. KEENE: - - - and impartial.

1 CHIEF JUDGE LIPPMAN: - - - our cases are  
2 so clear in using that word "unequivocal".

3 MR. KEENE: Yeah.

4 CHIEF JUDGE LIPPMAN: How do you square  
5 that - - - I see your point. I understand - - -

6 MR. KEENE: Yeah.

7 CHIEF JUDGE LIPPMAN: - - - likely to, et  
8 cetera, but how do you square what you're saying with  
9 this over and over again - - -

10 MR. KEENE: I - - - I think - - -

11 CHIEF JUDGE LIPPMAN: - - - unequivocal.

12 MR. KEENE: - - - it's the facts of this  
13 case, Judge, that make - - -

14 CHIEF JUDGE LIPPMAN: That make it  
15 unequivocal?

16 MR. KEENE: Yes.

17 CHIEF JUDGE LIPPMAN: Even with her say - -  
18 -

19 MR. KEENE: If you - - -

20 CHIEF JUDGE LIPPMAN: Even with her saying,  
21 well, at least to a slight degree or some degree I'd  
22 consider it, that could still be unequivocal  
23 statement of fairness?

24 MR. KEENE: Yes.

25 CHIEF JUDGE LIPPMAN: Even in that context

1 where there's this well, a small part of it is, you  
2 know - - -

3 MR. KEENE: Yeah, yeah. No, I mean, I  
4 agree that you don't want a juror that's got even a  
5 slight opinion sitting on a jury if she can't  
6 disregard that opinion during deliberations. And  
7 that's what - - -

8 JUDGE PIGOTT: But you were all concerned -  
9 - -

10 MR. KEENE: And that's what our whole  
11 process is about. But if that's what he wants to  
12 argue, then let him show that in the exchange that he  
13 has with the juror. Let him say to her, could you  
14 set that opinion aside or not?

15 JUDGE PIGOTT: This was such a high  
16 visibility case, I assume it was bothering everybody  
17 that - - - because I mean there was several venue  
18 motions and this is the second trial and - - -

19 MR. KEENE: Yes.

20 JUDGE PIGOTT: - - - everybody, I suppose,  
21 in town knew that this case was coming.

22 MR. KEENE: Yes.

23 JUDGE PIGOTT: So the question was to try  
24 to get - - -

25 MR. KEENE: Right.

1 JUDGE PIGOTT: - - - somebody that could be  
2 unequivocal.

3 JUDGE SMITH: Even though you're out of  
4 time, could you spend a couple of minutes on the  
5 sister-in-law hearsay?

6 MR. KEENE: On which, Judge?

7 JUDGE SMITH: The sister-in-law hearsay,  
8 the testimony by the two - - - by the sisters-in-law  
9 - - -

10 MR. KEENE: Oh, the hearsay issue?

11 JUDGE SMITH: Yes.

12 MR. KEENE: I think that on that, the way  
13 the witness, Mary Jo Harris, related that  
14 conversation to the jury, there was no other way to  
15 do it. There was no getting around - - -

16 JUDGE SMITH: Weren't they entitled at  
17 least to a limiting instruction?

18 MR. KEENE: I think they did get a limiting  
19 instruction from the court. It may not have been in  
20 the exact language that - - -

21 JUDGE SMITH: Why couldn't the judge say do  
22 not consider that for its truth?

23 MR. KEENE: Well, he could have said that;  
24 he could have said that, Judge, but he must have  
25 decided that the way he gave the instruction was a

1 lot more meaningful to a juror than saying you can't  
2 consider this for its truth, you can only consider it  
3 for the way Mr. Harris reacted to it. And basically  
4 that is what his instruction was, that consider that  
5 testimony insofar as the conversation that took place  
6 in Cooperstown in the way that Mr. Harris reacted to  
7 the allegation. And eventually he adopted those  
8 hearsay statements by saying, well, I might have said  
9 something like that but I didn't mean I was going to  
10 kill her.

11 CHIEF JUDGE LIPPMAN: Okay, counselor,  
12 thanks.

13 MR. KEENE: Thank you.

14 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

15 MR. EASTON: Yes, Your Honor. Briefly, the  
16 statement from Steele, the affidavit, we think is - -  
17 - it is reliable under any test. And one of the  
18 tests of reliability would be it mirrors a  
19 declaration against interest. It may be not a  
20 declaration against pecuniary issue, per se, or penal  
21 interest, but it was a declaration against his  
22 marital interest. And he knew it. He knew it at the  
23 time he wrote the letter to the judge. He knew it at  
24 the time that he signed the affidavit.

25 Secondly, as to Judge Pigott's concern,

1 last term, this court, in People v. Reed, addressed  
2 the opening the door by the defense regarding  
3 confrontation clause, otherwise inadmissible  
4 evidence. And the door here was clearly opened and  
5 the prosecution was on notice in the motion regarding  
6 the Steele affidavit that if they were to pursue  
7 Tubbs as a rogue witness or an outlier witness, we  
8 would hold that as being on open door.

9 JUDGE SMITH: But opening the door doesn't  
10 usually get in hearsay.

11 MR. EASTON: It - - -

12 JUDGE SMITH: I mean, opening the door is  
13 essentially a relevancy rule, isn't it?

14 MR. EASTON: It is, but the Reed case, I  
15 think, of this court last term, is squarely on point  
16 that the confrontation clause - - - confrontation  
17 clause violative evidence came in on door opening,  
18 and this is just the same - - -

19 JUDGE SMITH: Well, there's no  
20 confrontation clause problem; this wasn't  
21 testimonial, wasn't it?

22 MR. EASTON: No, this was - - - no, I'm not  
23 saying that, but otherwise inadmissible evidence was  
24 - - - the door was opened by the conduct of the  
25 parties.

1                   Secondly, Your Honor, the blood on the rug,  
2                   I think I'd like to address that. It was dark and  
3                   black. Mr. Keene has mentioned, well, it was  
4                   gathered by a technician right under the situs of the  
5                   five small stains. It was examined and that  
6                   technician was looking for red stains; it didn't find  
7                   them. It was only found to be stains on it months  
8                   later. They were dark brown to black; no one could  
9                   age them, and there is no evidence in this record  
10                  that they relate to the - - -

11                  JUDGE SMITH: Does - - - anyone have a  
12                  theory as to what the transfer stain was from?

13                  MR. EASTON: No, it's a seven-eighths by  
14                  seven-eighths square, a half inch square, it couldn't  
15                  - - - we couldn't conceive of a weapon that could  
16                  leave that. We were hypothesizing it could be a  
17                  Band-Aid pad, a high heel, but no one has come up  
18                  with what that could be.

19                  CHIEF JUDGE LIPPMAN: Okay, counsel.

20                  MR. EASTON: Thank you.

21                  CHIEF JUDGE LIPPMAN: Thank you both.

22                  (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of People v. Calvin L. Harris, No. 174 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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