

# Jury Room at Center of Fight Over New Trial

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A federal prisoner convicted of capital murder and sentenced to death for killing another inmate has filed a motion for new trial after a U.S. district judge made an unusual decision to dismiss a juror during deliberations.

But the defense and prosecution disagree over what happened during those deliberations.

In his Oct. 21 motion in *United States v. Joseph Ebron*, Ebron alleges that U.S. District Judge Marcia Crone of Beaumont erred by dismissing juror Brittany Johnson, who was "a holdout juror because she found the government's evidence insufficient." Ebron also alleges in the motion that Johnson was being harassed by fellow jurors for that view.

Ebron was convicted for killing Keith Barnes, a fellow prisoner in the Federal Correctional Complex in Beaumont, in 2005.

As alleged in Ebron's motion, the background to the May 2009 trial is as follows: Early in the deliberations, the jury sent Crone a note informing her that it was "hopelessly deadlocked" on the question of Ebron's guilt or innocence.

The court read an *Allen* charge to the jurors, ordering them to continue to deliberate. But the next day, the court received a note from Johnson that said other jurors "had sworn at Johnson." Johnson also said in the note that the jury had fully deliberated and she had left the jury room when she handed her note to the courtroom security officer.

Ebron's defense lawyer asked Crone to declare a mistrial. But the prosecutor allegedly theorized that despite Johnson's assurances that the jury had deliberated, her note and her presence in the hallway meant that "she is refusing to deliberate." The prosecutor allegedly argued that Crone should investigate to find out "whether she's violating the court's oath." Crone sent Johnson back into the jury room. Ebron's motion does not name the prosecutor.

Later that day, another juror requested that she be excused from her duties the following week to attend her children's award ceremonies. Defense counsel again asked for a mistrial arguing that "something was happening in the jury room" and requested, alternatively, that Crone explore "some

method of finding out where the jury is." The prosecutor allegedly suggested that Crone bring in the foreperson and ask whether "the jury was deliberating or not." Defense counsel had no objection.

Crone brought out the jury foreperson, who is not named in Ebron's motion, for questioning. In response to Crone's question about whether any juror was refusing to discuss the evidence, the foreperson said: "Well, discuss -- there's a discussion, but there's a refusal to accept what might be to anyone else pretty obvious facts."

Among other things, the foreperson allegedly told Crone that Johnson was not following the court's instructions and that, in his opinion, Johnson was biased against the prosecution and prosecution witnesses. As alleged in Ebron's motion, the foreperson also said that Johnson stated to the jury that if Ebron was acquitted, it would be the fourth time that Houston solo Katherine Scardino -- Ebron's defense lawyer -- had rescued somebody from death row. Standard 5th U.S. Circuit Court of Appeals criminal trial jury instructions instruct jurors to base their verdict "solely upon the evidence, without prejudice or sympathy."

The court, over Scardino's objection, decided to interview other members of the jury, producing mixed results. Some said there were problems in the jury room, others did not. Some jurors said they were able to discuss the evidence, others disagreed, Ebron alleges in his motion.

Johnson told Crone that other jurors were raising their voices, swearing and making derogatory comments "about opinions." Crone asked Johnson whether she had "made any personal comments about participants in the case, including lawyers." Johnson said she had not.

But Crone dismissed Johnson and replaced her with an alternate juror, prompting Scardino to file a motion for mistrial on May 10.

### **The Prosecution's Side**

The prosecution has until Dec. 5 to file a response to Ebron's Oct. 21 motion for new trial. But in its May 12 written response to Ebron's motion for mistrial, the prosecution had a different take on jurors' answers to Crone's questions.

As alleged by the prosecution, the foreperson told Crone that Johnson was relying on her personal prejudices; was not deliberating according to Crone's jury instructions and would not change her mind; and evidently had done some outside research of defense counsel and reported to the jury that Scardino is a good defense attorney who had rescued four people from death row in the past.

The prosecution argued in its motion that Crone was correct to dismiss Johnson from the jury, calling Johnson's alleged actions in the jury room "nothing less than unvarnished jury nullification."

On May 18, Crone denied Ebron's motion for mistrial and explained her reasons for dismissing Johnson from the jury.

"Here, the court's decision to release Johnson rested on two independent and relevant grounds -- her lack of candor under oath and her failure to follow the court's instructions regarding the interjection and use of extrinsic information during jury deliberations," Crone wrote in her order. "Each basis is supported by case law and the factual findings on the record. First, jurors -- like attorneys, witnesses, and parties -- must show candor when speaking under oath in the judicial process. Secondly, failing to follow the court's instructions is a relevant legal basis to release a juror."

Not so, Johnson says in a 13-page affidavit attached to Ebron's Oct. 21 motion for new trial. "I never made comments about the prosecution side," Johnson says. Among other things she also denies that she did any outside research on Scardino. She says she feels she was singled out and dismissed from the jury because she did not believe Ebron was guilty.

"I felt horrible when I was removed because I felt I was Ebron's only saving grace from a guilty verdict and death sentence," Johnson states in the affidavit. "I believed that if they came up with a guilty verdict that they would put him to death because of the personalities and the attitudes of the jurors involved."

Donna Coltharp, an assistant federal public defender who represents Ebron, did not return a telephone call seeking comment before presstime on Nov. 5. John Craft, an assistant U.S. attorney in the Eastern District of Texas a prosecutor in the Ebron trial, also did not return a call. A telephone number for Brittany Johnson could not be located.

In an interview, Scardino, who no longer represents Ebron, says she was opposed to Crone interviewing Johnson and other jurors during their deliberations and strenuously objected to the questioning.

"I felt like they should leave that woman [Johnson] alone, send her back in there and make her keep deliberating," Scardino says. "And this judge needed to grant our motion for a mistrial. And what this lady was doing, Ms. Johnson, was adding fuel to the flame for granting a mistrial."

Malcolm Bales, the U.S. attorney for the Eastern District of Texas, says it is an unusual circumstance for a juror to be dismissed from a case during deliberations but Ebron's conviction was lawful.

"We believe that Ebron obviously did the murder and was fairly tried to conviction according to the law. But it is unusual for all criminal cases for a juror to be dismissed in the middle of deliberations," Bales says. "So, we're sort of in new territory for us in the appellate area. We're going to defend the conviction because our view of both the law and the fact situation is that the court properly exercised their discretion."