

UNDISCLOSED, The State V. Rocky Myers
Episode 3 - Skin in the Game
July 1, 2019

[0:25] Colin Miller: In the recent HBO miniseries, “The Night Of,” viewers soon realized that the show focused on the skin condition of John Turturro’s attorney almost as much as the actual murder itself:

From *The Night Of*:

John Turturro:

It’s eczema. Dermatologist says keep them aerated, like that’s going to cure anything. I don’t know, maybe it helps, I really can’t tell.

Don’t worry about my feet - it’s not contagious.

Executive producer and writer Richard Wright would later note that TV critics and fans have “picked up on [eczema] as a metaphor for the frustrations of finding a solution and the entire judicial system.” But what if that same skin condition were not a frustration but instead the solution to the question of whether Rocky Myers killed Ludie Mae Tucker? And what if that weren’t the only reason he should be taken off death row?

[1:35] Colin Miller: Hello and welcome to *Undisclosed: The State vs. Rocky Myers*. This is the third episode in a four episode series about a 1991 murder in Decatur, Alabama and a man who sits on death row despite strong evidence that he’s an innocent man. This is Colin Miller, an Associate Dean and Professor at the University of South Carolina School of Law. Rabia is sick this week so I’m joined by my co-host Susan Simpson.

Susan Simpson: Hey Colin. This is Susan Simpson, I blog at TheViewfromLL2, and I’m an attorney at Clinton and Peed, PLLC, Washington, DC.

[3:43] Susan Simpson: Let’s go back to the crime scene that we described in Episode One of the series. Both Ludie Mae Tucker and Mamie Dutton said a man came to the door with a blood stained white t-shirt and said he was bleeding to death. That man then had physical altercations with both women, stabbing Tucker four times and Dutton once.

The man then forcibly removed a VCR that had been connected to the TV, and cable box.

The police then took Tucker and Dutton's clothing for testing, searched the crime scene for evidence, and dusted for fingerprints in the places where Tucker and Dutton said the perpetrator had been. The most promising leads were a fingerprint on the glass door from the cabinet where the VCR was taken and a palm print from the front door that the Fingerprint Examination Request Form says was "believed to be the suspect's."

So, what were the results of testing this evidence? Here's Rocky's attorney, Kacey Keeton:

Kacey Keeton:

No forensic evidence connected Mr. Myers to the crime. Back then, Mr. Myers was under a doctor's care for severe eczema, which caused his very dry skin to readily fake off. So if Mr. Myers had been present at Mrs. Tucker's house that evening, his skin condition surely would have indicated it, but police collected no forensic evidence from the crime scene or the victim's clothing that linked anything to Mr. Myers.

That's right, there were no skin cells, hair, or fingerprints at the crime scene that were a match for Rocky Myers, and none of his DNA was found there. But what about the second part of Keeton's statement? Due to Rocky Myers's extreme eczema, what's the likelihood that he would have left behind physical evidence at this particular crime scene?

Well, let's start with the nature of Rocky Myers's eczema at the time of the crime. Here's Rocky describing it at trial:

Rocky Myers, read from transcript by Colin Miller:

I was born with eczema, It's a skin disorder. My skin is very dry and it irritates real easy. I am allergic to a lot of things and I am allergic to dust. If I sweat too much it breaks me out. If I rub against something that is dirty -- I can't wrestle with somebody that has not showered. I will break out. We didn't have no money or nothing like that. I got real bad because I moved from New Jersey to down here but my skin was real bad and would flake up like fish scales. Like I got this tight shirt on I can do like this at the end of the day and skin will fall on the floor from my legs and my face, my hair was falling out and everything. I was seeing a doctor, I forgot who he was but I was getting treatment for it and it wasn't helping.

Now, of course, you might say that Rocky was exaggerating his condition because he knew at this point that no physical evidence had been found at the scene. But we also have the testimony of the officers who saw his skin condition when they arrested him. Here's Officer Dwight Hale:

Testimony of Officer Dwight Hale, read from transcript by Colin Miller and Susan Simpson:

Q. Let's talk about that skin condition. He had a real bad flakey skin condition, didn't he?

A. Yes, sir.

Q. In fact, the skin was scaling off his arms, wasn't it?

A. Yes, it was.

And here's John Boyd:

Testimony of Officer John Boyd, read from transcript by Colin Miller and Susan Simpson:

Q. Now, when you first talked with Robin Myers about this case, he indicated to you that he had a skin condition which was rather severe?

A. Yes, he did.

Q. And this skin condition was on his forearms?

A. It was then.

Q. And you made a note of it?

A. Yes, sir.

Q. And it was something which was quite noticeable?

A. Yes, it was.

[6:50] I asked Rocky about the origin of his eczema:

Colin Miller:

Do you know, when you were first diagnosed with eczema, how old you were?

Rocky Myers:

I was a baby. I was born with it. I had, Mom said, when I was born, I had to stay in the hospital, you know, for a while so they could figure it out and everything,

and she just put little socks on my hands to stop me from scratching. [Colin: Umm-hmm] From scratching my skin. So I've had it all my life.

I then asked Rocky about the nature of his eczema back in 1991 around the time of the murder:

Rocky Myers:

And my ex-wife can tell you - I can get up out of the bed, at that time, and it could be dry skin on the bed, you know. And I never, thinkin' about it now, I'm embarrassed. I'm embarrassed right now thinking about it. But back then I wasn't embarrassed, it didn't bother me, because that was my wife and she knew my condition and everything like that that there, you know. Yeah, it was awful back then. It was bad. Living with this at my house like we did, that was messed up. I had to do a lot - one of the reasons why they let us rent the house, I can't remember the rent but it was so cheap, because it was a fixer-upper, and they said "Well if you fix this up, you can live in here really really cheap." So, you know, I had to take floors up, and put windows in, and we had to fight with all kind of bugs and stuff like that there, and that's not good. That was never, ever good for my skin, especially when it's cold. [Colin: Right] It's not good for my skin at all. But yeah, it was around that time I had a bad eczema flare-up. Around that time, and I attribute that to two reasons- my living conditions, and it was freezing outside. It was cold.

So, what exactly is eczema? Here's Dr. Theodore First, a pediatrician at Vermont Children's Hospital:

Dr. Theodore First:

Eczema is a red, itchy rash, made up of tiny little red bumps, that sometimes ooze fluid or crust over. It's commonly found in about 10% of infants and young children, from 0-5. What's interesting is that about 50% of the time it goes away by adolescence, but 50% of the time it goes on to be associated with other allergic illnesses like hay fever or even asthma. That's because eczema is an allergic reaction to something that irritates the skin. It could be pollen or mold, it could be second hand tobacco smoke, it could be a wool fabric, it could even be stress or sweating. Something gets the skin upset and it starts to cause those little red bumps.

Now it turns out that there is no particular test to diagnose eczema except the appearance of the rash and possibly a family history. So where do you find it?

Well you might find it on a baby's cheeks, on their forehead, on their scalp. As kids get older it shows up on their chest, on their arms, on their legs, particularly in the creases of the elbow and behind the knees.

Rocky is one of the people who had eczema that never went away as he got older, and his eczema did indeed spread to his arms. And so, is it all plausible that a defendant with eczema like Rocky Myers would not leave behind any physical evidence at a crime scene like the one in the Ludie Mae Tucker case? It's a question that a research team from Germany decided to tackle a few years ago. The team did a study and published its findings in an article entitled "Good Shedder or Bad Shedder" in the International Journal of Legal Medicine. I was able to speak with one of the principal researchers on the study, Dr. Nicole von Wurmb-Schwark. I started by asking her why they did the study:

Dr. Nicole von Wurmb-Schwark:

There was always, in the forensic field, the question about how much DNA you really lose when you touch something. And it's really difficult to do some systematic investigations with this. And so when you check the literature there were many studies out published showing here, you can touch something and you can get a genetic fingerprint. There was of course also this paper about good and bad shedders. And we had the idea to really try a systematic approach and check out why you are a bad or a good shedder. Of course it is totally individualistic and specific but also you have to keep in mind the possible skin conditions such as specific diseases. [Colin: Right] So we just collected different groups, such like healthy persons with great skin, and persons with really, really dry skin, persons with specific diseases, as you can read in the paper, and to see how big the difference really is.

I then asked her about the study itself:

Dr. Nicole von Wurmb-Schwark:

So what we did, was what's written in the paper, we had these glass plates, where you have to touch plates, to give a full hand print. Then we did real time PCR to check for the overall human specific DNA, and of course we did the SDR typing. We also are forensic experts, we are sometimes also by court, and the judges often ask how likely it is that you shed your DNA just by touching. And sometimes they are really confused or they don't believe it when you have a really high amount of DNA from objects that are really only touched. And so this

was the background idea to do, to see whether there was a relation to specific diseases.

[12:39] Susan Simpson: It's hard to imagine a better study design for the Rocky Myers case. In the study, the researchers had the study participants hold glass plates. In this case for Rocky, the Decatur Police had understandably held a strong belief that a fingerprint on the glass stereo door that housed Ludie Mae Tucker's VCR had been left by her killer. So, what were the results of the study?

For study participants with normal skin who touched the glass plates, 9% left behind a full DNA profile. For people with skin ulcers that needed treatment, well, 20% left behind a DNA profile. And for those with psoriasis that needed treatment, 64% left behind a DNA profile. So, that leaves the study participants with eczema or atopic dermatitis that needed treatment.

Dr. Nicole von Wurmb-Schwark:

This is the one disease where you shed the most DNA. Because your skin is dry and it's, like, you have these little damages in the skin and you really lose a lot of cells, you shed a lot, really.

In terms of numbers, 90% of participants with eczema left behind a full DNA profile. And then, there's the amount of DNA left behind by people with eczema vs. those with healthy skin:

Colin Miller:

And I think the finding that I saw in there was that you leave four times as much DNA behind when you have atopic dermatitis as someone with regular skin, is that correct?

Dr. Nicole von Wurmb-Schwark:

Yeah, really that's the important thing also because, since this is such a systematic approach, you also have to keep in mind that a lot are underestimated, we think. Because the experimental procedure was to touch the smooth glass plate and to then check how much DNA you lose on this plate. In real life, when you touch things and you really touch the things differently, you know what I mean, so you have much more contact, more contact, so we think that actually in real life when you have such a skin disease you should lose even more.

Colin Miller:

Right.

And, of course, this underestimation would seem to be at play in the death of Ludie Mae Tucker, where the perpetrator didn't just touch the glass door but also had a violent encounter with both Tucker and Mamie Dutton and also forcefully dislodged the VCR. So, given the nature of the crime in this case, what's the likelihood that Rocky could have been the perpetrator?

Dr. Nicole von Wurmb-Schwark:

The account of the impact with the possible victim, when you touch each other it's not only careful touching, and then you have your clothes, and the clothes rubbing over your skin, and all of this should definitely lead to the fact that you really lose skin cells.

Colin Miller:

Right.

Dr. Nicole von Wurmb-Schwark:

I think it's really peculiar or really strange what you describe, when you have such a person, who really has this skin condition, and as far as I know that, and we saw that of course in the experimental study, but also with colleagues having really bad skin, that they lose DNA all the time.

Finally, as I was ending the conversation with Dr. von Wurmb-Schwark, she said the magic words:

Dr. Nicole von Wurmb-Schwark:

My colleague Michaela and I, we also write reports, if you need that for the judge or for the court. whatever, about how likely that it is from our point of view. So you can use that.

Colin Miller:

Okay, that would be, sure!

Dr. Nicole von Wurmb-Schwark:

I think that's rather strange (she and Colin laugh) Usually it happens the other way, where people lose so much DNA and we have to explain where they lose

everything, and that's pretty easy because they lose so much. Your case is interesting because you have the opposite.

Colin Miller:

Right.

Colin Miller: You can bet that we'll be following up to get a report on the unlikelihood of Rocky committing this crime, but is there another reason to believe that the study actually underestimates the odds that Rocky would have left physical evidence at the crime scene?

Late last year, a story quoted Dr. Theodore Rosen of the Baylor College of Medicine as saying, "Atopic dermatitis is an emergency in blacks ... anything you would do in your worst Caucasian eczema patient, do it sooner in African Americans." So, what did he mean by that? I reached out to him, and he said he meant three things: One is that eczema often leads to irregular and stigmatizing skin pigmentation in African Americans. Another is that comorbidities associated with eczema like heart attacks and strokes are more frequently seen in the African-American community, where the skin condition often goes undiagnosed for longer periods of time. And, finally and most importantly, we have this:

Dr. Theodore Rosen:

This is pretty specific to black individuals as opposed to any skin of color. For reasons that we don't understand, Black skin responds to inflammatory processes, injuries, trauma, more readily and more violently, producing a lot of scar tissue. So keloids would be the prototype. But you don't necessarily get keloids from atopic dermatitis, but you do get thickening of the skin so it feels funny, feels funny to other people, someone's holding your and you're hands all thick and rough, ew. And that's more likely to happen in African Americans.

In the story quoting Dr. Rosen, there's a fourth reason given for eczema being an emergency in the African-American community. They cite to a study by a team led by Dr. Emma Guttman-Yassky of the Icahn School of Medicine at Mount Sinai Medical Center. As the article notes,

The researchers discovered that not only is the molecular profile of the skin of people with eczema different compared to those without it, but that African Americans with the disorder show more skin inflammation than European Americans with the condition.

And so, there's every reason to believe that Rocky had more inflammation and skin shedding than the European-Americans in the German study. And what that means is that it's even less likely that Rocky killed Ludie Mae Tucker.

[22:08] Susan Simpson: There's another reason that we should have significant doubts about whether Rocky Myers killed Ludie Mae Tucker, and it takes us back to Episode One and the concept of residual doubt - that gap between "reasonable doubt" and "no doubt." After the recent exoneration of Charles Ray Finch, whose case we covered on a bonus episode of this podcast, there have been 166 death row exonerations in this country. The state with the most death row exonerations is Florida, which used to allow for both:

One: non-unanimous jury death votes, where, say, you have an 11-1 or 10-2 jury vote that leads to a death sentence; and

Two: judicial override, where you'd have, say, a judge who overrides a 10-2 or 9-3 jury vote in favor of a life sentence and instead imposes a death sentence.

It's Perhaps unsurprising then that Florida has the most death row exonerations, 29 in total, and, as we told you in Episode One, Robert Dunham and his team at the Death Penalty Information Center were able to get the jury votes in 22 of those cases. Again, here were their finding about those cases:

Robert Dunham:

In 20 of those 22, there were non-unanimous jury votes for death. So either judicial override or a majority but not a unanimous recommending the death penalty.

Colin Miller: That's right, 20 out of 22 death row exonerations, or 91%, were either cases of either non-unanimous jury votes or judicial override. Now, it might not technically be correct to call what was done in Florida judicial override because Florida explicitly deemed the jury's vote advisory, with the judge then having the final say on the sentence. And, in its 2015 opinion in [Hurst v. Florida](#), the United States Supreme Court declared this scheme unconstitutional. Here's Justice Sotomayor announcing the Court's opinion:

Supreme Court Justice Sonia Sotomayor:

Hurst's death sentence violates the 6th amendment right to a jury trial. This right requires a jury, not just a judge, to find any fact beyond a reasonable doubt if it exposes the defendant to additional punishment. In Hurst's case, the maximum punishment he could have received on the basis of the first jury's verdict and second jury's recommendation was life imprisonment. Florida law unconstitutionally allowed a judge to enhance Hurst's sentence by finding the critical facts missing from the jury verdicts.

Susan Simpson: This meant that Florida couldn't use its version of judicial override going forward, but what about inmates who had already been given death sentences under judicial override procedures? Again, here's Robert Dunham:

Robert Dunham:

In Florida, it was statutorily eliminated, judicial override was statutorily eliminated. And the non-unanimous jury verdict was declared unconstitutional and then statutorily eliminated. The Florida Supreme Court decided that the unconstitutionality of non-unanimous juries became clear in 2002 when the US Supreme Court ruled in a case called Ring vs. Arizona that there is a right to a jury determination of every fact necessary to impose a death penalty, and when there's a right to a jury determination, that has always been considered a unanimous finding by juries. So the Florida Supreme Court has said that cases that became final prior to 2002, you can go ahead and execute the defendant. The cases after 2002 were granted new penalty phase hearings, new sentencing hearings.

[25:28] So, what does this all mean? It means that, going forward, a defendant in Florida can *only* get a death sentence if all 12 jurors vote for the death penalty. And, it means that only *five* men remain on Florida's death row based on either judicial override or a non unanimous jury verdict. One of those men is Tommy Zeigler, whose attempts to get DNA testing in his case were recently covered in a series by the [Tampa Bay Times](#). Here's a clip of Zeigler from that coverage:

Tommy Zeigler:

A friend sent me a copy of an article from the Orlando Sentinel newspaper. It was on Lawson Lamar, the *then* State Attorney using DNA to convict the first man in the United States of America with DNA. I read that article. I made myself a cup of coffee and I read that article again. I read that article the third time, and I said, okay. If they can convict this man using DNA, they can clear me using DNA.

And I sat down and I wrote Terry Hadley and Vernon Davis a letter. And I told them what I wanted. That I wanted DNA. And I wanted to become a damn expert on DNA, I wanted everything that had ever been published on DNA sent to me immediately.

Susan Simpson: Zeigler still hasn't gotten that testing, and the State has Florida has denied death row prisoners access to DNA testing 70 times, including 8 men who have been executed, including a handful who were given nonunanimous death sentences. This might explain why Delaware, another state that had judicial override, made a different decision in the wake of the Hurst decision. Again, here's Robert Dunham:

Robert Dunham:

In Delaware, the Delaware Supreme Court declared their statute unconstitutional, applied that to everybody on Death Row, and cleared the row.

[22:20] Colin Miller: Finally, let's turn to Alabama, which was the third and final state to allow for judicial override. Like Florida, Alabama allowed for both non unanimous jury death votes and judicial override. The latter is what happened in Rocky's case. Here's Rocky's attorney, Kacey Keeton:

Kacey Keeton:

The jury recommended 9-3 that Mr. Myers be sentenced to life without the possibility of parole. However, the Judge overrode the jury's recommendation, and sentenced Mr. Myers to death.

Now, at this point, you may be wondering whether judicial override ever worked the other way, with a judge overruling a jury's recommendation of death and imposing a life sentence. The answer is that it could and that this was actually the initial purpose of judicial override. Again, here's Robert Dunham:

Robert Dunham:

The theory behind judicial override was that it was going to provide an additional layer of accuracy and protection. But that's not the way it worked out in any of the states that had it.

Simply put, the numbers in Alabama are stark. In 9 cases, the judge overrode a jury's recommendation of a death sentence and imposed a life sentence. Meanwhile, in 93 cases, the judge overrode a jury's life sentence recommendation, and instead imposed

a death sentence. So, what accounts for this disparity? Well, first, we have the races of defendants and their victims.

Robert Dunham:

And almost always the overrides were in cases in which there were African-American defendants, typically in cases in which there were African-American defendants and white victims.

Dunham is citing an Equal Justice Initiative report which found that more than half the judicial overrides of life sentences in Alabama were cases with African-American defendants, despite the fact that African-Americans only make up 26% of the population in Alabama. Moreover, that same study found that 75% of judicial overrides of life sentences were cases of white victims despite only 35% of all homicide victims in Alabama being white. So, for Rocky Myers, an African-American man convicted of killing a white woman, these were strikes one and two. As for strike three, we have the fact that judges in Alabama are elected:

Robert Dunham:

And what we saw over and over again was that these elected judges would increase the number of overrides in election years; in years that they were up for retention or when they had contested elections.

Susan Simpson: Dunham is again referencing the Equal Justice Initiative study, which found that judicial overrides to death sentences spiked in election years, with judges presumably trying to show the public that they were tough on crime. For example, in the election year of 2008, 30% of new death sentences were imposed by judicial override, compared to 7% in 1997, a non-election year. And, guess what? The judge who overrode the jury's life sentence in Rocky's case and imposed a death sentence instead- he was up for re-election.

But, according to one of Rocky's trial attorneys, the fact that it was an election year might not even have mattered:

Defense Attorney Mays:

That case was tried before a judge who gave the death penalty in every Capital case no matter what the recommendation of the jury. He gave death in every Capital case. Without exception.

Colin Miller:

Right.

Defense Attorney Mays:

I remember trying the case with a co-counsel, *The State of Alabama v. Roy Burgess*, I had that overturned on appeal. He was able to get his death sentence reversed. And he was a 9-3 for live vote because he was only 16 when it happened. This was pre- the Missouri case.

My co-counsel, when the judge overrode the verdict of the jury in *The State of Alabama v. Roy Burgess*, my co-counsel ran down the hall to the mens' room and vomited.

Now, Burgess did have his death sentence thrown out, but he was not declared innocent. And that may leave you wondering how many death row exonerations in Alabama were the result of unanimous jury death votes? The answer: Zero. There have been six death row exonerations in Alabama. One exoneree was Gary Drinkard, who waived a jury vote because he was afraid they'd vote for a life sentence and he wanted a death sentence, which would allow for appointed counsel on appeal, a wager that somehow paid off. And then we have the five other exonerees. The one you're likeliest to know is the case of Walter McMillian, which was the subject of Bryan Stevenson's acclaimed book, *Just Mercy*. Here's Stevenson talking about his case:

Bryan Stevenson:

The amazing thing was that at the time of the crime he was actually raising money for his sister's church, and there were about 30 people of color with him, 11 miles from the crime scene. So they knew he was innocent. And when he was arrested, they went to the sheriff and said, you've got the wrong man, they were ignored, the trial lasted a day and a half, he was convicted of Capital murder, and was actually sentenced to life without parole by the jury, and the trial judge, whose name was Robert E. Lee Key, overrode the jury's verdict and imposed the death penalty and he spent the next 6 years on death row.

And when I started working on the case, they had convicted him based on the testimony of one man. I found out that this man had been coerced to testify falsely. He just admitted to me that it was all a lie. And then he told me that he had been recorded, trying to persuade him that he shouldn't do this, and so we started looking and we found tapes, where the police had interrogated this man

while they were coercing him to testify falsely, and for some bizarre reason, they tape recorded those sessions.

So, the witness was actually on tape saying, "You want me to frame an innocent man for murder, and I don't feel right about that." and the police officer was saying, "Well you better give us what we want, or we're gonna put you on Death Row."

A second Alabama death row exoneree is Anthony Ray Hinton, who was convicted of a murder largely based upon a ballistics expert who testified that the bullets used in a murder came from his gun. Thirty years after the jurors entered a non unanimous verdict for a death sentence, that ballistics expert changed his tune. Here's Hinton describing what happened:

Anthony Ray Hinton:

He came back and I quote to you his exact words. He tested the bullets and he said, the bullets do not match the way that they matched 30 years ago. But, they matched exactly the way they did 30 years ago. Bullets are like fingerprints. They don't change. The State of Alabama was going to execute an innocent man, and they knew it.

[34:26] Colin Miller: Other death row exonerees in Alabama include Daniel Wade Moore, who was released on a *Brady* violation after a judge overrode an 8-4 jury vote in favor a life sentence and Wesley Quick, who was convicted on a non unanimous jury death vote despite strong evidence pointing in the direction of an alternate suspect.

And then we have Randal Padgett who was given the death penalty after being wrongfully convicted of the murder of his ex-wife and the jury voting 9-3 in favor of a life sentence. Here, Padgett describes his physical reaction to the judges override.

Randal Padgett:

The judge overrode the life without that the jury recommended and sentenced me to the electric chair.

Interviewer:

And what was that like?

Randal Padgett:

It was like a nightmare. Felt like being in a whole different planet. I don't know

how to explain it, but it was terrible.

When I spoke with Rocky, he described a similar reaction when the judge overrode the jury's 9-3 vote in favor of a life sentence:

Rocky Myers:

I remember this, though. I remember the ... thing that ever happened to be, because the guilty part didn't hurt me as much as when the judge said that I was a threat to society. Because he overrode the jury. And he overrode the jury for me to be executed. But, he told me that I was a threat to society. That I couldn't be trusted. That I'd get out and start killing everybody. And I'm like, that's so far from the truth, it's pathetic. And that really really hurt me. It hurt my feelings, it did. It's like somebody said you done something and you know you didn't do it, and it hurts you, especially if it's somebody you love, your child or your wife... the judge wasn't on that level, but still. The words were like needles, swords, knives going through. I remember that. That was horrible.

Now, we've been talking about judicial override in the context of residual doubt in the theoretical sense, with that theory being that it's likely that jurors vote for life sentences in capital cases in which they harbor some doubt about the defendant's guilt. But it turns out that it's not just theoretical. Patrick Mulvaney and his team at the Southern Center for Human Rights spoke with the jurors from some of these Alabama cases:

Patrick Mulvaney:

We went and talked to some of the jurors from those cases, and their experiences really line up with this concern about residual doubt. Jurors from several of those cases said, "We voted for life at the penalty phase because we had *some* doubts about the defendant's guilt," and then the judge overrode the jury and imposed the death penalty. And years later, we find out that those individuals were wrongfully convicted.

So, did some jurors in the Rocky Myers case also hold residual doubts? Well, it goes well beyond that. Some jurors in the Rocky Myers case were convinced he was innocent. Here's juror Mae Puckett:

Mae Puckett:

He was an innocent man [crying]. It's very important to me ... there's not a day that goes by that I don't think about this man, and I think back during the trial and during deliberations, if there was something that we could've don't differently.

And there wasn't. Our hands were tied. We only had certain decisions we could make, and we did the best we could do, but we could not change what the judge did. I remember this man every day. Every day I wake up and I think about him, and some time during the day it sneaks into my mind, and it's hard. It's a burden on my heart.

So, what does Puckett mean about their choices being limited? Well, she says that jury selection didn't start well, and things didn't improve once the trial started:

Mae Puckett:

One man, I forget what the question was, but his answer to Bob Purel was, "I feel like if a man has made it through the grand jury and to trial that he's guilty." And he made the cut for the jury, so at that point, in my mind, I thought -- How are we ever going to be able to make a fair decision if we've ... I mean, it couldn't work if one person already went in thinking, "I'm gonna vote that he's guilty no matter what," and I don't know how he got in that cut, but he did. So I had concerns already, going into deliberations, and even before we got that far. Several times, during the trial, the man sitting next to me was sleeping -- several times. I would have to nod and wake him up and no one acted like it was a big deal, ya know, and I'd nudge him -- a couple of times the bailiff's prompted me, and the other jurors, they would get someone's attention and they'd go down the line and get me to elbow him and wake him up. And he'd wake up and ...

Nonetheless, Puckett listened closely to the evidence, and it left her without any belief that Rocky Myers had killed Ludie Mae Tucker:

Mae Puckett:

I don't think that the State ever proved he did anything. The only connection that I can remember is that he had the VCR, and his story ... I mean, it was believable how he got the VCR because of his way of life. That did not connect him with the murder. And there was one of the jurors in there that kept saying over and over, "Rabbit tracks. Just look at the rabbit tracks." That's what he was using to refer to the VCR connected with Rocky Myers, and it just didn't make any sense. If someone's gonna find something in the bushes and sell it, that doesn't mean they killed someone.

And Puckett wasn't alone. There were other jurors who thought Rocky was innocent, including the one African-American on the jury:

Mae Puckett:

I remember the one black man. I remember him because he cried and he and I were one of the last ones to vote guilty.

Of course, this may leave you wondering how these jurors ended up finding Rocky Myers guilty if they believed him to be innocent. According to Puckett, there were two reasons. The first was the bailiff:

Mae Puckett:

A struggle was going on back there with us in deliberations and we were kinda feeling pressure. The bailiff kind of talked to the foreman and let her know that we needed to hurry up. I don't know what was said, but the foreman let us know that we needed to hurry up, that they're waiting on us, they're tired -- we need to make a decision.

And, if you're wondering...no, this isn't proper, and if the foreperson or any of the jurors had reported what the bailiff had done, it would have been grounds for a mistrial. And speaking of grounds for a mistrial, we have the second reason that the innocent-leaning jurors decided to vote guilty:

Mae Puckett:

Our hands were tied because, and this was actually a discussion with the jury back there with deliberations, we had, in our minds we played out the scenarios. An innocent vote, a not guilty vote, was out of the question. It was not gonna happen with the people who was back there, and we knew that. A guilty vote could go two ways -- if we vote guilty, we could recommend the death penalty or we could vote guilty and recommend life in prison. And we kinda negotiated. We negotiated for him to go to prison for life, and we felt like ... or I can only speak for myself, I felt like it was the only way to do it, because if we had a mistrial, and this was discussed too, if he had a mistrial he could get a jury that just found him guilty and it would just be the death penalty, you know?

And the reason I felt so strongly about him having life in prison was because of his children. I could tell during testimony, hearing from his wife and his kids, I think it was just the one son, but I have children of my own, and just to try to imagine being separated from them and not having the influence on them that you need them to have to grow and be healthy and to be able to survive in life ... I felt like if we could allow him that opportunity to be a father and to have

communication with his children, at least we could have done something good from that trial, because that's the only good that was gonna come from it.

This is what's known as a **compromise verdict**, and it's not supposed to happen. Indeed, if the attorneys had done what's known as a post-verdict *voir dire*, and a juror had mentioned their compromise verdict, a mistrial would have been declared. But now, years later, nothing can be done. For Mae Puckett, this is devastating:

Mae Puckett:

And to find out later that the judge had changed it, I was devastated. I had already told my family that I don't want to know anything else about it. If he's in the news, if his date comes up, I don't want to know anything about it, and I had thought that things had already happened because it had been so many years and I hadn't heard anything, so I thought -- they did a good job, my family did a good job at keeping that from me, but now I know that he'd been forgotten about. He'd just been cast aside and forgotten about.

[45:19] Colin Miller: Rocky Myers isn't the only Alabama death row inmate to be cast aside. We noted earlier that Delaware and Florida, the only other states that had judicial override, got rid of their procedures after the Supreme Court's opinion in *Hurst*, with Delaware clearing all override inmates from death row, and only five override inmates remaining in Florida after many were given re-sentencing. Like these states, Alabama also eliminated judicial override after *Hurst*, but it didn't apply this law retroactively, meaning that there are dozens of men on Alabama's death row based on a procedure that no longer exists.

And while Alabama did get rid of judicial override, it still allows for the death penalty based upon jury votes of 11-1 or 10-2 in favor of death, which was the vote in the Anthony Ray Hinton case. Alabama is now the **only** state that allows for non-unanimous jury votes, although there are two other states with quirky procedures. I am currently working with some Alabama representatives on changing this law, and we're hopeful that it will be successful in the next year or two.

But where does this leave Rocky Myers? Well, several Alabama inmates with judicial override death sentences have brought Constitutional challenges to their sentences. Some are based upon the Supreme Court's ruling in *Hurst*, but those might be a tough sell because of the odd nature of Florida's old procedure. The other challenge, however, sounds more promising:

Robert Dunham:

There's another issue, which I think was one of the reasons why the Alabama legislature ultimately did away with judicial override, and that is an 8th Amendment argument. The 8th Amendment prohibits cruel and unusual punishment, but the United States Supreme Court has said that in determining whether a punishment is a cruel and unusual punishment, you look to the evolving standards of decency in U.S. society, and that is measured first by legislative judgements about what an appropriate process is, and then there are a series of other factors that you take a look at. When you apply the evolving standards analysis to judicial override, you see that there was only one state left that allowed it, and the U.S. Supreme Court has declared a number of practices in the death penalty to be unconstitutional when there were, in some instances, 20 states that still allowed it, but in most instances around 2 or 3 states that still allowed it.

Facially, this seems like a compelling argument, but it might actually not be the strongest argument for taking Rocky Myers off of death row. That reason is a reason that has been compared to judicial override as a reason to believe that a death row inmate is innocent, and it's a reason that almost certainly applies to Rocky Myers. But it's also a reason that Rocky has never fully been able to raise in court because he was abandoned by his appellate counsel. Next time...on Undisclosed.

[48:18] Rabia Chaudry: A big thank you to everybody who makes Undisclosed possible. Thank you to our sponsors who help us put on our episodes week after week. Thank you to Mital Telhan, our Executive Producer for helping keep this ship afloat. Thank you to Rebecca LaVoie, our fantastic Audio Producer and also the co-host and producer of a couple of my favorite podcasts, including Crime Writers On. Do not miss her podcast. Thank you to Baluki for our logo, for Kristi for maintaining our website. Also a big thank you to our listeners. Thanks for coming back week after week. Check us out and make sure to follow us online on Twitter, Instagram, and Facebook. Our handle is @undisclosedpod. And please, do not forget to subscribe to us on iTunes and rate us! Thanks so much. See you in a week.