

# Thoughts on Race and the U.S. Justice Process; No Benefit of the Doubt for African Americans

**By David Banks**

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What does Trayvon Martin and the IRP-6 case have in common? Trayvon and myself are African-American and we both were profiled as criminals while not doing anything wrong. Trayvon was walking to his father's fiancée's home after a trip to the convenience store and ended up getting killed by George Zimmerman. I was doing my job as an executive with IRP Solutions Corporation (IRP) when Holland and Hart attorney Greg Goldberg profiled us as being criminals because we had failed to pay some business debts. Goldberg and some of his good friends, Assistant United States Attorney (AUSA) Matthew Kirsch, federal judge Christine Arguello and FBI agent John Smith colluded together to maliciously use the law as a sword to wrongfully convict and imprison us. Both myself and Trayvon deserved the benefit of the doubt and didn't deserve to be profiled as a criminal when we were doing nothing out of the ordinary.

In the U.S. justice system and through much of American society, Blacks are not given the benefit of the doubt that Caucasians are afforded. It happened in our case and in the Trayvon Martin case. In the Trayvon Martin case the white jury gave Zimmerman the benefit of the doubt --- devaluing the life of a Black teenager. In our case, prosecutors and FBI agents did not give us (African-Americans) the benefit of the doubt --- maliciously taking our liberty and bringing great sorrow to our families and friends. Both are American tragedies and a scathing indictment of the so-called best justice system in the world.

Trayvon Martin, who was simply walking through a neighborhood was profiled by George Zimmerman as a criminal, which resulted in Zimmerman, armed with a 9mm pistol, pursuing and killing Trayvon. When the smoke from the 9mm pistol cleared, Trayvon lies dead and Zimmerman decries self-defense. Juror B-37 also profiled Trayvon when she stated that she believed Trayvon's use of the term crazy a\*\* cracker was just the way these people were raised and talk. It is curious that the only thing Juror B-37 found true about Rachel Jeantel's testimony was her account that Trayvon made the cracker statement while rejecting the rest of her testimony as not credible. She believed the worst about Trayvon and Jeantel in the same way Zimmerman did when he profiled Trayvon and gave, who she affectionately and repeatedly referred to as "George", the benefit of the doubt.

The prosecution effectively presented evidence that Zimmerman made inconsistent statements and accounts about what happened the night he killed Trayvon, but the jury continued to give him the benefit of the doubt. The lack of Zimmerman's blood on Trayvon's hands and the lack of Zimmerman's DNA evidence under Trayvon's nails or anywhere else on his person substantiated the fact that Zimmerman's account of events could not be relied upon. However, the jury again gave Zimmerman the benefit of the doubt. It was as if the jury completely ignored all the circumstantial evidence presented by Florida prosecutors. Defense attorneys disingenuously argued that Zimmerman acted in self-defense to save himself from bodily injury or death. Certainly Zimmerman knew upfront that confronting a suspected criminal as he had profiled Trayvon could be a dangerous proposition that could result in harm to himself or his neighbors. Isn't that why he called the police in the first place? So he makes some disparaging, ill-meaning expletives about how these criminals always get away and sets out armed to confront innocent Trayvon as one of those criminals. How is that not profiling? Jurors

ignored all of the circumstantial evidence pointing to the Zimmerman's apparent motivations by taking a very narrow view of the incident and an equally narrow view of the law. Defense attorneys for Zimmerman stated that jurors made their decision based on the letter of the law and therefore the verdict should be respected and accepted. Therein lies the reason that the verdict was flawed and why it is mired in so much controversy. Jurors, prosecutors, defense attorneys and judges are required to show respect to the spirit and letter of the law. Trayvon was never given the benefit of the doubt that he feared for his life as a strange man is following him on a dark and stormy evening. Now Trayvon is dead and Zimmerman is not held accountable for his death. If we listen to juror B-37, Trayvon is responsible for his own death. Trayvon wasn't doing anything out of the ordinary. Just casually walking from the convenience store to his father's fiancée's house while chatting with his friend on his cell phone and he was profiled as a criminal by George Zimmerman.

The letter of the law is defined as the strictly literal meaning of the law rather than the intention or policy behind it. The spirit of the law is defined as the general meaning or purpose of the law as opposed to its literal context. Was the spirit or purpose of Florida's self-defense or stand your ground law meant to protect someone like Zimmerman who profiles an innocent teenager as a criminal, arms himself with a 9mm pistol, pursues, confronts and kills the unarmed teen, then decries he killed in defense of his life? The outrage in the Trayvon Martin case stems from the fact that normal people with common sense understand that the intent and purpose of the Florida self-defense laws were not meant to protect the actions of Zimmerman in this case. Consideration of the spirit of a law is something that is innate in all of us. It is that inner consciousness that tells us what is right. I believe some of the jurors understood in their heart and minds that something wasn't right about the story that Zimmerman was telling. They innately considered the spirit of the law and that's why three of them originally thought Zimmerman should be charged with manslaughter or second degree murder, but they reasoned within themselves that they must only adhere to the letter of the law and ignore the spirit of the law and circumstantial evidence against Zimmerman.

Hopefully in the future, our legislators will consider including a spirit narrative that addresses the purpose and intent of the laws they create to empower juries to properly evaluate and apply the law accordingly. A spirit narrative should be a required jury instruction mandated at all trials. This would make our jury system much more effective. A spirit narrative would also add much needed specificity to many laws and put tighter constraints on prosecutors to indict only when the facts support both the spirit and letter of the law. I believe a spirit narrative would have made a difference in our case and in Trayvon's case. I am not an attorney but being wrongly convicted makes me look closely of how we can close gaps in our legislative and judicial processes to limit prosecutorial abuse and improve the effectiveness of our jury system.

I am proud to say that I am the chief operating officer (COO) of IRP Solutions Corporation. We developed the best investigations case management software in the world and from what I see in law enforcement today, it's still far superior than any other solution in the industry. I am equally proud to say that I am innocent and absolutely did not commit the crimes that attorney Greg Goldberg, AUSA Kirsch, U.S Attorney John Walsh and Judge Arguello conspired together to imprison me on.

We were first profiled by attorney Greg Goldberg of Holland and Hart as fraudsters simply because our business had fell behind on paying our debts to staffing companies. Goldberg did not give us the benefit of the doubt. I believe in Goldberg's mind that a small business ran by African-Americans couldn't possibly be intelligent enough or capable of developing software that large defense contractors had previously failed at. So IRP executives had to be running a criminal enterprise. Convinced that we were criminals, Goldberg drafted a letter to his good friend AUSA Matthew Thor Kirsch, who was a

fellow prosecutor that he worked side by side with at the U.S. Attorney's Office in Colorado. Goldberg HAND-DELIVERED the letter to Kirsch where he explains that IRP executives are operating a criminal scheme and that they should be prosecuted and goes on to tell Kirsch how we should be prosecuted. Given the personal delivery of the letter, I am inclined to believe they discussed more salient details on how the prosecution should proceed. I don't believe it is a coincidence that Judge Arguello was assigned to the case given that Arguello is a former partner with Holland and Hart.

Goldberg had also stated in a Denver Post article that he knew Arguello very well. Kirsch and Arguello was not going to give me or any of us the benefit of the doubt irrespective of how much evidence to the contrary was presented to them. We are Black, Goldberg is Caucasian. Advantage Goldberg. We eagerly awaited the appointment and confirmation of John Walsh as the Colorado U.S. Attorney. We soon found out after presenting an extensive proffer substantiating our innocence that Walsh would not give us the benefit of the doubt. He discarded evidence of our innocence. We later found out that Walsh, Kirsch and Goldberg were friends and were co-instructors in a continuing education law course at Denver University. We were criminals in the minds of Goldberg, Kirsch, Walsh and Arguello and nothing was going to change their views. Goldberg had successfully created a cabal to take down the black executives. From the documents I have reviewed, Goldberg was not representing any of the staffing companies so I don't know exactly how he became involved. Discovery documents showed that Special Agent Smith directed staffing companies to contact Goldberg, who is a private attorney, not with the FBI and no longer with the U.S. Attorney's Office. Long before trial, I remember Judge Arguello in a hearing refer to our business as a scam. It didn't matter we had signed legally binding contracts with the staffing companies. It also didn't matter that staffing companies had filed civilly against us and prevailed with judgments. Kirsch, Arguello, Goldberg and Walsh were convinced we were criminals and were going to convict by any means necessary even if it meant denying us a fair trial.

Kirsch's first attempt was to try and implicate us on money laundering charges by trying to find evidence that we were getting kickbacks from information technology contractors and washing the money through our church. Kirsch failed to gain an indictment with that theory in 2007 after illegally gaining access to church and parishioner banking records and calling church members and family before the grand jury and asking them detailed questions about the church. The banking records were clean. After Kirsch's failure with the 2007 grand jury, Kirsch changed his strategy. A more senior FBI agent, Robert Moen, was assigned to the case. Moen's objective was to illicit false statements from staffing agencies that IRP executives had verbally stated to them that IRP had a government contract to deceive them into engaging in business with IRP. Staffing companies had already provided detailed chronologies and emails to FBI Agent John Smith about their interactions with IRP but they had not mentioned anything about being told by IRP executives about having a government contract. Kirsch then tried his hand again with the grand jury in 2009. This time he would only call one witness, FBI agent Moen. Kirsch finally got what he wanted. An indictment against us.

The trial ensued in 2011 after all of us fired our attorneys on the same day. None of the court-appointed attorneys had command of the facts in our case. They repeatedly delayed the start of our trial by asking for continuances for the same reason; that they had not had time to adequately review discovery. We think they were extending time so they could continue to bill the court and make more money. They had not interviewed one witness after being on the case for a year and a half. Repeated attempts were made by our attorneys towards getting us to plea. A plea was not an option under any circumstances and it was apparent to us that our attorneys were operating under the premise that we were guilty. They to did not give us the benefit of the doubt as being honest business men. They appeared to be working closely with Kirsch to ensure our conviction. During trial, Judge Arguello thwarted our ability to

present our defense by denying our witnesses and not enforcing subpoenas for witnesses who did not show. Some of our witnesses for trial from law enforcement agencies were in contact with Kirsch and Arguello prior to testifying. Isn't that witness tampering? It explains why our witnesses from law enforcement were so evasive in answering our questions at trial. During direct examination, retired Customs official Gary Hillbarry, who worked as an independent contractor with IRP, didn't even want to affirm what he stated in the affidavit he sent to FBI that was favorable to our defense. During a sidebar Judge Arguello forced our testimony at trial against our will by stating at a sidebar that one of us would have to testify given that our subpoenaed law enforcement witnesses did not show. Now the transcript of the sidebar is missing.

A Just Cause hired investigators who spoke with a couple of members of the jury who responded that they were shocked and did not understand why a defendant testified given the fact that we had told them we had not intended to testify. The actions of Arguello and Kirsch done irreparable damage to our defense at trial. During deliberations the jury sent a question to the court asking if the evidence in the jury room was all they had to make their decision given the fact that much of our evidence was not allowed in with the jury. Uncharacteristically, after the verdict of guilty, Judge Arguello immediately remanded us to the custody of the U.S. Marshals (the most professional and courteous people we encountered through this process) to be incarcerated. We were on personal recognizance after the indictment for 2 years and travelled internationally during that period. Attorneys told us to be remanded after verdict under those circumstances is unusual. We spent 42 days incarcerated until Magistrate Judge Boland released us on very strict home confinement terms. Kirsch had filed a motion comparing us to Bernie Madoff, of all people, as justification for us to remain incarcerated.

The hatred we felt from Arguello and Kirsch was palpable throughout the trial. We filed bond pending appeal and were denied by Judge Arguello. Kirsch filed a motion citing a district court case, not 10th Circuit precedent, that we were a flight risk. Arguello relied on this weak legal justification to deny us bond. The appellate court upheld her denial and we have remained incarcerated when there is clear and obvious error. I am not surprised by the appellate court. I am a Black defendant and should expect different rules to be applied to me. For instance, prevailing precedent in the 10th Circuit states that a missing transcript which makes the court unable to render a decision on a challenged action is reversible error. I guess precedent doesn't matter when you are African-American. I am not just spewing baseless assertions about what occurred. The court record supports everything I have stated.

Justice in America is not blind. When you are African-American, you are rarely given the benefit of the doubt by judges, prosecutors, law enforcement and even juries. We witnessed that first-hand just as Sybrina Fulton and Tracy Martin did in the death of their son Trayvon. I am not bitter nor do I harbor any hatred or ill-will towards AUSA Kirsch, Judge Arguello, Greg Goldberg, U.S. Attorney John Walsh, the government or the U.S. justice system, but I am shocked and deeply disturbed by their lack of respect for my constitutional rights and humanity. I honestly believe each and every one of them know we are innocent but really just don't care. Prior to this time most of my experiences with law enforcement and the judicial system have been positive. I have experienced racism, including the purse clutching incidents mentioned by President Obama. I have chastised many of my friends who wrongly used racism as a crutch or excuse for why they can't be better or successful. But in our case I saw a group of justice officials who from the outset profiled us as criminals when we were doing something so positive. We were developing software for law enforcement that would improve criminal investigations, information sharing and collaboration. Some of the very issues that contributed to 9/11. To be accused of running a criminal enterprise while working this closely with law enforcement is still disconcerting.

These justice officials really didn't care about doing justice, fairness, the rule of law or the Constitution; only about winning at any cost and supporting each other instead of supporting what is right. I have become keenly aware that if I can be profiled and convicted of committing a crime then it can happen to anyone. America cannot rationally tout they have best justice system in the world with the type of racial inequities and profiling seen in the IRP-6 and Trayvon Martin cases.