


JUSTICE DENIED

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The Magazine for the
Wrongly Convicted

NORFOLK FOUR SEEK PARDONS FROM FALSE CONFESSIONS

SEE P. 6




Clarence Elkins
Exonerated after 7 years of wrongful imprisonment for murder and rape.
See page 18




Wilton Dedge
Awarded \$2 million by Florida's Legislature for 22 years of wrongful imprisonment for rape.
See page 21



Kenneth Wyniemko
Awarded \$3.9 million for 9 years of wrongful imprisonment for rape.
See page 28



Josiah Sutton
Awarded \$118,000 for 4-1/2 years of wrongful imprisonment for rape.
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Alejandro Dominguez
Pardoned after 12 years of wrongful imprisonment for rape.
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MI City Attempts To Conceal \$3.9 Million Award For Wrongful Rape Conviction!

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**Issue 30
Fall 2005**

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Message From The Publisher

This issue completes *Justice:Denied's* seventh year. We extend a heartfelt thank you to everyone who has supported our efforts through a donation, a subscription or book order, or telling others about the magazine. *Justice:Denied* depends on that support because it is a genuine grass roots organization that doesn't receive any grants, or have a deep-pocketed financial supporter, or depend on advertising. Not being dependent on any significant outside financial sources has the downside of making *Justice:Denied* reliant on volunteers to produce. However, it has the very big upside of enabling *Justice:Denied* to have a genuinely independent editorial policy.

It is inevitable that toes will be stepped on in the course of *Justice:Denied's* reporting on cases and issues related to wrongful convictions. *Justice:Denied's* editorial independence ensures that the possible displeasure of a person or organization with the magazine's reporting is not a consideration as to whether an article will be published.

Five years ago *Justice:Denied* provided the first national exposure about the Norfolk Four's case. First-class legal teams are now aiding *pro bono* the three men who remain imprisoned because of their false confessions to rape and murder. Pardon applications filed in November 2005 present a compelling case for the men's innocence. A new 30-minute documentary about their case — *The Norfolk 4: A Miscarriage of Justice* — has also been submitted in support of their pardons. It is now up to Virginia's Governor Warner to act as a statesman and end the travesty of their imprisonment. A Norfolk Four case update is on page 6.

Hans Sherrer, Publisher
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Justice: Denied's logo represents the snake of evil and injustice climbing up on the scales of justice.



Information About *Justice:Denied*

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Justice:Denied does not and cannot give legal advice.

If you have an account of a wrongful conviction that you want to share, please read and follow the Submission Guidelines on page 46. If page 46 is missing, send a SASE or a 37¢ stamp with a request for an information packet to, Justice Denied, PO Box 68911, Seattle, WA 98168. Cases of wrongful conviction submitted in accordance with *Justice:Denied's* guidelines will be reviewed for their suitability to be published. *Justice:Denied* reserves the right to edit all submitted accounts for any reason.

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In February 2000, my husband Bob Dorotik and I lived in Valley Center, which is a rural area about 35 miles north of San Diego, California. Bob was a marathon runner and he went jogging on Sunday afternoon, February 13, 2000. I watched him put on his running shoes and lean over to tie them as he was watching a basketball game. He said, "I'm going out for a run." I was on my way to the upper foaling barn on our property to tend to our foaling mares, so I said to him, "Stoke the fire before you go." Those were our last words with each other, because it was the last time I saw Bob alive.

Shortly after 5 p.m. I returned to the house from the barn (a distance of several hundred yards) and Bob hadn't returned from running. I became alarmed because it was getting dark and Bob never ran after dark. [JD Note: According to the website of the U.S. Naval Observatory in Washington D.C., San Diego's sunset on Feb. 13, 2000 was at 5:32 p.m.] I drove around within a few miles of our house looking for Bob. When I didn't find him I went home and called the San Diego County Sheriff's Department.

That night a search for Bob was begun that involved sheriff deputies, friends, a civilian search and rescue team, and a scent tracking dog. Bob's body was found the following morning at 4:36 a.m. near a wooded intersection 3-1/2 miles from our home. His head had been bashed in to the point of being "pulpified." The rope used to strangle him, that cut 1/4" deep gashes into his neck, was still around his neck. Two sets of shoeprints were identified near his body. Bob's jacket was found along his jogging route a half a mile from where his body had been found.

Sheriff deputies guarded my husband's body, for over 12 hours until the coroner arrived Monday afternoon at 5 p.m. However, during the crime scene examination the coroner did not conduct a liver temperature test to pinpoint Bob's time of death.

During Bob's autopsy the coroner found "black

Husband Seen Jogging The Day After His Wife Allegedly Murdered Him — The Jane Dorotik Story

By Jane Dorotik

foreign particles" embedded in his skull which he determined to be black paint. Presumably these particles were from the unknown murder weapon since it was never found. The rope used to strangle Bob was not tested for possible DNA traces left by his killers' hands.

Two eyewitnesses independently provided the sheriff's office with information that they saw Bob after he left the house to go jogging that Sunday afternoon. However, the existence of those witnesses was not disclosed to my lawyer or me, and detectives didn't pursue investigating those leads. In fact, the eyewitness who saw Bob between two men in a small black pickup truck parked where his body was found, was specifically told by a homicide detective that "her information was irrelevant."

Two eyewitnesses independently came forward to provide the sheriff's office with information that they saw Bob after he left the house to go jogging that Sunday afternoon.

The first witness volunteered her information to a sheriff deputy the morning Bob's body was found. She reported seeing Bob at approximately five p.m. She said *he was "slumped over" between two Hispanics or American Indian men in a small black pickup truck just a few feet from where his body was found the following morning.* (See accompanying Interview of LS, p. 33.)

The second witness reported to a sheriff's investigator that she saw Bob jogging at approximately four p.m., less than a mile from where his body was found. That witness also saw a small black pickup truck being driven erratically along that road at the time she saw Bob jogging. She said "there were two men in

the truck who looked to be Hispanic or Indian." She was positive about seeing the truck and its occupants, because she said it "almost ran me off the road." (See accompanying Interview of SN, at bottom of page.) That witness is the last person known to have seen Bob alive — other

than his murderers. Both witnesses also described the small black pickup truck as being an older model with the old style California license plate.

Although I didn't learn it until two years later, on the morning Bob's body was found the first witness gave a short interview about what she saw to a reporter with San Diego television station KUSI that was broadcast later that day. A third witness contacted the sheriff's office to provide the information that on Sunday afternoon (Feb. 13) in the area where Bob was found, he saw two Hispanics in a small black pickup truck being driven so erratically that it crashed into some trash cans by the side of the road.

So the San Diego Sheriff's Office had independently corroborating evidence from three eyewitnesses suggesting two Hispanic or American Indian men in a small black pickup truck were involved in Bob's murder. However, I was neither notified about these witnesses, nor about the information they provided, and the sheriff's office didn't pursue investigating those critical eyewitness leads into Bob's murder. In fact, the eyewitness who saw Bob between two men in a small black pickup truck parked where his body was found, was specifically told by a homicide detective that "her information was irrelevant."

Consequently, when I was targeted as my husband's murderer I couldn't raise a public storm about the failure of the homicide detectives to focus their investigation on identifying the small black pickup truck and the two Hispanic or American Indian men that they had substantial reason to suspect were the perpetrators of Bob's murder.

Dorotik continued on page 33

INTERVIEW OF SN *

On March 5, 2005, SN was interviewed by a private investigator working on Jane Dorotik's behalf. *The woman's initials are being used by *Justice: Denied* in place of her name to provide a measure of protection for her family that lives in a rural area, since she is a witness and the men responsible for Bob Dorotik's brutal murder have not been apprehended.

Excerpts of Interview:

On February 13, 2000, at around

3:45 to 4:15 p.m., "not long before dark" she was going west on Woods Valley Road on her way to the market ... She saw a man ... jogging east on the road, on the opposite side she was going. The man jogging smiled at her, she smiled back and was able to get a good look at him. ... She then proceeded to the store, and stayed in the store for no more than 10 to 15 minutes. On her way home, she noticed that the man was now running in the same direction she was going ... he was still going east on Wood Valley Road ... She knew it was the same

man she saw a few moments before because he looked the same and was wearing the same jogging clothes.

... After she had turned right on N. Lake Wolford Road SN saw a black truck coming at her at a fast rate of speed. This black truck was in the same lane she was in, and the truck was coming at her head on. There were two men in the truck who looked to be Hispanic or Indian. ... She stated, "They both looked really scary. They reminded me of kids on a joy ride, but they were older than kids." She got out of the way just in time to avoid an accident,

and she indicated she had concern for the jogger because of the high rate of speed the truck was going.

SN ... described the [black] truck ... was a very old truck with the old licensed plated that was "black and yellow."

SN indicated that she had seen a photo of the man on February 14, 2000 on the news and recognized it as the same man she saw jogging. ... SN indicated that she has not seen the men in the black pickup truck since February 13, 2000.

A Mistaken Identification Leads To A Wrongful Conviction and Death Sentence — The Tony Ford Story

By Richard Burr



Tony's Lawyers Tried To Question The Reliability Of His Identification

At trial, the critical factual question for the jury to resolve was whether the Murillo's subsequent identification of Tony Ford from a photo array was reliable.

On December 18, 1991, two people broke in to the home of Myra Concepcion Murillo in El Paso, Texas. Saying they needed to see "the man of the house," and demanding to know where "the money" was, the two men became angry when their demands were met with confusion. Within moments, one of the men shot and killed Ms. Murillo's eighteen-year-old son, Armando, then shot Ms. Murillo and her two daughters. Ms. Murillo and her daughters survived.

A man named Van Belton (Van) was charged along with Tony Ford with breaking in to the Murillo's home. Van was the only person initially identified by Ms. Murillo's daughters. One of them recognized him from high school. Both daughters said Van was the second man involved in the break-in and was not the shooter. Neither knew the other man.



El Paso PD Mugshots
Victor Belton (L) and Tony Ford (R)

The prosecution's case at trial turned on the daughters' identification of Tony Ford from a photo array as one of the two men who broke in to their home and as the one who did the shooting. In his defense, Tony testified that he was not involved in the home break-in though he had driven the two men to the Murillo's house. He testified that he was outside in the vehicle waiting for the two men when the break-in occurred and that he did not know that the men planned to break in to the house and kill people.

After Van was arrested, he told the police that Tony was the other person. In Tony's statement to the police and in his testimony at trial, he confirmed that Van was one of the two men who broke in to the Murillo's home, but he testified that the second man was Van's brother Victor Belton (Victor).

Based on all the other evidence, the Murillo sisters' identification of Tony appeared to be a mistake, because no other evidence connected him directly to the crime:

- In a search of Tony's home after the crime, nothing related to the crime was found.
- By contrast, property taken from the Murillo's house was located at Van and Victor Belton's home.
- The only physical evidence suggesting a link to Tony was inconclusive. Three wool fibers found on Armando Murillo's shirt were determined to be similar in color, size, and appearance to the wool fibers from Tony's trench coat. The state's expert testified that the fibers "could" have come from the coat. In her lab report, this witness was even more equivocal. She reported that "[t]he three dark gray wool fibers were similar in color to some wool fibers in the overcoat

Ford cont. on page 41

Eduardo Velazquez Awarded \$2.95 Million For Wrongful Rape Conviction

By JD Staff

Eduardo Velazquez was convicted in 1988 of the 1987 knife-point rape of an Elms College student in Chicopee, Massachusetts. The prosecution relied on the victim's identification of Velazquez as her attacker, although he claimed she had mistakenly identified him.

Velazquez's conviction was vacated in 2001 after DNA tests unavailable at the time of his trial excluded him as the source of the attacker's bodily fluids on the victim's coat. He was released after 14 years of wrongful imprisonment.

In 2003 Velazquez filed a federal civil rights lawsuit in U.S. District Court in Springfield. The lawsuit sought \$10 million in damages, and named the City of Chicopee, the city's police department, and six police officers as defendants. The suit alleged that the police induced the victim to mistakenly identify him, and that they failed to disclose exonerating evidence.

After Massachusetts' wrongful conviction compensation statute was signed into law in December 2004, Velazquez filed a lawsuit against the state claiming damages. In August 2005 he became one of the first three people awarded compensation under the statute, when his suit was settled by the state Attorney General's Office for the statutory maximum of \$500,000.

Three months later, in November 2005, Chicopee and Velazquez agreed to settle his lawsuit for \$2,450,000. The city's aldermen voted to

approve the settlement after their attorney told them the city was facing a judgment of up to \$20 million if a jury ruled in Velazquez's favor. The aldermen also took into consideration that taking the case to trial would cost at least \$1 million in attorney's fees — since the city had to not only pay its legal fees, but also those of the six police officers named as a defendant, each of who had a separate lawyer. Alderman Jean Croteau Jr. said of the decision to settle the case, "It would still cost us \$1 million if we went to court and won. The risk factor is too great." In agreeing to the settlement, the city didn't acknowledge any intentional or unintentional wrongdoing by any police officer.

Velazquez, 39 and living in Puerto Rico, was awarded a total of \$2,950,000 for his 14 years of wrongful imprisonment.

Source: Settlement Set At \$2.45 Million, Etta Walsh, *The Republican*, Springfield, Massachusetts, November 16, 2005.

John Spirko Update

John Spirko's first-person story of being on Ohio's death row when there is evidence he was over 100 miles from the scene of Elgin, Ohio Postmistress Betty Jane Mottinger's 1982 abduction and murder, was in *Justice Denied*, Winter 2005, Issue 27.

Spirko's execution scheduled for September 20, 2005, was stayed by Ohio Gov. Bob Taft until November 15, 2005, who also ordered an unprecedented second clemency hearing. After that October 12, 2005, hearing, Ohio's Parole Board found by the same 6-3 vote as after the first hearing, that the new evidence of Spirko's innocence didn't merit clemency.

On November 7, Gov. Taft granted a stay of execution until January 19, 2006, at the request of Ohio Attorney General Jim Petro, so that the painting tarp and duct tape wrapped around Mottinger's body, and a cinder block found near her body could be tested for the presence of the killer's DNA — who a witness has

Spirko cont. on page 13

Eighteen-year-old Sarah Jane Adams of Cincinnati filed a police report on February 11, 1996, which accused James (Jim) Love with five counts of oral rape. Love was subsequently charged with rape in an indictment that stated the crimes had occurred six, seven and eight years earlier, "Sometime in 1988 ... Sometime in 1989 ... and, Sometime in 1990." Adams' testimony at Love's June 1996 trial was that the 1988 charge had occurred, "the week after Christmas in 1988." (Trial transcript pages 710-711.) The three 1989 charges were testified to as having occurred, "at least once a month each month after the first time." (Trial transcript pages 657-658; 664.) Which would have been January, February and March 1989. Testimony concerning the 1990 charge of rape appears only once in the trial transcripts and consists of Adams stating, "I can't remember when the last time was." (Trial transcript page 668.)

Prior to his trial, Love filed a Notice of Alibi stating that he had been out of the United States during a large portion of the time period addressed in the Indictment. In three separate pretrial motions, Love's lawyers requested more specific dates and times of the five rape charges. The prosecutor repeatedly denied there were any dates available.

Man Two Thousand Miles From Alleged Rape Scene Fighting For New Trial – The James Love Story

By James F. Love



Phone Records Prove Love Was Traveling Or Outside U.S. At Time Of Alleged Rapes

It was only during Love's June 1996 trial that the above dates were given by Adams. Love, upon learning the dates of Adam's accusations,

turned to his attorneys, Tom Miller and Kevin Spiering, and told them that he was living in Mexico and Belize during those periods of 1988 and 1989. Love obtained his mother's telephone records which showed that he had made collect calls from Mexico beginning on December 1, 1988, and continuing on December 24, 1988, March 4, 1989 and May 4, 1989. Love also made a collect call from Dallas/Fort Worth International Airport to his mother on May 17, 1989. On May 20, 1989, a call was made to Mexico City, Mexico, from his mother's telephone. Starting on May 20, 1989, collect calls to his mother were made from St. Louis, Missouri; Kansas City, Kansas, Oklahoma City, Oklahoma, and Laredo, Texas. Collect calls were also made to his mother from Mexico City on May 30, 1989, and from Belize on June 4, 1989 and June 12, 1989.

Love introduced his United States Passport into evidence. "Entry" and "Exit" stamps show he entered the country of Belize on June 2, 1989, and exited Belize on July 3, 1989.

The prosecutor argued that there was no proof the collect calls to Love's mother from Mexico, Belize and other places had been made by Love. The prosecutor objected to introducing Love's U.S. Passport into evi-

Love continued on page 43

Clerical Error Leads To False Sex Crime Conviction

By JD Staff

Three years after being listed in Illinois' sex offender registry and having his picture posted on the Internet as a sexual deviate, Corey Eason was convicted in March 2005 of three counts of failing to notify the police in McLean County he had changed his address.

Eason was listed in the sex offender registry in 2002, after he was paroled from prison for a cocaine dealing conviction. However, he had never been accused or arrested — much less been convicted — of any sex-related offense.

In September 2005, six months after his convictions, Eason contacted a Bloomington attorney, Leann Hill, about how he could get his picture removed from Illinois' sex offender website. Hill contacted the probation office in McLean county. After looking into Eason's case, they confirmed that he had not been convicted of a sex-related offense. The probation department contacted

the Illinois State Police — who maintain the sex offender website — and they began looking into Eason's case.

The McLean County prosecutors office was also notified of the situation that Eason wasn't a sex offender, but that he had nevertheless been convicted of not registering as one. The prosecutors office initially refused to acknowledge the probation office's finding that Eason had been wrongly listed in the Illinois sex offender registry — and hence he couldn't have committed the crime of failing to report his address change.

However, after looking into Eason's case the prosecutors realized a mistake had been made. During a hearing on October 25, 2005, the prosecutors dismissed the criminal charges and the judge vacated Eason's three convictions.

The Illinois State Police opened an investigation into how Eason was erroneously listed in the sex offender registry that it maintains, based on information provided by other state agencies.

After Eason's convictions were vacated, McLeans chief felony prosecutor couldn't

explain why Eason was prosecuted, since it was evident from his criminal record available to both the prosecutors and Eason's public defender, that he had no history of any sex-related offense. The prosecutor, Mark Messman, said, "Making good charging decisions is one of the most important things we do here. It's a system run by people and mistakes can happen. Somewhere along the line, somebody should have caught this."

Eason said that being listed in Illinois' sex offender registry and being publicly branded as a sexual deviate caused him many problems:

"I'm just tired of dealing with it. It just made my life miserable. I've been through a lot over this. I've lost jobs, my house. Police harass me. Prosecutors call me child molester in open court. I couldn't even go out in public without having people thinking I'm a sex offender."

Eason plans to hire an attorney to pursue a civil suit over his ordeal. He said, "They think I'm just going to go away. No. This is just the beginning."

Source: Man Feels Good About Overturned Conviction, by Brett Nauman, *Pantagraph*, October 26, 2005.

The 'Norfolk Four' Convicted of Brutal Rape And Murder Committed By Lone Assailant

By Larry Tice



Danial Williams, Derek Tice and Joseph Dick (left to right) Eric Wilson not shown.

Michelle Moore and William (Billy) Bosko were married on April 4, 1997. Billy was in the Navy stationed in Norfolk, Virginia where they had an apartment. Less than 24-hours before Billy was due back from a Naval cruise, eighteen-year-old Michelle Moore-Bosko was raped, then choked and stabbed to death between the late hours of July 7, 1997, and the early morning hours of July 8, 1997. Over the next twenty months eight suspects were arrested. The five suspects that confessed were prosecuted and convicted of crimes related to her rape and murder. The other three were released and never prosecuted. However, there is compelling evidence that four of the prosecuted men – Danial Williams, Eric C. Wilson, Derek Tice and Joseph J. Dick, Jr. – falsely confessed and were wrongly convicted. Williams, Dick and Tice were sentenced to life without parole, and Wilson to 8-1/2 years imprisonment. The fifth man, Omar Ballard, has confessed at least five separate times, and has not only repeatedly told authorities that he acted alone, but his were the only confessions with details mirroring the crime scene and physical evidence. Three of Ballard's confessions were to police (two orally and one in writing), one was in a letter to an acquaintance, and one was in a March 2005 sworn affidavit. The truthfulness of Ballard's claim of sole responsibility and

his accurate confessions are corroborated by DNA tests of crime scene evidence that excludes the other four defendants, but not him. The following chronology explains how each of the eight men fit into the Moore-Bosko case:

June 24, 1997: Ballard wounds a young woman living in Moore-Bosko's apartment complex by maliciously beating her with a baseball bat. An angry mob chases Ballard to the Bosko's apartment where William Bosko lets him in and refuses to turn him over to the crowd.

July 7, 1997: Between 11:00 pm on July 7, 1997 and 7:30 am on July 8, Moore-Bosko is raped and murdered in her apartment.

July 8, 1997: Moore-Bosko is found dead by her husband in their apartment. She has been stabbed, strangled and raped. He places a blanket over her body before the police arrive.

July 9, 1997: Norfolk police arrest Williams, who lives in the same apartment complex as Moore-Bosko. After an intense interrogation he confesses and is charged with her rape and murder.

July 18, 1997: Ballard rapes a 14-year-old girl near Moore-Bosko's apartment complex.

December 1997: Report provided to Norfolk police that DNA test result excludes Williams.

Norfolk cont. on page 35

Norfolk Four — Williams, Tice, Dick and Wilson — Seek Pardons From VA Governor

Petitions requesting executive clemency and pardons were filed with Virginia Governor Mark Warner by lawyers for Derek Tice, Joseph Dick and Danial Williams on November 10, 2005. The three men had been convicted of the rape and murder of Michelle Moore-Bosko in July 1997 based on their confessions. They were sentenced to life in prison. Eric Wilson was also convicted of rape, but not murder, after confessing. Wilson completed his prison sentence in September 2005, and has also filed a pardon petition.

All four men have retracted their confessions as being coerced under intense pressure by Norfolk, Virginia detectives and claimed their innocence.

The petitions for Tice, Dick and Williams incorporate the crime scene reconstruction analysis conducted by Academy Group,

Inc., a Virginia based forensic consulting firm. AGI released its a 60-page report on

November 3, 2005. The report examines the condition of the crime scene, the physical and DNA evidence recovered, and the consistency of the men's confessions with the crime scene and evidence. AGI's summarizes its report as conclusively establishing that none of the four men was involved in Moore-Bosko's rape and murder.

The Norfolk Four's pardon requests have attracted national attention to their case, including a feature article in *Time* magazine (Dec. 12, 2005) and a segment on ABC's *Nightline* program (Dec. 29, 2005).

Governor Warner has granted a pardon to three wrongly convicted men, Marvin L. Anderson, Julius Earl Ruffin and Troy D. Hopkins, and he has announced he will pardon two others. It is unknown when he will make a decision about the Norfolk Four's applications.

Crime Scene Analysis and Reconstruction of the July 8, 1997 Sexual Assault and Murder of Michelle Moore-Bosko

Excerpts of the 60-page Report by Academy Group, Inc.

Executive Summary

Mrs. Michelle Moore-Bosko was sexually assaulted and murdered by Omar Ballard on July 8, 1997, in her Norfolk, Virginia, apartment. Ballard was alone with Moore-Bosko when he killed her. He confessed to this homicide, and solely his DNA was found under her fingernails and in her vagina. Statements made by Ballard to police investigators were consistent with the physical evidence found at the crime scene and found during the victims autopsy.

There was no evidence of any nature linking Danial Williams, Joseph J. Dick Jr., Eric C. Wilson, or Derek Tice to this crime. Statements they made were not consistent with the physical evidence, victim's wounds, or behavioral evidence. They had nothing to do with this matter and were charged only because they confessed to the crimes. (p. 3)

Why the Evidence Does Not Support This as a Multiple-Offender Crime

If eight healthy young men were in a tiny (approximately 700 sq. ft.) apartment taking turns restraining and sexually assaulting a kicking and violently fighting female, it can be presumed that their vigorous activity, anxiety, nervousness and testosterone would lead to a far greater amount of physical, biological, and behavioral evidence being present than was found at this scene.

The greater the number of people present, the greater the chance for leaving fingerprints, hairs, fibers, footwear impressions, and semen, and the greater chance of breaking, stealing, or disturbing something in the small apartment. There was not enough physical evidence present to support this as being a multiple-offender crime. (p. 21)

Physical Evidence

If this were a multiple-offender crime one would expect:

- More fingerprints throughout the apartment
- More fingerprints on the polished surface of bedroom floor

Analysis cont. on page 30

Christopher (Chris) Parish was convicted in 1998 of “robbery as an accomplice” and “attempted murder” by an Elkhart, Indiana Circuit Court jury. He was sentenced

to 30 years in prison. In spite of his conviction and imprisonment, Parish could not have committed those crimes, because they did not occur.

The Prosecution’s Fabricated Robbery and Shooting Story

The prosecution presented the following story about the crime to the jury:

On October 29, 1996, at 9:30 p.m., two men intending to commit a robbery forced their way into apartment F on the third floor of an apartment building located at 729 Monroe street in Elkhart, Indiana. The occupants of apartment F at that time were: Michael Kershner, Nona Canell, Jennifer Dolph, Eddie Love, Jermaine Bradley and Jason Ackley. The taller of the intruders wore a baseball cap with the letter “J” inscribed on the front (“J hat”).

Immediately after these two men forced their way into apartment F, Kershner attempted to grab an SKS assault rifle, that was close at hand. During the ensuing struggle over the assault rifle, which involved the tallest intruder and Kershner, that intruder fired several shots from the handgun he had on him. One of the bullets struck Kershner in the hip and the other bullets came very close to Love’s head and ricocheted off the apartment walls. Also during the struggle, the intruder’s baseball cap fell off. After being shot in the hip Kershner fell to the floor and started rolling back and forward, yelling for someone to call 911.

The two intruders then left the apartment, with the taller one taking the SKS rifle and a taser gun, and the shorter intruder taking \$23 in coins. The baseball cap was left behind because of all the commotion.

After the intruders left, the occupants carried Kershner down three flights of stairs to a car and transported him to a nearby fire station. An ambulance then transported him to a hospital. One of the witnesses, Canell, stated that Kershner was “bleeding profusely from the gunshot injury and that there was blood everywhere.”

Phantom Robbery And Fake Crime Scene Leads To 30-Year Prison Sentence — The Christopher Parish Story

By Christopher Parish

If the above version of events is believed, it appears a serious crime took place in apartment F and the people involved should be prosecuted. However, the prosecution’s story becomes suspect when it is compared to reports by the investigating police officers, police photos of apartment F, analysis of DNA evidence, and the statements of eyewitnesses.

Alleged Courtroom Threat Used To Smear Parish As Dangerous

A problem with linking Parish to the prosecution’s scenario of the alleged apartment robbery and shooting was his solid alibi that on October 29, 1996, from 4 p.m. to 11:30 p.m., he and his wife and children were visiting relatives in Chicago. So the prosecution had to overcome the jury’s possible resistance to convicting a person who could credibly claim to have been 110 miles from the alleged crime scene. [JD Note: According to mapquest.com it is 110 miles from Elkhart, IN to Chicago, IL.] The prosecution was largely able to deal with that problem by seizing on an alleged trial event. During one day of Parish’s trial, at 2:45 p.m. Bradley began his trial testimony as one of the prosecution’s alleged crime scene witnesses. The next morning when the trial resumed at 9 a.m., Bradley testified that Parish had verbally threatened him in the courtroom prior to him beginning his previous day’s testimony. Bradley claimed the incident occurred ten seconds before the jury reentered the courtroom after a short recess, and two minutes before he was called as a prosecution witness.

Bradley’s accusation was absurd on its face. All the prosecution’s witnesses were sequestered in a room until called to testify, so Bradley could not have been loitering in the courtroom next to the defense table prior to testifying. Additionally, no other person in the courtroom, including Parish’s lawyer next to him, heard the alleged threat. Further still, Bradley made no mention of the threat the previous day when he testified immediately after it had allegedly happened.

However, in spite of the absurdity of Bradley’s courtroom threat accusation, prosecutor Christofeno referred to it during his closing argument as proof that Parish was guilty of the apartment robbery and the at-

Parish cont. on page 37

Parish’s Conviction Vacated New Trial Ordered!!

By Hans Sherrer

Indiana’s Court of Appeals vacated Christopher Parish’s convictions on December 6, 2005, and ordered a new trial in a published decision. (*Parish v. State*, No. 20A03-0502-PC-74 (Ind.App. 12/06/2005); 2005.IN.0000756 <www.versuslaw.com>)

Parish had been convicted in 1998 of robbery and attempted murder and sentenced to 30-years in prison. The convictions were related to Parish’s alleged October 29, 1996, invasion of an Elkhart, Indiana apartment occupied by six people, and the theft of \$23 and a rifle, and the shooting of one person by Parish’s alleged accomplice. (See, Phantom Robbery And Fake Crime Scene Leads To 30-Year Prison Sentence — The Christopher Parish Story, in this issue of *Justice:Denied*, .)

Parish’s convictions were affirmed on direct appeal, and he had appealed the October 2004 denial of his post-conviction petition for a new trial that he filed in 2000, and amended in 2004.

The appeals court noted in its decision that the Findings of Facts adopted by Superior Court Judge Stephen Platt after Parish’s August 2004 post-conviction hearing included several significant errors that could have contributed to the denial of his petition. Two of those errors were:

- Parish was cited as the shooter during the alleged October 1996 robbery and shooting at an Elkhart apartment, when the record actually shows his alleged accomplice was the shooter.
- The State’s star eyewitness, Eddie Love, had testified during Parish’s trial that Parish was at the crime scene, when the record actually shows that Elkhart Detective Steve Rezutko testified about what he claimed Love told him.

Judge Platt relied on those fundamental errors of fact in denying Parish’s petition, even though he wrote, “... the Court has re-read the entire transcript of the cause” (*Id.* at ¶ 28)

Those significant factual errors, and their possible influence on Judge Platt’s decision opened the door for the appeals court to closely review Parish’s case. Although Parish raised numerous issues, the ap-

Vacated cont. on page 39

CA Awards Peter Rose \$328,000 For Ten Years Wrongful Imprisonment

By JD Staff



Peter Rose was convicted in 1995 of kidnapping and raping a 13-year-old girl in Lodi, California. He was sentenced to 27 years in prison. The prosecution's key evidence was the girl's identification of Rose. She testified Rose was the man who punched her in the face as she walked to school, and then dragged her into an alley where he raped her.

In 2003 Rose contacted the Northern California Innocence Project at Golden Gate University in San Francisco, and requested their help in testing the attacker's semen found in the victim's underwear. They accepted his case, and in June 2004 secured a court order for a DNA test of the semen. The test excluded Rose as the source. The girl — who didn't identify Rose until three weeks after the attack and after multiple intense sessions with Lodi detectives — also recanted her identification of Rose. In recanting, the victim, now in her early 20s, said she didn't actually see her attacker but was pressured by the detectives to identify Rose. In October

2004, a San Joaquin County Superior Court judge declared Rose was "factually innocent" and ordered his release. Rose had been falsely imprisoned for almost ten years.

Rose filed a claim for restitution under California's compensation law that provides for \$100 per day from the date of a wrongful conviction. San Francisco attorney Ray Hasu represented Rose. He filed a 4-inch-thick claim to meet what he described as the law's "very high threshold" of requiring Rose to independently prove his innocence, to show he didn't do anything that contributed to his conviction, and that he suffered financially.

On October 20, 2005, the Victim Compensation and Government Claims Board voted unanimously to award Rose \$328,000 for the 3,280 days he had been wrongly imprisoned after his conviction. Rose had been unable to post his \$100,000 pretrial bail, and he also claimed compensation for the 318 days he spent jailed prior to his conviction. However, that claim was denied because the state law specifies compensation begins from the day of conviction — not arrest. Before it can be paid the award must be approved by the California legislature and then Governor Schwarzenegger, but in the past they have gone along with the Board's decision.

Rose, now 37, is the father of three children who were taken care of by his mother while he was imprisoned. After his release he worked in construction and on a fishing boat to support his children and mother — who has been diagnosed with bone cancer.

Peter Rose Seeks Millions in Federal Lawsuits

By JD Staff

Less than two weeks after being awarded \$328,000 under California's compensation statute for 10 years imprisonment after a wrongful rape conviction, Peter Rose filed a total of four federal civil rights lawsuits seeking millions in compensatory and punitive damages.

Filed in U.S. District Court in Sacramento in November 2005, the suits name a number of defendants, including the City of Lodi, San Joaquin County, the State of California, Rose's court-appointed defense attorney, two Lodi Police Department officers, and a technician employed by the California Department of Justice Crime Lab in San Joaquin County.

Rose cont. on page 27

After notified the compensation was approved, Rose's attorney Hasu said, "There's no way you can compensate someone for having been deprived of their life."

California has awarded compensation to twelve wrongly convicted people out of 55 claims filed since 1981.

Source: Man Wrongly Convicted in Rape to Get \$328,000, AP, *The Mercury News*, October 21, 2005. State Board Give \$328,000 to man for imprisonment, M.S. Enkoji (*Sacramento Bee*), *Contra Costa Times*, October 22, 2005.

Dimitre Dimitrov Acquitted After Murder Retrial

By Katherine E. Oleson

Dimitre Dimitrov was acquitted on October 29, 2005, after his retrial for the February 1996 murder of his friend and landlord, Hristo Veltchev. The trial in Ottawa, Canada lasted 11 days, and the jury deliberated for 12 hours. He is reportedly the first defendant acquitted in Ottawa in seven years.

The decision to charge Dimitrov, a Bulgarian refugee, was logically unsound — there were no eyewitnesses to Veltchev's murder the time of his death was difficult to determine, and Dimitrov did not have a motive. Veltchev's murder seemed to have involved some planning and maliciousness: He was bludgeoned to death in the garage of his home and stuffed into the trunk of his car, which was then driven to a public parking lot where it



Dimitre Dimitrov and his two lawyers, Richard Auger (L) and Vincent Clifford (R), after his acquittal.

was left. The bloodstains on the garage floor had been cleaned up and covered with sand.

Two other Bulgarian immigrants, fellow boarder Dimitre Tzenev and the victim's wife, Faith Veltchev, were initially considered as suspects. Ms. Veltchev phone was wiretapped and she was arrested twice and extensively questioned, once after attempting to claim an insurance policy in the amount of \$50,000 two months following her husband's death, but charges were never brought against her. Tzenev — who had a criminal record, a history of domestic violence, and may have suspected Veltchev was having an affair with his wife — was charged with the

murder as Dimitrov's co-defendant. However, the charge against Tzenev was dismissed for lack of evidence after a preliminary hearing. Dimitrov was convicted by a jury after his 1999 trial and sentenced to life in prison with a minimum of 12 years imprisonment before being eligible for parole.

Dimitrov appealed, and in December 2003 the Ontario Court of Appeals reversed his conviction and ordered a new trial. The three-judge panel ruled "forensic" evidence used in his trial was unreliable and inadmissible. The evidence in question related to testimony about a blood stained pair of boots found in the front hall closet of the victim's boardinghouse. A DNA test concluded the victim's blood was on the boots, as was the blood of another person. Investigators determined that whoever wore the boots could have been standing within three feet of the victim. However the blood on the boot was excluded by the DNA test from matching Dimitrov or the other two suspects.

Dimitrov cont. on page 9

Harris County DA Finally Agrees to \$118,000 Compensation For Josiah Sutton

By JD Staff



Sixteen year-old Josiah Sutton was arrested and charged in October 1998 with the rape at gunpoint of a Houston, Texas woman. At his January 1999, trial a Houston PD Crime Lab technician testified Sutton's DNA matched the assailant's DNA recovered from the victim. He was convicted and sentenced to 25 years in prison.

In March 2003, after irregularities in the testing of DNA evidence by the HPD's crime lab during the time of Sutton's trial became public, a sample of the assailant's DNA was retested. Sutton was excluded as the source, and he was released after 4-1/2 years of wrongful imprisonment.

After considering all the evidence in Sutton's case, the Texas Board of Pardons and Paroles recommended that the governor issue him a pardon. Texas Governor Rick Perry Sutton responded in May 2004 by granting Sutton a full pardon, based on his innocence of the crime.

Dimitrov cont. from page 8

In spite of the DNA test results, a Royal Canadian Mounted Police officer testified as an expert witness that he had developed a method of analyzing foot impressions left in footwear, and that Dimitrov was "likely" the person who had worn the blood stained boots. The expert likened the accuracy of his process of analyzing footprint impressions – which he called "barefoot morphology" – to the accuracy of a fingerprint identification.

The expert's testimony was the only evidence tying Dimitrov to the murder. Dimitrov's lawyer Richard Auger argued to the appeals court that Dimitrov's conviction was based on the prosecution's presentation of "erroneous, factually wrong" information to the jury.¹ The appeals court agreed. They found that foot impression analysis was such a scientifically unreliable form of identification that the expert's testimony should not have been admitted as evidence. They quashed Dimitrov's conviction, ruling that

Sutton then filed a claim under Texas' wrongful conviction compensation statute. The law provides for the payment of \$25,000 per year of incarceration if a person: (a) Served all or part of their sentence, (b) Received a pardon of innocence or relief

from a court based on their innocence, and (c) Can document the amount of time served. However, Sutton found that the law had been changed during the 2003 legislative session to include an additional requirement: a person claiming compensation must obtain a letter from the district attorney whose office prosecuted them certifying the claimant's "actual innocence."

Harris County (Houston) District Attorney Chuck Rosenthal refused to provide Sutton with the necessary letter. He rejected the DNA evidence excluding Sutton as the woman's assailant as proof of his innocence, because she refused to admit she had mistakenly identified an innocent man as her attacker. Displaying a severe case of 'sore loser syndrome' in the face of incontrovertible evidence of Sutton's innocence, Rosenthal said, "The complainant in the case still believes that he is not innocent, and I do not know that she is incorrect."¹ (See, Sutton's Pardon Not Enough For Compensation, *Justice:Denied*, Issue 29, Summer 2005, p. 17.)

the experts testimony had the potential of "distorting the fact-finding process."²

Dimitrov was then released on bail pending his retrial. He had been imprisoned for 4-1/2 years.

Dimitrov's attorneys stressed during his retrial that he lacked a motive, that the prosecution's only forensic evidence (the boots) did not contain his DNA, and witnesses described Dimitrov as a kind and gentle man who had never shown anger toward Veltchev or anyone else. They also argued that Ms. Veltchev had the motive and opportunity to arrange her husband's murder and couldn't be ruled out as the perpetrator. In summing up the case, attorney Clifford argued to the jury that "the defence had proved Mr. Dimitrov innocent beyond a shadow of a doubt."³ The jury agreed.

Dimitrov's acquittal vindicated the faith of his two lawyers, Vince Clifford and Richard Auger, who believed in his innocence from the time he was charged. After the verdict,

Rosenthal's opposition to compensating Sutton resulted in a chorus of editorial condemnation by the media in Texas. After a stalemate of over a year, Rosenthal caved-in and agreed to a compromise in August 2005: He would provide the state comptroller's office with a letter that he wasn't opposed to compensating Sutton. After it was determined that Sutton qualified for a payment of \$118,749.97, in late September a check for half that amount was mailed to Sutton. As part of the compromise, the balance will be paid to Sutton after a year if he has not been convicted of a felony.

Sutton said after being notified of the impending payment, "I have been running into roadblocks since I got out, because I didn't know how to be an adult and people didn't want to hire me. I have been through hell and back trying to get things together, but this is enough to get me and my family a foundation and to start living my dreams."²

Justin Waggoner, Sutton's lawyer, said, "The record was so abundantly clear that his was a pardon on the basis of innocence, that there wasn't any basis for denying him the money. I am hopeful this compensation will benefit him, but I certainly wouldn't trade 4 1/2 years of my life for this level of compensation."³

Endnotes and Source:

1 Pardoned Prisoner to Get \$118,000 In Reparations, *Austin American-Statesman*, October 1, 2005.

2 *Id.*

3 *Id.*

Clifford told reporters, "Justice was not done in 1999 because an innocent man was convicted. But justice was done here today. This demonstrates the system can work when an individual has a fair trial."⁴

Dimitrov was overwhelmed with emotion after the verdict and didn't make a public statement. It had been more than ten years since the forty-eight year-old man had seen his wife and children in Bulgaria. Clifford said, "He has just spoken with his family in Bulgaria. He's looking forward to seeing his wife and two children and to following through with the future he had hoped he would have in 1996."⁵

Endnotes and Sources:

1 *Canadian Broadcasting Corporation*. Wrongfully convicted murder suspect freed. Oct. 31, 2005.

2 Rupert, Jake. Dimitrov 'overwhelmed' after acquittal. *The Ottawa Citizen*. Oct. 30, 2005.

3 *Ibid*

4 McKibbin, Sean. A bittersweet acquittal: Dimitrov not guilty of murder after living under pall of suspicion nearly 10 years, *The Ottawa Sun*, October 30, 2005.

5 *Ibid.*

John Quinn was tried in March 1957 on charges of theft and handling stolen scrap lead and brass. Although Quinn admitted he had been a professional safe cracker, he proclaimed his innocence. He insisted he had gone straight two years earlier, after he met the woman who became his wife.

The prosecution relied on the testimony of William (Billy) Dixon, who claimed that he acted as a fence for the stolen metals given him by Quinn and another man.

The “other man” wasn’t identified, and without his testimony to support Quinn’s defense that he was falsely identified as the “other man’s” accomplice, the case came down to “Quinn says he’s innocent” versus “Dixon says Quinn’s guilty.” The jury chose to believe Dixon’s testimony, and Quinn was convicted after a three-day trial in Cumberland, England. The 23-year-old Quinn was sentenced to six years in prison. His appeal was rejected by the Court of Appeals on July 8, 1957.

Quinn continued to protest his innocence, but being imprisoned hampered his efforts to find new evidence, including the identity of the “other man” Dixon said was involved in the theft and handling of the metals.

In 1962, after serving five years at Dartmoor prison, Quinn was credited with saving the life of a guard who had collapsed. He was rewarded by being released a year early.

After his release, Quinn continued his effort to find proof of his innocence. During the next four decades his quest led him to write thousands of letters seeking and following leads. In a bit of an oddity for an Englishman, he also composed several country-western style ballads that told the story of his miscarriage of justice.

Quinn’s first break came nearly 20 years after his conviction, when he learned the identity of the “other man.” That man was George Jamieson, and when contacted he acknowledged Quinn had not been involved in the theft or handling of the metals. That information, however, was insufficient for Quinn to pursue a new appeal. The roadblocks were that Dixon hadn’t recanted his testimony, and the Cumbria police that investigated the crime issued a letter undermining Jamieson’s admissions.

Quinn’s second break came in 2002 when Dixon was convicted of a series of sex

Man Exonerated 47 Years After Wrongful Theft Conviction Seeks Compensation

By Hans Sherrer

offenses he had committed during the previous 20 years. The 80-year-old Dixon was sentenced to two years in prison.

With Dixon’s credibility as a witness put in doubt due to his conviction of sexually related offenses committed over a long period of time, Quinn filed a new appeal.

In February 2003 the Criminal Cases Review Commission (CCRC) was ordered by England’s Court of Appeals to determine if Quinn’s appeal was meritorious.

When told of the appeals court’s order, Quinn said, “I might be able to get justice at last. I’m not asking to be let off. I want a retrial and the chance to clear my name. I was convicted on the evidence of a man whose word was clearly worthless.”¹

The CCRC is a government funded agency independent of the courts that reviews alleged cases of miscarriage of justice to determine if there is a real possibility the appeal of a conviction will succeed. The CCRC evaluates a case based on two standards:

- The existence of an argument or evidence which has not been raised during the trial or at appeal.
- Exceptional circumstances.

In October 2003 the CCRC determined there was merit to Quinn’s claim of wrongful conviction, and referred it for review by the Court of Appeals.

Quinn’s appeal relied on the twin prongs of Jamieson’s exclusionary evidence and Dixon’s impeachment evidence. In November 2004 the Court of Appeals announced its decision to quash Quinn’s 1957 conviction. Although material witnesses were still alive, in light of the persuasiveness of the new evidence the Court of Appeals declined to order a retrial.

After the decision was announced, Quinn said outside the courthouse, “I am at a loss for words. My family now know I have been exonerated and do not have to worry about it any more. I have lived with it for 47 years now and fought all that time. I want to thank everyone who has helped me.”² Beside him stood his wife Marian, the woman for whom he had given up a life of crime

two years before the crime was committed of which he was convicted, and his daughter, who died of cancer several months later in early 2005.

In the summer of 2005 Quinn received a letter from the acting chief of the Cumbria Police, Christine Twigg. The letter corrected a number of inaccuracies contained in a letter the department wrote in 1975 after Quinn had tracked down Jamieson. Twigg’s letter stated in part, “I therefore apologise if you believe that your attempts to clear your name have in any way been hampered by the contents of that letter.”³



John Quinn holding the letter from the Cumbria Police apologizing for his wrongful conviction in 1957. *News & Star*

The letter provided additional support to the correctness of the Court of Appeals decision that the evidence used to obtain Quinn’s conviction was too unreliable to sustain his conviction. Quinn responded to receiving the letter

by saying, “The letter made me feel great. It means I can now apply for compensation and then hopefully this whole episode will finally be over.”⁴

In the fall of 2005 Quinn announced he was working with several people to put together a musical around the songs he wrote about overcoming nearly unimaginable odds to win his case after half-a-century of effort. Quinn said, “People already all me The Mighty Quinn, so that seems like a good title.”⁵

The 71-year-old Quinn said that in commemoration of his daughter’s death from cancer, he plans to donate to a cancer research charity money raised from the show. He will also donate a portion of the compensation he is awarded for his wrongful conviction and imprisonment.

Endnotes and Sources:

1 Man’s 50-year-old conviction reviewed, *BBC News*, February 11, 2003.

2 Conviction Quashed After 50 Years, *BBC News*, November 12, 2004.

3 Pensioner Starts Fight For Police Compensation, *Age Concern England*, August 2, 2005.

4 *Id.*

5 Now John’s Got Justice, It’s Quinn: The Musical’, Phil Coleman, *News & Star*, Cumbria, UK, October 10, 2005.



Who Wrote The Streamlined Procedures Act of 2005?

The Streamlined Procedures Act of 2005 (SPA) is currently being reviewed in the U.S. Senate Judiciary Committee and the House Committee on the Judiciary. Senate and House committee hearings concerning the SPA were held in November 2005, but as of mid-December neither has voted on whether to send it for a vote by the full House and Senate. Efforts to quickly send the SPA out of those committee's so it could be voted on and promptly enacted were thwarted by intense opposition from politically influential people who normally support "law and order" proposals. The accompany article by Marcia Coyle outlines some of the opposition to the SPA.

Federal courts have been an important avenue for a state prisoner to get relief from a wrongful conviction after state courts refused to do so. (See e.g., \$662,000 Awarded Man Imprisoned 5 Years For Phantom Rape of Woman "Sick Of Men", in this issue of *Justice:Denied*.) Because the SPA would more profoundly affect the accessibility of federal court to an innocent state prisoner than any legislation in U.S. history, its genesis and who wrote it is of interest to *Justice:Denied*.

The SPA was introduced in the Senate by Senator Jon Kyl (R. AZ) and in the House by Representative Daniel Lungren (R. CA). As reported in *Justice:Denied* Issue 29, the office of Senator Kyl's office in Washington D.C. was contacted in an effort to find out the authorship of the SPA he introduced. The Senator's press spokesperson told *Justice:Denied* the authorship of the SPA was a collaborative effort. However, when requested he was unable (or unwilling) to identify any of the collaborators. *Justice:Denied* then contacted Rep. Lungren's office in Washington D.C. The Representatives press spokesperson was very adamant that Lungren was the sole author of the SPA. It is unreasonable to believe that Lungren single-handedly wrote the SPA — or even a single word or it — since the bill he introduced in the House was identical to the bill introduced more than a month earlier in the Senate.

The SPA was carefully written by a person or persons possessing not only an intimate knowledge of the federal habeas statutes, but with the skill to deviously close the door to federal court in the face of state prisoners while maintaining the appearance that the door is still open. There are attorneys within the U.S. Department of Justice that possess both the specialized knowledge and the writing skills that were necessary to write the SPA.

If the chief judges of state and federal appellate courts, the organized national bar and a host of others say that a bill that would strip the federal courts of nearly all authority to review state convictions and sentences is a mistake, you'd think the bill's proponents might back down.

Think again.

Only a week after a second cautionary letter from the Judicial Conference of the United States — the Senate Judiciary Committee was prepared to vote [in October] on S. 1088, the so-called Streamlined Procedures Act of 2005, making the most sweeping changes in federal habeas review in a decade.

But lack of a quorum and strong objections by some Democratic senators forced a delay in the chairman's call to vote out the bill and deal with its problems later.

The bill's sponsor, Sen. Jon Kyl, R-Ariz., and supporters are expected to try again. But this time, a substitute measure — offered by judiciary Chairman Arlen Specter, R-Pa. — will be on the table, and Democratic committee members have pressed successfully for a public hearing.

Specter's Substitute

Specter, who had sought unsuccessfully to get a vote on

Consequently, in August 2005 *Justice:Denied* filed a Freedom of Information Act request with the DOJ that requested in part:

"... access to and copies of any and all information related to assistance provided by any employee of the Department of Justice in the research, development and or drafting of The Streamlined Procedures Act of 2005 ..."

In early December 2005 the DOJ responded to *Justice:Denied's* FOIA request by stating that no records could be found of any involvement

More Fuel Added To Debate Over Federal Habeas Review

By Marcia Coyle

his substitute at the meeting in early October, said then that his version meets the concerns of the Judicial Conference. That's news to the policy-making body of the federal judiciary.

"Our people hadn't seen it by then," said Richard Carelli, a spokesman for the Administrative Office of the U.S. Courts. "I'm assuming we will have some reaction to it."

But the substitute amendment, by virtue of its very existence, fails to do the one thing that federal and state chief judges have urged the senators to do: conduct a study on whether there is any unwarranted delay in resolving habeas corpus petitions in the federal courts.

The Judicial Conference recently sent the committee the results of a preliminary review of statistical data on the federal courts' handling of non-capital and capital habeas cases filed by state prisoners.

Based on that analysis, "The Conference does not believe that the data as a whole supports the need for a comprehensive overhaul of federal habeas jurisprudence," wrote Leonidas R. Mecham, conference secretary and director of the Administrative

Office of the U.S. Courts, the management arm of the federal judiciary.

"We oppose the [Specter] substitute," said Kyle O'Dowd, the legislative affairs director for the National Association of Criminal Defense Lawyers. "We don't think it's a reasonable legislative proposal. Senator [Russell] Feingold [D-Wis.] said this is a solution in search of a problem. There needs to be some systematic study of the issue before we even talk about legislation."

But the Specter proposal is "a good and necessary" bill, said Kent Scheidegger of the Criminal Justice Legal Foundation. The Antiterrorism and Effective Death Penalty Act of 1996 "didn't accomplish what states wanted to see done," he insisted. "There's no confidence that is going to happen. The courts have had 10 years to implement AEDPA."

Fast-Track Reform

The debate has now boiled down essentially to two problems that Kyl believes justify a habeas overhaul: delay — both in handling state prisoners' habeas corpus petitions and in carrying out death sentences — and a broken bargain under the 1996 AEDPA, which itself imposed sweeping limits on federal habeas review.

Habeas cont. on p. 40

by any DOJ employee in regards to the SPA. Of course, that only means that if DOJ employees were involved, they were smart enough not to leave an obvious paper or email trail.

U.S. Senators and Representatives are exempt from FOIA requests, so Senator Kyl and Rep. Lungren can stonewall written requests for information. So the mystery remains: Who wrote the SPA?

Justice:Denied is continuing its effort to obtain currently undisclosed information about the SPA that is of public interest.



Rural Washington County Settles Shoddy Indigent Defense Lawsuit

By C.C. Simmons

In 2004, the American Civil Liberties Union of Washington State (ACLU) and Columbia Legal Services (CLS) filed a class-action lawsuit in Kittitas County Superior Court. The ACLU and CLS claimed in the lawsuit that Grant County, a rural central Washington county, failed to provide adequate legal defense for people who couldn't afford their own attorney. The plaintiffs claimed that Grant County used unqualified and overworked public defenders who were paid a flat fee of only \$650 to represent defendants in serious felony cases.

On November 8, 2005, the day the trial was to begin, the parties reached a settlement which requires Grant County to pay the plaintiffs \$500,000 for attorneys' fees and costs. The county is also required to hire a full-time supervisor for its public defenders,

to limit individual defenders' caseloads to 150 felony cases per year, to hire one full-time investigator for each four public defenders, and to provide an interpreter, when needed, for attorney-client meetings.

To ensure compliance during the six-year term of the agreement, a monitor will be appointed to ensure that Grant County upholds its end of the agreement. For each year that the county fails to do so, \$100,000 will be added to the settlement fees. It will be the first time a Washington county's public defender system will be subject to comprehensive independent monitoring.

The plaintiffs noted that in 2004, the Washington Supreme Court disbarred two attorneys who had worked as public defenders in Grant County. The Washington State Bar had sought the disbarment of those public defenders, Tom Earl and Guillermo Romero, after substantiating accusations that they had solicited payments from indigent defendants they were appointed to represent.

Earl and Romero are now barred from practicing law, but two other Grant County public

defenders who were criticized by the plaintiff's lawsuit are not. Although the settlement provides that the county will not hire former defenders Randy Smith or Ted Mahr, Smith will apparently continue to represent the court-appointed clients he already has.

When questioned about the settlement, Mahr said that nobody had informed him that the county would not rehire him. He defended his work saying, "I work very hard and do a good job for my clients."

Smith's performance as a public defender has been questionable. The plaintiffs alleged that in one case, Smith didn't know how to enter a simple document into evidence. In another case, Smith misinformed a client about the consequences of a guilty plea that resulted in a sentence of up to life in prison. Nevertheless, Smith will continue to represent his indigent Grant County clients who were assigned before the settlement was reached.

According to LeRoy Allison, Chairman of the Grant County Board of Commissioners, the settlement "applies to future contracts, not current or past. So the impact of that determination isn't for today's clients or yesterday's clients, but for future clients."

Among the clients Smith will continue to represent is Evan Savoie, 15, who faces an April 2006 trial for murder. Savoie is charged with stabbing and killing Craig Sorger, then 13, in February 2003. Savoie was 12 when he allegedly killed Sorger.

The Savoie case has been highly publicized not only because of the parties' ages, but because the trial will bring together a public defender who has been harshly criticized, a prosecutor who has been convicted of a drug felony, a trial judge who has been censured for incompetence, and a public-defender system that is among the worst in Washington State.

When Smith was appointed to represent Savoie, he had been an attorney for fewer than four years. "Is there something about my law degree that is somehow less because I have an office in Grant County?" asked Smith. "Maybe I'm young and cocky but I think I'm pretty good," he added.

For more about the Grant County public defender scandal, see "The High Cost of Free Defense," *Justice:Denied*, Issue 26, Fall 2004, p. 26.

Sources: Grant County public defender out — after big case, Ken Armstrong and Jonathan Martin, *Seattle Times*, November 20, 2005. Grant County settles defense lawsuit, Ken Armstrong, *Seattle Times*, November 8, 2005

Appeal Judges Censure Magistrate For Wrongly Convicting Defendants

By Bob Frean & Ingrid Oellermann

A Port Shepstone, South Africa regional magistrate, Nonesi Dlamini, was reported to the Magistrate's Commission twice in October 2005 by high court judges of appeal sitting in Pietermaritzburg.

Judge Noel Hurt, with Judge Vivienne Niles-Duner concurring, found that Dlamini had not administered justice when she wrongly convicted a man of two rapes and sentenced him to an effective 15 years in jail.

Hurt set aside the sentence and referred his judgment to the minister of justice and to the Magistrate's Commission — the second case in three days in which judges have ordered their judgments, which are critical of Dlamini, to be sent to the commission.

In both cases dealt with by the high court, the wrongly convicted appellants had languished in jail for more than two years.

On Tuesday (Oct 18, 2005), Niles-Duner also set aside the murder conviction of Petros Zwelethu Shoji and his nine-year prison sentence, and ordered that a copy of the judgment be sent to the commission.

Port Shepstone is a town of about 6,000 people on the southeastern Indian Ocean coast of South Africa. It is about 130 miles southwest of Durban, the closest major city.

The 60-year-old accused in yesterday's appeal cannot be named, to protect the identity of his alleged victims, who were family members.

Hurt said that the alleged rapist and his wife had become estranged and Dlamini should have found that his assertions that the rape charges had been trumped up against him could have been true.

Dlamini had made no effort to apply the rules of law in her analysis of all the evidence, Hurt said. Other judges have previously set aside Dlamini's convictions and ordered copies of their judgments criticising her conduct, to be sent to the Magistrate's Commission.

In 2003 two of Dlamini's judgments were set aside. The first was described by the judges as being the worst they had ever seen. The judges on the second case criticised Dlamini's approach to the case as having been "entirely unacceptable" and suggestive of bias, and said the judgment had been "largely incomprehensible."

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Positive ID Sent An Innocent Alejandro Dominguez To Prison For 12 Years

By Rob Warden



The Vindication

Alejandro Dominguez, a Mexican national, was convicted in 1990 of raping a Caucasian woman the previous year in Waukegan, Illinois.

The only evidence purporting to link Dominguez to the crime was a dubious identification by the victim and forensic results that did not exclude him as the source of biological material recovered from the victim.

Although Dominguez was only 16 at the time of the crime and had no criminal record, he was tried as an adult. On advice of counsel, he waived a jury in favor of a bench trial before Lake County Circuit Court Judge Harry D. Hartel.

The Evidence

Hartel found Dominguez guilty, even though: The victim had told police that her attacker wore a diamond earring in a pierced ear – but Dominguez had no pierced ear. The victim had told police her attacker had a tattoo – but Dominguez had no tattoo. The victim had told police her attacker addressed her in English – but witnesses testified that Dominguez spoke only Spanish.

The victim's testimony was additionally suspect because the identification procedure employed by the Waukegan Police had been suggestive; the victim acknowledged on cross examination that the lead detective in the case told her before she made the identification, "Watch the one sitting on the chair. Tell me if that is the one . . ."

William Wilson, a forensic serologist from the Northern Illinois Crime Laboratory, testified that he could not eliminate Dominguez as a source of the biological material – semen – recovered from the victim. Wilson did not volunteer what portion of the male population was included among the possible sources. Had he been asked, or had he chosen to fairly portray his findings, the answer would have been 67% – or more than two-thirds of all men in the world.

Despite the flimsy evidence, Hartel deemed Dominguez guilty and sentenced him to nine years. With day-for-day good time and credit for time served in jail before trial, Dominguez was released from prison in December 1994.

Six years after his release, by which time he had married and fathered a child, the U.S. Immigration and Naturalization Service threatened to deport Dominguez for failing to register as a sex offender. At this point, he retained defense lawyers Jed Stone and John P. Curnyn to seek DNA testing of the supposedly inculpatory biological evidence in the case.

In 2001, Lake County Circuit Court Judge Raymond McKoski granted a motion for DNA testing at Dominguez's expense. And in March 2002, the results of the testing by the Serological Research Institute in Richmond, California, positively excluded Dominguez as the source of biological material recovered from the woman who had positively identified him and sent him to prison 12 years earlier.

Dominguez was officially exonerated on April 26, 2002, when Judge McKoski granted a motion in which prosecutors joined Stone and Curnyn in asking that the conviction be set aside.

No Apology

However, the prosecution was unapologetic for the error that cost the innocent youth more than four years of his life. "I won't apologize for the original conviction," Michael G. Mermel, chief of the felony trial division at the Lake County State's Attorney's Office, told the *Chicago Tribune*. "At the time, the science didn't exist, and we had a credible witness."

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Dominguez "Free Like A Bird" After Pardon

In August 2005, Illinois Governor Rod Blagojevich pardoned Alejandro Dominguez of a 1990 rape conviction.

Dominguez's conviction was based on his positive identification by the victim and an inconclusive test of the assailant's semen. DNA tests of the semen in 2002 excluded Dominguez, and his conviction was set aside in April 2002. (See, Positive ID Sent An Innocent Alejandro Dominguez To Prison For 12 Years on this page.)

However Dominguez's conviction was still on his record, and it interfered with getting jobs paying enough to support his wife and two children above subsistence level. As he put it, "I was out of jail, but the record still put me in a hole." The pardon acts to expunge the conviction from Dominguez's record, so that problem for him will be removed.

The pardon also enables Dominguez — who was 16 when tried as an adult for the rape — to apply to the Illinois Court of Claims to receive compensation for his four years of wrongful imprisonment.

Dominguez was elated at the news of his pardon — "After all these years, I'm free like a bird."

Source: Governor Pardons Man DNA Cleared, by Steve Mills, *Chicago Tribune*, August 4, 2005.



Spirko cont. from page 4

identified is a house painter who the witness also claims was the tarp's owner. That witness — whose information has been ignored for years by law enforcement authorities — passed a polygraph examination on October 26, 2005.

On September 6, 2005, U.S. District Court Judge James Carr dismissed Spirko's federal habeas petition, ruling that during a previous habeas proceeding before Judge Carr, there was no fraud perpetrated on the court by the State's non-disclosure that the lead investigator and star witness in Spirko's case, U.S. Postal Inspector Paul Hartman, had told people (including Spirko's trial prosecutor) that Spirko's co-defendant and friend, Delaney Gibson, had nothing to do with Mottinger's abduction and murder.

At the time of Spirko's trial the prosecutors claimed Gibson wasn't in custody because he hadn't been apprehended. Spirko was tried alone and presented an alibi defense — sup-

Spirko cont. on page 17

Florida Murder Conviction Based On Hearsay Tossed

By JD Staff

Gilbert Stokes' conviction of murdering 18-year-old Jyron Seider in 2000 during the robbery of a Belle Glade, Florida street dice game was reversed on two grounds by Florida's 4th District Court of Appeals on November 23, 2005. The Court ordered a retrial.

In its unanimous decision, the Court ruled that Stokes had been fatally prejudiced by the trial judge allowing the prosecution to expose the jury throughout the trial to its argument that Stokes' motive was Seider was not a gang member, while Stokes was a member of the Dogs Under Fire (DUF) gang whose headquarters were two blocks from the scene of the murder. The Court ruled that allowing the jury to repeatedly hear direct and indirect forms of the prosecution's inflammatory claim was reversible error, because "the key prosecution witness testified that Stokes socialized with him – a non-DUF member – on "all different corners". . . . No witness testified that Stokes robbed the game because the players were not in DUF or the game's location was outside of DUF's territory."¹ The Court also stated, "Here, the State lacked strong evidence and it is questionable, under the facts of this case, whether the jury would have found Stokes guilty without hearing evidence of his DUF [gang] membership."²

The appeals court also ruled that the trial judge improperly allowed a detective to testify about the unsubstantiated hearsay that people who did not testify at Stokes' trial implicated him in the murder. The Court ruled that was reversible error because, "From this, the jury could have inferred that non-testifying witnesses made accusatory statements to Detective Shatara about the defendant."³ . . . When the only possible relevance of an out-of-court statement is directed to the truth of the matters stated by a declarant, the subject matter is classic hearsay even though the proponent of such evidence seeks to clothe such hearsay under a non-hearsay label."⁴ Interestingly, the Court considered the detective's testimony so prejudicial to Stokes that it constituted reversible error, without even considering that it also deprived him of his constitutional right to confront and cross-examine the alleged and unidentified witnesses.

Leon Harrell was the State's star witness. Harrell was initially charged with Seider's murder, but the charges were dropped after he lived up to his street name of "The Rat" by

naming someone else – Stokes – as the shooter. Harrell claimed he left the dice game after losing all his money. He said he returned with Stokes, who went inside to rob the dice players while Harrell served as the look-out. However, the only DNA profile recovered from the crime scene was linked to Harrell, whose testimony he wasn't present at the time of Seider's murder was impeached by multiple witnesses. Witnesses also identified Harrell as the only person involved in the robbery and murder, and that a man dressed all in black wasn't involved – that person was Stokes.

Two jailhouse informants came forward after Stokes' trial and said Harrell had confessed to them. Stokes filed a motion for a new trial based on the new evidence, but in 2004 a Circuit Court judge ruled the two informants weren't reliable and their testimony wouldn't have affected the outcome of Stokes' trial.

The essence of the appeals court's reversal was that Stokes' jurors likely didn't find him guilty based on evidence of his guilt – but because of his alleged gang membership and the detective's hearsay claim that unidentified persons implicated Stokes in the dice game robbery and fatal shooting of Seider. That conclusion is supported by the fact that the crime scene's physical evidence and eyewitness testimony directly implicates the State's star witness – Leon Harrell – as Seider's murderer.

Stokes' appeal was handled by Gregg Lerman, his trial lawyer. Although Lerman rarely handles appeals, he believed so much in Stokes' innocence that he remained his lawyer. After the appeals court issued its ruling, Lerman said, "I held onto this case because I thought I was right. I had a personal stake in this case because I felt he was wrongly convicted."

As of mid-December 2005, Stokes remains imprisoned while the prosecution decides if they intend to retry him, or offer him his immediate release in exchange for pleading guilty or no contest to a lesser offense that he is innocent of having committed.

JD Note:

One doesn't have to read very far beneath the lines of the Appeals Court's decision to conclude they reversed Stokes' conviction because they don't think he was involved in the crime, and that the State's star witness protected from prosecution is the actual robber and murderer. It is interesting that Harrell's testimony benefiting the prosecution was deemed reliable enough by the trial judge to support Stokes' conviction, while the testimony of two jailhouse witnesses that Harrell admitted to the murder was deemed unreliable by the judge

Marlinga Update

Ex-Prosecutor Marlinga Re-indicted For Bribery

In January 2002, Macomb County Prosecutor Carl Marlinga filed a brief with the Michigan Supreme Court acknowledging that during Jeffrey Moldowan's 1991 kidnapping and rape trial he "may have suffered 'actual prejudice'" from insubstantial expert bite mark testimony.¹

The Court granted Moldowan's habeas petition and ordered a new trial. Moldowan was acquitted after his retrial in February 2003. Moldowan's co-defendant, Michael Cristini, was acquitted after his retrial in April 2004.

Two weeks after Cristini's acquittal, Marlinga, state Senator Jim Barcia, and realtor Ralph Roberts were indicted on federal charges that included bribery and federal campaign finance law violations related to Marlinga's January 2002 Supreme Court brief in Moldowan's case. Marlinga ran for the U.S. Congress in 2002, and federal prosecutors alleged that Roberts, who employed Moldowan's sister, bribed Marlinga to help Moldowan. The bribe was alleged to have been partially masked as a campaign contribution to Barcia in order to avoid Marlinga's federal contribution limits and reporting requirements. (See, Prosecutor Indicted For Bribery After Two Men Exonerated Of Kidnapping And Rape, *Justice:Denied*, Issue 27, Winter 2005.)

In February 2005 a Detroit federal judge ruled the indictment was defective for failing to detail how the defendants were linked

Marlinga cont. on page 15

reviewing Stoke's motion for a new trial. Not only was the testimony of those two men consistent with the eyewitnesses testimony and crime scene physical evidence directly implicating Harrell in Seider's murder, but those two men came forward with no expectation of receiving anything in return – while Harrell effectively testified against Stokes in exchange for having murder charges dropped against him.

Endnotes:

¹ *Stokes v State*, No. 4D02-5068 (Fla.App. 11/23/2005); 2005.FL.0006533, ¶14 <<http://www.versuslaw.com>>

² *Id.* at ¶15.

³ *Id.* at ¶16.

⁴ *Id.* at ¶18.

Additional Sources:

Belle Glade Man Convicted of 2000 Murder Receives New Trial, by Missy Stoddard, *South Florida Sun-Sentinel*, November 24, 2005.



Ken Marsh was convicted in November 1983 of murdering Phillip Buell, his girlfriend's two-year old son. Marsh claimed he had never harmed Phillip, and that he found him injured after he had fallen onto the fireplace hearth from the back of a couch. The San Diego Police Department detectives who investigated Phillip's death concluded that Marsh was telling the truth — the child's April 1983 death was accidental from a fall.

However, murder charges were filed against Marsh based on the determination of doctors at Children's Hospital in San Diego that Phillip's head injuries were caused by abuse, and the jury relied on their testimony in convicting Marsh.

On August 10, 2004, Marsh's conviction was vacated and he was released from prison after his petition for habeas corpus was granted without opposition from San Diego District Attorney Bonnie Dumanis. Marsh's petition was based on the analysis of numerous medical experts that Phillip's injuries were consistent with those that would be caused by him hitting his head on a brick fireplace hearth after falling off of a couch. Which was what Marsh had said from the time he was first questioned in 1983, and which the San Diego PD had agreed with after their investigation.

Marlinga cont. from page 14

together in what the government was alleging was a *de facto* conspiracy. Faced with trying the three defendants separately, federal prosecutors dropped the charges against Roberts in June 2005, and against Barcia in July 2005. (See, Marlinga Bribery Prosecution Update, *Justice:Denied*, Issue 28, Spring 2005)

On September 14, 2005, Marlinga was re-indicted on charges of bribery, mail and wire fraud, making false statements to the Federal Election Commission and violating federal campaign finance laws.

Prior to his April 2004 indictment, Marlinga had been the Macomb County Prosecutor for 20 years, and prior to that he had been a federal prosecutor.

Justice:Denied will report as the Marlinga case proceeds.

Endnotes:

1 Marlinga: the rape cases, Staff, *Detroit Free Press*, April 23, 2004.

Sources:

New Indictment Against ex-Macomb Prosecutor Issued, Jim Irwin, *AP News*, September 15, 2005.

Jury Indicts Marlinga Again, David Shepardson, *The Detroit News*, September 15, 2005.

Ken Marsh is "Factually Innocent" Says California's AG

By JD Staff

After Marsh's release he filed a claim for restitution under California's wrongful conviction compensation statute (Cal Penal Code §§ 4900 to 4906). The statute authorizes a payment of \$100 for each day of imprisonment after a wrongful conviction. Based on Marsh's 7,560 days of imprisonment, his claim totaled \$756,000.

After reviewing the claim, the office of California Attorney General Bill Lockyer took the position it should not be granted. Their opposition was based on the fact that the murder charges weren't dropped against Marsh on the basis of his innocence, but because San Diego's DA didn't think she could prove his guilt beyond a reasonable doubt if he was retried. Deputy Attorney General Jim Dutton explained in a memo that while the conclusion of an independent expert retained by the San Diego DA to evaluate the medical evidence, "may be enough to lose confidence in the integrity of Mr. Marsh's conviction ... it does not assist Mr. Marsh in establishing that he did nothing to inflict the injuries."¹

The standard for a successful compensation claim is a claimant must prove his or her innocence by a preponderance of the evidence, and that he or she did nothing to "contribute to the bringing about" of his arrest or conviction.

A hearing to determine if Marsh met the statute's threshold for making a claim, was scheduled to be held in Sacramento beginning on Monday, December 5, 2005.

With the burden of proof on Marsh, Deputy AG Dutton didn't present any evidence at the hearing. Multiple witnesses, including people who didn't testify at Marsh's trial, testified concerning accidents that caused Phillip's injuries that the hospital's doctors incorrectly attributed to abuse by Marsh.

After four days of hearing medical and eyewitness evidence that Phillip's injuries were not caused by Marsh, on Thursday, December 8, Dutton conceded that Marsh was "factually innocent," and thus had met his burden of proof under the statute to qualify for compensation.²

Although the hearing officer makes the final determination of whether to recommend compensation, he is expected to adopt the attorney general's position. The hearing officer's recommendation will be submitted



to the state Victim Compensation and Government Claims Board, which will then consider the merit of Marsh's claim. If they decide in Marsh's favor, then their recommendation goes to the state legislature which must authorize the payment from the state's general fund. If the legislature approves the payment, then it will go to Governor Schwarzenegger for his approval.

The Claims Board has never decided contrary to the recommendation of the attorney general, and the legislature has always appropriated the money approved by the board in a wrongful conviction case. So barring an unprecedented hang-up, Marsh should receive his \$756,000 in compensation sometime in 2006.

Dwight Ritter is the San Diego lawyer who represented Frederick Daye when he was awarded \$389,000 in 2002 after 10 years of wrongful imprisonment for rape. When asked about the adequacy of California's compensation scheme, he said in regards to Daye, "Do I think they fully compensated him? Not at all. One hundred dollars a day does not begin to compensate a person for what 10 years in a place like Folsom Prison does to a person."³

Also pending is a federal civil rights lawsuit that Marsh filed on August 9, 2005, in U.S. District Court in San Diego. The lawsuit named as defendants: San Diego County, San Diego's Children's Hospital, and Dr. David Chadwick (employed by Children's Hospital). As of mid-December 2005, the status of the lawsuit is the defendants have filed FRCvP Rule 12(b)(6) motions to dismiss based on grounds of full and qualified immunity. A Rule 12(b)(6) motion is based on grounds supporting a plaintiff's alleged failure to state a claim.

For more information about Ken Marsh's case see, Toddler's Accidental Death Ends With Babysitter's Murder Conviction — The Ken Marsh Story, *Justice:Denied*, Issue 25, Summer 2004, p. 4.

Sources: State won't block freed man's payout, Greg Moran, *San Diego Union-Tribune*, December 9, 2005. Marsh Press Statement, August 10, 2005, issued by Law Office of Thor O. Emblem, Escondido, CA.

Endnotes and Additional Sources:

1 Wrongful-conviction hearing starts today, Greg Moran, *San Diego Union-Tribune*, December 5, 2005.

2 Email from Tracy Emblem to Hans Sherrer, December 10, 2005. Ms. Emblem is one of Ken Marsh's attorneys.

3 After 20 years in prison, S.D. man seeks to prove he didn't kill child, Greg Moran, *San Diego Union-Tribune*, December 5, 2005.

With dreams of playing in the NFL, Nate Lewis began classes in the fall of 1996 as a freshman at the University of Akron. Two months later he was hit by a bigger blow than he'd ever experienced on the playing field: A female student he was friends with – Christina Heaslet – accused him of raping her in her dorm room.

Charged with rape, Lewis admitted that he and the young woman had sex together. However, he claimed that contrary to her accusation it had been consensual. Asserting his innocence, Lewis turned down a plea bargain that would have resulted in a short jail term.

Then several weeks prior to his trial, Lewis received an anonymously mailed envelope. The envelope contained photocopied excerpts of Heaslet's diary. The excerpts corroborated Lewis claim that she was a willing participant in their sexual encounter, and that she was motivated to falsely accuse Lewis by a combination of being "sick of men," and as a way to get money from him to help with her financial difficulties.

Lewis gave the photocopies to his lawyer, who disclosed their contents to the prosecutor and the judge. His lawyer then requested an order for Heaslet to produce her entire diary. The prosecutor obtained the diary, and after an in camera review by the judge, the prosecutor made a motion *in limine* to exclude most of the diary, including the excerpts anonymously mailed to Lewis — which were marked Exhibits A, B, C and D. Lewis' lawyer argued for their admissibility on the grounds "they were relevant to Heaslet's veracity and motive to lie and spoke directly to the issue of consent." ¹ Exhibit B was particularly important for Lewis' defense that Heaslet consented:

"I can't believe the trial's only a week away. I feel guilty (sort of) for trying to get Nate locked up, but his lack of respect for women is terrible. I remember how disrespectful he always was to all of us girls in the courtyard . . . he thinks females are a bunch of sex objects! And he's such a player! He was trying to get with Holly and me, and all the while he had a girlfriend. I think I pounced on Nate because he was the last straw. That, and because I've always seemed to need some drama in my life. Otherwise I get bored. That definitely needs to change. I'm sick of men taking advantage of me . . . and I'm sick of myself for giving in to them. I'm not a nympho like all those guys think. I'm just not strong enough to say no to them. I'm tired of being a whore. This is where it ends." ²

\$662,000 Awarded Man Imprisoned 5 Years For Phantom Rape of Woman "Sick Of Men"

By Hans Sherrer

The prosecution argued the excerpts constituted Heaslet's opinion and evidence of her past sexual activity, and were thus excludable under Ohio's rape shield law (Ohio Revised Code § 2907.02(D)). The judge agreed to bar the jury from hearing the passage — which was the one most favorable to Lewis' defense of consent — ruling that its probative value was outweighed by its prejudicial effect to Heaslet's reputation.

As for Heaslet's financial motive, she wrote in a passage,

"Yesterday morning I went to see two lawyers (partners) about a civil suit against Nate. . . . I know that suing him is wrong, but what else is there for me to do? I know I'm not an evil person normally, but Nate pissed me off, and took advantage of me. Sorry for him that I'm so revengeful. I'll probably feel guilty about this someday." "Speaking of money, I'm suing Nate. I'm desperate for money! My conscience (sic) wouldn't allow me to do that before, but I'm going to do whatever I have to to get out of debt." ³

She also wrote, "I can't wait to go to Charlotte. I want to start all over. I refuse to make the same mistakes that I've made in Akron. For one thing, I'll be honest." ⁴

Even though Lewis' prosecutors knew from Heaslet's diary that her rape allegation was false, they did not pursue criminal charges against her for filing a false rape report. Instead, they proceeded with Lewis' trial. Without being told about the critical passages in Heaslet's diary, Lewis' jury was faced with a choice between 'he says it was consensual, and she says it was rape'. The jury chose the woman's story, and Lewis was sentenced to eight years in prison.

After Lewis' conviction was affirmed by both Ohio's Court of Appeals and Supreme Court, he filed a federal habeas corpus petition in July of 1999. The petition's primary claim was that Lewis' Sixth Amendment right to confront his accuser had been denied by the trial judge's specific exclusion of Exhibit B that supported his defense that Heaslet consented.

Lewis' petition was denied by the U.S. District Court, which issued a Certificate of Appealability to the federal Sixth Circuit Court of Appeals on the issue of "[W]hether failure to admit specific portions of the victim's diary at trial effectively denied Lewis his Sixth Amendment [right] to confront a witness." ⁵

In October 2002 the Sixth Circuit reversed the District Court's decision, and ordered Lewis' release "from custody, unless he is retried within a reasonable period of time." (*Lewis v. Wilkinson*, 307 F.3d 413 (6th Cir. 10/07/2002)).

The Sixth Circuit's decision stated in part,

Appellant was denied his Sixth Amendment right to confrontation when the trial court excluded several statements from the alleged victim's diary. The statements at issue, especially when read with the diary entry in its entirety, can reasonably be said to form a particularized attack on the witness's credibility directed toward revealing possible ulterior motives, as well as implying her consent. . . . The trial court . . . did not adequately consider the defendant's constitutional right to confrontation. The jury should have been given the opportunity to hear the excluded diary statements and some cross examination, from which they could have inferred, if they chose, that the alleged victim consented to have sex with the appellant and/or that the alleged victim pursued charges against the appellant as a way of getting back at other men who previously took advantage of her." ⁶

Faced with no physical evidence a rape had occurred and the alleged "victim's" tacit admission she had consented, the prosecution dropped the charges and Lewis was released after five years of wrongful imprisonment.

In January 2003 Lewis filed a civil suit seeking a declaration that he was wrongly imprisoned, which was the predicate for him to file a claim under Ohio's wrongful conviction compensation statute. (Ohio Rev Code Ann § 2305.02 & §2743.48)

The office of the Ohio Attorney General vigorously opposed Lewis' lawsuit. However, the Summit County Court of Common Pleas found after a trial at which both Heaslet and Lewis testified, that he had met the statutory requirement, and "proven by a preponderance of the evidence that he was wrongfully imprisoned." ⁷ The State appealed. In May 2005, Ohio's Court of Appeals upheld the lower court's decision. (*Lewis v. State*, 2005 -Ohio-2400 (Ohio App. Dist.9 05/18/2005)) In its

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'Hurricane' Carter Receives Honorary Degree

By Simona Siad

With graciousness and exuberance Rubin "Hurricane" Carter swept into fall convocation to receive an honorary doctor of laws degree from York University.

The award culminates Carter's lifelong battle for innocence and justice in what was one of history's most widely publicized cases of wrongful conviction.

"The light shines in the darkness but the darkness will not overcome," said Carter to a packed room of York graduates and alumni on October 14, 2005.

Many know Dr. Carter as the former boxer who was wrongly convicted by an all-white jury for the murder of three white American citizens in the 1960s. He was convicted and sentenced to three life-terms.

Throughout that time, he continued to fight for his innocence, penning an autobiography entitled *The 16th Round* that garnered national and international attention. The book, along with celebrity supporters, protestors and two recantations of key witnesses helped secure a retrial. Once again, the state overturned the evidence and handed down another wrongful conviction.

In 1988, after 22 years of legal battles and imprisonment, all indictments were finally dropped. Dr Carter admits that it took incred-

ible mental strength, passion and perseverance to survive the time he spent in prison.

"Hopelessness belongs to the lowest level of human existence. That is what prison is, the lowest level of human existence," says Carter. "But I was not a prisoner, I had committed no crime. So I refused to go down there. I knew in order for me to survive, I would have to remain above the level of a prisoner."

During the ceremony, the dean of Osgoode Hall Law School, Patrick Monahan, praised Carter for his continuing work with the wrongfully convicted.

"Dr. Carter has been a tireless advocate for justice and the cause of the wrongfully convicted. He was instrumental in the creation of an organization called the Association for the Defence of the Wrongfully Convicted," said Monahan.

He went on to note that Carter has worked extensively with York University in the past.

"In 1997, he was instrumental in the establishment of the Innocence Project here at the Osgoode School of Law, which has garnered international attention for its work," said Monahan.

Upon receiving his award, Dr. Carter reminded the audience that there is a new generation of people being wrongfully convicted and that the fight for a fair justice system is far from over.



"During this time, these organizations of which I am a part of helped secure the release of many innocent people who were sentenced to death, or sentenced to long terms in prison," said Carter. He alluded to some of the problems these cases still face.

"Many of them were victims of prosecutorial misconduct, or the deliberate falsification of forensic evidence."

Dr. Carter also mentioned a new program he is the founder of called Innocence International that will "expose the abuses of criminal justice in attempts to free the innocent". He adds, "We will be civil but we won't be silent. There is no greater good than the saving of an innocent life."

The man that has been a middleweight championship contender, a civil rights activist, author, screenwriter and lecturer can now add doctor of laws to his long list of remarkable accomplishments.

When asked if he ever felt hopeless while he was in jail, he remarked with a smile, "I never lost hope. I had to dare to dream. I had to act like I was already free while I was locked down in prison. I knew I would be free. And it's been 20 years next month that I have been free. So dare to dream."

Reprinted with permission. Originally published in, *Excalibur* – York University's Newspaper, October 19, 2005. York University is in Toronto, Ontario, Canada.

Simona Siad is Sports Editor of *Excalibur*. Photo by Joyce Wong, *Excalibur*.

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ruling, the appeals court focused much more on Heaslet's financial motive for falsely accusing Lewis, than the federal Sixth Circuit had in reversing his conviction.⁸

Lewis then filed a claim for compensation with Ohio's Court of Claims. In September 2005 Lewis was awarded a total of \$662,000 — \$412,000 to him and \$250,000 in fees to his lawyers. Lewis' award included the statutory maximum of \$40,330 for each of the five years he was imprisoned.⁹

Lewis, now 28, lives near Ann Arbor, Michigan and he was working for a car rental company. After being notified of the settlement, Lewis said, "It's not really what I wanted, but it's better than nothing. You can't put a price on the years I lost."¹⁰

Lewis plays semi-pro football and still dreams of playing in the NFL, musing,

"We'll see what happens. Something has to crack sooner or later for me."¹¹

With his settlement decided, Lewis was glad that that he would finally be able to focus solely on his future, "It's over for me now. Thank God."¹²

Endnotes and Sources:

- 1 *Lewis v. Wilkinson*, 307 F.3d 413 (6th Cir. 10/07/2002); 2002.C06.0000352, ¶29 <<http://www.versuslaw.com>>
- 2 *Id.* at ¶30
- 3 *Lewis v. State*, 2005 -Ohio- 2400 (Ohio App. Dist.9 05/18/2005); 2005.OH.0002492, ¶38 <<http://www.versuslaw.com>>
- 4 *Id.* (Emphasis in original).
- 5 *Lewis v. Wilkinson*, *supra*, at ¶22
- 6 *Id.* at ¶64 <<http://www.versuslaw.com>>
- 7 *Lewis v. State*, *supra*, at ¶17
- 8 *Id.* at ¶37-40
- 9 "Wrongful Conviction Ordeal Ends: Court grants Belleville man damages for five years he spent in prison," Amalie Nash, *Ann Arbor News*, September 29, 2005.
- 10 *Id.*
- 11 *Id.*
- 12 *Id.*

Simona Siad is Sports Editor of *Excalibur*. Photo by Joyce Wong, *Excalibur*.

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ported by witnesses and phone records — that he was over 100 miles from Elgin. No physical, forensic or eyewitness evidence implicates Spirko in the crime, and he has not confessed.

A witness positively identified Gibson as the man she saw the morning of Mottinger's abduction. However, the prosecution elicited her testimony knowing Gibson had been in Asheville, North Carolina — 600 miles from the crime scene. In spite of knowing Gibson's innocence, the prosecution presented the jury with the crime theory that Spirko and Gibson jointly abducted and murdered Mottinger. So the prosecution's duplicity ensured Spirko's jury had no opportunity

Spirko cont. on page 20

Prosecutor Finally Caves To Ohio Attorney General's Plea To "Free Clarence Elkins"

By James Love



Clarence Elkins and his wife Melinda as he walked out of Ohio's Mansfield Correctional Institution on December 15, 2005.

In an unusual display of candor by a State Attorney General, Ohio Attorney General Jim Petro sent a letter on

October 28, 2005, to Summit County Prosecutor Sherri Walsh, supporting the release from prison of convicted murderer and rapist Clarence Elkins

after new DNA evidence implicated Earl Gene Mann, a former neighbor of the victims. After Elkins' trial Mann was convicted of raping his three pre-teen daughters, and is now serving time in Ohio.

A jury convicted Elkins on June 4, 1999, of murder, attempted aggravated murder, three counts of rape and felonious assault against his mother-in-law, 58-year-old Judith Johnson, and his 6-year-old niece who had been visiting her grandmother. Elkins' alibi defense was that the night of the attacks he had gone to several bars near where he lived in the Waynesburg area – which is 50 miles south of his mother-in-law's Barberton, Ohio home – and then going home to his wife and children. Elkins' case was tried before Judge John Adams in Akron, Ohio. It was the first murder trial Judge Adams had ever presided over. Elkins was sentenced to 55-years-to-life. His first parole hearing would be in 2054 when he would be 91 years old.

On June 7, 1998, Elkins' mother-in-law was beaten, raped and strangled to death, while his niece survived being raped, beaten and choked. The girl's first statement after the attack was in a phone message left with her parent's neighbors in which she said "somebody" killed her grandmother. After going to a neighbors house she started saying that the attacker "looked like" her "Uncle Clarence." By the time of his trial the niece's testimony definitely implicated Elkins as the attacker, and the jury convicted Elkins based solely on her testimony.¹

Elkins' Niece Recants

Elkins asserted his innocence from the time of his arrest. In 2002 his niece, then 10 years old, recanted her testimony and identification of Elkins.

Elkins' motion for a new trial, based upon the recanted testimony, was denied in December, 2002 by Judge Adams. In January 2004, the Ohio Innocence Project at the University of Cincinnati accepted Elkins' case. Family and friends paid for DNA tests by Orchid Cellmark in 2004. The DNA evidence excluded

Elkins as the perpetrator of the rape and murder of his mother-in-law, or the rape and beating of his niece.

DNA Evidence Excludes Elkins

A second motion for new trial was filed in 2004 based on the new DNA evidence excluding Elkins. At the time of the second new trial motion, the defense did not have a match for the DNA evidence to any particular person. All the new evidence showed was that Elkins was not the person who raped Johnson. Prosecutor Walsh argued that since DNA evidence was not used to link Elkins to the crimes at trial, new DNA evidence excluding Elkins should not be adequate to prove his innocence. Summit County Common Court Judge Judy Hunter denied Elkins' motion in July 2005, and issued a 51-page decision that agreed with Walsh's sophisticated argument.²

On September 22, 2005, Elkins' family and defense team held a press conference and announced that the new DNA evidence had been matched to Ohio prisoner Earl Gene Mann. At the time of the attack, Mann's three daughters and their mother, Tonia Brasiel, lived two doors from Johnson's home. Mann had gone AWOL from a half-way house in the area five days before. Elkins' niece had played with Brasiel and Mann's children, and after the attack she went to Brasiel's home seeking help. Her bathrobe was covered in blood and she was hysterical while telling Brasiel that her grandma was dead. However, instead of responding to the emergency by calling the police or an ambulance for immediate assistance, or even going to her neighbors house to see if perhaps the girl's grandmother was still alive and could be saved, Brasiel left the six-year-old standing outside for several minutes, before she took the child to her home about a mile away. It wasn't until after talking with Brasiel that the frightened and confused young girl started telling people that her attacker "looked like" her "Uncle Clarence."

In 2002, three years after Elkins' trial, Mann entered a plea of guilty to raping his three young daughters, which had occurred over several years. The girls were ages 8, 9 and 10 at the time of his prosecution. The guilty plea resulted in a seven-year sentence. Mann had been facing a sentence of 105 years-to-life if he had been convicted at trial. Brasiel was Mann's co-defendant in the rape case.

She was convicted of child endangerment for failing to protect their daughters from Mann, and sentenced to probation. At the time there was public consternation at the leniency of Mann's sentence for being a serial rapist of his pre-teenaged daughters.

Crime Scene DNA Linked To Earl Mann

Martin Yant, a Columbus private investigator, was hired by Elkins' family to search for proof of his innocence. Mann's name as a suspect had been identified, and Elkins' wife Melinda and Yant brainstormed that if Mann's DNA could be obtained then he could be either excluded or identified as the attacker. So Melinda surreptitiously wrote Mann in prison in an effort to lure him to respond so the envelope flap could be tested for his saliva's DNA. However, Mann didn't respond. In the fall of 2005, after Mann was transferred to Mansfield Correctional Institution where Elkins was imprisoned, Elkins' picked up a cigarette butt Mann discarded. Elkins placed that cigarette butt in an envelope and sent it to Jana DeLoach, an Akron Attorney on Elkins' defense team. DNA testing of the cigarette butt by Orchid Cellmark resulted in a DNA match between Mann's saliva and DNA extracted from the niece's underwear, and skin cells obtained by a vaginal swab of Johnson.³

In spite of the victim's DNA match to Mann, Walsh refused to acknowledge the new evidence proved Elkins was innocent. Walsh claimed the DNA tests were "incomplete," and justified her stance by stating that Elkins' conviction had been affirmed by two judges and the Summit County Court of Appeals.⁴

Ohio Attorney General Jim Petro Calls For Elkins' Release

On October 28, 2005, fed up with the obstructive and unrealistic attitude of Prosecutor Walsh, Ohio Attorney General Jim Petro stepped into the fray, expressing his opinion that the new DNA evidence proved Elkins was innocent.⁵

Petro stated he found the new evidence "compelling," and asked to meet with Walsh. That meeting failed to materialize. Petro stated the Summit County Prosecutor's Office kept "blowing him off," and refused to meet him regarding the Elkins case. Prosecutor Walsh called Petro's position in defense of Elkins, "highly inappropriate," and claimed it was based on partial evidence. On October 31, 2005, Elkins' defense team filed for an evidentiary hearing on the new DNA evidence. Walsh stated she was unsure if her office would oppose the motion. Petro accused Walsh of "sticking her head in the sand," in Elkins' case.⁶

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Australian State Is Weakening Jury Protection Of The Innocent

By Serena Nicholls

New South Wales (NSW) is Australia's most populous state, and Sydney is its largest city. In August of 2005 the New South Wales Law Reform Commission issued a report that strongly recommended that the system of unanimous jury verdicts in NSW should be retained. The NSW Government ignored that recommendation when it announced on the 9th of Novem-

ber 2005, that they "...have, on balance, decided to approve in principle the introduction of a system of majority verdicts."¹ The government proposal is to allow conviction by an 11-1 juror vote after six hours of deliberation has failed to result in a verdict. The recent questioning of unanimity has come shortly after the jury was discharged in the Kerry Whelan

murder trial because they were unable to reach a verdict.² NSW will become one of several Australian states that have introduced majority verdicts.³ This article considers some of the implications of abandoning the unanimous jury verdict.

Advantages of Non-unanimous Jury Verdicts

The main argument that has been advanced by supporters of majority (non-unanimous) verdicts is that they would reduce the opportunities for juries to hang, thereby reducing the number of retrials. This

argument is based on the belief that the administration of justice is frustrated when there is an irrational juror who refuses to consider the evidence in an impartial manner.⁴ Therefore, by eliminating the need for unanimity an irrational juror will no longer cause a hung jury.⁵ In turn, majority verdicts will reduce the number of undesirable compromises that are made, with dissenting jurors being persuaded to conform to the majority view.⁶ If these dissentient jurors are not persuaded then the unanimity rule

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Walsh stated to reporters that Petro had no right to say convicted killer Clarence Elkins is innocent without examining the entire case. Petro fired back stating, "I object so much to that charge," he said. "Where does she get off? We have been engaged for quite some time. Almost a year ago we said we had real concerns in this matter because he was totally excluded as a [DNA] match."⁷

In an editorial appearing in Cleveland's *The Plain Dealer* on November 7, 2005, prosecutor Walsh was accused of trying to "construct a fort of straw," in the Elkins case, after the new DNA evidence was discovered. *The Plain Dealer* wisely observes, "... justice also calls for something that won't show up in the county conviction rate: humility and the wisdom to respect science, the evidence and the law."⁸

Walsh also threw a new twist into Elkins' case by defending against the new DNA evidence by claiming Ohio's DNA statute only allows one year for inmates to apply for DNA testing. Since that statute had expired, she claimed Elkins' new DNA evidence was time barred. An evidentiary hearing concerning Elkins' new DNA evidence was scheduled for February 22, 2006, in the Summit County Common Pleas Court.

During all the prosecution's obstruction, the 42-year-old Elkins sat in prison, a spectator to the comedy of errors, display of misplaced pride and misperceived political on-upmanship.

"Pack Your Bags, You're Coming Home Baby"

Petro scheduled a press conference for the morning of Thursday, December 15, 2005, to announce the DNA test result of previously untested crime scene evidence that both ex-

cluded Elkins, and implicated Mann. That test was of a hair found in feces smeared on the girl's nightgown that she was wearing when attacked. Fifteen minutes before that press conference, prosecutor Walsh unexpectedly reversed her position and filed a motion to dismiss all charges against Elkins. Judge Hunter, who just five months earlier had denied Elkins' motion for a new trial, granted the motion and ordered Elkins' immediate release.

"Melinda Elkins has been tireless in trying to bring justice to her mother, Judith Johnson, to her niece, and to her husband, Clarence Elkins. She has led the fight from Day One. She was able to do something that the police and prosecutors were not able to do – solve this crime."

Carey Hoffman, The Ohio Innocence Project (Sept 2005)

Shortly after that Elkins' wife Melinda told him in a phone call, "Pack your bags, you're coming home baby."⁹ While waiting for his release to be processed, Elkins said in a phone interview, "When my wife told me I was coming home today for good, I was just overwhelmed with joy and tears of joy. I was amazed it was so soon. I thought it was going to drag out."¹⁰ Elkins walked out of Mansfield Correctional Institution about 4 p.m that afternoon. After seven years of wrongful imprisonment, Elkins told reporters outside the prison, "I don't think it's really hit me yet. It's strange. It's different. This is a day I will never forget."¹¹

Walsh apologized to the Elkins' family during a press conference, while at the same time defending her long-standing opposition to his efforts for a new trial. She explained that she only became convinced of Elkins' innocence after Mann had "miserably" failed five polygraph examinations in the preceding two

weeks, and made incriminating statements during his post-examination interviews. Although Mann hadn't confessed, he had admitted to being inside Johnson's home on the day she was murdered. After watching recent videotaped interviews, Walsh described Mann as a "very strange" and "violent" person. She said, "Based on our investigation, I no longer have the doubt that I had in [Elkins] case."¹² Although charges weren't immediately filed against Mann, it is expected that if they are, Walsh will seek the death penalty.

It cannot go without saying that Elkins had support from his wife Melinda, numerous friends, and first class investigative and legal aid in his fight for freedom. The tireless campaigning on Elkin's behalf resulted in national publicity for his case, including a segment titled *Star Witness* on CBS' *48 Hours* television program broadcast on September 13, 2003. That broadcast revealed additional exculpatory information in the form of a lab report obtained by *48 Hours* that showed two hairs found on Johnson's buttocks definitely did not originate from Elkins. Detailed information about Elkins' case is on his website, <http://www.freeclarencel.com>.

Endnotes:

- 1 Noted Forensic Scientist Doubts Murderer- Rapist's Guilt, Donna J. Robb, *Cleveland Plain Dealer*, July 5, 2002.
- 2 New Trial Denied Despite DNA Find," Phil Trexler, *Akron Beacon Journal*, July 15, 2005.
- 3 New Twist in DNA Killing, Phil Trexler, *Akron Beacon Journal*, September 22, 2005.
- 4 Inmate Helps Student's Case, by Sharon Coolidge, *Cincinnati Enquirer*, September 23, 2005.
- 5 DNA Should Free Inmate, Attorney General Says, Karen Farkas, *Cleveland Plain Dealer*, October 29, 2005.
- 6 '98 Case Divides Offices, Phil Trexler, *Akron Beacon Journal*, November 1, 2005.
- 7 Summit Prosecutor Rips Petro for Saying Prisoner is Innocent, Karen Farkas, *Cleveland Plain Dealer*, November 1, 2005.
- 8 Editorial, *Cleveland Plain Dealer*, November 7, 2005.
- 9 Man Cleared By DNA Leaves Ohio Prison, John McCarthy, *Washington Post*, December 15, 2005.
- 10 *Id.*
- 11 Elkins Wins His Freedom, Phil Trexler, *Akron Beacon Journal*, December 16, 2005.
- 12 *Id.*

Majority cont. from p. 19

would be undemocratic because it allows the minority to frustrate the decision of the majority.⁷ Those who favor majority verdicts further argue that unanimity places an unwarranted financial burden on the State and the accused person.⁸ By implementing the majority system there will be less hung juries, which will relieve the State of the financial burden of retrying cases.⁹ This notion is supported by the many studies that have shown that juries operating under a majority system will deliberate and deliver the verdict faster.¹⁰ An additional argument that has been advanced in favor of majority verdicts is that it reduces the possibility of juror corruption because more than one juror would need to be approached.¹¹

Advantages of Unanimous Jury Verdicts

Although some of the arguments for majority verdicts appear strong at first sight, they must be considered in the wider context of the criminal justice system. Firstly, the arguments in favour of a majority system would carry a greater degree of weight if hung juries were a common occurrence.¹² Research suggests that the Australian States that have implemented majority verdicts have only marginally lower rates of hung juries than Queensland (where unanimous verdicts are still required).¹³ Thus, implementing a majority system would only slightly decrease the incidence of hung juries.¹⁴ It can also be argued that a larger number of hung juries is beneficial to the criminal justice system because it serves to affirm the integrity of the jury and ensures that the judgment of each juror is valued. Therefore, it would be a mistake to assume that hung juries are indicative of a failing system.¹⁵ It is acknowledged that the implementation of the majority rule would represent some administrative and economic savings that accompany jury disagreements. However, these savings are, at best, very modest.¹⁶ They also come at a cost to the quality of our judicial system, with the loss of an important protection.¹⁷ The economic savings that may be bought about by the majority system should not be prioritised over the interests of justice.¹⁸

Another drawback of majority jury verdicts is the view of a dissenting juror is negated.¹⁹ If reasonable doubt exists in the mind of one juror then arguably a shadow is cast over the validity of the conviction.²⁰ As was noted in *Cheatle v The Queen* "...assuming that all jurors are acting reasonably, a verdict returned by the majority of the jurors, over the dissent of others, objectively suggests the existence of reasonable doubt and carries a greater risk of conviction of the innocent than does a unanimous verdict."²¹ In a majority system the prosecution's burden of persuasion is lighter than in a unanimous system,

where all twelve jurors need to be convinced of the defendant's guilt.²² Therefore, the practice of a majority verdict beyond a reasonable doubt is a contradiction in terms.²³

Research suggests that juries operating under a majority system deliberate quicker and reach a verdict in less time.²⁴ This is largely because juries can stop deliberating if a majority is obtainable immediately.²⁵ It is at this time that errors occur and the jury often asks the judge questions regarding the required standard of proof.²⁶ The majority system may not promote a full and passionate discussion of the issues. As a result the jury may start with the verdict category and then construct a story to fit.²⁷ In turn, if a majority system was implemented it is likely to increase the incidence of the accidental conviction of innocent people.²⁸ A unanimous system operates as one of the 'checks and balances', which aims to protect the innocent from wrongful conviction.²⁹ Therefore, we should be concerned about abandoning it in favour of the majority rule, which diminishes one of the procedures that has been established to protect the accused person.³⁰

Conclusion

Unanimous jury verdicts should not be abandoned in New South Wales. The supposed defects of unanimous verdicts will not be overcome by a majority system, and it is likely to bring with it another set of problems. Full and passionate jury deliberation is essential to the operation of the reasonable doubt standard. Majority jury verdicts undercut the prosecution's requirement to prove a defendant's guilt beyond a reasonable doubt. Unanimity is an essential safeguard to protect the interests of all accused persons. By negating the view of a dissenting juror the danger of convicting the innocent will increase. There are sound reasons to believe that implementing majority verdicts in NSW will derogate the quality of justice in our judicial system. That is unacceptable in a society that professes to be just.

Serena Nicholls is a former student member and current volunteer of the Griffith University Innocence Project, in Southport, Queensland, Australia. The views expressed in this article do not necessarily represent the views of the GU Innocence Project. Their website is, <http://www.gu.edu.au/school/law/innocence/home.html>

Endnotes:

- 1 NSW Legislative Assembly, 'Majority Verdicts' (9/11/05) <http://www.parliament.nsw.gov.au/prod/parliament/hansart.nsf/V3Key/LA20051109019>.
- 2 In 1997 Kerry Whelan disappeared. Although her body was never found, Bruce Burrell (a former co-worker), was charged with her murder. When this case went to trial the jury was dismissed because a verdict could not be reached.
- 3 Majority have been implemented since: 1927 in South Australia; 1936 in Tasmania; 1960 in Western Australia; 1963 in Northern Territory; and 1994 in Victoria. NSW Legislative Assembly, 'Majority Verdicts' (Report 111, 2005) (9/11/05) <http://www.parliament.nsw.gov.au/prod/parliament/hansart.nsf/V3Key/LA20051109019>.
- 4 *Id.*
- 5 *Id.*

6 *Id.*

7 New South Wales Law Reform Commission, 'Criminal Procedure: The Jury in a Criminal Trial' (Report 48, 1986).

8 *Id.*

9 Tucker WL, 'Johnson v. Louisiana: and Apodaca v. Oregon: Unanimity in the Criminal Jury Verdict' (1972-1973) 7 *Georgia Law Review* 339.

10 New South Wales Law Reform Commission, 'Majority Verdicts', *supra*.

11 New South Wales Law Reform Commission, 'Criminal Procedure: The Jury in a Criminal Trial', *supra*.

12 Salmelainen P, Bonney R, and Weatherburn D, 'Hung juries and majority verdicts' (1997) 36 *Crime and Justice Bulletin* 1.

13 New South Wales Law Reform Commission, 'Majority Verdicts', *supra*.

14 Tucker WL, *supra*.

15 New South Wales Law Reform Commission, 'Majority Verdicts', *supra*.

16 Salmelainen P, Bonney R, and Weatherburn D, *supra*.

17 Tucker WL, *supra*.

18 New South Wales Law Reform Commission, 'Majority Verdicts', *supra*.

19 *Id.*

20 New South Wales Law Reform Commission, 'Criminal Procedure: The Jury in a Criminal Trial', *supra*.

21 *Cheatle v The Queen* (1993) 177 CLR 541.

22 Dolinko PB, 'Constitutional Law - Johnson v. Louisiana: State Criminal Juries Need Not Reach Unanimous Verdicts' (1972-1973) 22 *De Paul Law Review* 635.

23 Tucker WL, *supra*.

24 Davis JH, Kerr NL, Atkin RS, Holt R, and Meek D, 'The decision processes of 6 and 12 person mock juries assigned unanimous and two-thirds majority rules' (1975) 57 *Journal of Personality and Social Psychology* 1-14.

25 New South Wales Law Reform Commission, 'Criminal Procedure: The Jury in a Criminal Trial', *supra*.

26 New South Wales Law Reform Commission, 'Majority Verdicts', *supra*.

27 Darbyshire P, Maughan A, and Stewart A, 'What Can the English Legal System Learn From Jury Research Published up to 2001?' (2001) <http://www.kingston.ac.uk/~ku00596/elsres01.pdf>.

28 Tucker WL, *supra*.

29 New South Wales Law Reform Commission, 'Criminal Procedure: The Jury in a Criminal Trial', *supra*.

30 Willis J, 'Jury Disagreements in Criminal Trials: Some Victorian Evidence' (1983) 16 *Australian and New Zealand Journal of Criminology* 20.

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to assess that his alibi defense was consistent with Gibson's lack of involvement.

Yet Judge Carr didn't think the prosecution's conduct was fraudulent. Spirko appealed to the federal Sixth Circuit Court of Appeals. During oral arguments on December 6, Spirko's lawyer Thomas Hill argued, "The star witness for the state did not believe the very theory that he was a proponent of." On December 22, 2005, the Sixth Circuit affirmed Carr's ruling.

Although Spirko's post-conviction investigations have accumulated substantive evidence that doesn't just undermine the evidentiary basis relied on by Ohio to obtain his conviction, but supports his actual innocence, he has not been granted an evidentiary hearing by any state or federal court.

As of late-December, the DNA test results have not been publicly released.

Barring the revelation of evidence of Spirko's guilt prior to January 19, 2006, that the State has not produced in the 23 years since Mottinger's murder, *Justice: Denied* will be submitting a letter to Governor Taft requesting that he grant Spirko executive clemency and a full pardon.

Wilton Dedge Awarded \$2 Million For 22 Years Wrongful Imprisonment

by Hans Sherrer



Wilton Dedge was convicted of rape in 1982 and sentenced to 30 years in prison. After the victim described her attacker to police as 6' and 160 pounds, she picked the 5'-5" and 125 pound Dedge out of a photo array. The jury disbelieved the six alibi witnesses who swore that he was at a garage 45 minutes from the rape scene. After Dedge's conviction was reversed in 1983, he was again wrongly convicted in 1984 and sentenced to life in prison.

Florida doesn't have a wrongful conviction compensation statute, so in January of 2005 it was announced that several state senators would sponsor a special-claims bill awarding Dedge \$4.9 million for lost wages, wrongful imprisonment and costs incurred by his family and lawyers.

However the legislature adjourned in May without passing a bill compensating Dedge. Opponents of the bill said Dedge should seek compensation by suing the state instead of through a "claims" bill in the legislature.

After the legislature's inaction, Dedge filed a lawsuit in the Brevard County Circuit Court on May 27, 2005, that named the State of Florida and state Dept. Of Corrections Secretary James Crosby Jr. as defendants, and Dedge and his parents, Walter and Mary Dedge, as plaintiffs. Dedge's parents were plaintiffs in the lawsuit because they were seeking reimbursement for spending all the money in their retirement account defending their son. The suit was based on the "takings" clause of Florida's Constitution. Dedge alleged in his suit that for 22 years the State of Florida had illegally "taken" his constitutionally protected liberty.

The taking of Dedge's liberty was compounded by his prosecutors response to his efforts that began in 1988 to have DNA testing performed on crime scene evidence. His prosecutors successfully opposed the DNA testing for 16 years. Dedge's lawsuit stated that if the state had not opposed the testing, it would have resulted in him being saved from "16 additional years in prison, saved the state from the expense of imprisoning an innocent man and the expense of extensive litigation the state undertook to prevent the testing."

The state filed a motion to dismiss the lawsuit on the grounds that Dedge's "taking" argument was a novel legal theory designed to get around

the sovereign immunity of the state from personal injury suits. During a hearing on August 19, 2005, the state's attorney, Ron Harrop, argued that under Florida's constitution "takings" applied to land and property seized by the government in eminent domain cases, not the deprivation of personal liberty. He said, "Property was not taken in this case, liberty was taken and liberty is protected by due process." Harrop conceded that Dedge had suffered personally, but "The law does not guarantee a system free of errors, it simply guarantees a system of due process." He added, "No matter how much empathy we have, no matter how much sympathy we have, no matter how much desire we have to somehow go back and undo what has happened, we must not take the principles of law, that have been the foundation of our jurisprudence, away."¹

Harrop argued that Dedge's remedy was to seek compensation from Florida's legislature.

Leon County Circuit Judge William Gary agreed with the state's argument that it was immune from lawsuits for personal compensation. On August 30, 2005, Judge Gary issued his three-page ruling dismissing Dedge's lawsuit, in which he wrote, "While everyone is in agreement that what happened to Wilton Dedge is tragic, only the Legislature can address the issue of compensation under existing law."²

Sandy D'Alemberte, a former president of Florida State University handling Dedge's case pro bono, responded to the dismissal with frustration, "They just keep dragging this out. The Legislature told us to go to the courts, and now the court is telling us to go to the Legislature. It's like a pingpong ball."³

Mary Dedge, Wilton's mother said, "Wilton is just so disappointed and frustrated."⁴ She said Dedge was getting by financially by mowing lawns, trimming trees and doing other odd jobs.

Dedge appealed the dismissal to the 1st District Court of Appeal in Tallahassee. D'Alemberte said the appeal was being pursued because, "As I read the constitution, where there's a wrong, there'll be a remedy. That's what the courts are for."⁵

After the lawsuit was dismissed, the media in Florida led a drumbeat that the legislature should compensate Dedge. The Florida legislature finally responded in early December 2005. The state Senate voted 39-0 in favor of a special-claims bill authorizing payment of \$2 million to Dedge for loss of liberty, lost wages and legal fees. The bill (SB 12B) also

includes 120 hours of free tuition to a Florida state college or university. The House of Representative then voted 117-2 to approve the bill. Payment under the bill is conditional on Dedge dropping his lawsuit.

Representative Don Brown was one of the two representatives who voted against the bill. He explained his nay vote by saying:

"It was out of fear that we may have set a dangerous precedent. I don't minimize at all the horror that Mr. Dedge went through. But I also recognize that the prosecution and American system of jurisprudence doesn't grant a perfect outcome but a fair one. I am yet to be convinced that the citizens should pay restitution when there is no real allegation of wrongdoing."⁷

House Speaker Allan Bense was the person who had blocked passage of the Dedge's claim bill in the previous legislative session. He publicly apologized to Dedge for his obstruction:

"You know, we could have passed this bill last session. And I stopped it... because I wasn't convinced at the time that it was the right thing to do. I hope that you'll accept my apologies. You're a bigger man than I am. And I humbly ask that you accept my apology for not getting this done sooner."⁸

The bill provides for payment of an unspecified lump sum plus an annuity designed to shield Dedge from paying excessive taxes. The details of those payments was to be worked out between Dedge and the state's Department of Financial Services.

Florida Governor Jeb Bush agreed compensating Dedge was "the right thing to do," and he signed the bill authorizing the payments on December 14, 2005.

JD Note: Sandy D'Alemberte represented Dedge pro bono as a special counsel to the Miami office of Hunton & Williams, a large law firm with offices around the world. Hunton & Williams also provided their services to Dedge pro bono.

Source: Wrongly Convicted Man Sues Florida, AP story, *Tallahassee Democrat*, May 29, 2005. Senate to Look at Compensation for Wrongly Convicted, Jackie Hallifax, *Florida Today*, February 19, 2005.

Endnotes and additional sources:

1 Lawyer: Dedge can't sue state, Paul Flemming, *Florida Today*, August 20, 2005.

2 Judge rejects lawsuit filed by Brevard man, Laurin Sellers, *Orlando Sentinel*, August 31, 2005.

3 *Id.*

4 *Id.*

5 Innocent man plans to appeal, James L. Rosica, *Tallahassee Democrat*, September 5, 2005.

6 *Id.*

7 Wrongly convicted man to get \$2 million in state restitution, Dara Kam, *The Palm Beach Post*, December 09, 2005.

8 *Id.*

Life After Exoneration Program



The nightmare of wrongful conviction and incarceration does not end with an exoneree's release from prison. The exonerated face serious challenges in virtually every aspect of rebuilding their lives on the outside, including employment, housing, financial resources, support systems, and access to medical, psychological and dental care. In most cases, exonerees are pushed out the prison door without as much as an apology, and left to fend for themselves.

The Life After Exoneration Program (LAEP) is the only national organization dedicated to helping survivors of wrongful conviction re-enter society and rebuild their lives. LAEP is working to ensure that exonerees have access to badly needed services. LAEP is helping to build a community of the exonerated. LAEP is supporting policy reform on behalf of the exonerated.

Traumatized by their Experience

A recent LAEP study of sixty exonerees nationwide confirmed that exonerees have considerable difficulty rebuilding their lives:

- Half were living with family members.
- Two-thirds were not financially independent.
- One-third lost custody of their children as a result of their wrongful incarceration.
- At least a quarter suffer from post-traumatic stress disorder.

Let Down by Society a Second Time

Most people do not realize that thirty states have no law providing compensation for an innocent person who wrongfully convicted for the time he or she spent in prison. In the states that do have compensation statutes, the amount can be meager and the process to qualify for it is difficult for most exonerees to negotiate.

What re-entry services are available to parolees are not available to exonerees. In most instances, a conviction remains on the exonerees record, even after the individual has proven innocence, thereby making it difficult for the exoneree to get a job, rent an apartment, or get credit.

LAEP assists exonerees and their family members in re-building their lives on the outside, by working to secure their physical,

spiritual, psychological, social and economic well being. LAEP does this by:

- Coordinating Direct Services to Exonerees
- Building a Network of the Exonerated
- Supporting Legislative and Policy Change

LAEP Coordinates Direct Services for Exonerees

The Need: Exonerees face a broad range of challenges as they try to rebuild their lives after wrongful incarceration. Most exonerees need psychological counseling, medical and dental treatment, job training and job counseling, and legal help. Our primary goal is to ensure that exonerees and their family members get access to the services they need.

How LAEP is Getting It Done: We begin by assessing the needs of the individual exoneree, then work with social service providers, medical, dental and mental health providers, and employers in the exoneree's community to ensure that the services they provide are adapted to the specific needs of exonerees, which are often particular to the experience of wrongful conviction. We are developing a model state policy for services to exonerees with states where exonerees reside in larger numbers. We provide remote intensive case management services when necessary. Although LAEP has coordinated direct services for 57 exonerees in 22 states, many more need our help.

LAEP also works to match exonerees with pro bono legal service providers in their communities. LAEP clients are currently receiving free legal representation with obtaining compensation, getting their records expunged, obtaining public benefits, and child custody. LAEP is working with several national law firms to assist in staffing cases.

LAEP Helps Maintain a Network of Exonerees

The Need: Exonerees are their own best mutual support system, but do not generally have the opportunity to connect with each other. It means a lot when you can speak with someone who really knows what it was like to be convicted of something you did not do, then sent to prison, where no one believes you when you say that you really are innocent.

How LAEP is Getting it Done: LAEP is building a network of exonerees, pairing recently released exonerees with those who were exonerated some time ago, building a system of mentors for exonerees and organizing periodic gatherings of exonerees around

Vietnam To Award Compensation

Vietnam's National Assembly has received unanimous public feedback supporting a resolution mandating compensation for a person wrongly convicted. Vietnam's legislature solicits public comments to gauge the pulse of the people. The primary concern of the nearly 1,000 people who expressed opinions about the resolution, had to do with how effectively it would be executed. Many respondents noted that legal officials regularly bend the law to their own purposes, so they had doubts about how faithfully the resolution letter, or spirit, would be followed. Particularly since the resolution did not mandate a specific formula for compensating a wrongly convicted person.

Source: Voters' Petitions Examined Thoroughly, *Vietnam News Agency*, Hanoi, Vietnam, November 24, 2005.

the country. We are also trying to help create an online community of exonerees.

LAEP Works for Legislative Reform and Policy Changes

The Need: An essential part of any long-term solution to helping the exonerated rebuild their lives is the establishment of compensation statutes in every state that fairly evaluate compensation claims and offer holistic remedies: social services, job training and expungement, in addition to monetary compensation.

How LAEP is Getting It Done: LAEP has convened a national working group on compensation legislation to develop guidelines for fair compensation, and study the effectiveness of current compensation systems. We are providing support to the advocacy efforts of our partners as they seek legislative reform.

LAEP Is a Non-Profit Organization

The Life After Exoneration Program is a public charity exempt from Federal income tax under IRS Code sections 501(c)(3) and 509(a)(1).

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In 2000 Illinois Governor George Ryan imposed a moratorium on executions in Illinois. He was influenced by the 16 years that an innocent Anthony Porter spent on death row before his release on Feb. 5, 1999. Five months earlier Porter came within 50 hours of being executed before a stay was issued. Governor Ryan said, "I cannot support a system which, in its administration, has proven so fraught with errors and has come so close to the ultimate nightmare, the state's taking of an innocent life. How do you prevent another Anthony Porter – another innocent man or woman from paying the ultimate penalty for a crime he or she did not commit?"¹

The legal system was prodded into correcting Porter's erroneous 1983 conviction and wrongful death sentence by the investigative efforts of a group of Northwestern University journalism students under the guidance of Professor David Protess. They gathered three key pieces of evidence that led to Porter's exoneration:

- By going to the South Side Chicago park and re-enacting the crime, the students proved the State's star eyewitness, William Taylor, could not have seen the August 1982 double murder from where he was standing in the park.
- A private investigator working with the students videotaped a detailed ten-minute long confession by Alstory Simon to the double murder. Simon voluntarily agreed to the videotaped interview, and while was under no external pressure whatsoever he admitted that he shot the two people because of a dispute over drug money. Simon said on tape, "I just pulled it up and started shooting."
- The students obtained a signed affidavit from Simon's wife that she witnessed him shoot the two victims over a drug money debt.

Taylor later corroborated the student's finding by admitting that he didn't see the shooting, although he was in the park the night it occurred. After the shooting Taylor was questioned extensively by the police, and he repeatedly told them he didn't see the shooting. He said later that he only identified Porter at his trial because the police threatened and coerced him into doing so.

More than a year after Porter's release, in May 2000 the Illinois Court of Claims awarded Porter \$145,875 for almost 17 years of "unjust imprisonment."²

Porter also filed a state lawsuit in 2000 against the City of Chicago for false imprisonment, alleging that the city police didn't have probable cause to arrest him in 1982 for the murders. The lawsuit sought \$24 million

Jury Rejects Anthony Porter's \$24 Million Lawsuit For 16 Years On Death Row

By JD Staff

in damages. Five years later Porter's lawsuit went to trial. After a weeklong trial, on November 15, 2005, a Cook County jury deliberated for six hours before arriving at their unanimous verdict in favor of the city.

When interviewed after the trial several jurors indicated that they would have voted for Porter if the case had been about misconduct by the Chicago PD's investigating officers, because his lawyers proved extensive misconduct had occurred. However, they didn't prove to the jurors' satisfaction that Porter had been arrested without probable cause. One juror said, "There was real misbehavior. We unanimously believed he was innocent, that he was wronged. But we couldn't [find for Porter]. The case was, 'Was there probable cause?'"³

Porter's attorney, James Montgomery Jr., was perplexed by the jury's decision. He said after the verdict, "We are shocked," and, "I can't get into the minds of the jury. This was not a jury of Mr. Porter's peers and is not typical of juries in the Daley Center of the city of Chicago." What Montgomery was referring to the fact that the jury pool for the trial was composed so that Porter – who is African-American – wound up with an all-white jury, even though only 31% of Chicago's population is white, and 36% is African-American.⁴ A family friend of Porter's told a Chicago television reporter, "They have come up with an all-white jury ... So we just know there's been a terrible miscarriage of justice."⁵ One of the jurors took exception to the allegations of racism in denying Porter any compensation. He said, "We didn't believe the police story." However, he explained the jury thought the assistant state's attorney believed he had probable cause to approve the charges against Porter, which he based on the faulty information provided by the investigating officers.

Mitigating the possible racism of the all-white jury's verdict against Porter is the jurors thought he should get some compensation for the police misconduct that led to his wrongful imprisonment. One juror said, "We told the judge we really want to make sure this guy gets compensation somehow."⁶

After the verdict, Chicago's attorney demonstrated that almost seven years after Porter's exoneration the city is unwilling to acknowledge it made a mistake in prosecuting him. He

pointed to where Porter had been sitting in the courtroom and said, "The killer has been sitting in that room right there all day."⁷

Kathleen Zellner is an experienced Chicago area civil attorney not involved in Porter's case who has won large sums for clients. She observed that jurors consider the actions of the police against the character of the person seeking compensation for their wrongdoing. Porter had a criminal record before his wrongful conviction and he was charged with domestic battery after his release – although those charges weren't prosecuted. In light of Porter's "character," Zellner said, "It is not enough to show that police didn't have probable cause, you've got to show your client has lived an exemplary life. Juries don't want to award any money unless they think your client is a good character. The dilemma for plaintiff attorneys is being able to present a sympathetic client. Jurors don't want to award millions to someone who may commit another crime."⁸

Zellner used the example of James Newsome, an African-American who sued the City of Chicago for the police department's rigging of the line-up in which he was identified as the murderer of a grocery store owner during a hold-up. He was wrongly convicted in 1979 and imprisoned for fifteen years on the basis of his erroneous identification in the rigged line-up. Zellner didn't represent Newsome, but she called him a "dream client. He got an education in prison and he came out looking stellar when he was presented to the jury, which awarded him \$15 million."⁹ Newsome won his lawsuit in 2002, and the jury awarded him \$1 million for each year of his wrongful imprisonment.

Twenty-two years after Porter's wrongful conviction and almost seven years after his sixteen years on Illinois' death row ended, he has been awarded total compensation of \$145,875. Since his release, Porter has been working at Chicago's Inner City Youth Foundation.

Endnotes and Sources:

1 Sorry remark in Porter case begs an apology, Eric Zorn, *Chicago Tribune*, November 20, 2005.

2 *Id.*

3 Jurors explain why they backed city over ex-Death Row inmate, Frank Main and Steve Patterson, *Chicago Sun-Times*, November 17, 2005.

4 Demographic Trends in the Chicago Metropolitan Area, Kenneth M. Johnson, PhD, Loyola University, October 2005, <http://www.luc.edu/depts/sociology/johnson/ChicagoCensus2004.html>.

5 Former death row inmate loses suit against CPD, John Garcia, ABC 7, Chicago, IL, November 15, 2005, <http://abclocal.go.com/wls/story?section=local&id=3636495>.

6 Jurors explain why they backed city over ex-Death Row inmate, *supra*.

7 Sorry remark in Porter case begs an apology, *supra*.

8 Wrongful arrest suits are tough sells: As in Porter case, big payouts often denied, Charles Sheehan, *Chicago Tribune*, November 17, 2005.

9 *Id.*



Diaz v. Gates, 420 F.3d 897 (9th Cir. 08/16/2005)

[1] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[2] No. 02-56818

[3] 420 F.3d 897, 2005 Daily Journal D.A.R. 9940, 05 Cal. Daily Op. Serv. 7270, 2005.C09.0003244<
<http://www.versuslaw.com>>

[4] August 16, 2005

[5] DAVID DIAZ, PLAINTIFF-APPELLANT v. DARYL GATES; et al., DEFENDANT-APPELLEE.

[6] Appeal from the United States District Court for the Central District of California Gary A. Feess, District Judge, Presiding D.C. No. CV-01-06400-GAF

[11] FOR PUBLICATION

[15] Per Curiam Opinion; Concurrence by Judge Reinhardt; Concurrence by Judge Kleinfeld; Concurrence by Judge Berzon; Dissent by Judge Gould [Seven judges voted with the majority and four dissented.]

[16] OPINION

[17] We examine whether a false imprisonment that caused the victim to lose employment and employment opportunities is an injury to “business or property” within the meaning of RICO.

[18] Facts

[19] Diaz claims to be a victim of the Los Angeles Police Department’s infamous Rampart scandal. He sued over two hundred people connected with the Los Angeles Police Department (LAPD) or Los Angeles city government under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, alleging that LAPD officers had “fabricated evidence” that he had committed assault with a deadly weapon, and that they had “tampered with witnesses and conspired to obtain [a] false conviction” against him, Compl. ¶ 16. As a consequence, Diaz claims, “[a]mong other forms of injury, [he] lost employment, employment opportunities, and the wages and other compensation associated with said business, employment and opportunities, in that [he] was rendered unable to pursue gainful employment while defending him-

self against unjust charges and while unjustly incarcerated.” Compl. ¶ 31.

[20] Defendant Parks moved to dismiss, arguing, among other things, that Diaz lacked standing because he did not allege an injury to “business or property” as required by RICO. See 18 U.S.C. § 1964(c). The district judge agreed and dismissed without prejudice and with leave to amend. Diaz did not amend, and the district judge then dismissed with prejudice. A divided panel of our court affirmed. ... We took the case en banc. ...

[21] Analysis

[23] ... [We] decided [in] *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002), where a class of agricultural laborers alleged that their employers had depressed their wages by illegally hiring undocumented workers at below-market wages. ... they did allege an injury to a property interest, the “legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes.” We held this property interest sufficient to provide standing under RICO. Diaz has alleged just such an interference with his business relations.

[31] ... Without a harm to a specific business or property interest – a categorical inquiry typically determined by reference to state law – there is no injury to business or property within the meaning of RICO.

[32] ... [Diaz] has alleged both the property interest and the financial loss. The harms he alleges amount to intentional interference with contract and interference with prospective business relations, both of which are established torts under California law. And his claimed financial loss? He could not fulfill his employment contract or pursue valuable employment opportunities because he was in jail.

[33] ... *Mendoza* speaks generally of a “legal entitlement to business relations.” ... California law protects the legal entitlement to both current and prospective contractual relations. ... There may be a practical difference between current and future employment for purposes of RICO – for instance,

RICO Applied To “Racketerring” Type Activity Resulting In A Wrongful Conviction

Over 100 convictions based on evidence gathered by the Los Angeles Police Department’s Ramparts anti-gang unit were vacated in the several years after it was publicly disclosed in the summer of 1999, that the unit engaged in the wholesale framing of innocent defendants by tactics that included planting weapons on injured but unarmed suspects, and filing false reports based on either fabricated or embellished events. Many of those wrongly convicted people filed a civil suit naming the LAPD, the City of Los Angeles, and responsible parties as a defendant. Over \$70 million in damages has been paid to plaintiffs in those suits. (See, *Wrongly Convicted Man Crippled By Police Awarded \$6.5 Million, Justice:Denied*, Summer 2005, Issue 29, p. 11)

David Diaz took a different tack. He filed a suit under the federal RICO statute “alleging that LAPD officers had “fabricated evidence” that he had committed assault with a deadly weapon, and that they had “tampered with witnesses and conspired to obtain [a] false conviction” against him.” He alleged that the LAPD’s activity constituted a pattern of “racketeering activity” actionable under the RICO statute, and for which the LAPD would be liable for treble damages.

The U.S. District Court judge dismissed Diaz’s suit after ruling he lacked standing under the RICO statutes. Diaz appealed to the federal Ninth Circuit Court of Appeals. On August 16, 2005 the Ninth Circuit ruled en banc that Diaz had standing to file suit against the LAPD under the RICO statute. This decision potentially has far reaching implications for wrongly convicted persons in the Ninth Circuit, and people in other federal circuits may find it worth considering to pursue a similar course of action in their circuit. Because of its implications, *Justice:Denied* is publishing a 2,000 word condensed version of the 11,000 word decision from which the reader can understand the gist of the Court’s reasoning. Excerpts from Judge Kleinfeld’s concurring opinion are also included. The full decision is available for free downloading or printing at, <http://justicedenied.org/cases/diaz.htm>

it may be easier to prove causation or determine damages for a plaintiff who has lost current employment – but this difference is not relevant to whether there was an injury to “business or property.”

[34] ... The only requirement for RICO standing is that one be a “person injured in his business or property by reason of a violation of section 1962.” 18 U.S.C. § 1964(c). And the Supreme Court has already told us that “by reason of” incorporates a proximate cause standard, see *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265-68 (1992), which is generous enough to include the unintended, though foreseeable, consequences of RICO predicate acts. ...

[35] ... In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the Supreme Court ... [determined] “Racketeering activity” is a broad concept, which “consists of no

more and no less than commission of a predicate act.” *Id.* at 495:

[36] “If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous “racketeering injury” requirement.” *Id.* at 495.

[38] ... The statute is broad, but that is the statute we have. Were the standard as the dissent claims, we would have the anomalous result that one could be liable under RICO for destroying a business if one aimed a bomb at it, but not if one aimed at the business owner, missed and hit the business by accident, or if one aimed at the

RICO cont. on p. 25

RICO cont. from p. 24

business owner who happened to be in the business at the time.

[40] We do not hold that plaintiffs may never recover under RICO for the loss of employment opportunities. We merely hold that the appellants cannot recover under RICO for those pecuniary losses that are most properly understood as part of a personal injury claim.

[41] ... Diaz suffered two types of injuries: (1) the personal injury of false imprisonment and (2) the property injury of interference with current or prospective contractual relations. Treating the two as separate, and denying recovery for the first but letting the suit go forward on the second, is both analytically cleaner and truer to the language of the statute.

[42] ... If Diaz properly alleges that his injuries were "by reason of a violation of section 1962," there is nothing to prevent him from "su[ing] therefor." See 18 U.S.C. § 1964(c). Diaz's complaint tracks the language of section 1962, which makes it illegal to, among other things, acquire or maintain control of an "enterprise," or conduct or participate in its affairs, through a "pattern of racketeering activity." ...

[44] ... We may not know precisely what type of employment Diaz alleges to have lost, but we know that Diaz alleges that his lost employment is an injury to a property interest as defined by state law. ...

[45] LAPD and various subdivisions are "enterprises" within the meaning of 18 U.S.C. § 1961(4). ... And he alleges acts that seem to fall within the definition of "racketeering activity," 18 U.S.C. § 1961(1), and seem to form a "pattern," id. § 1961(5).

[46] Whether these allegations of section 1962 violations are adequate is a matter on which we express no view. ... Now that we have set aside the district court's ruling as to standing, the district judge should, if he wishes to reinstate the order of dismissal, identify the specific deficiencies in a supplementary order, and plaintiff should then be given an opportunity to amend his complaint accordingly.

[47] REVERSED AND REMANDED.

[50] KLEINFELD, Circuit Judge, ... concurring:

[53] The RICO statute tells us what kinds of injuries give rise to RICO claims. ... The section stating what gives rise to a claim, section 1964, says "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court." ...

[54] Section 1962, which section 1964 tells us defines the violations giving rise to civil claims, says "It shall be unlawful for any person employed by or associated with any

enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

[59] Murder or kidnapping can cause injury to business or property, as well as personal injury. Suppose America suffered the frequent kidnapping for ransom of business executives that some countries do. If the business pays the ransom, it has been injured by the kidnapping. Or imagine that a person whom a business needs to function is murdered – perhaps a medical researcher who employs himself through an incorporated laboratory and obtains millions of dollars in research grants and contracts, and employs dozens of other people. The murder may well destroy the business, make it unable to pay its debts, and put all the employees out of work, giving them claims against the business for breach of their employment contracts. The laboratory corporation is a "person injured in his business" "by reason of" a section 1962 violation – murder. In these hypotheticals, I assume, of course, that a racketeering enterprise committed the wrongful conduct and that the section 1962 conduct caused the harm. The significance of the hypothetical cases is to illustrate that section 1962 personal injuries, such as murder and kidnapping, may indeed give rise to "injury to business or property" under section 1964.

[60] Diaz's claim to be a "person injured in his business or property" is more tenuous than the victims' claims in these hypothetical cases, but sufficient nonetheless. He pleads that, as a result of the putative RICO wrong, he lost the chance to get employment because he was in jail or absorbed with defending himself against the criminal charges he claims were the fraudulent result of police racketeering. That states a claim that he was "injured in his business."

[61] A person does not have to wear a suit and tie to be engaged in "business." A salaried employee might or might not, in ordinary speech, be characterized as a "businessman," but a sole proprietor of a service business un-

questionably runs a "business." For example, the owner of "AAA Snowplowing" is a businessman who owns a service business, and makes his living from it when he comes around with a blade on the front of his pickup truck after a snowfall. Dentists and lawyers are also businessmen who own and run businesses. So is a person who stands on a corner and waits to get picked up to do odd jobs as an independent contractor. There is no principled way to sort out who among sole proprietors has a "business" and who does not. They all do.

[63] The manifest statutory purpose of requiring not only injury "by reason of" section 1962 misconduct, but also injury to "business or property," is to exclude claims for other kinds of injuries, even those arising from denoted racketeering conduct. For example, a person who suffered physical injury and mental distress, but no injury to his business or property, on account of racketeering misconduct of the sort denoted in sections 1962 and 1961, could not state a claim upon which relief could be granted under section 1964. ...

[65] ... Though the RICO statute allows treble damages, the damages it allows, and allows to be trebled, are limited to injury to business or property. That limitation, particularly in light of the limited business and property of a considerable proportion of persons who are arrested, makes section 1983 a more attractive path for relief in most cases ...

[66] ... [W]ho can hear the word "RICO" without seeing in the mind's eye, Edward G. Robinson, in *Little Caesar*? But the Supreme Court has decided that RICO's statutory language just does not permit the courts to limit it to dishonest businesses that make their money through fraud and extortion. When it was passed, many ascribed to RICO the purpose of facilitating remedies against "mobsters and organized criminals. As the Supreme Court has construed the words of the statute since then, though, there is no way to corral RICO so that it would apply only to "racketeering" as that word may initially have been understood and as it is defined in the dictionary. ...

This is the story of Karlyn Eklof, a young woman delivered into the hands of a psychotic killer by traffickers in porn and mind control. She witnessed a murder and is currently serving two life sentences in Oregon for that crime. *Improper Submission* by Erma Armstrong documents:

- The way the killer's psychotic bragging was used by the prosecution to define the case against Karlyn.
- The way exculpatory evidence was hidden from the defense.
- The way erroneous assertions by the prosecution were used by the media, by judges reviewing the case, and even by her own lawyers to avoid looking at the record that reveals her innocence.
- The ways her appeal lawyers have denied any input that would require them to investigate official misconduct.
- Her case is classic example of coercion and denial of civil rights.

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Nightclub Owner Awarded \$2.28 Million For Drug Conviction Frame-Up

By Hans Sherrer

In 1992 Frank Shortt was the 57-year-old owner of the Point Inn, the largest and most successful nightclub in Donegal, Ireland. Donegal is a coastal town, located about 120 miles northwest of Dublin.

Drugs, particularly Ecstasy, were prevalent around Donegal, and Shortt wanted to make sure they stayed out of his nightclub. To that end he approached a senior police official and requested that undercover officers be deployed in the Point Inn to catch anyone trying to deal drugs. No undercover officers were assigned to patrol Shortt's nightclub in response to his request.

However, unbeknownst to Shortt, in the summer of 1993 Donegal police Inspector Kevin Lennon and Detective Noel McMahon made three surveillance visits to Shortt's nightclub. Lennon and McMahon submitted reports alleging that not only were drugs being dealt in the Point Inn, but that Shortt was knowingly allowing it to happen.

On the night of August 2, 1993, the Point Inn was raided by the police and a known dealer was arrested. Shortt, a millionaire and one of Donegal's most prominent citizens, was charged with knowingly allowing drugs to be sold in his nightclub.

Shortt pled not guilty and his trial was assigned to Dublin's Circuit Criminal Court.

The prosecution's case against Shortt seemed solid. It was based on circumstantial evidence and several witnesses, including a police informant and Detective McMahon. At Shortt's 1995 trial McMahon testified that he witnessed Shortt observing drug deals being made in the Point Inn, and Shortt did nothing to either stop or report them. However, one curious aspect of the case is no one was prosecuted for allegedly selling or buying drugs at the Point Inn — Shortt was the only defendant.

The jury considered the evidence was sufficient to prove Shortt knowingly allowed drugs to be sold in his nightclub. He said later that his lawyers told him he "wouldn't be going to jail. And then an hour later I was being led off in handcuffs to prison."¹ Shortt was sentenced to three years imprisonment. He was sent to Dublin's 150-year-old Mountjoy Prison.



Shortt's daughter, Sabrina, said years later during a radio interview, "When I was sixteen my father was sent to prison. A lot of my friends weren't allowed to come to my house anymore. My brothers and sisters got a lot of harassment at school, both from teachers and from their friends — having papers and things thrown at them on the bus."² Every Sunday Shortt's family visited him by making the 6-hour round-trip from Donegal to his prison. Sabrina, said of those visits, "We got one to two hours with my father, who spent the entire time talking to my mother about getting him out of prison, about dealing with finances at home, dealing with bills, people to talk to, ministers to talk to. By the time he had finished giving her the list of things to do, it was time to go back again. That was the way it went, every weekend."³

The efforts of Shortt and his wife were for naught. His appeal was denied and he served his entire sentence. With time-off credits, he was imprisoned for 27 months.

After his release, Shortt — whose financial fortunes were devastated when the Point Inn was destroyed by fire before he had a chance to sell it — continued his quest to clear his name.

By the fall of 2002 Shortt and his lawyers had acquired documents and witness statements that painted the picture that not only was he innocent, but he had been the victim of a premeditated frame-up orchestrated by Lennon and McMahon. That is why no one else was prosecuted for the alleged drug activity at the Point Inn — there was no actual evidence it occurred.

Lennon and McMahon were meticulous note takers of everything they did and observed during an investigation. That "anal retentive" attention to detail proved to be their undoing once Shortt and his lawyers obtained copies of their notes and reports.

Some of the key documents exposing what happened were obtained from an unlikely source — McMahon's ex-wife, Sheenagh McMahon. When the McMahon's were divorced in 1999 Sheenagh kept some of the incriminating memos her husband had written. She also provided testimony, corroborated by her ex-husband's chief informant, Adrienne McGlinchey, that McMahon and Lennon concocted evidence to convict Shortt, including planting drugs at the Point Inn.

Although it was unrelated to Shortt's case, they also provided evidence that Lennon and McMahon had also set up a bogus arms find. McGlinchey said that the two police officers and her drove a van loaded with explosives to Rosstown (near Donegal) and unloaded them into an unused shed. The next day police discovered the "arms cache" after being given an anonymous tip. The police then took claimed the explosives had been seized from IRA terrorists.

Ireland's Court of Criminal Appeal held a hearing in the late summer of 2002 to consider the new evidence of his innocence. At the hearing McMahon testified, "I am renowned and laughed at by people that live with me for making notes. I have to make a note of everything or I will forget something. It is a habit I have."⁴ In response to that admission, "Justice Adrian Hardimon scathingly noted that during the detective's three visits to the Point Inn, McMahon, the self-proclaimed compulsive note taker, had not once made a record in his notes about seeing Frank Shortt witnessing drug deals."⁵

It was also disclosed during the hearing that the money and drugs found in the coat pocket of an alleged drug dealer arrested at the Point Inn during the raid on August 2, 1993, had not been there when he was arrested that night. They were "discovered" the next day, which means they were planted by someone within the police department. That alleged dealer was not charged with any crime, although the "evidence" of the money and drugs "found" in his coat was used against Shortt at his trial.

In July of 2002 the appeals court quashed Shortt's conviction based on the overwhelming evidence he had suffered a miscarriage of justice. The evidence presented during his appeal conclusively showed that Lennon and McMahon had suppressed exculpatory evidence, planted bogus evidence, and perjured themselves during Shortt's trial.

Shortt then filed a lawsuit to recover compensation for his ordeal. On October 12, 2005, Ireland's High Court awarded Shortt payments totaling \$2,280,000⁶ That included \$955,000 for losses related to Point Inn plus \$652,000 in lost profits. It also included an award of \$593,000 under the Criminal Procedure Act, exemplary damages of \$59,000, and costs of \$21,000.⁷ It was the first award of compensation by the High Court in a case of wrongful conviction.

Shortt, now 70 years old, wasn't pleased with the award considering what he has gone through in the 12 years since he was falsely

Shortt continued on page 27

The Death of Innocents: An eyewitness account of wrongful executions

By Sister Helen Prejean

Random House, 2005, 310 pages, hardcover

Review by Katherine E. Oleson

Sister Helen Prejean's second book, *The Death of Innocents: An eyewitness account of wrongful executions*, is equally as compelling as her first, *Dead Man Walking*. As the title suggests, Prejean looks at the death penalty from another angle: cases of innocent individuals accused of crimes and sentenced to death. Former Supreme Court Justice Blackmun's fear of "the gross injustice if an innocent man were sentenced to death..." has come true more than once.

Prejean weaves personal accounts, legal arguments and criticism together to paint a fuller

Shortt continued from p. 26

accused — including the loss of his thriving business. He said, "Sally (his wife) and I are very disappointed with the judgement."⁸ His daughter Sabrina wasn't as restrained in her comments. In a radio interview days after the award was announced, she said, "I am completely outraged, and I do take it as a personal insult."⁹ She said that her father's experience in fighting the charges against him prior to his trial, his conviction and imprisonment, his quest to clear his name, and then his fight for compensation — all of which lasted for 12 years — has permanently altered his personality, "He is a different person now. He is completely obsessed with this case because he was so wronged, and he continues to be wronged and he was wronged again on October 12th."¹⁰

Endnotes:

1 Shocking Shortt Story, by Barry O'Kelly, GET SOURCE, August 11, 2002.

2 Daughter of Frank Shortt 'Outraged,' Irish Rights Watch, October 16, 2005.

3 *Id.*

4 Shocking Shortt Story, by Barry O'Kelly, GET SOURCE, August 11, 2002.

5 *Id.*

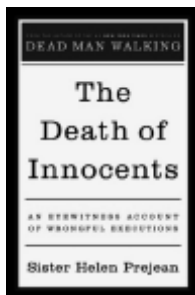
6 That is the dollar amount, since Ireland uses the Euro. The actual award was €1,923,871 (Euros). Based on an exchange rate of 1.1853 Euros per Dollar on December 23, 2005.

7 That is the dollar amount, since Ireland uses the Euro. The actual award amounts were €806,221 for losses related to Point Inn plus €550,000 in lost profits. It also included an award of €500,000 under the Criminal Procedure Act, exemplary damages of €50,000, and costs of €17,500. See, Shortt Awarded €1.93m for wrongful conviction, Irish Corruption website, October 13, 2005.

8 Nightclub owner disappointed at €1.9m payout, Irish News, October 12, 2005.

9 Daughter of Frank Shortt 'Outraged,' *supra*.

10 *Id.*



picture of what happened in the wrongful execution cases of two men she believes were truly innocent — Dobie Gillis Williams and Joseph Roger O'Dell.

Williams lived in rural Louisiana, and he was accused of raping and murdering a woman in 1984. His court-appointed lawyer neither investigated the prosecution's contrived crime scenario prior to his trial, nor challenged it during his trial. Williams was executed in 1997. Less than two years later the Supreme Court ruled it unconstitutional to execute a man with Williams' IQ of 65.

O'Dell was convicted in 1986 of rape and murder in Virginia, based largely on the testimony of a jailhouse informant. For more than ten years, O'Dell unsuccessfully sought court ordered DNA testing of crime scene evidence that might have proven his innocence. Supreme Court Justice Harry Blackmun disagreed with the Court's decision not to review his case, because he found "serious questions as to whether O'Dell committed the crime" and warned of "the gross injustice that would result if an innocent man were sentenced to death." O'Dell was executed in 1997. Virginia destroyed the evidence in 2000, so the truth will never be known.

Prejean legitimizes the voices of the accused by the seemingly sheer act of taking the time to ask questions and *listen* to the accused, Prejean brings attention to key pieces of evidence that had been ignored, disregarded, or not included by those at every stage of the judicial process. Sadly, as Prejean shows, these cases exemplify the many faults in the court systems across the United States.

Prejean writes in the preface, "I used to think that America had the best court system in the world. But now I know differently." Throughout the book, this revelation is illustrated. "When I first started visiting the condemned in 1982, I presumed the guilt of everyone on death row. I thought that an innocent person on death row would be a pure anomaly, a fluke. Not with all the extensive court reviews and appeals. Now, after working intimately with so many of the condemned and their attorneys, I know a lot better how the criminal justice system operates and how innocent people can end up on death row." (p. 9).

Prejean addresses many crime-related concerns in depth: contradictions in individual accounts of prosecution witnesses, coercion/hearsay of "confessions" by police, missing evidence from crime scenes, rationalizations used by lawyers and judges,

ridiculous prosecution scenarios with gaping holes in logic, and the list goes on.

Prejean dedicates a chapter to a thoughtful critique of Supreme Court Justice Scalia's support of "the machinery of death", particularly the reasoning he employs. In response to a statement by Justice Scalia that the death penalty is not a "difficult and soul-wrenching question", she states, "I find this morally troubling, because I can't help wondering how any human being could be called upon to decide life or death for his or her fellows and not break a moral sweat." (p. 173).

Once again, Prejean has brought attention to this debate through themes of dignity and respect for our fellow human beings that come forth in her writing. In a system ridden with flaws and injustices, she calls for public discourse and action on the death penalty. In her words, "Its practice demeans us all" (p. 270).

The Death of Innocents is available from The Innocents Bookshop at, <http://justicedenied.org/books.htm>.

Rose cont. from page 8

The suits make a variety of allegations that interrelate to portray the picture of how the systematic deprivation of Rose's rights to due process and a fair trial contributed to his wrongful conviction. Lodi Police detectives Matthew Foster and Ernest A. Nies Jr. are alleged to have coerced the rape victim to falsely identify Rose three weeks after the attack, and alleged to have failed to disclose exculpatory evidence that would have resulted in Rose's acquittal. Another allegation is San Joaquin County Deputy District Attorney Kevin Mayo "knew or should have known" that he coerced false testimony from the young victim when she identified Rose in court. Another allegation is DOJ Crime Lab technician Kathleen Cuila violated department protocol in the testing and analysis of fluid and hair samples. Other allegations are that Rose's court-appointed lawyer provided deficient representation, and that San Joaquin County randomly appointed the lawyer, who Rose alleges was unskilled and whose incompetence contributed to Rose's wrongful conviction.

The suit naming Cuila as a defendant seeks \$5 million in damages for Rose, and \$1 million each for his three children. The other suits don't specify damages.

Sources: Wrongly Convicted Man Seeking \$8 Million in Two New Lawsuits, *The Record*, Stockton, California, November 10, 2005.

Payback Sought For Years in Prison, *The Record*, Stockton, California, November 5, 2005.

Wrong Conviction Leads Former Lodi Resident to File Lawsuits, Layla Bohm, *News-Sentinel*, November 8, 2005.

Kenneth Wyniemko was awarded a minimum of \$3.9 million under a September 2005 agreement settling his lawsuit against Clinton Township, Michigan, for nine years of wrongful imprisonment for a rape he didn't commit.

Federal Judge Slaps Down City's Attempt To Conceal \$3.9 Million Award To Kenneth Wyniemko

By JD Staff



Chronology of Kenneth Wyniemko's saga

April 30, 1994: A man breaks into a 28-year-old Clinton Township woman's home and rapes her repeatedly over four hours while wielding a knife. Before leaving, the assailant steals \$3,000 in cash. The man wore a ski mask and she was blindfolded, so she was unable to identify her attacker.

July 14, 1994: A clean-shaven Wyniemko is arrested and appears in lineup with other men who all have facial hair except for one other man. He is released.

July 15, 1994: Wyniemko is arrested and arraigned on 15 counts of criminal sexual conduct and one count each of breaking and entering and armed robbery.

Oct. 31, 1994: Wyniemko's trial begins. His court-appointed attorney has little more than weekend to prepare his defense.

Nov. 9, 1994: Wyniemko is found guilty. The prosecution's star witness is a jailhouse informant, Glen McCormick, who testifies Wyniemko confessed the rape to him while the two were in the Macomb County Jail. After the trial the informant is spared the life sentence he faced prior to the trial. Although she didn't see her assailant clearly, the victim testified she is certain Wyniemko is her attacker, even though the man wore a ski mask and she was blindfolded.

Dec. 15, 1994: Wyniemko sentenced to 40-60 years imprisonment. The judge exceeds the sentencing guidelines because Wyniemko doesn't show remorse by insisting he is innocent.

May 2000: Wyniemko's father dies.

May 2001: The Innocence Project at Thomas M. Cooley Law School in Lansing accepts Wyniemko's case for review.

Spring 2002: Attorney Gail Pamukov agrees to represent Wyniemko pro bono.

Fall 2002: McCormick recants, saying he was coached to lie in exchange for not being given a life sentence.

June 17, 2003: Wyniemko released after nine years of wrongful imprisonment when DNA tests exclude him as the source of crime scene evidence that included, saliva on a cigarette butt discarded by the assailant, scrapings of the assailant's skin under the victim's fingernails, and the assailant's semen on a nylon used to gag the victim.

"I feel good. I want people to know this man is absolutely innocent." Macomb County Prosecutor Carl Marlinga, the day of Ken Wyniemko's release.

"This is surreal. I still can't believe this is happening." Ken Wyniemko the day of his release.

"There isn't really anything the township can do to change the fact that a man served over eight years in prison for a crime that, according to DNA tests, he didn't commit." Roger Smith, attorney for Clinton Township.

Fall 2003: Wyniemko files federal civil rights lawsuit in U.S. District Court in Detroit, naming Clinton Township and three police officers as defendants. The lawsuit alleges the officers coached jailhouse informant McCormick's testimony that Wyniemko confessed to the rape while they were in jail together. McCormick later recanted.

February 2005: Special prosecutor rules that a former Macomb County assistant prosecutor and a Clinton Township detective didn't commit wrongdoing in procuring McCormick's prosecution favorable testimony during Wyniemko's trial. The former prosecutor is

currently a Macomb County District Court judge, and the detective is still on the job.

March 2005: U.S. District Judge Lawrence Zatkoff denies the defendant's motion to dismiss Wyniemko's lawsuit. Zatkoff rules

there is evidence that police misconduct was instrumental to Wyniemko's conviction, and that he was denied a fair trial.

September 2005: Wyniemko's lawsuit against Clinton Township is tentatively settled. The settlement's terms are not publicly disclosed or reported to the federal court.

Mid-November 2005: Clinton Township's insurance carrier makes motion to dismiss Wyniemko's lawsuit on the basis a settlement has been agreed to. The attorney for the insurance carrier refuses Judge Zatkoff's request for the settlement's terms on the grounds it is confidential information. Zatkoff orders hearing about the settlement for November 29, 2005.

November 22, 2005: The *Detroit Free Press* files a Freedom of Information Act request for the settlement terms, asserting that the public has the right to know the details because it involves public funds.

November 28, 2005: The *Detroit Free Press* obtains the settlement terms and a copy is provided to Judge Zatkoff, who cancels the hearing scheduled for the next day.

November 29, 2005: The settlement's terms are publicly reported. Wyniemko is to receive a lump sum of \$1.8 million, plus \$6,409 monthly for the rest of his life. The monthly payment will increase 3% per year, and is payable for a minimum of 20 years. If Wyniemko, 54, dies, the payments will be made to his beneficiary. The monthly payments will amount to at least \$2,066,547, so the settlement amounts to a minimum of \$3,866,547.

Sources:

Clinton Township Secret Will Be Out, David Ashenfelter, *Detroit Free Press*, November 18, 2005.
Freed man to get \$3.7 million, David Ashenfelter, *Detroit Free Press*, November 29, 2005.
Freed By Science, He Celebrates, Kim North Shine, *Detroit Free Press*, June 18, 2003.



CA Judge Sacked For Jailing Woman For Non-Existent Crime and Holding Court In Strip Club

By Hans Sherrer

Los Angeles County Superior Court Judge Kevin Ross had been a prosecutor for eight years when he was elected to the Inglewood Municipal Court in 1998.

He was elevated to Superior Court judge in 2000 when the courts unified.

Ross was privately sanctioned for ethical mis-

conduct in February 2001 by California's Commission on Judicial Performance (CJP). The CJP's sanction of Ross involved his "abuse of authority, acting in derogation of the attorney-client relationship and the right against self-incrimination, and conducting proceedings that lacked decorum and were demeaning and humiliating to defendants." ¹

Judge continued on p. 32

JD Note:

This is Part VI of a serialization of an article published in the Fall of 2003 by the Northern Kentucky Law Review. It is the first extended critique published in this country of the critical role played by judges in causing wrongful conviction at the trial level, and then sustaining them on appeal. The extensive footnotes are omitted from this reprint, but ordering information of the complete article is at the end of the article.

The Complicity Of Judges In The Generation Of Wrongful Convictions

By Hans Sherrer

Part 6 of a 7 part serialization

VII.

Why The Judiciary Is Dangerous For Innocent People

The pervasiveness of outside influences dominates and even controls the decisions of judges at all levels from the lowliest city traffic court magistrate to the justices of the U.S. Supreme Court. The infection of politics throughout the judicial process helps one to understand how it can be that the U.S. Supreme Court found that it is constitutionally permissible for a person to be denied the opportunity to have proof of their actual innocence duly considered before they are carted off to be executed like an abandoned dog or cat in an animal shelter. In *Herrera v. Collins*, Leonel Herrera's four affidavits attesting to his innocence, including one from a person who attested to knowing who the real killer was, were dismissed as constitutionally insufficient to prevent his execution for a murder that he evidently did not commit. In his dissent, Justice Blackmun valiantly rallied against the virtual lawlessness the Court's majority was endorsing: "Of one thing, however, I am certain. Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who can show that he is innocent comes perilously close to *simple murder*."

Mr. Herrera's case is symbolic in that the foremost duty of a judge is to ensure the conveyor belt of the law enforcement system is kept moving, and if the receipt of justice by innocent men and women is sacrificed, that is just too bad for them. As one lawyer put it, "judges are conductors whose job is to ensure trainfuls of defendants continue to be

processed in a timely and uninterrupted manner." Perhaps more disturbing is that state and federal judges do not necessarily engage in rubber stamp justice to satisfy political needs, but because they are as integral a part of the political process as are state and federal representatives, senators and other elected and appointed public officials.

One need look no further for confirmation than the overwhelming percentage of rulings that a trial judge makes in favor of the government during a prosecution. All things being equal, the law of averages would dictate that the defense and the government would be *expected* to be considered "right" on a roughly equal number of issues during the course of a case. In reality that is a Pollyanna pipedream. It is inconceivable that a single judge in this country rules in favor of the defense on average anywhere close to half the time. It is irrelevant whether the prejudicial attitude of judges that stacks the deck heavily against a defendant from the beginning is conscious or unconscious, since its impact is the same either way.

That emphasizes the great danger posed to defendants by how amazingly easy it is for a judge to fix the outcome of a trial. Judges do this by such methods as: manipulating the jury selection process; deciding which witnesses can testify and what testimony they are allowed to be give; determining the physical and documentary items that can be introduced as evidence; deciding which objections are sustained or overruled; conveying to the jurors how the judge perceives the defendant by the tone and inflections in his voice and his body language toward the defendant and his or her lawyer(s); and by the instructions that are given to the jury as to the law and how it should be applied to the facts the judge permitted the jurors to see and hear.

The entire process makes it remarkably easy for the outcome to be rigged against a defendant disfavored by the judge, who all the while can make the proceedings have the superficial appearance of being fair towards the defendant being judicially sandbagged. As sociologist and legal commentator Abraham Blumberg noted, "A resourceful judge can, through his subtle domination of the proceedings, impose his will on the final outcome of a trial." Thus, in a very real sense, any criminal trial in the U.S. is potentially what is called a show trial in other countries, since the judge's opinion of a person's guilt or innocence can be the primary determinate of a trial's outcome, and not whether the person is actually innocent or guilty. Playing an important role in a judge's subtle manipulation of the proceedings in his/her courtroom is the judge's use of mind control techniques on jurors – the same techniques that are known to be used by law enforcement interrogators to

extract false confessions from innocent men and women. The use of these insidious techniques is a virtually unexplored aspect of how judges operate in courtrooms today, and it is a significant contributor to wrongful convictions. That is to be expected given the known role of those techniques in generating false confessions. Needless to say, this power is often used to the detriment of innocent men and women, because a judge can use all the methods and nuances of his craft to steer a trial in the direction of concluding in the way he or she has pre-determined it should end.

One of the mind control techniques in a judge's arsenal is to use the "light of truth" throughout a trial – from *voir dire* through the issuing of jury instructions – to influence jurors to arrive at a conclusion consistent with what the judge desires. The "light of truth" works when the judge uses his position as the purveyor of truth and goodness to influence the jurors to make a "false confession" about what they believe when they return their verdict. It is not uncommon for jurors, after the artificial influences they were subjected to in a courtroom have worn off, to say they would vote differently if they had it to do over again. In some cases one or more jurors have publicly proclaimed the innocence of the person they voted to convict. A recent well known example of this is that at least two jurors who voted to convict former Ohio State Representative James Trafficant publicly stated after his trial that they thought he was innocent and had been wrongly convicted. There are also accounts of jurors aiding in the overturning of a conviction of someone they voted to convict, but who they became convinced was innocent.

In a similar vein, jurors have been known to comment after a trial that they thought the defendant was not guilty, but based on what the judge told them to do, or perhaps only implied they must do (through his tone of voice and body language), they felt like they had to vote guilty, if for no other reason than to make the judge happy. A well known example of a jury convicting someone they did not think was guilty, was when baby doctor and author Benjamin Spock was convicted for aiding draft resisters during the Vietnam War. In Jessica Mitford's book about his case, *The Trial of Dr. Spock*, jurors are quoted as saying he was not guilty, but they thought the judge's jury instructions gave them no choice but to convict him. This is an indicator of the effectiveness of the psychological manipulation techniques used on jurors by judges: they are able to induce jurors to vote someone guilty that the jurors believe at the time to be innocent. It is a real life confirmation of how lay people acted in Professor Stanley Milgram's famous Yale University experiments, when they applied what they

Complicity cont. from p. 30

Complicity cont. from p. 29

thought was life threatening voltage to an innocent person strapped to a chair simply because they were instructed to do so by an authority figure in a white coat. Judges wearing a black robe instead of a white technician's smock confirm the validity of Professor Milgram's experiments every day in courtrooms all across the country. So what has subtly gone on in courtrooms for over a hundred years, since the Supreme Court's decision in *Sparf v. United States*, is nothing less than a sophisticated form of psychological manipulation of the jurors to produce the judge's desired verdict.

Of course, once a conviction is obtained, whether solely by psychologically torturing the jurors or a combination of multiple juror manipulation techniques, it is extraordinarily difficult for a defendant's conviction to be reversed on appeal to a higher court. Even when a higher court rebukes a trial judge, it often has no effect on the judge's conduct or rulings. In some cases a judge will simply ignore the order of the higher court that has no real power to force compliance with their edict.

The fact based documentary-drama, *Without Evidence*, about the trial and conviction of Frank Gable for the 1989 murder of Oregon Department of Corrections Director Michael Franke, graphically demonstrates how blatantly a trial judge can, to all appearances, successfully fix the conviction of what may be an innocent man, and how difficult it is for a defendant to have those prejudicial actions undone on appeal. Judges are literally able to do this with near impunity because of the discretion they are given to determine the ebb and flow of a trial by appellate courts reluctant to reverse lower court rulings. A skilled judge can use the latitude they are granted to express their preferences about a defendant while superficially appearing to the casual observer to be primarily concerned with protecting the dignity of the proceedings. It is also important to consider that even when a judge does not have a pre-judgment about a defendant, their typical prosecutorial bias can express itself in the form of a conscious or unconscious leaning toward the defendant's guilt. Although judges vary in the obviousness of expressing their preference for a defendant's conviction, they are all able to effectively do so whenever it suits them.

Part 7 will be in the next issue of *Justice:Denied*. **To order** the complete 27,000 word article, mail \$10 (check or money order) with a request for - **Vol. 30, No. 4, Symposium Issue** - to:

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Highland Heights, KY 41099

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Analysis cont. from page 6

- Footwear impressions on the polished wooden floor of the apartment and bedroom
- More sign of struggle or fight
- More debris tracked in by multiple offenders
- More hair and fibers in the scene
- Hair and fibers on the victim's shirt
- Greater disturbance to apartment
- Damage to apartment
- More theft
- Furniture movement in apartment
- There is no sign that anyone cleaned up in the bathroom or kitchen
- A mixture of semen and different DNA's found upon analysis

Wounds

If multiple offenders had committed this crime, it is expected that far more damage would have been inflicted upon the victim and that damage would have been evident at autopsy.

- The victim had blood under her fingernails from defending herself; if she were fighting several offenders it is expected that she would have "restraint injuries" (e.g., bruises to wrists, ankles, arms, legs)
- Victim managed to scratch one assailant; if there were multiple assailants present, she would have had the opportunity to scratch or bite more; however, the DNA of only one offender was under her fingernails and oral swabs did not reveal any DNA other than the victim's.
- With multiple offenders restraining a victim blunt force trauma is often found to the victim's face (e.g., black eye(s), facial bruising, lacerated lips, inner lip cuts, damaged nose); none was present in this case.
- If multiple offenders had stabbed the victim, it is expected that there would be a greater variation in wound location, direction, size, and depth.

Behavioral Evidence

- Noise
 - ✓ Multiple offenders involved in a gang rape may have generated enough noise that the neighbors would have immediately noticed and reported the noise to police, or to authorities, during their neighborhood canvas
 - ✓ If multiple offenders did not make much noise during the crime, they may have done so during their exit from the apartment, from the building, or from the apartment complex
- Notice of presence
 - ✓ While one person traveling about an apartment complex may go unnoticed, multiple people are a crowd; and a crowd of only males is a suspicious crowd that would

probably have not gone unnoticed to the neighbors and would have been reported to the police during their neighborhood canvas [JD Note: The resident's of Moore-Bosko's apartment complex were very watchful over their living environment and proactive in protecting it. Just two weeks prior to Moore-Bosko's rape and murder, an angry mob of apartment dwellers chased Ballard to their apartment after he had beaten a young girl with a baseball bat, and her husband, William Bosko, let him in and refused to turn him over to the crowd.]

- Rearrangement of furnishings
 - ✓ Only two chairs (of four) were pulled away from the dining table; if multiple offenders had been present, there should have been greater disruption of the furniture that would have been noticeable in the neat apartment

Why the Evidence Supports This as a Single-Offender Crime

Physical Evidence

The physical evidence, wounds, and behavioral evidence are consistent with a single offender having committed this crime. Additionally, only one DNA profile was found on and in the victim. (p. 25)

Wounds

The wounds found at this scene were consistent with what would be expected at a single-offender scene. There were no abrasions on victim's arms or legs, and no blunt force facial trauma as would be expected from multiple assailants. If multiple offenders had stabbed the victim, it is expected that there would be a greater variation in wound location, direction, size, and depth. In this case, the wounds indicate one offender that tormented/controlled, then tentatively stabbed, then resignedly stabbed.

Behavioral Evidence

The behavioral evidence found at this scene is consistent with what would be expected at a single-offender scene where the offender went to the residence for a sexual encounter. The victim was killed so she would not be able to testify that the sexual encounter became a violent sexual assault. Searching through the victim's purse was an afterthought to the crime.

Note: The **Assessment of Ballard's Statements** and the **Assessment of Williams, Dick, Wilson, and Tice's Statements** on page 31 are excerpted from "Crime Scene Analysis and Reconstruction of the July 8, 1997 Sexual Assault and Murder of Michelle Moore-Bosko."

Analysis cont. on p. 31

| ASSESSMENT OF BALLARD'S STATEMENTS | |
|--|--|
| Statement | Evidence |
| He had known victim for two months and she knew him | Consistent with voluntary entry into apartment |
| Victim invited him into the apartment before her assault | Consistent with the evidence |
| He followed victim to the bedroom, where he raped her | Consistent with evidence, however, the evidence shows he <i>chased</i> her, not just <i>followed</i> |
| "And maybe [there was sex] on the floor" | Consistent with the evidence |
| She never fought or screamed." | Consistent with the evidence and injuries |
| Knife used to stab victim was from kitchen drawer; brown, ridged handle, 4-5 in. blade | This is true according to victim's husband. Accurate description of knife. |
| I turned around and choked her | Consistent with the evidence |
| ... took \$35 from "on the table in the dining room. That's it. I know it was all \$10's and a \$5." | Consistent with purse contents dumped and searched on the dining table Consistent with other valuables not having been taken - victim's jewelry, CDs, electronics |
| He never hit her | Consistent with the evidence |
| He committed the crimes alone | Consistent with the evidence |

| ASSESSMENT OF WILLIAMS, DICK, WILSON, AND TICE'S STATEMENTS | |
|---|---|
| Statement | Evidence |
| Tice and Pauley went to Williams apartment and met with Wilson, Dick, Farris "I had one leg, Eric had the other leg, Joe had one arm, Jeff had one arm, and Rick Pauley <u>was trying to keep her from squirming.</u> " All six men raped the victim | This is a total of six men, and is inconsistent <u>with the evidence of a single-offender crime</u> . Inconsistent with victim's injuries; there are no abrasions and bruises that would have occurred with such restraint <ul style="list-style-type: none"> • Only DNA of one man (Ballard) found in victim • There was no mixture of DNA found • No DNA from any of the six men Tice named was found |
| We men rushed in and then carried her into the bedroom | Inconsistent with evidence for the following reasons: <ul style="list-style-type: none"> • The table directly in the path of the opening front door would have been dislodged and those items balanced on it (lamp and drinking glass) would have been askew or tumbled over • The 2'10" hallway is too narrow for people to navigate while side-by-side, much less while carrying a violently struggling victim • Chair protruded into hall, lessening the hallway width to 1'4" • The photograph on right side of hallway would have been dislodged, but there is no evidence this occurred • The mail, etc., on the kitchen/hallway shelves would have been dislodged from the shelves and strewn into the hallway and kitchen • The photograph on the hallway wall across from the bedroom door would have been dislodged • The hallway walls would show scratches, scrapes, and rub marks from such frantic passage down such a narrow corridor |
| "Jeff...stabbed her... then Dan stabbed her. I stabbed her, then Eric stabbed her, Joe stabbed her, and Pauley also stabbed her... After Rick had stabbed her, we released her [from a standing position], she fell to the ground..." | Inconsistent with: <ul style="list-style-type: none"> • Number of stab wounds This account relates six stabs There were actually four stab wounds and an additional five "knife point abrasions" • Victim's stab wounds being tightly clustered • Blood stains (indicate she was not standing when stabbed) |
| "...she did put up a struggle the whole time." | Inconsistent with evidence: <ul style="list-style-type: none"> • Lack of scrimmage and defensive injuries on victim • Lack of "restraint injuries" |
| Tice stated he ejaculated while raping victim | His DNA was not in the victim, nor found anywhere else in the apartment. |
| Eric hit victim a couple of times | No such injuries on victim |
| Covered victim with blanket from bed | No - husband did this upon finding victim |

Judge continued on p. 28

On November 16, 2005 – almost five years after his “private sanction” – the CJP again acted in response to Judge Ross’ ethical misconduct. However unlike their previous action that was swept under the rug, this time the CJP acted publicly by ordering his removal from office for committing a variety of serious ethical offenses that began months after his 2001 sanction.

The following are among Ross’ ethical violations documented in the CJP’s 72-page opinion:

- In 2001 Ross disclosed confidential information about a juvenile case pending in his courtroom, when he appeared on the KCET-TV public television program, “Life & Times Tonight.”
- During two appearances on “Life & Times Tonight” in 2002, Ross discussed a pending police brutality case involving an Inglewood police officer.
- Ross ordered his bailiff to remove a public defender who demanded a formal hearing for her client, who denied committing three misdemeanor probation violations. After the defendant’s lawyer was removed, Ross sentenced the defendant to 90 days in jail – over the objection of another deputy public defender in the courtroom for a different case.
- Ross started his court late an hour in 2000 with dozens of cases on the docket because he was detained making a radio appearance concerning Proposition 21, which made it easier for prosecutors to charge juveniles as adults.²
- In 2002 Ross was paid \$5,000 to appear in two pilot episodes of a reality television program – Mobile Court – in which small-claims “court” was conducted on location in front of an audience. One of those episodes was filmed inside a Los Angeles strip club decorated with “zebra carpet, neon, mirrors, and a pole front and center.”³ The episode was titled – “Beauty and the Beast” – and it concerned “An “erotic model” using the stage name Angel Cassidy who sued the “Dream Girls” adult club in San Diego, claiming that the club cheated her out of prize money because the security guard (identified on film as “Wolverine”) disqualified her from the final round of the “Miss Wet on the Net” contest.”⁴
- In 2003 Ross unilaterally added a criminal charge against a woman – D. Fuentes – during a hearing for her alleged traffic “infraction” of failing to wear a seat belt. Fuentes only faced a possible fine for the traffic infraction. She claimed she was the victim of mistaken identity, which she substantiated by presenting documenta-

tion to Ross that she was 5’-7”, 180 pounds, and born April 25, 1965, while the ticket was issued to a woman described by the issuing officer as 5’-4”, 250 pounds, and born April 25, 1967. In addition, Fuentes’ signature on her identification didn’t match the signature on the citation. In response to Fuentes’ mistaken identity defense, Ross declared, “I believe you’re lying to me,” and added a misdemeanor count of knowingly providing “false evidence of automobile insurance to a peace officer or court clerk in connection with financial responsibility laws.”⁵ Ross then summarily found her guilty of the new charge and sentenced her to 30 days in jail, even though “she was never arraigned in the sense of being advised either of the charges against her or of her other constitutional rights, including her rights to counsel and to a hearing. Judge Ross did not notify either the prosecutor or the public defender that he had added misdemeanor charges.”⁶ The woman had been jailed for 2-1/2 days when public defenders alerted to her plight were able to convince a different judge to order her release.

- Ross “trampled” on the rights of defendants in at least “four unrelated criminal cases between August 2001 and April 2003, including that he interfered with and abridged the defendants’ constitutional rights to counsel and to fair hearings and against self-incrimination, abused his judicial authority, and became embroiled in two of the pending cases.”⁷
- Ross misled the commission by lying during hearings and in documents related to the ethical charges against him.

In regards to Ross’ television appearances, particularly the pilots for Mobile Court, the CJP found that Ross, “was willing to allow himself to be marketed as a judge in hopes that he then could leave the bench for a more lucrative career in television.”⁸ Sitting judges can only arbitrate disputes within the public court system. Television judges, such as Judge Wapner and Judge Judy, are retired from the bench.

In regards to Ross’ general disregard for the rights of defendants, the CJP found that he “shows a shocking abuse of power and disregard of fundamental rights.”⁹ The CJP described Ross as having “improperly communicated with criminal defendants,” and he “abused his judicial authority, and become embroiled” in those cases.¹⁰

In regards to Ross’ summarily charging Ms. Fuentes with a misdemeanor crime, the CJP found he “usurped the function of the prosecutor to add additional charges.”¹¹ The

CJP further determined that Ross tried to deceive them by falsely claiming he ordered his clerk to release the woman after he found her guilty and ordered her immediate incarceration. They also neither believed his claim that he thought she would have a hearing before a different judge before actually being jailed (she was taken into custody in his courtroom), nor his contradictory claim that he thought she would automatically be released due to overcrowding. Ross’ defense to his courtroom treatment of Ms. Fuentes is he became “frustrated” because she insisted she was the innocent victim of a mistaken identity.

In regards to Ross’ lying during the CJP’s investigation and hearing process, they found that “Judge Ross’ lack of candor is utterly incompatible with the role of judge and impacts on the administration of justice and the public’s image of it. The adverse consequences of Judge Ross’ conduct are undeniable...”¹²

The CJP summarized its findings by writing, “Judge Ross’ manifest and pervasive lack of honesty and accountability throughout these proceedings compel our unanimous conclusion that we must remove him from office. Our mandate to protect the public requires nothing short of that ultimate sanction.”¹³

The CJP’s disciplinary action resulting in Judge Ross’ removal for ethical misconduct was instituted on August 30, 2004, after they learned about his appearance on the KCET-TV “Life & Times Tonight” program in 2001.

Ross is the eighth California judge removed for ethical violation since 1995. He has 90 days to appeal the CJP’s decision to the California Supreme Court. Ross, who makes \$149,160 yearly, is on paid administrative leave pending either the outcome of an appeal, or his resignation.

Sources: L.A. Judge Is Removed From Bench, Jean Guccione, *Los Angeles Times*, November 17, 2005.

Endnotes and additional sources:

1 Decision and Order Removing Judge Kevin A. Ross From Office, November 16, 2005, *Inquiry Concerning Judge Kevin A. Ross*, No. 174, California Commission on Judicial Performance.

2 The CJP cleared Ross of ethical wrongdoing in regards to this charge.

3 Decision and Order Removing Judge Kevin A. Ross, *supra* 4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*



Dorotik continued from page 3

The Prosecution's Theory of Bob's Murder

The detectives based their suspicion of me on a small amount of blood found in the master bedroom of our home. I told them it was residue from a nosebleed Bob had a week earlier. The detectives relied on that small amount of blood to construct the following scenario to neatly "solve" Bob's murder:

- I murdered Bob in our bedroom on Saturday, February 12, 2000.
- I then conducted an intensive operation to clean the bedroom of the significant amount of blood Bob lost from his extensive head wounds.
- I then carried Bob's body out of the bedroom, across a sixty foot porch, down a flight of stairs, lifted him into our truck, which was a *full-size white Ford F-250* and *not* a small black pickup truck, transported him to where he was found, and unloaded him.

The Prosecution's Theory Was Contrary To The Facts

Their scenario is ludicrous for the following reasons:

- The observable rigor mortis at the time Bob's body was found was inconsistent with a Saturday night death.

- There was no trace of blood in any of our home's sinks, the shower, or the tub in the master bathroom. In addition, our small household carpet cleaner wasn't capable of cleaning the significant amount of blood Bob lost from his injuries.
- In spite of the severity of Bob's head wounds, no brain matter or bone fragments were found in our master bedroom, elsewhere in our house, or outside from the house to the driveway.
- None of Bob's tissue or blood was found on any of my clothes.
- None of Bob's tissue or blood was found in the path from our bedroom to the outside door, on our deck, the steps, nor on our driveway.
- On the Sunday evening of Bob's disappearance, sheriff deputies, search and rescue team members, and a scent dog, were all in our bedroom and not a single person saw any blood, nor noticed that it looked like it had been shampooed within the previous 24 hours, nor that it was damp from having been cleaned and shampooed recently. Neither did the scent dog detect Bob's blood. The next evening after Bob's body was found, homicide detectives came to the house and interviewed family members, and did not notice any indication it was the crime scene. However, on February 16, and 17, the day I was arrested, there was a wind and rain storm that knocked out power in the area of our home and also caused rainwater

to leak around the window above our master bedroom and around the exterior sliding glass door in the master bedroom. The area dampened by the rainwater was in the same area where Bob had cleaned his nose-bleed the previous week. When interviewed by a private investigator *after* my conviction, our landlord "confirmed that there was leakage in the window above the master bedroom that caused leakage ... The leakage ... resulted in damp carpet. The sliding glass door area in the master bedroom also leaked to the storage rooms below and he admitted ... there was also dampness there." (See accompanying, Interview of RB, p. 34) [JD Note: According to the wunderground.com website, there was above average winds, high wind gusts, and nearly 2/3rd of an inch of rain on February 16 and 17, 2000 in the area of Valley Center, CA. This information was obtained by JD on October 22, 2005]

- I am not physically capable of carrying Bob's body out of our bedroom, across a sixty foot porch, down a flight of stairs and lifting him into our truck. I was about 40 pounds overweight and unfit, I have an arthritic back, and a serious motor vehicle accident left me with a fractured hip repaired with metal. I couldn't even lift the water bottle onto the cooler, much less lift and carry the dead weight of my husband's body across any distance. Yet the

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INTERVIEW OF LS *

On February 23, 2005, LS was interviewed by a private investigator working on Jane Dorotik's behalf. *The woman's initials are being used by *Justice:Denied* in place of her name to provide a measure of protection for her family that lives in a rural area, since she is a witness and the men responsible for Bob Dorotik's brutal murder have not been apprehended.

Excerpts of Interview:

LS lives [near] where the victim's body was found. She ... is very familiar with the area and its residents.

LS related ... 4 or 5 weeks before February 13, 2000, her young teenage daughter came home from school after getting off the school bus ... As she was walking home she saw a black truck parked ... and there were two men inside the truck.

When LS went to pick her daughter up at the bus stop the next day she noticed the black truck with the two men inside just as her daughter had told her the previous day. LS observed that the truck was an older model small pick-up that was rather beat up. The license plates were old.

They were black and gold like the type California once used. ... [The men] ... could have been Hispanic or American Indian. ...

On Sunday, February 13, 2000 LS was driving her husband to visit a sick grandfather between 4:00 p.m. and 5 p.m. She noticed the same black truck that she had seen previously. ... However, this time there was another man between the two men. This man was Caucasian, and was sitting between the two men whom she had seen several times. ... She described him as looking out of place. He had a medium sized mustache, his eyes were open and he was staring straight ahead, but his eyes didn't appear to be focused, it was like he wasn't seeing. ... He wasn't moving at all. The men on the two sides of this man seemed to be looking around a lot. She had no problem getting a good look at them because she could see all three men through her front windshield window and this gave her a frontal view because of the way the vehicle was parked. Since the above date LS has not seen the two men that were originally in the black truck.

The next day February 14, 2000, LS was driving to her grandfather's when she passed by the same location where she had seen the three men the

previous day. This time ... there were "news people and police" at the same location where she saw the men and the truck. LS approached a newsman and asked him what had happened and he told her that the body of a man had been found. Just as he told her this he also showed her a picture of the man that was found. LS related, "My God, that's the same person I saw sitting in the truck."

She was shocked when she looked at the picture, and she then related that cameras came toward her and filmed her. ... [T]he cameraman (KUSI - San Diego) started filming her as she was relating to the reporter that this was the same man she had seen the day before sitting between two men in a black pickup truck.

She went over (still at the scene) and told the Sheriffs what she had seen. ...

She related that the officer took her name and address and told her someone from their department would be contacting her to question her further.

LS said that afternoon and evening she saw herself, "all over the news" being described as an eyewitness. She said she felt afraid that the two men in the black pickup truck might

try and come after her or, even worse, one of her children. ... She ... called the sheriff and the news and told them she did not want her name or face being shown on television at all ... She said the media did not air anything about her again after that evening. She said even so, she still feared for her safety ...

LS said no one contacted her for the next fifteen months until she got a call from an investigator for the defense ... (May 28, 2001). ... She said that shortly after the initial contact from the defense investigator, she got a call from homicide Detective Ryzdzinski (May 31, 2001) telling her that her information was irrelevant...

LS related that she was subpoenaed to court by the defense... LS testified in court that she still believed the two men in the black pickup truck to be the real murderers of the victim ...

LS said the case bothered her a lot at the time, and still bothers her. She said she was absolutely certain that the man she saw in the truck on Sunday, February 13, 2000, was the victim. ... She said she felt detectives had not taken her seriously from the start and had more or less tried to talk her out of what she said she saw. LS said again, "I know what I saw."

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prosecution's scenario had me doing the impossible feat of carrying him down stairs and lifting him into and out of our truck.

- I am not strong enough to create the 1/4" deep gashes in Bob's neck caused by the rope. In addition, my hands showed no traces of cuts or marks that would likely have been caused from the exertion necessary for me to have inflicted his extensive injuries.
- My foot size and none of the many pairs of shoes seized during a search of our home matched either of the two sets of footprints where Bob's body was found.
- Bob's jacket was found a half-mile from his body on the other side of the road. Interestingly, there was no blood visible on his jacket.
- I had no motive to want Bob dead. We had a loving relationship. As all couples do, we had our differences over the course of our thirty-year marriage. However neither of us was contemplating divorce and there was no history of violence by either of us. At the time of Bob's death my lifetime police record consisted of two speeding tickets.

Compounding the impossibility of the detective's scenario is what was seen by the eyewitnesses. One witness saw my husband alive on Sunday afternoon at about 4 p.m. jogging on a public street, and at about that same time on that same road was almost run "off the road" by two Hispanic or Indian men in a small black pickup truck. Another wit-

INTERVIEW OF RB*

On March 23, 2005, RB was interviewed by a private investigator working on Jane Dorotik's behalf. *His initials are being used by *Justice: Denied* in place of his name since he is a witness who undermines part of the prosecution's case against Jane Dorotik, and the men responsible for Bob Dorotik's brutal murder have not been apprehended.

Excerpts of Interview:

RB was Jane Dorotik's landlord, and he knew about the condition of the house prior to Jane and her husband Robert Dorotik renting the house from him.

RB confirmed that there was leakage in the window above the master bedroom that caused leakage during a prolonged rainy season. The leakage went into the wall and also on to the flooring which resulted in damp carpet. ...

The sliding glass door area in the master bedroom also leaked to the storage rooms below and he admitted to this investigator that there was also dampness there.

RB related ... the persons responsible for the damage to the house were the ... former owners of the house. When RB bought the house ... he took possession in the damaged condition and didn't repair it prior to renting it to the Dorotik's.

ness saw Bob within the next hour "slumped over" between two Hispanic or American Indian men in a small black pickup truck. A third eyewitness said that on Sunday afternoon an erratically driven small black pickup truck with two Hispanic appearing men inside was near where Bob's body was found.

The San Diego County DA would be expected to know the following:

- Multiple eyewitnesses implicate two Hispanic appearing men in Bob's murder.
- Eyewitness evidence supports that Bob was likely either injured or dead while in a small black pickup truck parked where his body was found.
- Two sets of shoeprints were found by Bob's body, and my shoeprint was excluded as matching either of those crime scene shoeprints.
- The Hispanic who worked for us didn't show up for his regularly scheduled work the Sunday of Bob's death. He owed us money, drove a small black pickup truck and lived with his brother and other family members about half-a-mile from where Bob's body was found. It is also suspicious that he and his brother told wildly different stories to the detectives who questioned them about their whereabouts that Sunday.

The Prosecution Relied On A Shoddy Investigation, Perjury, And Speculation To Convict Me

Yet in spite of those facts, and that there was no eyewitness or physical evidence of my guilt, I was convicted and sentenced to 25 years to life in prison. So how was I convicted?

- The homicide detectives testified they found a large amount of blood in our bedroom that was not seen or detected by sheriff's officers, search and rescue workers or a scent dog on the evening of Bob's disappearance, or by the homicide detectives who were in our house and interviewed family members the next day after his body was found.
- The prosecution's forensic "expert" testified to an elaborate hypothetical scenario involving me bludgeoning Bob in our bed. This same forensic "expert" had been rejected as an expert by the San Diego County D.A. in other cases because of errors he had made. However neither I nor my attorney were aware of his lack of expertise at the time of my trial, and the prosecution did not disclose it to us.
- Based on nothing but his visual observations, a homicide detective testified that the rope used to strangle Bob – which was a common type of all-purpose rope – was identical to rope found on our property. No forensic tests were conducted to substantiate the detective's assertion.

- There is a hair very clearly depicted in two close-up autopsy photographs of Bob's right hand. Yet to my knowledge that crucial hair, which one could reasonably presume was from one of his killers, was neither collected as evidence nor analyzed.
- The Hispanic who worked for us, drove a small black pickup truck and lived a half-a-mile from where Bob's body was found, told detectives a radically different story than his brother about their whereabouts on that Sunday. He invoked his Fifth Amendment right against self-incrimination, so the judge didn't allow the jury to hear any of the circumstantial evidence suggesting that he and his brother could be my husband's murderers. We still don't know what he knew, or what he did, that he thought was incriminating.
- The homicide detectives and prosecutors did not disclose the existence of the eyewitnesses to my lawyer and me. We became aware of the first witness — who saw Bob "slumped over" between two Hispanic or American Indian men in a small black pickup truck no later than 5 p.m. — when she came forward to provide us with the information at the end of my trial. She did that in spite of expressing fear from knowing the killers were still at large. The judge allowed the jury to hear her testimony. However, her assertion that she "believed the two men in the black pick-up truck to be the real murderers" was so totally contrary to both the prosecution's theory of the crime and my lawyer's defense strategy, that the jurors didn't allow it to influence their decision. For them to have done so, they would have had to accept that my trial was nothing more than an elaborate, staged lie. We found out about the second witness, who saw Bob jogging about 4 p.m. on Sunday, when she called my lawyer *after* the jury had begun deliberating. The judge *did not* allow the jurors to hear her testimony that was consistent with the testimony of the other eyewitness. If the jurors had heard her testimony they would have been faced with considering the fact that my husband was seen jogging on a public road more than 12 hours after the prosecution claimed that I had killed him on Saturday the 12th.
- We have statements as to what both of those witnesses saw on the day Bob disappeared and was murdered. We have also obtained a video from a February 14, 2000, news report in which the first witness describes what she saw.

The flimsiness of the prosecution's case is indicated by the speculation of the prosecution's wound expert — who was a dentist — that the most likely murder weapon was a hammer. Yet he acknowledged on cross-examination that he knew of no hammer whose head would be

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painted black, and that it is unlikely a painted hammer even exists. He speculated as to what the murder weapon was, because it was not found. [JD Note: JD examined the hammers for sale at a Home Depot and a Loews Home Center on October 24, 2005. None of those hammers had a head painted black.]

The prosecution relied upon connecting some disconnected things to hide that there was no proper investigation and the detectives failed to follow leads, and that tests had not been conducted on physical evidence such as the rope found around my husband's neck. The prosecution built the case against me backwards. They began with the conclusion that I was guilty and then excluded everything that did not fit their theory, including ignoring the three eyewitnesses who saw the small black pickup truck the afternoon of Bob's murder.

My Lawyer's "Trial Strategy" Was To Accuse Our Daughter!!!

The plain and simple truth is that I am innocent of my husband's brutal murder.

Unfortunately, my lawyer failed to conduct even a cursory investigation to undermine the prosecution's case or expose the absurdity of the prosecution's theory. My lawyer didn't even challenge the prosecution's contention that our bedroom was the crime scene! Instead he presented the absurd theory that our daughter was the murderer!

That idea is beyond ridiculous because late on the Saturday morning before Bob's disappearance our twenty-four year-old daughter, who was temporarily living with us, had left to spend the weekend with my sister in Long Beach. My sister has the credit card receipt from their dinner on Saturday night at the Queen Mary, and our daughter didn't leave to return to Valley Center until after 7 p.m. on Sunday night. When I protested my lawyer's strategy of accusing our obviously innocent daughter of killing her father, he said it would force the prosecution to defend her and they would undermine their case against me when they did that. I reluctantly, and in retrospect foolishly, allowed myself

to be browbeaten into believing his strategy was my best hope to win an acquittal.

The weakness and inconsistencies in the prosecution case is reflected in the jury's deliberation for four days before finding me guilty. My conviction was upheld on direct appeal. I have exhausted my financial resources, and so I prepared and filed a *pro se* state habeas petition. On August 1, 2005 my petition was denied by my trial judge, and I have appealed to the state Court of Appeals.

If you have any information about my husband's murder, or investigative or legal expertise that can help me in my quest to overturn my conviction and gain my freedom, I can be contacted at:

Jane Dorotik W90870
CCWF 506-26-3L
PO Box 1508
Chowchilla, CA 93610

My outside contact is my sister:
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#2 - 36th Place, Apt. C
Long Beach, CA 90803
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He remains in custody based on his confession.

January 12, 1998: Norfolk police arrest Williams' housemate Dick as a second suspect in the case. Dick is in the Navy, and he tells detectives he was on duty the night Moore-Bosko was murdered. Dick confesses under intense pressure from detectives. (*Time* magazine verified Dick's alibi while researching a December 12, 2005, article about the Norfolk Four titled, "True Confessions?")

January 15, 1998: Ballard found guilty of raping the 14-year-old girl on July 18, 1997.

February 10, 1998: Ballard pleads guilty and is sentenced to five years in prison for the June 24, 1997, assault on the young girl in Moore-Bosko's apartment complex.

March 1998: Report provided to Norfolk police that DNA test result excludes Dick. He remains in custody based on his confession.

March 23, 1998: Ballard sentenced to 100 years in prison for the July 18, 1997 rape of the 14-year-old girl. Fifty-nine years of the sentence is suspended.

April 8, 1998: Wilson is the third suspect arrested by the Norfolk police. He confesses after intense interrogation.

May 1998: Report provided to Norfolk police that DNA test result excludes Wilson. He remains in custody based on his confession.

June 18, 1998: Tice is arrested as a fourth suspect after Dick implicates him under interrogation pressure.

June 25, 1998: Tice confesses during intense interrogation by Norfolk Detective R.G. Ford, and eventually implicates three additional men: Geoffrey A. Farris, John E. Danser and Richard D. Pauley, Jr.

Late June 1998: Report provided to Norfolk police that DNA test results exclude Tice, Pauley, and Farris. Tice remains in custody based on his confession, and the others because of Tice's statement.

July 1998: One year after Moore-Bosko's rape and murder, seven men had been charged in her death. Pauley, Farris, and Danser were charged based on Tice's information.

January 22, 1999: Williams, admittedly infatuated with Moore-Bosko, pleads guilty to avoid the death penalty.

February 1999: Report provided to Norfolk police that DNA test result excludes Danser. He remains in custody based on Tice's statement.

February 1999: Ballard confesses to Moore-Bosko's murder in letter to an acquaintance named Karen. The letter states in part (with spelling and grammar uncorrected):

"And one last thing *you remember that night I went to mommies house and the next morning Michelle got killed guess who did that, Me HA, HA. It wasn't the first time. Im good aint i. I don't give a f*** about nobody, if i was out i would have killed that bitch down the*

street from you too. Tell the police, tell the FBI, tell anybody who gives a f***, not me. You thought you knew me, you don't Karen, trust me yall don't. Nobody knows me." (emphasis added) Ballard becomes a suspect after the letter is provided to Norfolk police.

March 4, 1999: Ballard confesses to Norfolk police that he alone killed Moore-Bosko. Ballard is already imprisoned for the two violent attacks against young women, one involving a rape, that he committed in the vicinity of Moore-Bosko's apartment within three weeks of her rape and murder.

March 8, 1999: Police charge Ballard, the eighth and final suspect in the case.

March 11, 1999: Ballard makes a second confession to Norfolk police that he alone raped and killed Moore-Bosko.

March 18, 1999: New tests establish that Ballard's DNA is the only one of the eight suspects whose DNA matches crime scene evidence. The Virginia Bureau of Forensic Science determines that Ballard's DNA matches sperm fractions recovered from Moore-Bosko's vaginal swabs and the blanket covering her body. No physical, forensic, or independent eyewitness evidence links any person other than Ballard to the crime.

April 13, 1999: Ballard's third confession to committing the crime, and his claim he committed it alone, is filed in court papers.

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(This is in addition to Ballard's confessional letter to his friend Karen in February 1999.)

April 21, 1999: Dick pleads guilty to Moore-Bosko's rape and murder to avoid the death penalty.

April 28, 1999: Williams sentenced to two life terms without parole based on plea agreement.

May 7, 1999: Tice pleads not guilty to the rape and murder of Moore-Bosko.

May 14, 1999: Prosecutors withdraw charges against Danser, Farris and Pauley. The prosecution's case against the three men crumbles after Tice pled not guilty, since their charges depended on Tice's cooperation and testimony. With no physical evidence, no eyewitness, and no confession implicating the three men in Moore-Bosko's rape and murder, the charges are dropped, they are released, and they are never prosecuted.

June 2, 1999: Charges against Ballard are changed to capital murder, rape and robbery.

June 14, 1999: Wilson's trial begins. Wilson testifies during his trial that he made-up his confession to raping Moore-Bosko in order to stop Detective Ford from aggressively harassing him. "At that point in time, if they told me that I killed JFK, I would have said that I handed Oswald the gun." Wilson testifies Ford was "very aggressive, very threatening, very angry. I thought I better tell him what he wanted to hear. He started hitting me in the forehead with his finger." (emphasis added) Ford's eliciting of confessions from Tice, Williams, Dick and Wilson, and Wilson's testimony, is consistent with Ford's long history of coercing a confession from a suspect during an interrogation. Ford was suspended from the detective force in 1990 for coercing confessions from three teenagers. In 1997, Ford coerced a confession from a mentally disabled person. A court sealed the records of that incident. Wilson is found guilty of rape but acquitted of murder. The jury recommended an 8-1/2 year prison sentence.

September 8, 1999: Wilson sentenced to 8-1/2 years imprisonment.

September 8, 1999: Dick sentenced to two life terms without parole.

November 22, 1999: Tice granted a change of venue to Arlington, Virginia, based on pre-trial publicity.

February 11, 2000: Jury finds Tice guilty of rape and murder. The prosecutions only item of evidence was Tice's signed statement to police.

March 22, 2000: Ballard pleads guilty to the rape and murder of Moore-Bosko and is

immediately sentenced to two terms of life imprisonment.

June 7, 2000: Tice sentenced to two life terms in prison.

July 25, 2000: The Virginia Court of Appeals declined to overturn Williams' conviction and sentence. Williams had attempted to change his guilty plea at his sentencing hearing, but the appeals court affirmed the trial judge's ruling that Williams had entered his guilty plea knowingly and voluntarily.

November 2000: *Justice Denied* publishes article about Tice and the Norfolk Four.

June 7, 2001: Documentary about the Norfolk Four titled "Eight Men Out" is produced by Medstar, and broadcast for the first time on The Learning Channel's series *Medical Detectives*. The program was re-broadcast several times in the United States and in other countries.

May 21, 2002: Tice's conviction reversed by the Court of Appeals and a retrial is ordered. (*Tice v. Commonwealth*, 38 Va.App. 332, 563 S.E.2d 412 (Va.App. 05/21/2002))

January 27, 2003: Tice's retrial begins with Judge Charles Poston again the trial judge. D.J. Hansen, who had been co-prosecutor in Tice's first trial, is the lead prosecutor.

January 31, 2003: Tice convicted by jury, and immediately sentenced to two life terms in prison without parole.

February 2003: *Playboy* magazine publishes an article by Morgan Strong about the Norfolk Four case titled, "Confessions Are Us — Who needs evidence?"

August 8,, 2003: VA Court of Appeals denies Tice's appeal of his conviction.

July 6, 2004: VA Supreme Court denies Tice's appeal of his conviction.

November 2004: A large Washington D.C. law firm agrees to represent Tice on a pro bono basis. Other large law firms agree to represent Williams and Dick pro bono. Those firms hire a forensic consulting firm, Academy Group, Inc. (AGI), to reconstruct the crime scene and analyze how the known physical evidence and confessions by the defendants compare with it.

March 2005: Ballard executes sworn affidavit in which he states in part: "I acted alone when I killed Michelle Moore-Bosko. None of the other individuals who were charged with raping or killing Michelle were there or involved in any way. They are all innocent, and the ones who are in prison are serving long sentences for crimes they did not commit."

September 2005: Wilson released from prison after completing sentence.

November 3, 2005: AGI releases 60-page report titled, "Crime Scene Analysis and Reconstruction of the July 8, 1997 Sexual Assault and Murder of Michelle Moore-Bosko." The report's Executive Summary states:

"Mrs. Michelle Moore-Bosko was sexually assaulted and murdered by Omar Ballard on July 8, 1997, in her Norfolk, Virginia, apartment. Ballard was alone with Moore-Bosko when he killed her. He confessed to this homicide, and solely his DNA was found under her fingernails and in her vagina. Statements made by Ballard to police investigators were consistent with the physical evidence found at the crime scene and found during the victim's autopsy.

There was no evidence of any nature linking Williams, Dick, Wilson, or Tice to this crime. Statements they made were not consistent with the physical evidence, victim's wounds, or behavioral evidence. They had nothing to do with this matter and were charged only because they confessed to the crimes." (The full report is available for free downloading or printing at, <http://www.norfolk4.com>)

November 10, 2005: Petitions are filed with Virginia Governor Mark Warner by lawyers for Tice, Dick and Williams requesting executive clemency and pardons. The petitions rely in part on AGI's report dated November 3, 2005. Wilson filed a separate petition with Governor Warner requesting executive clemency and a pardon.

December 12, 2005: *Time* magazine publishes feature article by Brian Bennett about the Norfolk Four titled, "True Confessions?"

It is noteworthy that Norfolk Circuit Judge Charles Poston presided over all the Moore-Bosko cases. He sentenced Williams, Dick, and Ballard after their guilty pleas, and Wilson and Tice after their trials. Judge Poston also presided over Ballard's 1998 trial and conviction for abducting and raping a fourteen-year-old female, and he suspended 59 years of Ballard's 100 year sentence in that case.

The author, Larry Tice, is Derek Tice's father. He can be contacted at, LTice22433@aol.com.

The Norfolk Four's website is: <http://norfolkfour.com>

Sources: This chronology is comprised of information from a number of sources, including newspaper articles, court records, and personal knowledge of case details by the author.



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tempted murder of Kershner. The damage to Parish from the courtroom threat allegation didn't stop with its use in helping secure his conviction. During Parish's sentencing hearing the judge declared it was proof of his guilt, and relied on it to enhance his sentence.

Parish's Lawyer Admits "Failing As An Attorney"

During Parish's sentencing hearing, his attorney made the following admissions when addressing the Court:

I feel that, perhaps due to some of my failing as an attorney, maybe I didn't do as good a job as I – as I could have. There were a number of alibi witnesses that we – a number of more witnesses that we could have called. There was much mentioned at the -- at the trial, much cross-examination of the alibi witnesses; why didn't they go to the police right away? I didn't tell them to, and that's why they didn't.

And perhaps that was a failing of mine, but I guess being jaded by the system, I didn't see the value in that, given that – you know, it may have been a mistake that my client has to pay the price for. (Trial Transcript p. 760)

Indeed Parish did pay ... with a 30-year sentence.

Parish's Post-Trial Investigation Discovers His Prosecutors Failed To Disclose Exculpatory Evidence

Parish had claimed his innocence from the time of his arrest two days after the alleged crime. After Parish's trial, his family hired private investigators Tina Church and Mike Swanson to find evidence supporting his claim of actual innocence.

Swanson and Church's investigation found that exculpatory information had not been disclosed to Parish by the prosecution prior to his trial. Among the non-disclosed information was Elkhart City Police Department Technician Report, Case No. 96-303-0189. According to that report, at 9:53 p.m. on October 29, 1996, crime technician Joel Bourdon arrived at 729 Monroe St, Apt. F to investigate the reported shooting. The report states, "Upon arrival, I walked inside looking for a crime scene, but one was never located." The technician found no blood "whatsoever" in the apartment. Officers M. DeJong and Wargo were the first police to arrive at apartment F, and they found no one

there. In his report, DeJong describes his inability to find a crime scene in the apartment:

Photographs were taken inside the apartment. I looked through the entire apartment looking for a shell casing or any type of bloodstain. I searched inside the apartment looking on the floor and looking up near the ceiling trying to find even a bullet hole in the plaster, but one was never found. I also looked down the stairwell since I was told the shooting took place near the inside of the front door, but a casing was never located. I did locate a SKS rifle that had a cylinder type belt that appeared to be loaded lying upright in the living room. When I was clearing the room, I unloaded the gun and removed the cylinder of bullets to make the weapon safe. No round was in the chamber. Photos were taken of everything I just got done talking about. Officer M. DeJong #194.

Investigator Swanson also discovered there were two witnesses to Kershner's shooting, Stellana Neal and Bryant Wheeler, who claimed it occurred in a laundromat parking lot across the street from the apartment complex. Those witnesses had also told the police that Kershner was a known drug dealer who owned a lot of guns and operated his drug business out of Apartment F.

The Prosecution Failed To Disclose Exculpatory DNA Test Result

In September of 1997, Keith Cooper, Parish's alleged accomplice, the alleged shooter, and the alleged wearer of the "J hat," was convicted after a bench trial of the robbery that allegedly occurred in apartment F. He was acquitted of attempting to murder Kershner. Cooper was sentenced to 40 years in prison and is currently imprisoned.

At Parish's June 1998 trial, Christofeno introduced the "J hat" into evidence. Kershner and Nona Canell both testified that the "J hat" belonged to Cooper, and Christofeno used it to link Cooper as Parish's accomplice. However, Parish's post-trial investigation discovered that prosecutor Christofeno had not disclosed to Parish, the trial judge and the jury that DNA tests of biological material recovered from the "J hat" excluded Cooper as the hat's wearer.¹

August 2004 Post-Conviction Hearing

The Indiana Court of Appeals affirmed Parish's conviction in 1999. In 2000 Parish filed a post-conviction petition for a new trial based on new evidence of his actual innocence and claims of

ineffective assistance of counsel during his trial.

On August 26, 2004, a hearing related to Parish's post-conviction petition for a new trial was held in Elkhart Superior Court before Judge Stephen Platt.² At the hearing Indiana State Police laboratory DNA expert Lisa B. Black testified that prior to Parish's trial she compared the DNA recovered from the "J hat" with Cooper's DNA. She determined that they did not match. She also testified that the first test result was confirmed by a second test that also excluded Cooper's DNA from matching the DNA recovered from the "J hat." Yet prosecutor Christofeno not only failed to disclose that exculpatory information to Parish, but he argued during Parish's trial that the "J hat" belonged to his alleged accomplice – knowing that assertion wasn't true.

On March 8, 2004, a match was made between the DNA recovered from the "J hat" and a DNA sample in the FBI's National DNA Database. The match was to Johlanis Cortez Ervin, who is currently imprisoned by the Michigan DOC. [JD Note: According to the Michigan DOC website Ervin was convicted in 2002 of second degree murder and a firearm charge. He is serving a 62-year sentence. Ervin's 2002 convictions are unrelated to the alleged October 29, 1996, apartment F robbery and shooting.]

Parish's trial lawyer testified at the hearing that he was completely unaware of any exculpatory pre-trial DNA test results, the "crime scene" photographs that showed there was no crime scene, and the "crime scene" police reports that disclosed no crime scene was found in apartment F. He contended that the prosecution did not disclose that exculpatory information to the defense. In addition, he testified that he would have definitely used the exclusionary DNA test results, as well as the "crime scene" photographs and reports, because they undermined the prosecution's entire theory of the crime, including Parish's identification as one of the alleged perpetrators.

Parish's trial lawyer admitted to incompetently representing Parish, and that he had no excuse for failing to produce alibi witnesses, for failing to hire experts, for failing to tender defense favorable jury instructions, for failing to take depositions, or for failing to object to prosecution evidence, arguments and testimony. He frankly stated, "Had I done a good job, my client would not have been convicted." Those admissions were consistent with the lawyer's statement six years earlier during Parish's sentencing hearing, "I feel that, perhaps due to some of my failing as an attorney, maybe I didn't do as good a job as I – as I

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could have.” (Trial Transcript, P. 760)

Parish’s investigators also found two courtroom witnesses Pastor Cora Brown and Myron Donaldson, who stated under oath that on the afternoon Jermaine Bradley testified, he had been escorted directly from the witness waiting room to the witness stand and that Parish did not say anything to him. They further stated that Bradley’s exclusion from the courtroom until called as a witness was not unusual, because “All of the State witnesses were separated from the audience and escorted to the witness stand from the waiting room.” It was also learned that Bradley had been a mental patient at Oaklawn Mental Hospital for ‘paranoid schizophrenia’, and that he had been on medication during his trial testimony. The alleged courtroom threat never happened. The new information about the alleged “threat” incident provided evidence that prosecutor Christofeno’s use of the prejudicial allegation to smear Parish to the jury as a dangerous menace to society, inside and outside the courtroom, had been without any reasonable basis to believe it was true. Furthermore, the witness’ statements and the evidence of Bradley’s mental state undermined the judge’s reliance on the non-existent threat when Parish was sentenced.

One of the apartment witnesses, Love, had told the police that he was a member of the “Gangster Disciples,” a street gang. Love failed to appear at Parish’s trial, but Elkhart PD Detective Steve Rezutko testified that Love had identified Parish as one of the perpetrators. However, when Parish’s investigators interviewed Love, they discovered he had been intimidated and coerced by Rezutko into signing a statement identifying Parish.

Love had been a 15-year-old juvenile when he said he was coerced and intimidated into cooperating with the police. Love claimed to have been selling drugs for Rezutko, who he said put a gun to his head and threatened him with numerous charges if he did not sign a statement identifying Parish. Love told investigators, “I never told the Elkhart police that the shortest of the two robbers who came into Kershner’s apartment looked like a guy that I know by the name of Chris Parish. Those were not my words! Detective Rezutko coerced, threatened, and intimidated me into signing my name. I was only fifteen years old.” In addition Love informed the Court during Parish’s hearing, “Detective Rezutko had me selling his dope.” Love also stated, “I was locked up in Indiana Boy School for drugs when I was brought to Court to give false testimony against Keith Cooper, in exchange for my freedom.” Love

informed the court that he did not show up at Parish’s trial to testify for the prosecution because Parish is an innocent man.

Crime technician Bourdon testified that he took several photographs of the alleged crime scene and that he found no blood whatsoever in the apartment. Bourdon stated, “I would have taken photographs and documented any blood found, because blood is important evidence looked for when processing a crime scene.” Bourdon agreed that there was blood in the car that transported Kershner to a nearby fire station.

Furthermore, Bourdon stated that the Elkhart PD had apparently misplaced the original photo array that was allegedly used to establish probable cause to arrest Parish. (Parish was twenty-years-old in 1996, but the photo array contained a seven-year-old photo of Parish when he was thirteen. That outdated photo was included with mug shots of much older men in their 20s and 30s. That photo array could have contributed to Parish’s erroneous identification because it was unduly suggestive.) The photo array wasn’t the only misplaced evidence the jury didn’t see. Rezutko claimed that he and the prosecutor lost the supplemental report which supposedly stated, “Michael Kershner identified Parish.”

Stellana Neal and Bryant Wheeler both testified that Kershner was shot in the laundromat’s parking across the street from the apartment complex, and he was then put in the back of a vehicle and transported away. Neil had just bought some marijuana from Kershner, so she was close enough to see him bleeding after he was shot. Neal and Wheeler both testified that Kershner was a well-known drug supplier for the neighborhood. Love testified that he was outside with Kershner in the laundromat’s parking lot selling drugs, when two black guys came up and shot Kershner.

At the conclusion of Parish’s evidentiary hearing, Judge Platt stated:

[Parish] at least is entitled to a trial to determine ... whether or not this crime occurred in the apartment or outside in the parking lot. ...

Anybody sitting in this Courtroom today could not deny that the evidence and testimony presented here today would change the outcome of the jury trial. It seems there has been a miscarriage of justice. Sometimes the system fails us. It does not always work the way it was intended. You have made a good claim of newly discovered evidence. By the evidence presented, there is a possibility

the wrong man is in jail. Someone else may have committed this crime. I will make a ruling immediately. I will consider the newly discovered evidence as well as the other fifteen (15) plus issues argued in the Memorandum of Law. I want you to get on with your life.³

Yet six weeks after making those statements, on October 7, 2004, Platt denied Parish’s Petition for Post-Conviction Relief. Platt’s ruling inexplicably adopted the State’s proposed Findings of Fact and Conclusions of Law about the alleged crime which Platt had acknowledged at the conclusion of the evidentiary hearing were on their face, deeply flawed.

Documented Misconduct By Elkhart Detectives Rezutko, Towns and Ambrose

Elkhart is a small city, and three of its detectives at the time Parish’s case was investigated — Rezutko, Larry Towns and Steven Ambrose — have since been exposed as being involved in serious misconduct — and two of criminal activities.

On June 13, 2005, the City of Elkhart responded to Parish’s public records request by providing information that Rezutko was penalized, reprimanded or suspended eight times by the Elkhart PD before a charge of malfeasance was sustained on October 12, 2001, and he “voluntarily resigned from EPD.”⁴ The city also provided information that the Elkhart PD had penalized, reprimanded or suspended Ambrose ten times for offenses that included “brutality” toward suspects, arresting suspects without a warrant or probable cause, and a 1993 “Guilty verdict in Federal Court Case.”⁵ The city’s records show without any explanation that after being “suspended indefinitely without pay” because of his guilty verdict in the federal case, he was later reinstated.

Towns was indicted in May 2004 on thirteen charges that include the theft of \$9,000, a gun, and methamphetamines seized as evidence in a drug bust, and failing to turn over public records and property in his possession when he was replaced as coordinator of the Elkhart County Drug Task Force in January 2003.⁶ Towns took that job after retiring as an Elkhart detective in 1999. As of mid-December 2005 that criminal case had not been resolved.

The widespread misconduct and criminal activities of Elkhart PD personnel in the local drug trade may explain why no action was taken against the Kershner gang for dealing drugs. It also may explain why the involvement of prosecution witnesses in

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dealing drugs — including from apartment F — was not disclosed to Parish's jury.

Parish Is Innocent Of Committing A Crime That Never Happened

The evidence in Parish's case clearly establishes there was no crime scene, and therefore there was no crime. There is conclusive evidence Kershner was not shot in apartment F, that Parish was over 100 miles away in Chicago when Kershner was shot in a parking lot across the street from the apartment complex, and that the Kershner drug gang collaborated with certain Elkhart police personnel in fabricating the apartment shooting story in order to conceal illegal drug and gang activity.

The evidence uncovered by Parish's investigators clearly demonstrates the fraud, perjury, and official corruption engaged in by the police officers and the prosecutors involved in the wrongful conviction of an innocent man. Their actions were inadvertently aided by the admitted inaction of Parish's trial lawyer. He has acknowledged Parish's conviction was attributable to his failure to con-

duct a pre-trial investigation, his failure to conduct discovery, his failure to conduct interviews of his client and defense witnesses, his failure to adequately prepare for trial, and his failure to make timely objections.

Parish's trial was a mockery of justice, as was the denial of his petition for post-conviction relief. There is absolutely no substantive evidence the alleged robbery and shooting in apartment F occurred, while there is compelling evidence those crimes didn't happen. That evidence includes: the police "crime scene" investigation reports, the police photos of apartment F, eyewitnesses, DNA evidence, the lack of physical evidence, and Parish's alibi of being over 100 miles from the alleged crime scene. The prosecution has never disproved Parish's alibi of being in Chicago at the time Kershner was shot — in the parking lot. Which also means Parish is innocent even if Kershner had been shot in apartment F as the prosecution contends.

Parish remains imprisoned after being convicted of committing crimes that didn't occur. If you are interested in assisting Parish to correct this injustice, he will appreciate hearing from you. You can write him at:

Christopher Parish 985050
Indiana State Prison
P.O. Box 41
Michigan City, IN 46361-0041

His outside contact is:
Sharmel Gary
30988 Riverbend Circle #8
Osceola, IN 46561

Endnotes:

- 1 [JD Note: "The DNA report regarding the hat was available at the time of Parish's trial. Doty claimed that he was not aware of it..." *Parish v. State*, No. 20A03-0502-PC-74 (Ind.App. 12/06/2005); 2005.IN.0000756 ¶ 41 <<http://www.versuslaw.com>>.]
- 2 The Courtroom audience was packed full of Parish's family and friends. Attorney William Polansky from Indianapolis, IN and Attorney Kelly Schweingzer from Elkhart, IN were also in attendance.
- 3 Evidence to corroborate Parish's innocence is a matter of public record. i.e. trial transcripts, court files, affidavits, police reports, witness statements and DNA test results.
- 4 Disciplinary Record, Stephen Rezutko #057, The City of Elkhart, June 13, 2005. RE: Request for access to public record.
- 5 Disciplinary Actions, Steven Ambrose, The City of Elkhart, June 13, 2005. RE: Request for access to public record.
- 6 Towns Accused of Staling Gun, Drugs, \$9,000, Justin Leighty and Tom Dolan, *The Truth*, Elkhart, IN, May 18, 2004.

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peals court keyed on two related to ineffective assistance of counsel.

One was that Parish's trial lawyer "failed to conduct any meaningful pretrial investigation." Parish presented "substantial evidence" at the post-conviction hearing supporting his alibi that he had been in Chicago over 100 miles from Elkhart at the time of the alleged crime on October 29, 1996, (12 alibi witnesses) and that the crimes he had been convicted of didn't happen as alleged by the State's eyewitnesses (Eyewitnesses admitted to being coerced by the police to perjure themselves.). The appeals court determined that if Parish's lawyer had conducted a meaningful pre-trial investigation he could have presented that evidence undermining the State's case at Parish's trial, and it is reasonable that the jury might have then arrived at a different verdict. Since the lawyer's failure to conduct a pretrial investigation likely affected the trials outcome, it couldn't be considered harmless error attributable to "trial strategy."

The other issue was that Parish's lawyer failed to object to the trial judge issuing an *Allen* charge to the jury before it began deliberations. The appeals court stated, "An *Allen* charge is an instruction given to urge an apparently deadlocked jury to reach a

verdict. Such additional instructions are closely scrutinized to ensure that the court did not coerce the jury into reaching a verdict that is not truly unanimous. Here, the trial court did not give an additional instruction to an apparently deadlocked jury; it gave the challenged instruction before deliberations even began." (*Id.*, at ¶ 48) The Indiana Supreme Court ruled in 1997 that "the general pattern instruction regarding jury deliberations" was "preferable and adequate" to address "the possibility of juror disagreement" without "supplementation" by an *Allen* charge. (*Bowen v. State*, 680 N.E.2d 536 (Ind. 1997))

If Parish's lawyer had objected to the *Allen* charge, the trial judge would have been legally bound by precedent to omit it. The appeals court ruled the failure of Parish's lawyer to object to the initial *Allen* charge pressuring the jury not to deadlock wasn't harmless error, because the jury expressed doubts about the State's case after it began deliberations. The jury asked several questions about the prosecution's case after it began deliberating, including why Love "did not testify at trial" instead of Rezutko testifying about what he said Love told him. The judge's initial *Allen* charge could have short circuited their full deliberation of those doubts, and that error was compounded by the lawyer's failure to conduct a meaningful pretrial investigation.

Consequently, the Court of Appeals determined that Parish was deprived of his Sixth Amendment right to effective assistance of counsel.

There are at least two noteworthy aspects of the appeals courts decision. First, Parish filed his case pro se. The facts substantiating Parish' claims are so persuasive that the appeals court didn't overlook, or otherwise dismiss his appeal as being the rantings of a jailhouse lawyer. The three-judge panel carefully considered his issues and accepted the proposition that Parish may have been in Chicago at the time of alleged crime, and that the alleged robbery and shooting didn't occur as portrayed by the prosecution witnesses during his trial. Second, is that Parish's trial lawyer took the full brunt of the prejudicial effect the prosecution's suspect case had on causing Parish's conviction. Although the defense lawyer didn't meaningfully investigate Parish's alibi claim or uncover that the prosecution's theory of the crime was full of gaping holes — neither did the Elkhart County Prosecuting Attorney demand a meaningful and honest investigation by the Elkhart police of the shooting on October 29, 1996, before filing charges against Parish.

The Elkhart County Prosecuting Attorney didn't respond to *Justice:Denied's* requests for comment about Christopher Parish's case.

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AEDPA promises that if the states establish procedures for the appointment, compensation and payment of reasonable litigation expenses of competent counsel for indigent death row inmates in post-conviction cases, the states can take advantage of AEDPA's expedited time frames for federal review of habeas petitions. The federal circuits decide whether a state qualifies for "opt-in" status. To date, only Arizona is an opt-in state.

On the delay issue, the Judicial Conference recently reported to the judiciary committee that it reviewed statistical data compiled for fiscal year 2004 and found the following:

District Courts: There were 18,432 non-capital habeas corpus petitions filed by state prisoners in U.S. district courts, and 6,774 in U.S. courts of appeals. The total number of terminations for 2004 showed that the federal courts are bringing to conclusion nearly as many non-capital habeas petitions from state prisoners as are filed annually.

The median time from filing to disposition for those cases in the district courts has remained relatively constant since 1998, and in 2004 was six months. In the courts of appeals, the median time also remained relatively stable between 1998 and 2004, ranging from 10 to 12 months.

"Thus, the statistics appear to indicate that the district and appellate courts are handling non-capital habeas corpus petitions originating from state prisoners expeditiously," said Mechem.

For capital habeas corpus petitions, the data showed that from 1998 to 2002, more cases were filed in district courts than were concluded. As a result, the number pending increased from 466 at the end of 1998 to 721 at the end of 2002. But in 2003 and 2004, the number terminated nearly equaled the number filed, so the growth in the pending case-load slowed and was 732 at the end of 2004.

The median time from filing to disposition of state capital habeas cases was 13 months in 1998; 24.5 months in 2001; 20 months in 2003; and 25.3 months in 2004.

Habeas scholar Ira Robbins of American University Washington College of Law said that he could only speculate on why the disposition time for state capital habeas nearly doubled in the district courts from 1998 to 2004.

"In that six-year period, habeas corpus has gotten increasingly difficult," he said. "While Congress may have intended to speed up the

process, new statutes like AEDPA often tend to slow it down – especially when there is a long period of interpretative, or 'shake-out,' litigation, as there has been with AEDPA."

"This is one of the arguments against the pending habeas legislation: Now that the interpretative period of AEDPA has matured and judges know how to work with it, it would only slow down the process to add yet another layer of habeas complexity," he said.

Circuit Courts: In the courts of appeals, the Judicial Conference reported that the number of terminations of state capital habeas corpus appeals kept pace with the number of filings between 1998 and 2000.

But in 2001, the number filed was more than the number terminated, which increased the number of cases that are pending. From the end of 1998 to the end of 2004, pending state capital habeas cases rose from 185 to 284.

The median time from filing to disposition of capital habeas appeals ranged from 10 to 13 months between 1998 and 2002. The median time increased to 15.5 months in 2001; dropped to 13 months in 2003; and rose to 15 months in 2004. Those appeals pending three years or more increased from five (2.7 percent of all pending state capital habeas cases) at the end of 1998 to 36 (12.7 percent) at the end of 2004.

Without further information, the conference, said, "The judiciary is unable to draw a definitive conclusion" as to the causes for these increases or whether the time frames are unreasonable.

Broken Bargain

The debate over whether circuit courts have refused unfairly to certify states as "opt-in" states under AEDPA is mostly an anecdotal one. There appear to be no studies supporting either view.

Thomas Dolgenos, chief of the Federal Litigation Unit of the Philadelphia District Attorney's Office, said: "A fair number of states have tried but none has been able to meet the requirements to the satisfaction of the courts. The feeling around prosecutors I've spoken to about it is the system is sort of rigged. We're not sure if we're ever going to get compliance. A lot of states thought they should now be in compliance. They've taken steps but can't convince the circuits of that."

But long-time capital litigator George Kendall, senior counsel to Holland & Knight, called the opt-in reason a "red herring."

"Most states tried to opt-in right after AEDPA in cases pending," he said. "They wanted certification and hadn't crossed their 't's and dotted their 'i's."

"In most other cases, the states don't care to opt in. They don't have to provide lawyers and don't have to spend any money, because the general amendments to habeas in the 1996 act really cut it back. It's not like states have been going back and back and courts are irresponsibly saying, 'No, we're not going to certify.'"

American University's Robbins, who tracks habeas corpus decisions for his habeas textbook, agreed, saying, "I think it is generally accepted wisdom that states have stopped trying to opt-in because AEDPA's general habeas corpus reform provisions are already enormously state-favoring. As far as I know, there has been no major litigation on the opt-in question in a long time – at least not at the circuit court level."

Substitute Habeas

The Specter substitute reduces the amount of jurisdiction-stripping in the original Kyl bill, said opponents and supporters, but is still not acceptable to most of the original opponents.

On the opt-in issue, Specter adopts the Kyl approach that would give the U.S. attorney general the authority, and not the circuit courts, to determine whether a state qualifies as an opt-in state for the benefit of expedited review procedures in capital cases.

But Specter would not, as Kyl would, eliminate all federal habeas review once a state has qualified.

Both approaches would make the proposed review changes applicable to all cases pending at the time of enactment of the legislation but Specter eases the new time limits if they would have started for some cases on a date before enactment.

For procedurally defaulted claims, both senators would require the habeas petitioner to show cause why the claim was not raised in state court and add a requirement that the petitioner show he or she was innocent of the underlying crime.

Specter would provide some narrow protection for the attorney-client relationship when an indigent petitioner asks the court for funds to hire experts or investigators. He, like Kyl, still would prohibit *ex parte* communications with the judge on that request and require notice to the government and an opportunity to respond.

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and could have originated in the coat or any wool garment of a gray/purple color.”

- This coat also had a small stain on the inside of a pocket too small to type or test. The prosecution’s forensic examiner identified this stain as blood, but acknowledged that it was “consistent” with someone cutting a finger and putting his hand in the coat. Even this testimony was overstated. In the lab report, the witness expressed doubt about whether this stain was even blood: “The coat was treated with luminol reagent, resulting in a positive presumptive reaction for blood. Subsequent analysis using Takiyama, a confirmation test for blood, indicated no detectable blood present.” Thus, this witness’s testimony failed to link Tony’s coat to the crime at all.
- Finally, even if the jury saw the physical evidence as connecting Tony’s coat to the crime, there was an explanation for that that was consistent with Tony’s account of what happened: Tony loaned the coat to Victor shortly before the crime, so that Victor could conceal his gun under the coat.


To show how the Murillo’s could have mistakenly identified Tony, defense counsel introduced the booking photograph of Victor from December 19, 1991. Victor had been arrested at his parents’ house, along with his brother Van, in the early morning hours of December 19, 1991. Van was charged with the crimes that occurred at the Murillo’s house, Victor was arrested for assaulting the officers who were attempting to arrest Van, and their father was arrested for hindering the arrest of Van. The

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Stephen Saltzburg of George Washington University Law School, who has been working on alternative proposals on behalf of the American Bar Association and the Constitution Project, said there should not be much federal review when a petitioner has gone through state procedures and the state courts did it right.

“I understand the goals [Kyl and supporters] have,” he said. “But that doesn’t mean you have to basically cut off federal habeas completely. The problem is Arizona has a pretty good system, but a lot of other states don’t. In some jurisdictions, it’s a necessary protection.”

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Marcia Coyle is *The National Law Journal’s* Washington Bureau Chief. 

defense also introduced the booking sheets for Tony and for Victor. The sheets showed that as of December 19, 1991, both young men were 5’-8” tall. Victor weighed 156 pounds, while Tony weighed 150 pounds. Tony was 18 years, 6 months old; Victor was 17 years, 8 months old – only 10 months younger than Tony. As the photographs of Victor and Tony show, they also looked very similar. An eyewitness or victim could have mistakenly identified Victor Belton as Tony Ford.

Tony’s lawyers also tried to present additional evidence about the unreliability and inaccuracy of the Murillo sisters’ identifications. Before trial, they asked the court for funds to hire Dr. Roy Malpass, a highly regarded El Paso expert in eyewitness identification. The trial judge denied their request. Relying on the daughter’s questionable identification of Tony, the jury convicted him on July 9, 1993. He was subsequently sentenced to death.

An Eyewitness Identification Expert’s Post-Trial Examination

After exhausting his state court appeals, Tony filed a federal habeas corpus petition. In response to Tony’s request, the court provided the funds for Tony’s lawyers to consult with Malpass so that they could show what Tony’s trial attorneys could have presented to the jury had their request for Malpass’s assistance at trial been granted.

Working with Tony’s federal court lawyers, Malpass conducted two empirical studies, based on well-established scientific principles, to determine whether the process by which the Murillo sisters identified Tony – by looking at an array of six photographs of different people, one of whom was Tony – was likely to produce a mistaken identification.

The first study compared the similarity of facial features and appearance of Tony, the other five people included in the photo array, and Victor. The results showed that Tony and Victor were, by far, the most similar looking. Thus, someone who had seen Victor actually commit the crime and who was shown the photo array with Tony’s picture in it would have been drawn to Tony’s picture.

This is exactly what happened in the second study Malpass conducted. The second study was designed to determine whether the photo array from which the Murillo sisters picked out Tony was “suggestive” – that is, was composed of photographs of people different enough in appearance from Tony that he stood out and was more likely to be picked out by persons given a verbal description of Tony’s facial features. Based on this study, Malpass concluded that the photo array was substantially biased to lead to the identification of Mr. Ford’s photograph: His photo was four times more likely to be

picked out by research participants. A fair and non-suggestive photo array would have lead research participants to pick out each photo with approximately the same frequency.

The importance of this, as established by the first study, is that Victor looked remarkably like Tony. Thus, if the person the Murillo sisters saw shoot their brother was Victor they would have been highly likely to pick Tony out of the photo array they were shown – even though they had never seen him before.

Had the trial court provided the funding for Malpass’s assistance, he also could have provided additional critical information to the jury in their effort to determine whether the Murillo sisters’ identifications were reliable:

- Because the Murillo’s were Latino and the suspects were black, Malpass would have explained that the risk of a mistaken identification was higher. In a study based in El Paso, involving the cross-racial identification of a black suspect by Latino eyewitnesses, the results revealed that *67% of the time*, when the Latino witness identified a black suspect, the witness was mistaken. By contrast, when Latino witnesses identified Latino suspects, they were mistaken only *29% of the time*. Numerous other studies of this phenomenon have confirmed this extraordinarily high likelihood of mistake in cross-racial identifications.
- Malpass would also have explained that the presence of a weapon that is used in a threatening manner, as it was in the Murillo’s home, reduces the probability that an identification is accurate.
- Malpass would have explained that the Murillo sisters’ unwavering certainty that their identifications were accurate (each testifying, “I will never forget his face”) did not mean that they were accurate. Research has established that eyewitness certainty is not correlated with the accuracy of the identification. Among subjects who are highly certain of their identifications, the error rate of 50% is very high. This was especially important information for the jury to have had, because in post-trial interviews, members of Tony’s jury revealed that one of the jurors had once been the victim of a crime and this juror told the other jurors that she, like the Murillo sisters, would never forget what the assailant looked like.
- Finally, Malpass would have addressed another factor that increased the likelihood that the identification of Tony was unreliable. The exposure of an eyewitness to a photograph of the suspect before he or she views the suspect’s photograph as part of a photo spread increases the likelihood that the eyewitness will identify the

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same suspect in the photo spread even if the identification is erroneous. Before she viewed the photo spread, one of the Murillo sisters saw Tony's photograph in a local newspaper story that identified him as a suspect in her family's case.

An Unraised, Important Question About Tony's Identification By Myra Murillo

There was some question about whether the first one of the Murillo sisters (Myra) to identify Tony's photograph had – in fact – picked his photograph out of the photo spread. Ms. Murillo and Detective Lowe both testified at a pretrial hearing that Ms. Murillo picked Tony's photograph out of the photo spread at 4:10 pm on December 19, 1991. In addition, both Ms. Murillo and Detective Lowe testified that Ms. Murillo signed the back of Tony's photograph and noted the date and time as December 19, 1991 and 4:10 pm. Tony's photograph appeared in the number 5 position in the photo spread. Two minutes after Ms. Murillo allegedly signed the back of Tony's photograph, at 4:12 pm, Detective Lowe typed a statement for Ms. Murillo to sign concerning the number of the photo she picked out of the photo spread. In that statement Detective Lowe typed, "I have recognized the man whose picture is numbered 4 as the man who shot and killed my brother." When Ms. Murillo signed the statement thereafter, the reference to photograph number 4 is overwritten and the numeral "5" is written in by hand. There are no initials by this overwriting, and there is no note explaining what happened. There is just a change in the number, from the photo of someone else to the photo of Tony.

Obviously, this discrepancy raised questions about the integrity of the process by which the two eyewitnesses initially identified Tony. Nevertheless, Tony's trial lawyers never presented this evidence to the jury.

Evidence that the Police Likely Knew Victor Belton Was The Shooter

It is likely that the El Paso police learned in the course of their investigation that Victor, not Tony, murdered Armando Murillo. However, by the time they learned this, the Murillo sisters had already identified Tony as the assailant. Apparently worried about their ability to convict someone as the killer, the police concealed this evidence.

The evidence of official suppression of evidence began to be revealed when Tony's federal court lawyers were conducting new investigation in El Paso in 2002. By chance, they learned the following in a conversation with the court reporter from Tony's trial: In

1992 or 1993, the court reporter who transcribed Tony's trial was engaged by several El Paso police officers in a discussion about Tony's case. The trial apparently had just occurred, because the officers were expressing their surprise that Mr. Ford had been convicted. They explained to Mr. Thomas that they were surprised, "because the word on the street was that another individual, Victor Belton, did the shooting." The court reporter could not remember who these officers were.

Thereafter, Tony's current lawyers found a man from El Paso who had known Victor. He recounted an incident at a party a year after the murder of Armando Murillo, in which he and another person were talking with Victor. During the conversation, Victor told them that he had gotten away with a murder.

In further investigation at this same time, Tony's lawyers talked with the boyfriend of Myra Murillo. She told her boyfriend after she began to recover from her gunshot wound that there were three people involved in the break-in – one of whom stayed outside.

Given the common knowledge among the El Paso police that the information "on the street" was that Victor Belton was the killer, it is virtually inconceivable that the police did not have this information from Ms. Murillo. It is equally inconceivable they did not have information from individuals who heard Victor Belton admit what he had done.

A fact *not known to the police* that confirms Victor's involvement was uncovered by Tony's lawyers in 2002. A friend of Tony acquainted with Victor and Van Belton was in the El Paso jail in December, 1991, when Van and Tony were arrested. Shortly thereafter this man was contacted by Van. This man explained:

He [(Van Belton)] asked me to finger Tony Ford for the murder. He wanted me to tell the police that Ford admitted to him that he was involved. I told Belton that I couldn't do this because it wasn't true.

Based on all this information, Tony's federal habeas lawyers asked the federal court in El Paso to require the El Paso police and prosecutors to turn over all their *non-public investigation files* concerning Murillo's murder to the court so that the truth could be determined about the police department's knowledge of Victor's role in the murder. The court turned down Tony's request.

Tony Ford's Federal Habeas Corpus Petition

In spite of the troubling facts pointing clearly to Tony Ford's wrongful conviction, the federal district court in El Paso denied his ha-

beas petition without ever holding a hearing. As indefensible as that decision was under the circumstances of his case, the United States Court of Appeals for the Fifth Circuit affirmed it on June 22, 2005. The U.S. Supreme Court is expected to announce in early January 2006 their decision on whether they will grant Tony's writ of certiorari.

Stay Granted And DNA Testing of Victor Belton's Clothing Ordered

Eight days before Tony's scheduled December 7, 2005, execution, State District Judge William Moody issued a stay until March 14, 2006. The stay was issued so DNA testing can be performed on the clothing Victor was wearing at the time he was arrested for assaulting the police who came to arrest his brother Van. The clothes Victor was wearing, including his shoes, have been stored as evidence since his arrest on December 19, 1991. Although Victor's shirt and pants had visible bloodstains on them, his clothes have never been tested for whether the blood on them matches one or more of the Murillo family. If it does, then it will be conclusive proof that Victor was the shooter – and that Tony is innocent. Judge Moody, who presided over Tony's trial, also authorized funding for a defense forensic expert to provide independent input for the DNA testing that by state law must be conducted by the Texas State Crime Lab.

Richard Burr is one of Tony Ford's attorneys. He can be contacted by writing:

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Love cont. from page 5

dence, stating, "How do we know that is the Seal of the United States on the Passport?"

The jury ignored the evidence and convicted Love of four of the five charges of rape. Love was sentenced to four consecutive life sentences. Love's first parole hearing is scheduled in 2036. He will be 85-years-old.

Love Sends Letters Seeking Additional Proof He Wasn't In Cincinnati During The Time Of Alleged Rapes

After his imprisonment, Love began an effort to find more evidence proving he had been in Mexico, Belize or traveling from November 17, 1988 until July 20, 1989, with the exception of three days in mid-May. A driver's license was required for identification to enter and stay in Mexico. Love's driver's license was due to expire on his birthday, May 29, 1989. Love returned to Cincinnati from Mexico on May 17, 1989, to renew his Ohio driver's license. He began his drive back on May 20, 1989. Love wanted to snorkel the Great Barrier Reef off the coast of Belize in Central America. However, he needed a passport to travel to Belize. So on May 30, 1989, Love applied for and was issued a U.S. passport at the U.S. Embassy in Mexico City. Love then traveled to Belize where he spent June and part of July 1989. He stayed at a boarding house named "Mom's", and then went to Caye Caulker and rented a house for a month behind the soccer field. Caye Caulker is an island near the Great Barrier Reef. He also stayed in the Bull Frog Inn, a motel, in Belmopan, Belize, for a few days. After arriving in June 1989, Love opened a bank account at the Barnett Bank in Belmopan.

On June 18, 1996, 13 days after his trial, Love called his mother in Cincinnati and asked her to find the address book he had with him during the time he lived in Mexico and traveled to Belize. Love's mother sent him copies of the address book on June 19, 1996. He received it approximately two weeks later.

After he received his address book he began writing letters to the people he had met in Mexico, and to the U.S. Embassy in Mexico City. These included Carienne Jordan, of Vancouver, British Columbia, Canada; Yvonne Muller, of Dintiken, Switzerland, and the author of the book, *Home Ground*, who was a native of South Africa. The author of the book, Lynn Freed, had autographed the title page of the book for Love while he was in Mexico. Love did not have an address for her, but he wrote to her in care of her book's publisher, Penguin Books in New York City.

By then it had been almost ten years since Love's trips to Mexico and Belize. He didn't receive a response to any of his letters. Perhaps that was to be expected since the return address for the letters was a prison.

At that point Love started writing to various U.S. Government agencies, trying to find any records they might have regarding his trips out of the United States. Freedom of Information/Privacy Act requests were filed with the U.S. Custom's Service; Bureau of Immigration and Naturalization; the National Security Agency; the Central Intelligence Agency; the Border Patrol in Laredo, Texas; the Port Authority at Dallas International Airport; the United States Department of State, the United States Embassy in Mexico City, Mexico; and the Federal Aviation Administration (requesting passenger manifest for Delta Airlines on November 17, 1988 and May 17, 1989). He also wrote to Delta Airlines.

One after another the agencies answered, stating they had no records of Love's trips to Mexico and Belize in 1988-89. Delta Airlines responded that they only kept passenger manifests for one year, after which they destroyed them. The only agency that gave Love hope was the U.S. Department of State. That agency responded that they would attempt to locate the records of Love's application in May 1989 for a passport at the U.S. Embassy in Mexico City.

It was December 1998 and Love had not received an answer or response to any of the letters he had mailed to the people he met in Mexico. After Love expressed his frustration to his stepmother, she volunteered to mail registered letters for him if he would send the letters to her. In January 1999 she mailed those letters.

Loves Receives Responses To His Requests For Information

In January of 1999 a mailman in Switzerland was given a registered letter from Love's stepmother addressed to Yvonne Muller. The mailman had become a personal friend of Muller over the years she had lived in his city. He knew she had married a few years earlier and was now living in another city in Switzerland with her husband and children. Concerned that a registered letter from the United States might contain something important, yet knowing Muller's forwarding address had expired years ago, that mailman took it upon himself to ensure the letter was forwarded to Muller. On January 19, 1999, Yvonne Zeltner-Muller called Love's stepmother. Zeltner-Muller told her that she not only remembered meeting Love in Zihuatanejo, Mexico, on a little beach called La Ropa, but she had a picture of Love and her sitting on the beach

drinking out of a coconut. Zeltner-Muller agreed to find what records she could of her trip to Mexico and forward an affidavit to Love's attorney in Cincinnati.

Affidavit of Yvonne Zeltner-Muller (excerpts)

I was from January 2 to February 28, 1989 in Mexico living in a hotel in Zihuatanejo called Posada Citali. ... I met Jim (James Love) at the Zihuatanejo beach. He was introduced to me by a Canadian couple that used to spend the Canadian winter season in Zihuatanejo. Jim worked in a little restaurant at the end of La Ropa beach. We always used to chat a little. He was very interested in Switzerland and its culture. ...

March 26, 1999
Dintikon, Switzerland

On April 23, 1999, Zeltner-Muller's affidavit and documents arrived at the office of Cincinnati attorney Tom Miller who sent them to Kevin Spiering, Love's attorney in his federal habeas corpus petition. Zeltner-Muller's affidavit states she had been in Zihuatanejo, Mexico from January 2, 1989 until February 28, 1989, and that she and Love had been "beach buddies" during that time. She also stated she had been introduced to Jim Love "by a Canadian couple." However, she had lost her address book and could not find their address. She also sent four pictures taken on her trip to Mexico, dated as developed in April 1989. In one of the pictures she is shown sitting on a beach beside Love with them sipping from a coconut with two straws. Another picture showed the "Canadian couple," who had introduced her to Love, sitting at a table eating dinner. Zeltner-Muller supplied a receipt showing she took a Spanish class at a Spanish school, paying \$600 for the lesson. She also sent copies of her grade transcripts from the school. The school is located in Zihuatanejo, Mexico. The date of the receipts and grade transcripts are February 28, 1989.

On May 14, 1999, Love received a second letter from Zeltner-Muller. That letter stated, "Jim, I have refound my address book." The letter included the Canadian couple's names, Rex and Carienne Jordan, and their address in Vancouver, British Columbia, Canada.

Love wrote to Rex and Carienne Jordan at the address given by Zeltner-Muller, asking for help in proving he had been in Mexico. Carienne Thompson-Jordan responded to Love's letter, stating she had received the previous letters sent by Love, but that she had been in chemotherapy treatment for cancer and had been too ill to respond. She and Rex had divorced. Over the next two years

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Love received a total of three affidavits from Thompson-Jordan. The last affidavit was taken by a law firm in Vancouver, B.C., hired by Love's new attorney, William Gallagher of Cincinnati, Ohio.

One of Thompson-Jordan affidavits states she met Love, "in the fall of 1988," in Zihuatanejo, Mexico on La Ropa beach; that she lived in an apartment next to where Love had lived on the beach; that she saw him "once every two or three days," on the beach; and that when she and her husband left Mexico in mid-May 1989, Love was still living there.

Affidavit of Cairinne Thompson (excerpts)

I was an acquaintance of James Love in Zihuatanejo, Mexico during 1988 and 1989... That in approximately September 1988 I traveled to Zihuatanejo, Mexico with my former husband Rex Jordan. ... Sometime in the fall of 1988 I met James Loe on La Ropa beach in Zihuatanejo, Mexico. James Love and I would see one another every two to three days because we frequented the same beach. ... In 1989, I introduced James Love to Yvonne Muller, a woman who was also staying Zihuatanejo, Mexico. I recall my former husband and I left Zihuatanejo, Mexico sometime in May 1989 and that when we left James Love was still there.

February 15, 2000
North Vancouver, British Columbia, Canada

In August 1999, Love's mother contacted Angela Erwin of Hurricane, West Virginia. Erwin had known Love since she was 9 years old and they had been pen pals for almost 20 years. Erwin executed an affidavit stating that Love had written her from Zihuatanejo, Mexico in December 1988, and called her from Zihuatanejo in December 1988. She later submitted by affidavit a copy of a "Day Planner" entry on March 12, 1989, in which she wrote, "Jim Love called from Mexico."

Additional Proof Unearthed Love Was Out Of The Country

In May, 2000, Love's mother found a receipt from Dr. Pamela Hanson of Cincinnati which was dated November 11, 1988. Dr. Hanson had retired and was traveling in Europe. Love's attorney located her and asked for Love's medical records. Dr. Hanson informed him the medical records were archived and would have to be found. Love's medical records, with Dr. Hanson's affidavit, were received by his attorney in

October 2000. In those medical records Dr. Hanson recorded that Love visited her on November 11, 1988, and said that Love was "leaving Sunday" for "Old Mexico," and wanted to know what immunizations he needed to travel to Mexico. The medical records show that he was administered immunizations that day. In addition, Love's medical records show he visited Dr. Hanson again nine months later, on August 14, 1989, stating he had "just returned from Mexico," and that in May of 1989 a doctor in Mexico had erroneously diagnosed him as having Herpes Simplex B. Dr. Hanson sent Love to a Dermatologist in August 1989, who diagnosed him as having contracted Scabies. The medical records reflect he was last treated for Scabies on October 14, 1989, by Dr. Hanson. Scabies is extremely contagious, yet neither Sarah Adams, nor her mother, ever mentioned contracting Scabies from Love.

In October, 2000 Love's attorney located Lynn Freed, the author who personally autographed her book, *Home Ground*, for Love while he was in Mexico. Freed, a native of South Africa, was living in San Francisco. The autograph on the title page of the book states, "For Jim Love, Good luck for your own

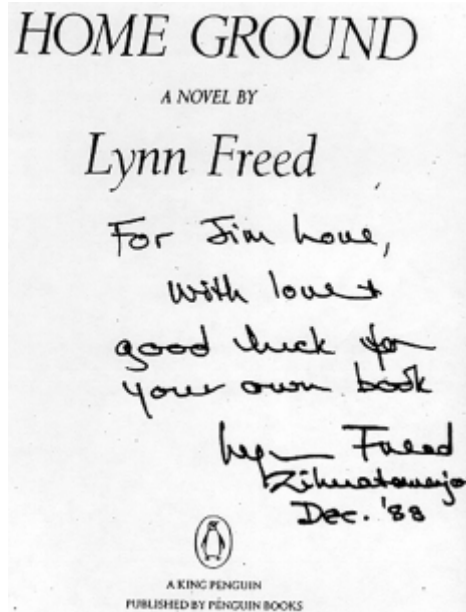


Lynn Freed, nationally known author who autographed her book *Home Ground* for James Love in Zihuatanejo, Mexico in December 1988.

(Photo, Mary S. Pitts)

book. Lynn Freed, Zihuatanejo, Dec. '88." Freed provided an affidavit attesting that the handwriting and autograph on the title page of Love's copy of *Home Ground* was her writing and signature. Freed also said she remembered autographing a book for a man on La Ropa beach in Zihuatanejo, Mexico while she was there on vacation. Freed further attested the only time she had ever been to Zihuatanejo, Mexico was between December 5 and December 8, 1988.

In June 2002, five years after Love filed a Freedom of Information Act/Privacy Act request in July 1997 with the U. S. Department of State, he was provided records showing that on May 30, 1989, James F. Love IV personally appeared at the United States Embassy in Mexico City, Mexico and applied for, and was issued, a United States Passport. The records show Love produced both his Ohio driver's license and his birth certificate as identification and proof of his U.S. Citizenship.



New Evidence Conclusively Proves Love's Alibi Of Being Out Of The Country

Adams testified at Love's trial that beginning the "week after Christmas in 1988," when she was 11 years old, Love did repeatedly, "at least once a month each month after the first time," perform oral sex on her. Adams testified these acts of oral sex also occurred "in the spring" of 1989." (Trial transcript Page 664.)

That is impossible. There is overwhelming evidence that from at least December 1, 1988 until May 17, 1989, and then from May 20, 1989 until July 20th, 1989, Love was not in Cincinnati, Ohio. This evidence includes:

- Affidavits by Yvonne Zeltner Muller of Switzerland, a businesswoman with three children. She spent time with Love in Mexico and provided date stamped photographs of her and other people with Love in Mexico.
- Affidavits by Carienne Thompson-Jordan of Vancouver, British Columbia, Canada, a 70 year old retired school teacher. She and her husband spent time with Love in Mexico.
- Affidavit by Lynn Freed, a native of South Africa who was living in San Francisco. Freed is the nationally known author of many books, and her most recent book, *Reading, Writing, and Leaving Home: Life on the Page* was reviewed in the October 9, 2005, issue of the *New York Times Book Review*. She met Love in Mexico and personally autographed a copy of her book *Home Ground* for Love with the date inscription, "Dec. '88."
- Angela Erwin of Hurricane, West Virginia, a Social Worker and a friend of Love's since she was nine years old who corre-

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- sponded with Love while he was in Mexico. She also talked on the telephone with Love at least twice while he was in Mexico.
- Doctor Pamela Hanson of Cincinnati, Ohio, retired, who gave medical exams to Love prior to and after he returned from Mexico and Belize.
 - Records of the United States Department of State, including the United States Embassy in Mexico City.
 - Love's United States Passport that he applied for, and was issued, on May 30, 1989, at the U.S. Embassy in Mexico City.
 - Telephone records of collect calls to Love's mother from Mexico, Belize and various cities in the U.S. while Love traveled to and from Mexico and Belize.

Furthermore, Love's medical records provided by Dr. Hanson show that Love had, and was treated for, Scabies, from at least mid-May 1989 until October 14, 1989. At Love's 1996 trial, Barbara Neal, Sarah Adams' mother, testified his relationship with her daughter ended, "Sometime in 1989." (Trial transcript page 586.) There was no testimony that Adams had the highly contagious Scabies during that period of time – when Love did have Scabies. Adams gave no testimony as to any "rape" in 1990.

Love's case has been in constant litigation since his 1996 trial. In April 1999, when Love's federal habeas corpus petition was being considered in U.S. District Court in Cincinnati, he obtained the first affidavit from Zeltner-Muller. Love presented the new evidence supporting his alibi defense to federal Judge Weber, but his petition was denied. Love appealed to the federal Sixth Circuit Court of Appeals, and during oral arguments on June 22, 2002, Assistant Prosecuting Attorney General M. Scott Chris told the three-judge panel, "*Love's reams of evidence proving his innocence*" is not relevant in a habeas corpus proceeding. When asked by Circuit Judge Boggs what Mr. Love's "remedy at law" would be, Chris replied, "Well, he will have to start over somewhere in State court."

Love Files Motion For New Trial

Based on the newly discovered evidence, on March 11, 2003, Love's attorney filed a "Motion for Leave to File a Motion for New Trial" in the Hamilton County Court of Common Pleas. The Hamilton County Prosecutor's Office did not oppose the motion, which Judge Charles J. Kubicki granted in October 2003. Judge Kubicki held a hearing on November 17, 2004, and November 22, 2004.

On February 4, 2005, Judge Kubicki issued an Order denying Love's new trial motion.

Kubicki refers to Adams trial testimony as "vague" about when the alleged rapes occurred, when she had in fact pinpointed them to identifiable periods of time. He also casually described as "some affidavits and documents," Love's new evidence proving he was traveling and out of the country during the periods of time Adams alleged the rapes occurred. Kubicki also held the new evidence was cumulative of the telephone records and passport introduced as alibi evidence at Love's trial. Yet the new evidence specifically answers the prosecution's argument during Love's trial that the telephone records do not in and of themselves provide evidence that Love was the person making the collect calls from cities around the U.S., and from Mexico and Belize. Kubicki also defied logic by ruling Love's many years long effort to locate the new evidence from this and other countries did not constitute "due diligence." The judge's final inexplicable finding was that in spite of the compelling new documentary evidence that Love was not in Cincinnati, and as far away as 2,000 miles in Mexico when the alleged rapes occurred, there is not a "strong probability that it will change the results if a new trial is granted."

Why didn't Kubicki think the new evidence of Love's *factual innocence* would change the outcome of a new trial? Because after his first trial "the jury believed the victim's testimony that Defendant committed the offenses against her." Kubicki's rationale doesn't appear reasonable, since it doesn't allow for any defendant accused by an alleged victim to be granted a new trial, because every one of them had been convicted by a jury that "... believed the victim's testimony.." (All quotes in this paragraph from, *State v Love*, Court of Common Pleas, Hamilton County, Ohio, No. B-9601201, Entry Denying Defendants Motion For New Trial, February 4, 2005.)

Love appealed Kubicki's ruling to Ohio's First District Court of Appeals. As of mid-December 2005 that court has not issued a decision.

New Evidence Proves Love's Actual Innocence

All the evidence needed to prove Love's innocence has been found. The state of Ohio continues its opposition to a new trial, even though Asst. P.A. Chris inferred Love's innocence is known, when during the June 2002 oral arguments in the federal Sixth Circuit Court of Appeals he referred to "Love's reams of evidence proving his innocence."

What Love needs at this time is public support and media attention to his case. Every court opinion in his case is unpublished and hidden away from public scrutiny. Love's case is enveloped in silence, and that is the state's greatest advantage in their continued imprisonment of an innocent man.

Information about Love's case, including the affidavits referred to in this article, are on Love's website produced by the Innocent Inmate's Association of Ohio at, <http://www.innocentinmates.org/love/frontline>. Information about Love's case is also at, <http://www.prisonerlife.com>.

After so many years of fighting his case and searching for witnesses on three separate continents, Love is now indigent. Letters of support or suggestions about how Love can proceed in his effort to obtain justice are welcome, and can be sent to:
James Love 329-475
Lebanon Correctional Institution
P.O. Box 56
Lebanon, OH 45036

James Love's outside contact is:
William R. Gallagher, Esq.
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Take your reader into your story step by step in the order it happened. Provide dates, names, times, and the location of events. Be clear. Write your story with a beginning, middle and end. Tell exactly what facts point to your innocence, and include crucial mistakes the defense lawyers made. Do not soft-pedal the truth: Explain what the judge or jury relied on to convict you.

However, don't treat your story as a "true confession" and **only include information either in the public record or that the prosecutor already has.** Do not repeat yourself. Remember: the people reading your account know nothing about your case except what you tell them. Do not complain about the system or the injustice you have experienced: let the facts speak for you. At the end tell what the present status of the case is, and provide your complete mailing address. Include the name and contact info for the person you want listed as an outside contact. Also provide Justice: Denied with the name and email address and/or phone number of any independent sources necessary to verify the account or who can clarify questions. This can speed acceptance of your story, since if Justice: Denied needs more information, it can readily be requested.

Among the basic elements a story should include are:

Who was the victim, who witnessed the crime, and who was charged?

What happened to the victim. What is the alibi of the person the story is about and who

can corroborate that alibi? What was the person charged with? What was the prosecution's theory of the crime? What evidence did the prosecution rely on to convict you?

Where did the crime happen (address or neighborhood, city and state).

When did the crime happen (time, day and year), and when was the person charged, convicted and sentenced (month/yr).

How did the wrong person become implicated as the crime's perpetrator?

Why did the wrong person become implicated as the crime's perpetrator?

The following is a short fictional account that has the elements that should be included in a story.

Mix-Up in Identities Leads to Robbery Conviction

By Jimm Parzuze

At 5p.m. on July 3, 2003, a convenience store on 673 West Belmont Street in Anytown, Anystate was robbed of \$87 by a lone robber who handed the clerk a note. The robber didn't wear a mask, brandish a weapon, or say anything. The clerk was not harmed.

My name is Jimm Parzuze and on July 17, 2003 I was arrested at my apartment on the eastside of town, about nine miles from the scene of the robbery. It was the first time I had been arrested. The police said that someone called the "crime hot-line" with the tip that I "sort of looked like the man" in a composite drawing of the robber posted in a public building. The drawing had been made by a sketch artist from the clerk's description of the robber. I protested my innocence. But I was ignored because I told the police I had been alone in my apartment at the time of the robbery. I was certain of my whereabouts because it had been the day before the 4th of July when I went to a family picnic.

After the clerk identified me in a line-up, I was indicted for the robbery. My trial was in November 2003. The prosecution's case relied on the clerk's testimony that I was "the robber." On cross-examination my lawyer asked the clerk why the drawing didn't show an unmistakable 3" long and 1/8" wide scar that I have on my left cheek from a car accident. The clerk said the right side of the robber's face was turned to him, so he didn't see the left side. My lawyer, a public defender, asked the clerk that if that was the case, then how could the police drawing show details on both sides of the robbers face - including a dimple in his left cheek - but not the much more noticeable scar? The clerk responded the drawing was based on the robber's image burned into his memory and it was the truth of what he saw.

I testified that I had never robbed any person or store, that I was at home at the time of the robbery, and that I was obviously not the man depicted in the police drawing.

In his closing argument my lawyer said that although I generally fit the physical description of the robber, so did probably 10,000 other people in the city, many of who had convictions for robbery and lived in the area of the robbery. He also argued that the clerk's explanation didn't make any sense of why he identified me, when unlike the robber he described to the police, I have a long, deep, and wide scar across my left cheek.

However the jury bought the prosecution's case and I was convicted. In December 2003 I was sentenced to eight years in prison.

My lawyer had submitted a pre-trial discovery request for the store's surveillance tape to prove I had been mistakenly identified, but the prosecutor told the judge it couldn't be located.

I lost my direct appeal. The appeals court said there was no substantive reason to doubt the clerk's ID of me. A private investigator is needed to search for possible witnesses to the robbery who could clear me, and to try and locate the "missing" surveillance tape. If you think you can help me, I can be written at,

Jimm Parzuze #ZZZZZZZ

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My sister Emily is my outside contact. Email her at, Aaaa@bbbb.com

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