

# JUSTICE DENIED

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Retail

The Magazine for the  
Wrongly Convicted

## Jeffrey Scott Hornoff

Awarded \$600k and \$47K  
yearly after 6½ years  
wrongful imprisonment  
for murder.  
See page 10



## Nino Lyons

Businessman's convictions  
vacated after discovery  
federal prosecutors bought  
testimony of 26 witnesses.  
See page 6



## Grace Sherwood

Posthumously pardoned  
300 years after wrongly  
convicted as the  
"Witch of Pungo"  
See page 17



## Clyde Kennard

1960 burglary con-  
viction overturned  
posthumously.  
See page 5



## Stephan Cowans

\$3.2 million awarded for 6½  
years imprisonment based on  
false fingerprint testimony.  
See page 13



## Ken Marsh

Awarded \$756,000  
for 21 years imprison-  
ment after wrongful  
murder conviction.  
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**Five Kuwaitis Acquitted Of Terrorism Charges After Four Years At Guantanamo Bay!**

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**81 Executed "Witches" Posthumously Pardoned In Scotland!**

**Issue 33  
Summer 2006**

# Justice:Denied - Issue 33, Summer 2006

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### Message From The Publisher

Clyde Kennard’s story on page 5 illustrates that the involvement of an impassioned lay person is essential for someone’s exoneration. That person can be a reporter, a friend or relative, a concerned “stranger”, a law or journalism student, or as in the case of Kennard — high school students. While an exonerated person’s lawyer often gets the publicity, behind the scenes that may not have been the key person indispensable to the outcome.

Myrlie Evers wrote in her 1967 book, *For Us, The Living*, that her husband, Medger Evers, thought Kennard’s 1960 prosecution was one of the greatest travesties of the budding civil rights movement in Mississippi. In May 2005 three female suburban Chicago high-school students began working on a documentary about Kennard. After a year of effort and inspiring individuals and organizations in Mississippi and around the country to join their cause of clearing his name, they succeeded in accomplishing what would likely have been described as a fools errand when they started: a Mississippi Circuit Court judge declared Clyde Kennard’s innocence and vacated his conviction in May 2006. That would not have happened without those three young women’s effort and passion, and their teacher’s encouragement.

Ten other articles in this issue also show the importance of lay persons to an exoneration: Nino Lyons (p. 6), Ken Marsh (p. 12), Grace Sherwood (p. 17), Jeffrey Moldowan (p. 18), Prestonpans “witches” (p. 20 ), Colin Ross (p. 23), George Kelly (p. 24), Malik Taj Mohammad (p. 28), Chief Leschi (p. 31), and Iva Toguri (p. 37).

Whether a high school student or a retired 70-year-old, all it takes to embark on the seemingly impossible task of undoing a plainly wrongful conviction is heart and fortitude and a near blind belief that it is a worthwhile endeavor.

Hans Sherrer, Publisher

*Justice:Denied* - the magazine for the wrongly convicted  
<http://justicedenied.org> - email: [hsherrer@justicedenied.org](mailto:hsherrer@justicedenied.org)

*Justice: Denied’s* logo represents the snake of evil and injustice climbing up on the scales of justice.



### Information About *Justice:Denied*

Six issues of *Justice:Denied* magazine costs \$10 for prisoners and \$20 for all other people and organizations. Prisoners can pay with stamps and pre-stamped envelopes. A sample issue costs \$3. See order form on page 39. An information packet will be sent with requests that include a 37¢ stamp or a pre-stamped envelope. Write: Justice Denied, PO Box 68911, Seattle, WA 98168.

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**If you have an account of a wrongful conviction that you want to share, please read and follow the Submission Guidelines on page 38.** If page 38 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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Karyse Phillips, Editor; Natalie Smith-Parra, Editor; Terri Smith, Mailing; Katha McDonald, Mailing; Trudie Dvorak, Typing; and Hans Sherrer.

Misty Morgan and Sarah Cleary went to a Houston, Texas dance club called Trio's on the evening of June 7, 1997, and while there they met Gabriel Boyd Saxton. After a few beers and a few dances, according to Saxton, Morgan offered to give Saxton a ride to Conroe where he lived with his sister, Lori Parker.

Saxton and the young women left Trio's about 2:13 a.m. in Cleary's car. They stopped at a convenience store before going to a Houston apartment where both young women stayed frequently. (Note: James McDougal of JAMAC Investigation plotted the timeline of events in this article based upon sources that included cell-phone records, and Saxton's testimony and statements.)

According to Saxton, after they arrived at the apartment Morgan and Cleary went inside while he remained outside transferring the young women's belongings from Cleary's to Morgan's car.

Gabriel Cepeda was inside the apartment, and he later testified that Cleary told him Morgan had picked up a guy at the bar and they were going to take him home. Cepeda also testified that Cleary had asked him to call the authorities if he didn't hear from either of the women in a few hours. Cepeda never saw the two women alive again.

Morgan placed a cell-phone call at 2:38 a.m. to her stepfather. That call lasted 29 seconds, during which time she told him she was in for the night. Morgan, Cleary and Saxton left the apartment at 2:43 a.m. to purchase cocaine for Saxton at a strip club called Fanta-

**JD Editor's Note:** Whenever a wrongful conviction story is written for the public, the limitation on length forces choices to be made about what details to include and exclude. Most people with the time and inclination to pore over trial transcripts, affidavits, and investigation records, would be astonished at the ability of those on the prosecution side for invention, incompetence, and gall. Lonnie LaBonte's story has those elements.

A noticeable aspect in Lonnie's story is; why oh why was Gabriel Saxton not the prime suspect? Why did the police focus their efforts on other people? When asked this question Betty LaBonte responded with something that isn't included in her narrative. The police had no inkling that Saxton was at the crime scene until long after they had focused their attention elsewhere. It's kind of an unwritten police rule: first suspected, first arrested; once arrested, ignore the facts that point to someone else—even if that "someone else" is likely the perpetrator.

## Failed Justice For Two Women And The Men Convicted Of Their Murder — The Lonnie LaBonte Story

By Betty LaBonte

sy North. They left the club at 3:04 a.m. to drive to Conroe, about 31 miles away.

Saxton and the women arrived in Conroe at 3:39 a.m. According to Saxton when they were about a mile from his home, Morgan asked if he wanted "to take care of some business." Saxton agreed, later saying he thought he might "get lucky." After turning onto a sandy road in a wooded area near the intersection of FM 3083 (also known as Teas Nursery Rd.) and Highway 75 (also known as N. Frazier St.) in Conroe at 3:51 a.m., Saxton says that he and the young women sat inside Morgan's car talking. Saxton also claims the girls drank alcohol and that he and Morgan smoked marijuana. After 15 minutes Saxton says he exited the car to go to the bathroom in the woods.

### Misty Morgan and Sarah Cleary's Murder

Saxton later testified in court that while in the woods, he saw what he assumed to be truck headlights. Fearing it might be a police vehicle and because he had outstanding warrants for parole violations, he remained in hiding. He said three people were in the truck. The only physical description he gave was that the person sitting in the middle (who remained inside the truck) had a ponytail. Saxton also testified that the driver and one of the truck's passengers got out and talked for 5 minutes in front of their vehicle.

According to Saxton, after a brief conversation between Cleary and the unknown pickup truck driver, a struggle began that ended with Cleary being killed and Morgan being knocked unconscious. Saxton claims that he was afraid so he ran through the woods tripping, falling, scratching his face, puncturing his arm, and hurting one leg. He says that after crossing some railroad tracks he stopped and remained quiet for five minutes until the unidentified truck left. Saxton states he then went back to Morgan's car to get his personal belongings that included: a hat, cigarettes, and cocaine, and to steal items from the women.

After removing Cleary's boots, he removed her pants and forcefully ripped her panties off (remember Saxton said that Cleary was already dead at this time). However, Saxton claims he saw headlights returning, so he decided to leave in Morgan's car. He says he drove her car further into the wooded area arriving at "a dead end" approximately 150

feet from where the car was initially parked. This is the location where her burnt-out car was found.

Upon exiting the car, Saxton admits that in addition to taking his personal items, he also stole items from the women that included Morgan's car keys, Cleary's boots, and the women's watches, cellphones and cigarettes. Saxton says he also took a cigarette pack containing a third girl's I.D. that it is believed Cleary used. Saxton claims he then again ran back through the woods and across the railroad tracks where he stayed for 15 minutes, until he heard "a whoosh" and saw "a flash of light," and then headlights backing out down the sandy road.

Saxton says he then returned to where the car was initially parked and where he had left Morgan and Cleary laying on the ground, but he could not find them. So he went to where he had left Morgan's car and saw that it was on fire. However, he claims he could not see anything or anyone inside the car due to the fire.

Saxton says he then went back through the woods for a third time, and he walked and ran down the railroad tracks. About a mile or so south of the crime scene the railroad tracks pass within a few blocks of where Saxton was living at his sister's house.

At 5:15 a.m. he called his sister when he was close to her residence. Shortly after this call Saxton says he saw headlights from a police car, so he ran to a nearby building where he accidentally dropped Cleary's cellphone and hid for 5 minutes. Saxton then resumed walking and after reaching his sister's house, he went to the attic to hide the items that he had stolen: the cell-phone, car keys, and the I.D. of the third girl. Saxton hid these items by dropping them down the inside portion of the wall in the attic, where they would remain until Saxton told police about them in February 1999.

Saxton claims he used both of the young women's cellphones to call 911 prior to and after robbing them, but asserts he was unable to get a proper signal where Morgan's car was parked. However, a cell tower was located less than half-a-mile away and Conroe police officer Taylor, who responded to the initial call to the police about discovery of the burned car, made a cellphone call from the scene.

### Morgan and Cleary's Murder Investigated

On the afternoon of June 8, 1997, Robert Burrows and a group of young children riding mountain bikes in the woods found

**LaBonte cont. on page 34**



## Wrongful Conviction Leads Christopher Ochoa To Law Degree

By Samara Kalk Derby

Prison is the last place a grown man wants to be seen crying. So Christopher Ochoa often wept alone in his cell, asking

God how this could have happened to him.

Ochoa, 39, missed the 1990s while spending more than a decade in prison as punishment for a brutal rape and murder he didn't commit.

Ochoa likely will cry when he is handed his law degree from the University of Wisconsin Law School. The commencement address he gives won't intimidate him because he has grown accustomed to giving speeches.

His hope in telling his story is to somehow influence a justice system that isn't always just. Law school has been difficult for him, as it is for other law students, Ochoa said.

"It's been more of a struggle for me because sometimes I think I don't know if I have what it takes to be a lawyer. That's just my own self-doubt," Ochoa told an audience of about 100 people during a public forum this week at the Overture Center. "But I've gotten this far."

There was a bleak night in 1996 when Ochoa contemplated taking his life. He had no sense that he would ever get out or hold his loved ones again. "I had lost all hope. I felt like a failure," he said. "I somehow made it through that night. My morals, my faith and my mother got me through."

That same night he vowed to take advantage of the educational opportunities offered in prison. "It's something they could never take away from me. I had lost everything," Ochoa said.

Unbeknown to him, it was at the same time that the man responsible for the crime, Achim Marino, came forward. Just as miraculously, DNA evidence from the case had been preserved, and it confirmed that Marino was the killer.

While in prison, Ochoa learned of DNA evidence and eventually discovered the Wisconsin Innocence Project. He appealed to the Madison group to take his case. They did.

Now, Ochoa takes every opportunity to express his gratitude to UW Law Professors

Keith Findley and John Pray, who founded the project in 1998.

A program of the University of Wisconsin Law School, the Innocence Project seeks to overturn

wrongful convictions. It's part of a national movement that has involved law schools and other organizations in the past 15 years. When it started there were four similar groups; now there are about 35.

The Wisconsin group has been responsible for the release of five prisoners, each of whom served time for serious crimes. The Innocence Project has also been effective in shaping laws so that fewer innocent people are convicted in the first place.

The crime: Ochoa's ordeal started in 1988, when a young woman was brutally raped and murdered at the Pizza Hut restaurant she managed in Austin, Texas. There were no witnesses. Two weeks later, Ochoa and a friend were in the restaurant and drew suspicion when they asked employees about the case.

Police interrogated Ochoa for two days, 12 hours at a time, threatening him with the death penalty if he did not confess. Eventually he signed a confession and was sentenced to life in prison.

"The first night in prison was the loneliest night that I have ever spent anywhere," he said.

During his 12 years in prison, Ochoa said he had lost faith in his government, at all levels: in the police, in Congress, in the president.

The UW Law School restored his faith, and when it came time to choose a law school he picked it. When he visited the university to speak after his release, Ochoa said, he really felt like he was a part of something. Then his law school hosts took him to his first football game. "That kind of sealed the deal," he said.

Ochoa vows never to practice criminal law, and hopes his story will influence those in the legal system: "The future lawyers, future judges, future district attorneys, future associates, future partners in large firms. Maybe they can see that law is about people," he said.

"When it becomes about people again, maybe wrongful convictions will stop."

Samara Kalk Derby is a reporter with *The Capital Times* in Madison, Wisconsin. Reprinted with permission. Published in *The Capital Times*, April 14, 2006. Capital Newspapers Copyright ©2006.

## Clyde Kennard's Conviction Tossed After Alabama's Governor Refuses Pardon

Beginning in May 2005, three Lincolnshire, Illinois high-school students spent more than six months documenting and uncovering new evidence that Clyde Kennard had been convicted in 1960 of trumped-up burglary charges to stop his efforts to become the first African-American to attend Mississippi Southern College (now the University of Southern Mississippi). The students, Callie McCune, Agnes Mazur, Mona Ghadiri, and their teacher Barry Bradford enlisted the aid of Professor Steve Drizin, of the Northwestern Center of Wrongful Convictions to compile and file an application with Mississippi Governor Haley Barbour for the posthumous pardon of Kennard, who died in 1963. Bradford contacted The Justice Institute in February 2006 and requested its support of the pardon application.<sup>1</sup>

The Justice Institute submitted a 1,300 word letter to Gov. Barbour dated March 24, 2006, that was included in the official pardon application. The letter stated in part:

Mr. Kennard is historically prominent as one of the people who endeavored, at grave personal risk, to create an environment in Mississippi of respect for racial, religious or ethnic differences. Mr. Kennard's good name and legacy have been unjustly stained for 46 years with a wrongful felony conviction. Consequently, the granting of a posthumous pardon to Mr. Kennard on the basis of his actual innocence would be a positive and proper exercise of executive clemency.

On May 4, 2006, a spokesperson announced that while Governor Barbour recognized Kennard was innocent, he would not pardon him.

After it became known that Gov. Barbour would not pardon Kennard, a motion to vacate his conviction was filed in the Forrest County Circuit Court. That is the same court in which Kennard had been convicted in 1960. On May 17, 2006, Judge Bob Helfrich declared, "I am compelled to do the right thing, and that is to declare Mr. Kennard innocent, and to declare that the conviction of Mr. Kennard is hereby null and void."

Endnote and Sources:

<sup>1</sup> The Justice Institute is *Justice: Denied's* parent organization. Ms judge tosses 1960 conviction of black veteran, AP story, *Sun Herald* (Gulfport, MS), May 17, 2006. For additional information about Clyde Kennard, see the article on page 5 of this JD issue, *Clyde Kennard: Gone, But Not Forgotten*. The Justice Institute's letter to Gov. Barbour is at, <http://clydekennard.org>



## Clyde Kennard: Gone, But Not Forgotten

Clyde Kennard's name is cleared thanks to effort spearheaded by three Illinois high school students

By Callia and Anya Watner

He was innocent. But how to get a pardon? This was the question in the minds of students Callie McCune, Agnes Mazur, Mona Ghadiri, and their teacher, Barry Bradford, of Adlai E. Stevenson High School, in Lincolnshire, Illinois, as they began their effort in May 2005 to secure a posthumous pardon for Clyde Kennard.

Kennard, an African-American living in Mississippi, was unjustly accused and convicted in 1959 of whisky possession and reckless driving in order to hinder him from continually trying to enroll at the segregationist Mississippi Southern College (now the University of Southern Mississippi). He was fined \$600. After Kennard continued his effort to attend MSC, segregationist leaders trumped-up false burglary charges against him in 1960. He was convicted of participating in the theft of \$25 worth of chicken feed and sentenced to seven years of hard labor. Clemency was shown by Mississippi Governor Ross Barnett in January 1963 when he suspended Kennard's prison sentence due to fast-failing health from cancer. Kennard died six months later in Chicago where he had gone to live with his sister.

The three students firmly believed that Kennard deserved to be pardoned. Their belief was proven well founded when his innocence was plainly proven in the January 27, 2006, sworn affidavit of Johnny Lee Roberts, Kennard's accuser. That affidavit states in part: "Kennard did not ask me to steal... [and] did not ask me to do anything illegal. Kennard is not guilty of burglary or any other crime." The students played a key role in Roberts' decision to break his decades of silence and publicly declare that Kennard was innocent.

"All Kennard wanted to do was better himself," said Callie McCune in September 2006. "It's that conviction that drew me to Kennard, [and] what I think caused all of us to stick with it, to fight for him." She remarked on how they became connected with his case, "We chose to participate in a club at our school called National History Day, where students conduct original research projects and present them in a variety of formats."

Three main sources of material helped the young women investigate Kennard's case –



views, writing congressmen, and dealing with paperwork were among the many details in their drive for Kennard's pardon. Two of the students traveled to Mississippi and gathered information firsthand.

"Organizing the research [was the hardest part of the project,]" commented Mona Ghadiri. A five-inch binder, four extra-large file holders, and three small boxes held papers which the students collected in research for the case. "Professor Steve Drizin, of the Northwestern Center of Wrongful Convictions took our research, compiled it in an application for clemency for Mr. Kennard, and thus started our three attempts to clear Mr. Kennard's name," wrote Ghadiri in September 2006.

As their campaign gained momentum, beginning in December 2005 the Jackson *Clarion-Ledger* published a number of articles detailing that Kennard had been wrongly convicted, and the newspaper editorially supported the clearing of his name. Students from the University of Southern Mississippi provided logistical support and circulated a petition supporting Kennard's exoneration that was signed by about a thousand people, and a number of Mississippi politicians and current and former judges went on record as supporting Kennard's exoneration.

The first attempt to exonerate Kennard was a pardon petition submitted to Mississippi Governor Haley Barbour. After Governor Barbour refused to pardon Kennard, the second attempt was consideration of Kennard's pardon by the Mississippi State Parole Board. "... [T]his failed mostly because Mr. Barbour [was]...present in that committee," said Mona. "The third time we went straight through the court system, and Mr. Kennard was actually exonerated in the same courthouse where he was originally convicted."

Forrest County Circuit Court Judge Bob Helfrich declared on May 17, 2006: "Because this matter did begin here, it should end here. To me, this is not a black and white issue – it's a right and wrong issue. To correct that wrong, I am compelled to do the right thing, and that is to declare Mr. Kennard innocent, and to declare that the conviction of Mr. Ken-

public libraries, the Mississippi State Sovereignty Commission Files, and the numerous interviews that were conducted with acquaintances and relatives of Kennard. Speaking to reporters, organizing inter-

nard is hereby null and void." Thus Kennard's criminal record was wiped clean. Forty-five years earlier, in March 1961, the Mississippi Supreme Court had overturned Kennard's 1959 reckless driving and liquor convictions.

It took one year of effort to finally exonerate Kennard, though, McCune observed, "the exoneration itself took one day of trial."

Victoria Gray, an NAACP official, said, speaking of Kennard after his release from prison in 1963, "I would be mad...[and] angry. I would be thinking of how I could get even. There was absolutely none of that [in Kennard]. He was the same Clyde—kind, caring, thoughtful."

Kennard's own words about his prison experience were, "Be sure to tell them what happened to me isn't as bad as what happened to the guard, because this system turned him into a beast, and it will turn his children into beasts." Shortly after saying that, he died on the 4th of July, 1963, one hundred eight-seven years after the signing of the Declaration of Independence, which proclaimed "All men are created equal." Those words were taken to heart by Kennard and his close friend Medgar Evers, who was murdered by a segregationist three weeks before Kennard died.

In June 2006, the documentary the three students produced about Kennard's case, "Carrying the Burden: The Story of Clyde Kennard," was honored as the 2006 National History Day's "Outstanding Senior Division State Entry from Illinois." It was also awarded 7th place nationally in the "Senior Group Documentary" classification.

McCune responded to Kennard's exoneration and the honors bestowed on their documentary by saying, "None of this would have been possible without Mr. Bradford....He hates to take credit for things [and] likes us girls to take the spotlight, but if there is anyone to thank for Kennard's cleared name, it's [he]."

We all owe a debt of gratitude to the three high school students, and their teacher who inspired and encouraged them, for their valuable contribution to clearing the name of an innocent and remarkable man 46 years after he was wrongly branded as a criminal.



Callie McCune, Agnes Mazur and Mona Ghadiri (left to right)

Kennard sources on page 6



Nino Lyons

# Businessman's Convictions Tossed After Disclosure Federal Prosecutors Purchased Perjurious Testimony From 26 Witnesses

By Hans Sherrer

Three years after being convicted of conspiracy to distribute cocaine and crack, carjacking and trafficking in stolen merchandise, all charges were dismissed against Cocoa, Florida businessman Antonino (Nino) Lyons.

As a child, Lyons' family wasn't well-to-do and they lived in a public housing project in Cocoa, on Florida's central eastern coast. Lyons developed into a star basketball player at Cocoa's Rockledge High School, and in the late 1970s he was honored as a High School All-American. Awarded a scholarship to attend the University of Florida. Lyons graduated with a degree in Managerial Science after transferring to the Florida Institute of Technology. He also assisted his mother in raising his six brothers and sisters, five of whom graduated from college.

Lyons became a successful businessman, and by his early 40s he owned several clothing stores in central Florida and a popular nightclub in Cocoa (Brevard County). He was a community activist, and served for a time as the vice-president of the Central Brevard NAACP. He also donated money to programs intended to keep kids off the streets and drugs. One of his charitable acts was providing uniforms for kids at Cocoa's Joe Lee Smith Recreation Center. <sup>1</sup> Lyons's wife, Debbie, rose in her education career to being a high-school principal.

## Kennard sources cont. from page 5

The official Clyde Kennard website is, <http://clydekennard.org>.

Merle Evers wrote about Clyde Kennard's 1960 burglary conviction in her 1967 book, *For Us, The Living*, that detailed her life with husband Medgar Evers before his 1963 murder by a Ku Klux Klan member.

### Sources:

Stevenson Team Tackles Documentary On Civil Rights Hero, By Abby Scalf, *Daily Herald* (Arlington Heights, IL), February 12, 2006.

1960 case inspires teens to take action: Stevenson High team wants Mississippi to pardon ex-Chicagoan, By M. Daniel Gibbard, *Chicago Tribune*, March 24, 2006.

Ms judge tosses 1960 conviction of black veteran, *Sun Herald* (Gulfport, MS), May 17, 2006.

*Kennard v. State*, 240 Miss. 488 (Miss.03-06-1961) Email from Callie McCune to the authors, dated Sept 6, 2006.

Email from Mona Ghadiri to the authors, dated Sept. 6, 2006.

Lyons' idyllic life was suddenly upset on December 20, 2000: His home and clothing stores were searched by agents with U.S. Customs, the Secret Service, the BATF, the Florida Department of Law Enforcement, and the Cocoa Police Department.

Lyons was indicted nine months later, in August 2001, by a federal grand jury in Orlando on a variety of charges that included conspiracy to distribute counterfeit clothing, drug trafficking, carjacking, possession of counterfeit currency, and possession of cocaine. Although Lyons had lifetime ties to the community and was a well-respected businessman who had never before been arrested or otherwise in trouble with the law, he was taken into custody on August 20, 2001, denied bail, and jailed as a federal detainee at the Seminole County Jail.

Lyons' trial began in November 2001. The government's case revolved around its theory that Lyons' clothing stores were fronts for his involvement in the drug trade and the fencing of counterfeit clothing. Since no drugs, drug related paraphernalia, or records tying Lyons to the drug trade or knowingly selling knock-off clothing were found during the searches of his home and stores or the subsequent investigation, the government's case hinged on the testimony of 26 people convicted of federal drug law violations. Those witnesses testified that Lyons sold them more than \$6 million in cocaine. However there was no independent evidence – no drugs, no non-felon witnesses, no wiretaps, no tape recordings by an undercover agent or informant, etc. – supporting the claims of the witnesses.

Nevertheless, after an 11-day trial, Lyons was convicted on November 26, 2001, of drug trafficking, carjacking, and distributing counterfeit clothing. The convictions were serious enough that he faced a sentence of up to life in prison under the federal sentencing guidelines.

Lyons's family and friends were so outraged at his conviction by specious testimony unbacked by evidence, that they set up The Committee To Free Nino Lyons. They wrote letters and made phone calls in support of Lyons, they held protests outside the courthouse in Orlando, and they set up a website, [freenino.org](http://freenino.org). Lyons's wife Debbie spearheaded those efforts.

Lyons's sentencing was delayed by his motion for a new trial. The crux of Lyons's argument was that the prosecution withheld documents potentially undermining their case, and that the testimony of the 26 convicted drug felons was unreliable. Lyons alleged the testimony of those witnesses was not just unreliable because it was procured with the promise of a reduced sentence, but the prosecution presented no independent evidence to corroborate their allegations.

Furthermore, there was no mention of Lyons in any wiretap, recorded conversation, or report by any undercover agent generated during the investigation of those 26 witnesses for their convicted crimes. Most of the witnesses cooperated with the government by naming names of bigger fish in order to get a lesser sentence when they were prosecuted. Yet Lyons' name wasn't raised by any of them. Then suddenly when they were offered the inducement of a sentence reduction, they started describing Lyons as a prominent drug kingpin in central Florida, even though they had spent years in prison out of the drug trade loop. Lyons' lawyer knew how the government had procured the witness testimony, because "Lyons received letters from prisoners who said they were approached by the government, but refused to testify, because they would be lying."<sup>2</sup>

In May 2002, U.S. District Judge Gregory Presnell granted Lyons's motion for a new trial, based on prosecutorial misconduct: namely the prosecution's knowing reliance on perjurious testimony and *Brady* violations by deliberately concealing exculpatory evidence. The government appealed the judge's order.

Judge Presnell then granted Lyons bail on June 25, 2002, to be secured by a \$250,000 cash surety bond. The judge stayed Lyons's release pending the prosecution's appeal of his ruling to the federal Eleventh Circuit Court of Appeals – which subsequently reversed Judge Presnell's bail order. So Lyons remained jailed while awaiting his retrial.

Then in November 2002 the Eleventh Circuit Court of Appeals reversed Judge Presnell's order for a new trial. The Court ruled that although the prosecution withheld *Brady* discovery evidence from Lyons, their actions constituted harmless error and not reversible prosecutorial misconduct.

With the case back in Judge Presnell's court, Lyons's lawyers filed a new motion for retrial based on additional evidence of prosecutorial misconduct. In May 2003 Judge Presnell ordered the prosecutors to turn over their case notes and other materi-

**Lyons cont. on page 7**

## Lyons cont. from page 6

als to U.S. Magistrate David Baker. After reviewing the evidence, Magistrate Baker would make a recommendation about the motion to Judge Presnell.

At that point Lyons had languished at the Seminole County Jail for 21 months. He was trapped in the limbo land between conviction and sentencing – but with the hope of being freed.

Although the prosecutors did not fully comply with Judge Presnell's order to produce case documents, Magistrate Baker was provided with enough information to issue a 66-page report in November 2003. The report concluded Lyons had been denied a fair trial by extensive prosecutorial misconduct that included the withholding of potentially exculpatory evidence and the failure to disclose perjurious testimony by government witnesses. The report documented e.g., that Assistant U.S. Attorney (AUSA) Bruce Hinshelwood entered into secret deals exchanging a reduced sentence for prosecution favorable testimony, and then remained silent in the courtroom when those witnesses denied the existence of the deal.<sup>3</sup> The report also documented that one of the witnesses told a federal agent, "some of the guys didn't really know Lyons but they made up stories."<sup>4</sup> The report also explained that as a ruse to avoid turning over documents covered by Judge Presnell's order, AUSA Anita Cream "Said she rarely took notes in pretrial interviews, preferring to rely on memory and agents' notes. But the report noted that Cream could not remember whom she interviewed and that no records of any kind existed for one of the witnesses."<sup>5</sup> Given that claim, Magistrate Baker rhetorically wrote, "The question therefore remains – how did the government know how to call [inmate] Clements as a witness? If AUSA Cream relies on agent's notes and no agent's notes exist, how could she prepare for the examination?"<sup>6</sup> Concerning the ongoing failure of the U.S. Attorney's Office to comply with Judge Presnell's order to turn over all relevant case notes and documents, Magistrate Baker wrote, "The government's refusal to produce the documents despite court orders to do so, leaves the court with nothing but an inference that they indicate prosecutorial misconduct or other improprieties."<sup>7</sup>

Two months after Magistrate Baker's report, in January 2004, the prosecutors turned over

an additional 2,500 documents to Judge Presnell. They also acknowledged that mistakes had been made in Lyons' prosecution. Those admissions were followed in May 2004 by the U.S. Attorney's motion to vacate Lyons's drug convictions – which Judge Presnell granted on May 21, 2004. At that same hearing Judge Presnell ordered Lyons's release on bail, which was unopposed by the prosecutors. After being jailed for 2 years and 9 months, Lyons was greeted home that night by relatives, friends and well-wishing strangers.



Protestors outside Orlando's Federal Courthouse

Four months later Judge Presnell vacated with prejudice, Lyons's convictions for carjacking and selling counterfeit clothing. The documents belatedly turned over by the prosecutors supported Lyons's contention that the prosecution's case against him was not just evidentially insufficient, but had the appearance of being a phantom case contrived

out of whole cloth by federal prosecutors.

Judge Presnell didn't mince words in his dismissal order of September 30, 2004, that stated in part:

"A review of U.S. Magistrate Judge Baker's ... Report and Recommendation ... and Supplemental Report and Recommendation ... exposes the myriad violations that collectively reveal a prosecution run amuck.

... In the course of a criminal prosecution, the Government has a continuing duty to honor a defendant's constitutional rights, which, according to *Brady*, requires the Government to disclose any evidence in its possession or control that is material either to guilt or punishment. ... In this regard, the prosecutor must disclose evidence that could, in the eyes of a neutral and objective observer, alter the outcome of the proceeding. ... In this case, by some mixture of negligence, recklessness, and wilfulness, the Government utterly failed in its prosecutorial duties.

.... This nation's adjudicatory system is not a tool finely tuned to obtain convictions, but a system designed to foster respectable justice. Although the Government, as the gatekeeper of certain exculpatory evidence, may contrive a case without any honest attempt to comply with its duties, the Court refuses to be the Government's rubber

stamp of single-minded injustice, however expedient that would be.

... Based on the foregoing, the Court finds that the Government committed *Brady* and *Giglio* violations material to all remaining counts in this case, and the Government's unwarranted denials and delay prejudiced Lyons and the judicial process to such a degree that dismissal of the remaining counts is appropriate."<sup>8</sup>

As the true story of Lyons's unfounded prosecution unfolded, his lawyer, Gregory W. Eisenmenger, said, "The story of this case is that the government should be held responsible for the manner in which they put together this prosecution. This was a case that was concocted completely on the testimony of convicted felons, telling the government what it wanted to hear. It becomes extremely upsetting and shocking that the government knew these people were not telling the truth."<sup>9</sup>

On the Friday night of the week the charges were dismissed, Lyons watched his son play halfback in the Rockledge-Cocoa High School football game. He told a reporter for *Florida Today*, "Being out feels great, but the idea of knowing that someone has the ability to do something of this magnitude is scary."<sup>10</sup>

As of the fall of 2006 it is unknown why businessman Nino Lyons was targeted for a fabricated federal prosecution that had him on track for spending the rest of his natural life in prison. Lyons is weighing his options for seeking compensation.

JD Note: Nino Lyons exoneration is extraordinary for two reasons. First, Judge Presnell displayed uncommon diligence in ferreting out if there was substance to Lyons' claim that federal prosecutors committed egregious prosecutorial misconduct. The judge's doggedness is particularly noteworthy because as he wrote in his dismissal order, it would have been expedient for him to have "rubber stamped" the shady illegal and unconscionable methods used by the prosecution to secure Lyons' convictions. Second, the prosecutors over-reached by promising over two-dozen jailhouse witnesses a reduced sentence in exchange for perjurious testimony. If the prosecutors had only purchased the false testimony of a couple of witnesses, the truth of what they did may have remained concealed. However, by doing that the prosecutors would have risked Lyons' acquittal, since there was no substantive evidence against him except for the false testimony of those jailhouse witnesses. Thus a large number of relatively uncredible witnesses were needed by the prosecutors to overcome the fact that Lyons

Lyons cont. on page 8

Eighteen years after the grisly double murder and sixteen years after one of the most controversial convictions in Long Island history, the case of wrongly imprisoned Martin (Marty) Tankleff has gone through more twists and turns than a long-running TV soap opera.

Not even the lawyers presently involved are capable of recounting all of the legal machinations that have occurred to date, and in-depth news reporters find themselves without sufficient time or space to recount even a bare-bones version of one of New York suburbia's juiciest crime stories. Instead of winding down, the saga keeps growing in size and intensity, with no clear end in sight. The stakes are high – not just for Marty Tankleff.

Connoisseurs of mistaken conviction rate Tankleff as one of the most memorable cases of false confession and police and prosecutorial misconduct they have encountered, notable for its incredibly complex webs of sordid intrigue and political corruption.

Chances are, if you have followed some of the many reports in the major news media or come across the dynamite blog at <http://martytankleff.org> maintained by many of Tankleff's relatives and friends, you may have already heard about it.

### 1988 Murders

It all started on the morning of Sept. 7, 1988, when Suffolk County police responded to a frantic emergency call from an upscale house in Belle Terre, on Long Island's North Shore. Marty Tankleff, aged seventeen, who was scheduled that day to begin his senior year in high school, blurted he had just awakened to find his father brutally bludgeoned and covered in blood. With instructions from 911, the boy helped keep his father alive until help arrived.

### Lyons cont. from page 7

was not only a well respected community activist and businessman with no criminal record – but that he was actually innocent.

#### Endnotes and sources:

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- 5 *Id.*
- 6 *Id.*
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- 8 *U.S. vs. Lyons*, Case No. 6:01-cr-134-Orl-31DAB (D.C. M.D.F.), Order, September 30, 2004.
- 9 Federal Judges Blast Trial's Prosecution, *supra*.
- 10 Lyons a free man with clean record, *supra*.



## Will The Frame-up Hold Up? The Martin Tankleff Story

By Scott Christianson

Emergency responders found Seymour Tankleff, aged 62, barely breathing and his wife, Arlene, horribly stabbed to death and nearly decapitated. Seymour, a wealthy insurance broker and entrepreneur, never came out of his coma and would die a few weeks later.

Although the slightly built youth had no criminal history, record of mental illness, or known strife with his parents, as their closest relative and lone survivor in the house at the time, the boy was quickly taken away to the police station for questioning without a lawyer present. Why would any killer have left behind a possible witness?

Despite Marty's claim that Jerard Steuerman, his father's estranged business partner in bagel stores and horseracing, owed the Tankleffs hundreds of thousands of dollars and had been the last one to leave a high-stakes card game at the house earlier that morning, the cops immediately targeted the kid as the prime suspect.

### Tricked into "Confessing"

The youth denied he had done anything wrong, but the police detectives persisted. When the teenager didn't confess, one of the detectives, K. James McCready, remained within earshot and pretended to receive a telephone call telling him that Seymour Tankleff had revived under adrenaline to blame his son for the attack. McCready also said, "We also have your hair in your mother's hand, Marty, we know you did it, just tell us you did it."

Tankleff said, "Absolutely not. I'd be willing to take a polygraph, I'll do anything I can. I have nothing to do with this."

But McCready countered, "Marty, then why would your father identify you?"

Tankleff replied, "Maybe because I helped him that morning, giving him first aid."

After that, the questioning just became more hostile and more aggressive, and within minutes young Tankleff broke down and "confessed" to the experienced detectives, without signing any statement or giving a videotaped admission. Although the teen quickly recanted his statement and proclaimed his innocence, the police arrested him and the district attorney charged him with murder.

### Attention Increases

The case became politicized when Tankleff's family hired as his defense lawyer Robert Gottlieb, a Democrat who was running for district attorney against the incumbent Republican. Gottlieb soon began to note that the police had no physical evidence whatsoever to support their supposed "confession." There was no bloody murder weapon, bloody gloves or clothes, or other corroborating evidence.

Tabloids reported the DA's line that Tankleff was a spoiled rich kid who had tried to eliminate his adoptive parents because he resented having to drive a "crummy Lincoln." Defenders focused on the "coerced" or "tricked" confession, which prompted law-and-order types to support the police. Greed, jealousy, mystery – reporters already saw a good crime story.

### Another Suspect

But when reports circulated that Seymour Tankleff still hadn't died, and might recover, Jerry Steuerman, his business partner, suddenly turned up missing. It quickly emerged that Steuerman had faked his own death, shaved off his beard, and fled across the country using a false identity. He was later found in California, where he had changed his hair weave and acted distraught, yet Detective McCready assured the public that he "wouldn't hurt a fly" and continued to insist that the boy had done it.

Steuerman and his son, Todd, were never seriously interrogated even after Suffolk law enforcement authorities secretly learned that they had been involved in cocaine trafficking from their bagel store and that a notorious drug enforcer, Joey "Guns" Creedon, told police Todd had shot him after he refused to agree to "cut out Marty Tankleff's tongue" for Jerry Steuerman. Todd Steuerman was quietly arrested, offered a lenient plea deal, and whisked off to prison, and the allegations against the Steuermans were kept away from the Tankleff defense and the news media.

### Tankleff Convicted

Instead, Marty Tankleff was tried for double murder in a high-profile trial that was televised live—a trial that attracted so much media attention it helped lead some enterprising businessmen to start Court TV.

The only member of his extended family who didn't support him was his half-sister Shari, and his brother-in-law, who gained more inheritance upon his conviction, and

### Tankleff cont. on p. 9



## Tankleff cont. from p. 8

were later found to have secretly gone into business with Detective McCready.

The Steuermans' alleged criminal background was kept out of the trial.

Despite a lack of any physical evidence against Tankleff, in 1990 he was convicted and sentenced to fifty years to life, based almost exclusively on his questioned confession.

### Fruitless Appeals

The case might have ended there, except that young Tankleff also attracted some pro bono legal assistance from several top-flight lawyers from a number of the nation's leading firms and law schools. (One of the law offices was Baker Botts, the Washington-based powerhouse headed by former Secretary of State James Baker.)

For more than ten years his lawyers brought potent appeals in the state and federal courts, but narrowly lost each time.

Some of their claims pointed out that Suffolk County law enforcement was notorious for compiling the nation's highest conviction rate based on "confessions", and its police and prosecutors were under federal and state investigation for drug corruption and other misconduct. Detective McCready himself had been targeted for perjury in a state corruption probe and acquitted of felony assault. Cops and prosecutors were in cahoots with the bad guys. In short, the county was a law enforcement sewer.

### Private Eye Strikes Gold

All of these appeals and entreaties failed to turn the tide for Marty Tankleff, however.

Then, in 2003, a miracle happened. Jay Salpeter, a retired New York Police Department homicide detective turned private investigator, entered the case in 2001. Two years later he obtained an affidavit from a career criminal who claimed to have served as the getaway driver of a hit team. He detailed how he transported two other known thugs to and from the scene of the Tankleff murders, and he stated that they had committed the murders for hire, at the behest of Jerry Steuerman.

The purported getaway driver, Glenn Harris, and Marty Tankleff, passed polygraph examinations for the defense. Witnesses who substantiated their accounts began to come out of the woodwork. (They are still popping up.)

Tankleff's lawyers, Bruce Barket and Barry Pollack, confronted the new Suffolk County district attorney, Thomas J. Spota, with the evidence. Spota, the first Democrat to be elected in decades, initially supported their motion for an evidentiary hearing in county court, thereby setting the stage for a public review of the controversial case. However, Spota also assigned as his investigator Walter Warkenthien, a former homicide detective who had been another detective named with McCready in the state corruption probe back in the 1980s. Spota also hired a new assistant, Leonard Lato, a flamboyant former federal prosecutor, to handle the case, claiming that Lato would conduct an independent probe.

### Harris Denied Immunity

Harris told his story on national TV, and *The New York Times* and other major media began to devote detailed coverage to the new evidence.

Then the courtroom showdown began in July 2004. Some observers hoped that the proceedings would result in Tankleff's immediate release, but when the district attorney and County Judge Stephen Braslow (a different judge from the same court that had presided over the original conviction) refused to grant Harris immunity from prosecution for testifying about his alleged inside knowledge of the murders, Harris – now represented by counsel – invoked his right against self-incrimination and refused to testify.

Despite the setback, Tankleff's team refused to give up. They called witness after witness, unleashing a cascade of new evidence, none of it effectively rebutted or discredited by the prosecution, which provided more corroborating details about the alleged murder plot and suggested a cover-up by the Suffolk authorities.

Tankleff's side acted like a prosecutor, identifying the killers, establishing a motive, finding the murder weapon and laying out the crime and its aftermath in graphic detail, whereas Lato responded like a defense attorney, by attacking defense witnesses and trying to raise reasonable doubt.

### Witnesses Depict Murder for Hire

Those who covered the hearings agreed that Tankleff's defense team marshaled much more evidence against the three career criminals – Joe Creedon, Peter Kent and Glenn Harris – in the murders, than the prosecution has ever presented against Tankleff.

Among the two dozen witnesses called by the defense were Creedon's former wife and

crime partners, who described his activities at the time of the murders, and Creedon's own son, who testified that his father had admitted to him that he had participated in the Tankleff murders. Professor Richard Ofshe, a leading authority on false confessions, explained how police convinced young Tankleff to admit to something he had not done – a phenomenon that has been revealed in many cases involving a false confession by a person proven innocent by DNA evidence. Witnesses from all walks of life (including a priest, businessmen, and a housewife, as well as career criminals) came forward to relate incriminating statements made by Jerry Steuerman, Harris, Kent and other figures in the case. Investigator Salpeter disclosed how he had gone to the scene where Harris claimed the murder weapon had been discarded – and found embedded in the earth a pipe matching the object. (DNA tests have thus far failed to link it to the murders or the alleged murderers.)

### Focus on Spota

Some of the most potent evidence presented at the hearings involved Suffolk's new DA, Spota, who otherwise had seemed to earn himself a reputation as a corruption fighter – the nemesis of the crooked old political machine.

Through the Tankleff case, it came out that before being elected in 2001, largely with key support from police unions, Spota had headed up the DA's homicide bureau. In the era of the murders, as a private lawyer he had represented McCready, when the detective was under investigation for perjury, corruption and assault. In those days Spota also represented police officers who were involved in drug corruption, some of whom ended up taking a fall to the feds. He knew where the bones are buried, all right.

As the hearings unfolded, Spota belatedly disclosed that in 1983 his law firm had defended Todd Steuerman when he was charged with dealing drugs out of his father's bagel store. Spota also acknowledged that shortly after the murders, his former longtime law partner had defended Jerry Steuerman in unspecified matters, and defended Todd Steuerman in another drug-dealing case. (Tankleff relatives say the slain couple's dispute with Jerry Steuerman over his son's stake in one of their bagel stores was a major factor in their murders.)

Yet Spota refused to recuse himself in the case or to yield to a special prosecutor, and his assistant, Lato continued to fight Tankleff every step of the way.

## Tankleff cont. on p. 10

## Tankleff cont. from p. 9

### Suffolk Judge Backs DA

Judge Braslow ruled in favor of the DA on every motion, refused to require a special prosecutor, and denied Tankleff's bid to conduct advanced DNA tests on pieces of human skin scraped from Arlene Tankleff's fingernails after the attack.

Braslow ultimately refused to overturn Tankleff's conviction, simply concluding that he didn't find the evidence presented by the defense to have been credible, thus forcing the defense to appeal in state court.

Although it was scarcely reported in the news media, Braslow also exhibited conflicts of interest, which should have led him to recuse himself from handling the case. He and Lato worked as a team. Stories abound that Braslow's father, a local Democratic boss, helped make Spota DA and figured in Lato getting hand-picked as Spota's assistant in the case. Judge Braslow showed obvious favoritism toward the prosecution, and his final opinion in the case was also poorly reasoned and extraordinarily weak.

### Support for Tankleff Grows

Numerous legal organizations, such as the National Association of Criminal Defense Lawyers, and several high-profile legal experts supported the appeal. Said Barry Scheck, co-director of the Innocence Project, "We've taken the unusual step of writing a letter along with our motion because the facts of this case are so strong, and because the lower-court ruling that denied Marty Tankleff a new trial was so misguided and troubling."

Meanwhile, members of the news media also weighed in. The CBS program, "48 Hours" devoted three prime-time shows to the case, and an array of newspapers, magazines and broadcast media supported Tankleff's cause.

His family and friends, aided by Soury Communications in New York City, widened their campaign over the Internet and held fundraisers in a SoHo art gallery and other locations. Twenty-seven relatives said in one statement, issued in 2004 on the sixteenth anniversary of the murders: "From the beginning, any impartial observer familiar with the facts of this case—and with the sordid history of the Suffolk County criminal justice system to which it will be forever linked—has come to the same conclusion: Marty didn't do it. That's where we find ourselves, 16 years later: Marty didn't do it, and everybody knows it. Yet, Marty remains in prison."



## Jeffrey Scott Hornoff Settles Lawsuits Over Wrongful 1996 Murder Conviction

By Hans Sherrer

Jeffrey Scott Hornoff was a married 27-year-old Warwick, Rhode Island police officer when in the summer of 1989 he had two sexual encounters with 29-year-old Victoria Cushman. On August 11, 1989, Cushman was found dead in her Warwick apartment. She

had been bludgeoned to death with a 17-pound fire extinguisher.

Initial suspicion that Hornoff might be Cushman's killer was fueled when he denied to Warwick police detectives that they had been anything other than friends. The detectives knew otherwise, and within an hour Hornoff changed his story and acknowledged their two sexual encounters.

Hornoff's alibi was that he was at a party with his wife and friends the night of

### Hornoff cont. on p. 11

### Tankleff Wins Leave to Appeal

In May 2006, Justice Reinaldo Rivera of the Appellate Division, Second Department, granted leave to appeal on the main motion to vacate the conviction. Appeal was also granted on the deprived indifference motion. The DNA motion will be heard by the appellate court, because there is an automatic right to appeal on DNA issues. Appeal was denied on the disqualification motion. The decision can be found at [www.courts.state.ny.us/re...5-2006.htm](http://www.courts.state.ny.us/re...5-2006.htm). Judge Rivera's actions mean that a panel of judges will review the case.

Motions, rebuttals and oral arguments are likely to continue until February 2007 at the earliest. The Appellate Division may not rule until early summer 2007. Even then it's possible that the case may end up in the State Court of Appeals. By the time the issues are resolved in state court, even if just in this latest bout, twenty years may have elapsed since the Tankleff murders.

### Tankleff Still Imprisoned

Thus far, Marty Tankleff remains wrongly convicted and imprisoned. Now in his mid-thirties, he is bulkier and has less hair than he did when he first left the courthouse in handcuffs. He has served most of his sentence in rock-hard Clinton Correctional Facility near the Canadian border, but in 2005 was moved to Great Meadow C.F. Over the years he has become one of the sharpest jailhouse lawyers in New York, and unlike many other wrongfully convicted prisoners, his spirit remains strong and he is still confident he will be exonerated. Over the years, he has managed to make and keep an amazing number of friends and supporters. But he still locked up.

Jerry Steuerman lives the good life in a gated community in Florida. Joey Creedon continues to roam the streets of Long Island. McCready is enjoying his retirement

in South Carolina. And Tom Spota does his best to protect them all, and himself, trying to ensure that what they all did back in the old days doesn't come back to haunt them.

Although the old Republican political machine no longer rules Suffolk County with a steel grip, and many of the mobsters (including John Gotti) and political scoundrels who haunted the scene in the 1980s are either dead or retired, and coke's boom era has tapered off a bit, innocent victims of the old corrupt law enforcement system (including Marty Tankleff) remain locked up for crimes they didn't commit, all these years later. The feds and the state do nothing to intervene; they just let nature take its course.

### "Chinatown" Syndrome

Like an East Coast, present-day version of "Chinatown," Suffolk's a place that contains some awfully dark secrets. As Noah Cross says in the movie, "Politicians, ugly buildings and whores all get respectable if they last long enough."

This is a drama that is still unfolding, and the final unscripted scenes haven't yet been acted out.

Stay tuned.

In the end, Marty Tankleff may go free — and others may take his place.

Scott Christianson, Ph.D., a longtime investigative reporter and former New York state criminal justice official, has written about the Tankleff case for *The New York Times* and *Newsday*. One of his books, *Innocent: Inside Wrongful Conviction Cases* (NYU Press, 2004), is scheduled to be reissued in paperback in November 2006. *Innocent: Inside Wrongful Conviction Cases* is available from Justice:Denied's Bookshop at, <http://justicedenied.org/books.html>



## Hornoff cont. from p. 10

Cushman's murder. People at the party confirmed Hornoff's presence.

The grand jury that considered the evidence was dismissed without indicting him. The Rhode Island State Patrol took over the murder investigation in 1991. After Hornoff was indicted in December 1994, more than five years after Cushman's murder, he was fired by the Warwick Police Department.

During Hornoff's 1996 trial the prosecution brushed aside his alibi by claiming he slipped away from the party, murdered Cushman, and returned without anyone noticing either his absence, or anything unusual about the condition of his clothing. They ignored the fact that something would be visible if he had just committed a brutal and bloody murder with a fire extinguisher. His initial claim of having only been friends with Cushman was presented as circumstantial evidence that he tried to cover-up murdering her.

After the jury accepted the prosecution's argument and convicted Hornoff of murder, he told the packed courtroom at his sentencing: "Am I guilty of something? Yes I am. I broke my sacred wedding vows, and for that I will never forgive myself."<sup>1</sup>

Sentenced to life in prison, the Rhode Island Supreme Court unanimously dismissed Hornoff's arguments when it upheld his conviction in 1999. That Court confidently stated, "For the foregoing reasons, the defendant's appeal is denied and dismissed and the judgment of conviction is affirmed."<sup>2</sup> Hornoff was slated to spend the rest of his life in prison without the miraculous discovery of new exculpatory evidence.

That is exactly what happened on Friday, November 1, 2002, when 45-year-old carpenter Todd Barry walked into the office of the Rhode Island Attorney General and confessed to murdering Cushman. Barry said he was consumed with guilt over an innocent man spending his life in prison for something Barry had done. After the AG's office spent the weekend comparing Barry's confession with the known evidence and facts of the case, some of which had not been publicly disclosed, he was charged on Monday, November 4 with Cushman's murder.

The degree to which Cushman's murder investigation was mishandled is indicated by the facts pointing to Barry as a suspect when Hornoff was prosecuted for her murder. Barry lived near her, he had dated her off and on for more than a year, his name and telephone number was near the front of her Rolodex

seized by police from her home, and he was known to her friends. Yet, not only was Barry never considered a suspect, he was never even questioned about her murder, not by the Warwick PD nor by the state police.

Almost fourteen years after the fact, and only after Barry had confessed, a prosecutor publicly acknowledged, "The two had met in the summer of 1988 and developed ... "an on-again, off-again relationship" that was "primarily sexual."<sup>3</sup> Yet in spite of the trail a mile wide leading straight to Barry, he was home free once law enforcement officials erroneously decided that Hornoff was Cushman's killer. At that point all meaningful investigation into Cushman's murder ended.

Hornoff was freed on bail five days after Barry confessed to Cushman's murder. He had been wrongly imprisoned for 6 years, 4 months and 18 days. He literally had nothing but the clothes on his back. His home, his career, his possessions, and his wife who divorced him in 1996 while he was in prison, were all gone, and his three sons had been deprived of their father for over six years.

When the murder charge was dismissed on January 7, 2003, Rhode Island Attorney General Sheldon Whitehouse tried to deflect attention away from the mishandling of Hornoff's case by blaming him for his own wrongful conviction. Whitehouse said Hornoff shouldn't have made the sort of "misstatements" to police typical of someone "who is trying to hide something."<sup>4</sup> Yet the police knew all Hornoff was trying to hide was his two intimate encounters with Cushman from his wife.

In response to a lawsuit Hornoff filed in state court against the City of Warwick, in January and March 2004 respectively, a Superior Court judge ordered Hornoff's reinstatement to the Warwick PD, and awarded him back pay of \$507,591. The city obtained a stay pending its appeal of those decisions to the Rhode Island Supreme Court.

On October 21, 2005, Hornoff filed a 12-count, 32-page civil rights lawsuit in U.S. District Court in Providence, Rhode Island. The defendants were the City of Warwick, the State of Rhode Island, the RI State Police, two officers each from the Warwick PD and the State Police, and a total of 30 John and Jane Does whose identities were then unknown.<sup>5</sup> The lawsuit stated in part:

"In or about 1991, due to the documented ineptitude of the Warwick Police Department, the State Police were asked to assist in investigating the 1989 Cushman murder. ... The State Police worked with

'liaison' police officers from Warwick and, together, they began building a false case against Hornoff... Only by knowingly or recklessly destroying, suppressing and ignoring key pieces of evidence, intimidating and coercing witnesses, offering false evidence, using improper investigatory techniques and committing other misdeeds were the State of Rhode Island, the City of Warwick and various individuals able to convince a jury that Hornoff was guilty of a murder he did not commit."<sup>6</sup>

The lawsuit also alleged that because of Hornoff's wrongful imprisonment he was suffering from post-traumatic stress disorder, and back and hip problems caused by his mistreatment that included being housed in isolation naked. The lawsuit sought unspecified compensatory and punitive damages, and attorney fees.

A global settlement of the state and federal lawsuits was reached on August 15, 2006, between Hornoff and the City of Warwick. The city agreed to pay Hornoff a lump sum of \$600,000 to settle the federal lawsuit, and a work-related disability pension guaranteeing him a tax-free \$47,000 a year to settle the state suit. The pension payments are retroactive to July 18, 2006.

Under the settlement's terms neither the city nor its two detectives admitted wrongdoing. Warwick's Mayor Scott Avedisian said, "I hope that this bad chapter of city history is finally behind us, and I wish Mr. Hornoff all the best."<sup>7</sup>

The 44-year-old Hornoff will not receive any of the settlement money until a Family Court judge determines how much of the lump sum payment and the yearly pension his former wife is entitled to. She is seeking half of the settlement.

As of September 2006 the RI State Patrol has declined to settle Hornoff's federal lawsuit.

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4 Man To Be Freed On Murder Rap, by Douglas Hadden, *Pawtucket Times*, November 5, 2002.

5 Hornoff Files Civil Rights Suit, by Kelly Smith, *Warwick Beacon*, November 3, 2005.

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7 Hornoff, city settle suits in wrongful imprisonment, by Daniel Barbarisi, *The Providence Journal*, August 17, 2006.





Ken Marsh after compensation award

## Ken Marsh Awarded \$756k For 21 Years Wrongful Imprisonment

By JD Staff

Twenty three years after Ken Marsh was wrongly convicted in San Diego of murdering his girlfriend's two-year-old son, California Governor Arnold Schwarzenegger signed legislation on March 23, 2006, awarding him \$756,900 in compensation for the 21 years he was imprisoned. It was the largest award made under California's compensation statute (Cal Penal Code §§ 4900 to 4906) that awards \$100 per day of wrongful imprisonment to a former prisoner able to prove by a preponderance of the evidence that he or she did nothing to "contribute to the bringing about" of his or her arrest or conviction.

Marsh, now 51, was convicted in November 1983 of murdering young Phillip Buell and sentenced to life in prison. Marsh claimed he had found Phillip injured after he had fallen onto the fireplace hearth from the back of a couch. Although San Diego Police Department detectives concluded Phillip's death was accidental from a fall, 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. The jury relied on the testimony of those doctors to convict Marsh.

After more than 20 years of support by Phillip's mother, Brenda, and years of pro bono representation by Escondido, CA attorney Tracy Emblem, on August 10, 2004, Marsh's conviction was vacated and he was released from prison after his state habeas corpus petition 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.

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After Marsh's release he filed a claim for restitution under California's wrongful conviction compensation statute. Based on his 7,569 days of imprisonment, his claim totaled \$756,900.

California Attorney General Bill Lockyer opposed Marsh's claim. A hearing to determine if Marsh met the statute's threshold for making a claim began on December 5, 2005. The State was represented by Deputy AG Dutton, and after four days of hearing medical and eyewitness evidence that Phillip's injuries were not caused by Marsh, Dutton conceded that Marsh was "factually innocent," and thus had met his burden of proof under the statute to qualify for compensation.<sup>1</sup>

The hearing officer subsequently wrote a 12-page decision finding that Marsh had proved by a preponderance of the evidence that he did not murder Phillip Buell. He recommended that the state Victim Compensation and Government Claims Board award Marsh \$756,900.

On January 19, 2006, the state board voted 3-0 in support of the compensation recommendation. The board's recommendation then went to the state legislature, which was required to authorize the payment from the state's general fund. The legislature approved the payment, and Governor Schwarzenegger signed the bill on March 23, 2006.

Included in the same bill was authorization to pay \$328,000 to Peter Rose for the 9-½ years he was imprisoned after his 1994 wrongful conviction of raping a 13-year-old girl in Lodi, California. Released in 2004, the Victim Compensation and Government Claims Board voted unanimously on October 20, 2005, to award the money to Rose. (For details of Rose's case, see, CA Awards Peter Rose \$328,000 For Ten Years Wrongful Imprisonment, *Justice:Denied*, Issue 30, Fall 2005, p.8.)

Marsh and Rose are both seeking money damages in pending federal civil rights lawsuits that name as defendants, persons and organizations responsible for their respective wrongful conviction and imprisonment.

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. Ken Marsh is "Factually Innocent" Says California's AG, *Justice:Denied*, Issue 30, Fall 2005, p. 15.

Sources:  
Governor Signs Bill — \$1M To Wrongly Convicted, AP story, *CBS 5*, San Francisco-Oakland, CA, March 23, 2006.

Endnote:  
1 Email from Tracy Emblem to Hans Sherrer, December 10, 2005. Ms. Emblem was one of Ken Marsh's attorneys.

## Man Sentenced To 53 Years For Murder Wrongly Pinned On Ray Krone

Ray Krone was convicted in 1992 and sentenced to death for Kim Ancona's 1991 murder in Phoenix, Arizona. He spent three years on Arizona's death row before the Arizona Supreme Court overturned his conviction. Krone was again convicted after a 1996 retrial, and sentenced to life in prison. He was released in April 2002 after DNA testing of blood and saliva found on Ancona's body and clothing conclusively proved he wasn't her assailant. In 2005 Krone settled federal civil rights lawsuits against the City of Phoenix and Maricopa County for a total of \$4.4 million.

The DNA testing that excluded Krone implicated another man, Kenneth Phillips Jr. At the time of Ancona's murder he lived 600 yards from where her body was found, and he was on probation for breaking into a neighboring woman's apartment and choking her while threatening to kill her. Twenty days after Ancona's murder, Phillips was arrested for assaulting a 7-year-old girl. Phillips was imprisoned in Arizona for sexually assaulting and choking the girl at the time of Krone's release.

Maricopa County prosecutors eventually charged Phillips with sexually assaulting Ancona, and sought the death penalty for her first-degree murder. Phillips then entered into a plea agreement. In exchange for his June 29, 2006, guilty pleas to sexual assault and first-degree murder, the prosecution dropped their request for the death penalty.

On August 18, 2006, Phillips was sentenced in Maricopa County Superior Court to a minimum of 25 years in prison for Ancona's murder. He was also sentenced to a consecutive 28-year prison term for her sexual assault. So Phillips, 40, will not be eligible for parole until he is 93 years old. During the sentencing hearing Phillips said, "If I could bring the person back, I would. I would take her place. I'm sorry." He made no comment about sitting by as Krone was sent to death row for the crimes Phillips had committed.

Krone was not present at Phillips' sentencing, but prior to the hearing he said he "did not feel that Phillips should get the death penalty no matter what, simply because the system executes too many innocent people."

Sources:  
Phoenix man gets prison in slaying previously pinned on wrong man, by Paul Davenport (AP), *Tucson Citizen*, August 18, 2006. See also, Ray Krone Settles For \$4.4 Million After Two Wrongful Murder Convictions, *Justice:Denied* Issue 32, Spring 2006. Twice Wrongly Convicted of Murder — Ray Krone Is Set Free After 10 Years, *Justice:Denied*, Vol. 2, Issue 9.

# \$3.2 Million To Stephan Cowans For Conviction Based On False Fingerprint Evidence

By Douglas Scott Arey



Stephan Cowans  
in May 2004

In a victory by the New England Innocence Project (NEIP), new DNA evidence first led to the reinvestigation of Stephan Cowans' 1988 criminal case, then his freedom in January 2004 after 6-1/2 years of wrongful imprisonment, and finally a \$3.2 million settlement of his federal civil rights lawsuit 2-1/2 years after his release.

On May 30, 1997, Boston Police Sergeant Gregory Gallagher was shot in his leg with his own gun during a confrontation and scuffle in a backyard. The perpetrator fled into a nearby residence where he held a mother and two children hostage. Before fleeing the house the perpetrator drank water from a glass cup. Boston police fingerprint analysts Dennis LeBlanc and Rosemary McLaughlin both identified Cowans' as the source of a fingerprint lifted from that cup.

In 1998 Cowans was convicted of armed assault with intent to murder, home invasion and related charges. The prosecution's key evidence was LeBlanc and McLaughlin's testimony that Cowans' fingerprint matched the perpetrator's recovered from the cup. Sergeant Gallagher confirmed their testimony by identifying Cowans as his assailant. Cowans was sentenced to 35 to 50 years in prison.

In 2003 NEIP lawyers requested DNA testing on a sweatshirt and baseball cap the shooter had discarded before fleeing. The DNA tests excluded Cowans. His convictions were then overturned on the basis of the new exculpatory evidence. The Suffolk County District Attorney's office vowed to retry Cowans, but discovered two days later that the fingerprint evidence also failed to match Cowans as originally claimed by the police analysts. At that point the District Attorney's office reversed its position and dismissed the charges against Cowans.

Cowans contracted hepatitis C while he was in prison. Further, his mother passed and his request to attend her funeral was refused. In a January 2004 interview with the *Boston Globe* after being exonerated by the exclusionary DNA and fingerprint evidence,

Cowans attributed his release to persistence, noting, "I was one who never gave up on myself."

The case put the BPD's fingerprint identification unit under a microscope. In October 2004 a private consultant issued a scathing report that concluded the BPD's fingerprint

analysts were poorly trained, had low performance standards, and weren't keeping up with advanced fingerprinting techniques. Moreover, according to an outside forensics team consulted by the BPD, LeBlanc knew that the fingerprint didn't match Cowans when he testified at Cowans' 1998 trial. This led to grand jury proceedings investigating LeBlanc and McLaughlin, but no criminal indictments resulted.

These explosive findings in turn sent shock waves through Boston's police and legal system. Police Commissioner Kathleen O'Toole was eventually compelled to close the fingerprint unit for more than a year. It was reopened only after a complete overhaul that included sweeping changes in how the fingerprint evidence is collected and analyzed.

A veteran analyst now supervises the fingerprint unit under strict protocols and standards in a state-of-the-art facility with six seasoned analysts, according to BPD spokeswoman Elaine Driscoll, who said, "They took great pains to guard against ever being faced with a similar situation." Driscoll also noted all analysts, including police officers, are now subject to continuing education and training requirements, with yearly proficiency tests.

Interestingly, Cowans monetary civil settlement does not cover claims against the two analysts who wrongly matched the shooter's fingerprint to Cowans. Kenneth Anderson, the lawyer representing LeBlanc, said the city is trying to "scapegoat" LeBlanc and McLaughlin by implying they were rogue officers who acted on their own.

Anderson said about the lawsuit, "Certainly the defense is that a mistake was made and [LeBlanc] was working in an inadequate facility with inadequate training." McLaughlin's lawyer, Fran Robinson, said she "had minimal involvement" in the case and opined that the city settlement should have covered the technician's actions. Cowans' civil claims against LeBlanc and McLaughlin remain unresolved as of late September 2006.

Massachusetts Attorney General Thomas Reilly agrees with the lawyers for the two fingerprint analysts, blaming Cowans' mis-

identifications on "personal and systemic" failures. These rationalizations for the BPD's errors that resulted in Cowans' wrongful conviction pale when contrasted with the fact that Boston has now paid out more than \$12 million in a little over a year to make amends for various misdeeds of its police officers.

Boston recently agreed to pay \$5.1 million to the family of Victoria Snellgrove, who was killed by the police in a Red Sox post-pennant clinching melee, and smaller sums to two others injured the same evening.

In March 2006 the City of Boston also agreed to a \$3.2 million settlement with Neil Miller, who was wrongfully convicted for rape and served 10 years in prison. The rape was linked to two other cases that Miller could not have committed, but the BPD never informed the prosecutor or defense attorneys about the links to those cases, that DNA tests eventually proved another man had committed. Howard Friedman, the lawyer who represented Miller, said these recent settlements are significant because proving liability for a federal civil rights violation is difficult in these types of cases.

As for Cowans, his release has been tempered by a continuing series of brushes with the legal system. In February 2004, a month after his release, Massachusetts State Police arrested him for assault and battery and breaking and entering in the nighttime; he was charged with breaking into his former girlfriend's house and beating her with a boot. In addition, Cowans was charged with operating a motor vehicle with a suspended license in April 2006.

Although Cowans has had a difficult personal readjustment after his release from almost seven years of wrongful imprisonment, the fallout from his case has had the positive effect of causing significant changes in the handling of fingerprints and their analysis by the Boston PD.

#### Sources:

Boston agrees to pay \$3.2 million to Stephan Cowans, *The Phoenix*, August 10, 2006.  
\$3.2 million award in wrongful jailing, *Boston Globe*, August 11, 2006.



### Californians Against Jessica's Law

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# Review Of Factors In The Case Of *Commonwealth Of Massachusetts v. Benjamin LaGuer* That Suggest It May Represent A Miscarriage of Justice

The following is a general review of some key factors suggesting a miscarriage of justice occurred when Benjamin LaGuer was convicted of aggravated rape, robbery, burglary, and assault and battery, related to events that allegedly occurred in the Leominster, Massachusetts apartment of 59-year-old Lennice Plante during the late evening of July 12, and early morning of July 13, 1983. <sup>1</sup> The eleven factors reviewed are:

1. LaGuer's Identification
2. Stolen Items
3. Juror Racism
4. Fingerprint Evidence
5. Blood Evidence
6. Sperm Evidence
7. DNA Evidence
8. Plante's Mental State
9. Missing Evidence
10. Police Misconduct/Criminality
11. Prosecutorial Misconduct

## 1. LaGuer's Identification

There are no independent witnesses placing Benjamin LaGuer in Lennice Plante's apartment during the time of the incident, even though she claimed she was assaulted over a continuous period of eight hours.

After a neighbor found Plante in her apartment with her ankles and wrists respectively bound with a hairdryer cord and telephone wire, Plante told police on the scene that she could not identify the lone man responsible for what she said was an eight-hour sexual assault that included vaginal and anal intercourse. She vaguely described the man as "very dark skinned," and as a "black man very short and small in build." Plante also told several medical personnel at the hospital she was taken to that she could not identify her alleged assailant.

Plante later identified LaGuer, but there are suspicions that she did so after being shown only a picture of him, and not a photo array of multiple possible suspects. The questionable circumstances surrounding LaGuer's identification are supported by the fact that he did not match any detail of Plante's description of her lone assailant: he is not "short", but at least six inches taller than Plante; he is not "very dark skinned", but has a light-olive skinned complexion; and he was not "small in build," but had a muscular build after his discharge three weeks earlier from

the Army. Additionally, Plante said her assailant spoke clearly and without an accent, while LaGuer had spoken with a severe stutter since childhood and he had a distinct ethnic accent. Neither did Plante's description of her assailant include LaGuer's tattoos or scars.

In addition, Plante denied ever telling police that she saw her assailant go into or out of LaGuer's apartment, even though police made that claim in an affidavit used to obtain a warrant to search LaGuer's apartment.

The veracity of Plante's identification of LaGuer during his trial is undermined by the fact that he was the only non-white sitting at the defense table and she had already seen at least one picture of him. Furthermore, her poor eyesight may have been the reason she initially told police and hospital personnel that she couldn't identify her assailant. Fourteen years after LaGuer's trial the prosecutor, James Lemire, told a Criminal Law class he taught at Assumption College in Worcester, Massachusetts, "the victim [Plante] had poor vision, she could not see close up or far away." (Affidavit of Michelle L. Chafitz, April 10, 2001, ¶9)

## 2. Stolen Items

Plante told police investigators that the intruder removed two rings from her left hand and her handbag was missing from her apartment. Neither the missing rings nor the handbag were found when LaGuer's apartment was searched.

## 3. Juror Racism

There were no non-whites on LaGuer's jury. After LaGuer's conviction evidence surfaced that there was significant racial prejudice against LaGuer amongst the jurors. A July 18, 1988, affidavit by juror William P. Nowick indicated the judgment of LaGuer's guilt by some jurors was based on ethnic stereotyping and a negative attitude toward his ethnicity: not on a reasoned consideration of the prosecution's evidence. These allegations eventually resulted in a remand in 1991 by the Supreme Judicial Court of Massachusetts for a hearing before the trial judge to determine the veracity of the allegations about juror prejudice. (*Commonwealth v Benjamin LaGuer*, 571 N.E. 2d 371, 410 Mass. 89 (05-14-91)) Although Nowick and a man publicly identified only as Juror X both recollected that jurors made prejudicial ethnic statements about LaGuer, the judge ruled against ordering

Massachusetts State Representative Ellen Story, 3rd Hampshire District, requested that The Justice Institute analyze the case of *Commonwealth of Massachusetts v. Benjamin LaGuer* (Case No. 83-103391), which concerns events that allegedly occurred on July 12-13, 1983, in the Leominster, Massachusetts apartment of 59-year-old Lennice Plante. This is the report of that analysis that was sent to Rep. Story on September 6, 2006.

a new trial. Even though the Supreme Judicial Court had indicated that evidence of juror bias entitled LaGuer to a new trial, in 1994 the Appeals Court of Massachusetts upheld the judge's denial of a new trial. (*Commonwealth v Benjamin LaGuer*, 630 N.E.2d 618, 36 Mass. App. Ct. 310 (03/31/94). See dissent by Judge Fine). Prosecutor Lemire later confirmed the substance of the racial allegation in Norwick's affidavit, and in doing so he exposed that the prosecution had not argued in good faith against the effect of the juror prejudice on LaGuer's due process right to a fair trial. During the Criminal law class Lemire taught at Assumption College: "Mr. Lemire said there was not a lot of evidence. ... the jury did not like Mr. LaGuer because he was black." (Affidavit of Michelle L. Chafitz, April 10, 2001, ¶6)

## 4. Fingerprint Evidence

Prior to LaGuer's trial his lawyer was informed that a "small partial" fingerprint had been recovered from the telephone from which the phone cord used to tie-up Plante had been obtained. During LaGuer's trial, Detective Ronald N. Carignan described the print as insignificant "in quality." (Tr 398-399, 402)

What LaGuer's attorney wasn't told by the prosecution, was that an additional four fingerprints had been lifted from the telephone and that on July 16, 1983, one day after LaGuer had been taken into custody, a Massachusetts State Police analyst excluded him as the source of the prints. However, those four exculpatory fingerprints were not disclosed to LaGuer until more than 18 years later – in November 2001.

## 5. Blood Evidence

Although there have been different claims concerning alleged blood evidence related to the events in Plante's apartment, LaGuer's blood type "B" is not linked to the case's blood evidence.

## 6. Sperm Evidence

Plante's rape kit included her vaginal and rectal swabs collected at the hospital she was

**LaGuer cont. on page 15**

## LaGuer cont. from page 14

taken to from her apartment. A Massachusetts Department of Public Safety (MDPS) lab technician tested the vaginal and rectal swabs for the presence of seminal fluid or spermatozoa. He concluded that neither was present on the swabs, and likewise none was detected on Plante's underwear. The rectal swab also had an absence of blood. Those conclusions were confirmed by Forensic Science Associates' (FSA) DNA testing of the swabs almost two decades later. DNA testing of a swab in a container with Plante's pubic hair also tested negative for the presence of any blood or sperm. Tests of the vaginal swab did show, however, that Plante was afflicted with a serious yeast infection.

### 7. DNA Evidence

The 2001 and 2002 DNA testing by FSA of items recovered from Plante's apartment, uninventoried items seized during a search of LaGuer's apartment, and clothing police officers saw LaGuer putting on in his apartment the day he was taken into custody (July 15, 1983), has been reviewed by Dr. Theodore D. Kessis (Report to Rep. Ellen Story, dated November 1, 2005), Dean A. Wideman (Forensic Case Review: *Commonwealth of Massachusetts v. Benjamin LaGuer*, March 30, 2006), and Professor Daniel L. Hartl, Harvard Dept. of Organismic and Evolutionary Biology (Letter to Rep. Ellen Story, dated August 21, 2006). Their analyses raise serious questions about the evidentiary value of those DNA tests considering the items fractured chain of custody; the mishandling of the items by police, prosecutors, crime lab and/or FSA lab personnel; the intermixing of items collected from Plante's apartment and her rape kit with items seized from LaGuer's apartment and the clothing he was wearing when taken into custody on July 15, 1983; and the irregular procedures used to test some of those items. It is notable that in spite of the questions raised by the DNA testing procedure, LaGuer was not implicated by the individual testing of items identifiable as originating from him or Plante. As detailed by the above named experts, the complete breakdown in the reliability of the hyper-sensitive PCR DNA testing technique occurred when items of indeterminate origin were exposed to contamination by intermixing. The PCR process is so susceptible to returning a false positive due to contamination that an FSA technician's DNA was detected in one of the tested samples.

### 8. Plante's Mental State

Plante experienced a mental breakdown 14 years before the incident in her apartment,

and she underwent drug therapy for many years afterwards. The day of the incident Plante's daughter told police at the hospital that her mother "had not been right since" the breakdown. (Investigation Report by Timothy E. Monahan, July 13, 1983, p.3.). During the Criminal Law class he taught at Assumption College, prosecutor "Lemire said he thought the victim [Plante] was mentally ill." (Affidavit of Michelle L. Chafitz, April 10, 2001, ¶8)

### 9. Missing Evidence

There are at least two items of missing physical evidence found by police investigators in Plane's apartment that could possibly cast light on the identity of the intruder and/or exclude LaGuer. One is a Pepsi can with an identifiable fingerprint on it that was sent to the MDPS for examination. The report of that print's analysis has never been disclosed to LaGuer. The second item is a knife found in Plante's apartment. She said that the intruder entered holding a knife and police investigators determined that her locked door had been "jimmied" open. No report about possible fingerprints or other tests that may have been conducted on the knife has been disclosed to LaGuer, nor has any information concerning a possible investigation into where it was purchased or who may have done so. If the whereabouts of the Pepsi can and the knife is known, the prosecution is concealing that information. However, if those items implicated LaGuer it is unreasonable to think test results would not be disclosed or the items provided by the prosecution.

### 10. Police Misconduct/Criminality

Detective Carignan committed actions during his investigation of the incident in Plante's apartment that at the very least are describable as grave misconduct, and that may have crossed the line into criminality. Among these are the following:

- 1) Carignan targeted LaGuer as a suspect without any evidence he was involved, and knowing that he did not match Plante's description of her intruder. LaGuer was targeted because he lived across the hall from Plante, and the police had a two-sentence report from three years earlier (Oct. 1980) that he and several friends (including one who became a Leominster police officer) were stopped and asked about a burglary.
- 2) Carignan obtained a search warrant for LaGuer's apartment based on his evidently false claim in an affidavit that Plante said she saw her intruder go into and out of LaGuer's apartment. During her testimony Plante vigorously denied making such a statement.

3) Carignan falsely testified during his August 1983 grand jury testimony that LaGuer's apartment was the scene of Plante's assault. He also falsely testified, possibly to make Plante's injuries seem much more severe than they were, that she was found in a pool of blood, when he knew she wasn't.

4) Carignan destroyed his contemporaneous investigation notes (that included crime scene and witness interview notes) after LaGuer was taken into custody. He then composed his investigative reports from his possibly selective or contrived remembrance of what he observed and was told.

It should be noted that Carignan was not the only police officer involved in LaGuer's case who may have engaged in misconduct and/or criminality.

### 11. Prosecutorial Misconduct

Immunity from liability for virtually all prosecution related acts and the free pass trial and appellate judges invariably grant prosecutors for their prejudicial pre-trial, trial and post-trial conduct, means that most well-founded accusations of prosecutorial misconduct have the effect of being little more than expressions of moral and ethical outrage. Regardless of the likely reluctance of a judge to hold LaGuer's prosecutors accountable, their concealment of the exculpatory fingerprint evidence from LaGuer for 18 years, and their numerous misstatements of fact related to court proceedings and filings since 1983 have directly contributed to obstructing justice by sabotaging discovery of the truth about what happened in Plante's apartment on July 12-13, 1983. The gravity of the prosecution's obstruction is further indicated by prosecutor Lemire's 1998 statement that "he questioned Mr. LaGuer's guilt." (Affidavit of Michelle L. Chafitz, April 10, 2001, ¶8)

### Summary of the Eleven Factors

- Benjamin LaGuer was not credibly identified as the intruder into Lennice Plante's apartment on July 12-13, 1983.
- Several of the jurors, and possibly more, decided on LaGuer's guilt based on his ethnicity and racial stereotyping, and not after considering whether the prosecution had met its burden of proving him guilty beyond a reasonable doubt.
- None of the items stolen from Plante was found in LaGuer's possession.

LaGuer cont. on page 16

## LaGuer cont. from page 15

- Prosecutors failed to disclose for 18 years that four of the lone intruder's fingerprints do not match LaGuer.
- The blood evidence recovered from Plante's apartment does not match LaGuer's blood type.
- No sperm was detected on Plante's vaginal, rectal or public hair swabs, or on her panties, and no blood was detected on the rectal swab.
- The DNA testing of segregated evidence does not implicate LaGuer, and the testing of a mixture of items containing LaGuer's and/or Plante's DNA does not produce an evidentially reliable result.
- Plante had serious mental problems for many years preceding the incident in her apartment on July 12-13, 1983, and her state of mind may have contributed to her embellishment of that incident by claiming she had been sexually assaulted for eight hours. It may also have heightened her susceptibility to agreeing when shown LaGuer's picture that he was her assailant, even though he didn't match any particular of her previous vague description to the police, and she had previously told the police and hospital personnel that she couldn't identify the intruder.
- Evidence from Plante's apartment is missing that could possibly exclude LaGuer and/or identify Plante's intruder, and if fingerprint or forensic testing of that evidence has been conducted, the results have not been disclosed to LaGuer.
- After selecting LaGuer as a suspect because of his proximity to Plante's apartment and a vague police report three years earlier concerning an unrelated property crime, one or more police officers fabricated evidence and/or testimony to implicate LaGuer as the intruder.
- Prosecutors may have pursued charges against LaGuer knowing they had no reasonable basis to believe he was the intruder into Plante's apartment.

### Conclusions

Benjamin LaGuer was excluded as the source of the fingerprints on the telephone from which the cord used to bind Lennice Plante's wrists was obtained. The source of those fingerprints was the intruder into Plante's apartment, and that person was not LaGuer. That explains why Plante's

identification of LaGuer was fraught with suspicious aspects and the case's physical evidence does not implicate him.

The DNA testing in LaGuer's case conducted in 2001 and 2002 is illustrative that the most advanced scientific techniques cannot be assumed to generate infallibly reliable results. Particularly due to its level of sophistication, the outcome of a DNA test is particularly subject to the old adage: 'garbage in, garbage out.' For any number of reasons, a DNA test can accidentally, or even be deliberately sabotaged to produce a false positive.

LaGuer's presumption of innocence and his due process right to a fair trial was subverted by the prosecution's concealment, and possible continued concealment of evidence supporting that he was not the intruder into Plante's apartment on July 12-13, 1983. Compounding that situation is the insidious effect of racial prejudice on LaGuer's right to a fair trial, which makes his conviction a late twentieth-century version of a nineteenth-century lynching.

Another disturbing aspect to LaGuer's conviction is the physical evidence contradicts Plante's claim that she was sexually assaulted vaginally and anally, much less over an eight-hour period of time. Consequently, the evidence supports that LaGuer was convicted of an aggravated rape that never happened.

If LaGuer was represented by competent counsel during a retrial it is nigh near inconceivable that reasonable and racially unbiased jurors would not lack reasonable doubt and vote to acquit him, after exposure to the new evidence, and the evidence as a whole.

Opposition by the prosecution to the granting of a retrial to LaGuer, and the likely subsequent dismissal of the charges against him, cannot reasonably be attributed to the prosecution's genuine belief in his guilt. It is not reasonable to think LaGuer's prosecutors are unaware the credible evidence of his guilt is on par with evidence that the Earth is flat.

The prosecution's opposition to LaGuer's retrial may be due to a combination of two factors. One, is their abhorrence to admit that LaGuer was not just wrongly convicted, but that he should not even have been considered a serious suspect. Two, is that dismissal of the charges against LaGuer opens up the prosecution's client government entity to significant civil liability, as well as exposing other government entities, agencies and employees to possible civil liability. Thus, as

long as LaGuer's conviction remains intact, the prosecution does not have to experience embarrassment or expose to civil liability the government entities, agencies and employees responsible for LaGuer's predicament of being imprisoned for 23 years for crimes the evidence substantiates were committed by someone else.

The actual perpetrator, that "someone else," was effectively granted a free pass by the prosecution from accountability for his crimes.

After reviewing a cross-section of the factors involved in Benjamin LaGuer's case, the most reasonable conclusion is his conviction was not merely a tragic error by an imperfect system, but it was a grave and avoidable miscarriage of justice.

The Justice Institute  
By Hans Sherrer, President  
September 6, 2006

### Endnote:

1 This Review is in response to a request by Massachusetts State Representative Ellen Story, 3rd Hampshire District, to analysis the case of *Commonwealth of Massachusetts v. Benjamin LaGuer* (Case No. 83-103391) which concerns events that allegedly occurred on July 12-13, 1983, in the Leominster, Massachusetts apartment of 59-year-old Lennice Plante. The observations and opinions outlined in this review are based on case information which includes, but is not limited to, the timeline of events, police reports, statements, affidavits, evidence inventory reports, appellate court rulings, court filings, and forensic laboratory reports.



## 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* Issue 27, Winter 2005.

On October 6, 2006, Ohio Attorney General Jim Petro requested that Governor Bob Taft order a fifth stay of Spirko's execution. Petro's request was for a four-month stay of Spirko's execution date of November 29, 2006. A.G. Petro requested the stay to allow time to complete DNA testing of the painting tarp and duct tape wrapped around Mottinger's body, and 30 to 100 cigarette butts found near her body. for the presence of the killer's DNA. A witness has identified the killer is a house painter who the witness also claims was the tarp's owner.

If Taft agrees to the delay, it means consideration of clemency for Spirko would be by whoever is elected governor in November 2006 to replace Taft, who leaves office in January 2007.



# Grace Sherwood – The “Witch of Pungo” Pardoned After 300 years

By Denise Watson Batts  
*The Virginian-Pilot*

On July 10, 1706, Grace Sherwood stood accused of witchcraft. Her thumbs were tied to her toes, and she was thrown into the Lynnhaven River. When she bobbed to the surface – thus rejected by the “pure” water – she was placed in prison.

Virginia Beach resident Belinda Nash has championed restoration of Grace Sherwood’s good name for more than 20 years.

On the 300th anniversary of her trial, Gov. Timothy M. Kaine exonerated Grace Sherwood, who had been convicted of witchcraft.



Belinda Nash

Virginia Beach Mayor Meyera E. Oberndorf read the announcement to the 40 or so who clustered at Ferry Plantation House for a reenactment of the trial, shortly before proclaiming Grace Sherwood Day.

“With 300 years of hindsight, we all certainly can agree that trial by water is an injustice,” Oberndorf read from the governor’s faxed letter. “We also can celebrate the fact that a woman’s equality is constitutionally protected today, and women have the freedom to pursue their hopes and dreams ... I am pleased to officially restore the good name of Grace Sherwood.”

Kevin Hall, the governor’s press secretary, said the governor doesn’t have to respond to all pardon requests, but this one caught his attention. In addition to the anniversary hook, Virginia Beach resident Belinda Nash made a passionate plea on Sherwood’s behalf.

“Nash is persistent and persuasive,” Hall said by phone on the road with the governor. “She made a compelling case.”

Nash, a volunteer at Ferry and a Sherwood champion for more than 20 years, stood glowing near the mayor as he read the announcement. For years, Nash has spoken to school and civic league groups about Sherwood’s life, of how the independent woman was misunderstood and eventually dunked in the Lynnhaven River to “test” her for sorcery. Nash appealed to the governor a few months ago, and as July 10 approached,

began calling his office every two hours to get an answer in time for the anniversary.

“This is so exciting,” Nash said. “You can’t believe how relieved I feel for Grace.”

Nash latched onto Sherwood shortly after moving to Virginia Beach in 1982 and hearing about Witchduck Point on the Western Branch of the Lynnhaven River. She heard the story and became intrigued.

Sherwood had gone to trial not once, but several times. Years before the famous trial, neighbors accused Sherwood of such tricks as “blighting” their cotton crop. She and her husband responded by charging them with slander and defamation. When Sherwood’s husband died in 1701, she did not remarry as many would have, but worked the land with their three sons.

Sherwood lived near the water and could swim, Nash said. She often wore pants, which – Nash believes – was probably viewed as scandalous for the time.

So, on July 10, 1706, Sherwood’s thumbs were tied to her toes, and she was thrown into the river. The theory, Nash said, was that if she was innocent she would sink; if she was a witch, the waters would reject her evil spirit and she would float.

Sherwood bobbed to the surface.

Records appear to show that Sherwood was jailed for eight years. She eventually returned to her land and lived a quiet life until her death in 1740, at age 80.

Nash has recognized the anniversary of the trial for the past two decades, initially by simply tolling the bell of Old Donation Episcopal.



Grace Sherwood

Yesterday’s reenactment was the sixth in which Nash corralled friends and family to don wigs and period clothing, including the group chanting, “Duck the witch!” as an actress climbed into a boat, pulled next to Ferry’s porch.

Following the trial, Nash unveiled an almost life-sized photo of the Grace Sherwood statue, which she began raising money for seven years ago, hoping to have it in place by the anniversary. A lack of money and a site have delayed the work.

She’s hoping that news of Sherwood’s exoneration will make a difference in finding a site for it. She believes some groups nixed the

statue because Sherwood carried the title of witch.

“Since she’s no longer a witch, I believe we’ll have some turning around,” Nash said. “We have a statue of a free woman.”

Reprinted with permission. Originally published as: “Witch of Pungo” pardoned by governor after 300 years, By Denise Watson Batts, *The Virginian-Pilot*, July 11, 2006.



Life-sized statue of Grace Sherwood

Belinda Nash told *Justice: Denied* that the life-sized bronze statue of Grace Sherwood was delivered to Virginia Beach, Virginia on September 29, 2006. She said the statute’s \$92,000 cost was paid through donations. Not only did Nash work for more than 20 years to clear the stain from Sherwood’s name of being a convicted witch, but she and her husband got the ball rolling by donating the first \$17,000 towards the statute’s cost.

Since Sherwood’s July pardon by Virginia Governor Kaine, resistance by people in Virginia Beach to providing a site for the statute evaporated. As of late September 2006 Nash was deciding between the two final locations under consideration.

The statute was created by world-renowned sculptor Robert Cunningham of Culver City, California. Nash explained the statute was designed with a racoon at Sherwood’s feet, because she was known as a friend to children and kind to animals. As soon as the statute’s location is selected, and its marble base is built, it will be erected at its final resting place. The statute’s public dedication will be the culmination of Nash’s seven year campaign to make her dream of a statute commemorating Grace Sherwood a reality.

Nash has written a book, *A Carpenter’s Daughter or a Witch?*, based on what she learned about Sherwood during the more than 20 years it took to clear her name. She said it was difficult condensing the wheelbarrow full of material she has accumulated into several hundred pages of text. Liberally illustrated with pictures, the book is expected to be published by the end of 2006.

To people outside Virginia, Grace Sherwood’s pardon and statute may seem to be much ado about nothing, but Nash said the attention is deserved because her trial 300 years ago is the most famous in Virginia’s history.

## John Duval Dies Six Years After Exoneration

In 1973 John Duval and Betty Tyson were convicted of murdering a businessman visiting Rochester, New York.

There was no physical evidence or eyewitnesses linking and Duval and Tyson to the murder. Their convictions were based on confessions that both later retracted, saying they were beaten out of them.

In 1998 Tyson's conviction was overturned on the basis of the prosecution's failure to disclose two witnesses to Tyson and Duval prior to their trial. One of the witnesses saw Tyson being beaten by police interrogators, and the other excluded them from being with the murdered man. The prosecution also secretly jailed the two witnesses for seven months until after Tyson and Duval's trial, so their lawyers wouldn't learn of the witnesses existence. It was also discovered that the detective who interrogated Tyson and Duval had been accused of physical brutality in numerous cases.

The prosecution declined to retry Tyson and she was released after 25 years wrongful imprisonment. A suit she filed against the city of Rochester for violation of her civil rights was settled for \$1.25 million.

Duval's conviction was overturned on the same new evidence that freed Tyson. However, prior to discovery of the concealed witnesses, Duval had told the Parole Board on two occasions that he was guilty. Based on those two statements, the prosecution decided to retry Duval. He was released on bail in 1999. At his February 2000 retrial Duval testified that he falsely told the Parole Board he was guilty because he thought it was what they wanted to hear before they would agree to his release on parole.

After his acquittal, Duval sued Rochester for violation of his civil rights and wrongful imprisonment for 26 years. The city was successful in getting the suit dismissed based on his two admissions of guilt to the Parole Board.

Duval continued living in Rochester, working at low-paying odd jobs. His prospects were looking up after he received an associate's degree in accounting from Rochester Business Institute in September 2005. Those hopes were short-lived. Four months later, on January 19, 2006, a friend found him dead in his apartment. The medical examiner determined he died of natural causes. John Duval was 53-years-old.

Sources: Man wrongfully imprisoned 26 years Is found dead, By Gary Craig, *Rochester Democrat and Chronicle*, January 20, 2006. Wrongfully imprisoned man didn't die bitter, By Gary Craig, *Rochester Democrat and Chronicle*, January 20, 2006.

## Ex-Prosecutor Acquitted Of Taking Bribe To Support New Trial

By JD Staff



Carl Marlinga after his acquittal on September 27, 2006.

Macomb County Prosecutor Carl Marlinga wrote a brief filed with the Michigan Supreme Court in January 2002 that acknowledged Jeffrey Moldowan "may have suffered 'actual prejudice'" from insubstantial expert bite mark testimony during his 1991 kidnapping and rape trial.<sup>1</sup>

The Court granted Moldowan's habeas petition and ordered a new trial. Moldowan was acquitted after his retrial in February 2003, and his 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. Federal prosecutors alleged that Roberts, who employed Moldowan's sister, made a bribe to Marlinga, who ran for the U.S. Congress in 2002, that was in part masked as a campaign contribution to Barcia in order to avoid federal contribution limits and reporting requirements.

In February 2005 a Detroit federal judge ruled the indictment was structurally defective for failing to detail how the defendants were linked together in what the government alleged 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.

Marlinga was re-indicted in September 2005, on two counts of bribery, one count of wire fraud, one count of making a false report to the Federal Election Commission, and one count of violating federal campaign finance laws.

Marlinga's trial began on September 13, 2006. His defense included that the charges were based on legitimate campaign contributions that were only a small fraction of the total contributions of a million dollars plus that he raised during his 2002 congressional campaign, and that he had intervened to the benefit of a defendant in at least five

cases prior to Moldowan's without any political contributions being involved.

On September 27, 2006, Marlinga was acquitted of all five counts after a two-week trial. One juror said afterwards that the federal prosecutors "showered us with evidence," but after sifting through it during two days of deliberations the jury didn't seriously consider convicting Marlinga. The jury forewoman said during closing arguments U.S. Attorney Robert Cares told the jury, "Connect the dots," but that the government failed to do exactly that with any evidence. She also said, "They put one dot here, one dot over here, but they didn't connect them."<sup>2</sup>

After Marlinga's acquittal, his one-time co-defendant Roberts said that after he was indicted federal prosecutors offered to drop the charges against him if he agreed to testify against Marlinga. When he refused, they told him they would drop the charges if he simply agreed not to testify as a defense witness. Roberts said, "I told them I couldn't testify to anything but the truth and the truth was we did nothing wrong. This is the end of four years worth of wasted taxpayer money."<sup>3</sup> Roberts said of the federal prosecutors and investigators involved in the case, "They were just trying to further their careers by bringing down a politician and a prominent businessman in Macomb County."<sup>4</sup> Roberts has written a book about his experience in drawing attention to Moldowan's case, and his subsequent investigation by the FBI and federal prosecution. The books working title is *Justice Miscarried*.

Prior to his April 2004 indictment, Marlinga had been the Macomb County Prosecutor for 20 years, and prior to that had been a federal prosecutor. There have been allegations that the prosecution of Marlinga, a Democrat, was politically motivated since after his resignation a Republican replaced him as Macomb County Prosecutor.

Having experienced what he had put thousands of people through as a prosecutor for more than 20 years, the 59-year-old Marlinga said outside the courthouse after his acquittal, "The last four years have been sheer agony. The emotional cost is not something you can possibly imagine."<sup>5</sup>

The day after his acquittal Marlinga commented "My one continuing criticism of the U.S. Attorney's Office was they had this unbelievably thin case. ... they had all of the information they needed to simply dismiss and yet

**Marlinga continued on page 19**

# Five Men Imprisoned For Four Years At Guantanamo Bay Acquitted Of Terrorism By Kuwaiti Court

By JD Staff

In the fall of 2001, the U.S. military in Afghanistan seized five Kuwaiti men. In exchange for a payment of \$10,000 each, the men had been identified by bounty hunters as Taleban fighters. The five men were Abdul Aziz Al-Shimmari, Abdullah Al-Ajmi, Adel Al-Zamel, Saad Al-Azmi and Mohamed Al-Dihani.

The five Kuwaitis were transported to Guantanamo Bay, Cuba, where they were interrogated during more than four years of imprisonment. In November 2005 the five men were released from U.S. custody and immediately deported to Kuwait, without charges being brought against any of them.

The five men were arrested upon landing in Kuwait City, and charged with:

- Joining the al-Qaeda organization on behalf of the Taleban government.
- Carrying out hostile actions against a foreign country thus harming Kuwait's political standing.
- Collecting donations for al-Wafaa, an Afghan charity the U.S. military claims provides money to al-Qaeda.
- One of the men, Abdullah Al-Ajmi, was also charged with fighting alongside the

## Marlinga continued from page 18

they persisted." When talking about the trial affect on him, Marlinga said, "It was the closest I think I will come to any mental illness."<sup>6</sup>

See previous JD articles:

Prosecutor Indicted For Bribery After Two Men Exonerated Of Kidnapping And Rape, *Justice:Denied*, Issue 27, Winter 2005.  
Marlinga Bribery Prosecution Update, *Justice:Denied*, Issue 28, Spring 2005.

Sources and Endnotes.

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

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

2 Marlinga not guilty, by Jameson Cook, *The Macomb Daily*, September 28, 2006.

3 *Id.*

4 Marlinga cleared, by Paul Egan, *The Detroit News*, September 28, 2006.

5 Marlinga not guilty, *supra*.

6 Acquittal sinks in for the Marlingas, by Peggy Walsh Samecki, *Detroit Free Press*, September 30, 2006



Taleban in Afghanistan against the U.S. supported Northern Alliance.

In pre-trial motions the men's lawyers objected that the charges were based on a single report

provided by the U.S. military that summarized alleged statements of the detained men that was neither signed by any of the defendants nor their interrogators. The men's lawyers argued that under Kuwaiti law such an undocumented report is inadmissible as evidence. They also argued the charges should be dismissed because the court lacked jurisdiction, since the men were not accused of doing anything illegal in Kuwait.

The court rejected the lack of jurisdiction argument and the men's trial began in early May 2006. The men's defense was that they were in Afghanistan doing charity work, and the only evidence to the contrary was the U.S. military's anonymously written and uncorroborated report.

## Exonerated People May Sue For Libel After Being Called "Criminals"

By JD Staff

British Prime Minister Tony Blair publicly apologized on February 9, 2005, to eleven people wrongly convicted in 1975 and 1976 of being Irish Republican Army bombers.

The media dubbed the four of those people convicted in 1975 as the Guildford Four, and the seven convicted in 1976 as the McGuire Seven. The Guildford Four were exonerated in 1989 and the McGuire Seven in 1991. One of the Guildford Four was Gerry Conlon, whose autobiography, *In The Name of the Father*, was made into a successful 1993 movie starring Daniel Day Lewis and Emma Thompson.

It became a matter of public contention that numerous other people exonerated in England during the past several decades were not included in Blair's 2005 apology.

During a radio interview in early May 2006 that was reported on by the press, Home Office Minister Fiona MacTaggart discussed the government's decision to cap compensation to a person whose wrongful conviction is quashed. She referred to those people as "criminals."

The five men were acquitted of all charges on May 21, 2006.

At the time of their release from U.S. custody in November 2005, Al-Dihani, 39 and the father of six, had been on a three-month hunger strike. According to an affidavit, Al-Dihani had been on his hunger strike at Guantanamo Bay for two months when in September 2005 his lawyer brought him a vegetarian pizza. Al-Dihani refused it, expressing sentiments perhaps shared by his four co-defendants: "The American justice system is like this pizza box. It looks very good on the outside but is empty on the inside. It is nothing but air."

As of late September 2006, six Kuwaitis remain indefinitely imprisoned without charges at Guantanamo Bay.

Sources:

5 Kuwaiti detainees returned home, *Seattle Times*, World Digest Section, November 4, 2005.

Kuwait criminal court acquits 5 former Guantanamo prisoners, *Arab Times*, May 22, 2006.



Within days, a letter was sent to Minister MacTaggart demanding that she retract her characterization of exonerated men and women as "criminals." The letter was written by Michael O'Brien, wrongly convicted of murder and robbery for 11 years before his exoneration in 1999. The letter was co-signed by Paddy Joe Hill, wrongly imprisoned for 16 years before his 1991 exoneration, Gerry Conlon, apologized to by Prime Minister Blair in 2005, and several other people wrongly convicted of murder.

All the signers of the letter had been exonerated of the crimes they had been convicted of committing by having their respective convictions quashed, and they contended MacTaggart's description of them as "criminals" was libelous under British law.

As of the fall of 2006, Minister MacTaggart had not responded to the demand for retracting her description of exonerated people as "criminals."

Sources:

British P. M. Tony Blair Apologizes To Guildford Four and Maguire Seven, *Justice:Denied*, Issue 31, Winter 2006, p. 45.

Miscarriage of justice victims may sue for libel, By Eric Allison, *Guardian Unlimited (UK)*, May 4, 2006. Wrongly convicted men claim libel, *BBC News*, May 3, 2006.

See also, British P. M. Tony Blair Apologizes To Guildford Four and Maguire Seven, *Justice:Denied*, Issue 31, Winter 2006.



# 81 Witches of Prestonpans

By Annemarie Allan

Prestoungrange University Press (2005)  
58 pages, softcover

Review by Hans Sherrer

Waves of hysteria about the presence and activities of witches periodically swept over Scotland from the mid-16th to the early 18th century. That hysteria was reflected in the Scottish Witchcraft Act, signed into law in 1563 by Mary Queen of Scots, which “forbade, on pain of death, any use of magic. In addition, anyone who consulted a magic user was subject to the same penalty.” (p.13)

Prestonpans is presently a small city of 7,000 on Scotland’s southeast coast about 10 miles east of Edinburgh. It was at center stage during the thousands of Scottish witch trials held during the 1500 and 1600s. Proportionate to its population four centuries ago, there were more accused witches convicted in Prestonpans than any other village, town or city in Scotland, and its total number of “witches” exceeded that of much larger municipalities.

A charge of witchcraft was instituted by one of three methods: “accusations by neighbours, a sorcerous reputation, [or] the naming of another individual by a witch under interrogation.” (p. 16) Although the charge of witchcraft was deemed to be evidence of guilt, a conviction was assured if it was augmented by a confession.

Knowing it meant a death sentence, an accused “witch” was typically resistant to confessing. Consequently extraordinary torture techniques were often employed to encourage a confession. Among the more mundane tactics were sleep deprivation, starvation, and being stripped naked and kept in a cold damp holding cell for weeks or even months until one’s tongue was loosened. The more vigorous tactics to induce a confession included being dipped in a river or held under freezing water (a medieval form of present day water boarding), and being skinned alive by being forced to wear a “hair shirt dipp’d in vinegar” (p. 17) It was also common for a ‘witch pricker’ to search for the “witches mark” by inserting a 3” long needle into various parts of an accused person’s body.

Once convicted, the witch was executed – usually by public strangulation and burning of his or her body. After the execution, the cost of the “witches” torture, trial and execution was reimbursed by the condemned person’s estate or family members.

A modern resurgence of interest in that dark time during Prestonpans history began after the publication in 2001 of *The Deil’s Ain* (The Devil’s Own). Written by Scottish historian Roy Pugh, the book documented the execution of 81 Prestonpans residents convicted of witchcraft. The executions occurred between 1590 and 1679. The actual number is believed to be much higher, but Pugh only included the verifiable cases for which records still exist. Pugh described the period from 1563 to 1727 in Scotland as a “mini-holocaust,” since as many as 4,500 Scots were convicted of witchcraft and executed.

Prestonpans lies within the domain of the Barons Courts of Prestoungrange & Dolphinstoun. On July 27, 2004, Prestoungrange’s Baron Gordon Prestoungrange and Dolphinstoun’s Baron Julian Wills exercised their ancient baronial authority by pardoning the 81 men, women and children identified in *The Deil’s Ain* as having been executed for witchcraft. (See *Pardon And Annual Remembrance Of 81 “Witches”* on page 21 of this *JD* issue.)

The Barons Courts also proclaimed that henceforth a Remembrance shall be held on each Halloween commemorating the injustice perpetrated on the 81 people wrongly convicted and executed as “witches.” The first Remembrance was held on October 31, 2004, the second on October 30, 2005, and the third is scheduled for Halloween 2006.

To provide background information about the Remembrance observance, the Prestoungrange University Press commissioned Annemarie Allan to write a historical study of the period of time during which the witchcraft trials and executions occurred. Published in 2005, Allan’s book, *81 Witches of Prestonpans*, goes far beyond being a recounting of Prestonpans local history. It provides an overview for the witch hunts in Scotland, which were “exported” to England by King James I (who prior to his coronation had been Scotland’s King James VI), and then “exported” to New England by Protestant émigrés – eventually resulting in the Salem witch trials of 1692.

*81 Witches of Prestonpans* also identifies that some responsibility for the English (and subsequent New England) witchhunts can be attributed to Shakespeare’s *Macbeth*. Although *Macbeth’s* exact publication date is uncertain, it is known to have been about the time King James I ascended the throne in England in 1603. Allan writes about *Macbeth*:

“The tale of a kingdom torn apart by the murder of its lawful King, of the unnatural signs and portents which accompany the murder of Duncan, God’s ordained monarch and the treasonable sorcery on

## Innocent People Are Executed The Question Is: How Many?

The following eight articles and reviews don’t even scratch the surface of the large body of work substantiating that innocent people are, and have been wrongly convicted of a capital crime for centuries in countries whose legal system evolved from England’s Common Law. While some of those errors have been detected prior to carrying out of the sentence, the unanswered question is how often they have not, and the frequency with which those errors continue to occur.

the part of the witches incorporates all the major themes of the witch panics of the 1590s. References to the ancestry of King James in the character of Banquo make it clear that Shakespeare was linking his work of fiction to the person of the King and the details included within the play clearly reveal the author’s familiarity with the description of events contained within ‘Newes from Scotland’.

The pursuit of witches did not, however, limit itself to England. By the time James succeeded to the throne of England, colonisation of the eastern seaboard of the American continent had already begun and the witchcraft act of 1604 has been identified as a primary cause of the most famous episode of witch persecution in America, the Salem witch trials of 1692.” (p. 42)

The public’s belief in witches was fueled by civil and religious leaders who saw it as a method of “controlling the population through religious fanaticism.” (*The Deil’s Ain*, p. 147) When public authorities issued an order for a witch-hunt, the superstitious fears of a large segment of the population was unleashed — distracting them from real problems that plagued their lives.

An interesting sub-theme of Allan’s book is that the widespread belief in witches was used by opportunists to accuse well-to-do persons of witchcraft so they could acquire their assets. In 1662 the Privy Council denounced accusers “who only acted out of envy or covetousness. All such unauthorised proceedings were now forbidden.” (p. 40)

Allan’s book also touches on the modern relevance of the witch hunts that occurred centuries ago. She notes that Arthur Miller’s 1953 play, *The Crucible*, while ostensibly about the Salem witch trials, was written during the time of the McCarthy Red Scare in the U.S. – when many people were misled into

**81 Witches cont. on page 21**

## 81 Witches cont. from page 20

believing communists lurked everywhere. *The Crucible* warned of the danger that determining guilt of any alleged “crime” on the basis of innuendo and association led to the prosecution of innocent people and barbaric behavior by normally civilized people.

The last major outbreak of witch hunting in Scotland was in 1678. However, the mood of the people had changed: Unlike previous witch hunts, some people were saved by neighbors who defied the label of “guilt by association” and came to their friend’s defense. The change of attitude toward unrestrained witch hunting was reflected in the 1662 proclamation by the Privy Council (Scotland’s highest judicial body):

“...a caution was given that there must be no torture for the purpose of extorting confession. The judges must act only upon voluntary confessions; and even where these were given, they must see that the accused appeared fully in their right mind.” (p. 40)

Isolated incidents of witch hunting continued in Scotland until 1727. In 1736 the Witchcraft Act was changed significantly. Witchcraft was effectively repudiated as mythical by a provision that only allowed for the fining or imprisonment of a person who sought to profit from *pretending* to possess powers of witchcraft. Thus capital punishment was no longer on the table because a person could no longer be convicted of being a witch – only pretending to be one.

The United Kingdom’s last witchcraft prosecution was in 1944. Helen Duncan was convicted of witchcraft and imprisoned for nine months “because the authorities feared her clairvoyant powers enabled her to predict details of wartime movement of shipping.” (p. 44) The Witchcraft Act was finally repealed by Parliament in 1951.

There is a two-fold purpose for Prestonpans annual Remembrance of the 81 executed ‘witches’ and the commissioning of Allan’s book. One is to honor the memory of those innocent people, and the other is to keep alive the memory of the irrational hysteria that induced those people’s friends and neighbors to actively participate or stand silent as they were wrongly accused, tortured into confessing, convicted, and then publicly strangled and their bodies burned for the commission of phantom crimes.

*81 Witches of Prestonpans* shows how easily the public’s fear of the unknown – including an unexplained event or unusual personal

## Pardon And Annual Remembrance Of 81 Convicted “Witches”

By JD Staff

Eighty-one Scots convicted of being witches and executed in the 16th and 17th centuries were publicly declared as innocent during a ceremony in Scotland’s Prestonpans township on October 31, 2004. The ceremony followed Baron Gordon Prestoungrange and Baron Julian Wills’ grant of a posthumous Absolute Pardon to the 81 people on July 27, 2004.<sup>1</sup> The Barons Court had existed since 1189 — predating the signing of the Magna Carta in 1215 by several decades — and it had the jurisdiction and *de jure* legal authority to issue the pardons.<sup>2</sup>

### Pardon Ceremony and First Annual Remembrance

Upwards of thirty descendants and namesakes of the pardoned people attended the ceremony on October 31, 2004. The ceremony also marked Prestonpans’ first Witches Remembrance that Baron Prestoungrange proclaimed was to be held annually on Halloween in commemoration of the wrongly convicted and executed people. A township spokesperson said, “There were some concerns that we’ve got the ceremony on Halloween, but we couldn’t have a witches remembrance in the middle of March. It has a serious purpose, we’re respecting these unfortunate individuals.”<sup>3</sup>

Historian and witch expert Roy Pugh, whose 2001 book *The Devil’s Ain* (The Devil’s Own) inspired interest in re-opening the cases of the people who were pardoned, spoke during the ceremony:

behavior – can be exploited by opportunists seeking financial gain or enhanced political authority. Once in a fearful state, it is a minor step for the gullible amongst the public to be convinced that their fear can be assuaged by punishing a person or persons identified as responsible, but who are in fact innocent of wrongdoing. Allan wrote about the cautionary message of the Prestonpans pardons for people living in the twenty-first century:

It is very easy for all of us to acknowledge and rail against the crimes that others perpetrate against humanity, but it is an altogether different thing to acknowledge that such inhumanity can occur within one’s own community.

## 81 Witches cont. on page 22

“It is too late to right the wrongs of a previous age. This modest ceremony may go some way towards a symbolical recognition of those countless victims of the witch-hunt who were cruelly persecuted. I invite those present – the possible descendants or namesakes of some of the 81 victims in Prestonpans – to lay a floral tribute at the Memorial which commemorates the names of those who were judicially executed.”<sup>4</sup>

### Second Annual Remembrance

On October 30, 2005, Prestonpans observed its second annual Remembrance of the 81 people wrongly condemned as witches.

During the week prior to the Remembrance the Port Seton Drama Group performed a new play the Prestoungrange Arts Festival commissioned Pugh to write. The play, *Witches!*, depicts the trial of Agnes Kelly and Marjorie Anderson, who were among the 81 executed “witches.” The presiding magistrate at their 1678 trial in Prestonpans was the then Baron of Prestoungrange, Sir Alexander Morrison. *Witches!* dramatizes the brutalization of the two women including their deprivation of sleep for many days in an effort to induce a confession to witchcraft. The women were found guilty and condemned based on the “spectral” evidence of witnesses and incriminating body marks found by a “witch pricker.” The plays three performances were well attended, in part because of extensive publicity, including reports on the British Broadcasting Corp. and Scottish Independent TV.

The Remembrance ceremony on the evening of October 30 was led by the current Baron of Prestoungrange. The climax of the ceremony was when 10 archers released 81 flaming arrows across the Firth of Forth.

The annual Remembrance is coordinated by the Prestoungrange Arts Festival, and they have expressed determination to maintain its focus on the injustices committed against the innocent people condemned for witchcraft, because such atrocities “could so easily be done again when any community takes against a minority within it.”

The third annual Remembrance will be held on Halloween 2006.

### Endnotes and Sources:

Prestonpans 2005 Hallowe’en Remembrance of our 81 Witches, <http://www.prestoungrange.org>

1 Absolute Pardon of 68 women and 13 men at, <http://www.prestoungrange.org/core-files/archive/absardon.pdf>

2 The Baron’s Court’s website is, <http://www.prestoungrange.org/prestoungrange/index.html>

3 Town pardons executed ‘witches’, *BBC News*, October 29, 2004.

4 Address by Roy Pugh, October 31, 2004, First Remembrance of Prestonpans 81 Witches, at, <http://www.prestoungrange.org/core-files/archive/RoyPugh.pdf>



## Time Without Pity

Starring Michael Redgrave and Peter Cushing  
Directed by Joseph Losey  
Screenplay by Ben Barzman  
Based on a play by Emlyn Williams  
Released to theaters in 1957, B&W,  
88 minutes. Released on VHS in 1995.

### Review by Hans Sherrer

*Time Without Pity* is one of those low budget British films from the 1950s that are typically shown late at night on Turner Classic Movies or other cable channels. Yet one look at the cast and people behind its production indicates it is anything but a “B” flick.

The movie opens with a stark scene of a young woman being attacked in a room and killed by a fortyish man. The movie then cuts to some time in the future, as a disheveled middle-aged man who looks like he just stepped out of a gin joint is picked up at London’s airport by a well-dressed gentleman. The traveler is the father of a young



man scheduled to be executed the next morning for the murder of the young woman, and the gentleman is the young man’s lawyer.

The father is an alcoholic writer who has been in a Canadian sanitarium during the entire time of his son’s legal ordeal. This was possible in the England of the 1940s and 50s, since as little as six months could pass from the time of a person’s arrest to their execution.

The father approaches his son’s impending execution with the same level of obsessiveness that one can imagine he approached his drinking – full tilt. He had failed his son at every other turn in life, and he doesn’t want to do so when there won’t be a chance for redemption. It is almost too much for him to handle when he realizes that if his son is to be saved it is up to him, and he only has 24 hours to do so. His son’s lawyer has given up hope that solid evidence of his innocence can be found and presented to the authorities in time to stop his execution. The clock pitilessly tick-tock-ticks on, one second at a time.

The pressure on the father is compounded by him not having anything to go on except blind faith that his son is telling the truth that he didn’t have anything to do with the young woman’s murder. On the surface the case against his son appears damning, but it is purely circumstantial and based on speculation of what *might* have happened. The victim was his girlfriend, she was found dead in an apartment where he was staying, and she was holding a locket with his picture in it. However, there are no witnesses or physical evidence tying him to the woman’s murder.

Looking at what happened with a fresh pair of eyes, the father feverishly races around the city questioning people who knew his son or the dead woman, or who might know some crucial but overlooked detail about the night she was killed that will unlock the iron door sealing his son’s fate.

Although it may seem preposterous that *Time Without Pity* revolves around a father’s panicked effort to find overlooked evidence in 24 hours that will prove his condemned son is innocent — it isn’t. Many condemned people professing their innocence have been granted a reprieve only hours prior to their scheduled execution, and later exonerated. Some of those

people were actually strapped into the electric chair or the gas chamber gurney and were only *minutes* from being executed for a crime they didn’t commit. In some of those last-minute miracles it was a relative or friend that found the crucial evidence.

*Time Without Pity* is also true to real life by portraying that most of the characters lead “messy lives.” Emphasizing the wrongness of his predicament, the condemned man led the most honorable life of all the significant characters in the movie. The ending of the movie is unexpected and has a unique twist. Yet it rings true by not sugar coating that someone sitting on death row waiting to be executed is deadly serious business, and it is deadly serious for a person trying to avert it from happening.

The film’s theme of a good and decent man horribly wronged by people blind to the truth, and its accurate character portrayal of people willing to sacrifice others to satisfy their blind ambition may have been a reflection of the real-life experiences of the film’s director, Joseph Losey, and its screenwriter, Ben Barzman. Both had successful careers in the film industry derailed after being blacklisted from working in the United States under their own names during the reign of terror known as McCarthyism. The film, made in England in 1957, was the first that gave directorial credit to Losey after his blacklisting in the U.S.

Given that the viewer knows from the first scene that the condemned man is innocent, *Time Without Pity* depends on powerful performances and the tension revolving around whether his debilitated father can find a way to prove it and stop the execution. Michael Redgrave is brilliant as the alcoholic father who becomes increasingly desperate to find some way to prove his son’s innocence and save him from having his life snuffed out. Although it has been almost five decades since it was first seen by moviegoers, *Time Without Pity* stands up remarkably well as solid entertainment. Neither has it lost any of its relevance as a cautionary tale that no matter how guilty someone may appear at first glance, if you look below the surface their innocence may be plain as day.

*Time Without Pity* is a classic example that a thoughtful and engrossing movie can be made on a modest budget if the production has a first-rate director, a well-written script and heartfelt acting performances.

*Time Without Pity* was released on VHS in 1995, and is available for purchase on Justice Denied’s website at, <http://justicedenied.org/movies.htm>

### 81 Witches cont. from page 21

The Pardon granted already stands as a distinctive memorial to those who lost their lives. But it must surely act forever as a warning that no-one amongst us can confidently state that they would never participate in such a process of persecution. The Kirk was right: there were indeed demons loose in their Godly state. Sadly, these demons were not supernatural – they were man-made, and still dwell amongst us. (p. 48)

Incorporating a wealth of diverse information spanning more than 400 years, *81 Witches of Prestonpans* serves as a warning that when irrationalism controls the legal process of a city, a state or a country – whether in 1590 or today – no one is safe from being accused of a non-existent crime that can result in their mistreatment, imprisonment, or even execution.

It is no minor feat that in a book of only 58-pages written in lay language Allan meaningfully contributes to the dialogue about the weighty social and legal issues she explores.

*81 Witches of Prestonpans* can be read or printed at no-charge from the Prestoungrange University Press website, [http://www.prestoungrange.org/core-files/archive/university\\_press/21\\_witches/bod-ytext\\_witch.pdf](http://www.prestoungrange.org/core-files/archive/university_press/21_witches/bod-ytext_witch.pdf). There is a link to the book on JD’s website at, <http://justicedenied.org>.



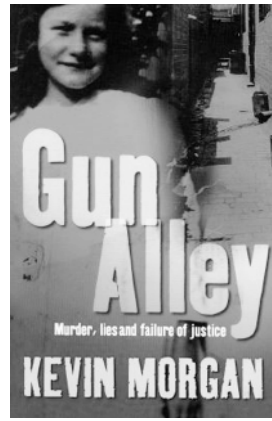
Kevin Morgan is committed to exposing the truth behind Australia's criminal justice system. Morgan's previous book, *The Particulars of Executions 1894-1967: The Hidden Truth about Capital Punishment*, successfully revealed the myth of a fast and humane execution. Morgan's recent book, *Gun Alley: Murder, Lies and Failure of Justice*, is a tale of one of the most horrific capital murder cases in Australian criminal history.

## ***Gun Alley: Murder, Lies and Failure of Justice***

By Kevin Morgan

Simon & Schuster (Australia)  
2005, 326 pages, softcover

Review by Serena Nicholls



*Gun Alley* recounts the story of Colin Ross, who was sent to the gallows for the 'schoolgirl murder' of Alma Tirtschke. On New Years Eve 1921, 12-year-old Alma was found raped and strangled in Gun Alley, an area considered Melbourne's underworld of criminal activity. The police were baffled over who killed Alma, as they had very few tangible leads. This resulted in a sense of outrage and public frenzy throughout the state of Victoria. The press and the public began to criticise the investigation for its lack of momentum. Government officials mirrored these criticisms and placed immense pressure on the investigators to solve the crime.

Ross became an early suspect because he was a local saloonkeeper, with a criminal history. On the 12th of January, less than a fortnight after the murder of Alma Tirtschke, Ross was charged. The evidence against Ross was largely circumstantial and consisted of witnesses who were disreputable and opportunistic. Nevertheless, on February 25, 1922, Ross was found guilty after a five-day trial and a sentence of death was passed onto him. Ross fervently protested his innocence and appealed to the higher courts. Ross's cries of injustice were not heard and his appeals were dismissed. On the 24th of April 1922, Ross became the 17th person to be executed in Victoria. He had been investigated, charged, found guilty, his appeals rejected and he was executed, all within four months of Alma's murder.

Ross' trial marked many firsts in Australian criminal history. His case was the first case to use hair comparisons to secure a conviction, which was a move toward scientific evidence being accepted in Australian courts. Ross' case also marked the first time that a capital case appeal was heard in the High Court of Australia. Furthermore, his case was the first to be played out day by day in the media. Both Ross' photo and the names and addresses of the jury members were published, which exposed the case to contamination.

The media demanded a conviction at all costs and even decided to post their own reward of

£250, which accompanied the £1000 award posted by the government. This reward was to be divided among anyone who came forward with information on who killed Alma. £1250 was an enormous amount of money in that era, with a skilled tradesman only earning £6 for a 44 hour week.<sup>1</sup> When the media put up the reward their coverage on the story increased, after all they now had an investment in the case. Unfortunately, since the media's intense coverage was a first in Australian criminal history, its ability to prejudice a fair trial was not recognized by law.

However, what makes the Ross case most striking is that close examination of the evidence reveals that he was an innocent man. Up until his last breath Ross was steadfast in proclaiming his innocence. At the gallows Ross declared "I am now face to face with my Maker, and I swear by Almighty God that I am an innocent man."<sup>2</sup>

Ross' innocence has only recently come to light because of Morgan's persistence. Morgan spent twelve years of his life researching and writing *Gun Alley* because he was confident there were two principal victims of this crime, Alma Tirtschke and Colin Ross. Morgan's exhaustive research uncovered artefacts that have buried the truth behind the 'schoolgirl murder'. When reading the book it becomes evident that Morgan left no stone unturned: he scrutinized documents that had been sealed since the murder; he interviewed descendants of the Ross and Tirtschke families; he uncovered letters that had been sent to Ross on the day of his execution; and he even located the actual forensic evidence that was used to convict Ross.

After Morgan had examined the evidence used to secure a guilty verdict against Ross, he became convinced that the wrong man was sent to the gallows. Morgan then decided that the next step was to re-examine the hair samples that implicated Ross in the murder. Modern-day experts found that the hair samples did not match those of the victim. Therefore, the first case in Australian criminal history to use

scientific evidence to secure a conviction got it wrong. Thus, Morgan's views expressed in *Gun Alley* are not sentimental opinion, but are supported by a thorough re-examination of the original evidence.

The social, political and media pressure that secured Ross' conviction for Alma's murder are revealed in *Gun Alley*. Investigators needed to produce results in order to save face. Morgan argues that this resulted in a miscarriage of justice because Ross was tried in an atmosphere of public frenzy.<sup>3</sup> This was recognized by Ross' defense counsel who submitted to

the jury that "before he was put on trial...his case had been judged by the community. Sentence had been pronounced before a single word of evidence in this trial had been given...It is not the evidence in the case that I am afraid of, it is the perceived opinion and judgement."<sup>4</sup> After the trial a jurymen anonymously acknowledged this public frenzy and admitted, "...it seemed to me as if some of the jurymen were afraid to say openly what they thought of Ross' evidence in case the jury should eventually fail to agree, and the hand of public scorn might point them out forever."<sup>5</sup>

*Gun Alley* thus explains how the Ross case was the first in Australian criminal history where trial by media occurred. Ross recognised that he was a scapegoat and told the court that "I was the only one they could lag."<sup>6</sup> This came to light in 1961 when one of the detectives admitted, "...the public were clamouring for police actions and the politicians, of course, were harassing us. They were nervous, thankless days. But we survived the uproar long enough to plump for the theory that Ross ravished and strangled Alma in the saloon...But we were all aware that our evidence ... was only circumstantial."<sup>7</sup> The detective also admitted that when evidence did not fit this theory it was simply discarded. That accounts for why the evidence relied on by the prosecution merely consisted of inconsistent and absurd witness testimonies. Ross had evidence suggesting his innocence, such as a watertight alibi, but this evidence was ignored. In an interview Morgan stated "By the standards of their day, they technically broke no laws. They pushed themselves and the legal system to the wire to get someone."<sup>8</sup>

*Gun Alley* not only exposes the flaws in the arrest and trial of Ross, but it also reveals the vital clues that were missed in the original investigation, and which would have led the police to the real 'schoolgirl murderer' if they hadn't fixated on Ross. Morgan outlines a scenario with supporting evidence of the person he believes raped and murdered Alma.

**Gun Alley cont. on p. 24**

## Gun Alley cont. from p. 23

Throughout *Gun Alley* Morgan confronts Australia with an innocent man who was executed. Ross believed that one day his name would be cleared. He wrote, "...dear ones do not fret too much for me. The day's coming when my innocence will be proved."<sup>9</sup>

Morgan has taken up Ross' fight to declare for the public record that an innocent man was sent to the gallows. Morgan is organizing a Petition of Mercy to get Ross' guilty verdict quashed.<sup>10</sup> Victoria's Attorney-General Rob Hulls has acknowledged the value of Morgan's exhaustive research in the Ross case. Hulls has stated that he is willing to consider any new evidence in order to have Ross' name legally cleared.

*Gun Alley* is a critical step in opening the eyes of Australian's to a forgotten miscarriage of justice. In the words of Ross's mother, Ross was the "...victim of a foul conspiracy, prompted by motives of revenge, jealousy and cupidity."<sup>11</sup> Although it has taken eight decades, Ross' belief that his name would be cleared has a chance to come true thanks to Morgan's unrelenting search for the truth of Alma Tirtschke's murder.

Morgan wrote the book from the eyes of the victim, Ross, the families and the detectives involved. The book is written as a recreation of the murder and the investigation leading to the arrest and execution of Colin Ross. At times there is a lot of information in the book but it becomes interwoven in the story. It will appeal to those who just want a good read, as well as those who are interested in a compelling miscarriages of justice.

*Gun Alley* can be purchased for \$13 plus \$5 service charge from *Justice:Denied's* Bookshop at, <http://justicedenied.org/books.html>. *Gun Alley* is not available on Amazon.com or Barnesandnoble.com, and only a limited number of copies are available to *Justice:Denied*.

Serena Nicholls was admitted as a Legal Practitioner in the Supreme Court of Queensland, Australia in September 2006. She is currently completing her Master of Laws and lives in Rowdy Creek, Queensland, Australia.

### Endnotes:

1 Morgan, Kevin (2005) *Gun Alley: Murder, Lies and Failure of Justice*, Simon & Schuster, Australia, p23.

2 *Id.* at 259.

3 *Id.* at 37.

4 *Id.* at 173-175.

5 *Id.* at 205.

6 *Id.* at 158.

7 *Id.* at 227-228.

8 The Hanged Man's Shadow, Australian Story, *Australian Broadcasting Corporation*, 13/04/00.

9 Morgan, *supra* at 256.

10 The Hanged Man's Shadow, *supra*.

11 Morgan, *supra* at 314.



## George Kelly Exonerated 53 Years After Being Hung By The Neck Until Dead

By Hans Sherrer

The manager of Liverpool's Cameo Cinema and another theater worker were shot to death during an attempted robbery on March 19, 1949. The robbery was botched so badly that in spite of the two murders, no money was stolen.

The crime became the focus of one of the most intense police investigations in English history: over 65,000 people were questioned and the police pursued many leads. There were no serious suspects, however, until the police received a letter by an anonymous writer who offered to name the people involved in exchange for immunity. To prove the authenticity of his information, the letter writer identified the pond where the murder weapon had been thrown. The pond was subsequently dragged without recovery of the gun. In spite of the bogus lead about the murder weapon, the police accepted the immunity deal by placing an ad in a local paper, the *Liverpool Echo*.

The informant was James Northam, a known criminal, who claimed to have planned the robbery. He fingered 27-year-old laborer George Kelly as the robber, and Charles Connolly, 26, as the lookout. They were arrested on September 30, 1949, more than six months after the murders,

### Prosecution of Kelly and Connolly

Although two murders were committed, under English law each murder had to be charged and tried separately, so the two men were charged with the manager's murder. No physical evidence tied the men to the crime and the defense argued the testimony of the prosecution's star witness, Northam, was unreliable.

Connolly had a solid alibi defense, corroborated by his wife and numerous witnesses, of being at a dance on the Saturday night the crime occurred.

Kelly's also had an alibi defense. The manager of Liverpool's Spofforth Hotel testified he was there at 9.25 p.m. and the bartender at the Leigh Arms (bar/hotel) — eight blocks away — testified she saw him there at 9.35 p.m. (the bar's clock showed 9:45 p.m., but it was set ten minutes fast.). After arriving at the Leigh Arms, Kelly called two of his brothers. They testified the call was at or shortly after



9:30 p.m. So there was a window of between five and ten minutes when Kelly could have committed the crime, except that the shooting occurred at about 9.35 p.m., when Kelly was already at the Leigh Arms. The Leigh Arms was eight blocks east from the Spofforth Hotel, while the Cameo Cinema was twelve blocks south from the hotel. Kelly's alibi was strengthened by the fact that within a ten-minute period of time he could not have traveled the more than two dozen blocks between the three locations, and also done the things the murderer was known to have done at the crime scene on the second floor of the cinema.

The case against Kelly and Connolly was so insubstantial that their 13-day trial ended in a hung jury.

The men were then retried separately: Connolly first. With the eyes of the nation focused on him, and facing a death sentence if convicted by a jury, he caved under the pressure and minimized his possible sentence by admitting at his trial to participating in the robbery as the lookout. Convicted of robbery and conspiracy to rob the cinema — but not murder — Connolly was sentenced to 10 years in prison.

Although Kelly knew the prosecution's case was bolstered by Connolly's admission, he steadfastly proclaimed his innocence. After what was then the longest criminal trial in English history Kelly was convicted of murder on February 8, 1950. He was sentenced to death.

Kelly's appeal was denied on March 10, and his petition for commutation of his sentence to life in prison was rejected. Seven weeks after his conviction, Kelly was hanged on March 28, 1950.

### Rose Heilbron's Defense of Kelly

After his indictment, Rose Heilbron was appointed as Kelly's lead lawyer. Although Heilbron was an experienced criminal lawyer who had acted as co-counsel in several dozen murder trials, Kelly's case was the first time in English history that a woman had represented an accused murderer as lead defense counsel.

At the beginning of the case Kelly was unhappy with Heilbron's appointment, saying, "I want no Judy defending me."<sup>1</sup> However, after his two trials and numerous court appearances, during which it is estimated Heil-

**Kelly cont. on page 25**



## Kelly cont. from page 24

Heilbron spoke 150,000 words on Kelly's behalf, he praised her painstaking and impassioned defense of him. Although Kelly was convicted and executed, Heilbron's peers and the press recognized her tireless efforts on his behalf. London's *Daily Mirror* went so far as to name Heilbron the newspaper's "Woman of the Year" for 1950.<sup>2</sup>

### Exculpatory Evidence Discovered in 1991

In 1991, four decades after Kelly's execution, a person interested in Kelly's case requested to see the Merseyside (Liverpool) police files.<sup>3</sup> In those files was exculpatory information concealed by the prosecution from Kelly and Connolly. The files included a statement by a Donald Johnson, confessing to the crime months before Kelly and Connolly were tried. Based on the new evidence, Kelly's family resumed their decades long effort to clear him of the crime.

Ten years later, in February 2001, the new exculpatory evidence convinced the Court of Appeals to begin a review of Kelly's case. In its court filings, the government admitted the authenticity of the documents and offered no rebuttal to the exculpatory information concealed from Kelly and Connolly's lawyers.<sup>4</sup>

In June 2003 a hearing on the appeal was held.

During the hearing, the government's attorney acknowledged that witness statements and other documents that could have destroyed the credibility of the prosecution's witnesses, including Northam and a senior police officer, were concealed by prosecutors from Kelly and Connolly's lawyers. Admitting that the men's trial had been unfair and the evidence against them was tainted, the government did not oppose the quashing of Kelly's conviction. However, it did oppose quashing Connolly's conviction. Although the same exonerating evidence was concealed from both men, the government could not acknowledge Connolly's conviction was erroneous without admitting he had been pressured into falsely confessing his guilt.

### Convictions Quashed in June 2003

The Court of Appeal quashed Kelly's conviction on June 9, 2003. On the same day the Court also quashed Connolly's conviction. The Court didn't take the case or their decision lightly: the decision was more than

22,000 words in length. In announcing the decision to quash the men's convictions, Lord Justice Rix said:

The prosecution itself did not regard its case as strong. A minute in the DPP file dated 13 October 1949, just before the committal proceedings, says "It is not a strong case." A letter dated 14 October to the DPP from the prosecuting solicitor says: "You will probably agree that the evidence is not very strong."<sup>5</sup>

If these appeals had happened timeously, fresh trials might have been held. If the Crown would have proceeded with them in the light of the new material, these matters could have been subjected to the scrutiny of a new jury. As it is, that cannot happen. However, having considered that there was in these cases a breakdown in the due administration of justice and a failure to ensure a fair trial, we consider that the consequence was a miscarriage of justice, which must be deeply regretted."<sup>6</sup>

Proving once again that the wheels of "justice" turn slowly, over 28 months passed from the time the Court's review of the case began on February 9, 2001, to its decision, and twelve years passed from when the new evidence came to light to when the two men were officially cleared.



Liverpool's Cameo Cinema (1949)

During and after the hearing the government's attorney tried to deflect attention away from suggestions of a conspiracy theory related to concealment of the exculpatory evidence, even though it is

known that a number of police personnel and prosecutors knew Kelly and Connolly were innocent before their first trial commenced. All of those people did in fact participate in a conspiracy of silence as the men were wrongly convicted, sentenced, and while Connolly spent a decade in prison and Kelly went to the gallows. To their everlasting shame any surviving conspirators remain silent to this day.

### Aftermath of the Men's Exoneration

Kelly was buried at Liverpool's Walton Jail where he was executed. His exoneration enabled his daughter Catherine to have him reburied with other family members.

Rex Makin, a Liverpool lawyer who had been peripherally involved in the George Kelly saga for over 50 years, represented Catherine. When Kelly's appeal was accepted in 2001 by

the Court of Appeals he said, "I was a very young solicitor, making a living by the sweat of my tongue, Frank and Joe, George's brothers, came to see me not long before Kelly was to be hanged to complain about the injustice being done to their brother. I could do nothing about it, and their faces haunt me to this day."<sup>7</sup> He described Kelly's trial as a "farce" and the case against him as a "fit-up" – but without the evidence concealed by the prosecutors and police neither Heilbron, he, nor anyone else could do anything to stop Kelly's execution.<sup>8</sup>

Released in 1960 after ten years in prison, Connolly lived for 37 more years protesting his innocence, and that he had been pressured into confessing to a crime he didn't commit. Connolly also lived everyday until his death in 1997 knowing that for refusing to do what he had done, George Kelly walked to the gallows in March 1950 and was hung by the neck until dead.

Eddie Connolly said after the quashing of his brother Charles' conviction, "A lot of doubters at the time have been proven wrong today. We've known all along that they were innocent."<sup>9</sup>

The quashing of Kelly and Connolly's convictions was also a belated vindication for the effort of Kelly's lawyer, Heilbron, to win his acquittal, and then to try and have his death sentence commuted. Heilbron went on to become one of England's most successful criminal defense lawyers. After having been appointed in 1956 as England's first female Recorder (part-time judge), in 1972 Heilbron became the second woman in England's history appointed as a full-time judge. When the 91-year-old Heilbron died in December 2005, her obituary in British newspapers mentioned that her representation of Kelly was a milestone for women in England's legal history.

George Kelly's family wouldn't let the case die, and the appeal of his conviction was driven by their desire to clear his name. Thanks to them England's judicial system finally acknowledged it erred by convicting him of a murder he didn't commit – even if it was 53 years too late to save his life.

### Endnotes and Sources:

1 Rose Heilbron – Obituary, *Daily Telegraph* (London UK), December 10, 2005.

2 *Id.*

3 Man Hanged 53 Years Ago Was Innocent, Owen Bowcott, *The Guardian* (London UK), June 11, 2003

4 *Id.*

5 *Kelly & Connolly v. Regina*, [2002] EWCA Crim 2957, ¶100

6 *Id.* At ¶130

7 Court To Look Into 1950 Hanging, David Ward, *The Guardian* (London UK), February 9, 2001

8 *Id.*

9 Man Hanged 53 Years Ago Was Innocent, *supra*.



A smile plays over Wilbert Coffin's lips as he descends the steps of the Prison de Quebec, looming high above the St. Lawrence River. If not for the handcuff shackling his wrist to a burly constable, he might be out for a stroll in the late-summer sunshine.

## Was The Wrong Man Hanged? Fifty years later, the cause celebre that was the Wilbert Coffin case is resurfacing

By Marian Scott

But the caption of the September 1955 photo explains otherwise: the affable mining prospector wearing a half-smile and his Sunday best is en route to his place of execution for the murders of three American bear hunters in the Gaspé bush.

Fifty years after Coffin's hanging on Feb. 10, 1956, at Montreal's Bordeaux Jail, the Gaspé woodsman who maintained his innocence to the gallows remains the justice system's most potent symbol of doubt.

Many believe he was a scapegoat, railroaded by Premier Maurice Duplessis's Union National government, anxious for a speedy conviction to appease U.S. authorities and protect the province's tourist industry.

"You're talking about a case where the doubts are so large and so palpable that it cries out as a total and complete injustice," says Toronto criminal lawyer Edward Greenspan.

And Coffin was, as his brother-in-law Leigh Stewart says, "just an ordinary guy like anyone around."

The Supreme Court of Canada upheld Coffin's conviction, and a 1964 royal commission cleared police of wrongdoing. But the controversy over Coffin's hanging galvanized opposition to capital punishment, culminating in Canada's abolition of the death penalty in 1976. And half a century later, residents of his native Gaspé region still share a deep sense of outrage.

"Everyone in the Gaspé has thought about the Coffin case," says Dale Boyle, 33, an award-winning folk-blues artist now living in Montreal, who penned a song about Coffin.

On February 10, 2006, 150 supporters and four generations of the Coffin family gathered at the white-frame St. Andrew's Church in York Centre where Coffin is buried, near the town of Gaspé, to commemorate his death. Anglican churches across Canada will remember him in prayer tomorrow.

In Toronto, the Association in Defence of the Wrongly Convicted announced it has assigned a team of lawyers to study the possibility of having Coffin's conviction overturned. "It seems amazing to me that nobody has been

willing to go the extra mile to look into this case," says Win Waher, director of client services for the group, who called it "a blot on the criminal justice system."

"We can't bring him back but we certainly can give him justice and bring peace to his family." "Duplessis wanted a culprit and he found one," says Lionel Rioux, 89. One of the few surviving players in the Coffin drama, Rioux is the coroner who held the inquest into the deaths of murder victims Eugene Lindsey, 45, his son, Richard, 17, and Frederick Claar, 19, all of Pennsylvania.

Under pressure from American hunters, U.S. Secretary of State John Foster Dulles demanded action from Quebec authorities. Duplessis, alarmed at the potential impact on tourism, didn't wait to see how local authorities would handle the case. He immediately sent in a hand-picked team that included Capt. Alphonse Matte, Quebec's toughest cop, and Assistant Attorney-General Noel Dorion, the province's top prosecutor.

"It was Duplessis's gang. All of Duplessis's big shots," says Rioux. Their murder investigation and the subsequent trial cut a swath through the close-knit community.

Sgt. Henri Doyon, head of the Quebec Provincial Police detachment in the Gaspé, was demoted and later fired for raising doubts over Coffin's guilt, and he died a broken man in 1975, says his daughter, Henriette Doyon, 53. "It's hard to fight a big machine," she says. "My father was an honest man, a fair man. In the name of justice, he lost everything."

"It's not just us, it's not just the Coffin family," Doyon adds. "Everyone in the Gaspé wants this injustice corrected. We all feel it in our hearts, that one of us was hanged."

"This mystery is in the true Gaspé style. It has the implications of bloody violence, the horror, the quality of the unknown, which has marked the legends and history of this land of stark granite cliffs and brooding forests since the white man first went there."  
— Frank Lowe, *Montreal Star*, July 21, 1953



Eugene Lindsey, a railway steam fitter in Altoona, Pa., had set out with his son and Claar in a green Ford truck on June 5, 1953, on a bear-hunting trip to celebrate Richard Lindsey's high school graduation. It was not their first visit to the Gaspé, a popular destination for hunters from the state.

When the trio still hadn't returned a month later, a search of the woods between Gaspé and Murdochville turned up the empty truck, the elder Lindsey's partial remains on July 15 and the boys' a week later. Bears had eaten much of the bodies but bullet wounds pointed to murder.

Hordes of reporters descended on the Gaspé to file sensational accounts of blood-crazed killers and gory folk tales, and the media's attention quickly fastened on Coffin, the last man known to have met the victims.

The 37-year-old was well-liked and had no criminal record aside from a fine for shooting deer out of season. But the newspaper coverage "was so lurid," says Cynthia Patterson, 51, a community activist whose father was on the inquest jury. "He (Coffin) was portrayed as this devilish person."

"I knew Coffin," says Rioux, who doubled as Gaspé's coroner for 17 of his 48 years as a country doctor. "He always had a smile on his face. He'd order a round for everybody with just 50 cents in his pocket."

**"the controversy over Coffin's hanging galvanized opposition to capital punishment, culminating in Canada's abolition of the death penalty in 1976."**

Of Rioux's rich trove of memories, the Coffin case haunts him the most, says the retired doctor as he squints through a magnifying glass at yellowed newspaper clippings in his Quebec City condo.

Coffin told his version of events at a coroner's inquest Rioux called on July 27, 1953. The former coroner says he sent the typed transcript of Coffin's testimony to the province's attorney-general in Quebec City, but it disappeared.

Coffin would never get another opportunity to tell his story; during his trial his own lawyer kept him off the stand. "They eliminated the only declaration that Coffin ever made," Rioux says. "Coffin defended himself pretty

**Coffin cont. on page 27**

## Coffin cont. from page 26

well at my inquest. They destroyed his testimony. I'm certain they did it on purpose."

Coffin said he met the hunters on his way into the bush to prospect for minerals when their truck stalled. He agreed to take Richard Lindsey into Gaspé to buy a new fuel pump, was rewarded with \$40 U.S. and promised to look in on them again. When he stopped by the Lindsey truck on July 12 as arranged, the hunters didn't show up.

Rioux felt Coffin wasn't telling the whole truth about what happened in the woods. Coffin would later admit that when the hunters didn't show up, he helped himself to a suitcase containing clothes, binoculars and the fuel pump from Lindsey's truck.

But asked whether he thinks Coffin was capable of killing the hunters, Rioux shakes his head emphatically. "No, he was a good-time Charlie."

On Aug. 11, police arrested Wilbert Coffin.

On Aug. 27, the coroner's inquest resumed, but this time Duplessis's right-hand man, Dorion, took charge, Rioux says. Dorion refused to let Rioux question Coffin. And then, Rioux says, he ordered the six-man jury to change its verdict.

"At the end of the inquest, the jury went into a corner to discuss. The leader came over to say: 'We can't hold Coffin responsible, there's no proof.'"

The jury had decided that Claar and Richard Lindsey were murdered by a person or persons unknown and that Eugene Lindsey had died of unknown causes. But Dorion had his own ideas.

"Dorion saw that things were not going the way he wanted," Rioux says. "He told the jury: 'If you don't condemn Coffin, we're going to do it ourselves.' He threatened the jury. The jury had no choice. It's appalling."

In the end, the coroner's jury found Coffin criminally responsible for the deaths of Claar and Richard Lindsey, and sent him to trial.

### Coffin's Trial

Marie Stewart pushes a tin of homemade gingersnaps towards the visitors in the cosy, wood-panelled kitchen of her house overlooking the York River in Gaspé. Now 75,

she was 22 and working in Toronto when news came over the radio that police had arrested her big brother for the murders.

"No way, no way did my brother do that," says Stewart, the second-youngest of 11 siblings. "He was such a kind person. He never hurt anybody in his whole life. He'd give the shirt off his back if he thought it would help someone."

The Coffin family felt caught up in a maelstrom far beyond its control. "Nobody knew what to do, and no money to do it," says Stewart's husband, Leigh, 74. "We all believed in the justice system. We never thought it would come to what it did," Marie says.

From the start, Duplessis's investigators treated the murders as an open-and-shut case, says Alton Price, 75, a retired schoolteacher in the Eastern Townships and author of a 1996 self-published book on the case, *To Build a Noose*.

For example, investigators pinned a photo of Coffin with a rope sketched around his neck on the wall. Rioux concurs the investigators had their minds made up about Coffin's guilt. "I was really disgusted to see that everything was decided in advance."

But they had little to support their case until early August, when police obtained the stolen

Just a stoic man, with a few mining claims.

When Alton County cracked the whip, at him was laid the blame.

You see, they got their man, but any man could have killed.

You see justice does leave holes, that the innocent sometimes fill.

from *The Wilbert Coffin Story* song by Dale Boyle

suitcase and its contents from Coffin's common-law wife, Marion Petrie, a coil-winder at Northern Electric in Montreal, after detaining her for 18 hours.

The three police officers sent from Quebec City — captains Matte and Raoul Sirois and Sgt. Jean-Charles VanHoutte — then subjected Coffin to a brutal interrogation for 16 days, but failed to extract a confession.

The day the inquest resumed, they finally allowed Coffin to see his father, Price says. The cops secretly monitored the exchange.

"When his father asked him how he was, Wilbert replied, 'Not to worry, they were not man enough to break him and he would be home soon,' " Price recounts. Prosecutors later presented Coffin's words — "they are not man enough to break me" — to the jury as a confession.

However, Doyon, the Gaspé police chief, trusted Coffin enough to let him sleep in his own family's apartment above the police station, says his daughter, Henriette. "The cells were downstairs, damp, cold little

cells," she says. "My father said, 'I wouldn't let a dog sleep down there.'"

Doyon, who was demoted to constable and transferred to Quebec City after the trial, was haunted by Coffin's death. "He often talked about Coffin," his daughter says. "He said: 'That man was not guilty.' It hung heavy on his heart."

But the family paid dearly for his defence of Coffin, she says: Fired after nearly 25 years of service, Henri Doyon was denied a pension. He had a nervous breakdown and became a heavy drinker. "They would have done better to hang Doyon, too, instead of killing him little by little," she says. "I'm proud of him, but we suffered a lot. Do you have to pay such a high price for honour?"

### Coffin's Lawyer Didn't Put On A Defense

Of all the puzzles in the Coffin case, none has confounded observers more than defence lawyer Raymond Maher's failure to call a single witness.

"Maher killed him. He might as well have opened the trapdoor," says lawyer Greenspan, who has studied the case extensively. "It was incompetence with a capital I. It's the worst case of lawyering I've ever seen."

The Crown ended up charging Coffin with only the murder of 17-year-old Richard Lindsey because it judged there was not sufficient evidence to obtain a conviction in the two other deaths. Police and prosecutors took a full year to build their case, scouring bars, gas stations and coffeeshops from Gaspé to Montreal for witnesses who saw Coffin spend the money they alleged he stole from the hunters.

At the three-week trial, which opened in Perce July 12, 1954, the prosecution called 88 witnesses who testified that Coffin had "sprayed U.S. money about," as the *Montreal Star* reported. Yet the prosecution produced no murder weapon and no direct evidence linking Coffin to the killings.

Maher, an alcoholic who was drunk for much of the trial, boasted he would call more than 100 witness to the stand. But when the time came, he rose to his feet to say: "My Lord, the defence rests."

The jury took only 30 minutes to convict Coffin of Richard Lindsey's murder. "It's a stain on not only the Gaspé but on Canadian legal history. It sits out there as a horrible example of how everything can go wrong in a case and nobody at the trial sees it," Greenspan says.

### Coffin cont. on page 28

## Coffin cont. from page 27

Maher's biggest mistake was refusing to let Coffin testify in his own defence, Greenspan says. "At the trial, all the jury wanted to hear was Wilbert Coffin say: 'I didn't do it.'"

Wilbert Coffin, convicted and sentenced to hang for the murder of a 17-year-old Boston hunter, escaped from the Quebec Jail early yesterday morning but surrendered voluntarily a few hours later.

— *Montreal Star*, Sept. 7, 1955

The day before his departure in the bright September sunshine for Bordeaux Jail's death row, Coffin talked his way out of prison with a fake gun and hailed a cab to freedom. But hours later he was back in custody, having heeded his lawyer's advice to put his confidence in the appeals process.

"When my brother broke out of prison, I stayed up all night and prayed, 'Bill, don't turn yourself in,' " Marie Stewart recalls. "If he was out in the woods, nobody on Earth would have found him."

"Have you ever seen a murderer go back to jail?" Rioux asks. "Coffin went back to prison like a good schoolboy."

Why did the appeal process in which Coffin placed his faith fail to free him? Simply, Greenspan explains, because the justice system was not set up to admit error. "The notion of wrongful conviction has only recently become part of our legal landscape in Canada," Greenspan says. "There was a belief that anyone who was convicted was rightly convicted and that the system never makes mistakes."

Greenspan adds that belief also prevailed at the 1964 Brossard Royal Commission into the Coffin case. The inquiry was sparked by the 1963 book *J'accuse les assassins de Coffin (I Accuse the Assassins of Coffin)* by Jacques Hebert, a crusading journalist and fierce opponent of the Duplessis administration.

However, to head the review of the police investigation, Judge Roger Brossard named none other than Captain Jean-Charles Van-Houtte, one of the three original police officers in the Coffin investigation whom the future senator Hebert named in his book as Coffin's assassins.

Hebert's two lawyers — one was his close friend Pierre Elliott Trudeau, future prime minister of Canada — objected to this conflict of interest but Brossard quashed the objection.

In his 719-page report, Brossard cleared police but vigorously denounced Hebert,

who was subsequently arrested for contempt of court for the book and sentenced to 30 days in jail and a \$3,000 fine.

"I was afraid at the Brossard inquiry," Rioux now admits. "If I had opened my mouth, I would have been condemned for contempt of court. When the authorities make a mistake, don't go ask them to retract."

Dale Boyle wrote a song, *The Wilbert Coffin Story*. The lyrics went in part.

Three years went by, and they sentenced him to hang / He swore "I ain't the one" and his hangman felt the same / With seven unlucky chimes, and a single death flag raised / Wilbert Coffin was sent to an early grave.

Hundreds gathered at Gaspé's train station when Wilbert Coffin's body came home, Marie Stewart recalls. "The day my mum brought his body home, it was unbelievable, the crowd at the station." On the simple headstone that marks where Wilbert Coffin was laid to rest is inscribed: "Judge not, that ye be not judged."

Once the funeral was over, family members shrouded their memories in silence. "The family never talked about it. We all felt a lot in our hearts but we never discussed it," says Stewart, one of four surviving sisters. "I said once to my brother Donny: 'Nothing in my life will ever hurt or affect me as much as this has.' And Donny said: 'Me, either.' "There's not a day goes by that I don't pray that some day this will be corrected."

Alton Price, who believes he knows the identity of the real killer, continues to lobby the federal government to reopen the case. "He was a little Gaspesian, a nobody in their minds," says Price, whose father worked for Noranda Mines and knew Coffin slightly. "I saw Coffin as coming from where I came from, the working class. That's why I wrote this book. I don't give a damn if it sells or not. I'll have peace of mind."

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Marian Scott is a reporter with *The Gazette*.

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## Convicted Murderer Released When "Dead" Woman Turns Up Alive

By JD Staff

Malkani Bibi's relatives tearfully buried her in 2003. Malik Taj Mohammad was arrested and charged with Bibi's kidnapping and murder by Pakistani prosecutors who claimed that his motive was to violently resolve an acrimonious property dispute.

Mohammad's defense was that he couldn't have murdered Bibi because she was alive. However, he didn't present any proof, and the court relied on the testimony of relatives who buried her in finding him guilty. He was sentenced to life in prison.

Three years later Mohammad's supporters were finally successful in proving that he was innocent: they discovered Bibi was imprisoned in the eastern Pakistan city of Gujarat. She had been there since a theft conviction in 2004.

After Mohammad filed a petition with Pakistan's Supreme Court for a new trial based on the new evidence, Bibi was transported to personally appear before the Court. Satisfied that Mohammad had been the victim of a miscarriage of justice, the Court quashed his conviction and ordered his immediate release. The chief justice also ordered a lower court to oversee an investigation of how Mohammad had been prosecuted and convicted of a crime that never happened, to affix responsibility for the grave error, and to determine appropriate compensation for Mohammad's ordeal.

### Sources:

Pakistani freed after murder victim found alive, Reuters News Service, *Scotsman*, July 25, 2006.  
The best grounds on which to free a convicted murderer, Reuters News Service, *Vancouver Sun*, July 28, 2006.



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## Final Argument

By Clifford Irving  
(Simon & Schuster, NY 1993)

Review by Hans Sherrer

The following is a reproduction of the gist of a conversation in a greasy spoon restaurant in the early 1990s between a waitress named Velda and a customer, apparently an author, who will only be identified as Mr. I. A customer sitting in the booth next to Mr. I's overhead the conversation that took place when Velda sat at Mr. I's booth while she was on a break.

Mr. I: Hey Velda! Going on your break?

Velda: Uh huh.

Mr. I: Sit down and take a load off your feet.

Velda: Sure. Thanks. I see you're scribbling away.

Mr. I: Yeah. I'm making some notes about publicizing my new book.

Velda: So what's it about?

Mr. I: Hum. The short version is a lawyer at a crossroads in his life takes an unexpected adventure.

Velda: Legal shmegal. Sounds like a snoozer.

Mr. I: No! Before the guy became a highly paid civil lawyer at a prestigious Florida law firm he was a top state prosecutor.

Velda: Yeah? So what?

Mr. I: Well you see, through a weird series of events he finds out that in his last case as a prosecutor, 12 years earlier, one of his witnesses committed perjury that the defendant had confessed to him!

Velda: Is that unusual?

Mr. I: No. It happens all the time.

Velda: So why should I care?

Mr. I: This was a capital case. The defendant was a kid in his late teens convicted of murdering the man who employed him as a yard handyman. Then he was sentenced to die in "Old Sparky." That's the name for Florida's electric chair.

Velda: Is that the one that when they turn on the juice a guy's head smokes like a forest fire and flames shoot out like a 4th of July sparkler?

Mr. I: Yup!

Velda: Sure gives new meaning to going out with a bang. Aren't lots of guys sentenced to be fried like a crispy critter?

Mr. I: Yes. In Florida. In most other states they are sentenced to die by lethal injection. But that's beside the point. You see this witness exchanged his made-up testimony to a different prosecutor in exchange for having charges against him dropped in that case. And he was told what to say in the kid's case by the detective in charge, who the lawyer later finds out *also* lied on the witness stand.

Velda: Well, is it unusual for a cop to lie?

Mr. I: No. It happens all the time. But what was unusual was this cop lied to protect the *real* killer!

Velda: So the kid waiting to be grilled without cheese is the wrong guy.

Mr. I: Bingo!

Velda: And this lawyer guy has a pang of conscience or something about the wrong guy getting a one-way ticket to visit "Old Sparky."

Mr. I: Righto!

Velda: Wait a minute ... It was 12 years ago. So the kid must be pushing up daisies by the time this lawyer guy finds out he made a lulu of a boner.

Mr. I: No. That's just it. He lucks out because the kid has been fighting his case. Appealing every which way he can to every court he can. So he's still alive. But he's scheduled to be executed in a month and the clocks ticking!

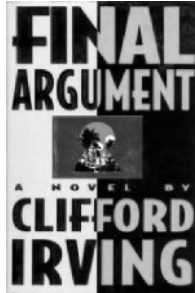
Velda: Let me guess. The lawyer dude decides to become some kind of Good Samaritan and save him.

Mr. I: Well he decides to do some poking around. So he visits the kid to see what he has to say for himself.

Velda: Must be in his late 40s or so. You know, going through the mid-life crisis thing.

Mr. I: Sort of. He's a partner in a successful law firm, married with children, and he's got all the toys. You know. House on the ocean, snazzy sailboat, and so on. But yeah, something is missing.

Velda: Oh yummy! He starts



fooling around! Now you're talking!

Mr. I: No. He wants meaning in his life. Not hot babes!

Velda: You sure no fooling around?

Mr. I: Well ... he did have an affair with the murdered man's wife.

But that was before the man was murdered.

Velda: That's it? No juicy stuff?

Mr. I: He doesn't have time Velda! The kid ... well he's now in his early 30s ... is rapidly headed for his date with the electric chair if the lawyer can't dig up new evidence to convince a judge to stay his execution!

Velda: Stay? Does that mean the lawyer dude just wants to put off the kid getting his big jolt of juice until another day?

Mr. I: Sheesh. No! He needs to delay the execution to give him time to see if there is enough new evidence to convince a judge to give the kid a new trial.

Velda: This lawyer dude cute?

Mr. I: He's an average Joe in good shape for his age .... but the story isn't about that Velda! It's about how he goes about unraveling the murder case that *he* put together 12 years earlier.

Velda: Isn't that a little ... you know ... schizo?

Mr. I: Well, after he becomes the kid's lawyer his law firm partners think he's lost his mind, the state bar wants to throw him out of the fraternity of brotherly lawyers, and he gets charged with felonious assault after he punches a mouthy prison guard in the face and breaks his nose.

Velda: So he's running on three cylinders and a loose cannon to boot. Hum. That's more like it! Danger Boy in a suit!

Mr. I: Yeah, sure, if that's how you want to look at it. But its dangerous business to dig up a past that some very serious people want to remain buried. So it takes someone who is living a little on the edge to take the chance.

Velda: So what's the upshot of all the lawyer guys' digging and poking around?

Mr. I: He's able to delay the kid's execution by getting what is called an evidentiary hearing.

Velda: An evidently what?

Mr. I: Evidentiary hearing. It is a court hearing where the judge can decide if there is enough evidence to give the kid a new trial.

Velda: So what happens?

Mr. I: Well. The lawyer peels the prosecution's case, which is his case from 12 years ago, apart piece by piece like it was an overripe onion.

Velda: Wadda ya mean? How'd he do that? What happens?

Mr. I: No dice Velda. You'll have to read the book. If I tell you'll blab it to all your friends and customers.

Velda: Ah come on. Be a sport. Fess up.

Mr. I: Oh, all right. But lean close.

Mr. I and Velda: Whisper, whisper, whisper.

Velda: Wow! Really!

Mr. I: Yup!

Velda: I've got to give it to ya. Your book sounded a little nerdy at first, but you've got me a little bit interested.

Mr. I: That's what I've been trying to tell you. It isn't written for lawyers. Although it may help turn on a light in their mind, as well as in that of police, prosecutors, judges, and yes even your friends, that so called incriminating evidence against a person may be nothing more than a convenient way of avoiding looking for the truth.

Velda: Incrimawhat?

Mr. I: Never mind. But since you're interested, I'm sure you'll tell your friends and customers about it, and that you know the author. After all, I've got to keep selling books so I can keep leaving you big tips!

Velda: I need em. So I'll be a one gal publicity machine for you. By the way what is its title?

Mr. I: *Final Argument*. But you won't know what it means until the last pages of the book.

Velda: Ooohhh. I've got to get back to work.

Mr. I: I'm leaving, so I'll see you next time Velda.

Velda: Bye.

*Final Argument* is out of print, but inexpensive used copies are readily available from Internet book sellers, including Amazon.com and Barnesandnoble.com.



# The Hangman And The Electric Chair

By Bernie Matthews

The last execution in Australia was in 1967. Advocates for the reintroduction of the death penalty in Australia would argue “an eye for an eye” is adequate justification for the return of the hangman. Accompanying this is a groundswell of opinion that prison does not appropriately exact society’s revenge for murder and violent crime.

But capital punishment is also an irrevocable step within any legal system. And legal systems are not infallible.

Proponents of the death penalty point to child murder as a crime worthy of capital punishment, but as unpalatable as this crime may be, there is no guarantee a miscarriage of justice cannot occur.

After the disappearance of 10-year-old South Australian schoolgirl, Louise Bell, from her parents’ home in the Adelaide suburb of Hackham West in January 1983, concerned parents demanded immediate action from the South Australian police.

A South Australian prisoner, Raymond John Geesing, was serving time in Adelaide Jail for an unrelated crime when he was charged with the abduction and murder of Louise Bell. The Crown case rested largely on evidence from four prisoner informants who had been in prison with Geesing and alleged he had confessed to them. Based on their evidence, Geesing was convicted and sentenced to life imprisonment.

On April 12, 1985, the South Australian Court of Criminal Appeal unanimously upheld an appeal by Geesing. South Australian Chief Justice, Mr Len King, ruled that Geesing’s 1983 trial had miscarried and the guilty verdict for the murder and abduction of Louise Bell was set aside. Chief Justice King said the prisoner informants were unreliable and untrustworthy witnesses.

One prisoner retracted his original statement. The evidence of another prisoner informant was declared inadmissible. The Court of Criminal Appeal ordered there be no retrial and Geesing walked to freedom after serving 17 months for a crime he had not committed.

## Innocents Executed in England

In March 1950, Timothy Evans was convicted and hanged in England for the murder of

his baby daughter, Geraldine. The court did not proceed with a second charge of the murder of his wife. During the trial, the dull-witted Evans insisted his wife and daughter had been murdered by “the other man” living in the house at 10 Rillington Place, London.

“The other man” was John Reginald Halliday Christie, one of the main witnesses for the prosecution. The trial judge complimented Christie for “his clarity of evidence” during the trial. Three years after Evans had been executed, Christie confessed to murdering eight women in England between 1940 and 1953. One of them was Evans’ wife. Christie was convicted and hanged at Pentonville Prison on July 15, 1953.

In 1966 the British Government granted Timothy Evans a posthumous pardon in recognition of his innocence. But the Evans case is not the only miscarriage of justice under British law where an innocent man has been executed.

In 1819, Thomas Harris, landlord of the Rising Sun Inn, on the York-Newcastle road, was executed for murder. It was later established that the barman at the inn and chief prosecution witness was the actual killer, and Harris had been innocent. The posthumous pardon awarded to Harris did not ameliorate the travesty of justice.

In March 1835 an Irish peddler, Daniel Savage, was sentenced to death for the murder of his wife 10 years earlier. After having his beard shaved off to “make the hangman’s job easier,” he was allowed a final visit from his sister.

The woman looked at the condemned prisoner, completely baffled, saying, “He’s not my brother. He doesn’t look anything like my brother!” There was not enough time to investigate the woman’s claim before the man was led to the scaffold and hanged. The sister had been correct. The man who had gone to his death was innocent. His name was Edmund Pine. Not Daniel Savage.

In the same month, another innocent man was executed in England.

Edward Poole Chalker was convicted and sentenced to death for killing a gamekeeper. He was led to the gallows protesting his innocence. Seven years later another man confessed to the crime. Chalker, like Pine, had been innocent.

Unlike Harris, Pine and Chalker, William Habron survived the death cell and the gallows. Habron was sentenced to death in

1876 for the murder of a London police officer, but because of his youth the sentence was commuted to life imprisonment. Three years later, while Habron was serving his life sentence, a notorious criminal, Charles Pearce, confessed to the murder. William Habron received a pardon and £800 compensation from the British Government.

In 1909, Oscar Slater was sentenced to death for the murder of an elderly woman in Glasgow but like Habron, had his sentence commuted to life imprisonment. After he had served 19 years in prison, it was established that Slater was completely innocent. He was relieved and awarded £6,000 compensation.

## Australian Cases

The Australian legal system is not immune from the same miscarriages of justice experienced in countries that retained the death penalty. But if the death penalty had still been a sentencing option under Australian law these people would, in all probability, have been executed for murder:

- New South Wales (NSW), 1947. Frederick McDermott was convicted of murder. He served seven years before a Royal Commission established his innocence. He was released from prison and granted a pardon for wrongful imprisonment.
- South Australia, 1978. Edward Charles Splatt was convicted of murder. He served six years before a Royal Commission established his innocence. He was released from prison and granted a pardon for wrongful imprisonment.
- NSW, 1979. Three men known as the Ananda Marga Trio — Paul Alister, Ross Dunn and Timothy Anderson were convicted of conspiracy to murder. They served seven years before a judicial inquiry into their convictions, conducted by Mr. Justice Wood in 1985, concluded they were innocent. They were released from prison and granted unconditional pardons.



Lindy Chamberlain during her 1982 trial

Hangman continued on page 31



Chief Leschi  
(Washington Historical Society)

## Chief Leschi Exonerated of Murder — 146 Years After His Execution

by Hans Sherrer

Thirty-four years before the Washington Territory became the State of Washington, the Nisqually Indian Nation and white

settlers in the Puget Sound area were engaged in what became known as the Indian War of 1855-56. The territorial government precipitated the war after members of the Nisqually Tribe refused to agree to a land cession treaty that would have created a 900 acre reservation in western Washington for the tribe.

On October 31, 1855 a firefright occurred east of present day Tacoma between the territorial militia and members of the Nisqually Tribe. During that skirmish, volunteer militiaman Colonel Abrams Moses was shot and killed.

Territorial Governor Isaac Stevens blamed Nisqually Chief Leschi for Moses'

Nisqually during the war. However Gov. Stevens didn't think the territorial government was bound by the Army's agreement. On November 16, 1856, three days after his arrest, Leschi was put on trial for Moses' "murder" in the federal territorial court.

The prosecution's case rested on one eyewitness — Antonio Rabbeson — who claimed Leschi was present when Moses was shot. However Leschi claimed he wasn't involved in the skirmish during which Moses was killed, and his counsel vigorously attacked Rabbeson's credibility. One distinct irregularity was Rabbeson chaired the grand jury that indicted Leschi for capital murder. The trial ended in a hung jury because two jurors held out for Leschi's acquittal. One of those jurors, Ezra Meeker, stated that Rabbeson was "obviously lying."<sup>1</sup>

Leschi was convicted of murder and sentenced to death after a retrial in March

"murder," and ordered his arrest. More than a year later, Leschi surrendered after being assured by the Army that he wouldn't be prosecuted for acts committed by the

1857. The territorial Supreme Court affirmed his conviction after refusing to consider new evidence: an Army map indicated Leschi was miles away from the scene of Moses' death. In its decision, the Court wrote that Leschi was the "leader of the Indian forces that "cruelly waged" war on settlers, "sacrificing citizens" in the Puget Sound region."<sup>2</sup> The Court's decision exhibited passion and prejudice against Leschi, who was the chief of the Nisqually Tribe that reacted hostilely to being displaced from their lands by white settlers.

Leschi was hanged on February 19, 1858, outside of Fort Steilacoom, south of present day Tacoma. The Army refused to participate on the grounds that Moses was a casualty of war, and had not been murdered. At the time many people, including his executioner, believed Leschi was innocent. Charles Grainger, his hangman later said, "I felt then I was hanging an innocent man, and I believe it yet."<sup>3</sup>

Since the time of his conviction and execution, the Nisqually have considered that Chief Leschi was unfairly prosecuted for Moses' death. Beginning in 2002, members

### Chief Leschi cont. from p. 32

### Hangman cont. from page 30

- NSW, 1980. Douglas Harry Rendall was convicted of murder. Rendall served nine years before a judicial inquiry into his conviction concluded he was innocent. Rendall was released from prison and granted an unconditional pardon.
- Northern Territory, 1982. Lindy Chamberlain was convicted of murder. Served four years before a Royal Commission of Inquiry headed by Mr Justice Trevor Morling concluded she was innocent. Lindy Chamberlain was released from prison, compensated for wrongful imprisonment and granted an unconditional pardon.
- Queensland, 1983. Barry Mannix was accused of murdering his father at Surfers Paradise. After allegations Queensland police fabricated Mannix's confession to the murder, three other men were arrested and confessed to the crime. Barry Mannix was immediately released from prison.
- Queensland, 1984. Kelvin Condren was convicted of murder. He served six years before the High Court of Australia and the Queensland Court of Criminal Appeal cast serious doubts on the conviction and his alleged confession. After examining the evidence, Queensland Attorney-General Deane Wells recommended

Condren's release from prison. Condren was set free in 1990.

- NSW, 1990. Roger Graham Bawden, surrendered himself to Queanbeyan police and confessed to a murder he committed in 1973. Another man, Johann Ernst Siegfried (Ziggy) Pohl, had been convicted of the murder and had already served over ten years in prison. The murder of Kum Yee "Joyce" Pohl at Queanbeyan became the subject of a special judicial inquiry which cleared Ziggy Pohl of the murder. Pohl was freed from prison and granted an unconditional pardon.

The wrongful imprisonment of an innocent person is a grave miscarriage of justice. But the execution of an innocent person is an irrevocable miscarriage of justice. There is no reprieve from the grave.

In February 1955, British Home Secretary Chuter Ede revealed the weight of that responsibility when he addressed the House of Commons on the death penalty in the Timothy Evans case:

I was the Home Secretary who wrote on Evans' papers "the law must take its course."

I think that the Evans case shows, in

spite of all that has been done since, that a mistake was possible and in the form of which a verdict was given in a particular case, a mistake was made.

I hope no future Home Secretary, in office or after he has left office, will ever have to feel that - although he did his best, although none would wish to accuse him of being either careless or inefficient — in fact he sent a man who was not guilty, as charged, to the gallows.

Reprinted and edited with permission of the author. Bernie Matthews is a convicted bank robber and prison escapee who has served time for armed robbery and prison escapes in Australia — New South Wales (1969-1980) and Queensland (1996-2000). During his periods of incarceration he studied journalism and received scholarships to study as an external student at the University of Southern Queensland. He is now a journalist.

The unedited version of *The Hangman And The Electric Chair - Part I* (July 28, 2005), and *Part II* (July 29, 2005) is available at,

<http://www.onlineopinion.com.au>



## Leschi continued from page 31

of the Nisqually Tribe, including some of Leschi's descendants, began a concerted campaign to clear his name. The effort paid off in 2004 when both the Washington State House and Senate passed resolutions recommending that the State Supreme Court conduct an extraordinary review of Leschi's conviction. Although Chief Justice Gerry Alexander declined to have the Supreme Court review the conviction, he was instrumental in organizing a Historical Court of Inquiry and Justice to retry Leschi in absentia.

### Chief Leschi's Retrial

The trial was arranged to be held on December 10, 2004, in a make-shift courtroom seating about 200 people in the basement of the Washington State Historical Society in Tacoma. Seven judges were selected to sit in judgment of the case — six state judges that included Chief Justice Alexander, and a judge representing the Nisqually Tribe. Alexander said before the trial, "This really is uncharted territory. It's got real challenges and greater difficulty." <sup>4</sup> Indicative of the trial's uncharted territory, is it was a hybrid adversarial proceeding, combining elements of both a trial and an appellate review.

Chief Leschi's retrial attracted national attention. *The New York Times* was among the newspapers that published a story about the controversy surrounding Leschi's conviction and execution.

Several current prosecutors, led by Carl Hultman, represented the territorial government. A team of lawyers, led by John Ladenburg, represented Leschi in absentia.

The prosecution did not present any witnesses. Their case was based on the legal record, and that "the territorial justice system was thorough and professional, strictly adhering to the rules of law." Consequently it was argued Leschi's conviction was soundly based on what the trial court and the Territorial Supreme Court agreed was relevant and incriminating evidence.

The defense countered with 11 witnesses who focused on establishing three points: That Leschi wasn't at the scene of Moses' death; that Rabbeson's testimony was unreliable; and that the Nisqually and the Washington Territorial government were at war, and thus under

the "law of war" Moses' death was not a murder by whoever killed him, but an unfortunate consequence of the conflict.

After more than three hours of testimony and presentation of evidence, the prosecution and defense made their closing arguments.

Prosecutor Hultman passionately and methodically argued the State's position that the Court should be bound by the regular rules of appellate procedure, and not consider any evidence that wasn't in the trial record. He asserted that under the appellate standard of viewing the evidence in the light most favorable to the prosecution, the Court should defer to the jury's guilty verdict in 1857 that was affirmed by the Territorial Supreme Court.

Defense counsel Ladenburg countered that the verdict was fatally flawed in light of the evidence of Leschi's innocence that wasn't considered by the jury, and the failure of the jurors or the Supreme Court to consider that Moses' death could not be considered a murder under the state of war that existed between the Nisqually and the territorial government. Ladenburg argued that irrespective of the compelling evidence of his innocence, it is reasonably probable that the failure of Leschi's lawyer to request an "enemy combatant" instruction affected the outcome, and thus constituted reversible error. Ladenburg contended that since Leschi was deprived of due process by ineffective assistance of counsel, his trial was constitutionally defective. It was also noted by Ladenburg during his closing argument that another Nisqually prosecuted and convicted of murdering a combatant during the war was pardoned prior to his scheduled execution. Ladenburg closed by telling the judges, "We cannot bring Leschi back to life, and we cannot restore Leschi to his land. We can, we must, restore his good name." He continued, "The only fair and just result for a historical court is to correct the historical record of our state and declare Leschi exonerated." <sup>5</sup>

### Court's Verdict

After the closing arguments the Court recessed to consider its verdict. When the Court reconvened, Chief Justice Alexander first announced that the seven judge panel unanimously agreed to the answers to two interlocutory questions posed by the prosecution or defense: The Court's deci-

sion had historical significance; and, a state of war existed between the Washington Territorial government and the sovereign Nisqually Nation at the time of Moses' death on October 31, 1855.

Justice Alexander then announced the Court's decision that was based on all evidence relevant to determining Leschi's guilt or innocence — irrespective of whether it was within or beyond the bounds of the trial record. The judges unanimously decided that regardless of who shot Moses, "The killing was a legitimate act of war, immune from prosecution." <sup>6</sup> Consequently, Leschi was declared "exonerated" of Abrams Moses' death.

Thus, even though there was significant and compelling evidence that Leschi was not present at the scene of Moses' death, as judges are apt to do, the seven member court took the shortest route to reaching its decision by deciding that irrespective of his whereabouts, he had been charged, prosecuted, convicted and executed for a non-existent crime.

One of the judges that exonerated Chief Leschi, Thurston County Superior Court Judge Daniel Berschauer, observed, "Even though this decision has no legal consequence, it clearly has a historical consequence." One of those consequences is that as many as 500 Washington State history books may be amended by various means to reflect the Court's decision.

Cynthia Iyall, a descendant of Chief Leschi's sister and chairwoman of the Committee to Exonerate Chief Leschi said after the verdict, "I'm just happy; this is really about the future. This is for all the kids: they need to know who that man was and what truthfully happened to him."

Although Chief Leschi is currently remembered in the Puget Sound region, with a school, a park and a Seattle neighborhood named after him, Dorian Sanchez, chairperson of the Nisqually Tribe, noted, "Now the world can know him as we know him, "warrior, leader, hero and innocent." <sup>7</sup>

Another historical aspect of Chief Leschi's case is that he was the first person sentenced to capital punishment and executed in the Washington Territory that became the State of Washington — and he is now exonerated.

Since the precedent of a Historical Court of Inquiry and Justice has been established, it may now be possible that other miscarriages of justice in Washington state may be

## Leschi continued on page 33



Cynthia Iyall, a descendant of Chief Leschi, who helped lead a two-year effort to reopen his murder case, at his grave in Tacoma, Washington. (Annie Marie Musselman/*The New York Times*)



## Wrongly Imprisoned Man Won't Shut Up About It

JOLIET, IL—George Howard Buell, an inmate wrongfully imprisoned at Stateville Correctional Center for third-degree sexual assault and aggravated battery, won't shut the hell up about being innocent.

Buell, 46, an Elmhurst, IL electrician, was convicted of raping and burglarizing his elderly neighbor in 1994, despite the fact that he was at work when the crime occurred. He was mistakenly sentenced to a prison term of 20 years to life. Since then, his imprisonment has been a source of nonstop bellyaching.

"I'm completely innocent of the charges brought against me," Buell said in yet another long-winded jailhouse statement last week. "I am a victim of inept police work, conflict-of-interest issues among the prosecution, and a lackadaisical defense. Anyone with even a peripheral familiarity with my case could see the inconsistencies. It's a complete miscarriage of justice."

Buell's insufferable tirades have taken the form of numerous appeals to state and federal courts, unsuccessful attempts to launch public

### Leschi continued from page 32

reopened for review. The same procedure could be instituted in other states to rectify injustices that are outside the bounds of the regular legal system.

Prime cases for such review are the second-degree murder convictions of seven men under very dubious circumstances related to an Armistice Day fracas between pro-union and anti-union people in Centralia, Washington on November 11, 1919, that resulted in the deaths of four men, and the lynching of one man kidnapped from the county jail.<sup>8</sup>

End notes:

<sup>1</sup> Historical Court Clears Chief Leschi's Name, Gregory Roberts, *Seattle Post-Intelligencer*, p. B1, B4, December 11, 2004.

<sup>2</sup> Historical Court Clears Chief Leschi's Name, Gregory Roberts, *Seattle Post-Intelligencer*, p. B1, B4, December 11, 2004.

<sup>3</sup> Indian Chief Hanged in 1858 is Cleared, AP, *The New York Times*, December 12, 2004.

<sup>4</sup> Chief's Retrial, 146 Years in the Making, Sarah Kershaw, *The New York Times*, December 5, 2004.

<sup>5</sup> Historical court clears Chief Leschi's name, By Gregory Roberts, *Seattle Post-Intelligencer*, December 11, 2004.

<sup>6</sup> Historical Court Clears Chief Leschi's Name, Gregory Roberts, *Seattle Post-Intelligencer*, p. B1, B4, December 11, 2004.

<sup>7</sup> Justice, 146 years later, By Rob Carson, *The News Tribune* (Tacoma, WA), December 11th, 2004.

<sup>8</sup> One of the most complete accounts of this case is, *The Centralia Conspiracy* by Ralph Chaplan (1920).



petitions, and e-publishing a 400,000-word autobiography titled *Won't Someone Please Hear My Anguished Plea?*

"Okay, I get it—he's innocent already," said Eric Holsapple, Buell's court-appointed attorney. "Like

I don't know that. I only toiled for, like, forever years making a case out of it. Every time I talk to him, I have to brace myself—okay, here comes the sob story, again."

After spending four years trying to capture the media's attention with the story of his innocence, the wrongfully imprisoned inmate began pestering the courts in 2001 for additional DNA testing or a declaration of a mistrial.

"I will take a lie-detector test. I will do anything. I don't belong in prison," the incessant motormouth said. "The security tape in the garage where I work shows me pulling into the lot at the time the crime took place. It wasn't admitted as evidence. That fact alone should be grounds for a mistrial."

Buell's cellmate, Bob Hannan, has heard the "in jail for a crime I didn't commit" song and dance "about a million times." Said Hannan: "The parking lot surveillance videotape, the horrible injustice. I've heard it all. A lot. I didn't like the way they handled my case either. But you don't hear me yammering about it all the time. It's called moving on."

The consortium of attorneys and social-justice activists who were unlucky enough to have been assigned the task of getting Buell and his big, wrongfully imprisoned mouth out of jail have gotten perhaps the biggest earful of his whining.

Darron and Eugene Buell speak to reporters after dragging themselves to yet another prison visit to hear their brother go on and on about his innocence.

Tania Schultz, a senior staff attorney at Northwestern University's Center On Wrongful Convictions, has worked on Buell's case for over two years. Although she is convinced that Buell is innocent, she is "fed up" with the subject.

"Even the unjustly incarcerated should do other things in prison, like lift weights, or knit," Schultz said. "Sadly, securing his freedom seems to be George's sole interest in life. He's obsessed with getting his life back."

Added Schultz: "All the time, it's 'free me'

this, 'free me' that. Me, me, me, me, me."

Buell's brother Darron, who visited the prisoner last Friday, reported afterward that Buell "did most of the talking. No prizes guessing what he was talking about," Darron added.

Buell's sob story will be heard by the Illinois State Supreme Court during its next term.

"I can't wait. Since being incarcerated, my innocence is all I have to cling to in this horrible, horrible place," said Buell, echoing comments that he has made to anyone who's had the misfortune of being in contact with him at any time during the past decade. "This goes beyond my worst nightmares of anything I could imagine ever happening to me, and I hope the justice system finally does something—anything—to free me from this living nightmare."

"I just wish he'd shut his trap about it," attorney Holsapple said. "I'm working on his appeal. That's more than most prisoners get. But is he satisfied? No. All he cares about is getting out of jail. I'm like, 'George, get a life.'"

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P. Wilson, Professor of Criminology, Bond University

## LaBonte cont. from page 3

Morgan's burned out car. Burrows immediately notified the Conroe Police Department. Officer Taylor was sent to verify the call. Once at the scene Taylor drove his patrol car up to the burned vehicle and discovered the remains of Morgan and Cleary inside.

Morgan was a friend of the LaBonte family. She visited the LaBonte family at their home and occasionally at their place of business. At the time of her murder, however, Lonnie had not spoken to Morgan in over three months. Lonnie knew Morgan because she was the girlfriend of his friend Gerald Barton. Neither Lonnie nor anyone else in the LaBonte family knew Cleary.

Detectives came to our home (Philip and Betty LaBonte) on the morning of June 19, 1997. They asked to talk with Lonnie regarding Gerald Barton and any connection he might have had with the death of Morgan and Cleary. Lonnie's dad and I encouraged him to speak with the detectives since he had been friends with Morgan, knew Gerald, and we knew Lonnie had nothing to hide. Lonnie allowed his fingerprints, palm prints and shoe impressions to be taken after his statement on June 19. Lonnie was questioned again by detectives on July 16, 1997.

Lonnie's then girlfriend, Melissa Brannon, also gave a police statement on June 19, and again on July 16, 1997. She denied any involvement or knowledge of the crime. She stated that she was with Lonnie at his home in New Waverly from about midnight June 7, 1997, until the following afternoon of June 8, 1997. She also said they never left during that time.

Lonnie and Melissa both willingly provided hair and blood samples to the police for DNA testing. All the tests, including the DNA tests, comparing the samples provided by Lonnie and Melissa with the crime scene evidence came back negative.

Lonnie began driving a 1996 Ford Ranger pick-up owned by Chris Vincent on June 5, 1997. Chris voluntarily allowed the police to examine the truck. Sometime between July 7 and July 10, 1997, ninety tiny spots the size of an ink-pen tip were said to be located on the outside of the truck. Nineteen of these "spots" were sent to the Department of Public Safety (DPS) Crime Lab in Houston for DNA testing. The results were inconclusive as to their origin. Kristi Wimsatt, a technician with the DPS crime lab in Houston, testified during Lonnie's trial that the tiny stains could have been iron, rust, or any number of other substances.

Saxton re-enacted his version of the events to police detectives on November 7, 1997. According to police officials Saxton gave different "stories" from November 1997 through February 1999. Saxton even gave a "new story" during Lonnie's trial that was different than all previously known statements. We do not know exactly how many statements Saxton has made, and they all may not have been provided to Lonnie's attorney. We do know, however, that Saxton was placed under hypnosis for 'questioning' at least once. That was never mentioned during Lonnie's trial, nor since in any legal filings.

### Police Use Statement By Melissa Brannon's Half-sister To Obtain Indictments

Police officials continued to investigate the case for several years without any charges being filed. Then police questioned Melissa Brannon's half-sister, Kiley Brannon, sometime in July of 1999, after she and her live-in boyfriend were charged with an unrelated crime. We believe Kiley was tricked, cajoled and frightened into giving a false statement to the police related to Cleary and Morgan's murder. Kiley says that when she told the truth during a polygraph exam that she didn't know anything about the murder of Cleary and Morgan, she was told she was lying. After being jailed overnight, she agreed to tell the polygraph examiner and police investigators what they indicated they wanted to hear her say as "the truth." She was then tested telling the made-up story that Lonnie and Melissa were involved in the murders. She says she was then told she passed the polygraph. However, to date neither Lonnie nor any attorney representing Lonnie, has been provided with, or even seen any statements made by Kiley to the authorities, nor the result of any polygraph tests administered to her. After she gave her statement the charges pending against her and her boyfriend were dropped.

The police and prosecutors relied in part on Kiley Brannon's statement to obtain arrest warrants, and later indictments in Montgomery County of two counts of capital murder and one count of arson against Lonnie, Melissa, and Russell LaFleur. LaFleur was a young man who stayed at Lonnie's residence for about two weeks about the time of Morgan and Cleary's murder.

After the indictments in January 2000, LaFleur gave a statement placing himself at the scene of the crime but blaming Lonnie for the deaths of both girls, saying he helped commit the arson only. Unbeknownst to LaFleur the statement had been video-taped. LaFleur quickly recanted the statement, claiming he had been deprived of sleep for days, denied food and water, physically threatened during

interrogations, and mentally abused to the breaking point when his police interrogators put a syringe of drugs to his arm ready to kill him with an injection, while making it appear he had accidentally overdosed. He also said the authorities told him the crime details.

LaFleur rejected the prosecution's pressure to accept a plea bargain that would have been sweetened if he had agreed to testify against Lonnie. LaFleur was tried about six months before Lonnie. The jury relied on LaFleur's recanted confession and Saxton's testimony to convict him of murder. He was sentenced to life in prison. LaFleur did not testify at Lonnie's trial. There is every reason to believe that Russell LaFleur is also innocent of any involvement in Morgan and Cleary's murders.

After she had been held in jail for over twenty months, and after repeatedly saying she knew nothing about the murders and was with Lonnie at his residence in New Waverly at the time of the murders, Melissa changed her statement. Approximately one week before Lonnie's trial, Melissa gave a video-taped statement that basically matched Saxton's 'story.' Information in her 'taped statement' is what Melissa testified to as being truthful at Lonnie's trial. It is apparent from the video that the detectives were leading Melissa and giving her information about the crime scene. (See Problem No. 4 below.)

### LaBonte's Trial

Melissa and Saxton provided the key prosecution testimony during Lonnie's trial. Melissa claimed that Lonnie drove the Ford Ranger down the sandy road 133 feet where the initial attack supposedly took place. She testified that Lonnie, LaFleur and her then left the crime scene in Lonnie's truck to find a vehicle to siphon gasoline from. After returning she said they loaded the victims into the back of the truck, and Lonnie drove another 100 feet to Morgan's car. She said they then moved the bodies from the truck to Morgan's car, and when finished they backed the truck 233 feet to the road and left. Saxton's testimony was the same as Melissa's except he did not identify Lonnie specifically, and he referred to an unidentifiable vehicle that he thought was a truck. Both Melissa and Saxton's testimony was about a crime scene scenario involving Morgan's car making one set of four tire tracks, and Lonnie's pickup truck making four sets of four tire tracks, for a total of five sets of four tire tracks.

The story doesn't match the crime scene evidence. It is known that Taylor's patrol car drove in 233 feet from the highway where Morgan's burned out car was found at the end

## LaBonte cont. on page 35

## LaBonte cont. from page 34

of the sandy road. The crime scene photos taken by police investigators clearly show only two sets of tire tracks: those of Morgan's car and Taylor's patrol car. Period. There are no tracks of the Ford Ranger Lonnie was driving at the time. Which proves it is impossible for the events they testified about to have happened as they testified they occurred.

Detective Joseph Sclider reported two shoe impressions were found at and near the crime scene. One was found near where the attack occurred, and the second by the railroad tracks. Both shoeprints were going in the direction of the railroad tracks, and the size 12 impressions appeared to be made by the same person. The only known person to go near the railroad tracks and known to be with the girls just before and immediately after their demise is Saxton. Lonnie's shoeprint is size 10, two sizes smaller than the crime scene shoeprints.

Other inconsistencies in the prosecution's case would have been exposed if Lonnie's lawyer had subpoenaed a critical exculpatory witness – Chris Gillaspie. Gillaspie is a friend of Saxton who gave a police statement in late 1997 describing how on the night of June 8, 1997, while partying on Galveston's Crystal Beach, Saxton admitted to killing and burning Morgan and Cleary earlier that day. Saxton also bragged that he had committed the perfect murders. Saxton's admissions would have been about 18 hours after Cleary and Morgan were murdered, and he would have been expected to be feeling the adrenaline rush from his deed.

Lonnie's lawyer was incompetent; no defense witness or expert testified and the sole defense exhibit was a police photo taken months after Morgan and Cleary were murdered that showed injuries from the night of their murder still visible on Saxton's body. During his closing statement Lonnie's lawyer argued to the jury that the prosecution hadn't proven their case against Lonnie beyond a reasonable doubt, and that Saxton was the killer.

Relying on the testimony of Saxton and Melissa, on September 26, 2000, the jury found Lonnie guilty of the murders, but they deadlocked on the arson count.

Prosecutors dropped the arson charge. Lonnie was sentenced to life in prison on September 28, 2000. He will have to serve a minimum of 40 years before being eligible for parole.

Melissa's reward for testifying against Lonnie was that two months after his trial she was released when the capital murder and arson charges against her were dismissed due to a

"lack of evidence." Yet the prosecution had claimed that there was enough evidence to arrest her, indict her for murder and arson, and hold her in jail for almost two years while awaiting her trial. Her trial never happened only because she testified in accordance with her agreement with Montgomery County District Attorney Michael McDougal to commit perjury in exchange for dismissal of the charges against her. (See Problem No. 4 below.) Prior to Lonnie's trial, neither he nor his attorney was informed about that agreement.

The Texas Court of Criminal Appeals denied Lonnie's direct appeal on February 19, 2003. His state habeas petition was denied on April 12, 2006.

### Problems With Lonnie's Case

There are many problems with this case. A few of the more obvious ones are:

1. The boots Saxton said he removed from Cleary's body have never been found.

2. Lonnie had no wounds when questioned by police on June 19, 1997, 11 days after the murders. In contrast, according to the police more than three months after Cleary and Morgan's murder Saxton still had "noticeable" injuries from that night, including deep scratches on his face, deep wounds on his arm, and one leg was injured severely enough that he was still limping. Police detectives were informed that Saxton's "scratches" did not appear to be caused from a bush, but were believed to be "fingernail scratches" and caused "from a fight."

3. Cellphone records prove that Lonnie was at his New Waverly residence during the time that the police say the murders and arson occurred. Lonnie's cellphone had a local calling area of Houston and surrounding areas that included Conroe. Lonnie's cellphone automatically went into roam mode when he was outside his cellphones local calling area. New Waverly is almost 50 miles north of Houston and about 16 miles north of the Conroe crime scene. New Waverly is outside Lonnie's cellphone local calling area, and so his cellphone was in roam mode for all calls made from his New Waverly residence. Records provided by Lonnie's cellphone provider prove that several calls were made with Lonnie's cellphone during the early-morning hours of June 8, 1997, while it was in roam mode, and that the calls were transmitted by the New Waverly cellphone tower, the range of which ended about 1,500 feet from Lonnie's residence.

4. Melissa Brannon gave a sworn Deposition on February 10, 2004, during which she described the "wink-type deal" she negotiated

with the Montgomery County District Attorney Michael McDougal exchanging her perjurious testimony against Lonnie for D.A. McDougal dropping the murder and arson charges against her. (See excerpts from "The Oral Sworn Deposition Of Melissa Brannon On February 10, 2004", on page 36.)

5. A sworn affidavit by Alfred Beauchamp documents conversations indicating a plea deal was negotiated between D.A. McDougal and Saxton long before Lonnie's trial. The substance of the deal is that in exchange for his prosecution favorable testimony against Lonnie, Saxton would not be prosecuted for murdering Cleary and Morgan. Mr. Beauchamp's affidavit was submitted as apart of Lonnie's state Habeas Corpus petition (Pursuant to Rule 11.07.).

6. James McDougal of JAMAC Investigations documents in an affidavit, his conversation with Saxton's Mother, Jackie Lewis, during which Saxton admitted to his mother that the prosecution told him what to say to ensure Lonnie would be convicted. James McDougal also states that Ms. Lewis said that Saxton admitted that he could neither see nor identify anyone as being involved in the crime, and that he doesn't know Lonnie. Ms. Lewis also stated that D.A. McDougal and police investigators threatened Saxton that if he ever told anyone about their deal he would be charged with conspiracy to murder Cleary and Morgan.

7. There had been a quarter of an inch of rain in Conroe on the afternoon and evening of June 7, 1997. Because of the moist ground it would be expected that there would have been tire track impressions of all vehicles driving down the sandy road in the early morning hours of June 8. In fact, there were tracks of the only two vehicles that there is proof drove down the road – Morgan's car and Taylor's police vehicle.<sup>1</sup>

8. Four people who saw smoke coming from the area where Morgan's burned-out car was found while separately driving on Teas Nursery Road (FM 3083) between 5:15 a.m. and 6:20 a.m., on June 8, 1997, gave statements to the police. None of those witnesses testified at Lonnie's trial, and none of their statements were introduced as evidence for the jury to consider. All four statements were submitted as apart of Lonnie's state Habeas Corpus petition.

9. The police recovered an outside surveillance video from a business located near the turn-off on to the sandy road where Morgan's car was found. We have not yet been allowed to view this video that may conclusively

**LaBonte cont. on page 36**

## LaBonte cont. from page 35

prove the truck Lonnie was driving on June 8 did not enter the sandy road at any time.

### Conclusion

None of the physical or forensic evidence in this case implicates Lonnie LaBonte, or Russell LaFleur, or Melissa Brannon in the murder of Misty Morgan and Sarah Cleary. In contrast, Gabriel Saxton admits he was with Morgan and Cleary at the scene of their murder prior to and after they were murdered, that he robbed items from both women, and that he even stole Cleary's boots from her corpse. Furthermore, he admitted to someone hours after the murders that he had committed the "perfect murders." It is consistent with what is known about the crimes to conclude that Saxton perjured himself at Lonnie's trial to save himself from two capital murder convictions and a likely death sentence.

Justice has not been served for society in Lonnie LaBonte's case because all the known evidence points to the real murderer of Morgan and Cleary being protected from prosecution by an agreement with Mont-

gomery County D.A. Michael McDougal to testify favorably for the prosecution.

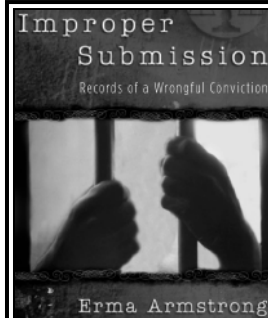
We all expect the judicial system to not fail victims. Victims deserve justice. It is equally important that the judicial system not create additional victims by wrongly convicting innocent persons. Please do what you can to help right the wrong done to Morgan, Cleary, Lonnie, LaFleur, Melissa, and our families. If you don't ... who will?

The Texas Center for Actual Innocence is currently reviewing Lonnie's case.

Lonnie LaBonte can be written at:  
Lonnie LaBonte 1003685  
Polunsky Unit  
3872 FM 350 South  
Livingston, TX 77351

Lonnie's outside contact are his parents:  
Philip and Betty LaBonte  
681 Portico  
Livingston, Texas 77351  
Email: freerson@livingston.net

There is Petition to Free Lonnie LaBonte at:  
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## Oral Sworn Deposition of Melissa Brannon on February 10, 2004

Excerpts from pages 26-29, 32-33

All questions (Q.) by Attorney Janice Baldwin. All answers (A.) by Melissa Brannon. Michael (Mike) McDougal is District Attorney for Montgomery County, Texas.

Q. And who suggested to you that it would be the better idea?

A. Mike McDougal offering me deals and whatnot.

Q. Okay. Can you remember and can you say in his words exactly what he said to you?

...  
A. Also he had, right before the trial, he had told me that if I would have made this statement that I was fixing to make at the trial from the day one, I would have never been in jail, they would have let me go the first day. I would have never had to sat in there. [Jailed

for 20 months] So if were to make this statement and help the state on this trial, that I have a strong possibility of being

able to go home.

Q. Okay. Did he ever say directly to you to tell something other than the truth. And when I say "he" I mean Michael McDougal. **Did Michael McDougal ever say to you to tell something other than the truth on the witness stand?**

A. Yes.

Q. All right. Do you ever remember him using those exact words or was it just done by innuendo?

A. Both. He had innuendo, and he also told me **when I testified to make sure that I tell the court that we had no deals and that he has not promised me anything, and that he really reiterated that I have to make sure that I tell them that we have no deals and he had not promised me anything because he could get in**

trouble otherwise.

Q. And he said those specific words, "he could get in trouble?"

A. Oh, yeah, that he could get in trouble.

Q. Okay. So let me ask you this, had the deal been made to dismiss your case prior to your testimony in the LaBonte case?

A. Assumably so. verbally, you know, verbally not, it was kind of a wink-type deal. He couldn't come out and tell me this was what he was going to do for me, but he insinuated to the fact that this was what was going to happen if I did this for him but he couldn't promise or guarantee anything for the sake of the law. It had to be this way.

Q. Because he knew he would be doing something illegal

A. Exactly.

Q. Is that what your intimidation was?

A. Very much so.

Q. And after your testimony in the LaBonte, in the 410th District Court, did you

thereafter receive a motion and an order to dismiss the case against you?

A. Yes.

Q. Do you remember seeing that motion at any time?

A. Yes.

Q. And do you remember that motion in part saying, "Due in large part to her testimony, Lonnie LaBonte was convicted of capital murder and sentenced to life in the Institutional Division of the Texas Department of Criminal Justice. Her testimony revealed that she had been present at the time of the murders but that she had nothing to do with planning or participating in them."

A. Right.

Q. "Subsequent to giving such testimony, the Defendant did submit to a polygraph examination conducted by the Federal Bureau of Examination," excuse me, "of Investigation which indicated that she was telling the truth."

A. Right. **The FBI never gave me a polygraph.**

Q. Okay. So you are saying that this statement in this particular motion to dismiss that you were given a polygraph examination by the Federal Bureau of Investigation, never happened?

A. Correct.

...

Q. Okay. Let me ask you this. Are you under the influence of any drugs or alcohol today?

A. No.

Q. And you have already told me that no one forced you or coerced you or paid you anything to come here at this time and that you are simply here to set the record straight and to see that justice is done.

A. Correct.

...

Q. ... And you are absolutely sure that this is the correct and true statement that you are giving today.

A. Right. It's always been from the get-go until two weeks before trial.

Melissa Brannon's entire 36-page deposition is available at, [http://justicedenied.org/issue/issue\\_33/brannon\\_02102004.pdf](http://justicedenied.org/issue/issue_33/brannon_02102004.pdf)

## In Memoriam: Iva Toguri D'Aquino 1916-2006

Iva Toguri was born in Los Angeles on July 4, 1916. Her parents were Japanese immigrants. After graduating from U.C.L.A., 25-year-old Iva left for Japan in July 1941 to help care for her ill mother's only living sister.

With relations deteriorating between Japan and the U.S., Iva wasn't allowed to board a California bound ship on December 2, 1941, because the Certificate of Identification provided by the State Department for her travel to and from Japan wasn't considered proof of her U.S. citizenship.

Iva was trapped in Japan when Pearl Harbor was attacked five days later. She refused to renounce her U.S. Citizenship, and because of her Japanese heritage government officials denied her request to be interned with other foreigners.

To repay money she borrowed due to six weeks hospitalization with pellagra, beriberi and malnutrition, Iva went to work as a typist at Radio Tokyo in August 1943.

Three allied POW officers were conscripted by the Japanese in early 1943 to broadcast the *Zero Hour* program on Radio Tokyo. The POWs subverted the program's intended propaganda purpose by writing the scripts to surreptitiously boost allied troop morale.

Iva gained the trust of the *Zero Hour* broadcast crew by smuggling food and medicine to them and other allied POWs. When the Japanese wanted to add a woman to the *Zero Hour* the POWs recommended Iva. She reluctantly agreed after being assured by the POW broadcasters that she would not have to say anything against U.S. servicemen. Iva's first broadcast was in November 1943. Her radio name was initially "Ann," and later "Orphan Ann."

Under the noses of the Japanese, the four *Zero Hour* broadcasters audaciously produced a news and entertainment program that reduced the Japanese's desired propaganda into harmless rhetoric and spirit lifting music.



Iva Toguri on  
September 4, 1945

Iva expected to return to the U.S. after the war ended in August 1945. Instead, she was arrested two months later by the 8th Army Counter Intelligence Corps (CIC), and imprisoned for a year while investigated by the CIC and FBI. Iva was released in October 1946, without charges being brought against her.

With Iva's return to the U.S. imminent, influential media personality Walter Winchell led a chorus of calls for her prosecution for treason. FBI Director J. Edgar Hoover personally directed the FBI's effort to find evidence against Iva. In August 1948 she was arrested in Tokyo by military police and escorted to the U.S. The FBI arrested her when she arrived in San Francisco.

Iva was indicted on eight counts of treason, and her trial began on July 5, 1949. The prosecution claimed Iva was 'Tokyo Rose' and that she "maliciously betrayed the United States."<sup>1</sup>

After a 12-week trial that was the most expensive in U.S. history up to that time, the jury acquitted Iva of seven treason counts after 80 hours of deliberations. They found her guilty of one count related to testimony by the government's two "star" witnesses: California born Japanese-Americans who were Iva's superiors at Radio Tokyo and who had renounced their U.S. citizenship after Pearl Harbor. Both men testified Iva made a treasonous statement during a broadcast after the U.S. Naval victory at the Philippines Leyte Gulf in October 1944.

Iva was the seventh person convicted of treason in U.S. history. On October 6, 1949, she was sentenced to 10 years in prison and a \$10,000 fine. Iva appealed, and the U.S. Supreme Court twice declined to review her conviction.

On January 28, 1956, Iva was released from prison on parole. She moved to Chicago and worked at her family's mercantile store. Iva's parole ended on April 18, 1959. She had spent a total of 8-1/2 years

in jails and prisons, and more than 3 years on parole from the time of her first arrest in 1945.

In 1976 the *Chicago Tribune's* Tokyo reporter, Ron Yates, tracked down the two men who had provided the critical testimony relied on by the jury to convict Iva of treason. Both men told Yates that Iva did not make any treasonous broadcasts, and they perjured themselves under pressure by the federal prosecutors.

Also in 1976, the Justice Department, the FBI and U.S. Army Intelligence provided San Francisco filmmaker Antonio Montanari with more than 2,300 documents about Iva's case in response to Freedom of Information Act requests.

Montanari discovered that before Japan surrendered, the U.S. Office of War Information determined, "There is no Tokyo Rose; the name is strictly a G-I invention."<sup>2</sup> He also discovered that, "Six months after Iva's arrest, the 8th Army's legal section reported, "There is no evidence that [Iva Toguri] ever broadcast greetings to units by names or location, or predicted military movements or attacks indicating access to secret military information and plans, etc."<sup>3</sup> That report unequivocally concluded, "the identification of Toguri as 'Tokyo Rose' is erroneous."<sup>4</sup>

Iva's federal prosecutors concealed from her trial lawyers the proof that she was not 'Tokyo Rose' and had never committed treason.

Yates wrote several articles about Iva's case for the *Chicago Tribune* that resulted in a segment about Iva on CBS' *60 Minutes* that aired on June 24, 1976. One of the CIC officers who interviewed her in 1945 said the U. S. State Department simply abandoned her in Japan. The jury foreman said he believed she was innocent, but he submitted to the pressure of the other jurors and the judge.

In November 1976 Wayne Merrill Collins, the son of Iva's trial lawyer, filed a presidential pardon petition for Iva. The evidence of her innocence was so convincing that President Ford pardoned Iva on January 19, 1977. She became the only person in U.S. history pardoned after a treason conviction.

Iva lived quietly in Chicago, declining interviews and working at the family store. Iva and Felipe D'Aquino, a Filipino, were married in April 1945. However, the federal government barred him from entering the U.S., and after decades apart the couple divorced in 1980.

On January 15, 2006, Iva was awarded the World War II Veterans Committee's Edward J. Herlihy Citizenship Award. Iva described it as "the most memorable day of my life."<sup>5</sup>

Two months after her 90th birthday, Iva Toguri D'Aquino died of natural causes in Chicago on September 26, 2006.

During a National Public Radio interview the day after Iva's death, Ron Yates was asked, although Iva had been granted a presidential pardon, "Did she ever come out from under the shadow of suspicion, or did people always think of her in some way as 'Tokyo Rose'?" Yates replied, "They always thought of her as 'Tokyo Rose'. It was branded onto her soul this 'Tokyo Rose' thing. She could never get out from under it."<sup>6</sup>

The media created myth of 'Tokyo Rose' may be what the general public believes, but it doesn't change the facts of Iva Toguri D'Aquino's life, or the quiet dignity with which she lived.

### Endnotes and Sources:

For details about Iva's experiences from 1941 to 1959, see, Iva Toguri Is Innocent!, *Justice:Denied*, Issue 28, Summer 2006.

1 They Called Her Traitor, J. Kingston Pierce, *American History*, October 2002, pp. 22, 28.

2 *Id.* 26.

3 *Id.* at 27.

4 *Id.* at 27.

5 Quiet life of alleged Tokyo Rose, By Ben Goldberger, *Chicago Sun-Times*, September 28, 2006.

6 Remembrances: Iva Toguri D'Aquino Dies at 90, All Things Considered program, *National Public Radio*, September 27, 2006.

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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

Any Prison

Anytown, Anystate

My sister Emily is my outside contact.

Email her at, Aaaa@bbbb.com

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