

JUSTICE DENIED

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The Magazine for the
Wrongly Convicted

US SUPREME COURT OKs IMMUNITY FOR ADMINISTRATIVE PROSECUTORS

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Mashelle Bullington

Exonerated 13 years
after burglary conviction
in California.
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Robert "Bob" Doyle

Posthumously awarded
\$129,000 for 2-1/2
years of wrongful imprisonment
in Alabama.
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Claude McCollum

Michigan prosecutor fired for
failing to disclose video exonerating
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Clay Bennett

Released after 3 years
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York for a rape that
never happened.
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Romeo Phillion

Conviction of
1967 murder
overturned by
proof he was
180 miles
from the crime scene. Served
31 years in prison.
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Jeong Won-Seop

Acquitted of murder
35 years after 1973
conviction.
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Winter 2009

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Message From The Publisher

Lonnie LaBonte’s story of being convicted of a double murder in Montgomery County, Texas was in *JD* Issue 34, Summer 2006. The Innocence Project of Texas became involved in his case and over the dogged opposition of the prosecution, on January 13, 2009 the Texas Court of Appeals granted DNA testing of the prosecution’s key evidence. Swabs from spots on the exterior of LaBonte’s truck tested positive for the possible presence of iron, and the prosecution claimed at trial it was the victim’s blood. If the spots prove to not be blood, the prosecution will have no physical evidence tying him to the crime, and he can petition for a new trial.

Karlyn Eklof’s story of being convicted of a Springfield, Oregon murder was in *JD* Issue 35, Fall 2006. On March 2, 2009 the US Supreme Court declined to review the lower federal court’s denial of her writ of habeas corpus. Anthony Bornstein with the Federal Public Defenders Office in Portland, Oregon wrote brilliant briefs on Karlyn’s behalf, but he was unable to convince the federal judges that evidence of her innocence concealed from the jury by the prosecution’s *Brady* violations wasn’t procedurally barred from consideration on its merits. Erma Armstrong, the retired music teacher who discovered the concealed evidence, is now spearheading the effort to prepare a clemency petition for submission to Oregon’s governor.

William “Bill” Coleman’s 18 month refusal to eat solid food to protest what he claims is the injustice of his conviction for allegedly raping his wife, is unusual for this country. (See article on p. 12) One of the most well known hunger strikes was in 1981 at Northern Ireland’s Long Kesh prison that resulted in the starvation death of ten IRA prisoners. *JD’s* Bookshop now carries the book *Ten Men Dead*. (See p. 21)

The underhanded tactic of prosecutors concealing exculpatory evidence is rarely exposed to the light of media publicity. Fortunately for Claude McCollum (See p. 19) and Ted Stevens (See *JD* Editorial on p. 5), publicity in their cases contributed to overturning their convictions.

Hans Sherrer, Publisher

Justice:Denied - the magazine for the wrongly convicted
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Justice: Denied’s logo represents the snake of evil and injustice climbing up on the scales of justice.



Information About *Justice:Denied*

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 23. An information packet will be sent with requests that include a first-class stamp or a pre-stamped envelope. Write: Justice Denied; PO Box 68911; Seattle, WA 98168.

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Justice:Denied volunteers directly contributing to this issue:
 Natalie Smith-Parra, Editor; Terri Smith, Mailing; Katha McDonald, Mailing; and Hans Sherrer.

For over 12 years, I have been deeply committed to seeing justice prevail for my husband, Jeffrey R. MacDonald. The struggle to overturn his wrongful conviction continues to be a torturous journey – and a nightmare for Jeff that dates back 39 years.

Background of the Case

Jeff was a 26-year-old Army captain at Ft. Bragg, North Carolina when his young wife Colette and two daughters, Kimberley, 5 and Kristen, 2, were brutally murdered in the early morning hours of February 17, 1970.

Jeff was found wounded and unconscious by military police. Upon resuscitation, he described intruders who had entered his home: A woman with long blond hair, a floppy hat and boots, at least one white male, and a black male wearing an Army jacket with E-6 Sergeant stripes.

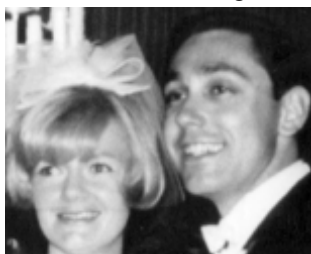
As he pleaded with medics to check his family, Jeff was rushed to the hospital and remained in the ICU for nine days. He was treated for severe injuries including multiple stab wounds, a collapsed lung, and a blow to the head.

In spite of his injuries and descriptions of the assailants, authorities focused on Jeff as a suspect. He was investigated and cleared by the Army, then honorably discharged.

Rebuilding a Productive Life

In an effort to rebuild his life after such unspeakable loss, Jeff took a job in Long Beach, California, entering the fast-paced environment of emergency medicine. He became an innovator in the field, and the first honorary member of the area Police Association, having saved so many officers' lives.

Years passed as the murders remained "unsolved". The Army tribunal had recommended an investigation of Helena Stoeckley, a woman who matched Jeff's description and was well-known to police as a drug user and reliable drug informant. Although she had no alibi for the night of the murders and



Colette and Jeff at a friend's wedding in 1968.
(Used with permission of Kathryn MacDonald)

had admitted her involvement to several people, she was not pursued as a suspect. Instead, military authorities (CID) continued to focus

Thirty Year Quest For Justice – *U.S. v. Jeffrey R. MacDonald*

By Kathryn MacDonald

on Jeff, even after he became a civilian. Army lawyer Brian Murtagh, who had been involved in the case, then transferred to the U.S. Department of Justice (DOJ) and was assigned to investigate Jeff.

The 1979 trial

Nine years after the murders, Jeff stood trial in 1979. He was prosecuted in federal court because the murders occurred on a military base. The government's theory was that during a fight with Colette because daughter Kristen had wet the bed, he used a club to strike at Colette and accidentally struck and killed his daughter Kim who was trying to intervene. Then, to cover-up his misdeed, he killed Colette, and then killed and mutilated Kristen to make it look like a cult slaying. The prosecution alleged that Jeff either wounded himself to defer suspicion or was wounded by Colette. Jeff's defense was simple – he was innocent.

The evidence the government presented to support its bizarre theory was circumstantial. To undercut Jeff's account, the government interwove the theme that there was "no physical evidence of intruders".

Helena Stoeckley was a key defense witness, and she was held in custody on a material witness warrant. When she took the stand she claimed amnesia as to her whereabouts during the murders. However, she did admit to destroying the blond wig, floppy hat, boots and clothes she said she was wearing on the night of the crimes, "because they connected her to the murders". Stoeckley had been a reliable prosecution witness in drug cases. Yet the judge ruled she was an unreliable defense witness because she was a drug user, so he barred the testimony of six witnesses to whom she had confessed to being present during the murders.

Jeff was convicted and sentenced to three consecutive life terms. A year later his conviction was overturned by the Fourth Circuit Court of Appeals on the ground he had been denied his constitutional right to a speedy trial. He was released from prison and returned to his work in California as Director of the ER at St. Mary Medical Center in Long Beach. His ordeal appeared to be over. It was until 1982, when the U.S. Supreme Court reinstated his conviction and life sentences, and he was returned to prison.

Fatal Vision's author sued and damages paid for fraud

While it is extremely difficult to overturn any conviction, the burden is tenfold when one has been vilified in the national media, as Jeff was by the grotesque portrait painted of him in the 1983 book *Fatal Vision*. The book was made into a highly-rated television mini-series in 1984. Before his trial, Jeff took the unprecedented step of giving a writer full access to his defense and personal life. He had nothing to hide and was badly in need of funds to pay his legal bills.

However, the book's publisher wanted a titillating novel that would sell lots of copies, not the true story of a man wrongly convicted in a legal charade. Consequently author Joe McGinniss juxtaposed and fabricated events and conversations to portray Jeff as a "golden boy" whose affability masked a homicidal rage.

Jeff sued McGinniss for fraud. In order to do so, he requested a transfer to a prison in California in 1986. The government had one stipulation – that Jeff agree to be housed in solitary confinement for the duration.

Although McGinniss later admitted his perfidy in open court and Jeff was paid a settlement of \$325,000, the damage was done. To this day, the press still calls him "The Fatal Vision Doctor".

In 1995 the book *Fatal Justice: Reinvestigating the MacDonald Murders* was published. Written by author Jerry Potter and reporter Fred Bost, the book dissected the government's case using its own documentation, dispelling many of the myths the government's prosecutors had perpetuated.

Post-Conviction

Jeff's post-conviction appeals in 1985 and 1991 were considered by his trial judge, Franklin Dupree, who declined to recuse himself. Opposition to Jeff was led by Brian Murtagh, who was one of his trial prosecutors after leaving the Army for the DOJ. Lead trial prosecutor James Blackburn was promoted to U.S. Attorney for North Carolina after winning the MacDonald case.

Helena Stoeckley and her boyfriend Greg Mitchell – both 18-years-old at the time of the MacDonald murders – had long since gone their separate ways. However they continued to confess independently to others (including law enforcement officials and clergy) of their involvement in the murders.

MacDonald cont. on page 4

MacDonald cont. from page 3

Both died in the early 1980's due to substance abuse.

After the McGinniss trial, Jeff learned that his mother was seriously ill and asked to stay in California to be near her. For four years total, he continued to live in solitary confinement, depending on friends to bring his mother to visit until her death in 1990.

He used those years of isolation to pore over thousands of pages of government documents obtained through the Freedom of Information Act. Exculpatory evidence, suppressed at trial, slowly came to light.

Not only was there physical evidence of intruders, but the evidence corroborated Jeff's account. Among the items the government suppressed were: 22" long blond wig fibers; black wool fibers on the body of Colette and the murder club; and blood in the exact location where Jeff said he had been knocked unconscious.

Jeff's FOIA requests were controlled by the DOJ, which doled them out over many years. By providing the documents piecemeal over time, there was no way to present the suppressed evidence in court all at once. Then, when a new item of evidence was discovered it was ruled to have been found "too late" or "not enough by itself" to overturn the case. Although the evidence had been secreted from him, Jeff had to show due diligence by filing a habeas in a timely manner, or be procedurally barred from ever relying on that new evidence.

Perjury by FBI expert and Blackburn imprisoned

In 1997, on Jeff's behalf defense attorneys Harvey Silverglate, Andrew Good and Phil Cormier filed a habeas petition based on fraud on the court. The petition relied on new evidence that FBI crime lab expert Michael Malone had falsely sworn synthetic blond hairs found at the crime scene were not from a wig. Malone left the FBI in disgrace three years later, when he was found to have lied in several other cases. Jeff's petition also requested DNA testing of biological evidence.

Judge Dupree had died, and in proceedings that took place in 1993 and 1994, Jeff's prosecutor Blackburn was disbarred, and charged with 12 felony counts of dishonesty that included embezzlement and changing court documents. After his conviction Blackburn faced up to 110 years in federal prison, but was sentenced to 7 years and was released after serving only 3 months.

Jeff's case was now being presided over by Judge James Fox. Admittedly close to the late Judge Dupree, he declined to recuse himself. Instead, he signed a waiver stating that he could be impartial. In addition, DOJ attorney Murtagh remained in control of the case for the government.

DNA testing ordered

In 1997, Judge Fox denied the habeas in total. Jeff appealed, and the Fourth Circuit upheld Fox's ruling regarding Malone, but granted DNA tests, remanding the matter back to Judge Fox to supervise them.

The defense sought to have all remaining biological evidence tested – some 50 exhibits that had been in FBI custody for 35 years. Innocence Project co-founder Barry Scheck and attorney Andy Good argued for the defense. DOJ attorney Murtagh opposed the inclusion of all exhibits, in particular any blood evidence. Judge Fox granted limited DNA testing.

Of the approximately 15 exhibits approved for testing, several specimens were found to be contaminated or missing. They were not replaced with other available exhibits. The scope of the testing became increasingly narrow.

Many years passed as we awaited the DNA test results. During that time, I became a paralegal in an effort to better assist the lawyers. Over the ensuing years, three witnesses contacted the defense website set-up in 2000, and that is overseen by volunteers. (www.themacdonaldcase.org) The three men, who did not know each other, signed sworn statements that Greg Mitchell had confessed to killing the MacDonald family.

A U.S. Marshal with a conscience

In 2005, former Deputy U.S. Marshal Jimmy B. Britt contacted Jeff's lawyers Wade Smith, who had remained of counsel since 1979, and Tim Junkin, who joined the defense in 2004. Mr. Britt explained that his conscience was weighing on him. He was the federal law enforcement official who escorted Helena Stoeckley during Jeff's trial. Consequently, he was present during a meeting in prosecutor Blackburn's office during which Stoeckley admitted her involvement in the murders. He also witnessed Blackburn threaten Stoeckley with indictment for murder if she so testified in front of the jury. The next day she capitulated to Blackburn's threat and lied on the stand.

Mr. Britt signed an affidavit as to what he saw and heard. He had a sterling reputation for integrity and passed a polygraph. The impor-



U.S. Marshal Jimmy Britt following Helena Stoeckley during Jeffrey MacDonald's 1979 trial. (AP photo)

tance of his revelations cannot be overstated. As the Fourth Circuit pointedly wrote in 1980:

"Stoeckley's statement on the stand at trial that she had no recollection of her whereabouts or activities during the critical period of midnight to 4:30 AM on the night of the crimes (although she remembered in detail events immediately prior and immediately subsequent to that crucial interval) had a great potential for prejudice to MacDonald, given the substantial possibility that she would have testified to being present in the MacDonald home during the dreadful massacre.

Had Stoeckley testified as it was reasonable to expect she might have testified, the injury to the government's case would have been incalculably great." (*U.S. v. MacDonald*, 632 F.2d 258 (4th Cir., 7-29-1980))

In 2005 a 4th habeas petition is filed

In late 2005, our attorneys (now including Hart Miles) filed a successive habeas petition seeking to vacate Jeff's conviction based on new evidence of his factual innocence. In addition to Jimmy Britt's explosive revelations, the petition included the three Mitchell confession affidavits, and two other affidavits corroborating Mr. Britt's statements. Those affidavits were from former U.S. Marshal Lee Tart and attorney Wendy Rouder, who had spent considerable time with Helena Stoeckley during Jeff's trial.

The standards of the gate keeping process for having a successive habeas petition reviewed on its merits are exceedingly high. One must make out a *prima facie* case for actual innocence, with new evidence so strong that had it been known at trial, no reasonable juror would have voted to convict. In January 2006 a three-judge panel of the Fourth Circuit Court unanimously agreed that Jeff had met that standard, and remanded the case back to Judge Fox for review.

MacDonald cont. on page 5

MacDonald cont. from page 4

DNA tests completed in 2006

In March 2006, after an 8-1/2 year wait, the DNA tests were completed. Before the results were released to Judge Fox, the government issued a press release falsely stating that the DNA results confirmed Jeff's guilt. The truth was the opposite. A hair forcibly removed with its root intact was found under the fingernail of 2-year-old Kristen – and the hair was not Jeff's. Another human hair, found on Kristen's bed also did not match Jeff's, and a third human hair, found underneath the body of his wife Colette, likewise did not match Jeff's hair. In later filings Murtagh dismissed the three hairs as unimportant.

The DOJ opposed Jeff's petition, and after the DNA testing, Murtagh requested that Judge Fox wait for the US Supreme Court's decision in *House v. Bell*. At issue was whether or not a defendant who passes the habeas threshold for a claim of actual innocence is entitled to a review of the totality of the evidence in his case. In June 2006 the Supreme Court decided in favor of such defendants.

The wait for Judge Fox's decision ensued. It seemed reasonable that, as mandated by *House v. Bell*, the court would order a hearing at which Britt, Rouder, Blackburn, and the three Mitchell witnesses would be heard, and at which the DNA results and all the other exculpatory evidence amassed over time would be reviewed. The government opposed a hearing, arguing that *House v. Bell*, the very decision Murtagh had asked the judge to wait on, did not apply to Jeff.

Helena Stoeckley's mother comes forward

Then, in March 2007, the younger brother of Helena Stoeckley, Gene, contacted our website. He stated that when Helena was dying she had confessed to their mother that she was indeed present during the murders. Their father, an Army Lt. Colonel, was now deceased. The MacDonald murders were not a topic for discussion while he was living. With the case back in the news, Gene's conscience compelled him to come forward. Helena told her mother that she lied on the stand at Jeff's trial, "because she was afraid of the prosecutor."

Attorney Hart Miles and notary Laura Redd met me to draft and witness Mrs. Stoeckley's sworn statement in front of Gene. It was filed in April 2007. The FBI immediately descended on Mrs. Stoeckley, as it had on Mr. Britt. Murtagh filed an opposition to Mrs. Stoeckley's affidavit, arguing that she was delusional, and that I had coerced her into signing a false statement.

Judge Fox remains silent as Jimmy Britt's health fails

In the summer of 2007, our lawyers wrote Judge Fox about the failing health of our witnesses. They stood ready to testify at any hearing he might order, but they were gravely ill. (Mr. Britt was dying of congestive heart failure, as was Mrs. Stoeckley.) Judge Fox did not respond.

In the fall of 2007, the defense wrote Judge Fox once again, requesting a status conference. The government objected, arguing there was no need, despite a year and a half of complete silence. Judge Fox did not respond.

In early 2008, Mr. Britt was holding on for dear life, desperate for his day in court. Soon after, Mrs. Stoeckley entered hospice care.

Jimmy Britt died on October 19, 2008.

Two weeks later, on November 4, Judge Fox issued a blanket denial of Jeff's petition. In his opinion, he accepted Jimmy Britt's sworn statement as true. Nonetheless, he denied Jeff relief, stating that since Helena Stoeckley was dead, no one could ever know whether Blackburn's threat affected her testimony. Judge Fox also refused to consider the evidence as a whole as mandated by *House v. Bell*, including the exculpatory DNA. He asserted that he didn't need to hold a hearing because there was no evidence Jeff could ever present that would make any difference to him.

Current Status

In December, 2008, federal appellate attorney Joe Zsezotarski joined the defense. Mrs. Stoeckley died on February 2, 2009. Two weeks later, on February 19, 2009, we filed a brief with the Fourth Circuit Court of Appeals requesting an appeal of Judge Fox's decision. An *Amicus* brief advocating for Jeff is expected to be filed in early April with the Fourth Circuit by Barry Scheck on behalf of the Innocence Project, and co-signed by the North Carolina Center on Actual Innocence and the New England Innocence Project.

Through 30 years of incarceration, my husband has never wavered from his initial account of events. Now 65 years old, he has always maintained his factual innocence. His courage and perseverance through the most unimaginable of circumstances continues to inspire me, and we move forward with an unshakable belief in the power of the truth.

There is extensive documentation about the Jeffrey MacDonald case at his official website, www.themacdonaldcase.org

JD Editorial Comment About Jeffrey MacDonald's Case

Brian Murtagh was an Army captain in his mid-20s, when in 1971 he became involved in the investigation of the murder of Jeffrey R. MacDonald's wife and two daughters at Ft. Bragg, North Carolina. After the Army cleared MacDonald and he left the Army, Murtagh continued investigating him. As an Army officer Murtagh assisted the US Department of Justice with the grand jury's indictment of MacDonald in 1975. Murtagh then accepted an offer to resign from the Army and take a DOJ job assisting with MacDonald's prosecution. Murtagh became co-counsel to lead prosecutor AUSA James Blackburn by claiming he "would assure a conviction."

Murtagh was true to his word. MacDonald was convicted in 1979 after Blackburn (with Murtagh remaining silent) failed to disclose exculpatory evidence and suborned perjury by key defense witness Helena Stoeckley.

For the past 30 years Murtagh has remained the government's point man in fighting to prevent MacDonald's retrial by a jury that would hear the truth about Stoeckley's participation in the murders, as well as additional testimonial and DNA evidence supporting that intruders murdered MacDonald's wife and children ... just as he has maintained since the day of the crime.

Murtagh became involved in MacDonald's case 38 years ago. The evidence supporting MacDonald's innocence has reached the point that Murtagh's opposition to a new trial can be interpreted as a strategy to avoid conceding MacDonald should not have been indicted ... much less imprisoned for 30 years. At what point does a prosecutor's zeal lose legitimacy and become a "truth be damned" psychotic obsession?

U.S. Attorney General Eric Holder announced on April 1, 2009 that "in the interests of justice" the DOJ filed a motion to dismiss the indictment and set aside former Alaska Senator Ted Stevens' October 2008 convictions for making false financial statements. The DOJ acted in response to media stories about the federal prosecutor's failure to disclose exculpatory evidence to Steven's lawyers in order to ensure his conviction.

Murtagh and Blackburn acted with the same "win at all costs" mentality as Stevens' prosecutors. The evidence of MacDonald's innocence is compelling, and AG Holder should act in "in the interests of justice" and order Murtagh and his DOJ allies to cease opposing a new trial for MacDonald, or in the alternative to move for dismissal of his indictment and to set aside his convictions.

Clay Bennett Released After Three Years Imprisonment For Rape That Never Happened



Clay Bennett the day of his release.

Clay Bennett lived with a woman and her 7-year-old daughter in Greenport, New York from June 2001 until December 2001. More than two years later the girl's mother complained to the police that Bennett sexually abused her daughter. After the girl was questioned by authorities, Bennett was indicted in 2004 for two alleged sexual assaults identified only as occurring "on or about and between June of 2001 and December of 2001."

Bennett refused to plea bargain, asserting the events never happened. Preparation of his defense was hampered by the lack of specificity as to when during the seven-month period of time the incidents allegedly occurred. The prosecution's case solely hinged on the girl's claim since there was no corroborating witness or medical evidence. To the contrary, a medical examination of the girl after she made the accusation determined she was still a virgin.

Waiving his right to a jury trial, during Bennett's 2005 bench trial the girl testified that the two incidents occurred during the winter. That was different than the indictment's allegation that they occurred within "two weeks" of each other "while it was warm out." The girl, then 11, was unable to be more precise as to when the incidents allegedly occurred – which she said happened while her mother was away from home on errands with her brother.

Although Bennett was unable to provide an alibi because he didn't even know what month the incidents allegedly occurred, he did present evidence that after he split-up with the woman he was awarded a six-figure personal injury settlement. The suggestion was that could have motivated the mother to encourage her daughter to lie in the hope of collecting money damages from Bennett.

In spite of the conclusive medical evidence that the girl was a virgin more than two years after she alleged Bennett vaginally raped her on two separate occasions, and that she could not even identify the month of the alleged incidents, the judge convicted Bennett of first-degree rape, sodomy and sexual abuse. Bennett was sentenced to a minimum of 20 years in prison.

Prior to Bennett's trial his attorney filed a motion to dismiss the indictment. The motion asserted Bennett's due process right to notice of the charges against him was prejudicially violated by the unreasonable seven-month time frame during which the acts allegedly occurred. The motion's denial by the trial judge was a key issue of Bennett's direct appeal.

On December 9, 2008 New York's Court of Appeals reversed Bennett's convictions and ordered dismissal of the indictment. In a published decision the Court ruled "the seven-month time frame cannot be found to be reasonable, "when weighed against the imperative notice rights of the defendant." (People v Clay Bennett, 2005-06365 (NY 2nd Appellate Div - 12-9-2008)) The Court explained, "Where an indictment charges a time interval which is so large that it is virtually impossible for a defendant to answer the charges and prepare a defense, dismissal should follow even though the People have acted diligently and a shorter time period cannot be alleged." The Court also ruled that the lack of notice to Bennett of when the alleged crimes occurred was compounded by his arrest and indictment which "did not occur until more than two years after the latest date specified for the crimes."

On the morning of December 17 – eight days after the Court's decision – a guard at the Coxsackie Correctional Facility told Bennett he was being immediately released. A few hours later the 37-year-old Bennett told reporters during an impromptu press conference of his disbelief at being released, "I still feel like I have shackles on." After describing his experience of constantly being given a hard time by guards and other prisoners because he was a convicted child rapist, he said, "Does that make me bitter? It makes me very bitter. It makes me angry." Bennett commented about the girl and her mother, "I would love them to come forward and tell the truth. Even then, they can't be forgiven."

Attorney John Ray represented Bennett during both his trial and his appeal. Ray told reporters after Bennett's release from more than three years of imprisonment, "I've rarely seen justice miscarried as badly as this. It is unfortunate that our system fails us significantly in finding men like Clay Bennett guilty just because a child says so. Clay Bennett did nothing wrong. He never touched this little girl."

Additional Sources:

Wrongful convict freed in rape case is 'bitter', *Newsday* (New York), December 18, 2008.

Convicted sex offender free on appeal, *WABC-TV* (New York, NY), December 18, 2008.

Hilary Swank Starring In Kenneth Waters Movie

Two-time Academy Award winner Hilary Swank is starring in a movie about Betty Anne Waters' 18-year effort to free her brother Kenneth Waters from his wrongful 1983 conviction for robbery and murder. Kenneth was sentenced to life in prison in Massachusetts.

Betty was a single mother and she went to law school in order to help free her brother who she believed was innocent. After she graduated from law school she became her brother's lawyer. Betty then miraculously discovered that biological evidence in his case had been preserved in the courthouse basement. DNA testing of the evidence excluded Kenneth as the murderer, and he was freed in 2001 after 18 years of imprisonment.

Swank is starring as Betty, and the film is tentatively titled "Betty Anne Waters." Sam Rockwell is starring as Kenneth Waters, and Minnie Driver is co-starring as one of Betty's friends. Tony Goldwyn is directing the film for Omega Entertainment, and Swank is the executive producer. Filming began in February 2009. The tentative release date is late 2009.

Source: Sam Rockwell wading in 'Waters', *Hollywood Reporter* (THR.com), February 11, 2009.

American Violet Premieres In Hearne, TX

On November 2, 2000, 27 innocent people were arrested in Hearne, Texas on felony drug charges. Hearne is about 120 miles northwest of Houston. The charges were based on information provided by a single informant, with no corroborating witness, or audio or video surveillance evidence.

Assisted by the ACLU, attorney David Moore discovered serious flaws in the defendant's cases, including that Robertson County DA John Paschall promised the informant felony drug charges would be dismissed against him if he produced 20 arrests. The charges were dismissed against the 20 defendants who didn't plead guilty before discovery of evidence the drug cases had been made-up by the informant.

One of the people charged was Regina Kelly, a 24-year-old single mother working as a waitress. *American Violet* is a major studio movie that revolves around Kelly's story of being caught up in the nightmare of a wrongful prosecution. The movie stars veteran actor Will Patton as Moore. Its world premiere was in Hearne on March 17, 2009, and it is being released in theaters nationwide in mid-April.

Mashelle Bullington Cleared 13 Years After Burglary Conviction

Luke Gaumond read with much interest a 2006 series of articles in the San Jose, California *Mercury News* titled, "Tainted Trials, Stolen Justice." The newspaper series reported on a number of probable wrongful convictions that occurred in Santa Clara County. The paper did not just examine cases of people whose convictions were suspect, it also delved into how they occurred, including that prosecution friendly county judges and prosecutors were more concerned with winning than convicting a crime's actual perpetrator. Gaumond knew about a case that wasn't included in the *Mercury News*' series ... two innocent people had been convicted in 1995 of a burglary he had committed in Campbell, a city bordering San Jose.

Gaumond confessed to the police and testified as a defense witness at the trial of Kenneth Foley and Mashelle Bullington that he alone committed the January 1995 burglary that they had been charged with. However, the business owner testified that it was Foley that he surprised breaking into a truck on his parking lot, and that Bullington pointed a gun at him from the "getaway" car she was sitting in.

During his closing argument Deputy District Attorney Charles Slone told the jurors he was "sickened" by the defense's "fraud" of having Gaumond testify that he committed the crime. Slone argued that Gaumond, who had a criminal record, was an unreliable witness. Slone explained to the jury, "I believe in God. I'm not here trying to convict innocent people."

The jury believed the businessman in convicting Foley and Bullington of second-degree burglary with the personal use gun enhancement. As a first-time offender the 28-year-old Bullington was sentenced to 4 years and 4 months in prison. Foley, 27, had been convicted of several burglaries as a teenager, so he was sentenced to 25 years to life under California's three-strike law. Gaumond was never charged with the burglary.

After Bullington completed her sentence she regained custody of her two children. By the time of the *Mercury News*' series she was a project manager with a local audiovisual supplier.

After reading the "Tainted Trials, Stolen Justice" series, Gaumond contacted Foley's attorney. Gaumond had previously contacted the attorney and explained that he committed the burglary alone, but the *Mercury News*'



Mashelle Bullington
(San Jose Mercury News photo)

series gave more weight to what he said, so the Santa Clara County DA's Office was contacted. They agreed to re-investigate the case to determine if Gaumond's claim was valid.

During the re-investigation Gaumond, who now owns a garage door business in San Jose, didn't deviate from his trial testimony of what happened, and Bullington confirmed it. To look for recycling materials he could sell for drug money, Gaumond offered to pay Bullington for use of her car. She agreed, but went with him to keep an eye on her car. After driving around for a while Bullington fell asleep. When the business owner armed with a pistol caught Gaumond breaking into the truck he also saw Bullington in a nearby parked car. Unbeknownst to him she had just awakened. The owner told them to leave. A few hours later he reported the burglary and the car's license plate number to a police officer he knew.

About 12 hours after the parking lot incident Foley was driving Bullington's car after his wife had borrowed it. He was stopped by the police for making an illegal left turn and ticketed for not having a valid driver's license. That tied him to driving Bullington's car. Foley and Bullington were arrested and charged after the business owner identified them from a photo lineup.

Working on Foley's case *pro bono*, the Northern California Innocence Project (NCIP) filed a writ of habeas corpus to overturn his conviction based upon newly discovered evidence, the prosecution's failure to disclose exculpatory evidence, and the ineffectiveness of his trial lawyer for failing to adequately investigate the case.

After the Foley's habeas was filed, the Santa Clara County DA's Office agreed to remove the burglary from being a three-strike offense, and support his resentencing for time served, based on their conclusion that the business owner had mistakenly testified about seeing a gun. Foley, 39, was released in November 2006 after 11 years and 7 months of imprisonment. During that time his wife divorced him, and his mother and grandmother died.

The DA's Office responded to Foley's habeas petition by acknowledging "a strong showing of actual innocence had been made." Foley's habeas was granted on April 5, 2007. The DA's office subsequently dropped the charge.

Although it had been ten years since Bullington's release from prison, the NCIP filed a writ of habeas corpus on her behalf. The DA's Office did not oppose the petition,

Justice:Denied Begins Its 11th Year

This issue marks the beginning of *Justice:Denied*'s 11th year. This milestone couldn't have been reached without the efforts of the many volunteers who have contributed their time and talents over the years since preparation for the first issue and the website began in the summer of 1998. The first issue was published in January 1999.

In addition to the magazine, *JD*'s website is important in providing information and promoting awareness about wrongful convictions. The website gets over four million visitors per year. The online Innocents Database that includes information about more than 2,500 exonerated people, receives almost another million visitors annually.

Wrongful convictions are a world-wide problem, and that is reflected in the visitors to *JD*'s website. In the last two years it has received visitors from more than 11,000 cities in 172 countries.

The need for *JD*'s independent reporting and editorial perspective has not diminished since 1999. *JD* can not even begin to cover all the stories and issues related to the difficulty of the legal system in the U.S. and other countries to distinguish the innocent from the guilty at trial, and to correct the erroneous conviction of an innocent person.

Justice:Denied has also published three books and in the coming year expects to publish several more. *JD* is a volunteer non-profit organization that receives no institutional support, so its magazine, website and book publishing depend on the financial support provided by subscribers, book purchasers and donors.

and joined in requesting that it be granted. Deputy DA David Angel wrote, "Ms. Bullington is innocent of the arming allegation. There is no harm in recognizing this truth. She deserves to have her name cleared. Our criminal justice system deserves the opportunity to correct this wrong."

Bullington's writ vacating the gun enhancement and reducing her conviction to a misdemeanor was granted on November 22, 2008. Now 41, she had been a drug user at the time of her 1995 arrest, and Angel said "It is inspirational how she turned her life around."

Sources:

Almost 14 years after Campbell burglary, woman's conviction overturned, San Jose *Mercury News*, November 29, 2008.

As One Atones, One Walks Free, San Jose *Mercury News*, November 22, 2006.

Harris County's DA Releases Report Critical Of Police, Prosecutors And Public Defenders In Richardo Rachell's Case

On March 11, 2009 Harris County District Attorney Patricia Lykos held a press conference in Houston, Texas during which she publicly released the Rachell Report. The report details the "series of unfortunate events, blunders and omissions" by Houston police, and Harris County prosecutors and public defenders that resulted in Ricardo Rachell's wrongful arrest, prosecution, conviction and six years of incarceration for the sexual assault of an eight-year-old boy. The same DNA tests that freed Rachell in December 2008 pointed to a convicted serial child rapist as the perpetrator. That rapist, who continued preying on children after Rachell's arrest, provided a detailed confession when questioned by Houston detectives in January 2009. He was charged in February 2009 with the assault that Rachell had been convicted of committing.

In response to what the Rachell Report describes as the "cascading, system-wide breakdown" that resulted in Rachell's conviction, DA Lykos announced two major policy changes in the Harris County District Attorney's Office. First, Harris County prosecutors must order DNA testing of biological evidence when it is relevant to prevent a possible miscarriage of justice, when previously the testing was discretionary. Second, copies of relevant police offense reports will be provided to a defendant's attorney, when previously they were only provided access to read and make notes of a report's contents.

The Rachell Report and DA Lykos' two meaningful reforms of procedures in the Harris County DA's Office, are in sharp contrast with the typical blanket denial of wrongdoing by the prosecutors and police involved in an innocent person's wrongful conviction. The following is the Rachell Report that has been edited for length.

Rachell Report

Joint report by the
Harris County District Attorney's
Office and the
Houston Police Department

Released to the public on March 11, 2009

This report is a chronology of events regarding the investigation, arrest, conviction and exoneration of Mr. Richardo Rachell, Cause No. 928275

Initial response to complaint

Sunday, October 20, 2002, the eight-year-old Complainant was observed running down Griggs Road, waving his hands in the air and crying. The Complainant was in a state of intense emotional distress; a witness stated he was almost "convulsive". He just stated that a man had a knife and was trying to kill him.

The citizens brought the Complainant home and patrol officers were called to the Complainant's residence. The details he gave officers that night was that he was offered ten dollars to pick up trash and the man took him on the man's bicycle. The only description of the suspect in the offense report is that he was an unknown black male, age 30.

The next morning the mother of the Complainant kept her son home. She drove her older son to school and when she was returning, she saw an individual whom she believed was the suspect. She returned to her house, gathered two friends and the Complainant, and began looking for the suspect. She located him walking down the street in the neighborhood. She asked her son if this person was the attacker; he replied affirmatively. She followed the suspect to his mother's home and the police were called. ... [Richard] Rachell was placed in the back of the patrol car and the officer pulled the Complainant aside and asked him if Rachell is the person who kidnapped him. The Complainant stated that he was the person. ... ADA James Alston declined to accept charges and requested further investigation. Rachell is released.

HPD Juvenile Division takes over the investigation

Later that day L. Clemons of HPD Juvenile Sex Crimes is assigned the case. She contacts the Complainant's mother and makes arrangements to take the child to the Children's Assessment Center, (CAC).

The Complainant is interviewed by a CAC forensic interviewer and discloses the sexual assault. For the first time he describes his attacker. After the interview the Complainant is given a sexual assault exam.

Officer Clemons interviewed the Complainant's mother. Mother advises Clemons that she saved the clothes he was wearing and put them in a bag. She stated that the underwear had a "yellowish cream substance" in the seat and this disturbed her. Clemons transports the rape kit and the clothes to the HPD property room.

Presentation of case to the District Attorney's Office

On October 23, 2002, Officer Clemons comes to the Harris County District Attorney's Office and presents in person the facts of the case to Assistant District Attorney R. Freyer. Charges are accepted and filed.

Arrest of Rachell, DNA sample and statement obtained

October 24, 2002, Mr. Rachell was arrested at his residence and Officer Clemons requested a voluntary sample of Mr. Rachell's DNA. After Mr. Rachell consented and a sample of his DNA was obtained, Officer Clemons delivered the sample to the Houston Police Department property room. Officer Clemons conducted an audio recorded interview of Rachell wherein he denies assaulting the Complainant and states the Complainant and his family are lying.

Lack of request for DNA comparison by prosecutors

Joanne Musick was assigned the Rachell case. She presented the case to a Grand Jury and Rachell was indicted January 30, 2003. Although there are references in the offense report to the existence of forensic evidence to be compared, there was no request that it be analyzed.

After Mrs. Musick left the Office, Jimmy Ortiz was assigned the Rachell case and he was the prosecutor, who tried the case to a jury in June, 2003. There are notes in the file to indicate that he was aware that a sample of the Defendant's DNA had been obtained; however, he did not request tests be performed to compare that sample to the rape kit and the clothes of the Complainant.

Lack of request for DNA comparison by defense counsel

Ron Hayes was appointed to represent Mr. Rachell. He was the only defense attorney on the case and represented Mr. Rachell through the jury verdict in the case. At no time did he request that his client's DNA be compared to the rape kit or the clothes obtained from the Complainant.

Rachell Report cont. on p. 9

Rachell Report cont. from p. 8

Jury trial of Ricardo Rachell

The mother of the Complainant testified at the trial. She was asked, how she thought Rachell was the person who attacked her son. She stated it was based on the description that her son had given her the night before.

The Complainant positively identified Mr. Rachell in the courtroom as his attacker.

On June 3, 2003, A Jury convicted Mr. Rachell and assessed his punishment at forty years in prison. The conviction was affirmed, September 30, 2004.

Pro se habeas corpus

Mr. Rachell filed his Petition for Writ of Habeas Corpus, September 11, 2005. It was denied, November 7, 2007.

Post-conviction activity

Mr. Rachell filed a *Pro Se* Chapter 64 request in the 185th District Court asking for DNA testing. Judge Brown appointed Deborah Summers on April 19, 2007 to represent Mr. Rachell in the Chapter 64 request.

Defense attorney Summers failed to file a Chapter 64 motion that would begin the process that would result in the testing of biological evidence; therefore Assistant District Attorney Sally Ring ... filed a motion in the 185th District Court on March 10, 2008 requesting that the trial court find that Mr. Rachell met the requirements of Chapter 64 and the trial court order DNA testing in the case. Evidence was sent to DPS testing on March 11, 2008.

DPS issued a report on October 28, 2008 stating that the DNA of the Defendant did not match the evidence collected in this case. Mark Donnelly, who replaced Sally Ring, requested that Mr. Rachell be bench warranted so that the District Attorney's Office could agree to a personal bond releasing Mr. Rachell from custody while a Writ was prepared and filed that would lead to the case being dismissed.

December 12, 2008 DPS Lab reports that the DNA evidence identified Andrew Wayne Hawthorne as the Complainant's attacker. [Mr. Rachell was released on a personal recognizance bond on December 12.]

Andrew Wayne Hawthorne

Andrew Wayne Hawthorne, in unrelated cases, was investigated by HPD Juvenile Sex

Crimes. He committed the sexual assault of boys in the same area of town and the method of luring the boys included the same MO. He approached the boys on a bicycle and offered them money for chores, then took them to a secluded area, and then anally raped them.

November 16, 2002, an eight-year-old boy was sexually assaulted in the same area as the Complainant in the Rachell case. ... October 23, 2003, HPD Juvenile Sex Crimes identified this case, via crime analysis, as the same MO as other sexual assaults against children in the southeast part of Houston.

Andrew Wayne Hawthorne pleaded guilty April 8, 2004 to all three cases and received 60 years in prison. [Hawthorne was dubbed the "Yellowstone Park Serial Rapist."]

Hawthorne was interviewed at the Hughes Unit in Amarillo, Texas, January 13, 2009, by Harris County District Attorney investigators. The investigators obtained a written confession from Hawthorne that he was the assailant in the crime for which Rachell was convicted. A buccal swab was obtained and tested; it was a match for the forensic evidence in Complainant's case.

The Harris County District Attorney's Office filed Aggravated Sexual Assault Against a Child charges against Hawthorne, February 24, 2009; the victim being the Complainant in the Rachell case.

Conclusion

- The wrongful conviction of Ricardo Rachell and the length of his incarceration was the result of a series of unfortunate events, blunders and omissions. There was a cascading, system-wide breakdown.
- The closure of the Houston Police Department's DNA Crime Lab was the most egregious system failure. This lab was closed from December 2002 until May 11, 2005.
- Prosecutors did not request DNA testing.
- Mr. Rachell's trial attorney made no request for DNA testing. Rachell's Chapter 64 lawyer did not prepare and file the requisite motion requesting testing, this prolonged Rachell's imprisonment almost a year.
- The responding police officers did not document a description of the Complainant's assailant; this omission may have contributed to the mis-identification of Rachell.
- The officer who secured the forensic evidence requested testing, tagged the evidence in the property room, but there was no follow through with procedures to ensure testing.

\$1.3 Million To LA Man Falsely Accused Of Murder

Edmond Ovasapyan was eating lunch with a cousin on November 1, 2005, at the exact time a man was shot to death in a Glendale, California home by three intruders.

The next day the 24-year-old Ovasapyan was arrested for the murder after being identified by the victim's mother in a photo lineup. He was charged with the murder with special circumstances, which made him eligible for the death penalty.

Ovasapyan, a tile contractor, languished for eight months in the Los Angeles County Jail until his attorney, Mark Garagos, was able to convince prosecutors that he had been mistakenly identified. Not only did crime scene evidence point to other men as the assailants, but Ovasapyan's cell phone records corroborated his alibi of being with his cousin. The charges were dropped and he was released in June 2006. He told reporters, "I feel great. But I shouldn't have gone through this for no reason."

In January 2008 Ovasapyan filed a federal civil rights lawsuit in Los Angeles against the City of Glendale and three police officers. The suit alleged that he had been falsely imprisoned and maliciously prosecuted.

The defendant's motion to dismiss the lawsuit was denied, and on February 25, 2009 a jury awarded Ovasapyan \$1.31 million: \$1.16 million in compensatory damages from the City of Glendale, and \$150,000 in punitive damages from Glendale police Det. Arthur Frank and Lt. Ian Grimes, the officers who headed the investigative team.

After the verdict Ovasapyan told reporters, "I thought this was never going to happen. I thought I was going to be in jail for the rest of my life. Justice prevailed."

Mark Garagos was also Kazuyoshi Miura's attorney. See p. 17.

Sources:

Man Cleared of Murder Charges in Robbery, *LA Daily News*, July 11, 2006.
Glendale man falsely accused of murder gets 1.3 million, *Los Angeles Times*, February 26, 2009.

- Juvenile Sex Crime investigators did not discern a pattern in attacks on children virtually identical to the victim in the Rachell case, the first of which occurred less than a month after Rachell's arrest. Eventually, crime analysis determined the pattern and Hawthorne was arrested and successfully prosecuted; but no one took a second look at Rachell's file.

Jeong Won-seop Acquitted 35 Years After Murder Conviction

Jeong Won-seop managed a comic book store in 1972 when a 9-year-old girl disappeared after leaving her home to walk to the store. An intensive search was undertaken because the girl's father was chief of the local police station in Chuncheon, South Korea. Her body was found in a nearby farm field, and it was determined she had been raped and strangled.

Jeong was a suspect because his store was the girl's destination. Jeong confessed during his intense interrogation, but after it ended he recanted. He protested he was innocent and only confessed to stop being tortured. Charged with the girl's rape and murder, Jeong's defense during his 1973 trial was his confession was coerced and the police had fabricated evidence. Convicted on the basis of his confession, Jeong was sentenced to life in prison. His appeal was denied by South Korea's Supreme Court, and he served almost 15 years in prison before being paroled in December 1987.

After his release Jeong became a Christian minister. In November 1999 he petitioned the Seoul High Court for a retrial based on the public disclosure that the police routinely tortured suspects in the early 1970s. That information supported his three-decade long contention that he was coerced to falsely confess. His petition was denied in October 2001.

South Korea's Truth and Reconciliation Com-



Jeong Won-seop raises his arms in victory after his acquittal on November 28, 2008

mittee (TRC) was established in December 2005 to investigate historical incidents in Korean history, including human rights abuses during previous political regimes. Jeong petitioned the TRC to consider his case. Only able to recommend that Jeong merited a retrial, in December 2007 the TRC forwarded Jeong's case to the Chuncheon District Court for review based on the police interrogator's violation of his human rights.

Jeong was granted a retrial, and the judge ruled his confession couldn't be introduced as evidence because of the threats and torture used by the police during his interrogation. Jeong was acquitted on November 28, 2008. Although Jeong's marriage dissolved during his imprisonment, his former wife and his son were present in the courtroom when his acquittal was announced.

Afterwards Jeong told reporters, "It is not only a victory for me, but also a victory for Korean democracy." Jeong also spoke about his torturers, "Those officers were promoted and rewarded despite their wrongdoing, but heaven will serve them justice. But now I want to forgive them." When asked, Jeong said, "I will file a lawsuit to get compensation from the state."

Sources:

35-year-old murder conviction tossed, *Joong Ang Daily* (Seoul), November 29, 2008.
Man Cleared of Murder Charge After 36 Years, *The Korea Times*, November 29, 2008.

Romeo Phillion's Murder Conviction Tossed After 31 Years Imprisonment

Romeo Phillion was convicted in 1972 for the 1967 murder of a Canadian fireman in Ottawa, Ontario. When questioned after the crime Phillion told police that on the day of the murder he was 180 miles away in Trenton having his broken down car repaired.

Four years later Phillion confessed to the murder while being questioned about a robbery. He immediately retracted the confession, and there was no physical, forensic or eyewitness evidence tying him to the murder. So in convicting him, the jury relied on his confession and four prosecution witnesses who testified they saw him in Ottawa on the day of the murder — but none saw him commit the crime. Phillion was sentenced to life in prison.



Romeo Phillion during Nov. 2008 hearing

In 1998 Phillion received a manila envelope from an anonymous sender. The envelope contained evidence the prosecution did not provide to his trial lawyer. The most important document was a police report written on April 12, 1968 that cleared Phillion of the murder. The report was written by Ottawa police investigator David McCombie, and it confirmed Phillion's alibi of being in Trenton at the time of the crime. Police investigators interviewed workers at the gas station where Phillion's car was repaired, who confirmed his alibi. Romeo also traded his car's radio for gas when he left the station. McCombie's report stated that because Romeo's presence in Trenton had been confirmed, "We do not believe that

Phillion cont. on p. 11

Teddy Thompson Awarded \$272,000 For Seven Years Wrongful Imprisonment

Sixteen year-old Teddy Pierries Thompson was arrested on May 8, 2000 as one of two robbers who committed a Hampton Roads, Virginia armed robbery. Thompson was identified by one of the two victims who stated he was "100 per cent sure" he participated in the March 26 robbery. During his trial in 2001 the jury disregarded the other victim's statement that Thompson wasn't the robber, and that Thompson produced a receipt for his rental of a Virginia Beach recording studio the night of the robbery. Protesting his innocence, Thompson was sentenced to 16 years in prison.

Thompson lost his appeals, and he was faced with completing his entire sentence when the unexpected happened. Antonio Mitchell, the witness who identified Thompson, contacted law enforcement officials on July 30, 2007 and told them he identified the wrong person. Mitchell told them that another man had admitted to him that he committed the robbery, and offered to return the stolen money. After an investigation the Hampton Commonwealth's Attorney determined that Mitchell's recantation was credible, and that without it there was no evidence supporting Thompson's conviction. He then submitted a motion to vacate Thompson's conviction, which was granted on September 10, 2007. Thompson was released later that day after seven years and four months of incarceration.

Thompson was thrilled to get out and spend time with his two 7-year-old daughters. He said, "I was in jail all their life. I'm just taking my time right now to get to know my kids." He also said that prison is "no place for nobody. You're talked to like an animal or a child. Every day, all day."

Virginia doesn't have a wrongful conviction compensation law, so a special legislative bill is required for a payment from the state. On January 13, 2009 state Representative Tom Gear from Hampton Roads submitted a bill providing for the payment to Thompson of more than \$50,000 in a lump sum, plus a \$207,000 annuity to be paid monthly for 25 years. The bill also provides a transition assistance grant of \$15,000 and tuition reimbursement up to \$10,000 for career and technical training. On February 24, 2009 the House and Senate both passed the compensation bill. The payments to Thompson will begin after Gov. Timothy Kaine signs the bill.

Sources: Rediscovering Freedom, *Daily Press* (Newport News, VA), September 12, 2007.
HB2050, 2008 Virginia Legislature.

Robert “Bob” Doyle was an insurance salesman in Montgomery, Alabama in 1991, when during a hotly contested custody fight his ex-wife accused him of sexually abusing their two young daughters. After his indictment he was convicted in November 1992 based on the testimony of the two girls. Sentenced to two ten-year prison terms, Doyle was allowed to remain free on bond pending the outcome of his direct appeal. Five years later, with his appeal denied, he began serving his sentence in December 1997.



Robert “Bob” Doyle

Alabama Awards Widow \$129,000 For Husband’s Wrongful Sexual Assault Convictions

daughters told police investigators that another man – not Doyle – committed the abuse. The prosecution also failed to disclose that after his trial one of the girls claimed she had participated in satanic rituals at a local church with her father. Authorities dismissed that allegation as incredible.

Doyle filed a motion for a new trial based on the non-disclosed evidence. In 1999 his motion was granted, and the State appealed. In affirming the grant of a new trial, the Alabama Court of Appeal ruled in January 2000 that the exculpatory evidence was unlawfully withheld from Doyle, and “the new evidence casts fundamental doubt on the accuracy and the reliability of the proceedings to such an extent that it undermines the entire prosecution and it points unerringly to [Doyle’s] innocence.” *State v. R. D.*, 805 So.2d 783 (Ala. Crim. Appeal, 2000).

Doyle’s was released on July 7, 2000 after more than two years and seven months in custody. His indictment was dismissed in January 2001. Although the Montgomery County DA opposed Doyle’s release and the dismissal of his indictment, the DA did not attempt to prosecute him again.

In January 2002 Doyle filed a claim under Alabama’s “Compensation For Wrongful Incarceration Act.” Enacted in 2001, the law provides for \$50,000 per year of wrongful incarceration. The law also provides that the committee considering a claim “shall have the authority to recommend some discretionary amount in addition to the base amount if circumstances warrant such a supplemental award. Any such supplemental amount shall be in the form of a bill to be presented to the Legislature.”

Agreeing with the State’s opposition to Doyle’s claim, in December 2002 the state agency in charge of evaluating compensation applications rejected him as ineligible. He then filed a lawsuit to compel the state to compensate him in accordance with the state law. After a bench trial, the judge ruled in June 2005 that Doyle met the law’s qualifications for compensation. On July 8, 2005 the judge released his written Order in which he explained that Doyle met the two basic requirements established by Alabama’s legislature for a valid compensation claim. First, he had been convicted and incarcerated for a felony charge of which he “was innocent.”

Second, “The accusatory instrument [was] dismissed on a ground consistent with innocence.” Al-

though the State argued that innocence must be proved “by DNA, ballistics or some other scientific means that eliminates any uncertainty,” the judge rejected that contention by noting the legislation included no requirement of “scientific certainty.” The judge also observed it was only required that an applicant’s indictment was dismissed on “a ground consistent with innocence.” Doyle met that standard because, “In light of the new evidence, the victims had little credibility, if any, remaining,” and “the new evidence pointed “unerringly” to innocence.” *Doyle v Dept of Finance*, CV-04-1182, Montgomery County, AL Circuit Court (July 8, 2005).

Two years later Doyle died of complications from diabetes and heart disease. He was 61. Although a decision had not yet been made on his compensation claim, his widow Donna, and his attorney Corky Hawthorne, continued with the process. On December 2, 2008 the Committee on Compensation for the Wrongly Incarcerated posthumously awarded Doyle \$129,000 for his 2 years and 212 days of incarceration. Doyle was the first person awarded compensation under Alabama’s 2001 law.

The committee’s decision cleared the way for Alabama’s legislature to appropriate the money for payment to Donna Doyle. Hawthorne also submitted a claim for Doyle’s legal and medical expenses, and his lost wages. Doyle’s health declined during the almost ten years he fought the charges before and during his imprisonment, and he went into debt. Introduction and passage of a special legislative bill is required for payment of Doyle’s expenses.

Bob and Donna married in 1996, after having met five years earlier before he was charged. He was imprisoned a year after their marriage and she supported him while he was imprisoned, through his eventually successful effort to overturn his conviction, and then the years long effort to obtain compensation. He died two weeks before their 11th anniversary.

Bob and Donna Doyle started the Alabama Justice Ministries Network after his release from prison, as an organization to aid released prisoners successfully reenter society. Donna continues to operate the AJMN that is based in Birmingham. The AJMN’s website is, <http://www.ajmn.org>

Sources:
Email from Donna Doyle to Justice Denied, March 26, 2009.
“State to pay for wrongful imprisonment,” *Montgomery Advertiser*, December 3, 2008.

Doyle’s ex-wife was represented during their divorce by a lawyer who became the Montgomery County district attorney behind Doyle’s indictment. After resigning as the DA, he served as the special prosecutor who pursued the charges against Doyle.

While imprisoned Doyle found out that the prosecutor had not disclosed exculpatory evidence about his daughter’s claims. The evidence concealed by the prosecutor included that prior to Doyle’s indictment his

Phillion cont. from p. 10

Romeo Phillion is responsible for this murder.” There was also evidence that the four prosecution witnesses perjured themselves by testifying they saw him in Ottawa.

Aided by lawyer James Lockyer and Canada’s Association in Defence of the Wrongly Convicted, Phillion filed an application in May 2003 with the Federal Justice Minister requesting that his conviction be set aside, and that he be granted a new trial based on the concealed exculpatory evidence.

On July 21, 2003, he was released on \$50,000 bond after 31 years imprisonment. It was the first time a Canadian prisoner challenging a conviction on wrongful conviction grounds was granted bail pending review of their case. *Justice:Denied* published an article about Phillion’s case in Issue 25 (Summer 2004).

A hearing was held by Ontario’s Court of Appeal in November 2008. On March 5, 2009 the appeals court overturned Phillion’s conviction and ordered a new trial. The Court’s 2-1 majority supported that the concealed report confirming Phillion’s alibi of being 180 miles from the crime scene could have influenced the jury to acquit him. The prosecution stated during the hearing that it would not retry Phillion. Afterwards Phillion told reporters, “If I go to my grave ... my name is cleared. I’ve dreamed about it.”

Sources: *R. v. Phillion*, 2009 ONCA 202.
New trial ordered for Phillion, *Globe and Mail* (Toronto), March 5, 2009.

William “Bill” Coleman and his wife entered the U.S. as British citizens in 1988 with temporary visas to work in Connecticut. When their visas expired they continued living and working in Connecticut while remaining in the United States illegally.

The couple had problems, separating and getting back together several times. During one of those separations in the fall of 2002 Coleman’s wife took up with another man. Shortly after Coleman learned of that relationship he told her that since they weren’t getting back together he was going to file for sole custody of their two children, and return to England to live. Coleman filed the custody papers in the Waterbury courthouse on September 30, 2002. His wife’s car broke down a few days before he filed the papers, and he continued driving her to and from work until her car was fixed.

On October 4 – four days after Coleman filed the custody papers – his wife went to the police complaining about him. He was arrested by Waterbury police and charged with Trespass (living in the family home), Larceny (using his wife’s ATM card) and Threatening Behavior (for protesting his arrest). When Coleman had been jailed for about a week the police told his wife he would be released on bail. After hiring a divorce lawyer, she then complained to the police for the first time that Coleman had raped her sometime in the latter part of September. No physical examination of her was conducted and there was no investigation into her allegation. So Coleman’s subsequent charge of sexual assault in a spousal relationship was based solely on his wife’s accusation. Coleman claimed his wife fabricated the rape claim as a lever to ensure she would get custody of their children.

The rape charge and the Coleman’s estrangement dragged on for almost two years until they were finally divorced in August 2004. To help resolve the contested custody of their children a family relations counselor investigated the Coleman’s for 15 months. Her report to the judge stated in part: “The alleged sexual assault remains a he-said, she-said situation, as Ms. Coleman did not go for a medical exam subsequent to the abuse. It remains difficult to ascertain which client is actually telling the truth.” The judge expressed similar skepticism about the truthfulness of the vague allegation against Coleman.

Coleman passed a lie detector test that the assault never happened – but it wasn’t admissible as evidence during his February 2005 trial. He also passed a psycho-sexual test administered by Dr. Joseph J. Plaud, but the findings were not used in Coleman’s defense by his lawyer. The case against Coleman, 45, began and ended with his wife’s accusation.

William Coleman Starves Claiming Innocence of Raping Wife

By Hans Sherrer

Waterbury police officers testified that they did not conduct any investigation into the rape allegation and there was no medical examination. Nevertheless, the six-person jury convicted Coleman after deliberating four days. During his sentencing hearing Coleman accused his wife of fabricating the charge and the prosecutors of pursuing his case to prevent a lawsuit for his false arrest, “The system does not work,” he said. “It fails the innocent and, in cases like this, it fails the children.” The judge sentenced him to 15 years in prison with the sentence suspended after eight years.

After Coleman’s direct appeal was denied, on September 16, 2007 he stopped eating solid food to protest what he believes is Connecticut’s broken and corrupt criminal legal process that can be manipulated to serve the interests of a civil litigant – such as his wife did in their child custody dispute. In January 2008 the Connecticut Department of Corrections filed suit to obtain a temporary injunction to force feed Coleman. The Connecticut ACLU argued on Coleman’s behalf that as a competent person he has the right to refuse food as a form of exercising his first amendment right to political speech. During the hearing Coleman testified he wouldn’t begin eating again, saying, “I’m not going to wait for the state of Connecticut to dole out truth and justice.”

The injunction was granted allowing the DOC to force feed Coleman if they deemed it necessary for medical reasons. The judge that granted the injunction told Coleman that his hunger strike wouldn’t draw “anymore attention than you’ve already received to date.”

Coleman maintained his strength by drinking water, juice, and some milk. However, on the one-year anniversary of beginning his protest Coleman stopped taking any nutrition, including water. The DOC responded

The Public Supports William Coleman’s Right Not To Eat

The *Hartford Courant* newspaper conducted an online poll that asked the question: Should state prison officials be allowed to force-feed convicted rapist William Coleman?

Yes — 21.7% (251 responses)
No — 78.3% (908 responses)

by administering a saline drip solution twice a week. During the first thirteen months of his protest Coleman lost half his body weight – going from 250 to 128 pounds.

Without notice to his ACLU attorneys, on October 22, 2008 the DOC forcibly strapped Coleman’s arms and legs to a table and shoved a tube down his nasal passage into his stomach. Surveillance cameras were turned off during the procedure which was carried out incorrectly and the tube “kinked.” Coleman described it as the “worst pain of his life” that was “ten times worse than getting a tooth pulled without a sedative.” The tube was withdrawn and a second tube was inserted. Afterwards he sneezed up blood. He received no medical treatment after the episode. Another forced feeding procedure was carried out by the DOC in a more humane manner.

The state ACLU’s Executive Director Andrew Schneider responded to the DOC’s action, “This violent procedure violates Mr. Coleman’s human rights, his right to deny medical treatment, and his right to political protest.” The ACLU also wrote a letter to the United Nation’s Special Rapporteur on Torture in Geneva, Switzerland, that states in part:

Force-feeding is universally considered to be a form of cruel, inhuman and degrading treatment and in some circumstances could even amount to torture, in violation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the U.S. ratified in 1994. Forced feeding is also considered to be unethical by the World Medical Association (WMA), of which the American Medical Association is a member. The WMA’s Declaration on Hunger Strikers states, “Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment.”

In its 1975 Declaration of Tokyo, WMA prohibited force-feeding and advised “where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially.” The WMA’s subsequent 1991 Declaration of Malta reinforces that “forced feeding contrary to an informed and voluntary refusal is unjustifiable” and recognizes the hunger strike as a “form of protest by people who lack other ways of making their demands known.”

Coleman cont. on page 13

A payday-loan store near Tacoma, Washington was robbed on April 12, 2004. James S. Anderson lived in Los Angeles, but he had spent time in the Pierce County Jail in Tacoma, so his mugshot was in the local police files. An eyewitness selected the 26-year-old Anderson as one of the robbers from a photo montage. Based on that identification he was charged with the robbery and arrested in Los Angeles.

While awaiting extradition to Washington, Anderson insisted he couldn't have committed the robbery because on April 12 he was more than 1,100 miles from Tacoma meeting with his probation officer in Los Angeles. Records from the LA County Probation Office confirmed Anderson's claim. The robbery charge was dropped and he was released.

Days later Anderson was re-arrested. Two suspects in the robbery of a Safeway store in Tacoma identified Anderson as one of the robbers photographed by a store surveillance camera. Anderson was charged in the robbery, which occurred at 4:20 a.m. on April 8,

Coleman cont. from page 12

After the furor of negative attention focused on the DOC's for its force feeding of Coleman, they went back to administering a drip saline solution. A hearing began on January 29, 2009 to determine if the January 2008 feeding injunction will be made permanent. Coleman was represented by the ACLU of Connecticut. Coleman testified during the two-week hearing, proclaiming: "I don't belong in prison. I'm innocent." He also read a Statement of Protest. (See accompanying box with excerpts from Coleman's statement.)

In 2005 Coleman filed a still pending state *habeas corpus* petition based on ineffective assistance by his trial lawyer. Coleman's trial attorney didn't file any pre-trial motions, submit a witness list, or conduct any investigation of the rape allegation. Coleman's trial attorney was suspended from practicing law in June 2007 for failing to observe ethics rules in more than ten cases.

If Coleman's challenge to his conviction is unsuccessful and he survives not eating, he is scheduled for release no later than December 2012. He will then be taken into custody by the federal government for deportation to England.

Sources:

Waterbury jury convicts man for rape of his wife, *Republican-American*, February 25, 2005.
Judge Ends Prisoner Hunger Strike, *News Junkie* (CT), January 23, 2008.

Starvation Diet: Convicted rapist Bill Coleman claims he's innocent, and he's starving himself to death to prove it, *New Haven Advocate*, October 30, 2008.

Connecticut ACLU Letter To UN Special Rapporteur on Torture, October 23, 2008.

Dr. Plaud specializes in evaluating sexual behavior. His website, <http://www.appliedbehavioralconsultants.com>

James S. Anderson Cleared Of Washington Robbery Committed When He Was 1,100 Miles Away In LA

2004. Anderson again claimed that he couldn't have committed the crime because less than 12 hours earlier he had been at the probation office in Los Angeles. Unlike the previous robbery charge, no records were forthcoming from the probation office to clear him. Anderson was extradited to Washington to stand trial for the robbery.

Somewhat unusually, Anderson insisted on representing himself, but the judge appointed a stand-by lawyer to assist him. To obtain evidence proving his claim that he had been in Los Angeles at the time of the burglary, Anderson filed a subpoena addressed to the judge and the prosecutor: "Need all check in logs from 4-7-2004 to 4-8-2004 from Probation Department Firestone Area Office; Los Angeles, Calif." He also contacted the prosecutor numerous times requesting that he obtain the probation office's records to confirm he was there only hours before the robbery. In addition,

Anderson's stand-by counsel was ordered by the judge to obtain the probation records. Anderson even wrote the judge a letter asking that he intervene in discovering the records that would prove his alibi of being present in the probation office on April 7.

At the time of Anderson's trial in late 2005 the prosecution had not produced the probation office records for April 7 and 8, 2004, his stand-by attorney had not obtained them, and the LA probation office refused to turn any records over to him directly.

Before the start of his trial Anderson again raised the issue with the judge that the probation office records had not been provided to him. The prosecutor told the judge that he had personally contacted the Los Angeles Probation Office, and "there are no records of any contacts [with the probation office] whatsoever between April 6th when he was released from jail and April 12th." To cover their bases the prosecution checked with the airlines to see if Anderson had flown from LA to the Seattle/Tacoma airport on April 7. He had not done so. It takes about 18 hours to drive from LA to Tacoma, so Anderson could not have

Anderson cont. on p. 14

William "Bill" Coleman's "Statement of Protest"

(Read during his testimony on February 10, 2009)

I, Bill Coleman, in September 2007, stopped eating solid food as a form of protest. I am protesting a broken judicial system that is incapable of providing justice as well as protesting the State of Connecticut assisting in the abuse of my children. The system has failed my children and me and I have communicated this in several forums, including in court. My case is not an isolated incident; countless others have been subjected to the injustice of the judicial system. Innocent people do not belong in prison and I now just want to be left alone to protest. Force-feeding me by inserting a tube through my nose into my stomach against my will violates all medical and international law. ...

I also want to make sure it is clear that my protest is not a reflection of the Connecticut Habeas Unit. They are good people doing a good job by fighting against an increasing amount of injustice in the system. The system is broken and corrupt and is also void of any moral or ethical values for the truth. This is further exacerbated because those incarcerated are not offered rehabilitation, which is no more than a token gesture, thus

making society a more dangerous place on a daily basis. This is compounded by politicians and legislators putting blame on everyone and everything other than themselves, where it belongs. More laws and longer sentences are not the answer. What Connecticut citizens should know, even if they don't care about my children and me, is that they are one 'falsely accused' arrest themselves away from my nightmare. Make no mistake, your arrest is your conviction in the State of Connecticut.

What surrounds my conviction is filled with suspicious wrongdoing of many types. Having explored every avenue, to save my children and prove my innocence, I now believe the system is not an option for the truth to come out and I choose to fight to the maximum with my life. I do not want to die, but I am willing to die. Force feeding only prolongs death as my organs, after a period of time, will eventually give out. This means the DOC will have to force feed me until my death. Instead of letting me continue my protest the State is wasting valuable resources to temporarily prolong my life for only an undetermined short period of time. These resources should be spent on a better cause such as an investigation of the corrupt judicial system which would help not only me, but also others who have been wronged. ...



Clockwise from top left - Irfan Raja, Awaab Iqbal, Aitzaz Zafar, Akbar Butt and Usman Malik

Terrorism Convictions Tossed For Five Muslim Youths "Intoxicated" By Religious And Political Literature

By JD Staff

On Raia's computer hard drive police investigators discovered information that they considered to be of an extreme religious and political nature.

After leaving home Raia traveled to Bradford, England, where he stayed with Awaab Iqbal and Aitzaz Zafar. When Raia contacted his parents several days after he left, they convinced him to return home. Upon his arrival he was arrested on suspicion of violating the United Kingdom's Terrorism Act of 2000.

During the subsequent investigation, records

identified that Raia had communicated with four other Muslim youths on an MSN (Microsoft Network) chat-room about traveling to Pakistan to train so they could aid the Muslim freedom fighters opposing the Afghan government. Those four young men, all Bradford University students, were Iqbal, 18, Zafar, 19, Akbar Butt, 19, and Usman Ahmed Malik, 20.

Searching the computer hard drives of the four students resulted in the discovery of political and religious information similar to what was on Raia's computer. However, analysis of the hard drives, interrogations of the youths, and extensive questioning of friends, family members, and students and

Intoxicated cont. on page 15

Anderson cont. from p. 13

been in Tacoma at the time of the robbery if he left LA by car on the afternoon of the 7th.

After Anderson explained to the judge his stand-by counsel's investigator wouldn't take collect calls from the jail, the judge again ordered the stand-by attorney to try and find the documents. Anderson's efforts were to no avail. By the start of his trial he still did not have the probation office records.

There was no physical, forensic, or eyewitness evidence linking Anderson to the robbery. The prosecution's case began and ended with the identification by the two men that Anderson was in one of the surveillance photos. However, the witnesses, who received reduced charges in exchange for their testimony, gave conflicting identifications of other men in that photo and another photo.

Without the probation documents Anderson's alibi defense was only supported by his testimony and that of his girlfriend from Los Angeles, who testified during his trial that she was with him during the early morning hours of April 8.

The jury believed the two police informants over Anderson's girlfriend. He was convicted of first-degree robbery and sentenced to more than 16 years in prison. After his conviction was affirmed on direct appeal, Anderson wrote the Innocence Project Northwest (IPNW) in Seattle, asking for their help in obtaining the records proving that in the late afternoon of April 7, 2004 he was at the LA County Probation Office. Boris Reznikov was the IPW student intern who reviewed Anderson's letter. Reznikov was skeptical of

Anderson's claim of being more than 1,100 miles from the crime scene, but he took the time to read the trial transcript and was struck by Anderson's dogged unsuccessful effort to obtain the probation records. Reznikov's curiosity was piqued enough for him to call the probation office and inquire about obtaining the records for April 7 and 8. The man he talked to checked the computerized records database while Reznikov waited on the line. The man told Reznikov that James S. Anderson had been in the probation office at 4:46 p.m. on April 7, 2004. That was less than 12 hours before the robbery. Reznikov knew the Pierce County Prosecutors Office had already checked with the airlines, and there was no evidence Anderson had flown from LA to the Seattle/Tacoma airport on the 7th. Anderson had been telling the truth! He had been convicted of committing a robbery in Tacoma when he was in California, two states away from the crime scene!

The IPNW agreed to represent Anderson in the filing of a Personal Restraint Petition challenging his conviction on the basis of newly discovered evidence. The State vigorously opposed the petition, with one of their arguments being that Anderson didn't meet the due diligence requirement for discovering the existence of the probation records. The Washington Court of Appeals unanimously granted Anderson's petition on December 11, 2008. In their Order the Court dismissed the State's "due diligence" argument by writing, "Anderson put forth a monumental effort to discover this evidence before trial, but his efforts were to no avail." Although the new evidence supported Anderson's actual innocence, the Court did not order his acquittal. Instead his conviction and sentence were vacated, and a new trial

ordered. That entitled him to a bail hearing pending a decision by the Pierce County Prosecutor's Office on how it would proceed.

Unfortunately for Anderson, just days after the ruling the Seattle/Tacoma area experienced the most intense and prolonged ice and snow storm in decades. With government offices, including the courts closed, Anderson languished for days in prison when he otherwise would have had a hearing on being granted bail pending the prosecution's decision to retry him or dismiss the indictment.

Finally, on Christmas Day 2008, Anderson was granted bail and released. Later that day he arrived at his family's home in Los Angeles after spending almost four-and-a-half-years in custody for a crime it is impossible for him to have committed. His mother, Yuralene Spencer told the Associated Press, "All the family's talking about James coming home. James coming home! Everyone is so happy, full of joy, like God gave us the best present we ever had." While imprisoned Anderson's father died, but his sister Loretta delayed her wedding after discovery of the probation records made his release a realistic possibility, so that he could walk her down the aisle.

Although Anderson was told by the LA County Probation Office that they provided the records for April 7 and 8 to the Pierce County Prosecutor's Office, after his release deputy prosecutor Michelle Luna-Green insisted, "We would never willfully withhold records of that nature."

Sources:
Gene Johnson, "Proven innocent, but still behind bars," *Seattle Post-Intelligencer*, December 23, 2008.
In Re: Pers. Restraint of James S Anderson, No. 37073-5-H (WA Ct of Appeals, 12-11-08).

Intoxicated cont. from page 14

teachers at Raia's school and Bradford University did not result in the discovery of any information that the five youths had done anything unusual or extreme. No information was discovered related to making any type of explosive device, and nothing found on the youth's computers or from questioning people during the investigation suggested they were plotting a bombing or any type of attack. They had merely downloaded information from the Internet that included a film showing atrocities against Muslims around the world, and discussed on an MSN chatroom the possibility of traveling to Pakistan to train as freedom fighters.

The five youths were initially charged with violating section 58 of the Terrorism Act of 2000. After considerable pre-trial maneuvering that included an appeal to the U.K.'s Court of Appeals about the appropriateness of charging a section 58 violation, the prosecution revised the charge to a violation of section 57. Section 57 states:

“(1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

(2) It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.”

The Terrorism Act of 2000 defines terrorism as: “‘Terrorism’ is defined by section 1 of the 2000 Act as including the use of firearms or explosives that endangers life for the purpose of advancing a political, religious or ideological cause.”

The youth's trial began in London on May 16, 2007. The trial was a major news story widely reported on throughout Britain.

The prosecution alleged that each of the five defendants violated section 57 (and engaged in terrorism) by downloading from the Internet to their computer hard drive radical religious and political literature that “instigated” that defendant to plan to travel to Pakistan, and then go to Afghanistan to fight against the government. The prosecution claimed the youths had become mentally “intoxicated” by the extremist literature they downloaded from the Internet, and that it was only because they were arrested that they had not been able to carry out their intention to fight against the Afghan gov-

ernment – which is supported by England and the United States.

The youths defense was that their hard drives stored religious and political information, and there was no direct relationship between that information and “the commission, preparation or instigation of an act of terrorism” required for a violation of section 57.

The judge gave jury instructions consistent with the prosecution's position. Consequently, after a two month trial the five defendants were unanimously convicted on July 24, 2007 of violating section 57. Malik was sentenced to three years in an adult prison. Because of their age at the time of their arrest the other four defendants were sentenced to terms in a youth offenders institution: three years for Zafar and Iqbal, 27 months for Butt, and 2 years for Raia.

The defendants appealed and the Court of Appeals unanimously quashed their convictions. (See, *Zafar, et al v. R.*, [2008] EWCA Crim. 184.) The Court zeroed in on two of the many issues raised in the appeal: What sort of connection is required by section 57 between an alleged act of terrorism and the information on the defendant's hard drives; and, was the jury properly instructed about the elements of the crime.

The Court ruled that there must be “a direct and obvious connection between the article and the intended act of terrorism.” (§20) The prosecution's case hinged on the supposition that it was enough of a connection with terrorism that each defendant's hard drive “was ‘for a purpose connected with’ the travel to Pakistan.” (§34) However, the Court concluded “there was nothing that evidenced expressly the use, or intention to use, the extremist literature to incite each other to do this. We think it doubtful whether there was a case of infringement of section 57, as we have interpreted it, that could properly have been left to the jury.” (§37)

The Court didn't stop by ruling there was no direct connection between the information on the hard drives and terrorism, which the prosecution had the burden to prove. They then analyzed if the jury had been properly instructed as to the second element that the prosecution had to prove to establish a violation of section 57: that the defendants had incited each other to engage in terrorism.

After analyzing the jury instructions, the Court ruled they were legally insufficient to inform the jury of what constitutes a section 57 violation. Among other issues, “They did not tell the jury that they had to be satisfied that each appellant intended to use the rele-

vant articles to incite his fellow planners to fight in Afghanistan.” (§46) The Court also decided, “We do not consider that it was made plain to the jury, whether by the prosecution or by the [judge], that the case that the appellants had to face was that they possessed the extremist material for use in the future to incite the commission of terrorist acts.” (§48)

The Court concluded its decision by writing: “Difficult questions of interpretation have been raised in this case by the attempt by the prosecution to use section 57 for a purpose for which it was not intended. ... The consequence of this is that the basis upon which the appellants were convicted is shown to have been unsound. Their appeals are allowed and their convictions must be quashed.” (§49)

With the Court having found that there was insufficient evidence to support a conviction and that the jury had been fatally misinstructed about the elements of a section 57 terrorism charge, the defendants were released after almost two years in custody.

Saghir Hussein, Malik's lawyer, said after the Court's decision was announced, “This is a landmark judgment in a test case over the innocent possession of materials, including books and speech, and the court has finally agreed that this is in no way connected to terrorism. It was very difficult in the current climate for any jury to decide on anything apart from conviction.” Hussein also observed, “A book about how to make bombs would come under Section 57, not a book that contains ideological material. It's just like reading *Mein Kampf* does not make you a Nazi.”

Malik described his ordeal as “worse than a nightmare. I was arrested and accused of being a terrorist. No one would listen to my claims of innocence.” He also said, “I was never a terrorist and have never supported violence. I was wrongly convicted and accused. No one should have to go through this, who is innocent.”

Joel Bennathan, a lawyer for Zafar, described the transparency of what the youths did by pointing out that Zafar made no attempt to conceal the information on his computer, since “his computer had no password,” and the contents of his hard drive were “not encrypted or deleted.”

Sources:

Zafar, et al v. R., [2008] EWCA Crim. 184 (February 13, 2008)
Appeal upheld for youths ‘intoxicated by terror’, By Tom Chivers, *The Telegraph* (London), February 13, 2008.
Five freed after terror convictions quashed, Vikram Dodd, *The Guardian* (London), February 13, 2008.

Thomas Goldstein was convicted in 1980 of a Long Beach, California murder. The lynchpin of the prosecution's case was Edward Floyd Fink's testimony that after Goldstein's arrest as a suspect he confessed to Fink while they were jailed in the same cell. During Goldstein's trial Fink testified he wasn't receiving any benefit for his prosecution favorable testimony, and that he had not received any benefit for his testimony in previous cases.

Sentenced to life in prison, Goldstein's direct and post-conviction appeals were denied.

After a decade and a half in prison Goldstein learned that Fink worked as a police informant in his case and previous cases, and that Fink was paid by having charges dismissed or his sentence reduced. In Goldstein's case charges pending against Fink were dismissed.

Goldstein filed a state habeas corpus petition primarily based on the new evidence that the prosecution failed to disclose that Fink was a police informant tangibly rewarded for his testimony, and that if Goldstein's lawyer had known that information to impeach Fink's credibility it could have changed the jury's verdict. After being denied by the state courts, in 1998 Goldstein filed a habeas corpus petition in federal district court. The federal judge granted Goldstein's petition, and the State responded by appealing to the Ninth Circuit Court of Appeals.

The Ninth Circuit affirmed the granting of Goldstein's habeas petition. The State resisted releasing Goldstein, and to avoid doing so they recharged him. However, with their star witness discredited, and without eyewitness, physical or forensic evidence linking him to the murder, the State finally dropped the charge and Goldstein was released on April 2, 2004, after more than twenty-four years imprisonment.

Goldstein subsequently filed a federal civil rights lawsuit (42 U.S.C. §1983). The defendants were the City of Long Beach, Los Angeles County and several individuals, including Los Angeles County District Attorney, John Van De Kamp, and Chief Deputy DA Curt Livesay, who were in office at the time of Goldstein's trial.

In the 1976 the U.S. Supreme Court established that a prosecutor has absolute immunity from civil liability for judicially related conduct. However, absolute immunity may not apply when a prosecutor performs investigative or administrative tasks. (See, *Imbler v. Pachtman*, 424 U.S. 409 (1976)) Goldstein only alleged he was harmed by Van De Kamp and Livesay's failure to ad-

US Supreme Court OKs Immunity For Negligent Administration Of Prosecutor Offices

ministratively ensure compliance with the constitutional requirement of the DA's Office to disclose witness impeachment material to him. (See, *Giglio v. United States*, 405 U. S. 150 (1972)) Goldstein alleged Van De Kamp and Livesay: (1) failed to properly train prosecutors to disclose impeachment material, (2) failed to properly supervise prosecutors in the disclosure of impeachment material, and/or (3) failed to establish an information system containing potential impeachment material about informants that was available to prosecutors.

Although Van De Kamp and Livesay were not directly involved in Goldstein's prosecution, they nevertheless sought dismissal of the claims against them, under Federal Rule of Civil Procedure 12(b)(6). They argued that the shield of absolute prosecutorial immunity encompasses the claims made in Goldstein's suit. The district court judge denied the motion to dismiss, ruling their alleged conduct was "administrative" in nature and distinctly different from the actions taken by a prosecutor in a judicial proceeding, which are protected by immunity from civil liability. Van De Kamp and Livesay filed an interlocutory appeal with the Ninth Circuit, which affirmed their lack of immunity for administrative conduct. (*Goldstein v Van De Kamp*, No. 06-55537 (9th Cir., March 28, 2007))

The defendants filed a writ of certiorari with the US Supreme Court, which accepted the case for review. On January 26, 2009 the Court unanimously ruled prosecutors performing the administrative functions alleged in Goldstein's suit are protected from civil liability by absolute immunity. (*Van de Kamp v. Goldstein*, No. 07-854 (USSC, January 26, 2009); 555 U.S. ___ (2009))

The Court's opinion by Justice Breyer conceded the harmful conduct alleged by Goldstein involved "administrative" procedures. However, the trial prosecutor's failure to disclose impeachment evidence about informant Fink was a predicate action of Goldstein's claim that Van De Kamp and Livesay failed to perform their "administrative" obligations of training and supervising trial prosecutors. If the trial prosecutor had disclosed the impeachment material constitutionally required by *Giglio*, Goldstein would have no pretense of a claim against Van De Kamp and Livesay for their alleged deficient administrative conduct.

Justice Breyer explained that if Goldstein's suit was allowed to proceed the anomaly would occur that while the trial prosecutor was civilly immune for failure to disclose the impeachment material on Fink, Van De Kamp and Livesay could be held civilly liable for not training or supervising him to make that material available to Goldstein.

The Court separately considered Goldstein's claim concerning Van De Kamp and Livesay's failure to establish an impeachment material "information system." Judge Breyer reasoned that Van De Kamp and Livesay are entitled to absolute immunity from that claim because the lack of such a system is only relevant to Goldstein's case by the information it would have made available to his trial prosecutor about Fink. Consequently, all administrative decisions made about what impeachment material to include or exclude from an "information system" would be related to the judicial proceedings in which the material would be used. Judge Breyer wrote, "Such decisions – whether made prior to or during a particular trial – are "intimately associated with the judicial phase of the criminal process." Thus, under the absolute immunity principle set forth in *Imbler*, a prosecutor is shielded from civil liability for any material included or excluded in an "information system," or even if no such system exists.

Having determined that all three of Goldstein's claims against that Van De Kamp and Livesay are "directly connected with the conduct of a trial," the Court ruled they are protected by absolute immunity.

A prosecutor is now protected from civil liability for engaging in administrative conduct that is tangibly related to the actions of another prosecutor involved in a judicial proceeding.

"A lie goes 'round the world while truth's still putting its boots on, sweetheart."

Dialogue in the movie *Evil Angels* about the wrongful conviction of Australian Lindy Chamberlain for murdering her infant daughter who was actually killed by a dingo.

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The pursuit of justice is not a game. After a crime is committed, the police are supposed to capture and arrest, District Attorneys prosecute, juries decide guilt, and judges hand out sentences. Justice should bring retribution to the criminal, consolation to the victim, and peace of mind to society.

The system is full of malfunctions. Some criminals elude capture, and others escape through loopholes. Likewise, many innocents get convicted and spend years in prison. Of these two travesties, the former draws more wrath and ire from the public. Sins going unpunished irritate and enrage the heart of the American soul.

American society is obsessed with winning. Winning has value in the realm of sports and in the stock market, but no real place in the arena of criminal justice. Yet, to a vast number of police and prosecutors winning is everything. At most justice is an afterthought.

Randall Adams knows this too well. The protagonist of the award winning documentary *The Thin Blue Line*, Adam's was arrested, found guilty, and sentenced to death for killing a Dallas police officer in 1976. Though another suspect on death row later confessed to the shooting, Dallas prosecutors relentlessly pursued Adams. Even after the confession, one prosecutor publicly derided both the judge who reopened the case, and called the Dallas Court of Criminal Appeals, certainly one of the nation's most conservative judicial bastions, "a bunch of twisted liberals." This obsession with winning resulted in his expulsion from the office.

Legendary Green Bay Football coach Vince Lombardi is known for espousing, "Winning isn't everything, it is the only thing." Though Lombardi never intended this remark to apply to criminal courts, his philosophy continues to infect and erode the mentality of criminal justice authorities. The goal of justice and fairness has been displaced by a "win at all costs" mentality. I call this attitude Lombardiology.

A recent victim of prosecutorial Lombardiology is Japanese businessman Kazuyoshi Miura. On February 22 of this year, U.S. authorities arrested Miura on the island of the Saipan. Although a famous vacation spot for Japanese tourists, Saipan is in the Northern Mariana Islands that became a self-governing U.S. territory in 1986. Miura was sought for years by the Los Angeles Police Department in regard to the murder of his wife Kazumi. She was shot during a burglary in 1981 while they were on vacation in southern California. Arrested in Tokyo in 1985, Miura was tried in Japan for assault and murder.

Kazuyoshi Miura Was A Victim Of Prosecutorial Lombardiology

By Michael H. Fox

The Japanese courts are extremely severe on criminal suspects: the guilty rate hovers at 99.8%. Though he denied the charges, Miura was found guilty of assault. Yet despite the great odds and the evidence presented to Japanese authorities by the LAPD in many visits to Japan, the Tokyo High Court declared Miura not guilty of murder in 1998. After almost two decades of incarceration, he was freed from prison in 2001. In 2003 Japan's Supreme Court acquitted him of the murder charge.

To the authorities in L.A., this was a defeat. But losing a game does not mean the series is finished. They sought a rematch. And one that would be played on their home ground

The problem is how do you arrest, detain and prosecute a suspect who has already been declared "not guilty?" How can you bend the rules and still show the world that the U.S. Constitution's sacrosanct guarantee against double jeopardy is not being violated? The solution: Use specious tactics. Insist that conspiracy was not prosecuted in Japan.

Miura's case was a media sensation in Japan. After his acquittal by Japan's Supreme Court in 2003, he estimated during an interview with *The Japan Times* that he had won about \$850,000 in damages from invasion of privacy and defamation lawsuits he had filed against Japanese magazines, newspapers and TV stations.

The LAPD's conspiracy case against Miura was built with fraudulence. During his long trial in Japan, he was not tried for pulling the trigger that killed his wife. He was charged and found not guilty of plotting the robbery incident in which she died. In other words Miura was acquitted at trial of being a participant in a conspiracy.

Despite great efforts by his lawyers and strong legal precedent supporting his case, Miura's extradition to California was allowed.

In 2004, the State of California passed a law nullifying double jeopardy for crimes occurring outside the United States. It stands to pass that wealthy criminals should not be allowed to buy their way out of justice in poor and corrupt societies. But Miura was found innocent in Japan for the 1981 crime in 2003, even before the California law was

passed. Retrying the case would have entailed an *ex post facto* [retroactive] prosecution – a violation of the precedents established by the US Supreme Court. If allowed to stand California's end-run around the Constitution would have enacted a new double jeopardy standard.

The plane landed in Los Angeles on the morning of October 10, 2008, and that evening he was found dead in his cell with a noose fashioned from his t-shirt around his neck. His death appeared to be a suicide.



Kazuyoshi Miura in 2008

Hardly proficient in English, and 61 years of age, Miura dreaded being incarcerated among street gangs and other rabble. Having endured 17 years spent in his own nation's prisons, the idea of more incarceration, more motions in front of judges, more prison food, more waiting and wondering ... proved too much for even a seasoned veteran in the pursuit of justice. He ended his life rather than face the dismal prospect of having to establish his innocence ... again.

Prosecuting the innocent and the exonerated, destroys more than the human soul. It demolishes the system which we have come to believe is the best in the free world. The unrelenting desire of police and prosecutors to win — regardless of facts, evidence, and prior acquittals — kills the basic rights inherent in the American system of justice. Ultimately, it killed Kazuyoshi Miura ... whether by his own hand or someone else's.

About the author: Michael H. Fox is associate professor at Hyogo University in Kakogawa City, Japan, and director of the Japan Institute for the Study of Wrongful Arrests and Convictions (www.jiswac.org).

Lawyer Claims Miura Was Murdered

Days after Miura's death his lawyer Mark Geragos hired an independent forensic pathologist examine his body. The pathologist found injuries consistent with him being beaten and choked to death. Miura had injuries to the middle and lower parts of the back as well as to the larynx. Miura was a prolific writer but no suicide note was found, and one of Geragos' associates visited Miura in the LA County Jail before the discovery of his body. He said Miura was in good spirits, and "He was ready and girded for the fight." On December 3, 2008 the LA County Coroner's Office issued its report that Miura's official cause of death was suicide.

Felipe G. Vargas was arrested November 7, 2003 at his home in the central Washington town of Quincy. He was charged with child molestation and indecent liberty with a minor.

The 39-year-old Vargas insisted on his innocence and asked to take a polygraph test, but his public defender, Thomas Earl, didn't arrange for a test and talked him into waiving his right to a speedy trial. Vargas was unable to post his \$100,000 bail, so he languished for months in the Grant County Jail.

There was no medical, forensic or corroborating eyewitness evidence to support the charges based on the victim's allegation. So in June 2004 the Grant County Prosecuting Attorney agreed to administration of a polygraph test. After Vargas passed the test a second test was conducted that he also passed. The prosecutor then agreed to drop the charges. Vargas was released after being jailed for seven months.

Vargas subsequently retained Moses Lake civil attorneys George Ahrend and Garth Dano. Among the information they discovered was that three days after Vargas' arrest the alleged victim recanted her accusation. Earl didn't know that because he did not hire an investigator to interview the girl, he did not file a discovery motion, and neither the police or the prosecutor voluntarily disclosed that information to him.

In 2006 Vargas' lawyers filed a federal civil rights lawsuit in Spokane's U.S. District Court on his behalf that named Grant County and Earl as defendants. The suit sought \$500,000 in actual damages and unspecified punitive damages. Vargas' key claim was that Earl provided ineffective assistance of counsel as the fixed-fee contract provider of public defender services for Grant County.

Grant County and Earl's summary judgment motions were denied by U.S. District Court Judge Justin Quackenbush. To avoid the risk and expense of a trial, in December 2008 Grant County settled with Vargas for \$250,000. Earl refused to negotiate a settlement, and the trial began in Spokane on January 26, 2009.

During the trial in which Earl represented himself, it was disclosed to the jury that Earl had a \$500,000 contract with Grant County in 2003 to provide felony case public defender services. The contract was all-inclusive, with Earl agreeing to hire lawyers, investigators, interpreters and even covering the cost of things such as polygraph tests, from the \$500,000. It was also disclosed that Earl handled 554 felony cases in

Felipe Vargas Awarded \$3 Million For Ineffective Assistance Of Counsel

2003, and that he also handled probation violation and family law cases in his private practice. On average Earl spent two hours with his felony clients from their arrest to their sentencing or release. The Washington Bar Association endorses the guidelines of The National Advisory Commission on Criminal Justice Standards and Goals that recommends a public defender be assigned a maximum of 150 felony cases per year. So Vargas' caseload was much larger than what is recommended for a public defender.

The specific details of Earl's representation of Vargas were also revealed. Earl failed to appear for Vargas' first two court appearances, and he had his son – a legal intern who failed is bar examination – interview Vargas. He also told the judge at one point he was ready for trial when he had done no preparation or any work whatsoever on Vargas' case.

Earl's ethical violations while providing legal services as Grant County's contract public defender resulted in his permanent disbarment from practicing law in Washington by order of the state Supreme Court on May 7, 2004. Among Earl's ethical violations was he solicited money from indigent clients whose case he had contracted with the county to represent at no charge.

Las Vegas Prosecutors Routinely Pay For Pre-trial Witness Interviews

In February 2009 it became public that for many years the Clark County, Nevada District Attorney's Office has paid witnesses for pre-trial interviews.

The longstanding practice came to light during an attempted robbery and kidnapping with a deadly weapon trial in Las Vegas. The prosecution's key witness was a 22-year-old woman with a record of prostitution and drug arrests. She testified during cross-examination that she was paid \$50 when interviewed by the prosecutor prior to trial — \$25 for coming to the meeting, plus another \$25 for transportation. She also testified that she used the \$50 to buy crack cocaine immediately after the meeting. The prosecution had not disclosed the witness' payment to the defendant's lawyers. After the woman testified an investigator for the district attorney's office testified. The following are excerpts

Seattle University legal ethics Professor John Strait testified that flat-fee public defender contracts "are all illegal and unethical for any attorney to enter into." The less money Earl spent on hiring attorneys or investigators the more he poked himself. In 2002 he kept at least \$255,000 of the \$500,000 the county paid him. In September 2008 the Washington Supreme Court strengthened the conflict-of-interest rules barring an attorney from putting his or her personal financial interests ahead of the due process rights of a criminal client.

The impact of Earl's representation on Vargas' life was revealed in testimony that he lost his job because of his prolonged jailing, friends deserted him, and he continues to experience psychological trauma.

On January 30 the jury returned their verdict in favor of Vargas. He was awarded \$762,000 in compensatory damages and \$2.25 million in punitive damages.

The 54-year-old Earl canceled his attorney malpractice insurance, and is seeking bankruptcy protection from creditors, so it is possible Vargas will receive none of the \$3.012 million award.

Sources:

Former public defender disbarred, accused of enriching self at poor clients' expense, *Seattle Times*, May 8, 2004
Man left in jail wins \$3 million, *Spokane Spokesman-Review*, January 31, 2009.

from the court transcript:

Deputy District Attorney: Is it customary for the District Attorney's Office to set up what's called a pretrial conference?

Investigator: Yes, it is.

...

DDA: "Are there times that a witness is paid for their appearance at that pretrial conference or their expenses getting to and from the courthouse are paid?"

Investigator: "All the time. Yes."

With the jury knowing about the witness' pre-trial payment, the defendant was acquitted.

The defendant's attorneys had never heard about pretrial payments to a prosecution witness, and when word began circulating in the Las Vegas legal community, other defense attorneys not only expressed surprise at the payments, but said they could be both illegal and unethical. Phil Kohn, the Clark County Public Defender, said he had never before known that prosecutors were paying witnesses for pre-trial interviews.

Payments cont. on page 19

Professor Carolyn Kronenberg was beaten, raped and strangled in her Lansing Community College classroom between 8:30 and 8:40 a.m. on January 23, 2005. Police had no leads so they began questioning everyone known to be on the campus at the time of the crime. One of those people was 27-year-old LCC student Claude McCollum, who had never taken any of Kronenberg's classes. Five days after the murder he consented to be interviewed without an attorney present. McCollum seemed to make some incriminating admissions, so he was interviewed further. The next day he was charged with murdering and sexually assaulting Kronenberg.



Michigan Prosecutor Fired For Role In Claude McCollum's Murder Conviction

In August 2007 27-year-old Matthew Emmanuel Macon was arrested on suspicion of murdering six Lansing area women beginning in 2004.

McCollum's supporters began publicly demanding that Kronenberg's murder be reopened. His sister Carol told reporters, "We thought the trial was a travesty of justice, the way he was railroaded, because they had no evidence, no DNA, no nothing. When you're convicted of murder, that's supposed to be without reasonable doubt." In early September 2007 the Ingham County prosecutor's office reopened Kronenberg's case. About a week later the prosecutor and McCollum's attorney filing a joint motion for a new trial.

On October 16, 2007 McCollum was released on a personal recognizance bond pending a retrial, and a week later the prosecutor dismissed the charges. McCollum had been incarcerated for 21 months.

The Ingham County prosecutor didn't act only because the week of McCollum's release Macon made a credible confession to murdering Kronenberg. The prosecutor had also been contacted in September by the Michigan State Police that there was video evidence exonerating McCollum.

That evidence was a tape from a surveillance camera in the lobby of a LCC building other than the one where the crime occurred. The tape showed that between 7:38 a.m. and 9:36 a.m. McCollum was visible and never left the building. Since Kronenberg was killed in a different building between 8:30 a.m. and 8:40 a.m., McCollum could not have committed the crime.

Prior to McCollum's trial his prosecutor Eric Matwiejczyk and the lead detective were specifically informed of the exculpatory video by Michigan State Police Detective Sgt. James

Young. Young wrote in his March 28, 2005 supplementary report, "McCollum was visible on camera #7 (TLC lobby) during the entire time period of 7:38 a.m. and 9:36 a.m."

In the wake of the revelation that the exculpatory tape and state police report had not been disclosed to McCollum's attorneys, the Michigan Attorney General's Office began an investigation into the case.

The report was publicly released on August 19, 2008. Although the report determined Matwiejczyk's actions weren't criminal, it did conclude, "Matwiejczyk's actions and omissions may have denied McCollum a fair trial and prejudiced the administration of justice."

McCollum's attorney Hugh Clarke Jr. told reporters, "We didn't need the report to tell us that. ... It's obvious he violated the rules of ethical conduct."

One day after the report's release, Ingham County Prosecutor Stuart Dunning III announced Matwiejczyk had been fired as an assistant prosecutor.

After McCollum's release he filed a still pending federal civil rights lawsuit that named Ingham County and several prosecutors and detectives as defendants.

Sources:

McCollum gets life in prison, no parole, *The State News* (East Lansing, MI), April 13, 2006.
 Prosecutor knew video cleared McCollum, *Lansing State Journal*, February 13, 2008.
 Ingham Co. assistant prosecutor fired, *Lansing State Journal*, August 21, 2008.

There was no physical, forensic or eyewitness evidence against McCollum. During his February 2006 trial the case against him was based on his audio and videotaped statement to the police. While bantering with a team of interrogators he gave convoluted answers to hypothetical questions about what could have happened, saying at one point, "Did I do it? I could have done it, unconsciously in my sleep." Under repetitive questioning McCollum did repeat back a scenario of how the crime occurred, but McCollum's brother and Kronenberg's son separately told reporters during the trial that things he said didn't fit what they knew.

Even though the prosecution's forensic expert testified that foreign DNA under Kronenberg's fingernails was not from McCollum, the jury convicted him after a ten-day trial. During the hearing when he was sentenced to life in prison without parole McCollum told the judge that he did not commit the crime. As he was being led out of the courtroom friends and family members disbelieving he was guilty hollered to him, "We love you," "It's not over," and "We know the truth will come out."

Payments cont. from page 18

When asked by the *Las Vegas Sun* about paying witnesses before trial, DA David Roger said that Clark County prosecutors have been doing it for at least 22 years.

However, prosecutors have not been disclosing the witness payments, and thus defense lawyers have not known to cross-examine a witness about having a possible ulterior financial motive to testify against a defendant.

Nevada ACLU Executive Director Gary Peck said about the payment practice, "We are especially concerned about the failure to disclose, which we believe is a legal obligation."


Nevada law specifically allows the payment of \$25 to a witness for testifying during trial. In defending its witness interview payments, the DA's office is arguing the law also applies to pretrial witness interviews — but there is no such language in the law, and there has never been a court case extending authorization to make the payments.

It is unknown what effect the Clark County DA's failure to disclose the payments may have on the cases of persons convicted by the testimony of a secretly paid witness.

Source:

Controversy erupts over prosecutors paying witnesses for interviews, *Las Vegas Sun*, February 13, 2009.

www.napsusa.org



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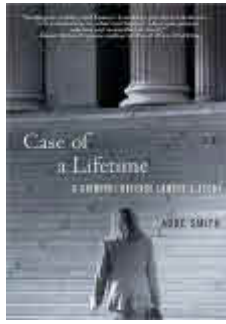
Case of a Lifetime: A Criminal Defense Lawyers's Story

By Abbe Smith
Palgrave Macmillan (2008), Hardcover

Reviewed by Rodney Uphoff

Case of a Lifetime is Abbe Smith's intensely personal account of her nearly 30-year struggle to achieve justice for her client, Patsy Kelly Jarrett. Despite her valiant efforts, Smith failed to right the wrong that she so strongly believes occurred when Jarrett was convicted of aiding in the murder of a 17-year-old gas station attendant in 1973. Although Smith may have failed to secure the exoneration she tirelessly pursued, her book is a smashing success.

This book traces Smith's relationship with her imprisoned client from initial contact with Jarrett — her very first client as a clinical law student at NYU's Prison Law Clinic — to her role in a protracted fight to secure clemency. The length and depth of Smith's relationship with her client is truly remarkable. Not surprisingly, the book reveals much about Jarrett and the case against her, and the reader is left with a powerful impression that it is highly unlikely that Jarrett was a knowing accomplice in her friend's murder spree. Nevertheless, as the book painstakingly highlights, once a person is convicted, the nature and structure of our current criminal justice system make it extremely difficult to secure an exoneration. Much of the book details the unsuccessful fight that Smith and other talented lawyers waged first to attempt to overturn Jarrett's conviction and then to gain clemency.



Perhaps even more compelling is what *Case of a Lifetime* reveals about Abbe Smith and criminal defense lawyers like her. As she blossoms from law student to public defender to clinical law professor at Harvard and then Georgetown Law School, Smith vividly describes her motivations and frustrations representing Jarrett and other clients. Smith finds it particularly frustrating, despite her growing expertise and best efforts, that she is powerless to free her innocent client who continues to languish in prison. The book does a marvelous job of capturing the essence of what it feels like to shoulder the awesome responsibility of representing someone in prison or facing a lengthy prison sentence.

For those of us who have walked in Smith's shoes and have defended both the innocent and the guilty, *Case of a Lifetime* will resonate as a forceful reminder of how hard the fight can be and why we fight fiercely on behalf of our clients. Undoubtedly, many clients and the public at large do not understand nor appreciate the role of the criminal defense lawyer. Many view public defenders with disdain. Admittedly, some public defenders and court appointed lawyers, especially those in jurisdictions with crushing caseloads and inadequate resources, do not provide quality representation. Nonetheless, some of the best lawyers in the country are indigent defenders who zealously and skillfully represent their clients despite long hours and poor pay. For many, then, this book offers an eye-opening look at the commitment that drives good public defenders to do what they do.

Finally, in this book Smith shares her insights into some of the most challenging dilemmas that confront criminal defense lawyers. For example, she uses Jarrett's decision to reject a plea bargain that would have led to her release as a vehicle to explore the question of how hard counsel should lean on a client to plead guilty in the face of a strong case against her despite her claim of innocence. Smith laments the fact that Jarrett turned down a deal and consequently spent 28 years and six months in prison. Unquestionably, wrestling with the decision to go to trial or take a deal — especially for an innocent client — puts incredible pressure on the defense counsel. This is true even though it is the client, not counsel, who will ultimately bear the direct consequences of such a decision. As *Case of a Lifetime* powerfully demonstrates, however, the conscientious lawyer also lives with the decisions her clients make.

The reviewer Rodney Uphoff is a professor at the University of Missouri School of Law.

Case of a Lifetime is available for \$22 in **hardcover** only from *JD's Bookshop*. Use the form on p. 21, or mail your order to: Justice Denied; PO Box 68911; Seattle, WA 98168. Or order online with a credit card at, <http://justicedenied.org/books.html>

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Victims of Justice Revisited by Thomas Frisbie and Randy Garrett - \$19.95 - 408 pgs. Tells the story of Rolando Cruz and his two co-defendants' accusation of kidnapping and murdering Jeanine Maneno in 1983 from the day the crime occurred to their exoneration in 1995 after three trials, to the trial of seven law officers accused of conspiring to deny Cruz a fair trial and falsely have him executed. #22

Innocent: Inside Wrongful Conviction Cases by Scott Christianson - \$18.95 - 208 pgs. The 42 cases collected and graphically documented in *Innocent* reveal the mistakes, abuses and underlying factors that led to miscarriages of justice, including the presumption of guilt, mistaken identification, eyewitness perjury, ineffective assistance of counsel, police misconduct, prosecutorial misconduct, and forensics, while also describing how determined prisoners, post-conviction attorneys, advocates and journalists struggled against tremendous odds to win their exonerations. #76

Tulsa: Race, Cocaine, and Corruption in a Small Texas Town by Nate Blakeslee - \$15.95 - 464 pgs. Definitive account of the five year travesty of justice in Tulsa that resulted in the wrongful conviction of 38 people on trumped up drug charges. Blakeslee is the award-winning reporter for the *Texas Observer* who broke the Tulsa story in 2000. #23

Ten Men Dead: The Story of the 1981 Irish Hunger Strike by David Beresford - \$13.50 - 336 pgs. In 1981 several dozen Irish Republic Army members in the Long Kesh prison in Belfast, Northern Ireland went on a hunger strike to make the British government recognize them as political prisoners rather than common criminals. Ten of the prisoners starved themselves to death, including Bobby Sands, who was elected to the England's Parliament three weeks before his death. This is the most in-depth book about the strike. #124

The Death of Innocents: An Eyewitness Account of Wrongful Executions by Helen Proghan - \$14 - 336 pgs. The book's first part focuses on the execution of two men who were likely innocent: Dobie Williams, a black man with an IQ of 63 from rural Louisiana represented by incompetent counsel and found guilty by an all-white jury based mostly on conjecture and speculation; and Joseph O'Dell, convicted of murder based on a jailhouse informant who later admitted to testifying falsely for his own benefit. The book's second part details the inequities in capital prosecutions and the arbitrary imposition of the death sentence. #27

Win Your Case: How to Present, Persuade, and Prevail - Every Place, Every Time by Gerry Spence - \$15.95 - 304 pgs. Written for defense lawyers or lay people. In his 50+ year career Spence has never lost a criminal case. He considers every case a "war" and he focuses on what is necessary to win. The book deals with waging the war: improving one's storytelling skills, conducting effective opening and closing statements and using witnesses. #72

Last Man Standing: The Tragedy and Triumph of Geromino Pratt by Jack Olson - \$16.95 - \$12 pgs. The story of Geromino Pratt's 1970 conviction and life sentence for an L.A. murder committed when he was 350 miles away from the crime scene and under FBI surveillance in Oakland, CA. Pratt was exonerated in 1997 and awarded \$2.75 million in 2000. This is a textbook case of abuse of the American legal system for political ends. #63

Last Words From Death Row by Norma Herrera - \$19.95 - 264 pgs. Leonel Herrera was executed in 1993 after the U.S. Supreme Court ruled evidence of his factual innocence was irrelevant to issuing a writ of habeas corpus. Leonel's last request to his sister was to tell his true story. His experience demonstrates that in the U.S. the legal system is more concerned with procedure than finding the truth of a person's guilt or innocence. #88

Freeing The Innocent: A Handbook For The Wrongly Convicted by Michael and Becky Purdue - \$15 - Self-help manual jam packed with handson - "You Too Can Do It" - advice explaining how Michael Purdue was freed in 2001 after 28 years of wrongful imprisonment. #01 (No Service Charge)

Kristin Blaise Lobato's Unreasonable Conviction by Hans Sherrer - \$10 - Kristin Blaise Lobato has twice been convicted in Las Vegas of murdering a homeless man and sexually assaulting his corpse in 2001. Yet, there is no forensic, physical, eyewitness or confession evidence linking her to the murder or the crime scene, and there is no evidence he was sexually assaulted by the perpetrator. This is the full story reported in *Justice: Denied* Issues 26 & 34. #160 (No Service Charge)

Improper Submissions: Records of a wrongful conviction by Erna Armstrong - \$10 - 370 pgs. The true story of how Karlyn Eloff was delivered into the hands of a psychotic killer by traffickers in porn and mind control. After she witnessed a murder she was prosecuted and convicted for that crime, and is currently serving two life sentences in Oregon. *Improper Submissions* documents that exculpatory and impeachable evidence was hidden by the prosecution, and dragging by the killer (later convicted and sentenced to death) was used by the prosecution against Karlyn. #28 (No Service Charge)

Who Killed Sarah? by Sheila and Dong Martin - \$16.95 - 272 pgs. Although there was no physical evidence, no witnesses to the crime and no murder weapon, Penny Brunner was convicted of first-degree murder in the death of Sarah Gonsleaved by a Madison, Wisconsin jury in October 1994. But did Brunner do it? Or was she herself a victim of overzealous prosecutors, tunnel-vision investigators, contradictory forensic scientists, and a prejudiced judge? It's a twilight zone, but it's real. #39

The Wrong Men: America's Epidemic of Wrongful Death Row Convictions by Stanley Cohen - \$15 - 256 pgs. Sociologist Cohen examines some 100 instances where people sentenced to death were later exonerated. Cohen also analyzes the chief reasons why wrongful convictions occur so frequently, and he presents a convincing argument to suspect the reliability of capital convictions. #32

Arbitrary Justice: The Power of the American Prosecutor by Angela J Davis - \$29.95 - 264 pgs. **Hardcover** Intense and long-overdue serious examination of the expanding power of prosecutors and their increasing politicization. Law Professor Davis explains how the day-to-day practices and decisions of prosecutors produce unfair and unequal treatment of defendants. Davis argues that the mechanisms purportedly holding prosecutors accountable are ineffectual and foster a climate of tolerance for misconduct. (Pub. April 2007) #84

Police Interrogation and American Justice by Richard A. Leo - \$40 - 328 pgs. **Hardcover** Professor Leo is one of the world's leading authorities on false confessions. Leo shows the police have developed sophisticated interrogation methods that rely on persuasion, manipulation, deception and psychological coercion to induce an admission of guilt from a suspect. Leo argues that standard interrogation techniques produce confessions that are inherently suspect, and that false confessions are relied on to wrongly convict a person. Leo also explains that the *Miranda* warning, ineffectively protects a suspect's right against self-incrimination. (Pub. March 2008) #102

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Merriam-Webster's Dictionary - \$6.50 - 939 pgs. Over 75,000 definitions. Good basic dictionary. #03

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Merriam-Webster's Vocabulary Builder - \$5.99 - 576 pgs. Good resource to expand one's vocabulary. Includes over 1,000 words with definitions and explanation of the words usage, including examples of its use in a sentence. #06

Essentials of English Grammar by L. Sue Baugh - \$9.95 - 176 pgs. Explains parts of speech, punctuation, capitalization, spelling, frequently confused words, and much more. Includes style tips on how to write with economy, clarity, and accuracy. #07

Merriam-Webster's Dictionary of Law - \$15.95 - 634 pgs. Over 3,000 legal terms defined. Includes chapters discussing important legal cases, important laws. There's also a section on important legal agencies in the U.S., and the full U.S. Constitution. More complete than the paperback edition of a well-known law dictionary that sells for \$29.00. #08

Legal Writing in Plain English by Bryan A. Garner - \$16 - 227 pgs. A guide to clear and effective legal writing. Includes: Tips on generating thoughts, organizing them, and creating outlines; Sound advice on expressing your ideas clearly and powerfully; Dozens of real-life writing examples to illustrate writing problems and solutions; Exercises to reinforce principles of good writing; Helpful guidance on page layout, A punctuation guide that shows the correct uses of every punctuation mark; and model legal documents that demonstrate the power of plain English. Probably need at least the equivalent of a high-school education to make use of this book. #09

A+ Style Manual for Legal Writing in Plain English by Research and Education Association - \$9.95 - 106 pgs. Practical manual for law students, paralegals, lawyers and anyone who prepares legal documents. Includes rules of citation, abbreviation and capitalization, footnotes and numbers, and grammar and punctuation. Aids in writing legal papers in "plain English" instead of "legalese." Less detailed than *Legal Writing in Plain English*, but more understandable for a layperson. #40

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The Criminal Law Handbook (9th ed.) (Sept. 2007) by Attorney Paul Bergman & Sara J. Bergman-Barrett - \$39.99 - 640 pgs. Explains what goes on in a criminal case. Covers: arrests; booking; preliminary hearings; charges; bail; courts; arraignment; search and seizure; defenses; evidence; trials; plea bargains; sentencing; juveniles. Covers Supreme Court cases and changes in criminal law (through August 2007). #10

Legal Research: How to Find & Understand the Law (14th ed.) (Sept. 2007) by Attorneys Paul Bergman & Sara J. Bergman-Barrett - \$39.99 - 322 pgs. Learn how to do legal research, and use a law library to seek and understand statutes, regulations and cases. Also explains online resources. Written for a layperson. Aids in saving time by narrowing your focus and formulating legal questions such as, "is the issue federal or state, civil or criminal, procedural or substantive?" #93

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New York Times Almanac - \$11.95 - 1,008 pgs. Includes a wealth of comprehensive information about a diverse range of topics related to the U.S. and the rest of the world. Includes social, political, population, geographic information, and sports. #14

Eyewitness Testimony by Elizabeth Loftus - \$25 - 272 pgs. Professor Loftus is one of the world's leading authorities on the unreliability of eyewitness testimony. She explains the basics of eyewitness fallibility, such as poor viewing conditions, brief exposure and stress. She also covers more subtle factors, such as expectations, biases, and personal stereotypes that can result in a suspect's erroneous identification. Loftus also explains that experiments have repeatedly proven that eyewitness memory is chronically inaccurate. #21

Surviving Justice: America's Wrongfully Convicted and Exonerated edited by Dave Eggers & Lola Volten - \$16 - 512 pgs. Thirteen exonerates describe their experiences, the events that led to their convictions, their years in prison, and their new lives outside. The exonerates tell of the devastating effect of incarceration on them and their loved ones, and how they have been forever changed by their experience. #49

No Cruel Tyrannies: Accusation, False Witness, and Other Terrors of Our Times by Dorothy Rabinowitz - \$13 - 236 pgs. Examines some of the sex-abuse cases of the 1980s and 90s that saw dozens of innocent adults convicted of absurd charges. Included are the "sex-ring" cases in Wenatchee, Washington where 19 people were wrongly convicted of sex abuse charges. Also included is the Aniramit case in Malden, Massachusetts, where bizarre false allegations were taken seriously. #52

The Innocent Man by John Grisham - \$7.99 - 448 pgs. Best selling author John Grisham spent two years researching and writing this account of Ron Williamson's life, and how he was convicted of rape and murder and sentenced to death in Oklahoma in spite of being innocent. #95

In Spite of Innocence: Erroneous Convictions in Capital Cases by Michael Radelet, Hugo Adam Bodau and Constance Putnam - \$24.95 - 416 pgs. Details how over 400 Americans were wrongly convicted in cases carrying the maximum penalty of a death sentence. Expands on well-known 1987 Stanford Law Review article by Radelet and Bodau that has been cited several times in U.S. Supreme Court opinions, most recently in June 2006. #15

Actual Innocence by Barry Schock, Peter Neufeld and Jim Dwyer - \$14.95 - 432 pgs. Latest edition. Case histories explain how people have been wrongly convicted by erroneous eyewitness identification, jailhouse informants, junk science, perjured testimony, prosecutor and police concealment of evidence, etc. Explains how new evidence, including scientific tests, has helped free wrongly convicted people. #16

Wrongly Convicted: Perspectives on Failed Justice Ed. by Sandra Westervelt and John Humphrey - \$23.95 - 301 pgs. Articles by leading authorities explain how and why wrongful convictions occur. The book is divided into four sections: the causes of wrongful convictions; the social characteristics of the wrongly convicted; case studies and personal histories; and suggestions for changes in the legal system to prevent wrongful convictions. #18

Suspect Identifiers: A History of Fingerprinting and Criminal Identification by Simon Cole - \$21 - 400 pgs. Most comprehensive book available about the history of fingerprinting and why it may not be the "gold standard" of evidence that most people believe it to be. Professor Cole is one of the world's leading critics of Court's allowing fingerprint examiners to testify as experts. A must have book by anyone with an interest in fingerprinting. #20

Dehumanization Is Not An Option by Hans Sherrer - \$10 - 106 pgs. Explains that the mistreatment of prisoners is not due to the rogue actions of a few "bad apples." It is a predictable response of placing people in a position of authority over others that they see as undeserving of humane treatment. This attitude of treating people barbarically is unleashed in those working in an authoritarian prison environment. #106

The J Chong: Meditations from the Joint by Tommy Chong - \$14.95 - 224 pgs. First person account of how a criminal drug case was contrived against Tommy Chong (of the comedy duo Cheech & Chong) that resulted in him spending nine months in federal prison in 2003-2004. A straightforward account of how the federal government misuses the criminal laws to prosecute critics of political policies. Written with the heart and wit that one would expect from a professional entertainer. #86

Mistaken Identification: The Eyewitness, Psychology and the Law by Brian L. Cutler and Steven D. Penrod - 44.99 - 300 pgs. Reviews research concerning the adequacy of safeguards protecting a person from being convicted due to a mistaken eyewitness identification. The presence of counsel at line-ups, cross-examination, and judges' instructions have proven ineffective at preventing a mistaken identification. Expert psychological testimony educating the jury about how memory processes work and how eyewitness testimony should be evaluated, shows much greater promise as a safeguard against mistaken identifications. #74

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"Innocent people are convicted every day in this country. A civilized society cannot say that it is in fact civilized or humane when it permits a system to exist that can result in the wrongful execution of innocent people."

Retired Florida Supreme Court Chief
Justice Gerald Kogan

JUSTICE DENIED

The Magazine for the
Wrongly Convicted

Houston's DA Admits "System-Wide Breakdown" Caused Richardo Rachell's False Conviction

Richardo Rachell's claim of innocence was ignored in June 2003 when he was convicted of sexually assaulting an 8-year-old boy in Houston and sentenced to 40 years in prison. Rachell was released more than five years later when DNA testing proved the assault was committed by a serial child rapist. Harris County DA Patricia Lykos released a report in March 2009 that described Rachell's conviction was caused by a "cascading, system-wide breakdown."

See the article on page 8.

The scales of justice are tipped against innocent people all across the country - from Maine to Hawaii and from Alaska to Florida.

Justice:Denied provides a public voice for innocent people victimized by that tragic reality.

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