


JUSTICE DENIED

\$3
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The Magazine for the
Wrongly Convicted

\$30.2 MILLION AWARDED EXONERATED PEOPLE IN 2008

SEE P. 20




Bruce Lisker
Released after 26 years of wrongful imprisonment for murder in California.
See page 10




Nancy Smith & Joseph Allen
Acquitted of child rape in Ohio after 15 years of wrongful imprisonment.
See page 6



Leroy McGee
Released after 3-1/2 years of wrongful imprisonment for robbery in Florida.
See page 10



Derek Tice
Federal judge overturns murder and rape convictions days after Tice, Danial Williams and Eric Wilson were conditionally pardoned by Virginia's governor.
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Paul Kamienski
1988 murder conviction overturned and released after 22 years of wrongful imprisonment in New Jersey.
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Ohio & Michigan Legal Professionals Acknowledge Wrongful Convictions Are Real!

Omaha Crime Lab Director Charged With Fabricating Evidence!

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Summer 2009**

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Message From The Publisher

Events of recent months in three cases provide additional confirmation that the likely innocence of every person featured in *Justice:Denied* deserves to be seriously considered.

Justice:Denied’s first article about the Norfolk Four – Derek Tice, Joseph Dick Jr., Danial Williams and Eric Wilson – was in 2000. Convicted of a young wife’s rape and murder, *JD’s* article was the first in this country that questioned the four men’s guilt. Wilson was released in 2005 after serving his 8-year sentence for rape only. On August 6, 2009 Virginia Governor Tim Kaine conditionally pardoned Tice, Dick and Williams from their life sentences. They were released after more than 11 years of incarceration. On September 14, 2009 a federal judge overturned Tice’s convictions. See p. 7.

Nancy Smith and James Allen were convicted in 1994 of raping children in a Lorain, Ohio Head Start program. An article in *JD’s* Summer 2005 issue detailed the crimes never happened, and were apparently concocted by one of several parents who subsequently collected multi-million dollar settlements from the school. On June 24, 2009 a judge acquitted Smith and Allen, who were incarcerated for more than 15 years. See p. 6.

Bruce Lisker’s case of being convicted in 1985 of murdering his mother was featured in *JD’s* Summer 2005 issue. A federal judge in Los Angeles granted Lisker’s writ of habeas corpus on August 6, 2009. He was released seven days later after 26-1/2 years of incarceration. See p. 10.

The conviction of innocent persons based on speculation rather than evidence of their guilt is a significant problem. This issue has reports about the overturning of convictions in two cases that were based on speculation — Donald Sweat (p. 12) and Paul Kamienski (p. 15).

Justice Denied is proud to announce that it is publishing *System Failure: A Critique of the Judicial System of the United States* by James F. Love. *System Failure* will be available Nov. 30. Order information is on page 20.

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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If you have an account of a wrongful conviction that you want to share, send a first-class stamp or a pre-stamped envelope with a request for an information packet to, Justice Denied, PO Box 68911, Seattle, WA 98168. Cases of wrongful conviction submitted in accordance with *Justice:Denied’s* guidelines will be reviewed for their suitability to be published. *Justice:Denied* reserves the right to edit all submitted accounts for any reason.

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

Early on the morning of December 15, 1974 I was awakened and found myself looking up at the barrel of guns pointed at me. Officers of the Elloree, South Carolina Police Department and the Orangeburg County Sheriff's Department were standing over me with their guns drawn. I was in my bed in my parent's home, and they told me "get up and get dressed." Then they handcuffed me and read me my rights. They told my parents that they just wanted to talk to me. It took only minutes to get to the Elloree City Hall. Once there I was placed in a small room to await the magistrate. There were only two pieces of furniture in the room, the chair I was sitting in and a small table in front of me.

Soon after I was put in the room, five men surrounded me. I sat there handcuffed and silent while they discussed with one another a crime that occurred earlier that night. Tiring of waiting for the magistrate, they decided to transport me to the Orangeburg County Jail. I arrived at the jail just before sunrise. I was in a total state of shock and confusion by all that was happening. I struggled the whole time, trying to get my senses together since I had been awakened from an alcohol induced sleep. I kept wondering "what is going on here?"

My mother and father found out I was at the jail and came to visit. Speaking with them through the thick wire mesh that separated us I could see the heartache on their faces. We were all in disbelief at what was happening.

Phillip Robinsion was out drinking on December 14, 1974

I was 21-years-old and I lived with my parents in Elloree. I would go out drinking occasionally with friends, but when I was low on cash I would simply stay at home with my mother and father. On the evening of Saturday, December 14 I was home when the doorbell rang. My father answered the door. Lewis Keitt was at the door and he told my father he wanted to speak to me. Keitt was a friend of mine, and he asked me if he could borrow a gun. At first, I told him "No." Then I asked him what he wanted the gun for. He told me that Phillip Scott, Ronnie Gilmore and he were going out partying. I asked him, "What is in the deal for me?" He told me, "A free high!" So I said, "Okay." I told my mother and father I was going out for a while.

We found my friend Mike, and he agreed to loan his gun to me. Scott, Gilmore, Keitt and I stopped in Elloree and drank for a while. Then we drove to the nearby town of Santee and stopped and bought a bottle of liquor. After we drank that we bought some more liquor and

Imprisoned For A Murder Another Man Was Convicted Of Committing – The Phillip Robinson Story

By Phillip Robinson*

drove around drinking liquor, smoking marijuana and talking and laughing. I drank more than the other guys and I soon became very drunk. Scott turned the heater up in the car and I remember asking him to turn it down because I was feeling woozy. I opened the window a little to get some fresh air but it seemed not to help. The next thing I knew I was awakened by the cold and opened my eyes. I was groggy and it was still dark, but I realized I was in my parent's front yard on their bench swing.** I got up and went in the house and went to bed. The nightmare was about to begin.

Gas station robbery and murder

Earlier that morning a Texaco gas station near Santee owned by G&M Oil Company was robbed and the lone attendant, John Smith Jr., was killed by a single shotgun blast. A witness, Jimmy E. Pence, told police that about midnight he and his girlfriend pulled into the station in his car and observed "three colored boys" robbing the station. Pence stated two of the boys carried a cash register to a faded 1966 or 1967 Ford while the car's driver waited for them. As the two boys were putting the cash register in the vehicle, Pence stated a single shotgun blast was fired out the car's window. The three robber's then fled in the car. The shotgun blast killed Mr. Smith.

Phillip Scott pled guilty to "voluntary manslaughter" for shooting to death John Smith Jr. ... the same person that days earlier Phillip Robinson had been sentenced to death for shooting!

Shortly after the robbery J.K. Ulmer III was driving to Elloree from a party at Santee State Park when he observed a car positioned in the road next to a cash register. Ulmer was a licensed State Constable, and when the car took off at high-speed he gave chase until it failed to make a corner and wrecked in a peach orchard. Ulmer recognized and arrested Scott, the lone occupant of the wrecked vehicle – a faded 1967 Ford. Elloree barber Harrison Griffith was driving with his wife when he saw a car parked beside the road. He stopped at about the time Ulmer's car approached, and the car took off. Where the car had been stopped Griffith found the stolen cash register along with money and a shotgun. He collected the money and shotgun and turned them over to a sheriff's deputy.

The robbery was carried out by the three the young men, Scott, 17, Keitt, 18 and Gilmore, 15, that I had been out drinking with before I passed out and woke up alone outside my parent's home. Scott was the mastermind of the robbery, and his motive was clear: he needed money and needed it fast. Scott owed his two accomplices for the money they had loaned him to get his car out of the repair shop earlier that day. The three were arrested within hours. The police were told that I helped get from my friend the gun used in the robbery, which is why I was arrested.

Robinson's two trials and death sentence

New Years Day 1975 had come and gone and I had still not been appointed an attorney. On January 9, 1975 I was appointed attorney Tom Friday. Four days later I learned I was being indicted for "willful, deliberate, and premeditated" "Murder while in the commission of a robbery while armed with a deadly weapon." My heart just dropped. I was in shock. I was numbed with disbelief as to what was happening. Still, I was confident the truth would emerge. I had not done anything to anyone. Scott, Gilmore and Keitt were also indicted for capital murder. Under South Carolina law we were all facing a mandatory death sentence if convicted.

I was the first person to be tried. My trial began on April 7, 1975 in the Orangeburg County Courthouse. The judge declared a mistrial when the jury foreman became ill after the jury began deliberations. I just knew in my heart that the truth of my innocence was prevailing and that I would soon be home with my family.

My second trial began on September 18, 1975. C.F. Martin, operator of the Texaco station testified there was \$229 in the stolen cash register. He also stated the station was so well lighted that "anytime at night you could read the newspaper anywhere on the lot." He further testified "the lights run the whole length of the canopy – and they, of course, they are lighted just like daylight underneath the canopy." Which was where the robber's car was when John Smith, Jr. was shot.

Eyewitness Pence testified when asked how many robbers there were, "three, the two boys out of the car and the driver." He also testified the robbers were "colored." When asked by the prosecutor if he could identify any of the robbers Pence answered, "No sir." When cross-examined by my lawyer Pence confirmed there were "a total of three people" in the robber's car, the "driver" and "two

Robinson cont. on p. 4

Robinson cont. from p. 3

passengers.” He also testified that as the two boys with the cash register “jumped in the car, I seen the barrel of the gun come to the window, the gun shot, the deceased fell between the gas pumps.” (Transcript, p. 18.)

Ulmer testified about seeing the cash register in the road, giving chase to the Ford until it crashed, and arresting Scott, the car’s driver and lone occupant.

Griffith testified about turning over to a sheriff’s deputy the money and shotgun that he found by the road where the car had been stopped before fleeing.

Scott did not testify. Keitt testified about the events leading up to, during, and after the robbery. He testified Scott drove the car and claimed I was in the car holding the shotgun on the attendant while he and Gilmore were stealing the cash register. He said he heard the shotgun blast but didn’t see John Smith Jr being shot. He also testified the robbery was planned before they went to my house to find a gun. Gilmore testified similar to Keitt, also testifying that he heard but didn’t see the actual shooting. When cross-examined by my lawyer, Keitt and Gilmore admitted to meeting with Solicitor (prosecutor) Norman E. Fogle, but they both denied agreeing to testify as a State witness in exchange for a promise of leniency.

An important part of Keitt’s testimony was he unwittingly revealed a dead-bang motive for Scott to kill John Smith Jr. – they *knew* each other. Mr. Smith would have immediately fingered Scott to the police as one of the robbers, and as Keitt testified, “A dead man couldn’t talk.” (Transcript, p. 85) Even though Scott had a perfect motive to gun down Mr. Smith, my lawyer did not ask either Keitt or Gilmore if Scott was the murderer.

Detective C.R. Smith testified on cross-examination that no fingerprints were recovered from either the shotgun or the cash register.

The State’s case was completed by the testimony of one of the five men present in the small room at the Ellore City Hall were I was taken after my arrest. Orangeburg County Sheriff Deputy William Martin testified the five men were talking amongst themselves a few feet from where I was sitting when I spontaneously said, “I am the one that pulled the trigger.” (Transcript, p. 128) When Solicitor Fogle asked Martin if I made any other statement he answered, “No, sir.” When Martin was asked if any written record was made of my statement he also answered, “No, sir.” (Transcript, p. 128)

The following exchanges took place when my attorney Friday cross-examined Martin about my alleged spontaneous confession:

Q. (Friday) All of you – all were present?

A. (Martin) Yes, sir.

Q. And you were all interrogating this defendant?

A. No, sir. He wouldn’t say anything to us.

Q. You mean to tell me all of these people were in the room and the defendant present, and nobody, not one of you, said anything to him?

A. Not at this time.

Q. In other words, you were all in the room, the defendant was sitting there handcuffed, surrounded by all of you all, and nobody –

A. He wasn’t –

Q. – said anything?

A. He wasn’t surrounded.

Q. Well, was anything said? Were you – all just standing there looking at him?

A. Well, we was talking among each other.

...

Q. And you are telling this court that all of a sudden he ups and says, “I am the trigger man”?

A. Yes, sir, he did ...

Q. And nobody said anything to him, nobody questioned him?

A. Nobody asked him a direct question. (Transcript, p. 136-138)

None of the other four men in the room testified that I made any statement of any kind. And no written record of any statement by me was introduced into evidence.

After the prosecution presented its case my court-appointed attorney did not call any defense witnesses. I did not know enough to insist on testifying.

My trial lasted only a few hours. After deliberating for a short period of time the jury of ten whites and two blacks found me guilty. About ten hours passed from the beginning of jury selection to my conviction by the jury. I returned to court the next day for my mandatory death sentence.

Three days before my twenty-second birthday Judge Harry Agnew casually declared an end to my life by electrocution. Those moments have seemed to last for eternity. Judge Agnew ended my sentencing with, “May God have mercy on your soul.”

A little more than 24-hours passed from the time my jury selection began to the time I was sentenced to death.

I was dazed. My conviction made no sense. Eyewitness Pence testified there were “three colored boys” involved in the robbery that

occurred under “daylight” conditions. The prosecutor did not attempt to impeach Pence’s testimony that matched his crime scene statement. Scott, Keitt and Gilmore were known to have been in the car when the robbery was committed. Yet, the jury disregarded the “reasonable doubt” created by Pence’s undisputed testimony and “stretched” the fact of three people being involved in the crime to convict a fourth “phantom” person of committing the shooting – me. It still doesn’t make sense today, thirty-four years later.

Phillip Scott is convicted for shooting John Smith Jr. ... 17 days after Robinson’s death sentence

What I do know is this. In the same courthouse where 17 days earlier I was sentenced to death, Scott, Lewis and Gilmore pled guilty to “Robbery while armed with a deadly weapon.” They were each sentenced to 21 years in prison. The capital murder charge was dismissed against all three of them. Scott also pled guilty to “Voluntary manslaughter” for shooting to death John Smith Jr. ... the same person that days earlier I had been sentenced to death for shooting! The very unfortunate Mr. Smith was only shot once by one person, and Scott pled guilty in open court to being the person who shot him. Scott’s admission to shooting Mr. Smith is consistent with the eyewitness testimony that there were three robbers, and the lone shot was fired from the car while Keitt and Gilmore were getting in the car with the safe.

I appealed my conviction. The South Carolina Supreme Court denied the issues my court appointed attorney raised supporting a new trial, but it did overturn my death sentence and remanded my case back to the trial court for resentencing.

On January 26, 1977 Judge Lewis Rosen resented me to life in prison. Only fifteen months earlier Judge Rosen had sentenced Scott to prison for committing the exact same shooting he resented me to life for supposedly committing.

Ronnie Gilmore’s affidavit exonerating Phillip Robinson

In 2000 I came face to face with Gilmore for the first time since he testified at my trial. He had been convicted of another crime and we happened to be assigned to the same prison construction project. He approached me and when we talked I asked him for an explanation of his testimony. He apologized for the lies he told at my trial. Twenty-six years after the horrible events of that December 1974 night, Gilmore on his own

Robinson cont. on p. 5

Robinson cont. from p. 4

wrote and signed a sworn and notarized Statement in which he described what actually happened. The following is Gilmore's Statement of November 13, 2000:

"My name is Ronnie Gilmore. I am not being pressured or threatened to say anything. All I want to do is tell the truth.

I was fifteen years old at the time the crime happened (in December of 1974). I was placed in Orangeburg City Jail in a cell by myself. The cell was very dark. I could not tell day from night. The Sheriff's department kept me there for almost a month. The only time I would see light was when they came to question me.

I was only fifteen years old. All I could hear was "Boy, you are in a lot of trouble. You are looking at fifty years." Detective Rush and [Orangeburg County] Solicitor [Prosecutor] Fogle yelled at me, asking me "who was the trigger man?" I replied that I did not know. They kept yelling, "You are a damn liar. Boy you had better talk, and fast, or do fifty years." So they locked me back up. Later they brought me a honey bun, soda, and a cigarette. The very next day they were harassing me again about who was the trigger man. This went on for three weeks.

Then Solicitor Fogle had me escorted to his office and told me to say that Phillip Robinson was the trigger man. Solicitor Fogle told me that if I cooperate he would get me a light sentence. I was afraid and did not know what to do. I wanted to kill myself; because, I had heard about how people get raped in prison and become "punks." I didn't want to take the witness stand, but Detective Rush and Solicitor Fogle told me that they would help me get my story together. I know that an innocent man was going to prison for something he never did.

Phillip, I am so sorry for accusing you of a crime that you did not know anything about. I know it is going to be hard for you to forgive me. I am going to tell you just what had happened.

Phil Scott's car was in the shop. He needed some money to get it out. He came to the store where Lewis Keitt and I worked and told Lewis Keitt and me that if we would help him to get his car out of the shop, he would get our money back to us that night. Lewis Keitt and I agreed to give Phil Scott the money. After we gave him the money Phil Scott left.

Later Phil Scott picked up Lewis Keitt and me after we got off from work. We

started riding around and getting high. I asked Phil Scott how was he going to give Lewis and me our money back. Phil Scott said that he had a plan, but we needed a gun. Phil Scott asked, "Who can we borrow one from?" Lewis Keitt said that he knew where he could borrow one from.

So, Lewis Keitt told Phil Scott to go around to Phillip Robinson's house. That's when Phil Scott told Lewis Keitt to tell Phillip Robinson that we needed a gun because we were going out partying. Phillip Robinson, however, said that he wanted to go partying with us.

So, we took Phillip Robinson to the house of one of his friends, whose name was Mike; but Mike was at his girlfriend's house. We found Mike. Phillip Robinson and Mike talked a while. We took Mike and Phillip Robinson and got the gun. Then we brought Mike back to his girlfriend's house.

We went to Mr. Thadese Moore's Night Club in Elloree, SC, where we enjoyed ourselves and drank beer and wine. We decided to leave Elloree and go to Mr. Turbie's Club located in Santee, SC, where we bought marijuana and liquor. We went to a Shell station in Santee, SC, where we sat in Phil Scott's car smoking, drinking and getting high. Then we started riding around in Santee. We stopped and bought a big bottle of gin. Then we started smoking a joint and drinking gin.

Phillip Robinson told Phil Scott to cut down the heat; because, he was getting ready to pass out. Phil Scott told him it is good for him. Phillip Robinson passed out in the car. We put Phillip Robinson in the back seat of the car.

Phil Scott then brought up the subject about coming up with some money to pay back Lewis Keitt and me for getting his car out of the shop. Phil Scott stated that he knew a Texaco gas station we could knock off. Lewis Keitt and I listened to what Phil Scott had to say and agreed to his suggestion. Phillip Robinson was so drunk that we took him back home and put him in the swing that was in the yard.

Phil Scott, Lewis Keitt, and I went back to Santee, and we pulled up at the Texaco station. The station attendant started pumping gas as he was told by Phil Scott. Lewis Keitt and I quickly ran inside, lifted up the cash register, and carried it out the door. As we approached the car we heard a gun shoot. Lewis Keitt and I both fell, got back up, threw the cash register on the front seat, and jumped in

the car. At that time a car pulled in behind us, and Phil Scott drove off.

We went down Highway 6 going back toward Elloree, SC. Then we decided to stop and open up the cash register. A car was coming in at a high speed. Phil Scott jumped into his car and took off without Lewis and I. The car that was coming down the road in a high speed turned around and started following Phil Scott. So, Lewis Keitt and I ran into the woods and went home.

That is what happened. It hurts me to know that all of us with the help from Solicitor Fogle, Detective Rush, and the Sheriff's Office had an innocent person sent to prison (namely Phillip Robinson).

I Ronnie Gilmore hereby swear that the above statement is true.
(Ronnie Gilmore Statement, November 13, 2000)

Gilmore's Statement is evidence of what I have known all along: my trial was a sham. The jury relied on deputy Martin's fantastic testimony that was supported by the perjured testimony suborned by Solicitor Fogle and other law enforcement officers. I was convicted and sent to death row on lies. I filed a state post-conviction relief petition based on the new evidence of Gilmore's statement. It was dismissed with prejudice on July 9, 2007 without a hearing being held. I then filed a *pro se* federal habeas corpus petition that was denied on March 20, 2008.

I am innocent of this terrible crime. Mr. Smith's confessed murderer is Phillip Scott. I have been incarcerated for more than 34 years since my December 1974 arrest. At the time I was 21. I am now 56 and many of my beloved family have died waiting and hoping that someday I would come home. I have lost my mother and father, two sisters and two brothers during this time. When will it end?

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* *Justice:Denied* contributed to this article by editing and verifying facts.

** *Justice:Denied* checked the weather records for Orangeburg, SC on December 15, 1974. The low temperature was 36°F, which is cold enough for a person to get the shivers and be awakened.

Nancy Smith & James Allen Acquitted Of Rape After 15 Years Imprisonment

Nancy Smith and Joseph Allen were convicted in November 1994 of multiple charges related to the alleged rape of children attending a Head Start program in Lorain, Ohio.

Smith was a Head Start school bus driver. The prosecution's theory was that after dropping off most of the kids at school she drove the bright yellow school bus to Allen's home in a residential neighborhood, where sexual abuse occurred in the front yard and inside his home.

The prosecution's case was based on the testimony of several children, and hearsay testimony by several adults about what other children had said. There was no incriminating physical or medical evidence, and no adult eyewitness corroborated the children's claims.

The jury rejected Smith and Allen's protestations of innocence, and their claim that prior to being charged they had never met. Smith was sentenced to 15 to 90 years in prison. Allen was sentenced to 20 years to life in prison.

In May 1996 Smith's family hired Columbus private investigator Martin Yant to look into the case. He became convinced of the innocence of Smith and Allen, and after his retainer was exhausted he continued to work *pro bono* on the case. Canadian researcher and writer Lona Manning became interested in the case, and she wrote "The Shame of Lorain, Ohio" for *Crime Magazine* (Dec. 2002). *Justice:Denied* published an updated version of Manning's article in Issue 29 (Summer 2005).

In 2005 the National Center for Reason and Justice awarded Yant a grant to work on the case. Yant then convinced the Ohio Innocence Project to accept Smith and Allen's cases. After Smith's parole was denied in February 2007, the OIP pursued the filing of a motion for a new trial.

Days prior to a scheduled hearing on February 4, 2009, supporters rallied outside the courthouse, and Smith told a reporter she would die in prison fighting to clear her name before confessing to crimes she did not commit. During that hearing Lorain County Common Pleas Court Judge James Burge unexpectedly vacated the convictions and sentences of both Smith and Allen. Smith was immediately released on \$100,000 bail. She told reporters, "I can't believe I'm sitting here. Sometimes I

didn't know if I'd ever see this day. I'm just in shock right now. I know it's not over. But now I can go home and clear my name." Allen was released on April 14 on \$100,000 bail.

The prosecution appealed, but the Ohio Court of Appeals upheld Judge Burge's authority to vacate the convictions and sentences.

During a hearing on June 24, 2009 Burge explained flaws he found in reviewing Smith and Allen's trial:

- Their right to cross-examine their accusers was denied by the adult's hearsay testimony about what the children told them, and that hearsay testimony would not be admissible in a retrial.
- The pretrial interview techniques used with the children who testified during their trial "was so suggestive that the children's in-court testimony would be inadmissible" in a retrial.
- The testimony of the children who did testify was presented in a prejudicial manner.
- Smith and Allen's right to cross-examine the children was impaired by the prosecution's failure to provide pretrial interview tapes until after the children testified on direct examination. Judge Burge ruled the tapes revealed the children's trial testimony was inconsistent and contradictory with their pretrial statements, but the delayed access of Smith and Allen's lawyers to the tapes did not allow the children to be effectively cross-examined.
- The children's pre-trial taped statements were so damning for the prosecution's case that they could have been relied on as substantive exculpatory evidence if they had been provided to the defense prior to the trial.
- Smith and Allen's trial lawyers failed to introduce exculpatory attendance records for the children that established they were in class during the times that the crimes were allegedly being committed miles away.

Judge Burge then announced, "I have absolutely no confidence that these verdicts are correct." He then *sua sponte* ordered judgments of acquittal entered for Smith, 52, and Allen, 56, and the return of their bonds.

Sources:

Nancy Smith, Joseph Allen acquitted by Lorain County judge in Head Start sex abuse case, *Cleveland Plain-Dealer*, June 25, 2009.

Judge James Burge's June 24, 2009 oral ruling in the case of Nancy Smith and Joseph Allen is available at, www.youtube.com/watch?v=eKTQVv7PUQA

California Lifer Newsletter is chock full of info (court decision summaries, reports, news stories, etc.) of interest to prisoners serving life in CA and their family members. Prisoners \$15 yr. (6 issues). All others \$20 yr. Write: CLN; PO Box 687; Walnut, CA 91788.

DNA Excludes Thomas Arthur

Thomas Arthur's case was first featured in *Justice:Denied* 10 years ago (Vol. 1 Issue 7, Fall 1999). Arthur has spent more than 20 years on Alabama's death row for a 1982 murder. The State of Alabama has opposed for more than a decade forensic/DNA testing of blood, hair, sperm and other evidence recovered from the crime scene that Arthur claims will prove he is innocent of the murder.

No physical evidence links Arthur to the crime, two alibi witnesses place him an hours drive from the crime scene, and the State's only eyewitness is the victim's wife, who didn't identify Arthur until she was offered the incentive of parole from her life sentence for murdering her husband.

Finally, in April 2009 a state judge ordered DNA testing of several crime scene items, including the wig worn by the murderer. The testing was conducted by the Alabama Department of Forensic Sciences. In July 2009 the test results excluded Arthur's DNA from being on the crime related evidence.

The judge denied the request of Arthur's *pro bono* lawyers for more state of the art DNA testing of the wig and other as yet untested evidence, to not just further exclude Arthur — but to identify the killer's DNA profile. The judge returned the case to the Alabama Supreme Court, and on September 3, 2009 Alabama Attorney General Troy King requested that the court set a new execution date.

Arthur's court-appointed trial lawyers were paid \$1,000. Due to missed filing deadlines, Arthur has not had either state or federal post-conviction review of his capital conviction or sentence. As a death row inmate claiming innocence, Arthur may be able to seek habeas review of his case under the US Supreme Court's ruling in Troy Davis' case on August 17, 2009. Arthur has had four stays of execution, twice being hours from execution. Extensive information about Arthur's case is on his website, www.thomasarthurfightforlife.com

For a copy of the USSC's 8-17-2009 ruling in Troy Davis' case, send \$2 or 5 first-class (44¢) stamps to: Justice Denied; PO Box 68911; Seattle, WA 98168

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By Michael and Becky Pardue

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U.S. Supreme Court Rules No Right To DNA Testing

In 1993 two men picked-up a prostitute in Anchorage, Alaska. After the vehicle's passenger raped the woman, she was left on the side of the road. The blue condom worn by the rapist was recovered by police. A man was arrested who admitted to being the car's driver. He identified William Osborne as his passenger who raped the woman.

Osborne insisted he was innocent. Even though DNA testing of the semen in the condom could prove or disprove his claim, neither the prosecution nor his court-appointed lawyer sought the testing.

Osborne was convicted by a jury of kidnapping, assault and sexual assault. He was sentenced to 26 years in prison.

In Osborne's 2004 application for parole he admitted to some of his convicted crimes. After his parole was denied he filed a post-conviction petition claiming he was innocent. He stated he falsely admitted to the crimes because asserting his innocence would have made him ineligible for parole. To prove his innocence Osborne's petition requested DNA testing of the semen by the STR technique that had not been developed at the time of his trial. Alaska's Court of Appeals affirmed the lower court's denial of his petition and DNA testing.

Osborne then filed a federal 42 U.S.C. §1983 lawsuit to obtain access to the semen for DNA testing. In 2007 the 9th Circuit Court of Appeals ruled that Osborne had a due process right to access the semen for DNA testing. The 9th Circuit arrived at its decision by extending Osborne's right to pretrial disclosure of potentially exculpatory evidence under *Brady v. Maryland*, to his post-conviction proceeding. The U.S. Supreme Court granted the State of Alaska's writ of certiorari.

On June 18, 2009 the Supreme Court sided with Alaska, ruling 5-4 that a convicted prisoner does not have a substantive due process right to access evidence for DNA testing that could prove the prisoner's innocence. (*D.A. v. Osborne*, No. 08-6 (USSC, 06-18-09)). Chief Justice Roberts explained the majority's reasoning that Alaska, along with other states and the federal government, have post-conviction procedures that can be pursued for DNA testing. Osborne simply has not yet been successful in his effort to obtain an order for the testing at the state level. Roberts also explained the Court has pragmatic reasons for ruling against Osborne:

"Establishing a freestanding right to access DNA evidence for testing would

force us to act as policymakers, and our substantive-due-process rulemaking authority would not only have to cover the right of access but a myriad of other issues. We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when? No doubt there would be a miscellany of other minor directives.

... At the end of the day, there is no reason to suppose that their answers to these questions would be any better than those of state courts and legislatures."

Although Roberts conceded that Osborne might have a right to DNA testing under Alaska's Constitution, the Supreme Court would not create "a new constitutional right" to DNA testing under the federal constitution, and take "over responsibility for refining it."

"It is very likely that Osborne will close the federal courthouse doors to at least some innocent prisoners who cannot get testing under state law - some of whom may spend their lives in prison, or even be executed, as a result."

Nina Morrison, attorney with the Innocence Project in New York.

Justice Stevens wrote for the dissenters:

"The State of Alaska possesses physical evidence that, if tested, will conclusively establish whether respondent William Osborne committed rape and attempted murder. If he did, justice has been served by his conviction and sentence. If not, Osborne has needlessly spent decades behind bars while the true culprit has not been brought to justice. The DNA test Osborne seeks is a simple one, its cost modest, and its results uniquely precise.

... DNA evidence has led to an extraordinary series of exonerations, not only in cases where the trial evidence was weak, but also in cases where the convicted parties confessed their guilt and where the trial evidence against them appeared overwhelming."

Since the Court's ruling was by only a one-vote majority, the Court may eventually reconsider the issue of whether a prisoner has the due process right to access evidence for post-conviction scientific testing that could provide evidence of his or her innocence.

For the complete *Osborne* decision, send \$4 (stamps OK) to: Justice Denied; PO Box 68911; Seattle, WA 98168

Norfolk Four Conditionally Pardoned

Derek Tice, Joseph Dick Jr., Danial Williams and Eric Wilson were four Navy enlisted men convicted in the July 1997 rape and murder of a Navy enlisted man's wife in the couple's Norfolk, Virginia apartment.

The four men who became known as the Norfolk Four, confessed after intense interrogation by the Norfolk PD. However, they all recanted their confessions that did not match the details of the crime, and no physical or forensic evidence linked any of them to the crime. Based on their confessions Tice, Williams and Dick were convicted of rape and murder and sentenced to life in prison without parole. Wilson, was convicted of rape only and sentenced to 8-1/2 years imprisonment.

A fifth man, Omar Ballard, confessed at least five separate times that he acted alone. Only his confessions match the crime scene and only his DNA matches biological evidence recovered from the victim. Ballard was also convicted and sentenced to life in prison.

The case of the Norfolk four became a cause célèbre. Major newspapers editorialized, and former prosecutors, judges and law enforcement officers publicly expressed their belief in the men's innocence and called for Virginia's governor to pardon them. Professor Richard Leo co-authored a book about the case — *The Wrong Guys: Murder, False Confessions, and the Norfolk Four* (2008).

Wilson was released in 2005 after completing his sentence. On August 6, 2009, Virginia Governor Tim Kaine conditionally pardoned Tice, Williams and Dick and ordered their immediate release. A future governor may be willing to revisit the cases of the Norfolk Four and grant them full pardons.

Derek Tice's Habeas Granted

Norfolk Four defendant Derek Tice's murder and rape convictions were overturned by U.S. District Court Judge Richard L. Williams on September 14, 2009. Judge Williams ruled Tice had been provided ineffective assistance of counsel, because his trial "Counsel failed to move to suppress Tice's June 25, 1998 confession on the ground that such confession was made after Tice had invoked his right to remain silent." Judge Williams ruled there is a reasonable probability the jury's verdict would have been different if his confession had been excluded. Many experts, including Professor Richard Leo, have determined Tice made a false confession under police pressure. See, *Derek Tice v Johnson*, No. 08-cv-69 (USDC ED-VA, 09-14-2009) Memorandum Opinion.

Seventeen people from Mansfield, Ohio had their drug convictions overturned and were released from federal prison after paid informant Jerrell Bray was discovered to have manufactured the evidence against them. Bray's controller, U.S. Drug Enforcement Agency Agent Lee Lucas, had sworn the evidence was true.

The Mansfield cases began in 2005

Timothy Harris was found slain south of Mansfield on December 31, 2004. Richland County Sheriff's investigators believed his murder was drug related and the best way to catch his killer would be to squeeze drug dealers around Mansfield for information. Their efforts did not result in any solid leads, so in September 2005 the county asked the DEA for assistance. A joint DEA-Richland County task force was set-up, headed by 15-year DEA agent Lee Lucas. Small-time drug dealer Jerrell Bray had worked as an informant in Cleveland on cases with Lucas, and he became Lucas' informant in the Richland County operation that was code-named Operation Turnaround.

In November 2005 twenty-three people were arrested based on alleged drug deals set-up by Bray. Mansfield city officials held a press conference in which they announced that the arrests had cleaned up the city of its major drug dealers.

Bray confesses to Mansfield frame-ups



Jerrell Bray

By May 2007 federal drug charges had been dropped against one of the defendants, seventeen had been convicted after a trial or a guilty plea, one was awaiting trial, and four had been acquitted.

That month Bray was charged with shooting a man during a drug deal in Cleveland. While jailed he admitted during an interview with a federal public defender that he and Lucas lied in affidavits and in their trial testimony to frame innocent people during Operation Turnaround.

DOJ investigates Operation Turnaround

The U.S. Attorney's office was alerted, and the Department of Justice assigned AUSA Bruce Teitelbaum as a special prosecutor to investigate Bray's allegations. The picture of what transpired during Operation Turnaround emerged during the investigation.

Mansfield, Ohio DEA Drug Sting Self-Destructs When Informant Admits Manufacturing Evidence

By James F. Love

Among other things Bray staged recorded phone calls that sounded like he was setting up a drug deal. Bray then staged transactions with stand-in friends and acquaintances making fake drug buys or sales, from or to Lucas or him. Bray and Lucas completed the process by identifying innocent people as the persons who made the fake drug transactions. In the cases that had a surveillance tape of the transaction, height, weight, facial and even voice mismatches between the person on the tape and the suspect were overlooked by officers not in on the scheme.

Geneva France had been convicted after a trial, and her case was one of the first reviewed. France was a mother of three with no criminal record when convicted in 2006 of dealing cocaine based on Lucas' identification of her as the person who sold him the drug. She was sentenced to ten years imprisonment. Twenty-two at the time of her arrest, Lucas identified her from a 6th grade elementary school photo taken when she was 11.

Within weeks of beginning their investigation, the U.S. Attorney's Office submitted a motion to vacate France's conviction and sentence. She was released on June 29, 2007, after spending 16 months in federal prisons in West Virginia and Kentucky. She said other prisoners ridiculed her claim of innocence and told her that she would serve her full ten-year sentence. When France was released the Bureau of Prisons gave her a bus ticket to Mansfield and \$68. When she arrived her youngest child did not recognize her and she had to start with nothing, since after her arrest her landlord had evicted her and thrown all her property into the street. Whenever France went somewhere, her youngest daughter would ask the person babysitting her, "Is Mommy coming back?"

Bray selected some of the innocent people to settle a personal grudge he had with the person. France went through her ordeal for the pettiest of reasons: Bray falsely fingered her as a drug dealer because she refused to go out on a date with him. Bray identified Mansfield businessman Dwayne Nabors as a cocaine dealer after he refused to allow Bray to use his car detailing business as a way for Bray to work himself into the neighborhood crowd.

Investigators also discovered that Bray was not only paid about \$24,000 for two months

of work as an informant in Mansfield, but he apparently stole additional thousands of dollars in drug "buy" money supplied to him during the course of Operation Turnaround.

U.S. Attorney Greg White proceeded with the Mansfield prosecutions in spite of several signs there were problems with Operation Turnaround. One sign was the dismissal of Roosevelt Williams' indictment after his lawyer provided evidence Williams was in Chicago visiting a sick relative on the day he allegedly purchased more than 50 grams of crack cocaine from Lucas. Another sign was Williams' indictment even though a local undercover officer who knew Williams reported that Williams did not make the drug buy from Lucas that he witnessed.

Ronald Davis' home was searched after Bray swore in an affidavit that he was France's cocaine supplier. Two handguns, but no drugs were found during the search. Davis denied knowing France, but he was convicted of drug and firearm charges and sentenced to 11 years in federal prison. The legal basis for the search of Davis' home evaporated when it was discovered that Bray fabricated his claim that Davis supplied France with cocaine. In October 2007 the U.S. Attorney's office submitted a motion to vacate Davis' federal convictions.

Also in October 2007, the DOJ submitted a motion to vacate Nabors conviction. The motion, which was granted, stated the DOJ's investigation "calls into question the validity" of Nabors' conviction and states that he "should not remain incarcerated."

In January 2008 the DOJ submitted motions to vacate the convictions of 14 additional people convicted as a result of Operation Turnaround. The motions were granted on January 25 by US District Court Judge John Adams, and the men were ordered released. They were (Name, age, sentence):

- Marion Brooks, 36, 3 years, 10 months.
- Tyron Brown, 29, 8 years, 4 months.
- James Burton, 37, 11 years, 8 months.
- Frank Douglas, 28, 7 years.
- Robert Harris, 20, 5 years.
- Albert Lee, 31, 10 years.
- Nolan Lovett, 22, 5 years.
- Charles Matthews, 24, 5 years, 3 months.
- Jerry Moton, 30, 3 years, 1 month.
- Noel Mott, 31, 4 years, 3 months.
- Dametrese Ranshaw, 29, 3 years, 6 months.
- Johnny Robertson, 26, 5 years, 10 months.
- Arrico Spires, 35, 4 years, 9 months.
- Jim Williams, 31, 5 years 3 months.

Mansfield cont. on page 9

Mansfield cont. from page 8

The men professed their innocence, but a number took plea deals for a lesser sentence after France was convicted and sentenced to ten years in prison. Federal prosecutors, however, refused to admit the men were innocent, instead stating that the evidence was too tainted to support their convictions. They had been incarcerated for 26 months since their November 2005 arrests. The seventeen wrongly convicted Mansfield defendants were incarcerated for a total of about 35 years.

Fall-out from the Mansfield frame-ups

Lucas was considered a DEA "star" before the frame-ups in Mansfield were exposed. Before being based in Cleveland, he was assigned to the DEA office in Miami, Florida and had worked for the DEA in Bolivia. A private investigator in Miami provided special prosecutor Teitelbaum with a summary of his investigation into Lucas's work in Florida. Lucas's tactics are described as "questionable and unethical" in some of the Florida cases. Teitelbaum was also provided a 2003 FBI report that federal prosecutors in Cleveland told FBI investigators they were concerned that Lucas had lied in past cases.

"Absolute power corrupts absolutely, and the war on drugs has done nothing but create an Orwellian power structure in which the innocent are only deemed so by the guilty."

Comment on Cleveland *Plain-Dealer* website in response to a May 13, 2009 article about Lee Lucas' indictment.

Bray pled guilty in 2007 to two counts of perjury and five counts of deprivation of civil rights he committed during Operation Turnaround. He was sentenced to 15 years in federal prison. He will begin serving that sentence after he completes an 11-year state sentence for shooting a man during a Cleveland drug deal.

Charles Metcalf pled guilty on May 14, 2009 to one misdemeanor count of violating the civil rights of Nabors. Metcalf, 46, is a 14-year veteran of the Richland County Sheriff's Department. He falsely testified during Nabors July 2006 trial that the drug buy allegedly involving Nabors was not videotaped. He also testified, as did Lucas, that Nabors bought the drugs. When the surveillance video of the "transaction" surfaced, it clearly showed Nabors was not the buyer. Metcalf's plea agreement was sealed, and he faces a maximum of one-year in prison during his sentencing scheduled for November 5, 2009.

Lucas was indicted by a federal grand jury in Cleveland a day before Metcalf pled guilty. The 18-count indictment charges Lucas with perjury, making false statements and violating the civil rights of three people. The indict-



Lee Lucas

ment alleges Lucas failed to monitor Bray, he concealed evidence from federal prosecutors, he lied in testimony given during two trials, and he made false and misleading statements in his internal DEA reports that summarized details of Operation Turnaround. Lucas' trial is scheduled for January 2010.

Lowestco Ballard was one of the people arrested by Lucas who was acquitted after a trial. When told by a reporter that Lucas had been indicted, Ballard exclaimed, "Are you serious? Is this for real? I can't believe it. It's wonderful how the inconsistencies finally came out."

White, 58, was appointed a U.S. Magistrate in Detroit in February 2008. He has described himself as essentially being duped into authorizing the Mansfield prosecutions. Prior to being appointed the U.S. Attorney for northern Ohio in 2003, White was the Lorain County, Ohio prosecutor for 22 years. White oversaw the prosecutions of Nancy Smith and Joseph Allen, whose 1994 child rape convictions in Lorain were overturned in June 2009 after 15 years of wrongful imprisonment. (See p. 6 in this issue.)

As of September 2009 at least nine federal civil rights lawsuits have been filed as a result of Operation Turnaround. The lawsuits allege malicious prosecution and violation of constitutional rights by the defendants, who include Richland County, the Richland County Sheriff's Department, and several officers.

Sources:

DEA snitch Jerrell Bray says he decided to come clean, *Cleveland Plain Dealer*, July 30, 2007.
Fallout continues from informant's confession, *Cleveland Plain-Dealer*, October 16, 2007.
Struggles Await 15 Men Freed In Tainted Mansfield Drug Case, *Cleveland Plain Dealer*, February 3, 2008.
DEA Agent Lee Lucas indicted on perjury, civil rights charges; pleads not guilty, *Cleveland Plain Dealer*, May 13, 2009.
Deputy Charles Metcalf, who worked with DEA agent Lee Lucas, pleads guilty to lying at drug trial, *Cleveland Plain Dealer*, May 14, 2009.
Lawsuits spring from bungled drug probe, *Mansfield News Journal*, May 21, 2009.
Lee Lucas' credibility is subject of subpoenaed records from three defense attorneys, *Cleveland Plain Dealer*, June 1, 2009.

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Jerrell Bray Claims Lee Lucas Agreed To Use DEA For Bray's Personal Revenge

When Jerrell Bray told federal public defenders about how he and Lee Lucas framed innocent people for drug deals in Mansfield, Ohio during Operation Turnaround, he also explained how he wound up working with Lucas in Mansfield.

In 1991 the 18-year-old Bray, Michael Frost and Dennis Kliment made a drug deal for cocaine that they discovered was sugar. When they confronted the people who ripped them off, a gunfight erupted. Bray was wounded, Kliment was killed, and Frost fled uninjured.

Bray pled guilty to involuntary manslaughter in Kliment's death, but he didn't reveal Frost's identity. He made a deal with Frost that he would take the fall alone if Frost looked out for Bray's family. Bray didn't think Frost kept his end of the bargain, so when he was paroled in 2004 he wanted to get revenge on Frost.

In early 2005 Bray and Lucas crossed paths in Cleveland. The two men and a Cleveland police officer assigned to a DEA task force agreed to a deal. Lucas and the officer would 'do whatever it takes' to get Frost off the street in exchange for Bray agreeing to assist them in arranging drug deals.

Frost was arrested after Bray set-up a buy of \$3,200 worth of crack from him. In August 2005 DEA Special Agent Robert Cross filed an affidavit describing the crack cocaine ring led by Frost. The details mainly came from Bray. Frost pled guilty to conspiracy to distribute cocaine and was sentenced to 11-years in prison.

Bray held up his end of the bargain with Lucas by framing innocent people in Mansfield during Operation Turnaround.

Source:

DEA snitch Jerrell Bray says he decided to come clean, *Cleveland Plain Dealer*, July 30, 2007.

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Leroy McGee Seeks Florida Compensation

By Jon Burstein



Leroy McGee spent three years and seven months in prison for a robbery he didn't commit. His pleas of innocence were ignored by Broward County, Florida jurors, who convicted him. They

went unheeded until one of his many letters to the outside landed on the desk of someone who believed he might be telling the truth.

That someone was the same judge who sent McGee to prison. Broward Circuit Judge Paul Backman eventually overturned McGee's conviction. The victory, though, came a year after McGee finished serving his prison sentence.

McGee, 41, is now seeking compensation from the state for his lost years — time in which he lost his marriage, his job and the chance to watch his children grow up. He is the first person to apply for reparations under the state's Victims of Wrongful Incarceration Compensation Act passed last year. He could be eligible for \$50,000 for every year he spent in prison.

"This was an innocent man who hired the wrong lawyer and ended up paying the price," Judge Backman told the *Sun Sentinel*.

McGee, a soft-spoken carpenter's apprentice for the Broward County School District, said the money isn't as important as what it represents: total vindication. And while the Fort Lauderdale father of five says he has no definite plans for the money, he says it will be used to provide a better life for his children, who range in age from 5 to 22.

"I talk to a lot of people and they say, 'You aren't bitter? I can't see you not being bitter,'" McGee said. "But there's no need for me to be like that. ... I lost everything, but coming back now, I'm getting back double of what I lost."

His legal odyssey began in August 1990 when he walked into a Fort Lauderdale gas station to buy \$3 of gas. The clerk was convinced McGee, then 23, was the gunman who robbed him three weeks earlier of \$463. Police arrested McGee a few weeks later.

McGee, who had no prior record, thought it would be easy to prove his innocence. He had been at work as a custodian at Fort

Lauderdale High School when the July 31, 1990, robbery occurred. His boss could testify to that. He had a time card. His car had been at a garage for maintenance that day.

McGee said his attorney, Theota McClaine, assured him he was going to win. But when it came to the two-day April 1991 trial, the attorney was woefully unprepared, failing to take depositions or know what his defense witnesses would say, according to court records. McClaine failed to raise a single objection during the trial. He didn't tell jurors how the clerk's original description of the gunman as skinny with a mustache didn't match McGee, who is stocky and didn't have facial hair. The attorney tried to enter into evidence a time card for the pay period ending July 25, 1990—five days before the robbery.

"It was absolutely the worst performance in the courtroom I've ever seen," said Backman, who as a judge is limited to ruling on the issues presented to him. He's prevented from entering evidence or arguments on the record himself. He said he made suggestions to McClaine that went unheeded. McClaine, who was disbarred in 1993 for mishandling clients' money, could not be reached for comment.

A jury convicted McGee of robbery. Under mandatory sentencing guidelines, Backman had no choice but to give him a 4 1/2-year prison term. "I went blank after they said I was guilty," McGee said. "Until I got back to that cell, I was blank. I thought, 'How? How could I be innocent and get charged with a crime that I didn't do?'"

Prison changed him—patience was a luxury he didn't have because he didn't want to be seen as soft. Violence surrounded him. One time he was on the phone with his mother when an inmate collapsed near him. He had been stabbed in the chest.

McGee never wavered about his innocence. He wrote letters to anyone he could, from President Bill Clinton to the NAACP. When Backman received a letter, he took it as a legal motion by McGee challenging his attorney's effectiveness. That allowed him to appoint another lawyer, Michael Wrubel, to examine whether he had received adequate representation.

Wrubel argued McGee was in prison because his attorney was ineffective. In August 1995, Backman agreed, throwing out the conviction and ordering a new trial. "In over 1,200 jury trials this court has never witnessed a more tragic set of circumstances," Backman wrote. "While it is unquestioned that the armed robbery took place, it is also clear that the defendant was not the

individual who perpetrated the act."

The Broward State Attorney's Office dropped the robbery charge. And McGee, with the quiet lobbying of the judge, was able to get his job back with the Broward School District.

Thirteen years after his conviction was overturned, McGee said he learned of the Victims of Wrongful Incarceration Compensation Act. Fort Lauderdale attorney David Comras filed paperwork in August asking Broward Circuit Judge Michele Towbin Singer to declare McGee eligible.

In December 2008, Towbin Singer signed an order that McGee had established his innocence by "clear and convincing evidence." The state Attorney General's Office said that McGee's application for compensation is under review.

McGee said it's been hard explaining what's happened to his children. He tries not to focus on the negatives, but on what the future holds. He enjoys taking his 5-year-old daughter Le-Sharria to the park. He's a regular churchgoer. He's ready to finish his carpenter's apprenticeship in December 2009 and become a carpenter for the school district. "I just want the American Dream," he said.

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Bruce Lisker's Murder Conviction Tossed After 26 Years Imprisonment

Seventeen-year-old Bruce Lisker discovered his mother dead in the family's Los Angeles, California home on March 10, 1983. Charged as an adult and convicted of her murder by circumstantial evidence, Lisker was sentenced to 16-years to life in prison. The California Supreme Court denied his post-conviction petition in 1989. Lisker did not file a federal habeas petition.

Lisker filed a second state post-conviction petition in March 2003 based on new evidence of his innocence. After it was denied by the California Supreme Court, Lisker filed his time-barred federal habeas petition under the AEDPA's miscarriage of justice exception. After U.S. Magistrate Ralph Zarefsky's May 2006 Report and Recommendation that Lisker's petition be accepted for review on its merits, it was returned to the California Supreme Court for litigation

Lisker cont. on p. 11



Javier Ovando in 1998

Public Defender Malpractice Lawsuit Settled For \$750,000

Javier Ovando was 19 in October 1996 when he walked into a vacant apartment where two Los Angeles Police Department officers were conducting gang surveillance. The officers opened fire on Ovando, hitting him in his head, shoulder and hip. Ovando was unarmed, so the officers, Rafael Pérez and Nino Durden, planted a throwaway rifle near Ovando and concocted a story. They told investigators that Ovando burst into the apartment pointing the rifle at them, so they fired on him in self-defense. Ovando was paralyzed from the waist down.

During Ovando's 1997 trial he told the jury he was unarmed when the two officers gunned him down. However, Ovando was a

Lisker cont. from p. 10

of several new claims. After it was again denied by the state court, Lisker's petition was returned to federal court for a reconsideration that included the new claims.

Magistrate Zarefsky recommended for a second time in March 2009 that Lisker's petition be accepted for consideration on its merits, since he had established that "more likely than not that no reasonable juror would have convicted him in the light of the new evidence," and thus his conviction was a miscarriage of justice under the standard established by *Schlup v. Delo*, 513 U.S. 298 (1995). Zarefsky cited that Lisker had been convicted on the basis of "false evidence," his trial lawyer's failure to adequately represent him, and the cumulative effect of constitutional violations. *Lisker v Knowles*, No. CV-04-02687 (USDC CDCA, 03-02-2009).

U.S. District Judge Virginia A. Phillips agreed with the Magistrate's Second Report and Recommendation, and on August 6, 2009 granted Lisker's petition. With his conviction overturned, Lisker was released on bond seven days later, after 26 years and 5 months of incarceration. The Los Angeles DA's Office announced on September 21 that it would not retry Lisker and his indictment was dismissed.

For a copy of Lisker's 82-page California habeas petition send \$6 (stamps OK). For a copy of Magistrate Zarefsky's 69-page Report and Recommendation of March 2009 send \$6 (stamps OK). Mail request to: Justice Denied; PO Box 68911; Seattle, WA 98168

former gang member, so it was easy for the jurors to believe the testimony of Pérez and Durden that they acted in self-defense. Ovando was convicted of attempted murder and sentenced to 23 years in prison.

Ovando would have served out his sentence as just another innocent person waiting to deaf ears if it hadn't been for Pérez's greed. In August 1998 Pérez was identified as the person who checked out six pounds of cocaine from a LAPD evidence room using the name of another officer. The cocaine was not recovered. LAPD investigators believed that Pérez used his girlfriend to sell the cocaine for \$800,000. Pérez was charged with possession of cocaine with intent to sell, grand theft and forgery. After five days of deliberations a mistrial was declared with the jury deadlocked 8-4 in favor of conviction.

While preparing for Pérez's retrial, investigators identified eleven additional cocaine thefts he had masterminded. In those cases Pérez ordered cocaine from a police evidence room for transfer to another police station. He then switched Bisquick for the cocaine before checking it in at the other evidence room.



Rafael Pérez after his release from state prison in July 2001.

Facing a likely conviction with the new evidence, on September 8, 1999 Pérez agreed to a deal: In exchange for a five-year prison sentence and immunity from further prosecution, he provided information about two "bad" shootings and wrongdoing by three other officers who were members along with Pérez and Durden in the LAPD's Rampart Division – which covered eight square miles west of downtown LA. One of the "bad" shootings Pérez described was how he and Durden had framed Ovando. Based on Pérez's affidavit recanting his arrest report and trial testimony, the LA District Attorney's Office filed a writ of habeas corpus and Ovando was released on September 16, after 2-1/2 years in prison.

The initial information Pérez provided about Rampart Division corruption ultimately resulted in more than 100 convictions being overturned. Those convictions were identified as being based on bogus or unsubstantiated evidence. More than 70 Rampart Division officers were implicated in wrongdoing, and almost two dozen officers were either fired or resigned. The officers wrongdoing included: unprovoked beatings and shootings, framing suspects by planting evidence and writing inaccurate reports, stealing and dealing narcotics, bank robbery, perjury, and covering up

evidence of the officer's crimes. (See, "The Beat Goes On: The Lessons of O.J. Continue To Be Ignored," *JD* Issue 11.)

In late 1999 Ovando filed a federal civil rights lawsuit against the City of Los Angeles, the LAPD, and several police officers. On November 21, 2000 the suit was settled for \$15 million.

Pérez was released from state prison in July 2001. In December 2001 he was indicted by a federal grand jury for conspiracy to violate Ovando's civil rights and possessing a firearm with an obliterated serial number (the planted rifle). He pled guilty in 2002 and was sentenced to five years in federal prison. After his release, in 2006 Pérez legally changed his name to Ray Lopez.

In June 2002 Durden pled guilty in federal court to violating Pérez's civil rights and possessing a firearm with an obliterated serial number. He was sentenced to three years in federal prison and ordered to pay \$281,010 in restitution.

Ovando also filed a lawsuit in Los Angeles Superior Court against Los Angeles County and his appointed county public defender. Ovando alleged legal malpractice by his public defender. Among Ovando's claims was that his public defender knew Rampart Division officers had a pattern of planting evidence and falsifying reports – but he did not use that information in his defense of Ovando. The lawsuit went to trial, and in May 2005 a jury awarded Ovando \$6.5 million. In August 2005 the trial judge overturned the verdict on the basis of misconduct by one juror who lied during *voir dire* that she did not know anything about the Rampart scandal. Ovando lost his appeal of that ruling. Two weeks before the case set for retrial, it was announced on July 7, 2009 that Ovando agreed to settle the lawsuit for \$750,000.

More than 140 civil lawsuits were filed against the City of Los Angeles as a result of the Rampart scandal. It is estimated the city has paid at least \$125 million to settle the lawsuits.

The FX cable network series *The Shield*, was modeled after the Rampart Division scandal. The series about a corrupt LAPD police division was proposed to FX with the title *Rampart*. However, before being broadcast the name was changed for legal reasons. The series ran from 2002 to November 2008.

Sources:
Jury Awards \$6.5 Million in Frame-Up, *Los Angeles Times*, May 26, 2005.
\$6.5-Million Award Is Overturned, *Los Angeles Times*, August 10, 2005.
The Outcome of the Rampart Scandal Investigations, *PBS Frontline*, last updated July 2008.
LA County settles suit with man framed by police, *San Jose Mercury News*, July 7, 2009.

NC Appeals Court Tosses Assault Conviction Based On Speculation

Donald Edward Sweat was arrested in February 2007 and charged in Lee County, North Carolina with assault with a deadly weapon inflicting serious injury. Unable to post his \$75,000 bail, he remained jailed until his April 2008 trial. He was convicted and sentenced to a minimum of 93 months and a maximum of 121 months imprisonment.

On April 7, 2009 the North Carolina Court of Appeals reversed his conviction on the basis of insufficient evidence: no one identified him as the perpetrator and there is no evidence he was at the crime scene. He was released several weeks later after almost 27 months of incarceration from the time of his arrest. The following are excerpts from the Court of Appeals' opinion in *North Carolina v. Donald E. Sweat*, No. 08-848 (NC COA, 4-7-2009):

The State's evidence tends to show that between 7:00 p.m. and 9:00 p.m. on 23 February 2007, brothers Joe and John Hunter were returning from a turkey shoot when they drove to check John's mailbox, which was located on Cletus Road about a mile and a half from John's home. The mailbox had been moved temporarily to the intersection of Cletus and Buchanan Roads while construction was being done on Cletus Road. Joe was driving the car when they pulled up to the mailbox. John stepped out of the car to check the mailbox, which was empty, and when he

turned back toward the car, he was attacked by an assailant. He was struck in the face and knocked to the ground, and struck in the face several more times as he tried to get up. John's cheekbone was cracked and his jawbone was broken by the blows. At that time, Joe Hunter got out of his car and told the assailant to leave John alone. The assailant threatened to kill Joe if he didn't get back in the car. Joe retreated. Meanwhile, John Hunter searched for his glasses which had been knocked off his face when he was hit. When he finally did find them, they were broken. John requires his glasses to see.

After the assailant forced Joe Hunter to retreat, he came back and put some type of knife to John's throat and told John if he moved, he would kill him. When John tried to get up again, the assailant cut John across the arm. The slash went through the sleeve of John's coat, and the cut later required nine stitches. The assailant told John, "I'm going to cut your damn head off." The assailant then left the scene. The Hunters then drove to John's house where they called the police at approximately 9:08 p.m. Neither John nor Joe could identify the assailant, and the only description they could give was that the assailant was a man or a boy. Neither of the two had seen defendant prior to being in court and neither could identify him as the attacker.

Defendant did not present any evidence. At the close of the evidence, defendant moved to dismiss the charge on the basis of insufficient evidence. The trial court denied the motion. The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury.

Defendant argues that the State failed to produce sufficient evidence of his identity as the perpetrator of the crime. Defendant contends no evidence shows that defendant was present at the scene of the crime, and that his motion to dismiss should have been granted.

In reviewing a decision on a motion to dismiss for lack of sufficiency of the evidence, we must view the evidence in the light most favorable to the State.

The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both.

None of the witnesses, notably the victim and the victim's brother who were at the scene of the attack, could identify defendant as Mr. Hunter's attacker. No evidence was presented that defendant's razor blade had any blood on it, nor do any of defendant's statements tie him to the specific attack on Mr. Hunter that night or provide any details that would place him at the scene of the crime. At most, the State's evidence raises a suspicion of guilt. However, mere suspicion or conjecture of defendant's identity as the perpetrator of the attack on Mr. Hunter, even if strong, is not sufficient to survive a motion to dismiss. The evidence allows an inference that defendant had the opportunity to commit the crime, nothing more. ... Thus, we conclude that the trial court erred in denying the motion to dismiss and we reverse the judgment and commitment for assault with a deadly weapon inflicting serious injury.

Reversed. Opinion is unpublished per N.C. Rule 30(e).

WV Supreme Court Broadens Self-Defense To Cover Battered Women

By Angie Rosser

The West Virginia Supreme Court of Appeals directed the acquittal and immediate release of Tanya Harden, a battered woman terrorized by life-threatening violence who killed her husband to protect herself and the lives of her children. She had been incarcerated for four years and nine months. (*West Virginia v. Harden*, No. 34268 (WV Sup Ct, 06-04-2009))

The court's opinion offered groundbreaking standards related to the relevance of past abuse and lethal threats faced by victims of domestic violence.

Tanya Harden's story is one shared by many



Tanya Harden the day of her arrest September 5, 2004.

women suffering from the violent and controlling behavior of abusive partners. Since her marriage at age 16, her husband prohibited her from working outside the home, from getting a driver's license and from having friends or family over without his permission and supervision.

In addition to being coerced and controlled, battered women endure repeated acts of violence and terror over time, comparable to the brutality survived by Tanya Harden documented in this case. The record states that for several hours her husband beat her with his fists and with the butt and barrel of a shotgun, threatened repeatedly to kill her and her children, and sealed the brutality with the vengeful crime of rape. The beatings and rape resulted in multiple severe injuries and frac-

tures of her face, arms and chest. Tanya Harden and her children are fortunate to be alive.

The recent decision by the Supreme Court recognizes that this battered mother took necessary steps to protect herself and her children. In the complex and dangerous dynamic of domestic violence, the legal system must consider past acts and patterns of abuse that cause a victim to know that further violence and death are imminent. This case is a clear example of self-defense, affirming that all individuals have the right to protect themselves in their own homes – regardless if the attacker is an intruding stranger or a cohabitating partner.

The prosecution against Tanya Harden ultimately failed in its attempt to argue that she had a responsibility to leave the home that evening to avoid further attacks from her husband. What would have resulted if she tried to escape after her husband had held a

Harden cont. on page 13

Wayne and Sharmon Stock were shot to death in their Murdock, Nebraska farmhouse on April 17, 2006. A mildly retarded nephew, Matthew Livers, was questioned the day after the murder by Nebraska State Patrol and Cass County Sheriff's Office investigators. Livers confessed after 11 continuous hours of questioning. He also implicated his cousin Nicholas Sampson.

Based on Livers' confession, he and Sampson were charged with two counts of first-degree murder and held without bail in the Cass County Jail.

Two days after the murders authorities impounded a Ford Contour that Sampson drove, but which was owned by his brother. No blood or other evidence was found during a 6-hour search of the car on April 19. Nor was any evidence incriminating Livers or Sampson found at the crime scene or during a search of their residences.

David Kofoed, director of the Douglas County (Omaha) CSI unit, was involved in the crime scene investigation and the car search. Eight days after the car was searched, Kofoed told a reporter for the Omaha *World-Herald* newspaper that he re-examined the car and found a small spot of blood under the car's dashboard. The blood tested positive for matching Wayne Stock. That physical evidence was considered confirmation of Livers' confession.

While Livers and Sampson languished in jail a strange picture emerged from testing of the crime scene evidence and further investigation. The evidence pointed to two perpetrators ... but those people were not the cousins. They were Gregory Fester and Jessica Reid, a romantically involved couple from Wisconsin.

When questioned Fester and Reid admitted to the crime and had knowledge of details not released to the public. After the couple were arrested for the murders, the charges were dismissed against Livers and Sampson and they were released after six months in jail.

Harden cont. from page 12

shotgun to her stomach in front of her young son asking her if she wanted to die? What would have happened to the three children in the home that night that she might have had to leave behind after her husband had already put a shotgun to her son's head and said no one would walk out of the house that night?

This case is a reminder of the unrealistic expectations and responsibilities often placed on battered women to "just leave."

Omaha Crime Lab Director Charged With Fabricating Evidence In Murder Case

Fester and Reid pled guilty to avoid the possibility of the death penalty after a trial. They were both sentenced to life in prison without the possibility of parole.

Suspicious about Kofoed's actions related to the blood evidence were fueled when Livers and Sampson each filed a federal civil rights lawsuit that among other claims alleges the blood evidence was planted.

An in-house investigation by Douglas County Sheriff Tim Dunning cleared Kofoed of wrongdoing. However, a special prosecutor was appointed by the State of Nebraska to investigate Kofoed's role in the Stock murder case, and the FBI also conducted an investigation. Kofoed told the *World-Herald* during an interview in the fall of 2008 that the blood could have gotten under the dashboard by "accidental contamination."

On April 22, 2009 Kofoed was charged in Cass County Court with one felony count of tampering with physical evidence. Kofoed was alleged to have falsified the report of when he allegedly found the blood in the car. He stated in the report that he found the blood on May 8, 2006, when 11 days before that he told a newspaper reporter he had found it. He also did not log, date or even bag the alleged blood swab, and he omitted from his report that another lab technician found no trace of blood when he examined the same area of the car after Kofoed had done so.

Special Prosecutor Clarence Mock told reporters that he wasn't alleging that Kofoed planted the blood evidence because there is no evidence the blood was recovered from the car. Instead Mock said: "This charge addresses the creation of an actual police report that was false, and Dave Kofoed knew that it was false, and he failed to inform anybody about that during the case."

The court's opinion reflects the understanding that "imposition of the duty to retreat on a battered woman who finds herself the target of a unilateral, unprovoked attack in her own home is inherently unfair. During repeated instances of past abuse, she has 'retreated,' only to be caught, dragged back inside, and severely beaten again."

This precedent-setting opinion holds great significance, not only for battered women struggling to stay alive, but also in signaling forward movement of society's under-

On April 23 a four-count federal indictment was unsealed charging Kofoed with:

- Deprivation of the civil rights of Matthew Livers, a misdemeanor that carries a maximum sentence of up to one year in jail.
- Deprivation of the civil rights of Nicholas Sampson, a misdemeanor that carries a maximum of up to one year in jail.
- Mail fraud, a felony offense that carries a penalty of up to 20 years in federal prison.
- Destruction, alteration or falsification of records, a felony punishable by up to 20 years in federal prison.

Kofoed, 52, pled not guilty to the state and federal charges, and refused to resign from the crime lab, although he was placed on administrative leave. He told reporters in his defense, "They [Livers and Sampson] didn't go to jail because of the CSI Unit. They went to jail because of a bad confession."

Kofoed and the Douglas County CSI Unit have been involved in many murder investigations, and Sampson's original defense attorney Jerry Soucie said he thought his indictments would raise questions about some of those cases, particularly two cases in which the defendant was convicted without discovery of the victim's body.

Locke Bowman is a lawyer affiliated with Northwestern University's Center on Wrongful Convictions that is representing Livers in his federal lawsuit. Bowman said about the indictments, "These allegations against Dave Kofoed are profoundly disturbing. The presentation of false evidence against an innocent man is the ultimate nightmare in terms of law enforcement misconduct."

On September 10, 2009 a federal court jury acquitted Kofoed. His state trial is expected to take place in 2010.

Sources:

Douglas County official charged with mishandling blood in Murdock case, *Omaha World-Herald*, April 23, 2009. Federal Charges against Kofoed unsealed, *Omaha World-Herald*, April 23, 2009. Kofoed verdict: Not guilty, *Omaha World-Herald*, April 23, 2009.

standing of the serious and lethal nature of domestic violence.

Reprinted with permission. First published in the *West Virginia Gazette*, June 12, 2009. About the author: Angie Rosser is the communications coordinator for the West Virginia Coalition Against Domestic Violence. Their website is, www.wvcadv.org

For a copy of *West Virginia v. Harden*, send \$2 (stamps OK), to: Justice Denied; PO Box 68911; Seattle, WA 98168

GA Supreme Court Tosses Teacher's Conviction For Sex With Student



Melissa Lee Chase

Melissa Lee Chase was a 28-year-old Harlem, Georgia high school teacher and softball coach in August 2006 when she began spending free-time with a 16-year-old former student. Chase even allowed the young woman, Christy Elaine Garcia, to spend the night at her home. On one occasion they had a sexual encounter. In November 2006 Garcia's mother contacted the police after she found a romantic note written to her daughter by Chase. Although 16 is the age of consent in Georgia, Chase was arrested and charged with sexual assault under a state law that criminalizes sexual contact between a teacher and a student enrolled in school. (OCGA § 16-6-5.1 (b))

Chase's lawyer talked her into waiving her right to a jury trial. During her 2007 bench trial Garcia testified that she wasn't just a willing participant to having sexual contact with Chase, but that she "pushed" the relationship with Chase because she "had feelings for her."

The judge sustained the prosecution's objection to Garcia's testimony that she consented to the sexual contact, ruling that consent was not a defense to the crime. The judge found

Chase guilty and sentenced her to 10 years in prison and 5 years probation. She would also have to register as a sex offender.

After the Georgia Court of Appeals affirmed Chase's conviction, the state Supreme Court accepted her case for review. On June 15, 2009, the Court issued its ruling in *Chase v. The State*, No. S09G0139 (GA Sup Ct., 06-15-2009). The 5-2 majority wrote:

"The age of consent in Georgia is 16. ... Thus, generally speaking, it is not a crime in Georgia to have physical sexual contact with a willing participant who is 16 years of age or older. (5) ... The plain language of the statute does not in any way indicate that the General Assembly intended to remove consent as a defense to a charge of violating subsection [OCGA § 16-6-5.1] (b). (6)

... If consent is no defense to a charge of sexual assault of a person enrolled in school, then the age of the teacher and the student have no effect on whether a crime has been committed. Consequently, a 30-year-old law school professor who engaged in a fully consensual sexual encounter with a 50-year-old law school student embarking on a second career would be guilty of a felony and subject to punishment of 10-30 years in prison. That result – not the situation in this case – would be truly absurd and unjust. But that is precise-

firm by the Appeals Court of Massachusetts in 2007 and the Supreme Judicial Court denied review, he filed a writ of certiorari with the U.S. Supreme Court.

On June 25, 2009 the USSC issued its 5-4 ruling in *Melendez-Diaz v. Massachusetts*, 557 U.S. ____ (2009). Justice Scalia wrote the majority opinion:

The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, ... provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford*, ... we held that it guarantees a defendant's right to confront those "who 'bear testimony'" against him. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. ...

The documents at issue here ... are quite plainly affidavits: "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths." ... They are incontrovertibly a

ly what the statute would mean were we to accept the reading adopted by the trial court and the Court of Appeals. (9-10)

... As the District Attorney concedes, the plain language of the statute does not eliminate consent as a defense to prosecutions under subsection (b). We agree with the United States Supreme Court's recent pronouncement, made in a unanimous decision, that "prosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes. Judgment reversed." (11)

On July 7, 2009 the Court declined to reconsider its decision. Since the Court ruled Garcia's consent is a defense for Chase, the prosecution cannot prove a crime occurred. The charge was dismissed and Chase was released on July 31 after 22 months of imprisonment.

The ruling had an immediate effect on another Georgia case. On July 8 charges of sexual contact with a student were dismissed against a female high school teacher in Baldwin County. She was 29 when charged in October 2008 with having sexual contact with two consenting male students, one 17 and the other 18, in different incidents.

Additional sources:
Sex charges dropped against Baldwin teacher, *The Telegraph* (Macon, GA), July 8, 2009.
Former teacher freed from prison, *Augusta Chronicle*, August 4, 2009.

U.S. Supreme Court Rules Right To Confront Witness Applies To Forensic Analysts

Luis Melendez-Diaz was tried in Boston, Massachusetts on state charges of distributing cocaine and trafficking in cocaine. The charges were based on several bags of a white substance seized as a result of searching a car in which Melendez-Diaz was a passenger.

The prosecution introduced three "certificates of analysis" as *prima facie* evidence the substance in the seized bags was cocaine. Melendez-Diaz's lawyer objected to admittance of the "certificates" as evidence without the testimony of the analyst who conducted the tests. He argued that Melendez-Diaz had the right under the federal constitution to cross-examine the laboratory technician who performed the tests. The lawyer relied on the U.S. Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). The judge over-ruled the objection, so the jury relied on the "certificates" to find Melendez-Diaz guilty.

After Melendez-Diaz's conviction was af-

firm by the Appeals Court of Massachusetts in 2007 and the Supreme Judicial Court denied review, he filed a writ of certiorari with the U.S. Supreme Court.

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The documents at issue here ... are quite plainly affidavits: "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths." ... They are incontrovertibly a

"solemn declaration or affirmation made for the purpose of establishing or proving some fact." ... The "certificates" are functionally identical to live, in-court testimony, doing "precisely what a witness does on direct examination."

... In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "be confronted with" the analysts at trial.

... This case involves little more than the application of our holding in *Crawford v. Washington*. The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error. We therefore reverse the judgment of the Appeals Court of Massachusetts...

For a copy of the *Melendez-Diaz* decision, send \$4 (stamps OK) to: Justice Denied, PO Box 68911; Seattle, WA 98168

In the summer of 1983 Paul Kamienski was a successful 35-year-old New Jersey entrepreneur living the high life, partying and recreationally using cocaine.

Paul Kamienski's Murder Convictions Based On Speculation Tossed

Around Labor Day, Kamienski was asked by his friends Henry ("Nick") and Barbara DeTournay, if he knew anyone interested in buying a large quantity of cocaine. The DeTournays were a middle-class couple – but they wanted to be financially set for life by making a one-time sale of cocaine they could buy wholesale in Florida.

Kamienski introduced the DeTournays to his cocaine suppliers, Anthony Alongi and Joseph Marsieno. Alongi and the DeTournays made a deal, and Kamienski agreed to be present during the exchange that was finally set for September 18, 1983.

On September 24 Nick's body was recovered from Barnegat Bay, about 50 miles north of Atlantic City. The next day Barbara's body was recovered near where Nick's body was found. Autopsies determined they both died from multiple gun shot wounds.

The murder investigation centered on Alongi, Marsieno and Kamienski – but it wasn't until four years later in October 1987 that the three were indicted by an Ocean County grand jury. The prosecution's theory was Alongi intended to steal the cocaine, Kamienski lured the DeTournays to the meeting, and Marsieno was the shooter.

The three men were jointly tried in 1988. Kamienski's defense was he arranged a straight-forward cocaine for money deal. There was no testimony that Kamienski knew Alongi and Marsieno intended to kill the DeTournays and steal their cocaine. The prosecutor conceded that during closing arguments when he stated:

"Paul Kamienski was there when [the DeTournays] were murdered. ...

Am I going to say does Paul Kamienski know that they're going to get killed? I don't think so. Not from the evidence and testimony that I've heard. ...

I'll say this, he never expected it to happen, he didn't expect them to be murdered. He said that to [his girlfriend] Donna as soon as they got outside. I couldn't control the situation, but it happened."

The jury convicted the three men of first-degree murder, felony murder, and conspiracy to possess cocaine with the intent to distribute. Kamienski's murder convictions were as an accomplice.

Kamienski filed a post-verdict motion for a judgment of acquittal, claiming the jury instruction on "accomplice liability" erroneously permitted the jury to convict him without the prosecution presenting evidence beyond a reasonable doubt he was an accomplice to the murders. The trial judge agreed. He granted Kamienski's motion and entered a judgment of acquittal for his murder convictions.

In 1992 New Jersey's Court of Appeal ruled the accomplice liability instruction was adequate and reinstated Kamienski's convictions. Kamienski was jailed during his appeal, and in April 1992 he was sentenced to 30-years to life in prison. The New Jersey Supreme Court declined review and Kamienski's state post-conviction appeal was denied after protracted proceedings.

In denying Kamienski's timely filed federal habeas corpus petition, the U.S. District Court judge ruled "There is evidence from which a reasonable jury could have found efforts by Kamienski to facilitate the robbery and murder." The judge's ruling permitted Kamienski to be convicted of first-degree and felony murder based on the evidence he arranged the drug deal, and his lack of advance knowledge, participation, or intent for the murders to occur was irrelevant.

Kamienski appealed to the federal Third Circuit Court of Appeals. In its unanimous opinion released on May 28, 2009, the appeals court emphasized the prosecution's admissions during closing arguments and in post-conviction briefs that Kamienski did not intend for the DeTournays to be robbed and killed. The appeals court wrote:

"Thus, to find Kamienski guilty as an accomplice to first-degree murder, the state must show that Kamienski shared the specific intent to kill the DeTournays."

Moreover, there is nothing other than rank speculation to suggest that he shared Marsieno's intent to rob and/or murder the DeTournays. ... Deference to a jury verdict...does not allow rank speculation to substitute for proof beyond a reasonable doubt.

We realize that "[i]nferences from established facts are accepted methods of proof when no direct evidence is available. It is [nevertheless] essential...that there be a logical and convincing connection be-



Paul Kamienski after his June 16, 2009 release

tween the facts established and the conclusion inferred.

However, based on our review of the evidence, the picture is simply not there and its existence can not be inferred absent the kind of guesswork that due process prohibits. Indeed, we can not accept the state's view of the evidence without choking all vitality from the requirement of proof beyond a reasonable doubt.

As we have noted, there was more than ample evidence of Kamienski's role in brokering a drug transaction. However, the [State's] Appellate Division conflated that proof into its inquiry into evidence of murder and felony murder. Doing so was not only error, it was unreasonable; it allowed Kamienski to be convicted on something less than proof of "every element of the offense" of conviction beyond a reasonable doubt.

[T]he record simply does not allow a reasonable juror to infer that Kamienski intended that the DeTournays be robbed or killed." *Kamienski v. Hendricks*, No. 06-4536 (3rd Cir., May 28, 2009)

Having found that Kamienski's murder convictions were based on the jury's speculation about his intent beyond simply arranging a drug deal, the appeals court ordered the district court to grant Kamienski's writ of habeas corpus.

Kamienski was released on \$1 million bail on June 16, 2009, pending the Ocean County prosecutors decision to either appeal the Court's ruling or dismiss the charges.

Hours after his release Kamienski told a *New York Times* reporter: "I'm still vibrating. It doesn't feel real." He also said, "Back then everyone was doing drugs — athletes, lawyers, doctors, stockbrokers, everyone. When you look at it now, it's almost as if we're in the 1940s looking back on the Prohibition. But it's a different time now, and I want to help educate people to avoid getting involved with the people I did."

On July 2, 2009 the Third Circuit Court of Appeals issued a one-word decision — "DENIED" — in response to the Ocean County prosecutor's motion for reconsideration and an *en banc* hearing.

Marsieno died in prison, and the 79-year-old Alongi remains behind bars.

Additional source:

After 22 Years in Prison, Man Convicted of Role in 2 Murders Is Freed, *The New York Times*, June 17, 2009.

Edward Radin wrote more than forty years ago in *The Innocents* (1964) that a judge told him confidentially that five percent of convictions in the United States were of an innocent person. Since then there have been a number of attempts to quantify the incidence of wrongful convictions based on techniques that include analyzing compilations of known wrongful convictions. These estimates have ranged from 1/2% to 15% of all convictions.¹

Estimates are relied on to have some understanding of how often wrongful convictions occur, because there is no official repository of the final disposition of all state and federal criminal cases in the U.S.

1983 Ohio survey

The results of a 1983 survey that expanded on Radin's idea of querying people directly involved in the criminal prosecution process about the incidence of wrongful convictions, was published in 1986 in the journal, *Crime and Delinquency* (Vol. 32, 518-544). That survey queried Ohio state prosecutors, judges, public defenders, sheriffs and police chiefs. Overall, 5.6% of the respondents believed there were zero wrongful convictions in Ohio, 77.4% believed they occurred in less than 1% of cases, and 22.6% believed that more than 1% of Ohio convictions were wrongful.

New Ohio survey

Twenty-one years later, in 2007, *Crime and Delinquency* (Vol. 53, 436-470) published the results of an expanded version of the 1986 Ohio survey. Professors Robert J. Ramsey and James Frank sent out over 1,500 questionnaires to sheriffs and police chiefs, chief and assistant prosecutors, private defense lawyers and public defenders, and common pleas and appellate judges in Ohio. They received 798 responses. Three of the questions were: (a) their perception of the percentage of wrongful felony convictions in their own jurisdiction; (b) their perception of the percentage of wrongful felony convictions in the United States; and (c) what they believed to be an "acceptable level" of wrongful convictions. Each question allowed a percentage response ranging from "0%" to "over 25%".

One of the survey's striking findings is the degree to which "not in my backyard" (NIMBY) is a very prevalent attitude. Other than defense lawyers, more than four out of five (83%) respondents reported that less than one out of a hundred (1%) convictions in Ohio are erroneous, while less than half (47%) of those same people believe that is true outside of Ohio. Likewise, other than defense lawyers, only about one in fourteen (7%) of the respon-

Ohio and Michigan Legal Professionals Acknowledge Wrongful Convictions Are Real

By Hans Sherrer

dents believe that more than 3% of convictions in Ohio are erroneous, while one in four (24%) of those same people believe that is true outside of Ohio. In contrast, 60% of defense lawyers think that more than 3% of Ohio convictions are erroneous, while 83% believe that is true outside Ohio. Overall, the survey respondents believe a wrongful conviction occurs in 4.5% of the cases outside of Ohio, and 2.7% of cases in Ohio.

In contrast with the wide difference of opinion about how often a wrongful conviction occurs, 63% of the respondents agreed that only a zero wrongful conviction rate is acceptable. The four Ohio groups believe on average that wrongful convictions occur nationally at a rate more than eleven times what they consider acceptable (4.5% v. 0.4%). (See the survey results in the tables at the end of the article.)

Michigan survey

To find out if the results of the Ohio survey would be replicated in Michigan, Professor Marvin Zalman (Professor of Criminal Justice at Wayne State University in Detroit) and two colleagues sent out questionnaires to the same four groups of professionals as the Ohio survey. They received 467 responses. The 55% response rate was similar to the Ohio survey's 53% response rate. Their findings were reported in March 2008 in the journal *Justice Quarterly* (Vol. 25:1, 72-100). The number of prosecutors who responded was less than for the Ohio survey because they were discouraged from participating by the state prosecutors association. However, the responses of the Michigan prosecutors that participated were similar to the responses by Ohio prosecutors.

The responses to the Ohio and Michigan surveys overall were comparable. For example, 99.3% of the Ohio respondents and 99.6% of the Michigan respondents believe that wrongful convictions occur in the United States. Although the NIMBY attitude is as alive and well in Michigan as it is in Ohio, its prevalence isn't the most notable finding of the studies. That is the degree to which each of the four professional groups in both studies acknowledged that the conviction of actually innocent persons does in fact occur in the United States. Overall, the professionals in the Michigan survey think a wrongful conviction occurs in 5.7% of cases nationally, and in 3.5% of Michigan cases.

Consistent with the Ohio results, more than half of the respondents (51%) believe that only a zero wrongful conviction rate is acceptable. Also consistent with the Ohio survey the four Michigan groups believe on average that wrongful convictions occur nationally at a rate more than eleven times what they think is acceptable (5.7% v. 0.5%). (See the survey results in the tables at the end of the article.)

Observations about the Ohio and Michigan wrongful conviction surveys

The following are observations about the results of the Ohio and Michigan surveys.

Wrongful convictions are recognized as a national problem

The Ohio and Michigan surveys are important because they cover a cross-section of the law enforcement system's four dominant groups in two populous states, and each of those groups recognize wrongful convictions occur nationally at rates they consider unacceptable. The surveys are also valuable by providing evidence that the prosecutors and judges who garner publicity by pooh-poohing the idea that wrongful convictions are a problem nationally are in the minority among their peers who believe otherwise. For example, 71% of the judges believe that at least 1% of convictions nationally are wrongful.

Judge's responses are "schizophrenic"

Although it isn't surprising that prosecutors and police think wrongful convictions occur with the least frequency, or that defense lawyers think they occur with the most frequency, the attitude of judges is unexpected. More than 8 out of 10 (84%) Michigan judges think wrongful convictions occur in more than 1% of cases outside of their jurisdiction, while almost half (47%) think they occur in more than 3% of cases, and more than one in eight (13%) think they occur in *more than 10% of cases*. Almost half (46%) of the Michigan judges think that a wrongful conviction occurs in more than 1% of cases within Michigan. A lesser, but still significant percentage of judges in Ohio think wrongful convictions are a problem. Yet, in both Ohio and Michigan about three out of four judges think the acceptable rate of wrongful convictions is 1/2% or less, and roughly nine out of ten judges think a rate of 1% or less is acceptable.

So there is a degree of disconnect between what many judges believe about the actual occurrence of wrongful convictions and what they profess is an acceptable rate of wrongful convictions. The articles about the

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two studies don't explore this anomaly – even though there is something schizophrenic about the attitude of the judges.

The judge is the single most important variable determining the fairness and likely outcome of a prosecution. The judge makes the pretrial rulings on what physical items and testimony will be admissible as evidence, the judge dictates the scope of witness examination by denying or sustaining objections, the judge decides the jury instructions, and the judge's tone of voice, mannerisms and courtroom rulings convey his or her attitude about the defendant's guilt or innocence – which can be expected to influence the judgment of jurors. Consequently a trial judge who wants to decrease the incidence of wrongful convictions can immediately contribute to their reduction by their rulings and behavior that will help ensure respect for a defendant's presumption of innocence. Appellate judges that want to decrease the incidence of wrongful convictions can immediately do so by not skewing their rulings to disfavor the defendant's position.

Since trial and appellate judges have it in their power to affect a reduction in the wrongful convictions they acknowledge are occurring at an unacceptable rate, the question is – why don't they? A prime reason can be the paralyzing effect of the "law and order" mentality that dominates public discourse about property and violent crimes. This mentality, sometimes referred to as "crime control," has been reflected in recent decades by expanding the number of crimes, harsher penalties imposed by both state and federal courts, the elimination or stingy granting of parole, and the creation of new laws and post-release reporting requirements for person's convicted of particular crimes – such as "sex" related offenses.

The law and order mentality also affects the election and nomination of judges. It is nothing short of the kiss of death for a judicial candidate or nominee to be painted as "soft on crime." That is a code phrase the prospective judge (or a state judge seeking reelection) does not believe "the book" should be thrown at a convicted criminal. It is particularly damaging for a judicial candidate or nominee to be saddled with the label of being a coddler of criminals by suggesting a sentence should be crafted to fit the individual and the circumstances of the crime, since that view can be considered as lenient on criminals.

Why isn't there more support for reform?

The results of the studies raises the question: Why isn't there widespread support by law enforcement professionals for meaningful

structural reforms that can be expected to reduce the incidence of wrongful convictions? Over-all about two-thirds of the respondents of both studies (72% MI and 65% OH) think that more than 1% of convictions in the U.S. are false, and about one-fourth think that more than 5% are false (29% MI and 23% OH). A 1% error rate is significant – and 90% of the respondents expressed the opinion that a 1% wrongful conviction rate is unacceptable. Yet, other than defense lawyers, there is no visible support among the respondents to enact meaningful reforms to reduce the incidence of false convictions that a large majority acknowledge are occurring nationally at a rate they consider unacceptable.

One reason for that could be that reforms would be at the state level and neither police nor prosecutors – both powerful political lobbies – in either Michigan or Ohio think that wrongful convictions are a problem in their respective state. Together they believe that 1/2 of 1% of convictions in their jurisdiction are wrongful – while they consider the acceptable rate of wrongful convictions is also 1/2 of 1%. Since overall they believe the rate of wrongful convictions in their "backyard" is the same as what they consider to be acceptable – there is an absence of support for reforms that could be expected to meaningfully reduce their incidence. From their perspective there is no need for reforms because the system in their state effectively weeds out the innocent from the guilty.

Judges in the two states believe wrongful convictions occur in their respective jurisdictions at a rate four times what they consider acceptable (1.9% v. 0.5%). The fear of being labeled "soft on crime" could be a reason why more judges don't support structural reforms that could be expected to reduce the wrongful convictions that they acknowledge are occurring at a significant rate. In contrast defense attorneys, who are politically weaker than the other three groups, support reforms to reduce wrongful convictions that they believe are occurring at pandemic levels in their state and nationally.

Is concern with wrongful convictions less than 25 years ago?

The surveys found that slightly more than four out of five of the Ohio and Michigan respondents believe wrongful convictions occur in their home state. That means that almost one out of five don't think they occur in their respective state. Considering there have been highly publicized exonerations in both states, it almost seems a denial of reality for anyone in this day and age to doubt that wrongful convictions occur.

The 1983 Ohio survey was conducted before DNA testing had been invented, so the attitude of the participating professionals was based on their awareness of wrongful convictions that had been detected in ways available at the time. Those included witness recantation, new evidence corroborating an alibi, new exclusionary forensic evidence such as blood typing or fingerprints, etc. Yet in 1983, 94% of the respondents believed that wrongful convictions occurred in Ohio. Thus almost four times as many legal professionals in Ohio believed in the 1983 survey that wrongful convictions occur in their state than believed it two decades later – even though at the time of the survey there had been publicity about more than 100 exonerations across the country attributable to DNA evidence.

That there was such a high awareness of wrongful convictions in Ohio in 1983 is not surprising. The first DNA exoneration in the U.S. wasn't until six years later in 1989, and even today the majority of exonerations in the U.S. and virtually all those in other countries are based on non-DNA evidence. In 2008, 20 of the known exonerations in the U.S. were attributable to DNA, while 76 were based on non-DNA evidence.²

So while DNA evidence is important in individual cases, publicity in the U.S. focused on DNA exonerations is disproportionate to its over-all impact as evidence to aid a convicted person seeking to establish that he or she did not commit a crime.

England, Scotland and Norway each established a Criminal Case Review Commission (CCRC) between 1997 and 2004, because of an awareness the level of uncorrected wrongful convictions was intolerable. That awareness existed even though there was only one DNA exoneration in England and none in Scotland or Norway.

Although DNA testing is an effective option in a very limited number of cases, it is nevertheless trumpeted in the U.S. as a safety net to correct wrongful convictions. Consequently, the Ohio and Michigan surveys suggest it is possible the focus on DNA exonerations in the U.S. during the last 15 years or so has distorted the discussion about wrongful convictions in this country to the point that it may be considered to be less of a problem than it was in the 1980s.

Ohio and Michigan Surveys Provide Data For New Wrongful Conviction Estimates

The articles describing the Michigan and Ohio surveys of law enforcement professionals break-down the percentage estimates

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of how often they believe wrongful convictions occur within their state jurisdiction, and in the United States as a whole. Although the survey's authors make no effort to do so, an estimate of the wrongful conviction rate can be adduced from their findings.

The surveys show that a large percentage of the professionals perceive false convictions to be both real and occurring in significant numbers nationally. The Michigan and Ohio respondents believe on average that 5% of convictions in the U.S. are false. Based on that estimate the 1,145,000 state and federal felony convictions in 2004³ resulted in 57,250 wrongful felony convictions in that one year. That is more than 1,100 per week and more than 220 per court day.

There were 1,540,805 prisoners in state and federal prisons in June 2008. A 5% wrongful conviction rate nationally means that 77,040 of those prisoners are innocent.

The 5% average of the legal professionals queried in the two surveys is in the mid-range of wrongful conviction estimates, and it is identical to the 5% estimate by the judge interviewed for Edward Radin's 1964 book, *The Innocents*.⁴ There has long been an acute awareness of wrongful convictions in this country. Although the actual number of wrongly convicted people is unknown, the Ohio and Michigan surveys document that it is perceived to be unacceptably high by the professionals involved in the arrest, prosecution, defense and adjudication of people accused of committing a crime.

Sources:

Huff, R. C., Rattner, A., & Sagarin, E. (1986). Guilty until proved innocent. *Crime & Delinquency*, 32, 518-544.
 Ramsey, Robert J., & Frank, J. (2007). Wrongful conviction: Perspectives of criminal justice professionals regarding the frequency of wrongful conviction and the extent of system errors. *Crime & Delinquency*, 53, 436-470.
 Zalman, Marvin, Smith, Brad and Kiger, Angie (2008). Officials' Estimates of the Incidence of "Actual Innocence" Convictions. *Justice Quarterly*, 25:1, 72-100.

Endnotes:

1. This author is intimately aware with the difficulty of getting a handle on the number of wrongful convictions. In 1996 I estimated, based on data available at the time, that almost 15% of convictions in the United States were of an innocent person - which means slightly more than one out of seven convictions are wrongful. Although that is on the high end of estimates, nothing I have been exposed to during the intervening 13 years compels me to think it is erroneous. In fact, 11.4% of

U.S. Supreme Court Orders Evidentiary Hearing For Troy Davis

Troy Anthony Davis was convicted in 1991 of murdering a Savannah, Georgia policeman and sentenced to death. From the time of his arrest, Davis has proclaimed he is the innocent victim of mistaken identification.

Davis has amassed significant new evidence supporting his innocence, including that seven of nine prosecution eyewitnesses have recanted, and three witnesses have identified the prosecution's primary witness as the shooter

On August 17, 2009 the U.S. Supreme Court took the extraordinary action of granting Davis' original writ of habeas corpus (i.e., it was filed directly with the USSC). The Su-

preme Court ordered that the U.S. District Court conduct a hearing to, "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."

Justice Steven's wrote in the Court's majority opinion: "no court, state or federal, has ever conducted a hearing to assess the reliability of the score of [postconviction] affidavits that, if reliable, would satisfy the threshold showing for a truly persuasive demonstration of actual innocence. The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing."

For a copy of the USSC's 8-17-2009 ruling in Troy Davis' case, send \$2 or 5 first-class (44¢) stamps to: Justice Denied; PO Box 68911; Seattle, WA 98168

Table 1 - Estimates of wrongful convictions in U.S. (Several "rate of occurrence" categories are combined in these tables.)

Rate of occurrence	Defense Attorneys		Judges		Police		Prosecutors		All Groups		Total
	MI	OH	MI	OH	MI	OH	MI	OH	MI	OH	MI & OH
0	0	0.5	0	0	0.6	1.1	4.5	1.0	0.4	0.7	0.6
<1%	4.8	7.9	16.0	37.3	50.0	44.9	59.1	61.5	27.7	34.5	32.0
1 to 5%	31.7	40.3	56.6	46.4	45.4	43.8	22.7	34.4	42.5	42.0	42.2
6 to 25%	54.5	43.5	26.5	15.6	3.5	9.6	13.6	3.1	25.9	20.2	22.4
>25%	9.0	7.9	.7	.6	0	0	0	0	3.4	2.5	2.8
Average	11.1%	9.0%	4.9%	3.3%	2.1%	2.7%	1.8%	1.6%	5.7%	4.5%	5.0%

Table 2 - Estimates of wrongful convictions in respondent's jurisdiction

Rate of occurrence	Defense Attorneys		Judges		Police		Prosecutors		All Groups		Total
	MI	OH	MI	OH	MI	OH	MI	OH	MI	OH	MI & OH
0	0	1.8	5.3	15.5	41.0	33.2	47.8	29.0	19.7	19.5	19.6
<1%	7.0	11.5	48.7	52.4	51.7	56.9	47.8	62.0	36.7	43.2	40.8
1 to 5%	41.3	45.1	36.2	25.0	6.8	9.5	4.3	7.0	24.7	23.1	23.7
6 to 25%	45.5	39.0	8.9	7.2	0.6	0.4	0	2.0	16.7	13.4	14.6
>25%	6.3	2.7	0.9	0	0	0	0	0	2.2	0.8	1.3
Average	8.9%	7.2%	2.3%	1.6%	0.4%	0.5%	0.2%	0.6%	3.5%	2.7%	3.0%

Table 3 - Acceptable level of wrongful convictions

Rate of occurrence	Defense Attorneys		Judges		Police		Prosecutors		All Groups		Total
	MI	OH	MI	OH	MI	OH	MI	OH	MI	OH	MI & OH
0	49.1	66.2	51.1	53.4	54.6	64.6	48.5	81.8	51.4	63.1	55.8
<1%	37.9	24.1	40.2	32.8	35.4	29.2	42.4	9.0	38.1	27.5	34.2
1 to 5%	11.3	8.3	8.6	12.1	7.4	5.6	9.1	9.1	9.0	8.2	8.7
6 to 25%	1.7	1.4	0	1.7	2.6	0.6	0	0	1.4	1.1	1.3
>25%	0	0	0	0	0	0	0	0	0	0	0
Average	0.6%	0.4%	0.4%	0.6%	0.6%	0.3%	0.4%	0.2%	0.5%	0.4%	0.5%

Estimated wrongful convictions based on Ohio and Michigan surveys

	U.S. Wrongful conviction rate	Felony convictions in U.S.	Wrongful felony convictions in U.S.	State prisoners (sentenced)	In-state wrongly convicted prisoners
Nationwide	5%	1,145,000 (2004)	57,250 (2004)		
Michigan	5%			46,638 (Sept 09)	2,332
Ohio	5%			50,889 (April 09)	2,545

the MI & OH survey respondents think the wrongful conviction rate is more than 15%.

2 The Innocents Database at, www.forejustice.org/search_idb.htm
 3 Criminal Sentencing Statistics 2004, Bureau of Justice Statistics, <http://www.ojp.usdoj.gov/bjs/sent.htm> (last visited 5-12-09) This is the most current sentencing

data available as of June 2009.

4 Radin also wrote in referring to the ability of the legal system in 1964 to determine the innocent from the guilty, "... lawyers who have specialized in freeing illegally convicted prisoners reduce it to eighty per cent." (9) That is, 20% of convicted persons are innocent.

15% of Prisoners Claim Innocence

During a discussion about an imprisoned person's claim of innocence it isn't unusual for someone to say something along the lines of, "all prisoners claim to be innocent," or "all prisoners are innocent, just ask them."

Statements like those have at least two effects: They dilute the value of a prisoner's claim of innocence as just one of innumerable claims that are likely false; and, they suggest that claims of innocence are a ruse by opportunistic guilty prisoners to try and escape responsibility for their crime(s).

A little known survey by the RAND Corporation supports that contrary to popular belief, a large majority of prisoners admit guilt – while about 15% claim innocence of their convicted crime. The RAND Inmate Survey was designed "to collect data on criminal careers and to develop policy implications from the data."¹ Convicted male prisoners in 12 prisons and 14 jails in California, Michigan and Texas participated in the survey. The 2,190 prisoners that were surveyed volunteered and provided their informed consent. RAND employees administered the surveys, and jail and prison officials were not involved. Regional differences could be detected since the surveys were conducted in three distinct areas of the country.

One of the most important considerations to researchers analyzing the completed surveys was to determine the truthfulness of the prisoner's responses. One way that was done was by comparing the questionnaire data with each prisoner's record. They found a very high degree of correspondence between the two – to the point that overall the prisoners reported more arrests and convictions than was reflected in their official records. The researchers found that, "In general, the prisoner respondents do not appear to be systematically denying their conviction offenses in the questionnaire."² The researchers concluded regarding the truthfulness of the prisoners, "on a general level, the data is close to unbiased."³

Convicted Offense	Did Not Commit
Rape	37.7%
Sex Offense (not rape)	26.9%
Murder	17.5%
Weapons	13.4%
Assault	12.8%
Robbery	11.5%
Forgery	9.9%
Burglary	9.0%
Drug Sale	8.1%
Drug Possession	5.2%
All Offenses	15.4%

Source: National Archive of Criminal Justice Data (2000)

Two survey questions provided an insight into the number of prisoners who claim innocence. The first question was: "What charge(s) were you convicted of that you are serving time for now? (Check all that apply)." The follow-up question was: "For these convictions, what crime, if any, do you think you really did? (Check all that apply)." The last of 16 choices for that question was: "Did no crime."⁴

The prisoner responses to those two questions were analyzed by sociology Professor Tony G. Poveda. He reported his findings in the article "Estimating Wrongful Convictions" (*Justice Quarterly*, September 2001).

Professor Poveda found that "15.4% claimed that they did not commit the crime for which they had been convicted and imprisoned. ... This finding did not vary widely by state: 14.1 percent of Michigan prisoners denied having committed any crime as did 14.6 percent in California and 16.7 percent in Texas."⁵

Professor Poveda also found there is a wide variance in claims of innocence depending on a prisoner's convicted offense. His findings are listed in Table 1. A noticeable finding is that claims of innocence by prisoners convicted of either selling or possessing drugs are lower than all other crimes. Almost 7% reported they did not commit their convicted drug crime. On the other end of the scale, prisoners convicted of either rape or another sex offense claim innocence at a higher rate than any other crime. Nearly one out of three (32.8%) of them reported they did not commit their convicted sex related crime. That high percentage is consistent with a study that found 41% of forcible rapes reported to the police in a U.S. city during a nine year period did not occur – the complaining women made up the non-existent sex crimes.⁶

Although some people may consider the survey's results to be unrealistically high, Professor Poveda weighted his findings toward fewer claims of innocence by only counting the "Did no crime" responses. He didn't count the responses of prisoners who claimed they had been convicted of the wrong crime. For example, 32.1% of the prisoners convicted of murder claimed they did not commit murder – but Poveda only counted the 17.5% who said they had committed no crime at all. The 14.6% who asserted they had committed another lesser crime, such as manslaughter and not murder, were not counted by Poveda.

Endnotes:
 1 Tony Poveda, "Estimating wrongful convictions," *Justice Quarterly*, Vol. 18, No. 3, 689, 699, Sep 2001. (The survey was conducted from late 1978 to early 1979.)
 2 *Id.* at 701.
 3 *Id.* at 701.
 4 *Id.* at 699.
 5 *Id.* at 701.
 6 Eugene J. Kanin, "False Rape Allegations," *Archives of Sexual Behavior*, Vol. 23, No. 1, 81, 1994.

Timothy Cole Exonerated Posthumously Of Rape

Timothy Cole was convicted in 1985 of rape in Lubbock, Texas based on his identification by the 20-year-old victim. He was sentenced to 25 years in prison. Insisting on his innocence, he turned down a pretrial plea bargain that would have resulted in a probationary sentence. In 1999 Cole died in prison of complications from asthma.

Jerry Wayne Johnson was imprisoned for several Lubbock rapes when in 1995 he confessed to several people he committed the rape Cole had been convicted of. Johnson tried for six years to get someone in the Lubbock District Court to pay attention to his confession. In 2001 a judge dismissed Johnson's confession as incredible.

Unaware Cole had died, Johnson wrote Cole's mother in May 2007 that he was the rapist and wanted to help clear her son. The Innocence Project of Texas became involved, and in May 2008 DNA tests excluded Cole, but Johnson's DNA was consistent with biological evidence from the crime.

The IPT filed a motion to vacate Cole's conviction based on the new DNA evidence and Johnson confession. Cole's conviction was posthumously vacated in February 2009. Lubbock County Judge Charlie Baird dismissed the indictment on April 7, 2009, stating, "The evidence is crystal clear that Timothy Cole died in prison an innocent man, and I find to a 100 percent moral, legal, and factual certainty that he did not commit the crime of which he was convicted."

Source: Judge exonerates Timothy Cole, *Avalanche-Journal* (Lubbock, TX), April 7, 2009.


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Compensation Awarded In The U.S. To The Wrongly Convicted In 2008

Name	Compensation	Paid By	State	Convicted	Released	Exonerated	Years	Avg. Yearly	Compensated	Exonerated By	Crime	Sentence
Gene Bibbins	\$ 1,000,000	City of Baton Rouge	LA	1986	2002	2002	16	\$ 62,500	2008	DNA	Robbery & Rape	Life in prison
Jimmy Ray Brumgard	\$ 3,500,000	State of Montana	MT	1987	2002	2002	15.5	\$ 25,806	2008	DNA	Rape	40 yrs
Roy A. Brown	\$ 2,600,000	State of New York	NY	1992	2007	2007	15.5	\$ 167,742	2008	DNA	Murder	25 yrs to life
Alan Crozier	\$ 1,250,000	State of Florida	FL	1982	2006	2006	24.5	\$ 51,020	2008	DNA	Sexual Assault	130 yrs
Dwayne Dail ¹	\$ 750,000	State of N. Carolina	NC	1989	2007	2007	18	\$ 41,667	2008	DNA	Rape	Life
Louis Greco	\$ 500,000	State of Massachusetts	MA	1968	DP-1995	2004	28	\$ 17,857	2008	Frame-up exposed	Murder	Death - then Life
Anthony Harris	\$ 2,200,000	Tuscarawas County	OH	1999	2000	2000	2	\$ 1,100,000	2008	False confession	Murder	Release at 21
Madison Hobley	\$ 1,000,000	City of Chicago	IL	1990	2003	2003	13	\$ 76,923	2008	Brady violation	Murder	Death
Darryl Hunt	\$ 391,455	State of N. Carolina	NC	1985	2004	2004	18.5	\$ 21,748	2008	DNA	Murder	Life
Rickey Johnson	\$ 150,000	State of Louisiana	LA	1982	2006	2006	25.5	\$ 5,882	2008	DNA	Rape	Life
Dennis Maher	\$ 165,000	City of Lowell	MA	1984	2003	2003	19.5	\$ 8,462	2008	DNA	Rape	Life
Larry Mayes	\$ 4,500,000	City of Hammond	IN	1982	2001	2001	21	\$ 214,286	2008	DNA	Rape & Robbery	80 yrs
Kenneth Moore	\$ 600,000	State of Ohio	OH	1995	2004	2004	9	\$ 66,667	2008	Retrial acquittal	Murder	15 yrs to life
James Ochoa	\$ 550,000	City of Buena Park	CA	2005	2006	2006	1.4	\$ 392,857	2008	DNA	Robbery	2 yrs
Anthony Powell	\$ 3,400,000	City of Boston	MA	1992	2004	2004	12.5	\$ 272,000	2008	DNA	Rape	12-20 yrs
Anthony Powell	\$ 500,000	State of Massachusetts	MA	1992	2004	2004	12.5	\$ 40,000	2008	DNA	Rape	12-20 yrs
Steve Snipes	\$ 150,000	State of N. Carolina	NC	1998	2003	2003	5	\$ 30,000	2008	New eyewitness	Armed robbery	
Samuel Snow	\$ 27,580	U.S. Army	WA	1944	1945	2007	4	\$ 68,950	2008	Concealed evidence	Rioting	1 year
Shih-Wei Su	\$ 3,500,000	City of New York	NY	1992	2003	2003	12	\$ 291,667	2008	Brady violation	Attempted murder	16-50 yrs
Jerry F. Townsend	\$ 2,200,000	City of Miami	FL	1980	2001	2001	21	\$ 104,762	2008	DNA	Rape & Murder	Death
Leo Waters	\$ 390,000	State of N. Carolina	NC	1982	2003	2003	21	\$ 18,571	2008	DNA	Rape	Life
Nicholas Yarris	\$ Millions	Delaware County	PA	1983	2003	2003	21	???	2008	DNA	Rape & Murder	Death
Daniel Young	\$ 700,000	City of Chicago	IL	1994	2005	2005	12.5	\$ 56,000	2008	DNA	Rape & Murder	Life
Daniel Young	\$ 130,000	State of Illinois	IL	1994	2005	2005	12.5	\$ 10,400	2008	DNA	Rape & Murder	Life
Totals (U.S.)	\$30,154,035						312²	\$96,710				

1 Dail was awarded \$368,493 in Feb. 2008. In July 2008 NC increased the max. award under state law to \$750,000, so in Nov. 2008 Dail was awarded an additional \$381,507. Hunt, Waters and Snipes were also awarded additional money.
2 Does not include Nicholas Yarris' 21 years of imprisonment. Yarris' compensation wasn't publicly disclosed, but it is believed to be more than \$1 million.

International Compensation 2008

In 2008 at least \$13,370,090 was awarded to wrongly convicted people in countries other than the United States. The follow are there name, country, offense, years imprisoned and amount awarded:

- Angela Cannings, England, murder, 2 yrs, amount unknown.
 - Liu Cuizhen, China, murder, 2 yrs, \$9,200.
 - James Driskell, Canada, murder, 13 yrs, \$3,827,000.
 - Henry Landini, Australia, drugs, 5 yrs, \$162,327.
 - Vasilii Kononov, Latvia, war crimes, 1 yr, \$47,010.
 - Peter Mickelberg, Australia, theft, 6 yrs, \$441,000.
 - Raymond Mickelberg, Australia, theft, 8 yrs, \$441,000.
 - Fritz Moen, Norway, rape & murder, 18-1/2 yrs, \$1,800,000.
 - Steven Truscott, Canada, murder, 10 yrs, \$6,387,000.
 - Jonathan Zealand, South Africa, murder, 6 yrs, \$255,553.
- (All amounts adjusted to US dollars on the day of the award.)

The average award was \$192,375 per year of imprisonment. That is almost double the average of \$96,710 per year awarded in the U.S. in 2008.

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See the article on page 16.

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