Editors Note:
This is Part III of a serialization of an article published in the Fall of 2003 by the Northern Kentucky Law Review. It is the first extended critique published in this country of the critical role played by judges in causing wrongful conviction at the trial level, and then sustaining them on appeal. The extensive footnotes are omitted from this reprint, but ordering information of the complete article from the NKLR for $10 is at the end of the article.

The Complicity of Judges In The Generation of Wrongful Convictions

by Hans Sherrer

PART III of a 5 part serialization

III.
THE VIOLENCE OF JUDGES

An extreme danger inherent in the political nature of federal and state judges is the awesome violence available at their beck and call. In his essay, *Violence and the Word*, Yale Law Professor Robert Cover explained that *every* word a judge utters takes place on a field of pain, violence, and even death. Judges are, in fact, among the most violent of all federal and state government employees. The violence judges routinely engage in makes the carnage of serial killers seem insignificant in comparison. Attorney Gerry Spence echoed Professor Cover's observation when he wrote, "Courtrooms are frightening places. Nothing grows in a courtroom – no pretty pansies, no little children laughing and playing. A courtroom is a deadly place. People die in courtrooms, killed by words."

The very position of being a judge is literally defined by their ability to engender violence by the utterance of words from their lofty perch. Furthermore, the more violence a judge can command, or the more people they can elicit obedience from in carrying out their orders, the more respected judges are considered to be. State Supreme Court justices can direct more people to carry out the violence implicit in their directives than a county judge can, and they are consequently accorded more deference and respect. Similarly, U.S. Supreme Court justices can direct and countenance the commission of more violence than a federal circuit court judge, a federal district court judge, or any state judge, and they also have a more exalted public persona.

The violence under the control of judges takes many forms. In one of its more innocuous expressions, a state judge can direct a person convicted of driving while intoxicated to spend a certain number of weekends in jail and pay a fine. The police or sheriffs under the direction of the judge will physically seize and drag the defendant to jail if he or she declines to comply with either judicial command. In much the same way, a federal judge can issue a command that federal law enforcement officers will physically force compliance with, if it isn't voluntarily complied with. As Gerry Spence noted in *From Freedom To Slavery*, "One judge has more power than all the people put together, for no matter how the people weep and wail, no matter how desperate, how deprecated and deprived, a single judge wielding only the law, can stand them off. Judges are keenly aware of their power, and power . . . longs to be exercised."

Yet, in spite of the regularity with which the violence of judges is exercised, their "iron fist in the velvet glove" is effectively hidden by the shield of having *others* actually commit the violence embodied in their oral and written words. Judge Patricia Wald recognized this phenomena in *Violence under the Law*, in which she noted how the relationship between judges and the violence they are a part of is obscured by paperwork and procedures: "Often by the time the most controversial and violence-fraught disputes reach the courts, they have been sanitized into doctrinal debates, dry legal arguments, discussions of precedents and constitutional or statutory texts, arcane questions of whether the right procedural route has been followed so that we can get to the merits at all." Hence, the violence inflicted on a defendant by a judge is masked as just another detail amidst the legalese that dominates every aspect of a criminal case.

The public veneer of civility concealing the inner workings of the judicial process serves vital deceptive purposes. Two of the most important of those are: (1) hiding the political nature of all judicial decisions, and (2) masking the inherent violence seething underneath the pomp and ceremony of judicial proceedings and a judge's officious pronouncements. Diversion of the public's attention away from the violence carried out under the direction of a judge also provides a self-serving illusion of dignity for the judge's themselves, by presenting a facade of scholarliness that conceals the violent dirty work they are intimately involved in.

The finely honed skill of a judge in the art of creating false images that is evident by their concealment of the violence permeating everything they do, is further displayed by their manner of recording the controversies they are involved in. That was implied by Judge Wald in *Violence Under the Law*, "A historian would do poorly to gauge the flavor of our society by reading its legal tomes." The sanitized version of the passionate life and death struggles presided over by judges and the violence they trigger with a flick of their pen or a stroke of their gavel is not accurately represented in the bureaucratic paperwork they produce. This is by design. U.S. Supreme Court Justice Hugo Black, for example, told his fellow Justice Harry Blackmun to "never show the agony" he felt about a case in his written decisions. That attitude exemplifies one way judges are complicit in concealing from the public's view or conscious awareness, the awful life-destroying violence inflicted on people by their written and oral words.

The aura of officialdom surrounding judicial proceedings is a primary reason why the attention of the general public has successfully been diverted for so long from the true nature of the horrific violence occurring every minute of every day in state and federal courthouses nationwide. There is no greater expression of that violence than when it is committed against a person that has his/her life utterly destroyed by being wrongly branded as a criminal and then is treated as such while imprisoned as well as after his/her release. The magnitude of that violence is hinted at by the human toll manufactured by an average of *at least one innocent man or woman being sentenced to prison every minute that courts are in regular session in the United States.* That amounts to well over 100,000 innocent people sentenced to prison every year for something they did not do. The blood of that nearly incomprehensible wave of violence is on the hands of every judge that presides over the proceedings that falsely condemn any one of those innocent people, and it further stains the hands of every judge reviewing those proceedings who does not do everything in his or her power to rectify the wrong.

IV.
The Judicial Irrelevance of Innocence

Americans are taught to think that the awesome, latent physical violence at the beck-and-call of judges is restrained by strict controls that prevent their abusive use of it. This is particularly important for people to believe because one of the most heinous and tragic ways a judge's power can be used is to contribute to the prosecution, conviction, imprisonment, and possible execution of an innocent person.

However, the over 1.3 million men and women enmeshed at any given time in the law enforcement system that are not guilty provides ample proof that the internal checks restraining the exercise of judicially instigated violence against the innocent are inadequate. This is not an accidental or happenstantial occurrence. On the contrary, it is a predictable consequence of the manner in which judges preside over the law enforcement process. In *Dead Wrong*, lawyer and law professor Michael Mello pointed out to lay readers what is well known in legal circles: "In federal court, innocence is irrelevant. The Supreme Court says so, and the lower [courts] listen – as they're required to do." Not only do lower federal courts listen to Supreme Court decisions such as *Herrera v. Collins*, in which the Court downplayed the relevance of a defendant's innocence, but state courts do as well. In a subsequent book, *The Wrong Man*, Professor Mello documented how federal and Florida state courts ignored the relevance of death row prisoner Joe Spaziano's innocence for over 20 years.

Of course, the ultimate injustice that can be committed by a judge is to countenance the execution of an innocent person.

Make no mistake about it, even though their role is protected from the glare of the spotlight, as surely as if they were doing it in person, the velvet-gloved fist of the trial and appellate judges involved is on the switch, lever, trigger, or syringe plunger used to snuff out the life of someone that is innocent. Considering the large number of judges involved in any given case, it is reasonable to think that cumulatively more than a thousand state and federal judges may have been involved in the dozens of known executions of innocent people in this century alone.

A person's innocence is discounted by judges for the simple reason that it is not a constitutional issue. The Constitution has been judicially interpreted to provide the innocent no more procedural protection than the guilty. This is consistent with the Supreme Court's holding in *Herrera v. Collins* that "a claim of 'actual innocence' is not itself a constitutional claim." The Constitution only guarantees that procedural formalities are to be followed, it does not guarantee that the outcome of those procedures will be correct or fair. As the Supreme Court has made crystal clear in *Herrera* and its progeny, neither does the Constitution assure that a defendant's innocence will be considered any more relevant to the outcome than his/her sex, age or the city of birth.

The shock to a person who first learns of the irrelevance of his/her innocence *after* being wrongly convicted *and* then losing on appeal(s) is compounded when he/she files a federal habeas corpus petition. Although it may be common for people to think that a federal judge will intervene to protect an apparently innocent person when no one else will – such a thought is far more of a romantic fantasy than a belief grounded in reality. That fantasy is fed by movies such as *The Hurricane*, in which Federal District Court Judge Lee Sarokin is shown granting Rubin "Hurricane" Carter's habeas corpus petition in 1985 after he had been imprisoned for almost 20 years for a triple murder he did not commit. What is not revealed is that Judge Sarokin may have been the only federal judge in the country that would have granted that writ under the circumstances of Carter's case, and to this day he is castigated for having done so. So it is only by sheer luck that "Hurricane" Carter and his co-defendant John Artis are free men today instead of still caged in a New Jersey prison. But people see and believe the Hollywood myth instead of the reality facing innocent people squarely in the face.

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Professors James S. Liebman and Randy Hertz, authors of the authoritative *Federal Habeas Corpus Practice and Procedure*, explain the legal predicament that hamstrings factually innocent people such as "Hurricane" Carter: "Habeas corpus is not a means of curing factually erroneous convictions." Yet, a habeas corpus petition is the only way a state prisoner can challenge his or her conviction in federal court and it is one of only two ways a federal prisoner can challenge his or her conviction. In the absence of a defendant's demonstrable claim of being denied a recognized constitutional protection, the mere allegation of innocence is, quite literally, irrelevant to judges in this country.

Part IV will be in the next issue of *Justice:Denied*. **To order** the complete 27,000 word article, send $10 (check or m/o) with a request for - **Vol. 30, No. 4, Symposium Issue** to: Northern Kentucky Law Review; Salmon P. Chase College of Law; Nunn Hall - Room 402; Highland Heights, KY 41099.

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mize his profits? How about the lawyer who represents the guy you never even met, the state's star witness against you? Do you feel satisfaction that he's gotten his client a sweetheart deal in exchange for testifying against you?

Start with yourself. If you don't want to be the client in these scenarios, don't be the lawyer in them. Don't turn a blind eye to the bad lawyering going on around you, either. Challenge yourself and your colleagues to be what you claim to be, advocates for the innocent. Take the advice offered nearly 2,500 years ago by the Greek philosopher, Socrates: "The greatest way to live with honor in this world is to be who we pretend to be."

Endnotes:

1. This reprint excludes the more than 100 footnotes in the article's published version that originally appeared in the Northern Kentucky Law Reviw, Vol. 30, No. 4, Symposium Issue. That volume also includes *The Complicity of Judges in the Generation of Wrongful Convictions*, that is serialized in this issue of *JusticeDenied* on page 25. Both of these articles can be obtained by sending $10 (check or m/o) with a request for - **Vol. 30, No. 4, Symposium Issue** to: Northern Kentucky Law Review; Salmon P. Chase College of Law; Nunn Hall - Room 402; Highland Heights, KY 41099.

2. Sheila Martin Berry is director of Truth in Justice, an educational non-profit organization whose website is at: http://truthinjustice.org.

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gets an average of 11 minutes of a defense lawyer's time.

- The salary for a public defender in Massachusetts starts at $35,000 annually while court-appointed defenders are paid as little as $30 per hour to represent an indigent client - the third lowest rate in the nation.
- In Lake County, California, just north of San Francisco, a flat-fee system is used for indigent defense. Lawyers in private practice are paid a flat fee to represent a client. There is no economic incentive for vigorous representation of the accused but rather a tendency to negotiate a guilty plea bargain and send the client to his fate.

Despite the Constitution's Sixth Amendment mandate for assistance of counsel, the nation's indigent defense system is failing. "The incompetent representation of the criminally accused - particularly indigents - is truly a scandal," said Monroe Freedman, a legal ethics scholar at Hofstra University School of Law at Hempstead, New York.

The problem has become so great that, late in June 2004, the National Committee on the Right to Counsel launched a nationwide review of indigent defense services. The Committee includes law enforcement officials, prosecutors, defense attorneys, and former judges. The Committee was formed by the Constitution Project and the National Legal Aid and Defender Association of Washington, D.C. The Committee has undertaken a comprehensive 18-month study of indigent defense systems and the people they are meant to serve. Seven jurisdictions from around the U.S. will be selected for on-site reviews.

A Committee spokesman explained it this way: Even though state and local governments are responsible for ensuring adequate counsel for defendants who cannot afford to hire their own lawyers, many people are nonetheless still convicted and imprisoned each year without any legal representation or with an inadequate one.

"The balance is tipped too heavily in favor of the government when it comes to prosecution of persons without means who can't afford private counsel," said Timothy T. Lewis who served a decade on the U.S. Court of Appeals for the Third Circuit. Lewis added, "We really need to take a look at that. Who are we as people if we are not giving adequate and equal representation to those who can't afford a lawyer?" Lewis is co-chair of the Committee.

Sources: The Boston Herald, the Los Angeles Times, The National Law Journal, The Seattle Times.

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This evidence could have proved my innocence and impeached all the state's key witnesses:

1 Obtain affidavits from Percy Baker, Jr., Sherman Jones, Officer Glen Perkins, Ken Falls and Jerry Ceisler; all would have testified that I was with each of them when the Ivy's testified under oath that I was with them on the day of the murder; the facts and the records will clearly show the Ivy's committed perjury.
2. Trial attorney failed to introduce evidence of my dad's blood group and type, even though he had it in his possession at the second trial. Mr. Vieley subpoenaed Methodist Hospital in Peoria, Illinois to release my dad's blood group and type and the hospital complied.
3. Trial attorney failed to introduce evidence at my second trial of the victims' actual blood grouping and types.
4. Trial attorney failed to introduce copies of the original autopsy reports to impeach Dr. Phillip Immesoete's second trial testimony regarding the death of the victims.
5. Trial attorney failed to request the court to order forensic testing of hair samples taken from the victims' parents, even though the step-dad was the first suspect in this case; moreover, both Officer Vogle and the mother noticed welts under William Peter Ellis Douglas's eye the day of the murder.

Moreover, my innocence could have been proven beyond all doubt with "one" single piece of evidence: The victims' family dog was that evidence. The victims' family dog was a full-grown German shepherd (Trouble Man). This dog was known for his protectiveness of the entire family, especially James, Connie and the baby, according to the testimony of both parents and friends of the family. I had only been to the victims' home one time, the day before the murder on January 17, 1977. Both parents gave statements to the police and testified under oath in both trials that the dog was at large in the house when they arrived home on January 18, 1977, the day of the murder, their home was a one story flat.

As of November 2004 I have a Petition For Executive Clemency pending before Illinois Governor Rod Blagojevich based on the indisputable evidence of my innocence. This petition includes new affidavits in which Frankie and Tina Ivy state they lied during my second trial under pressure by Detective Charles Cannon and Peoria police officers. Among the many people who have sent the Governor letters in support of my petition are: Rubin Hurricane Carter, Exec. Dir., Assoc. in Defence of the Wrongly Convicted; Kate Germond, Asst. Dir., Centurion Ministries; Colin Starger, Staff Attorney, Innocence Project at Cardozo School of Law; and Prentice H. Marshall, attorney and former U.S. District Court Judge. If you want to send a letter supporting my clemency petition, it must be mailed directly to:
Governor Rod Blagojevich
207 State House
Springfield, IL 62706

In closing, I thank you in advance for the opportunity to share my story with you. I assure you that all the facts I have expressed herein are true, and I have the documents to support those facts. God Bless.

My attorney's are with the firm of Jenner & Block: Christopher Tompkins (312) 840-8686 & Matthew Neumeier (312) 840-7749.

Key outside supporters are:
Beverly Vilberg, Treasurer, CCCJ, (309) 676-1123
Ted A. Gottfried, Attorney, State Appellate Defender, (217) 782-7203
Ms. Win Wahrer, Exec. Asst., Assoc. in Defence of the Wrongly Convicted (416) 504-7500.
The Free Johnny Lee Savory website is at:
http://friends.peoria.lib.il.us/community/freejohnny.html

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appalled, man. This is outrageous," he said.

Meanwhile, persistent rumors of wrongdoing swirled through the Grant County halls of justice. Those rumors accused Romero and Tom Earl of hitting up indigent defendants for money. The rumors brought a state bar investigation and, in November 2002, the state bar presented its case against Romero. The evidence showed that in at least three cases, Romero had improperly solicited money from court-appointed clients or their families. It also found that Romero had failed to file timely federal tax returns and owed back taxes and penalties of about $140,000. The recommended sanction: disbarment. In May 2003, the state Supreme Court ruled that Romero could keep his license pending their decision on disbarment. (In Washington, only the state Supreme Court has the authority to remove a lawyer's license.)

In Grant County, oblivious to his own impending fate, Tom Earl was busily reassigning Romero's cases. Romero's last day as a public defender was May 19, 2003. In March 2004, Romero was hired by his former adversary, prosecutor John Knodell, as Grant County's victim-witness coordinator.

In the meantime, the investigation of Romero's former employer, Tom Earl, was continuing. After hearing evidence that Tom, too, was soliciting and accepting money from court-assigned indigent clients, Tom's license was suspended in February 2004. On May 6, 2004, the Washington Supreme Court ordered Thomas J. Earl disbarred.

On July 22, 2004, the state Supreme Court upheld the bar disciplinary board's ruling and ordered Guillermo Romero's immediate disbarment. Following the high court's order, Romero was unavailable for comment. He had nothing to say. There can be little doubt, however, that the hundreds of former clients whose lives were left in shambles by a "free defense" and Romero's inept representation would have plenty to say. But that's another story.

Sources: The Dallas Morning News,- Seattle Post-Intelligencer, The Seattle Times, The World Almanac.