Editors Note:
This is Part IV 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 IV of a 6 part serialization

V.
Control of Defense Lawyers By Judges

There is one possible crink that can interfere with the smooth operation of the law enforcement process presided over by state and federal judges: defense lawyers. It is not unusual for a conscientious and knowledgeable defense lawyer to find him or herself in the position of having to choose whether to appear unruly and disrespectful in an effort to get a biased judge to observe the most meager standards of civilized fairness in conducting a trial. However, when that path is chosen it is rarely successful, because it is easy for a biased judge to cast a defendant in a bad light with the jury by reprimanding and rebuking a vigorous and conscientious defense lawyer.

Ironically, lawyers who believe their clients to be innocent are the most vulnerable to being smeared by a judge in front of a jury. This is because they are most likely to be intolerant and outraged by the way the proceedings determining their client's fate are being conducted by the judge. Yet, despite such frustrations, for all practical purposes there is little a defense lawyer can do in the courtroom about the velvet black jack wielded by a judge. *The Appearance of Justice* explained this dilemma in the following way:

> What alternatives are open to counsel? He must know his judge and be sure that registering an objection will not put him or his client at a disadvantage in the case before His Honor - and the next case, and the case after that. On paper, each judge is subject to some higher court review, but as a practical matter, the judge who acquires an aversion to certain counsel can destroy the lawyer's effectiveness in countless unreviewable ways. Simple matters such as continuances, the privilege of filing a slightly late brief, such courtesies of the courtroom as a full oral hearing – all these and many more amenities are sometimes unavailable to the attorney who is in disfavor with the court. The dilemma for the lawyer from out of town is no less acute though he may never have to face the same judge again. More likely than not he is able to appear at all only by the court's indulgence and must associate himself with local counsel whose own relationship with the judge could be jeopardized by any excessive zeal on the part of the visiting lawyer. Counsel must of course weigh the advantages and disadvantages of further delay in his case caused by a reassignment to another judge and also the imponderables of who that successor judge might be. Counsel must consider all this very rapidly and respond without hesitation, for the magistrate is there calling for an immediate answer on the suggested or implied waiver of his technical disqualification. . . . John P. Frank, one of the few longtime students of judicial ethics, described the waiver phenomenon as "nothing more than a *Velvet Blackjack*." Essentially, the Velvet Blackjack is a game based on assumed relationships of mutual confidence; it is, in other words, a species of confidence game. In the typical confidence game, the perpetrator engages his victim in a joint venture that requires the brief loan of the victim's treasure; the critical point in the transaction is when the intended victim has to decide – usually quickly, in a fluid situation – whether to surrender his valuables ever so briefly in the interest of acquiring something more valuable. The victim must decide not only whether to repose his trust in the individual, but more humanly wrenching, he must weigh the consequences of betraying apparent distrust and the risks of offending the other party. When the other party is a black-robed judge and the decision falls upon the lawyer, there is an extra dimension of human difficulty. . . . But the ordinary lawyer with the ordinary judge, while he is anything but happy to be governed by such a practice, may have no choice.

Consequently, a lawyer forced to settle for a judge known to be biased against his or her client is an integral part of the judicial process. This occurs even when a lawyer genuinely wants to help a defendant, but is precluded from doing so by settling for a judge that, at best, will project the illusory appearance to the jury of being fair to the defendant.

When defense lawyers challenge judges on the grounds of their impartiality, it is unlikely to result in their removal. This is true even in cases where there is overwhelming evidence of a blatant conflict of interest or egregious prejudicial behavior by a judge. The offending judge is typically protected by his or her fellow judges from being removed to maintain the illusion of judicial impartiality and decorum.

Appeals courts also aid in the effective control of diligent defense lawyers. The Ninth Circuit Court of Appeals has gone so far as to rule that it is not reversible error for a judge to make inaccurate and insupportable vitriolic remarks about a defense attorney's competence and "patriotism" in front of a jury. The Ninth Circuit further held that it is not reversible error for a judge to order the same attorney handcuffed and removed from the courtroom by the U.S. Marshals in front of the jury after the attorney persisted in trying to get the judge to correct what was, in fact, an erroneous ruling contradictory to a previous ruling by the judge.

The protection of a prejudicial trial judge by his or her brethren is encouraged by the legal doctrine of "the presumption of regularity," which presumes "that duly qualified officials always do right." This idea is similar to the monarchical doctrine that "The King can do no wrong." Thus, individually and as member of the good old boys network, judges can effectively function to control any defense lawyer that becomes too contentious in his or her efforts to defend a client – and those vigorous efforts are most likely to occur when that client's innocence is apparent from the evidence.

Part V 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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Thomas R. James continued from page 6

Lee Walls, and if she is my mother. He also could have requested a live line-up, in addition to investigating "Dog" and Thomas James to learn if they had ever been arrested together. He did not challenge or attempt to impeach perjured and inconsistent testimony presented by the prosecution. He should have also introduced dental records to prove my teeth are different then Lance Jacques description of the shooter's teeth. He waited until his closing argument to try and inform the jury that my small thin hands didn't match the description of the shooter's fat fingers.

Though my lawyer was well aware of these facts, he failed to use it to present the defense of mistaken identity, especially since the State's case relied on the inconsistent testimony of one unreliable witness - Dorothy Walton.

My case is procedurally barred because my lawyer was aware of all the aforementioned facts and deposition testimony. I did not learn of it until almost five years later, after a judge granted me access to the witness depositions. It can't be called newly discovered evidence because my counsel knew about it but kept it from me, the judge, and most importantly the jury. Had the jury known of these facts, a not guilty verdict was inevitable!

It should also be pointed out that the prosecutors went ahead with my prosecution although they knew of the evidence establishing my innocence.

My lawyer's performance was so inadequate that Thomas James and "Dog" took not one life, but two lives, because the same bullet that killed Mr. McKinnon's life also claimed my life!

The Thomas James involved in the murder of Mr. McKinnon was sentenced to life in prison on March 4, 1996. He was sentenced on that day for convictions of four different serious crimes that were similar to the one that resulted in Mr. McKinnon's death:

- Robbery with a deadly weapon on March 9, 1991
- Aggravated assault with a deadly weapon (gun) on April 21, 1991
- Robbery with a deadly weapon on April 30, 1991.
- Robbery with a deadly weapon (gun) and grand theft auto on December 31, 1993.

Case #90-23928, Police 30848K
The innocent: Thomas Raynard James FL DOC #420931
The masked man: Thomas James FL DOC #114319
The gunman: Vincent "Dog" Williams, aka Vincent Cephus (Released from prison on Oct. 27, 2004 after serving an 11 year sentence for aggravated battery with a deadly weapon (gun).

If you can aid me, please contact me at:
Thomas James 420931
Everglades Correctional Inst. C1-215U
P.O. Box 949000
Miami, Fl 33194-9000

My outside contact is my mother:
Doris Bailey
2766 N.W. 59th St.
Miami, Fl 33142

Kirstin Lobato Update

Kirstin Lobato's story was featured in *Justice:Denied*, Issue 26. Nationally known San Francisco based defense attorney J. Tony Serra has been retained on Kirstin's behalf by supporters believing in her innocence. At a January 2005 hearing Kirstin's retrial date was set for November 7, 2005. Kirstin's family and supporters are unable to post her Court ordered $500,000 bail, so she remains in pre-trial custody at the Southern Nevada Woman's Correctional Facility in Las Vegas.

In November 2004, Mr. Serra successfully defended Richard Tabish, who was acquitted after a retrial in Las Vegas of murdering casino heir Ted Binion in 1998. Evidence indicates that Mr. Binion died from a self-inflicted heroin overdose.