David Kibble continued from page 4

center mass in rapid succession" and the man "immediately dropped the knife and fell to the ground."

When he was asked to draw on the crime-scene sketch where the men were when they were fighting and where Kibble was when he shot him, Hicks indicated that the fighting occurred in a part of the parking lot close to the alley and that Kibble was in the middle of the alley when he shot him. No blood was found at either of these locations. But that wasn't the only oddity about Hicks' statement. Among the other questions it raised were:

- If Kibble "immediately dropped the knife and fell to the ground," when Hicks shot him in the middle of the alley, how did both Kibble and the knife end up in the grass by a fence more than 10 feet farther south?
- If Hicks shouted several times at the men to get them to stop fighting and several more times for Kibble to drop the knife, why didn't the other police officers or any of the witnesses say they heard his repeated shouts? And why wouldn't the other officers have rushed to his aid as he kept shouting for Kibble to "drop it"?
- If Hicks was standing where he said he was, how did two of the casings from his weapon – which usually only travel a few feet to the side — end up 18 and 22 feet further away?
- Why did Alan Dukes, Donnell Broomfield and Freddie Kibble, the three known witnesses to the shooting, say David Kibble was being chased at the time of the shooting?
- How did a man matching the description of Dukes' passenger turn up on a video taken minutes after the shooting showing how a bullet had gone through his baggy shorts if he wasn't chasing Kibble — or at least reasonably close to him?
- But the biggest question of all is: How can the Columbus Police Department turn a victim of circumstances like David Kibble into a prisoner for a crime that all the evidence it gathered other than a self-serving statement by one police officer indicated did not even occur?

David Kibble, meanwhile, is now Inmate A485895 at the Pickaway Correctional Institution, where he says he is living a nightmare come true. "I didn't do anything wrong that night and I ended up getting shot three times and being sentenced to prison for a crime that didn't happen," Kibble says. Kibble says he immediately regretted accepting the plea bargain after he entered his Alford plea and was taken back to jail. Then he realized it would take longer to withdraw his plea — a motion that is rarely granted — before he would be released from prison.

Kibble will have to start over from scratch then. He has lost almost everything he owned, including his car, as well as his girlfriend. And he now will have a first-degree felony on his record — all, it would seem, after being shot and almost killed for a crime that never occurred.

"That's crazy," Alan Dukes, one of the two men chasing David Kibble at the time of the shooting said when he was told of Kibble's conviction. "All he [Kibble] was trying to do was get away from us. I was shocked when I saw the officer start shooting for no reason. It didn't make any sense. That's why I took off. I was scared of what might happen next."

Given what happened to David Kibble, Dukes may have made a wise decision.

Martin Yant is author of *Presumed Guilty: When Innocent People Are Wrongly Convicte*d (Prometheus Books 1991). He is also an investigative journalist and legal investigator. He can be written at:
Martin Yant Investigations
1000 Urlin Ave. #1821
Columbus, Oh 43212
Email: martinyant@aol.com
Website: http://www.truthinjustice.org/yant

In Memoriam
Fred Korematsu (1919-2005)

He Fought To Free 120,000 People Wrongly Imprisoned In The U.S.

By JD Staff

Fred Korematsu was living in San Leandro, California when a May 3, 1942 U.S. Army directive ordered him to leave his home and self-report within six days to a federal imprisonment facility. Since he had not been convicted, or even accused of committing any crime, he ignored the order. He went on living his life as if the order hadn't been issued. On May 30, 1942 he was charged with failing to obey the order to report to the prison facility and arrested. Represented pro bono by San Francisco attorney Wayne M. Collins, Mr. Korematsu's defense was that as a native-born American the order violated his right to due process of law. Although the facts of his case were that he had not been indicted, tried or convicted of any crime when his imprisonment was ordered, he was convicted in U.S. District Court and his conviction was affirmed by the federal Ninth Circuit Court of Appeals. In December 1944 the U.S. Supreme Court affirmed his conviction by a vote of six to three.

Thirty-seven years later a private researcher, historian Peter Irons, discovered internal government memos proving that federal lawyers and possibly other officials fabricated evidence relied upon by the federal courts to affirm Mr. Korematsu's conviction. Two years later, in November 1983, a federal judge in San Francisco vacated Mr. Korematsu's conviction. However the discovery of that exculpatory evidence was too late to affect the impact of the Supreme Court's 1944 decision: The Court's affirmation of Mr. Korematsu conviction depended on their endorsement of the legality of the order of May 3, 1942, that was authorized by President Franklin Roosevelt's February 1942 Executive Order 9066, 7 Fed. Reg. 1407. That Executive Order (9066) was relied on by the federal government to summarily, and as was proven decades later, wrongly imprison 120,000 U.S. residents of Japanese ancestry. Mr. Korematsu was a native-born American of Japanese descent.

What historian Irons found were misplaced and mislabeled records related to the federal government's strategy and legal briefs opposing Mr. Korematsu's appeal. U.S. Solicitor General Charles Fahy headed the government's legal team, and in one memo Justice Department lawyers accused Fahy of lying to the Supreme Court in his briefs and oral arguments. To justify Roosevelt's order as militarily necessary for the country's national security Fahy argued, for example, that Japanese-Americans on the West Coast were communicating with Japanese ships by "extensive radio signaling and in shore-to-ship signaling." However it was known to government lawyers that the alleged "signaling" was actually the light of a flashlight used by people living near the coast to see the way to an outdoor toilet at night. The Justice Department contended in the internal memos that there were no known acts of treason (much less widespread activities) by Japanese-Americans on the West Coast supporting the orders for their summary imprisonment.

Relying in part on the records Irons discovered, in 1983 a federal commission unanimously approved the conclusion that Roosevelt's imprisonment order was not based on any actual threat by Japanese-Americans to national security or justifiable as a militarily necessity. Rather, it was a response to "race prejudice, war hysteria and a failure of political leadership."

In 1988 federal legislation was approved authorizing $20,000 in compensation to each surviving Japanese-American wrongly imprisoned as a consequence of Roosevelt's Executive Order 9066.

The Justice Department memos revealing that there was no factual basis for the wrongful imprisonment of 120,000 legally innocent Japanese-Americans would not have been written if Mr. Korematsu had meekly assented to the federal government's desire to indeterminately imprison him without so much as an accusation of criminal wrongdoing. So thanks to Mr. Korematsu's moral courage, more of the truth is known about that episode in U.S. history than if he had kowtowed to the order for his summary imprisonment for the non-crime of having Japanese ancestors. The treatment he declined to accept was described by U.S. Supreme Court Justice Murphy in another case as bearing "… a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe." *Hirabayashi v. United States*, 320 U.S. 81, 63 S. Ct. 1375, 1389, 1390. (J. Murphy *concurring*)

In April 2004 Mr. Korematsu once again stood up for the wrongly imprisoned. He filed a friend-of-the-court brief with the U.S. Supreme Court on behalf of the many hundreds of people indeterminately imprisoned at the Guantánamo Bay Naval Station in Cuba without being charged with any crime. The federal government mimicked its position in his case sixty years earlier, by contending that the military necessity of protecting the nation's security justified indeterminately imprisoning uncharged people without having their case reviewed in federal court. Mr. Korematsu's brief stated in part, "The extreme nature of the government's position is all too familiar." However unlike his case, in June 2004 the Supreme Court ruled that the people from dozens of countries imprisoned at Guantánamo Bay were entitled to a legal review of their case that could possibly result in their release. See, *Rasul v. Bush*, 124 S.Ct. 2686 (U.S. 06/28/2004). That is particularly important because international human rights organizations have estimated that upwards of 90% of the people imprisoned by the federal government as alleged "terrorists" since September 11, 2001 are innocent of any wrongdoing. Those people were swept into a state of indeterminate imprisonment due to simply being of a disfavored ethnicity or being in the wrong place at the wrong time.

Fred Korematsu died of respiratory failure on March 29, 2005. He was 86 years old.

Source: Internment foe finally won: Fred Korematsu fought relocation of Japanese Americans, Claudia Luther (Obituary writer, Los Angeles Times), The Seattle Times, April 3, 2005, News A23.
Korematsu v. U.S., 140 F2d 289 (9th Cir. 12/02/1943)
Korematsu v. U.S., 323 U.S. 214 (12/18/1944)

Report Downplays Wrongful Convictions in U.S.

By Hans Sherrer

Exonerations in the United States: 1989 through 2003 is a report by University of Michigan staffers and law students. The report analyzed data from 328 cases during that 15 year period in which the defendant was officially declared, "not guilty of a crime for which he or she had previously been convicted."

The report concentrates on rape and murder convictions, since 319 of the 328 cases studied involved a defendant convicted of one or both those crimes. One of two areas the researchers focused on, was how often several factors known to contribute to a wrongful conviction - eyewitness misidentification, perjury and a false confession - were present in those cases. It was found that 64% of the people exonerated of rape and/or murder had been misidentified, 15% had falsely confessed, and a prosecution witness had committed perjury in 44% of the cases.

The other area reported on is how race relates to exonerations. It was found that people of various races are exonerated at about the same rate as they are convicted – unless the person was under 18 at the time of arrest. Almost eight

Report continued on page 25

Iva Toguri continued from page 24

she used to travel to Japan in July 1941 but which was inadequate for her to return to the U.S. and trapped her there during and after the war.

- There is the Radio Tokyo employee that identified Iva to Harry Brundidge and Clark Lee as 'Tokyo Rose' for the $250 reward - knowing she wasn't.
- There is Harry Brundidge for his three unconscionable betrayals of Iva. The first led to her arrest on October 17, 1945 for what was subsequently found to be the baseless accusation she was 'Tokyo Rose,' the second was his smearing of her as the traitorous 'Tokyo Rose' in his 10-part newspaper series in 1948, and the third led to her equally baseless prosecution and wrongful conviction of treason. Amazingly Brundidge continued slandering Iva while she was in prison. The January 1954 issue of *The Mercury* featured an article by him, *America's First Woman Traitor*. [67] It is a mystery why Harry Brundidge, who died in 1960, had such a venomous hatred of Iva.
- There is Army General Elliott Thorpe for allowing the U.S. Army to be used to get Harry Brundidge off the hook to pay Iva $2,000 for the interview she gave Clark Lee and him, and then having her arrested and imprisoned without charges for more than a year beginning on October 17, 1945.
- There is federal Judge Michael Roche for his blatant pro-prosecution bias during Iva's trial that was essential for the jury to wrongfully convict her. [68]
- There are the Department of Justice attorneys who staged the elaborate charade of Iva's prosecution knowing all the while she was innocent, and who stood silently by as she was wrongly convicted, sentenced and hauled away to prison for over 6 years. The lead federal prosecutor in Iva's case displayed the same cowardice it took for him to participate in the framing of an innocent Iva when he committed suicide by shooting himself at age 56 – two months after Iva's parole ended in April 1959. [69]
- There are the federal agents in the Immigration Service who sought to deport her after her release from prison – even though she is a native born American.
- There are the hundreds of military personnel, employees of the FBI, the U.S. Attorney's Office, and other federal agencies who although knowing Iva was innocent, remained silent and failed to come to her aid. To their everlasting shame and infamy, they remain silent to this day.

There are also many people who noticeably went out of their way to help and support Iva, including her husband Felipe d'Aquino, Norman Cousins, Wallace Ince, Wayne Mortimer Collins and his son Wayne Merrill Collins, her father and other family members. [70] However, they were powerless to stop the government's fevered juggernaut to have Iva falsely branded as a traitor. It wasn't until reporter Ron Yates, filmmaker Antonio Montanari, Jr. and others were able to publicly uncover the perjury suborned by federal prosecutors and their concealment of her innocence that she was pardoned in 1977.

Through it all, Iva maintained her dignity and didn't reduce herself to the base level of those who caused her so much pain or used her misfortune to their own advantage. As her father, Jun Toguri said to her on September 25, 1948, when he saw her for the first time in over seven years: "Girl, I'm proud of you! You didn't change your stripes. A tiger can't change his stripes, but a person so easily can." [71]

After their release from the Gila River Relocation Center, the Toguri family relocated to Chicago. The family founded the J. Toguri Mercantile Co, which on March 29, 2003 was recognized during the annual Japanese-American National Museum dinner in Los Angleles as one of seventy-one 3-generation Japanese-American businesses in America, and the only one in Illinois. After her release from federal prison, Iva moved to Chicago and joined in operating the family business.

A fact based dramatic movie of Iva's life is in the planning stages, and it will enable this and future generations of Americans to be inspired by her courage in the face of unconscionable mistreatment and incredible adversity.

Iva Toguri d'Aquino — the innocent heroine who stood her ground while being shamelessly, dishonorably and wrongly treated for years by military investigators, FBI agents, federal prosecutors, a federal judge, immigration authorities and unscrupulous reporters — is 89 years old and lives in Chicago.

Iva Toguri d'Aquino's 89th birthday was on July 4, 2005. Wishes of good will to her can be sent to *Justice:Denied*, and they will be forward to her. Mail to:
Justice Denied - Iva, PO Box 68911, Seattle, WA 98168.

(Authors Note: This article was sent to Iva Toguri d'Aquino so she could respond with any factual corrections that she considered necessary. I want to acknowledge that the archivist of Iva's personal papers, Barbara Trembley, and Ron Yates reviewed it for accuracy at Iva's request.)

Endnotes:

1 Photo of Iva Toguri's taken on September 4, 1945 after a press conference at the Yokohama Bund Hotel. Published in Pacific Stars and Stripes magazine.
2 They Called Her Traitor, J. Kingston Pierce, *American History*, October 2002, pp. 22, 28.
3 *Id.* at 22, 28.
4 The oddity of Iva's conviction of that count is described later in this article, in The Trial – Part II.
5 Approximately 10,000 U.S. born Japanese-Americans were likewise trapped by circumstances in Japan. See e.g., They Call Her Tokyo Rose, Keith O'Brien, January 20, 1998, http://www./wire.com/01-20-98/Chicago_cover.html. The ship Iva was refused passage on, the Tatsata Maru, was a Japanese vessel forced to turn back in mid-voyage and return to Japan.
6 Suspicions were aroused by the Special Security Police's (Tokko Keisatsu) interrogation of Iva twice a week at her aunt's home for several months. They suggested that Iva's registration as a Japanese citizen would end her harassment. Iva eventually requested the permission of her relatives to move out, to avoid the embarrassment of them evicting her. Source: email from Ron Yates to Barbara Trembley, May 20, 2003.
7 They Call Her Tokyo Rose, *supra*.
8 Radio Tokyo was officially known as NHK - Nippon Hoso Kyokai.
9 They Called Her Traitor, *supra*, at 22, 25.
10 *Id.* at, 22, 25. This was broadcast on February 22, 1944.
11 *Id.* at, 22, 26.
12 *Id.* at, 22, 26.
13 A letter from Robert W. "Bob" White, 65th SQ, to Aerial Gunners Association Magazine http://www.kensmen.com/tokyoroseb.html

Iva Toguri - Endnotes continued on page 26

Report continued from page 5

times as many blacks wrongly convicted of a crime as a juvenile are exonerated than are whites (77% to 10%). That finding is consistent with the phenomena of erroneous cross-racial identifications, since many of those cases involved the ID of a black person by a white.

So in general the report's findings tend to be a fine tuning of what is already known about wrongful convictions. However there is one area where the report engages in speculation, and that is about how many non-death row exonerations there would have been if all cases "were reviewed with the same level of care that we devote to death sentences." That figure is estimated by the report to be 28,642 cases, and it refers to that as "a shocking prospect." While appearing numerically impressive, the report's estimate actually downplays the number of people that knowledgeable observers over the past four decades have estimated are wrongly convicted. Furthermore it doesn't just do so by a small number, but very significantly.

A judge interviewed for *The Innocents*, a 1964 book by investigative reporter Edward Radin, estimated that 5% of everyone convicted of a crime is innocent. The judge indicated that to maintain public support for the legal system, the false appearance has to be maintained that it is fair and accurately distinguishes the innocent from the guilty.

In *Presumed Guilty* (1992), Rev. James McCloskey (founder of Centurion Ministries, which is dedicated to freeing wrongly convicted people) is credited with estimating "10% of the people convicted of serious crimes each year are innocent."

In *Convicted But Innocent* (1996), the authors conservatively estimate that 2% of everyone convicted of an offense included in the FBI's Uniform Crime Report is innocent. However, they also reported that many judges, prosecutors and defense attorneys who completed a questionnaire think the number of wrongly convicted people exceeds 5%.

In March 1999 this author's estimate that 14% of convictions are of an innocent person was published in *Justice:Denied* magazine.

Furthermore it was reported in 1997 that the FBI found that 25% of the suspects in 12,000 rape cases were excluded by DNA testing. That finding is particularly significant because exclusionary DNA evidence is only available in a small percentage of all criminal cases.

So from 1964 to 1999 knowledgeable estimates of the number of wrongly convicted people range from 2% to 14%, and the finding of the FBI – an agency of the U.S. Department of Justice – lends empirical support to the higher figure.

Based on the most current Bureau of Justice Statistics data, it is estimated that from 1989 to 2003 there were 14,295,000 felony convictions in state and federal courts. So the report's estimate that there should have been 28,642 exonerations from 1989 to 2003 amounts to 2/10th of 1%, or .002% of the felony convictions during those 15 years. Furthermore, the report's estimate amounts to a projected 1,909 exonerations a year out of 953,000 convictions – or 1 out of 500.

The Supreme Court inferred in *Schlupv. Delo*, 115 S. Ct. 115 (1995) that the legal system may only need to ascertain guilt to an accuracy rate of 99% (99 out of 100). Thus the reports contention that 499 out of 500 convictions are of a guilty person provides powerful support to the contention that while not 100% perfect, the United States has a discerning legal system that is neither broken nor in need of significant reforms. The average new car has an average of over one significant problem within 90 days of its purchase. So if the report's estimate of wrongful convictions is to be believed, car manufacturers ought to be consulting with judges and prosecutors responsible for a correct conviction rate of 99.8%, on how to manufacture a more reliable product. Consequently the report's suspect finding plays directly into the hands of prosecutors, judges, police and corrections officials who contend the legal system works remarkably well at weeding out the innocent from the guilty.

However that assessment stands in stark contrast with the much different conclusion that can be drawn from the estimates of wrongful convictions from 1964 to 1999, the lowest of which extrapolates to an average of over 19,000 wrongly convicted people during each of the 15 years covered by the report. The highest estimate extrapolates to an average of over 133,000 wrongful convictions yearly.

Solid support for the pervasiveness of wrongful convictions indicated by the educated estimates from 1964 to 1999 is provided by the findings of a study published in June 2000. That study - *A Broken System: Error Rates in Capital Cases* – found that 68% of the 4,578 capital cases finalized from 1973 to 1995 was reversed on appeal; that "7% of capital cases nationwide are reversed because the condemned person was found to be innocent;" and that on retrial, the defendant was given a lesser sentence in 82% of those reversed cases. So based on the findings of that extensive multi-year study that was overseen by the esteemed Professor James Liebman (co-author of *Federal Habeas Corpus Practice and Procedure*), if every one of the 14,295,000 criminal conviction in this country from 1989 through 2003 had been subjected to the same degree of appellate review as is a capital case, then 9,720,600 of those cases (68%) would have been reversed, with the result that 680,442 of the defendants (7%) would have been exonerated, and 11,721,900 of the defendants (82%) would have been re-sentenced to a lesser punishment.

Consequently, the findings reported in *A Broken System* (and its follow-up report, *A Broken System***,** *Part II***,** Feb. 2002) are consistent with the estimates from 1964 to 1999 that there are serious systemic errors in the ability of this country's legal system to accurately distinguish the innocent from the guilty.

So while the analysis of various factors related to wrongful convictions in the University of Michigan report is valuable information, its attempt to downplay the incidence of the phenomena must be taken with a grain of salt.

The 37-page report, *Exonerations in the United States: 1989 through 2003*, can be downloaded for no charge at,
http://www.law.umich.edu/newsandinfo/exonerations-in-us.pdf

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