

On February 5, 1996, I was arrested in Dallas County, Texas, by U.S. Marshalls on a fugitive warrant for walking away from a California halfway house 11 days from my release date. A marshall asked "What's up with this girl in Houston?" Thinking he was talking about Leann, a young woman I knew in Houston, I stated that I asked her if she had wanted to smoke a joint and later we had consensual sex. He then asked if he could search my home for a video that might show me killing my wife in California. I consented, telling him that "my ex wife is alive and well and is going to get a kick out of being dead." The marshall told me detectives in Houston were alleging I had killed my wife. They took all my VHS videos. I was booked into Dallas County jail on the California warrant. The videos were returned after they didn't find anything about my ex-wife in them.

While at the jail I was questioned by two detectives. One claimed to be a DEA agent, and the other claimed to be an ATF agent. They said they wanted "information" so they

Exonerating DNA Test Cancelled Before Trial - The Michael Short Story

By Michael E. Short

could help me with my case. They also asked me, "What's with this girl in Houston?" I repeated the same thing I told the marshall. A few days later I was taken from my cell at about 5 a.m. and brought down stairs and put in a holding cell with some other guys. Finally I asked someone what was going on? And he stated that they were there to do a line-up. After talking we figured out it was me who was probably the intended suspect.

When a female and male detective came to bring us out, I asked if the line up had to do with me. When the female detective said "yes," I told her I had a lawyer in Houston, and I wanted him present during any line-up or questioning. The male detective then said in front of all the participants, "You don't have the right to have an attorney present. If you don't do the line-up now it will be used against you in court to show your guilt." So I did the line-up. The participants on either side of me, when it was their turn to step forward, bowed their arms and flexed their muscles like body builders. Many months later I found out that the main identifier the victim described about her attacker

was a spider web tattoo on his elbow. I was the only participant with a spider web tattoo. This would be critical in any identification.

When I first called my lawyer, I explained about Leaan. I thought she was whom it was all about, so I told him I did it. I was being up front because it was no big deal. I knew Leaan was pissed at me. I had left her in her van in the parking lot of the Turtle Club because we had fallen asleep. I left without waking her. Later cops cruising the parking lot woke her up. That embarrassed her. Needless to say all her fury was directed at me. I did not find out until 2 to 3 months later when I received the indictment, that the complainant was not Leaan, but someone I did not even know — a 16-year-old girl named Celeste P. She alleged that I had sexually assaulted her in a tow truck. I immediately called my lawyer's office, left a message, and then wrote him a follow up letter.

I paid my lawyer \$20,000 raised from the sale of my prized possession, a custom Harley show bike, and some other items. My lawyer was supposed to fly to Dallas to see me in jail soon after he was paid, but he didn't come to see me until 30 days before my trial. He was supposed to hire an identification expert, a DNA expert, and a private investigator. He didn't. When I called his home, his wife told me he was fighting cancer, he had two high profile cases on top of his regular case load, and he was stretched too thin.

Under those circumstances he never should

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Innocence Project Accepts Michael Short's Case!

Days before this issue of *Justice:Denied* went to the printer a letter was received from Michael Short with the news that the Innocence Project in New York had accepted his case.

Justice:Denied contacted the Innocence Project and staff paralegal Andre Vital confirmed they have accepted Mr. Short's case. He also said a somewhat unusual aspect of Mr. Short's case is an exculpatory DNA test has already been performed.

Phantom Phone Record Leads to Tossed Conviction

By Hans Sherrer

Justin Kirkwood was convicted in 2003 of robbing \$170 from a craft store in New Castle, Pennsylvania. The robbery occurred at 7pm on August 14, 2002, in the city of 26,000 people located 40 miles northwest of Pittsburgh.

The jurors relied on the eyewitness testimony of two store clerks who identified Kirkwood in court as the man who robbed them at knifepoint. In their police statements, both clerks described the robber as a 20ish white man wearing a dark short-sleeve polo shirt, khaki shorts, a light-colored baseball cap pulled down near his eyes, and who didn't have any distinguishing marks - no tattoos or scars. The clerk who stood in front of the robber said he had brown eyes and was 5'-4" tall - one inch taller than her 5'-3" height. The other clerk, who was 15' away from the robber, said she couldn't see his eyes.

The clerks made their initial identification of Kirkwood from a facial police mugshot of Kirkwood. After looking through hundreds of photos, one clerk said she wasn't positive that Kirkwood was the robber, but he "strongly resembled" him. The next day the other clerk identified Kirkwood as the robber after looking through an unknown number of photos. What is known is she only spent 15 minutes at the police station.

Kirkwood had no criminal record, but his mugshot had been taken months prior to the robbery when a dispute between him and his ex-girlfriend over a cell phone bill led to her obtaining a protection order against him. Although the dispute was resolved, the photo and fingerprints taken by the police after the order was issued remained in their files.

Kirkwood was arrested and charged with the robbery. Prosecutors offered him a deal of a short jail sentence if he would plead guilty. He refused, telling them he was innocent.

There was no physical evidence tying Kirk-



Justin Kirkwood is surprised by his parents, David and Debbie

upon his release from prison. (V.W.H. Campbell, Post-Gazette)

wood to the robbery — he hadn't been linked to the baseball cap, the knife, the khaki shorts, the short-sleeved polo shirt, or the money. So the prosecutions sole evidence was the testimony of the two eyewitnesses.

The 23-year-old Kirkwood relied on a mistaken identity defense based on two prongs. The first prong was that he didn't match the description of the robber provided to the police by the eyewitnesses. Kirkwood has blue eyes, not brown; he is 5'-7" tall, not 5'-4"; and he has a very visible dragon tattoo on his leg, and Japanese tattoos on both arms, while the two eyewitnesses told police

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have taken on my complex Aggravated Sexual Assault and Kidnapping case. During our only private conversation my lawyer told me, "We have nothing, they have everything." He refused to listen to me telling him that I did not do this crime. He said, "Do not try to change your story at this stage of the game." I explained that I called his wife and I wrote him two letters about my case months ago. He told me he received them. I knew after talking with my attorney that he was not defending me. He had not even begun preparing for my trial. At the end of our 30-minute meeting he told me he was going to get the case postponed because of flaws in the indictment.

On the morning of my trial – which my lawyer told me would be postponed – the bailiff pushed a black ball of clothes through the bars of the holding cell I was in, and told me to get dressed because, "you are picking a jury." I said "no, according to my lawyer we are getting a postponement." The bailiff then told me, "your lawyer is in the court room – get dressed." The suit my girlfriend bought me did not fit. It was too short and I had put on weight so the waist was too small. The bailiff refused my black socks so it had to be bright white socks in pants 5 inches too short.

When my lawyer finally came to the holding cell — that had 15 prisoners in it — two prisoners were at the cell doors talking to their lawyer. My lawyer called out my name and said, "You have a one-time offer of 20 years, you have 15 minutes to decide the fate of the rest of your life." One of the lawyers by the cell door looked at my lawyer and walked away. I moved up and said, "What are you talking about? What about the DNA evidence? It will prove I did not do this." He told me the assistant district attorney said the DNA test came back inconclusive, and she would use the percentages to convince the jury that inconclusive meant the physical evidence "could have" come from me. He also stated the prosecution had 32 witnesses waiting in the courthouse hallway. I told him I had just walked through the hallway and I only saw three people. He then said, "They are in the court room then." I told him that I looked into the courtroom as I walked by and I saw three or four people. To which he yelled: "They're in the jury room then!" He looked at his watch and said, "you have 10 minutes left," and walked away. All the inmates in the holding tank started saying all sorts of things like, "That dude is selling you out." They were all shocked when I told them I paid him \$20,000.

When my lawyer came back, the holding cell became quiet. He told me, "You have 5 minutes left." He said that if I took the plea I

would only do 5 years, 6 years max, and be out. But if I didn't take it I would get a life sentence and die in prison. I would never hold my son as a young boy, never go fishing or even attend a birthday party. He ended with, "You will die in prison." I replied, "I did not do this crime." He responded, "Just chalk it up to one of the crimes you got away with." He again told me the prosecution had 32 witnesses, and "they have everything and we have nothing." I realized he had done absolutely nothing. He was going to let me go to trial completely unprepared.

Although I wasn't charged with killing my ex-wife, the prosecution was alleging that I had done so. Yet my lawyer didn't even contact my ex-wife so she could appear and testify that she was not dead. He also didn't bother to do a background check on any of the prosecution witnesses. Not even the witnesses whose testimony was intended to provide evidence for the State of an extraneous offense. Just being arrested of something but not convicted, or a statement made by an extreme alcoholic or a drug dealer about something unrelated to what I was charged with, was going to be presented as fact at my trial. I have to believe that a first year law student would have prepared to impeach that testimony and those statements. But my lawyer did absolutely nothing.

At the time of my prosecution the Court ordered that the physical evidence be tested for the presence of my DNA, and my lawyer told me the results of those tests were inconclusive. I found that was a grotesque lie. The DNA tests were never performed. Someone canceled the tests.

Knowing my lawyer's ineptitude and lack of preparation, I knew he was telling the truth that I was going to lose if I went to trial — and that I was likely to get life. So I caved and took the deal for 20 years.

That was in 1996. Several years ago I filed a *pro se* motion under Texas' DNA law to have the physical evidence in the assault of Celeste P. tested for the presence of my DNA. As a result of filing the motion I learned something absolutely shocking. At the time of my prosecution the Court ordered that the physical evidence be tested for the presence of my DNA, and my lawyer told me the results of those tests were inconclusive. I found that was a grotesque lie. *The DNA tests were never performed. Someone canceled the tests.*

After a year of battling the DA's office opposition to my motion, it was granted. The tests were performed by the Texas Department of Public Safety's Crime Laboratory, and their report dated June 10, 2004 plainly states:

Evidence Submitted: Pubic combings from victim's sexual assault evidence collection kit

Requested Analysis: Five hairs were present in the pubic hair combings.

Conclusion: Michael Short is excluded as the contributor of the hairs. (See crime lab report on page 32.)

I also discovered that I was taller, heavier, and my hair was a different color than the perpetrator described by the victim. The victim also told the police that the tow truck in which she was assaulted was orange – while mine was black and red! Celeste P. also said the alleged crime occurred during the daytime while she sat in the passenger seat. I have three unmistakable deformities on my penis that were not described by her, even though they would have been clearly visible in daylight from the right side where she said she sat. I didn't learn about Celeste P.'s description of her assailant and his vehicle – neither of which matched me (just as my DNA didn't match her attacker) – until after I had been imprisoned.

Relying on all the new evidence, and about 25 prongs of error and 55 designated issues to be resolved, I filed a *pro se* state writ of habeas corpus alleging constitutionally ineffective assistance of counsel. I also claimed constitutionally impermissible cruel and unusual punishment related to medical malpractice, medical neglect, and deliberate indifference to my terminal lung cancer condition. My nickname in the oncology hospital is "Lucky Dog," because my cancer is currently in remission after I was told 3-1/2 years ago that I had six months to live.

The District Attorney's office conceded that I had some valid issues in my writ. The judge also agreed and ordered the resolving of designated issues.

I had temporary help from a free world paralegal volunteer and a good jailhouse lawyer, that due to new prison rules, I can no longer correspond with for help. I have been writing to some innocence projects, but I know it is a long shot because there are so many innocent people that need help. I have been locked up since February 5, 1996 for a crime I didn't commit. If you think you can help me, or would like more information, you can write me at:

Michael Short 774048
Ramsey III Unit
1300 FM 655
Rosharon, TX 77583



TEXAS DEPARTMENT OF PUBLIC SAFETY CRIME LABORATORY Report Dated June 10, 2004 is on Page 32.

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on the night of the robbery that the robber had no distinguishing marks.

The second prong was that at the time of the robbery he was at home in Shenango, 20 driving minutes across town from the store. Kirkwood lived with his parents, and his sister's wedding was scheduled for the upcoming Saturday, August 18. Six family members and friends who were gathered at the family home testified that Kirkwood was home at 7 p.m. on the evening of the robbery. The witnesses included his parents, sister, and family friends. Another alibi wit-

ness was Bill Fitts, owner of the oldest and largest car dealership in New Castle.

Fitts testified that on the day of the robbery he called the Kirkwood home to tell them that he had arranged for the family to use a Lincoln Town Car for the wedding. Justin Kirkwood's dad worked at Fitts' Ford dealership, so Fitts knew the members of the family. Fitts testified that Justin answered the phone and took the message about the car. He also testified he was certain the call was at 7 p.m., because immediately after the conversation he watched the 7 p.m. lottery picks on television.

During her cross-examination, Lawrence County District Attorney Birgitta Tolvanen denigrated the testimony of the witnesses who testified that at the time of the robbery they were with Kirkwood at the family's home. She even intimated that Kirkwood's sister — who had no criminal record — was lying to conceal that she was the robbery getaway driver.

Tolvanen didn't spare Fitts — a highly respected member of the community — from her vitriolic cross-examination technique. During her cross-examination, she waved a sheaf of his phone records in his face and asked him,

"Would you also be surprised, sir, that it shows ... no record of a telephone call being made to the Kirkwood residence on that day?"

Fitts response was, "I would be very surprised, because ... I did make the phone call." ¹

Although Kirkwood's attorney complained that the phone records hadn't been turned over to him during pre-trial discovery, he didn't move for a mistrial, object to their use, or request that he be given an opportunity to inspect them so he could re-direct his questioning of Fitts. Tolvanen didn't introduce the phone records into evidence, which she also re-

ferred to in her closing argument as undermining Fitts' credibility.

After 3-1/2 hours of deliberations the jury found Kirkwood guilty of armed robbery. He was perplexed at the verdict because of the complete dissimilarity between the eyewitness' police statements and their identification of him in court. He said, "They couldn't even describe me. [Its] not even right." ² Kirkwood was sentenced to 3-1/2 to 7 years in prison.

Although Kirkwood appealed his conviction, his family also contacted the Innocence Institute of Park Point University in Pittsburgh, which is a partnership between the University's Journalism Department and the *Pittsburgh Post-Gazette*.

The Innocence Institute accepted Kirkwood's case. Journalism students gathered information casting suspicion on the reliability of the prosecution's reliance on a mugshot to obtain the initial eyewitness identifications of Kirkwood as the robber. For example, "U.S. Department of Justice guidelines on eyewitness identification methods say mug books should be used only when other reliable sources of evidence have been exhausted, and the results should be evaluated with caution." ³ In contrast with those cautionary guidelines, Kirkwood was arrested after he was identified from his mugshot.

They also found that after Kirkwood was jailed, a series of similar robberies were committed in the area of the craft store by a robber who matched the clerk's original description of the craft store robber. He also used a long knife and fled on foot as did the craft store's robber. After his capture, that 20-year-old man — who lived blocks from the craft store — confessed to several armed robberies in New Castle before he hung himself at the Lawrence County jail.

Another 20-year-old white man generally matching the craft store robbers description is currently imprisoned after he confessed to five New Castle robberies, including twice robbing the convenience store across the street from the craft center. That man didn't respond to a letter sent to him by the Innocence Institute.

The students also obtained the phone records Tolvanen used to undermine Fitts' alibi testimony. They confirmed that Fitts' phone call to the Kirkwood residence wasn't on the phone bill. However they discovered it was missing because local calls were free calls and not listed. Yet Tolvanen's argument to the jury implied local calls were listed on Fitts' bill, and that his alleged call at 7 p.m. on August 14, 2002 was not among them.

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Michael Short's Crime Lab Report (excerpt showing DNA test result)

TEXAS DEPARTMENT OF PUBLIC SAFETY CRIME LABORATORY 12230 WEST ROAD HOUSTON, TEXAS 77065-4523

June 10, 2004

Larry Winkelmann
Harris County District Attorney
1201 Franklin, Suite 600
Houston, Texas 77002-1923

Laboratory Case No.	Agency Case No.	Offense Date
L2H-141831	54614695	05/15/95

Suspect(s)	Victim(s)
Short, Michael	P., Celeste

Offense: Sexual Assault
County of Offense: Harris (101)

Evidence Submitted

On December 11, 2003 in person by Larry Winkelmann:

1. Pubic combings from victim's sexual assault evidence collection kit
2. Blood sample from victim's sexual assault evidence collection kit
3. Blood sample from the suspect

Requested Analysis

Five hairs were present in the pubic hair combings.

The blood tube from the victim was swabbed. A blood stain card was made from the suspect's know blood sample.

Portions of the five hairs from the pubic hair combings were extracted by a method that yields DNA from tissue. A portion of the victim's blood tube swab and the suspect's blood card were extracted by a method that yields DNA from blood. The isolated DNA was subjected to the Polymerase Chain Reaction.

No DNA profile was obtained from hair #1 and the victim's blood tube swab.

The DNA profile from hair #2, hair #3, hair #4, and hair #5 is not consistent with the DNA profile of the suspect. **Michael Short is excluded as the contributor of the hairs.**