

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

**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.

## 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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## 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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## Kirkwood cont. from page 7

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.”<sup>1</sup>

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.”<sup>2</sup> 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.”<sup>3</sup> 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.

## Kirkwood continued on page 33

### 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.**

## Kirkwood cont. from page 32

The trial judge denied a post-conviction motion for a new trial based on the new evidence. Kirkwood appealed to the Pennsylvania Superior Court. During oral arguments about the appeal's merits, Tolvanen "admitted she tricked Fitts with the telephone records she waved in front of him. She acknowledged that she knew the telephone records didn't contain local calls and that she had misled the jury."<sup>4</sup>

After she made that admission, Superior Court Judge John Bender responded, "Did you just say, 'It really doesn't show anything. I was just trying to trick him?'" She answered "yes."<sup>5</sup>

The Superior Court decided to send the case back to the trial court for an evidentiary hearing.

On August 10, 2005, Common Pleas Judge Dominick Motto — who presided over Kirkwood's trial — vacated Kirkwood's conviction and ordered a new trial. In his 24-page opinion the judge ruled that Assistant DA Tolvanen's use of the telephone record to trick defense witness Fitts and mislead the jury denied Kirkwood's right to a fair trial. He wrote,

"The question was clearly a ruse designed to confuse the witness by suggesting that the telephone record disputed his testimony, when in fact it did not. Although it is entirely proper to test the credibility of a witness, it is not proper to test the credibility of a witness by misrepresenting evidence."<sup>6</sup>

Judge Motto also ruled that Kirkwood's trial lawyer was ineffective for failing to object to Tolvanen's use of the records she waived in the air and failing to request to examine them. If he had done that, "the implication made by the prosecutor would have been clearly refuted."<sup>7</sup> The judge ordered a retrial instead of dismissing the charges because he said Tolvanen's misconduct undermined the credibility of the witness, and not the court's credibility.

At the same time Judge Motto announced his ruling, he granted Kirkwood bail pending his retrial. He also ordered the Lawrence County sheriff to transport him back to New Castle from SCI Laurel Highlands in Somerset. However a day and a half later the sheriff hadn't dispatched a deputy to transport Kirkwood back to New Castle. So Kirkwood's lawyer persuaded the judge to allow his parents to pick him up. Kirkwood didn't know until he walked out of the prison that his parents, and not the sheriff, would be taking him back home.

As of mid-September 2005, the Lawrence County DA hasn't announced whether Kirk

## Prosecutor Accused Of Using Fraud To Win Kirkwood's Conviction

By JD Staff

A complaint filed with the Pennsylvania Disciplinary Board of the state Supreme Court accuses Lawrence County Asst. D.A. Birgitta Tolvanen of committing fraud during Justin Kirkwood's 2003 armed robbery trial in New Castle, Pennsylvania.

Jonathan Solomon, president of the Lawrence County Bar Association, filed the complaint in May 2005 — three months before Kirkwood's conviction was vacated on August 10, 2005, and a new trial ordered on the same misconduct by Tolvanen that Solomon described in his complaint.

During Kirkwood's trial, Bill Fitts' — the owner of New Castle's largest and oldest car dealership — testified that he called Kirkwood's home and talked with him at the exact time the robbery was being committed 20 minutes across town. In an effort to undermine Fitts' credibility, during her cross-examination of him, Tolvanen waved a sheaf of his phone records in his face during her cross-examination, and asked,

"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."<sup>1</sup>

It was later discovered that Tolvanen deceived the jury, the judge, and Fitts, because his phone records only listed long distance calls, and a call from Fitts' house to Kirkwood's house is a local call.

Solomon wrote in his complaint, "the testimony of the witness impeached by Ms. Tolvanen was crucial to the defense, in light

wood will be retried or the charges dropped. Although they have spent most of their life savings paying for their son's lawyers, his parents have vowed to help him until he is exonerated. After he was released on bond his dad David said, "He's innocent. He's wrongly accused. We'll fight this thing to the end. He had a very unfair trial."<sup>8</sup> His mother Debbie said, "I know he didn't do it. He was sitting in that kitchen with me and there's no way I'm giving up, no way."<sup>9</sup>

of the weakness of [other] evidence connecting the defendant to the crime.

"The district attorney's office has committed a fraud, not only upon the accused but also upon the court and upon the cause of justice. It is also an embarrassment to the legal profession."<sup>2</sup>

During the Pennsylvania Superior Court's October 2004 hearing of Kirkwood's appeal, Tolvanen admitted she deceived Fitts and misled the jury when she waved the phone records in his face and implied that if he had made the call to Kirkwood's home it would be listed on the bill.

When she made that admission, Superior Court Judge John Bender said, "Did you just say, 'It really doesn't show anything. I was just trying to trick him?'" She said yes.<sup>3</sup>

After the Superior Court sent the case back to the trial court for an evidentiary hearing, Kirkwood's conviction was vacated on the basis of Tolvanen's deception, and a new trial ordered. Kirkwood was released on bond after two years imprisonment.

Solomon's complaint also requested investigation of the Lawrence County district attorney's office for its failure to disclose to Kirkwood's attorney that the New Castle police officer who showed Kirkwood's photo to the eyewitnesses was under suspension for misconduct when he testified at Kirkwood's trial.

Solomon's complaint further requested investigation of allegations that a man who resembled Kirkwood and admitted committing other robberies near the craft store before he committed suicide at the Lawrence County Jail, may have confessed to the robbery Kirkwood was convicted of committing.

### Endnotes and Sources:

1 Lawrence County Prosecutor Accused of Trial Misconduct, Bill Moushey, *Pittsburgh Post-Gazette*, May 24, 2005.

2 *Id.*

3 Kirkwood Robbery Case Brings Witnesses' Memories Into Question, Bill Moushey, *Pittsburgh Post-Gazette*, May 8, 2005.



### Endnotes (Sources the same):

1 Kirkwood Robbery case brings witnesses' memories into question, by Bill Moushey and Nathan Crabbe, *Pittsburgh Post-Gazette*, May 8, 2005.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 New Castle Conviction Tossed Out, Bill Moushey, *Pittsburgh Post-Gazette*, August 11, 2005.

7 *Id.*

8 Convicted Man Gets New Trial, Debbie Wachter Morris, *New Castle News*, August 11, 2005.

9 New Castle Man Released From Prison After Judge Tosses Out 2003 Robbery Conviction, Bill Moushey, *Pittsburgh Post-Gazette*, August 13, 2005.

