

*Justice: Denied* has published several articles related to the wrongful murder convictions of four innocent men in Boston based on the perjured testimony of one of the actual murderers – a mob hitman who was an FBI informant protected from prosecution by that agency. (See, FBI's Legacy of Shame, *Justice: Denied*, Winter 2005, Issue 27, p. 24.)

Compelling evidence supports that Frederick Weichel is another innocent victim of the FBI's intimate alliance with Boston mobsters. On the basis of one suspect eyewitness, Weichel was convicted in 1981 of a murder that Thomas Barrett later confessed to in a letter and during conversations. Barrett has been directly linked to James "Whitey" Bulger – a notorious Boston mobster protected from prosecution for many years by the FBI. (See article on p. 34 of this issue.)

As of September 2005 Weichel remains imprisoned, as he has been for 24 years. Weichel wrote *Justice: Denied* a one page letter that was accompanied by a Boston judge's October 2004 decision vacating his conviction and ordering a new trial. The state appealed to the Massachusetts's Supreme Court, where briefing will be completed in October 2005. Weichel told *Justice: Denied* the judge's decision "says it all." He is right. So *Justice: Denied* is letting his story be told by way of the judge's decision. Due to space considerations, redundancies, extraneous information and most case citations have been edited out. The full Weichel decision is available on JD's website at <http://justicedenied.org/legal/weichel1004.pdf>.

COMMONWEALTH OF MASSACHUSETTS  
Norfolk ss.  
Superior Court Case No. 77144  
Commonwealth v. Frederick Weichel

MEMORANDUM OF DECISION AND  
ORDER ON DEFENDANT'S MOTION  
FOR A NEW TRIAL

1: INTRODUCTION

On August 20, 1981, a jury convicted defendant Frederick Weichel ("Weichel") of first degree murder in the Superior Court, Norfolk County, Barton, J., presiding. The Supreme Judicial Court ("SJC") affirmed his conviction on September 2, 1983. See *Commonwealth v. Weichel*. 390 Mass. 62 (1983). In August 1991, the defendant filed a motion for a new trial pursuant to Mass. R. Crim. P. 30(b) arguing ineffective assistance of counsel. Barton J. denied the motion in a margin decision, and the defendant did not appeal. Weichel now moves for a new trial pursuant to Mass. R. Crim. P. 30(b) on the grounds of newly discovered evidence and ineffective assis-

## Convicted of Murder Committed By FBI Protected Mobster The Frederick Weichel Story

tance of counsel. On December 20, 2002, I granted the defendant's motion for an evidentiary hearing based solely upon the claim of newly discovered evidence and denied the motion on all of the other grounds asserted.

During the evidentiary hearing on July 22, 23, 31, August 7, September 15, and October 23, 2003, the defendant presented testimony regarding two forms of evidence to support his newly discovered evidence claim: (1) an allegedly exculpatory letter dated March 19, 1982, sent on or about that time, to the defendant's now deceased mother, Gloria Weichel, and (2) Thomas Barrett's alleged confession to killing Robert LaMonica to Sherri Robb, a social worker with whom Barrett lived with periodically in the 1980's. The defendant contends that this evidence would have been admissible at his trial, that it casts real doubt on the justice of his conviction, and that justice requires a new trial so that he can admit this evidence and a jury should have the benefit of considering it, together with all the other evidence.

### II. BACKGROUND

Robert LaMonica ("LaMonica") was shot and killed near his apartment building after parking his car shortly after midnight on May 19, 1980. At the time of the shooting, four youths were gathered across the street at Faxon Park. These four eyewitnesses heard four shots and saw a man run from the direction of the shots, past the park, and into the passenger side of a parked car, which quickly left the area. None of the witnesses saw a driver.

That night and into the morning, the prosecution's key eyewitness, John Foley, worked with police to put together a composite drawing of a man strongly resembling Weichel. The next day, Foley chose the defendant's photo from an array at the police

station. About ten days to two weeks later, Foley again identified Weichel as the shooter by selecting the defendant's picture in a photo array with the police present. On June 12, 1980, during a police-escorted drive with the victim's two brothers, Foley drove around the streets of South Boston in a van and again identified Weichel as the man he saw run by Faxon Park on the night of the shooting.

At trial and on appeal, Anthony M. Cardinale ("Cardinale"), Weichel's trial and appellate counsel, presented alibi and misidentification theories, with Cardinale raising the issue of misidentification and other errors on appeal. Only one of the four youths gathered in Faxon Park on the night of the shooting, Foley, could describe the man he observed running in the distance. On cross-examination, Cardinale challenged Foley about his identification of Weichel and surrounding circumstances in an attempt to inject some degree of doubt into the jury's mind as to the accuracy of Foley's composite drawing and identification of the defendant. Foley's trial testimony revealed that he observed the man running for approximately seven seconds, *just one second of which he viewed the runner's full face*. In addition, Foley and his three companions in Faxon Park admitted to *consuming alcoholic beverages* prior to arriving at the park.

After reviewing the transcript of the defendant's trial and 1983 appeal, it is clear that the case against Weichel was not one of overwhelming guilt.

### III. FINDINGS OF FACT

#### BARRETT'S MURDER CONFESSION LETTER

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## From Wrongful Murder Conviction To Multi- Millionaire In Five Years

By Hans Sherrer

Five years ago, *Justice: Denied* reported on DeWayne McKinney's exoneration of robbery and murder convictions and his release after more than 19 years of wrongful imprisonment. See, "The 19-Year Ordeal of Dwayne McKinney: Injured and on Crutches 30 Miles Away From a Murder Is Finally Recognized as an Alibi," *Justice: Denied*, Vol. 1, Issue 11. This is an update about what Mr.

McKinney has experienced since his release.

DeWayne McKinney was convicted in 1982 of murdering the night manager of an Orange, California Burger King during the robbery of \$2,500 from the restaurant.



DeWayne McKinney near his Hawaii beachfront home in July 2005. (Allen J. Schaben / LAT)

McKinney was first implicated in the crime when one of the restaurant workers saw his

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## Weichel continued from page 9

During her lifetime, Gloria Weichel spoke periodically with her sister, the defendant's aunt, Lorrie Doddie ("Doddie") of Garden City, Michigan. Doddie testified credibly as to a telephone conversation that occurred during a twelve to twenty-four month period in 1982 and 1983, in which Gloria Weichel read Doddie a letter she had received appearing to be from a friend of the defendant. As Doddie recalled, the letter stated that the declarant was sorry and had not meant to hurt the defendant, but that the writer had killed the man for whom the defendant was convicted of murdering. Doddie further recalled her sister telling her that the letter appeared to have originated in California. During this same conversation, Gloria Weichel also told Doddie that two men she did not know had come to her South Boston home asking for the letter but that she did not give it to them. Based upon Doddie's credible testimony, I find that the defendant's mother expressed fear to her sister about the letter and the two men who came to her door.

Sometime around 1990, Gloria Weichel entrusted the alleged confession letter purportedly authored by Barrett to Frances Hurley ("Hurley"), an attorney and acquaintance of the defendant's family. Hurley testified that he first kept the letter, contents unknown to him, in a safe and later in a locked desk drawer in his professional office until some time after the death of Weichel's mother. Hurley testified credibly that it was his practice to hold letters and other documents for people he knew, often without being aware of the contents, as was the case with this letter. Hurley also testified that the defendant's friend, Don Lewis ("Lewis") contacted him in or around 2001-2002. Hurley stated that he did not learn the contents of the letter until after he received the defendant's permission to provide copies to Lewis and Jonathan Wells ("Wells"), a reporter from the Bos-

ton Herald. Additionally, Hurley testified that he delivered the original letter in its envelope to Carol Fitzsimmons, co-defense counsel for Weichel on this motion, around August of 2001.

Lewis, a family friend paying at least a portion the defendant's legal fees, testified that he learned that Hurley was holding a letter for the then-deceased Gloria Weichel around the year 2002. Lewis recalled that Weichel had also been speaking with Wells and told Lewis that the letter "may have information to convince Wells that Weichel was innocent." At the direction of the defendant's counsel, Lewis held to original envelope and letter in his custody briefly before turning it over to Alan Robillard, the handwriting expert retained by the defendant.

Barrett's mother and siblings, Veronice, Anne Marie, and Paul Barrett, respectively, testified that Barrett moved to California, either Mill Valley or Sausalito, subsequent to the defendant's trial and conviction. Veronice Barrett recalled that her son wrote and called occasionally and was living with Weichel's friend, Sherry.

Weichel testified that Whitey Bulger ("Bulger") and Stephen "The Rifleman" Flemmi ("Flemmi") approached him approximately four times prior to his arrest and once after his arrest while he was released on bail and awaiting trial for LaMonica's murder. At the first meeting, which took place in Bulger's motor vehicle in front of Weichel's residence, Weichel testified that Bulger told him, "*I do not want you to bring up Tommy Barrett's name ever.*" Weichel further testified that *Bulger threatened to harm him or his family should the defendant disregard Bulger's warning.* Weichel understood that the visit was a warning to ensure that he never spoke of Barrett.

The positions of Bulger and Flemmi when they met with the defendant are relevant here; they were leaders of gangs that operated largely in South Boston during the 1970s and 1990s. Bulger and Flemmi operated gambling rackets and trafficked in narcotics and weapons. *Neither party disputes that Bulger and Flemmi were ruthless killers who used fear, intimidation, coercion, threats, and murder to hold the community of South Boston hostage. Their gangs worked with virtual impunity as the FBI protected and even aided Bulger, a confidential informant for the FBI.* In the mid-1990's Bulger fled authorities and remains at-large. Bulger has previously sat atop the FBI's most wanted list and remains on it currently. Flemmi is incarcerated and has assisted investigators in locating the bodies of people that he, Bulger, and their associates murdered.

Around 1982, the defendant claims that Gloria Weichel informed him that she had re-

ceived a letter from Barrett that year declaring the defendant's innocence. However, given Bulger's threats, the defendant stopped his mother before she could divulge the actual contents of the letter. Weichel made no further inquiry into the alleged letter until after his mother's death and Bulger's flight from law enforcement. Weichel indicated that he refused to confront the contents of the letter because of Bulger's threats. Weichel testified that it was not until 2001, after his mother's death and at which point Bulger was a "fugitive from justice," that he finally inquired and learned the contents of the letter in Hurley's possession.

On July 22, 2003, Barrett, who allegedly wrote the letter at issue in this case, took the witness stand and invoked his Fifth Amendment privilege against self-incrimination.

The defense presented a handwriting expert, Alan Robillard ("Robillard"), a former FBI agent specially trained in the field of Questioned Documents with a Masters Degree in Forensic Science from George Washington University, to testify as to his opinion about whether Barrett wrote the alleged confession letter and the envelope containing it. Robillard based his opinion on the examination and comparison of two questioned documents, the letter dated March 19, 1982, allegedly received by Gloria Weichel as well as the envelope containing it from Mill Valley, California. After examining, testing, and comparing the two questioned documents with five known documents, including: two letters (one dated April 16, 1982), three envelopes that Barrett sent to Weichel after the defendant's incarceration, and two photocopied applications for a boxing license in California purportedly signed by Barrett, Robillard opined that it was highly probable that Barrett signed the questioned documents. Robillard's testimony was credible and believable; I find that Barrett wrote the letter and envelope at issue in this motion for a new trial.

### BARRETT'S MURDER CONFESSION TO ROBB

Robb, a social worker from Glendale, California, testified on July 31 and September 15, 2003. Robb stated that she worked in and around the South Boston area in the early to mid-1970's. At that time, Robb testified that she knew the defendant and was familiar with Barrett. For a period of time while still in Boston and before she moved to Sausalito, California in the late 1970's or early 1980's. Robb and Weichel had a romantic relationship. In the summer or early fall of 1980, the defendant called Robb in Sausalito and told her that Barrett was in trouble: the defendant did not elaborate. The defendant asked Robb if Barrett could stay with her because Barrett had

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### **"Whitey" Bulger On Run For 11 Years**

In December 1994, Boston mobster James "Whitey" Bulger, whose illegal activities had been protected for decades by the FBI, was tipped off by an FBI agent that he was about to be federally indicted for 21 murders and assorted other charges.

Bulger has eluded capture for almost 11 years, even though he is on the FBI's Most Wanted list and there is a \$1 million dollar reward on his head — and he isn't traveling light, since he is reportedly accompanied by his long-time girlfriend.

In August 2005 it was reported that Bulger has repeatedly been tipped off when close to capture. That indicates FBI personnel are continuing to protect him. Considering Bulger's willingness to use violence and the umbrella of protection provided by his well-connected friends, Frederick Weichel had good reason to heed his warnings to remain silent.

Source: Rat: Tips foiled feds' efforts to nab Whitey, *Boston Herald*, August 23, 2005.  
10 years, six continents, still no 'Whitey', *Baltimore Sun*, August 28, 2005.

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to get out of South Boston. Robb agreed and Barrett arrived at her home shortly thereafter.

Barrett stay with Robb and her roommate continuously over the next two or three months. About a year or a year and a half later, Barrett stayed with Robb again, this time in Mill Valley, California, for a two or three week period. She remained in contact with Barrett through the 1980's and even lived with him for six months in a house that Barrett's mother and Robb owned in Larchmont, California. When their co-habitation terminated in Larchmont, Robb never saw or heard from Barrett again.

Over the course of many face-to-face and telephone conversations, *Barrett told Robb that he "wanted to kill himself because someone was taking the rap for something that he did."* Barrett further told Robb that it was Weichel who was wrongly accused and in prison and that Barrett had in fact killed someone. Robb testified that she "pieced it together," that Barrett had committed the crime for which the defendant was convicted and incarcerated. Robb stated that she urged Barrett to "do the right thing," but that she never discussed Barrett's claims with his family or anyone else. Robb testified that the only time she referenced Barrett's statements to Weichel was during a conversation they had after the defendant had been in prison for "awhile" when she asked, "how could a friend not come forth?" According to Robb, that was the extent of their conversation about Barrett's statements to her. I find Robb's testimony to be credible.

I find the defendant's testimony that he was unaware of the contents of the letter to be credible. Although the defendant knew of the letter's existence for over twenty years prior to his filing a motion for a new trial, he did not know the letter's import. The backdrop of South Boston provides the context which buttresses Weichel's credibility. *The defendant was accused of murder and received five visits from Bulger and Flemmi. During those visits, Bulger made it abundantly clear that Tommy Barrett was a name that Weichel was not to utter. The forch behind Bulger's admonition derived from his reputation for ruthlessness and violence earned by terrorizing the South Boston community. Bulger's threats were not empty.*

When Gloria Weichel approached her son with news of a letter written by Barrett, Weichel did not want to discuss it. It is fair to infer that at the time Gloria Weichel told her son about the letter, Bulger's threats to him were fresh; Weichel had been convicted of murder just months earlier. Bulger's words would have been at the peak of their potency, given that Weichel had only been incarcerated for a few months. It is credible that Weichel would not have inquired

about the contents of the letter at that point, and that he did not do so until 2001.

### A. NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE

"A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of conviction." Evidence is newly discovered if it is unknown to the defendant and not reasonable discoverable by the defendant at the time of trial or at an earlier motion for a new trial. Evidence casts real doubt on the justice of the conviction if there is "a substantial risk that the jury would have reached a different result if the evidence had been admitted a trial."

#### 1. The Letter

In considering the defendant's motion for a new trial, the court must determine whether Weichel knew or reasonably could have discovered the exculpatory content within Barrett's March 19, 1982 letter. In assessing whether evidence is "newly discovered", the court should consider whether the defendant has proved that the evidence could not have been discovered with reasonable diligence.

This is not a case where the defendant knew about the evidence prior to trial. Some time after his trial, Weichel did learn about the existence of a letter from Barrett to his mother, however, the court finds and rules that Weichel did not know the letter's contents. Still, whether the defendant could have reasonably discovered the exculpatory content of the letter, requires more analysis.

In this case, the effects of Bulger's threats, the undisputed and widely known reputation earned by Whitey Bulger, reasonably and readily prevented Weichel from learning about and making use of the exculpatory evidence contained in Barrett's letter. Bulger's iron grip on the South Boston community in the 1970s and 1980s is without doubt. Bulger personally appeared at the defendant's home five times to threaten not only the defendant's life but the lives of his family as well. In addition, two unidentified men paid a visit to Weichel's mother at her home seeking the letter. Even if the defendant had the opportunity to discover the contents of Barrett's letter, his and his mother's reasonable fear provide strong support for his ignorance. Given the intense fear and intimidation the defendant faced at the hands of Bulger and Flemmi, it was reasonable for Weichel to be afraid for himself and especially for his family and decide not to uncover the content contained in Barrett's letter.

#### 2. Barrett's Oral Confession To Robb

Barrett's confession to Robb that he killed LaMonica also constitutes newly-discovered evidence. Weichel's council on his motion for a new trial did not discover that Robb had information relating to the defendant's case until after the evidentiary hearing had begun, and there is no evidence that Weichel had any reason to believe that Robb possessed exculpatory evidence.

### B. ADMISSIBILITY OF THE EVIDENCE

Though newly discovered and material, both Barrett's March 19, 1982, letter and his statements to Robb are hearsay, and as such, their admissibility must be established under the statement against penal interest exception to the hearsay rule.

Hearsay evidence is admissible as a statement against penal interest if three elements are met: "(1) [T]he declarant's testimony must be unavailable; (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable man in his position would not have made the statement unless he believed it to be true; and (3) the statement, if offered to exculpate the accused, must be corroborated by circumstances clearly indicating its trustworthiness. These requirements provide "strong safeguards" against "the hazards of fabrication or unreliability with respect to" statements against a declarant's penal interest.

In this case, the first element to the statement against penal interest exception to the hearsay rule is satisfied because Barrett's invocation of his constitutional right against self-incrimination at the hearing on the defendant's motion for a new trial renders Barrett's testimony unavailable. Regarding the second element, the court must consider not only whether Barrett's oral and written statements were against his interest but also whether Barrett was aware that they were against his interest, since it is the knowing risk of likely harm to the declarant that makes statements against interest inherently reliable.

Barrett's March 19, 1982, letter was clearly against his interest. In the letter, written just months after Weichel's conviction, Barrett directly inculpates himself in LaMonica's murder. Detective Sprague questioned Barrett in the aftermath of LaMonica's murder and even produced a composite drawing of Barrett. So Barrett was clearly aware that he was a suspect in the case. Still, the extent to which Barrett believed that sending a letter to Gloria Weichel after Weichel's conviction would subject him to criminal liability presents a separate question.

I find that Barrett reasonably believed that the defendant's mother could and would alert the police to his letter.

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Barrett's statement to Robb about LaMonica's murder were also against his interest. Barrett could have reasonably believed that Robb would inform the police of Barrett's confession, thereby subjecting him to criminal liability. Robb had dated the defendant and maintained a platonic relationship with him after she left Boston. In fact, Weichel was the person who arranged for Barrett to stay with Robb in California. I would have been clear to Barrett that Robb's loyalty was likely to have been with Weichel and not with him.

Consequently, since the defendant offers Barrett's oral and written statements to exculpate himself and inculpate Barrett, the central question for this court on the issue of admissibility is whether the defendant has shown the Barrett's statements are sufficiently corroborated "by circumstances clearly indicating (their) trustworthiness." Such inquiry ensures that fabricated exculpatory evidence is not introduced.

In assessing whether corroborating circumstances indicate the trustworthiness of an out-of-court statement, a judge should not attempt to determine whether the statement is true, but rather, "whether, in light of the other evidence already adduced or to be adduced, there is some reasonable likelihood that the statement could be true".

Finally, a judge should consider: whether the statement was made spontaneously; whether other people heard the out-of-court statement; whether there is any apparent motive for the declarant to misrepresent the matter; and whether and in what circumstances the statement was repeated"

Massachusetts courts have used these factors numerous times to determine the admissibility of hearsay declarations. In *Commonwealth v. Galloway*, 404 Mass. 204, 208-209 (1989), the SJC held that the trial judge should have allowed three witnesses to testify at trial about the declarant's statement that he committed the crime for which his cousin was being tried. 404 Mass. at 209.

The Massachusetts Appeals Court also found sufficient corroboration to merit the admissibility of a confession under the statement against penal interest exception to the hearsay rule. In *Commonwealth v. Fiore*, 53 Mass. App. Ct. 785, 791 (2002), the Appeals Court found that the admission by the defendant's husband that he may have started the fire for which she was convicted of arson was admissible as a statement against penal interest. In reversing the defendant's conviction, the Appeals Court concluded that the Commonwealth's failure to present evidence that an accelerant was used, its failure to place the defendant at the source of

the fire, and testimony placing the declarant at the source of the fire shortly before it was discovered, sufficiently corroborated the husband's statement. *Id.* at 791-792.

Federal courts have identified three additional factors consider in-determining whether adequate corroboration supports a hearsay statement's admissibility: (1) the closeness of the relationships between the parties involved; (2) whether the declarant made the statement after Miranda warnings were given; and (3) whether the declarant made the statement to curry favor with authorities.

In applying these factors to this case, the circumstances in which Barrett confessed to LaMonica's murder indicate their trustworthiness. Barrett clearly had reason to believe that he was both a suspect and co-suspect in the LaMonica homicide. Barrett was also familiar with the law; Detective Sprague detailed Barrett's legal rights for him. Furthermore, Barrett's inculpatory statements came shortly after Weichel's conviction and without currying favor with anyone. Consequently, the fact that Barrett's oral and written confessions occurred after he had fled to California and amidst a homicide case that was still relatively fresh, makes it unlikely that Barrett would expose himself to criminal liability by lying about his involvement in LaMonica's murder.

Further enhancing their reliability, Barrett's confessions were repeated; Barrett's essentially identical statements to Gloria Weichel and Robb corroborate each other. Moreover, Barrett's retelling of the story indicates his awareness of his actions and supports the contention that Barrett's confession to Robb stemmed from his grief and guilt over the fact that Weichel was serving what should have been Barrett's time in prison.

In carefully applying the factors set forth above to the evidence as presented through witness testimony, exhibits, arguments by counsel during the hearing on the defendant's motion for a new trial, as well as the trial transcript, I find and rule that both Barrett's written and oral confessions would be admissible at trial. The totality of the circumstances of this case, clearly show that Barrett had little to gain and much to lose by confessing to the murder of Robert LaMonica. Given the unlikelihood that Barrett would fabricate a story and risk criminal liability by twice repeating it to two people who were loyal to the defendant. I find that sufficient corroboration merits the admissibility of Barrett's confessions.

### C. WHETHER THE NEWLY DISCOVERED EVIDENCE CASTS REAL DOUBT ON THE JUSTICE OF WEICHEL'S CONVICTION

In addition to showing that the evidence is newly discovered, a defendant seeking a new trial based on newly discovered evidence must also show that the evidence casts real doubt on the justice of the conviction. A defendant meets this burden by demonstrating that the purported newly discovered evidence is both credible, material, and carries "a measure of strength in support of the defendant's position." In assessing whether newly discovered evidence casts doubt on the defendant's conviction, the determination for the court is "not whether the verdict would have been different, but rather, whether the new evidence would probably have been a real factor in the jury's deliberations." Consequently, the strength of the case supporting the defendant's conviction at trial is relevant in assessing the materiality of the evidence.

The case against [Weichel] was not one of overwhelming evidence of guilt; it was an identification case in which only one of four eyewitnesses on the scene, Foley, was able to identify the defendant, and with *only seconds*, late at night, to make the observations. Beyond that, however, the evidence of guilty was thin. A gun was found nearby that was consistent with bullets that shot the victim but nothing linked the defendant to that weapon. There was no other evidence; no weapon, fingerprints, or vehicle identification connecting the defendant to the crime.

Both Barrett's written and oral confessions cast real doubt on the justice of Weichel's conviction, especially since the conviction was not based on overwhelming evidence of guilt. The exculpatory evidence contained in Barrett's letter to the defendant's mother and in his confession to Robb were not available at trial. Since Weichel did not have the opportunity to present this exculpatory evidence to the jury, he is entitled to that opportunity now, in order to receive a fair trial, and because the newly discovered evidence casts doubt on the conviction.

The court notes that *either Barrett's letter or his statements to Robb*, taken alone, are enough to merit a new trial in this case. All of the evidence together provides particular strength to its weight.

The court ORDERS that the defendant's motion for a new trial is ALLOWED.

Isaac Borenstein  
Justice of the Superior Court  
Dated: October 25, 2004

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