

### JD Note:

This is Part VI of a serialization of an article published in the Fall of 2003 by the Northern Kentucky Law Review. It is the first extended critique published in this country of the critical role played by judges in causing wrongful conviction at the trial level, and then sustaining them on appeal. The extensive footnotes are omitted from this reprint, but ordering information of the complete article is at the end of the article.

## The Complicity Of Judges In The Generation Of Wrongful Convictions

By Hans Sherrer

Part 6 of a 7 part serialization

### VII.

#### Why The Judiciary Is Dangerous For Innocent People

The pervasiveness of outside influences dominates and even controls the decisions of judges at all levels from the lowliest city traffic court magistrate to the justices of the U.S. Supreme Court. The infection of politics throughout the judicial process helps one to understand how it can be that the U.S. Supreme Court found that it is constitutionally permissible for a person to be denied the opportunity to have proof of their actual innocence duly considered before they are carted off to be executed like an abandoned dog or cat in an animal shelter. In *Herrera v. Collins*, Leonel Herrera's four affidavits attesting to his innocence, including one from a person who attested to knowing who the real killer was, were dismissed as constitutionally insufficient to prevent his execution for a murder that he evidently did not commit. In his dissent, Justice Blackmun valiantly rallied against the virtual lawlessness the Court's majority was endorsing: "Of one thing, however, I am certain. Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who can show that he is innocent comes perilously close to *simple murder*."

Mr. Herrera's case is symbolic in that the foremost duty of a judge is to ensure the conveyor belt of the law enforcement system is kept moving, and if the receipt of justice by innocent men and women is sacrificed, that is just too bad for them. As one lawyer put it, "judges are conductors whose job is to ensure trainfuls of defendants continue to be

processed in a timely and uninterrupted manner." Perhaps more disturbing is that state and federal judges do not necessarily engage in rubber stamp justice to satisfy political needs, but because they are as integral a part of the political process as are state and federal representatives, senators and other elected and appointed public officials.

One need look no further for confirmation than the overwhelming percentage of rulings that a trial judge makes in favor of the government during a prosecution. All things being equal, the law of averages would dictate that the defense and the government would be *expected* to be considered "right" on a roughly equal number of issues during the course of a case. In reality that is a Pollyanna pipedream. It is inconceivable that a single judge in this country rules in favor of the defense on average anywhere close to half the time. It is irrelevant whether the prejudicial attitude of judges that stacks the deck heavily against a defendant from the beginning is conscious or unconscious, since its impact is the same either way.

That emphasizes the great danger posed to defendants by how amazingly easy it is for a judge to fix the outcome of a trial. Judges do this by such methods as: manipulating the jury selection process; deciding which witnesses can testify and what testimony they are allowed to be give; determining the physical and documentary items that can be introduced as evidence; deciding which objections are sustained or overruled; conveying to the jurors how the judge perceives the defendant by the tone and inflections in his voice and his body language toward the defendant and his or her lawyer(s); and by the instructions that are given to the jury as to the law and how it should be applied to the facts the judge permitted the jurors to see and hear.

The entire process makes it remarkably easy for the outcome to be rigged against a defendant disfavored by the judge, who all the while can make the proceedings have the superficial appearance of being fair towards the defendant being judicially sandbagged. As sociologist and legal commentator Abraham Blumberg noted, "A resourceful judge can, through his subtle domination of the proceedings, impose his will on the final outcome of a trial." Thus, in a very real sense, any criminal trial in the U.S. is potentially what is called a show trial in other countries, since the judge's opinion of a person's guilt or innocence can be the primary determinate of a trial's outcome, and not whether the person is actually innocent or guilty. Playing an important role in a judge's subtle manipulation of the proceedings in his/her courtroom is the judge's use of mind control techniques on jurors – the same techniques that are known to be used by law enforcement interrogators to

extract false confessions from innocent men and women. The use of these insidious techniques is a virtually unexplored aspect of how judges operate in courtrooms today, and it is a significant contributor to wrongful convictions. That is to be expected given the known role of those techniques in generating false confessions. Needless to say, this power is often used to the detriment of innocent men and women, because a judge can use all the methods and nuances of his craft to steer a trial in the direction of concluding in the way he or she has pre-determined it should end.

One of the mind control techniques in a judge's arsenal is to use the "light of truth" throughout a trial – from *voir dire* through the issuing of jury instructions – to influence jurors to arrive at a conclusion consistent with what the judge desires. The "light of truth" works when the judge uses his position as the purveyor of truth and goodness to influence the jurors to make a "false confession" about what they believe when they return their verdict. It is not uncommon for jurors, after the artificial influences they were subjected to in a courtroom have worn off, to say they would vote differently if they had it to do over again. In some cases one or more jurors have publicly proclaimed the innocence of the person they voted to convict. A recent well known example of this is that at least two jurors who voted to convict former Ohio State Representative James Trafficant publicly stated after his trial that they thought he was innocent and had been wrongly convicted. There are also accounts of jurors aiding in the overturning of a conviction of someone they voted to convict, but who they became convinced was innocent.

In a similar vein, jurors have been known to comment after a trial that they thought the defendant was not guilty, but based on what the judge told them to do, or perhaps only implied they must do (through his tone of voice and body language), they felt like they had to vote guilty, if for no other reason than to make the judge happy. A well known example of a jury convicting someone they did not think was guilty, was when baby doctor and author Benjamin Spock was convicted for aiding draft resisters during the Vietnam War. In Jessica Mitford's book about his case, *The Trial of Dr. Spock*, jurors are quoted as saying he was not guilty, but they thought the judge's jury instructions gave them no choice but to convict him. This is an indicator of the effectiveness of the psychological manipulation techniques used on jurors by judges: they are able to induce jurors to vote someone guilty that the jurors believe at the time to be innocent. It is a real life confirmation of how lay people acted in Professor Stanley Milgram's famous Yale University experiments, when they applied what they

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## Complicity cont. from p. 29

thought was life threatening voltage to an innocent person strapped to a chair simply because they were instructed to do so by an authority figure in a white coat. Judges wearing a black robe instead of a white technician's smock confirm the validity of Professor Milgram's experiments every day in courtrooms all across the country. So what has subtly gone on in courtrooms for over a hundred years, since the Supreme Court's decision in *Sparf v. United States*, is nothing less than a sophisticated form of psychological manipulation of the jurors to produce the judge's desired verdict.

Of course, once a conviction is obtained, whether solely by psychologically torturing the jurors or a combination of multiple juror manipulation techniques, it is extraordinarily difficult for a defendant's conviction to be reversed on appeal to a higher court. Even when a higher court rebukes a trial judge, it often has no effect on the judge's conduct or rulings. In some cases a judge will simply ignore the order of the higher court that has no real power to force compliance with their edict.

The fact based documentary-drama, *Without Evidence*, about the trial and conviction of Frank Gable for the 1989 murder of Oregon Department of Corrections Director Michael Franke, graphically demonstrates how blatantly a trial judge can, to all appearances, successfully fix the conviction of what may be an innocent man, and how difficult it is for a defendant to have those prejudicial actions undone on appeal. Judges are literally able to do this with near impunity because of the discretion they are given to determine the ebb and flow of a trial by appellate courts reluctant to reverse lower court rulings. A skilled judge can use the latitude they are granted to express their preferences about a defendant while superficially appearing to the casual observer to be primarily concerned with protecting the dignity of the proceedings. It is also important to consider that even when a judge does not have a pre-judgment about a defendant, their typical prosecutorial bias can express itself in the form of a conscious or unconscious leaning toward the defendant's guilt. Although judges vary in the obviousness of expressing their preference for a defendant's conviction, they are all able to effectively do so whenever it suits them.

Part 7 will be in the next issue of *Justice:Denied*. **To order** the complete 27,000 word article, mail \$10 (check or money order) with a request for - **Vol. 30, No. 4, Symposium Issue** - to:

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## Analysis cont. from page 6

- Footwear impressions on the polished wooden floor of the apartment and bedroom
- More sign of struggle or fight
- More debris tracked in by multiple offenders
- More hair and fibers in the scene
- Hair and fibers on the victim's shirt
- Greater disturbance to apartment
- Damage to apartment
- More theft
- Furniture movement in apartment
- There is no sign that anyone cleaned up in the bathroom or kitchen
- A mixture of semen and different DNA's found upon analysis

### Wounds

If multiple offenders had committed this crime, it is expected that far more damage would have been inflicted upon the victim and that damage would have been evident at autopsy.

- The victim had blood under her fingernails from defending herself; if she were fighting several offenders it is expected that she would have "restraint injuries" (e.g., bruises to wrists, ankles, arms, legs)
- Victim managed to scratch one assailant; if there were multiple assailants present, she would have had the opportunity to scratch or bite more; however, the DNA of only one offender was under her fingernails and oral swabs did not reveal any DNA other than the victim's.
- With multiple offenders restraining a victim blunt force trauma is often found to the victim's face (e.g., black eye(s), facial bruising, lacerated lips, inner lip cuts, damaged nose); none was present in this case.
- If multiple offenders had stabbed the victim, it is expected that there would be a greater variation in wound location, direction, size, and depth.

### Behavioral Evidence

- Noise
  - ✓ Multiple offenders involved in a gang rape may have generated enough noise that the neighbors would have immediately noticed and reported the noise to police, or to authorities, during their neighborhood canvas
  - ✓ If multiple offenders did not make much noise during the crime, they may have done so during their exit from the apartment, from the building, or from the apartment complex
- Notice of presence
  - ✓ While one person traveling about an apartment complex may go unnoticed, multiple people are a crowd; and a crowd of only males is a suspicious crowd that would

probably have not gone unnoticed to the neighbors and would have been reported to the police during their neighborhood canvas [JD Note: The resident's of Moore-Bosko's apartment complex were very watchful over their living environment and proactive in protecting it. Just two weeks prior to Moore-Bosko's rape and murder, an angry mob of apartment dwellers chased Ballard to their apartment after he had beaten a young girl with a baseball bat, and her husband, William Bosko, let him in and refused to turn him over to the crowd.]

- Rearrangement of furnishings
  - ✓ Only two chairs (of four) were pulled away from the dining table; if multiple offenders had been present, there should have been greater disruption of the furniture that would have been noticeable in the neat apartment

## Why the Evidence Supports This as a Single-Offender Crime

### Physical Evidence

The physical evidence, wounds, and behavioral evidence are consistent with a single offender having committed this crime. Additionally, only one DNA profile was found on and in the victim. (p. 25)

### Wounds

The wounds found at this scene were consistent with what would be expected at a single-offender scene. There were no abrasions on victim's arms or legs, and no blunt force facial trauma as would be expected from multiple assailants. If multiple offenders had stabbed the victim, it is expected that there would be a greater variation in wound location, direction, size, and depth. In this case, the wounds indicate one offender that tormented/controlled, then tentatively stabbed, then resignedly stabbed.

### Behavioral Evidence

The behavioral evidence found at this scene is consistent with what would be expected at a single-offender scene where the offender went to the residence for a sexual encounter. The victim was killed so she would not be able to testify that the sexual encounter became a violent sexual assault. Searching through the victim's purse was an afterthought to the crime.

**Note:** The **Assessment of Ballard's Statements** and the **Assessment of Williams, Dick, Wilson, and Tice's Statements** on page 31 are excerpted from "Crime Scene Analysis and Reconstruction of the July 8, 1997 Sexual Assault and Murder of Michelle Moore-Bosko."

## Analysis cont. on p. 31