

# Prosecutor Finally Caves To Ohio Attorney General's Plea To "Free Clarence Elkins"

By James Love



Clarence Elkins and his wife Melinda as he walked out of Ohio's Mansfield Correctional Institution on December 15, 2005.

In an unusual display of candor by a State Attorney General, Ohio Attorney General Jim Petro sent a letter on

October 28, 2005, to Summit County Prosecutor Sherri Walsh, supporting the release from prison of convicted murderer and rapist Clarence Elkins

after new DNA evidence implicated Earl Gene Mann, a former neighbor of the victims. After Elkins' trial Mann was convicted of raping his three pre-teen daughters, and is now serving time in Ohio.

A jury convicted Elkins on June 4, 1999, of murder, attempted aggravated murder, three counts of rape and felonious assault against his mother-in-law, 58-year-old Judith Johnson, and his 6-year-old niece who had been visiting her grandmother. Elkins' alibi defense was that the night of the attacks he had gone to several bars near where he lived in the Waynesburg area – which is 50 miles south of his mother-in-law's Barberton, Ohio home – and then going home to his wife and children. Elkins' case was tried before Judge John Adams in Akron, Ohio. It was the first murder trial Judge Adams had ever presided over. Elkins was sentenced to 55-years-to-life. His first parole hearing would be in 2054 when he would be 91 years old.

On June 7, 1998, Elkins' mother-in-law was beaten, raped and strangled to death, while his niece survived being raped, beaten and choked. The girl's first statement after the attack was in a phone message left with her parent's neighbors in which she said "somebody" killed her grandmother. After going to a neighbors house she started saying that the attacker "looked like" her "Uncle Clarence." By the time of his trial the niece's testimony definitely implicated Elkins as the attacker, and the jury convicted Elkins based solely on her testimony.<sup>1</sup>

## Elkins' Niece Recants

Elkins asserted his innocence from the time of his arrest. In 2002 his niece, then 10 years old, recanted her testimony and identification of Elkins.

Elkins' motion for a new trial, based upon the recanted testimony, was denied in December, 2002 by Judge Adams. In January 2004, the Ohio Innocence Project at the University of Cincinnati accepted Elkins' case. Family and friends paid for DNA tests by Orchid Cellmark in 2004. The DNA evidence excluded

Elkins as the perpetrator of the rape and murder of his mother-in-law, or the rape and beating of his niece.

## DNA Evidence Excludes Elkins

A second motion for new trial was filed in 2004 based on the new DNA evidence excluding Elkins. At the time of the second new trial motion, the defense did not have a match for the DNA evidence to any particular person. All the new evidence showed was that Elkins was not the person who raped Johnson. Prosecutor Walsh argued that since DNA evidence was not used to link Elkins to the crimes at trial, new DNA evidence excluding Elkins should not be adequate to prove his innocence. Summit County Common Court Judge Judy Hunter denied Elkins' motion in July 2005, and issued a 51-page decision that agreed with Walsh's sophisticated argument.<sup>2</sup>

On September 22, 2005, Elkins' family and defense team held a press conference and announced that the new DNA evidence had been matched to Ohio prisoner Earl Gene Mann. At the time of the attack, Mann's three daughters and their mother, Tonia Brasiel, lived two doors from Johnson's home. Mann had gone AWOL from a half-way house in the area five days before. Elkins' niece had played with Brasiel and Mann's children, and after the attack she went to Brasiel's home seeking help. Her bathrobe was covered in blood and she was hysterical while telling Brasiel that her grandma was dead. However, instead of responding to the emergency by calling the police or an ambulance for immediate assistance, or even going to her neighbors house to see if perhaps the girl's grandmother was still alive and could be saved, Brasiel left the six-year-old standing outside for several minutes, before she took the child to her home about a mile away. It wasn't until after talking with Brasiel that the frightened and confused young girl started telling people that her attacker "looked like" her "Uncle Clarence."

In 2002, three years after Elkins' trial, Mann entered a plea of guilty to raping his three young daughters, which had occurred over several years. The girls were ages 8, 9 and 10 at the time of his prosecution. The guilty plea resulted in a seven-year sentence. Mann had been facing a sentence of 105 years-to-life if he had been convicted at trial. Brasiel was Mann's co-defendant in the rape case.

She was convicted of child endangerment for failing to protect their daughters from Mann, and sentenced to probation. At the time there was public consternation at the leniency of Mann's sentence for being a serial rapist of his pre-teenaged daughters.

## Crime Scene DNA Linked To Earl Mann

Martin Yant, a Columbus private investigator, was hired by Elkins' family to search for proof of his innocence. Mann's name as a suspect had been identified, and Elkins' wife Melinda and Yant brainstormed that if Mann's DNA could be obtained then he could be either excluded or identified as the attacker. So Melinda surreptitiously wrote Mann in prison in an effort to lure him to respond so the envelope flap could be tested for his saliva's DNA. However, Mann didn't respond. In the fall of 2005, after Mann was transferred to Mansfield Correctional Institution where Elkins was imprisoned, Elkins' picked up a cigarette butt Mann discarded. Elkins placed that cigarette butt in an envelope and sent it to Jana DeLoach, an Akron Attorney on Elkins' defense team. DNA testing of the cigarette butt by Orchid Cellmark resulted in a DNA match between Mann's saliva and DNA extracted from the niece's underwear, and skin cells obtained by a vaginal swab of Johnson.<sup>3</sup>

In spite of the victim's DNA match to Mann, Walsh refused to acknowledge the new evidence proved Elkins was innocent. Walsh claimed the DNA tests were "incomplete," and justified her stance by stating that Elkins' conviction had been affirmed by two judges and the Summit County Court of Appeals.<sup>4</sup>

## Ohio Attorney General Jim Petro Calls For Elkins' Release

On October 28, 2005, fed up with the obstructive and unrealistic attitude of Prosecutor Walsh, Ohio Attorney General Jim Petro stepped into the fray, expressing his opinion that the new DNA evidence proved Elkins was innocent.<sup>5</sup>

Petro stated he found the new evidence "compelling," and asked to meet with Walsh. That meeting failed to materialize. Petro stated the Summit County Prosecutor's Office kept "blowing him off," and refused to meet him regarding the Elkins case. Prosecutor Walsh called Petro's position in defense of Elkins, "highly inappropriate," and claimed it was based on partial evidence. On October 31, 2005, Elkins' defense team filed for an evidentiary hearing on the new DNA evidence. Walsh stated she was unsure if her office would oppose the motion. Petro accused Walsh of "sticking her head in the sand," in Elkins' case.<sup>6</sup>

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# Australian State Is Weakening Jury Protection Of The Innocent

By Serena Nicholls

New South Wales (NSW) is Australia's most populous state, and Sydney is its largest city. In August of 2005 the New South Wales Law Reform Commission issued a report that strongly recommended that the system of unanimous jury verdicts in NSW should be retained. The NSW Government ignored that recommendation when it announced on the 9th of Novem-

ber 2005, that they "...have, on balance, decided to approve in principle the introduction of a system of majority verdicts."<sup>1</sup> The government proposal is to allow conviction by an 11-1 juror vote after six hours of deliberation has failed to result in a verdict. The recent questioning of unanimity has come shortly after the jury was discharged in the Kerry Whelan

murder trial because they were unable to reach a verdict.<sup>2</sup> NSW will become one of several Australian states that have introduced majority verdicts.<sup>3</sup> This article considers some of the implications of abandoning the unanimous jury verdict.

## Advantages of Non-unanimous Jury Verdicts

The main argument that has been advanced by supporters of majority (non-unanimous) verdicts is that they would reduce the opportunities for juries to hang, thereby reducing the number of retrials. This

argument is based on the belief that the administration of justice is frustrated when there is an irrational juror who refuses to consider the evidence in an impartial manner.<sup>4</sup> Therefore, by eliminating the need for unanimity an irrational juror will no longer cause a hung jury.<sup>5</sup> In turn, majority verdicts will reduce the number of undesirable compromises that are made, with dissenting jurors being persuaded to conform to the majority view.<sup>6</sup> If these dissentient jurors are not persuaded then the unanimity rule

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Walsh stated to reporters that Petro had no right to say convicted killer Clarence Elkins is innocent without examining the entire case. Petro fired back stating, "I object so much to that charge," he said. "Where does she get off? We have been engaged for quite some time. Almost a year ago we said we had real concerns in this matter because he was totally excluded as a [DNA] match."<sup>7</sup>

In an editorial appearing in Cleveland's *The Plain Dealer* on November 7, 2005, prosecutor Walsh was accused of trying to "construct a fort of straw," in the Elkins case, after the new DNA evidence was discovered. *The Plain Dealer* wisely observes, "... justice also calls for something that won't show up in the county conviction rate: humility and the wisdom to respect science, the evidence and the law."<sup>8</sup>

Walsh also threw a new twist into Elkins' case by defending against the new DNA evidence by claiming Ohio's DNA statute only allows one year for inmates to apply for DNA testing. Since that statute had expired, she claimed Elkins' new DNA evidence was time barred. An evidentiary hearing concerning Elkins' new DNA evidence was scheduled for February 22, 2006, in the Summit County Common Pleas Court.

During all the prosecution's obstruction, the 42-year-old Elkins sat in prison, a spectator to the comedy of errors, display of misplaced pride and misperceived political on-upmanship.

### "Pack Your Bags, You're Coming Home Baby"

Petro scheduled a press conference for the morning of Thursday, December 15, 2005, to announce the DNA test result of previously untested crime scene evidence that both ex-

cluded Elkins, and implicated Mann. That test was of a hair found in feces smeared on the girl's nightgown that she was wearing when attacked. Fifteen minutes before that press conference, prosecutor Walsh unexpectedly reversed her position and filed a motion to dismiss all charges against Elkins. Judge Hunter, who just five months earlier had denied Elkins' motion for a new trial, granted the motion and ordered Elkins' immediate release.

"Melinda Elkins has been tireless in trying to bring justice to her mother, Judith Johnson, to her niece, and to her husband, Clarence Elkins. She has led the fight from Day One. She was able to do something that the police and prosecutors were not able to do – solve this crime."

Carey Hoffman, The Ohio Innocence Project (Sept 2005)

Shortly after that Elkins' wife Melinda told him in a phone call, "Pack your bags, you're coming home baby."<sup>9</sup> While waiting for his release to be processed, Elkins said in a phone interview, "When my wife told me I was coming home today for good, I was just overwhelmed with joy and tears of joy. I was amazed it was so soon. I thought it was going to drag out."<sup>10</sup> Elkins walked out of Mansfield Correctional Institution about 4 p.m that afternoon. After seven years of wrongful imprisonment, Elkins told reporters outside the prison, "I don't think it's really hit me yet. It's strange. It's different. This is a day I will never forget."<sup>11</sup>

Walsh apologized to the Elkins' family during a press conference, while at the same time defending her long-standing opposition to his efforts for a new trial. She explained that she only became convinced of Elkins' innocence after Mann had "miserably" failed five polygraph examinations in the preceding two

weeks, and made incriminating statements during his post-examination interviews. Although Mann hadn't confessed, he had admitted to being inside Johnson's home on the day she was murdered. After watching recent videotaped interviews, Walsh described Mann as a "very strange" and "violent" person. She said, "Based on our investigation, I no longer have the doubt that I had in [Elkins] case."<sup>12</sup> Although charges weren't immediately filed against Mann, it is expected that if they are, Walsh will seek the death penalty.

It cannot go without saying that Elkins had support from his wife Melinda, numerous friends, and first class investigative and legal aid in his fight for freedom. The tireless campaigning on Elkin's behalf resulted in national publicity for his case, including a segment titled *Star Witness* on CBS' *48 Hours* television program broadcast on September 13, 2003. That broadcast revealed additional exculpatory information in the form of a lab report obtained by *48 Hours* that showed two hairs found on Johnson's buttocks definitely did not originate from Elkins. Detailed information about Elkins' case is on his website, <http://www.freeclarencel.com>.

## Endnotes:

- 1 Noted Forensic Scientist Doubts Murderer- Rapist's Guilt, Donna J. Robb, *Cleveland Plain Dealer*, July 5, 2002.
- 2 New Trial Denied Despite DNA Find," Phil Trexler, *Akron Beacon Journal*, July 15, 2005.
- 3 New Twist in DNA Killing, Phil Trexler, *Akron Beacon Journal*, September 22, 2005.
- 4 Inmate Helps Student's Case, by Sharon Coolidge, *Cincinnati Enquirer*, September 23, 2005.
- 5 DNA Should Free Inmate, Attorney General Says, Karen Farkas, *Cleveland Plain Dealer*, October 29, 2005.
- 6 '98 Case Divides Offices, Phil Trexler, *Akron Beacon Journal*, November 1, 2005.
- 7 Summit Prosecutor Rips Petro for Saying Prisoner is Innocent, Karen Farkas, *Cleveland Plain Dealer*, November 1, 2005.
- 8 Editorial, *Cleveland Plain Dealer*, November 7, 2005.
- 9 Man Cleared By DNA Leaves Ohio Prison, John McCarthy, *Washington Post*, December 15, 2005.
- 10 *Id.*
- 11 Elkins Wins His Freedom, Phil Trexler, *Akron Beacon Journal*, December 16, 2005.
- 12 *Id.*