

A Mistaken Identification Leads To A Wrongful Conviction and Death Sentence — The Tony Ford Story

By Richard Burr

On December 18, 1991, two people broke in to the home of Myra Concepcion Murillo in El Paso, Texas. Saying they needed to see “the man of the house,” and demanding to know where “the money” was, the two men became angry when their demands were met with confusion. Within moments, one of the men shot and killed Ms. Murillo’s eighteen-year-old son, Armando, then shot Ms. Murillo and her two daughters. Ms. Murillo and her daughters survived.

The prosecution’s case at trial turned on the daughters’ identification of Tony Ford from a photo array as one of the two men who broke in to their home and as the one who did the shooting. In his defense, Tony testified that he was not involved in the home break-in though he had driven the two men to the Murillo’s house. He testified that he was outside in the vehicle waiting for the two men when the break-in occurred and that he did not know that the men planned to break in to the house and kill people.

A man named Van Belton (Van) was charged along with Tony Ford with breaking in to the Murillo’s home. Van was the only person initially identified by Ms. Murillo’s daughters. One of them recognized him from high school. Both daughters said Van was the second man involved in the break-in and was not the shooter. Neither knew the other man.



El Paso PD Mugshots
Victor Belton (L) and Tony Ford (R)

After Van was arrested, he told the police that Tony was the other person. In Tony’s statement to the police and in his testimony at trial, he confirmed that Van was one of the two men who broke in to the Murillo’s home, but he testified that the second man was Van’s brother Victor Belton (Victor).



Tony’s Lawyers Tried To Question The Reliability Of His Identification

At trial, the critical factual question for the jury to resolve was whether the Murillo’s subsequent identification of Tony Ford from a photo array was reliable.

Based on all the other evidence, the Murillo sisters’ identification of Tony appeared to be a mistake, because no other evidence connected him directly to the crime:

- In a search of Tony’s home after the crime, nothing related to the crime was found.
- By contrast, property taken from the Murillo’s house was located at Van and Victor Belton’s home.
- The only physical evidence suggesting a link to Tony was inconclusive. Three wool fibers found on Armando Murillo’s shirt were determined to be similar in color, size, and appearance to the wool fibers from Tony’s trench coat. The state’s expert testified that the fibers “could” have come from the coat. In her lab report, this witness was even more equivocal. She reported that “[t]he three dark gray wool fibers were similar in color to some wool fibers in the overcoat

Ford cont. on page 41

Eduardo Velazquez Awarded \$2.95 Million For Wrongful Rape Conviction

By JD Staff

Eduardo Velazquez was convicted in 1988 of the 1987 knife-point rape of an Elms College student in Chicopee, Massachusetts. The prosecution relied on the victim’s identification of Velazquez as her attacker, although he claimed she had mistakenly identified him.

Velazquez’s conviction was vacated in 2001 after DNA tests unavailable at the time of his trial excluded him as the source of the attacker’s bodily fluids on the victim’s coat. He was released after 14 years of wrongful imprisonment.

In 2003 Velazquez filed a federal civil rights lawsuit in U.S. District Court in Springfield. The lawsuit sought \$10 million in damages, and named the City of Chicopee, the city’s police department, and six police officers as defendants. The suit alleged that the police induced the victim to mistakenly identify him, and that they failed to disclose exonerating evidence.

After Massachusetts’ wrongful conviction compensation statute was signed into law in December 2004, Velazquez filed a lawsuit against the state claiming damages. In August 2005 he became one of the first three people awarded compensation under the statute, when his suit was settled by the state Attorney General’s Office for the statutory maximum of \$500,000.

Three months later, in November 2005, Chicopee and Velazquez agreed to settle his lawsuit for \$2,450,000. The city’s aldermen voted to

approve the settlement after their attorney told them the city was facing a judgment of up to \$20 million if a jury ruled in Velazquez’s favor. The aldermen also took into consideration that taking the case to trial would cost at least \$1 million in attorney’s fees — since the city had to not only pay its legal fees, but also those of the six police officers named as a defendant, each of who had a separate lawyer. Alderman Jean Croteau Jr. said of the decision to settle the case, “It would still cost us \$1 million if we went to court and won. The risk factor is too great.” In agreeing to the settlement, the city didn’t acknowledge any intentional or unintentional wrongdoing by any police officer.

Velazquez, 39 and living in Puerto Rico, was awarded a total of \$2,950,000 for his 14 years of wrongful imprisonment.

Source: Settlement Set At \$2.45 Million, Etta Walsh, *The Republican*, Springfield, Massachusetts, November 16, 2005.

John Spirko Update

John Spirko’s first-person story of being on Ohio’s death row when there is evidence he was over 100 miles from the scene of Elgin, Ohio Postmistress Betty Jane Mottinger’s 1982 abduction and murder, was in *Justice Denied*, Winter 2005, Issue 27.

Spirko’s execution scheduled for September 20, 2005, was stayed by Ohio Gov. Bob Taft until November 15, 2005, who also ordered an unprecedented second clemency hearing. After that October 12, 2005, hearing, Ohio’s Parole Board found by the same 6-3 vote as after the first hearing, that the new evidence of Spirko’s innocence didn’t merit clemency.

On November 7, Gov. Taft granted a stay of execution until January 19, 2006, at the request of Ohio Attorney General Jim Petro, so that the painting tarp and duct tape wrapped around Mottinger’s body, and a cinder block found near her body could be tested for the presence of the killer’s DNA — who a witness has

Spirko cont. on page 13

Ford continued from page 4

and could have originated in the coat or any wool garment of a gray/purple color.”

- This coat also had a small stain on the inside of a pocket too small to type or test. The prosecution’s forensic examiner identified this stain as blood, but acknowledged that it was “consistent” with someone cutting a finger and putting his hand in the coat. Even this testimony was overstated. In the lab report, the witness expressed doubt about whether this stain was even blood: “The coat was treated with luminol reagent, resulting in a positive presumptive reaction for blood. Subsequent analysis using Takiyama, a confirmation test for blood, indicated no detectable blood present.” Thus, this witness’s testimony failed to link Tony’s coat to the crime at all.
- Finally, even if the jury saw the physical evidence as connecting Tony’s coat to the crime, there was an explanation for that that was consistent with Tony’s account of what happened: Tony loaned the coat to Victor shortly before the crime, so that Victor could conceal his gun under the coat.

To show how the Murillo’s could have mistakenly identified Tony, defense counsel introduced the booking photograph of Victor from December 19, 1991. Victor had been arrested at his parents’ house, along with his brother Van, in the early morning hours of December 19, 1991. Van was charged with the crimes that occurred at the Murillo’s house, Victor was arrested for assaulting the officers who were attempting to arrest Van, and their father was arrested for hindering the arrest of Van. The

Habeas continued from page 40

Stephen Saltzburg of George Washington University Law School, who has been working on alternative proposals on behalf of the American Bar Association and the Constitution Project, said there should not be much federal review when a petitioner has gone through state procedures and the state courts did it right.

“I understand the goals [Kyl and supporters] have,” he said. “But that doesn’t mean you have to basically cut off federal habeas completely. The problem is Arizona has a pretty good system, but a lot of other states don’t. In some jurisdictions, it’s a necessary protection.”

Reprinted with permission. Originally published in *The National Law Journal*, October 20, 2005. <http://www.law.com/jsp/nlj>.

Marcia Coyle is *The National Law Journal’s* Washington Bureau Chief. 

defense also introduced the booking sheets for Tony and for Victor. The sheets showed that as of December 19, 1991, both young men were 5’-8” tall. Victor weighed 156 pounds, while Tony weighed 150 pounds. Tony was 18 years, 6 months old; Victor was 17 years, 8 months old – only 10 months younger than Tony. As the photographs of Victor and Tony show, they also looked very similar. An eyewitness or victim could have mistakenly identified Victor Belton as Tony Ford.

Tony’s lawyers also tried to present additional evidence about the unreliability and inaccuracy of the Murillo sisters’ identifications. Before trial, they asked the court for funds to hire Dr. Roy Malpass, a highly regarded El Paso expert in eyewitness identification. The trial judge denied their request. Relying on the daughter’s questionable identification of Tony, the jury convicted him on July 9, 1993. He was subsequently sentenced to death.

An Eyewitness Identification Expert’s Post-Trial Examination

After exhausting his state court appeals, Tony filed a federal habeas corpus petition. In response to Tony’s request, the court provided the funds for Tony’s lawyers to consult with Malpass so that they could show what Tony’s trial attorneys could have presented to the jury had their request for Malpass’s assistance at trial been granted.

Working with Tony’s federal court lawyers, Malpass conducted two empirical studies, based on well-established scientific principles, to determine whether the process by which the Murillo sisters identified Tony – by looking at an array of six photographs of different people, one of whom was Tony – was likely to produce a mistaken identification.

The first study compared the similarity of facial features and appearance of Tony, the other five people included in the photo array, and Victor. The results showed that Tony and Victor were, by far, the most similar looking. Thus, someone who had seen Victor actually commit the crime and who was shown the photo array with Tony’s picture in it would have been drawn to Tony’s picture.

This is exactly what happened in the second study Malpass conducted. The second study was designed to determine whether the photo array from which the Murillo sisters picked out Tony was “suggestive” – that is, was composed of photographs of people different enough in appearance from Tony that he stood out and was more likely to be picked out by persons given a verbal description of Tony’s facial features. Based on this study, Malpass concluded that the photo array was substantially biased to lead to the identification of Mr. Ford’s photograph: His photo was four times more likely to be

picked out by research participants. A fair and non-suggestive photo array would have lead research participants to pick out each photo with approximately the same frequency.

The importance of this, as established by the first study, is that Victor looked remarkably like Tony. Thus, if the person the Murillo sisters saw shoot their brother was Victor they would have been highly likely to pick Tony out of the photo array they were shown – even though they had never seen him before.

Had the trial court provided the funding for Malpass’s assistance, he also could have provided additional critical information to the jury in their effort to determine whether the Murillo sisters’ identifications were reliable:

- Because the Murillo’s were Latino and the suspects were black, Malpass would have explained that the risk of a mistaken identification was higher. In a study based in El Paso, involving the cross-racial identification of a black suspect by Latino eyewitnesses, the results revealed that *67% of the time*, when the Latino witness identified a black suspect, the witness was mistaken. By contrast, when Latino witnesses identified Latino suspects, they were mistaken only *29% of the time*. Numerous other studies of this phenomenon have confirmed this extraordinarily high likelihood of mistake in cross-racial identifications.
- Malpass would also have explained that the presence of a weapon that is used in a threatening manner, as it was in the Murillo’s home, reduces the probability that an identification is accurate.
- Malpass would have explained that the Murillo sisters’ unwavering certainty that their identifications were accurate (each testifying, “I will never forget his face”) did not mean that they were accurate. Research has established that eyewitness certainty is not correlated with the accuracy of the identification. Among subjects who are highly certain of their identifications, the error rate of 50% is very high. This was especially important information for the jury to have had, because in post-trial interviews, members of Tony’s jury revealed that one of the jurors had once been the victim of a crime and this juror told the other jurors that she, like the Murillo sisters, would never forget what the assailant looked like.
- Finally, Malpass would have addressed another factor that increased the likelihood that the identification of Tony was unreliable. The exposure of an eyewitness to a photograph of the suspect before he or she views the suspect’s photograph as part of a photo spread increases the likelihood that the eyewitness will identify the

Ford continued on page 42

Ford continued from page 41

same suspect in the photo spread even if the identification is erroneous. Before she viewed the photo spread, one of the Murillo sisters saw Tony's photograph in a local newspaper story that identified him as a suspect in her family's case.

An Unraised, Important Question About Tony's Identification By Myra Murillo

There was some question about whether the first one of the Murillo sisters (Myra) to identify Tony's photograph had – in fact – picked his photograph out of the photo spread. Ms. Murillo and Detective Lowe both testified at a pretrial hearing that Ms. Murillo picked Tony's photograph out of the photo spread at 4:10 pm on December 19, 1991. In addition, both Ms. Murillo and Detective Lowe testified that Ms. Murillo signed the back of Tony's photograph and noted the date and time as December 19, 1991 and 4:10 pm. Tony's photograph appeared in the number 5 position in the photo spread. Two minutes after Ms. Murillo allegedly signed the back of Tony's photograph, at 4:12 pm, Detective Lowe typed a statement for Ms. Murillo to sign concerning the number of the photo she picked out of the photo spread. In that statement Detective Lowe typed, "I have recognized the man whose picture is numbered 4 as the man who shot and killed my brother." When Ms. Murillo signed the statement thereafter, the reference to photograph number 4 is overwritten and the numeral "5" is written in by hand. There are no initials by this overwriting, and there is no note explaining what happened. There is just a change in the number, from the photo of someone else to the photo of Tony.

Obviously, this discrepancy raised questions about the integrity of the process by which the two eyewitnesses initially identified Tony. Nevertheless, Tony's trial lawyers never presented this evidence to the jury.

Evidence that the Police Likely Knew Victor Belton Was The Shooter

It is likely that the El Paso police learned in the course of their investigation that Victor, not Tony, murdered Armando Murillo. However, by the time they learned this, the Murillo sisters had already identified Tony as the assailant. Apparently worried about their ability to convict someone as the killer, the police concealed this evidence.

The evidence of official suppression of evidence began to be revealed when Tony's federal court lawyers were conducting new investigation in El Paso in 2002. By chance, they learned the following in a conversation with the court reporter from Tony's trial: In

1992 or 1993, the court reporter who transcribed Tony's trial was engaged by several El Paso police officers in a discussion about Tony's case. The trial apparently had just occurred, because the officers were expressing their surprise that Mr. Ford had been convicted. They explained to Mr. Thomas that they were surprised, "because the word on the street was that another individual, Victor Belton, did the shooting." The court reporter could not remember who these officers were.

Thereafter, Tony's current lawyers found a man from El Paso who had known Victor. He recounted an incident at a party a year after the murder of Armando Murillo, in which he and another person were talking with Victor. During the conversation, Victor told them that he had gotten away with a murder.

In further investigation at this same time, Tony's lawyers talked with the boyfriend of Myra Murillo. She told her boyfriend after she began to recover from her gunshot wound that there were three people involved in the break-in – one of whom stayed outside.

Given the common knowledge among the El Paso police that the information "on the street" was that Victor Belton was the killer, it is virtually inconceivable that the police did not have this information from Ms. Murillo. It is equally inconceivable they did not have information from individuals who heard Victor Belton admit what he had done.

A fact *not known to the police* that confirms Victor's involvement was uncovered by Tony's lawyers in 2002. A friend of Tony acquainted with Victor and Van Belton was in the El Paso jail in December, 1991, when Van and Tony were arrested. Shortly thereafter this man was contacted by Van. This man explained:

He [(Van Belton)] asked me to finger Tony Ford for the murder. He wanted me to tell the police that Ford admitted to him that he was involved. I told Belton that I couldn't do this because it wasn't true.

Based on all this information, Tony's federal habeas lawyers asked the federal court in El Paso to require the El Paso police and prosecutors to turn over all their *non-public investigation files* concerning Murillo's murder to the court so that the truth could be determined about the police department's knowledge of Victor's role in the murder. The court turned down Tony's request.

Tony Ford's Federal Habeas Corpus Petition

In spite of the troubling facts pointing clearly to Tony Ford's wrongful conviction, the federal district court in El Paso denied his ha-

beas petition without ever holding a hearing. As indefensible as that decision was under the circumstances of his case, the United States Court of Appeals for the Fifth Circuit affirmed it on June 22, 2005. The U.S. Supreme Court is expected to announce in early January 2006 their decision on whether they will grant Tony's writ of certiorari.

Stay Granted And DNA Testing of Victor Belton's Clothing Ordered

Eight days before Tony's scheduled December 7, 2005, execution, State District Judge William Moody issued a stay until March 14, 2006. The stay was issued so DNA testing can be performed on the clothing Victor was wearing at the time he was arrested for assaulting the police who came to arrest his brother Van. The clothes Victor was wearing, including his shoes, have been stored as evidence since his arrest on December 19, 1991. Although Victor's shirt and pants had visible bloodstains on them, his clothes have never been tested for whether the blood on them matches one or more of the Murillo family. If it does, then it will be conclusive proof that Victor was the shooter – and that Tony is innocent. Judge Moody, who presided over Tony's trial, also authorized funding for a defense forensic expert to provide independent input for the DNA testing that by state law must be conducted by the Texas State Crime Lab.

Richard Burr is one of Tony Ford's attorneys. He can be contacted by writing:

Richard Burr
Burr & Welch
412 Main St., Suite 1100
Houston, TX 77002
Or email: dick@burrandwelch.com



Visit the Innocents Database

http://forejustice.org/search_idb.htm

Information about more than 1,700 wrongly convicted people in 30 countries is available.

Visit Justice: Denied's Website:

<http://justicedenied.org>

Back issues of *Justice: Denied* can be read, along with other information related to wrongful convictions.

To ensure delivery, please notify *Justice: Denied* promptly of a Change of Address! Write: Justice Denied

PO Box 66291
Seattle, WA 98166

Or enter a COA online at,
<http://justicedenied.org>