

# Florida Murder Conviction Based On Hearsay Tossed

By JD Staff

Gilbert Stokes' conviction of murdering 18-year-old Jyron Seider in 2000 during the robbery of a Belle Glade, Florida street dice game was reversed on two grounds by Florida's 4th District Court of Appeals on November 23, 2005. The Court ordered a retrial.

In its unanimous decision, the Court ruled that Stokes had been fatally prejudiced by the trial judge allowing the prosecution to expose the jury throughout the trial to its argument that Stokes' motive was Seider was not a gang member, while Stokes was a member of the Dogs Under Fire (DUF) gang whose headquarters were two blocks from the scene of the murder. The Court ruled that allowing the jury to repeatedly hear direct and indirect forms of the prosecution's inflammatory claim was reversible error, because "the key prosecution witness testified that Stokes socialized with him – a non-DUF member – on "all different corners". . . . No witness testified that Stokes robbed the game because the players were not in DUF or the game's location was outside of DUF's territory."<sup>1</sup> The Court also stated, "Here, the State lacked strong evidence and it is questionable, under the facts of this case, whether the jury would have found Stokes guilty without hearing evidence of his DUF [gang] membership."<sup>2</sup>

The appeals court also ruled that the trial judge improperly allowed a detective to testify about the unsubstantiated hearsay that people who did not testify at Stokes' trial implicated him in the murder. The Court ruled that was reversible error because, "From this, the jury could have inferred that non-testifying witnesses made accusatory statements to Detective Shatara about the defendant."<sup>3</sup> . . . When the only possible relevance of an out-of-court statement is directed to the truth of the matters stated by a declarant, the subject matter is classic hearsay even though the proponent of such evidence seeks to clothe such hearsay under a non-hearsay label."<sup>4</sup> Interestingly, the Court considered the detective's testimony so prejudicial to Stokes that it constituted reversible error, without even considering that it also deprived him of his constitutional right to confront and cross-examine the alleged and unidentified witnesses.

Leon Harrell was the State's star witness. Harrell was initially charged with Seider's murder, but the charges were dropped after he lived up to his street name of "The Rat" by

naming someone else – Stokes – as the shooter. Harrell claimed he left the dice game after losing all his money. He said he returned with Stokes, who went inside to rob the dice players while Harrell served as the look-out. However, the only DNA profile recovered from the crime scene was linked to Harrell, whose testimony he wasn't present at the time of Seider's murder was impeached by multiple witnesses. Witnesses also identified Harrell as the only person involved in the robbery and murder, and that a man dressed all in black wasn't involved – that person was Stokes.

Two jailhouse informants came forward after Stokes' trial and said Harrell had confessed to them. Stokes filed a motion for a new trial based on the new evidence, but in 2004 a Circuit Court judge ruled the two informants weren't reliable and their testimony wouldn't have affected the outcome of Stokes' trial.

The essence of the appeals court's reversal was that Stokes' jurors likely didn't find him guilty based on evidence of his guilt – but because of his alleged gang membership and the detective's hearsay claim that unidentified persons implicated Stokes in the dice game robbery and fatal shooting of Seider. That conclusion is supported by the fact that the crime scene's physical evidence and eyewitness testimony directly implicates the State's star witness – Leon Harrell – as Seider's murderer.

Stokes' appeal was handled by Gregg Lerman, his trial lawyer. Although Lerman rarely handles appeals, he believed so much in Stokes' innocence that he remained his lawyer. After the appeals court issued its ruling, Lerman said, "I held onto this case because I thought I was right. I had a personal stake in this case because I felt he was wrongly convicted."

As of mid-December 2005, Stokes remains imprisoned while the prosecution decides if they intend to retry him, or offer him his immediate release in exchange for pleading guilty or no contest to a lesser offense that he is innocent of having committed.

JD Note:

One doesn't have to read very far beneath the lines of the Appeals Court's decision to conclude they reversed Stokes' conviction because they don't think he was involved in the crime, and that the State's star witness protected from prosecution is the actual robber and murderer. It is interesting that Harrell's testimony benefiting the prosecution was deemed reliable enough by the trial judge to support Stokes' conviction, while the testimony of two jailhouse witnesses that Harrell admitted to the murder was deemed unreliable by the judge

## Marlinga Update

# Ex-Prosecutor Marlinga Re-indicted For Bribery

In January 2002, Macomb County Prosecutor Carl Marlinga filed a brief with the Michigan Supreme Court acknowledging that during Jeffrey Moldowan's 1991 kidnapping and rape trial he "may have suffered 'actual prejudice'" from insubstantial expert bite mark testimony.<sup>1</sup>

The Court granted Moldowan's habeas petition and ordered a new trial. Moldowan was acquitted after his retrial in February 2003. Moldowan's co-defendant, Michael Cristini, was acquitted after his retrial in April 2004.

Two weeks after Cristini's acquittal, Marlinga, state Senator Jim Barcia, and realtor Ralph Roberts were indicted on federal charges that included bribery and federal campaign finance law violations related to Marlinga's January 2002 Supreme Court brief in Moldowan's case. Marlinga ran for the U.S. Congress in 2002, and federal prosecutors alleged that Roberts, who employed Moldowan's sister, bribed Marlinga to help Moldowan. The bribe was alleged to have been partially masked as a campaign contribution to Barcia in order to avoid Marlinga's federal contribution limits and reporting requirements. (See, Prosecutor Indicted For Bribery After Two Men Exonerated Of Kidnapping And Rape, *Justice:Denied*, Issue 27, Winter 2005.)

In February 2005 a Detroit federal judge ruled the indictment was defective for failing to detail how the defendants were linked

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reviewing Stoke's motion for a new trial. Not only was the testimony of those two men consistent with the eyewitnesses testimony and crime scene physical evidence directly implicating Harrell in Seider's murder, but those two men came forward with no expectation of receiving anything in return – while Harrell effectively testified against Stokes in exchange for having murder charges dropped against him.

### Endnotes:

- <sup>1</sup> *Stokes v State*, No. 4D02-5068 (Fla.App. 11/23/2005); 2005.FL.0006533, ¶14 <<http://www.versuslaw.com>>
- <sup>2</sup> *Id.* at ¶15.
- <sup>3</sup> *Id.* at ¶16.
- <sup>4</sup> *Id.* at ¶18.

### Additional Sources:

Belle Glade Man Convicted of 2000 Murder Receives New Trial, by Missy Stoddard, *South Florida Sun-Sentinel*, November 24, 2005.



Ken Marsh was convicted in November 1983 of murdering Phillip Buell, his girlfriend's two-year old son. Marsh claimed he had never harmed Phillip, and that he found him injured after he had fallen onto the fireplace hearth from the back of a couch. The San Diego Police Department detectives who investigated Phillip's death concluded that Marsh was telling the truth — the child's April 1983 death was accidental from a fall.

However, murder charges were filed against Marsh based on the determination of doctors at Children's Hospital in San Diego that Phillip's head injuries were caused by abuse, and the jury relied on their testimony in convicting Marsh.

On August 10, 2004, Marsh's conviction was vacated and he was released from prison after his petition for habeas corpus was granted without opposition from San Diego District Attorney Bonnie Dumanis. Marsh's petition was based on the analysis of numerous medical experts that Phillip's injuries were consistent with those that would be caused by him hitting his head on a brick fireplace hearth after falling off of a couch. Which was what Marsh had said from the time he was first questioned in 1983, and which the San Diego PD had agreed with after their investigation.

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together in what the government was alleging was a *de facto* conspiracy. Faced with trying the three defendants separately, federal prosecutors dropped the charges against Roberts in June 2005, and against Barcia in July 2005. (See, Marlinga Bribery Prosecution Update, *Justice:Denied*, Issue 28, Spring 2005)

On September 14, 2005, Marlinga was re-indicted on charges of bribery, mail and wire fraud, making false statements to the Federal Election Commission and violating federal campaign finance laws.

Prior to his April 2004 indictment, Marlinga had been the Macomb County Prosecutor for 20 years, and prior to that he had been a federal prosecutor.

*Justice:Denied* will report as the Marlinga case proceeds.

#### Endnotes:

1 Marlinga: the rape cases, Staff, *Detroit Free Press*, April 23, 2004.

#### Sources:

New Indictment Against ex-Macomb Prosecutor Issued, Jim Irwin, *AP News*, September 15, 2005.

Jury Indicts Marlinga Again, David Shepardson, *The Detroit News*, September 15, 2005.

## Ken Marsh is "Factually Innocent" Says California's AG

By JD Staff

After Marsh's release he filed a claim for restitution under California's wrongful conviction compensation statute (Cal Penal Code §§ 4900 to 4906). The statute authorizes a payment of \$100 for each day of imprisonment after a wrongful conviction. Based on Marsh's 7,560 days of imprisonment, his claim totaled \$756,000.

After reviewing the claim, the office of California Attorney General Bill Lockyer took the position it should not be granted. Their opposition was based on the fact that the murder charges weren't dropped against Marsh on the basis of his innocence, but because San Diego's DA didn't think she could prove his guilt beyond a reasonable doubt if he was retried. Deputy Attorney General Jim Dutton explained in a memo that while the conclusion of an independent expert retained by the San Diego DA to evaluate the medical evidence, "may be enough to lose confidence in the integrity of Mr. Marsh's conviction ... it does not assist Mr. Marsh in establishing that he did nothing to inflict the injuries."<sup>1</sup>

The standard for a successful compensation claim is a claimant must prove his or her innocence by a preponderance of the evidence, and that he or she did nothing to "contribute to the bringing about" of his arrest or conviction.

A hearing to determine if Marsh met the statute's threshold for making a claim, was scheduled to be held in Sacramento beginning on Monday, December 5, 2005.

With the burden of proof on Marsh, Deputy AG Dutton didn't present any evidence at the hearing. Multiple witnesses, including people who didn't testify at Marsh's trial, testified concerning accidents that caused Phillip's injuries that the hospital's doctors incorrectly attributed to abuse by Marsh.

After four days of hearing medical and eyewitness evidence that Phillip's injuries were not caused by Marsh, on Thursday, December 8, Dutton conceded that Marsh was "factually innocent," and thus had met his burden of proof under the statute to qualify for compensation.<sup>2</sup>

Although the hearing officer makes the final determination of whether to recommend compensation, he is expected to adopt the attorney general's position. The hearing officer's recommendation will be submitted



to the state Victim Compensation and Government Claims Board, which will then consider the merit of Marsh's claim. If they decide in Marsh's favor, then their recommendation goes to the state legislature which must authorize the payment from the state's general fund. If the legislature approves the payment, then it will go to Governor Schwarzenegger for his approval.

The Claims Board has never decided contrary to the recommendation of the attorney general, and the legislature has always appropriated the money approved by the board in a wrongful conviction case. So barring an unprecedented hang-up, Marsh should receive his \$756,000 in compensation sometime in 2006.

Dwight Ritter is the San Diego lawyer who represented Frederick Daye when he was awarded \$389,000 in 2002 after 10 years of wrongful imprisonment for rape. When asked about the adequacy of California's compensation scheme, he said in regards to Daye, "Do I think they fully compensated him? Not at all. One hundred dollars a day does not begin to compensate a person for what 10 years in a place like Folsom Prison does to a person."<sup>3</sup>

Also pending is a federal civil rights lawsuit that Marsh filed on August 9, 2005, in U.S. District Court in San Diego. The lawsuit named as defendants: San Diego County, San Diego's Children's Hospital, and Dr. David Chadwick (employed by Children's Hospital). As of mid-December 2005, the status of the lawsuit is the defendants have filed FRCvP Rule 12(b)(6) motions to dismiss based on grounds of full and qualified immunity. A Rule 12(b)(6) motion is based on grounds supporting a plaintiff's alleged failure to state a claim.

For more information about Ken Marsh's case see, Toddler's Accidental Death Ends With Babysitter's Murder Conviction — The Ken Marsh Story, *Justice:Denied*, Issue 25, Summer 2004, p. 4.

Sources: State won't block freed man's payout, Greg Moran, *San Diego Union-Tribune*, December 9, 2005. Marsh Press Statement, August 10, 2005, issued by Law Office of Thor O. Emblem, Escondido, CA.

#### Endnotes and Additional Sources:

1 Wrongful-conviction hearing starts today, Greg Moran, *San Diego Union-Tribune*, December 5, 2005.

2 Email from Tracy Emblem to Hans Sherrer, December 10, 2005. Ms. Emblem is one of Ken Marsh's attorneys.

3 After 20 years in prison, S.D. man seeks to prove he didn't kill child, Greg Moran, *San Diego Union-Tribune*, December 5, 2005.