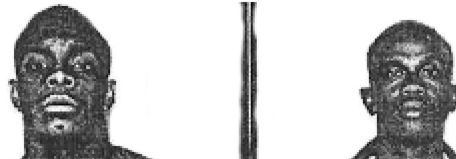
A Mistaken Identification Leads To A Wrongful Conviction and Death Sentence — The Tony Ford Story

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

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Eduardo Velazquez Awarded $2.95 Million For Wrongful Rape Conviction

By JD Staff

Eduardo Velazquez was convicted in 1988 of the 1987 knifepoint 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

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Positive ID Sent An Innocent Alejandro Dominguez To Prison For 12 Years

By Rob Warden

Alejandro Dominguez, a Mexican national, was convicted in 1990 of raping a Caucasian woman the previous year in Waukegan, Illinois.

The only evidence purporting to link Dominguez to the crime was a dubious identification by the victim and forensic results that did not exclude him as the source of biological material recovered from the victim.

Although Dominguez was only 16 at the time of the crime and had no criminal record, he was tried as an adult. On advice of counsel, he waived a jury in favor of a bench trial before Lake County Circuit Court Judge Harry D. Hartel.

The Evidence

Hartel found Dominguez guilty, even though: The victim had told police that her attacker wore a diamond earring in a pieced ear – but Dominguez had no pierced ear. The victim had told police her attacker had a tattoo – but Dominguez had no tattoo. The victim had told police her attacker addressed her in English – but witnesses testified that Dominguez spoke only Spanish.

The victim's testimony was additionally suspect because the identification procedure employed by the Waukegan Police had been suggestive; the victim acknowledged on cross examination that the lead detective in the case told her before she made the identification, "Watch the one sitting on the chair. Tell me if that is the one . . ."

William Wilson, a forensic serologist from the Northern Illinois Crime Laboratory, testified that he could not eliminate Dominguez as a source of the biological material – semen – recovered from the victim. Wilson did not volunteer what portion of the male population was included among the possible sources. Had he been asked, or had he chosen to fairly portray his findings, the answer would have been 67% – or more than two-thirds of all men in the world.

Despite the flimsy evidence, Hartel deemed Dominguez guilty and sentenced him to nine years. With day-for-day good time and credit for time served in jail before trial, Dominguez was released from prison in December 1994.

The Vindication

Six years after his release, by which time he had married and fathered a child, the U.S. Immigration and Naturalization Service threatened to deport Dominguez for failing to register as a sex offender. At this point, he retained defense lawyers Jed Stone and John P. Curnyn to seek DNA testing of the supposedly inculpatory biological evidence in the case.

In 2001, Lake County Circuit Court Judge Raymond McKoski granted a motion for DNA testing at Dominguez's expense. And in March 2002, the results of the testing by the Serological Research Institute in Richmond, California, positively excluded Dominguez as the source of biological material recovered from the woman who had positively identified him and sent him to prison 12 years earlier.

Dominguez was officially exonerated on April 26, 2002, when Judge McKoski granted a motion in which prosecutors joined Stone and Curnyn in asking that the conviction be set aside.

No Apology

However, the prosecution was unapologetic for the error that cost the innocent youth more than four years of his life. "I won't apologize for the original conviction," Michael G. Mermel, chief of the felony trial division at the Lake County State's Attorney's Office, told the *Chicago Tribune*. "At the time, the science didn't exist, and we had a credible witness."

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www.law.northwestern.edu/wrongfulconvictions

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Dominguez "Free Like A Bird" After Pardon

In August 2005, Illinois Governor Rod Blagojevich pardoned Alejandro Dominguez of a 1990 rape conviction.

Dominguez's conviction was based on his positive identification by the victim and an inconclusive test of the assailant's semen. DNA tests of the semen in 2002 excluded Dominguez, and his conviction was set aside in April 2002. (See, Positive ID Sent An Innocent Alejandro Dominguez To Prison For 12 Years on this page.)

However Dominguez's conviction was still on his record, and it interfered with getting jobs paying enough to support his wife and two children above subsistence level. As he put it, "I was out of jail, but the record still put me in a hole." The pardon acts to expunge the conviction from Dominguez's record, so that problem for him will be removed.

The pardon also enables Dominguez — who was 16 when tried as an adult for the rape — to apply to the Illinois Court of Claims to receive compensation for his four years of wrongful imprisonment.

Dominguez was elated at the news of his pardon — "After all these years, I'm free like a bird."

Source: Governor Pardons Man DNA Cleared, by Steve Mills, *Chicago Tribune*, August 4, 2005.

Spirko cont. from page 4

identified is a house painter who the witness also claims was the tarp's owner. That witness — whose information has been ignored for years by law enforcement authorities — passed a polygraph examination on October 26, 2005.

On September 6, 2005, U.S. District Court Judge James Carr dismissed Spirko's federal habeas petition, ruling that during a previous habeas proceeding before Judge Carr, there was no fraud perpetrated on the court by the State's non-disclosure that the lead investigator and star witness in Spirko's case, U.S. Postal Inspector Paul Hartman, had told people (including Spirko's trial prosecutor) that Spirko's co-defendant and friend, Delaney Gibson, had nothing to do with Mottinger's abduction and murder.

At the time of Spirko's trial the prosecutors claimed Gibson wasn't in custody because he hadn't been apprehended. Spirko was tried alone and presented an alibi defense — sup-

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'Hurricane' Carter Receives Honorary Degree

By Simona Siad

With graciousness and exuberance Rubin "Hurricane" Carter swept into fall convocation to receive an honorary doctor of laws degree from York University.

The award culminates Carter's lifelong battle for innocence and justice in what was one of history's most widely publicized cases of wrongful conviction.

"The light shines in the darkness but the darkness will not overcome," said Carter to a packed room of York graduates and alumni on October 14, 2005.

Many know Dr. Carter as the former pro-boxer who was wrongly convicted by an all-white jury for the murder of three white American citizens in the 1960s. He was convicted and sentenced to three life-terms.

Throughout that time, he continued to fight for his innocence, penning an autobiography entitled *The 16th Round* that garnered national and international attention. The book, along with celebrity supporters, protestors and two recantations of key witnesses helped secure a retrial. Once again, the state overturned the evidence and handed down another wrongful conviction.

In 1988, after 22 years of legal battles and imprisonment, all indictments were finally dropped. Dr Carter admits that it took incredible mental strength, passion and perseverance to survive the time he spent in prison.

"Hopelessness belongs to the lowest level of human existence. That is what prison is, the lowest level of human existence," says Carter. "But I was not a prisoner, I had committed no crime. So I refused to go down there. I knew in order for me to survive, I would have to remain above the level of a prisoner."

During the ceremony, the dean of Osgoode Hall Law School, Patrick Monahan, praised Carter for his continuing work with the wrongfully convicted.

"Dr. Carter has been a tireless advocate for justice and the cause of the wrongfully convicted. He was instrumental in the creation of an organization called the Association for the Defence of the Wrongfully Convicted," said Monahan.

He went on to note that Carter has worked extensively with York University in the past.

"In 1997, he was instrumental in the establishment of the Innocence Project here at the Osgoode School of Law, which has garnered international attention for its work," said Monahan.

Upon receiving his award, Dr. Carter reminded the audience that there is a new generation of people being wrongfully convicted and that the fight for a fair justice system is far from over.

"During this time, these organizations of which I am a part of helped secure the release of many innocent people who were sentenced to death, or sentenced to long terms in prison," said Carter. He alluded to some of the problems these cases still face.

"Many of them were victims of prosecutorial misconduct, or the deliberate falsification of forensic evidence."

Dr. Carter also mentioned a new program he is the founder of called Innocence International that will "expose the abuses of criminal justice in attempts to free the innocent". He adds, "We will be civil but we won't be silent. There is no greater good than the saving of an innocent life."

The man that has been a middleweight championship contender, a civil rights activist, author, screenwriter and lecturer can now add doctor of laws to his long list of remarkable accomplishments.

When asked if he ever felt hopeless while he was in jail, he remarked with a smile, "I never lost hope. I had to dare to dream. I had to act like I was already free while I was locked down in prison. I knew I would be free. And it's been 20 years next month that I have been free. So dare to dream."

Reprinted with permission. Originally published in, *Excalibur* – York University's Newspaper, October 19, 2005. York University is in Toronto, Ontario, Canada.

Simona Siad is Sports Editor of *Excalibur*. Photo by Joyce Wong, *Excalibur*.

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ruling, the appeals court focused much more on Heaslet's financial motive for falsely accusing Lewis, than the federal Sixth Circuit had in reversing his conviction. [8]

Lewis then filed a claim for compensation with Ohio's Court of Claims. In September 2005 Lewis was awarded a total of $662,000 — $412,000 to him and $250,000 in fees to his lawyers. Lewis' award included the statutory maximum of $40,330 for each of the five years he was imprisoned. [9]

Lewis, now 28, lives near Ann Arbor, Michigan and he was working for a car rental company. After being notified of the settlement, Lewis said, "It's not really what I wanted, but it's better than nothing. You can't put a price on the years I lost." [10]

Lewis plays semi-pro football and still dreams of playing in the NFL, musing, "We'll see what happens. Something has to crack sooner or later for me." [11]

With his settlement decided, Lewis was glad that that he would finally be able to focus solely on his future, "It's over for me now. Thank God." [12]

Endnotes and Sources:

1 *Lewis v. Wilkinson*, 307 F.3d 413 (6th Cir. 10/07/2002); 2002.C06.0000352, ¶29 <http://www.versuslaw.com>
2 *Id.* at ¶30
3 *Lewis v. State*, 2005 -Ohio- 2400 (Ohio App. Dist.9 05/18/2005); 2005.OH.0002492, ¶38 < http://www.versuslaw.com>
4 *Id.* (Emphasis in original).
5 *Lewis v. Wilkinson*, *supra*, at ¶22
6 *Id.* at ¶64 <http://www.versuslaw.com>
7 *Lewis v. State*, *supra*, at ¶17
8 *Id.* at ¶37-40
9 "Wrongful Conviction Ordeal Ends: Court grants Belleville man damages for five years he spent in prison," Amalie Nash, *Ann Arbor News*, September 29, 2005.
10 *Id.*
11 *Id.*
12 *Id.*

Spirko cont. from page 13

ported by witnesses and phone records — that he was over 100 miles from Elgin. No physical, forensic or eyewitness evidence implicates Spirko in the crime, and he has not confessed.

A witness positively identified Gibson as the man she saw the morning of Mottinger's abduction. However, the prosecution elicited her testimony knowing Gibson had been in Asheville, North Carolina — 600 miles from the crime scene. In spite of knowing Gibson's innocence, the prosecution presented the jury with the crime theory that Spirko and Gibson jointly abducted and murdered Mottinger. So the prosecution's duplicity ensured Spirko's jury had no opportunity

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Majority cont. from p. 19

would be undemocratic because it allows the minority to frustrate the decision of the majority.[7] Those who favor majority verdicts further argue that unanimity places an unwarranted financial burden on the State and the accused person.[8] By implementing the majority system there will be less hung juries, which will relieve the State of the financial burden of retrying cases.[9] This notion is supported by the many studies that have shown that juries operating under a majority system will deliberate and deliver the verdict faster.[10] An additional argument that has been advanced in favor of majority verdicts is that it reduces the possibility of juror corruption because more than one juror would need to be approached.[11]

Advantages of Unanimous Jury Verdicts

Although some of the arguments for majority verdicts appear strong at first sight, they must be considered in the wider context of the criminal justice system. Firstly, the arguments in favour of a majority system would carry a greater degree of weight if hung juries were a common occurrence.[12] Research suggests that the Australian States that have implemented majority verdicts have only marginally lower rates of hung juries than Queensland (where unanimous verdicts are still required).[13] Thus, implementing a majority system would only slightly decrease the incidence of hung juries.[14] It can also be argued that a larger number of hung juries is beneficial to the criminal justice system because it serves to affirm the integrity of the jury and ensures that the judgment of each juror is valued. Therefore, it would be a mistake to assume that hung juries are indicative of a failing system.[15] It is acknowledged that the implementation of the majority rule would represent some administrative and economic savings that accompany jury disagreements. However, these savings are, at best, very modest.[16] They also come at a cost to the quality of our judicial system, with the loss of an important protection.[17] The economic savings that may be bought about by the majority system should not be prioritised over the interests of justice.[18]

Another drawback of majority jury verdicts is the view of a dissenting juror is negated.[19] If reasonable doubt exists in the mind of one juror then arguably a shadow is cast over the validity of the conviction.[20] As was noted in *Cheatle v The Queen* "…assuming that all jurors are acting reasonably, a verdict returned by the majority of the jurors, over the dissent of others, objectively suggests the existence of reasonable doubt and carries a greater risk of conviction of the innocent than does a unanimous verdict."[21] In a majority system the prosecution's burden of persuasion is lighter than in a unanimous system, where all twelve jurors need to be convinced of the defendant's guilt.[22] Therefore, the practice of a majority verdict beyond a reasonable doubt is a contradiction in terms.[23]

Research suggests that juries operating under a majority system deliberate quicker and reach a verdict in less time.[24] This is largely because juries can stop deliberating if a majority is obtainable immediately.[25] It is at this time that errors occur and the jury often asks the judge questions regarding the required standard of proof.[26] The majority system may not promote a full and passionate discussion of the issues. As a result the jury may start with the verdict category and then construct a story to fit.[27] In turn, if a majority system was implemented it is likely to increase the incidence of the accidental conviction of innocent people.[28] A unanimous system operates as one of the 'checks and balances', which aims to protect the innocent from wrongful conviction.[29] Therefore, we should be concerned about abandoning it in favour of the majority rule, which diminishes one of the procedures that has been established to protect the accused person.[30]

Conclusion

Unanimous jury verdicts should not be abandoned in New South Wales. The supposed defects of unanimous verdicts will not be overcome by a majority system, and it is likely to bring with it another set of problems. Full and passionate jury deliberation is essential to the operation of the reasonable doubt standard. Majority jury verdicts undercut the prosecution's requirement to prove a defendant's guilt beyond a reasonable doubt. Unanimity is an essential safeguard to protect the interests of all accused persons. By negating the view of a dissenting juror the danger of convicting the innocent will increase. There are sound reasons to believe that implementing majority verdicts in NSW will derogate the quality of justice in our judicial system. That is unacceptable in a society that professes to be just.

Serena Nicholls is a former student member and current volunteer of the Griffith University Innocence Project, in Southport, Queensland, Australia. The views expressed in this article do not necessarily represent the views of the GU Innocence Project. Their website is, http://www.gu.edu.au/school/law/innocence/home.html

Endnotes:
1 NSW Legislative Assembly, 'Majority Verdicts' (9/11/05) http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20051109019.
2 In 1997 Kerry Whelan disappeared. Although her body was never found, Bruce Burrell (a former co-worker), was charged with her murder. When this case went to trial the jury was dismissed because a verdict could not be reached.
3 Majority have been implemented since: 1927 in South Australia; 1936 in Tasmania; 1960 in Western Australia; 1963 in Northern Territory; and 1994 in Victoria. NSW Legislative Assembly, 'Majority Verdicts' (Report 111, 2005) (9/11/05) http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20051109019.
4 *Id.*
5 *Id.*
6 *Id.*
7 New South Wales Law Reform Commission, 'Criminal Procedure: The Jury in a Criminal Trial' (Report 48, 1986).
8 *Id.*
9 Tucker WL, '*Johnson v. Louisiana*: and *Apodaca v. Oregon*: Unanimity in the Criminal Jury Verdict' (1972-1973) 7 *Georgia Law Review* 339.
10 New South Wales Law Reform Commission, 'Majority Verdicts', *supra*.
11 New South Wales Law Reform Commission, 'Criminal Procedure: The Jury in a Criminal Trial', *supra*.
12 Salmelainen P, Bonney R, and Weatherburn D, 'Hung juries and majority verdicts' (1997) 36 Crime and Justice Bulletin 1.
13 New South Wales Law Reform Commission, 'Majority Verdicts', *supra*.
14 Tucker WL, *supra*.
15 New South Wales Law Reform Commission, 'Majority Verdicts', *supra*.
16 Salmelainen P, Bonney R, and Weatherburn D, *supra*.
17 Tucker WL, *supra*.
18 New South Wales Law Reform Commission, 'Majority Verdicts', *supra*.
19 *Id.*
20 New South Wales Law Reform Commission, 'Criminal Procedure: The Jury in a Criminal Trial', *supra*.
21 *Cheatle v The Queen* (1993) 177 CLR 541.
22 Dolinko PB, 'Constitutional Law – *Johnson v. Louisiana*: State Criminal Juries Need Not Reach Unanimous Verdicts' (1972-1973) 22 *De Paul Law Review* 635.
23 Tucker WL, *supra*.
24 Davis JH, Kerr NL, Atkin RS, Holt R, and Meek D, 'The decision processes of 6 and 12 person mock juries assigned unanimous and two-thirds majority rules' (1975) 57 *Journal of Personality and Social Psychology* 1-14.
25 New South Wales Law Reform Commission, 'Criminal Procedure: The Jury in a Criminal Trial', *supra*.
26 New South Wales Law Reform Commission, 'Majority Verdicts', *supra*.
27 Darbyshire P, Maughan A, and Stewart A, 'What Can the English Legal System Learn From Jury Research Published up to 2001?' (2001) http://www.kingston.ac.uk/~ku00596/elsres01.pdf.
28 Tucker WL, *supra*.
29 New South Wales Law Reform Commission, 'Criminal Procedure: The Jury in a Criminal Trial', *supra*.
30 Willis J, 'Jury Disagreements in Criminal Trials: Some Victorian Evidence' (1983) 16 *Australian and New Zealand Journal of Criminology* 20.

Spirko cont. from page 17

to assess that his alibi defense was consistent with Gibson's lack of involvement.

Yet Judge Carr didn't think the prosecution's conduct was fraudulent. Spirko appealed to the federal Sixth Circuit Court of Appeals. During oral arguments on December 6, Spirko's lawyer Thomas Hill argued, "The star witness for the state did not believe the very theory that he was a proponent of." On December 22, 2005, the Sixth Circuit affirmed Carr's ruling.

Although Spirko's post-conviction investigations have accumulated substantive evidence that doesn't just undermine the evidentiary basis relied on by Ohio to obtain his conviction, but supports his actual innocence, he has not been granted an evidentiary hearing by any state or federal court.

As of late-December, the DNA test results have not been publicly released.

Barring the revelation of evidence of Spirko's guilt prior to January 19, 2006, that the State has not produced in the 23 years since Mottinger's murder, *Justice:Denied* will be submitting a letter to Governor Taft requesting that he grant Spirko executive clemency and a full pardon.