

A cast of four people were at the center of the wrongful conviction of 38 people in Tulia, Texas beginning in July 1999 on trumped up drug charges. The sheer number of wrongly convicted people in Tulia resulted in national press coverage that ultimately contributed to Governor Rick Perry's mass pardoning of 35 of those people in August 2003. The \$6,000,000 settlement in 2004 of federal civil rights lawsuits was distributed to the 46 people falsely arrested due to the drug investigation.

One of the cast members was Swisher County sheriff deputy Tom Coleman. During an 18 month undercover drug investigation he reported making what were in fact non-existent drug buys from 46 Tulia area residents. Coleman was sentenced to 10 years probation after being convicted in January 2005 of one count of aggravated perjury for lying during a March 2003 evidentiary hearing in Tulia. That hearing was held by order of the Texas Court of Criminal Appeals to determine if the drug convictions of four of the Tulia defendants was supported by any evidence other than Coleman's word. Disclosures during that hearing about Coleman's dishonesty, and thus the insubstantiality of the Tulia convictions, contributed to Governor Perry's pardon of the 35 defendants five months later.

Another cast member was Swisher County Sheriff Larry Stewart. He accepted Coleman's claims about the drug deals without any corroboration – no other officer witnessed any drug buys, and there were no audio or video recordings. Stewart demonstrated blind absolute faith in what Coleman told him, in spite of the fact that during Coleman's investigation he was indicted for theft of services totaling \$6,700 during the time he had previously been employed as a Cochran County, Texas sheriff deputy. Even though Stewart suspended the drug investigation after he arrested Coleman on the theft warrant, he reinstated Coleman after the stolen money was repaid. Stewart has not suffered lasting negative public consequences from his direct and intimate involvement in the wrongful conviction of 38 people.

Still another cast member was Swisher County District Judge Edward Self, who made evidentiary rulings that allowed information about Coleman's shady and violent past, and his criminal indictment to be concealed from the public (and the defendant's jurors). Judge Self's rulings were indispensable to the prosecution, because the conviction of the Tulia defendants depended solely on Coleman's credibility. After ensuring the defendant's were convicted, Judge Self then handed down unconscionably long sentences of up to 99 years (i.e., life) in prison. Judge Self has not

“Tulia Travesty” Prosecutor Terry McEachern’s Conduct Swept Under The Rug By Texas State Bar

By Hans Sherrer

suffered lasting negative public consequences from his direct and intimate involvement in the wrongful conviction of the Tulia defendants.

The final key cast member was Swisher County Prosecutor Terry McEachern. He approved the arrest of the Tulia defendants, led their prosecution, and sought stiff sentences against those convicted. After an investigation by the Texas Bar Association's Chief Disciplinary Counsel's Office (CDCO), a wide ranging complaint alleging serious ethical violations was filed against McEachern in May 2004. (See, Tulia Prosecutor Sued By Texas State Bar, *Justice:Denied*, Issue 25, Summer 2004, p. 6.) The public was made aware of the complaint because the CDCO issued a press release announcing its filing.

McEachern contested the allegations. They were so serious that he faced the possibility of permanent disbarment if he was found to have committed them. After maneuvering by McEachern and the Bar, an evidentiary hearing was held in the 242nd District Court of Hale County. It was found after that hearing that:

McEachern made a false statement of material fact or law to a tribunal. He failed to disclose a fact to a tribunal when disclosure was necessary to avoid assisting a criminal or fraudulent act. McEachern offered or used evidence that he knew to be false and falsified evidence or counseled or assisted a witness to testify falsely. He failed to refrain from prosecuting or threatening to prosecute a charge that he knew was not supported by probable cause or make timely disclosure to the defense of all evidence or information known to him that tended to negate the guilt of the accused or mitigate the offense. In connection with sentencing, he failed to disclose to the defense and to the tribunal all unprivileged mitigating information known to him. McEachern engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation and engaged in conduct constituting obstruction of justice.

McEachern's conduct was found to have violated Rules 3.03(a)(1), (a)(2), and (a)(5), 3.04(b), 3.09(a) and (d), and 8.04(a)(3) and (a)(4).¹

Pretty serious findings. Many of them involve actions that go far beyond ethical lapses and

enter the realm of serious felony criminal acts. Although all the findings are damning, if they are all disregarded except for thirteen words – “assisting a criminal or fraudulent act” and “engaged in conduct constituting obstruction of justice” – they would still seem sufficient to indicate that McEachern might not just be headed for lifetime disbarment as a lawyer, but that he could well be headed for a healthy stretch in a federal or Texas state prison.

When the State Bar announced McEachern's punishment it didn't issue a press release like when the ethical complaint was filed. Instead it was quietly published amongst a series of notices in the September 2005 issue of the *Texas Bar Journal*. The punishment the Texas Bar negotiated with McEachern is: “A two-year, fully probated suspension effective June 15, 2005.” He was also “ordered to pay \$6,225 in attorney's fees.”²

When requested to provide clarification of what a “fully probated suspension” means, the Chief Disciplinary Counsel's Office explained it allows McEachern to practice law with no restrictions during his probationary period. However, if an ethics complaint is filed against McEachern during the term of his probation and he is found to have committed the violation, he could be ordered to serve a period of “active suspension” of his license to practice law.³

In the same issue of the *Texas Bar Journal* that reported the resolution of the ethical complaints against McEachern, another lawyer was reported as being given a more serious punishment. That lawyer, William F. Estes, was given a “two-year, partially probated suspension ... with the first month actively served ...”⁴ What did that lawyer do to warrant being barred from practicing law for one month when McEachern received no suspension? Estes employed a legal assistant with whom he shared the legal fees paid by clients that the assistant had solicited. The Bar said, “In sharing legal fees with his legal assistant, Estes financed the commission of barratry.”⁵

So the Texas State Bar has clarified that it considers paying someone a commission for work that person has performed is more serious than a lawyer deliberately engaging in fraudulent, if not outright criminal actions that resulted in the wrongful conviction of 38 people. The Texas State Bar has taken that position in spite of having publicly recognized that McEachern assisted “a criminal or fraudulent act” and “engaged in conduct constituting obstruction of justice.” McEachern's conduct goes far beyond merely being an ethical lapse,

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Louisiana Makes First Wrongful Conviction Award of \$150k To Gene Bibbins

By JD Staff

On July 12, 2005, Louisiana became the 20th state in the U.S. to enact a wrongful conviction compensation statute. That law H.B.663 (Innocence Compensation Fund), provides a maximum award of \$15,000 per year for up to 10 years imprisonment to a person whose conviction has been reversed or vacated, and who can prove by "clear and convincing" evidence that he or she is "factually innocent" of the crime. The law also provides for the payment of training, education tuition, and counseling. Prior to passage of the law Louisiana would provide \$10 and a bus ticket "home" to an exonerated person as they left a state prison.

In February 2006 Gene Bibbins became the first person in Louisiana awarded compen-

sation under the new law. State District Judge Timothy Kelly ruled that the DNA evidence excluding him as the assailant of the woman he had been convicted of raping met the law's requirement that he prove his factual innocence by clear and convincing evidence.

Bibbins' innocence of raping a 13-year-old girl in 1986 had been established when DNA testing unavailable at the time of his 1987 trial excluded him as her assailant. Bibbins was released on \$5,000 bond in December 2002. His conviction was reversed and his sentence was vacated on March 7, 2003.

The girl had testified at Bibbins' trial that he was the man who crawled through her bedroom window and held a knife to her throat while raping her. Bibbins was found to be in possession of a radio stolen from the girl's room. Based on the girl's eyewitness testimony, the jury didn't believe his claim that he found the radio discarded on the street. The exclusionary DNA test indirectly established that he had been as truthful

about finding the radio as he had been in denying raping the girl.

Since Bibbins had been wrongly imprisoned for 16 years, Judge Kelley ruled he was entitled to the statutory maximum of \$150,000. The judge also said Bibbins should receive the educational benefits and job training provided for in the statute. However, he couldn't order it because the statute's language is vague as to whether those benefits are to be provided in addition to the monetary award, or if they are to be paid by deducting their cost from the \$150,000.

A catch to Bibbins' collection of the award is that there is no money in the Innocence Compensation Fund. Before he can be paid, state legislators will have to appropriate money for the compensation fund.

Sources:

Judge Rules Innocent Man Due Money For 17 Years in Prison, *The Advocate*, Baton Rouge, February 7, 2006.

DNA Tests Free Convicted Rapist, AP Story, *CBS News*, December 6, 2002.



In March 1986 Steven Avery was convicted of raping a woman also severely beaten on July 29, 1985, on a Lake Michigan beach in Manitowoc County, Wisconsin.

Steven Avery Settles Wrongful Imprisonment Suit For \$400k

By JD Staff

To obtain Avery's conviction, the prosecution depended on the jury's acceptance of the believability of two key witnesses. One was a crime lab analyst, who after a microscopic examination of a hair recovered from

the crime scene, determined it was "consistent" with Avery's hair. The other was the lone eyewitness identifying Avery as the woman's assailant.

source of the hair. Later that day the judge granted the Manitowoc County District Attorney's motion to dismiss the charges. Avery was released the next day after 18 years imprisonment. While he had been imprisoned his wife divorced him and his five children had all grown to adulthood.

The Wisconsin Innocence Project at the University of Wisconsin Law School provided key assistance to Avery in having the exonerating DNA tests conducted.

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but if honestly investigated by state or federal law enforcement authorities could have grave criminal consequences for him.

McEachern lost re-election in March 2004 after 14 years as the district attorney for Swisher, Hale and Castro counties. He is now in private practice in Plainview, Texas.

The Bar's action against McEachern resolves the legal actions thus far initiated as fall-out from the Tulia cases, unless Coleman's appeal of his perjury conviction is successful,

Although the prosecution had the two key witnesses, the jury couldn't have decided Avery was guilty beyond a reasonable doubt unless it disbelieved each one of his 16 alibi witnesses. Each of those witnesses placed him over 40 miles away in Green Bay throughout the day of the attack. Those witnesses included a cement contractor, friends, family members, and even clerks at a Shopko store where Avery was buying paint at the approximate time of the attack. He was accompanied at the Shopko by his wife and five children, and the sale was corroborated with a receipt.

Avery's conviction was affirmed by the state appeals courts.

The same DNA tests that excluded Avery indicated that Gregory Allen, imprisoned for a 1995 sexual assault, was the woman's actual assailant. It later came to light that for two weeks prior to the woman's July 1985 assault the Manitowoc police had been suspicious enough of Allen to have tailed him.

After his release Avery filed a \$36 million federal civil rights lawsuit naming as defendants: Manitowoc County, former sheriff Tom Kocourek and former district attorney Denis Vogel.

Endnotes and source:

1 Disciplinary Actions, *Texas Bar Journal*, September 2005, 758-9.

2 *Id.* at 758.

3 Telephone conversation between Hans Sherrer and a spokesperson with the Chief Disciplinary Counsel's Office on March 8, 2006.

4 Disciplinary Actions, *supra.* at 758.

5 *Id.* at 758.

For background information see, Travesty in Tulia, Texas, *Justice Denied*, Issue 23, Winter 2004, page 3, and sources cited therein.



In April 2002, after Avery had languished in prison for almost two decades, he relied on a post-conviction DNA testing statute to obtain a court order for the DNA testing of a pubic hair recovered from the victim immediately after the attack. Seventeen months later, on September 10, 2003, the final test results were released: Avery was excluded as a

In February 2006, Avery and the defendant's agreed to settle the suit for \$400,000. The settlement was to be paid by the county's insurance carriers. Avery was designated to receive 60%, \$240,000, with the remaining going to pay attorney fees and expenses.

Source:

Avery Settles Suit Over Jailing, Tom Kertscher, *Milwaukee Journal Sentinel*, February 14, 2006.

