

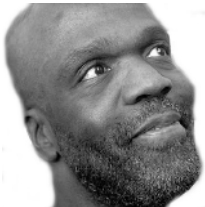
JUSTICE DENIED

\$3
Retail

The Magazine for the
Wrongly Convicted

\$16.86 MILLION AWARDED EXONERATED PEOPLE IN 2005

SEE P. 45



Drew Whitley

Released after 18 years wrongful imprisonment for murder.
See page 8



Timothy Howard

Awarded \$2,500,000 after 26 years wrongful imprisonment for murder.
See page 14



Ray Krone

\$4.4 million compensation and apology from AZ legislators after 10-1/2 years wrongful imprisonment.
See page 16

Earl Washington

Awarded \$2,250,000 for 18 years wrongful imprisonment for murder based on fabricated confession.
See page 5

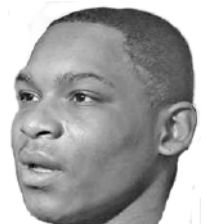


Lori Berenson

After 11 years imprisonment will new administration in Peru review her suspect conviction?
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Dante Allen

Released after wrongful assault and kidnapping conviction.
See page 4



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Fed Prosecutor Indicted For Framing Four Men On False Terrorism Charges!

Did David Cawthon Take The Fall For A Con Artist Who Stole \$52 Million?

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Montana's Governor Pardons 78 Wrongly Convicted Of Sedition!

**Issue 32
Spring 2006**

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Message From The Publisher

During the Faces of Wrongful Conviction Conference at UC Los Angeles in April, Lawrence Marshall, director of Stanford’s Clinical Law Program, commented that a significant problem with correcting wrongful convictions is the arrogant attitude of many prosecutors, judges and police investigators that the legal system reliably convicts the right person, and errors are aberrations.

With all due respect to Professor Marshall, I think it is more accurate to describe their attitude as pigheaded at best, and malevolent at worst. I can’t recall meeting a person claiming innocence convicted in either a state or federal court, or one of their family members or friends who witnessed all or part of the person’s trial, who didn’t express the impression that the courtroom proceedings were akin to a “kangaroo court.”

It is telling that a system held in such low esteem by the people it most personally affects and who are living examples of how unreliable it can be, is viewed with uncritical admiration by so many judges and people associated with the prosecution. For an example of how that pigheaded (or malevolent) attitude was expressed in a recent U.S. Supreme Court decision, see the article and editorial concerning *Kansas v. Marsh* (U.S. 2006) on page 34.

At the same UCLA conference, Craig Haney, Professor of Psychology, UC Santa Cruz, and author of *Death By Design*, gave a presentation explaining the mainstream media regularly exposes the public to the idea “crimes” are committed by “bad” people who deserve severe punishment. Jurors accepting that idea have a propensity to convict a defendant in spite of skimpy evidence, and in a capital case to favor a death sentence. Haney’s research underscores the importance of alternate media, such as *JD*, to countervail “tough on crime”/pro-prosecution attitudes by exposing how and why it isn’t unusual for an innocent person to be accused, and convicted, of a crime.

Hans Sherrer, Publisher

Justice:Denied - the magazine for the wrongly convicted

Justice: Denied’s logo represents the snake of evil and injustice climbing up on the scales of justice.



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Convicted Bank Robber Was 468 Miles From Scene of The Crime – The Emanuel Brown Story

By Emanuel Brown

On September 13, 1990, at about 11:30 a.m., two black males robbed the Wachovia Bank & Trust Co. (WBTC), at 1200 E. Bessemer Avenue, in Greensboro N.C. Authorities later alleged they stole \$371,000. About an hour after the robbery a city code enforcement officer noticed several black males in and around a U-Haul truck at Greensboro's Carolina Circle Mall. The mall is about 2-1/2 miles from the bank robbery scene. Considering the men suspicious, the code officer called and reported them to the Greensboro Police Department.

Several minutes later a male Greensboro PD officer arrived at the mall and began following the U-Haul truck. The driver of the truck pulled into another parking area of the mall.

The officer stopped about fifty feet from the truck. The U-Haul's occupant, Charles Walker, then approached the police car. The police officer got out of his vehicle, and with his weapon drawn ordered Walker to lay face down on the ground. Several minutes later a female officer arrived at the parking lot and kept a watchful eye on Walker while the male officer searched the cab and cargo area of the U-Haul. The officer did not discover any weapons, cash, drugs, or illegal contraband of any kind within the U-Haul. The male officer then requested that Walker produce his identification. Since there was no indication Walker was involved in doing anything illegal, the male officer eventually decided to arrest Walker for operating a motor vehicle without a legal drivers license.

No physical evidence, confession, or eyewitness identification by any bank customer, employee, or passerby in the bank area linked Walker to the bank robbery. He was, however, a black man arrested more than an hour after the robbery several miles from the bank. So about a day after he was arrested on the moving vehicle violation, local law enforcement authorities decided to charge him with the WBTC robbery. He was held in the Greensboro County Jail under \$500,000 bond.

The FBI became involved in the bank robbery investigation. When he was questioned, Walker made no incriminating statements to the local police or the FBI. However, the FBI discovered that the U-

Haul truck driven by Walker was rented on September 12, 1990, in Durham, N.C. The rental agreement showed that the truck was rented to a person displaying a Pennsylvania driver's license issued to an Emanuel Brown, and listed a Philadelphia address.

Brown arrested

In spite of the fact that there was no evidence linking Walker or the truck he was driving to the WBTC bank robbery, the FBI immediately focused on Brown as a possible suspect. On the afternoon of September 28, 1990, Brown was stopped while driving on a Philadelphia street. He was arrested after his car was surrounded by Philadelphia PD officers and FBI agents with guns drawn.

When Brown arrived at a Philadelphia police station, he asked an FBI special agent why he had been arrested. The agent told him a U.S Magistrate in North Carolina had issued an arrest warrant against him for a bank robbery in Greensboro. Brown denied any involvement in the bank robbery and requested to see the arrest warrant. The FBI agent told him a copy was at his downtown Philadelphia office.

Three days later Brown appeared in front of U.S. Magistrate James Melinson. He requested a copy of the arrest warrant. The U.S. Attorney's Office responded by requesting a three-day continuance.

On the afternoon of Brown's arrest the FBI searched his residence. They confiscated \$67,365.85 that they found, on suspicion it was part of the bank robbery money. The FBI claimed a copy of the search warrant was left at Brown's residence, and that U.S. Magistrate Judge M. Faith Angell signed it in Philadelphia on September 28, 1990, at 10:30 p.m. Brown, however, didn't receive a copy of the warrant until the time of his trial.

The money seized by the FBI had no connection to the bank robbery. For six years prior to his arrest (1985 to 1990), Brown co-owned three Philadelphia businesses with William (Seville Bill) Merrill. Two were nightclubs, M & M Club Unique and High Rollers/Studio West. The other was a restaurant. They were all businesses that took in a lot of cash. The money seized by the FBI was proceeds from those businesses, and it was never connected to the bank robbery.

On October 4, 1990, Brown again appeared before Magistrate Melinson. He again

requested a copy of the arrest warrant. Neither the magistrate nor Brown was provided with a signed copy of the arrest warrant prior to his transportation to North Carolina by U.S. Marshalls.

Brown, Walker and others indicted

Walker was still a state prisoner when a federal grand jury in North Carolina indicted Brown and him on October 29, 1990, for armed bank robbery of the WBTC. The grand jury relied on the testimony of an FBI agent in the Charlotte FBI office. At that time neither Brown nor Walker had made any incriminating statements.

Four weeks after his indictment, on or about November 26, Walker appeared in front of a federal grand jury. He proceeded to implicate not only Brown and himself in the robbery, but two additional people, Susan Parker, and Neil Harewood. That grand jury issued a superseding indictment naming all four people as accomplices in the WBTC robbery.

During a pretrial motions hearing, Brown requested the professional services of a handwriting expert to prove he didn't sign the U-Haul truck rental agreement. Brown also requested the services of a private investigator to document that at the time the bank robbery took place in Greensboro, he was almost 500 miles away in Philadelphia. The district court judge denied both motions. The judge explained that the prosecution was not going to present a handwriting expert to authenticate that the signature on the rental agreement was Browns', so therefore Brown did not need a handwriting expert to testify that the signature wasn't his. In denying the request for a defense investigator, the judge explained that Brown's court appointed defense counsel could personally contact and investigate any government witness.

After the judge's prosecution favorable rulings on the pretrial motions, Brown's lawyer encouraged him to agree to a plea deal. His lawyer told him, "I believe you are guilty, and I believe the jury is going to find you guilty." Disenchanted with his lawyer and concerned that a local lawyer wouldn't vigorously defend him, Brown suggested that the judge appoint a different lawyer from outside the Greensboro federal court district. The judge rejected Brown's request. Brown was faced with choosing between two very unpleasant choices: either represent himself *pro se* or proceed with his unsatisfactory court appointed counsel.

Brown cont. on page 41

Cincinnati Teen Facing 34 Years Imprisonment Exonerated After Assault and Kidnapping Conviction



By James Love

On June 6, 2005, two African-American teenagers climbed aboard a Cincinnati Metro bus, waving a gun at passengers and demanding to know if any of the passengers were from Bond Hill in Cincinnati, or knew anything about the murder of Eugene Lampkin that same day. A mother and child were so terrified that they refused to leave their seats even after the two gunmen had left the bus. The bus driver was so frightened she needed medical attention for breathing problems.

The community reacted to high profile news coverage with demands the gunmen be caught and brought to justice. Witnesses identified Brandon Mincy, 18, and Dante Allen, 16, as the two teenagers who had invaded the bus, and they were arrested by Cincinnati Police the same day. Both were charged with felonious assault, kidnapping, inducing panic and disturbing public service. They faced 34 years in prison if convicted. Allen insisted from the beginning that the police had arrested the wrong person and that he was innocent.

On July 22, 2005 Allen was bound over by a Hamilton County Juvenile Court Judge, and the case was moved to adult court. Indictments were returned on September 9, 2005.

At the two-day bench trial, held before Hamilton County Common Pleas Judge Mark Schweikert on November 30 and December 1, 2005, Mincy's attorney, Carl Lewis, admitted that Mincy was on the bus, but argued he meant no harm and was grieving over the loss of his friend, Lampkin. In contrast, Allen's attorney, Richard

Bouchard, argued the police had the wrong person. Mincy testified that Allen had not been the other person on the bus with him.

A surveillance camera on the bus recorded the crime, but its perpetrators weren't identifiable from the video. So the prosecution relied on the bus driver and a passenger to identify Allen as one of the two teens on the bus. Three police officers also testified against Allen. Both teens were found guilty by the judge, and sentencing was set for December 13, 2005.

However, before their sentencing the Cincinnati Police received an anonymous telephone call telling them that Allen was innocent, and naming a 17-year-old, as the person who had been on the bus with Mincy. Acting on that information the police arrested the teen on December 7, 2005. After the 17-year-old admitted that he, and not Allen, was the second teen on the bus, he was charged him with the same crimes for which Allen had just been convicted.

The next day and only eight days after his conviction, Judge Schweikert ordered Allen's release without bond pending a final dismissal of the charges against him.

"It was a real struggle, I cried every night," Dante said after his release from more than six months in an adult jail, "It was scary."¹

Ms. Eddie Allen, Dante's mother, said, "They just wanted to arrest someone, they didn't care who."²

Hamilton County Prosecutor Joe Deters commented, "This was based on a witness who said it was him. Identification cases are very difficult."³ Deter's statement is somewhat curious considering that this same prosecutor's office regularly argues in court how reliable their eyewitnesses are in order to obtain convictions of defendants – including Allen less than two weeks before.

Wonderland quality. As you are handcuffed and marched to your cell, anger at the injustice of it all replaces the shock, if you are a strong person. If not, the jail or prison staff where you are at are only too ready to prescribe you some happy pills to keep you quiet, and render you incapable of fighting your case. Thorazine is one of their favorites.

The *Cincinnati Enquirer* headlined its editorial, "Innocent but convicted: We must ask how, why." But there is another important question that must be asked: How often are wrongful convictions not corrected? How many Dante Allen's remain imprisoned?

Allen told the media, "I feel good, I thank my lawyer. He kept fighting for me. He believed me when I said I was innocent."⁴ Allen's attorney said a lawsuit "had not been ruled out."⁵

After his release, Allen reflected on his stunned reaction when Judge Schweikert pronounced him guilty of crimes he had nothing to do with, "I was thinking, what happened? The justice system is not supposed to work like this."⁶

Allen's co-defendant, Brandon Mincy, was sentenced to 18 years in prison on December 30, 2005. Since Allen was convicted of the same crimes, that likely would have also been his sentence if the exonerating evidence hadn't surfaced.

Endnotes:

1 "Wrongly convicted boy, 17, is freed," by Sharon Coolidge, *Cincinnati Enquirer*, December 9, 2005.

2 *Id.*

3 *Id.*

4 *Id.*

5 *WCPO.com*, 12/11/05, "Tri-state Teen Wrongly Convicted, Now Released," by Lance Barry.

6 Wrongly convicted boy, 17, is freed," *supra*.

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* Issue 27, Winter 2005.

Ohio Governor Bob Taft granted Spirko a fourth stay of execution on June 19, 2006. Spirko's scheduled July 19, 2006, execution was stayed until November 29. Ohio Attorney General Jim Petro requested the stay to allow time to complete testing of the painting tarp and duct tape wrapped around Mottinger's body, and 30 to 100 cigarette butts found near her body. for the presence of the killer's DNA. A witness has identified the killer is a house painter who the witness also claims was the tarp's owner.

Rob Warden, Executive Director of the Center on Wrongful Convictions at the Northwestern University School of Law has said of Spirko's case, "This is the weakest capital case I have ever seen reach this stage in any state, including Texas, Florida and Alabama."

In Nov. 2005 Spirko described his situation, "I don't think there's ever been any case before this governor ... that had so much evidence, a mountain of evidence, that I'm innocent. Still, I'm running against a wall here. ... Where's the justice?"

Comment By James Love

A December 10, 2005, *Cincinnati Enquirer* editorial raised disturbing questions as to how an innocent teen such as Dante Allen could be convicted. Allen's case seemed to catch the attention of the mainstream media because he was a teenager. Yet, the trauma of being wrongfully convicted and imprisoned is so vast and indescribable that the age at which it occurs has very little bearing on the impact it has on a person at the moment of conviction. Your knees go weak, your breath stops and the whole courtroom takes on an Alice in

After a two-week trial and six hours of deliberations, on May 5, 2006, a U. S. District Court jury in Charlottesville, Virginia awarded Earl Washington, Jr. \$2.25 million for his wrongful conviction and 18 years of imprisonment, that included 9-1/2 years on death row. At one point Washington came within nine days of execution.

Washington won a civil suit against the estate of a State Police Agent Curtis Reese Wilmore. Jurors decided Wilmore, who died in 1994, fabricated Washington's "confession." Before the jurors could award damages, U. S. District Court Judge Norman Moon advised them they had to make three findings: that Wilmore fabricated evidence against Washington; that Wilmore did so deliberately; and that his actions resulted in Washington's conviction and death sentence.

Peter Neufeld, one of Washington's lawyers, believes the jury's verdict is the largest civil-rights award for one person in Virginia history. He said, "The State of Virginia is morally and financially responsible for this miscarriage of justice."¹ Debi Cornwell, another one of Washington's attorneys, said the monetary award would come from insurance held by the Virginia State Police.

The State of Virginia accepted responsibility for defending Wilmore's estate because he was working as a state employee when the events alleged in Washington's lawsuit occurred. The law firm representing Wilmore's estate billed the state for over \$530,000 for work done prior to the two-week trial and post-trial challenges to the jury's verdict.² Their final bill may approach \$1 million, particularly since they are contesting the jury's verdict on the basis that the trial judge erred by refusing their use of a peremptory challenge to remove the only remaining person of color in the jury pool – who happened to be a police officer and a former prison guard.³ Although it hasn't yet been resolved, Washington's lawyers intend to argue that their considerable fees should be paid from the state's insurance, and not from Washington's award.

After the verdict was announced Neufeld said, "We provided overwhelming evidence ... that a false confession was fabricated by a Virginia State Police officer who put an innocent man on death row."⁴

When the original criminal investigation began, Washington repeatedly gave Wilmore wrong answers about details of the crime in his "confession" to a gruesome rape-murder in Culpeper, Virginia south of Charlottesville.

Earl Washington Awarded \$2.25 Million For 18 Years Wrongful Imprisonment

By Douglas Arey

ville. In 1982 victim Williams was stabbed 38 times in her apartment. In his efforts to "confess" Washington described Williams, who was white, as black, and claimed he had only stabbed her a few times.

The civil trial was predicated on the jurors being successfully convinced that Washington, who is mildly retarded, was fed details about the murder that only the killer and Wilmore (and other investigators) would have known, such as the removal of a halter top from the victim, and the location of a blood-stained shirt. The jury's award demonstrates how effectively they were convinced that Washington's confession was coached.

This victory concluded a remarkable run of good luck and fortunate interventions for Washington over the last two decades. Washington was nearly executed in 1985 but spared when a lawyer volunteered to take his case. Then Governor L. Douglas Wilder commuted his sentence to life in prison in 1994 when DNA testing, unavailable when the murder was investigated, strongly suggested Washington's innocence. In addition, Governor Jim Gilmore pardoned Washington in 2002 when more sophisticated testing matched the crime scene DNA with a convicted rapist in sperm on a blanket, but failed to find any forensic evidence of Washington at the crime scene.

Washington's exoneration shook up Virginia's judges, politicians and officials and led to major changes in Virginia statutes, which now give prisoners the right to request DNA testing to prove their innocence.

Perhaps the best assessment of the impact of this case came from an Editorial in *The Virginian-Pilot* that asked several unsettling questions:

- Why did the state refuse to declare Washington innocent of the rape-murder for which he received an unconditional pardon from Governor Gilmore?
- Why did special prosecutor Rick Moore, who is supposedly still investigating the case, never retracted the statement that Washington remains a suspect?
- Is there another case in the history of Virginia in which the semen of a convicted



ed rapist has been found on both the body and bed of a dead woman, and yet Virginia allows a shadow of guilt to hover over another man?⁵

Just as the very first prisoner in the nation cleared from death row by DNA

evidence, Kirk Bloodsworth of Maryland, was denied the prosecutor's recognition of his innocence for a decade, until later DNA testing verified another Maryland prisoner was the perpetrator, so too was Washington denied recognition of his innocence of the rape/murder when Governor Gilmore granted him a pardon on October 2, 2000. Although DNA tests excluded Washington as the perpetrator, they weren't considered to conclusively prove Washington's innocence.

It was only in 2004 that further testing by an independent expert identified convicted rapist Tinsley's DNA matched the sperm found at the crime scene, and it was only through a stipulation in court, prior to the 2006 trial that Virginia finally agreed Washington was factually innocent. Neufeld said the stipulation was the first time Virginia publicly acknowledged Washington is innocent.

In effect, it was only the persistence of Washington's lawyers and other advocates over the past years that finally cleared Earl Washington of this gruesome crime.

Neufeld posited the verdict sent a larger message. Wilmore did not record his interrogation of Washington and during the first hour he didn't even take any notes. "What this case proves is that Virginia should join all the states that require all police interrogations to be recorded."⁶ He hopes the state will require all interrogations are tape-recorded, warning: "If they don't do it, there's going to be more Earl Washingtons."⁷

Endnotes:

1 "\$2.25 million verdict for Washington in false confession," by Frank Green, *Richmond Times-Dispatch*, May 6, 2006

2 Fees in civil case footed by taxpayers, by Frank Green, *Richmond Times-Dispatch*, May 31, 2006

3 New trial sought in death-row civil case, Frank Green, *Richmond Times-Dispatch*, May 24, 2006

4 "\$2.25 million verdict for Washington in false confession," *supra*.

5 "Kangaroo court for Earl Washington," Editorial Staff, *The Virginian-Pilot*, May 1, 2006

6 "Federal jury awards Earl Washington Jr. \$2.25 million," *The Virginian-Pilot*, May 6, 2006

7 "Freed man's lawsuit says confession was coached," *The Virginian-Pilot*, April 26, 2006



In the midst of WWI Montana enacted a Sedition Act that criminalized anything said, written or published that was considered unpatriotic to the United States.¹ Criticizing the government or inciting resistance to the war effort could be punished with a maximum penalty of 20 years and a \$20,000 fine. Montana's sedition law was the model for the less severe federal Sedition Act of 1918.

Montana's legislature also created the Council of Defense that was vested with the authority to enact regulations restricting the content of publications and speech. Among the Council's edicts was the banning of books about Germany and publicly speaking German.

The Sedition Act had long ago faded away to be just another historical footnote, when Clemens Work shined a spotlight on it with the October 2005 publication of his book, *Darkness Before Dawn: Sedition and Free Speech in the American West* (University of New Mexico Press). Work, a University of Montana journalism professor, detailed the law's vigorous enforcement against Montanans for doing things such as expressing support for Germany, refusing to buy Liberty Bonds (U.S. government bonds), criticizing the U.S.'s entry into the European war, or refusing to kiss the national flag.

Work also related that the Council of Defense's decrees were taken very seriously. Illustrative of that is what happened in the central Montana town of Lewistown, where a mob of 500 people burned German books on Main Street as they sang The Star Spangled Banner. One of Lewistown's citizens was found guilty of sedition because he didn't buy any Liberty Bonds.

Considering the vigorousness of the Sedition Acts enforcement and its effect on the people of Montana, Work described the law as "probably the harshest anti-speech law in the history of this country."²

A representative sampling of Montana's "Seditionists"

Herman Bausch, a German immigrant said, "I do not care anything about the Red, White and Blue; I won't do anything voluntarily to aid this war; I don't care who wins this war; ... We should never have entered this war and this war should be stopped immediately and peace declared."³ Convicted of sedition, he was sentenced to 4 to 8 years in prison and served 28 months at the old Deer Lodge State



Herman Bausch

Montana Governor Pardons 78 Wrongly Convicted Of Sedition in WWI

By Hans Sherrer

Penitentiary. After his release, Bausch wrote, "I do not regret what I have done or rather what I refused to do. I have lost much, but I am more than ever in possession of my soul, my self-respect, and the love and affection of my beautiful wife."⁴



Ben Kahn

Ben Kahn was a traveling liquor salesman from San Francisco when he said to the owner of a Red Lodge hotel, "Mr. Polard, this is a rich man's war." Then in response to a question about the sinking of the Lusitania he said Americans "had no business in that boat. They were hauling over munitions and wheat." He also said that wartime food regulations were a "big joke."⁵ Later that day Kahn was arrested and charged with sedition. After his conviction he was sentenced to 7 1/2 to 20 years imprisonment. The Montana Supreme Court denied his appeal on May 20, 1919. Kahn served 34 months before his release on parole.

Martin Wehinger was an immigrant from Austria. In the spring of 1918 he was prosecuted for sedition after saying about the United State's entry into the war, "we had no business sticking our nose in there and we should get licked for doing so."⁶ Sentenced to 3-6 years imprisonment, Wehinger served 18 months at Deer Lodge before being released on parole. He died four months later.



Martin Wehinger



Janet Smith

Janet Smith was the postmistress in Sayle, Montana. She and her husband were well-to-do, owning close to 1,000 acres, a large numbers of sheep, 300 head of cattle, 35 horses, and other assets. The couple were arrested for sedition after Janet allegedly "advocated turning the stock into the crops to prevent helping the government, and killing off all the cripples, insane, and convicts in order to save food instead of making all the food restrictions." She also allegedly said the Red Cross was "fake."⁷ She denied making

the statements, but after her conviction she was sentenced to 5-10 years in prison. One of only two women at the state penitentiary in Deer Lodge, she was released after 26 months imprisonment. Her husband William was also convicted based on his alleged statements that included, "The war was for the benefit of the rich people and the Liberty Bonds of the United States were By God all a damn graft."⁸ He was sentenced to 10-20 years in prison, plus a \$20,000 fine. Eighty acres of the couples land was sold to pay the fine. During William's sentencing his judge told him, "If I could follow the dictates of my own judgment, I would either sentence you to a term in the state prison for your natural life, or I would order you banished entirely from the country."⁹ William was paroled after 24 months imprisonment.



Fred Rodewald

Fred Rodewald was a German immigrant who was charged with sedition after allegedly saying the people in United States "would have hard times unless the Kaiser didn't get over here and rule this country."¹⁰ Sentenced to 2-5 years imprisonment, he was paroled after 19 months.

Ellsworth Burling was a native of Illinois prosecuted for sedition after a witness alleged he said in a store, "If he had \$10,000 he would not buy a Liberty Bond because the Liberty Bonds were nothing but a damn graft," and that the European war "was a rich man's war and let the rich men buy bonds."¹¹ Sentenced to 1-2 years imprisonment, Burling was paroled after 9 months.



Ellsworth Burling

The Montana Sedition Project pursues pardons

After reading Work's book, Jeffrey Renz, Director of the Criminal Defense Clinic at the University of Montana Law School joined forces with Work to document the cases of people convicted of violating the state's Sedition Law with an eye toward seeking their posthumous pardons from Montana's Governor. They called their effort The Montana Sedition Project, and set up a website, <http://www.seditionproject.net>.

Work and three of his journalism students, and Renz and seven of his law students scoured court and state prison records, and

Montana Pardons cont. on p. 7

Montana Pardons cont. from p. 6

did other research to compile a list of everyone convicted of violating the Sedition Law, along with as many details as possible about the circumstances of the convictions. They identified 76 men and 3 women that had been convicted of violating the law. One of the men was pardoned in 1921.

A total of 63-1/2 years in prison was served by 41 of the convicted seditionists, for an average imprisonment of 19 months. Three others were sentenced to prison but didn't serve any of their sentence, and the other 35 were fined only.

Pardon Petition filed in April 2006

On April 13, 2006, just six months after Work's book was published, a Pardon Petition was formally submitted to Montana Governor Brian Schweitzer. One of the letters included with the petition that was signed by academics from around the country stated in part:

"In 1918 and 1919, 40 men and one woman were convicted and incarcerated at the Montana State Penitentiary in Deer Lodge for terms of up to 20 years because they criticized the government during wartime. Another 37 persons were convicted but did not go to prison.

We ... urge you to grant these men and women posthumous pardons... We respectfully urge you to do this for two basic reasons: (1) to affirm Montana's commitment to free expression; and (2) to bring a measure of justice and redemption to these people and their living descendants.

The state law under which these people were convicted, signed by then Governor Sam Stewart on Feb. 23, 1918 ... Anyone who in wartime uttered or published any "disloyal, profane, violent, scurrilous, contemptuous, slurring or abusive language about the form of government of the United States" could be convicted of sedition, sent to prison for up to 20 years, and fined up to \$20,000.

Beginning in March 1918 and continuing for about a year, even after the Armistice had been signed, county prosecutors charged some 150 people in the state with sedition; about half were convicted. As the formal petition record makes clear, the trials took place in an atmosphere of suspicion and fear, at a time when any dissent was rooted out and punished.

... The crabbed conception of free speech reflected in the Montana state court decisions has long since been rejected in Montana and

throughout the nation. It has been replaced, to draw from Justice William Brennan's opinion for the Supreme Court in *New York Times v. Sullivan* (1964), with "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Montana's own right to participate in government, and to criticize it in the most severe terms is preserved in the Montana Constitution.



Clemens Work, author of *Darkness Before Dawn*

Should you exercise your authority to pardon those punished for exercising what we now acknowledge to have been their constitutional right to question their own government, you would be acting in accord with a tradition dating back at least as far as 1840, when President Martin Van Buren posthumously pardoned Vermont newspaperman Matthew Lyon. The former Revolutionary War hero, later a Congressman, had been convicted under the Sedition Act of 1798 for speaking out against President Adams' "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice." In June 1927 California Governor Clement C. Young pardoned Charlotte Anita Whitney after the U.S. Supreme Court upheld her state conviction for criminal syndicalism. In 1921, President Warren Harding pardoned Socialist leader Eugene Debs, who had been convicted of violating the federal sedition act during World War I. Four years later, New York Gov. Al Smith pardoned another socialist leader, Benjamin Gitlow, who had been convicted of violating a New York law by publishing "The Left Wing Manifesto." In much the same spirit, President Franklin D. Roosevelt in 1933 restored voting rights and other civil liberties to approximately 1,500 men and women who had been convicted of seditious utterances under federal law during World War I. More recently, in 2003, New York Gov. George Pataki posthumously pardoned pioneer stand-up comedian Lenny Bruce for a 40-year-old obscenity conviction based on biting comedic political commentary.

Granting the posthumous pardon petitions herein requested would ease the hearts of the living descendants of those convicted and would provide justice and a measure of redemption. ...

By pardoning the men and women convicted of sedition in Montana during a time when fear and hysteria gripped the nation, you affirm our state and national commitment to free speech in America. You there-

by affirm freedom. In that American spirit, we respectfully urge you to grant the posthumous petitions herein requested."¹²

Governor Schweitzer issues 78 pardons

On May 3, 2006, three weeks after receiving the Pardon Petition, Governor Schweitzer signed a Proclamation of Clemency that posthumously granted unconditional pardons to 78 people convicted of violating Montana's Sedition Law. About 50 relatives of eight of the pardoned persons attended the ceremony held in the Capitol rotunda in Helena.

Many of the sedition convictions were based on eyewitness reports of casual, but colorful statements by working folk after a few drinks in a saloon. Schweitzer recognized that "Freedom of speech is a fundamental and a constitutional right in times of war and peace alike. Neighbors spying on neighbors and hindering freedom is not the America or Montana way."¹³

A grandson of German-speaking immigrants, Schweitzer said, "Across this country, it was a time in which we had lost our minds. So today in Montana, we will attempt to make it right. In Montana, we will say to an entire generation of people, we are sorry. And we challenge the rest of the country to do the same."¹⁴

Schweitzer's 78 pardons were the first issued posthumously in Montana history.

Endnotes and sources:

1 "Whenever the United States shall be engaged in war, any person or persons who shall utter, print, write or publish any disloyal, profane, violent, scurrilous, contemptuous, slurring or abusive language about the form of government of the United States, or the constitution of the United States, or the soldiers or sailors of the United States, or the flag of the United States, or the uniform of the army or navy of the United States or shall utter, print, write or publish any language calculated to incite or inflame resistance to any duly constituted Federal or State authority in connection with the prosecution of the War shall be guilty of sedition." 1918 Montana Laws chapter 11, section 1.

2 78 convicted of sedition in Montana pardoned, by Charles S. Johnson, *Billings Gazette*, May 4, 2006.

3 The Montana Sedition Project, <http://www.seditionproject.net/MontanaSedition.htm>

4 Pardoned!, The Montana Sedition Project, <http://www.seditionproject.net/pardonproject.html>

5 What They Allegedly Said, The Montana Sedition Project, <http://www.seditionproject.net/profiles.html>

6 *Id.*

7 The Montana Sedition Project, *supra*.

8 *Id.*

9 What They Allegedly Said, *supra*.

10 *Id.*

11 Ellsworth Burling web page, *The Montana Sedition Project*, <http://www.seditionproject.net/BURLING.htm>

12 Letter and Petition to Governor Schweitzer, March 27, 2006, <http://www.seditionproject.net/petitionletter.html>.

13 Governor Schweitzer Signs Pardons for Those Convicted Under MT Sedition Act, *Governor's News Release*, May 3, 2006.

14 78 convicted of sedition in Montana pardoned, by Charles S. Johnson, *Billings Gazette*, May 4, 2006.



Drew Whitley Freed After 18 Years

By Bill Moushey

Taking in freedom after 18 years of incarceration for a murder he didn't commit, Drew Whitley gazed longingly towards his mother Hattie, thanked her for not only helping him fight his personal war for exoneration but for consoling him in his darkest hours.

"I got a little weary at times, and I would call mom, she was always there, keeping me focused throughout this nightmare," he said just moments after a judge dismissed charges that he killed Noreen Malloy, 22, a McDonald's restaurant night manager near Kennywood Park in 1988 after DNA tests proved he was not the killer.

"Mom, you stood by me through thick and thin, we went through this war together, and we won," said Mr. Whitley, as he embraced the teary-eyed woman.

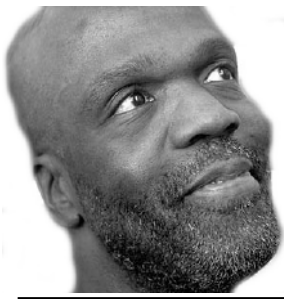
"It don't get no better than this," was all Mrs. Whitley could say as they walked out of the courtroom of Allegheny County Common Pleas Judge Anthony Mariani, then strolled on the sun-splashed day to the county jail to complete paperwork on his trek to freedom.

Mr. Whitley, now 50, has spent nearly two decades and hundreds of courtroom hours trying to overturn his conviction in the brutal slaying of Ms. Malloy, who was shot twice and left to die in the restaurant parking lot during a botched robbery attempt.

At an emotional hearing on May 1, 2006, it took Judge Anthony Mariani only five minutes to set him free after the Allegheny County District Attorneys office requested a dismissal of all charges against Mr. Whitley due to extreme reasonable doubt of his guilt.

With the judge listening, Mr. Whitley thanked his mother and Scott Coffey, his lawyer, then singled out the work of students at the Innocence Institute of Point Park University, which investigated his claims of innocence for five years. "Bill Moushey, you are my hero, thank you," he said about the investigative journalism program where students probe into and write about claims of wrongful convictions.

During his imprisonment, Mr. Whitley — who has steadfastly maintained his innocence — said he felt as if someone put him into "a room



Drew Whitley a day after his release.
Andy Starnes, *Pittsburgh Post-Gazette*

His son, Marcus Whitley, now 31, said, "He's been gone since I was 14; this is like Christmas." Asked what he was going to do with his father, the younger Mr. Whitley smiled and said: "Chill, just chill."

Another interested attendee was Thomas Doswell, who was exonerated after serving almost 19 years in prison on a rape conviction through DNA testing last August. The two became friends in prison and helped each other on their cases.

"I believed in his situation. I'm thankful to live to see this day that another man has been found innocent," Mr. Doswell said.

No members of Noreen Malloy's family attended the hearing, and none have commented on the case since Allegheny County District Attorney Stephen A. Zappala Jr. announced last week that DNA tests showed that hairs found in the nylon mask worn by the man who shot Ms. Malloy did not belong to Mr. Whitley.

It was the second set of DNA tests on physical evidence from the case that indicated Mr. Whitley did not commit the crime, and along with the case involving Mr. Doswell was the second time that post-conviction DNA tests have cleared someone in Allegheny County.

Mr. Whitley was convicted in 1989 on physical evidence and the word of two controversial witnesses. Mr. Zappala last week called the case "another example of how science has contradicted the testimony of witnesses." Other than to say the case is now "open and active," a spokesman for Mr. Zappala had no comment yesterday.

Mr. Coffey said it was difficult to get to the truth because evidence was lost for years and it was mired in procedural delays.

"It shows the system does work, the system ultimately did work," he said.

Mr. Coffey also was stunned by the turnaround. Just two weeks ago Mr. Zappala's

with a million doors and there is only one door that you can open, and they blindfold you and over the years you got to keep on trying to find those doors when you're blindfolded...its crazy," he said.

office had filed a motion suggesting the prosecutor would oppose his request for a new trial based on the first round of DNA tests that excluded Mr. Whitley earlier this year.

For years, prosecutors had fought Mr. Whitley's efforts to conduct DNA tests on more than 40 hairs that had been found in clothing worn by the man who beat and shot Ms. Malloy to death. Last summer, after DNA testing exonerated Mr. Doswell of Homewood, Mr. Zappala said he would reconsider his interpretation of a 2003 state law that authorizes DNA tests for people convicted of major crimes.

On the fact that others who were wrongfully convicted remain incarcerated, Mr. Whitley praised the new law: "Me and Tommy are just fortunate. We had the DNA evidence. If I didn't have it, I'd still be in there (prison)," he said.

On his release, Mr. Whitley was anxious to go to his mother's home to rekindle relationships that for almost two decades were limited to prison visits, letters and occasional telephone conversations.

Reflecting on the ordeal, he remained stoic: "In difficult times, I get better, not bitter. Don't get me wrong, I got upset at times, angry, but not bitter," he said.

That is because he was able to remain hopeful.

"Keep hope alive, don't ever give up on hope, always remember tough times don't last, tough people do," he said, while smiling about his new-found freedom, adding, "It's a beautiful thing."

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Bill Moushey is a Pittsburgh *Post-Gazette* staff writer and an associate professor of journalism at Pittsburgh's Point Park University. He is founder and director of the Innocence Institute of Point Park University, a partnership between the University and the *Post-Gazette* that allows students to learn investigative reporting by looking into allegations of wrongful conviction in Western Pennsylvania.

Prisoners in Western Pennsylvania and West Virginia **only** who are claiming innocence can write:
Innocence Institute Of Point Park University
201 Wood Street
Pittsburgh, PA 15222



Texas Denies Man Compensation For Wrongful Imprisonment

by C. C. Simmons

In 1998, a Dallas, Texas District Court jury convicted Morris S. Jones of aggravated assault with a deadly weapon. He was sentenced to 15 years imprisonment. On appeal, the trial court's judgment was affirmed.

Jones then filed an application for a post-conviction writ of habeas corpus. He claimed that newly discovered evidence established he was actually innocent of the offense of which he was convicted. The Texas Court of Criminal Appeals held a hearing on Jones' application, and in June 2001 vacated his conviction.

Thereafter, Jones sought compensation of \$25,000 per year of wrongful imprisonment as provided by Texas state law. Section 103, et seq., of the Texas Civil Practice and Remedies Code states that a person who served his sentence in prison under the laws of Texas and who has been granted relief on the basis of actual innocence of the crime for which he was sentenced is entitled to compensation.

Section 103.002, "Choice of Compensation Method," states that a person entitled to compensation may proceed administratively and apply for compensation to the State Comptroller under §103.051 or may seek compensation by bringing suit against the state under § 103.101, but may not seek compensation under both sections.

Initially, Jones applied for compensation under § 103.051 through Carole Keeton Strayhorn, the Texas State Comptroller. She denied his application. He then requested reconsideration of his application for compensation, but Strayhorn again denied it. Jones took no further action on either his § 103.051 application or on his motion for reconsideration.

Two years later, Jones filed suit in the 95th District Court, Dallas. He sought compensation for wrongful imprisonment under Civil Practice and Remedies Code § 103.101, and also sought mandamus relief against Comptroller Strayhorn under § 103.051(e). After a bench trial, the court dismissed Jones' lawsuit for want of jurisdiction. In a judgment signed on October 11, 2004, Judge Karen Johnson found: 1) Jones had initially applied for compensation administratively under § 103.051 and his application had been denied. 2) Under the Choice of Compensation Method set out in §103.002, Jones had opted for administrative relief under § 103.051. 3) Therefore Jones was barred from

seeking relief by filing suit under § 103.101.

Judge Johnson dismissed Jones' lawsuit without prejudice and for want of jurisdiction. Moreover, the court ordered that it did not have jurisdiction to enter a Writ of Mandamus against Comptroller Strayhorn under § 103.051(e). On direct appeal from Judge Johnson's ruling, Texas' Fifth Court of Appeals at Dallas upheld the trial court. Although Jones had sought but failed to receive compensation by the administrative mechanism of § 103.051, the appellate court agreed with the trial court that Jones was henceforth barred from seeking compensation by filing a lawsuit in the courts under § 103.101.

Consequently, Jones received no compensation from Texas for his three years of wrongful imprisonment. Three points in Jones' five year quest for compensation are worth noting.

First, the trial court acted properly when it declined to enter a Writ of Mandamus against Comptroller Strayhorn. The Texas Constitution and Texas (government Code § 22.002 provide that the Comptroller is one of seven state officials identified as an Executive Officer. Only the Supreme Court of Texas has authority to issue a Writ of Mandamus against an Executive Officer; only the Texas high court can issue the writ to compel the performance of a judicial, ministerial, or discretionary act that the Comptroller is authorized to perform. Clearly, then, Jones filed his petition for mandamus relief in the wrong court – the trial court. As set out in state law, Jones should have filed in the state Supreme Court which was the court of proper jurisdiction.

Second, the trial court dismissed Jones' suit without prejudice and thus left open the opportunity for Jones to refile his lawsuit in a court of competent jurisdiction.

Third, Carole Keeton Strayhorn has been a colorful and popular character on the Texas political stage for many years. She is widely known as "one tough grandma." In 2002, she received more votes than any other statewide candidate in her bid to become the state's top financial officer. She is running for Governor of Texas as an independent in the 2006 election. She is also the mother of Scott McClellan who was President Bush's Press Secretary until he resigned in April 2006.

References and Sources:

State of Texas v Morris S. Jones, F98-18511-MT, 283rd District Court, Dallas (criminal conviction); *Jones v State*, 05-98-01871-CR, Dallas Court of Appeals (criminal appeal); *Ex parte Jones*, 74116, Texas Court of Criminal Appeals (post-conviction state habeas corpus); *Jones v State v Strayhorn*, DV-0211926-D, 95th District Court, Dallas (trial court dismissal for want of jurisdiction); *Jones v State*, 05-04-01625-CV, Dallas Court of Appeals (appeal of trial court dismissal); *Newsweek*, July 4, 2005, p. 8; *Newsweek*, May 1, 2006, p. 25 ff.

Conviction Tossed For Alleged "Vampire" Rapist

In the fall of 2004, 19-year-old Leon Benjamin Forde was accused of being the "vampire" rapist. A 15-year-old girl accused Forde of ritualistically raping her two years earlier – including biting her on the neck as if he were a vampire. The attack allegedly happened in Lincoln, a city of 85,000 people about 100 miles north of London, England.

Since two years had passed from the time of the alleged rape to when the girl made her accusation, there was no physical evidence implicating Forde. The prosecution's case relied on the girl's testimony and Forde's defense relied on his denial. The jury chose to believe the girl and convicted Forde. He was sentenced to eight years in prison.

After Forde's conviction he obtained information that the girl kept a computer diary suggesting she made up the rape allegation. He filed an appeal based on the new evidence undermining his conviction.

On May 18, 2006, the Court of Criminal Appeal quashed Forde's conviction based on the girl's computer diary that suggested the rape never occurred and that she had "made it all up." The Court ordered Forde's immediate release without a retrial based on the new evidence that he had been convicted of a non-existent crime.

Just hours after the appeals court quashed his conviction, Forde was released after 18 months of wrongful imprisonment. When asked his experience, Forde described his time in prison as a convicted rapist as "hell."

Source:

Conviction quashed over 'made up' vampire claim, *The Guardian* (London, UK), May 19, 2006.



SSRI antidepressants are known to cause suicidal and violent behavior in otherwise peaceful people. "Stop Antidepressant Violence from Escalating" (S.A.V.E.) is offering an SSRI Information Packet to any prisoner who believes that their conviction was the result of SSRI intoxication. Request the "SSRI Info Pack" by writing:

SAVE
c/o J. Milea
111 Fox Run Road
Stewartville, NJ 08886



I have received *Justice Denied* for several years. I've read about many people wrongly convicted of murder or rape. I felt that my wrongful conviction somehow wasn't worthy or as bad as what happened to those people. But the realization finally hit me; I am serving 210 months – 17-1/2 years – for a crime about which I still know very little. While conspiracy to launder monetary instruments may not seem as “bad” as rape or murder, the time in prison is just as real, the horror of being wrongly convicted just as sickening, and just as repressive.

Years before my conviction, seemingly in another life, I was a financial planner and insurance broker. I had built up a client base and over about 14 years had secured contracts with 102 insurance companies. In early 1997 I was told about a financial opportunity by a business associate, who was later to be a codefendant. Global Financial Investments (GFI) was planning to issue short-term corporate promissory notes to individuals much like banks issue certificates of deposit. The notes matured (came due) in 9 to 12 months and paid a higher interest rate than banks and insurance companies.

Five Men Convicted Of Financial Crimes Committed By Con Artist – The David Cawthon Story

By David Cawthon

Virgil Womack was president of GFI, its chief executive officer and he controlled the company. I met Womack maybe twice. Yet even though I had little contact with Womack and no involvement in GFI's management, the federal prosecutor would later imply I was one of the schemes “kingpins.”

There were three primary “selling points” for the promissory notes. First they were insured by a company, Keyes International, which was in turn reinsured by Lloyds of London. Second, we had a “due diligence” letter from an attorney stating the insurer (Keyes) was stable. Third, GFI claimed assets of \$1.2 billion. Finally, we had Womack, the man behind GFI, checked by the FBI. The FBI reported that while they could not actively approve of doing business with someone, nothing detrimental could be found regarding Womack or GFI. As brokers we were furnished with numerous documents that verified GFI could perform exactly as Womack represented.

My codefendants and I soon sold almost \$6.5 million in notes to clients, acquaintances and family members. I sold about \$1 million in notes. Our clients included lawyers, retired teachers and certified public accountants (CPA). One client was a federal assistant United States attorney (AUSA) who invested \$100,000 in GFI notes. Conventional wisdom would dictate that if someone is running a scam the absolute last person on Earth he or she wants involved is an AUSA! Furthermore, that AUSA was the brother of one of my codefendants who invested his family's life savings in GFI notes. That codefendant's parents also purchased GFI notes. Simple logic dictates a person involved in a scam isn't going to jeopardize *his* family's money *and* that of his brother and parents!

But we thought all was on the “up and up.” We had no reason to think otherwise. A CPA would later testify that he thought Womack was a “billionaire philanthropist who could most certainly do what he said.” In the end, we were all hustled by Womack. At trial, the federal prosecutor asserted that involvement of the CPA and the AUSA was all part of our “master plan.” Our prosecutor

Cawthon continued on page 11

What became known as the “Detroit sleeper cell” terrorism case began six days after September 11, 2001, when a Detroit apartment was searched by federal agents looking for a person on the FBI's Terrorist Watch List. That man, Nabil al-Marabh, was not found. However, the discovery of fake identity documents during the search led to the arrest of the three men from northern Africa who were in the apartment.

Ten days after the raid, on September 27, 2001, a federal indictment alleging fraud and misuse of visas, permits and other documents, was issued against two of those men, Karim Koubriti and Ahmed Hannan, and a third man, Youssef Hmimssa, whose fake I.D. was found during the apartment search. Koubriti and Hannan worked as dishwashers, and Hmimssa was an illegal Moroccan immigrant arrested on September 28.

The three men denied any involvement in terrorism, nothing seized during the search plainly linked them to terrorism, and when interviewed by the FBI, a former roommate of Koubriti and Hannan described them as lazy pot-smoking drunks who didn't practice any religion. He also said he never heard them talk about anything related to terrorism. Hmimssa also described the two men to interrogators as heavy drinkers who

Federal Prosecutor Indicted For Frame-up Of Four Men Innocent Of Terrorism

By Hans Sherrer

smoked hashish and didn't seem religious.

Assistant United States Attorney Richard Convertino was assigned as lead prosecutor in the case. About a month after the indictment Convertino induced Hmimssa to cooperate by using the threat of the 81 years in prison he was facing in three unrelated federal theft and fraud cases. However, during the next four months Hmimssa consistently denied that any of the men were involved in terrorism. Then beginning in March 2002 he suggested Koubriti and Hannan were terrorists, and he provided “details” during many meetings with investigators conducted without his attorney present.

Indictment and trial of alleged Detroit “sleeper cell” terrorists

On August 28, 2002, a superceding four count indictment was issued against Koubriti, Hannan, and two other men, Farouk Ali-Haimoud (who worked at an ice cream shop) and Ab-

del-Ilah Elmardoudi. The case was known as *United States v. Koubriti, et al.*¹ All four men were accused of fraud and misuse of visas, permits and other documents; conspiracy to commit those offenses; fraud related to identification documents; and providing material support or resources to terrorists. The terrorism charge was the most serious. It was largely based on information provided by Hmimssa, and the alleged similarity between a sketch in a day planner found during the September 2001 apartment search and a military hospital in Amman, Jordan. Convertino and his team speculated the hospital was a possible terrorist target.

Six days before the trial's scheduled start the U.S. launched its invasion of Iraq. The judge denied a defense motion to delay the trial so the possible inflammation of prejudice by jurors against Muslims accused of terrorism could subside. The motion was denied and the trial began on March 26, 2003. It was the first post-9/11 terrorism trial in the U.S.

Under a plea agreement recommending he would serve no more than 46 months imprisonment if he testified as a friendly government witness, Hmimssa pled guilty on April 3, to 10 counts of identity theft and credit card fraud charges resulting from federal indictments in

Convertino continued on page 38

Cawthon cont. from p. 10

also argued that our FBI inquiry before we began selling the notes was also somehow part of our “master plan.”

Master plan? Right. For the \$1 million of GFI notes I sold over a period of about six months, I was promptly paid some \$27,000 in commission via company checks that I did not try to hide in any way. I deposited the checks into my checking account and paid bills. The deal was for me to receive the remainder of my commission (\$27,000) over the next 6 months. Hence, the total commission was \$54,000, or 5.4%, over a 12-month period. Some contracts I had with major insurance carriers at that time would have paid me up to 18% commission in a *lump sum* for investments of \$1 million plus. So according to the prosecution my “master plan” was to be paid \$54,000 over 12 months illegally, when selling the same total amount for top insurance companies I could have made \$180,000 paid all at once – legally.

Yet at our trial the prosecutor insisted with a straight face that making less commission on GFI’s promissory notes was part of our grand conspiracy to somehow make millions. As a salesman, the advantage of selling GFI’s notes was they were in denominations of \$10,000, so they were easier to market than opportunities with the insurance companies I represented that required a larger investment.

Five of us who sold GFI’s notes were indicted for everything but the proverbial kitchen sink: Conspiracy to defraud; mail fraud; wire fraud; securities fraud; and conspiracy to launder monetary instruments. The most serious charge was the alleged money laundering.

Indictment irregularity

According to the President’s Commission the purpose of money laundering is to “conceal and disguise” funds, and that they be used to “promote” an ongoing criminal enterprise. Yet promotion was only mentioned in our indictment as it relates to our personal assets, while concealment and/or disguise was not mentioned at all. It wasn’t mentioned because since we weren’t committing crimes, we didn’t attempt to “conceal and disguise” our actions. An indictment is supposed to track the statutory language and include all essential elements of the alleged crime(s). That requirement helps guard against the erroneous indictment of innocent persons, and that it wasn’t followed in our case contributed to our wrongful convictions.

Two trials

We went to trial in U.S. District Court in Macon, Georgia. Twice. For all of us, these

were our first and only felony charges. We were businessmen accused of white collar crimes that didn’t involve any drugs, guns, or violence. The broadness of the money laundering and conspiracy statutes allows the government to characterize practically any business activity as a crime. In my case I sold some promissory notes that I had every reason to think were completely legitimate, and collected a commission for their sale.

The first trial was declared a mistrial in November 2001. The trial was an eye-opening education for the five of us into how ruthless federal prosecutors are and how little regard they have for the truth.

Our second trial began in January 2002. The prosecutor’s zeal to ensure our conviction intensified during the second trial, as did the judge’s open bias against us. A blow to our defense was when the judge upheld the prosecution’s objection to allowing our key witness to testify. The witness wasn’t a shady character with a long criminal rap sheet and zero credibility. He was Georgia Superior Court Judge John D. Crosby, of the Tifton Judicial Circuit.

In the summer of 1997 Georgia’s Secretary of State filed suit against GFI and Womack claiming the notes he was marketing were unregistered securities. After a bench trial, in October 1997 Judge Crosby issued a permanent restraining order against GFI barring its sale of the promissory notes (unregistered securities), and appointed a receiver to take over GFI’s assets and operation. Womack appealed Judge Crosby’s decision, and it was upheld unanimously by the Georgia Supreme Court in September 1998. (*Womack v. State*, 270 Ga. 56, 507 S.E.2d 425 (Ga. 09-14-1998)) If Judge Crosby had been allowed to testify about what he knew of GFI’s operation and Womack, he would have proven without a doubt our innocence.

Why didn’t Judge Crosby testify? He traveled from Tifton to Macon (105 miles one-way) to testify, but when we were ready to call him as a witness our judge said there wasn’t enough time for him to complete his testimony that day, and he didn’t want his testimony interrupted. So Judge Crosby returned to the federal courthouse the next morning expecting to be the first witness called. However, overnight our judge had a change in attitude: He refused to allow Judge Crosby to testify, saying, “I will not allow another judge in my courtroom.” Out lawyer’s objections to barring Judge Crosby from testifying were futile.

Another egregious breach of our rights during both trials was the prosecutor withheld important exculpatory evidence that would

have impeached the testimony of a critical witness representing the Georgia Secretary of State’s office. The withheld information was that an agent with the Secretary of State’s office had called Womack several times and told him that for \$150,000 Georgia’s investigation of him and GFI would “all go away.” The agent later pled guilty to solicitation of a bribe. All the calls to Womack were recorded and verified to have been by this particular agent. During both trials this key information establishing Womack’s culpability in GFI was concealed from us by the prosecution, even as agents from the Secretary of State’s office testified against us.

Another witness that didn’t testify was Womack’s secretary. She did testify as a defense witness in our first trial that ended in a mistrial. Our judge, however, discouraged her testimony during our second trial, telling our lawyers, “There is no need to bother this young lady yet again.” Yet Womack’s secretary could not only have provided valuable testimony about how Womack operated his fraudulent “business,” and how we knew nothing about it being a scam, but she also could have disclosed during her testimony that she had an affair with the Georgia Secretary of State agent who attempted to shake down Womack for a \$150,000 bribe.

Also, even though a viable defense to the charges against us was that we had an innocent “state of mind” and thus lacked criminal intent at the time the alleged events occurred, repeated attempts by our lawyers to establish our lack of knowledge or intent were rejected by the judge. At one point when I asked my attorney why the judge was so extremely hostile toward us, he said, “Looks like we got a new prosecutor today.” The “new” prosecutor being the judge who didn’t seem interested in even attempting to appear unbiased.

Since Womack had made a sweetheart plea deal with the US Department of Justice, somebody else had to be cast as the “bad guys” to take the fall for his scam. Tag. We were it.

Trial judge kept the jury in the dark about what happened to \$2.8 million

Besides disallowing our key witness to testify and preventing the introduction of evidence proving our lack of criminal intent, the judge also prejudiced us by answering a question by the jury during its deliberations in an “affirmative pregnant” manner. During their deliberation the jury asked a question about what had happened to \$2.8 million that had been removed from GFI’s corporate bank account about the time Judge Crosby issued the restraining order against GFI.

Cawthon cont. on p. 12

Cawthon cont. from p. 11

An “affirmative pregnant” answer is an answer to an unasked question implying a negative. Essentially, the jury asked the judge, “Your honor, we have heard about this \$2.8 million dollars. *What exactly happened to that money?*” Rather than simply tell the jury what took place, the judge told the jury that what happened to the money was not an issue in the case. But that was an answer to a question the jury didn’t ask. Ironically, if Judge Crosby had been allowed to testify the jury wouldn’t have needed to ask the question, since he could have explained what happened to the money during his testimony.

What the jury wasn’t told is that after the Secretary of State’s investigation of GFI and Womack became known, two signatories to GFI’s corporate bank account (who were codefendants of mine) withdrew the money in question (\$2.8 million) without Womack’s knowledge and turned it over to an attorney to be deposited into an interest bearing trust account for safekeeping. Although Womack threatened those two men if they didn’t return the money to him, it wasn’t, and the receiver appointed by Judge Crosby eventually took possession of the money for distribution to investors scammed by Womack/GFI. Our trial judge knew all of this. But if he told (or had allowed Judge Crosby to tell) the jury the truth that the \$2.8 million had only been returned to purchasers of GFI’s notes because of my two codefendants, it would have made us look less culpable, less guilty. So our judge chose to deceptively respond to the jury’s question, and consequently in weighing our fate, the jury was kept in the dark that largely because of that \$2.8 million, Womack’s “marks” were lucky as victim’s of scams go: the actual over-all loss to purchasers of GFI’s notes was less than 50%. The five of us codefendants weren’t so lucky.

Giving evidence that the judge’s response to the jury was done with a “guilty mind,” his interaction with the jury in regards to their question about the money wasn’t conducted in open court. He secretly answered the jury’s question behind closed doors. We weren’t present, nor were we allowed an opportunity to rebut or object to the judge’s “affirmatively pregnant” answer to the jury! What happened to the principle of a “public” trial?

The second trial ended in January 2002 with guilty verdicts against the five of us as to all counts. I was sentenced in March 2002, to 210 months – 17-1/2 years – in prison, the same as my four codefendants. I began my sentence on March 19, 2002, and with the BOP’s 15% good-time credit I’m scheduled for release on June 26, 2017.

My judge was feeble-minded

There has been a lot of talk regarding the mental agility and acumen of judges once they start aging. In our case that originally included Womack as a codefendant, the indictment had a total of 72 counts. I was named in 18 of those counts, the last being count 52. Count 52 was conspiracy to launder money. Although it carried a maximum sentence of 20 years in prison, it included a lesser sentencing provision of “only” 10 years. My four codefendants were also named in count 52. Count 53 was a different and more serious money laundering charge that only Womack and his wife were charged with violating. Yet even though we were not named in count 53, our judge, born in 1930, instructed our jury on count 53 as if we were charged with violating it!

Consequently, the jury mistakenly voted us guilty of the money laundering allegations in count 53 that us five codefendants weren’t even alleged by the government to have violated! That was a serious mistake because count 53 involved a much more serious penalty under the sentencing guidelines.

The *indicted* crimes that the jury found us guilty of committing carried sentences of from 24 to 30 months under the mandatory federal sentencing guidelines (remember this was pre-*Booker*). However, with the prosecutor’s approval, the judge relied on a crime of which we weren’t convicted (Count 53), and facts not proven by the prosecution beyond a reasonable doubt to the jury, and to “enhance” our sentence by 700% to 800% – to 210 months.

11th Circuit orders resentencing

We were disappointed when on direct appeal the federal 11th Circuit affirmed our convictions. However, the appeals court did get the problem with our sentences right by ordering our trial judge to re-sentence us pursuant to the less stringent (up to 10 year) portion of the money laundering statutes – which supported our contention that the guideline sentencing range was 24-30 months. At our re-sentencing hearing, the judge simply disregarded the 11th Circuit’s ruling, and sentenced us to the same 210 months! We are now in our second direct appeal due to the judge’s failure to comply with the appeal court’s mandate. Our briefs were filed in January 2005 – 18 months ago. As this is written we await our fate.

If the 11th Circuit rules as it did previously, and we are sentenced accordingly to 24-30 months, we would be released with time served since we have been imprisoned for more than four years. Whether released or not, I will file a Writ of Certiorari with the Supreme Court seeking to overturn my con-

victions, and if that is not successful, I will be pursuing a \$2255 motion to challenge my conviction on multiple grounds.

Womack the King Pin was “more equal” than the other defendants

For more than four years, five innocent businessmen have languished in federal prison for crimes they did not commit and can prove they didn’t commit. In contrast with our treatment, the actual criminal, Womack, came out “smelling like a rose.” He pled guilty to laundering some \$52 million, of which \$6.5 million was the money involved in the GFI note scam. While five of us received 17-1/2 years on fabricated charges, Womack slid by with 60 months in a federal prison camp for his role as the King Pin in his money laundering scheme. He’s now free. [JD Note: Womack was released from BOP custody on December 27, 2005.] Womack’s wife was treated even more royally than he was. Although indicted for crimes far more serious than me and my four codefendants, the U.S. Attorney’s Office offered her a “too good to be true” deal that allowed her to slide by with a one year sentence.

Other than the \$2.8 million my two codefendant’s removed from GFI’s account for safekeeping and any money seized by the government, Womack has not paid back any of the \$52 million he admitted stealing. The figure could be a lot more. That is just all the government admitted it found out about.

George Orwell wrote in *Animal Farm* (1945): “All animals are equal – some are just more equal than others.” For reasons unknown to me, Womack and his wife were considered “more equal” than some of the other animals named on the indictment. Could Womack’s stolen millions buy more equality? Sure seems so.

The conduct of the federal investigators, prosecutors and our trial judge were so totally skewed toward ensuring our convictions in spite of our innocence, that at the end of the day the nagging question remains: “Quis custodiet ipsos custodes?” – “Who shall guard the guards themselves?”

Thank you for reading about our plight. I can be written at:

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Lady Vengeance

Review by Hans Sherrer

What if a 19-year-old woman confessed to murdering a five-year-old boy and was imprisoned for 13-1/2 years?

What if the confession by that woman – Lee Geum-ja – was based on crime scene details provided to her by a police investigator because she had no knowledge of those details?

What if Geum-ja falsely confessed because the boy's actual murderer, a kindergarten teacher named Mr. Baek, threatened to murder her infant daughter if she didn't do so?

What if Geum-ja's sense of justice and patience was displayed by her slow three-year poisoning with bleach of a thuggish woman prisoner who sexually preyed on intimidated prisoners, and by doing this and other things she gained the loyalty of prisoners she helped?

What if Geum-ja didn't see her daughter during her many years of imprisonment because she had been adopted by an Australian couple?

What if Geum-ja had no interest in pursuing her legal exoneration, but instead during her years of imprisonment she devised a plan of retribution against Baek?

What if upon her release Geum-ja set her plan in motion and enlisted the aid of released prisoners she had helped?

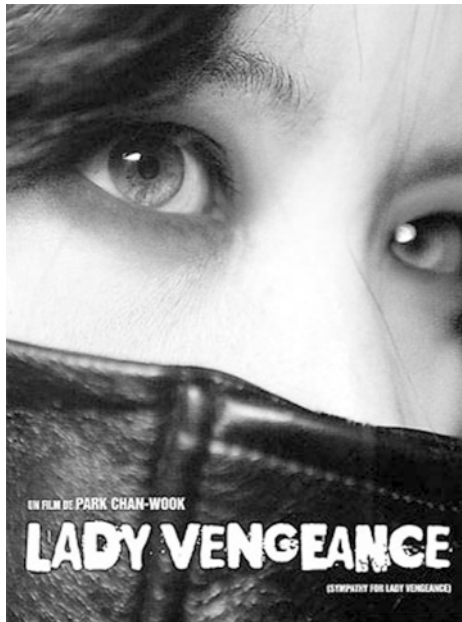
What if while surreptitiously searching Baek's home Geum-ja found video tapes of him sadistically killing five other children?

What if Geum-ja contacted the children's parents, including the parents of the boy she falsely confessed to murdering, and after showing them the video tapes gave them the option of either being a part of her retribution plan, or going to the police and letting the legal system deal with Baek?

What if the children's parents unanimously decided to pro-actively deal with their personal loss, and not involve the legal system?

Lady Vengeance is a South Korean movie that answers all of those "what ifs" as well as many others.

Lady Vengeance is a thought provoking movie that presents a way of looking at life and responding to a personal crisis in ways that are not just different than the norm in



this country, but which are in some ways diametrically opposite.

It may be novel for many people to consider that reliance on the legal system is not the only way to satisfactorily resolve a situation in which people have been harmed by a person's heinous actions. It also unwittingly provides support for the idea suggested by a British psychologist that more than a legal exoneration or compensation (Geum-ja cared about neither), a wrongfully convicted person psychologically craves a public apology by those responsible for the loss they experienced.¹ At a minimum *Lady Vengeance* honestly explores the importance of providing an emotionally satisfying resolution to the life shaking experience of a wrongful conviction.

The movie also suggests that the public prosecution, conviction and imprisonment of Baek was of no significance to the children's parents. What they wanted was to bring an unusual form of closure to the wounds caused by Baek's actions. Or, at the very least to know that Baek would experience an extreme dose of his own medicine.

Geum-ja has an almost angelic quality as she methodically and without any reservation pursues Baek's comeuppance. A promotional tagline for *Lady Vengeance* is: "All she wanted was a peaceful life." The inner calm felt by Geum-ja (and the children's parents) at the end of the movie indicates that after all she went through, she achieved her desire.

Lady Vengeance has an R rating for several scenes showing the aftermath of violence, and several non-graphic prison rape scenes

(between women prisoners). It is definitely not for the squeamish. Yet, unlike many U.S. films, the language is non-offensive enough to satisfy the most pious preacher. Although the movie has English subtitles, it is visually engrossing enough that they are not a distraction.

Lady Vengeance is South Korean director Park Chan-wook's final movie in a trilogy exploring vengeance. The first movie, *Sympathy For Mr. Vengeance*, was released in 2002, and at least one U.S. movie critic named it the best movie of the year. The second movie, *Old Boy*, was the 2004 Cannes Film Festivals Grand Prix winner. *Lady Vengeance* grossed more money during its opening weekend in July 2005 than any film in South Korean history. It opened in a limited number of U.S. theaters in the spring of 2006.

Chan-wook's trilogy is a powerful reality check for people who have the mistaken impression that South Korean movies are cartoonish kung-fu type flicks. *Lady Vengeance* is worth seeing if you are not queasy about diving head first into a thoughtful exploration of the struggle people endure to make sense of being thrust into the nightmare-like world inhabited by a person such as Baek, who has a heart of darkness.

Lady Vengeance facts:

Starring Lee Young-ae as Lee Geum-ja
Director, Park Chan-wook

Released in U.S. by Tartan Films

112 minutes, color, R rating for violence
Korean with English subtitles

Released in South Korea in July 2005 and
in the U.S. in April 2006.

Available on DVD July 24, 2006.

1 See, e.g., Grounds, Adrian. Psychological consequences of wrongful conviction and imprisonment. *Canadian Journal of Criminology and Criminal Justice*. Ottawa: Jan 2004. Vol.46, Iss. 2; pg. 165.

Freeing The Innocent A Handbook for the Wrongfully Convicted

By Michael and Becky Pardue

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"I congratulate you on your marvelous book *Freeing the Innocent*."

P. Wilson, Professor of Criminology, Bond University

On December 21, 1976, two young African-American men walked into the Ohio National Bank in Columbus, Ohio, stole \$1,207 and shot and killed 74-year-old bank guard Berne Davis.

29 Years And \$2,500,000 Later – The Timothy Howard And Gary James Story Continues

By James Love

Columbus police said that Robert Simpson, a key prosecution witness, immediately after the crime identified one of the robbers as a man named “Tim”, who had been in Simpson’s tire shop across from the bank. Yet Simpson gave a statement to the FBI six days later in which he did not mention any “Tim”, and stated he “did not recognize...the two Negro males” leaving the bank.

Simpson’s FBI statement was not disclosed to the two men who were charged with the crime, Timothy Howard and Gary James, prior to their trial. It was only discovered several decades later after Freedom of Information Act requests were responded to by the FBI.

Physical evidence of the crime was minimal. The murder weapon and stolen money were never recovered, and there were no pictures of the assailants because the bank’s security camera did not contain any film. Detective Harry Coder testified he found only a partial palm print at the bank that didn’t match either Howard or James. However, it was not disclosed to the defense prior to trial that three fingerprints found at the crime scene did not match either Howard or James.

Bank employee Michaela M. Hollenbach initially told police she could identify the gunman who killed Davis. When shown a photo lineup she was unable to identify James. This impeachment evidence was not disclosed to defense counsel before trial.

With their attorneys unaware of the exculpatory evidence, Howard and James were convicted in 1977 and sentenced to death. In 1978 Ohio’s Death Penalty statute was declared unconstitutional, and both men were re-sentenced to life in prison.

After Centurion Ministries, the nation’s oldest innocence project, accepted Howard and James case, the exculpatory evidence that had not been disclosed to their defense attorneys at the time of their trial was eventually discovered.

The men filed motions for a new trial based on the new evidence undisclosed by the prosecution. Franklin County Common Pleas Judge Michael Watson granted Howard’s motion and he was released in April 2003. Then after James passed a state-administered polygraph test, Franklin Coun-

ty prosecutor Ron O’Brien agreed to dismiss his charges “in the interest of justice.” James was released in July 2003. While acknowledging the 27-year-old murder and robbery became an unsolved crime with the release of James and Howard, O’Brien said, “We don’t want anybody in prison serving time for something they didn’t do.”¹

After their release, Howard and James filed separate lawsuits seeking compensation under Ohio’s wrongful conviction compensation statute. The Court of Common Pleas must find that a claimant for compensation is innocent by a preponderance of the evidence.



Timothy Howard
after his 2003 release



Gary James after
his 2003 release



Timothy Howard
1976 mugshot



Gary James
1976 mugshot

The office of Ohio’s attorney general contested Howard’s claim, and on March 15, 2006, a jury found Howard was actually innocent. Howard then filed a claim for damages with Ohio’s Court of Claims. It was confirmed on April 21, 2006, that Howard’s claim would be settled for \$2.5 million. It was the largest wrongful conviction settlement in Ohio history, and amounted to \$96,153 for each of the more than 26 years Howard was imprisoned. After deductions for attorney’s fees and expenses, and taxes, Howard will receive less than 2/3rds of the settlement. Howard’s award uses up 50% of the \$5 million Ohio has set aside in an emergency fund to compensate wrongfully convicted Ohio prisoners.

James’ lawsuit is still pending, but is expected to involve similar compensation.

While in their stories about the case of Howard and James *The Columbus Dispatch* credited attorney Jim Owen of the Ohio Public Defender’s Office and Jim McCloskey of Centurion Ministries with obtaining the men’s release, Columbus investigator and author Martin Yant also played a critical role.

Contrary to the reports in *The Columbus Dispatch*, it was Yant who convinced James’ sentencing judge, Judge William Gillie, to sign an important affidavit suggesting both James and Howard should receive new trials at which they could “present newly discovered evidence that supports their claims of innocence.”² In addition to getting some of the details wrong about how the men’s release came about, the paper also under-reported or outright ignored the culpability of the Columbus Police in the men’s wrongful convictions.

James and Howard were 23 years old when they were wrongfully convicted and imprisoned 29 years ago. Both are now over 50. When he learned that Howard settled his lawsuit for \$2.5 million, James told *The Columbus Dispatch*, “If they gave him \$26 million, it wouldn’t be enough.”³

Note about the author. James Love has written numerous articles about wrongful convictions. Many of those articles are posted on the Innocent Inmates of Ohio website at, <http://www.innocentinmates.org>. Love’s story of being wrongly convicted of several rapes alleged to have occurred in Cincinnati, Ohio when he was 2,000 miles away in Mexico and Belize, was featured in *Justice: Denied* Issue 30, Fall 2005, p. 5. Love is currently at Allen Correctional Institution in Lima, Ohio, the same prison Gary James was released from in July 2003. Prisoners who knew James told Love that he was well liked and stayed to himself.

Endnotes:

1 Wrongly Convicted Now Free as a Bird, *Columbus Dispatch*, July 18, 2003.

2 Justice Shirked, by Martin Yant, *Columbus Dispatch*, February 10, 2002.

3 \$2.5 Million Deal: Man gets payback for years in prison by Alan Johnson, *Columbus Dispatch*, April 22, 2006.

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The cases of Thomas Broady, Jack Searcy Jr., Allen Thrower, Anthony Washington, and Timothy Howard and Gary James demonstrate that Columbus, Ohio police detective Tom Jones Sr. had a definite knack for framing a suspect into a wrongful conviction. What isn't known is how many of Jones frame-ups went undetected. Detective Jones retired from the Columbus Police Department in August 1978, under a hail of suspicion related to his years of unprofessional and possibly illegal conduct.

Thomas Broady

Detective Jones was involved in the investigation that resulted in Thomas Broady being charged and convicted of murdering John Georgeoff in 1973. During Broady's trial, Jones was informed by FBI agent Dick Cleary that another suspect had credibly confessed to the murder. Jones responded by telling Cleary, "we have our man," and he failed to inform the prosecutors or defense counsel about the confession. After Broady discovered existence of the confession he was granted a new trial and acquitted.

Jack Searcy, Jr.

In 1975 Jones played a role in the indictment of Jack Searcy, Jr., for the murder of William Ruh. In September 1976, Assistant prosecutor (now prosecutor) Ron O'Brien, asked that the indictment against Searcy be dismissed, as "the only legal and ethical thing to do."

Frame-up Artist Behind Conviction Of Gary James And Timothy Howard

By James Love

Prior to dismissal of the indictment in the Ruh case, Jones had played a key role in Searcy's conviction for another murder that was also based on dubious evidence. Jones cultivated informants from the Franklin County (Ohio) Jail who testified Searcy had "confessed" to them that he committed the January 1975 murder of James Peoples. A prisoner who testified against Searcy has told Yant that Searcy didn't confess to him, and that Jones coerced the prisoner into perjuringly testifying against Searcy.

Allen Thrower

In 1978 the Internal Affairs Bureau of the Columbus Division of Police determined that Jones had acted egregiously during the investigation of Allen Thrower, who was convicted for the homicide of Columbus Police Officer Joseph Edwards in 1972. Thrower was released from prison in 1979.

Anthony Washington

Columbus PD Internal Affairs investigators reportedly pursued allegations Jones manufactured the evidence and recruited informants to finger defendant Anthony Washington in a 1977 murder. The indict-

ment against Washington was dismissed shortly after Jones retired in August 1978.

Timothy Howard and Gary James

Timothy Howard and Gary James had operated a paper route together on the eastside of Columbus, and they remained casual friends during their teens. After a bank witness (mistakenly) identified James as being involved in a December 1976 bank robbery during which a bank guard was killed, Howard became a suspect because of their friendship. When Howard heard he was a suspect, he contacted the Columbus police with the intention of clearing his name.

Detective Jones focused the bank robbery and murder investigation on Howard and James. He contributed to their convictions by tailoring the evidence disclosed to their lawyers to appear to implicate them, while concealing exculpatory evidence. After discovery of the concealed evidence that included exculpatory witness statements and exclusionary fingerprint evidence, Howard and James were released in 2003 after more than 26 years of wrongful imprisonment. In April 2006, Howard settled his lawsuit for compensation for \$2.5 million, and James was expected to settle for a similar amount.

Sources:

Justice Shirked, by Martin Yant, *The Columbus Dispatch*, February 10, 2002.

Were they wrongly convicted? Twenty five years after being convicted of murder, new evidence might help two men receive new trials, by Alan Johnson, *The Columbus Dispatch*, February 10, 2002.



Quick And Dirty Course In Prosecutor 101 Logic

Justice:Denied published a favorable review of *Veronica Mars* in Issue 29 (Summer 2005), when the UPN television network was undecided about renewing the low rated program.

Justice:Denied published an unfavorable review of *In Justice* in Issue 31 (Winter 2006), when the ABC television network was undecided about renewing the low rated program.

After *Justice:Denied's* published its *Veronica Mars* review the program was renewed for a second season. It has since been renewed for a third season (2006-07 television year).

After *Justice:Denied* published its *In Justice* review the program was canceled after not being renewed for a second season.

If only *Veronica Mars* had been renewed after *Justice:Denied's* favorable review, or only *In Justice* had been canceled after *Justice:Denied's* unfavorable review, then what happened to the programs could be chalked up to coincidence. But it stretches credulity to suggest that the decisions about both programs by network executives coincidentally mirrored *Justice:Denied's* reviews.

Sounds logical! Sounds plausible! Except for one thing. It is dead wrong. *Veronica Mars* fans engaged in a massive letter writing campaign that convinced the WB to renew it in spite of low ratings. While *In Justice* wasn't renewed because it did not inspire a cadre of loyal fans among its low rated audience.

Yet prosecutors make arguments everyday linking a defendant to a crime by relying on logic as shaky as that used to link *Justice:Denied's* reviews with the fate of the two national television programs.

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

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In December 1991, Ray Krone was a postal worker in his mid-30s with no criminal record living in Phoenix, Arizona. He had recently bought a house and regularly played darts at the CBS Lounge in Phoenix where 35-year-old Kim Ancona worked. They casually knew each other, and Krone said that he gave her a ride to a Christmas party in his prized 1970 Corvette. A week later, while cleaning up the lounge after closing, she was brutally murdered.

Ray Krone Settles For \$4.4 Million After Two Wrongful Murder Convictions

By Hans Sherrer

When questioned about his whereabouts the night of Ancona's murder, Krone told a detective that he went to bed at 10 p.m. Krone, however, came under suspicion because Ancona had some unusual bite marks on her left breast and the detective questioning him noticed his front teeth were deformed. Investigators focused on Krone even though his roommate corroborated his alibi. Neither was the investigators' interest in Krone cooled by the 14 shoeprints imprinted around Ancona's body that didn't match Krone's shoe size. The shoeprints were identified as being made by a size 9-1/2 to 10-1/2 Converse brand sneaker, while Krone wore a size 11 and didn't own any Converse shoes.

Two days after he was questioned the police surrounded Krone's house and he was arrested on suspicion of first-degree murder, kidnapping and sexual assault. Years later he described his thoughts at the time of his arrest. "Why were they doing this? They knew it wasn't true. It's embarrassing to be 35 years old and find out you're stupid, you're naive."¹

Krone tried, and convicted twice

Krone was subsequently indicted for the capital murder of Ancona. The prosecution had no physical evidence or eyewitnesses linking Krone to her murder, and the centerpiece of their circumstantial evidence was he knew her well enough to have given her a ride one time a week before her death. Absent other incriminating evidence, the prosecution's case hinged on a dental expert's testimony that his deformed teeth matched the bite marks on Ancona's left breast and throat. The prosecution spent more than \$50,000 just supporting its bite mark theory – more than thirty times the \$1,500 Krone's public defender was allotted for investigating all aspects of his case.

Print and television media went into a frenzy with the prosecution's claim that Krone gnawed on Ancona with his deformed teeth; they tagged him as the "Snaggletooth Killer." Krone's August 1992 trial lasted six days, and

while no defense expert testified to rebut the prosecution's bite mark expert, Krone took the stand and proclaimed his innocence. The jury didn't believe him. He was convicted and three months later sentenced to death.

Because the prosecution concealed a videotape concerning the bite mark evidence until one day before Krone's trial began, the Arizona Supreme Court reversed his conviction in 1995.

Retried in 1996, Krone had the benefit of a retained attorney and expert testimony. It didn't, however, prevent him from again being convicted based on testimony by the same prosecution "expert" who testified at Krone's first trial linking his teeth to the bite marks on Ancona.

After his second conviction in 1996, Krone told *The Arizona Republic* he was innocent. "I was not there that night. This pretty much rules out any faith I have in truth and justice." Although the prosecution again sought the death penalty, Krone's judge expressed doubts about the strength of the prosecution's case and sentenced him to life in prison.

Years of effort payoff when crime scene evidence is tested

Krone's mother, stepfather, and a cousin who was a small businessman in Lake Tahoe, continued to believe in his innocence. They hired Phoenix attorney Alan Simpson in 2000 to pursue DNA testing of physical evidence collected during the original investigation – including saliva and blood found on Ancona's clothes and body. The Maricopa County Attorney's Office opposed Krone's motion for DNA testing, claiming that the crime lab tests at the time of Krone's prosecution established that none of the evidence had any exculpatory value. The judge, however, granted the motion in 2001.

On April 4, 2002, the DNA test results were released. They excluded Krone as the perpetrator. The tests, however, did implicate Kenneth Phillips, then imprisoned in Arizona for sexually assaulting and choking a 7-year-old girl. At the time of Ancona's murder Phillips



Ray Krone moments after his release from a Yuma, Arizona prison. (Charles Whitehouse/AP)

lived 600 yards from the CBS Lounge, and he was on probation for breaking into a neighboring woman's apartment and choking her while threatening to kill her. Phillips was charged with assaulting the 7-year-old only twenty days after Ancona's murder.

After the DNA tests excluded Krone, his attorney told *The Arizona Republic*, "This proves with certainty that Ray Krone is an innocent man. Every day from this point forward that Ray spends in jail is a day the county acts at their own peril." Four days later Krone was freed after 3,769 days of wrongful imprisonment that included two years and eight months on Arizona's death row.

Ignoring the DNA's exclusion of Krone, Maricopa County Attorney Rick Romley defended Krone's convictions by claiming there was "strong circumstantial evidence" of his guilt. He didn't bother to address the fact that the original crime lab failed to do the DNA testing that would have excluded Krone. Faced with irrefutable proof that Krone had twice been convicted of first-degree murder when he was actually innocent, Romley said, "we will try to do better."

By the time Krone was released, his mother and stepfather, who lived in his hometown of Dover, Pennsylvania, had mortgaged their home and spent an estimated \$150,000 in their effort to win his exoneration. Krone's cousin in Lake Tahoe spent an additional \$100,000. After his release Krone was welcomed back to live in Dover, where hundreds of people in the area convinced of his innocence had donated time and money to help his parents (and sister) free him.

Krone sues City of Phoenix and Maricopa County

Within months of his release, Krone and his mother filed a \$100 million lawsuit in U.S. District Court in Phoenix naming as primary defendants Maricopa County and the City of Phoenix.

Among other allegations they claimed Maricopa County "obtained the conviction and death sentence... by prosecutorial misconduct, the use of altered and manufactured evidence, expert shopping, a refusal to adequately investigate... through the concealment and destruction of evidence, through perjured documents and statements, and through the unfairly prejudicial inflammation of public opinion."²

Krone continued on page 17

Krone continued from page 16

The suit also alleged that Krone's convictions were attributable to the negligent conduct of the Phoenix police crime lab in the testing, or in some cases, the failure to test available crime scene evidence. Among other deficient acts, the crime lab failed to test and/or analyze "hair, blood and fingerprints" that when examined years after Krone's second conviction, excluded him and implicated Phillips in Ancona's murder.

During the lawsuit's discovery process Krone learned that before his second trial Maricopa County's prosecuting attorney was personally told by two of the country's most respected dental forensic experts that there was "no way" the teeth marks on Ancona's body were made by Krone. They experts asserted the prosecution's dental expert was absolutely wrong to identify Krone as the source of the bite marks. Not only did the prosecutor not inform the defense of that exculpatory information, but he proceeded with seeking the death penalty.

Information discovered by Krone as a result of the lawsuit painted the picture that his capital murder prosecution was pursued by law enforcement authorities who arguably either knew he was innocent, or simply didn't pay attention to the information available to them supporting his innocence.

After learning in April 2002 that the DNA tests excluded Krone, Kim Ancona's mother told *The Arizona Republic*, "My God, I hope he becomes a millionaire, because I can't give him those 10-1/2 years back." ³ Her wish for Krone came true three years later.

Facing significant liability if they allowed the case to go to trial before a jury, Maricopa County settled Krone's claims for \$1.4 million in April 2005, and the City of Phoenix settled for \$3 million in September 2005. Out of that Krone had to pay around \$800,000 in legal fees and other debts, plus taxes.

"Snaggletooth" no more – Krone undergoes "Extreme Makeover"

In 2004 Krone and his infamous crooked front teeth came to the attention of the television program *Extreme Makeover*.

They offered to pay for an extreme makeover of Krone that would include replacing five front teeth, corrective eye surgery, hair transplants, laser treatment of acne scars, and sessions with a physical trainer and nutritionist so he could establish healthy habits. All he had to do in exchange was agree to allow filming of

his transformation, which would be edited into a two-hour program broadcast on ABC-TV.

At the time Krone was just getting by financially since his lawsuits had not been settled, so he jumped at their offer. All of the various surgeries and procedures had a value of about \$200,000, and took several months to complete.

The program documenting his physical transformation was broadcast on February 10, 2005. He was pleased with the results. "I know it's still me and nothing has changed. But I look in the mirror and say, 'Wow, I look 15 years younger.'" ⁴

When asked why the program had selected Krone, one of the producers, Lou Gorfain, responded, "Who's more deserving of a makeover?" ⁵



Ray Krone before his Extreme Makeover



Ray Krone after his Extreme Makeover

Arizona legislators apologize to Ray Krone

On February 20, 2006, the head of Arizona's Senate Judiciary Committee, John Huppenthal (R), and more than half-a-dozen other House and Senate members apologized to Krone. In his apology on the floor of the Senate, Huppenthal said Krone's was "a truly tragic case. In a way, it's a lesson for us all that this can happen in a modern society. When we think we have foolproof systems where this would never, never happen, it has

happened. And we need to be aware that it truly could happen again and is likely happening again. This is happening more frequently than we would like to admit." ⁶

Postscript

Ray Krone lives in Dover, Pennsylvania. He has traveled around the country as a spokesman against the death penalty. As he says, "Those 10 years must have been for a purpose. No system is 100 percent accurate." ⁷

While he has had a physical makeover and is financially secure, an interview with *The Arizona Republic* shows that his wrongful prosecution, conviction and imprisonment had a profound impact on his psyche, "I don't recognize myself anymore. I'm cynical now, totally paranoid now. I used to have a normal life. Now, I don't know what normal is." ⁸

Additional Sources:

State v. Krone, 897 P.2d 621, 182 Ariz. 319 (Ariz. 06/22/1995)
Twice Wrongly Convicted of Murder – Ray Krone Is Set Free After 10 Years, *Justice Denied*, Vol. 2, Issue 9.
County to pay nearly \$1.6M to settle lawsuits, by Gary Grado, *East Valley Tribune*, Mesa, AZ, March 23, 2005.
Phoenix OKs \$3 mil Krone settlement, by Beth DeFalco, *The Arizona Republic*, September 28, 2005.

Endnotes:

- 1 Cleared by DNA, Krone trying to escape bitterness, by David J. Cieslak, *The Arizona Republic*, June 3, 2004
- 2 Arizona sent an innocent man to death row, by Jana Bommersbach, *Phoenix Magazine*, July 2004.
- 3 DNA frees Arizona inmate after 10 years in prison: 10 years included time on death row, Dennis Wagner, Beth DeFalco and Patricia Biggs, *The Arizona Republic*, April 9, 2002.
- 4 From Death Row To TV 'Makeover', by Richard Willing, *USA Today*, February 7, 2006.
- 5 *Id.*
- 6 Wrongfully convicted man gets apology after two years on death row, by Howard Fischer, *Arizona Daily Star*, February 20, 2006
- 7 Arizona lawmakers apologize to exonerated man, by Paul Davenport, *Times-Leader* (Wilkes-Barre, PA), February 20, 2006.
- 8 Cleared by DNA, Krone trying to escape bitterness, *supra*.



In October 1994, with no physical evidence, no witnesses to the crime and no murder weapon, a Madison, Wisconsin jury convicted Penny Brummer of first-degree murder in the death of Sarah Gonstead.

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Who Killed Sarah



SHEEDING NEW LIGHT ON
A QUESTIONABLE CONVICTION

SHEILA AND DOUG BERRY

Alabama Prisoner Ordered Released Due To Prosecutor's Misconduct Concealing Evidence

IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

State of Alabama vs. Daniel Wade Moore
Case No(s). CC02-646, CC00-1260

ORDER [Portions excerpted by JD]

I. Introduction and Statement of the Case

The above styled cause is before the Court on the Defendant's Post Trial Motion to Dismiss the Indictments. The Defendant, Daniel Wade Moore, was tried and convicted of Capital Murder in the Circuit Court of Morgan County, Alabama. ... of the murder of Karen Croft Tipton. ...

II. Findings of Facts

1. During the discovery phase of this trial, counsel for the Defendant made repeated requests for copies of statements and other documents in the possession of agents from the Federal Bureau of Investigation. The Court ordered the prosecutor and the investigators to provide the Defendant's attorney with copies of all documents in their possession of whatever kind relating to the murder of Karen Croft Tipton. Repeatedly, [Decatur Police Department Investigator Mike Petty and Prosecutors, Don Valeska and William Dill, denied the very existence of any reports or documents prepared or generated by agents from the Federal Bureau of Investigation. ...

2. After the Defendant was tried and convicted, Don Valeska produced to the Court a copy of a five page document that was faxed to him from the Federal Bureau of Investigation. The Court then learned that Mr. Valeska had actual knowledge of this document prior to his fervent denial that any such documents or reports existed. It was based on this fact that the Court granted the Defendant's Motion for New Trial.

3. The Court later learned that the Federal Bureau of Investigation had, in fact, collected 245 pages of documents in an internal document, which was released to the Defendant's attorneys after the trial and conviction of the Defendant.

4. During the trial of Daniel Wade Moore, the trial court sustained objections from the prosecution, which prevented counsel for the Defendant from asking Sarah Joyce Holden about conversations she had with the victim prior to her murder. ... In the days just prior to her murder, the victim told Ms. Holden that her burglar alarm system had been malfunctioning and that she, the victim, had discon-

nected said system so that she could sleep. ... Ms. Holden was interviewed by Investigator Mike Petty following the murder of the victim, at which time she conveyed this information about the alarm system. Ms. Holden prepared a written statement containing the aforementioned information.

5. At no time prior to the trial of the Defendant was the defense provided with the information given by Sarah Joyce Holden nor was the defense provided with a copy of her written statement containing the same information. Additionally, the prosecution consistently denied the existence of this written statement.

7. Pamela Brown Smith called the Decatur Police Department to report the fact that she had seen Karen Tipton alive in her driveway at her mailbox at 3:30 p.m. on the day of her death. Ms. Smith asked to speak to the person in charge of the Tipton investigation. She recalls that the person she spoke to was male. She gave them her name, her address, and the information she had. She was told that they would get back in contact with her, but they never did.

8. The defense was never provided with any information regarding Pamela Brown Smith or the statement she made to the person at Decatur Police Department regarding the time of the victim's death. ...

"There ain't no such thing as an FBI report."

Assistant A.G. Don Valeska lying to Judge Glenn Thompson about a 245-page FBI report he was concealing from Daniel Wade Moore's attorneys.

9. Pamela Brown Smith was never interviewed further by the Decatur Police Department and came forward after the trial of the Defendant when she learned that the investigators had estimated the time of death for Karen Tipton between 1:00 p.m. and 4:00 p.m.

11. ...On or about October 11, 2002, ... a four page synopsis of this case that had been compiled by the FBI plus a cover sheet was faxed from the FBI to Mr. Valeska nearly a month prior to the trial of the Defendant.

12. Investigator Mike Petty told Don Valeska prior to the trial of the case that he had sent questionnaires to various people connected to the case, had them fill out the questionnaires, and sent the information back to the Federal Bureau of Investigation. None of these materials were ever provided to the Defendant. ...

13. On October 30, 2002, the Court had hearings on motions filed by the defense requesting copies of information about an alleged Federal Bureau of Investigation report. On October 30, 2002, when questioned specifically by the Court regarding a Federal Bureau of Investigation report, Assistant Attorney General Don

Valeska, said to the Court, "There ain't no such thing as an FBI report."

14. ... All of the material in question here passed through the hands of the investigators for the Decatur Police Department or the Assistant Attorney General Don Valeska and should have been provided to the defense as ordered by this Court.

15. The Decatur Police Department denies that the FBI did any investigation in the present case. However, the Court has before it 245 pages of information that was collected by investigators from the Decatur Police Department and provided to the Federal Bureau of Investigation, ... The prosecution, in fact, denied to the Court the existence of the documents which they collected and sent to the Federal Bureau of Investigation. Said documents and information were ... only provided it to the Court after the Defendant was tried and convicted.

16. ... This information was subject to the Court's order requiring ALL information collected or gathered in this case be provided to the defendant. ...

21. ... The Court finds the Investigator Mike Petty wrongfully refused to acknowledge the existence of these documents and did not provide copies of the questionnaires they collected to the defense as ordered by this Court.

22. ... FBI agents, Stapp Regalia and Jennifer Akin came to Decatur to meet with Decatur Police Investigator Mike Petty at his request. The FBI summary says that during this meeting, Investigator Petty presented the facts and circumstances surrounding this matter to include a complete victimology of Karen Tipton, crime scene information, including a walk-thru of the residence and surrounding area, autopsy and laboratory information, and "neighborhood investigation and interviews conducted with family members, close friends, and associates." Yet, when questioned during the hearing on January 20, 2004, Investigator Petty denied having conducted any interviews with family members or close friends. He further denied having any information regarding victimology and denied conducting a neighborhood investigation.

23. The medical examiner's report indicates that they reported the cause of death of Karen Tipton, not only to Investigator Petty, but also to Special Agent Regalia of the FBI.



Daniel Wade Moore the day of his release. The Alabama Ct. of Appeals ordered him back in custody four days later. *The Decatur Daily*

Moore cont. on page 19

Moore cont. from page 18

24. Decatur Police Department Investigators traveled to the Days Inn located at Highway 69 at the Good Hope Exit on Interstate 65 to interview Mary Tomlinson regarding two members of the paving crew working for Bonner Paving, which paved the Tipton's driveway the day before the murder of the victim. Said crew was working next door to the victim's house on the day of her murder. The defense was never provided with any information regarding that interview or the fact that one of these crew members was known to keep large sums of money in the safe at the Days Inn and that three (3) days after the murder of Karen Tipton, he removed his money from the motel safe and left the State of Alabama. This information was provided to the FBI by the Decatur Police Department but not to the Defendant's attorneys.

26. The Court finds that Investigator Mike Pettey of the Decatur Police Department did not conduct a fair and impartial investigation and that said actions were intentional and violated the Defendant's Constitutional rights.

27. The Court finds that Assistant Attorney General Don Valeska intentionally withheld information from the Defendant in violation of the Defendant's Constitutional rights and in defiance of this Court's Order of Discovery. Further, Assistant Attorney General Don Valeska failed to be honest and forthright with this Court regarding the information about which he learned and that was at his disposal.

III. Statement of Applicable Law

The Fifth Amendment to the United States Constitution states that, "[no person shall] be subject for the same offence to be twice put in jeopardy of life or limb." About the Double Jeopardy Clause, the courts have said: "the Double Jeopardy Clause bars retrials where bad faith conduct by a judge or prosecutor threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant." *United States v. Dinitz*, 424 U.S. 600 (1976). ...

The United States Supreme Court makes it clear that under ordinary circumstances a defendant's request for a new trial (or mistrial) generally removes any Constitutional barrier to a retrial. Ordinarily, a retrial would be necessary to protect the public's interest in fair trials designed to end in just judgments. However, the Supreme Court also recognizes that there may be exceptions to this general rule; rare cases involving circumstances which are attributable to prosecutorial misconduct and overreaching. Where prosecutorial overreaching exists, a defendant's new trial request does not remove the Constitutional barrier afforded

by the Double Jeopardy Clause, preventing the retrial of the defendant. *United States v. Jorn*, 400 U.S. 470 (1971), *United States v. Kessler*, 530 F.2d 1246 (5th Cir. 1976).

To find prosecutorial overreaching the government must have, through gross negligence or intentional misconduct, caused aggravated circumstances to develop which seriously prejudiced the defendant causing him to reasonably conclude that a continuation of the tainted proceedings would result in a conviction. See *United States v. Dinitz*, supra. A stringent analysis of the prosecutor's conduct, considering the totality of the circumstances, is required to determine if this prosecutorial overreaching has occurred. See *Kessler*, 530 F.2d 1246. Additionally, the Court's inquiry must center upon the prosecutor's conduct prior to the granting of a new trial. Although mere negligence by the prosecutor is not the type of overreaching contemplated by *Dinitz*, if prosecutorial error is motivated by bad faith or undertaken to harass or prejudice the defendant, then prosecutorial overreaching will be found. *United States v. Martin*, 561 F.2d 135 (8th Cir. 1977). Where this overreaching is found, a second trial will be barred by the Double Jeopardy Clause. (See *Jorn*, supra; *Kessler*, supra; *Dinitz*, supra.)

"It appears to have been and to be the attitude of Assistant Attorney General Don Valeska that it is his job to procure a conviction at all costs, without consideration for the Constitutional rights of the Defendant "

Morgan County Circuit Court Judge Glenn Thompson

The Court's power to dismiss an indictment on the grounds of prosecutorial misconduct is frequently discussed but rarely invoked. Generally, the Court will not interfere with prosecutorial discretion unless it is abused to such an extent as to be arbitrary and capricious to the point that it violates the Due Process rights of the defendant. The goal of the Court in the dismissal of an indictment is to protect the integrity of the judicial power from unfair and improper prosecutorial conduct.

IV. The Application of Law

"Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the

end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."¹

One of the greatest elements of our system of criminal jurisprudence is that all legally available, admissible evidence, whether showing guilt or innocence, is presented to the jury. It is therefore of utmost importance that the State not suppress evidence that might exonerate the defendant. Only the self-serving interest of a prosecutor is advanced, and not the interest of justice, when such evidence is withheld from the finder of fact. It is the duty of the prosecutor to fully air all relevant evidence in his possession. Assistant Attorney General Don Valeska chose to disregard his duty.²

The Defendant, Daniel Wade Moore, made an incriminating statement to his uncle while being returned to jail by his uncle and grandfather. At this time, the Defendant was addicted to crack cocaine. ... it is not at all uncommon for a person addicted to crack cocaine ... to make any statement, true or false, and even against his own interests, to avoid being put in jail.

At the trial of the Defendant, DNA evidence was presented by the prosecution. This evidence was not nuclear DNA which would have been able to identify the perpetrator with a very high degree of scientific certainty. The DNA evidence offered against the Defendant in this case was mitochondrial DNA. This evidence only failed to exclude the Defendant as the donor; however, it also did not exclude others as the possible donor of the sample tested. In fact, the trial of the Defendant was based almost entirely on circumstantial evidence. There is no direct evidence linking the Defendant to the scene of the crime. Additionally, the prosecution pointed to the circumstance that the Defendant had previously been employed by the burglar alarm company that installed the system belonging to the victim, stating that he knew how to disable it. However, the statements of Sarah Joyce Holden made to the Decatur Police, makes this evidence almost irrelevant.³ The prosecution never informed the defense of Ms. Holden's statements.

The thrust of the Defendant's case was that someone else had committed this terrible crime. Because of this, the conduct of Don Valeska and Mike Pettey was more egregious. The information wrongfully withheld from the defense included the names of others who had the means, motive, and opportunity to commit the crime of which the Defendant was accused. The information suppressed is exculpatory in nature and supportive of the Defendant's contentions and defense. By ex-

Moore cont. on page 40



Schapelle Corby's Bali Vacation Turned Into 20 Year Prison Sentence By Planted Drugs

By Serena Nicholls

Twenty-seven year old Schapelle Corby and her brother left Brisbane, Australia on October 8, 2004, bound for a vacation on the Indonesian island of Bali. When they arrived at Bali's Denpasar airport, Indonesian customs officers found nine pounds (4.1 kg.) of marijuana in Schapelle's boogie board bag. When questioned Schapelle claimed she knew nothing about the marijuana and didn't know how it got in her bag. She was arrested and charged with violating Indonesia's harsh drug importation law that carries a maximum sentence of death by firing squad. The charges were grave because Indonesia vigorously enforces its drug laws and many convicted drug smugglers have been sentenced to death and executed.

Schapelle's trial

Schapelle was held in a Bali jail without bail pending her trial. Indonesia's legal system is based on the European Civil Law system, and a jury is comprised of a panel of three judges. The judges control the proceedings by asking questions of both the prosecution and defense.

Schapelle's trial began on January 28, 2005. The prosecution's primary evidence was provided by the airport customs officer who testified Schapelle was reluctant to open her bag when asked, and when she did she admitted that the marijuana found inside was hers.¹

During her testimony Schapelle recounted a far different encounter with the customs officer. She testified she readily opened the bag, which was unlocked, and that until she opened it and saw the plastic bag, she did not know there was marijuana in it. She said that what she admitted to the customs officer was that the boogie board bag was hers – not that the marijuana was hers.

A witness for the defense corroborated Schapelle's testimony, explaining to the court that Schapelle opened the unlocked bag without hesitation and that "when she saw the plastic transparent bag, she was shocked and stepped back."²

After checking their bags in Brisbane, Schapelle and her brother James had to change planes in Sydney, where her bag was handled by airport baggage handlers. After arriving at Denpasar's airport, James carried the bag from the baggage claim area to the customs inspection counter. Schapelle's lawyers suggested that without her knowledge the marijuana could have been stashed in her bag by baggage handlers in Sydney.

The defense put forward evidence to support the claim that Schapelle was a victim of a drug smuggling network operating in Australian airports. At trial John Ford, an Australian prisoner, testified that he overheard prisoners talk about a stash of marijuana that had been lost while trying to be smuggled by a group of baggage handlers. While Schapelle was imprisoned an inquiry into Australia's baggage handlers revealed a multi-million dollar cocaine syndicate operating through Australian airports with the assistance of corrupt baggage handlers.³ As a result of this inquiry 15 Australians were arrested on charges of importing drugs. So it is known baggage handlers consider airline luggage as a good conduit for transporting drugs.

Australian Prime Minister John Howard wrote to the Indonesian court outlining the fresh evidence against corrupt baggage handlers in Australian airports. The Indonesian court considered that evidence was irrelevant in determining Schapelle's fate.

To disprove that Schapelle's prints were on the plastic bag containing the marijuana, her lawyers made numerous requests that the Indonesian authorities analyze the bag for fingerprints. All the requests were denied. Another problem for Schapelle's defense was her luggage was not individually weighed or recorded at either the Brisbane or Sydney airport. Consequently, she could not prove that the boogie board bag weighed more in either Sydney or Bali, than when it was checked-in at the Brisbane airport.

On the last day of Schapelle's trial, April 29, 2005, she made the most important statement of her life: "I would like to say to the prosecutors I cannot admit to a crime that I did not commit...I am an innocent victim of a tactless drug smuggling network...I believe the seven months which I've already

been in prison is severe enough punishment for not putting locks on my bags...I swear that as God is my witness, I did not know that the marijuana was in my bag".⁴ Before the court began its deliberations, the presiding judge said Schapelle's tearful address carried absolutely no legal weight and therefore it would not be taken into account.

In May 2005, after Schapelle's trial concluded but before her verdict was announced, the head of the Balinese drug squad, Colonel Bambang Sugiarto, admitted during an interview with Australian Channel Nine that the case against Schapelle was weak and that the investigation was flawed for a number of reasons. He concluded that her case was only 50% investigated.⁵ However, Sugiarto's statements didn't constitute new evidence supporting her innocence, they only supported that the Indonesian police conducted an unprofessional and incomplete investigation.

Schapelle's plight gripped the heart of millions of Australians. On May 27, 2005, Australia stood still as people across the country breathlessly watched the verdict announced live on national television. The panel of judges decided that Schapelle had attempted to illegally import drugs into Indonesia and sentenced her to 20-years imprisonment. Since she admitted the bag was hers, the judges held her responsible for its contents. The judges were particularly critical of the impact the marijuana, if undetected, could have had on Balinese youth. Schapelle cried, and then fought with the police, before being dragged out of the courtroom by a cadre of police.

The judgement sparked enormous sympathy for Schapelle and anger at the Indonesian judicial system. There were calls to boycott Bali – a popular resort for Australians – and to ban Indonesian products being imported. At the extreme, there were threats and attacks on Indonesians that were living in Australia. Australian Prime Minister John Howard pleaded with Australians not to interfere with the Indonesian justice system, "But I do ask that we all pause and understand the situation and recognize and respect that when we visit other countries, we are subject to the laws and the rules of those countries."⁶

After the trial a survey revealed that 92% of Australians believe that Schapelle knew nothing about the marijuana found in her boogie board bag.⁷ This strong response was a result of the prosecution's failure to present evidence proving Schapelle was aware of the marijuana, which was consistent with the fact there is no evidence of any kind implicating

Corby continued on page 21

Corby continued from page 20

her in the purchase or handling of the marijuana, or ever having been involved in the illegal drug business. She was a typical Aussie, and a middle-class beautician in Brisbane.

Schapelle appeals

Schapelle filed an appeal against her conviction and 20-year sentence, requesting that her case be re-opened and fresh evidence heard that she was the unwitting victim of drug smugglers. Indonesian prosecutors also appealed against Schapelle's conviction on the basis that she should have received a sentence of life imprisonment. On October 12, 2005, Bali's High Court denied Schapelle's appeal of her conviction, but reduced her sentence from 20-years to 15-years imprisonment. Schapelle was not satisfied with this reduction, as she was steadfast in her claim of innocence.

Parallel appeals were then filed with Indonesia's Supreme Court. Schapelle sought to have her conviction quashed and the prosecution wanted her 20-year sentence reinstated. Schapelle's appeal was rejected on January 19, 2006, but the prosecution's counter appeal was successful. The Supreme Court reinstated her 20-year sentence, and in a further blow to Schapelle, ordered the destruction of all evidence in the case – including the boogie board bag, the plastic bag, and the marijuana – signaling that the Court's judgment was final and the case was closed.

Schapelle is currently in Bali's notorious Kerobokan Prison, serving her 20-year sentence. It is difficult for people familiar with prison conditions in western countries such as Australia and the United States to grasp the primitiveness of conditions in third-world prisons such as Kerobokan. According to human rights organizations, rampant untreatable diseases and a lack of basic medical and dental care, and unsanitary food, water and living conditions, and constant exposure to Bali's oppressive tropical climate (8° south of the equator) combine to weaken a once healthy prisoner to the point that they can die after 10 to 15 years imprisonment.⁸

Was Schapelle's brother involved in smuggling the marijuana in Schapelle's bag?

The circumstances surrounding the behavior of Schapelle's brother James after their arrival in Bali, after Schapelle was arrested, and then later in Australia, can at a minimum be described as suspect.

James carried Schapelle's bag from the Denpasar airport's baggage claim to the customs

check-in-counter. Schapelle didn't touch her unlocked bag until the customs officer asked her to open it. The obvious question is why James didn't notice that the boogie board bag weighed an extra nine pounds (4.1kg) and was larger in size?

It is also suspicious that James left Bali immediately after Schapelle was arrested. It is further suspect that unlike the rest of Schapelle's family, he did not return to Indonesia to visit her or support her during her trial.

Then on January 19, 2006, the day Schapelle's 20-year sentence was reinstated by Indonesia's Supreme Court, James was denied bail in an Australian court on eight charges, including drug production, assault and deprivation of liberty. Queensland police successfully opposed the granting of bail by tendering an affidavit that detailed James was suspected of "some involvement in the exportation of cannabis for which his sister has received a 20-year imprisonment sentence."⁹

No reason was ever given for James' sudden departure from Indonesia or his failure to return to the country to visit Schapelle in jail or attend her trial. However, many Australians believe he was involved in the stashing of the marijuana in Schapelle's bag without her knowledge by baggage handlers in Sydney when it was transferred to their Bali bound plane. He would have then intended to remove the marijuana in Bali before Schapelle would have needed to open the bag to use her boogie board. When this theory was suggested to Schapelle in an interview she told the reporter that to her knowledge the drugs did not belong to her brother.¹⁰ Even if Schapelle now knows the truth and is 'covering-up' for her brother, it would not lessen her innocence of the drug charge.

Sydney airport security camera tampered with on the day Schapelle went to Bali

The possibility the marijuana had been placed in her unlocked bag en route was recently strengthened when the Australian government revealed that on the day Schapelle traveled through Sydney to Bali, a security camera monitoring the baggage handling area at Sydney's airport had been tampered with.

Senator Chris Ellison, Australia's Minister for Justice and Customs said, "we believe there may have been some human involvement and that has been the subject of a Customs inquiry and investigation."¹¹ The investigation did not identify who may have been responsible for tampering with the security camera. The affected camera monitors baggage handlers as they sift through lug-

gage. Based on this information, it is quite plausible that someone tampered with the camera and then stashed the marijuana in Schapelle's bag without her knowledge. And of course, possibly the bags of other travelers.

What are Schapelle's options?

Much of the evidence that could support Schapelle's claim of innocence is now unavailable. The Indonesian Supreme Court's order to burn the marijuana was carried out on March 17, 2006. The burning of the marijuana and destruction of the other physical evidence went ahead in spite of Schapelle's plea to preserve the evidence so it would be available for any future hearings.

The weakness of the case against Schapelle doesn't change the fact that her future looks quite dim. The evidence in her case has been destroyed and she has exhausted all judicial avenues of appeal. She could seek to reopen her case if new evidence surfaced, such as a confession by her brother or someone else involved that the marijuana was stashed in her bag without her knowledge.

A remote possibility is a pardon from Indonesian President Susilo Bambang Yudhoyono. However, that is unlikely because Schapelle refuses to admit that she committed the crime. Another problem with obtaining a pardon is that since Schapelle's case is a cause celebrity, the Indonesian government will lose face if it even appears they have capitulated to outside influences in releasing her. If Schapelle's brother is guilty, his confession would allow Indonesia to save face by releasing her and imprisoning him in her place. The Australian government, and Australian's in general, would likely be satisfied with that resolution.

Conclusion

Schapelle has been handicapped throughout her case by the Indonesian judiciary's assumption that since the bag was hers, then so was the marijuana inside it.

If she isn't exonerated or otherwise released early, Schapelle's time imprisoned would be under vastly more humane conditions and it would be easier for her family to visit if she could be part of a prisoner exchange between Indonesia and Australia. Although the Australian government has made it clear that because political relations between Australia and Indonesia are at an all time high they have no intention of diplomatically interfering in Schapelle's case, it does claim to be looking into a prisoner exchange.

Corby endnotes on page 22

You almost could have mistaken the start of the three-day Justice for All conference on forensic science at Duquesne University for a DNA revival.

Forensics Under The Microscope

By Martin Yant

"Thank God for DNA!" *Chicago Tribune* reporter Maurice Possley exclaimed.

"I almost jumped and cheered when the first DNA test results came back!" exclaimed former FBI Director William Sessions.

But there was good, rational reason for Possley's and Sessions' religious-like fervor. Possley noted that, in addition to helping prove over a hundred prisoners were innocent, DNA testing has opened the public's mind to the possibility that others have been wrongly convicted even if physical evidence isn't available for DNA testing to prove it. Sessions' joy, on the other hand, was because 30 percent of the first suspects whose DNA was tested by the FBI proved to be innocent. DNA, Sessions said, quickly proved its worth to defense attorneys as well as investigators, and FBI tests still exclude 25 to 26 percent of the suspects whose DNA is tested. Sessions, who along with DNA exoneree Kirk Bloodsworth headed the Washington D.C. based Justice Project's campaign to get the Innocence Protection Act of 2004 passed by Congress, said that was not an easy task. "Mother Justice is a demanding woman," the tall Texan said with his folksy accent.

Other speakers and panelists at the intense April 2006 conference sponsored by The Cyril H. Wecht Institute of Forensic Science and Law, the Duquesne University School of Law, and The Justice Project, noted that DNA is not a panacea for the ills of the American criminal-justice system.

"Don't forget Josiah Sutton, who was convicted with DNA evidence and later exonerated," said Frederick W. Fochtman, an associate director of Duquesne University's five-year master's in forensics and law program. Sutton's tale, Fochtman noted, is a red flag about the limits of forensics science, no

matter how good it is, as long as human beings are involved.

Sutton was exonerated in 2004 after serving 4-1/2 years of a 25-year sentence for a rape he did not commit. Sutton's conviction was the result of a mistaken identification and faulty DNA testing performed by the scandal-plagued Houston police laboratory. As a result of that scandal, Sutton's case gained the attention of University of California criminology professor William Thompson, who said the lab's DNA report was the worst he had ever seen. Thompson's finding led to retesting that concluded the semen once identified as Sutton's was actually that of a different man.

Sutton's case has shed light on many other Houston area cases where a potentially innocent prisoner is incarcerated as a result of a faulty crime lab examination. Since 2002, errors also have been exposed in the labs divisions that test firearms, body fluids and controlled substances. The Houston Police Department Crime Laboratory was subsequently shut down pending a full-scale investigation of its many problems.

In 2005 the Houston PD chose Michael Bromwich, a former U.S. Justice Department official, to conduct a special investigation of the lab. In his most recent report Bromwich said lab analysts skewed reports to fit police theories in several cases, ignoring results that conflicted with police expectations because of either a lack of confidence in their own skills or a conscious effort to secure convictions.

Houston PD officials hope to introduce enough reforms for the lab to be accredited. But Fochtman said that accreditation has not proved to be a guarantee of lab accuracy. He said the major accreditation agency, the Society of Crime Lab Directors, is dominated by law enforcement agencies and it protects

member labs as much as it inspects and reports their deficiencies.

As important as improvements in true forensic science, as opposed to junk science, has been in the past decade, many conference speakers stressed the importance of not accepting the conclusions of crime lab forensic analysts without confirmation.

George Castelle, the affable chief public defender in Charleston, West Virginia, spoke about Fred Zain, the most notorious crime lab forensic fraud artist yet discovered. Various investigations of Zain over the years found that he testified in West Virginia and later Texas cases about forensic tests and conclusions he was unqualified to conduct and interpret. But testify he did, always saying what the prosecution wanted to hear.

Then came the case of Glen Woodall, who was convicted in 1987 of multiple felonies, including two counts of sexual assault. At Woodall's trial, Zain testified that based upon his scientific analysis of semen recovered from the victims, "[t]he assailant's blood types ... were identical to Mr. Woodall's." Woodall's conviction was affirmed on appeal. However, DNA testing later established that he could not have been the perpetrator. Woodall was freed when his conviction was overturned in 1992. He sued for false imprisonment and received a \$1 million settlement.

The irregularities in Woodall's case ultimately led to a massive investigation of Zain's work ordered by the West Virginia Supreme Court. It concluded that the actual guilt of 134 people was in doubt because the convictions were based on inculpatory reports and/or testimony by Zain. Nine men have been freed because without the suspect expert testimony of Zain – who had never passed a college science course – the remaining evidence offered against them was insufficient for conviction, had.

But the Zain scandal didn't necessarily change the attitude of West Virginia Crime Lab workers. Castille told how, while working on an appeal, he found that a state forensic analyst had greatly exaggerated a scientific rule to gain a conviction. "Don't take anything for granted," said Castelle, who is currently representing the interests of West Virginia prisoners in a new investigation of the crime lab.

One place jurors did take things for granted was in Oklahoma. Jeffrey Pierce spent 15 years in prison there for a rape he did not commit because jurors assumed the truthfulness of Oklahoma City crime lab chemist Joyce Gilchrist, who testified she had matched

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Endnotes:

- 1 Tracy Bowden, 'Corby Defence Team Hopes for Breakthrough', *The 7:30 Report*, ABC, March 16, 2005
- 2 Transcript of Schapelle Corby Verdict, May 27, 2005, <http://www.usp.com.au/fpss/news-indonesia95.html#TWO>
- 3 Jonathon Harley, 'Airport Baggage Handlers Linked to Drugs, Court Told', November 5, 2005, *The 7:30 Report*, ABC.
- 4 Corby Trial Statement 'I ask for you...to find me innocent', <http://www.usp.com.au/fpss/news-indonesia74.html#FOUR>

- 5 Indonesian police admit Corby case flaws, ABC News Online, May 8, 2005, <http://abc.net.au/news/newsitems/200505/s1362510.htm>
- 6 Hamish Fitzsimmons, 'Political Parties Express Sympathy for Corby', May 27, 2005, Lateline, ABC.
- 7 The Corby Case Timeline, *Nine News*, March 17, 2005, <http://ninemsn.com.au>.
- 8 Schapelle Corby: Kerobokan Prison Conditions, Herald Sun (Melbourne), May 29, 2005.
- 9 Corby's Brother 'not linked to her case', January 23, 2006, <http://usp.com.au/fpss/news-indonesia/news-indo-schapelle121.html>.
- 10 John Stewart and Renata Gombac, 'Corby's Next Door Neighbour Faces Drug Charges', *The 7:30 Report*, ABC, January 30, 2006.
- 11 Cameras 'worked for Corby', April 4, 2006, <http://www.usp.com.au/fpss/news-indonesia/news-indo-schapelle136.html>.



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hair and semen samples from the crime scene to Pierce. DNA testing later proved Gilchrist's testimony was wrong. A review was then begun of hundreds of cases in which Gilchrist participated. Paul Giannelli, a law professor at Case Western University, noted that in the resulting report Gilchrist's testimony in many cases was described as "at best incomplete and at worst inaccurate and misleading." The report also noted that in her missionary zeal to promote the cause of the prosecution, Gilchrist "had put blinders on her professional conscience so that the truth of science took a backseat to her acting the role of an advocate."

Giannelli also noted that while dishonesty is a major problem at crime labs, so is error. His handout reported a *Chicago Tribune* finding that, of nearly 200 "DNA and Death Row exoneration cases since 1986 ... more than a quarter involved faulty lab work or testimony."

The vaunted FBI crime lab has had serious problems with dishonest employees. In 2004, the Justice Department's Inspector General found that in 90 cases FBI lab employee Jacqueline Blake failed to properly complete testing of evidence that had the presence of DNA. The IG's report said Blake also "falsified her laboratory documentation to conceal" her improper work. Blake later plead guilty in federal court to making false statements in her lab reports.

Giannelli also mentioned that there have been problems at the FBI crime lab for at least three decades. A 1977 investigation of sloppiness at the FBI crime lab turned up serious allegations that lab analysts were pressured by investigative agents to lie about their scientific findings, and that their conclusions were sometimes changed by a lab supervisor to support a criminal prosecution.

Several former and current lab officials have also alleged conduct by FBI investigating agents and supervisors that raised fundamental questions about the integrity of some FBI employees.

As the result of an Inspector General's report, FBI crime lab employees were ordered to seek accreditation; explosives unit examiners were required to have scientific backgrounds in chemistry, metallurgy or engineering, and each examiner was required to sign a report instead of turning in a composite report "without attribution to individual examiners."

But after that report things got worse instead of better. In 2004, the FBI offered a rare public apology for mistakenly linking the fingerprint of an American lawyer,

Brandon Mayfield, to a fingerprint on a plastic bag found near the scene of a terrorist bombing in Spain. The blunder led to Mayfield's imprisonment for two weeks.

Giannelli noted that the FBI originally insisted on the accuracy of the fingerprint match even though Spanish officials matched the fingerprint on the plastic bag to an Algerian national. An independent report of the error later stated that the "dissimilarities . . . were easily observed when a detailed analysis of the latent prints was conducted. The error was blamed on the "inherent pressure of a high-profile case" and "confirmation bias."

There will likely be more apologies in the future as government crime labs are forced to admit that some of their trusted investigative techniques are not accurate as they thought. In his handout Giannelli noted that the FBI stopped outside quality control audits in 1997. In 2003, internal fingerprint examiners got high grades, but the tests were not very demanding. In fact, a New Scotland Yard examiner said after he saw the test: "It's not testing their ability. And if I gave my experts these tests, they'd fall about laughing."

But the reliance of crime labs on fingerprint identification is not a joke. It's very much for real.

Although Giannelli didn't mention it, the FBI suffered another embarrassment in 2005 when it announced it would no longer conduct the examination of bullet lead because of the potential for inaccuracy. Bullet lead examinations have historically been performed in limited circumstances, typically when a firearm has not been recovered or when a fired bullet is too mutilated for comparison of physical markings. Bullet lead examinations use analytical chemistry to determine the amounts of trace elements (such as copper, arsenic, antimony, tin, etc.) found within a bullet. In theory that analysis allows a crime scene bullet to be compared to bullets associated with a suspect. Since the early 1980s the FBI Laboratory has conducted bullet lead examinations in approximately 2,500 cases submitted by federal, state, local, and foreign law enforcement agencies. However, as mentioned in 2005, the lack of a scientific basis for the bullet tests caused the FBI to abandon conducting them.

So what has the U.S. Department of Justice learned from the problems it has uncovered with the FBI crime labs testing techniques? Apparently not much. Giannelli's handout information noted a *Science* magazine editorial written by editor-in-chief Donald Patrick, titled *Forensic Science: Oxymoron?* Patrick noted that the National Institute of

Justice (NIJ), a division of the DOJ, supports an annual Conference on Science and the Law. However, "In planning the agenda for these conferences, NIJ has regularly resisted including comprehensive evaluations of the science underlying forensic techniques."

The session closed with a bang – the presentation that many attendees were waiting for – The CSI Effect. Katherine Ramsland, an assistant professor at DeSales University and the author of 25 books, gave a fast-paced explanation on the impact of *CSI*, *Law & Order*, *Forensic Files* and the many other related programs on American television. Ramsland quoted the commonly held belief that *CSI* has permeated our culture so much that it actually affects verdicts. Unfortunately for all who buy into this theory, Ramsland, says, there is no empirical evidence to back it up. All we have at this point is anecdotal tales, and the rise in such tales could be due to other factors:

- People are less trusting of investigators.
- Prosecutors are not as good as they think they are.
- Rather than causing more acquittals, *CSI* could just as easily cause more convictions.

Yet a CSI Effect is consistent with other types of psychological studies, which suggest that juries can be influenced by media exposure. So there could be a subtle effect not yet tested for. But media biases in general are likely to have far greater influence on the judgment of jurors than a few *CSI* shows.

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Californians Against Jessica's Law

STOP California's 30-year Sex Crime Witch Hunt Nightmare!
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Robert LaMonica was shot to death at about 12:15 a.m. on May 30, 1980, in the parking lot of his Boston apartment. The parking lot was across the street from Faxon Park. At the time of the shooting, four young people were drinking in the park where they had gone after attending a drive-in movie, where they had also been drinking.

Two of the four youths in the park claimed to have seen a man running at some distance from them (later estimated at 180') immediately after they heard four shots. One of the four, a man, said that while the man was running he passed under a street light and looked in the direction of the park for about one second. Minutes after the shooting, when police arrived on the scene, the witness described the man as 5'-9", 175, with dark curly hair, bushy eyebrows and thick sideburns. The witness also told police that he had consumed four or five beers within the last several hours.

The day after the shooting that witness was shown an array of nine photographs and he selected the photo of Frederick Weichel as the one closest to the man he saw running, describing Weichel as "a pretty good likeness."¹ Then after he had seen a close-up photograph of Weichel, the police took him out in a van that drove by where Weichel was standing on the street: the witness said, "That's the guy."²

However, contrary to that witness' positive ID, Weichel didn't match the detailed description he provided to police minutes after the shooting: Weichel weighed 155 pounds, not 175, he was 5'-7" not 5'-9", he did not have thick sideburns, he did not have curly hair, and he did not have bushy eyebrows.

A woman was the other person in the park who said she saw the running man. On three separate occasions she was shown the same array of nine photos that had been shown to the male witness. She did not positively identify Weichel.

Weichel was indicted solely on the basis of the male witness' identification.

During his August 1981 trial the woman witness was asked if the man she saw running was in the courtroom. She did not identify Weichel. Instead, she identified a man sitting in the back of the crowded courtroom. The man she identified was one of the victim's brothers.

A Boston restaurant owner supported Weichel's alibi and testified that Weichel was in his restaurant until about midnight. Other witnesses testified he then went to a South Boston lounge and was in the lounge at the time of the shooting.

MA Supreme Court Reinstates Frederick Weichel's Conviction

By Hans Sherrer

There was no physical or forensic evidence linking Weichel to LaMonica's murder.

The jury disregarded the lack of evidence, Weichel's alibi witnesses, the woman's eyewitness testimony, and the fact that the male witness's description didn't resemble Weichel in any particular. Instead, they relied on the male witness' courtroom identification of Weichel to convict him on August 20, 1981.

"Whitey" Bulger – Mobster Extraordinaire

For decades until the mid-1990s, James "Whitey" Bulger was a gangster involved in gambling, narcotics and weapons who "used fear, intimidation, coercion, threats, and murder to hold the community of South Boston hostage."³ Before his trial began, Weichel was visited five times by Bulger and his right-hand man, Stephen ("The Rifleman") Flemmi. Bulger warned Weichel during those visits, "I do not want you to bring up Tommy Barrett's name ever."⁴ Bulger threatened to harm Weichel and his family (his mother) if he didn't heed his warning. Weichel, and everyone in South Boston, knew that a threat by Bulger could be ignored only at one's personnel peril.

In December 1994 Bulger was federally indicted on 18 counts of murder (and other charges). Bulger was tipped off about the sealed indictment by an FBI contact, so he was able to go underground before he could be arrested. Bulger disappeared and 12 years later remains on the FBI's list of Ten Most Wanted Fugitives – alongside Osama bin Laden. The FBI is offering a \$1 million dollar reward for information leading directly to Bulger's arrest, and there is no one on the list with a larger FBI reward.⁵

Barrett's written and verbal confessions to murdering LaMonica

In 1982 Weichel's mother lived in Boston and received a letter with a March 19th California postmark from Barrett. In the letter Barrett clearly and repeatedly stated he killed the man Weichel had been convicted of murdering and that Weichel was innocent.⁶ When she told Weichel that she received a letter from Barrett, he was mindful of Bulger's threats and stopped her before she could tell him what was in the letter. Weichel "did not inquire or learn of the contents of the

letter until 2001, after his mother's death and after Bulger had become a fugitive from justice."⁷

In January 2002 Weichel filed a motion for a new trial primarily based on the new evidence of Barrett's written confessions to murdering LaMonica. The motion also included new information corroborating Weichel's alibi, namely that an FBI agent on Bulger's payroll saw Weichel at the lounge at the time of the murder, and that Bulger told another FBI agent that Weichel wasn't involved in the murder.⁸

Weichel's trial judge had retired, so Superior Court Judge Isaac Borenstein was assigned to his case.

Borenstein ruled an evidentiary hearing was warranted, during which Barrett's mother testified. Based on her testimony a friend of Barrett's, Sherry Robb, was contacted for the first time for possible information she might know about LaMonica's murder. Robb, a social worker, had lived in South Boston in the 1970s where Barrett had met her. In the early 1980s when she was living in California, Barrett stayed for a time with her and a roommate. Robb testified at the hearing that Barrett told her "that he wanted to kill himself because 'someone was taking the rap for something that he had done.'"⁹ He then told her Weichel "had been wrongly accused and that Barrett had in fact killed someone."¹⁰

After the evidentiary hearing Borenstein found that based on an expert's handwriting analysis Barrett had written the confession letter. He also ruled that Barrett's 1982 letter was new evidence because Weichel could not have reasonably discovered the letter's contents due to his legitimate fear for his and his mother's life if he dared publicly implicate Barrett as LaMonica's murderer. Borenstein likened Weichel's situation to that of a battered woman who fails to act out of fear of the consequences.

Borenstein also found that Robb's testimony concerning Barrett's verbal confession was new evidence, credible, and admissible "under the exception to the hearsay rule for statements against penal interest." The exception has a requirement that when a person makes incriminating admissions, "the statement, if offered to exculpate the accused, must be corroborated by circumstances clearly indicating its trustworthiness."¹¹ After considering factors such as that Barrett knew he was a suspect and he would have expected authorities to eventually learn of his confession, Borenstein determined "the totality of circumstances 'clearly show that

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Barrett had little to gain and much to lose by confessing to the murder.”¹²

On October 25, 2004, Borenstein issued his ruling. He wrote in his decision’s concluding paragraphs:

The case against [Weichel] was not one of overwhelming evidence of guilt; it was an identification case in which only one of four eyewitnesses on the scene ... was able to identify [Weichel], and with only seconds, late at night, to make the observations. ... Beyond that, however, the evidence of guilt was thin. A gun was found nearby that was consistent with bullets that shot the victim but nothing linked the defendant to that weapon. There was no other evidence; no weapon, fingerprints, or vehicle identification connecting the defendant to the crime.

Both Barrett’s written and oral confessions cast real doubt on the justice of Weichel’s conviction, especially since the conviction was not based on overwhelming evidence of guilt. The exculpatory evidence contained in Barrett’s letter to the defendant’s mother and in his confession to Robb were not available at trial. Since Weichel did not have the opportunity to present this exculpatory evidence to the jury, he is entitled to that opportunity now, in order to receive a fair trial, and because the newly discovered evidence casts doubt on the conviction.

The court notes that either Barrett’s letter or his statements to Robb, taken alone, are enough to merit a new trial in this case. All of the evidence together provides particular strength to its weight.

The court ORDERS that the defendant’s motion for a new trial is ALLOWED.¹³

The Suffolk County District Attorney appealed Borenstein’s ruling to the Massachusetts Supreme Court.

Massachusetts Supreme Court issues its Weichel decision.

Since Borenstein was not the trial judge, the Court only deferred to his credibility determinations; the rest of the case’s record was open to their assessment. On May 22, 2006, the Court issued its decision.

The Court first ruled that Barrett’s confession letter was not new evidence. The Court reject-

ed Weichel’s rationale for not previously discovering “the exculpatory content of Barrett’s confession letter because he feared, and had been threatened by, Bulger and had been intimidated by Bulger and Flemmi.”¹⁴ The Court declared, “In essence, the judge ... carved out a coercion or fear exception to the reasonable diligence requirement of newly discovered evidence. This was inappropriate.”¹⁵

The Court explained, “Consistent with his duty of reasonable diligence, the defendant could have ‘uncovered’ the content of Barrett’s confession letter and revealed the content to his attorney, and he could have sought protection for himself and his family from the government. ‘A hard choice is not the same as no choice.’ *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000). He should not be rewarded for making the wrong choice with resulting impairment of the integrity of the jury’s verdict.”¹⁶

The Court continued, “In reaching his conclusions, the judge made findings concerning the ‘backdrop’ of South Boston and the past activities, past reputations, and current status of both Bulger and Flemmi. ... Subsequent disclosures about the evils and wrongdoings of Bulger and Flemmi are not legally relevant. We are satisfied that the defendant had it within his means to ascertain the content of the Barrett letter long before he filed his current motion, and his deliberate failure to do so renders the information clearly not newly discovered.”¹⁷

The Court then ruled that Barrett’s confession to Robb was not new evidence because Weichel was aware that she and Barrett knew each other, yet he did not pursue finding out if she had any exculpatory information until Barrett’s mother testified during Weichel’s evidentiary hearing.

The Court also ruled Barrett’s confession to Robb was inadmissible hearsay, stating, “The judge erred on the third criteria [assessing the admissibility of statements “against penal interest”] because Barrett’s statements were not adequately corroborated.”¹⁸ The Court’s rationalized his confession wasn’t reliable because, “... Barrett’s character was, at best, questionable. ... Robb had observed Barrett drinking and suspected that he used drugs because of his “destructive” and “erratic” behavior. Barrett also had been arrested (in the 1970’s) for armed robbery and for assault and battery by means of a dangerous weapon. The judge should have factored this evidence into his assessment. Had he done so, he would have had no choice (on this record) but to question the reliability and trustworthiness of any statements made by Barrett.”¹⁹

Having found reasons to reject consideration of Barrett’s written and verbal confessions to murdering LaMonica, the Court concluded its decision with, “The order allowing the defendant’s motion for new trial is vacated. A new order shall enter denying the motion.”²⁰

Does the MA Supreme Court’s decision make sense?

Weichel’s motion for a new trial is unusual because of the central role played by the long shadow “Whitey” Bulger has cast over his case for more than a quarter of a century. A casual observer might find merit in the Massachusetts Supreme Court’s rejection of the possibility that retaliation by Bulger and Flemmi was a legitimate reason for Weichel to have avoided promptly learning of, and acting on the confession in Barrett’s letter, because “he could have sought protection for himself and his family from the government.”²¹

However, the Court’s analysis about the timeliness of discovering the letter’s contents is flawed for two reasons.

First, a threat by Bulger was unusual in that not only did he personally partake in killing people who crossed him, but so did the people around him, including Flemmi. They were both perceived to be killers. To people living in Boston who knew of Bulger, such as Weichel, a threat to kill a person who crossed him could be considered a promise. Bulger was indicted for 18 murders in 1994, but those were only the murders federal prosecutors thought they could prove he committed – it doesn’t include dozens of possible murders that were legally unprovable.

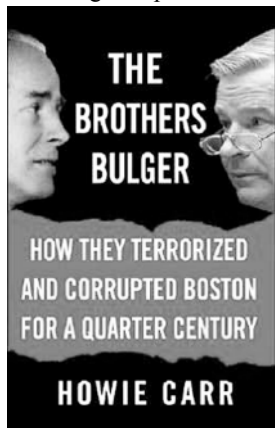
Second, Bulger able to engage in a veritable reign of terror in South Boston for over 20 years because he was protected by state and federal law enforcement authorities. Bulger’s status as an FBI informant protected him for many years from prosecution by federal prosecutors. He was so ingratiated with law enforcement that at one time he had at least six FBI agents on his payroll.²² Who tipped Bulger off about his federal indictment in December 1994 so he could go underground before being arrested? An FBI contact. How has Bulger eluded capture for almost 12 years even though it is known he has traveled around the United States almost like a tourist with two different girlfriends, even returning to South Boston on several occasions? His law enforcement contacts, who continue to aid him.²³

Three months before the Court’s decision, *The Brothers Bulger: How They Terrorized and Corrupted Boston for a Quarter Century*

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(Warner Books Feb. 2006) was published. Written by Boston Herald columnist Howie Carr, among other things the book documents that Bulger kept his closest associates in line



by their fear that if they crossed him they would be killed just as unhesitatingly as anyone else who crossed him – which was common knowledge in South Boston. It also documents how deeply Bulger was protected by law enforcement.

So the information was publicly and readily available to the justices of the Massachusetts Supreme Court at the time of their May 2006 decision, that Weichel couldn't have safely "sought protection for himself and his family from the government,"²⁴ at least until his mother died, because Bulger's tentacles extended deeply into state and federal law enforcement agencies.

The Court's ruling that Barrett's verbal confession was inadmissible hearsay because "the reliability and trustworthiness of any statements" he made was questionable due to his history of committing violent crimes and his history of drinking and illegal drug use is inexplicable. Confessions in Massachusetts (and across the country) by suspects with a long record of violent crimes and a history of drug and alcohol use similar to Barrett are not just deemed admissible, but typically underpin a conviction. In some of those cases the lone witness was a facially unreliable jailhouse informant with a violent criminal history and personal history of excessive alcohol and drug use similar to Barrett – which wasn't an issue with determining Robb's credibility. The Court's *Weichel* decision may backfire on them if Massachusetts defendants confessing under far less reliable circumstances than Barrett, rely on it to have their confession ruled as inadmissible hearsay.

The Court's decision carefully avoids discussing that Weichel's argument for a new trial is fundamentally based on the premise that Barrett's confessions not only support Weichel's actual innocence, but also provides law enforcement with professions of guilt by a person who was originally investigated as involved in the murder. Bulger's interventions on Barrett's behalf before

Weichel's trial also powerfully supports the veracity of Barrett's subsequent confessions.

The decision also didn't address a subtext issue supporting Weichel's conviction as a miscarriage of justice: Barrett's written and verbal confessions to murdering LaMonica, the numerous alibi witnesses, and the identification of a different man in the courtroom by the female eyewitness explains the inconsistency of Weichel's courtroom identification by the one witness the jury relied on to convict Weichel. The simplest and most likely reason the courtroom identification of Weichel by that male witness was inconsistent with his description given to police minutes after he saw the man running on the street, and the other evidence in the case, is he did not see Weichel at the crime scene. Since 1981 much has been learned about factors that can affect the accuracy of an eyewitness identification – and the circumstances under which the people in the park saw the man (it was late at night with only a street light, he was running parallel to them, they were about 180 feet from him, they were inebriated, etc.) weren't conducive to a reliable identification.

Recent research at the University of Washington documents that even one alcoholic drink within an hour can severely impair a person's awareness and ability to accurately recollect obvious and significant details of an event occurring under conditions of perfect lighting and zero stress.²⁵ Another study based on a simulated crime scene found that a person considered legally drunk (.08-1%) is *1/3rd less* likely than a sober person to make an accurate identification of a thief they witnessed committing a crime under perfect conditions (lighting, etc.)²⁶ This research has serious implications for the accuracy of eyewitness memory, and the testimony the jury relied on to convict Weichel was by a witness who admitted he had been heavily drinking for hours prior to the shooting. Application of this and similar scientific research to the circumstances of Weichel's identification may constitute new evidence.

Even though the Court never questioned the veracity of Barrett's confession in the letter, they asserted that since they rejected it as "new evidence," there wasn't "the chance that a miscarriage of justice occurred."²⁷ Yet Barrett's confession means Weichel is innocent. So the Court's *de facto* rationale is that in determining whether "a miscarriage of justice occurred" in Weichel's case, compelling evidence of his actual innocence is trumped by the liberal prosecution favorable application of procedural and evidentiary rules to exculpatory evidence his jury didn't consider. Contrary to the Court's assertion, "the integrity of the jury's verdict" is not impaired by

evidence of Weichel's innocence the jury did not consider, and that neither Weichel nor the prosecution had at the time of his trial, and which if it had been available, arguably would have resulted in the prosecution's dismissal of the charges against Weichel.

Did the MA Supreme Court make a political decision?

When notified that *Justice:Denied* would be publishing an article about his case in the Summer 2005 issue (Issue 29), Weichel expressed guarded optimism the state Supreme Court would affirm the order for a new trial. He explained that political influences affected the Court's interpretation and application of the law in its decisions, and that powerful political forces didn't want his conviction disturbed. The Court's May 22 decision shows he had good reason for concern, and it also shows that Judge Borenstein was able to rise above political concerns to grant relief to Weichel, who based on the evidence now available is actually innocent of LaMonica's murder.

Although it is not well known to people outside Massachusetts, "Whitey" Bulger's younger brother, William, is one of the most powerful and prominent politicians in the state. He was president of the State Senate for 17 years (1978-1996), and was president of the University of Massachusetts for seven years (1996-2003). Did William Bulger use his influence to sway the state Supreme Court to overturn Borenstein's order for a new trial? And if so, why? Or did someone else? And if so, why?

What's next?

Weichel can now pursue a federal habeas petition, or possibly first pursue a challenge in state court of his identification by the lone eyewitness, based on new scientific research that an intoxicated person cannot reliably provide eyewitness details. If his jury had known about the significantly reduced likelihood of an accurate identification by an intoxicated person such as the male witness in Faxon Park, there is a reasonable likelihood they would have acquitted him. Cutting through the semantic fog, the essence of Weichel's case is he has compelling evidence of his actual innocence that his jury didn't consider.

The U.S. Supreme Court's decision in *House v. Bell*, No. 04-8990 (U.S. 06/12/2006) was issued three weeks after the Massachusetts Supreme Court's *Weichel* decision. It provides particular support for Weichel for two reasons: Like Weichel, the state court considered House's claims to be procedurally defaulted from consideration; and, Weichel has

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My daughter Lori Berenson has been wrongfully incarcerated in Perú since the night of Nov. 30, 1995, when she was arrested on a public bus in Lima. She was twenty-six years old.

What Was Lori Doing In Perú?

Lori became interested in Perú after reading extensively about that country. Lori traveled to Perú in November 1994 and became further intrigued with the rich indigenous history, culture, and interesting political atmosphere. In April 1992, Perú experienced a "self-coup" and political upheaval as President Alberto Fujimori attempted to bring peace and order to the chaotic nation with strong leadership and repressive anti-terrorism laws. Lori traveled throughout the country learning about the culture and meeting many poor Peruvians.

Relying on her hands-on experience with poverty and the plight of the poor in Central and South America, Lori was able to obtain assignments from two U.S. publications, *Modern Times* and *Third World Viewpoint*, to work as a free-lance journalist. She secured appropriate press credentials in Lima, Perú's capital. At the time of her arrest Lori was researching articles about the effects of poverty on women in Perú. We are in possession of some of the transcripts of her work, but the Peruvian anti-terrorist police seized most of it when they searched her apartment.

Did Lori Know MRTA Members?

Lori now knows that some of the people she met during the months she was in Perú before her arrest were members of the rebel organization MRTA (Movimiento Revolucionario Tupac Amaru). But before her arrest she did not know their real names or that they were involved in MRTA activities. As Lori stated

Guilt By Association – The Political Jailing of Lori Berenson

By Mark L. Berenson

in an interview with *The Washington Post*, "My relationship with the other people accused was a social relationship, talking about things. Until I was in jail I finally figured out more or less what they are, which is much different than what I thought originally...."

Soon after Lori arrived in Lima, a sprawling city of almost seven million people, she and Pacifico Castrellón, a Panamanian artist she met while traveling to Perú, co-rented a house in the city's La Molina district. It was a large, four-story house, like a boarding house, and had ample room for Castrellón to paint. Several weeks later, Lori and Pacifico sublet the house's fourth floor to a man who said he was an engineer named Tizoc Ruiz. After that, Lori never went to the fourth floor. Ruiz subsequently hired a live-in housekeeper.

Lori moved out of the house in August 1995. At the time of her arrest almost four months later, she was living in an apartment across the city in Lima's San Borja district. The large La Molina house, however, remained occupied by Pacifico, the housekeeper and Ruiz – along with the 18 MRTA recruits brought in from the Peruvian jungles who were clandestinely residing in the rooms on the fourth floor and training in preparation for an attack on the Peruvian Congress.

After Lori's arrest, she first learned that Castrellón was in fact a long-time MRTA member, and that the alleged engineer Ruiz to whom Lori was introduced on a social basis, was really Miguel Rincón, a high-ranking MRTA leader. In addition, the hired house-

keeper turned out to be an MRTA member and the alleged Bolivian photographer Rosa Mita Calle, who Lori had met a few weeks earlier, was really Nancy Gilvonio, a Peruvian married to Nestor Cerpa, the MRTA leader). Nancy was arrested on the same bus as Lori.

Military Tribunal Convicts Lori of Treason

In January 1996, a hooded military tribunal (now deemed illegal in Perú) convicted Lori, a U.S. citizen, of treason against the fatherland of Peru as a leader of the MRTA. The tribunal then sentenced her to life in prison while a hooded soldier held a gun to her head. The military tribunal's proceedings were arbitrary and did not observe any of Lori's due process protections. Lori was unable to defend herself against any accusations, and she wasn't informed of statements people had made about her – possibly under duress and threats of torture.

Negative Reaction to Lori's Military Conviction Leads to Civilian Trial

In December 1998, the United Nations High Commission on Human Rights stated Lori had been deprived of her liberty arbitrarily and the government of Perú must take all necessary steps to remedy her wrongful incarceration.

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compelling evidence of his actual innocence, whereas House did not. House only had evidence supporting that "it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt."²⁸ That is the gateway standard under *Schlup v. Delo*, 513 U. S. 298 (1995) for obtaining federal review in spite of a state procedural default.²⁹ Consequently, *Weichel* not only meets the *Schlup* standard for federal review of his state conviction, but he arguably also meets the even higher standard implied in *Herrera v. Collins*, 506 U. S. 390, 417 (1993), that "a freestanding innocence claim" warrants federal relief from an unconstitutional imprisonment (or execution).³⁰

Time will tell how the next chapter of *Weichel*'s 26-year odyssey unfolds.

Endnotes:

- 1 *Commonwealth v. Welch*, No. SJ-09556 (Mass. 05/22/2006); 2006.MA.0000193 ¶21 <http://www.versuslaw.com>
- 2 *Id.* at ¶22 <www.versuslaw.com>
- 3 *Id.* at ¶40 <www.versuslaw.com>
- 4 *Id.* at ¶39 <www.versuslaw.com>
- 5 Information from the FBI website on June 25, 2006, at <http://www.fbi.gov/wanted/topten/fugitives/bulger.htm>
- 6 "Dear Gloria, I really don't know what to say! So I will get straight to the point. I haven't had a good night sleep in almost a year because I know [the defendant] did not kill [the victim]. I did! Yes, Gloria I killed [the victim]. [The defendant] has known this. I told him a couple weeks after it happened! Gloria, I never thought in a million years that they would blame and convict a[n] innocent man. Gloria, I am so sorry for all of the pain I put you and [the defendant] through. I can't let [the defendant] spend the rest of his life in jail for something he didn't do! So, Gloria, if there is ANYTHING I can do to help clear [the defendant] please let me know. Gloria, I mean anything at all." (Emphasis in original). The letter was signed "Tommy Barrett"; was dated March 19, 1982; bore a Mill Valley, California, return address; and bore a California postmark dated March 19, 1982.
- 7 *Id.* at ¶41 <www.versuslaw.com>
- 8 *Id.* at ¶31 fn.4 <www.versuslaw.com>
- 9 *Id.* at ¶46 <www.versuslaw.com>

- 10 *Id.* at ¶46 <www.versuslaw.com>
- 11 *Id.* at ¶54 <www.versuslaw.com>
- 12 *Id.* at ¶54 <www.versuslaw.com>
- 13 *Commonwealth v. Welch*, No. 77144, Memorandum Of Decision And Order On Defendant's Motion For A New Trial, (10/25/2004)
- 14 *Commonwealth v. Welch*, *supra*, ¶64 <www.versuslaw.com>
- 15 *Id.* at ¶64 <www.versuslaw.com>
- 16 *Id.* at ¶66 <www.versuslaw.com>
- 17 *Id.* at ¶67 <www.versuslaw.com>
- 18 *Id.* at ¶73 <www.versuslaw.com>
- 19 *Id.* at ¶78 <www.versuslaw.com>
- 20 *Id.* at ¶81 <www.versuslaw.com>
- 21 *Id.* at ¶66 <www.versuslaw.com>
- 22 *The Brothers Bulger: How They Terrorized and Corrupted Boston for a Quarter Century*, by Howie Carr, (Warner Books 2006), p. 330.
- 23 Rat: Tips foiled feds' efforts to nab Whitey, *Boston Herald*, August 23, 2005; 10 years, six continents, still no 'Whitey', *Baltimore Sun*, August 28, 2005.
- 24 *Commonwealth v. Welch*, ¶66 <www.versuslaw.com>
- 25 Clifasefi SL et al. "Blind Drunk: The Effects of Alcohol on Inattention Blindness." *Applied Cognitive Psychology* 20: 697-704, July 2006.
- 26 Some Effects of Alcohol on Eyewitness Memory, John C. Yuille and Patricia A. Tollestrup, *Journal of Applied Psychology*, 1990, Vol. 75, No. 3, 268, 271.
- 27 *Commonwealth v. Welch*, *supra*, ¶61 <www.versuslaw.com>
- 28 *House v. Bell*, No. 04-8990 ¶123 (U.S. 06/12/2006)
- 29 *Id.* at ¶12, 18
- 30 *Id.* at ¶126.



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In August 2000, the Supreme Council of Military Justice acted on evidence proving Lori was not a leader of a subversive group. They nullified her conviction and overturned her sentence; however, instead of ordering her release they remanded her case to Perú's Special Civilian Courts for Terrorism. At that time, according to the U.S. State Department's annual country reports, trials in these courts "fail to meet international standards of openness, fairness, and due process."

Lori's Civilian Trial

Lori was never involved in any act of violence in Perú or elsewhere, and she was never accused of such. In her civilian trial she was accused of collaboration based on: (1) pretending to be married to Pacifico Castellón in order to rent the house in La Molina to be used as a safe haven for the MRTA; (2) renting the apartment in San Borja to hide Nancy Gilvonio; (3) participating in indoctrination courses for MRTA members and preparing and serving food for them; (4) buying beepers and other electronic equipment for the MRTA; (5) obtaining press credentials for herself and Nancy Gilvonio in order to enter Congress and aid the MRTA in their plans to seize the Congress. None of the accusations were supported by evidence. In particular:

- No witness claimed Lori was a member of the MRTA and no other evidence supports the charge.
- No witness claimed Lori collaborated with the MRTA. Even Castellón, the prosecutor's principle witness, testified he did not know of any collaboration between Lori and the MRTA.
- The prosecutor charged Lori with buying beepers, cell phones and computers for the MRTA but his only evidence were receipts for one of each and the only testimony showed they were her personal property.
- No witness supported the prosecutor's claim that the La Molina house was rented for the purpose of providing a "safe haven" for the MRTA in order to plan an attack on the Peruvian Congress. MRTA leader Rincón testified that MRTA members moved into the fourth floor weeks after Lori moved out. Those members testified they never saw Lori until after their arrests.
- Lori rented an apartment in San Borja in August, nearly four months before her arrest on Nov. 30, 1995, and the raid on the house in La Molina. All the evidence, including testimony of two doormen at the new apartment, was that she lived there alone as a normal tenant and no one associated with the MRTA was identified as ever

being there, including Nancy Gilvonio who the prosecutor charged was hidden there.

- Castellón and Rincón both testified Lori knew nothing about any MRTA plans concerning the Congress and never provided the MRTA with any information about the Congress.
- Affidavits from editors for the two U.S. magazines attested that Lori was authorized to write articles for them about the status of women and the prevalence of poverty in Perú and they maintained contact with her concerning the articles until her arrest.

Although Castellón was a prosecution witness, during the public phase of her trial he declined to accuse Lori of collaborating with the MRTA. He also testified that he never heard her talk about subversive activities. All of those who lived on the fourth floor testified they never saw Lori until after their arrest, confirming Lori's testimony. Rincón testified that Castellón was a long-time, important member of the MRTA who brought Lori unknowingly into the picture to cover-up MRTA activities. Rincón emphasized that Lori did not know who he was or his connection to the MRTA when he lived in the La Molina house, and she did not know about Castellón's involvement. Rincón said Lori was not a member, of or a collaborator with the MRTA.

On June 20, 2001, the civilian court acquitted Lori of a leadership role in the MRTA that formed the basis of her military tribunal conviction. She was also acquitted of both membership in a subversive group and militancy in a subversive group. In spite of the testimony by MRTA's members that Lori was not involved with them in any way, and they had concealed their activities from her, she was found guilty of collaboration and was convicted as a "secondary accomplice." This essentially means that she was found to have been acquainted with people known to belong to what the Peruvian government deemed a terrorist organization (MRTA). Although it seems inconsequential, Lori knowing people who concealed their true identities and personal ties formed part of the charge of collaboration with terrorism – which carried a minimum 20 year sentence. Lori was subsequently sentenced to 20 years imprisonment.

Lori's Civilian Court Conviction Challenged

Perú's Supreme Appeals Court reviewed Lori's civilian trial. Justice Guillermo Cabala, the Court's president, argued in February 2002 that he did not agree with Lori's conviction for collaboration because he did not think the charge was proven. He argued that "Lori Berenson is not a terrorist and has not committed a terrorist act."

He was outvoted 4 to 1, as the Court affirmed Lori's conviction.

The Inter-American Commission on Human Rights had been studying Lori's case since January 1998. After all judicial remedies were exhausted within Perú, on April 3, 2002, it announced its unanimous 7-0 decision that Lori's civilian trial was riddled with violations of due process; that her rights under the American Convention on Human Rights needed to be completely restored; that she receive moral, psychological and financial indemnification for her wrongful suffering; and that Perú must bring its anti-terrorism laws into compliance with international standards. Problems cited with the civilian trial included the lack of presumption of innocence, the bias of the chief judge, the failure of the Peruvian court to allow Lori's defense attorney proper access to records or time to be with her, and the failure of the Peruvian court to properly document its conclusions in reaching its verdict against Lori.

The Inter-American Commission has no way to enforce its rulings and Perú refused to comply with it. So three months later, in July 2002, the Commission brought the case before the Inter-American Court of Human Rights, whose decisions are binding for all members of the Organization of American States (OAS) that accept its jurisdiction.

In November 2002, the Inter-American Court agreed to review the Inter-American Commission's case against Perú. The Inter-American Court's role is not to judge guilt or innocence, but to ascertain whether an accused person has had a fair trial with full guarantees of due process under the American Convention on Human Rights.

For two years we waited.

Perú Influences the Inter-American Court

Anticipating a court ruling for Lori's freedom, Peruvian politicians who seemingly never agree on anything united against Lori by calling the Inter-American Court "soft on terrorism" – words that could only embarrass it in the post-9/11 global campaign against terrorism.

Peruvian President Alejandro Toledo and his administration also devised a clever political ploy. On November 5, 2004, ten days before the Inter-American Court was to reconvene in Costa Rica, a projected lengthy mega-trial of Shining Path leader Abimaél Guzmán and 17 co-defendants was scheduled to begin, despite the fact that the Peruvian courts normally begin a long summer recess at the start of the holiday season.

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On the mega-trial's first day, the chief judge "allowed" the press to encourage Guzman and his followers to ignore the court, raise their fists and chant, causing chaos in the courtroom and an immediate suspension of the trial.

The next day, on November 6, President Toledo raised the specter of "terrorism," voicing his determination to protect the Peruvian people from the return of terrorism. Allegedly "angered and embarrassed" by the Shining Path courtroom spectacle, an "irate" President Toledo declared that nobody "accused or convicted of terrorism will ever go free."

Rumors linking a favorable decision for Lori Berenson to the freedom of hundreds of dangerous "terrorists" circulated in Perú for more than two weeks. The impending verdict in Lori's case became first-page news and received widespread radio and television coverage. The media campaign to fuel fear of terrorism was successful. A poll conducted in November indicated that 82% of the population in Lima believed terrorism was an "imminent threat," in spite of the fact there had not been serious terrorist activity in years.

Self-selecting write-in, wire-service polls indicated overwhelming support from a frightened populace for Perú to ignore any decision favorable to Lori, and if necessary, to withdraw from the Inter-American Court's jurisdiction.

The court's final hearings, held on November 24 and 25 in Costa Rica, were closed to the public, and no lawyers from Lori's legal team, the Inter-American Commission, or the Peruvian government were allowed to participate. Nevertheless, the Peruvian *ad hoc* judge was able to argue his government's position, as he told the Peruvian newspaper *Peru21*, point-by-point, with no one able to provide countering viewpoints.

Inter-American Court Capitulates to Peruvian Politics

Rather than be rendered powerless by a disgruntled member country, on December 2, 2004, the Inter-American Court voted 6-1 to uphold Lori's civilian conviction. The Court's decision did, however, order Perú to compensate Lori for her illegal military trial and the inhumane and degrading treatment she received during her incarceration at the infamous Yanamayo Prison. The Court ordered removal of a \$30,000 fine levied against her, and to compensate her family \$30,000 for legal expenses unnecessarily incurred by that illegal military trial in 1996.

Chilean Judge Cecilia Medina Quiroga, re-

portedly the writer of the original working draft that allegedly called for Lori's freedom, wrote a strong dissenting opinion. She said that Perú's laws did not comply with the due process requirements of the American Convention on Human Rights, and that the only fair remedy was Lori's immediate liberation. Medina Quiroga argued the Inter-American Court should not rely on tainted evidence from Lori's illegal military trial and that Perú must adequately define terrorism before it could convict her (or anyone else) of collaboration with terrorism.

Monroy Galvez, the *ad hoc* judge appointed to represent Perú in the Court's closed-door deliberations and vote, substantiated the effectiveness of Perú's orchestrated political campaign to influence the Court's decision. Galvez later told *Peru21* that on November 10 he received the Court's "working draft document" of its preliminary decision. He said it was very favorable to the Inter-American Commission's position in the case, apparently calling for Lori's release.

If it is true that pressure politics won out over truth and justice, then there is little hope for individuals in high profile cases looking to the Inter-American Court to protect their rights.

Perú Uses the Napoleonic Legal System

Peruvian justice, based on the Napoleonic system of proving innocence, is foreign to our judicial culture. To me, it is often incomprehensible. In Perú, murderers, rapists, kidnapers, violent offenders and armed robbers receive short sentences and on average are back on the streets in under five years. Lori, who has never even been accused of being involved in an act of violence, has, as of mid-2006, been imprisoned for almost 11 years.

Perú Has Made an "Example" of Lori

From the first moments of her arrest on Nov. 30, 1995, Perú's then President Alberto Fujimori decided to "make an example" out of Lori as a warning to others who might venture to Perú and speak the truth about his dictatorship, thinly veiled as a democracy. The politicization of her case began when Fujimori waived her U.S. passport on Peruvian television the morning after her arrest. Through Fujimori's controlled media, Lori's image was portrayed as that of a "terrorist monster." Lori was smeared and maligned and through this character assassination she became the symbol of Perú's tough stance against "terrorism." Unfortunately, subsequent Peruvian governments have continued Fujimori's policy toward Lori, even though he himself is now a fugitive. (Former President Fujimori is currently being detained in Chile awaiting extra-

dition to Perú to stand trial for a multitude of crimes allegedly committed during his time in office, including: murder, torture, corruption, wiretapping, election tampering, illegal enrichment, and other crimes.) Incomprehensibly, there has not been sufficient interest among the many honorable Peruvian politicians to closely examine this orchestrated and wrongful political persecution of Lori.

Peruvian prisons are primitive by U.S. standards, and Lori nearly 11 years of imprisonment have been brutal, particularly the five years before her treason conviction was thrown out. For the first three of those years, Lori was kept at Yanamayo, a special prison for terrorists located in the Andes Mountains at an altitude of 12,700 feet. The extremeness of being imprisoned at that altitude is indicated by the fact that Mount Whitney in the Sierra Nevada mountains of California is the tallest peak in the continental United States, and at 14,498 feet it is less than 1,800 feet higher than the Peruvian prison. Compounding the altitude was the conditions under which she was held. In 2000 she said, "I was in a very dark place; I was isolated. For almost two years I was not allowed to see anyone, hear anyone, talk to anyone. It was harsh and cold." (Lori Berenson Speaks, *48 Hours* (CBS News), October 19, 2000.)

Alan García was elected as Perú's new president on June 4, 2006, and he will take office on July 28, 2006. We can only hope that President-elect García will review the case, realize that Lori has been wronged, change Perú's position towards Lori and pardon her.

Lori or Mark Berenson can be written at:

The Committee to Free Lori Berenson
P.O. Box 701
New York, NY 10159-0701

Or email, berenson@freelori.org

Mail to Lori will be forwarded to her at Huacariz Prison in Peru. Prison officials censor her mail for content, so no mention should be made of her case, anything political, or any recent news event.

Mark L. Berenson, a professor at Montclair State University, is Lori Berenson's father. More information is available at www.freelori.org. This article is edited with permission of the author, and is based on two articles by the author, *The Political Jailing of Lori Berenson*, by Mark L. Berenson, *CounterPunch*, Weekend Edition, January 22-24, 2005; and, *Perú vs. Lori Berenson: The Case Continues*, by Mark L. Berenson, *NACLA Report on the Americas*, Vol. 38, No. 5, March/April 2005 pp. 4-5.



Federal 9th Circuit Allows Post-conviction §1983 Civil Rights Lawsuit To Access Evidence

A roadblock to successfully challenging a wrongful conviction can be the prosecution's obstruction to post-conviction access to critical evidence. In 2002 the federal Eleventh Circuit Court of Appeals ruled a 42 U.S.C. §1983 civil rights lawsuit is an avenue to access biological evidence in the possession of a state (or federal) agency for post-conviction testing. (See, *Bradley v. Pryor*, 305 F.3d 1287, 1288 (11th Cir. 2002)) The federal Ninth Circuit has joined the Eleventh Circuit. (See, *Osborne v. District Attorney's Office for the*

Third Judicial RRB District, 423 F.3d 1050 (9th Cir. 09/08/2005))

Although the Ninth and Eleventh Circuit cases specifically concerned a defendant's post-conviction pursuit of access to biological evidence, there is nothing in either decision precluding use of a §1983 suit to obtain access to other types of evidence withheld by a government agency, such as fingerprints, or documents to analyze for handwriting or authentication.

The Ninth Circuit's *Osborne* deci-

sion, and the Eleventh Circuit *Bradley* decision provide valuable precedents for anyone seeking access to evidence by a §1983 suit in the eight federal circuits that have not ruled on the issue. The Fourth (2002) and Fifth Circuits (2002) have barred use of a §1983 suit as a post-conviction method of accessing biological evidence possessed by the government.

A significant aspect of the the Ninth and Eleventh Circuit precedents is that a §1983 suit does not require exhaustion of state remedies, so a defendant in

those Circuits can bypass state procedures that may be unfavorable to accessing the evidence, or that enable the state to use tactics delaying, or at worst, denying access to the evidence.

In May 2006 the Ninth Circuit reiterated *Osborne* by issuing a ruling in an unpublished decision favoring a defendant seeking access to withheld evidence through a §1983 lawsuit. (See, *Jackson v. Clark*, No. 04-55032 (9th Cir. 05/09/2006)). Condensed versions of the *Osborne* and *Jackson* decisions follow.

***Osborne v. District Attorney's Office for the Third Judicial RRB District*, 423 F.3d 1050 (9th Cir. 09/08/2005)**

[1] United States Court Of Appeals For The Ninth Circuit

[3]2005.C09.0003464< <http://www.versuslaw.com>>

[19] Following a March 1994 jury trial in Alaska Superior Court, Osborne was convicted of kidnapping, assault, and sexual assault, and was sentenced to 26 years' imprisonment. The charges arose from a March 1993 incident in which the victim, a prostitute named K.G., after agreeing to perform fellatio on two clients, was driven to a secluded area of Anchorage, raped at gunpoint, beaten with an axe handle, and shot and left for dead.

[20] K.G. later identified, from photo line-ups, Osborne and Dexter Jackson as her assailants. At their joint trial, abundant physical evidence linked Jackson to the crime scene. ... By contrast, aside from K.G.'s ... identification of Osborne as the second assailant, the State tied Osborne to the assault based primarily on its analysis of biological evidence recovered from the crime scene—namely, a used condom, two hairs, and certain bloodied and semen-stained clothing.

[21] The State subjected the sperm found in the used condom to "DQ Alpha" testing, an early form of DNA testing that, like ABO blood typing, reveals the alleles present at a single genetic locus. The results showed that the sperm had the same DQ Alpha type as Osborne; however, this DQ Alpha type is shared by 14.7 to 16 percent of African Americans, and can thus be expected in one of every 6 or 7 black men. The State also recovered two hairs from the crime scene: one from the used condom, and another from K.G.'s sweatshirt. DQ Alpha typing of these hairs was unsuccessful, likely because the samples were too small for analysis. Both, however, were "negroid" pubic hairs

with the "same microscopic features" as Osborne's pubic hair. Tests performed on K.G.'s clothing were inconclusive.

[22] This evidence was submitted to the jury, which rejected Osborne's defense of mistaken identity and convicted him of kidnapping, first-degree assault, and two counts of first-degree sexual assault. His convictions were affirmed on direct appeal. With his application for state post-conviction relief still pending in the Alaska courts, Osborne filed the instant § 1983 claim. His complaint alleges that the District Attorney's Office, District Attorney Susan Parkes, the Anchorage Police Department, and Police Chief Walt Monegan (collectively, the "State") violated his federal constitutional rights by denying him access to this evidence. As relief, he seeks only "the release of the biological evidence" and "the transfer of such evidence for DNA testing."

[24] The magistrate judge recommended dismissing Osborne's § 1983 action, finding that because he seeks to "set the stage" for an attack on his underlying conviction, under *Heck* a petition for habeas corpus is his sole remedy. The district court accepted and adopted this recommendation, and dismissed the action.

[27] DISCUSSION

[28] [1] This case requires us to consider, once again, "the extent to which § 1983 is a permissible alternative to the traditional remedy of habeas corpus." As the Supreme Court has recognized, state prisoners have two potential avenues to remedy violations of their federal constitutional rights: a habeas petition under 28 U.S.C. § 2254, and a civil suit under 42 U.S.C. § 1983. [*Heck v. Humphrey*, 512 U.S. 477, 480 (1994)]. Of course, while a habeas petition may ultimately secure release, habeas relief is often barred by procedural hurdles. By contrast, a § 1983 suit will not result in release, but is generally not barred by a

failure to exhaust state remedies. *Id.* at 480-81.

[29] A. Preiser, *Heck*, and their Progeny

[30] [2] The [Supreme] Court, like this circuit, has attempted to "harmoniz[e] the broad language of § 1983, a general statute, with the specific federal habeas corpus statute." *Id.* at 491 (Thomas, J., concurring) ... These efforts began in *Preiser*, where the Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." [*Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973))] They continued in *Heck*, where the Court enunciated what has become known as the "favorable termination" requirement: Where a prisoner's § 1983 action, if successful, "would necessarily imply the invalidity" of his conviction or sentence, it must be dismissed "unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck*, 512 U.S. at 487; see also *Docken*, 393 F.3d at 1027-28. And they were refined, in the wake of *Heck*, in cases most commonly involving prisoner challenges to state disciplinary and parole procedures. ...

[31] [3] Most recently, the [Supreme] Court in *Wilkinson v. Dotson*, 125 S.Ct. 1242 (2005), reviewed *Preiser*, *Heck*, and their progeny, and explained that:

[32] These cases, taken together, indicate that a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—if success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Osborne cont. on p. 31

Osborne cont. from p. 30

[33] *Id.* at 1248. *Dotson* thus erases any doubt that *Heck* applies both to actions for money damages and to those, like this one, for injunctive relief, and clarifies that *Heck* provides the relevant test to determine whether § 1983 is a permissible avenue of relief for Osborne.

[34] B. Osborne's Claim

[35] Although the district court recognized that Osborne raises "a direct challenge to [neither] the fact nor duration of imprisonment," it ruled that his claim was *Heck*-barred because he seeks to "set the stage" to attack his underlying conviction. [T]hree circuits – the Fourth, Fifth, and Eleventh – have previously confronted the very question we now face.

[36] [4] The State argues that Osborne seeks to use § 1983 as a discovery device for a later habeas petition, and that allowing him to do so would circumvent habeas procedural requirements and undermine the principles of comity and federalism that *Heck* protects. ... Put simply, the State contends that if a claim can be brought in habeas, it must be brought in habeas. Accordingly, it urges us to adopt the reasoning of the Fourth Circuit in *Harvey v. Horan* (Harvey I), 278 F.3d 370, 375-79 (4th Cir. 2002), in which a split panel held, for much the same reasons, that § 1983 actions by prisoners seeking post-conviction access to biological evidence are barred by *Heck*. ...

[37] [5] Osborne argues, by contrast, that the appropriate question under *Heck* is not whether he seeks to "set the stage" to attack his underlying conviction, but rather whether success on his § 1983 claim "necessarily implies" the invalidity of his conviction. This question must be answered in the negative, he submits, because success on his § 1983 claim guarantees only access to the DNA evidence. Though he concedes that he ultimately hopes to establish his innocence, he points out that additional DNA testing may inculpate him, exculpate him, or be inconclusive. And, even if the testing exonerates him, release would come through an entirely different proceeding, either habeas or clemency. Osborne thus suggests we adopt the reasoning of the Eleventh Circuit in *Bradley v. Pryor*, 305 F.3d 1287, 1288 (11th Cir. 2002) ... which held, for these reasons, that a § 1983 action seeking post-conviction access to DNA evidence is not *Heck*-barred. ...

[38] [6] We agree with Osborne, and join the Eleventh Circuit in holding that *Heck* does not bar a prisoner's § 1983 action seeking post-conviction access to biological evidence in the government's possession. It is clear to us, as a matter of logic, that success in such an action would not "necessarily demonstrate the invalidity of confinement or its duration." *Dotson*, 125 S.Ct. at 1248. First, success would yield only access to the evidence—nothing more. ...

Second, further DNA analysis may prove exculpatory, inculpatory, or inconclusive; thus, there is a significant chance that the results will either confirm or have no effect on the validity of Osborne's confinement. ... And third, even if the results exonerate Osborne, a separate action – alleging a separate constitutional violation altogether—would be required to overturn his conviction. ...

[39] C. *Dotson*

[40] [7] Any remaining doubt as to the propriety of this approach is removed, we believe, by the Court's recent opinion in *Dotson*, which reads "necessarily" to mean "inevitably" and rejects the notion that a claim which can be brought in habeas must be brought in habeas. 125 S.Ct. at 1246-48. In *Dotson*, the Court considered the § 1983 claims of two Ohio prisoners who alleged ex post facto and due process violations at their parole hearings, and who sought injunctive relief in the form of new, constitutionally proper parole hearings. *Id.* at 1245. Ohio argued that these claims were *Heck*-barred because the prisoners "believe that victory on their claims will lead to speedier release from prison," and thus the suits, "in effect, collaterally attack the duration of their confinement." *Id.* at 1245-46. The Court rejected this argument, saying:

[41] The problem with Ohio's argument lies in its jump from a true premise (that in all likelihood the prisoners hope these actions will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief).

[42] *Id.* at 1246. This confirms our prior understanding ... that § 1983 and habeas are not always mutually exclusive. It also fatally undermines the State's insistence that a claim which can be brought in habeas must be brought in habeas...

[43] The Court in *Dotson* ... repeatedly emphasized that to be barred under *Heck*, a § 1983 claim must, if successful, necessarily demonstrate the invalidity of confinement or its duration. *Id.* at 1247-48 ... These statements undercut considerably the State's argument that Osborne's claim is *Heck*-barred even if he seeks only to "facilitate" or "set the stage" for a future attack on his conviction.

[44] Moreover, in response to Ohio's argument that allowing *Dotson* to sue under § 1983 would contravene principles of comity and federalism, the Court said: Our earlier cases ... have already placed the States' important comity considerations in the balance, weighed them against the competing need to vindicate federal rights without exhaustion, and concluded that prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement. ...

[46] Ultimately, the *Dotson* court found it key that neither prisoner sought an injunction ordering "immediate or speedier release"; at most, success meant a new parole hearing, at which the prisoners might-or might not-receive reduced sentences. *Id.* at 1248. ... This reasoning applies with equal force and dictates the outcome here.

[47] ... Thus, for the reasons ... embraced by the Eleventh Circuit in *Bradley*, we hold that *Heck* does not bar a prisoner's § 1983 action seeking post-conviction access to biological evidence in the government's possession.

[48] CONCLUSION

[49] [8] For the above reasons, Osborne's § 1983 action "should be allowed to proceed, in the absence of some other bar to the suit." *Heck*, 512 U.S. at 487 ... Accordingly, we reverse the judgment of the district court and remand for further proceedings.

Ninth Circuit reiterates *Osborne* and use of §1983 to access evidence in May 2006 unpublished decision

Jackson v. Clark, No. 04-55032 (9th Cir. 05/09/2006);
2006.C09.0002083<<http://www.versuslaw.com>>

[7] NOT FOR PUBLICATION

[11] Arthur Duane Jackson ("Jackson"), convicted in state court of carjacking and attempted murder, appeals *pro se* the district court's *sua sponte* dismissal of his 42 U.S.C. § 1983 action. Jackson seeks to compel the defendants to provide him with, or account for, various evidence pertaining to his state conviction. Based on intervening authority not available to the district court when it dismissed, we reverse and remand.

[12] The district court determined that Jackson's action was barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), concluding that providing Jackson with allegedly withheld evidence would "necessarily imply the invalidity" of his state court conviction. An intervening decision, however, held that *Heck* does not preclude a § 1983 action seeking to compel the state to release certain evidence because success would only yield access to evidence, which, in and of itself, "would not 'necessarily demonstrate the invalidity of confinement ...'" *Osborne v. District Attorney's Office for the Third Judicial District*, 423 F.3d 1050, 1054 (9th Cir. 2005). Because Jackson, much like the prisoner in *Osborne*, only seeks the release, or accounting, of potentially exculpatory evidence, success on the merits would not necessarily imply the invalidity of his conviction.

[13] Accordingly, we reverse the district court and remand for further proceedings.



The U.S. Supreme Court issued five opinions in May and June 2006 related to wrongful convictions. A condensation or summary of each case begins on the following pages:

Page 32 – *Bobby Lee Holmes v. South Carolina*, No. 04-1327 (U.S. 05/01/2006)

Page 36 – *House v. Bell*, No. 04-8990 (U.S. 06/12/2006)

Page 33 – *Youngblood v. West Virginia*, No. 05-6997 (U.S. 06/19/2006)

Page 33 – *Hamdan v. Rumsfeld*, No. 05-184 (U.S. 06/29/2006)

Page 34 – *Kansas v. Marsh*, No. 04-1170 (U.S. 06/26/2006)

Page 34 – *Justice:Denied's* editorial response to Justice Scalia's concurring opinion in *Kansas v. Marsh*.

held that such evidence is admissible if it "raise[s] a reasonable inference or presumption as to [the defendant's] own innocence" "but is not admissible if it merely "cast[s] a bare suspicion upon another" or "raise[s] a con-

guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt" may (or perhaps must) be excluded. [citation omitted]

[40] Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.

[41] Furthermore, as applied in this case, the South Carolina Supreme Court's rule seems to call for little, if any, examination of the credibility of the prosecution's witnesses or the reliability of its evidence. Here, for example, the defense strenuously claimed that the prosecution's forensic evidence was so unreliable (due to mishandling and a deliberate plot to frame petitioner) that the evidence should not have even been admitted. ... Yet, in evaluating the prosecution's forensic evidence and deeming it to be "strong" -- and thereby justifying exclusion of petitioner's third-party guilt evidence -- the South Carolina Supreme Court made no mention of the defense challenges to the prosecution's evidence.

[42] [W]here the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.

[44] The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. ... It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have "a meaningful opportunity to present a complete defense."

[46] For these reasons, we vacate the judgment of the South Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.



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Defendant's Right To Defense Trump's Prosecution's "Strong Forensic Evidence"

Bobby Lee Holmes v. South Carolina, No. 04-1327 (U.S. 05/01/2006); 2006.SCT.0000074 < <http://www.versuslaw.com>>

[22] On the morning of December 31, 1989, 86-year-old Mary Stewart was beaten, raped, and robbed in her home. She later died of complications stemming from her injuries. Holmes was convicted by a South Carolina jury of murder, first-degree criminal sexual conduct, first-degree burglary, and robbery, and he was sentenced to death ... Upon state post-conviction review, however, petitioner was granted a new trial.

[23] At the second trial, the prosecution relied heavily on ... forensic evidence:

[26] As a major part of his defense, petitioner attempted to undermine the State's forensic evidence by suggesting that it had been contaminated and that certain law enforcement officers had engaged in a plot to frame him. ... Petitioner's expert witnesses criticized the procedures used by the police in handling the fiber and DNA evidence and in collecting the fingerprint evidence. ... Another defense expert provided testimony that petitioner cited as supporting his claim that the palm print had been planted by the police. ...

[27] Petitioner also sought to introduce proof that another man, Jimmy McCaw White, had attacked Stewart. ... At a pretrial hearing, petitioner proffered several witnesses who placed White in the victim's neighborhood on the morning of the assault, as well as four other witnesses who testified that White had either acknowledged that petitioner was "innocent" "or had actually admitted to committing the crimes. ... One witness recounted that when he asked White about the "word ... on the street" that White was responsible for Stewart's murder, White "put his head down and he raised his head back up and he said, well, you know I like older women."

[28] The trial court excluded petitioner's third-party guilt evidence citing *State v. Gregory*, 198 S. C. 98, 16 S. E. 2d 532 (1941), which

jectural inference as to the commission of the crime by another." [citation omitted] On appeal, the South Carolina Supreme Court found no error in the exclusion of petitioner's third-party guilt evidence. ... [T]he court held that petitioner could not "overcome the forensic evidence against him to raise a reasonable inference of his own innocence." [citation omitted] We granted certiorari.

[30] "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." [citations omitted] This latitude, however, has limits. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" [citations omitted] This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "arbitrary" or "disproportionate to the purposes they are designed to serve." [citations omitted]

[37] In *Gregory*, the South Carolina Supreme Court adopted and applied a rule apparently intended to be of this type, given the court's references to the "applicable rule" from *Corpus Juris* and *American Jurisprudence*:

[38] "[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." [citation omitted]

[39] In *Gay* and this case, however, the South Carolina Supreme Court radically changed and extended the rule. ... [T]he State Supreme Court applied the rule that "where there is strong evidence of [a defendant's]

WV Supreme Court Slapped Down For Ignoring Brady Disclosure Obligation

Denver Youngblood was convicted in 2003 of sexual assault, brandishing a firearm and indecent exposure. Youngblood learned after his trial that the prosecution had not informed him about a one-page handwritten note by an eyewitness and friend of the alleged victim. The note contained evidence that the crimes Youngblood had been convicted of committing had not even occurred. Thus the note supported Youngblood's claim of innocence and could have been used to impeach the alleged victim's testimony.

After discovering existence of the note and its contents, Youngblood filed a motion for a new trial on the basis that the prosecution violated its legal obligation to disclose the note's existence under *Brady v. Maryland*, 373 U.S. 83 (1963). The trial judge denied the motion on the basis that the prosecution hadn't committed a *Brady* violation because the note constituted impeachment evidence only, and thus the failure to disclose its existence didn't constitute grounds for a new trial.

In affirming Youngblood's conviction, the West Virginia Supreme Court ruled in 2005 that the trial judge did not abuse his discretion by denying a new trial. Relying on an 1894 state case, the Court majority reasoned, "the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side."¹ By the way it handled the issue of the undisclosed note, the Court sidestepped considering Youngblood's claim that its concealment was a constitutional *Brady* due process violation.

However, in his dissent, Justice Davis tackled Youngblood's claim of a *Brady* violation head on. He wrote,

"I believe the writing provided both exculpatory and impeachment evidence. However, assuming for the sake of argument that the writing was purely impeachment evidence, under *Brady* and its progeny, due process still required its disclosure. ... In fact, the United States Supreme Court has expressly 'disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes.'²

Youngblood appealed to the U.S. Supreme Court. On June 19, 2006, the Court issued a GVR (Grant, Vacate and Remand) ruling, *Youngblood v. West Virginia*, No. 05-6997 (U.S. 06/19/2006), on the basis of the written briefs, and without oral arguments:

The trial court denied Youngblood a new trial, saying that the note provided only impeachment, but not exculpatory, evidence. The trial court did not discuss *Brady* or its scope, but expressed the view that the investigating trooper had attached no importance to the note, and because he had failed to give it to the prosecutor the State could not now be faulted for failing to share it with Youngblood's counsel.³

... A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. See 373 U.S., at 87. This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985), and *Brady* suppression occurs when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor," *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). See *id.*, at 437 ("[T]he

individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,'" *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *Bagley*, supra, at 682 (opinion of Blackmun, J.)), although a 'showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,' *Kyles*, 514 U.S., at 434. The reversal of a conviction is required upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*, at 435.

Youngblood clearly presented a federal constitutional *Brady* claim to the State Supreme Court. ... We, therefore, grant the petition for certiorari, vacate the judgment of the State Supreme Court, and remand the case for further proceedings not inconsistent with this opinion.⁴

Interestingly, the three dissenters, Scalia, Thomas and Kennedy, didn't do so because they disagreed with the substance of the Court's decision about Youngblood's *Brady* claim. They objected to the use of the GVR procedure to expedite resolution of the case.

Endnotes:

- 1 *State v. Youngblood*, 618 S.E.2d 544, 217 W.Va. 535 (W.Va. 06/24/2005); 2005.WV.0000065 ¶ 83 < <http://www.versuslaw.com>>
- 2 *Id.* at ¶ 115 < <http://www.versuslaw.com>>
- 3 *Youngblood v. West Virginia*, No. 05-6997 (U.S. 06/19/2006); 2006.SCT.0000111 ¶ 11 < <http://www.versuslaw.com>>
- 4 *Id.* at ¶ 14-15 < <http://www.versuslaw.com>>



Salim Ahmed Hamdan v. Donald H. Rumsfeld, No. 05-184, 548 U.S. ____ (U.S. 06/29/2006)

[3] 2006.SCT.0000136<www.versuslaw.com>

[35] Petitioner Salim Ahmed Hamdan, a Yemeni national, is in custody at an American prison in Guantanamo Bay, Cuba. In November 2001, during hostilities between the United States and the Taliban (which then governed Afghanistan), Hamdan was captured by militia forces and turned over to the U. S. military. In June 2002, he was transported to Guantanamo Bay. Over a year later, the President deemed him eligible for trial by military commission for then-unspecified crimes. After another year had passed, Hamdan was charged with one count of conspiracy "to commit ... Offenses triable by military commission." ...

Supreme Court Nixes Guantanamo Bay Military Commissions

[36] Hamdan filed petitions for writs of habeas corpus ... His objection is that the military commission the President has convened lacks such authority, for two principal reasons: First, neither congressional Act nor the common law of war supports trial by this commission for the crime of conspiracy — an offense that, Hamdan says, is not a violation of the law of war. Second, Hamdan contends, the procedures that the President has adopted to try him violate the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.

[37] The District Court granted Hamdan's request for a writ of habeas corpus. ... The Court of Appeals for the District of Columbia Circuit reversed. ... Recognizing, as we did over a half-century ago, that trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure, *Ex parte Quirin*, 317 U.S. 1, 19 (1942), we granted certiorari.

[38] For the reasons that follow, we conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ [Uniform Code of Military Justice] and the Geneva Conventions. Four of us also conclude ... that the offense with

Hamdan cont. on p. 44

In *Kansas v. Marsh*, No. 04-1170 (U.S. 06/26/2006), the U.S. Supreme Court approved by a 5-4 margin, Kansas' statutory scheme that when during the sentencing phase of a capital case the jury finds the aggravating and mitigating factors for imposing a death sentence are balanced, the defendant "shall be sentenced to death."¹

Justice Souter wrote in his dissent regarding Kansas' "tie breaker" scheme for imposing a capital sentence, "A law that requires execution when the case for aggravation has failed to convince the sentencing jury is morally absurd."² Souter explained that a reason for objecting to Kansas' sentencing scheme that places "a 'thumb [on] death's side of the scale,"³ was that it removed a hurdle to the execution of an innocent person. He wrote in part,

A few numbers from a growing literature will give a sense of the reality that must be addressed. When the Governor of Illinois imposed a moratorium on executions in 2000, 13 prisoners under death sentences had been released since

Justice Scalia Claims "Insignificant" Risk of Executing An Innocent Person In U.S.

1977 after a number of them were shown to be innocent, ... During the same period, 12 condemned convicts had been executed. Subsequently the Governor determined that 4 more death row inmates were innocent. ... Illinois had thus wrongly convicted and condemned even more capital defendants than it had executed, but it may well not have been otherwise unique; ... Another report states that "more than 110" death row prisoners have been released since 1973 upon findings that they were innocent of the crimes charged, and "[h]undreds of additional wrongful convictions in potentially capital cases have been documented over the past century." ... the total shows that among all prosecutions homicide cases suffer an unusually high incidence of false conviction, ... probably owing to the combined difficulty of investigating without help from the victim, intense pressure to get convictions in homicide cases, and

the corresponding incentive for the guilty to frame the innocent ..."⁴

Souter explained, "false verdicts defy correction after the fatal moment, the Illinois experience shows them to be remarkable in number..."⁵ In his final paragraph Souter summarized his argument, "In the face of evidence of the hazards of capital prosecution, maintaining a sentencing system mandating death when the sentencer finds the evidence pro and con to be in equipoise is obtuse by any moral or social measure."⁶

Souter's concerns about the possibility an innocent person could be executed due to Kansas' weighted sentencing scheme struck a raw nerve in Justice Scalia. While Souter wrote approximately 600 words in this comments about the risk of executing an innocent person, in his concurring opinion Scalia wrote over 4,300 words trying to convince the reader that no innocent person has been executed in the U.S. He also intimated the protections built into the legal process since *Furman v. Georgia*, 408 U.S. 238 (1972)

Kansas cont. on p. 35

Justice Scalia emphatically takes the position in his concurring opinion in *Kansas v. Marsh*, No. 04-1170 (U.S. 06/26/2006) that the United States' legal system is so reliable that the likelihood of an innocent person being executed is "insignificant," and those who disagree are out of the mainstream of society. (See, Justice Scalia Claims "Insignificant" Risk of Executing An Innocent Person In U.S., on p. 34 of this *JD* issue.)

Scalia takes pains to emphasize that technically a conviction's reversal is based on the prosecution's inability "to meet its burden of proof," not a defendant's innocence.¹ What he neglects to mention is that a defendant's presumption of innocence is restored by a reversal, which means that legally that person is as innocent of the alleged crime as is Justice Scalia. In the absence of proof, the prosecution's belief a person committed a crime is based on a combination of suspicion, innu-

Justice: Denied Editorial Reality Undermines Justice Scalia's Lack Of Concern About Wrongful Convictions

endo and prejudice, which experience has shown is what a judge or jury rely on all too often to convict an actually innocent person.

Scalia derides Justice Souter for opposing as arbitrary, the imposition of a death sentence on a person the prosecution can't even prove by a preponderance of evidence is "the worst of the worst," and who may in fact be innocent. Scalia considers that objection to be a "second-guessing of the judgment" of the majority of adults in the U.S. favoring capital punishment.² Yet four weeks before the opinion in *Kansas v. Marsh*, "A May 2006 Gallup Poll examining American opinion about the death penalty found that when given a choice between the sentencing options of life without parole and the death penalty, only 47% of respondents chose

capital punishment."³ That is less than a majority.

Additionally, Scalia's infers his opinion that there is an "insignificant" possibility an innocent person has been executed is representative of the majority of adults. Yet contrary to Scalia's assertion, almost two-thirds of adults, "63% of those polled believe that an innocent person has been executed in the past 5 years."⁴

Scalia also asserts that "The American people have determined that the good to be derived from capital punishment - [is] in deterrence..."⁵ Yet that same Gallup Poll found that only one-third of adults, "34% believe it does deter," while "64% of those polled stated that it does not."⁶

So underlying Scalia's attack on Souter for suggesting that laws providing for death as a penalty should cautiously be imposed only when there is the highest certainty that a person is "the worst of the worst," is Scalia's false claim that his opinions represent mainstream America. He is wrong. Unlike Scalia the ma-

jority of Americans believe that when given the choice life in prison should be imposed instead of a death sentence. Unlike Scalia the majority of Americans believe that innocent people are executed. Unlike Scalia the majority of Americans believe that the death penalty doesn't deter crime. Scalia's pomposity doesn't change the reality that in regards to the death penalty he and his ideological brethren, Justices Thomas, Roberts and Alito, are amongst the minority of American society. Public attitudes do fluctuate, but Scalia misrepresented what it was at the time he wrote his *Kansas v. Marsh* opinion.

Countering Scalia's claim that there is an "insignificant" likelihood an innocent person can or has been executed, are the many indisputably actually innocent people among the many hundreds of defendants in recent decades who have had their status of being presumed innocent restored by way of a reversal of their conviction, or dismissal of their charges, or an executive pardon.

Scalia cont. on p. 35

Kansas cont. from p. 34

preclude the likelihood an innocent person can be executed. He also argues that exonerations are proof of how effectively the system self-corrects its few errors.⁷

For denigration, Scalia particularly singles out Hugo Adam Bedau and Michael L. Radelet, authors of a well-known 1987 Stanford Law Review article that suggested at least 23 innocent people were executed in the U.S. from 1901 to 1987.⁸ He writes, "The 1987 article's obsolescence began at the moment of publication." He complains that in spite of its "dubious methodology" Bedau and Radelet's article has been cited hundreds of times, and even several times in Supreme Court opinions.⁹

Scalia also complains about "inflation of the word 'exoneration,'"¹⁰ and the "distorted concept of what constitutes exoneration."¹¹ He cites an opinion of the Illinois Supreme Court, "While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent. . . . A not guilty verdict expresses no view as to a defendant's

innocence. Rather, [a reversal of conviction] indicates simply that the prosecution has failed to meet its burden of proof."¹²

Not even Souter was safe from Scalia's criticism. He wrote about Souter's dissent, "Of course even in identifying exonerees, the dissent is willing to accept anybody's say-so. It engages in no critical review, but merely parrots articles or reports that support its attack on the American criminal justice system."¹³

Scalia concluded by first making a modest concession, and then continuing with more of his hard boiled rhetoric, "Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum. . . . The American people have determined that the good to be derived from capital punishment – in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes – outweighs the risk of error. It is no

proper part of the business of this Court, or of its Justices, to second-guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution."¹⁴ (See, *Justice:Denied* Editorial, on p. 34 of this *JD* Issue.)

Endnotes:

- 1 *Kansas v. Marsh*, No. 04-1170 (U.S. 06/26/2006); 2006.SCT.0000124 ¶28 <<http://www.versuslaw.com>>
- 2 *Id.* at ¶125 <<http://www.versuslaw.com>>
- 3 *Id.* at ¶124
- 4 *Id.* at ¶128
- 5 *Id.* at ¶129
- 6 *Id.* at ¶130
- 7 *Id.* at ¶92 ("Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out.")
- 8 Miscarriages of Justice in Potentially Capital Cases, Hugo Adam Bedau & Michael L. Radelet, *Stanford Law Review*, November, 1987, Vol. 40, pp. 21-179.
- 9 *Kansas v. Marsh*, supra at ¶91 <<http://www.versuslaw.com>>
- 10 *Id.* at ¶98 <<http://www.versuslaw.com>>
- 11 *Id.* at ¶99
- 12 *Id.* at ¶94 (citing, *People v. Smith*, 185 Ill. 2d 532, 545; 708 N. E. 2d 365, 371 (1999))
- 13 *Id.* at ¶92
- 14 *Id.* at ¶103



Scalia cont. from p. 34

Furthermore, Scalia's claim that no proof exists that an innocent person has been executed, particularly since 1972, is disingenuous because he emphasizes elsewhere in his opinion that the prosecution's inability "to meet its burden of proof"⁷ is the determinant of when a defendant's presumption of innocence is preserved (acquittal or a hung jury after a trial) or restored (post-conviction). Yet Scalia erects a barrier of his own – provable actual innocence – as the standard to judge the legal system's efficacy, and he crows that no one has met his personal standard. However, when applying the legal standard of proof beyond a reasonable doubt (as opposed to Scalia's personal standard), at least four cases have been publicized in the last year or so of an executed person who would in all likelihood be acquitted if retried today on the basis of new evidence their jury did not consider. Those people are: Frances Newton (executed in Texas in 2005)⁸; Ruben Cantu (executed in Texas in 1993)⁹; Cameron

Todd Willingham (executed in Texas in 2004)¹⁰; and Larry Griffin (executed in Missouri 1995)¹¹ Justice Souter pointed out in his *Kansas v. Marsh* dissent, "False verdicts defy correction after the fatal moment."¹² Those four people, and they may be just the tip of the iceberg, don't have the opportunity to be legally cleared after a retrial because the State killed them.

Scalia's mindset of approving the near-unrestrained exercise of governmental power has imbued him with mental blinders that make his position in cases involving an individual's claim of governmental over-reaching or error much more predictable than flipping a coin. Contrary to Scalia's belief that the conviction of an innocent person is only minutely possible because of the legal system's design, the known cases of wrongful conviction reveal his trust is misplaced because their exposure has typically been due to some aberrant stroke of good fortune, such as the fortuitous discovery of exonerating evidence by a defendant's friend or relative, or a reporter, or even law or journalism students.

Scalia describes Souter's approach to applying the death penalty with a cautionary eye toward the possibility a defendant is innocent as an "attack on the American criminal justice system."¹³ No, it is a recognition that the system is not very effective at correcting cases of wrongful conviction without the intervention of people unassociated with the police, prosecution or courts, and who are able through an extraordinary effort to ferret out "new" evidence undermining the soundness of the conviction.

Scalia's agenda in writing his opinion is unknown, but it may have been to place a person concerned about avoiding the system's worst possible error – the execution of an innocent person – into the category of being considered a tin foil hat wearing wingnut. If Scalia had chosen to rely more on facts and sound reasoning and less on hyperbolic verbiage, he could have meaningfully contributed to elevating the discussion about the legal system's unreliability. Instead he chose to derogate legitimate concerns about wrongful convictions, and in doing so

he revealed his arguments are based on bluster, not reality.

Endnotes:

- 1 *Kansas v. Marsh*, No. 04-1170 (U.S. 06/26/2006); 2006.SCT.0000124 ¶94 <<http://www.versuslaw.com>>
- 2 *Id.* at ¶103
- 3 New Gallup Poll Reveals Growing Number of Americans Favors Life Without Parole, Gallup News Service, June 1, 2006, <http://www.deathpenaltyinfo.org/newsarchive.php?scid=23>.
- 4 *Id.*
- 5 *Kansas v. Marsh*, ¶103 <<http://www.versuslaw.com>>
- 6 New Gallup Poll Reveals Growing Number of Americans Favors Life Without Parole, *supra*.
- 7 *Kansas v. Marsh*, ¶94 <<http://www.versuslaw.com>>
- 8 Without Evidence: Executing Frances Newton, *Austin Chronicle*, September 9, 2005; and, New Evidence of Frances Newton's Innocence Ignored By Courts And Texas Governor, *Justice:Denied*, Issue 29, Summer 2005, p.4.
- 9 Did Texas execute an innocent man, by Lise Olsen, *Houston Chronicle*, November 20, 2005
- 10 Report: Inmate wrongly executed, by Maurice Possley, *Chicago Tribune*, May 3, 2006; and, Texas man executed on disproved forensics, by Steve Mills and Maurice Possley, *Chicago Tribune*, December 9, 2004.
- 11 Was the wrong man executed?, by Terry Ganey, *St. Louis Post-Dispatch*, July 11 2005.
- 12 *Kansas v. Marsh*, ¶129 <<http://www.versuslaw.com>>
- 13 *Id.* at ¶92



Actual Innocence Procedural Default Exception Clarified By Supreme Court

Paul Gregory House v. Ricky Bell, No. 04-8990, 547 U. S. ____ (U.S. 06/12/2006)

[3] 2006.SCT.0000101<<http://www.versuslaw.com>>

[9] A Tennessee jury convicted petitioner House of Carolyn Muncey's murder and sentenced him to death. The State's case included evidence that FBI testing showing semen consistent (or so it seemed) with House's on Mrs. Muncey's clothing and small bloodstains consistent with her blood but not House's on his jeans. In the sentencing phase, the jury found, *inter alia*, the aggravating factor that the murder was committed while House was committing, attempting to commit, or fleeing from the commission of rape or kidnapping. In affirming, the State Supreme Court described the evidence as circumstantial but strong. House was denied state post-conviction relief. Subsequently, the Federal District Court denied habeas relief, deeming House's claims procedurally defaulted and granting the State summary judgment on most of his claims. It also found, after an evidentiary hearing at which House attacked the blood and semen evidence and presented other evidence, including a putative confession, suggesting that Mr. Muncey committed the crime, that House did not fall within the "actual innocence" exception to procedural default recognized in *Schlup v. Delo*, 513 U. S. 298, and *Sawyer v. Whitley*, 505 U. S. 333. The Sixth Circuit ultimately affirmed.

[22] The opinion of the court was delivered by: Justice Kennedy.

[78] As a general rule, claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error. The bar is not, however, unqualified. In an effort to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case," ... the Court has recognized a miscarriage-of-justice exception. "[I]n appropriate cases ... the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration,' ...

[79] In *Schlup*, the Court adopted a specific rule to implement this general principle. It held that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." ... This formulation, *Schlup* explains, "ensures that petitioner's case is truly 'extraordinary,' while still providing petitioner a meaningful avenue by which to

avoid a manifest injustice." ... Yet a petition supported by a convincing *Schlup* gateway

showing "raise[s] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error"; hence, "a review of the merits of the constitutional claims" is justified. ...

[80] For purposes of this case several features of the *Schlup* standard bear emphasis. First, although "[t]o be credible" a gateway claim requires "new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial," ... the habeas court's analysis is not limited to such evidence. *Schlup* makes plain that the habeas court must consider "all the evidence," "old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under "rules of admissibility that would govern at trial." Based on this total record, the court must make "a probabilistic determination about what reasonable, properly instructed jurors would do." ... The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.

[81] Second, it bears repeating that the *Schlup* standard is demanding and permits review only in the "extraordinary" case. ... [T]he *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence. A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt ...

[82] Finally, Because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. ... If new evidence so requires, this may include consideration of "the credibility of the witnesses presented at trial." ...

[83] As an initial matter, the State argues that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) ... has replaced the *Schlup* standard with a stricter test based on *Sawyer*, ... Neither provision addresses the type of petition at issue here -- a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence. ...

[84] Yet the *Schlup* inquiry, we repeat, requires a holistic judgment about "all the evidence," " ... As a general rule, the inquiry

Justice: Denied Comment About The House v. Bell Decision

It remains to be seen how federal District and Circuit Court judges will apply the U.S. Supreme Court's 5-3 decision in *House v. Bell*. If they do so faithfully, it will contribute to serious consideration of many habeas petitions alleging actual innocence that until now have been given the short shrift of a dismissal on the ground of a procedural default, particularly by defendants who did not file a petition within the Anti-terrorism and Effective Death Penalty's (AEDPA) one-year deadline.

There are at least three reasons to hope the *House* decision will contribute to rectifying miscarriages of justice that since the the AEDPA's enactment were unlikely to be accorded fair consideration.

First, House is not plainly innocent. The majority decision described its finding for *House* as being a close call. ¹ The scales were barely tilted toward supporting their finding that no reasonable juror would find him guilty based on a consideration of all the evidence now available. Compare that, for example, with the compelling evidence of Frederick Weichel's actual innocence (see page 24 of this *JD* issue.), who after 25 years of imprisonment has yet to file his first federal habeas petition.

Second, while there is DNA evidence favorable to House, it is only a piece of the evidence puzzle that the Supreme Court relied on. There are also multiple confessions and suspicious behavior by the victim's husband, likely contamination of House's pants with the victim's blood stored in a vial after her autopsy, and other evidence tending to support that House isn't the murderer.

Third, there is a spirit to the reasoning of the *House* decision that has been generally lacking in review of federal habeas petitions. Namely, that the concept of judicial finality is not intended to perpetrate an injustice by barring the door to serious consideration of a petition submitted by a defendant able to make a colorable showing that while at the time of trial the government was able to overcome the defendant's 'presumption of innocence,' new evidence establishes "it is more likely than not" that is no longer true, and "that no reasonable juror viewing the record as a whole would lack reasonable doubt." ²

¹ *House v. Bell*, No. 04-8990, 547 U. S. ____ (U.S. 06/12/2006), 2006 SCT.0000101 ¶ 123 <www.versuslaw.com> ("Accordingly, and although the issue is close, we conclude that this is the rare case where -- had the jury heard all the conflicting testimony -- it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.")
² *Id.*

House cont. on page 37

House cont. from page 36

does not turn on discrete findings regarding disputed points of fact, ...

[85] With this background in mind we turn to the evidence developed in House's federal habeas proceedings.

[86] DNA Evidence

[87] First, in direct contradiction of evidence presented at trial, DNA testing has established that the semen on Mrs. Muncey's nightgown and panties came from her husband, Mr. Muncey, not from House. ... In fact we consider the new disclosure of central importance.

[88] From beginning to end the case is about who committed the crime. When identity is in question, motive is key. ... Referring to "evidence at the scene," the prosecutor suggested that House committed, or attempted to commit, some "indignity" on Mrs. Muncey. ...

[90] ... When the only direct evidence of sexual assault drops out of the case, so, too, does a central theme in the State's narrative linking House to the crime. ...

[91] Bloodstains

[92] The other relevant forensic evidence is the blood on House's pants, which appears in small, even minute, stains in scattered places. ... House ... now presents an alternative ex-

planation that, if credited, would undermine the probative value of the blood evidence.

[93] During House's habeas proceedings, Dr. Cleland Blake, an Assistant Chief Medical Examiner for the State of Tennessee and a consultant in forensic pathology to the TBI for 22 years, testified that the blood on House's pants was chemically too degraded, and too similar to blood collected during the autopsy, to have come from Mrs. Muncey's body on the night of the crime. The blood samples collected during the autopsy were placed in test tubes without preservative. Under such conditions, according to Dr. Blake, "you will have enzyme degradation. ... The blood on House's pants, ... judging by Agent Bigbee's tests, showed "similar deterioration, breakdown of certain of the named numbered enzymes" as in the autopsy samples. ... "[I]f the victim's blood had spilled on the jeans while the victim was alive and this blood had dried," Dr. Blake stated, "the deterioration would not have occurred," *ibid.*, and "you would expect [the blood on the jeans] to be different than what was in the tube," ... Dr. Blake thus concluded the blood on the jeans came from the autopsy samples, not from Mrs. Muncey's live (or recently killed) body.

[94] Other evidence confirms that blood did in fact spill from the vials. ...

[99] ... (As has been noted, no blood was found on House's shoes.)

[101] In sum, considering "all the evidence," "... on this issue, we think the evidentiary disarray surrounding the blood, taken together with Dr. Blake's testimony and the limited rebuttal of it in the present record, would prevent reasonable jurors from placing significant reliance on the blood evidence. We now know, though the trial jury did not, that an Assistant Chief Medical Examiner believes the blood on House's jeans must have come from autopsy samples; that a vial and a quarter of autopsy blood is unaccounted for; that the blood was transported to the FBI together with the pants in conditions that could have caused vials to spill; that the blood did indeed spill at least once during its journey from Tennessee authorities through FBI hands to a defense expert; that the pants were stored in a plastic bag bearing both a large blood stain and a label with TBI Agent Scott's name; and that the styrofoam box containing the blood samples may well have been opened before it arrived at the FBI lab. Thus, whereas the bloodstains, emphasized by the prosecution, seemed strong evidence of House's guilt at trial, the record now raises substantial questions about the blood's origin.

[102] A Different Suspect

[103] [I]n the post-trial proceedings House presented troubling evidence that Mr. Muncey, the victim's husband, himself

could have been the murderer.

[113] In the habeas proceedings ... two different witnesses ... described a confession by Mr. Muncey; two more ... described suspicious behavior (a fight and an attempt to construct a false alibi) around the time of the crime; and still other witnesses described a history of abuse.

[116] ... The confession evidence here involves an alleged spontaneous statement recounted by two eyewitnesses with no evident motive to lie. ...

[117] The evidence pointing to Mr. Muncey is by no means conclusive. If considered in isolation, a reasonable jury might well disregard it. In combination, however, with the challenges to the blood evidence and the lack of motive with respect to House, the evidence pointing to Mr. Muncey likely would reinforce other doubts as to House's guilt.

[122] Conclusion

[123] This is not a case of conclusive exoneration. ... Accordingly, and although the issue is close, we conclude that ... had the jury heard all the conflicting testimony - it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.

[125] In addition to his gateway claim under *Schlup*, House argues that he has shown freestanding innocence and that as a result his imprisonment and planned execution are unconstitutional. In *Herrera*, decided three years before *Schlup*, the Court assumed without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." ...

[126] ... We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it. ... It follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera*.

[127] House has satisfied the gateway standard set forth in *Schlup* and may proceed on remand with procedurally defaulted constitutional claims. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

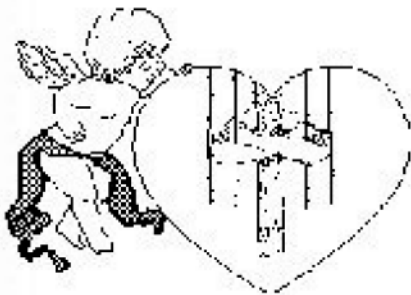
[131] Chief Justice Roberts, with whom Justice Scalia and Justice Thomas join, concurring in the judgment in part and dissenting in part.

[132] Considering all the evidence, ... I do not find it probable that no reasonable juror would vote to convict him, and accordingly I dissent.



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Convertino cont. from page 10

Michigan, Iowa and Illinois.² Hmimssa's testimony was the only evidence directly tying the four defendants to terrorism. During his five days of testimony Hmimssa described the men as devout Muslim extremists, and claimed Elmaroudi was the ringleader of their alleged plans that included smuggling terrorist "brothers" into the U.S. The defense was disadvantaged in challenging Hmimssa's testimony because his contradictory pre-March 2002 statements to investigators hadn't been disclosed by Convertino to the defendants.

Convertino also presented two witnesses who testified that a sketch in the seized day planner matched the physical layout of a military hospital in Jordan. One witness was an FBI agent involved in the investigation, Michael Thomas, and another was Harry Smith III, who aided Convertino's investigation as the Assistant Regional Security Officer for the Department of State at the U.S. Embassy in Amman. Interestingly, in spite of his intimate familiarity with Amman, Smith said the resemblance between the sketch and the hospital wasn't obvious, but the more he looked at the sketch the more he was able to see its likeness to the area around the hospital.

Prior to trial the defendant's lawyers made discovery requests for photographs of the hospital to compare it with the day planner sketch. Convertino responded by claiming the prosecution had no photos. He also said he hadn't taken any photos when he personally traveled to Amman in February 2002 to look at the hospital. Under cross-examination Smith supported Convertino's claim by testifying he didn't know of any photos, and that he had never taken any photos of the hospital because State Department protocol barred him from taking photos of a foreign military structure without authorization.

The two lynchpins of the government's case were Hmimssa's testimony and the testimony matching the day planner sketch with the hospital. However, the jury didn't consider the prosecution's evidence overwhelming, because after a six-week trial the government only achieved a partial victory. On June 3, 2003, Elmaroudi and Hannan were convicted of "providing material support to terrorists" (Count 1) and "conspiracy to engage in fraud and misuse of visas" (Count 2). They were acquitted of the fraud charges in Count 3 and 4. Koubriti was convicted of "conspiracy to engage in fraud and misuse of visas" (Count 2) and acquitted of the other charges. Ali-Haimoud was acquitted of all charges. Attorney General John Ashcroft hailed the terrorism convictions as an important victory in the war on terror.

Convertino's deceit comes to light after his removal from the Koubriti case

On September 4, 2003, Convertino and his co-counsel were removed from the case. The federal prosecutor who took over the case soon discovered that Convertino had failed to disclose significant *Brady* discovery evidence to the defendant's lawyers. The concealed evidence included: multiple aerial photos of the military hospital; multiple exculpatory witness statements; the assessment of multiple government analysts, including a CIA expert, that the day planner sketch did not match the hospital layout, and the suggestion of Air Force analysts that it was an outline of the Middle East. That Air Force assessment was consistent with Convertino's failure to also disclose, "that Nasser Ahmed, a Yemeni man, had told [FBI Special Agent Michael] Thomas that his mentally unstable brother Ali Ahmed might have been doodling in the day planner and drawn a map of the Middle East."³

Among the evidence concealed by Convertino was that in a December 2002 letter to a man he had been in jail with, Hmimssa wrote that he made up everything he told investigators about the defendant's involvement in terrorism. *The Washington Post* reported that, Hmimssa wrote, "how he lied to the FBI, how he fooled the Secret Service agent on his case."⁴

Convertino also failed to disclose the FBI statements by both Hmimssa and the roommate of Koubriti and Hannan detailing the life of debauchery the two men engaged in. Those statements completely discredit Convertino's argument to the jury that the men were devout Muslims engaged in a religious "jihad" against the West. If the charges against the four men hadn't been so serious, Convertino's description of the men as a terrorist "sleeping cell" would have been comical. The men's false identification as Islamic extremists is reminiscent of the wrongful convictions in England during the 1970s of more than a dozen people as Irish Republican Army (IRA) bombers who obviously lacked the lifestyle and discipline to be IRA members.⁵

Neither was it disclosed that after al-Marabh was arrested, he told investigators he didn't know any of the four defendants. Charged with an immigration law violation but not terrorism, al-Marabh pled guilty and was deported after serving an eight-month prison sentence. He was thus unavailable as a defense witness.

At the time of Convertino's removal the three convicted defendants had not been sentenced, and a motion for a new trial filed by their lawyers was pending. The US Attorney's Office notified US District Court Judge Gerald Rosen about the undisclosed *Brady* discovery

material, and in December 2004 he ordered the government to respond to the defense motion in light of the new information.

On August 31, 2004, the government filed its response to the defendant's motion for a new trial. The 60-page response conceded the prosecution committed multiple *Brady* violations that prejudiced the due process rights of the defendants to a fair trial. The response concluded, "the government respectfully concurs in defendants' new trial requests and hereby moves to dismiss Count I without prejudice."⁶ On September 2, 2004, Judge Rosen vacated Elmaroudi, Hannan and Koubriti's convictions, and the terrorism charges were subsequently dismissed.

Convertino's Privacy Act lawsuit

Convertino filed a federal lawsuit on February 13, 2004, alleging harm from violations of his rights under the Privacy Act. Named as defendants were the U.S. Dept. of Justice, Attorney General John Ashcroft and several other DOJ officials. Convertino alleged he was harmed by the DOJ's alleged leak to a reporter for the *Detroit Free Press*, of a letter to the DOJ's Office of Professional Responsibility's detailing alleged ethical wrongdoing by Convertino in the Koubriti case.⁷ The irony of Convertino's lawsuit is that more than two years after initiation of the OPR's investigation he was indicted.

Convertino's 38-page Complaint provides a rare public glimpse into the infighting, career positioning and paranoia that prevails within the inner sanctum of the U.S. Department of Justice. His lawsuit claims, among other things, that on or about August 29, 2003, Hmimssa was interviewed about identity fraud techniques by an investigator for the Senate Finance Committee. Four days later Convertino was notified that Committee Chairman Senator Charles E. Grassley wanted Hmimssa to testify before the committee about identity fraud, and Convertino to testify "about the factual background of United States v. Koubriti to place context to Mr. Hmimssa's testimony."⁸ Convertino, who in internal memos and conversations had repeatedly criticized the DOJ's handling of the war on terror, notified his superior about the committee's request. Convertino's complaint alleges DOJ officials in Washington D.C. did not want him to testify because they feared he "would go 'off the reservation' and share in a public forum [his] strong opinions on the difficulties encountered with the way the Koubriti terrorism case and other terrorism cases were hindered by [the] DOJ."⁹ Two days later, on September 4, Convertino asserts that he and his co-counsel were removed as prosecutors of the Koubriti case

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Convertino cont. from page 38

“as a direct result and consequence of [their] contacts with the investigators from the Senate Finance Committee staff.”¹⁰

Convertino also claims that hours after his removal from the case on September 4, Senator Grassley personally called Attorney General John Ashcroft at his home to express his displeasure with the DOJ’s action. Convertino asserts that because of Grassley’s phone call, the next day he “was told he was now in jeopardy of losing his job as an AUSA.”¹¹ Convertino voluntarily resigned more than one and a half years later in May 2005.

On July 12, 2006, Convertino subpoenaed officers of the Gannett Co., owner of the *Detroit Free Press* in an effort to identify the DOJ source for the newspaper’s January 17, 2004, story about the DOJ investigation into Convertino’s alleged misconduct in the Koubriti and other cases.¹²

Criminal investigation of Convertino results in indictment

In March 2004 the DOJ launched a criminal investigation of Convertino. That investigation resulted in a Detroit grand jury’s issuance of a four-count indictment on March 29, 2006. Named as defendants were Convertino and Harry Smith III.

Count I alleges “Conspiracy to Obstruct Justice and Make False Declarations” relating to concealment of the military hospital photographs. It states in part, “The object of the conspiracy was to present false evidence at trial and to conceal inconsistent and potentially damaging evidence from the defendants in the Koubriti trial in order to obtain criminal convictions. It was further an object of the conspiracy to conceal the objects of the conspiracy and the acts committed to further it.”¹³

Count II alleges “Obstruction of Justice,” stating in part that the defendants “... did corruptly influence, obstruct and impede, and corruptly endeavor to influence, obstruct and impede, the due administration of justice in the Koubriti case by presenting false and misleading evidence to and concealing contradictory evidence from the Court, defendants and jurors, and by concealing such acts during a court ordered post-trial review.”¹⁴

Count III alleges “Making a Materially False Declaration before a Court,” stating in part, “On or about April 2, 2003, in the Eastern District of Michigan, Defendant HARRY RAYMOND SMITH III, while under oath as a witness in the trial of the Koubriti case, in the United States District Court, did knowingly

make false material declarations, aided and abetted by Defendant RICHARD G. CONVERTINO.”¹⁵ Namely, Smith testified that he had not taken pictures of the military hospital in Amman, Jordan, when in fact he had taken numerous photographs, and Convertino knew that when he elicited Smith’s false testimony.

Count IV alleges “Obstruction of Justice,” and only names Convertino as the defendant. The count is related to a January 16, 2003 plea agreement between Convertino and a drug informant that recommended 8 months imprisonment for one count of distribution of a controlled substance. The pre-sentence investigation report recommended a sentence of 108-135 months, and during the sentencing hearing the US District Court judge stated: “I’ve never seen such a gross disparity between the sentencing guidelines and a Rule 11 plea agreement. So I must have some very good reasons for the difference.”¹⁶ The indictment states:

On or about July 1, 2003, Defendant CONVERTINO, in an attempt to explain the disparity described in the preceding paragraph and to convince the Court to grant a downward departure from the appropriate legal guidelines range of 108 to 135 months of imprisonment, to 8 months of imprisonment with 3 months of supervised release, made false and misleading representations about the beliefs of a fellow prosecutor about the quantity of controlled substances attributed to John Doe and the nature and extent of John Doe’s cooperation with the government.¹⁷

Convertino and Smith were arraigned on April 21, 2006. They stood mute when asked for their plea, so U.S. Magistrate Judge Donald Scheer entered not guilty pleas and released them pending trial on \$25,000 bonds.

Convertino has complained that his indictment is payback for his lawsuit against the DOJ, and his perceived disloyalty for complaining about the DOJ’s handling of terrorism cases. Convertino’s claim is revealing because it infers his deliberate elicitation of false testimony and illegal concealment of *Brady* evidence in the *Koubriti* case was the norm for him and other federal prosecutors, since he claims he was only singled out for investigation after he went “off the reservation” and was no longer considered a loyal company man.

FBI agent’s report claims day planner sketch matches military hospital

FBI Agent Paul George supervised the investigation that resulted in Convertino’s prosecution of the four alleged Detroit terrorists. George was so key to the government’s case that he was Convertino’s final witness. He testified for three days as a terrorism

“tradecraft” expert, even though he had never published anything establishing he had any such specialized knowledge, and thus the defense was unable to disprove his self-professed expertise. At the time of his testimony, Detroit’s *Metro Times* identified that George had a personal interest in ensuring the conviction of the four defendants, when it wrote, “Attorneys for the defendants implied that George’s career hinges on the conviction of the four, since he supervised the investigation. The defense also pointed out that George attended the trial daily, thereby allowing him to tailor his testimony to bolster the prosecution’s allegations.”¹⁸

When the trial judge asked George why Hmimssa hadn’t been charged with terrorism since he testified for days about his alleged extensive firsthand knowledge of the four defendant’s alleged involvement in terrorism, George replied, “I saw no indication that he ever was involved. I can’t prove a negative.”¹⁹ Since the government’s contrived terrorism case against the four defendants was dependent on Hmimssa’s testimony, George’s testimony was accurate. There was no evidence Hmimssa was involved in terrorism because apart from the government’s charade that he was a part of, there was no evidence the four defendants he testified against were involved in terrorism.

The collapse of the government’s case against the four Detroit “terrorist” defendants as an elaborate fabrication somewhat tarnished George’s reputation – since from his inside position he had to be fully knowledgeable of Convertino’s concealment of the exculpatory evidence from the defendant’s lawyers. Convertino’s conviction could be expected to further sully George’s reputation, if not his career. With speculation that Convertino’s indictment was imminent, George took it upon himself to write a 13-page missive about his comparison of the day planner’s sketch with images from Google’s satellite photo service of the military hospital in Jordan.²⁰ George claims there appears to be some matching characteristics. His assessment, however, lacks credibility to be taken at face value because of his intimate association with Convertino and the wrongful conviction of the Detroit “terrorist” defendants, and his self-interest in trying to salvage his reputation by providing information that will aid Convertino’s defense.

Convertino’s resignation and new career

After 15 years as an Assistant U.S. Attorney, Convertino resigned his \$160,000 a year job in May 2005.²¹ He started a criminal defense practice. There could be an expectation that his years of working the system to ensure the conviction of a defendant would be good training

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to help keep a defendant from being convicted. That proved true in his first case, when in January 2006 he won an acquittal for a Michigan State Trooper charged with second degree murder and manslaughter for shooting an unarmed drunken man shuffling toward him with his pants down around his knees. The trooper's defense was that he acted in self-defense because he was in fear of his life. He was acquitted even though the shooting was videotaped by a Detroit police car's dashboard camera.²²

Koubriti claims double jeopardy bars retrial

On May 1, 2006, Judge Rosen held a hearing concerning a motion by Koubriti's lawyers to dismiss the conspiracy to commit fraud charge that is pending against him. Koubriti's lawyers argued that Convertino's egregious misconduct during Koubriti's 2003 trial bars a retrial because it would violate his Fifth Amendment right against double jeopardy. The U.S. Attorney's Office argued against dismissal of the charge, and as of early July 2006 Rosen has not made a ruling on the motion. The 27-year-old Koubriti has been released on bail pending the outcome of his criminal case. He is working two jobs, and according to his lawyer, is "trying to get on with his life."²³

Endnotes:

- 1 *United States v Koubriti, Hannan, El Mardoudi*, CR NO. 01-80778 (USDC ED MI, S DIV), Previous *Justice:Denied* articles about the Koubriti case are: Terrorism Conviction Of 2 Men Tossed - Prosecutor Criminally Investigated For Frame-up, *Justice:Denied*, Issue 27, Winter 2005; and, Federal Prosecutor Resigns Under Heat of Criminal Investigation For Possible Frame-up Of 35 People, *Justice:Denied*, Issue 28, Spring 2005.
- 2 Hmimssa is scheduled for release from Bureau of Prison custody on July 24, 2008.
- 3 *United States v Koubriti, supra.*, Government's consolidated response concurring in the defendants' motions for a new trial, August 31, 2004, at 32, 56.
- 4 U.S. to Seek Dismissal of Terrorism Convictions, Allan Lengel and Susan Schmidt, *The Washington Post*, September 1, 2004, p. A02.
- 5 These included the Birmingham Six, Guildford Four and the McGuire Seven.
- 6 *United States v Koubriti, supra.*, Government's consolidated response concurring in the defendants' motions for a new trial, August 31, 2004, at 60.
- 7 "Terror case prosecutor is probed on conduct," by David Ashenfelter, *Detroit Free Press*, January 17, 2004.
- 8 *Convertino v United States Dept of Justice, et al*, USDC Dist of Col.), Complaint, February 13, 2004, ¶42.
- 9 *Id.* at ¶58.
- 10 *Id.* at ¶49.
- 11 *Id.* at ¶52.
- 12 News publisher subpoenaed by former federal prosecutor, *Reporters Committee for Freedom of the Press*, July 14, 2006.
- 13 *United States v Convertino et al*, Case: 2:06-cr-20173 (USDC ED MI, S DIV), Indictment, March 29, 2006.
- 14 *Id.*
- 15 *Id.*
- 16 *Id.*
- 17 *Id.*
- 18 Witness for the prosecution, by Ann Mullen, *Detroit Metro Times*, May 7, 2003.
- 19 *Id.*
- 20 Report: FBI raises questions in bungled Detroit terror case, by John Solomon, *Detroit Free Press*, April 21, 2006.
- 21 U.S. Prosecutor Resigns, David Ashenfelter, *Detroit Free Press*, May 17, 2005.
- 22 Trooper acquitted in fatal shooting of man, by Ben Schmitt, *Detroit Free Press*, January 6, 2006.
- 23 Lawyer-drop terror case charge, by Paul Egan, *Detroit News*, May 1, 2006.

Moore cont. from p. 19

cluding this evidence, Mr. Valeska greatly enhanced his chances for a conviction.

It appears to have been and to be the attitude of Assistant Attorney General Don Valeska that it is his job to procure a conviction at all costs, without consideration for the Constitutional rights of the Defendant or for the orderly administration of justice. When Assistant Attorney General Don Valeska and Investigator Mike Pettey willfully defied this Court's orders they chose to defy justice. When Assistant Attorney General Don Valeska and Investigator Mike Pettey intentionally suppressed relevant, exculpatory evidence they chose to suppress justice. Such disregard for our process of administering fair justice goes beyond mere negligence and rises to the level of intentional misconduct.

V. Conclusion

When viewing the totality of the circumstances, this Court finds that the intentional misconduct on the part of the prosecution resulted in "prosecutorial overreaching" due to the serious nature of the governmental misconduct. Further, said misconduct insured a much more favorable opportunity for the State to convict the Defendant, and these circumstances caused serious prejudice to the Defendant. Proceeding in this matter would result in tainted jurisprudence and would undermine the sanctity of the criminal justice process. The Double Jeopardy Clause protects a criminal defendant's interest in a single, fair adjudication of his guilt or innocence.⁴ When the lack of fairness is intentionally caused by the government's overreaching and misconduct, the Defendant is entitled to the protections of the Constitutions of the United States and the State of Alabama.

This Court can only conclude that Daniel Wade Moore's Constitutional right not to be twice put in jeopardy will be violated if the State is allowed to proceed with a second trial in this matter. The prosecution had its opportunity to place Daniel Wade Moore on trial, and they squandered that right.

Therefore, for the above stated reasons, it is hereby ORDERED, ADJUDGED, and DECREED that the Defendant's Motion to Dismiss with Prejudice is due to be and is hereby GRANTED. ... The Defendant is hereby DISCHARGED.

... the 4th day of February 2005.

Glenn E. Thompson, Circuit Judge

Endnotes:


- 1 Excerpt from Justice Brandeis' famous dissent in *Olmstead v. United States*, 48 S.Ct. 564 (1928).
- 2 See the Court's Finding of Fact above.
- 3 See Finding of Fact # 4 above.
- 4 See *United States v. Jenkins*, 420 U.S. 358 (1975); *United States v. Wilson*, 420 U.S. 332 (1975); *Downum v. United States*, 372 U.S.

Daniel Wade Moore's Case Chronology

March 12, 1999	Karen Tipton murdered in her Decatur, Alabama home.
November 2002	Moore convicted of the first-degree murder of Tipton.
January 23, 2003	Jury recommends life without parole, but Judge Glenn Thompson sentences Moore to death.
March 2003	Thompson set aside Moore's convictions and vacated his sentence after granting his Motion for a New Trial based on the prosecution's failure to disclose exculpatory evidence.
January 20-1, 2004	Thompson holds hearing concerning Moore's Motion to Dismiss the Indictments based on additional exculpatory evidence concealed by the prosecution.
February 4, 2005	Judge Thompson dismisses Moore's indictment with prejudice and orders his immediate release due to prosecutorial misconduct in concealing exculpatory evidence. Moore released that night.
February 5, 2005	After learning of Thompson's ruling, one juror declared, "I'm happy with it. I felt like Daniel didn't do it."
February 8, 2005	AL Court of Appeals (COA) grants State's Motion to Stay Thompson's Order and Orders Moore Back into custody. COA indicates it will give Moore's case preference over other cases.
February 10, 2005	AL COA denies bail to Moore and orders Thompson to not make any rulings in Moore's case pending the State's appeal.
March 2005	AL COA denies Moore's motion to dismiss the State's appeal because it had failed to comply with a time limit on paying for a trial transcript. The COA suspends enforcement of the rule.
June 2006	After 16 months of inaction by the COA, Moore files AL Supreme Court petition requesting dismissal of the State's appeal.

As this issue of *Justice:Denied* was going to press, Alabama's Court of Appeals ruled on July 21, 2006, that the egregious prosecutorial misconduct in Daniel Wade Moore's case entitles him to a new trial, but not a dismissal of the charges. *Justice:Denied* will report on future developments in Moore's case.

The untold story of the friendship between African-American Maurice Carter and white journalist Doug Tjapkes. Wrongly convicted of attempted murder, Carter was released in 2004 after 28 years imprisonment.



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Brown decided the relationship between him and his lawyer was too strained to continue, so he proceeded by representing himself *pro se*. The judge, however, did appoint the same lawyer as standby counsel to answer Brown's legal questions.

Both Walker and Harewood agreed to plead guilty and testify against Brown and Parker in exchange for lenient sentencing recommendations. In the case of Walker, he was also rewarded by dismissal of his charge of using a firearm during the commission of a crime of violence (18 USC §924(c)(1)).

The trial of Brown and Parker began on February 25, 1991, in the U.S. District Court for the Middle District of North Carolina. Walker and Harewood were the prosecution's star witnesses. They both testified that Brown was the bank robbery's ring-leader, and he fronted the money for the transportation, food, hotel rooms, the U-Haul truck and one of the weapons used in the bank robbery.

Harewood also testified that he and Walker used a stolen Camaro as the getaway vehicle after the two of them robbed the bank. He said the Camaro was abandoned near the bank, and he and Walker got into the U-Haul driven by “Nawny.” Harewood and Walker testified that “Nawny” got lost after leaving the bank and wound up at the Carolina Circle Mall – 2-1/2 miles from the bank. The men said Brown, who was driving his Monte Carlo and hadn’t participated in the robbery, and Harewood then went into one of the Mall’s stores to buy a bag to put the money in. They claimed Brown then drove alone in his Monte Carlo to the Comfort Inn in Durham. Harewood testified he and “Nawny” kept the robbery money and took a cab from the mall to the Comfort Inn, about 55 miles away. Walker was going to drive the U-Haul to the Comfort Inn in Durham.

Q. Isn't it true, sir, that Mr. Brown tried to guide you in the right direction?

[illegible]

One surprise during the trial was that an FBI agent had testified during the grand jury proceeding that he had knowledge of witnesses who could establish the guilt of Brown, et al. Yet those alleged witnesses were not called to testify during the trial, which casts doubt on both their existence and the truthfulness of his testimony relied on by the grand jury to issue an indictment.

George Jackson was the owner of Jackson Auto Body Repair in Philadelphia. Jackson testified that on August 23, 1990, Brown dropped his Monte Carlo off for bodywork and painting. The car was painted GM color #52 – Copper Beige (tan). Jackson further testified that Brown personally picked the car up between 11 a.m. and noon on September 13, 1990, and paid the bill. That was the same car Harewood claimed Brown drove to North Carolina two days earlier, when it was actually picked-up from the body shop the same day and about the same time that the WTBC was being robbed 468 miles, and two states away, in Greensboro, North Carolina! [JD Note: See accompanying picture of the dated receipt provided by Jackson.]

Brown cont. on page 42

Brown cont. from page 41

scheduled physical therapy. The physical therapy was for a job related back injury that occurred about one year before the bank robbery. Martinez authenticated the sign-in sheets for staff and patients that substantiated Brown personally appeared at the medical center and that she personally aided him with "cybex exercises." Martinez was called as a defense witness, and since Brown was defending himself *pro se*, he personally questioned her on direct-examination. The following exchange is from the trial transcript:

Q. [by Brown] Miss Martinez, do you recognize the defendant ... in the courtroom today?

A. [by Martinez] That's yourself?

Q. Emanuel Brown?

A. Yes.

...

Q. You know Mr. Brown as a patient at Cynwyd Medical Center; is that correct?

A. That's correct.

Q. And your duties as a physical therapist, is that of someone who is injured on a job or someone who has some type of medical disability, it is your responsibility to give that individual therapy?

A. Yes, it is.

Q. Physical therapy.

A. Yes. (Trial Transcript, Vol. VII, 1333-1334, *U.S. v Emanuel Brown*, et al. CR-90-240-G)

...

Q. And there is a sign-in card at the front desk, isn't there?

A. Yes. (Trial Transcript, Vol. VII, 1336, *U.S. v Emanuel Brown*, et al. CR-90-240-G)

...

Q. Drawing your attention to that particular sheet, does this indicate on September 13, 1990 you personally performed what they call Cybex exercises?

A. Yes.

Q. Miss Martinez, who did you perform those Cybex exercises on, whose physical therapy sheet card?

A. Emanuel Brown. (Trial Transcript, Vol. VII, 1337, *U.S. v Emanuel Brown*, et al. CR-90-240-G)

...

Q. Okay. Now on the Cybex exercises, it just has "AM," which is Antonio Martinez, correct?

A. Correct.

Q. And it just has that on one particular day, which is September 13, 1990.

A. Right.

Q. Can you explain why "AM" would just be on that particular day as opposed to the other days?

A. Well, anytime anybody comes after 6:00, that's an hour before closing time, and Mr.

Conrad King is busy cleaning the whirlpools and getting everything prepared for the next day. So whoever is available will go to the exercise room and give the patient therapy. Cybex is considered therapy also.

Q. Thank you.

The Court: So what does that indicate?

A. That Mr. King wasn't available because at the time he was busy doing something else.

The Court: What time would that be?

A. Between 6 and 7 p.m. (Trial Transcript, Vol. VII, 1338-1339, *U.S. v Emanuel Brown*, et al. CR-90-240-G)

...

Q. ... You said that Mr. Brown was receiving therapy for over a year or so; is that correct?

A. ... Yes, for a long time.

Q. Would July 1989 up until now, would that sound correct as far as the date?

A. It's possible, you know, because I know I've seen you for a long time there. (Trial Transcript, Vol. VII, 1341-1342, *U.S. v Emanuel Brown*, et al. CR-90-240-G)

...

Q. And the date 9-13-90, there is no difference in the therapy or the Cybex exercise, is there?

A. No, there isn't.

Q. He received the same treatment he has been receiving under the doctor's care for X amount of period?

A. Right.

Q. And there is no difference in the therapy or the Cybex exercise; is that correct?

A. That's correct.

Q. And 9-17, 9-20, 9-24, 9-26, 9-27, all of these dates also reflect the same periods of therapy and Cybex exercises; is that correct, Miss Martinez?

A. Yes.

Q. And Mr. Brown was billed for those dates, wasn't he.

A. Yes. (Trial Transcript, Vol. VII, 1344, *U.S. v Emanuel Brown*, et al. CR-90-240-G)

...

Q. Miss Martinez, on that particular sheet, the date of September 13, 1990, your initials appear on that particular date?

A. Yes.

Q. And there is no mistake or error on that sheet relating to that particular date. Is there?

A. No. No, there isn't.

Q. Is there any doubt in your mind that Mr. Brown received therapy on September 13, 1990?

A. No, there is not a doubt.

Q. At what time does it indicate that Mr. Brown received this therapy September 13, 1990, Miss Martinez?

A. At 6:10 p.m.

Q. At 6:10 p.m. Thank you very much, Miss Martinez. (Trial Transcript, Vol. VII, 1347-48, *U.S. v Emanuel Brown*, et al. CR-90-240-G)

After Brown's direct-examination and her cross-examination by the prosecutor, Brown questioned her on re-direct:

Q. Miss Martinez, did you – you were interviewed by FBI Agent Johnston twice; is that correct?

A. Correct.

...

Q. Miss Martinez, did you receive the impression that Agent Johnston was trying to get you to change the dates that Mr. Brown –

Prosecutor. Objection, Your Honor.

The Court. Sustained.

Q. – came to the clinic on September 13, 1990?

The Court. Sustained. You may ask her did Agent Johnston do anything to try to get you to change those –

Q. Did – yes.

Q. He tried – I don't know which one is which since I was speaking to both of them [FBI agents], but they insinuated something on that behalf. (Trial Transcript, Vol. VII, 1362-63, *U.S. v Emanuel Brown*, et al. CR-90-240-G)

So Martinez's testimony established that Brown had a long-standing injury requiring regular physical therapy, that his visit of September 13, 1990, was typical of his other visits before and after that date, and that the FBI attempted to get her to change the record showing that Brown was treated at 6:10 p.m. on September 13th – about 6-1/2 hours after the WBTC was robbed in Greensboro. The trip from the bank to the Cynwyd Medical Center takes about eight hours. [JD Note: According to Yahoo.com's mapping service, it is 468 miles from the WBTC branch in Greensboro to the Cynwyd Medical Center. Yahoo.com estimates that driving at the speed limit directly between the two businesses without any stopovers takes an estimated 7 hours and 49 minutes.]

Laura Peltier worked at the Mangum Street Rental Center in Durham, North Carolina. Peltier testified as a witness for the prosecution that on September 12, 1990, she rented a U-Haul truck to a man presenting a Pennsylvania driver's license in the name of Emanuel Brown. She also testified that she compared the picture on the driver's license with the person renting the truck, and they were the same. She further said she watched the man sign the rental contract. She said she took particular note of the man's appearance because she was from Lancaster, Pennsylvania, and that she could identify him if she saw him again. Interestingly, during her direct examination Peltier was not asked

Brown cont. on page 43

Brown cont. from page 42

by the prosecutor if the man she rented the truck to was present in the courtroom.

Woman who rented U-haul did not identify Brown

Brown personally cross-examined Peltier, since he was defending himself *pro se*. The following exchange is from the trial transcript:

Q. [By Brown] Ms. Peltier, you stated to the court that you remember this particular individual renting this U-Haul truck because he was from Pennsylvania, right?

A. [By Peltier] Uh-huh.

Q. Ms. Peltier, do you recognize the individual in court today who rented the U-Haul truck from you?

A. I haven't even really looked around.

Q. Would you take a look around the courtroom and see if you can identify the individual who you remember or may remember.

A. [After looking around the courtroom.] Not offhand.

Q. Okay. No further questions. Thank you. (Trial Transcript, Vol. II, 274-275, *U.S. v Emanuel Brown*, et al. CR-90-240-G)

So after testifying that she could identify the man who rented the truck, and that the man presented identification that he was Emanuel Brown – Peltier could not identify Brown as that person when he was standing directly in front of her asking her questions with her full attention focused on him. Thus it bears repeating that on direct examination the prosecution did not ask Peltier to identify the man who rented the truck, even though Brown was sitting right in the courtroom. Which suggests the prosecution knew when Peltier was called as a witness that she would not identify Brown as the man who rented the U-Haul. That is also significant because the trial was only five months after the truck was rented and even though Peltier's memory wouldn't be expected to be completely eroded, she didn't suggest that Brown bore any resemblance to the truck's renter.

Brown found guilty in spite of being 468 miles from the crime scene

In spite of Harewood's admission that Brown encouraged him *not* to commit hold-ups, the eyewitness evidence that Brown didn't rent the U-Haul, and the eyewitness and documentary evidence that he was in Philadelphia picking up his Monte Carlo from a bodyshop at about the time of the robbery and that he was getting physical

therapy in Philadelphia 6-1/2 hours after the robbery 468 miles away, the jury found Brown guilty of all counts after a three-week trial. Parker, who was represented by a lawyer, was acquitted of all counts.

What was Brown's relationship with his co-defendants?

At the time of Brown's indictment he had not met Walker or know who he was.

"Nawny's" actual identity was never disclosed, so Brown doesn't know if he had ever met "Nawny" or know of him, or even if "Nawny" was a real person!

Harewood lived in Philadelphia next door to Brown's best friend Charles, so Brown was acquainted with him. Prior to the robbery Harewood attempted to entice Brown, Charles, and another acquaintance of theirs to rent a car that he could use to drive to North Carolina. Brown had stayed at Charles' house at one time, and among some personal effects stored at his house was a duplicate driver's license that Brown acquired after having misplaced his license at one time. It is possible Harewood obtained that license and with his connections found someone with the ability to replace Brown's picture. Not knowing what did happen, Brown can only guess.

A friend of Brown's had a woman friend named Carolyn who lived in Greensboro, North Carolina. The woman and several relatives, including her sister, visited Philadelphia for a family reunion. While in Philadelphia Carolyn and her sister went out one night to Brown's nightclub. Carolyn's sister was Susan Parker, and that night was the first and only time Brown met Parker prior to their indictment.

An odd twist is that the day after the WBTC robbery, and before Brown knew he was a suspect, he loaned his Monte Carlo to Charles and Evonne Richardson, who drove the car to North Carolina where they visited friends. If Brown had been involved in the bank robbery the last thing in the world he would have done was allow friends to drive the car to the same state where the robbery was committed and where the car may have been seen!

The prosecutor's pay-off of Harewood and Walker

In exchange for their testimony, Harewood was given a sentence of 5 years for violating §924(c)(1) and *no prison time* for the bank robbery! Walker was given a sentence of

ten years for the bank robbery. Those may seem like stiff sentences after fully cooperating with the government, but remember this was a federal prosecution, and they are light compared to the 27-1/2 year sentence given Brown.

Brown's appeals denied

Brown's direct appeal was to the federal Fourth Circuit Court of Appeal. The tenor of the Court's 1993 decision was set in the first sentence of its 'statement of facts', "Brown masterminded a plan to rob the Bank using information from a Bank employee." (*United States v. Brown*, No. 91-5088 (4th Cir. 01/06/1993)) The 3-judge panel erroneously adopted as "fact" the prosecution's theory of the crime that was disproved at trial because Parker – the alleged "Bank employee" providing "information" – was acquitted of all charges! In 1998 Brown's 28 USC §2255 (habeas) petition was denied.

In February 2005, Brown filed successive §2255 petition that was denied in July 2005. Harewood was released from federal Bureau of Prison custody on October 20, 1995, and Walker on May 28, 1999. So Brown's best chance to challenge his conviction is for an investigator to find and interview them. The statute of limitations for perjury has expired, so one or both might now be willing to tell the truth and recant their false testimony in an affidavit. Their admissions could also trigger the discovery of additional new evidence of Brown's actual innocence that would enable him to prevail on another successive §2255 petition.

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Hamdan cont. from p. 33

which Hamdan has been charged is not an "offens[e] that by ... the law of war may be tried by military commissions." ...

[46] Hamdan is alleged to have acted as Osama bin Laden's "bodyguard and personal driver,"

[114] The charge against Hamdan ... alleges a conspiracy extending over a number of years, ... All but two months of that more than 5-year-long period preceded the attacks of September 11, 2001 ... None of the overt acts that Hamdan is alleged to have committed violates the law of war.

[115] These facts alone cast doubt on the legality of the charge and, hence, the commission; ... the offense alleged must have been committed both in a theater of war and during, not before, the relevant conflict. But the deficiencies in the time and place allegations also underscore — indeed are symptomatic of — the most serious defect of this charge: The offense it alleges is not triable by law-of-war military commission. ...

[127] If anything, *Quirin* supports Hamdan's argument that conspiracy is not a violation of the law of war. Not only did the Court pointedly omit any discussion of the conspiracy charge, but its analysis of Charge I placed special emphasis on the completion of an offense; it took seriously the saboteurs' argument that there can be no violation of a law of war — at least not one triable by military commission — without the actual commission of or attempt to commit a "hostile and warlike act." *Id.*, at 37-38.

[134] Far from making the requisite substantial showing, the Government has failed even to offer a "merely colorable" case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission. ... Because the charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan.

[139] The commission's procedures are set forth in Commission Order No. 1, which was amended most recently on August 31, 2005 — after Hamdan's trial had already begun. ...

[141] Another striking feature of the rules governing Hamdan's commission is that they permit the admission of any evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." ... Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn. ... Moreover, the accused and his civilian counsel may be denied access to evidence ... and that its admission without the accused's knowledge would not "result in the denial of a full and fair trial." ...

[142] ... A two-thirds vote will suffice for both a verdict of guilty ... Any appeal is taken to a three-member review panel composed of military officers ... only one member of which need have experience as a judge. ...

[164] Under the circumstances, then, the rules applicable in courts-martial must apply. ...

[165] ... That Article not having been complied with here, the rules specified for Hamdan's trial are illegal. ...

[167] The procedures adopted to try Hamdan also violate the Geneva Conventions.

[171] ... The United States, by the Geneva Convention of July 27, 1929, ... concluded with forty-six other countries, ... an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection.

[185] Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." ...

[190] ... But in undertaking to try Hamdan and subject him to criminal punishment, the

Hamdan Decision Foretold By Guantanamo Prosecutor Complaints

In 2004 three Guantanamo Bay military prosecutors were transferred after they expressed concerns about the legality of procedures established for the trial of detainees.

Air Force Major Robert Preston, emailed his superior, "I consider the insistence on pressing ahead with cases that would be marginal even if properly prepared to be a severe threat to the reputation of the military justice system and even a fraud on the American people."


A second prosecutor, Air Force Captain John Carr, emailed his superior, "You have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees" Capt. Carr also wrote that defendants weren't provided with exculpatory evidence in documents withheld from disclosure for national security reasons by the CIA, and that notes by military staff and statements by detainees concerning torture and abuse disappeared.

A third prosecutor, Air Force Captain Carrie Wolf, also expressed concerns about the legality of the trial process to her superior.

The trial procedures denying even the appearance of "due process," were too rigged for the three military prosecutors to stomach. The Supreme Court majority in *Hamdan* concluded similarly, "the rules specified for Hamdan's trial are illegal."

See: Three Prosecutors Reassigned After Protesting Rigged Guantanamo Trials, *Justice Denied*, Issue 29, Summer 2005, p. 14.

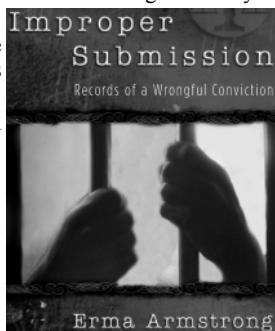
Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.

[191] The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings. 

This is the story of Karlyn Eklof, a young woman delivered into the hands of a psychotic killer by traffickers in porn and mind control. She witnessed a murder and is currently serving two life sentences in Oregon for that crime. *Improper Submission* by Erma Armstrong documents:

- The way the killer's psychotic bragging was used by the prosecution to define the case against Karlyn.
- The way exculpatory evidence was hidden from the defense.
- The way erroneous assertions by the prosecution were used by the media, by judges reviewing the case, and even by her own lawyers to avoid looking at the record that reveals her innocence.
- The ways her appeal lawyers have denied any input that would require them to investigate official misconduct.
- Her case is classic example of coercion and denial of civil rights.

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In Memoriam: Anne Rose-Pierce 1950-2005

Volunteer activists are the heart and soul of many organizations dedicated to social issues. One of those people was Anne Rose-Pierce.

Anne was a long-time resident of Oregon. After she graduated from Eastern Oregon University with a teaching degree, she taught school in several eastern Oregon towns before moving to Portland in the late 1980s.

In 1994 she met Greg Pierce, who had been in and out of trouble with the law for many years. They fell in love and planned to marry. Nineteen months later Greg died after being hospitalized while in the Multnomah County Jail (Portland). After Greg died in 1996 Anne legally changed her last name from Rose to Rose-Pierce.

During a conversation with Greg's probation officer, he commented to Anne about Greg's repeated run-ins with the law, "After 17 years, what made you think he could change?" Appalled at that attitude, the lack of care Greg had received while sick, and that he was chained to his hospital bed when on death's door, Anne decided to start a grass-roots organization to raise awareness about prisoner related issues. Remembering what the probation officer said, she named it "... after 17 years ...". Her organizations by-laws barred charging for any services it provided, although she did accept donations.

In between working at her day job of managing apartments for adults with disabilities, Anne published a quarterly newsletter with prisoner oriented information that she named "... after 17 years..." In addition to the newsletter that she distributed at no charge to prisoners, she visited prisoners, she gave a helping hand as she was able to released prisoners, she contacted and was interviewed by the media about prisoner issues, and in the

late 1990s she founded a weekly thirty-minute radio program devoted to prisoner oriented topics. That program, Prison Pipeline, was broadcast Tuesday nights on Portland's KBOO 90.7 FM. Prison Pipeline reached the five state and federal prison complexes in the Portland-Salem area, and Anne reported on a wide variety of topics, such as proposed laws that affected prisoners, and she interviewed many people. *Justice: Denied's* publisher Hans Sherrer was a guest on Prison Pipeline a number of times. Anne said about her program, "The Prison Pipeline is my way of shortening the distance between prisoners and our community. It's two way communication, so the prisoners know what's going on outside, and the community knows what goes on inside."¹

Over a period of years Anne paid many thousands of dollars out of her pocket for printing and mailing "... after 17 years ...", and she volunteered thousands of hours of her time to writing the newsletter, maintaining the mailing database, and answering mail. In 2004, after the mailing list neared 2,000, she made the difficult decision to suspend publication until should could find a donor or grant to cover the newsletter's expense.

Beginning in 2004 when Oregon was one of the two states that had not yet criminalized the rape of prisoners by staff members, Anne helped with the effort that resulted in Oregon's passage of a custodial sexual misconduct bill that became effective on July 13, 2005.

Anne was afflicted with Sleep Apnea, and she died in her sleep at her home in Portland on November 30, 2005. She was 55 years old.

Anne would be pleased that Prison Pipeline lives on at KBOO with two new co-hosts. It can be listened to from 6:30-7pm on Tuesdays at 90.7 FM in the Portland metro area, or it can be listened to over the Internet from KBOO's website at, <http://kboo.org>.

¹ Take No Prisoners: Women Activists Making a Change, by Brigitte Sarabi, *Justice Matters* (Western Prison Project), Summer 2001 issue.

Compensation Awarded To The Wrongly Convicted In 2005

Name	Compensation	Paid By	State	Convicted	Released	Exonerated	Yrs Jailed	Avg. Yearly	Compensated	Exonerated By	Crime	Sentence
Wilton Dedge	\$2,000,000	State of FL	FL	1982	2004	2004	22	\$90,909	2005	DNA	Rape	Life
Ed Heinrich	\$660,000	City of Houston	TX	1994	1994	1999	.4	\$1,650,000	2005	Conv. reversed	Theft	4 yrs
Ray Krone	\$1,400,000	Maricopa County	AZ	1992	2002	2002	10.5	\$133,333	2005	DNA	Murder	Death, then resentenced to Life
Ray Krone	\$3,000,000	City of Phoenix	AZ	1992	2002	2002	10.5	\$285,714	2005	DNA	Murder	Death, then resentenced to Life
Milton Lantigua	\$1,000,000	New York City	NY	1992	1996	1996	6	\$166,667	2005	Conv. reversed	Murder	20 yrs
Nathaniel Lewis	\$662,000	State of OH	OH	1997	2002	2002	5	\$132,400	2005	Proof of innocence	Rape	8 yrs
Dennis Maher	\$550,000	State of MA	MA	1984	2003	2003	19	\$28,947	2005	DNA	Rape	Life
Eric Sarsfield	\$550,000	State of MA	MA	1987	1999	2000	9.5	\$52,632	2005	DNA	Rape	10-15 yrs
Joseph Smith	\$120,000	Oneida County	NY	2001	2001	2001	1	\$120,000	2005	Perpetrator found	Murder	Exonerated prior to sentencing
Josiah Sutton	\$118,000	State of TX	TX	1998	2002	2002	4.5	\$26,222	2005	DNA	Rape	25 yrs
Eduardo Velazquez	\$500,000	State of MA	MA	1988	2001	2001	14	\$35,714	2005	DNA	Rape	12-18 yrs
Eduardo Velazquez	\$2,450,000	City of Chicago	MA	1988	2001	2001	14	\$175,000	2005	DNA	Rape	12-18 yrs
Kenneth Wymienko	\$3,900,000	Clinton Township	MI	1994	2003	2003	9	\$433,333	2005	DNA	Rape	40-60 yrs
Totals	\$16,860,000						125	\$134,450				

Article Submission Guidelines

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Take your reader into your story step-by-step *in the order it happened.* Provide dates, names, times, and the location of events. Be clear. Write your story with a beginning, middle and end. Tell exactly what facts point to your innocence, and include crucial mistakes the defense lawyers made. Do not soft-pedal the truth: Explain what the judge or jury relied on to convict you.

However, don't treat your story as a "true confession" and **only include information either in the public record or that the prosecutor already has.** Do not repeat yourself. Remember: the people reading your account know nothing about your case except what you tell them. Do not complain about the system or the injustice you have experienced: let the facts speak for you. At the end tell what the present status of the case is, and provide your complete mailing address. Include the name and contact info for the person you want listed as an outside contact. Also provide Justice:Denied with the name and email address and/or phone number of any independent sources necessary to verify the account or who can clarify questions. This can speed acceptance of your story, since if Justice:Denied needs more information, it can readily be requested.

Among the basic elements a story should include are:

Who was the victim, who witnessed the crime, and who was charged?

What happened to the victim. What is the alibi of the person the story is about and who

can corroborate that alibi? What was the person charged with? What was the prosecution's theory of the crime? What evidence did the prosecution rely on to convict you?

Where did the crime happen (address or neighborhood, city and state).

When did the crime happen (time, day and year), and when was the person charged, convicted and sentenced (month/yr).

How did the wrong person become implicated as the crime's perpetrator?

Why did the wrong person become implicated as the crime's perpetrator?

The following is a short fictional account that has the elements that should be included in a story.

Mix-Up in Identities Leads to Robbery Conviction

By Jimm Parzuze

At 5p.m. on July 3, 2003, a convenience store on 673 West Belmont Street in Anytown, Anystate was robbed of \$87 by a lone robber who handed the clerk a note. The robber didn't wear a mask, brandish a weapon, or say anything. The clerk was not harmed.

My name is Jimm Parzuze and on July 17, 2003 I was arrested at my apartment on the eastside of town, about nine miles from the scene of the robbery. It was the first time I had been arrested. The police said that someone called the "crime hot-line" with the tip that I "sort of looked like the man" in a composite drawing of the robber posted in a public building. The drawing had been made by a sketch artist from the clerk's description of the robber. I protested my innocence. But I was ignored because I told the police I had been alone in my apartment at the time of the robbery. I was certain of my whereabouts because it had been the day before the 4th of July when I went to a family picnic.

After the clerk identified me in a line-up, I was indicted for the robbery. My trial was in November 2003. The prosecution's case relied on the clerk's testimony that I was "the robber." On cross-examination my lawyer asked the clerk why the drawing didn't show an unmistakable 3" long and 1/8" wide scar that I have on my left cheek from a car accident. The clerk said the right side of the robber's face was turned to him, so he didn't see the left side. My lawyer, a public defender, asked the clerk that if that was the case, then how could the police drawing show details on both sides of the robbers face - including a dimple in his left cheek - but not the much more noticeable scar? The clerk responded the drawing was based on the robber's image burned into his memory and it was the truth of what he saw.

I testified that I had never robbed any person or store, that I was at home at the time of the robbery, and that I was obviously not the man depicted in the police drawing.

In his closing argument my lawyer said that although I generally fit the physical description of the robber, so did probably 10,000 other people in the city, many of who had convictions for robbery and lived in the area of the robbery. He also argued that the clerk's explanation didn't make any sense of why he identified me, when unlike the robber he described to the police, I have a long, deep, and wide scar across my left cheek.

However the jury bought the prosecution's case and I was convicted. In December 2003 I was sentenced to eight years in prison.

My lawyer had submitted a pre-trial discovery request for the store's surveillance tape to prove I had been mistakenly identified, but the prosecutor told the judge it couldn't be located.

I lost my direct appeal. The appeals court said there was no substantive reason to doubt the clerk's ID of me. A private investigator is needed to search for possible witnesses to the robbery who could clear me, and to try and locate the "missing" surveillance tape. If you think you can help me, I can be written at,

Jimm Parzuze #zzzzzzzz

Any Prison

Anytown, Anystate

My sister Emily is my outside contact. Email her at, Aaaa@bbbb.com

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New York Judge John Collins

(In 1992 when he vacated Albert Ramos' rape conviction after eight years of wrongful imprisonment.)

John Spirko's Execution Stayed For Fourth Time!

Ohio Gov. Taft ordered a fourth stay of John Spirko's execution so DNA testing can be performed on crime scene evidence.

See page 4

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