

# The Magazine for the Wrongly Convicted

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Haunted by 1975 wrongful conviction that Maryland officials defy court orders to expunge. See page 5



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Issue 34 Fall 2006

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#### **Message From The Publisher**

Two men whose stories were featured in *Justice:Denied* were recently awarded new trials, and the charges were dismissed against a third man. Derek Tice, one of the Norfolk Four convicted of rape and murder was awarded a new trial (his third) because of ineffective assistance of counsel, James Love was awarded a new trial because new evidence proves he was out of the country at the time he allegedly committed rapes in Cincinnati, and the charges were dismissed against Christopher Parish for a non-existent robbery and attempted murder. (See pages 18-19.)

A significant development in 2006 that enables large numbers of people to learn from observation how wrongful convictions occur, is Court TV's "Extra." Extra broadcasts notable state trials from across the country live and without commercials via Court TV's website. So from any Internet connection a viewer is a courtroom spectator. A viewer can typically choose from two live trial broadcasts. Video clips are also posted of a trial's highlights. Kirstin Blaise Lobato's month-long retrial was broadcast live by Court TV Extra. (See p. 24.)

Among Extra's many values is it provides a birds-eye view of the nationwide prevalence of prosecutions based on shaky evidence, and the susceptibility of jurors to accept such cases as sufficient to convict a defendant. Those factors work together to ensure that wrongful convictions occur with regularity.

Extra's monthly subscription fee is only \$5.95 for unlimited access. They offer a 30-day free trial at, http://courttv.com/extra. I can't recommend Extra highly enough. It is a prime example of a commercial enterprise providing a reasonably priced service that has great public interest value.

Hans Sherrer, Publisher

Justice: Denied - the magazine for the wrongly convicted http://justicedenied.org - email: hsherrer@justicedenied.org

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



#### Information About Justice: Denied

Six issues of *Justice:Denied* magazine costs \$10 for prisoners and \$20 for all other people and organizations. Prisoners can pay with stamps and pre-stamped envelopes. A sample issue costs \$3. See order form on page 39. An information packet will be sent with requests that include a 37¢ stamp or a pre-stamped envelope. Write: Justice Denied, PO Box 68911, Seattle, WA 98168.

# <u>DO NOT SEND JUSTICE: DENIED ANY LEGAL WORK!</u> Justice: Denied does not and cannot give legal advice.

If you have an account of a wrongful conviction that you want to share, send a SASE or a 37¢ stamp with a request for an information packet to, Justice Denied, PO Box 68911, Seattle, WA 98168. Cases of wrongful conviction submitted in accordance with *Justice:Denied's* guidelines will be reviewed for their suitability to be published. *Justice:Denied* reserves the right to edit all submitted accounts for any reason.

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eeling from serious prosecutorial misconduct allegations, the Burleson County District Attorney's Office quit Anthony Graves' murder case in December 2006. A special prosecutor was appointed to take over Graves' case.

In March 2006 the federal Fifth Circuit Court of Appeals overturned Graves' 1994 murder conviction and death sentence. The Court ruled that prosecutor's egregious Brady violations of failing to turn over exculpatory witness statements deprived Graves of his right to a fair trial. (Graves v. Dretke, 442 F.3d 334 (5th Cir. 03/03/2006)) The appeals court ordered the state to retry Graves or release him outright. Graves had been convicted, along with another man, Robert Carter, of killing a family of six in Sommerville, Texas in 1992.

Pretrial proceedings were underway in Burleson County, where the case was originally tried, when, at a hearing on November 30,

2006, defense lawyers argued for the removal of Assistant District Attorney Joan Scroggins. Scroggins was on Graves' original prosecution team. In their effort to have Scroggins recused, Graves' lawyers cited the federal appellate court's finding that Burleson County prosecutors suppressed exculpatory witness statements in the 1994 trial. County Judge Reva Towslee-Corbett, whose father presided over Graves' first trial, granted the recusal motion one week later. Burleson County District Attorney Renee Meuller then filed a

motion stating she could not proceed without Scroggins' and voluntarily disqualified her entire office from the case.

A court-recognized expert on state laws governing professional ethics called the Graves case the most "outrageous" case of prosecutorial misconduct he had seen in 30 years of practicing law in Texas. Bob Bennett, a Houston attorney, testified for the defense at the November 30 hearing. "[Scroggins] knew what was going on. She knew false testimony was being offered. She knew that subornation was happening and she decided to ignore it," Bennett said at the hearing.

In response to the prosecutorial misconduct, Graves' attorneys have argued their client would never receive a fair trial in Burleson County, but the same judge presides over four counties, and a change of venue outside the local area would not likely be granted. Burleson County is 95 miles northwest of Houston.

#### **Capital Conviction Tossed Because Prosecutors Concealed Evidence** — The Anthony Graves Story

By Erika McDonald

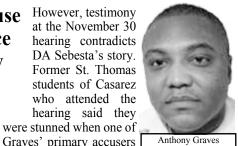
The state's evidence against Graves consisted of Carter's evewitness testimony that Graves helped him commit the murders. There was no other evidence linked Graves to Carter or the murder scene. The night before he was to testify. Carter told prosecutors he lied about Graves' involvement and admitted to killing all the family members himself. Carter said, "I did it all myself, Mr. Sebesta. I did it all myself." Scroggins' trial partner was then-District Attorney Charles Sebesta, and neither prosecutor disclosed to Graves' lawyers that Carter recanted *before* those prosecutors elicited Carter's trial testimony implicating Graves. Carter was eventually executed, insisting on Graves' innocence right up to the time his lethal injection was administered.

The special prosecutor appointed to take over Anthony Graves' case, Navarro County Criminal District Attorney Patrick Batchelor, is experienced in securing a wrongful conviction based on shaky evidence. He was the prosecutor of Cameron Todd Willingham, convicted of setting a fire that killed his three children in 1991. As Willingham's execution date approached the Chicago Tribune reported that his conviction was based on outmoded theories used to identify arson. Five arson experts signed a report that found the trial testimony the jury relied on to convict Willingham was based on out-of-date assumptions. In spite of the new evidence supporting Willingham's possible innocence, Governor Rick Perry declined to intervene and he was executed in 2004.

> A decade after the Sommerville murders, Professor Nicole Casarez's investigative journalism class at the University of St. Thomas in Houston took an interest in the Graves case. The journalism class constitutes the UST Innocence Project, which is a part of the Texas Innocence Network. Casarez and her students uncovered the constitutional violations by the Burleson County prosecutors after several years of digging. The new evidence attracted the attention of Houston media, and eventually led to the appeals court order that Graves be released or retried.

> After Graves' conviction was overturned by the federal court, Sebesta made frequent appearances in the local media to defend his reputation. Sebesta claims he never told Graves' lawyers about Carter's exculpatory statement because he did not believe him. Sebesta has explained he thought Carter simply had "cold feet" about testifying at Graves' trial.

However, testimony at the November 30 hearing contradicts DA Sebesta's story. Former St. Thomas students of Casarez who attended the hearing said they were stunned when one of



changed his story after more than a decade. Senior Captain Ray Coffman of the Texas Rangers, admitted he heard Carter confess sole responsibility for the murders numerous times. Coffman, who lead the 1992 investigation against Graves, originally testified that, although Carter frequently changed his story about what happened the night of the murders, he claimed to have acted alone only once.

At the November 30 hearing one of Graves' attorneys asked Coffman if Carter told prosecutors that Graves was innocent. According to transcripts, Coffman answered, "Oh, sure. Several times." Coffman also testified

that he always informed Sebesta when Carter told him that Graves was innocent, but said he never documented the statements in any of his written reports.

In the appellate ruling issued even before Coffman's latest disclosure. the Fifth Circuit Court questioned his involvement in DA Sebesta's misconduct.

"Although there is no factual finding regarding whether Ranger Coffman knew of Carter's statement that he

committed the crimes alone. Sebesta clearly knew of the statement and used Ranger Coffman as well as Carter to present a picture of Carter's consistency that Sebesta clearly knew was false," the court stated.

One of Casarez's former students, Gia Gustilo, who first began investigating the Graves case five years ago, said she was not surprised that Coffman knew of Carter's statements but said she was surprised that Coffman finally decided to tell the truth. She said that by presenting false testimony in Graves'trial, Coffman and Sebesta "cheated" Graves out of his right to properly defend himself.

"It should have been the jury's job, not Ranger Coffman's, to say if Robert Carter's statements were credible. And it should have been Mr. Graves' right to have that information so that he could show the jury that Carter was lying on the stand," Gustilo said. "But then again, a lot of things hap-

Graves cont. on p. 4

#### Two Men Awarded \$1 Million Each After False Arrest For **Baseball Game Explosion** — Third **Man Fights Wrongful Conviction**

By James F. Love

linton Oliver, Donald Krieger and Andrew Mendez, felt they had a stroke of luck when Oliver's younger sister gave them three tickets to attend a June 2002 Cleveland Indians baseball game at Jacobs Field. Oliver's sister had won the tickets for being the MVP on her softball team at Elyria High School. Unable to attend the game, she gave the tickets to her older brother. Little did her brother and his friends know, as they bounced into the stadium, that they would be subjected to a false arrest, wrongful prosecution, and for at least Mendez, what now appears to be a wrongful conviction.

On June 11, 2002, Oliver, Krieger and Mendez entered Jacobs Field and began watching the game from the upper level. After the game began Oliver and Krieger moved to box seats at ground level, while Mendez stayed in the upper deck. In the top of the ninth inning, an

smoking area shook the stadium and injured four people. Witnesses device the causing explosion. One witness described it as a "small soup can," thrown from the upper level. No one saw who threw it.

but Mendez was seated in the upper deck above the explosion. Stadium authorities arrested all three young men because their tickets had adjoining upper level seat numbers.

Oliver and Krieger were held for four days in the Cuyahoga County Jail in Cleveland, Ohio before a stadium security camera tape showed that they were seated at ground level when the explosion occurred. They were released, but Mendez wasn't as fortunate. Even though no one saw him throw the explosive device, he was charged and convicted after a bench trial of aggravated arson, assault, three counts of negligent assault, and sentenced to spend three years in the Ohio prison system. He was paroled after seven months.

Krieger and Oliver filed a civil suit in the Cuyahoga County Common Pleas Court against the city of Cleveland that alleged

explosion in the lower-level malicious prosecution, false arrest and intentional infliction of emotional distress.

provided During the trial in November 2006, Oliver contradictory statements about testified he was a Marine home on medical leave when he was arrested, and he was prevented from re-enlisting because of the charges. Now an auto salesman, Oliver told the jury, "I was devastated. They took my career." Testimony at the trial was the three men were kept in a holding cell that smelled like urine and they had to sleep with toilet paper in their ears to keep roaches from entering their ears. In addition they were deprived of showers, toothbrushes, soap, mattresses, blankets or pillows, and given paper coveralls to wear. They slept on bare steel bunks, and the cell they were held in was so filthy their feet stuck to the floor when they walked. Oliver testified that the time he spent in the holding cell was the longest 96 hours of his life.

> John Spellacy, Krieger's attorney, told the jury that the men "were falsely accused, but what happened to them in jail compounded this miscarriage of justice." Oliver's attorney, John Chambers, compared the men's jail stay to a "prisoner of war situation" that the police hoped would squeeze confessions out of them.

> On November 9, 2006, the jury deliberated for an hour and a half before awarding both Oliver and Krieger \$400,000 in compensatory damages and \$600,000 in punitive damages. The jury forewoman said of the eight person jury as she left the courthouse, "We were all in agreement that the plaintiffs were wronged." Spellacy expressed his thoughts, "The jury spoke loud and clear about how these innocent guvs were treated. Obviously, they were disgusted and wanted to send the message so this doesn't happen to other people."

> Ohio's Court of Appeals affirmed Mendez's conviction in June 2004. Among Mendez's many arguments was that a stadium surveillance video filmed the explosive device falling 16 feet in one second. In his brief Mendez included physics calculations that if it had been thrown from the 63' height of the upper level where he was sitting, it would have been falling at four times that velocity – thus it had to have been thrown from the level below where he was sitting. The Court rejected that science based argument without even considering it, stating that the calculations Mendez provided "requires explanation in order to apply. It contains terms that are not generally known such as "final velocity," "average velocity," and the "acceleration of gravity." The Court then stated, "Judicial notice

#### Graves cont. from p. 3

pened in this case that shouldn't have and that's why Anthony Graves has been on death row for more than a decade."

After the state did not act to retry Graves or move for a bond hearing within 120 days of the 5th Circuit's decision, in October 2006. U.S. District Judge Samuel Kent set Graves bond at \$50,000, with a \$5,000 cash payment. His pro bono attorneys posted the bond, but the Texas Attorney General's Office appealed to the 5th Circuit Court of Appeals. Although the appeals court upheld Kent's authority to set the bond, they stayed Graves' release until January 4, 2007, to give the AG the opportunity to request a state court bond hearing. On December 20, without holding a hearing, Burleson County District Judge Reva Towslee-Corbett set Graves' state bond at \$1 million. One of Graves' attorneys, Jeff Blackburn, said the bond was, "a ridiculous amount designed to do nothing but keep him locked up."

Graves attorneys petitioned the U.S. District Court to order his release on the grounds that the federal bond had been paid and the state bond was excessive. On January 5, 2007, U.S. Magistrate John Froeschner decided that the federal court lacked

iurisdiction to interfere the state bond. "I can agree with you that it sounds pretty excessive and pretty oppressive, but that's the business of the state court."

Graves is being held in Burleson County's jail awaiting a decision by the special prosecutor on whether he will be retried, or released of a crime that he has unwaveringly claimed he didn't commit, and that Carter went to his grave insisting he was innocent of committing.

• This article is primarily based on the firsthand information of Erika McDonald, a former student of Professor Nicole Casarez's investigative journalism class at the University of St. Thomas that researched Anthony Graves case.

Secondary sources:

Judge calls bond for former death-row inmate 'excessive', by Harvey Rice, Houston Chronicle, January 5, 2007.

New prosecutor named to retry anthony graves, by Melissa Phillip, Houston Chronicle, January 10, 2007

Texas prisoners claiming innocence can write the Texas Innocence Network at: Texas Innocence Network University of Houston Law Center 100 Law Center Houston, TX 77204



Baseball cont. on p. 9

eslie Vass' odyssey is a horrifying tale of how Maryland's criminal justice system fails the innocent throughout their lives. More than twenty years after his release from prison, Vass is still struggling with the aftereffects of his wrongful 1975 conviction that just won't disappear from

Maryland's law enforcement records, in spite of two court orders for its expungement.

Vass was 16 when he was arrested and jailed in 1974 for an armed robbery he did not commit. He was sentenced to 20 years imprisonment after his 1975 conviction in the Baltimore City Circuit Court. After Vass was imprisoned for almost ten years, the South Baltimore robbery victim came forward to say he had identified the wrong man to police, and that Vass did not commit the robbery. Vass' conviction was vacated and he was freed in 1984.

Vass sued various state agencies for his wrongful imprisonment. In 1987 he settled with the State of Maryland for \$250,000 to be paid in installments over eight years.

Maryland had no statute for compensating a wrongly convicted person when Vass was compensated in 1987; his was a case of first impression. After Kirk Bloodsworth was released in 1993 from nine years of wrongful imprisonment for a rape-murder he didn't commit, Maryland's \$300,000 payment to him was based on the compensation precedent established in Vass' case.

Unknown to Vass at the time of his settlement, was that state officials would add insult to the injury of his wrongful imprisonment by failing to comply with the order of two judges for expungement of the armed robbery conviction from Vass' criminal record. So anyone inquiring about Vass' criminal record - whether they were a potential employer, a member of the public, a law enforcement officer, or a court employee – would be mislead to believe that Vass was a potentially dangerous ex-con, when in fact he was the survivor of a terrible miscarriage of justice.

In 1999 Vass sued the state for the failure of state agencies to erase his erroneous criminal charges and conviction from his criminal record. Vass was paid \$50,000 to settle that lawsuit. After the settlement, Vass told the Washington Post during an interview, "I am not happy at all about this," explaining that he agreed to the state's low offer so he could quickly get money to pay off bills and avoid eviction from his home. He also said, "I just hope no one else ever has to go



### **Leslie Vass Haunted** By Unexpunged 1975 **Wrongful Conviction**

By Douglas Scott Arey

mistakes made by the state." On a more hopeful note he said, "I want to help other people. If I be positive, I'll do positive."

Unfortunately for Vass, Maryland officials didn't share his desire to do right by people. Even after two judges had ordered expungement of Vass' criminal record and Maryland paid \$50,000 to Vass for failing to do so, state officials still did not correct his record.

Vass found that out the hard way in March 2004, when he was arrested after his estranged wife accused him of stabbing her. He learned that his 1975 conviction remained on the books when the judge refused to grant bail because of his criminal record as a dangerous felon. The stabbing charge was false, and the jury showed it believed his testimony by acquitting him in July 2005. But that wasn't until Vass had lost another 16 months of his life to false imprisonment, and he had also lost the company of his children who were placed in foster care. Those bad things happened to Vass solely because the judge relied on his erroneous criminal record to deny bail while Vass awaited trial.

During an interview with Baltimore's WJZ-TV after his acquittal and release from jail, Vass said about his unexpunged 1975 conviction, "This has been going on for years, and I'm tired of it. Why keep holding it over me and using it against me?"

This latest example of egregious behavior by the state against Vass may be immune from suit or compensation. Why? When in 1999 Vass accepted the settlement of \$50,000 for Maryland's failure to expunge the 1975 conviction, he signed an agreement barring him from seeking further relief. That provision would be an honest and legitimate bar from further litigation if Maryland had complied in good faith with the very subject of the 1999 compensation settlement. Yet the two judicial orders for expungement of Vass' wrongful conviction still have not been honored or fulfilled to this day, many years after the 1999 settlement.

Vass has experienced periods of very tough times since his release from prison in 1984. and it hasn't helped that he has been unfair-

ly burdened by having an erroneous criminal record as a violent ex-con. Former Baltimore Sun columnist Michael Olesker wrote that Vass was homeless, jobless, and penniless at various times in the 1990s.

Vass was hopeful that he had turned through what I've been through because of things around for himself when he graduated with a BA in Sociology, and obtained certificates in Paralegal Studies and Computer Office Specialist Training. Those qualifications landed him a full-time job in 1999 as a placement specialist with the Maryland Job Service, a part of the Maryland Department of Labor, Licensing, and Regulation. He enjoyed his job for five years, earned numerous awards, and thought the bad times were over. But his position was eliminated in 2003 when the office was phased out, and that was followed by the false stabbing charges.

> Now almost 50, Vass lives with his parents and hits the pavement with his resume to looking for a living wage job that will enable him to get his own place, get his children out of foster care, and once again restart his life. Ironically, even though he was employed with the State of Maryland as a job placement counselor, he has had difficulty placing himself in a job, largely due to the ghostly criminal conviction that has never vanished in spite of multiple court orders. Vass' vacated conviction turns up like an apparition when a prospective employer runs a criminal background check on his name.

> In recent story about Vass' Baltimore's WJZ-TV reporter Richard Sher described Vass' unexpunged conviction as a "nuisance" to him, but it has been much worse than that.

> So the saga goes on, with Leslie Vass repeatedly victimized for more than three decades by Maryland's system of "justice," with no end in sight. Edgar Allen Poe, who died in Maryland, was the author of classic horror tales. While Poe's tales were fiction, Maryland has written a true-life horror tale for Leslie Vass that shows no signs of ending.

#### Sources:

"After stay in hospital, man back in the cold," by columnist Dan Rodricks, Sun-Sentinel, Fort Lauderdale, Florida, February 20, 2006

"Still Struggling with Wrongful Conviction after 31 years," truthinjustice.org, January 31, 2006, citing Washington Post and WJZ-TV as sources.

"Wrongfully convicted," Leslie by mdwrongfullyimprisoned.org, September 17, 2005 "Wrongfully convicted Maryland man gets paid again for State's mistake," Jet magazine, January 18, 1999



#### **U.S. Sup. Ct. Restrictively Interprets Federal Habeas For State Convictions**

The U.S. Supreme Court sent a clear message in its December 2006 decision in *Carey v. Musladin*, 127 S. Ct. 649, that federal courts were to strictly interpret the requirement in the Antiterrorism and Effective Death Penalty Act of 1996, that habeas relief was only to be granted to a state prisoner's claim if the state court's adjudication:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. §2254(d)(1).

The following are excerpts from the Court's decision.

Carey v. Musladin, 127 S.Ct. 649 (U.S. 12/11/2006)

#### [1] SUPREME COURT OF THE UNITED STATES

- [3] 127 S.Ct. 649, 2006.SCT.0000193 < http://www.versuslaw.com>
- [4] December 11, 2006
- [15] Thomas, J., delivered the opinion of the Court ...
- [16] On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit Court: 427 F. 3d 653
- [19] This Court has recognized that certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial. Estelle v. Williams, 425 U. S. 501, 503-506 (1976); Holbrook v. Flynn, 475 U. S. 560, 568 (1986). ...
- [21] On May 13, 1994, respondent Mathew Musladin shot and killed Tom Studer outside the home of Musladin's estranged wife. Pamela. At trial. Musladin admitted that he killed Studer but argued that he did so in self-defense. A California jury rejected Musladin's self-defense argument and convicted him of first-degree murder and three related offenses.
- [22] During Musladin's trial, several members of Studer's family sat in the front row of the spectators' gallery. On at least some of the trial's 14 days, some members of Studer's family wore buttons with a photo of Studer on them. Prior to opening statements, Musladin's counsel moved the court to order the Studer family not to wear the buttons during the

- trial. The court denied the motion, stating that it saw "no possible prejudice to the defendant." ...
- [23] Musladin appealed his conviction to the California Court of Appeal in 1997. He argued that the buttons deprived him of his Fourteenth Amendment and Sixth Amendment rights. At the outset of its analysis, the Court of Appeal stated that Musladin had to show actual or inherent prejudice to succeed on his claim and cited Flynn, supra, at 570, as providing the test for inherent prejudice. ... the court concluded, again quoting Flynn, supra, at 571, that the buttons had not "branded defendant 'with an unmistakable mark of guilt' in the eyes of the jurors" because "[t]he simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of [a] family member." ...
- [24] At the conclusion of the state appellate process, Musladin filed an application for writ of habeas corpus in federal district court pursuant to §2254. In his application. Musladin argued that the buttons were inherently prejudicial and that the California Court of Appeal erred by holding that the Studers' wearing of the buttons did not deprive him of a fair trial. The District Court denied habeas relief but granted a certificate of appealability on the buttons issue.
- [25] The Court of Appeals for the Ninth Circuit reversed and remanded for issuance of the writ, finding that under §2254 the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

- States." §2254(d)(1). According to the Court of Appeals, this Court's decisions in Williams and Flynn clearly established a rule of federal law applicable to Musladin's case. ... We granted certiorari, 547 U. S. \_\_\_ (2006), and now vacate.
- [27] Under the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1219:
- [28] "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
- [29] "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. §2254(d)(1).
- [30] In Williams v. Taylor, 529 U. S. 362 (2000), we explained that "clearly established Federal law" in §2254(d)(1) "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." Id., at 412. Therefore, federal habeas relief may be granted here if the California Court of Appeal's decision was contrary to or involved an unreasonable application of this Court's applicable holdings.
- [32] In Estelle v. Williams and Flynn, this Court addressed the effect of courtroom practices on defendants' fair-trial rights. In Williams, the Court considered "whether an accused who is compelled to wear identifiable prison clothing at his trial by a jury is denied due process or equal protection of the laws." 425 U.S., at 502. The Court stated that "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes," id., at 512, but held that the defendant in that case had waived any objection to being tried in prison clothes by failing to object at trial, id., at 512-513.

- Supreme Court of the United [33] In Flynn, the Court addressed whether seating "four uniformed state troopers" in the row of spectators' seats immediately behind the defendant at trial denied the defendant his right to a fair trial. 475 U.S., at 562. The Court held that the presence of the troopers was not so inherently prejudicial that it denied the defendant a fair trial. *Id.*, at 571....
  - [34] Both Williams and Flynn dealt with government-sponsored practices: In Williams, the State compelled the defendant to stand trial in prison clothes, and in Flynn, the State seated the troopers immediately behind the defendant. Moreover, in both cases, this Court noted that some practices are so inherently prejudicial that they must be justified by an "essential state" policy or interest. ...
  - [36] In contrast to state-sponsored courtroom practices, the effect on a defendant's fair-trial rights of the spectator conduct to which Musladin objects is an open question in our jurisprudence. This Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial. ...
  - [38] Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be that the state said court "unreasonabl[y] appli[ed] clearly established Federal law." §2254(d)(1). No holding of this Court required the California Court of Appeal to apply the test of Williams and Flynn to the spectators' conduct here. Therefore, the state court's decision was not contrary to or an unreasonable application of clearly established federal law.
  - [40] The Court of Appeals improperly concluded that the California Court of Appeal's decision was contrary to or an unreasonable application of clearly established federal law as determined by this Court. For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

Duarnis Perez was deported to the Dominican Republic in 1996 after a felony drug conviction. At the time the 23-year-old Perez had lived in the United States for more than a dozen years.

Perez was arrested four years later at a New York border checkpoint while trying to enter the U.S. from Canada. Perez pled guilty to one count of illegal reentry after deportation (8 U.S.C. 1326). He was sentenced to 57-months federal imprisonment to be followed by three years of supervised release. After serving his prison sentence Perez was released from the federal Bureau of Prison's custody on April 9, 2004.

He met the next day with an Immigration and Customs Enforcement (ICE) officer, because he was being held in custody on an immigration detainer. The ICE officer told Perez he couldn't be deported because he was a U.S. citizen. Unbeknownst to Perez, his mother, or his lawyers in 1996 or 2000, he automatically became a U.S. citizen at the age of 15, when his mother was naturalized in 1988. Released from ICE custody, Perez was subsequently issued a Certificate of Citizenship dated July 2, 2004.

Based on the new evidence that he had been a U.S. citizen since 1988, in January 2005 Perez filed a writ of error *coram nobis* to vacate his conviction for illegal reentry. Due to his supervised release status that subjected him to the custody of the federal government, the U.S. District "Court ordered that Perez recharacterize his application as one for a writ of habeas corpus, pursuant to 28 U.S.C. § 2255." <sup>1</sup>

In October 2005 Perez filed a § 2255 petition requesting that his conviction be vacated and his supervised release terminated. His petition relied on the argument that as a U.S. citizen he had been wrongfully deported in 1996, and thereafter wrongfully convicted of illegal reentry in 2000.

The U.S. Department of Justice (DOJ) responded to Perez's habeas corpus petition by claiming his conviction should stand, because it was his responsibility to know his citizenship status, not the federal governments. The DOJ also asserted that Perez could have discovered he was a U.S. citizen if he had exercised "due diligence," so they contended he was procedurally barred from filing his habeas petition, because the one-year time period began tolling after his sentencing in 2000.

Perez countered that neither he nor his mother, nor his lawyers knew he automatically became a U.S. citizen in 1988 when his mother

# U.S. Citizen's Conviction For Reentering The U.S. Vacated he was not a United States citizen. ... Deportation is, in effect, notice, by the Government, to the deportee that he is not a

By Hans Sherrer

was naturalized, because he was a minor under the age of 16 living legally in the U.S. under her sole custody. His mother had even erroneously told him he wasn't a U.S. citizen. Since he didn't know of his correct citizenship status until an officer of the federal government (ICE) informed him of that fact on April 10, 2004, Perez contended the one-year filing period began tolling on that date under the "new evidence" exception to the deadline imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

"The Government is arguing that an innocent man who was wrongly convicted should not be released from the custody of the United States. ... Because the prosecutor is the representative of the Government in a criminal prosecution, his role is more than a mere adversary; he is charged with ensuring that an accused receive due process—that is, a fair trial."

U.S. District Court Judge Lawrence Kohn

The DOJ also contended that since Perez had pled guilty he was barred from challenging (collaterally attacking) his conviction. Perez countered that an exception to that rule is when a petitioner presents newly discovered evidence that establishes his or her actual innocence of the crime. He argued that being informed by an officer of the federal government after he pled guilty, that he was a U.S. citizen, satisfied the "newly discovered evidence" exception.

A third contention by the DOJ was that Perez was procedurally barred from attacking his conviction by a habeas petition, because his direct appeal only challenged his sentence. Perez countered that the miscarriage-of-justice exception to procedurally defaulting on a defense claim applied to his case, because at the time he filed his direct appeal he did not know he was a U.S. citizen.

On August 15, 2006, U.S. District Court Judge Lawrence Kahn issued his ruling on Perez's habeas petition.

In regards to the DOJ's first argument, that Perez's petition was time barred, Judge Kahn wrote: "The Court ... finds that it was not unreasonable for Petitioner, once he had already been deported [in 1996], to assume that

he was not a United States citizen. ... Deportation is, in effect, notice, by the Government, to the deportee that he is not a United States citizen. ... The Court finds that the statute of limitations did not begin until Petitioner was informed of his citizenship status by the ICE agent on April 10, 2004. As a result, the instant petition, which was filed on January 13, 2005, is timely." <sup>2</sup>

In regards to the DOJ's second argument, that Perez couldn't collaterally attack his conviction by a guilty plea, Judge Kahn ruled: "In sum, a petitioner may challenge his guilty plea if, in light of all new evidence provided by both the petitioner and the Government, the petitioner can show that a reasonable juror would have a reasonable doubt as to his guilt. ... In support of his actual innocence claim, Petitioner advances his Certificate of Citizenship as newly discovered evidence to prove that he is, in fact, a United States citizen. ... [T]he Court finds that Petitioner's Certificate of Citizenship properly serves as new evidence to support his actual innocence claim. ... Petitioner may advance a § 2255 petition to challenge his guilty plea." <sup>3</sup>

In regards to the DOJ's third argument, that Perez had procedurally defaulted on his defense that he was a U.S. citizen charged with an offense reserved for non-citizens, Judge Kahn ruled, "The Supreme Court has, however, recognized a miscarriage-of-justice exception to the general bar. *Murray v. Carrier*, 477 U.S. 478, 495 (1986). ... [T]he Court may review the petition on its merits because Petitioner has established his actual innocence, as the Court previously noted, based on newly discovered evidence." <sup>4</sup>

Having determined that he could consider Perez's petition on its merits, Kahn wrote:

"A federal prisoner may move the court that sentenced him to vacate his conviction and sentence when imposed in violation of the Constitution or laws of the United States. ... The criminal justice system of the United States fundamentally serves to ensure that "the guilty be convicted and the innocent go free." Yet, ... the Government opposes the § 2255 petition while simultaneously conceding that Petitioner is a United States citizen and. therefore, could not be properly prosecuted pursuant to 8 U.S.C. § 1326. ... In effect, the Government is arguing that an innocent man who was wrongly convicted should not be released from the custody of the United States. Moreover, the Government, in opposing a petition that would correct the wrongful conviction of an innocent man, has wasted limited judicial and prosecutorial resources. Because

Perez cont. on p. 8

#### **Larry Mayes Awarded \$9** Million For 19 Years Wrongful Imprisonment

By James F. Love

n 18-year-old gas station attendant was Trobbed, abducted and raped in Hammond. Indiana on October 5, 1980. Two men. James Hill Jr. and Larry Mayes, were arrested for the crime and prosecuted as co-defendants. Both were convicted, with Hill sentenced to 80 years in prison and Mayes to 108 years.

In 2001 Mayes was excluded as the rapist by DNA testing unavailable at the time of his conviction. His conviction was overturned and he was released after a total of 21 years imprisonment. Hill had been released on parole in 1999 after serving 19 years, and his



Photo by Jennifer Linzer

conviction is pending as of late 2006.

Mayes filed a federal civil rights lawsuit in 2003 seeking \$19 million in damages for his more than two decades of false imprisonment. The defen-

included the Hammond Police Department and several officers. Among the lawsuits' allegations were that the officers failed to take any notes during the investigations first six-weeks, and they withheld from Mayes' trial counsel the exculpatory evidence that they pulled the victim off to the side and asked her to reconsider her identification of another person during a suspect line-up that did not include Mayes; and they used hypnosis techniques to "enhance" the victim's memory before she selected Mayes from a photo lineup that included multiple photos of him.

petition to overturn his Mayes' burden of proof in the civil suit was extremely high. He had to show that the police department's overall procedures constituted a systemic failure resulting in negligent conduct towards the constitutional rights of suspects.

> In a 106-page decision issued in July 7, 2006, U.S. District Judge Paul Cherry ruled against the defendant's summary judgment motion, and allowed the case to proceed to trial. He ruled that Mayes had met his burden of showing there were material issues of fact requiring a jury's determination in regards to whether or not the Hammond Police Department had failed to provide even the most basic oversight and training for the detectives in Mayes' case.

> Mayes' civil attorneys were Cochran, Neufeld and Scheck of New York City, the private for profit law firm of Peter Neufeld and Barry Scheck, co-directors of the non-profit Inno-

> > Mayes cont. on page 9

#### Perez cont. from p. 7

the prosecutor is the representative of the Government in a criminal prosecution, his role is more than a mere adversary; he is charged with ensuring that an accused receive due No competent defense attorney would adprocess—that is, a fair trial." 5

The Supreme Court has, therefore, established that it is a violation of the accused's constitutional right to due process for the Government, in good faith or in bad faith, to withhold any material, exculpatory evidence whether or not the defendant explicitly requests this evidence. See Brady v. Maryland, 373 U.S. 83, 87 (1963). 6

The prosecutor, moreover, is obligated to disclose any material, exculpatory information that is in its constructive possession—that is, any information that is in the possession of an "arm of the prosecution." ... Thus, the Court may impute, to the prosecutor, the knowledge of any exculpatory evidence that is known to any government agent or agency involved in the prosecution of a criminal case."

As the Government's representative, the prosecutor has the responsibility to be aware of all information in the possession of the Government and ensure that this information, if favorable to the defendant, is disclosed to the defense. Otherwise, government agents and agencies would be encouraged to withhold exculpatory evidence from the prosecutor in order to avoid disclosing such information to the defense. Such a system would be manifestly unjust since exculpatory information possessed solely by a government agent or agency

would never come to light. Innocent defendants could face conviction since such defendants would not have access to the information that would exonerate them. 8

vise his client to plead guilty to a charge on which the Government would be unable to convict the accused. Therefore, if the prosecution's failure to disclose evidence could have, with reasonable probability, resulted in an inability to convict the accused, that is grounds for vacating a conviction pursuant to 28 U.S.C. § 2255. 9

... [T]he evidence supporting the fact that Petitioner is a United States citizen, if improperly withheld, is material. 10

The Government had constructive knowledge of the fact that Petitioner was a United States citizen when he was prosecuted pursuant to 8 U.S.C. § 1326. In 2000, when the Government prosecuted Petitioner for illegal reentry, the INS was the government agency that handled legal and illegal immigration and naturalization. ... 11

The INS's knowledge of Petitioner's citizenship status may be imputed to the prosecutor because the INS acted as a part of the prosecution team. ... 12

In sum, the Government was obligated to disclose to Petitioner that he was a United States citizen because (1) that information was in the constructive possession of the prosecutor and (2) that information was material. Because the Government did not disclose the material, exculpatory information to him, Petitioner suffered a constitutional due process violation. ... 13

... To deny a United States citizen the privilege to reenter and remain in the United States, and the immunity from being convicted for doing so, would be "repugnant to the Constitution." ... 14

In the present case, because Petitioner has established that he is a United States citizen, it is a constitutional violation to convict him for reentering the United States. As a result, the Court finds that Petitioner's conviction and, in turn, his sentence should be vacated pursuant to 28 U.S.C. § 2255. 15

The vacating of Perez's conviction may aid his position in a federal civil rights lawsuit for wrongful imprisonment he filed. The defendants include the federal BOP, the DOJ, and the Legal Aid Society in Albany, New York that represented him on the illegal reentry charge in 2000. That lawsuit is pending as of December 2006.

#### Endnotes:

13 *Id.* at ¶48. 14 *Id.* at ¶49.

15 Id. at ¶50.

1 Perez v. United States, No. 1:05-CV-1294 (N.D.N.Y. 08/15/2006); 2006.NNY.0000291 ¶13 < http://www.versuslaw.com> mip://www.versusla 2 Id. at ¶¶24-26. 3 Id. at ¶¶28, 30-31. 4 Id. at ¶¶34-35. 5 Id. at ¶¶37-38. 6 Id. at ¶39. 7 Id. at ¶40. 8 *Id.* at ¶42. 9 Id. at ¶44. 10 Id. at ¶45 11 *Id*. at ¶46. 12 *Id*. at ¶47.



#### Mayes cont. from page 8

cence Project that aided in having the DNA tests conducted that led to Mayes' release. 1 They presented evidence that when Frank Dupey was appointed police chief in 1976, he was a former patrolman without any experience in supervising police or investigating crimes. He had been a clerk for Hammond City Judge Ed Raskosky, and when Raskosky was elected mayor, he had asked Dupey to head the department of 200 employees. Knowing he had no experience, Dupey passed his responsibilities to oversee the department down the line to a captain, also without experience, who then passed the responsibilities down to Detective (Lieutenant) Mike Solan. Solan had been in charge of the investigation into the crimes Mayes was convicted of committing.

None of the detectives involved in the rape and robbery investigation, had any training in identification procedures to be used in a rape case. In a lawsuit deposition given by Solan, he stated in response to a question by Mayes' counsel, "Identification procedure is so common. I mean, its not something that I

#### Baseball cont. from p. 4

will not be taken of such scientific facts and matters, however, unless they are of such universal notoriety and so generally understood that they may be regarded as forming part of the common knowledge of every person."

Although Mendez's argument that it is scientifically impossible for him to have thrown the firecracker relied on the understanding of physics pioneered by Sir Isaac Newton in 1679, the Court decided that because Mendez relied on a scientific formula beyond a layperson's expected knowledge, "we decline to take judicial notice. Consequently, Mendez's first assigned error is overruled." 1 In November 2004 the Ohio Supreme Court declined review of Mendez's conviction.

Oliver is so convinced of Mendez's innocence that after the jury awarded him \$1 million, Oliver said he was going to use the money to hire an attorney for his friend's fight to exonerate himself. Oliver said of Mendez, "I swear on my life he didn't do it," he said, "No, I take that back – I swear on my Marine reputation."

#### Endnote and Sources:

1 (*State v. Mendez*, 2004 -Ohio- 3107 (Ohio App. Dist.8 06/17/2004); 2004-ohio-3107, 2004.OH.0002907 ¶¶43-45 < http://www.versuslaw.com>)

have to sit there and tell my detectives, you Hammond's attorney announced the city know, get six pictures that are similar and make sure they're all the same race. I mean, we don't have to go to 101 academics here. prior convictions. They know this stuff counselor."

Yet the procedure Solan defended was that the witness was asked to reconsider identifying a person in a regular line-up who wasn't Mayes, and the witness was then hypnotized before finally identifying Mayes in a six-picture photo-lineup that included several pictures of him. So contrary to Solan's claim that the detectives involved in the investigation did not need a course in "101 academics," Mayes' misidentification was predictable because the procedures used by the detectives are well known to result in an unreliable identification. In spite of the shady identification procedures used in Mayes' case, there use wasn't disclosed to him until his conviction was overturned in 2001 - 19 years after his trial.

Prior to the start of Mayes' civil trial, lawyers for the city of Hammond unsuccessfully attempted to call into question the certainty of the DNA evidence that freed him. They suggested that before the DNA testing in 2001, the evidence may have been compromised while stored in the court evidence vault. It is not well known to the general public, but police and prosecutors who are only too eager to use DNA evidence to convict a criminal suspect, have for the past 15 years attempted to call that same certainty of DNA evidence into question when it exonerates a person convicted by non-DNA evidence.

Jury selection for Mayes' civil trial began on August 7, 2006. The potential jurors were asked if they would have any difficulty awarding millions of dollars in damages to an African-American who had been wrongfully imprisoned for several decades.

Mayes took the stand on August 16. He described what it was like to be confined for 19 years in a maximum security prison convicted of a rape and robbery he had not committed which had followed him being jailed for two years awaiting trial. The jurors were not permitted to hear evidence that Mayes had a prior conviction for rape and robbery. That prior unrelated conviction was why Mayes was targeted by police for the crimes against the gas station attendent that he didn't commit.

Two weeks after the trial began, the case was submitted to the jury on August 22. After only 4-1/2 hours of deliberation the jury returned a verdict against the city of Hammond and retired Detective Solan. They awarded Mayes \$9 million.

would appeal the jury's decision based on the exclusion of evidence about Mayes'

In the years since Mayes' conviction Solan has been promoted from lieutenant to captain in Hammond's Police Department. Before the civil trial the city of Hammond told Solan they would pay any damages awarded against him, and they paid for his attorney during the trial. After the jury's verdict they reneged and said they would only pay the first \$300,000 of his portion of the award. Solan's lawyer Nick Brustin said of the city, "They have never disciplined him, never investigated him (for misconduct in Mayes' case). Now, rather than pay Larry Mayes, they are going to force (Solan) into bankruptcy."

On December 8, 2006, a hearing was held in the U.S. District Court to determine how much of the \$9 million award Solan was liable to pay. Solan testified his assets were very modest. After the hearing Hammond's mayor, Thomas McDermott Jr., said the city would have to sell municipal bonds to pay their portion of the award, which would be levied as a small tax on city residents. In addition to the judgment, the city's legal fees continue to mount. They totaled more than \$788,000 before their appeal was filed. Although it is unknown if they will be successful, Mayes' attorneys are likely to request that their legal fees and expenses be added to the money he was awarded. If granted, that would add an additional \$3.6 million plus to the award. Otherwise the legal fees will be paid out Mayes' \$9 million.

After the jury returned the \$9 million award, the 57-year-old Mayes said that he still remembers Solan taunting him 25 years ago, telling him that he "would be an old man before he ever saw the outside again." Mayes told reporters, "I just want to let him know: 'How you like me now?"

"Hypnotism, withheld evidence highlighted in \$21M lawsuit," by Joe Carlson, *The Times* (Munster, IN), July 17, 2006. "Hammond defends police practices," by Joe Carlson, The Times (Munster, IN), August 9, 2006.

"Defense firm fights to include DNA evidence in Hammond trial," by Joe Carlson, *The Times* (Munster, IN), August 10, 2006.

"Mayes takes stand in suit against copes," by Susan Brown, The Times (Munster, Indiana), August 17, 2006. 'Jury says city must pay \$9 million in wrongful conviction suit," by Joe Carlson, The Times (Munster, IN), August 23, 2006.

"Police officer faces paying part of \$9 million law-suit," By Andy Grimm, *Post-Tribune* (Merrillville, IN), December 9, 2006.

1 Scheck and Neufeld publicize themselves as co-directors of The Innocence Project at the Benjamin N. Cardozo School of Law at Yeshiva University, but The Innocence Project's IRS Form 990 (2005) doesn't list them as having any official association with the organization.

<sup>&</sup>quot;Two win Jacobs Field bomb suit. Jury awards each \$1 million for false accusation," By James F. McCarty, Cleveland Plain Dealer, November 10, 2006.

<sup>&</sup>quot;Jury Awards Fan \$1 Million," by Matt Suman, Cleveland Morning Journal, November 11, 2006.

#### **Mother Refunded Money Paid To Shyster Lawyer** Hired To Defend Her Innocent Son

by John Cole Vodicka

Fer name is Catherine Williams. I want to Her name is Camerine williams. I have someone who, over the last four years, I have come to know well, and who has taught me much about perseverance, persistence, endurance and faith.

Catherine Williams is an African American woman in her mid-forties. She is a single mom. She lives in Americus, Georgia and works at a nursing home.

In April 2001, Catherine Williams called me on the telephone asking for the Prison & Jail Project's help. The story she shared with me was this: Two years earlier in 1999, Catherine Williams' then-18-year-old son Tacoma had been arrested and charged with several criminal offenses — falsely so-she believed. Catherine, who is not a wealthy woman by any means, scraped up \$750 to hire an Americus attorney. The \$750 was the amount this lawyer required to take Tacoma's case and to file the necessary paperwork and motions to begin representing the young man. Then several months later, in early 2000, the lawyer called Catherine demand another \$1,500 because he was "going to take the case to trial" and needed the money to do that. It was money she didn't have, but convinced of her son's innocence and the lawyer's legal abilities, she found the \$1.500 and handed it over to the attorney.

Months went by and she heard nothing more from the lawyer. Later that year, 2000, the lawyer's office called her and said they were going to need even more money from her, that the case was going to trial and they needed to hire an investigator to check on certain matters. Catherine was unable to raise any additional money; the lawyer told her that the \$1,500 she had paid him earlier would not be sufficient.

Then in October, 2000. Catherine was visiting neighbors when the grandmother of the codefendant in the case against Tacoma called out to her: "Hey, did you hear the good news? The DA's office dropped the charges against my grandson and Tacoma!" Catherine was puzzled. She had just days earlier talked to Tacoma's lawyer who was demanding more money from her because "Tacoma's case was going to trial."



refund check

A confused but determined Catherine Williams then went in person to the district attorney's office in Americus and asked about her son's case. "We dismissed those charges last month," the district attorney said, handing a copy of the indictment to Ms. Williams that had stamped "nolprossed" on the paper, dated October, 2000.

lawyer's office to

find out if the case against Tacoma had

indeed been dis-

missed. The attorney

said no, and again de-

manded more money

from Catherine.

Catherine returned home and immediately put in a call to the lawyer's office. She told his secretary that she had a copy of the legal document showing that Tacoma's case had been dismissed. The secretary denied that the case was dismissed. Catherine hung up the phone. Minutes later the lawyer himself called her back to tell her that, yes, the DA It was also at this time that Catherine rehad decided to dismiss the case.

Catherine was incensed. "You knew this case had been dismissed and vet you were trying to get more money from me. You have been lying to me." The lawyer claimed ignorance. Catherine demanded that he return the \$1,500 she had paid him a year earlier, telling him, "You didn't do anything at all on this case." The lawyer refused to refund Catherine Williams any of the money.

Catherine told me all this in that April 2001 phone call to me and then, several days later, in person, when I first visited her in her home. She showed me the receipts she had for both the \$750 retainer fee, and the \$1,500 additional fee the lawyer had initially demanded of her. I was astonished. I told Catherine that in all likelihood she was entitled to be refunded at least the \$1,500 she had forked over to the attorney.

On April 13, 2001 a determined Catherine Williams and I sat down and drafted a letter to the lawyer, formally requesting that he refund the money to Catherine. We waited three weeks but there was no response to our letter.

She and I then filed a grievance against the attorney on May 7, 2001 with the Georgia Bar Association, asking that the Bar investigate the matter. The Bar in turn notified the lawyer that our grievance had been filed; the lawyer responded to the Bar, and in his response actually fabricated invoices and other documents to make it appear as though

Catherine called the he had properly represented Tacoma Williams in the early stages of the criminal case. In June 2001, Catherine and I filed a rebuttal to the lawyer's statement, taking him on point-by-point-by-point.

> More time went by. In December 2001 we got word that the lawyer had been disbarred. He was disciplined by the Bar not because of his shoddy representation of Tacoma Williams but because of other, even more serious complaints filed against him. It was during this period of time that the attorney had been indicted locally for cocaine possession. "So those who are last will be first, and those who are first will be last, "Catherine told me one morning when I visited her at her home.

> Although the bar gives aggrieved clients like Catherine a chance to recoup money taken from them by shyster lawyers and ex-lawyers. the lawver in question had been disbarred. So it was uncertain that the Bar had any further authority over whether or not he made things right with any of the clients he'd ripped off.

> ceived a package from the Georgia Bar asking that she fill out a pile of forms so that she could apply for reimbursement of the \$1,500 from the Bar's "Clients' Security Fund." Catherine filled out this set of forms and we sent them to the Bar.

> More time went by. In June 2002, Catherine called me to ask what more, if anything, she could do. I was not very encouraging to her, but I did call the Bar for an update. I was told Catherine could still file a request to have the matter "arbitrated" by Bar-chosen arbitrators. We did make that request, requiring Catherine to fill out vet more forms. swear out an affidavit, and so on.

> We then heard nothing for quite some time. Catherine would call me on occasion, or stop at my office, to ask about her grievance, but more significantly, let me know she was not going to give up the fight. She must have sensed that I was having serious doubts about prospects for success in her quest for justice. Indeed, I was getting weary, and very cynical. I didn't tell her this, but I was starting to feel that there was no way the high and mighty legal system was going pay serious attention to one African American women in Americus. Georgia complaining about losing what was to them a piddly \$1,500. It felt futile to me.

> I remember visiting one time and wondering aloud to Catherine if the Georgia Bar Association really cared about the misbehavior of Georgia's lawyers, if it was inter-

> > Mother continued on p. 11

#### Mother continued from p. 10

ested in the consumer at all. Catherine looked dead at me across her kitchen table and said. "Jesus looked straight at his disciples saying, 'This is impossible for human beings, but for God everything is possible."

Eighteen months later the Bar notified Catherine that a fee arbitration hearing had been set up and that on December 18, 2003, she was to appear in Americus before three arbitrators.

I was not available to be with Catherine on December 18, 2003, having committed to other matters on that day. So Catherine Williams went into a conference room in an Americus law office to sit in front of three white male arbitrators, with the offending lawyer and his attorney present. She confronted the lawyer face-to-face and demanded that she be refunded the \$1,500 he "swindled" from her 4-1/2 years earlier! She told her story. The lawyer became belligerent at this hearing, Catherine said, and called her names, made false accusations against her, and, at one point, had to be restrained by his lawyer. Catherine said she sat upright throughout the hearing, looked each of the men in that room in the eye, and told them that she was confident "truth would win the day." "It's in God's hands," she said, "and God knows the truth."

Six months later, in June 2004, Catherine received word that the arbitration panel had voted 2-1 to award her the \$1,500! We were elated. But not long after, we were informed that the lawyer had refused to be bound by the arbitrators' decision, since he was no longer licensed to practice law. There would be no money coming her way. Her only option, according to the Bar official, was to take the now-disbarred lawyer to court over the arbitration, something that would take even more time, require legal assistance, and, in all likelihood, not be successful.

I was disappointed, mostly for Catherine. I was also assuming that it was time to throw in the towel. You gave it your absolute best shot, Catherine. I told her. You forced people in high places to at least take notice about what happened to you; maybe in the future others will gain from your trailblazing effort. Catherine's response was to quote to me a scripture passage from Luke's gospel: "The seeds that fell in a good soil stand for those who hear the message and retain it in a good and obedient heart, and they persist until they bear fruit."

Catherine continued to hold out hope, and we petitioned the Bar Association once again to consider appointing her an attorney to file the arbitration litigation against the lawyer. To my absolute surprise, the Bar agreed to do just that! Catherine received a letter from the Bar in April 2005 telling her that not only would they appoint an attorney to represent her, but that the lawyer they chose for her was the Georgia Bar Association's General Counsel!

"If you believe, you will receive whatever you ask for in prayer," Catherine told me on the telephone that day.

Then, one month later, on May 9, 2005, Catherine called me early that morning. In her voice I could detect the smile on her face and the sparkle in her eyes as I listened to her words to me: "John, I got another letter from the Bar people, that Clients' Security Fund we applied to back in December 2001. They've agreed to send me \$1,500." Catherine chuckled. "But I have to fill out some more forms first, and get them notarized."

I cradled the phone on my shoulder and wiped tears from my eyes as I listened to Catherine read to me the letter she'd just received from the Bar's representative. I jumped into my car and drove out to her house to look at the letter myself, to celebrate with this courageous, perseverant woman this monumental victory she had achieved. We filled out the forms, I put my notary stamp on the documents and we mailed the material back to the Bar that very day.

Two weeks later a certified check for \$1,500 in Catherine Williams's mailbox. Catherine gave me permission to come back out to her house to take a picture of her, proudly holding the check with outstretched hands. (See photo on page 10.) We celebrated all over again! It had been four years, almost to the day, since Catherine Williams had called me to ask what she could do to make a wrong right, and would I help her.

"You have been my ram in the bush," Catherine said as we hugged goodbye. I brushed off her compliment and praised her for her determination and her gumption. I told her how much she had taught me about human dignity in the four years we spent fighting the system. And finally winning!

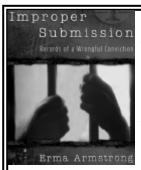
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#### **Michael Evans Loses Compensation Lawsuit** After 27 Years Of Wrongful Imprisonment

By James F. Love

Michael Evans and Paul Terry were 17-years-old in 1976 when they were arrested for the rape and murder of 9-year-old Lisa Cabassa on Chicago's South Side. Detectives from Chicago's notorious Area 2 violent crime division, led by Detective Jon Burge, investigated young Cabassa's murder.

Twenty-seven years later, Evans and Terry were exonerated in 2003 by DNA evidence and released from prison. Two year later Illinois Governor Rod Blagojevich pardoned the men on January 5, 2005. Evans and Terry were then paid \$160,000 by the State of Illinois for the 27 years they spent wrongfully imprisoned, which is the maximum allowed by a state law passed in the mid-1990's. That law is now under review as being inadequate. (See, Illinois Legislature To Review Compensation For Wrongfully Convicted, on page 13.)

Evans filed a civil rights lawsuit in federal court that included the Chicago Police Department and a number of police officers as defendants. The suit claimed that to obtain Evans' wrongful conviction the officers fabricated evidence and withheld exculpatory evidence from his attorneys. Evans also claimed that the police told him that if he cooperated he would be released to his mother. At the time of his arrest Evans was not only a minor, but he could barely read and write due to a learning disability. Evans asked for \$60 million dollars in damages and an additional \$2 million dollars for unspecified damages.

The civil trial began on July 11, 2006.

During the trial Kenneth Adams, who spent 18 years wrongfully imprisoned as a defendant in the infamous "Ford Heights Four" case, testified regarding the violence and squalor that prisoners are forced to live with every day. Adams had been imprisoned in both the Menard and Danville prisons where Evans had been imprisoned.

Adams testified, "You have to be cold. You have to be heartless at times. You feel no emotion at all." He also testified about when soon after his imprisonment he saw a prisoner stabbed: "The thing that struck me the most about that was no one else seemed to notice. It seemed no one cared about this



away that you have to survive the best you can. No one's going to come to your aid or assistance."

The judge called a halt to the trial and recessed until the following day while Evans was describing the ordeal he had suffered

through while wrongfully imprisoned for the rape and murder of a child. He testified, "My mother was experiencing something she shouldn't have been experiencing. I was trying to be strong for my mother," before he broke down sobbing on the witness stand about an hour into his testimony.

Andrew Hale, an attorney for the defendants, asserted the police had acted reasonably, pointing to the fact that Evans had advanced three different alibis for his whereabouts at the time of the crime. In 1976, Evans had told police he was in his cousin's basement at the The only "eyewitness" in the case, Judy time of Cabassa's abduction. He later said he was at 86th and Saginaw playing with a 7-year-old niece. Then in Evans' application for a pardon, his attorney claimed Evans had been home with influenza. Evans testified at the civil trial that he couldn't remember the exact time of the latter two of those alibis, in relation to the time of the crime.

What the defendant's lawyer tried to obscure is that Evans' lack of certainty about where he was at a specific time – in this case when Lisa Cabassa was a crime victim – is not unusual. In general, only people who know they are going to need an alibi have all the times and dates of when they were at particular places organized in their mind and ready to present to the police if questioned. Except perhaps when working, a person does not normally keep careful or deliberate track of where they were at a specific time during the day. When asked later to account for their whereabouts on a particular day, the person has to reconstruct their past from records, memory, and from the memory of other people.

Given time, an alibi may be reconstructed in detail, but when an innocent person is in the heat of a first confrontation with police who are making what seems to be an outrageous accusation — such as happened to the 17-yearold Evans — it is extremely difficult under the stress of the moment to think clearly, quickly and accurately. When asked for an alibi on the spur of the moment, the answer is usually a confused best guess that is vague and lacking in detail. It is not unusual for the person to give alternative answers, consisting of, "Well, I might have been here – no wait – I went over

individual. I learned right there first, and then I think I...," and so on. This is especially true when an accused is asked to provide an alibi for a short period of time several months in the past.

> Yet frequently prosecutors argue before juries that the first answer given by an accused is a "false" alibi that evidences a guilty mind. Although such practices are unfair because they disregard normal human behavior, they are nevertheless used to prejudice the jury by substituting an unfair and inaccurate insinuation of deceptiveness for proof of guilt.

> Cook County State's Attorney Richard Devine testified during the civil trial that it was the DNA evidence, not allegations of police misconduct, that gave rise to the decision by his office not to retry Evans. In 2003 Devine wrote a letter to a local newspaper that expressed his opinion the new DNA evidence "undercut" the evidence in the case against Evans.

> Januczewski, testified that she had been repeatedly subjected marathon to interrogations for six weeks by police before she named Evans as the person she claims was "wrestling on a street corner" with Cabassa. However, Januczewski didn't come forward until five days after Cabassa's murder, when she learned a group of people were offering a reward for information. It is unknown if Januczewski saw anything or if she made up her "recollection" in an effort to collect the reward.

> On August 8, 2006, the jury found against Evans and denied all of his claims for damages. Unless Evans can prevail on appeal, that will mean that for over 27 years of wrongful imprisonment he will only receive the state paid compensation of \$160,000, which amounts to a mere \$6,000 per year while imprisoned for what the prison population considers the most horrid of all crimes.

> Locke Bowman of the MacArthur Justice Center at Northwestern University told reporters in regards to the jury deciding against Evans' claim, "30 years ago a miscarriage of justice took place at 26th and California." (The Cook County Criminal Court where Evans was convicted.). Bowman then added, "Another miscarriage of justice took place here today."

> Burge and other detectives of Chicago's Area 2 are presently awaiting disposition of numerous civil suits brought against them by citizens claiming they were tortured as

> > Evans cont. on p. 13

#### Illinois Legislature To **Review Wrongful Conviction Compensation**

By James F. Love

ne day after Michael Evans' federal civil rights lawsuit seeking \$60 million dollars for 27 years wrongful imprisonment was rejected by a jury, Illinois legislators began discussing increasing the \$160,000 compensation cap set by a state law passed in the mid-1990's.

Illinois House Majority Leader Barbara Flynn Currie stated her belief the \$160,000 the state awarded Evans was inadequate compensation. She stated she hoped the Illinois Legislature would re-address the issue. State Rep. Mary Flowers (D-Chicago), said she would reintroduce a bill, which has twice before been rejected, to increase the compensation paid to a person found to have been wrongfully convicted.

Karen Daniel, a senior staff attorney at the Northwestern University School of Law's Center on Wrongful Convictions, said, "It doesn't matter whether police acted wrongly or a prosecutor acted wrongly, it's the same damage for the innocent person who went to prison. You're harmed regardless of how you got there. You're still losing that part of your life."

DNA exonerations nationwide have contributed to state legislatures addressing or revisiting compensation for the wrongfully convicted. In the past seven years at least eight states have enacted compensation laws, or raised the amount of compensation. California allows \$100 a day; New York has no limit; Ohio recently doubled its amount of compensation to over \$43,000 per year; Tennessee has a \$1 million cap on an award. Twenty-one states and the federal government have some law providing for compensation.

Source: "More pay sought in wrongful jailings." by Michael Higgins, Chicago Tribune, August 10, 2006.

to torture, the practice is now documented

as having been widespread in Area 2. Such

practices become well known throughout

the communities where they are practiced.

So it is little wonder Evans testified he was

in great fear of his interrogators when

Evans' attorney, Jon Loevy, told reporters

that evidence of the practice of torture on

suspects by the Area 2 detectives had been

ordered by the judge to be withheld from Evans' civil jury. Loevy said Evans will

questioned as a 17-year-old in 1976.

#### Evans cont. from p. 12

cases were "too old" for charges to be filed.

The degree of wrongdoing by the Chicago PD is indicated by the fact that eight of the ten officers named as defendants in Evans' civil suit invoked their Fifth Amendment right to remain silent and not incriminate themselves during the court ordered depositions.

defendant officers personally subjected him

appeal that the judge's evidentiary rulings prejudiced Evans and unfairly affected the outcome. Loevy added that he believes that "at the end of the day when all the evidence is heard, we will prevail."

Paul Terry, Evans' co-defendant, has a federal civil rights lawsuit pending that has not yet come to trial.

Previous JD article about Evans and Terry, "DNA tests may prove yet another quarter century injustice in Illinois," Snapshots, Justice: Denied, Vol. 2, Issue 9.

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27-year inmate in tears at wrongful conviction trial, by Frank Main, Chicago Sun-Times, July 12, 2006.

DNA results precluded retrial, prosecutor says. Says police misconduct had no influence. Associated Press, July 30, 2006.

1 of Ford Heights 4 helps former inmate, by Jeff Coen, Chicago Tribune, August 2, 2006.

Ex-inmate's \$60 million suit against city denied, by Rudolph Bush and Jeff Coen, Chicago Tribune, August 8, 2006.

"Wrongly convicted, but he gets zilch," by Natasha Korecki, Chicago Sun-Times, August 9, 2006.

criminal suspects. Court appointed special prosecutors have found evidence that dozens of suspects might have been beaten, dunked in water, and hooded with a typewriter cover to simulate suffocation, in the interrogation room of Area 2 headquarters. Although the special prosecutors found there was sufficient proof of criminal conduct by the officers to support their prosecution, the

Even though Evans did not claim the

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#### Wrongful Conviction **Compensation**

Comment By James Love

While the question of what monetary compensation is adequate is extremely complicated, a flat "daily" or "yearly" rate of compensation does not take into account the progressive harms caused by lengthy imprisonment. Compensation should be determined based on a geometric progression, as opposed to a linear flat-line increase. What is the first day of wrongful imprisonment worth compared with the last day of a 20-year wrongful imprisonment - due to the harm that has accumulated between the first and last day?

The longer the period of wrongful imprisonment, the greater the harm personally and psychologically. Friends and family die. Acquaintances who may have initially supported the wrongfully convicted person's battle for freedom, fade away as time passes. The wrongfully convicted person still unexonerated after years of effort, finds him or herself more or less alone in the battle for justice, and faced with greater and greater skepticism, not only from fellow prisoners, but also from society in general. Most of society firmly believes that if a person is truly innocent, the courts would have already corrected the error that led to the wrongful conviction before 10. 15 or 20 years have passed. Even though DNA exonerations of people after their imprisonment for years shows this common belief to be untrue, it is still a reaction people have to a prisoner's claim of innocence.

What price should be placed on a wrongfully convicted person's loss of hope, as the years pass, that vindication will ever happen? What price should be placed on a person prevented from attending a parent's funeral? What price can be placed on a person being wrongly branded as a criminal and forcibly separated from a child whose mind is poisoned by a bitter ex-spouse, or family or friends, or a new step-parent? What price can be placed on a person's personal and professional losses, the loss of years in which to live and in the quality of life left in those years?

A flat per diem or annual rate of compensation doesn't account for the cumulative effect of losses a wrongly convicted person experiences. The amount paid should increase for each year of imprisonment, and the annual increase should not be flat-lined. The multiple harms caused by long-term wrongful imprisonment increase geometrically as the years pass, and should be compensated accordingly.

he hazardousness of living in the former Soviet Union (1917-1991) is attested to by that regime's murder of more than 61 million men, women and children innocent

#### Migalka Under Attack In Russia – **Innocent Driver's Conviction Overturned After Thousands Protest**

By Hans Sherrer

of any wrongdoing.1 (The methods used included shooting, starvation, working to death, freezing, etc.)

Stalin was the most prolific of the Soviet Union's murderers, and depending on the source, he is either ahead or behind Communist China's Mao Tse-tung as history's most prolific mass murderer. While Stalin and other top communist leaders had the most privileges, people throughout the Soviet Union with political connections shared their elitist attitude that they were superior to everyone else in society.

The Soviets' elitist attitude that common folk were disposable second-class citizens was so deeply ingrained in the psyche of Russians that after the dissolution of the This widespread resentment of migalka came Soviet Union in 1991, certain Soviet practices granting special privileges to high government officials and politically connected persons were allowed to continue.

One of those privileges is known as migalka - which is a flashing blue light on the roof of a vehicle that in conjunction with a siren and a special license plate allows a vehicle's driver to disregard all traffic law, and gives that vehicle the right of way over all traffic going in both directions. Migalka is different than the disregard of traffic laws by emergency personnel and police – since it is a perk unrelated to assisting public safety.

Thirty government agencies have the authority to issue *migalka* privileges, and fifteen years after the Soviet Unions dissolution, more than 5,000 people in Moscow alone have migalka privileges. Nationwide the total in Russia is many thousands more.

The number of privately owned cars in Russia has increased significantly since 1991 and so traffic jams, which were unknown under the Soviets, are now common in Russia's larger cities. That has resulted in the illicit sale of migalka privileges to wealthy private citizens by corrupt government officials. The going bribe is about \$50,000 for basic migalka privileges – the use of the blue light, a siren and the special license plate to avoid the traffic laws. However, for a bribe of \$200,000 or more, a person can obtain a migalka and a predisaniye - which is an official document forbidding the police from even visually inspecting the inside of a vehicle through an open window.

Since few people in the Soviet Union drove cars, most people saw *migalka* as a perk of government position that didn't affect their daily life, and even if they didn't like it, they couldn't do anything to change it. Its continued use, however, has bred deep resentment among the tens of millions of Russian who now drive and see government workers and politically connected business persons legally disregard the traffic laws with impunity as they careen down congested city streets and highways.

The large number of traffic related deaths and injuries in Russia is attributed in part to the many thousands of recklessly driven vehicles sporting the migalka.2

to a head in February 2006, when a Siberian railway worker, Oleg Shcherbinsky, was convicted of "failing to yield" to the Mercedes of Mikhail Yevdokimov, the governor of Russia's Altai region in SE Siberia.

On August 7, 2005, Yevdokimov's Mercedes was traveling at 80 miles per hour going in the same direction as Shcherbinsky, but it was being driven on the wrong side of the two-lane road with its blue *migalka* light flashing. The Mercedes crashed into a tree after sideswiping Shcherbinsky's car that had just begun making a left-hand turn. Governor Yevkokimov, his bodyguard and his driver were killed. His wife was seriously injured. Criminal charges were filed against Shcherbinsky in the death of Yevkokimov.

Shcherbinsky's defense was he didn't see the fast moving Mercedes in his rear view mirror when he began making the left turn. His defense was rejected by the judge who ruled Yevkokimov had the right of way so Shcherbinsky was responsible for the accident and the governor's death. He was convicted on February 3, and sentenced to four years imprisonment in a labor colony.

The reaction to Shcherbinsky's conviction was swift and intense among Russian's fedup with the class structure of Russia's drivers - one class being the common folk required to follow the law, and the other the elite lawless class of politically connected people granted migalka privileges. A grass roots organization, the Free Choice Motorists' Movement.



Russians protesting Oleg Shcherbinsky's conviction

used the Internet to quickly organize a nationwide protest of Shcherbinsky's conviction.

Vyacheslav Lysakov, head of the Free Choice Motorists' Movement, said several days before the protest was scheduled to take place, "Shcherbinsky's sentence has really shocked people, because it shows that in this country anyone can be put in jail, even if he is innocent."3

On February 12 (only nine days after Shcherbinsky's conviction), thousands of motorists in 21 cities throughout Russia participated in the protest by tying black and orange ribbons to their cars and slowly driving in convoys through their respective city. The protestors displayed signs and waved placards with messages that included: "Today Shcherbinsky – Tomorrow You!" and, "We want the law to be equal for everyone!"4

One of the protestors in Moscow, a 30-yearold man, told a reporter, "The situation is getting absurd. This cannot be tolerated any longer. The Shcherbinsky trial showed yet again that the authorities view ordinary citizens as nothing more than cattle."5

Another protester said, "The Shcherbinsky case has resonated throughout Russian society."6

The police didn't just stand by and let the protestors clog city streets. They applied a heavy hand in an effort to disrupt the protests, which had been publicly announced in advance, by stopping participating drivers for "document checks and purported traffic violations."7 In Moscow alone, hundreds of drivers were harassed.

The car convoys were the most organized public protest in Russia since the early 1990s, and it sent shockwaves through the Kremlin and Russia's regional governments. The black and orange ribbons on the cars was highly symbolic. The black represented the "death of justice" and the orange symbolized Ukraine's 2004 "Orange Revolution" when masses of protesters forced a

Migalka cont. on page 15

#### **Daughter Awarded \$315,000** For Deceased Father's Wrongful **Murder Conviction**

By JD Staff

C ixteen-year-old Thai-Ameri-Can Sherry Ann Duncan was found murdered in scrubland outside Bangkok, Thailand in August 1986.

Four construction workers and their employer were soon arrested on suspicion of being involved in the schoolgirl's murder. The employer, Winai Chaipanit, was soon bailed out by his girlfriend, socialite Suwimon Pongpat.

Physical brutality by the police during interrogations resulted in a confession by all four workers. The police also intimidated other people to provide witness statements implicating the men in the abduction and murder of Duncan, who had an American father and a Thai mother.

During their trial all four defendants retracted their confessions, claiming they were false and had only been provided to stop the police's brutal interrogation tactics. They also claimed the prosecution's witnesses weren't being truthful about seeing them with Duncan.

the Criminal After Court rejected the men's defense and found them guilty, they were all sentenced to death.

As the men languished on death row while their appeals were considered, defense lawyer Pennapa Thamrungroj encountered police opposition and intimidation as she doggedly pursued leads to prove that the prosecution's witnesses hadn't been truthful, and that other people were responsible for Duncan's murder. After high police officials intervened and assigned a new officer to head a reinvestigation of Duncan's murder, new evidence surfaced that other men had committed the crime

Relying on the fresh evidence of the four condemned men's innocence, in 1993 Thailand's Supreme Court overturned their convictions and ordered their immediate release.

The seven years in Thailand's worst maximum-security prison while awaiting execution were not kind to the men's well being. One died in prison before his exoneration, another died shortly after his release, another was permanently



Sherry Ann Duncan

disabled from a beating by guards, and the fourth, Thawat Kitprayoon, died of cancer in 1999.

The new evidence discovered during the reinvestigation of Duncan's murder

resulted in the 1995 prosecution of Suviboon Patpongpanich as the mastermind of the crime. She was subsequently convicted of hiring two hit men to murder Duncan for dating her two-timing boyfriend. In 1999 Thailand's Supreme Court overturned Suviboon's conviction on the ground of insufficient evidence.

It was eventually revealed that Duncan had also been a twotimer. She had been dating both Suviboon's boyfriend Chaipanit, the 42-year-old businessman who had been arrested in 1986 on suspicion of being involved in her murder.

After the men's exoneration, a suit for compensation was filed in the Civil Court naming the Royal Thai Police Office as the primary defendant. In October 2003 \$1 million (26 million baht, Thailand's currency) was awarded to the lone survivor and the relatives of the three deceased wrongly convicted men.

The case then took a new twist when Thawat's former employer Chaipanit, filed a claim for Thawat's share of the \$1 million civil award. In support of his claim he produced Thawat's will that named Chaipanit as sole beneficiary of any award to Thawat from the civil suit. Thawat's daughter, Ratchanee Kitprayoon, responded by filing a complaint with Thailand's Crime Suppression Division alleging Chaipanit falsified the will, and her legal challenge to his claim blocked any payment to him pending resolution of the dispute.

The Civil Court decided in favor of Thawat's daughter when it ruled that the purported will was invalid because it didn't bear the required authenticating signatures of witnesses. Chaipanit appealed, and on July 28, 2006, Thailand's Supreme Court upheld the lower court's ruling. It also ordered the payment of \$315,000 (11.9 million baht) by the Royal Thai Police as compensation to Thawat's daughter. She said that she had spent \$16,000 opposing Chaipanit's false claim (which is three to four years wages for a typical Thai).

As of the fall of 2006 Sherry Ann Duncan's 1986 murder re-

Daughter cont. on p. 16

#### Migalka cont. from page 14

Kremlin backed candidate to step down after he had won a rigged election.

Russia's central government recognized they needed to quickly deal with the furor caused by the Shcherbinsky case and the attention it focused on the trafficking in migalka privileges. They promptly announced a *migalka* would only be available to emergency services (police and ambulances), senior government

officials, judges and members of Russia's parliament.

Another development after Shcherbinsky's conviction was one of Russia's most prominent lawyers, Anatoly Kucherena, agreed to handle his appeal at no charge. Also, petitions

of people across Russia were delivered to the It was speculated in the Russian media that Altai Regional Court that was considering Shcherbinsky's appeal.

Expedited consideration was given to Shcherbinsky's appeal, and less than six weeks after the nationwide protests, his conviction was set aside on March 23, 2006. The court ruled Shcherbinsky had acted lawfully while the governor's driver had "grossly violated" several traffic laws. He was released later that day after seven months in custody.

> He left the jail in a car that had one of the protest stickers that cars all over Russia displayed — "All of us are Shcherbinsky." His wife was overjoyed that he wouldn't be spending years at hard labor in prison, "We had faith from the very beginning to the end."8

Shcherbinsky benefited from a combination of excellent legal representation on appeal and the nationwide outrage over the unfairness of his conviction.

#### Endnotes:

6 Id.

1 Death By Government, by R.J. Rummel, Transaction Publishers, New Brunswick, N.J., 1994. Chapter 4: 61,911,000 Murdered: The Soviet Gulag State.

2 In 2003, 36,000 Russian deaths and 250,000 injuries were related to traffic "accidents." Road traffic injuries in the Russian Federation. See, Facts and figures, World Health Organization,

www.euro.who.int/violenceinjury/injuries/20060425 2.htm 3 Russian drivers to jam streets in protest, NewKerala.com, February 10, 2006.

4 Angry motorists protest russian VIP traffic rules, Australian Broadcasting Corp., February 12, 2006, www.abc.net.au/news/newsitems/200602/s1568037.htm 5 *Id*.

7 Police Pull Over Cars During Drivers' Protest, by Carl Schreck, Moscow Times, February 13, 2006, p. 3. 8 Siberian Court Overturns Ruling, Frees Driver, by Judith Ingram (AP), St. Petersburg Times (St. Petersburg, Russia), March 24, 2006.



#### State of Connecticut v. Judith Scruggs

No. SC 17587 (Conn. 09/05/2006): 2006.CT.0000448< http://www.versuslaw.com>

The Connecticut Supreme Court ordered the acquittal of Judith Scruggs from her conviction of contributing to the suicide of her 12-year-old son by keeping a "messy" home. The following are excerpts from the September 2006 opinion.



dith Scruggs was a single parent living in a three bedroom apartment with her two children, Kara Morris (Kara) and Daniel. Kara was seventeen and Daniel was twelve. The

defendant worked approximately sixty hours a week at two jobs-one as a full-time employee of the school that Daniel attended, the other as a part-time employee at Wal-Mart. Daniel was bullied relentlessly at school and, from September through December, 2001, was absent on many days. He frequently exhibited poor hygiene and occasionally defecated in his pants. At home, he slept in his bedroom closet, where he kept knives and a homemade spear to protect himself. The state department of children and families (department) was aware of Daniel's problems, and had been working with the defendant to have him placed in a different school. At some point in

#### Daughter cont. from page 15

mains an unsolved crime. A 2001 movie about the case, Sherry Ann, received excellent reviews for its production values, acting and faithfulness to the facts.

Duncan's murder was one of the most publicized crimes in Thailand's history, and the unprofessional conduct of the police during the initial investigation of the case, including the brutal interrogations that caused all four defendants to falsely confess, resulted in changes to the country's criminal code.

Note: As of December 2006, the DVD of Sherrv Ann has only been released in REGION 0 PAL FORMAT, which is incompatible with the DVD players sold in the United States.

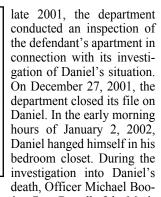
#### Sources:

Our Man in Asia Pacific, by Mike Thomason, July 17,

Daughter of wrongfully convicted man gets b11.9m, Bangkok Post, July 29, 2006

Outcome in Sherry Ann Case, Thai News, Issue 59, October 2003, p. 2

Kin win case for compensation, The Nation, Bangkok, Thailand, July 29, 2006



[12] ... In late 2001, Ju-throyd and Detective Gary Brandl of the Meriden police department, Pamela Kudla, a crisis intervention specialist called in by the police to assist Daniel's family, and Ronald Chase, an investigator for the state medical examiner's office, entered the defendant's apartment. They observed that it was extremely cluttered and that it had an unpleasant odor.

> [14] Thereafter, the state filed a four count information [charging Scruggs with child neglect or endangerment violations.]

> [16] The jury found the defendant guilty under the first count ... only ["willfully or unlawfully causing or permitting a child under the age of sixteen years to be placed in such a situation that the health of such child was likely to be injured ... [by] providing a home living environment that was unhealthy and unsafe" in violation of § 53-21 (a) (1).]

> [22] The trial court rejected the defendant's claim that expert testimony was required to establish that the conditions in the apartment likely would result in injury to the mental health of a child.

> [27] On appeal, the defendant claims that: (1) § 53-21 (a) (1) is unconstitutionally vague as applied to her conduct because the statute provides no notice that poor housekeeping may be a criminal offense; and (2) the evidence was insufficient to support the defendant's conviction for risk of injury to a child under § 53-21(a) (1) because, without expert testimony, the jury had no basis upon which to conclude that the conditions in her apartment were likely to cause a mental health injury to a child.

> [28] The defendant argues that  $\S 53-21$  (a) (1) is unconstitutionally vague as applied to her conduct because it does not require the state to prove that she had the intent to injure Daniel, She further argues that, even if the statute includes a knowledge requirement, the statute is vague because she could not have known that her conduct violated the statute.

> [29] "A statute ... [that] forbids or requires conduct in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates

late 2001, the department the first essential of due process.... Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." ... [T]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute ... and the guarantee against standardless law enforcement.

> [33] We agree with the defendant that the intent requirement of § 53-21 (a) (1), which, on its face, requires the state to prove only that the defendant had the general intent to commit an act that was likely to injure the health of a child. would be unconstitutionally vague as applied to otherwise lawful conduct that no reasonable person could have known to have posed such a threat. [W]e conclude that the statute is unconstitutionally vague as applied to the defendant's conduct. The state has pointed to no statutes, published or unpublished court opinions in this state or from other jurisdictions, newspaper reports, television programs or other public information that would support a conclusion that the defendant should have known that the conditions in her apartment posed an unlawful risk to the mental health of a child. Rather, the state implicitly relies on an "I know it when I see it" standard. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating that, although it is difficult to define obscenity, "I know it when I see it"). We recognize that there may be generally accepted housekeeping norms and that it may be common knowledge that, all things being equal, a clean and orderly home is preferable to a dirty and cluttered home. The same could be said of any number of conditions and actions that affect a child's well-being. It may be common knowledge, for example, that drinking milk is healthier than a constant diet of soft drinks, reading books is preferable to constant exposure to television programs, large cars are safer than small cars, playing computer games is safer than riding a bicycle, and so on. All of these comparisons, however, involve virtually infinite gradations of conduct, making it extremely difficult, if not impossible, for an ordinary person to know where the line between potentially harmful but lawful conduct and unlawful conduct lies or, indeed, whether that line exists at all. Not all conduct that poses a risk to the mental or physical health of a child is unlawful. Rather, there is an acceptable range of risk.

> [45] Moreover, ... the evidence showed that employees of the department had inspected the defendant's apartment during late 2001, and had closed its file on the family only days before Daniel's suicide, ... the only experts in child safety who had knowledge of the conditions in the defendant's home during the relevant period apparently had concluded that

> > Scruggs cont. on page 17

#### \$1.67 Million To Man Wrongly **Convicted Of Murder Based** On False Positive Lab Test

By JD Staff

Richard Karling met with an ex-girl-friend, Dorothy Niven, at a Glasgow, Scotland coffee shop in 1995. After she became ill and he took her home. He left while she was resting. The next day he went to see how she was doing. He found her dead and called the police.

Karling told police about the events of the previous day. Police investigators interviewed witnesses at the cafe who described the couple as genially talking until Niven seemed to become ill. She was described as being unsteady and weak-kneed when the couple left together.

A sample of Niven's blood was tested at Glasgow University for the presence of drugs. The test produced a negative result. But a retest resulted in a positive test for temazepam: a commonly prescribed watersoluble drug that helps a person fall asleep.

Police theorized that Karling drugged the orange juice Niven was drinking at the coffee shop with temazepam to make her weak and groggy, and then took her home and smothered her.

Prosecuted for Niven's murder, the media sensationally dubbed Karling as the

was the name of the coffee shop where he allegedly drugged her.

The centerpiece of the prosecution's case was the positive test result for temazepam. It was used as the basis for

Niven, since her official cause of death was ruled to be suffocation. Karling's lawyers retained a pathologist to render an opinion on Niven's cause of death, and he also determined she almost certainly died of suffocation.

At trial, the defense expert was called as a The prosecution dismissed the charges witness by the prosecution to bolster their theory of the crime. Karling's lawyers argued that the expert opinions about Niven's cause of death could be mistaken, and that all that was known for certain was the 33year-old woman's heart had stopped.

Karling was convicted by a majority jury verdict and sentenced to life in prison. (Scotland allows a murder conviction by a Karling also filed a lawsuit against the pamajority jury vote.)

While working on his appeal, Karling learned that prior to his trial the police had also sent a sample of Niven's blood to Guy's Hospital in London that has expertise in detecting poisons. No temazepam was detected during multiple tests of that sample.

In addition, expert analysis of Niven's postmortem examination determined there was no scientific evidence to base a conclusion that she died from suffocation.

"Pancake Place" murderer, since that Based on the exculpatory blood tests the prosecution had not disclosed to Karling, and the new evidence that Niven didn't die from suffocation, in 2000 Scotland's Court of Appeal ordered Karling's release on bail pending the outcome of his appeal.

their theory that Karling smothered Karling's conviction was quashed by the Court of Appeals in 2001. The Court ruled Karling's conviction was a miscarriage of justice because the Guy's Hospital test results were "completely contradictory of the evidence that was placed before the jury."

> since the new evidence left them without the pretense of a viable case against Karling.

Cleared of being the Pancake Place murderer, Karling filed a lawsuit against the Strathclyde (Glasgow) Police for their role in concealing the toxicology report by Guy's Hospital.

thologist his lawyers retained prior to his trial, but who in fact testified for the prosecution. Karling's suit alleging "breach of contract" and "negligence" claimed in part:

"The pursuer [Karling] has suffered loss and damage as a consequence of breach of contract on the part of the defender [pathologist]. The defender was employed on behalf of the pursuer to undertake a post mortem examination and to advise the pursuer's defence team on

#### Karling cont. on p. 18

#### Scruggs cont. from page 16

they were not so deplorable as to pose an immediate threat to Daniel's mental health. ...

[46] There were several possible explanations for Daniel's state of mind and behavior, however, including the relentless bullying that he endured at school and his inherently fragile psyche. When a defendant knows that he is engaged in conduct that is sufficiently dangerous to be criminalized, the defendant is on notice that exposure to that conduct could injure a child's mental health. In the present case, the state concedes that being messy is not, in and of itself, unlawful, and points to no objective standards for determining the point at which housekeeping becomes so poor that an ordinary person should know that it poses an unacceptable risk to the mental health of a child.

[49] ... Moreover, the trial court found that the conditions were not so bad that they would pose a threat to a child's physical health. The

evidence showed only that the apartment was extremely cluttered and had an unpleasant odor of uncertain origin. We cannot conclude that the defendant was on notice that these conditions were so squalid that they posed a risk of injury to the mental health of a child within the meaning of § 53-21 (a) (1). Accordingly, we conclude that the statute is unconstitutionally vague as applied to the defendant's conduct.

[50] The judgment is reversed and the case is remanded to the trial court with direction to grant the defendant's motion for judgment of acquittal.

[52] BORDEN, J., with whom PALMER, J., joins, concurring.

[53] I fully agree with and join the well reasoned majority opinion. ....

[56] The record reflects that ... only days before Daniel's death, the agency of the state of Connecticut that is dedicated to protecting children from abuse and neglect, had, by its

conduct and words, sent a clear message to the defendant that the department saw no significant cause for concern regarding Daniel's health and welfare. Indeed, the department's message was that the defendant should keep Daniel home from school in the very conditions that the same state of Connecticut, through its criminal prosecutorial arm, later charged created an unreasonable risk to his mental health. Although, of course, the law enforcement arm of the state is not bound by a prior determination, express or implied, of the department, from a standpoint of fair notice, the defendant reasonably cannot be expected to make the legal distinction between the two agencies' subject matter jurisdictions. From the viewpoint of the ordinary citizen, it is not fair, and does not comport with adequate notice, for the state to say, in effect, we have no concern for Daniel's health by virtue of his living conditions, and then to say, but we will prosecute the defendant criminally for maintaining those same living conditions.

#### Karling cont. from p. 17

the forensic evidence. In carrying out these instructions, the defender required to advise whether the pathological evidence enabled a cause of death to be established with any degree of certainty. The defender required to advise on whether further investigations were appropriate to ascertain or confirm the likely cause of death.

••

It was his duty to advise of other potential causes of death including epilepsy. It was his duty to emphasise the lack of any pathological signs of suffocation. It was his duty to advise that the toxicology tests should be independently verified .... It was his duty to advise that further investigations were required....."

••

The pursuer has suffered loss and damage as a consequence of fault and negligence on the part of the defender. ... In carrying out his instructions, he owed a duty of care to the pursuer." *Karling v Purdue* [2004] ScotCS 221 (29 September 2004)

In September 2004, Karling's suit against the pathologist was dismissed on the general defense that irrespective of any provable breach of contract or negligence, "... a forensic expert is immune from suit where he is engaged in the course of ongoing criminal proceedings."

Then about a year later, in late 2005, as compensation for Karling's miscarriage of justice, the Scottish government agreed to an *ex-gratia* payment of \$1,670,584 (£891,717 English pounds). Karling was satisfied with the award: "I am really happy the Executive did the right thing. They gave me a really good settlement that reflects the level of the miscarriage of justice."

In June 2006, Karling requested dismissal of his suit against the police. The 52-year-old Karling indicated to the Glasgow *Daily Record* that the ongoing legal fees and the lawsuit's uncertain outcome were why he decided to end it. He said, "a fair chunk" of his compensation had "disappeared in legal" expenses. He also said, "I just have to live on the interest from what's left."

#### Sources:

Pancake Murder Accused Got £900K, *Daily Record* (Glasgow, Scotland), June 7, 2006.

Wrongly convicted man wins £490 For Each Day In Prison, *The Scotsman* (Glasgow, Scotland), June 7 2006.

Karling v Purdue [2004] ScotCS 221 (29 September 2004).

#### Third Trial Ordered For Derek Tice

By James F. Love

In Norfolk, Virginia, in 1997, seven men were arrested for the rape and murder of a young Navy wife. Three of the men were released after charges against them were dropped for lack of evidence. Derek Tice was one of the four men charged with the rape and murder of 18-year-old Michelle Moore-Bosko. Three of those men, including Tice, were convicted of all the charges and sentenced to life in prison without possibility of parole. One defendant, Eric Wilson, was convicted only of rape and sentenced to 8-1/2 years in prison. He was released in September 2005 after serving his sentence.

The Virginia Court of Appeal overturned Tice's conviction in May 2002, and ordered a retrial. Tice was re-convicted in January 2003 after a retrial, and again sentenced to life in prison without parole.

Virginia's Court of Appeals affirmed Tice's reconviction in August 2003, and the state Supreme Court denied Tice's appeal in July 2004. Tice subsequently filed a state habeas petition. On November 27, 2006, state Circuit Court Judge Everett Martin Jr. ruled that Tice had received ineffective assistance of counsel during his retrial, vacated his convictions and sentences, and ordered a new trial.

Judge Martin found that Tice's trial counsel, James Broccoletti and Jeffrey Russell, failed to file a motion to suppress Tice's statement and confession that was made during a police interrogation after his June 1998 arrest. Tice made the statement after he clearly asserted his right to remain silent under the Fifth Amendment, but his assertion disregarded by the police who continued interrogating him. Notes included in Tice's case file show Norfolk Police Investigator Randy Crank memorialized that Tice stated to him, "He told me he decide (sic) not to say any more; that he might decide to after he talks with a lawyer or spends some time alone thinking about it." Judge Martin held this was an "unambiguous and unequivocal" invocation of Tice's right to remain silent that should have been honored by the police.

Judge Martin noted that except for Tice's statement, the only evidence pointing to his guilt is the testimony of co-defendant Joseph Dick Jr. No physical, forensic or scientific evidence was adduced against Tice at either of his two trials. Judge Martin held that, without

the unconstitutionally obtained confession, there was a reasonable probability the jury would have acquitted Tice of the charges.

Stephen McCullough, from the State Attorney General's Office, stated Judge Martin's decision will be appealed. At a December 20, 2006, bail hearing, Judge Martin ruled in favor of the state's position that Tice should remain in custody while the State appeals the order for Tice's new trial.

Omar Ballard, one of the five men convicted of charges related to Moore-Bosko's rape and murder, has confessed multiple times (first in February 1999) that he acted alone. Tice and the other three convicted men have claimed their confessions were false and coerced by police. Supporting their claims of false confessions and Ballard's repeated voluntary admissions of guilt, is that all the crime scene evidence (including DNA evidence) only implicates him — as the lone assailant. None of the other four men's confessions are consistent with details of Moore-Bosko's murder or the crime scene.

Deborah Boardman, one of the attorneys representing Tice, said in response to Judge Martin's ruling, "We are thrilled. This is terrific news. James Broccoletti, one of the trial attorneys found as ineffective, stated that he had always thought Tice was innocent and expressed his hopes that now Tice would get the chance to prove it.

Tice's father, Larry Tice, told Michelle Washington, a reporter from The Virginian-Pilot, during a telephone interview, "I'm still about three-feet above the ground," he said, "I'm still in a state of disbelief that we won it."

The four defendants claiming their confessions were coerced, including Tice, have filed petitions for clemency with Virginia Governor Timothy M. Kaine. A spokesman for Governor Kaine stated the Virginia Parole Board was monitoring Tice's case as part of it's clemency review process.

The most recent of several *JD* articles about the 'Norfolk Four' is: The 'Norfolk Four' Convicted of Brutal Rape And Murder Committed By Lone Assailant, by Larry Tice, *Justice:Denied*, Issue 30, Fall 2005, pp. 6.

The Norfolk Four's website is: http://norfolkfour.com Source:

"Judge: Man convicted in rape could be released from prison," by Michelle Washington, *The Virginian-Pilot*, November 30, 2006.

*Tice v. Johnson*, No. CL05-2067-00, Fourth Judicial Circuit of Virginia – Circuit Court of the City of Norfolk, November 27, 2006.

#### **New Evidence In** Mark Kirk Case

ark Kirk's story of being convicted of Larson in 1997 was in Justice: Denied's Fall 2004 issue. Kirk was convicted of starting a fire in his Delaware home by allegedly pouring Captain Morgan rum on an electric stove's burner. Captain Morgan rum is 70 proof, which means it is only 35% alcohol. Kirk has long believed that Captain Morgan won't ignite because of its low alcohol content, so it couldn't have started the fire.

John Lentini, has been associated with the Fire Investigation division of Applied Technical Services since 1978. He has conducted more than 2,000 fire origin and cause investigations. Lentini is recognized by one of the leading fire investigation experts in the United States.

On September 16, 2006, Lentini conducted three controlled experiments of the flammability of Captain Morgan rum by pouring significant quantities of it on an electric stove's red-hot burner. At no time did Captain Morgan rum give any indication of any flammability. Lentini filmed the entire experiment and it can be viewed in its entirety from a link on JD's website at,

http://justicedenied.org/mark kirk 09-13-06.mpg



John Lentini holding bottle of 70-proof Captain Morgan rum.



John Lentini pouring 70proof Captain Morgan rum on red hot electric burner.

#### **James Love's Rape Convictions** Vacated — New Trial Ordered

Tames Love's story of being convicted in **J** 1996 of four counts of rape in Cincinnati when at the time of the alleged crimes he was 2,000 miles away in Belize and Mexico, was in Justice: Denied's Fall 2005 issue. On November 22, 2006, the Ohio Court of Appeals vacated Love's convictions and ordered a new trial. In their unanimous decision the three-judge panel wrote in part:

{¶1} Defendant-appellant James Love appeals the trial court's denial of his motion for a new trial based on newly discovered evidence. Love argues that the state failed through the bill of particulars to identify the times for the crimes alleged. Thus, he argues that he was surprised at trial when the victim testified about dates when, he contends, he was not in the country.

 $\{\P 2\}$  Since being imprisoned, Love has worked to prove his innocence by tracking down witnesses and documentation to con-

firm that he was not in the United States when the alleged offenses occurred. And he has done so. The evidence of a passport application, photographs, a personally signed book, medical records, and four independent witnesses, three of whom are foreign nationals, all show that Love was not in the United States when the alleged crimes occurred. The trial court erred by denying Love's motion for new trial. We now reverse that decision and remand for a new trial." State v. Love, 2006-Ohio-6158 (Ohio App. Dist.1 11/22/2006)

The full decision can be read, printed or downloaded from JD's website at, http://justicedenied.org/state v love 2006ohio-6158.pdf

#### **Charges Dismissed Against Christopher Parish**

hristopher Parish's story of being sentenced to 30 years in prison after being convicted in 1998 of a phantom robbery and non-existent attempted murder based on a fake Elkhart. Indiana crime scene, was in Justice: Denied's Fall 2005 issue. Adding insult to the injury of Parish's wrongful conviction was that multiple witnesses corroborated his alibi of being 110 miles away in Chicago at the time the alleged crimes occurred.

On December 6, 2005, Indiana's Court of Appeals relied on new evidence to vacate Parish's convictions and order a new trial. (Parish v. State, No. 20A03-0502-PC-74

(Ind.App. 12/06/2005). After eight years of imprisonment, Parish was allowed to bond out of prison in July 2006 while awaiting his new trial.

On December 1, 2006, Elkhart Superior Court Judge Evan Roberts granted the prosecution's motion to dismiss all charges against Parish.

See: Phantom Robbery And Fake Crime Scene Leads To 30-Year Prison Sentence - The Christopher Parish Story, by Christopher Parish, Justice: Denied, Issue 30, Fall 2005, p. 7.

Not where he left off, by Ellen Lechlitner, The Truth (Elkhart, IN), December 18, 2006



#### **Federal Judge Orders BOP** To Deliver Justice: Denied **Copies To ADMAX Prisoner**

States' highest security prison — the federal ADMAX in Florence, Colorado. Jordan was mailed Justice: Denied back issues printed from JD's website. When the prison refused to deliver the issues, he filed a grievance. After being ruled against by the BOP all the way up the ladder to its Washington, DC headquarters, Jordan filed a lawsuit pro se in federal District Court in Denver. On October 26, 2006, U.S. District Judge PO Box 68911, Seattle, WA 98168.

Phillip S. Figa ruled that it was an unconstitutional violation of Jordan's First Amendment rights for the BOP to withhold "unbound printed pages such as newspaper or magazine clippings, photocopies of newspaper or maga-

ark Jordan is a prisoner at the United zine articles, and internet printouts." Judge Figa also enjoined the BOP from refusing to deliver those items when mailed to Jordan. Figa's decision was reported nationally from a wire service story.

> Judge Figa's 13-page decision can be read on JD's website at http://justicedenied.org. Or mail \$2 (stamps OK) with a request for "Jordan Decision" to: Justice Denied,

#### **Freeing The Innocent** A Handbook for the **Wrongfully Convicted** By Michael and Becky Pardue

Self-help manual jam packed with handson - 'You Too Can Do It' - advice explaining how Michael Pardue was freed in 2001 after 28 years of wrongful imprisonment. Soft-cover. Send \$15 (check, m/o or stamps) to: Justice Denied; PO Box 68911; Seattle, WA 98168. (See Order Form on p. 39). Or order with a credit card from JD's website, http://justicedenied.org.

"I congratulate you on your marvellous book Freeing the Innocent." P. Wilson, Professor of Criminology, Bond University

#### **North Carolina Innocence Inquiry Commission Created**

fter several high-profile exonerations the North Carolina Actual Innocence Commission was created in 2002 to investigate how they had occurred and what could be done to make future miscarriages of justice less likely. Although the NCAIC suggested reforms in police practices, such as eyewitness identification and evidence storage, they also recognized that the direct and post-conviction appeal process failed to correct known cases of wrongful conviction. The NCAIC proposed creation of a new organization to analyze claims of innocence by prisoners based on evidence not previously considered at trial or during that person's post-conviction relief process.

North Carolina Governor Michael Easley signed legislation on August 3, 2006, creating the North Carolina Innocence Inquiry

Commission. The Commission is an alternate legal process that exclusively considers a claim of "factual innocence" by a convicted person for possible referral to a three-judge panel empowered to dismiss all or any of the charges.

Accompanying this are three articles about the North Carolina Innocence Inquiry Commission:

- A condensed version of the legislation's highlights
- An analysis of NC Innocence Inquiry Commission Statutory Provisions
- Justice: Denied's editorial about the NC Innocence Inquiry Commission

#### GENERAL ASSEMBLY OF NORTH CAROLINA

#### **HOUSE BILL 1323**

SECTION 1. Chapter 15A of the General Statutes is amended by adding a new article to read:

North Carolina Innocence Inquiry Commission.

- § 15A-1460. Definitions.
- (1) "Claim of factual innocence" means ... complete innocence of any criminal responsibility for the felony for which the person was convicted ... and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief.
- § 15A-1462. Commission established.
- (a) The North Carolina Innocence Inquiry Commission shall be an independent commission under the Judicial Department for administrative purposes.
- 15A-1463. Membership; chair; meetings; quorum.
- (a) The Commission shall consist of eight voting members as follows: (1) One shall be a superior court judge.
- (2) One shall be a prosecuting attornev.
- (3) One shall be a victim advocate.
- (4) One shall be engaged in the practice of criminal defense law. (5) One shall be a public member who is not an attorney and who is not an officer or employee of the Judicial Department.

- (6) One shall be a sheriff holding office at the time of his or her appointment.
- (7) The vocations of the two remaining appointed voting members shall be at the discretion of the Chief Justice.

The Chief Justice of the North Carolina Supreme Court shall make the initial appointment for members identified in subdivisions (4) through (6) of this subsection. The Chief Judge of the Court of Appeals shall make the initial appointment for members identified in subdivisions (1) through (3) of this subsection....

- (b) The superior court judge who is appointed as a member under subsection (a) of this section shall serve as Chair of the Commission. The Commission shall have its initial meeting no later than January 31, 2007, at the call of the Chair. The Commission shall meet a minimum of once every six months and may also meet more often at the call of the Chair. ...
- § 15A-1464. Terms of members; compensation; expenses.
- (a) ... The Chief Justice may remove members, with cause.... (b) The Commission members shall receive no salary for serv-
- § 15A-1465. Director and other staff.
- (a) The Commission shall employ a Director. The Director shall be an attorney licensed to practice in North Carolina ... the Director shall employ such other staff and shall contract for services as is necessary to assist the

Commission in the performance matters unrelated to a convicted of its duties, and as funds permit.

§ 15A-1466. Duties.

The Commission shall have the following duties and powers:

- (2) To conduct inquiries into claims of factual innocence, with priority to be given to those cases in which the convicted person is currently incarcerated solely for the crime for which he or she claims factual innocence.
- (5) To prepare written reports outlining Commission investigations and recommendations to the trial court at the completion of each inquiry.

§ 15A-1467. Claims of innocence; waiver of convicted person's procedural safeguards and privileges; formal inquiry; notification of the crime victim. (a) A claim of factual innocence may be referred to the Commission by any court, person, or agency. The Commission shall not consider a claim of factual innocence if the convicted person is deceased. ...

(b) No formal inquiry into a claim of innocence shall be made by the Commission unless the Director or the Director's designee first obtains a signed agreement from the convicted person in which the convicted person waives his or her procedural safeguards and privileges, agrees to cooperate with the Commission, and agrees to provide full disclosure regarding all inquiry requirements of the Commission. The waiver under this subsection does not apply to person's claim of innocence. ...

- (c) If a formal inquiry regarding a claim of factual innocence is granted, the Director shall use all due diligence to notify the victim in the case and explain the inquiry process. ...
- (d) ... The Commission may ... issue process to compel the attendance of witnesses and the production of evidence ...
- (f) All State discovery and disclosure statutes in effect at the time of formal inquiry shall be enforceable as if the convicted person were currently being tried for the charge for which the convicted person is claiming innocence.
- § 15A-1468. Commission proceedings.
- (a) At the completion of a formal inquiry, all relevant evidence shall be presented to the full Commission. ... The determination as to whether to conduct public hearings is solely in the discretion of the Commission....
- (b) The Director shall use all due diligence to notify the victim at least 30 days prior to any proceedings of the full Commission held in regard to the victim's case. ... the victim is permitted to attend proceedings otherwise closed to the public ...
- (c) After hearing the evidence, the full Commission shall vote to establish further case disposition as provided by this subsection. All eight voting members of the Commission shall participate in that vote.

Except in cases where the convicted person entered and was convict-

Highlights cont. on p. 21

#### **Analysis of NC Innocence Inquiry Commission Statutory Provisions**

#### **Innocence Inquiry Commission**

#### **Good Points**

- 1) No time limit on when new evidence was obtained.
- 15A-1460(1)
- 2) Commission conducts investigation and writes report of findings.
- 15A-1466(2)-(5)
- 3) Claim can be referred by any "person" or "agency."

15A-1467(a)

- 4) Provision for appointment of counsel 15A-1467(b)
- 5) Subpoena power to compel production of documents and attendance of witnesses.

15A-1467(d)

#### **Bad Points**

1) Relief is based on "Factual Innocence," which is defined to "complete innocence." mean (Note: This is a new legal concept. Lack of culpability in a crime is based the on prosecution's failure to meet its burden of proving the defendant's

guilt beyond a reasonable doubt. sion member appointments. Historically relief after a conviction is based on some form of a defendant's undermining of the reliability of the prosecution's evidence used to prove his or her guilt beyond a reasonable doubt.) 15A-1460(1)

- 2) Mandated vocational composition of commission members. Four members can be expected to likely have a pro-prosecution. anti-defendant tendency. Those are "a prosecuting attorney"; "a victim advocate"; "a sheriff"; and "a superior court judge." 15A-1463(a)
- 3) Chief Justice of the Supreme Court and the Chief Judge of the Court of Appeals make commis-

15A-1463(7)

4) The commission's superior court judge member is the Chair of the commission.

15A-1463(b)

- 5) Supreme Court Chief Justice can remove commission members. 15A-1464(a)
- 6) The commission's director "shall be an attorney licensed to practice law in North Carolina." 15A-1465(a)
- 7) The applicant must waive his or her constitutional protections and provide full disclosure "regarding all inquiry requirements of the Commission.' 15A-1467(b)

Analysis cont. on p. 22

#### Highlights cont. from p. 20

ed on a plea of guilty, if five or more of the eight voting members of the Commission conclude there is sufficient evidence of factual innocence to merit judicial review, the case shall be referred to the senior resident superior court judge in the district of original jurisdiction ... In cases where the convicted person entered and was convicted on a plea of guilty, if all of the eight voting members of the Commission conclude there is sufficient evidence of factual innocence to merit judicial review, the case shall be referred to the senior resident superior court judge in the district of original jurisdiction.

If ... the Commission shall conclude there is insufficient evidence of factual innocence to merit judicial review. The Commission shall document that opinion, along with supporting findings of fact, and file those documents and supporting materials with the clerk of superior court in the district of original jurisdiction, with a copy to the district attorney and the senior resident superior court judge.

(d) ... Evidence favorable to the person convicted disclosed through formal inquiry or Commission proceedings shall be disclosed to the convicted person and the convicted person's counsel, if the convicted person has counsel.

(e) All proceedings of the Commission shall be recorded and transcribed as part of the record. ... all files and materials considered by the Commission and a full transcript of the hearing before the Commission, shall become public at the time of referral to the superior court. Commission records for conclusions of insufficient evidence of factual innocence to merit judicial review shall remain confidential, except as provided in subsection (d) of this section.

§ 15A-1469. Postcommission three-judge panel.

- (a) If the Commission concludes there is sufficient evidence of factual innocence to merit judicial review, the Chair of the Commission shall request the Chief Justice to appoint a three-judge panel, not to include any trial judge that has had substantial previous involvement in the case, ... to convene a special session of the superior court of the original jurisdiction to hear evidence relevant to the Commission's recommendation. ...
- (b) The senior resident superior court judge shall enter an order setting the case for hearing ... and shall require the State to file a response to the Commission's opinion within 60 days of the date of the order.
- (c) The district attorney of the district of conviction ... shall represent the State ...
- (d) The three-judge panel shall conduct an evidentiary hearing. At priate relief.

the hearing, the court may compel the testimony of any witness, including the convicted person. The convicted person may not assert any privilege or prevent a witness from testifying. The convicted person has a right to be present at the evidentiary hearing and to be represented by counsel. ...

(e) The senior resident superior court judge shall determine ... if appropriate, enter an order for the appointment of counsel. ...

(h) The three-judge panel shall rule as to whether the convicted person has proved by clear and convincing evidence that the convicted person is innocent of the charges. Such a determination shall require a unanimous vote. If the vote is unanimous, the panel shall enter dismissal of all or any of the charges. If the vote is not unanimous, the panel shall deny relief.

#### § 15A-1470. ...

(a) ... the decisions of the Commission and of the three-judge panel are final and are not subject to further review by appeal, certification, writ, motion, or otherwise. (b) A claim of factual innocence asserted through the Innocence Inquiry Commission shall not adversely affect the convicted person's rights to other postconviction relief."

SECTION 4. G.S. 15A-1411 reads as rewritten:

§ 15A-1411. Motion for appro-

(d) A claim of factual innocence asserted through the North Carolina Innocence Inquiry Commission does not constitute a motion for appropriate relief and does not impact rights or relief provided for in this Article."

SECTION 7. G.S. 132-1.4 reads as rewritten:

§ 132-1.4.

Records of ... investiga-(a) tions conducted by the North Carolina Innocence Inquiry Commission, are not public records as defined by G.S. 132-1.

SECTION 11. ... No claims of actual innocence may be filed with the Commission until November 1, 2006. No claims of actual innocence where the convicted person entered and was convicted on a plea of guilty may be filed with the Commission until November 1, 2008.

SECTION 12. This act is effective when it becomes law and applies to claims of factual innocence filed on or before December 31, 2010.

In the General Assembly read three times and ratified this the 27th day of July, 2006.

Approved this 3rd day of August 2006, by Michael F. Easley, Governor



#### Justice: Denied Editorial

#### **Worse Than Nothing**

The North Carolina Innocence Inquiry Commission is a huge step in the wrong direction

he North Carolina Innocence Inquiry L Commission (NCIIC) was signed into law by Governor Michael Easley on August 3, 2006. Its stated purpose is to provide "postconviction review of credible claims of factual innocence supported by verifiable evidence not previously presented at trial or at a hearing granted through postconviction relief." (For details about the NCIIC, see two articles in this JD issue beginning on page 20.)

Sounds laudatory. As with much legislation, however, the devil concealed by a flowery title and introduction is in the details. The following is a sampling of seven NCIIC's details that indicate the PR spin that it is for the benefit of wrongly convicted people is not accurate:

- 1) The NCIIC is not an independent agency, but is subject to judicial influence and oversight.
- 2) A judge involved in an applicant's prosecution, direct appeal, or state habeas petition can not only be involved in the judicial review phase of the NCIIC process, but that judge can make critical decisions.
- 3) A case is reviewed under the heretoforeunknown legal standard that a defendant's "complete innocence" must be established before he or she will be accorded relief from a conviction.

- his or her constitutional rights during the NCIIC's investigatory process, and if approved for referral, during review of the applicant's case by a three-judge panel.
- 5) Five of eight commission members must vote to refer a case for judicial review that involves an applicant convicted after a trial. However, the designated vocation or expected self-interest of four commission members suggests that they will tend to have a pro-prosecution bias.
- 6) All eight commission members must vote to refer a case for judicial review that involves an applicant convicted by a guilty plea. The higher standard for referring the case of an applicant who pled guilty is contrary to the fact that a person who did not commit a crime is far more likely to falsely plead guilty than to be convicted after a trial.
- 7) The NCIIC has a built in bias against an applicant by designating the person(s) the crime was committed against as the "victim," and involving that person(s) (if alive) throughout the process. Yet the "victims" sole relevance to the NCIIC's inquiry is the same as any other person: what, if any, evidence that person can provide.

The foregoing and other areas of concern about the NCIIC provide a reasonable basis to make several conclusions:

1) Relief after a conviction, historically, is based on some form of a defendant undermining the reliability of the prosecution's evidence relied on by a judge and/or jury to prove his or her guilt beyond a reasonable doubt. Modern language such as the phrase "actual innocence" used in the federal habe-

4) An applicant must agree to a waiver of as statutes does not change that, since it refers to whether new evidence makes it more likely than not that a reasonable juror would find the defendant not guilty. (See e.g., House v. Bell, 126 S.Ct. 2064 (U.S. 06/12/2006.)) Under that standard it is not necessary that new evidence establishes the defendant's innocence in any objective way, but merely that it sufficiently undermines the government's ability to meet its burden of proving the defendant guilty beyond a reasonable doubt. The NCIIC turns that standard on its head by reversing the burden to the defendant to prove his or her "complete innocence" by "clear and convincing" evidence in order to be granted relief.

- 2) The NCIIC is not modeled after the United Kingdom's Criminal Case Review Commission (CCRC), except in the most general and non-specific ways. A few of the significant differences between the NCIIC and the CCRC are:
- The CCRC is an independent organization distinctly separate from the judiciary, the prosecution, defense attorneys, or victims rights advocates.
- The CCRC does not inquire into an applicant's possible innocence, and it is per se unconcerned with an applicant's innocence. Rather, it seeks to determine if there is credible new evidence or arguments supporting that the applicant's conviction is a miscarriage of justice.
- The CCRC refers a case to the Court of Appeals after determining specific evidence supports that the applicant's conviction is "unsafe," and the same standards apply to review of the case as for any other appeal.

#### Editorial cont. on p. 23

#### Analysis cont. from p. 21 victim of the legal system.

8) Five of the eight members must vote to refer a case for iudicial review when there was not a guilty plea.

15A-1468(c)

9) The eight members must unanimously vote to refer a case for judicial review when a defendant pled guilty.

15A-1468(c)

10) Victim is assumed throughout the statute to be the person against whom the original crime was perpetrated, when the purported purpose of the Innocence Inquiry Commission is to determine if the applicant is a wrongly convicted person, which makes him or her a

#### **Three-Judge Panel**

#### **Good Points**

1) Any witness can be subpoenaed to testify.

15A-1469(d)

2) Public evidentiary hearing held.

15A-1469(d)

3) Provision for appointment of counsel.

15A-1469(e)

4) Charges are dismissed if the panel decides unanimously to grant relief. (The dismissal of charges is good, but see Bad Points No. 5.) 15A-1469(h)

#### **Bad Points**

1) Three-judge panel can include trial judge(s) with previous involvement in the case.

15A-1469(a)

2) Supreme Court Chief Justice appoints the three-judge panel. 15A-1469(a)

3) Panel can include superior court (trial judges), appeals court judges, and supreme court justices. (It isn't explicitly set-

judge is excluded.)

15A-1469(a)

4) The applicant can be compelled to testify and cannot claim the Fifth Amendment right against self-incrimination.

forth in the statute that any state

15A-1469(d)

5) Unanimous panel decision necessary for determination that applicant is "innocent of the charges" by "clear and convincing evidence."

15A-1469(h)

6) No appeal of panel's decision. 15A-1470(a)

#### Other

1) Claim of factual innocence, whether denied at the Commission level or by the three-judge panel doesn't affect other rights to post-conviction relief.

15A-1470(b)

2) Period for filing claims sunsets on December 31, 2010. Section 12



#### **Editorial continued from page 22**

- The CCRC, and the Court of Appeal's review of a case referred by the CCRC, does not alter the prosecution's burden of proof beyond a reasonable doubt.
- The CCRC reviews applications that a sentence is a miscarriage of justice, even if the applicant doesn't claim the underlying conviction is erroneous.
- 3) The assertion that the NCIIC provides a viable mechanism for a person claiming innocence to successfully challenge his or her conviction is based on rhetoric, and not the reality of the review and judicial process the legislation creates. The byzantine rules under which the NCIIC and the three-judge panel appointed to review a case referred by the commission operates, raises the question: Who will be successful in having erroneous charges dismissed against him or her?
- 4) North Carolina has 38,000 adult prisoners (Dec 2006), so if perchance several of them a year overcome the NCIIC's procedures and succeed in having their charge(s) dismissed, they will likely be used as examples of the legal system's effectiveness, and how rarely it errors by convicting the wrong person.

The perceived need for the NCIIC (or any sort of extra-judicial review of criminal convictions) is a backlash to procedural impediments in habeas proceedings, such as 'time limit' and 'due diligence' rules that must be satisfied before "new" exculpatory evidence will be considered. In the absence of compelling scientific evidence, discovery of evidence sufficient to undermine a conviction can be a cumulative and non-linear process that can take an extended period of time to complete. Present day artificial federal and state time limits for filing a challenge to a conviction after discovery of new evidence is inconsistent with how non-scientific evidence is gathered in the real world.

Consequently, if all revisions to habeas rules in the federal Anti-Terrorism and Effective Death Penalty Act (1996) were repealed, and all states repealed procedural impediments to the introduction of new evidence in habeas proceedings – an inquiry commission (such as the NCIIC) would be somewhat redundant. Consistent with that observation is that state and federal post-conviction habeas proceedings following exhaustion of a defendant's direct appeal don't have a parallel in the United Kingdom (England) – and the CCRC process was created to fill that void.

The current enshrinement in federal and state habeas laws of procedure over substance means that untold numbers of defendant's are being deprived of a judge considering the merits of the person's claim of being illegally convicted. Repealing the federal and state procedural bars prohibiting those people from having access to judicial review could be expected to result in hundreds of overturned convictions each year – that today are going uncorrected.

The gulf is wider than the Grand Canyon between the hopes raised by the talk of a body in North Carolina to review claims of wrongful conviction, and the reality of what was crafted under the influence and watchful eye of judicial, prosecution, and so-called "victims" rights advocates and lobbyists. The NCIIC adds additional layers of complexity to the legal process, when reducing layers is what is needed to aid the wrongly convicted.

The NCIIC is worse than nothing. It can only be hoped that no other state relies on it as a model to establish a comparable statutory scheme, and that the deadline for submitting a claim to the NCIIC is not extended beyond its sunset date of December 31, 2010.



#### Man Convicted Of Murder After DNA Cleared Him, Awarded \$706,000

In June 2000, 10-year-old Nienke Kleiss was raped and murdered in Schiedam, Netherlands. Her 11-year-old male friend, Maikel, survived by pretending to be dead after being severely beaten.

Schiedam is a suburb of Rotterdam, Netherlands second largest city.

A 28-year-man, Cees B., was seen near the scene of the crime. He was arrested because he fit the police profile of a potential pedophile. After some hours of intense interrogation, Cees confessed to Nienke's murder and rape, and the assault of her friend. Immediately afterward he retracted his confession, claiming it was coerced by the police.

Cees' protestations of innocence during his trial fell on deaf ears. The prosecution relied on his confession to obtain his conviction of murder, rape and assault. He was sentenced to 18 years in prison with mandatory TBS (behavioral modification) psychiatric treatment. His conviction was affirmed on appeal.

Then, in the summer of 2004, a man, Wik H.,

was arrested for attempted sexual assault. During his questioning he admitted committing a very violent rape in The Hague in 2002, and killing Nienke and assaulting her friend in 2000. Wik's confession was confirmed when a DNA test of sperm found on Nienke did not exclude him as her assailant.

Cees began proceedings to overturn his conviction based on the new evidence of his innocence. The Court of Appeals ordered his release in January 2005, after 4-1/2 years of wrongful imprisonment. He subsequently filed a damage claim against the police and prosecutors for their mishandling of his case.

After Wik was convicted of the same crimes Cees' had previously been convicted of committing, he was sentenced to 20 years in prison with mandatory TBS psychiatric treatment. Wik's sentence was reduced to 18 years in November 2005, when the Court of Appeals ruled the prosecution had not presented evidence that Wik assaulted Maikel to prevent being identified.

In September 2005, a memo was leaked to the Dutch news media revealing that prior to Cees' trial, Netherlands' National Forensic Service (NFI) had notified the prosecution that DNA tests excluded him as the source of evidence left at the crime scene by Nienke and Maikel's assailant. The prosecution did not disclose the exculpatory DNA test results to Cees' lawyer prior to his trial, nor to the Appeals Court that freed him in January 2005. The leaked memo stated in part, "The NFI let it be known during a discussion with the officer in charge of this case that there were doubts about [Cees] B's guilt."

Although the prosecutors responded by vigorously denying they had concealed evidence of Cees' innocence at the same time they were prosecuting him, 70 percent of the Dutch people polled said they believed that was exactly what the prosecutors did. One newspaper wrote, "To the majority of the Dutch public this equates to a murderer caught standing over a dead body with a knife in his hand."

Cees' claim for damages was greatly strengthened by the surfacing of the exclusionary DNA report, since it supported his claim that police interrogators had coerced him into falsely confessing. In November 2005, Cees was awarded \$706,000 by Netherlands' government to settle his false imprisonment damages claim.

#### Sources:

Appeal Court Cuts Sentence On Nienke's Killer, Expatica News (Netherlands), November 22, 2005.

Mugging The Messenger, Expatica News (Netherlands), November 24, 2005.

Dutch Pay For Wrongful Conviction, Science Daily, November 28, 2005.

#### Possibility Of Guilt Replaces Proof Beyond A Reasonable Doubt

Las Vegas Detectives, Prosecutors And Judge Orchestrate Kirstin Blaise Lobato's Serial Rape By The Legal System

By Hans Sherrer

On the hot, arid evening of Sunday, July 8, 2001, a man was 'dumpster diving' in a trash enclosure several blocks west of the Las Vegas strip. Around twilight he lifted a trash covered piece of cardboard next to the dumpster and saw a man's torso. He called 911.

#### Police at crime scene

The first police officers arrived at 10:36 p.m. One of the officers went inside the trash enclosure and saw a human foot exposed with the rest of the person's body buried under a pile of trash. He also saw still moist bloody shoeprints leading away from the body toward the trash enclosure's opening.

After medical personnel arrived, one of them lifted the trash covered cardboard and determined the body was that of a dead man.

Several crime scene analysts arrived and they began systematically removing piece by piece the large number of trash items covering the body. Only a few items were collected as evidence, while the rest of the evidence was discarded. When the body was fully uncovered it was apparent that the man had many wounds, including an amputated penis.

It appeared that the man had been living in the trash enclosure.

It wasn't until 3:50 a.m. on Monday the 9th, that the coroner's investigator examined the body at the scene. At 8 p.m. that night the FBI identified the dead man as Duran Bailey from his fingerprints.

When the man who found Bailey's body was questioned, he said he hadn't stepped in Bailey's blood, which was completely covered by trash. His shoes were examined and there was no blood on their soles.

# Autopsy determines Bailey's cause of death was "blunt head trauma"

Clark County Chief Medical Examiner Lary Simms performed Bailey's autopsy. He found

See companion article on page 33, Lobato Jurors Engaged In Misconduct.



Kirstin "Blaise" Lobato as a H.S. senior before her July 2001 arrest

that while alive, Bailey experi-

enced a plethora of serious injuries to his neck, face, head and upper body, including defensive wounds to his arms and right hand. Simms also determined that following Bailey's death he was stabbed several times in his abdomen, his penis was severed at its base, and his anus area was stabbed and sliced. Simms determined Bailey's cause of death was "blunt head trauma," and "a significant contributing condition was multiple stab and incised wounds," including a severed carotid artery. <sup>1</sup>

A month after Bailey's autopsy, Simms expressed his opinion during a preliminary hearing for the person charged with Bailey's murder that it was "more likely than not" his death occurred within 12 hours from when the first officer arrived at the scene – or no earlier than 10:36 a.m. on Sunday, July 8. <sup>2</sup>

#### Non-investigation of prime suspects

Las Vegas Metro PD (LVMPD) Homicide Detectives Thomas Thowsen and Jim LaRochelle were assigned to investigate the case.

Thowsen and LaRochelle immediately had a prime suspect. While the crime scene was still being processed on the morning of July 9, a woman named Diann Parker approached one of the police officers and told him, 'I might know who that guy is. I was the victim of a rape a week ago and that might be the guy that did it.' The information was relayed to the detectives.

The detectives went to Parker's apartment on the 9th to informally question her. She told them that Bailey and her were acquaintances, and that she had on occasion exchanged sex with him for crack cocaine that he bought.

During their conversation Parker said that several "Mexican" men in her apartment complex saw Bailey slap and threaten her on July 1 while she was drinking beer with them. The Mexicans talked with Bailey and told him to leave Parker alone. When she left, they were "watching" to make sure she got back to her apartment safely. Later that day Bailey re-

turned. He became enraged when she told him she didn't want anything more to do with him. After forcing his way into her apartment he beat and kicked her, and raped and tried to sodomize her while holding a knife to her neck and throat and threatening to kill her.

Afraid to go to the police because of Bailey's threats, she did call 911 three days later when he returned and tried to break into her apartment.

She told the officer who responded that reporting Bailey's assault and rape of her was going "to get me killed." She also told the police, "If you all don't catch him, I will be dead." <sup>3</sup> When she asked the officer for protection he told her, "you got to do what you got to do to protect yourself the best you can." <sup>4</sup> She was reluctant to give him too much information about the Mexicans because she thought they could have been in the country illegally.

Parker also told the officer the homeless Bailey "stayed behind the ... Nevada State Bank" at "Flamingo and Arville." That is where Bailey's body was found three days later.

Parker told Thowsen the two apartment numbers where the Mexicans lived. He talked with the apartment complex's manager and learned the names they used to rent the apartments. The manager also told Thowsen they didn't cause any trouble. Thowsen ran a criminal background check on the names. No record showed up for any of them so he did not interview the Mexicans.

Thowsen and LaRochelle not only knew that Parker had a significant motive to want to see Bailey harmed or killed, but the photographs of her extensive injuries from the beating Bailey inflicted and his knife wielding were eerily similar to the wounds about Bailey's face and neck. Bailey even cut her neck with the knife near her carotid artery, just as he was cut days later by his murderer(s).

In spite of the strong circumstantial evidence suggesting Parker and/or the Mexicans may have been were involved in Bailey's murder, the detectives didn't pursue investigating them by interrogations or obtaining warrants to search their apartments and vehicles to look for the murder weapon(s), bloody shoes or clothing, or any other possibly incriminating physical evidence that could link them to the crime.

When asked later why on July 9 he didn't interview the Mexicans after talking with Parker, Thowsen said words to the effect, 'It was a long day and we were getting tired and at some point you just have to call it a day.'

# Laura Johnson provides detective with "third-hand" tip about Las Vegas stabbing

On July 20, twelve days after Bailey's death, Thowsen received a phone call from Laura Johnson, the juvenile probation officer for Lincoln County, Nevada. Johnson's office was in the county seat of Pioche – more than 170 miles north of Las Vegas. Johnson informed Thowsen that Dixie Tienken, a Lincoln County teacher, told her that a former student of Dixie's told Dixie that she had cut off the penis of a man who attacked her in Las Vegas. Johnson told Thowsen that the young woman's name was Kirstin Blaise Lobato, and she was living with her parents in Panaca, a small town about ten miles southeast of Pioche. (Kirstin goes by, and is known by her middle name, so this article will refer to her as "Blaise".) Johnson also told Thowsen she checked and learned that Blaise owned a red 1984 Pontiac Fiero with a custom license plate. She also said she had a Lincoln County sheriff deputy drive by the home of Blaise's parents and her car was parked in front on the public street.

Thowsen ran a background check on Blaise after talking with Johnson. He learned she was 18, and when she was 6-years-old her mother's boyfriend had sexually assaulted her for nine months in Las Vegas.

# Detectives Thowsen and LaRochelle travel to Lincoln County to arrest Blaise

Thowsen arranged for LaRochelle and crime scene analyst Maria Thomas to travel to Lincoln County, and he called the county sheriff's office to notify them the three would be arriving that afternoon. Thomas was told that she would be impounding a car – Blaise's Fiero.

Within an hour or so after receiving Johnson's phone call, Thowsen, LaRochelle and the crime scene analyst headed north on US Hwy 93 in two vehicles to arrest Blaise for Bailey's murder.

## Johnson's statement to Thowsen and LaRochelle

After the nearly three hour drive to Pioche, Johnson gave a taped interview to the detectives. She reiterated what she told Thowsen on the phone. However, she added that the detectives shouldn't contact Dixie — the source of Johnson's third-hand information about what Blaise had allegedly told Dixie — because she thought Dixie would warn Blaise that they were coming to arrest her.

Compounding Johnson's implicating of Blaise in Bailey's murder without any personal knowledge of anything Blaise said, or what she did or didn't do in Las Vegas, was the fact that Johnson made the false declaration in her statement that Blaise had been in trouble with the law in Lincoln County and sentenced to probation with Johnson supervising her. <sup>5</sup> However, the detectives didn't know Johnson made-up that inflammatory assertion, because they didn't verify her claims before deciding Blaise was Bailey's murderer. <sup>6</sup>

After arranging for a Lincoln County sheriff deputy to accompany them to where Blaise was living, and arranging for a flat-bed tow truck to transport her car to Las Vegas, Thowsen and his colleagues headed to nearby Panaca to arrest Blaise.

#### Detectives unaware the incident Dixie told Johnson about wasn't Bailey's murder

What Thowsen and LaRochelle didn't know before forming their opinions about Blaise's guilt, was that the incident Blaise told Dixie about was an attempted rape that she fended off with a knife six weeks prior to Bailey's murder. Shortly after midnight on or about May 25, a "really big" black man over 6' and 200 pounds grabbed the 5'-7" and 100 pound Blaise as she got out of her car at the Budget Suites motel near Sam's Town casino on Vegas' east side. He threw her onto the ground and as he knelt over her with his pants pulled down, she pulled out a butterfly knife her dad gave her for self-protection and tried to stab or cut his groin area. She was able to get away from him, and she heard him crying and saw him getting up as she drove off. 7

If the detectives had conducted even a perfunctory investigation into the details of what Blaise told Dixie, they would have learned that prior to Bailey's murder Blaise had told multiple people about the attack on her that occurred just before the Memorial Day weekend - eight miles from where Bailey was later murdered on Vegas' west side. 8 They also would have learned from investigating that at least ten people would swear they saw Blaise in Panaca on July 8 at times from very early in the morning, to throughout the day, to late that evening. The detectives also would have discovered much more evidence, including medical and telephone records, that excluded Blaise from even cursory suspicion of being involved in Bailey's murder.

However, the detectives didn't have any idea they were targeting the wrong person because they decided to arrest Blaise without conducting an investigation into the substance of Johnson's conversation with Dixie.

#### Blaise's July 20, 2001 interrogation

When the detectives arrived at the home of Blaise's parents, Larry and Becky Lobato, Blaise was in the shower and they were let in by her younger sister Ashley. Neither of her parents were home. The first thing Thowsen said to Blaise when he began questioning her at 5:55 p.m., was they knew she had been sexually molested by her mother's boyfriend when she was a child. Blaise began sobbing and continued to do so, even after she signed a Miranda waiver 12 minutes later at 6:07 p.m., which was when Thowsen turned his tape recorder on.

Blaise thought they were interrogating her about the Budget Suites assault in May, because at no time before or after the tape recording began did Thowsen or LaRochelle tell Blaise they were investigating the murder of a man who had been savagely beaten and sexually mutilated, its location in Las Vegas, or the day it happened. Consequently, she had no way of knowing the details of the May assault she told the detectives about bore no relationship whatsoever to the circumstances or details of Bailey's death six weeks later on July 8. There are 16 significant details in Blaise's 26-minute recorded statement inconsistent with specific details of Bailey's death that Thowsen and LaRochelle would have known at the time of her interrogation. There are eight additional significant details in her statement inconsistent with the details of Bailey's death that the detectives would have been aware of shortly after her arrest, due to forensic testing, expert evidence analvsis, or subsequent witness interviews. 9

## No matching points between Bailey's murder and Blaise's statement

That Bailey, and Blaise's assailant were black, both events occurred in Las Vegas, and a cutting instrument was involved, were the only three general areas of intersection between the undisputed circumstances of Bailey's death and Blaise's statement. However, those didn't remotely "match," because Bailey was a smaller man – shorter and much lighter than Blaise's assailant; Bailey was killed eight miles west of where Blaise was assaulted; and Blaise only described attempting to cut her assailant once to get free and flee, while Bailey was beaten severely, and stabbed and cut many times before being sexually dismembered.

Thus there are no actual matching points between Blaise's statement and the details of Bailey's death. The logical explanation for the dissimilarity is because they were different events.

#### Blaise's arrest

True to the detective's purpose of traveling to Panaca to arrest Blaise on the basis of Johnson's third-hand "double hearsay" information – the detectives abruptly terminated Blaise's interrogation after she told them she had been attacked "over a month ago," and placed her under arrest for Bailey's murder. Her car was loaded on the flatbed tow truck to be taken for examination by the LVMPD Crime Lab.

She was booked into the Clark County Detention Center that night and three days later (7-23) she was charged with, "murder with use of a deadly weapon." <sup>10</sup> Three days later the DA added the charge of "sexual penetration of a dead human body," based on ME Simms belief that Bailey's "anal opening had been cut after his death." <sup>11</sup>

It is indicative of how sloppy, hasty, and incomplete Thowsen and LaRochelle's investigation was that they didn't even discover how to correctly spell Blaise's first name before arresting her for Bailey's first-degree murder. In her statement they spelled her first name *Kirsten* — not *Kirstin*.

Six days after Blaise's arrest, Thowsen returned to Lincoln County and interviewed Dixie and several other people. Dixie's taped statement of Blaise's conversation with her differed in important details from Johnson's claims of what Dixie said Blaise said to her. Particularly, Dixie said that Blaise was staying with her parents – not hiding out, and Dixie did not say her parents were doing anything to hide or get rid of her car, or camouflage it by painting it. Nor did Blaise ask her not to tell anyone about the assault she described. Dixie told Justice: Denied during an interview that Thowsen talked to her for quite some time before turning on his tape recorder. While the tape recorder was off, Dixie said Thowsen tried to pressure her to shape her statement to what he wanted her to say Blaise told her, not what she recollected.

## People in Lincoln County learn Bailey was killed when Blaise was in Panaca

The Las Vegas *Review-Journal* published an article on July 25 that reported Blaise was charged with murdering Bailey on July 8. That article was the first that the Lobato family and other people in Panaca knew that July 8 was the date of the incident Blaise was accused of being involved in.

Blaise's dad Larry called Thowsen and left a message. When Thowsen returned the call, Larry told him they had charged the wrong person because Blaise had been in Panaca all day on the 8th. Thowsen's response was "that as far as he was concerned he had arrested and charged the right person and did not need any further information." <sup>12</sup>

#### Crime lab tests exclude Blaise

Almost a week after Blaise's arrest, and days after she was charged, the physical evidence recovered from the crime scene that included, fingerprints and tire treads, as well as Blaise's car and personal effects, were examined by the LVMPD Crime Lab. Blaise was excluded as the source of four identifiable crime scene fingerprints. Her metal baseball bat with a porous rubber handle tested negative for the presence of blood. A spot on the interior of her car's driver's side door panel and on her car seat cover tested weakly positive after a presumptive luminol test for the presence of an unknown iron bearing substance (blood contains iron), but both spots tested negative as being blood when subjected to a precise confirmatory test.

Somewhat remarkably, the single most important piece of evidence recovered from the crime scene – Bailey's severed penis that was handled by his killer – wasn't tested for the presence of identifiable foreign DNA before being buried with his body.

The crime lab did not analyze the bloody shoeprints leading away from Bailey's body, so Blaise's public defenders retained a nationally renowned shoeprint expert, William J. Bodziak. He wrote in his report of March 27, 2002:

"Based on the corresponding dimensions of comparable portions of other brands of footwear having this generic design, it was determined the Q1-Q2 impressions most closely correspond to a U.S. men's size 9 athletic shoe of this type. ...

... Using a standard Brannock foot-measuring device, the length of the LOBA-TO right foot equates to U.S. men's sizes between 6 to 6-1/2. ... The right foot size of KIRSTIN LOBATO would therefore be at least 2 1/2 sizes smaller than the estimated crime scene shoe size." <sup>13</sup>

## Prosecution's lack of evidence solved by jailhouse informant

On the eve of Blaise's trial, ten months after her arrest, the prosecution had no physical, forensic or scientific evidence, eyewitness



or confession linking her to Bailey's murder. Neither did they have a single witness who saw her or her car in Las Vegas on the day of Bailey's death or for nearly a week preceding it. In contrast, numerous witnesses said she and her car had been in Panaca on the 8th and the six days preceding it.

What the prosecution did have was a "jailhouse informant" - Korinda Martin. Martin claimed that while they were both in the Clark County Detention Center, Blaise was loudly "bragging" on several occasions in the open area of the jail module (where the prisoners watch television and socialize), "That she was there for murder and that she had cut a man's penis off and stuffed it down his throat." 14 The accurate details about Bailey's murder that Martin claimed Blaise described were included in a July 25, 2001, article about Blaise's arrest in the Review-Journal, Las Vegas' most widely read newspaper that was delivered to the jail. While Martin's inaccurate details, such as her claim that Bailey's penis was stuffed in his mouth, were not in the paper.

#### Blaise's trial

Blaise's trial began on May 8, 2002, in the courtroom of Clark County District Court Judge Valorie Vega. Blaise's attorneys were Clark County Public Defenders Gloria Navarro and Phillip Kohn. The prosecutors were Assistant D.A.s Sandra DiGiacomo and William Kephart.

The prosecution tried to influence the jury by generally focusing on a series of prongs that they represented during closing arguments were "proven" by the evidence. The prosecution's case during Blaise's trial can be understood by explaining several of the key prongs they argued. The following are eight of those prongs, followed by a rebuttal

Bailey's murder.

#### First prosecution prong

It was too coincidental that a knife would be used to stab at a man's groin in two separate incidents in Las Vegas six weeks apart.

#### Response

The prosecution ignored that Las Vegas was a crime haven in 2001. According to the FBI's 2001 Uniform Crime Report (UCR), Las Vegas had one of the highest rates of rape in the country, 30% above the national average, 15 and murder was so commonplace that it was double the national average, with almost three per week. 16 Also undermining the prosecution "coincidence" claim is that in 2001, almost two out of five murders were committed by cutting or beating – the causes of Bailey's death. 17

Consequently, it wasn't unusual for Bailey to be beaten and stabbed to death, and six weeks earlier for Blaise to have used a knife to fend off a sexual assault eight miles away in east Las Vegas.

Blaise explained in her statement that she didn't report the May 2001 attack because she had reported previous sexual assaults and the police "basically blew me off. It's been my experience that it doesn't do any good." <sup>18</sup> Her non-reporting of the attempted rape is the norm. The U.S. Dept. of Justice estimates that in 2001 only 39% of rapes and/or sexual assaults nationwide were reported. 19

#### Second prosecution prong

The Budget Suites assault Blaise described and Bailey's murder were the same event.

#### Response

The prosecution's attempt to transpose the two events ignored that none of the details in Blaise's statement and during her trial testimony matched the crime scene or the circumstances of Bailey's death. Not the time, the size of her attacker, the type of attack, the injuries involved ... nothing. There are at least 24 specific details in her 26-minute statement that are inconsistent with the facts of Bailey's murder.

#### Third prosecution prong

The prosecution's "theory of the crime" was Bailey's murder resulted from "A drug deal gone bad." 20

#### Response

non-fact based speculation for many reasons, including:

- Bailey used crack cocaine, which was in his system at the time of his death, and witnesses testified he didn't use metham-
- There was no testimony Bailey ever sold drugs of any kind.
- There was no testimony that Bailey and Blaise had ever met, or that she knew Bailey was living in the trash enclosure.
- Multiple witnesses testified that Blaise used methamphetamines when staying in Las Vegas.
- There was no testimony why Blaise would drive 170 miles to Las Vegas solely to get meth as the prosecution alleged, when it was available within walking distance of her parent's Panaca house.

#### Fourth prosecution prong

Korinda Martin testified that Blaise bragged at the Clark County Detention Center about killing Bailey.

#### Response

Undermining Martin's claims is that the accurate details about Bailey's death that Martin testified Blaise said, were included in a LV Review-Journal article published five days after Blaise's arrest. The inaccurate details Martin testified about weren't in the media.

#### Fifth prosecution prong

The prosecution portrayed Blaise as a bad person of low moral character who grew up in the sticks of Lincoln County, used methamphetamines, and on two occasions engaged in amateur exotic dancing in Las Vegas.

#### Response

Contrary to the prosecution's intimations, there was no testimony supporting that because of her upbringing, experiences or lifestyle Blaise would ever harm anyone except in self-defense.

#### Sixth prosecution prong

To explain how Bailey's extensive injuries could have been inflicted by a person of Blaise's slender physique, the prosecution speculated that after she stabbed him while he was standing, she repeatedly hit him with the aluminum baseball bat that she kept in the back seat of her car for self-protection.

#### Response

of why each one didn't implicate Blaise in The prosecution's "theory of the crime" was That speculation was unsupported by testimony. ME Lary Simms testified that Bailey "didn't have any skull fractures that were depressed like, you know, a bat would depress somebody." 21

> Thomas Wahl, a technician with the LVMPD Crime Lab. testified. "There was no blood, hairs or tissue recovered from the aluminum baseball bat or detected on that item." <sup>22</sup> The bat has a porous rubber handle that had no trace blood residue.

> George Schiro was a forensic scientist of national repute retained by Blaise's public defenders to expertly analyze the prosecution's physical evidence. He wrote in his Forensic Science Report:

"There is no documentation of blood spatter above a height of 12 inches on any of the surrounding crime scene surfaces. ... The confined space of the crime scene enclosures and the lack of [blood] cast-off indicate that a baseball bat was not used to beat Mr. Bailey. The beating was more likely due to a pounding or punching type motion." 23

Judge Vega, however, did not allow the jury to hear Schiro's exculpatory blood 'spatter' and 'cast off' testimony. She sustained the prosecution's objection that Blaise's lawyers had not provided them with proper notice of the scope of his expert testimony.

#### **Seventh prosecution prong**

Since Blaise described stabbing at her assailant as he hovered over her, the prosecution argued that Bailey was standing with his pants down when he was stabbed in his groin.

#### Response

Schiro's analyzed the evidence for 'vertically dripped blood':

"The photographs of his pants also do not indicate the presence of any vertically dripped blood. This indicates that he did not receive any bleeding injuries while in a standing position." <sup>24</sup>

Judge Vega, however, did not allow the jury to hear Schiro's exculpatory blood dripping testimony. She sustained the prosecution's objection that Blaise's lawyers had not provided them with proper notice of the scope of his expert testimony.

#### **Eighth prosecution prong**

To fit Bailey's murder with Blaise's statement that she was on a methamphetamine binge and awake for the three days preceding being assaulted, the prosecution speculated she drove her car from Panaca to Las Vegas on July 6. They further speculated that after murdering Bailey early on the morning of the 8th, Blaise drove back for Panaca, arriving around 10 a.m.

#### Response

The prosecution presented no evidence whatsoever that Blaise was in Las Vegas on July 6, 7 or 8; numerous people saw Blaise in Panaca on July 6, 7 or 8; and multiple people saw Blaise's car was parked in front of her parent's house from July 2 to July 20.

Furthermore, the prosecution's argument completely ignored that Blaise also said she was out of her mind on meth for a week before and after she was assaulted. Yet, Blaise's blood sample taken at the Caliente Clinic on July 5 didn't test positive for meth, her urine sample was collected on July 7, and many people saw she was tired and lethargic for four or five days after arriving in Panaca on July 2 – not hyped up on meth. Blaise's boyfriend Doug Twining has testified that he and Blaise only smoked marijuana while she was in Las Vegas from July 9 to 13, when her dad picked her up and took her back to Panaca.

The jury, however, was unaware of some of the alibi testimony corroborating Blaise's presence in Panaca from July 2 through July 9. Citing inadequate notice to the prosecution. Judge Vega barred the jury from being exposed to that exculpatory information.

#### **Defense expert Schiro's testimony limited**

Vega did not allow the jury to hear the majority of defense witness Schiro's proposed expert testimony that would have undermined that the prosecution's case had any pretense of a scientific basis.

The jury also did not hear Schiro's crime scene reconstruction based on his analysis of the evidence that Bailey's murder was a premeditated methodically executed event.

Schiro was allowed to testify about the testing for the presence of blood in Blaise's car. He discussed that both presumptive luminol and phenolphthalein tests were subject to a high incidence of false positives, and that negative confirmatory tests indicated to him that human blood did not cause the weakly positive

presumptive tests for two spots in Blaise's car. bond, was taken into custody.

After he had given his very limited testimony, Schiro, who had spent the overwhelming majority of his career as a prosecution witness identifying crime scene evidence that inculpated an accused person, told reporters in the courthouse hallway what Judge Vega barred him from telling Blaise's jurors: "There is no evidence to tie Ms. Lobato to the crime scene. I feel the evidence is even exclusionary on her behalf." 25

#### The prosecution's case didn't implicate Blaise in Bailey's death

At the point that the prosecution and defense rested their cases, none of the prosecution's prongs supported implicating Blaise as Bailey's killer.

#### Conclusion of Blaise's trial

The closing arguments were made on Friday, May 18, 2002. DA DiGiacomo's argument was based on a multitude of speculations about how and why Blaise had murdered Bailey.

Blaise's lawyer Kohn, emphasized that the detectives did not identify the date of the man's stabbing they were talking about when they interrogated Blaise. Furthermore, he pointed out that the detectives and prosecutors were wrongly assuming she was talking about Bailey, when none of the details of the incident she described matched those of his death. Kohn told the jury, "Two people talking about two different incidents." <sup>26</sup> He compared the prosecution of Blaise to the Salem Witch Trials, during which many innocent women were put to death, "Women who were different, who were odd and who said stupid things." <sup>27</sup>

DA Kephart asserted in his rebuttal argument that Blaise's acknowledgement during her interrogation that she stabbed at a man's groin recuse Vega from the case in spite of her

area to fend off his sexual assault constituted a confession to Bailey's murder.

#### Verdict and sentence

Judge Vega finished reading the jury instructions at 9 p.m. The jury began deliberations immediately. After five hours they announced they had arrived at a verdict. At 3 a.m. their verdicts of guilty to both counts were read in court, and Blaise, who had been free on \$50,000



on bail in December 2005.

Her lawyer Navarro told reporters, "She placed her belief in the justice system, and she ended up being convicted of a crime that she did not commit." 28

On July 2, 2002, Blaise was sentenced to serve a minimum of 40 years before becoming eligible for parole.

#### Blaise's conviction reversed by Nevada Supreme Court on September 3, 2004

On September 3, 2004, the Nevada Supreme Court reversed Blaise's conviction and remanded her case for a new trial. Lobato v. State, 96 P.3d 765 (Nev. 09/03/2004) The reversal was based on Judge Vega's failure to allow Blaise's lawyers to cross-examine Korinda Martin about letters suggesting leniency that she wanted sent to her sentencing judge. The Court noted, "The proffered letters and extrinsic evidence relating to them confirmed Martin's desperation to obtain an early release from incarceration and her willingness to adopt a fraudulent course of action to achieve that goal." <sup>29</sup> The Court also ruled that it was prejudicial error for Vega to bar Blaise' lawyers from examining the woman the letters were mailed to, as well as introducing the letters themselves.

#### New defense lawyers for Blaise's retrial

After reviewing her case and becoming convinced of her innocence, San Francisco based lawyers Shari Greenberger and Sara Zalkin agreed to represent Blaise pro-bono during her retrial as co-counsel to her lead lawyer, David Schieck, with the Clark County Special Public Defenders Office. In December 2005 Blaise was released pending her retrial on a \$500,000 bond posted by supporters believing in her innocence. For reasons unknown, Blaise's attorneys did not move to known bias against Blaise.

#### Vega's pretrial rulings favor the prosecution

The Nevada Supreme Court was bluntly disappointed with the prejudicial effect of a number of Judge Vega's prosecution favorable rulings during Blaise's trial. The pretrial motions hearings for Blaise's retrial were the first opportunity for Vega, a former Clark County, Nevada prosecutor, to indicate if she was going to continue to openly favor her former colleagues. At the

conclusion of those hearings in May 2006, there was no doubt she was not going to be more balanced. Vega did not grant any defense motion in limine or suppression outright. The following are some of her rulings.

- The prosecution could introduce as one of the murder weapons, the bat found in Blaise's car when it was searched on July 20, 2001, even though it had no known connection to Bailey's murder.
- The prosecution could introduce pictures and testimony about Blaise's custom license plate, even though her car was not found to have any connection whatsoever with Bailey's death. Her tire tracks didn't match those found at the crime scene and confirmatory scientific tests excluded the presence of any blood in her car.
- The prosecution could introduce the "double hearsay" testimony of Laura Johnson about what she alleged Dixie Tienken said that Blaise had said. The defense argued, "By seeking to introduce this impermissible hearsay the State is trying to circumvent the rules of evidence." 30 Judge Vega denied the defense's motion without prejudice as premature, since Johnson had not yet testified, but the defense could object for the record when Johnson testified. Thus, Vega cleverly sided with the prosecution by allowing Johnson to testify about the "double hearsay" statements without making a ruling on the motion's merits.
- The prosecution could introduce Blaise's July 20, 2001 statement, even though her lawyers argued that its details had no relevance to Bailey's death, and she advised Thowsen and LaRochelle in the statement that the incident she described occurred more than a month prior to the interrogation, and thus more than two weeks prior to Bailey's death.
- The prosecution could introduce presumptive tests of two spots on Blaise's car that weakly tested positive (indicating the possible presence of an iron bearing substance, one of which is blood.), even though the much more sophisticated and precise confirmatory tests returned negative results for the presence of blood. Blaise's lawyers argued in vain that the jury would be misled that the weakly positive presumptive tests inferred the presence of blood in Blaise's car, when the spots were disproven as blood by the negative confirmatory tests.
- The prosecution could introduce what amounted to about 140 photographs of the crime scene and Bailey's autopsy photos. Blaise's lawyers argued unsuccessfully that the cumulative effect of the photos, many that were near duplicates, would

- have "the principle effect of inciting and inflaming the jury, due to graphic depictions of the victim's body, the horror of the crime and the cumulative effect of unnecessarily duplicative photographs." <sup>31</sup>
- Judge Vega also denied the defense motion to dismiss the charges based on "the state's failure to preserve and collect exculpatory evidence." Blaise's lawyers argued the failure to collect and/or preserve potentially exculpatory crime scene evidence for testing was a fatal due process violation caused by the "bad faith," or at a minimum the "gross negligence" of the police. Judge Vega ruled that in July 2001 the crime scene investigators and police could not have been expected to know that fingerprints and scientific testing such as DNA, could possibly identify Bailey's murderer(s) from their handling of any particular item, so they couldn't have acted in "bad faith" in failing to collect and preserve the crime scene evidence.
- Judge Vega also denied a defense motion to dismiss the charges on the basis that the prosecution "cannot establish the corpus delicti of the crime with evidence independent of defendant's extrajudicial admissions." 32 Just weeks before the motion was heard, the Nevada Supreme Court reiterated, "It has long been black letter law in Nevada that the corpus delicti of a crime must be proven independently of the defendant's extra-judicial admissions." *Edwards v. State*, 132 P.3d 581 (Nev. 04/27/2006). Due to the absence of any evidence independent of her July 20, 2001, statement and her other purported extra-judicial statements. Blaise's lawyers argued that contrary to the prohibition by the Nevada Supreme Court, the prosecution relied solely on her extra-judicial statements "to prove the corpus delicti of Bailey's homicide." 33 Although Vega was aware that there must be independent evidence of Blaise's alleged guilt apart from interpretations and recollections of her purported extra-judicial statements, she nevertheless denied the motion.

It was evident from Vega's pre-trial rulings that she was going to allow the prosecutors free-reign to run a replay of Blaise's first trial.

# Pubic hair DNA tests excluded Blaise in Sept 2006

Several weeks before Blaise's retrial was scheduled to begin on September 11, 2006, the prosecution disclosed that it had finally ordered DNA testing of a pubic hair found during a combing of Bailey's pubic hair on the day his body was discovered. The hair had remained untested for years in his rape kit, even though the defense had repeatedly asked for it to be tested.

The DNA test excluded Blaise and Bailey as the hair's source, but it did reveal that it came from an unidentified male. That finding was consistent with ME Simms' testimony during Blaise's May 2002 trial that the manner of Bailey's murder had homosexual overtones.

#### Prosecution Surprise - No Korinda Martin Testimony During Retrial

The prosecution had let it be known during pretrial proceedings that they intended to present the same case during Blaise's retrial as during her first trial. That, however, wasn't true. The defense found out during opening statements that Korinda Martin wouldn't be called as a prosecution witness. The prosecution may have been influenced to omit Martin as a witness because the defense contended in a pretrial motion to exclude Martin's testimony that allowing her testimony would constitute subornation of perjury by prosecutors DiGiacomo and Kephart. 34 The prosecutors also knew that based on Vega's pretrial rulings they didn't need Martin's testimony.

#### **Prosecution strategy**

Since there was no physical, forensic, scientific, circumstantial, documentary, eyewitness or confession evidence linking Blaise, her car, or any item of hers within 170 miles of Las Vegas at the time of Bailey's murder, the prosecution's primary strategy was to argue: 'It is possible she did it.' The defense had timely filed its notice of an alibi defense, and over a dozen witnesses were scheduled to testify who would place Blaise in Panaca from July 2 to 9. So the success of the prosecution's 'It is possible' strategy depended on their success at blocking anyone from testifying about their knowledge of the attack on Blaise six weeks before Bailey's murder.

#### Dixie Tienken testifies

Dixie had been Blaise's adult education teacher when she earned her GED at 17 in 2000. Blaise considered Dixie her friend and during a three hour conversation in early July 2001 that covered many topics, Blaise mentioned she had fended off a sexual assault with her knife when she had been staving in Las Vegas. Dixie didn't provide any testimony specifically linking Blaise to Bailey's murder, and she actually provided testimony supporting that the attack Blaise described had occurred between one and two months prior to their conversation. Although the prosecution treated Dixie as a hostile witness, her testimony was necessary to lay the foundation for "Star Witness" Laura Johnson's "double

hearsay" testimony about what Johnson claimed Dixie told her Blaise had said.

#### "Star Witness" Laura Johnson testifies

During Laura Johnson's "double hearsay" testimony, she testified that Dixie said Blaise said that when she was coming out of a strip club where she worked in Las Vegas, a man attacked her while his penis was hanging out of his pants and she cut it off. Johnson also said Dixie said Blaise said she was "hiding out" at her parents house and her parents were trying to get rid of her car, or get it painted to hide it. Thus Johnson provided the magic phrases suggesting Blaise had a 'guilty mind', which Dixie denied Blaise told her. First, that Blaise had been "hiding out" in Panaca, and second, with the help of her parents she wanted to "get rid" of her car or "hide" it by painting it.

#### ME Simms "Games" Bailey's Time of Death

During Blaise's Preliminary Hearing in August 2001, ME Simms' testified that Bailey died no earlier than 10:36 a.m. on July 8. That didn't jibe with Blaise's statement that she was attacked during very early morning hours, so at Blaise's first trial he "gamed" Bailey's time of death by expanding it six hours to the pre-dawn time of 4:36 a.m. That allowed the prosecution to argue that the nighttime assault on Blaise and Bailey's death were the same event. During Blaise's retrial Simms further "gamed" Bailey's time of death to as early as 3:50 a.m. <sup>35</sup>

#### **Detective Thowsen testifies**

During Detective Thowsen's direct testimony and cross-examination, he described informally visiting Diann Parker after being told she had been at Bailey's murder scene asking about him. Thowsen also described her telling him that Bailey beat and raped her on July 1, after several Mexicans in her apartment complex told him earlier that day to leave her alone after he slapped and threatened her while she was drinking beer with them. Thowsen then talked to the apartment manager who provided him with the names used by the Mexicans. He said they didn't cause any trouble. After Thowsen ran a background check on the names that returned nothing, he didn't question the Mexicans.

Although Bailey's murder was rich with fertile leads, Thowsen did no more "investigating" into Bailey's case until getting a call from Johnson on July 20 about her

conversation with Dixie. He described doing a background check on Blaise, and contacting the Lincoln County Sheriff that he would be driving up that afternoon with another detective and a crime scene analyst to interview a witness and arrest a murder suspect.

During defense attorney David Schieck's cross-examination, Thowsen was asked why he didn't investigate the Budget Suites attack Blaise described in her statement before arresting her, Thowsen replied, 'Because it didn't happen.' Thowsen elaborated that every detail in Blaise's statement that is inconsistent with Bailey's crime scene or manner of death is explainable as "minimizing." Which he described as a guilty person's technique of reducing the seriousness of what he or she did.

Thowsen's testimony about Blaise's alleged "minimizing" was critical to the prosecution, because nothing in her statement identified her as involved in Bailey's murder. What Schieck didn't know during his cross-examination was that Thowsen fabricated his explanation that she had "minimized" her involvement. According to the FBI and other experts in police interrogation techniques, "minimizing" is what a detective does to induce a suspect who has already admitted to an identifiable level of involvement in a crime to further incriminate him or herself by confessing to more specific details. The following are excerpts from an article in the August 2005 issue of the FBI Law Enforcement Bulletin, titled, "Reducing a Guilty Suspect's Resistance to Confessing":

The investigator presents the acceptable reasons to confess, usually in one of three ... categories: rationalizations, projections of blame, and minimizations. ... investigators can try to reduce, or *minimize*, the heinous nature of the crime so it produces less guilt or shame for the suspect. ...

Because the focus of the rational choice theory is centered on self-interest, projecting the blame on anything else is appropriate to reduce the suspect's feelings of guilt. ... the investigator can *minimize* the woman's shame by acknowledging her righteousness ...

To make the crime more acceptable, the investigator can *minimize* the suspect's deviant actions by explaining how he has seemingly overcome overwhelming natural circumstances...

Regarding *minimizations*, the investigators could suggest that engaging in property crimes to obtain the American dream offers a much more acceptable route than committing violent crimes.

To *minimize* the crime, the investigator can convince the suspect that his actions were minor offenses ... <sup>36</sup>

The preceding explanation of "minimization" in an official FBI publication clarifies that during Blaise's interrogation neither Thowsen nor LaRochelle "minimized" her involvement in the assault she described. Further undermining Thowsen's credibility about "minimization" is that Blaise said nothing to reduce her involvement in the assault she described in her statement.

Thowsen's false testimony about "minimizing" to explain away the absence of similarity between Blaise's statement and the details of Bailey's death wasn't a minor infraction. It was the cornerstone of his testimony.

# Prosecution's case lacked evidence implicating Blaise

There were several dozen witnesses during the prosecution's nearly three-week case. Those witnesses included police officers, several crime lab technicians, medical examiner's office personnel, relatives of Bailey, and friends and acquaintances of Blaise. What is notable about those witnesses is that not a single one provided any testimony linking Blaise to any involvement in Bailey's murder, or that on July 8 she had been within 170 miles of Las Vegas, or that she had ever met Bailey. Not even the two key witnesses, Johnson and Thowsen, provided any testimony that was anything more than conjecture that Blaise possibly could have been referring to Bailey's death when she described fending off a sexual assault with her knife.

That lack of testimonial evidence was backed up by the absence of any physical, forensic or scientific evidence that Blaise or her car was present at the crime scene. Her involvement was in fact undermined by the crime scene fingerprints that excluded her, the DNA test of the pubic hair found on Bailey's body that excluded her, the bloody male shoeprints that excluded her, the tire tracks that excluded her car, and the DNA on chewing gum found on the cardboard covering Bailey's body that excluded her.

During cross-examination of law enforcement witnesses, the defense was repeatedly able to expose the multiple deficiencies in the collection, preservation, and/or testing of crime scene evidence. The portrait painted by the defense's cross-examination was that with a few exceptions, the LV Metro PD handled Bailey's crime

scene and investigation like they were a cross between the Keystone Cops and rank amateurs.

#### Two defense experts

The defense did not retain Schiro for Blaise's retrial, but it did enlist two experts who testified, Dr. Michael Laufer and Brent Turvey.

# Dr. Michael Laufer testifies Bailey was likely murdered with scissors

Dr. Michael Laufer is associated with Stanford Medical School and the nationally recognized inventor of more than 100 medically related products.

In the course of reviewing the autopsy report, and autopsy and crime scene photos, Laufer began doubting that Bailey's stab and slashing wounds were caused by a knife, as he had been told when he agreed to review the case. He noticed they resembled scissors wounds he had treated during his years as an emergency room doctor. So he proceeded to conduct a photographed controlled experiment to see if he could duplicate Bailey's wounds by stabbing scissors into a flesh substitute — foam rubber tightly covered with ultra suede.

In his final report, dated September 24, 2006, Laufer determined that Bailey's stab wounds were consistent with being caused by scissors, and that barber scissors with a finger hook were the most likely type used to inflict Bailey's wounds. He also concluded that scissors were likely used to snip his carotid artery, and "The penile amputation was most likely performed with scissors." <sup>37</sup>

Laufer's experiment that duplicated a wound to Bailey's abdomen disclosed "a "ring distance" between the inside of the second finger and the inside of the fifth finger of the assailant's hand of at least 5.8 cm." <sup>38</sup> The "ring distance" of Blaise's hand was measured to be 4.3 cm. Thus Laufer concluded her hand is much smaller than Bailey's assailant.



Laufer also determined that because the bleeding of Bailey's blood stopped at the waist level of his pants, the wounds above his waist were inflicted while his pants were pulled up.

Laufer testified to his findings about Bailey's wounds and cause of death on direct examination. The prosecution, however, successfully blocked his testimony about the case's extensive blood evidence. Judge Vega agreed

with the prosecutors that the defense had not provided the required notice about the extent of Laufer's expert testimony.

Kephart was taken aback during his crossexamination, when Laufer testified that he provided his expertise in Blaise's case pro bono. Laufer said, "The first thing I was told [by defense lawyer Greenberger] was, "We don't have any money.""

# Brent Turvey testifies no physical evidence implicates Blaise in Bailey's murder

The other defense expert was Brent Turvey, a forensic scientist and criminal profiler. After analyzing a large number of case reports and documents, Turvey completed a report dated October 17, 2005. His findings were:

- 1. There is no physical evidence associating Kirstin "Blaise" Lobato, or her vehicle (a red 1984 Fiero), to the crime scene.
- 2. The offender in this case would have transferred bloodstains to specific areas of any vehicle they entered and operated.
- 3. The failure of Luminol to luminesce at any of the requisite sites in the defendant's vehicle is a reasonably certain indication that blood was not ever present, despite any conventional attempts at cleaning.
- 4. There are several items of potentially exculpatory evidence that were present on or with the body at the crime scene but subsequently not submitted to the crime lab for analysis.
- 5. A primary motive in this case is directed anger expressed in the form of brutal injury, overkill and sexual punishment to the victim's genitals.
- 6. The wound patterns in this case may be used to support a theory of multiple assailants. <sup>39</sup>

Turvey testified to his findings on direct examination. Key points of his testimony revolved around forensic science's "exchange principle," which is that "every contact leaves a trace" and, "no evidence means no proof of contact." 40 The "exchange principle" is the basis of his conclusion that there is no physical evidence Blaise was involved in Bailey's murder.

Turvey's cross-examination was much more contentious than Laufer's. The biggest fireworks occurred when Turvey resisted DiGiacomo's attempts to pressure him to acknowledge that the two spots in Blaise's car that weakly tested positive after a presumptive test, "possibly" could be blood. Turvey repeatedly responded that the much more precise confirmatory testing of the spots were negative for blood, so the idea it was blood "had to be let go."

A nationwide Westlaw search of state and federal appellate cases revealed only 16 homicides where an adult victim's penis was actually cut off. In all but one case it was a male, or a group of two or more males, who committed the murder and the ultimate removal of the victim's penis:

Notably, the alleged circumstances in *only one case* involved a female acting alone to attack, subdue, and remove the penis of an adult male victim – *Nevada* v. *Kirstin Blaise Lobato*.

Forensic Examination Report, Brent E. Turvey, MS, October 17, 2005, p. 3.

# Four witnesses not allowed to testify attack on Blaise was before Bailey's death

The prosecution knew that prior to Bailey's murder Blaise talked with at least five people about the May 2001 Budget Suites assault. Those five people are Steve Pyszkowski, Kathy Renninger, Michelle Austria, Heather McBride, and Blaise's dad, Larry Lobato.

During Blaise's first trial Vega had allowed Pyszkowski, Austria and McBride to testify that they were told about the assault against Blaise in Las Vegas on days that ranged from a month to six days preceding Bailey's murder on July 8. Larry was told by Blaise about the attack in late June 2001, but he wasn't called as a witness by the defense.

Four of those people, Pyszkowski, Austria, McBride, and Larry testified at Blaise's retrial, but Judge Vega blocked all of them from testifying about their knowledge of the May assault, by sustaining the prosecution's objections it was hearsay.

#### Alibi witnesses

Thirteen people testified that they saw Blaise in Panaca between July 2 and July 9. <sup>41</sup> Ten of those people testified they saw her on the weekend of July 7 and 8. All of the relatives, acquaintances, and neighbors who also testified about seeing Blaise's car parked in front of her parents house said they never saw it moved or parked in a different position on the city street behind a utility trailer, after she arrived from Las Vegas on July 2, until the police took it away on July 20.

#### Kristina Paulette

During LVMPD Crime Lab technician Kristina Paulette's testimony on September 25 as a prosecution witness, she described the

DNA test results of a pubic hair combed from Bailey's public hair that remained untested in Bailey's rape kit for more than five years. The test not only excluded Blaise, but it was from an unidentified male. After the retrial began DiGiacomo instructed the police crime lab to perform DNA testing of three cigarette butts found on Bailey's body. That DNA report was issued two days after Paulette testified for the prosecution, so she was called as a defense witness on October 2. She testified that one butt did not have isolatable DNA, another had Bailey's DNA (from his blood) and the DNA of an unidentifiable person, and the third only had the DNA of an unidentified male. Paulette testified that Blaise was conclusively excluded as a source of the DNA on the second and third cigarette butts.

#### **Closing arguments**

The personality differences between the two prosecutors and Blaise's lawyer conducting the closing, David Schieck were stark. Prosecutor DiGiacomo has the bearing and mannerisms of a spoiled, petulant child. Prosecutor Kephart has a forceful personality and the mannerisms of a snake-oil salesman. While Schieck has an earnest, low key manner.

#### DiGiacomo's closing argument

DiGiacomo's closing revolved around the theme: It is possible Blaise killed Bailey.

To support her 'It's possible she did it' claim, DiGiacomo speculated about numerous allegations that were unsupported by any trial evidence. She even had a PowerPoint presentation laying out her supposition that Blaise was Bailey's killer. Although DiGiacomo made her arguments without caution or restraint, Blaise's lawyers didn't object.

#### Schieck's closing argument

Schieck's closing was built on several interrelated themes: the crime scene evidence that was collected and tested excludes Blaise; there is nothing in her statement that incriminates her in Bailey's murder; nothing in her possession or her car links her to Bailey's murder; the unrebutted alibi testimony of nearly a dozen people establishes she was in Panaca the entire day of July 8; and because of the complete absence of inculpatory evidence, the prosecution was seeking to have Blaise convicted on their speculation it was possible she killed Bailey – and not proof beyond a reasonable doubt.

He described the prosecution's case as: "It's possible it happened this way;" "somehow Blaise came into contact with Mr. Bailey;" "Somehow, somehow, somehow, it goes on and on."

Schieck explained that the prosecution was supporting their scenario of the crime with the argument, "There is nothing to disprove this so it must be true." He told the jurors, "The prosecution is actually defending themselves from the lack of evidence and trying to convince you that somehow they have proved anything in this case."

Schieck plainly asked the jury, "Isn't it possible that she wasn't there and that's why they have no evidence? Isn't it possible they are prosecuting an innocent person? Isn't that a possibility if they want to talk about possibilities?"

Schieck emphasized, "What happened in this case is a snap judgment was made to arrest Blaise Lobato in Panaca, Nevada, and for the next five years the state and the detectives have attempted to prove their case after they made their arrest instead of doing it the right way of getting your facts straight before you arrest someone and charge them with murder."

He encouraged the jurors to listen to Blaise's taped statement, telling them, "There is no evidence in that statement that is going to convict her in this case."

He also told the jury that when the defense presents an alibi defense, the burden is on the state to disprove the alibi beyond a reasonable doubt. Yet the prosecution presented no testimonial or documentary evidence rebutting Blaise's alibi of continuously being in Panaca from the afternoon of July 2 until the early morning of July 9. So she wasn't even in Las Vegas when Bailey was murdered on the 8th.

Schieck gave the jury a bit of a history lesson by telling them that the prosecution's burden of proving a defendant guilty beyond a reasonable doubt was embedded in the Bill of Rights to prevent a person such as Blaise from being convicted without any evidence. He explained, "The burden of proof is beyond a reasonable doubt, not, it's possible."

#### **Kephart's rebuttal closing argument**

Kephart is an experienced prosecutor who knows from more than 100 jury trials that evidence of a defendant's guilt isn't necessary to win a conviction, as long as he is able to push the jurors emotional buttons that make them bypass the thought process

and feel a defendant is guilty without being able to coherently articulate why.

Since the prosecution had no direct or circumstantial evidence upon which to base an argument for the jury to find Blaise guilty, Kephart resorted during his rebuttal to using his forceful personality to command the jury's attention while he made an emotion laden zealous argument for a guilty verdict based on the theme that it was too coincidental for a man to be non-fatally wounded by having his groin area stabbed or cut as Blaise described in her statement, and six weeks later for another man across town to have his penis severed after he was dead.

Kephart's argument bet that the all-white middle-class jury could be induced to disregard that no evidence tied Blaise to Bailey's murder if they could be convinced that in July 2001 she was a thoroughly bad and depraved young women who would do anything to satisfy what he alleged was her meth craving. Kephart's wild-eyed ranting about Blaise during his closing was in some ways reminiscent of old film clips of fevered denunciations by Hitler and other Nazis of Jews as subhuman and deserving of punishment.

Kephart's closing emotional appeal to the jury was showing them a large blow-up of Blaise's picture taken when she was arrested in Panaca on July 20. He thundered that the short-haired bleach blond 18-year-old with no make-up shown in the picture is who the jury was judging and should convict – not the attractive 23-year-old brunette with long "swept-back" hair sitting at the defense table. As with DiGiacomo's closing, the defense allowed Kephart to run-off his mouth unrestrained by objections.

#### Jury's verdict

After Kephart's fire-breathing evangelical closing, some trial observers might have been concerned the jury would rush out like a lynch mob and convict Blaise in short order while in a fevered state of mind. The jury began deliberating at 6:45 p.m. on Thursday, October 5, and when they requested to go home at midnight, it was known that at least one juror wanted to at least consider the evidence. The jury resumed deliberating at 8:30 a.m. on Friday, the day before the beginning of the Columbus Day holiday weekend. In mid-afternoon, after more than ten hours of deliberation, they notified the bailiff they had reached a verdict.

The jury convicted Blaise of voluntary manslaughter with a deadly weapon and sexual

penetration of a dead body. Schieck moved for continuation of Blaise's release on \$500,000 bond. Kephart opposed it, arguing she was a flight risk because she hadn't personally put up the bond money. Vega adopted Kephart's position and Blaise was taken into custody.

After the verdict, both Kephart and Schieck publicly expressed the opinion that it was a compromise: some jurors wanted to acquit Blaise, and others wanted to convict her of first or second-degree murder. But on the eve of a holiday weekend, the jurors settled in the middle rather than continue deliberating through the holiday, and possibly even then be unable to reach a unanimous noncompromise verdict.

Judge Vega went along with the recommendation of her former colleagues in the Clark County DA's office and sentenced Blaise to the maximum of 13 to 45 years in prison on February 2, 2007, even though she was eligible for probation, she received a positive psychological evaluation from both a prosecution and a defense expert, and there was no evidence presented during the sentencing hearing that she poses any danger to the community.

#### Conclusion

Almost six years after Duran Bailey's murder, all the physical evidence and evaluation of the crime scene points exclusively to one or more males as the perpetrator. Yet Blaise has twice been convicted in this death without any evidence whatsoever she was within 170 miles of Las Vegas at the time of his murder.

An examination of Blaise's case reveals deep flaws in the collection and testing of evidence, and the investigation, prosecution and adjudication of serious crimes in Clark County, Nevada, and in a larger sense, juris-

dictions all across the United States. That is because the same bureaucratic police, prosecution and judicial processes and influences involved in Blaise's case are typical of those that prevail throughout the country. It is sobering to consider, but there is every reason to think Blaise could have been convicted – twice – anywhere else under the same circumstances of an underfunded defense, detectives unconcerned about the truth, prosecutors obsessed with "winning at all costs," and an overtly prosecution friendly judge who is a former assistant DA. 42

#### Endnotes:

1 Autopsy Report: Pathologic Examination On The Body Of Duran Bailey,

1 Autopsy Report: Pathologic Examination On The Body Of Duran Bailey, Clark County Coroner, July 9, 2001 (Las Vegas, NV).
2 Simms expressed that opinion during Kirstin "Blaise" Lobato's Preliminary Hearing on August 7, 2001, based on the fact that when examined by the coroner's investigator at the crime scene, "The body wasn't manifesting any significant degree of decomposition, so I would say he had died a lot closer to the time he was discovered than not." See, State v. Lobato, Case No. C177394, Reporter's Transcript of Preliminary Hearing, August 7, 2001, 32-33.
3 The State of Nevada v. Kirstin Blaise Lobato, No. 40370, Transcript Vol. 5, 45, Testimony of Diann Parker, May 14, 2002.
4 Id., 46
5 Statement to Las Vegas Metropolitian Police Denartment by Laura Linn

4 10., 40 S Statement to Las Vegas Metropolitan Police Department by Laura Linn Johnson, Event #010708-2410, July 20, 2001, pp. 2-3. G Contrary to Johnson's assertion, Lincoln County District Attorney Greg Barlow reports that Blaise has never been investigated, arrested, convicted, sentenced, or served any probationary term for any alleged violation of any law in Lincoln County. District Attorney Barlow provided that information in a letter dated January 4, 2007, to The Justice Institute/Justice:Denied, in response to a Public Records Law request.

7 This relating of events is a composite of Blaise's statement to Detectives Thowsen and LaRochelle on July 20, 2001, and conversations she had with other people. See, Statement to Las Vegas Metropolitan Police Department by Kirsten Blaise Lobato, Event #010708-2410, July 20, 2001, (hereinafter,

by Kirsten Blaise Lobato, Event #010708-2410, July 20, 2001, (herematter, "Blaise's Statement").

8 The testimony of Doug Twining establishes the assault occurred on May 23, 24 or 25, just before the 2001 Memorial Day weekend.

9 These 24 details are documented in two charts at, http://justicedenied.org/issue/issue\_34/statement\_differences.htm

10 The State of Nevada v. Kirstin Blaise Lobato, No. 01F12209X, Dept.

2, Criminal Complaint, July 23, 2001. 11 The State of Nevada v. Kirstin Blaise Lobato, No. 01F12209X, Dept. 2,

Amended Criminal Complaint, July 26, 2001. 12 Larry Lobato testimony on October 3, 2006, at retrial of Kirstin Blaise

21 Larry Lobato testimony on October 3, 2006, at retrial of Kirstin Blaise Lobato.

3 William J Bodziak, Footwear Examination Report, Forensic Consultant Services, March 27, 2002.

14 The State of Nevada v. Kirstin Blaise Lobato, No. 40370, Transcript Vol. 3, 169, Testimony of Korinda Martin, May 10, 2002.

15 Crime in the United States 2001, Uniform Crime Reports, FBI, U.S. DOJ, Washington D.C., Table 6, Index of Crime (There were 447 reported rapes in Las Vegas in 2001).

16 Id. (There were 133 identifiable murders in Las Vegas in 2001).

17 Crime in the United States 2001, Uniform Crime Reports, Federal Bureau of Investigation, U.S. Department of Justice, Washington D.C., Table 2.9, Murder, Types of Weapons Used. (A sharp object (knife, scissors, etc.) was involved in 13% of all murders, and 24% of murders were committed with fists or an unknown weapon.) or an unknown weapon.)

18 'Sensitive' Defendant Denies Mutilation Slaying Charge, Glenn Puit,

18 Sensitive Detendant Denies Mutilation Slaying Charge, Glenn Puit, Las Vegas Review-Journal, May 16, 2002.

19 "Reporting to the police," 2001 National Crime Victimization Survey, Bureau of Justice Statistics (U. S. Department of Justice), p. 10. At, http://www.ojp.gov/bis/pub/pdf/cv01.pdf.

20 Kephart didn't just argue this in court, but explained it to journalists

during the jurors deliberations and then after Blaise was sentenced on August 28, 2002. See, Homeless man's killer sentenced, Las Vegas

Review-Journal, August 28, 2002; Jurors Deliberate Severed Penis Slaying, Glen Puit, Las Vegas Review-Journal, May 17, 2002. 21 The State of Nevada v. Kirstin Blaise Lobato, No. 40370, Transcript Vol. 2, 38, Testimony of Lary Simms, May 9, 2002. 22 The State of Nevada v. Kirstin Lobato, No. 40370, Transcript Vol. 4,

124, Testimony of Thomas Wahl, May 13, 2002.
23 Crime Scene Reconstruction and Forensic Science Interpretation in

State v. Lobato, Case No. C177394. Forensic Science Resources, Case No. FSR2-02, May 31, 2002, p. 3. (Bold in original.) This report was completed after Blaise's trial.

24 Id., p. 3. (Bold in original.) 25 Expert's Testimony Limited, Las Vegas *Review-Journal*, May 17, 2002. (emphasis added)

26 Jurors Deliberate Severed Penis Slaying, Glenn Puit (staff), Las Vegas Review-Journal, May 17, 2002 27 Id.

28 Convicted Killer Turned Down Plea Deal. Las Vegas Journal-Review.

28 Convicted Killer 1 urned Down Plea Deal, Las Vegas Journal-Review, May 29, 2002.
29 Lobato v. State, 96 P.3d 765 (Nev. 09/03/2004)
30 Defendant Lobato's Notice Of Motion And Motion In Limine To Exclude Testimony Of Laura Johnson, State v. Lobato, No C177394, District Court, Clark County, NV, p. 12.
31 Defendant Lobato's Notice Of Motion And Motion In Limine To Evolved Left-Representations of the Proceedings of the Proceeding

31 Defendant Lobato's Notice Of Motion And Motion in Limine 16 Exclude Inflammatory and Cumulative Photographs, State v. Lobato, Case No. C177394, Dept II, District Court, Clark County, Nevada, p. 4. 32 Kirstin Lobato's Motion To Dismiss Because The State Cannot Establish The Corpus Delicti Of The Crime With Evidence Independent Of Defendant's Extrajudicial Admissions, State v. Lobato, Case No. C177394, Dept II, District Court, Clark County, Nevada.

33 *Id.* at 6.

34 Defendant Lobato's Notice Of Motion And Motion In Limine To Exclude Witness Korinda Martin's Testimony ..., *State v. Lobato*, Case No. C177394 ("...the presentation of said testimony is tantamount to suborning perjury.")
35 Simms has twice revised his estimate of Bailey's time of death, even

though the information upon which he based his initial estimate remains unchanged.

unchänged.

A Geducing a Guilty Suspect's Resistance to Confessing: Applying Criminological Theory to Interrogation Theme Development, By Brian Parsi Boetig, M.S., FBI Law Enforcement Bulletin, August 2005 Volume 74 Number 8, United States Department of Justice Federal Bureau of Investigation Washington, DC 20535-0001. (Emphasis added to original.)

37 Report Re: Lobato, Michael D. Laufer, MD, September 24, 2006, Interpretation of findings, No. 8., p. 3.

38 Id., Conclusions, No. 5., p. 4.

39 Forensic Examination Report, Brent E. Turvey, MS, October 17, 2005, p. 2.

40 Brent Turvey's testimony on October 2, 2006, at Kirstin "Blaise"

Lobato's retrial.

41 A chart of the alibi witnesses is at,

41 A chart of the autor witnesses is at, http://www.justicedenied.org/issue/issue\_34/alibi.htm 42 For a discussion of the dominance of bureaucratic processes in the

Sherrer, The Independent Review, Vol. 5, No. 2, Fall 2000, 249-264.

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#### **Lobato Jurors Engaged In Misconduct**

he following is a copy of the notarized affidavit mailed on November 9, 2006, to David Schieck, Kirstin Blaise Lobato's lead lawyer. It documents that a week before jury deliberations began, jurors were discussing the case and appear to have formed opinions without consideration of the defense's case, the presentation of which began only hours before the events related in the affidavit. Querying the jurors during an evidentiary hearing could flesh out the degree of their discussions and opinions formed prior to commencement of deliberations on Oct. 5, 2006.

#### Affidavit of Hans Sherrer

State of Washington ) ) SS: County of King

I, Hans Sherrer, first duly sworn, depose and say that the foregoing is true and correct to the best of my knowledge and belief: 1) On Friday, September 29, 2006, I was a spectator at the trial of Kirstin Blaise Lobaon the 16th floor of the Clark County Courthouse in Las Vegas, Nevada.

- 2) At about 1 p.m. that afternoon the prosecution rested its case in chief and the defense began presenting its case.
- 3) At about 3:30 p.m., during the trial's afternoon "stretch" break, I was in the Kirstin Lobato trial. men's public bathroom on the 16th floor.
- to in the courtroom of Judge Valorie Vega 4) My attention was drawn to two men in the bathroom, when one referred to "differences of opinion."
  - 5) The other man responded to the first man's comment by saying, "Deliberations are going to take a long time."
  - 6) I noticed that both men were jurors in the

#### **Jurors continued on page 34**

#### Jurors cont. from p. 33

- 7) I recognized the man who made the response about "deliberations" was the same juror I had observed dozing (or actually sleeping) in the courtroom for about fifteen minutes on the afternoon of Tuesday, September 26, 2006, during the testimony out of turn by defense witness Dr. Michael Laufer.
- 8) In regards to the September 26 incident involving that juror, on the morning of Wednesday, September 27, 2006, I informed Clark County Deputy District Attorney William Kephart that I had something I wanted to jointly inform the prosecution and defense attorneys about, and later that morning I jointly informed them what I had observed the juror doing, and showed Mr. Kephart the written note I had made about the incident the preceding day at the time of the incident.
- two jurors on the afternoon of September 29, 2006, I had reason to believe that after compresentation of the plete prosecution's case, but after only partial presentation of the defense's case, the jurors were deeply divided in their opinion about the impact of the evidence presented as it affected Ms. Lobato's conviction or acquittal.
- 10) After Ms. Lobato's conviction on the afternoon of October 6, 2006, I read an article on Court TV's website about the trial's outcome, and that story included the analysis by both Ms. Lobato's attorney David Schieck and Deputy DA Kephart that the verdict was a "compromise" by jurors divided between wanting to acquit her, and wanting to convict her of more than voluntary manslaughter.
- 11) After reading the news reports about the verdict, I knew that the jurors' conversation

- 9) Based on the comments of the concerning the differing opinions formed by the jurors that I overhead in the bathroom six days before the jury began deliberating accurately reflected that the jurors were sharply divided about the case, and that they had resolved being a "hung jury" by settling on what both the defense and prosecution attorneys recognize was a compromise verdict.
  - 12) While attending the trial I witnessed that prior to an adjournment for lunch, a "stretch break," or after a day's proceedings, Judge Vega admonished the jury with words to the effect that jurors were not to talk amongst themselves about the trial or form or express any opinion on any subject related to the trial until the case was submitted to them.
  - 13) On the morning of October 9, 2006, the Monday after the Friday afternoon verdict in Ms. Lobato's case. I called the office of the Clark County Special Public De-

- fender and asked for Mr. Schieck, whereupon the woman answering the telephone informed me that he was in Carson City, Nevada, and would return the following day.
- 14) On Tuesday, October 10, 2006, at about 10 a.m., I called the office of the Clark County Special Public Defender and asked for Mr. Schieck, whereupon the woman answering the telephone informed me he wasn't available but I could leave a message on his voice mail.
- 15) After being transferred to Mr. Schieck's voice mail, I left a message that I had information concerning juror conduct during Ms. Lobato's case, and that I would be sending him an affidavit.

BY:

#### Hans Sherrer

Subscribed and sworn to before me, this 9th day of November,

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