

Seventeen-year-old Bruce Lisker was arrested in 1983 for murdering his mother Dorka, on the same day he reported finding her beaten and stabbed in her Sherman Oaks, California home. Two years later he was convicted of second-degree murder and sentenced to 16 years to life in prison. His conviction was based on five key prosecution points:

- He couldn't have first seen his mother lying on the floor by looking into the house through the outside windows where he said he was standing.
- There were blood drops on his clothes.
- He allegedly confessed to a jailhouse informant.
- His bloody shoeprints were allegedly found at the scene.
- His motive of robbery was established by money allegedly missing from his mother's purse.

His conviction was affirmed on direct appeal and his state habeas was denied. However, he didn't immediately pursue challenging his conviction in federal court.

Lisker filed his first federal habeas corpus petition in 2004, nineteen years after his conviction and eight years after enactment of the Anti-terrorism and Effective Death Penalty Act (AEDPA). The AEDPA includes a one-year statute of limitations after finalization of a state conviction, for a person to file a federal habeas petition. (The calculation of the statute of limitations is subject to a number of factors.)

Lisker's petition was based on his allegation of ineffective assistance of counsel by his trial attorney, and that his right to have a lawyer present during police questioning was violated. The state responded with a "Motion to Dismiss" that contended Lisker's petition was barred by the AEDPA's one-year filing deadline. Lisker countered that his petition was timely under the U.S. Supreme Court's miscarriage of justice "gateway" exception in *Schlup v. Delo*, 513 U.S. 298 (1995).

After a week-long evidentiary hearing in December 2005, U.S. District Court Magistrate Ralph Zarefsky submitted his 57-page "Report and Recommendation" to District Court Judge Virginia Phillips. Excerpts of that May 4, 2006, "Report and Recommendation" follow:

The Supreme Court has assumed, without deciding, that there is a constitutional right to federal habeas review of state court judgments. *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996).

## Bruce Lisker Granted Miscarriage Of Justice Exception For Late Filing Of Federal Habeas Petition

By JD Staff

If such a right exists, then the writ could well be rendered ineffective or inadequate ... by a limitations period which prevents a petitioner, who can demonstrate probable innocence, from proceeding in a first federal petition. ...

... the *Schlup* miscarriage of justice concept is a well-established equitable doctrine, the Court concludes that AEDPA's statute of limitations must be tolled when an evidentiary showing demonstrates that its application would work a miscarriage of justice under *Schlup*. ...

### VI. THE STANDARD FOR DETERMINING INNOCENCE

... under *Schlup*, a petitioner is "actually innocent" if it is more probable than not that no reasonable juror would find the petitioner guilty beyond a reasonable doubt in light of the new evidence. *Schlup*, 513 U.S. at 327. ... *Schlup* requires the habeas court to posit a hypothetical jury that is entitled to consider both admissible and inadmissible evidence, so long as the inadmissible evidence is reliable. ... In *Schlup*, the Supreme Court refers to this decision as a "probabilistic determination, ..."

... this Court finds that in order to pass through the innocence gateway, Petitioner is required to show that it is more likely than not that no reasonable juror would convict him in light of the new evidence.

Respondent also has argued that "new evidence" under *Schlup* should include only evidence which Petitioner had not discovered at the time of trial. The Ninth Circuit has held to the contrary; "new evidence" is evidence which was not presented at trial. ...

### VII. PETITIONER HAS SATISFIED THE SCHLUP STANDARD

This Court retains no confidence in the verdict achieved through the presentation of evidence at Petitioner's trial because none of the evidence from that trial, upon which the conviction rested, withstands scrutiny in light of the newly presented evidence here. Petitioner could have seen his mother from outside the

house; ... The shoe prints inside and around the house did not all belong to Petitioner. ... The blood on Petitioner did not suggest guilt any more than innocence. The victim's purse contained most of the missing money. Hughes' testimony was not credible either in isolation or in conjunction with other evidence. ... There was a different suspect who was not "convincingly cleared" and whose involvement police appear to have ignored in spite of compelling evidence. ...

... The evidence Respondent relied on consists primarily of the conditional guilty plea Petitioner entered when he was to be considered for placement in the California Youth Authority ... and the statements Petitioner made during his parole proceedings from 1991 to 1998. ...

At first blush a guilty plea seems quite damning. But the mere existence of the guilty plea itself is not conclusive. ... This particular plea cannot be considered very reliable.

... Petitioner ... pled guilty ... based on the assumptions of what the evidence would have shown at the time, and that is the very evidence which the hearing in this Court undermined in its entirety. ...

Lacking in any detail ... Petitioner's 1984 conditional plea ... [is] not strong evidence of his guilt. ...

Petitioner's admissions of guilt in parole proceedings are even less persuasive evidence of Petitioner's guilt. ... these admissions were made with everything to gain and nothing to lose, ... Most important ... the admissions either were almost entirely devoid of details which might give them verisimilitude or contained statements that conflicted with the evidence ...

In sum, the [hypothetical jury envisioned by the Supreme Court in *Schlup*] would know that there is essentially no evidence of Petitioner's guilt ... In such circumstances, it is more probable than not that no reasonable juror would find Petitioner guilty of murder beyond a reasonable doubt. ...

### IX. RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the District Court (1) issue an Order accepting and adopting this Report and denying the motion to dismiss the action; and (2) refer this case back to

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the undersigned for further proceedings.

DATED: May 4, 2006  
Ralph Zarefsky  
United States Magistrate Judge <sup>1</sup>

Zarefsky's analysis that a jury would reject Lisker's admissions of guilt as false and acquit him after considering the new exculpatory evidence was consistent with the opinion of five jurors from Lisker's 1985 trial. Those jurors have said they would have voted to acquit Lisker if they had known the evidence upon which Zarefsky relied in making his decision. While reading a *Los Angeles Times* article about the new evidence, juror Linda R. Kelly said, "It was making me sick to my stomach. I just hate to think that I was a party to this. I feel that I made a mistake. Hopefully, he will get a new trial and he can have the rest of his life." Another juror, Mary L. Tweten, said about the LAPD and the prosecution, "They didn't do their job right. They didn't present us the whole truth." She also said if the evidence had been presented during Lisker's trial, "I would not have voted guilty — absolutely not." Juror Lorraine Maxwell said in a sworn statement, "I am saddened, as well as angered, that the evidence ... was not presented to the jury," and there is "no way" she would have convicted Lisker if the evidence had been introduced during his trial. <sup>2</sup>

Judge Phillips announced in October 2006 that she agreed with Zarefsky's "Report and Recommendation," and she accepted Lisker's habeas petition as filed timely under *Schlup's* miscarriage of justice "gateway" exception.

Having successfully demonstrated that a jury would probably acquit him based on the new evidence, the path was cleared for Lisker to be granted a new trial if he proved his habeas' claim that the alleged violations of his federal constitutional rights deprived him of his right to due process. <sup>3</sup>

After the federal Ninth Circuit Court of Appeals denied the California Attorney General's interlocutory appeal of Judge Phillips ruling, Lisker filed an amended habeas petition with two new claims. Magistrate Zarefsky agreed with the California AG's objection that Lisker's new claims had not been exhausted in state court. Zarefsky then stayed Lisker's federal habeas on January 12, 2007, to give him the opportunity to pursue the new claims in state court.

Lisker filed what was his second successive state habeas corpus with the California Su-

preme Court on February 12, 2007. His previous writs were in 1989 and 2003. He cited four Grounds For Relief:

1. Petitioner's Conviction Violates Due Process Because it Was Based on False Evidence Material to the Verdict.
2. Petitioner Was Denied the Effective Assistance of Counsel by His Counsel's Failure to Investigate and Advance a Third-Party Culpability Defense. ("The above evidence is sufficient not only to support a third-party culpability defense, but to return a swift guilty verdict [against Michael Ryan as the person who murdered Dorka Lisker.]." p. 66.)
3. Petitioner's Sixth Amendment Right Was Violated By the State's Knowing Exploitation of An Opportunity to Confront Him Without Counsel.
4. The Cumulative Effect of the Errors Entitled Petitioner to Relief. <sup>4</sup>

As of early July 2007 Lisker's state habeas is pending.

### Sources and Endnotes:

A previous *Justice:Denied* article about Lisker's case is, "Not So Solved – The Bruce Lisker Story," By Amy Fisher, *Justice:Denied*, Issue 29, Summer 2005, p. 6, 38-40.

1 *Lisker v Warden*, CV 04-2687-VAP(RZ), (U.S.D.C. C.D.CA), Notice Of Filing Of Magistrate Judge's Report And Recommendation, May 4, 2006.

2 "Jurors Now Fear They Knew Too Little," By Matt Lait and Scott Glover (staff), *Los Angeles Times*, May 24, 2005.

3 "Inmate's Bid For Freedom Can Proceed, Judge Rules," By Matt Lait and Scott Glover (staff), *Los Angeles Times*, October 12, 2006.

4. *In Re Bruce Lisker*, CA Supreme Court, Memorandum of Points and Authorities, D. 1, 2, 3, and 4.



Magistrate Zarefsky's 57-page Report and Recommendation can be ordered for \$5. Lisker's 82-page Feb 2007 CA state habeas and memorandum can be ordered for \$5, or order both for \$10. Mail check, money order or stamps with a request for "Zarefsky Report" or "Lisker Habeas" to:  
Justice Denied  
PO Box 68911  
Seattle, WA 98168

Zarefsky's R&R and Lisker's habeas can be viewed or printed from JD's website at, [www.justicedenied.org/liskerdocs.htm](http://www.justicedenied.org/liskerdocs.htm)

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## In Memory Of Evan Zimmerman

By Mike "Pie" Piaskowski  
(Exonerated of murder in 2001 after six years of wrongful imprisonment.)

Evan Zimmerman was a fellow Wisconsin exoneree and good friend of mine. Sadly, Evan passed away of cancer on June 30, 2007. He was only 61.

Evan's ex-lady friend, Kathy Thompson, was found strangled to death in February 2000 in Eau Claire, Wisconsin. Her murder was "solved" when Evan, a former police officer, was arrested about a year later. Evan steadfastly denied any involvement in her death from the time he first became a suspect. Nevertheless, he was convicted in 2001 of first-degree homicide and sentenced to life in prison.

After more than three years of imprisonment, the Wisconsin Innocence Project aided Evan's successful appeal of his conviction, and his retrial was ordered. In 2005, with the prosecution's case in shambles, the D.A. dramatically dropped all charges during the middle of Evan's retrial.

After his release from prison Evan filed a wrongful-conviction lawsuit against the Eau Claire police department. Unfortunately for Evan, in September 2006 the federal court dismissed his suit.

In June 2006 the A&E cable channel first broadcast a documentary about Evan's case – *Facing Life: The Retrial of Evan Zimmerman*.

Evan was a wonderful person and will be missed by many. Let us pray that we can all work together, in Evan's name, as well as all of the exonerees throughout the country, to help eliminate wrongful convictions and all other forms of injustice created by our justice system.

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Back issues of *Justice: Denied* can be read, there are links to wrongful conviction websites, and other information related to wrongful convictions is available. JD's online Bookshop includes more than 60 wrongful conviction books, and JD's VideoShop includes many dozens of wrongful conviction movies and documentaries.