Murder Conviction Based On Perjury And Withheld Evidence – The Douglas Arey Case

By Douglas Scott Arey [1]

Samuel Shapiro was last seen alive around 5 P.M. on May 9, 1973. Shapiro's secretary and mistress, Nancy Frank, last saw him walking on a Baltimore sidewalk with Dennis Mullene Moon.

Two days later, after Shapiro had been listed as missing, Douglas Scott Arey was questioned at the Baltimore City Police Headquarters about Shapiro. Arey, who knew both Moon and Shapiro, was arrested eighteen hours later on suspicion that he committed a premeditated armed robbery of Shapiro that resulted in his death. One week later Shapiro's body was found in a trunk in Pennsylvania.

The charges and evidence

Arey was subsequently indicted under a felony murder theory that Shapiro's death was the intended consequence of an armed robbery. However, out of an eight count indictment for armed robbery, larceny and theft, after arguments by Arey's attorney the trial court dismissed seven counts, and the jury acquitted Arey on the remaining count. Thus Arey's felony murder charge was based on the prosecution's false theory that he was involved in robbing Shapiro.

There was no eyewitness to the murder. The murder weapon wasn't recovered. There were no fingerprints on the trunk in which Shapiro was found. The prosecution's case against Arey was based on circumstantial evidence, his alleged confession to three police officers, a jailhouse informant, Moon's claim he was involved in the murder with Arey, and a prosecution "experts" claim that Shapiro's blood was found on Arey's shirt.

Arey's purported "confession" to three police officers

Three police officers testified during an interrogation Arey "confessed" to the murder. Yet there was no written record of it, Arey didn't initial or sign a handwritten or typed confession, and there was no video or audio recording. Even more curious, all three officers testified that none of them even wrote any notes when Arey made his purported confession. Furthermore, the State's primary witness was Moon and he testified those same three officers told him that Arey had not confessed anything to them and denied involvement in Shapiro's murder. The only physical evidence introduced at Arey's trial in support of his purported "confession" was about thirty words handwritten on a single page of legal paper that were supposedly "notes" written by Baltimore Detective James Russell sometime later outside the interrogation room.

Baltimore police involved in stolen property ring

To disprove the credibility of the claim that he made an undocumented confession, Arey introduced evidence that several Burglary Squad detectives were involved in a stolen property ring with Moon and Arey. That gave the police a reason to lie about Arey's involvement in Shapiro's murder. Indeed, one of the detectives who testified to hearing Arey "confess" was the brother of a Burglary Squad detective mixed-up in the heart of the stolen goods ring. The news of police involvement in the stolen property scheme made the front page of the Baltimore *Sun* in April 1974. After Arey's trial, as a result of Internal Affairs and other investigations, about seven police officers involved in Arey's case were suspended, dismissed, quit, transferred, retired or otherwise found new careers. However, because these were "personnel" matters, the official investigation reports were not publicly released or disclosed post-conviction to Arey as exculpatory *Brady* evidence.

The jailhouse informant

Like many other cases, Arey's involved a "jailhouse informant." Jerry Carneal claimed that while he was housed in a cell with Arey in the Baltimore City Jail (BCJ), Arey contracted with him to silence Moon. To prove Carneal's claim was false, Arey secured affidavits from three BCJ correctional officers that Arey had spent his entire time in protective custody because of the investigation of the Baltimore PD burglary squad's involvement in the stolen goods ring. Carneal claimed he had no special deal with the State's Attorney, but after being arrested for assault on January 15, 1973, and then agreeing to testify against Arey, he pled guilty and was sentenced in June 1973 to five years incarceration. His payoff was being paroled in January 1974 after serving only about 12% of his sentence. Carneal's sweetheart deal of being released after serving 12% of his sentence was a violation of Maryland's parole statutes. Although it wasn't disclosed to Arey until 33 years after his trial, Carneal was a professional jailhouse informant who had testified in a prior case, he gave the police false information about a non-existent "escape" attempt by Arey, and he "volunteered" to testify in another case after Arey's trial.

Baltimore P.D. Detective James Russell was a key prosecution witness in 1974 when Michael Austin was convicted of murder. Austin was exonerated and released in 2001, after 27 years of wrongful imprisonment. A few months before Austin's trial, Russell testified at Arey's trial as one of the three officers who claimed to have heard Arey "confess" to Shapiro's murder. Russell was the "lead detective" in both Arey's case and Austin's case.

Moon given immunity for murder

The State's Attorney granted Moon transactional immunity from prosecution for admitting his participation in Shapiro's murder, in exchange for his "truthful" testimony against Arey. Moon's deal wasn't legal because Maryland statutes and case law didn't provide for immunity for murder. [2] Furthermore, 33 years after Arey's trial he learned that Moon had been a prosecution witness in previous trials, and at the time he testified during Arey's trial he had a deal to testify as a prosecution witness at the sodomy trial of Lawrence Librich.

Moon's deal was also unusual because he had an extensive and violent criminal history, while Arey did not. Moon had previously been convicted in Maryland of crushing a woman's head with a lead pipe and paralyzing her for life. His attack resulted in him being convicted of armed robbery, assault with intent to murder, and larceny. (See, *Moon v. State*, 250 Md. 468 (1970)) He was sentenced to twenty years, but at Arey's trial he denied under oath that he had been given that sentence.

Moon's other convictions included a 1960 car theft and a 1961 escape while serving the car theft sentence. During his escape he stole a car in which he crossed state lines, and he was captured after a high-speed chase with the police shooting at him. Those events resulted in his Dyer Act and interstate flight to avoid prosecution convictions in 1962. Moon also had a dishonorable discharge from the military for a 1958 larceny for which he was sentenced to Fort Leavenworth. He was also convicted in Baltimore in early 1972 for assault by threatening with a firearm, at the same location where Shapiro was murdered a year later.

When Moon was questioned about his criminal record during Arey's trial, he denied being convicted for assault by threatening a person with a firearm in the Belvedere Hotel a year before Shapiro was shot to death in that same hotel. The State's Attorney backed Moon up by falsely denying knowl-

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edge the conviction had occurred. This *Brady* violation was discovered by Arey after his trial when a record of it was obtained under the Maryland Public Information Act.

The long and short of it is that Moon had a very long and violent criminal history, and the jury didn't know when assessing his credibility that he had already been convicted of threatening to kill a person at the very site of Shapiro's murder.

Judge denies warrant to search Moon's home for murder weapon

The police had not recovered the murder weapon, so Arey made a motion for the police to search Moon's home for the murder weapon. The judge held that granting a defense motion for a search would be a Maryland precedent, and that it would be harassment of Moon. So what the judge did was order the police to go to Moon's home accompanied by Arey's defense counsel, and request that Moon permit a search for weapons in his home. Moon was on parole so he of course refused. The judge's refusal to issue a search warrant for the murder weapon ensured that it would likely never be found.

Records support Moon's rental of car for disposal of Shapiro's body

Moon testified that he had been with Arey at Baltimore's Belvedere Hotel at 6 p.m. on May 9, 1973, moving Shapiro's body. At that time he had in fact been across town renting a green Duster at National Car Rental. The trial was stopped in the middle of the day on April 4, 1974, so a Baltimore City policeman and a state trooper could go with sirens screaming to Friendship Airport in Glen Burnie to seize the original car rental records. The time and date stamped records showed Moon rented the car at 6:06 p.m. on May 9, 1973. Arey's lawyer used the records to prove Moon lied that Arey was with him at the Belvedere Hotel at 6 p.m. on the day of Shapiro's disappearance. The car rental records also established that Moon personally rented and returned the vehicle.

When shown the rental documents Moon admitted they were authentic, but he claimed the date and time stamps were in error on the documents he signed, both when he rented and returned the car. Moon also denied he rented the Duster to transport Shapiro's body. Unknown to Arey, however, was Moon had admitted this in his police statement, a copy of which the judge refused to order turned over to the defense as discovery material. Arey obtained a copy of Moon's Police Statement after his trial, another *Brady* violation.

Moon's immunity deal from prosecution for Shapiro's murder was conditioned upon his truthful testimony. Yet, repeated proof of his perjury about his criminal history, his location at the time of Shapiro's disappearance, and the rental car, was not considered a deal breaker to bar Moon's testimony or invalidate his immunity from prosecution for his admission to Shapiro's murder.

Prosecution falsely claimed Shapiro's blood was on Arey's shirt

When Arey was questioned on May 11, 1973, it was his first ever police interrogation. During the long periods of time that he was left in the Interview Room with nothing to read or do, he indulged in a bad habit while awaiting each round of questioning.

Arey felt pimples on his forehead, picked and scratched them and then saw a little blood on his finger. With no tissue or running water available Arey licked his finger and applied saliva to the pimples in order to slow or staunch the minimal bleeding, and dried his finger on

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The scientific evidence of arson was thus fundamental to the State's case. Yet Richey's counsel did next to nothing to determine if the State's arson conclusion was impervious to attack. … At bottom, the record shows that Richey's counsel did not conduct the investigation that a reasonably competent lawyer would have conducted into an available defense-that the fire was not caused by arson-before deciding not to mount that defense. (¶118)

[W]e can discern no strategic reason why counsel would have so readily ceded this terrain to the prosecution. (¶121)

The testimony of experts such as Armstrong and Custer, both of whom have stated they would have testified on Richey's behalf had they been contacted, would have severely undermined the State's case against him. Armstrong and Custer would have attacked the State's gas chromatography analysis as unsound and out of step with prevailing scientific standards; they would have disputed the State's conclusion that any of the samples contained traces of gasoline or paint thinner; they would have testified that the burn patterns, about which Cryer made so much, were just as consistent with a naturally occurring fire; and they would have rejected Cryer's contention that the fire's speed was indicative of arson, explaining that modern furnishings cause fires to burn more rapidly. Finally, they would have testified that the most likely cause of the fire was a cigarette smoldering in the cushions of Collins's couch. (¶122)

There can be little doubt that Richey was prejudiced by his counsel's deficient performance. There is a reasonable probability that had his counsel mounted the available defense that the fire was caused by an accident, and was not the result of arson at all, the outcome of either the guilt or the penalty phase would have been different. … Confronted with evidence debunking the State's scientific conclusions, the trial court might have had a reasonable doubt about Richey's guilt... (¶123)

III. CONCLUSION

… because the deficient performance of Richey's counsel undermines our confidence in the outcome of his trial, and because we believe that the Ohio state courts unreasonably applied *Strickland* in determining otherwise, we reverse the judgment of the district court and remand with instructions to enter a conditional writ of habeas corpus, giving the State of Ohio ninety days to retry Richey or release him. (¶125)

The 11-page *Richey v. Bradshaw*, No. 01-3477 (6th Cir. 08/10/2007) decision is on *JD's* website at, www.justicedenied.org/cases/richey_081007.htm, or order the "Richey Opinion 0807" for $3 (stamps OK) from: Justice Denied; PO Box 68911; Seattle, WA 98168.

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his shirt. Detective Russell observed this, which occurred within a few hours of his placement in the Interview Room.

When Arey was taken some fifteen hours later to a holding cell, Officer Robinson instructed him to remove his shirt and pants. Arey asked why. Robinson said they were needed for forensic testing. Detective Russell was present, and said, "That happened here. I watched him pick at the pimple." Robinson looked at Russell and commented it didn't matter. Keep in mind that DNA testing didn't exist in 1973, blood testing consisted then of classifying it by blood type.

Nothing was heard about the clothes for some eight months until the state claimed the deceased's blood was on the shirt. When pre-trial motions hearings were held before Judge Charles Harris, Arey moved for retesting of the shirt. Russell testified in January 1974 that he observed Arey place the blood and saliva on the shirt, confirming Arey's testimony. Judge Harris ruled that the blood on the shirt must be retested.

After the judge's ruling, Arey's lawyer Leslie Gladstone moved for physical custody of the evidence so an independent lab could test it. The prosecution then claimed the crime lab's testing consumed the blood evidence, so there was no blood left to test.

Police lab technician faked credentials

The prosecution's expert witness, forensic technician Robert Davis, testified at trial that the blood on Arey's clothing was identified as type AB, the deceased's blood type, while Arey's blood is type O. Based on detective Russell's testimony about the source of the blood on Arey's shirt, Arey's attorney was convinced Davis' testimony about blood typing was false.

In establishing his expertise, Davis testified he graduated from West Virginia State University with blood training at the Department of Agriculture Graduate School. After his trial, Arey obtained a copy of Davis' class syllabus from Davis' graduate school professor that refuted Davis' academic claims at trial. Davis never took any college course in blood typing. His training actually consisted of one hour of instruction about blood and a 1-1/2 hour lab about blood typing, which involved the simplest introductory course work.

On cross-examination Davis claimed he followed the testing protocols for blood typing outlined in books by nationally recognized experts. However, when asked about his various procedures, in each instance Davis claimed that either the national expert whose laboratory protocols he "followed" were in error, or else he had a different procedure than that laid out in the manual. However, regardless of the falsity of Davis' testimony, the blood remaining on the shirt can be tested using DNA techniques that were unavailable in the 1970s. (DNA testing in a criminal case was first used in 1986.) Alternatively, the trial transcript could be expertly analyzed to determine if Davis falsely testified, such as was done in the case of Bernard Webster, who was subsequently exonerated and released in 2002 after 20 years of wrongful imprisonment.

Exculpatory soil sample tests concealed from Arey until after trial

Another forensic evidence deception involved soil samples the State took from the crime scene and several other locations, supposedly to see if they matched dirt on a shovel and several other tools and implements Arey had. At trial, the State claimed it had not received test results from the soil samples sent to the FBI crime lab. However, the FBI lab results had not only been provided to the State's Attorney prior to trial, but they were exculpatory. They proved there was no relationship between Arey's tools and any of the crime scene soil samples that the prosecution introduced into evidence as circumstantial evidence of his guilt. The State's Attorney's *Brady* violation of failing to disclose the exculpatory scientific evidence was discovered when the FBI later released copies of the test results.

Arey's alibi

Arey testified he was at his antique shop, then the parking lot, Moon's carriage house, etc. looking for Moon, but could not find him between 5 p.m. and when he later found him. Arey also spoke with C&P telephone messaging service, which wrote a two-page report of their telephone contacts with Arey. Thirty-three years after Arey's trial, he obtained police reports that Moon's wife, the victim's son, and Moon all verified Arey's testimony when questioned by the police, but not one of them testified at trial remotely similar to what they told the police. Yet these police reports that impeached their testimony were not made available to Arey's trial counsel.

Conviction and appeal

Arey was convicted in April 1974 of first-degree murder and sentenced to life in prison. Arey's direct appeal was denied in 1975 by the Maryland Court of Special Appeals.

Post-conviction proceedings

Arey received no post-conviction relief of his conviction or sentence. However, in 2000 Arey's attorney admitted in writing that he failed to provide effective post-conviction assistance of counsel. That admission preserves Arey's right to a *Stovall* (144 Md.App. 711 (2002)) proceeding to reopen his post-conviction case on the basis of ineffective assistance of post-conviction counsel.

When Arey finally got his trial transcript in about 1984, after a ten-year battle, he started working on his court case. The State then promptly classified him at a lower security level. While that made him eligible for work release, it also required that he send the trial transcript out of the prison.

In May 2002 Arey filed a *pro se* Circuit Court petition for post-conviction DNA testing of the blood present on the clothing seized from him during his police interrogation. In April 2006 he was granted a hearing, scheduled for July 25, 2006, to consider his petition. However, eight days before that hearing, it was cancelled and the judge summarily denied Arey's petition for DNA testing. The judge's action was based on a Baltimore PD sergeant's affidavit that he looked through an evidence database and reviewed forms listing the location of clothes in evidence, but he couldn't find any reference to the clothes requested by Arey. Arey appealed the judge's dismissal.

After the DNA petition's dismissal, Arey submitted a Public Records request to the State's Attorney for Baltimore for a complete copy of all materials, documents, reports, etc. related to his 1974 indictment. The State's Attorney responded on August 28, 2006, "In response to your letter dated August 7, 2006, a thorough search for the above case was unsuccessful." Yet this prosecutors office that claims it has no records related to Arey's indictment has adamantly opposed all his efforts to be awarded a new trial.

MD Court of Appeals rules State must search for missing DNA evidence

On August 1, 2007 the Maryland Court of Appeals ruled in Arey's favor by deciding that before a post-conviction petition for DNA testing can be dismissed on the basis the evidence no longer exists, "the State needs to check any place the evidence could reasonably be found, unless there is a written record that the evidence had been destroyed in accordance with then existing protocol." *Arey v. State*, No. 82, September Term, 2006 (Md. 08/01/2007), 2007.MD.0000240 ¶53 <www.versuslaw.com>. The Court listed

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Petition Seeks To Nullify Jesus Christ's Conviction

A petition was filed in Kenya's High Court on August 29, 2007, challenging the constitutionality of the mode of questioning, the evidence, the trial, and the sentencing and punishment of Jesus Christ. The petition's requested relief is a declaration that the proceedings are a "nullity" because "they did not conform to the rule at the material time." The plaintiff is the Friends of Jesus, and the ten defendants include The Republic of Italy and the State of Israel.

The 29-page petition contends that the proceedings Jesus was subjected to were infected with the bias and prejudice of "Judicial Misconduct, Prosecutorial Misconduct, Malicious Prosecution, Abuse Of Office, Fabrication Of Evidence and Human Rights Abuses and Malicious Prosecution." (§1, p. 11)

If the petition satisfies the threshold procedural and substantive requirements for a constitutional review, it will be referred to a three-judge panel to consider its merits. Kenyan legal analysts have identified that three hurdles for the plaintiff to overcome are establishing the High Court's jurisdiction, that the petition's claims aren't time barred, and that the plaintiff's have standing to bring the action.

The High Court has jurisdiction over human rights issues, so it may be able to consider the petition's claims. The time bar and legal standing hurdles may be more difficult to overcome.

An interesting aspect of the petition is its contention that both the defendant states of Italy and Israel, "upon attaining Independence has incorporated all the preceding laws that existed in the ROMAN EMPIRE at the time of the Trial in question." (§§11-12, p. 12-13)

The case is being taken very seriously in Kenya, with legal analysts debating the merits of its legal basis, its claims, and its requested relief. The Kenya Civil Liberties Union has joined the proceedings as *amicus curiae*.

The petition is *Friends of Jesus v Tiberius, Emperor of Rome; Pontius Pilate; et al*, Republic of Kenya Constitutional Petition No. 965 of 2007. It is on *JD's* website at, www.justicedenied.org/cases/fojesus.pdf Or order "Jesus Petition" for $5 (stamps OK) from: Justice Denied, PO Box 68911, Seattle, WA 98168.

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thirteen separate locations among the traditional and non-traditional places that should be investigated for recovery of the missing evidence, stating, "a court should not conclude that evidence no longer exists until the State performs a reasonable search for the requested evidence." *Id.*

The Court also ruled on Arey's contention he was entitled to appointment of counsel to litigate his DNA petition. The Court clarified "that although there is no constitutional or statutory right to counsel at the time a petitioner files the petition for DNA testing, a court has the inherent power to appoint counsel at any stage of proceedings until he "receives favorable DNA testing results." *Id.* at ¶ 76.

The decision in Arey's case is published and precedential for all people seeking to use Maryland's post-conviction DNA testing law.

As of late-September 2007, the State is searching for the missing trial evidence, and Arey has not been appointed a lawyer.

Evidence of prime suspect disclosed 33 years after Arey's trial

At the time of Arey's arrest in 1973, he was a 24 year-old Caucasian male who had formerly been employed by Shapiro, and two years prior to his Shapiro's murder Arey had lived in one of Shapiro's apartment buildings.

Thirty-three years after Arey's trial, on August 16, 2007, the Baltimore City District Court responded to Arey's request under Maryland's Public Information Act for records about his case. Arey learned for the first time that before he was even arrested, the police had another suspect they could not locate. That man was Charles Eugene Thornton, a 24 year-old Caucasian male employed by Shapiro until shortly before Shapiro's murder, and who lived in one of Shapiro's apartment buildings.

Days before Shapiro was murdered he had filed sworn felony charges against Thornton for embezzlement, larceny, theft and related charges. The prosecution knew before Arey's arrest that Thornton was a prime suspect because he had a compelling motive: Shapiro was the complaining witness against Thornton, so with him dead the charges against Thornton would be dismissed for want of a witness.

To smear Arey's character and make him appear to have a motive to murder Shapiro, prosecution witness Frank tried to convince Arey's jury that he committed embezzlement, larceny, theft and related charges against Shapiro. Those were the crimes that Shapiro had accused Thornton of committing – not Arey! Also, Frank attributed to Arey a supposed threat against Shapiro, "I'll get you, you dirty …". The new evidence suggests that Thornton was the most likely person to have uttered that supposed threat.

The prosecution not only prejudiced Arey's defense by failing to disclose the *Brady* evidence of a prime suspect with characteristics virtually identical to Arey, but prejudicially influenced the jury to be more inclined to convict Arey by falsely projecting Thornton's motive and alleged crimes against Shapiro onto Arey.

The prosecution's timely disclosure that Thornton was a prime suspect would have enabled Arey's counsel to investigate and possibly uncover additional evidence implicating Thornton. Although the information the prosecution failed to disclose about Thornton may have been enough by itself to sway the jurors to have had a reasonable doubt of Arey's guilt, additional investigation into Thornton's background and activities could have only helped influence them to have voted not guilty.

Current status

Arey is seeking a new trial and full disclosure of the truth not only to clear his name and be released from prison, but so that the Shapiro family can know the truth about Samuel Shapiro's murder.

The Maryland DOC responded to Arey winning his Court of Appeals case by inexplicably transferring him, so he can be written in care of *Justice:Denied* and it will be forwarded to him. As of early October 2007 he has not been appointed a lawyer, so he welcomes any helpful court cases, legal strategies, or assistance:

Douglas Arey c/o
Justice Denied
PO Box 68911
Seattle, WA 98168

Or email Arey at, www.prisonmail.org
Click "Join a mailbox," and enter: 130196

Arey v. State, No. 82, September Term, 2006 (Md. 08/01/2007), is available on Justice Denied's website at, www.justicedenied.org/cases/arey080107.htm Or order "Arey Opinion 0807" for $3 (stamps OK) from: Justice Denied; PO Box 68911; Seattle, WA 98168.

Endnotes:

1 This account is based on transcripts, court rulings, other case documents, and the personal knowledge of Douglas Scott Arey.
2 See, Maryland State Prosecutors meeting, Hunt Valley Inn, January 1974, "Statutory Immunity Memorandum of Law," report of then Montgomery County States Attorney (now Judge) Sonner.