

# John Tension Denied California Compensation

By Hans Sherrer

In August 1989 Roderick Shannon was beaten by a group of young men and then shot to death in the parking lot of a Super Fair Market in San Francisco.

Four months later, 17-year-old John Tension was arrested and charged as an adult with the first-degree murder of Shannon. The prosecution's theory was that after a number of young men chased Shannon and caught him in the supermarket's parking lot, Tension held Shannon while Anton Goff shot him.

Tension and Goff were tried as co-defendants in October 1990. The prosecution's main evidence connecting Tension to the murder was the testimony of two young girls, Masina Fauolo, 11, and Pauline Maluina, 14. The girls testified Masina had been driving around in a stolen car with Pauline as her passenger when they saw Shannon being chased. They said they followed him to the parking lot, where they saw the shooting.

The jury found Tension guilty of first-degree murder. Prior to his sentencing, Tension filed a motion for a new trial primarily based on newly discovered evidence that Lovinsky Ricard confessed to police in No-

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Consequently, Alabama's opposition to DNA testing of the crime evidence is for the same reason that Arthur wants it — the testing could result in the new exculpatory evidence necessary for Arthur to meet the requirements to file a motion for state, and if necessary federal, post-conviction review of his conviction.

Arthur's lawyers currently have two writs of certiorari filed in the U.S. Supreme Court. One seeks review of the Eleventh Circuit's dismissal of Arthur's lawsuit for DNA testing of the crime evidence. The other challenges the constitutionality of Alabama's lethal injection procedure.

Alabama Gov. Bob Riley ordered a 45-day stay hours before Arthur's scheduled execution on September 27, so that the Alabama Department of Corrections could alter its lethal injection protocol. As of early October, the Alabama Sup. Ct. has not set a new date.

Arthur's website has extensive case information, links to an online petition to Gov. Riley, and contact information, [www.thomasarthurfightforlife.com](http://www.thomasarthurfightforlife.com)

ember 1990 that he was the person who shot Shannon. Ricard also stated that Tension was not present. In June 1991 Tension's motion was denied and he was sentenced to 25 years to life in prison.

## Federal habeas granted

Tension's state court direct appeal and habeas corpus petition were denied. He then filed a habeas petition in federal district court that was granted in August 2003. The court's decision was based on five violations by the prosecution of its constitutional obligation to disclose potentially exculpatory evidence to Tension, as required by *Brady v. Maryland* (1963) 373 U.S. 83, and its progeny. The federal court concluded, "Given the weakness of the prosecution's case against Tension, ... there is a reasonable probability that any one of [the five pieces of non-disclosed evidence] ... could have caused the result of Tension's ... trial to have been different." Tension's conviction was vacated and the state was ordered to release or retry him.

Two days after the decision, Tension's lawyer filed a Joint Stipulation for his immediate release from custody. The federal court ordered Tension's release on his own recognizance, and the San Francisco District Attorney's office announced it would not retry Tension for Shannon's murder.

## Tension declared factually innocent

After Tension's release from almost 14 years of wrongful imprisonment, he filed a motion under California Penal Code section 851.8 for an order declaring him factually innocent of Shannon's murder. The San Francisco D.A.'s response was: "The People concur that Petitioner is factually innocent pursuant to Penal Code section 851.8." The San Francisco Superior Court then entered an order that stated in part: "... all evidence in this case ... shows that Tension is innocent of all charges relating to the murder of Roderick Shannon and that he should not have been tried for Shannon's murder."

## State compensation claim

Tension filed a claim, in December 2003, under Penal Code section 4903 for \$445,300 with the state Victim Compensation and Government Claims Board ("Board"). Tension stated his innocence was "undisputed" based on the court order declaring him factually innocent. Goff, who had been released several days after Tension, submitted a separate claim for \$489,800. The California Attorney General disputed Tension's and Goff's claims of innocence. In November 2004, the Admin-

istrative Law Judge ("ALJ") issued a proposed joint decision denying the claims of Tension and Goff, concluding that each "failed to establish by a preponderance of the evidence that he is entitled to compensation pursuant to Penal Code section 4903."

In June 2005 the Board adopted the ALJ's proposed decision that the superior court's findings of "factual innocence" pursuant to section 851.8 are "not binding and inapplicable" to a section 4900 compensation proceeding. After the Board's ruling, Tension filed a petition for writ of mandate in the trial court. The court agreed with the Board in denying Tension's petition. Tension appealed.

## Court of Appeals decision

The Court of Appeals decision in June 2007 rejected the trial court's ruling that, "a finding of factual innocence under section 851.8 is somehow different from a finding under section 4900 that the defendant did not commit the crime charged." The court ruled, "Both proceedings concern the identical issue: whether the evidence proves the defendant did not, in fact, commit a particular crime." (*Tension v. California Victim Compensation and Government Claims Board*, No. A112313 (Cal.App. Dist.1 06/28/2007))

However, the appeals court noted that because the San Francisco D.A. conceded Tension was factually innocent, the superior court entered its order under section 851.8 without having heard any evidence concerning Shannon's murder. The court's order "was thus the equivalent of "a stipulated judgment, or consent decree, [whereby] litigants voluntarily terminate a lawsuit by assenting to specified terms, which the court agrees to enforce as a judgment." The appeals court thus decided, "it would disserve the integrity of the court system to give preclusive effect to what was essentially a stipulated order on the section 851.8 motion."

The court concluded that the vacating of Tension's conviction and his release had nothing to do with his innocence, stating, "The federal habeas court granted relief based on a legal impropriety, not insufficiency of the evidence. ... Thus, despite the district attorney's ... stipulation, and the court's acquiescence to it, Tension was not entitled to petition for or receive a finding of factual innocence under section 851.8."

The appeals court then proceeded to discount the exculpatory value of the evidence the federal court relied on in finding that if Tension were retried, it is more likely than not that a reasonable juror would not vote to

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**K**enneth Selby witnessed Kevin Kent's 2003 murder in Cumberland County, New Jersey. Selby provided the police with a written statement, and in February 2006 he participated in a pre-trial interview at the prosecutor's office. During the interview Selby was served with a stand-by subpoena to testify at the trial of Terrell Cornish, the man accused of killing Kent. The stand-by subpoena stated, "Do not come to court until you have called the prosecutor's office." It also instructed Selby to "call the Prosecutor's Office on Friday, March 10, 2006, and ask for Detective George Chopek. ... You will then be told when to appear."

Selby telephoned the prosecutor's office on March 10 and asked for Detective Chopek. He was told Chopek was out of the office. After Selby's call, neither the prosecutor's office nor Detective Chopek made contact with Selby prior to the beginning of Cornish's trial, which ended with a plea bargain before a verdict was reached.

In retaliation for Selby not appearing to testify, the Cumberland County Prosecutor filed for an Order to Show Cause why Selby should not be found in contempt for failing to comply with the stand-by subpoena. The contempt hearing was conducted on June 7, 2006 by Cornish's trial judge.

Before the prosecution began presenting its case the judge told Selby's lawyer, "put your client on the stand, counsel, because I

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convict him. The basis of the appeals court's rationale was that even though Pauline recanted her trial testimony that she witnessed Shannon's murder, Masina didn't recant. The court determined Masina's testimony outweighed the four witnesses to the murder who attested after Tennison's conviction that he wasn't present at the scene, and Ricard's confession to being the murderer.

The appeals court also considered Masina's testimony to carry more weight than Tennison's alibi - which as a part of his lawyer's "trial strategy" wasn't presented at his trial - that he was at a party attended by 20-25 people on the evening of the crime.

The appeals court concluded that to prevail on his compensation claim Tennison had to prove by a preponderance of the evidence that he is "innocent of the crime with which he was charged," and that he did nothing to contribute to his conviction by "way of act of omission." The court decided that Tennison failed to prove he hadn't contributed to his conviction by his attorney's failure to present his alibi defense at

# Contempt Conviction Tossed For Witness Who Wasn't Notified To Testify

By JD Staff

find that it's a valid subpoena. ... I'll take his testimony and hear it and then I'll have to let the Prosecutor go from there since it's your client's burden ..." (§25)

Selby's defense was that he had fully complied with the stand-by subpoena, but at the conclusion of the hearing the judge found him guilty of contempt. Selby was sentenced to 120 days in jail and a \$500 fine. He appealed his conviction, and pending its outcome his sentence was stayed.

Selby argued in his appeal "that he was not afforded the presumption of innocence, or the requirement that the State prove his guilt beyond a reasonable doubt and, most importantly, that the court shifted the burden of proof from the State to Selby." (§24) He contended that the judge's statements mandating that he testify prior to the State's witnesses was evidence the judge impermissibly shifted the burden of proof to him and denied his due process rights during the contempt proceeding.

The three-judge appeal panel issued its unanimous decision on August 22, 2007. (*In re Selby*, No. A-6383-05T2 (N.J.Super.App.Div.

trial, and that he hadn't proven his innocence. Consequently, "substantial evidence supports the Board's determination Tennison failed to carry his burden of proof. Accordingly, the Board did not abuse its discretion in denying his request for relief under section 4900."

After learning of the ruling, Daniel Purcell, one of Tennison's attorneys, said, "We're disappointed. We think this process was set up to deny John relief." Tennison did not appeal the decision to the California Supreme Court.

Tennison's federal civil rights lawsuit that named the County and City of San Francisco and several law enforcement officers as defendants, is still ongoing. In early 2006 the federal district court denied the defendant's motions for summary judgment, and as of September 2007 their appeal of that decision is being considered by the federal Ninth Circuit Court of Appeals.

Sources:  
*Tennison v. California Victim Compensation and Government Claims Board*, No. A112313 (Cal.App. Dist.1 06/28/2007)  
Interview of Daniel Purcell by Hans Sherrer, August 1, 2007.

08/22/2007)) The Court began its analysis of the law governing a contempt proceeding by citing *In re Ruth M. Buehrer* (50 N.J. 501 (1967)), in which the N.J. Supreme Court held:

[S]ince the summary [contempt] power lends itself to arbitrariness, it should be hemmed in by measures consistent with its mission. To that end, our rules embody sundry restraints ... [A] conviction is reviewable upon appeal both upon the law and the facts, and the appellate court shall give such judgment as it shall deem just.

The presumption of innocence of course obtains, and the burden of the prosecution is to prove guilt beyond a reasonable doubt.

Thus, the defendant is afforded all the rights of one charged with crime except the right to indictment and the right to trial by jury. *Id.* at 515-16.

After reviewing how Selby's contempt hearing was conducted when compared to the requirements set forth in *In re Ruth M. Buehrer*, the appeals court concluded:

By proceeding as was done in this case, the alleged contemnor [Selby], in addition to being prohibited from confronting and cross-examining the State's witnesses before the judge in order to evaluate what, if any, defense he should mount, was denied the ability to argue ... for a dismissal at the close of the State's case on the basis that the State's evidence was insufficient to warrant a conviction. The procedure employed here was fraught with real and potential problems and is inconsistent with affording the full panoply of constitutional and procedural rights articulated in *In re Ruth M. Buehrer* to one charged with an offense which may result in incarceration.

In sum, we are convinced that the trial court's ... statements as to the burden, as well as the unorthodox procedure used in prosecuting this contempt, merits a reversal and a remand for a new trial. (§§ 36-37)

As of late September 2007 the Cumberland County Prosecutor had not refiled the contempt charge against Selby.

Sources:  
*In re Selby*, No. A-6383-05T2 (N.J.Super.App.Div. 08/22/2007) (All quotes in text are from the indicated paragraph in the decision.)  
Court reverses contempt conviction of the man who didn't testify, By John Martins, *The Press* (Atlantic City, NJ), August 23, 2007.

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