

JUSTICE DENIED

\$3
Retail

The Magazine for the
Wrongly Convicted

FEDERAL HABEAS PETITIONS GRANTED LESS OFTEN UNDER THE AEDPA

SEE P. 17

Katherine Clifton

Convicted of making false statements after causing a college professor to be charged with first-degree rape who had never seen her outside of class.

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Steven Truscott

Exonerated 48 years after being wrongly convicted of murder and sentenced to death as a 14-year-old.

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Warren Blackwell

Awarded \$504,000 after rape conviction overturned. His accuser has falsely accused at least seven men of sexual assault.

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Cinzia Sannino

Convicted of perverting justice after a mobile phone video proved she falsely accused four men of raping her.

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Serena Kozakura

Conviction of willful destruction of property overturned after the size of her breasts proved she couldn't be the perpetrator.

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Calvin Williams' Compensation Award Nullified By Louisiana Appeals Court!

Guantanamo Lawyer Claims Prosecutions Are Political Show Trials!

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Winter 2008**

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Message From The Publisher

The Anti-Terrorism and Death Penalty Act of 1996 seriously changed the rules for federal habeas petitions filed by state prisoners. A recent study documents just how dramatic the AEDPA's effect has been on the relief granted to petitioners. See the article on p. 17. The AEDPA was ill-advised legislation, and *JD* has editorialized that its habeas provisions should be repealed in their entirety.

Thomas Arthur is one of the people harmed by the AEDPA. *JD* has reported on, and editorialized about the State of Alabama's opposition to forensically testing evidence in Arthur's case since before his 1991 murder conviction and death sentence. Just days after the Supreme Court's ruled in *Baze v Rees* (No. 07-5439, April 16, 2008) that lethal injection is constitutional, Alabama's AG filed a motion for the setting of a new execution date for Arthur. Arthur's case isn't just a travesty because the DNA testing opposed by Alabama could prove his innocence, but his case has never been reviewed by a federal court because of the AEDPA's one-year filing deadline. Another person harmed by the AEDPA's filing deadline is Jesse Friedman. See the article on p. 10.

It seems like a story from *The Onion*, but Serena Kozakura was fortunate her appellate lawyer was imaginative enough to use the size of her breasts to prove she couldn't have committed an apartment break-in. See the article on p. 4.

Justice:Denied editorialized on its website in the fall of 2007 opposing former federal judge Michael Mukasey's confirmation as U.S. Attorney General. Among other things Mukasey has a well-documented disdain for the presumption of innocence and other basic legal principles that can shield the innocent from a wrongful conviction. So it isn't surprising that since taking office in November 2007, AG Mukasey has used his position to protect Bush administration officials from accountability for a variety of serious actions, including complicity in violating domestic and internal laws by the torturing of people based on suspicion of their wrongdoing. When the highest federal law enforcement official openly functions as a partisan political hack, it is legitimate to question the integrity of the U.S. Department Of Justice as a whole.

Hans Sherrer, Publisher

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



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Natalie Smith-Parra, Editor; Terri Smith, Mailing; Katha McDonald, Mailing;
and Hans Sherrer.

Dr. Tariq Rafay, his wife Sultana and their daughter Basma were viciously bludgeoned to death in their Bellevue, Washington home about dusk on July 12, 1994. About four hours later, after dinner, a movie and a late-night snack, 18-year-old Atif Rafay, the son of Tariq and Sultana, returned home with Glen Sebastian Burns, a close friend who was also 18 and a guest of the Rafay family. They discovered the horrific scene. Numb with shock, Burns called 911. The two teenagers then ran into the street to await the arrival of the police. Within moments a police cruiser passed the house, unable to find the correct address. The frantic teenagers chased after it, pounding on a window to get it to stop.

Police entering the Rafay's suburban Seattle home were shocked by the horrible, bloody crime scene. Sultana was killed by a fatal blow to her head. Basma was injured and died later at a hospital, having suffered repeated blows to the head and body. Dr. Rafay lay in bed, his head completely crushed by a blunt object. The walls, floor and ceiling of his bedroom were covered in blood, bone, teeth and tissue. Tremendous amounts of blood were tracked throughout the house – in the carpets, on the walls, in the downstairs bathroom and in a series of shoeprints in the garage.

Burns and Rafay cooperate with police

In the hours and days that followed the murders, Burns and Rafay accompanied the Bellevue Police Department for extensive questioning, provided them with their clothing, shoes and, in Atif's case, eyeglasses, and allowed police to perform searches of their bodies and personal items using a specialized light designed to detect blood in minuscule quantities. They allowed the Bellevue police to fingerprint, photograph, and subject them to other tests. Neither Burns or Rafay denied a single police request during these days, nor did they exercise their *Miranda* right to counsel. Rafay also gave investigators permission to search the contents of his computer. The two teenagers were also repeatedly interrogated by Bellevue police for more than two days. During that time they stayed in a dingy room at a

Rubin "Hurricane" Carter supports new trial for Rafay and Burns

Wrongly convicted of murder and imprisoned for 19 years, Rubin "Hurricane" Carter is the founder and director of Innocence International. Carter wrote an article published in *The Vancouver Sun* (Vancouver, B.C.) on March 25, 2008, in which he explains his reasons for supporting a new trial for Rafay and Burns, and that he believes they would be acquitted.

"Mr. Big" Sting Used To Frame Teenagers For A Family's Murder – The Atif Rafay & Sebastian Burns Story

By Sarah Isaacs

since-demolished Bellevue motel where they were given little opportunity for sleep.

None of these tests, searches or interrogations revealed any incriminating evidence against either teenager. Although subjected to intense interrogations, neither teenager was offered any grief counseling or support by the police in the days after the murders.

Media fed false information by police

Burns and Rafay are both Canadian citizens, and on July 15, 1994 the Canadian Consulate in Seattle obtained explicit permission from the Bellevue PD for them to return to Vancouver, British Columbia, where they would live with Burns' parents. The Rafay family had only recently moved to Bellevue from Vancouver, which was home to Tariq Rafay. In spite of their full cooperation with the Bellevue PD and their escorted and legal return to Canada, the Bellevue police soon decided they were prime suspects and labeled them fugitives for being home in Canada. The Bellevue police told journalists in both countries a series of lies that were reported by the media. These lies included:

- Burns and Rafay behaved strangely on the night of the murders and the following days, thereby arousing suspicion;
- They failed to show emotion after finding the Rafay family murdered;
- They did not cooperate with the Bellevue police;
- They "fled" to Canada.

After observing the foul play of Bellevue police investigators, friends, family and legal counsel for Burns and Rafay recommended that they remain in Canada.

Crime evidence excludes Burns and Rafay

In the days, weeks and months following the murders, the Bellevue police discovered that contrary to their initial assumption, the evidence pointed away from supporting that either Burns or Rafay were involved:

- Neighbors on both side of the Rafay home confirmed that the murders occurred when the teenagers were known to be across the city watching a movie;
- No crime scene physical evidence linked either teenager to the crime;
- No blood, bone or tissue was found on either

teenager's body or clothing that could possibly suggest involvement in the murders.

Although the physical, forensic and circumstantial evidence didn't implicate Burns or Rafay, the detectives on the case persisted in their belief that they were guilty.

Evidence points to others as killers

The physical evidence demonstrated that at least three people, none of whom was Burns or Rafay, were responsible for the murders. This is confirmed by DNA found at the crime scene and by analysis of the blood spatter in Dr. Rafay's bedroom by the State's expert.

Investigators found physical evidence at the crime scene that they believed must have been left by the killers. This key evidence was tested and re-tested, but was found to contain DNA that did not belong to either the three victims or Burns or Rafay. Key pieces of evidence are:

- A coarse body hair or pubic hair found on Dr. Rafay's fitted sheet;
- DNA in the downstairs shower mixed with Dr. Rafay's blood;
- DNA in a footprint in the garage mixed with Dr. Rafay's blood.

Ross Gardner, the state's expert who examined the blood spatter evidence, concluded in both his report and his trial testimony that at least three people were in Dr. Rafay's bedroom while blows were being struck. While on the stand this expert said, "I cannot explain the stains in any other way."

The Bellevue police didn't just have physical evidence telling them three other people murdered the Rafays. They also received three independent tips, all vetted by other law enforcement agencies, that clearly implicate other parties with motives to harm the Rafays. Those tips included Islamic extremism.

Dr. Rafay had religious enemies

Dr. Rafay was a prominent Sunni Muslim active in his religious and cultural community, first in Vancouver, then in Bellevue. He was co-founder and President of the Canadian-Pakistan Friendship Organization. Among his controversial activities were publishing a paper and developing a computer program indicating Muslims in British Columbia weren't facing Mecca when they prayed.

Burns & Rafay cont. on p. 18

Large Breasts Prove Women's Innocence Of Apartment Break-in

By JD Staff

Japanese actress Serena Kozakura was convicted in July 2007 of willful destruction of property and sentenced to 14 months imprisonment. Her sentence was suspended for three years conditional on her good behavior. Kozakura's conviction was based on the testimony of a male friend. He testified that in November 2006 she thought he was with another woman, so she kicked a hole in the door to his Tokyo apartment, that she then crawled through.

Kozakura appealed to Tokyo's High Court on the basis that she is factually innocent. She asserted that it is impossible for her to fit through the 8-1/2" wide hole in the door because of her 44" breasts. Her lawyer explained that her breasts protrude further from her chest bone than the hole is wide, and to illustrate that she could not fit through the hole he showed the appeals court judges a plate the size of the hole. He also argued that the clothes she wore on that day showed no signs of the damage that would have occurred if she had tried to squeeze through the small hole, and her shoes showed no signs of the damage that would have occurred from kicking a hole in the door.

The appeals court judges agreed and overturned her conviction on March 3, 2008. The presiding judge stated, "There are considerable doubts about the man's testimony."

After the court's decision was announced, the 38-year-old Kozakura told reporters, "I lost work after being charged, but justice prevailed in the end. I used to hate my body so much, but it was my breasts that won in court." Kozakura later appeared on Japan's Asahi television network and demonstrated that she can not fit through a hole 8-1/2" wide.

Sources:

Big breasts help actress to get conviction overturned, *Mainichi Daily News* (Tokyo, Japan), March 4, 2008.
Japanese bikini model acquitted: Tokyo High Court cites her 44-inch breasts, *Pinoyspy Reporter* website, March 4, 2008.



Serena Kozakura after her conviction was overturned

Dutch businessman Guus Kouwenhoven was convicted in the Netherlands in June 2006 of violating a United Nations arms embargo against Liberia. Kouwenhoven was the managing director of Oriental Timber Corporation (OTC) and owned 35% of the company's stock. His conviction was based on allegations that OTC smuggled AK-47s and anti-tank weapons into Liberia. Those arms were then allegedly used by Liberian supported militia groups to commit atrocities against civilians in the neighboring country of Sierra Leone.

The prosecution's theory was that in exchange for OTC's exclusive logging rights to large tracts of Liberian timber, Kouwenhoven agreed to provide the arms to aid then President Charles Taylor's plan to politically destabilize Sierra Leone so Liberia could gain access to its neighbor's diamond resources. OTC's agreement with Liberia granted the company exclusive logging rights to 3,953,686 acres (6,178 square miles, an area larger than Connecticut.), for which Liberia was paid 50% of the timber sale profits.

Kouwenhoven was considered by the United Nations to be a major player in the illegal arms trade. In 2001 the U.N. barred him from traveling to Liberia, and in 2004 he was added to the international banking community's "freeze list." That meant he could not legally access his financial assets estimated to be about \$70 million. The "freeze list" includes alleged terrorists, drug barons, arms dealers and dictators.

The prosecution's case that Kouwenhoven was an arms trader was based on witnesses deposed in Liberia. In response to the prosecution's claims, Kouwenhoven testified in his defense, "I never saw weapons on a ship in the port of Buchanan. I was never present when arms were handed out. I was never present at military meetings with Taylor. I never encouraged OTC personnel to go to the front lines." Acquitted of the war crimes charges that would have resulted in a sentence of life imprisonment, the 63-year-old Kouwenhoven was sentenced to eight years in prison for his arms embargo conviction.

Kouwenhoven appealed. After nine months imprisonment he was released in March 2007 pending his appeal's

Businessman's Arms Conviction Tossed

By JD Staff



Guus Kouwenhoven

outcome. During the appeal's oral arguments in February 2008, the prosecution argued for increasing Kouwenhoven's sentence to 20 years and imposing a fine of \$675,000 (450,000 Euros). His attorney's argued that his conviction should be overturned because there was insufficient evidence that he (and OTC) had been involved in any arms shipments.

The 2006 movie *Blood Diamond* that starred Leonardo DiCaprio, was about the fighting in Sierra Leone during the period of time that Kouwenhoven was accused of supplying Liberia with arms to fuel the conflict.

On March 10, 2008, The Court of Appeal in The Hague announced its decision: Kouwenhoven was acquitted of the arms charges, and his acquittal of the war crimes charges was upheld. The Court's written decision stated, "The suspect must be acquitted of these deeds because of far-reaching lack of reliable evidence on which to base a conviction." Among other things, the Court noted that witnesses claimed to have seen an OTC ship deliver weapons to Liberia in late 1999, when the company didn't purchase that ship until months later in May 2000. The Court criticized the prosecution for not taking more seriously the extreme contradictions in the testimony of its witnesses that was fatal to its case. Kouwenhoven was acquitted because of the insufficient evidence and he can't be retried.

In 2003 former Liberian President Taylor was indicted for allegedly committing crimes against humanity and violations of international humanitarian law. Taylor's trial by the Special Court for Sierra Leone began in June 2007 in The Hague. As of early April 2008 his trial was still ongoing.

Sources:

Kouwenhoven was accused of breaching Security Council Resolution 1343 adopted on March 7, 2001, that established an arms embargo against Liberia. Charles Taylor's Dutch ally goes on trial for war crimes, *Radio Netherlands*, April 24, 2006.
Dutch appeals court acquits businessman of arms dealing in Liberia, *International Herald Tribune*, March 10, 2008.



Sex With Mannequin Conviction Tossed

The South Dakota Supreme Court unanimously ruled in November 2007 that a young man having sex with a mannequin in a closed room with no one else present does not violate the state's indecent exposure law. The following are excerpts from the Court's decision in *State v. Horse*, 2007 S.D. 114 (S.D. 11/07/2007).

In the late afternoon of November 14, 2005, Michael James Plenty Horse was walking to the YMCA in Sioux Falls, South Dakota. On his way, he stopped by the Washington Pavilion of Arts and Sciences and ventured upstairs. Shortly afterwards, he was surprised by a security guard in the Alumni Room, a small third-floor space containing high school mementos and photos honoring students who had attended Washington High School. There were no other persons in the area at the time. The guard found Horse lying on top of a mannequin, with its band uniform partially removed. It appeared that Horse was having simulated intercourse. Horse was clothed, but his pants were partially down, and a wad of paper was in his hand. Horse rolled off the mannequin, turned away, and began adjusting his pants. Horse was told to remain where he was, and the police were called. The guard had walked upon this scene because he noticed that the door to the room was closed. This door,

according to the guard, was to be left open and, to his knowledge, had only been closed three times in the three years he had worked there. When the guard opened the door and walked in the room, the lights were off. [¶2.]

When questioned about what he was doing, Horse, visibly ashamed, declined to talk about it. A low functioning nineteen-year old, defendant has been classified as a high school sophomore for the past three years. His reading comprehension remains at the level of a fourteen-year old; his math skills, that of an eight-year old; and his written language, that of a thirteen-year old. With more questioning, he finally admitted that because he had not seen his girlfriend in a year his needs had not been met. He worried about what would be told to his mother. [¶3.]

Horse was charged with indecent exposure under SDCL 22-24-1.2 (2005), a class one misdemeanor. A court trial was held before a magistrate, who found Horse guilty. He was granted a suspended imposition of sentence and placed on supervised probation for three years. With this conviction, Horse must register as a sex offender. His appeal in circuit court was affirmed. Horse appealed to the state Supreme Court, asserting that there was insufficient evidence to convict him of indecent exposure under the statute. [¶4.]

Analysis and Decision

A person commits the crime of indecent exposure if, with the intent to arouse or

gratify the sexual desire of any person, the person exposes his or her genitals in a public place under circumstances in which that person knows that person's conduct is likely to annoy, offend, or alarm another person. Clearly, the "with the intent to" language proclaims that indecent exposure should be defined as a specific intent crime. [¶6.]

Because this is a specific intent crime, the prosecution must link the exhibition of one's genitals to the intent to seek sexual gratification by such public exposure. Thus, it must be proved that the offender exhibited or displayed his genitals with the intent of arousing himself or someone else. [¶7.]

Although Horse had the observable intent to sexually gratify himself, no evidence demonstrated that he intended to arouse or gratify his (or someone else's) sexual desire by the act of exposing his genitals in public. On the contrary, while he was alone and the lights were off, defendant closed the door and went over by a desk. It was late in the afternoon, near to closing time, and no other patrons were in the area. Nothing establishes that his conduct was done with the specific intent to generate sexual arousal or gratification by the act of publicly exposing, i.e., displaying or offering to the public view, his genitals. Therefore, defendant's act, lewd though it may have been, does not fall within the purview of the indecent exposure statute. [¶9.]

Reversed. [¶10.]

John Spirko's story of being on Ohio's death row when there is compelling evidence he was over 100 miles from the scene of Elgin, Ohio Postmistress Betty Jane Mottinger's 1982 abduction and murder, was in *Justice:Denied* Issue 27, Winter 2005.

Beginning in November 2005, two Ohio governors granted seven stays of execution at the request of Ohio's Attorney General so that state-of-the-art DNA tests unavailable at the time of Spirko's 1984 trial could be conducted on evidence in the case. After more than two years of DNA testing hundreds of items of crime scene evidence, no DNA link could be established between Spirko and the crime scene or Mottinger's murder.

With Spirko's seventh stay of execution scheduled to expire on January 16, 2008, and no more evidence to test that could possibly inculpate Spirko in the crime, on January 9, 2008 Ohio Governor Ted Strickland commuted Spirko's death sentence to life in prison without the possibility of parole.

Governor Strickland acted in response to a Clemency Application submitted by Spirko's lawyers on October 2005 that sought a full

John Spirko's Sentence Commuted To Life In Prison

pardon and the release of Spirko after more than 20 years on Ohio's death row. The pardon request was based on the fact that there is no physical, forensic or eyewitness evidence tying Spirko to Mottinger's murder, and Spirko has the un rebutted alibi of being in the Toledo area more than 100 miles from the crime scene. Spirko's alleged accomplice, Delaney Gibson, was never tried, and there is testimonial and photographic evidence that on the entire day of the crime Gibson was in Asheville, North Carolina, more than 500 miles from where Mottinger was abducted.

In December 2007 Spirko's lawyers pressed Governor Strickland to act on the clemency application, writing in a letter that the evidence as it exists today "can lead only to the conclusion that Mr. Spirko is an innocent man. Mr. Spirko has already spent 25 long and hard years in prison . . . for a crime he did not commit. He is 61 years old, and he cannot, and certainly should not, wait any longer for this injustice to be addressed."

The governor conceded in his January 9, 2008 commutation statement that there is a "lack of physical evidence linking Mr. Spirko" to Mottinger's murder, and that there is "residual doubt about his responsibility for the murder arising from a careful scrutiny of the case record and revelations about the case over the past 20 years." However, in spite of the overwhelming evidence of Spirko's factual innocence, Governor Strickland's sentence commutation avoided the negative publicity that would have followed pardoning Spirko and his release from prison.

Sources:

Governor's Statement Regarding Clemency Application of John G. Spirko, Columbus Ohio, January 9, 2008. Application For Executive Clemency For John G. Spirko Jr., October 7, 2005.

Case Based On A "Foundation Of Sand" Enough To Send Man To Death Row - The John Spirko Story, *Justice:Denied*, Issue 27, Winter 2005.

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A Dying Erin Walsh Acquitted Of Murder 33 Years After Wrongful Conviction



Erin Walsh after his acquittal

By Sean MacDonald

Erin Walsh's dying wish was granted on March 14, 2008 when he was acquitted him of the second-degree murder of Melvin Peters, more than three decades after his conviction of the crime.

Walsh, who is in the final stages of terminal colon cancer, tearfully hugged his emotionally overwrought wife, Angela, and then struggled to rise from his wheelchair and address the court. "On behalf of my family and myself, it is just a tremendous relief for me and I just want to thank you for your fairness, your astuteness, in coming to this decision."

"I'm a free man," an ecstatic and emotional Walsh said outside the courtroom. "I mean, freedom now means something to me. It is not just a word. It is something that I'm going to wear every day of my life like I wore my captivity."

That captivity began on Friday, October 17, 1975, when a jury convicted Walsh of second-degree murder. It took jurors an hour to reach the verdict, during which time they also stopped to eat lunch. To them it was an open and shut case. It wasn't quite so simple for Walsh. He spent the next 20 years in jail for that crime, and a total of more than 32 years trying to undo that 60-minute decision.

Overwhelming odds

The criminal process had finished: Walsh's trial was over and his appeal was denied. He was a convicted murderer, one voice in a sea of inmates screaming for attention. His credibility was non-existent and the courts had spoken. He had no money, no lawyer and no real access to the outside world. He was alone.

In spite of the overwhelming odds, Walsh continued to pursue justice with the few resources he had at his disposal. He wrote to whoever he thought would listen, seeking information wherever he could find it. He continued even when it was to his detriment – even when the parole board would hold it against him in considering his release.

At Walsh's trial, the prosecution alleged that he bought a sawed-off shotgun from an asso-

ciate of Donald McMillan, and that he used it the next day to murder Peters in his Cadillac near Saint John. (Saint John is on Canada's east coast about 400 driving miles northeast of Boston.)

Walsh claimed that McMillan, David Walton and Peters attempted to twice rob him of money and drugs that he had on him. Walsh testified that after their first attempt, he managed to escape, and ran to some nearby Canadian National Railway workers. He begged them to call the police, which they did. When he tried to make his way back to his car to escape, the would-be robbers found him. They forced him into his car at gunpoint. Walsh testified that he then began a life and death struggle for possession of the shotgun. He claimed the weapon ultimately ended up in the hands of McMillan, where it discharged and killed Peters.

But at the time, there wasn't any independent evidence to support Walsh's testimony. McMillan and Walton testified as prosecution witnesses, which led to Walsh's conviction and life sentence with no parole before serving a minimum of ten years.

New evidence uncovered

In 2003, after 28 years of proclaiming his innocence, Walsh wrote to the New Brunswick Provincial Archives and received the prosecution's complete file of his case. In it he found a treasure trove of exculpatory evidence never disclosed to him or presented in court. Most significantly he discovered:

- Less than an hour after the shooting a Saint John police officer overheard Walton – the prosecution's star witness and the only eyewitness to the shooting – ask McMillan why he shot Peters;
- A police report never disclosed to Walsh or his lawyers supported his version of events;
- Saint John police recorded a statement from a local hardware store proprietor who said the gun shells used in the crime were purchased one day before McMillan said they were, when Walsh was in Ontario, hundreds of miles from Saint John; and,
- Seven signed statements by witnesses that supported his claim that he ran away from the three men after they attempted to rob him, and that he asked for the police to be called just 10 minutes before Peters was killed.

Armed with the new exculpatory evidence, Walsh contacted the Toronto based Association in Defence of the Wrongly Convicted for legal help. The AIDWYC agreed to represent Walsh in a new appeal.

On February 22, 2008, Canada's Federal Justice Minister issued a Ministerial Remedy acknowledging that based on the new evidence, a miscarriage of justice likely occurred. Walsh's case was referred to the New Brunswick Court of Appeal. New Brunswick's Attorney General took the position that not only was a miscarriage "likely," but that it in fact occurred.

Walsh told reporters, "I have never claimed to be an angel. What I have claimed is that I am a wrongfully convicted man. All I am asking is that I get justice." One of Walsh's AIDWYC lawyers told reporters, "In 1975 a jury convicted Erin in one hour ... With the power of his case today, as we now know it, there is not a jury in this country that would not acquit him in half that time."

The Court of Appeal expedited hearing Walsh's case because of his grave medical condition, and it unanimously quashed his conviction on March 14, 2008. It was a landmark ruling because it was the first time in the New Brunswick justice system's 200-year history that a wrongful conviction has been recognized.

James Lockyer, founding director of AIDWYC, told reporters, "the acquittal is a great ending to a difficult story."

Walsh experienced immediate repercussions from his exoneration. As a convicted murderer Correctional Services Canada had been funding his homeopathic cancer treatments. After his acquittal it cut-off paying for his treatments.

William McCarroll was Walsh's prosecutor, and he is now a New Brunswick provincial judge in Saint John. McCarroll continues to defend his handling of the case.

Now 59, Walsh is also seeking justice in the civil courts. Last year he filed a lawsuit against former prosecutor McCarroll, the City of Saint John, all Saint John police chiefs in power since 1975, the province of New Brunswick, and the RCMP for their deliberate attempts to suppress evidence: the very evidence that led to his acquittal.

Reprinted with permission. Originally published in *The AIDWYC Journal*, Spring 2008, Volume 9. About the author. Sean MacDonald is a Toronto attorney who was a member of the AIDWYC's team of lawyers that worked to exonerate Erin Walsh.

Additional source: Dying Ontario man gets last-wish acquittal on 33-year-old murder conviction, *The Canadian Press*, March 14, 2008.



Last Words from Death Row

By Norma Herrera

Nightengale Press (2007), Softcover

Review by Natalie Smith-Parra

Last Words from Death Row is a sister's gift. It is a record of the death of an innocent man, author Norma Herrera's brother Leo, executed in 1993 by Texas' legal system.

The saga begins in a small south Texas town where Leonel (Leo) Herrera's family is partners with the local sheriff and his deputies in smuggling large amounts of cocaine into the United States from Mexico. When two deputies are killed, it is Leo who is arrested for the crimes – which he didn't commit. He is captured and beaten unconscious by 20 officers. When Norma is admitted into the jail with a lawyer, she sees her brother handcuffed wrists to ankles, bloody and unconscious. Every officer she passes on the way to Leo's cell has blood on his knuckles, arms, boots, or clothes. Norma has little medical training, but upon seeing her brother on the concrete floor she administers CPR to save his life. She first has to tilt his head to allow blood to slither out of his mouth. The sheriff finally transports Leo to the hospital emergency room...in a hearse. And so begins a story of injustice and brutality that the Herrera family suffered, a story so horrific, that few people would believe it could occur in a so-called civilized country.

Eventually, Sheriff Marmalejo is arrested and convicted for his role in the drug smuggling operation. He is sent to prison in Florida, but none of the considerable assets he acquired from the drug trade are seized.

As too often happens in small towns, four members of Leo's jury are intimately connected to local law enforcement and the two murdered deputies.

After Leo's conviction and death sentence, his brother Raul came forward and admitted to the killings. He explains that when he shows up instead of Leo to cut the drugs, Deputy Rucker becomes infuriated. An argument ensues during which Raul shoots Rucker. Raul shoots the second deputy on the way home when he is stopped for speeding. Raul's son, then nine years old witnesses both murders, and when he is questioned by law enforcement, he tells what he knows.

Years later, Raul Jr. writes an affidavit attesting to what he saw: His father shot both men and his Uncle Leo was not present. Several other witnesses also executed affidavits clearing Leo of the murders.

Hours before Leo's first scheduled execution, a U.S. District Court judge orders a stay so that his writ of habeas corpus' claim of innocence can be considered. In his order he writes, "...a sense of fairness and due process made it necessary for a state court to listen to Herrera's evidence of innocence." The State of Texas appeals.

In overruling the stay and giving the OK for Leo's execution, the federal Fifth Circuit Court of Appeal writes: "The existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." Leo then obtains a stay while he appeals to the U.S. Supreme Court.

In February 1993 the U.S. Supreme Court rules against Leo, "Petitioner urges us to hold that this showing of innocence entitles him to relief in this federal habeas proceeding. We hold that it does not." National Public Radio Commentator Nina Totenberg summed it up: "Innocence is irrelevant." The Supreme Court's ruling in Leo's case is memorialized in *Herrera v. Collins* (USSC 1993) The way is paved for Texas to carry out Leo's sentence.

A series of protests take place on the days leading up to Leo's execution scheduled for May 12, 1993. Celebrities, including actor Danny Glover, attend the protests of an innocent man about to be executed.

The final telephone conversation between Leo and his sister and mother is as heart-breaking a page of writing as has been written. Norma agonizes about how to tell their mother that all avenues to save Leo have been exhausted: What do you say? "I'm sorry, Mom. There is nothing left to do. They are going to execute Leo."

Leo makes a final request to his sister: "My story, remember, I want you to make sure that people know what was done to me and the whole truth. This will be the last thing I will ask of you."

And it is the last thing Norma is able to do for her brother: to tell his story. To save his memory, even though she couldn't save his life.

In Memoriam: Norma Herrera Ellis

Leonel Herrera was convicted in Texas of the 1981 murder of a police officer and sentenced to death. After the U.S. Supreme Court ruled against considering the merits of Herrera's writ of habeas corpus that was based on new evidence of his factual innocence, he was executed in 1993. The Supreme Court's decision in Herrera's case, *Herrera v. Collins*, 506 U.S. 390 (1993), is well-known in legal circles because Justice Blackmun decried the Court's refusal to consider Herrera's petition, bluntly writing in his dissent, "The execution of a person who can show that he is innocent comes perilously close to simple murder."

Leonel Herrera

Herrera's sister Norma unconditionally supported him, and in the days before his execution he asked her to tell the true story of his case. Fourteen years after his execution she finally completed her book. In February 2007 Norma published a detailed account of her brother's case, *Last Words From Death Row*.



Norma Herrera Ellis at a book signing for *Last Words From Death Row* at Hastings Books in McAllen, Texas on June 30, 2007.

Norma Herrera Ellis, 54, a retired nurse who lived in McAllen, Texas, died of an apparent heart attack on January 14, 2008.

Last Words From Death Row is available from *Justice:Denied's* Bookshop for \$19.95 (264 pages, softcover). Send a check or money order (stamps OK) to: Justice Denied; PO Box 68911; Seattle, WA 98168. Or order with a credit card from JD's website, www.justicedenied.org/books.html

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Warren Blackwell was convicted in October 1999 of sexually assaulting a woman after she left a 1999 New Years Eve party in Northamptonshire, England, about 50 miles north of London. The woman claimed she was forced her into an alley by a knife wielding Blackwell where the sexual assault took place. She also claimed Blackwell inflicted physical injuries on her.

Rape Conviction Tossed When The "Victim" Is Revealed As A Serial Rape Accuser

By JD Staff



Warren Blackwell and his wife Tanya

Blackwell, the married father of two children, appealed his conviction. He not only lost his appeal in March 2002, but the Court of Appeal increased his sentence from three to five years in prison. He was paroled in February 2003 after serving three years and four months in prison. His wife Tanya believed in her husband's innocence and stayed with him through his ordeal.

After Blackwell exhausted his legal appeals, he filed an application with the Criminal Cases Review Commission (CCRC) for review of his conviction. After accepting his case, the CCRC discovered during its investigation that his accuser had falsely alleged being sexually or physically assaulted on at least six occasions prior to accusing Blackwell. Her false accusations included:

- She was married twice and made false assault allegations against both husbands.
- She accused her father of sexual assault, but police investigators determined she made the incident up.
- When she was a teenager she accused a boy of rape, but the doctor who examined her discovered she was a virgin.

It was also discovered that the woman had a history of mental illness and self-harm. She had even once used scissors to inscribe the word 'HATE' on her body.

The CCRC concluded based on her history and suspicious aspects of her story about the alleged assault by Blackwell, that she "lied about the assault and was not attacked at all, her injuries being self-inflicted." Based on the new evidence, the CCRC referred Blackwell's case to England's Court of Appeal.

The prosecution didn't oppose Blackwell's appeal. The lead prosecutor wrote, "This conviction is unsafe. What has come out of the woodwork paints a picture of a woman with immense personal problems with serious difficulties in distinguishing between truth and lies." He also wrote that if the new evidence had been known at the time her alleged assault was reported, "this case would not have made it off the ground."

On September 8, 2006, the appeals court unanimously quashed Blackwell's conviction. The court took the unusual action of recommending that police agencies across the country be alerted to details about the woman to forestall her from harming another man with a false accusation.

Outside the courthouse, the 36 years-old Blackwell described his accuser as "every man's worst nightmare. Clearly something has to be done about this woman. She needs to be stopped. The prosecution say she is psychiatrically disturbed, but insane people who murder are tried and if found guilty put away." In a statement he later released, Blackwell said, "It took the police and the justice system nine months to convict me of a crime that not only did I not commit, but a crime that never even took place. It has taken almost seven years to clear my name."

Blackwell awarded \$504,000 minus \$25,000 for prison room and board

In January 2008 it was reported that Blackwell was awarded \$504,000 for his wrongful prosecution and imprisonment. However, in accordance with the British government's standard practice of charging a wrongly convicted person room and board, \$25,000 was deducted to reimburse the prison service for feeding and providing him with a bed during his 40 months of imprisonment. So Blackwell's payment was \$479,000.¹

While pleased with the award of compensation, Blackwell was upset with the 'board and lodging' deduction. "It's the principle of the thing. They slam you in jail for three years and four months, brand you a sex attacker, leave your family to cope without you, then turn around and say sorry but demand \$25,000 (£12,500) for living expenses incurred during your time inside. It is illogical that someone should have to pay for a punishment — which prison is — that should never have been given in the first place." He continued, "If murderers and robbers don't get charged for their time in the clanger, how come an innocent man does? It doesn't make sense and it is plain discrimination."

Blackwell's lawyer, Robert Berg, also decried the government's policy of requiring a wrongly convicted person to reimburse the cost of their upkeep while imprisoned. He

told the London's *Daily Mail*, "Even though he was in prison, it doesn't mean there were no living expenses at his home. His family was still there, having to feed themselves and manage the home. So they cooked one less pork chop because he wasn't there — it's hardly a great saving, is it?"

The legality of the "bed and board" deduction was challenged by three wrongly convicted men, Vincent Hickey, Michael Hickey and Michael O'Brien, who were awarded substantial amounts for their respective wrongful murder convictions. In 2004 England's Court of Appeals upheld the deduction, which the government argued is necessary to prevent a wrongly convicted person from getting a financial windfall by being paid the money they saved on living expenses while imprisoned. In March 2007 England's highest court, the House of Lords, upheld the principle upon which the deduction is based.

Consequently, in spite of his displeasure with the deduction, Blackwell will accept it. He told the *Daily Mail*, "I tried to fight against it but my solicitor says the only hope of overturning the decision would be to go all the way to the European Court of Human Rights. I would probably use up all the compensation money on legal fees if I did that."

Endnote:

¹ Blackwell was awarded £252,500, which converts to US\$504,243 at the exchange rate on January 1, 2008 of 1.997 pounds per U.S. Dollar. Blackwell was charged £12,500 for 'board and lodging', which converts to US\$24,963.

Sources:

Man freed but serial rape accuser remains anonymous, *Evening Standard* (London) September 9, 2006.
Man jailed after woman made up sex attack is freed five years later, *The Telegraph* (London), September 9, 2006.
Victim of false rape claim must pay £12,500 for bed and board in jail, *The Daily Mail* (London), January 1, 2008.
O'Brien and Others v. Independent Assessor, [2007] UKHL 10, March 14, 2007.
Independent Assessor v O'Brien, [2004] EWCA Civ 1035, July 29, 2004.

Freeing The Innocent

A Handbook for the Wrongfully Convicted

By Michael and Becky Pardue

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Calvin Williams' Comp Award Annulled By Court

In March 2007 Calvin Williams became the first person awarded compensation for a wrongful conviction under a Louisiana statute enacted in 2005. (La. R.S.15:572.8).

Williams was convicted in Orleans Parish in 1977 of first-degree murder and sentenced to life in prison. He was granted a new trial in 1992 when it was discovered the prosecution failed to disclose to his trial lawyers a police report that was materially inconsistent with the testimony of a key witness. The prosecution also failed to disclose that the same witness did not identify Williams in a police photo lineup. The prosecution decided not to retry Williams and he was released in 1992 after 15 years and 8 months of wrongful imprisonment. The murder charge was dismissed four years later in August 1996.

After the compensation law was enacted, Williams filed a claim. The State of Louisiana opposed the claim, and during the hearing in state district court to determine his eligibility, the judge refused to allow the assistant attorney general representing the State to question Williams. The judge ruled that it would amount to a retrial of Williams, which is barred by the constitutional prohibition against double jeopardy. The judge then awarded Williams the maximum of \$150,000 allowed by the law.

The State appealed. On February 20, 2008 Louisiana's 1st Circuit Court of Appeal annulled Williams' award. (*In Re: Calvin Williams*, 2007CA1380 (02/20/2008)) The court explained that the statute places the burden on a claimant to "prove by clear and convincing scientific or non scientific evidence that he is factually innocent of the crime for which he was convicted." The court noted in regards to the argument that the state was attempting to use the compensation hearing to retry Williams, "The evidence submitted is only relevant to the critical determination of factual innocence, which if shown, entitles the applicant to compensation for wrongful imprisonment."

Therefore the court ruled the judge erred by not allowing the Attorney General's Office to question Williams, and they sent the case back to the district court for a new hearing. The ruling means Williams will either have to testify or forfeit his compensation claim. As of early April 2008 a rehearing has not been scheduled.

Additional source: Court annuls money award, *The Advocate* (Baton Rouge, LA), February 27, 2008.

Woman Sentenced To Prison After Video Proves She Falsely Accused Four Men Of Rape

By JD Staff

Eighteen year-old Cinzia Sannino went to a party at a club in Cardiff Bay, Wales on News Years Eve 2006. She left the party with four men, and they all went to the house of one of the men to continue partying.

The next morning, January 1, 2006, Cinzia left the house at 7 a.m. and called 999 (England's equivalent of 911) to request a ride home. When the emergency services operator said they weren't a taxi service, Cinzia started crying and claimed she had been raped.

After the police picked her up, she said that she had left a party the night before with four men and went to a house with them. While there she said she started dancing wearing all of her clothes, but stopped after becoming dizzy, feeling like she had been drugged, and she then laid down and fell asleep. She said she awoke that morning to find one of the men having sex with her.

Based on her statement the police moved fast. Three doctors and a forensics team were assigned to the case and a recently closed police station was reopened as the base of operations. Later that day the police drove her around town and she saw the four men on the street.

The men, aged 20 to 28, were arrested on suspicion of raping Cinzia. When questioned they all told police the same basic story: they met Cinzia at the News Years Party, she agreed to leave the party with them, after arriving at the home of one of the men she began giving lap dances to the men while she was removing her clothes, she rubbed the hands of the men all over her body while she danced, and that after she was nude she asked the men to have sex with her.

One of the men told the police it could be proven Cinzia consented to have sex. He had taken a video with his mobile phone camera of her dancing and propositioning the men. After police officers viewed the video of Cinzia dancing nude, rubbing the men's hands on her body and asking them to have sex with her, she was re-interviewed. When asked if she made-up the rape accusation so that she could get a ride home, she insisted she had been raped and refused to retract her original statement. The officers then went over her statement paragraph by paragraph with her reaffirming its truthfulness. She then signed her statement.



18-year-old Cinzia Sannino on couch before she removed her clothes and asked four men to have sex with her.

Police then showed Cinzia the video of her conduct at the house. She responded by withdrawing her statement accusing the men of rape. The four men were promptly released after 36-hours in custody.

Cinzia was charged with perverting the course of justice. She wasn't just faced with the video as evidence against her, but she also had a personal website on which she described herself as "a wild girl who likes to have fun." She pled guilty, and at her sentencing on September 18, 2006, she threw herself on the mercy of the court. Judge Roderick Evans responded to her plea for leniency by telling her, "I have no doubt you had voluntary, consensual sexual intercourse with each of the men. ... Four men were arrested, interviewed and locked up for 36 hours based on your allegations. Some people would say that your conduct was more than foolish and ill-advised – it was evil." He sentenced Cinzia to six months imprisonment.

A spokeswoman with the False Allegations Support Organisation said that women should welcome Cinzia's imprisonment, because false rape accusations hurt the credibility of woman actually assaulted. She said, "Up to now girls who falsely accuse have had nothing done to them. I welcome this course of action ... The police often waste their time looking into cases like this, when there are girls out there who have actually been raped. I'm happy that the deterrent that has been there all the time is beginning to be used because very few girls, up until now, have been taken to court."

If the man had not recorded the video the case could have had a very different outcome. The men were seen leaving the party with Cinzia, she positively identified them as her attackers, they admitted having sex with her, and they could easily have been portrayed by an enterprising prosecutor as preying on a young woman defenseless against their unwanted sexual advances. Without the video, those men could have all too easily been convicted and wound up spending many years wrongly imprisoned.

Sources:

The Explicit Video That Trapped A Blonde Who Cried Rape, London *Daily Express*, September 20, 2006.
Judge Tells Rape Girl Conduct Was 'Evil', *Western Mail* (Cardiff, Wales), September 19, 2006.

Steven Truscott: His Victory After 48 Years

By Fiorella Grossi

"It's a dream come true," said a gracious and grateful Steven Truscott on August 28, 2007, his first day in nearly 50 years that he was no longer living as a convicted murderer.



Steven Truscott the day of his exoneration in August 2007

"This is a day for all of us to celebrate something that has taken a long time and will really take a long time to sink in." The dream certainly became real for the 62-year-old when he and his family were greeted with thunderous applause by friends and supporters, and media cameras and microphones, as they arrived at a Toronto press conference just moments after hearing the decision of the Ontario Court of Appeals.

A panel of five judges unanimously acquitted Steven of his 1959 conviction of raping and murdering his classmate, 12-year-old Lynne Harper. Fourteen-year-old Steven then became the youngest person in Canadian history sentenced to hang. His death sentence was later commuted to life in prison and he was paroled in 1969 after ten years imprisonment.

"Never in my wildest dreams did I expect this to come true," Steven said. He thanked his "dream team," of lawyers from the Toronto based Association in Defence of the Wrongly Convicted who worked on his case during the 10 years it took to clear his name – James Lockyer, Phil Campbell, Marlys Edwardh, Hersh Wolch and Jenny Friedland.

AIDWYC uncovered a mountain of evidence that ultimately convinced the court of appeal that Steven's conviction was a "miscarriage of justice and must be quashed." The evidence AIDWYC presented:

- Supported that the prosecution's version of the timeline of events that lead to the murder – and pointed to Steven as the murder – was false;
- Proved the prosecution's time of death was "scientifically unsupportable"; and
- Cast serious doubt on the honesty of a key prosecution witness.

Steven also thanked his children Lesley, Ryan and Devon, for their unwavering belief in his innocence, and his wife Marlene, his "strongest supporter in the world ... I don't know what I would've done without her." True to his courageous and generous spirit, Steven identified that there were friends in the audience who have also gone through the ordeal of being wrongly convicted, and vowed to help exonerate them.

One battle is behind Steven, but another looms: the issue of compensation. How much should a man receive after being initially condemned to hang, spending 10 years behind bars for a crime he never committed, and who, along with his family, was forced to live for decades with the stigma of a murder conviction?



Steven Truscott in 1959 when he was convicted of murder as a 14-year-old

Ontario Attorney General Michael Bryant, who apologized to Steven after the decision was released, immediately appointed retired Judge Sydney Robins to advise the government on the compensation issue. In 2003 Thomas Sophonow received \$2.3 million for the wrongful murder conviction of a doughnut shop waitress in 1981. Since Steven's life has been severely circumscribed by this tragic event, we should expect the government to honor a moral obligation by generously compensating him for the experience he and his family have had to endure.

Reprinted with permission. Originally published in *The AIDWYC Journal*, Fall 2007, Volume 8.



Jesse Friedman filed a federal habeas corpus petition on June 23, 2006 challenging his 1988 conviction of charges related to the alleged sexual assault of children by him and his father in the basement of the family's Great Neck, New York home. (See accompanying review of *Capturing the Friedmans*, a documentary about the case that was nominated for the 2003 Academy Award for best documentary.)

Friedman's petition was based on three grounds: (1) the prosecution failed to disclose eyewitnesses who denied that Petitioner committed any wrongdoing; (2) the police officers investigating the case used overtly suggestive and aggressive interrogation methods with the child witnesses; and, (3) the state failed to disclose that at least one child witness underwent hypnosis prior to alleging that Petitioner sexually abused him.

Friedman first learned of the information underlying his petition when in 2003 he saw interviews of possible witnesses in the documentary *Capturing the Friedmans*. The documentary about the investigation and prosecution of Jesse and his dad was produced by an independent filmmaker who had no direct association with the Friedmans.

Jesse Friedman's Federal Habeas Dismissed As Untimely

By JD Staff

U.S. District Judge Joanna Seybert dismissed Friedman's first and second claims as time-barred by the AEDPA, but she reserved judgment about the third claim. Oral arguments were held by Seybert on October 3, 2007, concerning the timeliness of Friedman's claim that the state failed to disclose the use of hypnosis to enhance the memory of Friedman's accusers.

Three months after the hearing Friedman's third claim was dismissed by Seybert on January 4, 2008. The AEDPA imposes a one year statute of limitations for filing a federal habeas petition beginning on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." (28 U.S.C. 2244(d)(1)(D)) Seybert's dismissal was based on her analysis of when Friedman first "knew, or could have known through the exercise of due diligence, that the prosecution may have withheld information regard-

ing the use of hypnosis" on his accusers. Seybert ruled that calculating the one year time limit beginning from the date she considered most favorable to Friedman, his habeas petition was filed "eighteen days late."

Consequently, Friedman's habeas petition that challenged the underlying factual basis of his convictions has been dismissed in its entirety without having any of his claims considered on their merits.

In a March 2008 email Jesse wrote: "With what we've been able to uncover it is apparent that the children were subjected to dangerous therapeutic methods. It appears that nearly all complainants were subjected to therapeutic practices not limited to hypnosis, but also guided imagery, suggestive questioning, and treatment for suspected "disassociation disorder", all of which are now known to induce false memories. This was the evidence we were hoping to present to the judge, had we been granted the opportunity. Had Judge Seybert granted our motion for discovery, we believe extensive evidence would have been uncovered to support our initial indication that hypnosis therapy was

Friedman cont. on page 11

Capturing the Friedmans is a documentary about the impact on the Arnold Friedman family of allegations that father Arnold, a retired school teacher, and teenaged son Jesse, molested and sodomized male children in the mid-1980s in Great Neck, New York.

The documentary that was an Academy Award Nominee for the Best Documentary Feature in 2003, traces the Friedman family back to when Arnold and his wife were children. In so doing it peels off the mask of middle-class normalcy that concealed Arnold's disturbing past of being a molestation victim as a child, and that up to the time of his 1984 arrest he had a secret fetish for child pornography.

Satisfying his desire to see pictures of young boys was what led Arnold to purchase a kiddie porn magazine from the Netherlands that was inspected by U.S. Customs. During the subsequent search of the Friedman's home, Customs agents and police officers not only found many magazines that Arnold had kept hidden from his wife and three teenaged sons – but they also found records of computer classes that Arnold taught in his home with the sometimes help of his teenaged son Jesse.

Local police detectives tracked down children who took the computer classes, and after being severely browbeaten, and in some cases hypnotized, several of the boys agreed that Arnold and Jesse had sodomized them and engaged in bizarre sexual games with many boys at a time in the Friedman's home.

The documentary effectively portrays through news clips and interviews the hysteria that swept Great Neck in the wake of the arrest and charges against Arnold and Jesse.

Arnold and Jesse both adamantly professed their innocence. However, faced with the testimony of the children that the jurors would likely accept as believable because of his many kiddie porn magazines, Arnold pled guilty to try and prevent his son Jesse from

Friedman cont. from page 10

used as a method to elicit false testimony from witnesses." He also emphasized that "Judge Seybert did not indicate that my appeal was without merit, groundless, unfounded, or factually unsupported. Her decisions focused strictly on a technical matter relating to the counting of days on a calendar."

Sources:

Jesse Friedman v. Joe Rehal, et al, 06-CV-3136(JS) (EDNY 1-4-2008), Memorandum and Order.
Email received by *Justice Denied* from Jesse Friedman, March 19, 2008.

Capturing the Friedmans

Documentary, Directed by Andrew Jardecki, 107 minutes, Released to theaters in 2003. Available on DVD.

Review by Hans Sherrer

being convicted by association with him in their scheduled joint trial. Arnold was sentenced in 1988 to 10 to 30 years in prison.

A few days before Jesse's trial, he faced the reality that the witch hunt atmosphere in Great Neck (and around the country at that time regarding child sex charges) would prevent him from receiving a fair trial, and the judge had already let it be known that if convicted he would be sentenced to three consecutive life sentences. That meant 19-year-old Jesse would never be paroled and die in prison. So even though Jesse claimed he had never done anything sexual to any of the students and he never saw his father inappropriately touch a student, and no student ever told their parents – prior to being interrogated by the police – that anything had been done to them by Arnold or Jesse, he caved in to the pressure and pled guilty. Jesse was sentenced in 1989 to 6 to 18 years in prison.

Since Arnold's wife divorced him after his imprisonment and remarried, Jesse was the beneficiary of Arnold's \$250,000 life insurance policy that didn't have a suicide exclusion. So when Arnold committed suicide in 1995 with an overdose of medicine, Jesse had the \$250,000 to build his life after his release from prison, which occurred in 2001 after almost 13 years of imprisonment.

Capturing the Friedmans doesn't soft pedal Arnold's pedophilia, but he denied ever harming any of his computer students. His claim has some credibility because of his candid admission to two incidents with young children in another city years before the Great Neck allegations. Also supporting his claim are the filmmaker's interviews with students who said they agreed with the police interrogator's suggestions to implicate the Friedman's only to stop the officer's badgering. Arnold and Jesse's denials and the student's statements that nothing happened are consistent with the fact that no physical or medical evidence supported the children's fantastic tales of unusual and repeated sex orgies at the Friedman home, and that no child mentioned anything to

their parents who observed nothing that gave them any inkling that any sexual abuse occurred at the Friedman's home.

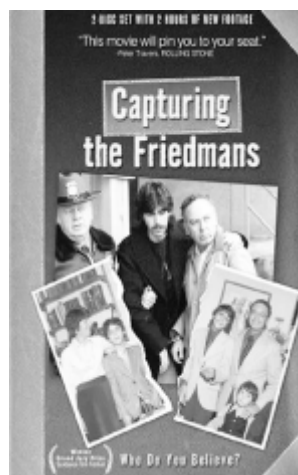
Capturing the Friedmans once again proves that truth is stranger than fiction, as it lays bare the complex dynamics of the Friedman family and the response of each family member to the criminal charges. Although the filmmakers don't take a position on Arnold or Jesse's guilt or innocence, they definitely gives the viewer reasons to conclude that they were the innocent victims of unsavory police detectives and prosecutors hellbent on making a case against them, and the public's lynch mob fever fueled by the media's sensationalized reporting.

With its blend of archival film clips of news stories and courtroom proceedings, the Friedman's home movies made before and after Arnold and Jesse's arrest and imprisonment, and interviews with the Friedmans and students who were allegedly molested, watching *Capturing the Friedmans* is a mesmerizing and surprisingly gripping viewing experience. It can be purchased at video stores or from Internet sellers.

Postscript

A postscript to the documentary is that in 2004 Jesse Friedman filed a motion for a new trial in New York State court. The motion was based on exculpatory evidence concealed by the prosecution prior to Arnold and Jesse's guilty pleas. The concealment of the evidence was discovered by the filmmakers during their three-year investigation of the Friedman's case and interviews they conducted for *Capturing the Friedmans*.

After Jesse's motion was denied by the New York State courts, he filed a federal writ of habeas corpus. In July 2007 two of Jesse's three claims were dismissed as untimely under the one year statute of limitations imposed by the Anti-Terrorism and Death Penalty Act of 1996 (AEDPA). (See p. 16.) On January 4, 2008 Jesse's third claim — that the prosecution failed to disclose the use of hypnosis to enhance the memory of Friedman's accusers — was also dismissed on the basis of the judge's determination that Jesse's habeas petition was filed 18 days later than the one-year time limit imposed by the AEDPA. Jesse Friedman's website is at, <http://www.freejesse.net>



James Love's Indictment Dismissed For Raping A Girl In Cincinnati When He Was 2,000 Miles Away In Mexico

By JD Staff

James Love was charged in 1996 with raping an ex-girlfriend's daughter "sometime in 1988," "sometime in 1989," and "sometime in 1990." Love pled not guilty and told his lawyer that he had never done anything inappropriate with the girl. His lawyer was unsuccessful at finding out prior to Love's June 1996 trial the exact dates of the alleged rapes.

On the next to last day of Love's trial his accuser testified that the rapes occurred in late December 1988, early January 1989 and early February 1989. Love told his lawyer that he was in Mexico during the entirety of those months, and he and his mother feverishly tried to gather together documentary proof he was out of the country. Under the time constraints Love was only able to locate his U.S. Passport, and telephone records of calls to and from Mexico and his mother's telephone number in Cincinnati. Over the prosecutor's objection Love introduced his U.S. Passport that showed he entered Belize on June 2, 1989 and exited it on July 3, 1989. The prosecution's case was solely based on the testimony of the alleged victim, but the alibi records Love was able to gather in one day were not enough to convince the jury that his accuser was lying about the alleged rapes.

Love, 45, was sentenced to four terms of life in prison. After Love's incarceration he began collecting proof he had been in Mexico from November 1988 to June 2, 1989, and then in Belize from June 2, 1989 to July 3, 1989.

Love filed a motion for a new trial in March 2003, based on the formidable evidence he had amassed proving he was out of the United States during the time of the alleged rapes. He had acquired affidavits from people in the U.S. and other countries who spent time with him in Mexico, he had medical records, he had additional phone records, and he had obtained a document from the U.S. Department of State that he personally appeared at the U.S. Embassy in Mexico City in May 1989 to obtain a U.S. Passport. One of Love's affidavits was from Lynn Freed, the best-selling author of *Home Ground* and other books. Freed and Love spent time together in Zihuatanejo, Mexico in December 1988.

In February 2005 Love's motion for a new trial was denied. The judge reasoned that all of Love's new alibi evidence was cumula-

tive to the limited phone records and passport that the jury had considered, and therefore it was insufficient to warrant a new trial. Love appealed to the Ohio Court of Appeals.

Justice:Denied published a feature article about Love's case in its Fall 2005 issue (Issue 30), "Man Two Thousand Miles From Alleged Rape Scene Fighting For New Trial – The James Love Story."

On November 22, 2006 the Court of Appeals unanimously vacated Love's convictions and sentence and ordered his retrial. (*State v. Love*, 2006 -Ohio- 6158 (Ohio App. Dist.1 11/22/2006)) The Court wrote: "Love's new evidence, if believed by a jury, would have showed that he could not have committed the crimes alleged by Sarah on the dates she testified to at trial." (§150)

After the Hamilton County Prosecutor failed to act on the appeals court's order for a new trial, Love pressed the issue. The prosecutor responded by agreeing to a stipulation that Love was outside the United States from November 1988 to July 3, 1989. (With the exception of three days in May 1989 when he returned to Cincinnati to renew his driver's license.) The prosecutor then filed an amended Statement of Facts that alleged the rapes didn't occur on the dates Love's accuser testified to at his trial, but after he returned to the United States.

Love filed a Motion to Dismiss the Indictment on the ground of double jeopardy. Love argued the prosecution had conceded he did not commit the rapes of which he was convicted because he was outside the United States, and that when the prosecution had the opportunity to do so during his trial, it did not present evidence that the rapes occurred on the dates it was alleging in the amended Statement of Facts. Love relied on a considerable number of Ohio and U.S. Supreme Court precedents in arguing that his constitutional right against double jeopardy was being violated by the prosecution.

On February 15, 2008 Judge Robert Ruehlman of the Hamilton County Court of Common Pleas granted Love's Motion to Dismiss in a one-page order. The Hamilton County prosecutor is appealing the order, and as of early April 2008 Love remains imprisoned.

Source:

Ohio v. James Franklin Love, Case No. B-9601201, (Hamilton County Court Of Common Pleas 2-15-08), Entry Granting Defendant's Motion To Dismiss Indictment.

Duke Hoax Rape Prosecutor Mike Nifong Bankrupt



Mike Nifong

Mike Nifong, the former Durham County district attorney who has been disbarred from practicing law in North Carolina and convicted of criminal contempt for his role in the prosecution of three Duke lacrosse players for a rape that never happened, filed for federal bankruptcy protection on January 15, 2008. In his Chapter 7 petition Nifong lists assets of \$244,000 and liabilities of more than \$180 million. The liabilities are primarily legal claims filed against Nifong related to the botched investigation he oversaw of an exotic dancer's false allegations that she was raped her during a lacrosse team party.

The petition was filed on the last day Nifong could respond to a civil lawsuit filed by Dave Evans, Collin Finnerty and Reade Seligmann, the three lacrosse players whose charges of raping and kidnapping the dancer were dismissed in April 2007. The petition includes potential debts of \$30 million each to the three former players.

Nifong describes himself as retired in his petition, and in March 2008 a federal bankruptcy court administrator concluded that Nifong's annual income of \$146,151 from pension or retirement benefits doesn't disqualify him from bankruptcy protection because the bulk of his potential debt is non-consumer.

All civil actions against Nifong are on hold pending resolution of his bankruptcy filing, but if a judge finds that he acted willfully and maliciously in his prosecution of the players, bankruptcy rules will not shield him from financial liability.

After Nifong filed the bankruptcy petition, thirty-eight members of the lacrosse team filed a lawsuit against Duke University and the city of Durham in February 2008, alleging their reputations were damaged by association with the false rape allegations. Nifong wasn't named as a defendant, however, if he loses his bankruptcy protection he could be added as a defendant at a later date.

See previous *JD* stories:

Darryl Hunt, The NAACP, And The Nature Of Evidence, *Justice:Denied*, Issue 35, Winter 2007, p. 17.
Duke U. Hoax Rape Prosecutor Mike Nifong Convicted Of Contempt, *Justice:Denied*, Issue 38, Fall, 2007, p. 13.

Sources:

Mike Nifong Bankrupt: Disgraced Duke prosecutor lists \$180M in liabilities, *SmokingGun.com*, January 15, 2008
Nifong can claim bankruptcy, court decrees, *The News & Observer* (Raleigh, NC), March 21, 2008.



Feds Appeal \$102 Million Award To Men FBI Framed

In July 2007 U.S. District Judge Nancy Gertner awarded \$101.75 million to four men and their families for the FBI's involvement in causing the men to be maliciously prosecuted and wrongly convicted in 1968 for murdering Edward Deegan near Boston. Two of the men, Louis Greco and Henry Tameleo, died in prison so their compensation of \$28 million and \$13 million respectively, would go to their heirs. The other two men Joseph Salvati and Peter Limone, were respectively awarded \$29 million for 30 years, and \$26 million for 33 years of wrongful imprisonment. Salvati is now 75, and Limone 73.

The \$101.75 million judgment, the largest in United States history related to wrongful convictions, was formally entered in December 2007, and it began accruing interest at the rate of more than \$100,000 per week. In February 2008 Judge Gertner's 235-page decision awarding the compensation was appealed by the U.S. Department of Justice to the federal First Circuit Court of Appeals.

Salvati's longtime attorney Victor Garo said the appeal didn't surprise him, "The federal government has never, ever acknowledged that they've done anything wrong in this matter, so why should they not appeal? It was more important for the FBI to protect their murderous informants than it was for them to protect innocent men who had young families." Garo also said that if the award is upheld, the appeal will cost the government more than \$5 million per year in interest plus legal fees.

See previous *Justice:Denied* articles, FBI's Legacy of Shame, *Justice:Denied*, Issue 27, Winter 2005.

Four Innocent Men Awarded \$101.75 Million By Federal Judge Nancy Gertner For FBI Frame-up, *Justice:Denied*, Issue 27, Summer 2007.

Additional source:

Justice Dept. appealing awards in Deegan case, *Boston Herald*, February 16, 2008.

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Seattle, Washington area college student Katherine M. Clifton reported on July 9, 2007 that she had been raped in her home by one of her professors. Clifton, 21, reported to King County Sheriff deputies that four days earlier the professor entered her Woodinville house at 7 a.m. and raped her.

Clifton told detectives the professor was obsessed with her, and she showed them emails in which he said he had "romantic feelings" for her and he suggested that he would raise her grade if she agreed "to a few conditions." She also said that at least 15 times since March 2007 the professor had "randomly showed up at locations she frequented," and she gave the detectives a King County District Court restraining order against the professor.

When the professor was questioned he denied all of Clifton's allegations, telling the detectives that he had never seen her off the campus and he had no interest in her. He admitted that he had sent her emails related to the class she was taking, but when shown the ones she gave the detectives, he said they had been altered.

Three days after Clifton reported being raped, the professor was arrested and charged with burglary with sexual motivation and first-degree rape – both class A felonies. The King County Prosecutor's Office asked for \$500,000 bail, describing the professor as "an extreme threat to the victim and the community." After his arrest the professor was placed on leave from his job.

With the professor adamantly denying the charges, the detectives took a closer look at the emails. They concluded that the text had been altered from the emails sent by the professor. They also learned that none of the professor's fingerprints were found in Clifton's house, and a sexual-assault examination of her found no evidence she had been raped. The detectives also checked into the restraining order she had provided them with: the judge's signature was illegible and the case number didn't match any King County case.

After nine days in jail, the professor was released on bail on July 21.

On July 25 the detectives confronted Clifton with what they learned from their investigation. She admitted that she created the restraining order on her computer and forged the judge's signature. She also admitted that she had altered the emails on her computer, the professor did not rape her, and that she had never seen him off the campus. The next day the rape and burglary charges were dismissed against the professor, and a day later, July 27, Clifton was charged with the misdemeanor of making false statements to a public servant.

Woman Convicted Of Fabricating Rape Complaint

By JD Staff



Katherine M. Clifton

Clifton pled guilty on March 17, 2008 to making false statements to a public servant. King County District Court Judge Peter Nault called the case one of the "saddest" he'd ever seen in court. He also said "That we hurry to castigate a person who turns out to be entirely innocent ... I don't know how it could be worse."

Clifton did not make a statement prior to her sentencing, but her lawyer told Nault that she had "extremely deep remorse" for making the false statements and that she was bothered by events that occurred when she was a child. The professor was not present when Nault sentenced Clifton to serve 365 days in jail, with 357 days suspended. She was also ordered to pay a \$5,000 fine, with \$4,750 suspended. She was also ordered to serve the suspended portion of her sentence on probation, to perform community service, and to pay the professor's attorney fees.

After the hearing the King County Prosecutor's Office admitted the professor had done nothing wrong, but it defended his arrest and the filing of multiple class A felony charges because law enforcement was acting on the best information available at the time about an alleged violent rape. A Sheriff's Office spokesman said that Clifton was "an extremely articulate and credible victim. There was no reason to suspect she wasn't telling the truth."

In a court document filed prior to Clifton's sentencing the professor wrote that he has his job back, but "Even though I did absolutely nothing wrong ... my rape and burglary with sexual-motivation charges, albeit false, will remain in the court records forever." He also requested that he not be publicly identified so the damage already done to his life wouldn't be compounded. (*Justice:Denied* is honoring the professors request by not identifying him or the college where he teaches.)

The professor would have been sentenced to more than a decade in prison if he had been convicted of the false charges. In contrast, for her elaborate premeditated plan to destroy the professor's life, Clifton's punishment is to only serve eight days in jail, and pay a \$250 dollar fine and the professor's legal fees, unless she violates her probation and must serve a portion of her suspended sentence in jail.

Source:

Woman pleads guilty to false rape report, *The Seattle Times*, March 19, 2008.

Troy Davis Denied New Trial By Georgia Supreme Court

By JD Staff

Troy Anthony Davis was convicted in 1993 and sentenced to death for the murder of Savannah, Georgia police officer Mark MacPhail. Davis professed his innocence, but his conviction and sentence were affirmed on direct appeal and his federal habeas petition was denied.

Eight days before Davis' scheduled execution on July 9, 2007, he filed an extraordinary motion for a new trial based on evidence supporting his innocence. The trial judge denied the motion without conducting an evidentiary hearing. The Georgia Supreme Court agreed to review the denial of Davis' new trial motion and stayed his execution. On March 17, 2008 the Court affirmed the denial of a new trial by a majority 4 to 3 decision. (*Davis v. The State*, S07A1758, March 17, 2008) Davis' motion was based on four classes of evidence, and in a published opinion the Court rejected each one as materially insufficient to warrant a new trial. A brief summary of each rejected class of evidence follows.

A. Recantations by Trial Witnesses

The Court rejected affidavits from four trial witnesses recanting their identification of Davis. The Court ruled that a trial witness' recantation of his or her trial witness must be disregarded unless "every material part is purest fabrication." (7) The Court recognized that "A recantation impeaches the witness' prior testimony. However, it is not the kind of evidence that proves the witness' previous testimony was the purest fabrication." (7)

B. Statements Recounting Alleged Admissions of Guilt by Sylvester Coles

The Court ruled that Davis' new trial motion was not materially supported by the affidavit of three people who at different times were told by Sylvester "Red" Coles that he shot officer MacPhail.

C. Statements that Coles Disposed of a Handgun Following the Murder

The Court ruled that Davis' new trial motion was not materially supported by the affidavit of two women who attested that they saw Coles possessing a handgun shortly after MacPhail's murder.

D. Alleged Eyewitness Accounts

The Court ruled that the statement and affidavit of two eyewitnesses who did not testify at Davis' trial did not materially support

Davis' new trial motion.

In affirming the denial of a new trial, the Court stated, "we have chosen to focus primarily on one of the required showings for an extraordinary motion for new trial, the requirement that the new evidence be "so material that it would probably produce a different verdict.'" (19) In rejecting the value of Davis' new evidence provided by the eleven witnesses, the Court stated, "At trial, the jury had the benefit of hearing from witnesses and investigators close to the time of the murder ... We simply cannot disregard the jury's verdict in this case." (20)

The Court separately rejected Davis' "claim that his execution should be barred because his execution would be unconstitutional in light of the evidence of his alleged innocence. Because this claim was not asserted distinctly in the trial court, it will not be considered for the first time on appeal." (21)

Three justices dissent

Three justices dissented from the Court's ruling, including Chief Justice Leah Sears, who wrote the dissent. The dissenters argued that Davis should be granted a hearing where the credibility of his eleven witnesses could be tested in open court, and their testimony subjected to cross-examination. Judge Sears wrote, "I believe that this case illustrates that this Court's approach in extraordinary motions for new trials based on new evidence is overly rigid and fails to allow an adequate inquiry into the fundamental question, which is whether or not an innocent person might have been convicted or even, as in this case, might be put to death." (Dissent 1)

Sears also wrote, "In this case, nearly every witness who identified Davis as the shooter at trial has now disclaimed his or her ability to do so reliably. Three persons have stated that Sylvester Coles confessed to being the shooter. Two witnesses have stated that Sylvester Coles, contrary to his trial testimony, possessed a handgun immediately after the murder. Another witness has provided a description of the crimes that might indicate that Sylvester Coles was the shooter. (Dissent 4) ... But the collective effect of all of Davis' new testimony, if it were to be found credible by the trial court in a hearing, would show the probability that a new jury would find reasonable doubt of Davis' guilt or at least sufficient residual doubt to decline to impose the death penalty." (Dissent 5)

Aftermath

The Courts ruling will likely have an effect on the consideration of future extraordinary

motions for a new trial in Georgia. The Court justified denying Davis an evidentiary hearing by effectively establishing two new rules of law closing his (and future litigants) avenues to pursue a new trial. Decrying the Court's action, Justice Sears wrote in her dissent, regarding "extraordinary motions for new trial, I would hold that *recantations* and *confessions to third parties* are not categorically excluded." (Dissent 3 emphasis added) She wrote further, "If recantation testimony, either alone or supported by other evidence, shows convincingly that prior trial testimony was false, it simply defies all logic and morality to hold that it must be disregarded categorically." (Dissent 2)

One of Davis' lawyers, Chris Adams, said after the ruling, "I was very surprised by the decision. We felt that the proper course was to hear all the witnesses ... and then to make a judgment call." Adams was troubled by the decision because this is an "actual innocence case. The kind of case you go to law school for. You would hope all your cases would have this kind of significance — or that none of them would."

As of early April 2008 a new execution date for Troy Anthony Davis has not been set.

Sources:

Davis v. The State, S07A1758, March 17, 2008
Lethal injustice: no new trial for death row prisoner Troy Davis, By Liliana Segura, *Alternet*, March 20, 2008.

State Judge Complains About "The 'Innocence' Myth"

In a *Wall Street Journal* commentary titled "The 'Innocence' Myth," Colorado state District Court Judge Morris B. Hoffman complains about the efforts of organizations (such as *Justice Denied*) to expose flaws in the criminal legal system. In addition to undermining confidence in the legal system, Hoffman claims that the educational effort of such organizations contributes to innocent people pleading guilty to a "lesser offense" rather than going to trial — because they don't believe they will get a fair trial.

JD Comment: In reading this article it is difficult not to think that the *WSJ* made a mistake and misidentified Hoffman as a judge, because his comments are indistinguishable from those of prosecutors who propound that the legal process in the United States is nearly infallible, and cite high conviction and low exoneration rates as proof.

Source: *The 'Innocence' Myth*, Comment by Morris B. Hoffman, *The Wall Street Journal*, April 26, 2007.

Derek Tice's Conviction Reinstated by VA Sup. Ct.

Derek Tice is one of four former Navy men known as the Norfolk Four, convicted of charges related to the 1997 rape and murder of an 18-year-old woman in Norfolk, Virginia. Tice was convicted largely due to a confession that he claims is false and coerced by the police. He was sentenced to life in prison.

Tice's defense was that Omar Ballard committed the crime. Ballard, the only non-Navy man convicted of the rape and murder, has confessed multiple times that he acted alone. Ballard's confessions are supported by crime scene DNA evidence that implicates him as the lone assailant.

The Virginia Court of Appeal overturned Tice's convictions in 2002 and ordered a retrial. Tice was re-convicted in January 2003 and again sentenced to life in prison.

After Virginia's Court of Appeals affirmed Tice's reconviction, and the state Supreme Court denied Tice's appeal, he filed a state habeas petition. In November 2006, state Circuit Court Judge Everett Martin Jr. ruled that Tice had received ineffective assistance of counsel, vacated his convictions, and ordered a new trial.

Judge Martin found that Tice was prejudiced by his trial counsel's failure to file a motion to suppress his confession. The police continued interrogating Tice after he clearly asserted his right to remain silent under the Fifth Amendment. The judge noted there is no physical, forensic or scientific evidence linking Tice to the crime, and that without the confession, there is a reasonable probability the jury would have acquitted Tice.

On January 11, 2008 the Virginia Supreme Court reinstated Tice's convictions. The Court ruled, "We hold, as a matter of law, that Tice failed to meet his burden of proving ... there was a reasonable probability of a different result at his criminal trial if the jury had not considered his confession." (*Johnson v. Tice*, No. 070531 (VA SCt 01/11/2008))

Having exhausted his state appeals, two weeks later Tice filed a writ of habeas corpus in federal court. As of early April 2008 Tice's habeas proceeding is in the briefing stage.

The most recent of several *JD* articles about the Norfolk Four is: Third Trial Ordered For Derek Tice, *Justice:Denied*, Issue 34, Fall 2006.

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

Four days after U.S. Congressman John Conyers toured Louisiana's Angola State Prison on March 20, 2008, Albert Woodfox and Herman Wallace were released to live in a dorm after 36 years in solitary confinement.

Woodfox and Wallace, two of the men known as the Angola 3, were convicted in 1972 of stabbing to death Angola prison guard Brent Miller. Robert Wilkerson, the third man of the Angola 3, was released from prison in 2001 after spending 29 years in solitary for allegedly killing a prisoner during a riot – although Wilkerson was never charged with the crime.

The three men were kept in solitary for decades because prison officials contended they were a threat to the prison's security. Prior to Miller's murder Woodfox and Wallace founded a chapter of the Black Panther Party at the prison, and Wilkerson was a Black Panther when he was imprisoned.

Woodfox and Wallace have always claimed innocence of the guard's murder, and they are currently appealing a state judge's reversal of a commissioner's recommendation that they be granted a new trial. The commissioner issued the ruling after reviewing the evidence and holding a evidentiary hearing ordered by the Louisiana Court of Appeals. The commissioner found that the only alleged eyewitness to Miller's murder was a prisoner who was bribed by Angola's Warden Murray Henderson to identify and testify against Woodfox and Wallace. The commissioner decided that it is more likely than not that without the prisoner's tainted testimony the men would not have been convicted, because none of the physical evidence matched either man. Although Woodfox and Wallace were eliminated as the source of four fingerprints found at the murder scene, prison officials have refused for 36 years to compare them to the prints of the more than 200 other prisoners that were in the unit.

Miller's widow recently said that she doubts Woodfox and Wallace killed her husband.

The men's lawyer, Nick Trenticosta said before Conyers visited the prison: "This was a railroad job. The prison authorities decided it was Herman and Albert, they ignored every bit of evidence to the contrary, and they bribed another prisoner, Hezekiah Brown, to testify. They gave Herman and Albert's names to Hezekiah and promised him his freedom if he would help them 'crack the

Angola 3 Released From Solitary After Prison Visit By U.S. Congressman

By JD Staff



The Angola 3
Herman Wallace, Robert King Wilkerson, and Albert Woodfox (left to right)

case'. So Herman and Albert spend the rest of their lives in solitary confinement, and Hezekiah, a convicted rapist, goes free because he did a favor for the warden."

Ironically, former Warden Henderson died in a Louisiana prison in 2004 after being convicted of attempting to murder his wife in 1997. As his physical condition worsened he unsuccessfully petitioned the parole board for a compassionate release. In his plea for release he told the board, "I have a horror of dying in prison."

Prior to Wilkerson's 2001 release the three men filed a federal civil rights lawsuit challenging their indeterminate solitary confinement as a violation of their Eighth Amendment right against "cruel and unusual punishment." As of early April 2008 that lawsuit is still ongoing.

Current Angola Warden Burl Cain is on record describing Wallace and Woodfox as "crybabies" for wanting to be released from more than three decades in solitary. Cain said they had nothing to complain about being in solitary because they could watch television and they ate the same food as other prisoners.

Representative Conyers (D MI) is Chairman of the U.S. House of Representatives Judiciary Committee, which has oversight of federal funds for state prisons, which are required to meet basic standards of fair prisoner treatment. Conyers was briefed about Woodfox and Wallace's case, and after his visit to the prison he issued a statement that the evidence suggests they were wrongly convicted. Days later the men were moved to a dorm.

Justice:Denied reported on the Angola 3 in its first issue. See, "Herman Wallace, Political Prisoner?", By Herman Wallace, *Justice:Denied*, Issue 1. *JD* has published three other articles about their case.

Sources:

US House Judiciary Committee visits Angola, *Godard News Director*, March 20, 2008.
Lawyers call for release of 'Angola 3,' nearly 36 years after guard's murder, *The Times Picayune* (New Orleans), March 17, 2008.
Angola 3 pair move to dorm, *The Advocate* (Baton Rouge, LA), March 27, 2008.

Guantanamo Detainee Lawyer Claims Prosecutions Are Political Show Trials

The lawyer for Guantanamo Bay detainee Salim Hamdan filed a motion on March 27, 2008 to dismiss the charges against Hamdan. The motion asserts that political influence over Hamdan's prosecution deprives him of his right to a fair trial. The motion alleges that the Bush administration exercises "unlawful command influence" over the proceedings, and that White House officials are orchestrating Hamdan's military commission trial for maximum political benefit. Republican candidates claiming to be tough on terrorism could be boosted by Hamdan's conviction prior to the November 2008 elections.

In the motion Hamdan's attorney, Navy Lt. Brian Mizer, quotes Bush appointee Deputy Defense Secretary Gordon England telling military prosecutors, "We need to think about charging some of the high-value detainees because there could be strategic political value to charging some of these detainees before the election."

Former chief Guantanamo prosecutor Air Force Col. Morris Davis resigned in October 2007 because of political interference in the military commission trial process. Among other things he said he was pressured to pursue weak "sexy" high-profile cases, and since convictions were expected, "I felt I was being pressured to do something less than full, fair and open."

Davis is scheduled to be a pretrial witness for Hamdan. Davis says he welcomes the "opportunity to tell the truth" about how the prosecutions are being conducted.

Prior to Davis' resignation, three Guantanamo prosecutors were transferred in 2004 after they protested the military tribunal procedures that they said were tilted to ensure convictions. One of the reassigned prosecutors, Air Force Captain John Carr, wrote to his superior: "When I volunteered to assist with this process and was assigned to this office, I expected there would at least be a minimal effort to establish a fair process and diligently prepare cases against significant accused. Instead, I find a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged. You have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees and that we only

needed to worry about building a record for the review panel."

Another of the reassigned prosecutors, Air Force Major Robert Preston, wrote to his superior: "I consider the insistence on pressing ahead with cases that would be marginal even if properly prepared to be a severe threat to the reputation of the military justice system and even a fraud on the American people."

Davis' resignation suggests that nothing has fundamentally changed in the way the Guantanamo prosecutions are being handled than they were when those prosecutors were reassigned almost four years.

Hamdan is one of the "low-level accused" that Carr was referring to. He is charged with conspiracy and supporting terrorism because he worked at one time as a driver for Osama bin Laden. Hamdan's alleged crimes are the result of his proximity to bin Laden, because the government does not allege that he had any role in planning or carrying out any attacks against the United States or U.S. military personnel. Hamdan faces up to life in prison if convicted by the tribunal.

In April 2008 Hamdan "walked out" of a pre-trial hearing, saying he didn't believe a fair trial was possible with the tribunal process.

See previous *JD* article:

Three Prosecutors Reassigned After Protesting Rigged Guantanamo Trials, *Justice Denied*, Issue 29, Summer 2005, p. 14.

Sources:

Gitmo trials pegged to '08 campaign, *Miami Herald*, March 28, 2008.

Detainee's lawyer claims charges are about politics, *Seattle Times*, March 29, 2008.

Ex-Prosecutor Alleges Pentagon Plays Politics, *Washington Post*, October 20, 2007.



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Dallas DA Admits Innocent People Are Prosecuted For Sport

Craig Watkins, elected in 2006 as the District Attorney for Dallas County, Texas, gave a remarkable interview published in *Reason Online* in which he acknowledged what many people have long suspected: there are prosecutors who get a kick out of prosecuting a person they know is innocent. Watkins said, "Oh yeah, it was a badge of honor at the time—to knowingly convict someone that wasn't guilty." He also acknowledged that he had to clean house when he took office because his predecessor fostered a culture of "convict at all costs."

Watkins established a "Conviction Integrity Unit" in the district attorneys office staffed by two attorneys and two investigators. The unit ferrets out cases of wrongful conviction, and trains other DAs in their responsibility to disclose exculpatory evidence and in general to seek the truth, and not just notch another conviction on their belt.

The April 7, 2008 interview by Radley Balko, "Is This America's Best Prosecutor? - Meet Dallas County District Attorney Craig Watkins," is on *Reason* magazine's website at, www.reason.com/news/show/125596.html

Prosecutor Immunity Considered By Sup. Ct.

After 24 years of wrongful imprisonment Thomas Goldstein was exonerated of murder in 2004 based on his post-conviction discovery that the prosecution's key witness was an experienced jailhouse snitch who lied that he wasn't rewarded for his testimony. Goldstein then filed a federal civil rights lawsuit against the Los Angeles County district attorney from 1975 to 1983 and his top deputy. Goldstein alleged his rights were violated by the prosecutors failure to administer a system for sharing information on whether informants had been used before and had been given promises in exchange for their testimony. The District Court refused to dismiss the lawsuit on the basis of prosecutorial immunity, ruling Goldstein was seeking damages for administrative and not trial related duties. After the 9th Circuit affirmed the District Court's ruling, the U.S. Supreme Court granted the prosecutor's writ of certiorari to decide the question of whether absolute prosecutorial immunity extends to administrative functions. The Court will issue its ruling in the summer of 2008.

Source: Supreme court to hear Los Angeles County district attorney immunity case, *Los Angeles Times*, April 15, 2008.

AEDPA Has Reduced Federal Habeas Relief For State Prisoners

Report summary by Hans Sherrer

Habeas *Litigation in U.S. District Courts* is the first study conducted on the effect of the Antiterrorism and Effective Death Penalty Act of 1996 on habeas corpus petitions filed by state prisoners. The two year study of federal district court rulings was conducted by a three person team headed by Nancy J. King, a Vanderbilt University Law School professor. The study's Final Report was released to the public on August 21, 2007. *

The AEDPA changed federal habeas law by:

- ♦ Establishing a 1-year statute of limitations for filing a federal habeas petition, which begins when appeal of the state judgment is complete. The filing deadline is tolled during "properly filed" state post-conviction proceedings.
- ♦ Authorizing federal judges to deny on the merits any claim that a petitioner failed to exhaust in state court.
- ♦ Prohibiting a federal court from holding an evidentiary hearing when the petitioner failed to develop the facts in state court, except in limited circumstances.
- ♦ Barring successive petitions, except in limited circumstances.
- ♦ Mandating a new standard of review for evaluating state court determinations of fact and applications of constitutional law.

The effect of these changes was studied by examining 2,384 non-capital cases randomly selected from 37,000 federal habeas cases filed nationally in 2003 and 2004, and 368 capital cases filed between 2000 and 2002 in the thirteen federal judicial districts in which the most capital habeas cases were

filed. Four of those districts were in Texas, two in Ohio, and one each in seven states.

The researchers compared their findings with four pre-AEDPA studies. The study found that the AEDPA has had the following general effects in both capital and non-capital federal habeas cases compared to before its 1996 enactment:

- ♦ Cases take longer to complete in district court;
- ♦ Fewer evidentiary hearings are granted in district court; and,
- ♦ A case is less likely to end in a grant of the writ.

Summary of report's findings by subject

Evidentiary hearing and discovery

Before the AEDPA an evidentiary hearing in a non-capital case was rare, only being granted in one out of every 99 petitions (1.1%). Under the AEDPA the likelihood of an evidentiary hearing is even rarer – only one granted for every 243 petitions (0.41%).

Evidentiary hearings are granted in only half as many capital cases as before the AEDPA's enactment – 9.5% of cases after the AEDPA compared with 19.5% before.

Discovery is also less common after the AEDPA. Although ordered in 12.5% of post-AEDPA capital cases (1 in 8), it is only ordered in 0.26% of non-capital cases (1 in 397).

State defenses against a petition's claims

22% of non-capital and 4% of capital habeas petitions are dismissed as time-barred (exceed the statute of limitations for filing) by the AEDPA, without consideration of any claims on their merits.

An additional 6.9% of non-capital and 3.8% of capital habeas petitions are dismissed as

successive under the AEDPA, without consideration of any claims on their merits.

Processing time of case

From the time of filing to disposition, non-capital cases take about a month longer on average to process after the AEDPA – 7 months compared with 6 months previously.

Capital cases take almost twice as long to process after the AEDPA as before – 29 months compared with 15 months previously. None of the 13 federal districts studied, on average, complete capital cases within the 450-day time limit imposed by the AEDPA for states qualifying for fast track status.

Grants of relief in non-capital cases

The most noticeable effect of the AEDPA is where the rubber meets the road: the granting or denial of a habeas request for relief. Prior to the AEDPA about one in every 100 (1%) habeas petitioner in a non-capital case was granted the relief of a new trial or a sentence reduction. Under the AEDPA, only about 3 of every 1,000 state non-capital petitioners is receiving any form of relief (0.29%).

Grants of relief in capital cases

Prior to the AEDPA 4 out of 10 (40%) petitioners in a capital case were granted a new trial or a reduced sentence. Since enactment of the AEDPA the granting of relief has been reduced to only 1 in 8 (12.4%) petitioners. Of those, 70% were only granted a reduction in his or her death sentence, while the other 30% were granted a new trial. Thus, only about 4 out of 100 (1 in 25) capital habeas petitions now results in an order for a new trial.

The study shows that a capital petitioner is 43 times more likely to receive a new trial or a sentence reduction than a non-capital petitioner.

Effect of lawyer representation

While all death penalty states but Alabama provide post-conviction counsel, only 7% of non-capital petitioners were represented by an attorney. The study's findings show that representation by a lawyer has the effect of increasing the time before final disposition, and increases the likelihood that one or more of a petition's claims will be decided on its merits and not terminated as time barred or for a procedural violation. The study shows that the disparity in legal representation between capital and non-capital petitioners has the following result:

AEDPA cont. on page 18

Percentage of state prisoner federal habeas petitions that raise a particular claim		
Type of claim	% of capital cases	% of non-capital cases
Ineffective assistance of counsel	81.0	50.4
Improper jury instructions or comments	68.3	14.5
Improper prosecutorial argument	48.0	10.1
Erroneous evidence ruling, guilt phase (other than illegal confession, search, or seizure)	45.8	19.8
False, lost, or undisclosed evidence	43.1	13.0
New evidence of innocence of conviction	10.8	3.9
Sentencing proceeding error	5.1	12.9
Plea or plea negotiation error *	4.0	14.8
* 10 of 349 capital petitioners were convicted by plea (0.29%); 35% of the non-capital petitions were filed by a plea-convicted prisoner.		

Burns & Rafay cont. from p. 3

About two weeks after the murders, a FBI informant told Bellevue investigators that a Muslim cleric in Seattle ordered Dr. Rafay killed because of disagreement with his teachings of the Koran. This informant also said a baseball bat was a murder weapon, which was a fact that had not been made public. Incredibly, the Bellevue police did not investigate this or two other credible tips, even though the tips included details like the names of people involved.

Similar murder unsolved

Today it would be readily accepted that the murders of the Rafays were religiously motivated because there are media reports every day about extreme sectarian violence. However, more than a decade ago the police investigators obviously didn't believe what can't be denied today – the murders could have been motivated by passions inflamed by differing religious ideas or extremism. The police were not only uninformed at the

time, but tragic events continue to suggest Islamic extremism remains a threat to Muslims both domestically and abroad. In January 2003, Riasat Ali Khan, a close friend of Dr. Rafay and also a former president of the Canadian-Pakistan Friendship Organization, was murdered outside his home in Vancouver, BC. His murder remains unsolved.

RCMP “Mr. Big” sting operation

Nine months after the murders, frustrated by the lack of evidence suggesting the guilt of Burns or Rafay and uninterested in pursuing the evidence directly implicating other people as responsible for the murders, the Bellevue police obtained the assistance of the Royal Canadian Mounted Police in an effort to obtain incriminating evidence against the two teenagers. The RCMP decided to initiate an undercover sting operation known in Canada as “Mr. Big,” in an effort to elicit a confession from one or both of them. Evidence from a Mr. Big type operation is not admissible in the United States unless it is obtained outside the country. Although legal

in Canada, the technique is known to have produced false confessions from a number of people suspected of a murder.

The Mr. Big sting initiated in 1995 involved two undercover RCMP officers who first made the acquaintance of Burns, and then Rafay. They introduced themselves using phony identities as violent criminals, with one posing as a crime boss. They then systematically set out to gain the teenagers' confidence so they could coerce them to become involved in their group. They did this by putting them in the position of “knowing too much” about the alleged criminal's activities. Using threats of death and violence, promises, and even pretending to have underworld connections to the investigation in Bellevue, these undercover officers repeatedly challenged the teenagers to put to rest their professed skittishness for violence. The officers were eventually successful in pressuring them to reassure the officers of their toughness by bragging about their respective alleged roles in the Bellevue murders. Burns, Rafay and their friend Jimmy Miyoshi were subsequently arrested based on those so-called “confessions.”

AEDPA cont. from page 17

1. It is 14 times more likely that a capital petitioner is represented by a lawyer than a non-capital petitioner.
2. It is 23 times more likely for a capital petitioner to be granted an evidentiary hearing.
3. It is 43 times more likely for a capital petitioner to be granted a new trial or a sentence reduction.

These findings about the possible impact of being represented by an experienced post-conviction lawyer are emphasized by the fact that 58% of non-capital petitions are denied on the merits of one or more claims. That isn't dramatically less than the 72% of capital petitions decided on the merits of a claim. An experienced post-conviction lawyer is able to not just frame legal arguments, but eliminate weak arguments from a petition that detract from possibly winning arguments.

Claims for relief

The study also analyzed the number and types of claims that are made in post-AEDPA petitions. Non-capital habeas cases average about four claims for relief from a conviction or sentence. Capital habeas petitions averaged 28 claims, with significant differences between districts: California petitions averaged 80 claims, while Texas petitions averaged only 13 claims.

Although a significant number of capital and non-capital petitions allege new evidence of

innocence, no petitioner was granted relief on the basis of his or her factual innocence.

Conclusion

The study only includes the processing of habeas cases at the district court level. However, given the restrictive rules for the court of appeals consideration of a district court's ruling, the study's findings may be indicative of over-all how federal courts handle state habeas petitions.

This is only a very brief summary of the findings detailed in the study's 194-page report. The report can be read or printed from JD's website at, www.justicedenied.org/cases/habeasreport2007.pdf

The report's 12-page Executive Summary can be read or printed from JD's website at, www.justicedenied.org/cases/habeassummary2007.pdf

The Executive Summary (only) can also be obtained by mailing \$3 (stamps OK) with a request for “Executive Habeas Summary” to: Justice Denied; PO Box 68911; Seattle, WA 98168.

* Final Technical Report: Habeas Litigation in U.S. District Courts – An empirical study of habeas corpus cases filed by state prisoners under the Antiterrorism and Effective Death Penalty Act of 1996, by Nancy J. King, J.D., Fred L. Cheesman II, Ph.D., and Brian J. Ostrom, Ph.D., Vanderbilt Public Law Research Paper No. 07-21, August 21, 2007.

Later, the RCMP threatened Miyoshi with a charge of conspiracy to commit murder, even suggesting to him that he could face the death penalty if he did not tell the police that Burns and Rafay were guilty. Miyoshi signed an immunity agreement and provided the RCMP with a number of statements. Every statement by Miyoshi contradicts the last and each one contradicts the physical evidence at the crime scene.

Miyoshi, who lives in Japan, refused to return to North America to testify at Burns and Rafay's trial. Instead, his deposition videotaped months earlier was shown to the jury. Before giving this videotaped deposition Miyoshi phoned Burns' lawyer and asked him for help. The lawyer could not do anything for him because he didn't represent him and Miyoshi was a witness for the prosecution.

False confessions

The statements provided by Miyoshi and the confessions by Burns and Rafay are not merely unreliable because they were coerced by threats and promises, but they are false. How do we know they are false? Every material element of them is refuted by physical evidence collected by the police, and forensic testing and analysis of that evidence by the state's experts who testified during Burns and Rafay's trial. Some of the inconsistencies in the statements and confessions are:

Burns & Rafay cont. on p. 19

Burns & Rafay cont. from p. 18

- The number of killers (The state's expert concluded at least 3 killers.);
- The identity of a murder weapon (Wounds on Dr. Rafay's neck show a sharp object was also used in the attack.);
- The timing of the murders (Two independent witnesses — neighbors of the Rafays — confirm the murders began shortly before 10 p.m. and were completed by 10:15 p.m., while the two teenagers were positively seen at a movie theater);
- The use of gloves (The state's expert said in a pre-trial interview that he would have found glove marks at the scene if gloves were used, but he didn't find any.);
- Details of Basma Rafay's attack (The state's expert concluded Basma moved from her bed to the floor, and she never walked around as newspapers reported and *later* the confessions claimed.); and,
- Movement of the murderers in the house (Blood evidence shows the killers were in the garage.).

These details were not known by Burns or Rafay at the time of the RCMP's Mr. Big sting, and they weren't public knowledge. However, the police and the killers knew them. The only reasonable explanation for the serious and numerous discrepancies between the evidence, and the statements and confessions, is that they are false.



DOCUMENTARY BLOWS THE LID OFF "MR. BIG"

Mr. Big is the name of an undercover sting created and perfected by the Royal Canadian Mounted Police. Although it is known to have produced many false confessions by innocent persons, Canadian courts allow confessions to be admitted as evidence that have been made to a cop posing as a violent mafia-type criminal — Mr. Big.

The legal systems of many countries, including the United States, consider Mr. Big as an entrapment scheme if conducted domestically. However, a confession resulting from a Mr. Big operation outside the U.S. can be considered admissible as evidence.

Frustrated that DNA and extensive other crime scene evidence and witnesses point-

Inconsistent "confessions"

The so-called "confessions" by Burns and Rafay are false by definition, because they are inconsistent with the facts of the case and the analysis of the crime scene by the prosecution's experts. But the manner in which Burns and Rafay told these stories also tells us they are false: their confessions are internally inconsistent and each contradicts the other's confession regarding what Burns was wearing, what they did with the incriminating evidence, and where they obtained the murder weapon. Burns and Rafay couldn't keep their stories straight, and those differing stories are also contrary to the crime scene evidence.

Even more importantly, the "confessions" do not contain information that only the killers could know. Yet, based on those demonstrably false "confessions" Burns and Rafay were each charged with three counts of aggravated murder in late July 1995.

Canada bars death penalty

The aggravated murder charges carried the possibility of the death penalty. Canada doesn't permit the death penalty as punishment for a crime. Both teenagers opposed their extradition to the United States on the basis that as Canadian citizens, Canada's Charter of Rights and Freedoms (rough equivalent to the U.S. Bill of Rights) barred their extradition to a country for charges that could

ed to at least three unknown persons as responsible for murdering the Rafay family in Bellevue, Washington in 1993, the local police enlisted the aid of the RCMP in Vancouver, British Columbia to run a Mr. Big sting to obtain confessions from two teenagers, Sebastian Burns and Atif Rafay. They were subsequently convicted by jurors relying on those confessions. However, the jurors were not permitted to hear expert testimony about how and why a Mr. Big sting easily induces a false confession.

Tiffany Burns is in the broadcast industry. She was so alarmed at the tactics the RCMP used to enmesh her brother Sebastian in the Rafay family murders that she produced and directed a documentary — *Mr. Big*, that publicly exposes the RCMP's Mr. Big undercover sting operation. With shocking undercover police video and heart-wrenching interviews *Mr. Big* reveals the experience of several sting victims exonerated after spending years in prison for murders they didn't commit.

As of the spring of 2008 *Mr. Big* is being played at film festivals in the United States and Canada. A trailer of *Mr. Big* and extensive information about the film at: www.mrbigthemovie.com

result in a sentence of death. After a Canadian judge rejected their arguments in July 1996 and ordered their extradition, they appealed to the British Columbia Court of Appeals. In June 1997 the appeals court ruled they could not be extradited if they could receive a death sentence. British Columbia's Attorney General appealed to the ruling to Canada's Supreme Court, which in Feb 2001 issued the precedent setting ruling that a Canadian citizen can not be extradited to any country for a crime that could result in a sentence of death. (*United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283) The King County, Washington prosecutor responded by agreeing not to seek the death penalty against either Burns or Rafay, and they were turned over to U.S. authorities and jailed to await their trial.

Burns and Rafay's trial

The trial began on November 24, 2003, in King County Superior Court in Seattle.

Rafay and Burns defense was what they both repeatedly told police in the days after the murders: They drove to a Bellevue restaurant for dinner, then went to a movie in Bellevue, then had a late-night snack in downtown Seattle before returning home about 2 a.m., and when they discovered what had happened they immediately called 911. Their presence at all three locations was corroborated by witnesses.

The movie, *The Lion King*, was scheduled to start at 9:50 p.m. and they were well remembered: when the curtain malfunctioned at the beginning of the movie Burns complained to the manager after he and Rafay ran up to the front of the theatre and tugged at the curtain in an effort to free it. So their presence at the theatre is positively known until at least 10:05 p.m., and no one saw them leave the movie before it ended. The waitress who served them at Steve's Broiler in downtown Seattle after midnight testified they were friendly, polite and she did not say they appeared nervous or freshly showered. (Downtown Seattle is about 12 miles from Bellevue.)

The prosecution's theory of the crime was that the two snuck out of the theatre during the movie, went home, took off their clothes, beat all three family members with a baseball bat, washed off all the blood and brain matter in the downstairs shower, dressed in the same clothes they had been wearing, and then went to Steve's Broiler to have an alibi for when they returned home at about 2 a.m. to call 911 and report the attack.

Money was the motive alleged by the prosecution. As the surviving family member

Burns & Rafay cont. on p. 20

Burns & Rafay cont. from p. 19

Rafay would inherit the family's estate that was estimated to total about \$200,000.

After a six-month trial, in May 2004 the jury deliberated for almost four days before convicting Burns and Rafay of three counts of aggravated murder. The prosecution managed to convince the jury that at the time of the murders Burns and Rafay were arrogant, diabolical teenagers capable of planning and executing the perfect murder. Yet, in this age of scientific analysis of a crime scene and evidence:

- Could two 18-year-olds remove *all* the minute physical evidence of three vicious bludgeonings from their own bodies, from their clothes, from their car, and from a horrifically bloody crime scene?
- Could they fabricate evidence at the crime scene to indicate that at least three other unidentified people were responsible?
- Could they coerce numerous witnesses to provide statements confirming their airtight alibi – without any of those people disclosing to anyone that they were somehow pressured to aid the two teenagers?
- Could they possibly plant other people's DNA at the crime scene – without leaving any of their own?
- Could they have the skill and know how to plant leads – untraceable to them – before and after the murders that indicate the involvement of violent religious extremists?
- Could these same supposedly brilliant 18-year-old master criminals then be completely fooled by two undercover Canadian police officers *pretending* to be violent criminals?

Of course not. Nevertheless, they were convicted and sentenced to life in prison.

Trial judge allowed the jury to be misled

The question is: If the innocence of Burns and Rafay is so clear, why did the twelve jurors vote to convict them, and condemn them to life in prison? The most obvious answer is that the jury's understanding of this case was incomplete because the trial judge's pre-trial and trial rulings were heavily tilted to favor the prosecution and obfuscate the truth. He ruled key evidence inadmissible. Among his rulings he barred the jury from learning about the lead pointing to religious extremists provided by an FBI informant, a lead from the Seattle Police Department that also pointed to Muslim extremists as the killers, and a lead that the RCMP learned two days *before* the murders that they were contract killings. These leads that could lead to the Rafay family's killers, have never been investigated by the Bellevue police.

The judge also did not permit the jury to hear testimony from two defense experts, Dr. Richard A Leo and Michael Levine. The former is an expert in false confessions and the latter is an expert in undercover police operations. (Both Levine and Leo appear in the documentary, *Mr. Big*, see p. 18.)

Dr. Leo is a professor of law at the University of San Francisco, and one of the world's leading experts on the phenomenon of false confessions. Dr. Leo is also the author of one of the leading books on false confessions, *Police Interrogation and American Justice* (Harvard University Press 2008). Dr. Leo explained in his Declaration to the court that the purpose of his testimony was "to provide the jury with relevant and reliable social scientific information about the psychological phenomenon of interrogation and false confessions so that the jury can make a more informed decision when deciding the factual issue of the reliability of the defendants' admissions in this case." Dr. Leo also explained, "False confessions often lead to the erroneous conviction of factually innocent defendants because jurors tend to place more weight on confessions than any other type of evidence. ... Most people assume that confessions must be true because the idea of a false confession is so counter-intuitive and beyond common knowledge and experience."

Instead of allowing Dr. Leo's expert testimony, the judge determined that it was "the province of this jury to decide whether or not in their common experience and common sense these statements made by these defendants to those undercover police officers are voluntary or involuntary." It is reasonable to doubt if police officers posing as violent murderers to teenagers could possibly be part of the common experience or common sense of any juror. The judge's assumption that the jurors intuitively had Dr. Leo's specialized knowledge is why jurors in this trial, and many others in which expert testimony about false confessions is not allowed, are unable to distinguish real confessions from false ones.

Michael Levine is a former undercover senior DEA officer who was described on CBS' *60 Minutes* as "America's top undercover cop for 25 years." Levine has testified as an expert witness in dozens of civil and criminal cases. He has written several books on undercover operations, and since 1995 has hosted "The Expert Witness Radio Show." Levine is intimately familiar with Mr. Big type stings and he is an expert in their operation, since he used similar ones in the war on drugs. He studied the transcripts in the Burns-Rafay case, read the police reports, watched the RCMP undercover video, and listened to the wiretaps. He concluded that it was a "pin the tail on the donkey" type of operation — meaning that

any time the "marks" (Burns and Rafay) were going to talk in a direction that sounded like they were innocent the undercover officer diverted the conversation or ended it. According to Levine the officers involved did this repeatedly — which means they weren't seeking to learn the truth, but they were attempting to solely obtain recorded information that supported a predetermined opinion. Levine's analysis has extra weight because he is not opposed in principle to the use of a Mr. Big type sting to obtain information — he thinks if conducted properly it can be effective in obtaining accurate information. But he opined that the manner of its use in this case was an example of poor police work.

The judge did not just refuse to allow either of these indisputable experts to testify about the Mr. Big sting, but he did not adhere to his own ruling that Burns and Rafay's videotaped statements were to be judged by the jury alone. The judge allowed undercover RCMP officers to deconstruct and analyze the teenagers behavior during the undercover operation, including repeatedly telling the jury an innocent person would not behave as they did during the sting.

Why did the judge allow the operators of the undercover sting to masquerade as experts on how innocent people respond to their menacing and coercive tactics? Conversely, why didn't the judge allow Dr. Leo, an internationally recognized expert with no interest in the outcome of the trial, to inform the jury of how innocent people actually respond to coercive and bullish police tactics? In a fair trial the officers would not have been allowed to mislead the jury with inexperienced testimony, or in the alternative, the defense would have been allowed to introduce an expert to respond to the undercover police officers' self-serving and subjective interpretations of Burns and Rafay's behavior and psychology.

Current status

Burns and Rafay are both in the direct appeal process. They can be written at:

Glen Burns 8786360
Washington State Prison
1313 N. 13th St.
Walla Walla, WA 99362-1065

Atif Rafay 876362
Monroe CF - WSR
PO Box 777
Monroe, WA 98272-0777

The official website about the case is, www.rafaelburnsappeal.com

Sarah Isaacs is involved with the Rafay Burns Appeal Committee. She can be emailed at, committee@rafaelburnsappeal.com



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Victims of Justice Revisited by Thomas Frisbie Cruz and Randy Garrett. \$19.95 - 408 pages. Tells the story of Rolando Cruz and his two co-defendants accusation of kidnapping and murdering Jeanne Nease in 1983 from the day the crime occurred to their exoneration in 1995 after three trials. In the trial of seven law officers accused of conspiring to deny Cruz a fair trial and falsely have him executed #23.

Innocent: Inside Wrongful Conviction Cases by Scott Christianson - \$18.95 - 208 pages. The 42 cases collected and graphically documented in *Innocent* reveal the mistakes, abuses and underlying factors that led to miscarriages of justice, including the presumption of guilt, mistaken identification, eyewitness perjury, ineffective assistance of counsel, police misconduct, prosecutorial misconduct, and forensics, while also describing how determined prisoners, post-conviction attorneys, advocates and journalists struggled against tremendous odds to win their exonerations. #76

Tulsa: Race, Cocaine, and Corruption in a Small Texas Town by Nate Blakeslee - \$14.95 - 404 pages. Definitive account of the five year travesty of justice in Tulsa that resulted in the wrongful conviction of 38 people on trumped up drug charges. Blakeslee is the award-winning reporter for the *Texas Observer* who broke the Tulsa story in 2000. #25

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Tulsa: Race, Economic, and Corruption in a Small Texas Town by Nate Blakeslee—\$14.95—464 pgs. Definitive account of the five-year travesty of justice in Tulsa that resulted in the wrongful conviction of 38 people on trumped-up drug charges. Blakeslee is the award-winning reporter for the *Texas Observer* who broke the Tulsa story in 2004. #25

Exit to Freedom by Calvin C. Johnson Jr. with Greg Hampikian. \$18.95 - 286 pp. After his 1953 conviction for rape and related crimes, Calvin C. Johnson Jr. told the judge, "With God as my witness, I have been falsely accused of these crimes; I did not commit them. I'm an innocent man." Sentenced to life in prison, *Exit To Freedom* is Johnson's story of how he spent the next sixteen years working to free himself before DNA testing ruled out the possibility he was guilty, and he was released in 1979. ©2004

The book's second part details the inequities in capital prosecutions and thebitrary imposition of the death sentence. #27

Win or Lose: How to Present, Persuade, and Prevail by Victor C. Starnes. New York: Basic Books, 1991. 288 pp. \$14.95. #72

Every Place, Every Time by Gary Spence. \$14.95. 304 pp.

Written for defense lawyers or the people in his 50-year career, Spence has never lost a criminal case. He considers every case a "war" and he focuses on what is necessary to win. The book deals with waging the war: improving one's storytelling skills, conducting effective opening and closing statements and using witnesses. #72

Pratt by Jack Olsen - \$15.95 - 512 pgs. The story of Gerónimo Pratt's 1970 conviction and life sentence for an L.A. murder committed when he was 350 miles away from the crime scene and under FBI surveillance in Oakland, CA. Pratt was exonerated in 1997 and awarded \$2.75 million in 2000. This is a textbook case of abuse of the American legal system for political ends. #63

Last Words From Death Row by Norma Herrera - \$19.95 - 264 pgs. Leonard Herrera was executed in 1993 after the U.S. Supreme Court ruled evidence of his factual innocence was irrelevant to his sentencing. Herrera's last request to his sister was to tell his true story. His experience demonstrates that in the U.S., the legal system is more concerned with procedure than finding the truth of a person's guilt or innocence. #88

Freeing the Innocent: A Handbuck For The Wrongly Convicted by Michael and Becky Pardue - SIS - Self-Help manual jam packed with hands-on - 'You Too Can Do It' advice explaining how Michael Pardue was freed in 2001 after 28 years of wrongful imprisonment #01 (No Service Charge)

Kiprian **Blaise** **Lobato's** **Unresolvable** **conviction** by **Hans** **Sherrin** **\$10** **Kiprian** **Blaise** **Lobato** has twice been convicted in Las Vegas of murdering a homeless man and sexually assaulting his corpse in 2001. Yet, there is no forensic, physical, eyewitness or confession evidence linking her to the murder or the crime scene, and there is no evidence he was sexually assaulted by the perpetrator. This is the full story, reported in *Justice/Demist* Issues 26 & 34, #100 (No Service Charge)

Improper Submissions: Records of a wrongful conviction by Erma Armstrong - \$10 - 370 pgs. The true story of how Karl's Eklof was delivered into the hands of a psychotic killer by traffickers in porn and mind control. After she witnessed a murder she was prosecuted and convicted for that crime, and is currently serving two life sentences in Oregon. *Improper Submissions* documents that exculpatory, and impeachable evidence was hidden by the prosecution, and bringing by the killer (later convicted and sentenced to death) was used by the prosecution against Karl's. #78. (No Service Charge)

Who Killed Sarah? by Sheila and Doug Martin - \$16.95 - 272 pp. Although there was no physical evidence, no witnesses to the crime and no murder weapon, Penny Brumner was convicted of first-degree murder in the death of Sarah Gossard by a Madison, Wisconsin jury in October 1994. But Brumner did it? Or was she herself a victim of overzealous prosecutors, tunnel-vision investigators, contradictory forensic scientists, and a prejudiced judge? It's a tight zone, but it's real. #29

The Wrong Men: America's Epidemic of Wrongful Death Row Convictions by Stanley Cohen - \$15 - 256 pgs. Sociologist Cohen examines some 110 instances where people sentenced to death were later exonerated. Cohen also analyzes the chief reasons why wrongful convictions occur so frequently, and he presents a convincing argument to support the reliability of capital convictions. #32

Arbitrary Justice: The Power of the American Prosecutor by Angela J. Davis. \$29.95, 264 pgs. Hardcover. Intense and long-overdue serious examination of the expanding power of prosecutors and their increasing politicization. Law Professor Davis explains how the day-to-day practices and decisions of prosecutors produce unfair and unequal treatment of defendants. Davis argues that the mechanisms purportedly holding prosecutors accountable are ineffectual and foster a climate of tolerance for misconduct. (Pub. April 2007) #84

Police Interrogation and American Justice by Richard A. Leo - \$40 - 328 pages. **Hardcover.** Professor Leo is one of the world's leading authorities on false confessions. Leo shows that police have developed sophisticated interrogation methods that rely on persuasion, manipulation, deception and psychological coercion to induce an admission of guilt from a suspect. Leo argues that standard interrogation techniques produce confessions that are inherently suspect, and that false confessions are often the result of coercion. Leo also explains that the *Miranda* warning, which is intended to protect a suspect's right against self-incrimination, (Pub. March 2008) #102

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Merriam-Webster's Dictionary - \$6.50 - 939 pgs. Over 75,000 definitions. Good basic dictionary. #03

Merriam-Webster's Spanish-English Dictionary - \$6.50 - 800 pgs. More than 80,000 entries and 100,000 translations. Many examples of a word's use in context. English-Spanish and Spanish-English. Includes Latin-American Spanish. #04

Roget's 21st Century Thesaurus in Dictionary Form - \$5.99 - 976 pgs. Includes more than 1 million word choices. Features easy-to-use dictionary format, plus a Concept Index that also arranges words by idea. Includes definitions for each main entry. #05

Merriam-Webster's Vocabulary Builder - \$5.99 - 576 pgs. Good resource to expand one's vocabulary. Includes over 1,000 words with definitions and explanation of the words usage, including examples of its use in a sentence. #06

Essentials of English Grammar by L. Sue Baugh - \$8.95 - 176 pgs. Explains parts of speech, punctuation, capitalization, spelling, frequently confused words, and much more. Includes style tips on how to write with economy, clarity, and accuracy. #07

Merriam-Webster's Dictionary of Law - \$15.95 - 634 pgs. Over 3,000 legal terms defined. Includes chapters discussing important legal cases, important laws. There's also a section on important legal agencies in the U.S., and the full U.S. Constitution. More complete than the paperback edition of a well-known law dictionary that sells for \$29.00. #08

Legal Writing in Plain English by Bryan A. Garner - \$16 - 227 pgs. A guide to clear and effective legal writing. Includes: Tips on generating thoughts, organizing them, and creating outlines. Sound advice on expressing your ideas clearly and powerfully. Dozens of real-life writing examples to illustrate writing problems and solutions. Exercises to reinforce principles of good writing. Helpful guidance on page layout. A punctuation guide that shows the correct uses of every punctuation mark; and model legal documents that demonstrate the power of plain English. Probably need at least the equivalent of a high-school education to make use of this book. #09

A+ Style Manual for Legal Writing in Plain English by Research and Education Association - \$9.95 - 106 pgs. Practical manual for law students, paralegals, lawyers and anyone who prepares legal documents. Includes rules of citation, abbreviation and capitalization, footnotes and numbers, and grammar and punctuation. Aids in writing legal papers in "plain English" instead of "legalese." Less detailed than *Legal Writing in Plain English*, but more understandable for a lay person. #40

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The Criminal Law Handbook (9th ed.) (Sept. 2007) by Attorney's Paul Bergman & Sara J. Bergman-Barrett - \$39.99 - 640 pgs. Explains what goes on in a criminal case. Covers: arrests; booking; preliminary hearings; charges; bail; courts; arraignment; search and seizure; defenses; evidence; trials; plea bargains; sentencing; juveniles. Covers Supreme Court cases and changes in criminal law (through August 2007). #10

Legal Research: How to Find & Understand the Law (14th ed.) (Sept. 2007) by Attorney's Paul Bergman & Sara J. Bergman-Barrett - \$39.99 - 322 pgs. Learn how to do legal research, and use a law library to seek and understand statutes, regulations and cases. Also explains online resources. Written for a layperson. Aids in saving time by narrowing your focus and formulating legal questions such as, is the issue federal or state, civil or criminal, procedural or substantive? #93

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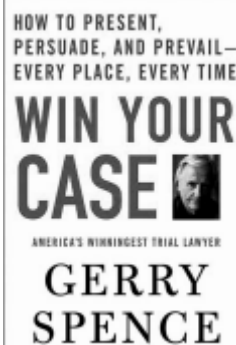
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See the article on page 16.

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