

San Diego, California. The mere mention of the city and your mind fills with visions of palm trees swaying, warm ocean breezes blowing, healthy people smiling. But, in 1998 and 1999 something especially ugly was taking place. Frail, elderly residents of the communities of University Heights, Kensington and North Park were being smashed in the face, kicked down and robbed. The assaults were not just to accomplish the robbery; they were seemingly vindictively ugly and brutal. As each incident took place, the media reports became more frequent, and the San Diego Police Department pressured its officers to make an arrest.

The officers responded in the spring of 1999 by arresting Kevin Orlando Gunn as a suspect in the crime spree. Now, almost ten years later, Gunn finds himself surviving day after day behind the dark prison walls of a California prison as he serves a 17-year prison sentence.

### Causes of a wrongful conviction

Studies of the cases of exonerated men and women recognize there are hallmarks of a miscarriage of justice. Kevin Gunn's case has most of these 'causes'.

#### False confession – No

One cause of a wrongful conviction which does not show itself in Gunn's case is a false confession. From the day of his arrest Gunn has denied committing these ugly crimes against elderly persons.

#### Erroneous forensic science – No

Another missing cause is poor forensic science. No physical evidence traceable to the assailant was recovered, so there wasn't any bad science connected to Gunn's case.

#### Eyewitness misidentification – Yes

Studies indicate that in 79% of wrongful convictions there exists eyewitness misidentification. Gunn was tried on three counts of these assaults committed in broad daylight. There were twelve witnesses. In their police statements they gave similar physical descriptions of the assailant, and none bore any resemblance to Gunn. Neither was Gunn positively identified as the assailant by any witness from a photo lineup, while seven witnesses selected someone else as the perpetrator and three selected no one in the lineup.

Why Gunn wasn't selected from the line-up is understandable from the witness statements, and the bulletin issued and circulated

## Gentle Giant Mistaken For Robber — The Kevin Orlando Gunn Story

By Kathryn Branham

by the police identifying the suspect as 6' to 6'-2" tall, 200 to 220 pounds with very dark shiny skin. That is the description of a man who would blend into a crowd in San Diego.

Is Gunn a man who you wouldn't notice walking down the street – either alone or with other people? No.

Why? Because his physical size is remarkable! Gunn is 6-foot 9-inches tall! And he is muscular and beefy and weighs over 300 pounds! When the biggest man you have ever met walks by, would you describe him as the common size of around 6-foot and 200 pounds? No you wouldn't.

The assaults took place in broad daylight. Eyewitnesses to the crimes saw the assailant cold-cock one of the elderly victims. Do you think a giant like Gunn would look much *smaller* standing next to an elderly woman? If anything he would have looked *bigger*.

What about the assailant's very dark shiny complexion? That is not Gunn, whose complexion is extremely light.

**The gigantic beefy Kevin Gunn is significantly taller and heavier than the robber described by nearly a dozen eyewitnesses, and his complexion is much lighter.**

If incriminating evidence existed, the obvious mismatch between Gunn and the assailant would not be quite as compelling. But, this is an eyewitness case. Without the inapplicable identification of Gunn in court by some of the witnesses who described a different person in their statements and who didn't select him from a line-up, the prosecution had no case. Nada, nothing, zilch, zero.

Another element of the eyewitness testimony speaks to the credibility of their in-court identification of Gunn.

All police reports from late 1998 through April 1999 identify the assailant as clean-shaven. Yet photos taken of Gunn on February 29, 1999 and in a Quick Mart on April 6, 1999 – the day of one of the assaults – show he was *not* clean-shaven. During the preliminary hearing an eyewitness testified the perpetrator's shirt had *no distinctive tears or holes*. The crime he witnessed was committed shortly before Gunn's arrest, and the shirt Gunn was wearing was introduced into evi-

dence during his trial. The same eyewitness contradicted his earlier testimony by claiming he recognized it *because* it had the *same hole* as the shirt the robber was wearing! This witness helped the police prepare the composite drawing. When asked about the obvious difference between Gunn's light complexion and the dark skinned person in the drawing, his response was "the defendant must have gotten lighter."

#### Snitch testimony – Yes

Snitch testimony often refers to jailed witnesses who claim to have overheard a suspect admit committing a crime or provide other evidence favorable to the prosecution. But not all snitches are currently in jail. Steve Doepker is of the latter sort. On the day of one of the assaults he told the police that "he saw nothing pertinent to the crime." Yet at Gunn's trial he testified Gunn is the man he saw leaving the scene. Doepker, a transient, was paid \$300 for his testimony, and the police provided him with a motel room and meals prior to and while the trial went on. Doepker was even given money the day he was called to testify, and he appeared to be intoxicated when he took the stand. Gunn's lawyer objected to Doepker testifying, but Judge Kevin Enright allowed him to testify.

#### Police misconduct and prosecutorial misconduct – Yes

The prosecution failed to disclose exculpatory evidence and encouraged testimony which it had reason to doubt was true. Detective Pete Griffin was the chief investigator on the case. None of the eyewitnesses who viewed a photo lineup positively identified Gunn, while seven positively excluded him as the assailant. Yet, Griffin told the prosecutor and Gunn's lawyer there were no lineup reports. Likewise, the prosecution didn't disclose to Gunn's lawyer either Doepker's statement that he couldn't identify the assailant, or the incentives given to him in exchange for his testimony identifying Gunn.

Rulings in several Supreme Court cases speak to the testimony and actions of the government in Gunn's case.

In the 1959 Supreme Court case of *Napue v. Illinois*, the court ruled, "... it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." During Gunn's trial Doepker falsely testified that he received no compensation in exchange for his testimony. The government knew this was untrue, yet didn't correct the record.

**Gunn cont. on p. 4**

## Gunn cont. from p. 3

In *Brady v. Maryland* (1963), the court ruled “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.” In Gunn’s case the prosecution failed to disclose the exculpatory eyewitness line-up reports and the incentives provided to Doepker.

The Supreme Court’s 1995 decision in *Kyles v. Whitley* addressed *Brady* material once more. The Court ruled that the prosecutor is responsible for disclosing all exculpatory evidence known by any government agency involved in the prosecution, regardless of the prosecutor’s personal knowledge of that evidence. The informant in the *Kyles* case gave a statement that he did not see the crime take place. He only saw the suspect fleeing the area. Then at the trial, he testified that he saw the defendant with a .32 caliber pistol shoot the victim in the head. The parallels of that case to Doepker’s statement concealed by the prosecution and the incentives provided him in exchange for his testimony during Gunn’s trial are astounding.

Other areas of the police testimony and investigation appear sloppy or perhaps worse. One of the victims was interviewed at the time of the crime, but the notes taken at the time of her interview were lost according to the investigating detective.

### Could Kevin Gunn be “mistaken” for a person 6’ tall?



A 6'-9" man and a 6'-1" man standing next to a 5'-5" person, about the likely size of the older women attacked. Gunn is much heavier than the slightly stooping 6-9 man in the photo, so he is even more imposing next to shorter people.

## Poor lawyering – Yes

What else occurred? Not very good legal work. In fact, the prosecuting attorney’s work was so poor that the jury foreman was compelled to write a letter to the county prosecutor the day after Gunn’s trial ended. Can you imagine the day after concluding a man was guilty, after days of being tied to a court case, after being absent from your life; you feel compelled to sit down and write a letter about the lack of merit of the prosecution’s case?

Jury foreman Robert Morse’s letter was addressed to Paul Pfingst, the San Diego County District Attorney. He wrote that “after the prosecution’s opening statements, I barely had an idea of what she intended to prove.” He refers to “scattered bits of evidence.” Characterizing the prosecution as “sloppy,” Morse noted the prosecutor introduce any evidence about elapsed time, which was a very important element in the case. Morse also commented that the prosecutor said during opening statements there are issues with height perception and suggested an expert would testify to this. Yet no such expert testified.

In this same letter Morse discusses the sloppiness of the defense attorney as well, “to be fair, the defense did an equally confusing job.”

The letter contends the jury was not provided with sufficient information from either side. Some of the complaints are: the jury was provided with little information about height perception; there was an extreme unexplained contrast between the composite drawing and Gunn; the maps of the neighborhood lacked detail; and the license plate number of the assailant’s car did not match the plates on the car Gunn was allegedly driving, and the physical condition of those cars was different. These discrepancies were apparent to the jury, but neither exploited by Gunn’s defense lawyer, nor explained away by the prosecution.

## Jury misconduct – Yes

There is another element of Morse’s letter which is even more unnerving than his description of the bad lawyering. Morse expounds, “Based on the prosecutor’s performance, had the jury been less proactive or less intelligent there would not have been a conviction...” This compels us to ask, “What is a proactive jury?”

Justin Brooks, professor at the Western California School of Law in San Diego explains. “Being proactive is not the role of the juror. The role of the juror is to be reactive to the evidence. They’re supposed to consider what is put in front of them and nothing else and make their decision based on that. What

(Morse) is saying is the prosecutor didn’t prove the case, but we went ahead and convicted anyway.” Brooks’ views were published in the *San Diego Weekly Reader* article of May 17, 2001 titled, “Justice for the Giant.”

Brooks’ statement agrees with the definition of “jury” in *West’s Encyclopedia of American Law*: A jury is “charged with deciding matters of fact and delivering a verdict of guilty or innocence based on the evidence in a case.” This is not what Morse says happened Gunn’s case. Let’s just take one of the statements from the letter regarding the evidence presented to the jury. The prosecutor stated during her opening argument, that height misperceptions are “usual”. She also said she would present expert testimony in that regard. But no such expert testified. Morse wrote that to convict Gunn the jury relied on the prosecutor’s unsubstantiated assertion in forming an opinion that Gunn could be mistaken for a significantly smaller man. This flies in the face of the requirement of California jurors to take an oath to “render true verdict according only to evidence presented and the instructions of the court.”

## Other exculpatory evidence

There were valuable pieces of information never revealed to the jury. Such as when Gunn was stopped for a traffic violation near one of the robberies an eyewitness told the police that Gunn wasn’t the robber. The jury was also unaware of the timing of an exculpatory convenience store video surveillance tape in which Gunn appears, and the receipt stamp on a utility bill that proves he is not the assailant.

The perpetrator was seen leaving one of the crimes in a late model dull black Toyota or similar vehicle that had body damage. When Kevin was pulled over for a traffic violation and questioned about a nearby robbery, he was driving his girlfriend’s black Daihatsu. However, her car had no body damage, it wasn’t a late model but a 1990, and it had a different license plate number than the assailant’s getaway vehicle. Also, both Gunn’s girlfriend and her mother testified that he had not driven her car and had no access to it during a three week period when they were estranged. The robbery by the “Toyota” driver was committed when Kevin and his girlfriend were apart and he didn’t drive her car.

The investigating detective was not the only member of the San Diego PD conducting his job in a questionable manner. Let’s look at the traffic stop. Gunn is stopped with a receipt in his pocket for the payment of a utility bill. The receipt is stamped 2:14 p.m. The robbery occurred between 2:14 and 2:15 p.m.

## Gunn cont. on p. 5

## Gunn cont. from p. 4

Officer Troussel, one of the officers, testified in court that the police transmission gave the description of a tall, light-skinned, African-American male as having just committed an assault and robbery. He also stated that Gunn was speeding through the area and they pursued him a number of blocks, stopped him and detained him. A witness, John Burkholder, who viewed Gunn where he was stopped told the police, "I'm sure that is not him." In fact, the receipt proves that at the exact time of the crime he was paying a utility bill. The owner of the store testified that Gunn was in his store paying a bill on that day and time.

Gunn's attorney played a tape recording of the dispatch for the jury. This tape completely contradicted all of Officer Troussel's testimony. There was no description given of a tall, light skinned African-American male. Troussel describes to dispatch a routine traffic stop, and there was an absence of any reference of speeding or evasive maneuvers in his police report.

On April 6, 1999 Gunn went to the QuickMart. The store surveillance video showed him entering at 12:25 p.m. A robbery of an elderly person occurred down the street at 12:30 p.m. Because he was in the vicinity and had been questioned during the traffic stop, Gunn was placed under surveillance. Although Gunn was not observed committing any crimes, pressure by local politicians and SDPD officials to "solve" the robberies led to his arrest.

San Diego City Councilwoman Christine Kehoe held a news conference during which she awarded Detective Griffin and other officers commendations for Gunn's arrest. People in attendance questioned Gunn's arrest because he did not fit the description in the composite drawing the police issued to the public and broadcast on television. (Kehoe is now a state senator.)

### Gunn didn't testify

Gunn did not testify on the advice of his attorney. Gunn could have told the jury he didn't commit the robberies and confirmed the testimony already given that he didn't drive his girlfriend's car when they were having difficulties. But that would have opened the door for the prosecution to inform the jury about his non-violent convictions ten years earlier as a way to try and impeach his testimony.

### Robberies continued after Gunn's arrest

Vicious robberies matching the *modus operandi* of the crimes Gunn was convicted of continued after his arrest.

On August 29, 2000 the *San Diego Union Tribune* reported an incident that occurred over sixteen months after Gunn's arrest. A 71-year-old man died from injuries he suffered when robbed in an alley in North Park. A similar crime was also committed in 2000 against an older woman. She suffered severe injuries to her head and face when assaulted by Marvin Goldston, who grabbed her purse. After his capture Goldston confessed that he had committed many hundreds of robberies around San Diego. Goldston, a dark-skinned African American is mentally unstable and prone to violence. The daylight robbery, the cold-cocking to the head and face, combined with the theft, are hallmarks of the crimes for which Gunn was convicted.

### Gunn's appeal

A primary ground of Gunn's appeal was insufficiency of the evidence – particularly considering the vast difference between the assailant's description by eyewitnesses and the composite drawing, and Gunn's imposing physical appearance. The appeals court rejected Gunn's arguments about the evidence, but he had also raised the issue of the jury's misconduct. Wanting to know more, the appeals court sent his case back to the trial court to develop further facts about that claim.

Judge Ronald Domnitz was directed by the Fourth District Court of Appeal to issue an order granting release of personal juror information to the defense. This information was to be used by the defense to investigate possible jury misconduct. In their remand the appellate court stated, "It could be reasonably inferred from the jury's foreperson letter that the jurors may have engaged in improper actions in proactively deciding Gunn's guilt or innocence." Judge Domnitz, however, took exception to the appeals court directive and increased the time allowed by the higher court for complying with its order. This allowed Domnitz time to send written correspondence to the former jurors alerting them about the misconduct investigation. Domnitz also informed the jurors that they didn't have to cooperate with Gunn's attorneys, and they could refuse to consent to the release of their personal information. Judge Domnitz also took it upon himself to limit the scope of the misconduct investigation by barring the interviewing of any juror, and he ruled against holding an evidentiary hearing.

Needless to say, since the jurors didn't approve releasing their personal information after being contacted by Judge Domnitz, and Gunn's attorneys weren't permitted to question any of the jurors, and no evidentiary hearing was held, the judge's actions emasculated the court of appeal's remand

order. Judge Domnitz's ruling that no misconduct occurred was a foregone conclusion considering that he effectively blocked any investigation of the juror misconduct outlined in jury foreman Morse's letter.

In California 98% of appeals are denied, so every appeal is a longshot. Not surprisingly then, the appeals court denied Gunn's appeal when it reconsidered his case in light of Judge Domnitz's finding of no juror misconduct.

After California's state courts denied Gunn's state habeas, he filed a *pro se* federal habeas corpus petition on May 27, 2008. His petition cites eight claims of constitutional error. Most compelling are his claims of insufficient evidence, ineffective assistance of counsel, prosecution misconduct, and trial court error. The insufficiency of the evidence is most convincingly described by the jury foreman's letter documenting that the jury convicted Gunn after "proactively" filling in gaps in the prosecution's case. Gunn's lawyer was ineffective for among other things, failing to investigate the extreme physical discrepancy between the assailant and Gunn or have an expert testify about height and weight perception. Among the prosecution's egregious misdeeds were failing to disclose the exculpatory witness line-up reports, and the money and favors bestowed on Doepker in exchange for his testimony. The errors by the trial court include the failure of Judge Domnitz to conduct a meaningful inquiry into the possible juror misconduct.

California's Attorney General filed a Motion to Dismiss Gunn's habeas petition, claiming it is time barred. The AG asserts Gunn violated the AEDPA one-year filing deadline. Gunn struggles on. "I filed my writ with two weeks to spare," he maintains.

### Gunn remains imprisoned

When Kevin Gunn was arrested in 1999, he had full custody of his daughter. Odd, as even now, statistics show that the courts are reluctant at best to grant custody to the male parent. Gunn is a big bear of a man. He is a daddy in whose lap a little girl could snuggle as her papa reads a bedtime story. She was four when her father was abruptly ripped from her life. His son, eighteen months old at the time, likely has no memory of being playfully lifted high in the air by his father's strong, safe arms.

Gunn's daughter and son have grown for almost ten years as their dad spends every evening in prison for crimes he didn't commit — crimes known to have actually been committed by a man up to a foot shorter and 100 or more pounds lighter than Kevin Gunn.

## Gunn cont. on p. 6

After the July 1982 rape of a woman in Many, Louisiana by an unknown assailant, the police showed her the photos of three possible suspects. One of those was a photo of 26-year-old Rickey Johnson taken when he was 18. The woman identified Johnson from the nearly decade old picture, and he was arrested and charged with her rape.

During Johnson's January 1983 trial the prosecution's case was based on the woman's identification. Convicted, Johnson was sentenced to life in prison, which in Louisiana meant he would die in Angola State Prison.

In the fall of 2007 testing of the vaginal swab in the victim's rape kit was approved by a state judge under Louisiana's DNA testing law. In December the test results excluded Johnson. But that wasn't all. The semen's DNA profile was run through Louisiana's database of convicted offenders. The DNA matched a man convicted of raping a woman in the same apartment complex as the rape Johnson had been convicted of—

## Ricky Johnson Awarded \$150,000 For 25 Years Wrongful Imprisonment



Rickey Johnson after his January 2008 release from prison.

only nine months later. That man, John Carnell McNeal, was sentenced to life in prison in April 1983 and sent to Angola. McNeal and Johnson knew each other at Angola, but in the more than twenty years they were imprisoned together McNeal never told Johnson that he had committed the July 1982 rape.

Based on the new evidence the Sabine Parish District Attorney did not oppose Johnson's motion for a new trial. On January 11, 2008 Johnson was released on bail, and the charge was subsequently dismissed. From the time of his arrest he had been incarcerated for over twenty-five years.

The 52-year-old Johnson filed a claim under Louisiana's compensation statute that pro-

vides for a payment of \$15,000 per year for up to ten years of wrongful imprisonment. On July 2, 2008 Johnson was notified that Governor Bobby Jindal signed the bill authorizing the maximum \$150,000 payment.

Johnson became a leather craftsman while in prison, and he told the *Shreveport Times* that he plans to use the money to start a leatherworks business in Leesville, "It'll help to support my living expenses and all of that. If my business grows or profits, I'll be just fine. I know it will be a good business. I've got a lot of people waiting on me to get the business open. There is money to be made."

Sabine Parish DA Don Burkett, who did nothing to impede the DNA testing or Johnson's release when the results cleared him of the crime, said about the compensation payment, "He's deserving of it, and I'm happy for him. It in no way makes up for the injustice, but I'm happy that he has this money to try to help him get a fresh start."

Source: Compensation approved for wrongly convicted man, *Shreveport Times*, July 4, 2008.

### Gunn cont. from p. 5

Kevin Gunn can be written at:  
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Kathryn Branham is a volunteer with Proving Innocence, an organization that publicizes and investigates cases of false conviction. She can be written at:  
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### Gunn Files Civil Rights Lawsuit

In July 2008 Kevin Gunn filed a federal civil rights lawsuit over a March 2007 incident in the dining room at the California Correctional Institution in Tehachapi, California. After Gunn asked a guard if the Kool-aid dispenser was going to be filled, he turned and began walking away. The guard responded by using his baton to strike Gunn in the back of his right leg so hard that the baton fell from his hands. The guard then grabbed the stunned Gunn and threw him to the floor on his back. Gunn rolled over, and while face down he held his hands behind his back and he was handcuffed.

## MO A.G. Agrees Villasana Due Compensation

Armand Villasana was convicted in November 1999 of kidnapping, raping and forcibly sodomizing Judith Ann Lummis at knifepoint in September 1998 near Springfield, Missouri. Villasana had been arrested for an unrelated matter and he became a suspect because he faintly resembled a sketch made from Lummis' description of her attacker's face. Lummis subsequently identified Villasana in a photo line-up and testified he was her assailant, even though he was taller, thinner and twenty years older than the man she described to police in her statement.

Another guard then sprayed Gunn in the face with a prolonged burst of Pepper Spray.

Gunn's back was injured from the assault and he has had to use a cane to walk. He needs back surgery that as of late November 2008 the CA DOC has not authorized to be performed. Gunn's lawsuit requests compensatory and punitive damages, future medical expenses, and other economic considerations. The case is, *Kevin Gunn v. James Tilton, et al.*, 1:08CV01038 (ED CA, 07-21-2008). A copy of Gunn's 12-page complaint can be obtained by sending \$3 (stamps OK) with a request for "Gunn Lawsuit" to:

Justice Denied  
PO Box 68911  
Seattle, WA 98168

Villasana was facing 40 years in prison, but prior to his sentencing his lawyers discovered they had been misled by a crime lab report — there was in fact DNA testable evidence in the case. Villasana's motion to DNA test the evidence was granted. In June 2000 the results excluded Villasana and identified an unknown male. The prosecution dismissed the charges against Villasana and he was released after spending 21 months in the Greene County Jail.

In November 2005 the DNA was matched to a Missouri prisoner. He told investigators that he had been having an affair with Lummis which is why his DNA was detected. He said that when her husband questioned why she had gotten home late one night she made up the rape story. In August 2007 Lummis admitted the assault was a hoax. Several weeks later Greene County Prosecutor Darrell Moore publicly revealed that Villasana had been convicted of a non-existent crime.

In 2006 Missouri passed a law providing \$50 for each day of imprisonment after a wrongful conviction. Villasana filed a claim of \$11,250 for the 225 days from the date of his conviction to his release. In August 2008 the Missouri Attorney General's Office informed Villasana that it would not oppose his claim.

Source: AG's Office agrees restitution needed, *News-Leader* (Springfield, MO), August 27, 2008.

For a more detailed account see previous JD article: "Woman Admits Fabricating Rape Accusation Against Armand Villasana – Seven Years After His Release From Prison," *Justice:Denied*, Issue 38, Fall 2007.