

# JUSTICE DENIED

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The Magazine for the  
Wrongly Convicted

## THE INNOCENT ARE HARMED BY SENTENCING ENHANCEMENTS

SEE P. 20



**Natalie Maines**

Dixie Chicks lead singer Natalie Maines sued for libel for comments made at a rally and on the Dixie Chicks website in support of the West Memphis Three.

See page 18

**Dennis Maher**

\$160,000 lawsuit settlement for 19 years of wrongful imprisonment for rape in Massachusetts.

See page 13



**Alan Crotzer**

Awarded \$1,858,000 for almost 25 years of wrongful imprisonment for rape in Florida.

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**Joseph White**

One of the Beatrice Six. Released after 19 years of wrongful imprisonment for murder in Nebraska. Five co-defendants also cleared.

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**Ricky Johnson**

Awarded \$150,000 for 25 years of wrongful imprisonment for rape in Louisiana.

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**Shih-Wei Su Awarded \$3.5 Million For New York Attempted Murder Conviction!**

**Darrell Copeland Cleared By Virginia's First "Writ Of Actual Innocence"!**

**Two Women Awarded \$2.58 Million For Robbery Convictions Based On Speculation!**

**Was Derrick Hamilton Convicted Of NY Murder Committed When He Was In CT?**

**Burglary Conviction Tossed By Exposure Of Junk Earprint Evidence!**

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Summer 2008**

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**Message From The Publisher**

The two feature articles in this issue illustrate the inadequacy of this country’s state and federal direct appeal and post-conviction processes to give due consideration to claims of actual innocence. There is no evidence that Kevin Gunn (see p. 3) and Derrick Hamilton (see p. 10) are anything but actually innocent. In any number of countries — Norway, Scotland and England among them — both men would have long ago been released and compensated for their respective ordeal. While in the United States they continue to languish in prison.

Two Michigan women were fortunate the state appeals court tossed their robbery convictions that were based only on speculation, and that they successfully sued for compensation. (see p. 8) In contrast Kirstin Lobato has twice been convicted of a Las Vegas murder based only on speculation she might be guilty, and she remains imprisoned. (see p. 18)

*Justice:Denied* has published a number of stories about men victimized by a false rape charge. (see p. 19) That isn’t surprising considering that a study found 41% of rape reports are false. (see p. 15) Research also suggests more than half of all rape accusations by college women are of a non-existent or a consensual encounter. So the fabricated Duke University lacrosse rape case was not abnormal. (see *JD* Issues 35, 38 and 39)

Excessive sentencing is an important issue in this country, but confining a person for life *after* completion of their sentence borders on insanity. Yet that is what has happened to Kevin Coe, whose case was featured in *JD* Issue 25 (Summer 2004). (See *JD* Editorial on p. 20)

Kudos to Washington Supreme Court Justice Richard Sanders for standing up during a November 20 Washington DC speech by US Attorney General Michael Mukasey and saying, “Tyrant! You are a tyrant!” Five days later Sanders issued a statement in which he explained, “I felt compelled to speak out. I believe we must speak our conscience in moments that demand it, even if we are but one voice.”

Hans Sherrer, Publisher

*Justice:Denied* - the magazine for the wrongly convicted  
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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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*Justice:Denied* volunteers directly contributing to this issue:  
 Natalie Smith-Parra, Editor; Terri Smith, Mailing; Katha McDonald, Mailing;  
 and Hans Sherrer.

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:  
Proving Innocence  
PO Box 4  
Bloomfield, MI 48303

### 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.

## Shih-Wei Su Awarded \$3.5 Million For Attempted Murder Convictions

Shih-Wei Su was convicted in 1992 of two counts of attempted murder in a New York City pool hall shooting. Su protested his innocence, but in convicting him the jury relied on the testimony of a jailhouse informant that Su ordered the 1991 shooting. When the informant was questioned during direct examination by the prosecutor, he denied that he made a deal with the prosecution for leniency in exchange for his testimony. Other witnesses, including the pool hall's owner who knew Su and was present at the time of the shooting, said Su wasn't there. The 19-year-old Su was sentenced to 16 to 50 years in prison.

Su was later able to get a court order to unseal the records of the prosecution's star witness, who was a minor when he testified. The records showed that the witness had in fact made a pre-trial deal with the prosecution for leniency in exchange for his testimony.

Su filed a motion for a new trial based on the prosecutions misconduct of concealing the secret deal and knowingly eliciting false testimony from the witness. The motion was denied by New York state courts. Su then filed a federal writ of habeas corpus that was denied by the U.S. District Court Judge.

However, on July 11, 2003 the federal Court of Appeals for the Second Circuit granted Su's habeas petition because the jurors were misled and the outcome of his trial was likely affected by Assistant DA Linda Rosero's elicitation of false testimony from the witness. The Court wrote in their decision: "The prosecution knowingly elicited false testimony from a crucial witness. ... Since at least 1935, it has been the established law of the United States that a conviction obtained through testimony the prosecutor knows to be false is repugnant to the Constitution. (*Mooney v. Holohan*, 294 U.S. 103, 112 (1935)) This is so because, in order to reduce the danger of false convictions, we rely on the prosecutor not to be simply a party in litigation whose sole object is the conviction of the defendant before him. The prosecutor is an officer of the court whose duty is to present a forceful and truthful case to the jury, not to win at any cost." *Su v. Fillion*, 335 F.3d 119 (2d Cir. 07-11-2003)

The New York DA's Office subsequently dismissed the charges and Su was released after more than 12 years of wrongful incarceration.

In New York complaints against a lawyer are handled by a grievance committees ap-

pointed by the Appellate Division of the State Supreme Court. After Su's release filed a complaint against Rosero for knowingly eliciting false testimony.

The Grievance Committee decided that Rosero's actions were attributable to her being "naïve, inexperienced and, possibly, stupid." Although finding that she wasn't responsible for the false testimony, the committee did issue her a written admonition.

Su angrily wrote the Committee after it's decision: "Is 12 years worth of my life worth only an admonition? Even jaywalking can get prison time. So can stealing a loaf of bread. With all due respect, the message that this committee is sending out is loud and clear: Don't worry about using false evidence; you will only get an admonition if you are stupid enough to admit it."

In February 2006 Su filed a federal civil rights lawsuit demanding \$25 million in damages from the City of New York for the prosecutor's action of "knowingly presenting perjured testimony and deceiving a jury into wrongfully convicting plaintiff of attempted murder." Su and NY City settled the suit for \$3.5 million in October 2008.

Now 35, Su was pleased the case was resolved, but angry that no prosecutor had been punished for fabricating the case against him. "The settlement doesn't buy back the time I lost and doesn't do real justice, but the amount shows the public something is very wrong here. I did 12 years on a wrongful conviction, and no one was punished for it."

Su's attorney, Joel B. Rudin of New York City, has conducted research showing that about 80 convictions in NYC's Queens borough from about 1988 to 2003 were reversed because of prosecutorial wrongdoing. Yet, not a single prosecutor was disciplined for his or her misconduct.

In December 2003 a lawsuit Rudin filed against New York City on behalf of Alberto Ramos was settled for \$5 million. Ramos was one of The Bronx Five: Five men working at day care centers in the Bronx who were prosecuted by Assistant DA Mario Merola. Ramos was convicted in May 1985 of child abuse and sentenced to 8-1/3 to 25 yrs in prison. His conviction was overturned on appeal in 1992 based on the prosecution's concealment of exculpatory evidence that likely would have resulted in his acquittal. He was wrongly imprisoned for seven years.

Sources:  
City to pay 3.5 million to wrongfully imprisoned queens man, *The New York Times*, October 18, 2008.  
Prosecutorial Misconduct and Official Inaction, at a Cost of 3.5 Million, *The New York Times*, October 22, 2008.

## Policeman's Extortion Conviction Overturned

In May 2006 a man reported finding an abandoned stolen 1984 Jeep CJ-7 on his property in Virginia Beach, Virginia. The vehicle belonged to Virginia Beach Police Officer Jesse Spry. Several days later Spry and five of his fellow officers went to the man's home, handcuffed him, and demanded he pay Spry \$8,200 or he would be arrested for stealing the vehicle. The man agreed to give Spry the money, but after he was released he filed a complaint with the police department. Spry was charged with extortion.

A jury convicted Spry of extortion after a two-day trial in September 2007. The jury recommended that he serve a six-month jail sentence and pay a \$2,500 fine. Spry was released on bail pending sentencing.

Nine months after Spry's conviction and prior to his sentencing, on June 3, 2008 trial Judge A. Joseph Canada granted a defense motion to set-aside the jury's verdict. Judge Canada ruled that the State presented insufficient evidence that Spry's actions constituted extortion. It was the first time in 13 years on the bench that Judge Canada set-aside a jury's verdict.

The Commonwealth's Attorney, Harvey Bryant, was taken aback by the judge's ruling, telling reporters: "Twelve citizens had no problem, after having been given instructions by Judge Canada, in deciding that Spry was guilty of extortion and should go to jail as punishment."

University of Virginia's Law School professor Anne Coughlin said of the judge's ruling, "It's extraordinary." She added, "There is a heavy burden on a defendant once convicted to win such a motion. A judge will have to find that the evidence was clearly inadequate to support a conviction. The judge is saying, 'I saw the same evidence you saw, and I conclude that no reasonable person could convict.'"

Spry, a 28-year veteran of the police force, retired after he was charged. He had not spent any time in jail at the time his conviction was set-aside.

Source: Virginia beach police officer's conviction dismissed by judge, *The Virginian-Pilot*, June 3, 2008.

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Three women working at a Sprint telephone store in Detroit, Michigan were accosted by two men on the morning of March 7, 2002. The armed men, who didn't wear masks, said they wanted money from the store's safe.

Tevya Urquhart was the senior staff person, and she was ordered to open the safe while the other two women, Kimberly Sykes and Kimberly Holmes, were forced to lay face down on the floor. After Urquhart tossed a money bag to the robbers, they locked the women in the safe room and ran out of the store. The women then called the police using a cellphone.

It was later determined that the robbers made off with \$27,762, but they were unaware that there was a second money bag in the safe that Urquhart did not give them. There was about \$14,000 in that bag.

### Store employees charged with robbery

Two of the officers assigned to the case were Detroit Police Department detectives Derrick Anderson and Carol Nichols. All three women provided similar statements about the robbery. The store's 24-hour surveillance tape was given to the police without being viewed by the security company or any Sprint employee.

The same Sprint store had been robbed at gunpoint three weeks earlier when Urquhart and a different woman were working. The earlier robbery plus the similarities in the statements by the three women – who had experienced the exact same event – made the detectives so doubtful that there had been a robbery that they didn't perform a typical armed robbery investigation. They didn't dust the store for fingerprints that may have been left by the two men, they didn't have composite sketches made of the robbers, they didn't canvass the area for possible witnesses, and they didn't interview the Sprint employee that was with Urquhart during the previous robbery to explore the possibility that the robberies were related. It was learned later that the surveillance camera recorded a facial shot of at least one of the robbers that could have been blown up to identify him – but the detectives made no effort to do so.

After their investigation, the Detroit PD submitted a request to the Wayne County Prosecutor's Office to file charges against all three women for larceny by conversion of more than \$20,000, and the false report of a felony. The warrant request was based on the assumption that the three women stole the money, and it stated that "no robbery took place." After the three women

## Two Women Awarded \$2.58 Million For Robbery Convictions Based On Speculation

By Hans Sherrer

were arrested and released on bond, they pled not guilty when arraigned.

### October 2002 trial

Urquhart and Sykes were tried together in October 2002. The prosecution's theory was that Holmes masterminded the theft by concocting the cover story of an armed robbery, and she enlisted the other two women to aid and abet her in exchange for a share of the stolen money. The prosecution's key evidence was information that a large amount of money was processed through Holmes' account at Detroit's Motor City Casino in the days following the robbery.

The Detroit PD edited the store's 24-hour surveillance video into a 14-minute version that was played once during the trial. The prosecution contended the video supported the women's guilt, because it showed Urquhart opening the safe and removing the money bag. Although it did show a man wearing a baseball cap standing near the safe room's door, he was not in the room or holding the money bag.

On cross-examination detective Anderson acknowledged there was no evidence the three women conspired to steal Sprint's money and there was no evidence that any of the women came into possession of any of the stolen money.

Even though the prosecution's case was based on speculation that it is possible the three women stole the money, and not evidence that they actually did so, the jury convicted Urquhart and Sykes of both charges. Sykes was considered a passive participant in the robbery since her role was to keep her mouth shut, so she was sentenced in October 2002 to three months in the county jail, three years probation, and 120 days of community service. Urquhart was given the much more severe sentence of serving up to ten years in prison because of her active role of opening the safe and taking out the money bag. While at Scott Correctional Facility her appeal lawyer was successful in getting her a resentencing hearing. On December 20, 2002 Urquhart was given a sentence more in line with Sykes' sentence – five months in the county jail and three years probation. Two days after the hearing she was released after spending a total of about 2-1/2 months in custody.

Although Holmes was the alleged mastermind of the robbery, the felony charges against her were dismissed when in September 2003 she pled guilty to a misdemeanor and was sentenced to probation.

### Women appeal convictions

Urquhart and Sykes appealed their convictions, but it was long after they had served their jail sentences that the Michigan Court of Appeals issued separate rulings on May 4, 2004.

Since the women were jointly tried and convicted of the same charges based on the same prosecution theory and evidence, the opinions were very similar. In Sykes' opinion the appeals court wrote, "A thorough review of the record finds no evidence, beyond speculation, to support defendant's conviction of larceny by conversion under an aiding and abetting theory. ... The conclusion that defendant aided and abetted [the robbers] in taking the money was supported only by impermissibly layered inferences and not by evidence." (*Michigan v Kimberly Sykes*, c245079, MI Ct of Appeals, May 4, 2004, 2,3 (unpublished).)

The appeals court judge's also wrote, "With regard to defendant's conviction of false report of a felony, defendant's cell phone records, which were admitted at trial, indicated that defendant called the police to report the robbery. She also gave a statement to the police that the Sprint store was robbed by two armed men. However, as discussed *supra*, there was no evidence, besides the layers of impermissible inferences built upon the fact that [money] was processed through Holmes' account at the Motor City Casino in the three days after the robbery, to establish that the robbery was faked. ... The testimony by the store manager was that defendant, who usually had a calm demeanor, was distraught when she was let out of the safe room. *In fact, the prosecutor, in closing argument, acknowledged that defendant and [Urquhart] may not have known that the robbery was faked.* Without some indication that she knew the robbery was a sham, defendant's conviction of false report of a felony cannot withstand a challenge on sufficiency of evidence grounds." (*Id.* at 3. emphasis added)

Similarly, the appeals court wrote in Urquhart's opinion, "The detective admitted that he had no evidence that [the three women] conspired to take Sprint's money and there was no evidence that defendant ever came into possession of any of the missing

### Two women cont. on p. 9

## Two women cont. from p. 8

money. The prosecution's assertion that defendant took the money is based on pure speculation." (*Michigan v Tevya G. Urquhart*, c246001, MI Ct of Appeals, May 4, 2004, 2 (unpublished).) Thus the judges decided, "The conclusion that defendant aided and abetted [the robbers] in taking the money was supported only by impermissible inferences and not by evidence." (*Id.* at 3.)

Regarding Urquhart's conviction of a false report of a felony, the appeals court wrote, "There was no statement by defendant that she knew the robbery was faked. The videotape showed her being walked back to the safe, removing a white bag/envelope and sliding it towards an unidentified man. The videotape then showed that she was very upset, crying, and ill. [Sykes] testified that defendant was hyperventilating after the robbery under the counter and the police officer who interviewed defendant conceded that it was difficult to take defendant's statement because she was so upset.... there was no evidence that defendant knew it was a faked robbery." (*Id.* at 4.)

Having found insufficient evidence to support the charges against either Urquhart or Sykes, the appeals court unanimously reversed their convictions. In the fall of 2004 the charges against both women were dismissed with prejudice in the Wayne County Circuit Court.

### Women file separate civil rights lawsuits

Sykes then retained a civil attorney to look into suing the city. In November 2004 the lawyer submitted a state Freedom of Information Act request to the Detroit Police Department for an unedited copy of the Sprint store's 24-hour surveillance video. They responded by turning the video over to the city attorney's office – which did not provide Sykes' attorney with a copy of the unedited video. However, in February 2005 they did provide a copy of the edited version that was shown to the jury.

In 2005 Urquhart and Sykes (who had hired different lawyers) filed separate civil rights lawsuits in Detroit's federal district court. The defendants were six Detroit police officers and the city of Detroit. The two suits, which were later joined, claimed that the defendants caused the women to be falsely arrested and maliciously prosecuted without probable cause, that the defendants intentionally or recklessly misrepresenting the facts of the crime by improperly tampering with or editing the Sprint store's surveillance videotape of the robbery, and that the defendant's actions violated the women's right to a fair trial and to due process of law. The suit's allegations against Detroit included that it failed to

adequately train its police officers to perform their constitutional duty to disclose exculpatory evidence. The lawsuits requested compensatory and punitive damages to be determined by a jury. (*Tevya Grace Urquhart v City of Detroit, et al*, No. 05-73725, EDM; and, *Kimberly Sykes v. Derrick Anderson, et al*, No. 05-71199, EDM.)

The women's lawyers submitted a discovery request to the Detroit city attorneys office for the unedited surveillance video. After they didn't comply, the federal magistrate overseeing the case ordered the city's attorneys to produce the video. They responded that the video had disappeared. Among the discovery the women did receive was a cautionary letter from the Motor City Casino that the prosecution had failed to disclose to Sykes and Urquhart prior to their criminal trial. The letter showed Holmes' gambling wagers in the days after the robbery had been misrepresented to the jury. The amount of money the casino reported for Holmes' transactions was cumulative winnings and losses – which meant she could have actually wagered much less money and simply churned it over as her luck changed. The letter also explained the reported figure of Holmes' wagers was unedited, so it may have been incorrect.

In August 2007 U.S. District Court Judge Bernard Friedman denied the defendant's summary judgment motion to dismiss the lawsuit. However he did rule that Urquhart's false imprisonment and false arrest claims were time-barred because she did not file her lawsuit within three years of her arrest. After Friedman became ill the case was assigned to Judge Nancy Edmunds for trial.

Judge Edmunds ruled against the women on every substantive pre-trial issue, and even barred the jury from being informed that the city had failed to turn over the 24-hour surveillance video in spite of being ordered to do so by the Court. Judge Edmunds, who was described by a courtroom observer as openly hostile to the women's attorneys, also declined to sanction the city for its failure to comply with the Court's discovery order to turn over the unedited video.

### Jury awards total of \$2.58 million

Although hamstrung by Edmunds' rulings, during the trial Sykes and Urquhart's lawyers were effective in presenting their case against the defendants by techniques that included a PowerPoint presentation. After a trial that extended over three weeks, the jury deliberated about seven hours before arriving at a verdict. On February 25, 2008 the jury found detectives Anderson and Nichols liable for malicious prosecution and violating the

women's right to a fair trial. The jury awarded 28-year-old Sykes \$1.063 million in compensatory damages and \$250,000 in punitive damages for a total of \$1.313 million. Urquhart, 37, was awarded \$1.02 million in compensatory damages and \$250,000 in punitive damages for a total of \$1.27 million. Afterwards, Julie Hurwitz, Sykes' lawyer, said of the women, "They feel tremendously vindicated."

The trial's outcome was somewhat ironic for the defendants. During a pre-trial mediation conference the women's lawyers submitted a settlement figure that Judge Edmunds thought was excessive and which the defendants rejected, but that figure was less than the jury awarded.

No one outside the Detroit Police Department or the city attorneys office has ever seen the full surveillance video, and the extraordinary lengths to which the city has gone to prevent its public release suggests that it may provide conclusive visual proof of the women's innocence.

### Additional sources:

2 get million in false prosecutions, *The Detroit Free Press*, February 26, 2008.

Bad cops cost city millions, *The Michigan Citizen*, March 2, 2008.

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## Cuba Commutes Death Sentences

Cuba has been heavily criticized for its legal process that has been used to imprison a number of people who claim to be innocent. Prisoners on death row who may be innocent were spared execution by Cuban President Raul Castro: He announced on April 28, 2008 that all but three death sentences were being commuted to terms of 30 years to life in prison. The three death row prisoners whose sentences were not commuted, are all still on appeal from terrorism related convictions. The Cuban government's official announcement said the commutations were taken for "humanitarian" reasons. However, it may have been to bring Cuba in conformance in spirit with two United Nations human rights agreements that Cuba signed in early March. Former President Fidel Castro had opposed Cuba being a signatory to those human rights agreements.

Source: Cuba's Raul Castro commutes most death sentences, *Reuters*, April 28, 2008

On the morning of January 4, 1991, 15-year-old Tasheen Douglas was walking in Brooklyn, New York on his way to school when a red car pulled up alongside him. Inside the car were three acquaintances, Amir "YaYa" Johnson, Willie "Money-Will" Dawson and a guy he knew as Dequan. They told Douglas they were headed to see Nathaniel Cash to settle a dispute between Johnson and Cash. Hoping to mediate between Johnson and Cash, Douglas jumped in the car and rode to Cash's apartment.

Upon arriving Dawson called Cash to come downstairs to talk. When the conversation between Johnson and Cash in the building's vestibule got heated, Cash smacked Johnson in the face and told him to leave. Johnson responded by pulling out a pistol and shooting Cash several times. Wounded but still on his feet, Cash fled but was shot in the back by Dawson as he ran down the steps in front of the building. Cash then fell down and died.

Douglas, Johnson and Dequan left in the car they arrived in, while Dawson stayed behind.

#### **911 called at 11:01 a.m.**

At 11:01 a.m. a female caller to 911 reported that a male had been shot at 215 Monroe Street, and three male blacks were fleeing in a red Pontiac Grand Am southbound on Nostrand Avenue. The police arrived at 11:04 a.m. and saw a hysterical woman standing over Cash's body. When questioned by homicide Detective Delouisa the woman told him her name was Karen Smith and she had spent the previous night with Cash. She also told him that at 10:25 a.m. she went to the corner store, and upon returning about 11 a.m. she discovered Cash dead outside the building. Smith told Delouisa that she "did not witness the shooting." Delouisa made notes of his interview with Smith on two pages of his memo book.

After the police arrived Dawson came out of his hiding place and began telling onlookers that Derrick "Bush" Hamilton shot Cash. Dawson also spoke with Delouisa at the crime scene and identified himself as a friend of Cash. When Cash's two sisters arrived, Dawson told them that Smith was involved in their brother's murder. A brawl erupted between Smith and Cash's sisters. Police separated the women, and since Smith was being accused of involvement in the murder she was transported to the 79th police precinct to be interrogated.

#### **Smith's precinct statement**

When Delouisa questioned Smith at the precinct she told him that Hamilton shot Cash, which is what Dawson was spreading around

## **In Connecticut At Time Of Brooklyn Murder – The Derrick Hamilton Story**

By Nicole Hamilton

at the crime scene. Although Smith's identification of Hamilton was contrary to her crime scene declaration to Delouisa that she "did not witness the shooting," Hamilton became the prime suspect based on Smith's claim. Smith also revealed that her name was Jewel Smith, not Karen Smith. She gave a false name at the crime scene because she was on probation and didn't want trouble for herself.

#### **No investigation of Smith's two statements**

The police detectives did not investigate Smith's crime scene declaration that she was not present during Cash's shooting. Nor was Smith questioned regarding her two inconsistent and incompatible statements on the day of the murder. The prosecutor subsequently relied on Smith's identification of Hamilton to obtain his grand jury indictment.

On March 21, 1991, a joint task force from the New Haven Police Department and the NY Police Department converged on the beauty salon that Hamilton co-owned in New Haven, Connecticut. Hamilton was arrested and later transported to New York for trial.

#### **Smith's second recantation**

Four days after Hamilton's arrest, Smith went to the office in New York of Hamilton's attorney George Sheinberg. She admitted to Sheinberg that she did not see Hamilton shoot Cash. However, she did not mention that she gave a crime scene statement under the name of Karen Smith.

#### **The trial**

The prosecution's case against Hamilton amounted to the evidence of one person: Smith. There was no other evidence even placing Hamilton at the crime scene. Smith did not want to testify during Hamilton's July 1992 trial, but Judge Edward M. Rappaport directed Smith to "cooperate fully" with the prosecutor or risk being jailed. Faced with the judge's order and possible perjury charges if she changed her grand jury testimony, Smith fabricated a story. She told the jury that Hamilton alone fired a gun at Cash.

Detective Delouisa reportedly retired prior to Hamilton's trial and he wasn't subpoenaed by the prosecution to testify. During jury selection the memo book notes of Delouisa's crime

scene interview of Karen Smith were provided by the prosecutor to Sheinberg. But Sheinberg didn't know who Karen Smith was. Prior to starting his cross-examination of Jewel Smith, Sheinberg "asked the Assistant District Attorney Anne Gutmann if Jewel Smith was Karen Smith, and she said no." Since Sheinberg didn't know that Karen and Jewel Smith were the same person, he didn't cross-examine her about the discrepancy between her crime scene statement and her statement hours later at the police station in which she identified Hamilton as the shooter. After Smith testified Sheinberg "asked Gutmann if she knew who Karen Smith was; she said she had no idea or she didn't know." (Quotes are from Sheinberg's direct testimony: *People v. Hamilton*, No 142/91, Kings County Supreme Court, Post-conviction hearing, October 19, 1992.)

The prosecution's ballistics expert was Thomas Natale, a technician with the Ballistics Section of the NYPD. On direct examination he testified:

Q. (By A.D.A. Gutmann) Based upon your examination of 1 through 15 and People's 7 and People's 8, did you come to a conclusion?

A. Yes, ma'am. ... Two separate firearms fired the discharged shells. ...

The Court: Let me ask you a question, Detective Natale, as an expert, are you saying based upon what you told us so far, that two separate guns were used in this, based upon the forensic evidence?

The Witness: That's correct, your Honor.

After several more pages of testimony in which Natale explained the process of microscopic examination of bullet fragments, the judge asked him:

The Court: Based upon all of this, your conclusion is that two different guns were used?

The Witness: That is correct. (*Derrick Hamilton v. State*, Trial transcript, 324-325, 327-328)

Natale's testimony was in direct conflict with Smith's testimony that she saw Cash shot by one person.

Sheinberg filed a Notice of Alibi Defense prior to Hamilton's trial that listed Alphonso Dixon, Kim Freeman and James Hamilton as witnesses, but they didn't testify.

#### **Alibi evidence not revealed to jury**

On the evening of January 3, 1991, Hamilton and his companion Kim Freeman attended a going away party for a friend at the

**Hamilton cont. on page 11**

## Hamilton cont. from page 10

Quality Inn Hotel in New Haven, Connecticut. The event was hosted by Alphonso Dixon, Hamilton's friend and his partner in the beauty salon where Hamilton was arrested eleven weeks later in March.

The next morning (January 4) at approximately 11 a.m., Hamilton and Kelly Turner drove in her car from the Quality Inn Hotel to her talent booking business in New Haven. Turner and Hamilton had met at the party the night before, and learned that they had mutual business interests. At Turner's office they discussed the music business and exchanged networking contacts. During their meeting one thing they discussed was Hamilton's contacts might be able to help Turner book talent at the Apollo Theater in Harlem.

Later that day (the 4<sup>th</sup>) Hamilton and Freeman were informed of Cash's murder in Brooklyn. Freeman is the mother of a daughter fathered by Cash. Although distraught that her child's father had been tragically killed, she was angry when told that people in Brooklyn were accusing Hamilton of shooting Cash.

Dixon, who organized the party on the evening of January 3 that ended the next morning around 2 am, wanted to testify as a defense witness. However he was unable to travel from New Haven to the trial because of his poor health. Dixon wrote in an affidavit submitted to the judge a week before Hamilton's trial began in July 1992:

I, Alphonso Dixon, being duly sworn deposes and says; that in January 1991, Me, Derrick Hamilton, and a few other relatives and friends gave a party at the Quality Inn Hotel ... in the town of New Haven, CT ... On January 3, 1991 which was the night of the party. Derrick and I stayed at the party, until approximately 2 or 3:00 a.m., which is when Derrick accompanied by a female (whom I know to be Kim) went to his room. ... Derrick and [his brother] James stayed with me from January 3, 1991 until January 5, 1991. ... He used the money his deceased father left to him and invested it in a Beauty Salon in New Haven, CT. ... On approximately March 21, 1991, Derrick was arrested in the Salon ...

Along with this affidavit is a letter from my Doctor, who advised me not to travel to New York to testify, due to my medical problems ...  
(Affidavit of Alphonso Dixon, June 24, 1992.)

Dixon's doctor wrote a letter explaining Dixon's health condition:

Mr. Alphonso Dixon is followed at the Cardiology Clinic and is suffering from a severe dilated cardiomyopathy with congestive heart failure.

Sincerely,  
Dr. Marc Moreau, M.D.  
June 25, 1992

During Hamilton's trial there was no testimony regarding Dixon's affidavit or the doctor's letter.

Kim Freeman executed an affidavit several days prior to Hamilton's trial in which she stated in part:

[O]n Friday January 4, 1991, I was in New Haven, Connecticut with Derrick Hamilton. We went there on Thursday, January the 3rd ... to attend a party. I stayed there with Derrick for the weekend, and found out from Derrick that my child's father had been murdered and people were saying that Derrick committed the murder. If Nathaniel [Cash] was killed on January 4th, I know it was impossible for Derrick to do this because I was with him ... I will not testify in a court of law because I have been threatened by Nate's friends, that if I come to court I will be murdered like Money-Will (Willie Dawson) was killed. ... I trust this document will shed light on a matter I know is true. ... Please let this be enough to satisfy the court and Derrick's attorney, because I would flee if I thought I would be called and had to testify publicly to these events. My life means more to me and my child, than helping Derrick or anyone else. Thank you for listening.  
(Affidavit of Kim Freeman, June 29, 1992.)

Kim Freeman didn't testify and there was no testimony regarding her affidavit.

So the jury convicted Hamilton without knowing there were credible witnesses who could establish an alibi defense for his presence in New Haven on the day of Cash's murder 82 miles away in Brooklyn.\* Hamilton's attorney didn't present any witnesses, instead he relied on the strategy of trying to poke holes in the prosecution's case to demonstrate there was reasonable doubt of Hamilton's guilt.

### The verdict

The jury advised the judge on July 17, 1992 that they were deadlocked and could not reach a verdict. The jury's note read: "Your Honor, after serious deliberation of the evidence presented, we are unable to reach a unanimous decision. The weight and burden of our deliberations are at the point of causing severe mental and emotional anguish. We

feel that we have conscientiously attempted to attain a unanimous decision." The judge ordered the jury to continue deliberating. Later that day they convicted Hamilton of second-degree murder. Hamilton was later sentenced to 25 years to life in prison.

### Post-verdict and post-conviction testimony, affidavits and evidence

After Hamilton's conviction he began to obtain affidavits from people who either had knowledge he did not shoot Cash or that he was in New Haven at the time of the crime. He obtained an affidavit from Turner, who he was with at the time of Cash's murder, in which she states:

1. ... I am presently a police officer with the New Haven, Connecticut Police Department.
2. I have been a member of said police department since November 22, 1991.
- ...
6. I first met Derrick Hamilton (Hamilton) on the evening of January 3, 1991 when I was introduced to him at a party I attended in the Banquet Room at the Quality Inn located at Exit 59 of the Wilbur Cross Parkway in New Haven, Connecticut.
- ...
10. At the time, I ran a talent agency located at 1440 Whaley Avenue, New Haven, Connecticut.
11. It was my job to acquire jobs and book groups for shows, clubs, parties, etc.
12. I recall that I spoke for some time with Hamilton concerning my business, and Hamilton seemed to think he could help me with bookings in New York City where he said he had several contacts.
13. I made an appointment that evening with Hamilton to meet him at the Quality Inn the following morning between 11:00 a.m. and 11:15 a.m. in order to show him my office and further discuss business.
14. The party at the Quality Inn ended at approximately 1 or 2 a.m.
15. The following morning, January 4, 1991 I drove to the above Quality Inn and picked up Hamilton between 11 and 11:15 am.
16. Thereafter, we drove to my office at 1440 Whaley Avenue in New Haven, arriving there at approximately 11:20 am.
17. The meeting with Hamilton concluded at about 12 noon.
- ...
20. I recall the dates very clearly because, among other things, I clearly recall that the above going-away party was three days after New Year's Eve.  
(Affidavit of Kelly Turner, May 1995.)

## Hamilton cont. on page 12

## Hamilton cont. from page 11

Davette Mahan, who worked with Turner at the talent agency, also executed an affidavit confirming from her personal knowledge that Turner met with Hamilton on the late morning of January 4. The Quality Inn's billing records show that Dixon was charged \$803.60 for a sixty to one hundred person party in the Washington South conference room on the evening of January 3. Their records also show payments for hotel rooms at the Quality Inn.

Several of the affidavits Hamilton obtained were by people who claimed to have given statements to the police or the prosecutor. However, those statements were not disclosed to Hamilton's attorney even though they were exculpatory. Darren Breeden provided an affidavit that states in part:

I recall speaking to A.D.A. Anne Gutmann about Derrick Hamilton ["Bush"] and the accusations of murder made against him by Jewel Smith.

I told A.D.A. Gutmann, Mr. Hamilton did not shoot Cash. I was on Nostrand and Gates the same day of the shooting speaking to a person named Money Will who told me that himself (Money Will) and a person named Yaya shot Nate after Nate slapped Yaya. They spread the word around saying Bush did it because they didn't want to get arrested for the crime. I also spoke to Jewel Smith, around March of 1991 ... Jewel told me that she never witnessed the crime, but had been forced to say Bush did it because the police had threatened to lock her up until she testified to having seen Bush shoot Nathaniel ...

I told Ms. Gutmann, about my conversation with Money Will and Jewel, yet she insisted if I wanted a deal with their office on my pending cases, I would have to testify on Derrick Hamilton ["Bush"] implicating him in Nathaniel Cash's murder. I thought about it for a while, then declined the offer ... I couldn't see myself lying on Derrick Hamilton, and [him] getting 20 years to life for my part in the subterfuge. (Affidavit of Darren Breeden, August 10, 1996.)

Tasheen Douglas was with Johnson ("YaYa") and Dawson ("Will"), and he saw them shoot Cash. Douglas' police statement wasn't provided to Hamilton's attorney. Douglas stated in an affidavit after Hamilton's trial:

1. That the affidavit I'm making is true and based on my recollection as to the best of my knowledge of an interview with law enforcement agencies of Kings County in the months of June or July 1992 or soon before said months.

2. That I was interviewed and stated in full what knowledge I had concerning the shooting death of Nathaniel. Cash on January 4, 1991. I told the people who questioned me that my friends YaYa and Will killed Nate.

3. The reason Nate died was because he slapped YaYa after they had an argument. On the day of the shooting nobody was conscious that Nate was gonna get shot or killed, it happened spontaneously. Nate slapped YaYa and the next thing I knew both Will and YaYa started shooting him (Nate).

4. Present on the scene of the crime was myself, Money Will (Will), YaYa and Daquan. Our purpose being there was to talk to Nate about threats he made against YaYa. ...

5. Once Nate slapped YaYa things got out of hand. We all left after the shooting except Will who stayed. YaYa had a red car which I believe was a Trans Am or something. Will later told me and YaYa that he made it look like "Bush" Derrick Hamilton, killed Nate, because everyone in the neighborhood knew that they had a dispute recently ...

7. I told the law enforcement agents what I knew when they came to see me. Which was that Derrick Hamilton was innocent and that YaYa and Will was guilty of the murder of Nate.

8. At the time of the shooting no one was present except Me, Will, YaYa and Daquan. Nobody else witnessed the shooting. ...

(Affidavit of Tasheen Douglas, September 10, 1993.)

Felicia Schuler was another person who provided an affidavit. She swore that Smith and her were at the grocery store at the time Cash was murdered. Felicia Schuler's affidavit was executed on December 8, 1992.

The most important affidavit was by the prosecution's key witness – Jewel Smith. Hamilton discovered after his conviction that Karen Smith who gave the crime scene statement and Jewel Smith who testified at his trial, are the same woman. A private investigator hired by Hamilton learned she was living in North Carolina and traveled there in April 1993 to interview her. Smith executed an affidavit in which she stated in part:

Q. Mrs. Smith did you testify ... against Derrick Hamilton?

A. Yes

Q. Was your testimony true?

A. No

...

Q. On January 4, 1991, did you in fact ever see Derrick Hamilton at anytime that day?

A. No

Q. Did you ever see Derrick Hamilton fire a gun which killed Nathaniel Cash in your presence?

A. No

Q. Did you testify truthfully when you stated that you saw Derrick Hamilton shoot Nathaniel Cash numerous times?

A. No

Q. Did you ever tell the police or the District Attorneys Office that what you were to testify to was untruthful?

A. Yes, several times

...

Q. When you made these revelations to these officials that the testimony you were going to give was false what did they do to make you falsely testify in this case?

A. They threaten me; gave me ultimatum, they would put me in jail for the murder until I was ready to testify, take my kids from me and I would never see them again and get me violated for being with a known felon.

...

Q. Has anyone made any threats or promise to you to conduct this interview and recant upon prior testimony?

A. No

(Jewel Smith Affidavit of April 21, 1993.)

At least 13 people have provided an affidavit or testified during post-conviction proceedings either that Hamilton wasn't at the crime scene, that individuals other than Hamilton are responsible for Cash's murder, or that Smith wasn't present at the time of the shooting.

## Appeals denied

After Hamilton was found guilty in July 1992, he filed a *pro se* motion to set aside the verdict based on newly discovered evidence of his innocence. The key evidence was Smith's sworn recantation. Several evidentiary hearings were held regarding that motion. Smith testified that she did not see Hamilton shoot Cash, and Det. Delouisa testified that Smith was the woman who gave him the spontaneous crime scene statement that she "did not witness the shooting." On July 8, 1993 the judge denied the motion, ruling that Smith's recantation of her trial testimony wasn't credible. Four days later Hamilton was sentenced to 25 years to life in prison.

Hamilton filed a *pro se* motion on January 5, 1994 to vacate his judgment of conviction. He claimed prosecution *Brady* and *Rosario* violations, and that his trial lawyer was ineffective for failing to investigate witnesses or subpoena witnesses who could have established an alibi defense that Hamilton was in New Haven at the time of the crime. Judge Rappaport denied most of

## Hamilton cont. on page 13

## Dennis Maher Settles Rape Lawsuit For \$160,000



Dennis Maher the day of his release.

Dennis Maher was a 22-year-old Army paratrooper stationed at Fort Devens, Massachusetts when in December 1983 he was arrested for possessing one-half ounce of marijuana. At the time he was wearing a red sweatshirt, and during the search of his car a green Army jacket and a military knife were found. Those items matched descriptions given by a rape and an attempted rape victim in Lowell. Maher became a suspect in those crimes, in addition to the rape of a woman in the nearby town of Ayer. Although at the time of the Lowell rape Maher was meeting with his commanding officer 22 miles away at Fort Devens, his jacket and knife were common for Army personnel, and his eye and hair color didn't match the women's attacker, he was

charged with the crimes.

In the spring of 1984 Maher was tried and convicted of the Lowell rape and attempted rape based on the victim's identification of him, and the items of clothing and the knife. He was sentenced to 12 to 20 years in prison. He was then tried and convicted of the Ayer rape based on the victim's testimony. He was sentenced to life in prison for that crime.

Maher learned about DNA testing in 1993, but the prosecution denied for years that evidence from the Lowell rape trial still existed. The evidence was finally located in the Cambridge court house basement. In January 2001 DNA testing proved it was not Maher's semen on the Lowell rape victim's underpants. Prosecutors then disclosed that a slide from the Ayer victim's rape kit had been located. DNA testing also cleared Maher in that case. Maher was released on April 3, 2003 after his convictions were overturned and the charges were dismissed by Middlesex's D.A., who called the

convictions a "miscarriage of justice."

Maher filed a claim under Massachusetts' law providing compensation for wrongful incarceration. In September 2005 he settled with the state for \$550,000. In March 2006 Maher filed a federal civil rights lawsuit naming as defendants the city of Lowell, the town of Ayer and several police officers — including Edward Davis, who was the Lowell policeman who arrested Maher in 1983, and is now Boston's police commissioner. Maher alleged the defendants used improper identification techniques, failed to disclose evidence and investigate, and fabricated evidence.

In early December 2008 Maher settled his claims against Lowell for \$160,000. His claims against the town of Ayer and its police officer remain unresolved.

Sources: 19 years later, innocence comes home, *The Boston Globe*, October 12, 2003.

Lowell settles with man wrongly imprisoned in sex assaults, *Lowell Sun*, December 12, 2008.

## Hamilton cont. from page 12

Hamilton's claims. Among his rulings were that neither the inability of Dixon to testify because of ill health, nor the failure of Freeman to testify because of fears for the safety of her and her child, had anything to do with the competence of Hamilton's attorney. The judge also denied Hamilton's *Brady* and *Rosario's* claims, ruling there was "insufficient proof the prosecution was in possession of this exculpatory evidence."

However, Judge Rappaport did grant Hamilton an evidentiary hearing regarding Tasheen Douglas' affidavit of September 1993. Douglas subsequently testified in detail about the events described in his affidavit. On April 2, 1996 Judge Edward M. Rappaport judge ruled there was no *Brady* violation regarding the four statements that Douglas claimed to have made to NYPD detectives, because of insufficient evidence that the prosecution was in possession of Douglas' exculpatory statements. Even though Hamilton's conviction was based solely on the trial testimony of Smith that she recanted, the judge also ruled that Douglas' affidavit wasn't "new evidence" warranting a new trial, because it wasn't sufficient by itself to have altered the jury's verdict. In addition, the judge refused to consider the exculpatory alibi affidavits of Turner and Mahan, who were not listed as witnesses on Hamilton's Notice of Alibi Defense.

The New York Appellate Division granted Hamilton leave to appeal the motion's denial, and consolidated his direct appeal into that appeal. In 2000 the appeals court denied

Hamilton's direct appeal and affirmed the dismissal of the motion to vacate his conviction he filed in 1994. (See, *People v. Hamilton*, 272 A.D.2d 553 (2000).) In its ruling the court determined that Hamilton's attorney wasn't ineffective for failing to investigate or subpoena alibi or exculpatory witnesses.

### Federal habeas corpus petition

Having exhausted his state remedies, Hamilton filed a pro-se federal *habeas corpus* petition on March 16, 2001. U.S. District Court Judge Gleeson denied the petition on January 16, 2004. However, Gleeson did acknowledge that if Hamilton's attorney had known that Jewel Smith made crime scene declaration that she did not witness the shooting, it could have been used to undermine her trial testimony.

### Coram nobis writ denied

Hamilton filed a *pro se* writ of error *coram nobis* in state court to vacate the appeals court's 2000 decision denying his direct appeal. Hamilton claimed ineffective assistance of his appellate counsel. On September 9, 2008 the New York Appellate Division denied Hamilton's writ in a one-line ruling, "The appellant has failed to establish that he was denied the effective assistance of appellate counsel." *People v. Hamilton*, 2008 NY Slip Op 06851 (N.Y. App. Div. 9/9/2008).

### Smith supports Hamilton's release

In addition to Smith's admission during Hamilton's post-conviction hearing that she perjured herself during her grand jury and

trial testimony, and her affidavit admitting her perjury, she wrote letters to the appellate judges prior to their denial of Hamilton's direct appeal in 2000, and she wrote letters on his behalf to NY Attorney General Elliott Spitzer in 2007 and to the New York State Board of Parole.

### Current status

Hamilton is gathering affidavits and letters to include with a pardon application. Hamilton's court appointed attorney in 1992 and 1993 during his post-trial challenge to his conviction was New York attorney Howard Weiswasser. Fifteen years later Weiswasser executed an Affirmation on April 25, 2008 that was based on his extensive knowledge of Hamilton's case. Weiswasser swore: "Based upon all I know about this matter it is my opinion that DERRICK HAMILTON is an innocent man with an unjust conviction."

Derrick Hamilton can be written at:  
Derrick Hamilton 93-A-5631  
Shawangunk CF  
P.O. Box 700  
Wallkill, NY 12589

Nicole Hamilton is Derrick Hamilton's wife and she is his outside contact. Email her at, Nickmickron@yahoo.com

\* It is 82 miles from the Quality Inn in New Haven, CT to the location of Cash's murder in Brooklyn, according to Mapquest.com, and the travel time is 1 hr. 53 minutes.

## Alan Crotzer Awarded \$1.86 Million For 1982 Rape Conviction

Alan Crotzer was convicted in 1982 of charges related to the July 1981 abduction and rape of a 12-year-old girl and a 38-year-old woman after an armed robbery by three black men in Tampa, Florida. Although several alibi witnesses testified on Crotzer's behalf, the all-white jury chose to believe the eyewitness identification of him by the two victims, and the woman's husband and a family friend present at the time of the robbery. Crotzer was sentenced to 130 years in prison. Two other men were also convicted of the crimes, although neither identified Crotzer as their accomplice.

Nine years later Crotzer was convicted of a controlled substance violation after he wouldn't reveal the name of a guard smuggling marijuana into the prison where he was incarcerated.

## Conviction Tossed For Man In Another Country At Time Of Robbery

Edward Mzwinila was sentenced to ten years imprisonment after being convicted in 2006 of an armed robbery in Botswana. The prosecution was based on Mzwinila's identification by the victim. Mzwinila alibi defense was that he had been mistakenly identified because he was in neighboring South Africa at the time of the robbery. The judge, however, denied Mzwinila's request for the release of his passport that had been seized after his indictment, so he was unable to introduce it as evidence.

For his appeal Mzwinila was able to obtain his passport that had border exit and entry stamps proving that he left Botswana for South Africa on the day of the robbery (Oct 31, 2002), and that he returned three days later. A witness established that she called Mzwinila at 11 a.m. in South Africa, an hour before the robbery was committed at noon in Botswana. In April 2008 Botswana's Court of Appeal overturned Mzwinila's conviction and sentence on the basis that his alibi was credible, and thus his guilt could not be established beyond a reasonable doubt. The Court stated in its ruling, "If the appellant was in Mafikeng [South Africa] at 11:00 a.m. he could not have been at the scene of the crime at 12:00 noon."

### Sources:

Appeal court sets aside mzwinila's conviction, *The Voice* (Francistown, Botswana), May 6, 2008.  
Court reserves judgement in Mzwinila appeal, *BOPA Daily News* (Lobatse, Botswana), April 17, 2008.

In February 2004 DNA testing unavailable at the time of Crotzer's 1982 trial excluded him as one of the assailants. Almost two years later a deluge of negative media publicity and public outrage about the continued imprisonment of a provably innocent man all but drove the reluctant prosecutors to drop the charges against Crotzer in January 2006. The 45-year-old Crotzer was released after being wrongly imprisoned for more than 24 years.

Barred from suing for meaningful compensation by Florida's sovereign immunity statute, Crotzer sought to have a claims bill filed on his behalf in the state legislature. One state representative and two state senators agreed to sponsor the claims bill. On March 24, 2008 "An Act for the Relief of Alan Jerome Crotzer" (HB 7037) was introduced in Florida's House of Representatives. Given expedited consideration, it passed two days later by a vote of 116 to 0. The bill then passed the Senate on April 3 by a vote of 33 to 5. Governor Charlie Crist signed the bill into law on April 10.

## \$7.8 Million Grant For DNA Innocence Research

The U.S. Department of Justice granted \$7.8 million to five states in September 2008 to aid in detecting wrongful convictions through DNA testing. The grants were the first made under provisions of the Justice For All Act of 2004. The five states that received grants were: Arizona, Kentucky, Texas, Virginia, and Washington. Jeffrey L. Sedgwick, Acting Assistant Attorney General of the DOJ's Office of Justice Programs said about the grants: "These awards are another important step in implementing the President's DNA Initiative in an effort to protect the innocent and to bring the guilty to justice."

Arizona's grant of almost \$1.4 million is to be used in a partnership between the Arizona Attorney General's Office and the Arizona Justice Project to support a review of Arizona's inmate population to identify unresolved cases where biological evidence is present and post-conviction DNA analysis is needed to determine a prisoner's possible innocence. The AJP is the innocence project at Arizona State University's College of Law.

### Source:

Department of Justice Provides States with Funding for Testing in Post-conviction Cases, Press Release by the Office of Justice Programs, US Dept. Of Justice, September 16, 2008.



Alex Sink signs agreement providing for payment of \$1.858 million to Alan Crotzer (standing).

The bill provides for the state's purchase of a \$1.25 million annuity for Crotzer's benefit. The bill also provides for 120 hours of tuition free instruction at a state career center, community college, or state university of Crotzer's choosing. To receive the benefits, the bill required Crotzer to waive any legal right to sue any state or local agency or employee related to his 1982 conviction.

On May 6 Florida's Chief Financial Officer Alex Sink signed the agreement designating the schedule of payments Crotzer was to receive from the annuity. On June 1, 2008 he received a lump sum payment of \$250,000. At the same time he also received the first payment of \$6,700 that he will receive monthly for 20 years until May 2028, when he will be 67. The total amount to be paid Crotzer is \$1,858,000.

Crotzer then filed a petition requesting a full pardon of his 1991 conviction that was retaliation for his refusal to be a "snitch" in the investigation of the guard smuggling marijuana into the prison where he was at, and a 1979 robbery conviction based on him acting as the look out when four buddies shoplifted a case of Busch Light from a convenience store. Having just turned eighteen at the time of the shoplifting incident, Crotzer described it as a stupid youthful indiscretion that resulted in him having the felony conviction that caused the police to include him in the photos looked at by the victims of the 1981 rape and abduction. Crotzer also requested expungement of his criminal records, based on a late night stop after his release. During the stop the officer grilled him about his convictions and demanded that he be allowed to search Crotzer's car.

On October 21, 2008 Florida's Executive Clemency Board considered Crotzer's petition. An attorney for the Florida Department of Law Enforcement told the Board that it didn't have the authority to expunge Crotzer's criminal record, since that authority rested with the courts. Governor Crist reacted testily to the attorney's claim, and the Board went ahead and voted to grant Crotzer the pardons and to expunge his criminal record. As of late November 2008 a legal challenge to the expungement had not been filed.

### Sources:

HB 7037 - Relief of Alan Jerome Crotzer, Legislative History, <http://www.myfloridahouse.gov>  
CFO Sink Signs Settlement Agreement For Alan Crotzer, *Press Release by the Florida Department of Financial Services*, May 6, 2008.  
Florida Cabinet votes to expunge Crotzer's other convictions, *St Petersburg Times*, October 22, 2008.  
See also a previous *JD* article: DNA Tests, Word On The Street Agree — The Alan Crotzer Story, *JD* Issue 31, Winter 2006.

## DeWayne McKinney Dies After Moped Crash

DeWayne McKinney was exonerated in January 2000 of a 1980 murder-robbery at an Orange, California Burger King when the actual perpetrators were identified and the DA acknowledged he was innocent. After McKinney's release from almost 20 years of wrongful imprisonment he sued the City of Orange, which settled in the summer of 2002 for \$1.7 million. He received a check for about \$1 million after deductions for attorneys fees and expenses.

McKinney didn't squander his money. He invested it in half-a-dozen condominiums in La Mirada — a Los Angeles suburb. He then learned that it is possible for a person to buy and operate automated teller machines (ATM). The ATM's owner is paid a commission on each transaction. After meeting a man whose company sold and installed ATMs, McKinney recruited two acquaintances to work on commission to find locations. His first machine was installed at a Unocal station in Santa Ana. Within a few months McKinney had 20 ATMs around Southern California.

However he felt uncomfortable in Southern California and decided he wanted to live in Hawaii. So in 2003 he sold his ATMs and bought a beachfront five-unit fixer upper apartment near Oahu's North Shore. He and his wife lived in one unit and rented the rest.

## DeWayne McKinney Dies After Moped Crash

McKinney then began installing ATMs in and around Honolulu.

McKinney and his wife equally divided the ATMs in the family business after their divorce in 2004. Within a year McKinney built his business back up to the 20 ATM machines he had before the divorce.

After the divorce McKinney sold for \$2.7 million, the five-unit apartment he bought for \$740,000 in 2003. He used the money to buy real estate on Oahu, including a beachfront home in Honolulu.

McKinney continued expanding the number of ATMs he owned, and by the fall of 2008 he had 48 throughout Hawaii in restaurants, bars and shopping malls.

On October 7, 2008 McKinney was seriously injured when shortly after midnight the moped he was riding crashed into a telephone pole in Honolulu. The 47-year-old McKinney was taken to a local hospital where he died from his injuries. McKinney



DeWayne McKinney in 2005 on the beach in front of his Honolulu home

wasn't wearing a helmet and the cause of the crash was not immediately known.

Nine days after McKinney's death, Honolulu's chief medical examiner reported that McKinney's blood-alcohol level was .22% — nearly three times the legal limit.

McKinney spoke about his prison experiences at churches and wrongful conviction conferences. After his death friends said that he had difficulty controlling the drinking that he turned to as a way of coping with the psychological trauma of being falsely convicted of a brutal murder and imprisoned for two decades.

*Justice: Denied* published two stories about McKinney's case: "The 19-Year Ordeal of Dwayne McKinney: Injured and on Crutches 30 Miles Away From a Murder Is Finally Recognized as an Alibi," (Issue 11, March 2000); and five years later, "From Wrongful Murder Conviction To Multi-Millionaire In Five Years," (Issue 29, Summer 2005).

### Sources:

Millionaire ex-inmate dies in scooter crash, Los Angeles Times, October 8, 2008.

Inmate turned millionaire was drunk when he fatally crashed his moped, Los Angeles Times, October 16, 2008.

## Virginia Issues First "Writ of Actual Innocence"

In 2006 Darrell A Copeland was a passenger in a car that crashed near Chesapeake, Virginia. A state trooper at the scene found an unloaded pistol under the seat where Copeland had been sitting. A computer check found that Copeland had a felony robbery conviction, so he was arrested as a felon in possession of a firearm.

During Copeland's May 2007 trial the prosecution didn't introduce the pistol into evidence, instead relying on the trooper's testimony that he found an unloaded pistol under Copeland's seat. Copeland's lawyer challenged the officer's testimony as insufficient to establish that what he found was in fact a firearm, but the judge sided with prosecution's argument that the trooper's expertise in identifying firearms was a sufficient substitute for its introduction into evidence.

Copeland was sentenced to five years in prison, and in March 2008 the Virginia Court of Appeals affirmed his conviction and sentence.

At the time of Copeland's trial the pistol was

in the possession of the Virginia Department of Forensic Science. Two months after his conviction was affirmed, the lab analyzed the pistol and determined it is a "gas gun" that uses compressed gas to discharge a pellet.

In 2004 Virginia revised its 21-day limit barring new non-DNA evidence, to allow the filing of a special writ if new non-DNA evidence could establish a defendant's actual innocence of their convicted crime.

Virginia statutorily defines a firearm as an instrument "intended to expel a projectile by means of an explosion." Based on the new forensic evidence that Copeland was actually innocent because he had not been in possession of a firearm, his lawyer relied on the 2004 law to file a "Writ of Actual Innocence" with Virginia's Court of Appeals. Virginia's Attorney General conceded in the State's response that the item in Copeland's possession did not meet the definition of a firearm, and that he could not have presented evidence about that prior to when his conviction became final because the pistol was in the possession of the lab that had not issued its report.

The appeals court had not granted any of the more than 120 writs that had been filed in

the first four years the actual innocence law had been in effect, but Copeland's writ was the first one the State did not oppose.

On August 12, 2008 the Court of Appeals issued its ruling. After explaining the Court had "no obligation to accept concessions of error" by the Attorney General, they concluded "the unique circumstances of this case make it prudent to accept the Attorney General's concession without "further development of the facts." The Court granted Copeland's writ, vacated his conviction, and ordered the Circuit Court to expunge it from his record.

### Source:

*Darrell A. Copeland v Virginia*, No. 1547-08-1 (VA Ct. of Appeals 08-12-2008)

## Study Finds 41% of Rapes Fake

A 9-year study in a metropolitan area found that 41% of reported rapes never happened. The study by Purdue Professor Eugene J. Kanin, Ph.D., discovered the three main reasons women make false rape complaints are: for an alibi; as a means of gaining revenge; and to gain attention/sympathy. For a copy of the "Rape Study" send \$3 (stamps OK) to: Justice Denied; PO Box 68911; Seattle, WA 98168.

Sixty-eight year-old widow Helen Wilson was beaten, raped and suffocated to death in her Beatrice, Nebraska apartment late on the evening of February 5 or the early morning of February 6, 1985.

A number of people were investigated as suspects. One was Beatrice native Bruce Allen Smith. A month after Wilson's slaying Smith was eliminated as a suspect when his blood type was determined to be different than the assailant's blood recovered from the scene. Oklahoma City crime lab technician Joyce Gilchrist performed the blood test.

The Gage County Sheriff's Office took over the investigation after the Beatrice Police Department was unable to solve the crime.

The case remained unsolved with no solid leads until 1987 when former Beatrice police officer Bert Searcey reported that a confidential informant told him that a former Beatrice resident, Ada JoAnn Taylor, said that she had been involved in Wilson's murder. Gage County hired Searcey and he was put in charge of the Wilson investigation.

Taylor was located and questioned. During a series of interrogations Taylor gave a variety of conflicting accounts about the night of Wilson's murder. Her descriptions involved different people and details. At one point she told an interrogator about Wilson's murder, "I don't remember it, but police officers said they could prove I was up there at the time."<sup>1</sup>

Eventually Taylor, and two other women and three men came under suspicion. They were believed to have drank alcohol and taken drugs with each other in Beatrice around the time of Wilson's murder, when they ranged from 19 to 27 years-old.

The six were arrested beginning in March 1989.

In an effort to obtain confessions the Gage County Attorney and sheriff deputies threatened the six that if they didn't cooperate they would be given the death penalty if convicted of first-degree murder after a trial. At first they all denied being in Wilson's apartment or having anything to do with her death. More than four years had passed since Wilson's murder, so the five people implicated by Taylor were as fuzzy as she was about details of where they were and what they did on the night of Wilson's death. Years of alcohol and drug use by some of them didn't help the clarity of their memory.

Four of the six eventually confessed and agreed to be prosecution witnesses in exchange for reduced charges, one man

## Six People Cleared Of 1985 Nebraska Murder That Four Confessed To Committing

By Hans Sherrer

claimed he had no memory of anything that happened on the night of February 5-6, 1985, and one man insisted on his innocence. That man, Joseph E. White, went on trial for first-degree felony murder in late 1989.

There was no physical evidence or witnesses placing any of the six people in Wilson's small downtown apartment at the time of the murder, they were all excluded as the source of fingerprints found in her apartment, and White's blood type was different than that found at the crime scene.

The case against White began and ended with his co-defendants who testified that during a night of drinking and drug use they broke into Wilson's apartment to steal money, and that first White, and then Winslow raped Wilson while Taylor held a pillow over her face to stifle her screams. In an effort to discredit their testimony, White's attorney was able to bring out on cross-examination that the testimony of two witnesses was influenced by their dreams, another said she communicated with her boyfriend in Missouri by telepathy and she had five past lives, and still another witness in one day told the police three different versions of what happened the night of Wilson's murder. Winslow testified he had no memory of anything that happened that night. White testified in his defense that he was not at Wilson's apartment and he had nothing to do with her rape and murder.

After deliberating for 2-1/2 hours the jury convicted White of first-degree felony murder. To avoid the same fate, Winslow agreed to plead no contest to aiding and abetting second-degree murder, although he still maintained that he had no memory of that night.

In January 1990 Winslow was sentenced to 10 to 50 years in prison; Taylor was sentenced to 10 to 40 years in prison for pleading guilty to second-degree murder; and James Dean, Debra Shelden and Kathy A. Gonzalez were sentenced to 10 years in prison each after pleading guilty to aiding and abetting second-degree murder. Several weeks later White was sentenced on February 16, 1990 to life in prison.

Dean and Shelden were released in August 1994, almost five-and-a-half years after being arrested and jailed, and Gonzalez was released two months later.

Winslow and Taylor languished in prison year after year as White first lost his direct appeal, and was then denied his state and federal habeas petitions. With his appeals exhausted, in May 2005 White retained attorney Doug Stratton to look into his case. Stratton discovered that the Beatrice Police Department had preserved biological evidence from the case that could be DNA tested, namely the assailant's semen and crime scene blood and hairs. Winslow learned about the discovery that testable evidence still existed, and he contacted the Nebraska Commission on Public Advocacy. Attorney Jerry Soucie agreed to represent Winslow *pro bono* in an effort have the evidence DNA tested. Convinced that White's claim of innocence could be true, Stratton agreed to continue representing White on a *pro bono* basis when his retainer was exhausted.

In 2001 Nebraska's DNA Testing Act was enacted to provide a means for post-conviction DNA testing. In March 2006 both White and Winslow filed a motion for testing the evidence, arguing that at the time of the crime DNA testing was unavailable, and the evidence had never been tested. Gage County District Attorney Richard Smith, who had prosecuted the six defendants in 1989 and 1990, opposed the motions. Among his arguments were that White and Winslow were not convicted of sexual assault, so even negative DNA test results would have no bearing on their respective convictions.

In August 2006 Judge Vicky Johnson denied the DNA motions. She ruled that White was convicted of a murder that occurred during the commission of another felony, so whether he raped Wilson was irrelevant to his conviction. Johnson ruled that because Winslow entered a plea he could not request post-conviction testing under the DNA Testing Act.

Both White and Winslow separately appealed to Nebraska's Court of Appeal, which ruled against them. They then appealed to the Nebraska Supreme Court, which in November 2007 reversed Judge Johnson's rulings. The Court stated the purpose of the DNA Testing Act was to consider evidence "which is favorable to the person in custody and material to the issue of the guilt of the person in custody." (*State v. White*, 274 Neb. 419 (2007)) In Winslow's companion decision, the Court ruled "that the DNA Testing Act does not exclude persons who were convicted and sentenced pursuant to pleas." (*State v. Winslow*, 274 Neb. 427 (2007)) Since it was possible that DNA testing of biological evidence could shed light on whether White and Winslow were actually guilty or had been properly sen-

**Beatrice cont. on p. 17**

## Beatrice cont. from p. 16

tenced for their convicted crimes, they were entitled to having the testing performed.

In the summer of 2008 testing of semen and some blood evidence was conducted at the University of Nebraska's Human DNA Identification Laboratory. The tests excluded both men. A second series of DNA tests was then conducted involving 43 additional biological samples. The test results released in early August 2008 excluded all six defendants, and identified an unknown male as Wilson's assailant.

A joint state-local reinvestigation of Wilson's murder was launched at the direction of Nebraska Attorney General Jon Bruning.

White filed a motion for a new trial based on the new exculpatory DNA evidence. During the hearing held on October 15, 2008, Assistant AG Corey O'Brien responded when asked by the judge about the importance of the DNA evidence, "Would it have affected my decision as a juror? I would be lying to this court if I said it wouldn't have."<sup>2</sup> Unopposed by the State, White's motion was granted and he was released on a personal recognizance bond later that day. White was the first person exonerated by DNA testing in Nebraska. It had been almost twenty years since his arrest at his family's home in Cullman, Alabama and his extradition to Nebraska. Speaking to reporters White simply said, "It's been a long, hard road and I'm glad it's over. I'm going to go home and start trying to rebuild my life."<sup>3</sup> Toney Redman was White's lawyer during his 1989 trial. The day of White's release he admitted to being "absolutely astounded" that it had finally been proven that White was telling the truth during his trial while his co-defendant's lied.

Faced with the new DNA evidence, Randall Ritnour, who had been elected Gage County District Attorney in 2006, agreed to Winslow's resentencing to time served. Winslow was released hours after being resentenced on October 17, 2008.

On November 7, 2008 AG Bruning announced that the assailant's DNA was matched to Bruce Allen Smith ... the person eliminated as a suspect by Gilchrist's blood testing a month after the crime. Bruning also announced that the crime's reinvestigation determined that Smith committed the crime by himself. However, Smith could not be prosecuted since he died of AIDS in 1992. The six defendants had been extensively interviewed during the reinvestigation. The false confessions by four of them was attributed by the AG's office to prosecutors and police officers eager to solve

Wilson's four year-old murder case by using interrogation methods that have since been discredited and are no longer used in Nebraska.

Publicly acknowledging that the six co-defendants were innocent, Bruning arranged for an expedited parole hearing so that Taylor could be promptly released. Three days later, on November 10, Taylor was released on parole. The AG's office announced it would press for the pardoning of the five defendants who took plea agreements.

Contacted at his parent's home in Alabama, White reacted to the AG's announcement by exclaiming, "My bullheadedness has cleared us all!" White's indictment will be dismissed in April 2009 – six months after his conviction was vacated.

The six defendants were incarcerated for a total of more than 75 years from the time of their arrests: Joseph White – 19-1/2 years; Thomas Winslow – 19-1/2 years; Ada JoAnn Taylor – 19-2/3 years (false confession); James Dean – 5-1/2 years (false confession); Kathy Gonzalez – 5-1/2 years (false confession); Debra Shelden – 5-1/2 years (false confession). The six exonerations is the largest number based on post-conviction testing of DNA evidence in one case. Another twist to the case is that even though it is now known Shelden is innocent, she has apparently convinced herself that she was present during Wilson's murder so she has not recanted her confession.

When Stratton was interviewed about the dramatic events he set in motion by taking White's case, he observed, "It's important to keep in mind that the pursuit of justice isn't just won by a conviction – it's by the conviction of the right person for that crime. Unfortunately, that gets lost sometimes. It obviously did in this case."<sup>4</sup>

### Joyce Gilchrist's early connection to the Wilson case was undetected

Questions had been raised for years about the quality of Gilchrist's work with Oklahoma City's crime lab and the reliability of her testimony, when her competence came under intense scrutiny in May 2001. That is when it was discovered by DNA testing that her faulty testimony about hair and semen analysis contributed to Jeffrey Pierce's wrongful 1986 conviction in Oklahoma for rape. Pierce was released after 15 years in prison.

In a case three years earlier Robert Lee Miller Jr. was exonerated by DNA testing after spending ten years on Oklahoma's death row. Miller was convicted in 1988 of a 1986 rape and murder based on Gilchrist's trial

testimony. After Miller's release a man was charged with the crime after he had been cleared by Gilchrist prior to Miller's arrest.

After Pierce's release the problems with cases Gilchrist had been involved with resulted in the FBI conducting an investigation into her lab work and courtroom testimony. The FBI determined she had "misidentified evidence or given improper courtroom testimony in at least five of eight cases the agency reviewed."<sup>5</sup> The FBI also found her laboratory notes "were often incomplete or inadequate to support the conclusions she testified to."<sup>6</sup> Gilchrist was fired in September 2001 as supervisor of Oklahoma City's crime lab due to "laboratory mismanagement, criticism from court challenges and flawed casework analysis."<sup>7</sup>

In 2001 Oklahoma's Governor responded to the FBI's findings by ordering an investigation into the over 3,000 felony cases Gilchrist was involved as a technician from 1980 to 1993. However, no one made the connection between Gilchrist and her faulty blood analysis a month after Wilson's murder that resulted in Smith's erroneous exclusion as a suspect. Further investigation of Smith in 1985 might have resulted in the discovery of more evidence linking him to the crime, and during questioning it is possible he would have provided details known only by Wilson's assailant. So the Beatrice Six can be added to the list of people wrongly convicted due to Gilchrist's questionable competence.

#### Sources and Endnotes:

1 Wrongful convictions pinned to old forensic science, by Paul Hammel, Leslie Reed and Martha Stoddard, *Omaha World-Herald*, November 13, 2008.

2 White released after 18 years, *Beatrice Daily Sun*, October 16, 2008.

3 *Id.*

4 Norfolk attorney part of historic DNA case, *Norfolk Daily News*, October 28, 2008.

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6 *Id.*

7 Police chemist fired for shoddy work and misleading testimony, *The Berkeley Daily Planet* (Berkeley, CA), September 26, 2001.



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## Dixie Chicks Sued For Libel

Damien Echols, Jessie Misskelley Jr. and Jason Baldwin were teenagers when charged with the 1993 murders of three 8-year-old boys in West Memphis, Arkansas. There was no incriminating physical evidence, murder weapon, or connection of the three teenagers to the victims. The prosecution's theory was the teenagers killed the children as part of a satanic ritual. Key evidence was a "confession" by the mentally handicapped 17-year-old Misskelley after 12 hours of interrogation without having access to a lawyer or his parents. Misskelley's statement was grossly inconsistent with the facts of the crime that would have been known to a participant, and false confession expert Richard Ofshe testified during Misskelley's trial that his confession, was a "classic example" of police coercion.

Convicted of the murders, Echols was sentenced to death, Baldwin received life without parole, and Misskelley got life plus 40 years. Dubbed by the media the "West Memphis Three" (WM3), their case became a *cause célèbre*, with arguments for their innocence set-out in several books and two HBO documentaries, *Paradise Lost* and *Paradise Lost 2*.

Post-conviction DNA testing of crime scene evidence the WM3 had sought for years was performed in 2007. The three were excluded. In October 2007 Echols filed an amended federal writ of habeas corpus based in part on the new DNA evidence. However, the DNA did match Terry Hobbs, the step-father of one of the victims. The petition included that information plus evidence from Hobbs' former wife that could implicate him in the murders.

Dixie Chicks lead singer Natalie Maines saw *Paradise Lost* in the summer of 2007. After further looking into the case she was inspired to write on the Dixie Chicks' Myspace.com blog on November 21, 2007: "The evidence is so strong that at the very least the judge will grant a new trial, but hopefully he will overturn the verdict and these guys will finally be sent home to their lives and families. I know that this is a hard thing to just take my word on, so please look at the case and the evidence for yourself. ... The system hasn't only failed Damien, Jesse, and Jason, but it has failed the three little boys that were murdered. Their killer(s) is still out there, and justice has yet to be served."

Movie stars Johnny Depp and Jack Black, and rock musician Eddie Vedder of Pearl Jam are other celebrities who have publicly

expressed support for the WM3.

On December 19, 2007 at a rally for the WM3 in Little Rock, Arkansas, Maines told the crowd that DNA evidence and the behavior of Hobbs suggested he played a role in the murders. Maines also posted a letter on the Dixie Chicks' website expressing a similar opinion about Hobbs. Maines' comments and writing was consistent with what was in the 200-page habeas petition prepared by Echols' lawyers.

On November 25, 2008 Hobbs filed a lawsuit in Pulaski County, Arkansas Circuit Court naming each of the Dixie Chicks as a defendant. Based on Maines' comments and information on the Dixie Chicks' website, Hobbs is alleging defamation, libel, intentional infliction of emotional distress by outrageous conduct and false-light invasion of privacy. He is seeking an unspecified amount of compensatory and punitive damages.

As of late November 2008 the West Memphis Three remain imprisoned while they pursue overturning their convictions.

### Sources:

Natalie Maines Sued Over Defense Of 'West Memphis Three', *The Post Chronicle* (Denville, NJ), December 5, 2008. Dixie Chicks, WM3 - CALL TO ACTION, November 21, 2007, <http://blog.myspace.com>

## Kirstin Blaise Lobato's Unreasonable Conviction

### Possibility Of Guilt Replaces Proof Beyond A Reasonable Doubt

By Hans Sherrer

The Justice Institute, 2008, 106 pages  
8-1/2x11 softcover, \$10

Review by Michael H. Fox

### KIRSTIN BLAISE LOBATO'S UNREASONABLE CONVICTION

Possibility Of Guilt Replaces Proof Beyond A Reasonable Doubt



Imagine you are a prosecutor. A murder occurs in your jurisdiction and you want the case cleared as easily as possible. An autopsy of the gruesomely murdered victim indicates an act carried out with extreme vengeance and strong male homosexual overtones.

Although several men are known by the police to have the motive, means and opportunity to have committed the crime, they aren't investigated. A bit of vague hearsay leads to an 18-year-old female, hardly the description of a twisted male homosexual. You charge her with the crime, and then discover she was 170 miles

away from the scene at the time of the incident. When it is time to go to trial, you have no physical or forensic evidence, eyewitnesses, or confession. Can you win the case? The answer, quite shockingly, is yes. This what to do:

1) Inflame the jury. Human beings, first and foremost, are emotional creatures. Appealing to passion will usually override logic and facts.

2) Make deals with witnesses and rely on hearsay. Suspects charged with crimes will be happy to lie in return for leniency. Use a jail house snitch. Our nation's jails are full of innocents who allegedly confessed their crimes to com-

plete strangers while in custody. Among the many wrongful convictions based on snitch testimony are those of Kerry Max Cook and Ron Williamson.

3) Try the case in front of a former prosecutor. They all know the criminal element deserves punishment, to hell with the facts. And if the judge is a former colleague from the same office, a sweet result is nearly guaranteed.

4) Create the possibility of guilt. Of course, guilt is supposed to be proven beyond a reasonable doubt, but so what? When the jury is inflamed, jail house snitches sing, incredible witnesses testify, and the judge is a former chum, the high standard of reasonable doubt can be decreased to "it's possible she did it."

The above scenario is the unexaggerated and sorrowful story of the conviction of Kirstin Blaise Lobato. Lobato was convicted in May 2002 of murdering a homeless man and sexually assaulting his corpse in Las Vegas. The Nevada Supreme Court overturned her

conviction because of errors by her ex-prosecutor judge. She was then reconvicted in October 2006 after a near carbon copy retrial before the same judge. While CSI and many other TV dramas focus on the scientific methods used for capturing criminals, much less is said about the emotional and inflammatory *modus operandi* utilized for convicting the innocent.

This book is an easily readable yet shocking introduction into the realm of prosecutorial malfeasance. It should be mandatory reading for introductory criminology courses, and anybody with a budding interest in wrongful arrest and miscarriages of justice.

About the reviewer. Michael H. Fox is an associate professor at Hyogo College in Kakogawa City, Japan, and director of the Japan Institute for the Study of Wrongful Convictions, [www.jiswac.org](http://www.jiswac.org)

*KBL's Unreasonable Conviction* can be purchased from JD's Book-Shop (See. P. 21), or send \$10 (stamps OK) to: Justice Denied; PO Box 68911; Seattle, WA

## Earprint Burglary Conviction Tossed

Mark Kempster was a 35-year-old handyman when convicted in March 2001 of burglarizing a widow's home in Southampton, England of about \$90 (£45). (Southampton is 80 miles southwest of London.) Kempster had performed some work around the woman's home several months prior to its midnight burglarization in June 2000.

No fingerprints or biological material traceable to the burglar was found in the house. What the police did find was the impression of an earprint recovered from the outside of the window where the burglar entered the house. The police theorized that before entering the house the burglar listened at the window for noise to be sure no one was awake. The woman was awoken by the burglar who asked her where her money was. His head was covered so she couldn't identify him.

Southampton police fingerprint examiner Cheryl McGowan provided the prosecution's key evidence against Kempster. She had some familiarity with comparing earprints, and she compared an impression of Kempster's earprint with the crime scene earprint. Kempster was charged with the burglary based on McGowan's report that the earprints matched.

At Kempster's trial McGowan testified that earprints are unique like fingerprints in that no two person's earprints are alike. Kempster's attorney neither challenged McGowan's testimony about the uniqueness of earprints, nor the methodology she used in comparing the crime scene earprint with Kempster's earprint. Furthermore, he did not present expert testimony to counter her assessment that the windowpane earprint matched Kempster's ear.

Kempster was so distraught at his lawyer's performance that he fired him in the middle of the trial. After the judge refused to declare a mistrial, Kempster proceeded to represent himself. He testified that he had been to the victim's house twice while performing work for her, but that it was ridiculous to suggest he would burglarize the house of someone that knew him well and could identify him. He also testified that he couldn't have committed the burglary because on the night it occurred he was out with his family until about midnight, and that when they returned home they discovered his horse had given birth to a foal. Kempster's wife, mother and brother-in-law all testified consistent with his alibi, and a similar statement by his sister was read into the record. That timeline wouldn't have enabled Kempster to commit the burglary,

which was in progress when the woman's silent alarm alerted the police at 12:16 a.m.

The prosecution argued Kempster cased out the house for valuables when he worked on it. The jury relied on McGowan's unchallenged testimony to reject Kempster's alibi and convict him of the burglary. He was sentenced to ten years imprisonment.

Kempster's family hired a lawyer to handle his appeal. The lawyer hired an expert to provide evidence in support of the appeal's ground that McGowan's earprint testimony had no probative value and should have been excluded. The expert, Dr. Christophe Champod, did not compare the crime scene earprint with Kempster's earprint. Instead he approached the issue from the perspective that earprint analysis is an imperfect evolving identification technique, and it "could properly be used to exclude a person as a suspect, but it could not provide a positive identification of a suspect." The Court of Appeal denied Kempster's appeal in December 2003.

Kempster's family then hired Dr. Graeme Ingleby to analyze the earprint evidence in preparation for submittal of an application to England's Criminal Case Review Commission. Dr. Ingleby is a respected expert involved in a European research project known as FearID (Forensic earprint identification), that was set up to evaluate the use of earprint identification as forensic evidence. Ingleby examined the same evidence that McGowan relied on. His conclusion, however, was much different: The windowpane earprint relied on to convict Kempster was of insufficient quality to make a reliable match with his ear.

Kempster application to the CCRC was largely based on Ingleby's report, and they accepted his case in April 2006. After conducting an investigation that included a more elaborate analysis by Ingleby of the actual earprint evidence, the CCRC referred Kempster's case to the Court of Appeal in May 2007.

During the hearing in the Court of Appeal on April 16, 2008, the CCRC's case primarily consisted of a presentation by Dr. Ingleby of the three reasons why he thought the identification of Kempster's earprint as the source of the crime scene earprint was unreliable. First, he demonstrated that the documentary evidence presented by McGowan during the trial purporting to show a match in fact shows significant irreconcilable differences between the two earprints. Second, he presented his own transparencies of the crime scene earprint laid over Kempster's earprint to demonstrate the discrepancies between the two earprints. Third, he explained that the crime scene earprint was of insufficient qual-

ity to make an identification of its source, since it didn't provide enough minute anatomical features such as notches, nodules or creases in the ear structure to reliably be matched with Kempster's earprint. However, he also explained that the non-minute details present were sufficient to exclude Kempster as the source – since the outside rim of the two ears had different measurements.

Michael Mansfield, one of England's most respected lawyers, represented Kempster during the hearing. He argued to the court after Ingleby's presentation that ear print evidence was "art more than science," and that it was a "highly subjective" identification technique that was "still in its infancy."

After the hearing the court orally overturned Kempster's conviction based on the unreliability of his identification as the culprit by a lone earprint. The court's written decision was released three weeks later. (*R v Kempster*, [2008] EWCA Crim 975 (07 May 2008))

Kempster was fortunate to have the unconditional support of his family was willing and able to hire lawyers and experts to help him. They know of his innocence because he was with them when the burglary was committed.

### Sources:

*R v Kempster*, [2008] EWCA Crim 975 (07 May 2008)  
Ear evidence gets a day in court, *BBC News*, April 16, 2008.

## Cab Video Nixes Rape Claim

After a young couple directed a cab driver to take them to an early morning party in May 2008, they jumped out at the destination without paying. The woman forgot her purse, and when she returned to get it back the Stockholm, Sweden cab driver told her he would report them to the police if they didn't pay.

The woman refused to pay, and to get her purse back the couple reported to the police that the cab driver raped her. The police stormed the cab driver's home and arrested him. He explained what happened and the cab's surveillance video backed up his claim that the couple fled the cab without paying.

The driver was released and when confronted with the video the man and woman admitted they made up the rape story to get her purse back without paying the cab fare. The couple were then charged with bearing false witness for filing the fake rape report.

The driver told a reporter, "I felt like I'd lost all my rights when I was suddenly arrested. I just wanted to get paid for the trip."

Source: Cab driver cleared of false rape allegations, *The Local* (Stockholm, Sweden), September 29, 2008.

# JD Editorial

## Sentencing Enhancements Hurt The Innocent

It is well-known that an innocent person in the U.S. can be subjected to the misjustice of being wrongfully convicted. But insisting on one's innocence also typically results in a much harsher sentence than falsely accepting responsibility by taking a plea deal, or failing to express remorse after one's conviction.

Actual accounts abound of an innocent person being offered probation or a relatively short sentence before trial, and then given a long sentence or even life in prison after a conviction. That treatment can be described as the "innocence sentencing enhancement," since a guilty person indicted for the same criminal conduct as an innocent person is rewarded with a much lesser sentence for agreeing to a plea deal.

The "innocence enhancement" is not an anomaly. There are a number of state and federal sentencing policies that can enhance a convicted person's punishment. These enhancements include: a prior convicted offense(s) (e.g., three-strike laws); uncharged alleged offenses; and offenses a person has been acquitted of committing. A mandatory minimum sentence can even be considered as an "innocence enhancement" when an innocent person has refused a plea deal for a lesser offense that would have removed him or her from being subjected to a mandatory sentence.

High-sounding rationales are offered for these sentencing policies. But there is another *de facto* sentence enhancement that is

even more insidious, because it is only applied to a person whose period of confinement is considered insufficient *after* their sentence has been served in full.

That enhancement is civil commitment, and it can result in a person's confinement for life – even if their original sentence was for only a few years. In 1997 the Supreme Court approved civil commitment of a person who has completed their criminal sentence. (See, *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997)) After a commitment trial a person judged likely to reoffend can be confined in a prison-like special facility until such time as he or she is no longer deemed a threat to society.

The prosecution is not hampered during a commitment proceeding by a criminal trial's requirement of presenting proof beyond a reasonable doubt.

Washington state has a civil commitment law for a person convicted of a sex offense involving violence. The perpetrator of a series of sexual assaults in Spokane in the late 1970s and early 1980s was dubbed the South Hill rapist by the media. Kevin Coe was convicted of four South Hill rapes after his 1985 trial, but the Washington Supreme Court reversed three of those convictions. Insisting on his innocence, Coe refused to participate in prison sex offender programs. Coe completed his 25-year sentence for the one conviction in September 2006. The 59-year-old Coe had paid a serious debt to society that he claimed he didn't owe. (*Justice:Denied* featured Coe's case in Issue 25 (Summer 2004)).

However, instead of being released as a free person Coe was immediately jailed by the State to await a civil commitment trial.

Coe's commitment trial began in September 2008 in Spokane. The judge stretched the outer bounds of the rules of evidence by allowing extensive hearsay, opinion, and alleged "bad character" and "bad acts" evidence that the State relied on to argue Coe was a threat to commit a sexual assault if permitted to live in society. On October 16, 2008 the jury announced its verdict that Coe should be confined in Washington's Special Commitment Center until such time as he is no longer considered a threat. If Coe continues to assert his innocence he will never be released, so the juror's verdict effectively "enhanced" his original 25-year sentence to the equivalent of life without parole.

Innocent or not, Kevin Coe completed the sentence for the crime of which he was convicted. If he is innocent he has already been subjected to a horrific injustice for more than two decades. If he is guilty he served his prison sentence. Every person in Washington and other states confined because of the "civil commitment enhancement" should be immediately released and those laws repealed. Not only is the prediction of future behavior a voodoo like craft and not a scientific process, but a commitment proceeding more resembles a hysteria driven 17<sup>th</sup> century witch hunt than a search for the truth.

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**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 layperson. #40

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**Legal Research: How to Find & Understand the Law** (14th ed.) (Sept. 2007) by Attorney's Paul Bergman & Sara J. Berman-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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**Surviving Justice: America's Wrongfully Convicted and Exonerated** edited by Dave Eggers & Lola Volian - \$16 - 512 pgs. Thirteen exonerates describe their experiences, the events that led to their convictions, their years in prison, and their new lives outside. The exonerates tell of the devastating effect of incarceration on them and their loved ones, and how they have been forever changed by their experience. #49

**No Crueler Tyrannies: Accusation, False Witness, and Other Terrors of Our Times** by Dorothy Rabinowitz - \$13 - 256 pgs. Examines some of the sex-abuse cases of the 1980s and 90s that saw dozens of innocent adults convicted of absurd charges. Included are the "sex-rings" cases in Wenatchee, Washington where 19 people were wrongly convicted of sex abuse charges. Also included is the Anirault case in Malden, Massachusetts, where bizarre false allegations were taken seriously. #52

**The Innocent Man** by John Grisham - \$7.99 - 448 pgs. Best selling author John Grisham spent two years researching and writing this account of Ron Williamson's life, and how he was convicted of rape and murder and sentenced to death in Oklahoma in spite of being innocent. #95

**In Spite of Innocence: Erroneous Convictions in Capital Cases** by Michael Radelet, Hugo Adam Bodau and Constance Putnam - \$24.95 - 416 pgs. Details how over 400 Americans were wrongly convicted in cases carrying the maximum penalty of a death sentence. Expands on well-known 1987 Stanford Law Review article by Radelet and Bodau that has been cited several times in U.S. Supreme Court opinions, most recently in June 2006. #15

**Actual Innocence** by Barry Schack. Peter Neufeld and Jim Dwyer - \$14.95 - 432 pgs. Latest edition. Case histories explain how people have been wrongly convicted by erroneous eyewitness identification, jailhouse informants, junk science, perjured testimony, prosecutor and police concealment of evidence, etc. Explains how new evidence, including scientific tests, has helped free wrongly convicted people. #16

**Wrongly Convicted: Perspectives on Failed Justice** Ed. by Sandra Westervelt and John Humphrey - \$23.95 - 301 pgs. Articles by leading authorities explain how and why wrongful convictions occur. The book is divided into four sections: the causes of wrongful convictions; the social characteristics of the wrongly convicted; case studies and personal histories; and suggestions for changes in the legal system to prevent wrongful convictions. #18

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**Dehumanization Is Not An Option** by Hans Sherrer - \$10 - 106 pgs. Explains that the mistreatment of prisoners is not due to the rogue actions of a few "bad apples." It is a predictable response of placing people in a position of authority over others that they see as undeserving of humane treatment. This attitude of treating people barbarically is unleashed in those working in an authoritarian prison environment. #106

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New York Judge John Collins

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# JUSTICE DENIED

The Magazine for the  
Wrongly Convicted

### Courts Ignore Alibi By Police Officer That Derrick Hamilton Was 82 Miles From Murder Scene

A decorated 17-year veteran of the New Haven, Connecticut Police Department has sworn in an affidavit that Derrick Hamilton was meeting with her on January 4, 1991 at the exact time a murder was committed 82 miles away in Brooklyn, New York. Hamilton's lawyer did not subpoena the officer to testify at his trial, and no state or federal judge has permitted the officer's affidavit to be considered as evidence supporting a new trial for Hamilton.

See the article on page 10.

The scales of justice are tipped against innocent people all across the country - from Maine to Hawaii and from Alaska to Florida.

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