

Felipe G. Vargas was arrested November 7, 2003 at his home in the central Washington town of Quincy. He was charged with child molestation and indecent liberty with a minor.

The 39-year-old Vargas insisted on his innocence and asked to take a polygraph test, but his public defender, Thomas Earl, didn't arrange for a test and talked him into waiving his right to a speedy trial. Vargas was unable to post his \$100,000 bail, so he languished for months in the Grant County Jail.

There was no medical, forensic or corroborating eyewitness evidence to support the charges based on the victim's allegation. So in June 2004 the Grant County Prosecuting Attorney agreed to administration of a polygraph test. After Vargas passed the test a second test was conducted that he also passed. The prosecutor then agreed to drop the charges. Vargas was released after being jailed for seven months.

Vargas subsequently retained Moses Lake civil attorneys George Ahrend and Garth Dano. Among the information they discovered was that three days after Vargas' arrest the alleged victim recanted her accusation. Earl didn't know that because he did not hire an investigator to interview the girl, he did not file a discovery motion, and neither the police or the prosecutor voluntarily disclosed that information to him.

In 2006 Vargas' lawyers filed a federal civil rights lawsuit in Spokane's U.S. District Court on his behalf that named Grant County and Earl as defendants. The suit sought \$500,000 in actual damages and unspecified punitive damages. Vargas' key claim was that Earl provided ineffective assistance of counsel as the fixed-fee contract provider of public defender services for Grant County.

Grant County and Earl's summary judgment motions were denied by U.S. District Court Judge Justin Quackenbush. To avoid the risk and expense of a trial, in December 2008 Grant County settled with Vargas for \$250,000. Earl refused to negotiate a settlement, and the trial began in Spokane on January 26, 2009.

During the trial in which Earl represented himself, it was disclosed to the jury that Earl had a \$500,000 contract with Grant County in 2003 to provide felony case public defender services. The contract was all-inclusive, with Earl agreeing to hire lawyers, investigators, interpreters and even covering the cost of things such as polygraph tests, from the \$500,000. It was also disclosed that Earl handled 554 felony cases in

Felipe Vargas Awarded \$3 Million For Ineffective Assistance Of Counsel

2003, and that he also handled probation violation and family law cases in his private practice. On average Earl spent two hours with his felony clients from their arrest to their sentencing or release. The Washington Bar Association endorses the guidelines of The National Advisory Commission on Criminal Justice Standards and Goals that recommends a public defender be assigned a maximum of 150 felony cases per year. So Vargas' caseload was much larger than what is recommended for a public defender.

The specific details of Earl's representation of Vargas were also revealed. Earl failed to appear for Vargas' first two court appearances, and he had his son – a legal intern who failed is bar examination – interview Vargas. He also told the judge at one point he was ready for trial when he had done no preparation or any work whatsoever on Vargas' case.

Earl's ethical violations while providing legal services as Grant County's contract public defender resulted in his permanent disbarment from practicing law in Washington by order of the state Supreme Court on May 7, 2004. Among Earl's ethical violations was he solicited money from indigent clients whose case he had contracted with the county to represent at no charge.

Las Vegas Prosecutors Routinely Pay For Pre-trial Witness Interviews

In February 2009 it became public that for many years the Clark County, Nevada District Attorney's Office has paid witnesses for pre-trial interviews.

The longstanding practice came to light during an attempted robbery and kidnapping with a deadly weapon trial in Las Vegas. The prosecution's key witness was a 22-year-old woman with a record of prostitution and drug arrests. She testified during cross-examination that she was paid \$50 when interviewed by the prosecutor prior to trial — \$25 for coming to the meeting, plus another \$25 for transportation. She also testified that she used the \$50 to buy crack cocaine immediately after the meeting. The prosecution had not disclosed the witness' payment to the defendant's lawyers. After the woman testified an investigator for the district attorney's office testified. The following are excerpts

Seattle University legal ethics Professor John Strait testified that flat-fee public defender contracts "are all illegal and unethical for any attorney to enter into." The less money Earl spent on hiring attorneys or investigators the more he pocketed himself. In 2002 he kept at least \$255,000 of the \$500,000 the county paid him. In September 2008 the Washington Supreme Court strengthened the conflict-of-interest rules barring an attorney from putting his or her personal financial interests ahead of the due process rights of a criminal client.

The impact of Earl's representation on Vargas' life was revealed in testimony that he lost his job because of his prolonged jailing, friends deserted him, and he continues to experience psychological trauma.

On January 30 the jury returned their verdict in favor of Vargas. He was awarded \$762,000 in compensatory damages and \$2.25 million in punitive damages.

The 54-year-old Earl canceled his attorney malpractice insurance, and is seeking bankruptcy protection from creditors, so it is possible Vargas will receive none of the \$3.012 million award.

Sources:

Former public defender disbarred, accused of enriching self at poor clients' expense, *Seattle Times*, May 8, 2004
Man left in jail wins \$3 million, *Spokane Spokesman-Review*, January 31, 2009.

from the court transcript:

Deputy District Attorney: Is it customary for the District Attorney's Office to set up what's called a pretrial conference?

Investigator: Yes, it is.

...

DDA: "Are there times that a witness is paid for their appearance at that pretrial conference or their expenses getting to and from the courthouse are paid?"

Investigator: "All the time. Yes."

With the jury knowing about the witness' pre-trial payment, the defendant was acquitted.

The defendant's attorneys had never heard about pretrial payments to a prosecution witness, and when word began circulating in the Las Vegas legal community, other defense attorneys not only expressed surprise at the payments, but said they could be both illegal and unethical. Phil Kohn, the Clark County Public Defender, said he had never before known that prosecutors were paying witnesses for pre-trial interviews.

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Professor Carolyn Kronenberg was beaten, raped and strangled in her Lansing Community College classroom between 8:30 and 8:40 a.m. on January 23, 2005. Police had no leads so they began questioning everyone known to be on the campus at the time of the crime. One of those people was 27-year-old LCC student Claude McCollum, who had never taken any of Kronenberg's classes. Five days after the murder he consented to be interviewed without an attorney present. McCollum seemed to make some incriminating admissions, so he was interviewed further. The next day he was charged with murdering and sexually assaulting Kronenberg.



Michigan Prosecutor Fired For Role In Claude McCollum's Murder Conviction

In August 2007 27-year-old Matthew Emmanuel Macon was arrested on suspicion of murdering six Lansing area women beginning in 2004.

McCollum's supporters began publicly demanding that Kronenberg's murder be reopened. His sister Carol told reporters, "We thought the trial was a travesty of justice, the way he was railroaded, because they had no evidence, no DNA, no nothing. When you're convicted of murder, that's supposed to be without reasonable doubt." In early September 2007 the Ingham County prosecutor's office reopened Kronenberg's case. About a week later the prosecutor and McCollum's attorney filing a joint motion for a new trial.

On October 16, 2007 McCollum was released on a personal recognizance bond pending a retrial, and a week later the prosecutor dismissed the charges. McCollum had been incarcerated for 21 months.

The Ingham County prosecutor didn't act only because the week of McCollum's release Macon made a credible confession to murdering Kronenberg. The prosecutor had also been contacted in September by the Michigan State Police that there was video evidence exonerating McCollum.

That evidence was a tape from a surveillance camera in the lobby of a LCC building other than the one where the crime occurred. The tape showed that between 7:38 a.m. and 9:36 a.m. McCollum was visible and never left the building. Since Kronenberg was killed in a different building between 8:30 a.m. and 8:40 a.m., McCollum could not have committed the crime.

Prior to McCollum's trial his prosecutor Eric Matwiejczyk and the lead detective were specifically informed of the exculpatory video by Michigan State Police Detective Sgt. James

Young. Young wrote in his March 28, 2005 supplementary report, "McCollum was visible on camera #7 (TLC lobby) during the entire time period of 7:38 a.m. and 9:36 a.m."

In the wake of the revelation that the exculpatory tape and state police report had not been disclosed to McCollum's attorneys, the Michigan Attorney General's Office began an investigation into the case.

The report was publicly released on August 19, 2008. Although the report determined Matwiejczyk's actions weren't criminal, it did conclude, "Matwiejczyk's actions and omissions may have denied McCollum a fair trial and prejudiced the administration of justice."

McCollum's attorney Hugh Clarke Jr. told reporters, "We didn't need the report to tell us that. ... It's obvious he violated the rules of ethical conduct."

One day after the report's release, Ingham County Prosecutor Stuart Dunning III announced Matwiejczyk had been fired as an assistant prosecutor.

After McCollum's release he filed a still pending federal civil rights lawsuit that named Ingham County and several prosecutors and detectives as defendants.

Sources:

McCollum gets life in prison, no parole, *The State News* (East Lansing, MI), April 13, 2006.
 Prosecutor knew video cleared McCollum, *Lansing State Journal*, February 13, 2008.
 Ingham Co. assistant prosecutor fired, *Lansing State Journal*, August 21, 2008.

There was no physical, forensic or eyewitness evidence against McCollum. During his February 2006 trial the case against him was based on his audio and videotaped statement to the police. While bantering with a team of interrogators he gave convoluted answers to hypothetical questions about what could have happened, saying at one point, "Did I do it? I could have done it, unconsciously in my sleep." Under repetitive questioning McCollum did repeat back a scenario of how the crime occurred, but McCollum's brother and Kronenberg's son separately told reporters during the trial that things he said didn't fit what they knew.

Even though the prosecution's forensic expert testified that foreign DNA under Kronenberg's fingernails was not from McCollum, the jury convicted him after a ten-day trial. During the hearing when he was sentenced to life in prison without parole McCollum told the judge that he did not commit the crime. As he was being led out of the courtroom friends and family members disbelieving he was guilty hollered to him, "We love you," "It's not over," and "We know the truth will come out."

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When asked by the *Las Vegas Sun* about paying witnesses before trial, DA David Roger said that Clark County prosecutors have been doing it for at least 22 years.

However, prosecutors have not been disclosing the witness payments, and thus defense lawyers have not known to cross-examine a witness about having a possible ulterior financial motive to testify against a defendant.

Nevada ACLU Executive Director Gary Peck said about the payment practice, "We are especially concerned about the failure to disclose, which we believe is a legal obligation."


Nevada law specifically allows the payment of \$25 to a witness for testifying during trial. In defending its witness interview payments, the DA's office is arguing the law also applies to pretrial witness interviews — but there is no such language in the law, and there has never been a court case extending authorization to make the payments.

It is unknown what effect the Clark County DA's failure to disclose the payments may have on the cases of persons convicted by the testimony of a secretly paid witness.

Source:

Controversy erupts over prosecutors paying witnesses for interviews, *Las Vegas Sun*, February 13, 2009.

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