

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.

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## 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 pocked 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.

**Payments cont. on page 19**