

# JUSTICE DENIED

The Magazine for the  
Wrongly Convicted

**Donald Knight**



Awarded total of \$289,983 for wrongful imprisonment in New Zealand for arson.  
See page 16

**Phillip Johnston**



**Maurice Caldwell**



Released after 21 years of wrongful imprisonment in California for murder.  
See page 14

**Réjean Hinse**



Awarded \$13.57 million for 5 years of wrongful imprisonment in Canada for robbery.  
See page 10

**Koua Fong Lee**



Can't sue Toyota for 2-1/2 years wrongful imprisonment for vehicular homicide that may have been caused by defective car.  
See page 7

**Amanda Knox**



Acquitted of murder after 4 years of wrongful imprisonment in Italy.  
See page 12

**Raffaele Sollecito**



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**Armed Robbery Conviction Tossed For Man Walking Near Crime Scene!**

**Police Dogs Wrong 85% Of The Time In Searches For Drugs And Explosives!**

**Four Men Exonerated 38 Years After Convictions For Singing In Pub!**

**Two Men Acquitted Of Murder After 29 Years Imprisonment In Japan!**

**New Fingerprint Technology Could Aid the Wrongly Convicted!**

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**Message From The Publisher**

For more than 100 years fingerprints that are aged, dry and weak have not been able to be accurately identified. A new technique developed in Australia that can detect amino acids deposited by sweat from a fingerprint overcomes the limitations of traditional identification methods. One use of the technique can be to seek new evidence for a person claiming actual innocence. See p. 5.

False rape accusations are so common that there are websites tracking them. (See e.g., [falserapecociety.blogspot.com](http://falserapecociety.blogspot.com)) A Swedish woman who falsely accused a man of rape while she was vacationing in Greece has been sued by her male victim for libel. See p. 10.

John Demjanjuk fought for decades accusations that during WWII he either assisted in or was present during the murder of innocent people in Nazi death camps. His 1988 conviction and death sentence in Israeli was overturned based on his misidentification, and his 2010 conviction in Germany of accessory to murder has been overturned after he died during his appeal. Newly discovered FBI documents reveal he was convicted on unreliable evidence. See p. 11.

Although federal courts are the last resort for an innocent state prisoner to correct a wrongful conviction, the U.S. Supreme Court has sent the clear message to federal courts that when in doubt a state prisoner’s habeas corpus petition should be denied. See p. 19.

It is well documented that false testimony by a jailhouse informant has resulted in many wrongful convictions. California has passed a revision to its evidence code that an informant’s testimony about a fellow prisoner’s alleged confession is inadmissible without corroboration by forensic evidence or uncompromised testimony. See p. 11.

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



## Introduction

In 1985, Erskine Leroy Johnson was convicted and sentenced to death for a crime that he didn't commit. After 20 years on death row, his death sentence was overturned and he was resentenced to life in prison with the possibility of parole. In overturning the death sentence, a unanimous Tennessee Supreme Court found that the State had improperly withheld critical evidence from the defense pertaining to the penalty phase of the trial.

## The Crime

On the morning of October 2, 1983, Joe Belenchia, a white storeowner, was shot and killed by a black man while tending the cash register at his Memphis supermarket. It was a Sunday morning and there were at least ten people in the store who witnessed the attempted robbery and shooting. Witnesses said that two black men and a black woman entered the store. The woman and one of the men held the store security guard at gunpoint while the main perpetrator approached Belenchia's register and demanded money.

The car used in the crime had been stolen from a rental car agency at the St. Louis, Missouri airport. Concluding that the perpetrators were from St. Louis, the police immediately began investigating suspects from the area.

## The Prosecution's Case Against Johnson

• Eyewitness testimony. None of the more than 10 eyewitnesses to the crime could positively identify Johnson as one of the perpetrators of this robbery/homicide. At trial, the state did call one eyewitness, Tommy Perkins, who testified that Johnson kind of looked like the shooter. Perkins admitted under cross-examination that he was not more than 80 percent sure of his identification. In Johnson's case the best the police could do was get one eyewitness to say that Johnson resembled the person who committed this crime. Perkins further testified that the police and prosecutors repeatedly showed him "several photos" of Johnson and told him "this person had been caught."

The prosecution presented another eyewitness, David Johnson, who saw the shooting at close range and was able to describe in detail the shooter's actions and words. David Johnson testified that he did not recognize Johnson as the shooter. Investigators working on Johnson's behalf found and interviewed David Johnson in 2006. He

# Erskine Johnson Convicted Of Memphis Murder When He Was 300 Miles Away In St. Louis

By Erskine Johnson

stated that prior to his testimony the police and prosecutors showed him photographs of the victim's autopsy and several photos of Johnson, and tried to coerce him into identifying Johnson.

• Immunity in Exchange for Testimony. The prosecutor made a deal with two witnesses the police learned about after they received an anonymous tip that the perpetrators were from out of town and had been visiting those witnesses — Elizabeth Starks and Dennis Williams — the weekend of the homicide.

Elizabeth Starks gave three different statements to police before my trial. In her first statement, she made no mention of Johnson. The police withheld this first statement from Johnson's trial lawyer. By the time the trial began, Starks had changed her story dramatically. Before the jury, she testified that Johnson was at her house in Memphis the night before and morning of the crime and that he and some of his companions left her home to take Williams to the store around the time that the crime occurred. Starks admitted, however, that she was able to "identify" Johnson only after police repeatedly put his picture, Johnson's picture alone, in front of her four of five times.

Defense investigators have discovered that Starks had a strong motive to lie: she had a strong connection to the group of individuals that are likely responsible for this crime. One of the members of this group was a close childhood friend of Starks. Accordingly, Starks may have identified Johnson as a means of diverting attention from the actual perpetrators and thus protecting herself and her friends.

Williams gave a statement prior to trial in which he supported Starks' final version of events. In short, he stated that Johnson was at Starks' house the weekend of the crime and was talking about committing a robbery. At the trial itself, however, Williams refused to cooperate with the prosecution and responded to all of the prosecutor's questions with the same response, "I don't recall." Williams has recently given a statement to defense investigators, admitting that he identified Johnson only because police pressured him to do so. He insists that Johnson was not one of the visitors at

Stark's house that weekend.

• A Last Minute Witness. Seeking to shore up its weak case, the prosecution called a surprise witness, Beverly Batts. Batts was a convicted felon who several years earlier had falsely accused Johnson's niece of committing a crime that Batts had actually committed.

Batts testified at trial that Johnson had confessed to her that he had committed a murder in Tennessee. She was able to provide little detail of this alleged confession.

Since Johnson's trial, his new lawyers have developed significant evidence discrediting Batts' testimony, and that the police participated in the fabrication of her testimony.

• Physical Evidence. The prosecution claimed that they were able to match a palm-print of Johnson's purported to be lifted from the getaway car. But according to the police own reports, they did **not** lift any prints from the area of the car where they claim to have found Johnson's palm-print. The prosecutors also withheld a print examiner's report that stated that Johnson's prints were checked and they didn't match. It is also suspicious that the police did not make this "match" until nearly a year after they had access to his print file.

## Johnson's Alibi Defense

In 1983, the year the crime occurred, Johnson was living in St. Louis, Missouri — the city where he was born and raised. St. Louis is about 300 miles from Memphis.

The crime occurred in Memphis on the early morning of Sunday, October 2. The Saturday evening before the crime, Johnson and his brothers, sisters, family and friends were attending a surprise birthday party in honor of his mother at her home.

Prior to trial, the family provided Johnson's defense lawyer with a list of more than twenty five people who were at the birthday party and could testify that Johnson was there. Johnson's lawyer failed to interview many of these witnesses and only called six to testify at trial. Those who testified all swore that Johnson was at his mother's birthday party (whose birthday was on October 1) in St. Louis until the early morning of Sunday, October 2. Some of the witnesses also testified to seeing Johnson in St. Louis at various points during the day on Sunday. Additionally, a man who helped Johnson with some yard work testified he

**Erskine Johnson on p. 4**

## Erskine Johnson from p. 3

saw Johnson at his St. Louis home at the very hour the crime was taking place 300 miles away in Memphis.

### Evidence Of Johnson's Innocence Withheld By Prosecution

In every criminal trial, the prosecution has a constitutional obligation to turn over all exculpatory evidence to the defense. In other words, the prosecution must turn over any information or evidence in the police or prosecution possession/files that establishes the defendant's innocence or that may be helpful to the defense. In violation of this constitutional mandate, the prosecution in Johnson's case withheld a shocking amount of exculpatory evidence from the defense. Deprived of this evidence pointing to an entirely different group of suspects, Johnson was certainly denied a fair trial.

The withheld evidence — comprised of several interlocking pieces of evidence from independent sources — all pointed to the Brown Gang as the true perpetrators of the Belenchia robbery/homicide. The Brown Gang — comprised of Michael Brown, his brother Eric Brown, Charles Keller (the Brown's cousin by marriage), Betty Jo Ford, (Eric Brown's girlfriend), and Darvi Cunningham — all of whom were involved in a range of criminal activity, including car theft and prostitution.

Because this evidence was improperly withheld, the jury who convicted Johnson never heard any of the following:

- Two eyewitnesses — Johnnie Wilburn and Harold Quarles — identified Michael Brown after the police showed them a group of 24 photographs that included Johnson's picture.

Wilburn witnessed the shooting at close range. The police report specifically notes that Wilburn "picked out a photograph of Michael Brown, and identified this photograph as looking like the [black male] that shot Belenchia."

Quarles witnessed the perpetrators changing the license plate on their getaway car. Before looking at the photo spread Quarles told police that he would probably be able to recognize "the one who change the license plates and the one who got out of the white car to get in the maroon car." Quarles was right. When shown the 24 photographs, he quickly picked out photographs of Michael Brown and Keller. The police report states: "While looking through the large

group of photographs, Harold Quarles pulled out [the photographs of] Brown and Keller "without hesitation."

- The getaway car — a maroon station wagon — is linked to Michael Brown and Keller. In the early stages of their investigation, the police recovered the getaway car, a maroon station wagon after it was abandoned by the perpetrators. The police quickly determined that the station wagon had been stolen from the Hertz rental car agency at the St. Louis, Missouri airport.

- The Memphis police discovered the Brown Gang had a history of stealing rental cars from the Hertz agency at the St. Louis airport.

- The St. Louis police notified Memphis detectives that Michael and Eric Brown, and Keller were suspected of regularly stealing rental cars from Hertz at the St. Louis airport, and using them in their criminal enterprises.

- Six weeks before the Belenchia murder, the police recovered one of these stolen rental cars — a red Ford model — from Cunningham's residence. Witnesses told police that Eric Brown brought the car to Memphis from St. Louis and left it at Cunningham's home.

- Miles McKinny, a neighbor of Cunningham positively identified the car used in the crime, the maroon station wagon, as a car he saw parked at Cunningham's residence. McKinny stated there was not "any doubt" in his mind it was the car he saw at Cunningham's residence and being driven by Cunningham. The car was distinctive, McKinny noted, for the piece of chrome missing from the left side of the vehicle.

- Other evidence found in the stolen maroon station wagon linked the vehicle to the Browns.

- Cunningham and Betty Jo Ford were prostitutes who worked for Eric Brown, said that they regularly traveled from Memphis to Chicago and worked truck stops along the route.

- In the maroon station wagon police found a lottery ticket purchased in Chicago, and a receipt from the Dixie Trucker's Home in McLean, Illinois purchased a mere six days before the Belenchia shooting.

The stolen station wagon had been driven 10,000 miles in the three months between the time it was stolen from the Hertz rental agency in St. Louis and the time of the Belenchia homicide. This significant accumulation of mileage in a short period of time is consistent with the Brown's having driven the car on prostitution excursions to

Chicago.

### Newly Discovered Evidence Linking The Brown Gang To The Crime

In the course of investigating the case, Johnson's legal team discovered a critical piece of new evidence linking the Brown Gang to the crime.

- As noted above, Starks testified against Johnson in exchange for immunity from prosecution. In her first statement to police, she said that the visitors, at her home the weekend of the crime, were Shirley, a woman she had previously met at a gospel convention, and Shirley's male friends. She then changed her story and said that it was Johnson and some of his friends — none of whom (including Johnson) she had met before — who visited her that weekend.

- Betty Jo Ford has long used the alias "Shirley."

- Investigators learned that Starks and Ford were longtime friends. They were so close that people often mistakenly believed they were related. As one witness told investigators, when I saw one of them, "the other one was not far behind."

- Williams' sworn affidavit confessing that Johnson was not one of the people he met at Starks' home on the weekend in question is more proof of Starks' cover-up.

The connection between Starks and the Brown Gang is compelling new evidence of Johnson's innocence. This evidence shows that Starks had a compelling motive to falsely implicate Johnson..

### The Taint of Racism

Johnson was convicted by an all-white jury in Memphis; a city with a majority black population. In Tennessee, both the prosecution and the defense are allowed to exclude a certain number of jurors without explanation through the use of peremptory strikes. In Johnson's case, the prosecution used all of their peremptory strikes against black jurors, including the two alternates. By using all of their peremptory strikes against black jurors — and none against the white members of the jury pool — the prosecution was able to secure an all-white jury.

### New Trial Granted

On December 9, 2011, after this article was accepted for publication in *Justice Denied*, the Tennessee Court of Criminal Appeals overturned Johnson's conviction and grant-

### Erskine Johnson on p. 5



## New Fingerprint Technology Could Result In New Evidence For Innocent People

Dr. Xanthe Spindler has preliminarily developed a new technique that has the capability of recovering usable latent fingerprints from old evidence and difficult surfaces. Dr. Spindler is a forensic science researcher at the University of Technology (UTS) in Sydney, Australia. Dr. Spindler's development is one of the most significant advancements in fingerprint technology since it first began to be used by law enforcement more than a hundred years ago.

Traditional fingerprinting methods either can't detect or accurately identify a latent fingerprint that is aged, dry and weak. Dr. Spindler's method uses antibodies designed

### Erskine Johnson from p. 4

ed him a new trial. The court ruled in, [Erskine Leroy Johnson v. State of Tennessee](#), No. W2010-01800-CCA-R3-CO (TN COCA, 12-9-2011):

As noted by the trial court and this court, Ms. Starks was a "very important" witness for the State. Although Mr. Perkins's identification and Mr. Williams's trial testimony have not been overcome, Mr. Perkins's testimony was "significantly impeached, and perhaps discredited," while Mr. Williams's testimony now corroborates Ms. Starks, who has likewise been significantly impeached and discredited. We conclude that evidence tending to impeach Ms. Starks's testimony and forge a link between her and the Brown Gang, when considered in conjunction with multiple pieces of evidence implicating the Brown Gang and the evidence at the trial, including evidence that the sole eyewitness identifying the Petitioner as the shooter had his testimony significantly impeached, may have resulted in a different judgment had it been presented at the trial. We conclude that the trial court erred by denying the petition.

In consideration of the foregoing and the record as a whole, we reverse the judgment of the trial court, vacate the Petitioner's felony murder conviction, and remand the case for a new trial.

Johnson now goes by Ndume Olatushani, and he remains imprisoned as he awaits his retrial.

to target amino acids that are present in sweat which is deposited in most fingerprints. In an announcement about Dr. Spindler's research on the UTS website she explained, "... existing methods are most effective recovering fresh fingermarks that contain a reasonable level of moisture. That has meant that people with dry skin are weak donors and evidence is rapidly degraded in dry conditions or after long storage."

Dr. Spindler stated that her immunogenic technique can be expected to enable the reliable recovery of latent fingerprints more than three hours old from human skin. She said, "Current techniques of powdering and fuming have never worked well on skin, with the ability to only enhance fingermarks less than three hours old."

Dr. Spindler also stated: "We've been able to successfully target amino acids on non-porous surfaces for the first time, with promising results in enhancing aged and degraded fingermarks that typically give poor results with traditional powdering and cyanoacrylate fuming. The potential is there to go back to old cases to see what might now be recovered."



Latent fingermarks identified on aluminium foil using the immunogenic method developed by Dr. Xanthe Spindler (Dr. Xanthe Spindler)

## Robbery Conviction Tossed For Man Walking Near Crime Scene

Ryan Omar Butler was convicted on September 9, 2010 of the attempted robbery of an armored truck on December 21, 2007 in Nassau, The Bahamas. Butler was shot in the parking lot where the attempted robbery took place. He claimed he was caught in cross-fire between the robbers and the police as he was walking to a grocery store to purchase milk for his girlfriend who was recuperating from surgery. The store was in the shopping center where the attempted robbery took place.

Witnesses said two men were involved in the robbery and they didn't wear masks. No eyewitnesses identified Butler as one of the robbers, and he didn't have a gun on him.



Dr. Xanthe Spindler (Terry Clinton)

actual perpetrator.

An article about Dr. Spindler's research was recently published in *Chemical Communications*, a journal of the Royal Society of Chemistry.

In addition to Dr Spindler, investigators and personnel involved in the new fingerprint identification research include Professor Claude Roux the Director of the UTS Centre for Forensic Science, Professor Chris Lennard from the University of Canberra, Professor Oliver Hofstetter from Northern Illinois University and Dr Andrew McDonagh from UTS.

It is not known when the new fingerprint technique will be available for general use by laboratories.

Source:

"[A step towards a revolution in law enforcement](#)," UTS: Sydney, June 2, 2011.

"[Enhancement of latent fingermarks](#) on non-porous surfaces using anti-L-amino acid antibodies conjugated to gold nanoparticles," Xanthe Spindler, Oliver Hofstetter, Andrew M. McDonagh, Claude Roux and Chris Lennard, *Chem. Commun.*, 2011, 47, 5602-5604.

He was charged with being one of the robbers solely based on his wound. Butler, who represented himself during his trial, called as a witness a woman who was also shot in the shopping center. She testified that she believed a police officer shot her. The jury convicted Butler.

Another man accused in the robbery, Raymond Bastian, was free on bail when he was gunned down in a drive-by shooting two days before the start of his trial.

The Bahamas Court of Appeals quashed Butler's conviction on March 16, 2011, ruling there was insufficient evidence Butler was involved in the crime. He was released after six months imprisonment.

Sources:

[Verdict expected](#) today in attempted armed robbery case, *The Nassau Guardian*, September 9, 2010.

[Man convicted](#) of armoured truck robbery attempt has conviction quashed, *The Tribune* (Nassau, Bahamas), March 17, 2011.

# Karim Koubriti's Lawsuit For False Terrorism Conviction Tossed By Federal Judge

Karim Koubriti's federal civil rights lawsuit against FBI agent Michael Thomas for fabricating evidence he was a terrorist was dismissed by U.S. District Judge Marianne Battani.

In June 2003 Koubriti and his co-defendant, Abdel-Ilah Elmaroudi, were convicted in federal court in Detroit of providing material support for terrorism. Koubriti, Elmaroudi and a third co-defendant, Ahmed Hannan, were also convicted of document fraud (allegedly possessing false identification papers), but Hannan was acquitted of the terrorism charge. A fourth co-defendant, Farouk Ali-Haimoud, was acquitted of all the charges. It was the first federal terrorism trial after September 11, 2001, and the jury deliberated for six days before reaching its verdicts.

The key witness against the defendants was Youssef Hmimssa, a Moroccan forger illegally in the U.S. who had been convicted of stolen credit card charges. [Youssef testified](#) the defendants attempted to recruit him into their scheme to overthrow the Algerian government. He also testified that Koubriti and Hannan talked about poisoning airline passengers at the Detroit Metro Airport, and that "Al-Haimoud talked about joining Osama bin Laden and killing Jews, Christians and wrong-thinking Muslims."

The lead FBI agent in the case was Thomas, Harry "Ray" Smith was the lead State Department official in the case, and the lead prosecutor was Assistant U.S. Attorney Richard Convertino.

The convictions were national news and U.S. Attorney General John Ashcroft [told reporters](#), "I congratulate the prosecutors and agents who worked tirelessly on this case." Ashcroft also noted that the case demonstrated the Justice Department's commitment to "detect, disrupt and dismantle the activities of terrorist cells in the United States and abroad."

Prior to their sentencing the defendants filed a motion for a new trial that alleged the prosecution concealed exculpatory evidence and witnesses, and offered tainted testimony. Among the motion's allegations were that Convertino failed to disclose a December 2001 letter Youssef wrote to another man he had been in jail with, that he made-up every-



Karim Koubriti after his release on October 12, 2004

thing he told law enforcement authorities about the defendants. [Youssef wrote](#), "how he lied to the FBI, how he fool'd the Secret Service agent on his case."

The motion also alleged that Convertino failed to disclose witness statements that the defendants were not devote Muslims, and that they were lazy, drank alcohol, smoked, and never talked about religion. Those witnesses would have undermined the prosecution's claim the defendants were fanatical Muslims engaged in a holy war.

U.S. District Judge Gerald Rosen ordered the Justice Department to respond to the motion. After receiving that order Detroit's U.S. Attorney removed Convertino and his superior from the case.

On August 31, 2004 the DOJ filed a 60-page response to the defendant's motion for a new trial. The DOJ conceded Convertino introduced false testimony and withheld exculpatory evidence from the defense on the terrorism charges. The DOJ requested that Judge Rosen vacate the defendant's convictions, and that they only intended to retry them on the document fraud charges.

On September 2, 2004 Judge Rosen vacated all the three defendant's convictions. In his order, [Judge Rosen wrote](#), "Certainly, the legal front of the war on terrorism is a battle that must be fought and won in the courts, but it must be won in accordance with the rule of law." He also wrote, that the prosecution's desire to convict the defendant's "overcame not only its professional judgement, but its broader obligations to the justice system and the rule of law. It is an inescapable conclusion that the defendant's due process, confrontation and fair trial rights were violated. There is at least a reasonable probability that the jury's verdict would have been different had constitutional standards been met."

With the charges dismissed, defense lawyer William Swor said about the government's case, "They lied, lied, lied and lied."

When the 26-year-old Koubriti was released on bail on October 12, 2004 [he told reporters](#), "I always say I was innocent. Three years ago I said I was innocent and nobody believed me except these guys," referring to his lawyers. He also said that after his arrest, "I thought it was a mistake or something and they would find out the truth. It took them too long to find out the truth." Koubriti said that he had been kept in an isolation cell 23 hours a day for

much of his incarceration. "All my time in Wayne County [jail] they didn't even let me out to smell air." He also said about his time in jail, "It was horrible, especially from some of the deputies - not all, to be honest with you. I heard all sorts of stuff - devil worshiper, monster, go pray to your terrorist god."

After a two-year DOJ criminal investigation, Convertino and Smith were indicted in March 2006 on charges of conspiracy, obstruction of justice, and false statements during the trial of the four defendants. On October 31, 2007 a federal jury in Detroit acquitted both defendants of all charges. The jury foreman told reporters the jury acquitted the men because Convertino could have mistakenly failed to disclose the crucial exculpatory evidence, and Smith could have misspoke when he repeatedly testified falsely during the trial.

On August 31, 2007, Koubriti filed a federal civil rights lawsuit (42 U.S.C. §1983) in Detroit's federal court that alleged multiple violations of his constitutional rights by Convertino, Thomas, and Smith.

U.S. District Judge Marianne Battani dismissed the claims against Smith, and in February 2010 the federal Sixth Circuit Court of Appeals ordered dismissal of the claims against Convertino because he is shielded by prosecutorial immunity from civil liability for any of his actions that may have harmed Koubriti. On remand Judge Battani [dismissed the claims](#) against Thomas, ruling that Koubriti had not disprove Thomas' declaration that he did not fabricate or withhold evidence.

Eight years after Koubriti was wrongly convicted of fabricated terrorism charges, he has not received a penny of compensation for the more than three years he was incarcerated after his arrest on September 17, 2001 when federal law enforcement officers raided his Detroit apartment.

*Justice Denied* has published the following four articles about the various twists and turns in the Detroit terrorism case:

Terrorism Conviction Of 2 Men Tossed, *Justice Denied*, [Issue 27](#), April 2005.

Federal Prosecutor Resigns Under Heat of Criminal Investigation For Possible Frame-up Of 35 People, *Justice Denied*, [Issue 28](#), June 2005.

Federal Prosecutor Indicted For Frame-up Of Four Men Innocent Of Terrorism, *Justice Denied*, [Issue 32](#), July 2006.

Ex-federal Prosecutor Richard Convertino Sued Over Fake Terrorism Prosecution, *Justice Denied*, [Issue 38](#), January 2008.

Other sources:

[Immunity Protects Prosecutor](#) Against Bivens Claims, *Koubriti v. Convertino*, Case No. 09-1016 (C.A. 6, Feb. 3, 2010). [Judge tosses lawsuit](#) by cleared terror suspect against Convertino, *The Detroit News*, May 23, 2011.



## Koua Fong Lee Can't Sue Toyota For Damages For Wrongful Imprisonment

**K**oua Fong Lee was convicted in October 2007 of vehicle homicide in the death of three people on June 10, 2006 when his 1996 Toyota Camry crashed into the rear of their car at a stop light at an Interstate off-ramp in St Paul, Minnesota.

The jury rejected Lee's defense that on the off-ramp his car accelerated even though he was pressing hard on the brake. Lee was sentenced to 8 years in prison. His conviction was affirmed on direct appeal.

In response to national publicity about people experiencing unexplained acceleration and the inability to break their Toyota vehicle, in November 2009 Toyota initiated a recall of over 4 million vehicles.

In the course of reporting about the recall ABC News ran a national story about Lee's case. Lee's lawyer was contacted by people around the country who saw the story and owned an older model Camry similar to Lee's that had suddenly accelerated and experienced brake failure. Lee filed a post-conviction petition based on the new evidence that a defect in his Camry could have caused the collision as he testified at trial, and ineffective assistance of counsel.

During a four-day evidentiary hearing in August 2010 Lee introduced new expert evidence that the brakes on his car didn't work properly, and the testimony of nine Toyota Camry owners who had a similar problem of sudden acceleration and brake failure.

Kiersten Jaeger, a St. Paul high school Spanish teacher, testified that when her 1996 Toyota Camry suddenly began accelerating, "It seemed to drive itself."

Lisa Falchetti of San Diego testified about when her 1996 Camry suddenly accelerated, "Ever been on a runaway horse? It was like it was out of control." She said of her July 2007 experience, "I loved my Camry till then; now I'm scared of it." She was taking her parents to the airport after a visit when, "All of a sudden my car started accelerating. I hit the brakes really hard, put both of my feet on the brakes, put the car into neutral. The car was screaming, revving like it was going to blow up."

Kurt Thomson of Stillwater, Minnesota is 6 feet tall and weighs 220 pounds. He testi-



Koua Fong Lee with his wife Panghoua Moua after his release from prison on August 5, 2010

fied that when his 1995 Camry suddenly accelerated, "I had both feet on the brakes, pushing as hard as I could, and I couldn't stop it. My butt was raised off the seat. I was pulling back on the wheel." Thomson ended up rear-ending another vehicle at a four-way stop.

John S. Gathright Jr. of Richmond, Virginia testified that when he was headed home in rush-hour traffic on a freeway his 1995 Camry "took off like a wild horse. I could not control it. Before this little journey was over, I was going 90 to 95 miles per hour." He testified, "It was running like a wild bull. It was chaos. I managed to weave between all the cars. Wherever there was a slot, I took it." He was eventually able to drive his car to the side of the freeway and turn it off.

Patrick Powers testified that in April 2008 his 1996 Camry suddenly accelerated until he was going more than 110 mph on a freeway in Milwaukee. He said he was only able to stop his car after 8 miles.

Michael Frazier testified that in September 2006 he was driving his wife's 1996 Camry in rush-hour traffic north of Boston when the engine began to race. He said that to try and stop the car he pushed on the brake pedal with both feet. He pushed so hard that the brakes eventually caught fire.

After the hearing concluded the Ramsey County district attorney offered Lee a deal that if he pled guilty to a lesser felony charge he would be immediately freed with his driver's license suspended for 10 years and 15 years of probation. Lee rejected the deal.

On August 5, 2010 Judge Joanne Smith, who was Lee's trial judge, ruled that if Lee's jury had known the new evidence it could have changed their verdict. She vacated Lee's conviction and ordered a new trial. The judge also ordered that Lee could be released on bail. An hour after the judge's ruling Ramsey County District Attorney Susan Gaertner announced during hastily called press conference that Lee would not be re-

tried, saying, "I believe the system worked, and this is a very good day for the criminal justice system." The charges against Lee, 32, were subsequently dismissed.

Family members of the people killed in the crash of Lee's car filed a federal lawsuit against Toyota after the recall was announced. After Lee's charges were dismissed he filed a motion to be allowed to join the lawsuit against Toyota. In November 2010 the motion was granted.

On June 13, 2011 U.S. District Court Judge Ann Montgomery ruled in response to a motion by Toyota that the company was not liable for damages for the time that Lee was imprisoned. Judge Montgomery ruled that Lee was wrongly convicted due to a long chain of actions and decisions by prosecutors, his attorney, the judge and the jury, but that none of Toyota's alleged actions can be considered a "substantial factor" in bringing about Lee's wrongful incarceration for more than 2-1/2 years. However, the judge is allowing other parts of the lawsuit to go forward, including injury claims by Lee and his relatives, other injured crash victims, and claims by survivors of people killed in the crash.

The two attorneys who represented Lee *pro bono* in his post-conviction appeal, Eagan, Minnesota defense attorney Brent Schafer and Corpus Christi, Texas attorney Robert Hilliard, [were finalists](#) for the 2011 Trial Lawyer of the Year Award by the Public Justice Foundation.

### Sources:

Man guilty in crash that killed father, son, *Minneapolis Star-Tribune*, October 12, 2007.  
Sudden Acceleration Prompts Toyota Recall, ABC-4 (St Louis, MO), November 25, 2009.  
Koua Lee case witnesses - Cars just roared off, *Minneapolis Star-Tribune*, August 3, 2010.  
Toyota Driver Freed From Prison, Prosecutor Drops Charges, ABC News, August 5, 2010  
Judge limits ability of Minn. man jailed for fatal crash to sue Toyota; lawsuits can advance, AP Story, *Washington Post*, June 13, 2011.  
In Koua Fong Lee case, justice delayed was justice denied, *Minneapolis Star-Tribune*, August 8, 2010.

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## Minnesota Court Of Appeals Tosses Scooter Drunk Driving Conviction

The Minnesota Court Of Appeals overturned James Anthony Brown Jr. driving while intoxicated conviction on June 13, 2011. The court ruled that the scooter Brown was operating was not a motor vehicle and therefore he didn't violate the DWI law.

James Anthony Brown Jr. was a 60-year-old disabled man living in Grand Rapids, Minnesota in the summer of 2009. Brown got around by riding his battery operated three-wheel scooter on city sidewalks. His scooter had a maximum speed of 5 mph. On July 29 he rode his scooter to a local business where an employee thought he smelled alcohol on Brown's breath and called police. When the police arrived Brown consented to being given a breathalyzer test that registered a blood alcohol content of 0.17. Brown was arrested and charged with driving while intoxicated because his alcohol level was more than twice the legal limit of .08 for a driver. He was jailed overnight before being released on bail.

Prior to Brown's trial his lawyer filed a motion to dismiss the charge, arguing that under state law a scooter isn't legally considered a "motor vehicle" and consequently Brown can't be considered to have been the "driver" of a motor vehicle as required by the DWI



James Anthony Brown Jr. (Itasca County)

statute. The judge denied Brown's motion and he was subsequently convicted of third-degree driving while intoxicated. The judge sentenced Brown to one-year in jail, with all but 30 days suspended if he had no arrests for three-years. Brown's sentence was stayed pending the outcome of his appeal.

On June 13, 2011 the Minnesota Court Of Appeals overturned Brown's conviction. The court ruled that the scooter Brown was operating while intoxicated was not a motor vehicle and therefore he didn't violate the law. The Court ruled in *State v Brown*, No A10-1192 (MN Ct of Appeals, 6-13-2011) that:

... a driver's license is not required to operate the scooter, vehicle insurance is not required for the scooter, and the scooter cannot be registered at the Department of Public Safety in order to obtain vehicle license plates...

It is plain that for purposes of traffic regulations ... Brown's scooter is a wheelchair and is not a motor vehicle, and Brown, who uses the scooter as a substitute for walking, is, while operating his scooter, a pedestrian.

... we conclude that Brown's operation



James Anthony Brown Jr.'s scooter (KSTP-TV)

of his scooter as a substitute for walking does not make him the driver of a motor vehicle within the meaning of Minn. Stat. §169A.20, subd. 1, and does not subject him to criminal charges for operating the scooter while impaired.

... The district court erred by concluding that on July 29, 2009, Brown drove a motor vehicle while impaired in violation of Minn. Stat. § 169A.20, subd. 1(5), and was thereby guilty of gross-misdemeanor DWI. Reversed.

After Brown's conviction was overturned he told reporters: "They made a mountain out of a molehill. It never should have come to this. Go out and catch the bad guys instead of farting around with a guy on a scooter. It is a waste of taxpayer money."

It is anticipated that the ruling in Brown's case will not only affect scooter operators in Minnesota, but will influence how they are legally treated in other states.

### Sources:

*State v Brown*, No A10-1192 (MN Ct of Appeals, 6-13-2011). Disabled Scooter Driver's DWI Conviction Overturned, *WDIO.com* (Duluth, MN), June 13, 2011. DWI conviction of Grand Rapids scooter user is overturned, *Minneapolis Star-Tribune*, June 13, 2011.

## Police Scent Dogs Wrong 85% Of The Time In Searches For Drugs

Police scent dogs were wrong 100% of the time in alerting their handler to the presence of drugs during multiple sweeps of schools in Janesville, Wisconsin. During sweeps at six middle and high schools the scent dogs gave 80 alerts for the presence of drugs in a student's locker — and no drugs were found in any of the lockers. The dogs also falsely detected drugs in 13 cars during a sweep of the parking lot at two high schools. The sweep of a high school in nearby Edgerton by police scent dogs resulted in 9 alerts for drugs when none were present. So in those sweeps the dogs falsely alerted for drugs a total of 102 times — without correctly detecting drugs a single time.

The inability of the scent dogs to reliably detect drugs during the school sweeps is consistent with the finding of a recent double blind experiment involving 18 certified

police scent dog/handler teams that found they were wrong 85% of the time in detecting drugs and/or explosives. An article about that experiment, "Handler beliefs affect scent detection dog outcomes," was reported in the January 2011 issue of the journal *Animal Cognition*.

The scent dogs used to sweep the schools were certified to detect marijuana, cocaine, heroin and methamphetamine. The scent dogs inability to reliably detect drugs suggests the certification process is flawed since it does not involve a double-blind test to determine a dog's competence. A double-blind test is one in which the dog's handler doesn't know if there are any drugs in an area the dog is assigned to search or where those drugs might be located. The experiment of the 18 police scent dog/handler teams also supports that a handler sends conscious or unconscious cues to his dog where drugs or explosives are believed to be located. Consequently the only way to determine a scent dog's competence is to administer a double-blind test that prevents the handler from tipping off the dog where to search.

Although it is now known that a scent dog's alert for drugs and explosives is overwhelmingly likely to be false, the widely believed myth that dogs can accurately detect the presence of contraband is relied on by judges to almost automatically issue a search warrant when presented with scent dog evidence that is actually in the realm of "junk science."

If you go to the *Janesville Gazette's* website, [www.gazettextra.com](http://www.gazettextra.com), and enter "drugs dogs schools" into the search box a series of articles will be listed about the scent dog searches in area schools.

### Sources:

[Drug dog finds](#) nothing in Edison Middle School search, *Janesville Gazette*, Oct. 2, 2010. [Searches by dogs](#) yield no drugs at Janesville middle schools, *Janesville Gazette*, April 2, 2011. [Drug dogs search](#) Parker High School, *Janesville Gazette*, Nov. 23, 2010. [No drugs found](#) in Marshall Middle School search, *Janesville Gazette*, Dec. 16, 2010. [Craig High School](#) police dog search yields pot pipe, *Janesville Gazette*, Dec. 4, 2010. [Dogs come up empty](#) in drug search at Franklin, *Janesville Gazette*, Oct. 27, 2010. [No drugs found](#) during search of high school parking lots, *Janesville Gazette*, May 28, 2009. [No drugs found in](#) Edgerton search, *Janesville Gazette*, Oct. 29, 2009.



## Four Men Exonerated 38 Years After Convictions For Singing Anti-Soviet Song In Pub

Twenty-two years after the fall of communism in Czechoslovakia, the Czech Supreme Court on June 22, 2011 quashed the convictions of four men sentenced to prison in 1973 for singing an anti-Soviet song in a Prague pub.

Ivan Martin Jirous, Eugen Brikcius, Jaroslav Korán and Jirí Daníček were drinking beer at the U Plavců pub in central Prague on July 28, 1973. Jirous was a poet and leader of the Plastic People of the Universe, a nonconformist rock band banned by the communist regime, and the other three were literary rebels involved in the underground movement against the communist regime. The men began singing songs, and the lyrics of one of the songs described driving the Russians to hell where they belong. A captain in the Czech secret police (StB) was in the pub and he called the police. The four men were arrested and charged with defamation of the Soviet Union and hooliganism



Ivan Martin Jirous in 2011. (ISIFA)

of the Soviet Union. Jirous was sentenced to ten months in prison and it was ordered that he undergo psychiatric treatment. The other three defendants were sentenced to 8 to 12 months in prison.

After they completed their sentences, Jirous continued to stand up to Czechoslovakia's communist regime and he spent another seven and a half years in prison, during which time he wrote one of his most acclaimed books of poetry. Brikcius left Czechoslovakia

and settled in Vienna. Daníček worked as a manual labourer until the fall of communism, after which he founded a publishing house. Daníček is now the head of the Czech Jewish communities' federation. Korán translated Kurt Vonnegut, William S. Burroughs and other authors into Czech, and he became Prague's first post-communist mayor.

The Czech Republic's Jus-

tice Minister recently sought review of the 1973 convictions. On June 22, 2011 the Czech Supreme Court quashed the 38-year-old convictions on the basis that singing a song in a pub did not merit being regarded as a serious disturbance and threat to the public, the judges were influenced by the ruling communist regime, and the song about Russians was an expression of frustration with the Soviet occupation that began in 1968, and not defamation of the Russian nation.



Eugen Brikcius

After the Court announced its ruling Eugen Brikcius told Radio Praha:

"I don't want to sound pretentious, but I think the ruling is self-evident. Even though it was a joke, what we did was a public declaration of disapproval with the restriction of freedom, a fundamental human right."

With their convictions quashed, the four men can seek compensation from the Justice Ministry for their wrongful imprisonment. The U Plavců pub is still a popular meeting place in central Prague.

Sources:

[Czech court quashes communist conviction](#) of Plastic People member, Czechposition.com, June 22, 2011  
[Top court cancels 1973 verdict](#) that sent four writers to jail for anti-Soviet song, Radio Praha, June 22, 2011



U Plavců pub in central Prague (Marek Novotný)

## Lynette Stewart Cleared Of A Sexual Assault That Didn't Happen

The November 2005 trial of Lynette Kaye Stewart and Kristina Rachael Oliver was national news in New Zealand. Stewart and Oliver were a lesbian couple, and it was reported they were the first women prosecuted in the history of the country on charges related to women sexually assaulting another woman.

Stewart and Oliver lived in Masterton about 60 miles northwest of New Zealand's capital of Wellington. The prosecution alleged that the night after Stewart and Oliver had a meal with a woman at their home in 2003, they lured her back on the pretext of having coffee with them. The prosecution alleged that Oliver then physically assaulted and sexually penetrated the woman against her will with Stewart encouraging her. The prosecution's key evidence was the testimony of the alleged victim. Stewart and Oli-

ver's defense was that the alleged victim fabricated her story of an assault and that no sexual encounter occurred.

The jury convicted Oliver of two counts of assault and one of sexual violation, and Stewart was convicted as a secondary party to the count of sexual violation. Oliver, 33, was sentenced to six years in prison, and Stewart, 38, was sentenced to two years in prison.

Stewart's appeal was denied by the Court of Appeals in 2006. Oliver's appeal incorporated new medical evidence discovered after Stewart's appeal: expert medical examination of the alleged victim's medical records was inconsistent with her claim that she had been sexually assaulted. Based on that new evidence Oliver's conviction was quashed by the Court of Appeal in 2007 and her retrial was ordered. She was released on bail pending her retrial.

During Oliver's retrial in February 2008 the prosecution didn't present any evidence and she was deemed to have been acquitted.

Stewart then filed a second appeal based on the ground that her conviction should be quashed since it was based on her being a secondary party to the assault Oliver was acquitted on retrial of committing. Since Oliver's acquittal was based on new evidence supporting that no assault took place, Stewart argued she had been convicted of a crime there was no evidence had even occurred. The prosecution conceded "that a substantial miscarriage of justice has occurred" in Stewart's case and did not oppose her appeal.

New Zealand's Supreme Court quashed Stewart's conviction on June 2, 2011 in *Lynette Kaye Stewart v The Queen*, [2011] NZSC 62. The Court stated in part:

[7] Ms Oliver and Ms Stewart were jointly charged and tried together in the District Court on the same evidence, and Ms Oliver was the only possible principal offender. The doubt cast by the medical evidence led during Ms Oliver's appeal must therefore have a direct bear-

**Stewart cont. on page 10**

## Réjean Hinse Awarded \$13.57 Million For 5 Years Wrongful Imprisonment For Armed Robbery

Réjean Hinse was convicted in 1964 and sentenced to 15 years in prison for being one of a number of men who staged the 1961 armed robbery of a couple in their home in Mont-Laurier, Quebec. Hinse, 24 at the time of the robbery, insisted he had nothing to do with the crime.

Hinse served five years of his sentence before he was paroled in 1969. He continued to pursue overturning his conviction, and he was able to get three of the five actual robbers to sign sworn statements that he wasn't involved in the robbery. His persistence also paid off by initiation of a review of the case by the Quebec Police Commission, which in 1989 determined the Mont-Laurier police botched their investigation of the robbery. Based on the new evidence Hinse filed an appeal with the Quebec Court of Appeal, which in 1991 overturned his guilty verdict. However, the appeals court issued a stay of the proceedings, which barred his retrial and the opportunity for his acquittal by a jury. Hinse appealed the stay to the Canadian Supreme Court, which in January 1997 ruled in *R. v. Réjean Hinse* [1997] 1 S.C.R.:

In the circumstances, being of the view that the evidence could not allow a reasonable jury properly instructed to find the appellant guilty beyond a reasonable doubt, we are all of the view that the ap-

### Stewart cont. from page 9

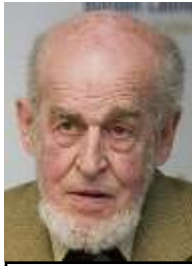
ing also on whether Ms Stewart could be found to have committed an offence. Where Ms Oliver has been discharged at retrial for a want of evidence that she had committed any offence, it would amount to an "unjust inconsistency" and a substantial miscarriage of justice to allow Ms Stewart's conviction to stand.

Although both Stewart and Oliver were vindicated, it was only after Stewart served her two-year sentence and Oliver served more than a year of her six-year sentence.

#### Sources:

[Lesbian couple jailed](#) for sexually violating woman, New Nation News Reporters Newsroom, December 8, 2005

[Lynette Kaye Stewart v The Queen](#), [2011] NZSC 62 (NZ Supreme Court, June 2, 2011)



Réjean Hinse on April 14, 2011. (Graham Hughe, Canadian Press)

Acquitted of the robbery, Hinse sought compensation. When it was denied he filed a lawsuit against the Province of Quebec and Canada's federal government. The bench trial began in November 2010 and lasted for six weeks. While the judge was deliberating her decision, Hinse agreed to settle his claim against Quebec for \$4.5-million (Canadian). The federal government refused to settle, and Quebec Superior Court Judge Héléne Poulin ruled on April 14, 2011 they were liable for \$8.6 million. In her ruling Judge Poulin was critical of federal officials for stonewalling and "cruelly ignoring" Mr. Hinse's pleas of his innocence, and she said how do you "set a price for the pain of someone who was unjustly, all his adult life, identified by his colleagues, neighbours and others as a violent robber, and who

appropriate remedy is an acquittal.

Accordingly, the appeal is allowed, the stay of proceedings order is set aside and the acquittal of the appellant is entered.

spent 50 years of his existence in the shadow of the criminal he wasn't?"

The total amount to be paid Hinse is \$13.1-million (Canadian) -- which equaled \$13,566,360 in U.S. dollars at the exchange rate on the day of the judge's ruling.

Hinse is now 73. He told reporters after the judge's award was announced that even though he has been out of prison since 1969, he feels like he spent his life in a "psychological prison" from being convicted of a crime he didn't commit.

If Hinse had been convicted in the U.S. and defied the odds by succeeding in having his conviction overturned, and he had then defied the odds and prevailed in a civil rights lawsuit, his monetary award for five years in prison for robbery could have been expected to be a fraction of what he was awarded in Canada.

#### Sources:

[R. v. Réjean Hinse](#) [1997] 1 S.C.R. 3.

[Man wrongly convicted](#) tells his side of the story, *Montreal Headlines Examiner*, November 4, 2010.

Quebec man wins largest award for wrongful conviction, *The Globe and Mail* (Toronto), April 14, 2011.

## Swedish Woman Sued For Libel For False Rape Claim

In 2008 a Swedish woman vacationing on the Greek island of Samos reported to the local police on the last day of her stay that the previous evening she had been beaten and raped. The woman, whose first name is Anna, returned to Sweden that day as scheduled without undergoing a medical exam.

In 2009 Anna learned that Greek authorities did not file rape charges because they didn't believe a crime had occurred. She also learned the Greek authorities doubted the truthfulness of her account because of Swedish women reporting a rape, and then making a claim for insurance upon their return home. In Sweden a woman can claim compensation for an alleged rape under a special clause in their home insurance.

The public prosecution office on Samos informed Anna in April 2011 that the man she accused was suing her for making a false rape accusation and libel. After she received a summons for a court appearance in May, she told a Swedish television station there was "not a chance" she would voluntarily return to Greece. Since Sweden and Greece are members of the European Union, Greece may have the option to pur-

sue Anna's extradition.

*Xaniotika Nea* is a paper in Crete that recently published the article "Rape as an industry to reap benefits," in which Greek medical examiner Stamatis Belivanis said about Swedish women, "They come here on vacation and then a day or so before leaving, after having sexual relations with someone, they report a rape. Back home they try to claim on the insurance."

That women in some countries financially benefit after reporting being raped while on vacation adds a dimension of believability to the claim by the man involved in those cases that they engaged in consensual sex with their accuser.

#### Source:

[Swedish women fake rape](#) to claim payouts, *The Local*, April 15, 2011.

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## John Demjanjuk Convicted Of “Accessory To Murder” Based On Novel Legal Theory And A Key Document The FBI Believes Was Fabricated

John Demjanjuk emigrated to the United States from Europe in 1952 when he was 32-years-old. The Ukrainian born Demjanjuk was a retired Ford auto worker living in Cleveland, Ohio when accusations surfaced that he was “Ivan the Terrible” — a brutal prison guard at Nazi Germany’s Treblinka death camp in Poland. Demjanjuk was subsequently denaturalized as a citizen in 1977 based on alleged falsehoods in his immigration documents and he was ordered deported to the Soviet Ukraine. Israel opposed that order and sought his extradition to Israel to stand trial for crimes against humanity. Proclaiming his innocence that he wasn’t “Ivan the Terrible,” Demjanjuk opposed his extradition, but in 1986 he was transported to Israel. His trial began in February 1987, and in 1988 he was convicted of crimes against humanity and sentenced to death.

However, during his appeal it was discovered that the U.S. Justice Department’s Office of Special Investigations concealed documents during Demjanjuk’s extradition proceedings that identified another man was “Ivan the Terrible.” Based on the new evidence substantiating Demjanjuk’s trial defense that he was the victim of a mistaken identification, Israeli’s Supreme Court acquitted him in 1992. He was freed and allowed to return to the U.S. in 1993.

Germany then sought Demjanjuk for prosecution based on their contention he was a guard at the Sobibor death camp in Poland.

After years of opposing his deportation, Demjanjuk was deported to Germany in May 2009 and upon his arrival in Munich he was arrested. He was charged with being an accessory to murder at Sobibor, based on the novel legal argument that he was criminally responsible even though the prosecution only alleged he was a guard and didn’t harm anyone.

Demjanjuk’s trial began in November 2009. Key prosecution evidence was an identity card that indicated he was posted at Sobibor.

Demjanjuk’s defense was he was the victim of mistaken identity: He fought in the Soviet Army and was captured by the Germans in



John Demjanjuk in his wheelchair during his trial in Munich, Germany (AP)

May 1942. He contended the identity card was a fake manufactured by Russia’s KGB. Then in April 2011 the Associated Press examined newly declassified documents about Demjanjuk’s case at the National Archives and discovered an FBI report written in 1985 about the ID card. The report stated: “Justice is ill-served in the prosecution of an American citizen on evidence which is not only normally inadmissible in a court of law, but based on evidence and allegations quite likely fabricated by the KGB.” The report that supported Demjanjuk’s claim the ID card was a fake had never been disclosed to Demjanjuk’s lawyers in the U.S., Israeli, or Germany.

The authenticity of the ID card was not determined during Demjanjuk’s trial — with prosecution experts testifying it “could” be authentic and the defense contending it was a fake.

The 91-year-old wheelchair bound Demjanjuk was convicted on May 12, 2011 of 28,060 counts of accessory to murder and sentenced to five years in prison. Although held in custody throughout the trial, the judge ordered him released pending the outcome of his appeal.

Demjanjuk’s conviction raised a legal issue that caused significant debate among legal scholars during the Nuremberg trials after WWII: the ex-Nazi’s and Nazi sympathizers charged with “crimes against humanity” were prosecuted for that “crime” even though it didn’t exist at the time the defendant’s allegedly violated it — so it was an *ex post facto* law retroactively applied to them. The same thing is true of Demjanjuk — 66 years after the end of WWII he is the first person prosecuted for being an accessory to murder for possibly being present at a prison camp when murders occurred somewhere at that camp.

*Esquire* magazine published an extensive article in its August 11, 2010 issue about Demjanjuk’s case that questioned the legal basis of his prosecution:

“Demjanjuk is essentially on trial not for anything he did, but simply for being at Sobibor. No specific criminal acts need be alleged, much less proved. Page through transcripts of previous Nazi trials and you’ll find a rigorous focus on particulars, because that is what should be required to convict a defendant. No one in any such trial ever was convicted simply on the basis of being present at the scene.”

Demjanjuk’s appeal was pending when he died on March 17, 2012. Since he was presumed innocent through the conclusion of his appeal, his conviction was invalidated.

Demjanjuk’s death left open the possibility that other aged people could be prosecuted as an “accessory to murder” in Nazi occupied countries — including the many civilians who lived near camps such as Sobibor and visited them regularly to provide essential goods and services without which the camps could not have operated.

Sources:

“[John Demjanjuk](#): The Last Nazi,” *Esquire Magazine*, August 11, 2010.

“[FBI thought Soviet Union’s](#) John Demjanjuk evidence was faked,” *Cleveland Plain-Dealer*, April 12, 2011.

[Convicted Nazi criminal](#) Demjanjuk deemed innocent in Germany over technicality, *HAARETZ.com*, March 23, 2012.

## California Bars Admissibility Of Uncorroborated Jailhouse Snitch Testimony

California Governor Jerry Brown signed Senate Bill 687 into law on August 1, 2011. The bill bars the admissibility of testimony by a jailhouse informant that a defendant confessed without independent forensic evidence or uncompromised testimony by another person that corroborates a defendant’s guilt.

California is the 18th state to bar the admissibility of uncorroborated jailhouse informant testimony. Similar legislation was twice vetoed by former Gov. Arnold Schwarzenegger.

Although the bill was vigorously opposed by the California District Attorneys Association, it was supported by San Francisco District Attorney George Gascón and Los Angeles County District Attorney Steve Cooley.

In response to a number of convictions in LA County that were overturned by state and federal appeals courts based on the unreliability of uncorroborated jailhouse snitch testimony, the DA’s Office instituted a policy of not pursuing cases without independent corroborating evidence. DA Cooley supported SB687 because LA’s policy has made testimony more reliable and hasn’t prevented convictions. [He said](#), “When the wrong person is prosecuted, the guilty go free.”

Source:

[Gov. Brown signs](#) law weakening testimony of jailhouse snitches, *Los Angeles Times*, August 1, 2011.



# Amanda Knox And Raffaele Sollecito Acquitted Of Murder And Sexual Assault By Appeals Court

By Hans Sherrer

Amanda Knox and her co-defendant and former boyfriend Raffaele Sollecito were acquitted by an appellate court on October 3, 2011 of the November 2007 murder and sexual assault of Meredith Kercher in Perugia, Italy. They were released 90 minutes later. After the two were convicted in December 2009 she was sentenced to 26 years in prison and Sollecito to 25 years.

Knox was a 20-year-old student at the University of Washington when in September 2007 she traveled from her hometown of Seattle, Washington to Italy where she planned to spend her junior year studying at the University for Foreigners in Perugia.

She and three other young women shared a house in Perugia. One of her housemates was 21-year-old Meredith Kercher from England.

Kercher's body that had been beaten and stabbed multiple times was found in her blood-soaked bedroom on November 2, 2007. Knox called the police after she returned home from spending the night at Sollecito's apartment when she saw blood in the bathroom and Kercher's bedroom door was locked. Over the next four days she was interrogated without a lawyer present for a total of 50 hours. During a marathon interrogation session she made statement that she was in the house with Sollecito when Kercher was killed by Patrick Lumumba, the owner of a local bar where Knox worked. Based on that statement Knox, Sollecito, and Lumumba were arrested on suspicion of murdering Kercher.

Knox was an attractive young woman, and after her arrest the media in Italy and England dubbed her "Foxy Knoxy," and the case became an international sensation that was reported in newspapers, magazine cover stories, and innumerable television news programs in the U.S., England, Italy and other countries. The intense media coverage made Knox the most recognized person in Italy, and probably one of the most recognizable non-public figures in the world.

Two after Lumumba's arrest he was released because he had the iron-clad alibi of being at his bar when Kercher was murdered. That added fuel to the media bonfire since the only evidence against him was Knox's statement.

Forensic testing of the evidence in Kercher's room only identified the DNA and fingerprints of one man -- 20-year-old Rudy Guede. The DNA evidence placing Guede at the scene included his semen recovered from Kercher. An arrest warrant was issued and he was tracked down in Germany where he had fled immediately after Kercher's murder. He was extradited to Italy. When questioned Guede admitted having sex with Kercher which he said was consensual and that he was present when she was murdered by a man he didn't know who entered through her bedroom window. He didn't identify Knox and Sollecito as being present. Guede was indicted for the murder and sexual assault of Kercher.

In October 2008 Guede was convicted of murdering and sexually assaulting Kercher. He was sentenced to 30 years in prison.

Days after Guede's convictions Knox and Sollecito were indicted for the murder and sexual assault of Kercher. Knox was also charged with *calunnia* (misleading and obstructing the police) for falsely implicating Lumumba in Kercher's murder.

Their trial began on January 16, 2009. Knox testified in her own defense on June 12, 2009 that the police threatened her with 30 years in prison and beat her into making false statements, that included naming Lumumba.

The prosecution's case largely hinged on forensic testimony that suggested Sollecito's DNA was recovered from Kercher's bra strap, and Knox's DNA was found on the handle of a knife recovered from Sollecito's apartment that had Kercher's DNA on the blade, although no blood was found on the knife. None of Knox or Sollecito's DNA was found in Kercher's bedroom, none of the shoeprints imprinted in blood in her bedroom were made by either of them, and none of Kercher's blood was found on any of Knox or Sollecito's clothing or shoes, or in his apartment. The judge denied the request of Knox and Sollecito's lawyers for an independent review of the DNA evidence.



Amanda Knox during her trial.

Based on the skimpy forensic evidence, lead prosecutor Giuliano Mignini wove a tale unsupported by any evidence that Kercher's murder was the result of a sex game gone wrong. One of his props unsupported by evidence was an animated cartoon shown to the jury that depicted Knox stabbing Kercher as Sollecito and Guede held her on her knees.

They were both convicted of all charges on December 4, 2009. Knox was sentenced to 26 years in prison and Sollecito to 25 years. Together they were ordered to pay 5 million euros (\$7.4 million) to Kercher's family. In addition, Knox was ordered to pay 40,000 euros (\$60,000) to Lumumba.

On appeal Guede's conviction was upheld on December 22, 2009, but his sentence was reduced to 16 years because he expressed remorse for his role in Kercher's murder.

Most observers expected Knox and Sollecito to be acquitted, so interest dramatically intensified in their case after their convictions. Instantly their case became an international cause célèbre of two apparently innocent people wrongly convicted of a horrible crime. A Lifetime cable network movie was produced, at least 17 books were written about the case (see the list at the end of this article), and numerous websites and blogs in different countries were dedicated to analyzing the evidence or reporting about the latest developments. A key website with detailed information was [www.InjusticeInPerugia.org](http://www.InjusticeInPerugia.org) that had analyses of the case by former FBI special agent Steve Moore, Forensic Engineer Ron Hendry, Mark C. Waterbury, Ph.D., and Professor Chris Halkides. Another key website was [FriendsOfAmanda.org](http://FriendsOfAmanda.org).

On November 8, 2010 Knox was charged with slander based on her trial testimony accusing the police of beating her incriminating statements out of her.

Italy's appeal system is different than the United States. The direct appeal of a conviction involves a retrial by a jury of two judges and six lay people, and the jury can consider new evidence the original jury didn't have available.

Knox and Sollecito's appeal trial began in Perugia on November 24, 2010. Their lawyers requested that the DNA evidence be reviewed by independent examiners appointed by the appeals court. Their request

**Knox cont. on page 13**

## Knox cont. from page 12

was granted. The appeal had a number of adjournments, and on June 29, 2011 the independent forensic report was submitted to the court and entered through testimony. The report found the crime scene was compromised and much of the DNA evidence was exposed to contamination. Among other things the report detailed that Kercher's DNA wasn't on the knife blade, but it was likely a crumb of rye bread. The report also detailed that the bra clasp wasn't collected until 47 days after Kercher's murder and that it was moved around the room repeatedly until it ended up in a pile of garbage was too contaminated to have any reliable evidentiary value.

When Guede testified he didn't say that Knox or Sollecito were involved in the murder, but neither did he say they weren't.

With not even the thin forensic evidence relied on during the 2009 trial to support their case, during closing arguments the prosecution pulled out all the stops in trying to have Knox's conviction upheld and her sentence increased to life in prison based on smearing her character. Descriptions of her bordered on absurd: "Amanda is one thing and another — that is, both Saint Maria Goretti and a satanic, diabolic she-devil given to borderline behavior." She is a "witch of deception" whose life of easy sex, drugs and alcohol is hidden behind her fresh-faced "soap-and-water" looks. She was described as having the "mask of an impostor.", and "We're not talking about the girl you're seeing today, who has been through four years of prison."

Another difference in Italy's legal system is the defense gets the last word. On the morning of October 3, 2011 after her lawyers concluded their arguments, Knox made her own impassioned plea to the judges. (It can be listened to at, <http://www.youtube.com/watch?v=ca-igVQBMk>) It began with:

It was said many times that I'm a different person from the way I look. And that people cannot figure out who I am. I'm the same person I was four years ago. I've always been the same.

The only difference is what I suffered in four years. I lost a friend in the most brutal inexplicable way. My trust, my full trust in the police has been betrayed. I had to face absolutely unjust charges, accusations and I'm paying with my life for something that I did not commit.

And ended with:

Maddy was killed, was murdered and I always wanted justice for her. I'm not escaping truth. I never escaped. I'm not fleeing from justice. I insist on the truth. I insist after four hopeless years. My innocence, our innocence is true. It deserves to be defended and acknowledged.

I want to go home. I want to go back to my life. I don't want to be punished. I don't want my future to be taken away from me for something I didn't do. Because I am innocent. Just like he is innocent. We deserve freedom. We didn't do anything not to deserve freedom.

I have all the respect for this court, for the care shown during our trial. Thank you.

After 11 hours of deliberations the jury announced it had arrived at its verdict. On October 3 at about 9:30 p.m. in Perugia the chief judge announced that Knox's conviction of obstruction for falsely implicating Lumumba was upheld. She was sentenced to three years in prison and to pay him 22,000 euros (about \$29,000) restitution and his legal fees. The judge then announced the defendants were acquitted of their other convicted crimes and ordered their immediate release. Since Knox had been imprisoned for almost four years she already served her three year sentence for obstruction.

She returned to Seattle on October 4.

The acquittal of Knox and Sollecito was reported on the front pages of newspapers in the U.S., Canada, England, Italy, throughout Europe, and in Australia and other countries. For all intents and purposes their case has concluded. Although another difference in Italy's legal system is the prosecution can appeal their acquittal to Italy's Supreme Court, it would be a suicidal bet to place money on the high court reinstating Knox and Sollecito's convictions considering there is no credible evidence they had any involvement in Kercher's murder.

It can be said without any reservation that the case of Knox and Sollecito received more media attention than any other wrongful conviction case in modern history. That publicity is important because their convictions involved many of the classic elements contributing to a wrongful conviction whether it occurs in the U.S., England, Australia, China or anywhere else. Among those elements is there was an inadequate police investigation that bordered on being shoddy. There was an intense and pro-

longed police interrogation of a suspect without a lawyer present that resulted in a false incriminating statement. The prosecutors decided to charge the suspects in spite of incomplete or conflicting evidence of their guilt. The suspect's convictions were largely based on unreliable forensic testimony. A key prosecution witness testified differently than what he or she had previously stated, and afterwards he received a significant sentence reduction. The trial judge allowed the prosecution to rely on character assassination and innuendo to make-up for the lack of incriminating evidence. The lack of credible evidence gave the aura that the prosecution was engaged in a quasi-witch hunt. Knox and Sollecito's ultimate exoneration was only possible because after their convictions people volunteered their time, energy and money to organize the effort necessary to enlist the aid of experts to provide their expertise *pro bono* to analysis evidence that either outright proved their innocence or cast extreme doubt on their guilt.

One of the side issues of the case is that while it was ongoing the lead prosecutor Mignini was convicted in January 2010 of abuse of office for his conduct as lead prosecutor in the infamous Monster of Florence case that involved a serial killer who has never been identified. Mignini was sentenced to 14 months in prison, but he was allowed to remain free pending appeal, and he was also allowed to continue on as lead prosecutor in Knox's case.

Perugia was once home to the hunting and burning of witches, and it was only through years of effort by many people that Knox and Sollecito were rescued from the bonfire.

Sources:

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[Amanda Knox is a "she-devil."](#) Italian court told, *Reuters*, September 26, 2011.  
[Amanda Knox Final Plea:](#) Full Text Transcript, *International Business Times*, October 3, 2011.  
[Amanda Knox Exclusive:](#) Convicted Prosecutor Giuliano Mignini May Return for "Appealing" Courtroom Drama, Citing Loophole, *CBS News*, April 22, 2010.



Amanda Knox at Rome airport on October 4, 2011 after her release. (Reuters)



## Proving Innocence Is No Longer Necessary For Wrongful Conviction Compensation In England

Eamonn MacDermott and Raymond McCartney were tried in January 1979 in Belfast, Northern Ireland for the 1977 murder of detective constable Liam McNulty, and McCartney was also tried for the murder of Geoffrey Agate. The sole evidence against the men were admissions they made during interrogations, which they claimed were coerced by ill-treatment by the police. The men were convicted and sentenced to life in prison.

Their appeals were denied in 1982, and McCartney served 15 years before he was paroled in 1994, and MacDermott served 17 years before his parole in 1996.

In 2006 MacDermott and McCartney filed a new appeal based on new evidence that the prosecution failed to disclose during their trial: the police had assaulted the men in order to obtain their confessions, and that a confession obtained under similar circumstances by one of the officers involved had been quashed.

In February 2007 Northern Ireland's Court of Appeal quashed the men's convictions based on the unreliability of their confessions that the jury relied on to convict them.

In the United Kingdom Section 133 of the Criminal Justice Act 1988 mandates that the Secretary of State for Justice shall pay compensation 'when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice.' The law was enacted to conform with Article 14(6) of the International Covenant on Civil and Political Rights 1966 that the United Kingdom ratified in May 1976. Section 133 and Article 14(6) both refer to a 'miscarriage of justice' as the standard for when compensation should be awarded.

A 'miscarriage of justice' under section 133 had been interpreted to mean that a person is only eligible for compensation if a fact not available at trial conclusively proves he or she is innocent of their convicted offence.

MacDermott and McCartney filed claims for compensation, which were denied in 2008 by England's Secretary of State for Justice on the grounds their convictions had



Raymond McCartney (L) and Eamonn MacDermott

not been quashed on the basis of their innocence. The men appealed to the Court of Appeals, which affirmed the denial. They then appealed to the Supreme Court, which made a landmark ruling on May 11, 2011 that broadens what constitutes a "miscarriage of justice" under the compensation statute. By a 5 to 4 majority England's Supreme Court ruled in an opinion written by Lord Phillips that for the purposes of a compensation claim under Section 133:

*"A new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it. ... This test will not guarantee that all those who are entitled to compensation are in fact innocent. It will, however, ensure that when innocent defendants are convicted on evi-*

dence which is subsequently discredited, they are not precluded from obtaining compensation because they cannot prove their innocence beyond reasonable doubt." *In the Matter of an Application by Eamonn MacDermott for Judicial Review* (Northern Ireland), [2011] UKSC 18 (May 11, 2011), ¶55

Consequently, McCartney and MacDermott can pursue their compensation claims because:

"The newly discovered facts in the case of Mr. McCartney and Mr. MacDermott ... so undermine the evidence against them that no conviction could possibly be based upon it. There can be no reasonable doubt of this. Accordingly I would allow their appeal and hold that they are entitled to compensation pursuant to the provisions of section 133." *Id.* at ¶65

In 2010 the Secretary of State for Justice rejected 36 of 37 wrongful conviction compensation claims. It is expected that some of those claimants, like McCartney and MacDermott, will now prevail in new applications submitted based on the Supreme Court's ruling.

Sources:

[In the Matter of](#) an Application by Eamonn MacDermott for Judicial Review (Northern Ireland), [2011] UKSC 18, May 11, 2011.

[Degrees of innocence](#): The Supreme Court makes it easier for victims of wrongful imprisonment to get compensation, *The Economist*, May 12, 2011.

[Two men jailed](#) for murder can seek compensation, *Irish Times*, May 12, 2011.

## Maurice Caldwell Exonerated After 21 Years Imprisonment For Murder

Maurice Caldwell was convicted by a jury in 1991 of the 1990 murder of a woman during a drug deal at a San Francisco apartment complex.

An eyewitness told police immediately after the crime that she was looking out her apartment window and saw the shooting, but she didn't recognize either of the two men who shot the woman. The witness was Mary Cobbs, and Caldwell, 22, was her next door neighbor. When the police brought Caldwell to her door she told them he wasn't one of the shooters. Two weeks later she picked Caldwell out of a lineup as a shooter and he was charged with the murder.

There was no physical evidence linking Caldwell to the crime and he was convicted based on his neighbor's testimony he was one of the shooters. Caldwell was sentenced



Maurice Caldwell released on March 28, 2011 (CBS, San Fran)

to 27 years to life in prison. His convictions were affirmed on appeal.

Caldwell contacted the Northern California Innocence Project, which accepted his case in 2008. The [NCIP](#) reinvestigated Caldwell's case. They obtained a declaration from Marritte Funches that he was one of two men involved in the shooting and that Caldwell was not involved. Funches is serving a life sentence without possibility of parole in Nevada for a different murder. The NCIP also obtained declarations from two eyewitnesses to the murder who didn't testify at Caldwell's trial. They both stated Caldwell was not involved in the crime. Cobbs had died so she couldn't be questioned.

Based on the new evidence Caldwell filed a state *habeas corpus* petition seeking a new trial based on his trial lawyer's ineffectiveness for failing to adequately investigate his case.

**Caldwell cont. on p. 15**



## Two Men Wrongly Imprisoned For 29 Years Acquitted Of Murder

Takao Sugiyama and Shoji Sakurai were acquitted on May 24, 2011 of a 1967 robbery and murder in Tone, Japan. Convicted in 1970 and sentenced to life in prison, the two men were released on parole in 1996 after 29 years of incarceration.

Sugiyama and Sakurai, both 20, were arrested in October 1967 on suspicion of robbing and murdering a 62-year-old carpenter in Tone, about 40 miles northwest of Tokyo. They were charged with the crimes after they both confessed, although they retracted their confessions claiming they had been coerced by the police. An eyewitness also identified them as the perpetrator.

During their October 1970 trial they protested their innocence, but they were convicted based on their confessions and the eyewitness identification. They were sentenced to life in prison.

Their convictions were affirmed on appeal and they were released on parole in November 1996 — 29 years and 1 month after their arrest.

In 2001 Sugiyama and Sakurai filed a petition for a retrial. The petition was granted in 2005 by a High Court judge who found that the police pressured the men into signing confessions that didn't fit the facts of the crime. The judge also found it likely the police interview tapes had been edited, and



Shoji Sakurai (left) and Takao Sugiyama during their retrial.

that the men's convictions had been based on their dubious confessions. The prosecution appealed that ruling, but it was upheld by the Tokyo High Court in July 2008 and then by Japan's Supreme Court in December 2009.

Their retrial in the Mito District Court in Tsuchiura began in July 2010. The prosecution's case was again based on their confessions and the eyewitness identifications. Sugiyama and Sakurai's defense was the hairs and fingerprints found at the crime scene didn't match either man; the circumstances of the eyewitness identifications made them unreliable; they introduced the exculpatory testimony of a new eyewitness, a 78-year-old woman; and their confessions were false and coerced by the police. Their lawyers introduced evidence that an acoustics expert analyzed the audio tape of Sakurai's "confession" and discovered it had been edited in 13 places.

After the trial concluded in November 2010, the court was scheduled to announce its decision on March 16, 2011. However, it was rescheduled because the devastating earthquake and tsunami that struck Japan on March 11 crippled railways and other transit.

On May 24, 2011 presiding Judge Daisuke Kanda announced the acquittal of Sugiyama and Sakurai, based on the lack of objective evidence linking them to the crime, that the physical evidence excluded them from the crime scene, and that the eyewitness accounts lacked credibility. By acquitting the men the Court placed no weight on their confessions.

Sugiyama and Sakurai, both 64, can now pursue compensation for their 44-year ordeal.

National publicity about Sugiyama and Sakurai's case intensified the public debate in Japan that the country's legal system needs major reforms, particularly related to the law that allows a suspect to be jailed for up to 23 days and interrogated from morning to night. During those 23 days a suspect's lawyer is allowed only limited access to meet with their client. That law is one reason why Japan has a 99% conviction rate, and those convictions are typically based on a confession.

Sources:

[Japan's justice system on trial](#), *The Australian*, July 10, 2010.  
[Court acquits pair](#) after serving decades in jail, *The Japan Times*, May 25, 2011,  
[Japan court acquits two](#) after decades in jail, *AFP*, May 24, 2011.

### Caldwell cont. from p. 14

In 1993 Caldwell's trial lawyer, Craig Kenneth Martin, [was suspended](#) from practicing law for six months, but that punishment was stayed and he was placed on probation for a year. In 1996 Martin was [again suspended](#) from practicing law. His two year suspension was stayed and he was placed on three years of probation with an actual 90-day suspension. That was the fourth time Martin had been disciplined by the California Bar Association. On July 22, 2010 [Martin was](#) [disbarred](#) by the California Supreme Court from practicing law in California.

On December 16, 2010 Caldwell's petition for a new trial was granted based on Martin's ineffective assistance of counsel.

In January 2011 the San Francisco District Attorney's Office refiled the murder charge against Caldwell and announced their inten-

tion to retry him based on Cobbs' trial testimony that would be read into the record.

Caldwell's new lawyer filed a pre-trial motion challenging his retrial on the basis his due process right to a fair trial would be violated because he would not be able to cross-examine Cobbs, and the trial exhibits, such as the photos Cobbs referred to in her testimony, had been destroyed by the court. The judge agreed and ruled that Cobbs' testimony from Caldwell's first trial was inadmissible.

After the judge's ruling the DA offered Caldwell a deal: If he would plead guilty to voluntary manslaughter, attempted murder, and shooting into an occupied vehicle he would be sentenced to time served and released immediately. Caldwell refused the plea deal, stating he was innocent.

On March 25 the DA's Office moved to

dismiss the charge against Caldwell on the basis they couldn't proceed without Cobbs' testimony, and the judge ordered Caldwell's release from prison.

Caldwell, now 43, was released on March 28 after almost 21 years of wrongful incarceration.

The DA's Office refuses to admit that Caldwell is innocent, stating that they just don't have any evidence to prove he is guilty.

Sources:

[Conviction of S.F. man](#) in prison 21 years set aside, By Rachel Gordon, *Chronicle Staff Writer*, *San Francisco Chronicle*, December 17, 2010.  
[Retrial Set After '91](#) San Francisco Murder Conviction Tossed, *CBS San Francisco*, January 20, 2011.  
[Man convicted of murder](#) released from jail, *ABC Channel 7 (San Francisco)*, March 28, 2011.  
[Supreme Court Minutes](#), Thursday, July 22, 2010, *San Francisco, California*.

## Two New Zealand Men Awarded Compensation For Wrongful Arson Convictions

Phillip Johnston and Donald (Jaden) Knight were driving through Foxton, New Zealand in November 2003 when they stopped and offered to help during a fire at the Manawatu Hotel. Knight worked as security guard and they both lived 70 miles south of Foxton in a town near Wellington, New Zealand's capital.

No one was hurt during the fire that caused tens of thousands of dollars in damage.

The police became suspicious of the coincidence that the men happened to be driving through town at the time of the fire and stopped to offer their help. When questioned by the police several weeks after the fire, Knight caved in after eight hours of non-stop interrogation and confessed that he helped Johnston. Immediately after the interrogation ended Knight retracted his confession, saying he only made it to stop the pressure of the interrogation. When shown Knight's confession Johnston told the police he had nothing to do with causing the fire. Based on Knight's confession Johnston, 28, was charged with starting the fire, and Knight, 27, was charged with assisting him.

During their joint trial in September 2004 the prosecution did not introduce any physical, forensic or eyewitness evidence tying the men to the fire. Although the hotel's security camera recorded the arsonist — Johnston was not positively identifiable from the video. The prosecution's ace-in-the-hole was Knight's confession.

The jury convicted Knight and Johnston, and both were sentenced to six years imprisonment.

The men's convictions were quashed by New Zealand's Court of Appeal in June 2005 based on the judge's erroneous summing up of the case to the jury that gave the jurors inadequate direction, and they were released on bail while awaiting their retrial.

After the men's conviction Knight's mother, Neroli Edwards, and Johnston's mother, Darrel Arcus, began investigating the case themselves. They went through all the documents and made freedom of information act requests for information that wasn't in the files of their son's attorneys. The moth-



Donald (Jaden) Knight during press conference after compensation award (NZ Herald).

ers obtained information there was a fire-bug on the loose, because there were 150 arson fires in the Foxton area while Knight and Johnston were either in jail or 70 miles away in the Wellington area being monitored on bail.

The mothers also hired a private investigator. He discovered that the time stamp of the hotel's CCTV (surveillance) video which showed the arsonist was set five minutes before the time stamp of the fire department's video of the firemen at the scene. The prosecution had shown the two videos during the trial based on them being synchronized to establish that Johnston could have been at the scene and started the fire. But based on the time it was known Johnston and Knight were elsewhere, it couldn't be Johnston in the hotel's video.

To establish that Johnston and Knight had been at the scene prior to the fire, during their trial the prosecution introduced receipts from the pub in the hotel that had the names of Johnston and Knight on them. However, the private investigator discovered that the prosecution knew prior to the trial that those receipts were for people with the last name of Johnston and Knight but with different first names -- and that one of them was an ex-police officer.

Their retrial began in January 2006, but the judge declared a mistrial on the third day when the prosecution disclosed that they had not provided the defendants with a police file listing people considered possible suspects in the fire. The judge also ordered that if retried Johnston and Knight would have separate trials.

Johnston was retried in August 2006. With the new evidence available to his lawyer that had been discovered by the mothers and the private investigator, the jury quickly acquitted him. After Johnston's trial the police obtained new evidence that neither man was responsible for the arson, and in February 2007 the charges were dismissed against Knight. On March 13, 2007 police Superintendent Mark Lammas apologized to both men in a letter that stated it had been "ascertained by Police that the offence for which you were charged, convicted and incarcerated had not been committed by you." The letter was an admission that Knight's confession was false.

New Zealand does not have a wrongful con-



Phillip Johnston (ONE News)

viction compensation statute, so all payments are made by the federal government on an *ex gratia* basis under guidelines formulated by the Ministry of Justice. A person can apply for compensation if they have served all or part of a sentence of imprisonment and had their conviction quashed on appeal without a retrial being ordered, or they have been granted a "free" pardon, and can "prove on the balance of probabilities they were innocent of the crime for which they were convicted."

Under the guidelines a person for whom a retrial was ordered cannot apply for compensation. However, based on Superintendent Lammas' letter that they were factually innocent Johnston and Knight filed compensation claims in December 2007.

New Zealand's government has residual discretion to consider extraordinary compensation claims that fall outside the guidelines. Although it wasn't publicly reported at the time, in September 2010 the Minister of Justice submitted a Report to New Zealand's Cabinet that determined the circumstances of Johnston and Knight's claims met the requirement that their case was extraordinary and that in the interests of justice they should be compensated.

On May 11, 2011 Justice Minister Simon Power announced that Johnston had been awarded compensation of \$146,011 and Knight \$221,936 (New Zealand dollars). In U.S. dollars Johnston's compensation was \$114,470 and Knight's was \$175,513 (At the conversion rate of 0.7908 NZL dollars to the U.S. Dollar.). Power also publicly apologized to Johnston and Knight, saying, "The standards that New Zealanders expect of their justice system fell well short in this case. I'm disturbed at the way the system treated Mr Johnston and Mr Knight. New Zealanders need to be confident that their criminal justice system is sound and effective, and an essential part of that is acknowledging when there is a breakdown in the system." Power's apology is believed to be the first by a Justice Minister to people granted compensation for wrongful imprisonment.

The parents of Johnston and Knight each spent more than \$20,000 on the lawyers who represented the two men during their trial, the different lawyers who handled their appeal, and a private investigator. Knight estimated he lost more than \$160,000 in wages during the three years he

**New Zealand cont. on p. 17**



# Marchelletta's Tax Convictions Overturned By Appeals Court

White collar crimes such as alleged tax or securities law violations are different than alleged crimes such as murder, rape and robbery — because they typically don't involve a factual dispute of what the defendant did or didn't do. The key issue is the intent of the accused in doing or not doing something. That is because white collar crimes are solely created by statutes that can have different interpretations of when a person has committed a criminal violation.

The defense of a person claiming actual innocence of murder, rape or robbery is they didn't commit the physical act constituting the crime, while the defense of a person claiming actual innocence of a white collar crime is typically that they had no intention to commit a crime by their involvement in the physical acts alleged to constitute the crime. Barry Bonds prosecution for allegedly lying to a federal grand jury about knowingly using anabolic steroids is an example of a typical white collar prosecution by a person claiming innocence. Bonds' defense was he didn't knowingly use steroids, so he had no criminal intent to lie to the grand jury. Although convicted of a single count of obstruction of justice, Bonds' conviction may be overturned on appeal.

Consequently, jury instructions about what does and does not constitute intent to commit the defendant's alleged crime are critically important in a white collar case.

Gerard M. Marchelletta, Jr [Junior] and his father Gerard M. Marchelletta, Sr [Senior]

## New Zealand cont. from p. 16

was either in prison or released on bail.

Det. Sergeant Peter Govers was responsible for procuring Knight's false confession and the prosecution of Johnston and Knight for a crime they didn't commit. Govers has not been disciplined and continues working.

### Sources:

Police apologise to duo wrongly jailed for arson, New Zealand Lawyer, March 23, 2007.

[Pair Still Await Compo](#), *Manawatu Standard*, December 12, 2009.

[Rough justice sees mums fight](#) sons' case, TVNZ, May 8, 2011.

["Compensation for Two Persons Wrongly Convicted and Imprisoned For Arson,"](#) New Zealand Cabinet, February 15, 2010.

[Tearful mother](#) hits out at 'institutional bullying', *Otago Daily Times*, May 11, 2011.



Gerard Marchelletta Jr. in May 2011 (Bita Honarvar - AJC)

After an extensive investigation of their personal and business finances, Junior, Senior and Circle Industries bookkeeper Theresa L. Kottwitz were indicted for tax related violations for 1999, 2000 and 2001. Those alleged violations allegedly resulted in the non-payment of about \$1.5 million in taxes by the Marchellettas.

Among the charges were that the three defendants conspired to impede the collection of revenue by the I.R.S., they aided and abetted the filing of a false corporate tax return in 2001 for Circle Industries, and Kottwitz aided in the filing of a false personal tax return for Junior in 1999 and Senior in 2000.

During the three defendant's October 2007 trial the government contended "that the Marchellettas "conspired with each other and their long-time loyal employee, . . . Kottwitz, the bookkeeper" to hide money from taxes by "cooking the books" and "through accounting tricks," and by filing false tax returns." *USA v. Theresa Kottwitz, et al*, No. 08-13740 (11th Cir 08-19-2010), Op. Cit. 26-27.

Their defense was they relied on the expert advise and regular assistance of Circle Industries' accountant as well as other experts that included a "forensic accountant and former IRS agent." So if there were any errors on the tax returns or how Kottwitz kept the books it was due to their reliance on erroneous expert accounting advice. That negated that they had the requisite criminal intent to violate the law.

At the close of evidence the defendants moved for a directed verdict of acquittal because the government didn't introduce any evidence they intended to violate the tax laws. The judge denied the motion.

The defendant's then requested a "good faith reliance on accountant" jury instruction because, "The Government must estab-

lish beyond a reasonable doubt that the Defendant acted willfully and with specific intent as charged in the indictment. "Good faith reliance on a qualified accountant . . . [is] a defense to willfulness in cases of tax fraud." So, a Defendant would not be "willfully" doing wrong if, before taking any action with regard to the alleged offense, the Defendant consulted in good faith an . . . accountant whom the Defendant considered competent, made a full and accurate report to that . . . accountant of all material facts of which Defendant had the means of knowledge, and then acted strictly in accordance with the advice given by that . . . accountant." The judge refused to give the jury instruction.

owned a drywall (sheet-rock) contracting company based in Atlanta, Georgia that worked on large east coast commercial construction projects. After being awarded the drywall contract for the Atlantis Hotel and Casino in Nassau, The Bahamas, U.S. Customs began an investigation of their company — Circle Industries — and that investigation involved the Internal Revenue Service.

lish beyond a reasonable doubt that the Defendant acted willfully and with specific intent as charged in the indictment. "Good faith reliance on a qualified accountant . . . [is] a defense to willfulness in cases of tax fraud." So, a Defendant would not be "willfully" doing wrong if, before taking any action with regard to the alleged offense, the Defendant consulted in good faith an . . . accountant whom the Defendant considered competent, made a full and accurate report to that . . . accountant of all material facts of which Defendant had the means of knowledge, and then acted strictly in accordance with the advice given by that . . . accountant." The judge refused to give the jury instruction.

The defendants were convicted of all charges except for one that the government dismissed prior to the beginning of jury deliberations.

They appealed, and on August 19, 2010, a three-judge panel of the federal 11th Circuit Court of Appeals unanimously overturned all of the convictions except for the conspiracy charge.

The three defendant's filed a motion for reconsideration, and on December 22, 2010 the three-judge panel overturned the conspiracy count on the basis that the judge failed to give the "good faith reliance on accountant" jury instruction that could have been expected to result in the defendant's acquittal because they relied on the advice of accounting experts for everything they did.

The government filed a motion for reconsideration by the 11th Circuit *en banc*, but the motion was denied.

In a May 5, 2011 front-page story in the *Atlanta Journal-Constitution* about the Marchelletta's case their attorney estimated they had spent more than \$4 million in legal fees fighting the tax charges.

Circle Industries' [website](#) has the following quote by Ralph Waldo Emerson: "When a resolute young fellow steps up to the great bully, the world, and takes him boldly by the beard, he is often surprised to find it comes off in his hand, and that it was only tied on to scare away the timid adventurers."

### Sources:

*USA v. Theresa Kottwitz, et al* - No. 08-13740 (11th Cir 08-19-2010) (panel decision acquitting the defendants of some charges)

*USA v. Theresa Kottwitz, et al* - No. 08-13740 (11th Cir 12-22-2010) (panel decision on rehearing that jury instruction should have been given)

[Fighting to clear his name](#), company, *Atlanta Journal-Constitution*, May 5, 2011



# In Memoriam: Robert B. Waterhouse, 1946-2012

By Robert Waterhouse

Ten years ago I wrote in *Justice Denied* about my namesake, Robert B. Waterhouse, who had been on the Florida Department of Corrections' Death Row since September 1980. On February 15 2012 he was executed, maintaining to the last that he did not murder Deborah Kammerer, and being denied DNA testing of evidence tested which might have proved his innocence (law enforcement authorities claimed the evidence had inadvertently destroyed).

But I'm not writing about innocence or guilt here. I spelt out the "facts" of the case in my previous article. It's a sad but all-too-common litany of injustice on the part of the courts and the system, simply added to by the flurry of appeals as his execution date approached. In fact, his execution was delayed two hours while waiting for the final appeal to be inevitably denied. What was he thinking at that point?

This obituary of my friend will be short.

I met and corresponded with a man who, via his wife Frances (she married him when he was on death row), via the small monochrome TV in his cell, and via writing to people like me, somehow kept in touch with the outside world. He had strong likes and dislikes about politics, society, people and sport. We argued the toss on many occasions.

## Former Police Chief Convicted of Falsifying Report To Protect Killer

It is well-known that with few exceptions a judge will give a much more lenient sentence to a law enforcement officer convicted of a crime than a regular citizen convicted of a comparable crime. One of the catastrophic consequences of judges failing to consider crimes by law enforcement officers as at least as serious as comparable crimes by other people in society, is that attitude contributes to wrongful convictions. A common feature of wrongful conviction cases is one or more officers involved concealed evidence of the person's innocence and/or committed perjury during their trial. Police officers can do that with impunity because they know there is an infinitesimal chance they will be prose-



Robert B. Waterhouse  
(FL DOC)

Over the time I knew him he became more and more cynical. I was told he mistrusted his attorney and that he bickered with Frances, who offered him nothing less than unquestioning love. She worked all hours to support him, visiting every weekend.

I found it increasingly hard to write to him – to say anything that made sense. I have no idea what he thought of the letters or cards I sent each day during his final three weeks: he never replied.

Whatever this man may or may not have done, he was destroyed by the system long before that lethal injection. He was tortured in the name of justice, like every other death row inmate. Perhaps the worst torture, over 31 years of hell, is the hope that there might somehow be a reprieve.

I feel I let my friend down. In the final count, I was unable to help him. He went to his end, a sick man physically, jeered at by the pro-death lobby which had suddenly rediscovered his case. He needed a doctor, not an executioner. I miss him.

(JD Note: "The Robert Waterhouse Story," by Robert Waterhouse, was in *Justice Denied*, Issue 21, and can be read at, [www.justicedenied.org/robertwaterhouse.htm](http://www.justicedenied.org/robertwaterhouse.htm)

immigrant from Mexico and Shenandoah is predominately white.

Nestor was prosecuted based on the U.S. Attorney's theory that he used his position as police chief to try and protect Ramirez's assailants from being identified and arrested for the fatal assault.

Two of Ramirez's assailants, Derrick Donchak and Brandon Piekarsky, were convicted in October 2010 of a federal hate crime and are serving nine-year federal prison sentences.

During Nestor's sentencing hearing federal prosecutor Myesha Braden [said he](#) "abused his position of trust. As chief of police, he had an obligation to see that justice was done, to see that the truth came out. ... He undermined that system of justice by filing a false police report. Officers need to know that if you fail to honor your oath ... there will be punishment and consequences." Although Nestor's convicted crime has a maximum sentence of 20 years in prison, the government sought a sentence of 57 to 71 months based on the federal sentencing guidelines for the severity of Nestor's crime.

Senior U.S. District Judge A. Richard Caputo rejected the government's recommended sentence of 57 to 71 months in prison, and instead sentenced Nestor to 13 months. Judge Caputo said the [guideline sentence](#) was "overly harsh," and that Nestor falsified the police report because he "was unable to separate himself as a human being from the fabric of his community and the friendships he had."

Shenandoah police officer William Moyer was convicted of lying to the FBI about what a 911 caller had told him on the night of the fight. During his sentencing hearing on June 1, 2011, the U.S. Attorney's Office argued that he should be sentenced to one year prison based on the federal sentencing guidelines. However, Judge Caputo rejected that as too harsh and instead sentenced him to three months in federal prison.

Sources:  
[Ex-chief gets prison](#) in immigrant death cover-up, *Austin American-Statesman*, June 1, 2011.  
[Two Former](#) Shenandoah, Pennsylvania, Police Officers Convicted of Falsifying Information About Hate Crime, U.S. Dept of Justice, Press Release, January 11, 2011.

cut, and that even if they are they will likely be treated with kid gloves by the judge involved in their case.



Matthew Nestor arrives for his sentencing hearing on June 1, 2011 (AP, The Citizens' Voice, Mark Moran)

The adage that judges treat law enforcement officers with leniency was once again proven true on June 1, 2011.

Former Shenandoah, Pennsylvania Police Chief Matthew Nestor

was convicted in January 2011 by a federal jury of hindering an FBI investigation by falsifying a police report to conceal the names of several local high school football players who in July 2008 beat and kicked to death 25-year-old Luis Ramirez. Shenandoah is a small town in northeastern Pennsylvania. The FBI investigated Ramirez's death as a hate crime because he was an

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## U.S. Supreme Court Sends Message To Federal Courts That When In Doubt Deny A State Prisoner's Habeas Petition

In 2004 Steven Frank Jackson was convicted in Sacramento County, California of charges related to the sexual assault in 2002 of a 72-year-old woman who lived in his apartment complex. He was sentenced to 25 years to life in prison.

During jury selection, Jackson who is black, objected to the prosecutor's peremptory challenges to two of the three blacks in the jury pool. Jackson's lawyer argued there was no valid reason for their exclusion from his jury except for their skin color. In 1986 the US Supreme Court ruled it violates a defendant's right to equal protection of the law for a juror to be excluded based on their race. That case was *Batson v. Kentucky*, 476 U. S. 79 (1986) and when a defendant challenges the prosecution's exclusion of a juror based on race it is known as a "*Batson* challenge."

The prosecutor claimed the exclusion of the two jurors was for "race-neutral" reasons.

The prosecutor justified striking Juror J, a black woman with a master's degree in social work, "based on her educational background." Jackson's lawyer countered that several white prospective jurors with educational backgrounds were not challenged by the prosecutor. The prosecutor did not ask Juror J a single question while the white jurors were asked questions about their educational backgrounds.

The prosecutor justified striking Juror S, a black man, because he had been "frequently stopped by California police officers." Jackson's lawyer countered that several white prospective jurors who had "negative experiences with law enforcement" were not challenged by the prosecutor.

Jackson raised his *Batson* challenge as an issue in his direct appeal to the California Court of Appeal that affirmed his conviction, and the California Supreme Court denied his petition for review.

Jackson filed a federal petition for a writ of *habeas corpus* that included his *Batson* challenge to exclusion of the two black jurors. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs the review of a state prisoner's federal habeas

petition, and under it relief may not be granted unless the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(2). The U.S. District Court judge determined that the Court of Appeal's finding that the black jurors were not excluded because of their skin color was not unreasonable.

Jackson appealed that ruling to the Ninth Circuit Court of Appeals, which in July 2010 reversed the lower court's ruling. In their unpublished memorandum the three judge panel unanimously ruled:

"The prosecutor's proffered race-neutral bases for peremptorily striking the two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors." *Jackson v. Felkner*, 389 Fed. Appx. 640, 641 (2010).

The U.S. Supreme Court agreed to review the Ninth Circuit's ruling. On March 21, 2011 the Court unanimously ruled in favor of granting the California Attorney General's writ of *certiorari*. The Court's opinion in *Felkner v. Jackson*, 562 U.S. \_\_\_\_ (2011) states in part:

The *Batson* issue before us turns largely on an "evaluation of credibility." The trial court's determination is entitled to "great deference," *ibid.*, and "must be sustained unless it is clearly erroneous," *Snyder v. Louisiana*, 552 U. S. 472, 477 (2008).

That is the standard on direct review. On federal habeas review, AEDPA "imposes a highly deferential standard for evaluating state-court rulings" and "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U. S. \_\_\_\_, \_\_\_\_ (2010) Here the trial court credited the prosecutor's race-neutral explanations, and the California Court of Appeal carefully reviewed the record at some length in upholding the trial court's findings. The state appellate court's decision was plainly not unreasonable. There was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner.

The U.S. Supreme Court reviewed the same evidence related to Jackson's jury selection and applied the same legal standard to analyzing that evidence as the Ninth Circuit, but the Supreme Court decided that more

## Duke Lacrosse Hoax Rape Case Accuser Charged With Murder

Crystal Gail Mangum is the woman who falsely accused three Duke University lacrosse players of raping her during a party in 2006 that she and another woman were hired to dance at while scantily clad.

The media firestorm about the case was initially focused on the angle that the accused white players were from wealthy families while the black Mangum was a struggling single mother who had to take demeaning jobs to make ends meet.

Based on Mangum's accusation Reade Seligmann, Collin Finnerty, and David Evans were charged in May 2006 with rape, sexual offense and kidnapping.

When details of the case became publicly known — including that Mangum gave six different accounts of the alleged incident, that she had a history of making made false sexual assault allegations, and that DNA tests of the sperm recovered from her didn't match either the three accused players or any of the other 43 men at the party — Durham County DA Mike Nifong dismissed the rape charges against the three men on December 22, 2006. However, Nifong refused to dismiss the sexual offense and kidnapping charges.

North Carolina's Attorney General took over the case in January 2007. After reviewing the case the AG dismissed the remaining charges against Seligmann, Finnerty and Evans in April 2007.

It was reported that at the time the charges were dismissed the families of the three young men had spent over \$1 million in legal fees.

In September 2007 Seligmann, Finnerty and Evans filed a federal civil rights lawsuit that named a number of defendants, including Duke University, and the city of Durham and its police department.

Duke University settled with the three men

### Mangum cont. on p. 20

extreme deference should be given to upholding the state court's ruling. The decision in *Felkner v. Jackson* sent the strong message to all federal district and appeals courts that when in doubt to deny the *habeas corpus* petition of a state prisoner.



## Washington Cities Sued For Violating Defendants' Right To Counsel

A class-action lawsuit has been filed against two Washington cities for violating defendants' constitutional right to effective assistance of counsel. The lawsuit was filed in Skagit County Superior Court. The three plaintiffs are prisoners at the Skagit County Jail in Mount Vernon.

Mount Vernon and Burlington are about 65 miles north of Seattle. The cities jointly contract all their public defender services to two private attorneys. In 2010 those two lawyers handled the defense of more than 2,100 people charged with criminal misdemeanors in the two cities. The cities pay the two lawyers a total of \$180,000 yearly, and according to the cities the two lawyers spend no more than 1/3 of their time handling criminal cases for the cities. That would mean that in handling more than 2,100 cases yearly, the lawyers spend an average of less than 20 minutes on each case. However, the time spent on the average case is much less than 20 minutes because of the time the

### Mangum cont. from p. 19

in late 2007, but the terms of the settlement weren't publicly disclosed. The lawsuit's claim against the city of Durham is still pending as of early 2012.

Although Magnum had several serious run-ins with the law after it was exposed her rape accusation against the Duke students was a hoax, none were as serious as her arrest on April 3, 2011 for stabbing her 46-year-old boyfriend, Reginald Daye, multiple times in his stomach. She was charged with assault with a deadly weapon with intent to kill inflicting serious injury. After Daye died from his injuries on April 13, Mangum was indicted for first-degree murder on April 18, 2011.

In November 2011 she was found competent to stand trial. As of early 2012 her murder charge is pending.

#### Sources:

[Duke lacrosse accuser](#) Crystal Mangum charged in stabbing, *CBS News*, April 4, 2011.  
[Former Duke lacrosse accuser now faces murder charge](#), *Reuters*, April 19, 2011.  
[All Charges Dismissed](#) Against The Duke Lacrosse Three, *Justice Denied*, Issue 35.  
[Darryl Hunt](#), The NAACP, And The Nature Of Evidence, *Justice Denied*, Issue 35.  
[Duke U. Hoax](#) Rape Prosecutor Mike Nifong Convicted Of Contempt, *Justice Denied*, Issue 38.  
[Duke Hoax Rape](#) Prosecutor Mike Nifong Bankrupt, *Justice Denied*, Issue 39.

lawyers spend on trials — sometimes five a week — for defendants who refuse to plead guilty.



Morgan Witt  
(www.legalwitt.com)

It was reported in the [Seattle Times](#) that the two contract lawyers — Richard M. Sybrandy and Morgan Witt — visited the Skagit County Jail a total of six times in 2010, during which they saw seven clients.

During an interview with *The Seattle Times* Sybrandy admitted that he rarely visits his clients in jail. He also said it has been at least two years since he hired an investigator to investigate a case.

There have been many complaints that clients are unable to communicate with Sybrandy and Witt, and even the Mount Vernon Police Department [has reported](#) that it "is not an isolated case" when they can't reach the public defenders to discuss a case.

The Washington State Bar Association recommends that public defenders handle no more than 400 cases a year, and the Washington Supreme Court is considering setting binding standards for public defense. Seattle is one of the few cities that cap case loads, limiting public defenders to 380 cases yearly. Based on the WSBA's recommendation Mount Vernon and Burlington need six public defenders instead of two.

In the lawsuit against Mount Vernon and Burlington "the plaintiffs allege that excessive caseloads and inadequate monitoring by the cities have resulted in a public defense system that deprives indigent persons of their constitutional rights. Among other things, plaintiffs claim the attorneys do not investigate the charges filed against indigent persons, do not respond to communications from indigent persons, do not meet with indigent persons in advance of court, and do not stand with or represent indigent persons during court hearings." Consequently defendants are being provided with a lawyer in name only.

In a press release Toby Marshall, one of the lead attorneys for the plaintiffs, says: "When you are arrested and charged with a crime, the right to counsel is the most fundamental and important right that you have. This is true regardless of your economic status." Matt Zuchetto, another attorney in the case, says: "We intend to present extensive evidence that will show the public defense system in Mount Vernon and Burlington is broken. At the end of the day, our

clients are simply asking for one thing: to fix the system."



Richard Sybrandy  
(www.sybrandy-law.org)

The Mount Vernon and Burlington city councils recently voted to extend their contract with Sybrandy and Witt for an additional two years.

In Washington cities and counties pay for public defender services, so there is a wide variance in the quality of representation. While someone accused of a crime in a wealthy city like Seattle can get first-class representation, a person charged with the same crime in a poor rural county may get representation no better or even worse than if a customer at a local coffee shop had been randomly picked to represent the person.

Deficient public defender representation in Grant County, Washington was national news several years ago. Among other things, PD Guillermo Romero was disbarred by the Washington Supreme Court in 2004 for soliciting money from indigent clients whose case he was assigned. Another Grant County PD, Thomas J. Earl, was also disbarred by the Washington Supreme Court in 2004. See the article, "[The High Cost of Free Defense](#)" in *Justice Denied* Issue 26.

In November 2005 Grant County settled a class-action lawsuit for its failure to provide adequate legal defense for people who couldn't afford their own attorney. The settlement required Grant County to pay the plaintiffs \$500,000 for attorneys' fees and costs. The county also agreed to hire a full-time supervisor for its public defenders, to limit individual defenders' caseloads to 150 felony cases per year, to hire one full-time investigator for each four public defenders, and to provide an interpreter, when needed, for attorney-client meetings. See the article, "[Rural Washington County Settles Shoddy Indigent Defense Lawsuit](#)," in *Justice Denied* Issue 30.

#### Sources:

[Skagit County suit](#) claims public defenders too busy to defend, *Seattle Times*, June 21, 2011.  
[Mount Vernon and Burlington Sued](#) for Allegedly Violating the Constitutional Rights of Indigent Defendants, Press Release, Terrell Marshall Daudt & Willie PLLC (Seattle, WA), June 10, 2011.

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# Larry Swearingen's Execution Is Stayed So His Actual Innocence Claim Can Be Considered

Texas is one of at least eight states that allows a free-standing claim of actual innocence. The Texas Court of Criminal Appeals issued a stay of Larry Swearingen's execution based on Swearingen's writ of habeas corpus that raised a single claim: he is actually innocent of murdering Melissa Aline Trotter because at the time of her death he was in the Montgomery County Jail. The Court ordered the stay so the due process violation alleged in his petition — that he is actually innocent — could be reviewed and resolved by the trial court.

Swearingen was convicted in 2000 of murdering Ms. Trotter, a 19-year-old freshman at Montgomery College in Conroe, Texas. Ms. Trotter was last seen by family and friends on December 8, 1998, and her clothed body was found on January 2, 1999 by hunters in the Sam Houston National Forest north of Conroe.

Swearingen was a friend of Ms. Trotter's and he was seen with her on the college campus the day she disappeared, but he wasn't seen leaving with her. Three days after she was last seen the 27-year-old Swearingen was arrested on December 11 for outstanding traffic tickets. He was in custody from then until Ms. Trotter's body was found three weeks later. He was subsequently charged with kidnapping, raping, and murdering her.

The prosecution's case during Swearingen's trial was circumstantial because there was no direct evidence he was Ms. Trotter's assailant and DNA tests excluded him as the source of blood under her fingernails and of a pubic hair recovered from a vaginal swab. The prosecution's speculation that Swearingen abducted and killed her was supported by the testimony of Harris County Chief Medical Examiner Joyce Carter: She testified Ms. Trotter's body was placed in the forest approximately 25 days prior to its discovery. That estimate matched the day she was last seen on December 8.

Swearingen's convictions were affirmed on direct appeal and his state and federal post-

conviction petitions were denied.

Then, more than seven years after Swearingen's conviction Dr. Carter recanted her trial testimony about Ms. Trotter's time of death. Dr. Carter explained in an affidavit dated October 31, 2007 that the condition of Ms. Trotter's torso, her internal organs, her body weight that was only 4 pounds less than several weeks prior to her disappearance, and the weather in the weeks before discovery of her body "supports a forensic opinion that Ms. Trotter's body was left in the woods within two weeks of the date of discovery on January 2, 1999." The earliest date Ms. Trotter could have been left in the forest based on Carter's analysis is December 19.

In addition to Carter six other experts — two forensic entomologists and four forensic pathologists — have provided an affidavit, report or testimony during an evidentiary hearing opinions ranging from December 18 to December 29 as the *earliest* Ms. Trotter's body could have been placed in the forest. Two of the pathologists opined that the minimal deterioration of her pancreas and other internal organs suggests she wasn't left in the forest until *after* December 28.

The most compelling evidence of when Ms. Trotter died was discovered in January 2009 when heart, nerve and vascular tissue taken from Trotter's body during her autopsy were discovered preserved in a paraffin block. There was no mention of the preserved tissue in Ms. Trotter's autopsy report. Analysis of those tissues provides the most accurate determination of when Ms. Trotter died, because within a few days after a person dies enzymes begin to digest the cells in their major organs such as the heart and liver. Ms. Trotter's tissue samples were microscopically examined by Dr. Lloyd White, Tarrant County Deputy Medical Examiner who reported in April 2009, that "the microscopic evidence permits only one forensic conclusion, and that is that *Ms. Trotter died no sooner than December 29 or December 30, 1998.* ([Pathological Opinion](#) of Dr. Lloyd White, Tarrant County Deputy Medical Examiner, April 14, 2009) Dr. Stephen Pustilnik, Chief Medical Examiner of Galveston County, Texas also microscopically examined the new tissue evidence and reported, "... the deceased was killed within reasonable certainty between five to seven days prior to her discovery. This would put



Larry Swearingen during prison interview (Justin Dehn)



Melissa Aline Trotter (Nov. 26, 1979 to Dec. 1998)

the *date of death on or about December 26, 1998.* ([Findings of Dr. Stephen Pustilnik](#), Chief Medical Examiner of Galveston County, Texas, April 14, 2009)

The new medical evidence in 2009 narrowed the date of Ms. Trotter's death to no earlier than December 26 — which was 15 days after Swearingen was jailed.

The Montgomery County DA's Office has not provided any evidence countering the medical and scientific evidence by the seven experts that the earliest Ms. Trotter's body could have been left where it was found was a week after Swearingen was jailed on December 11 -- so based on the opinions of the seven experts it is physically impossible he abducted and murdered her.

Swearingen jurors convicted him in 2000 without being aware of the new medical and scientific evidence that provides him with the perfect alibi of being in the Montgomery County Jail when Ms. Trotter was murdered.

In spite of the fact there is no direct, eyewitness or confession evidence that Larry Swearingen murdered Melissa Trotter, while there is un rebutted medical and scientific evidence proving she was placed in the national forest when he was incarcerated in the Montgomery County Jail, the State of Texas was prepared to go ahead with his execution scheduled for August 18, 2011 until the appeals court issued its stay.

During an interview with [The Texas Tribune](#) on July 27, a day before the stay of his execution was issued, Swearingen said he had lunch with Ms. Trotter before she disappeared later that day, and that "The district attorney took evidence of a friendship and turned it into a murder."

#### Sources:

[Ex parte Larry Ray Swearingen](#), Nos. WR-53,613-10 and WR-53,613-11 (TX Court of Criminal Appeals, 7-28-2011).

Larry Swearingen's website that has extensive information about his case. See, <http://www.larry-swearingen.com/>

See also,

[Justice Denied's](#) Editorial in July 2011, "The State of Texas Prepares To Execute Larry Swearingen For A Murder That It Knows He Didn't Commit" at, <http://justicedenied.org/wordpress/archives/1359>

And, [Justice Denied's](#) Editorial in January 2009 when Larry Swearingen was previously scheduled to be executed: "Larry Swearingen Scheduled For Execution Based On "Seat Of The Pants" Evidence" at, <http://justicedenied.org/wordpress/archives/287>

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- There is no evidence she was anywhere in Clark County (Las Vegas) at anytime on the day of the murder.

Ms. Lobato's prosecution for Mr. Bailey's murder is as inexplicable as if she had been randomly chosen for prosecution by her name being pulled out of a hat containing the name of everyone who lived within 200 miles of Las Vegas.

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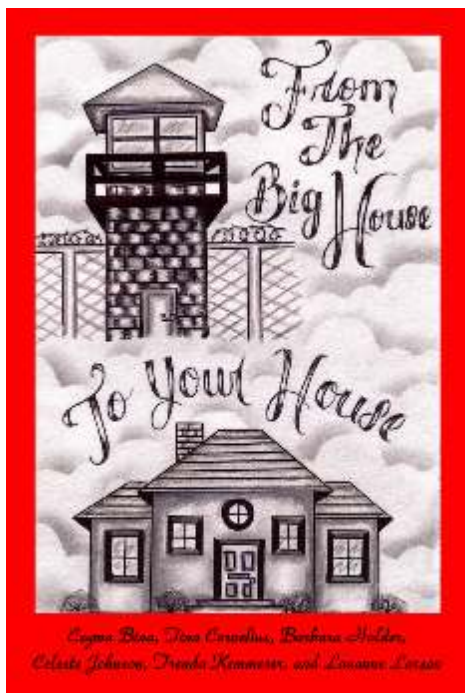
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Records of a Wrongful Conviction  
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- The way exculpatory and witness impeachment evidence was hidden from the defense.
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