

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

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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]

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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 Comp.](#), *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