

Federal Judge Denies Habeas Petition By Man Who Claims Surveillance Video Will Prove He Is Actually Innocent

The U. S. Supreme Court has never ruled that evidence in a habeas corpus petition proving a person is actually innocent is sufficient by itself to overturn his or her conviction. What the Supreme Court has done is consistently rule that to vacate a conviction there must be a constitutional defect in a trial such as ineffective assistance of counsel, or the prosecution's failure to disclose exculpatory evidence. Although the Supreme Court has considered several cases that involved a habeas petitioner claiming actual innocence, the Court has failed to decide if a compelling free-standing claim of innocence warrants

White cont. from p. 15

Law Enforcement System to reflect White's acquittal on all child molestation charges."

The agreement also includes as an exhibit a [statement by White](#) that reads in part:

"One could not ever imagine what my family has had to endure throughout this whole ordeal of false allegations and wrongful imprisonment as a result of my Constitutional rights being ignored by people elected or hired to defend the Constitutional rights of its citizens.

...

"My hope is that my case will bring about changes in the criminal justice system and cause law enforcement and elected officials to make sure that the Constitutional rights of the citizens they serve will never be ignored. We, as citizens, have to stand up for our rights even when people try and abuse the system to their own benefit. The abuse ran rampant in my case and should have never been allowed to happen."

White's ordeal is legally over thirteen years after it began. White, now 50, lives in Utah.

Sources:

[Terms of White's \\$15.5 million settlement disclosed, Lee's Summit Journal](#), July 22, 2011

[Lee's Summit](#) will pay \$15.5 million to wrongly convicted Ted White, [Kansas City Star](#), July 22, 2011

[Lee's Summit Could Face Fraud Charges In Ted White Case](#), [Fox4kc.com](#) (Kansas City, MO), March 8, 2011

[Jury awards man \\$16 million](#), [The Joplin Globe](#) (Aurora, MO), September 13, 2008

granting a habeas corpus petition. (See e.g., *Herrera v Collins*, 506 U.S. 390 (U.S. 1993); and *House v. Bell*, 547 U.S. 518 (U.S. 2006).)

Larashai Burton was convicted of first-degree assault and first-degree gang assault related to the beating in April 2004 of a man outside a Jim's Steakout restaurant in Buffalo, New York. He was sentenced to two concurrent twenty year prison terms, to be followed by five years of post-release supervision.

Burton's defense was that during the assault he was inside the restaurant and wasn't involved in the crime. Key evidence against Burton was a co-defendant who in exchange for reduced charges testified that he saw Burton stomp the victim in the head twice.

After Burton's convictions were affirmed on direct appeal his post-conviction motion for a new trial was denied by the New York State courts. Burton then filed a *pro se* federal writ of *habeas corpus* based on a single claim: He is actually innocent of his convicted crimes and his innocence is proven by a restaurant CCTV surveillance tape seized by a Buffalo police officer the night of the assault. Burton also alleged that the officer knowingly committed perjury when he testified at trial that he did not retrieve the videotape.

The prosecution did not provide the videotape (or a copy) to Burton's trial lawyer and up to the time Burton filed his federal *habeas petition* it had not been provided to Burton, but he alleged in his petition that it would show he was inside the restaurant at the time of the assault and he was misidentified by the eyewitnesses.

U.S. District Court Judge Michael A. Telesca denied Burton's petition, ruling that "Petitioner has failed to make a "substantial showing of a denial of a constitutional right." (*Burton v. Conway*, No. 09-CV-6065 (MAT), Dist. Court, WD New York, March 7, 2011) Judge Telesca's ruling was based on the lack of a U.S. Supreme Court ruling that a habeas petition can be based on a "freestanding innocence claim." Although Judge Telesca did not order the prosecution to produce the videotape so he could view it, he expressed skepticism of Burton's in-



The outside of Jim's Steakout on Elmwood in Buffalo, NY where the assault Larashai Burton was convicted of took place (Google Street View)

nocence claim because his conviction was based on eyewitness evidence. Judge Telesca also declined to issue a certificate of appealability to the federal court of appeals.

Judge Telesca [also wrote](#), "Following a review of the record, it appears that the alleged videotape was part of petitioner's file from the inception of the prosecution." Even though Burton's lawyer filed a discovery motion for the prosecution to produce

Brady (exculpatory) evidence, Judge Telesca blamed Burton's lawyer for failing "to inspect and/or copy" the videotape in the prosecution's possession.

Since Burton told the officer who arrested him that the restaurant's surveillance tape would prove he "was not outside at the time the victim was attacked," Judge Telesca ruled, "Given that petitioner knew of this supposed exculpatory evidence at the time of his arrest, it cannot be said to be "new reliable evidence." So to Judge Telesca the videotape isn't new evidence because the prosecution has successfully concealed its contents, even though Burton has asserted from the time of his arrest in 2004 that what is recorded on the videotape can prove his innocence.

Burton filed a *pro se* [petition for a](#) certificate of appealability with the federal Second Circuit Court of Appeals on April 1, 2011 that is pending.

Burton, 31, has pursued his post-conviction case *pro se*. It is possible a competent lawyer could have successfully framed a *Brady* argument based on the failure of the prosecution to produce the videotape, or an ineffective assistance of counsel ground based on the failure of his lawyer to pursue every avenue to obtain the videotape. If Judge Telesca's ruling isn't reversed by the appeals court, Burton will have to serve his 20-year sentence because of the prosecution's success in not providing the videotape that can establish he wasn't at the scene of the assault — and thus prove he is actually innocent.

Sources:

[Burton v. Conway](#), No. 09-CV-6065 (MAT), Dist. Court, WD New York, Denial of habeas corpus petition, March 7, 2011

[Burton v. Conway](#), No. 11-1260, 2nd Cir Ct of Appeals