

# JUSTICE



The Magazine for the  
Wrongly Convicted

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**Message From The Publisher**

Derrick Hamilton’s exoneration is a case study of the perseverance necessary to overcome the legal system’s obstinance to admit error. For two decades prosecutors and courts threw every hurdle imaginable in Hamilton’s way to avoid recognizing that his alibi evidence by a police officer established his actual innocence of a murder committed in Brooklyn when he was 80 miles away in Hartford, Connecticut. See p. 3.

Mikael Halvarsson’s rape exoneration in Sweden based on him suffering from “sexsomnia” shows that lack of criminal intent can be proved in unusual ways. See p. 7.

Steven Spriggs exoneration in California for using a map app on his iPhone’s shows that courts are slowly adapting to the increasing use of technology in daily life. See p. 11.

What is an exoneration? The widespread reporting of DNA exonerations tends to obscure that the large majority of people are exonerated by non-DNA evidence, and a significant number of those cases don’t involve new evidence. See p. 14.

*High Fence Foodie* by Celeste Johnson has just been published by the Justice Institute. The book has more than 200 easy to prepare recipes for meals, soups, snacks, desserts and beverages. The recipes use ingredients available in a prison commissary, or people on the outside can purchase from a convenience or grocery store. It is a follow-up book to the very successful *From The Big House To Your House*, that was written by Ms. Johnson and five other female Texas prisoners. See p. 18 for ordering information.

Hans Sherrer, Editor and Publisher  
[www.justicedenied.org](http://www.justicedenied.org) – email: [hsherrer@justicedenied.org](mailto:hsherrer@justicedenied.org)

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



Derrick Hamilton's indictment for the murder of Nathaniel Cash in New York City in 1991 [was dismissed](#) on January 9, 2015. Kings County Supreme Court Justice Raymond Guzman granted the motion to dismiss submitted by the Kings County (Brooklyn) District Attorney's Office.

*Justice Denied* first reported on Hamilton's case in the summer of 2008 after it verified his alibi that at the exact time Cash was murdered on a Brooklyn sidewalk, Hamilton was 82 miles away in New Haven, Connecticut meeting with Kelly Turner — who is now a decorated New Haven police officer. Hamilton had unrefuted ironclad new evidence of his factual innocence the jury didn't hear during his trial. Yet he wasn't exonerated for another 6-1/2 years because the King's County DA's Office fought tooth and nail to maintain his conviction until District Attorney Kenneth Thompson took office in 2014.

### Derrick Hamilton's case

Hamilton was convicted in 1993 of the shooting death of Nathaniel Cash on a Brooklyn sidewalk at 11 a.m. on January 4, 1991. As a crowd gathered around Cash's body a man who was later identified as one of the shooters came out of hiding and started spreading the rumor that Derrick Hamilton shot Cash. Hamilton was charged with the murder based on Jewel Smith — one of Cash's woman friends — believing the rumor was true, and lying to the police that she witnessed Hamilton shooting Cash.

During Hamilton's trial Smith was the only witness who testified to seeing him shoot Cash.

Hamilton's alibi defense was that at the time of the shooting in Brooklyn he was more than 80 miles away in New Haven, Connecticut. Although Hamilton had several credible alibi witnesses, his lawyer didn't subpoena them of them to testify during his trial.

The jury convicted Hamilton of second-degree murder, and he was sentenced to 25 years to life in prison.

After Hamilton's conviction was affirmed by the court of appeals, he filed numerous post-conviction motions for a new trial based on new evidence and ineffective assistance of counsel.

Hamilton's most important new evidence

## Derrick Hamilton Exonerated 22 Years After Wrongful New York Murder Conviction

By Hans Sherrer

was a 1995 affidavit by New Haven police officer Kelly Turner. Her affidavit details that in 1991 she owned a talent booking agency in New Haven, and that she was with Hamilton in New Haven from about 11 am until about noon on January 4, 1991 to discuss booking musical talent in New York City. Davette Mahan worked at the talent agency, and she provided an Affidavit that she saw Hamilton at the talent agency office in New Haven the morning of January 4, 1991.



Derrick Hamilton after his release in December 2011 (Jesse A. Ward, NY Daily News)

Hamilton's efforts to be granted a new trial based on his new evidence were thwarted by the rulings of New York courts that the new

evidence by Turner and Mahan couldn't be considered because his trial lawyer didn't list either of them on Hamilton's alibi witness list.

In late 2007 Hamilton contacted *Justice Denied*. In the course of investigating his case *Justice Denied* contacted New Haven Police Officer Kelly Turner and she verified the accuracy of the information in her Affidavit. She also told *Justice Denied* that if subpoenaed for a hearing she would testify under oath to her Affidavit's contents.



New Haven police officer Kelly Turner (USmile magazine)

*Justice Denied* published a feature article about Hamilton's case in its Summer 2008 issue: [In Connecticut At Time Of Brooklyn Murder](#) – The Derrick Hamilton Story".

*Justice Denied's* Editor and Publisher Hans Sherrer provided an Affidavit to Hamilton in June 2009 that stated in part:

9. The affiant believes that Jewel Smith's post-trial recantation of her trial "eyewitness" testimony upon which the jury relied to convict Derrick Hamilton, is 100% consistent with other evidence Derrick Hamilton has accumulated post-conviction that she did not witness the crime.

10. The affiant believes the evidence Derrick Hamilton has accumulated post-

trial credibly establishes that he was in New Haven, Connecticut at the time Nathaniel Cash was murdered in New York. Most compelling is the affidavit of current New Haven Police Officer Kelly Turner that she was meeting with Derrick Hamilton in New Haven at the time the murder occurred in New York.

11. The affiant believes the accumulated evidence the jury did not have available to assess Derrick Hamilton's guilt beyond a reasonable doubt supports that he is actually innocent of Nathaniel Cash's murder.

Hamilton filed a state habeas corpus petition in July 7, 2009, that claimed his new alibi evidence established his actual innocence and his trial lawyer provided ineffective assistance of counsel.

*Justice Denied* published a follow-up article about Hamilton's case in its Summer 2011 issue: ["Derrick Hamilton's Alibi By Police Officer He Was 82 Miles From 1991 Murder Ignored By The Courts"](#).

Hamilton's petition was denied by the trial court in July 2011, and he appealed.

On December 7, 2011 Hamilton was released on parole after more than 20 years of incarceration from the date of his arrest. He was 46. During his parole hearing Commissioner Christina Hernandez [said to Hamilton](#), "If, in fact, you're incarcerated for something that you did not commit, I hope that you're successful in your appeal."

Hamilton told the *New York Daily News* [after his release](#): "It's just the most remarkable feeling ever and I'm overwhelmed with joy. It's like 1,000 pounds got off your back and you can breathe again." He added, "The fight goes on."

After almost two decades of having his arguments rejected by every court that heard them, on January 15, 2014 the appellate division of the Supreme Court of New York issued its precedent setting ruling in *People v. Hamilton* (2014 NY Slip Op 00238). The Court's ruling [stated in part](#):

"A freestanding claim of actual innocence is rooted in several different concepts, including the constitutional rights to substantive and procedural due process, and the constitutional right not to

**Hamilton cont. on page 4**

## Hamilton cont. from page 3

be subjected to cruel and unusual punishment.” [Op. Cit. 4]

....  
“...we hold that a “freestanding” claim of actual innocence is cognizable in New York, and that a defendant who establishes his or her actual innocence by clear and convincing evidence is entitled to relief under the statute.” [Op. Cit. 1]

and,

“Here, the defendant has made a prima facie showing based upon evidence of a credible alibi and manipulation of the witnesses, and the fact that the witness against him has recanted. Accordingly, there should be a hearing on his claim of actual innocence.

At the hearing, all reliable evidence ... should be admitted. If the defendant establishes his actual innocence by clear and convincing evidence, the indictment should be dismissed...” [Op. Cit. 7-8]

The Court also reversed the lower court’s denial of Hamilton’s ineffective assistance of counsel claim, ruling:

“The failure of the defendant’s trial counsel to name all the alibi witnesses in the notice of alibi could constitute ineffective assistance of counsel. Accordingly, at the hearing, the defendant should also be afforded an opportunity to prove, by a preponderance of the evidence, that trial counsel’s representation was ineffective. Although the remedy for ineffective assistance of counsel generally is to grant a new trial, if the defendant prevails on his claim of actual innocence, a new trial would not be necessary.” [Op. Cit. 8]

The appeals court’s ruling in Hamilton’s case paves the way for all imprisoned or paroled persons in New York to have their claim of actual innocence considered on its merits, without them having to endure his arduous 20 year quest for justice.

Two weeks before the appeals court’s ruling Kenneth Thompson took office on January 1, 2014 — replacing Charles J. Hynes who had been in office for more than two decades. Thompson was elected on a platform to clean up the DA’s Office that under Hynes had a reputation as being one of, if not the most corrupt DA’s Office in the United States. In Thompson’s first year in office the Kings County DA’s office supported the exoneration of eleven persons — two posthumously — who had fought for years to have their convictions overturned. Hamilton’s case was

one of around 100 under review by the DA’s Office. On January 5, 2015 [Thompson met](#) with Hamilton and informed him that on January 9 his office would submit a motion to dismiss the murder charge.

On January 9, 2015 the Kings County Supreme Court Justice Raymond Guzman granted the motion submitted by the Kings County (Brooklyn) District Attorney’s Office to dismiss Hamilton’s murder indictment.

Homicide Detective Louis Scarcella obtained Smith’s false statement implicating Hamilton in Cash’s murder. Scarcella, who is now retired, was the investigating officer in the cases of five men exonerated in 2014. After the judge dismissed the charge against him, Hamilton [told reporters](#) at the courthouse: “I have no sentiment for him (Scarcella). I believe he belongs in jail.” Scarcella was the homicide detective in more than 70 of the cases still under review by the Kings County DA’s Office.

With dismissal of his indictment Hamilton can file a compensation lawsuit with the New York State Court of Claims for his more than 20 years of wrongful imprisonment.

*Justice Denied* has published three articles about Hamilton’s case:

[Click here to read](#) “In Connecticut At Time Of Brooklyn Murder – The Derrick Hamilton Story,” *Justice Denied* magazine, Summer 2008, pp. 10-13.

[Click here to read](#) “Derrick Hamilton’s Alibi By Police Officer He Was 82 Miles From 1991 Murder Ignored By The Courts,” *Justice Denied* magazine, Summer 2011, p. 16.

[Click here to read](#) “Derrick Hamilton Entitled To Actual Innocence Hearing Rules NY Appeals Court,” *Justice Denied* magazine, Spring 2014, p. 11.

Source:

[In Connecticut At Time Of Brooklyn Murder](#) – The Derrick Hamilton Story, by Nicole Hamilton, *Justice Denied* magazine, Issue 41, Summer 2008, pp. 10-13.

[Derrick Hamilton’s Alibi By Police Officer He Was 82 Miles From 1991 Murder Ignored By The Courts](#), By Hans Sherrer, *Justice Denied* magazine, Issue 47, Summer 2011, p. 16.

[Derrick Hamilton Entitled To Actual Innocence Hearing Rules NY Appeals Court](#), *Justice Denied* magazine, Issue 57, Spring 2014, p. 11.

[People v Hamilton](#), 115 A.D.3d 12, 979 N.Y.S. 2d 97 (NY Supreme Ct, Appellate Div., Second Jud. Dept. 1-15-14).

[Man released from prison after 20 years](#) can prove innocence in landmark ruling, *New York Daily News*, January 16, 2014.

[Brooklyn man is freed from prison after 20 years](#), *New York Daily News*, December 14, 2011.

[Brooklyn man wrongfully convicted of murder exonerated](#) after spending more than 20 years behind bars, *New York Daily News*, January 9, 2015.

## Motorcyclist Acquitted On Appeal Of Indecent Exposure Conviction

Nicolaas Chrisoffel Gert Petrus Nagel [has been acquitted](#) of committing indecent exposure while riding his motorcycle in Auckland, New Zealand in March 2013.

In March 2013 a woman in the North Shore area of Auckland saw a motorcycle go by her with a man standing on the seat with his pants pulled down and holding the handlebars with one hand and masturbating with his other hand. She then saw a motorcycle go by traveling in the opposite direction. She wrote down the license plate number of the second motorcycle. When the woman reported the incident to the police she estimated the first motorcycle was going about 20 mph, and she said the rider of the second motorcycle was seated normally.

The police tracked Nagel down as the owner of the second motorcycle and he was charged with indecent exposure.

Nagel testified during his bench (judge only) trial that he not only wasn’t on the motorcycle the woman saw with the masturbating rider, but that he couldn’t have been because he did not have the ability to ride standing on his motorcycle’s seat traveling at about 20 mph and masturbate at the same time. During the woman’s testimony she didn’t identify Nagel as the rider of the first motorcycle, and she wasn’t able to point to any distinctive characteristics of the bikes or riders she saw. She explained that she was focused on what the rider of the first motorcycle was doing, and she was then focused on writing down the license plate number when the second motorcycle passed by her.

The North Shore District Court judge found Nagel guilty of indecent exposure.

Nagel appealed. In late November 2014 the Auckland High Court [quashed Nagel’s conviction](#) on the basis the woman’s testimony was insufficient evidence he was guilty. Justice Pamela Andrews ruled that while their was credible evidence Nagel was the rider of the second motorcycle, there was no evidence he was the rider of the first motorcycle the woman saw traveling in the opposite direction.

Source:

[Motorcyclist wins appeal](#) over ‘masturbating’ conviction, TV3 Auckland (Auckland, NZL), December 2, 2014

[Motorcyclist not the masturbator](#): judge, By NZ Newswire, MSN.com, Dec. 1, 2014

# Tang Nguyen Acquitted By Appeals Court Of Conviction For Avoiding \$129.73 In Federal Taxes On “Contraband” Viet- namese Cigarettes

A federal appeals court [has acquitted](#) 62-year-old Tang Nguyen of her 2012 conviction of knowingly receiving cigarettes mailed from Vietnam to Nebraska that were considered contraband because \$129.73 in federal cigarette taxes had not been paid on them.

Tang Nguyen, who is also known by her nickname Janny, is a Vietnamese immigrant living in Lincoln, Nebraska where her sister and other Vietnamese immigrants live.

In May 2011 an informant notified the Otoe County Sheriff’s Office that a Vietnamese immigrant was selling untaxed Vietnamese cigarettes in Nebraska City, about fifty miles east of Lincoln. The information was passed on to the U. S. Immigration and Customs Enforcement (ICE), which began an investigation. Between December 2011 and April 2012 ICE agents conducted searches of packages from Vietnam addressed to either the home of Nguyen or her sister Kim Nguyen who lived nearby. The searches discovered the packages contained Vietnamese manufactured cigarettes upon which neither the federal nor the Nebraska state cigarette tax had been paid. Consequently the cigarettes were considered illegal contraband. The ICE investigation identified six people allegedly involved in receiving or selling the untaxed cigarettes in Lincoln and Nebraska City. Those six people [were indicted](#) by a federal grand jury on May 22, 2012 of a variety of charges that included conspiracy, mail fraud, fraudulent importation of “contraband cigarettes,” and evasion of federal cigarette taxes.

Four of the defendants -- including Nguyen’s sister Kim -- pled guilty to reduced charges in exchange for testifying as prosecution witnesses against Nguyen and another defendant, Nhu Van Phan, who elected to go to trial.

The trial of Nguyen and Phan began in October 2012 in the U.S. District Court in Lincoln. During their trial the government introduced statements Nguyen made to ICE agents when her home was searched in April 2012. An ICE [agent testified](#) Nguyen acknowledged packages mailed by her

brother in Vietnam had come to her residence “and she knew that they contained cigarettes.” He also testified Nguyen said her sister Kim would pick up the unopened packages. Kim testified her sister wasn’t paid for receiving the packages, she didn’t sell any cigarettes, and money from sale of the cigarettes was sent to their brother in Vietnam. Kim also testified she didn’t discuss with her sister the Vietnamese cigarettes were not “were not taxed by the United States.”

Nguyen’s defense was she had no criminal intent because she didn’t know any U.S. laws were being violated by sale of the cigarettes.

After a five day trial the jury deliberated for two days before acquitting Phan of all charges on November 7, 2012, while Nguyen [was acquitted](#) of all charges except that she did “knowingly ship, transport, receive, possess, sell and distribute ‘contraband cigarettes’” in violation of 18 U.S.C. § 2342(a).

During Nguyen’s sentencing hearing on February 21, 2013 her federal prosecutor argued the U.S. Treasury had been defrauded of \$129.73 in federal cigarette taxes by importation of the Vietnamese cigarettes. The judge sentenced Nguyen to 1 day in custody of the federal Bureau of Prisons for processing by the United States Marshal’s Service; 3 years supervised release with special conditions; \$100 Special Assessment; Restitution of \$129.73 to be paid to the United States treasury, and restitution to be paid to the Nebraska Dept. of Revenue in the amount of \$5,921.88 for alleged lost state cigarette tax revenue. The restitution was ordered to be paid jointly and severally with her co-defendants who pled guilty. So if the five convicted defendants paid an equal share Nguyen owed \$25.95 in restitution to the United States for lost cigarette tax revenue. Nguyen’s sentence was stayed while she appealed.

Nguyen’s appeal argued the prosecution introduced insufficient evidence to prove beyond a reasonable doubt she “knowingly” violated § 2342(a).

On July 15, 2014 the U.S. 8<sup>th</sup> Circuit Court of Appeal vacated Nguyen’s conviction and ordered dismissal of the charge against her because the government introduced insufficient evidence of her guilt. Their ruling in *United States v. Tang Nguyen*, No. 13-1455 (8th Cir. 7-15-2014) [states in part](#):

(1) The packages arriving from Vietnam bore no outward sign that they con-

tained cigarettes. ... (2) There was no evidence Ms. Nguyen ever opened a package received at her home. ... (3) The warrant search of Ms. Nguyen’s home uncovered no evidence that any box was opened at her home. (4) There was no evidence



“Sleigh” brand Vietnamese cigarette package

Ms. Nguyen ever sold or distributed the cigarettes, or profited from their distribution. She just delivered packages received at her home from Vietnam, unopened, to her sister. Our review of this evidence persuades us that the government simply failed to prove a knowing violation of § 2342(a).

Thus, the verdict convicting Ms. Nguyen of Count VI must be overturned. In addition, as this was a failure of proof at a trial in which the government had fair opportunity “to offer whatever proof it could assemble,” the Double Jeopardy Clause requires entry of judgment of acquittal, rather than grant of a new trial.

Consequently, the four defendants who pled guilty, including Nguyen’s sister have to pay the \$129.73 restitution to the U.S. Treasury, and the restitution to the Nebraska Department of Revenue that the federal court acted as a bill collector for.

[Click here to read](#) *United States v. Tang Nguyen*, No. 13-1455 (8th Cir. 7-15-2014).

Source: [United States v. Tang](#), No. 13-1455 (8th Cir. 7-15-2014) (Vacating conviction on insufficient evidence.)

[Contraband cigarette conviction reversed](#), *Lincoln Journal Star* (Lincoln, Neb.), June 15, 2014.

[Jury: 2 not guilty of cigarette smuggling conspiracy](#), *Lincoln Journal Star* (Lincoln, Neb.), Nov. 7, 2012.

[6 indicted for alleged part in cigarette smuggling ring](#), *Lincoln Journal Star* (Lincoln, Neb.), June 15, 2012.

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# Judge Constance Briscoe Sentenced To 16 Months Imprisonment For Lying During Police Investigation

Judge Constance Briscoe [has been sentenced](#) to 16 months in prison after her convictions of lying to the police and falsifying documents during a police investigation -- becoming the first British judge in several decades to be imprisoned for her criminal activity.

The convictions of Judge Briscoe, 56, were the result of her lying to the police investigating media leaks that were traced back to her concerning a speeding case in 2003 that involved Christopher Huhne -- who served as the UK's Energy Secretary from 2010 until he was forced to resign in 2012 due to the public scandal created by the media leaks.

In 2003 Huhne was a member of the European Parliament when he was issued a ticket for speeding. His wife Vasiliki Pryce was a passenger in the car. If convicted Huhne would have had his driver's license suspended for exceeding the maximum allowable "speeding points," so Pryce protected her husband by admitting guilt for the speeding offense he committed.

Seven years later Huhne was the UK's Energy Secretary when he left his wife Pryce for another woman, and the two divorced in 2011. Pryce wanted to retaliate against her husband for ending the marriage by publicly exposing what he had done in the 2003 speeding ticket case. Judge Briscoe was Pryce's friend and neighbor, and she had known about the speeding ticket incident since 2003. To help Pryce in her revenge scheme to destroy Huhne's political career, Judge Briscoe agreed to leak the story to the press in emails and telephone calls.



Vicky Pryce, the day before she began serving her 8 month prison sentence on March 11, 2013. (Daily Mail)

The story developed into a major scandal in England. Huhne resigned his Cabinet position in February 2012 when he was charged with perverting the course of justice related to his wife pleading guilty to the 2003 speeding ticket.

Ironically, Huhne's former wife Pryce was also charged for her role in the incident.



Judge Constance Briscoe (The Telegraph)

The police obtained email and phone records proving she was the source of the media leaks about Huhne, which she had denied in her two official police statements — the first in May 2011 and the second in October 2012.

As a result of her prosecution Judge Briscoe was suspended from the judiciary and as a barrister.

Judge Briscoe was charged with a two additional counts of perverting the course of justice after it was discovered she altered a copy of her second witness statement, which she then provided to a defense expert who didn't know his testimony during her trial was going to be based on the fraudulent document.

In February 2013 Chris Huhne, 58, pled guilty to perverting the course of justice, and his former wife Vicky Pryce, 60, was convicted by a jury in March 2013. They were each sentenced to eight months imprisonment.



Chris Huhne, after Judge Constance Briscoe was convicted on May 1, 2014.

Judge Briscoe's January 2014 trial in London's Central Criminal Court [ended in a mistrial](#) because the jury couldn't reach a verdict.

During Judge Briscoe's retrial that began in April 2014, the prosecution produced evidence that Huhne suspected from the beginning she was the source of the media leaks. [Huhne said](#) during a recorded phone call with his then wife Pryce about the media leaks: "The only person batty enough to go on this sort of vendetta is [Judge] Constance [Briscoe]." There was also evidence a journalist wrote to a colleague about the media leaks he knew were from Judge Briscoe, that she "is determined to go for the kill. ... she wants Huhne to get his comeuppance, i.e., to lose his position as Energy Secretary ..."

Prosecutor Bobbie Cheema QC [told the jury](#) the 2003 speeding case was "a tiny

snowball of deception [which] caused a mighty avalanche many years later." On May 1, 2014 a 12-person jury unanimously found Judge Briscoe guilty of all three counts of perverting the course of justice.

[Judge Jeremy Baker](#) stated during Judge Briscoe's sentencing that she "considered that respect for the law was for others," and he said regarding her role in the 2003 speeding case media leaks:

"... you sought to hide your true motive and role in the exposure of that story. You then compounded your position by deliberately fabricating evidence when you thought that you might be exposed.

... I am sure that you realise only too well that such conduct strikes at the heart of our much cherished system of criminal justice, which is integral and invaluable to the good order of society. ... your conduct not only involved deliberately seeking to paint a false picture of your role and attitude for the purposes of enhancing your credibility in the Chris Huhne and Vicky Pryce prosecution, but was compounded by the deliberate manufacturing of evidence so as to avoid your own detection. The last of these deceptions taking place during the period leading towards your own trial. In those circumstances, and having regard to the principle of totality, I consider that the least sentence which can properly be passed upon you is one of 16 months imprisonment."

Judge Briscoe is expected to be released on parole after eight months imprisonment.

Judge Briscoe's pattern of dishonest conduct over many years was exposed during her trial, and in the press, including that [while visiting in Australia](#) "she forged the signature of a friend, an Australian judge, so she could skip a course, fly home and collect an award"



Carmen Briscoe-Mitchell, the mother of Judge Constance Briscoe.

*The Independent* newspaper [published a story](#) that in 1999 — 15 years before Judge Briscoe's convictions — [her mother](#) filed a nine-page complaint with the UK's Bar Council that "her daughter should be barred from the profession because of dishonesty and financial wrong-doing." The complaint

**Brisco cont. on page 7**

## Brisco cont. from page 6

asserted Judge Briscoe “forged the signature of a relative to obtain a council flat and falsified information on a passport application.” The Bar Council protected Judge Briscoe by dismissing the complaint without conducting an investigation.

After Judge Briscoe’s conviction Huhne **told reporters Judge**: “Constance Briscoe has been revealed as a compulsive liar and self-publicising fantasist. ...the Bar, the Crown Prosecution Service and the judiciary went on entrusting her with responsibility for people’s lives because they were not prepared to blow the whistle on one of their own.”

During Judge Briscoe’s trial the BBC published a story that Scotland Yard confirmed **a criminal investigation** had been opened into allegations she committed fraud by lying under oath and relying on forged documents to successfully defend in 2008 against a defamation lawsuit brought against her by her widowed mother Carmen Briscoe-Mitchell. Judge Briscoe’s mother alleged in her 2006 book “Ugly” that her parents abused her as a child. Judge Briscoe relied on two medical documents to prove the abuse denied by her mother and her siblings, but the doctor whose signature is on the documents told the BBC they are fakes because he did not author or sign either document. The lawsuit bankrupted Judge Briscoe’s 80-year-old mother who told reporters after her daughter’s convictions that she is going to pursue having the libel verdict overturned, which it is now known was based on fraudulent evidence submitted by a convicted liar.

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**Constance Briscoe guilty**: High-flying barrister faces jail for lying in Chris Huhne speeding case, *The Independent*, May 1, 2014.

**R v Constance Briscoe**, Sentencing Remarks by Judge Jeremy Baker.

**Judge accused of lying to police investigating** Chris Huhne’s points swap case is facing a re-trial after the jury failed to reach verdict, *Daily Mail* (London), January 31, 2014.

**Constance Briscoe guilty**, *The Independent*, May 1, 2014.

**Constance Briscoe faces new criminal inquiry**, *The Telegraph*, May 1, 2014.

Constance Briscoe: **ugly tale of the barrister who lied to police**, *The Guardian*, May 1, 2014

## Appeals Court Acquits Man Of Rape Who Experiences Sexsomnia

Mikael Halvarsson has **been acquitted** of raping a woman who was sleeping in his bed by a Swedish Appeals Court.

On the morning of April 2, 2014 a woman called the police in Sundsvall, Sweden and reported that she had been raped. Sundsvall is a city of 51,000 about 235 miles north of Stockholm. She told the police that she and Halvarsson were sleeping in the same bed under separate blankets when she woke up and found he was having sex with her. When the police arrived Halvarsson was asleep, and when questioned he said he had no recollection of having sex with his friend.

Halvarsson was charged with rape, and based on his accuser’s testimony he was convicted. He was sentenced to two years in prison.

Halvarsson appealed, arguing the prosecution failed to prove the essential element he had the criminal intent to rape the woman because he suffered from the medical condition of sexsomnia. Halvarsson presented expert evidence that sexsomnia is a **sleep disorder** in which a person will unknowingly engage in sexual activities while asleep about which they have no memory when awakened. Sexsomnia is considered a type of non-rapid eye movement sleep parasomnia that includes: Somnambulism (sleep walking); Somniloquy (sleep talking); sleep eating; nightmares or night terrors; and sleep paralysis. Halvarsson also presented evidence from a previous girlfriend that he had tried to have sex with her while she was sleeping, and that he had acted confused when she stopped him and woke him up. In addition he presented evidence from his mother that he had suffered from disturbed sleeping patterns in the past.

Based on the evidence he had sex with the woman due to sexsomnia and not his conscious intention, the appeals court acquitted Halvarsson in September 2014. The **appeals court ruled** the evidence supported that Halvarsson “was in a state of sleepiness, unconscious of what was happening.”

Halvarsson’s acquittal is one of a **growing number** of cases in which a man has been cleared of sexual assault based on a sexsomnia defense. Lack of conscious awareness while asleep has long been recognized as a valid medical defense to sexual assault in England, where at least a dozen men have been acquitted of rape since 1996 based on a sexsomnia defense. It is also recognized in

Canada, where Jan Luedecke relied on it for his acquittal of rape in Toronto in 2005.

Matthew Walker, professor of neurology at the National Hospital for Neurology and Neurosurgery in London, has acted as an expert witness in sexsomnia cases.

**Professor Walker said** about sexsomnia: “The people I see are often couples and usually both are very distressed. The person doing it has no recollection of doing it, and it’s usually not much fun for the person having it done to them. The sex is usually loveless and more aggressive.”

After Halvarsson acquittal Dr. Kingman Strohl — a professor of medicine and director of research at the Sleep Center at Case Medical Center in Cleveland — **told ABC News** about patients who report sexsomnia, “Usually people are very scared and also quite confused as to what’s going on.”

It is estimated that as much as 1% of the population suffer from “sexsomnia” or have seen it, and the *Sun* newspaper in London **published a story** about a married couple who have been battling the husband’s sexsomnia for five years.

Information about sexsomnia (also known as “sleep sex”) is available at:

\* Sleep Sex, [Wikipedia.org](http://Wikipedia.org)

\* [www.sexsomnia.org](http://www.sexsomnia.org)

\* [www.sleepsex.org](http://www.sleepsex.org), founded by psychologist Dr. Michael Mangan.

\* A book on the subject is *Sleepsex: Uncovered*, by Michael Mangan Ph.D. (Xlibris, 2001), 108 pgs., that can be purchased from [Amazon.com](http://Amazon.com) by **clicking here**.

### Source:

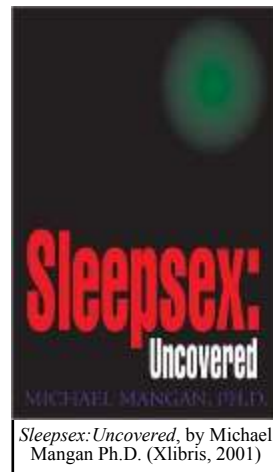
**Swedish court accepts** ‘sexsomnia’ defence and acquits man of rape, *The Guardian* (London), September 18, 2014

**Swedish Man Acquitted of Rape** Due to ‘Sexsomnia’, *ABC News*, Sep 20, 2014

**Are men getting away with rape** by pretending they were asleep? Rising number of attackers are trying extraordinary defence that they had ‘sexsomnia’, *Daily Mail* (London), December 28, 2012

**Meet the sexsomniaics**: Kelly and Stephen have battled with condition which makes him have sex in his SLEEP for five years, *The Sun* (London), January 27, 2012

**Sleep Sex**, Wikipedia.org



# Virginia Supreme Court Acquits Maureen Anne Blake Of Bringing Her Children To School Late

Maureen Anne Blake has [been acquitted](#) by the Virginia Supreme Court of her convictions for delivering her children late to school. The Court's ruling on October 31, 2014 was significant for parents of school age children in Virginia because it clarifies that the compulsory school attendance law doesn't apply to tardiness or absences from school.

Blake is a mother of three daughters living in Purcellville, Virginia who shares custody of her three children with her ex-husband. In December 2011 her daughters were 8, 10, and 11 and attended Lincoln Elementary School in Purcellville. On the school days Blake had custody she took her daughters to school in her car. During the seven weeks between Dec. 1, 2011 and Jan. 19, 2012 her children were late for school five times on days she had custody. They were generally late a few minutes but once for 20 minutes. She was charged on January 25, 2012 with three misdemeanor counts of violating Virginia's compulsory school attendance law (Virginia Code § 22.1-254(A) as enforced by § 22.1-263.) — one count for each child being tardy five times.

Blake was charged based on the Loudoun County Commonwealth's Attorney's contention that tardiness caused by a parent violated the school attendance law's mandate that a custodial parent or guardian "... shall, during the period of each year the public schools are in session and for the



Maureen Anne Blake (Maureen Anne Blake Facebook page)

same number of days and hours per day as the public schools, [send](#) such child to a public school or to a private, denominational, or parochial school ..." Virginia Code [§ 22.1-254\(A\)](#).

Blake filed a pretrial motion to dismiss the charges that argued the school attendance law did not apply to children who were a few minutes late. The judge denied the motion [in ruling](#) that Code § 22.1-254(A) applies to "tardiness and early departures."

During Blake's bench trial on February 29, 2012 in the Loudoun County Juvenile and Domestic Relations Court the prosecution argued it didn't have to prove she had any knowledge or intent to violate the attendance law, and that her guilt was proved beyond a reasonable doubt by her admission she brought her children to school late multiple times.

Blake's defense was she did not knowingly violate the law and had no intention for her children to be tardy. She explained that some of the tardiness was due to the ADHD that she and one of her children suffers from, and others were caused by one of her daughters oversleeping, one of her daughters wanting to wear a particular item of clothing that she could not find, that Blake had to clean up spilled food, and that she misplaced her purse with her car keys.

The judge found Blake guilty of all three counts -- agreeing with the prosecution that Blake's admission of delivering her three children to school late on five occasions was sufficient evidence to find her guilty. She [was sentenced](#) to pay a fine of \$1,000 for each count, totaling \$3,000. The judge suspended the fine for one year on condition she didn't commit any crimes and that her three children have no unexcused absences or tardy slips on their school records in that time.

Blake appealed [on two grounds](#): First "that Code § 22.1-254 only mandates the enrollment of a child in school and neither a addresses nor prohibits tardiness."; and, second, "the evidence did not support a finding that she knowingly and willfully failed to have the children timely appear at school."

In November 2013 the Virginia Court of Appeals affirmed Blake's convictions. The [Court ruled](#) it couldn't address the scope of

the school attendance statute because she did not preserve that argument for appeal, and that because she "was convicted and sentenced pursuant to Class 3 misdemeanors, the Commonwealth was not required to prove that she knowingly and willfully violated the compulsory attendance law, nor was the Commonwealth required to prove notice." (*Blake v. Commonwealth*, No. 1751-12-4 (VA Ct. of Appeals, 11-19-2013)

Blake appealed to the Virginia Supreme Court, which granted review because her case involved an issue of significant precedential value. On October 31, 2014 the Supreme Court [vacated Blake's convictions](#) in *Blake v. Commonwealth*, No. 140081 (VA Supreme Ct., 10-31-2014). The Court ruled that Code § 22.1-254(A)'s use of the word "send" regarding a child attending school doesn't apply to either tardiness or absences from school. [The Court stated](#):

"We therefore conclude that the requirement that a parent, guardian, or person having control or charge of a minor "send" that child to school requires that such child be enrolled in a school program fulfilling the requirements of Code § 22.1-254(A), including that the program meet for as many days and hours each year as the public school year. We further conclude that, while enrollment necessarily contemplates general attendance, the statute cannot be used to prosecute instances of tardiness.

... For the aforementioned reasons, we hold that Code § 22.1-254 cannot be used to prosecute tardiness. Accordingly, we will reverse the judgment of the Court of Appeals and enter final judgment vacating the defendant's convictions."

The Court's ruling *de facto* acquitted Maureen Blake because she was prosecuted and convicted of a non-existent crime.

Maureen Anne Blake [wrote on her](#) Facebook page after the Virginia Supreme Court's ruling: "Alexis Downing of the Loudoun County Public Defenders Office really is the one with the big win today! She won a precedent setting case. Had she not been diligent and zealous in her work the lower court decision could have adversely affected many parents! My kids number of tardys are not even close (in numbers) to some of the "chronic" offenders who are the ones that should be most grateful their limitation of failure to arrive on time to school has not been made criminal."



Maureen Anne Blake (3rd from left) with her three children and an unidentified woman in the back. (Maureen Anne Blake Facebook page)

**Blake cont. on page 9**



# Newlywed Convicted Of Making False Rape Claim To Cover-Up Six-Year Affair

Jessica Gore [has been convicted](#) of perverting the course of justice for fabricating a false rape claim to conceal from her husband of four weeks that she was continuing a six-year affair with another man.

Gore was a 32-year-old mother of two children when she was married in August 2013 in Ashford, England. Ashford is about 55 miles southwest of London.

Less than four weeks after her marriage she came home late on the evening of September 24, 2013. She had left home at 8:15 p.m. claiming she going to babysit a short while for a friend. She arrived back home at 10:20 p.m. When queried by her husband about why she was late, Gore cried and told him that on her way home a man grabbed her from behind as she walked in an alleyway and raped her. Her husband insisted she call the police.

Gore gave a very detailed statement to the police about the assault [in which](#) “She had been shoved to the ground and her trousers and underwear were pulled down and she had then been raped.” She also gave a description of her assailant to the police, who collected the clothes she had been wearing as evidence. Her description of her assailant was similar to publicized descriptions of a man who was wanted for other reported sexual assaults in the area. The Kent and



Jessica Gore and her husband Darren on their wedding day in August 2013 (Facebook)

Essex Serious Crime unit was assigned Gore’s case. In the course of their investigation the police discovered no physical or forensic evidence an assault had taken place in the alley, the clothes she was wearing didn’t show any sign of an assault, and Gore’s friend told the police Gore hadn’t babysat for her on the evening of September 24. What the police did discover is that she had a lover of six years who lived within walking distance of her house, and she was actually late returning home after an intimate rendezvous with him.

Gore admitted she had fabricated the rape claim when confronted with the evidence that included a statement by her lover the two had been together the evening of the alleged rape, the statement by her friend she hadn’t babysat the night of the alleged rape, and numerous sex related text messages between her lover and her over a long period of time.

A week after she had made her rape allegation Gore was charged with perverting the course of justice. She faced up to a year in prison.

Gore pled guilty.

During Gore’s her sentencing hearing her lawyer argued for leniency on the basis she was suffering from mental health issues, and he blamed problems as a child for her difficulties with men. Prosecutor Richard Scott argued for jail time because Gore had deliberately lied to the police to cover-up her affair from her husband. Scott explained that while her husband was putting Gore’s children to bed at home, [she was](#) “having

sex with her lover” at his house.

Judge Heather Norton [told Gore](#): “This wasn’t just a vague allegation. You gave an incredible amount of detail. Sadly, in this case, the allegation of rape proved to be untrue but was not admitted until after extensive inquiries had been carried out by detectives, at a time when there was understandable public concern about a number of earlier assaults being carried out in the Ashford area.” Judge Norton gave Gore an eight month prison sentence suspended for a year with good behavior, stating that “I do so with some reluctance and it is really by the skin of your teeth,” that she didn’t sentence her to prison. Judge Norton may have spared Gore prison because a man wasn’t wrongly arrested based on her false rape claim.

Gore’s cuckold husband Darrin defended his wife in a post online to a news story about her sentencing. [Darrin wrote](#) that the man his wife willingly carried on a sexual relationship with for six years was “an obsessed deranged individual.” Unbeknownst to her husband, Gore may have actually been carrying on with a number of men. One of the people who responded to Darrin’s post [wrote that his wife](#) Jessica continued to have a live profile on the dating website [TWOO.com](#) that listed her as unmarried. TWOO.com describes itself as a “...a dating website, as well as a social networking service that allows users to meet new people in a fun and interactive way... Your ideal match won’t resist the temptation.”

Sources:

[Wife cried rape](#) to keep her SIX-YEAR affair secret just a MONTH after her wedding, *Daily Mail* (London), February 6, 2014.

[Crv-rape Ashford woman Jessica Gore spared jail](#) after making up alley attack in South Willesborough, *KentOnline.co.uk*, January 29, 2014.

[TWOO.com](#)



## Blake cont. from page 8

[Click here to read](#) the Virginia Supreme Court’s ruling in *Blake v. Commonwealth*, No. 140081 (VA Supreme Ct., 10-31-2014).

Source:

[Blake v. Commonwealth](#), No. 140081 (VA Supreme Ct., 10-31-2014) (Vacating convictions and ordering dismissal)

[Blake v. Commonwealth](#), No. 1751-12-4 (VA Ct. of Appeals, 11-19-2013) (Affirming convictions)

[Virginia Code § 22.1-254](#). Compulsory attendance required

[Court spurns Virginia mom’s conviction](#) for taking children to school late, By Gary Robertson, WKZO.com (Kalamazoo, MI), October 31, 2014

[Purcellville woman found guilty](#) of children’s constant tardiness, By Laura Peters, Loudon Times, March 1, 2014

[Maureen Blake Facebook](#) page



Police Forensic officers investigating at the alleyway where Jessica Gore claimed she was raped on September 24, 2013 (Gary Browne)

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## Henry Lee McCollum and Leon Brown Exonerated By New Evidence After 31 Years of Wrongful Imprisonment

After 31 years of wrongful imprisonment half-brothers Henry Lee McCollum and Leon Brown [were released](#) based on new evidence they are innocent of the rape and murder of 11-year-old Sabrina Buie in Red Springs, North Carolina in September 1983. The new evidence was the DNA profile identified from a cigarette butt found *near* Ms. Buie's body that doesn't match McCollum or Brown — but does match a man currently imprisoned for the rape and murder of a teenage girl in Red Springs a month after Ms. Buie's murder.

The 19-year-old McCollum and 15-year-old Brown had recently moved to North Carolina from New Jersey, when they were arrested after a local teenager cast suspicion on McCollum in Ms. Buie's death. After five hours of interrogation without a lawyer present and not being allowed to see his mother, and during which McCollum was threatened he could be executed if he did not cooperate, the police suggested to him he could go home if he told them he committed the crime. After McCollum told the



Leon Brown after his exoneration on September 2, 2014 (Jenny Warburg)

Collum had confessed. Both young men are "intellectually disabled," and they subsequently recanted their confessions as coerced.

The prosecution had no physical, forensic or eyewitness evidence linking McCollum and Brown to the crime, so their convictions of rape and murder in 1984 were based on their confessions. Both were sentenced to death. After their convictions were overturned on appeal, McCollum was again convicted of rape and murder in 1991 and sentenced to death. Brown was retried in 1992 and after being convicted of only rape, he was sentenced to life in prison.

On August 26, 2014 lawyers for McCollum and Brown [filed a motion](#) in Robeson County that requested the overturning of their convictions and dismissal of the charges based on new DNA evidence from a

police he and three other youths attacked and killed the girl [he asked](#) the detectives: "Can I go home now?"

Brown was also being interrogated and threatened with execution if he didn't confess. He steadfastly denied any involvement in the crime until told that Mc-

cigarette butt found near Ms. Buie's body that excluded the two men, but matched the DNA of Roscoe Artis. Artis is currently imprisoned for a teenager's rape and murder in Red Springs about a month after Ms. Buie's murder. The motion also included evidence that Artis had admitted to fellow prisoners that he raped and killed Ms. Buie, and that McCollum and Brown were not involved.

A week later, on September 2, 2014, Superior Court Judge Douglas B. Sasser [granted the motion](#) and ordered the immediate release of McCollum, 50, and Brown, 46.

McCollum had spent almost 30 years on death row for his rape and murder convictions, while Brown was serving life in prison for his rape conviction.

Source: [DNA Evidence Clears Two Men](#) in 1983 Murder, *The New York Times*, Sept. 2, 2014

[North Carolina Men Are Released](#) After Convictions Are Overturned, *The New York Times*, September 3, 2014

[Motion says Roscoe Artis killed Buie](#): Seeks release of McCollum, Brown, [www.robsonian.com](#), August 27, 2014



Henry McCollum after his exoneration on September 2, 2014 (Jenny Warburg)

## Jerry Lee Brock Released After 19 Years In Prison When Accuser Recants

Jerry Lee Brock [was released](#) on November 20, 2014 after 19 years and 4 months in prison for a child molestation the alleged victim now admits never occurred.

In early 1995 Brock was living in Thurston County, Washington. His girlfriend's 11-year-old daughter, Regina Rush, accused Brock of molesting her while she was in bed. Brock was charged on March 29, 1995 with first-degree child molestation and appointed a public defender.

Jury selection for Brock's trial began on July 10, 1995. The prosecution's case was primarily based on Rush's testimony, although a detective also testified that when arrested Brock made a vague comment that he "made a mistake." Brock's defense was the incident never happened. On July 12 the jury convicted Brock of one count of first-degree child molestation. Brock was taken

into custody. He had two prior non-violent felony convictions -- promoting prostitution and burglary -- and he was sentenced on November 3, 1995 to life in prison without the possibility of parole under Washington's "three-strikes" law.

Brock's direct appeal was denied by the Washington Court of Appeals in 1997 and the Washington Supreme Court declined to review his case. Brock then filed a personal restraint petition (PRP) (Washington's version of a post-conviction petition) in 2000 that asserted his burglary conviction was invalid and therefore it should not have been used as a basis for determining he was a persistent offender. That petition was denied. In 2007 Brock filed his second PRP, which asserted Washington's Persistent Offender Accountability Act — Initiative 593 passed by the voters in 1994 — was unconstitutional. The court of appeals ruled that Brock's claim was time barred because he needed to raise the issue within one year of his conviction becoming final in 1997.



Thurston County Courthouse (Olympia, Wash.)

Then, out of the blue, in 2012 Rush contacted the police in Thurston County and admitted that she had made up the accusation against Brock. At the time she contacted the police Rush didn't know

Brock was still in prison. Rush gave a six-page typewritten statement that she signed. She said she made up the story because she wanted her mother to pay attention to her and she was worried that Brock was a drug user and a bad influence on her mom. She said she had previously been taken away from her mother due to her mother's drug use, and she didn't want it to happen again because of Brock. Rush explained why she was coming forward after 17 years:

"Telling the truth is very important to me now as an adult because now that I am older I realize I do not get anywhere lying. ... I feel like now is the time to tell the truth and get it off my chest. ... I feel bad and the lie eats me up all the time. ... I have a one-year old daughter that I

**Brock cont. on page 11**

## Calif. Appeals Court Overturns Steven Spriggs' Conviction For Using iPhone Map App

The California Court of Appeal has overturned the conviction of Steven R. Spriggs for using his hand-held iPhone's map application while driving. The Court ruled California's law prohibiting talking on a hand-held wireless phone while driving doesn't apply to using a map application.

On January 5, 2012 Spriggs was driving in Fresno, California when he encountered road construction. He activated his Apple iPhone 4's map application to see if there was a route around the traffic jam. Spriggs heard a siren and saw a California Highway Patrol motorcycle officer was motioning him to pull over. Spriggs told the officer he wasn't talking, and showed him his iPhone that had its map application open. The officer told Spriggs that when driving he couldn't use his wireless phone for any purpose. Spriggs was cited for looking at a map on his hand-held wireless phone while driving.

Spriggs, 58, who was working as professional development officer at Fresno State University, was a law school graduate. He contested the ticket and during his hearing in April 2012 he demonstrated that trying to



Steven R. Spriggs  
(Robin Abcarian, LA  
Times)

The judge rejected his arguments and found him guilty of violating California Vehicle Code §23123(a). He was fined \$165.

Spriggs appealed, and representing himself he filed a brief that argued the statute only prohibited "listening and talking" on a hand-held wireless phone while driving. The State of California did not file a brief opposing Spriggs arguments. In March 2013 a three-judge panel of the Appellate Division of the Fresno County Superior Court affirmed Spriggs' conviction based on their interpretation the statute prohibited using a hand-held wireless phone for any purpose while driving. **Their ruling stated:** "Because it is undisputed that appellant used his wireless telephone while holding it in his hand as he drove his vehicle, his conduct violated Vehicle Code section 23123, subdivision (a)."

Spriggs appealed that ruling to the Court of Appeals. He argued his conduct didn't violate the statute that specifically only prohib-

its using a hand-held wireless phone to converse while driving. Perhaps realizing the potential implications if Spriggs prevailed, the California Attorney General's Office assigned *five assistant and deputy attorney generals* to support the State's position the statute *banned any* use of a hand-held wireless phone while driving.

The California Court of Appeals overturned Spriggs' conviction in its unanimous 18-page opinion issued on February 27, 2014. **The Court recognized** the State's interpretation of the statute "would lead to absurd results," and stated:

"Based on the statute's language, its legislative history, and subsequent legislative enactments, we conclude that the statute means what it says – it prohibits a driver only from holding a wireless telephone while conversing on it. Consequently, we reverse his conviction."

**Click here to read the ruling** in *The People v. Steven R. Spriggs*, No. F066927 (CA Ct. of Appeals, 5th Dist, 2-27-14).

Sources:  
**The People v. Steven R. Spriggs**, No. F066927 (CA Ct. of Appeals, 5th Dist, 2-27-14)  
**The People v. Steven R. Spriggs**, No. 0002345 (Fresno County Superior Ct., Appellate Div., 3-21-13)

**Fresno driver can't be ticketed** for using phone's map app, court rules, *The Fresno Bee*, February 27, 2014

**Fresno driver can't be ticketed** for using phone's map app, court rules, *The Fresno Bee*, February 27, 2014

**Fresno driver can't be ticketed** for using phone's map app, court rules, *The Fresno Bee*, February 27, 2014

### Brock cont. from page 10

care for very well. ... I have a brother who has been in the pen for a very long time so I know what it is like to have a brother taken from me. ... I am giving this statement now because I want to clear my conscience."

Based on the new evidence of Rush's statement Brock filed a third PRP. During an **evidentiary hearing** on November 10, 2014 Rush, 31, testified at length about her recantation. The prosecution argued her statement and testimony wasn't credible and she only came forward because she was bothered by the length of Brock's sentence. At the conclusion of the hearing Thurston County Superior Court Judge Erik Price announced his ruling that he was granting Brock a new trial.

Ten days later, on November 20, Judge Price issued his written ruling granting a new trial in which he rejected the prosecution's arguments about Rush's motivation

for recanting her trial testimony, by noting she didn't know Brock was still in prison when she came forward in 2012. **The judge wrote:** "Ms. Rush testified that she realized just how wrong it is to make such serious false accusations. ... The Court concludes that Ms. Rush's recantation was not motivated by anything other than her stated desire to tell the truth." Judge Price then set conditions for Brock's release. Brock, 55, was freed after 19 years and 4 months in custody, and his brother Tommy was present to take him to his home in Tacoma.

Brock didn't speak to reporters, but his public defender Patrick O'Connor **said:** "He's a very gentle guy. He doesn't seem to have any animosity or anger, anything like that." Until he was transferred to the Thurston County Jail for the evidentiary hearing, Brock had been serving his sentence at Clallam Bay Corrections Center, where he served as a minister.

Judge Price ordered Brock's retrial for February 10, 2015, but without Rush's testimo-

ny there is no evidence a crime occurred, so it is likely that the State will move to dismiss the charges.

Source:  
**Man gets new trial in Thurston County** after woman recants molestation charge, *The Olympian* (Olympia, WA), November 10, 2014.

**Man in Prison 19 Years Freed** After Claim Recanted, *The Olympian* (Olympia, Wash.), November 20, 2014.

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# Indiana Ct. of Appeals Overturns Burglary Conviction That Was Based On Perjured Testimony

The Indiana Court of Appeals [has overturned](#) the conviction of Antonio Smith for a burglary the prosecution knew was committed by the witness who testified against Smith.

On December 19, 2012, a Dollar General store in Mishawaka, Indiana was burglarized by a person wearing a mask, two hooded sweatshirts, and gloves. Approximately \$3,500 in cash was stolen. Video surveillance revealed the burglar was a white female, although she couldn't be identified.

During the police investigation employees of the Dollar General store were questioned because it was apparently an inside job: the store's outside door had been opened and the alarm system disarmed. One of the store's employees was Nicole Greenlee, a white female. On December 28 she confessed to the burglary. The initial police investigation concluded Greenlee acted on her own, even though at one point she named Antonio Smith, her boyfriend at the time, and another woman as accomplices in the burglary. Smith is black.

Greenlee was charged with burglary. She pled guilty and during her plea hearing on May 6, 2013 she testified under oath that she opened the store's outside door to get inside, and then she disarmed the alarm system using the code. Greenlee did not testify that Smith or anyone else helped her in any way to commit the burglary. Greenlee was convicted based on her guilty plea.



Nicole Greenlee (St. Joseph County Sheriff's Dept.)

After Greenlee pled guilty, but before she was sentenced to probation, Smith was charged with being the person who committed the Dollar General store burglary.

Smith denied committing the burglary. Greenlee was the prosecution's key witness during his trial that began on July 30, 2013. St. Joseph County Deputy Prosecuting Attorney Micah Cox admitted during his opening statement that Greenlee was going to testify about two different versions of the burglary: the first was that she pled guilty and was convicted of committing the burglary alone;



Antonio Smith (St. Joseph County Sheriff's Dept.)

and the second was that she was outside in the bushes while Smith was inside the store committing the burglary.

After the State's opening statement Smith's lawyer advised the judge during a sidebar that during Greenlee's guilty plea hearing she "made a factual basis under oath that she was the one who went into the store." He argued Greenlee would commit perjury if she testified Smith was the person who entered the store and committed the burglary. Cox told the judge the State was granting Greenlee "use immunity" from prosecution for perjury regarding her guilty plea testimony. The judge allowed Greenlee to testify that it was Smith who entered the store and committed the burglary.

After Greenlee concluded her direct testimony, Smith's lawyer moved for a mistrial on the basis she committed perjury during her testimony; the prosecution knew she intended to commit perjury; and that "a case with perjury that is known about will be overturned on appeal." The judge denied the motion, agreeing with Cox that Greenlee's sworn testimony during her plea hearing that she alone committed the crime was merely inconsistent with her trial that Smith entered the store and committed the burglary.

The jury convicted Smith even though the surveillance video was played for the jurors that showed a lone white female was inside the store committing the burglary. On November 15, 2013 Smith was sentenced to four years in prison. Greenlee had been sentenced to probation for committing the same crime.

Smith appealed, arguing that his due process right to a fair trial was violated by the State's knowing use of Greenlee's perjured testimony. On November 24, 2014 the Indiana Court of Appeals reversed Smith's conviction in [Smith v. Indiana](#), No. 71A04-1312-CR-609 (Ind. COA, 11-24-2014). The Court's ruling states in part:

"At her guilty plea hearing, Greenlee testified under oath that she had knowingly broken and entered the Dollar General store with the intent to commit theft. ... But at Smith's trial, Greenlee testified under oath that it was Smith who had broken and entered the store while she waited outside and acted as a

lookout. These two versions of the burglary that Greenlee gave under oath, first at her guilty plea hearing and then at Smith's trial, are inconsistent to the degree that one of them is necessarily false. Accordingly, we hold that Greenlee committed perjury as a matter of law..." (p. 9)

... the State knowingly proffered perjured testimony. And after Greenlee had testified, the State knew with certainty that she had committed perjury. At that point, the State had a duty to correct the perjury. ... The State should have joined in Smith's motion for a mistrial. (p. 12)

The knowing use of perjured testimony violates due process, impeaches the verdict, and undermines the integrity of the judicial system. Greenlee's testimony poisoned the well and denied Smith a fair trial. (p. 14)

We hold that Smith's conviction was obtained by the State's knowing use of perjured testimony, and we reverse his conviction. (p. 15)

The Indiana Supreme Court accepted the St. Joseph County Prosecutor's request to review the appeals court's ruling. [The Court determined](#) the issues in Smith's case are important enough to warrant oral argument, which was scheduled for April 2, 2015.

A copy of the Court's ruling is being sent to the Supreme Court Disciplinary Commission, and it could decide to initiate an investigation of DPA Micah Cox's conduct during the trial.

[Click here to read](#) the appeals court's ruling in *Smith v. Indiana*, No. 71A04-1312-CR-609 (IN COA, 11-24-2014).

Source: [Antonio Smith v. State of Indiana](#), No. 71A04-1312-CR-609 (Indiana Ct. of Appeals, 11-24-2014) (vacating conviction on basis of prosecution witness perjury)

[Conviction overturned because of alleged perjury](#), deputy prosecutor blamed, WSBT-TV (Mishawaka, IN), Nov. 26, 2014

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## Nevada Supreme Court Notified The State's Lawyer Lied Repeatedly During Kirstin Lobato's Oral Argument

**L**awyer Lied During Kirstin Lobato's Nevada Supreme Court Arguments was the lead article on the [front-page](#) of the *Las Vegas Tribune* on Nov. 12, 2014. That article was a condensed version of the [full 2,700 word article](#) published by *Justice Denied* on November 7, 2014 titled: *The State Of Nevada's Lawyer Lied And Lied During Kirstin Lobato's Nevada Supreme Court Arguments*. The article was written by Hans Sherrer, Justice Denied's Publisher and Editor.

Nevada Supreme Court justices are public employees who are popularly elected and accountable to the voters in Nevada the same as every other elected official. On December 3, 2014 the Justice Institute mailed each of the Court's seven justices the following letter to ensure they have the same information as the general public, concerning the dishonesty of the lawyer that represented the State of Nevada during the oral arguments on September 9, 2014, in *Kirstin Blaise Lobato v. State of Nevada* (No. 58913). The letter was:

Justice Institute  
PO Box 66291  
Seattle, WA 98166

December 3, 2014

Chief Justice Mark Gibbons  
Justice Michael A. Cherry  
Justice Kristina Pickering  
Justice Michael L. Douglas  
Justice Nancy M. Saitta  
Justice James W. Hardesty  
Justice Ron D. Parraguirre  
Nevada Supreme Court  
201 South Carson Street, Suite 250  
Carson City, NV 89701-4702

RE: Steven S. Owens dishonesty during *Lobato v. State*, No. 58913 oral arguments

Dear Justices of the Nevada Supreme Court,

A matter of grave public concern is Steven S. Owens' extensive dishonesty in his capacity as the State's representative during the September 9, 2014 oral argument in *Lobato v. State*, No. 58913.

To apprise the Nevada Supreme Court of the



Nev. Supreme Court Justices (Dec. 2014) (supreme.nvcourts.gov) Seated: Justice Michael A. Cherry, Justice Kristina Pickering. Standing: Justice Michael L. Douglas, Justice Nancy M. Saitta, Chief Justice Mark Gibbons, Justice James W. Hardesty, Justice Ron D. Parraguirre.

magnitude of Mr. Owens' dishonesty, attached is an article that details 16 issues about which Mr. Owens was dishonest by deception, misrepresentation, or outright fabrication of material facts or legal issues related to *Lobato v. State*. The 16 issues aren't exhaustive, but they are representative of Mr. Owens' dishonesty during his oral argument.

Every litigant appearing before the Nevada Supreme Court is entitled to have their case impartially decided on the relevant facts and applicable law. Mr. Owens' dishonest conduct on September 9, 2014 egregiously undermined the deliberation process in *Lobato v. State*. The public cannot have confidence in the judiciary if the State is known to be able to attempt influencing the outcome of any case by tilting the scale of justice through the dishonest argument of its representative.

Sincerely,  
Hans Sherrer

\*\*\*\*\*

Attached to the letter as an exhibit was a hard copy of the 2,700 word article: *The State Of Nevada's Lawyer Lied And Lied During Kirstin Lobato's Nevada Supreme Court Arguments* that was written by Hans Sherrer, *Justice Denied's* Publisher and Editor. [Click here to read the article](#) on Justice Denied's website.

[Click here to read](#) the condensed version of that article that was published as the lead article on the front page of the *Las Vegas Tribune* on November 12, 2014 — *Lawyer Lied During Kirstin Lobato's Nevada Supreme Court Arguments*.

To learn more about Kirstin Lobato's case, [click here to go to Justice Denied's Kirstin Blaise Lobato webpage](#).

[Click here to go to the Justice For Kirstin website](#).

## 53,000 Copies Of "Kirstin Blaise Lobato's Unreasonable Conviction" Downloaded From Justice Denied's Website

**M**ore than 53,000 copies of the book [Kirstin Blaise Lobato's Unreasonable Conviction](#) — *Possibility of Guilt Replaces Proof Beyond A Reasonable Doubt* have been downloaded at no charge from [Justice Denied's](#) website (as of March 15, 2015).

The book details how Kirstin Lobato has twice been convicted of a July 8, 2001 Las Vegas homicide when the prosecution doesn't deny it has no physical, forensic, eyewitness, confession, informant, surveillance video or documentary evidence she was in Las Vegas at any time on the day of the crime. The prosecution also concedes she was at her home 165 miles from Las Vegas at the time new forensic entomology and forensic pathology evidence conclusively proves the man died between 8 p.m. and 10 p.m. The book also details that in 2001 the 18-year-old Ms. Lobato was prosecuted even though the Las Vegas Metropolitan Police Department and the Clark County District Attorney's Office obtained evidence [three days after her arrest](#) she is innocent.

The book has several chapter about Ms. Lobato's habeas corpus petition. Her petition includes new evidence her jury didn't hear by more than two dozen expert, alibi, and third-party culprit witnesses that supports her actual innocence.

The 169-page book written by *Justice Denied's* editor and publisher Hans Sherrer is supported by 416 source endnotes. In documents filed in the Nevada Supreme Court the Clark County District Attorney's Office and the State of Nevada don't assert there is a single factual error in the book.

[Click here to download at no charge](#) "Kirstin Blaise Lobato's Unreasonable Conviction" in PDF format from [www.justicedenied.org/kbl.htm](#). A hard-copy of the book can be purchased from Justice Denied for \$13 by check, money order or a credit card [by clicking here](#).

Kirstin Lobato's website [www.justice4kirstin.com](#) has extensive information about her case.

Justice Denied's webpage with information about the Kirstin Lobato case is [www.justicedenied.org/kbl.htm](#).



## Improper Submissions: Records of a Wrongful Conviction

By Erma Armstrong

This is the story of Karlyn Eklof, a young woman delivered into the hands of a psychotic killer. She witnessed him commit a murder and she is currently serving two life sentences in Oregon for that crime. *Improper Submissions* documents:



- The killer's psychotic bragging was used by the prosecution against Karlyn.
- Exculpatory and witness impeachment evidence was hidden from the defense.
- Erroneous assertions by the prosecution were used by the media, judges reviewing the case, and even by her own lawyers to avoid looking at the record that reveals her innocence.

Paperback, 370 pages, \$10

Order with a credit card from Justice Denied's Bookshop, [www.justicedenied.org](http://www.justicedenied.org)

## Justice Denied Article Was 7th Most Important 2014 News Story In Las Vegas



The *Las Vegas Tribune* [has recognized](#) *Lawyer Lied During Kirstin Lobato's Nevada Supreme Court Arguments* as the seventh most important 2014 Las Vegas news story. The article was published in the *Las Vegas Tribune* on November 12, 2014. It was a condensation of the full article [published online](#) by *Justice Denied* on November 7, and which is in *Justice Denied Issue 58* beginning on page 16.

The *Tribune's* article listing the top 10 Las Vegas news stories for 2014 can be read [by clicking here](#).

[Click here to read](#) *Justice Denied's* full 2,700 word article: *The State Of Nevada's Lawyer Lied And Lied During Kirstin Lobato's Nevada Supreme Court Arguments*, that was written by Hans Sherrer, *JD's* Publisher and Editor.

## An Exoneration Can Be Judicial Or By Executive Or Legislative Clemency

By Hans Sherrer\*

### What is an exoneration?

Exoneration is derived from the Latin word *exoneratio*, which means "an unloading, lightening."<sup>1</sup> The first known use of exoneration in English was in 1640, and in 1660 it was expressly used to describe relief from a government decree: "An act concerning the exoneration of the Kings subjects from exactions and impositions."<sup>2</sup> The *Oxford English Dictionary* is the world's most authoritative English dictionary, and it defines "exoneration" as: "2. The action of disburdening or relieving, or the state of being relieved from a duty, office, obligation, payment, etc.; also, from blame or reproach; an instance of this, a formal discharge."<sup>3</sup> The historical and modern definition of exoneration makes it clear that it broadly describes relief or discharge from an imposition by a governmental authority.<sup>3</sup> Consequently, exoneration can refer to an official declaration retrospectively relieving a person of "blame or reproach" for the imposition of being convicted of committing a crime.

As its definition suggests, there is not a single degree of relief or discharge that constitutes an exoneration. That is borne out by the differences in how an exoneration of convicted crimes is achieved by way of judicial, executive, or legislative action.<sup>4</sup> The following are brief explanations of those three processes.

### Judicial Exonerations

A judicial exoneration that restores a person's presumption of innocence most conclusively absolves that person of "blame or reproach" for a criminal conviction.

The presumption of innocence shielding a person who is suspected or charged with committing a crime, but not convicted of doing so, is recognized by the legal systems of countries around the world – including every country whose legal system is a descendant of the British common law. "Innocent until proven guilty" is such a universal principle that it was incorporated in 1948 in the United Nations' Declaration of Human Rights (Article eleven, section one); in 1953 in the European Convention

for the Protection of Human Rights (Article 6, section 2); and in the United Nations International Covenant on Civil and Political Rights (Article 14, section 2) that went into force in 1976.<sup>5</sup>

When a defendant in the United States pleads guilty or no contest that public admission/confession to committing the crime is considered sufficient to overcome his presumption of innocence. Consequently, the defendant's plea relieves the prosecution of needing to present testimonial or documentary evidence of his guilt.

However, when a defendant pleads not guilty and asserts his right to a trial the prosecuting authority is faced with overcoming his presumption of innocence by presenting credible evidence that proves beyond a reasonable doubt to the judge or jury the defendant's guilt of every essential element of his charged crime(s).<sup>6</sup> For example, to prove a defendant robbed a bank the prosecution may have to present evidence: 1) The defendant was present at the bank; 2) The defendant unlawfully obtained something of value from the bank; and, 3) The defendant had the intent to unlawfully obtain something of value from the bank. To lawfully convict a defendant the prosecution is required to present admissible evidence proving *each* of those elements of the crime beyond a reasonable doubt.

During several stages of a state or federal case in the U.S. a defendant can typically directly or indirectly raise variants of the issue the prosecution's evidence presented at trial is not sufficient to overcome his presumption of innocence. Those include:

- \* A motion for the judge to declare an acquittal prior to deliberations by the judge or jury.
- \* A post-verdict/pre-sentence motion to vacate the conviction and acquit the defendant.
- \* A direct appeal argument to vacate the conviction and acquit the defendant.
- \* A post-conviction ineffective assistance of counsel claim for a new trial.
- \* A post-verdict motion for a new trial based on new evidence that undermines the factual or legal basis of the conviction.
- \* A post-conviction *habeas corpus* petition for a new trial based on new evidence that undermines the factual or legal basis of the conviction.
- \* A post-conviction motion/petition for dismissal of the charges based on new

**Exoneration cont. on p. 15**

## Exoneration cont. From p. 14

evidence of actual innocence.

\* A post-completion of sentence *coram nobis* petition for a new trial based on new evidence undermining the factual or legal basis of the conviction.

A brief explanation of these options follows.

After the prosecution has presented its evidence at trial, but before the jury or judge begins deliberating, many jurisdictions allow a defendant to make a motion for the presiding judge to declare a judgment of acquittal based on the prosecution's failure to present evidence sufficient to prove the defendant's guilt beyond a reasonable doubt of every essential element of his charged crime(s).<sup>7</sup>

If that trial court motion is denied and the defendant is convicted, he may have several opportunities to later assert the prosecution failed at trial to present evidence sufficient to overcome his presumption of innocence. One is a post-verdict/pre-sentence motion to vacate the conviction; and another is a direct appeal argument to vacate the conviction.

For one of those motions to prevail in federal court and typically in a state courts, a defendant must demonstrate "that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt."<sup>8</sup> That standard is so high because vacating a conviction based on insufficient evidence is the legal equivalent of an acquittal, with the defendant's retrial barred under double jeopardy, and his charges must be dismissed in the U.S. and many other countries.<sup>9</sup> With restoration of a defendant's presumption of innocence, his legal rights revert to what they were before he had been charged.<sup>10</sup>

If a defendant is unsuccessful in having his conviction overturned pre-sentencing or during his direct appeal, in the U.S. he can then attempt to do so during the post-conviction appeal process. Generally a post-conviction petition cannot raise an issue that either was, or could have been raised on direct appeal. Consequently, a defendant is generally barred from *directly* bringing a claim the prosecution introduced insufficient evidence at trial, because that challenge could have been made in his direct appeal.

In that circumstance a defendant can assert in his post-conviction appeal that either pre-verdict, pre-sentencing, or on direct

appeal, his lawyer provided ineffective assistance of counsel for failing to raise the issue the prosecution introduced insufficient evidence.<sup>11</sup> If successful, the defendant will be granted a new trial, and not dismissal of the charges, because to prevail the defendant must meet the relatively low standard that by less than a preponderance of the evidence there is a "reasonable probability" that but for his counsel's deficient conduct he would have had success on appeal.<sup>12</sup>

In addition to challenging the sufficiency of the prosecution's trial evidence, a defendant may have several other avenues available to contest his conviction in an effort to have his charge(s) dismissed, which would restore his presumption of innocence.

A defendant can file a post-verdict motion for a new trial if new evidence is discovered after trial or that was not known at the time of his guilty or no contest plea that materially undermines the factual basis of his conviction.<sup>13</sup> There are generally time limits from the date of the verdict for filing that motion.<sup>14</sup> That evidence can be a new eyewitness, new forensic evidence, new alibi evidence, recantation by a key prosecution witness, etc. After the time limit expires for a post-verdict motion, or a conviction becomes final with the denial of the defendant's direct appeal, a post-conviction/habeas corpus petition asserting new evidence can be filed by a defendant who hasn't completed all conditions of his sentence.

In the United States the general standard in federal and state courts for evaluating a post-verdict motion or post-conviction petition based on new evidence is whether it is more likely than not a reasonable juror would have voted to convict the defendant when the trial evidence supporting the conviction is viewed in light of the new evidence. Some statutes and court rules, such as Federal Rules of Criminal Procedure Rule 33, apply the "interest of justice" standard for evaluating a post-verdict new trial motion.<sup>15</sup>

Regardless of when it is filed, to be granted a motion or petition requesting a new trial based on new evidence must meet a lower standard of proof than a motion or direct appeal based on insufficiency of the evidence at trial. That is because granting of the former results in the prosecution having the option to retry the defendant, while granting the latter results in dismissal of the charge(s). The longer the period of time that has elapsed from the time of trial, the more

likely it is that the granting of a new trial motion will result in the prosecution electing not to retry a defendant. In that case the prosecution typically moves to dismiss the charges, however, when granted by the presiding judge it is a dismissal "without prejudice." That means that if new evidence of the defendant's guilt is discovered the charges can be refiled depending on the charge and the statute of limitations.<sup>16</sup>

The high courts of several states have ruled a defendant can file a post-conviction petition asserting his actual innocence based on new evidence not presented at trial or known at the time of his guilty plea that establishes he is actually innocent. Those states include Texas, New Mexico, Missouri, Connecticut, New York, Nevada, Illinois, and California.<sup>17</sup> Most of those states require that a defendant's actual innocence be proven by clear and convincing new evidence for the petition to be granted and the charges dismissed.<sup>18</sup> The rationale underlying consideration of a defendant's petition is the conviction and imprisonment of an actually innocent person violates his constitutional rights to due process, a fair trial, and barring cruel and unusual punishment.<sup>19</sup>

In addition to the foregoing post-conviction remedies, one state, North Carolina has established an innocence inquiry commission that considers new evidence of a convicted person's actual innocence in determining if his case warrants being referred for judicial consideration of his conviction in light of the new evidence.<sup>20</sup> For relief to be granted a three-judge panel must unanimously determine the person is "innocent of the charges" by "clear and convincing evidence" under NCGS 15A-1469(h).<sup>21</sup>

A defendant who discovers new evidence undermining the factual basis of his conviction *after* he has completed *all* affirmative conditions of his sentence (imprisonment, probation and/or payment of a fine/restitution) is barred from filing a post-conviction *habeas corpus* petition (*Habeas corpus* means "release the body."). In that situation the defendant's only judicial option may be to explore if filing a *coram nobis* petition is an option to overturn his conviction.

In 1954 the U.S. Supreme Court ruled that under certain circumstances *coram nobis* is available to overturn the federal court conviction of a person who has completed his sentence, "Otherwise a wrong may stand

## Exoneration cont. on p. 16

uncorrected which the available remedy would right.”<sup>22</sup> Each state can determine legislatively or judicially if *coram nobis* is available to a person who has completed his sentence for a state court conviction.

U.S. Circuit Courts of Appeal have ruled that for a federal conviction to be overturned by way of *coram nobis* the petition must satisfy four requirements: First, the petition has to be filed in the federal district court where the conviction occurred; second, the person filing the petition continues to suffer significant *legal* consequences from his or her conviction that may be remedied by granting the petition; third, there must be sound reasons for the failure to seek appropriate relief earlier; and fourth, the petition must set forth proof compelling that it be granted to alleviate a manifest injustice.<sup>23</sup> Although it isn’t necessary for a petitioner to meet a specific standard of proof, it is so difficult to meet all four requirements that in the 60 years from 1954 to June 2014 there are less than two dozen known cases of an exoneration resulting from the filing of a federal *coram nobis* petition.<sup>24</sup>

### Executive Clemency

If a defendant’s efforts are unsuccessful to restore his presumption of innocence by having a court overturn his conviction(s) on the basis of insufficient evidence of guilt, new evidence, or actual innocence, then pursuit of executive clemency, commonly referred to as a pardon, is an option in many countries.<sup>25</sup> However, with few exceptions a pardon – even when granted based on new evidence of actual innocence – only relieves a defendant of some or all penalties and forfeitures imposed as a result of his conviction, and it may restore some rights of citizenship.<sup>26</sup> Seeking a pardon can constitute an admission of guilt, and “By the modern view, the granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal, but rather is an executive action that mitigates or sets aside the punishment for a crime.”<sup>27</sup> Since the effect of a pardon is to forgive and not to forget, a full and unconditional pardon “cannot erase the basic fact of a conviction, nor can it wipe away the social stigma that a conviction inflicts.”<sup>28</sup> Consequently a defendant can be pardoned based on a convincing argument his continued imprisonment is unjust for reasons unrelated to new evidence of his innocence – such as that he has been rehabilitated and no longer poses a threat to society, or his sentence

was disproportionate to the crime, etc.

Illinois is unusual in that after a defendant’s indictment has been dismissed post-conviction by a court, he must satisfy the procedural step of being granted an executive pardon before being eligible for statutory compensation from the State of Illinois. In that circumstance a pardon in Illinois doesn’t have any legal effect on the defendant’s conviction.

Thus with few exceptions a pardon “symbolically” – but not legally – exonerates a defendant convicted on shaky evidence or who is unable to judicially overturn his conviction based on new evidence that substantively undermines the factual basis of his conviction. The irony of that is the U.S. Supreme Court has deferred to the historical power of executive clemency in declining to rule on whether a state prisoner has a constitutional right to base a federal *habeas corpus* petition challenging his conviction solely on new evidence of his actual innocence.<sup>29</sup> The Supreme Court stated in *Herrera v. Collins* (1993): “Executive clemency has provided the “fail safe” in our criminal justice system. It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.”<sup>30</sup>

### Legislative Clemency

Legislative clemency acknowledging an injustice is a rarely used alternative to executive clemency. It is a remedy that has typically been used to retrospectively adjudge the convictions of multiple defendants to have been beyond the bounds of a law’s intention or its misuse by the executive and/or judicial branches of government. It has also been used to posthumously rehabilitate the reputation of deceased persons who were unjustly convicted of a crime. An example is legislative clemency has been used in Germany to absolve many elderly or deceased individuals of guilt who were convicted of treason or lesser charges during the Nazi era, including the persons convicted for their involvement in creating, printing, and distributing White Rose anti-Nazi literature during World War II.<sup>31</sup> In the United States it has been used to posthumously absolve of guilt individuals who were convicted of witchcraft in Salem, Massachusetts in 1692.<sup>32</sup>

As the foregoing briefly explains there are different paths a person can pursue to be exonerated of his or her criminal conviction(s).

A challenging path with the highest standard of proof a defendant must meet for exoneration are the procedures available to overturn a conviction and dismiss the charges based on the prosecution’s reliance on insufficient evidence. The next highest standard of proof that must be met to overturn a conviction and dismiss the charges is by way of a motion or petition based on new evidence of a defendant’s actual innocence. The lowest standard of legal proof that must be met to overturn a conviction is by way of a motion or petition asserting new evidence that undermines the factual basis of the defendant’s conviction(s), with dismissal of the charges at the discretion of the prosecuting authority and the presiding judge. The difficulty of meeting all four requirements for the granting of a federal *coram nobis* petition is consistent with its status as the judicial option of last resort. The granting of executive or legislative clemency is a political and not a judicial action, so the the authorities and/or politicians involved determine if the defendant/applicant’s circumstances warrants public absolution.

Although an exoneration accomplished judicially by the overturning of a person’s conviction and dismissal of his charges most completely absolves him, executive or legislative clemency based on evidence of a miscarriage of justice also falls under the general umbrella of an exoneration.

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\* Hans Sherrer is President of the Justice Institute that promotes awareness of issues related to wrongful convictions, and Publisher and Editor of *Justice Denied: the magazine for the wrongly convicted*. The website is, <http://www.justicedenied.org>.

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### Endnotes:

<sup>1</sup> Etymology of the entry for “Exoneration” in the *Online Etymology Dictionary* available at, [www.etymonline.com](http://www.etymonline.com).

<sup>2</sup> Exoneration, n. 2. “1660. R. Coke *Elements Power & Subjection* 211 in *Justice Vindicated*, An act concerning the exoneration of the Kings subjects from exactions and impositions.”, *Oxford English Dictionary*, available online at, [www.oed.com](http://www.oed.com).

<sup>3</sup> An artificial entity such as a business can also be



## Exoneration cont. From p. 16

exonerated of an imposition.

<sup>4</sup> This article was suggested by Zieva Konvissar to explain the breadth of cases included in the Innocents Database that doesn't artificially filter out exoneration, and includes all documentable exoneration from all countries regardless of when they occurred. As of October 28, 2014 the Innocents Database listed 5,004 cases online at, <http://forejustice.org/innocentsdatabase.htm>.

<sup>5</sup> "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." International Covenant on Civil and Political Rights, Article 14, section 2, available at, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last viewed June 28, 2014).

<sup>6</sup> *In re Winship*, 397 U.S. 358, 361 (1970), established the prosecution's constitutional due process obligation to introduce evidence proving a defendant's guilt beyond a reasonable doubt.

<sup>7</sup> There are variations of a motion for a judgment of acquittal in some jurisdictions. In Nevada, for example, NRS 175.381(1) only allows a defendant to make a motion for the judge to issue a non-binding instruction to the jury to acquit based on the prosecution's failure to introduce evidence sufficient to prove every essential element of the alleged offense(s) beyond a reasonable doubt. The jury can consider the judge's advisory during its deliberations.

<sup>8</sup> See, *Jackson vs. Virginia*, 443 U.S. 307, 324 (1979). In cases which the prosecution presented no direct evidence supporting the defendant's guilt, but relied solely on circumstantial evidence, some states have adopted the standard that for a conviction to be sustained on appeal "the facts proved must all be consistent with guilt and inconsistent with innocence." *People v Borrero*, 26 N.Y.2d 430, 434-435 (NY Ct. of Appeals, 1970).

<sup>9</sup> See, *Burks v. United States*, 437 U.S. 1, 18 (1978) ("the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient."); see also, *Hudson v. Louisiana*, 450 U.S. 40, 44-45 (1981) (Double Jeopardy Clause bars retrial if conviction vacated based on insufficient evidence.). Since states must meet the minimum requirements of the federal Constitution, most, if not all state high courts have similarly ruled. See, e.g., *State v Purcell*, 110 Nev. 1389, 887 P.2d 276, 279 (1994) ("If there is truly insufficient evidence, a defendant must be acquitted."). Some countries, including the United Kingdom, have repudiated absolute double jeopardy, and made it conditional for serious crimes such as murder, with it possible for charges to be refiled if new evidence of the defendant's guilt is discovered after their acquittal. See, e.g., "Change in double jeopardy law led to Gary Dobson's retrial," *The Guardian* (London), January 3, 2012.

<sup>10</sup> In the United States a conviction does not become final until a defendant has either exhausted his direct appeal options, or waived exercising them. For example, if the conviction of a defendant in a state court is affirmed on direct appeal by the state's highest court, and the defendant files a writ for review of his conviction with the U.S. Supreme Court, the conviction doesn't become final until the Supreme Court decides how it will dispose of the case.

<sup>11</sup> In the U.S. that claim of trial counsel's constitutionally ineffective assistance of counsel would be brought in federal court under the U.S. Supreme Court's ruling in *Strickland v. Washington*, 466 U.S. 668 (1984), and in state court under rulings consistent with *Strickland*.

<sup>12</sup> *Strickland's* reasonable probability standard for effective assistance of trial counsel was applied to appellate counsel by subsequent U.S. Court of Appeal and U.S. Supreme Court rulings. See, *Heath v. Jones*, 941 F.2d 1126, 1132 (11th Cir. 1991); and, *Smith v.*

*Robbins*, 528 U.S. 259, 289 (2000).

<sup>13</sup> The most expansive legal view of new evidence is evidence that wasn't presented to the fact finder for consideration in arriving at the verdict. Consequently, "new evidence" applies to conviction obtained by way of a guilty or no contest plea, as well as by the verdict of a judge or jury after a trial.

<sup>14</sup> For example, federal court [Rule 33. New trial](#), provides that "Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty."

<sup>15</sup> FRCP Rule 33. New Trial (a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment. The U.S. Supreme Court has recognized that "some federal courts have interpreted Rule 33 of the Federal Rules of Criminal Procedure, which authorizes a new trial "if required in the interest of justice," to permit the trial judge to set aside a conviction that is against the weight of the evidence." *Tibbs v. Florida*, 457 US 31, 39 note 13 (1982).

<sup>16</sup> E.g., in the U.S. there is no state or federal statute of limitations for a murder charge.

<sup>17</sup> *State ex rel Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. 2003); *Montoya v. Ulibarri*, 163 P.3d 476, 487 (N.M. 2007); *Ex parte Elizondo*, 947 S.W.2d 202, 210 (Tex. Crim. App. 1996); *People v Hamilton*, 115 A.D.3d 12, 979 N.Y.S.2d 97 (2014); *People v. Washington*, 171 Ill.2d 475, 479-80, 665 N.E.2d 1330 (1996); *Miller v. Comm'r of Corr.*, 242 Conn. 745, 700 A.2d 1108, 1132 (1997); *State ex rel. Orsborn v. Fogliani*, 82 Nev. 300, 417 P. 2d 148 (Nev Sup Ct 1966); and, *In re Clark*, 5 Cal.4th 750, 21 Cal. Rptr.2d 509, 855 P. 2d 729 (CA Supreme Court 1993). California allows a post-conviction claim of actual innocence by statute.

<sup>18</sup> Illinois only requires new evidence that proves actual innocence by a preponderance of the evidence for a new trial to be granted. *People v. Washington*, 171 Ill.2d 475, 479-80, 665 N.E.2d 1330 (1996).

<sup>19</sup> The states that allow a petition asserting actual innocence do not distinguish between a claim made by a prisoner sentenced to death and a prisoner sentenced to prison, which is consistent with the U.S. Supreme Court's suggestion in *Herrera v. Collins*, 506 U.S. 390, 405 (1993) that there is no fundamental difference between the innocence claim of a prisoner on death row and a prisoner sentenced to prison: "It would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison." *Id.* at 405.

<sup>20</sup> Three countries have established commissions for post-conviction review of criminal convictions. The Criminal Case Review Commission reviews possible miscarriages of justice in the criminal courts of England, Wales and Northern Ireland; Scotland has the Scottish Criminal Case Review Commission; and, Norway has the Norwegian Criminal Case Review Commission.

<sup>21</sup> The North Carolina Innocence Inquiry Commission's enabling statute establishes it as a non-independent organization and imposes structural deficiencies that hamstring its ability to effectively function as a tool to exonerate persons, as explained in the following articles written *before it began* operating: "North Carolina Innocence Inquiry Commission Created," *Justice Denied* magazine, Issue 34, p. 20; "House Bill 1323 — North Carolina Innocence Inquiry Commission," *Justice Denied* magazine, Issue 34, p. 20; "Analysis of NC Innocence Inquiry Commission Statutory Provisions," By Hans Sherrer, *Justice Denied* magazine, Issue 34, p. 21; "Worse Than Nothing — The North Carolina Innocence Inquiry Commission is a huge step in the wrong direction," Editorial, *Justice Denied* magazine, Issue 34, p. 22. The NCIC has been even more impotent than predicted because it has assisted in only seven

exonerations in its first seven years of operation.

<sup>22</sup> *U.S. v Morgan*, 346 U.S. 502, 512 (1954). The Court ruled 28 U.S.C. § 1651 provides a federal court with jurisdiction to consider a *coram nobis* petition in a criminal case.

<sup>23</sup> See e.g., *Hirabayashi v. U.S.*, 828 F. 2d 591, 604-607 (9th Cir 1987), and, *Foont v. US*, 93 F. 3d 76, 79 (2nd Cir Ct. 1996).

<sup>24</sup> The Innocents Database lists more than a dozen exoneration by way of a federal *coram nobis* petition from 1954 to 2014. See, [http://forejustice.org/search\\_idb.htm](http://forejustice.org/search_idb.htm) (last visited October 19, 2014).

<sup>25</sup> "The term "clemency" refers not only to full or conditional pardons, but also commutations, remissions of fines, and reprieves. See Kobil, "The Quality of Mercy Strained: Wrestling the Pardoning Power from the King," 69 *Texas L. Rev.* 569, 575-578 (1991)", quote from *Herrera v. Collins*, 506 U.S. 390, 411, note 12 (1993). Historically the English Common Law did not provide for the direct appeal of a conviction, or a post-conviction judicial appeal based on *any* ground. Consequently, an innocent person's only option was an executive pardon until Courts of Appeal were legislatively established as a mechanism to review convictions. See, e.g., Marshall, Peter D. "A Comparative Analysis Of The Right To Appeal" (2011) *Duke J. Comp. & Int'l L. 1* (Vol. 22, No. 1), esp. 4-11. Available at: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1014&context=djcl>

<sup>26</sup> In the United States a full presidential pardon and a full pardon by most state governors or a pardon/parole board only directly relieves a defendant of some or all direct *consequences* of his conviction that can include the sentence and restrictions of civil rights. An excellent general discussion of the pardon power in the United States, and specifically as it relates to Nevada, is the Nevada Attorney General's 25-page informal opinion dated November 18, 2003 submitted to Dorla M. Salling, Chairman of the Nevada Board of Parole Commissioners about the legal effect of a pardon in Nevada. Available online at, <http://pardons.nv.gov/uploadedFiles/pardonsnvgov/content/About/PardonInformalOpinion.pdf> (last viewed June 22, 2014). An exception to this is Texas has a statute that specifically provides for a pardon based on new evidence of actual innocence. Tex. Admin. Code Title 37, Pt. 5, Chap. 143, SubChap. A, §143.2. The statute states: "(b) Evidence submitted under subsection (a)(1) of this section shall include the results and analysis of pre-trial and post-trial DNA tests or other forensic tests, if any, and may also include affidavits of witnesses upon which the recommendation of actual innocence is based."

<sup>27</sup> See, 59 AM. JUR. 2D Pardon and Parole § 60 (2003). One exception to this is Texas' pardon statute under which, "A pardon based on innocence exonerates a person of the crime and erases the conviction when there is evidence of actual innocence or a court has determined the person is innocent." See the Texas Board of Pardons and Paroles website, [http://www.tdcj.state.tx.us/bpp/exec\\_clem/Pardon\\_for\\_Innocence.html](http://www.tdcj.state.tx.us/bpp/exec_clem/Pardon_for_Innocence.html)

<sup>28</sup> *Bierkan v. United States*, 529 F.2d 125, 126 (7th Cir. 1975).

<sup>29</sup> See, *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

<sup>30</sup> *Herrera v. Collins*, 506 U.S. 390, 411-417 (1993).

<sup>31</sup> Michael Stolleis, "The Law Under The Swastika: Studies on Legal History in Nazi Germany," *The University of Chicago Press* (1992), p. 157, and endnote 21 at p. 243.

<sup>32</sup> "Executed Salem Witches Exonerated," by Steve LeBlanc (AP), *Worldwide Religious News*, November 2, 2001, available at, <http://wwrn.org/articles/9431/?&section=occult>

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