

Indiana Governor Mike Pence successfully goaded Keith Cooper's lawyers to file a post-conviction petition on October 3, 2016, that seeks to overturn his 1997 robbery conviction. On September 20, 2016 Pence informed Cooper that he couldn't consider his pardon request until he exhausted his legal options to overturn his conviction. As a result of Pence prodding Cooper's lawyers to act on his behalf, Cooper could be awarded \$5 million or more in compensation from a federal civil rights lawsuit if he is able to have his conviction overturned by a court. He wouldn't get 5 cents if granted a pardon.

Cooper and his co-defendant, Christopher Parish, were prosecuted for charges related to the non-fatal shooting of Michael Kershner during a robbery in an apartment in Elkhart, Indiana on October 29, 1996. Cooper and Parish were tried separately.

Cooper was convicted by a judge in September 1997 of robbery resulting in serious bodily injury, but he was acquitted of attempted murder. During Cooper's trial the prosecution alleged that when committing the crime he wore a hat with the letter "J" inscribed on the front that was recovered from the crime scene. Cooper's lawyer agreed to a stipulation that a test of DNA recovered from the hat's sweatband was inconclusive and couldn't exclude Cooper as the source. Cooper, who waived his right to a jury trial, was sentenced to 40 years in prison.

Parish was convicted by a jury in June 1998 of attempted murder and robbery resulting in serious bodily injury. During Parish's trial the "J" hat allegedly worn by Cooper was introduced into evidence by the prosecution as proof of Parish's guilt. The jury rejected Parish's alibi defense — supported by seven eyewitnesses — that he was with his wife and children 110 miles away in Chicago at the time of the crime. Parish was sentenced to 30 years in prison (Concurrent 30 year prison terms for both of his convictions.).

After Parish's direct appeal of his convictions was denied in 1999, he filed a *pro se* post-conviction petition in 2000 that was based on new evidence the prosecution fabricated the claim there had been a robbery and shooting in the apartment, and that his lawyer provided ineffective assistance of counsel.

During an evidentiary hearing in August 2004 an Indiana State Police Laboratory DNA expert testified that prior to Parish's trial DNA testing of the "J" hat allegedly worn by Cooper excluded the presence of Cooper's DNA. However, the prosecution

Indiana Gov. Mike Pence Helped Keith Cooper To Seek His Exoneration

By Hans Sherrer

not only failed to disclose that exclusionary test to Parish's lawyer, but argued to the jury that the finding of the hat at the crime scene was proof of Parish's guilt. There was also testimony during the hearing that in March 2004 the DNA on the hat was matched to Johlanis Cortez Ervin. In 2002 Ervin was convicted of second-degree murder and a firearm charge in an unrelated case, and he was sentenced to 62 years in prison.

During the hearing Parish's trial lawyer Mark Doty testified he was unaware of the exclusionary "J" hat DNA test results, and the "crime scene" photographs and police reports that undermined both the prosecution's theory that the "crime" occurred in the apartment, and Parish's identification as one of the alleged perpetrators. The photos and reports supported that the fake apartment shooting story was concocted to cover-up that Kershner was actually shot in the apartment parking lot, while he was on home detention for a gun related conviction.



Doty [testified during the hearing](#), "Had I done a good job, my client would not have been convicted." That testimony echoed Doty's statement six years earlier during Parish's sentencing hearing, "I feel that, perhaps due to some of my failing as an attorney, maybe I didn't do as good a job as I — as I could have."

Parish appealed the denial of his petition by Superior Court Judge Stephen Platt.

It was only because of Gov. Pence's prodding that Keith Cooper's lawyers acted in his interests by filing a post-conviction petition to overturn his conviction.

On December 6, 2005 the Indiana Court of Appeals reversed Platt's ruling, and vacated Parish's convictions and ordered his retrial based on ineffective assistance of counsel by his trial lawyer. The Court ruled that because Parish's lawyer failed to "conduct any meaningful pretrial investigation" that would have

discovered evidence the shooting occurred outside the apartment and Parish (and Cooper) weren't present, Parish was unable to undermine the trial testimony that Parish (and Cooper) were involved in a robbery and shooting in the apartment that didn't occur. The Court also ruled that Doty failed to object to an erroneous jury instruction.

In July 2006 Parish was released on bond pending his retrial.

On December 1, 2006, Elkhart Superior Court Judge Evan Roberts granted the prosecution's motion to dismiss all charges against Parish.

Cooper filed a petition for a new trial based on the evidence discovered during Parish's post-conviction proceedings. Cooper was released on April 27, 2006 after he accepted the offer of the Elkhart County DA for his sentence to be modified to time served in exchange for agreeing to drop his post conviction petition.

In 2009 Cooper filed an application for an executive pardon that included Kershner's recantation of identifying Cooper and Parish as his assailants: "It would be a blessing from God for an innocent man to get off, and I am so sorry for falsely accusing you. I swear to God I really thought you were the one. Please forgive me and God forgive me. I was wrong." (Man asks for pardon after name is cleared, *The Elkhart Truth*, March 29, 2009) Governor Mitch Daniels did not grant Cooper a pardon. After a hearing in February 2014, the Indiana Parole Board unanimously recommended Cooper's pardon.

Indiana Deputy Public Defender William D. Polansky wrote a "To Whom It May Concern" letter on January 22, 2016 that [expressed his opinion](#) Cooper was barred from pursuing his exoneration in a post-conviction petition because of his sentence modification deal in 2006. However, Polansky's letter was flawed because it did not present any evidence of a judicial order that the withdrawal of Cooper's petition in 2006 was with prejudice. Since it wasn't dismissed with prejudice, Cooper could file a petition to overturn his conviction that includes all the evidence of his innocence, including Kershner's recantation in 2009.

On September 20, 2016, Mark Ahearn, General Counsel for Governor Pence, in-

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formed Cooper in a letter that his pardon request couldn't be processed until he exhausted his judicial remedies to overturn his conviction. [Ahearn stated](#), "...we need to be certain the judicial process is complete and has been given every opportunity to address any error that may have occurred."

On October 3, 2016 Cooper's lawyers filed a petition in the Elkhart County Superior Court requesting that his conviction be vacated and a new trial granted. If Cooper's petition is granted, it would then be up to the DA's office to either pursue a retrial, or request the dismissal of his charges. If Cooper's petition is unsuccessful, then Gov. Pence, or his predecessor, would then consider his pardon.

If Cooper is successful in getting his conviction overturned, he would be able to file a federal civil rights lawsuit seeking compensation just as Parish did.

Parish filed a federal civil rights lawsuit on September 24, 2007 against the City of Elkhart and three former Elkhart PD officers. Parish's [lawsuit alleged](#): "Almost immediately after the Kershner shooting, defendants Rezutko, Abrose, Cutler, and the other law enforcement defendants determined to falsely implicate Parish and to build a false case against him, with the aim of securing his false arrest and then his false imprisonment." After more than seven years of litigation, in November 2014 Parish and the City of Elkhart settled his suit for \$4.9 million.

The saga continues that began twenty years ago this month when Cooper and Parish were charged with crimes fabricated with the help of the Elkhart police -- who didn't even bother to learn that at that time Cooper and Parish were complete strangers who had never even met.

Sources:

[Phantom Robbery And Fake Crime Scene Leads To 30-Year Prison Sentence](#) — The Christopher Parish Story, By Christopher Parish, Justice Denied Issue 30 (Jan. 2006), 7, 37-39

[Parish's Conviction Vacated - New Trial Ordered!!](#), By Hans Sherrer, Justice Denied, Issue 30 (Jan. 2006), 7

[Charges Dismissed Against Christopher Parish](#), By Hans Sherrer, Justice Denied Issue 34 (Feb. 2007), 19

[Parish v. State](#), 838 NE 2d 495 (Ind. Court of Appeals 2005) (Reversing conviction based on ineffective assistance of counsel.)

[Wrongfully convicted Keith Cooper asks for new trial](#), By Madeline Buckley, www.indystar.com, October 4, 2016

[Christopher Parish, et al v. City of Elkhart, IN, et al](#), No. 09-2056 (7th Cir. 7-30-2010)

[Parish et al v. Elkhart City of et al](#), No. 3:2007cv00452 (USDC Ind. N) (Complaint under 42 USC 1983)

Stealing Food Out Of Necessity Not A Crime, Rules Italy's Supreme Court

On May 2, 2016 Italy's Supreme Court [issued its landmark ruling](#) that stealing a small amount of food out of necessity is not a crime.

In 2011 Roman Ostriakov was a 31-year-old homeless Ukrainian immigrant living in Genoa, Italy. Ostriakov went into a supermarket and he only had enough money to buy some breadsticks, that he paid for. However, a shopper alerted store personnel to seeing Ostriakov place food items in his pocket. Ostriakov was detained when he attempted to leave the market. Police were called, and a search of his pockets discovered two pieces of cheese and a package of sausages he had not paid for. Ostriakov was arrested and charged with theft of the cheese and sausage worth \$5.50 (€4.07).¹

Ostriakov was convicted of the theft of the cheese and sausage. He was sentenced to six months in jail and ordered to pay a €100 fine (US\$114) — which he couldn't afford to pay. Ostriakov appealed, but his conviction and sentence were affirmed in two rounds of appellate review, the last on February 12, 2015 by the Court of Appeal of Genoa.

The Attorney General of the Court of Appeal of Genoa appealed to Italy's highest court — the Supreme Court of Cassation in Rome. The Attorney General argued that Ostriakov's theft conviction and sentence should be set-aside, because his arrest before he left the supermarket prevented him from completing the theft. Therefore, Ostriakov's theft conviction should be replaced with a conviction for the lesser crime of attempted theft and his sentence reduced accordingly.

On May 2, 2015 Italy's Supreme Court set-aside Ostriakov's theft conviction, but rejected the prosecution's argument he committed a lesser crime, and acquitted him. The Supreme Court made the landmark ruling that stealing a small amount of food necessary to overcome a person's immediate need for food "does not constitute a crime" under Italian law. The [Court ruled](#):

"The condition of the defendant and the circumstances in which the seizure of merchandise took place prove that he took possession of that small amount of food in the face of an immediate and essential need for nourishment, acting



Italy's Supreme Court of Cassation in Rome (wikimapia.org)

therefore in a state of necessity. People should not be punished if, forced by need, they steal small quantities of food in order to meet the basic requirement of feeding themselves." (Supreme Court of Cassation, Judgment 18248, fifth criminal section, May 2, 2016)

The Supreme Court's ruling was favorably commented on by the press in Italy, with some of them comparing Ostriakov's situation to that of Jean Valjean in Victor Hugo's novel *Les Misérables*. Valjean served 19 years in prison after stealing a loaf of bread to feed his sister's starving children.

La Stampa published an editorial on its front-page [that stated](#), "The court's decision reminds us all that in a civilised country no one should be allowed to die of hunger."

Massimo Gramellini [wrote in an op-ed](#) titled "The Right To Be Hungry" published in *La Stampa*, "For chief judges the right to survival prevails over the property. [That attitude in] America would be blasphemy..."

An article in *Corriere Della Sera* [opined that](#) statistics support that 615 people are added to the ranks of Italy's poor every day, and it was "unthinkable that the law should not take note of reality."

It is unimaginable that Italy's *Ostriakov* ruling could be duplicated in the United States. A previously convicted defendant's sentence could be expected to be enhanced for the crime of stealing \$5.50 in merchandise -- not acquitted of committing a non-crime.

Endnote 1. In late 2011 the exchange rate was about \$1.35 per euro (€).

Sources:

[Stealing food if you are poor and hungry is not a crime](#), Italy's highest court rules, *The Telegraph* (London, UK), May 3, 2016

[Italian court rules food theft 'not a crime' if hungry](#), BBC News, May 3, 2016

[Il diritto di avere fame](#) (The Right To Be Hungry), *La Stampa*, May 3, 2016 (Translated into English with Google Translate)