

JUSTICE

DENIED

The Magazine for the
Wrongly Convicted



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Deborah Busch

Acquitted along with Rory Russell of trespassing on neighbors property in New York.
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**Issue 65
Fall 2017**

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Message From The Publisher

Justice Denied began investigating Kirstin Lobato's case in the spring of 2003, more than 13 years ago. Our article in the fall of 2004 detailed that she was innocent of a 2001 Las Vegas homicide, and had been framed by the the Clark County, Nevada D.A.'s Office, Las Vegas Metro PD, and District Court Judge Valorie Vega. After her conviction following a retrial in 2006 was affirmed on appeal, Justice Denied's complete investigation resulted in the discovery of more than two dozen witnesses with new evidence supporting her innocence. That evidence was the basis of her *habeas corpus* petition filed in 2010. In Nov. 2016 the Nevada Supreme Court relied on that evidence to order the District Court to hold an evidentiary hearing, and consider issues related to her actual innocence claim. See p. 16.

The tragic consequences of law enforcement's failure to recognize that people with intellectual disabilities are especially susceptible to falsely confess during questioning or interrogation is highlighted by the high profile case of Brendan Dassey. A federal judge granted Dassey's habeas corpus petition and ordered a new trial based on his coerced confession. See p. 3.

Indiana Governor Mike Pence called out Keith Cooper's lazy lawyers and forced them to actually represent him by filing a post-conviction motion to overturn his convictions. See p. 12.

Unlike the U.S., India's legal system is not afraid to to admit its error in convicting a likely innocent person. A report by the Centre on the Death Penalty details that 30% of people convicted and sentenced to death in India are acquitted on appeal. See. p. 10.

Hans Sherrer, Editor and Publisher

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Federal Judge Grants Brendan Dassey New Trial And Castigates His First Lawyer

Brendan R. Dassey was granted a new trial by U.S. Magistrate Judge William E. Duffin on August 12, 2016. [Judge Duffin granted](#) Dassey's federal habeas corpus petition, vacated Dassey's convictions related to Teresa Halbach's homicide in 2005, and ordered that he either be retried within 90 days or released.

Brendan Dassey and his uncle Steven Avery were convicted in separate trials of charges related to the disappearance in late October 2005 of 25-year-old Teresa Halbach, and her apparent murder. The case was the subject of the [Netflix series](#) — *Making A Murderer* — that was first broadcast in December 2015.

Dassey was 16-years-old when Halbach disappeared. Dassey had intellectual disabilities, and he had been involved in special education services. Testing in October 2002 showed his cognitive abilities were below average, his verbal abilities were below average, and his short and long-term memory was below average.

Four months after Halbach disappeared, Dassey was interrogated four times during a 48-hour period from February 27 to March 1, 2006 about Halbach's disappearance. During a three-hour interrogation session on March 1, 2006 -- without an attorney or his mother present on his behalf -- Dassey gave an audio and videotaped statement implicating himself and his uncle Steven in the rape, murder, and mutilation of Halbach.

Based on his confession, Dassey was charged with first-degree intentional homicide, second-degree sexual assault, and mutilation of a corpse.

On March 7, 2006, attorney Leonard Kachinsky was appointed to represent Dassey.

Three days later Dassey met and talked with Kachinsky for the first time. Dassey told Kachinsky he knew nothing about Halbach's disappearance, his statement wasn't true, and he wanted to take a polygraph test to prove his innocence.

Kachinsky gave numerous local and national media interviews in which he blamed



Brendan Dassey
(Wisc. DOC, 2011)

Avery for being a bad influence on Dassey, who might take a plea deal. Kachinsky didn't mention to reporters that Dassey wasn't considering a plea deal, and he insisted his statement was false and he was innocent. Kachinsky [even](#)

[stated](#) on Nancy Grace's national television program, "there is, quite frankly, no defense" for Dassey if his recorded statement was accurate and admissible.

Avery stated to the media that Dassey was not very smart and it would have been easy for the police to have coerced him, and that his confession must have been coerced because there was no physical evidence to support his confession. Kachinsky responded by telling a reporter that it did not appear from Dassey's recorded statement that the police coerced him. Kachinsky told another reporter that Dassey had a good ability to recall the events he described in his statement.

Three weeks later Dassey met for a second time with Kachinsky, insisted he was innocent, and reiterated that he wanted to take a polygraph examination.

Apparently without conducting a background check, Kachinsky hired Michael O'Kelly, who claimed to be a private investigator and a polygraph examiner, to conduct a polygraph examination. Kachinsky notified Dassey in a letter about the planned polygraph examination, but [he added](#) in the letter, "the videotape is pretty convincing that you were being truthful on March 1."

Before Dassey took the polygraph examination the Manitowoc County District Attorney sent an email to Kachinsky expressing concern about his pre-trial press interviews. He also referred Kachinsky to the relevant bar association ethics rule governing such publicity.

O'Kelly reported that Dassey's polygraph result was inconclusive, but he expressed [his opinion](#) that Dassey was "a kid without a conscience." Kachinsky hired O'Kelly as the defense investigator. However, O'Kelly's primary mission was to find evidence that would assist the prosecution to convict Avery, since Kachinsky was assuming that Dassey would plead guilty and be a cooperative prosecution witness against his uncle. None of the information

that O'Kelly provided to the prosecution resulted in the discovery of any evidence against either Dassey or Avery.

On April 19, 2006 [Kachinsky filed](#) a motion to suppress Dassey's police statements and video taped confession. He expected to lose the motion. To increase his leverage with getting a plea bargain, he told O'Kelly to interrogate Dassey and get an additional confession from him to Halbach's murder.

After the suppression motion was denied on May 12, 2006, O'Kelly videotaped his interrogation session that day in which he acted belligerent towards Dassey and tried to scare and bully him into confessing to the involvement of him and his uncle Steven in Halbach's murder. O'Kelly even lied to Dassey and told him that he had failed the polygraph examination. Dassey insisted he didn't do anything, and he was innocent. After O'Kelly told Dassey that he would spend the rest of his life in prison if he didn't confess, Dassey recounted a story similar to what was in his police videotaped confession.

Without watching the videotape, Kachinsky authorized O'Kelly to communicate with the prosecution about the substance of Dassey's "new" confession.

The next day, May 13, Kachinsky authorized Dassey to be interrogated by the prosecution's investigators without him being present. While O'Kelly observed from another room, Dassey gave a statement that contained many internal contradictions, and which was inconsistent with his statement on March 1.

That same day, Dassey called his mother Janda from jail. He told her that he had been interrogated again, and that Kachinsky wasn't present. In the recorded conversation [she told him](#): "Don't talk to them no more. ... They are putting you in places where you're not. ... what your attorney should be doing is putting an order on all of them that they cannot interfere with you or your family members unless your attorney is present. ... Cause they're all investigators for the Halbach case.... Cause the only thing that they're putting out there is bad stuff about you ..."

The State Public Defender's Office sent a letter to Dassey's trial judge that stated Kachinsky allowing law enforcement officers to interview Dassey without counsel present was "indefensible," and that it had decertified him from being appointed in

Dassey cont. on p. 4

Dassey cont. from p. 3

Class A through Class D felony cases.

Kachinsky filed a motion to withdraw as Dassey's lawyer, which was granted during a hearing on August 25, 2006. The judge [also ruled that](#) Dassey's statement on May 13 would not be admissible. The judge stated that in light of Dassey's age and record of intellectual deficits, "Kachinsky's failure to be present while his client gave a statement to investigators" "constituted deficient performance on Attorney Kachinsky's part."

Dassey was appointed another lawyer.

During his trial in April 2007 the prosecution's key evidence was Dassey's March 1, 2006 confession.

Dassey relied on two defenses:

First, that his incriminating statements were not true. Dassey's lawyer introduced records to prove his intellectual disabilities, and forensic psychologist Dr. Robert H. Gordon testified that his examination and testing of Dassey showed he was "highly suggestible ... when being interrogated," and that the officer's interrogation of Dassey on March 1 exploited his suggestibility.

Second, his alibi defense for October 31, 2005 was he was home from the time he got off the school bus until his uncle Steven called him about 7 p.m. to invite him to the Avery family's wrecking yard where Avery was burning some branches and tires. He got home about 10 p.m. Dassey testified in his defense that he did not see Halbach on October 31, and he never saw her picture or heard her name until after she was reported missing. When asked why he confessed to the law enforcement officers that he participated in the rape and murder of Halbach, [Dassey responded](#), "I don't know." He testified that he was led to believe by his interrogators that he would be able to go home to his family "regardless of what he said."

Dassey was convicted by a jury of all charges on April 25, 2007. For his first-degree intentional homicide conviction Dassey was sentenced to life imprisonment with the possibility of parole after November 1, 2048. He was sentenced to concurrent terms of 14 years imprisonment for second-degree sexual assault, and six years for mutilation of a corpse. Avery was convicted in March 2007 of first-degree intentional homicide and illegal possession of a firearm. He was sentenced to life in prison.

On January 30, 2013 the Wisconsin Court of Appeal [denied Dassey's](#) consolidated direct appeal and petition for post-conviction relief. The court affirmed the trial court's ruling admitting Dassey's confession, because it "was voluntary and admissible," and he was not coerced. The court also ruled that Kachinsky's pretrial conduct did not constitute an "actual conflict of interest" because Dassey hadn't proven by clear and convincing evidence that he "actively represented conflicting interests." The court also ruled against Dassey's claims his trial lawyers [were ineffective](#) "because they failed to present substantial evidence that his March 1 confession was unreliable, failed to retain an expert on coercive interrogation tactics, failed to present a part of his confession suggesting recantation, and, in closing argument, conceded his guilt to the corpse-mutilation charge."

The Wisconsin Supreme Court declined to review the appeals court's ruling.

In October 2014 Dassey filed a federal habeas corpus petition that raised two issues: Kachinsky's pre-trial conduct denied Dassey his Sixth Amendment right to effective assistance of counsel; and, Dassey's confession was obtained in violation of the Fifth Amendment.

The State of Wisconsin vigorously opposed Dassey's petition.

On August 12, 2016 U.S. District Court Magistrate Judge William E. Duffin [issued his ruling](#) in *Dassey v. Dittmann*, No. 1-14-cv-01310 (USDC ED Wisc., 8/12/2016).

Duffin denied Dassey's claim that Kachinsky's pre-trial conduct constituted a "conflict of interest." Duffin had to deny Dassey's claim because the U.S. Supreme Court has never ruled a defense lawyer assisting the prosecution to the detriment of his client is an actual conflict of interest. [See Endnote 1 for explanation] In making his ruling Duffin didn't mince words that Kachinsky's acted contrary to Dassey's interests. [Duffin emphasized](#) Kachinsky's "conduct was inexcusable both tactically and ethically. It is one thing for an attorney to point out to a client how deep of a hole the client is in. But to assist the prosecution in digging that hole deeper is an affront to the principles of justice that underlie a defense attorney's vital role in the adversarial system."

However, Duffin grant Dassey's petition based on the involuntariness of his confession. Duffin's [ruling stated](#):

"Most significantly, however, the [Wis-

consin] court of appeals erred when it focused on the statements of the investigators in isolation to conclude that they did not make any promises of leniency. ... But when assessed collectively and cumulatively, as voluntariness must be assessed, it is clear how the investigators' actions amounted to deceptive interrogation tactics that overbore Dassey's free will. [Op. cit. 86]

... Thus, as long as Dassey told a version the investigators accepted as "the truth," he was led to believe he had no fear of negative consequences. But if the investigators did not accept as true the story Dassey told them, he was told there would be repercussions. [Op. cit. 87]

... Especially when the investigators' promises, assurances, and threats of negative consequences are assessed in conjunction with Dassey's age, intellectual deficits, lack of experience in dealing with the police, the absence of a parent, and other relevant personal characteristics, the free will of a reasonable person in Dassey's position would have been overborne. ... [Op. cit. 88]

... Dassey's confession was, as a practical matter, the entirety of the case against him on each of the three counts. [Op. cit. 89]

... the state courts unreasonably found that the investigators never made Dassey any promises during the March 1, 2006 interrogation. ... These repeated false promises ... rendered Dassey's confession involuntary under the Fifth and Fourteenth Amendments. The Wisconsin Court of Appeals' decision to the contrary was an unreasonable application of clearly established federal law. [Op. cit. 90]

... **IT IS THEREFORE ORDERED** that Brendan Dassey's petition for a writ of habeas corpus is **GRANTED**. The respondent shall release Dassey from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." [Op. cit. 90]

The State of [Wisconsin appealed](#) Duffin's ruling to the U.S. Seventh Circuit Court of Appeals on September 9, 2016. If Duffin's ruling is overturned, it may come back to haunt Dassey that his post-conviction lawyers failed to claim Kachinsky provided ineffective assistance of counsel — instead of asserting he had a "conflict of interest" —

Dassey cont. on p. 5

Dassey cont. from p. 5

for his conduct detrimental to Dassey during the six months after Dassey was arrested.

On November 14, 2016 Judge Duffin ordered Dassey's release pending the outcome of the State's appeal. Duffin rejected the State of Wisconsin's argument that Dassey is a threat to public safety. The State appealed, and on November 17, 2016 the Seventh Circuit Court [reversed Duffin's](#) ruling, and ordered that Dassey remain in custody pending his appeal.

[Click here to read *Dassey v. Dittmann*](#), No. 1-14-cv-01310-wed (USDC ED Wisc., 8-12-2016), in which Magistrate Judge Duffin granted Dassey's federal habeas corpus petition.

Avery is expected to rely on the ruling in Dassey's case in the brief due on August 29, 2016 in his post-conviction case.

[In 2012 Justice Denied](#) was one of the first organizations to publicly suggest Dassey and Avery were innocent of involvement in Teresa Halbach disappearance, "and that just as he [Avery] and his lawyers claimed, he was framed for a second time by the Manitowoc County Sheriff's Office and the District Attorney's Office." See, "Has Steven Avery Twice Been Wrongly Convicted Of Heinous Crimes?", *Justice Denied*, [Issue 52 \(Fall 2012\)](#), pp. 3-5.

Justice Denied was [highly critical](#) in 2006 of the Wisconsin Innocence Project's disregard of Steven Avery's presumption of innocence and their abandonment of Avery after he was charged with Halbach's apparent homicide. See *Justice Denied's* Editorial, "Wisconsin Innocence Project Needs To Show Backbone In Steven Avery's Case," *Justice Denied*, [Issue 31 \(Winter 2006\)](#), p. 5.

Avery needed money to pay his defense lawyers for his prosecution for Halbach's homicide, so in February 2006 he hastily agreed to a \$400,000 settlement of his \$36 million federal civil rights lawsuit against Manitowoc County for his wrongful conviction in 1985 for the rape of Penny Beerntsen, and his 18 years of imprisonment. DNA testing later identified another man committed the crime, and Avery was released in 2003. See, "Steven Avery Settles Wrongful Imprisonment Suit For \$400k," *Justice Denied*, [Issue 31 \(Winter 2006\)](#), p. 22.

Endnote 1.

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) governed

Magistrate Judge Duffin's consideration of Dassey's habeas petition. Under the AEDPA a federal court can only grant a writ of habeas corpus when the state court's adjudication of the petitioner's claim on the merits: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Dassey's post-conviction lawyers inexplicably argued that Kachinsky's conduct was an actual "conflict of interest," even though the U.S. Supreme Court has never held -- as required by the AEDPA -- that the type of attorney conflict Dassey alleged requires a new trial. In doing that Dassey's lawyers failed to properly base his claim regarding Kachinsky, to assert he provided ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). His lawyers did that [even though](#), "In its decision granting Kachinsky's motion to withdraw from the case, the trial court found that Kachinsky's performance was deficient under *Strickland* when he allowed investigators to interrogate Dassey without an attorney present." Duffin's ruling laid out that Dassey's post-conviction lawyers could be considered deficient in their handling of this issue, because, "Although Kachinsky's conduct might support a claim for relief under *Strickland*, Dassey never made this argument to the state courts or to this court."

Dassey's post-conviction lawyers erroneously relied on *Cuyler v. Sullivan*, 446 U.S. 335 (1980) to assert his "conflict of interest" claim. Duffin noted in his ruling, "In *Sullivan* two attorneys jointly represented three co-defendants, all at separate trials." and, the Supreme Court ruled in 2002 that *Sullivan* "does not clearly establish, or indeed even support" expansion of "conflict of interest" to "various types of conflicts other than those involving the representation of multiple clients." Consequently, under the AEDPA's restriction that a federal habeas claim must rely on "clearly established Federal law, as determined by the Supreme Court of the United States," Duffin's claim had no legal basis. [Quotes from, *Dassey v. Dittmann*, No. 1-14-cv-01310 wed (USDC ED Wisc.), *Op. cit.* 50-51.] A "conflict of interest" claim in Wisconsin under *Sullivan* must be proven by "clear and convincing evidence," while to establish an ineffective assistance counsel of claim under *Strickland* must be proven by the lesser

standard that a petitioner "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). Under *Sullivan* a petitioner must prove "adverse effect" from the multiple representation, while *Strickland* requires a petitioner must prove he or she was prejudiced by their counsel's conduct. [*Dassey*, *Op. Cit.* 57.]

Sources:

[Dassey v. Dittmann](#), No. 1-14-cv-01310-wed (USDC ED Wisc.) (Decision granting habeas corpus petition, 8-12-2016)

[State of Wisconsin v. Brendan R. Dassey](#), No. 06-CF-88 (Cir. Ct. of Manitowoc County, April 19, 2006) (Notice of Motion And Motion To Suppress Statements)

[State v. Dassey](#), No. 2010AP3105-CR (Wis. Ct of Appeals, 2nd Dist. 2013) (Denying consolidated direct appeal and petition for post-conviction relief.)

[Making a Murderer](#), Netflix.com

[Dassey to remain in prison](#), Appeals court rules, *Post Crescent*, November 17, 2016



Justice Denied's Mobile Device Homepage Is Online!

Justice Denied's [mobile device homepage](#) is now online. The mobile friendly homepage has the narrow width recommended for smartphones and other mobile devices.

Justice Denied's homepage detects when it is accessed by a mobile device, and the user is automatically redirected to the mobile homepage. There is also a link to the mobile homepage in the upper right-hand corner of [Justice Denied's homepage](#).

The mobile friendly homepage was created because half of all visitors to Justice Denied's website now use a hand-held device. The following shows the growth of hand-held devices used to access [justicedenied.org](#).

Year	Desktop	Mobile	Tablet
2008	100%		
2009	99.7%	0.3%	
2010	97%	3%	
2011	92%	8%	
2012	82%	13%	5%
2013	72%	19%	9%
2014	61%	28%	11%
2015	51%	37%	12%
2016	50%	39%	11%

Justice Denied's mobile device homepage is [www.m.justicedenied.org](#).



David Bryant's Rape Conviction Based On Fantasist's Fabrications Tossed By Appeals Court

On July 20, 2016 David Bryant's 2013 conviction for the rape of a male teenager in the mid-1970s was overturned by England's Court of Appeals based on new evidence his accuser is a chronic liar who fabricated the alleged assault out of thin air.

David Bryant was a 63-year-old retired fireman living in Christchurch, England in October 2012 when 49-year-old Daniel Day made a complaint to the police that Bryant and fellow fireman Dennis Goodman took turns raping him on a pool table sometime in 1976, 1977, or 1978. At the time Danny Day was around 14-years-old. Day alleged the rapes occurred on a single occasion at the Christchurch Fire Station where the firemen invited him to play darts. Day could only identify the alleged assaults occurred sometime within a three year period of time, and he said he never told his family about the incident. He said he was reminded of it when he visited Dorset County in 2010. (Christchurch is in Dorset County, on England's southern coast, about 100 miles southwest of London.)

Day claimed that he waited 35 years to accuse Bryant (Goodman was deceased) because he was inspired to do so by publicity about the 'Jimmy Savile affair'. Saville was a BBC personality who was discovered to be a prolific paedophile.

During Bryant's trial the prosecution's case was based on Day's testimony -- because there was no other evidence the incident occurred.

Bryant adamantly denied the incident testified to by Day occurred, and he presented evidence of his unblemished character.

Faced with a "He Said, He Said" case with no evidence confirming Day's account, a majority of the jury chose to believe Day and convicted Bryant of rape. (To avoid mistrials, England allows 10-2 and 11-1 majority jury verdicts.)



Danny Day, the fantasist who fabricated his claims against David Bryant (Daily Mail, London)

Bryant was sentenced on January



David Bryant after his conviction was overturned on July 20, 2016 (The Times of London)

duly lenient," and increased it to 8-1/2 years.

Day was paid around £50,000 (US\$78,000) as a victim of crime under England's taxpayer funded Criminal Injuries Compensation Scheme.

Day, who waived his legal right to anonymity as the alleged victim of a sexual assault, filed a civil lawsuit in early 2015 against Bryant and Dorset County. Day's lawsuit sought aggravated damages of up to £200,000 (US\$312,000). The lawsuit's claims included that Day was a boxing champion with a record better than Muhammad Ali, but he had to give up his place on the British boxing team at the Los Angeles Olympics in 1984 because of the trauma of Bryant's sexual assault.

Both Bryant and Dorset County denied liability.

Bryant's wife, Lynn Bryant, passionately believed in her husband's innocence and she convinced several lawyers to represent him pro bono. She also convinced private investigators to work on his case pro bono.

The lawyers were able to convince the judge in the civil case to deny Day's demand for interim damages of £30,000 and the award of legal costs of £30,000, prior to a trial.

The investigators discovered evidence that Day was a pathological serial liar and fantasist. Day's fabrications included his lawsuit's completely false claim he was a champion boxer — and in fact there was no evidence he had ever set foot in a boxing ring in his life. The investigators found that a witness statement in the lawsuit supporting Day's boxing claims had been written by Day and signed by a friend, who admitted the statement was false. The investigators also discovered that the pool table that Day claimed he was raped on wasn't pur-

24, 2014 to six years in prison -- the minimum allowed under the law. Bryant, who had been free on bail, was immediately taken into custody.

Bryant appealed. In affirming his conviction in 2014, the Court of Appeals for England and Wales found his sentence was "un-

chased until 1992 — 15 years after the alleged incident. The investigators also discovered the fire station had been remodeled, and that Day's testimony matched the current layout — while plans of the fire station as it was in the 1970s showed a different layout. The lawyers obtained Day's medical records and discovered that from at least 2000 to 2010 Day was treated for mental illness and being a "chronic liar."

Bryant filed a petition in March 2015 for leave to appeal his conviction based on the new evidence that Day was a compulsive liar and fantasist who fabricated his allegations against Bryant, and he was a gold digger who wanted to manipulate the legal system into a big payday for himself. The petition argued that the new evidence undermined the credibility of Day's testimony the jury relied on to convict Bryant.

In August 2015 a judge dismissed Bryant's petition. However, Bryant renewed his application and it was scheduled to be heard by a three-judge panel of the Court of Appeal. In March 2016 Bryant was granted leave to appeal.

The Crown Prosecution Service did not oppose Bryant's petition — conceding that Bryant's new evidence undercut the credibility of Day's trial testimony.



David Bryant and his wife Lynn Bryant outside the Royal Courts of Justice after Bryant's conviction was overturned on July 20, 2016. (Telegraph (London))

On July 20, 2016 the Court of Appeal quashed Bryant's conviction. In announcing the ruling, Justice Singh stated regarding the new evidence Day was a serial liar, that the one issue in the case was "credibility," and "This was vital to the jury's task of resolving the conflict in the evidence between the complainant and the appellant." Justice Singh also stated: "We regret that these matters did not come to light earlier and that the appellant, a man of good character, has suffered the consequences that he has." The CPS informed the court it would not seek a retrial, and Bryant was immediately released after two years and seven

Bryant cont. on page 7

Michael Kenneth McAlister Will Forfeit More Than \$1 million In Compensation If Convicted Of Drug Charge

Michael Kenneth McAlister will forfeit over \$1 million in wrongful imprisonment compensation if he is convicted of pending [felony drug charges](#) in Florida.

McAlister's saga began more than thirty years ago.

On February 23, 1986 a man attempted to rape and abduct a 22-year-old woman from the laundry room at the Town and Country Apartments in Richmond, Virginia. She told the police her assailant wore a red plaid shirt and a stocking mask hid most of his face. She also said she scratched his face while trying to fight him off.

The police made a composite sketch from the woman's description. An investigator thought the sketch resembled McAlister, who had a misdemeanor criminal record. When he was questioned he had no scratches on his face and adamantly denied involvement in the attack. He agreed to pose for a picture to be shown the victim, and he also agreed to wear a red plaid shirt. On March 3, 1986 the woman identified McAlister from that photo.



Michael Kenneth McAlister in 2015 (Richmond Times-Dispatch)

During McAlister's bench trial the prosecutor told the judge that he was guilty "pure and simple." The judge found McAlister guilty of both charges on September 24, 1986.

McAlister was sentenced to consecutive terms of 40 years in prison for abduction with the intent to defile, and 10 years for attempted rape. Fifteen years were suspended, so his final sentence was 35 years in prison.

After McAlister was convicted the lead detective in the case, Charles M. Martin, became convinced that the crimes had actually been committed by Norman Bruce Derr. Derr was a suspect in sexual assaults with a similar MO. Martin believed the victim misidentified McAlister because he was wearing a red plaid shirt and his face resembled Derr. McAlister's prosecutor, Joseph D. Morrissey, also suspected that McAlister had been misidentified, and stated that if he had known about Derr at the time of McAl-

McAlister was charged with attempted rape and abduction based solely on her identification. No physical or eyewitness evidence linked him to the crime.

He waived his right to a jury trial.

ister's trial he wouldn't have prosecuted him.

Martin and Morrissey testified before the Virginia Parole Board to urge McAlister's early release, which was denied.

McAlister then filed a clemency petition that included Martin's statement: "I am convinced that Mr. McAlister did not commit the crimes for which he is incarcerated and that he was simply misidentified by the victim." Virginia Gov. Mark Warner declined to pardon McAlister in 2003.

McAlister was released on mandatory parole on August 19, 2004. His parole was revoked in 2006 for violating conditions of his release, that included excessive drinking. He was returned to prison to serve the remainder of his sentence.

On June 7, 2013 Jerry Lee Jenkins was exonerated of a rape that DNA testing linked to Derr. That rape had been committed on February 6, 1986 by Derr while he was wearing a stocking mask and a plaid shirt. It occurred only 17 days before the rape that McAlister had been convicted of committing. At the time of that DNA testing Derr was in prison serving life sentences for his convictions of two 1984 rapes, one in Maryland and the other in Virginia. His convictions were based on cold case DNA testing conducted in one of those cases in 2004, and the other case in 2010.

McAlister cont. on p. 8

Bryant cont. on page 6

months in custody.

David Bryant, now 66, [told reporters](#) outside the court building after his conviction was quashed: "After over two years jailed for a crime I did not commit, today I am a free man. This was a case that should never have been brought, which has caused so much pain and hurt to me and my wife and our family. Danny Day is a fantasist and a liar and it is his actions and the failure of the police and the CPS that led to me, an innocent man, being wrongly jailed in a gross miscarriage of justice. While today is a victory and I am once again free, there are serious questions about how allegations of historic sexual abuse are investigated and dealt with. What happened to me must never be allowed to happen again. Being wrongly imprisoned as an innocent man is a living hell and something I wouldn't wish upon my worst enemy." Bryant also said, "This could happen to any decent citizen. That is the frightening thing about it. Some-

body has made an absolutely ludicrous allegation and the police have run with it."

Bryant [called for a](#) criminal investigation of Day (and possibly his friend) for perverting the course of justice and perjury. Bryant told reporters: "Dorset [police] didn't do a proper job. Their mindset was, if a "victim" comes forward they are to be believed."

Bryant credited his wife's support and perseverance [for his release](#): "I owe her everything, she is the one that has battled and fought for me and got me this far."

Lynn Bryant [told reporters](#) outside the courthouse, "Danny Day is an evil man. He was after the money."

After Bryant's release, there was criticism in England of the lack of a police investigation of Day's claims prior to Bryant being charged, and that the Crown Prosecution Service didn't vet the case and Day's credibility before proceeding to trial.

Based on the appeals court's ruling, Day's civil lawsuit will likely be dismissed either by Day voluntarily withdrawing it, or by the granting of a motion by Bryant and Dorset County to dismiss it.

It is not known if the government will seek repayment by Day of the £50,000 (US\$78,000) he was paid by fraudulently claiming to be the victim of crime. Day lives in Bromley, a suburb of London.

Sources:

[Fire chief wrongly accused of sex attack freed](#) after three years in jail thanks to loyal wife's detective work, *The Telegraph* (London, UK), July 23, 2016

[Fire chief wrongly convicted of rape freed](#) from 8-year prison sentence by devoted wife, *Mirror* (London, UK), July 26, 2016

[Fireman David Bryant found guilty](#) of raping schoolboy almost 40 years ago, *The Argus*, December 20, 2013

[Former fireman David Bryant jailed for six years](#) for raping schoolboy almost 40 years ago, *The Bournemouth Echo* (Bournemouth, UK), January 24, 2014

[Police and prosecutors criticised](#) after firefighter wrongly convicted of sex attacks solely on testimony of fantasist, *The Telegraph*, July 20, 2016

[The shocking case of David Bryant](#) reveals the fallacy that we can always spot a liar, *BarristerBlogger.com*, July 21, 2016

McAlister cont. on p. 7

In 2014 the Washington D.C. [law firm of](#) Miller & Chevalier agreed to represent McAlister *pro bono*, and the Mid-Atlantic Innocence Project became involved in McAlister's case. There was no physical evidence or a rape kit to test for DNA evidence. However, when questioned Derr gave a full confession to the rape McAlister had been convicted of committing.

In April 2015 McAlister filed a Petition for Pardon that was supported by the Richmond Commonwealth's Attorney. McAlister was nearing completion of his sentence. A hearing was scheduled for May 18, 2015 to determine if he should be kept in custody indefinitely as a sexual predator under Virginia's civil commitment law.

McAlister's petition was fast-tracked because of the pending commitment hearing. On May 13, 2015 McAlister was pardoned by Virginia Governor Terry McAuliffe. Governor McAuliffe [said in his statement](#):

"Today I am issuing an absolute pardon for Michael Kenneth McAlister. My staff and I have carefully and thoroughly reviewed the documentation in this case and concluded that a pardon is appropriate in light of the overwhelming evidence, including a recent confession by another individual, pointing to Mr. McAlister's actual innocence of the crime for which he was convicted."

McAlister was released after serving more than 27 years in custody.

A bill was introduced in Virginia's legislature to compensate McAlister. On April 8, 2016 the Virginia legislature [approved payment of](#) \$1,268,694 to McAlister: \$253,740 was to be paid in a lump sum, and the balance of \$1,014,954 was to fund an annuity. McAuliffe signed the bill.

On October 8, 2016 the 60-year-old McAlister was arrested in Orlando, Florida. [He was charged with](#) felony possession of cocaine, felony destruction of evidence, and misdemeanor resisting arrest.

Orange County Sheriff Deputy Andrea Solorzano stated in her arrest affidavit that McAlister's car was illegally parked in a handicap space, and when asked he said he didn't have any identification. He also said he was drunk. After McAlister was ordered out of the car he began to place his hands underneath the front passenger-side seat. Solorzano states: "I then pulled him out of

the vehicle. As I pulled McAlister out of the vehicle for my safety, I observed a nickel-sized piece of cocaine in plain sight underneath the front passenger seat where he was sitting." She also asserts that McAlister tried to fight against being handcuffed.

The day after his arrest McAlister filed an Application For Criminal Indigent Status. His application that listed an Orlando address as his home, identified that he owned a 2014 Toyota Camry, he had \$140,000 in assets, and that he had certificates of deposit or money market accounts. In spite of his considerable assets, the judge granted McAlister's indigency application, and he was appointed a public defender.

After five days in jail, McAlister was released on bond on October 13, 2016. He pled not guilty to the charges on October 31, 2016. His public defender withdrew, and was replaced by criminal [defense attorney](#) Alexander Pearson, who McAlister had retained.

On December 22, 2016 the Orange County State's Attorney [filed two charges](#) against McAlister: Felony possession of cocaine; and, misdemeanor resisting arrest. The State decided not to pursue the destruction of evidence charge.

Conviction of the felony charge will bar McAlister's receipt of any annuity payments, and the money will be returned to the State. His forfeiture of the more than \$1 million would be required [under Virginia law](#) that states as a condition for continued compensation:

"Any person awarded compensation under this article who is subsequently convicted of a felony shall, immediately upon such conviction, not be eligible to receive any unpaid amounts from any compensation awarded and his beneficiaries shall not be eligible to receive any payments under an annuity purchased pursuant to subsection B of § 8.01-195.11. Any unpaid amounts remaining under any annuity shall become the property of the Commonwealth and shall be deposited into the general fund of the state treasury." [Code of Virginia, § 8.01-195.12 (A).]

McAlister's arraignment on the two charges is scheduled for January 12, 2017 in the Orange County Circuit Court.

Sources: [Miller & Chevalier](#), Washington D.C. [Gov. Terry McAuliffe Grants Absolute Pardon](#) to Michael McAlister in Wrongful Conviction Case, Press Release, Miller & Chevalier (Washington D.C.), May

13, 2015

[An Act for the relief of Michael Kenneth McAlister](#), Virginia Acts of Assembly — 2016 Session

[Code of Virginia, § 8.01-195.12 \(A\)](#). Conditions for continued compensation.

[Exonerated man arrested on new charges](#), *Culpeper Star-Exponent*, December 17, 2016

[State of Florida v. Michael Kenneth McAlister](#), No. 48-2016-CF-012890-O (Orange County, Florida Circuit Court) (Information filed Dec. 22, 2016)

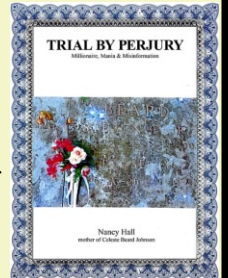
[The Law Office of Alexander Pearson](#), Orlando, Florida



Trial by Perjury: Millionaire, Mania & Misinformation

by Nancy Hall

This \$3.99 [Amazon Kindle e-book](#) book is about how Celeste Beard Johnson was convicted in 2003 of capital murder in the death of her then husband Steven F. Beard, who died of natural causes in 2000. She was sentenced to life in prison.



While in bed at home in Oct. 1999, Steven was shot in his stomach with a shotgun. Tracey Tarlton, a woman who became infatuated with Celeste after they met in February 1999, admitted the shooting and she was charged with Injury to an Elderly Person. Steven recovered and was discharged from the hospital on January 18, 2000. The next day he was readmitted with a yeast infection and he complained of chest pains. Exams showed he had severe heart disease and other medical problems. He died four days later. Tarlton and Celeste were charged with murdering Steven. Tarlton pled guilty and agreed to testify against Celeste in exchange for a 10-20 year prison sentence. Celeste was convicted even though medical evidence showed Steven died of natural causes — not murder. Order for the Amazon Kindle for [only \\$3.99 from Amazon.com](#). (252 pgs)

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Deborah Busch and Rory Russell Acquitted Of Trespassing For Being On Neighbor's Porch

The trespassing convictions of Deborah Busch and Rory Russell in Fort Ann, New York for being on their neighbor's porch [have been overturned](#) on appeal.

In July 2014 Russell owned a home on Lake George in Fort Ann. Busch was his girlfriend, and she lived in Berne -- 85 miles south of Fort Ann. Fort Ann is 220 miles due north of New York City.

Russell had an acrimonious relationship with his next-door neighbors — Thomas Bolen and Carole Bolen. Among other things Russell believed the Bolens were poisoning him by not complying with state and federal lead abatement techniques in the scraping of lead-based paint from their vacation house. Russell thought lead dust was drifting into his home and making him ill. He had blood tests that confirmed he had elevated lead levels.

On July 13, 2014 the Bolens arrived at their home [and saw](#) Busch and Russell “crouching down on the porch.” Bolen yelled for them to get off his property, and Busch and Russell immediately left. Bolen found a lead-testing kit where he saw the two had been crouching.

Bolen filed a complaint with the New York State Patrol, and [told them](#) he wanted Busch and Russell “arrested and prosecuted to the fullest extent of the law.” Thomas and Carole Bolen both gave statements to the state patrol that Russell and Busch had repeatedly been told to stay off their property.

Based on the Bolens statements Busch, 51, and Russell, 57, were charged with trespassing. They rejected a plea bargain prior to their trial.

During their two day bench trial in the Fort Ann Town Justice Court, the Bolens testified they never told Russell to stay off their property -- which was the exact opposite of what they told the state patrol. They also testified they had never talked with Busch.

Russell testified that he and Busch were on the porch for two minutes to get paint scrapings to be tested for lead. [He testified](#), “When someone is poisoning you, you should have the right to go on that property and figure out where the poison is coming

from.” Russell [testified regarding](#) Busch being present: “She didn’t do anything but follow me. ... She had nothing to do with this. We just started dating. She didn’t know there was any contentious situation.”

Busch testified she and Russell left as soon as they were asked to do so, and they had spent \$12,000 in legal fees defending themselves.

The prosecution argued it didn’t matter if the Bolens hadn’t specifically told Russell and Busch to stay off their property: the two were guilty because they hadn’t been given permission to be on the Bolen’s property.

Judge James Richardson agreed with the prosecution, and after finding Busch and Russell guilty on November 12, 2014, he fined them \$125 each.

After her conviction Busch blasted town and county officials for refusing to deal with the Bolen’s lead problem, which forced Russell to take proactive action to protect his health and safety. [Busch told a reporter](#), “Though I’m very disappointed in the ruling, I am much more appalled of the way we had such a malicious prosecution over really a bogus charge.”

Busch and Russell appealed their convictions.

On June 29, 2016 Washington County Judge Kelly S. McKeighan [vacated the convictions](#) of Busch and Russell, and acquitted them on the basis the prosecution introduced insufficient evidence they had committed trespassing. Judge McKeighan ruled legal precedent in New York was that being on a neighbor’s porch was not automatically presumed to be trespassing -- when it was “open to the public.” He noted that Busch and Russell immediately left the Bolen’s property when asked to do so, and the Bolens testified they had never told Russell to stay off their property, and they had never “personally communicated” with Busch.

Judge McKeighan [wrote in his ruling](#): “In a free society, a balance must be struck wherein some degree of limited encroachment is tolerated in order to allow people to freely converse, while retaining for the property owner the right to revoke a person’s ability to so advance. As a practical matter, to hold, as the People suggest, would subject to threat of prosecution, any member of the public visiting a person’s porch without prior consent, the chilling



Deborah Busch
(Philip Kamrass)

effect upon our society would be intolerable.” In a footnote in his decision Judge McKeighan wrote that if the State’s interpretation of the trespassing statute was accepted, then “Any visiting neighbor, lost individual, office seeker, petition carrier, delivery person, postal employee, salesperson, even those seeking consent to be on the porch would be subject to a charge of trespass.”

With the acquittal of Busch and Russell, Fort Ann Town was required to reimburse the fines they paid.

Busch lives in Berne, New York, and at the time she was prosecuted she was a Republican legislator representing Albany County's largely Democratic Hilltown district. In November 2015 Busch lost her bid for re-election by 200 votes and she credited publicity about the case for her loss. The day after her conviction was overturned [she told reporters](#), “I know the needs of the Hilltowns and served them well. We lost our traction... One thing people in the Hilltowns won’t tolerate is criminal behavior.” She also said, “Mr. Bolen filed a false accusatory instrument, and when you do that to someone who has a political career and professional career such as myself, you injure them and you injure them out of malice and spite.”

After his conviction was overturned, Russell [told reporters](#), “Our professional reputations have been irrevocably tarnished and the expense to defend ourselves financially exhausting. This has been two years of mental distress.” Russell said he plans to seek the filing of charges against Thomas Bolen and his wife for lying to state troopers that they had repeatedly told Russell and Busch to stay off their property. It was those lies that resulted in the filing of the false trespassing charges against Russell and Busch.

Sources:

[Judge tosses trespass conviction of ex-Albany County lawmaker](#): Ex-legislator says she lost seat over coverage, *Times Union* (Albany, NY), July 14, 2016

[Busch, boyfriend convicted in Fort Ann trespassing case](#), *Times Union* (Albany, NY), November 12, 2014

[Albany lawmaker calls her conviction](#) ‘a failure of government’: County legislator, boyfriend decry idling on lead issue, *Times Union* (Albany, NY), November 13, 2014



Database of Japanese Cases

The Japan Innocence & Death Penalty Information Center has a database of wrongful Japanese convictions online at, <http://www.jiade.org>

Thirty Percent Of Death Row Prisoners In India Are Acquitted On Appeal

Thirty percent of the defendants convicted of a capital crime and sentenced to death in India are acquitted on appeal. That is one of the most [striking findings](#) in “The Death Penalty India Report.” The report is the result of a research project by the [Centre on the Death Penalty](#) at the National Law University in Delhi, India. The report documents the findings of the first comprehensive study ever attempted of convicted defendants sentenced to death in India.

Information related to every death penalty case in India from 2000 to January 2015 is included in the report. During those 15 years 1,810 people were convicted of a capital crime and sentenced to death.

During those same 15 years, 1,486 defendants sentenced to death — some of whom were convicted prior to 2000 — are known to have completed what the report calls the judicial ladder” of the appeals process.

More than 99% of the defendants in those appeals were convicted of a crime that involved murder, with less than 1% convicted of a serious drug offense.

India has a two-tier appeal system for trial court criminal cases. The High Court is the first appellate level. There are 24 High Courts that review appeals for one or more of India’s 29 states. The Supreme Court of India reviews conviction and death sentences affirmed by the High Court.

Between 1985 to 1995 India had a special court that heard cases filed under the Terrorist and Disruptive Activities (Prevention) Act, aka TADA. A conviction and death sentence by the TADA court was directly reviewed by the Supreme Court of India.

[The final outcome](#) of the 1,486 death penalty appeals decided by the High Court and Supreme Court was [30% \(443\) of the defendants were acquitted; 65% \(970\) had their sentence commuted to life in prison; and 5% \(73\) had their conviction and sentence affirmed.](#) Those statistics show that by-and-large appellate court judges in India do not have the pro-prosecution bias that affects the judgment of the overwhelming majority of state and federal appellate court judges/justices in the United States.

Prisoners whose death sentence is upheld on appeal can submit a petition for mercy to

the Governor of the state in which they were convicted, or the President of India.

India’s legal system — as does the U.S. legal system — has many similarities to the English legal system, an inheritance of more than 150 years of British Colonial rule. Article 22 of India’s Constitution guarantees the right of every arrested person to consult or be defended by a legal practitioner of her choice. However, as in the U.S., the substandard quality of the legal representation often provided to indigent defendants at the trial court level in India is a major problem. That deficiency in India contributes to a defendant’s conviction of a crime he or she didn’t commit — as evidenced by the 30% acquittal rate on appeal -- and the imposition of the death penalty in cases where it is inappropriate under the law — as evidenced by the 65% commutation rate to life in prison on appeal.

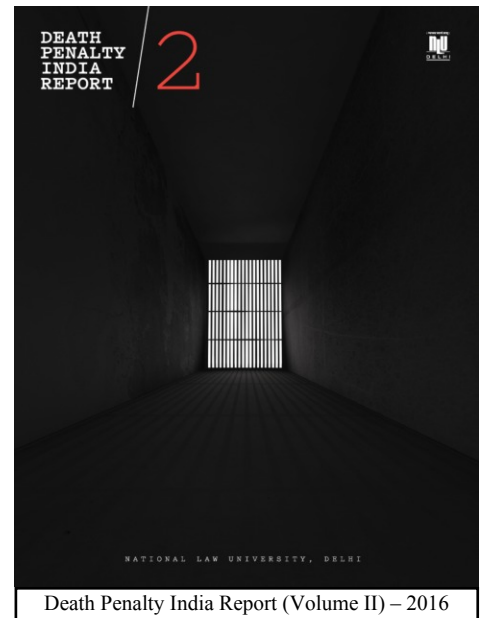
However, a major difference between legal system in India and the U.S. is that appellate courts in India are far more likely to correct the error of a person’s wrongful conviction by ordering an acquittal, or correcting the improvident imposition of a death sentence.

A similarity with the U.S. is India bars the admissibility of a confession extracted by physical coercion. Nevertheless, as in the U.S., police interrogators in India try to get around that prohibition by using intimidation, trickery, threats, psychological coercion, and other shady interrogation tactics. The report documents instances where the police delved into the realm of physical torture that sound like former Chicago Police Department officers moved to India so they could continue inflicting physical pain to extract a confession from a suspect to justify the filing of criminal charges. Many of the tortures documented in the report don’t leave physical wounds so the police have deniability of their use. [Those tortures include:](#) soap water run through nasal canal; no food or water for long periods; head immersed in the toilet; waterboarding; forced to drink urine; not allowed to sit for long periods; stripped and tied to a table with a snake let loose in the room; immersed in ice cold water; electric current passed through wet body/lips/nipples/genitals, etc. (Tortures detailed in Vol. 2, p. 22-23.)

The following charts the outcome of trial court and TADA case appeals from 2000 through 2014:

Trial Court death penalty cases: 1,463

High Court appeals
No. of defendants acquitted: 428



No. of death sentences commuted: 851
No. of convictions and death sentences confirmed: 184

Supreme Court appeals
No. of defendants acquitted: 15
No. of death sentences commuted: 108
No. of convictions and death sentences confirmed: 67
(Note: Supreme Court reversed the High Court’s acquittal of 1 defendant, and reinstated the death sentence of 5 defendants.)

TADA cases: 23

Supreme Court appeals
No. of defendants acquitted: 1
No. of death sentences commuted: 16
No. of convictions and death sentences confirmed: 6

Final outcome of all appeals: 1,486 cases
No. of defendants acquitted: 443
No. of death sentences commuted: 970
No. of convictions and death sentences confirmed: 73

The Death Penalty India Report has a wealth of information and many insightful observations about the Indian legal system. The 375 page report is published in two volumes:

Volume 1 includes:

Chapter 1: Coverage Of The Project
Chapter 2: Durations On Death Row
Chapter 3: Nature Of Crimes
Chapter 4: Socio-Economic Profile
Chapter 5: Legal Assistance

Volume 2 includes:

Chapter 6: Experience In Custody

India cont. on page 11

India cont. from page 10

Chapter 7: Trial And Appeals
Chapter 8: Living On Death Row
Chapter 9: Seeking Mercy
Chapter 10: Impact
Death Sentences in India (2000-2015): An Overview

The Overview that begins on page 149 of Vol. 2 includes a number of graphics and 29 tables of data.

[Click here to read online the Summary](#) of the Death Penalty India Report.

[Click here to read online Volume One](#) of the Death Penalty India Report.

[Click here to read online Volume Two](#) of the Death Penalty India Report.

[Click here to go to the website of the Centre On The Death Penalty, NLU, Delhi.](#)

Sources:

[1 in 3 sentenced to death is eventually acquitted](#), reveals study, *The Times of India*, May 7, 2016

[Centre On The Death Penalty](#), NLU, Delhi

[Death Penalty India Report](#) (Summary) – 2016, by Dr. Anup Surendranath (Author, Preface), Shreya Rastogi (Author), Lina Mathias (Editor), 30 pgs.

[Death Penalty India Report](#) (Volume I) – 2016, by Dr. Anup Surendranath (Author, Preface), Shreya Rastogi (Author), Lina Mathias (Editor), 174 pgs.

[Death Penalty India Report](#) (Volume II) – 2016, by Dr. Anup Surendranath (Author, Preface), Shreya Rastogi (Author), Lina Mathias (Editor), 210 pgs.

[Death Penalty India Report](#) (Volume I and II) Hardcover – 2016, by Dr. Anup Surendranath (Author,

Derrick Redd Awarded New Trial Based On Pervasive Prosecutor Misconduct

Derrick W. Redd was [awarded a new trial](#) on July 6, 2016 by the Appellate Division of the New York Supreme Court based on pervasive prosecutor misconduct during his trial. Derrick Redd was convicted of second-degree murder in 2012, and the appeals court identified at least six different types of prejudicial prosecutor misconduct during his trial.

In October 2008 Redd was 35 and living with his mother in Queens County, New York (One of New York City's five boroughs). Redd had been seeing 25-year-old Niasha Delain off and on for some months. She was pregnant, but Redd didn't think it was his child. Niasha lived in Queens several miles from Redd.

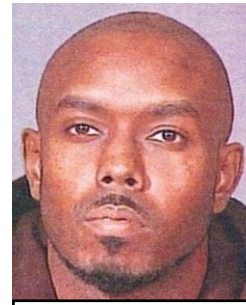
On the early evening of October 25, 2008, Niasha's mother, Townada Wimms, called Redd and told him she hadn't heard from her daughter that day. They arranged to meet at Niasha's apartment. When they entered they found Niasha was dead. The New York Police were called at 7:40 p.m.

When the police arrived they found that Niasha, who was nine months pregnant, had multiple stab wounds, including stab wounds to her stomach.

The murder weapon was not found in her apartment. However, the police found the bars on one of the apartment building's rear windows had been removed and that window was open.

Niasha's autopsy later determined she died from her stab wounds, and her fetus didn't survive the attack.

Police asked Redd and Townada to go to the police station for questioning. Redd arrived at about 10 p.m., and he was vigorously interrogated during the next 27 hours without being allowed to sleep, or eating. His interrogators later claimed he was given his *Miranda* warning about midnight, and he waived his rights to remain silent and to consult with a lawyer. Redd was allowed to go to the



Derrick W. Redd

bathroom with an officer present, but he wasn't allowed to make any phone calls.

During Redd's marathon interrogation he repeatedly denied having anything to do with Niasha's death, and

he did not make any statement implicating him in the crime. He was released.

Redd's two cars were searched, as were the residences of his mother, his father, and his grandparents. No physical evidence was found linking him to Niasha's death. No witness was found who saw Redd outside or inside Niasha's apartment building on the day she died.

Redd was not identified by DNA testing as the father of Niasha's unborn child.

However, three weeks later, in November 2008, Redd was charged with second-degree murder, second-degree abortifacient act, and fourth-degree criminal possession of a weapon.

While Redd was awaiting trial, his girlfriend gave birth to their son in July 2009.

Redd's jury trial began in October 2011.

The prosecution had no physical, forensic, eyewitness, or confession evidence linking him to the crime. Its circumstantial case was based on the prosecution's belief he killed Niasha because she refused to have an abortion, that cell phone records showed he had made a call within five blocks of Niasha's apartment in the early morning of October 25, 2008, and an upstairs neighbor, Jinette Gerve, said that between 5:30 and 6 a.m. on October 25 [she heard a woman](#) in the apartment below her apartment scream "Stop," "No," and "Don't Do that."

To make up for the lack of evidence presented during the trial, the lead prosecutor, Queens County Assistant District Attorney Eugene P. Reibstein, made numerous claims during his opening statement and closing argument that were either not supported by evidence or that were misstatements of the evidence. Redd's lawyer objected to many of those statements, but the judge didn't deter Reibstein from continuing to do so.

Redd's defense was the cell phone location

Redd cont. on page 12



Niasha Delain
(Richmond Hill Times)

Visit the Innocents Database

Includes details about more than 6,800 wrongly convicted people from the U.S. and other countries.

www.foreignjustice.org/search_idb.htm

Visit Justice Denied's Website

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Back issues of *Justice: Denied* can be read, there are links to wrongful conviction websites, and other information related to wrongful convictions is available. JD's online Bookshop includes more than 70 wrongful conviction books, and JD's Videoshop includes many dozens of wrongful conviction movies and documentaries.

Juan Rivera's Wrongful Conviction Lawsuit Settlement Is Marital Property In Divorce

The Illinois Appellate Court [ruled on](#) September 30, 2016 that the \$11.36 million Juan Rivera is to receive for being wrongfully imprisoned for more than 19 years is marital property. Rivera is in the midst of divorcing Melissa Sanders-Rivera, his wife of 16 years. Under the court's ruling Rivera must equitably share the \$11.36 million with Melissa.

Juan A. Rivera Jr. was convicted of charges related to the August 17, 1992 rape and

murder of 11-year-old Holly Staker in 1993 in Waukegan, Illinois. Rivera was sentenced to life in prison without the possibility of parole.

There was no physical, forensic or eyewitness evidence tying Rivera to the crime. However, the police received a tip about 2-1/2 months after the crime that Rivera, a former special education student who was 19 at the time, might have been involved.

Rivera was taken into custody on October 26, 1992. After four days of interrogations during which he repeatedly denied any involvement, he finally broke. On October 30,



Juan Rivera with wife Melissa Sanders-Rivera at Northwestern U. Law School January 2012. (Abel Uribe, Chicago Tribune)

1992 Rivera signed a confession prepared by his interrogators.

Rivera's trial was in 1993. The prosecution's case was based on his confession. He was sentenced to life in prison without the possibility of parole after the jury that convicted him rejected the prosecution's request for the death penalty.

His convictions were overturned in 1996 and a new trial was ordered by the Illinois Appellate Court. The prosecution again primarily relied on Rivera's confession during

Rivera cont. on p. 13

Redd cont. from page 11

records didn't identify he was with Niasha at the time of her death, and, the medical examiner specifically testified: "I found nothing in my autopsy that would be consistent with the time of death of six a.m. the previous day." On cross-examination Gerve admitted that when she was interviewed by the police she gave a statement that she didn't hear anything coming from the downstairs apartment on October 25. She also admitted that in exchange for agreeing to contradict her police statement and say she heard screaming, the Queen's County DA's Office [promised to provide](#) significant assistance to her: "She admitted that she received assistance from the District Attorney's office with regard to her residence, employment, and immigration status."

The jury convicted Redd of all the charges on November 3, 2011.

During Redd's sentencing hearing on January 4, 2012, the judge denied Redd's post-verdict motion for a judgment of acquittal based on insufficient evidence, rejecting lawyer Barry Krinsky's argument the prosecution's entirely circumstantial case didn't prove Redd's guilt beyond a reasonable doubt. Redd then gave a statement during which [he told the judge](#): "I stand here an innocent man. ... It's sad that you're sentencing an innocent man today." The judge sentenced Redd to the maximum of 25 years to life in prison.

Redd appealed.

More than four years later the New York Supreme Court Appellate Division reversed Redd's conviction on the basis prosecutor Reibstein engaged in a tsunami of misconduct that deprived Redd of a fair trial.

The Court stated in [People v Redd](#), 2016 NY Slip Op 05392 (NY SCt, App. Div., 2nd Dept., 7-6-16) that "the judgment of conviction must be reversed and a new trial ordered as a result of pervasive prosecutorial misconduct. During opening statements as well as on summation, the prosecutor repeatedly engaged in improper conduct, including":

- "misstating the evidence"
- "vouching for the credibility of witnesses with regard to significant aspects of the People's case"
- "calling for speculation by the jury"
- "seeking to inflame the jury and arouse its sympathy"
- "improperly denigrating the defense"
- "improperly cast the prosecutor as an unsworn expert witness in his own case"

The [court ruled](#) regarding prosecutor Reibstein's pervasive misconduct, "it cannot be said that there is no significant probability that the verdict in this circumstantial case would have been different absent the cumulative, prejudicial effect of these errors."

Somewhat inexplicably, relying primarily on the cell phone records that showed Redd was in the vicinity of Niasha's apartment at a time when she wasn't killed, the appeals court ruled against his claim he should have been acquitted based on the prosecution's failure to introduce sufficient evidence proving every essential element beyond a reasonable doubt.

The Queens County DA's Office will have to decide if it will retry Redd, try to induce him to pled guilty to lesser charges in exchange for his immediate release from prison, or dismiss the charges. If there is a retrial it will not be handled by ADA Reib-

stein, who retired after 31 years with the Queens County DA's Office.

Even though Queens County Supreme Court Judge Daniel Lewis allowed Reibstein to engage in his outrageous conduct throughout Redd's trial, the appeals court failed to order that on remand the case would be assigned to a new judge. Judge Lewis disregarded most of the objections by Redd's lawyer to Reibstein's antics, while only directing a few mild admonishments to Reibstein. The appeals court [also ruled](#) in their opinion, that Judge Reibstein violated Redd's right to a fair trial by allowing Reibstein to introduce extensive evidence about Niasha's personal and family life that "was not probative of any issue to be determined at trial and was prejudicial to the defendant." None of that irrelevant evidence will be allowed to be admitted if Redd is retried. Judge Lewis' prosecution favorable leanings are indicative that he began his career as an assistant district attorney in New York County.

[Click here to read People v Redd](#), 141 A.D.3d 546, 35 N.Y.S.3d 402 (NY SCt, App. Div., 2nd Dept., 7-6-16).

Sources:

[People v Redd](#), 141 A.D.3d 546, 35 N.Y.S.3d 402 (NY Sup. Ct., Appellate Division, 2nd Dept., July 6, 2016)

[Queens man convicted of killing pregnant girlfriend](#) will get new trial because prosecutor said too much to fire up jury, *New York Daily News*, July 8, 2016

[Baby Mom Says Redd Is Innocent](#): Convicted Killer Awaiting Sentencing, *The Wave* (Rockaway Beach, NY), Dec. 2, 2011

[Jamaica Man Gets 25-to-Life For Stabbing Pregnant Girlfriend](#), *The Forum* (Howard Beach, NY), January 5, 2012

[Queens Man Convicted Of Murder](#) Following Jury Trial For Fatal Stabbing Of Pregnant Girlfriend, Press Release, Queens County District Attorney's Office, November 3, 2011

Rivera cont. from p. 12

his 1998 retrial. Rivera was convicted by the jury, and he was again sentenced to life in prison without the possibility of parole.

Melissa Sanders met Rivera in 1998 after his second conviction. She had taken an interest in the law, and volunteered to work on Rivera's case. About two years later, Rivera and Melissa were married on October 31, 2000.

Melissa believed in Rivera's innocence, and advocated on his behalf. She was instrumental in getting the Northwestern University School of Law's Center on Wrongful Convictions to accept his case after his appeal was unsuccessful and his convictions were affirmed in 2001.

In 2004 a petition for post-conviction DNA testing of Holly's vaginal swabs was granted. In 2005 DNA testing excluded Rivera as the source of the sperm recovered from the vaginal swabs. The sperm's DNA profile was not matched to anyone in the Illinois state DNA database, or the FBI's national CODIS DNA database.

Rivera filed a petition for a new trial based on the new DNA evidence, which was granted in 2006.

Rivera's third trial began in April 2009. On May 8, 2009 Rivera was convicted for a third time. The jury chose to believe Rivera's confession over the exculpatory DNA evidence. Rivera was again sentenced to life in prison without the possibility of parole.

Rivera appealed.

On December 9, 2011 the Illinois Appellate Court overturned Rivera's conviction on the basis his confession was unreliable and without it there was not enough evidence to support his conviction: [thus his conviction was "unjustified and cannot stand."](#)

The Cook County State's Attorney's Office decided not to retry Rivera for a fourth time. The SA's Office filed a motion to dismiss the charges against Rivera that was granted on January 6, 2012. Rivera was released after more than 19 years and two months in custody.

On October 30, 2012 Rivera filed a federal civil rights lawsuit complaint that named as defendants: Lake County, the City of Waukegan, and members of the Illinois State Police. The lawsuit sought damages for violation of Rivera's constitutional

rights under color of law.

Rivera also filed a claim for compensation from the State of Illinois after he was granted a Certificate of Innocence. Rivera was awarded about \$213,000 from Illinois in 2014.

More than two years after Rivera's release, he filed a petition on May 23, 2014 to dissolve his marriage to Melissa. Melissa filed a counter-petition for divorce on July 3, 2014.

The divorce of Rivera and Melissa was pending when on March 20, 2015 it was announced that Rivera's federal civil rights lawsuit against Lake County and the City of Waukegan was settled for a total of \$20 million. Lake County agreed to pay Rivera \$12.5 million, and the City of Waukegan agreed to pay \$7.5 million. It was the largest settlement of a civil rights lawsuit in U. S. history without there first being a trial.

Rivera's legal fees and costs of \$8.64 million amounted to more than 43% of the settlement. Rivera's share of the settlement was \$11.36 million. The money was held in trust because of the unresolved divorce between Rivera and Melissa.

In May 2015 Rivera filed a summary judgment motion in his divorce case that argued Melissa wasn't legally entitled to any of the money from either the lawsuit settlement or the State of Illinois compensation, because he was convicted of crimes that occurred in 1992 -- eight years prior to his marriage.

Melissa filed a counter motion that [argued all the money](#) awarded to Rivera, and particularly the lawsuit settlement, was marital property because "the lawsuit did not become property until the conviction was reversed in 2011, after the parties were married; and the lawsuit is marital property because the lawsuit accrued during the marriage." Melissa also noted that Rivera made that same argument to counter the attempt by Lake County and the City of Waukegan to have his lawsuit dismissed as time barred. Rivera argued his lawsuit was timely because he couldn't file it until his conviction was overturned in 2011. Melissa also argued the lawsuit included a defamation claim that appeared in *The New York Times* in 2011, during the marriage.

The divorce court judge granted Rivera's motion. The judge sided with Rivera that none of the money he received as a result of his convictions is marital property because Holly was murdered in 1992 -- before Rive-

ra and Melissa were married.

Melissa appealed.

On September 30, 2016 the Illinois Appellate Court reversed the judge's decision, in ruling the lawsuit settlement is marital property, and Melissa has a right to a share of the settlement. The Court's [ruling stated](#):

"Petitioner did not have a property interest in his lawsuit (or stated differently no lawsuit existed) until the appellate court vacated his conviction in 2011. If there was no lawsuit, or property, in 1992 and 1993, there are no grounds for finding the lawsuit is nonmarital property. Because the lawsuit accrued in 2011, during the marriage, it is marital property subject to distribution pursuant to the factors set forth in section 503 of the Dissolution Act."

[Click here to read *In re Marriage of Juan A. Rivera and Melissa Sanders-Rivera*, 2016 IL App \(1st\) 160552 \(Ill. Ct. of Appeals, 4th Div., 9-30-2016\).](#)

Although Rivera may have died in prison without Melissa's advocacy on his behalf, Rivera's divorce lawyer Michael Berger said he was "disappointed" in the ruling, and insisted that Melissa wasn't entitled to any of the settlement money. Berger vowed to file an appeal with the Illinois Supreme Court. Berger [told a *Chicago Tribune* reporter](#): "We feel it's a further injustice to Mr. Rivera. Hopefully we'll be able to reverse the appellate court decision. But if the result remains, hopefully a jury would only grant a nominal amount, if any, to Mrs. Rivera."

Sources:

[*People v. Rivera*, 962 NE 2d 53 \(Ill. Appellate Court, 2nd Dist., 12-9-2011\)](#)

[*Appellate court reverses Juan Rivera murder conviction*, *Lake County News-Sun*, December 11, 2011](#)

[*Juan Rivera, Center on Wrongful Convictions*, Northwestern School of Law](#)

[*Illinois man whose murder, rape convictions were overturned* settles lawsuit for \\$20 million, *Daily Journal* \(Franklin, IN\), March 20, 2015](#)

Juan Rivera v. Lake County, et al., No. 1:2012-Cv-8665 (USDC Northern Dist Ill., Eastern Div.) (42 USC 1983 lawsuit)

[*In re Marriage of Juan A. Rivera and Melissa Sanders-Rivera*, 2016 IL App \(1st\) 160552 \(Ill. Ct. of Appeals, 4th Div., 9-30-2016\) \(\\$11.36 million settlement from Rivera's wrongful imprisonment is marital property.\)](#)

[*\\$20 million settlement up for grabs in exonerated man's divorce*, *Chicago Tribune*, October 5, 2016](#)



New Mexico Supreme Court Rules Expert Testimony By Skype Violates Right To Confront Witness

The New Mexico Supreme Court [has ruled](#) the remote two-way video testimony of an expert by Skype violated the federal constitutional right of a defendant to confront that expert in court.

The body of 28-year-old Guadalupe Ashford was found on June 3, 2010 near at the edge of an abandoned apartment complex's parking lot in Albuquerque, New Mexico. Police collected a six-inch by six-inch bloodied brick found near her body that they believed to be the murder weapon.

An Albuquerque Police Department forensic analyst performed DNA testing of the blood on the brick. She found it was Ashford's. DNA testing of swabs of the brick also resulted in the finding of two other DNA profiles. The analyst thought only one of those profiles was complete enough to be uploaded to the FBI's Combined DNA Index System (CODIS) database to search for a possible match.

The FBI's database reported a match with the DNA profile of 49-year-old Truett Clyde Thomas.

Thomas was arrested 25 days after the discovery of Ashford's body, and he was charged with kidnapping and first-degree murder.

Thomas was held in custody for 25 months awaiting trial.

There was no eyewitness or other witness connecting Thomas to Ashford, so the prosecution's case was solely based on the purported match of his DNA with DNA recovered from the crime scene. Thomas insisted he was innocent and that he had never seen or had any contact with Ashford.

Prior to Thomas' trial the DNA analyst moved out of state. Rather than subpoena her to appear in person to provide her expert testimony, the prosecution suggested during a pretrial hearing that she be allowed to testify by way of Skype — a two-way audio-video Internet communications application. Thomas' lawyer expressed reservations, but [he didn't object, saying](#): "I don't like it, but I think it will work. . . . It's just weird."



District Judge
Samuel L. Winder
(Albuquerque Journal)

A week before trial Thomas' lawyer changed his position, [stating during a hearing](#): "... we have rethought our position on that, and we're thinking it's going to cause a confrontation problem." The prosecution's response was that it hadn't issued a subpoena for the analyst to appear in person, and the judge ruled that during the previous hearing Thomas' lawyer had waived objecting to using Skype to present the analyst's expert DNA testimony.

During Thomas' trial the analyst [testified remotely](#) via Skype. "During her testimony ... she was able to see only an image of the attorney questioning her and could not see Defendant, the jury, or the district court judge at any time."

After the jury convicted Thomas of kidnapping and first-degree murder, but before his sentencing, his attorney filed a motion for a new trial based on new DNA evidence: The third DNA profile [found on the brick](#) was a "known profile which should have been investigated by the Albuquerque Police Department," and DNA swabs collected from a beer can and a vodka bottle found at the crime scene would link two persons -- neither of whom was Thomas -- to the crime scene. A post-verdict defense investigation discovered that those items were purchased by two men at a nearby Circle K the night before Ashford's body was found. The motion stated: "The police did not identify this lead during their investigation. ... This new evidence will affect the decision of any reasonable jury."

Thomas' trial judge -- District Judge Samuel L. Winder -- did not preside over the hearing about his new trial motion. During that hearing Thomas' lawyer raised the additional issue for a new trial that Judge Winder had posted comments on his election campaign's Facebook page about Thomas' case throughout his trial, and after the jury's verdict [he posted the comment](#): "Justice was served. Thank you for your prayers." (Judge Winder, a former prosecutor who had been appointed to his position, lost the general election.)

Thomas' motion for a new trial was denied, and he was sentenced to life in prison for murder and 18 years for kidnapping.

Thomas appealed his conviction directly to the New Mexico Supreme Court. (New Mexico's Constitution mandates the appeal of a case involving a death sentence or life sentence to bypass the Court of Appeals and be heard directly by the Su-

preme Court.) Thomas raised a number of issues in his appeal.

On June 20, 2016 the Supreme Court issued its [unanimous ruling](#) in *State v. Thomas* (2016) that the DNA expert's testimony was inadmissible because Thomas' federal constitutional Sixth Amendment right to confront a witness against him was violated by her testimony via Skype. [The Court stated](#):

"The central purpose of the Confrontation Clause, to ensure the reliability of evidence, is served by "[t]he combined effect of . . . physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." ... Under current United States Supreme Court Confrontation Clause jurisprudence, Defendant's Sixth Amendment right to confrontation was violated by the admission of the video testimony."

[The Court ruled](#) the inadmissible expert testimony wasn't harmless and required reversal of both of Thomas' convictions because "the erroneously admitted DNA evidence was all that implicated Defendant in any crime."

The Court also reversed Thomas' kidnapping conviction based on the prosecution's failure to prove that Ashford had been kidnapped. However, the Court declined to reverse his murder conviction on insufficient evidence, since as the jury heard it, the DNA evidence could be interpreted to suggest Thomas' involvement. The kidnapping charge was to be dismissed, but the Court ordered a retrial of Thomas' murder charge.

Because it had already granted Thomas a new trial, the Court didn't have to rule if Judge Winder's Facebook postings and lack of impartiality was so prejudicial that they required a new trial. However, the [Court did note](#):

"A judge must understand the requirements of the Code of Judicial Conduct and how the Code may be implicated in the technological characteristics of social media in order to participate responsibly in social networking. Members of the judiciary must at all times remain conscious of their ethical obligations."

The Bernalillo County DA will have to decide whether to retry Thomas or dismiss the murder charge.

[Click here to read the New Mexico Supreme Court's ruling](#) in *State of New Mexico v. Truett Thomas*, 376 P.3d 184, 2016-NMSC-024 (NM Sup. Ct., 6-20-2016).

Skype cont. from page 15

6,807 Cases Now In Innocents Database

The Innocents Database now includes 6,807 cases: 4,276 from the U.S., and 2,531 from 116 other countries. The database includes 3,159 U.S. cases from 2016 to 1989, when the first DNA exoneration occurred.

The [Innocents Database](#) is the world's largest database of exonerated persons, and it includes all identifiable exonerations in the United States, as well as internationally. The Innocents Database includes:

- 571 innocent people sentenced to death.
- 913 innocent people sentenced to life in prison.
- 2,129 innocent people convicted of a

- homicide related crime.
- 1,037 innocent people convicted of a sexual assault related crime.
- 776 innocent people were convicted after a false confession by him or herself or a co-defendant.
- 2,093 innocent people were convicted of a crime that never occurred.
- 220 innocent people were posthumously exonerated by a court or a pardon.
- 73 people were convicted of a crime when they were in another city, state or country from where the crime occurred.
- 1,757 innocent people had 1 or more co-defendants. The most innocent co-defendants in any one case was 29, and 20 cases had 10 or more co-defendants.
- 12% of wrongly convicted persons are women.
- The average for all exonerated persons is 7-1/8 years imprisonment before their release.
- 31 is the average age when a person is wrongly imprisoned.
- Cases of innocent people convicted in 117 countries are in the database.
- 4,276 cases involve a person convicted in the United States.
- 2,531 cases involve a person convicted in a country other than the U.S.

Skype cont. from page 14

Sources:

[State of New Mexico v. Truett Thomas](#), 376 P.3d 184, 2016-NMSC-024 (NM Sup. Ct., 6-20-2016) (Reversing kidnapping conviction based on insufficient evidence and reversing murder conviction and remanding for new trial.)

[Supreme Court orders new trial in 2010 murder case](#), *Albuquerque Journal*, June 20, 2016

[New Evidence Cited After Conviction](#), *Albuquerque Journal*, October 20, 2012

[Judge on Facebook](#): 'Justice Was Served', *Albuquerque Journal*, Sept. 22, 2012



[Click here to go to the Innocents Database homepage.](#)

All the cases are supported by public sources for research. Those sources include court rulings, newspaper and magazine articles, and books. The database is linked to from [Justice Denied's](#) website.

User defined searches, and user defined sorts of any combination of more than 100 columns of data can be made for:

[U. S. cases from 1989 to 2016](#);

[U. S. cases prior to 1989](#);

and, [International cases up to 2016](#)

The database can now be sorted on a Compensation column to find such information as: the compensation awarded to persons for any year or state, or the compensation awarded in a particular type of case, such as those involving DNA or a false confession, etc.

The Innocents Database is an ongoing project that began more than 19 years ago, and now contains millions of bytes of data related to exonerations. The accessibility and usefulness of that data to the public and researchers is improved by the ability to search and sort for specific information.

Email a question, correction, or suggested addition to the Innocents Database to: innocents@forejustice.org.



3rd Revised and Updated Edition of "Kirstin Blaise Lobato's Unreasonable Conviction" Online!

The third revised and updated edition of [Kirstin Blaise Lobato's Unreasonable Conviction](#) — *Possibility of Guilt Replaces Proof Beyond A Reasonable Doubt* is available in PDF format to be read or downloaded at no charge for personal use from [Justice Denied's](#) website.*

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.

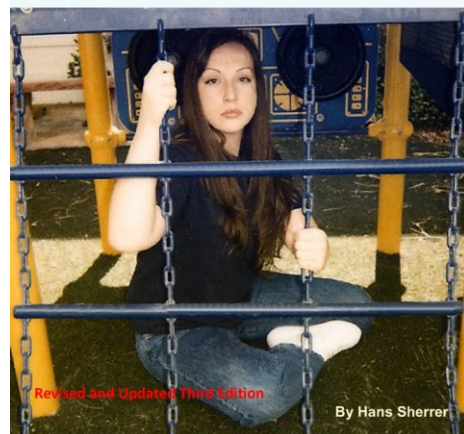
The 3rd revised edition has 57 pages of new information, that includes:

- * An updated Timeline of Ms. Lobato's case from 2001 to the present, that begins on p. 10.
- * Six new sub-chapters in the Appendix that begin on page 150. Those include a Power Point presentation of Ms. Lobato's case and the new evidence in her habeas corpus petition currently under review by the Nevada Supreme Court. Ms. Lobato's 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 232-page book written by *Justice Denied's* editor and publisher Hans Sherrer is supported by 427 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.

KIRSTIN BLAISE LOBATO'S UNREASONABLE CONVICTION

Possibility Of Guilt Replaces Proof Beyond A Reasonable Doubt



[Click here to download at no charge](#) *Kirstin Blaise Lobato's Unreasonable Conviction* in PDF format from www.justicedenied.org/kbl.htm.

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

* The book can be printed at no charge for non-commercial use only.

Kirstin Lobato's Habeas Case Sent Back To District Court By Nevada Supreme Court

On November 23, 2016 the Nevada Supreme Court [ruled that](#) Kirstin Lobato's habeas corpus case will be returned to the district court for an evidentiary hearing and consideration of her actual innocence claim.

Ms. Lobato was convicted in October 2006 of charges related to the death of homeless Duran Bailey in a Las Vegas bank's trash enclosure on July 8, 2001. She was sentenced to serve 13 to 35 years in prison.

The Nevada Supreme Court affirmed Ms. Lobato's convictions in October 2009, and in May 2010 she filed a habeas corpus petition that included 79 grounds for overturning her convictions.

In August 2011 Ms. Lobato's petition was summarily denied by Clark County District Court Judge Valorie Vega, and she filed an appeal in the Nevada Supreme Court.

The NSC heard oral arguments in Ms. Lobato's habeas corpus case on September 9, 2014.

After more than two years of deliberations the NSC issued its ruling on November 23. The Court overturned Vega's ruling on 27 of Ms. Lobato's 79 habeas grounds. However, the Court did not reverse her conviction. Instead her case was remanded to the district court for further consideration of two issues in her petition.



Kirstin Lobato after her release on bail in Dec. 2005 while awaiting her retrial.

to was in Panaca, 165 miles from Las Vegas.

Strickland v. Washington, 466 U.S. 668 (1984) established a two-prong test to determine ineffective assistance of counsel: that there is a reasonable probability a petitioner was *prejudiced* by their counsel's *deficient* conduct. The NSC ruled MS. Lobato satisfied the first prong because she was prejudiced by her trial counsel's conduct because there is a reasonable probability she would have been acquitted if her jury had known the new forensic evidence. However, the Court ordered an evidentiary hearing to determine if her counsel's failure to investigate the new evidence was deficient conduct by falling "below an objective standard of reasonableness."

The NSC also ruled Judge Vega erred in summarily denying Ms. Lobato's 25 grounds that assert new evidence supports her actual innocence. Although the NSC's ruling in three cases over the past 50 years supports that a claim of actual innocence can be made in a post-conviction habeas petition, the Court has never specifically ruled that it can. The NSC's Nov. 23 ruling states that it wants the district court to decide if an actual innocence claim can be

The NSC ruled Judge Vega erred in summarily denying Ms. Lobato's two grounds that assert her trial lawyer provided ineffective assistance of counsel for failing to investigate forensic entomology and forensic pathology evidence that establish Bailey died at a time the prosecution has conceded Ms. Lobato

made under Nevada's post-conviction statute. That issue was somewhat argued in the briefs by Ms. Lobato and the State filed in the NSC, so it is not known why the Court chose to pass off the responsibility to make that important decision to the lower court.

The NSC summarily denied Ms. Lobato's two grounds based on the failure of the Clark County District Attorney's Office to disclose evidence favorable to her innocence. The NSC refused to consider 50 of her grounds that asserted ineffective assistance of her trial lawyers. Eight of those grounds detail her trial lawyers ineffectiveness for failing to object to the commission of at least 293 deliberate acts of gross misconduct by ADAs William Kephart and Sandra DiGiacomo throughout Ms. Lobato's trial. The NSC's ruling rewards the State of Nevada by letting Kephart and DiGiacomo get away scot free for repeatedly stepping on the scales of justice to ensure the outcome of Ms. Lobato's trial would be her conviction.

Ms. Lobato and the State each have the option to file a motion for the NSC to reconsider its ruling.

Justice Denied began investigating Ms. Lobato's case in 2003. Justice Denied's post-conviction investigation of Ms. Lobato's case resulted in the discovery of the new evidence of her actual innocence that the NSC's ruling directs the district court to review for its admissibility in her habeas petition.

Judge Vega retired in January 2015, so Ms. Lobato's case is now reassigned to Clark County District Court Judge Stefany Miley.



President Obama Doesn't Know He Can Pardon Edward Snowden and Hillary Clinton?

President Barack Obama was asked during an interview on November 17, 2016 if he was going to pardon Edward Snowden. [Obama responded](#): "I can't pardon somebody who hasn't gone before a court and presented themselves, so that's not something that I would comment on at this point."

On June 14, 2013 Snowden [was charged](#) with three federal charges: one count of theft, and two counts of violating the Espionage Act for "unauthorized communication of national defense information"; and,

"willful communication of classified communications intelligence information to an unauthorized person."

The charges were related to Snowden's copying and leaking classified information from the National Security Agency in 2013 without prior authorization. The public disclosure of that information revealed global surveillance programs run by the NSA and other countries, including the Five Eyes Intelligence Alliance operated with the co-operation of telecommunication companies and European governments.

In May 2013 Snowden flew from Hawaii, where he was working, to Hong Kong with the information he had taken. He was in Hong Kong when the first news stories about the NSA surveillance programs were

published, and he was there when the charges against him were unsealed on June 21, 2013. Two days later he flew to Moscow, Russia, with the intention of flying to Ecuador that had granted him asylum. After Snowden arrived in Russia the U.S. revoked his passport. That prevented him from flying to Ecuador, because his connecting flight to Cuba had to fly over U.S. friendly countries and territory.

Unable to leave Russia, Snowden was initially granted temporary asylum, and he remains in Russia under a residency permit.

Wikileaks has admitted it paid for Snowden's hotel stay in Hong Kong and his flight to Russia.

Obama cont. on p. 17

Obama cont. from p. 16

Oliver Stone's 2016 movie *Snowden* is a bio-pic that depicts the events surrounding the release of the classified NSA documents.

Snowden has let it be known that wants to be pardoned by Obama so he can return to the U.S. Stone and many other people have publicly spoke out in support of Snowden being pardoned. Hence, when Obama was interviewed by German media outlets Spiegel and ARD on November 17 in Berlin, Germany, [he was asked](#):

ARD/Spiegel: Are you going to pardon Edward Snowden?

Obama: I can't pardon somebody who hasn't gone before a court and presented themselves, so that's not something that I would comment on at this point. ... At the point at which Mr. Snowden wants to present himself before the legal authorities and make his arguments or have his lawyers make his arguments, then I think those issues come into play."

The U.S. Supreme Court has recognized the near all-encompassing authority of a president to pardon a person. The [Court stated in](#) *Ex parte Garland*, 71 U.S. 333 (1866):

"The Constitution provides that the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. [Article II, § 2.]

The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders.



President Barack Obama interviewed by Klaus Brinkbäumer and Sonia Seymour Mikich (Spiegel)

The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions." *Id.* at 380. (underlining added)

Obama is well aware his pardon power is all but unlimited. With two months to go in his presidency Obama [has already](#) pardoned 71 people. Consequently, his answer to the question by the German reporters was disingenuous, and he may have deflected it to avoid the controversy of plainly stating he doesn't want to pardon Snowden.

Obama's position he can't preemptively pardon Snowden means he also can't preemptively pardon Hillary Clinton of many possible federal crimes she committed during her tenure as U.S. Secretary of State from 2009 to 2013. It also means he can't pardon Clinton, her husband Bill Clinton, and their daughter Chelsea Clinton for possible federal crimes committed in the operation of the Clinton Foundation before, during, and after her time as Secretary of State. The Clinton Foundation has been described as a massive money laundering scheme that is a ["fake charitable organization"](#), and the ["largest unprosecuted charity fraud in history."](#)

Contrary to his public assertion, Obama can with strokes of his pen pardon Edward Snowden, and Hillary Clinton, Bill Clinton, and Chelsea Clinton.

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[Spiegel Interview with US President Barack Obama](#): 'We Could See More and More Divisions', Interview Conducted by Klaus Brinkbäumer and Sonia Seymour Mikich, Spiegel.de, Nov. 18, 2016

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[Ex parte Garland](#), 71 U.S. 333 (1866)

[Snowden](#), IMDB.com

[The Clinton Foundation Has Collected More Than \\$1.34 Billion Operating As A Fake Charitable Organization](#), *Justice Denied*, Oct. 1, 2016

[Clinton Foundation Largest Unprosecuted Charity Fraud in History](#) — Charles Ortel, USAWatchdog.com, August 28, 2016

"Rape Culture" Hysteria: Fixing the Damage Done to Men and Women

By Wendy McElroy

Vulgus Press (Canada)
(2016)

Review by [Hans Sherrer](#)
[JusticeDenied.org](#)

Rape Culture" Hysteria: Fixing the Damage Done to Men and Women is Wendy McElroy's new book. *Rape Culture Hysteria* impressively tackles and debunks the idea that the United States has a "rape culture" -- which McElroy calls a fiction that doesn't exist.

The majority of Americans are not generally aware of "rape culture" so it may seem bizarre to them that it needs debunking. While it is flying under the radar of the silent majority, McElroy explains "rape culture" is an idea with dangerous ramifications that has infected certain areas of American society -- most notably college campuses.

Rape is a serious crime. It is so serious that 988 convicted rapists [were executed](#) in the United States before the U.S. Supreme Court abolished the death penalty as a punishment for rape in 1977. The criminal code of many states authorize a sentence of life imprisonment for a rape conviction.

The U.S. Constitution specifically mandates that a person accused of a crime -- including rape -- has the right to: due process; appointment of counsel; confront one's accuser; and trial by jury. Furthermore, under the U.S. Constitution a person can only be convicted after the prosecution has introduced admissible evidence that proves beyond a reasonable doubt that the person is guilty.

Considering the severity American society places on rape, it is reasonable to assume that whenever a woman has a rape complaint the incident is reported to the police and handled by the legal system. A news flash for most Americans is that isn't necessarily true. Of particular importance to those concerned about innocent persons being wrongly accused and found guilty of rape, McElroy explains the bizarre handling of rape allegations on college campuses.

With the approval of the U.S. government,

McElroy cont. on p. 18



McElroy cont. from p. 17

institutions of higher learning can internally handle rape accusations by way of a civil administrative hearing. Those proceedings don't adhere to the criminal rules of evidence, the accused person doesn't have the constitutional protections of a criminally charged person, and he can be found "guilty" by a preponderance of the evidence. The preponderance standard -- 50.1% likelihood of guilt -- is dramatically easier to satisfy than proof beyond a reasonable doubt. That lower standard of proof makes an accused person particularly vulnerable to being wrongly found guilty in a typical "she said/he said" case. In those cases the only evidence is the accuser's claim an assault occurred -- which the accused person denies. While a person found guilty can't be sentenced to jail, he can suffer serious consequences, and the finding of guilt can have a seriously detrimental effect on his life.

These extra-judicial college administrative procedures weighted toward finding an accused person guilty are terrifying considering that studies have shown that 40% and more of rape accusations are false. It is also terrifying that innocent men are being enmeshed in that process by impressionable young women on college campuses who are misled by the rabid anti-male feminist agenda that all men are potential rapists who need to be brought to heel.

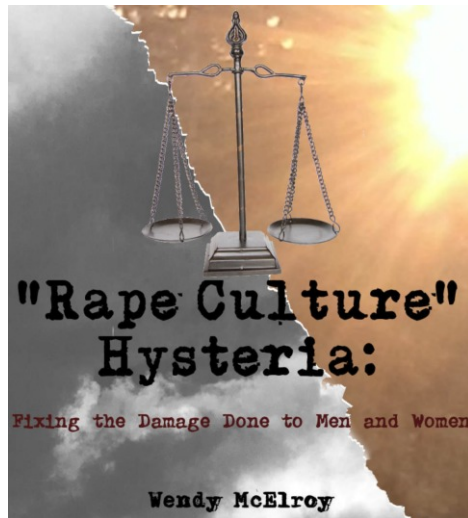
Rape Culture Hysteria is an important book that gives the reader a well grounded understanding of not just the idea of "rape culture", but provides food for thought of the societal consequences of its acceptance by college-educated woman indoctrinated with it.

Rape Culture Hysteria is [available from Amazon.com](#) in both [a Softcover book](#), and in a [Kindle electronic version](#).

Wendy McElroy is a well-known pro-individualist author and lecturer, she operates the www.ifeminists.org and wendymcelroy.com websites, and she is a Research Fellow at the [Independent Institute](#).

The following is the description of the chapters in *Rape Culture Hysteria* on [Amazon.com](#).

Rape Culture Hysteria: Fixing the Damage Done to Men and Women offers a compre-



hensive overview and debunking of the "rape culture" myth that has devastated campuses and is spilling into Main Street America. An ideological madness is grotesquely distorting North America's view of sexuality. The book applies sanity to the claims that men are natural rapists and our culture encourages sexual violence.

Written by a libertarian feminist and rape survivor, *Rape Culture Hysteria* opens with a highly personal appeal to depoliticize rape and treat it instead as a crime. Victims need to heal. Politicizing their pain and rage is a callous political maneuver that harms victims, women and men.

Chapter One: The Fiction of the Rape Culture defines the "rape culture" and explains why it does not exist in North America. It glances back at how the fiction became embedded into society, especially in academia. Then it looks forward to an emerging rape culture trend that will deeply impact daily life: microaggressions.

Chapter Two: Intellectual Framework and Myth History of Rape Culture. The myth did not arise in an intellectual vacuum. In a straight-forward manner, Chapter Two explains the theories upon which the rape culture is based, including social construction, gender, patriarchy, post-Marxism, and social justice. It rejects three of the rape culture's founding beliefs: rape is facilitated by society; men have created a mass psychology of rape; and, rape is a part of normal life.

Chapter Three: Dynamics of the Hysteria and Psychology of Rape Culture True Believers. The dynamics of rape culture politics are exposed through the behavior of its social justice warriors. A recent travesty is used to showcase those dynamics. On November 19, 2014, Rolling Stone accused

members of a University of Virginia fraternity of gang-raping a female student. The accusation was quickly revealed as untrue. The unraveling at U-Va. is a perfect vehicle to illustrate how rape culture dogma is maintained even when it is revealed to be untrue. The chapter discusses effective tactics with which to handle social justice warriors.

Chapter Four: Data, False and True. The rape culture myth is based on untrue and unfounded "facts," which have been repeatedly refuted. Yet they lumber on as zombie stats, kept alive by those to whom the lies are useful and so are repeated like a mantra that drowns out contradicting evidence. This chapter examines some of the more prevalent zombie stats such as "one in every 4 or 5 women will be raped in their lifetimes." Where did the faux "facts" originate? What evidence, if any, supports them? Which stats better reflect reality?

Chapter Five: Comparative Studies and Surveys. This chapter compares and contrasts four of the most important, frequently cited studies and surveys on rape: National Crime Victimization Survey; National Intimate Partner and Sexual Violence Survey; Campus Sexual Assault Study; and, Uniform Crime Reporting Program. They are analyzed independently but also compared to each other, including major strengths and weaknesses. Lesser studies are also analyzed in passing.

Chapter Six: Harms of the Rape Culture. The gender war must end. Chapter Six offers in-depth analysis of the extreme damage it inflicts on innocent people, with emphasis on the damage done to victims of rape. Victims are a focus because rape culture adherents claim to be their greatest champions; the opposite is true.

Chapter Seven: Solutions to Rape Culture Hysteria. Moving Toward Sanity. We can fix this. This is the ultimate message of the book. Undoing the damage is not only possible but also within reach. The solutions offered range from radical suggestions, such as abolishing the Department of Education, to more modest ones, such as recognizing rape as a criminal matter to be handled by police.

Defend yourself and your children against rape culture zealots. Demand sanity.

Sources:
US Executions from 1608-2002, deathpenalty.procon.org



High Fence Foodie Cookbook Now Available!

High Fence Foodie is [a new cookbook](#) by Texas prisoner Celeste Johnson that was recently published by The Justice Institute.

High Fence Foodie has more than two hundred easy to prepare recipes for meals, soups, snacks, desserts, and beverages. These recipes can be made from basic items a prisoner can purchase from their unit's commissary, or people on the outside can purchase from a convenience or grocery store. They are written by Celeste Johnson, a woman imprisoned in Texas who loves to cook and try out new combinations of the simple food ingredients available to her.

High Fence Foodie's all new recipes are a follow-up to the more than 200 recipes in *From The Big House To Your House* that was written by Celeste Johnson and five fellow prisoners at the Mountain View Unit, a woman's prison in Gatesville, Texas.

From The Big House To Your House received

rave reviews on Amazon.com, with 75% of reviewers giving it 4 or 5 stars! Some of the comments are:

"A lot of the recipes are very imaginative, and fun to make. Well worth the money." J.C.

"I loved the food and was inspired by the can-do attitude of the ladies involved with this project." Dan

"My daughter got this for her husband for father's day. He loves using it!!" J.H.

"I am a college student making a limited income and these recipes are great and fulfilling for people like me who don't have a ton of \$ to spend on groceries." Alicia

"I sent this to my daughter. She absolutely loves this little cookbook!" D. G.

High Fence Foodie continues the high standard of *From The Big House To Your House*! Celeste hopes her recipes will ignite a read-



er's taste buds as well as spark their imagination to explore unlimited creations of their own! She encourages substitutions to a reader's individual tastes or availability of ingredients. She is confident users of her recipes will enjoy creating a home-felt comfort whether behind the High Fence, or at Your House!

Celeste Johnson does not financially profit from sales of *High Fence Foodie*. All profits from the book's sale are

donated to [The Justice Institute](#) Justice Denied to contribute to its work on behalf of wrongly convicted persons.

[Click here for more information](#) about the book's contents and to [order it from Justice Denied](#) with no shipping charge.

[Click here to buy High Fence Foodie from Amazon.com.](#)

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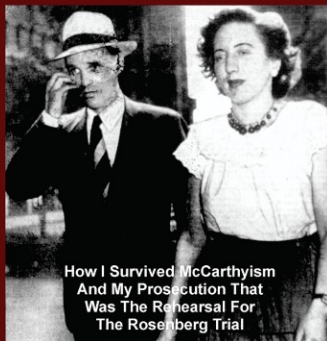
Phantom Spies, Phantom Justice

Phantom Spies, Phantom Justice by Miriam Moskowitz was published in July 2012 by Justice Denied/The Justice Institute. The book is Ms. Moskowitz' autobiography that explains how it came to be that in 1950 she was falsely accused, indicted and convicted of obstruction of justice in a grand jury that was investigating Soviet espionage. The book's subtitle is *How I Survived McCarthyism And My Prosecution That Was the Rehearsal For The Rosenberg Trial*. The Afterword written by *Justice Denied's* editor and publisher Hans Sherrer states in part:

Miriam Moskowitz is an innocent person who was caught up in the whirlwind of anti-communist hysteria that prevailed in this country at the time of her trial in 1950. We know that because of FBI documents she obtained through the Freedom of Information Act decades after her conviction for conspiring to obstruct justice during a grand jury investigation.

The prosecution's case depended on the trial testimony of FBI informant Harry Gold. He testified that in 1947 *she observed* a conversation during which he and her business

Phantom Spies, Phantom Justice



MIRIAM MOSKOWITZ

Updated with new chapters and copies of FBI documents

partner, Abraham Brothman, allegedly discussed providing false testimony to a grand jury investigating possible Soviet espionage. She did not testify before that grand jury.

The FBI documents Ms. Moskowitz obtained are proof that prior to her trial Mr. Gold told the FBI *she was not present* during that alleged conversation. Furthermore, Mr. Gold told the FBI he didn't speak candidly in front of Ms. Moskowitz because of

her possible negative reaction if he said something incriminating in her presence, and he didn't like her.

Although Ms. Moskowitz's case had nothing directly to do with the Rosenberg trial that took place four months after her trial, they were tied together because Mr. Gold was a key witness against the Rosenbergs and the same prosecutors and judge were involved in both trials.

Phantom Spies, Phantom Justice is a compelling story of how an innocent 34-year-old woman found herself being publicly branded as an enemy of the United States. Ms. Moskowitz is now 96 and still seeking the justice of having her conviction overturned, although she can't get back the time she spent incarcerated because of her two-year prison sentence.

\$19.95

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FROM THE BIG HOUSE TO YOUR HOUSE

Cooking in prison

With

Ceyma Bina, Tina Cornelius,
Barbara Holder, Celeste Johnson,
Trenda Kemmerer, and Louanne Larson

From The Big House To Your House has two hundred easy to prepare recipes for meals, snacks and desserts. Written by six women imprisoned in Texas, the recipes can be made from basic items a prisoner can purchase from their commissary, or people on the outside can purchase from a convenience or grocery store.

From The Big House To Your House is the result of the cooking experiences of six women while confined at the Mountain View Unit, a woman's prison in Gatesville, Texas. They met and bonded in the G-3

dorm housing only prisoners with a sentence in excess of 50 years. While there isn't much freedom to be found when incarcerated, using the commissary to cook what YOU want offers a wonderful avenue for creativity and enjoyment! They hope these recipes will ignite your taste buds as well as spark your imagination to explore unlimited creations of your own! They encourage you to make substitutions to your individual tastes and/or availability of ingredients. They are confident you will enjoy the liberty found in creating a home-felt comfort whether you are in the Big House, or Your House!

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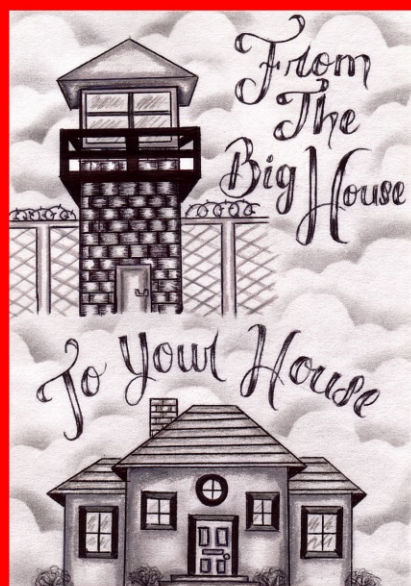
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Ceyma Bina, Tina Cornelius, Barbara Holder,
Celeste Johnson, Trenda Kemmerer, and Louanne Larson

Published by Justice Denied

Edwin M. Borchard – Convicting The Innocent

Edwin M. Borchard – *Convicting The Innocent and State Indemnity For Errors Of Criminal Justice* has [been published](#) by The Justice Institute/Justice Denied.

Yale University Law School Professor Edwin Borchard was an early pioneer in exposing the causes of wrongful convictions and the inadequacy of compensation for exonerated persons in the United States. So it is important that it be remembered his works laid the foundation for today's advocates for wrongly convicted persons, and the encouragement of public policies that may prevent wrongful convictions and ensure adequate indemnification when they occur.

This 358-page book includes Borchard's key works *European Systems Of State Indemnity For Errors of Criminal Justice*, and *Convicting The Innocent: Sixty-Five Actual Errors of Criminal Justice*. The Table of Contents is:

Introduction

Chapter 1. Edwin M. Borchard: Pioneer In Analyzing Wrongful Convictions And Advocate For Compensation

Chapter 2. Edwin Borchard, Law Expert, Dead

Chapter 3. European Systems Of State Indemnity For Errors Of Criminal Justice

Chapter 4. Convicting The Innocent: Sixty-Five Actual Errors Of Criminal Justice

Convicting the Innocent (Chapter 4) has not lost its luster as one of the most insightful books published on the topic of wrongful convictions. Seventy-one years after its publication the multitude of causes underlying the cases of injustice it details not only continue to plague the legal system in the United States, but they are arguably more prevalent today than when the book was published, with the exception of confessions extracted by physical violence.

Compensating exonerated persons is as topical a subject as it was one hundred years after Borchard's article about indemnifying wrongly convicted persons. Borchard article (Chapter 3) makes it clear that many European countries were more advanced in providing indemnification 100 years and more ago, than is the norm in the United States in 2015.

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EDWIN M. BORCHARD
Convicting The Innocent
and State Indemnity For
Errors Of Criminal Justice

COMPILED AND INTRODUCTION
BY HANS SHERRER

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Coalition For Prisoner Rights is a monthly newsletter providing info, analysis and alternatives for the imprisoned & interested outsiders. Free to prisoners and family. Individuals \$12/yr, Org. \$25/yr. Write: CPR, Box 1911, Santa Fe, NM 87504

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Justice:Denied Disclaimer

Justice:Denied provides a forum for people who can make a credible claim of innocence, but who are not yet exonerated, to publicize their plight. *Justice:Denied* strives to provide sufficient information so that the reader can make a general assessment about a person's claim of innocence. However unless specifically stated, *Justice: Denied* does not take a position concerning a person's claim of innocence.

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www.cuadp.org

Prison Legal News is a monthly magazine reporting on prisoner rights and prison conditions of confinement issues. Send \$3 for sample issue or request an info packet. Write: PLN, PO Box 1151,1013 Lucerne Ave., Lake Worth, FL 33460.

Dehumanization Is Not An Option

An Inquiry Into Law Enforcement and Prison Behavior

By Hans Sherrer

This compilation of essays and reviews explains that the dehumanization characteristic of institutionalized law enforcement processes is as predictable as it is inevitable. The beginning point of thinking about alternatives to the dehumanizing aspects of law enforcement systems is understanding their causes. The essays include:

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KIRSTIN BLAISE LOBATO'S UNREASONABLE CONVICTION

Possibility Of Guilt Replaces Proof Beyond A Reasonable Doubt



2006 and she is currently serving a sentence of 13-35 years in Nevada. *Kirstin Blaise Lobato's Unreasonable Conviction* documents:

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Read back issues, there are links to wrongful conviction websites and JD's Blog and Facebook pages, and other information related to wrongful convictions is available. JD's online BookShop includes almost 100 wrongful conviction books, and JD's VideoShop includes dozens of wrongful conviction movies and documentaries.

I grew up with J. Edgar Hoover. He was the G-man, a hero to everybody, and the Federal Bureau of Investigation was the big, feared organization. He was ahead of his time as far as building up forensic evidence and fingerprinting. But he took down a lot of innocent people, too.

Clint Eastwood

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Brendan Dassey Awarded New Trial Due To False Confession

A federal judge's granting of a new trial to Brendan Dassey highlights the inadequacy of protections in the U.S. to guard against intellectually challenged individuals from falsely confessing to a crime. The confession by Dassey was relied on by prosecutors to secure both his conviction, and that of his uncle, Steven Avery, of the apparent murder of Teresa Halbach after her disappearance in October 2005.

See p. 3

The Magazine for the Wrongly Convicted

The scales of justice are tipped against innocent people all across the country - from Maine to Hawaii and from Alaska to Florida.

JusticeDenied provides a public voice for innocent people victimized by that tragic reality.