

## Charles K. Zisa's Retrial Barred By Pervasive Prosecutor Misconduct

On August 23, 2016 former Hackensack, New Jersey Police Chief Charles Kenneth Zisa's indictment for official misconduct [was dismissed](#), based on pervasive prosecutor misconduct during his trial in 2012. The ruling bars Zisa's retrial after his conviction was overturned in July 2015.

In 2010 Charles Zisa, aka Ken Zisa, had been a member of the Hackensack, New Jersey Police Department for 34 years, and the Chief of Police for 15 years. He was indicted on October 19, 2010 for official misconduct related to his alleged interference in 2004 of a criminal investigation that involved the juvenile sons of Zisa's live-in girlfriend Kathleen Tiernan. Her two teenage sons were suspected of being involved in beating up another teenager.

Zisa was also indicted for official misconduct, a pattern of official misconduct, witness tampering, and insurance fraud, related to a 2008 accident when Tiernan drove a car owned by Zisa into a utility pole. Zisa arrived and transported her when the two Hackensack police officers at the scene notified him she was involved. Zisa submitted an insurance claim that asserted Tiernan lost control of the car when she swerved to avoid an animal in the roadway. Zisa's insurance company paid \$11,000 to settle claim.

Tiernan was indicted for insurance fraud related to the 2008 accident.

During Zisa's trial in May 2012 the prosecution did not present any evidence that Zisa influenced the way the police handled the 2004 case involving Tiernan's sons. Evidence was introduced that the incident was resolved to the satisfaction of the teenager and his family after they received restitution.

The prosecution's case regarding the 2008 accident was primarily based on testimony of the two Hackensack police officers who claimed that Tiernan appeared intoxicated, and Zisa later asked them to suppress that information. The Bergen County Sheriff's deputy who was the first officer on the scene also testified that Zisa appeared intoxicated. The testimony of the three officers was contradicted during their cross-examination when it was brought out that none of the contemporaneous incident reports they filed about the incident made any mention that Tiernan appeared intoxicated, or even



Charles "Ken" Zisa after his conviction was overturned in July 2015 (Paul Nichols - Bergen Dispatch)

that they suspected the crash was attributable to her drinking.

It was also brought out on cross-examination that none of the three officers claimed that Tiernan appeared intoxicated until after they filed civil lawsuits against Zisa regarding unrelated disciplinary matters. The Sheriff's deputy denied on direct examination that he had talked with either of the Hackensack officers about his prospective trial testimony. However, he admitted during his cross-examination that wasn't true, when he testified he had numerous telephone conversations with one of the officers.

Zisa's defense was he did not interfere with the investigation of the incident in 2004 involving her girlfriend's sons, and that Tiernan was not intoxicated at the time of the car crash in 2008. Three retired Bergen County prosecutor's detectives who investigated the allegations against Zisa testified for the defense that the prosecutor directed them to destroy their handwritten investigation notes, after Zisa's lawyer filed a motion to be provided copies of those notes.

During Zisa's trial his lawyer made five motions for a mistrial based on prosecutor misconduct by Assistant Bergen County District Attorney Daniel Keitel. Bergen County Superior Court Judge Joseph Conte's only response was to repeatedly admonish Keitel, but he didn't grant the motions: he denied some of the motions, and others he said he would rule on later -- but he never did. The five motions were:

\* First motion was made at the end of the prosecutor's opening statement. It was based on numerous prejudicial allegations by Keitel that were not in the indictment and about which the defense had no knowledge of, because Keitel had not disclosed to the defense any evidence regarding those claims.

\* Second motion was made after the Sheriff's deputy testified. It was based on the deputy's failure to provide any evidence of a conspiracy, contrary to Keitel's assertion during his opening statement.

\* Third motion was made during a 404(b) hearing held mid-trial regarding the prosecution's desire to present bad character evidence against Zisa. Zisa asserted the

evidence was irrelevant and prejudicial to the alleged crimes he was being tried for. Judge Conte disallowed introduction of the evidence, but didn't grant the mistrial motion.

\* Fourth motion was made during Keitel's direct examination of one of the Hackensack police officers who was at the scene of the 2008 accident. The officer had been granted immunity from prosecution for his testimony. Zisa's lawyer argued that Keitel had deliberately elicited false testimony from the officer.

\* Fifth motion was made during Keitel's direct examination of the other Hackensack police officer who was at the scene of the 2008 accident. Zisa's lawyer argued that Keitel had "knowingly and intentionally" elicited testimony from the officer that Judge Conte had specifically barred from being introduced.

On May 16, 2012 the jury acquitted Zisa of all charges related to the 2004 incident, except for one count of official misconduct -- which Judge Conte acquitted Zisa of by granting a post-verdict motion based on the prosecution's failure to introduce sufficient evidence of his guilt. Related to the 2008 incident the jury convicted Zisa of two counts of official misconduct, a pattern of official misconduct, and insurance fraud. Conte granted Zisa's post-verdict motion for a judgment of acquittal for one count of official misconduct and a pattern of official misconduct.

After Judge Conte's ruling Zisa's two remaining convictions were second-degree official misconduct and insurance fraud.

Tiernan was convicted of insurance fraud by the jury.

On June 22, 2012 Judge Conte granted the motion of Tiernan's lawyer for her to sentenced under New Jersey's Pre-Trial Intervention (PTI) program to reimburse \$5,500 to the insurance company within three years, with a minimum payment of \$50 monthly. If she was not charged with another crime before she completed the restitution, her conviction was to be expunged. The Bergen County DA's Office did not oppose the motion or imposition of Tiernan's sentence under the PTI -- even though it may not have been legal. Keitel didn't object, although [he said](#) he wasn't aware that the state statute "has been changed from pre-trial intervention to post-trial intervention."

On September 20, 2012 Judge Conte sen-

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tenced Zisa to the mandatory five years in prison without parole for his official misconduct conviction, a concurrent three year sentence for his insurance fraud conviction, and a \$1,000 fine. Judge Conte ordered that Zisa be allowed to remain free on \$50,000 bond pending the outcome of his appeal.

Zisa appealed his two convictions on insufficiency of the evidence, and also argued that Judge Conte erred by not ordering a mistrial because of Keitel's pervasive misconduct throughout Zisa's trial. He also argued that his retrial should be barred because Keitel goaded Zisa into making five mistrial motions. The State appealed Judge Conte's ruling acquitting Zisa of three of his convictions.

On July 31, 2015 the Superior Court of New Jersey, Appellate Division, [issued its ruling](#) in *State v. Zisa*, No. A-0653-12T4 2105 (N.J. Super. Ct., App. Div. July 31, 2015).

The appeals court affirmed Conte's rulings acquitting Zisa. The Court also ordered Zisa's acquittal of his insurance fraud conviction based on insufficient evidence of his guilt. However, the Court affirmed Zisa's official misconduct conviction, subject to a hearing on remand to determine if the prosecution deliberately tried to force a mistrial. If it did so, then the lower court would determine if the prosecution's misconduct violated Zisa's right against double jeopardy, and thus bar his retrial.

While Zisa's case was on appeal, Judge Conte retired in June 2013 and went into private legal practice. His case was reassigned to Superior Court Judge Susan J. Steele.

The same day as the appeals court ruled on July 31, 2015, Judge Steele modified Zisa's release order. She ordered his release on his own recognizance, and the return of his \$50,000 bond that his attorney argued he needed to buy food, and to pay his mortgage and other living expenses.

Thirteen months later, on August 23, 2016, Judge Steele granted Zisa's motion to dismiss the only count of his indictment that he hadn't been acquitted of by the jury, the trial judge, or the appellate court -- second-degree official misconduct related to the 2008



Kathleen Tiernan during arraignment in Dec. 2010 (The Record - Bergen County, NJ)

traffic accident.

Judge Steele ruled the prosecution had no credible evidence Zisa committed the crime, and that the prosecution's extreme, deliberate and pervasive misconduct during his trial of trying to force a mistrial precluded his retrial because it would violate his right against double jeopardy. Judge Steele also ruled that Zisa's retrial was additionally barred by "fundamental fairness" due to the prosecution's pervasive misconduct and disregard of Judge Conte's rulings during his trial.

(See, [New Jersey v. Zisa](#), No. 10-10-01812-i (Superior Ct. Bergen County, 8-23-2016))

### Judge Steele's ruling stated:

"Considering the State's lack of proofs and the weaknesses of its case, it is surprising this case was prosecuted to begin with. Looking to the trial itself, it is equally surprising a mistrial was not ordered at any point. The court is not charged with venturing to guess why the charges were not dismissed or why a mistrial was not called.

Irrespective of the prosecutor's motivation for desiring a mistrial, such conduct simply cannot and should not be tolerated. The United States Constitution and our New Jersey Constitution protects individuals from repeated attempts to convict. "The bedrock principle is that the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual, thus compelling him to live in a continuing state of anxiety and insecurity." [] The prosecutor had a full opportunity to try this case without injecting any prejudice into the trial. Yet, that is not what happened here. Instead, he chose to taint the proceedings at the outset, with full knowledge that he was crossing the line; after all, he was not surprised when the defense moved for mistrial the first time. This court cannot fathom a single reason why the State, after sabotaging the first trial, should have another bite at the apple and put the defendant through another trial for the one count that remains. "The law cannot reward ignorance; there must be a point at which lawyers are conclusively presumed to

know what is proper and what is not." [] Given the "substantial factual evidence of intent" in the record before the court, and the court finds a retrial to be an insufficient remedy as it would violate the defendant's right against double

jeopardy. [] Accordingly, the remaining count of the indictment is dismissed with prejudice. [*Id.* 105-106.]



Charles "Ken" Zisa during his arraignment in Dec. 2010 (The Record - Bergen County, NJ)

### Fundamental Fairness

Moving to defendant's motion to dismiss on the basis of fundamental fairness, the court is mindful the doctrine is rarely applied.

... the prosecutor's conduct was woefully unprofessional. Not only did the prosecutor ignore the trial court's repeated rulings, forbidding his reliance on impermissible testimony and evidence, he was openly hostile to the court ...

Considering these factors in total, the court also grants defendant's motion to dismiss on this ground. [106, 108]

### Conclusion

... the court finds the State vaulted the threshold of prosecutorial misconduct to goad defendant to seek a mistrial not once, but repeatedly, five times. But for the trial court's reluctance, a mistrial would have been granted. It is unequivocal the record is rife with repeated attempts by the State to goad defendant from the outset and by blatantly refusing to heed the admonishments of the court thereafter. Rather, the State continued in its quest to admit foreclosed testimony and evidence. *A careful scrutiny of the record shocks the conscience and can leave this court with no other conclusion.* As strikingly noted by the Appellate Division, "Lastly, we remind all concerned that 'the primary duty of a prosecutor is not to obtain convictions, but to see that justice is done.'" That was not done here and for that reason

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# Juan Rivera's \$20 Million Compensation Will Be Divided In Divorce Court

On January 25, 2017 the Illinois Supreme Court [declined to review](#) a ruling by the Illinois Court of Appeal that Juan Rivera's \$20 million wrongful conviction lawsuit settlement is marital property in his pending divorce.

Melissa Sanders married Rivera on October 31, 2000. At the time he was imprisoned for life in Illinois for his 1998 murder conviction in the 1992 rape and murder of 11-year-old Holly Staker in Waukegan, Illinois. Sanders had met Rivera in 1998 after she had taken an interest in the law, and volunteered to work on his case.

Sanders was a staunch advocate of Rivera's innocence. After years of legal proceedings, which included Rivera's reconviction in 1999, 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.

*Justice Denied* published an article about Rivera's release: "[Juan Rivera Released From 19 Year 'Nightmare Of Wrongful Incarceration'](#)".

The Cook County State's Attorney's Office

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defendant's motion is granted. The sole pending count is dismissed with prejudice." [108-109]

[Click here to read State of New Jersey v. Charles Kenneth Zisa](#), No. 10-10-01812-i (Superior Ct Bergen County, 8-23-2016).

Sources:

[State v. Zisa](#), No. A-0653-12T4 2105 N.J. Super. Unpub. LEXIS 1842 (App. Div. July 31, 2015) (Reversing insurance fraud conviction for evidence insufficiency, and affirming trial court's judgment of acquittal on counts 3, 10 & 13.)

[State of New Jersey v. Charles Kenneth Zisa](#), No. 10-10-01812-i (Superior Ct Bergen County, 8-23-2016)

[Former Hackensack chief, state assemblyman Ken Zisa](#) sentenced to five years in prison, *NJ Advance Media*, September 20, 2012

[Zisa ex-gal pal gets pre-trial intervention for insurance fraud](#), *Hackensack Daily Voice*, June 22, 2012

[Judge dismisses remaining criminal charge](#) against ex-Hackensack police chief Zisa, *The Record* (Bergen County, NJ), August 23, 2016



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

than 19 years and two months in custody.

In October 2012 Rivera filed a federal civil rights lawsuit against Lake County, the City of Waukegan, and other defendants, that alleged violations of his constitutional rights.

In 2014 Rivera was granted \$213,000 compensation by the State of Illinois.

Rivera filed a petition in May 2014 to dissolve his marriage to Melissa, and she filed a counter-petition in July 2014.

While their divorce was pending, it was announced in March 2015 that Rivera's lawsuit was settled for \$20 million. Lake County agreed to pay \$12.5 million, and the City of Waukegan agreed to pay \$7.5 million.

Rivera was to receive \$11.36 million after the deduction of \$8.64 for legal fees and costs to his lawyers.

In May 2015 Rivera filed a motion in his divorce case that sought to exclude Melissa from receiving any money from either the lawsuit settlement or Illinois' compensation. He argued he was convicted of crimes that occurred in 1992 -- eight years prior to his marriage.

Melissa countered the motion by making claims that included [arguing the money](#) "is marital property because the lawsuit accrued during the marriage."

The divorce court judge sided with Rivera and granted his motion.

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.

*Justice Denied* published an article in Octo-

ber 2016 about the divorce case: "[Juan Rivera's Wrongful Conviction Lawsuit Settlement Is Marital Property In Divorce](#)."

Rivera sought review of the ruling by the Illinois Supreme Court.

On January 25, 2017 the Supreme Court announced it [would not review](#) the appeals court's ruling.

Juan and Melissa-Sanders Rivera's divorce trial [is scheduled to](#) begin on July 18, 2017 in the Cook County Circuit Court's domestic relations division.

Sources:

[\\$20 million wrongful conviction settlement headed for divorce court](#), *Chicago Tribune*, January 27, 2017

Juan Rivera's Wrongful Conviction Lawsuit Settlement Is Marital Property In Divorce, *Justice Denied*, Oct. 16, 2016

"Juan Rivera Released From 19 Year 'Nightmare Of Wrongful Incarceration'", *Justice Denied*, February 7, 2012

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



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

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

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