

JUSTICE DENIED

Justice: Denied
Begins
Its Seventh Year!



The Magazine for the
Wrongly Convicted

ROLL CALL OF INNOCENT PEOPLE EXONERATED OR PARDONED IN 2004

Laurence Adams	MA	30 yrs.	Louis Greco ³	MA	27 yrs.	Ken Marsh	CA	21 yrs.	Rick Tabish ⁹	NV	4
Timothy Bailey	WA	1	Harold Hall	CA	19	Ryan Matthews	LA	7	Angel Toro	MA	21
Dennis Brown	LA	19	Ahmed Hannan	MI	3	Brandon Moon	TX	17	Frederick Weichel	MA	23
Robert Coney	TX	40	Clarence Harrison	GA	17	Sandy Murphy ⁶	NV	3	Arthur Whitfield	VA	22
Kenneth Conley ¹	MA	0	John Harvey	TX	12	James B. Parker	NC	14	Ernest Willis	TX	17
Stephan Cowans	MA	6	Crystal Holliday ⁴	PA	0	Anthony Powell	MA	13	David Wong	NY	18
Michael Cristini	MI	13	Darryl Hunt	NC	18	Jesse Reynolds	IN	3	See Roll Call notes on p. 7		
Susan Cummings	WA	20	Juan Johnson	IL	11	Adam Riojas	CA	13			
Wilton Dedge	FL	22	David Jones	CA	12	Juvenile Rogers ⁷	MD	0	51 PEOPLE WRONGLY IMPRISONED 656 YEARS		
Elizabeth Ehlert	IL	13	Karim Koubriti	MI	3	Lafonso Rollins	IL	11			
Abdel-Ilah Elmaroudi	MI	3	Barry Laughman	PA	16	Peter Rose	CA	10	 Louis Greco 1968 Convicted of murder in MA and sentenced to death. 1972 Death sentence commuted to life in prison. 1995 Died at 78 in prison hospital of colon cancer and heart disease. 2000 Dept. of Justice discloses documents proving the FBI knew at the time of their trial, that Greco and three co-defendants were innocent. 2004 Conviction posthumously vacated in September. See page 24		
Alan Gell	NC	9	Chief Leschi ⁵	WA	2	Sylvester Smith	NC	20			
Thomas Goldstein	CA	24	Nathaniel Lewis	OH	5	Gordon Steidl	IL	17			
Bruce Goodman	UT	19	Antonino Lyons	FL	3	John Stoll	CA	20			
Cordez Graham ²	PA	0	Steven Manning	MO	14	Reshenda Strickland ⁸	WA	1			

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Convictions Tossed For Two Innocent "Terrorists" In Detroit!

Study Reveals False Confessions Fuel Wrongful Convictions!

Tulia Travesty's Tom Coleman Convicted of Perjury!

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2005 National Innocence Conference
in Washington D.C. from
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Message From The Editor

Greetings, JD readers,

Welcome to a new edition of *Justice:Denied* magazine. It marks the beginning of our seventh year of publication. In 1998 a small group of people who mainly knew each other by email brainstormed the idea of a magazine about wrongful convictions. That idea came to fruition when the the first issue was published in January 1999. However it was only possible due to the efforts of many volunteers. JD continues to rely on volunteers since it has no paid staff. On the back page (p. 28) is a list of the almost 150 people who have donated their time as a *Justice:Denied* staff member, writer or editor from the first issue through this current issue. We thank all of you.

Many thanks to everyone who generously responded to JD’s request for year-end donations. JD does not have a deep-pocketed sponsor bankrolling our efforts. So we depend on our readers for the financial support that enables us to continue to get the word out about wrongful convictions.

We plan some positive changes for the coming year. One is that we intend to make all back issues available on our website in PDF format. That will enable a website visitor to read, download or print a JD back issue in its entirety. All stories from JD’s back issues are currently available for viewing on our website in HTM format,

Blessings to all, on behalf of the entire JD Staff,

Clara A. Thomas Boggs
Editor in Chief and Publisher
Justice:Denied - The Magazine for the Wrongly Convicted
<http://justicedenied.org>

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



Information About Justice: Denied

Six issues of *Justice:Denied* magazine costs \$10 for prisoners and \$20 for all other people and organizations. Prisoners can pay with stamps and pre-stamped envelope. A sample issue costs \$3. See order form on page 27. An information packet will be sent with requests that include a 37¢ stamp or a pre-stamped envelope (Please write INFO on the envelope). Write: Justice Denied - Info, PO Box 881, Coquille, OR 97423

DO NOT SEND JUSTICE:DENIED ANY LEGAL WORK!

***Justice:Denied* does not and cannot give legal advice.**

If you have a story of wrongful conviction that you want to share, please read and follow the Submission Guidelines on page 26. Cases of wrongful conviction submitted in accordance with *Justice:Denied’s* guidelines will be considered for publication. Be sure and submit a case story to the person listed on page 26 for the state where the person is imprisoned or living. If page 26 is missing, send a 37¢ stamp with a request for an information packet to the address listed in the first paragraph. *Justice:Denied* does not promise that it will publish any given story, because each story must pass a review process involving a number of staff members.

Justice:Denied is published at least four times yearly by The Justice Institute, a 501(c)(3) non-profit organization. If you want to financially support the important work of publicizing wrongful convictions, tax deductible contributions can be made to:

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On August 9, 1982 at about 8:30 am, the Elgin, Ohio Post Office was robbed of stamps and money orders, and Postmaster Betty Jane Mottinger was abducted.

Elgin, Ohio was a rural town with a population of approximately 50 people. U.S. Postal Inspectors took charge of the case that afternoon and set up a Task Force to solve the crime. The physical evidence recovered, a few fingerprints lifted from the safe and surrounding area, gave investigators few leads.

The postal inspectors and local Van Wert County police interviewed two "eyewitnesses" several times. One of the witnesses was Opal Seibert, a 65 year-old woman who wore heavy rimmed glasses. She said she was drinking coffee on her back porch that morning and that her husband was with her. She stated that she saw Betty drive up in her car at about 8:20 am and park near her house, just as she did each morning. Seibert said Betty got out of her car and started across the street, but then came back to the car to retrieve something. She then walked across the road to the post office, unlocked the door, entered the building, and then closed the door and locked it.

Seibert said that at exactly 8:30 am she saw a man drive up to the post office. He got out of the car and looked all around. Seibert stated that she had never seen the man before. She said she watched as he stood between the car and the open door with his arm on the car's roof. She was certain there were no other cars or people in front of the post office. The postal inspectors interviewed Seibert several times and had her describe this man to a sketch artist. She gave the initial description of a lean, clean-shaven man, 6'-4", who had heavy, dark eyebrows and dark hair that was combed straight back. He was wearing a blue long-sleeved shirt with the sleeves rolled up, and he wore glasses. However, in subsequent interviews her descriptions of the man's height went from 6'-4", to 6'-2", then 6'-0", and finally, she said he was 5'-8".

Seibert also said she had a clear view of everything in front of the post office. The only traffic was a semi-truck that came from the north at about 8:35 am. Seibert said that as soon as the truck passed, the man who had been standing by his car drove off at a high rate of speed heading south across the railroad tracks.

The other eyewitness was Mark Lewis, a truck driver for the Elgin Grain Company, located behind the post office. When

Ohio's largest circulation newspaper, Cleveland's *The Plain Dealer*, published an editorial on February 3, 2005 concerning John Spirko's case. Titled *Lying Isn't A Capital Offense*, that editorial stated in part:

The 201 wretches who currently populate Ohio's death row are, without a doubt, troubled people. ... In at least one case, the state is prepared to kill a man even though a compelling body of evidence indicates that he literally lied his way into a death sentence.

In a three-part series last week, *Plain Dealer* reporter Bob Paynter meticulously detailed the web of lies, deception and stunningly inane logic that Spirko used to convince law-enforcement authorities that he was an eyewitness to a 1982 murder in Van Wert County.

The evidence, however, is overwhelming that Spirko had absolutely nothing to do with the murder of Betty Jane Mottinger, who ran a post office in tiny Elgin, Ohio. But using the impenetrable logic of a classic bumbling criminal, Spirko told authorities he was present at her murder, hoping to parlay a web of lies into a deal that would lessen the penalty he and a girlfriend faced in a unrelated assault case.

There was no physical evidence that he was present at Mottinger's brutal slaying, and his stories - contradictory and constantly changing - made no more sense then than they do now.

Yet, with the help of a zealous postal inspector investigating the case of a lifetime, Spirko managed to get himself not only convicted, but sentenced to die. A number of courts have upheld the conviction, and Spirko is down to his final appeal with the U.S. Supreme Court.

Nor is he the only one involved in this case who is guilty of shading the truth. The Van Wert County prosecutors office failed to share with defense counsel compelling evidence that would have seriously damaged the case against Spirko.

Failing a Supreme Court stay, Gov. Bob Taft should weigh the evidence and decide whether an execution would be an injustice.

Case Based On "Foundation Of Sand" Enough To Send Man To Death Row - The John Spirko Story

By John Spirko

Edited by Sheila Howard, JD Editor

he returned to the grain elevator on the afternoon of August 9th, Lewis was told of Mottinger's disappearance and gave a statement. Lewis recalled he left that morning for Toledo at about 8:20 am and noticed a man standing between the car and the open door with his arm on the roof of the car. Lewis said the man wore dark glasses, weighed about 240 pounds, had a potbelly, wore a short sleeve green shirt with orange stripes, and had sandy brown or reddish hair and a light mustache. Lewis said he drove by this guy heading north and only had a quick look at him -- no more then two or three seconds. Lewis could not remember if he stopped his truck to get cigarettes. However, he did say that Betty Jane Mottinger crossed the street in front of him that morning.

It is worth noting that the only similar aspect of Seibert and Lewis' description of the stranger is that he wore glasses. Both witnesses later underwent hypnosis in an effort to gain more insight into what they saw that morning.

The Task Force's investigation involved scores of state and federal law enforcement officers, who conducted thousands of interviews spanning 38 states. Six weeks after the crime, Betty Jane Mottinger's skeletal remains were found in a Hancock County bean field wrapped in a paint-smeared drop cloth. She was fully clothed and had been stabbed more than a dozen times.

The postal inspectors intensified their manhunt after Betty's remains were found. Lewis was shown a photo array and picked out a photo of a man he said looked like the stranger. This man had been paroled from a federal prison for robbing post offices in the general area of Elgin. After a nationwide manhunt, the man was located in Texas. He was later cleared of involvement in Mottinger's murder by a girlfriend's alibi.

Ruse To Spring LuAnn Smith From Jail

On July 9, 1982, I was paroled after serving 13 years of a life sentence for a murder in Kentucky. I went to live with my sister and her husband in Swanton, Ohio.

On October 9, 1982, I was arrested for a parole violation related to a barroom brawl with three bikers. The next day I went looking for the bikers. One of the biker women said I assaulted her and tried to make her tell me where the bikers lived. I was arrested and charged with a parole violation. I was to be sent back to Kentucky to serve more time.

While in jail, I talked my girlfriend LuAnn Smith into bringing me in several hacksaw blades so I could escape. She did. I then tried to escape, but in the process, I injured two deputies. I was caught before I ever made it out of the jail.

I was then sent to the Lucas County jail in Toledo and charged with offenses related to the escape attempt. I was transferred to a high security area with just four cells and cameras watching me 24 hours a day. I learned that my girlfriend had been arrested and charged with aiding my escape. I was sick that I had gotten LuAnn into serious trouble, so I began to think of a way to help her.

There was a television in the block, and one day I saw a news story about the Betty Jane Mottinger case. The FBI and postal inspectors were looking for leads concerning her murder. I then had the idea that I could claim I had information about the case, and work out a deal for LuAnn. My problem was I didn't know anything about the case. So I got all the articles I could find about the Mottinger case and I watched the TV for new developments in the investigation. I then had my brother-in-law call the FBI to tell them I wanted to discuss the Mottinger case. Several days later, a postal inspector came to see me. He asked what information I had. I told him I was not going to say anything until I had a deal for all charges to be dropped against LuAnn. He said he could not do that, but that he would pass the information on to his boss.

About a week later, I was taken to Fulton County to answer to the new charges against me. After the hearing, I was taken into a room with seven or eight law enforcement officers, including FBI agents and postal inspectors.

In May 2004, Judge Ronald Lee Gilman on the Federal Sixth Circuit Court of Appeals voted to grant John Spirko an evidentiary hearing, writing that the case against him was built on a "foundation of sand," and that the "complete absence" of physical evidence raised "considerable doubt" that he had been lawfully convicted. Judge Gilman was outvoted 2 to 1.

The head of the Task Force was there and he asked me what information I had. I said I was not going to say anything until I had a deal for my girlfriend's release, and I also included myself in the deal. He said he couldn't make a deal, but if my information was good, he would talk to the people who could. He then asked me what I knew. I told him I saw a mailbag with money orders and change in it while I was at a party with some bikers, and they told me they robbed a post office in Elgin. He asked me if I would meet with a member of his team for additional information while he tried to get a deal for me. I said I would.

In late November, while I was in the Lucas County Jail, I first met with a US Postal Inspector Paul Hartman. During the course of a month or so, I gave him 12 to 15 different stories that I had made up. I made up names like Rooster, the Dope Man, Dirty Dan, Spooky, and Swartz weaving stories involving conspiracies and drugs. I did not sign anything, nor were any of the interviews recorded or witnessed by anyone, although Hartman took notes of what I said. I finally entered into a plea agreement. I agreed to plead guilty to two state charges of assault in return for two sentences of 5-15 years in prison, to be served in a federal prison. I believed my girlfriend would be given probation for her actions in the failed escape. In December 1982, I was transferred to the federal penitentiary in Leavenworth, Kansas.

When Hartman tried to verify my many stories, he found I had been not been truthful. He interviewed me again and told me he was aware of my lies, but I just fed him new lies. When he came to see me again in January 1983, he threw a mug shot of Delaney Gibson on the table. He said he knew Gibson was the person I was protecting with my lies. He said an eyewitness had made a positive ID of Gibson, placing him in front of the Elgin Post Office the morning Mottinger disappeared. I told him he was nuts to think I was protecting Gibson because I had not seen him in years.

Hartman told me that LuAnn was due for sentencing in March, and unless he had something to take to his boss her deal was off and she would go to prison. I was very upset about that, since all my lies up to that point had been to try to help LuAnn. Thus, I told him, "Yes, I saw Gibson and he told me about this crime." I then gave yet another false story about what I knew.

John Spirko continued on age 22

I am writing this story with the hope that someone may read it and could possibly help me in proving my innocence.

I was convicted of the second degree murder of a Mr. Cygan and the second degree assault on my wife in 1975. I have not been free for over 30 years.

My situation started after I came back from Viet Nam in 1969. I came back using drugs and not thinking quite right. I was, and still am, nonviolent, and I was sick of the military and the war. After my return stateside, I jumped straight into sex, drugs, and rock and roll. I got married and tried to forget about the war. I became a hippie in every sense of the word. As per the hippie lifestyle, my ex-wife and I lived with groups of people.

In 1974 a friend of ours needed a place to stay so he moved into my house to live with my wife and me. The prosecuting attorney said I had a motive in the murder charge against me as our friend was having sexual relations with my wife. The assault charge was for an assault I was supposed to have committed against my wife at that time for having an affair. I am innocent of both the murder and the assault. I knew that my friend and wife were having a sexual relationship; I simply didn't care. She had sexual relations with anyone she wanted to and I didn't ask or care because that was our lifestyle. Since I just didn't care, there was no motive.

My wife had no evidence of an assault on her; there were no marks, no photos, and no doctor's report. When asked about the assault, everyone who took the stand at my trial said that she looked fine and that there were no marks on her. Police are trained observers, and they were at the house within three days of the alleged assault, yet they saw no evidence it had occurred.

They were at our house to investigate the disappearance of the murder victim. There were no witnesses to the murder or the alleged assault. There is a third party -- the actual killer -- who was also a friend who turned state's evidence and was given immunity in return for his testimony. His testimony about the events that happened while he was at my house prior to the

Murder Conviction Based on Impossible Prosecution Theory - The Timothy Thompson Story

By Timothy Thompson

Edited by Clara Boggs, JD Editor-in-Chief

a.m. Yet a friend, Rick Seward, said that I was at his house visiting with him in his living room from 2:00 a.m. to 7:00 a.m., which made it impossible for me to commit the murder.

To top everything off, at that time I was shooting (injecting intravenously) speed -- a very large amount of speed, for an extended period of time. According to the testimony, I attacked my friend, dragged him to a back bedroom, tied him to a set of bedsprings and tortured him for part of the night. It was said that I beat him repeatedly with a rubber hose. Later in the night I was supposed to have put the murder victim in a sleeping bag, picked him up -- even though I was strung out on speed and the victim outweighed me by 40 pounds -- carried him out to the garage, put him in the trunk of the car and took him out and buried him alive. The fact is, there was no evidence of abuse found on the body, hence, no torture.

Based on the prosecution's timeline, I would have had to have put the person in the car, driven to the river through town in the early morning hours, dug a hole, buried the victim and driven back to Seward's house (a ten minute drive) - all within twenty minutes.

My case is in the books, *State v Thompson*, 88 WN.2d 518. The trial transcripts show it would take ten minutes to drive to Seward's house from my house. The body was found by a river that was approximately five miles from my house. Based on the prosecution's timeline, I would have had to have put the person in the car, driven to the river through town in the early morning hours, dug a hole, buried the victim and driven back to Seward's house (a ten

murder are inconsistent with the testimony of my ex-wife. There are many discrepancies in how events unfolded, what took place, who was where, and what was done. For example, my wife (now ex-wife) testified that I left our house with the victim at 2:00 a.m. and returned at 7:00

minute drive) - all within twenty minutes. To top this off, I wasn't even driving. I was coming down off a speed run. I had been awake for a week. It would have been impossible for me to drive in the condition I was in.

There are three different versions of what happened that night. I proclaim my innocence. My ex-wife and Seward can't agree on what happened, who was where, or what was done. My ex-wife said that we went to Seward's house in the victim's car. Seward and his two kids were at the house. Seward said he drove my ex-wife and me to his house in his car and there was a baby-sitter at the house. Seward is the one who took the cops to the body. A police report says:

"Richard Frank Seward, witness to Thompson's attack on Cygan on August 6, 1974, was placed in the Tacoma City Jail on a parole hold charging him with withholding knowledge of a felony involving violence. On October 9, 1974 Seward said that he learned from an unidentified person that Thompson had buried Cygan on the east bank of the Puyallup River in the vicinity of the sawdust pile and the Burlington Northern and Seattle-Tacoma Bridge. Seward would not divulge his source of information, nor would he accompany the officers to the site at the time. Seward then met with his attorney, Gary Weber, and Weber emerged from this meeting with his client saying that Seward would cooperate if granted immunity from prosecution. Weber then met with Deputy Prosecuting Attorney Ellsworth Connelly and M. A. Steward, parole officer, regarding immunity for Seward in return for his cooperation. Mr. Steward and DPA Connelly agreed and Seward led investigating officers to Cygan's burial site. The autopsy performed on Cygan by Dr. Apa of Puget Sound Hospital found no apparent cause of death, but there was a good possibility that death was caused by suffocation due to being buried alive."

During the testimony of Dr. Wood, a pathologist who had done pathological work for NASA, he said there was no trauma to the body. I could not have beat Cygan as testified to by my ex-wife and Seward. Dr. Wood testified that if Cygan had been beat with a rubber hose as described by my

Timothy Thompson continued on page 27

Harold Hall Freed! After 19 years wrongful imprisonment

By Hans Sherrer

"My name is Harold Hall. I am a thirty-two year old African American and I have been unjustly incarcerated for over 14 years for a crime I did not commit." ¹ Thus began *The Coercion of Harold Hall*, published in *Justice:Denied* magazine almost five years ago. Hall continued, "The following is a description of the facts leading to my false conviction and persistent fight for justice." ²

Harold Hall's prisoner photo.



Hall described in his article that after being psychologically and physically tormented by a tag team of four Los Angeles police detectives during a 17 hour interrogation in September 1985, he gave a false confession to the June 1985 murders of Nola Duncan and her brother David Rainey. Eighteen years old at the time, Hall's confession materially differed from the separate crime scenes where the two people were found. Hall immediately retracted the confession after the marathon interrogation session was over, asserting it was false and coerced. In

Justice:Denied's story he also described that jailhouse informant Cornelius Lee fabricated both a confession Hall allegedly made to him, and incriminatory handwritten notes allegedly written by Hall.

Five years after the interrogation, in 1990, Hall was tried and convicted of both murders based on his "confession" and Lee's jailhouse informant testimony and notes. He was sentenced to life in prison. In 1994 the California Court of Appeals ruled there was insufficient evidence to support Hall's conviction of murdering Rainey, and reversed his conviction. The same Court upheld his conviction of murdering Duncan.

However the prosecution's case then began to crack: Lee recanted his testimony, and he described how he fabricated the incriminating notes that he had alleged were written by Hall. In September 1994 Hall filed a state habeas corpus petition based on the new evidence of Lee's recantation. During an evidentiary hearing, prosecution and defense experts independently confirmed Lee's admission that he falsified the notes. Hall's conviction of murdering Duncan was vacated and he was granted a new trial by his trial judge. However on July 23, 1996 the California Court of Appeals reinstated the conviction, and Hall was subsequently re-sentenced to life without the possibility of parole, plus one year.

During the course of appealing his case Hall had sought court ordered DNA testing of blood, semen and hair evi-

dence that he claimed would exclude him as Duncan's murder. However, his request was denied.

After his state appeals were exhausted, Hall filed a federal habeas corpus petition that was denied by a U.S. District Court judge on April 10, 2002. Hall appealed that ruling to the Federal 9th Circuit Court of Appeals. Since only alleged violations of the federal constitution can be raised in federal court, Hall's key claim for relief was that in convicting him of Duncan's murder, the jury relied on the fake evidence of Lee's falsified notes. The 9th Circuit noted in its decision of September 8, 2003, "Hall does argue that to allow his conviction to stand, based on the present knowledge that the evidence was falsified, is a violation of his right to due process under the Fourteenth Amendment." ³ The 9th Circuit reversed the District Court judge's decision, and granted his writ of habeas corpus. In concluding its lengthy opinion, the Court wrote:

"There was absolutely no physical or forensic evidence connecting Hall to the body or the alley in which it was found. The only other evidence of Hall's guilt was his curious and largely uncorroborated confession, which was shown to contain multiple inconsistencies and inaccuracies. For the most part, the confession did not match the evidence of the crime, and the descriptions of the position and loca-

Harold Hall continued on next page

\$1 Million Awarded NY Man 9 Years After His Exoneration

In 1990 Felix Ayala was shot to death on a Bronx street. A woman who said she witnessed the shooting from her bedroom window was later driven around by the police to look for suspects. As he was walking down a Bronx sidewalk, 20 year-old Milton Lantigua was ID'd by the woman as the shooter. The sole evidence against Lantigua was the woman's ID, and the jury couldn't arrive at a verdict after his trial, in 1990. Prosecutors then offered Lantigua a deal to plead guilty to weapons possession and be sentenced to time served. He refused, asserting his innocence. With no additional evidence, Lantigua was convicted of second degree murder after his retrial in 1992. He was sentenced to 20 years to life in prison.

After his conviction, Lantigua's accuser revealed that she had recanted her testimony to prosecutors prior to his second trial, and she had falsely testified. At an evidentiary hearing, a prosecutor testified that the woman had recanted, telling them that she hadn't been alone looking out her window at the time of Ayala's slaying, but she had been occupied with a man who was in her apartment.

In 1996, a state appeals court reversed Lantigua's conviction on the basis that the only evidence tying him to Ayala's murder was the woman's unreliable testimony, "the evidence she gave was confusing, inarticulate, vague, frequently inaudible and extremely hesitant." The Court also noted that prosecutors allowed her to testify without notifying the defense she had recanted. After Lantigua's release prosecutors refused to charge her with perjury, claiming her false testimony was an "honest mistake."

Lantigua spent six years wrongly imprisoned from his 1990 arrest to his 1996 exoneration. In February 2005 New York City agreed to pay Lantigua \$1 million to settle his civil rights lawsuit against the city. The State of New York had settled with him in March 2004 for \$300,000. So Lantigua was awarded a total of \$1.3 million. His lawyer said, "For this amount of time in prison, for a totally innocent person, a law-abiding guy, it's not enough money." Lantigua said he got what he wanted, "to clear my case, clean my name, and come out with a clean record."

Source: Wrongfully Convicted Man Wins \$1 Million Settlement, By Benjamin Weiser and Andrea Elliott, *NY Times*, Feb. 5, 2005.



The Exonerated Debuts On Court TV

A made for Court Television version of *The Exonerated* debuted at 9pm on January 27, 2005. *The Exonerated* tells compressed versions of how six death row prisoners were identified by the police as a suspect, it outlines their prosecution, and then explains the evidence that contributed to each person's eventual release. Those six people are:

- Kerry Cook, convicted in 1978 of murdering a woman acquaintance. He was released in 2000 after being imprisoned in Texas for 22 years.
- Robert Hayes, convicted in 1991 of murdering and raping a co-worker. He was released in 1997 after being imprisoned in Florida for six years.
- Delbert Tibbs, convicted in 1974 of murdering a man and raping his companion. He was released in 1977 after being imprisoned in Florida for three years.
- Sonia Jacobs, convicted in 1976 of murdering two policemen. She was released in 1992 after being imprisoned in Florida for 16 years.
- Gary Gauger, convicted in 1993 of murdering his mother and father. He was released in 1996 after being imprisoned in Illinois for three years.
- David Keaton, convicted in 1971 of murder. He was released in 1973 after two years of imprisonment in Florida.

Originally written for the stage, *The Exonerated* was effectively adapted for television. That can be credited in part to many close-ups of the actors, the use of extras in the background of several scenes, and that the plays MTV style of quickly cutting from scene to scene and character to character is more suited to television than the theater. The cast included Aidan Quinn as Kerry Cook, Danny Glover as David Keaton, Delroy Lindo as Delbert Tibbs, Susan Sarandon as Sonia Jacobs, Brian Dennehy as Gary Gauger, and David Brown Jr. as Robert Hayes.

While the additional capabilities of a television production enhanced viewing *The Exonerated*, the script is faithful to the stage version. The end result is somewhat unusual in that some people may find the television version of *The*

Exonerated to be a more satisfying experience than seeing it performed live.

The Court Television cable network is to be commended for co-producing *The Exonerated*, and broadcasting it commercial free in prime time on its debut night. Their support enabled more people to see *The Exonerated* on television that one night, than have seen it live on stage since it was first produced in 2000. Court Television then broadcast encore presentations of *The Exonerated* on January 29th and 30th.

A review of the stage version of *The Exonerated* was published in *Justice:Denied* Issue 24, Spring 2004, p. 17.



JURIES: Conscience of the Community by Mara Taub

First hand account by Mara Taub of her experience as the jury foreperson on the longest federal jury trial in New Mexico history. After eight weeks of deliberation, none of the eight defendants were convicted of any of the charges!

What does Toney Anaya, former Governor and former Attorney General of New Mexico, say about Juries: Conscience of the Community?

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Harold Hall continued from page 4

tion of the body were public knowledge. Once Hall's statements were shown to contain multiple discrepancies, the jailhouse notes took on added importance.

Recognizing this, in closing argument, *the prosecutor urged the jury to rely on the notes* as corroborating evidence of Hall's guilt. In responding to the defense attacks on Hall's confession, the prosecutor stated, "you have a handwritten note by the defendant, which the defense didn't try to explain, where he also admits liability." The prosecution used Lee's notes to corroborate Hall's confession, but the jury never had the opportunity to hear Lee testify and to assess his demeanor and veracity.

This is precisely why the state trial judge (who had presided over the original trial) concluded that the notes were material to the jury's decision. There is a reasonable likelihood that the introduction of the falsified notes affected the jury's verdict in this case. *Giglio*, 405 U.S. at 154. We have no confidence in the verdict under these circumstances. *Kyles*, 514 U.S. at 434. In light of the already scant evidence on which the conviction was based, and the emphasis the notes thus took on at the original trial, it was unreasonable for the California Court of Appeal to conclude otherwise.

Because false and material evidence was admitted at Hall's trial in violation of his due process rights, we REVERSE the judgment of the district court with instructions that it should issue an unconditional writ of habeas corpus unless the state court grants Hall a new trial within 120 days of the issuance of this court's mandate.⁴

On August 20, 2004 - almost a year after Hall's conviction was reversed - the Los Angeles District Attorney decided he would not be retried. After a motion was granted to dismiss the charge of murdering Nola Duncan, Hall was released later that day after 19 years of wrongful imprisonment.

It is noteworthy that in its September 2003 decision reversing Hall's conviction, the 9th Circuit confirmed his portrayal - that was published in *Justice:Denied* three years earlier - of the events surrounding his conviction and the reasons it was unsound.

After Hall's release, his attorney William Genego said, "Harold is an extraordinary individual. He had the where-withal to continue on. It took a long, long time."⁵ During his periods of time without an attorney, Hall was relentless in researching his case, and filing and responding to motions. As he described his efforts, "I just had to stay focused to prove my case. I knew it was gonna come. It was just a matter of time."⁶

Imprisoned at 18, and having spent more than half his life wrongly confined behind bars, Hall was philosophical about his experience, "What they took from me, I can't get back. The thing is to move forward, to enjoy what I have now."⁷

Five years earlier Harold Hall closed his *Justice:Denied* story by writing, "There are several lawyers, private investigators and community people who have freely donated their time and energy to support my efforts. Without them, I know I would not have made it this far. I only hope and pray that I will soon be able to personally thank them from outside these jail walls, which have kept my body, but not my spirit, captive for the past 14 years."⁸ It was a long time coming, but after his release he was able to make good on that vow.

Endnotes:

¹ *The Coercion of Harold Hall*, Harold Hall, *Justice:Denied*, Vol. 1, Issue 9 (2000), <http://justicedenied.org/v1issue9.htm>

² *Id.*

³ *Hall vs. Director of Corrections*, 343 F.3d 976 (9th Cir. 09-08-2003), 2003.C09.0000667 ¶ 50 <<http://www.versuslaw.com>>.

⁴ *Hall*, 343 F.3d 976, 2003.C09.0000667 ¶¶ 68-71 <<http://www.versuslaw.com>> (emphasis added).

⁵ Patience, Resolve Fueled Man on His Long Road to Freedom, Anna Gorman, *Los Angeles Times*, August 21, 2004.

⁶ *Id.*

⁷ *Id.*

⁸ *The Coercion of Harold Hall*, *supra*.



Mistaken Identity Leads To False Murder Conviction - The Thomas R. James Story

By Thomas R. James

Edited by Karyse Phillips, JD Editor

Is it possible that having the same first and last name as a person who participated in a murder cause you to spend the rest of your life in prison? The answer is yes - and I am living proof.

I am Thomas Raynard James better known as "Jay." I am serving a life sentence for armed robbery, first degree murder, armed burglary, and aggravated assault. However I had nothing to do with those crimes. I was charged, tried and convicted of them because I have the same name as the man identified as the perpetrator - Thomas James.

On the evening of January 17, 1990, at approximately 7:10 p.m., two assailants entered the residence of Francis and Ethra McKinnon at 135 South Dixie Highway, apt. 110, in Coconut Grove, Florida, to commit armed robbery. Also present was their daughter and son-in-law, (Dorothy and John Walton), and two kids from the neighborhood, (Lance Jacques and a girl, Josie). Mr. McKinnon emerged from the bedroom and was shot to death.

One of the assailants wore a mask to conceal his identity. He didn't possess a weapon, and was generally described as 6'-0" tall, one hundred and seventy pounds, and seventeen or eighteen years of age.

The other assailant was the gunman. He didn't wear a mask, but he did wear a hat and shorts. He was generally described as much shorter, 5'-4" or 5'-5" tall, weighing over two hundred pounds, with short, fat, stubby fingers.

After the shot was fired the assailants abruptly fled the scene into the surrounding area of Coconut Grove, but not before being spotted by area residents, who recognized the unmasked gunman as Vincent "Dog" Williams (aka Vincent Cephus). His name was provided to the police, along with that of Thomas James, a neighborhood friend of "Dog's" and his partner in crime.

Since "Dog" didn't wear a mask he was positively identified by witnesses who knew him as the robber with the gun. However when the police sought to discover Thomas James' identity, my photo came up because my name is Thomas Raynard James. Thus began the identity mix-up that resulted in my predicament. I am not the Thomas James who ran with "Dog," or aided him in the attack of January 17, 1990, yet I was charged, tried and convicted, not as his accomplice, but as the person with the gun!

Its also important that I was not charged with this crime until six months later. Detective Kelvin Connelly stated he was satisfied with the identification of me as the assailant "Thomas James," the day after the crime by Dorothy Walton and Larry Miller. The prosecution had a tactical advantage by delaying my arrest, because I was unable to provide an alibi for exactly where I was or who I was with on the evening of the crime six months earlier.

There was no physical evidence to link me to the crime. Fingerprints were found, but they were not mine. I was linked to the crime by the testimony of *one* of the victims - Dorothy Walton - that was full of inconsistencies and insubstantial statements. I will discuss some of those statements along with the reason they are incorrect.

"My back was to the door and I was doodling on a piece of

paper. I saw the gunman when he entered shouting 'get down.' I could see my mother on the sofa, but didn't see the two kids sitting besides my mother." However, there are many things that Mrs. Walton doesn't notice. She doesn't know how or when her husband came into the kitchen from where he sat in the living room across from her mother. She didn't see the gunman take money out of the can that was sitting on the table in front of her mother, put it in his pocket and throw the can on the floor. She was staring at the gunman's face so intently he asked her "what are you looking at?" She did not see any gold teeth. She was also looking at his hands, the gun in it. She described his hand as being short, fat and stubby, although she said the gunman never lifted any of the items out of her purse with the other hand, somehow she was able to see which items he was touching from where she was on the floor. She didn't see the gunman get money out of her purse. She was also watching the masked robber at the front door. Keep in mind that Mrs. Walton claims she simultaneously saw all of this while in fear for her life - the masked robber at the door, her mother on the sofa, her husband with the gun to his head, the gunman's face, the gun, his hands, what he touched in her purse - from where she lay on the floor! Yet she did not see him get money out of the can or from her purse, she did not see gold teeth in the gunman's mouth, didn't see the shot fired, failed to observe not one but two kids on the sofa with her mother. I only point all of this out in order to emphasize the fallibility of eyewitness testimony.

After first picking someone else as the person with the gun, hat and shorts Larry Miller picked my photo. Then at my trial he did not identify me as one of the two men, which was consistent with him initially picking another person's photo. He was told after he picked my photo that he had picked the same person as Mrs. Walton. He then told her that they picked the same picture. Which erased any doubt she may have had.

Mrs. McKinnon testified at trial but did not identify me. Furthermore, none of the following deposition testimony was brought out at trial: She said Thomas James' mother is *Mary* the daughter of Mamie Lee Walls who was her *sister-in-law*. She also stated her daughter knows Mary and her family just like she does. Mrs. McKinnon was asked how did she know who did committed the crime? She stated "his mother told me and the other one she called "Dog," his right name is Vincent Cephus."

The positive identification of the robber Thomas James' mother as Mary is critical because my mother's name is Doris Bailey. Furthermore, unlike the mother of "Dog's" crime partner, my mother has never lived in Ft. Valley, Georgia, or the southwest section of Dade Co.

Could this be the reason Thomas James wore a mask? Or are these just mere coincidences? Thomas James and "Dog" have addresses on record that show they lived a block apart in the Coconut Grove area. Thomas James is now serving a life sentence for an armed robbery that took place in the *same* area. His visitor's list shows his mother's name is *Mary*. He was born 10-27-72, so in 1990 he was the very age described by the witnesses. Also keep in mind his face was covered.

The positive identification of the robber Thomas James' mother as Mary is critical, because my mother's name is *Doris Bailey*. Furthermore, unlike the mother of "Dog's" crime partner, my mother has never lived in Ft. Valley, Georgia, or the southwest section of Dade Co.

YOU COMPARE!

Thomas Raynard James claims he was mistakenly convicted of murder based on his identity being confused with that of a man named **Thomas James**, the alleged masked accomplice of Vincent Cephus (Williams) during the robbery gone bad that ended with Mr. McKinnon's murder. The men's physical attributes are eerily similar.

Thomas R. James - claims he is victim of mistaken identity. **Thomas James** - alleged masked accomplice of Mr. McKinnon's murderer.



DC Number: 420931
Name: JAMES, THOMAS R
Race: BLACK
Sex: MALE
Hair Color: BLACK
Eye Color: BROWN
Height: 5'11"
Weight: 177
Birth Date: 01/28/1967



DC Number: 114319
Name: JAMES, THOMAS
Race: BLACK
Sex: MALE
Hair Color: BLACK
Eye Color: BROWN
Height: 5'11"
Weight: 170
Birth Date: 10/27/1972

Information from the Florida DOC website, current as of February 20, 2005.

My trial attorney, public defender Owen Chin did not call any of the witnesses who would have established the defense of mistaken identity and my innocence. Nor did he investigate potentially favorable witnesses that the State provided.

Cheryl Holcom stated she was hiding behind a car after seeing the robbers enter. After the shot was fired she saw Lance and Josie run out of the apartment. Her testimony would have corroborated the fact that there were two kids in the house and contradicted Mrs. Walton's testimony as to who, and what she saw.

Lance Jacques stated he was sitting on the sofa with Mrs. McKinnon and Josie when he saw the robbers enter. He also saw the shooter take the money out of the can that was on the table in front of the sofa and then throw the can on the floor. The can would have the shooter's fingerprints on it, but there is no known record it was tested. He said the shooter had an upper left front gold tooth and a lower right gold tooth. He is the only person who actually saw the murderer shoot Mr. McKinnon. Had he testified he too would have exonerated me and cast doubt on the State's case that was based on Mrs. Walton's testimony.

Regina Ortiz stated she ran out to her balcony after hearing the shot and saw "Dog" running away from the scene holding a gun and wearing a hat. She knew him and had seen him at Pinkney's Grocery. She also stated that her nephew Lance was inside the apartment. Had she testified she too would have exonerated me.

Joy Thomson stated she was hanging out clothes when she saw "Dog" and another person running through the alley. She too identified "Dog" as the one with the gun and hat. She too would have exonerated me from the crime.

John Walton, had he testified, would have exonerated me as not being the person who held the gun to his head. He also would have contradicted his wife's testimony that she saw all she claims she did, because he said *she was face down*, while he was looking at the gunman. (Note: None of the adults in the apartment were shown "Dog's" photo!)

My lawyer could have called Doris Bailey to the stand to ascertain if she lived in Ft. Valley, Georgia, if she knew the McKinnon's or Walton's, if her mother's name was Mamie

Thomas R. James continued on page 25

Terrorism Conviction Of 2 Men Tossed - Prosecutor Criminally Investigated For Frame-up

By Hans Sherrer

In early June 2003 the news media around the world reported on the conviction of two men in Detroit for providing "material support" for terrorism.¹ It was the first federal terrorism trial after September 11, 2001. The men, Karim Koubriti and Abdel-Ilah Elmaroudi, both Moroccan immigrants, were prosecuted along with two other men also charged with, but acquitted of the terrorism charges. Those men were Ahmed Hannan and Farouk Ali-Haimoud. The four men were also prosecuted for document fraud (possessing false identification papers), and all the men except for Ali-Haimoud were convicted of those charges. The jury had deliberated for six days before announcing its verdicts.

The prosecution relied primarily on a single witness and several sketches in a day planner to obtain the men's convictions. The witness was Youssef Hmimssa, a Moroccan forger illegally in the U.S. who had been convicted of stolen credit card charges. He testified concerning the defendant's attempt to recruit him into their scheme to overthrow the Algerian government. Hmimssa claimed they wanted to take advantage of his skills as a forger and credit card thief to send weapons and money to Algeria.² He also said Koubriti and Hannan talked about poisoning airline passengers at the Detroit Metro Airport, and that "Al-Haimoud talked about joining Osama bin Laden and killing Jews, Christians and wrong-thinking Muslims."³

U.S. Attorney General John Ashcroft was pleased with the convictions that he described as breaking a terrorist sleeper cell intended to secure weapons and attack targets in this and other countries. He said, "I congratulate the prosecutors and agents who worked tirelessly on this case."⁴ Ashcroft also noted that the case demonstrated the Justice Department's commitment to "detect, disrupt and dismantle the activities of terrorist cells in the United States and abroad."⁵

However the three convicted defendants rained on the government's congratulatory back-slapping by filing a presentence motion for a new trial that claimed the prosecution, headed by Assistant United States Attorney (AUSA) Richard Convertino, had concealed exculpatory evidence and witnesses, and offered tainted testimony, all of which undermined the veracity of the convictions. In response to the defendant's contentions, U.S. District Judge Gerald Rosen ordered the Justice Department to respond after fully reviewing the information available to it about the government's investigation and prosecution of the defendants. After receiving that order, Detroit's U.S. Attorney removed from the case, AUSA Convertino and his superior, AUSA Keith Corbett (head of Detroit's Organized Crime Strike Force).⁶

While the government prepared its response to their motion, the three defendants remained in custody – trapped in limbo between conviction and sentencing.

On August 31, 2004 the government filed a 60 page response to the defendant's motion for a new trial. It requested that Judge Rosen vacate all the convictions, and then order a retrial of the three defendants on the document fraud charges. At the same time the government said it would drop the terrorism charges against the men. The government justified dropping the terrorism charges by conceding that prosecutor Convertino had withheld potentially exculpatory evidence from the defense. That evidence included:

- In a December 2001 letter prosecutor Convertino concealed from the defendants, Youssef wrote to another man he had been in jail with, that everything he told law

enforcement authorities about the defendant's had been made up: Youssef wrote, "how he lied to the FBI, how he fool'd the Secret Service agent on his case."⁷ Youssef's trial testimony was based on what he said Ali-Haimoud, Hannan and Koubriti talked about while he was in jail with them, after their arrests on September 17, 2001.

- Contrary to prosecution favorable testimony during the trial, some officials, including a CIA expert, disagreed that a day planner found during a search of the defendant's apartment contained case sketches of potential terrorist targets.⁸ One of the sketches of an alleged target, e.g., actually resembled a free-hand sketch of the Middle East.
- Prosecutor Convertino told the judge and the defendants that the government didn't have a photo of an overseas facility that it claimed was depicted as a target in the day planner, when it did have a photo of it, and it didn't resemble the day planner sketch introduced into evidence at the trial.
- Prosecutor Convertino concealed a witness statement from the defendants in which a former roommate of two of the defendants described them as lazy drunks who smoked and never talked about religion. That description of the men's lifestyle directly contradicted Convertino's courtroom characterization of the men as devote Muslims engaged in a religious "jihad" against the West. If they were devote Muslims involved in anti-Western activities, they would not have behaved as decadent Westerners.⁹

On September 2, 2004 Judge Rosen vacated the three defendant's convictions and ordered that they be retried only on the document fraud charges. In his order, Judge Rosen wrote, "Certainly, the legal front of the war on terrorism is a battle that must be fought and won in the courts, but it must be won in accordance with the rule of law."¹⁰ He wrote, that the prosecution's desire to convict the defendant's "overcame not only its professional judgement, but its broader obligations to the justice system and the rule of law. It is an inescapable conclusion that the defendant's due process, confrontation and fair trial rights were violated. There is at least a reasonable probability that the jury's verdict would have been different had constitutional standards been met."¹¹ The Justice Department then motioned the trial court to dismiss the document fraud charges. With those charges dismissed, the four men were exonerated of all the charges filed against them after federal law enforcement officers raided their Detroit apartment on September 17, 2001.

"They lied, lied, lied and lied."

Defense lawyer William Swor's description of the government's case, after Federal Judge Gerald Rosen vacated the terrorism convictions of Abdel-Ilah Elmaroudi and Karim Koubriti.

The lead prosecutor in the men's trial, AUSA Convertino, is under federal criminal investigation for his handling of the case. Based on the Justice Department's admissions in its response of August 31, 2004, Convertino's actions may have amounted to nothing less than orchestrating the deliberate frame-up of four men he had every reason to believe were innocent of the terrorism charges - because there was no evidence they were guilty - except for what he is under investigation for possibly contriving.

An interesting twist in the case is that AUSA Convertino filed a whistle-blower lawsuit against Attorney General John Ashcroft and the Justice Department in February 2004. Among his claims is that agency officials in Washington D.C. frustrated his efforts to convict the four defendants by "gross mismanagement" and a "lack of support and cooperation," and they are using him as the scapegoat for the collapse of any basis for the terrorism charges brought against the four men.¹² At this point it is unknown if there is any merit to Convertino's claim of negative interference by his superiors in Washington D.C. However his assertion is undermined by the vehemence with which the conviction of the four defendants was pursued by the Justice Department, which at least tacitly approved of Convertino's untoward tactics, and by Judge Rosen's public

admonishment of Ashcroft's public comments about the case that exhibited "a distressing lack of care" for the due process right of the defendants to a fair trial.¹³

The apparent support by Convertino's superiors for his "win at all costs" strategy supports that he is being made the scapegoat for the botched terrorism prosecutions. If true, he isn't in that role because of his constitutionally impermissible tactics, but because he is the lowest man on the prosecution totem pole who can legitimately be pinned with approving those tactics. After all, although John Ashcroft was quick to bask in the glory of having Koubriti and Elmaroudi's terrorism convictions occur during his tenure as attorney general, it is inconceivable that would ever publicly admit that the order to fabricate and conceal evidence in their case came from him or one of his lieutenants – even if it did.

Just as with the "terrorism" cases of Brandon Mayfield in Oregon, Sami Omar Al-Hussayen in Idaho, and James Yee in Florida,¹⁴ there was no substance to the government's accusation that Karim Koubriti, Abdel-Ilah Elmaroudi, Ahmed Hannan and Abdel-Ilah Elmaroudi were involved in international terrorism. The only terror that existed was the federal government's terrorization of innocent people.

Federal prosecutors, however, are continuing to try and draw blood to justify the millions of dollars that were spent investigating, prosecuting and jailing the four men for the insubstantial terrorism charges. In December 2004, Karim Koubriti and Ahmed Hannan were indicted for allegedly filing a fraudulent \$2,500 insurance claim after a July 2001 automobile accident. As of February 2005, the trial of the men is scheduled for June 7, 2005.¹⁵

Endnotes:

- 1 See, 18 U.S.C. 2339(a). In Issue 25, *Justice:Denied* reported on the 17 month imprisonment of Sami Omar Al-Hussayen related to his unfounded prosecution for allegedly providing "material support" in the promotion of terrorism by allegedly offering his "expert advice or assistance" as a website designer for a terrorist organization that actually disseminated Islamic related news and information. Al-Hussayen's trial ended in June 2004 with an acquittal of the terrorism related charges, and a hung jury on charges related to his volunteer work on the website when his student visa prohibited working in the U.S. See, Innocent Muslim Student Prosecuted as a Terrorist and Jailed for 17 Months, Hans Sherrer, *Justice:Denied*, Issue 25, Summer 2004, p. 10.
- 2 Two Guilty in Detroit Terror Trial, *Newsmax Wires*, June 4, 2003.
- 3 *Id.*
- 4 *Id.*
- 5 *Id.*
- 6 U.S. to Seek Dismissal of Terrorism Convictions, Allan Lengel and Susan Schmidt, *The Washington Post*, September 1, 2004, p. A02.
- 7 *Id.*
- 8 Federal judge dismisses terrorism charges against two men in Detroit, Associated Press, *Detroit Free Press*, September 2, 2004.
- 9 U.S. to Seek Dismissal of Terrorism Convictions, *supra*.
- 10 Federal judge dismisses terrorism charges against two men in Detroit, *supra*.
- 11 *Id.*
- 12 U.S. to Seek Dismissal of Terrorism Convictions, *supra*.
- 13 *Id.*
- 14 See, The Innocent Are Menaced by the "War on Terror", Hans Sherrer, *Justice:Denied*, Issue 25, Summer 2004, p. 10.
- 15 Fraud trial set for two former terror suspects, David Shepardson, *The Detroit News*, January 27, 2005.



Karim Koubriti
(federal mug shot)



Abdel-Ilah Elmaroudi
(federal mug shot)

Notes for 2004 Roll Call on cover

1. Remained free on bail pending appeal of his 1998 perjury conviction that was vacated in August 2004.
2. Remained free on bail pending sentencing. 2003 securities fraud conviction vacated in March 2004 prior to sentencing.
3. Died in prison in 1995 after 28 years imprisonment. 1968 murder conviction vacated in November 2004.
4. Remained free on bail pending sentencing. 2003 securities fraud conviction vacated in March 2004 prior to sentencing.
5. Convicted of murder in 1857 and sentenced to death. Executed in 1858. Exonerated in November 2004 by a unanimous vote of 7-0 by a Washington State Court of Historical Inquiry and Justice presided over by Washington State Supreme Court Chief Justice Gerry Alexander.
6. Convicted of murder and theft in 2000. Convictions reversed by Nevada Supreme Court in 2003. Acquitted of murder in November 2004, reconvicted of theft.
7. This is the juvenile daughter of Laura Rogers who told police her step-father had repeatedly raped her. The man denied the accusation and the daughter was convicted of filing a false police report. After video tapes made by the man were later discovered showing him repeatedly raping the girl, her conviction was vacated.
8. She was imprisoned for 3 months before surveillance video tapes proved her innocence of shoplifting.
9. Convicted of murder and theft in 2000. Convictions reversed by Nevada Supreme Court in 2003. Acquitted of murder in November 2004, reconvicted of theft.

Abuse Victim Swears She Lied to Convict Her Cousin, Jay Van Story

By Scott Nowell

In 2000, 37-year-old Jay Van Story received a startling letter from his 20-year-old cousin, Angie. There had been no contact between them in more than a decade, but Angie had recently married and become a Christian. Now she was suddenly asking Van Story for forgiveness.

"I hope that you understand and know that I was only a kid," Angie wrote. "I know I cannot make up for the time you have lost of your life, but I can try to make it up by getting you free."

Van Story has spent the last 15 years serving a life sentence for the aggravated sexual harassment of Angie. That 1989 Lubbock conviction was based primarily on her testimony that he had lain naked on top of her two years earlier, when she was seven years old.

Her later confession did not stop with a personal letter to the inmate. In 2000, University of Houston law professor David Dow began the Texas Innocence Network for students to delve into cases where defendants may have been wrongfully convicted. Not long after that, Angie contacted the group, seeking help in exonerating Van Story.

In late 2001, one of Dow's students took the 200-mile trip to Angie's home in East Texas, where she made a sworn affidavit. [The affidavit is at the end of this article.] Angie swore that her real abuser, a brother, initially had forced her to tell her mother that Van Story had molested her.

As the lie spun out of control, investigators with Children's Protective Services in Lubbock did not believe her when she told them who really had molested her, she said. Angie had been moved into a foster home, and was threatened by authorities with never living with her mother again if she did not cooperate in the prosecution of Van Story, her affidavit says.

After his conviction, Van Story, described as a model inmate, says he was repeatedly assaulted by inmates. Texas motorists have never heard of him, but they know his work as a prison graphics worker -- he designed the state license plates festooned with the yucca, mounted cowboy, space shuttle and other emblems of the Lone Star State.

As for Angie, she eventually was returned to her home, where her real abuser continued his assaults on her, her affidavit states, "I am coming forward with the truth at this time,"

Jay Van Story continued on next page

Juries: Conscience of the Community

by Mara Taub

177 pages, soft cover, \$19 (postage paid)
CPR Books; P.O. Box 1911; Santa Fe, NM 87504

Reviewed by C. C. Simmons, JD Correspondent

Here's an extraordinary book by an ordinary citizen who served on the jury of one of the longest running criminal trials in the history of New Mexico. From voir dire through verdicts Mara Taub tells the story of a federal district court trial that ran for 6 months and convicted none of the nine defendants -- with a view from the inside looking out, Taub's real-life report of the operation of the criminal justice system is a refreshing departure from the stultifying discourse on juries found in most law school text books.

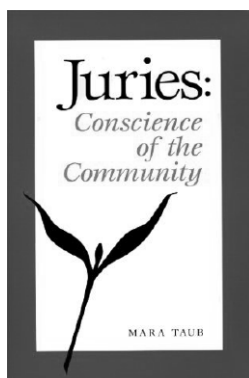
The author, a school teacher, and community activist of more than 35 years, sat on the jury of United States of America vs. Gabriel Rodriguez-Aguirre, et al. At the outset, jurors were told to expect an 8-to-10 week trial; the trial actually ran 4 months and jury deliberations continued for an additional 2 months.

There were 300 witnesses, 4,000 exhibits, nine defendants, 17 counts, and 31 charges against the various defendants. The single charge common to all defendants was that each had engaged in "the unlawful, knowing, and intentional distribution of 100 kilograms of marijuana." If found guilty, the defendants faced prison terms of from 10 years to life.

In her well documented and insightful analysis of the government's case, Taub found flaw after flaw. As a sitting juror, she observed that while the prosecutors alleged "vast amounts" of marijuana had been bought and sold by the defendants - 10,000 to 12,000 kilos - no marijuana was ever admitted into evidence at trial. The government did introduce photographs of marijuana but those photographs didn't show any of the defendants or the arresting officers.

Prosecutors also alleged that one of the defendants buried \$1.7 million in his back yard but it was unclear how much money had actually been dug up or who buried it. Because local prosecutors lacked the staff to manually count the cash, the recovered money had been sent to Dallas where there was a money-counting machine. Jurors were shown a video of the machine but there was no way to tell if the money being counted was connected to the Aguirre case. Only two worn \$50 bills were introduced as evidence at trial.

The jurors were also invited to believe that the two large empty holes in the ground shown in the government's photographs were



actually storage vaults used by the defendants to store marijuana.

None of the horses, more than 200 of them, whose purchase was purported to have been part of the money laundering operation, was trotted into court. There were not even photographs of most of the horses although one, assertedly owned by one of the defendants, won the All American Futurity at Ruidoso, New Mexico. That race's \$1 million purse is the largest in the country.

As the trial lurched from weeks to months, Taub's wry observations of the criminal justice system and its cast of characters became more pointed. She noted that the deputy marshals in the courtroom behaved as if they were guards to restrain the jury from doing anything wrong; they acted as if the defendants were guilty and deserved any punishment they got. Nor, she wrote, did the judge appear to have any doubt about the guilt of the defendants.

Of more than 300 witnesses, those who testified the longest were the informants or "snitches" who cut a deal with the prosecutors. Some had originally been defendants but, with a goal of self-preservation, realigned their allegiances.

After 2 months of deliberations, Taub's jury did not convict any of the nine defendants. Three were acquitted while the jury hung on the other six. The judge was furious with the verdicts.

The jury learned that any scrap of paper with words on it could be referred to as a "document" and thus introduced as an exhibit. More than 4,000 exhibits were presented at trial, most by the prosecution. The defendants, five men and four women, were all Hispanic and related to one southern New Mexico family. Although the defendants supposedly made millions of dollars in their marijuana operation, eight were found to be indigent and thus qualified for court-appointed defense lawyers at trial.

After a four month trial, the judge read the jury 69 pages of instructions. Their deliberations began on May 5 and the verdicts were returned on July 12.

About half of the jury of 11 women and one man were over 50 years of age. Several jurors were Hispanics, two Navajos, and three Anglos. Ten of the 12 were, in some capacity, employed outside the home. All jurors resided in Albuquerque or in the northern part of New Mexico.

During deliberations, one juror said that people should be considered guilty until proven innocent. Another woman opined that jurors were suffering stress because of witchcraft that might be

coming from Mexico. Two jurors were frightened by the reputations of the defendants who might come after them in some way.

There was also a woman who felt God was displeased by what the defendants had done and she saw to it that the jurors began deliberations every morning with a silent prayer while holding hands around the table.

The jurors agreed that the prosecutors' case was lengthy, detailed, and unclear. The first 3 weeks of deliberations were spent going through notes and exhibits and attempting to put the government's case together. The next 2 weeks were devoted to trying to organize and clarify the vague, inconsistent, and contradictory testimony of 25 informant witnesses. Thereafter, deliberations began in earnest.

After 2 months of deliberations, Taub's jury did not convict any of the nine defendants. Three were acquitted while the jury hung on the other six. The judge was furious with the verdicts. He later said he would have thrown the book at all defendants.

When there is a hung jury, the prosecution decides whether to try the defendants again. In the Aguirre case, the government decided to do so. The second trial began with six defendants, a different jury, and the same insubstantial evidence that was insufficient to produce convictions at the first trial.

During the second trial, one defendant became ill and accepted a plea bargain deal. The other five defendants were convicted and sentenced to prison. Taub was present for the sentencing phase, the only juror from either trial to attend.

As with the first trial, the second was held in the same court with the same prosecutors, the same evidence, and six of the same defendants. Only the jury was different. One might conclude that defendants are better served when a jury is populated by citizens with the intelligence, personality, and communication skills necessary to guide a jury to discover the deficiencies in the government's case.

Taub skillfully interweaves her chronology of the Aguirre trial with brief but instructive excerpts from scholarly works, news reports, and appellate court opinions. She presents learned commentary on wrongful convictions, mandatory minimum sentencing, jury nullification, reasonable doubt, and the death penalty. Toney Anaya, the former Governor and Attorney General of New Mexico, said of Taub's Juries, "A unique glimpse into the mind of a juror with values she would not compromise who voted her conscience and dared to judge a criminal justice system that discriminates against people of color and the poor. Must readings for potential jurors and anyone truly interested in doing what is right."

Conscience of the Community can be ordered for a \$19 (postage included) check or money order from:

CPR Books
P. O. Box 1911
Santa Fe, NM 87504



Jay Van Story continued from page 8

Angie concluded in her affidavit, “because my heart has been burdened by the fact that an innocent man is imprisoned because of my false testimony.” [See note at end of article.]

Known as an especially bright kid in Lubbock, Van Story quickly moved beyond the standard youthful stints of sacking groceries and busing restaurant tables. By age 16, he was a studio camera operator for newscasts at KLBK-TV in Lubbock. He was a cabbie for a year and then was a news photographer for another station there.

While still a teen, he moved to Austin where he worked behind the wheel of a UT shuttle bus and was a circulation sales manager for the *Austin American-Statesman*.

His legal troubles also began at a young age in 1985, while he was working at a school for emotionally challenged children. A nine-year-old boy under his care told school officials that Van Story had videotaped him taking a bath during a weekend visit at his home. Van Story admits to that but says there was nothing sexual involved, that it was just a foolish stunt he did at an immature age.

Still, he was hit with a charge of sexual performance by a child, convicted and sentenced to three years in prison. Investigators noted that he’d previously been employed at the Lubbock State School, although interviews with every child under his care turned up no claims of inappropriate behavior.

Lubbock authorities did file two charges of indecency after finding a videotape in his family’s home. It contained images of a mentally challenged boy walking around naked, and another boy mooning the camera. But relatives explained that it was a harmless family video of his two cousins, filmed with several amused adults present.

Van Story claims that CPS investigator Roger Bowers was angered when those two charges were dismissed in 1985, becoming convinced that Van Story posed a threat to children. Van Story maintains that the dismissals provided the motive for investigators and the D.A.’s office to build the later case against him.

Angie’s affidavit says she was molested by her brother. Afraid of him, she told her mother it was Van Story, and the mother relayed that to CPS. Bowers and another investigator refused to listen to her real account of abuse by her brother -- or her words that Van Story was innocent, her affidavit states. Angie says she continued to lie during the trial because “Mr. Bowers told me it was the only way to get back with my Mom.”

According to family members, Angie’s mother confessed to her daughter on her deathbed three years ago that she too had lied -- saying Angie had told her about being molested by Van Story -- because she feared losing her children.

Bowers refused requests for an interview, and none of the agencies involved with this story will comment on Angie’s affidavit. However, the earlier charges and conviction against Van Story appear to be one of their prime arguments against her now. As prosecutor Rebecca Atchley asked, “You do know about this guy’s past, don’t you?”

Van Story was first convicted in Angie’s case in 1988. That verdict was overturned because the judge refused Van Story’s request to represent himself. His court-appointed attorney had admitted to the court that he was unprepared for trial, and proved it during testimony by not following up on numerous inconsistencies in the prosecution’s version of events.

At the 1989 retrial, Van Story represented himself. “I had completely lost faith in the court-appointed system,” he says. “But I knew exactly what the truth was and I felt it would be more difficult for any of the state witnesses to try and get any lies past me.”

“Actually, he did a pretty good job,” says Jared Tyler, a staff attorney for the Texas Innocence Network.

At the retrial, Van Story was able to get Angie to recant virtually every detail of her testimony from the first trial. She told jurors that her brother was the molester and that Bowers had threatened to remove the child from her mother unless she implicated Van Story. Lubbock attorney Rod Hobson recalls watching part of that trial. He says talk around the courthouse then was that the D.A.’s office was “going to shit-can the case.”

But the next day, prosecutor Atchley put Angie back on the stand. The nine-year-old seemed confused and unsure of what to say, but she went back to identifying Van Story as her molester. The prosecution also sought to undermine Angie’s earlier words by having two therapists testify. Though neither had been present during Angie’s testimony, both said that she was likely traumatized from questioning by her alleged abuser.

“They presented this sort of Stockholm syndrome defense,” says Hobson, referring to situations where hostages sometimes empathize with their captors.

“What I saw was this child being intimidated,” says prosecutor Atchley. “We put the testimony on, and the jury made the call.”

Angie wound up spending the next several years in foster homes, and says in her affidavit that the real abuser continued to molest her when she returned home at age 14.

Van Story’s defenders contend that Angie’s confusion and changing versions of events indicate that the girl’s story was coached. In arguing that pressure was applied to the girl, they point to larger questions of ethical lapses by the prosecution during the tenure of Travis Ware as Lubbock D.A. from 1987 to 1994. Former Lubbock police sergeant Bill Hubbard detailed many allegations of prosecution corruption in his book *Substantial Evidence: A Whistleblower’s True Tale of Corruption, Death and Justice*. Ware and Atchley have been admonished by appellate courts for presenting false testimony. Both were ordered to pay Hubbard and another officer \$300,000 for maliciously prosecuting them after the officers went public with their allegations regarding the D.A.’s office.

The Texas Innocence Network at the University of Houston has the goals of exonerating the wrongfully convicted and training law students in evaluating and investigating claims of innocence. The 20 or so students taking Dow’s “Innocence Investigations” class each semester read through hundreds of inmate letters to determine which cases are worthy of investigation.

They’ve had some successes. A student team investigated the case of James Byrd, who was convicted of a robbery he insisted he did not commit. Students got a videotaped confession from the actual robber, helping in Byrd’s release from prison in 2002. The network also represented Josiah Sutton in his attempts to gain a pardon after he had been wrongly convicted of rape based on faulty DNA evidence.

However, Van Story’s case poses a particularly difficult challenge. Last year, the network filed a petition for a pardon based on actual innocence. But the Texas Board of Pardons and Paroles requires that before the board can vote on such a petition, it must be agreed to by the trial judge, the prosecutor and the investigating law enforcement agency.

Neither the judge, the Lubbock County D.A.’s office or the Lubbock Police Department ever responded to that petition. Officials from the court and the police department did not respond to calls from the Press. Marilyn Lutter, spokeswoman for the Lubbock D.A., says the office doesn’t investigate pardons and that they’ve “never approved one.”

The Texas Innocence Network could ask for a new trial based on Angie’s affidavit, but the group doesn’t have the resources to represent people in court. Tyler says that the network hopes

to find an attorney in Lubbock willing to take on Van Story’s appeal. He says the D.A.’s office won’t even return his calls in response to Van Story’s petition for a pardon.

Van Story says conditions for him have improved somewhat since the beatings and assaults that first awaited him at the Beto prison unit as a child molester. “I was a young, nonviolent, easygoing man, thrown into a den of street toughs, prison-hardened gangs and thugs,” he says. “I didn’t have a chance. It was an extended horror show.”

He filed repeated grievances and finally gained a transfer to the safer Wynne Unit. For the past 11 years, Van Story has worked as a graphic designer at a prison license-plate factory. He’s regularly written op-ed articles advocating penal and justice-system reforms.

In 2002, he worked for the new Texas Prison Museum, designing a series of panels depicting the history of the prison system. A museum official who worked closely with him then remembers Van Story as “very intellectual, very intelligent...a model inmate.” His looks, his articulate manner and his situation have led some fellow inmates to nickname him Shawshank, in reference to Tim Robbins’s character in the prison film *The Shawshank Redemption*.

In the meantime, he is trying to amass support in his effort for freedom, saying those who prosecuted him relied on intimidation and fabricated testimony. “They abused their power, they abused the public’s trust,” Van Story says, “and they abused a little girl who just wanted to tell the truth.”

JD note: Reprinted with permission of Scott Nowell and the *Houston Press*. “Angie” is not the real name of Van Story’s accuser. This article was published in the December 2, 2004 issue of the *Houston Press*, which has a policy of not publishing the name of an alleged sex crime victim. “Angie” swears in her affidavit that she was serially molested by her brother - not her cousin Jay Van Story.

You can write Jay Van Story at:
Jay Van Story 477049
Wynne Unit 3 Dorm 42
Huntsville, TX 77349

Jay Van Story is accepting letters to submit in support of his application for a pardon from Texas Governor Rick Perry. A letter in support should be addressed to:
Texas Board of Pardons and Paroles
8610 Shoal Creek Blvd.
Austin, TX 78757

However, **do not mail** the letter to the TBPP. It should be mailed to Jay’s outside legal contact for submittal as part of Jay’s pardon package. Please mail to:
Jared Taylor, Deputy Director
Texas Innocence Network
Univ. Of Houston Law Center
100 Law Center
Houston, TX 77204-6060
Or, email a letter of support to: jptyler@central.uh.edu

A lawyer is preparing a habeas petition for Jay Van Story that will include the following affidavit by his accuser. However the affidavit is not yet a matter of public record. So the names of Van Story’s family members referred to in the affidavit are identified by the first letter and asterisks for the remaining letters.

AFFIDAVIT OF A**** C**** A****

THE STATE OF TEXAS
COUNTY OF NAVARRO

BEFORE ME, the undersigned authority, personally appeared A**** C**** A****, who was sworn and says under oath:

Jay Van Story Affidavit cont. on page 18

Prosecutor Indicted For Bribery After Two Men Exonerated Of Kidnapping And Rape

By Hans Sherrer

On May 13, 1991 Michael Cristini and Jeffrey Moldowan were convicted in Macomb County, Michigan of kidnapping Moldowan's ex-girlfriend in August 1990, and assaulting and raping her. The men's convictions hinged on the testimony of three witnesses: Maureen Fournier testified the men kidnapped her and bit her while she was being raped; and two dentists testified that marks on her body matched the bite of the men's teeth.¹ One of those witnesses, Allan Warnick, testified that the likelihood a bite mark on Fournier was made by someone other than Moldowan, "was at least 3 million to 1."²

In the face of the expert testimony and the eyewitness testimony of the woman, the jury ignored the men's alibis of being elsewhere that supported their protestations of innocence. However two other men identified by Ms. Fournier as being involved were not tried. One of those men was not charged, and the charges against the other man were dropped.³ The failure of prosecutors to take those men to trial suggested there could be unrecognized substance to Moldowan and Cristini's claim of innocence, and that the prosecution's experts had misanalyzed the marks on Ms. Fournier.

Moldowan and Cristini were respectively sentenced to prison terms of 60 to 90 years, and 50 to 75 years in prison.

Fast-forwarding twelve years, Jeffrey Moldowan was acquitted on February 12, 2003 by a jury that deliberated less than *two hours* after a six week retrial. Fourteen months later his co-defendant, Michael Cristini, was acquitted by a jury that deliberated for *one hour* after a three week retrial.⁴

What happened to cause the exoneration of the men after each had been imprisoned for more than a dozen years? Two events severely undermined the prosecution evidence the men's jury relied on to convict them in 1991: One of the prosecution's expert witnesses recanted her bite mark testimony against the men; and the testimony of the other expert witness, Allan Warnick, was discredited by his demonstrably unreliable bite mark testimony in several other cases.

Jeffrey Moldowan's Exoneration

Jeffrey Moldowan submitted a petition to the Michigan Supreme Court in 2001 for a retrial based on new evidence that the jury's reliance on the insubstantial expert bite mark testimony made his conviction unsafe. In his response, Macomb County Prosecutor Carl Marlinga acknowledged in a brief dated January 3, 2002, that Moldowan "may have suffered 'actual prejudice'" from the unreliable expert testimony.⁵ Prosecutor Marlinga also stated "the result of the trial could be different" without Warnick's testimony.⁶ However he also asserted the convictions were sound based on the eyewitness testimony of the alleged victim.

On May 15, 2002, the Michigan Supreme Court ordered a new trial for Moldowan. The Court's ruling was influenced by the acknowledgement in Marlinga's brief that Moldowan may have experienced "actual prejudice" by the jury's dependence on the discredited bite mark testimony.⁷

When Sally Moldowan learned the Court threw out her son's conviction, she said, "It's a miracle. I've been praying all of these years. The truth is finally coming out. He has spent 12 years in jail for something he didn't do."⁸

Her joy was somewhat tempered when prosecutor Marlinga elected to retry Moldowan rather than dismiss the charges. However Moldowan was released on bail in the summer of 2002, pending his retrial. When his retrial began in January

2003, the prosecution's case centered on the testimony of Maureen Fournier identifying Moldowan as one of her attackers and describing what he allegedly did to her.

Yet in this day and age of sophisticated forensic identification techniques, there was no physical evidence that Moldowan had anything to do with the Fournier's injuries, or other than her claim, that she had been raped. Her examination at the hospital that treated her injuries neither indicated she had been raped, nor was the presence of any sperm detected.⁹

Furthermore, a shadow was cast on her testimony by the disclosure that she was a drug user who was frequently seen buying crack in the Detroit neighborhood where she was found nude on the morning of April 9, 1990.¹⁰ Moldowan's lawyer suggested that her physical injuries were consistent with someone who experienced a beating by dope dealers as payback for welshing on a drug debt. Defense lawyer Dennis Johnson asked the jury a rhetorical question, "Can we believe one single that [Maureen Fournier] has said?"¹¹

Moldowan's alibi – that prosecutors couldn't disprove – was he was with friends at the time she said she was kidnapped and assaulted.

Although the retrial lasted for six weeks, the Circuit Court jury acquitted Jeffrey Moldowan after deliberating for less than two hours. After his release, Moldowan said he wanted to see Maureen Fournier charged with perjury for her lies that cost him 12 years of wrongful imprisonment.¹²

Michael Cristini's Exoneration

Eight months after Moldowan's acquittal, Macomb County Circuit Court Judge Edward Servitto ordered a new trial for his co-defendant, Michael Cristini. Judge Servitto ruled on October 20, 2003 that Cristini should be treated the same as Moldowan, since they were originally tried together, and the jury convicted both men by relying on the same discredited bite mark testimony.¹³

Prosecutor Marlinga decided to also retry Cristini, who was released on bail in the fall of 2003 pending the outcome of his new trial. Cristini's retrial began in March 2004, and he had the rock solid alibi by his co-workers and employment records, that he was working at his pizza restaurant job when the attack took place.¹⁴ To counter his alibi, the prosecution complemented Ms. Fournier's testimony with new bite mark experts to try and tie him to the attack. The defense countered with their own dental experts.

On April 8, 2004, after a three week trial, the jury deliberated for one hour before acquitting Michael Cristini. Afterwards, jurors said the prosecution and defense experts cancelled each other out. So they were left with weighing Maureen Fournier's testimony against the solid testimony and documentary proof Cristini was working at the time of the attack, and thus he could not possibly have been involved.¹⁵ Macomb County's Chief Trial Attorney, Eric Kaiser, exhibited a severe case of the 'sore losers syndrome' by denigrating the integrity of the twelve jury members who voted unanimously for Cristini's acquittal: "We're hoping it wasn't just that the jury decided to be lazy, but it certainly seemed they didn't try to give the case any fair analysis."¹⁶

Cindy Barach, Moldowan's sister, worked for years to help her brother and Cristini clear their names against the false accusations by prosecutors and Fournier that they were kidnappers and rapists. After Cristini's acquittal she said they were first going to "celebrate, then we're going to sue the hell out of them and make them pay."¹⁷

Federal Investigation of Prosecutor Marlinga

A story involving Macomb County Prosecutor Marlinga unfolded parallel to the drama of Moldowan and Cristini's exoneration. Detroit area newspapers reported in August 2002, that Macomb County real-estate agent Ralph Roberts asked prosecutor Marlinga in May 2000 to consider that the bite mark testimony against Moldowan – that had by then been discredited – justified his support for a new trial for Moldowan.¹⁸ Cindy Barach, Moldowan's sister and one of his most steadfast supporters, worked for Roberts and she had convinced him of her brother's innocence.

Seventeen months later, in October 2001, Roberts began directly and indirectly contributing to Marlinga's 2002 campaign for the U.S. Congress.¹⁹ Those contributions eventually totaled \$8,000.

Also in October 2001, Marlinga told Moldowan's lawyer he would take the unusual step of intervening in the case and personally writing the prosecution's brief responding to Moldowan's petition for a new trial.²⁰ However he wouldn't promise what it would say. Although the brief filed with the Michigan Supreme Court on January 3, 2002 acknowledged the discredited bite mark testimony could have caused "actual prejudice" to Moldowan's right to due process, it didn't support Moldowan's request for a new trial.²¹

So Roberts' tie to Moldowan's sister, his contact with Marlinga on Moldowan's behalf, his subsequent substantial contributions to Marlinga's congressional campaign, Marlinga's writing of the Supreme Court brief and involvement in case details normally handled by a subordinate, and his admissions in the brief that opened the door to Moldowan's retrial, melded together to create the appearance of possible impropriety. Namely, that Marlinga's writing of the brief and his choice of words lending credence to Moldowan's arguments for a retrial, was a quid pro quo for the Roberts' contributions. However that speculation was undercut by Marlinga's pursuit of Moldowan's retrial, and later, Cristini's retrial, instead of dismissing the charges as he could have legitimately done under the circumstances. Additionally, after the initial news report suggesting the contributions were tainted, Marlinga returned \$4,000 to Roberts before the November 2002 election – which he lost.²²

Two days before Moldowan's acquittal, Marlinga acknowledged a federal grand jury was investigating the Roberts' contributions to his campaign. Two weeks later, on February 27, 2003, the FBI searched Roberts' home, office, and the office of a lawyer he was associated with.²³ Among the items seized were over 100 tape recordings. Roberts began recording all of his telephone calls in 1998 to protect himself against claims of a real estate buyer or seller about what he or they did or didn't say. On the tapes were several conversations between Marlinga and Roberts concerning Moldowan. Marlinga told Roberts during one conversation to "tell the truth" to anyone asking questions about their relationship, and that even though they agreed on some things, they fundamentally disagreed about Moldowan: Roberts believed he was innocent and Marlinga thought he was guilty. However Marlinga did acknowledge during a taped conversation, "I'm kind of soft-pedaling some of the evidence" in the brief.²⁴

Prosecutor Marlinga's Federal Indictment

Two weeks after Cristini's acquittal, federal indictments were issued on April 22, 2004 against Marlinga (nine counts), Roberts (three counts), and State Senator James Barcia (two counts). The charges were all related to the 19-month grand jury probe into contributions to Marlinga. The indictment included allegations against Marlinga of conspiracy, fraud, false statements to a federal agency, and exceeding federal campaign contribution limits.²⁵ Roberts was charged with

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conspiracy, fraud and exceeding the limit on federal campaign contributions. Barcia was accused of making false statements to the Federal Election Commission and funneling excess contributions to Marlinga through Friends of Jim Barcia.²⁶

The indictment alleged Marlinga accepted \$8,000 from Roberts in exchange for using his official position to help Moldowan get a new trial. It also alleged that in an unrelated case, 73-year-old businessman James Hulet contributed \$26,000 to Marlinga's congressional campaign in exchange for a 'sweet heart' plea agreement. Hulet was facing serious prison time related to charges that over a two year period he drugged and raped a teenage girl.²⁷ In January 2003, after Hulet had arranged a \$1 million payment to the young woman to settle her civil suit against him, he pled guilty to a lesser charge and a Macomb County judge sentenced him to two years in prison.²⁸

Marlinga's Prosecution Is Politically Driven

The essence of the allegations in the indictment is that in exchange for the promise to take actions that could possibly aid Moldowan and Hulet, Marlinga fattened his campaign war chest by \$34,000.²⁹

However amidst the breast beating by Marlinga's federal prosecutors and political detractors, former assistant U.S. attorney and current Wayne State University law Professor Peter Henning made the often overlooked observation, "In a sense, every campaign contribution is a bribe - it's because you expect the candidate to do something."³⁰ If the \$34,000 had been contributed by business people seeking support for a public works project they would benefit from - which commonly occurs - Marlinga would not have been indicted. That can be said with certainty, because those sorts of quid pro quo campaign contributions are standard fare across the country. The \$34,000 mentioned in his indictment was only about 3% of the nearly \$1 million contributed to his 2002 congressional campaign. The individuals, businesses and organizations that gave him that million dollars didn't do so because of his "good looks," but because they expected a return of one sort of another on their investment.³¹ Yet neither Marlinga nor any of those contributors were indicted for their payments to his congressional campaign that can more accurately be described, Professor Henning noted, as a form of bribery.

Moldowan Sues For Damages

On January 28, 2005, Jeffrey Moldowan filed a 90-page civil lawsuit in U.S. District Court in Detroit. The lawsuit names as defendants: the city of Warren, the Warren Police Department, Warren PD Detective Mark Christian, former Warren PD Detective Donald Ingles, Macomb County, Macomb County Prosecutor Eric Smith, bite-mark specialist Allan Warnick, Maureen Fournier, and as-yet-unnamed employees of the city and county.

Alleging multiple violations of Moldowan's constitutional rights, including the Warren PD's fabrication of inculpatory evidence and concealment of exculpatory evidence, the suit seeks compensation for his loss of liberty, and living in degrading and inhumane living conditions and being subjected to physical and mental abuse during his 12 years of wrongful imprisonment for a crime he didn't commit. The suit seeks actual and punitive damages.

After filing the suit, Moldowan's lawyer, Dennis Dettmer said, "At a point during the investigation, Warren police knew - or should have known - that Jeffrey Moldowan was innocent. Our justice system wrongfully accused, wrongfully convicted and wrongfully imprisoned Jeff Moldowan."¹

Endnote:

¹ Suspect acquitted in rape case retrial sues, David Ashenfelter (staff), *Detroit Free Press*, February 1, 2005.

Source: Warren man wrongly accused in rape sues, Chad Halcom (staff), *The Macomb Daily*, February 1, 2005.

It was not surprising then that the grand jury investigation of Marlinga, a Democrat, was begun by the Republican led U.S. Attorney's Office in Detroit at the behest of Republican Party leaders.³² That also explains why the U.S. Attorney in Detroit didn't seek the indictments until after both Moldowan and Cristini were freed, since the grand jury had the information it relied on before Cristini's acquittal. By charging a prominent Democrat with accepting a bribe that led to the release of two men convicted of heinous crimes, and another accused of such crimes, Democrats can be publicly painted with the broad brush of being soft on crime.

Michigan's U.S. Attorney, however, is not the only one engaged in politically partisan prosecutions. Baltimore's all Democratic city council was put under investigation by the Maryland U.S. Attorney's Office, headed by Republican Thomas DiBagio,³³ who ordered his staff in July 2004 to "produce three "Front Page" indictments of elected officials" before the November 2nd elections.³⁴

A former assistant United States attorney, Marlinga had held the office of Macomb County Prosecutor since first elected in 1984. However he decided not to seek re-election after his indictment. *The Detroit News* reported in April 2004, "Republicans are elated with Marlinga's decision not to seek re-election."³⁵ A republican won the November 2004 election in the contest for Macomb County Prosecutor.

Whether for Justice or Money - Marlinga Did The Right Thing

There is no question that Moldowan and Cristini benefited from the wording Marlinga chose to use in the January 3, 2002 Supreme Court brief. His choice of the two magic words - "actual prejudice" - was the key necessary to open the door to the retrial and exoneration of two innocent men who otherwise might have died in prison.

Regardless of Marlinga's motivation, if he had played it safe by listening to his assistants, and not done the right thing by wording the brief as he did, he wouldn't be under federal indictment, and Moldowan and Cristini would still be in prison. After sending an unknown number of innocent people - including Moldowan and Cristini - to prison during his 20 years as Macomb County Prosecutor, the shoe is now on the other foot. Marlinga told reporters after his indictment, "I'm an innocent guy."³⁶ Roberts also proclaimed his innocence of wrongdoing. As for his discussions with Marlinga about Moldowan, Roberts said he did what "any caring, responsible citizen of this country would have done. Two innocent men were in jail for many years. Thank God they are free."³⁷

On the day he filed a civil suit against the city of Warren, Macomb County and multiple individuals, Moldowan expressed compassion for Marlinga, the man who had twice prosecuted him for kidnapping and rape:

"Carl Marlinga, we tried to get him or someone to do what he did for a long time, and now I feel bad for him, because he was the one person who tried to do the right thing. And no matter what he has said about the case publicly, I'm sure he knows that Michael (Cristini) and I were innocent. It's just a crying shame."³⁸

If Marlinga is convicted, the surreal situation will exist of him being branded as a criminal related to his promotion - while Macomb County's Prosecutor - of the cause of justice in Moldowan's case. That chilling message is not lost on prosecutors nationwide. Under the advisory federal sentencing guidelines Marlinga faces eight to ten years in federal prison if convicted of the charges in the indictment.³⁹

As of March 2005, the trial of Marlinga, Roberts, and Barcia is scheduled to begin April 5, 2005.

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2005 Innocence Conference

The 2005 National Innocence Conference will be held from Friday, April 1 to Sunday, April 3, 2005, at the University of District Columbia's David A. Clarke School of Law.

The conference begins at 2 pm on Friday, and ends at noon on Sunday. As this issue of *Justice Denied* goes to press, the conference's agenda and speakers has not been set in stone, so for the most current information and to register online, go to Justice Denied's homepage - <http://justicedenied.org> - and click on 2005 National Innocence Conference.

If you have a general question, contact the conference chairman Daniel Medwed, medwedd@law.utah.edu or (801) 585-5228.

If you have a registration question, contact Karen Hamilton, khamilt2@central.uh.edu or (832) 922-1094.

Captain James Yee Update

On January 7, 2005 Captain James Yee was honorably discharged from the Army. Yee's story of being wrongly arrested on suspicion of being an international terrorist and imprisoned for almost three months appeared in *Justice:Denied* Issue 25, Summer 2004.

The Seattle Times published an investigative exposé on the U.S. Government's reckless and systematic destruction of Captain's Yee's career that appeared on the newspaper's front page for eight consecutive days from January 9 to January 16, 2005. *The Times* describes the series thusly:

"Seattle Times reporter Ray Rivera spent seven months investigating the origins and collapse of the spy case against Army Capt. James Yee. He interviewed more than 70 people, including more than a dozen directly involved in or intimately familiar with the investigation and the legal cases of Yee and Air Force Senior Airman Ahmad Al Halabi. The story also draws on more than 130 documents, comprising more than 1,000 pages, obtained through the Freedom of Information Act and from government sources and legal proceedings involving Yee and Al Halabi."

To obtain a reprint of the complete series, send \$2.50 (check or money order) to: The Seattle Times
Suspicion in the Ranks
PO Box 1735
Seattle, WA 98111

Or call 206-464-3113 to order with a credit card.

The Snitch System Exposed

The Center on Wrongful Convictions at Northwestern University School of Law has released a new report entitled, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*. The report highlights 51 cases of Americans who were wrongfully convicted and given death sentences based on the testimony of witnesses with incentives to lie. According to the Center, snitch testimony is the primary cause for approximately 45% of all wrongful capital convictions, making it the leading problem resulting in innocent people being sent to death row.

The 16-page 8-1/2"x11" booklet is available for free downloading at:
<http://www.law.northwestern.edu/wrongfulconvictions/>

Center on Wrongful Convictions
Northwestern University School of Law
357 East Chicago Avenue
Chicago, Illinois 60611

Two Victims From One Bullet - The Timothy Fonseca Story

By Timothy Fonseca

Edited by Karyse Philips, JD Editor

In the early morning hours of April 23, 1995, Los Angeles Police Officers Marroquin and Anderson, were working patrol car 11Z1 in the vicinity of Echo Park Avenue and Scott Avenue. At approximately 3:45am a call was broadcast of a shooting in progress at 1933 Scott Avenue and they responded. They arrived on the scene within a minute and observed no unusual activity whatsoever. There was no pedestrian traffic and no vehicles were leaving the scene. Sergeant O'Neil met them at the scene in patrol car 116Z0; he had been in the vicinity of Glendale Boulevard and Alessandro Street when the call was broadcast. Officers Marroquin, Anderson, and Sergeant O'Neil did not hear any shots being fired.

As these officers communicated with each other on Scott Avenue and Lake Shore Street, a citizen drove east bound on Scott Ave. from Glendale Boulevard and stopped next to them. The citizen informed the trio that a man had been shot on Glendale Blvd. The officers asked the citizen "Where on Glendale?" and the unknown citizen replied, "In front of McDonald's." All the officers immediately responded to the location.

Upon reaching the location on Glendale Boulevard in front of McDonald's they observed a black van on the southbound lanes of Glendale Boulevard on the street next to the curb. The officers pulled in approximately 50' behind the vehicle. Observing that most of the windows had been shot out, officers Anderson and Marroquin approached the van on foot with guns drawn. As Marroquin approached the driver's side, he observed a male Hispanic sitting in the drivers seat leaning over towards the front passenger seat. He could see that he had an apparent gunshot wound to the back of the head near the neck; he was still breathing, but with difficulty. The officer immediately requested an additional unit to respond to the location for the crime scene.

As the officer was requesting additional units to respond to the scene, another citizen who resides on Glendale Boulevard directly across from the McDonald's, came out of the residence and waived at Officer Marroquin. The officer crossed the street to investigate. That citizen informed him that a woman wearing a black dress had been in the street screaming for help. The officers had not seen her anywhere in the area. When asked whether he had heard the shooting, the citizen stated the he heard the shooting and saw the van come to a stop there with the woman in the black dress running out of it.

While speaking to this citizen, the officer observed the female come running out of the Kentucky Fried Chicken parking lot. She was screaming for help. The officers approached her and could hear her screaming, "Those f***en' cholos! They shot my husband!" They tried to calm her down, but she was hysterical. The woman provided the police with a partial description of the shooter as a male Hispanic, "cholo" type, wearing a green plaid shirt. She stated that they shot them at the gas station at Scott Avenue and Glendale Blvd.. She stated that the suspects ran in an eastbound direction on Scott Ave. from Glendale Boulevard and possibly northbound on Liberty St.

As Officer Marroquin was gathering this information, Sergeant O'Neil stated that the radio was broadcasting that the shooting suspects possibly had ran into 1933 Scott Avenue. They then formulated a response team and went to that location, deployed on it and knocked on the door. Getting no answer, they then deployed on the perimeter.

Officer Marroquin subsequently transported the woman to the LAPD's Northeast Station. The woman stated that she

and her husband were returning home when they decided to buy cigarettes at the Mobil gas station located at the intersection of Glendale Blvd. and Scott Ave. She further stated that while her husband in the store she was in the vehicle, that was parked on Glendale Blvd. facing northbound toward Scott Ave. She observed two male Hispanics in a vehicle in the middle of the street begin to shoot at several men near the van. She said one of those men had brown hair, was approximately 5'7" to 5'8" tall, and was wearing a plaid shirt. She also said the men in the vehicle continued shooting in the direction of their van while they traveled southbound on Glendale Blvd. Arthur Mayer, the driver of the van, was struck and killed by one of the shots fired during this gun battle between rival gangs. She then began screaming for help and minutes later the police arrived.

I was accused, tried, convicted, and sentenced to life in prison for this crime. The problem is that I am innocent.

The evidence that was gathered in this case - like the fingerprints on the alleged murder weapon that do not match mine - was not used to prove my innocence. At the same time the officers involved gave testimony that twisted the evidence to make me appear guilty, and the testimony of witnesses was manipulated by these same officers. The result is I was convicted. How can this be, you may ask? Well, let me tell you just how.

Only a few hours after the crime was committed, neighbors of 1933 Scott Avenue (the residence of the suspects), a Ms. Stuart and Mr. Preston were brought down to the Northeast station to give statements about what they saw and/or heard. According to the Chronological Record, they were interviewed at 0740 on April 23, 1995. In this report, it is not reflected that she tells the police that she heard any names being yelled out into the night.

Yet the "field" notes of the detectives who performed those interviews indicate that Ms. Stuart states that she heard a few names, one of which was "Sniper." The problem is that the date on this so-called "field" report is dated April 28, 1995 - five days after this alleged interview took place. According to the transcripts of my trial, Ms. Stuart was not contacted again until the trial a year and half later. Do you know what happened? She is summoned to court and as soon as she walks through the door the district attorney hands her these bogus notes and advises her to refresh her memory concerning her statement. She then proceeds to testify to it without even thinking that perhaps her statement was changed—not bothering to look at the fact that the statement she is reviewing does not have her signature and is dated five days after she was interviewed!

At midnight on April 23, 1995, detectives threatened a young juvenile gang member by the name of "Evil" to come down to the Northeast station. In this interview, according to the officers, Daniel (AKA Evil) says he was there, but had nothing to do with the murder and that "Sniper did it." That is when the detectives began molding the evidence and information to fit me.

On April 28, 2003, Roxanne (victim/witness) came to the Northeast station to view a photo 6-pack of possible suspects. Initially she chose picture #2 (which was not me), but commented that the guy in #3 looked similar. I was the person in picture #3. Based on that information the detectives had me arrested for first degree murder, but the LA District Attorney subsequently dismissed it for lack of evidence.

During the investigation, the detectives learned that there were numerous gang members at 1933 Scott Avenue, where the shooting was initiated. It was the residence of two brothers (known gang members) who were involved in the shooting that resulted in the death of Arthur Mayer. One of these brothers was even shot in the exchange of gunfire.

Federal Convictions Of Non-Existent Crime Tossed

Third Person Pled Guilty to Non-Crime

A federal judge in Pittsburgh has set aside the December 2003 convictions of two people who were prosecuted for allegedly violating a federal "securities" law. Cordez Graham, 30, his wife Crystal Holliday, 26, and Angela Barnes, 21, were alleged to have used counterfeit sales receipts to obtain refunds from several Bed Bath & Beyond stores. The three were indicted for allegedly violating United States Code Title 18 Section 2314, "Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting."

Barnes pled guilty and agreed to testify as a friendly government witness against Graham and Holliday in exchange for the prosecution's recommendation of a downward departure in her sentence. After the conviction of her co-defendants, Barnes was sentenced to three months imprisonment that she completed on March 16, 2004.

In a post-trial motion for a judgment of acquittal, Graham and Holliday argued that they were convicted of a non-existent crime. They keyed on the fact that for an item to be considered as a security under Section 2314, it must have value in and of itself and identify the owner. The alleged counterfeit sales receipts meet neither of those criteria, and therefore they could not be guilty of the crime they were convicted of committing.

Senior U.S. District Judge William Standish agreed that the prosecution had not proved the two convicted defendant's violated Section 2314, and in late March 2004 granted the motion setting aside their convictions. Judge Standish didn't have to vacate their sentences, since Graham and Holliday's motion was post-trial and pre-sentencing.

In his decision setting aside the couple's convictions, Judge Standish wrote that Angela Barnes was also entitled to have her conviction set aside, because she had pled guilty to a non-existent crime. His decision was issued a week after she completed her three month prison sentence.

Sources: Federal Judge Overturns Convictions in Fraudulent Receipt Case, AP Pittsburgh, Lancaster Intelligencer-Journal, March 23, 2004. Judge Overturns Fraud Convictions, Torsten Ove, Pittsburgh Post-Gazette, March 27, 2004.



Upon searching the residence of 1933 Scott Avenue numerous weapons and live ammo were found inside the dwelling and hidden under bushes in the back yard. One of the four weapons that they found turned out to be the alleged murder weapon, an SKS Assault Rifle. None of the gang members present at the time of the murder was charged with the crime. Not even the people living at the house where these weapons were discovered was charged.

Fingerprints were found on the alleged murder weapon, the SKS - but they did not match my fingerprints.

On June 29, 1995, the LAPD obtained a warrant to force me to subject myself to a live lineup. I was not made aware that prior to the lineup that the witness was exposed to my picture. The initial choice (picture #2) from the photo 6-pack was *not* in my live lineup. Therefore, she mistakenly went with the face that looked familiar - mine - which she testified to during the trial.

What more can I say? A lot! What I've shared with you here is only the highlights of my situation. It is hard not to be angry and not to preach about how I've been wronged. I did not murder Arthur Mayer. The true perpetrator of this

Tim Fonseca continued on next page

Tulia Undercover Deputy Tom Coleman Convicted Of Perjury

By Hans Sherrer

Tom Coleman was on top of the world after being honored as the Texas Department of Public Safety's 1999 Outstanding Lawman of the Year. The award was for his undercover investigation between January 1998 and July 1999 in the small Texas Panhandle town of Tulia that resulted in 46 arrests and 38 convictions for drug dealing. However beginning in 2000, there have been many revelations about Coleman's wrongdoing before, during, and after his investigation.¹

Among the irregularities in Coleman's investigation was the lack of any audio or video surveillance recordings corroborating that he had bought drugs from a single arrested or convicted person, and when the dozens of people were arrested and their homes searched, no drugs, weapons or unusual amounts of money were found. It was also discovered that when hired by Swisher County, Coleman was under indictment for stealing \$6,700 from Cochran County merchants while employed there as a sheriff deputy.

The disclosures about faults with Coleman's drug "investigation" and his questionable character culminated in Governor Rick Perry's pardon of 35 of the Tulia defendants in August 2003, and a \$6 million settlement in April 2004 of a civil rights lawsuit against counties and cities belonging to the Panhandle Regional Narcotics Trafficking Task Force. That settlement was split amongst the 46 people arrested due to Coleman's investigation.

Coleman's fall from grace was completed on January 14, 2005. A Lubbock, Texas jury found him guilty of one count of aggravated perjury during a March 2003 evidentiary hearing in Tulia. That hearing was ordered by the Texas Court of Criminal Appeals to determine if the drug conviction of four Tulia defendants was supported by any evidence other than Coleman's word. During that hearing Coleman testified that he did not learn that he had been indicted in 1997 for stealing \$6,700 from Cochran County, Texas merchants - while working as a Cochran County sheriff deputy - until August 1998. In convicting Coleman, the jury relied on evidence that included Coleman's signature on a waiver of arraignment dated June 1, 1998 - two months prior to when he swore under oath he knew about it.

An interesting development during Coleman's trial is that after testifying as a defense witness, Swisher County Sheriff Larry Stewart apparently forgot while being cross-examined by Special Prosecutor Rod Hobson that he was a participating in a perjury trial. Stewart was the person who hired Coleman as an undercover agent in January 1998. Prior to Stewart testifying, Amarillo Detective Jerry Massengill testified that he conducted an extensive background check of Coleman - including interviewing authorities and former associates in Cochran County - and that he shared what he learned about Coleman's shady past with Stewart prior to Coleman's hiring. Yet after Massengill's testimony, Stewart testified on cross-examination that he wasn't aware of Coleman's troubled background and pending Cochran County theft charges when he hired Coleman. Outside the presence of the jury, Hobson told Judge



Tom Coleman entering the Lubbock County Courthouse on January 14, 2005 - the day of his conviction.

supported by his testimony that he wouldn't rule out, in hindsight, hiring Coleman knowing that he was under indictment for theft while working as a law enforcement officer.³

After the five-day trial, the jury deliberated for about three hours before convicting Coleman of the aggravated perjury count. However he was acquitted of another aggravated perjury count related to whether he testified falsely about filling a private vehicle at a Cochran County owned fuel pump, even though a witness testified to seeing him do so. The jury also recommended he serve a seven-year probationary sentence.

After the verdict, Hobson said that whether perjury charges would be filed against Sheriff Stewart is up to Lubbock County Criminal District Attorney Bill Sowder and a Lubbock County grand jury.⁴

Four days after Coleman's conviction, Judge Gleason held his sentencing hearing at the Swisher County Courthouse in Tulia. Coleman was sentenced to ten years probation. That makes him vulnerable to being sent to prison for a probation violation. As Hobson observed, "It's not necessarily going to be easy for him to live on probation."⁵

Many people recognize that Coleman was the little fish who took the fall for his superiors. Hobson expressed that opinion after the sentencing hearing, "He (Sheriff Stewart) was the evil architect in this whole deal."⁶

Note by Hans Sherrer. In the summer of 2004 I talked with Special Prosecutor Rod Hobson about the status of Coleman's prosecution. He expressed determination to present what he thought was a solid case against Tom Coleman. Based on the *Lubbock Avalanche-Journal's* daily news stories about the trial, that is what he did. Although there is no shortage of opportunities to cast the actions of prosecutors across the nation in an unfavorable light, Hobson deserves credit for not extending the law enforcement courtesy of presenting a fluff prosecution case against Coleman that would have ensured his acquittal of both perjury counts. Furthermore, Hobson's hard-nosed questioning of Sheriff Stewart laid the foundation for Stewart's possible prosecution for perjury if Lubbock County's prosecutor displays the same backbone as Hobson.

Endnotes:

- 1 See, Travesty in Tulia, Texas, Hans Sherrer *Justice:Denied*, Issue 23, Winter 2004, page 3.
- 2 Swisher County sheriff grilled on Coleman's background, by D. Lance Lunsford, *Lubbock Avalanche-Journal*, January 13, 2005.
- 3 Sheriff testifies about Coleman's arrest record, by Betsy Blaney (AP), *Lubbock Avalanche-Journal*, January 13, 2005.
- 4 Coleman convicted of perjury, by D. Lance Lunsford, *Lubbock Avalanche-Journal*, January 15, 2005.
- 5 Case closed, but echoes still haunt Tulia, D. Lance Lunsford, *Lubbock Avalanche-Journal*, January 19, 2005.
- 6 *Id.*

Lawrence Marshall Leaving Northwestern For Stanford

Law Professor Lawrence Marshall co-founder, and director of Northwestern University's Center on Wrongful Convictions announced in January 2005 that he accepted a new position at Stanford University. On September 1, 2005, Marshall will become director of Stanford's Clinical Law Program.

According to Stanford Law School Dean Larry Kramer, Marshall has the administration's backing to develop a program that will enable law students to gain real-life experience by working on actual cases. Kramer said, "In terms of national reputation, Larry was at the top of the list. Our goal is to have him come in with his vision in building Stanford's clinic. Northwestern has a fantastic program, and Larry is one of the reasons for that." As one of the countries most well-endowed universities, Stanford's commitment can be interpreted as good news for people who have been wronged in California.

Marshall commented, "Clinical education creates a unique bridge between the world of theory and the world of actual practice. (Most law students) never get exposure to the kinds of clients who desperately need representation."

After co-founding Northwestern's Center on Wrongful Convictions in 1998, Marshall played a key role in the freeing of five wrongfully convicted men from Illinois' death row. The Center's efforts also influenced the decision of former Governor George Ryan to pardon four condemned men on January 10, 2003, and then commutation the next day of the sentence of all 167 people on Illinois' death row to life in prison without parole.¹

Marshall spent 21 years at Northwestern, first as a student, and then as a law professor. Journalism Professor David Protess, co-founder with Marshall of Northwestern's Center on Wrongful Convictions, said about his leaving, "Whoever replaces him as the center's legal director will have a tough act to follow."

On February 26th, Northwestern announced that Steven Drizin, an expert in false confessions, would be the NCWC's new legal director. (See page 17 for an article about a 2004 false confession study by Mr. Drizin and Richard Leo.) *Justice:Denied* will provide information about the Stanford program to be directed by Marshall when it becomes available.

¹ See, Illinois Governor George Ryan Pardoned Four Innocent Men Condemned to Death On January 10, 2003, and the Next Day He Cleared Illinois' Death Row, Hans Sherrer, *Justice:Denied*, Vol. 2, Issue 9. Source: NU prof leaving post for Stanford: Criminal justice advocate known for work to overturn Ill. wrongful convictions, by Helena Oh, *The Daily Northwestern*, January 21, 2005



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Info about more than 1,600 wrongly convicted people in 26 countries is available.

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Freeing The Innocent

A Handbook for the Wrongfully Convicted
By Michael and Becky Pardue

Self-help manual jam packed with hands-on - 'You Too Can Do It' - advice explaining how Michael Pardue was freed in 2001 after 28 years of wrongful imprisonment.
\$15, softcover, order info on page 27



Tim Fonseca continued from page 12

crime roams free amongst you as I live out my life in prison. The bullet fired on April 23, 1995 that quickly killed Arthur Mayer is more slowly killing me, as I spend my life in prison for a crime I had nothing to do with.

Thank you for reading the story of my plight. You can write me at:

Timothy Fonseca J-27755
Pleasant Valley State Prison A2-233
PO Box 8501
Coalinga, CA 93210

My outside contact is my wife,
Lynn Fonseca
email: grbrblue@aol.com

Murder Conviction Based On A “Buddy” Argument - The Robert Dana Story

By Don Laws and Nicole Johnson

Edited by Karyse Phillips, JD Editor

On the Monday after Easter, April 19, 1976, thirty-six year old Robert Dana was working in a field on a farm in Sutter County, California. Sutter County is an agricultural area, not the kind of place where you would expect to capture a double murderer. Robert was on his tractor when he was surrounded at gunpoint by plain-clothes sheriff deputies and ordered off the equipment. Life as he knew it was now over.

Robert had grown up tending the fields and dairy cattle on his family's farm in North Central California. It was not an area of gangs and violence but of solid hard-working Americans raising their families, living the family values lifestyle, and looking out for one another. The old adage, “an acorn never falls far from the tree” was true of the Dana family. Robert, his parents and his brother, Junior, all lived very close together and all worked on farms in the area.

Sutter County was well known for its abundant streams and the large schools of fish that swim in them. Robert and his friends passed the time fishing the nearby waterways, downing a few beers, and telling fish stories. The area was dotted with a number of small taverns where fishermen could pick up supplies, fuel or launch their boats, and have a few drinks. They did not have the fancy “watering holes” of the big cities.

Twelve years earlier, Robert's brother, Junior, had introduced Robert to Herschel Koller. Herschel, who went by the name Gene, was employed by the Sutter County Highway Department. Outside of work, Robert and Gene enjoyed drinking and fishing together. Like a lot of buddies, they sometimes worked too hard, drank too much, and spent too much time fishing. That was just their way of life and they developed a very good relationship.

Robert was known as a happy-go-lucky type of guy -- the kind who knew everyone and the one everyone knew. He volunteered with the Department of Fish and Game, was an active member of the NRA, and carried a concealed weapons permit issued by the Sutter County Sheriff's Department. It was not unusual for residents to be armed in this part of the country. There were bears and other wild game along with an abundance of large rats and snakes that enjoyed drinking from the waterways of the area. Much of the time Robert worked alone in the fields and had dispatched a number of rats and snakes with the gun he always carried with him.

Three or four months before Easter 1976, there seemed to be a negative undercurrent in the relationship between Robert, his brother Junior, and Gene. From time to time Robert would see his brother and Gene talking to two mysterious Hispanic-looking men who were not from the area. The relationship between Junior, Gene, and the two unknown men, appeared strained or even threatening. Robert, trying to be a good friend, offered on several occasions to intervene and attempt to mediate the problem if they would just disclose the situation. They told Robert not to get involved and they said they would work out the issues themselves.

Robert began to notice that the unknown Hispanic men were around Gene and Junior more often and the situation appeared to become more threatening than it had been. When Robert tried to talk to them about it, they told him not to worry. They said that if they needed help they would call on some of their friends at the Sutter County Sheriff's Office. One day Robert was approached by the two mysterious men and asked if he

was holding a briefcase for Gene. Robert told them that he was not and even if he was, it was none of their business.

Things started getting serious on the day Gene, Robert, and his two sons went down to the levee to fish. They had only been fishing for a short time when six gunshots, apparently shot from tall grass nearby, hit the ground between them. Robert quickly grabbed the .30-.30 he carried in his truck and squeezed off a couple of rounds toward the two figures they saw running away. They tried to give chase, but the two unknown men had too much of a head start. After arriving back home, Robert called the sheriff's department and filed a report about the incident. Nothing else happened.

On Easter 1976, after working in the fields all day, Robert met up with Gene and Gene's live-in girlfriend, Elaine Matte, at Joe's Landing Tavern around 7:30 p.m. Gene and Elaine had been out fishing and drinking during the day so they had a head start on Robert. As the evening wore on and the drinks kept flowing, Gene and Robert had a “buddy” argument. Gene had made a remark about Robert's wife; Robert took offense and told Gene if he ever did it again he would just shoot him. Minutes later they were back to being old buddies.

Around 10:30 that night, Gene, Robert, Elaine, and the bartender, Denise Williams, were the only one's left in the tavern. Denise told them because of the Easter holiday, she would like to close early if they didn't mind. Everyone helped Denise clean the bar. Around 11 p.m., they headed for the parking lot.

After leaving the tavern, Gene and Elaine headed out of the parking lot in their truck with their fishing boat in tow. Robert followed them but turned off in a different direction to do a couple of errands. The last of those errands was to stop by Gene's shed and pick up a couple of short boat oars Gene had given him. He was a little surprised that Gene and Elaine were not yet home when he got there. They should have been home by then. He thought that maybe Gene had stopped by the county garage to check on some equipment or something, but when he drove by the yard he saw no signs of Gene. Robert drove home, checked on his livestock, and climbed into his own bed for the last time on April 19, 1976.

As Robert climbed down off the farm tractor, one of the deputies told him he was being arrested for the murders of Herschel (Gene) Koller and Elaine Matte.

At 5:30 that morning, the bodies of Gene and Elaine had been found near their truck and boat on a levee road. Both had been shot to death. In less time than it would take most law enforcement agencies to process a double murder crime scene, Sutter County's finest had arrested their only suspect, Robert L. Dana. It was noon.

Earlier that morning someone heard about the murders and told the investigators about the “buddy” argument Robert and Gene had the night before. With that scant bit of information, Robert was arrested and jailed. Sutter County detective Frank Harrison, Jr. headed the investigation. Harrison spent the next several hours interrogating Robert. Robert repeatedly denied any knowledge or involvement in the murders of his two friends. Harrison taped the first interrogation. Two days later Harrison said the tapes were flawed and he wanted to re-record the interrogation.

Harrison asked more questions. Robert repeated his answers and explanations. Harrison would stop the tape and tell Robert to answer only “yes” or “no” to the questions. With the exception of what had occurred the previous evening at Joe's Landing, Robert never admitted to any crimes, nor did he have any facts about the case.

Harrison then called in someone from the Department of Justice to conduct a gunshot residue (GSR) test on Robert's hands. Before the test Robert was asked if he had recently shot a gun. Robert answered that on Sunday he had shot and

killed a snake in the farm field. He told them where they could find the snake and spent casings. They never looked. He was then asked if he worked around lubricants. He told them he did daily maintenance on the farm equipment. (Lubricants can give false GSR test results.) Later that day, the person conducting the test returned to the interrogation room and told Harrison that they may have a problem. The GSR test was positive, but due to the fact he had shot a gun and had worked with lubricants, it was inconclusive. Harrison instructed him to write up the test as positive for GSR.

Over the course of the next several months Robert was offered plea deals by Detective Harrison and District Attorney H. Ted Hansen. Still having faith in the justice system, Robert refused the plea bargains.

Robert had been assigned a public defender by the name of Roy D. VanDenHeuvel. As his trial date neared - almost a year later - Robert became concerned that his public defender wasn't focusing on his case, and his defense but rather seemed to have little time at all for Robert due to his busy schedule. Reports surfaced that DA Hansen and VanDenHeuvel had been seen together discussing Robert's case over lunch. In one last attempt, Robert says Hansen visited his cell to offer him one more plea bargain. Hansen said he had a number of unsolved murders in the county and the public was getting restless. He promised Robert that if he pleaded guilty to all the murders he could assure Robert that he would not get the death penalty. Robert stopped short of physically throwing Hansen out of his cell.

At trial, the district attorney put on a strictly circumstantial case. There was no physical evidence linking Robert Dana to the murders. Denise Williams testified concerning the argument she witnessed that fateful Easter evening. Prosecutors said that was the motive. They recovered a gun from the river, but ballistic experts testified the tests on the gun and bullets to be “inconclusive.” They also had the testimony that Robert's hands had tested positive for gunshot residue.

Robert's public defender seemed to do very little to dispute the evidence -- or lack thereof -- presented by the prosecution. There was no confession, no blood evidence, no witnesses, inconclusive ballistics, and inconclusive GSR testing. Instead, VanDerHeuvel seemed to focus on a defense of “diminished capacity.” He was trying to show the jury that if Robert had committed these murders it was because he was drinking and taking prescription medication and just could not determine right from wrong. This flawed “defense” did not impress the jury.

On March 22, 1977, Robert Dana was found guilty and sentenced to seven years-to-life for the murders. His appeals, which were also filed by public defenders, have been rejected. District Attorney H. Ted Hansen, now a superior court judge in Sutter County, has fought all of Robert's attempts for parole. Robert says that parole board members told him that if he would admit to the crimes and show remorse he would have a better chance at freedom. Robert refuses.

Recently, there has been some hope for Robert. Someone came forward in early 2004, nearly 28 years later, who may have information that had not been discovered at the time this case was tried. That person has indicated an interest in helping in the search for truth.

You can contact Robert at:
Robert Dana B-81537
CMF J-186-L
P O Box 2000
Vacaville, CA 95696-2000

Robert's outside contact is C'Rene Dana at
CVDana@sbcglobal.net



Conviction Without Evidence - The Gary Lee Morris Story

By Gary Lee Morris

Edited by Karyse Philips, JD Editor

In 1994 my mother was 80 and living on a fixed income. Along with her small social security check, she relied on payments she received from renting a mobile home to my daughter, Sherry. For thirteen years Sherry lived in the mobile home and met her obligations faithfully. Then in 1993 her boyfriend, Joe Piper, started staying with her sometimes. Joe was a loafer. He used drugs and didn't maintain a regular job. Joe's drug abuse quickly drove my daughter into debt. Soon she was behind on her utility bills and rent payments. For an entire year my mother suffered from a lack of an adequate income because my daughter was not paying rent. My mother's social security check did not cover the taxes and other expenses that were piling up on her mobile home. My mother became desperate and in her desperation she decided to evict Sherry.

Sherry fought with me and the rest of our family all the time. With Joe's arrival, Sherry had become another person. When we asked her about her failure to meet her obligation in rent payments to my mother, she would go into a rage and tell us to "butt out" of her business. She was out of control, but no one realized just how far out of control she had gotten until the police stormed in one day to arrest me.

In June 1994, I was cleaning my mother's trailer. Sherry had been evicted and I was getting the mobile home ready for new tenants. I was in the back of the trailer vacuuming. Suddenly I heard a loud crash and then voices shouting out my name. There were state and local police everywhere. One of them grabbed me and handcuffed me while other officers went about searching for anyone else who might be present. I was terrified! I shouted, "What's going on here?"

"You're being arrested for raping your 13-year-old grand-

daughter; that's what's going on here!" said one of the officers. Terror swept through me. I could not believe this was happening. With the exception of a minor traffic ticket, I had never been in trouble with the law. Now I was being arrested based on an accusation of a major crime and being taken to jail.

The rest of the day I was in a fog. I remember being questioned by detectives and being accused of the most disgusting criminal acts imaginable - against my own granddaughter. I was arraigned on three counts of Criminal Sexual Conduct in the first degree and three counts of Criminal Sexual Conduct in the second degree. My bond was set at \$300,000 and I was given a court-appointed lawyer. Three months later the bond was reduced to \$150,000. I was released after my mother and I put up our houses for collateral and paid a bondsman \$15,000.

While I was out on bond, I learned that the rape charges had been initiated the day before my daughter had been evicted from my mother's trailer. When I discussed this with my court-appointed lawyer, he told me not to worry because the charges were obviously fraudulent and would be dismissed before the case went to trial. Six months later the prosecutor was attempting to negotiate a plea bargain in which I would serve a year in the county jail.

I refused to accept a plea bargain or admit to a crime for which I was not guilty. I made up my mind to go to trial. I could not believe a jury would convict an innocent man.

My trial lasted two days. It was a one-sided circus in which the prosecutor was the ringmaster. My lawyer sat there like a potted plant and offered no defense on my behalf. The prosecution claimed that, in March 1991, when my granddaughter was 10-years-old, she was sexually abused by me in my apartment. There was no physical evidence produced to support this claim. The prosecutor also claimed that in April 1992 I drove my granddaughter to school and that on the way there she performed oral sex on me. Evidence surfaced during the trial that showed that my daughter, Melody, drove my granddaughter to school along with her two kids on that particular day, and that I was at home in my own apartment. The prosecutor also said that in September 1993 I had sexual

intercourse with my granddaughter. This claim was impeached with conflicting statements and reports.

The physical evidence did not support the claims made by the prosecution. To the contrary, a report written by Dr. Charfoos, the doctor my granddaughter was taken to, shows that my granddaughter's hymen was still intact at the time of her examination. In fact, Dr. Charfoos report shows no lacerations or lesions to indicate a rape had occurred.

The entire trial consisted of prosecutorial manipulation of the evidence that was designed to prejudice the jury. My lawyer sat there like a bump on a log and did nothing to contradict the prosecutor's portrayal. The medical evidence established that after two-and-a-half years of alleged sexual assault my granddaughter was still a virgin. That one fact conclusively proves the alleged crimes were not committed against my granddaughter. Yet my court-appointed lawyer did not attempt to convey the exculpatory facts to the jury. Instead, he inexplicably let the prosecutor run the show in a most convincing way. The jury was not out more than three hours before they returned a verdict of guilty.

I was sentenced to 20 to 40 years in prison. The Michigan Court of Appeals affirmed my conviction and sentence, and the Michigan Supreme Court denied leave to appeal to that court. I am currently pursuing an appeal in the Federal Sixth Circuit Court of Appeals.

I am hopeful that someone on the outside will take up my cause and help me gather evidence that will satisfy a court of my innocence. One specific request I have, is if a qualified person will be willing to review the medical reports in my case and give an opinion on their contents. My daughter has those reports, and her address is below.

Thank you, for taking time to consider this travesty,

Please contact my other daughter for additional information
Melody Morris
123 N. Corbin
Holly, MI 48442



Steven Manning Awarded \$6.6 Million For FBI Agent's Frame-up

By JD Staff

On January 24, 2005, a federal jury in Chicago awarded Steven Manning \$6,581,000 in damages after finding that two FBI agents framed him for two different prosecutions. The jury deliberated for 6-1/2 days after a five-week trial. The two FBI agents were Robert Buchan and Gary Miller.

Manning was a former Chicago police officer working as a limousine driver and security guard when he was arrested in 1990 for allegedly kidnapping two reputed Kansas City drug traffickers in 1984. Prior to the arrest, Manning had been working as an FBI informant, but after he quit in 1986 he was hounded so much to resume providing information that he sued the agency for harassment.

Buchan was the investigating FBI agent in the Missouri case. Manning's conviction was based on the testimony of three prosecution witnesses. However, the jury in the civil suit found that Buchan had influenced the testimony of those witnesses and concealed his conduct from the state prosecutors involved. He actually bought the testimony of one of the witnesses with a promise of payment. Manning was sentenced to two life terms plus 100 years for the kidnapping conviction. However it is unknown if the kidnapping ever took place, or if Buchan fabricated it.

Buchan and Miller were investigating agents in the 1990 murder of Chicago trucking company owner Jimmy Pellegrino. After Manning's kidnapping conviction, they tagged him for the murder and he was convicted in 1993 and sentenced to

death. His conviction was built on the testimony of jailhouse informant Tommy Dye who claimed that Manning confessed to him by grabbing his arm, putting a finger to his head like it was a gun, and saying, "This is how I killed Pellegrino."

During the civil trial Dye testified by video hookup from a California prison about how he tailored his testimony to what Buchan and Miller told him would fit the prosecution's theory of Pellegrino's murder. He also said that as a reward for his help, Buchan and Miller let him have conjugal visits in an FBI office. Dye is somewhat infamous, since he was featured in a 1999 *Chicago Tribune* investigation into the reliance of Illinois prosecutors on jailhouse informants in death penalty cases.

Manning's murder conviction was reversed in 1998 when the Illinois Supreme Court ruled that his prosecutors used improper evidence, including Dye's unreliable testimony. Lacking evidence of Manning's involvement in Pellegrino's murder, Cook County prosecutors opted to drop the murder charge in 2000 instead of retrying him.

Still serving time for the Missouri kidnapping conviction, in 2003 the Federal Eighth Circuit Court of Appeals ordered a new trial for Manning based on ineffective assistance of counsel, the FBI's improper recruitment of his girlfriend as a government agent, and judicial errors. Again lacking evidence of Manning's involvement in the kidnapping, or even if it had ever occurred, prosecutors opted to drop the charge instead of retry him. Manning was released in February 2004 after 14 years of wrongful imprisonment.

The civil juries finding that FBI agents had framed Manning by successfully manipulating witnesses and manufacturing evidence in two separate cases is not just unusual, but it may be a first in U.S. legal history. Manning argued during his trial that the agents were motivated by revenge because he

sued them for harassment after he quit as an FBI informant.

After the jury announced its decision, the trial judge, U.S. District Judge Matthew Kennelly needed to determine whether the FBI is shares responsibility with agents Buchan and Miller for Manning's malicious prosecutions. If Judge Kennelly makes that finding, the damages would be increased by an amount he would determine the FBI is liable for.

In a joint statement after the verdicts, U.S. Attorney Patrick J. Fitzgerald and the acting head of the FBI's Chicago office defended Buchan and Miller, so it is unlikely that they will be the subject of a criminal investigation for their actions. In the statement they cast aspersions on the juries findings by writing, "We do wish to make clear now, however, that we remain confident that the agents who were sued did not engage in any misconduct in this matter."

Defended by the Office of the U.S. Attorney, that attitude was also evident during the civil trial's closing arguments, when the federal attorney described both Buchan and Miller as dedicated and law-abiding FBI agents. Buchan and Miller remain employed by the FBI. Jon Loevy, Manning's attorney, commented on the government's position, "They're saying until the end of the day that justice was done when Steve Manning was sent to prison." The degree to which the government is unwilling to admit wrongdoing in Manning's case is indicated by Loevy's comment that it may pay the judgment against Buchan and Miller.

After the verdict, Manning, now 54, thanked the jurors and his lawyers. He said, "It is a long, long way from Death Row to complete vindication."

Sources:
Jury believes ex-Chicago cop framed by FBI: \$6 million-plus damages awarded, by Matt O'Connor (staff reporter), Chicago Tribune, January 25, 2005
Ex-Death Row Inmate Wins Suit Against FBI Agents, Reuters, January 24, 2005



False Confessions Are Alive And Well In The U.S.

Anyone suffering from the misapprehension that the Supreme Court's 1966 decision in *Miranda v. Arizona* had a positive impact on reducing false confessions in this country will get a much needed dose of reality from the following articles, plus Harold Hall's story of exoneration after falsely confessing to two murders that is elsewhere in this issue of *Justice Denied*.

Innocent people falsely confess everyday, and it is not due to inadvertent or negligent conduct by police interrogators, but rather, it is attributable to their training. In the March 2004 law review article exploring false confessions that inspired the article on the facing page, Professors Steven Drizin and Richard Leo explain that police interrogators are trained in coercive techniques that trigger a suspect to use the logic that confessing to a serious crime is in the person's self-interest. However those techniques don't distinguish the innocent from the guilty: Thus with the expectation of getting a lesser sentence, innocent people can and do rationally deduce - just like people who are guilty - that under the circumstances of their situation it is better to confess than deny involvement with a crime.

Furthermore, the hallowed *Miranda* decision did not impair the application of those techniques. That is why there has not been an identifiable reduction in the rate of confessions - including false confessions - since 1966. To the contrary, there is evidence they have increased.

Miranda imposed the obligation on the police to inform a person in a custodial setting of his or her rights to remain silent and to consult with a lawyer prior to their interrogation. After which - in the absence of a finding that the person was subjected to physical or psychological torture - a person's incriminatory admissions would be considered to have been the result of a "voluntary, knowing and intelligent" waiver of his or her rights.

Miranda's procedural requirement was interposed in place of the "voluntariness test" that had previously been relied on to determine the admissibility of a challenged confession on a case by case basis. While not perfect, the "voluntariness test" examined the totality of an interrogation's circumstances, whereas a *Miranda* hearing is centered on the time a suspect was or was not read his or her rights. Thus *Miranda* replaced a substantive judicial procedure that publicly exposed the intimate and all too often embarrassing (and possibly criminal) details of an interrogation with a process primarily concerned with determining if a bureaucratic procedure was followed prior to the interrogation itself. In hindsight, it was inevitable that *Miranda* would do nothing to protect people in this country from interrogation techniques - particularly psychological ones - that are proven in their effectiveness to extract a confession from the innocent as well as the guilty.

There is no fail-safe catch-all method of determining the truthfulness of a confession or if the person giving it is innocent or guilty. However there are easily implemented procedures that will improve the likelihood a confession is more veracious. The Supreme Court recognized in *Miranda* that the only way a suspect can effectively be protected from involuntarily waiving his or her right to silence is to consult with a lawyer about their situation.

Miranda however, was fatally deficient in its implementation of that idea. The Supreme Court left it up to a suspect's interrogators to inform the person of their rights to silence and counsel, and that anything the person says can and will be used against him or her. Yet it is not in the professional self-interest of police interrogators - who are trained to assume all suspects are guilty - to faithfully respect the letter and spirit of *Miranda*, and so they don't. Looking at the situation from the perspective of an interrogator, conscientiously respecting the due process rights of a suspect presumed guilty undermines the likelihood the person will be induced to begin talking and incriminate him or herself prior to consulting with a lawyer. Once a *Miranda*

Man Cleared 12 Years After Falsely Confessing As Serial Killer

By Theresa Torricellas, JD Correspondent

In March 2004, California prisoner David Allen Jones was released from state prison after a police cold case unit investigation discovered that DNA evidence conclusively linked state prisoner Chester Dwayne Turner to at least two of the three slayings for which Jones was convicted. The DNA evidence also indicated Turner could be responsible for ten other unsolved murders.

Turner, confined in state prisons for a 2002 rape conviction, became a suspect in the murders as a result of his DNA being matched to evidence from a dozen murder cases in the Los Angeles area. Police Detective Cliff Shepard, member of a special unit designed to investigate the city's unsolved killings, submitted a semen sample from the unsolved 1998 rape-strangulation murder of Paula Vance to the LAPD crime lab to see if it would match the DNA of any known criminals on file.

After Turner was linked to the Vance killing and detectives discovered he was already in prison, they further researched Turner's background, then reviewed a computer database of 50 to 60 similar motivated murders occurring in the general area of crimes to which Turner had been linked. The database, which failed to distinguish between solved or unsolved crimes, included homicides for which Jones had been convicted, and was serving a prison sentence for.

Observing that Jones' blood type did not match the body fluids recovered from the crimes of which he'd been convicted, but that Turner's blood type did not provide a match, detectives ordered follow up DNA testing which linked Turner to the murders and led to Jones' exoneration.

Over a three month period in late 1992, the bodies of three strangled prostitutes were found in and near the 97th Street Elementary School in South Los Angeles. After searching

waiver is obtained, the legal bar to the admissibility of an innocent suspect's incriminating statements is effectively removed. So as the article on the facing page explains, a variety of psychological techniques are employed by interrogators determined - by hook or by crook - to induce a *Miranda* waiver from a vulnerable, and all too often innocent suspect.

However the solution to correct that situation is deceptively simple: prohibit *any* interrogation of a suspect prior to their consultation with a lawyer. That removes an interrogator or anyone else associated with the prosecution from being involved in something - enforcing a suspect's right to silence and consultation with an attorney - that they not only have no interest in doing, but that they will sabotage if at all possible.

That is not a new idea, nor is the observation that *Miranda* was a ceremonially important decision that actually made it easier for the police to obtain legally admissible incriminating statements. In *Are Confessions Really Good For the Soul?*, a 1987 *Harvard Law Review* article, Charles Ogletree wrote:

Although *Miranda* warnings may seem adequate from the detached perspective of a trial or appellate courtroom, *in the harsh reality of a police interrogation room they are woefully ineffective*. My own experience as a public defender has been that many suspects make statements during the process of police interrogation and are surprised to learn thereafter that they had a constitutional right to remain silent or to have an attorney present during questioning. This pattern suggests that *Miranda* warnings as currently delivered by the police are not an effective means of informing suspects both of the existence and extent of their privi-

recent sex crime reports for a suspect, police investigators focused on David Jones.

Jones, a mentally retarded, part-time janitor with an IQ between 60 and 73, and the mental capacity of an eight year-old, lived on 101st Street, near the killings, was already in jail charged with attempted rape of a prostitute near the school, and years before had been arrested near the school with a prostitute.

Frederick Miller, the lead robbery-homicide investigating detective in the deaths, interrogated Jones three times over the course of two days. He obtained incriminating admissions from Jones that placed him at the crime scene, fighting with the victims, and putting them in a police-style choke hold to subdue them.

During the first unrecorded interview at the jail, detectives showed Jones photographs of the crime scene locations. During subsequent taped interviews, prodded by detectives, Jones admitted having sex and smoking crack cocaine with the victims at the locations where their bodies were found, then fighting with the women and placing them in a choke hold after they demanded more money and drugs. Jones nonetheless denied having killed any of the women, insisting they were alive when he left them.

During the taped interviews, Jones was asked leading questions, and corrected by detectives when he gave statements that contradicted the evidence or his prior statements. Detectives corrected Jones twice on the crime location for one of the victims. Jones was also driven to the crime scenes so detectives could video tape him pointing out where events occurred.

After Miller finished interrogating Jones, he turned Jones over to a detective investigating the September 13, 1992 killing of Crystal Cain, a prostitute whose body was found a quarter-mile from the school. Jones admitted having fought with Cain, but again denied any killing.

Jones was then charged with four murders in the deaths of Tammie Christmas, Mary Edwards, Debra Williams and

Man Cleared continued on page 21

lege against self-incrimination and of their right to consult with counsel before they make any statements.

...
I would propose the adoption, either judicially or legislatively, of a per se rule prohibiting law enforcement authorities from interrogating a suspect in custody who has not consulted with an attorney. If, after conferring with counsel, a suspect desires to make a statement, it may be used against her. *Any statements made without the assistance of counsel, however, would be inadmissible.*"¹

Under *Miranda* the federal constitution theoretically provides the shield of legal counsel to protect an innocent suspect from making false incriminating statements when confronted by police interrogators. However that protection is hollow for a suspect nakedly confronted by psychologically sophisticated interrogation techniques intended to extract information - but which do not discriminate as to the quality of that information. Furthermore, wealth and fame provide no protection from a person's susceptibility to those techniques. Although at this point it is unknown if she is innocent, Martha Stewart is a high-profile example of a convicted person whose prosecution was dependent on statements investigators induced her to make while she was unassisted by legal counsel.

False confessions are alive and well in this country, and their use to prosecute an innocent person will continue unabated until there is a blanket absolute evidentiary exclusion of all statements made to an interrogator by a person directly and immediately unassisted by counsel. *Hans Sherrer*

¹ *Are Confessions Really Good For the Soul?: A Proposal To Mirandize Miranda*, Charles J. Ogletree, 100 *Harvard L. Rev.* 1826 (1987), at 1827-1828, 1830 (emphasis added).



Miranda's Failure To Protect The Innocent Exposed in False Confession Study

By Hans Sherrer

Whether in a movie, television or real life, many millions of people have heard the Miranda warning:

"You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to be speak to an attorney, and to have an attorney present during any questioning. If you cannot afford a lawyer, one will be provided for you at government expense."

However the Miranda warning is a phrase that is as little understood as it is commonly known. So a pertinent question is: Why did the Supreme Court rule in *Miranda v. Arizona*, 384 U.S. 436 (1966), that a person "questioned while in custody or otherwise deprived of his freedom of action in any significant way," must first be informed of his or her rights to remain silent and to consult with an attorney? ¹ The answer to that question is clarified by briefly explaining several Supreme Court decisions that proceeded *Miranda*.

In 1936 the Supreme Court ruled in *Brown v. Mississippi*, 297 U.S. 278 (1936) that a confession obtained by the use of physical torture is a violation of the person's Sixth Amendment right to due process. In its decision the Court stated:

Further details of the brutal treatment to which these helpless prisoners were subjected need not be pursued. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government. ² ... That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. ... Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief inequity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The constitution recognized the evils that lay behind these practices and prohibited them in this country. ³

Four years later, in *Chambers v. Florida*, 309 U.S. 227 (1940), the Court extended application of the due process clause to a confession obtained by the use of psychological torture techniques. The Court stated in part:

For five days, petitioners were subjected to interrogations culminating in Saturday's (May 20th) all-night examination. Over a period of five days, they steadily refused to confess, and disclaimed any guilt. The very circumstances surrounding their confinement and their questioning, without any formal charges having been brought, were such as to fill petitioners with terror and frightful misgivings. Some were practical strangers in the community; three were arrested in a one-room farm tenant house which was their home; the haunting fear of mob violence was around them in an atmosphere charged with excitement and public indignation. From virtually the moment of their arrest until their eventual confessions, they never knew just when any one would be called back to the fourth floor room, and there, surrounded by his accusers and others, interrogated by men who held their very lives -- so far as these ignorant petitioners could know -- in the balance. The rejection of petitioner Woodward's first "confession," given in the early hours of Sunday morning because it was found wanting, demonstrates the relentless

tenacity which "broke" petitioners' will and rendered them helpless to resist their accusers further. To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol.

We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. ... Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution -- of whatever race, creed or persuasion. ⁴

So for decades prior to *Miranda*, a confession deemed to have been the product of either physical or psychological torture was inadmissible as evidence against a defendant under the Federal constitution's Sixth Amendment due process clause (and applicable to the State's under the Fourteenth Amendment -- since both *Brown* and *Chambers* originated as state cases.). In contrast, Ernesto Miranda's appeal to the Supreme Court revolved around the issue of when a confession is constitutionally admissible as evidence in a criminal proceeding under the Fifth Amendment's bar against self-incrimination and the Sixth Amendment's affirmation of the right to the assistance of counsel. In its majority opinion, the Court recognized in *Miranda* that many known physical techniques can effectively induce a person to involuntarily confess to a crime. ⁵ The Court also recognized that while they were less well known than physically coercive methods, psychologically coercive techniques intended to induce a state of mental disorientation were actually more widely used to elicit an incriminating statement or confession. ⁶ However irrespective of the method(s) used, the Court gave notice that there is an all too real possibility that an innocent person will be induced to falsely confess when subjected to a police interrogation. ⁷

The Court further recognized that compounding the possibility of falsely confessing, is that an interrogated person who isn't counseled by a lawyer is more likely to involuntarily waive his or her right to remain silent than a person who doesn't have counsel available. ⁸

Premised on the idea that the Fifth Amendment only protects a person against an involuntary confession, and that in the absence of counsel a person is more likely to involuntarily confess, the *Miranda* decision approached the enforcement of that amendment's protection by establishing a 'procedural waiver test' that would be administered by a law enforcement officers involved. Hence, if a person is informed of his or her rights to remain silent and consult with an attorney prior to being questioned in a custodial setting about a crime, and that person does not exercise those rights, then he or she is legally presumed to have "voluntarily, knowingly, and intelligently" waived them. ⁹ Henceforth, anything the person says that may be incriminating is legally admissible as evidence unless it can be proved to be the product of physical and/or psychological torture. Thus under *Miranda* and its progeny, as long as a law enforcement officer follows the proper procedure of obtaining a Miranda waiver from a person in custody and doesn't engage in actions determined to be tortuous, a suspect's confession can be used as evidence against him or her.

However, in spite of the Supreme Court's recognition of how effective psychological techniques are at coercing a

False Confessions Are Wrung From The Mentally Impaired

By Theresa Torricellas, JD Correspondent

Minors and the mentally impaired are more prone to making false confessions and incriminating admissions to police, even though the able-minded can make false admissions during interrogations as a result of psychological pressure by police, according to experts and their studies. Professors Steven Drizin and Richard Leo reviewed cases of 125 person who were exonerated after making a false confession, and found that 32% were minors, which 22% were mentally retarded.

Law Professor Morgan Cloud co-wrote a study which found that even the mildly retarded are often incapable of understanding a police Miranda warning about their right to remain silent and to consult with a lawyer. Cloud found "They are more likely to go along, agree and comply with authority figures -- to say what police want them to say -- than the general population."

According to the Innocence Project at Cardozo University, 25% of the people exonerated by DNA evidence through 2003 had falsely confessed or made incriminating admissions. "False confessions are not an anomaly," said Professor Leo, "they happen with regularity." Coercive police interrogations are the main reason an innocent falsely confesses to a crime, according to Richard Ofshe, a UC Berkeley sociologist who has reviewed 700-1,000 confessions.

The likelihood of being convicted multiply once a suspect has made an incriminating statement that is admitted into evidence at trial. According to Drizin, "Jurors simply cant' get over their reluctance to believe that anybody would confess to a crime they didn't commit, especially murder."

Experts believe that requiring police to tape or video record all suspect interviews from the very beginning, including Miranda warnings, would help ensure confessions and admissions are truthful. "Tape recording will prevent police from doing the extraordinary things that need to be done to cause an innocent person to confess," said Ofshe, who believes that video or voice recording would reduce false confessions by as much as 90%. Two states, Alaska and Minnesota, already require such recordings.

Source: Telling Police What They Want to Hear, Even If It's False, Maura Dolan and Evelyn Larrubia, Los Angeles Times, October 30, 2004.



confession, it overlooked the use of such techniques to induce an unintelligent, unknowing and/or involuntary Miranda waiver - after which the interrogated person's statements would be admissible against him or her. The Court also overlooked the use of psychological techniques to induce a person who invokes his or her right to remain silent and consult with an attorney, to then reverse that decision and waive those rights prior to having an opportunity to talk with a lawyer. Those oversights by the Court were succinctly noted in a 1987 Harvard Law Review article by Charles J. Ogletree, *Are Confessions Really Good For the Soul?: A Proposal To Mirandize Miranda*:

Although Miranda warnings may seem adequate from the detached perspective of a trial or appellate courtroom, in the harsh reality of a police interrogation room they are woefully ineffective. My own experience as a public defender has been that many suspects make statements during the process of police interrogation and are surprised to learn thereafter that they had a

Miranda's Failure continued on page 19

69% of Innocent People Signed False Confession In Experiment

By Hans Sherrer

Sixty-nine percent of the 79 participants in a 1996 experiment at Williams College signed a confession after being falsely accused of causing a computer program to crash with the loss of data. The experimenters, Saul Kassin and Katherine Kiechel, wrote about their findings in *The Social Psychology of False Confessions* (see, *Psychological Science*, V. 7. N. 3, 125-8, May 1996).

The 40 males and 39 females that participated were told they were involved in a typing experiment. They were instructed to type on a computer keyboard letters spoken by a tester. However they were warned not to press the “ALT” key, since it would cause the computer program to crash and data to be lost.

The participants were not told that the object of the experiment was to find their response to being falsely accused and interrogated about their supposedly negligent act of pressing the “ALT” key while typing the letters.

The study was intended to provide information about four areas of false confessions about which little information is known:

- How often will the presentation of false evidence lead a person to confess to an act they didn’t commit?
- How many of the people who falsely confess believe their confession is true?
- How many of people who believe their false confession fabricate details about their non-existent act?
- How does the level of a person’s certainty about their innocence affect that person’s vulnerability to falsely confessing?

To measure the effect of a participant’s certainty of not pressing the “ALT” key on their likelihood of falsely confessing, the letters to be typed were read slowly (43 letters per minute) to half the participants by a tester, and 50% faster (67 letters per minute) to the other half. The idea being that with more time to press the “right” key, the participants in the former group would be more certain of their innocence of pressing the “ALT” key, and thus have a “lower vulnerability” to falsely confessing than the latter group, who with less time between keystrokes might have a “higher vulnerability” to falsely confessing. Table A below shows the experiment found there is a correlation between certainty of one’s innocence and signing a false confession.

To measure the effect of confronting a suspect with false evidence of his or her guilt, half the participants were told an onlooker (a confederate in the experiment) was an eyewitness to their pressing of the “ALT” key, while the other half were not presented with independent evidence that they had pressed the ALT” key. The idea being that the former group might be less certain of their innocence than the latter group.

Table A shows that when confronted with the evidence that their pressing of the “ALT” key was witnessed by another person, 94% of the innocent participants signed what was in fact a false confession. Perhaps more remarkably, 54% of those people believed they had pressed the “ALT” key when they hadn’t, and 20% confabulated facts explaining their non-existent pressing of the “ALT” key.

Since interrogators are trained to increase a suspect’s vulnerability by lying that evidence ties him or her to the crime (e.g., an eyewitness, fingerprints, DNA, etc. that doesn’t actually exist), the experiment’s finding about the rate of false confessions when an “eyewitness” confirms that the “ALT” key was pressed is important for understanding what happens during a real world police interrogation.

The meat of the experiment began when the computer screen suddenly went blank as a participant was typing a

letter. The tester then examined the keyboard and the computer. After verifying that data was lost, the tester asked the participant: “Did you hit the “ALT” key?” All the participants initially denied pressing the “ALT” key (Mimicking the reflex response: ‘No Mommy! I didn’t take the cookies out of the cookie jar!’). However, whether the answer was affirmative or negative, the tester than wrote out a confession that the participant was asked to sign, “I hit the “ALT” key and caused the program to crash. Data was lost.” (126) Each participant was told a consequence of signing the confession would be a phone call from an investigator. If the participant refused to sign, they were asked a second time. Eventually, a high percentage signed the confession.

In addition to signing a confession, some participants made a voluntary statement. Among them, “I hit the wrong button and ruined the program.”; “I hit a button I wasn’t supposed to.”; and, “I hit it with the side of my hand right after you called out the ‘A’”. (126-7)

After each participant had either signed the confession or refused to do so, they were told that they hadn’t pressed the “ALT” or caused the loss of any data. According to Kassin and Kiechel, they mostly “reacted with a combination of relief (that they had not ruined the experiment), amazement (that their perceptions of their own behavior had been so completely manipulated), and a sense of satisfaction (at having played a meaningful role in an important study).” (127)

The experiment’s finding that there is a high likelihood an innocent person can be induced to falsely confess is highlighted by the finding that 35% of the participants falsely confessed who had a low vulnerability and no eyewitness claimed to have seen him or her press the “ALT” key. The experiments further finding that an innocent suspect is almost twice as likely to falsely confess when an interrogator lies about fake incriminatory evidence, suggests that techniques increases the unreliability of a confession to such a degree that it should be barred in real life.

Although critics correctly claim the experiment didn’t mimic the conditions of a police interrogation – that fact makes its findings all the more compelling. The participants were not subject to the overbearing pressure of being interrogated about a serious crime of which they knew nothing by the police in a hostile environment. They were all intelligent (avg. SAT over 1300), self-assured college students voluntarily participating in an activity and subjected to a grilling that they could have walked away from at any time. Furthermore, Kassin and Kiechel point out that the internalization of guilt and the fabrication of explanations by a significant percentage of the participants for their non-existent negligent action, “is not seriously compromised by the laboratory paradigm that was used.” In other words, it reflects what people do in the real world.

The experiment has serious implications for considering that a person’s claim of having falsely confessed has much more likelihood of validity than the incredulity that might intuitively be ascribed to such a claim. The importance of taking a false confession claim seriously is underscored by what was reported in a subsequent article that Kassin co-authored, *Coerced Confessions and the Jury*:

“In the studies reported in this article, mock jurors did not sufficiently discount a defendant’s confes-

Table A - Result when witness confirms the “Alt” key was pressed.		
Form of influence	Lower vulnerability	Higher vulnerability
Real world comparison	“Normal” people not under the influence of alcohol, drugs, etc.)	People mentally impaired by alcohol, drugs, retardation, etc.)
Signed false confession	89%	100%
Believed their confession was true	44%	65%
Fabricated facts supporting confession	6%	35%

sion in reaching a verdict – even when they saw the confession as coerced, even when the judge ruled the confession inadmissible, and even when participants said it did not influence their decision-making. The mere presence of a confession was thus sufficient to turn acquittal into conviction, irrespective of the contexts in which it was elicited and presented. (42)

...the presence of any confession powerfully increased the conviction rate – even when it was seen as coerced, even when it was ruled inadmissible, and even when participants claimed that it did not affect their verdicts.” (44) (*Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, Saul M. Kassin and Holly Sukel, *Law and Human Behavior*, Vol. 21, No. 1, 1997, 27-46.)

So once made, the negative consequences of a false (or suspect) confession cannot be undone by anything less than dismissal of the charges. Since that is a rarity, the integrity of the law enforcement system is grievously undermined by the prevalence of false confessions, the techniques used to obtain them, and the deficient ability of police, prosecutors, judges and jurors to detect a real confession from a false one, or to discount it as evidence when it is known to be false.



Jay Van Story Affidavit cont. from page 9

My name is A**** C**** A****, I live presently at *** ***** ** P****, Texas, *****, and I say the following to be true and under oath:

1. I have personal knowledge of the facts stated in this affidavit.
 2. I provided testimony at the time that Jay Van Story was prosecuted for molesting me and I make this affidavit in the interest of justice.
 3. When I was seven years old, my brother, R***** B****, molested me by touching my chest and vagina.
 4. R***** B**** told me to tell my mother that it was Jay Van Story who molested me. R***** B**** had previously threatened to get Mr. Van Story in trouble.
 5. I was scared of R***** B**** so I told my mother that Mr. Van Story touched me.
 6. Mr. Van Story, on one occasion, was my babysitter, but he never inappropriately touched me.
 7. My mother reported my false allegations to Child Protective Services (CPS). Roger Bowers and Connie Christian, investigators with CPS, came to my school, Stewart Elementary, in Lubbock, Texas. They removed me from class and locked me in a room. The principal left me alone in the room with Mr. Bowers and Ms. Christian. Mr. Bowers told me about the report and I told him immediately that my brother, Robert Bates, had molested me, and that Jay Van Story had never molested me. Mr. Bowers did not believe me and said that it was Jay Van Story who had molested me.
 8. Mr. Bowers and Ms. Christian took me to the CPS office from school where my mother and R***** B**** were present. I again tried to tell Mr. Bowers that Jay Van Story did not abuse me, but because of my brother's presence, I was pressured into falsely accusing Jay Van Story. I was removed from my mother's custody and lived in various foster homes for approximately the next seven years.
 9. After being removed from my home, I continued to falsely accuse Mr. Van Story during his trial because Mr. Bowers told me that it was the only way to get back with my Mom. In addition, Mr. Bowers and Ms. Christian coached me to falsely accused Mr. Van Story of molesting me. I also feared my brother, R***** B****.
 10. My mother's attorney, Johnny O'Shea, told my mother that she would never get me back if she did not cooperate with the CPS authorities and the prosecutors in convicting Mr. Van Story by corroborating the evidence against him. I know this to be true because my mother told me this before she died.
 11. When I was about fourteen, I was allowed to return home to the custody of my mother. At that time, R***** B**** continued to sexually abuse me on several occasions by variously touching my breasts, watching me in the shower, and in other ways. D***** E*****, my niece, has told me that R***** B**** abused her also. My husband, K**** A****, has seen R***** B**** in inappropriate situations with D***** E*****. This occurred as recently as about 1997 or 1998, after which two of my nieces and a nephew were removed from the custody of her grandmother, D***** L** C**** (my mother).
 12. I am coming forward with the truth at this time because my heart has been burdened by the fact that an innocent man is imprisoned because of my false testimony.
- I verify that the statements made in this affidavit are true and correct, and that I sign this affidavit freely and voluntarily.

A**** C**** A****

SWORN TO, SUBSCRIBED, AND ACKNOWLEDGED before me, the undersigned Notary Public, this 9th day of November, 2001.

J**** C*****

Notary Public for the State of Texas
My commission expires June 20, 2005



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constitutional right to remain silent or to have an attorney present during questioning. This pattern suggests that Miranda warnings as currently delivered by the police are not an effective means of informing suspects both of the existence and extent of their privilege against self-incrimination and of their right to consult with counsel before they make any statements. My clients and my colleagues' clients often report that, notwithstanding the warnings, they believed either that their silence could be used against them as evidence of guilt or, more frequently, that by remaining silent they would forfeit their opportunity to be released on bail.

These reports reflect a serious flaw in the *Miranda* majority's hope that suspects would decide to waive their rights only "voluntarily, knowingly, and intelligently." (*Miranda*, 384 U.S. at 444) Under *Miranda*, the police themselves have the responsibility to advise a suspect of her rights. The police, however, have little interest in protecting the suspect's right to a knowing and intelligent waiver. Their objective is to obtain a confession, and therefore it is unlikely that they will fully inform the suspect of her right to counsel or her right to remain silent, or dispel misconceptions about those rights.

Moreover, when a suspect is confronted by the police, whether on the street, at the police station, or at home, there appears to be an almost irresistible impulse to respond to the accusations, notwithstanding the *Miranda* warnings. In these settings, police may be accusatory, or appear to empathize with the suspect, or imply that cooperation is in the suspect's best interest, or simply lie about the strength of the evidence against the suspect. Suspects generally hope that by responding they will in some way improve their position. Suspects, generally unprepared for the trickery or outright deceit the police may use, are often coerced into confessing or incriminating themselves once they have waived their rights and agreed to talk. Even those who initially invoke their right to silence and request the assistance of counsel face pressure to waive those rights. Indigent suspects are likely to be told that counsel will not be available for hours or, in some jurisdictions, days. In these extra-judicial settings, *Miranda* warnings do not ensure that defendants will waive their rights only "voluntarily, knowingly, and intelligently."¹⁰

Those observations about the practical ineffectiveness of the *Miranda* decision to protect a suspect's right against self-incrimination are consistent with Patrick Malone's observation in the *American Scholar* the previous year (1986), that reciting the *Miranda* warning to suspects "has not appreciably affected the confession rate."¹¹

So twenty years after the *Miranda* warning was mandated, keen observers explained in respected journals that it was only providing a criminal suspect with an illusory shield of protection under the Fifth Amendment's right against self-incrimination and the Sixth Amendment's right to counsel.

Thus the Arizona Supreme Court's holding in *Miranda* - "We hold that a confession may be admissible when made without an attorney if it is voluntary and does not violate the constitutional rights of the defendant."¹² - that the Supreme Court rejected upon review, has prevailed in actual practice.

One expected consequence of the failure of *Miranda* to protect a person targeted for a criminal interrogation against incriminating him or herself, is that it would be ineffective at protecting an innocent person from falsely confessing to a crime. That is more than a logical supposition, but a fact.

False Confessions Have Continued After *Miranda*

The phenomena of false confessions has been explored in a number of legal and lay articles, and books over the past

several decades. That literature was significantly contributed to by a March 2004 *North Carolina Law Review* article by Professors Steven Drizin and Richard Leo.¹³ Their 111-page article, *The Problem of False Confessions in the Post-DNA World*, is notable for two reasons: it reports on an analysis of 125 cases of false confession, more than twice as many as any previous study; and it only includes proven cases of false confession. The crux of the article is identifying how and why a false confession can have a causal role in a wrongful conviction. The article's six parts are summarized as follows:

- Part I discusses from a historical perspective, the study of wrongful convictions and the prominent role that false confessions have played in such studies. Part I also discusses the development of DNA testing and its role in renewing interest in the study of wrongful convictions.
- Part II highlights the connection between police interrogation methods and false confessions, focusing principally on the social psychology of false confessions and research on the causes and consequences of false confessions.
- Part III discusses the methodology used to compile the false confessions that make up the database of case studies analyzed in the article, and the limitations of the data.
- Part IV sets forth the quantitative findings gleaned from the false confession cases included in the article.
- Part V takes a more qualitative approach to the false confession data by highlighting some of the common themes and trends that emerge from the cases studied, and describing illustrative cases in some detail.
- Part VI makes three policy recommendations that would be expected to reduce incidences of false confession. It also highlights some recent positive developments that suggest reforms designed to reduce the frequency of false confessions may stand a better chance of being implemented now than ever before.

Each of the article's six parts will be briefly explained.

Part I

The first study in this country that attempted to quantify the causes of wrongful convictions was *Miscarriages of Justice in Potentially Capital Cases* by Professors Hugo Bedau and Michael Radelet. Their 1987 *Stanford Law Review* article analyzed 350 cases of wrongful conviction from 1900 to 1987. One of their findings was that a false confession was involved in 14% of those cases. Two other studies of wrongful convictions since 1987 found a false confession was involved in 18% and 24% of the 28 and 62 cases that were respectively examined in those studies. Furthermore, 25% of the people exonerated by DNA evidence through 2003 had falsely confessed. (904) So research during the past two decades has confirmed that between 1/4th and 1/7th of exonerations involved a person who falsely confessed. A confession is considered damning evidence of guilt, and the wrongful conviction of those people was based wholly or in part on his or her false confession.

One of the prime values of an exoneration based on DNA evidence as contrasted with witness recantation, disclosure of prosecution concealed exculpatory evidence, etc., is it incontrovertibly proves the person's confession was false. Thus those exonerations underscore the realness of the phenomena, while at the same time undercutting the criticism of naysayers.

Part II

Through the first 35 years of the 20th-century, the police relied on "third degree" methods of inflicting physical pain and psychological torment to extract a confession from a stubborn suspect. In the words of Drizin and Leo:

"These techniques ranged from the direct and explicit use of physical violence (such as beating, punching, kicking or mauling a suspect) to more elaborate strategies of torture (such as the "sweat box," the "water

cure," and the "electric monkey") to physically and psychologically coercive techniques that did not leave marks (such as the use of a rubber hose, suffocation, extended incommunicado interrogation, or food and sleep deprivation) to lesser forms of psychological duress such as threats of harm and promises of leniency. As Ernest Jerome Hopkins wrote in the heyday of the third degree, "there are a thousand forms of compulsion; our police show great ingenuity in the variety employed." (907-908)

Since "third-degree" interrogation techniques began to be less commonly used in the mid-1930s after the *Brown* decision, the continuation of false confessions as a problem may seem "counter-intuitive" to the vast majority of people who haven't experienced what predominately replaced them - "the psychologically manipulative methods and strategies of police interrogators." (909) Consequently, many people mistakenly believe "that an innocent person will not falsely confess to a serious crime unless he is physically tortured or mentally ill." (909) However it is known the innocent people who falsely confess are not limited to the tortured or mentally unbalanced.

The article identifies that a significant reason false confessions occur is because a person targeted for interrogation is presumed guilty - and that belief provides a justification for the use of techniques that are designed to extract a confession that is likewise presumed to be true. Drizin and Leo observe, "Because it is designed to break the anticipated resistance of an individual who is presumed guilty, police interrogation is stress inducing by design; it is intentionally structured to promote isolation, anxiety, fear, powerlessness, and hopelessness." (910)

A widely accepted explanation for the effectiveness of those techniques to convince an innocent person to claim responsibility for something he or she didn't do, is known as The Decision-Making Model of Confession. The authors write, "According to this model, the interrogator's goal is to persuade the suspect that the act of admission is in his self-interest and therefore the most rational course of action, just as the act of continued denial is against his self-interest and therefore the least rational course of action." (912) Interrogators are aided in influencing a person to think the pragmatic thing to do is confess - even if it isn't true - by the absence of legal restraints on police lying to suspects.¹⁴ The authors emphasize this by noting, "American police often confront suspects with fabricated evidence, such as nonexistent eyewitnesses, false fingerprints, make-believe videotapes, fake polygraph results, and so on."¹⁵ The effect of those techniques is an accomplished interrogator is able to make an innocent person do what intuitively seems irrational - confessing to a crime - appear to be a rational means of minimizing the punishment that person has accepted is likely unavoidable. That is reflected in the fact that most false confessions are by "cognitively and intellectually normal individuals." (918)

The article also makes the point that, "Interrogation-induced false confession has always been a leading cause of miscarriages of justice in the United States." (918) However an apparent increase in the phenomena may be attributable to several reasons: In recent decades there has been an increase in the number of people prosecuted; and, in spite of the effectiveness of modern interrogation techniques, police training manuals and seminars ignore that the elicitation of a false confessions is a possible consequence.

Part III

The 125 cases of false confession analyzed in the article are of people proven innocent by one of four methods:

- It was objectively established the crime never happened.
- It was objectively established the person could not have committed the crime (such as being in a different state.).
- The true perpetrator of the crime was identified.

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- Scientific evidence - such as DNA - established the person's innocence.

To emphasize that false confessions are a problem under the United States' current legal framework, the article only includes cases that have occurred since the Supreme Court's *Miranda* decision. Many pre-1966 cases could have been included if Drizin and Leo had chosen to do so. They also make the point that although the frequency of false confessions is unknown, what is important "from a scientific perspective" is gaining an understanding of how and why they occur. (929)

Part IV

Statistically analyzing the article's false confession data reveals some interesting information. Thirty-five percent (35%) of the false confessors were under 18 years old, 58% were 18 to 39, and only 7% were 40 or older. (Table 3) That tends to indicate that the very young are disproportionately susceptible to falsely confessing, and that people approaching and beyond middle age may be less prone to doing so.

Ninety-two percent (92%) of the false confessions were to murder, attempted murder, or rape. That can be due to a combination of two reasons: There is more reporting of errors related to serious crimes; and a person suspected of a serious crime is more likely to be subjected to an intense interrogation. The effectiveness of modern psychological techniques is indicated by 50% of the interrogations lasted 12 hours or less and 89% lasted 24 hours or less. (Table 7) In contrast, the defendants in *Brown v. Mississippi* (1936) didn't break until after five days of physical torture.

Forty-four of the false confessions resulted in a conviction, with nine innocent people sentenced to death, ten to life in prison, and eight to more than 20 years in prison. (Table 8) Of those convicted people, 61% were imprisoned for more than six years before their exoneration. (Table 10) The article also relates that, "a false confessor who chooses to take his case to trial stands more than an 80% chance of conviction, despite the fact that he is officially presumed innocent, that he is in fact innocent, and that there is no reliable evidence confirming or supporting his false confession." (959) That finding indicates how prejudicial a false confession is to judges and jurors, even if it is demonstrably false and the person explains the unsavory details to the judge and/or jury of what the police did to obtain it. (960)

Part V

There are identifiable trends among false confessors. One is children, juveniles, and the mentally ill and impaired are particularly vulnerable to being induced to falsely confess. Two other trends are that more than 30% of the case's studied involved more than one person falsely confessing to the same crime, and several defendants falsely confessed to multiple crimes. (Table 6, 972, 981)

Jerry Frank Townsend's experience in Florida is an extreme example of how readily a false confession unsubstantiated by corroborating evidence is believed. Beginning in 1980 he was convicted on four separate occasions over a period of almost three years, of a total of six murders and one rape. (983-986) No physical evidence linked Townsend to any of the crimes, and all the convictions were based on his false confessions. Through a variety of means proof of Townsend's innocence came to light, and the last of his wrongful convictions was vacated in 2001 after he had been falsely imprisoned for 22 years. (983-986, esp. 986)

A bizarre consequence to an exonerated person can be their subsequent prosecution for having falsely confessed. After David Saraceno was convicted of arson based on his false confession to burning 15 school buses in Connecticut, his lawyer learned that the prosecution had concealed the identity of the actual arsonists. Burned by the disclosure of their dupli-

city, the prosecutors would only agree to dismiss the arson charge without a fight if Saraceno pled guilty to "hindering prosecution by falsely confessing." (991) In another case, Teresa Sornberger falsely confessed that she served as the lookout while her husband robbed a bank, and that she drove the getaway car. However before the couple's trial, bank surveillance tapes proved their innocence. Nevertheless, Mrs. Sornberger's prosecutors would only agree to voluntarily drop the bank robbery charges if she pled "guilty to obstructing justice for giving false information to authorities." (992)

One of the studies more disheartening findings is that the innocence of nearly a quarter (24%) of known convicted false confessors is not proven until after his or her sentence is served in full. (Table 14)

Part VI

The article concludes with three suggested courses of action to help alleviate false confessions.

- "Electronically record the entirety of all custodial interrogations of suspects." (993) As of January 2005, Alaska and Minnesota are the only two states that require the recording of interrogations - although Illinois is scheduled to begin doing so in July 2005. Federal law enforcement agencies aren't required to record interrogations. The importance of recording an interrogation as a method to help ensure the integrity of a confession has been recognized for more than forty years. In 1961, five years before the *Miranda* decision, ACLU attorney and future U.S. Magistrate Judge Bernard Weisberg argued for the need of "a record from start to finish of any interrogation in a police station." (994)
- Increase the "education and training" of police interrogators about how and why a person falsely confesses, with particular attention focused on the people most vulnerable - juveniles and the developmentally challenged.
- DNA testing should promptly be conducted when testable physical evidence exists. That would either expose a false confession, or exclude a person as a suspect before he or she falsely confesses.

Miranda Fails to Protect the Rights to Silence and Counsel

Professors Drizin and Leo's study is a significant contribution to understanding the phenomena of false confessions, and their suggestions to help minimize them are sound. Although they don't directly raise the issue, their study provides persuasive evidence that false confessions continue to be a serious problem in the United States because the *Miranda* warning fails to effectively shield a suspect from the de facto coercive effects of modern police interrogation techniques. Consequently, their study provides empirical support for an idea that would give teeth to the suggestion in *Miranda* that interposing a lawyer between a suspect and his or her would be interrogators may be the only way a person can meaningfully exercise their right to remain silent. In 1987 Charles Ogletree wrote in *Are Confessions Really Good For the Soul?*:

I would propose the adoption, either judicially or legislatively, of a per se rule prohibiting law enforcement authorities from interrogating a suspect in custody who has not consulted with an attorney. If, after conferring with counsel, a suspect desires to make a statement, it may be used against her. Any statements made without the assistance of counsel, however, would be inadmissible. This solution completes the *Miranda* Court's effort to reconcile conflicting doctrine on confessions in a way that maintains this nation's commitment to an accusatorial rather than an inquisitorial system of criminal justice, and reaffirms the constitutional values that motivated the decision.¹⁶

Although it doesn't go as far as Ogletree's proposal to protect a criminal suspect's rights, the Canadian Supreme Court ad-

opted a bright-line rule in the 1990 case of *R. v. Brydges* (1 S.C.R. 190) that has similarities to his suggestion. In *Brydges* the Court ruled that under the Canadian Charter of Rights and Freedom, "A detainee is advised of the right to retain and instruct counsel without delay because it is upon arrest or detention that a detainee is faced with an immediate need for legal advice, especially in respect of how to exercise the right to remain silent."¹⁷ The *Brydges* rule goes beyond the *Miranda* rule because it not only mandates that the police have an obligation to inform a detained or arrested suspect of their right to retain legal counsel, but that if they can't afford private counsel, "the police must furnish the detained or accused person with basic information about how to access those free legal services that are available in any particular jurisdiction for the benefit of persons who have been arrested or detained (for example, by calling a toll-free number or by being provided with a list of the telephone numbers of lawyers who act as duty counsel)."¹⁸ That mandate undercuts a tactic used by interrogators in this country that emasculates the meaning and the spirit of the *Miranda* rule: After reciting the *Miranda* warning, and in the instant before the person can respond that they want to talk to a lawyer, the interrogator injects that they can talk and anytime the suspect wants to stop they will do so. Experienced interrogators report that psychological trick is very effective at inducing a suspect to begin talking - even though the person's actual intent is to exercise their right to consult with a lawyer before waiving their right to remain silent.

In the 1994 case of *R. v. Bartle* (3 S.C.R. 173), the Canadian Supreme Court amplified on the reason for the *Brydges* rule:

"a person who is 'detained' ... is in *immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty*. ... [B]ecause the purpose of the right to counsel ... is about providing detainees with meaningful choices, it follows that a detainee should be fully advised of available services before being expected to assert that right, particularly given that subsequent duties on the state are not triggered unless and until a detainee expresses a desire to contact counsel. ... [T]he purpose of the right to counsel would be defeated if police were only required to advise detainees of the existence and availability of legal aid after some triggering of the right by the detainee."¹⁹

Yet the very process decried by the Canadian Supreme Court in *Bartle* as ineffective at protecting a person's rights, is the norm in this country. The consequence is a plethora of false confessions.

It was proposed in a 1996 article by Grace Ashikawa, *R. v. Brydges: The Inadequacy of Miranda and a Proposal To Adopt Canada's Rule Calling For The Right To Immediate Free Counsel*, that the U. S. follow in the footsteps of Canada by adopting a rule that people who are detained or arrested shall automatically be provided by the police with contact information (including toll free numbers when applicable), so they can immediately consult with a lawyer prior to making any decision about whether or not to waive their right to remain silent.²⁰ Although such a rule would fall short of Ogletree's proposal, it would go far beyond the *Miranda* rule by contributing to short-circuiting the subtle and not so subtle physical and/or psychological pressures that are exerted on a detained or arrested person in this country to waive his or her right against self-incrimination without having a meaningful opportunity to consult with a lawyer. As Ogletree pointed out in *Are Confessions Really Good For the Soul?*, police interrogators are trained to use techniques that can cause a person to "involuntarily, unknowingly and unintelligently" waive their right to remain silent and consult with a lawyer.²¹

The importance of requiring pre-interrogation attorney consultation is underscored by Drizin and Leo's finding that even "cognitively and intellectually normal individuals" are susceptible to falsely confessing when subjected to standard

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interrogation techniques.²² That a large majority of suspects succumb to police psychological tactics is supported by Professor Leo’s report in a previous article, *Miranda’s Revenge* (1996), that 81% of the 182 suspects he observed being interrogated waived their right to remain silent and to consult with a lawyer.²³ Leo’s real-world finding that a large percentage of people waive their rights was corroborated by an academic study involving 72 “subjects” (32 men and 40 women). Those participants were randomly assigned the role of either “stealing” or not “steal” \$100 from a drawer. When subjected to standard interrogation techniques, 81% of the innocent people waived their rights, while only 36% of those who “stole” the \$100 waived their rights. Psychology Professors Saul Kassin and Rebecca Norwick conducted the study. They wrote about its results in *Why People Waive Their Miranda Right*, published in April 2004 in the journal *Law and Human Behavior*.²⁴ Thus both Leo’s real-world findings and Kassin and Norwick’s academic findings suggest that an interrogated suspect who is actually innocent naively believes their innocence will protect him or her from saying something incriminatory. An innocent person is consequently very likely to submit to what they don’t understand is a full-scale criminal interrogation by experts trained in techniques proven to elicit a confession. Unfortunately those techniques are indiscriminate in their ability to extract a false confession from an innocent person as easy as, or perhaps easier than a valid one from a guilty person.

Although Drizin and Leo don’t indicate in their article that they intended to do so, its documentation of the prevalence of false confessions by people who were induced to waive their right to remain silent provides empirical evidence that *Miranda* only created the appearance of protecting important rights, while actually leaving them open to being routinely emasculated by the police. Thus, their article provides scholarly confirmation that *Miranda* has been a failure at protecting the right against self-incrimination of a suspect presumed under the law to be innocent - and who all too often is in fact innocent – while exposing as unfounded, the claim of *Miranda’s* critics that it impairs law enforcement efforts to secure a confession.

Drizin and Leo have consequently provided solid evidence that reliance on physically and/or psychologically coercive interrogation techniques is not only inhumane – which the Supreme Court acknowledged over 60 years ago – but that they produce information of questionable or even zero practical value – which the Court recognized almost 40 years ago.

The known susceptibility of a lone person to an authority figure’s suggested course of action is a compelling reason to bar exposure of a person - who is legally presumed to be innocent - to an interrogator without prior and ongoing access to counsel. (See on page 18 the accompanying article, *69% of Innocent People in Experiment Signed False Confession*.)

However *The Problem of False Confessions in the Post-DNA World* clearly demonstrates that in spite of that knowledge being known for many decades - neither the Supreme Court nor Congress has done anything to ensure the effective protection of an interrogated person’s right to remain silent and consult with a lawyer - that would not only reduce the incidence of false confessions, but convey the importance of respecting those rights by law enforcement officers, prosecutors and judges.

Postscript

The research underlying *The Problem of False Confessions in the Post-DNA World* has importance beyond what it reveals about the unreliable results that can be expected from the interrogation techniques used on criminal suspects in this country. There has been worldwide reporting about the coercive interrogation methods used at U.S. detention facilities in Guantanamo Bay and other places. The information in the

article supports the supposition that those techniques can be expected to result in any number of false admissions of guilt, or the elicitation of other forms of inaccurate information.

Thus the condemnation of coercive techniques tantamount to torture in any circumstance by the United Nations’ *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,²⁵ and the Geneva Convention’s barring of torture of combatants or civilians during an armed conflict,²⁶ are more than an application of humane treatment to a vulnerable person. They are consistent with the recognition that torture is impractical as a reliable information gathering technique.

Note: To order the article by Professors Steven Drizin and Richard Leo., send your complete mailing address with a check or money order for \$9.50 (shipping included), with a request for, **82 North Carolina Law Review, No. 3, March 2004**, to: Publication Editor, NC Law Review School of Law UNC at Chapel Hill CB #3380, Van Hecke-Wettach Hall Chapel Hill, North Carolina 27599-3380

Endnotes:

1 *Miranda v. Arizona*, 384 U.S. 436, 445 (1966)
2 *Brown v. Mississippi*, 297 U.S. 278 (1936); 1936.SCT.40147, ¶ 20 (versuslaw.com) (emphasis added).
3 *Brown*, 297 U.S. 278; 1936.SCT.40147, ¶ 26 (versuslaw.com).
4 *Chambers v. Florida*, 309 U.S. 227, 239-241 (1940)
5 *Miranda*, 384 U.S. 436 at 446.
6 *Miranda*, 384 U.S. at 447-448 (“Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented.” Id. at 448)
7 *Miranda*, 384 U.S. at 447.
8 *Miranda*, 384 U.S. at 465-466.
9 *Miranda*, 384 U.S. at 444.
10 *Are Confessions Really Good For the Soul?: A Proposal To Mirandize Miranda*, Charles J. Ogletree, 100 *Harvard L. Rev* 1826 (1987), at 1827-1829.
11 *You have the Right to Remain Silent*, Patrick A. Malone, American Scholar, Summer, 1986, pp. 367-380.
12 *The problem of false confessions in the post-DNA world*, Drizin, Steven A. and Richard A. Leo., 82 N.C. L. Rev. 891-1007 (2004).
13 *State v. Miranda*, 401 P.2d 721, 98 Ariz. 18, 1965.AZ.40322, ¶121 <http://www.versuslaw.com>
14 The acceptability of police lying during an interrogation has been analyzed in several articles. See e.g., *Trust, Lies, and Interrogations*, Margaret L. Paris, 3 Va. J. Soc. Policy & Law 3 (1995); and, *Confessions Induced by Broken Government Promises*, Professor Welsh S. White, 43 *Duke L.J.* 947 (1994).
15 *The problem of false confessions in the post-DNA world*, *supra*, at 913.
16 *Are Confessions Really Good For the Soul?*, *supra* at 1830-1831.
17 *R. v. Brydges*, 1 S.C.R. 190 (1990).
18 *Subsequent Decisions Of The Supreme Court Of Canada - A Review of Brydges Duty Counsel Services in Canada*, 2.2, Department of Justice Canada website, http://canada.justice.gc.ca/en/ps/rs/rep/rr03_lars/rr03_lars_003A.html (last visited January 18, 2005)
19 *R. v. Bartle* (3 S.C.R. 173), at 300, 302 (emphasis added).
20 *R. v. Brydges: The Inadequacy of Miranda and a Proposal To Adopt Canada’s Rule Calling For The Right To Immediate Free Counsel*, Grace F. Ashikawa, Southwestern Journal of Law and Trade in the Americas, Vol. III, No. 1, 1996, pp. 245-268.
21 *Are Confessions Really Good For the Soul?*, *supra*, at 1827-1829.
22 *The problem of false confessions in the post-DNA world*, *supra*, at 918.
23 *Miranda’s revenge: Police interrogation as a confidence game*, Richard A. Leo, Law and Society Review, 30, 259-288 (1996).
24 *Why People Waive Their Miranda Rights: The Power of Innocence*, Saul M. Kassin and Rebecca J. Norwick, Law and Human Behavior, Vol. 28, No. 2, April 2004, 211-221.
25 Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975.
26 Torture is forbidden by the Geneva Conventions in cases of internal conflicts (Convention I, Art. 3, Sec. 1A), wounded combatants (Convention I, Art. 12), civilians in occupied territories (Convention IV, Art. 32), civilians in international conflicts (Protocol I, Art. 75, Sec. 2Ai) and civilians in internal conflicts (Protocol II, Art. 4, Sec. 2A).



Two Men Exonerated cont. from p. 11

1 Judge Overturns Rape Conviction, Gene Schabath, *The Detroit News*, May 22, 2004.
2 Disputed Bite Mark Case Back in Court, Alexa Capeloto (staff), *Detroit Free Press*, January 15, 2003.
3 Judge Orders New Trial in Rape Case, Marisa Schultz, *The Detroit News*, October 21, 2003.
4 Man Is Cleared in Rape Retrial, Amber Hunt Martin and Alexa Capeloto, *Detroit Free Press*, April 9, 2004.
5 Marlinga: the rape cases, Staff, *Detroit Free Press*, April 23, 2004.
6 Macomb Prosecutor Agrees to Return Contribution, AP, *The Detroit News*, August 17, 2002.
7 Marlinga: the rape cases, *supra*.
8 Judge Overturns Rape Conviction, *supra*.
9 Disputed Bite Mark Case Back in Court, *supra*.
10 Suspect Awaits New Jury’s Verdict, Marisa Schultz (staff), *The Detroit News*, February 12, 2003.
11 *Id.*
12 Ex-Boyfriend Acquitted in Rape Retrial, Marisa Schultz, *The Detroit News*, February 13, 2003.
13 Judge Orders New Trial in Rape Case, *supra*.
14 Man Is Cleared in Rape Retrial, *supra*.
15 *Id.*
16 *Id.*
17 *Id.*
18 Case Based on Tape of Indicted Realtor, David Shepardson (staff), *The Detroit News*, April 23, 2004.
19 Marlinga: The Rape Cases, *supra*.
20 Marlinga Inquiry Takes An Odd Turn, Amber Hunt Martin, Nancy Youssef and David Ashenfelter, *Detroit Free Press*, August 9, 2004.
21 *Id.*
22 Macomb Prosecutor Agrees to Return Contribution, *supra*.
23 Case Based on Tape of Indicted Realtor, *supra*.
24 *Id.*
25 The Charges, Staff, *The Detroit News*, April 23, 2004.
26 *Id.*

Man Cleared continued from page 16

Crystal Cain. Jones’ blood and hair were collected, then compared to evidence from the crime scene. An LAPD crime lab technician determined evidence from the crime scenes for three of the victims was Type A, while Jones was Type O. A lab technician later compared hairs found in the mouth of Christmas, and hairs found on Williams and her clothing, but according to records, none of the hair belonged to Jones.

Jones’ lawyer, Patrick Thomason, argued Jones did not have the mental capacity to freely waive his rights. Two judges ruled Jones’ statements admissible at trial, and the rulings were later upheld by an appellate court.

Without any physical evidence or witnesses linking Jones to any of the killings, the prosecution’s case at trial centered on the interrogations, along with the testimony of a women who claimed Jones had raped her in his backyard. The prosecutor argued Jones had committed stealth attacks on all of the victims, similar to the testifying rape victim, then explained away the physical evidence pointing to another suspect by implying the evidence was meaningless because he victims were prostitutes.

A psychologist called to testify for Jones informed the jury Jones was mentally retarded and easily led in questioning. Jones’ lawyer argued the unknown person who let the semen and saliva evidence was the real killer.

Jones was convicted of the rape charge, and of murder in the Edwards case, but convicted of manslaughter in the deaths of Williams and Christmas, and sentenced to 36 years to life in state prison. Jones was acquitted of the Cain murder because, according to one of the jurors, unlike the others, Cain had been badly beaten, so the crime “didn’t fit the pattern.”

In prison, Jones continued to profess his innocence. When signing a letter to the FBI composed by another inmate, which stated Jones had been “falsely accused and falsely imprisoned,” and that had DNA been used in his case, it would have proved he was not the assailant, Jones misspelled his own first name.

Civil Right lawyer Constance L. Rice, selected to assess the police department’s handling of the police corruption scandal in the Ramparts Division said of Jones’ interrogation transcripts, “This is nothing but detectives trying to put a fabricated story in the mind of a retarded man. You could have convinced him he was Spiderman for the afternoon.”

Former federal prosecutor and past inspector general for the Los Angeles Police Commission, Jeffrey C. English, agreed that detectives had put words in Jones’ mouth during interrogations, but noted that was an accepted police tactic.

LAPD officials say they will be inquiring into the detective work that led to Jones’ convictions. Jones was also cleared by police of the third murder for which he was convicted, even though no physical evidence remained from that case.

After his release, Jones filed a damage claim against Los Angeles for his false imprisonment.

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John Spirko continued from page 3

In March 1983, LuAnn was sentenced to 1-to-5 years in prison; I was shocked and very upset about that. I called the postal inspectors and they came to see me. However, this time they brought a tape recorder with them. I told them if they would let LuAnn out of prison, I would tell them what they wanted. They said they didn't know if they could do that, so I told them to turn off the tape recorder. After the recorder was off, I stated if they couldn't help LuAnn, I couldn't help them. They asked me about Gibson. I told them I didn't know anything about Gibson because I had not seen him in a few years and they left.

In September of 1983, I was flown to the state prison in Columbus, Ohio. The next day I was served with a state indictment for aggravated murder and kidnapping. Gibson was indicted as my co-defendant for the same charges. The State's theory was that Delaney Gibson and I robbed the Elgin Post Office, abducted Betty Jane Mottinger, then killed her and disposed of her body.

July 1984 Trial

Gibson was at large after having escaped from a jail in Kentucky, so I went to trial alone in July 1984. The state's case tying me to the crime was my statements to Hartman, and two jailhouse snitches that were given sweetheart deals by the prosecution to testify that I confessed to them about Mottinger's murder. We found out later that one snitch had 85 years knocked off his sentence for testifying to those lies, while the other one had a deal with the prosecutor to be given an early release from prison for his perjurious testimony. Their favorable treatment was the quid pro quo for telling the lies the prosecutor wanted the jury to hear. Both of those snitches later directly or indirectly recanted their testimony.

The State's two eyewitnesses, Seibert and Lewis, testified about what I described earlier in this article, with two exceptions: Seibert swore she was 100% certain the man she saw was Gibson, who she described as clean-shaven; Lewis testified he was "70% sure" he saw me! To substantiate Seibert's identification of Gibson, the prosecution put on evidence that he was in Elgin on the morning of August 9, 1982.

From their opening statement to their closing argument, the prosecution's case was that Gibson and I kidnapped and murdered Betty Jane Mottinger together. Yet there was no physical evidence that identified either Gibson or me as perpetrators of the crime. There was no physical evidence, at either the post office or the site where Mottinger was found, that even sug-

Men Do The Darnedest Things For Love!

In 1956, 18 year-old Robert Williams was convicted in California of first-degree murder and sentenced to life in prison. Williams' conviction was based on his confession to the crime. Two years later, Williams was convicted of a second murder that he had also confessed to committing. He was sentenced to a second life term.

However Williams protested his innocence before his first trial and conviction, claiming he only confessed to impress his girlfriend who he thought was interested in marrying someone else. Williams also protested his innocence before his second trial and conviction, claiming he only confessed to prove it was possible to be convicted based on a false confession.

After 19 years imprisonment, Williams was released on parole in 1975. Three years later a judge ordered Williams' release from parole when he was able to prove through police records that he was in custody at the time of the first murder he was convicted of committing, and that he was imprisoned at the time the second murder was committed.

Williams served 19 in prison and 3 years on parole because of what in hindsight was a foolish act for love.

Source: *In Spite of Innocence*, Hugo Adam Bedau, Michael Radelet, and C. Putnam, Northeastern Univ. Press, 1992, p. 354.

gested Gibson or I were involved. Though the victim was stabbed multiple times, searches of my belongings turned up no blood or even trace evidence. Furthermore, none of the fingerprints found in the post office matched either Gibson's or mine.

Before the trial, my defense filed 26 motions for discovery. In spite of this, the prosecution and U.S. postal inspectors denied us access to many of the investigation records. Without the potentially exculpatory evidence in those files, I was forced to go to trial and make a defense for myself.

At my trial I tried to show that I could not possibly have committed the crime because on the morning of August 9, 1982, I was 120 miles away sitting in my parole officer's office in Swanton. Since it was impossible for me to be in two places at the same time that are several hours distant from each other by car, I was obviously innocent.

My parole officer testified that I was in his office on August 9, 1982, and that the interview took anywhere from 45 minutes to an hour and a half. Although he said he could not remember what time of day it was, he did remember that my sister was with me. He recalled he had asked her a couple of questions, that he did not notice anything unusual about her, and she seemed coherent and alert. You'll see shortly why her alert state of mind when he saw her is important.

My sister testified that she was with me at my parole officers office, and we were there at 9:30 am. She also said there was a slip in the door from the Swanton Post Office when we returned home, informing her of packages at the post office. The packages were my personal belongings that were mailed from the prison in Eddyville, Kentucky. I went to the post office and picked up both packages myself, I signed a slip acknowledging receipt of the packages, and the post office clerk also signed the slip that indicated the date - August 9, 1982, and time - 2:17pm. I took the packages to my sister's house and discovered that my television set was not in either package, so I called the prison and spoke with a mailroom staff person. The phone bill shows that call was made from my sister's home to the prison the afternoon of August 9th.

I then took my sister to the doctor. She received a shot of a very powerful narcotic to counter severe migraines attributed to a car accident several years earlier. She had received the same treatment many times, and the doctor testified that he would not give the injection to her unless she had someone to drive her home. My sister testified that I drove her home after she was given the shot. She was not "alert" after this appointment, and would not have appeared "alert" to anyone, including my parole officer.

An old girlfriend of mine called me after we returned to my sister's house, and we spoke for around 20 minutes. The phone records again verify the call, and that it was on the afternoon of August 9th.

However, the jury chose to believe the prosecution story of what happened and the obvious lies I had told investigators to try and help LuAnn: I was convicted on Aug. 22, 1984, and sentenced to die.

Exculpatory Evidence Turned Over After My Trial

After years of fighting, my attorneys finally gained access to the U.S. Postal investigation documents related to Betty Jane Mottinger's disappearance and death. It was a "limited review" and done "under seal," which meant that we could not discuss anything in the records - and I was not allowed to see them. In those records we found the State and postal inspectors hid evidence from my defense and they knew Gibson was not involved in the crime. On the morning of August 9, 1982, Gibson was in Asheville, North Carolina working on a farm over 500 miles from Elgin, Ohio.

My prosecutors also knew that Gibson was not clean-shaven on August 9th, but that he had a full beard. The state concealed 58 photographs from my defense and the jury that Gibson's

Spirko Concocted Murder Confession in 1969!

"Thirteen years earlier, while in custody in Flint, Mich., after another barroom brawl, a 23-year-old Spirko embarrassed a veteran homicide detective by concocting a detailed, convincing and altogether phony confession to a series of coed murders then filling the local newspapers. Spirko simply wanted to get out of his jail cell for a few hours of coffee and conversation, he later admitted. Further investigation showed that he had nothing to do with what came to be known as "The Michigan Murders.""

A Cold-Blooded Liar, by Bob Paynter, *The Plain Dealer*, Cleveland, January 23, 2005

wife had turned over to investigators before my trial. Among them were photos taken of Gibson in North Carolina on August 8th, with a full beard. His presence in North Carolina on August 9th was confirmed by eyewitnesses, including his boss.

The withheld exculpatory evidence proves that my prosecutors presented a case to the jury they knew was false. The lynchpin of their case was that Gibson was the man seen outside the Elgin Post Office on the morning of August 9, 1982 - when they knew all the while he was over 500 miles away in a different state!

There was also a confession by another man who admitted to the crime. That was never turned over to us. Also withheld from me were witness interviews of other people who were in front of the post office at 8:20 to 8:25 am. One witness in fact had a brown and white Monte Carlo that was parked in front of the post office at 8:25 am that morning. She, and several other people, were at the post office that morning waiting to pick up their mail. They even leaned against the woman's car waiting for the post office to open.

Another witness was driving his daughter to the doctor's office that morning and saw Mark Lewis park his truck. The witness claimed that Lewis got out of the truck and waved at him that morning. The witness also said that as he drove by the post office he saw Betty Jane Mottinger put her key in the door, and there were no cars in front of the post office.

Investigators made a sketch of the crime scene. However I did not see that sketch until after I had been on death row for 12 years. After comparing that sketch with the testimony of Seibert and Lewis, there is no way - in fact it is impossible - for either of those two alleged eyewitnesses to have seen *anything*. Their testimony was false. Based on the information provided my attorneys after my trial, there is reason to believe the prosecutors knew it was false at the time it was given in the courtroom.

The state has argued that I knew details of the crime that were not public knowledge, and that only a person involved in the crime could know those details. They argue that none of these details, the victim's purse, her clothing, the way in which the body had been wrapped, was ever made public. That is a bold-faced lie. The fact of the matter is that every so-called detail I told investigators was published in newspapers in the days after the crime. We included several newspaper clippings of those articles as exhibits to our briefs. We proved these details had been made public, yet the courts still choose to ignore the facts. I continue to be denied relief by every court and they have denied the truth for twenty years.

Delaney Gibson Was Never Prosecuted

In the 23 years since Betty Jane Mottinger disappeared and I was found murdered, the State of Ohio has never made any effort to put Delaney Gibson on trial. Why? Because they know he is innocent, and they know he can prove his innocence! Although he had been indicted in the Mottinger case, Ohio never placed a detainer against him during the 17 years he spent in a Kentucky prison for two unrelated murders. Consequently, Gibson was paroled in 1998, returned to prison

John Spirko continued on next page

John Spirko continued from page 22

on a parole violation, and paroled again. He was repeatedly released from prison even though there was an outstanding warrant for his arrest and he was under indictment in Ohio for capital murder with death penalty specifications.

There is something very wrong when Delaney Gibson was freed from prison while under indictment for the same capital crime that I was convicted and sentenced to death for. However, as I've explained the reason is simple: the State knew Gibson was innocent of any involvement in Betty Jane Mottinger's abduction and murder. Yet the prosecution argued to my jury that Gibson and I committed this crime together. My prosecutors did nothing less than present false evidence and a false case to my jury, knowing it was false at the time of my trial.

May 2004 Appeals Court Denial

On May 17, 2004, a three-judge panel in the Federal Sixth Circuit Court of Appeals voted 2-1 to deny my habeas petition. (*Spirko v. Mitchell*, 368 F.3d 603 (6th Cir. 05/17/2004))

On the same day, the Van Wert County prosecutor dropped all charges against Delaney Gibson. He is now a free man.

The Sixth Circuit's majority decision ruling was based on consideration of only one of my appeal issues: my claim that my due process rights were violated by the prosecution's failure to disclose exculpatory information, information that could have altered the jury's decision to convict me -- which is known as a Brady violation. The Court did not address my claim of actual innocence, or my claims that I was denied due process by the prosecution's willful presentation of a false case that was based on false evidence.

The two appeals court judges who voted to deny my petition cited my knowledge of facts of the crime as a reason why I was guilty, and thus they didn't even consider my other issues. They ignored that we proved those "facts" were published in newspapers and were available to anyone who read a newspaper in the days after the crime occurred. Concerned people all over Ohio, in cafes, taverns, court-houses, and other public places, undoubtedly discussed the same facts in the days after the crime that I knew. Our proof conclusively undermined the State's unsupported claim that those facts were not publicly available.

Judge Ronald Lee Gilman was the dissenter to the Sixth Circuit's decision. He wrote in part,

"John Spirko lied." This incontestable conclusion is well-documented in the majority opinion's recitation of the many inconsistent stories that Spirko told to Inspector Hartman. *But lying is not a capital offense.* And while the record leaves no doubt about Spirko's falsifications, it leaves me with considerable doubt as to whether he has been lawfully subjected to the death penalty in light of the state's alleged Brady violation. *Spirko v. Mitchell*, 368 F.3d 603 (6th Cir. 05/17/2004); 2004.C06.0000143 ¶67 <<http://www.versuslaw.com>> (emphasis added)

The case against Spirko is far from overwhelming. It is substantially based upon three evidentiary pillars: (1) an eyewitness who was "100% sure" that Spirko's best friend, Delaney Gibson, was at the Elgin, Ohio post office when the postmistress was abducted, (2) another eyewitness who was "70% sure" that Spirko was also at the scene, and (3) Spirko's knowledge of factual details concerning the murder that were not known to the general public. *Each of these pillars, however, has a foundation of sand.* The "certain" identification of a clean-shaven Gibson is cast in grave doubt both by photographs and receipts in the possession of the state, but not disclosed to the defense, indicating that Gibson had a full beard immediately before the date of the abduction, and by statements

made to investigators by several people who said that Gibson had a full beard during the entire summer of 1982. As for Spirko's presence at the scene, a confidence level of only 70% is far from "beyond a reasonable doubt." Finally, *Spirko's knowledge could have come from second-hand repetition rather than first-hand participation.* *Spirko, Id.* at ¶68 (emphasis added).

A striking fact about the record in this case is the complete absence of any forensic evidence linking Spirko to the crime. There are no fingerprints, footprints, fibers, blood, or stolen items to bolster the state's case. Nor is there any written or recorded confession of guilt by Spirko or incriminating testimony by a witness who turned state's evidence. (Although two of Spirko's former cellmates testified at trial that Spirko admitted to them that he murdered Mottinger, *those cellmates have subsequently recanted their testimony*, either directly or indirectly.) We are thus left with nothing other than the three shaky pillars described above. *Spirko, Id.* at ¶69 (emphasis added).

For all of the reasons set forth above, this court should remand the case to the district court for an evidentiary hearing on Spirko's Brady claim. Under pre-AEDPA law, which we must follow in this case, a habeas petitioner is entitled to an evidentiary hearing if "for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." (citation omitted) *Spirko points out that, despite his requests, he has not received an evidentiary hearing on his Brady claim in any state or federal court.* An evidentiary hearing would allow the district court to determine whether the state in fact violated Spirko's constitutional rights by not turning over to the defense the photos and receipts in its possession. Accordingly, this court should vacate the judgment of the district court and remand the case for an evidentiary hearing on Spirko's Brady claim. *Spirko, Id.* at ¶96 (emphasis added).

Judge Gilman's dissent was well reasoned. It indicated an understanding of the underlying issues in my case that support my innocence, and the State's denial of due process and a fair trial to me.

As I write this, a petition to the U.S. Supreme Court is my last hope to have a court review my case. Filed in January 2005, I am requesting that the Court grant a new trial, or alternatively, an evidentiary hearing in the U.S. District Court. The Court could make its decision about whether it will accept my case for review by late March 2005.

If the Supreme Court denies my petition, then Ohio Governor Bob Taft will have to grant clemency to avert my execution for a crime I did not commit, and a crime that my prosecutors know I did not commit.

The one or more people who murdered Betty Jane Mottinger have not been brought to justice. Yet as I write this I am on track to be killed by the State of Ohio for that crime. If that happens I will not be the only person to suffer an injustice, but so will Betty Jane Mottinger - because my execution will ensure that her killer or killers will never be held responsible for murdering her.

Information about my case is on my website: www.johnspirko.com

I can be written at:
John Spirko A-171433
Mansfield Correctional Institution
P.O. Box 788
Mansfield, Ohio 44901

My outside contact is Tracy Smothers. Her email is: justiceforjohn@aol.com



Wrongful Conviction Lawyer In Hot Water For Criticizing Judges "who don't know what they are doing."

Attorney Jerome Kennedy is Newfoundland's representative for Canada's Association in Defence of the Wrongly Convicted. Kennedy was a key person in the exoneration of Gregory Parsons and Ronald Dalton. Parsons' 1994 conviction of murdering his mother was quashed in 1998 when DNA evidence proved his innocence. Dalton's conviction of murdering his wife was quashed in 1998 when forensic medical evidence established that she had not been strangled, but had died from choking on a piece of food. He was acquitted after a retrial in 2000.

In July 2003 Kennedy gave a speech prior to the convening of an inquiry into the reasons for the wrongful conviction in Newfoundland of three people - Parsons, Dalton, and Randy Druken. Kennedy expressed the opinion that every aspect of the legal system should come under scrutiny during the inquiry to determine what caused the convictions - including the role of the judges and jurors involved. He said that was important because one reason for wrongful convictions are trial judges "who don't know what they are doing." Kennedy identified that "Part of this is as a result of political appointments." He also said, "Part of it is as a result of intentional or unintentional biases -- in other words, the forming of a belief in guilt before all the evidence is in."

Kennedy's speech was reported in the media. Chief Justice Derek Green of the trial division of the Newfoundland Supreme Court responded by filing a complaint with the Law Society (Bar Association) of Newfoundland, claiming that Kennedy's comments could reduce public confidence in the judiciary. Justice Green wrote,

"These imputations strike directly at the heart of the judicial oath. If true, they would be grounds for removal from office of every judge affected by the allegations. My concern with Mr. Kennedy's comments is that they appear to be a generalized condemnation of the judges of the Supreme Court, reflecting on their general competence as well as suggesting not only inherent and systemic bias, but also deliberate -- i.e. intentional -- partiality and close-mindedness."

Several lawyers in Canada have defended Kennedy, pointing out that some of his statements were matters of fact, such as the appointment of judges, and others were expressions of opinion protected by freedom of speech.

The Law Society's disciplinary hearing to determine if Kennedy's comments constitute professional misconduct was held in January 2005. A decision is expected within several months. If the decision goes against Kennedy, his maximum penalty would be disbarment, however commentators have said he would more likely be given a reprimand or period of suspension.

Source:

Newfoundland lawyer accused of misconduct, by Kirk Makin, *Globe and Mail, Toronto*, January 15, 2005, pg.A12. Free speech in the public interest, Michelle Mann, *CBC News Viewpoint*, January 24, 2005.



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FBI's Legacy of Shame

Timeline of the FBI's four-decades long cover-up of complicity in Edward Deegan's murder, and the agencies frame-up of four innocent men

By Hans Sherrer

1964 – Boston FBI agent H. Paul Rico wrote in an October 19, 1964, memorandum that an informant reported Edward “Teddy” Deegan, a local hoodlum, was marked for a mob hit. “A memorandum from the Boston Office of the FBI to the Director of the FBI [J. Edgar Hoover] dated March 10, 1965, disclosed an informant’s report that [Vincent “Jimmy The Bear”] Flemmi and [Joseph] Barboza had contacted [Raymond] Patriarca to get his “OK” to kill Deegan. That same day, another informant told Rico that Flemmi believed Patriarca approved the “hit” and that a “dry run” had been made. Neither Rico, Condon, Handley, nor any other FBI agents warned Deegan or took steps to prevent their informants, Flemmi and Barboza, from carrying out the plan.”¹

1965 – Edward Deegan was shot to death in a Chelsea, Massachusetts alley on March 12th – two days after FBI Director Hoover had been informed he was marked for death, and did nothing to warn him or otherwise protect him.

1965 – An FBI memo dated March 19, 1965 (seven days after Deegan’s murder), notes:

“Informants report that Ronald Casessa, Romeo Martin, Vincent James Flemmi, and Joseph Barboza, prominent local hoodlums, were responsible for the [Deegan] killing. They accomplished this by having Roy French, another Boston hoodlum, set Deegan up in a proposed ‘breaking and entering’ in Chelsea, Mass. French apparently walked in behind Deegan when they were gaining entrance to the building and fired the first shot hitting Deegan in the back of the head. Casessa and Martin immediately thereafter shot Deegan from the front. The State and Chelsea Police Departments had reports similar to those discussed above.”²

1965 – FBI Director J. Edgar Hoover was sent a memo dated June 9, 1965 by the FBI agent in charge of the Boston office identifying Flemmi as the murderer of seven men, including Deegan. The memo stated, “From all indications, (Jimmy The Bear) is going to continue to commit murder. ... The informant’s potential outweighs the risks.”³

1967 – Six men were indicted in Suffolk County, Massachusetts (Boston) for Deegan’s murder, however the FBI informant known by the bureau to be one of the actual killers – Vincent Flemmi – was not indicted.

1968 – On July 31st Louis Greco, Henry Tameleo and Peter Limone were convicted of Deegan’s murder and sentenced to death. Joseph Salvati was sentenced to life in prison after being convicted as an accessory to Deegan’s murder and two counts of conspiracy. The jury didn’t believe multiple witnesses who testified that Greco was in Miami at the time of Deegan’s murder – which the FBI knew was true. The prosecution’s star witness was Joseph Barboza, an FBI informant and one of the people known by the FBI to have been present at Deegan’s killing.

1968 – On August 1st, FBI agent Rico bragged at a mob party in Boston about how easy it was to convict the “four pigeons” – Greco, Tameleo, Salvati and Limone – and he thought “it was funny” that Greco was sentenced to death when the FBI knew he was over 1,500 miles away in Miami when Deegan was murdered..

1972 – Greco, Tameleo and Limone’s death sentences are commuted to life in prison in the wake of the U.S.

Supreme Court’s *Furman v. Georgia* (1972) decision.

1977 – Attorney John Cavicchi began efforts to clear Greco. Those efforts continued until Greco’s death 18 years later in 1995. Cavicchi then began aiding Limone.

1983 – In August the Massachusetts Advisory Board of Pardons recommended gubernatorial commutation of Limone’s sentence. Limone’s petition was supported by Deegan’s family, who believed he was innocent. However, “FBI agents ... then channeled false information to the office of the Governor to dissuade him from approving the commutation petition. It worked. On September 20, 1983, Governor Dukakis denied Limone’s petition.”⁴

1985 – After the FBI funneled false information to the governor’s office, Governor Dukakis denied Greco’s commutation that had been recommended by the Massachusetts Advisory Board of Pardons.

1985 – Henry Tameleo died in prison of respiratory failure in August. He had been imprisoned for 17 years. Tameleo was 84, and the oldest prisoner in the Massachusetts state prison system at the time of his death.

1986 – After the FBI provides it with false information, the Advisory Board of Pardons rescinds its vote approving a commutation hearing for Salvati.

1993 – The Suffolk County District Attorney’s Office ignores information provided by a Massachusetts’ State Trooper that Salvati had been framed for Deegan’s murder.

1993 – After the FBI funneled false information to the governor’s office, Governor Weld denied Greco’s commutation that had been recommended by the Massachusetts Advisory Board of Pardons.

1995 – Greco dies in prison from colon cancer and heart disease after 27 years of incarceration.

1997 – Louis Greco Jr., one of Greco’s sons, commits suicide by drinking a bottle of Drano.

1997 – Salvati is released after 30 years of incarceration when Massachusetts’ governor commutes his life sentence to time served. Salvati’s wife Marie visited him every week he was imprisoned, and she was waiting when he was released.

2000 – In December a Justice Department investigation into FBI corruption uncovers secret FBI informant files that contain information concerning the FBI’s prior knowledge that Deegan was marked for a hit by FBI informants, that the FBI didn’t try to warn or otherwise protect Deegan, that Deegan’s murder was carried out by FBI informants, and that four men known by the FBI to be innocent – Greco, Limone, Tameleo and Salvati – were framed for the murder with the complicity of the FBI. The FBI documents show that Limone had actually tried to protect Deegan by warning him that he was in danger.

2001 – Limone’s conviction is vacated in January and he is released after 33 years, 2 months and 5 days imprisonment. He is 66.

2001 – Salvati’s conviction is vacated in January.

2001 – Limone, Greco’s son, and relatives of Tameleo file separate federal lawsuits against multiple state and federal defendants for wrongful imprisonment, malicious prosecution, violation of their civil rights, etc. Limone’s suit asks for a \$300 million in damages, and Greco’s asks for \$75 million.

2002 – Salvati filed \$300 million federal lawsuit against multiple state and federal defendants for wrongful imprisonment, malicious prosecution, violation of his civil rights, etc.

2003 – In June, Boston U.S. District Court Judge Nancy Gertner rejected a motion to dismiss filed by the defendants in Limone’s suit. The motion argued the decisions leading to Limone’s indictment and conviction were judgment calls immune from a lawsuit. In rejecting the motion,

Judge Gertner wrote, “‘Obviously conduct cannot be ‘discretionary’ if it violates the constitution, federal laws, or established agency policies and regulations. ‘There can be no doubt that suborning perjury and fabricating evidence violate the constitution.’”⁵

2003 – In November an almost 150-page report by the House Government Reform Committee was released after a two-year congressional investigation into the FBI and its connections to the New England Mafia. The report condemned the FBI’s use of known murderers as informants, the FBI’s shielding of those murderers from prosecution, and the FBI’s use of perjurious testimony by murderers to knowingly convict innocent people. The report concluded that the FBI’s efforts “must be considered one of the greatest failures in the history of federal law enforcement.”⁶

2004 – Edward “Teddy” Deegan’s younger brother and his two daughters filed lawsuits against the federal government. They claimed damages for the government’s complicity in his murder, including Director Hoover’s being informed two days prior to his death that he was marked for death and doing nothing to stop the killers – who were FBI informants – or to warn or otherwise protect Deegan. Paul F. Denver, the attorney for Deegan’s daughters, said “The government owes the daughters compensation for the wrongful death of their father because agents knew there was a threat against their father’s life and took no steps to prevent the death of Teddy Deegan.”⁷

2004 – In September a Massachusetts state judge posthumously vacated Greco’s conviction. The lawyer representing Greco’s family said, “This was an innocent man who was framed, and the most amazing part is the government knew it.”⁸

2004 – Federal Judge Gertner ruled on September 17th that the federal lawsuits related to the four men can go forward, since their causes of action that began in 1968, continued after enactment of a 1974 law that eliminated the federal government’s immunity from lawsuits for wrongdoing by federal agents. In her decision, Judge Gertner didn’t mince words, “... the state prosecution of Limone, Greco, Salvati, and Tameleo was procured by the FBI and nurtured by both federal agents and state officers who knew that the charges were bogus. None of the agents or supervisors involved took steps to stop the prosecution. Indeed, they did just the opposite.”⁹

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⁴ *Limone, supra.*, at 13.

⁵ Judge Rules Lawsuit Alleging FBI Frameup Can Proceed, AP, July 18, 2003.

⁶ Report: FBI Shielded Killers, Washington D.C., CBS News.com, November 21, 2003.

⁷ Some Wonder Does FBI Still Stand For Fidelity, Bravery, Integrity?, *Newswithviews.com*, October 5, 2004.

⁸ District attorney’s office drops charges posthumously in frame-up related to New England mob, Associated Press, *Boston Herald*, November 4, 2004

⁹ *Limone, supra.*, at 11.



Henry Tameleo

Died in 1982 after 15 years of wrongful imprisonment



Peter Limone

Released in 2001 after 33 years of wrongful imprisonment



Louis Greco

Died in 1995 after 27 years of wrongful imprisonment



Joseph Salvati

Released in 1997 after 30 years of wrongful imprisonment



H. Paul Rico



J. Edgar Hoover

Hoover's FBI Crony Laughed The Day Greco, Limone and Tameleo Went To Death Row

H. Paul Rico was FBI Director J. Edgar Hoover’s crony who orchestrated the frame-up of Louis Greco, Joseph Salvati, Peter Limone and Henry Tameleo for the 1965 murder of Edward Deegan.

Rico wrote a memo to Hoover after Deegan’s murder, and provided a list of five men that mob informants had provided as involved. None of the four men were on the list. Although Hoover and other officials within the FBI were informed of the men’s innocence, none intervened on their behalf.

The day after the four men were convicted, Rico gloated at a party to a Boston mob boss, “about how easily they sent the four pigeons up the river.” Rico also “thought it was funny” that Greco was convicted of participating in the Boston area murder when it was known to the FBI that at the time he was over 1,500 miles away in Miami.

Rico was questioned in October 2003 by a U.S. House Judiciary Committee that was investigating irregularities in the operation of the FBI’s Boston office. When asked about his role in the wrongful conviction of Salvati, Limone, Tameleo and Greco, Rico responded while smirking, “What do you want, tears?”

Source: Bureau’s dirty star founded original trenchcoat mafia, by Tom Mashberg, *Boston Herald*, January 18, 2004.

Editors Note:

This is Part IV of a serialization of an article published in the Fall of 2003 by the Northern Kentucky Law Review. It is the first extended critique published in this country of the critical role played by judges in causing wrongful conviction at the trial level, and then sustaining them on appeal. The extensive footnotes are omitted from this reprint, but ordering information of the complete article from the NKLR for \$10 is at the end of the article.

The Complicity Of Judges In The Generation Of Wrongful Convictions

By Hans Sherrer

PART IV of a 6 part serialization

V.

Control of Defense Lawyers By Judges

There is one possible crink that can interfere with the smooth operation of the law enforcement process presided over by state and federal judges: defense lawyers. It is not unusual for a conscientious and knowledgeable defense lawyer to find him or herself in the position of having to choose whether to appear unruly and disrespectful in an effort to get a biased judge to observe the most meager standards of civilized fairness in conducting a trial. However, when that path is chosen it is rarely successful, because it is easy for a biased judge to cast a defendant in a bad light with the jury by reprimanding and rebuking a vigorous and conscientious defense lawyer.

Ironically, lawyers who believe their clients to be innocent are the most vulnerable to being smeared by a judge in front of a jury. This is because they are most likely to be intolerant and outraged by the way the proceedings determining their client's fate are being conducted by the judge. Yet, despite such frustrations, for all practical purposes there is little a defense lawyer can do in the courtroom about the velvet black jack wielded by a judge. *The Appearance of Justice* explained this dilemma in the following way:

What alternatives are open to counsel? He must know his judge and be sure that registering an objection will not put him or his client at a disadvantage in the case before His Honor - and the next case, and the case after that. On paper, each judge is subject to some higher court review, but as a practical matter, the judge who acquires an aversion to certain counsel can destroy the lawyer's effectiveness in countless unreviewable ways. Simple matters such as continuances, the privilege of filing a slightly late brief, such courtesies of the courtroom as a full oral hearing - all these and many more amenities are sometimes unavailable to the attorney who is in disfavor with the court. The dilemma for the lawyer from out of town is no less acute though he may never have to face the same judge again. More likely than not he is able to appear at all only by the court's indulgence and must associate himself with local counsel whose own relationship with the judge could be jeopardized by any excessive zeal on the part of the visiting lawyer. Counsel must of course weigh the advantages and disadvantages of further delay in his case caused by a reassignment to another judge and also the imponderables of who that successor judge might be. Counsel must consider all this very rapidly and respond without hesitation, for the magistrate is there calling for an immediate answer on the suggested or implied

waiver of his technical disqualification. . . . John P. Frank, one of the few longtime students of judicial ethics, described the waiver phenomenon as "nothing more than a *Velvet Blackjack*." Essentially, the Velvet Blackjack is a game based on assumed relationships of mutual confidence; it is, in other words, a species of confidence game. In the typical confidence game, the perpetrator engages his victim in a joint venture that requires the brief loan of the victim's treasure; the critical point in the transaction is when the intended victim has to decide - usually quickly, in a fluid situation - whether to surrender his valuables ever so briefly in the interest of acquiring something more valuable. The victim must decide not only whether to repose his trust in the individual, but more humanly wrenching, he must weigh the consequences of betraying apparent distrust and the risks of offending the other party. When the other party is a black-robed judge and the decision falls upon the lawyer, there is an extra dimension of human difficulty. . . . But the ordinary lawyer with the ordinary judge, while he is anything but happy to be governed by such a practice, may have no choice.

Consequently, a lawyer forced to settle for a judge known to be biased against his or her client is an integral part of the judicial process. This occurs even when a lawyer genuinely wants to help a defendant, but is precluded from doing so by settling for a judge that, at best, will project the illusory appearance to the jury of being fair to the defendant.

When defense lawyers challenge judges on the grounds of their impartiality, it is unlikely to result in their removal. This is true even in cases where there is overwhelming evidence of a blatant conflict of interest or egregious prejudicial behavior by a judge. The offending judge is typically protected by his or her fellow judges from being removed to maintain the illusion of judicial impartiality and decorum.

Appeals courts also aid in the effective control of diligent defense lawyers. The Ninth Circuit Court of Appeals has gone so far as to rule that it is not reversible error for a judge to make inaccurate and insupportable vitriolic remarks about a defense attorney's competence and "patriotism" in front of a jury. The Ninth Circuit further held that it is not reversible error for a judge to order the same attorney handcuffed and removed from the courtroom by the U.S. Marshals in front of the jury after the attorney persisted in trying to get the judge to correct what was, in fact, an erroneous ruling contradictory to a previous ruling by the judge.

The protection of a prejudicial trial judge by his or her brethren is encouraged by the legal doctrine of "the presumption of regularity," which presumes "that duly qualified officials always do right." This idea is similar to the monarchical doctrine that "The King can do no wrong." Thus, individually and as member of the good old boys network, judges can effectively function to control any defense lawyer that becomes too contentious in his or her efforts to defend a client - and those vigorous efforts are most likely to occur when that client's innocence is apparent from the evidence.

Part V will be in the next issue of *Justice Denied*. **To order** the complete 27,000 word article, send \$10 (check or m/o) with a request for - **Vol. 30, No. 4, Symposium Issue** to: Northern Kentucky Law Review; Salmon P. Chase College of Law; Nunn Hall - Room 402; Highland Heights, KY 41099.

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Thomas R. James continued from page 6

Lee Walls, and if she is my mother. He also could have requested a live line-up, in addition to investigating "Dog" and Thomas James to learn if they had ever been arrested together. He did not challenge or attempt to impeach perjured and inconsistent testimony presented by the prosecution. He should have also introduced dental records to prove my teeth are different than Lance Jacques description of the shooter's teeth. He waited until his closing argument to try and inform the jury that my small thin hands didn't match the description of the shooter's fat fingers.

Though my lawyer was well aware of these facts, he failed to use it to present the defense of mistaken identity, especially since the State's case relied on the inconsistent testimony of one unreliable witness - Dorothy Walton.

My case is procedurally barred because my lawyer was aware of all the aforementioned facts and deposition testimony. I did not learn of it until almost five years later, after a judge granted me access to the witness depositions. It can't be called newly discovered evidence because my counsel knew about it but kept it from me, the judge, and most importantly the jury. Had the jury known of these facts, a not guilty verdict was inevitable!

It should also be pointed out that the prosecutors went ahead with my prosecution although they knew of the evidence establishing my innocence.

My lawyer's performance was so inadequate that Thomas James and "Dog" took not one life, but two lives, because the same bullet that killed Mr. McKinnon's life also claimed my life!

The Thomas James involved in the murder of Mr. McKinnon was sentenced to life in prison on March 4, 1996. He was sentenced on that day for convictions of four different serious crimes that were similar to the one that resulted in Mr. McKinnon's death:

- Robbery with a deadly weapon on March 9, 1991
- Aggravated assault with a deadly weapon (gun) on April 21, 1991
- Robbery with a deadly weapon on April 30, 1991.
- Robbery with a deadly weapon (gun) and grand theft auto on December 31, 1993.

Case #90-23928, Police 30848K

The innocent: Thomas Raynard James FL DOC #420931
The masked man: Thomas James FL DOC #114319
The gunman: Vincent "Dog" Williams, aka Vincent Cephus (Released from prison on Oct. 27, 2004 after serving an 11 year sentence for aggravated battery with a deadly weapon (gun).

If you can aid me, please contact me at:
Thomas James 420931
Everglades Correctional Inst. C1-215U
P.O. Box 949000
Miami, FL 33194-9000

My outside contact is my mother:
Doris Bailey
2766 N.W. 59th St.
Miami, FL 33142



Kirstin Lobato Update Kirstin Lobato's story was featured in *Justice Denied*, Issue 26. Nationally known San Francisco based defense attorney J. Tony Serra has been retained on Kirstin's behalf by supporters believing in her innocence. At a January 2005 hearing Kirstin's retrial date was set for November 7, 2005. Kirstin's family and supporters are unable to post her Court ordered \$500,000 bail, so she remains in pre-trial custody at the Southern Nevada Woman's Correctional Facility in Las Vegas.

In November 2004, Mr. Serra successfully defended Richard Tabish, who was acquitted after a retrial in Las Vegas of murdering casino heir Ted Binion in 1998. Evidence indicates that Mr. Binion died from a self-inflicted heroin overdose.

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Take your reader into your story step by step in the order it happened. Give dates, names, times, places of events. Be clear. Write your story with a beginning, middle and end. Tell exactly what facts point to your innocence, and include crucial mistakes the defense lawyers made. Do not soft-pedal the truth: Explain what the judge or jury relied on to convict you.

However, don't treat your story as a "true confession" and **only include information either in the public record or that the prosecutor already has**. Do not repeat yourself. Cover the "motive" angle: why didn't you have a motive? If the prosecutor said you had one, disclose what that was. Remember: the people reading your account know nothing about your case except what you tell them. Do not complain about the system or the injustice you have experienced: let the facts speak for you. At the end tell what the present status of the case is, and provide the prisoner's **complete** mailing address. Also provide *Justice: Denied* with the name and email address and/or phone number of any independent sources necessary to verify the account or can clarify questions. This can speed acceptance of your story. Include the name and contact info for the person you want listed as your outside contact.

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There is a waiting list for accounts to be published. Your chances of getting a story published are greatly improved if you follow our guidelines and provide as many **essential** details as possible when you first contact *Justice: Denied*.

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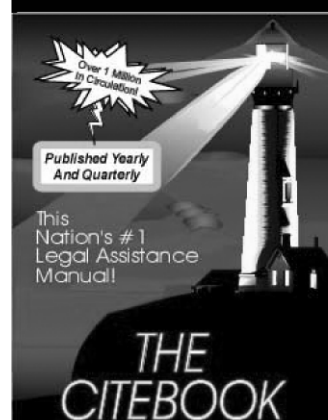
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Timothy Thompson continued from page 4

ex-wife and Seward, the bruises would have been readily apparent had they been there before death.

As of my last parole board hearing, I was given the rest of my time which means I'll do another eight years and four months.

I have tried to fight my case and I have run up against the procedural roadblocks of time bars, etc. At this time I have a motion for production in the trial court that has been there for quite some time and the transcripts I managed to get my hands on were incomplete or altered; some parts of the transcript that should have been there were left out. [JD Note: It is not uncommon for portions of trial transcripts to be in the condition described by Mr. Thompson.]

As of this writing, I know of fourteen constitutional violations in my conviction. These violations include issues with my lawyers, a prosecuting attorney who knowingly used perjured testimony, no search warrant, and tainted evidence. According to testimony at my trial, I was in two different places at the time I was allegedly killing my friend. So I think that the prosecution knows that I was framed and will do anything to keep me from being able to prove that I did not commit the crimes that I was convicted of.

I would be grateful for any help a person can provide me with. I am willing to share any settlement I receive for my wrongful conviction with the person(s) who helps me prove that I did not do the crimes I was framed for. I am willing to answer any and all questions from any interested parties. I have all of the pertinent paperwork with the exception of all the police reports. I am in the process of petitioning to obtain them. If anyone would like to help me I can be contacted at:

Timothy A Thompson 235088

WSR A-1-01

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Justice: Denied provides a public voice for innocent people victimized by that tragic reality.

Justice:Denied is an all-volunteer organization that depends on people to donate their time in a variety of ways. This issue marks the beginning of JD's seventh year of publication. We want to publicly thank every person who has donated his or her time to making the magazine possible since the first issue in January 1999. The following list of almost 150 people is broken into three categories: JD volunteers (including prisoner mail team members, etc.), article editors, and article writers. Some people could have been placed in more than one category, so they have been listed in the one that seems most appropriate. If we are notified by anyone inadvertently not included, we will recognize the person in a future issue.

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