

JUSTICE DENIED



The Magazine for the
Wrongly Convicted

\$72 MILLION COMPENSATION TO THE WRONGLY CONVICTED IN 2003-04

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Iva Toguri d'Aquino
An American heroine who was falsely accused of being 'Tokyo Rose' and wrongly convicted in 1949 of committing treason during WWII.
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Clarence Harrison



Released after 18 years of wrongful imprisonment for rape he didn't commit. \$1 million compensation.
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Michael Green



\$2.6 million compensation for 13 years of wrongful imprisonment for rape he didn't commit.
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\$7.5 million compensation for 16 years of wrongful imprisonment for murder she didn't commit.
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\$5 million compensation for 14 years of wrongful imprisonment on Nevada's Death Row.
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Message From Clara Boggs

To all my friends who read *Justice:Denied*:

As of this issue, I have stepped down as *Justice:Denied*'s co-publisher and editor-in-chief. I have also resigned the presidency of The Justice Institute. Hans Sherrer is now *Justice:Denied*'s publisher and The Justice Institute's president. I believe that Hans is a good choice because he cares about the magazine and he cares about justice.

I appreciate your support of *Justice:Denied* and The Justice Institute over these many years. They are in good hands.

Clara A. Thomas Boggs
Former editor-in-chief and co-publisher
Justice:Denied - The Magazine for the Wrongly Convicted

Message From Hans Sherrer

There would not have been a *Justice:Denied*, nor would it have survived this long, without Clara Boggs. Clara has earned her place as one of the most important people in this country's history at exposing the prevalence of wrongful convictions, and how and why they occur.

The only visible change to *Justice:Denied*'s readers from Clara stepping down from her positions is that the magazine now has a Seattle, Washington address. Mail sent to *JD*'s Coquille, Oregon address is being forwarded to Seattle. In the next issue I will report on some of the things *JD* and The Justice Institute are doing to promote awareness of issues related to wrongful convictions.

Hans Sherrer
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 envelopes. 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. Write: Justice Denied - Info, PO Box 68911, Seattle, WA 98168.

DO NOT SEND JUSTICE:DENIED ANY LEGAL WORK!

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

If you have an account of a wrongful conviction that you want to share, please read and follow the Submission Guidelines on page 26. If page 26 is missing, send a SASE or a 37¢ stamp with a request for an information packet to, Justice Denied - Info, PO Box 68911, Seattle, WA 98168. Cases of wrongful conviction submitted in accordance with *Justice:Denied*'s guidelines will be considered for publication. Submissions are reviewed by *Justice:Denied* for their suitability to be published. *Justice:Denied* reserves the right to edit all submitted accounts for any reason.

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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Lana Nielsen, Volunteer Coordinator
Katherine Oleson, Editor
Clara Boggs, Editor
Hans Sherrer, Publisher

Clara Boggs Steps Down From *Justice:Denied*

Justice:Denied's co-founder Clara Boggs has stepped down as the magazine's co-publisher and editor-in-chief. Clara also stepped down as president of The Justice Institute, which is *Justice:Denied's* parent company. Clara cited personal reasons for relinquishing her positions.

Hans Sherrer, who has been involved with the *Justice:Denied* since its founding, has assumed the responsibilities of being the magazine's publisher and The Justice Institute's president.

Justice:Denied's operation has been moved to Seattle, Washington from Coquille, Oregon. The new mailing address is: Justice Denied
PO Box 68911
Seattle, WA 98168

Justice Denied Editorial

Judge Mary Ann Ottinger Has Earned Removal From Office

On June 18, 2004 the Washington State Commission on Judicial Conduct (CJC) censured King County District Court Judge Mary Ann Ottinger, "for, among other misconduct, engaging in a pattern or practice of violating criminal defendants' fundamental constitutional and due process rights."¹ Judge Ottinger's misconduct included failing to advise unrepresented defendants at arraignment that they had the right to court-appointed counsel, the right to remain silent, and the right not to incriminate him or herself. She also accepted guilty pleas without informing defendants of the elements of the crime that had to be proven by the prosecution beyond a reasonable doubt, the maximum available penalty that could be imposed, and other legal consequences of a guilty plea.

The CJC noted "The nature, extent and frequency of the due process violations, in particular, have been significant. ... Because the practices implicate the Constitutional rights of the defendants involved, the nature of the violations cannot be overstated."² It further stated, "The extent to which Respondent's [Ottinger's] failure to properly advise defendants of their rights has had a substantial impact on the rights of the defendant's involved."³ Her misconduct was particularly grave, because "Protecting the rights of accused individuals is one of the highest duties of any judicial officer."⁴

The censure was part of a stipulated agreement the CJC entered into with Judge Ottinger. That agreement imposed several sanctions, the most meaningful of which was, "Respondent agrees that she will participate in training, approved in advance by the CJC, related to the proper administration of her court, including proper procedures for rights advisement..."⁵ In giving Judge Ottinger such a mild punishment for such serious judicial misconduct, the CJC took into the consideration the mitigating factor that she "... acknowledges her need to change or modify the conduct in question and represents that she will do so..."⁶

We now know Judge Ottinger didn't mean it and she successfully pulled the wool over the eyes of the CJC's members.

On June 14, 2005, the CJC filed a Statement of Charges against Judge Ottinger in which it is alleged that on July 7, 2004, *less than a month* after the filing of the agreement in which she effectively agreed *in writing* to respect a "criminal defendants' fundamental constitutional and due process rights," the CJC received a complaint that she was continuing to fail to do so. (See, Judge Charged With Continuing To Conceal Defendants' Rights, on page 11 of this issue of *JD*). The CJC commenced a new investigation of Judge Ottinger that resulted in the filing of the new charges that substantially duplicate those that were resolved by the stipulated agreement filed on June 18, 2004. The CJC's new complaint alleges that from August to November 2004, Judge Ottinger "repeatedly failed to comply with court rules and case law requiring full advisement of rights to counsel for criminal defendants at arraignments. In multiples cases, Respondent failed to properly advise criminal defendants of their right to counsel, of the maximum available penalties and other potential consequences of conviction, of their right to remain silent."⁷ The new complaint also alleges that Judge Ottinger continued to accept guilty pleas without informing unrepresented defendants of the their right to counsel, of the elements of the crimes to which they pled guilty, and she "consistently failed to determine the defendants' understanding of the proceedings."⁸

The new complaint also alleges that Judge Ottinger committed serious misconduct related to bail hearings, probation revocation proceedings and alleged offenses involving non-citizens.

The CJC has the goods on Judge Ottinger since the Statement of Charges documents the defendant's name, the case number, and the date of more than a dozen representative alleged violations.

It needs to be kept in mind that every single person whose "fundamental constitutional and due process rights" has either admittedly or allegedly been disregarded by Judge Ottinger over god knows how many years, was at that time as legally innocent under the law of what they were accused of as you and I.

Michael and Becky Pardue's Message of Appreciation to Clara Boggs

From my husband and I who found in *Justice:Denied* a level of recognition and support in our struggle for Michael's freedom that was absolutely imperative to our ultimate success; we must acknowledge Clara Boggs.

We had been in the grips of the ongoing injustice known as *Alabama v. Pardue* for years when I received a note from Clara Boggs. I was astounded to learn that we were not alone in our battle. We all know the devastating feeling of seemingly having the entire world and all its endless resources against you. We all have experienced the helplessness and fear in knowing you are right and just in your position, yet the "good guys" are your enemy. We all have felt the grip of terror in not knowing if your loved innocent would survive another day in a cage created to minimize and destroy the very soul of its captives. Then, there comes a ray of light, a sprinkle of hope in the deluge of fear. Our sprinkle came in the form of a note from *Justice:Denied*, from Clara.

Everything changed with a simple acknowledgment from a stranger that we were not alone. Details aren't necessary, but our profound thanks are. Thank you, Clara, not for just saving us, but also for the thousands of lost and afraid souls you have touched and given hope. The immense value of your selfless drive for justice cannot be measured. Your energy and work stand as a beacon toward which we all can strive.

We acknowledge your long hours of work, your sleepless nights, your vision, your relentless drive, your tears and your successes. Thank you for these and the other endless efforts of which we are unaware.

With great gratitude,
Michael Pardue, free after 28 years of wrongful imprisonment and wife, Becky
May 2005

An unknown number of those people were undoubtedly actually innocent, and the only thing that stood in the path blocking their possible wrongful conviction was the very "fundamental constitutional and due process rights" that Judge Ottinger steadfastly *refused* to inform them that they had. We know with a moral certainty that she *refused* to inform defendants of their "fundamental constitutional and due process rights" and that it wasn't due to inadvertence or ignorance, because after agreeing in writing to engage in "proper procedures for rights advisement," she continued to repeatedly *not* do so throughout the many months that the CJC's investigation in 2004 was conducted.

Judge Ottinger's knowledge and intent is further established by her response to the CJC after it granted her the "insiders" courtesy of informally contacting her in 2002 after it received complaints about her lack of concern for the rights of defendants. Judge Ottinger "represented that she would correct her plea acceptance and rights advisement practices in the future to comply with CrRLJ 4.2 and Washington law."⁹ It was Judge Ottinger's failure to abide by what was her false representation to the CJC in 2002 that caused the initiation of the official proceeding that resulted in the June 18, 2004, stipulated agreement.

Judge Ottinger is every prosecutors dream judge, because she effectively sweeps aside the "fundamental constitutional and due process rights" that are the only impediment to a defendants summary conviction. Her actions systematically undermine whatever meager confidence people both in and out of her courtroom may have in the fairness of the criminal process. Each issue of *Justice:Denied* bears witness to the human carnage of lost dignity, life and property caused by the dismissive attitude of Judge Ottinger and other state and federal judges of her ilk across the country.

Judge Ottinger is a habitual offender who has twice made fools of the CJC's members by tricking them into not taking effective remedial action against her — and people who are innocent under the law have suffered because of it. The complaint filed on June 14, 2005 details the considerable depth of Judge Ottinger's deception and her cava-

lier manner of 'thumbing her nose' at the CJC's mistaken belief that she signed last years stipulated agreement in good-faith.

Since 1982 the CJC has made the decision in three cases that the appropriate remedy for a judge's egregious misconduct was removal from office.

Judge Ottinger's removal would be a foregone conclusion if she had committed the one-time offense of taking the bribe of a car to fix a case, or feloniously assaulted a defendant who appeared before her. Yet those are petty offenses compared to the pervasive constitutionally violative misconduct she admitted to in 2002 and 2004, and which she is now charged with continuing to engage in.

One does not have to resort to hyperbole to describe the seriousness of Judge Ottinger's deliberate and egregious misconduct over a period of years that has obliterated "the integrity ... of the judiciary," and demonstrated her contempt for being "faithful to the law." A judge engaging in that quality of misconduct has earned removal from office.

Judge Ottinger earned removal from office for her censured conduct last year. She likely has powerful friends in high places, and that may be why the CJC has thus far chosen to ignore the gravity of her misconduct by agreeing to gently admonish her with "tsk-tsk" taps on her wrist. However the charges against Judge Ottinger transcend political back-scratching because they concern the quality of the type of society we live in - and aspire to live in.

A CJC spokesperson anticipates the public hearing concerning the complaint of June 14, 2005, will be scheduled for the fall of 2005. The hearings outcome will determine whether the CJC will be given the opportunity to rectify their error of last year by deciding that Judge Ottinger has earned removal from office. That is unless Judge Ottinger takes the cowards way out by resigning before-hand with full pension benefits, or the CJC once again shirks its oversight obligation to protect the public from judges like Ottinger, by making another sweet-heart deal that allows her to avoid responsibility for her actions that are destructive to the social fabric of our society.

Hans Sherrer

(Endnotes on page 6)

Did Columbus Cops Shoot And Jail The Wrong Man? - The David Kibble Story

By Martin Yant

The bewitching hour of midnight is historically viewed as a time of bad luck, and that certainly proved true for David Kibble on June 19, 2004. Because of an unfortunate intersection of unrelated events just after midnight that evening, Kibble was shot and seriously wounded by a Columbus police officer and ended up in prison for a crime the physical evidence and witness statements suggest he didn't commit.

Kibble's bad luck went beyond getting shot when he was charged on June 24 with felonious assault of Officer Adam Hicks even though every statement taken by police until then indicated that Kibble was chased by one or two men into the alley in which Hicks shot him at approximately 12:06 a.m. With gun drawn, Hicks was looking for an armed suspect in a car-jacking who reportedly was wearing a red shirt when Kibble, who also was wearing a red shirt, ran into the alley while pulling a knife out of his pocket in case he had to defend himself from the men chasing him, one of whom he believed had a gun. Doctors said later that two of the bullets went right through Kibble. A third lodged in his upper gastric area and was removed during surgery.

To add insult to literal injury, Kibble was later forced to enter an Alford plea, through which the defendant pleads guilty while maintaining his innocence, as part of a plea-bargain agreement that kept him from risking up to 10 years in prison. Instead, Kibble got a one-year sentence, almost half of which he was credited with having already served while in jail awaiting trial.

Defense attorney Mike Morgan said he recommended that Kibble take the plea bargain because the only witnesses Kibble could count on testifying were two relatives, whose testimony jurors tend to discount. Morgan feared that the only other witness to the shooting — Alan Dukes, who admitted he was chasing Kibble at the time of the shooting — wouldn't show up to testify because there was an arrest warrant out for him. (Dukes said later he planned to testify.)

Kibble's fate seemed to be sealed on July 6, when Officer Hicks gave a prepared statement to detectives in the presence of his attorney. Hicks claimed that Kibble had approached him in a threatening manner while holding a knife and that he continued to come toward Hicks after being told to stop and drop the knife. Although Hicks' statement was at odds with every statement given by those who witnessed the shooting or the events leading up to it as well as the physical evidence found at the scene, the two detectives who took the statement did not ask him about the inconsistencies.

The events leading to the tragedy of errors on June 19 started shortly before midnight, when officers were dispatched to 1271 E. 17th Avenue. According to a cell-phone caller, Melvin Collins, a man Officer Smith Weir and others were looking for concerning a reported car-jacking earlier that evening, was standing in front of the home at that address with a handgun.

Weir said police were also looking for Collins because, according Detective Brian Carney's interview summary, "he was suppose[d] to fight a gentleman named Jamal Lewis AKA J-Rock. Officer Weir indicated that each time they would get close to where the gentlemen were fighting, everyone would run away."

Something close to that apparently happened again when Weir and other officers approached 1271 E. 17th Avenue. Vickie Johnson, who lived across the street at 1296 E. 17th Avenue, told Detective Dana Farbacher that she saw "several

police officers" chase a man from the area. Farbacher's report says "Johnson described this individual as a male black wearing a red shirt." A short time later, Johnson said, she heard what sounded like three gunshots. Johnson told Farbacher that she saw Kibble — who was also wearing a red shirt — and he was not the man police were chasing.

Officer Weir told Detective Carney that he chased Collins southbound into the alley that ran between 17th and 16th avenues but lost him. Weir said officers Hicks and James L. Stover joined him in the alley. Weir said they were told that Collins might be inside a nearby abandoned house. As they approached the house, Weir said, they heard a commotion further down the alley and Hicks said he would go "see who was arguing." Weir said that as he and Stover approached the abandoned house from the back, he heard three gunshots coming from the area that Hicks had walked to. Weir said he immediately aired an officer-in-trouble message, then ran down the alley and saw Hicks standing in the grass on the south side of the alley with his gun pointed at David Kibble, who was lying on the ground in a prone position. Weir said he told Stover to handcuff Kibble while he concentrated on preserving the crime scene.

Stover gave Detective Carney a similar statement. Although Stover and Weir both heard the commotion that Hicks decided to check out, neither officer said they heard Hicks shouting any kind of warning before they heard the gunshots.

How can the Columbus Police Department turn a victim of circumstances like David Kibble into a prisoner for a crime that all the evidence it gathered other than a self-serving statement by one police officer indicated did not even occur?

Stover said that, as he approached Kibble to handcuff him, Kibble told him: "I've been shot. I got a knife, it wasn't meant for you, it was meant for somebody else."

Detectives later traced the license plate on the Oldsmobile driven by the men involved in the altercation to Victor Dukes. Victor told them that his brother Alan was driving the car the night of the shooting. When Detective Gillette interviewed Alan Dukes on June 24, he told a story very similar to everyone else's. Not that it mattered. Although every statement on the record at that point indicated that, by a strange quirk of fate, David Kibble was the innocent victim of a police shooting, Gillette had filed charges against Kibble for the felonious assault of Officer Hicks earlier that day.

If Gillette thought Dukes would bolster his case, he was sorely mistaken. Dukes told Gillette that after he had parked behind 1237 E. 17th Avenue, the men standing there started an argument with him and Donnell Broomfield then took a swing at him and Dukes swung back. After the fight ended, Dukes said, David Kibble came up behind him and hit him in the mouth. Dukes said he then went after Kibble, who started backpedaling as he reached into his pocket.

As they entered the alley, Dukes said, he saw a police officer shining a flashlight on Kibble and heard three to five shots fired. Dukes said the shooting scared him and he took off. Dukes said he did not hear the officer say anything before the shooting.

Gillette did not ask Dukes about his purported passenger and Dukes did not volunteer anything because, he said later, the man had just gotten out of prison and didn't want to get involved. But a videotape taken minutes after the shooting obtained by this writer contains a scene in which a man matching the description of Dukes' passenger walks up to the camera and shows where a bullet appeared to have gone through his baggy shorts without causing an injury.

After he was released from the hospital and arrested on June 25, Kibble gave a recorded statement that explains how a bullet could have gone through the shorts of Dukes' apparent associate: He was also chasing Kibble along with Dukes when Hicks fired his weapon.

"The reason the officer shot me was because I was running from two guys," Kibble said. "I saw the officer in the alley and decided to go to where the police officer was standing. ... As I got closer to the officer, I had the knife out and the police officer said, put your hands up and drop the knife! As I was putting my hands up and dropping the knife, I was shot. I was yelling officer, officer but he was so far from me he couldn't hear what I was saying."

Kibble also said what everyone else did — that the fight that attracted Hicks' attention was between Dukes and Donnell Broomfield, not Dukes and Kibble. According to Gillette's summary, Kibble admitted that he probably "scared the hell out of [Hicks]" because he had a red shirt on, as did the man they were looking for. Although Adams had previously arrested suspect Melvin Collins, court records show that Kibble and Collins have approximately the same height and weight, which could lead to temporary misidentification in a dark alley on a star-crossed night.

But that is something to which Hicks — after three weeks to develop 20-20 hindsight — was not about to admit. Instead, Hicks gave Gillette the ammunition he needed to back up the charges he had filed against Kibble when he read a prepared statement to Gillette and another detective on July 6 with his attorney, Grant Shaub, by his side.

Hicks first told how he had walked down the alley, with his gun drawn, to check out a fight. "After walking about 40 or 50 yards, I could see that two male blacks were fighting in the back of the alley and a third black male appeared to be watching the fight," Adams said. (There actually were three men watching the fight.) "I knew what Melvin Collins looked like and he was not one of the three people in the alley," Hicks said in an apparent attempt to undercut the argument that he thought Kibble was Collins.

At this point, Hicks' version of events diverges radically from the statements of every other witness and the physical evidence. For starters, Hicks said the two men stopped only after he had yelled at them three or four times to do so. No one else reported Hicks yelling anything at this time. In fact, the only person who reported hearing Hicks shout anything at any time was David Kibble, who said he started to drop his knife when Hicks ordered him to. Hicks said he was only 15 to 20 feet away from them at that point.

"One of the men who had been fighting then reached with his right hand into his pants pocket and pulled out of a knife," Hicks said. "He quickly flicked his wrist and the knife blade opened up. The man with the knife began heading toward the man he had just been fighting with yelling, 'I'm going to f***** kill you.' I immediately ordered the man to drop the knife. . . . At this point, I tucked my flashlight in my pants and held my gun with both hands, pointed it at the man with the knife and order[ed] him to drop it."

Instead, Hicks claimed, the man with the knife began heading toward him as Hicks continued to yell at him to drop the knife. Hicks said he then took a couple of steps back, but the man continued to come toward him until he had entered what Hicks believed was "the zone of danger" even though Hicks had kept shouting at the man to stop.

At this point, Hicks said, he believed the man "intended to attack me with his knife in an attempt to seriously wound or kill me." Hicks said he then "fired three shots at his

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center mass in rapid succession” and the man “immediately dropped the knife and fell to the ground.”

When he was asked to draw on the crime-scene sketch where the men were when they were fighting and where Kibble was when he shot him, Hicks indicated that the fighting occurred in a part of the parking lot close to the alley and that Kibble was in the middle of the alley when he shot him. No blood was found at either of these locations. But that wasn't the only oddity about Hicks' statement. Among the other questions it raised were:

- If Kibble “immediately dropped the knife and fell to the ground,” when Hicks shot him in the middle of the alley, how did both Kibble and the knife end up in the grass by a fence more than 10 feet farther south?
- If Hicks shouted several times at the men to get them to stop fighting and several more times for Kibble to drop the knife, why didn't the other police officers or any of the witnesses say they heard his repeated shouts? And why wouldn't the other officers have rushed to his aid as he kept shouting for Kibble to “drop it”?
- If Hicks was standing where he said he was, how did two of the casings from his weapon — which usually only travel a few feet to the side — end up 18 and 22 feet further away?
- Why did Alan Dukes, Donnell Broomfield and Freddie Kibble, the three known witnesses to the shooting, say David Kibble was being chased at the time of the shooting?
- How did a man matching the description of Dukes' passenger turn up on a video taken minutes after the shooting showing how a bullet had gone through his baggy shorts if he wasn't chasing Kibble — or at least reasonably close to him?
- But the biggest question of all is: How can the Columbus Police Department turn a victim of circumstances like David Kibble into a prisoner for a crime that all the evidence it gathered other than a self-serving statement by one police officer indicated did not even occur?

David Kibble, meanwhile, is now Inmate A485895 at the Pick-away Correctional Institution, where he says he is living a nightmare come true. “I didn't do anything wrong that night and I ended up getting shot three times and being sentenced to prison for a crime that didn't happen,” Kibble says. Kibble says he immediately regretted accepting the plea bargain after he entered his Alford plea and was taken back to jail. Then he realized it would take longer to withdraw his plea — a motion that is rarely granted — before he would be released from prison.

Kibble will have to start over from scratch then. He has lost almost everything he owned, including his car, as well as his girlfriend. And he now will have a first-degree felony on his record — all, it would seem, after being shot and almost killed for a crime that never occurred.

“That's crazy,” Alan Dukes, one of the two men chasing David Kibble at the time of the shooting said when he was told of Kibble's conviction. “All he [Kibble] was trying to do was get away from us. I was shocked when I saw the officer start shooting for no reason. It didn't make any sense. That's why I took off. I was scared of what might happen next.”

Given what happened to David Kibble, Dukes may have made a wise decision.

Martin Yant is author of *Presumed Guilty: When Innocent People Are Wrongly Convicted* (Prometheus Books 1991). He is also an investigative journalist and legal investigator. He can be written at: Martin Yant Investigations 1000 Urlin Ave. #1821 Columbus, Oh 43212 Email: martinyant@aol.com Website: <http://www.truthinjustice.org/yant>



In Memoriam Fred Korematsu (1919-2005)

He Fought To Free 120,000 People Wrongly Imprisoned In The U.S.

By JD Staff

Fred Korematsu was living in San Leandro, California when a May 3, 1942 U.S. Army directive ordered him to leave his home and self-report within six days to a federal imprisonment facility. Since he had not been convicted, or even accused of committing any crime, he ignored the order. He went on living his life as if the order hadn't been issued. On May 30, 1942 he was charged with failing to obey the order to report to the prison facility and arrested. Represented pro bono by San Francisco attorney Wayne M. Collins, Mr. Korematsu's defense was that as a native-born American the order violated his right to due process of law. Although the facts of his case were that he had not been indicted, tried or convicted of any crime when his imprisonment was ordered, he was convicted in U.S. District Court and his conviction was affirmed by the federal Ninth Circuit Court of Appeals. In December 1944 the U.S. Supreme Court affirmed his conviction by a vote of six to three.

Thirty-seven years later a private researcher, historian Peter Irons, discovered internal government memos proving that federal lawyers and possibly other officials fabricated evidence relied upon by the federal courts to affirm Mr. Korematsu's conviction. Two years later, in November 1983, a federal judge in San Francisco vacated Mr. Korematsu's conviction. However the discovery of that exculpatory evidence was too late to affect the impact of the Supreme Court's 1944 decision: The Court's affirmation of Mr. Korematsu conviction depended on their endorsement of the legality of the order of May 3, 1942, that was authorized by President Franklin Roosevelt's February 1942 Executive Order 9066, 7 Fed. Reg. 1407. That Executive Order (9066) was relied on by the federal government to summarily, and as was proven decades later, wrongly imprison 120,000 U.S. residents of Japanese ancestry. Mr. Korematsu was a native-born American of Japanese descent.

What historian Irons found were misplaced and mislabeled records related to the federal government's strategy and legal briefs opposing Mr. Korematsu's appeal. U.S. Solicitor General Charles Fahy headed the government's legal team, and in one memo Justice Department lawyers accused Fahy of lying to the Supreme Court in his briefs and oral arguments. To justify Roosevelt's order as militarily necessary for the country's national security Fahy argued, for example, that Japanese-Americans on the West Coast were communicating with Japanese ships by “extensive radio signaling and in shore-to-ship signaling.” However it was known to government lawyers that the alleged “signaling” was actually the light of a flashlight used by people living near the coast to see the way to an outdoor toilet at night. The Justice Department contended in the internal memos that there were no known acts of treason (much less

widespread activities) by Japanese-Americans on the West Coast supporting the orders for their summary imprisonment.

Relying in part on the records Irons discovered, in 1983 a federal commission unanimously approved the conclusion that Roosevelt's imprisonment order was not based on any actual threat by Japanese-Americans to national security or justifiable as a military necessity. Rather, it was a response to “race prejudice, war hysteria and a failure of political leadership.”

In 1988 federal legislation was approved authorizing \$20,000 in compensation to each surviving Japanese-American wrongly imprisoned as a consequence of Roosevelt's Executive Order 9066.

The Justice Department memos revealing that there was no factual basis for the wrongful imprisonment of 120,000 legally innocent Japanese-Americans would not have been written if Mr. Korematsu had meekly assented to the federal government's desire to indeterminately imprison him without so much as an accusation of criminal wrongdoing. So thanks to Mr. Korematsu's moral courage, more of the truth is known about that episode in U.S. history than if he had kowtowed to the order for his summary imprisonment for the non-crime of having Japanese ancestors. The treatment he declined to accept was described by U.S. Supreme Court Justice Murphy in another case as bearing “... a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe.” *Hirabayashi v. United States*, 320 U.S. 81, 63 S. Ct. 1375, 1389, 1390. (J. Murphy concurring)

In April 2004 Mr. Korematsu once again stood up for the wrongly imprisoned. He filed a friend-of-the-court brief with the U.S. Supreme Court on behalf of the many hundreds of people indeterminately imprisoned at the Guantánamo Bay Naval Station in Cuba without being charged with any crime. The federal government mimicked its position in his case sixty years earlier, by contending that the military necessity of protecting the nation's security justified indeterminately imprisoning uncharged people without having their case reviewed in federal court. Mr. Korematsu's brief stated in part, “The extreme nature of the government's position is all too familiar.” However unlike his case, in June 2004 the Supreme Court ruled that the people from dozens of countries imprisoned at Guantánamo Bay were entitled to a legal review of their case that could possibly result in their release. See, *Rasul v. Bush*, 124 S.Ct. 2686 (U.S. 06/28/2004). That is particularly important because international human rights organizations have estimated that upwards of 90% of the people imprisoned by the federal government as alleged “terrorists” since September 11, 2001 are innocent of any wrongdoing. Those people were swept into a state of indeterminate imprisonment due to simply being of a disfavored ethnicity or being in the wrong place at the wrong time.

Fred Korematsu died of respiratory failure on March 29, 2005. He was 86 years old.

Source: Internment foe finally won: Fred Korematsu fought relocation of Japanese Americans, Claudia Luther (Obituary writer, Los Angeles Times), The Seattle Times, April 3, 2005, News A23. *Korematsu v. U.S.*, 140 F2d 289 (9th Cir. 12/02/1943) *Korematsu v. U.S.*, 323 U.S. 214 (12/18/1944)



Report Downplays Wrongful Convictions in U.S.

By Hans Sherrer

Exonerations in the United States: 1989 through 2003 is a report by University of Michigan staffers and law students. The report analyzed data from 328 cases during that 15 year period in which the defendant was officially declared, “not guilty of a crime for which he or she had previously been convicted.”

The report concentrates on rape and murder convictions,

since 319 of the 328 cases studied involved a defendant convicted of one or both those crimes. One of two areas the researchers focused on, was how often several factors known to contribute to a wrongful conviction - eyewitness misidentification, perjury and a false confession - were present in those cases. It was found that 64% of the people exonerated of rape and/or murder had been misidentified, 15% had falsely confessed, and a prosecution witness had committed perjury in 44% of the cases.

The other area reported on is how race relates to exonerations. It was found that people of various races are exonerated at about the same rate as they are convicted — unless the person was under 18 at the time of arrest. Almost eight

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Prosecution's Timeline Makes Crime Impossible - The Mickey Davis Story

By Mickey Davis

Edited by Karyse Phillips, JD Editor

My name is Mickey Davis. On April 23, 1996 a jury convicted me of first-degree murder and felony firearm in the Circuit Court of Berrien County, Michigan.

My conviction was in connection with the shooting death of my wife, Priscilla Davis, in her parent's home on the evening of October 6, 1995. The prosecution's theory was that I had broken into the home with my alleged girlfriend, Melissa Peters, and that I fatally shot Priscilla when she returned home and encountered us in her home. The alleged motive was I wanted custody of our daughter Alyssa. My defense countered that I was not in the area at the time of the offense and suggested that the prosecution's chief witness — Melissa Peters — had killed Priscilla out of jealousy.

Background

I had been working as a maintenance supervisor for a property management company and on June 1, 1994 I was transferred from Benton Harbor to Lansing. I worked in Lansing during the week and was home on the weekends. Priscilla did not want to move to Lansing, about 130 miles away from her parents, and as a result we were separated in August of 1994. We had a daughter together named Alyssa and a son, Troy, from my previous marriage. Priscilla filed for a divorce and was granted temporary custody of Alyssa and they lived with her parents in Benton Harbor, while Troy lived with me in Lansing. Priscilla was granted child support and I was given custody of our daughter every other weekend. In December of 1994, Priscilla called and said that I did not have to come to pick Alyssa up. She said that she would drive our daughter to Benton Harbor because in order to talk to me. Priscilla asked me if I would take her back. She wanted our marriage to work and said that she was sorry for everything that had happened, but that her parents had wanted us divorced and it may take some time. In January of 1995, I filed a motion to stop child support and Priscilla filed a response in the Berrien County court. My motion was granted on January 26, 1995, and any arrears were forgiven. Due to the pressure on Priscilla by her parents she continued to live with them. Priscilla and I agreed that Alyssa would live with me in Lansing for the summer and that I would return her a week before preschool started in the fall. Priscilla and I would usually meet in Kalamazoo to exchange custody of our daughter at 6:00 p.m.

In February 1995, I took a week vacation and picked up Alyssa. I tried taking her to a licensed babysitter, dropping her off for a couple of hours and then picking her up, but she was not happy with that, so I knew that I was going to have to come up with something else for the summer. In April, I was introduced to Melissa Peters, who was seventeen and had a six-month old baby. She watched Alyssa for a couple of hours the following Saturday and everything went fine. Peters and I reached an agreement. She and her baby would move in for the summer. She would watch Alyssa while I was at work. Troy or I would watch her baby while she worked, and I would buy whatever the baby needed. The next time I went to pick up Alyssa, I took Peters and her baby with me to meet Priscilla so that she would know who was watching our daughter while I was at work.

Pre-Trial Events

After my arrest, Mr. Renfro was appointed to represent me. A preliminary examination was held on October 24, 1995. The prosecution requested that the autopsy reports, prepared and submitted by Dr. Cohle, be admitted into evidence in lieu of his live testimony and they were admitted. Officer Lange testified

that upon arriving at the crime scene he was directed to the bedroom where he observed a white female lying kind of face up next to a bed. He also testified that he had checked the exterior of the house and found no sign of forced entry. Peters took the witness stand and was to present her testimony in accordance with a plea agreement with the Berrien County prosecuting Attorney's Office. Peters stated, "Before we begin I would like to say something. Mickey Davis over there (indicating me) had nothing to do with this. Okay? I'm sorry, everything that I have said has not been the truth. I have to now say everything that has happened. Every one of my statements need to be removed. They are not true." The hearing was stopped at this point. Even though my lawyer objected, the judge granted the prosecution a two-week continuance.

On November 7, 1995, a second preliminary examination was held. Peters testified for the prosecution that I drove her to Benton Harbor and dropped her off down the street from Priscilla's house. She was not sure what time it was. I was supposed to meet Priscilla in Kalamazoo at 6:00 pm to pick up Alyssa for the weekend. Peters testified that I returned to Benton Harbor and picked her up at 6:45 pm. She was sure of the time because she had looked at her watch. Peters testified that Alyssa was asleep when she was picked up and we parked the car, leaving Alyssa in the car asleep. She testified that she and I walked to the house and I used a pry bar to open the south door of the house. According to her, several minutes after we were in the house searching it, Priscilla arrived and we hid. Priscilla unlocked the south door, entered the house, set her keys and purse down, then went to the phone and made a call, but did not talk and then hung up the phone. After Priscilla went into her bedroom, Peters further testified that she headed towards the south door to leave when she heard 3 or 4 shots fired. She went back to the bedroom and saw Priscilla lying on the floor and I was standing there holding a gun. She testified that I handed her the gun and told her to shoot Priscilla and that when she refused, I struck her above her left eye. After she shot Priscilla in the leg, she went into Priscilla's bathroom to retrieve her coat. According to Peters, she was driving Priscilla's car, dropped me off at my car, and then followed me to a rest area by Exit 72 on I-94. She said we stopped there before continuing to where she had parked, and that is where she left Priscilla's car.

After being bound over to circuit court, I filed a pro per Motion for Substitute Counsel and a Motion for Discovery. My attorney had refused to file any motions, refused to investigate and obtain exculpatory evidence, and never talked to me about the case. On January 30, 1996, 28 days before trial, the judge granted the motion for substitute counsel, but ruled the motion for discovery "moot." Renfro was removed from representing me, and replaced by his law firm's partner, Mr. White.

After asking White several times, I wrote him a letter requesting that he subpoena the phone records of (616) 9**-6***, showing the local and long distant calls made on October 6, 1995, between 6:30 p.m. - 7:15p.m. White did submit a written request to subpoena the phone records and Peters' criminal history. Also, an oral request was made for her criminal history at a hearing held on April 8, 1996. Although White filed a motion for discovery, he withdrew it on that same day and failed to follow through with the subpoena requests. White also filed a motion to withdraw due to a conflict of interest that the judge denied. The judge also ruled that Renfro could not be called as a witness by the defense.

Before my trial, a hearing was held to consider the prosecution's request to admit evidence of prior acts. The trial judge ruled against admitting statements made by Priscilla to friends or associates. The judge stated, "Statements made by the deceased to friends or associates will not produce a fair trial by allowing the jury to consider those as evidence, so I'm not letting it in, I guarantee a reversible error if I did."

The Trial

Officer Neal testified at my trial that after he arrived, he was directed to the bedroom where he observed Priscilla lying on her back. Officer Lange testified he had prepared the search warrant and that he had checked the house for any signs of forced entry and found nothing that appeared to be new. Officer Reeves testified he executed the search warrant for my apartment and car with the help of other officers. Several items were seized from my apartment and car. A device was found in the car that consisted of a clear pop container wrapped in duct tape, with steel wool and cloth wadding inside of it. Also, a photo was taken to show all the ammunition lying around my bedroom.

Two of Priscilla's friends, Mr. Hirsch and Mr. Bryant, testified they and Priscilla left Benton Harbor in two separate vehicles (Priscilla & Alyssa in one, the two of them in the other one) about 4: 15 p.m. and arrived in Kalamazoo about 5:15 p.m. I was already there, parked in my car when they arrived. They left Kalamazoo about 6:20-6:25 p.m. and arrived at the Petro Station in Benton Harbor about 7:30 p.m. At about 7:35-7:40 p.m. Priscilla headed home and the two men stopped for beer and then proceeded to Hirsch's house, arriving there at about 7:45-7:50 p.m. Hirsch went to Priscilla's house at about 10:00 p.m., where he found her on her bedroom floor. He said she was lying on her back and he did not move her. Mr. Hirsch testified that PX #14, a photo of the Priscilla, reflects how he saw her when he entered the bedroom. In August of 1998 I obtained a copy of Priscilla's Certificate of Death which indicates the time of death at 1915 hours (7:15 p.m.). Also, police reports, the autopsy report, and affidavits of three search warrants all state that Priscilla was last seen alive at about 7:00 p.m. None of those documents were offered as evidence at my trial by my lawyer.

... it took a police officer 24 minutes to drive from Paw Paw to the Benton Harbor Exit 33, on I-94, traveling at 71 mph, which was still 5-6 miles, 4 stop signs, and reduced city speed limits from the crime scene. ... It is physically impossible for Mr. Davis, or anyone, to drive from Paw Paw to the crime scene in 12 minutes, half the time it took the police to just drive from Exit 60 (Paw Paw) to Exit 33.

Peters testified she had never previously been in trouble, never been arrested, or convicted of any crime and was testifying as part of a plea agreement. In July of 1999, I obtained a report that shows, contrary to her testimony, Peters has a criminal history in several states (juvenile record) which was not provided to the defense before or during trial. An oral request was made at a hearing on April 8, 1996, and a written request was made before trial for Peter's criminal history.

In her now changed testimony, Peters omitted retrieving her coat from Priscilla's bathroom, or stopping at the rest area, and she had no idea what time I picked her up, but she was sure that she was dropped off at 5:15 p.m. because she had looked at her watch. The time differs from the time of her original testimony. There were numerous other discrepancies between her testimony and what she said at the preliminary examination. She testified that neither she nor I left my apartment the following day (Saturday) before the police arrived. After saying she was feeling sick, the judge granted a short recess. That was at 1:56 p.m. She left the courtroom, but at 1:59 p.m. she returned to the witness stand. When she resumed testifying, she changed her testimony of a few minutes earlier by stating that she had left the apartment on that Saturday to go shopping. However, this was contradicted by Mr. and Mrs. Hernandez, who testified that Alyssa and I were at their house on Saturday for a few hours. Peters also claimed that she was scared of me and could not get away from me and that I would not allow her out of my sight after Priscilla's murder, which contradicted her claim that she went shopping. She also said there was no ammunition lying around the apartment, but a police photo shows differently. Peters and the jurors were given a floor diagram of the crime scene (PX #53) that shows a body in the bedroom. She indicated on the diagram where she stood when she supposedly shot Priscilla in the leg.

Dr. Cohle, the prosecution's medical expert, testified that he performed the autopsy on Priscilla. He stated that the most remarkable thing about the wound to the left leg was the path of this bullet was from left-to-right, from back-to-front, and

Mickey Davis continued on page 13

At one time or another who hasn't stopped at a convenience store in the early evening to get a loaf of bread, or a quart of milk, or some snack treat? A person doesn't expect for such a shopping trip to result in being embroiled in a murder investigation – much less being arrested, prosecuted, convicted, and spending years in prison for a murder committed by someone else. Yet that is exactly what happened to Eric Proctor and Christopher Boots.

The men's nightmare began on June 7, 1983, when they stopped at a Springfield, Oregon convenience store. They couldn't find a clerk so they left. Boots returned to the store after dropping Proctor at home. There was still no clerk in the store, so Boots started looking around. He discovered the clerk's body in the walk-in cooler. The hands of the clerk – Raymond Oliver – had been bound with tape and he had been shot three times in the head. Boots immediately called 9-1-1. However he soon discovered that Proctor and him were considered the prime suspects in Oliver's murder. The men were arrested several weeks after the murder, but they were released three days later without being charged.¹

Indignant over his treatment, in January 1984 Boots filed a notice of intention to sue the city of Springfield for false arrest. The Lane County District Attorney then convened a grand jury to consider the evidence accumulated during Oliver's murder investigation. The primary evidence for them to consider was a particle found on Proctor's shirt that tested positive for oxidizers. However the test was inconclusive because while oxidizers can indicate the presence of gunpowder, they are also present in many common substances including matches, fertilizer, car paint and fireworks. Lane County's D.A. declined to seek an indictment against Boots or Proctor because there was no substantive evidence implicating the men in Oliver's murder.

Then in early 1986 — 2-1/2 years after Oliver's murder - Oregon State Police (OSP) crime lab technician Charles Vaughan claimed he discovered a "second" previously overlooked flake on the clothing Proctor was wearing the night of the crime that tested positive for oxidizers. Vaughan submitted the flake to the FBI's crime lab for confirmation of his analysis. Included with his request for testing was a letter dated March 7, 1986 that stated in part, "Time is of the essence now because of a lawsuit one of the suspects (Boots) is bringing against the police department for false arrest."² The FBI's lab confirmed Vaughan's analysis that the flake was gunpowder. In May 1986 a different Lane County D.A. was in office, and he relied on the new evidence to obtain an indictment of the men for Oliver's murder.

Boots and Proctor had separate trials. Although two jailhouse snitches implicated the men in Oliver's murder, the prosecution's case depended on expert testimony by FBI crime lab supervisor Charles Calfee that the microscopic particle of gunpowder found on Proctor's shirt in 1986 was gunpowder, and Vaughan's testimony that "high-velocity blood spatter" from the victim was on the clothes of both men.³ Both men were convicted and sentenced to life in prison.

After Boots and Proctor had been imprisoned for eight years, an informant told police in 1994 that a man named Richard Kuppens had actually killed Oliver. The police subsequently found the pistol used to shoot Oliver that they linked to Kuppens, and they also found similarities between Kuppens' fingerprint and one found on the tape used to bound the clerk. An informant then taped Kuppens admitting to the murder. However Kuppens committed suicide the day before he was going to be arrested.⁴ By that time the jailhouse snitches who testified against the men had recanted their testimony as fabricated at the behest of the prosecutors.

On the basis of the new evidence of their innocence Boots and Proctor were released from prison in November 1994. In early 1995 the charges against them were dismissed. The men's exoneration was no surprise to Frederic Whitehurst, a former supervisor of the FBI's explosives lab. He determined after their release that the data relied on by Calfee did not prove the particle was

Crime Lab Technician Whose Testimony Contributed To Murder Conviction Of Two Innocent Men Sues For Libel

By Hans Sherrer

gunpowder.⁵ It also wasn't surprising to William Thompson, a criminology and law professor at UC-Irvine. Thompson said, "The FBI's analysis was essentially worthless. There wasn't a firm scientific basis for saying it was gunpowder or not."⁶

After the charges were dismissed, Boots and Proctor filed a \$42 million federal civil rights lawsuit against the city of Springfield and two police officers involved in the investigation. The lawsuit alleged that the two policemen had pressured witnesses at their trial to commit perjury and that they hid exonerating evidence.⁷ The suit also alleged that the Springfield police department framed the men for Oliver's murder in retaliation for Boots' false arrest lawsuit

On May 7, 1998, the men's lawsuit was settled for \$2 million. Proctor and Boots received \$1 million each for an ordeal that lasted a total of 15 years - from their fateful visit to the convenience store in June 1983 to the settlement of their lawsuit in May 1998. However neither of the two policemen named in the lawsuit suffered personally. One of them was even promoted to being a Springfield police department captain.⁸

Seattle P-I Reports On Vaughn's Checkered Past

Six years later, in December 2004, the *Seattle Post-Intelligencer* (*P-I*) published an investigative article that revealed Charles Vaughan retired from the Oregon State Police crime lab a few months after Boots and Proctor's exoneration, and two months later (in July 1995) he was hired by the Washington State Patrol's (WSP) crime lab.

Barry Logan is the director of the WSP's crime lab, and he told the *P-I* that until the newspaper informed him of Vaughan's background, he was unaware of Vaughan's role in the wrongful conviction of Boots and Proctor. Logan said, "He never told anybody that I've spoken to about his involvement in this case."⁹ Logan also said indicated there was no mention of the case in Vaughan's employment application or when he was interviewed, there was no mention of the case by references provided by Vaughan prior to his hiring, nor did it show up during his pre-employment background check.¹⁰

The deception Vaughan perpetrated on the Washington State Patrol and its crime lab about his background was so complete that a July 1995 WSP memo noted he was a "recognized expert in blood-spatter interpretation" and that he "had agreed to be a lead instructor on that subject at a State Patrol academy."¹¹ That was memo written only a few months after two innocent men were exonerated of murder after being convicted in part on the basis of Vaughan's insubstantial laboratory analysis and courtroom testimony concerning blood-spatter evidence.

The *P-I*'s article disclosed that in addition to his erroneous testing of evidence and insubstantial courtroom testimony in the Boots and Proctor case, Vaughan was "demoted in 1993 from director of the Eugene lab to assistant director after he failed to discipline an employee accused of falsifying test results."¹² Vaughan admitted to the demotion during a deposition related to the 1995 lawsuit filed by Boots and Proctor.

The *P-I* also reported that in September 1999 a national accreditation team inspecting the WSP's crime lab discovered that "Vaughan had made a mistake on an annual proficiency exam a year earlier. ... Vaughan failed to interpret footprint evidence correctly."¹³

Also in September 1999, burglary charges were dismissed against a defendant in Thurston County, Washington when

it was determined that Vaughan had erroneously concluded hair found at the crime scene was linked to the defendant.¹⁴ Vaughan defended his analysis by claiming that the "subjective nature" of analyzing hair evidence can result in different interpretations of its evidentiary value.¹⁵ If Vaughan's explanation that hair analysis is a subjective 'black art' was judicially accepted, its admissibility could be challenged as non-scientific under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and its progeny.

So it is known that Vaughan provided insubstantial testimony in two murder cases about gunpowder residue and blood spatter interpretation. He provided testimony in a burglary case related to hair analysis that the judge did not deem to be substantial, and he failed a footprint identification proficiency test. In addition, Vaughan's regard for objective scientific inquiry by crime lab technicians is so minimal that he was demoted for tacitly approving of an OSP crime lab technician's falsification of test results so they would be prosecution favorable.

It is also known that Vaughan was somewhat less than forthcoming with an honest accounting of his background when he was hired by a police agency of the State of Washington as a crime lab technician. That raises the possibility that he induced that state agency - the Washington State Patrol - to hire him under false pretenses and that his termination may be warranted. Particularly considering the similarities between Arnold Melnikoff's case and that of Vaughan. Melnikoff was terminated as a WSP crime lab technician on March 23, 2004 based on his role in Paul Kordonowy's wrongful rape conviction in Montana.¹⁶ Kordonowy's case was one of three Montana cases in which Melnikoff's prosecution favorable testimony contributed to the rape conviction of an innocent man.¹⁷ Melnikoff was the Director of the Montana State Police Crime Laboratory prior to being hired as a WSP crime lab technician.

Vaughn Sues Seattle P-I & Tacoma News-Tribune

In May 2005 Vaughan responded to the *P-I*'s disclosures in its December 27, 2004 article by filing a libel lawsuit against the *P-I* and the article's author, reporter Ruth Teichroeb. Vaughan alleges he was libeled by the assertion in the article that the conviction of Boots and Proctor was attributable to his "lab work and testimony."¹⁸ The *P-I*'s legal counsel said that Vaughan demanded a correction or retraction in February 2005, but when he was "invited to cite specific misstatements of fact, ... he never responded."¹⁹

Vaughan also filed a libel lawsuit against the Tacoma, Washington *News-Tribune* for stating in a January 4, 2005 editorial that "he 'botched' the Oregon case because of 'sloppy procedures.'"²⁰

The *P-I* reported that Vaughan "contends both papers damaged his professional reputation and caused him ongoing emotional distress."²¹ The former claim would seem on its face to have dubious merit because Vaughan damaged his own "professional reputation" by making what are known to be the insubstantive analysis of physical evidence related to gunpowder residue, blood-spatters, footprints and hair, and for not considering any punishment was warranted for a crime lab technician's falsification of evidence test results. The *P-I* simply reported facts that are important for the public to know about the suspect competence level and overt secretiveness of a Washington State public employee whose erroneous judgments can, and have had a profound effect on the life of multiple innocent people.

Insofar as the *News-Tribune*'s editorial is concerned, the language it used was what could be expected of a layperson (such as a newspaper editorial writer) in response to being informed about Vaughan's performance in the Boots and Proctor case (and who knows how many more cases that haven't yet been brought to light): In lay terms Vaughan "botched" the case to the point that two innocent men spent eight years imprisoned for a murder they had nothing to do with.

Crime Lab Tech continued on page 8

On January 27, 1995, at approximately 9:30 a.m. I was arrested in front of my place of business, The New House of Hits record shop at 6005 Prospect Street, Kansas City, Missouri. I was transported to the city jail handcuffed behind my back. I asked the officer what I was being arrested for and his response was that homicide detectives wanted to talk to me. While en route to the jail, the officer asked me if I knew Donna Meredith, to which I replied, “yes.” In response to his questions, I told him that all I knew about her death was what I saw on television: which was that her body had been discovered in her home. This officer later suggested that I shouldn’t attend Donna’s funeral because some of her family members think I may have had something to do with her death.

After being booked, I was put in a holding cell to await the arrival of the detectives. Once the detectives arrived, I was taken to their unit where I was photographed and hair samples were extracted from my head and pubic area. I was then handcuffed and transported to Baptist Hospital where a nurse took blood from my left arm. I was told that I could not refuse to cooperate in any of the samples taken. I was returned to the jail and put back in a holding cell. At approximately 5:00 or 5:30 a.m., January 28, 1995, I was released. When I returned home, I learned that Detective Wells had obtained a search warrant to search my house and impound my 1980 Corvette. Within a week, I was allowed to retrieve my car from the police lot.

On the execution of the search warrant a pair of cowboy boots, a pair of purple leather pants, and a matching leather sweater were confiscated and sent to the crime lab for testing.

Nearly six months later, I was re-arrested on July 12, 1995 on a warrant for first-degree murder and armed criminal action and was held in the county jail without bail. I was able to obtain the service of attorney Mark Komoroski to represent me at trial. My defense was an alibi defense. My trial began May 6, 1996.

Crime Lab Tech continued from page 7

It is unknown if Boots or Proctor sympathize with Vaughan’s claim that the *P-I* and *News-Tribune*’s truthful public disclosure of his role in their ordeal caused him “emotional distress.”

Endnotes:

1 2 wrongly imprisoned settle for \$2 million, Ashbel S. Green and Janet Filips, (staff writers) *The Oregonian*, Portland, OR, May 8, 1998, pp. A1, A13.

2 Forensic Scientist in Washington Crime Lab Tied to Wrongful Convictions in Oregon, Ruth Teichroeb, *Seattle Post-Intelligencer*, December 27, 2004.

3 *Id.*

4 Money no recompense for youth, Charles E. Beggs, *Oregonian*, May 9, 1998, p. D5

5 Forensic Scientist in Washington Crime Lab Tied to Wrongful Convictions in Oregon, *supra*.

6 *Id.*

7 2 wrongly imprisoned settle for \$2 million, pp. A1, A13

8 *Id.*

9 Forensic Scientist in Washington Crime Lab Tied to Wrongful Convictions in Oregon, *supra*.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 John K. Wiley, State Patrol fires embattled crime-lab scientist, *The Seattle Times*, March 24, 2004, page B3. (“Forensic scientists with expertise in fiber and hair examinations later concluded Melnikoff’s testimony on the number of hair examinations he had conducted and statistical comparisons contained “egregious misstatements.””). *Id.*

Paul Kordonowy was prosecuted in Montana, and Melnikoff’s testimony in the case was based on work he allegedly performed while employed at the MSPCL. *Id.*

17 Ruth Teichroeb, Shadow of Doubt, *Seattle Post-Intelligencer*, March 13, 2004, A1, A7. (Those three men, all wrongly convicted of rape, were Chester Bauer, Jimmy Ray Bromgard and Paul Kordonowy. The three men were respectively wrongly imprisoned for 14, 15 and 13 years.)

18 Scientist Sues P-I, Reporter Over Story, Staff, *Seattle Post-Intelligencer*, May 14, 2005, p. B4.

19 *Id.*

20 *Id.*

21 *Id.*

Bar-Hopping Alibi Against Murder Charge - Richard Stallings’ Story

By Richard Stallings

Edited by Clara Boggs

The first of the state’s witnesses to testify was Ms. Wanda Ray, a neighbor who lived practically a block away from the victim. She testified that on January 21, 1995 she was preparing for bed around 8:30 p.m. and she heard three loud gunshots. Huey James Love, testified that he had a scheduled date with Ms. Meredith around 6:30 p.m. that same day, when he noticed me following him in my white Lincoln Continental. He also alleged that he called Ms. Meredith to get my car phone number, but was unable to reach me when he called, but when he called Ms. Meredith back, she informed him that I was there.

Ms. Brenda Abdekhalig, testified that she called Ms. Meredith about 8:00 p.m. and in a nervous voice, Ms. Meredith said she had company and that she would call her back. She further testified that Ms. Meredith had told her that on another occasion her phone wires had been cut, that I had been calling her all the time and that I had at some time thrown her down, put a pistol in her mouth and threatened to kill her. Ms. Zena Miles, the victim’s daughter testified that I had told the victim at her (Zena’s) birthday party in January of 1994 that, “If I can’t have you, nobody can.” She further testified that Donna told her that if she (Donna Meredith) came up dead, Richard did it.

Theresa Walsh, the victim’s sister, testified that I had threatened to kill a man because he had made a compliment about how good Donna looked. Helen Davis, the victim’s sister-in-law, testified that I had told her I didn’t care if the bitch was dead. Willie Wells testified that he called Donna shortly before 10:00 p.m. on January 21, 1995. He testified she told him in a “whispering voice that, He’s here, Richard is here,” and that he heard a voice in the background saying, “Hang up the phone, bitch.” He further testified that that voice was mine. Two Kansas City police officers testified that on January 21, 1995 they had stopped me for running a red light on 34th and Prospect approximately ten blocks from the victim’s residence and they remembered that I was wearing purple leather pants and cowboy boots, but were uncertain about any other attire.

All the evidence the state presented against me was totally circumstantial and possibly coerced from these people whom I allegedly had met at some given time. There was a considerable amount of evidence at the crime scene that did not belong to me, but was never identified or investigated. There was a bloody shoe print, hair strands on the victim’s shirt, fibers under her broken finger nails from struggling with her assailant, numerous fingerprints in the victim’s house, and there was no gun powder residue on either the pants, sweater, or boots.

Prior to trial, I wrote my attorney instructing him on who to call as a witness in support of my alibi defense. Of those people he called as a witness, Johnny Walker, Robert Jackson, and Carletta Collins and her daughter, Yahna Reid. However he did not call the following people to testify: Milton Holmes, Fred Martin, Nina Taylor, Missy Crockett, and Lana Timberlake. Those people are bartenders at each of the clubs I frequented that day. Those people could have verified that they served me and established the time I was at each club. I also requested that my attorney call as a witness Bertha Johnson, one of Donna’s neighbors. Johnson told the police that on her way to church on January 22, she noticed that Donna’s driveway was empty, but when she returned from church at 3:15 p.m., Donna’s black Jeep was parked in her driveway.

The police obtained Johnson’s statement when they canvassed the neighborhood for witnesses, and it was provided to my attorney in pre-trial discovery. But my

May 1996 Trial

The prosecuting attorneys built their case on the information of several witnesses who were closely acquainted with the victim, not withstanding the crime lab saying that the victim’s blood was on my purple leather pants.

attorney did not utilize Johnson’s observation in my defense. My attorney also failed to depose any of the state’s witnesses so I could have the opportunity to refute their testimony. My attorney also didn’t comply with my request to have a blood splatter analysis performed to establish that the blood on my pants was not the type of stain that would result from a gunshot.

My attorney also didn’t act on my instruction to to call as a witness, Donna’s grandmother, Opal Meredith. She could have best characterized my relationship with her granddaughter Donna. I explained to my attorney that Meredith could testify that I had, on two separate occasions, tended to Donna after she had surgery and that I was wearing those particular pants on at least one of those occasions in her presence. I further explained that Donna had a few nose bleeds and there was a possibility I could have gotten blood on myself from any one of those incidents. Meredith had already made a statement to the police that she had never known me to be abusive to Donna. The State cherry-picked witnesses that supported their theory that jealousy was the motive for Donna’s murder. But that was contrary to the police report that her house had been ransacked and a number of items were listed as missing. The items included: .38 caliber live ammunition, spent .38 caliber shell casings, one silver bracelet with Donna spelled out in diamonds and with one red ruby, a gold ring with small double hearts, one gold ring with a oval shaped setting encircled in diamonds, one silver ring with a large heart shaped setting covered with diamonds, and bloody clothing. None of the above items listed were found in my possession. The police report also indicated that Donna might have been sexually assaulted.

The autopsy report indicated that Donna had been killed by four gunshot wounds to the head. Further examination of Donna’s body revealed a broken right thumbnail with hair and fibers recovered from underneath the remaining nail. Dr. Michael Berkland, the Jackson County Chief Medical Examiner, testified that Donna’s body was in the condition of a person that had been dead for seventy-two hours. There was no fixed time given in testimony on approximately what time Donna was killed. The first suggested time was from state witness Wanda Ray, who testified that she heard 3 gunshots around 8:30 p.m. as she was preparing for bed. Wells testified that he called Donna around 10 p.m. or so from his house, which is about an hour and a half after the gunshots were heard. My attorney didn’t investigate phone records to corroborate Willie Wells’ testimony that he claimed to have called from home. So in a residential neighborhood only one person claimed to have heard gunshots - and that was an hour-and-a-half before Wells claimed he called Donna’s home and talked with her.

After a two day trial, on May 8 I was found guilty of first-degree murder and armed criminal action. I was sentenced to life without the possibility of probation or parole for first-degree murder and life for armed criminal action with the sentences to run consecutive. My direct appeal was denied. I was also denied post-conviction relief on my 29.15, a motion for an evidentiary hearing claiming ineffective assistance of trial counsel. All remedies before the Missouri courts have been exhausted.

Prosecution Witnesses Had Axes To Grind

Huey James Love and I probably befriended Donna around the same time, which was at the time she was going through the trauma of her husband, Victor Shivers, being murdered. Donna and I had an affair without terms or commitment. I have no idea as to how intense Donna and Love’s relationship was. However, I was aware that they had been sexually involved and this information came from Donna. I first met Love through Victor and my association with Love was limited. However I told him that if he was trying to get next to Donna I wouldn’t help him.to get there.

On the day the State alleged Donna was killed, Love claimed I was following him in my Lincoln Continental. I do not own

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48 Years After Wrongful Conviction - Eddie Mayes' Sentence Commuted

By JD Staff

In November 1956, twenty-one year-old Eddie Mayes was living in central Florida when he traveled to northern Georgia to visit his family. One night he went riding in a car with his half-brother and one of his friends. After Eddie had fallen asleep in the back seat, he woke up when the police stopped the car and arrested the three young black men for a series of robberies in five Georgia counties.

Although his brother admitted he was involved in the robberies, he told the police his brother was just visiting from Florida and he had nothing to do with them. He also told the judge when he pled guilty, that Eddie wasn't involved in the robberies. Eddie knew how unfair and vindictive white Southern justice was toward blacks who protested their innocence and went to trial. So he pled guilty after being told he would be given a short sentence. However Eddie wasn't told the truth: His short sentence amounted to a very long 35 years.

Three and a half years later Eddie was serving his time at the Jefferson County Public Works Camp. In the summer of 1960 he was put in "the hole" twice for ten days each time. The first time for complaining about creosote preservative that had gotten into his eye, and soon after that when a guard accused him of not working fast enough. "The hole," a small windowless cell where he was stripped to his shorts and given bread and water, inflamed his desire to escape. On July 22, 1960, the day he was released from his second stint in "the hole," Eddie's work crew was sent to dig a drainage ditch 12 miles from the camp. At some point Eddie asked permission to get a drink of water. After getting the drink he continued walking toward the edge of a pine forest 100 yards away. Years later he described what was going through his mind as he walked away from the work crew and two armed

guards, "Shoot me and get it over, 'cause I'm gone." ¹ However the guards didn't notice him leaving, and in the forest he found a dump with some old clothes. Out of his prison garb, Eddie ran to the highway several miles away and made it back to Florida by hitching a ride with a trucker headed to Miami. Back on his home turf, he adopted the alias of Eddie Miller, changed his birth date, and kept a low profile by earning money for many years as a migrant fruit picker.

Eddie married in 1969. He had two sons and a daughter with his wife Ethel. However he never told her he was a wanted fugitive, so it came as a shock to her when he was arrested at their home on March 5, 2004. After 44 years of freedom, Eddie had gotten careless and submitted an application to be put on the visiting list of his son, who was serving a 27 month sentence in a Florida prison for burglary. His application was red flagged when the criminal background check of his application reported that Eddie Miller was an alias of Eddie Mayes – wanted for a 1960 escape in Georgia.

After three months of investigation, police confirmed they were the same person. Sixty-nine year-old Eddie was arrested at his home in Florida and extradited to Georgia. The Georgia Department of Corrections sent him to the high security Autry State Prison in Pelham to finish serving his sentence as prisoner #363086. Eddie's scheduled release date was January 18, 2025 — when he would be 90 years old.

However on June 1, 2004 – three months after his arrest – Eddie was notified that on its own initiative, the Georgia State Board of Pardons and Paroles had voted unanimously to commute his sentence to time served. In making its decision, the Board took into consideration his age, that no weapons were involved in his convicted crimes, and that he had stayed out of serious legal trouble while on the lam for 44 years. The only two brushes he had with the law were a speeding citation, and a \$500 fine in 1982 for transporting fruit without a ticket. When Eddie was released from prison on June 11, his wife of 35 years met him at the front gate and drove him back home to Florida.

Eddie was hiding in plain sight when he was arrested in March 2004. He was living in Fort Pierce, the same town he

enough to slap me in the face with the gun, which cut my upper lip and knock my upper partial teeth out. Willie ran to his car and took off. I ran to my car and took off after him, but I hit the curb and my car shut down. I pulled off the road and that's when I noticed that I was bleeding from the mouth and hand.

I called my wife on my car phone and told her to come get me and that I might need to go to the hospital. In about 20 minutes, she arrived and drove me straight to Truman Medical Center. It was determined that my index finger was broken and I needed stitches in my upper lip. A doctor, Dan Bennett, came in to perform the necessary surgery and cast my left hand. Officers from the Kansas City Police Department came to the hospital asking me for a statement, which I declined. One of the officers asked if I wanted to press any charges against Willie Welles and I said, "No, no." The officer told me they had my partial teeth and if I wanted them I could come to the downtown property room and pick them up. In a few days, I did go pick up my teeth. I never saw Willie Welles again and I never talked to him. From November 1994 to January 1995 my hand remained in a cast.

I have proclaimed my innocence of murdering Donna. The people who have accused me made false declarations out of spite and hate. I had no reason to commit an act of violence against Donna, and I did not.

I want to respectfully thank you for reading my story,

Richard Stallings 522048
Crossroads Correctional Center
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Cameron, MO 64429

lived in when he was wrongly accused and convicted of burglary in 1956, and the first place he went after his prison escape. Eddie points to his many decades of clean living after his escape as further proof of his innocence: "In 44 years, if I had done something with robbery or burglary, I would have done something between then. I'm clean as a whistle." ² Although it may be a long shot, at some point in time the governor of Georgia may acknowledge the wrong committed against Eddie Miller 48 years ago by granting him a pardon.

To that end Eddie has begun work on a book about his case that he hopes will raise enough money to pay for the legal legwork necessary to exonerate him. As Eddie said after his release, "I just want to get all this behind me. I just want to clear my name up." ³

Sources:

Escapee Gets Lucky Break After 44 Years on Lam, *The Seattle Times*, July 4, 2004, p. A5

Second chance after life on lam: Eddie Mayes is caught in his Fort Pierce home 44 years after escaping a work gang. by Post Staff and Wire Reports, *Palm Beach Post*, July 05, 2004, p. A1.

Endnotes:

1 Second chance after life on lam: Eddie Mayes is caught in his Fort Pierce home 44 years after escaping a work gang, by Post Staff and Wire Reports, *Palm Beach Post*, July 05, 2004, p. A1.

2 *Id.*

3 *Id.*



Eddie Miller and Ethel, his wife of 35 years, after his release on June 11, 2004.
(Photo: Meghan McCarthy/Palm Beach Post)

Marlinga Bribery Prosecution Update

Macomb County Prosecutor Carl Marlinga was federally indicted in April 2004 after co-defendants Jeffrey Moldowan and Michael Cristini were exonerated of kidnapping and rape charges after being wrongly imprisoned for 12 years and 13 years respectively. Marlinga's indictment related to his alleged acceptance of a bribe to structure a brief to the Michigan Supreme Court so that Moldowan would be granted a new trial. (See, Prosecutor Indicted For Bribery After Two Men Exonerated Of Kidnapping And Rape, *Justice Denied*, Winter 2005, Issue 27.) Two other men, Ralph Roberts and James Barcia were also indicted — Roberts for allegedly making the bribe, and Barcia for allegedly structuring the bribe as a federal campaign contribution.

In February 2005 the trial judge dismissed the indictment against the three men on the grounds that it improperly linked them into an over-arching conspiracy unsupported by the facts. The government had no proof, e.g., that Roberts and Barcia knew each other, or had ever had any communication with each other prior to their indictment. In June 2005 the Justice Department announced that all charges were being dropped against Roberts. Barcia's lawyer said that the charges against him would be dropped after he completed a diversion program that would consist of obeying federal and state laws and other unspecified conditions for six months to a year.

Barcia, a former U.S. Congressman, said, "Having my name and my image brought into things like an alleged conspiracy with rape defendants and people I had never heard of, I couldn't believe it. This experience has taught me a little appreciation for why some people fear the federal government. There's an awful lot of power there that can really affect people's lives."

Marlina said in response to the dismissal of the charges, "I'm pleased both for Ralph Roberts and Jim Barcia, two innocent people who deserve this moment."

Prosecutors said they intended to go ahead with Marlinga's prosecution. However they have not indicated what charges would be in a new indictment, since Barcia and Roberts both expressed doubt they would be called as a prosecution witness.

Source: Roberts' fraud charges dropped, *Macomb Daily News*, June 3, 2005.
Lawyer: Deal in works for Barcia to take part in diversion program, *Detroit Free Press*, June 16, 2005.

Richard Stallings continued from page 8

or drive a Lincoln Continental. My car was a Lincoln Town Car, which is distinguishable in body and style from that of the Continental. It was also established by the police that when I was stopped for the red light violation, I was driving my Corvette. This is why Love received no answer on my car cellular phone when he claims to have called me from. I was never questioned by the police about the jewelry or any of the alleged items on the search warrant that were missing, but it was insinuated that these items might be in my possession. Love was more aware of the value of this jewelry than I.

Early one morning I had gotten into an argument with a guy, but it didn't escalate into anything physical. When I was on my way home my car phone rang. It was Donna. She asked me who I had argued with. I asked her how she knew about the argument. She said, "Willie Welles called me." This was at 4:00 a.m. and I made up my mind that the next time, regardless of where, I was going to jump on Willie. One night in the month of November, 1994, my friend Johnny Walker and I were out bar hopping and as fate would have it I ran into Willie at My Way Lounge. It had been so long since I had seen Willie I really had forgotten what he looked like. While Johnny and I were watching the dart tournament that was going on, Johnny said there's ole Willie Wells." I said, "where," he pointed to Willie standing at the bar. I walked over to Willie and tapped him on the shoulder and when he turned around I hit him in the jaw as hard as I could and sent him sailing over a few tables. When Willie got up he started throwing chairs and tables at me, striking me on the hands. He then ran out to his car and retrieved a gun. He was talking about killing me and Johnny was telling him that he didn't have to kill me, that he would take me home. In my drunken state, Willie must have got close



Out Of The Fire - The Jennifer Hall Story

By Nadia Pflaum

When Harrisonville fire investigator Wayne Schraml and officers from the Missouri State Fire Marshal's Office failed to notice a bead of copper on a wire at the Cass County Medical Center after a fire in the respiratory therapy office in 2001, it cost then-20-year-old Jennifer Hall a year of her life in prison.

The fire, which caused an estimated \$23,000 in damage to a desk, a computer and a wall in an office (to which Hall had one of the only keys), occurred near tanks that control a flow of oxygen to the entire Harrisonville hospital.

Hall was the respiratory therapist on duty at the hospital when the fire started, shortly after 7 p.m. January 24, 2001. She says she had left the building to get a soda out of her truck, thinking she wouldn't have time to get it later because she would be observing a patient in a sleep study.

When she heard the fire alarm, she rushed inside the hospital and joined two co-workers. All three heard over the intercom that the fire was located in the respiratory therapy offices. One of the workers, Violet Warren, ran to get a fire extinguisher while Hall and Mark Berry went toward the source of the fire to reach the oxygen-shut-off valve to prevent an explosion.

The trio made it through two doors before the smoke became too heavy for them to continue. Berry leaned farthest into the smoke, trying to see the source of the fire, and Warren reached around Hall to grab Berry's sleeve and pull him back. When Berry lost his balance, Hall says, he bumped into her accidentally, and she reached out to steady herself on a metal door frame, which was hot.

Schraml and his co-investigator from the fire marshal's office, Lee Johnson, could find no obvious cause for the blaze but noted the burn on Hall's hand and what they considered an unusual amount of charred paper in the vicinity of the fire. They concluded that it had been intentionally set. Three weeks later, police arrested Hall.

Hall's parents, Don and Debi Hall, say they now regret their next move, which was to hire Gary Cover of Clinton, Missouri, a lawyer recommended by a cousin.

In court transcripts, Cover routinely mixes up facts, dates and names. Don and Jennifer Hall say they both asked Cover whether he should examine the computer, clock and other equipment in the fire. But Cover said it was unnecessary. He did contact the assistant prosecutor handling the criminal case and ask to look at the items seized from the scene. But when he was told that the items were in the possession of the insurance company for the hospital, Cover focused instead on proving that Hall wasn't near the scene of the fire when it started.

Prosecutors Michael Yost and Jamie Hunt told Cass County jurors that Hall had burned herself on a match while setting the fire, not on a hot door frame, and that she had worn her hair curly that day — it was normally straightened — because she expected to be the center of attention after the arson allowed her to stage a heroic attempt to put out the fire.

Schraml, the investigator, testified that he saw no other explanation for the fire and that it must have been intentionally set. The prosecutors, meanwhile, claimed that Hall's motivation was her unhappiness over a sexual harassment claim that she'd made against a co-worker. "That motive, to us, was just insane," says Hall's father, who explains that the man about whom his daughter complained had died of a heart attack two weeks before the fire.



A fire investigator failed to notice a faulty wire — and Jennifer Hall paid dearly for his mistake by being wrongly convicted and imprisoned for arson.

The jury found Hall guilty of second-degree arson and recommended a sentence of three years in prison.

Hall says that on the day of sentencing, Cover advised her that the court might look more favorably upon her if she "took responsibility" for the fire.

"He said that I needed to go with their theory that I was doing it for attention," Hall tells the Pitch. "And I said, 'I don't want to say that, because it's going to make me look even worse.'" Instead, feeling pressure from her attorney to look conciliatory, she says she made up a story about setting the fire accidentally by dropping a cigarette. "I've never smoked," she says. A probation officer reported Hall's confession to the judge.

Cover billed the Halls \$10,000. The family hired another attorney, Matt O'Connor, for Hall's appeals.

O'Connor did what Cover did not: He hired an expert, a forensics specialist named Carl Martin.

Martin says that when he was granted access to items removed from the fire scene and examined the power cord on a clock that had been close to where the fire started, he said to himself, "Is this a joke?" A bead of copper gleamed from a small, burned break in the cord, visible to the naked eye. The short circuit hadn't been noted in the report written by Schraml, the Harrisonville fire investigator whose testimony was key in convicting Hall.

"I don't know what the heck went on in that case, but I've never seen anything like it before," Martin says. "There wasn't any doubt that there had been an electrical short circuit. Everything was very consistent with it being a long-term short circuit in a very old power cord on an old clock very near the fire's origin. It was black-and-white after we tested it. There was no other way.... Unfortunately, the investigators and police and the prosecutors were unable to see that. I don't know if they had bad vision. I don't know why they chose not to consider the most significant piece of evidence they had."

The large amount of paper around the site of the fire can be explained, O'Connor says, by the fact that a black file tray was knocked over during the fire. As the tray melted, the plastic cascaded down the side of the computer in a gooey mess. The paper that was in the tray could have fallen near the site of the fire in a big, charred clump.

O'Connor filed numerous appeals on Hall's behalf. The first, a motion for a hearing based on newly discovered evidence, was denied. The Missouri Court of Appeals denied a second appeal on July 22, 2003. O'Connor filed a motion in November 2003, claiming that Hall was denied effective assistance of counsel, in part because Cover had failed to investigate possible alternative causes for the fire.

Meanwhile, Hall spent from July 25, 2003, to July 23, 2004, at a women's maximum-security prison in Vandalia, where she shared a cell with four other inmates.

She recalls being scared her first day. Another inmate told her, "Just act like you've been here before, and nobody will mess with you."

Despite her pretending, the stress got to her. An epileptic, she usually suffered one seizure every eight to ten months, but while in prison, she had two or three a week. Because O'Connor

distrusted Vandalia's medical care for inmates (a well-publicized medication mix-up last summer caused a dozen inmates to be hospitalized), he says he faxed information regarding Hall's epilepsy medication to the prison every day.

"Not everybody in prison says they're innocent, but a lot of people do," Hall says. And like the others, she wasn't believed. But worse, she says, was the threat she felt living in proximity to a roommate Hall says was serving time for murder.

"I called [O'Connor] to tell him that if I die, this is who did it," Hall says. "I flat-out told him, I think I'm going to die in here. Bad things can happen there. You wouldn't believe what people can make into a weapon. Anything."

Meanwhile, her parents were struggling to afford their daughter's legal bills. Don, an employee at Kansas City Fire and Security, and Debi, who works as an assistant at an Overland Park dentist's office, both took night jobs answering phones for Pizza Hut's delivery line.

On June 29, 2004, the original judge to hear Hall's case, Jacqueline Cook, found that Hall had received inadequate counsel and agreed that Cover should at least have hired an expert to examine the fire site and damaged equipment. She set aside Hall's sentence and sent the case back to Cass County for a possible new trial, if prosecutors wanted one.

Hall was paroled from the prison in Vandalia just one week before the judge's motion to set aside her sentence took effect. But five months later, Cass County Prosecutor Theresa Hensley and her assistant, Jamie Hunt, decided to try her again.

The new jury found Hall not guilty in February 2005.

The Halls are critical of Cass County prosecutors for retrying their daughter. They believe it was done out of spite. O'Connor says that even if the new jury had found her guilty, she would not have been eligible to spend any more time in jail because she had already served her sentence. The new trial cost the Halls another \$20,000, bringing their total bill that they owed O'Connor for legal services to \$100,000.

Cass County Prosecutor Theresa Hensley says that her office pursued the case because they believed they still had enough evidence to convict Hall. "We could have decided not to retry her," Hensley says. "Jamie Hunt, who second-chaired the first trial, believed he had enough evidence to find her guilty, that she had, in fact, started the fire. That's why we have courthouses and a jury system. The experts don't always agree, and that's why we have trials. Twelve jurors in the second trial believed their expert [Martin] over our expert [Schraml]. Jamie is a prosecutor I think highly of. I think he has good judgment. I think if you asked him today, he would tell you he still believes she did it."

Schraml's colleagues at the Harrisonville Police Department and at the Missouri State Fire Marshal's Office stand behind him, too. Schraml testified that he has investigated more than 300 fires and that he bases his success on how many convictions his reports have helped secure.

Schraml is taking a medical leave of absence from the Harrisonville Police Department, where he has worked for five years. Lt. Doug Catron, his superior, confirms that Schraml is the department's only fire investigator. Harrisonville's population is less than 10,000.

Apparently unaware that Hall had been exonerated, Catron says, "There is a rumor that circulated from the family of Ms. Hall that the fire could have been caused by an extension cord. Our department firmly stands behind both our investigator and the state fire marshal who co-investigated that fire." What about the bead of copper on the wire, indicating a short circuit that Schraml missed? And what about O'Connor's forensic findings?

Jennifer Hall continued on next page

Federal Prosecutor Resigns Under Heat of Criminal Investigation For Possible Frame-up Of 35 People

By JD Staff

In June 2003 two men were convicted in Detroit of providing "material support" for terrorism, and two other men were acquitted of that charge. The verdicts came in the United States' first major terrorism trial post-September 11, 2001. The chief federal prosecutor was Assistant United States Attorney Richard Convertino.

After their terrorism convictions, the defendants filed a pre-sentence motion for a new trial based on allegations that the prosecutors involved in the case concealed exculpatory evidence and witness statements, and offered tainted testimony. Convertino and his immediate superior were removed from the case in December 2003 after the trial judge ordered the Justice Department to respond to the defendant's motion. In its response of August 31, 2004, the Justice Department conceded the prosecution committed multiple Brady violations that prejudiced the due process rights of the defendants to a fair trial. On September 2, 2004 the judge vacated the men's convictions and the terrorism charges were subsequently dismissed. (See: Terrorism Conviction Of 2 Men Tossed - Prosecutor Criminally Investigated For Frame-up, *Justice:Denied* magazine, Issue 27, Winter 2005, page 7.)

In March 2004 the Justice Department's Public Integrity Section launched a criminal investigation of Convertino. The impetus for the investigation was that Convertino's actions in the "terrorism" case may have amounted to nothing less than his orchestration of the deliberate frame-up of four men he had every reason to believe were inno-

cent of materially supporting terrorism. Particularly since there was no evidence the men were guilty except for what Convertino was placed under criminal investigation for possibly contriving.

The Detroit News reported in December 2004 that the Justice Department had secretly expanded its criminal investigation of Convertino to include two major drug cases in which a total of 31 defendants were convicted in the late 1990s. Convertino was the lead prosecutor in both cases, that were based on the testimony of numerous defendants who pled guilty and favorably testified for the government in exchange for leniency. Several of those defendants subsequently executed sworn affidavits detailing Convertino's intimidation of them into committing perjury. Those affidavits came to light when they were included in a petition for a new trial by one of the men whose conviction was based in part on the allegedly perjured testimony. Furthermore, according to the petition Convertino not only concealed the existence of the deals for leniency from the jurors, the trial judge and the defendants, but he was duplicitous about the negotiations that resulted in those deals. According to the *Detroit Free Press*, "Convertino went to extreme lengths to portray that no agreement had been reached" with the government's witnesses. The implication of the sworn affidavits and allegations set forth in the petition is that all or some of the 31 convicted defendants in the two cases under investigation may be the innocent victim of a frame-up by Convertino's use of tactics similar to those used to frame the two innocent terrorism defendants convicted in June 2003. In another case Convertino is being criminally investigated for improperly recommending leniency for an informant charged with drug crimes.

On May 16, 2005 Richard Convertino resigned after 15 years as an Assistant U.S. Attorney. As of June 2005 no public announcement has been made about completion of the criminal investigation of Convertino.

Sources: U.S. Prosecutor Resigns, David Ashenfelter (staff), *Detroit Free Press*, May 17, 2005.
U.S. Widens Probe of Prosecutor, David Shepardson (staff), *Detroit News*, December 3, 2004.

Jennifer Hall continued from page 10

"Someone could say the sun might not come up tomorrow, and who could refute that?" Catron says.

Deputy Chief Jim Wilson with the state fire marshal's office tells the Pitch that missing a short circuit is "not uncommon."

John Spirko Update

John Spirko's story of being on Ohio's death row when there is evidence he was over 100 miles from the scene of the crime was in *Justice Denied*, Winter 2005, Issue 27: Case Based On "Foundation Of Sand" Enough To Send Man To Death Row - The John Spirko Story.

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. However Judge Gilman was outvoted 2 to 1. Spirko appealed the Sixth Circuit's decision to the Supreme Court. On March 28, 2005 the Supreme Court declined to hear Spirko's case.

Spirko's lawyers then filed a petition with the Federal Court in Detroit, and U.S. District Court Judge Carr has issued discovery orders. In spite of the ongoing legal action (as of late June), the State of Ohio has set a tentative execution date of September 20, 2005.

John Spirko's website has the most current information about his case, <http://www.johnspirko.com>

Even Schraml admitted that the cause of the fire might have been a short-circuit. In O'Connor's deposition of Schraml, taken in December 2004, the officer admitted that the clock cord was a plausible ignition source for the fire. But Schraml told O'Connor that he didn't get to use a microscope to examine the wire. O'Connor says the bead of metal was visible to the naked eye.

O'Connor calls Schraml "incompetent to the point of being dangerous." Schraml did not return calls from the Pitch.

Cover, the lawyer found ineffective by Judge Cook, tells the Pitch, "All I can say is, I'm confident that I did a good job in representing Ms. Hall, and my representation was very professional."

Hall is home now, but the family has installed a security camera that feeds a picture of the front doorstep to a monitor in Hall's room.

"I'm constantly worried, even now that it's over, that they're going to come back with something else," she says.

Hall, now 24, lives at home and works for Farmer's Insurance. She is struggling to get licensed, she says, because of her erroneous conviction. She lives at home to help her parents pay her legal bills. The family has hired a new lawyer, Georgie McGonagle, to investigate possible civil suits.

"People still don't believe you totally, even if you've been exonerated," Hall says.

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Judge Charged With Continuing To Conceal Defendants' Rights

By JD Staff

Washington State court rules and case law requires a judge to publicly advise every defendant on the record of their legal rights at the time of their arraignment, and to advise a defendant of the legal consequences of making a plea of guilty prior to accepting such a guilty plea.

On June 14, 2005 King County, Washington District Court Judge Mary Ann Ottinger was charged by Washington's Commission on Judicial Conduct (CJC) with failing to inform criminal defendants of their due process rights on numerous occasions from August to November 2004. Among the rights she didn't inform defendants about were their right to a court-appointed lawyer, their right to remain silent, and their right against making incriminating statements. Judge Ottinger was also charged with repeatedly accepting a guilty plea from a defendant who had not been informed by her of the elements of the crime, the maximum penalty she could impose, and other real and potential consequences of pleading guilty. Judge Ottinger was further charged with imposing bail and pretrial release conditions on defendants without first making a probable cause finding.

In June 2004, Judge Ottinger was censured by the CJC for committing many of the same violations she was charged with committing in the June 2005 complaint. The CJC found that in regards to Judge Ottinger's conduct, "Because the practices implicate Constitutional rights of the defendants involved, the nature of the violations cannot be overstated."¹ The CJC also determined that Judge Ottinger's misconduct was "routine." (See, WA Judges Conceal Rights From Defendants, *Justice Denied*, Issue 26, Fall 2004, p. 11.)

As punishment for her conduct that she admitted in a stipulate agreement (the equivalent of a plea bargain in a criminal case) violated the Code of Judicial Conduct, Judge Ottinger agreed to being publicly censured, and to participate in training "related to the proper administration of her court, including proper procedures for rights advisement related to accepting pleas and imposing probationary terms and conditions."²

The CJC's June 2005 complaint documents alleged violations by Judge Ottinger that occurred during the four-month period from August to November 2004, which was after she was censured and agreed to punishment for the previous charges against her. In response to the new complaint, Judge Ottinger's attorney complained in the *Seattle Post-Intelligencer* that the CJC was focusing on technicalities, and that "She's an excellent judge."³

A CJC spokesperson told *Justice:Denied* that under CJC procedures a public hearing will likely be scheduled for late fall 2005 to determine if Judge Ottinger committed the violations alleged in the new complaint.

Out of about 4,600 complaints that have been made to the CJC from 1982 to June 2005, 118 Washington state judges have been disciplined for violating the Code of Judicial Conduct. The CJC has determined the misconduct of three judges was egregious enough to warrant removal from office.

Primary sources: *In re Mary Ann Ottinger*, CJC No. 4475-F-119, Statement of Charges, 6/14/2005, <http://www.cjc.state.wa.us/>
In re Mary Ann Ottinger, CJC No. 3811-F-110, Stipulation, Agreement and Order of Censure, 6/18/2005, <http://www.cjc.state.wa.us/>
Endnotes:

1 *In re Mary Ann Ottinger*, CJC No. 3811-F-110, Stipulation, Agreement and Order of Censure, 6/18/2005, <http://www.cjc.state.wa.us/>
2 *Id.*

3 Censured Judge Is In Hot Water Again, *Seattle Post-Intelligencer*, June 15, 2005, p. B2.

Justice For All Act Of 2004

By Hans Sherrer

The Justice For All Act of 2004 (JFAA) was signed into law by President Bush on October 30, 2004. Legislatively identified as H.R. 5107, the JFAA was passed by a vote of 393-14 in the House of Representatives on October 6, 2004 and by a unanimous vote of the Senate on October 9, 2004.

The JFAA is comprised of four sections:

- Title I. Crime Victims Rights Act
- Title II. Rape Kits and DNA Evidence Backlog Elimination Act of 2004
- Title III. DNA Sexual Assault Justice Act of 2004
- Title IV. Innocence Protection Act of 2004

The innocent can be affected by one or more sections of the JFAA's four titles. Those provisions that are most likely to affect the innocent will be briefly analyzed.

Title I. Crime Victims Rights Act

Title I, Section 102 "Establishes enhanced rights for victims of Federal crimes, including the right to be reasonably protected from the accused; the right to reasonable, accurate, and timely notice of certain proceedings and events; the right not to be excluded from certain proceedings; the right to be reasonably heard at certain proceedings and to confer with the attorney for the Government in the case; the right to full and timely restitution..."¹ Under Title I, an innocent person can have their torment increased prior to their trial, and if wrongly convicted, after their trial, by pressure brought to bear on the prosecutor and/or the court by the victim or alleged victim of the crime.

Title II. Rape Kits and DNA Evidence Backlog Elimination Act of 2004

Title II, Section 202 increases the authorized funding to analyze DNA evidence to \$151 million annually for the next five years. This money can be distributed at the state level to fund the testing of potential DNA evidence, including several hundred thousand rape kits nationwide that are unanalyzed.

Section 203 authorizes expansion of the information in the national Combined DNA Index System (CODIS) to include virtually any DNA information a State chooses to collect, with two exceptions: DNA profiles of arrestees who have not been charged in an indictment or information, and DNA samples that are voluntarily submitted solely for elimination purposes.

Section 204 changes federal law so the statute of limitations begins tolling when DNA testing implicates a person in the commission of a felony (except for a felony offense under chap. 109A) - not the date the crime was committed.

Section 206 authorizes State and local governments to spend federal funds to hire private for profit laboratories to analyze DNA in order to reduce their backlog of evidence samples.

Title III. DNA Sexual Assault Justice Act of 2004

Title III, Section 302 "Requires that eligible State and local government public crime labs are accredited and undergo external audits, not less than once every 2 years, to demonstrate compliance with Federal standards established by the Federal Bureau of Investigation."²

Several sections – 303 and 304 - authorize a total of \$42.5 million per year to train and educate law enforcement and correctional personnel, prosecutors, defense lawyers, judges, forensic scientists and medical personnel in the identification, collection, preservation and analysis of DNA evidence. Other sections authorize money to advance DNA research and development and FBI DNA programs.

Section 309 expands the potential fine to \$100,000 for each federal criminal offense of unauthorized "use" of DNA information.

Title IV. Innocence Protection Act of 2004

Title IV most directly affects the innocent, and it includes three subtitles.

Subtitle 1 - Exonerating The Innocent Through DNA Testing, includes specific guidelines under Section 411 for Federal prisoners asserting a claim of "actual innocence" to apply for DNA testing of potentially exculpatory evidence. Section 411's language implies retroactivity, and furthermore, it specifically directs that a federal court "shall" grant an applicant's motion for a new trial or resentencing if "the DNA test results, when considered with all other evidence in the case (regardless of whether such evidence was introduced at trial), establish by compelling evidence that a new trial would result in an acquittal..."³ Section 411 also "prohibits the destruction of DNA evidence in a Federal criminal case while a defendant remains incarcerated, with certain exceptions." A federal defendant with an active case and untested evidence who makes a timely motion to preserve that evidence is excluded from the exceptions. Although diligent enforcement is problematic, Section 411 does codify that "Intentional violations of these evidence-retention provisions to prevent evidence from being tested or used in court are punishable by a term of imprisonment."⁴ It needs to be emphasized that Section 411 only applies to Federal cases, and its provisions are specifically excluded from providing "a basis for relief in any Federal habeas corpus proceeding."⁵

Section 412 "authorizes \$5 million a year in grants through 2009 to help States to defray the costs of post-conviction DNA testing."⁶ This program is named in honor of Kirk Bloodsworth, the first death row prisoner to be exonerated by DNA testing. Section 413 authorizes granting that money to "States that have adopted reasonable procedures for providing post-conviction DNA testing and preserving DNA evidence."⁷

Subtitle 2 - Improving The Quality of Representation In State Capital Cases, authorizes \$75 million per year under Section 421 "to improve the quality of legal representation provided to indigent defendants in State capital cases. Grants shall be used to establish, implement, or improve an effective system for providing competent legal representation in capital cases, but may not be used to fund representation in specific cases. An effective system is one in which a public defender program or other entity establishes qualifications for attorneys who may be appointed to represent indigents in capital cases; establishes and maintains a roster of qualified attorneys and assigns attorneys from the roster (or provides the trial judge with a choice of attorneys from the roster); trains and monitors the performance of such attorneys; and ensures funding for the full cost of competent legal representation by the defense team and any outside experts."⁸

Subtitle 3—Compensation Of the Wrongfully Convicted, Section 431, "Increases the maximum amount of damages that the U.S. Court of Federal Claims may award against the United States in cases of unjust imprisonment from a flat

\$5,000 to \$50,000 per year in non-capital cases, and \$100,000 per year in capital cases."⁹ Although it doesn't have the force of law, Section 432 "expresses the sense of Congress that States should provide reasonable compensation to any person found to have been unjustly convicted of an offense against the State and sentenced to death."¹⁰

Summary

As with all legislation, the JFAA is a product of compromises that watered down some of its provisions from what they were when first proposed over four years prior to its enactment. The Innocence Protection Act of 2004, like the other provisions, was affected by compromises after it was originally introduced in 2001. The JFAA includes a total of \$1.26 billion over five years in new grant programs, and over \$1 billion of that is earmarked to States for the testing and better understanding of DNA evidence by people at all levels of the law enforcement systems and the improvement of representation in capital cases.

Unfortunately, most of the JFAA amounts to 'smoke and mirrors' posturing that will do little if anything to actually protect the innocent. An example is Section 302 that, "Requires that eligible State and local government public crime labs are accredited and undergo external audits, not less than once every 2 years...." The accreditation part of the section means nothing because it simply relates to ensuring crime labs shuffle their paperwork properly. However the "external audit" provision could contribute to improving the competence of technicians, evidence handling and storage procedures, and testing protocols of state and local crime labs, if not for the fact that the FBI is the arbiter of the "external audit" standards to be applied to those labs. That is like putting the fox in charge of guarding the henhouse. There has been a stream of disclosures over the past several decades that the FBI crime lab routinely provides prosecutors with insubstantial evidence test results, and that its technicians regularly either perjure themselves in court or overstate the evidentiary value of a tested item. Those practices continue to this day, and they can be expected to continue for at least as long as the FBI's crime lab is exempt from independent external auditing. The FBI has shown by its actions that it is unlikely to audit state crime labs with honest vigilance, and that deficiency is compounded by the FBI's designation in the JFAA as the agency that establishes the standards of the audit. An excellent critique of the FBI's crime lab's endemic problems, is *Tainting Evidence: Inside the Scandals at the FBI Crime Lab* by John F. Kelly and Phillip K. Wearne (The Free Press 1998).

Another provision of the JFAA section that superficially looks like it might help an innocent person accused of a state capital offense, but which is unlikely to do so in practice, is Section 421. It authorizes \$75 million per year for five years "to improve the quality of legal representation provided to indigent defendants in State capital cases." However, accomplishing that objective is undercut by Section 421's very next sentence that prohibits any of that money from being used "to fund representation in specific cases." The problem with representation accorded an indigent innocent defendant in a capital case directly relates to the amount of money available to pay a team of competent lawyers, to pay for a thorough investigation, and to pay the necessary paralegal and secretarial support staff. The JFAA completely ignores the legal, investigative and support services required to provide meaningful assistance for an indigent person legally presumed innocent of a capital crime – and who may be actually innocent. (*Justice:Denied* Issue 26, Fall 2004, included a series of four articles related to the generally deficient legal representation provided indigent people in the U.S.).

Justice For All Act continued on page 13

Justice For All Act continued from page 12

Another part of the JFAA that cosmetically looks like a step forward is Section 431's increase in compensation for an unjustly imprisoned federal prisoner from a flat \$5,000 payment, to a maximum of \$50,000 per year of "unjust imprisonment" in non-capital, and \$100,000 per year of "unjust imprisonment" in capital cases. However that change will likely mean little in actual practice, because a microscopic percentage of federal prisoners will be found to have satisfied the compensation requirement of having been "unjustly imprisoned."

Still another provision of the JFAA, Section 204, could prove ominous if applied to cases that don't involve DNA evidence, since it alters the tolling of the statute of limitations from the date of a crime's commission, to the date a suspect is implicated by an inculpatory DNA test.

Furthermore, there is one glaring omission from the JFAA that would have provided meaningful assistance to innocent death row prisoners: Reestablishment of state level Death Penalty Resource Centers, for which funding was cut in 1996.

One the other hand, a glaring inclusion in the JFAA that can harm an innocent person, is Section 411's specific exclusion of its provision acknowledging the exculpatory value of DNA evidence from being applicable to a habeas corpus proceeding. A provision in the JFAA mandating that Federal courts consider the exculpatory value of DNA evidence in a habeas petition by a federal or state prisoner would have provided an additional measure of protection for the innocent. Particularly since there is no consensus in Federal court as to the evidentiary value of exculpatory DNA evidence.

The JFAA does however, have several provisions that may help the innocent. Section 202 provides for funding the testing of DNA samples at the state level, particularly in several hundred thousand untested rape kits, that could potentially prove to include exculpatory evidence for a wrongly accused or convicted person. Section 411 establishes clear and important guidelines for the preservation, testing, and consideration of DNA evidence in Federal cases. Section 412 authorizes a nominal amount of money (\$5 million per year) "...to help States to defray the costs of post-conviction DNA testing."

The miracle that the JFAA has any teeth at all is indicated by the fact that when the House of Representatives passed it, the White House (President Bush), the U.S. Department of Justice (Attorney General John Ashcroft) and two influential Republican Senators (Jeff Sessions and Jon Kyl) were adamantly opposed to its enactment. Given the overwhelming support for the JFAA in both the House and Senate, the Bush Administration's determined efforts to block it failed. However President Bush did wait until the last day that he had available to sign the bill, which he might have vetoed if he hadn't known Congress would have overridden it.

The Justice For All Act of 2004 can be read, downloaded or printed (34 pgs) from *Justice:Denied's* website at: <http://justicedenied.org/jfaa.pdf>

Endnotes:

¹ Justice For All Act of 2004: Section-By-Section Analysis, U.S. Senator Patrick Leahy, <http://leahy.senate.gov/press/200410/100904E.html>

² *Id.*

³ Justice For All Act of 2004. Sec. 411. Federal post-conviction DNA testing.

⁴ *Id.*

⁵ *Id.*

⁶ Justice For All Act of 2004: Section-By-Section Analysis, *supra*.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Justice For All Act of 2004. Sec. 432. Sense of Congress regarding compensation in State death penalty cases.

Convictions Tossed For Talking Suggestively On Telephone

Seventeen year-old Anthony McKenzie made several collect phone calls in June and July 2003 from Georgia's Forsyth County jail to a 14-year-old girl he met over the Internet. During the jail monitored calls the couple carried on sexually suggestive conversations.

McKenzie was then prosecuted and convicted of two counts of violating a Georgia state law (OCGA § 46-5-21(a)(1)) that criminalizes "indecent, lewd, lascivious, and filthy, as well as obscene, telephonic communication made by private individuals or commercial entities regardless of the speaker's intent." (*McKenzie v. State*, No. S05A0298 (Ga. 04/26/2005); 2005.GA.0000544 ¶ 9 <<http://www.versuslaw.com>>).

On April 25, 2005 the Georgia Supreme Court tossed McKenzie's convictions when it unanimously ruled:

"Instead of applying only to obscene speech, it [the statute] applies to speech that is merely indecent. Instead of making illegal such speech only when directed at minors, it makes such speech illegal when heard by adults. Instead of applying only to speech not welcomed by the listener and spoken with intent to harass, it applies to speech welcomed by the listener and spoken with intent to please or amuse. Because the statute is an overbroad infringement on the First Amendment's guarantee of freedom of speech, appellant's convictions for violating the unconstitutional statute must be reversed." (*Id.* at ¶ 11)

Source: *McKenzie v. State*, No. S05A0298 (Ga. 04/26/2005)

Mickey Davis continued from page 6

from below-upward. Dr. Cohle was then given PX #14 (a photo of the victim lying on the floor) and asked if the path of the bullet would be consistent with that photo, if a person was standing at the victim's feet and shooting her. He replied that it was consistent with what he previously said. He stated that there was little bleeding from this wound, which would indicate that it was one of the last or the last wound. He was told that Priscilla had last been seen alive about 7:00 p.m. and found dead at 10:00 p.m., so he determined that she was shot about 7:15 p.m. Dr. Cohle's testimony was used to corroborate Peters' testimony. But, Dr. Cohle's testimony is contrary to the physical facts contained in Autopsy Reports (A-95-480) which state the path of direction of this bullet is slightly from above-downward and testimony and physical evidence shows Priscilla was lying on her back. Therefore, this wound could not have been inflicted as was testified to, nor could it have been one of, or the last shot fired. The autopsy reports were not offered into evidence by either my lawyer or the prosecutor. Evidence shows that this wound would have been the first or one of first inflicted, before Priscilla ended up on her back.

Detective Renhawitz testified that he saw a bruise under one of Peters eyes and that was contrary to Peters' testimony. Her mug shot, taken at the time of her arrest, showed there was no bruise, but the mug shot was not offered into evidence by my lawyer.

Several of Priscilla's neighbors testified to seeing Peters in the neighborhood of Priscilla's house, and around the house itself. Several forensic experts testified that the fingerprints and footwear impressions found at the crime scene and in the victim's car did not match mine, nor was the murder weapon traceable to me. The fabric, tape, plastic, and steel wool samples from the crime scene did not match the items taken from my apartment or the device from my car. No physical evidence links me to Priscilla's murder. The prosecution's case hinged on its star witness — Peters. The judge observed, "If Ms. Peters didn't testify against him, I wouldn't think the prosecution would have an awful lot of case." The judge added, "The prosecution would have a real tough time convicting you without that evidence."

Mr. Hanner, a co-worker of Priscilla's, alleged that Priscilla told him that I had called her the morning of this homicide, and threatened to kill her. The judge ruled prior to my trial that his testimony concerning the phone call was inadmissible, but during the trial he changed his mind and decided to allowed it under MRE 803(2), as an excited utterance. When my lawyer tried to elicit Hanner's entire statement, the prosecution objected that it was hearsay. The judge ruled the jury couldn't hear, "Ms. Peters might kill her," because it was neither material nor relevant. However the judge did allow the statement, "Mr. Davis threatened to kill her." After Hanner left the stand, the judge told the jury the reason he allowed this testimony was because it served to identify the perpetrator. At that point the judge effectively expressed to the jury the belief that I was the perpetrator, and the prosecution capitalized on that in his closing argument. Hanner's handwritten statement and his police interview support that his alleged conversation with Priscilla was not an excited utterance. The statements also conflict with his testimony and indicate he told the jury his own words and not those of Priscilla. My lawyer didn't present Hanner's previous statements to strengthen his objection to the judge's ruling allowing Hanner's testimony.

I took the stand on my own behalf and testified that I did not kill my wife, nor was I involved in her murder. I was with our 4-year-old daughter when I received a page on my pager. I then made a phone call from the town of Paw Paw at 7:01 p.m. for 2 minutes to Priscilla's house. That call was answered by the answering machine. I was not even in Berrien County that evening. The only corroborating evidence my lawyer presented was the phone bill showing the call I made from Paw Paw. Also, I had not seen Peters since about 1:00 p.m. until I picked her up at about 8:20 p.m.

On rebuttal, testimony was given that it took a police officer 24 minutes to drive the 27 miles from Paw Paw to the Benton Harbor Exit 33, on I-94, traveling at 71 mph, which was still 5-6 miles, 4 stop signs, and reduced city speed limits from the crime scene. The undisclosed phone records for (616) 927-6068 would have established that Priscilla was home before 7:00 p.m., and that she paged me. That is critical because Priscilla's Certificate of Death states her time of death was 1915 hrs. (7:15 p.m.). It is physically impossible that I, or anyone, could drive from Paw Paw to the crime scene in 12 minutes, which is half the time it took the police to just drive from Exit 60 (Paw Paw) to Exit 33.

The prosecutor misstated crucial evidence and testimony in his closing argument and presented his own version of the alleged phone conversation between my wife and I that was not in evidence or testified to at trial.

My conviction was affirmed by the Michigan Court of Appeals on June 5, 1998. The Michigan Supreme Court denied an application for leave to appeal on March 30, 1999. A Motion for Relief from Judgment was denied on October 24, 2000, by my trial judge, who indicated that I failed to satisfy the "actual prejudice" and "good cause" requirements set forth in MCR 6.508(D)(3)(A). My trial judge denied a Motion for Subpoena for Phone Records stating that there was no meritorious basis for granting the motion, even though it is exculpatory evidence that would help establish my innocence. On September 30, 2002 the U.S. District Court, Eastern District denied a habeas corpus petition. On April 9, 2002 the federal Sixth Circuit Court of Appeals denied my appeal of the District Court's decision. On August 5, 2004 the U.S. Supreme Court rejected my petition for a writ of certiorari. To date, no state or federal court has considered the importance of my claims of actual innocence.

Thank you for reading about my case and my current legal predicament. I can be contacted at:
Mickey Davis 133518
Bellamy Creek Correctional Facility
1727 Bluewater Highway
Ionia, MI 48846

My outside contact is:
Valerie Kevan
9007 W Montecito Ave.
Phoenix, AZ 85037

Wrongful Conviction Compensation Governed By Mish-Mash Of State And Federal Laws

As of June 2005 eighteen states, the District of Columbia, and the federal government have statutes that provide compensation to a person who can establish that he or she was wrongfully convicted.

Those statutes are summarized in the chart on page 17. No two statutes are the same. They vary as to the qualification requirement for compensation, who makes the determination of eligibility, what proof standard is applied, who makes the determination of compensation, and how much can be awarded. There are also differences in the type of conviction that is eligible for compensation, the statute of limitations for filing a claim, and whether other considerations can affect the size of the compensation award (such as legal expenses, lost income, medical expenses, etc.)

The most striking dissimilarity is in the maximum possible award. They range from Montana's niggardly award of free tuition to any school in the state's university system - and then only to a person exonerated by DNA evidence - to the award of "fair and reasonable damages" by New York and West Virginia - with no statutory maximum. The District of Columbia also has no statutory maximum award, but punitive damages are excluded.

A legislative appropriation or a section 1983 federal civil rights lawsuit are the primary avenues available for a wrongly convicted person in the 32 states that don't have a compensation statute. Although a suit can also be filed in state court, damages are typically limited by statute under the doctrine of sovereign immunity.

The proof of how effectively the wrongly convicted are compensated in the real world is how they fair in actual cases. The chart on page 15 lists 74 awards of compensation in 2003 and 2004. Three people were awarded compensation by more than one jurisdiction, and the 46 Tulsa, Texas defendants were awarded a lump sum that was divided by a formula that took into account their conviction and the length of their time in custody.

The chart's most noticeable information is the discrepancy in the Average Yearly Compensation. It ranges from the \$8,000 per year awarded by the State of Illinois to three defendants sentenced to life in prison, to the \$1 million per year awarded a defendant sentenced to life in prison who sued the City of Chicago.

The 71 people awarded compensation were convicted in ten states, and they were awarded an average of \$165,398 for each of the 434 years they were wrongly imprisoned. The average time from exoneration to a compensation award was over two years, although in one case - Albert Ramos - it was 11 years. The cases of Wilton Dedge (below), Ken Marsh (p. 16), and Michael Pardue (p. 20) are emblematic of the myriad of difficulties a wrongly convicted person can face to obtain compensation.

Wilton Dedge Sues For 22 Years Wrongful Imprisonment

by JD Staff

Wilton Dedge was released in August 2004 after 22 years imprisonment for a rape a DNA test in 2004 excluded him from committing. Dedge was convicted in 1982 and sentenced to 30 years in prison, even though six alibi witnesses swore that when the rape occurred he was at a garage 45 minutes away. After his conviction was reversed, he was again wrongfully convicted after a retrial and sentenced to life in prison.

Almost six years ago *Justice:Denied* reported on Ellen Reasonover's dramatic release from 16 years of wrongful imprisonment. (See, Lone Juror Saves Innocent Good Samaritan From Death Sentence, *Justice:Denied*, Vol. 1, Issue 8).



Reasonover was convicted in 1983 of murdering 19-year-old James Buckley during a robbery of the Dellwood, Missouri gas station attendant. She was sentenced to life in prison without parole for 50 years, after coming within a single vote by her jurors of being sentenced to death. In August 1999 Reasonover's conviction was reversed by a federal judge who ruled her trial was "fundamentally unfair," and indicated that based on the evidence Reasonover was innocent. How and why was Reasonover in the situation of being wrongfully convicted of a murder she didn't commit?

In January 1983 Reasonover had been at a convenience store across the street from a Dellwood gas station getting change to wash her clothes at a nearby laundromat. Dellwood is in St. Louis county, and near the city of St. Louis. Later that night she saw on the news that the attendant at that gas station had been shot and killed during a robbery about the time she was at the store. Reasonover remembered seeing a car with two men in it leave the gas station, and she called the police to give them a description of the car as a possible lead. However instead of following up on Reasonover's report, the police focused on her as the murderer.

Reasonover's protestation's of innocence fell on the deaf ears of the police who built the case against her, the St. Louis County prosecutors who charged her with first degree murder, and her jurors who after convicting her, voted 11 to 1 to sentence her to death. Reasonover was sentenced to life in prison and lost her direct appeal.

In 1993 Centurion Ministries (the nation's oldest innocence project) responded to Reasonover's plea for help by taking up the cause of finding new evidence to prove she did not receive a constitutionally fair trial. In 1993 and 1994 Centurion's staff investigator, Paul Henderson, interviewed 94 people who might have information helpful to Reasonover. One of those people mentioned hearing an audio tape recording with Reasonover on it, that was made at the Dellwood police station immediately after her arrest in 1983. The tape had been referred to by the prosecution during Reasonover's direct appeal. The lawyer working with Centurion requested, and was provided with a copy of the tape by the St. Louis County District Attorney. It was a 58-minute recording of Reasonover and her boyfriend, Stanley White, who had been arrested at the same time as her. Left in a room together but unaware they were being recorded, Reasonover and Stanley denied 20 times in 58 minutes that they were involved in the murder and openly wondered why they had been arrested. That conversation would have been unlikely if they had killed James Buckley - since they would have been expected to spend their time alone to formulate or rehearse their alibi story. Stanley was released after his arrest without being charged.

Florida doesn't have a wrongful conviction compensation statute, so in January 2005 it was announced that several state senators would sponsor a special-claims bill awarding Dedge \$4.9 million for lost wages, wrongful imprisonment and costs incurred by his family and lawyers.

In February state Rep. David Simmons filed a claims bill in the House that would provide Dedge with "modest" restitution of less than \$1 million. Simmons said, "We're not in the business of providing a lottery to someone who's been wrongfully convicted."

However the legislature adjourned in May without passing a bill compensating Dedge.

On May 27, 2005 a lawsuit was filed in the Brevard County Circuit Court that named the State of Florida and state Dept. Of Corrections Secretary James Crosby Jr. as defendants, and

Ellen Reasonover Awarded \$7.5 Million Compensation For 16 Years Wrongful Imprisonment

By Hans Sherrer

The contents of the tape corroborated Reasonover's statement to the police that she called the police to provide information she thought might help track down Buckley's killers. Although it was discoverable exculpatory evidence, her prosecutors did not turn it over to her trial and appellate lawyers.

Centurion Ministries also found evidence discrediting the two jailhouse informants the prosecution relied on to convince the jurors of Reasonover's guilt. Although both informants claimed to have heard her confess, one was proven to have lied for the prosecution, and the truthfulness of the other was seriously cast in doubt because she only testified after Reasonover's prosecutors bribed her with a sweetheart deal.

In reversing Reasonover's conviction, U.S. District Judge Jean Hamilton ruled that if the jurors had heard the concealed tape recording and the evidence discrediting the prosecution's two star jailhouse informants, there is a reasonable probability that they would have agreed with Reasonover's claim of innocence and found her not guilty.

In 2001 Reasonover filed a multi-million dollar federal civil rights lawsuit against the city of Dellwood, lead police investigator Dan Chapman, St. Louis County, lead prosecutor Steven H. Goldman, and several other officers. In 2003, U.S. District Court Judge Carol Jackson dismissed the claims against all the defendants except the city of Dellwood and Chapman, who is now the city's police chief. In dismissing the claims against prosecutor Goldman, who is now a St. Louis County judge, Jackson wrote, "A prosecutor is entitled to absolute immunity against allegations that he withheld or suppressed favorable evidence." ¹

Although they denied any wrongdoing, in September 2004 the city of Dellwood and Police Chief Chapman settled Reasonover's claims against them for \$7.5 million. James Buckley might agree that it is a fitting end to the unconscionable mistreatment by law enforcement authorities of the one person in the world who cared enough to act as a Good Samaritan by calling the police to provide a lead that might have led to the capture of his killers. To this day James Buckley's killers have been given a free pass because the Dellwood police and the St. Louis County District Attorney's Office took the easy way out by framing an innocent woman for the tragic snuffing out of his life at nineteen years old.

Endnotes:
1 Reasonover Gets \$7.5 Million in Suit, William C. Lhotka (staff), *St. Louis Post-Dispatch*, September 16, 2004.
Sources: Reasonover Gets \$7.5 Million in Suit, William C. Lhotka (staff), *St. Louis Post-Dispatch*, September 16, 2004
Lone Juror Saves Innocent Good Samaritan From Death Sentence, Hans Sherrer, *Justice Denied*, Vol. 1, Issue 8.

Dedge and his parents, Walter and Mary Dedge, as plaintiffs. Although the lawsuit does not ask for a specific dollar amount, legal awards are limited under Florida's sovereign immunity law to \$100,000 per person and \$200,000 per claim.

Sandy D'Alemberte, a former president of Florida State University who is handling Dedge's case pro bono, said that Dedge's imprisonment was "all the more cruel" because Dedge had first sought DNA testing of crime scene evidence in 1988. However Dedge's prosecutors had fought against the DNA tests. Dedge's lawsuit states that if the state had agreed to the testing, it would have resulted in him being saved from "16 additional years in prison, saved the state from the expense of imprisoning an innocent man and the expense of extensive litigation the state undertook to prevent the testing."

Source: Senate to Look at Compensation for Wrongly Convicted, Jackie Hallifax, *Florida Today*, February 19, 2005.
Wrongly Convicted Man Sues Florida, AP story, *Tallahassee Democrat*, May 29, 2005.

Compensation Awarded To The Wrongly Convicted In 2003 & 2004

Name	Compensation	Paid By	State	Convicted	Released	Exonerated	Yrs. Im- prisoned	Avg. Yearly Compensation	Compensation Awarded	Exonerated By	Convicted Crime	Sentence
Michael Austin	\$ 1,400,000	State of MD	MD	1974	2001	2001	27	\$ 51,852	2004	Eyewitness error and ineffective assistance of counsel	Murder	Life
Marcellius Bradford	\$ 120,000	State of IL	IL	1986	1992	2001	6	\$ 20,000	2003	DNA	Kidnapping	12 yrs
Rolando Cruz	\$ 120,300	State of IL	IL	1982	1995	2002	13	\$ 9,254	2003	Acquittal after retrial	Murder	Death Row
Richad Danziger	\$ 9,000,000	City of Austin	TX	1988	2001	2001	13	\$ 692,308	2003	DNA	Rape	Life
Frederick “Rick” Daye	\$ 389,000	State of CA	CA	1984	1994	1994	10	\$ 38,900	2003	DNA	Rape & kidnapping	Life
Anthony Faison	\$ 1,650,000	State of NY	NY	1987	2001	2001	14	\$ 117,857	2003	Recanting witness & fingerprint exclusion	Murder	Life
Bruce Godschalk	\$ 2,340,000	State of PA	PA	1986	2002	2002	16	\$ 146,250	2004	DNA	Rape	10-20 yrs
Michael Green	\$ 1,000,000	State of OH	OH	1988	2001	2001	13	\$ 76,923	2004	DNA	Rape & robbery	20-50 yrs
Michael Green	\$ 1,600,000	City of Cleveland	OH	1988	2001	2001	13	\$ 123,077	2004	DNA	Rape & robbery	20-50 yrs
Vincent Jenkins	\$ 2,000,000	State of NY	NY	1982	1999	1999	17	\$ 117,647	2003	DNA	Rape	20-to-Life
Martin Lantigua	\$ 300,000	State of NY	NY	1992	1996	1996	6	\$ 50,000	2004	Eyewitness error	Murder	Life
Martin Lantigua	\$ 1,000,000	City of New York	NY	1992	1996	1996	6	\$ 166,667	2004	Eyewitness error	Murder	Life
Clark McMillan	\$ 832,950	State of TN	TN	1980	2002	2002	22	\$ 37,861	2004	DNA	Rape & robbery	119 yrs
Leonard McSherry	\$ 481,000	State of CA	CA	1988	2001	2001	13	\$ 37,000	2003	DNA	Kidnapping & rape	48 yrs
Roberto Miranda	\$ 5,000,000	Clark County	NV	1982	1996	1996	14	\$ 357,143	2004	Ineffective assistance of counsel	Murder	Death Row
James Newsome	\$15,000,000	City of Chicago	IL	1979	1994	1995	15	\$1,000,000	2003	Prosecutors concealed exculpatory evid. and false testimony	Murder	Life
Christopher Ochoa	\$ 5,300,000	City of Austin	TX	1988	2001	2001	13	\$ 407,692	2003	DNA	Rape & murder	Life
Calvin Ollins	\$ 120,000	State of IL	IL	1986	2001	2001	15	\$ 8,000	2003	DNA	Murder, rape, kidnapping & robbery	Life
Calvin Ollins	\$ 1,500,000	City of Chicago	IL	1986	2001	2001	15	\$ 100,000	2003	DNA	Murder, rape, kidnapping & robbery	Life
Larry Ollins	\$ 120,000	State of IL	IL	1986	2001	2001	15	\$ 8,000	2003	DNA	Murder, rape & robbery	Life
Aaron Patterson	\$ 161,500	State of IL	IL	1986	2003	2003	17	\$ 9,500	2003	Pardon based on false confession extracted by police torture	Murder	Death Row
Albert Ramos	\$ 5,000,000	State of NY	NY	1984	1992	1992	8	\$ 625,000	2003	False confession extracted by police torture	Child abuse	25 yrs
Ellen Reasonover	\$ 7,500,000	City of Dellwood	MO	1983	1999	1999	16	\$ 468,750	2004	Perjurious prosecution testimony	Murder	Life
Omar Saunders	\$ 120,000	State of IL	IL	1986	2001	2001	15	\$ 8,000	2003	DNA	Murder, rape, kidnapping & robbery	Life
Charles Shepard	\$ 1,650,000	State of NY	NY	1987	2001	2001	14	\$ 117,857	2003	Recanting witness & fingerprint exclusion	Murder	Life
Tulia - 46 defendants	\$ 6,000,000	29 Panhandle Cities & Counties	TX	1999-2000	1999-2003	1999-2003	80	\$ 75,000	2004	Police perjury	Drugs	Probation to 99 yrs
Quedellis “Rick” Walker	\$ 428,000	State of CA	CA	1991	2003	2003	12	\$ 35,667	2003	New scientific evidence (not DNA).	Murder	Life
Bernard Webster	\$ 900,000	State of MD	MD	1982	2002	2002	20	\$ 45,000	2003	DNA	Rape	30 yrs
Jimmy Williams	\$ 750,000	State of OH	OH	1991	2001	2001	10	\$ 75,000	2003	Eyewitness recanted	Rape	Life
Totals	\$71,782,750						434*	\$ 165,398				

* The three defendants awarded compensation from two sources are counted only one time.

Chart prepared by Hans Sherrer.

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Fabricated Prosecution Expert Testimony And Evidence Nets Michael Green \$2.6 million for 13 Yrs Wrongful Imprisonment

By JD Staff

In 1988 Michael Green was convicted of raping a Cleveland Clinic patient. He was released in October 2001 after being excluded as the woman's attacker by the DNA analysis of a washrag found at the crime scene that was used by the rapist to wipe himself. Green had been wrongly imprisoned for 13 years.

It was also learned during the reinvestigation of Green's case that Cleveland police lab technician Joseph Serowik falsely testified as an expert witness about key prosecution evidence. He testified that after analyzing the victim's and Green's pubic hair and head hair, he made a match and that his finding was statistically supportable – when it wasn't. He also testified that the washrag had only the rapist's semen on it - which he falsely claimed was Greens'. However it was impossible for the washrag not to have also had the victim's fluids on it – and it was later discovered it did. Thus the washrag was invaluable as evidence excluding any man whose semen was dissimilar to that on it. Furthermore, when Serowik's lab notes were reviewed by Green's lawyers, they discovered he knew at the time he testified that the washrag had a detectable presence of fluid from both the attacker and the victim.

The *Cleveland Plain Dealer* published a series of articles about Green's case in 2002 titled, *The Burden of Innocence*. Although Green had been released the previous year, Rodney Rhines confessed to the rape a week after the articles appeared, and he is currently serving a five-year sentence.

In May 2003 Green filed a multi-million dollar federal civil rights lawsuit in Cleveland naming as defendants: the Cleveland Clinic Foundation and several of its officers, the city of Cleveland, and two of his former lawyers. Among the suit's allegations were that Cleveland police investiga-



tors provided the victim with information that led her to identify Green in a lineup after she had previously failed to do so, and that the police fabricated some of the prosecution's evidence.

On June 7, 2004, Cleveland and Michael Green agreed to settle his claims against the city for \$1.6 million to be paid in ten annual yearly installments beginning in 2004, and the city also agreed to reinvestigate all criminal cases that meet at least one of the following four criteria:

- All cases from January 1, 1987 on, in which forensic lab technician Joseph Serowik testified at trial.
- Any cases in which Serowik performed serology and/or hair analysis before the defendant pleaded guilty before trial.
- A random selection of all other files involving Serowik and serology and/or hair evidence.
- A random selection of other forensic lab employees where serology and/or hair evidence has been analyzed since 1987.

Cleveland hired attorney James Wooley to oversee the forensic audit, that it is believed will include more than 100 cases.

At the time the suit was settled, the director of Cleveland's crime lab, Subodh Chandra, admitted about Serowik, "He's still in the lab. He still has his job. He's not doing serological or hair analysis any more." However both Serowik and his supervisor were later put on unpaid leave pending completion of Wooley's investigation.

After the settlement was announced, Michael Green commented about its unusual provision requiring an independently supervised audit of the Cleveland crime lab's work dating back 17 years, was, "This is a chance for me to reach through the bars and help the inmates I left behind."

Green had previously been awarded about \$1 million in compensation by the state of Ohio.

Source: City to pay \$1.6 million for man's prison time, Connie Schultz (staff), *Cleveland Plain Dealer*, June 8, 2004.

Ken Marsh \$50 Mil. Claim Rejected

In 1983 Ken Marsh was convicted of murdering Phillip Buell, his girlfriend's two-year old son. On August 10, 2004 his conviction was vacated and he was released from prison after his petition for habeas corpus was granted without opposition from San Diego District Attorney Bonnie Dumanis. Marsh's petition was based on the analysis of numerous medical experts that Phillip's injuries were consistent with those that would be caused by him hitting his head on a brick fireplace hearth after falling off of a couch.

That is not just what Marsh had claimed from the time he was first questioned about Phillip's injury, but the investigating officers with the San Diego Police Department concluded that Phillip's death was accidental from a fall. However doctors with San Diego's Children's Hospital influenced the San Diego DA to pursue murder charges against Marsh.

On September 3, 2004, Dumanis announced she was dropping the charges against Marsh because of an independent evaluation of the medical evidence by a Florida forensic pathologist, who was "unable to conclude beyond a reasonable doubt or to a reasonable degree of medical certainty that [Phillip Buell] was a victim of child abuse." The charges were dismissed that same day, after Marsh had spent 21 years wrongly imprisoned.

In early February 2005, Marsh filed a \$50 million claim

against San Diego County, claiming that county officials conspired to convict him of Phillip's death. The claim also named San Diego's Children's Hospital and several doctors as potential defendants.

The claim also alleged Marsh was convicted "as a result of false and misleading statements and statements made with reckless disregard for the truth by the county and its employees."

The county rejected Marsh's false imprisonment claim on March 23. Other claims were rejected by the county on February 15 as being untimely (late). Since Marsh has six months to file a lawsuit from the date the claim was rejected, Paul Leehey, one of Marsh's attorneys, anticipates a lawsuit will be filed on or before August 10, 2005.

For more information about Ken Marsh's case, see, Toddler's Accidental Death Ends With Babysitter's Murder Conviction: The Ken Marsh Story, *Justice:Denied*, Issue 25, Summer 2004, p. 4; and, Ken Marsh Exonerated of Murder on September 3, 2004, *Justice:Denied*, Issue 26, Fall 2004, p. 10.

Source: Man freed after doubt shed on conviction files claim, Greg Moran (staff), *San Diego Union-Tribune*, February 9, 2005. Attorney Paul W. Leehey email to Hans Sherrer, June 28, 2005.



Ken Marsh and his wife Brenda Warter. They were married after Ken's release from prison in the fall of 2004. (NBC7 San Diego)

Roberto Miranda Receives \$5 Million For Wrongly Spending 14 Years On NV's Death Row

By JD Staff

In 1980 Roberto Miranda immigrated to the United States from Cuba. In 1982 he was charged with the 1981 Las Vegas murder of Manuel Rodriguez Torres. Although he only spoke Spanish, Clark County, Nevada (Las Vegas) prosecutors administered a polygraph examination in English that he had great difficulty understanding. After performing poorly on the exam, the Clark County Public Defenders office assigned him an inexperienced lawyer a year out of law school who had never handled a capital murder case. Protesting his innocence, Roberto was convicted and sentenced to death.



After losing his direct appeal, Roberto filed a state post-conviction petition requesting a new trial. Roberto claimed he had been deprived of a constitutionally permissible level of representation by his lawyer. Among his claims was that his lawyer failed to investigate leads Roberto provided him with that would have supported his innocence and cast doubt on his guilt, as well as failing to vigorously contest the veracity of the prosecution's physical and testimonial evidence. Roberto also alleged that his lawyer had not pursued disclosure of exculpatory evidence concealed by the prosecution.

In 1996 a state District Court judge who stated in part — "The lack of pretrial investigation and preparation by trial counsel ... cannot be justified" - ruled Miranda had been denied effective assistance of counsel, reversed his conviction, and ordered a new trial. The murder charge was dismissed after prosecutors declined to retry Miranda. He was released after spending 14 years on death row.

Represented by Spence, Shockey & McCalla (Gerry Spence's Jackson, Wyoming law firm), in 1998 Roberto filed a federal lawsuit against Clark County, Nevada, the Clark County Public Defenders' office, and the lawyer who represented him at trial. His basic claim was his civil rights were violated by their handling of his case. A U.S. District Court judge dismissed the lawsuit on the ground that Roberto couldn't sue the county, the public defenders office, or the lawyer for poor representation. Roberto appealed that ruling, which was upheld by a three judge panel in the Ninth Circuit Court of Appeals. However sitting en banc, the Ninth Circuit partially reversed itself after granting Roberto's motion for reconsideration. In remanding the case back to the district court for trial, the Ninth Circuit ruled that Roberto could sue Clark County and the director of the Public Defenders office who assigned the inexperienced lawyer to Roberto's case (because he represented Clark County when he did so). However the Court ruled Miranda couldn't sue the ineffective lawyer. Clark County appealed the ruling to the U.S. Supreme Court, which in October 2003 declined to review the decision.

Facing a possibly catastrophic jury verdict for its egregious mishandling of Roberto Miranda's representation, Clark County agreed to a \$5 million settlement that was finalized on June 22, 2004 with the dismissal of his civil suit.

Sources: Settlement Ends Ex-Inmates Sage, Carri Geer Thevenot, *Las Vegas Review-Journal*, June 30, 2004. Wrongful Incarceration Suit Settled for \$5 Million, Press Release, Spence, Shockey & McCalla, June 29, 2004.

Chart Of State And Federal Compensation For The Exonerated *

State	Statute	Year Enacted	Qualification Requirement	Conviction Restriction	Who Makes Determination	Proof Standard	Statue of Limitation for Claim	Maximum Award	Considerations
Alabama	Code of Alabama §29-2-150 through 165	2001	Conviction vacated or reversed and charges dismissed	Felony conviction with total incarceration of more than 2 yrs.	Verification by Div. of Risk Management, judgment by the Committee on Compensation for Wrongful Incarceration, and appropriation by Legislature.	Not specified	2 years	Minimum of \$50,000 for each year of incarceration, but committee can recommend larger legislative award.	Not Specified
California	Cal Penal Code §§ 4900 to 4906	2000	Pardon based on innocence	Felony conviction with incarceration	State Board of Control makes a recommendation. to the legislature	Not specified	6 months after acquittal, pardon, or release and 4 months before new legislative meeting	\$100 per day of incarceration	Not Specified
Dist. of Col.	DC Code § 2-421 - 2-425	1981	Pardon based on innocence or conviction reversed or set aside based on innocence	Convicted with incarceration	Civil court	Clear and convincing	Available to any person released after 1979	No maximum.(No punitive damages)	Not specified
Iowa	Iowa Code Ann § 663A.1	1997	Conviction dismissed, vacated or reversed	Aggravated misdemeanor or felony conviction with incarceration	District Court determines liability. State Appeal Board or Civil Court determine damages	Clear and convincing	2 years	\$50 per day & lost wages up to \$25,000/yr & attorney's fees	Not specified
Illinois	Ill Rev Stat Ch. 705 § 505/8	1945	Pardon based on innocence	Not specified	Court of Claims	Preponderance of the evidence	≤5 yrs., 15K max, ≤14 yrs., 30K max, >14 yrs., 35K max, with CPI increase for each year since 1996	Not specified	Not specified
Massachusetts	M.G.L. Ch. 258D	2004	Pardon based on innocence or conviction vacated or reversed, charges dismissed, or "not guilty" verdict after new trial.	Felony conviction with incarceration sentences of 1 yr or greater	Civil Court	Clear and convincing	2 years	Fair and reasonable damages up to \$500,000 (No punitive or exemplary damages). Half-price tuition to state and community colleges.	Lost income
Maryland	MD State Fin. & Proc. § 10-501	1963	Pardon based on conviction in error	Convicted, sentenced and confined	Bd of Public Works	Conclusive	Not specified	Actual damages and reasonable amount for counseling	Not specified
Maine	14 Me Rev Stat Ann 8241-8244	1993	Pardon based on innocence	Incarcerated	Superior Court	Clear and convincing	2 years	\$300,000 maximum (No punitive or exemplary damages allowed)	Not specified
Montana	Mont. Code Ann. § 53-1-214	2003	Exonerated by post-conviction DNA testing	Felony conviction with incarceration	Appropriated by the legislature and authorized by the Dept. Of Corrections	DNA test result	10 years	Free tuition to any school in the state's university system.	Not specified
North Carolina	NC Gen Stat §§ 148-82 to 148-84	1947 (rev. 2001)	Pardon based on innocence	Felony conviction with incarceration	Industrial Commission, but subject to judicial review	Vindicated in connection with alleged offense	5 years	\$20,000 per year with Maximum of \$500,000	Not specified
New Hampshire	NH Stat § 541-B:14	1977	Found innocent	Convicted and incarcerated	Board of Claims	Board must find by majority vote that claim is "justified"	3 years	\$20,000 maximum total payout	Not specified
New Jersey	NJ Stat Ann §§52:4C-1 to 4C-6	1997	Not specified	Incarcerated	Superior Court	Clear and convincing	2 years	2x claimant's income in the year prior to incarceration or 20K per year of incarceration, whichever is greater	Not specified
New York	NY Ct. of Claims Act § 8-b	1984	Pardon based on innocence, or conviction reversed and charges dismissed based on innocence, or "not guilty" verdict after new trial.	Felony or misdemeanor convictions with incarceration	Court of Claims	Clear and convincing	2 years	Fair and reasonable damages with no maximum.	Not specified
Ohio	Ohio Rev Code Ann § 2305.02 & § 2743.48	2003	Conviction vacated reversed and charges dismissed based on procedural error or determination the person didn't commit the offense or it was not committed by any person.	Felony conviction with incarceration	Court of Common Pleas for liability; Court of Claims for damages	Preponderance of evidence	2 years after finding by Court of Common Pleas	\$40,330 per yr and lost wages, prison costs, and attorney's fees	Not specified
Oklahoma	51 Okl. St. § 154	2004	Pardon based on innocence, or conviction vacated and charges dismissed based on "actual innocence."	Felony with incarceration	Civil Court	Clear and convincing	No time limit	\$175,000 maximum total payout (No punitive or exemplary damages allowed)	Not specified
Tennessee	Tenn Code Ann §9-8-108 (a)(7) §40-27-109	1984 (rev. 2004)	Pardon based on innocence, or judicial "exoneration."	Incarceration	Board of Claims	Not specified	1 year	\$1,000,000 maximum total payout	Relevant factors including physical and mental suffering and earning loss
Texas	Tex Code Ann § 103	2001	Pardon based on innocence, or judicial relief on the basis of innocence.	Incarceration	Either administrative claim with comptroller or civil suit.	Preponderance of evidence	3 year	25K per year to a max of \$500,000, and one free year of counseling if mutually agreed by Dep. of Mental Health	Legal expenses; lost wages, and medical expenses (incl. counseling)
Wisconsin	Wis Stat § 775.05	1913 (rev. 1987)	Innocent of convicted offense	Convicted with incarceration	Claims Board	Clear and convincing	Not specified	\$5,000/yr, max \$25,000 but Board may petition legislature for additional funds	Not specified
West Virginia	W Va Code § 14-2-13(a)	1987	Pardon based on innocence, or conviction reversed and charges dismissed, or acquittal on retrial.	Arrest or conviction with incarceration	Court of Claims	Clear and convincing	2 year	Fair and reasonable damages with no maximum.	Not specified
Federal	H.R. 5107 (108th Congress)	2004 (rev.)	Unjust imprisonment	Incarceration	U.S. Court of Federal Claims	Not specified	Not specified	\$50,000 per yr in non-capital cases, and \$100,000 per yr in capital cases	Not specified

Louisiana: Bill approved by the Louisiana House Appropriations Committee on June 1, 2005 that provides a maximum of \$15,000 per year of incarceration with a maximum total payout of \$150,000. The Bill must be passed by the full House and Senate and signed by the governor. Louisiana currently provides an exonerated person with \$10 and a bus ticket home.

* Information is believed to be accurate as of June 1, 2005. Primary Source: Criminal Justice Policy Coalition, 563 Massachusetts Avenue, Boston, MA 02118, website: <http://cjpc.org>

Clarence Harrison Exonerated Of Rape, Kidnapping And Robbery After 18 Years Imprisonment

By JD Staff

In 1987 Clarence Harrison was convicted and sentenced to life in prison for the October 25, 1986 kidnapping, rape and robbery of a 25 year-old-woman waiting at a bus stop in Decatur, Georgia, who was also robbed of her watch and money. Clarence was 27 years old. Although she was attacked at 6a.m., before dawn, the jury relied on the woman's identification of Clarence out of a photo lineup and her courtroom ID of him during his trial. Testing of the seminal fluid collected from the victim was only able to narrow her attacker to 88% of the male population. The police initially fingered Clarence as a suspect because he lived in the area of the attack, and he had served five years in prison after being convicted at 19 of armed robbery.

Determined to prove his innocence, Clarence at first spent all his spare time in prison diligently working on his case. As he recently said, "I worked on my case so much I got migraine headaches." ¹ However after encountering the setbacks of having his direct appeal denied, and having a private lab determine in 1988 that the attacker's semen sample was unsuitable for DNA testing, Clarence began to despair: "After a year or so, you get burned out and you fall off into the system and you lose faith and your hope and you begin to believe you'll never get out. And that happened to me." ²

Denied parole, and unlikely to be granted it without accepting responsibility for a heinous crime he didn't commit, Clarence languished in prison. A turning point came in 1997 when a young fellow prisoner talking to his girlfriend on the telephone, unexpectedly handed Clarence the phone: On the other end was the young woman's mother, Yvonne Zellers. Yvonne offered to write Clarence, but he resisted because at that point it appeared he would die in prison. Clarence finally agreed she could write him about what she learned from the Bible, and she soon began to visit him. A year later he asked Yvonne if she would marry him if he was ever released from prison. She said yes, and Clarence had a renewed reason to fight for his exoneration.

After years of pursuing various leads, on February 10, 2003 Clarence wrote a letter to the newly formed Georgia Innocence Project (GIP) that began: "My name is Clarence Harrison. I am presently being held falsely accused of crimes I could not have committed."

The lawyer who handled Clarence's direct appeal in 1988 was on the GIP's Board of Directors, and in part due to the lawyer's knowledge of Clarence's case and personnel belief in his innocence, the project accepted his case. The DeKalb County District Attorney's office told the GIP that all the evidence from Clarence's case had been destroyed. However the persistence of its student interns paid off when they found a slide of the rapist's semen from the victim's rape kit.

Dear Sir,
My Name Is Clarence Harrison, I am presently being held falsely accused of crimes I could not have committed and I am presently being held here at South State Prison. I am seeking to vindicate myself by the only means I know how, being a poor man, ignorant of the law, unable to afford the advice of a reasonable competent professional attorney.

On August 24, 2004, the semen tested by a private laboratory in California, Forensic Science Associates, excluded Clarence as the women's attacker. A week later, on August 31st, Judge Cynthia Becker granted Clarence's motion for a new trial and then dismissed the charges. Clarence was immediately released from custody. On the DeKalb County courthouse steps, the same courthouse where almost 18 years earlier he had wrongly been found guilty and sentenced to life in prison, Clarence Harrison credited his fiancé Yvonne with giving him the renewed hope that led to his exoneration. He also said he hopes to work with the GIP to help free the many innocent men that he believes he left behind in prison. Clarence also mentioned that Yvonne and he would marry as soon as he could afford to buy a ring. Within days, strangers stepped forward and donated such things as rings, a cake, and a singer for their wedding. Several business owners also called to offer Clarence a job.

Although it is unknown how much the victim was influenced by the Decatur police and DeKalb County's D.A. to wrongly identify Clarence as her attacker during the initial photo line-up, and then at his trial, he holds no enmity towards her. After his release he said, "I never held any anger toward her. I just thought she made a mistake." ³

I'm still in a daze," was Clarence Harrison's response to how he felt, two days after his release from 17 years of wrongful imprisonment, as he sat in the office of the Georgia Innocence Project that had successfully worked to prove his innocence.



Clarence Harrison after his release

Sources:

An Innocent Man: Clarence Harrison had nearly given up – then a phone call changed his life, David Simpson, *Atlanta Journal-Constitution*, September 2, 2004.

Wrongly Accused Inmate Freed: Legal Advocacy Group Championed Man's Cause, *WSBTV.com*, August 31, 2004.

Endnotes:

1. An Innocent Man: Clarence Harrison had nearly given up – then a phone call changed his life, David Simpson, *Atlanta Journal-Constitution*, September 2, 2004.

2. *Id.*

3. *Id.*

Emory Law Student Helps Free Georgia Man Imprisoned 18 Yrs

By Georgia Innocence Project

Jason Costa, 21, is still reeling from the release of Clarence Harrison, who spent almost 18 years in prison for a crime he did not commit. Harrison, 44, was freed on August 31, 2004 after DNA test results ruled him out as the perpetrator of a rape for which he was convicted in 1987.

Costa, an Emory Law School student, started an internship with the Georgia Innocence Project (GIP) in May 2004. The two-year-old organization has received more than 1,400 letters from prisoners asking for help with their cases. GIP has only opened six cases, and Harrison is the first prisoner to be exonerated through its efforts.

"It was the kind of case where we knew we could help him because we expected DNA to be available," GIP Executive Director Aimee Maxwell said. "There is absolutely no way we would get the work done without the law students. We are a very bare-boned nonprofit, and there is no way I could devote the energy and time on the cases without Jason and others

Clarence Harrison Awarded \$1 Million Compensation

In May 2005 Georgia's governor signed legislation that will compensate Clarence Harrison \$1 million for his 18 years of wrongful imprisonment for kidnapping, robbery and rape. House Resolution 108 authorized an initial lump sum payment of \$100,000, and an annuity of \$45,000 annually for 20 years.

HR 108 recognized that during his nearly two decades of wrongful imprisonment "Mr. Harrison was divorced by his wife and virtually prevented from seeing his two children throughout his incarceration; he missed the birth of his first grandchild; his mother and one sister died; and he suffered from medical conditions including a worsened back problem that causes him now to have to walk with a cane, migraine headaches for three years for which he received no treatment, and due to a delayed diagnosis of kidney cancer, he had to have a kidney removed."

House Resolutions to compensate Douglas Echols and Samuel Scott who were exonerated of rape in 2002 after being wrongly imprisoned for 4 years and 15 years respectively, didn't make it out of a House Appropriations subcommittee.

Source: Governor Signs Compensation Measure For Wrongly-Convicted Man, Georgia Innocence Project, May 17, 2005, <http://www.ga-innocenceproject.org>



helping." Others who helped on the case are Emory Law School student Jennifer Walker, 21, Laura Verduci, a Georgia State Law School student, and Emily Gilbert, now a public defender in DeKalb County.

The case has helped Costa realize his true calling – public interest law. "It was fantastic to help free someone who is innocent. But as great as it was, the real accomplishment is doing the work that we're doing. This just highlights how important public interest work is," he said. Costa, president of the Emory Public Interest Committee at the law school, received the Sutherland, Asbill & Brennan grant, which paid his summer salary at GIP.

Harrison first wrote to GIP in February 2003. He was told all evidence from his case had been destroyed, but GIP interns found one slide from the rape kit.

Costa worked with the DeKalb County District Attorney's Office to allow evidence to be tested by a lab GIP considers the best, Forensic Science Associates in California. Another lab had trouble testing the evidence a few years earlier.

"Jason coordinated going to the prison to take our client's DNA sample. He watched the Georgia Bureau of Investigation take the sample and made sure the evidence was delivered to the lab," Maxwell said. It was the first time Costa met Harrison. Although he had communicated with him by telephone and letter.

Harrison, Costa, and Walker will continue to work for the GIP. Costa will design and help Harrison implement a plan to transition to life after exoneration, Maxwell said, including obtaining a driver's license, getting a job, and settling into a new home.

"Historically when a person has been exonerated, the biggest challenge has been that there is not enough help for the individual to get re-acclimated to society," Costa explained. "We get to set a new standard on what kind of impact an organization such as GIP can have in an individual's life."



Jason Costa and Clarence Harrison



Insanity Grips The British High Court – OK Given To Charge Exonerated People ‘Room and Board’

by Hans Sherrer

Insanity is defined by the Random House Webster’s Unabridged Dictionary (1999 ed) as “the condition of being insane.” The same dictionary defines *insane* as “not of sound mind; of, pertaining to, or characteristic of a person who is mentally deranged.” July 29, 2004 marks the day members of the British High Court were gripped by insanity.

Mike O’Brien was one of three defendants known in Britain as the ‘Cardiff Newsagent Three’, convicted in 1988 of the October 1987 robbery and murder of newsagent Phillip Saunders in Cardiff, Wales. The three men were exonerated of the murder in 1999 and released after 11 years of imprisonment.

O’Brien was awarded damages of \$1.17 million ¹ by the British Home Office. However the Home Office deducted \$66,000 ² what it describes as his ‘saved living expenses’ during the time he was wrongly imprisoned.

The Home Office’s deduction was based on their formula of charging O’Brien about \$6,300 ³ annually or \$525 monthly, for the ‘bed and board’ he had been provided for 11 years by the British Prison Service. The charge only covered the estimated cost of providing O’Brien with food and a cell to sleep in. The Home Office’s rationale was that the British government had to bear the cost of his upkeep during the period of his imprisonment, expenses that he would have had to personally bear if he had been free. So the deduction was imposed to prevent him from experiencing a financial windfall by saving those expenses while imprisoned. A Home Office spokesperson said of the deduction, “morally, this is reasonable and appropriate.” ⁴

The Home Office also considers the ‘bed and board’ deduction a bargain for O’Brien, since the Prison Service’s budget expense apportioned for each British prisoner is approximately £26,000 (\$47,000) per year. ⁵

O’Brien experience with the Home Office isn’t unique. The ‘bed and board’ deduction is levied against everyone in Britain awarded damages by the Home Office after exoneration from a wrongful conviction.

Robert Brown, e.g., was exonerated in 2002 of a 1977 murder conviction and released after 25 years of wrongful imprisonment. Imprisoned at 19 years old, and released a quarter-century later at 44, he was billed about \$144,000 ⁶ for the living expenses he had saved during his decades of wrongful imprisonment. Brown’s reaction to the deduction was one of disbelief: “I was arrested, fitted up and held hostage for 25 years and now they are going to charge me for being kept as their prisoner against my will. Can you think of a more disgusting way to abuse someone? I really feel that my heart is truly and finally broken. ... I’ve tried to maintain my dignity, but the state has treated me with nothing but contempt – now they are asking me for money for my bed and board in jail.” ⁷

Paddy Hill was one of the Birmingham Six wrongly convicted in 1975 as IRA terrorists. The six innocent people were released in 1991 after 16 years of imprisonment. Hill was billed \$90,000 ⁸ for room and board, and the Home Office also deducted \$126,000 ⁹ as interest on money it advanced him pending a decision on his damage award. He was not told at the time of the “advance” that he would be charged interest – much less the usurious interest rate of 23%. Hill responded

angrily to the Home Office’s conduct: “They had enough money to frame me. Nevertheless, when it comes to paying out compensation for ruining my life they happily rip me to shreds. ... I’ve had to put up with this, yet there has not been one police officer convicted of fitting people up. The Home Office had no shortage of money to keep me in jail or to run a charade of a trial.” ¹⁰ Hill continued, “While I was in prison, my family lost their home, yet they get no compensation. But the state wants its money back. It’s like being kicked in the head when someone has beat you already.” ¹¹

Vincent Hickey was one of the Bridgewater Four wrongly convicted of killing a paperboy in 1979. The four people were exonerated and released in 1997. Hickey was charged \$108,000 ¹² for the 18 years that the Prison Service provided him three squares a day and a bed to sleep on. ¹³ Showing he hadn’t lost his sense of irony after being victimized by a frame-up orchestrated by ten police officers, Hickey quipped, “If I had known this I would have stayed on hunger-strike longer, that way I would have had a smaller bill.” ¹⁴

The harshest public criticism of the Home Office’s policy was by John McManus, with the Scottish Miscarriage of Justice Organisation: “The government seems intent on punishing innocent people. It’s hard to believe someone actually thought this policy up. If you tell a child about this they will think it insane. Only a sick mind could have invented this policy. ... It is cruelty with intent. They seem to want to punish people for having the audacity to be innocent.” ¹⁵

Although everyone affected was upset by the ‘bed and board’ deduction, Mike O’Brien was the only one who chose to legally challenge the Home Office’s policy. He said, “Morally, the position of the government is just outrageous. It shows total contempt for the victims of miscarriages of justice. It makes me livid. ... A government can’t get much worse than this.” ¹⁶

In March 2004 the British High Court (Court of Appeals) ruled in O’Brien’s favor: It was improper for the Home Office to deduct a ‘saved living expense’ charge from his damage award. ¹⁷ However the Home Office appealed for reconsideration. In reversing its decision on July 29, 2004, the Court stated the charge was a “lawful and reasonable” deduction. ¹⁸ The Home Office now has a green light to charge ‘room and board’ to exonerated people.

Although he has been diagnosed as suffering from “irreversible, persistent and disabling post-traumatic stress syndrome,” due to his ordeal of being wrongly convicted and imprisoned for over a decade, O’Brien has vowed to continue fighting the Home Office. He is planning to appeal to the House of Lords, and if they don’t intervene, he will take his case to the European Court of Human Rights at Strasbourg. ¹⁹

There seems to be something amiss with the idea that a person should reimburse the cost of their room and board to the very government agency that was a party to their wrongful conviction and imprisonment. As John McManus observed, “Only a sick mind could have invented this policy.” ²⁰ Its reasonable description as an idea “characteristic of a person who is mentally deranged,” places it squarely within the realm of something definable as insane. Thus the British High Court can be said to have been gripped by insanity when it embraced the insane policy of charging an innocent person room and board for the term of their wrongful imprisonment.

Endnotes:

1 The award was for £650,000. All money amounts are converted from £ (British pounds) to \$ at the exchange rate on June 15, 2005 of about £1.8 to \$1.

2 £37,000

3 £3,500

4 *We locked you up in jail for 25 years and you were innocent all along? That’ll be £80,000 please*, Neil Mackay (Home Affairs Editor), Sunday Herald, March 14, 2004.

5 The British Prison Service’s 2004 budget is approximately £2 billion (\$3.6 billion), and as of August 27, 2004 there were 75,045 people under custody of the Prison Service. See, HM Prison Service homepage at, <http://www.hmprisonservice.gov.uk/>.

6 £80,000

7 *We locked you up in jail for 25 years and you were innocent all along?*, *supra*.

8 £50,000

9 £70,000

10 *We locked you up in jail for 25 years and you were innocent all along?*, *supra*.

11 *Innocent Brits charged for prison stays*, WorldNetDaily.com, March 15, 2004.

12 £60,000

13 *We locked you up in jail for 25 years and you were innocent all along?*, *supra*.

Anthony Marino Update

By Annmarie Roberts

Anthony Marino is an innocent U.S. citizen who has been imprisoned in Costa Rica for six years. After three years of pre-trial custody Anthony was convicted in 2002 of allegedly defrauding several U.S. investors. He was sentenced to 18 years in prison. He vehemently denies the fraud accusation and is appealing his conviction. (See, *Unjust Cruelty Hidden As Dual Criminality - The Anthony Marino Story, Justice:Denied*, Issue 24, Spring 2004).

Anthony is over 65 and in poor health. He has diabetes, high blood pressure with severe hypertension, and an aneurysm. Concern by Anthony’s family about his health led them to contact the Ombudsmen in Costa Rica, who worked with Anthony’s Costa Rican public defender to successfully argue to a judge the Costa Rica’s Constitution required Anthony’s transfer to a prison facility that had some provisions for a prisoner over 65 with health problems. Consequently, Anthony was recently transferred to such a facility from the grossly overcrowded general population prison where he had been for almost six years. (Note: The Ombudsmen are involved with a non-governmental human rights organization that works according to United Nations guidelines to help people who are having their human rights abused.)

On December 4, 1982 Costa Rica signed and adopted the International Covenant on Economic, Social and Cultural Rights (ICESCR), an Organization of American States (OAS) treaty that governs international prisoner transfers. The importance of considering a transfer for health reasons is recognized in that treaty’s Article 12 - The Right to the Highest Attainable Standard of Health. That article’s section entitled, Violations of the Obligation to Respect, specifically emphasizes the importance of a state’s legal obligation to first and foremost respect a prisoners “right to health” – which includes authorizing a prisoner’s transfer to his or her home country when that is necessary for health reasons.

Costa Rican doctors have told Anthony that his medical care needs are unavailable in Costa Rica. So beginning in 2002 his family spent a year preparing paperwork and obtaining United States government approval for his transfer under the ICESCR to a prison medical facility in the U.S. where he could receive the care he needs.

Even though the Costa Rican government is aware of Anthony’s medical needs, in August 2003 they denied his transfer to a prison medical facility in the United States. Their justification was that he owes restitution to the group of American investors who originally filed the claim of fraud against him in a Costa Rican court. These investors recently requested Anthony’s transfer to the United States so their dispute can be settled in the United States. In spite of the expressed desire of the investors and Anthony’s health needs, Costa Rica continues to deny his transfer to the United States.

Anthony is indigent and cannot repay the debts Costa Rica claims he owes, so no one can benefit financially from him remaining in that country’s prison system. His family continues working with the Costa Rican Ombudsmen, his public defender, and human rights groups to convince Costa Rican authorities that Anthony’s health condition is precisely the type of circumstance that should trigger his transfer under the ICESCR to a U.S. medical prison facility.

Anthony Marino’s contact person is his daughter, Annmarie Roberts. Email her at: annroberts1111@hotmail.com.

14 *Id.*

15 *Id.*

16 *Id.*

17 *The wrongly imprisoned are still paying for crimes they didn’t commit*, Comment, The Observer (London UK), July 31, 2004.

18 *Making the innocent pay twice*, Editorial Comment, The Herald, London UK, July 30, 2004.

19 The wrongly imprisoned are still paying for crimes they didn’t commit, *supra*.

20 *We locked you up in jail for 25 years and you were innocent all along?*, *supra*.

In February 2001 the official word from The State of Alabama was, “In the Michael Pardue case, the system worked.”

If the official who made that statement had just emerged from nearly 28 years of wrongful imprisonment, perhaps he would not have been so generous with his assessment of the system’s efficiency. But, it was not he who was innocent and imprisoned in 1973 at age 17 in the harshest prison in the Deep South for something he had not done. It was not he, but a small-framed blonde boy named Michael Pardue.

Since you are reading this, chances are that you too have been touched by the criminal injustice system in America. And unless you have tremendous help, endless resources, or both, you or your loved probably remains imprisoned. But, if you are among those who have accomplished the impossible by being liberated from the iron fists of injustice, several questions remain. What do you do next? Do you walk away, simply thrilled with your success and bask in the sunlight of your newly found freedom? Do you swallow the ludicrous boasting of state officials who loudly proclaim your release is proof the system works? In our case we did not have to give it much thought. Freedom is sweet, but we could not let the responsible people and organizations get away scot-free with what they had done to Michael, and me. We fought together for 18 years to free him – and I was his wife for the last 13 years of that fight.

Now, we are fighting for compensation for all those lost years. We are also working to have the people prosecuted and imprisoned who violated the law in order to convict and imprison Michael. This time, instead of his name, the prosecutors’ names are on the “DEFENDANT” line. Kind of gives you a rush, doesn’t it? It did us too, but the rush was very short lived.

Background Information

A little background information about Michael’s case will help to understand our compensation efforts. Much of the next seven paragraphs is excerpted from Donald Connery’s Introduction to our book *Freeing the Innocent - How We Did It*.

At age 17, Michael Pardue was a lost soul. He was a homeless, high school dropout living on scraps. His family had been destroyed when his father killed his mother the year before and was sent to prison. Though he had a gentle nature to go with his slight physique, the boy’s occasional delinquent behavior had brought him to the attention of the police. Thus, he became a convenient suspect in the separate shotgun slayings of two filling station attendants in the Mobile, Alabama area on May 22, 1973.

In their rush to solve the highly publicized crimes that had rocked the community, the police ignored strong leads to the two actual killers. Though not a speck of valid corroborating evidence or reliable eyewitness testimony connected the teenager to the crimes; he was subjected to a four-day round the clock interrogation. Locked in a police station, deprived of any outside contact including legal counsel, food, water or access to a bathroom, he finally succumbed to the marathon of physical and psychological intimidation. Beaten, dehydrated, hungry and having soiled himself repeatedly, he finally confessed to the killings - never mind that his admissions were contrary to the forensic facts. When the cops found a decomposed body in the nearby woods, possibly but not certainly a homicide victim, he was forced into a third confession to help them close that case as well.

Mike’s quick farce of a trial lasted less than three hours. He had an attorney, only recently a prosecutor, “whose representation was worse than no representation at all” according to a court ruling decades later. Sped off to prison as a confessed and convicted triple murderer, he seemed doomed to die behind bars, perhaps sooner than later. Alabama’s lockups in

Michael Pardue’s Quest For Compensation After 28 Years of Wrongful Imprisonment

By Becky Pardue

the 1970s were notoriously violent and he was the youngest inmate in the worst penitentiary of all.

He survived. To ward off predators, he pretended to be the crazed and dangerous triple murderer of the headlines. In his early years as a convict he twice briefly and nonviolently escaped. Then, as if taking the advice he now gives other inmates, Michael Pardue settled down to become a model prisoner. He worked and studied. He kept to himself. He avoided trouble. As the years rolled by, he read a mountain of books. He was a quiet man in a caged world of nose and menace. Like the innocent hero of The Shawshank Redemption, he used his wits to keep himself sane and whole as he clung to a faint hope that somehow, some day; the truth would set him free.

Then, Becky entered his life on 1983. She liked his sketches he mailed for her t-shirt business in Mobile. They corresponded, met and fell in love. They had a small window of opportunity for parole. When a cruel bureaucratic decree slammed that window shut in 1987, Mike’s frustration led him to “the biggest mistake of my life” he escaped for a third time, again nonviolently by driving away from the prison ranch. That rash act earned him a draconian life-without-the-possibility-of-parole sentence under Alabama’s “three strikes” habitual offender act.

Mike and Becky were trapped in a nightmare. Short of execution, his penalty for fleeing the prisons where he did not belong was as severe as it could be. Proving his actual innocence of the original crimes would demonstrate the unfairness of it all, but that seemed a hopeless task. What they could try to do, despite their scant knowledge and meager resources, was to use the legal system to challenge the shady and illegal means employed by the state to win its prosecutions back in 1973. If they could find a path through the maze of Alabama’s lower and higher courts and finally overturn all three murder convictions, the way would be clear to challenge the die-in-prison punishment for the escapes.

Remarkably, they managed in just six years to erase all the murder convictions, one by one. But then the authorities in 1995 chose to validate the mistakes of their predecessors by going back to trial on one of the old homicides. Relying again on the bogus confession, this time misleading the jury with a long-hidden partial tape of the interrogations, the prosecutors won a new guilty verdict. He appealed. The Alabama Court of Criminal Appeals unanimously reversed his murder conviction as unconstitutional having been based entirely on a coerced confession. The state could have mustered their case and proceeded to trial again, without the false confession, but they refused. They had nothing to take to trial, they never did. In typical fashion, rather than giving Michael a new trial where a jury would find him not guilty, thus allowing him some measure of vindication, the state dropped the murder charges. In 1997, the final murder conviction was erased when the state Supreme Court agreed that the confession was coerced. Armed with nothing else, unable to build a case, the state conceded.

We promptly went about attacking the three escapees charges. In an odd twist of fate, the State of Alabama is not only judicially corrupt, it is inept as well. Michael was able to find ample constitutional flaws in the escape convictions to force reversals. It took another 4 years.

On February 15, 2001 Michael Pardue was released from prison after 27 years and 9 months of wrongful incarceration.

The following is how our efforts to obtain compensation for Michael’s ordeal is progressing.

In Alabama there were two avenues for obtaining compensation: a Section 1983 federal civil rights lawsuit and Alabama’s newly legislative act creating compensation for the wrongfully incarcerated. We acted on both.

Compensation Claim Filed

In 2001, Alabama enacted a bill to compensate (at \$50,000 per year with no cap) the wrongfully incarcerated. We were taken aback by this progressive move in the Deep South. Within months of Michael’s release we began to compile our application for compensation citing this new law. We did not simply fill out papers explaining the legalities leading to the reversal of the murders. Knowing that Attorney General Bill Pryor - who vehemently fought against Michael’s release - was a member of the compensation committee, it was obvious to us that a simple application would not do. The documentation we sent was nothing less than an excruciatingly detailed case study. It included everything, every single piece of evidence existing about the murder cases, including the names of the actual perpetrators. We cataloged and cross-referenced every document with testimony, forensic work and expert analysis. We actually had the profound fortune to get Dr. Herbert McDonnell, Dr. Henry Lee’s associate to study crime scene photographs, perform blood spatter analysis and produce a comparative report between this evidence and Michael’s confession. The confession was clearly a fraud by a world renowned specialist’s analysis. We took about three months out of our life to make the most comprehensive report possible. When all was said and done our beautifully prepared case study weighed in at 25 pounds, 12 ounces according to the postal scale. It was mailed — certified and insured — on February 23, 2003.

The state had previously admitted they could not bring Michael’s case back to trial for lack of evidence. They made no secret that a new trial for Pardue without the “confession” would most certainly end with an acquittal. We erroneously took that as a concession, after all, if the prosecution does not have enough evidence to convict, isn’t that tantamount to the defendant being not guilty? Innocent until proven guilty is the most basic principle of American law. Right? So we were confident of a positive response when we submitted our compensation application.

Yet almost two and a half years later we are still awaiting a response of any kind. We have stopped calling for a progress report. There is no progress to report. Why? *The compensation committee has never convened to consider our application.* It is sitting collecting dust in the corner of an office in Montgomery - Alabama’s state capitol. The official word on our application is this: The Division of Risk Management must certify our application. They are unable to do so because they do not know the definition of wrongfully incarcerated. They have sent a request for a definition to Alabama’s attorney general. The attorney general fought Michael’s release and is currently defending the city, county and state officials who conspired and successfully convicted and imprisoned him. So much for Alabama’s progressive compensation legislation that looks good on paper but so far has been meaningless in practice.

Federal Civil Rights Lawsuit Filed

In 1999 we filed our Section 1983 federal civil rights lawsuit in Mobile against the conspirators directly responsible for Michael’s 28 years of unconstitutional imprisonment for crimes he did not commit. Keep in mind that it is not simply those lost years, experiences and opportunities that Michael seeks compensation. It is also what replaced those 28 years of free-world experiences: being wrongly thrown into the bowels of Alabama’s hellish prison system for that period of time.

Michael Pardue continued on page 21

Michael Pardue continued from page 20

The defendants we named in our suit from Michael's 1973 prosecution include Chandler Stanard, recent district attorney turned defense lawyer and Michael's court-appointed defense counsel from 1973, Baldwin County Chief Detective Robert Stewart, Baldwin County Sheriff Cotton Long, Baldwin County DA James Hendrix, Mobile County Chief Detective Bill Travis, Mobile County DA Charles Graddick and DA Willis Holloway, Saraland Police Chief Frank Pridegin, Saraland Police Lt. Frank Mann, and Mobile forensic specialist Marion Sennet. The defendants from Michael's 1995 prosecution include Baldwin County Asst. DA Judy Newcomb, Mobile County DA John Tyson, Jr., Mobile County Asst. DA Tom Harrison and Asst. DA Mike Davis, and Mobile County investigator Ed Lemler.

We cited obstruction of justice, conspiracy to obstruct justice, perjury, libel and slander, false prosecution, coercing a false confession, and suppression of exculpatory evidence. Under the U.S. Supreme Court's decision in *Heck v. Humphrey*, 512 US 477 (1994), a defendant has two years from the day a case is terminated in which to file a civil rights lawsuit. The Alabama State Supreme Court ordered the reversal of Michael's convictions in 1997 and the *nolle prosequi* motions were promptly filed by the district attorneys involved. So in accordance with *Heck*, we filed our claim in 1999 - which was two years before Michael's release.

Alabama Attorney General Bill Pryor chose to defend the defendant's named in our suit. Again, the unlimited resources of the state were pitted against us.

Our case was originally assigned to Federal District Court Judge Richard Vollmer. In the initial hearing, he ruled that he would not hear any arguments from the defendant's concerning the timeliness of our lawsuit, since under *Heck's* guidelines we had filed timely.

We waited. Months passed with no action, then Judge Vollmer issued a 104-page ruling that gutted a large part of our case. Without an immunity hearing of any sort, he granted 11th Amendment Immunity to Mobile County DA John Tyson, Jr., Chief Asst. DA Tom Harrison and Asst. DA Michael Davis, the prosecutors in Michael's 1995 retrial. We attempted to appeal this immunity issue to the federal 11th Circuit Court of Appeals. They refused to hear the appeal, stating that since Judge Vollmer's Order was not final; we had to wait until it was "final" before they would review our claims. Judge Vollmer Order also removed the state law claims (the libel and slander claims against Tyson and Graddick) from our lawsuit. We then filed them in state court.

During discovery for our civil suit we found proof in the Mobile DA's files that prosecution witnesses Willis Holloway, "Cotton" Long, and Frank Mann (all involved in Michael's 1973 prosecution) perjured themselves during Michael's 1995 retrial, and that the prosecutors had to have known it at the time they testified. We also learned that prior to Michael's 1995 trial that his prosecutors had a tape of an alibi witness (who had been unknown to us) who stated that Michael Pardue was with him at the time of the 1973 murders. Yet the tape had neither been disclosed to Michael during discovery prior to his 1995 retrial, nor during the federal court ordered discovery during Michael's 1994 federal habeas corpus proceeding that preceded his 1995 retrial. Furthermore, a series of photographs conclusively proving that Michael's 1973 confession was false in numerous critical aspects was provided by the DA's office during the civil suit's discovery process. Those photos were concealed from Michael during the discovery process prior to his 1973 and 1995 trials, and his federal habeas corpus proceedings in 1994 and 1995. The State has yet to explain the concealment of those exculpatory photos from Michael and his attorneys.

While deposing DA Tyson in 2002, we confronted him with DA Harrison's and DA Davis' use of perjury to win Michael's conviction in 1995. Yet as of June 2005, DA Tyson has done nothing to investigate or prosecute the perjurers.

We moved the federal court to order the release of the 1995 grand jury witness list and transcript to prove our conspiracy and obstruction of justice claims in the 1995 trial. DA Tyson's office responded that to release that information would be a violation of state law. We responded that was false. To date, there has been no further action on this motion. We know that if Lanier (the prosecution's alleged "eyewitness" to the 1973 murders, and who we believe was used to obtain Michael's 1995 grand jury indictment, but who did not testify at his 1995 retrial), Holloway, Long, or Mann testified before the 1995 grand jury that they all gave false testimony. Since the state had more than sufficient information to know they were lying at the time of their testimony, the witness list and transcript would prove our obstruction and conspiracy claims. Thus far the state has effectively kept these proofs out of our reach.

In the pending civil case, the defendant's attorneys were initially Alabama Assistant AG Scott Rouse and Alabama Asst. AG Andrew Christman, both under Alabama's AG Bill Pryor. In the second year of the case, the state advised us that they had turned our cases over to an independent attorney. Shortly after that we were advised that the independent attorney handling our cases was Andrew Christman - who had left the AG's office for private practice. He took our case files from the AG's office with him. Asst. AG Scott Rouse continues to attend every critical deposition and hearing.

After deposing key state witness Holloway and the others, we wrote Christman a letter citing the federal and ABA Model Code of Legal Ethics and Responsibilities advising him that it was his legal duty to remove himself from the case as he is permitting his clients to false swear to the federal court. We gave him undeniable proof of the perjury and we quoted the code advising him that he had a legal duty to step down. Christman's response was in the form of a threatening letter advising us that our case "billing" to date totaled over \$250,000.00 and he would countersue us for this amount, but he would absorb it if we immediately dropped the cases against his clients. His arrogance is laughable. We didn't drop the case and he didn't countersue us.

Then, Judge Vollmer died in March 2003.

Mobile's Chief U.S. District Court Judge Callie Granade then took over our case. Judge Granade went directly from the Mobile federal prosecutors office to being a federal district court judge. She came into power from the Alabama Republican lineage of U.S. Senators Richard Shelby and Jeff Sessions, and Alabama A.G. Bill Pryor, who resigned to accept a judgeship on the Federal 11th Circuit Court of Appeals. In June 2005 the U.S. Senate formally confirmed Pryor as a federal appeals court judge. This conservative contingency also includes Randy Butler, the current Senior US Federal District Judge for the Southern District of Alabama. Butler was the Mobile County DA in 1973 when Michael was wrongfully prosecuted by Asst. DA's Holloway Graddick. It is noteworthy that Graddick is the author of the revised Alabama Penal Code and a vocal proponent of the death penalty in Alabama. Graddick was known as "electric chair Charlie" when he was Attorney General. As unbelievable as it sounds, Graddick's most notable quote was, "Fry 'em 'til their eyeballs pop out." Graddick is now a Mobile County Circuit Judge. We are in state court suing Graddick and DA Tyson for libel and slander. Graddick was publicly quoted at the time of Michael's release, "Mike Pardue killed for pleasure and got sexual gratification from the murders....."

Our lawsuit was in its fifth year and we were set for a pre-trial hearing with a trial date, when Judge Granade dismissed our entire suit. She ruled that we were not in compliance with *Heck's* filing guidelines. Recall that Judge Vollmer had previously ruled that we met the *Heck* standard.

We prepared a lengthy brief point by point showing Judge Granade that her ruling was erroneous. Fighting us by any method, she ruled that our brief was too long; we must rewrite it using considerably fewer pages. We did so. That was nearly a year ago. To date she has not ruled on our motion to reconsider her ruling on *Heck*.

We can anticipate that when she does rule, she will refuse to reverse her previous ruling. We will then appeal her ruling to the 11th Circuit, where our arch-enemy former Alabama AG Bill Pryor now sits as a federal judge. We will file a motion for Pryor's recusal on the grounds that he is fatally prejudiced against Michael because he fought tooth and nail against Michael's release. In fact, during our battle to free Michael, then Attorney General Pryor made a speech to The Southern Christian Coalition in which he said it was his "Christian duty to keep Michael Pardue in prison..." We can also anticipate that under those circumstances Pryor will be recused, and that the 11th Circuit will then rule in our favor that we filed our suit timely under the *Heck* standard. Our case will then be sent back to Judge Granade for action. We can anticipate this because - as we have seen so many times before - local court refuse to accept liability for doing what is right when it crosses one of their own. So it is left for a higher court to order them to do what they knew they should have done initially. This predictable pattern gives lower level judges the denial of responsibility for calling their cohorts on their illegal actions. What we don't know is how long our motion for reconsideration will sit on Judge Granade's desk before she acts.

We're Pitted Against A System That Is Self-Protecting

As you can see, the people responsible for wrongly imprisoning Michael in 1973, and keeping him imprisoned for four years after his last murder charge was dropped in 1997, continue to infiltrate every level of the state and federal judiciary from which we are compelled to seek justice - all the way up to the Federal 11th Circuit Court of Appeals, only one step below the U.S. Supreme Court. Our case seems effectively and hopelessly thwarted by the defendants and their cronies who are now in positions to cover and protect their own, which they are doing very effectively.

That is the ultimate Catch 22 - the legal system that erroneously pronounced Michael guilty of crimes he didn't commit is the same system he must rely on to award him compensation for the personal destruction he experienced because of that system's errors. If you have a bad feeling in the pit of your stomach about this situation it is completely justified. It is a long and rough road. But it must be traveled. Those who manipulate and corrupt the system for their personal gain must be called to task. Their names must appear on the defendant's line. Put them on the witness stand to try to defend what they've done. Put their names on the front pages across this country. It must be done and it is up to you and me.

Today, like over 20 years ago when we set out to free Michael from three murder convictions, we know that although the politicians and judges who control and manipulate the law for their personal gain are corrupt, those laws contain a depth of integrity that we must believe will prevail in the end.

Although our drawn out bid for compensation has thus far gone on for six years, we remain positive that sooner or later we will win ... again ... just as we did when Michael was released from prison on February 15, 2001.



It was news around the world when on September 29, 1949, the woman identified as the infamous ‘Tokyo Rose’ was convicted of treason against the United States. Found guilty of aiding the Japanese by making a radio broadcast during WWII that could have harmed U.S. troop morale, she was sentenced to ten years in prison. Yet her prosecution, conviction and imprisonment was an unconscionable travesty of justice. At the same time Justice Department prosecutors were publicly defaming the woman they called ‘Tokyo Rose’ to all of the world as a vicious blackheart, they were suborning witnesses to commit perjury and concealing evidence of her innocence. Her prosecutors successfully used smoke and mirror tactics to create the illusion the innocent woman on trial was guilty. For more than 25 years the federal government successfully concealed the truth: rather than being a traitorous siren, the woman prosecuted as ‘Tokyo Rose’ was a genuine American heroine who risked her safety to aid allied POWs in Japan and subvert Japanese efforts to undermine allied troop morale in the Pacific.

The Trial

On July 5, 1949 the trial began in San Francisco’s federal court of the woman known to the world as ‘Tokyo Rose.’ She was a U.S. citizen charged with treasonous conduct during WWII for allegedly voluntarily remaining in Japan after the war began and making radio broadcasts that betrayed the U.S. by “urging G.I.’s to lay down their arms.”²

The trial of ‘Tokyo Rose’ was a major world media event that is on the short list of candidates for Trial of the Century. It lasted 13 weeks and cost \$750,000, which was more than the government had spent prosecuting any person in U.S. history up to that time. After deliberating for 80 hours, on September 29th the jury returned not guilty verdicts on 7 of the 8 counts in the indictment. The one guilty verdict was for “speak[ing] into a microphone concerning the loss of ships.”³ That count referred to her alleged broadcast of news about the Battle of Leyte Gulf in the Philippines in October 1944.⁴

Eight days later, on October 6, 1949, U.S. District Judge Michael Roche sentenced ‘Tokyo Rose’ to 10 years in prison and fined her \$10,000. Her release on January 28, 1956 after serving over 6 years at the Federal Reformatory for Women in Alderson, West Virginia, and a total of 8-1/2 years in custody, would seem to have closed the book on the infamous ‘Tokyo Rose.’

It would have except for two things: ‘Tokyo Rose’ never existed; and the woman accused, prosecuted, convicted and imprisoned of being her innocent. That woman was Iva Toguri. (Her married name was Iva Toguri d’Aquino.)

Who Was Iva Toguri?

Born in Los Angeles on July 4, 1916 to parents that had immigrated to the U.S., Iva’s parents discouraged her from learning to read or write Japanese, so English was her native language. An exceptionally bright young woman, Iva graduated from U.C.L.A. in 1940 with a bachelors degree in zoology. Her mother was diabetic and Iva planned to enter medical school and become a doctor.

In the summer of 1941, Iva traveled to Japan to be the family’s representative at the expected death of her ill mother’s only living sister. On July 5 the 25 year-old Iva left for Japan expecting to be gone for a year. Although she traveled without a passport or a visa, the State Department issued her a Certificate of Identification that she was told would allow her to travel to and from Japan.

Iva Toguri Is Innocent!

Iva Toguri was not ‘Tokyo Rose’ and she was wrongly convicted of treason

By Hans Sherrer

One of the twentieth-century’s most publicized criminal prosecutions was the 1949 trial of an innocent woman for treasonous conduct during WWII radio broadcasts from Japan. That woman was publicly described as ‘Tokyo Rose.’ By deliberately presenting perjured testimony, concealing exonerating documents and openly lying in court, her prosecutors succeeded in publicly transforming a woman who should have been hailed as a national heroine, into a convicted felon and a figure of public scorn.

Although her trial was over five decades ago, Iva Toguri’s story remains compelling because she is still alive, and it remains relevant because the tactics of deception used by her prosecutors to pervert the fair functioning of the judicial system to make an innocent woman appear guilty are regularly used in state and federal criminal trials across the country.

After arriving in Japan, Iva was totally a fish out of water. She could neither read nor write Japanese, although she could passingly speak and understand it, and she was so out of touch with the culture that she didn’t even know how to use chopsticks.

In September Iva visited the U.S. Vice Counsel in Japan to apply for a passport, and her application was sent to the U.S. for processing. As relations rapidly deteriorated between the governments of Japan and the U.S., Iva made hasty arrangement in late November 1941 to return to the U.S. However, when she attempted to board a California bound ship on December 2, 1941, she wasn’t permitted to do so because the Certificate of Identification provided by the State Department wasn’t considered proof of her U.S. citizenship.

Iva found herself trapped in Japan when Pearl Harbor was attacked five days later.⁵ After refusing the suggestion of Japanese government agents to renounce her U.S. citizenship, Iva had to move out of her aunt’s house when neighbors began suspecting she was an American spy, and neighborhood children jeered her as a *horyo* (“POW”) and threw stones at her.⁶ Although Iva was considered an enemy alien, the government refused her request to be interned with other foreigners since she was thought harmless as a woman of Japanese heritage, and she was considered capable of providing for herself.

To survive in a country whose language she couldn’t read or write, Iva got a job teaching the piano to pay for Japanese language lessons. In the summer of 1942, when she was finally able to communicate in Japanese, Iva was hired for a job paying 110 yen per month (about \$5) transcribing English language radio broadcasts at Domei, Japan’s national news agency.⁷ While working at Domei, Iva saw her family on a list of Japanese-Americans sent to Arizona’s Gila River Relocation Center.

Iva met her first real friend in Japan at Domei, Felipe d’Aquino, a Portuguese citizen of Japanese-Portuguese ancestry. Felipe was a fellow radio monitor who shared her pro-American views. While at Domei Iva’s boardinghouse room was ransacked by the Kempeitai, Japan’s secret military police and counter espionage service. Iva again requested to be interned with other foreigners, but the government denied her request since she was able to support herself.

The food rations in wartime Japan were so poor that Iva was hospitalized for six weeks in the summer of 1943 with pellagra, beriberi and malnutrition. In debt to Felipe for the money she borrowed to pay her hospital bill and to the roominghouse where she was living, Iva went to work at Radio Tokyo in August 1943, after responding to a help wanted ad for a typist fluent in English.⁸



Iva Toguri in 1945¹

The Zero Hour

In March 1943, the Japanese conscripted captured Australian radio personality Major Charles Hughes Cousens to start the *Zero Hour* program on Radio Tokyo. Broadcast in English from 6p.m. to 7:15p.m. every day but Sunday, the Japanese intended it as a propaganda tool to undermine the morale of allied troops in the Pacific. However, Major Cousens planned to subvert the *Zero Hour* by using the program as a way to boost allied troop morale under the noses of the Japanese.

Prisoners of war U.S. Army Captain Wallace Ince and Filipino Lieutenant Norman Reyes, were also conscripted to work on the *Zero Hour* with Cousens. The three were able to take over writing the show’s scripts by feigning difficulty understanding the copy written by Radio Japan’s writers. Once they began

writing their broadcasts, Cousens, Ince and Reyes were able to slip double-entendres, innuendos and sarcastic references past censors into their broadcasts.

Iva gained the trust of the *Zero Hour* broadcast crew by smuggling food and medicine to them and other POWs. She was also the only Japanese-American working at Radio Tokyo who had not renounced her U.S. citizenship. Several months after the *Zero Hour* went on the air Cousens’ Japanese bosses told him to add a woman broadcaster. Suspecting all the English speaking women at Radio Tokyo were Kempeitai spies except for Iva, Cousens suggested Iva for the job and his Japanese superior agreed. Iva reluctantly joined the *Zero Hour* crew after Cousens assured her she would only have to read scripts prepared by him and she would not have to say anything against American servicemen. Working for 150 yen a month (about \$7), Iva’s first broadcast was in November 1943.⁹

Iva Joins The Zero Hour

When she first started broadcasting Iva used the radio name of “Ann,” and it was later expanded to “Orphan Ann.” That name was appropriate given her situation in Japan and that she grew up a fan of “Little Orphan Annie.” Cousens was able to make the *Zero Hour* into a news and entertainment program that reduced the Japanese’s desired propaganda into being harmless rhetoric and spirit lifting music. The four members of the *Zero Hour* audaciously used the Japanese’s flagship radio station to wage war on them from behind enemy lines.¹⁰ If the Japanese had known what the four were doing, they all could have been shot.

Iva tongue in cheek warned listeners during her 20 minute segment that it had “dangerous and wicked propaganda, so beware!”¹¹ An example of her program’s innocuous tongue-in-cheek dialogue is:

“Hello there, Enemies! How’s tricks? This is Ann of Radio Tokyo, and we’re just going to begin our regular program of music, news and the Zero Hour for our friends – I mean, our enemies! - in Australia and the South Pacific. So be on your guard, and mind the children don’t hear! All set? OK. Here’s the first blow to your morale – the Boston Pops playing “Strike Up The Band!” (music)”¹²

U.S. military personnel also credited Iva with slipping serious things into her broadcasts like air raid warnings in the guise of bragging about Japanese military superiority. After the war a member of a B-24 Squadron wrote that she make comments such as:

“Hi, boys, this is your old friend, Orphan Ann. I’ve got some swell records just in from the states. You’d better listen to them while you can, because late tonight our

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flyers are coming over to bomb the 43rd group when you are all asleep. So listen while you are still alive.”¹³

In describing the warnings he credited Iva with broadcasting on her program, that same serviceman wrote: “Almost without fail, the Jap bombers would come over. She was a better air raid system than our own.”¹⁴ Other pilots acknowledged the help they thought she provided by letting them know Tokyo’s weather conditions.¹⁵

As the war dragged on, the *Zero Hour* underwent many changes. In June 1944 Cousins had a heart attack, Ince was fired from the program for insubordination, and Reyes was looked upon as a “friendly alien” after Japan annexed The Philippines.

Iva had continued working at Domei after she started at Radio Tokyo, but she was fired from that job in the summer of 1944 for her openly pro-American views. When she found a replacement job at the Danish legation she attempted to resign from the *Zero Hour*, but her Japanese bosses refused to let her go.

After Cousins left the *Zero Hour*, Iva began writing her own scripts, modeling them after those he had written for her. In April 1945 Iva married Felipe d’Aquino, and she began to only sporadically show up to do her radio shift. The women that filled in for Iva during her frequent absences read the propaganda laden scripts written by Japanese personnel at Radio Tokyo.

In May 1945 the Kempeitai visited Iva and ordered her back to work at Radio Tokyo. She regularly hosted the “Orphan Ann” program from then until Japan’s surrender three months later in August 1945. During her 21 months on the *Zero Hour*, Iva broadcast a total of 340 programs.¹⁶

Iva had every reason to expect she would be able to return to the U.S. soon after the war ended. After all, she was an American citizen refused passage to the U.S. before the war began; her requests to be interned with other trapped foreign nationals was rebuffed by Japanese authorities; and although kept under scrutiny by the Kempetai she carried on a one woman war effort behind enemy lines by scavenging food and medicine for allied POWs, and doing everything possible to ensure her “Orphan Ann” radio program always boosted the spirits of allied servicemen and provided warnings whenever possible.

Who Is ‘Tokyo Rose’?

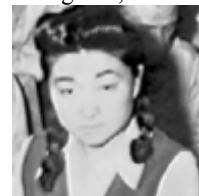
Servicemen throughout the Pacific had adopted the moniker of Tokyo Rose to describe English speaking women broadcasters on Japanese radio stations. There were more than a dozen on Radio Tokyo alone. When the war ended, hundreds of reporters descended on Tokyo, and dozens combed the city trying to get the scoop on the greatest mystery and one of the hottest stories in postwar Japan: Who is *the* Tokyo Rose?

Two of the reporters wanting to get the Tokyo Rose scoop were *Cosmopolitan Magazine*’s Harry Brundidge and Clark Lee of International News Service.

In post-war Japan the average income was the equivalent of about \$80 per year, so the \$250 reward Brundidge offered for information leading to Tokyo Rose was a veritable fortune. Brundidge also offered \$2,000 – 25 years of income at the time – for an exclusive interview with ‘Tokyo Rose’. To collect the \$250 reward, a Japanese worker at Radio Tokyo identified Iva as the infamous ‘Tokyo Rose’.¹⁷ To avoid being out-scooped, Clark Lee promptly reported to the world that the 29 year-old Iva was ‘Tokyo Rose’.

Iva was desperately in need of money and she knew that since there was no actual ‘Tokyo Rose’ she could claim to be her as legitimately as any other woman broadcaster at Radio Tokyo. In exchange for Brundidge’s agreement to pay her \$2,000, Iva gave an interview that Lee recorded in 17 pages of notes.¹⁸ Included in the notes of the interview was her statement she was “the one and original ‘Tokyo Rose’.”¹⁹

However, *Cosmopolitan* rejected Brundidge’s article and refused to pay the \$2,000 he had contracted to pay Iva without their authorization. So Brundidge was personally on the hook to pay her the money, which he didn’t want to do. His contract with Iva had an exclusivity clause, and to void it he enlisted the aid of 8th Army Counter Intelligence Corps (CIC) Commanding General Elliott Thorpe to arrange a press conference at the Yokohama Bund Hotel that was attended by over 100 reporters.²⁰ He also gave Lee’s interview notes to General Thorpe, telling him, “She’s a traitor and here’s her confession.”²¹



Iva at the Yokohama Bund Hotel press conference

Thinking she was a celebrity appreciated for her efforts to help the allied war effort from within the belly of the enemy, Iva freely answered questions during the press conference, gave interviews with *Yank*, *Stars and Strips*, signed autographs and posed for pictures.²² She told reporters, “I didn’t think I was doing anything disloyal to America,” and that she had “never, never broadcast propaganda.”²³

Post-War Investigation and Iva’s Imprisonment Without Charges

On October 17, 1945 Iva was arrested at her Tokyo apartment by the CIC without a warrant or charges against her. It was 9 weeks after Japan’s surrender, and she had been waiting to receive a visa to return to the U.S.. Jailed in the brig at 8th Army Headquarters, she wasn’t told why she was arrested, she was denied visits by her husband, and she was only allowed one bucket of hot water every three days to use for bathing and washing her clothes.²⁴

After a month Iva was transferred to Sugamo Prison in Tokyo. For the next 11-1/2 months she was caged in a 6’ x 9’ cell, permitted to bathe once every three days, and allowed to have a single 20 minute visit with her husband, Felipe, on the first day of each month.²⁵ Iva had no privacy, and once several visiting members of Congress voyeuristically peered in on her as she was bathing. While at Sugamo Iva learned that her mother had died enroute to the internment camp in Arizona, and that after being released when the war ended, her family had relocated to Chicago.²⁶

During the time Iva was at Sugamo Prison, Charles Cousins, the Australian Major who had recruited her to work on the *Zero Hour*, was tried for treason by the Australian Army for his work on that program.²⁷ After his acquittal he returned to his prewar job of working for Radio Sydney.

Also while she was at Sugamo Prison, Army Captain Wallace Ince was not only cleared after a U.S. military investigation of having acted treasonously by working on the *Zero Hour*, but he was promoted to Major.²⁸

Iva continued languishing in Sugamo Prison being relentlessly interrogated by the FBI and the Army CIC, even though all evidence pointed to neither her nor anyone else being Tokyo Rose.²⁹ It was simply a catchy name used by U.S. servicemen to describe English speaking women on Japanese radio broadcasts, and it didn’t refer to any one of them in particular. Neither was any evidence found of her having done anything treasonous during her 21 months on the *Zero Hour*.



Iva in her Sugamo Prison cell

After being imprisoned for more than a year without any charges filed against her, Iva was suddenly and unconditionally released on October 25, 1946.³⁰ Her release was a major media event and reporters from all the world’s major news services were present as she left the prison.³¹

Wanting to return to the U.S., Iva found that the same lack of documentation that had trapped her in Japan before the war interfered with her getting a passport. After she had waited

more than a year, the State Department issued a ruling that it had “no objection at all” to her being issued a passport.³²

When it became known in the U.S. that her return was imminent, a number of people expressed opposition, but none more vocally than Walter Winchell. From his bully pulpit as the most powerful newspaper columnist and radio commentator of his time, Winchell didn’t just call for Iva to be kept out of the country, he demanded that she be prosecuted for treason. Joining in the chorus of “let’s get Iva,” J. Edgar Hoover requested the help of anyone who could assist the FBI in proving she was ‘Tokyo Rose’.³³

Then working for the Nashville *Tennessean*, Harry Brundidge answered Hoover’s request for assistance. In March 1948 he went to Tokyo to assist the FBI and the Justice Department build a case against Iva by inducing her to sign Clark Lee’s notes of the interview she gave in 1945 as authentic.³⁴ She had never been told Brundidge was the “rat” behind her arrest in October 1945, and he feigned being her friend.³⁵ He assured Iva that if she signed the notes it would speed up her return to the U.S.

She resisted signing them, telling him, “Most of this is made up,” including that she was ‘Tokyo Rose’.³⁶ Brundidge knew what was in the notes was largely a figment of her imagination, and that she had told Lee and him what they wanted to hear in exchange for the desperately needed \$2,000 – which she was never paid. Brundidge persisted and perhaps due to the emotional strain of having had her baby die the day after it was born two months previously, combined with wanting to be reunited with her family after a seven year separation, combined with her then 2-1/2 year effort to return to the U.S. after the end of the war, Iva caved in and signed the notes.

Two months after returning to the U.S., Brundidge openly betrayed Iva to further his career by publishing a 10 part series portraying Iva as ‘Tokyo Rose’ and a traitor. The first part was titled: *Arrest of “Tokyo Rose” Nears: She Signs Confession to “Sell-Out.”*³⁷ His betrayal of Iva didn’t stop at publicly smearing her with what he knew were lies.

For the second time Harry Brundidge was the key figure in a catastrophe in Iva’s life when five months after he badgered her into signing Lee’s notes, the Justice Department used them to indict her for treasonous conduct.³⁸ In August 1948 she was arrested by military police at her apartment in Japan. She was finally granted her wish to return to the U.S. on September 25, 1948. However it was under a military escort, and when Iva arrived in San Francisco she was arrested by the FBI as an accused enemy of the United States.³⁹

The Trial – Part II

When Iva’s trial began on July 5, 1949 she had already spent 11 months in custody since her arrest in Japan. She was denied bail, and after her arrival in the U.S. one irregularity was the FBI took her out of the San Francisco Jail where she was being held and attempted to interrogate her without her lawyer being present. He learned about it and was able to intercede and stop the illegal interrogation.⁴⁰ When the defense uncovered evidence the government relied on the perjured testimony of a grand jury witness to obtain Iva’s indictment, U.S. District Court Judge Michael Roche ruled it was harmless error because the witness wasn’t a trial witness.⁴¹ Judge Roche also barred the jury - all white and chosen in two hours - from being exposed to any evidence about Iva’s efforts on behalf of allied POWs, ruling it was irrelevant to the treason charges.⁴²

Forty six witnesses testified for the government, including sixteen brought from Japan.⁴³ Two of the witnesses brought from Japan, Kenkichi Oki and George Mitushio, were California born Japanese-Americans who were superiors of Iva’s at Radio Tokyo.⁴⁴ The men, who had renounced their U.S. citizenship during the war, testified that Iva made a treasonous statement during a broadcast after the U.S. Naval victory at the Philippines Leyte Gulf in October 1944.⁴⁵

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Unlike the free spending of multiple federal agencies focused on convicting her, Iva's meager defense was paid by her father with borrowed money.⁴⁶ Her three lawyers, headed by Wayne Mortimer Collins, donated their months of time to defend her.⁴⁷ It helped that Charles Cousens paid his own expenses to travel from Australia to San Francisco to testify for Iva.⁴⁸ Wallace Ince also paid his own travel expenses to testify for her. The third male member of the *Zero Hour* broadcasting team, Norman Reyes, also testified on Iva's behalf. When he did so he recanted earlier testimony as a prosecution witness, stating it had been coerced from him by federal prosecutors.⁴⁹ A total of twenty-six witnesses testified during Iva's defense.⁵⁰

By the time Iva testified for eight days on her own behalf in September 1949, she had been jailed for 13 months. Looking "pale" and "haggard," she asserted her innocence of doing anything that could be considered treasonous or that harmed the allied war effort.⁵¹

The government's case against Iva revolved around convincing the jurors that Iva had encouraged American servicemen to stop fighting, that she choose to stay in Japan after the war began, that she "maliciously betrayed the United States," and that she was 'Tokyo Rose'.⁵² Although the jury didn't know it, Iva could not have been 'Tokyo Rose' because on December 11, 1941 an entry was made in a U.S. submarine's log book describing an English speaking woman on a Japanese radio broadcast as 'Tokyo Rose'.⁵³ That was nine days after Iva had been refused passage back to the U.S., four days after the attack on Pearl Harbor, and 23 months before Iva began broadcasting the Orphan Ann program on Radio Tokyo. A month later, in January 1942, another U.S. submarine (the *Seawolf*) made an entry in its log book referring to a different English speaking Japanese broadcaster as 'Tokyo Rose.'⁵⁴

Even with the withholding of evidence from the jury favorable to Iva, few witnesses to the trial expected Iva to be convicted of any of the eight counts. Nine out of ten reporters informally polled thought she would be acquitted. After the jury had failed to reach a verdict after days of deliberating, Judge Roche refused to declare a mistrial. To help break the deadlocked jury, he gave an "Allen" instruction to the jury that the trial had cost the government over half a million dollars, and that they should continue deliberating until they arrived at a verdict.⁵⁵ Finally, on September 29th after 80 hours of deliberations they acquitted Iva of seven treason counts, and found her guilty of one:

"That on a day during October, 1944, the exact date being to the Grand Jurors unknown, said defendant at Tokyo, Japan, in a broadcasting studio of the Broadcasting Corporation of Japan, did speak into a microphone concerning the loss of ships."⁵⁶

That the jury submitted to the judge's pressure to come to a verdict by settling on finding Iva guilty of that count was particularly odd considering its vagueness. It didn't specify the day or time the alleged broadcast took place, or whether it referred to the loss of Japanese or U.S. ships, or both.



The news story of Iva's conviction was written by S.F. Chronicle columnist Stanton Delaplane. During Iva's trial he wrote on August 2nd about her broadcasts: "On the face of it, none of the material seemed particularly vicious."⁵⁷

Iva was the seventh person convicted of treason in U.S. history. The minimum sentence for treason was five years and the maximum was death. On October 6, 1949 Judge Roche sentenced her to 10 years in prison and a \$10,000 fine.

Imprisonment and Return To Regular Life

Iva lost her appeal, and the U.S. Supreme Court twice declined to review her conviction. She was a model prisoner at the Federal Reformatory for Women in Alderson, West Virginia. Her husband Felipe was a Filipino, and the federal government barred him from entering the U.S. to visit her, so they were only able to correspond by letters.

On January 28, 1956, Iva was released from prison on parole. However her ordeal wasn't over. Although she had been born in the U.S., and she had attended and graduated from UCLA as a native Californian, an agent of the U.S. Immigration Service served a warrant for her deportation as she left the prison. After veterans and other groups and people publicly expressed opposition to Iva's deportation, the government backed off from actively pursuing execution of the warrant. In 1958 the Immigration Service announced it was ceasing efforts to deport Iva.⁵⁸

Iva's parole ended on April 18, 1959. Although she was stigmatized by being a felon convicted of treason, her more than 18 year odyssey to return to her family and freely resume her life in the U.S. - that began with the refusal to let her board the U.S. bound ship on December 2, 1941 - was finally over. She had spent a total of 8-1/2 years in jails and prisons, and more than 3 years on parole. She was jailed for a year by the military from October 1945 to October 1946; she was jailed for 1 year and 2 months from her arrest in August 1948 through her sentencing in October 1949; and she was imprisoned for 6 years and 4 months from October 1949 to January 28, 1956. Her \$10,000 fine was paid out of her father's estate when he died in 1972.

Proof Is Discovered The Federal Government Concealed Iva's Innocence

Iva made two applications for a Presidential pardon that were ignored: one was submitted to President Eisenhower in 1954 while she was still imprisoned, and the other was to President Johnson in 1968. At that time Iva simply didn't have the hard evidence to support a pardon. That changed in 1976, when two independent efforts converged to provide the documentary and testimonial proof that Iva was not only innocent, but the federal prosecutors misled the jury, her lawyers and the world at large by concealing proof of her innocence and suborning witnesses to perjure themselves in court.

In the early 1970s Ron Yates, a Chicago Tribune reporter, took an interest in Iva's case after receiving a letter from a reader. In 1976 while the Tribune's correspondent in Tokyo, Yates tracked down the two men, Kenkichi Oki and George Mitushio, who had provided the critical testimony about the lone count of treason Iva had been convicted of. During a meeting at a Tokyo restaurant, both men admitted to Yates that Iva did not make the treasonous broadcast they testified to at her trial, and that they perjured themselves under pressure by the federal prosecutors.⁵⁹

Complementing Yates' findings were the discoveries of a San Francisco filmmaker, Antonio Montanari, Jr. He accidentally stumbled across Iva's case in 1972 while researching U.S. Army Intelligence's belief during WW II that Amelia Earhart was 'Tokyo Rose'.⁶⁰ His curiosity piqued by Iva's conviction in spite of a lack of evidence against her, Montanari submitted requests under the newly enacted Freedom of Information Act of 1974 with the Justice Department, the FBI and U.S. Army Intelligence for documents about her case. Two years later he obtained over 2,300 documents from those agencies.⁶¹

By the fall of 1976 it had been learned that before the war ended, and more than four years prior to the start of her trial, the U.S. Office of War Information determined, "There is no Tokyo Rose; the name is strictly a G-I invention. ... Government monitors listening in twenty-four hours a day have never heard the words Tokyo Rose over a Japanese-con-

trolled Far Eastern radio."⁶² Already knowing she was not Tokyo Rose, "Six months after Iva's arrest, the Eight Army's legal section reported, "There is no evidence that [Iva Toguri d'Aquino] ever broadcast greetings to units by names or location, or predicted military movements or attacks indicating access to secret military information and plans, etc., as the Tokyo Rose of rumor and legend is reported to have done."⁶³ The office of the U.S. Attorney General was aware of this report, and it was their recognition that "the identification of Toguri as 'Tokyo Rose' is erroneous," that led to her rapid release from custody on October 25, 1946.⁶⁴ Yet less than two years later, United States Attorney General Tom Clark authorized Iva's indictment for treason by federal prosecutors who knew she was not Tokyo Rose and that she had never committed treason. Federal prosecutors and other government agents continued the charade by concealing their knowledge of her innocence all through her trial, her appeals process, and while the Immigration Service attempted to deport her after she had finished her prison sentence.



Morley Safer introducing the June 24, 1976 *60 Minutes* segment on Iva

Yates wrote several articles about Iva's case for the *Chicago Tribune* that contributed to the production of a segment about Iva for CBS' *60 Minutes* television program. During that segment aired on June 24, 1976, one of the CIC officers that had interviewed her in 1945, George Guysi, said that the U. S. State Department had simply abandoned her in Japan. John Mann, the foreman of her trial jury, said he always believed she was innocent of all the charges, but he submitted to the pressure of the other jurors and the judge by voting guilty on the one count she was convicted of.⁶⁵ During an interview with Morley Safer aired on that program, Iva alluded to her role as a media generated sacrificial lamb: "I suppose, if they found someone and got the job over with, they were all satisfied. It was Eeny, Meeny, Miney ... and I was Moe."⁶⁶

With the publicity generated by the revelations of recanted testimony and the prosecutors concealment of evidence supporting Iva's innocence, support began to build for Iva's pardon.

Iva's Pardon

In November 1976 Wayne Merrill Collins, the son of Iva's trial lawyer filed a presidential pardon petition for Iva. The public disclosures supporting her innocence were so convincing by that time, that on January 19, 1977, in one of his last acts prior to leaving office, President Ford agreed with the recommendation of U.S. Attorney General Edward Levi, and pardoned Iva. She is the only person convicted of treason in this country that has been pardoned.



Newspaper story about President Ford's pardon of Iva on January 19, 1977.

However, Iva has not been compensated for her wrongful conviction and imprisonment, the \$10,000 fine taken from her father's estate has not been repaid, and neither her contributions to helping allied POWs in Japan during the war nor the risks she took by using her *Zero Hour* radio program to bolster allied troop morale have been officially recognized. Yet she did those things and took those personal risks while high military "leaders" spent the war in relative safety piling up undeserved medals, promotions and notoriety.

Aftermath

There is no shortage of villains who had roles in Iva Toguri d'Aquino's 18 year ordeal from December 2, 1941 when U.S. officials refused to let her board a California bound ship, to April 18, 1959 when her parole ended.

- There are the nameless and faceless State Department bureaucrats who issued the Certificate of Identification

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she used to travel to Japan in July 1941 but which was inadequate for her to return to the U.S. and trapped her there during and after the war.

- There is the Radio Tokyo employee that identified Iva to Harry Brundidge and Clark Lee as ‘Tokyo Rose’ for the \$250 reward - knowing she wasn’t.
- There is Harry Brundidge for his three unconscionable betrayals of Iva. The first led to her arrest on October 17, 1945 for what was subsequently found to be the baseless accusation she was ‘Tokyo Rose,’ the second was his smearing of her as the traitorous ‘Tokyo Rose’ in his 10-part newspaper series in 1948, and the third led to her equally baseless prosecution and wrongful conviction of treason. Amazingly Brundidge continued slandering Iva while she was in prison. The January 1954 issue of *The Mercury* featured an article by him, *America’s First Woman Traitor*.⁶⁷ It is a mystery why Harry Brundidge, who died in 1960, had such a venomous hatred of Iva.
- There is Army General Elliott Thorpe for allowing the U.S. Army to be used to get Harry Brundidge off the hook to pay Iva \$2,000 for the interview she gave Clark Lee and him, and then having her arrested and imprisoned without charges for more than a year beginning on October 17, 1945.
- There is federal Judge Michael Roche for his blatant pro-prosecution bias during Iva’s trial that was essential for the jury to wrongfully convict her.⁶⁸
- There are the Department of Justice attorneys who staged the elaborate charade of Iva’s prosecution knowing all the while she was innocent, and who stood silently by as she was wrongly convicted, sentenced and hauled away to prison for over 6 years. The lead federal prosecutor in Iva’s case displayed the same cowardice it took for him to participate in the framing of an innocent Iva when he committed suicide by shooting himself at age 56 – two months after Iva’s parole ended in April 1959.⁶⁹
- There are the federal agents in the Immigration Service who sought to deport her after her release from prison – even though she is a native born American.
- There are the hundreds of military personnel, employees of the FBI, the U.S. Attorney’s Office, and other federal agencies who although knowing Iva was innocent, remained silent and failed to come to her aid. To their everlasting shame and infamy, they remain silent to this day.

There are also many people who noticeably went out of their way to help and support Iva, including her husband Felipe d’Aquino, Norman Cousins, Wallace Ince, Wayne Mortimer Collins and his son Wayne Merrill Collins, her father and other family members.⁷⁰ However, they were powerless to stop the government’s fevered juggernaut to have Iva falsely branded as a traitor. It wasn’t until reporter Ron Yates, filmmaker Antonio Montanari, Jr. and others were able to publicly uncover the perjury suborned by federal prosecutors and their concealment of her innocence that she was pardoned in 1977.

Through it all, Iva maintained her dignity and didn’t reduce herself to the base level of those who caused her so much pain or used her misfortune to their own advantage. As her father, Jun Toguri said to her on September 25, 1948, when he saw her for the first time in over seven years: “Girl, I’m proud of you! You didn’t change your stripes. A tiger can’t change his stripes, but a person so easily can.”⁷¹

After their release from the Gila River Relocation Center, the Toguri family relocated to Chicago. The family founded the J. Toguri Mercantile Co, which on March 29, 2003 was recognized during the annual Japanese-American National Museum dinner in Los Angeles as one of seventy-one 3-generation Japanese-American businesses in America, and the only one in Illinois. After her release from federal prison, Iva moved to Chicago and joined in operating the family business.

A fact based dramatic movie of Iva’s life is in the planning stages, and it will enable this and future generations of Americans to be inspired by her courage in the face of unconscionable mistreatment and incredible adversity.

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times as many blacks wrongly convicted of a crime as a juvenile are exonerated than are whites (77% to 10%). That finding is consistent with the phenomena of erroneous cross-racial identifications, since many of those cases involved the ID of a black person by a white.

So in general the report’s findings tend to be a fine tuning of what is already known about wrongful convictions. However there is one area where the report engages in speculation, and that is about how many non-death row exonerations there would have been if all cases “were reviewed with the same level of care that we devote to death sentences.” That figure is estimated by the report to be 28,642 cases, and it refers to that as “a shocking prospect.” While appearing numerically impressive, the report’s estimate actually downplays the number of people that knowledgeable observers over the past four decades have estimated are wrongly convicted. Furthermore it doesn’t just do so by a small number, but very significantly.

A judge interviewed for *The Innocents*, a 1964 book by investigative reporter Edward Radin, estimated that 5% of everyone convicted of a crime is innocent. The judge indicated that to maintain public support for the legal system, the false appearance has to be maintained that it is fair and accurately distinguishes the innocent from the guilty.

In *Presumed Guilty* (1992), Rev. James McCloskey (founder of Centurion Ministries, which is dedicated to freeing wrongly convicted people) is credited with estimating “10% of the people convicted of serious crimes each year are innocent.”

In *Convicted But Innocent* (1996), the authors conservatively estimate that 2% of everyone convicted of an offense included in the FBI’s Uniform Crime Report is innocent. However, they also reported that many judges, prosecutors and defense attorneys who completed a questionnaire think the number of wrongly convicted people exceeds 5%.

In March 1999 this author’s estimate that 14% of convictions are of an innocent person was published in *Justice:Denied* magazine.

Furthermore it was reported in 1997 that the FBI found that 25% of the suspects in 12,000 rape cases were excluded by DNA testing. That finding is particularly significant because exclusionary DNA evidence is only available in a small percentage of all criminal cases.

So from 1964 to 1999 knowledgeable estimates of the number of wrongly convicted people range from 2% to 14%, and the finding of the FBI – an agency of the U.S. Department of Justice – lends empirical support to the higher figure.

Based on the most current Bureau of Justice Statistics data, it is estimated that from 1989 to 2003 there were 14,295,000 felony convictions in state and federal courts. So the report’s estimate that there should have been 28,642 exonerations from 1989 to 2003 amounts to 2/10th of 1%, or .002% of the felony convictions during those 15 years. Furthermore, the report’s estimate amounts to a projected 1,909 exonerations a year out of 953,000 convictions – or 1 out of 500.

Iva Toguri d’Aquino — the innocent heroine who stood her ground while being shamelessly, dishonorably and wrongly treated for years by military investigators, FBI agents, federal prosecutors, a federal judge, immigration authorities and unscrupulous reporters — is 89 years old and lives in Chicago.

Iva Toguri d’Aquino’s 89th birthday was on July 4, 2005. Wishes of good will to her can be sent to *Justice:Denied*, and they will be forward to her. Mail to: Justice Denied - Iva, PO Box 68911, Seattle, WA 98168.

(Authors Note: This article was sent to Iva Toguri d’Aquino so she could respond with any factual corrections that she considered necessary. I want to acknowledge that the archivist of Iva’s personal papers, Barbara Trembley, and Ron Yates reviewed it for accuracy at Iva’s request.)

The Supreme Court inferred in *Schlupv. Delo*, 115 S. Ct. 115 (1995) that the legal system may only need to ascertain guilt to an accuracy rate of 99% (99 out of 100). Thus the reports contention that 499 out of 500 convictions are of a guilty person provides powerful support to the contention that while not 100% perfect, the United States has a discerning legal system that is neither broken nor in need of significant reforms. The average new car has an average of over one significant problem within 90 days of its purchase. So if the report’s estimate of wrongful convictions is to be believed, car manufacturers ought to be consulting with judges and prosecutors responsible for a correct conviction rate of 99.8%, on how to manufacture a more reliable product. Consequently the report’s suspect finding plays directly into the hands of prosecutors, judges, police and corrections officials who contend the legal system works remarkably well at weeding out the innocent from the guilty.

However that assessment stands in stark contrast with the much different conclusion that can be drawn from the estimates of wrongful convictions from 1964 to 1999, the lowest of which extrapolates to an average of over 19,000 wrongly convicted people during each of the 15 years covered by the report. The highest estimate extrapolates to an average of over 133,000 wrongful convictions yearly.

Solid support for the pervasiveness of wrongful convictions indicated by the educated estimates from 1964 to 1999 is provided by the findings of a study published in June 2000. That study - *A Broken System: Error Rates in Capital Cases* – found that 68% of the 4,578 capital cases finalized from 1973 to 1995 was reversed on appeal; that “7% of capital cases nationwide are reversed because the condemned person was found to be innocent;” and that on retrial, the defendant was given a lesser sentence in 82% of those reversed cases. So based on the findings of that extensive multi-year study that was overseen by the esteemed Professor James Liebman (co-author of *Federal Habeas Corpus Practice and Procedure*), if every one of the 14,295,000 criminal conviction in this country from 1989 through 2003 had been subjected to the same degree of appellate review as is a capital case, then 9,720,600 of those cases (68%) would have been reversed, with the result that 680,442 of the defendants (7%) would have been exonerated, and 11,721,900 of the defendants (82%) would have been re-sentenced to a lesser punishment.

Consequently, the findings reported in *A Broken System* (and its follow-up report, *A Broken System, Part II*, Feb. 2002) are consistent with the estimates from 1964 to 1999 that there are serious systemic errors in the ability of this country’s legal system to accurately distinguish the innocent from the guilty.

So while the analysis of various factors related to wrongful convictions in the University of Michigan report is valuable information, its attempt to downplay the incidence of the phenomena must be taken with a grain of salt.

The 37-page report, *Exonerations in the United States: 1989 through 2003*, can be downloaded for no charge at, <http://www.law.umich.edu/newsandinfo/exonerations-in-us.pdf>

Endnotes:

- 1 Photo of Iva Toguri’s taken on September 4, 1945 after a press conference at the Yokohama Bund Hotel. Published in Pacific Stars and Stripes magazine.
- 2 They Called Her Traitor, J. Kingston Pierce, *American History*, October 2002, pp. 22, 28.
- 3 *Id.* at 22, 28.
- 4 The oddity of Iva’s conviction of that count is described later in this article, in *The Trial – Part II*.
- 5 Approximately 10,000 U.S. born Japanese-Americans were likewise trapped by circumstances in Japan. See e.g., They Call Her Tokyo Rose, Keith O’Brien, January 20, 1998, http://www.wire.com/01-20-98/Chicago_cover.html. The ship Iva was refused passage on, the Tatsata Maru, was a Japanese vessel forced to turn back in mid-voyage and return to Japan.
- 6 Suspicions were aroused by the Special Security Police’s (Tokko Keisatsu) interrogation of Iva twice a week at her aunt’s home for several months. They suggested that Iva’s registration as a Japanese citizen would end her harassment. Iva eventually requested the permission of her relatives to move out, to avoid the embarrassment of them evicting her. Source: email from Ron Yates to Barbara Trembley, May 20, 2003.
- 7 They Call Her Tokyo Rose, *supra*.
- 8 Radio Tokyo was officially known as NHK - Nippon Hoso Kyokai.
- 9 They Called Her Traitor, *supra*, at 22, 25.
- 10 *Id.* at 22, 25. This was broadcast on February 22, 1944.
- 11 *Id.* at 22, 26.
- 12 *Id.* at 22, 26.
- 13 A letter from Robert W. "Bob" White, 65th SQ, to Aerial Gunners Association Magazine <http://www.kensmen.com/tokyoroseb.html>

Article Submission Guidelines

PLEASE READ CAREFULLY!

1. **DO NOT SEND JUSTICE: DENIED ANY LEGAL WORK!** *Justice: Denied does not and cannot give legal advice.*

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3. **Justice: Denied is ONLY concerned with publishing accounts of the wrongly convicted. PERIOD.** As a volunteer organization with limited resources, mail unrelated to a wrongful conviction *can not be answered.*

4. **Anyone may submit a case account of a wrongful conviction for consideration by Justice: Denied.** However your account should be no more than 3,000 words in length. Short accounts are more likely to attract people to your story. A typed account is best, but not necessary. If you hand write your account, *make sure it is legible* and that there are at least ½" margins to the edge of the paper. First impressions are important, so it is to your advantage to pay attention to the following guidelines when you write the account that you submit to Justice: Denied.

Take your reader into your story step by step in the order it happened. Provide dates, names, times, and the location 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. 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 your complete mailing address. Include the name and contact info for the person you want listed as an outside contact. Also provide Justice: Denied with the name and email address and/or phone number of any independent sources necessary to verify the account or who can clarify questions. This can speed acceptance of your story, since if Justice: Denied needs more information, it can readily be requested.

Among the basic elements a story should include are: **Who** was the victim, who witnessed the crime, and who was charged?

What happened to the victim. What is the alibi of the person the story is about and who can corroborate that alibi? What was the person charged with? What was the prosecution's theory of the crime? What evidence did the prosecution rely on to convict you? **Where** did the crime happen (address or neighborhood, city and state).

When did the crime happen (time, day and year), and when was the person charged, convicted and sentenced (month/yr).

How did the wrong person become implicated as the crime's perpetrator?

Why did the wrong person become implicated as the crime's perpetrator?

The following is a short fictional account that has the elements that should be included in a story.

Mix-Up in Identities Leads to Robbery Conviction By Jimm Parzuze

At 5p.m. on July 3, 2003, a convenience store on 673 West Belmont Street in Anytown, Anystate was robbed of \$87 by a lone robber who handed the clerk a note. The robber didn't wear a mask, brandish a weapon, or say anything. The clerk was not harmed.

My name is Jimm Parzuze and on July 17, 2003 I was arrested at my apartment on the eastside of town, about nine miles from the scene of the robbery. It was the first time I had been arrested. The police said that someone called the "crime hot-line" with the tip that I "sort of looked like the man" in a composite drawing of the robber posted in a public building. The drawing had been made by a sketch artist from the clerk's description of the robber. I protested my innocence. But I was ignored because I told the police I had been alone in my apartment at the time of the robbery. I was certain of my whereabouts because it had been the day before the 4th of July when I went to a family picnic.

After the clerk identified me in a line-up, I was indicted for the robbery. My trial was in November 2003. The prosecution's case relied on the clerk's testimony that I was "the robber." On cross-examination my lawyer asked the clerk why the drawing didn't show an unmistakable 3" long and 1/8" wide scar that I have on my left cheek from a car accident. The clerk said the right side of the robber's face was turned to him, so he didn't see the left side. My lawyer, a public defender, asked the clerk that if that was the case, then how could the police drawing show details on both sides of the robbers face – including a dimple in his left cheek – but not the much more noticeable scar? The clerk responded the drawing was based on the robber's image burned into his memory and it was the truth of what he saw.

I testified that I had never robbed any person or store, that I was at home at the time of the robbery, and that I was obviously not the man depicted in the police drawing.

In his closing argument my lawyer said that although I generally fit the physical description of the robber, so did probably 10,000 other people in the city, many of who had convictions for robbery and lived in the area of the robbery. He also argued that the clerk's explanation didn't make any sense of why he identified me, when unlike the robber he described to the police, I have a long, deep, and wide scar across my left cheek.

However the jury bought the prosecution's case and I was convicted. In December 2003 I was sentenced to eight years in prison.

My lawyer had submitted a pre-trial discovery request for the store's surveillance tape to prove I had been mistakenly identified, but the prosecutor told the judge it couldn't be located.

I lost my direct appeal. The appeals court said there was no substantive reason to doubt the clerk's ID of me. A private investigator is needed to search for possible witnesses to the robbery who could clear me,

and to try and locate the "missing" surveillance tape. If you think you can help me, I can be written at, Jimm Parzuze #zzzzzzz
Any Prison
Anytown, Anystate
My sister Emily is my outside contact.
Email her at, Aaaa@bbbb.com

You can also read an issue of the magazine for examples of how actual case accounts have been written. A sample copy is available for \$3. Write: Justice Denied, PO Box 68911, Seattle, WA 98168.

Justice: Denied reserves the right to edit a submitted account for any reason. Most commonly those reasons are repetition, objectionable language, extraneous information, poor sentence structure, misspellings, etc. The author grants Justice: Denied the no fee right to publish the story in the magazine, and post it on Justice: Denied's website in perpetuity.

5. **All accounts submitted to Justice: Denied must pass a review process.** Your account will only be accepted if Justice: Denied's reviewers are convinced you make a credible case for being innocent. Accounts are published at Justice: Denied's discretion. If your account is published in Justice: Denied, you can hope it attracts the attention of the media, activists, and/or legal aid that can help you win exoneration.

6. **Mail your account to: Justice Denied, PO Box 68911, Seattle, WA 98168 Or email it to: jdstory@justicedenied.org**

Justice: Denied is committed to exposing the injustice of wrongful convictions, and *JD's* staff stands with you if you are innocent, or if you are the Champion of an innocent person.

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

JD Editorial endnotes continued from page 3:

¹ In Re the Matter of Mary Ann Ottinger, No. 4475-F-119, Comm. Judicial Conduct, June 14, 2005, p.1.

² In Re the Matter of Mary Ann Ottinger, No. 3811-F-110, Comm. Judicial Conduct, June 18, 2004, p.3, II., b.

³ Id. at, 4, II., e.

⁴ Id. at, 4, II., g. (emphasis added)

⁵ Id. at, 5, III., 4.

⁶ Id. at, 5, II., 4. (emphasis added)

⁷ In Re the Matter of Mary Ann Ottinger, No. 4475-F-119, supra at, 2, II.A.

⁸ Id. at, 2-3, II.B. (emphasis added)

⁹ In Re the Matter of Mary Ann Ottinger, No. 3811-F-110, supra at, 2, I., A. 3.

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Iva Toguri - Endnotes continued from p. 25

14 *Id.*
 15 There is some controversy about whether Iva gave the warnings of impending bombings and provided weather conditions over Tokyo to American pilots that U.S. servicemen have credited her with providing. However, the men that have done so had no association with Iva, and their gratitude is a real part of Iva Toguri's lore. If Iva gave the warnings she saved the lives of American servicemen, and if she didn't they thought she was and acted accordingly to protect themselves. So either way the lore of Iva's warnings to American servicemen undermines allegations of treasonous conduct later made against her. Also, in the late 1950s WW II veterans became some of Iva's staunchest supporters in opposing her deportation from the U.S.
 16 Bill Kurtiss' 1969 radio documentary about Iva Toguri at: http://www.earthstation1.com/Tokyo_Rose.html
 17 The person at Radio Tokyo who pointed out Iva as 'Tokyo Rose' is identified as Kenkichi Oki in They Called Her Traitor, *supra*, at 22, 26. What is undisputed is the person who identified Iva as Tokyo Rose worked with her at Radio Tokyo.
 18 Orphan Ann Home Page, Sec III,
http://www.dyarstraights.com/orphan_ann/rosehunt.html
 19 *Id.*
 20 *Id.*
 21 *Id.*
 22 *Id.*
 23 They Called Her Traitor, *supra*, at 22, 26.
 24 Orphan Ann Home Page, Section III, *supra*.
 25 Iva Toguri was imprisoned at Sugamo Prison from November 16, 1945 to October 25, 1946.
 26 Orphan Ann Home Page, Section III, *supra*.
 27 *Id.*
 28 *Id.*
 29 *Id.*
 30 *Id.*
 31 *Id.*
 32 They Called Her Traitor, *supra*, at 22, 27.
 33 *Id.* at 22, 28.
 34 *Id.* at 22, 27.
 35 *Id.* at 22, 28.
 36 *Id.* at 22, 28.
 37 Orphan Ann Home Page, Section IV, at, http://www.dyarstraights.com/orphan_ann/rosehunt.html
 38 They Called Her Traitor, *supra*, at 22, 28.
 39 *Id.* at 22, 28. See also, Tokyo Rose: Famous Cases, FBI website, <http://www.fbi.gov/libref/historic/famcases/rose/rose.htm>
 40 Orphan Ann Home Page, Section IV, *supra*.
 41 *Id.*
 42 *Id.*
 43 Tokyo Rose: Famous Cases, *supra*.
 44 They Call Her Tokyo Rose, *supra*.
 45 *Id.*
 46 They Called Her Traitor, *supra*, at 22, 28.
 47 They Called Her Tokyo Rose, Rex B. Gunn, self-published, 1977, at 106. It is also noteworthy that in 1944, Iva's lead lawyer, Wayne Collins, unsuccessfully argued before the Supreme Court in *Korematsu v. U.S.*, 323 U.S. 214 (1944) that the removal of 110,000 Japanese-Americans to internment camps was unconstitutional. Michi Wegly's book, *Years of Infamy: The Untold Story of America's Concentration Camps* was dedicated to Wayne Collins. She stated he "did more to correct a democracy's mistake than any other one person."
 48 They Called Her Traitor, *supra*, at 22, 28.

49 Orphan Ann Home Page, Section IV, *supra*.
 50 Tokyo Rose: Famous Cases, *supra*.
 51 They Called Her Traitor, *supra*, at 22, 28.
 52 *Id.* at 22, 28.
 53 They Called Her Tokyo Rose, *supra*, at 1. Mr. Gunn also mentions that the earliest known reference to Tokyo Rose prior to the war, was in 1937, when military construction workers in the Pacific used the name to describe an English speaking woman on a Japanese radio broadcast.
 54 *Id.* at 2.
 55 Orphan Ann Home Page, Section IV, *supra*.
 56 Tokyo Rose: Famous Cases, *supra*.
 57 Email from Ron Yates to Barbara Trembley, May 20, 2003.
 58 They Called Her Tokyo Rose, *supra*, at 101-102; and, They Called Her Traitor, *supra*, at 22, 28.
 59 See e.g., They Call Her Tokyo Rose, *supra*.
 60 U.S.A. vs. 'Tokyo Rose', SAGAZine, <http://www.sagazine.com/tokyoroze.htm>
 61 *Id.*
 62 They Called Her Traitor, *supra*, at 22, 26. (emphasis added)
 63 *Id.* at 22, 27.
 64 *Id.* at 22, 27.
 65 *Id.* at 22, 28.
 66 Orphan Ann Home Page, Section III, *supra*.
 67 They Called Her Tokyo Rose, *supra*, at 102.
 68 The prosecutors relied on Judge Roche's favorable rulings to secure Iva's wrongful conviction. Judge Roche's pro-prosecution bias was reflected in his evidentiary and testimonial rulings that made Iva's innocence of all charges less apparent to the jury. He not only contributed to concealing Iva's innocence, but if he had declared a hung jury instead of pushing the jury to reach a verdict when it was clearly at an impasse, Iva's ordeal would likely have ended in the fall of 1949 with the U.S. Attorney's Office declining to retry her. After interviewing Judge Roche in 1958, AP reporter Katherine Beebe Pinkham observed what had been apparent to observers from his rulings in Iva's case: his prejudice against her was so ingrained in him that he may not have been conscious to it. See They Called Her Tokyo Rose, *supra*, at 103-104; see also, Orphan Ann Home Page, Section IV, *supra*.
 69 They Called Her Tokyo Rose, *supra*, at 109-110.
 70 With Felipe barred from entering the U.S., and Iva afraid to leave the country for fear of not being readmitted, the last time the d'Aquino's saw each other was in 1949 when Iva was tried. Corresponding monthly while she was in prison, they divorced in 1980, not having seen each other in 31 years.
 71 Orphan Ann Home Page at, http://www.dyarstraights.com/orphan_ann/suggest1.html

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Notice

Due to a lack of space in this issue, Part 5 of the serialization of The Complicity of Judges in the Generation of Wrongful Convictions will appear in the next issue of *Justice:Denied*. This article was 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 in *Justice:Denied's* serialization. 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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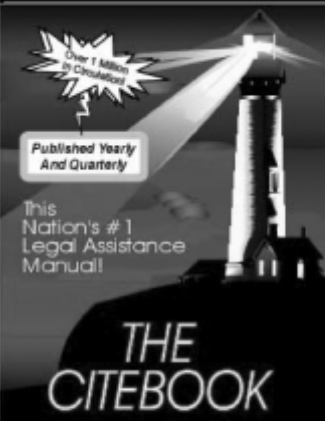
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The scales of justice are tipped against innocent people all across the country - from Maine to Hawaii and from Alaska to Florida.

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In this issue of *Justice: Denied* is the *true story* of Iva Toguri — an American who was wrongly accused of being the mythical 'Tokyo Rose' and wrongly convicted of treason in 1949 for allegedly making an announcement on Radio Tokyo in 1944 that could have harmed U.S. troop morale. She was wrongly imprisoned for a total of 8-1/2 years.

In 1989 former U.S. Attorney General Ramsey Clark wrote: "The proceedings against Iva Toguri, in addition to reflecting racist and wartime hatred ... thoroughly trashed the Constitution of the United States. ... A deadly myth survives to this day reflecting American racism, indifference to truth, fanatical commitment to might as right, tolerance of cruel injustice and utter contempt for freedom. We must read [Iva Toguri's] story, think long about it, ask how it could happen..." *The Hunt For 'Tokyo Rose'*, Russell Warren Howe (Madison Books 1989), xvi-xvii.

The myths that Iva Toguri was 'Tokyo Rose' and that she committed treason lives on due to the continued spreading of those fables in place of the truth by people who have a national audience. It is not only important for the truth to be told for historical reasons, but because Iva Toguri is still alive

"Justice Denied" is a lot more than a magazine. It is a reference work, a call to arms, and a beacon of hope all rolled into one. If more people read it, we would live in a better country. On behalf of the wrongfully convicted, and now fully exonerated, citizens of Tulia and the legal team that got it done, we salute your efforts and thank you for your work.

Jeff Blackburn, Amarillo, Texas, attorney for the Tulia, Texas wrongly convicted defendants

In his column of April 14, 2005, Bill O'Reilly devoted six paragraphs to perpetrating the tabloid-like myths about Iva Toguri. Other media personalities are contributing to keeping the 'Tokyo Rose' folklore alive by describing people who disagree with the Bush administration's foreign policies as being treasonous like 'Tokyo Rose.' O'Reilly's column was printed in *The King County Journal*, a suburban Seattle, Washington newspaper. To counteract the disinformation that pervaded O'Reilly's column, *Justice: Denied's* publisher Hans Sherrer wrote the following Letter to the Editor that was published in the *KCJ* on May 2, 2005:

Woman Not A Traitor

Bill O'Reilly devoted six paragraphs in a recent column to perpetuating the myth that Iva Toguri is 'Tokyo Rose,' and that during World War II she was a traitor to the American people.

After World War II the FBI and Army conducted intensive investigations that determined there was no such person as 'Tokyo Rose,' and Toguri hadn't committed treason after being trapped in Japan caring for an ill aunt when the war began.

Influential broadcaster and columnist Walter Winchell inflamed passion nationwide against Iva when her return to the United States was imminent. In 1949 she was convicted of treason for allegedly announcing on Radio Tokyo that ships were lost during a 1944 battle at Leyte Gulf. However, no military personnel heard Toguri's alleged broadcast. The government's only evidence was the testimony of two Japanese-Americans at Radio Tokyo who had renounced their U.S. citizenship.

In the mid-1970s a filmmaker used the Freedom of Information Act to obtain exculpatory documents that Toguri's

prosecutors didn't disclose to her lawyers. The *Chicago Tribune's* reporter in Tokyo then tracked down the two witnesses. Both men confessed they fabricated their testimony after being threatened with prosecution if they didn't testify against Toguri.

Toguri submitted an application for a presidential pardon based on the documentary and testimonial proof of her innocence. In January 1977 President Ford granted Iva a full and unconditional pardon.

The truth is Iva Toguri — 88 years old and living in Chicago — is an American heroine.

Hans Sherrer, Publisher, *Justice: Denied* magazine, Seattle

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

"The greatest crime of all in a civilized society is an unjust conviction. It is truly a scandal which reflects unfavorably on all participants in the criminal justice system."

New York Judge John Collins

(In 1992 when he vacated Albert Ramos' rape conviction after eight years of wrongful imprisonment.)

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Guildford Four and Maguire Seven Receive Apology From British Prime Minister Tony Blair

In 1975 four alleged Irish Republican Army operatives were convicted of participating in the 1974 bombing of a pub in Guildford, England that killed five people. Although there was no physical evidence or a single witness tying them to the crime, all four were physically tortured into signing a confession that didn't mesh with the facts of the crime. However in finding the four guilty, their jurors relied on the confessions and ignored their protestations of innocence and the lack of evidence. The four were sentenced to life in prison, and the judge openly wondered why they weren't charged with treason so that he could have sentenced them to death.

The four defendants became known as the Guildford Four, and in 1989 their convictions were quashed and they were released after 15 years of wrongful imprisonment. Gerry Conlon's autobiographical account of their ordeal served as the basis for the 1993 movie, *In the Name of the Father*, that starred Daniel Day Lewis as Conlon and Emma Thompson as the person most responsible for their exoneration - attorney Gareth Pierce. (See the review of *In the Name of the Father*, in *Justice:Denied*, Vol. 2, Issue 4, available on JD's website, <http://justicedenied.org>)

In 1976 seven people were convicted of "handling explosives" involved in a 1974 pub bombing in Woolwich, England that killed two people. The defendants became known as the Maguire Seven, because five were members of the Maguire family - and the other two were an aunt of Gerry Conlon and his ailing father Guiseppe. The only evidence of their alleged guilt was supposed traces of nitroglycerin detected on their hands by a swab test. The seven protested their innocence, and the authorities did not explain how the alleged nitroglycerin got onto their hands or even from where it came.

By 1991 the case against the Maguire Seven had been discredited and their convictions were quashed. However by then all of them had completed their sentences, except for Guiseppe Conlon, who died in 1980 after six years of wrongful imprisonment.

Gerry Conlon and others have been demanding that Prime Minister Tony Blair apologize on behalf of the British government for the "dreadful miscarriage of justice" committed against his father, him, and many other people.

On February 9, 2005 Blair officially apologized to the eleven people wrongly convicted of the 1974 bombings. Blair said in a nationally televised address:

"The Guildford and Woolwich bombings killed seven people and injured over 100. Their loss, the loss suffered by their families, will never go away. But it serves no one for the wrong people to be convicted for such an awful crime.

It is a matter of great regret when anyone suffers a miscarriage of justice. I recognize the trauma that the conviction caused the Conlon and Maguire families and the stigma which wrongly attaches to them to this day.



Gerry Conlon on Feb. 9, 2005 (Reuters)

I am very sorry that they were subject to such an ordeal and such an injustice. That's why I am making this apology today. They deserve to be completely and publicly exonerated." ¹

The timing of Blair's apology to Irish citizens wrongly convicted by British courts was heavily laden with political overtones. There is a deadlock in Northern Ireland's peace process, and there is pressure mounting on the IRA-linked Sinn Fein party over the IRA's alleged recent robbery of \$50 million in cash from a Belfast bank.

The political nature of the apology wasn't lost on the many people not included in Blair's statement who have suffered a wrongful conviction in a British court. The comment of Paddy Joe Hill - one of the Birmingham Six who were wrongly convicted of two 1975 Birmingham bombings and exonerated in 1991 after 16 years of imprisonment - is representative of that criticism:

"However what I want to know is when are we the Birmingham Six going to receive an apology, as well as Judith Ward, Tottenham Three, Bridgewater Four, Cardiff Three, M25 Three, Cardiff Newsagent Three, John Kamara, Patrick Nicholl, Tommy Campbell, Robert Brown, Eddie Browning, Rob Alsobrook, Stephen Downing, Terry Pinfold, Reg Dudley, Bob Maynard and the many more victims of miscarriages of justice that have walked out the appeal court over the past fifteen years. It would probably take Tony Blair the best part of a week to speak out all the names of those who have been exonerated." ²

There is no indication that Blair will be apologizing anytime soon to the people mentioned by Paddy Joe Hill.

Sources:

Blair Apologizes to Wrongly Convicted Men, Ed Johnson (AP), The Guardian (UK), February 9, 2005.

What In the Name of the Father Teaches About False Confessions, Hans Sherrer, *Justice:Denied*, Vol. 2, Issue 4, <http://justicedenied.org/Inthenameofthefather.htm>

Comment from Paddy Joe Hill - One of the Birmingham Six wrongly convicted in 1975 of an IRA bombing and exonerated in 1991, *Miscarriages of JusticeUK (MOJUK) News Service*, February 10, 2005.

Endnotes:

¹ Blair Apologizes to Wrongly Convicted Men, Ed Johnson (AP), The Guardian (UK), February 9, 2005.

² Comment from Paddy Joe Hill - One of the Birmingham Six wrongly convicted in 1975 of an IRA bombing and exonerated in 1991, *Miscarriages of JusticeUK (MOJUK) News Service*, February 10, 2005.

REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE
FPT HEADS OF PROSECUTIONS COMMITTEE
WORKING GROUP
January 2005

Read online:

<http://canada.justice.gc.ca/en/dept/pub/hop/index.html>

Download PDF:

<http://canada.justice.gc.ca/en/dept/pub/hop/PreventionOfMiscarriagesOfJustice.pdf>

From FORWARD:

On behalf of the FPT Heads of Prosecutions Committee, we are pleased to submit the report of its Working Group on the Prevention of Miscarriages of Justice.

The Working Group has worked diligently for the past two years to produce this excellent report and we are indebted to its members. This report was drafted in close collaboration with the police community. This new cooperative approach will serve as a model for future joint work on issues of mutual concern.

The Heads of Prosecutions Committee has twice reviewed the report and we are pleased to inform you that jurisdictions have already begun to review their policies and practices in light of the recommendations. To supplement these efforts, as a group, the Committee has already taken concrete steps to act on several key recommendations, including the establishment of a permanent standing sub-committee on the prevention of wrongful convictions.

Accountability Rules Weakened For Fed Judges

Federal judges are among the most secure of all government employees. Their lifetime appointment can only end prior to their death by either their resignation or their removal by the Congressional impeachment process. Since only seven federal judges have been removed by Congress in the 216 years since 1789 - so only a judge with a demonstrable trail of wrongdoing need worry about impeachment.

In October 2004, the Committee on Codes of Conduct that oversees the rules that determine the parameters of ethical conduct for federal judges.

Source: New Rules For Judges Are Weaker, Critics Say, Washington Post, Dec. 17, 2004, p. A31.

In The Wrong Place At The **HOLD** Wrong Time - The Jamie Jackson Story

By Jamie Jackson

Edited by ????????????, JD Staff

My name is Jamie Jackson. I am presently incarcerated in the Stateville Correctional Complex in Joliet, Illinois. I was charged with, and wrongfully convicted of, first degree murder and armed robbery by the Circuit Court of Cook County.

Please allow me to share with you the story of injustice the justice system has inflicted upon me. The Lansing Police Department, with assistance from the State's Attorney of the Circuit Court of Cook County, has framed me in this case. This I will prove to you within this short briefing of my case.

During the course of my incarceration I've been vigorously fighting with the court system trying to prove my innocence and regain my freedom. From the outcome of my previous appeals to the various courts I've been constantly denied without merit to my issues. The reason my issues aren't being heard is because the judges, who various communities have voted in with confidence to be upholders of the law, do not want to fully utilize the law to help those who are due their share of justice in this system.

Being a citizen of the United States, my legal rights are to be protected by the Constitution. My rights, like the rights of others who have been wrongly convicted and railroaded by the justice system, are constantly being violated without public notice. This is my reason for reaching out to all people of all nationalities; this is not only affecting me and my family but those of you who may have a family member or loved one who may have also fallen victim to our unjust justice system. It is of great importance that we as a people address these issues; that we may shine some light on this dark system, and to, hopefully, support me in my fight for justice.

One piece of evidence that judges have been refusing to consider is that the murder weapon in which Mr. Robert Hanshew, a convenience store clerk, was killed with, does not have my fingerprints on it. There are fingerprints on it that the state says are unidentifiable. There's blood from the crime scene that is not mine nor the victim's. The state is saying that's unidentifiable as well. The only thing my fingerprints were on was a bag of potato chips that had I put on the counter that, along with some gas, I was going to purchase but there was no attendant. I called for some service but no one answered. When I went to the back of the store to see if anyone was back there, I saw the victim, Mr. Hanshew, laying in a pool of blood. Once I saw that he was dead, I ran out of the store because I was scared. I was only seventeen. That was the first time I had ever seen anything like that and I didn't want to get caught up in a murder.

The Lansing Police Department searched my place of residence without a search warrant or consent, confiscated a gym bag containing my personal belongings and a wad of money that belonged to my sister that the police said had been taken from the gas station. The money was then taken for fingerprinting. Neither my fingerprints nor the victim's fingerprints were found on it. The Lansing Police Department and the state's attorney still insisted that I had robbed this gas station and killed Mr. Hanshew. That has been proven false

just by looking at the evidence. Other evidence includes an older white male who called 911 directly after the crime had taken place. A witness to the crime told the Lansing Police Department who the guy was who murdered Mr. Hanshew. He told them it was a white male by the name of Bob Streeter. The Lansing Police Department never attempted to locate Bob Streeter or to even investigate this tip.

The Lansing Police Department said that the 911 tape had been destroyed when they were asked to produce it. During my trial, the 911 operator came to testify in my behalf since the police department didn't want me to have the 911 tape, but before my trial the State's Attorney called this witness and told him there was no need for him to come to court so he didn't show. The state was able to secure a conviction because the victim himself was white. The murder took place in a predominately white area where my sister lived; I used to visit her frequently to get away from the East Side of Chicago neighborhood I lived in. The Lansing Police Department, the State's Attorney's Office and Judge Bolan turned this into a racially motivated case and the law was thrown out the window.

The State had a witness -- not an eyewitness -- who at that time was my best friend, Christopher Boose. He later told me that the police had verbally abused him and threatened to charge him with all kinds of crimes if he didn't cooperate with them and tell them something. When he said he didn't know anything, the police insisted that he do as they say or he was going to jail for the rest of his life. With this threat in mind, he said exactly what the police had told him to say. He gave several different statements and he gave perjured testimony during my trial which was left unaddressed by my attorney, Robert Pantoga. Mr. Pantoga was found to be ineffective by my last lawyer, Daniel T. Coyne, a very brilliant attorney.

My friend Chris has said he had wanted to recant his testimony. We had affidavits but he changed his mind. He said he feared what the police might try to do in retaliation to him for coming forth with the truth. I later found out that he sold drugs and what he really wanted was to not allow any heat to be brought his way. His drug dealing landed him in the federal penitentiary with an eight-year sentence. I am going to write him to see if he's willing to do the right thing now. Another friend, Phillip, was going to testify to the lies that Chris had told about me, but he was fighting a case and his lawyer wouldn't let him help me. To this day I still can't understand this, but I know I can get him to do the right thing.

Testimony from Mr. Pantoga during my post-trial motion was given in front of the same judge who had found me guilty by way of bench trial and who was also presiding at my post-trial motion. (Keep in mind, I had already been railroaded in this same courtroom once.) After the judge heard for himself Mr. Pantoga's ineffectiveness, he supported Mr. Pantoga and denied my motion for a new trial. He said on record that, "[L]aw licenses are really not easy to come by, reputations are made and they can be harmed and destroyed very quickly in some fashion. I have a different agenda in addition to your hearing a motion, okay?" This is the judge who is still talking my lawyer, Mr. Coyne, and me.

The investigator that my lawyer claimed to have hired, and who supposedly had done an investigation of my case, Mr. Thomas Romano, said by way of stipulation that my lawyer had never hired him to do any investigation in my case at all. Mr. Pantoga himself said in court, "The murderer of that Lansing gas station attendant is still out there...I know that because the Lansing police on the very day they

picked him [me] up, they got a call from Burke's Liquor Store, somebody was saying that on February 25 a voice of an older white male called in and said to the police, Bob Streeter is the person that you are looking for for the murder of Robert Hanshew. That is what the voice said, and that the police got other tips."

The judge went on to say that, "I have some other interest involved, too. I see some conflicting interest here..." He also said, "I have known trial counsel [Mr. Pantoga] for a number of years" and for that cause the judge was predisposed to deny my motion for a new trial no matter what the evidence showed. In order for trial court to pursue its own agenda, I was denied a fair trial and a meaningful hearing in my post-trial motion. If the judge would have given me a new trial, Mr. Pantoga's law license would have been revoked and he would have been under investigation. The judge didn't want a good friend of his to go out like that. The judge's decision concerning this matter was clear prejudice against me. This is why I'm asking that people help and support me in my fight against such injustices.

My lawyer, Daniel Coyne, had to relinquish his duties in my case because I could no longer afford him. The court has sentenced me to a term of natural life with no means of parole for a crime they know I didn't commit. This entire ordeal has really taken a toll on my family. Im asking for financial and/or political help. The power of justice in your voices and your togetherness to stand up for what's right. I really need help in supporting my quest for freedom because I'm an innocent young man and through those who believe in justice like those leaders who paved the way for us to be treated equally, and for those who have fought against racism so that we may all live amongst each other, you are the people the legacy lives through. Through you is where my innocence will be seen and heard. God bless all of you and I pray to hear from you soon. Thank you for your time and support.

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Consensual Sex Leads to Rape Conviction - The Troy Anthony Foster Story

By Troy Anthony Foster

Edited by Karyse Philips, JD Editor

My name is Troy Anthony Foster. I have been falsely accused and unjustly convicted of sexual assault against Michelle Anne Bowens. At the time of the false allegations against me she was thirty-one years old and I was in my late 20s.

As an indigent black man accused of sexually assaulting a white woman, I have found that from the time I voluntarily turned myself into the police that I didn't stand a fair chance against the legal system. I also didn't stand a chance against the ineffectiveness of my court appointed lawyer. My appeal to the Nevada Supreme Court was dismissed two months after being submitted. Since that time, I have learned that the timeline of having a direct appeal decided in only two months is unheard of in the appellate court process.

It is without a doubt that race played a major factor in my case. My court appointed attorney never investigated my case. After I tried to have him dismissed on January 16, 1998, my court appointed attorney had to be ordered by the judge to interview me at the jail. Also, during the course of my trial I wanted to take the witness stand in my own defense, but my attorney told me not to do so. He told me he would not represent me to the fullest if I took the stand. So, my side of the story has never been told.

On December 7, 1997, I met a woman at a Reno, Nevada nightclub. She introduced herself as Michelle and invited me to sit with her in the lobby of the club. From the moment I sat down beside her she started rubbing and touching my arm, leg, and chest area. At one point I had to remove her hand from my genital area. Michelle was in the company of her friend, Megan. Megan was talking with a friend of mine named Gerald (whose nickname was "G") who had accompanied me to the club. "G" and Megan were seated to the left of Michelle and I was seated to her right. Within five minutes of meeting Michelle, she stuck her tongue in my ear as I leaned over to speak with "G." That blew my mind! I did not expect such aggressive action from someone I just met a short time before. After a time I stood up and told Michelle, "goodbye." I went inside the club leaving her behind in the lobby area. (All of this is on video and was presented to the jury at trial). She later came inside the nightclub and was on the dance floor dancing very provocatively with some guy. After that she disappeared for a long time and when I saw her again it was almost closing time. At closing time "G" and I were leaving the club and once we got outside, Michelle and Megan came out behind us. Megan and "G" started talking and he invited the ladies to have a drink with us at the *El Dorado Casino*.

On our way to the *El Dorado Casino* we had to stop to let a train pass by. While we were waiting, Michelle started kissing me and then she put her hand down my pants. Her hand was cold so I pulled it out fast. When we arrived at the casino Michelle went directly to the restroom. "G" and Megan sat at one table and I sat at the table next to them to give them some privacy in their conversation. When Michelle returned she and I went to get everyone a drink. When we returned to our table Michelle climbed on top of after I sat down and straddled me. We started kissing and putting hickeys on each other. She was wearing a leather coat that blocked us from being seen. Then she took my hand and placed it under her shirt. I put hickeys on her breasts right there in the casino.

While Michelle and I were making out, she put her hand inside the pocket of my pants and pulled out a gold Montebianc fountain pen. I got upset because I thought going into my pockets like that was disrespectful. I checked the cap on the pen to make sure it was secured tightly. When I removed the cap, Michelle must have mistaken the gold cap for a bullet. (She told the police that I had a pen with a bullet in it.) Although she never alleged that I used this pen against her, she did say that I told her that it could be for her.

After Michelle apologized for going in my pocket, we resumed making out. She then said, "I want to f*** the hell out of you. I want to have sex, go to sleep, and wake up and f*** you again." She then invited me to go home with her to Carson City, Nevada (thirty minutes outside of Reno) to have sex with her. I told her that I didn't have any problem with that but that my friend "G" lived on the other side of town and if I had to take him home I'd be staying on that side of town. She told me that "G" could come out to her place, too. I asked him if he wanted to go to Carson City and he said that that would be fine with him. Megan then said that she did not want "G" and me to come out to their house. I asked, "Why not?" and she explained that she doesn't allow strangers to come to her place because she has children there. Megan then left us to go to the restroom. When she walked away, Michelle said, "The hell with that, it's my house too and I want you there." I told Michelle that she would have to invite "G" and take that up with her friend, Megan. Michelle then asked "G" if he still wanted to go to Carson City and he said, "Yes." When Megan returned, "G" asked her if we were still going to Carson City. Megan said, "I told y'all before, you're not coming to my house." "G" told her that Michelle had just invited us out there. Michelle confirmed to Megan that she had invited us to their home. We all got up and headed for our cars. The cars were a block away from the casino and mine was parked on the street outside of a parking garage. Megan's car was parked inside of the garage.

"G" said he was going to ride with the girls but he asked me not to leave just yet because he wanted to get a cassette tape out of the car I was driving. As I walked toward the car I noticed Michelle following me. I asked her where was she going and she said she was riding with me. I got in my car and unlocked the door for her to get in. I started the car and I was leaning forward close to the steering wheel because it was cold. Michelle put her hand on my shoulder, leaned me back toward the seat, unzipped my pants and performed oral sex on me. About five minutes later, "G" came up to the car window to get the cassette tape and saw what was going on. He said something quirky and went back to Megan's car. (Michelle never mentioned that the oral sex happened outside of the parking garage or that it was the only time it had ever happened.) As we headed on to Carson City, Michelle was touching and feeling all over me and distracting me while I was driving the car. I told her I was going to crash if she kept diverting my attention. She told me to pull over somewhere so we could "f*** in the car." I told her the car was too small and that Carson City was only thirty minutes away. She said that her children might be awake when we get there and wouldn't allow us any privacy. I told Michelle again that the car was too small, but added that we could try it.

While I looked for a place to park, Michelle removed her shoes and put them behind my seat on the floor. She then removed her shirt and overalls and, except for her bra, was completely disrobed. After I parked the car the only thing I took off her was her bra when she asked me to unhook it for her. (In her police report, she said that I had taken her shirt off. In her follow-up report she said that she had taken her own shirt off.) After I undressed and put on a condom, I showed Michelle that there was a handle on the side of the seat to make it recline. After she reclined the seat we started having sex. Michelle said that during intercourse I turned her over and had anal sex with her. Being that Michelle and I are both very large people, it would have been impossible for me

to have turned her over to have anal sex because the car -- a Suzuki Swift -- was too small. With the help of an evidence expert, I could prove that she placed her legs over my shoulders. (The car is still being held by the state.) After we were done having sex, I removed the condom put it on the floor of the car and climbed back into the driver seat to get dressed. Michelle got out of the car to put her clothes on.

When I went to get the condom to throw it out, it was gone. I was frantically searching for it because the car did not belong to me. I never found it and I assumed that it must have fallen out of the car when Michelle got out to dress. (It turned out that Michelle had taken the condom. It was admitted into evidence and mentioned in court, but never used as evidence against me. In fact, nothing but her testimony was used against me. Michelle said that the condom was found hanging from her rectum, but that's impossible because I took it off myself and put it on the floor of the car. If it had come off by itself I wouldn't have tried to find it, but I know I would have felt it if it had come off while having sex.) As we continued on to Carson City, Michelle noticed a marijuana joint in the ashtray and asked if she could smoke it. I told her to go ahead. I never had any clue that anything was wrong at all. We held hands and talked all the way to Carson City.

When we got to Carson City we stopped at a *Burger King*. I pulled up to a phone booth in the parking lot about 40 feet from the Burger King. Michelle got out of the car to call Megan and let her know that we were on our way. I went to use the restroom and to grab something to eat. I was in the restaurant for fifteen to twenty minutes. When I came out, Michelle told me that "G" wanted to talk to me on the phone. He asked me to get him something to eat. I asked Michelle if she wanted anything and she said, "No." I went back inside the Burger King and was in there for another five to ten minutes. When I returned to the car, Michelle was sitting inside of it. (I never had any clue that anything was wrong with her.) She never tried to call the police, nor did she ever try to run away while I was inside the Burger King. (She alleged sexual assault but never tried to runaway while I was inside the restaurant? She was at a phone booth and never tried to call the police to say she had been sexually assaulted?)

When I got back inside the vehicle, Michelle gave me directions to her home. When we arrived at her place, Michelle said she was going to take a shower. I sat down to eat and talk with "G" and Michelle's oldest son. Michelle came back downstairs and introduced her children to me. After approximately two hours, "G" and I decided to head back to Reno. I asked Megan to tell Michelle that we were about to leave and I wanted to say goodbye before leaving. When Michelle came downstairs, I gave her a kiss on the cheek and told her that I would call her.

On the following Monday, I had a meeting with some guys pertaining to the music business in Tahoe, California. Since I had to go through Carson City to get there and Michelle had mentioned that she was new to Nevada, I thought I could show Lake Tahoe to her and her children. When I called Michelle she was not home so I left a number for her to contact me. I found out later that at that very moment Michelle was filing a police report against me for sexual assault.

I also didn't find out until the trial that Michelle had consumed a wine cooler and four double shots of **Tangueray** Gin, and that she was on Paxil and Buspar medications. She contradicted her own story and did not remember a lot of things that happened that night. (Her reason for fabricating this story is unclear to me other than the fact that she was heavily intoxicated and taking Paxil and Buspar. I believe that she was embarrassed by her actions in the presence of her friend Megan.) Michelle was the sexual aggressor who took control of the situation the entire night.

I have never forced anyone to do anything against their will -- this includes Michelle Bowens. I have been in trouble

Troy Anthony Foster from prev. page

with the law before but never for anything like this. Until this case, I've only had one conviction for a felony possession of marijuana in 1990, and a misdemeanor.

I'm now serving three consecutive life sentences with a minimum of ten years to be served on each sentence. I was acquitted of a kidnapping charge and one of the sexual assault charges. Originally I was charged with four counts of sexual assault.

I am now asking for help in looking into this case and possibly investigating it properly for me. I have been wrongfully convicted of a sex crime that wasn't a crime.

I'm going to conclude this story with the only information that I have pertaining to Michelle Anne Bowens: DOB August 5, 1966; San Fernando Valley and Murreita, CA.

Please keep in mind that I had approximately sixteen character witnesses willing to testify on my behalf at my trial and my attorney refused to put any of them on the stand. Also, none of my DNA was taken for evidentiary purposes, although somewhat inexplicably, I am being charged for DNA testing. The only evidence presented against me was Michelle's testimony; my side of the story was never told. I had only consumed six ounces of beer and was in no way impaired. Michelle had consumed a lot of alcohol and was also taking medication. There should have been a psychological evaluation of her before she was permitted to take the stand and testify, but that wasn't done due to the ineffective assistance by my attorney.

Finally, I have been married twice in my life. I was married to my first wife for four years and to my second wife for eight years. I have never engaged in anal sex with my either of former wives or any other woman. This is simply not in my character (and it would have been impossible in that small car).

Thank you in advance for your consideration. Please feel free to contact me should you require any additional information.

Respectfully,

Troy Anthony Foster 58629
Nevada State Prison
P.O. Box 607
Carson City, Nevada 89702

My outside contact is:
Deanne Baren
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Police case No. 280359-97
District Court Case No. CR98-0120
Supreme Court Case No. 32872



Time Without Pity

Starring Michael Redgrave, Ann Todd, Leo McKern, Peter Cushing and Alec McCowen.

Directed by Joseph Losey

Screenplay by Ben Barzman

Based on a play by Emlyn Williams

Released to theaters in 1957, B&W, 88 minutes. Released on VHS in 1995.

Review by Hans Sherrer



Time Without Pity is one of those low budget British films from the 1950s that are typically shown late at night on Turner Classic Movies or other cable channels. Yet one look at the cast and people behind its production indicates it is anything but a “B” flick.

The movie opens with a stark scene of a young woman being attacked in a room and killed by a fortyish man. The movie then cuts to some time in the future, as a disheveled middle-aged man who looks like he just stepped out of a gin joint is picked up at London’s airport by a well-dressed gentleman. The traveler is the father of a young man scheduled to be executed the next morning for the murder of the young woman, and the gentleman is the young man’s lawyer.

The father is an alcoholic writer who has been in a Canadian sanitarium during the entire time of his son’s legal ordeal. This was possible in the England of the 1940s and 50s, since as little as six months could pass from the time of someone’s arrest to their execution. The father approaches his son’s impending execution with the same level of obsessiveness that one can imagine he approached his drinking – full tilt. He had failed his son at every other turn in life, and he doesn’t want to do so when there won’t be a chance for redemption. It is almost too much for him to handle when he realizes that if his son is to be saved it is up to him, and he only has 24 hours to do so. His son’s lawyer has given up hope that solid evidence of his innocence can be found and presented to the authorities in time to stop his execution. The clock pitilessly tick-tock-ticks on, one second at a time.

The pressure on the father is compounded by him not having anything to go on except blind faith that his son is telling the truth that he didn’t have anything to do with the young woman’s murder. On the surface the case against his son appears damning, but it is purely circumstantial and based on speculation of what *might* have happened. The victim was his girlfriend, she was found dead in an apartment where he was staying, and she was holding a locket with his picture in it. However, there are no witnesses or physical evidence tying him to the woman’s murder. Looking at what happened with a fresh pair of eyes, the father feverishly races around the city questioning people who knew his son or the dead woman, or who might know some crucial but overlooked detail about the night she was killed that will unlock the iron door sealing his son’s fate.

Although it may seem preposterous that *Time Without Pity* revolves around a father’s panicked effort to find overlooked evidence in 24 hours that will prove his condemned son is innocent - it isn’t. Many condemned people professing their innocence have been granted a reprieve only hours prior to their scheduled execution, and later exonerated. Some of those people were actually strapped into the electric chair or the gas chamber gurney and were only *minutes* from being executed for a crime they didn’t commit. In many of those cases it was a relative, friend or even college students that found the crucial evidence.

Time Without Pity is also true to real life by portraying that most of the character lead “messy lives.” Emphasizing the

wrongness of his predicament, the condemned man led the most honorable life of all the significant characters in the movie. The ending of the movie is unexpected and has a unique twist. Yet it rings true by not sugar coating that someone sitting on death row waiting to be executed is deadly serious, and it is deadly serious for someone trying to avert it from happening.

The film’s theme of a good and decent man horribly wronged by people blind to the truth, and its accurate character portrayal of people willing to sacrifice others to satisfy their blind ambition may have been a reflection of the real-life experiences of the film’s director, Joseph Losey, and its screenwriter, Ben Barzman. Both had successful careers in the film industry derailed after being blacklisted from working in the United States under their own names during the reign of McCarthyism. The film, made in England in 1957, was the first that gave directorial credit to Losey after his blacklisting in the U.S.

Given that the viewer knows from the first scene that the condemned man is innocent, *Time Without Pity* depends on powerful performances and the tension revolving around whether his debilitated father can find a way to prove it and stop the execution. Michael Redgrave is brilliant as the alcoholic father who becomes increasingly desperate to find some way to prove his son’s innocence and save him from having his life snuffed out. Although it has been almost five decades since it was first seen by moviegoers, *Time Without Pity* stands up remarkably well as solid entertainment. Neither has it lost any of its relevance as a cautionary tale that no matter how guilty someone may appear at first glance, if you look below the surface their innocence may be plain as day.

Time Without Pity is a classic example that a thoughtful and engrossing movie can be made on a modest budget if the production has a first-rate director, a well-written script and heartfelt acting performances. It may take a little sleuthing to track down a copy of *Time Without Pity*, but it is well worth taking the time to do so.

Kirstin Lobato's Gang Rape by the Las Vegas Legal System

by Hans Sherrer ¹

A homeless man named Duran Bailey was sadistically mutilated, stabbed repeatedly, and savagely beaten to death in a west Las Vegas parking lot on July 8, 2001. In May 2002, 19 year-old Kirstin Lobato was convicted of murdering Bailey and sexually penetrating his dead body. (For extensive details about Kirstin Lobato's case that includes source information, see page ____, *Kirstin Lobato's "Very Peculiar Story" - Woman 170 Miles From Crime Scene Framed For Murder By Las Vegas Police and Prosecutors* (Justice:Denied, Issue 26, Fall 2004)

While at first glance that would seem to close the book on Bailey's unusually brutal murder, there is a fundamental flaw with Kirstin's conviction - she is demonstrably innocent.

- Kirstin's innocence is substantiated by crime scene evidence that positively excludes her, particularly that the murderer's size 10 man's shoeprint was imprinted in blood around and leading away from Bailey's body, as well as on a piece of cardboard that covered his face - while Kirstin wears a woman's size 7 shoe.

- Kirstin's innocence is inferred by the absence of any evidence that she had ever met Bailey or knew who he was, and the lack of a link between her and hairs and other physical evidence found at the crime scene.

- Kirstin's innocence is supported by the crime scene's bloody carnage caused by Bailey's brutal beating with fisticuffs, and his repeated stabbing and sadistic sexual mutilation with a knife - when sophisticated blood detection techniques discovered that none of his blood was in Kirstin's car or on any other item of hers.

- Kirstin's innocence is suggested by the logical inability of a 5'- 6" slightly built female teenager weighing 100 pounds, to physically manhandle a taller and heavier 44-year-old man in the way that Bailey's killer did.

- Kirstin's innocence is proven by an incontrovertible fact: At the time of Bailey's murder, she was in Panaca, Nevada, 170 miles from Las Vegas. That is why there is a complete absence of inculpatory evidence that she was involved in Bailey's death - while evidence exists excluding her.

Although many people have been convicted of a crime when they were many miles or even one or more states from the crime scene, Kirstin's case is somewhat set apart by the degree of certainty that the police and prosecutors involved *knew* she was three plus driving hours distant from Las Vegas at the time of Bailey's death. Thus her case is similar to that of Romeo Phillion. Convicted of murder in 1972, Phillion was released in July 2003 after 31 years of wrongful imprisonment. He was released after it was discovered his prosecutors had concealed a police report from his trial lawyer verifying his alibi that at the time of the murder, he was having his car repaired at a gas station 150 miles from the crime scene. (See, *I Feel Like a Million Bucks!*, Justice:Denied, Issue 25, Summer 2004, p. 5). Thus both Kirstin and Phillion were convicted of phantom cases built on the superficial appearance of guilt by police and prosecutors who knew no link existed between either person and the murder committed over 100 miles away from where each person was at the time it occurred.

Considering the substantial body of evidence that individually and collectively goes far beyond casting doubt on



Kirstin Lobato as a high school senior in 2001 - less than a year before she became an innocent victim of the incestuous Las Vegas police, prosecution and judicial systems.

Kirstin's possible guilt, but points directly to her innocence, her wrongful prosecution, conviction and imprisonment was only made possible by the contrivance of the case against her by the Las Vegas Metropolitan Police Department (LVMPD) and the Clark County (Las Vegas) District Attorney (DA), and the unwillingness of the Clark County District Court to protect her due process rights to a fair trial. A brief summary of the contribution each of those three agencies made to ensuring Kirstin's wrongful conviction follows:

Deliberate Indifference by Las Vegas Detectives to Evidence of Kirstin's Innocence

The detectives assigned to probe into Duran Bailey's death on July 8, 2001 failed to conduct a serious investigation of his murder. Although Bailey was a crack smoking homeless drug dealer, there is nothing in the job description of LVMPD homicide detectives that excludes someone like him from being given the same effort at finding his killer as someone from Vegas' Strip side of the tracks. After interrogating Kirstin at her parents home in Panaca on July 20, 2001, Detectives Tom Thowsen and Jim LaRochelle appear to have taken the easy way to stamp solved on Bailey's case file by tagging her as his murderer and arresting her on the spot. However they were only able to do that by taking facts related to a May 25, 2001 sexual assault against Kirstin on Vegas' east side, that were quite disparate from the facts related to Bailey's brutal beating and sexual mutilation in west Las Vegas on July 8, 2001, and superimpose them onto Bailey's case, and then claim the two unrelated incidents that occurred six weeks apart in different areas of Las Vegas were the same event. ² That 'slight of hand' was inelegant - but it was a 'quick and dirty' way for the detectives to claim Bailey's murder was solved.

An incident soon after Kirstin's arrest is particularly indicative that the detectives didn't conduct a serious investigation into Bailey's death. When Kirstin's father learned from a news report that July 8th was the day of Bailey's death, he called the case detective and told him that Kirstin had been in Panaca on that day, so she couldn't possibly be his killer. ³ The detective's response was "that as far as he was concerned he had arrested and charged the right person and did not need any further information." ⁴

Furthermore, the detectives failed to investigate solid leads that could have led to Bailey's killer(s) - such as the police report *a week before his death*, that at *knifepoint* he brutally raped a woman who was involved in the seamy side of Las Vegas life and would be expected to know the sort of muscular no-nonsense men capable of exacting revenge on Bailey by killing him in a torture like fashion. Although the detective's deliberate indifference at being informed there was incontrovertible evidence of Kirstin's innocence was typical of their slipshod investigation into Bailey's death, the harm their conduct ultimately caused Kirstin was dependant on the cooperation of the Clark County District Attorney.

DA Hastily Filed Murder Charges Against Kirstin Without Substantive Evidence

The Clark County District Attorney hastily filed first-degree murder charges against Kirstin without carefully reviewing

what, if any, substantive evidence supported it. How do we know? Prior to her trial she was offered a deal to plead guilty to manslaughter with a 3-year sentence. It is inconceivable that the DA would make an offer like that to any defendant who was believed to have committed a premeditated murder and then cold-bloodedly mutilated the dead body. It is only reasonable to surmise that the plea offer followed the DA taking a hard look at the absence of inculpatory evidence supporting the arresting detective's blind leap-of-faith that the May 2001 sexual assault on Kirstin was the same event as the murderous July 2001 attack on Bailey.

However the DA couldn't simply drop the charges against Kirstin - who had been publicly described in the media as an accused sadistic murderer - without exposing Clark County, the City of Las Vegas, the detectives, and possibly others involved in the case, to significant civil liability for false arrest and other claims related to violations of her rights. ⁶ So the only way for the DA to save face while at the same time protecting his clients from significant monetary damages for negligently arresting Kirstin without an adequate investigation and the filing of unwarranted criminal charges without an adequate review of the case's evidence, ⁷ was to present her with a deal carrying as minimum of an amount of prison time as could be offered without making what was being done obvious to the most unsophisticated observer.

The Clark County District Attorney's haste in filing first-degree murder charges against Kirstin did not go unnoticed. Five days after her arrest, Deputy Public Defender Curtis Brown, who initially represented Kirstin, was quoted in the *Las Vegas Review-Journal*, "I am surprised that they decided that charges would be filed at this point on this case." ⁵

Thus the DA's pre-trial plea offer wasn't a 'sweetheart plea deal' - it was an, 'I know you're innocent, but this is the best I can do, so please take me plea deal.' The ploy didn't bank on one thing: Kirstin refused to plead guilty to a crime she didn't commit.

Facing going to trial with a leaky case, the prosecution's major evidentiary problem of not having a single piece of evidence linking Kirstin to the scene of Bailey's murder was "magically" solved *after* Kirstin was arrested and charged. The prosecution produced a "jailhouse snitch" - Korinda Martin - who claimed that while they were in the Clark County Detention Center at the same time, Kirstin not only loudly bragged to anyone who would listen that she had killed Bailey, but she gave details of the crime. Curiously however, the prosecution did not produce any other person - whether a prisoner or jail staff member - who claimed to have heard Kirstin's alleged boasting. Furthermore, *every* accurate detail about Bailey's murder that Martin testified to was included in a July 25, 2001 article in Las Vegas' most widely read newspaper, *The Las Vegas Review-Journal*. While a mathematician may be able to calculate the astronomical odds of that being a coincidence, a much more realistic explanation is the prosecution relied on the contrived perjurious testimony of a jailhouse snitch who was either expecting, or had good reason to hope for a favorable reward from the DA.

So instead of admitting the truth that there was no substantive evidence of Kirstin's guilt, the DA grossly misused the legal system to perpetrate an unconscionable charade at her trial that resulted in an innocent woman's wrongful conviction and sentence to a minimum of 40 years in prison.

The Public Officials Who Have Mistreated Kirstin Lobato Should Be Held Accountable

Kirstin's Rape continued on page ??

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Kirstin's Rape continued from page ??

Kirstin Lobato's treatment by the Las Vegas Metropolitan Police Department and the Clark County District Attorney's office has been at best negligent, and at worst criminal. Kirstin has been victimized by the LVMPD's negligence for conducting a sloppy investigation into Duran Bailey's death that ignored the plethora of information excluding her from any involvement in the crime and failed to follow-up on solid leads, and by the DA's negligence for hastily and carelessly filing *first-degree murder* charges unsupported by credible evidence – or even a coherent theory of her alleged role in Bailey's death. Therefore I am suggesting the following actions are warranted to be taken:

- For what appears to be the deliberate implication of Kirstin Lobato in a crime they had no substantive basis to believe she was involved in, I am calling for the immediate suspension of LVMPD Detectives Tom Thowsen (P-1467) and Jim LaRoche (P-4353), and the instituting of an independent state and/or federal criminal investigation into their conduct. I welcome the response of their knee-jerk defenders who may claim that framing an innocent woman for murder does not violate any state and/or federal law.

- For what appears to have been the deliberate prosecution of Kirstin Lobato without substantive reason to believe she was involved in Bailey's death – which at a minimum is indicative of unacceptably gross malfeasance, betrayal of the public trust, and an abuse of power – I am calling for the immediate firing of Clark County Chief Deputy District Attorney William Kephart, who was the lead prosecutor at Kirstin's trial.

Furthermore, District Court Judge Valorie Vega bears a heavy responsibility for the travesty of justice inflicted on Kirstin. Judge Vega made blatantly pro-prosecution rulings related to denying the admission of exculpatory expert testimony, exculpatory alibi witnesses, admission of documents and testimony undermining the truthfulness of jailhouse snitch Martin - the prosecution's "star witness", and the conducting of the jury's deliberations. Her rulings could not have been more helpful to the prosecution than if she were working under the direction of the Clark County District Attorney. It is beyond malfeasance for a judge to create by her actions, the appearance of being a shill for the prosecution. Judge Vega's has demonstrated a clear inability to conduct herself with the impartiality, decorum, and inspiration of trust that every person in Clark County, Nevada not only deserves, but should demand at all times and without a single exception from a judge whose conduct has a dramatic impact on the life of every defendant appearing in his or her courtroom. Consequently, I am publicly calling for Judge Vega's immediate resignation for her shameful conduct in Kirstin Lobato's case. Lest you think I am being overly judgmental of Valorie Vegas' blatant and inexcusable shortcomings as a judge, I am not.

In a May 2, 2004 article in the *Las Vegas Review-Journal*, comments by lawyers about Clark County District Court judges were published, one lawyer made a very telling observation about Judge Vega that is consistent with her insubstantial rulings that undergird Kirstin's wrongful conviction: "Judge Vega has made several inexplicable rulings that run counter to evidence and common sense. I would not want to try cases in front of her." ⁸ Another lawyer commented that since becoming a District Court judge in 1999, she seems to be getting better at being a judge. So I am merely publicly voicing what it appears a number of attorneys in Clark County would if they felt free to do so without adverse repercussions.

If she chooses not to resign, at a minimum Judge Vega should voluntarily recuse herself from Kirstin's case to

eliminate the possibility of the continued appearance of her gross improprieties.

To date, the triumvirate of the LVMPD, the Clark County DA and the District Court's representative, Judge Vega, have effectively worked together to ensure that in Las Vegas, Kirstin has been accorded the level of justice she could have expected from living in a backward and incestuously corrupt third world country. In the course of Kirstin's case, the only semblance of legal professionalism and impartiality has been the Nevada Supreme Court's unanimous reversal of her conviction on September 3, 2004. (See, *Lobato v. State*, 96 P.3d 765 (Nev. 09/03/2004).) The Court's reversal was based on Judge Vega's errors regarding her refusal to allow the admission

Indicative of the egregiousness of Kirstin's mischarging as a heinous murderer and mutilator of a dead man's body, is that she was released on \$50,000 bail pending her trial, and she didn't flee when she had the chance. Instead she dutifully complied with the conditions of her release, and promptly appeared in court each day.

of documentary and testimonial evidence that undermined the truthfulness of jailhouse snitch Martin, who the Court described as the prosecution's "star witness." ⁹ Martin's testimony was the prosecution's sole evidentiary link placing Kirstin at the scene of Bailey's death - and the Nevada Supreme Court ruled, Judge Vega illegally blocked Kirstin's lawyers from introducing damning evidence impeaching her testimony. ¹⁰ As the Court stated in its opinion, "The proffered letters and extrinsic evidence relating to them confirmed Martin's desperation to obtain an early release from incarceration and her willingness to adopt a fraudulent course of action to achieve that goal." ¹¹

Las Vegas' Legal System Has Raped Kirstin In Ways Her May 2001 Attacker Couldn't

Kirstin Lobato's conviction for a Las Vegas murder when she was 170 miles from the crime scene is a travesty of justice only made possible by Kirstin's figurative gang rape by people at the controls of Clark County, Nevada's legal system. ¹² The LVMPD, the DA, and Judge Vega have all taken turns violating Kirstin's dignity as a human being in ways that her attacker in May 2001 couldn't have done if he had sodomized and beaten her senseless.

Perhaps the most disturbing aspect of Kirstin's case is that if she had let her attacker rape her - instead of fending off his assault with a knife given to her by her father - she would not have been considered a suspect in an unrelated incident six weeks later in which the murdered man happened to be knifed, among his numerous other injuries. A subtle but unmistakable message by the LVMPD, the DA and Judge Vega to women sexually assaulted is: "Don't defend yourself - just lay back and enjoy it." That cavalier attitude toward victims of sexual assault is hinted at by the failure of LVMPD to investigate the May 2001 sexual assault of Kirstin, the June 2001 sexual assault of Mumbina when Kirstin informed them of it, or the July 2001 sexual assault of Diann Parker by Duran Bailey. ¹³

District Attorney David Rogers Has The Power To "Stop The Insanity"

In Kirstin's case to date, the Clark County District Attorney's office has abrogated any claim of being interested in pursuing the fair and impartial administration of justice. As this is written in November 2004, her prosecu-

tors are attempting to entice her to accept a plea bargain so they can avoid a retrial. However one person has the power to "stop the insanity" of Kirstin's prosecution for a crime she had nothing to do with. ¹⁴ That person is Clark County District Attorney David Rogers. DA Rogers was not the DA during Kirstin's prosecution in 2001 and 2002, so he cannot be blamed for her initial prosecution. However he now has an opportunity to do something good and right and humane and for which he could be proud: He can exercise the power of his office to correct the horrific injustice perpetrated against Kirstin Lobato by dropping the charges against her, so she can pick up the pieces of her life and begin anew while she is still a young woman.

However there are admittedly political considerations that would stand in opposition to DA Rogers' exercising his prerogative to "stop the insanity" and drop the charges against Kirstin. If DA Rogers doesn't act in the name of sanity, and a retrial is held that is fairly administered by an unbiased trial judge with competent counsel defending her, it is difficult to imagine a scenario other than that the phantom nature of the prosecution's case against Kirstin will be exposed for the entire world to see.

Endnotes

1. This article solely expresses the personal views of Hans Sherrer regarding the Kirstin Lobato case, and does not represent the official position of *Justice Denied* magazine or The Justice Institute.
2. If the framing of Kirstin as Bailey's murder was deliberate on the part of the detectives, as it appears to have been, then they may have been inspired to concoct their plan from illusionists on the Las Vegas Strip, such as Siegfried and Roy, who at that time created the illusion of wild animals disappearing and then instantly reappearing in a different location of the stage or auditorium. While the illusion is that one animal is in two locations within a millisecond of each other, common sense dictates that two different animals in two different locations were involved. The success of illusionists such as Siegfried and Roy, David Copperfield and others, is dependant on the ease of inducing people to suspend disbelief and accept the impossible as true. Whether knowingly or unknowingly, Kirstin's detectives relied on that phenomena to induce a suspension of disbelief - in the prosecutors, the judge and Kirstin's jurors - that it is impossible for two separate events occurring six weeks apart in different areas of Las Vegas to be one and the same event.
3. Kirstin's Story, http://www.angelfire.com/stars4/justiceforKirstin/Kirstin_s_Story/Kirstin_s_story.html
4. *Id.*
5. Murder Charge: Cut Result of Attack, Teen Says, Peter O'Connell, Las Vegas Review-Journal, July 25, 2001, at http://www.reviewjournal.com/lvrj_home/2001/Jul-25-Wed-2001/news/16615387.html (last visited November 7, 2004).
6. This is even more of a factor for the DA to consider than in 2001, because in June 2004 Roberto Miranda settled his wrongful imprisonment lawsuit against Clark County, Nevada for \$5 million, after spending 13 years on Nevada's death row for a murder he didn't commit. See, *Man freed after 14 years on Nevada's death row gets \$5 million*, Brendan Riley (AP), Las Vegas Sun, June 29, 2004.
7. At the time of Kirstin's arrest, a Clark County Deputy Public Defender Curtis Brown was quoted in the Las Vegas Review-Journal as questioning the filing of first-degree murder charges based on the available evidence. See, *Murder Charge: Cut Result of Attack, Teen Says, supra note 5.*
8. *Clark County District Court Civil/Criminal Divisions*, Las Vegas Review-Journal, May 2, 2004, at http://www.reviewjournal.com/lvrj_home/2004/May-02-Sun-2004/news/23792702.html (last viewed October 31, 2004).
9. In reversing Kirstin's conviction, the Nevada Supreme Court described Korinda Martin as the prosecution's "Star witness" in, *Lobato v. State*, 96 P.3d 765 (Nev. 09/03/2004).
10. Illegally is used here in its defined sense that Judge Vega's barring of evidence impeaching Korinda Martin's testimony was "contrary to or forbidden by official rules, regulations, etc." See, *Random House Webster's Unabridged Dictionary*, 1999, illegal: "2. contrary to or forbidden by official rules, regulations, etc."
11. *Lobato v. State*, 96 P.3d 765 (Nev. 09/03/2004); 2004.NV.0000064 ¶ 38 <<http://www.versuslaw.com>>
12. Although rape is normally associated with the sexual violation of a person, it is used here to describe Kirstin's mistreatment in its defined sense of being, "an act of violent seizure or abuse." See, *Random House Webster's Unabridged Dictionary*, 1999, rape: "4. an act of plunder, violent seizure, or abuse; despoliation; violation."
13. For details about these incidents, see page ____, *Kirstin Lobato's "Very Peculiar Story" - Woman 170 Miles From Crime Scene Framed For Murder By Las Vegas Police and Prosecutors* (Justice Denied, Issue 26, Fall 2004).
14. Author and fitness guru Susan Powter popularized the phrase, "Stop The Insanity." I am using it in the sense of its definition in the *Random House Webster's Unabridged Dictionary*, 1999, insanity: "4. extreme folly; senselessness; foolhardiness."





(Washington Historical Society)

Chief Leschi Exonerated of Murder - 146 Years After His Execution

by Hans Sherrer

Thirty-four years before the Washington Territory became the state of Washington, the Nisqually Indian Nation and white settlers in the Puget Sound area were engaged in what became known as the Indian War of 1855-56. The territorial government precipitated the war after members of the Nisqually Tribe refused to agree to a land cession treaty that would have created a 900 acre reservation in western Washington for the tribe.

On October 31, 1855 a firefight occurred east of present day Tacoma between the territorial militia and members of the Nisqually Tribe. During that skirmish, volunteer militiaman Colonel Abrams Moses was shot and killed.

Territorial Governor Isaac Stevens blamed Nisqually Chief Leschi for Moses' "murder," and ordered his arrest. More than a year later, Leschi surrendered after being assured by the Army that he wouldn't be prosecuted for acts committed by the Nisqually during the war. However Gov. Stevens didn't think the territorial government was bound by the Army's agreement. On November 16, 1856, three days after his arrest, Leschi was put on trial for Moses' "murder" in the federal territorial court.

The prosecution's case rested on one eyewitness - Antonio Rabbeson - who claimed Leschi was present when Moses was shot. However Leschi claimed he wasn't involved in the skirmish during which Moses was killed, and his counsel vigorously attacked Rabbeson's credibility. One distinct irregularity was Rabbeson chaired the grand jury that indicted Leschi for capital murder. The trial ended in a hung jury because two jurors held out for Leschi's acquittal. One of those jurors, Ezra Meeker, stated that Rabbeson was "obviously lying."¹

Leschi was convicted of murder and sentenced to death after a retrial in March 1857. The territorial Supreme Court affirmed his conviction after refusing to consider new evidence - a map by the Army that indicated Leschi was miles away from the scene of Moses' death. In its decision, the Court wrote that Leschi was the "leader of the Indian forces that 'cruelly waged' war on settlers, 'sacrificing citizens' in the Puget Sound region."² The Court's decision exhibited passion and prejudice against Leschi, who was the chief of the Nisqually Tribe that had been hostile to being displaced from their lands by white settlers. Leschi was hanged on February 19, 1858 outside of Fort Steilacoom, south of present day Tacoma. The Army refused to participate on the grounds that Moses was a casualty of war, and had not been murdered. At the time many people, including his executioner, believed Leschi was innocent. Charles Grainger, his hangman later said, "I felt then I was hanging an innocent man, and I believe it yet."³

Since the time of his conviction and execution, the Nisqually have considered that Chief Leschi was unfairly prosecuted for Moses' death. Beginning in 2002, members of the Nisqually Tribe, including some of Leschi's descendants, began a concerted campaign to clear his name. The effort paid off in 2004 when both the Washington State House and Senate passed resolutions recommending that the State Supreme Court conduct an extraordinary review of Leschi's conviction. Although Chief Justice Gerry Alexander declined to have the Supreme Court review the conviction, he was instrumental in organiz-

ing a Historical Court of Inquiry and Justice to retry Leschi in absentia. The trial was arranged to be held on December 10, 2004, in a make-shift courtroom seating about 200 people in the basement of the Washington State Historical Society in Tacoma. Seven judges were selected to sit in judgment of the case - six state judges, including Chief Justice Alexander, and a judge representing the Nisqually Tribe. Alexander said before the trial, "This really is uncharted territory. It's got real challenges and greater difficulty."⁴ Indicative of the trial's uncharted territory, is it was a hybrid adversarial proceeding, combining elements of both a trial and an appellate review.

Chief Leschi's retrial attracted national attention. *The New York Times* was among the newspapers that published a story about the controversy surrounding his conviction and execution.

Several current prosecutors, led by Carl Hultman, represented the territorial government. A team of lawyers, led by John Ladenburg, represented Leschi in absentia.



The seven judges at Chief Leschi's retrial on December 10, 2004.

(Drew Perine/The News Tribune)

The prosecution did not present any witnesses. Their case was based on the legal record, and that "the territorial justice system was thorough and professional, strictly adhering to the rules of law." Consequently it was argued Leschi's conviction was soundly based on what the trial court and the Territorial Supreme Court agreed was relevant and incriminating evidence. The defense countered with 11 witnesses who focused on establishing three points: That Leschi wasn't at the scene of Moses' death; that Rabbeson's testimony was unreliable; and that the Nisqually and the Washington Territorial government were at war, and thus under the "law of war" his death was not a murder by whoever killed him, but an unfortunate consequence of the conflict.

After more than three hours of testimony and presentation of evidence, the prosecution and defense made their closing arguments. Prosecutor Hultman passionately and methodically argued the State's position that the Court should be bound by the regular rules of appellate procedure, and not consider any evidence that wasn't in the trial record. He asserted that under the appellate standard of viewing the evidence in the light most favorable to the prosecution, the Court should defer to the jury's guilty verdict in 1857 that was affirmed by the Territorial Supreme Court. Ladenburg countered that the verdict was fatally flawed in light of the evidence of Leschi's innocence that wasn't considered by the jury, and the failure of the jurors or the Supreme Court to consider that Moses' death could not be considered a murder under the state of war that existed between the Nisqually and the territorial government. Ladenburg argued that irrespective of the compelling evidence of his innocence, it is reasonably probable that the failure of Leschi's lawyer to request an "enemy combatant" instruction affected the outcome, and thus constituted reversible error. Ladenburg contended that since Leschi was deprived of due process by ineffective assistance of counsel, his trial was constitutionally defective. It was also noted during the closing arguments that another Nisqually prosecuted and convicted of murdering a combatant during the war was pardoned prior to his scheduled execution. Ladenburg

closed by telling the judges, "We cannot bring Leschi back to life, and we cannot restore Leschi to his land. We can, we must, restore his good name." He continued, "The only fair and just result for a historical court is to correct the historical record of our state and declare Leschi exonerated."

After the closing arguments the Court recessed to consider its verdict. When the Court reconvened, Chief Justice Alexander first announced that the seven judge panel unanimously agreed to the answers to two interlocutory questions posed by the prosecution or defense: The Court's decision had historical significance; and, a state of war existed between the Washington Territorial government and the sovereign Nisqually Nation at the time of Moses' death on October 31, 1855.

Justice Alexander then announced the Court's decision that was based on all evidence relevant to determining Leschi's guilt or innocence - irrespective of whether it was within or beyond the bounds of the trial record. The judges unanimously decided that regardless of who shot Moses, "The killing was a legitimate act of war, immune from prosecution."⁵ Consequently, Leschi was declared "exonerated" of Abrams Moses' murder.

Thus, even though there was significant and compelling evidence that Leschi was not present at the scene of Moses' death, as judges are apt to do, the seven member court took the shortest route to reaching its decision by deciding he had been charged, prosecuted, convicted and executed for a non-existent crime.

One of the judges that exonerated Chief Leschi, Thurston County Superior Court Judge Daniel Berschauer, noted "Even though this decision has no legal consequence, it clearly has a historical consequence." One of those consequences is that as many as 500 Washington State history books may be amended by various means to reflect the Court's decision.

Cynthia Iyall, a descendant of Chief Leschi's sister and chairwoman of the Committee to Exonerate Chief Leschi said after the verdict, "I'm just happy; this is really about the future. This is for all the kids: they need to know who that man was and what truthfully happened to him."

Although Chief Leschi is currently remembered in the Puget Sound region, with a school, a park and a Seattle neighborhood named after him, Dorian Sanchez, chairperson of the Nisqually Tribe, noted, "Now the world can know him as we know him, 'warrior, leader, hero and innocent.'"

Another historical aspect of Chief Leschi's case is that he was the first person sentenced to capital punishment and executed in the Washington Territory that became the State of Washington - and he is now exonerated.

Since the precedent of a Historical Court of Inquiry and Justice has been established, it may now be possible that other miscarriages of justice in Washington state may be reopened for review. A prime case for such review were the second degree murder convictions of seven men under very dubious circumstances, related to the death of Wesley Everest in Centralia, Washington on November 11, 1919.⁶

Cynthia Iyall, a descendant of Chief Leschi who helped lead a two-year effort to reopen his murder case, at his grave in Tacoma, Washington. (Annie Marie Musselman for *The New York Times*)



End notes:

¹ Historical Court Clears Chief Leschi's Name, Gregory Roberts, Seattle Post-Intelligencer, p. B1,B4, December 11, 2004.

² Historical Court Clears Chief Leschi’s Name, Gregory Roberts, Seattle Post-Intelligencer, p. B1,B4, December 11, 2004.
³ Indian Chief Hanged in 1858 is Cleared, AP, The New York Times, December 12, 2004.
⁴ Chief’s Retrial, 146 Years in the Making, Sarah Kershaw, The New York Times, December 5, 2004.
⁵ Historical Court Clears Chief Leschi’s Name, Gregory Roberts, Seattle Post-Intelligencer, p. B1,B4, December 11, 2004.
⁶ One of the most complete accounts of this case is, *The Centralia Conspiracy* by Ralph Chaplan (1920).

81 Scottish “Witches” Pardoned

by Hans Sherrer

Halloween 2004 was very special for 81 Scots. Convicted of being witches and executed in the 16th and 17th centuries, their innocence was publicly declared during an October 31st ceremony in Scotland’s Prestonpans township. The ceremony followed Baron Gordon Prestoungrange’s grant of posthumous pardons to the 81 people on July 27, 2004. ¹

Witchcraft was made a capital offense under Scotland’s Witchcraft Act of 1563 (also known as Mary’s Law) that was given royal assent by Mary, Queen of Scots. ² (That same year, 1563, Queen Elizabeth I assented to England’s adoption of a copycat Witchcraft act.) Mary’s Law defined witchcraft as “conjuration or sorcery,” and a witch was a person considered to have supernatural powers granted by Satan in exchange for their soul.

The 81 pardoned people were convicted of being witches in Prestonpans during a period of time that Scottish historian Roy Pugh has described as a “mini-holocaust.” ³ From 1563 to 1727 as many as 4,500 Scots - 80% women - were lawfully convicted of witchcraft and executed. That is an average of *more than two* innocent people in Scotland being convicted of a capital crime *every month* for 164 years.



Woodcut depicting John Fian, a schoolmaster whom was convicted of witchcraft in 1590 and burned to death in Edinburgh, Scotland. Fian

was one of the 81 people pardoned by Baron Gordon Prestoungrange on July 27, 2004. (Glasgow University Library - AP Photo)

Many people were identified as witches by an informant who offered ‘spectral evidence’ against the accused person. Those prosecution witnesses claimed to have “felt” the presence of evil ‘spirits’ or ‘heard’ spirit ‘voices’ while in the presence of the accused person. ⁴ The ethereal nature of ‘spectral evidence’ made it difficult for a person to disprove an accusation of being a witch, since there was no way to cross-examine the alleged ‘spirit’ concerned. ⁵ Additional prosecution support for an accusation of witchcraft was typically as insubstantial as a person’s brewing of home-made remedies, owning a black cat, or living alone. ⁶

A suspected witch had no refuge, since in a counterpart to today’s conspiracy laws, under Mary’s Law anyone who assisted him or her was subject to being accused of witchcraft based on guilt by association. ⁷



Woman being courted by the Devil to exchange her soul for supernatural powers. (Scottish Sunday Express)

Witch hunting became a profession in 1603 after enact-

ment of Scottish Statute 1603, 1 Jac. 1, c. 12, which authorized the appointment of “witchfinders” to ferret out or investigate an accused witch. ⁸ The 17th century counterpart of today’s “special prosecutor,” a witchfinder had broad investigative powers. One of their witch detection techniques was to prick a suspect “with pins until they found the ‘devil’s mark’” ⁹

The pardons by the Barons Court noted that after being identified by an informant or a witchfinder, a suspected witch’s examination was “conducted in an atmosphere of terror with total physical examination by witch prickers. Confessions were extracted by hideous torture Some would be dipped in the river or held under freezing water until they confessed. If by some lucky chance, they survived, they were considered innocent. Many old women died from drowning whilst undergoing such tortures. The use of lashes, witch bridles, irons and pilniewinks [thumbscrews] was widespread to extract confessions.” ¹⁰ A “witch’s bridle” was a diabolical medieval device designed to extract a confession from an obstinate suspected witch, by exhausting him or her from a lack of sleep. The *Dictionary of Phrase and Fable* (1898) described it as “an iron bridle or hoop bound across [the person’s] face with four prongs thrust into [their] mouth. The “bridle” was fastened behind to the wall by a chain in such a manner that the victim was unable to lie down.” ¹¹ The accused witch was kept in that position until he or she either confessed or collapsed from exhaustion and had their face ripped off.

Although the precise figure is unknown, the confession rate under those circumstances was very much in the prosecution’s favor. Convicted upon undefendable ‘spectral evidence’ and their coerced confession, the “witch” was then burnt at the stake.

However while Scots were told the witchcraft laws were helping to rid their country of evil elements, the truth was far more sinister. While researching his 2001 book, *The Devil’s Ain* (The Devil’s Own), Scottish historian Roy Pugh identified a single motive behind the ruthless hunting of innocent people who could plausibly be accused of being a witch, their barbaric treatment in being forced to falsely confess, and then their unimaginably painful death by being burned alive: “Controlling the population through religious fanaticism.” ¹² When public authorities issued an order for a witch-hunt, the superstitious fears of a large segment of the population was unleashed - distracting them from real problems that plagued their lives. As Pugh described it:

“The ingredient of the witch hunt included putting the fear of God into the population, encouraging hysteria, paranoia, hypocrisy, self-righteousness and prejudice – vital ingredients in a crusade which was based on superstition masquerading as Christian principles. The hapless victims of the witch-hunt – eight out of ten were women – became the scapegoats for all the ills which afflicted that predominately rural society, in which illness struck without warning and animals died suddenly and mysteriously. In my researches, I found a connection between the witch epidemics and the dearth of food which threatened survival. The witch-hunt was as much a mirror of a crisis of the intellect as it was the product of a harsh climate, periodic economic crisis and personal misfortune.

The [authorities] readily grasped the potential for propaganda. [They] saw that the ills of society could be blamed on those who had strayed from the faith or left the path of righteousness. [T]he leading lights in this crusade, were the ministers and landowners, the ‘better off’ minority of the time. In this, they were aided and abetted by the secular authorities ... to give these commissions some veneer of legality. ... These kangaroo courts allowed neither legal counsel for the accused, nor did they permit a jury. Witnesses – usually hostile

and prejudiced – gave evidence to the commission, a process which did not allow cross-examination.

Witchcraft trials were legal insofar as suspects were indicted under the Witchcraft Act of 1563. Where I take issue with this is the manner in which the trials were conducted and the ludicrous evidence which was used to obtain a guilty verdict. The nonsense which passed as evidence was only surpassed by the ignorance, stupidity, superstition, self-righteousness and paranoia of those who were appointed to try their victims.” ¹³

The centuries long reign of terror against innocent people branded as a witch ended with Scotland’s Witchcraft Act of 1735. That Act banned the execution of a person for witchcraft, however it criminalized pretending to be a witch. Thus while Scotland’s last witchcraft execution was in 1727, witchcraft related prosecutions continued through the mid-20th century. The most recent prosecution, in 1944, resulted in Helen Duncan’s conviction of “pretending to be able to make spirits materialise.” ¹⁴ A campaign to overturn her conviction was denied in 2002.

Prior to the Witchcraft Act of 1735 a few brave souls spoke out against the prosecution, conviction and execution of people who were plainly innocent of committing a capital crime. Reginald Scott was one of those people. In 1584 Scott wrote *The Discoveries of Witchcraft* with “the goal of preventing the further persecution of people popularly believed to be witches. The declared purpose of his studies was ‘to expose the impostors on the one hand, and the credulity on the other that supported the belief in witchcraft’.” ¹⁵ The continued execution of convicted “witches” in Scotland for another 143 years indicates that although well intentioned, Scott’s book was ineffectual at affecting public policy.

Some people have scoffed at the July 2004 pardons. However the Barons Court has existed since 1189 - predating the signing of the Magna Carta in 1215 by several decades - and it had the *de jure* legal authority to issue the pardons. ¹⁶ Furthermore, it was imperative that the pardons were granted before November 28, 2004, when Baron Prestoungrange’s ancient feudal power of pardoning would be stripped by legislation that ended Scotland’s feudal system. The July 27, 2004 grant of Absolute Pardon states in part:

FINDS IN FACT:

- 1) THAT it appears that a gross miscarriage of justice was inflicted upon many persons convicted of ‘conjuration or sorcery’ within the jurisdiction of the Baron Courts of Prestoungrange and Dolphinstoun and executed for the same before the enactment of *The Witchcraft Act 1735*.
- 2) THAT before the enactment of *The Witchcraft Act, 1735*, thousands of people through out Scotland and their cats, were executed for ‘conjuration or sorcery’ ... upon legally insufficient ‘spectral evidence’ under Scots Law.
- 3) THAT those persons condemned for witchcraft within the jurisdiction of the Baron Courts of Prestoungrange and Dolphinstoun were convicted on the basis of ‘spectral evidence’, that is to say, the ‘voices’ or actions of ‘spirits’ given as ‘evidence’ of the ‘guilt’ of the accused.
- 4) THAT this gave rise to a situation of waging private vendettas by accusing one’s enemies of witchcraft.
- 5) THAT all those persons and their cats were convicted of ‘conjuration or sorcery’ within the jurisdiction of the Baron Courts of Prestoungrange and Dolphinstoun and executed for the same were convicted on the basis of legally insufficient “spectral evidence” and were probably the victims of personal vendettas by personal enemies who alleged the commission of ‘Witchcraft’ solely as a means to getting rid of the accused.

FINDS IN LAW:

- 1) THAT 'spectral evidence', consisting of the 'voices' or 'actions' of evil spirits, is impossible to prove or to disprove in a court of law; nor is it possible for the accused to cross-examine the 'spirit' concerned: One is convicted upon the very making of such charges without any possibility of offering a defence against such 'spectral evidence'.
- 2) THAT at the least, the verdict of "Not Proven" should have been rendered in all cases and situation where those accused of witchcraft were convicted on the basis of legally insufficient 'spectral evidence'.
- 3) THAT all those persons and their cats convicted of 'conjurat[i]on or sorcery' within the jurisdiction of the Baron Courts of Prestoungrange and Dolphinstoun and executed for the same were wrongly convicted upon the basis of "spectral evidence" legally insufficient under Scots law to sustain a conviction.

HELD:

- 1) The Baron Courts of Prestoungrange and Dolphinstoun rule that weightily and sufficient grounds of both fact and law exist for vacating the conviction of all those persons and their cats who were convicted of 'conjurat[i]on or sorcery' within the jurisdiction of the Baron Courts of Prestoungrange and Dolphinstoun and executed for the same before the enactment of *The Witchcraft Act 1735*: In all cases such convictions were based upon 'spectral evidence' legally insufficient under Scots law to sustain a conviction. In all such cases the verdict of "Not Proven" ought to have been rendered by the Baron Courts of the day.
- 2) Accordingly, the Baron Courts of Prestoungrange and Dolphinstoun grant an Absolute Pardon to those persons convicted of 'conjurat[i]on or sorcery' within their jurisdiction before the enactment of *The Witchcraft Act 1735* as well as to the cats concerned.
- 3) Furthermore, the Baron Courts order that this most unfortunate miscarriage of justice inflicted upon such persons and their cats be remembered:
 - (i) in murals to be painted in the baronies depicting their plight;
 - (ii) by an historical record being published that both recounts their alleged crimes and punishments and records such Absolute Pardon; and that,
 - (iii) the tragic events involved be re-enacted each year on Hallow-e'en and from time to time as a living reminder of this earlier process of justice in Scotland.¹⁷

It will be noted that Baron Prestoungrange magnanimously pardoned the cats burned alive with their human companion.

Upwards of thirty descendants and namesakes of the pardoned people attended the October 31, 2004 ceremony in Prestonpans during which the innocence of the condemned witches was publicly recognized. The ceremony also marked Prestonpans' first Witches' Remembrance Day, which will henceforth be held each October 31st in commemoration of the wrongly convicted people. A township spokesperson said, "There were some concerns that we've got the ceremony on Halloween, but we couldn't have a witches remembrance in the middle of March. It has a serious purpose, we're respecting these unfortunate individuals." Historian Pugh, whose book *The Deil's Ain* (Harlaw Heritage 2001) inspired interest in re-opening the cases of the people who were pardoned, said in part during the ceremony:

"It is too late to right the wrongs of a previous age. This modest ceremony may go some way towards a symbolical recognition of those countless victims of the witch-hunt who were cruelly persecuted. I invite those present – the possible descendants or namesakes of some of the 81 victims in Prestonpans – to lay a

floral tribute at the Memorial which commemorates the names of those who were judicially executed."¹⁸



Rena Thomson holding a pardon granted to six of her ancestors wrongly convicted of being witches and executed.



Eighty-One People Pardoned on July 27, 2004

Name Year of Execution

Endnotes:

- 1 Absolute Pardon, at, <http://www.prestoungrange.org/core-files/archive/absardon.pdf> (last visited November 26, 2004)] Sixty-eight were women and 13 were men.
- 2 Address by Roy Pugh, October 31, 2004, First Remembrance of Prestonpans 81 Witches, at, <http://www.prestoungrange.org/core-files/archive/RoyPugh.pdf> (last visited November 26, 2004)
- 3 Witches in the Clear after 400 Years, Baron Courts of Prestoungrange & Dolphinstoun website, October 29, 2004, http://www.prestoungrange.org/prestoungrange/html/news/show_news.asp (last visited November 26, 2004).
- 4 Judgement and Declarator, Barons Courts of Prestoungrange & Dolphinstoun, Trinity Session: Elizabeth II. 53. 2004, July - November, ¶ 7.A., at, http://www.prestoungrange.org/core-files/archive/trinity_session/09_1753_impost_on_fowlers_at_2d_per_pint.pdf (last visited November 26, 2004).
- 5 Id. At ¶ 7.B.
- 6 81 Witches, Executed with Cats Centuries Ago, to be Pardoned, *Seattle Post-Intelligencer*, October 30, 2004, p. A4.
- 7 Judgement and Declarator, *supra* at ¶ 5.B.
- 8 Id. at ¶ 5.
- 9 Id. at ¶ 5.A.
- 10 Id. at ¶ 4.D. (Pilniewinks (thumbscrews) were fitted to the victim's thumbs and then tightened until the thumbs were crushed. They were also called 'Thumbikins'.)
- 11 "Waking a Witch," *Dictionary of Phrase and Fable*, 1898, E Cobham Brewer, at <http://www.bartleby.com/81/17223.html> (last visited November 26, 2004).
- 12 Address by Roy Pugh, *supra*.
- 13 Id.
- 14 Queen Asks Ministers to Probe Executions, Derek Lamble and John Skinner, *Scottish Sunday Express*, October 24, 2004.
- 15 Judgement and Declarator, *supra* at ¶ 6.
- 16 The Baron's Court's website is, <http://www.prestoungrange.org/prestoungrange/index.html> (last visited November 26, 2004).
- 17 Judgement and Declarator, *supra*
- 18 Address by Roy Pugh, *supra*.

Margaret Aitchesoun	1590
Masle Aitchesoun	1590
Agnes Aird	1661
Marjorie Andersone	1678
Margaret Auchinmoutie	1661
Marioun Ballzie (Baillie)	1590
Christian Blaikie	1661
Meg Bogtoun	1590
Janet Boyd	1628
Bessie Broune (Brown)	1590
Thomas Brounhill (Brownhill)	1590
Wife of Thomas Brounhill	1590
Duncan Buchquhannan	1590
Margaret Butter	1661
Martha Butter	1659
Jonett Campbell	1590
Elsbeth Cheuslie	1679
Thomas Cockburn	1590
Marioun Congilton	1590
Bessie Cowane	1590
Beatrix Cuthbertson	1628
Janet Darlig	1628
Agnes Dempstar	1628
Gelie Duncan	1591
Catherine Duncane	1590
Thomas Fean	1591
John Flan or Flene	1590
Jonett Gall	1590
Malie Geddie	1590
Helen Gibesone (Gibson)	1661
Johnne Gordon	1590
Catherine Gray	1590
Jonnett Gray	1661
Robert Griersoune	1591
Issobell Griersoune	1607
Issobell Gylloun	1590
Margaret Hall	1661
Agnes Kelly	1678
Cristian Kerington	1590
Helene Lauder	1590
Issobell Lauder	1590
Agnes Liddell	1628
Katherine Liddell	1678
Jonett Logan	1590
Ewfame McCalzean	1590
Euphernia McLean	1590
Catherine McGill	1590
Gilbert McGill	1590
Johnne McGill	1590
Barbara Mathie	1628
Wife of George Moitis	1590
Wife of Nichol Murray	1590
Ane Nairn	1591
Jonett Nicolsoun	1590
Marioun Nicolsoun	1590
Margaret Oliver	1628
Marie Patersoune	1590
wife Portar of Seton	1590
Helen Quhyte (White)	1590
Alexander Quhytelaw (Whitelaw)	1590
Wife of John Ramsey	1590
Marion Ranking	1590
Janet Reid	1628
Bessie Riddell	1628
Margaret Ridpeth	1628
Donald Robinson	1590
Anny Rycheson	1590
Daughters of Agnes Sampsoun	1590
Agnes Sampsoun	1590
Marioune Schaw	1590
Ane Simson	1591
Wife of Smythe	1590
Elizabeth Steven	1629
Jonett Straitton	1590
Janet Strauchane (Strachan)	1628
Margrett Thomson	1590
Bessie Thomsoune	1590
Katherine Wallace	1590
Charles Wat	1591
Bessie Wrycht (Wright)	1590
Margaret Young	1628

Prestonpans, Scotland: The Most Noble City in the World

Prestonpans is a city of about 7,000 people located in southeastern Scotland near Edinburgh. It holds the unique distinction of being the only city in the world that has not only publicly declared it was the site of many dozens of innocent people being wrongly convicted and executed - but it commemorates that egregious crime against humanity by holding a public ceremony each year in honor of those unfortunate people. That open and respectful admission that an inexcusable wrong was committed against innocent people in Prestonpans by public authorities, is in sharp contrast with the attitude of public officials worldwide who take the ostrich approach of ignoring how prevalent incidences of a wrongful conviction have been, and continue to be within their sphere of authority. Prestonpans' annual observance of the wrongful convictions of people as witches is consistent with the *Random-House Webster's Unabridged Dictionary's* definition of *noble*: "4. of an exalted moral or

Queen Elizabeth Requested to Pardon 56 "Witches" Convicted of Treason

Baron Gordon Prestoungrange's pardoning authority did not extend to treason against the Crown. So in the summer of 2004 he formally submitted a request to Queen Elizabeth II that she issue pardons to 56 of the Prestonpanians he absolutely pardoned for witchcraft, who were also convicted of treason. The Baron wrote in his request to the Queen, "What does seem clear is that the offences against the King (James I) which led to their conviction for treason were concerned with creating storms at sea between Scotland and Denmark in 1589 when James and his proxy wife, Anne, attempted to sail to meet one another. ... We humbly beseech that you may review the evidence and grant your absolute pardon." The Baron's request was based on the reasoning that since the conviction of the 56 people - 13

Scottish Professor Believes the Pardoned Prestonpanians were Witches!

Dr. Peter Maxwell-Stewart, a lecturer at Scotland's University of St. Andrews, is among the critics of Baron Prestoungrange's pardons. In the *Scottish Sunday Express* (October 24, 2004) he was quoted as saying, "There's a high likelihood the people convicted were guilty." Thus Dr. Maxwell-Stewart expressed his belief in, among other things, that the 56 Prestonpanians convicted of treason against King James I had used witchcraft to cause Atlantic Ocean storms in 1589. It might be enlightening for Dr. Maxwell-Stewart to consider that if he had lived in Scotland 400 years ago, he might have experienced being dragged from his home after a witchcraft accusation, subject to all manners of torture before giving a coerced confession, and then having his flesh burned from his body while he was still alive as his screams were muted by an iron mouth piece. Then his ancestors could have experienced the poetic justice of having some academic in 2004 pronounce his pardon of witchcraft as farcical because he was likely guilty. With all due respect to Dr. Maxwell-Stewart, the plain and simple reality he is overlooking is the "high likelihood the people convicted" of witchcraft in Prestonpans and executed were no different than himself. He is likewise overlooking that if the roles were reversed, he too would have fallen prey to prosecutors and judges running amuck. Queen Asks Ministers to Probe Executions, Derek Lamble and John Skinner, *Scottish Sunday Express*, October

Husband Seen Jogging On A Public Street The Day After His Wife Allegedly Murdered Him

- The Jane Dorotik Story

By Jane Dorotik UNEDITED (1900 words)

My husband Bob Dorotik went jogging between 3:30 and 4 p.m. on Sunday, February 13, 2000. I became increasingly concerned when Bob did not return, and at 7:30 p.m. I called the San Diego Sheriff's Department for help. A search for Bob by sheriff deputies, a civilian search and rescue team, and a scent tracking dog was commenced later that night. Bob's body was found the following morning at 4:36 a.m. near a wooded intersection that is 3-1/2 miles from our home. His head had been bashed in to the point of being "pulpified" and his brain matter was exposed. A rope used to strangle him and that cut 1/4" deep gashes in his skin was still around his neck. Bob's jacket was found 1/2 mile from his body on the opposite side of the road. Two sets of footprints were also identified where Bob's body was found.

Sheriff deputies guarded my husband's body where it was found for over 12 hours until the coroner arrived that Monday afternoon at 5 p.m. However during his crime scene examination the coroner did not conduct a liver temperature test to establish Bob's approximate time of death.

During Bob's autopsy the coroner found "black foreign articles" embedded in his skull that he determined to be black paint. Presumably those "articles" were from the unknown murder weapon - since it was not found. The rope used to strangle Bob was not tested for possible DNA traces left by his killer(s).

Two eyewitnesses came forward to the police who positively identified seeing Bob after he left the house to go jogging that Sunday afternoon. The first witness volunteered her information the morning Bob's body was found. She reported having seen Bob at approximately five p.m. Sunday. He was "slumped over" between two Hispanics in a small black pickup truck just a few feet from where his body was found the following morning. The second witness saw Bob jogging at approximately four p.m. less than a mile from where his body was found. That witness also encountered a small black pickup truck being driven erratically along that road at the time she saw Bob jogging. She was positive about seeing the truck because she said it "almost ran me off the road."

So the San Diego Sheriff's Office had independently corroborating information suggesting two Hispanics driving a small black pickup were involved in Bob's murder. However I was not notified about the information those witnesses provided and the sheriff's office didn't intensely investigate those critical leads. Consequently when I was targeted as my husband's murderer I couldn't raise a public storm about the failure of the sheriff department's homicide detectives to focus their investigation on identifying the two men and the black pickup truck that they had substantial reason to suspect were involved in the crime.

The sheriff detectives based their suspicion on a small amount of blood found in the carpet of our bedroom. I told them it was residue from a nosebleed Bob had a week prior to his death. The detectives relied on that small blood stain to construct the following scenario to neatly "solve" Bob's murder.

- I murdered Bob in our bedroom on Saturday, February 12, 2000.
- I then conducted an intensive operation to clean-up the bedroom of the significant amount of blood Bob lost from his extensive head wounds - remember his head was bashed in to the point that his brain was exposed.
- I then carried Bob's body out of the bedroom, across a sixty foot porch, down a flight of stairs, lifted him into our truck - which is *not* a "small black pickup" but a

(PROVIDE TYPE OF TRUCK AND COLOR) - transported him to where he was found and unloaded him.

That scenario is ludicrous for the following reasons:

- The observable rigor mortis that had set in at the time Bob's body was found and when the coroner examined his body was inconsistent with him dying on Saturday night.
- There was no trace of blood in any of our home's sinks, the shower, the tub in the bathroom off the master bedroom, nor was there any traces of blood in the garbage in or outside the house, or elsewhere on our property. Plus no blood-stained rags, wash cloths or other items were found. In addition our small household carpet cleaner had no traces of blood in it, nor would it have been capable of thoroughly cleaning the significant amount of blood Bob lost from his wounds.
- None of Bob's brain matter or other tissue from his wounds was found in our bedroom or elsewhere in our house.
- None of Bob's blood was found on any of my clothes.
- None of Bob's blood was found in the path from our bedroom to the outside door, on our deck, the steps, our driveway, or the bed or interior of our truck.
- On the Sunday evening of Bob's disappearance, sheriff deputies, search and rescue team members, and a scent dog were all in our bedroom and not a single person saw any blood on the carpet, or observed that it looked like it had been shampooed within the previous 24 hours, or that it was damp from having been extensively cleaned and shampooed recently. On the next day homicide detectives examined the bedroom and didn't notice any indication that the carpet had been recently cleaned of the large amount of blood that would have flowed from Bob's wounds.
- I am not physically capable of carrying Bob's body

out of our bedroom, across a sixty foot porch, down a flight of stairs and lifting him into our truck. Bob was _____" tall and weighed _____ pounds, while I am 5'-____" tall and weighed about _____ at the time of his death. (FILL IN BLANKS)

- I am not physically strong enough to create the 1/4" deep gashes in Bob's neck caused by the rope.
- No tire tracks were found at or near the crime scene that matched those of our truck.
- My feet and none of my many pairs of shoes seized during a search of our home matched either of the two sets of footprints identified where Bob's body was found.
- I had no motive to want Bob dead. We had a loving relationship and neither of us was contemplating divorce. Neither was there any history of violence in our 30-year marriage. At the time of Bob's death my police record consisted of two speeding tickets in my life.

The detectives scenario is absurd because it couldn't be true even if I could wiggle my nose like Samantha in *Bewitched* to make my husband's body levitate off the floor and float through our house, across our deck, down the stairs and into our truck - and then off the truck where he was found. That would still leave explaining how our house could magically be cleaned of the massive amount of blood Bob lost due to his injuries, and how all traces of brain matter and skin that would have been left from Bob's extensive head and neck injuries could have been found and removed, the identity of the two people who made the footprints by Bob's body, and who forcibly strangled him with the rope.

Compounding the impossibility of the detectives scenario are the two eyewitnesses. One of whom saw my husband alive on Sunday afternoon at about 4 p.m. jogging on a public street, and who was almost run "off the road" by a small black pickup on that same road about the same time. While the other witness saw him about an hour later "slumped over" between two Hispanics in a small black pickup truck.

Yet with no witness, no murder weapon, or any physical or even circumstantial evidence of my guilt, I was charged with my husband's murder, convicted, and sentenced to _____ (LIST SENTENCE). How was I convicted?

- The homicide detectives perjured themselves on the witness stand by claiming they found a large amount of blood in our bedroom that was not in fact seen or detected by sheriff officers, search and rescue workers or a scent dog on the even of Bob's disappearance, or by the homicide detectives when they interviewed me on Monday, February 14th, and inspected our house - including the bedroom.
- The homicide detectives testified that the rope used to strangle Bob - which by its appearance was a very common type of all-purpose rope - was identical to rope found on our property without any tests having been conducted to substantiate that claim.
- The homicide detectives and prosecutors concealed the existence of the two eyewitnesses from me and my lawyers. We first became aware of the witness who saw Bob "slumped over" in between two Hispanics in a

small black pickup truck at 5 p.m. when she came forward to provide us with the information at the end of my trial. The judge allowed the jury to hear her testimony - but it was so totally contrary to the prosecution's case that they obviously didn't allow it to influence their decision - since if they had done so then they would have had to find that the entire case against me was nothing more than an elaborate lie. We first became aware of the witness who saw Bob jogging about 4 p.m. on Sunday after the jury had begun deliberating. The judge did not allow the jurors to hear her testimony that was consistent with the testimony of the other eyewitness. If the jurors had heard her testimony they would have been faced with the choice of either finding me not guilty or finding me guilty of killing a man who was seen alive jogging on a public street more than 12 hours after the prosecution claimed I had killed him.

I was convicted without a shred of actual evidence. The flimsiness of the prosecution's case is indicated by the speculation by the prosecution's wound expert - who was a dentist - that the most likely murder weapon was a hammer. Yet he acknowledged that he knew of no hammer whose head would be painted black and that it is unlikely a painted hammer even exists. He had to speculate as a prosecution witness about what the murder weapon was, because it was not found.

So the prosecution relied on having their witnesses connect some very disconnected things to mask over that the sheriff's department did not conduct a credible investigation, and they failed to follow up on solid leads or have tests conducted on important physical evidence such as the rope found around my husband's neck. The prosecution built the case against me backwards by starting from the conclusion I was guilty, and then excluding everything that did not fit their theory - most particularly the two eyewitnesses who completely exonerate me of any involvement in my husband's murder and whose existence was concealed from me and my lawyers.

The plain and simple truth is that I am innocent of my husband's brutal murder.

Unfortunately my court appointed lawyer not only failed to vigorously defend me by exposing the absurdity of the prosecution's theory of the crime, but he didn't even challenge the prosecution's contention that our bedroom was the crime scene!

My conviction was upheld on direct appeal, and I am currently challenging my conviction in a habeas proceeding.

If you have any information about my husband's murder or investigative or legal expertise that can help me in my quest to overturn my conviction and gain my freedom, I can be contacted at:

Jane Dorotik W90870
CCWF
PO Box 1508
Chowchilla, CA 93610

My outside contact is my sister:

Bonnie Long
#2 - 36th Place, Apt. C
Long Beach, CA 90803-2657
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The Complicity Of Judges In The Generation Of Wrongful Convictions

By Hans Sherrer

PART 5 of a 7 part serialization

VI.

Appellate Courts Cover-up the Errors of Trial Judges

There are two significant and complementary ways the political nature of judges contributes to victimization of the innocent. The first method is the use of the harmless error rule to dismiss the grounds upon which a wrongful conviction or prosecution is challenged. The second method is the use of unpublished opinions to minimize attention given to an appeal and to conceal the details of the appeal's resolution.

A. The Harmless Error Rule

The harmless error rule is a relatively recent development in this country, having been adopted federally in 1919. It is codified in the *Federal Rules of Criminal Procedure* as Rule 52 and it states that a harmless error is, "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The states followed the federal government's lead and adopted a variation of the harmless error rule applicable in their courts.

Prior to adoption of the harmless error rule, structural omissions or errors in an indictment, search warrant or jury instructions, and a trial judge's judgmental errors in such matters as evidentiary rulings, limiting witness testimony, or motions for a judgment of acquittal that were related to essential facts of a case, were presumed to prejudice a defendant, and thus constituted grounds for automatic reversal of a conviction and a retrial or possible dismissal of the charges. That was consistent with the common law rule that review of a conviction did not involve any re-examination of the facts, which was the sole province of the jury, *and* that was the law applied to Americans at the time the Constitution was written and the federal judiciary was created.

Before codification of the harmless error doctrine, it was recognized that structural errors in documents such as an indictment or search warrant could be due to the possible inability of the prosecution to correct them, and defects that could be cured by the prosecution would be. Trial and appellate judges did not interpose their opinion about the relative strength or weakness of the government's pleadings, but merely ascertained if it met the legal standard for sufficiency and summarily rejected those that did not. The harmless error rule turned that common sense standard on its head by allowing a judge to determine if errors or omissions that made a pleading, document, or jury instructions insufficient were irrelevant, if in the judge's opinion it had no effect on the proceedings. In other words, the harmless error rule elevated the expression 'good enough for government work,' which means conduct and work that is third-rate, shoddy, and not worthy of praise, to the sub-standard by which all legal pleadings in a criminal case affecting a person's life and liberty are judged.

Before the harmless error rule, the jury was considered to be the sole arbiter of a case's facts and any failure by jurors to consider essential facts of a case or to consider the impact of facts on essential elements of an offense, was assumed to have impaired their judgment, and thus, constituted the deprivation of a fair trial to a defendant and warranted reversal of the conviction. Prior to 1919, there was effectively a presumption that trial level errors could prejudice a defendant to

a judge and jurors exposed to them, since the State's painting of a person as a criminal carries with it a strong de facto presumption of guilt. Thus, the State must be bound to follow the proper procedures to ensure that an innocent person is not erroneously colored by that de facto presumption of guilt. Consequently, trial level errors embody the presumption that they are prejudicial, some in ways that may remain unseen to anyone outside of the jury: so recognition of their prejudicial effect on a defendant's right to a fair trial and their possible contribution to an adverse verdict is essential to preserve not just the integrity of the judicial process, but the appearance of the system's integrity.

The automatic reversal of a conviction acted as an important shield of protection for innocent defendants from the structural and judgmental errors of a judge, prosecutors and police. Its obliteration began in 1919, and nine decades later is virtually complete: only a hollow pretense of judicial concern for determining the soundness of any conviction remains.

The harmless error rule is defended in a criminal context as contributing to judicial economy by allowing a judge to avoid ruling in a defendant's favor when reasonable grounds can be stated that in the judge's opinion, an error by the police, prosecutors or a judge in a case did not alter the outcome of the issue being considered. The Supreme Court has extended that rationale to encompass the most serious violations of a defendant's express protections under the Bill of Rights. The end result of that rationale was expressed in *Arizona v. Fulminate*, 499 U.S. 279 (1991), a case involving a confession obtained in violation of the defendant's Fifth Amendment right against self-incrimination. The Court has not only continued to apply the rationale that a constitutional violation does not mandate a conviction's automatic reversal, but it has extended it in subsequent cases to encompass indictments and jury instructions that fail to include essential elements of a defendant's alleged criminal offense. Thus, the assessment of a case's facts and deficient prosecution documents and pleadings by a judge who owes his position to the same political establishment to which the prosecutor belongs, has effectively replaced the jury that symbolically represents the community, as the final arbiter of the weight to be given to those facts that the judge cannot possibly view from a disinterested perspective.

It was predictable in 1919 that the 'harmless error rule' would result in less attention to critical details at every stage of a criminal investigation, prosecution and review of a conviction, given the overtly political nature of the state and federal judiciaries, and the panoply of political considerations that are the overriding criteria used to fill those positions and that affect the decisions of judges. So even though details are the life blood of a criminal prosecution and the protection of all criminal defendants is shielded by the presumption of innocence, the liberal application of the 'harmless error rule' has enshrined 'close enough for government work' as the motto that most accurately expresses the standard applicable to misdeeds, errors and constitutional violations committed during the course of a case by judges, prosecutors and the police.

The grave danger posed to the innocent by the Supreme Court's extension of the 'harmless error' principle to an every increasing panoply of prosecution related errors was conclusively proven by the aftermath of its ruling in *Arizona v. Youngblood*, 488 U.S. 51 (1988). Convicted of the 1983 kidnapping and sexual assault of a 10 year-old boy based solely on the victims testimony, the Arizona Court of Appeals reversed Larry Youngblood's conviction in 1986 on the ground that the failure of the police to preserve semen samples from the victim's body and clothing that there was substantive reason to believe could have exonerated him, violated his Due Process right to a fair trial. In 1988 the Supreme Court reversed, holding that such destruction of material evidence by the prosecution must be done in "bad faith" to constitute a Due Process violation. The Court's majority acknowledged that although the actions of the police in Youngblood's case could be "described as negligent," they didn't act in "bad faith."

However, in 2000 a preserved rectal swab sample taken from the victim containing the attackers semen was discovered. When subjected to state of the art DNA testing unavailable at the time of his trial, Mr. Youngblood was excluded as the assailant. Mr. Youngblood's exoneration, *after* he had served his prison term, vindicated Justice Blackmun's concern that the Court was using his case to erroneously expand when destruction of material evidence by the prosecution was constitutionally permissible:

The Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial. Respondent here, by what may have been nothing more than police ineptitude, was denied the opportunity to present a full defense. That ineptitude, however, deprived respondent of his guaranteed right to due process of law.

...
The evidence in this case was far from conclusive, and the possibility that the evidence denied to respondent would have exonerated him was not remote. The result is that he was denied a fair trial by the actions of the State, and consequently was denied due process of law.

Yet in spite of Mr. Youngblood's actual innocence being later proven and Justice Blackmun's correct analysis of why the Court should have affirmed the Arizona Court's reversal, the Court's decision continues to be the controlling authority insofar as whether the prosecution's destruction of material evidence violates Due Process or is merely 'harmless.' It is reasonable to surmise that the Court erred as egregiously in other applications of the harmless error principle to possible Constitutional violations as it did in its as yet uncorrected *Youngblood* ruling.

One logical consequence of the ever more liberal use the 'harmless error rule' is the two pronged evil of a nationwide acceptance of wrongful convictions as the norm, and the failure of appellate courts to reverse convictions that it would have unhesitatingly declared as unsafe mere decades ago. Thus, adoption of the 'harmless error rule' is a largely unseen factor that has evolved into being one of the keys necessary to trigger and sustain what has become nothing less than a tsunami of wrongful convictions in the United States.

B. Unpublished Opinions and the Creation of an Unprecedented Body of Law

The replacement of a written opinion explaining the rationale underlying an appellate court decision, with an unpublished opinion or one line or one word orders has become a pervasive phenomenon in the last three decades. As recently as 1950, a written opinion was issued in all federal appeals as a right. Today, however, over 85% of all federal circuit court opinions are unpublished. The increased use of unpublished opinions since the late 1960's and early 1970's somewhat parallels the growth in the number of people imprisoned since then. It is common for both federal and state appellate courts to use an unpublished opinion to dismiss a defendant's challenges to a conviction based on misconduct, errors and omissions by a judge, prosecutor and the police, as constituting 'harmless error.'

The authors of *Elitism, Expediency, and the New Certiorari*, recognize the negative consequences of the trend toward less public disclosure of the reasons underlying a judicial decision:

The implications of these changes are enormous. Federal appellate courts are treating litigants differently, a difference that generally turns on a litigant's ability to mobilize substantial private legal assistance. As a result, judicial procedures no longer permit judges to fulfill their oath of office and 'administer justice without respect to persons, and do

Judge Mary Ann Ottinger Has Earned Removal From Office

On June 18, 2004 the Washington State Commission on Judicial Conduct (Commission) censured King County District Court Judge Mary Ann Ottinger, “for, among other misconduct, engaging in a pattern or practice of violating criminal defendants’ fundamental constitutional and due process rights.”¹ Judge Ottinger’s misconduct included failing to advise unrepresented defendants at arraignment that they had the right to court-appointed counsel, the right to remain silent, and the right not to incriminate him or herself. She also accepted guilty pleas without informing defendants of the elements of the crime that had to be proven by the prosecution beyond a reasonable doubt, the maximum available penalty that could be imposed, and other legal consequences of a guilty plea.

The Commission noted “The nature, extent and frequency of the due process violations, in particular, have been significant. ... Because the practices implicate the Constitutional rights of the defendants involved, the nature of the violations cannot be overstated.”² It further stated, “The extent to which Respondent’s failure to properly advise defendants of their rights has had a substantial impact on the rights of the defendant’s involved.”³ The Commission emphasized Judge Ottinger’s misconduct was particularly severe, because “Protecting the rights of accused individuals is one of the highest duties of any judicial officer.”⁴

The censure was part of stipulated agreement the Commission entered into with Judge Ottinger. That agreement imposed several sanctions, the most meaningful of which was, “Respondent agrees that she will participate in training, approved in advance by the Commission, related to the proper administration of her court, including proper procedures for rights advisement...”⁵ In giving Judge Ottinger such a mild punishment for such serious judicial misconduct, the Commission took into the consideration the mitigating factor that she “... acknowledges her need to change or modify the conduct in question and represents that she will do so...”⁶

We now know Judge Ottinger didn’t mean it and she successfully pulled the wool over the eyes of the Commission’s members.

On June 14, 2005 the Commission filed a Statement of Charges against Judge Ottinger in

which it is alleged that on July 7, 2004, *less than a month* after the filing of the agreement in which she effectively agreed *in writing* to respect a “criminal defendants’ fundamental constitutional and due process rights,” the Commission received a complaint that she was continuing to fail to do so. (See, Judge Charged With Continuing To Conceal Defendants’ Rights, on page 11 of this issue of *Justice:Denied*). The Commission commenced a new investigation of Judge Ottinger that resulted in the filing of the new charges that substantially duplicate those that were resolved by the stipulated agreement filed on June 18, 2004. The Commission’s new complaint alleges that from August to November 2004 Judge Ottinger “repeatedly failed to comply with court rules and case law requiring full advisement of rights to counsel for criminal defendants at arraignments. In multiples cases, Respondent failed to properly advise criminal defendants of their right to counsel, of the maximum available penalties and other potential consequences of conviction, of their right to remain silent.”⁷ The new complaint also documents that Judge Ottinger continued to accept guilty pleas without informing unrepresented defendants of the their right to counsel, of the elements of the crimes to which they pled guilty, and she “*consistently failed to determine the defendants’ understanding of the proceedings.*”⁸

The new complaint also alleges that Judge Ottinger committed serious misconduct related to bail hearings, probation revocation proceedings and alleged offenses involving non-citizens.

The Commission has the goods on Judge Ottinger since the Statement of Charges documents the defendant’s name, the case number, and the date of more than a dozen representative alleged violations.

It needs to be kept in mind that every single person whose “fundamental constitutional and due process rights” has either admittedly or allegedly been disregarded by Judge Ottinger over god knows how many years, was at that time as legally innocent under the law of what they were accused of as you and I. An unknown number of those people were undoubtedly actually innocent, and the only thing that stood in the path blocking their possible wrongful conviction was the very “fundamental constitutional and due process rights” that Judge Ottinger steadfastly *refused* to inform them that they had. We know with a moral certainty that she *refused* to inform defendant’s of their “fundamental constitutional and due process rights” and that it wasn’t due to inadvertence or ignorance, because after agreeing in writing to engage in

“proper procedures for rights advisement,” she continued to repeatedly *not* do so throughout the many months that the Commission’s investigation in 2004 was conducted.

Judge Ottinger’s knowledge and intent is further established by her response to the Commission after it granted her the “insiders” courtesy of informally contacting her in 2002 after it received complaints about her lack of concern for the rights of defendants. Judge Ottinger “represented that she would correct her plea acceptance and rights advisement practices in the future to comply with CrRLJ 4.2 and Washington law.”⁹ It was Judge Ottinger’s failure to abide by what was her false representation to the Commission in 2002 that caused the initiation of the official proceeding that resulted in the June 18, 2004 stipulated agreement.

Judge Ottinger is every prosecutors dream judge, because she effectively sweeps aside the only impediment to a defendant’s summary conviction - that person’s “fundamental constitutional and due process rights.” Her actions systematically undermine whatever meager confidence people both in and out of her courtroom may have in the fairness of the criminal process. Each issue of *Justice:Denied* bears witness to the human carnage of lost dignity, life and property caused by the attitude of Judge Ottinger and other state and federal judges of her ilk.

Judge Ottinger is a habitual offender who has twice fooled the Commission into not taking effective remedial action against her, and people who are innocent under the law have suffered because of it. The complaint filed on June 14, 2005 details the considerable depth of Judge Ottinger’s deception and her cavalier manner of ‘thumbing her nose’ at the Commission’s mistaken belief that she signed last years stipulated agreement in good-faith.

Since 1982 the Commission has made the decision in three cases that the appropriate remedy for a judge’s egregious misconduct was removal from office.

If Judge Ottinger had committed the one-time offense of taking the bribe of a car to fix a case, or been convicted of felonious assault, her removal would be a foregone conclusion. Yet those are petty offenses compared to the pervasive misconduct she admitted to in 2002 and 2004, and which she is now charged with continuing to engage in.

One does not have to resort to hyperbole to describe the seriousness of Judge Ottinger’s

actions. Her deliberate and egregious misconduct over a period of years that has obliterated “the integrity ... of the judiciary,” and demonstrated her contempt for being “faithful to the law.” A judge engaging in that quality of misconduct has earned removal from office.

Judge Ottinger earned removal from office for her censured conduct last year. She likely has powerful friends in high places, and that may be why the Commission has thus far chosen to ignore the gravity of her misconduct by agreeing to gently admonish her with “tsk-tsk” taps on her wrist. However the charges against Judge Ottinger transcend political back-scratching because they concern the quality of the type of society we live in - and aspire to live in.

A Commission spokesperson anticipates the public hearing concerning the complaint of June 14, 2005 will be scheduled for the fall of 2005. The hearings outcome will determine whether the Commission will be given the opportunity to rectify their error of last year by deciding that Judge Ottinger has earned removal from office. That is unless Judge Ottinger takes the cowards way out by resigning before-hand with full pension benefits, or the Commission once again shirks its oversight obligation by making another sweetheart deal that allows her to avoid responsibility for her destructive actions.

Hans Sherrer, Publisher, Justice Denied

Endnotes:

¹ In Re the Matter of Mary Ann Ottinger, No. 4475-F-119, Comm. Judicial Conduct, June 14, 2005, p.1.

² In Re the Matter of Mary Ann Ottinger, No. 3811-F-110, Comm. Judicial Conduct, June 18, 2004, p.3, II., b.

³ In Re the Matter of Mary Ann Ottinger, No. 3811-F-110, Comm. Judicial Conduct, June 18, 2004, p.4, II., e.

⁴ In Re the Matter of Mary Ann Ottinger, No. 3811-F-110, Comm. Judicial Conduct, June 18, 2004, p.4, II., g.

⁵ In Re the Matter of Mary Ann Ottinger, No. 3811-F-110, Comm. Judicial Conduct, June 18, 2004, p.5, III., 4.

⁶ In Re the Matter of Mary Ann Ottinger, No. 3811-F-110, Comm. Judicial Conduct, June 18, 2004, p.5, II., 4.

⁷ In Re the Matter of Mary Ann Ottinger, No. 4475-F-119, Comm. Judicial Conduct, June 14, 2005, p.2, II.A.

⁸ In Re the Matter of Mary Ann Ottinger, No. 4475-F-119, Comm. Judicial Conduct, June 14, 2005, p.2-3, II.B.

⁹ In Re the Matter of Mary Ann Ottinger, No. 3811-F-110, Comm. Judicial Conduct, June 18, 2004, p.2, I., A. 3.

Prosecution's Timeline Makes Crime Impossible - The Mickey Davis Story

By Mickey Davis

Edited by Karyse Phillips, JD Editor

My name is Mickey Davis. On April 23, 1996 a jury convicted me of first-degree murder and felony firearm in the Circuit Court of Berrien County, Michigan.

My conviction was in connection with the shooting death of my wife, Priscilla Davis, in her parent's home on the evening of October 6, 1995. The prosecution's theory was that I had broken into the home with my alleged girlfriend, Melissa Peters, and that I fatally shot Priscilla when she returned home and encountered us in her home. The alleged motive was I wanted custody of our daughter Alyssa. The defense countered that I was not even in the area at the time of the offense and suggested that the prosecution's chief witness — Melissa Peters — had killed Priscilla out of jealousy towards Priscilla.

Background

I had been working as a maintenance supervisor for a property management company and on June 1, 1994 I was transferred from Benton Harbor to Lansing. I worked in Lansing during the week and was home on the weekends. Priscilla did not want to move to Lansing, about 130 miles away from her parents, and as a result we were separated in August of 1994. We had a daughter together named Alyssa and a son, Troy, from my previous marriage. Priscilla filed for a divorce and was granted temporary custody of Alyssa and they resided with her parents in Benton Harbor, while Troy lived with me in Lansing. Priscilla was granted child support and I was given custody of our daughter every other weekend. In December of 1994, Priscilla called and said that I did not have to come to pick Alyssa up, that she would drive her to Benton Harbor because she wanted to talk to me. Priscilla asked me if I would take her back. She wanted our marriage to work and said that she was sorry for everything that had happened, but that her parents had wanted us divorced and it make take some time. In January of 1995, I filed a motion to stop child support and Priscilla filed a response in the Berrien County court. The motion was granted on January 26, 1995, and any arrears were forgiven. Due to the pressure on Priscilla by her parents she continued to live with them. Priscilla and I agreed that Alyssa would live with me in Lansing for the summer and that I would return her a week before preschool started in the fall. Priscilla and I would usually meet in Kalamazoo to exchange custody of our daughter at 6:00 pm.

In February 1995, I took a week vacation and picked up Alyssa. I tried taking her to a licensed babysitter, dropping her off for a couple of hours and then picking her up, but she was not happy with that, so I knew that I was going to have to come up with something else for the summer. In April, I was introduced to Melissa Peters, who was seventeen and had a six-month old baby. She watched Alyssa for a couple of hours the following Saturday and everything went fine. Peters and I reached an agreement: She and her baby would move in for the summer. She would watch Alyssa while I was at work. Troy or I would watch her baby while she worked, and I would buy whatever the baby needed. The next time I went to pick up Alyssa, I took her and her baby with me to meet Priscilla so that she would know who was watching our daughter while I was at work.

Pre-Trial Events

After my arrest, Mr. Renfro was appointed to represent me. A preliminary examination was held on October 24, 1995. The prosecution requested that the autopsy reports, prepared and submitted by Dr. Cohle, be admitted into evidence in lieu of his live testimony and they were admitted. Officer Lange testified

that upon arriving at the crime scene he was directed to the bedroom where he observed a white female lying kind of face up next to a bed. Also, that he had checked the exterior of the house and found no sign of forced entry. Peters took the witness stand and was to present her testimony in accordance to a plea agreement with the Berrien County prosecuting Attorney's Office. Peters stated, "Before we begin I would like to say something. Mickey Davis over there (indicating) had nothing to do with this. Okay? I'm sorry, everything that I have said has not been the truth. I have to now say everything that has happened. Every one of my statements need to be removed. They are not true." The hearing was stopped at this point. Even though defense counsel objected to a continuance the court granted the prosecution a two-week continuance.

On November 7, 1995, a second preliminary examination was held. Peters testified for the prosecution that I drove her to Benton Harbor and dropped her off down the street from Priscilla's house. She was not sure what time it was. I was supposed to meet Priscilla in Kalamazoo at 6:00 pm to pick up Alyssa for the weekend. Peters testified that I returned to Benton Harbor and picked her up at 6:45 pm. She was sure of the time because she had looked at her watch. Peters testified that Alyssa was asleep when she was picked up and we parked the car, leaving Alyssa in the car asleep. She testified that she and I walked to the house and I used a pry bar to open the south door of the house. According to her, several minutes after we were in the house searching it, Priscilla arrived and we hid. Priscilla unlocked the south door, entered the house, set her keys and purse down, then went to the phone and made a call, but did not talk and then hung up the phone. After Priscilla went into her bedroom, Peters further testified that she headed towards the south door to leave when she heard 3 or 4 shots fired. She went back to the bedroom and saw Priscilla lying on the floor and I was standing there holding a gun. She testified that I handed her the gun and told her to shoot Priscilla and that when she refused, I struck her above her left eye. After she shot Priscilla in the leg, she went into Priscilla's bathroom to retrieve her coat. Driving Priscilla's car, Peters dropped me off at my car and then followed me to a rest area by Exit 72 on I-94. She said we stopped there before continuing to the place where she had parked, and that is where she left Priscilla's car.

After being bound over to circuit court, I filed a *pro per* Motion for Substitute Counsel and a Motion for Discovery. My attorney had refused to file any motions, refused to investigate and obtain exculpatory evidence, and never talked to me about the case. On January 30, 1996, 28 days before trial, the court granted the motion for substitute counsel, but ruled the motion for discovery "moot." Renfro was removed from representing me, and replaced by his law firm's partner, Mr. White.

After asking White several times, I wrote him a letter requesting that he subpoena the phone records of (616) 927-6068, showing the local and long distant calls made on October 6, 1995, between 6:30 p.m. - 7:15p.m. White did submit a written request to subpoena the phone records and Peters' criminal history. Also, an oral request was made for her criminal history at a hearing held on April 8, 1996. Although White filed a motion for discovery, he withdrew it on that same day, and failed to follow through with the subpoena requests. White, also filed a motion to withdraw due to a conflict of interest that the judge denied. The judge also stated that Renfro could not be called as a witness by the defense.

Before my trial a hearing was held to consider the prosecution's request to admit evidence of prior acts. The trial court ruled against admitting statements made by Priscilla to friends or associates. The court stated, "Statements made by the deceased to friends or associates will not produce a fair trial by allowing the jury to consider those as evidence, so I'm not letting it in, I guarantee a reversible error if I did."

The Trial

Officer Neal testified at my trial that after he arrived, he was directed to the bedroom where he observed Priscilla lying on her back. Officer Lange testified he had prepared the search warrant and that he had checked the house for any signs of forced entry and found nothing that appeared to be new. Officer Reeves testified he executed the search warrant for my apartment and car with the help of other officers. Several items were seized from my apartment and car. A device was found in the car which consisted of a clear pop container wrapped in duct tape, with steel wool and cloth wadding inside of it. Also, a photo was taken to show all the ammunition lying around my bedroom.

Two of Priscilla's friends, Mr. Hirsch and Mr. Bryant, testified they and Priscilla left Benton Harbor in two separate vehicles (Priscilla & Alyssa in one, the two of them in the other one) about 4:15 p.m. and arrived in Kalamazoo about 5:15 p.m. I was already there, parked in my car alone when they arrived. They left Kalamazoo about 6:20-6:25 p.m. and arrived at the Petro Station in Benton Harbor about 7:30 p.m. At about 7:35-7:40 p.m. Priscilla headed home and the two men stopped for beer and then proceeded to Hirsch's house, arriving there at about 7:45-7:50 p.m. Hirsch went to Priscilla's house at about 10:00 p.m., where he found her on her bedroom floor. He said she was lying on her back and he did not move her. Mr. Hirsch testified that PX #14, a photo of the Priscilla, reflects how he saw her when he entered the bedroom. In August of 1998 I obtained a copy of Priscilla's Certificate of Death which indicates the time of death at 1915 hours (7:15 pm). Also, police reports, the autopsy report, and affidavits of three search warrants all state that Priscilla was last seen alive at about 7:00 p.m. None of those documents were offered as evidence at my trial by my lawyer.

... it took a police officer 24 minutes to drive from Paw Paw to the Benton Harbor Exit 33, on I-94, traveling at 71 mph, which was still 5-6 miles, 4 stop signs, and reduced city speed limits from the crime scene. ... It is physically impossible for Mr. Davis, or anyone, to drive from Paw Paw to the crime scene in 12 minutes, half the time it took the police to just drive from Exit 60 (Paw Paw) to Exit 33.

defense before or during trial. An oral request was made at a hearing on April 8, 1996, and a written request was made before trial for Peters criminal history.

In her testimony, Peters omitted retrieving her coat from Priscilla's bathroom, or stopping at the rest area, and she had no idea what time I picked her up, but she was sure that she was dropped off at 5:15 p.m. because she had looked at her watch. There were numerous discrepancies between her testimony and what she said at the preliminary examination. She testified that neither she nor I left my apartment the following day (Saturday) before the police arrived. After saying she was feeling sick, the judge granted a short recess. That was at 1:56 p.m. She left the courtroom, but at 1:59 p.m. she returned to the witness stand. When she resumed testifying, she changed her previous testimony by stating that she had left the apartment on that Saturday to go shopping. However, her testimony was contradicted by Mr. and Mrs. Hernandez, who testified that Alyssa and I were at their house on Saturday for a few hours. Peters also claimed that she was scared of me and could not get away from me and that I would not allow her out of my sight after Priscilla's murder, which contradicted her claim that she went shopping. She also said there was no ammunition laying around the apartment, but a police photo shows differently. Peters and the jurors were given a floor diagram of the crime scene (PX #53) that shows a body in the bedroom. She indicated on the diagram where she stood when she supposedly shot Priscilla in the leg.

Dr. Cohle, the prosecution's medical expert, testified that he performed the autopsy on Priscilla. He stated that the most remarkable thing about the wound to the left leg was the path of this bullet was from left-to-right, from back-to-front, and

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