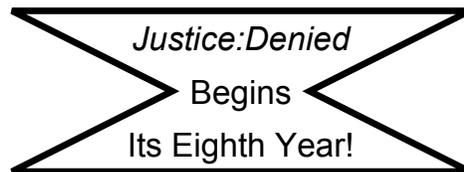


# JUSTICE DENIED



**\$3**  
Retail

The Magazine for the  
Wrongly Convicted

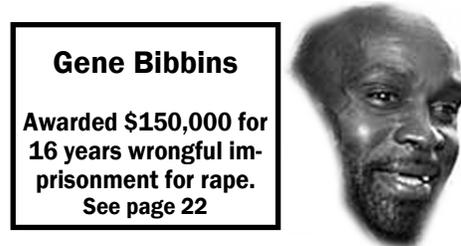
## ROLL CALL OF INNOCENT PEOPLE EXONERATED OR PARDONED IN 2005

Ronald Addison	MD	9 yrs.	Keith Phillips	OH	1 yrs.
Joseph Arnold	TN	2	Sergio Radillo Jr.	FL	11
Donte Booker	OH	18	John Restivo	NY	18
Robert Clark	GA	24	George Rodriguez	TX	18
David Crane	WA	18	Peter Rose	CA	10
Willie Davidson	VA	11	Ivan Serrano	PA	18
Luis Diaz	FL	26	Michael Sipin	WA	2
Alfredo Domenech	PA	18	Larry Souter	MI	13
Thomas Doswell	PA	19	Gilbert Stokes	FL	3
Corey Eason	IL	0	Phillip Thurman	VA	20
Clarence Elkins	OH	7	Keith Turner	TX	4
Barry Gibbs	NY	19	Frederick Waller	TN	3
Jennifer Hall	MO	1	Leo Waters	NC	21
Dennis Halstead	NY	18	Michelle Wesson	FL	2
Olmado Hidalgo	NY	14	Michael Williams	LA	24
Harold Hill	IL	15	Harold Wilson	PA	17
Troy Hopkins	VA	10	Anthony Woods	MO	18
Entre Nax Karage	TX	7	Dan Young	IL	15
Justin Kirkwood	PA	2	Evan Zimmerman	WI	4
John Kogut	NY	17			
Marie La Pinta	NY	22			
Anthony McKenzie	GA	0			



**Andrew Mallard**

Released after 12  
years of wrongful im-  
prisonment for murder  
See page 16



**Gene Bibbins**

Awarded \$150,000 for  
16 years wrongful im-  
prisonment for rape.  
See page 22

**41 PEOPLE WRONGLY  
IMPRISONED 499 YEARS**

### In This Issue

**LaFonso Rollins Settles Wrongful Rape Conviction Suit For \$9 Million!**

**Is Paul Ford Jr.'s Murder Conviction Based on An Unreliable Witness?**

**\$6.74 Million Awarded Three Men Framed For Murder By Chicago PD Informant!**

**Alan Crotzer Released 24 Years After Wrongful Rape Conviction!**

**WA State Supreme Court Tosses \$3 Million Wenatchee "Sex Ring" Award!**

**The Innocent Are Ravaged By Unpublished Decisions!**

**Issue 31  
Winter 2006**

# Justice:Denied - Issue 31, Winter 2006

## Table of Contents

Shaky Testimony Puts Man in Jail for Life – The Paul Ford Jr. Story.....	3
Arthur Mumphrey Freed After 18 Years Wrongful Imprisonment For Sexual Assault.....	4
John Spirko Update.....	5
Wisconsin Innocence Project Needs To Show Backbone In Steven Avery’s Case.....	5
Four Men Framed By Chicago PD Informant Exonerated Of Murder.....	6
\$6.74 Million Awarded To Three Men Framed For 1997 Chicago Gang Murder.....	6
DNA Tests, Word On The Street Agree - The Alan Crotzer Story.....	7
“After Innocence” - A Review of the Documentary.....	9
LaFonso Rollins Awarded \$9 Million For Wrongful Rape Conviction.....	9
\$3 Million Wenatchee “Sex Ring” Award Tossed By WA Supreme Court.....	10
Canadian Supreme Court Tosses “Bawdy House” Convictions.....	11
Wrongful Conviction Lawyer Cleared After Criticizing Judges.....	11
Eric Sarsfield’s Rape Exoneration Leads to \$2.5 Million Compensation.....	12
Rodney Addison Freed From Nine Years Of Wrongful Imprisonment.....	13
Boston Agrees To Pay \$3.2 Million To Neil Miller For False Rape Conviction.....	13
Exculpatory Surveillance Video Not Analyzed Prior to Trial - The Kenneth Krause Story.....	14
Tony Ford Update.....	15
Norfolk Four Update.....	15
Andrew Mallard Released After 12 Years Wrongful Imprisonment.....	16
Magistrate Awarded \$348,000 And New Job After “Threat” Conviction Tossed.....	17
‘Aussie Battler’ Pauline Hanson Exonerated Of Fraud Conviction.....	18
Man Innocent Of Rape Sues His Accuser For Defamation.....	20
Malaysia Offers Compensation For Wrongful Immigration Conviction.....	20
“Tulia Travesty” Prosecutor Terry McEachern’s Conduct Swept Under The Rug By Texas State Bar.....	21
Steven Avery Settles Wrongful Imprisonment Suit For \$400k.....	22
Louisiana Makes First Wrongful Conviction Award of \$150k To Gene Bibbins.....	22
In Justice - A Review Of The Television Program.....	23
The Anatomy Of A Sex Conviction Frame-Up - The Alleged “Victim” Exposes The Lie.....	24
Florida Supreme Court Acquits John Robert Ballard From Death Row.....	26
Commitment To Justice Requires All Appellate Opinions Must Be Published and Precedential.....	29
Non-published and Non-precedential Opinions Stealthily Harm The Innocent.....	29
California Justices Carve Exception To No-Cite Rule.....	32
Invisible Executions: Non-published Opinions In Capital Cases.....	33
Has Anyone Noticed the Judiciary’s Abandonment of Stare Decisis?.....	35
Publicity Spurred Crotzer’s Release By Reluctant Officials.....	40
State Court Rules On Citation Of Unpublished Opinions.....	41
“A Long Time Coming!” - Two Men Exonerated Of Murdering Man Scotland Yard Knew Was Alive.....	43
British P.M. Tony Blair Apologizes To Guildford Four and Maguire Seven.....	45
Article Submission Guidelines.....	46

## Message From The Publisher

It is a damning indictment of this country’s state and federal legal process that the names of only 41 people are listed on the cover of this issue. Do the math. That is less than one per state. One reason is the reluctance of prosecutors and judges to disturb a conviction, since no matter how you cut it, that constitutes on some level an admission that the system didn’t work. While the efforts of investigators, lawyers and support personnel are critical, they all too often aren’t enough to overcome the protective shield of darkness provided by containment of a case within the confines of the courtroom.

Defendant favorable publicity throws a monkey-wrench in the “containment” process. At its most effective it moves the issues outside the courtroom and the tight control of the legal players involved, and into the court of public opinion. Alan Crotzer’s story on page 7 is confirmation of the power of publicity to light a fire under a prosecutor and judge reluctant to act when faced with overwhelming proof a new trial or dismissal of charges is warranted. Clarence Elkins, reported on in *JD* Issue 30, likewise owes the timing of his release to a crescendo of publicity supporting his release due to his provable innocence. Similarly, in *Freeing The Innocent*, Michael and Becky Pardue credit positive publicity as a strategy critical to winning Michael’s release from 28 years of wrongful imprisonment. An enterprising public relations person might be able to create a niche business by devising publicity strategies for the wrongly convicted.

Kudos to Jackie McMurtrie and the Innocence Project Northwest for the fabulous job they did in hosting the 2006 National Innocence Network Conference at the University of Washington Law School in March. The food was great, the conversation stimulating, and the programs informative.

Hans Sherrer, Publisher

*Justice:Denied* - the magazine for the wrongly convicted

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



JUSTICE DENIED: THE MAGAZINE FOR THE WRONGLY CONVICTED

## 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 47. An information packet will be sent with requests that include a 37¢ stamp or a pre-stamped envelope. Write: Justice Denied, PO Box 68911, Seattle, WA 98168.

### **DO NOT SEND JUSTICE:DENIED ANY LEGAL WORK!**

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**If you have an account of a wrongful conviction that you want to share, please read and follow the Submission Guidelines on page 46.** If page 46 is missing, send a SASE or a 37¢ stamp with a request for an information packet to, Justice Denied, PO Box 68911, Seattle, WA 98168. Cases of wrongful conviction submitted in accordance with *Justice:Denied’s* guidelines will be reviewed for their suitability to be published. *Justice:Denied* reserves the right to edit all submitted accounts for any reason.

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*Justice:Denied* volunteers directly contributing to this issue:

Karyse Phillips, Editor; Terri Smith, Mailing; Katha McDonald, Mailing; Trudie Dvorak, Typing; and, Hans Sherrer, Publisher.

Joey Jones told seven people he shot a man dead outside a Monview Heights tenement and he matched the description two others gave of the killer. However, on the witness stand, Jones pointed the finger at Paul Ford Jr.

Crack addict Nikela Carrington told police she watched Ford rob and kill a man that day in 1994, but she was in her apartment, where a neighboring building would have blocked her view.

Nicole Bennett, a friend of Carrington's and a fellow drug user, denied seeing the shooting for six days, then told police she saw Ford pull the trigger and later admitted conspiring with Carrington to extort money from Ford by threatening to say that he did it.

### **No forensic evidence tied Ford to the killing**

The only witnesses against him were Jones, Carrington and Bennett, all admitted liars.

But seven people, including two jail guards, said Jones confessed to the killing. Two witnesses said they saw a man matching Jones' description flee the shooting and dispose of the weapon, but they never were called to testify.

Ford was convicted of second-degree murder and sentenced to life without parole.

Twelve years later, the Pittsburgh *Post-Gazette* and the Innocence Institute of Point Park University investigated the case and found that police ignored evidence which pointed away from Ford and might have got the wrong man, just as Ford has maintained all along.

Ford, a street-level drug dealer, admitted being at the scene of the killing with some associates but denied involvement in it.

He believes he was targeted because of his illegal activities and the fact that, eight years before, his father had shot the lead detective in the investigation. Allegheny County Police Detective Gary Tallent, who is now retired, had survived two shots to the chest during a 1986 hostage siege because he was wearing a bulletproof vest.

Prosecutors have prevailed in Ford's appeals and have repeatedly denied improprieties in the investigation. Detective Tallent, his superiors in the police department and Allegheny County District Attorney Stephen A. Zappala Jr. did not respond to written requests for their views on this case.

Ford, from his cell at the State Correctional Institution at Frackville, continues to maintain his innocence and closes his letters

## **Shaky Testimony Puts Man in Jail for Life – The Paul Ford Jr. Story**

By Bill Moushey and Elizabeth Perry

with: "I have committed no crime, a crime has been committed against me."

### **Maurice Price is killed**

A hulking 410-pound Maurice Price arrived at the Monview Heights housing development in West Mifflin on an unseasonably warm February afternoon 12 years ago worth \$250 to buy a quarter ounce of cocaine.

When he couldn't find his regular dealer, he asked a group of people milling around, including Ford, if anyone else could make the sale.

That is when, according to initial police reports, a short, dark-skinned black man dressed in black, his face covered by a ski mask, a .357-caliber Magnum in his hand, rounded the corner of a building and confronted Price.

"Throw it off," the assailant ordered, demanding Price's money. Price was shot once in the chest.

The gunman fled down a hill and through a playground. Everyone else in the area, including the taller, lighter-skinned Ford, who was wearing a light blue flannel shirt, also ran as Price lay dying, his \$250 gone.

### **Nothing points to Paul Ford**

Amateur video taken by a neighbor 15 minutes after the shooting shows Price's body sprawled in the patchy snow as an angry West Mifflin police officer lambasted wary witnesses.

"When people around here start knowing something, when people around here start seeing something, when people around here start hearing something, then I can do my job!" he shouted as he paced in front of Price's corpse.

Those who did talk provided descriptions of the gunman, which did not match Ford's size, skin color or clothing.

Sara Beatty, of Monview Heights, told police she saw a young, dark-skinned black man in black clothing run from the scene as she was looking out a window for her grandson's school bus. He stopped for a few

seconds by the cellar door under her townhouse, then fled, she said.

A man working at the housing project's security gate gave police a similar account. Under Beatty's door, they found a .357-caliber revolver that proved to be the murder weapon.

The next day, police showed Beatty a picture of Ford and she told them he wasn't the man she saw. They never contacted her again, and neither she nor the guard testified at trial.

### **A witness comes forward**

Ford was well-known in Monview Heights, but only one person, Carrington, initially identified him as the killer.

Police knew Carrington, 21, was, at best, a questionable witness. She was a crack addict with a violent criminal past who had admitted lying under oath.

Carrington had been implicated in the vicious baseball-bat beating death of an ex-boyfriend but had avoided charges by agreeing to testify against the father of her child, who was convicted and sentenced to life in prison.

She later repeatedly told the attorney of the convicted man that she had lied on the stand. During her testimony, she admitted being involved in an earlier baseball-bat beating of a pizza delivery man and spending time in a mental institution after overdosing on drugs.

Despite Carrington's questionable background and considerable contradictory evidence, Detective Tallent secured a written statement from her identifying Ford as the man who had shot Price. She initially had told police Jones also was at the scene, but she omitted his name from her written statement.

That night, after fingering Ford, Carrington went with Ford to the apartment of her friend, Nicole Bennett, to do some cocaine. Both Carrington and Bennett would later admit that, during the drug binge, they promised Ford they would not implicate him in the murder if he paid them. He says he refused to pay them and left.

Ford was arrested the next day based on Carrington's statement. He protested his innocence and said he told Detective Tallent on the way to jail that he had seen Jones shoot Price.

"Tell your father hello" was the response, according to Ford, a reference to the inci-

**Ford continued on page 42**

On the morning of January 26, 2006, Texas State District Court Judge Kathleen Hamilton ordered Arthur M. Mumphrey released after he had served 18 years for a crime he did not commit.

### Troubles Begin

On the night of February 28, 1986, two men repeatedly sexually assaulted a 13-year-old girl near the small southeastern Texas town of Dobbins. While Arthur Mumphrey was standing silent nearby, a man heard Steve Thomas brag on the night of the assault that he had sex with a young girl. The man reported what he heard to the police. Mumphrey and Thomas were arrested, and even though the victim did not identify either of the men as her attackers, they were charged with aggravated sexual assault on the basis of Thomas' braggadocio and Mumphrey's failure to deny involvement when he did so. In a plea-bargain deal with Montgomery County Assistant District Attorney Wilbur Aylor, Thomas confessed to the assault and accepted a 15-year prison sentence in exchange for his testimony against Mumphrey. Steadfastly maintaining his innocence, Mumphrey demanded a jury trial.

In the summer of 1986, Mumphrey stood trial in Montgomery County's 359th District Court in Conroe, about 50 miles northwest of Houston. The technology to make comparisons of DNA from bodily fluids was not then available. So the testing of biological evidence that included semen stains on the victim's panties and her vaginal swab, was limited to blood group analysis. Mumphrey's type O blood did not exclude him as the assailant.

Following lengthy deliberations, the jury returned a verdict of guilty. On August 12, 1986, Arthur Mumphrey was sentenced to 35 years in prison.

Following his trial, Arthur Mumphrey unsuccessfully pursued the usual post-conviction remedies available to Texas prisoners. His final appeal was denied in June 1989.

### Didn't Give Up

Mumphrey and his wife Angela didn't give up. Almost two decades after his conviction, they hired Houston attorney Eric J. Davis to find the new evidence necessary to re-open Mumphrey's case. During his investigation, Davis learned that blood tests had been done on Mumphrey, Thomas, and the girl, and that the biological material from these tests had been collected and may have been preserved. With an eye towards having DNA testing conducted, Davis contacted the Texas Department of Public Safety (DPS) and asked if the biological evidence from the Mumphrey case was

## Arthur Mumphrey Freed After 18 Years Wrongful Imprisonment For Sexual Assault

By C. C. Simmons

still available. After DPS officials reported they did not have the evidence, Davis contacted the Montgomery County DA's Office. They also said the evidence was not available.

Disappointed but unwilling to give up, Davis again contacted the DPS. A helpful employee searched and found that the biological evidence had been stored in a refrigerator. Davis then filed a motion for DNA testing. Judge Hamilton granted the testing in the fall of 2005. The results were released on January 17, 2006. They showed that DNA from Mumphrey's blood and saliva conclusively excluded him as the source of the assailant's semen on the girl's panties and vaginal swab.

### Mumphrey Released

Judge Hamilton subsequently ordered a hearing for January 26, 2006. On the morning of the 26th, Mumphrey entered Judge Hamilton's courtroom wearing a yellow plaid shirt, khaki trousers, and boots. He seemed relaxed and calm. Family members looked on with smiles and barely restrained joy as the brief proceeding got underway.

"We are here because I have found that because of technology we have now, justice was not done 20 years ago. I am ordering your release," said Judge Hamilton.

### Mumphrey Pardoned

After Mumphrey's release, Marc Brumberger, an Assistant District Attorney for Montgomery County said, "The District Attorney's Office deeply regrets that something like this happened. I would like to take this opportunity to apologize. We feel terrible about what happened to you. We offer you best wishes for your future."

The Montgomery County DA's office didn't oppose the DNA testing and since the results conclusively exclude Mumphrey as the perpetrator, Brumberger said his office would file a request for a pardon with the Texas Board of Pardons and Paroles.

The Board responded to the request by submitting a recommendation to Texas Governor Rick Perry that he grant Mumphrey a pardon.

On March 17, 2006, only two months after his release, Gov. Perry pardoned Mumphrey.

When he signed Mumphrey's pardon Perry said, "My action today cannot give back the time he spent in prison, but it does end this miscarriage of justice."

While it was well meaning, Gov. Perry's statement didn't tell the whole story. By the peculiarities of Texas law Mumphrey's pardon doesn't erase his rape conviction. Even with a pardon in his pocket, unless and until Mumphrey is granted a new trial and acquitted, his record will not be cleared of the sexual assault conviction.

### Aftermath

Former District Attorney Aylor, who is now retired, is unwilling to admit that that he prosecuted the wrong man in 1986. Aylor doesn't think the exclusionary evidence that freed Mumphrey proves his innocence, because Aylor thinks the evidence presented at his trial pointed to his guilt. Without explaining how it supported Mumphrey's guilt, Aylor noted there was evidence Mumphrey and Thomas had been drinking the night of the assault, and a wine bottle and the girl's shoes were found at the crime scene. Aylor said, "The fact that his DNA was not found doesn't prove to me that he didn't do it." Aylor's closed-minded attitude toward the new evidence proving Mumphrey's innocence may be indicative of how Aylor erroneously prosecuted him in 1986.

Further supporting Mumphrey's innocence, is that in a peculiar twist of events, Arthur's younger brother, Charles Ray Mumphrey, confessed to the crime in 1986 shortly after it occurred. Charles, now 34, admitted that it was he who had assaulted the young girl. However, he changed his story after investigators accused him of lying to protect his older brother. Charles is currently serving a one-year prison sentence for unauthorized use of a motor vehicle. In spite of his confession, it is unlikely Charles will be prosecuted for the 1986 crime because the statute of limitations has expired. Charles' confession and Mumphrey's exoneration also casts serious doubt on the truthfulness of Thomas' boast in 1986 and his guilty plea. Additional testing may also prove Thomas was wrongly convicted of the assault, and pled guilty and falsely implicated Mumphrey solely to obtain a drastically reduced sentence.

After Mumphrey's release, his original appeal lawyer George Renneberg said, "I was never really satisfied he was guilty ... I thought he was innocent."

Mumphrey's current lawyer Davis observed, "If we had given up, he'd still be in

**Mumphrey cont. on page 5**

The Wisconsin Innocence Project (WIP) located at the University of Wisconsin Law School was instrumental in Steven Avery's exoneration of involvement in a 1985 rape. Avery was released in September 2003 after serving 18 years of a 60-year sentence. DNA testing had established the truthfulness of Avery's 16 alibi witnesses who supported his claim that he had been over 40 miles from the rape scene. Another man, convicted of another rape, has been implicated as the actual perpetrator of the 1985 rape. The WIP proudly showed Avery's case on its website.

On November 15, 2005, Avery was arrested for suspicion of murdering 25-year-old Teresa Halbach two weeks earlier. Halbach was a photographer for *Auto Trader* magazine, and on October 31 she had been at the Avery family auto salvage business in Manitowoc county photographing a car for the magazine.

At the time of Avery's arrest he and Manitowoc county authorities were locked in battle over a \$36 million federal civil rights lawsuit he had filed against the county and several of its law enforcement agents over his wrongful conviction and imprisonment for the 1985 rape. Avery's arrest was fortuitous for the county's position in the lawsuit. Faced with a \$500,000 bail and the desire to retain a private defense lawyer, Avery agreed to what can charitably be described as the county's "sub-ball" offer of \$400,000 to settle the lawsuit. Avery's arrest likely saved the county untold millions of dollars, because he had compelling evidence there had been unconscionable wrongdoing in his case.

Avery's arrest is the kind of story that is used to attract television viewers and newspaper readers. The Manitowoc County DA's office has taken full advantage of the media's thirst for salacious news about Avery's case. They have effectively used the press to smear Avery and have him portrayed as guilty. His jury pool will likely be comprised of people who, in spite of their assurances of impartiality during *voir dire*, will be predisposed to a guilty verdict.

Let's be clear. The Manitowoc County DA isn't doing anything in Avery's case that isn't done by prosecutors in cases all over this country every day. After all, prosecutors are like the house in Vegas; they'll do whatever it takes to stack the odds in their favor. It's all about winning.

While the disdain of Avery's prosecutors for the presumption of innocence is to be expected, the reaction of the WIP to Avery's arrest is disturbing. They removed his photo from their website and references to his case except for seven paragraphs on a single page. They

## Wisconsin Innocence Project Needs To Show Backbone In Steven Avery's Case

JD Editorial

were released ... by the prosecution of course.

Avery claims he is being framed in retaliation for having filed his lawsuit. At this point it is unknown if Avery had anything to do with Halbach's murder – just as his innocence was unknown at this point of his prosecution for the 1985 rape. We now know he was innocent of that crime.

The core principle of this country's due process, that includes reasonable doubt, trial by jury, right to counsel, confrontation of one's accuser, etc., is the idea that an accused person is presumed innocent. Otherwise there would be no need for a trial. Just go straight from indictment to sentencing. The WIP ought to know from helping free innocent people what happens when the presumption of innocence intended to cloak Avery from prejudice is disregarded.

Although if asked Avery's prosecutors would give lip service to respecting Avery's presumption of innocence, their actions infer they think his guilt is obvious without having a trial. However, skipping a trial and imprisoning Avery indefinitely on the suspicion he is guilty would be too obvious a violation of the law. So the Manitowoc County DA is willing to settle for the public spectacle of a trial intended to confirm his guilt.

By distancing itself from their efforts on Avery's behalf in the 1985 case, the WIP conveys the underlying message that it agrees with the prosecution's assumption of Avery's guilt in his current case. That position is incompatible with due process. That position is incompatible with the very idea of justice. By failing to unabashedly defend Avery's presumption of innocence the WIP aids his prosecutors; indeed, they become part of his prosecution.

Even if the prosecution achieves a guilty verdict in Avery's current case, it does not alter the fact that he was innocent of the 1985 rape. He spent 18 years in prison for a crime he did not commit. Anything that came later doesn't diminish that fact.

The WIP has earned an outstanding reputation and is much respected for its commitment to the innocent. It does a disservice to itself and its supporters by sully that reputation. Avery's presumption of innocence is sacrosanct. The WIP should restore its website.

### Mumphrey cont. from page 4

jail. It's by the grace of God."

When asked how he got through the 18-year ordeal, Mumphrey said, "Personal determination to clear myself and move on with my life."

Under Texas law, Mumphrey will be eligible for compensation for wrongful imprisonment. At the current rate of \$25,000 per year as allowed by law, Mumphrey stands to be awarded almost a half-million dollars.

Sources: Fort Worth *Star-Telegram*, *Houston Chronicle*, Denton *Record-Chronicle*, and Associated Press reports.



### John Spirko Update

John Spirko's first-person story of being on Ohio's death row when there is evidence he was over 100 miles from the scene of Elgin, Ohio Postmistress Betty Jane Mottinger's 1982 abduction and murder, was in *Justice Denied*, Winter 2005, Issue 27.

Ten days before his scheduled January 19, 2006, execution, Ohio Governor Bob Taft granted Spirko a third stay of execution. The governor granted a six month stay until July 19, 2006, so that the painting tarp and duct tape wrapped around Mottinger's body, and a cinder block found near her body can be tested for the presence of the killer's DNA — who a witness has identified is a house painter who the witness also claims was the tarp's owner. That witness is willing to testify. His information has been ignored for years by law enforcement authorities even though it is credible, and he passed a polygraph examination conducted by a former FBI examiner on October 26, 2005.

# Four Men Framed By Chicago PD Informant Exonerated Of Murder

By Hans Sherrer

Sindulfo Miranda was kidnapped, tortured and murdered in Chicago on July 17, 1997. The 56-year-old furniture dealer's badly burned body was found in his car that had been set on fire. Four months after the murder, police investigators thought the case was solved when an informant, Miguel LaSalle, gave them the names of five men he said committed the crime.

The five men fingered by LaSalle were Robert Gayol, Omar Aguirre, Edar Duarte Santos, Luis Ortiz and Ronnie Gamboa. LaSalle knew the men through Santos, a former apartment tenant of his. LaSalle claimed he heard the five men plotting to kill Miranda at Ronny's Bar in Chicago, that he saw Miranda with the men the night he was killed, and that Santos was talking on his cell phone with LaSalle while the crime was occurring. The five men were arrested on November 7, 1997. They all protested their innocence to the deaf ears of the Chicago police and prosecutors.

Four of the men went to trial. Although their charges all related to Miranda's abduction and murder, the four men were tried separately. Gamboa, the owner of Ronny's Bar, was acquitted. In January 1999 Aguirre was convicted of Miranda's murder and sentenced to 55 years in prison. He was convicted on the basis of LaSalle's testimony and his alleged confession to police interrogators that also implicated Santos. Aguirre's denial that he confessed to the murder and did not sign a confession was supported by the fact the alleged confession was written entirely in English, while he only reads and writes Spanish, and the signature on it didn't match his. Ortiz was convicted of murder and sentenced to life in prison. However, in an unusual twist, he later agreed to plead guilty to the murder and testify against Gayol in exchange for a 25-year prison sentence. After his conviction in September 2001, Gayol was sentenced to life in prison.

After spending more than four years in the Cook County Jail awaiting trial, in February 2002 Santos pled guilty to aggravated kidnapping in exchange for a 12 year sentence.

In the course of investigating drug related kidnappings and torture/murders in the Chicago area, the FBI discovered evidence that Miranda's murder was one of a series of similar crimes committed by the "Carman

# \$6.74 Million Awarded To Three Men Framed For 1997 Chicago Gang Murder

By JD Staff

On February 18, 2006 a Cook County, Illinois jury awarded \$6.74 million to three men wrongly convicted of the brutal July 1997 murder of South Chicago furniture store owner Sindulfo Miranda.<sup>1</sup> The men, Omar Aguirre, Edar Duarte Santos, and Robert Gayol were exonerated on December 18, 2002, after an FBI investigation of Chicago street gangs discovered that the murder had actually been committed by members of the "Carman Brothers Crew" gang. In 2005 Richard Carman was sentenced to 60 years in prison after pleading guilty to murdering Miranda, who was tortured with scissors and a broomstick before he died.

The keystone of the prosecution's case against the men was the testimony of a Chicago Police Department informant who claimed to have heard the men plotting the murder the night it occurred. The informant, Miguel LaSalle, also implicated two other innocent men in the Miranda's murder who were not part of the lawsuit, Luis Ortiz and Ronnie Gamboa. Ortiz was also exonerated of his murder conviction on December 18, 2002, while Gamboa was acquitted after a trial.

After a monthlong state court trial, the jury agreed with the suit's allegation that Chicago police officers used excessive force and coercion to help obtain the men's wrongful convictions. The jury heard testimony, e.g., that after Aguirre's November 1997 arrest he was pummeled by one officer and another stomped on his chest.

Brothers Crew" street gang.<sup>1</sup> They also established that the five men fingered by LaSalle had nothing to do with either the "Carman Brothers Crew" or Miranda's murder. The FBI shared that information with Illinois law enforcement authorities.

On December 18, 2002, state prosecutors appeared before a Cook County judge and admitted that Gayol, Aguirre, Santos and Ortiz were innocent of Miranda's murder. Aguirre and Santos were ordered immediately released on bail, while Gayol and Ortiz continued to be held in custody on other unrelated charges. Aguirre declined to talk with reporters after his release from prison later that day. Duarte Santos made only a brief statement before leaving with two carloads of family and friends that were waiting for him as he walked out of prison, "There were five Christmases that I missed with my family. This one is going to be special, it's such a great blessing."

<sup>2</sup> The murder and kidnapping charges were later dismissed against the four men.

Aguirre, 37, had been sentenced to 55 years in prison. Gayol, 42, had been sentenced to life in prison. While Santos, 33, had been sentenced to 12 years in prison after taking a plea bargain and falsely pleading guilty after he had been jailed for almost 4-1/2 years awaiting trial.

Aguirre was awarded \$3 million, Santos was awarded \$3 million, and Gayol was awarded \$740,000. All the men had been wrongly imprisoned for over five years. After the verdicts, Aguirre said, "This whole episode has been difficult. You know it's been based on wrongdoing."<sup>2</sup> Santos commented, "I'm happy this has been decided fairly." The men's lawyer, James Montgomery Sr., was pleased with the outcome, "It is past time for the city and these officers to be held accountable for their actions."<sup>3</sup>

A spokesman for Chicago, Jennifer Hoyle, put a positive spin on the jury's verdict, "You have to consider they were asking the jury for \$21.5 million, and the jury came back with substantially less."<sup>4</sup>

Footnotes and source:

1 3 Win Suit in Cop Beatings, Ray Quintanilla, *Chicago Tribune*, February 18, 2006.

2 *Id.*

3 *Id.*

4 *Id.*

For additional details, see, Four Men Framed By Chicago PD Informant Exonerated of Murder, in this issue of *Justice Denied*.



Cook County State's Attorney Richard Devine tried to deflect criticism of the Chicago police and the prosecutors for their role in causing the men's five-year plight, by making misstatements and omitting important points when he publicly discussed the case:<sup>3</sup>

- He blamed the innocent men for their wrongful convictions.
- He mentioned that two of the men pled guilty to crimes they didn't commit, without explaining the pressures put on them by the police and prosecutors to do so. Santos sweated out more than four years in the Cook County Jail awaiting trial, and Ortiz took the carrot of a significant reduction from his life sentence.
- He falsely stated Aguirre's lawyer didn't challenge his alleged confession, which she not only did, but which is now known with absolute certainty wasn't worth the paper it was fabricated on by police interrogators.<sup>12</sup>

**Gang Murder cont. on page 7**

Lots of people in the old neighborhood say they know he didn't do it. They talk about it at the salons over by the Deuces. There are knowing nods when someone mentions his name at the Blue Nile corner shop on 18th Avenue S. They say they know what really went down.

## DNA Tests, Word On The Street Agree

The Alan Crotzer Story

By Candace Rondeaux



"The Hillsborough State Attorney's Office has been very cooperative. All along they've sought to do justice. When we sought DNA testing, they supported our efforts," said David Menschel, the lead attorney on Crotzer's case and a former staff member of the Innocence Project-New York, which works to use DNA testing to free wrongly convicted defendants.

Alan Crotzer has spent more than half his life in prison, but many who know about him believe he's innocent.

Years ago, witnesses said Crotzer was a rapist, a dark-eyed man with a sawed-off shotgun and a bad temper. One of three St. Petersburg men accused of kidnapping and raping a 12-year-old girl and 38-year-old woman at gunpoint after a robbery in Tampa in July 1981, Crotzer was cast as the cold-blooded ringleader in an assault that shocked the Tampa Bay area.

Now, nearly 24 years after his conviction, a team of lawyers that includes one of Florida's most prominent death row defense attorneys says DNA evidence proves Crotzer

was not the rapist. Several witnesses, including one of Crotzer's co-defendants, say he was not there that long ago evening in Tampa.

With Hillsborough prosecutors reviewing his case, Crotzer, now 44, could become the fifth person in Florida to be exonerated by DNA. If prosecutors agree to clear him, he would join a growing roster of exonerated prisoners in Florida, adding to its rank as the state with the most wrongful convictions on the books, according to the Death Penalty Information Center. In December 2005, state lawmakers voted to pay \$2-million to Wilton Dedge, freed after serving 22 years in prison for a rape he didn't commit.

"Now that the DNA testing proves Alan Crotzer is innocent, I fully expect the state will again do justice and ask the court to overturn his wrongful conviction."

The Hillsborough State Attorney's Office is still reviewing the results of a recent DNA test and has not decided yet whether to move to dismiss the charges against Crotzer.

**A long night: July 8, 1981**

The plane was late. A man named Daniel waited 90 minutes at Tampa International

**Crotzer continued on page 8**

### Gang Murder cont. from p. 6

- He claimed law enforcement officials should be commended for doing "the right thing" of acknowledging the men's innocence, implying prosecutors were doing the innocent men a favor, and not their job, by supporting their exoneration.<sup>13</sup>
- He failed to mention the men's wrongful convictions were caused by the failure of the Chicago police to thoroughly investigate both Miranda's murder and LaSalle's claim the five men were involved in it, and that the prosecutors didn't insist that they do so.
- He failed to mention that without the FBI's new information that caused the reinvestigation of Miranda's murder – the four men's innocence would have been concealed forever and the men would have served out their sentences.
- He also failed to mention that he knew the men were innocent for six weeks before acting on it, so he caused Aguirre and Santos to spend the Thanksgiving holiday wrongly imprisoned instead of with their families at home where they belonged.

It is not known why LaSalle fingered the five innocent men, or why soon thereafter he moved to Florida. What is known is it was really bad luck for the men that Santos had been LaSalle's tenant, and that they made convenient patsies because LaSalle was aware they knew each other.

The same day state prosecutors publicly acknowledged the four men's innocence, the U.S. Attorney for Chicago announced the indictment of LaSalle for making three false statements to FBI agents investigating Miranda's kidnapping and murder. At the same time he also announced that three men believed to be Miranda's killers were federally indicted on murder, drug and other charges. Six other members of the gang those three belonged to were also indicted on a variety of federal charges.

In 2005 Richard Carman pled guilty to murdering Miranda, and admitted torturing him with scissors and a broomstick before he died, after which his body was badly burned when he was put in his car that was set on fire. Carman was sentenced to 60 years in prison. The other eight "Carman Brothers Crew" members were also convicted of a variety of federal offenses and given sentences of up to 36 years.

LaSalle was convicted of making false statements to the FBI. He lied about:

- Being present in Ronnie's Bar at the time he claimed to have overheard statements by Santos concerning Miranda's planned murder or robbery.
- Seeing Santos, Gamboa, Ortiz, Gayol and Aguirre with Miranda at Ronnie's Bar on July 17, 1997.<sup>4</sup>

However, perhaps reflecting the murky world he inhabited as an informant, the

federal BOP only publicly discloses that while his release date is "unknown," he is "not in BOP custody."<sup>5</sup>

Miranda's actual killers were protected for more than five years by LaSalle's deliberate misidentification of the five innocent men. Unfortunately for those men, the Chicago police and the case's prosecutors uncritically accepted LaSalle's frame-up as the truth. Those authorities then used their factually baseless presumption that the men were guilty to justify forging Aguirre's alleged confession, to pressure Ortiz to perjure himself by testifying against Gayol, and to extract guilty pleas out of Santos and Ortiz to crimes they didn't commit.<sup>20</sup>

#### Endnotes:

1 He Was Innocent, But Pleaded Guilty Nonetheless, Rob Warden, Center For Wrongful Convictions, January 22, 2003, at:

<http://www.law.northwestern.edu/depts/clinic/wrongful>.

2 Four Wrongly Convicted of Murder; New Gang Suspects Indicted in Crime, AP (Chicago), Fox News Channel, December 18, 2002.

3 *Id.*

4 Nine Defendants Indicted In Series Of Drug-Related Violent Crimes, Including 1997 Murder, U.S. Northern District of Illinois, Press Release, December 18, 2002.

5 This information was listed on the federal BOP website inmate locator for Miguel LaSalle on February 21, 2006, at <http://www.bop.gov>.

6 If federal prosecutors had any doubts about LaSalle's veracity after interviewing him during the original investigation of Mr. Miranda's murder, those doubts were insufficient to cause them to intervene on behalf of the four innocent men.

#### Additional Sources:

New Facts Exonerate 4 Men in '97 Killing, David Heinzmann and Jeff Coen, *Chicago Tribune*, December 19, 2002.



## Crotzer continued from page 7

Airport before his old Army buddy, Martin, and his wife arrived from Pensacola. The couple were in town for an opticians' convention and were staying with Daniel, a salesman for a paper company, at his family's duplex.

On the way home, the threesome stopped at a steakhouse off Dale Mabry Highway. As they left, Daniel noticed three black men tooling around the parking lot in a beat-up gold Buick and said something to his friend. Both men thought it was strange, but they didn't know then how much stranger it would get.

They didn't know one of the men in the Buick was trying to disappear.

A tall, fit 22-year-old, with intense, steely brown eyes that seemed to bore holes through everyone he met, Corlenzo James was an outlaw. Three days earlier, he had walked onto a Trailways bus with a sawed-off shotgun, robbed a bus ticket agent of \$200 and ordered the driver to drop him at an intersection near his home in St. Petersburg.

With the police on his trail for the bus robbery, James needed to get out of town. The plan was to drive north to Havana, Fla., where he could hole up with relatives. On the night of July 8, 1981, he, his brother Douglas James, and a third man piled into the Buick for the long road trip.

Court records reveal the details of what happened next.

It was about 11:30 p.m. when they stumbled upon Daniel and Martin and his wife as they left the restaurant. The three men followed the friends home to Daniel's apartment on Yorkshire Court in Tampa. Minutes later, a man was holding a sawed-off shotgun to Daniel's face. Tall, solid and menacing with thick sideburns and a gold chain around his neck, he poked the gun at Daniel, Martin, their wives and Daniel's 12-year-old daughter.

The others worked quickly, binding all five of their hostages' hands with neckties they had grabbed from a closet. They took about \$60 cash, then went upstairs to grab a TV. All the while the man with the sideburns sat in an armchair smoking a cigarette, his gun trained on the two families.

Just as the robbers were about to leave, they heard a noise outside. Martin used the momentary confusion to fake a heart attack. For a minute it seemed to work, until the ringleader became agitated and ordered the other two to grab one of the women and the 12-year-old girl.

The three men dragged the girl and Martin's wife out the door and shoved them into the trunk of the Buick. They drove for what seemed like an eternity. The air inside the trunk was thick and hot. An interior light flickered eerily, as the three men drove the car over train tracks. The victims could hear the men arguing through the interior wall of the car's trunk. For a fleeting second, the woman, 38, thought they might let her and the girl go.

The car stopped. The tall one with the sideburns and the sawed-off shotgun climbed into the trunk with her and the girl. He pulled the lid shut again. He pressed his body up against them as the Buick sped down empty county roads beneath a new moon.

The woman whispered to the girl to stay calm before the men pulled the 12-year-old out of the trunk and shoved her to the ground. She told the girl God was with her and she needed to be strong.

After the rapes, the woman was almost too weak to stand. Her head was throbbing, her clothes were torn and body bruised. Two of the men used neckties to bind her and the girl to a tree while the third sat in the car. Afraid they would shoot them as they drove away from the wooded field near Bugg Road and State Road 60, the woman used her body to shield the girl from bullets that never came.

In the days and months after the robbery and rapes, the victims, who are not being identified because of the nature of the crimes, recounted the events of that night to detectives, prosecutors and later jurors. The *St. Petersburg Times* relied on sworn statements from witnesses, records of interviews with investigators, trial transcripts and police records to reconstruct the victims' story. One of the victims agreed to talk to the *Times* about the ordeal.

"It was very horrific and traumatizing," said Martin, the husband of the 38-year-old rape victim.

Since divorced, Martin said the State Attorney's Office asked him recently for a DNA sample for testing, but he did not know much more about prosecutors' plans.

### A question of identity

Later, the woman told investigators that the man with the shotgun was black with a beard, sideburns and short cropped hair, about 6 feet tall and 130 pounds.

Hours after doctors examined the rape victims, they looked at dozens of photos of black men. At first, none of the robbery

victims recognized any of the men in the photos. Finally, one, then another leapt out from the pile of pictures. Some of the victims identified brothers Douglas and Corlenzo James as two of the assailants.

Armed with a license plate number for the Buick, police were already on their way to the James brothers' home on 25th Avenue S in St. Petersburg.

Meanwhile, the woman sat alone in a room with a detective sifting through still more photos, looking for the man who raped her. Investigators had the victims view the lineups separately so one victim would not influence another. She had already looked at several photo packs when she suddenly screamed and threw Alan Crotzer's photo down on the table.

"It's him."

Confident they had the third man, detectives instructed her to sign the back of Crotzer's photo. As she did, her husband, Martin, and friend Daniel walked in. Although they had not identified Crotzer as one of the assailants when they viewed him separately in previous photo lineups, both men now said they were confident he was the ringleader.

Paroled after serving time for a 1979 robbery, Crotzer, then 20, had been out of prison a month before the 1981 robbery and rapes. Police were looking for a 6-foot-tall, 130-pound man with sideburns. What they found when they arrested Crotzer at his girlfriend's apartment in St. Petersburg was a youthful looking man who was 5 feet 5 and 135 pounds who didn't look like the man the victims described. Crotzer told police he didn't know what they were talking about. His protests fell on deaf ears; nine months later he and Douglas James were tried together in a Tampa court.

A day before the trial, Corlenzo James was sentenced to 20 years for armed robbery and burglary as part of plea bargain. He was later convicted of robbing the bus and sentenced to 90 years.

After a four-day trial, the all-white jury convicted Crotzer of two counts of sexual assault, as well as armed robbery, burglary, aggravated assault and false imprisonment. Douglas James was convicted of one count of sexual assault, armed robbery, burglary and aggravated assault. Each was sentenced to more than 100 years in prison.

### It's not so secret

Alan Crotzer was like a ghost; he haunted Pearl Daniels and her two sisters for years.

**Crotzer continued on page 40**

## “After Innocence” Life After Release For The Wrongfully Imprisoned

Documentary. Directed by Jessica Sanders. Produced and written by Jessica Sanders and Marc Simon. 95 minutes. Not rated; for mature audiences.

Review by Moira Macdonald

“I remember, when I first got out of prison, how loud the world was,” says Nick Yarris softly. He’s one of a number of wrongfully imprisoned men profiled in Jessica Sanders’ powerful Academy Award-nominated documentary “After Innocence.”

Yarris was released after 23 years in solitary confinement for a crime he didn’t commit. The film shows him visiting his childhood neighborhood, looking pale and dazed after years confined in darkness. “I’m a ghost in my own life,” he says.

Yarris became the 140th person in the United States to be exonerated by post-conviction DNA testing and the 13th DNA exoneration from death row. Many of these cases were

handled by The Innocence Project, a non-profit legal clinic dedicated to criminal-justice reform and freeing the innocent. In the film, we see law students processing the many letters from inmates received by the office — file drawers are stuffed full of desperate letters not yet read, like muffled cries for help.

Sanders’ film, a series of profiles interspersed by the throughline of one man’s ongoing case, feels more like a great subject than great filmmaking. Mostly she just lets the exonerees tell their stories, and mostly that’s more than enough. (One sequence, as a man is released from prison and into the arms of his family as Sanders’ camera watches, feels a bit invasive: You wonder how this scene might have played itself out without cameras.)

But “After Innocence” is ultimately informative (we learn, for example, that exonerees are generally given no follow-up assistance upon release, as parolees are) and deeply moving. The sister of Vincent Moto, who spent 10-1/2 years wrongfully imprisoned, explains how her brother has changed: “What’s different is, he knows fair doesn’t exist.”

Dennis Maher, imprisoned 19 years, moves back in with his parents upon his release,

sleeping on a foldout couch in what used to be his parents’ TV room. At his modest birthday party, his extended family sings “Happy Birthday” in that pleasantly off-key way that families do, and he’s quiet, perhaps remembering how many birthdays passed without song.

And a friendship briefly profiled near the end is so unlikely, it gives hope for a better world. Jennifer Thompson-Canino was raped as a college student, and through her ordeal forced herself to remember every detail of her assailant’s face. But her memory was imperfect: On her identification, Ronald Cotton received a life sentence, but years later another man confessed to the crime. DNA testing confirmed that Cotton, who had served 11 years, was innocent.

Now Thompson-Canino and Cotton are friends, often publicly speaking together about the problems of eyewitness identification. In the film, they are at ease together, and Cotton’s simple words about his new life resonate: “Live, forgive and keep moving on.”

Moira Macdonald is *The Seattle Times*’ movie critic.

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## LaFonso Rollins Awarded \$9 Million For Wrongful Rape Conviction

By JD Staff

After his 1993 arrest for the rape of an elderly Chicago woman, 16-year-old LaFonso Rollins confessed in writing to the attack. He immediately recanted, claiming he had “confessed” because it was the only way to stop being struck and threatened by the Chicago police detectives questioning him.

The jury in LaFonso’s 1994 trial rejected his claim of innocence. Instead they convicted him by relying on his confession and the witnesses who picked him out of a lineup. He was sentenced to 75 years in prison.

Although the Chicago PD had collected the assailant’s semen found on a pillowcase in the woman’s apartment, the Chicago crime lab did not do a DNA comparison of that evidence with LaFonso’s blood and saliva that detectives had obtained.

After years of effort by LaFonso and his supporters, in 2004 a DNA test was finally conducted on the assailant’s semen and LaFonso’s blood and saliva. He was excluded, and subse-

quently released in July 2004 – 4,193 days – 11-1/2 years – after being wrongly imprisoned.

Illinois Governor Rod Blagojevich pardoned Rollins in January 2005.

Rollins filed a \$10 million civil lawsuit in state court against the City of Chicago. The suit alleged that Rollins falsely confessed to the rape because city police detectives used “excessive force, intimidation, threats and misrepresentations.”<sup>1</sup>

In January 2006, Chicago and Rollins agreed to settle the suit for \$9 million – only \$1 million less than he was seeking.

A city attorney said in response to being asked why the city agreed to quickly settle the suit for such a large amount, “We hope the expeditious resolution of this case, as well as the substantial settlement, will serve as a demonstration of our good faith in this matter.”<sup>2</sup>

That was lawyerese masking the real reason for Chicago’s eagerness to settle the case: documents provided city attorneys during their preparations to defend against Rollins lawsuit indicated there was a problem with the way the Chicago crime lab handled the evidence in his case. That information indicated a crime lab analyst may not have disclosed test results that excluded Rollins. Chicago’s law-

yers interpreted the information to mean that if the case went to trial, a jury might decide to award Rollins much more than \$10 million. So they cut their losses.

Chicago PD Superintendent Philip Cline announced after the settlement that he wanted an internal investigation conducted into how the five detectives involved in Rollins’ case obtained his written confession, when he was in fact innocent.

A special state prosecutor has been investigating allegations that Chicago police officers have tortured numerous suspects into making false confessions. Although one of the Chicago PD officers being investigated in that probe denies torturing anyone in his custody, he was in fact fired for his gross mistreatment of a suspect.

Rollins, now 30, said after the settlement was announced, “What people got to keep in mind is that this is not a lottery ticket. I had to fight physically and mentally ... to try to hold onto my dignity and pride.”<sup>3</sup>

Endnotes and sources:

1 Wrongfully convicted man get \$9 million, Gary Washburn, *Chicago Tribune*, January 27, 2006.

2 *Id.*

3 City reaches settlement in conviction suit, Megan Reichgott (AP), *Chicago Sun-Times*, January 27, 2006.



In the spring of 1995 Honnah Sims, her husband, and their 13-year-old son Daniel lived in the small north central Washington city of Wenatchee. She was a Sunday school teacher at the East Wenatchee church that became known nationwide as the center of an alleged child "sex ring" that ultimately resulted in the arrest of forty-four adults in 1994 and 1995 on 29,726 charges of sexually abusing 60 children.

During 1994 and through the Spring of 1995 Sims saw many of her fellow church members arrested and their children taken into the custody of the Washington State Department of Social and Health Services (DSHS) for placement in a foster home. After learning in April 1995 that she was accused in police reports of abusing children, Sims feared that her arrest was imminent. In order to protect their son Daniel from being seized and placed in a foster home by DSHS, Sims and her husband sent Daniel to live with a grandparent in Kansas. To prevent DSHS from trying to extradite Daniel back to Washington, they legally relinquished his guardianship to that grandparent.

Sims was arrested on May 22, 1995, after she was indicted on six counts of raping and molesting two children. Neither of those children were hers. Two months later a jury acquitted Sims of all the charges.

In November 1995 the family thought it was safe for Daniel to return home. He had been separated from his mother and father for seven months.

### **Sims Sues**

After her acquittal, the Sims family and several other exonerated Wenatchee parents and their minor children filed suit in King County Superior Court (Seattle) against the City of Wenatchee, Douglas County and several other defendants. Among other claims, the defendants were alleged to have engaged in negligent investigation and negligent supervision.

The trial court dismissed the negligent investigation and negligent supervision claims and removed some of the defendants from the suit. The jury returned a verdict for the defendants on the remaining claims. Sims and the other plaintiffs appealed the two dismissed claims, which were allegations that would result in significant financial liability for the defendants.

The Washington Court of Appeals reversed the dismissal of the negligent investigation claim. The Court ruled that "negligent investigation of child abuse allegations by law enforcement"

## **\$3 Million Wenatchee "Sex Ring" Award Tossed By WA Supreme Court**

By Hans Sherrer

was a basis for civil liability. <sup>1</sup> The state Supreme Court declined to review the decision. With the case sent back for trial, there was a change of venue to Spokane County Superior Court (280 miles east of Seattle).

### **Sims Wins At Trial**

After a trial, the jury determined Douglas County had engaged in a negligent investigation and awarded \$2,000,000 to Sims, \$1,000,000 to her husband, and nothing to their son Daniel.

Douglas County appealed. In their briefs they argued for the first time in the case, that at that point had gone on for more than five years, that the Simses had no cause of action because the statute under which they sued, 26.44 RCW, could only implicate liability "when DSHS conducts a biased or faulty investigation that leads to a harmful placement decision." <sup>2</sup> Douglas County argued they had no liability because they had not investigated possible abuse of Daniel by his parents, and the Simses proactive action of sending Daniel to live with a grandparent in Kansas had eliminated the possibility of a possible "harmful placement decision."

In 2004 the Washington Court of Appeals agreed with Douglas County, ruling that the Simses had no cause of action because "their child was not the subject of a negligent criminal investigation that led to a harmful placement decision." <sup>3</sup>

### **WA Sup. Ct. Rules Against Sims**

The Simses appealed to the Washington Supreme Court, arguing that the Appeals Court committed error on two points: the law of the case making Douglas County liable had been determined by the Appeals Court decision in 2000; and, the county raised an issue on appeal not raised in the trial court.

On December 1, 2005 the Supreme Court decided in favor of Douglas County by a 5 to 3 vote.

The Court's decision tied the Simses two arguments together. In regards to the Simses argument about the 'law of the case,' the Court ruled that the 2000 Appeals Court ruling sending the Simses case back for trial

was trumped by a state Supreme Court decision in 2003, *M.W. v. Dep't of Soc. & Health Servs.* That decision held DSHS is only liable under 26.44 RCW when it "conducts a biased or faulty investigation that leads to a harmful placement decision." <sup>4</sup> The Court rejected the Simses argument that since they had good reason to believe their son's removal by DSHS was imminent, their preemptive move of him to safety in Kansas was "tantamount to 'constructive removal' of him from their custody by the State." <sup>5</sup>

The Court ruled against the Simses other argument by relying on the same 2003 case. Since the Simses removed Daniel from the reach of the DSHS "through their voluntary acts," they had prevented themselves from suffering from his seizure based on "a harmful placement decision." <sup>6</sup> Thus, they had no cause of action under 26.44 RCW.

In his dissent, Justice Richard B. Sanders pointed out the Hobson's choice the Court's decision would force parents into making:

The majority's holding forces innocent parents negligently investigated for child abuse to choose between forfeiting their beloved children to the state or forfeiting their claims under chapter 26.44 RCW. Presenting parents with such a choice contravenes the statutory aim of preserving the integrity of the family. <sup>7</sup>

So more than ten years after Honnah Sims was wrongly accused of the heinous crime of child rape, acquitted of those charges, and separated from her son for many months because of her baseless prosecution, her family has not been compensated in any way for the ordeal they were subjected to by local and state government agencies.

### **Postscript**

Ultimately, nineteen of the adults arrested in the Wenatchee "sex ring" cases were convicted, and nine were acquitted or had their charges dismissed prior to trial. The information disclosed during the trials of the acquitted defendants and the appeals of those who were convicted creates serious doubt that any of the alleged abuse actually took place. All the evidence points to a Wenatchee detective's reliance on insubstantial allegations of child abuse to begin an investigation that was allowed to spin out of control due to inadequate oversight by police supervisors, DSHS agents, and prosecutors who uncritically accepted fantastic claims that over a long period of time many dozens of adults had routinely raped many dozens of children

**Sims cont. on page 11**

# Wrongful Conviction Lawyer Cleared After Criticizing Judges

By JD Staff

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

In July 2003, Kennedy made a speech in which he explained judges who "don't know what they are doing" are an overlooked cause of wrongful convictions. Kennedy also explained that many judges have "intentional or unintentional biases" toward a defendant that aids the prosecution. He also explained that using judgeships as a form of political patronage contributed to the problem. In addition, Kennedy expressed frustration that a public inquiry into three wrongful murder convictions in Newfoundland was not look-

## Sims continued from page 10

in an elaborate "sex ring." Based on the information that has surfaced, and is continuing to surface in the civil suits that are still ongoing, all of the Wenatchee defendants were wrongly convicted.

The forty-four adults arrested in the "sex-ring" cases were cumulatively jailed and imprisoned for more than 60 years.

### Endnotes and sources:

- 1 *Roberson v. Perez*, No. 75486-1 (Wash. 12-01-2005); 2005.WA.0001815 ¶ 29 <<http://www.versuslaw.com>>. See also, *Rodriguez v. Perez*, 99 Wn. App. 439, 451-452, 994 P.2d 874 (2000)
- 2 *Roberson v. Perez*, No. 75486-1, ¶ 36 <<http://www.versuslaw.com>>.
- 3 *Roberson v. Perez*, 119 Wn. App. 928, 934, 83 P.3d 1026 (2004).
- 4 *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 591; 70 P.3d 954 (2003)
- 5 *Roberson v. Perez*, No. 75486-1, ¶ 63 <<http://www.versuslaw.com>>.
- 6 *Id.* at ¶ 67.
- 7 *Id.* at ¶ 86. J. Sanders dissenting.

Additional source: \$20 Million Wenatchee "Sex-Ring" Suit Back On Track, *Justice:Denied*, Issue 29, Summer 2005, p. 12.



ing into the role of the judges involved as a contributory cause of the injustices.

Kennedy's activism on behalf of the wrongly convicted had for years been an embarrassment to the Canadian legal system. His speech raising questions about the integrity of Canada's judiciary provided an opportunity for those who didn't appreciate his idealism to put him on the carpet.

Newfoundland Supreme Court Chief Justice Derek Green promptly filed a complaint with the Law Society of Newfoundland and Labrador (U.S. equivalent of the bar association), alleging that Kennedy's comments could undermine the public's confidence in the impartiality of judges. The Law Society responded to the complaint by charging Kennedy with bringing the administration of justice into disrepute.

An adjudication panel began a public hearing in January 2005. It was, however, suspended when one of its ruling was appealed to the Courts.

Eleven months later Kennedy and Chief Justice Greene resolved the dispute by agreeing to a compromise. Kennedy wrote a letter to the Chief Justice in which he said he had "respect for the court" although it is "subject to fallibility in specific cases." Chief Justice Greene then wrote to the Law Society that he was satisfied, "Mr. Kennedy recognizes the importance of the court as an institution and has not intended to attack it as such." The Law Society formally dismissed the complaint on December 9, 2005.

After the complaint was dropped, James Lockyer, a prominent Toronto lawyer who has aided many innocent people, said it is an "obvious fact" that a judge can cause a wrongful conviction. Lockyer added, "Every player in the system, from witness to defence to Crown to police to judge, can all separately and independently be a cause of a wrongful conviction."

One consequence of the complaint against Kennedy is that it opened up a national debate about the use of judgeships as a form of political patronage. Hearings held in late 2005 by a House of Commons justice subcommittee heard testimony that condemned the political nature of selecting judges in much stronger terms than Kennedy had used in 2003.

### Sources:

Newfoundland Lawyer Cleared of Charge, Richard Blackwell, *The Globe and Mail*, December 13, 2005. Wrongful Conviction Lawyer In Hot Water For Criticizing Judges "who don't know what they are doing," *Justice:Denied*, Issue 27, Winter 2005, p. 23.



# Canadian Supreme Court Tosses "Bawdy House" Convictions

By JD Staff

On December 21, 2005, the Supreme Court of Canada quashed the convictions of two men convicted in separate cases of keeping a "bawdy house." By a 7-2 vote, the Court ruled in *R. v. Kouri* and *R. v. Labaye* (12/21/2005) that the test for an indecent act is it must be shown to "interfere with the proper functioning of society." and not simply that it might be contrary to community standards.

The defendants in the cases were James Kouri and Jean-Paul Labaye. The two men owned different swinger clubs in Montreal that allowed private sex acts, including swapping.

Kouri owned Coeur a Corps, and he had been fined \$7,500 (Canadian) after being convicted of two counts of keeping a common bawdy house. Labaye owned L'Orage, a members-only club, and he was fined \$2,500 (Canadian) after being convicted of one count of keeping a bawdy house.

The Court distinguished public sex acts that could be construed to be indecent because of their tendency to "interfere with the proper functioning of society," and the private acts allowed in the two private clubs that didn't harm the public.

In its ruling, the Court majority rejected the argument of the two dissenters that the standard of indecency for public acts should also apply to acts performed in private.

Separate Court of Appeal panels had sustained Labaye's conviction, and overturned Kouri's convictions. So the Supreme Court's ruling quashed both men's conviction by affirming the appeals court's *Kouri* decision, and reversing the *Labaye* decision.

### Sources:

*R. v. Kouri* and *R. v. Labaye*, December 21, 2005, Supreme Court of Canada. Swingers clubs don't harm society, top court rules, *CBC News*, December 21, 2005.



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# Eric Sarsfield's Rape Exoneration Leads to \$2.5 Million Compensation

By JD Staff

Twenty-four-year-old Eric Sarsfield was convicted in July 1987 of raping a 30-year-old woman in her Marlborough, Massachusetts apartment on August 24, 1986.

In convicting him, the jury relied on the woman's identification of Sarsfield as her attacker. No physical evidence or other witnesses placed Sarsfield at the crime scene. Sarsfield testified in vain that he did not rape the woman, and that the woman had mistakenly identified him. When the jury announced its verdict, Sarsfield was so stunned that he told the judge, "Excuse me, I didn't do it."<sup>1</sup>

Sarsfield was sentenced to a prison term of 10 to 15 years. He unsuccessfully pursued all available appeals. Then beginning in 1997, Sarsfield sought to have DNA testing performed on the assailant's semen found on the woman's clothing. The testing was vigorously opposed by the Middlesex District Attorney's Office, so it wasn't performed prior to his release on parole in June 1999. Sarsfield had been imprisoned for almost ten years.

Sarsfield pursued proving his innocence on the outside. He was able to get semen on the woman's clothing compared to his DNA after the DA agreed to the testing if Sarsfield paid for it. In March 2000 the test results came back excluding him as her assailant. Armed with the new evidence of his innocence, Sarsfield was successful in getting his conviction vacated in 2000.

Doubts about the woman's identification of Sarsfield surfaced as early as 1993. His claims of innocence had kept the case in the public eye enough that a reporter for the *Telegram & Gazette*, a local newspaper, interviewed her. During that 1993 interview she admitted, "that during counseling she had considered whether she had picked out the wrong man."<sup>2</sup>

After his exoneration, Sarsfield kept digging into his case. In 2003 he filed a federal civil rights lawsuit naming as defendants the city of Marlborough, then-police chief Floyd Russell, former mayor Chester E. Conary and eight police officers. The suit requested actual and punitive damages of at least \$10 million. The suit alleged the woman's initial identification of Sarsfield in a photo array was not of her own volition and knowledge. He alleged she did not consider him as her assailant until police offi-



cers specifically pointed at him and suggested he was her attacker. The suit alleged her subsequent identifications were based on that police induced suggestion, and not her own recollection of the events of August 24, 1986.

Sarsfield's suit claimed: "As a result of improper suggestive identification procedures, [police] improperly induced an unsuspecting victim to identify Mr. Sarsfield incorrectly, fabricated exculpatory evidence [of their wrongdoing] and withheld evidence of their misconduct in order to ensure his false arrest, unfair trial, and wrongful conviction."<sup>3</sup> The suit also alleged that the woman "consistently told police that she was uncertain about identifying Mr. Sarsfield as the man who raped her."<sup>4</sup>

The lawsuit was somewhat novel in that it alleging the police's action had victimized both Sarsfield and the woman who had been sexually assaulted. He claimed they were both, "manipulated, cheated, and betrayed by law enforcement officers more interested in closing a case and getting a conviction than in playing by the rules and serving justice."<sup>5</sup>

In 2004 the city learned that its insurance carriers refused to cover the legal fees or any judgment or settlement resulting from Sarsfield's lawsuit. They claimed that at the time of Sarsfield's arrest the city didn't have insurance indemnifying it against the actions of city employees. The lack of insurance put pressure on the Marlborough to settle the case, since city officials conceded that a \$10 million plus award would bankrupt the city.

In March 2006, Marlborough's city council approved a settlement paying Sarsfield \$2 million. It also assigned to Sarsfield the city's rights to proceed with litigation against the city's insurance companies that denied coverage for the lawsuit. At that time the city had already paid \$400,000 defending against the suit, and its lawyers informed them it would cost at least another \$500,000 in legal fees to take the case to trial.

The city and its police force denied wrongdoing by agreeing to the settlement. Marlborough's city lawyer said, "We're very mindful of the pain and trauma Mr. Sarsfield went through. However, we are of the opinion that our police officers involved in this case did nothing wrong."<sup>6</sup>

That denial of police wrongdoing is not just disingenuous, but an obfuscation of the truth. Sarsfield was locked onto as the suspect about a month after the woman was attacked and at that point any objective police investigation into the rape ended.

While Sarsfield was buying some diapers at a 7-Eleven for his girlfriend's baby, a policeman noticed he had blond hair and blue eyes like the assailant described by the woman. The policeman followed Sarsfield to his home and asked him if he had a tattoo of a cross on his arm like the woman said her attacker had. Sarsfield said no and showed the policeman his arm. At that point you would think the interest of the police in Sarsfield would have ended since they knew he wasn't the woman's assailant. However, as Sarsfield's suit outlined, the police proceeded to do everything possible to outright frame him for a rape that they knew he didn't commit.

Now 42, Sarsfield said after the settlement was announced, "A part of my life has gone by. It has been 20 years of my life. At least I don't have to worry about it any more, I can put it behind me now."<sup>7</sup> It can only be hoped that he can. In December 2005, three months before the settlement, *The Boston Globe* published an extended article about Sarsfield's case. He told a reporter, "I have dreams that I'm still in prison. The door is locked and they won't let me go."<sup>8</sup>

Seven months before the Marlborough settlement, Sarsfield was awarded \$500,000 under Massachusetts' wrongful conviction compensation statute that became law in December 2004. Sarsfield, Eduardo Velazquez and Dennis Maher were all awarded compensation on the same day in August 2005. They were the first three people awarded compensation under Massachusetts' new law.

## Endnotes and sources:

- 1 The wrong man, Megan Woolhouse, *The Boston Globe*, December 11, 2005.
- 2 Marlborough to pay \$2M in rape suit, Elaine Thompson, *Telegram & Gazette*, March 7, 2006.
- 3 *Id.*
- 4 *Id.*
- 5 Wrongfully convicted man settles lawsuit with Marlborough, *The Boston Globe*, March 7, 2006.
- 6 Marlborough to pay \$2M in rape suit, *supra*.
- 7 *Id.*
- 8 The wrong man, *supra*.



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Rodney Addison was released in December 2005 after nine years of wrongful incarceration. Addison was 23-years-old when convicted of second degree murder in the October 1996 shooting of Lewis Jackson in northwest Baltimore. Addison was sentenced to 30 years imprisonment.

## Rodney Addison Freed From Nine Years Of Wrongful Imprisonment

by Douglas Scott Arey

In 1994 Addison had pled guilty to a drug charge when he claimed he wasn't guilty. It was a mistake he vowed not to repeat again. His attitude was, "I'd rather be innocent and in there for 30 years than say I'm guilty." After his conviction Addison haunted the prison law library researching legal citations in an effort to find a way to overturn his conviction.

The Maryland Office of Public Defender Innocence Project adopted Addison's cause and discovered a major Brady violation: three witness statements contradicting the testimony of the state's sole witness, Frances Morgan, were obtained by Baltimore police during their initial investigation. Yet they had not been released to Addison prior to his trial. A Public Information Act request for all police documents in Addison's case led to disclosure of the exculpatory statements.

In October 2005 Baltimore City Circuit Court Judge Edward Hargadon ordered a new trial. He said the state's failure to disclose the three exculpatory witness statements "undermined the confidence of the entire verdict." Two months later, the Baltimore State's Attorney Office dismissed the murder charge, stating they did not have the evidence or witnesses to pursue another trial. The dismissal resulted in Addison's release.

Ironically, according to the trial transcript, Addison exclaimed during his trial, "I think I can prove the witness was lying on the stand yesterday when she said she looked out her window." He made that statement two days before he was convicted. The concealed witness statements proved Addison was telling the truth, and that members of the prosecution knew it at the time of his trial.

Suzanne Drouet, an assistant public defender associated with the Maryland Innocence Project, told Baltimore's paper *The Sun*, "This is a beautiful case for showing how an innocent person can wind up getting convicted. Every step of the process somebody didn't do their job, and the result is what people don't think can happen - a totally innocent person winds up getting convicted. It's everybody not doing their job. You have fault at every level." Drouet further said, "We showed that the state had not

turned over certain information about three eyewitnesses that would have shown that this woman who testified ... was in fact lying. They should have turned those things over."

*The Sun* also reported that in "a photo line-up from 1996 that included Addison, Ernest Green identified someone else as the shooter and testified that he saw the suspect flee on foot. Glenn Maxey had also given police a verbal description of a suspect that did not match that of Addison in 1996." Both men testified at Addison's post-conviction hearing in 2005.

Margaret T. Burns, a spokeswoman for the prosecutors' office agreed the "case pointed to poorly organized paperwork, the possibility that not all evidence from police was transferred to prosecutors and Addison's initial inadequate legal representation."

*The Sun* reported Addison's dismay with prison, which he characterized as "living in a time warp, a vacuum. It was miserable ... and not a place anyone should have to live in." Addison coped as best he could, "completing a General Educational Development program, joining book clubs and doing a lot of drawing and writing on his own." Drouet said, "He was always persistent but patient. He never seemed to get frustrated or angry. But he never wavered from the fact that he was absolutely innocent and he was going to keep fighting this for as long as it took."

Several days after his release Addison said, "A lot of times I dreamed that I was home, and I woke up and I was there, in prison. Now, when I wake up, I'm not in a cell. I'm in a house, with people, family members. That's when I know it's real. I'm free."

Addison's case is the first time the Maryland Innocence Project has aided reversal of a conviction on grounds other than DNA evidence.

Maryland has a wrongful conviction compensation statute that requires a pardon by the governor. A hurdle for Addison to overcome in obtaining a pardon is that the State's Attorney Office is taking the position that Addison wasn't exonerated by the dismissal of the charges. They are claiming it only means there is no evidence he was involved in Jackson's murder - not that he is innocent. State's Attorney spokeswoman Burns also emphasized that dismissal of the charges didn't expunge the police record of Addison's "arrest for first-degree murder."

Sources: Prosecutors drop murder charges, *The Sun*, Baltimore, December 17, 2005; and Readjusting to freedom, *The Sun*, Baltimore, MD, December 24, 2005.

## Boston Agrees To Pay \$3.2 Million To Neil Miller For False Rape Conviction

By JD Staff

In 1989 by a student at Boston's Emerson College reported a screwdriver wielding man forced himself into her apartment after she answered the door. She said the man robbed and raped her.

Neil Miller was twenty-two when convicted in 1989 of raping and robbing the woman by a jury that depended on her identification of him as her attacker. There was no crime scene evidence or other witnesses tying him to the crime. He was sentenced to 45 years in prison. His daughter was three-years-old.

After ten years imprisonment Miller was successful in getting a judge to order DNA testing of a bed sheet and the victim's vaginal swabs. The tests excluded Miller. He was released in June 2000 and his conviction was vacated.

In 2003 Miller filed a federal civil rights lawsuit against the city of Boston, its police department, and several officers. He claimed the police led the victim to falsely identify him, and they ignored evidence clearing him of the crimes.

Miller alleged that after the attack, police had the victim look through 600 pictures of males. When she didn't pick any of the pictures they had her look through about a dozen photos that included a six-year-old picture of Miller. The woman indicated Miller's picture resembled her attacker. However, she couldn't identify him with certainty, so the police told her she should go with her first impression. As time went on she became more positive that the old picture of Miller was her attacker. The lawsuit alleged that the police's conduct in guiding the woman to select Miller amounted to "deliberate indifference" to performing their duty to find the woman's assailant.

On March 8, 2006, four days before Miller's lawsuit was scheduled to go to trial, a settlement for \$3,200,000 was announced. Although denying any responsibility for what happened to Miller, the city of Boston issued a press release explaining the settlement acknowledged "the terrible tragedy of an innocent man incarcerated in 1989 for a crime he did not commit."

Miller's settlement is the largest in a wrongful conviction case in Massachusetts history.

Miller continued on page 14



**Justice:Denied Introduction:** A wrongly convicted person is usually thought of as someone who in the course of their daily life became ensnared in the nightmare of a prosecution, and convicted of a crime that he or she did not commit. However, after someone is convicted and imprisoned for a crime the person may or may not have committed, that person becomes vulnerable to being wrongly accused of a crime that occurred within the prison. The following story of Kenneth Krause illustrates that the same factors can be

involved in the prosecution of a person who may be innocent of committing a crime in a prison, as someone accused of committing a crime on the street. Those factors involved in Mr. Krause's case include: using suspect informant testimony; concealment of exculpatory evidence; fabrication of prosecution favorable evidence; piling on of unjustified charges to try and coerce a guilty plea; non-existent independent expert evaluation of crime scene evidence; and inadequate pre-trial, trial, and post-trial legal representation.

## Exculpatory Surveillance Video Not Analyzed Prior to Trial - The Kenneth Krause Story

By Kenneth Krause

On May 8, 1999, I was in the special housing unit (SHU) at the United States Penitentiary in Lompoc, California. I was serving a 12-1/2 year sentence for a 1993 bank robbery conviction. I was in a two-man cell that I shared with Jeff Milton. At approximately 10 a.m. on the 8th, I commented to Officer Alexander White as he passed me my food tray that he should give my rotten apple to Officer Anita Pahnke and tell her to stick it where the sun don't shine. About an hour later when Pahnke was passing out coffee she stopped at our cell (D-15), and told me to "Grow up and get some balls."

Apparently my cellmate Milton was personally affronted by Pahnke's comment, because he immediately jumped up from the lower bunk. As he approached the closed cell door he told Pahnke, "That's tough talk behind a cell door." Rising to Milton's challenge, Pahnke ordered Officer Cintora, who was manning the control panel, to open our cell door. Against (SHU) regulations, Cintora responded by opening the cell door. As the cell door opened Milton punched Pahnke in the mouth so hard it spun her around 180 degrees before she fell down between our cell (D-15) and the one next to it (D-14). Jumping down from the top bunk - I peeked out of the cell door at her in disbelief. I then took approximately two steps out of the cell onto the tier, but I never touched Pahnke.

Within seconds officers began to arrive in response to the alarm Cintora had activated

### Miller continued from page 13

In 2005 a Boston man, Larry Taylor, pled guilty to three rapes, including the 1989 rape Miller had been convicted of committing. Prior to his conviction, Taylor had been arrested several times for various crimes after Miller's 1989 conviction.

Source:

City of Boston Reaches \$3.2 million settlement with wrongly convicted man, Brandie Jefferson, *Boston Globe*, March 9, 2006.



and both Milton and myself stepped back into the cell. Minutes later both of us were dragged out of the cell and severely beaten before being stripped and chained hand and foot to a concrete slab for a solid week. We were not only

forced to lie naked in our urine and fecal matter for the week we were chained to the slab, but we were repeatedly brutalized by several guards who punched and kicked us.

At the end of that first week, I was given two incident reports. They falsely claimed that I had not only been recorded by video surveillance camera as personally punching and kicking officer Pahnke, but that a razor blade used by Milton to cut Pahnke had been discovered in our cell's toilet. Although the videotape was too blurry to discern very much, the prison staff relied on it during an institutional disciplinary hearing in order to find me guilty of the charge of assaulting Pahnke. That resulted in my security reclassification and my subsequent transfer to the highest security federal prison in the United States - the federal supermax prison in Florence, Colorado.

### Pre-Trial Events

In March of 2000, I was indicted by a federal grand jury in Los Angeles for: Conspiracy to Assault, Assault on a Federal Officer, and Aiding and Abetting. I soon discovered that to protect Pahnke from any wrongdoing regarding the opening of the (SHU) cell door against policy, an "official story" had been concocted that inmate Milton and myself had conspired to assault officer Pahnke by pretending to be in a fight when she came to our cell. Then when she ordered the opening of the cell door, ostensibly to break up the fight, we supposedly both turned on her. This staged cell fight story was the basis of the conspiracy charge that alleged seven overt acts.

I repeatedly assured my court appointed lawyer, Judith Rochlin, that I was innocent and that if she could have the surveillance tape expertly analyzed it would prove beyond any shadow of a doubt that at no time did I touch Pahnke. Regrettably, before any progress could be made in that regard, differences of opinion and a clash of personalities forced us to go our separate ways. But before she withdrew as my lawyer, she filed an *ex parte*

motion for funds to have the original surveillance videotape analyzed. I immediately notified the court appointed lawyer who replaced Rochlin about the pending videotape motion. He repeatedly assured me he would follow-up on having a defense expert analyze the video. However, he failed to do so, and I was thereby denied the only realistic means of conclusively proving my innocence.

After a severance, Milton went to trial first since he admitting striking Pahnke, although he claimed doing so in self-defense. During Milton's trial several important aspects of the government's case were debunked:

- Cintora testified there had not been a fight in the cell at the time Pahnke ordered him to open the cell door. His testimony proved the story of a staged cell fight was a concocted lie to cover up Pahnke's breach of (SHU) security. That lie formed the basis of the conspiracy charge. Corroborating Cintora's testimony is an internal report I obtained under the Freedom of Information Act, after the trial, that there was no cell fight.
- Testimony established that a correctional officer had actually planted the razor blade in the cell toilet.

Milton was found not guilty of the conspiracy charge and found guilty of the lesser included offense of 'intentionally striking an officer.' He was sentenced to serve an additional 3 years. Soon after Milton's verdict, the government superceded my indictment twice to include the allegation that I had directly kicked Pahnke and that my foot was a dangerous weapon. Not until Milton's favorable verdict had the prosecution ever accused me of personally assaulting Officer Pahnke.

### The Trial

During my trial the government produced two inmate witnesses.

The first was Lamont Nelson who had been in cell D-16 on the day of the incident. He testified that by protruding a one-inch mirror on a stick through his cell door crack, he witnessed me rush out as soon as the door opened and begin kicking Pahnke in the buttocks both

**Krause cont. on page 15**

## Krause cont. from page 14

before and while she was falling to the floor. My attorney was unable to convincingly impeach Nelson's testimony because he failed to pursue expert enhancement of the surveillance tape to clearly establish that I did not emerge from the cell until after Pahnke was already on the floor. Which made it impossible for me to have been kicking her before and during her fall as the prosecution claimed.

Vincent Harrell was the second inmate witness. Harrell was an FBI/DEA informant who had already testified in several other criminal cases on behalf of the government in exchange for sentence reductions. Unaware that Harrell was a practiced snitch, I had shown him the error filled incident reports issued against me concerning Pahnke's assault. Harrell then used the false account of the events depicted in the reports to concoct a story of how I had allegedly confessed my involvement in the assault to him.

The self-serving testimony of Harrell and Nelson was contradicted by two BOP staff members: Cintora and the first officer on the scene both testified they did not see me touch Pahnke at any time. Inmate Milton and several other inmate defense witnesses also testified I did not touch Pahnke.

The prosecution's entire case rested on the testimony of the two inmate snitches. Of course, during my trial they both denied being promised anything by the U.S. Attorney's Office in exchange for their testimony. [JD note: Harrell was released by the BOP on December 13, 2002, and Nelson is scheduled for release by the BOP on April 29, 2006.] That is patently absurd because in the circumstances of my prosecution, an inmate snitch would only "volunteer" to testify for the government as a friendly witness in exchange for "compensation" of one sort or another.

Harrell and Nelson's disclaimers of horse trading for their testimony also rings hollow because it was indispensable for the prosecution to "prove" its case. Especially since the alleged victim, Officer Pahnke, did not testify that I touched her. She claimed amnesia after being struck by Milton.

If my lawyer had followed-up on having the surveillance video's image enhanced by an expert, it could have proven the two officers and defense witnesses told the truth about my innocence, while the prosecution's two inmate "snitch" witnesses lied.

While the jury was deliberating they requested to view the blurry videotape three times. In the end I was found not guilty of

the conspiracy, but guilty of an assault with a dangerous weapon (my foot). I was sentenced to an additional 10 years. It was the first time I've ever heard that the testimony of convicted "snitch" criminals was considered more credible by jurors than the testimony of law enforcement officers.

### Post Trial

In February of 2005, I filed a 28 USC §2255 petition claiming ineffective assistance of counsel, based on my lawyer's failure to investigate and examine exculpatory evidence – that being the original master surveillance tape. I also filed a discovery motion requesting access to the master surveillance tape for the purpose of subjecting it to Video Image Stabilization on Reconstruction (VISOR) analysis. My petition was denied by the U.S. District Court judge in October 2005, and a Certificate of Appealability on all the petition's claims is pending in the federal Ninth Circuit.

Because of my imprisonment I lack financial resources and I am receiving no outside help. My hope is that someone will read of my plight and assist me in having the master tape expertly analyzed, so I can prove my innocence of assaulting Officer Pahnke. Although it is part of my appeal, to date I have been unable to obtain court authorized payment for the tape's analysis or appointment of counsel.

I pled guilty to bank robbery in 1993 because I am not innocent of that crime. However, I am innocent of the trumped-up charges related to the assault on Pahnke. If you are able to help, please contact me at: Kenneth Krause 39956-004  
USP Florence – ADMAX  
PO Box 8500  
Florence, CO 81226

Thank you for your time and consideration concerning my predicament.

*Justice:Denied* comment. *Justice:Denied* contacted a nationally recognized forensic tape analyst who declined to analyze Mr. Krause's tape on a pro bono basis. He did, however, quote the discounted price of \$2,250 to enhance two minutes of videotape in "real-time." According to Mr. Krause, the events recorded during the first thirty seconds of the incident would be sufficient to establish his innocence. 

### Visit the Innocents Database

[http://forejustice.org/search\\_idb.htm](http://forejustice.org/search_idb.htm)

Information about more than 1,700 wrongly convicted people in 30 countries is available.

## Norfolk Four Update

Petitions requesting executive clemency and pardons were filed with Virginia Governor Mark Warner by lawyers for Derek Tice, Joseph Dick and Danial Williams on November 10, 2005. The three men had been convicted of the rape and murder of Michelle Moore-Bosko in July 1997. They were sentenced to life in prison. The petitions argued for clemency on the basis of new evidence supporting the men's actual innocence. A fourth defendant, Eric Wilson was also convicted of rape, but not murder. Wilson completed his prison sentence in September 2005, and he also filed a pardon petition. (See, The 'Norfolk Four' Convicted of Brutal Rape And Murder Committed By Lone Assailant, *Justice:Denied*, Issue 30, p. 6)

After the clemency petitions were filed, a number of the trial jurors were contacted. Eleven of them said that if they had been aware of the new information at the time they were a juror, it would have influenced them to have voted not guilty. Affidavits and letters from those jurors were submitted on January 4, 2006, in support of the clemency petitions. (See, Jurors Back Clemency for 'Norfolk 4': Convictions Renounced In Rape-Murder Case, Tom Jackman, Washington Post, January 6, 2006, p. B1.)

Governor Warner ordered the state parole board to enlist a detective to investigate the clemency petitions. However, the investigation wasn't completed prior to the end of Warner's term on January 14th. So it is now up to his successor, Governor Tim Kaine, to make a decision about the clemency applications by the Norfolk Four.

## Tony Ford Update

Tony Ford's scheduled December 7, 2005 execution in Texas was first delayed until March 14, 2006, and then in February 2006 it was delayed indefinitely so that DNA testing of blood evidence can be conducted that may be able to conclusively prove Ford's innocence of a 1991 murder. There is significant evidence that Ford's identity was mistaken for that of the actual murderer. (See, A Mistaken Identification Leads To A Wrongful Conviction and Death Sentence — The Tony Ford Story, *Justice:Denied*, Issue 30, p. 4)

On the 23rd of May 1994 Pamela Lawrence was killed at her jewellery store in Perth, Australia. Pamela was brutally attacked with a blunt instrument, which caused multiple skull fractures. She suffered immensely prior to her death. The police assumed that the motive was robbery, even though no jewellery was missing from the store.

The police were quick to action and began to investigate over 100 people that were in the vicinity of the murder, including Andrew Mallard. Although Mallard didn't have a history of violence, he had been involved in petty offences.

Mallard was being treated for bipolar disorder at Graylands Hospital when he was first interviewed by the police on the 26th of May 1994. On the 10th of June 1994, Mallard was questioned again, this time at the police station for nine hours. This interview was not recorded but the police alleged that Mallard confessed to the murder during the interview. In spite of his alleged confession, the police did not arrest Mallard. Instead they released him for the second time. On the 17th of June 1994, Mallard was again questioned at the police station. One portion of this interview was videotaped for about 20 minutes, but it did not contain an out-right confession. He was released for a third time.

Four weeks later, Mallard was back in treatment at Graylands Hospital, which is where he was arrested for the murder of Lawrence. Lacking an eyewitness, and no physical or forensic evidence implicating Mallard in the murder, prosecutors relied on the police's allegation he confessed and the video taped interview in which he didn't confess, to convince a jury to convict him on the 15th of November 1995. He was sentenced to 30 years imprisonment.

Mallard insisted that he was innocent and appealed his conviction. It was denied. On the 3rd of December 2003, after Mallard had petitioned for clemency, the Supreme Court of Western Australia dismissed Mallard's second appeal. However, the court acknowledged that the case was riddled with inconsistencies.<sup>1</sup> Mallard appealed, and on the 15th of November 2005, the High Court of Australia overturned Mallard's murder conviction.<sup>2</sup> Finally, Mallard had won his fight for freedom after almost twelve years of wrongful imprisonment. He was released from the maximum security Casuarina Prison near Perth on February 20, 2006.

### Why was Mallard Wrongfully Convicted?

Mallard was convicted solely on an alleged confession and a 20-minute videotaped inter-

## Andrew Mallard Released After 12 Years Wrongful Imprisonment

By Serena Nicholls

view. The confessional evidence consisted of police notes of verbal interviews that Mallard consistently refused to sign because they did not accurately represent what he said. The sequence of events immediately prior to this alleged confession has one questioning its validity and reliability. In the first interview Mallard was undergoing treatment at a psychiatric hospital. Not only was Mallard suffering from a bipolar disorder but he had just been given a cocktail of drugs by his doctors.

Shortly before Mallard was interviewed for the second time he had been bashed by a man in a nightclub brawl. So at the time of his alleged confession Mallard was confused, vulnerable, emotionally exhausted and suffering from sleep deprivation. Mallard claimed that prior to his alleged confession he was continually threatened and mistreated by the police. Mallard even suggested that one of the detectives put a pistol in his face and instructed him to confess to the murder.

The defense also argued that the detectives capitalized on Mallard's vulnerability and tricked him into what the prosecution characterized as a confession. Mallard was told that he would be able to assist the police in solving the murder by putting forward his own theories on how the murder may have been committed. Through Mallard's gullibility and confusion, he began to recite hypothetical theories based on the information he had gained from the media and the detectives themselves. Mallard also drew a picture of the shop and the murder weapon by adding the details that had been given to him by the detectives. Although this scenario sounds convenient, Mallard passed two polygraph tests that scrutinized his involvement in the case. The results were not admitted as evidence by the Supreme Court because Australian courts do not view polygraph results as reliable evidence.

When the High Court overturned Mallard's conviction the judges emphasized that the prosecution had not adhered to the principle of equality of arms: "Of particular concern is that items of evidentiary material, consistent with innocence and presenting difficulties for the prosecutor's hypothesis of guilt, were actually suppressed or removed from material supplied to the defence."<sup>3</sup> For ex-



Andrew Mallard on the day of his release with his mother (l) and sister (r), on Perth's waterfront.

ample, the prosecution withheld evidence in relation to witness statements and scientific testing that doubted the murder weapon.

### Mallard's Case To Be Investigated

Although the Corruption and Crime Commission (CCC) has recently announced that it will conduct an investigation into the handling of Mallard's case, the commission's objectivity should be questioned. This is because the commission's General Counsel (at the time of the High Court judgement) is married to the prosecutor in the Mallard trial.<sup>4</sup> Therefore, the commission may not be diligent in fully uncovering how the prosecution perverted the course of justice by failing to disclose vital evidence.

Police misconduct, hidden evidence and judicial error contributed to Mallard's wrongful conviction

It is the responsibility of the CCC to hold those involved in this miscarriage of justice accountable for their actions.

Particularly because Mallard is not a high profile person and most Australians have never even heard of his case of injustice.

### Conclusion

Andrew Mallard's case is a perfect illustration of how a wrongful conviction can result from police misconduct, hidden evidence and judicial error:

- The police capitalized on Mallard's vulnerability and naivety in the legal system. They tricked him into appearing to confess to a murder that he did not commit.
- The prosecution deliberately withheld evidence that was consistent with Mallard's pleading of innocence.
- The judicial system erred by displaying a blind faith in the police and investigative process, and the prosecutor's honesty.

It was the cumulative effect of these actions that resulted in Mallard being framed for the murder of Pamela Lawrence, and being wrongly imprisoned for 11-½ years. Mallard's case serves as a warning to all Australians who are under the delusion that the law is impartial and unprejudiced. Mal-

Mallard continued on page 17

In the summer of 2002, Di Fingleton was Chief magistrate in the state of Queensland, in northeastern Australia. Fingleton notified Magistrate Anne Thacker in July 2002 that she had decided to transfer her from Queensland's largest city of Brisbane, to Townsville 700 miles north. Thacker promptly filed an appeal of Fingleton's decision to the judicial committee. Thacker was concerned about the hardship the transfer would cause her family. On August 12, 2002, Co-ordinating Magistrate Basil Gribbin provided a sworn affidavit to Thacker's lawyer supporting her challenge to the transfer.<sup>1</sup> Fingleton retaliated against Gribbin by sending him an email on September 18, 2002, giving him seven days to show cause why he should not be demoted from his position as a coordinating magistrate for his "insubordination" of providing the affidavit.

Queensland's Criminal Code § 119B states:

"A person who, without reasonable cause, causes, or threatens to cause, any injury or detriment to a judicial officer, juror, witness ... in retaliation because of ... anything lawfully done by the juror or witness in any judicial proceeding; is guilty of a crime. Maximum penalty - 7 years imprisonment."

Gribbin was a "witness" who had "lawfully" provided evidence in the form of his affidavit in the "judicial proceeding" of Thacker's appeal, and in retaliation Fingleton "threaten[ed] to cause" him the "injury or detriment" of a demotion. After an investigation, a two-count indictment was issued against Fingleton. She was charged with violating Criminal Code § 119B, and attempting to pervert the course of justice.

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## Mallard cont. from page 16

Mallard is a perfect illustration of how easy it is for the police to target someone for a crime that they did not commit.

Serena Nicholls is a former student member of the Griffith University Innocence Project, in Southport, Queensland, Australia. She is currently completing her Masters in Laws.

### Endnotes and sources:

1 *Mallard v The Queen* [2003] WASCA 296.

2 *Mallard v The Queen* [2005] HCA 68.

3 *Id.* at 68 (Justice Kirby). (Under human rights conventions 'equality of arms' means that the conditions of trial do not "put the accused unfairly at a disadvantage.")

4 Corruption and Crime Commission (2005) 'Media Report: CCC to Investigate Controversial Case', released on 02/12/05.

## Magistrate Awarded \$348,000 And New Job After "Threat" Conviction Tossed

By Hans Sherrer

On June 4, 2003, a jury convicted Fingleton of violating § 119B. It was her second trial: her first trial ended in a hung jury. The jury was unable to arrive at a decision about the second count. She was sentenced to one year in prison for threatening a witness in a judicial proceeding.

Fingleton was allowed to remain in her position pending the outcome of her appeal to Queensland's Court of Appeal. The appeals court upheld her conviction on June 26, 2003. However, the Court modified her sentence to six months imprisonment, and six months was suspended dependent on two years of clear conduct after her release. (*R. v. Fingleton* [2003] QCA 266 (26 June 2003)) Fingleton then resigned her judgeship and began serving her sentence.

In June 2005, more than a year after she had completed her sentence, Australia's High Court quashed Fingleton's conviction and entered a judgment of acquittal on both counts in the indictment – even though she had only been convicted of one count. (*Fingleton v The Queen* [2005] HCA 34 (23 June 2005))

The High Court didn't base its decision on the merits of the prosecution's case. Which was that Fingleton had illegally threatened to retaliate against Gribbin for filing an affidavit in support of Thacker's challenge to her transfer. Rather, the High Court unanimously (6-0) based its ruling on the premise that under Section 30 of Queensland's Magistrates Act, "a magistrate is not criminally responsible for anything done or omitted to be done by the magistrate in the exercise of an administrative function or power conferred on the magistrate under an Act, although the act done is in excess of the magistrate's administrative authority."<sup>2</sup>

Since the power to order Thacker's transfer was a part of Fingleton's administrative authority as Chief Magistrate, the Court ruled she was immune from prosecution for any of her actions related to that transfer that exceeded her authority – including her conviction for criminally violating § 119B. Having determined that Fingleton's criminal act was shielded from prosecution by the cloak of magisterial immunity, the Court considered her to have been wrongly convicted.

Queensland has no wrongful conviction compensation statute, so a person whose conviction is quashed must seek an *ex gratia* payment from the government, or sue the people responsible who are not immune from liability. (Judges, prosecutors, and defense lawyers in Queensland are immune from civil liability for a wrongful conviction.)

Queensland's Premier Peter Beattie initially took the hard-line that Fingleton would neither be considered for an *ex gratia* payment, nor would she be restored to her judgeship. His position was based on the fear that doing so would open the floodgates for every exonerated person in Queensland to make a claim for *ex gratia* compensation.

However, contrary to Premier Beattie's public posture, behind the scenes the government was negotiating with Fingleton. In September 2005 a settlement was announced that Queensland would pay Fingleton \$348,000 (\$475,000 Australian) in back pay, and she would be reinstated as a magistrate. She was not reinstated as chief magistrate because someone had been appointed to that position in her absence. She also didn't receive any payment, *per se*, for her wrongful imprisonment – since the monetary award was described as "lost earnings" from June 2003 to her reinstatement effective in October 2005.

Fingleton's "loss of income, liberty, reputation and trauma suffered" were cited as justifications for her payment and reinstatement. Beattie sought to distinguish her situation from other cases of wrongful conviction. Beattie said, "The High Court of Australia decided she never should have been charged, let alone served time in prison. This case is entirely different to others where people have been quite properly charged and convicted and then later acquitted."<sup>3</sup>

Beattie comment was likely referring to Pauline Hanson, the co-founder of Australia's One Nation political party who was convicted of election fraud in August 2003. Hanson was jailed immediately and served three months in prison before her conviction was quashed by the Court of Appeals in November 2003. The Court determined that the election fraud never occurred. Queensland's Attorney General formalized Beattie's comments in October 2005 by denying Hanson's claim for compensation, saying, "The convention with *ex gratia* payments in Queensland is, unless exceptional circumstances exist, a person acquitted of a criminal charge will not be compensated either for their legal expenses on defending the charge, or for any time spent in custody."<sup>4</sup>

Fingleton continued on page 18



In the political arena you can expect that some factions will engage in 'dirty politics'. Pauline Hanson, one of Australia's leading politicians, found out about dirty politics the hard way when influential figures orchestrated her wrongfully prosecution and conviction of non-existent crimes.

### The political rise of Pauline Hanson

Pauline Hanson began her political career in March 1996, when she won a convincing victory and was elected as the Independent member of the federal House of Representatives for Oxley, a suburb of Brisbane, in the Australian state of Queensland. She successfully made the transition from the 'fish and chip shop lady' to one of Australia's leading politicians. Hanson almost immediately climbed the political ladder and gained television notoriety. She became the media's 'best friend' and at times received more attention than all of Australia's other politicians combined. Hanson's appeal to the media was not just because of her working class background and that she was an attractive and dynamic woman, it was also the result of the controversial views that she held. The issues that received the greatest degree of publicity revolved around race, culture and welfare in Australian society. Hanson argued that she was a typical 'Aussie battler' and that the government of Prime Minister John Howard was no longer in touch with the average Australian.

### Fingleton cont. from page 19

After Fingleton's settlement was announced, Fingleton's lawyer, Matt Woods stated, "The payment to her is some recognition of the injustice she has suffered. However, no amount of money could make up for what my client and her husband have been through."<sup>5</sup>

#### Footnotes and sources:

1 In addition to their regular duties, a Co-ordinating Magistrate allocates the work of the Magistrates Court, for which they are paid an additional \$2,000 per year.

2 *Fingleton v The Queen* [2005] HCA 34 (23 June 2005), ¶42. The Court ruling recognized that a magistrate's protection from criminal liability for administrative actions was a companion to the principle enunciated in Section 30 of the Code that, "a magistrate is not criminally responsible for anything done by the magistrate in the exercise of the magistrate's judicial functions, although the act done is in excess of the magistrate's judicial authority." *Id.* at ¶ 42.

3 Fingleton Given \$475,000 And Job Back On Bench, Rosemary Odgers and Louise Crossen, *The Courier-Mail*, Brisbane, September 2, 2005.

4 Payout denied to former One Nation leader, *The Australian*, October 27, 2005.

5 Fingleton Given \$475,000 And Job Back On Bench, *supra*.

#### Additional sources:

*R. v. Fingleton* [2003] QCA 266 (26 June 2003)  
Australia's Hanson Free From Jail, *BBC News*,  
November 6, 2003.

## 'Aussie Battler' Pauline Hanson Exonerated Of Fraud

By Serena Nicholls

Hanson also spoke out against Australia's promotion of multiculturalism and the government funding that was allocated for Ab-origines. In Hanson's maiden speech she stated that she "...did not believe that the colour of your skin determines whether you are disadvantaged," and that "...most Australians want our immigration policy radically reviewed and that of multiculturalism abolished. I believe that we are in danger of being swamped by Asians."<sup>1</sup> In accordance with this view, Hanson believed that the solution to Australia's 'race' issue was to return to a "white" Australia. These views were widely reported around Australia and the Asia Pacific region. This in turn placed immense pressure on Prime Minister Howard.

Initially, Howard argued strongly for Hanson's right to free speech, regardless of its perceived racial content. Howard received strong criticism over his actions, or lack thereof. Many Australians urged Howard to make a public statement explaining that Hanson's views did not represent mainstream Australia. This was necessary because many Australians were concerned that Hanson's views would negatively impact the perception of Australia and ultimately its tourism. When Howard refused to publicly refute Hanson's views there was a public uproar. Howard was repeatedly criticized by the media as being impotent and incompetent. Some even referred to Hanson as the tiger that Howard could not control.<sup>2</sup> Emotions ran high with many arguing that Howard's failure to refute Hanson's views was because he identified with her policies.

The media interest in Hanson began to slowly fade until April 1997, when she co-founded the One Nation Party. Hanson once again became prominent in newspaper headlines. The unexpected phenomenon was Australia's response to her. It seemed a significant segment of Queensland's electorate was prepared to identify with Hanson's policies. Fourteen months later, Hanson's One Nation Party took 11 out of the 88 seats in the state parliament.<sup>3</sup> Many suggested the main reason for this phenomenon was Hanson appealed to Australians who couldn't understand why their lives were so tough, while foreigners were perceived to have it easy.

Although Hanson and the One Nation Party had widespread support, many demonstrators

condemned her policies and labeled her a racist. Opposition was at its peak when Hanson successfully applied for an injunction to prevent a network from playing a song with lyrics describing her as a male homosexual, a prostitute and a member of the Ku Klux Klan. Regardless of the demonstrations, Hanson remained an influential political figure and a potential threat to the Howard government.

The views expressed by Hanson and her One Nation Party greatly impacted Australia's political arena. Some politicians begrudged Hanson for her immediate success in an arena that often takes years to accomplish. Therefore, what happened next was both satisfying for some people and reprehensible for others.

### The demise of Pauline Hanson

The Howard government publicly turned against Hanson after One Nation received almost one-quarter of the vote in the June 1998 Queensland election and won eleven seats in Legislative Assembly. In particular, Howard questioned the party's organizational practices and election finances. Hanson responded to these claims by threatening to mount a campaign to devastate the Howard government at the next election. Howard's right-hand-man, Tony Abbot proceeded to surreptitiously campaign against Hanson by soliciting others to commence litigation against One Nation.<sup>4</sup> This campaign to undermine Hanson enabled the Howard government to narrowly survive the federal election and remain in power. Hanson also lost her legislative seat. One Nation began to lose momentum and was no longer considered a political threat.

Then in 2001, One Nation dramatically resurfaced by winning nearly 10% of the seats in Queensland's state election. That was a blow to the Howard government, and sent the message that Hanson and One Nation were forces to be reckoned with that weren't going away.

Four months after that election, the Queensland police issued a summons against Hanson to face fraud charges. This assisted in the investigation against Hanson and resulted in her prosecution (One Nation co-founder David Ettridge was also prosecuted). The Department of Public Prosecutions alleged that Hanson falsely registered One Nation by submitting the names of 500 supporters instead of party members. On the 20th of August 2003, a jury found Hanson guilty. Hanson defiantly exclaimed, "Rubbish, I'm not guilty ... it's a joke."<sup>5</sup>

She was then sentenced to three years imprisonment without the possibility of parole. Judge Wolfe stated the sentence was appropriate because Hanson had undermined Aus-

### Hanson continued on page 19

## Hanson cont. from page 18

tralian politics: "The crimes you have committed affect the confidence of the people in the electorate process."<sup>6</sup> Hanson's co-defendant Ettridge was also found guilty and sentenced to three years imprisonment. Both defendants were immediately taken into custody and began serving their sentences.

### Hanson's exoneration

Hanson appealed her conviction. The main basis for her appeal was that the prosecution failed to establish beyond a reasonable doubt that the persons named on the registration were not members of the One Nation Party.<sup>7</sup> On the 6th of November 2003, the Court of Appeal took one day to find that Hanson had in fact submitted the names of 500 party members, and therefore there was no legal basis for



her conviction. Although the Court quashed Hanson's conviction, it emphasized that the process leading to her conviction was lawful. The court explained

Hanson's wrongful conviction was the result of her inexperienced legal counsel and the prosecutor's presentation of the case. The court also quashed Ettridge's conviction. Hanson and Ettridge were released after three months of wrongful imprisonment.

### Hanson denied compensation

In quashing Hanson's conviction the Court emphasized that she would be ineligible for ex gratia compensation for her three months of wrongful imprisonment.<sup>8</sup> This was based on the argument that "it should be understood that result [quashing Hanson's conviction] will not mean the process has to this point been unlawful. While the appellants' experience will in that event have been insupportably painful, they will have endured the consequence of adjudication through due process in accordance with what is compendiously termed the rule of law."<sup>9</sup> This was upheld when Hanson's quest for compensation was denied by Queensland's Attorney General in October 2005. This decision came after ex gratia compensation was granted to Australian Chief Magistrate Di Fingleton in September 2005, three months after her June 2003, conviction for threatening another magistrate was quashed. (See, "Magistrate Awarded \$348,000 And New Job After Conviction Tossed," in this issue of *Justice: Denied*.) Thus, Hanson did not receive any compensation after having

her rights violated, losing her freedom and having the door closed on her political career.

### Political motivation behind Hanson's false prosecution whitewashed

An investigation into Hanson's prosecution was conducted by the Crime and Misconduct Commission (CMC). In January 2004, the CMC issued a report which concluded that "...no misconduct or other impropriety has been shown to have been associated with the conduct of the litigation concerning the founders of the political party 'One Nation', Pauline Hanson and David Ettridge, or with the police investigations leading to their prosecution."<sup>10</sup> The CMC also concluded that there was no evidence that suggested improper influence on the proceedings or the involvement of Tony Abbott and the Howard government.

It is reasonable to surmise that both the Court of Appeals and the CMC white-washed the political motivation underlying Hanson's false prosecution. It seems more than coincidental that Hanson was convicted four months prior to the next federal election, in which she was standing as a candidate for the Senate and One Nation had significant public support. Obviously, Hanson would be prohibited from all political activity for the duration of her sentence and One Nation would flounder with its leader jailed. It likewise doesn't seem coincidental that the Howard government began to publicly campaign against Hanson and the One Nation Party immediately prior to her being investigated for fraud. The Howard government was concerned with the probable impact of One Nation at the next election. In particular, Howard was concerned that a loss of seats would result in a reduction of his party's power. All indications are that Howard united with other influential persons to eliminate Hanson because she was a political threat, and that the chronology of events leading to her demise was calculated.

While many Australians questioned the legality and length of Hanson's imprisonment, the Howard government supported it. The decision to pursue Hanson for what were in fact bogus fraud charges was successful in not only preventing her from running for the Senate in the next election, but it was also successful in forcing her to reassess her career goals. Shortly after Hanson was released from prison she vowed never to return to politics. Thus the elimination of a potent challenger to Howard's political power was accomplished without having to do so at the ballot box.

### Hanson's wrongful conviction sets a dangerous precedent

Regardless of how one views the economic

A year after her conviction was quashed and she was released from prison, Pauline Hanson was a finalist in Australia's *Dancing With The Stars* in late 2004.



and social policies of Pauline Hanson, she was a victim of political and legal hounding. The only thing she was guilty of was thinking the Howard government would idly stand back and allow their power to be weakened by her and the One Nation Party.

The misuse of the criminal law to secure Hanson's wrongful conviction sets an extremely dangerous precedent. The "vendetta" type dirty legal tactics used to eliminate Hanson serves as a warning to any political upstart. It is now known that a person or group with a vendetta can use their position to influence the investigation, prosecution and possible conviction of an innocent politician. Contrary to the judge's admonishment of Hanson at her sentencing, it is not Hanson who undermined the electoral process but the Howard government.

These political tactics are appalling. Australians, as well as voters in all democratic countries, deserve the right to go to the ballot polls with the confidence that there has been no extra-legal interference with their choice of candidates. This is a basic democratic right that should not be violated.

### Endnotes and Sources:

- 1 McNamara, Lawrence (1998) 'The Things You Need: Racial Hatred, Pauline Hanson and the Limits of the Law' 2 Southern Cross University Law Review 92.
- 2 Probyn, Fiona (1999) 'That Woman', Pauline Hanson and Cultural Crisis' 14(29) Australian Feminist Studies 161.
- 3 McNamara, Lawrence (1998) 'The Things You Need: Racial Hatred, Pauline Hanson and the Limits of the Law' 2 Southern Cross University Law Review 92.
- 4 Head, Michael (2003) 'The Jailing of Pauline Hanson: A Victory for Democracy?' 28(6) Alternative Law Journal 264.
- 5 Hanson and Ettridge jailed for three years, *Sydney Morning Herald*, August 20, 2003.
- 6 *R v Ettridge and Hanson*, District Court of Queensland, 20 August 2003.
- 7 *R v Hanson; R v Ettridge* [2003] QCA 488.
- 8 Queensland doesn't have a wrongful conviction compensation statute, so the government must either grant an exonerated person an ex gratia payment, which is a payment made without the state recognizing any liability or legal obligation, or the person must file a common law suit for damages.
- 9 *R v Hanson; R v Ettridge* [2003] QCA 488. (De Jersey CJ).
- 10 Crime and Misconduct Commission (2004) 'CMC Report into Hanson-Ettridge Prosecution', Media Release, 23 January 2004.



# Malaysia Offers Compensation For Wrongful Conviction

By JD Staff

When immigration authorities raided his workplace in Malaysia on March 5, 2005, Nepalese Mangal Bahadur Gurung was arrested when he was only able to produce a photocopy of his passport as proof he was in the country legally.

After 18 days in custody, Gurung pled guilty in the Petaling Jaya magistrate's court to entering Malaysia illegally. The 31-year-old father of two was sentenced to ten months imprisonment and a canning.

After the canning had been carried out, a lawyer who had been retained to work on Gurung behalf presented proof to the court that he had a valid passport and work permit. The lawyer explained that Gurung had not been provided with an interpreter, so at the time he acknowledged committing the offense he didn't know what he was admitting to having done. On May 12, 2005, Judge Zaharah agreed a miscarriage of justice had taken place. He set aside Gurung's conviction and ordered his immediate release. Shortly after his release, Gurung left to return to his home and family in Nepal, where he earns money as a trekking guide.

Responding to public criticism of its actions, the Immigration Department denied it had erred. Officials blamed Gurung for his wrongful conviction, asserting it was caused when he lied in admitting his guilt. That claim was a stretch because he hadn't been provided with an interpreter. Immigration officials also blamed Gurung for failing to produce his documents at the time his workplace was raided. That argument was also disingenuous, because at the time of Gurung's arrest his work permit and passport were being held by his employer. His employer took possession of the documents after Gurung filed a complaint with the government's Labor Department in 2004 for non-payment of his wages.

Before Gurung had returned to Nepal he filed an application for compensation. In February 2006 the Malaysian government announced that it had decided to award Gurung compensation of \$2,246. <sup>1</sup> Although the amount was small, it was unprecedented. Gurung's case was the first time Malaysia has agreed to compensate a wrongly convicted person.

A human rights advocate in Malaysia, Irene Fernandez, decried the offer as "a paltry sum." She described it as insufficient considering what Gurung endured. He was not only imprisoned in a foreign country, but she noted "He was also caned, which can be so emotionally traumatic that it can take years to recover. To make matters worse, he was innocent." <sup>2</sup> Fernandez also said of any award, "It should be big enough as we also heard that he is trying to get medical treat-

ment there [in Nepal]. Since medical treatment is not cheap, the compensation should be sufficient to cover all that is necessary." <sup>3</sup>

When Gurung was notified in Nepal of Malaysia's offer, his initial reaction was to reject it as insufficient. Gurung spoke through a friend identified as George, who said, "He had sought compensation before leaving Malaysia but did not expect 'so little'. The scar is still fresh and every time he recalled how he tried to fight for his innocence while in custody. It pained him to realize that nobody cared. The money he earns as a guide is not much, but at least he is home and among people he can trust." <sup>4</sup>

Although Gurung was undecided about accepting the compensation offer, his friend George emphasized, "this is not just about money but his dignity." <sup>5</sup>

It is unknown if the Malaysian government will revise its offer if it is rejected by Gurung. Since it is the first time Malaysia has offered a wrongly convicted person compensation, government officials may think they are doing Gurung a favor by offering any amount.

Endnotes and sources:

1 RM 8,340 for Mangal, *The Malay Mail*, February 26, 2006. At the exchange rate on February 27, 2006, Malaysian RM 8,340 is the equivalent of \$2,246.

2 It's too little, says Tenaganita, *The Malay Mail*, February 27, 2006.

3 *Id.*

4 'Paltry' Compensation For Mangal, *The Malay Mail*, February 27, 2006.

5 *Id.*



# Man Innocent Of Rape Sues His Accuser For Defamation

By JD Staff

Chris Matthew was arrested on September 3, 2005, for allegedly committing a rape in Charlottesville, Virginia. A former University of Virginia law student had identified Matthew as the man who had sexually assaulted her.

Five days later a DNA test excluded Matthews as the source of semen recovered from the woman. The rape charge was dropped against Matthew and he was released from custody.

Another man, John Henry Agee, was later arrested for allegedly raping the woman.

In December 2005, Matthew filed an \$850,000 defamation suit against the woman

who had falsely accused him, which caused his arrest and public identification as a rapist.

Charlottesville DA Dave Chapman responded to the lawsuit by acknowledging Matthew's arrest was a "tragic mistake." However, he denounced the lawsuit, claiming "it will have a chilling effect on the willingness of women to report sexual assaults." <sup>1</sup>

Several Virginia lawmakers responded to Matthew's suit by sponsoring a bill in Virginia's General Assembly that would immunize from civil liability a witness in a criminal case who testifies or makes a criminal identification "with the good faith belief in its veracity." <sup>2</sup>

Matthew's lawyer, Deborah Wyatt, responded to the proposed immunization bill by saying that Matthew had a legitimate cause of action because there was reason to believe the woman was "negligent in accusing Matthew." Wyatt also said she thought that the civil immunization bill was racially motivated. She was quoted in the Cavalier

Daily, "If instead of being a pretty, blonde, University of Virginia type girl who had accused a black male barber and traumatized him, this had been a poor black woman who'd falsely accused a white captain of the football team and traumatized him, would [the Delegates] have been sponsoring the same bill?" <sup>3</sup>

Although Virginia doesn't have a wrongful conviction statute, if it did it wouldn't have applied to Matthew because he was released prior to being convicted. There is no apparent wrongdoing by the police, who acted on the basis of the woman's false identification. So she is Matthew's sole source of redress for being falsely identified publicly as a rapist.

Endnotes and sources:

1 Better or Worse - The week in review, *The Hook*, December 22, 2005.

2 Bill Aims To Limit Liability of Witnesses, Christina Tkacik, *Cavalier Daily*, University of Virginia, February 2, 2006.

3 *Id.*



A cast of four people were at the center of the wrongful conviction of 38 people in Tulia, Texas beginning in July 1999 on trumped up drug charges. The sheer number of wrongly convicted people in Tulia resulted in national press coverage that ultimately contributed to Governor Rick Perry's mass pardoning of 35 of those people in August 2003. The \$6,000,000 settlement in 2004 of federal civil rights lawsuits was distributed to the 46 people falsely arrested due to the drug investigation.

One of the cast members was Swisher County sheriff deputy Tom Coleman. During an 18 month undercover drug investigation he reported making what were in fact non-existent drug buys from 46 Tulia area residents. Coleman was sentenced to 10 years probation after being convicted in January 2005 of one count of aggravated perjury for lying during a March 2003 evidentiary hearing in Tulia. That hearing was held by order of the Texas Court of Criminal Appeals to determine if the drug convictions of four of the Tulia defendants was supported by any evidence other than Coleman's word. Disclosures during that hearing about Coleman's dishonesty, and thus the insubstantiality of the Tulia convictions, contributed to Governor Perry's pardon of the 35 defendants five months later.

Another cast member was Swisher County Sheriff Larry Stewart. He accepted Coleman's claims about the drug deals without any corroboration – no other officer witnessed any drug buys, and there were no audio or video recordings. Stewart demonstrated blind absolute faith in what Coleman told him, in spite of the fact that during Coleman's investigation he was indicted for theft of services totaling \$6,700 during the time he had previously been employed as a Cochran County, Texas sheriff deputy. Even though Stewart suspended the drug investigation after he arrested Coleman on the theft warrant, he reinstated Coleman after the stolen money was repaid. Stewart has not suffered lasting negative public consequences from his direct and intimate involvement in the wrongful conviction of 38 people.

Still another cast member was Swisher County District Judge Edward Self, who made evidentiary rulings that allowed information about Coleman's shady and violent past, and his criminal indictment to be concealed from the public (and the defendant's jurors). Judge Self's rulings were indispensable to the prosecution, because the conviction of the Tulia defendants depended solely on Coleman's credibility. After ensuring the defendant's were convicted, Judge Self then handed down unconscionably long sentences of up to 99 years (i.e., life) in prison. Judge Self has not

## “Tulia Travesty” Prosecutor Terry McEachern’s Conduct Swept Under The Rug By Texas State Bar

By Hans Sherrer

suffered lasting negative public consequences from his direct and intimate involvement in the wrongful conviction of the Tulia defendants.

The final key cast member was Swisher County Prosecutor Terry McEachern. He approved the arrest of the Tulia defendants, led their prosecution, and sought stiff sentences against those convicted. After an investigation by the Texas Bar Association's Chief Disciplinary Counsel's Office (CDCO), a wide ranging complaint alleging serious ethical violations was filed against McEachern in May 2004. (See, Tulia Prosecutor Sued By Texas State Bar, *Justice:Denied*, Issue 25, Summer 2004, p. 6.) The public was made aware of the complaint because the CDCO issued a press release announcing its filing.

McEachern contested the allegations. They were so serious that he faced the possibility of permanent disbarment if he was found to have committed them. After maneuvering by McEachern and the Bar, an evidentiary hearing was held in the 242nd District Court of Hale County. It was found after that hearing that:

McEachern made a false statement of material fact or law to a tribunal. He failed to disclose a fact to a tribunal when disclosure was necessary to avoid assisting a criminal or fraudulent act. McEachern offered or used evidence that he knew to be false and falsified evidence or counseled or assisted a witness to testify falsely. He failed to refrain from prosecuting or threatening to prosecute a charge that he knew was not supported by probable cause or make timely disclosure to the defense of all evidence or information known to him that tended to negate the guilt of the accused or mitigate the offense. In connection with sentencing, he failed to disclose to the defense and to the tribunal all unprivileged mitigating information known to him. McEachern engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation and engaged in conduct constituting obstruction of justice.

McEachern's conduct was found to have violated Rules 3.03(a)(1), (a)(2), and (a)(5), 3.04(b), 3.09(a) and (d), and 8.04(a)(3) and (a)(4).<sup>1</sup>

Pretty serious findings. Many of them involve actions that go far beyond ethical lapses and

enter the realm of serious felony criminal acts. Although all the findings are damning, if they are all disregarded except for thirteen words – “assisting a criminal or fraudulent act” and “engaged in conduct constituting obstruction of justice” – they would still seem sufficient to indicate that McEachern might not just be headed for lifetime disbarment as a lawyer, but that he could well be headed for a healthy stretch in a federal or Texas state prison.

When the State Bar announced McEachern's punishment it didn't issue a press release like when the ethical complaint was filed. Instead it was quietly published amongst a series of notices in the September 2005 issue of the *Texas Bar Journal*. The punishment the Texas Bar negotiated with McEachern is: “A two-year, fully probated suspension effective June 15, 2005.” He was also “ordered to pay \$6,225 in attorney's fees.”<sup>2</sup>

When requested to provide clarification of what a “fully probated suspension” means, the Chief Disciplinary Counsel's Office explained it allows McEachern to practice law with no restrictions during his probationary period. However, if an ethics complaint is filed against McEachern during the term of his probation and he is found to have committed the violation, he could be ordered to serve a period of “active suspension” of his license to practice law.<sup>3</sup>

In the same issue of the *Texas Bar Journal* that reported the resolution of the ethical complaints against McEachern, another lawyer was reported as being given a more serious punishment. That lawyer, William F. Estes, was given a “two-year, partially probated suspension ... with the first month actively served ...”<sup>4</sup> What did that lawyer do to warrant being barred from practicing law for one month when McEachern received no suspension? Estes employed a legal assistant with whom he shared the legal fees paid by clients that the assistant had solicited. The Bar said, “In sharing legal fees with his legal assistant, Estes financed the commission of barratry.”<sup>5</sup>

So the Texas State Bar has clarified that it considers paying someone a commission for work that person has performed is more serious than a lawyer deliberately engaging in fraudulent, if not outright criminal actions that resulted in the wrongful conviction of 38 people. The Texas State Bar has taken that position in spite of having publicly recognized that McEachern assisted “a criminal or fraudulent act” and “engaged in conduct constituting obstruction of justice.” McEachern's conduct goes far beyond merely being an ethical lapse,

**McEachern cont. on page 22**

# Louisiana Makes First Wrongful Conviction Award of \$150k To Gene Bibbins

By JD Staff

On July 12, 2005, Louisiana became the 20th state in the U.S. to enact a wrongful conviction compensation statute. That law H.B.663 (Innocence Compensation Fund), provides a maximum award of \$15,000 per year for up to 10 years imprisonment to a person whose conviction has been reversed or vacated, and who can prove by "clear and convincing" evidence that he or she is "factually innocent" of the crime. The law also provides for the payment of training, education tuition, and counseling. Prior to passage of the law Louisiana would provide \$10 and a bus ticket "home" to an exonerated person as they left a state prison.

In February 2006 Gene Bibbins became the first person in Louisiana awarded compen-

sation under the new law. State District Judge Timothy Kelly ruled that the DNA evidence excluding him as the assailant of the woman he had been convicted of raping met the law's requirement that he prove his factual innocence by clear and convincing evidence.

Bibbins' innocence of raping a 13-year-old girl in 1986 had been established when DNA testing unavailable at the time of his 1987 trial excluded him as her assailant. Bibbins was released on \$5,000 bond in December 2002. His conviction was reversed and his sentence was vacated on March 7, 2003.

The girl had testified at Bibbins' trial that he was the man who crawled through her bedroom window and held a knife to her throat while raping her. Bibbins was found to be in possession of a radio stolen from the girl's room. Based on the girl's eyewitness testimony, the jury didn't believe his claim that he found the radio discarded on the street. The exclusionary DNA test indirectly established that he had been as truthful

about finding the radio as he had been in denying raping the girl.

Since Bibbins had been wrongly imprisoned for 16 years, Judge Kelley ruled he was entitled to the statutory maximum of \$150,000. The judge also said Bibbins should receive the educational benefits and job training provided for in the statute. However, he couldn't order it because the statute's language is vague as to whether those benefits are to be provided in addition to the monetary award, or if they are to be paid by deducting their cost from the \$150,000.

A catch to Bibbins' collection of the award is that there is no money in the Innocence Compensation Fund. Before he can be paid, state legislators will have to appropriate money for the compensation fund.

Sources:

Judge Rules Innocent Man Due Money For 17 Years in Prison, *The Advocate*, Baton Rouge, February 7, 2006.

DNA Tests Free Convicted Rapist, AP Story, *CBS News*, December 6, 2002.



In March 1986 Steven Avery was convicted of raping a woman also severely beaten on July 29, 1985, on a Lake Michigan beach in Manitowoc County, Wisconsin.

To obtain Avery's conviction, the prosecution depended on the jury's acceptance of the believability of two key witnesses. One was a crime lab analyst, who after a microscopic examination of a hair recovered from

## Steven Avery Settles Wrongful Imprisonment Suit For \$400k

By JD Staff

the crime scene, determined it was "consistent" with Avery's hair. The other was the lone eyewitness identifying Avery as the woman's assailant.

Although the prosecution had the two key witnesses, the jury couldn't have decided Avery was guilty beyond a reasonable doubt unless it disbelieved each one of his 16 alibi witnesses. Each of those witnesses placed him over 40 miles away in Green Bay throughout the day of the attack. Those witnesses included a cement contractor, friends, family members, and even clerks at a Shopko store where Avery was buying paint at the approximate time of the attack. He was accompanied at the Shopko by his wife and five children, and the sale was corroborated with a receipt.

Avery's conviction was affirmed by the state appeals courts.

In April 2002, after Avery had languished in prison for almost two decades, he relied on a post-conviction DNA testing statute to obtain a court order for the DNA testing of a pubic hair recovered from the victim immediately after the attack. Seventeen months later, on September 10, 2003, the final test results were released: Avery was excluded as a

source of the hair. Later that day the judge granted the Manitowoc County District Attorney's motion to dismiss the charges. Avery was released the next day after 18 years imprisonment. While he had been imprisoned his wife divorced him and his five children had all grown to adulthood.

The Wisconsin Innocence Project at the University of Wisconsin Law School provided key assistance to Avery in having the exonerating DNA tests conducted.

The same DNA tests that excluded Avery indicated that Gregory Allen, imprisoned for a 1995 sexual assault, was the woman's actual assailant. It later came to light that for two weeks prior to the woman's July 1985 assault the Manitowoc police had been suspicious enough of Allen to have tailed him.

After his release Avery filed a \$36 million federal civil rights lawsuit naming as defendants: Manitowoc County, former sheriff Tom Kocourek and former district attorney Denis Vogel.

In February 2006, Avery and the defendant's agreed to settle the suit for \$400,000. The settlement was to be paid by the county's insurance carriers. Avery was designated to receive 60%, \$240,000, with the remaining going to pay attorney fees and expenses.

Source:

Avery Settles Suit Over Jailing, Tom Kertscher, *Milwaukee Journal Sentinel*, February 14, 2006.



### McEachern cont. from page 21

but if honestly investigated by state or federal law enforcement authorities could have grave criminal consequences for him.

McEachern lost re-election in March 2004 after 14 years as the district attorney for Swisher, Hale and Castro counties. He is now in private practice in Plainview, Texas.

The Bar's action against McEachern resolves the legal actions thus far initiated as fall-out from the Tulia cases, unless Coleman's appeal of his perjury conviction is successful,

Endnotes and source:

1 Disciplinary Actions, *Texas Bar Journal*, September 2005, 758-9.

2 *Id.* at 758.

3 Telephone conversation between Hans Sherrer and a spokesperson with the Chief Disciplinary Counsel's Office on March 8, 2006.

4 Disciplinary Actions, *supra.* at 758.

5 *Id.* at 758.

For background information see, Travesty in Tulia, Texas, *Justice Denied*, Issue 23, Winter 2004, page 3, and sources cited therein.



Prime-time television programs have one over-riding purpose – to garner high ratings in the target demographic audience of the program’s advertisers. Cutting through the fog of misplaced romantic notions, television programs are the filler intended to keep people entertained between the commercials. Why? Simple. Advertisers pay the bills.

In the fall of 2005 ABC began promoting *In Justice*, a new ABC series about a California based innocence project aiding wrongly convicted people.

Certainly sounded good. If it measured up to the exceptional television programs of the past that either directly or indirectly dealt with wrongly accused or convicted people, then it would be a treat. Those programs include *Perry Mason (1957-66)*, *The Defenders (1961-65)*, *Judd for the Defense (1967-1969)* and of course, *The Fugitive (1963-67)*. A common feature of those programs was a gritty realism.

*In Justice* premiered on January 1, 2006. Alas, the hope was soon dashed that it could be mentioned in the same breath with the just mentioned programs from the 1950s and 60s. *In Justice’s* producers have chosen to present a candy-coated view of the process by which untold numbers of innocent people are ensnared in a criminal prosecution and convicted, with only a few of them successfully winning their release. There is no grittiness in sight and very little realism. There is, however, an abundance of attractive shapely women and buff guys acting out absurd scripts.

The program’s distortions are legion.

Perhaps most disturbing is *In Justice* makes the process of successfully challenging a wrongful conviction seem as straightforward as ordering a pizza by phone. It’s as simple as 1-2-3! Find a witness to recant their perjurious testimony or find exclusionary forensic evidence, file a motion for a new trial, and abracadabra the innocent person is released lickety-split. All in a sixty-minute program, minus time for promos and advertisements.

Results like that is news to all the innocent people who toil for years putting a case together so they have a fighting chance to get back into court. A lay viewer of *In Justice* will be oblivious about the grim truth that in spite of the best efforts by supporters on the outside, only a small percentage of innocent people are successful at winning a new trial or dismissal of their charges. The overwhelming majority languish in prison with little hope.

*In Justice* also downplays the misconduct of police investigators or the inadequacy of their

## *In Justice*

ABC television network series.

Review by Hans Sherrer

initial investigation. In one episode it even had the police promptly re-opening their investigation of a case after they were provided with evidence the prosecution’s star witness didn’t tell them the truth. That storyline would be OK if *In Justice* was a black comedy or spoof, but it is presented as a drama.

Compounding the distortions about the role of police in a wrongful conviction, is that prosecutors are portrayed as valiant crusaders for truth. A prosecutor in one episode even risked her career by providing internal information to aid the innocence project’s lead investigator who was looking into the innocence claim of a convicted cop killer! Do you laugh at such a plot or do you shake your head in disbelief? Or both?

One scene is emblematic of *In Justice’s* disconnect from reality. The innocence project’s lead lawyer is tossed in jail for contempt after arguing too strenuously with the judge that a new trial should be granted to his client. (That is in itself inaccurate by projecting the false idea that a defense lawyer today would fight for his or her client by deliberately baiting a judge to the degree necessary to get tossed in jail for contempt. It is not realistic to think a lawyer will consciously risk his or her professional standing to help a client, especially a pro-bono or reduced rate client.) Then as the jailed lawyer is giving legal lessons to his fellow prisoners in an airy, sunlight filled, immaculately clean holding cell, a deputy brings a tray of coffee drinks the lawyer had ordered for everyone – a latte for this person, a mocha for that one, specialty tea for another, etc. What is wrong with that picture? To most viewers nothing at all. Since most Americans have not been arrested it fits right in with their idea that “criminals” are coddled. In the real world, however, holding cells are not airy and pleasant. Nor do they offer specialty coffee service by officers as eager to please as a Starbucks barista.

In contrast with that portrayal, holding cells are often nasty places occupied by people arrested for drunkenness, or who are coming down from a drug such as meth or heroin, or who are in an unpleasant mood after being arrested for a crime against a person or property. Instead of being Officer Friendly — the officers on duty are likely to have a no nonsense attitude. Reality is that one can expect a holding cell to be a thoroughly unpleasant and disheartening place. So *In Justice* couldn’t have gotten the jailed

lawyer scene more wrong if its producers had set out to deliberately misrepresent the truth.

*In Justice’s* inaccuracies are not trivial because the vast majority of its audience is unaware that what they are seeing is a television fantasy – not reality. So those people are being indoctrinated into thinking the legal system is like a self-righting ship: just inform the police, prosecutors and judge involved in a case after they respectively, investigated, prosecuted and presided over the conviction and sentencing of an innocent person, and they will spring into action to correct the “in justice.” Yeah right. Maybe in a parallel universe but not in this one.

Police, prosecutors and judges don’t initiate aiding a person claiming to be innocent, because if its true that means *they were wrong*. Big time. Experience has shown those within the legal system are loath to acknowledge responsibility for contributing to a wrongful conviction – even when it is apparent to open-minded people outside the system.

If one looks at the glass as half-full and takes the perspective that all publicity about a cause is good as long as the names get spelled right, then *In Justice* has been positive in promoting awareness of wrongful convictions. However, the half-empty view is that this country’s law enforcement personnel (including police, prosecutors and judges) involved in causing wrongful convictions breathed a sigh of relief when they learned that *In Justice* presents a generally positive portrait of the legal system. A view that is consistent with the one presented by *CSI*, *Law and Order*, and other shows of their ilk.

The probability that any television program will make it past one, or possibly two seasons is slim. Given those odds, the producers of *In Justice* don’t have anything to lose by going for broke and portraying the legal system as it really is. Instead they are presenting an *Alice in Wonderland* view consistent with the fantasy of how middle and upper America imagines the system functions. Yet they might find that they could keep advertisers satisfied by tapping into an audience hungry for honesty instead of another mind-numbing cops and courtroom TV program. By displaying some guts and imagination, *In Justice’s* producers might stumble into making a program that people will fondly remember forty years from now, instead of one that will only be known as the obscure answer to a trivia question.

Here are some off-the-cuff ideas for *In Justice’s* producers to consider. Reduce the saccharin level of the program by ratcheting up the factual accuracy of the scripts and relying on solid acting and not the eye candy

***In Justice* continued on page 24**

**M**y name is Benjamin G. Kent. I am 26-years-old. The following events occurred in late 1991 and early 1992 when I was 12-years-old.

## The Anatomy Of A Sex Conviction Frame-Up The Alleged "Victim" Exposes The Lie

By Benjamin G. Kent

In December 1991, Bill L.\* was a Petty Officer Third Class assigned to Base Security at New York's Staten Island Naval Station. On December 17, 1991, Bill reported that one of his supervising officers was engaging in adultery, an imprisonable offense under the Uniform Code of Military Justice. That officer was my mother's boyfriend.

### The planning of a sex-crime frame-up

My dad was in the Navy and we lived in an apartment on the Staten Island base. Bill was in his early 20s, and he also lived on the base. My brother Joshua is a year younger than me, and we were not just friends with Bill, but we both thought of him as a big brother.

On the night of December 17, my mom and her boyfriend, William, told me that Bill had

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### *In Justice* cont. from page 23

quotient of the actors. Another suggestion is to stop making the police, prosecutors and judges involved in a wrongful conviction look like decent, well-meaning folk. A wrongful conviction isn't an "opps we goofed" sort of mistake. It is a predictable consequence of the interaction of the police investigators, prosecutors and judge(s) who had a role in producing the erroneous conviction. Any one of those people could have stopped or at least impeded the injustice by saying No!, and either refused to cooperate or actually blown the whistle to the defense. Still another suggestion is to have episodes span two, three or even four shows in order to portray the grit of a wrongful conviction investigation, including the importance of involvement by family members, friends, journalists, and even strangers, to make an exoneration happen. Another avenue that could be pursued is to build on the program's opening sequence that portrays the prosecution's erroneous theory of the crime relied on by the jury that convicted the innocent person(s). How did the prosecution get it so wrong? What decisions by police investigators, prosecutors and the trial judge contributed to the creation of the fantasy crime scenario presented to the jury.

One thing is for sure. There is no shortage of ideas that could set *In Justice* apart and make it distinctive. *In Justice's* premise is promising. However, the open question is how long it can survive in its current format that lacks grit and guts, before it is relegated to the graveyard of canceled shows that had unfulfilled promise.



reported him. They also told me that I wouldn't be able to see Bill after he left the next day to spend the Christmas holiday at his parents home. My brother and I were also told by my mom and her boyfriend that when my parent's divorce was final we could be put in a foster home if my mom didn't get custody, since my dad was out to sea most of the time. The next morning (the 18th) my mom, her boyfriend and his friend, a Naval Investigative Service (NIS) agent, got together and came up with a "story" that would discredit Bill's allegation that William was committing adultery with my mom. I was kept home from my last day of school before the Christmas holiday recess so that we could go over what I was to say as my part of the story.

Although I didn't think of it in those terms at the time, what my mom, her boyfriend and his Navy friends did was cook-up a conspiracy to use the military's court martial system to frame my friend Bill for sex crimes against me that never happened.

The scheme was conceived to start with my mom claiming to get an anonymous phone call from a woman telling her that she overheard me telling another boy that Bill sleeps and touches me sexually. My mom would then notify William, since he was an officer with base security. He would then notify his two friends, the base security chief and the NIS agent, who would initiate and be in charge of the investigation. I was told that my role was to deny the accusation, and then after being questioned I would cry and say that it happened. I would also need to have a medical examination (which turned out to be horrible), be interviewed by the New York State Victims Service Agency, and then testify in court about what I had been instructed to say.

### The frame-up in action

When I came in from playing outside on the 18th, I was confronted and questioned by William, the base security chief, and the NIS agent. They asked me if I told a friend that I was sexually touched by Bill. I told the officers "no." They then went into an adjoining room for a few minutes, and resumed questioning me when they returned. I kept on saying that nothing happened. The security chief and NIS agent would then tell me that something did happen and say things such as, "well didn't Bill do something like this" and they would show me by putting their hand on their leg and moving it towards their private area and rubbing their

privates. I kept on saying "no" but they kept on badgering me and insisting that it did happen. After a while I just said "yes" to get them off my back, and as had been planned for me to say. But they didn't leave. They continued their questioning by asking if Bill ever slept in my bed. I said "no." Disregarding my denials that I had ever been in bed with Bill, they asked if he ever touched me or if anything ever happened while I was in bed with him. Once again I said "no," but they kept on saying things like "did this happen," "did that happen," "did Bill ever do this while in bed with you," and so on. I answered "no" to all their questions. The officers left the room again for a few minutes. After they returned they asked me questions such as, "did Bill put his penis in your anus," "was the object against your back wet," and "did you notice if Bill had an erection?" I answered "no" to all the questions, but they kept on pressuring me and giving me examples. As had been planned, I eventually agreed to their example that Bill told me to get in bed with only my underwear on, that he did have an erection, and that I saw a wet spot on his underwear when I got out of bed. Next I was asked if Bill ever touched my privates while at his Bachelors Enlisted Quarters (BEQ) room, and just as before, I told them "no." I finally agreed with them, as I had been instructed earlier to do, that Bill touched me in his BEQ room and while driving in a car.

### Counselors told about the frame-up

That night I met with two counselors from the Victims Services Agency. The interview with the counselors was "confidential," or so I thought. When they asked me about the abuse, I told them the truth that nothing happened. When they asked me why I told base security that something happened, I told them that my mom told me to falsely accuse Bill and that her boyfriend and his Naval buddies were in on it.

After I had met with the counselors I never heard from or saw them again. This kind of confused me because I was hoping they could help Bill by testifying in court about what I told them. But they didn't testify. I later found out that what I told the counselors wasn't confidential. They weren't called as witnesses because their testimony would have exposed that Bill was being falsely prosecuted to cover-up William's adultery with my mom.

### Military prosecutor in on the frame-up

This brings me up to when I was interrogated by two military lawyers, the prosecutor and Bill's defense counsel. I say interrogated because the lawyers were more demanding than

### Frame-up cont. on page 25

## Frame-up cont. from page 24

the Navy police investigators. I told the lawyers that nothing happened and that I just said “yes” to the investigator’s questions to get them off my back. They told me they had to go on what was in the investigation report, and so they continued to badger me with questions. Although I didn’t tell the lawyers about Bill’s frame-up, it appeared they knew about it and its details. Which they would have learned from the counselors, who were not called upon to testify at Bill’s court martial.

I knew that since the accusation against Bill was a lie, that I would also have to lie to the lawyers to end their interrogation. Both military lawyers intimidated me by telling me what to say in court. They also told me what could happen to me, my brother, and my mom and dad if I didn’t testify against Bill. The whole situation started to seem so unreal that I’m not sure knew what was actually happening or what I was saying. But in the end I agreed to what the lawyers told me to say. I was scared stiff that if I didn’t lie about Bill, my brother and I would be taken from our parents and put in a home, and that the military might do something to my dad. The lawyers convinced me that nothing would happen to anyone in our family if I told the fictitious story that my mom, her boyfriend, the lawyers, and the other people wanted me to tell.

### A court martial completed the frame-up

One charge of violating UCMJ Article 134 was filed against Bill. He was alleged to have taken “indecent liberties with a male under 16 years of age.” The charge included two specifications, with one alleging the abuse occurred at my base apartment, and the second alleging it also occurred at Bill’s room (BEQ quarters).

Bill’s court martial took place at the Philadelphia Naval Shipyard on April 27 and 28, 1992. I committed perjury by testifying that he fondled my private parts and rubbed my crotch area. I also testified that my brother was present during the times that Bill abused me, and my brother testified that he didn’t see anything. No one else testified they saw Bill abuse me. Since there was no physical, forensic or expert testimony that I had experienced any abuse, my testimony was the sole evidence against Bill.

The lone military judge who presided over Bill’s court martial relied on my testimony to find him guilty of alleged abuse that occurred at my family’s apartment. However, in order to arrive at a guilty verdict the judge had to change the wording of material allegations in the charge to fit my testimony. The judge acquitted Bill of the allegation abuse had occurred at his BEQ room.

Bill was sentenced to 14 months confinement, reduction in rate to E-1 (from E-4), forfeiture of all pay and allowances, and discharged from the United States Navy with a Bad Conduct Discharge. Bill was released from a military prison in April 1993. Although he was convicted by a military court, Bill still has a felony and FBI record as a pedophile.

### My quest to help undo the consequences of the frame-up

Shortly after Bill’s conviction I wrote him and apologized to him and his family for lying at his trial and causing him to be sent to prison. I didn’t receive a response. Although I still hadn’t heard from Bill, a little more than two years after his conviction I wrote the Commanding Office of the Navy Defense Attorney Division in Washington D.C. I was 14-years-old, and in my letter dated July 15, 1994 I wrote in part:

My name is Ben Kent ... I am writing in hopes that what I did on April 27 and 28, 1992, in Philadelphia can be fixed.

Back on April 27 and 28, 1992, I lied about my Friend Bill ... Everything that I said was a lie and told to me by my Mom to say. I knew this was wrong at the time but my Mom warned me that if I did not say this that the divorce judge would put me and my brother in foster homes since my Dad was at sea most of the time, and since she was having an affair... I did not say everything that my mother told me to say hoping that Bill’s lawyers would figure out the truth since I kept changing my story. ... My brother Joshua was always with Bill and me and what he said is true, nothing was seen because it did not happen. I did a lot of things on purpose hoping that Bill wouldn’t be found guilty. When I did find out that Bill was found guilty I felt real bad and since then have been trying to find a way to tell someone. ... I called a friend back in New York and she got me this address. ... please forgive me and please correct my mistake. I can’t correct it but you can.

... Bill was a big brother and friend to me and my brother and we both still think of him as one. Sir I hope that you help Bill out and correct the wrong things that not only I did but the military did also.

I would like to thank you for listening to me and please accept my apology and please help Bill ...

Very Sorry,  
Ben Kent

In December 2004, after not having contact with each other for 13 years, I recognized Bill in an AOL Star Wars chat room. I explained why I testified against him, and we resumed our friendship. Based on the new information I provided about the immense pressure put on me by my mom, her boyfriend, the Navy police and the military lawyers to lie that he molested me, Bill filed an application with the Board of Corrections of Naval Records to correct the error and injustice of his conviction. [JD Note: This is the equivalent in civilian court of filing a motion to set aside a conviction.] Also included in his application are two pieces of exculpatory evidence that weren’t introduced into evidence at his General Court Martial. One was a Chemistry and Serology Report and Memorandum that showed no evidence of abuse, and an interview with a Staten Island University Hospital physician who examined me and found no signs of abuse.

I wrote and submitted a letter dated September 28, 2005, in support of Bill’s application for a correction of his military record. That letter states in part:

Dear Members of the Board for Correction of Naval Records:

The enclosure is a letter I sent to the Commanding Officer, Navy Defense Attorney Division on July 15, 1994, while my friends’ case was still under appellate review. I know that his lawyer received my first letter because in an April 21, 1995 letter to Bill his lawyer references my letter. So the military had a letter that was understandably suspicious but never checked it out.

Yes, I can understand that the courts look at recanted testimony with suspicion but when more than one person can corroborate that the testimony was coerced and forced, the court members should be reasonably well satisfied that the testimony given at the court-martial was false and that he was denied his Due Process and is innocent.

... As I see it, if my first letter was investigated we wouldn’t be here right now. But with the Navy viewing my letter with extreme suspicion and never checking on its authentication, they ultimately kept an innocent man in prison and ignored the fact that my testimony, as the “victim”, was coerced by the three Navy Police officers, an NIS Agent and two Navy Lawyers, all whom instructed, told, and scared me ... into saying things and testifying to things that were lies.

## Frame-up cont. on page 26

## Frame-up cont. from page 25

No matter where they got their ideas or if it was on their own, it was a lie.

With this and with all the other new evidence I pray and hope that the board members realize that he is innocent and grant his requests.

....  
Sincerely,  
Benjamin G. Kent

Current events are showing that anyone can be convicted of molesting a child many years after the alleged molestation occurred, even if the alleged "victim" didn't say anything to anyone for 20 years. So it is only right to exonerate an innocent person such as Bill, who was wrongly convicted years ago due to my admittedly false testimony and the prosecutors misconduct of eliciting false testimony from me (the alleged victim) and condoning perjury by other prosecution witnesses. The prosecutor was given considerable aid by the gross ineffective assistance of Bill's defense counsel, who worked hand in glove with the prosecutor. There is also the special circumstance in Bill's case that I've been telling people since before his court martial 14 years ago that his alleged abuse of me is a lie, and my letter to Naval officials 12 years ago when I was 14 was ignored. I hope that the person or persons with the power to correct Bill's conviction will be mature, and say, "hey, we made a mistake," so both Bill and I can have closure to this horrifying ordeal.

As of April 2006, Bill's application to correct his Naval record is pending.

Thank you for the opportunity to unburden myself from the terrible wrong I committed against my friend Bill, that caused him and his family great suffering.

I can be contacted by writing:  
Ben Kent  
PO Box 4252  
St. Augustine, FL 32085  
Or email: benkent79@yahoo.com

Bill can be emailed at: wjc725@yahoo.com

\* At Bill L.'s request, *Justice: Denied* is taking the unusual step of not publishing his last name. *Justice: Denied* agreed to this because he was convicted out of the public eye by a military court martial, his case has not received any press, and he has built a life after his release from military prison. If the Navy declines to "correct" Bill's conviction and he pursues his exoneration in federal court, his full name will then become a matter of public record.



## Florida Supreme Court Acquits John Robert Ballard From Death Row

By Hans Sherrer

Jennifer Jones, 17, and William Patin, 22, lived together in a duplex apartment in Golden Gate, a small city in southwestern Florida's Collier County. John Robert Ballard lived across the street from their apartment, and he regularly socialized with them.

Jones supplemented her regular job by dealing marijuana around the area where she lived. It was known that she usually conducted drug deals in her bedroom. The last week in February 1999, a car drove by the couple's apartment and fired bullets through her bedroom window. Ballard witnessed the shooting and described the vehicle and several occupants to a Collier County Sheriff Deputy. Based on Ballard's information, the vehicle was stopped. Five people were in the car, and one person was charged with the shooting. The accused shooter and another man in the car were known street gang members. The shooting was attributed to a drug dispute with Jones.

A week later, on Saturday, March 6, 1999, Ballard and at least three other people attended a small going away party at Jones and Patin's apartment. The two were planning to move on Monday (the 8th) to Texas where Patin was going to start a job working with his father. A woman attending the party said she saw Jones with what she later estimated was \$1,000.

### Jones and Patin Found Dead

Jones and two of the people at the party arranged to go boating at 11 a.m. on Sunday. After Jones didn't show up, both people separately went to the couple's apartment on Sunday to check on them. No one answered the door and Jones' car wasn't in the driveway, so they assumed the couple wasn't home.

On Monday at 9 a.m., someone reported to the Collier County Sheriff's Office that a car was parked in a vacant lot. The deputy who responded ran a license plate check. After learning the car was registered to Jones, the deputy drove by her residence, which was about a mile from where her car was parked. He didn't stop because he didn't notice anything suspicious.

Although the couple had planned to leave for Texas that Monday, no one had heard from them since the party Saturday night. So late Monday afternoon one of the people

Jones had arranged to go boating with on Sunday went to the couple's apartment with Jones' father. The front door was locked so they popped out the sliding glass patio door in the back of the apartment.

They found Jones' body in the master bedroom and Patin's body in the spare bedroom. The friend went to a neighbor and called 911.

### Murders Investigated

Sheriff investigators collected evidence from the apartment. In addition to blood evidence, they found one hundred and eighteen latent fingerprints and collected hundreds of hair samples, along with nail scrapings and clippings. Officers found no large amount of money on the victims or in their apartment.

They also examined Jones' car for fingerprints, blood, and hair samples.

The medical examiner determined that Jones and Patin had been brutally bludgeoned to death, and that Jones had not been sexually assaulted. It was determined both victims were standing when attacked, and they had defensive injuries consistent with vigorously resisting their attacker, or attackers. A sustained and simultaneous attack on Jones and Patin by multiple perpetrators was suggested by extensive blood splatter evidence in the bathroom, hallway, spare bedroom, and in the master bedroom around Jones' body. The medical examiner could not determine the murder weapon, except that it was likely a blunt object. Sheriff investigators found no murder weapon at the crime scene nor in Jones' car.

Ballard was investigated as a suspect because he lived near the victims and he had provided eyewitness information to the Sheriff's Office about the shooting into Jones' bedroom a week before the murders. Ballard denied any involvement. None of the evidence collected from Jones' car was matched to Ballard, and no evidence was found in his car when it was searched and examined with his consent.

Out of the many hundreds of evidence samples collected from the crime scene that were identified as originating from several different people, Sheriff investigators eventually keyed on two pieces of evidence samples:

- Of the more than one hundred fingerprints of numerous people found in the apartment, one fingerprint on the headboard of Jones' bed was identified by a Florida Dept. of Law Enforcement (FDLE) crime lab technician as being Ballard's print.

**Ballard cont. on page 27**

## Ballard cont. from page 26

The fingerprint was not imprinted in blood and there was no blood around it.

- Of the hundreds of hairs originating from numerous people found in Jones and Patin's apartment, one of the six hairs found on Jones' palm was identified by a FDLE crime lab technician as being microscopically consistent with Ballard's arm hair.

### Ballard Prosecuted

Prosecutors relied on the analysis of the headboard fingerprint and the arm hair to charge Ballard in May 2001, with the robbery of \$1,000 from Jones and the capital murder of Jones and Patin. Ballard was alleged to be the lone assailant, and his alleged motive was to steal Jones' money.

During Ballard's trial that began in April 2003, the prosecution relied on the fingerprint and hair to place him in the victim's apartment, and they tied him to Jones' car by claiming it was incriminating that it was found in the same neighborhood where he had lived with his father-in-law for several months in 1994 – five years before the murders.

Ballard's defense relied on the fact that he was a frequent guest at the victim's apartment, even being there at their going away party the night before their murders, and that he was known to have access to all the apartment's rooms. Consequently it would have been unusual if one or more of his fingerprints and hairs had not been found in the apartment. On cross-examination a FDLE crime lab technician testified that Ballard's arm hair found in Jones' palm could have been shed from his skin naturally, and that "it is possible for hair to be transferred from one surface to another, such as from carpeting to someone's hand."<sup>1</sup> Ballard's arm hair was only one of six hairs found on Jones' hand.

A neighbor of Ballard's testified that on the Sunday of the couple's murder Ballard and his family were at his house for a barbecue and he acted normally.

Ballard moved for a judgment of acquittal when the government rested its case, and again when he completed presenting his defense. He argued that the government had failed to prove his guilt beyond a reasonable doubt, because "there was a reasonable hypothesis of innocence in that the only evidence that linked Ballard to the case is equally consistent with the fact that he was often a guest in Jones and Patin's apartment."<sup>2</sup> Circuit Court Judge Lauren Miller denied Ballard's motions.

The jury convicted Ballard of both murders and robbery. After a sentencing hearing the jury voted 9-3 for the death penalty. On May 23, 2003, Judge Miller sentenced Ballard to 15 years in prison for the robbery and sentenced him to death for the murders. Judge Miller told Ballard, "You have not only forfeited your right to live among us, but under the laws of the state of Florida, you have forfeited your right to live at all."<sup>3</sup>

### Ballard Appeals Conviction

In his appeal to the Florida Supreme Court, Ballard's primary issue was the insufficiency of the evidence. He argued that the prosecution failed to prove beyond a reasonable doubt that he had committed the crimes. Ballard outlined that the prosecution's case against him was entirely circumstantial. There was no witness, no murder weapon, no confession, no informant, no incriminating evidence in Jones' car, no recovered stolen money, no crime scene evidence establishing he was in the victim's apartment at the time of the murders, no incriminating evidence in his vehicle, and no physical or forensic evidence suggesting he committed or otherwise participated in the murders.

Ballard also argued that contrary to the prosecution's contention, the discovery of Jones' car a mile from the crime scene, in the general area of where he had lived five years prior to the murders, did not support an inference of his guilt. Particularly considering there was no eyewitness, or physical or forensic evidence that he had driven or even been in Jones' car after the murders. In addition, testimony by prosecution witnesses established that the lot "served as the location for activities involving numerous individuals."<sup>4</sup> Ballard was not identified as being one of those individuals.

Ballard further argued that while the prosecution proved Jones and Patin had been murdered and possibly robbed, even if one accepted their contention that his hair and fingerprint was found in their apartment, it merely proved that at some time he had been in their apartment. That wasn't incriminating because it was common knowledge they were friends, and he had been in their apartment as recently as the party the night before their murders. The strength of Ballard's argument was indicated by the fact it was valid, without even considering that a fingerprint expert testified for the defense that the headboard fingerprint was inconsistent with Ballard's print.

Ballard contended his conviction should be reversed because the prosecution's circumstantial case based on non-incriminating fingerprint and hair evidence and an unsubstantiated supposition about Jones' car sup-

ported his innocence as much or more than it supported his guilt.

### Florida Supreme Court Reviews Ballard's Conviction

The Florida Supreme Court opened its analysis of the law governing the facts of Ballard's case by acknowledging that its "fundamental obligation [was] to ascertain whether the State has presented sufficient evidence to support a conviction,"<sup>5</sup> and that his case was based on "purely circumstantial evidence."<sup>6</sup>

In analyzing the sufficiency of circumstantial evidence, the Court explained:

Evidence which furnishes nothing stronger than a suspicion . . . is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.<sup>7</sup>

The Court also noted that in a previous case it had clearly set forth the consequence of insufficient circumstantial evidence, "If the State's evidence is not inconsistent with the defendant's hypothesis of innocence, then no jury could return a verdict in favor of the State."<sup>8</sup>

The Court explained Ballard's defense:

Ballard's hypothesis of innocence at trial was that he was not guilty, and that another individual, including perhaps a member of the gang that had shot into Jones and Patin's apartment a week prior to the murders, or some other unknown assailant, committed the murders. He further contends that any evidence of his presence in the apartment, such as a hair or fingerprint, is equally as susceptible to an inference that it was left there during one of his numerous innocent visits to the premises as it would be to an inference that it was placed there while he was committing the charged crimes. He similarly notes the countless other hairs and fingerprints in the premises and in Jones' car that were not traced to him and could have belonged to the unknown perpetrator.<sup>9</sup>

## Ballard cont. on page 28

## Ballard cont. from page 27

The Court then analyzed Ballard's contentions:

Given the evidence of Ballard's frequent and personal access to the premises, the State simply did not refute the possibility of his prior innocent presence in the bedroom as accounting for the hair and print. The fingerprint and hair evidence only serves to prove that Ballard was in Jones and Patin's apartment at some point in time, which Ballard readily admits because he was a long-time friend of the couple and socialized regularly with them.<sup>10</sup>

The Court also recognized that experts gave conflicting testimony about whether the fingerprint found on the headboard was actually Ballard's print. They noted though, that even if it was assumed to be his, it didn't mean he had anything to do with the murders because he had been a frequent guest at the apartment, and a Florida Department of Law Enforcement crime lab analyst testified, "that it is impossible to scientifically determine the age of a fingerprint or how long it has been in place."<sup>11</sup>

In regards to the State's reliance on the finding of Jones' abandoned car near where Ballard had lived years earlier as circumstantial evidence of his involvement, the Court stated,

[T]here was no evidence presented to connect Ballard to the car. Testimony at trial established that this vacant lot served as the location for activities involving numerous individuals. There was blood found in the car, but it was Patin's and not Ballard's. Further, fingerprints were found in the car but were not matched to Ballard.<sup>12</sup>... There were also some seventy hairs found in Jones' car, and none of them were consistent with Ballard's profile.

<sup>13</sup>

In its consideration of Ballard's arguments that members of the gang that shot through Jones' window might have been responsible for the murders, the Court wrote:

[T]here was evidence presented by the defense at trial concerning a drug-related gang shooting into Jones and Patin's apartment a week prior to the murders. However, despite having full knowledge of this event, the State did not present definitive evidence ruling out members of the gang as the perpetrators of the murders. ... [T]he defense established that the gang has

approximately eighty members total; none of these other members were ruled out by the State's presentation of evidence regarding its investigation of the murders. Whether a member of this gang or someone else committed these terrible crimes is simply not known.<sup>14</sup>

In summarizing its analysis of Ballard's case, the Court concluded:

[I]t is ... the duty of the courts to ensure that the State is held to its burden of proof when someone is charged with a serious crime and liberty and life are at risk. ... because this case is purely circumstantial, we must determine whether competent evidence is present to support an inference of guilt "to the exclusion of all other inferences." Our discussion of the evidence outlined above leads us to conclude that the State has not met this standard and has not performed its duty to prove this case against John Robert Ballard beyond a reasonable doubt.<sup>15</sup>

The Court then ordered the reversal of Ballard's convictions, the vacation of his sentences, and his case was remanded to the trial court with an order that a "judgment of acquittal be entered."<sup>16</sup> The Florida Attorney General's Office promptly announced they would not seek a rehearing, so the Court's ruling was final.

The February 23, 2006, decision by the Florida Supreme Court was significant not only because it found the evidence against Ballard was insufficient to support his conviction, but it was so woefully inadequate that for only the third time in the last thirty years the Court ordered a judgment of acquittal, and not a retrial. The Court's opinion left no doubt that Judge Miller had not performed her obligation to follow the law when she denied Ballard's two motions for a judgment of acquittal.

### Ballard's Release

Less than 48 hours after the Florida Supreme Court ordered his acquittal, Ballard was released from Union Correctional Institution's death row. He was quietly picked-up at the Raiford prison after dark by his sister. When interviewed about 24 hours later, she told a reporter, "He's nowhere near Florida. I'm not even going to tell you if he's in the United States."<sup>17</sup>

After Ballard's release, his trial public defender, Michael Orlando, said he was wrongly convicted because of the pressure put on jurors to convict caused by intense media coverage of the crime and trial, tight courthouse security, a crowded courtroom, and the families of

both victims demanding justice, "You're dealing with the intensity of the courtroom in this particular case. All these things tend to put a lot of pressure on jurors."<sup>18</sup>

Two public defenders, James Moorman and Paul Helm, represented Ballard in his appeal. Helm said he was very pleased with the Court's ruling, and "Mr. Ballard has always said he was innocent of the murders of his two neighbors."<sup>19</sup>

Abe Bonowitz, director of Gainesville based Floridians for Alternatives to the Death Penalty, said after Ballard's release, "Here's a guy who survived death row, who was wrongly convicted."<sup>20</sup> He also noted, "This is one of those cases where Supreme Court scrutiny on the first appeal has actually worked."<sup>21</sup> Bonowitz also expressed empathy for Ballard's desire to lay low and avoid the knee-jerk negative reaction of people who didn't bother to understand that the Florida Supreme Court overturned his conviction and ordered his release because there was absolutely no evidence he was guilty. Bonowitz said Ballard's relatives were trying to protect him from "a witch hunt" of the same sort that resulted in his wrongful conviction in 2003.<sup>22</sup>

If you are concerned about death penalty issues in Florida, write:

Floridians for Alternatives to the DP  
2603 Dr. Martin Luther King Jr. Hwy. #335  
Gainesville, FL 32609  
Or email: fadp@fadp.org

### Endnotes and sources:

1 *Ballard v. State*, No. SC03-1012 (Fla. 02/23/2006); 2006.FL.0001488 ¶32 <<http://www.versuslaw.com>>

2 *Id.* at ¶42.

3 Supreme Court acquits 3-year death row inmate, *Miami Herald*, February 24, 2006.

4 *Id.* at ¶57.

5 *Id.* at ¶44.

6 *Id.* at ¶45.

7 *Id.* at ¶46, quoting *Davis v. State*, 90 So. 2d 629 (Fla. 1956).

8 *Id.* at ¶47, quoting *State v. Law*, 559 So. 2d 187, 189 (Fla. 1989).

9 *Id.* at ¶52.

10 *Id.* at ¶53.

11 *Id.* at ¶54.

12 *Id.* at ¶57.

13 *Id.* at ¶58.

14 *Id.* at ¶59.

15 *Id.* at ¶61.

16 *Id.* at ¶62.

17 Relative of John Ballard wants to clear the air, *NBC 2 News*, Fort Myers, Florida, February 26, 2006.

18 John Ballard's release raises questions, Leonora LaPeter, *St. Petersburg Times*, March 6, 2006.

19 Supreme Court acquits 3-year death row inmate, *supra*.

20 John Ballard's release raises questions, *supra*.

21 Supreme Court acquits 3-year death row inmate, *supra*.

22 John Ballard's release raises questions, *supra*.



## Non-published And Non-precedential Opinions Stealthily Harm The Innocent

Non-published and non-precedential opinions were unknown 45 years ago, and they have only come into widespread use in the last 30 years. Yet in that short period of time they have stealthily become an integral and dominating feature of this country's legal system.

The reliance of appeals court judges on a non-published opinion to resolve a case has grown to the point that in 2005 they were used in about 80% of federal Circuit Court cases, and in 93% of the Court of Appeals cases in California, the country's most litigious state.

Use of non-published opinions, which with very rare exceptions are non-precedential, has reached the point that they are a significant factor affecting the handling and outcome of state and federal civil and criminal cases.

The innocent are one class of litigants affected by the surreptitious and pervasive use of non-published opinions. They are likely affected more profoundly than any other identifiable group, because non-published opinions are being used by judges (and prosecutors) as a tool to deny under the cover of darkness the very thing the courts are not just touted as offering, but which is their very reason for existing — to offer litigants the opportunity for “justice.”

Justice is not an ephemeral concept ... it is the sole reason for courts in this country to have any legitimacy. Any institutional procedure that undermines the likelihood that a person will be fairly and impartially treated is unacceptable in a society committed to observing “justice” as a real and vibrant guidepost, and not just a meaningless catchphrase intended to placate the masses of

people who will never find out how illusory of a concept it can be within the four corners of a courtroom.

When state and federal policies were adopted allowing the resolution of a case with a non-published and non-precedential opinion, there was no serious public debate about the consequences that would result. The following four articles express concerns about the use of non-published and non-precedential opinions from varying perspectives. Looked at as a whole, however, they can be interpreted to make one thing crystal clear: since non-published opinions undermine the historical underpinning of this country's legal system, the debate today ought to be about whether they should be used in any circumstance — or relegated to the dustbin of history as a menace to “Justice,” and the innocent.

### Commitment To Justice Requires All Appellate Opinions Must Be Published and Precedential

By Hans Sherrer

The judgment of every state and federal judge in the United States is subject to being colored by varying shades of a pro-prosecution bias. This is to be expected because of the politically laden processes that are used to elect or select both state and federal judges and prosecutors. The country recently witnessed the prevalence of judicial bias by the confirmation of two judges to the U.S. Supreme Court with a track record of being overly solicitous to executive power. Deference of judges to executive authority can manifest itself subtly and not-so-subtly in rulings, body language, verbal queues, and courtroom treatment of prosecutors and their witnesses, as well as in numerous other ways from the time of a defendant's arraignment through resolution of his or her final habeas appeal. This judicial attitude only occasionally appears to weaken in a case that may involve particularly egregious conduct by police or prosecutors.

In this country there are two checks on conscious displays of judicial bias.

One is the conducting of proceedings in public, and the consequent availability of a case's documents and transcripts. The rare instance of when a judge is admonished for ethical misconduct occurs only because a case is public. The Fifth Amendment wisely requires the process of a “public” trial, which arguably isn't concluded until after a convicted defendant's judgment and sen-

tence are finalized when his or her direct appeal is exhausted.

The second check is *stare decisis*, which is expressed in the common law as the “doctrine of fairness.”<sup>1</sup> Stated simply, that means fairness

requires that similarly situated litigants should be treated equally regardless of the judge(s) involved. If defendant Jones' case was dismissed because of a particular police impropriety, then *stare decisis* dictates that defendant Smith's identical case under a different judge needs to likewise be dismissed.

That all decisions of a court have precedential value was a given for the first 175 years of the United States' history, and it is integral to the common law upon which this country's legal heritage rests. It is also integral to the common law that whatever aspect of a particular decision is precedential can only be determined by a court in the future confronted with similar circumstances — not by the court issuing the opinion.<sup>2</sup>

#### Two Tier System of Opinions Created

A revolutionary assault on precedent, a critical component of this country's legal system, was launched in 1964 when the Judicial Conference of the United States issued a report that recommended, “that the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct.”<sup>3</sup> The impetus behind the Conference's recommendation was to limit the growth in the number of legal volumes necessary to store opinions — by creating a heretofore unknown

class of non-precedential decisions that were not published as an opinion of the court. The idea was based on the assumption that most cases involve factual situations resolvable by established legal rules, and consequently it would be duplicative to publish any case that followed the precedent setting case. The time and energy of judges spent thinking about and writing decisions would thus be saved for “important” first-tier cases involving new legal issues, while all others would be relegated to second-tier non-published status.

In 1971 the First Circuit Court of Appeal became the first federal court to authorize the judges deciding a case to issue an unpublished opinion that would be barred from citation as precedent. Within the next few years all the federal circuit courts adopted rules that to varying degrees restricted publishing and citation of selected opinions. A majority of state appellate courts did likewise. Thus the creation was begun in this country of an underworld of what Supreme Court Justice John Paul Stevens described in 1985 as “a body of secret law,” that only applies to the litigants of the particular case under review.<sup>4</sup>

For three decades the revolutionary new system of appellate courts routinely issuing decisions that were neither published nor allowed to be considered precedential was implemented with little fanfare. Members of the general public, and even some lawyers, only became aware of it if they happened to be involved in a civil or criminal case secretly disposed of with an order or memorandum stamped Do Not Publish or Not For Publication. The practice expanded to the point that in 2005 about 80% of federal circuit court decisions were non-pub-

Non-published cont. on p. 30

## Non-published cont. from p. 29

lished,<sup>5</sup> and in 2004, 92% of California Appeals Court decisions were non-published.<sup>6</sup>

### Non-published opinions hit the radar screen

The general public became aware that something was seriously amiss when the Supreme Court issued its December 2000 decision in *Bush v. Gore*, 531 U.S. 98 (2000). The public controversy was generated because it was an obviously partisan decision that effectively determined the outcome of the presidential election.<sup>7</sup> Although it attracted less publicity, Bush was also significant because the Court mimicked the common practice of the lower federal courts by declaring that its decision was to be considered non-precedential, although in doing so it created the precedent of publishing its non-precedential decision.

The public furor over the Court's decision in Bush was a reflection of the furor created in legal circles four months earlier when a panel of federal Eighth Circuit judges ruled that Circuit's non-precedential (non-citation/non-publishing) rule violated Article III of the U.S. Constitution. Based on the historical common law tradition predating the U.S. Constitution of judges relying on the precedential value of any prior decision to decide a case, Judge Richard Arnold wrote for the panel in *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir.8-22-2000), that the rule "insofar as it would allow us to avoid the precedential effect of our prior decisions purports to expand the judicial power beyond the bounds of Article III."<sup>8</sup>

The Eighth Circuit subsequently vacated that decision as moot when the civil dispute between Anastasoff and the IRS that gave rise to the case was settled. However, the controversy triggered by the decision resulted in numerous articles in law reviews and legal publications discussing the pros and cons of non-precedential and/or non-published decisions, and the creation of at least one website devoted to the subject. The research inspired by *Anastasoff* supports several basic conclusions:

- Classification of selected appellate court decisions as non-precedential was a radical departure from the centuries old practice of considering every decision as precedential. As Richard Cappalli observed in *The Common-Law's Case Against Non-Precedential Opinions*, "The non-precedent regimen starkly reverses centuries of common law tradition."<sup>9</sup>
- A significant percentage of cases categorized as non-precedential establish recognizable new rules of law or refine existing ones. These hidden precedential opinions have been

described as a "shadow body of law"<sup>10</sup> created by judges inappropriately exercising their unchecked discretion to designate an opinion for non-publication. One commentator described as "frightening," the common practice of sweeping "under the rug" decisions involving controversial, difficult or complex issues, by their designation as non-precedential.<sup>11</sup> One consequence of this practice is that judges are routinely violating court rules by designating what they know are precedential decisions for non-publication.

- Less attention is devoted to producing non-published decisions. That is indicated by a June 2005 Federal Judicial Center report analyzing 650 randomly selected cases from all thirteen federal circuit courts.<sup>12</sup> The 15% of the opinions that were published averaged 5,137 words. That is 648% longer than the non-published opinions that averaged 793 words.<sup>13</sup> This situation is particularly pronounced in four circuits: in the Fourth Circuit 98% of the opinions were non-published and they averaged 273 words; in the Fifth Circuit 94% of the opinions were non-published and they averaged 390 words; in the Ninth Circuit 92% of the opinions were non-published and they averaged 557

words; and, in the Eleventh Circuit 98% of the opinions were non-published and they averaged 557 words.<sup>14</sup> The report's findings were consistent with the belief that the Fourth, Fifth and Eleventh Circuits are defendant unfriendly federal appeals courts, while it also indicates that in spite of its reputation to the contrary, the Ninth Circuit may be no better for defendants.

- The quality of non-published decisions is so inferior that they have been described as "dreadful in quality."<sup>15</sup> This can be partially attributable to a judge's lack of reviewing a case once it is assigned for "second class" processing by the bureaucratic decision of the judge's clerk or staff attorney who filtered the case based on factors that can include its anticipated precedential value, or if it concerns an issue of particular interest to the judge, or possibly the staff member(s) filtering it. The lesser quality of non-published opinions can also be attributed to them typically being reasoned and written by a clerk or staff attorney who may lack experience or training in "legal methods" of understanding and interpreting case law and statutes.<sup>16</sup>

- Publishing only selected opinions allows the weighing of those opinions to favor prosecution friendly arguments consistent with the executive deferential world-view of the judges involved, while defendant favorable decisions are more likely to be designated for non-publication status. Indeed, less and different justice is reserved for those without political power or influence.

- The designation of a case for non-publication status and the lesser attention to details devoted to it can be due to judicial laziness, since many appellate judges view their position as a form of semi-retirement. Designating cases for non-publication status is an effective method of reducing a judge's work by clearing his or her caseload by disposing of those cases without personally spending time considering their merits. That may be one reason "that judges support the non-precedent policy en masse against the near unanimous opposition of lawyers and academics."<sup>17</sup>

- Non-publishing an opinion allows the arbitrariness and inconsistency that underlies it to go undetected. It also encourages their use since it enables the deliberate discre-

"Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges.

I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules."

Monroe Freedman, Professor of Law at Hofstra University School of Law, Speech to The Seventh Annual Judicial Conference of the US Court of Appeals for the Federal Circuit (May 24, 1989).

tionary application of precedents due to a bias or preference for a particular appellant or issue by the judge, or possibly the clerk or staff attorney who screened the case. A defendant with case law favorable to the facts of his or her case can be ruled against by a court that either ignores or misstates applicable case law, or ignores or misstates the key fact(s) so it doesn't appear the case law applies, with the subterfuge tucked away in a

non-published opinion. Thus by such devices as "fact stretching or shrinking," non-published opinions allow a precedent to "rule" publicly in name, while being ignored in practice. The consequence of this situation is most pronounced in capital cases, and there are many opportunities for it to happen. A recent study of a random sampling of capital cases from six leading death penalty states found that overall, 40% of the state and federal appellate decisions in those cases were non-published.<sup>18</sup>

- Designating selected opinions as non-precedential may violate the Fifth Amendments "equal protection" and "due process" clauses. It is legitimate to ask whether a litigant is deprived of due process by being ac-

## Non-published cont. on p. 31

## Non-published cont. from p. 30

- corded the significantly less attention to his or her case that is indicated by the issuing of a non-published opinion. Is that same person also deprived of equal protection by their second class treatment compared to a litigant whose opinion is published?
- No discernable justification for a decision is set forth in many non-published opinions. Those decisions are issued without substantive legal support based on the case's facts. That can be due to a lack of understanding about a case's facts or ignoring those facts, or possibly their deliberate misrepresentation. As law Professor Richard Cappalli phrased it, "Today's appellant wins and tomorrow's appellant loses on the same basic facts."<sup>19</sup> A decision's designation for non-publication status, however, virtually eliminates the likelihood that the judges involved will experience any negative public or professional fall-out from issuing what to all appearances is an insubstantial opinion.
  - Contrary to court rules, when making a decision judges are known to secretly rely on non-published opinions as if they had precedential effect. This is being done unbeknownst to the parties involved in jurisdictions that either bar citing a non-published opinion, or only permit doing so for its persuasive value in supporting an argument.
  - There is an aura of secrecy enveloping a non-published opinion that is contrary to the procedural transparency guaranteed by the constitutional requirement for public trials. This secrecy is particularly odious when non-published opinions disproportionately involve affirmation of a conviction or rejection of a habeas petition. In overturning a rape conviction, during the trial of which the judge cleared the courtroom of all spectators when three prosecution witnesses testified the Eighth Circuit (in a published opinion) recently stated: "While the Supreme Court has held that the right of access to a criminal trial is 'not absolute,' the Court has never actually upheld the closure of a courtroom during a criminal trial or any part of it, or approved a decision to allow witnesses in such a trial to testify outside the public eye."<sup>20</sup> Non-published opinions are inconsistent with the requirement that the trial proceedings about which the opinion is concerned must be conducted publicly. The intuitive insight that non-published opinions are given less attention than published decisions is born out by their known lesser quality, and as Professors William Reynolds and William Richman observed in *The Non-Precedential Precedent*, "Justice must not only be done, it must also appear to be done."<sup>21</sup> Non-published and non-precedential opinions are outside of our system of justice, and

even under the lowest level of scrutiny they don't even appear to do justice.

- Practical observations about the negative aspects of non-published/non-precedential opinions are compounded by the ethical and legal considerations related to non-judicial bureaucrats who routinely and surreptitiously perform tasks that the public, the media and the litigants believe are performed by the judge(s) involved. Yet the only association a judge may have with a non-published opinion is reviewing his or her staff person's summary of the case and signing off on its assignment to non-precedential status, and then signing the opinion/memorandum/order written by a clerk or staff attorney. It is possible that the judge has not read a single word of the petition or briefs, so he or she doesn't even have the knowledge necessary to challenge the staff member's opinion of the case. For all practical purposes, the actual judge(s) of the case were the bureaucrats involved whose judgment determined its outcome. Thus behind the scenes the role of the judge and his or her staff members has been reversed: the judge is the bureaucrat and the staff members act as the judge.

### How Many Innocent People Are Affected By Non-published Opinions?

There is no hard data on how many innocent people have been adversely affected by the negative consequences of issuing non-published opinions. However, a hint of the problems magnitude can be gleaned by considering the number of non-published opinions that are issued. It is conservatively estimated that from 1980 to 2005 some 460,000 non-published federal appeals court opinions were issued.<sup>22</sup> Forty-five states (plus the Dist. of Columbia) limit non-published decisions to non-precedential status,<sup>23</sup> and state courts handle many times more appeals than federal courts. About 48% of federal appeals involve a criminal case,<sup>24</sup> and in the state of California, for example, 50% of appeals involve a criminal case.<sup>25</sup> So it can conservatively be surmised that something more than a million non-published opinions were issued by state and federal courts in the past quarter-century.

For example, if only 1% of only one million state and federal non-published decisions from 1980 to 2005 involved a criminal case in which an innocent defendant's conviction was affirmed or habeas relief was denied, that would amount to 10,000 innocent defendants directly impacted by the scheme of designating select opinions for non-precedential status.

Another consideration is that even if there were 10,000 wrongly decided cases during the past twenty-five years involving an innocent person, it would still be a significant under-

statement of the impact non-published opinions have had on the innocent. Consider, e.g., their effect on the plea bargaining process. About 95% of state and federal convictions are obtained by a plea bargain. Defendants claiming innocence may agree to a plea bargain at the goading of a defense lawyer who may be convinced that the prosecution slanted case law relied on by the trial judge, and if necessary the appellate judges, is adverse to the facts of the defendant's case, or that there is the possibility the case's facts or a precedent favorable to the defendant could be manipulated or ignored in a non-published opinion.

### Conclusion

An enormous body of non-precedential opinions has been created by the selective publishing rules instituted as an experiment to reduce the number of legal volumes necessary to be published, purchased and stored for reference purposes. That justification has evaporated due to the ability of unlimited numbers of opinions to be electronically stored and readily accessed for a reasonable cost. However, in an example of the moving goalpost, since the original justification for publishing only selected opinions is no longer legitimate, it has been replaced by the argument that the present number of judges is insufficient to devote the time and energy necessary to carefully analyze and write a complete opinion outlining the facts of each case, the applicable case law, and the judge's reasoning for deciding for or against the relief sought by a litigant.

That argument ignores that if a person allegedly committed an offense serious enough to warrant the expenditure of the considerable resources necessary to investigate, prosecute, convict and punish him or her, then it is reasonable to require a full, public and precedential explanation of the reasons used to justify upholding that person's conviction and sentence. If that necessitates more appellate judges, so be it. That would be a minor additional expenditure to increase confidence in not just the fairness of the judiciary's treatment of all defendants, but the legitimacy of the law enforcement process itself. Yet while there have been stopgap measures offered to diffuse the broad based opposition to disallowing the citation of non-published opinions, to date no judicial organization has favored restoring precedential status to all appellate decisions.

Considering the plethora of negatives associated with non-published decisions, there is no sustainable argument in favor of continuing the experimental procedure of selectively publishing opinions as precedential. Consequently, the non-publishing experiment should be abandoned and all appellate opinions should be

## Non-published cont. on p. 32

# CA Justices Carve Exception To No-Cite Rule

By Kenneth J. Schmier and Michael K. Schmier

Fifty California appellate justices, more than half the bench, were caught violating the same court rule they insist on enforcing against litigants — the rule prohibiting reliance on unpublished appeal decisions. The Judicial Performance Commission (CJP) must now decide whether to sanction them.

## Non-published cont. from p. 31

published and considered precedential without restriction. This restoration of precedentiality to all opinions should not be delayed. Innocent people are being mistreated by the judiciary every day that non-published and non-precedential decisions are allowed to be issued.

Note: This is an edited version of the complete article that omits many endnotes not associated with a direct quote or reference to a statistic.

### Endnotes:

- 1 Ronald Dworkin, *Taking Rights Seriously* (1977), p. 113.
- 2 Richard B. Cappalli, The Common Law's Case Against Non-Precedential Opinions, *Southern California Law Review*, Vol. 76:755, 774- 775 (2003).
- 3 Joshua R. Mandell, Trees That Fall In The Forest: The Precedential Effect Of Unpublished Opinions, *Loyola of Los Angeles Law Review*, 34:1255, 1259, April 2001.
- 4 *County of Los Angeles v. Kling*, 474 U.S. 936, 937 (1985) (Stevens, J., dissenting).
- 5 U.S. Court of Appeals - Judicial Caseload Profile (2000-2005), at <http://www.uscourts.gov/cgi-bin/cmsa2005.pl>
- 6 Percentage of Majority Opinions Published Courts of Appeal, Fiscal Year 2003-04 Table 9, 2005 Court Statistics Report (California), p. 29, at <http://www.courtinfo.ca.gov/reference/documents/csr2005.pdf>.
- 7 For an analysis of the Republican partisanship of the five justices who voted with the majority in Bush, see, see Vincent Bugliosi, *The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President* (Thunder's Mouth Press 2001).
- 8 *Anastoff v. United States*, 223 F.3d 898, 900 (8th Cir. 8-22-2000).
- 9 Richard B. Cappalli, 772.
- 10 *Id.*, at 764, note 52, and also note 53.
- 11 Joshua R. Mandell, *supra*, 1264.
- 12 Tim Reagan, Citations to Unpublished Opinions in the Federal Courts of Appeals, Federal Judicial Center, June 1, 2005.
- 13 *Id.*
- 14 *Id.*
- 15 Richard B. Cappalli, *supra* at 789.
- 16 *Id.* at 790.
- 17 *Id.* at 760, (citation omitted)
- 18 See, David R. Dow; Bridget T. McNeese, Invisible Executions: A Preliminary Analysis of Publication Rates in Death Penalty Cases in Selected Jurisdictions, *Texas Journal on Civil Liberties & Civil Rights*; 2004.
- 19 Richard B. Cappalli, *supra* at 787.
- 20 *United States v. Thunder*, No. 04-3780 (8th Cir. 02/22/2006); 2006.C08.0000279 ¶12 -<http://www.versuslaw.com>
- 21 William Reynolds and William Richman, The Non-Precedential Precedent - Limited Publication and No-Citation Rules in the United States, 78 *Colum. L. Rev.* 1167, 1175 (1978).
- 22 Richard B. Cappalli, *supra* at 769-770, note 71.
- 23 See, Melissa M. Serfass and Jessie Wallace Cranford, Federal and State Court Rules Governing Publication and Citation of Opinions: An Update, *The Journal of Appellate Practice and Process* (Fall 2004).
- 24 U.S. Court of Appeals - Judicial Caseload Profile (2000-2005), <http://www.uscourts.gov/cgi-bin/cmsa2005.pl>. This includes direct federal criminal appeals and state and federal habeas corpus petitions (including 28 USC §§2254 and 2255 petitions.)
- 25 Summary of Filings Courts of Appeal, Fiscal Years 1994-95 Through 2003-04 Table 4, , 2005 Court Statistics Report (California), p. 24, at <http://www.courtinfo.ca.gov/reference/documents/csr2005.pdf>.

The embarrassing violations of Rule 977(a) came to light when the Supreme Court Advisory Committee on Rules for Publication ("Werdegar Committee") released its preliminary report in mid-October 2005. A survey taken by the committee revealed that 58 percent of 86 justices responding rely upon "unpublished" appellate opinions when drafting their opinions. California's "no-citation" Rule 977 says unpublished opinions "must not be cited or relied on by a court or party."

California appellate courts have repeatedly rejected challenges to Rule 977. Rule 977 and other no-citation rules have spawned a great deal of controversy over the past decade. Many high ranking judicial officers have argued that no-citation rules must be rescinded.

## Flouting The Law

Nonetheless the California judiciary, its chief justice, its Judicial Council, the attorney general and, most importantly, the appellate courts, have resolutely defended the validity of Rule 977. To paraphrase the late Johnnie Cochran, if the rule is fit, the appellate bench too must submit.

But half are not submitting. A comment included in the Werdegar Committee's report said, "Most justices who rely on unpublished opinions indicated that they do so in order to consider the rationale or analysis used in a similar decision or to ensure consistency with their own rulings or with those in their district/division." Justices are deciding cases by relying upon unpublished decisions in the same way they would use decisions marked "Certified for Publication" — except without citation. Apparently the admission escaped the attention of the committee's chair, Justice Kathryn Mickle Werdegar, and the members of her committee specially chosen by Chief Justice George.

We are the ones who complained to the Commission on Judicial Performance that justices are violating Rule 977. Given the poor regard in which we hold Rule 977, why did we do so? We invoke the rule of law to attack it. The rule of law requires that law — bad or good — be applicable to all, including the appellate bench. If the appellate bench finds abiding by Rule 977 awkward, the rule of law forces the bench to change it. It is not acceptable that judges, who made and enforce the rule that forbids us to rely on unpublished decisions, secretly violate the same prohibition.

"Violating rules relating to court administration" constitutes judicial misconduct, according to the CJP. But is the CJP sufficiently independent of the judicial establishment to issue charges?

We are giving the CJP an opportunity to prove its rectitude. The complaint is not frivolous; there is great harm in what the justices are doing.

Clandestine reliance upon unpublished decisions deprives litigants and attorneys of any opportunity to argue against their validity. Worse, these decisions have never been vetted before the tens of thousands of court watchers, incentivized by citability and stare decisis, who monitor published appellate decisions. Among these court watchers is vast expertise regarding all manner of issues that come before appellate courts. Vetting decisions before them serves as a realistic and vocal quality control mechanism for the enormous volume of appellate dispositions.

But court watchers, and justices too, have been misled by Rule 977 into believing unpublished decisions do not influence the determination of future cases, and rarely criticize them. Unpublished opinions lack the crucial dignity of standing for something. They are not supposed to count, except for the parties, who are often shocked, and many devastated, by their "result orientation." The warranty of rightness is stripped when unpublished opinions circumvent court watcher inspection. Yet the Werdegar Committee report reveals that these opinions are calcifying into decision-determining lines of secret precedent anyway.

Our strategy depends upon the CJP to enforce Rule 977. Will it? It's already waffling. Its executive secretary, Bernadette Torivino, responded to our complaint the day it was received. She wrote that the investigation will not go forward until we name the justices and "specify exactly, what action or behavior of each judge is the basis for your complaint." When 50 of 101 justices have admitted a serious violation in writings held by a Supreme Court advisory committee, it is hard to believe the CJP does not have enough information to move forward. Sounds like evasive bureau-speak to us.

We cannot identify the specific justices because, despite open government Proposition 59, the committee met in secret and will not release to us the survey responses or other records of their meetings. We have sued the Judicial Council to gain access, but the Judicial Council, represented by Morrison & Foerster, aggressively defends its questionable right to hold all of its policy-making subcommittee meetings in secret and to keep their papers from the public.

So we shall name all of the appellate justices and rely upon the CJP to use its investigative powers to defend the rule of law, and hope for the best.



## Introduction

Executions in America are typically invisible. <sup>1</sup> High profile executions are the exceptions that demonstrate the rule. When a particularly infamous murderer is put to death, such as Timothy McVeigh or Ted Bundy, the execution receives significant attention. Yet, in nearly all other cases, executions are banal. For example, just two days after the media circus that was McVeigh's execution, John Wheat was executed in Texas. <sup>2</sup> A day after that, Jay Scott was executed in Ohio. <sup>3</sup> Yet no one paid attention to Wheat or Scott. Occasionally a reporter from the local paper where the murderer or murder victim grew up might file a story, but the story is minor and the coverage local. Infamous murderers and milestone executions (like the three-hundredth execution in Texas) garner coverage. All others occur in darkness.

The haphazard coverage given to executions by the national media caused us to wonder whether the treatment of death penalty cases by state and federal appellate courts has been similarly haphazard. We decided to explore this question by examining the various stages of a death penalty case to ascertain whether state and federal courts dispose of the cases with published (public) or unpublished (hidden) decisions. Death penalty cases typically involve three appeals: the direct appeal, the state habeas proceeding, and the federal habeas appeal. We chose to examine these three stages of appeals in California, Florida, Georgia, Oklahoma, Texas, and Virginia, because they either have significant death row populations, carry out a significant number of executions, or both. Our methodology consisted of analyzing the frequency of publication in direct appeal opinions, state habeas opinions, and federal habeas appeals at the appellate level. <sup>4</sup>

### The impact of non-published opinions

We were interested in examining publication rates for two different reasons. First, much as Rousseau loved mankind while hating man,

## Invisible Executions: Non-published Opinions In Capital Cases

By David Dow and Bridget McNeese

the current media interest in the death penalty has focused on general themes while ignoring individual cases. Death penalty opinions, however, necessarily pertain to a particular case. Accordingly, a high number of unpublished opinions would be consistent with a general lack of interest in particular cases.

Second, and more important, the issuance of unpublished death penalty opinions has an impact on death penalty litigation. Opinions that are unpublished, especially state court opinions, are at times difficult to locate. Furthermore, even when unpublished opinions are available electronically, death penalty lawyers are required to finesse Byzantine and inconsistent rules concerning the permissibility of citing these unpublished cases. In some jurisdictions, unpublished opinions may be cited and are authoritative; elsewhere, unpublished opinions may be cited, but are not authoritative; in still other circuits, unpublished opinions may not be cited and lawyers who violate this "no citation" rule are subject to sanction. [See, State Citation Rules in this *JD* issue.]

Where lawyers are literally unaware of the existence of unpublished opinions, or where they are cognizant that certain opinions exist but are restrained from citing them, arbitrary injustice may result. If an unpublished opinion is favorable to a death row inmate, a lawyer who does not have access to the appellate court's reasoning, or who is precluded from citing to it, may be unable to press a similar argument in the case of his or her client. If the lawyer's client does not prevail on habeas under facts that are arguably indistinguishable from the favorable case that went unpublished, then arbitrariness results.

There has been an ongoing debate over unpublished opinions precisely because a significant percentage of state and federal appellate decisions are not published. [See, Has Anyone Noticed the Judiciary's Abandonment of *Stare Decisis?*, in this *JD* issue.] In the federal courts of appeal about eighty percent are unpublished. <sup>5</sup> Unpublished opinions appear in two forms: those that are denominated "not for publication" but are nevertheless distributed to companies that publish them electronically (like Westlaw or Lexis) and are possibly made available on the court's website; and those that are not published at all, either electronically or in official reporters.

Whatever the merits of unpublished opinions in the typical civil or criminal case, death penalty cases are different. In contexts other than the death penalty, if they choose to do so, the party most affected by the litigation can widely disseminate the opinion.

For example, an insurance company aggrieved or gladdened by an unpublished opinion can call attention to it in communications with others of similar interest. When in 1992 the Fourth Circuit held in an unpublished opinion that a hotel that had been damaged by Hurricane Hugo could not recover projected lost earnings from its insurer, <sup>6</sup> the insurance company alerted other insurers to the opinion by publishing it in a trade journal. <sup>7</sup> Other companies then used the decision as a basis to deny similar claims following a subsequent hurricane. <sup>8</sup> In contrast, in a capital case the person aggrieved by an unpublished opinion has been executed. To be sure, the condemned's lawyer or family members may call attention to the opinion denying relief, but the person with the most direct incentive to do so is dead. Judges can feel comfortable issuing tendentious, sloppy opinions because there is no one left alive with an interest in holding them up to shame.

### Methodology

To date, no study has specifically examined the use of unpublished opinions in death penalty cases. However, publication rates in general are known. We therefore identified the three states with the largest death row population, Florida, California, and Texas, as well as three other states that have carried out a significant number of executions, Georgia, Oklahoma, and Virginia. We began by identifying the most recent executions in each of these jurisdictions. Several of the states maintain web sites that provide this information, and the Death Penalty Information

**Invisible cont. on page 34**

**Post-AEDPA and Pre-AEDPA Data from Six Jurisdictions in Death Penalty Cases** <sup>10 & 13</sup>

State	Post-AEDPA Cases	Direct Appeal Published	State Habeas Published	Federal Habeas Published	Pre-AEDPA Cases	Direct Appeal Published	State Habeas Published	Federal Habeas Published
California	10	10	3	10	3	3	0	2
Florida	10	10	6	8	5	5	4	4
Georgia	7	7	3	7	5	5	2	5
Oklahoma	10	10	9	7	5	5	3	3
Texas	20	10	2	3	5	5	0 <sup>14</sup>	3 <sup>15</sup>
Virginia	10	10	0 <sup>16</sup>	8	5	5	0	3
Total	67	57	23	43	28	28	9	20

## Invisible cont. from page 33

Center maintains a site that includes information for each of the states.<sup>9</sup>

We had some concern that enactment of the Anti-terrorism and Effective Death Penalty Act (AEDPA) in 1996 may have altered publication rates. Consequently, we supplemented the most recent executions by augmenting the list of cases with up to five executions in each state, selected at random that occurred between 1990 and 1995, prior to the enactment of the AEDPA.

### Observations

An appellate court's decision as to whether to publish an opinion reveals something about how important the court believes that opinion to be. Several general conclusions are apparent from the publication data we studied:

- Either the direct appeal opinion or the state habeas opinion was published in one hundred percent of the cases in every jurisdiction other than Texas.
- With the exception of the Fifth Circuit (that includes Texas), every other court of appeal publishes a significantly higher percentage of its death penalty opinions than of its opinions generally. Federal circuit courts as a whole published about 65% of the capital habeas opinions, compared with an average of 20% for all federal opinions.
- The average word count of published opinions is significantly more than unpublished opinions.<sup>14</sup>

We began with two assumptions: that death penalty opinions would be as invisible in courts of appeal as they are in the media, and that they would be equally invisible irrespective of jurisdiction. Those assumptions proved false. Texas, as it happens, is unique. In Texas, state courts publish fewer opinions than the state courts in other jurisdictions that impose or carry out a significant number of death sentences. In addition, the Fifth Circuit has the lowest publication rate of any federal court of appeal in death penalty cases.

The root of the word "publication" is public, and the etymology of the word indicates precisely the reason why judicial opinions should be published. Publication ensures that the American judicial system remains a public institution and what passes for justice in a given case does not occur in secrecy.

Although the practice of not publishing a decision may be indefensible following this logic, it is understandable. Judges hide what they are not proud of. Indeed, in defending the practice of prohibiting citation to unpub-

lished opinions, Ninth Circuit Judge Alex Kozinski argued that were the rule otherwise, "judges would have to pay much closer attention to the way they word their unpublished rulings."<sup>15</sup> In other words, if judicial sloppiness could be brought to the attention of the sloppy judges, not to mention the public generally, the sloppy judges would be forced to clean up their acts.<sup>16</sup>

We would hope that Judge Kozinski is correct in his assessment of what would happen if unpublished opinions were to have the light of day shone upon them, but it is not obvious how that is a negative. It seems apparent that judges write inferior opinions when they do not intend to publish them. In all contexts, but particularly where the state is taking a life, the argument that judges would have to work harder were their opinions to be subject to public scrutiny is, in a word, laughable.

### Conclusion

One consequence of denying publication is dramatically illustrated by a Fifth Circuit fiasco in 1999. Two inmates were set to be executed on consecutive days: Danny Barber was set to die on a Tuesday, and Stan Faulder on Wednesday. Faulder's lawyers persuaded a federal judge in Austin that the State's clemency proceedings are constitutionally defective, and the judge therefore granted Faulder a stay.<sup>17</sup> Faulder's lawyers contacted Barber's lawyers and Barber authorized the identical issue to be raised in his case. He too received a stay from the same federal judge.<sup>18</sup> The State appealed both cases. On Tuesday afternoon the Fifth Circuit refused to disturb the stay in Barber's case. Yet the next day in an unpublished decision, a different panel dissolved the stay in the Faulder case. Both inmates had raised the identical legal claim; indeed, the exact same pleadings were used by both sets of lawyers. All that differed was the name of the party seeking relief. The panel in Faulder's case added a footnote to its opinion acknowledging it was aware a different group of judges had, on the previous day, approved the halting of Barber's execution on the same grounds. The Faulder panel did not explain why it was pursuing a different course.<sup>19</sup>

The difference between the Fifth Circuit and every other federal court of appeal that decides a significant number of death penalty cases is not that the Fifth Circuit is significantly more hostile to claims coming from death row. The difference is that the Fifth Circuit's hostility is more secretive and buried. Only one other court that we examined goes to comparable lengths to hide its death penalty opinions from public view: the Texas Court of Criminal Appeals. The combination of the refusal of these two courts to routinely announce their deci-

sions in published opinions, coupled with the pace of executions in Texas, means that the majority of cases in the state that carries out the most executions go unnoticed.

Publishing their opinions may cause embarrassment to judges: But perhaps they ought to be embarrassed. It seems not too draconian to suggest that when the state is going to execute one of its citizens, who may in fact be actually innocent, that the judges who authorize or permit that act of violence must not be permitted to hide their reasons for doing so.

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The unedited version of *Invisible Executions* is available for reading and downloading at, <http://www.nonpublication.com>

### Endnotes:

1 This article is an edited version of, David R. Dow and Bridget T. McNeese, *Invisible Executions: A Preliminary Analysis of Publication Rates in Death Penalty Cases in Selected Jurisdictions*, Texas Journal On Civil Liberties & Civil Rights, Vol. 8:2 (2004).

2 Death Penalty Information Center, *Executions in the U.S.* in 2001, at <http://www.deathpenaltyinfo.org>

3 *Id.*

4 We have not examined publication rates at the district court level in federal habeas proceedings, largely because the publication rate is exceedingly low in all jurisdictions.

5 This percentage was calculated from information found at [www.uscourts.gov/courtsofappeals.html](http://www.uscourts.gov/courtsofappeals.html) (last visited Sept. 8, 2003). JD Note: The percentage was about the same in 2005.

6 See *Prudential LMI Commercial Ins. Co. v. Colleton Enters., Inc.*, No. 91-1757, 1992 U.S. App. LEXIS 25719 (4th Cir. Oct. 5, 1992).

7 See Eron Berg, *Unpublished Decisions: Routine Cases or Shadow Precedents?*, Wash. State Bar News, Dec. 2000.

8 *Id.*

9 Death Penalty Information Center, *State by State Death Penalty Information*, at <http://www.deathpenaltyinfo.org/article.php?did=121&scid=11> (last visited Sept. 8, 2003).

10 This table is based on Tables 1 through 32 in the author's article cited in note 1.

11 One appeal waived.

12 One appeal waived.

13 Three defendants didn't file a state habeas, and a fourth defendant's habeas was dismissed as untimely.

14 This same finding was reported in another study related to unpublished opinions: Tim Reagan, *Citations to Unpublished Opinions in the Federal Courts of Appeals*, Federal Judicial Center, June 1, 2005.

15 *Hart v. Massanari*, 266 F.3d 1155, 1178 (9th Cir. 2001).

16 The policy of "publishing" opinions electronically while forbidding citation to them is a policy that is at odds with the very idea of law. As Johana Schiavoni has argued:

That judges render binding precedential decisions is the basic precept of our common-law judicial system.... In choosing a common-law system over that of a civil-code system, the Founders expressed their preference for giving judges the power to make decisions that were

**Invisible cont. on page 35**

*Stare decisis* is fundamental to our judicial system, and our judicial system is part of the foundation of our democracy.

*Stare decisis* (Latin for “let the decision stand”) is legal shorthand for considerations judges must give when both following and making legal precedent. *Stare decisis* controls not just how cases are to be decided in light of existing cases, but also controls the caprice of judges by requiring them to suppose that all similar future cases will be decided according to their instant decision. This accountability is not only sobering, but also encourages the examination of decisions from all perspectives, ensuring a result consistent with legal principles. *Stare decisis* is a bureaucracy buster, since it does not allow issues to be swept under carpets.

The constraints of *stare decisis* are fundamental to the judicial process. The late Judge Arnold of the United States Court of Appeals for the Eighth Circuit (hereinafter 8th Circuit) recognized this when he wrote that “principles of ... decision[s] are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence.”<sup>1</sup>

### Are you aware of what the judiciary has done to *sare decisis*?

You might not know that 93% of California appellate court opinions are illegal to mention in California courts. Pursuant to a California court rule, “[a]n opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party.”<sup>2</sup> This practice is not confined

### Invisible cont. from page 34

prospectively binding.... The Framers consciously continued the common-law judicial system, placing their faith in the rule of law and in judges to follow their interpretations of the law in later cases.

Johanna S. Schiavoni, Comment, Who’s Afraid of Precedents?, 49 UCLA L. Rev. 1859, 1877 (2002) (citations omitted).

17 See *Faulder v. Tx. Bd. of Pardons & Parole*, 178 F.3d 344 (5th Cir. 1999), cert. denied, 527 U.S. 1017 (1999) (recounting procedural history).

18 Neither of the opinions relating to the clemency issue in the *Barber* litigation has been published. The Supreme Court’s denial of relief is located at 525 U.S. 1132 (1999). I have previously criticized the refusal of the courts - both state and federal - to publish their opinions in death penalty cases. See David Dow, The State, the Death Penalty, and Carl Johnson, 37 B.C. L. Rev. 691 (1996). The details in the text are based on my first-hand knowledge of the cases.

19 The opinion is unpublished. The Supreme Court did eventually stay *Faulder*’s execution, though the legal basis for that decision remains unclear. *Faulder* was subsequently executed, as was *Barber*.

## Has Anyone Noticed the Judiciary’s Abandonment of *Stare Decisis*?

By Kenneth J. Schmier and Michael K. Schmier

just to California. The United States Court of Appeals for the Ninth Circuit [hereinafter 9th Circuit] has a similar rule, Rule 36-3(b), which provides that “[u]npublished dispositions and orders of this court may not be cited to or by the courts of this circuit, [except under certain circumstances].”<sup>3</sup> In the 9th Circuit, 87.2% of decisions are unpublished, and therefore illegal to mention. You may have thought that lawyers are free to select pertinent authorities from all past appellate court decisions, but this is no longer true. In fact, the vast majority of appellate decisions are no longer precedents, or even academic opinions of the content of our law, but rather mere legal nullities.

*Stare decisis*, which “serves to take the capricious element out of law and to give stability to a society,”<sup>4</sup> is rendered completely ineffective and “cannot operate as a ‘workable doctrine’ as long as courts . . . are able to reach directly contrary results on diametrically opposed legal theories, by the simple expedient of publishing one set of results but not the other.”<sup>5</sup>

You are not alone if you were not aware of this. No-citation rules are largely unknown by politicians, journalists, attorneys general, and even most lawyers, not to mention the general public. We will explain and illustrate how the *stare decisis* doctrine is affected by no-citation rules, lay out a brief history of no-citation rules, provide some of their claimed justifications, and argue that no-citation rules undermine vital democratic processes to an extent that compels their abolition.

### An example of *stare decisis* abandonment

Ninth Circuit Court Judge Kozinski appears to be the leading apologist for no-citation rules and is one of the few judges to defend no-citation rules in writing. In *Sorchini v. City of Covina*, 250 F.3d 706, 708-09 (9th Cir. 2001), he held counsel for the City of Covina’s cite of a prior unpublished 9th Circuit opinion to be a violation of Rule 36-3(b) that warranted punishment. Counsel for the City of Covina had attempted to cite *Kish v. City of Santa Monica*, No. 98-56297 (9th Cir. Apr. 13, 2000) (unpublished disposition), a case which directly relieved the City of Covina of liability for a dog bite where police did not announce the release of a dog during the chase of a hidden suspect.

Counsel advised the court that *Kish* was unpublished. *Kish* was the only prior decision of the 9th Circuit squarely on point. Judge Kozinski explained in the citable portion of *Sorchini* that:

[b]ecause *Kish* is not precedent, neither *Kish*’s holding, nor *Kish*’s observations about the state of the law, have any bearing on this inquiry. The only way *Kish* could help counsel’s argument is prohibited by ... Rule 36-3—by persuading us to rule in the City’s favor because an earlier panel of our court had ruled the same way.” *Sorchini*, 250 F.3d at 708-09

Curiously, despite appellate resolutions of the “unannounced police dog biting arrestee” issue in both *Kish* and the unpublished portion of *Sorchini*, the existence of Rule 36-3 has allowed the legal issue to remain unresolved. While the appellate court cries loudly about the volume of litigation, it has left future litigation, which should be made unnecessary by these decisions, all but inevitable.

### Does *Sorchini* mark the end of Common Law as we know it?

Lawyers are supposed to cite cases showing the court what it has done with similar facts in the past. In turn, courts are supposed to respect past decisions. How is it then that *Kish*, a prior holding of the court on exactly the same facts, cannot be mentioned to the *Sorchini* court? Judge Kozinski tells us *Kish* cannot be mentioned because Rule 36-3 makes it not precedent. But Rule 36-3 does not deny precedential value to *Kish*; it only prohibits citation of unpublished cases. It is circular for Judge Kozinski to say *Kish* is not precedent solely because it is not citable and that it is not citable solely because it is not precedent. Missing from Judge Kozinski’s rationale is some reason *Kish* is not precedent, and no reason is stated.

Precedents, by definition, are the prior holdings of the courts regarding similar fact patterns. To say that *Kish* is not precedent for *Sorchini* is to say *Sorchini* is unprecedented. The court, however, already decided in *Kish* the issue presented in *Sorchini*, so by logic *Sorchini* is precedented. Only by redefining the meaning of precedent can Judge Kozinski make *Sorchini* unprecedented and *Kish* not precedent.

Something is obviously amiss here. Denying opinions of appellate courts prospective application without compelling reasons should raise some suspicion. Selective prospectivity, or limiting the prospective application of an opin-

### Stare Decisis cont. on page 36



## Stare Decisis cont. from page 35

ion, has been held unconstitutional in both civil and criminal matters.<sup>6</sup> Can the contrivance of making the same opinions merely uncitable avoid the ban of selective prospectivity?

Litigants are entitled to the respect of having their matters ultimately decided by law — that is, according to rules that are to be the same for everyone. Before no-citation rules, this requirement was met. Our common law legal system could (theoretically) be described as intrinsically just, because each decision became law for all. But this facade of intrinsic justness cannot be maintained when 93% of decisions are not law for everyone. We consider this a major change — indeed an abandonment — of the common law system.

### Foreseeable damage caused by abandonment of the Common Law system

Even if courts can make decisions that are not considered precedents, it seems unfair that they can make their own decisions entirely unmentionable in our judicial system, no matter how enlightening those decisions might be. What honorable judge can really be comfortable preventing a criminal defendant from truthfully arguing that the appellate court has already determined that the acts he is charged with do not constitute a criminal offense? Defendant City of Covina may not elicit the same compassion as a criminal defendant, but defendants in civil cases should be entitled to show how the courts have treated others so that they won't be treated differently without explanation. We see another constitutional issue here — the right to free speech and we are disappointed that California and Judge Kozinski reject this right. It is a right that exists in our courts; indeed, it is linked inextricably to equal protection and due process. They cannot exist if litigants and courts are legally bound to ignore previous court decisions, and without them, the foundation of our judicial system is compromised.

If the judicial branch of our government system can make its prior actions of no consequence in its treatment of present litigants, can other branches of government make their treatment of others irrelevant? Our nation's founders and early judges recognized that unbridled discretion is the root of corruption in government. William Cranch, an early DC circuit court judge, writing about the necessity of reporting cases (which we think is analogous to the necessity of citing cases) recognized:

In a government, which is emphatically styled a government of laws, the least possible range ought to be left to the discretion of the judge. Whatever tends

to render the laws certain, equally tends to limit that discretion; and perhaps, nothing induces more to that object than the publication of reports. Every case decided is a check upon the judge: he cannot decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public. The avenues of corruption are thus obstructed, and the sources of litigation closed. William Cranch, 1 United States Reports (5 U.S.) iii (1803).

We predict that if every government branch has the power to treat citizens as it pleases without a common standard, then there will be no stopping corruption of our government functionaries.

### A very brief history of uncitability

During the 1960s, lawyers objected that too many appellate precedents were being issued, unnecessarily filling bookshelves. In response, judiciaries across America decided they would not publish "routine" decisions of their courts. California Court Rule 976 was established in 1964. California's constitutional revision of 1966 (CAL. CONST. art. VI, § 16) allowed the California Supreme Court to selectively publish appellate court decisions but the revision commission expressly rejected including a no-citation provision fearing it would constitute a "prohibition on enlightenment."<sup>7</sup>

The rule (and similarly that of the 9th Circuit) did not mandate that any decision be published for any reason — even if it constitutes a marked departure from existing law. The decision of whether to publish or not was left principally with the deciding judges. This led to specialized attorneys searching court files for generally unknowable aberrant decisions and using them to ambush opponents. In 1977, California no-citation Rule 977 (CAL. CT. R. CODE §977) was added to address fairness concerns raised regarding these tactics. By prohibiting both parties to lawsuits and the judge from citing unpublished opinions, the judicial council deemed the legal contest fair. But no public hearings appear to have ever taken place, nor was the new rule publicized outside of legal circles.

Plenty of objections to no-citation rules were raised in and out of court. Notably, Judge Cole believed:

[A] fair reading of rule 977 of the California Rules of Court surely allows citation to the unpublished opinion. To hold otherwise leaves us in the Orwellian situation where the Court of Appeal opinion binds us, under Auto Equity Sales . . . but we cannot tell anyone

about it. Such a rule of law is intolerable in a society whose government decisions are supposed to be free and open and whose legal system is founded on principles of the common law . . . with its elementary reliance on the doctrine of *stare decisis*. *County of Los Angeles v. Wilshire Ins. Co.*, 103 Cal. App. 3d Supp. 1, 5, 163 Cal. Rptr 123 (1979).

An appellate department of the Superior Court of Los Angeles held the rule unconstitutional, but the appellate court removed the case on its own motion and vacated the decision.<sup>8</sup> Law professors bemoaned the serious decline in quality of appellate decision making. A study by Professors William Richmond and William Reynolds indicated that in three federal circuits at least sixty percent of unpublished appellate decisions failed to meet minimal standards of quality.<sup>9</sup>

No one seems to have voiced concern that the fairness of applying a rule equally to all sides in a contest, which is considered fair in sport and perhaps trial by fire, had no application to a judicial system promising justice under law. Judges fearing making bad precedent had a whole new decision option. A case could be resolved and, by law, only affect the present litigants. As Justice Thompson recognized:

An imperfectly reasoned and generally result-oriented opinion may be buried in a non-publication grave. A panel may avoid public heat or appointing authority disapprobation by interring an opinion of real precedential [sic] value. More frequently, a panel may make a mistake . . . and fail to publish an opinion.<sup>10</sup>

The scary responsibility of appellate judging was lifted. No longer accountable to the common law with public consequences of their decisions, appellate courts became comfortable deviating from law. Courts routinely began delegating decision-making authority to staff, and except for public formalities, largely did away with three perspectives, judicial or otherwise. Where judges did not totally delegate to staff, they began casually determining results for clerks to backfill with opinions. All of this allowed appellate courts to process ever-larger numbers of cases. As a result, the use of uncitable decisions skyrocketed.

Lawyers and parties disgruntled by apparently wrong appellate opinions have coupled their petitions for rehearing with alternative demands that the appellate court make its decision citable as law for all. They reason that if their clients are to be burdened by a certain result, the decision should represent law for all. Such petitions have been uniformly denied.

## Stare Decisis cont. on page 37

## Stare Decisis cont. from page 36

When charges were brought that the appellate process was creating logical conundrums instead of clarifying the law — they were dismissed.<sup>11</sup> Lawyers complaining that their profession requires them to ascertain law for clients from appellate decisions, and that no-citation rules render the law uncertain, unpredictable, or even unknowable, have nonetheless been denied standing to question no-citation rules. Notably, the decision in a lawsuit filed by the authors of this article resolving the free speech issue presented by the application of the no-citation rule is itself uncitable, and both the California and U.S. Supreme Courts denied it review.<sup>12</sup>

Attempts to challenge no-citation rules legally have been met with the refusal of courts to force any part of the judiciary to answer questions as to the no-citation practice. Perhaps more troubling to us than no-citation rules themselves has been the refusal of so many lawyers to involve themselves due to fear of judicial retribution.

Federal 8th Circuit Court Judge Richard Arnold criticized no-citation rules and held the making of nonprecedential opinions unconstitutional, writing:

[Some] courts are saying to the bar: “We may have decided this question the opposite way yesterday, but that does not bind us today, and what’s more, you cannot even tell us what we did yesterday.” *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir.2000). As we have tried to explain in this opinion, such a statement exceeds judicial power, which is based on reason, not fiat.

But *Anastasoff* was vacated as moot after en banc review was granted.<sup>13</sup>

### Justifications given for no-citation rules

What reasons are given to justify no-citation rules? “There would not be enough books to hold the unpublished opinions,” says Justice Werdegar.<sup>14</sup> Chief Justice George explains that uncitable opinions “are a necessary evil to chill the development of the law.”<sup>15</sup> California Assembly member Hannah Beth-Jackson defended California’s no-citation rule to the Assembly Judiciary Committee, stating that it was unreasonable to require lawyers to search through large numbers of unpublished opinions to find the law.<sup>16</sup> The Western Center for Law and Poverty has said that were unpublished opinions citable the additional research would be burdensome on less affluent litigants.

After Judge Kozinski told *The New York Times* that uncitable opinions are “garbage,”<sup>17</sup> he wrote to the Federal Appellate Rules Committee (FARC) that “when the people making the sausage tell you it’s not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway.”<sup>18</sup> But according to Judge Kozinski, it is acceptable for the appellate court to issue garbage, because all that matters in an uncitable case is that the result is correct.<sup>19</sup> In short, the argument is the sheer volume of cases handled by the appellate courts necessitates issuing uncitable opinions.

Kozinski points out that trying to parse an unpublished opinion to determine the thinking of judges is futile because most likely, *the judges have had little if anything to do with the opinion*.<sup>20</sup> Holding the judiciary responsible for writing an opinion that is reasoned according to law just because three judges signed it is, to him, unreasonable.<sup>21</sup> Startled by his candor, the Federal Judicial Center (hereinafter FJC) issued a press release to disclose (belatedly) the judiciary’s delegation of most decision-making to non-judicial staff.<sup>22</sup> Many judges have argued that eliminating no-citation rules will fundamentally change operations in appellate court systems.<sup>23</sup> While this has not proved to be true, we think no-citation rules hide quality control problems resulting from the delegation of appellate decision making to law clerks.

Judge Thompson argues that *appellate courts need more judges and far less staff because the appellate task is not fit for delegation*. Having judges dictate right results to be supported by clerk-drawn opinions, he says, is “posterior backward,” resulting in legal analysis that often falls short of its conclusions.<sup>24</sup> Privately he has poignantly observed that in ghost-writing opinions, law clerks will extend their judge’s known proclivities beyond those the judge himself might allow in search of approbation.<sup>25</sup>

Whether it is appropriate for the judicial function to be delegated to staff is outside the scope of this article, but language lifted from Judge Kozinski’s dissent in *Pinckney v. Andrews*, No. 02-56577 15897 (November 15, 2004), indicates that Judge Kozinski should be the last person to justify no-citation rules on this basis. He stated, “While delegation may be a necessity in modern law practice, it can’t be a lever for ratcheting down the standard for professional competence.” *Id.* at 15916 That standard is evidenced in the California Constitution, which requires written decisions with reasons stated. From litigants’ point of view, the elimination of any prospective authority from those stated reasons leaves the analysis untrustworthy.

Judge Kozinski justifies no-citation rules by a separation of “error correction” and “law-making” functions.<sup>26</sup> Judge Kozinski asserts that precious judge time must be reserved for the law-making function. He defines a judicial methodology contrary to the practice commonly taught in the United States:

“[The lower courts and appellate courts not sitting en banc] responsibility in applying the law is to analyze and apply the published opinions of this court and opinions of the Supreme Court. They are not relieved of this duty just because there is an unpublished circuit disposition where three judges have applied the relevant rule of law to what appears to be a similar factual situation. The tendency of lower court judges, of course, is to follow the guidance of the court of appeals, and the message we communicate through our noncitation rule is that relying on an unpublished disposition, rather than extrapolating from published binding authorities, is not a permissible shortcut. We help ensure that judges faithfully discharge this duty by prohibiting lawyers from putting such authorities before them, and thereby distracting the judges from their responsibility of analyzing and reasoning from our published precedents.”<sup>27</sup>

### Our response to the justifications

Inconsistency in human knowledge forces thought. Judge Kozinski holds that no-citation rules foster consistency of the published precedent. But the inconsistencies of unpublished opinions do not go away. Litigants are hurt and courts inculcate into themselves bad precedent nonetheless. [JD Note: Judge Kozinski’s analysis is fatally flawed because it doesn’t take into account that the uncitability of non-published decisions gives judges a blank check in those cases to ignore applicable circuit and Supreme Court precedents with impunity without public or professional accountability.]

Viewed over time, common law processes chart a path that is a better way to improve consistency. Under that method, conflicting authorities are brought to judges who give reasons supporting the better precedent. Thus, the law is continuously improved by countless judges through the ongoing weighing of precedents, arguments, and issues, together with reasoned adherence to *stare decisis*. The law is found not from any one source, but from the ongoing discussion.

There can be no question that the abilities of judges to weigh wisely these considerations vary greatly. But the purpose of the judiciary

### Stare Decisis cont. on page 38

## Stare Decisis cont. from page 37

is to employ common sense (born of individual human judgment) with historical experience born of precedent, as a last check over all of our laws and those with power. We use the judiciary as such a check with the hope that one or a few thinking persons can keep us from an illogical or unjust stampede. Precedents, and the making of precedent, force thought. Judge Learned Hand wanted the following slogan emblazoned over the portals of every courthouse: "I beseech ye ... think ye may be mistaken."<sup>28</sup>

There is a measure of chaos here that might offend those that want a perfectly consistent, hierarchical system of judicial decision-making. But, as Dee Hock profoundly explains in *Birth of the Chaordic Age* (Berrett-Koehler Publishers, 1999, 264), institutions work best when the human beings comprising them are freest to use the limits of their abilities to advance the goals of the organization. Hock's word "chaordic" is a blend of chaos and order. It is intended to describe institutions that harness the human capacity to *think* creatively (limited only by a firm commitment to common goals and standards). Nowhere, in our view, does *stare decisis* compel any court to follow any historical rule, even of higher courts. But it does direct judges to *think carefully* about considerations that should be given in deciding to follow or not follow such historical rules. We trust that by *thinking carefully*, judges will appreciate the need for consistent application of law and will only depart from consistent application when certain that they can enlighten the community with an approach that yields better justice or demonstrates appropriate mercy. We trust that as the chaordic process of individual judges continually valuing competing precedents continues over time, constant refinement of our law will be the result.

Many distinguished scholars, bar associations, and a few judges have carefully highlighted compromises to the legal system, constitutional rights, and respect for individuals that result from no-citation rules. (A vast selection of these articles can be linked via <http://www.nonpublication.com>. Most documents referenced herein can be found at that web site.)

We believe the making of decisions that carry no precedential effect whatsoever violates the constitutional prohibition of selective prospectivity. We also believe no-citation rules are insidiously poisoning our democratic system. We realize this is an extreme statement, but if consideration is given to the centrality of voluntary obedience by the citizenry to a

known body of accepted law, the destructive potential should become apparent.

### Citability provides feedback to our government system

Citation of appellate opinions is a *sine qua non* for a government system worthy of trust. Any system must have feedback of its real world performance so it can correct itself. Heaters, for example, have thermostats for this purpose. Citability provides an elegant manner of feedback to our governmental system.

Our "system" could be described thus: The judiciary is where democratically created law is made to affect individuals. No person can be subject to government force except with the sanction of a court. Every person subject to an order of a court has the right to appeal to a higher court which is required to issue a written decision with supporting reasons stated. Because the resulting decision is citable and because of *stare decisis*, that decision potentially affects all persons that are, or even might become, similarly situated. Relying upon the reality that most of us are far more concerned about potential impact of court decisions on our own lives than actual impact upon faceless others, our system can count on journalists to spread word of appellate decisions. Informed as to an appellate court decision, a very large community of court watchers drawn from the public, having skills in many areas, monitors and criticizes those court actions.

The community of court watchers includes lawyers, judges, academics, journalists, industry groups, politicians, social workers, and clergy — in a word, everyone. These court watchers protect individual litigants because they can be expected to, and often do, join with litigants to raise the issue of an incorrect judicial resolution to a supreme court or to executive or legislative bodies. Via the threat and promise of equal application of law made real by *stare decisis*, our "system" of government makes sure not only that individuals subject to bad law are unlikely to stand alone, but that constituencies sufficient to amplify cries of error form around such individuals such that the body politic has to take notice.

To use a physical analogy, the citation of opinions is like water. Unlike other materials, the solid form of water floats in its liquid form. Were it not so, water frozen each winter would not be raised to be thawed by the sun in the spring and our earth could be frozen solid. So too, error should not be allowed to sink out of view, lest we be frozen in error, but should be attached to a mechanism likely over time to bring the error to light. The citation of opinions is that mechanism. This feedback system regulates the democracy. It is our essential

warranty to protect us by striving for enlightenment and equal treatment. It stood as a substantial quality control system, not just for the courts, but for the entire society.

What is left of this system in the presence of no-citation rules? Little. The public is discouraged from monitoring unpublished opinions not just because they do not readily appear with the court's work, but because judges often eliminate any statement of facts from these decisions, supposedly to save time in the decision-writing process.<sup>29</sup> Without a statement of facts, the effort to review a court decision becomes unreasonably difficult for all but the parties.

It has been reported to us that some judges view statements of facts and legal analysis minimally necessary for citability as "make work." First year algebra students often decry "showing their work" as unnecessary, too. But it certainly makes error easier to isolate. Would any court find the requirement in our California Building Code that structural engineers show their calculations to be too onerous? No, because somebody could get hurt by error, and we know that error happens when process is not followed. Appellate courts can cause immeasurable harm by embracing an apparent result without the process of testing that result with step by step analysis resting on a careful fact statement. A careful fact statement shows the litigants that the judges know the facts, and serves as the basis upon which court watchers can evaluate the rightness of a decision.

### No-citation rules keep the judiciary from learning

Citation is the method by which our judiciary, even our entire society, learns as a whole. Any person may write a comment regarding a judicial opinion. Through modern research techniques, any comment containing a case citation can be discovered. That comment may cause a court to decide a subsequent case a different way, criticize the old authority, and make the law wiser and more defined over time. Any person writing superior logic can truly expect to influence the law.

Over time we can expect our communal knowledge base to identify right, and, perhaps more important to the communal learning process, clarify why errors are wrong. No-citation rules sedate this process. In short, no-citation rules operate as a ban on enlightenment.

Because no-citation rules disconnect the amplification equal protection would otherwise bring to unpublished judicial actions, systematic feedback of the problems encountered in the enforcement of our laws to those

## Stare Decisis cont. on page 39

## Stare Decisis cont. from page 38

that can correct those problems is greatly inhibited. Before error becomes apparent, judiciaries are likely to have established firmly rooted but hidden precedents, calcifying not only the error of their decision, but the bureaucratic practices established or preserved in accordance with those decisions.

### Full citation allows us to expect a better future

The formation of precedent at the highest level of review of right asserts over our legal system the moral authority of the Golden Rule: "Treat others as you would like to be treated in the same situation." It makes certain that our judges never subject any one of us to that which the court is not willing to subject others, were another person similarly situated. Full citability encourages respect for the inestimable value of every individual. This in turn reinforces the core systemic strength of our democracy — that so long as all are treated equally, issues will ultimately be made right.

Citation should be unimpeded, and we should continue to have faith that with open discussion of all our law our democracy shall, one day, achieve the ideal of liberty and justice for all.

### Recent developments

A hearing on no-citation rules was held before the House of Representatives Subcommittee on the Courts, Intellectual Property and the Internet in 2002. The Subcommittee encouraged FARC to create proposed Federal Rule of Appellate Procedure (hereinafter FRAP) 32.1, which would eliminate no-citation rules in the federal judiciary. The text of FRAP 32.1 reads:

#### Rule 32.1 Citation of Judicial Dispositions

(a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

(b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment,

or other written disposition with the brief or other paper in which it is cited.

A letter-writing campaign against the new rule led by Judge Kozinski failed to avert endorsement of the new rule by the Subcommittee. However, the proposed rule was delayed one year by the Standing Committee on rules of the judicial conference so a study could be conducted by the Federal Judicial Center of the operation of no-citation rules in the federal courts. The study was completed on April 14, 2005. On April 18, 2005 FARC approved FRAP 32.1. Then on June 15, 2005, the Standing Committee unanimously approved FRAP 32.1. Then on September 20, 2005, The Judicial Conference of the United States voted to approve FRAP 32.1. The Supreme Court will review it by May 2006. As a member of the Advisory Committee on Appellate Rules, Chief Justice John Roberts has twice voted in favor of adopting FRAP 32.1. After the Supreme Court approves FRAP 32.1, Congress will have the opportunity to review its adoption. If there is no congressional opposition, the new rule will apply to decisions issued on or after January 1, 2007.

The Judicial Conference's vote is indicative that in the past few years there has been a trend toward questioning the advisability of non-citation rule experiments, while no jurisdiction has recently adopted such a rule. As of April 2006, the 9th Circuit and the California systems remain committed to enforcing their no-citation rules.

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Kenneth J. Schmier is Chairman of the Committee for the Rule of Law, an ad hoc group he formed with his brother Michael Schmier to bring attention to the compromise of the judicial system caused by no-citation rules.

Michael K. Schmier is Dean of Academic Affairs and Professor of Law at East Bay Law School in Oakland, California. He practices law in Emeryville, California, and was a candidate for Attorney General of California in 1998 and 2002.

#### Endnotes:

- 1 *Anastasoff v. United States*, 223 F.3d 898, 903-04 (8th Cir. 2000) (quoting Joseph Story, Commentaries on the Constitution of the United States §§377-78 (1833)), *vacated as moot*.
- 2 CAL. CT. R. CODE §977 (West Supp. 2004).
- 3 28 U.S.C. §36-3(b) (2004).
- 4 William Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).
- 5 Gideon Kanner, The Unpublished Appellate Opinion: Friend Or Foe?, 48 CAL. ST. B.J. 386, 445 (1973) (quoting Seligson & Warnloff, The Use of Unreported Cases in California, 24 HASTINGS L. J. 37, 53 (1972)).
- 6 See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) and *Griffith v. Kentucky*, 479 U.S. 314 (1987).
- 7 Constitutional Revision Commission, Minutes (n.d.) (on file with authors).
- 8 See generally *People v. Valenzuela*, 86 Cal. App. 3d 427, 150 Cal. Rptr 314 (1978).

9 "In a study conducted fifteen years ago, we found that twenty percent of unpublished opinions in nine of the eleven circuits failed to satisfy a very undemanding definition of minimum standards, and that sixty percent of the opinions in three circuits failed to meet those standards. There is no reason to think that the situation has improved in the years since." William L. Reynolds & William M. Richman, *Elitism, Expediency, and the New Certiorari: Requiems for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 284 (1996) (referring to William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 602 (1981)).

10 Robert S. Thompson, *Mitigating the Damage, One Judge and No Judge Appellate Decisions*, CAL. ST. B. J., Nov.-Dec. 1975, at 476, 480.

11 See *In re Michiko Kamiyama*, No. G022 140 (Cal. Ct. App. 4th Dist. May 29, 1998), <http://www.nonpublication.com/newfiles/kamiyama.html>.

An example of a reversal of a lower court in an appellate decision of first impression. What should a trial judge do if the same fact pattern comes before the court again? *Stare decisis* requires the court to act the same way. The court knows it has been reversed, but the no-citation rule prohibits the court from taking that into consideration. The law, by law, becomes unknowable.

12 See *Schmier v. Sup. Ct. of Cal.*, No. A101206.

13 We attempted to buy Mrs. Anastasoff's claim for its full amount, \$6,436 which would have avoided the opportunity for vacation by *en banc* panel. Had her counsel not refused the offer, the law on this point might be different.

14 Video tape: Marin Meet Your Judges Night (October 28, 1998) (on file with authors).

15 Peter Blumberg, *Publish His Platform*, DAILY J., March 19, 1998, at 1.

16 Appellate Opinions: New Publication and Citability Rules Hearing before the Assembly Judiciary Comm. on A.B. 1165, 2003 Leg., 2003-2004 Sess. 2 (Cal. 2003) (statement of Hannah Beth-Jackson, Assembly member), <http://www.nonpublication.com/1165analysis.htm>.

17 See William Glaberson, *Ideas & Trends: Unprecedented; Legal Shortcuts Run Into Dead Ends*, N. Y. TIMES, October 8, 2000, (Week in Review), at 44, <http://www.nonpublication.com/glaberson.htm>.

18 Letter from Alex Kozinski, U.S. Circuit Judge, 9th Cir., to Samuel Alito, Jr., U.S. Circuit Judge, 3d Cir., Jan. 16, 2004, at 2, <http://www.nonpublication.com/kozinskiletter.pdf>.

19 "To cite [unpublished opinions] as if they were—as if they represented more than the bare result as explicated by some law clerk or staff attorney — is a particularly subtle and insidious form of fraud." *Id.* at 5, 7.

20 "Dispositions bearing the names of three court of appeals judges are very different in that regard. Published opinions set the law of the circuit, and even unpublished dispositions tend to be viewed with fear and awe, simply because they, too, appear to have been written (but most likely were not) by three circuit judges." Kozinski, *supra* note 18, at 2.

21 *Id.* at 6.

22 Press Release, Federal Judicial Center, Staff Attorney Offices Help Manage Rising Caseloads (issued undated), <http://www.uscourts.gov/newsroom/stffattys.htm>.

23 "This is insufficient reason to alter the status quo in an area so fraught with consequence for the judiciary, for the orderly development of precedential case law, for the practice of law, and for persons who pay legal bills." Judge Diane S. Sykes, Supreme Court of Wisconsin, at <http://www.nonpublication.com/wisepdf>.

24 Robert S. Thompson, *Courts Shouldn't Put Publishable Data in Unpublished Opinions*, DAILY J., Apr. 22, 2004, <http://www.nonpublication.com/thompson.html>.

25 Judge Thompson told this to Kenneth Schmier in private discussion at his home. Judge Thompson's telephone number is (858) 456-8092.

26 "Court of appeals judges perform two related but separate tasks. The first is error-correction: We review several thousand cases every year to ensure that the law is applied correctly by the lower courts, as well as by the many administrative agencies whose decisions we review. The second is development of the circuit's law: We write opinions that announce new rules of law or extensions of existing rules." See Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Opinions*, California Lawyer, June 2000.

27 Kozinski, *supra* note 18, at 6. (Moreover, Judge Thompson has told this author that clerks often excessively embrace certain positions they think a judge favors, whereas the judge himself would recognize the limits.)

28 *Learned Hand, The Spirit of Liberty: Papers and Addresses of Learned Hand 229-30* (Irving Dilliard ed., Alfred A. Knopf, Inc., 1963) (1952).

29 In the 9th Circuit, e.g., judges are forbidden to set out the facts of the unpublished cases they decide. See U.S.C.A. 9th General Order 4.3 (a).



## Crotzer continued from page 8

She remembered the day she first saw him; he was sitting near her brother, Douglas James, in court. Something wasn't right. She quietly conferred with her mother.

"When they arrested Doug and we saw that boy, we said 'Well, who is he?'"

Daniels believes it was not Crotzer, but a longtime family friend of her brother's who was in the car that night with the James brothers. She and her sister, Sharon Watson, both say they saw their brother's childhood friend drive away in the Buick the night of the rapes.

"We knew from the beginning that boy (Crotzer) was not with them," she said.

Daniels knew it, her sisters knew it; her mother knew it; her brothers knew it and so did lots of people in their neighborhood. But when the mother tried to tell prosecutors she had never seen Crotzer before, and that their family friend was the one they should pursue, authorities didn't listen, Daniels said.

Six years later, her mother was dead from cancer and Crotzer was still in prison.

"My mother wanted the truth to come out. She died with a broken heart over that," Daniels said.

Two decades later, Daniels and her sisters are working with Crotzer's defense attorneys to free him. Still living in the neighborhood, the childhood friend has refused the sisters' appeals to come clean.

Daniels and her sisters are learning it takes a lot more than a broken heart to uncover the truth.

### A second chance

It would be years before Crotzer's story resurfaced. When it did, it landed on a cluttered desk in New York in late 2002, 1,200 miles away from the Polk County prison where Crotzer was serving his sentence. With nothing but time on his hands, Crotzer laid out his case in a letter to the Innocence Project, the New York-based legal nonprofit that has successfully uncovered dozens of wrongful convictions. He said he had filed an appeal asking a court to review DNA evidence in his case shortly before Florida's then-deadline for consideration.

(Florida legislators are still debating whether there should be a deadline for DNA appeals.)

Crotzer's motion was denied, but his case caught the attention of Innocence Project

## Publicity Spurred Crotzer's Release By Reluctant Officials

On February 4, 2004, Alan Crotzer's *pro bono* legal team filed a motion to set aside his 1982 rape and robbery conviction and vacate his sentence. The motion was based on the new evidence of DNA tests excluding him as the rapist, and the statement of one of his two co-defendants that Crotzer wasn't involved. The new evidence confirmed the truthfulness of multiple alibi witnesses who in vain testified at Crotzer's trial that he wasn't at the crime scene.

The Hillsborough County State Attorney's Office opposed Crotzer's motion, and the case languished for more than a year and a half due to legal maneuvering and retesting of evidence. Then on December 11, 2005, the *St. Petersburg Times* published a major front-page article detailing the case for Crotzer's innocence. The *Times* published several follow-up articles and other media in the St. Petersburg area also reported on the outrageous circumstances of Crotzer's

continued imprisonment. On January 13, 2006, the *Times* led off an editorial titled *Waiting For Justice* with, "How much more time is it going to take before Hillsborough County prosecutors are satisfied that Alan Crotzer is innocent and should have his convictions set aside?"

The *next day* Hillsborough State Attorney Mark Ober finally caved and agreed Crotzer should go free. A hearing was scheduled for January 23 on the state attorney's motion to vacate Crotzer's conviction and sentence. The spotlight of publicity on how the prosecutors were standing in the path of a provably innocent man's release from prison accomplished what almost two years of efforts by Crotzer's legal team had failed to accomplish in the courtroom.

Nine days later, on January 23, 2006, Crotzer was released after 24 years of wrongful imprisonment. It was two weeks shy of two years after his motion had been filed in February 2004, and twenty-nine months after the DNA tests first excluded Crotzer as the rapist.

volunteer Sam Roberts and attorney David Menschel, then a recent Yale University law graduate. Roberts began trying to track down any remaining evidence from Crotzer's decades-old trial. He asked around at the Hillsborough Sheriff's Office. No luck. There wasn't even much left of the trial files at the courthouse, Roberts said.

But then he struck gold: An official at the Florida Department of Law Enforcement's crime lab in Tampa said she had found five slides of material taken from the rape victims more than 20 years earlier.

The two approached Hillsborough prosecutor Michael Sinacore about having an independent lab in Maryland perform a DNA test on the material to see if any semen present in the samples matched Crotzer's DNA or if the results would exclude him as a rapist.

Sinacore agreed. But the Maryland lab said the samples were too small to determine whether there was a DNA match. When the initial tests failed to produce meaningful results, Roberts and Menschel worried that DNA evidence wouldn't pan out. So they flew to Florida in May 2003 to ask Crotzer's co-defendants, Corlenzo and Douglas James, what they knew.

"Fairly early on we developed a sense that this case was different," Menschel said. "As soon as we began to scratch beneath the surface, the evidence of his innocence was

so overwhelming that Sam and I decided to pursue the case no matter what."

They visited Corlenzo James, 45, first. He said he knew why they were there. He admitted Crotzer was not with him and his brother the night of the rapes, but he refused to sign a statement to that effect, Roberts said.

"He knew something was up right from the beginning," Roberts said. "He would look away and laugh to himself."

Corlenzo wouldn't budge, but Douglas, 52, was different.

"We didn't even have a chance to ask the question before he started talking," Menschel said. "Douglas' story was that he did everything that he was accused and eventually convicted of that night. He said his brother Corlenzo was the shotgun-wielding double rapist and his childhood friend was the third man."

Armed with Douglas James' statement, the two returned to New York and asked Sinacore to allow them to have the evidence tested again. The slides were sent to a lab in England in August 2003 where highly sensitive tests were performed. But that test didn't yield complete results.

Meanwhile, Menschel and Roberts turned to one of Florida's most well-known death penalty lawyers for assistance. Martin Mc-

**Crotzer continued on page 41**

**Crotzer cont. from page 40**

Clain has worked on more than 155 capital cases. He won notoriety for helping exonerate three wrongly convicted men in Florida. McClain says he believes race may have been a factor in the confusion over the photo identifications since the victims were white and the perpetrators were black.

“Is this a situation where one black man is as good as another? I hate to level the racism charge, but there does seem to be this acceptance or this failure to question these discrepancies,” McClain said.

Crotzer’s attorneys persuaded Sinacore to allow them to send the slides to Dr. Edward Blake in Richmond, Calif. A pioneer in DNA forensics, Blake has run Forensic Science Associates since 1978. His lab has received national recognition for its work as an independent testing lab for postconviction testing. The lab’s work proved crucial; test results showed DNA evidence excluded Crotzer as a rapist.

On Feb. 4, Menschel and McClain filed a motion asking a Hillsborough court to throw out Crotzer’s conviction and sentence.

“Every day that Alan Crotzer remains in prison is a day too long,” Menschel said. “He’s served 24 years for a crime he didn’t commit. The time to free him is now.”

**The Crotzer Case Timeline**

July 8, 1981: Corlenzo James, his brother Douglas and a third man drive to Tampa, where they rob five people at an apartment on Yorkshire Court, then abduct and rape a 12-year-old girl and 38-year-old woman.

July 9, 1981: Detectives show the five victims dozens of photos. Some identify Corlenzo and Douglas James. The 38-year-old woman identifies Alan Crotzer as the ringleader and double rapist.

July 10, 1981: At his girlfriend’s home in St. Petersburg, police arrest Crotzer in the robbery and rapes.

April 22, 1982: A jury convicts Crotzer and Douglas James of robbery and rape, and they are each sentenced to more than 100 years in prison.

December 2002: The Innocence Project in New York begins investigating Crotzer’s claim that he was wrongly convicted and asks the Hillsborough County State Attorney’s Office for permission to test for DNA on evidence leftover from the case.

**State Court Rules on Citation of Unpublished Opinions**

I	II	III	IV	V
All Opinions Citable	Citable as Precedent	Citable for Persuasive Value	Too Close to Call	Citation Prohibited
Connecticut	Delaware North Dakota Ohio <sup>5</sup> Utah	Alaska <sup>1</sup> Iowa Kansas Oklahoma <sup>6</sup> Michigan Minnesota Mississippi <sup>3</sup> New Jersey New York Vermont Virginia	Georgia Oregon New Mexico Wyoming	Alabama, Arizona Arkansas, California Colorado, Dist. of Col. Florida, Hawaii Idaho, Illinois Indiana, Kentucky Louisiana, Maine Maryland <sup>2</sup> Massachusetts Missouri, Montana Nebraska, Nevada New Hampshire North Carolina <sup>4</sup> Pennsylvania Rhode Island South Carolina South Dakota Tennessee <sup>7</sup> , Texas <sup>8</sup> Washington West Virginia, Wisconsin
1	4	11	4	31

Notes:

- 1 Citation prohibited by statute. Citation approved for “persuasive power” only by appellate decision.
- 2 May be cited for any purpose except as precedent or “persuasive authority.”
- 3 Decisions prior to Nov. 1, 1998, are not citable under any circumstance.
- 4 Citable only if no published case covers the issue, otherwise citation disfavored.
- 5 Applicable to decisions on or after May 1, 2002.
- 6 Citable only if no published case covers the issue, otherwise citation disfavored.
- 7 Unpublished opinions not designated “not for citation” can be cited for persuasive authority only.
- 8 Tex. R. App. P. 77.3 (Ct of Crim. Appeals) “no value as precedent and must not be cited as authority.”

Source: Federal and State Court Rules Governing Publication and Citation of Opinions: An Update, Melissa M. Serfass and Jessie Wallace Cranford, *The Journal of Appellate Practice and Process*, Vol. 6, No. 2 (Fall 2004).

May 2003: Douglas James tells an Innocence Project attorney that he was one of the robbers, fingers his brother, Corlenzo, as the ringleader and says another man - not Crotzer - was there the night of the robbery.

August 2003: DNA forensics pioneer Dr. Edward Blake confirms through testing at his Richmond, Calif., lab that DNA evidence excludes Crotzer as the rapist.

February 2004: Crotzer’s attorneys file a motion to have the sentence and charges against him dismissed.

Candace Rondeau is a *St. Petersburg Times* staff writer.

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**SHEDDING NEW LIGHT ON A QUESTIONABLE CONVICTION**

**SHEILA AND DOUG BERRY**

## Ford continued from page 3

dent eight years before when Detective Tallent was shot by Ford's father.

Bennett denied seeing anything on the day of the killing, but police began to pressure her for information after Carrington said Ford had shot Price. The second time she was interviewed by Detective Tallent, Bennett corroborated Carrington's story.

### What about Joey Jones?

A few days later, an anonymous tip led police to Jones.

Initial police reports said Jones was being sought only as a witness, even though both Ford had told them he thought Jones had committed the crime and two of Mr Price's cousins said Jones admitted to the killing while he was being detained pending Ford's trial at the Shuman Juvenile Detention Center.

On his arrest, Jones lied about his name, but police quickly figured out who he was and that he was wanted for a robbery and shooting in North Carolina. At that point, Jones, who matched the witnesses' descriptions of the man who had tossed the gun into Beatty's basement, told police he saw Ford shoot Price.

The day before, Jones had told a woman with whom he was staying that he had shot Price. She would testify that Jones said the gun accidentally fired and that all he wanted was enough money to buy a bus ticket to North Carolina.

At a coroner's inquest, Jones implicated Ford, but Carrington hedged.

"I don't have nothing against nobody sitting there, but I already been through three years of hell and I can't sit up here and testify against nobody. This is just not me," she said, running out of the courtroom.

After police chased her down a hallway and persuaded her to return to the stand, Carrington identified Ford as the killer.

Coroner's Solicitor Arthur Gilkes reluctantly held the case for trial.

"We have two divergent, opposite stories, one which exonerates Paul Ford and the other which inculpates him. The decision has to be done by a jury," he said.

After the inquest, while awaiting trial at Shuman Juvenile Detention Center, Jones told other inmates who were related to Price

in the presence of two guards that he had killed Price. He boasted that he never would be charged.

After reading the account of the Ford case in the Pittsburgh *Post-Gazette*, James Price, the victim's brother, said that while Jones claimed to be Price's killer and that his relatives beat him over it at Shuman Center, the Price family does not believe Jones did the killing. Even if he did, James Price says he still believes Ford had something to do with it.

### Conflicting testimony

At trial, the three witnesses who testified that Paul Ford killed Maurice Price could agree on little else.

"I don't remember specific, you know, half of what really happened," Carrington said, becoming more and more uncooperative. Allegheny County Common Pleas Judge John Zottola recessed the trial so she could read her previous testimony.

The next day, Carrington related a few details of the crime and identified Ford, mainly by answering yes or no to scenarios posed by Assistant District Attorney Chris Avetta.

Carrington never mentioned seeing Jones at the scene and no one ever asked. She wavered on where she was during the shooting, eventually settling on her apartment. "From where my building is," she said, "you can see everything."

Using the videotape of the scene, a visit to the site, police records and testimony, students at the Innocence Institute confirmed that Carrington could not have seen the shooting from her apartment. The view is obstructed by a building.

Four witnesses testified that Carrington had not ventured outside until after the fatal shot was fired.

Bennett admitted that she lied to police initially, saying she was terrified of Ford. Under cross examination, she admitted letting Ford into her house to do drugs just after the killing and attempting to extort money from him in a plot which, she said, was hatched by Carrington "for him to pay me not to testify."

On the witness stand, Jones denied his jailhouse confessions, despite the seven witnesses who said they had heard them.

Among other contradictory evidence, Bennett said Ford had held the gun in his left

hand when he shot Price. Jones insisted that Ford had held it in his right hand.

Ford's attorney did get Jones to admit that he had lied to police and in testimony about numerous things, including his name, address, age and an alias he had used.

Sara Beatty, the grandmother who had seen the killer dispose of his gun, waited throughout the trial for her turn to suggest it was Jones, not Ford, who had run by her home and tossed the weapon into her basement. She was not called to testify.

Neither was the Monview Heights security guard who had said Jones fit the description of the man he saw.

Ford's attorney, the late Robert Garshak, told the defendant he thought the prosecution's case was so weak that he didn't need their testimony.

### Life without parole

In his closing argument, Garshak chastised prosecutors for bringing charges and said the police had failed even to entertain the possibility that someone other than Ford could have committed the crime. He said they had "quit on this one with two admitted liars and Joey Jones."

Avetta told the jury that Jones' multiple confessions were merely "bait." He added, "Ladies and gentlemen, you are not fish. Certainly not suckers. Don't fall for it. Don't rise up to that bait."

Ford was convicted of second-degree murder and condemned to life in prison without parole. He has lost several appeals.

Those who testified against him have not fared much better.

Jones eluded a murder charge in Pennsylvania but is serving up to 36 years in North Carolina for armed robbery.

Bennett broke into a neighbor's house in 1995. She assaulted a woman, threatened her baby and stole \$342 in money and food stamps. A month later, she pleaded guilty to beating another woman while robbing her of \$14 in cash and a gold ring.

Bennett was given probation for both offenses. In 2003, she was charged with prostitution and jumped bail.

**Ford continued on page 43**

## “A Long Time Coming!”

Two Innocent Businessmen Were Imprisoned More Than Two Decades For Murdering A Man Scotland Yard Knew Was Alive

By Hans Sherrer

In the early 1970s, Terry Pinfold and Harry MacKenney became partners in the manufacture of underwater diving equipment. They started their company in Dagenham, Essex (near London, England) after their release from prison, where they met. While in prison the men became acquainted with John “Bruce” Childs, and they gave him a job when he was released. Terence Eve, also a former prisoner, owned a teddy bear manufacturing company located in the same



Harry MacKenney and Terry Pinfold outside the courthouse the day of their exoneration.

building as the diving equipment venture.

In the fall of 1974 Eve became a suspect in the hijacking of over \$150,000 (£75,000) in stereo equipment. He apparently

found out before he could be arrested that a warrant had been issued for his role in the theft. Facing five years in prison, Terence Eve left work on a Friday afternoon in November 1974, and he didn't return the following Monday. He seemingly vanished without a trace. His family didn't hear from him again and his body was never found.

## Child confesses to murdering Eve

Police considered Eve's disappearance an unsolved mystery until December 1979, when Childs, who no longer worked for Pinfold and MacKenney, went to police and confessed to murdering Eve in November 1974. He also confessed to murdering five other people who vanished without a trace from November 1974 to October 1978. Childs implicated Pinfold and MacKenney in his confession by telling police the missing people were victims of discount contract killings: Pinfold solicited the jobs and he and MacKenney carried them out.

Childs also told the police that Eve was killed by the three men in his teddy bear factory on

**Long Time cont. on page 44**

## Ford continued from page 42

Carrington has been charged with two violent assaults and several petty crimes. In two incidents, one in which she sliced a woman's face with a broken beer bottle and another in which she attacked two police officers, Carrington was sentenced to probation and enrollment in a substance abuse treatment program.

She has not spent time in prison, but she was shot twice in a drug-related incident.

While she refused comment when confronted in Rankin by Innocence Institute students in 2004, and her mother responded to letters in a profanity-laced refusal to discuss the matter, a woman who described herself as Carrington called a day after a story about the Ford case appeared in the Pittsburgh *Post-Gazette*.

She told Elizabeth Perry of the Innocence Institute that she was going to sue over the story and stated she's glad Paul Ford Jr. is rotting in jail. “F\*\*\* him, he's going to do all the f\*\*\*\*\* time for killing that guy because he did it,” she said, before hanging up the telephone from an area outside of Pennsylvania.

## Three Years of Hell

When Nikela Carrington, the first person to implicate Paul Ford Jr., talked about living “three years of hell” at the inquest into the murder of Maurice Price before fleeing those proceedings, she was referring in part to her experiences in the drug world.

The hell she described also related to her spotty record as a star witness in which she repeatedly testified others in crimes some have claimed she was responsible for.

Four years before she provided questionable statements in the case against Ford, the entire prosecution in the Anthony “Two-Tone” Turner murder case rested on her testimony.

In that case, Carrington was the sole witness who testified Turner, her boyfriend, killed Cordell “Corey” Franklin by beating him to death with a baseball bat, setting his body on fire and turning all the gas burners up on the stove in order to ignite the building he lay dead in.

Carrington was never charged in the crime, despite her admitted involvement and physical evidence found on her clothes. Just as in the case against Ford, no forensic evidence linked Turner to the murder.

John Markowitz, a juror in the first trial against Turner trial said Carrington “stumbled” on her way to the witness stand and was “obviously stoned.”

“It made me very skeptical of the judicial process,” Markowitz added.

The first trial ended in a hung jury, but the second concluded with Turner being convicted and sentenced to life.

Months later, Carrington began calling Turner's attorney repeatedly, claiming that she'd lied on the witness stand. Despite that, Turner has failed to win a new trial.

Carrington testified against Paul Ford Jr. in 2003, then continued her plunge into drug addiction and associated crime until eight years later when she was shot in the head.

She survived the shooting and told police her cousin, Alon “Beano” Carrington was her

attacker. After seeing several men arrested with her cousin on television, Carrington accused them as well. Carrington was once again the only link the prosecution had.

Pittsburgh Attorney Ralph Karsh represented one of the four men accused. Of the four, two spent less than twenty-four months in jail on reduced charges in plea agreements and charges the other two were dismissed due to the unreliability of Carrington's testimony. Karsh says Carrington's testimony was tainted because she was “drug addled” and a “crack head fool.”

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Bill Moushey is a Pittsburgh *Post-Gazette* staff writer and an associate professor of journalism at Pittsburgh's Point Park University. He is founder and director of the Innocence Institute of Point Park University, a partnership between the University and the *Post-Gazette* that allows students to learn investigative reporting by looking into allegations of wrongful conviction in Western Pennsylvania.

Elizabeth Perry is a graduate student at Point Park University and Innocence Project volunteer. Point Park graduate Sara Summer Wolfe also contributed to this article.

Prisoners in Western Pennsylvania and West Virginia *only* who are claiming innocence can write:

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## Long Time cont. from page 43

the Saturday morning of the weekend he disappeared. However when questioned by police after Eve's disappearance, Pinfold said he was in Clacton all weekend with his in-laws, which they corroborated. Eve's wife, mother and one of his factory workers all told police they were in the factory the Saturday morning of the weekend he went missing. They said they did not see anything out of the ordinary, nor did they see Eve, Pinfold or MacKenney that day.

### MacKenney and Pinfold Convicted

Bruce Childs pled guilty to the six murders. He was not only the star witness against his former employers, but since there were no bodies, murder weapons, corroborating witnesses, or physical or forensic evidence that any of the six people had been murdered, his testimony was the prosecution's sole evidence that they had been the victim of foul play. Pinfold and MacKenney's defense focused on the inconsistencies in Childs' account, and that the men had solid alibis. The jurors, however, ignored the weakness of the prosecution's case and convicted Pinfold and MacKenney of various charges. They were both sentenced to life in prison.

The men's appeal of their convictions were denied in 1981.

A break came in July 1986 when Childs recanted his trial testimony in a sworn affidavit. He swore in the affidavit that he testified falsely at the trial because prosecutors had offered him "the inducement that my 'cooperation' at the trial would ensure my early release from prison."<sup>1</sup> However an appeal filed in 1988 citing Childs' affidavit as new evidence of the men's innocence was denied. The Court didn't consider Childs' affidavit persuasive enough to overcome the dismissal of their previous appeal – even the earlier appeal had been based on different arguments.

Pinfold and MacKenney would have qualified for parole in the early-to-mid-1990s if they admitted their guilt. However, both men refused to do so and continued trying to find exonerating evidence. With the help of people on the outside, evidence of Childs' condition of being a pathological liar was assembled. In an effort to win a new trial, an application relying on the accumulated exculpatory evidence was filed with the Criminal Cases Review Commission (CCRC).

In September 2001, Pinfold was granted bail after the CCRC submitted his case for review

by the Court of Appeals. MacKenney wasn't as fortunate. He was not granted bail until October 2003, when the Appeals Court heard the evidence not heard by their trial jury.

### Scotland yard concealed Eve was alive

Among that new evidence was explosive documentation obtained by the men in 2003. The prosecution had concealed the information from Pinfold and MacKenney for nearly a quarter of a century. Neither prior to nor during the men's trial, nor after their convictions, was it disclosed to them that Eve was known by Scotland Yard to be alive and living in west London under an assumed name three years after his alleged murder in November 1974.<sup>2</sup> In 1977 the late Scotland Yard Commander Bert Wickstead reported during an investigation for another case that Eve was living in west London under an assumed name. However, instead of pursuing the discovery Eve was alive, he stopped any further inquiry into the matter.<sup>3</sup> Eve's disappearance and starting of a new life under an assumed name occurred at precisely the time necessary for him to avoid prosecution and a possible five year prison term for the stereo hijacking caper.

### Convictions quashed

After hearing the new evidence that included Childs was "an immensely plausible liar" whose testimony was evidentially "worthless," the Court of Appeal granted MacKenney bail in October 2003 pending its decision. On December 15, 2003, the Court formally quashed the men's convictions. Pinfold was 71-years-old and had spent 22 years wrongly imprisoned. MacKenney was 72-years-old and he had been wrongly imprisoned for 24 years. Those decades of imprisonment were not kind to the men: Pinfold suffered six strokes in prison and has heart and bowel problems; while MacKenney had contracted emphysema and pneumonia.

After the Court of Appeals issued its decision, lawyer's for the men announced they would make a compensation claim for about \$1.8 million (£1 million). However, as of early 2006, the men have not been awarded compensation.

Neither has any action for wrongdoing been taken against anyone involved in the men's prosecution.

In spite of their age and infirmities, upon their exoneration both men had spunk when describing the wrong they needlessly suffered. MacKenney said, "It has been a long time coming. The case should never have got to

court. It was a fiasco. This has come 23 years too late."<sup>4</sup> Traveling to the hearing from a hospital to which he returned after it was over, Pinfold expressed similar sentiments, "I am not going to let this go. Everything that happened to us will come out eventually. The trial 20 years ago was a joke. Witnesses were coerced, threatened, bullied, and misled. It has taken over two decades to right this wrong, and things are still not right."<sup>5</sup> They certainly aren't. When Terry Pinfold walked out of prison in September 2001, he had \$85 (£47) to his name, after losing his wife, his business, his home and his health while imprisoned.

Unfortunately for the two men, obtaining compensation for their ordeal has thus far proven elusive. That was the one thing they counted on so they could have some measure of comfort in their remaining years.

### Why did Scotland Yard conceal Eve was alive?

It has not been publicly reported why after his disappearance, Scotland Yard protected Eve's new identity to the point of allowing Pinfold and MacKenney to be tried, convicted and imprisoned for over two decades for a heinous crime that it was not only impossible for them to have committed – but which never happened. Since the November 1974 murder of Eve was a figment of Childs' imagination, and there is an absence of any evidence sans Childs' unsubstantiated confessions that the other five missing people were murdered by the trio of men. So for all anyone knows, they are all fictitious crimes.<sup>6</sup> Fabricating a confession to neatly solve the disappearance of six people for the police, indicates that Childs' personal problems go much deeper than simply being a pathological liar.

However if Scotland Yard shares the FBI's policy that was secret until only a few years ago of sacrificing innocent people to protect informants, it is plausible Eve made a deal to provide information in exchange for concealment of his new identity. The FBI's practice of doing that was publicly exposed in January 2001, when it was reported that information provided to lawyers for Joseph Salvati and Peter Limone proved the FBI and prosecutors knew at the time of their 1967 trial for the 1965 murder of Edward Deegan in Boston, that they and their two co-defendants – Louis Greco and Harry Tameleo – were innocent.<sup>7</sup> Yet people within the FBI and others involved in the men's prosecution who knew the truth, stood in unison and allowed four innocent men to be convicted of murder and languish in prison for decades. Two of those men – Greco and Tameleo – died while wrongly imprisoned, and the

## Long Time cont. on page 45

## Long Time cont. from page 44

other two were not exonerated until 2001, after more than 30 years of imprisonment.<sup>8</sup>

Scotland Yard and others involved in the prosecution of Pinfold and MacKenney likewise remained silent and allowed the horrific injustice of their conviction to occur. Furthermore, during the intervening two decades while they fought for their freedom, not a single one of the police and prosecutors who knew the truth bothered to exert the effort to pick-up a telephone and dial a few numbers to tip-off the men's lawyers of the concealed evidence undermining the soundness of their convictions.

At a minimum the tragedy that befell Terry Pinfold and Harry MacKenney highlights the inability to consider any conviction safe that hinges on the testimony of a sole prosecution witness, who like Bruce Childs may not be telling the truth, but simply saying what is necessary to receive an expected reward from the prosecution.<sup>9</sup>

### Endnotes and sources:

1 The Ordeal of Terry Pinfold, *The Guardian*, July 14, 2003. See also, Lifer's 23-year fight to clear his name, Hugh Muir, *The Guardian*, London UK, October 27, 2003.

2 Murder victim 'was alive' *BBC News*, October 28, 2003.

3 *Id.* See also, The Ordeal of Terry Pinfold, *The Guardian*, July 14, 2003.

4 Murder case pair convicted on word of liar are cleared, Hugh Muir, *The Guardian*, October 31, 2003.

5 £1m claim by two men jailed for 23 years on word of pathological liar, Hugh Muir, *The Guardian*, UK, December 16, 2003.

6 It has not been reported since the men's trial in 1980, that any evidence has turned up that any of the six missing people they were tried for playing a part in killing, was actually murdered by anyone. It has been reported that thousands of people yearly in the UK are known to "disappear" by moving and changing their name in an effort to start a new life.

7 See e.g., Four Men Exonerated of 1965 Murder After FBI Frame-up is Exposed, *Justice:Denied*, Vol. 1, Issue; Update On the FBI's Frame-up of Four Innocent Men in Boston, *Justice:Denied*, Vol. 2, Issue 8; and, FBI's Legacy of Shame, *Justice:Denied*, Issue 27, p. 24.

8 *Id.*

9 For an explanation of this process see e.g., Prosecutors Are Master Framers, *Justice:Denied*, Vol. 1, No. 9; Prosecutorial Lawlessness is its Real Name, *Justice:Denied*, Vol. 1, No. 6; and, The Ring of Truth, *Justice:Denied*, Vol. 1, No. 7.



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## British P. M. Tony Blair Apologizes To Guildford Four and Maguire Seven

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. All four were physically tortured into signing a confession that didn't mesh with the facts of the crime. Although there was no physical evidence or a single witness tying them to the crime, their jurors relied on the confessions to find them guilty. All 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.)

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. They all protested their innocence, but were convicted and given stiff prison terms.

By 1991 the nitroglycerin evidence used to convict 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 prison in 1980.

Gerry Conlon and others have been demanding that British Prime Minister Tony Blair apologize on behalf of the British government for the "dreadful miscarriages of justice" committed by the British government.

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.

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."<sup>1</sup>

Although it was a bold admission by the British government, many people, including 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 — criticized Blair for not also apologizing to the many other people wrongly convicted in Britain.



### Endnotes:

1 Blair Apologizes to Wrongly Convicted Men, *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.

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

- The way the killer's psychotic bragging was used by the prosecution to define the case against Karlyn.
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- The way erroneous assertions by the prosecution were used by the media, by judges reviewing the case, and even by her own lawyers to avoid looking at the record that reveals her innocence.
- The ways her appeal lawyers have denied any input that would require them to investigate official misconduct.
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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

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