

JUSTICE DENIED

The Magazine for the
Wrongly Convicted



Diane Lee

Appeals court in Taiwan acquitted her committing fraud.

See page 10



Alan Newton

Judge reverses award of \$18.6 million for 12 years of wrongful imprisonment in New York for rape.

See page 18

Anthony Graves



Awarded \$1.45 million for 18 years of wrongful imprisonment in Texas for six murders.

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Keith Longtin

Awarded \$7.5 million for being falsely charged with his wife's murder in Maryland.

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Theodore White

Settled lawsuit for \$15.5 million for 5 years of wrongful imprisonment for murder in Missouri.

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Dwayne Jackson awarded \$1.5 million for 4 years wrongful imprisonment!

Conspiracy convictions of 20 environmental activists overturned!

Daniel Cvijanovich's conviction of threatening President Bush overturned!

Troy Davis executed in spite of evidence he was innocent of murder !

Vladek Filler acquitted after retrial of sexually assaulting his estranged wife!

Federal judge declares habeas corpus is "dead in this country"!

**Issue 51
Summer 2012**

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Message From The Publisher

The difficulty of a prisoner to obtain relief in federal court is emphasized by three cases in this issue. Lorenzo Johnson had been released after 16 years of imprisonment in Pennsylvania for a murder there was evidence he didn’t commit, when the U.S. Supreme Court reinstated his conviction and he was taken back into custody to resume serving his life sentence. See p. 3. Federal 11th Circuit Court of Appeals Judge James Hill declared that “habeas corpus is dead in this country” after the appeals court refused to reduce Ezell Gilbert’s sentence that had been almost doubled to 24-1/3 years by what the majority of the judges acknowledged was the improper application of the “career offender” enhancement that didn’t apply to him. Sound crazy? See p. 17. The substantial new evidence supporting Troy Davis’ actual innocence wasn’t enough for the U.S. Supreme Court to stop his execution. See p. 7.

The difficulty faced in federal court extends to seeking compensation for a wrongful conviction. After a jury awarded Alan Newton \$18.6 million for his wrongful imprisonment in New York for a rape he didn’t commit, the federal judge reversed the jury’s award on the rationale Newton hadn’t proved his imprisonment was due to the intentional violation of his constitutional rights. See. p. 17.

Advances in forensic science has helped release hundreds of innocent persons from prison – but the downside is that the contamination or mixing up biological samples can cause a wrongful conviction. That is what happened to Dwayne Jackson when his DNA sample was switched with the man who actually committed a home invasion. He was awarded \$1.5 million for the almost four years in was imprisoned. See p. 6.

Hans Sherrer, Editor and Publisher
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Introduction

Lorenzo Johnson's saga of having his conviction overturned and released after 16 years in prison, only to have his conviction reinstated by the U.S. Supreme Court and taken back into custody demonstrates once again that it is easier to climb Mount Everest than for a person with evidence of their innocence to overturn their conviction in the United States.

On May 29, 2012 the U.S. Supreme Court reinstated Lorenzo Johnson's convictions of being an accomplice and co-conspirator in the 1995 murder of Taraja Williams in Harrisburg, Pennsylvania. The Court reversed the Third Circuit Court of Appeals' ruling that there was insufficient evidence of Johnson's guilt.

Johnson and his acquaintance Corey Walker were charged with murder and conspiracy to commit murder and jointly tried in 1997.

The prosecution claimed that Walker and Williams argued and got into an altercation at the Midnight Special Bar in Harrisburg on the night of December 14-15, 1995. The argument was apparently over money that Williams owed Walker, and shortly after midnight a doorman told them to leave. The prosecution's scenario was Johnson followed them outside and he remained on the sidewalk while Walker and Williams went into an alley next to the bar. A loud boom was heard coming from the alley, where Williams was found dead from a shotgun blast. A shotgun without a barrel was found near the murder scene.

Carla Brown was the prosecution's star witness. She testified that she was a drug addict and on the night of the shooting she was drinking alcohol and had consumed a large quantity of crack cocaine. She also admitted that when first questioned by the police she told them she didn't know anything about the shooting. Nevertheless, she testified that she was in the bar when Walker and Williams were arguing and that when they were told to leave Johnson followed them. Brown said she left the bar trailing them and Johnson did not follow Walker and Williams into the alley. She ran away when she heard a loud boom come from the alley.

The other witness who placed Johnson in the area of the bar at the time of the shooting

U.S. Supreme Court Reinstates Lorenzo Johnson's Convictions -- He Resumes Serving Life Sentence In Spite Of Evidence He Is Innocent

By Hans Sherrer

was Brian Ramsey. He testified that he saw Williams walk into the alley with three people -- two men and a woman -- who he couldn't identify because of the darkness. After he heard a "boom" he saw Johnson and Walker standing in a crowd that had gathered in front of the bar. (Ramsey later provided Johnson with a post-conviction Affidavit that he falsely testified to seeing Johnson outside the bar that night, and that he only saw Walker in the crowd -- "I actually never saw Mr. Johnson." (See, [Johnson v. Mechling](#), No. 08-2477 (3rd Cir., 10-4-2011), *Op Cit.* 12.)

Johnson's alibi defense was that he was in New York City 170 miles from Harrisburg at the time of the murder. Suquan Ripply testified that he, Johnson, and several other people left Harrisburg for New York at about 4 p.m. on December 14 and that they returned the morning of December 15, and that is what he told the police when he was first questioned. On cross-examination by the prosecution he acknowledged it was possible they actually left for New York on the afternoon of December 15. However, that wasn't possible and the prosecution shot itself in the foot with that testimony because Johnson was arrested early in the afternoon on the 15th -- about 12 hours after the murder. Consequently, Ripply and Johnson could only have left Harrisburg on the afternoon of December 14 and returned from New York on the morning of the 15th after Williams' murder.

Defense witness Victoria "Doubs testified that sometime after Williams' murder she ran into Carla Brown and that the two of them got high together. Doubs testified that while they were smoking crack together, Brown stated that Walker had given her a couple of crack rocks to take Williams into the alley on the night of the murder." (See, [Johnson v. Mechling](#), No. 08-2477 (3rd Cir., 10-4-2011), *Op Cit.* 8.) That confirmed Ramsey's account that he saw a woman go into the alley with Williams. Although Doubs and Ramsey's testimony supports that Brown was used as bait to lure Williams to his death no charges were filed against her.

During Johnson's three-day trial no direct evidence was introduced -- even assuming *arguendo* he was in Harrisburg and at the bar -- that he knew Walker was going to murder Williams in the alley and that they had an agreement he would do so.

The jury convicted Walker of first-degree murder and conspiracy to commit murder while Johnson was convicted of being his accomplice and co-conspirator in the murder. Both men were sentenced to mandatory terms of life in prison for their murder convictions, and five to ten years in prison for their conspiracy convictions.



Lorenzo Johnson at the party on February 24, 2012 celebrating his release. (Lorenzo Johnson, Facebook.com)

Johnson argued in his direct appeal that the evidence against him was insufficient to sustain his guilty verdicts. His convictions were affirmed with one [judge dissenting](#), "I believe that there is no direct evidence, nor can any be inferred, linking defendant Johnson to the death of Taraja Williams nor any agreement with defendant Walker which resulted in William's death." (*Commonwealth v. Johnson*, 726 A.2d 1079 (Pa. Super. Ct. 1998).)

Johnson then filed his state post-conviction petition that raised several issues, including the insufficiency of the evidence. After his petition was denied by the Pennsylvania Supreme Court, Johnson filed a federal habeas petition that made the claim: "the evidence presented at trial was insufficient to support the guilty verdicts, thereby violating his rights to due process under *Jackson v. Virginia*, 443 U.S. 307 (1979)."

The U.S. Supreme Court ruled in *Jackson v. Virginia* that evidence is sufficient to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (443 U.S., at 319.) A federal court can only overturn a conviction based on insufficiency of the evidence if the state court's rationale for upholding the conviction was "objectively unreasonable."

The district court denied Johnson's petition, but he was granted a certificate of appealability on the issue of whether the evidence

Lorenzo Johnson on p. 4

Lorenzo Johnson from p. 3

against him was sufficient to prove every essential element of his convicted crimes beyond a reasonable doubt. In October 2011 the Third Circuit Court of Appeals reversed the district court's order and granted his petition. In [Johnson v. Mechling](#), No. 08-2477 (3rd Cir., 10-4-2011) the appeals court ruled:

“We find the record lacking in sufficient evidence to support the necessary conclusion that Johnson shared Walker's intent to murder Williams and that Johnson acted in a manner that encouraged or facilitated the murder. Viewing, as we must, the evidence in the light most favorable to the Commonwealth, such evidence does not permit any reasonable fact finder to reasonably infer Johnson's specific intent to kill Williams.”

...
The Pennsylvania Superior Court's decision affirming Johnson's conviction was an unreasonable application of the Constitutional requirement that the Commonwealth present evidence sufficient to prove every element of a crime beyond a reasonable doubt. 28 U.S.C. 2254(d)(1); *In re Winship*, 397 U.S. 358, 365-68 (1970); *Jackson*, 443 U.S. at 319.” (*Op. Cit.*, at 19, 20.)

The appeals court specifically noted the state courts did not conduct any analysis during Johnson's direct appeal or post-conviction proceedings to determine whether the prosecution had introduced evidence proving each essential element of his convicted crimes beyond a reasonable doubt as required by *Jackson*. The state courts simply stated the evidence was sufficient. (*Id.*, at 11.)

The appeals court also found that the absence of evidence meant Johnson's guilty verdicts were based on the jury's speculative assumptions and unreasonable inferences, which “is Constitutionally insufficient to support a conviction.” (*Id.*, at 20.)

Johnson subsequently filed a motion for his release that the State Attorney General's Office opposed. During a hearing four guards from the state prison in Mahanoy testified Johnson was a model prisoner who never demonstrated any attitude, aggression or dishonesty toward them. The judge granted the motion and after more than 16

years of incarceration Johnson [was released](#) on his own recognizance on January 18, 2012. Johnson's [Facebook page](#) shows him with friends at a party on February 24, 2012 celebrating his release.

The U.S. Supreme Court, however, granted the State of Pennsylvania's writ of *certiorari* to review the appeals court's decision. On May 29, 2012, based only on the briefs and without oral arguments, the Supreme Court reversed the appeals court's decision and reinstated Johnson's convictions. The Court ruled in [Coleman v. Johnson](#), 566 U.S. ____ (2012) (*per curiam*): “The evidence was sufficient to convict Johnson as an accomplice and a co-conspirator in the murder of Taraja Williams.” (*Op. Cit.*, at 7.) The Supreme Court's *per curiam* opinion was unsigned, and the Supreme Court's website does not have any information about which justices voted to reinstate Johnson's conviction.

The Court's ruling emphasized the importance of giving deference to the decisions by the jury and the state courts that the evidence was sufficient: “This deferential standard does not permit the type of fine-grained factual parsing in which the Court of Appeals engaged.” (*Id.*, at 6.) However, the Supreme Court made no mention of the disputed facts, the evidence Johnson was in

New York at the time of the crime, and the key observation by the court of appeals that the state courts did not conduct an analysis of whether the prosecution had in fact introduced evidence proving each and every essential element beyond a reasonable doubt as required by *Jackson*, and the jury couldn't have done so because they had to have violated Johnson's federal right to due process by relying on speculative assumptions and inferences to find him guilty.

The Court's ruling in *Coleman v. Johnson* doesn't break any new ground while reiterating its precedent in *Jackson*. Instead it gives guidance to federal district courts and courts of appeal that in determining if the prosecution's evidence fell “below the threshold of bare rationality” extreme deference should be given to the jury's verdict and the state court rulings that found the evidence was sufficient. (The Supreme Court essentially made that same point last year in [Cavazos v. Smith](#), 565 U.S. 1 (2011) (*per curiam*); and in 2010 in [Renico v. Lett](#), 559 U.S. ____ (2010).)

The difference between the rulings in Johnson's case by the Supreme Court and the appeals court was the weight they respectively gave to the disputed facts. That difference of opinion resulted in the Supreme Court condemning a possibly innocent man to life in prison.

Days after the Supreme Court's ruling the Pennsylvania Attorney General's office filed a motion for Johnson to be taken into custody. The motion was granted. Johnson, 38, was taken back into custody on June 14, 2012 to resume serving his life sentence.

On July 23, 2012 the U.S. Supreme Court denied Johnson's petition for rehearing and issued its final judgment.

The Pennsylvania Department of Corrections' website reports that Johnson is now imprisoned at SCI Mahanoy. His mailing address as of early August 2012 is:

Lorenzo Johnson DF-1036
SCI Mahanoy
301 Morea Road
Frackville, PA 17932

Lorenzo Johnson has a [Facebook page](#), [www.facebook.com/JohnsonLorenzo](#). That page has pictures of his welcome home party in February 2012.

[Click here to read](#) the Supreme Court's ruling in *Coleman v. Johnson*, 566 U.S. ____ (2012) (*per curiam*).

Information about Johnson's case is on the Innocent in Prison Project International website — [www.iippi.org](#) — that can be read [by clicking here](#).

Sources:

[Coleman v. Johnson](#), No 11-1053 (USSC 5-29-2012)

[Johnson v. Mechling](#), No. 08-2477 (3rd Cir., 10-4-2011)

[Appeals court orders](#) release of Harrisburg man convicted in killing after 16 years in prison, *The Patriot-News* (Harrisburg, PA), January 17, 2012
[Pennsylvania Attorney General's](#) Office wants to appeal release of Lorenzo Johnson, *The Patriot-News*, March 2, 2012

[Former Harrisburg man](#) released after murder conviction set aside may be heading back to jail, By John Beauge (staff), *The Patriot-News* (Harrisburg, PA), May 29, 2012

Innocent in Prison Project International, [http://www.iippi.org](#), [Lorenzo Johnson web-page](#)

Coleman v. Johnson, No. 11-1053, [USSC docket](#), Judgment Issue on July 23, 2012.



Poster promoting the February 24, 2012 party celebrating Lorenzo Johnson's release. (Lorenzo Johnson, Facebook.com)

Keith Longtin Paid \$7.5 Million After Being Falsely Charged With His Wife's Murder

Keith Longtin has been paid more than \$7.5 million by Prince George County, Maryland for violating his state constitutional rights after detectives targeted him as a suspect in the murder of his estranged wife. Donna Zinetti's body was found on October 4, 1999 in a wooded area near her apartment in Laurel, Maryland where she had been jogging. Zinetti, 36, had been raped and stabbed 13 times in the face, neck and chest.

Although there was no physical evidence or eyewitness placing the 43-year-old Longtin at the scene of his wife's murder, he was considered the prime suspect after Prince George County detectives learned the couple had quarreled the day before her murder. Detectives picked-up Longtin and he was interrogated for 38 hours by a team of detectives — 28 hours straight and then for almost another 10 hours straight after he was allowed to rest for only 50 minutes. The detectives alleged that Longtin admitted arguing with his wife on the day of her murder and picking up a knife and chasing after her when she left to go jogging. Longtin's interrogation wasn't audio or video recorded. He denied making the incriminating statement and that he had in fact repeatedly told the detectives he did not kill his wife. The detectives ignored several requests by Longtin to talk with a lawyer and he was unable to reach two lawyers that he tried to call. (Longtin's cell phone records confirm that he tried to call the two lawyers.)

Longtin was charged on October 7, 1999 with his wife's murder based on his alleged confession.

Maryland's Police Crime Laboratory informed the Prince George County police on January 14, 2000 that Longtin's DNA was excluded as the source of sperm recovered from his wife's body. The police did not inform the State's Attorney or Longtin's lawyer that he was excluded as his wife's assailant.

Although at the time of Zinetti's rape and murder a number of rapes had been committed in the area around her apartment, including the rape of one of her neighbors, and Nathaniel D. Oesby had been arrested as the suspected rapist — the police waited until March 2000 before submitting a sample of



Keith Longtin in April 2011

Oesby's DNA to the crime lab for comparison with the sperm recovered from Zinetti. On June 12, 2000 the police informed the State's Attorney's Office that Longtin was excluded as the source of the DNA found on Zinetti while it matched Oesby's DNA. Longtin was released the next day on a personal recognizance bond after being jailed for more than eight months. The murder charge was dismissed against Longtin in November 2000.

While incarcerated Longtin lost three automobiles, and after being evicted from his apartment for non-payment of rent he lost all his possessions that were left on the curb. While in the county detention center he was assaulted by an inmate, and he was not permitted to attend his wife's funeral. When Longtin was released he had "little more than the clothes on his back."

Oesby was convicted in June 2001 of Zinetti's rape and murder and he was sentenced to two terms of life in prison.

After sending Prince George County in October 2000 a notice of claim under the "Local Government Tort Claims Act" that the county ignored, Longtin filed a lawsuit in state court in October 2001 that named Prince George County, its then-chief of police, and 5 detectives in the county police department as defendants. Longtin's claims included that he had been falsely arrested and imprisoned without probable cause, and that he had been maliciously prosecuted.

After a two week trial, on August 31, 2006 a Circuit Court jury awarded Longtin \$5.2 million in compensatory damages against the county, and it also awarded him \$1.175 million in punitive damages against four detectives for violating his civil rights — \$275,000 each from three detectives and \$350,000 from the fourth.

The county filed a motion to vacate the judgment, but the judge only determined that it was excessive and reduced it to \$5.025 million against the county and \$50,000 against one of the detectives, for a total award of \$5.075 million.

The county appealed relying on arguments that included Longtin had filed his notice of claim late and the award against the county exceeded the tort claims act's compensatory damages limit of \$200,000. In January 2010

Maryland's Court of Special Appeals ruled against the county in. The county then appealed to the Court of Appeals, which on April 25, 2011 ruled against the county — Longtin's notice of his claim was timely and the compensatory damages cap didn't apply to the violation of Longtin's state constitutional rights by Prince George County.

The Court of Appeals also established the right for plaintiffs to bring "pattern or practice" claims against local governments in a lawsuit. It was discovered after Longtin's release that detectives in Prince George County had a history of eliciting false confessions from suspects. So the "false confession" that Longtin's murder charge was based on was part of a "pattern or practice" of wrongdoing by the county's detectives that the jury could rely on in making their decision.

Longtin's lawyer Cary J. Hansel said about [the court's ruling](#):

"It's absolutely historic. Previously, Maryland courts were limited to reviewing each case piecemeal. Prior misconduct, even of the same nature, was often hidden from the jury, no matter how egregious or extensive. Now, where there is a history of abuse, juries will be made aware of prior civil rights violations."

The Court of Appeals is Maryland's highest court, so the county was out of legal options. The \$5.075 million award began accruing compound interest from the day of the jury's finding against the county on August 31, 2006 — so when it paid Longtin in mid-July 2011 the award had increased with interest to more than \$7.5 million. Longtin is now 55 and an ordained minister in Maryland.

A video of an interview of Keith Longtin after the appeals court ruling in April 2011 is at, www.youtube.com/watch?v=YUoq4iGXNGs

The most complete source for the factual background of Longtin's case is the January 2010 opinion by Maryland's Court of Special Appeals, *Prince George's County v. Longtin*, [988 A. 2d 20](#) (Md Court of Special Appeals, 1-27-2010).

Sources:

"[Verdict Attacks](#) Police Grilling," *Washington Post*, September 1, 2006.

"[Man falsely charged](#) with murder in Prince George's wins appeal," *Washington Post*, April 25, 2011.

"[Wrongly accused](#) Pr. George's man paid \$7.5 million, lawyer said," *Washington Post*, July 20, 2011.

Dwayne Jackson Awarded \$1.5 Million For Wrongful Robbery Conviction Caused By Lab Switching DNA Samples

Dwayne Jackson has been awarded \$1.5 million in compensation for four years of imprisonment for a Las Vegas, Nevada robbery he didn't commit. His conviction resulted from the Clark County Metropolitan Police Department's crime lab switching his DNA sample with that of the crime's perpetrator.

On November 6, 2001 an intruder entered a Las Vegas house while a woman and her two children were home. He demanded money but the woman only had \$23, so the intruder who was armed with a baseball bat, ordered her drive to an ATM machine to withdraw money. When they drove back to her house her husband was outside and chased the man away. The woman described her assailant as a black youth wearing a blue, hooded sweatshirt and ski mask.

Later, when the police were canvassing the area they saw Dwayne Jackson riding his bike with his cousin Howard Dupree Grissom. They were both young blacks, and after the police saw them go into a house they looked inside a car parked in the driveway. The police saw a blue, hooded sweatshirt and ski mask matching what the victim had described. After Jackson, 18, and Grissom, 16, were arrested they provided DNA samples. The LVMPD crime lab matched Jackson's DNA to the sweatshirt.

Neither the woman nor her husband could identify Jackson as her assailant, Jackson insisted on his innocence, and Grissom denied involvement and didn't implicate Jackson in the crime. So the only evidence linking Jackson to the crime was the positive DNA test. Jackson was charged with burglary, robbery and 3 counts of kidnapping. If convicted of the kidnapping charge Jackson could have been sentenced to life in prison, so he agreed to pled guilty to one count of robbery in exchange for dropping of the burglary and kidnapping charges. Jackson was sentenced to prison in January 2003 and released in late 2006.

Grissom was arrested in Las Vegas in 2007 and pled guilty to robbery and conspiracy to commit a crime. He was sentenced to 2 to 5 years in prison. He was released a number of months after his conviction and in late

2007 he was arrested for the beating and rape of a woman behind a gas station in Moreno Valley, about 60 miles east of Los Angeles. Grissom was convicted of attempted manslaughter and sentenced to serve between 41 years and life in prison. When he entered prison in 2008 a sample of his DNA was taken and entered into the FBI's CODIS national DNA database. CODIS compares the DNA profiles in its system with the DNA from solved and unsolved crimes nationally.

In October 2010 the California Department of Justice learned that Grissom's DNA matched the DNA recovered from evidence in the 2001 Las Vegas robbery that Jackson had been convicted of committing.



Howard Grissom, who DNA identified as the perpetrator of the robbery Dwayne Jackson was convicted of committing. (Fox 5, Las Vegas)

The California DOJ contacted the Clark County Metro PD in November 2010 and informed them about the match between Grissom's DNA and the DNA in the robbery case. However, when the crime lab officials looked up the case they discovered that their testing determined Jackson's DNA and not Grissom's DNA matched the evidence. They began an investigation and eventually discovered that the vials with Jackson and Grissom's DNA had been switched and mislabeled. So when the tests were conducted in 2002 they actually matched Grissom's DNA to the sweatshirt and not Jackson's DNA.

In April 2011 the LV Metro PD contacted the Clark County District Attorney and informed him that their investigation discovered that in 2002 Jackson's DNA had been erroneously identified as matching DNA recovered from the robber's sweatshirt.

The DA contacted Jackson's lawyer in May 2011 and informed him of the new development, and that the DA's Office would not oppose vacating Jackson's conviction, dismissing the robbery charge, and expunging the record of his conviction.

There was no public disclosure about the new evidence in Jackson's case until July 7, 2011, when Metro PD Sheriff Doug Gillespie held a press conference during which he announced that Jackson had been wrongly convicted of robbery based on the mishandling of his DNA sample by the crime lab. Gillespie said, "We sent an inno-

cent man to prison. To say this error is regrettable would be an understatement. It's unacceptable and not to our standards. There are no words I could say that will give back the time Mr. Jackson spent incarcerated."

Clark County Metro PD crime lab technician Terry Cook was identified by as the person who had accidentally switched Jackson and Grissom's DNA samples. Gillespie said about [the incident](#), "This was not a scientific error or a technical error, but a human error."

Cook, who was hired by Metro PD in 1983, has been placed on paid administrative leave while an internal investigation is completed. Metro PD is evaluating 225 to 250 DNA cases handled by Cook. Assistant Sheriff Ray Flynn also spoke at the press conference and he [told reporters](#), "We expect completion of reanalysis (of the cases) within two to three months." A case will be submitted for retesting if it includes a person and a DNA sample from evidence.

The Clark County Metropolitan Police Department's Fiscal Committee voted on July 25, 2011 to approve [the payment](#) of \$1.5 million to Jackson to settle his claim against the county.

Grissom will not be prosecuted because the statute of limitations has expired for any crimes committed during the 2001 home invasion.

Sources:

[Man wrongly convicted](#) after a DNA mix-up awarded \$1.5 million, *Las Vegas Sun*, July 25, 2011.
[Metro reviewing DNA cases](#) after error led to wrongful conviction, *Las Vegas Sun*, July 7, 2001.
[Las Vegas police](#) reveal DNA error put wrong man in prison, *Las Vegas Review-Journal*, July 7, 2011.

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Troy Anthony Davis Executed For A Crime There Is Reasonable Doubt He Committed

Troy Davis would not have been convicted in 1991 of the 1989 murder of Mark MacPhail in Savannah, Georgia if his jurors had known the evidence that is available today. How do we know that? Because four jurors who voted to convict Davis in 1991 and then voted to sentence him to death have signed affidavits that they have doubts about his guilt based on evidence they now know that they didn't consider in finding him guilty. Brenda Forrest is one of those jurors and she said in a TV interview, "If I knew then what I know now, Troy Davis would not be on death row...the verdict would be 'not guilty'."

In the United States the standard for being found guilty is not that a defendant must prove their innocence, but that the State must prove their guilt beyond a reasonable doubt. In Georgia if only one juror has a reasonable doubt then a person cannot be convicted. There is no question that Troy Davis' jury found him guilty based on a flawed prosecution case.

No murder weapon was ever found, no DNA evidence or fingerprints tie Davis to the crime, and other witnesses have since said the murder was committed by Sylvester Coles — who testified as a prosecution witness against Davis. Seven out of nine witnesses who gave evidence at his trial in 1991 have recanted or changed their testimony, and one of the two who hasn't is Coles.

In addition two witnesses have come forward directly implicating Coles as MacPhail's killer, and neither one has any connection to Davis or his family. Benjamin Gordon testified at a 2010 evidentiary hearing in federal court that he saw Coles shoot MacPhail. Quiana Glover has sworn that she heard Coles confess in 2009 to MacPhail's murder.

It is known that Coles was at the scene of the shooting, and he was the person who implicated Davis in the killing. Based on what is known today he may have done that to cover his tracks. In fact based on the evidence known today not only would Davis be acquitted, but it appears there is a possibility that Coles could be convicted if he was fairly tried with all the evidence aired in public.

Yet even though it is known that the State's case against Davis has been decimated to the point that jurors who convicted him no longer



Troy Anthony Davis

believe he is guilty, he is scheduled to be executed on September 21, 2011.

Davis wasn't able to get any traction in the state or federal courts until August 2009 when the U.S. Supreme Court ordered the U.S. District Court in Atlanta to hold an evidentiary hearing to consider Davis' new evidence. However, the judicial attitude of indifference to Davis' claim of innocence was clearly expressed in Justice Scalia's dissent in which he wrote:

"Even if the District Court were to be persuaded by Davis's affidavits, it would have no power to grant relief. ... This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is "actually" innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged "actual innocence" is constitutionally cognizable." *In Re Troy Anthony Davis*, 130 S. Ct. 1, 2-3, 557 US __ (2009)

Scalia didn't mince words — Davis' innocence is irrelevant and the only way to uphold the law is to execute him. Clarence Thomas was the only other justice that agreed with Scalia.

After conducting the evidentiary hearing U.S. District Court Judge William T. Moore Jr. denied Davis' habeas corpus petition on August 24, 2010. In his 172-page ruling Judge Moore ruled that Davis had not proven by "clear and convincing" evidence that he is innocent of MacPhail's murder. Judge Moore's ruling was largely based on a logical incongruence — the witnesses testified under oath during his trial, so they can't now be truthful in their sworn affidavits/testimony that benefit Davis. In his ruling Judge Moore relied heavily on the fact that Davis had been convicted in 1991, and he seemed confused about the purpose of the evidentiary hearing because he discounted the value of Davis new evidence of his innocence precisely because it hadn't been presented at trial. (*In Re Troy Anthony Davis*, No. CV409-130 (DC SDGA, 08-24-10, Order Denying Writ Of Habeas Corpus)

Although doubts about Davis' guilt were so substantial that even former FBI Director William S. Sessions wrote an Op-Ed article for the *Atlanta Journal Constitution* opposing his execution, the federal 11th Circuit Court

of Appeals and the U.S. Supreme Court subsequently declined to review Moore's ruling.

On September 6, 2011 Davis' execution was scheduled for September 21. His last best hope resided with the five members of Georgia's Board of Pardons and Paroles. On September 19 Davis' lawyers finished their presentation for commutation of his sentence in a last ditch effort to stave off his execution. The Board denied clemency for Davis on the 20th, and he was executed the next day at 7 pm.

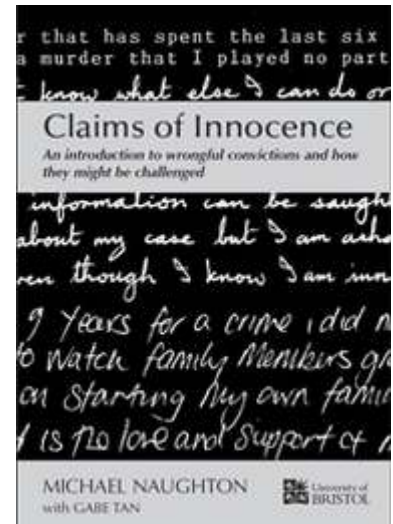
U.S. Supreme Court Justice Blackmun wrote in 1992, "The execution of a person who can show that he is innocent comes perilously close to simple murder." *Herrera v. Collins*, 506 U.S. 390, 446 (1993) In light of the evidence that Davis was legally innocent because the State no longer had a credible case for his guilt, it may be that the State of Georgia murdered him in the name of the law.

Troy Davis' website has a lot of information about his case at, <http://troyanthonydavis.org>.

There is a good summary of Troy Davis' case on the NAACP's website at, <http://www.naacp.org/pages/troy-davis-a-case-for-clemency>.

Claims of Innocence: An introduction to wrongful convictions and how they might be challenged

Claims of Innocence is an 80-page booklet by Michael Naughton with Gabe Tan. Published in 2010 by the University of Bristol, it can now be downloaded for no charge [by clicking here](#). Michael Naughton is founder and director of the [Innocence Network UK](#), and although *Claims of Innocence* is specific to the United Kingdom, much of its information, particularly in "Part 3: [Proving your innocence](#)," is applicable to the United States and other countries.



Court OK's Compensation Lawsuit By Terry Irving For 4-1/2 Years Wrongful Imprisonment For Bank Robbery

Terry Irving has been given the green light by the Supreme Court in Brisbane, Queensland, Australia to proceed with his lawsuit seeking compensation for 4-1/2 years of wrongful incarceration for the armed robbery of a bank in 1993 that was committed by another person.

Irving's ordeal began in March 1993 when he loaned his car to an acquaintance he met at pub he frequented in Cairns, the gateway to the Great Barrier Reef on Australia's northeastern coast. Irving's car was later identified as the getaway vehicle used by a lone person who committed the armed robbery of AUS\$6,230 from a bank in Cairns.

When questioned by police Irving explained he had nothing to do with the robbery that occurred while the acquaintance had his car. Irving did not match the description of the robber provided by witnesses who described him as a young man in his early 20s with dark hair and more than 5'-11" (180cm) tall, while Irving was 37 with brown hair and 5'-7" (172cm) tall.

However, in May 1993 Irving was arrested and charged with the robbery based on his identification by three bank tellers, even though he didn't fit their descriptions of the robber in their police statements. He was denied bail based on an arrest when he was 19.

Twelve days before Irving's December 1993 trial his lawyer went on vacation, and then his barrister failed to show up for the trial. (A barrister is a lawyer who specializes in court proceedings.) Irving's trial that was scheduled to last for three days was completed in less than a day. Based on the teller's in-court identification of Irving the jury convicted him of the robbery and he was sentenced to seven years and five months in prison.

Australia [does not mandate](#) legal representation for a direct appeal and Irving's application for legal aid was denied. Irving's *pro se* appeal to the Queensland Court of Appeal was dismissed in April 1994. He was then denied legal aid to prepare his application for leave to appeal to the High Court of Australia. Irving made six more applications between July 1994 and August 1995 for



Terry Irving
(Cameron Laird --
The Courier-Mail)

legal aid to file a special leave to appeal his conviction to the High Court. All were denied. In August 1995 Irving was dealt another blow when he was sued for compensation by the three bank tellers who testified against him at his trial. In September 1995 he appeared in court representing himself and claimed that he had been misidentified and was innocent of robbing the bank. In November 1995 he was ordered to compensate the tellers.

Irving was able to obtain through Freedom of Information requests exculpatory evidence that hadn't been disclosed to him or introduced by the prosecution during his trial. That evidence included a bank security camera photograph of the robber who bore no resemblance to Irving. Also, Irving discovered that two employees at the neighboring post office saw the robber standing outside the bank undisguised and gave statements to police that Irving wasn't the robber.

With no hope of being appointed a lawyer, Irving prepared a *pro se* application for special leave to appeal his conviction to the High Court. (A *writ of certiorari* is the equivalent of a special leave to appeal.) In May 1996 the High Court accepted his documentation as a special leave to appeal. The State conceded in their response to Irving's application that his trial had been unfair. On December 8, 1997 -- four years to the day after his conviction -- the High Court took the extraordinary action of granting Irving special leave to appeal, allowed his appeal, quashed his conviction and ordered a retrial. [The Court stated](#) it had "the gravest misgivings about the circumstances of this case", that "it is a very disturbing situation" and that "in all of this, the accused has been denied legal aid for his appeal." Three days later Irving was released from prison on bail after being incarcerated for 4-1/2 years from the time of his arrest. In October 1998 the Director of Public Prosecutions of Queensland notified Irving that he would not be re-tried, and in January 1999 the charge was dismissed.

Irving applied in July 1998 to the Queensland Attorney General for *ex gratia* compensation based on his conviction being a miscarriage of justice. He also requested the establishment of an independent Commission of Inquiry to investigate the circumstances of his wrongful conviction and imprisonment.

In March 1999 Irving filed a lawsuit against

the investigating officer and the State of Queensland, seeking damages for malicious prosecution and exemplary damages.

Since Queensland's Attorney General had not responded to his previous application, in July 1999 Irving filed another application for compensation.

In August 1999 the Criminal Justice Commission declined to establish a Commission of Inquiry based on their determination there wasn't a reasonable suspicion of official misconduct in Irving's prosecution.

Ultimately Irving's lawsuit was dismissed and Queensland's Attorney-General Kerry Shine announced a review of the case. After Cameron Dick succeeded Shine as attorney-general he announced in December 2009 [that Irving would](#) not be granted *ex gratia* compensation because he didn't consider his case a miscarriage of justice. Dick said that Irving would have to file a lawsuit if he wanted to pursue compensation.

Irving filed a lawsuit against the State of Queensland, and the government sought its dismissal. In late August 2011 the Supreme Court in Brisbane [ruled Irving's lawsuit](#) can proceed to trial.

After the Court announced its ruling, the now 56-year-old [Irving said](#): "The checks and balances did not protect me. This has affected my family, my friends. The thing that drives me is that I don't want this to happen to my children, my grandchildren, anyone."

Irving's lawsuit is expected to go to trial sometime in 2012, and depending on its outcome it may be the final chapter to his odyssey that began when he loaned his car to the wrong person two decades ago.

Note:

Some background details of Irving's case are from a report by the Office Of The United Nations High Commissioner For Human Rights, [Terry Irving v. Australia](#): Communication No. 880/1999, U.N. Doc. CCPR/C/74/D/880/1999 (2002), April 1, 2002.

Sources:

[Terry Irving](#) seeks compensation from Queensland Government after being wrongly jailed, *The Courier-Mail*, August 29, 2011
[Man to sue](#) Government over wrongful conviction, *ABC News*, August 30, 2011
[Wrongly accused](#) robber told to sue for compo, *Townsville Bulletin*, December 22, 2009
[Terry Irving](#) v. Australia, Communication No. 880/1999, U.N. Doc. CCPR/C/74/D/880/1999 (2002), April 1, 2002



Daniel E. Cvijanovich's Threat Conviction Is Dismissed With Prejudice

Daniel Edward Cvijanovich's 2008 conviction of threatening President Bush was dismissed with prejudice on November 28, 2011. His conviction was based on the testimony of a single jailhouse snitch.

Cvijanovich was arrested in March 2006 based on an anonymous tip that he allegedly threw rocks at the federal building in Fargo, North Dakota in 2001 while protesting Leonard Peltier's imprisonment. The tipster also alleged that in 2005 Cvijanovich made threats against President Bush.

FBI agents searched Cvijanovich's residence and thoroughly investigated the alleged threats, but found no evidence corroborating the anonymous accusation. Cvijanovich subsequently pled guilty to misdemeanor counts related to the 2001 rock throwing incident that occurred when he was 20, and he was sentenced to one year in federal prison.

After Cvijanovich pled guilty a cellmate at the Stutsman County Jail, Kyle White, reported to authorities that Cvijanovich confessed to threatening President Bush.

Based on White's grand jury testimony Cvijanovich was charged with making statements threatening President Bush.

During Cvijanovich's trial the star witness was White, and in October 2007 the jury convicted Cvijanovich of one count of making threats against the President. During his sentencing hearing Cvijanovich read a statement during which [he said in part](#):

"I am innocent of this charge. ... Judge Erickson, you have chosen to uphold a wrongful conviction. No sentence you hand down today will be just. And any personal criticism you might offer will be out of line and will carry no weight. I am innocent of this charge, and that says it all."

Cvijanovich was sentenced to 19 months in prison and 3 years of supervised release. With credit for time served and good-time credits Cvijanovich was released from federal prison on October 15, 2008.

Four months after Cvijanovich's release his [appeal was denied](#) in February 2009 by the federal Eighth Circuit Court of Appeals.



Daniel Edward Cvijanovich (Daniel E. Cvijanovich's Facebook page)

On April 5, 2010 Cvijanovich filed a 28 USC 2255 motion to vacate his conviction based newly discovered evidence that the government failed to disclose Brady evidence prior to or during his trial that impeached White's credibility -- namely that White's sentence had been enhanced because he obstructed justice and solicited perjury in his own federal case that involved his assault of his own young son.

The government's defense to Cvijanovich's motion was he could have obtained the impeachment evidence from sources other than the prosecution, so it had no Brady obligation to provide him with the information.

On July 8, 2011 Judge Erickson -- the same judge who presided over Cvijanovich's trial and sentenced him to prison -- granted the 2255 motion and ordered a new trial. The Order [stated in part](#):

"Before his own trial, White wrote a letter to his cousin that establishes he was willing to lie to avoid prison in his own criminal case, he was not reluctant to obstruct justice by suborning perjury, and he was aware of the seriousness of creating a perjured defense. ... The information was clearly in the possession of the United States. The information was not disclosed and Cvijanovich did not discover it until after trial. White's letter was not readily available to defense counsel, and the obstruction of justice enhancement was only explained in White's Presentence Investigation Report which was not part of the publicly available court file. Cvijanovich did not have equal access to the information and clearly he was not in a position of parity with the government. White's letter and the obstruction of justice sentencing enhancement are different than other impeachment information used at trial and are not merely cumulative. White was the only direct witness to the charge Cvijanovich was convicted on and this information creates a reasonable probability the outcome of the proceeding would have been different. Consequently, the Court finds that the United States suppressed this information in violation of the Brady doctrine and Cvijanovich's motion to vacate his conviction is granted."

On July 20, 2011 Judge Erickson [ordered](#)

[Cvijanovich's](#) release from supervision, that was scheduled to end in October 2011.

After the U.S. Attorney's Office decided not to appeal the order for a new trial, they filed a motion to dismiss Cvijanovich's indictment with prejudice, which was granted on November 28, 2011.

Cvijanovich, now 30, is a 2002 graduate of the State University of New York at Buffalo and his website [Justice For Dan](#) reports that he has scored highly on the LSAT test and he plans to attend law school and advocate on behalf of prisoners and criminal defendants in some capacity.

Sources:

[U.S.A. v. Daniel E. Cvijanovich](#), No. 08-1203, 08-1204 (8th Cir. 02-25-2009)

[U.S.A. v. Daniel E. Cvijanovich](#), CR No. 3:07-cr-55 (USDC ND SE Div, 07-08-2011) [Order Granting Motion To Vacate, Set Aside, Or Correct Sentence](#)

[U.S.A. v. Daniel E. Cvijanovich](#), CR No. 3:07-cr-55 (USDC ND SE Div, 07-08-2011) [Order Of Dismissal](#).

Justice For Dan, <http://justice4dan.com>

85-Year-Old Grandma's Hemp Conviction Tossed

Akosua Nimo is an 85-year-old frail and partially blind grandmother who was convicted of possession of Indian hemp by a Circuit Court in Ghana's Eastern Region. Nimo was sentenced to 10 years imprisonment. She was incarcerated at the Nsawam Prison that is [internationally known](#) for its deplorable conditions and extreme overcrowding -- built to house 700 prisoners, it holds around 3,000.

Nimo appealed, and on July 26, 2011 her conviction was vacated and [she was acquitted](#) by the Accra Fast Track High Court, presided over by Justice Charles Quist. The Court ruled there was insufficient evidence Nimo was in possession of the hemp.

Nimo was present at the hearing, and after her acquittal she was discharged from custody. Also convicted were her husband and another person, but their appeals have not yet been decided.

Ghana is on Africa's northwestern coast. English is the official language in government and business affairs, and its legal system is based on British common law. International Monetary Fund data identifies Ghana as having the world's fastest growing economy in 2011.

Sources:

[Grandma 85](#), freed from 10years jail, *The Chronicle* (Accra, Ghana), July 27, 2011

Diane Lee Acquitted Of Fraud By Appeals Court Judges Who Are Sued For Malfeasance

Diane Lee was unanimously acquitted by Taiwan's High Court on August 23, 2011 of four counts of fraud related to her holding public office in Taiwan while a dual-citizen of the United States and Taiwan. Lee's acquittal caused a firestorm of criticism in Taiwan, and on August 26 the three appeals court judges who acquitted Lee [were sued](#) for malfeasance.

Lee, 52, is the daughter of Lee Huan, who served as Taiwan's premier between 1989-1990. She was born in Taiwan but in her early-20's she traveled to the United States for her education. She obtained permanent residency in the U.S. in 1985 and citizenship in 1991. Lee did not give up her Taiwanese citizenship.

She returned to Taiwan in 1994 when she was 35 and was elected as a Taipei City councilor. Taipei is Taiwan's capital and largest city. Four years later Lee was elected as a legislator to Taiwan's Parliament and she was re-elected twice to four year terms as a member of the Chinese Nationalist Party (KMT).

In June 2001 Taiwan modified its Nationality Law with Article 20 that prohibits foreign citizens from holding any government office.

Almost seven years later Taiwan's *Next Magazine* published an article in March 2008 that alleged Lee was violating the law by serving as a public official while holding dual citizenship in the United States and Taiwan and that she had a U.S. Passport.

Lee vigorously [denied the allegation](#) and claimed that she lost her U.S. citizenship when she was elected to office in 1994. Her lawyer met with reporters and explained that under Section 349(A)(4) of the U.S. Immigration and Nationality Act a U.S. citizen loses their citizenship by serving as a public official in another country or by taking an oath of allegiance to another country in relation to a government post. Which is what Lee did in 1994 when elected as a Taipei City councilor.

In a follow-up article *Next* claimed that Taiwan's Ministry of Foreign Affairs had received confirmation from U.S. officials that Lee was a U.S. citizen.

The main rival of the KMT is the Democrat-



Diane Lee in 2008
(ChuPei-Hsiung,
Taipei Times)

ic Progressive Party (DPP), and after the *Next* articles were published they reported Lee's case to the Taipei District Prosecutors' Office for investigation. In January 2009 the prosecutors' office received confirmation from the U.S. Department of State that Lee was a U.S. citizen.

The Lee scandal was front page news in Taiwan and the DPP went all out to fan the flames of the controversy.

Lee resigned in December 2008 from the KMT and gave up her position as a legislator in January 2009.

In February 2009 Taiwan's Central Election Committee voted to annul Lee's [four elections](#) from 1994 to 2008, and there was speculation it would require her to return all the money she had been paid in salary and expenses during her 14 years as an elected official.

In September 2009 Lee was indicted on four counts of fraud. The indictment alleged that during her four elections to public office she had intentionally concealed her U.S. citizenship, and during her 14 years as a public official she had been illegally paid about US\$3.9 million in salary and other payments. (Lee was charged with being paid NT\$127.77, which was about US\$3.9 million at the Sept. 2009 exchange rate of 32.5 NT\$ per US\$.)

During Lee's trial her defense was that she didn't knowingly commit any fraud as a councilor or legislator, although she did acknowledge the evidence from U.S. authorities supported that she remained a U.S. citizen after her 1994 election.

The Taipei District Court [found her guilty](#) of the four counts of fraud and sentenced her to two years in prison on February 4, 2010. She was allowed to remain free pending resolution of her appeal.

After Lee's conviction the Taipei City Council filed a lawsuit against Lee seeking return of the NT\$22.7 million (US\$698,000) that she earned during her four years as a city councilor. On March 29, 2011 the Taipei High Administrative Court [ruled that because](#) no complaint was made about Lee's performance of her duties as a councilor from 1994 to 1998, the income she received was legal and she did not have

to return it.

On August 23, 2011 a three-judge panel of Taiwan's High Court acquitted Lee [of all four](#) fraud counts. The Court ruled that although technically her elected status should have been invalidated by the Central Election Committee because of her dual citizenship that could have easily been proven, the commission had maintained Lee's elected status, which was an administrative error not of Lee's doing and so her acceptance of her salary couldn't be construed as fraud. Official inquiries had never been made of Lee about her possible dual U.S.-Taiwanese citizenship prior to any of the four elections she won, and neither the Taipei City Council nor the Legislator had examined or even asked her whether she had dual nationality, and consequently the prosecution had not proven that she committed fraud.

There was immediate condemnation of Lee's acquittal by her former political opponents. An editorial in the *China Post* newspaper [described the appeals court](#) ruling as Kafkaesque because it put the burden on election officials to determine whether a person was eligible for public office.

Three days after her acquittal the Taiwan Solidarity Union (TSU) [filed a lawsuit](#) against the three High Court judges who acquitted Lee, accusing them of malfeasance. When interviewed, Chou Ni-an, a deputy director of the TSU described the three judges as "dinosaur judges." Ni-an also said of the judge's ruling, "This is like telling people that it's OK to cheat."

Lee's brother Lee Ching-hua has weathered the attacks on his sister, and he remains a KMT legislator in Taiwan's Parliament.

Sources:

[Diane Lee](#) threatens to sue 'Next' for citizenship story, *Taipei Times*, May 22, 2008

[Taiwan KMT](#) ex-lawmaker Diane Lee sentenced to 2 years over U.S. nationality, *Taiwan News*, Feb 4, 2010
[Diane Lee may](#) keep salary: court, *Taipei Times*, March 30, 2011

[Diane Lee's fraud](#) conviction quashed by the High Court, *Taipei Times*, August 24, 2011

[TSU files](#) a lawsuit against judges in the Diane Lee case, *Taipei Times*, August 27, 2011

Visit Justice Denied's Facebook Page

Justice Denied's Facebook page has information related to wrongful convictions. Justice Denied's homepage has a link to the Facebook page, www.justicedenied.org

Massachusetts Conviction Overturned Because Right To Confront Document Preparer Violated

Peter L. Parenteau's conviction in 2009 for driving with a revoked driver's license was [set-aside](#) by Massachusetts' Supreme Judicial Court on June 10, 2011. The SJC ruled Parenteau had been denied his Sixth Amendment right to confront and cross-examine the person who prepared the document the prosecution relied on to prove he had been informed his license was revoked.

Parenteau pled guilty in April 2007 to driving under the influence of intoxicating liquor in Massachusetts. In sentencing Parenteau the judge told him his driver's license would be revoked for two years.

More than two years later, in May 2009 Parenteau was parked at a Gulf service station in Boxborough when a police officer ran his license plate. The officer learned that Parenteau was the registered owner of the vehicle and that he had a revoked driver's license. The officer confronted Parenteau, and even though he produced a valid driver's license the officer arrested him for driving with a revoked license.

Prior to Parenteau's trial the prosecution provided his lawyer with a certification from the Registry of Motor Vehicles dated July 24, 2009, that showed he had been mailed a notice on May 2, 2007 that his driver's license had been revoked for ten years. Parenteau's lawyer filed a *motion in limine* to exclude the certification on the ground that it violated his right to confront the witness against him — namely whoever allegedly prepared and mailed the notice in May 2007. The judge denied the motion and Parenteau was subsequently convicted.

Parenteau appealed and on June 10, 2011 Massachusetts' Supreme Judicial Court overturned Parenteau's conviction, ruling that a certificate issued by the Registry of Motor Vehicles cannot be used as evidence that a person has been notified their driver's license



Gulf gas station in Boxborough, MA where Peter L. Parenteau was arrested (Google streetview)

has been revoked. Based on the U.S. Supreme Court's 2009 ruling in [Melendez-Diaz v. Massachusetts](#), 129 S.Ct. 2527 (2009), in which the Court ruled that the expert conducting a drug-test is required to testify — and must be available for cross-examination — about their findings in court, the SJC ruled that introduction of the certificate violated Parenteau's Sixth Amendment right to confront the witness testifying against him, which would be the person who allegedly mailed the certificate. The SJC stated in [Commonwealth vs. Peter L. Parenteau](#), SJC-10763 (6-10-2011):

We conclude that the registry certificate, like a certificate of drug analysis, is testimonial in nature. It is a solemn declaration made by the registrar for the purpose of establishing the fact that a notice of license revocation was mailed to the defendant on May 2, 2007, and, by inference, was received by him. The registry certificate was dated July 24, 2009, nearly two months after the criminal complaint for operating a motor vehicle after license revocation had issued against the defendant. As such, it plainly was made for use at the defendant's trial as prima facie evidence that he was notified of his license revocation, an essential element of the charged crime that the Commonwealth was required to prove. The certificate did not simply attest to the existence and authenticity of records kept by the registry but made a factual representation based on those records that a particular action had been performed—notice had been mailed on a specified date. The mere existence of a copy of the notice of license revocation in the registrar's files did not, in and of itself, constitute proof that it was mailed to the defendant. Because the certificate is a testimonial statement, its admission at trial in the absence of testimony from a registry witness violated the defendant's Sixth Amendment right to confrontation.

Since there is no evidence Parenteau was notified his license was revoked for ten years instead of the two years the judge told him during his sentencing hearing, his conviction for driving with a revoked driver's license was set-aside by the SJC.

The principles set forth in [Melendez-Diaz v. Massachusetts](#), and in the USSC's earlier decision in [Crawford v. Washington](#), 541 U.S. 36, 59 (2004) about a defendant's Sixth Amendment right to confront and cross-examine witnesses are applicable to many wrongful conviction cases.

Sources:
[SJC overturns '09 conviction](#), *Boston Globe*, June 11, 2011

Vladek Filler Acquitted After Retrial Of Sexually Assaulting His Estranged Wife

Vladek Filler was acquitted by a jury in Hancock County, Maine on May 27, 2011 of sexually assaulting his estranged wife Ligia. Filler was retried after the Maine Supreme Court overturned his January 2009 sexual assault conviction and ordered a retrial.

Filler and his wife lived in Gouldsboro, Maine when they separated in 2007 with the intention to divorce. Filler told his estranged wife that he was planning to move from Maine to Georgia where his relatives lived, and that he wanted the couples two young children to move with him. She then filed a criminal complaint that on one occasion Filler anally raped her and on two other occasions physically abused her. After doing that she filed for a protection order and an order granting her full custody of their children. She also included the allegations in a subsequent divorce petition.



Vladek Filler during May 2011 trial (John Clarke Russ, BDN)

Filler was charged with rape, gross sexual assault, and two misdemeanor counts of assault. There was no evidence of that Ligia had been raped because she refused to have a medical examination even though the police encouraged her to do so.

During Filler's trial his defense was that after learning he wanted to move to Georgia his wife fabricated the rape allegation and grossly exaggerated arguments they had by claiming they were assaults in order to obtain custody of the couple's children. The prosecution objected when Filler's lawyer attempted during his cross-examination of Filler's wife to impeach her credibility by questioning her about the custody dispute and the timing of her making criminal accusations against her husband. The judge sustained the prosecution's objection based on his opinion that her testimony would amount to litigation of the still unresolved "custody issues and that's not what this case is about."

Then during its rebuttal argument the prosecution argued that Filler had not presented any evidence supporting his claim that it wasn't until after his wife realized they

Filler cont. on page 12

Anthony Graves Awarded \$1.45 Million Compensation For 18 Years Wrongful Imprisonment

Anthony Graves has received \$1.45 million compensation from the State of Texas for 18 years incarceration for six 1992 murders he didn't commit.

Graves was convicted in 1994 of murdering 45-year-old Bobbie Joyce Davis, her 16-

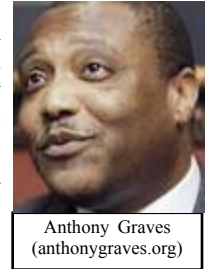
year-old daughter Nicole, and four grandchildren, ages 4-9 in 1992. He was jailed from 1992 until the time of his trial.

There was no physical or forensic evidence linking Graves to the murders. His conviction and death sentence were based on the testimony of Robert Earl Carter, who was also convicted of the murders. Carter recanted his testimony before his 1998 execution and swore that Graves had nothing to do with the murders.

In 2006 the 5th U.S. Circuit Court of Appeals overturned Graves' conviction and

death sentence based on the prosecutor's misconduct of withholding exculpatory evidence and eliciting false testimony.

After a reinvestigation of the case by Special Prosecutor Kelly Siegler, Graves was released on October 27, 2010 after Siegler and Burleson-Washington County District Attorney Bill Parham both agreed he is innocent of any involvement in the murders, and the charges were dismissed.



Filler cont. from page 11

were going to have a major custody dispute that she made criminal accusations against him. Filler's lawyer objected to that argument and moved for a mistrial because it was the prosecution that objected to the testimony by Filler's wife that would have supported the truthfulness of Filler's claim that the criminal charges were related to the couple's custody dispute. The judge overruled the objection by Filler's lawyer and denied the motion for a mistrial.

The jury convicted Filler of one count of gross sexual assault and two counts of misdemeanor assault.

Filler's lawyer filed a post-verdict motion for a new trial based in part on the argument that he was denied a fair trial by the prosecutor successfully objecting to testimony by Filler's wife about their bitter custody dispute, and then arguing to the jury that the absence of any testimony about the custody dispute disproved Filler's claim that they had a custody dispute. The judge agreed that the prosecutor's argument prejudiced Filler's right to a fair trial and vacated his conviction.

The prosecution appealed, and on September 9, 2010 Maine's Supreme Court affirmed the grant of a new trial in [State of Maine v. Vladek Filler](#), 2010 ME 90 (ME Sup Ct, 9-9-2010). The Court's ruling states:

The likelihood that the jury might have been persuaded to accept the central premise of Filler's defense—that his wife had a strong motive to fabricate her claims—was greatly diminished by the State's emphasis on

the absence of evidence that the marriage was ending and the parties were engaged in a child custody dispute. The court did not err in concluding that the interest of justice requires a new trial. (Op. Cit. 14)

The prosecution elected to retry Filler.

Prior to the retrial T.J. Ward, the former lead investigator in Aruba's high-profile Natalee Holloway murder case, [publicly described](#) the sexual assault charge against Filler as a fabrication by his wife and that he was the victim of malicious prosecution, because there was no medical or forensic evidence supporting her allegation, there was no rape kit because she refused to be medically examined, and she had a had a history of emotional instability.

After a three-day trial [the jury acquitted](#) Filler on May 27, 2011 of the gross sexual assault and one of the misdemeanor assault counts. He was convicted of one count of misdemeanor assault based on a photograph introduced during the trial that showed a small bruise on his wife's arm.

The misdemeanor assault conviction carries a maximum of one year in prison and a minimum of probation. Filler was released on bond pending sentencing. His lawyer said he will appeal that conviction.

Filler, 41, lives in Atlanta, Georgia with his two children, now 5 and 14. He was awarded [custody of his children](#) based on the recommendation of the Maine Department of Health and Human Services. It is reported he and his wife Ligia are finalizing their divorce.

Sources: [State of Maine v. Vladek Filler](#), 2010 ME 90 (ME Sup Ct, 9-9-2010) [Man found](#) not guilty of raping wife, but guilty on one of two misdemeanor assault charges, *Bangor Daily News*, May 27, 2011 [Internationally Respected](#) Investigator Says Vladek Filler Rape Accusation is "Fabrication", *National Coalition For Men*, Press Release, April 8, 2011

Graves filed a claim with the comptroller's office under Texas wrongful conviction compensation statute. His attorney was notified on February 11, 2011 that the claim was denied because the judge's order does not state Graves' release was due to his "actual innocence." The comptroller's office explained that the law is very specific that a court's order releasing a claimant must state "on its face" that the release is based "on the claimant's actual innocence." When asked for comment about the controversy caused by the comptroller office's decision, spokesman [R.J. Silva said](#) "the law did not allow for special consideration of the facts in Graves' case."

Siegler commented regarding the denial of compensation to Graves, "Who would have envisioned this kind of situation happening? I'm willing to testify to the fact that we believe he's innocent. I've signed an affidavit. I'm not sure what we are supposed to do to make it happen."

Texas Governor [Rick Perry called](#) Graves' case a "great miscarriage of justice," and said he would assist him through legislation or "directly with the comptroller's office."

On June 22, 2011 Perry signed special legislation authorizing the payment of \$1.45 million to Graves. Eight days later Graves received a check for \$1.45 million from Texas Comptroller Susan Combs. Graves will also receive monthly annuity checks beginning next year.

The [Innocence Project of Texas](#) represented Graves. After IPT chief counsel Jeff Blackburn [said about Graves' case](#), "The worst thing we can do is believe that Anthony's case shows that the Texas criminal justice system works. This case shows that it doesn't work."

Source: [Comptroller Pays](#) Anthony Graves \$1.4 Million, *The Texas Tribune*, June 30, 2011 [State rejects](#) compensation for wrongly convicted man, *Houston Chronicle*, February 14, 2011. [Perry pledges](#) to help Graves, *Brenham Banner-Press*, February 17, 2011



Woman protesting Vladek Filler's prosecution (NCFM.org)

Ivan Henry Files Lawsuit For 27 Years Wrongful Imprisonment As A Serial Rapist

Ivan Henry has filed a lawsuit seeking money damages for his wrongful conviction as a serial rapist, and more than 27 years of incarceration until his release in June 2009.

Henry was 35 when arrested in May 1982 on charges of committing sexual offences against eight women in Vancouver, British Columbia. Henry proclaimed his innocence, and there was no physical, forensic or independent eyewitness evidence linking him to any of the crimes. The prosecution's key evidence was his identification by the victims, and in the "he said, she said" contest his jurors were faced with, they sided with the women. Henry was convicted on March 15, 1983 of three rapes, two attempted rapes, and five indecent assaults.

Henry insisted during his sentencing hearing that the women had misidentified him and he was innocent. The judge responded by saying that Henry didn't have "any redeeming qualities" as a human being, and that "Society must be permanently protected from the predatory behaviour of Henry." The judge ruled Henry was a "dangerous offender" and sentenced him to an indeterminate sentence, which meant he would die in prison unless he was granted release on parole.

Henry's *pro se* direct appeal was dismissed in 1984 on the procedural ground that he missed a filing deadline. Henry missed the deadline because he couldn't afford the \$4,300 cost of his trial transcript. All of Henry's numerous post-conviction appeals were also dismissed without a review of the merits of his case.

After Henry had languished in prison for more than two decades, the Vancouver police alerted British Columbia's Attorney General in 2006 that while conducting Project Small Man, an investigation into a series



1982 photo of Ivan Henry in a headlock by a police officer during a lineup. The lineup was made up of police officers in civilian clothes. Most were smiling, except for Ivan Henry.

of crimes, they discovered evidence that Henry may not have committed his convicted crimes. In November 2006 the Attorney General appointed Vancouver lawyer Leonard Doust as an Independent Special Prosecutor to investigate whether Henry's convictions constituted a potential miscarriage of justice.

After a 16 month investigation, in March 2008 Doust reported to the Attorney General that the new evidence provided sufficient grounds for an appeal by Henry of his convictions on the basis they constituted a miscarriage of justice. The report also recommended that the AG disclose all relevant evidence to Henry, including the results of the Project Smallman investigation, so he could prepare his appeal.

Henry's appeal was prepared by three lawyers who agreed to represent him *pro bono*. His appeal claimed that the police botched the investigation, exculpatory evidence was not disclosed, the trial judge erroneously instructed the jury, and another man could have been responsible for the crimes.

On January 13, 2009 British Columbia's Court of Appeal unanimously approved reopening Henry's case. In her oral ruling Justice Mary Saunders explained that Henry had never had an appeal of the merits of his case, and "This is an extraordinary application." The court's ruling was Henry's first victory after he had "soldiered on" for a quarter-century as a jailhouse lawyer and getting nowhere with the numerous petitions he filed related to his conviction and sentence.

Henry was released on bail in June 2009 pending the outcome of his appeal. He had been incarcerated for 27 years and 1 months.

On October 27, 2010, the appeals court unanimously acquitted Henry of all 10 sexual offences he had been convicted of against the eight women.

Henry [filed a lawsuit](#) in June 2011 seeking unspecified damages against the City of Vancouver, the provincial and federal governments, and three members of the Vancouver police department. He is seeking damages for loss of liberty, reputation and privacy while in prison, along with pain and

Mistrial Declared After Defense Lawyer Questions Judge's "Professional Competence"

John Henry Browne lived up to his reputation as one of the most zealous defense lawyers in Washington state when a mistrial was declared on July 6, 2011 during a trial in Kitsap County as a result of his contentious sparring with the judge over what he claimed was the judge's denial of his client's constitutional rights to a fair trial.

Among Browne's many successes during his four decade legal career was helping to exonerate some of the innocent people convicted in what became known nationally as the Wenatchee Sex Ring cases. In the mid-1990s forty-three innocent people were arrested for child rape and other charges that

Browne cont. on page 14



Ivan Henry, with daughters Tanya Olivares (left) and Kary Henry on October 27, 2010 when he was acquitted by British Columbia's Court of Appeal (Ian Smith, Vancouver Sun)

suffering, emotional and psychological harm, and humiliation and disgrace caused by the defendant's conduct. He claims the police engaged in "high-handed, outrageous, reckless" behavior in his case.

Henry is also seeking damages for loss of usual, everyday experiences, past income and loss of opportunity to earn income. He is also seeking an award for his daughters, who were children when he was wrongfully imprisoned and to compensate them for expenses they incurred as a result of his incarceration. [Henry's lawsuit claims](#), "As a result of his wrongful conviction and incarceration they were effectively deprived of a father and the benefits of a father's love, guidance and affection."

Read *Justice Denied's* March 2009 article [about Henry's case](#), "Ivan Henry's Case Re-opened After 25 Years Proclaiming His Innocence Of Being A Serial Rapist."

Sources:

[B.C. man](#) wrongfully convicted in rape cases seeks damages in suit; Ivan Henry also wants compensation for daughters, *Vancouver Sun*, June 29, 2011
[B.C. man launches](#) suit over wrongful rape convictions, *The Canadian Press*, June 30, 2011
[Ivan Henry's Case](#) Re-opened After 25 Years Proclaiming His Innocence Of Being A Serial Rapist, By Hans Sherrer, *Justice Denied* blog, March 21, 2009

Browne cont. from page 13

were fabricated by a detective with the Wenatchee, Washington Police Department.

Dominic Briceno was charged in 2009 with six drug related felonies in Kitsap County, and he hired Browne to represent him. Briceno's trial began in June 2011. Superior Court Judge Theodore Spearman denied Browne's pretrial motions and ruled in the prosecution's favor on every significant evidentiary issue that arose during the trial. Browne expounded during many of his objections so the jury would understand why he was objecting. Judge Spearman countered by ordering Browne to only utter a single word when he objected — "Objection." Spearman twice fined Browne \$500 and threatened to jail him after finding him in contempt for violating his order to confine his objections to one word.

Browne repeatedly moved for a mistrial during the trial, and the tussle between Browne and Spearman came to a head on July 5, 2011 when Kitsap County deputy prosecutor Alexis Foster objected to Browne's "ongoing speaking objections" in violation of the judge's order. Spearman agreed with the prosecutor and fined Browne another \$500. Browne [then declared](#) with the jury present that Judge Spearman was preventing him from effectively representing Briceno and that he no longer wanted "to participate in this trial."

Spearman adjourned court for the day and told Browne to tell him the next day how he wanted to proceed. The following morning Browne filed a "memorandum regarding judicial conduct." [Browne's memorandum](#) asserted that Briceno's constitutional rights were violated by Spearman's rulings throughout the trial, and that the "court's misapprehension and misapplication of the law — always in favor of the state — demonstrates the court's incompetence to preside over (the) trial." Browne also asserted that Spearman interfered with Briceno's right to a fair trial by failing "to even consider the defense argument" and those decisions "thus call the court's faithfulness to the law and professional competence into serious question." The conclusion of Browne's analysis of the case was to request that Spearman recuse himself in the interests of justice.

In court on the morning of July 6 Spearman refused to consider Browne's memorandum and request for his recusal, and he indicated



he was going to resume the trial. Browne countered by making a motion for a 10-day continuance that Spearman denied. Browne consulted with Briceno, after which Briceno told Spearman "he would like to fire his counsel." Browne reiterated that he would be refusing to participate in the case, so agreeing to remove Browne as Briceno's attorney seemed Spearman's only option, because to continue the trial with Browne plainly doing nothing to assist Briceno would mean a virtually automatic reversal of Briceno's conviction on appeal if he were convicted.

Spearman announced that he was inclined to declare a mistrial [due to Browne](#) "behaving improperly" and "obstructing justice." Deputy prosecutor Foster suggested that Spearman should find Browne in contempt and jail him.

Spearman recessed court while he considered his options. During that recess a bailiff overheard a juror [say that he](#) would like to "punch that defense attorney in the nose." After the comment was reported to Spearman, court was reconvened and he declared a mistrial on the basis that Browne's conduct had "thwarted" the administration of justice and created "incurable prejudice" in the juror's against his client.

Kitsap County Prosecutor Russ Hauge [announced after](#) Spearman's ruling, "We have no issues with Judge Spearman's performance." He also said the prosecutor's office will file a motion requesting that Browne be ordered to pay for the cost of retrying Briceno, since a retrial is only necessary because of Browne's "intentional conduct." Hauge defended Spearman, who has been a judge since 2004, describing him as "an extraordinarily well experienced lawyer."

Browne said [about Judge Spearman](#) to a KOMO-TV reporter, "It became apparent to me that during the course of this trial that he has, in my opinion, some serious cognitive deficits. He told me he wouldn't read briefs. I filed briefs and he said, 'I'm not going to read that.' He would rule on objections and say 'sustained' and then say 'overruled' for the same

objection. It got really bizarre." Browne said he will appeal the fines imposed by Judge Spearman and that he will file a complaint against him with the Washington State Commission on Judicial Conduct.

Browne was ordered by Spearman to return to Port Orchard on July 27 for a fact-finding hearing concerning Browne's conduct during the trial. However, days before the hearing was scheduled to take place [Spearman delayed it](#) until after Briceno's case was tried.

The hearing was not held and Spearman died on January 3, 2012 of complications from a brain aneurysm. Browne, who [has been described](#) as "the most hated man in the state" of Washington for his defense of high profile clients, including Ted Bundy, says that it comes with the territory: People take their freedom for granted. They don't teach civics anymore. They don't realize how delicate the system is. It is a simple equation: The more power you give to government the less power you give to individuals."

Dan Satterberg, then chief of staff for the King County Prosecutor's Office, said of Browne, "He never seems to doubt the righteousness of his case. Other attorneys will allow themselves to have a casual aside with a prosecutor that he thinks his case is weak or his client is lying. But you won't get any of that from John."

John Henry Browne's website is, <http://www.jhblawyer.com>.

Witch Hunt: A True Story of Social Hysteria and Abused Justice by Kathryn Lyon (Avon books 1998) is the single best source of information about the Wenatchee Sex Ring cases. Used copies are available very reasonably on [amazon.com's website](#).

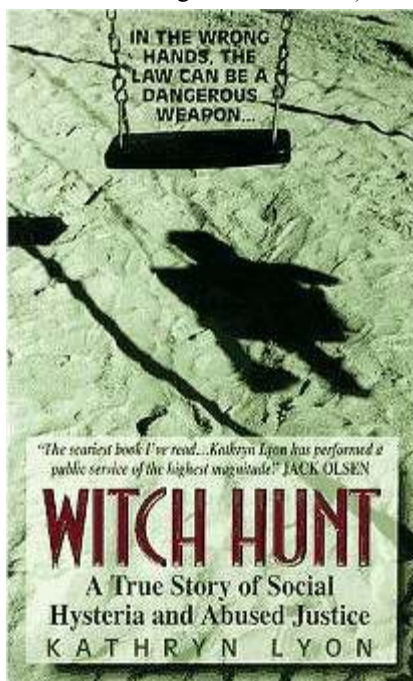
Sources:

[Seattle attorney](#) questions Kitsap judge's competence, spurs mistrial, *Kitsap Sun* (Bremerton, WA), July 8, 2011

[Mistrial after](#) juror wants to punch lawyer in nose, *Kitsap Sun* (Bremerton, WA), July 8, 2011

[Kitsap judge](#) delays Seattle lawyer's discipline hearing, *Kitsap Sun*, July 25, 2011

[For The Defense](#) — Bundy, Ng, Pang And An Eagle Scout: Attorney John Henry Browne Has Defended Them All With His Own Peculiar Style, *The Seattle Times*, March 22, 1998



Theodore White Jr. Settles Wrongful Conviction Lawsuit For \$15.5 Million

Theodore (Ted) White Jr. is being paid \$15.5 million by the City of Lee's Summit, Missouri to settle his federal lawsuit that alleged his constitutional rights were violated when he was wrongly prosecuted and convicted in 1999 of molesting his minor step-daughter.

In April 1998 White, a 37-year-old businessman in Lee's Summit, was arrested after charges were filed alleging he raped, sexually molested, sodomized and provided pornographic material to his adopted daughter in 1993 when she was 12-years-old. The charges followed an investigation that was initiated after his estranged wife Tina made allegations against White.

White's defense was the charges were all fabricated by his wife as part of their troubled relationship, but with his daughter testifying as a prosecution witness White was convicted of the charges in 1999 after a three-day trial. The judge allowed to remain free on bail pending his sentencing. Claiming he had been convicted of crimes he didn't commit, White fled a week after his conviction. White was spotted in Arkansas, Florida and South America before dropping out of sight.

While on the run White was sentenced in absentia to 50 years imprisonment.

White settled in Costa Rica where he sold real estate to support himself. A client turned him in after seeing him on an episode of the television program America's Most Wanted. While jailed in Costa Rica for five months while he fought extradition to the U.S., White learned that his wife was involved in a sexual relationship with Detective Richard McKinley while McKinley was investigating the charges against White. During White's trial McKinley testified about his investigation. Tina subsequently divorced White, and after his conviction she married McKinley.

White also learned the prosecution knew of the relationship and didn't disclose it to his attorneys. Based on his belief the new evidence would result in him getting a new trial White waived his extradition. After arriving back in Missouri he began serving his sentence. His lawyers filed a motion for a new trial based on new evidence that the prosecution failed to disclose the relationship between White's wife and the lead detective in the case. In April 2002 the Missouri Court

of Appeals ordered a new trial.

The prosecution decided to retry White, again relying on the testimony of his former adopted daughter. However, an investigation by White's lawyers resulted in the discovery of evidence, including that he was out of town on business during periods of time when he allegedly molesting his daughter, and defense witnesses who directly contradicted many aspects of her testimony about her relationship with White. In addition, White's lawyers were able to introduce evidence that McKinley was involved with White's wife during his investigation, and they argued that the two of them had cooked up the charges against White as a way to get him out of the way so they could be together, and convinced her daughter to go along with the ploy. After a six day trial, in June 2004 a mistrial was declared after the jury deadlocked 11 to 1 for White's acquittal.

After the trial four jurors publicly spoke out that there was no credible evidence of White's guilt, but that one juror refused to participate in deliberations or change his guilty vote even though he admitted he had "doubts" about White's guilt. Juror Jill Miller [told reporters](#), "He is not guilty, for sure. There is not one bit of evidence the state brought us to prove his guilt. When it was over we just cried. It was so outrageous, there are no words to describe it. ... After the verdict, (several jurors) went out together, and said, "We want to do anything we can to help them out. We just can't let it end like this — we have to do something to help them.'" Miller and several jurors began advocating on White's behalf, including writing letters to Missouri's Attorney General Jay Nixon encouraging him to intervene and encourage the Jackson County Prosecuting Attorney's Office to dismiss the charges so White could go free.

An investigation by White's lawyers after the trial found that the juror who refused to deliberate had lied on his juror form when he stated he had lived in Missouri for 29 years when it had only been 2 years, and he lied that he had never been involved in a civil or criminal action when he had been sued by landlords, credit-card companies and filed bankruptcy. His lawyer's motion to disqualify the juror after the verdict was denied.

Jackson County's prosecutor decided to try White a third time. In a case that was largely a rerun of his second trial -- albeit without a juror who lied on his juror form — White was acquitted in April 2005. He was re-



Theodore (Ted) White Jr. (KMBCTV, Kansas City, MO)

leased after serving about five years of his 50-year sentence.

A month later White filed a federal civil rights lawsuit against the City of Lee's Summit, its chief of police, Detective McKinley, and his ex-wife, alleging among other things false arrest, conspiracy and malicious prosecution. The city and White then signed an agreement in 2006 that he would drop the city and its police chief as defendants in exchange for the city agreeing to pay any judgment that White won against McKinley.

On August 30, 2008 an eight person jury in U.S. District Court in Kansas City [awarded White](#) \$14 million in compensatory damages and \$2 million in punitive damages after finding that Detective McKinley and White's wife Tina conspired to convict White of false charges and deprive him of his right to a fair trial.

Lee's Summit appealed, and in July 2010 the federal 8th Circuit Court of Appeals upheld the judgment.

Faced with paying White \$16 million, in August 2010 the City of Lee's Summit informed White that it wouldn't pay the judgment as it had promised because it would violate a city ordinance that forbids it from indemnifying a city employee who violates a person's constitutional rights.

White's lawyer then filed a motion alleging that the city had committed fraud by inducing White to drop the city and the police chief as defendants as a strategy to avoid paying any judgment awarded against McKinley. There was a hearing in March 2011 during which the city's attorneys claimed attorney-client privilege in refusing to answer questions or provide documents to U.S. District Court Judge Nanette Laughrey related to the 2006 agreement between the city and White. [It was reported](#) in April 2011 that Judge Laughrey was considering ordering an investigation to determine if the city committed fraud when it entered the 2006 agreement with White.

On July 22, 2011 Lee's Summit announced that it had [reached an agreement](#) with White to pay him \$15.5 million to settle all his claims against the city, its police chief and McKinley. The city also agreed to "make corrections with state and national law enforcement units, including the National Crime Information Center, Kansas City Metro ALERT and the Missouri Uniform

White cont. on p. 16

Federal Judge Denies Habeas Petition By Man Who Claims Surveillance Video Will Prove He Is Actually Innocent

The U. S. Supreme Court has never ruled that evidence in a habeas corpus petition proving a person is actually innocent is sufficient by itself to overturn his or her conviction. What the Supreme Court has done is consistently rule that to vacate a conviction there must be a constitutional defect in a trial such as ineffective assistance of counsel, or the prosecution's failure to disclose exculpatory evidence. Although the Supreme Court has considered several cases that involved a habeas petitioner claiming actual innocence, the Court has failed to decide if a compelling free-standing claim of innocence warrants

White cont. from p. 15

Law Enforcement System to reflect White's acquittal on all child molestation charges."

The agreement also includes as an exhibit a [statement by White](#) that reads in part:

"One could not ever imagine what my family has had to endure throughout this whole ordeal of false allegations and wrongful imprisonment as a result of my Constitutional rights being ignored by people elected or hired to defend the Constitutional rights of its citizens.

...

"My hope is that my case will bring about changes in the criminal justice system and cause law enforcement and elected officials to make sure that the Constitutional rights of the citizens they serve will never be ignored. We, as citizens, have to stand up for our rights even when people try and abuse the system to their own benefit. The abuse ran rampant in my case and should have never been allowed to happen."

White's ordeal is legally over thirteen years after it began. White, now 50, lives in Utah.

Sources:

[Terms of White's \\$15.5 million settlement disclosed, Lee's Summit Journal](#), July 22, 2011

[Lee's Summit](#) will pay \$15.5 million to wrongly convicted Ted White, [Kansas City Star](#), July 22, 2011

[Lee's Summit Could Face Fraud Charges In Ted White Case](#), [Fox4kc.com](#) (Kansas City, MO), March 8, 2011

[Jury awards man \\$16 million](#), [The Joplin Globe](#) (Aurora, MO), September 13, 2008

granting a habeas corpus petition. (See e.g., *Herrera v Collins*, 506 U.S. 390 (U.S. 1993); and *House v. Bell*, 547 U.S. 518 (U.S. 2006).)

Larashai Burton was convicted of first-degree assault and first-degree gang assault related to the beating in April 2004 of a man outside a Jim's Steakout restaurant in Buffalo, New York. He was sentenced to two concurrent twenty year prison terms, to be followed by five years of post-release supervision.

Burton's defense was that during the assault he was inside the restaurant and wasn't involved in the crime. Key evidence against Burton was a co-defendant who in exchange for reduced charges testified that he saw Burton stomp the victim in the head twice.

After Burton's convictions were affirmed on direct appeal his post-conviction motion for a new trial was denied by the New York State courts. Burton then filed a *pro se* federal writ of *habeas corpus* based on a single claim: He is actually innocent of his convicted crimes and his innocence is proven by a restaurant CCTV surveillance tape seized by a Buffalo police officer the night of the assault. Burton also alleged that the officer knowingly committed perjury when he testified at trial that he did not retrieve the videotape.

The prosecution did not provide the videotape (or a copy) to Burton's trial lawyer and up to the time Burton filed his federal *habeas petition* it had not been provided to Burton, but he alleged in his petition that it would show he was inside the restaurant at the time of the assault and he was misidentified by the eyewitnesses.

U.S. District Court Judge Michael A. Telesca denied Burton's petition, ruling that "Petitioner has failed to make a "substantial showing of a denial of a constitutional right." (*Burton v. Conway*, No. 09-CV-6065 (MAT), Dist. Court, WD New York, March 7, 2011) Judge Telesca's ruling was based on the lack of a U.S. Supreme Court ruling that a habeas petition can be based on a "freestanding innocence claim." Although Judge Telesca did not order the prosecution to produce the videotape so he could view it, he expressed skepticism of Burton's in-



The outside of Jim's Steakout on Elmwood in Buffalo, NY where the assault Larashai Burton was convicted of took place (Google Street View)

nocence claim because his conviction was based on eyewitness evidence. Judge Telesca also declined to issue a certificate of appealability to the federal court of appeals.

Judge Telesca [also wrote](#), "Following a review of the record, it appears that the alleged videotape was part of petitioner's file from the inception of the prosecution." Even though Burton's lawyer filed a discovery motion for the prosecution to produce

Brady (exculpatory) evidence, Judge Telesca blamed Burton's lawyer for failing "to inspect and/or copy" the videotape in the prosecution's possession.

Since Burton told the officer who arrested him that the restaurant's surveillance tape would prove he "was not outside at the time the victim was attacked," Judge Telesca ruled, "Given that petitioner knew of this supposed exculpatory evidence at the time of his arrest, it cannot be said to be "new reliable evidence." So to Judge Telesca the videotape isn't new evidence because the prosecution has successfully concealed its contents, even though Burton has asserted from the time of his arrest in 2004 that what is recorded on the videotape can prove his innocence.

Burton filed a *pro se* [petition for a](#) certificate of appealability with the federal Second Circuit Court of Appeals on April 1, 2011 that is pending.

Burton, 31, has pursued his post-conviction case *pro se*. It is possible a competent lawyer could have successfully framed a *Brady* argument based on the failure of the prosecution to produce the videotape, or an ineffective assistance of counsel ground based on the failure of his lawyer to pursue every avenue to obtain the videotape. If Judge Telesca's ruling isn't reversed by the appeals court, Burton will have to serve his 20-year sentence because of the prosecution's success in not providing the videotape that can establish he wasn't at the scene of the assault — and thus prove he is actually innocent.

Sources:

[Burton v. Conway](#), No. 09-CV-6065 (MAT), Dist. Court, WD New York, Denial of habeas corpus petition, March 7, 2011

[Burton v. Conway](#), No. 11-1260, 2nd Cir Ct of Appeals

Federal Judge Declares Habeas Corpus Is “Dead In This Country”

It is increasing rare in the United States that one hears a state or federal judge plainly tell the truth in a dissenting opinion about the injustice perpetrated by the majority of a court’s members against a person who by any rational understanding of right and justice deserves to have their conviction overturned or their sentence reduced. U.S. Circuit Court Judge James C. Hill’s dissent in the 11th U.S. Circuit Court of Appeals *en banc* ruling in the case of [Ezell Gilbert v. United States](#) (2011) qualifies as one of those occasions when a judge simply can no longer contain the sense of outrage fueled by the extreme mistreatment of a person that is carried out in the name of the law. Judge Hill wrote that the court’s majority ruling “confirms what I have long feared. The Great Writ [of *habeas corpus*] is dead in this country.” Two other judges also wrote strongly worded dissents that the Court’s ruling amounted to an unconstitutional suspension of *habeas corpus*.

In 1996 Ezell Gilbert pled guilty to several federal drug charges, one of which involved him carrying a concealed firearm. During his sentencing hearing in 1997 the judge ruled that carrying a concealed firearm was a “crime of violence” that made the “career offender enhancement” applicable to Gilbert. Gilbert’s lawyer objected to the judge applying the “career offender enhancement” that increased his sentence from a maximum of 13-1/2 years under the federal sentencing guidelines to 24-1/3 years in prison.

Gilbert’s appeal of his sentence was denied by the 11th Circuit and the U.S. Supreme Court declined to review his case. Gilbert then filed a *pro se* post-conviction §2255 petition that was denied in 2003.

In response to a U.S. Supreme Court ruling in 2008 that clarified what could be considered a “crime of violence” triggering the “career offender enhancement” to a sentence, the 11th Circuit also ruled in 2008 that carrying a concealed firearm was not a “crime of violence” for purposes of applying the “career offender enhancement.”

Gilbert then filed a petition seeking to reopen his original §2255 post-conviction petition. He argued that he was entitled to have his sentence vacated and to be resentenced because the U.S. Supreme Court and the 11th

Circuit agreed that the career offender enhancement didn’t apply to his case -- which is exactly what Gilbert’s lawyer argued during his sentencing hearing and in his appeal to the 11th Circuit that was denied in 1998. With good-time credits Gilbert would have to serve about 11-1/2 years on a 13-1/2 year sentence, so without the enhancement Gilbert’s sentence would be complete.

The district court ruled that Gilbert’s §2255 petition was a *de facto* successive petition and not a continuation of his original petition. Since §2255 of the Anti-Terrorism and Death Penalty Act of 1996 (AEDPA) bars a successive petition in circumstances such as Gilbert’s, the judge denied Gilbert’s petition without considering the merits of his claim that his sentence was illegal.

Gilbert appealed to the 11th Circuit. In reversing the district court’s ruling, a 3-judge panel decided that Gilbert could pursue his claim of being illegally sentenced in a *habeas corpus* petition filed under 42 U.S.C. §2241, instead of pursuing his claim in a post-conviction petition under §2255 of the AEDPA.

The U.S. Department of Justice then filed a motion for an *en banc* hearing of Gilbert’s case by all the 11th Circuit’s judges, which was granted. On May 19, 2011 the 11th Circuit Court decided by an 8 to 3 majority to affirm the district court judge’s denial of relief to Gilbert. In [Gilbert v. United States](#), No. 09-12513 (11th Cir., 5-19-2011) the Court did agree, as did the US Department of Justice, that the “career offender enhancement” that almost doubled Gilbert’s sentence would not be applied to his case if he were sentenced today. However, the Court ruled that §2255 bars Gilbert from filing a successive petition, and the doctrine of finality that encourages keeping a case closed bars creating an exception in Gilbert’s case that would allow him to instead file a *habeas corpus* petition. The Court’s ruling expressed concern that allowing an exception for Gilbert could result in an unknown number of prisoners to pursue resentencing because he or she was illegally sentenced as a “career offender” when the enhancement did not apply to their case.

All three judges who dissented wrote an opinion.

Circuit Judge Beverly B. Martin wrote that by denying Gilbert the opportunity to even have his claim of being illegally incarcerated heard the Court was raising the constitutional question of whether its interpretation of the AEDPA “constitutes a suspension of the writ [of *habeas corpus*] in violation of Arti-

cle I, § 9, cl. 2 of the United States Constitution.” (*Op. Cit.* 89) Judge Martin concluded her lengthy dissent with the following:

For the reasons set out above, I see no impediment imposed by statute or legal precedent which prevents this court from correcting the mistake we made in Mr. Gilbert’s case so long ago. To the contrary, I see it as our duty to do so.

Finally, I do not share the majority’s concern that giving Mr. Gilbert relief under these extraordinary circumstances will open the floodgates to other prisoners. Indeed if there are others who are wrongfully detained without a remedy, we should devote the time and incur the expense to hear their cases. What is the role of the courts, if not this? But what is important today is the consequence to Mr. Gilbert of our unwillingness to correct our past legal error.” (*Op. Cit.* 101)

Circuit Judge Rosemary Barkett wrote in her dissent that the Court’s ruling amounted to an “unconstitutional suspension of the writ of *habeas corpus*. In this case, there can be no dispute that Gilbert, through no fault of his own, has been denied a meaningful opportunity to challenge the legality of his detention.” (*Op. Cit.* 86-87)

The strongest criticism of the Court’s ruling was by Circuit Judge James Hill. Judge Hill functioned as a whistleblower in his dissent because it is one of those rare instances when an insider dares to openly describe the questionable conduct by the judicial bureaucracy he is a part of without the normal filter of trying to dignify what it has done by using neutral words that amount to trying to put lipstick on a pig. Judge Hill’s four-page dissent follows in its entirety:

Ezell Gilbert’s sentence was enhanced ... as the result of his being found by the district court – reluctantly and at the explicit urging of the government – to be a career offender. Ezell Gilbert is not now, nor has he ever been, a career offender. The Supreme Court says so.

Today, this court holds that we may not remedy such a sentencing error. This shocking result – urged by a department of the United States that calls itself, without a trace of irony, the Department of Justice – and accepted by a court that emasculates itself by adopting such a rule of judicial impotency – confirms what I have long feared. The Great Writ is dead in this country.

Gilbert raised his claim of sentencing er-

Habeas cont. on p. 18

Habeas cont. from p. 17

ror to every court he could, every chance he got. No court correctly resolved his claim until the Supreme Court made clear that Gilbert's claim was meritorious – he was never a career offender. Now, he has come back to us for relief from his illegal confinement. Our response to him is that he cannot apply for relief under § 2255 because he has done so before, and, although we erroneously rejected his claim, the statute does not permit such reapplication. Of course, had he not applied for § 2255 relief, we would be holding now that he had procedurally defaulted his claim by failing to raise it before.

This “Catch-22” approach to sentencing claims is nothing more than a judicial “gotcha.” Through our self-imposed limitations, we have found a way to deny virtually all sentencing claims. We do this, avowedly, in the pursuit of “finality.” But, in so doing, we cast a pall of unconstitutionality over the otherwise beneficial provisions of § 2255.

Furthermore, to “seal the deal” on finality, we hold today that even the savings clause of § 2255 – which appears to permit resort to the Great Writ itself in circumstances such as these – provides no avenue to relief for Gilbert because confinement pursuant to sentencing errors such as his does not offend the Constitution. Rather than acknowledging that Gilbert's sentence is fundamentally defective and a miscarriage of justice, we hold that the error resulting in an additional eight and one-half years of prison time for Gilbert is a mere technicality, a misapplication of the Guidelines that has no remedy because it is not all that important. Gilbert's erroneous enhancement as a career offender – demanded by the government at the time – is argued to be mere harmless error now that he has been proven right.

The government even has the temerity to argue that the Sentencing Guidelines enjoy some sort of legal immunity from claims of error because they are not statutes at all, but mere policy suggestions. And the majority appears not to understand that Gilbert's imprisonment – no matter how his sentence was calculated – is the act of the Sovereign, who is forbidden by our Constitution to deprive a citizen of his liberty in violation of the laws of the United States.²

I recognize that without finality there can be no justice. But it is equally true that, without justice, finality is nothing more than a bureaucratic achievement.

Case closed. Move on to the next. Finality with justice is achieved only when the imprisoned has had a meaningful opportunity for a reliable judicial determination of his claim. Gilbert has never had this opportunity.

A judicial system that values finality over justice is morally bankrupt. That is why Congress provided in § 2255 an avenue to relief in circumstances just such as these. For this court to hold that it is without the power to provide relief to a citizen that the Sovereign seeks to confine illegally for eight and one-half years is to adopt a posture of judicial impotency that is shocking in a country that has enshrined the Great Writ in its Constitution. Surely, the Great Writ cannot be so moribund, so shackled by the procedural requirements of rigid gatekeeping, that it does not afford review of Gilbert's claim.

Much is made of the “floodgates” that will open should the court exercise its authority to remedy the mistake made by us in Gilbert's sentence. The government hints that there are many others in Gilbert's position – sitting in prison serving sentences that were illegally imposed. We used to call such systems “gulags.” Now, apparently, we call them the United States.

One last thought. The majority spends an enormous amount of time arguing that Gilbert is not a nice man. Perhaps. But neither, I expect, was Clarence Gideon, the burglar, or Ernesto Miranda, the rapist. The Supreme Court managed to ignore this legal irrelevancy in upholding the constitutional principle under attack in those cases. Would that we could have also.

I respectfully dissent from the majority's holding. With the addition of these thoughts of my own, I join in both Judge Barkett's and Judge Martin's dissents. (*Op. Cit.* 102-105)

Judge Hill was also very critical [in a footnote](#) about the government's suggestion in its brief that although it was arguing Gilbert had no legal recourse to correct what it conceded was his illegal sentence and continued imprisonment, “an application for clemency by Gilbert might be favorably received by the government.” Judge Hill wrote that the government's position “mocks our constitutional guarantees by implying that they are gifts that may be bestowed or withheld at the whim of the Sovereign.” (Fn 2)

Although the 11th Circuit's majority opinion tried to undermine Judge Hill's claim that “The Great Writ is dead in this country” by

Federal Judge Reverses Jury Award Of \$18.6 Million To Alan Newton For 12 Years Imprisonment

Alan Newton was arrested in 1984 for the rape, robbery and assault of a 25-year-old woman in New York City's Bronx borough. The victim identified Newton from a photo lineup, and she later identified him from a live lineup.



Alan Newton after his release in July 2006.

Newton's alibi defense during his trial in 1985 was that on the evening of the crime he went to a movie in Brooklyn with his fiancé, her daughter, and other relatives, and he spent the night at his fiancé's home in Queens — which is about 10 miles from the Bronx. The victim identified Newton in court and the jury convicted him. Newton was sentenced to 13-1/2 to 40 years in prison.

In 1994 Newton sought DNA testing of the victim's rape kit that included the assailant's semen, but the judge denied it because the prosecution said the rape kit couldn't be located. Newton again sought DNA testing in 2005. The Property Clerk's Office initially reported, as it had for almost 12 years, that the rape kit couldn't be found, but it was eventually located in a warehouse. Testing of the semen in March 2006 determined that Newton's DNA did not match that of the assailant. Based on that new evidence his conviction was overturned and he was released from prison on July 6,

Newton cont. on p. 19

citing several cases in which *habeas corpus* was granted in the past 10 years (but none in the 11th Circuit), the opinion completely ignored that for Gilbert and other federal prisoners illegally sentenced and imprisoned as a “career offender” *it is dead* because the 11th Circuit will not allow it to be used to free them.

A week before the ruling in Gilbert's case was announced, the American Bar Association [honored Judge Hill](#), 87, with its Pursuit of Justice Award.

Sources:

[Gilbert v. United States](#), No. 09-12513 (11th Cir., 5-19-2011)
[Judge James C. Hill](#) is Recipient of ABA's Pursuit of Justice Award, American Bar Assoc Press Release, May 12, 2011

Newton cont. from p. 18

2006, after almost 22 years of incarceration from the time of his arrest.

Newton filed a federal civil rights lawsuit against the City of New York, the New York City Police Department and several officers, alleging among other claims that their conduct constituted reckless disregard for Newton's constitutional right to due process because the city's system for safeguarding DNA evidence and a defendant's access to it was inadequate. After a 3-1/2 week trial, on October 19, 2010 the jury awarded Newton a total of \$18,592,000 for 12 years of wrongful imprisonment from 1994 when he first sought the DNA testing of the rape kit that the NYPD claimed it couldn't locate, to 2006 when he was released.

The city filed a motion challenging the verdict. On May 12, 2011 U.S. District Court Judge Shira A. Scheindlin reversed the [jury's verdict](#), ruling that Newton had proved the city acted negligently, but not that any city employee had intentionally violated his constitutional rights by withholding evidence for DNA testing. In her 31-page ruling Judge Scheindlin wrote that Newton had not proved any city employees "withheld evidence in deliberate contravention or disregard of his right to due process. Newton's due process claim cannot be sustained absent proof that a city employee acted with the requisite constitutional culpability in withholding evidence." Judge Scheindlin wrote, "It is not enough for Newton to have shown that the city's post-trial evidence management system is disorganized. As disturbing as such negligence may be, in the end that is what it is: mere negligence."

Newton [told reporters](#) after the ruling, "I'm totally shocked. The city's saying I'm not entitled to anything, and no one has to answer for what happened to me anymore. ... This is the last thing I expected."

Newton's lawyer, John Schutty told reporters [he would appeal](#) the judge's ruling that he thinks is contrary to the evidence the jury relied on in making their award, because "The Police Department had the evidence in their possession during the 12 years he repeatedly requested it and they didn't produce it."

See *Justice Denied's* article about [the jury's](#) \$18.592 million award in October 2010.

Sources:

[\\$18.5 Million](#) Lawsuit Taken From Wrongfully Convicted Man, *The St Louis American*, May 17, 2011

[Ruling Blocks](#) \$18.5 Million to Man Freed in Rape Case, *The New York Times*, May 12, 2011

[Judge nixes](#) \$18.5 million award for Alan Newton, man jailed for 22 years for rape he didn't commit, *New York Daily News*, May 12, 2011

Dominique Strauss-Kahn's Rape Charges Dismissed Because There Is No Evidence A Crime Occurred

After Dominique Strauss-Kahn's had resigned as managing director of the International Monetary Fund and his character assassinated by the media that also all but tried and convicted him of raping a hotel maid in New York City in May 2011 — the truth emerged that the maid has so little credibility that the charges were dismissed on August 23, 2011.

Strauss-Kahn's photo was plastered on the front page of newspapers and websites all over the world when he was arrested on May 14, 2011 for allegedly raping Nafissatou Diallo, a maid at the Sofitel New York, [a luxury hotel](#) in Manhattan where he was staying. At the time Strauss-Kahn was the managing director of the International Monetary Fund and a leading candidate for the French presidency. *The Telegraph* of London reported that because [of the allegations](#) Strauss-Kahn "has been destroyed overnight." Four days after his arrest he resigned from the I.M.F.

Diallo's original account of the alleged assault was so strange that it raised red flags about its believability for people who retained an open mind: Why would a multi-millionaire and one of the most powerful men in the world staying in a \$3,000 a night hotel suite allegedly pursue a not very attractive hotel maid to force her to have sex with him when he could have a callgirl in New York City as easily and quickly as ordering a Domino's Pizza?

Strauss-Kahn, 62, was indicted on May 19, 2011 for two counts of first-degree criminal sexual act, first-degree attempted rape, first-degree sexual abuse, second-degree unlawful imprisonment, third-degree sexual abuse, and forcible touching. Later that day a judge ordered that he could be released on house arrest after posting a \$6 million bail — \$1 million in cash with an additional \$5 million in collateral.

Inconsistencies began to be reported in Diallo's account of the alleged assault, and on July 2 the judge lifted Strauss-Kahn's house arrest restriction.



Dominique Strauss-Kahn

Although Diallo had denied to prosecutors that she had a financial motive for accusing Strauss-Kahn of rape, on August 8 she [filed a civil lawsuit](#) in New York's State Supreme Court in the Bronx. The lawsuit sought unspecified damages for what it alleged was Strauss-Kahn's "senseless attack on Ms. Diallo has caused her to suffer both physical and psychological harm, as well as permanent harm to her professional and personal reputations, and severe mental anguish and emotional distress, from which she may never recover."

Then on August 22, 2011 Manhattan's District Attorney filed a "Recommendation For Dismissal" [of the charges](#) against Strauss-Kahn. The prosecution's request for dismissal extensively details that Diallo is a pathological liar with no credibility whatsoever. Among her lies is a detailed story she fabricated for her application for asylum in the United States about being gang raped in Guinea. When confronted by prosecutors with evidence that she hadn't been truthful Diallo admitted she lied to the grand jury that indicted Strauss-Kahn. Since there was no evidence Diallo had been raped other than her claim — and she told investigators three different and conflicting stories of what allegedly happened — the prosecution simply had no basis to proceed with its case. The "Recommendation For Dismissal" stated in part:

"For a host of reasons, including those set forth below, the complainant's untruthfulness makes it impossible to credit her. Because we cannot credit the complainant's testimony beyond a reasonable doubt, we cannot ask a jury to do so. The remaining evidence is insufficient to satisfy the elements of the charged crimes. We are therefore required, as both a legal and ethical matter, to move for dismissal of the indictment." (11)

After the charges were dismissed the next day he [issued a Statement](#) that said in part:

"These past two and a half months have been a nightmare for me and my family. I want to thank all the friends in France and in the United States who have believed in my innocence, and to the thousands of people who sent us their support personally and in writing. I am most deeply grateful to my wife and family who have gone through this ordeal with me."

Strauss-Kahn cont. on p. 20

Conspiracy Convictions Of 20 Environmental Activists Overturned Because Prosecution Concealed Exculpatory Recordings And Reports

The convictions of 20 people in December 2010 for conspiracy to commit aggravated trespass have been quashed by England's Court of Appeals after it was discovered after their trial that the prosecution failed to disclose recordings and notes made by an undercover policeman that

Strauss-Kahn cont. from p. 19

Strauss-Kahn's passport was returned on August 25, and he left the U.S. for France on September 1.

Since Diallo has admitted that she committed perjury about her non-existent gang rape on her application for asylum in the U.S., it is possible she will be deported back to Guinea.

An [excellent summary](#) of Strauss-Kahn's case is on the False Rape Society website.

If it wasn't for Strauss-Kahn's financial resources and social position it is questionable if the prosecutors would have delved into Diallo's past and vetted her story as thoroughly as they did — after initially rushing to the judgment that he was guilty and having him arrested and indicted on what turned out to be perjurious testimony by Diallo. If Strauss-Kahn had been a regular Joe who had to depend for his defense on an overworked public defender, he very well could have wound up convicted and sentenced to spend decades in prison — where he very possibly could have died given his age.

In May 2012 Strauss-Kahn filed a \$1 million lawsuit against Diallo claiming her baseless accusations cost him his job as managing director of the International Monetary Fund and "other professional opportunities."

Sources:

[Strauss-Kahn](#) Indicted, Granted Bail, *Fox 5 News*, New York, New York

[Hotel Housekeeper](#) Sues Strauss-Kahn, *The New York Times*, August 8, 2011

[Manhattan](#) DA's Motion To Dismiss, Filed on August 26, 2011

[Women's advocates](#) do disservice to rape victims by telling them that justice was not served in the DSK case, [FalseRapeSociety.blogspot.com](#), August 26, 2011

[Strauss-Kahn](#) Sues Housekeeper, Saying She Hurt His Career, *The New York Times*, May 15, 2012

proved their defense.

The UK's third-largest coal-fired power plant is in Nottinghamshire about 130 miles north of London.

In April 2009 hundreds of climate change activists were planning to peacefully occupy the power station so they could shut it down for a week to stop 150,000 tons of CO2 from entering the atmosphere. Days before the planned occupation the protester's headquarters were raided by the police and 114 protestors were arrested.

Twenty of the activists charged with conspiracy to commit aggravated trespass went on trial in December 2010. The facts underlying the case were not in dispute: the 20 defendants admitted planning to occupy the power plant to try and shut it down. What was in dispute was their intent. The prosecution contended the planned occupation was illegal because it was intended as a publicity stunt to draw attention to climate change, while the activist's defense was that under the "law of necessity" their planned action was legal because they believed it was necessary to protect the public's health from the power plant's dangerous emissions.

The jury convicted all 20 defendants, and three weeks later the judge issued sentences of up to 18 months in prison that were suspended pending good behavior.

One of the most vocal activists was Mark Stone whose nickname was "Flash" because he always had money. He drove the car on the initial reconnaissance of the power plant and he rented a 7½-ton truck to be used on the day of the occupation. He was arrested with the other protesters but when the charges against him were dropped some of his colleagues became suspicious. In October 2010 they discovered a passport bearing his real name Mark Kennedy. They eventually unearthed documentary proof he had been a policeman since around 1994, which Kennedy admitted when he was confronted with the evidence.

Days after the trial in December 2010 London's *Sunday Times* [reported that Kennedy](#) began working in 2004 as an undercover police officer infiltrating social activist groups. He was paid about \$80,000



Ratcliffe-on-Soar Power Station in Nottinghamshire, England (Lady Wulfrun)

(£50,000) a year and he traveled with a false passport to 22 countries in his role as an activist to gather intelligence information on environmental groups. The revelations about Kennedy triggered a public firestorm in England about the police monitoring of environmen-

talists.

Six other activists were scheduled to go on trial January 10, 2011, and Kennedy announced he would testify as a defense witness. Three days before the trial was to begin the prosecution provided the defendant's lawyers with transcripts of recordings that Kennedy had made of meetings during which planning of the power plant occupation was discussed. They were also provided Kennedy's written reports that confirmed the information in the recordings. The prosecution also informed the lawyers that they weren't going to offer any evidence against the six defendants. The trial was delayed and the charges were subsequently dismissed.

The key evidence in the recordings and Kennedy's reports was that the protesters were motivated to act because they believed the power plant's emissions posed a serious and immediate threat to the public's health. The protests leaders also stressed the importance of not causing harm to any person or damaging property. That new evidence not only supported the "necessity" defense of the 20 defendants convicted in December, but it was contrary to the prosecution's claim during their trial that they were only seeking publicity.

In their appeal the 20 defendants relied on the new exculpatory evidence the prosecution had failed to disclose prior to their trial, even though it was obligated to do so.

On July 20, 2011 England's Court of Appeals quashed all 20 convictions. [The Court described](#) Kennedy's role "as an enthusiastic supporter" in the planned power plant protest as "arguably, an agent provocateur," because he had "a significant role in assisting, advising and supporting...the very activity for which these appellants were prosecuted." (§13) The ruling in [Barkshire and Others vs The Queen](#) (Court of Appeal (Criminal Division), July 20, 2011) states in part:

One of the contentions advanced by the Crown at trial was that the protesters main objective was "publicity" for their



Mark Kennedy, aka Mike Stone, undercover cop who infiltrated environmental groups for 7 years

Environmental cont. on p. 21

Environmental cont. from p. 20

cause, rather than a genuine, if mistaken, attempt to address any imminent problem arising from carbon emissions. However the transcripts of the recordings made by Kennedy show that during the course of briefings on 12th April one of the appellants, Spencer Cook, and indeed another person who was never prosecuted, show they placed great emphasis on the objective of the intended actions. This was to bring about an enormous reduction in carbon emissions by keeping the power station closed for seven days. In other words, this material tended to show that this was not a mere publicity stunt. It is also clear that during the course of the briefings those who were present were advised that they did not need to get involved if they did not wish to do so. The importance of safety and non violence and the avoidance of criminal damage to property were underlined. (¶15)

...
In summary these convictions were quashed because of the failure of the Crown to make proper disclosure of material relating to the role and activities of the undercover police officer, Mark Kennedy as well as of materials which had the potential to provide support for the defence case or to undermine the case for the prosecution. These materials were pertinent to a potential submission of abuse of process by way of entrapment and in any event they had the capacity to support the defence of necessity and justification. The trial was rendered unfair and the convictions are unsafe. Accordingly they were quashed. (¶32)

Five official investigations were launched in the wake of the public revelations about Kennedy's infiltration of environmental groups for seven years and his active role in planning and preparing for the power plant protest.

Kennedy has reportedly resigned from the Metropolitan Police.

Sources:

[David Robert Barkshire and Others vs The Queen](#) (Court of Appeal (Criminal Division), 7-20-2011)

[Ratcliffe power](#) station protesters cleared on appeal, BBC News, July 19, 2011

[Cleared power](#) station activists tell of fury over 'rigged trial', *London Evening Standard*, July 25, 2011

[Undercover officer](#) spied on green activists, *Guardian* (London), January 9, 2011

[7-year snitch](#): 'Flash' the activist is a secret cop, *The Sunday Times*, December 19, 2010

In Memoriam: Robert B. Waterhouse — 1946-2012

By Robert Waterhouse

Ten years ago [I wrote in *Justice Denied*](#) about my namesake, Robert B. Waterhouse, who had been on the Florida Department of Corrections' Death Row since September 1980. On February 15 2012 he was executed, maintaining to the last that he did not murder Deborah Kammerer, despite being denied the right to have DNA evidence tested which might have proved his innocence (law enforcement authorities claimed the evidence had inadvertently destroyed).

But I'm not writing about innocence or guilt here. I spelt out the "facts" of the case in my previous article (you can read it at, www.justicedenied.org/robertwaterhouse.htm). It's a sad but all-too-common litany of injustice on the part of the courts and the system, simply added to by the flurry of appeals as his execution date approached. In fact, his execution was delayed two hours while waiting for the final appeal to be inevitably denied. What was he thinking at that point?

This obituary of my friend will be short.

I met and corresponded with a man who, via his wife Frances (she married him when he was on Death Row), via the small monochrome TV in his cell, and via writing to people like me, somehow kept in touch with the outside world. He had strong likes and dislikes about politics, society, people and sport. We argued the toss on many occasions.

Over the time I knew him he became more and more cynical. I was told he mistrusted his attorney and that he bickered with Frances, who offered him nothing less than unquestioning love. She worked all hours to support him, visiting every weekend.

I found it increasingly hard to write to him – to say anything that made sense. I have no idea what he thought of the letters or cards I sent each day during his final three weeks: he never replied.

Whatever this man may or may not have done, he was destroyed by the system long before that lethal injection. He was tortured in the name of justice, like every other Death Row inmate. Perhaps the worst torture, over 31 years of hell, is the hope that there might somehow be a reprieve.

I feel I let my friend down. In the final count,



Robert B. Waterhouse,
December 16, 1946 -
February 15, 2012.
(Florida DOC)

I was unable to help him. He went to his end, a sick man physically, jeered at by the pro-Death lobby which had suddenly rediscovered his case. He needed a doctor, not an executioner. I miss him.

(JD Note: "The Robert Waterhouse Story," by Robert Waterhouse, was in *Justice Denied*, Issue

21. [Click here](#) to read the article.)

"Kirstin Blaise Lobato's Unreasonable Conviction" Updated Second Edition

The revised and updated second edition of *Kirstin Blaise Lobato's Unreasonable Conviction* by *Justice Denied's* editor and publisher Hans Sherrer is now available. The second edition includes more than 70 pages of new information, including the filing of Ms. Lobato's Nevada state *habeas corpus* petition, which is pending.

Kirstin Blaise Lobato was 18-years-old when charged with the first-degree murder of Duran Bailey in Las Vegas in July 2001. She was convicted in October 2006 of voluntary manslaughter and other charges. Her case is an example of the perfect wrongful conviction:

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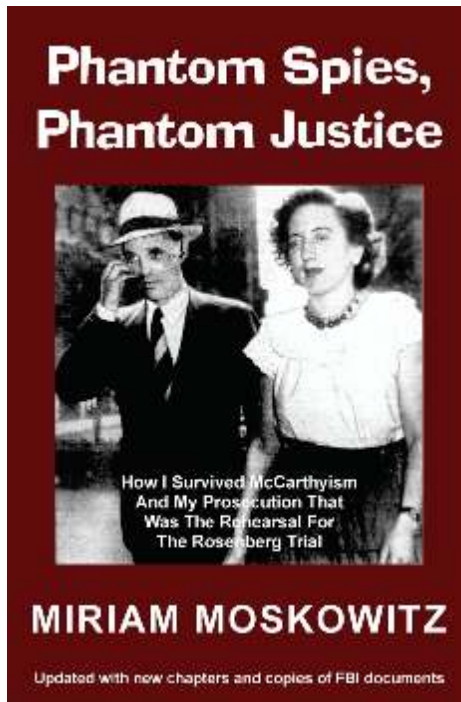
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Phantom Spies, Phantom Justice Now Available!

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

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

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



edly discussed providing false testimony to a grand jury investigating possible Soviet espionage. She did not testify before that grand jury.

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

in front of Ms. Moskowitz because of her possible negative reaction if he said something incriminating in her presence, and he didn't like her.

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

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

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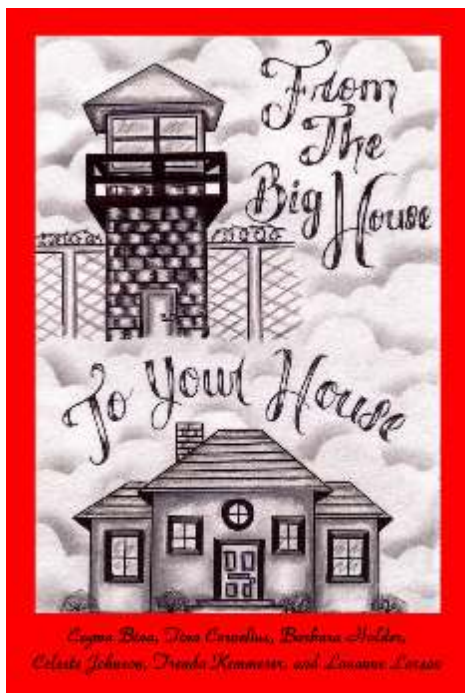
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The Magazine for the Wrongly Convicted

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

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

U.S. Supreme Court Reinstates Lorenzo Johnson's Convictions

Lorenzo Johnson was released in January 2012 after 16 years of imprisonment when a federal appeals court overturned his convictions related to a 1995 murder. In May 2012 the U.S. Supreme Court reinstated his convictions and he was taken into custody in June 2012 to resume serving his life sentence.

See p. 3.

Justice Denied
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