JUSTICE DENIED

The Magazine for the Wrongly Convicted

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Mark Jones, Kenneth Gardiner and Dominic Lucci

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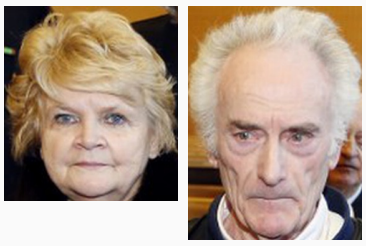

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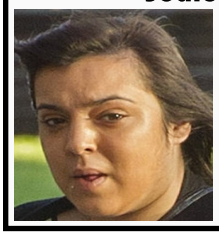

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Greed by Pablo Picasso's son led to the wrongful conviction of a husband and wife in France for possessing "stolen" artworks created by Picasso. On appeal their convictions were overturned because the prosecution lacked evidence disproving their claim Picasso gave them the artwork as a thank you for work they had done on Picasso's house. See p. 5.

One of the worst kept secrets in the legal system is widespread judicial corruption of all kinds: power corrupts and absolute power corrupts absolutely. One of the rare occasions when a judge was convicted of corrupt behavior was Cook County Circuit Court Judge Jessica Arong O'Brien's conviction of mortgage fraud. See p. 6.

The prevalence of wrongful convictions resulting from a legal system's reliance on outdated concepts is generally overlooked. However, the Philippines Supreme Court has acquitted two men of rape because their convictions were based on the many decades old precedent that a "woman's honor" prevents her from lying about being raped. See p. 7.

Electronic evidence is playing an increasingly important role in exonerating a wrongly convicted person. Jodie Rana's her arson conviction was overturned in England based on new mobile phone evidence she wasn't at the crime scene. See p. 9.

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Three Ex-Soldiers Exonerated After 26 Years Incarceration For Murder Frame-up By Savannah, Georgia Police And Prosecutors

Murder and firearm charges **were dismissed** against Mark Jones, Kenneth Gardiner and Dominic Lucci on July 12, 2018.[1] The three were in the Army when convicted in November 1992 of the shooting death of a man in Savannah, Georgia. Almost 20 years later the men discovered the police and prosecutors had intimidated the lone eyewitness to lie during their trial, and the prosecution failed to disclose an exculpatory report to their lawyers. After a years long legal battle, their convictions were overturned in November 2017 and they were released after almost 26 years of incarceration.

In January 1992 Jones, Gardiner, and Lucci were Army buddies stationed at Fort Stewart, almost 50 miles southwest of Savannah. Jones was 20, Gardiner was 21, and Lucci was 22.

On January 31, 1992 Jones and his fiancee had their wedding rehearsal dinner in Hinesville, near Fort Stewart. Their wedding was planned for the next day. When the dinner ended Jones, Gardiner and Lucci decided to have an impromptu bachelor party in Savannah. They left the dinner in Gardiner's car between 9:15 and 9:30 p.m.

About 10 p.m. that night Stanley Jackson was shot to death while standing on a Savannah street corner. An eyewitness, James White, told police a vehicle drove by with two men leaning out of windows who shot him with automatic or semi-automatic rifles, while a third man drove.

When Jones, Gardiner and Lucci arrived in Savannah they came upon the crime scene. Jones got out of the car and asked an officer for directions to Club Asia. Unable to find it, they stopped at a supermarket where they approached a uniformed off-duty police officer working security at a supermarket and asked directions to Club Asia. Still unable to find it, they stopped outside a police station and asked a third police officer for directions to Club Asia. As they were leaving, White was being escorted into the station. He told an officer he thought their car looked like the one the shooters in.

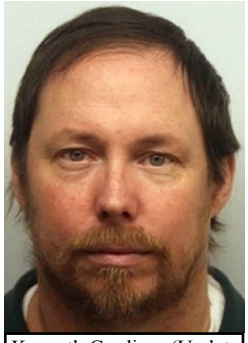
Mark Jones (Undated photo) (Chatham County Sheriff's Office)

White was taken to the Club Asia parking lot where he told officer's the black Chevrolet Cavalier that Jones, Gardiner and Lucci arrived in looked like the shooter's car.[2] The three men were arrested in the club.

Jones wasn't married the next day. Instead, he and his two buddies spent the next 25 years, 10 months, and 22 days in custody.

No rifles, bullets, or shell casings were found in their car, and no gunshot residue was found. The murder weapons were never found.

White didn't immediately identify any of the three as the two shooters. He eventually identified Jones and Gardiner as the shooters when he testified at their preliminary hearing. He didn't identify Lucci because he said he didn't get a good look at the third man who was driving.

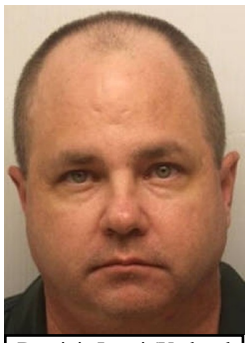


Kenneth Gardiner (Undated photo) (Chatham County Sheriff's Office)

All three men were charged with malice murder and possession of a firearm in the commission of a felony.

Their trial in November 1992 had racial overtones because Jackson was black while the three defendants were white.

The prosecution's case against Jones and Gardiner was based on the direct evidence of White's identification they were the shooters. The case against Lucci was based on the circumstantial evidence he was with them that night, therefore he had to be the driver.



Dominic Lucci (Undated photo) (Chatham County Sheriff's Office)

The three men presented the alibi defense that they couldn't have committed the crime because they were at Jones' wedding rehearsal dinner in Hinesville until between 9:15 and 9:30 p.m., when they left to drive to Savannah -- about 50 miles away -- for an impromptu bachelor party. (Bing Maps indicates it takes an hour to drive from Hinesville to Savannah with light traffic.)Consequently, they were on the road when Jackson was killed about 10 p.m. After they arrived in Savannah they came upon the crime scene and they asked a policeman for directions. Alibi witnesses testified regarding the time they left the pre-wedding event.

The trial judge denied the men's motion for a directed verdict of acquittal based on insufficiency of the prosecution's evidence.

It didn't trouble the jury that the three men *initiated three separate contacts* with Savannah police officers while trying to find Club Asia *after* Jackson had been shot, and neither gunshot residue nor the murder weapons were in their car. After the jury convicted all three of both charges, they were sentenced to life in prison for malice murder, plus 5 years for committing a felony while in possession of a firearm.

Their convictions and sentence were affirmed by the Georgia Supreme Court on June 13, 1994. The Court ruled the evidence was sufficient to support the convictions of Jones and Gardiner that were primarily based on the direct evidence of White's identification testimony, and the conviction of Lucci that was based on the circumstantial evidence he had been with his friends that night.

In 2009 Centurion Ministries, based in Princeton, New Jersey, began an investigation of the three men's case.

In 2010 Centurion interviewed White and he told them he didn't testify truthfully during the preliminary hearing or the trial. **He said he** only told the police at the Asia Club that the men's car "looked like" the shooter's car, not that it was, and he also told them that "he did not recognize the three suspects and could not identify any of them as the shooters." He also said he asked the police "to provide him a line-up for identification purposes, but they would not." He also described that "he was pressured by investigators, prosecutors, and members of the community — including clergymen — to identify the defendants as the shooters; he received anonymous telephone calls to his house that included threats to his family if he did not identify the defendants as the shooters." White caved under the pressure. After the preliminary

Soldiers cont. on p. 4

Soldiers cont. from p. 3

hearing where he identified Jones and Gardiner as the shooters, he told the police "he could not truly identify them, he was threatened with being prosecuted for perjury if he did not testify at trial as he had at the preliminary hearing, and he was told that there would "be rioting in the city" if the defendants were not convicted." White caved again, and ID the two men during their trial. White also told Centurion he had only told his wife that he testified falsely.

Centurion also discovered the prosecution had failed to disclose an exculpatory police report that **a witness told** a police officer several hours after Jackson was shot that white men with military style haircuts and semi-automatic weapons had driven through the Yamacraw Village public housing project threatening "to shoot blacks who hang out on street corners." (Yamacraw Village is about 1-1/2 miles from where Jackson was shot.) The non-disclosed report -- identified as the Yamacraw Report -- indirectly supported their alibi defense that they weren't in Savannah at the time of the crime by identifying other viable suspects who weren't investigated. The report also exposed the inadequacy of the police investigation because gunshot residue and the murder weapons might have been found linking the men who terrorized Yamacraw Village to Jackon's shooting.

The three men each filed a post-conviction habeas corpus petition for a new trial based on the new evidence that White was coerced into giving false trial testimony, and the prosecution's failure to disclose the Yamacraw Report as constitutionally required by *Brady v. Maryland* (1963).

The three petitions were consolidated because they were all based on the same evidence and claims. After an evidentiary hearing the judge denied the petition on the basis the men's *Brady* claims were procedurally defaulted.

They appealed. In 2014 the Georgia Supreme Court determined their *Brady* claims were not defaulted, and remanded the case for the habeas court to analyze the merit of their claims.

The judge denied the petition after determining the Yamacraw Report would not have been admissible at trial, and thus didn't qualify as *Brady* material required to be disclosed by the prosecution. He also determined White's recantation of his trial testimony as coerced was not credible be-

Jim McCloskey (Undated photo) (Centurion Ministries)

cause it was contrary to evidence presented at trial about White's "level of certainty" regarding his identification of Jones and Gardiner.

The men appealed.

On November 2, 2017 the Georgia Supreme Court unanimously reversed the denial of their habeas petition and ordered a new trial on the basis the judge erred because admissibility of the Yamacraw Report was irrelevant to evaluating whether the defendant's right to due process was violated by the prosecution's failure to disclose it. The Court ruled that considering the totality of the evidence, the prosecution's failure to disclose the Yamacraw Report undermined confidence in the jury's verdict because it could have affected the jury's verdict.

The Court acknowledged that although White's recanted preliminary hearing and trial testimony **was not a** "Brady violation, and thus are not grounds for habeas relief, we must consider the importance of identity testimony on the course of the trial. The State's case was heavily dependent on White's testimony and his eyewitness identification of the defendants." (855)

The Court described the defendant's alibi defense and the absence of evidence (other than White's recanted testimony) linking them to the crime:

"Jackson was killed shortly after 10:00 p.m. on January 31, 1992. There was trial testimony from several witnesses that, until 9:15 or 9:30 p.m., the petitioners were at the rehearsal of Jones's wedding, which was to take place the next day, and a dinner afterward, which took place in a town that was over a 50-minute drive away from the relevant areas of Savannah. No murder weapon was ever recovered; no firearm was found in the defendants' car, no casings from an automatic weapon were found there, and the forensic scientist who vacuumed the interior of the car looking for gunshot residue found none. (855)

Thus, in light of the totality of the circumstances, confidence in the outcome of the trial was undermined by the State's failure to provide the Yamacraw Report to the defense. ... Certainly, in the face of the Yamacraw Report, the jury "could have voted to convict [the defendants], [but] we have 'no confidence that it would have done so.'" Accordingly, the habeas court's denial of the petitions for writs of habeas corpus must be reversed." (855)

Jones, Gardiner, and Lucci were released on $30,000 bond each on December 20, 2017. They had spend almost 26 years in custody since their arrests on January 31, 1992.

The men awaited the decision of Chatham County District Attorney Meg Heap whether to retry them or dismiss the charges.

On July 12, 2018 a motion by DA Heap to dismiss the charges was granted. Heap didn't acknowledge the men's innocence, instead **stating to the media**: "Based on the age of the case, witnesses no longer being available and other issues, it just could not be retried."

Centurion Ministries founder Jim McCloskey **told reporters**: "I will say this until the day I die — there's no doubt in my mind that these three men had absolutely nothing to do with this crime."

As a result of their frame-up the three men will be able to file a federal civil rights lawsuit against the City of Savannah, the Savannah Police Department, and the police officers involved in their case for pressuring White during their preliminary hearing and their trial to falsely implicate them in the crime. They may also be able to sue Chatham County for the role the prosecutors office played in pressuring White to lie. They may also have claims related to the Yamacraw Report that was known about by the Savannah PD.

The Georgia Supreme Court's ruling in *Jones v. Medlin*, 807 SE 2d 849 (Ga. Supreme Court, 11-2-2017) can be read at, **www.tinyurl.com/y5pu6ssn**.

Endnotes:

[1] The men's full names are: Mark Jason Jones, Kenneth Eric Gardiner, and Dominic Brian Lucci.

[2] The police didn't investigate that a soldier friend of Lucci's owned a black Chevrolet Cavalier, as did Gardiner.

Sources:

'**Completely Free**': No Retrial of Ex-Soldiers in 1992 Killing, By Jeff Martin and Russ Bynum (AP), USNews.com, July 12, 2018

Jones v. Medlin, 807 SE 2d 849 (Ga. Supreme Court, 11-2-2017) (Reversing denial of writ of habeas corpus, vacating convictions and ordering new trials for Jones, Gardiner, and Lucci.)

Gardiner v. State, 264 Ga. 329 (Ga. Supreme Court 1994) (Affirming conviction and sentence of Gardiner, Lucci, and Jones.)

Ex-soldiers get bail in Georgia murder case after 25 years in prison, *Times Free Press* (Chattanooga, TN), December 20, 2017

Pierre Le Guennec And Wife Danielle Have Convictions Overturned For Possessing Artwork Given To Them By Pablo Picasso's Widow In 1973

Pierre Le Guennec and his wife Danielle Le Guennec **had their 2015 convictions** for possession of stolen goods annulled by France's highest appeals court on February 28, 2018. The Le Guennec's convictions were based on the discovery in 2010 that for almost 40 years they stored in their garage 271 artworks created by Pablo Picasso. When Picasso died in 1973 he was the most famous artist in the world.

In 1971 Pierre was a 32 year old electrician living in Mougins, France with his wife Danielle. Mougins is on the Mediterranean Sea about 425 miles southeast of Paris.

Picasso and his wife Jacqueline had a villa in Mougins. They hired Pierre to fix their stove. Pleased with his work, they hired him to do other jobs, including installing a burglar alarm. Pablo and Jacqueline became friends with Pierre and Danielle.

Picasso was 92 when he died in 1973. Jacqueline gave Pierre a dozen or so bags full of artwork by Picasso for safekeeping. Pierre stored the bags in his garage. Sometime later Jacqueline retrieved the bags but, as Pierre tells it, she gave him a box of artwork as a thank you for his help. Pierre put the box on a shelf in his garage where it remained for almost 40 years. Pierre says he put it out of his mind.

Jacqueline died in 1983.

Pierre came across the box in 2009. He and Danielle opened it and found it had two sketchbooks and many sheets of loose-leaf paper with drawings. None of the artwork

Pablo Picasso in his studio in Vallauris, France, Oct. 23, 1953 (AP)

Danielle Le Guennec and Pierre Le Guennec in courtroom (AFP)

was signed.

In 2010 Pierre was ill and facing surgery. Thinking he should get his affairs in order he wanted to know if the artwork in the box was created by Picasso, and what it might be worth.

The Picasso Administration in Paris is the only place in the world that can certify a work as a genuine Picasso. Pierre wrote a letter to the Administration describing the artwork he had, and included some photos. Claude Picasso, who runs the Administration, responded by inviting the Le Guennecs to come to Paris with some of the artwork.

Pierre and Danielle went to Paris and met with Claude. He recognized that all the artwork they showed him was authentic, but he didn't tell that to them. What he did was call the police, who opened an investigation. Three weeks later the police searched the Le Guennec's house and garage. The box of artwork was seized and the couple was arrested. They were released two days later. The 271 pieces of artwork in the box included drawings, sketches, lithographs and very rare cubist collages. The artwork was transported to the Bank of France in Paris, which is considered the most secure place in the country.

The Le Guennec's were charged with possession of stolen goods. They weren't charged with theft because there was no evidence they had stolen the artwork. Their prosecution was pressed by Claude Picasso who was very public in dismissing their claim they had stored the artwork in their garage for almost 40 years, and that his step-mother had given it to them. Claude claimed -- without offering any proof -- that Pierre was a swindler associated with an international stolen art laundering operation.

The prosecution's case during the Le Guennec's trial in 2015 was based on the testimony of a number of witnesses who knew Picasso and Jacqueline. The witnesses all claimed neither of them was generous enough to have given anyone the gift of a box of his artwork.

Danielle **testified in her** defense that she had a close friendship with Jacqueline Picasso, who "considered the Le Guennec home a refuge from the pressures of being the wife and widow of the 20th century's best-known artist."

After being found guilty, Pierre and Danielle were each given two year suspended prison sentences.

Their convictions and sentences were affirmed in 2016 but the Cour de Cassation, which also ordered that the artwork be given to Picasso's heirs.

The Le Guennec's appealed.

CBS' *Sixty Minutes* did a program about the case that was broadcast on July 30, 2017. Pierre was interviewed in his home, and he was **asked the question**: "If you had known then what you know now, would you have taken the artwork to Claude?" Pierre responded: "If this had to be done all over again, well Monsieur, the box would've ended up in the chimney in the room right behind you there."

On February 28, 2018 France's Court of Cassation overturned the Le Guennec's convictions, **ruling the** prosecution introduced insufficient evidence that "the goods held by the suspects had been stolen." The Court stated a conviction for "handling stolen goods only stands if the theft itself can be demonstrated."

The Court ordered a retrial. However, for the case to proceed against the Le Guennec's, someone else will have to be charged with stealing the artwork, and the prosecution will have to argue the couple were knowing accomplices for storing it for the thief (or thieves) *for 37 years*. In the almost eight years since their arrest, the authorities have not suggested the Le Guennec's were involved with anyone.

Picasso's 271 artworks seized from the Le Guennec's garage were created betwen 1900 and 1932. The artwork has not been assessed, but it is estimated to be worth $85 million to $125 million.

If the retrial ends favorably for the Le Guennec's then a court will need to deter-

Picasso cont. on p. 6

Judge Jessica Arong O'Brien Convicted Of Mortgage Fraud Scheme In Chicago

Cook County Circuit Court Judge Jessica Arong O'Brien **was convicted** on February 15, 2018 of bank and mail fraud in U.S. District Court in Chicago. O'Brien's federal prosecution was based on her scheme to defraud several mortgage lenders of $1.4 million from which she pocketed $325,000. O'Brien will lose her $198,075 per year position as a judge due to an Illinois law that mandates the removal of an elected official following a felony conviction. When sentenced on July 6 the 50-year-old O'Brien faces a likely sentence of four to seven years in prison.

Jessica O'Brien graduated from law school in 1998 when she was 31. In 2002 she obtained her doctorate as a Master of Laws in Taxation. In 2000 she went to work as a Special Assistant Attorney General with the Illinois Department of Revenue, and in 2011 her duties were expanded to include being the Acting Chief Counsel of the Illinois Lottery. While working as an attorney for the State of Illinois, in 2001 she started a real-estate company in Chicago: O'Brien Realty LLC.[1]

In November 2012 O'Brien was elected as judge in the Circuit Court of Cook County, and she took office in January 2013. In December 2012 she resigned her positions with the State of Illinois, and in January 2013 she closed her real estate company.

O'Brien was indicted on April 12, 2017 by a federal grand jury for one count each of mail and bank fraud. Maria Bartko was indicted for one count of mail fraud as O'Brien's codefendant. The indictment alleged that between 2004 and 2007 O'Brien made false representations and concealed

Cook County Circuit Court Judge Jessica Arong O'Brien in her judges chambers (ABS-CBN News)

facts in loan documents to obtain about $1.4 million in four mortgage and commercial loans. She was provided the money to buy two houses on Chicago's South Side: one on West 46th Street, and the other on West 54th Street, for which she also obtained a refinancing loan. The indictment alleged she then fraudulently obtained a commercial line of credit to maintain the properties before Bartko fraudulently obtained mortgages to purchase the properties as a "straw buyer" for which she was paid money from the loans.

What was surprising about the indictment is O'Brien and Bartko weren't charged with conspiracy — a much more serious charge than fraud — even though underlying the fraud charges was the two women conspired with each other to engage in fraud.

At her arraignment O'Brien pled not guilty and was released on a $100,000 bond. Bartko also pled not guilty and was released on bond.

After O'Brien's indictment she was reassigned to Circuit Court administrative duties. She didn't file as a candidate for her retention election in 2018.

Bartko, 50, pled guilty **on January 26, 2018** to one count of mail fraud affecting a financial institution. During Bartko's plea hearing she told District Court Judge Thomas Durkin: "I know what I did was wrong.… I know what I submitted was false information."

O'Brien's trial began on February 5, 2018. The prosecution presented a number of witnesses to establish O'Brien submitted fraudulent financial documents and that she transmitted fraudulent documents through the mail. O'Brien's dishonest actions included overstating her income on numerous loan documents, and failing to disclose liabilities, including the substantial mortgage on her primary residence. The prosecution presented evidence that she made $325,000 as a result of her fraudulent conduct. Evidence was also presented that Bartko acted as a "straw buyer" for two pieces of property owned by O'Brien, and that O'Brien tried to conceal two payoff payments she made to Bartko totaling $73,000. Although Bartko had been subpoenaed and was expected to testify, the prosecutors evidently thought they proved their case without her because she wasn't called as a witness.

The prosecution also presented evidence that O'Brien caused losses to the lenders she defrauded because Bartko defaulted on payments and the properties she "bought" from O'Brien wound up in foreclosure.

O'Brien presented a "dumb dumb" defense: she made mistakes, but she didn't knowingly commit fraud in her numerous loan applications that wouldn't have been granted but for the inaccurate financial information she provided, and she didn't intend to conceal the large payments to Bartko. Her lawyer **argued that she** acted in "good faith" and what she did was "no different than anyone else" who applied for a mortgage or commercial loan.

O'Brien's advanced legal degree in tax law, founding a real estate company, and working for 12 years as a lawyer with the Illinois Department of Revenue undermined the argument that mistakes and carelessness on her part accounted for all her actions over a three year period of time related to the two properties that resulted in her pocketing $325,000 in profits, Bartko pocketing $73,000, and the banks losing money.

After a six day trial the federal court jury unanimously convicted O'Brien of both fraud counts on February 15, 2018.

O'Brien is scheduled to be sentenced on July 6. A person convicted of her offenses is generally sentenced to four to seven years in prison. A possible enhancement factor is it is unusual for a person convicted of bank and mail fraud to be a judge elected to a position of public trust.

O'Brien is married to Brendan Alan O'Brien, who in November 2016 was elected as a Cook County Circuit Court judge. She has three children.

Endnote 1. According to the records of the Illinois Secretary of State, Jessica Arong O'Brien was the agent and manager for JVA Properties, LLC that filed its papers on Oct., 15, 2001, and she changed its name to O'Brien Realty LLC on April 29, 2004. It was voluntarily dissolved on January 29, 2013. A potential legal issue unrelated to O'Brien's federal prosecution is if she complied with any disclosure requirements that she was operating a private real estate business while employed as a state employee.

Sources:

Cook County judge convicted of mortgage fraud,

Arong cont. on p. 7

Picasso cont. from p. 5

mine if the artwork is to be returned to them since the legal presumption would be it was given to them as a gift, or if the artwork would be turned over to Picasso's heirs.

Sources:

Picasso's French electrician has conviction for stealing artist's collection quashed, www.thelocal.fr, March 2, 2018

A Picasso mystery examined by 60 Minutes, www.cbsnews.com, July 30, 2017

French court annuls conviction for electrician in possession of stolen Picasso works, *The Art Newspaper*, March 5, 2018

Juvy Amarela And Junard Racho Acquitted Because 'Woman's Honor' Is Outdated Concept A Woman Won't Lie About Rape

The 58-year-old precedent **that a reputable** 'woman's honor' prevents her from lying about being raped was overturned by the Philippines Supreme Court on January 18, 2018. The Supreme Court acquitted Juvy Amarela and Junard Racho who were convicted in 2012 of raping a woman in Davao City in separate incidents that allegedly occurred hours apart in 2009. They were both sentenced to life in prison. The Supreme Court ordered their immediate release from prison.

On the late afternoon of February 10, 2009 a young woman, publicly identified only as AAA, and her aunt were watching a beauty contest being held at a basketball court in Davao City, Philippines.[2] AAA said that she needed to use the bathroom, so she left to go to a nearby building that had the bathrooms. Her description of what happened after that until she arrived home around eight hours later differs radically from what Amarela and Racho describe.

AAA claims that while going through a treed area that separated the basketball court from the bathrooms, she was seized by Amarela.[3] She said he pulled her under the stage and after punching her in the stomach he undressed her and got on top of her and inserted his penis inside her vagina. When she shouted for help Amarela fled and three men came to her rescue. However, when they took her to a hut she thought they had bad intentions so she fled.

She said that while on her way home she stopped at an acquaintances house, who took her to Racho's house because he thought her aunt wasn't home. In the early morning of February 11 AAA left for her aunt's house and Racho's mother asked him to accompany her. AAA claimed that Racho took her into a shanty against her will and after grappling her he forcibly undressed her, got on top of her, and inserted his penis into her. AAA said that he left after he was finished, and she walked home alone.

Philippines Supreme Court Justice Samuel Martires who wrote the ruling overturning the 'woman's honor' doctrine, in *Philippines Vs. Juvy D. Amarela and Junard G. Racho*, G.R. Nos. 225642-43 (Phil. Sup. Ct., Third Div, Jan. 17, 2018).

AAA said that when she arrived home her parents were asleep. The next day she told her mother and eldest brother what she said happened. They reported the incidents to the police and Amarela and Racho were arrested on February 11. Both men denied that they had assaulted AAA.

A medical examination of AAA on February 12 found no bruising on her body, no physical injuries, and she had no physical trauma normally found in a rape victim. The examination did find indications she may have recently had sexual intercourse, but it didn't involve violence.

Amarela and Racho were charged with the separate forcible rape incidents alleged by AAA. More than three years later they were jointly tried in a bench (judge only) trial.

The prosecution's case was based on AAA's testimony and her positive identification of Amarela and Racho as her rapists.

Amarela testified in his defense that on February 10, 2009 he attended the fiesta celebrations in Davao City. About 4 o'clock in the afternoon he saw AAA and she asked him if he knew Eric Dumandan, who she said was her boyfriend. He said he later saw Dumandan and told him AAA was looking form him. He soon left the fiesta and after a drinking spree with his friend Asther Sanchez he felt dizzy, so Sanchez took him to the house of his elder brother Joey. Amarela said he went to sleep and didn't wake up until six o'clock the next morning.

Anita Racho, Racho's mother, testified that on the evening of Feb. 10 AAA arrived at her home with Godo Dumandan and she said she had been raped by three men. She said that after a while she insisted on going home and Racho left with her after her eldest son refused to take her. She said that later Racho returned home and went to sleep.

Racho testified in his defense was he was at his mother's house on February 10 when that evening AAA arrived at the house with Dumandan. **He said she** "was asking for help while crying because she was allegedly raped by three persons in the pineapple plantation." He said that after they left his house AAA didn't want to go to her aunt's house because she would scold her, and instead wanted to go to her parent's house in Ventura. Racho said that because Ventura was far and it was very late he didn't want to go with her to Ventura, and instead went home. He said that when the police came to his house on February 11 **he told them** that he could not have done what they alleged "because his hand is impaired while showing a long scar on his left arm." He said it was from a hacking incident on September 21, 2008 and he had a Medical Certificate that proved he was hospitalized for ten days. His arm was in a cast for three months, not being removed until January 2009, and afterwards "his arm was still painful and he could not move it around."

On June 26, 2012 the trial judge found Amarela and Racho guilty in the "She said, they denied case."

Amarela was sentenced to *reclusion perpetua* -- which is life imprisonment plus being barred for life from holding political office if he was ever released. In addition he was ordered to pay restitution to AAA of 50,000 pesos (US$1,176) in civil indemnity and 50,000 pesos (US$1,176) as moral damages.[1] Racho was given the same sentence and restitution order.

The men appealed separately, but their appeals were consolidated in the Court of Appeals in November 2015. They argued their were substantial inconsistencies between AAA's police statement and her trial testimony, and the trial judge failed to adequately consider the medical evidence AAA wasn't raped by anyone, and the testimony of Amarela and Racho in their defense.

On February 17, 2016 the Philippines Court of Appeal affirmed their convictions and sentences. The Court ruled that AAA's testimony was convincing of Amarela and Racho's guilt under the 'woman's honor' doctrine established by the Supreme Court of the Philippines in the 1960 case of *People v. Tano*. The Court **ruled in the** *Tano*

Woman's Honor cont. on p. 8

Arong cont. from p. 6

Chicago Tribune, February 15, 2018

Woman charged along with Cook County judge in mortgage fraud case pleads guilty, *Chicago Sun-Times*, Jan. 26, 2018

Federal Grand Jury Indicts Illinois Attorney in Mortgage Fraud Scheme, Press Release, U.S. Attorney's Office for the Northern District of Illinois, April 12, 2017

Federal Jury Convicts Illinois Attorney in Mortgage Fraud Scheme, Press Release, U.S. Attorney's Office for the Northern District of Illinois, February 15, 2018

20,000 Misdemeanor Marijuana Convictions In Kings County, NY Could Be Vacated In New Program By DA's Office

More than 20,000 misdemeanor marijuana convictions could be vacated in Brooklyn, New York. Kings County District Attorney Eric Gonzalez has approved a program that allows eligible persons to submit a request with the DA's Office to vacate their conviction. If the request is approved the DA's Office will file Motion with the Kings County Supreme Court to vacate the person's misdemeanor drug conviction in the interests of justice. The person is not required to appear in court.

People with convictions for "violent felonies and sex offenses" are not be eligible to have their misdemeanor marijuana conviction(s) vacated under the program. Gonzalez issued **a statement**:

Kings County District Attorney Eric Gonzalez (Kings County DA's Office)

> "As we move away from criminalizing low-level possession and use of marijuana, we cannot forget those who carry a conviction for conduct that is no longer being prosecuted. That criminal record can seriously impede a person's ability to get a job, education, housing and other important services. It is only fair to relieve these individuals of that burden and allow them to turn over a new leaf and move on with their lives."

The DA's Office is conducting the program in partnership with The Legal Aid Society, Brooklyn Defender Services, Brooklyn Law School, and the Center on the Administration of Criminal Law at NYU School of Law.

The program is set to begin the weekend of September 21-22 at Lenox Road Baptist Church (1356 Nostrand Avenue) in Brooklyn. Information will be provided and defense attorneys will be present to provide legal consultation. Eligible people will be provided assistance to fill out the paperwork that will submitted to the DA's Office.

Click here to read DA Gonzalez' statement can be read at, **http://tinyurl.com/yckzjge8**.

Sources:

"**Brooklyn District Attorney Announces** New Program to Erase Misdemeanor Marijuana Convictions," Press Release, District Attorney Kings County, September 7, 2018

Brooklyn DA To Expunge Low-Level Marijuana Convictions, *Gothamist.com*, Sept. 7, 2018

Woman's Honor cont. from p. 7

case that "no young Filipina of decent repute would publicly admit that she has been sexually abused, unless that is the truth, for it is her natural instinct to protect her honor." Since as a reputable young woman AAA wouldn't lie she was raped, Amarela and Racho must be guilty.

The men appealed to the Philippines Supreme Court.

On January 17, 2018 the Supreme Court set-aside the convictions of Amarela and Racho and ordered their acquittal in a precedent setting ruling that overturned the 'woman's honor' doctrine it had established in 1960. The Court ruled the idea a woman would be too ashamed to publicly accuse a male of rape unless it was true was outdated and false.

The Court's ruling stated regarding the 'woman's honor' doctrine: "However, this misconception, particularly in this day and age, not only puts the accused at an unfair disadvantage, but creates a travesty of justice." The court stated about the Court's 1960 ruling presuming a woman's truthfulness about being raped: "This opinion borders on the fallacy of *non sequitor*. And while the factual setting back then would have been appropriate to say it is natural for a woman to be reluctant in disclosing a sexual assault; today, we simply cannot be stuck to the Maria Clara stereotype of a demure and reserved Filipino woman. ... In this way, we can evaluate the testimony of a private complainant of rape without gender bias or cultural misconception. ... in order for us to affirm a conviction for rape, we must believe beyond reasonable doubt the version of events narrated by the victim." [7-8]

The Court then stated:

> "After a careful review of the records and a closer scrutiny of AAA's testimony, reasonable doubt lingers as we are not fully convinced that AAA was telling the truth. The following circumstances, particularly, would cast doubt as to the credibility of her testimony: (1) the version of AAA's story appearing in her affidavit-complaint differs materially from her testimony in court; (2) AAA could not have easily identified Amarela because the crime scene was dark and she only saw him for the first time; (3) her testimony lacks material details on how she was brought under the stage against her will; and (4) the medical findings do not corroborate physical injuries and are inconclusive of any signs of forced entry." [9]
>
> ... Accused-appellants Juvy D. Amarela and Junard G. Racho are ACQUITTED of the charge of rape on the ground of reasonable doubt. Their IMMEDIATE RELEASE from custody is hereby ordered unless they are being held for other lawful cause." [19]

Read the decision in *People of the Philippines Vs. Juvy D. Amarela and Junard G. Racho*, G.R. Nos. 225642-43 (Philippines Supreme Court, Third Div, January 17, 2018) in **http://tinyurl.com/y49pgx2p**.

Endnotes:

1. On 6-26-2012 the exchange rate was 42.504986 Philippine Pesos per US$1. Source: www.x-rates.com.
2. Davao City is the third largest city in the Philippines, and about 900 miles southeast of Manila.
3. AAA's age in 2009 isn't listed in the Supreme Court's ruling, but she was described as a young woman working as a housekeeper, and cites the medical report that listed her height as 5'-4" and her weight at 98 pounds.

Sources:

People of the Philippines *vs. Juvy D. Amarela and Junard G. Racho*, G.R. Nos. 225642-43 (Philippines Supreme Court, Third Div, January 17, 2018) (Setting aside rape convictions on the basis the "woman's honor" doctrine that a woman wouldn't lie about rape which the court established in 1960 was out of date for current society.)

SC sets aside 'woman's honor' doctrine in resolving rape cases, *Business Mirror*, February 20, 2018

Jodie Rana Has Arson Conviction Overturned Based On New Mobile Phone Evidence She Wasn't At Crime Scene

Jodie Rana's **convictions of** arson and perverting the course of justice were quashed by England's Court of Appeals on April 11, 2018. After her convictions by a jury in 2015, Rana was sentenced to six years in prison. Mobile phone and WiFi router tests conducted after her trial discovered new evidence corroborating her alibi she wasn't at the crime scene. Rana was released after more than two years in prison.

In the fall of 2014 Jodie Rana was 22 and living with her parents in Telford, England. Telford is a city of 148,000 people, 154 miles northeast of London.

On the evening of Friday, October 24, 2014, Rana went out partying with friends. At 2 am they dropped her off at the intersection of Waterloo Road and Crescent Road, about 150' from her house (as the crow flies). Rana stayed near the intersection for about 15 minutes while smoking a cigarette and making several phone calls to her friend Becky.

Rana's iPhone connected to the WiFi router in her bedroom, as it had been set-up to do when it was within range.

Rana's parents were asleep upstairs when a fire started at about 2:15 am. They were woken when a smoke alarm went off. Rana's father was unable to put out the fire near the stairs, and emergency services was called at about 2:20 am. Her parents escaped unhurt from their bedroom window down a ladder. They also rescued Rana's cat.

Rana called her friend Becky at 2:21: she was hysterical and crying, telling her the house was on fire and screaming about her parents and her cat.

After the fire was known to have started, witnesses saw Rana approaching the house from the direction of the intersection.

The fire was quickly extinguished and the fire fighters found evidence it had been started with an accelerant, suspected to be gasoline.

Jodie Rana outside the courthouse during her trial. (shropshirestar.com)

Rana went to her grandmother's nearby house. She told the police officer who interviewed her that her former boyfriend had threatened the previous week "to do this," and she confirmed that in a written statement. She made a further statement he told her that if she did not complete forms relating to a traffic accident claim, he would kill her and her family.

The police seized the clothes Rana had worn at the time of the fire and her shoes. Forensic examination did not find any fire damage, smoke, or any trace of gasoline on her clothes or shoes.

Rana's "ex-boyfriend" was arrested on October 25. He denied starting the fire, and also denied he and Rana had split-up.

When interviewed again, Rana admitted she lied about the relationship having ended.

Rana was arrested on December 6, 2014 and charged with Count 1: arson, being reckless as to whether life was endangered; and Count 2: perverting the course of justice (Misleading police by lying about having split-up with her boyfriend.)

The prosecution's case during Rana's trial was she set fire to her home in the early hours while her parents were asleep, and blamed her boyfriend by falsely suggesting he had threatened to kill her and her family if she did not assist him with an auto claim. To disprove Rana's assertion that when the fire started she was at the intersection where she was dropped off, the prosecution introduced a report from cell site expert Martin Griffiths. Griffiths, who was not called as a witness, stated in his report that Rana's iPhone needed to be within a clear line of sight radius of 20-25 meters (32'-40') from her WiFi router to connect to it.

Jodie Rana outside the courthouse during her trial (shropshirestar.com)

The prosecution argued she had the *opportunity* to set the fire because she had access to the unlocked house and to gasoline stored in the garage, and she smoked so she had the *means* to ignite the gas. The prosecution presented no evidence her fingerprints were on the gas can. The prosecution argued her *motive* was that she thought it was a way to get her boyfriend out of her life.

Rana testified in her defense there is no conceivable reason she would have started the fire because she had a loving relationship with her parents, and she loved her cat that was in the house.

She also testified that she lingered and called her friend and smoked near the intersection where she had been dropped off because her parents did not know that she smoked. She said she became aware of the fire from noise she heard coming from the direction of her house.

She adamantly disagreed her iPhone needed to be within 40' of her WiFi router to connect, even though her lawyer stipulated to admittance of Griffiths' report. **She said** "that she had often been able to connect to her wireless signal from much further away, including the corner of Waterloo Road and at her grandmother's house nearby."

She said she didn't see anyone fleeing as she approached **the house**, "but that it would have been possible for someone to leave by the back garden and over a field."

During her cross-examination Rana admitted she lied to the police that she had split up with her boyfriend, but she said the night of the fire he was angry she went out with her friends, and she reiterated that he "had indeed threatened her and her family a week before the fire." The prosecutor unsuccessfully tried to shake her testimony that she regularly connected to her WiFi router from more than 40 feet away: she even expanded on her direct testimony by giving details of the signal strength when she was at her grandmother's house, and that her experiences connecting far from the house were shared by her mother.

On September 4, 2015 the jury unanimously convicted Rana of both charges. She was subsequently sentenced to six years in prison for arson, and a concurrent 4 month sentence for perverting the course of justice. She began serving her sentence.

After her conviction Rana obtained a new lawyer, who retained cell site engineer Gregory Robinson to determine the distance from which Rana's WiFi router could connect to a mobile phone. "**Robinson conducted** his own tests from his commercial

Jodie Rana cont. on p. 10

Jodie Rana cont. from p. 9

premises with the identical model of router (the actual router no longer being available, apparently having been disposed of by the insurance company) but a different model mobile phone." His tests found there were "several areas up to 160m (257') away where the test handset logged onto the network and exchanged data."

Rana's petition for leave to appeal was granted based on the new expert evidence that supported her alibi she was at the intersection at the time the fire started in her home.

The Court of Appeal held a hearing on March 21, 2018 during which Robinson testified about his findings.

On April 11, 2018 the Court of Appeal quashed Rana's convictions based on the new expert evidence her iPhone could connect to the WiFi router from a distance much greater than the distance from the intersection to her home. The Court's ruling stated:

"We now know that the expert evidence was wrong and that the appellant's account on that aspect of the case was credible. Yet in a prosecution which relied so heavily on her admitted and alleged lies, we consider that this expert evidence was a powerful and damning part of the Crown's case. ...

We took time to consider our judgment at the conclusion of the hearing because we wished to re-read the evidence and summing up to enable that question to be answered. The prosecution case rested upon the premise that the appellant's evidence that her boyfriend had threatened violence was a pretence ...

We have noted that there was no forensic connection between the appellant and either petrol or fire, or the petrol can. ... we have concluded that the fresh evidence, undermining as it does an important part of the prosecution case both on timing and also the potency of the appellant's lies, renders the conviction unsafe. In the circumstances we allow the appeal and quash the convictions."

Read the appeals court's decision in *R v. Jodie Rana*, [2018] EWCA Crim 725 (11 April 2018) at, **http://www.bailii.org/ew/cases/EWCA/Crim/2018/725.html.**

Sources:
R. v Jodie Rana [2018] EWCA Crim 725 (11 April 2018) (Quashing conviction based on new electronic evidence.)
Free again: Telford woman's arson conviction quashed thanks to fresh phone evidence, *Shropshire Star*, April 12, 2018

Larry Guyette Granted New Trial Because Judge Accepted Guilty Plea Without Evidence He Was Guilty

Larry Guyette has been granted a new trial in Suffolk County, New York of five driving offenses because the trial judge found him guilty and sentenced him without Guyette waiving his constitutional due process rights and admitting he committed the offenses.

Guyette was driving his 2003 Chevrolet on State Route 112 in Medford, New York on March 13, 2015 when he was stopped by a Suffolk County police officer. Medford is about 60 miles east of New York City. The officer issued five tickets: operating a motor vehicle without an inspection certificate; operating an uninsured motor vehicle; operating an unregistered motor vehicle; operating a motor vehicle without distinctive number license plates; and operating a motor vehicle with improper license plates.

On November 13, 2015 Guyette appeared without a lawyer before Suffolk County Judicial Hearing Officer Martin J. Kerins. The prosecutor **stated the** "People are willing to dispose of this matter" without a trial, and "discussed the proposed fines, surcharges and fees."

The following exchange **then occurred between** Kerins and Guyette:

"The Court: Alright, Mr. Guyette, you heard what the county prosecutor just put on the record. I must inform you that a conviction for driving without insurance will result in not only the fine today, but your license and/or privilege to drive will be suspended, revoked for at least a year and when you try to get it back, they're going to hit you with another civil penalty of $750.00; are you aware of all that?

Mr. Guyette: Yes, I am, your Honor.

The Court: Okay, do you need a lawyer?

Mr. Guyette: I spoke to Scott Lockwood, he couldn't be here today.

The Court: I'm asking you if you want a lawyer to go to trial?

Mr. Guyette: Yes, your Honor, yes.

The Court: To go to trial?

Mr. Guyette: No.

The Court: No, okay.

Mr. Guyette: I just want to end this now.

The Court: Okay.

Mr. Guyette: I don't even want —

The Court: Okay, fair enough. Okay, accordingly, the Court will accept all charges as they were put on the record ... sentence the defendant to pay all the recommended fines, fees and surcharges, they total $1,190.00."

Guyette appealed, claiming his "guilty pleas" were not made knowingly or voluntarily.

On March 22, 2018 the New York Supreme Court Appellate Term, Second Department reversed Guyette's convictions on the basis **he was convicted** even though he "never admitted his guilt to the charges. The court did not ask him questions, such as whether he had been driving an uninsured vehicle or an unregistered vehicle. ... here, there was virtually no allocution of the unrepresented, inexperienced defendant. Furthermore, there was no affirmative showing on the record that defendant waived any of his constitutional rights. Thus, it was not established that his plea was entered into voluntarily, knowingly and intelligently.

Accordingly, the judgments of conviction are reversed and the matters are remitted to the District Court, Suffolk County Traffic and Parking Violations Agency, for all further proceedings."

Read the appeals court's ruling in *People v Guyette (Larry)*, 2018 NY Slip Op 50402(U) (NY Supreme Ct., Appellate Term, Second Department, March 22, 2018) at, **http://tinyurl.com/y9ouuhun**.

With Guyette's presumption of innocence restored, unless the charges aren't dismissed, he will either go to trial or agree to a plea bargain.

JD Note: What the trial judge did in Guyette's case is not abnormal. Judges routinely go through the motions and accept a "guilty plea" without adhering to the requirements for a defendant to both waive their constitutional due process rights and admit guilt. What is unusual in Guyette's case is his appeal provided the appeals court with the opportunity to point out he didn't do either before being found guilty by the judge and sentenced.

Sources:
People v Guyette (Larry), 2018 NY Slip Op 50402(U) (NY Supreme Ct., Appellate Term, Second Department, March 22, 2018)

Alban Ajaegbu Acquitted After 15 years On Death Row For Boy's Ritualistic Murder

Alban Ajaegbu **was acquitted** by Nigeria's Supreme Court on May 18, 2018 of the ritualistic murder of a boy in 1996. Ajaegbu was convicted in 2003 and sentenced to death.

On September 19, 1996, 11-year-old Anthony Ikechukuwu Okoronkwo was selling boiled groundnuts on the streets of Owerri, Nigeria. Owerri is 340 miles west of Nigeria's capital of Lagos.

Okoronkwo was lured into the Otokoto Hotel with the promise of a Coca-Cola. The soda was drugged. Okoronkwo was killed, he was decapitated, his penis was amputated, and internal organs were removed. His body was buried in a shallow grave at a farm near the hotel.

The crime was discovered soon after it occurred. One of the participants — Innocent Ekeanyanwu — left the Otokoto Hotel carrying Okoronkwo's head in a polythene bag to deliver it to his uncle. The motorcycle taxi driver saw the fresh human head, and he contacted the police after they arrived at their destination. Ekeanyanwu's uncle was gone. They left to return to the hotel, with Ekeanyanwu still carrying the head. They were stopped at a police roadblock, and Ekeanyanwu was arrested.

Ekeanyanwu confessed and in his police statement he implicated socially prominent and wealthy people in Okoronkwo's murder. One of those was the hotel's owner, Vincent Duru.

Ekeanyanwu was found dead in his cell three days after his arrest. It was suspected he had been poisoned. It was later determined his death wasn't accidental. In 2002 three policeman were found guilty of his murder and sentenced to death.

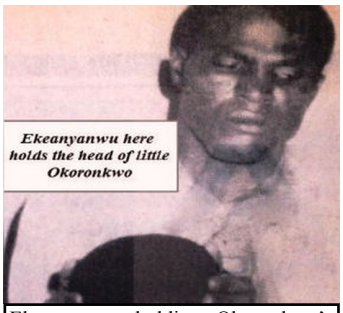
A photograph of Ekeanyanwu holding Okoronkwo's head was publicized in the local media. The photo sparked a rampage by enraged residents who destroyed property owned by people implicated in crime. The destroyed property included houses, hotels, gas stations, and cars.

Nigerian Supreme Court Justice Kudirat Kekere-Ekun

Seven men were charged with Okoronkwo's murder.

Six of the defendants were prosecuted based on Ekeanyanwu's statement and other witness evidence.

The seventh defendant was Alban Ajaegbu. He had worked as the Otokoto Hotel's gardener for 17 years. The hotel was comprised of three detached buildings and had extensive grounds.



Ekeanyanwu holding Okoronkwo's head that sparked mob rampage in Owerri. (The bottom part of the photo that shows Okoronkwo's face has been cropped out by JD.) (Sahara Gossip Blog)

The case against Ajaegbu was entirely circumstantial. The prosecution asserted that as the hotel's gardener he had to have known Duru owned the farm where the body was found: which he denied when questioned by police.

The trial of the seven defendants began on December 9, 1996. More than six years later their trial concluded in February 2003 with Owerri High Court Justice Chioma Nwosu-Iheme finding them all guilty of murder. They were all sentenced to death.

In 2012 Ajaegbu's conviction and death sentence were affirmed by the Court of Appeal in Owerri. Ajaegbu appealed the ruling.

In 2013 the Court of Appeal **vacated the** conviction of defendant Ebenezer Egwueke and ordered his acquittal. The appeals court determined the prosecution introduced insufficient evidence to prove his guilt beyond a reasonable doubt. Egwueke was 62 when he was released after 16-1/2 years in custody — the last ten on death row.

On May 18, 2018 Nigeria's Supreme Court unanimously (5-0) vacated Ajaegbu's conviction and ordered his acquittal. Justice Kudirat Kekere-Ekun announced in open court her lead ruling that Ajaegbu's conviction and the affirmation of his conviction by the Court of Appeal were based solely on speculation he was guilty, without any substantive evidence to support that conclusion.

Kekere-Ekun's **ruling stated**: "It must be restated here that the appellant was charged with murder and the prosecution has the burden of proving beyond reasonable doubt that it was the act of the appellant that caused the death of deceased. The appellant does not have the burden to prove his innocence. The lower court held that the defence of the appellant raised a lot of suspicion. The law is well settled that suspicion, no matter how grave, cannot take the place of proof."

Kekere-Ekun also noted the assumption of the trial court and the appellate court was fallacious that because Ajaegbu worked at the hotel for many years, he should have known who owned the farm where Okoronkwo **was buried**: "Suspicion cannot take the place of legal proof. That the appellant worked in the hotel for 17 years and didn't know who owned the farm cannot make him guilty."

Ajaegbu was immediately released from the Port Harcourt Prison after 21 years and 8 months in custody. He had been on death row for 15 years and 3 months. (Port Harcourt Prison is notorious for its atrocious conditions: it was built for 800 prisoners and houses more than 5,000.)

The Supreme Court dismissed Otokoto Hotel owner Duru's appeal on December 9, 2016. His sentence of death by hanging was carried out.

Sources:

Supreme Court acquits Otokoto suspect Alban Ajaegbu after spending 22 years in jail, Naija.ng, May 19, 2018

Otokoto: Supreme Court Frees Ajaegbu After 22yrs, Independent (Ogba, Ikeja, Nigeria), May 18, 2018

Chief Vincent Duru (Alias Otokoto) *v S* (SC.235/2012)[2016] NGSC 125 (9 December 2016) (Affirming conviction and death sentence.)

Otokoto ritual murder: 20 things to know about convict hanged 20 years after crime, informationng.com, November 26, 2016

Menace To The Innocent: Insubstantial Expert Evidence Endangers Innocent People Accused Of A Crime

By Hans Sherrer

Menace To The Innocent: Insubstantial Expert Evidence Endangers Innocent People Accused Of A Crime **is now available on Amazon.com** at, **www.tinyurl.com/yc5u3kqn** .

Menace To The Innocent was written by Hans Sherrer, **Justice Denied's** editor and publisher. It is published by **The Justice Institute**.

The following is an excerpt from the book's INTRODUCTION:

We live in an age of magic as a way of life. At least that is how a person who lived 200 years ago could be expected to think of the modern world. In actually, we live in an age of science that to the uninitiated certainly can seem magical. Almost every man-made process we have today that wasn't available 200 years ago is the result of applying scientific principles to varying degrees to achieve the end result.

The quest to solve crimes has not been immune to the application of science. However, this book demonstrates it is not unusual for science to be misapplied, disregarded, or relied on in name only to "solve" a crime and close a case by identifying a person as the culprit. The result is a crime solved by the magical masquerading as science. This situation exists because there to no reliable mechanism to ensure the system isn't gamed by the prosecution's reliance on expert "scientific" evidence that in reality is no more reliable than a confession to being a witch by a person who simply wants to stop being dunked into a pond.

There is generally no scrutiny of crimes "solved" through expert evidence because of the resources necessary to do so, and over 95% of convictions in the U.S. are by a guilty plea that precludes any critical examination of the prosecution's supposedly expert evidence. The overwhelming majority of defendants in this country have limited – if non-existent – financial resources, and public defenders who handle the overwhelming majority of criminal cases have limited budgets, and case load pressure to take the path of least resistance and plead out every case possible.

Consequently, the legal system is structured so that the overwhelming majority of convictions that rely on the soggy foundation of suspect expert evidence – which may in fact be no more stable than quicksand – fall through the cracks into the black hole of a case closed by a plea bargain.

There is relatively little will-power by those within the system to correct this state of affairs. The four primary actors in the legal system's operation – judges, prosecutors, police, and defense lawyers – are integral parts of the assembly line that generates the steady flow of convictions the system depends on for its smooth functioning. The increasing reliance on expert evidence to secure convictions assists to grease the wheels of that system.

The depth of that reliance is demonstrated by how those primary actors exhibit a quasi form of Stockholm Syndrome by their psychological alliance with the use of expert evidence that often is insubstantial and undermines the credibility of the system they are a part of. That psychological state can be called "Expert Syndrome." The way experts are viewed and uncritically relied on masks that their contribution to a case is often no more reliable than the incantation of a witch doctor is to cure an illness or end a drought.

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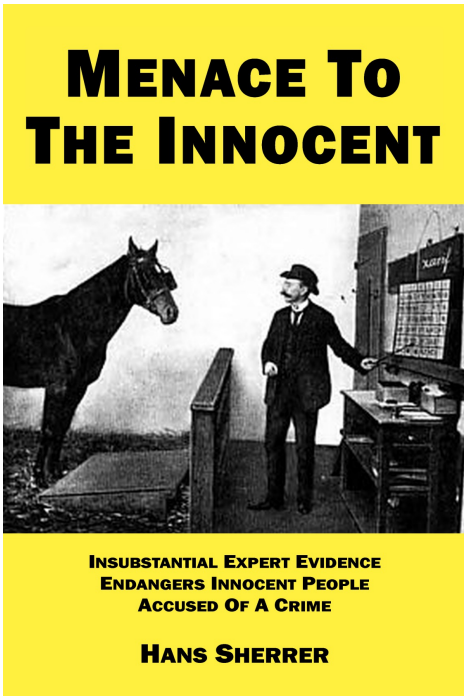
"*Menace To the Innocent"* goes far beyond identifying the magnitude of the problem: In its last chapters it proscribes no-nonsense solutions to rectify the problem of innocent people being ravaged by prosecutors who rely on bogus expert evidence to secure their conviction. One of those solutions is to close the FBI crime lab and all local, county, and state crime labs because they are inherently, and irredeemably biased toward the prosecution. Not incidentally, those crime labs operate in a manner that would be unacceptable for a university science lab ... much less a privately operated commercial laboratory.

The Table of Contents follows:



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Menace To The Innocent can be ordered from Amazon.com at, **www.tinyurl.com/yc5u3kqn** .

Patricia Foster Skelton Can Sue Trial Lawyer For Malpractice After Her Forgery Conviction Was Overturned And Charges Dismissed

On March 14, 2018 the Texas 4th Ct. of Appeals ruled Patricia Foster Skelton **can proceed** with her legal malpractice lawsuit against the lawyer who represented her when she was wrongly convicted in 2007 of forging a will. In 2014 the 4th Ct. of Appeals granted Skelton's habeas corpus petition and ordered a new trial based on ineffective assistance of counsel by her trial lawyer. The Real County District Attorney declined to retry her, and her forgery charge was dismissed. She was prosecuted for a crime that didn't happen.

In 2002, 44-year-old Patricia Skelton, known to her friends as Patti Skelton, was a lawyer whose office was in Leakey, Texas. Leakey is in Real County, about 100 miles northwest of San Antonio.

Skelton prepared a will for Ysidro Canales that he signed on August 16, 2002. Canales kept the signed original, while Skelton retained a copy.

Canales died in May 2003. His nephew asked Skelton to file his will with the court in Kerr County where Canales lived. She located her copy, but discovered it had been water-damaged in a flood. The will document Skelton prepared was stored on her computer, so she printed out a copy -- which lacked signatures. To solve the problem Skelton physically cut the signatures from her water damaged copy of the original, and pasted them onto the newly printed copy. Skelton made a photocopy of the new document, and filed it in Kerr County as a copy of Canales' will. Skelton did not inform the court she made the will from two copies.

Skelton's secretary notified the police in September 2003 that she believed Skelton had created and filed a false will for Canales.

Because Skelton had previously served as the county attorney for Real County, the investigation into the forgery allegation was headed by Texas Ranger Coy Smith. Skelton learned she was under investigation when Smith obtained a search warrant and raided her office. Skelton was indicted on November 14, 2004 for forging the will of a deceased client.

Patricia Skelton during Texas State Bar Board of Disciplinary Appeals hearing on Sept. 27, 2011 (Youtube.com)

Attorney Guy James Gray represented Skelton **during her** December 2007 trial in the Real County District Court.

The **prosecution alleged** "that Skelton fabricated the terms of the will out of whole cloth to the benefit of Canales's nephew, who was the main beneficiary of the will filed by Skelton. One of the motives alleged by the prosecution was that Skelton was afraid Canales's nephew would sue her for malpractice if she could not produce Canales's will." An element the State had to prove to convict Skelton was she forged Canales' will with the intent to defraud or harm another person.

Skelton's defense was she didn't commit forgery because she did not act with the intent to defraud or harm anyone. Skelton testified in her defense the provisions of the will she filed were exactly as signed by Canales. She also testified that Canales kept the signed original, and she described how she made the copy that was filed. She also testified she didn't know she could have filed an unsigned copy of his will to probate his estate. The two people whose signatures were on the will testified for the defense that they witnessed Canales sign the will on the date stated on the copy.

After her conviction by a jury Skelton was sentenced to a one year suspended prison term and two years of community supervision.

Skelton hired a different lawyer to represent her in her direct appeal. Her term of community supervision was stayed while her appeal was pending.

On June 9, 2010 the Texas 4th Ct. of Appeals affirmed her conviction and sentence. She began serving her sentence.

Some of Canales' relative contested his purported will and the distribution of his estate valued at $160,000. Those proceedings were stayed until Skelton's criminal trial was completed, after which they resumed. While Skelton's direct appeal was pending a civil trial was held involving Canales' contested will. The **civil jury found**: "(1) Canales executed a valid will; (2) Skelton did not act with the intent to defraud or harm another when she physically altered the will; and (3) the will submitted to probate was an accurate copy of Canales's will. Based on the jury's verdict, a judgment was rendered on March 17, 2009 ordering that the will contestants take nothing."

Skelton had been suspended on June 19, 2008 by the State Bar of Texas' Board of Disciplinary Appeals due to her felony conviction. The Board of Disciplinary Appeals held a two hour hearing on September 27, 2011 to determine her final punishment. During the hearing board members expressed concern the civil jury's judgment the will Skelton filed was valid, she did not act with intent to defraud, and the will she submitted was an accurate copy, conflicted with the jury's decision in her criminal case. On September 29, 2011 the Board of Disciplinary Appeals signed a final judgment suspending Skelton until her sentence was completed in 2012. It was effectively the lightest punishment they could impose.

Skelton was on community supervision when she filed an application for a writ of habeas corpus on September 26, 2011. Her **petition claimed**: "she is actually innocent, she was denied a fair trial due to prosecutorial misconduct, and she received ineffective assistance of counsel." Her habeas petition asserted her trial lawyer was ineffective because he:

a) did not object when the State enlarged its theory of the case beyond the indictment;
b) did not object when the State elicited testimony about Skelton's invocation of her right to silence and her right to counsel after she was informed of her Miranda rights and he emphasized that testimony on cross-examination;
c) did not object when the State presented Ranger Smith as an expert on the law of forgery and he testified she was guilty of forgery;
d) did not object when the State elicited hearsay testimony to bolster a witness's credibility; and
e) did not object when the State made improper jury arguments by enlarging its theory of the case beyond the indictment and physically struck at Skelton over the shoulders of her attorney without him objecting.

The habeas judge summarily Skelton's petition as frivolous on its face without making written findings of fact and conclusions of law.

Skelton cont. on p. 14

Skelton cont. from p. 13

Skelton appealed, requesting that either the judge's order be reversed, or an evidentiary hearing ordered.

The Texas 4th Ct. of Appeals remanded the case, ordering that the habeas court conduct an evidentiary hearing and make written findings of fact and conclusions of law regarding Skelton's ineffective assistance of counsel claim.

After holding an evidentiary hearing, the judge's written findings of fact and conclusions of law recommended denying Skelton's petition. The judge ruled her trial lawyer's performance had not been deficient because he had the experience of practicing law for over 30 years; he had served as an elected District Attorney; and his actions Skelton complained about were all objectively reasonable strategic decisions. The judge also ruled that even if her lawyer's performance had been deficient, she hadn't demonstrated she was prejudiced because they didn't affect the outcome of her trial.

The Texas 4th Ct. of Appeals reviewed the judge's recommendation. On July 10, 2013 the Court ruled the performance of Skelton's lawyer **was deficient** "By not objecting to Ranger Smith's "expert" and clearly inadmissible opinion of Skelton's guilt." However, the Court ruled her lawyer's conduct was harmless and she wasn't prejudiced because "we conclude that Skelton's attorney committed only isolated error, and the fundamental fairness of her trial was not undermined."

The Court denied her actual innocence claim that was based on the new evidence of the conflicting verdicts between her criminal trial and the civil probate trial that found she had not filed a forged will, **stating**: "Because we have found no constitutional error at Skelton's trial, we need not decide whether the conflicting civil verdict is new evidence of actual innocence."

Texas Fourth Court of Appeals building in San Antonio

The Court denied her prosecutor misconduct claim on the basis it was procedurally barred because it should have been raised in her direct appeal.

Skelton filed a motion for a rehearing of the Court's decision. The State elected not to file a response or oppose her motion. The appeals court ordered briefing by Skelton and the State on her ineffective assistance of counsel claims.

On May 28, 2014 the 4th Ct. of Appeals granted Skelton's motion on the basis the Court's 2013 ruling did not fully address her ineffective assistance of counsel claims. The Court withdrew its 2013 opinion and issue a new opinion in its place in which it granted her petition on the basis her trial lawyer provided ineffective assistance of counsel. The Court vacated Skelton's conviction and remanded her case for a new trial. The Court's ruling in *Ex Parte Patricia Skelton* (Tex. 4th Ct. of Appeals, 5-28-2014) **stated in part**:

> "We have identified three points at Skelton's trial where her counsel's performance fell below an objective standard of reasonable representation. The first point is when her counsel allowed the prosecution to elicit testimony that Skelton invoked her rights to counsel and to remain silent, the second is when her counsel emphasized and highlighted Ranger Smith's prejudicial testimony on cross-examination, and the third is when her counsel allowed Ranger Smith to testify as an "expert" that Skelton was guilty of forgery. ..."
>
> "Because Skelton's defense rested in large part on her credibility and her counsel failed to object to inadmissible evidence that was severely prejudicial to her credibility, we hold that Skelton's counsel performed below an objective standard of reasonable representation."
>
> ....

The Court then had to decide if there was a reasonable probability the deficient conduct of Skelton's lawyer affected the **outcome of her trial**:

> "When considered in the context of the overall record, we conclude that the effects of counsel's deficient performance permeated Skelton's trial. ...
>
> Looking to the totality of Skelton's trial, we conclude that the prejudice resulting from Skelton's counsel's deficient performance permeated her trial. It harmed Skelton's credibility and damaged her defense before she was even allowed to offer her exculpatory story. The prosecution also revisited the subject on rebuttal, immediately prior to the jury's deliberations. Based on this record, we hold that Skelton made the required showing that there is a reasonable probability she would not have been convicted but for her attorney's unprofessional errors. The record shows Skelton is entitled to habeas relief because her counsel was ineffective."

The Court considered Skelton's actual innocence claim, and again denied it on procedural grounds without considering the merit of her innocence argument. The Court **then ruled**:

> "We reverse the order of the habeas court and grant Skelton habeas relief because the fundamental fairness of her trial was tainted by the ineffective assistance of her trial counsel. Accordingly, we vacate the judgment in cause number 2004–0934–DR from the 38th Judicial District Court of Real County, Texas."

The Real County District Attorney decided not to retry Skelton, and the DA's motion to dismiss her indictment was granted on February 6, 2015.

Read the decision in *Ex Parte Patricia Skelton*, No. 04-12-00066-CR (Tex. 4th Ct. of Appeals, 5-28-2014) at, **www.caselaw.findlaw.com/tx-court-of appeals/1667968.html**.

Skelton filed a lawsuit against her trial lawyer Guy Gray on May 27, 2016. She alleged he committed legal malpractice and breach of fiduciary duty in her case. Gray responded by filing a Rule 91a motion to dismiss Skelton's lawsuit on the basis her legal malpractice claim was barred by the Texas precedent of *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995), "because she has not been exonerated from the underlying criminal conviction," and also because the statute of limitations barred her claims for both legal malpractice and breach of fiduciary duty."

The District Court judge granted Gray's motion and dismissed her lawsuit.

Skelton appealed.

On March 14, 2018 the 4th Ct. of Appeals unanimously reversed the District Court judge's decision. The appeals court ruled: 1) the *Peeler* case was misapplied because the conviction of the plaintiff in that case

Skelton cont. on p. 15

Skelton cont. from p. 14

had not been vacated and the charges dismissed; and, 2) Skelton filed her lawsuit claiming legal malpractice within the two year statute of limitations that commenced on February 6, 2015. However, the Court ruled Skelton's claim of Gray's breach of fiduciary duty was properly dismissed as untimely, because Gray's representation of her ended in December 2007 -- eight and a half years before she filed her lawsuit. The Court remanded her case for consideration of her legal malpractice claim.

Read the decision in *Patricia Skelton v. Guy James Gray*, No. 04-16-00828-CV (Tex. 4th Ct. of Appeals, 3-14-2018) at, **http://tinyurl.com/5nbvkk**.

It is not known why Skelton didn't file a federal civil rights lawsuit against Gray, since the appeals court ruled he deprived her of her constitutional right to effective assistance of counsel.

Patricia Skelton, now 58, has spent almost 14 years fighting her prosecution for a crime that never happened and its aftermath. Skelton has a private law practice. She lives in Utopia, Texas.

Sources:

Patricia Skelton v. Guy James Gray, No. 04-16 00828-CV (Tex. 4th Ct. of Appeals, 3-14-2018)

Patricia Skelton v. Guy James Gray, No. 04-16 00828-CV (Tex. 4th Ct. of Appeals, 3-14-2018) (Docket as of 3-15-2018)

Ex Parte Patricia Skelton, No. 04-12-00066-CR (Tex. 4th Ct. of Appeals, 5-28-2014) (Granting Skelton's motion for a rehearing and granting her writ of habeas corpus based on ineffective assistance of counsel.)

Ex Parte Patricia Skelton, No. 04-12-00066-CR (Tex. 4th Ct. of Appeals, 7-10-2013) (Denying Skelton's writ of habeas corpus.)

In re Patricia Foster Skelton, The Board of Disciplinary Appeals appointed by the Supreme Court of Texas, Docket page

Forgery trial opens for ex-Real official, *San Antonio Express-News*, December 9, 2007

Patricia Foster 'Patti' Skelton, Texas Bar, March 24, 2018

In re Patricia Foster Skelton, The Board of Disciplinary Appeals appointed by the Supreme Court of Texas, Public hearing held on Sept. 27, 2011.

Robert McCoy Granted New Trial By US Supreme Court Because His Lawyer Told Jury He Was Guilty

Robert LeRoy McCoy **was granted** a new trial on May 14, 2018 by the U.S. Supreme Court. The Court ruled McCoy was denied his Sixth Amendment right to make a fundamental choice about his defense because his trial lawyer disregarded his repeated claims of innocence, and instead told the jury he was guilty. Robert McCoy was convicted in 2011 of a triple murder committed in 2008 in Louisiana, and he was sentenced to death.

On May 5, 2008, the mother, stepfather, and son of Robert McCoy's estranged wife were shot to death in Bossier City, Louisiana.

McCoy was a suspect. Four days after the murders he was arrested in Idaho after the police in Bossier City received a tip. He was extradited to Louisiana. McCoy was indicted for three counts of first-degree murder. The prosecution gave notice it intended to seek the death penalty.

McCoy was appointed a lawyer from the public defender's office.

McCoy unwaveringly insisted he was out of state at the time of the murders, and he believed that rogue cops killed the victims in a botched drug deal. McCoy's lawyer requested he be examined to determine his sanity, and he was found competent to stand trial.

In early 2010 McCoy told the judge his relationship with his public defender had irretrievably broken down. The judge allowed him to represent himself until his parents could hire a private lawyer in his behalf. In March 2010 Larry English was hired as McCoy's lawyer.

English decided McCoy was guilty, and the only way he could avoid a death sentence was to concede he committed the crimes. McCoy rejected English's suggestion to make a deal and plead guilty. Two weeks before trial McCoy became furious when English told him he was going to tell the jury McCoy committed the murders in an effort to avoid a death sentence. McCoy specifically told English he was innocent, to pursue his acquittal, and not to make any concession of guilt to the jury.

Robert LeRoy McCoy
(Bossier Parish Sheriff's Office)

Two days before his trial was scheduled to begin in September 2011, McCoy sought to terminate English as his lawyer, and English asked to be relieved of representing him. The judge refused, **telling English**: "[Y]ou are the attorney. [Y]ou have to make the trial decision of what you're going to proceed with."

English disregarded McCoy's instructions and **told the jury** during his opening statement: "there was "no way reasonably possible" that based on the prosecution's case they could reach "any other conclusion than Robert McCoy was the cause of these individuals' death." McCoy immediately protested to English, and told the judge that English was "selling [him] out" by maintaining that he "murdered [his] family." The judge told McCoy that English was "representing" him and he would not permit "any other outbursts."

The prosecution's case was circumstantial. It had no eyewitness, confession, or physical or forensic evidence placing McCoy at the crime scene. The prosecution's key evidence was a 911 call on the day of the murders in which one of the victims is **heard saying**: "She's not here, Robert." The prosecutors argued the "Robert" referred to had to be McCoy.

McCoy testified in his own defense he was innocent and out of state when the murders occurred. He **told the jury**: "I'm no monster. I'm no cold-blooded killer." He testified his arrest was a set-up by the Bossier Police Department in retaliation for him exposing officers were dealing drugs. He told the jury: "This isn't fair, this isn't justice. Police officers are supposed to uphold the law, not break it." He also said he was "forced out of the state" on April 21st by his exposure of the police drug dealing. That was two weeks before the murders on May 5, 2008.

During McCoy's cross-examination **he told** District Attorney Schuyler Marvin: "You can't put me at the scene of this crime, and that's what you have to do."

English told the jury during his closing argument that **his client** McCoy was "a defective figure," and **that he** "took [the]

McCoy cont. on p. 16

McCoy cont. from p. 15

burden off of [the prosecutor]" to prove his guilt because McCoy was the killer. However, he argued McCoy was only guilty of second-degree murder, because severe emotional issues prevented him from forming the intent necessary to be guilty of first-degree murder.

After six hours of deliberations the jury returned a unanimous guilty verdict of first-degree murder on all three counts.

English again conceded **during the** penalty phase, over McCoy's objection, that: "Robert McCoy committed these crimes." However, he urged mercy because he claimed McCoy had "serious mental and emotional issues." The jury returned three verdicts for a death sentence.

McCoy was subsequently sentenced to death.

In October 2016 the Louisiana Supreme Court denied McCoy's appeal that raised 16 grounds for a new trial. One of those **rejected grounds was** "the trial court erred in ruling that the defendant's retained counsel could decide whether to concede guilt of the charged murders at trial, without the defendant's consent." The Court ruled:" This court does not sit to second guess strategic and tactical choices made by trial counsel. We find no merit in this assignment of error."

In March 2017 McCoy submitted a writ of certiorari to the U.S. Supreme Court. In September 2017 his writ was accepted to resolve an issue that had never been ruled on by the USSC: "1. Is it unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection?"

Oral arguments were held on January 17, 2018.

On May 14, 2018 the Supreme Court issued its ruling that reversed McCoy's convictions and ordered a new trial. In a 6 to 3 majority opinion written by Justice Ginsburg, the Court ruled that McCoy's lawyer violated his Six Amendment right to make a fundamental choice about his own defense by repeatedly telling the jury McCoy was guilty. Furthermore, the Court ruled the lawyer's egregious conduct that was permitted by the trial judge was "structural," and therefore it was not subject to harmless-error review and automatically required a new trial. The Court concluded its opinion **by stating**:

"McCoy insistently maintained: "I did not murder my family." Once he communicated that to court and counsel, strenuously objecting to English's proposed strategy, a concession of guilt should have been off the table. The trial court's allowance of English's admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment. Because the error was structural, a new trial is the required corrective." [Op.Cit. 13]

Read the Supreme Court's ruling in *McCoy v. Louisiana*, 584 U.S. ___ (2018) at, **www.courthousenews.com/wp-content/uploads/2018/05/McCOY LOUISIANA.pdf**.

Under the Supreme Court's precedential ruling, no defendant's lawyer in a state or federal case can disregard his client's *specific objection* to the lawyer stating his opinion to a jury the defendant is guilty.

The Caddo Parish District Attorney now has to decide whether to directly proceed with a new trial or try to entice McCoy to accept a deal to resolve the case. If McCoy refuses to a plea bargain, the DA will either have to proceed to trial or seek dismissal of the charges.

Sources:
McCoy v. Louisiana, 584 U.S. ___ (2018) (Granting new trial)

State of Louisiana v. Robert Leroy McCoy, NO. 2014-KA-1449 (Supreme Court of Louisiana, October 19, 2016) (Affirming convictions and death sentence.)

Justices Grant New Trial for Inmate Whose Lawyer Conceded Guilt, By Dan McCue, CourtHouseNews.com, May 14, 2018.

McCoy guilty as charged in 2008 triple murder in Bossier City, KSLA-TV (Fox19).

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The mobile friendly homepage was created because half of all visitors to JD's website now use a hand-held device. The following shows the growth of hand-held devices used to access **justicedenied.org**.

Year	Desktop	Mobile	Tablet
2008	100%		
2009	99.7%	0.3%	
2010	97%	3%	
2011	92%	8%	
2012	82%	13%	5%
2013	72%	19%	9%
2014	61%	28%	11%
2015	51%	37%	12%
2016	50%	39%	11%
2017	49%	43%	8%
2018	47%	45%	8%

Justice Denied's mobile device homepage is **www.m.justicedenied.org**.

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www.forejustice.org/biblio/bibliography.htm

"With the criminal justice system not providing even the minimal degree of justice, more and more people are being unjustly incarcerated, and abused while under the "protection" of the state. Education – meaning the dissemination of information – is the major way to correct individual miscarriages of justice as well as a global correction. This is a moral issue, as well as a legal and pragmatic one."

Glenn Larkin, M.D. forensic pathologist, North Carolina

Chimps Kiko And Tommy Will Not Be Freed -- Appeals Court Refuses To Consider Denial of Habeas Corpus Petition

On May 8, 2018 the New York Court of Appeals **denied leave for** chimpanzees Kiko and Tommy to appeal the denial of their habeas corpus petitions that requested they be freed from unlawful detention. Kiko and Tommy are represented by The Nonhuman Rights Project (NhRP) based in Coral Springs, Florida. NhRP argues chimps have the legal rights of human beings. The ruling means the denial of Kiko and Tommy's habeas corpus petitions are final in New York's state courts.

The NhRP was seeking for New York to follow the lead of Argentina: **In April 2017** chimpanzee Cecilia became the non-human person to be freed from unlawful confinement after the granting of her writ of habeas corpus petition.

Tommy's habeas petitions

NhRP filed a habeas petition on behalf of Tommy on December 4, 2015. The petition alleged he was unlawfully detained in Gloversville, New York, and **requested the following** relief:

> a) require Respondents to justify their detention of a chimpanzee named Tommy,
> b) **order Tommy's immediate discharge**, and
> c) **order Tommy's transfer to an appropriate primate sanctuary**, which the NhRP suggests is Save the Chimps.

On December 23, 2015 New York County Supreme Court Justice Barbara Jaffe denied Tommy's petition -- which was his second petition -- **on the basis** its allegations were not "sufficiently distinct from those set forth in the first petition."

In December 2014 Tommy's first petition was **denied on appeal because**, Tommy "is not a 'person' entitled to the rights and protections afforded by the writ of habeas corpus" since, "unlike human beings, chimpanzees can't bear any legal duties, submit to societal responsibilities, or be held legally accountable for their actions." (*People Ex rel. v. Lavery*, 124 AD 3d 148, 150 (NY Appellate Div., 3rd Dept. 2014)

Tommy the chimpanzee (Nonhuman Rights Project)

Kiko's habeas petitions

NhRP filed a habeas petition on behalf of Kiko on January 7, 2016. The petition alleged he was unlawfully detained and **requested the following** relief:

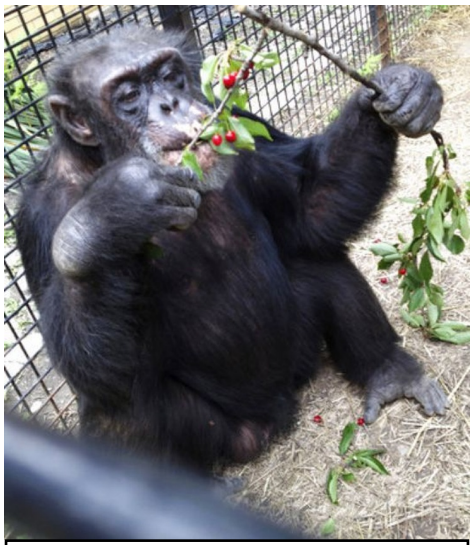
> A. Upon a determination that Kiko is being unlawfully detained, **ordering his immediate release and transfer forthwith to an appropriate primate sanctuary**;

On January 29, 2016 Justice Jaffe denied Kiko's petition -- which was his ***fifth petition*** -- **on the basis** it was a successive petition whose allegations and offers of proof were indistinguishable from the previous petitions that had been denied. Jaffe also stated that even if Kiko's petition "passed muster" to be considered on its merits, it would have to be denied based on the December 2014 New York appeals court ruling denying Tommy's first habeas petition.

Joint appeal for Kiko and Tommy

Jaffe's rulings denying the petitions of Kiko and Tommy were jointly appealed.

On June 8, 2017 the New York Supreme Court, Appellate Division First Judicial Department unanimously affirmed Jaffe's ruling denying the petitions of Kiko and Tommy on the basis they were successive petitions that didn't raise a new issue or new evidence to prove chimpanzees were "persons" entitled to habeas relief. (*Nonhuman Rights v Lavery*, 2017 NY Slip Op 04574 (NY Appellate Div., 1st Dept., 6-8-2017))



Kiko the chimpanzee at the nonprofit Primate Sanctuary in Niagara Falls, NY in July 2013 (AP)

NhRP's founder Steven M. Wise announced that Kiko and Tommy would request leave to appeal the ruling. Wise **stated in a** press release: "... we remain confident that Tommy's and Kiko's fundamental right to bodily liberty will be recognized as a matter of justice so that they too may experience the freedom they so desperately deserve."

On May 8, 2018 the New York Court of Appeals issued its unanimous (5-0) ruling denying leave for Kiko and Tommy to appeal the denial of their habeas corpus petition. The Court issued a one sentence ruling: "Motion for leave to appeal denied." However, Justice Eugene Fahey wrote a six-page concurring opinion that **stated in part**:

> "The inadequacy of the law as a vehicle to address some of our most difficult ethical dilemmas is on display in this matter. [1]
>
> If this Court were to grant petitioner leave to appeal, I would be most likely to vote to affirm pursuant to CPLR 7003 (b) (Successive petitions for writ). Accordingly, I concur in the Court's decision to deny leave. However, I write to underscore that denial of leave to appeal is not a decision on the merits of petitioner's claims. ... The lower courts in this appeal and related cases, in deciding that habeas corpus is unavailable to challenge the legality of the chimpanzees' confinement, rely in the first instance on dictionary definitions. The habeas corpus statute does not define "person," but dictionaries instruct us that the meaning of the word extends to any "entity . . . that is recognized by law as having most of the rights and duties of a human being. ...[2-3]
>
> The Appellate Division's conclusion that a chimpanzee cannot be considered a"person" and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species ... The better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus. ...[4]
>
> To treat a chimpanzee as if he or she had

Kiko cont. on p. 18

Habeas Corpus Petition Filed To Free Elephants Karen, Minnie and Beulah From Alleged Unlawful Detention

Freedom from alleged unlawful detention is being sought for elephants Karen, Minnie, and Beulah in a habeas corpus petition **filed in** Connecticut on June 11, 2018. The petition was filed in Rockville Superior Court by the Nonhuman Rights Project (NhRP) on behalf of the female elephants. The petition does not allege the elephants are being mistreated, only that they are being unlawfully detained. The cutting edge of habeas corpus law in the United States is the NhRP's effort to expand it to apply to non-humans.

The June 11 habeas petition was the second one filed in Connecticut on behalf of Karen, Minnie, and Beulah by the NhRP, that is based in Coral Springs, Florida. **The NhRP** states its mission is "... to secure legally recognized fundamental rights for nonhuman animals."

Minnie the elephant (Commerford Zoo)

The three elephants are owned by the **Commerford Zoo** headquartered in Goshen, Connecticut. The Commerford Zoo is a small family owned business that was founded by Robert W. Commerford more than 40 years ago. Its annual revenue is less than 25% of an average McDonald's restaurant.[1] It is a traveling zoo that presents kids fun fairs year-round, up and down the east coast. It has rides on elephants, camels, and ponies. Its petting zoo includes pygmy horses, goats, zebras, a kangaroo, a unicow, and other animals.

Commerford Zoo is on **PETA's hit list** of Roadside Zoos and Traveling Menageries, pleading: "Please do not patronize these exhibits."

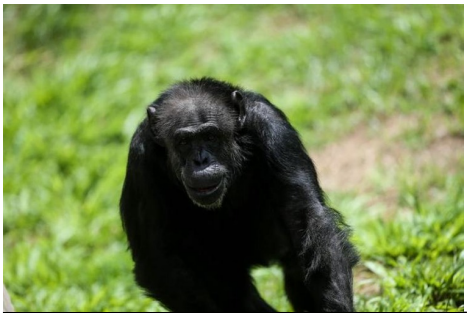
Laws in numerous large cities banning the use of an elephant in an entertainment show was a primary reason given by the Ringling Bros. and Barnum & Bailey Circus for their demise in May 2017 after **146 years** in business. The Ringling Bros. circus stopped using elephants in 2016. Children want to see elephants, and without elephants they couldn't sell enough tickets in major markets to stay in business. (The first circus in

Elephants cont. on p. 19

Kiko cont. from p. 17

no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect. ... [5]

Chimpanzees share at least 96% of their DNA with humans. They are autonomous, intelligent creatures. To solve this dilemma,we have to recognize its complexity and confront it. ... Although I concur in the Court's decision to deny leave to appeal now, I continue to question whether the Court was right to deny leave in the first instance. The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a "person," there is no doubt that it is not merely a thing." [6-7]



Cecilia, the Argentine female chimpanzee freed after having her habeas corpus petition granted (Jornadaonline.com)

Read the court's ruling and Justice Fahey's concurring opinion *In the Matter of Nonhuman Rights Project, Inc.,on Behalf of Tommy v. Patrick C. Lavery, et al.*, and *In the Matter of Nonhuman Rights Project, Inc.,on Behalf of Kiko v. Carmen Presti et al.*, Motion No. 2018-268 (NY Ct. of Appeal, 5-8-2018) at, **https://www.nycourts.gov/ctapps/Decisions/2018/May18/M2018-268opn18Decision.pdf**.

The court's ruling means that in New York state courts the denial of Kiko and Tommy's habeas corpus petitions are final. The NhRP has the option to appeal the ruling to federal court. However, no federal court has ruled chimpanzees are persons with standing to have a habeas petition considered on its merits.

The NhRP's webpage for Tommy is at, **https://www.nonhumanrights.org/client tommy/**.

The NhRP's webpage for Kiko is at, **https://www.nonhumanrights.org/client-kiko/**.

Justice Denied's article about Justice Jaffe's denial of Tommy and Kiko's habeas petitions: "Chimps Kiko And Tommy Denied Habeas Corpus Relief In New York," can be read at, **http://justicedenied.org/wordpress/archives/3701**.

Justice Denied **reported in April 2017** that Cecilia, a chimpanzee in Argentina, became the first non-human person in the world freed from illegal imprisonment by the granting of a writ of habeas corpus. Read "Cecilia Becomes First Non-Human Person Freed By Habeas Corpus From Illegal Imprisonment" at, **http://justicedenied.org/wordpress/archives/3609**.

Sources:

New York's top court refuses to free chimps from cages, *Reuters*, May 8, 2018

In the Matter of Nonhuman Rights Project, Inc.,on Behalf of Tommy v. Patrick C. Lavery, et al., and *In the Matter of Nonhuman Rights Project, Inc.,on Behalf of Kiko v. Carmen Presti et al.*, Motion No. 2018-268 (NY Ct. of Appeal, 5-8-2018) (Denying leave to appeal.)

Chimps Kiko And Tommy Denied Habeas Corpus Relief In New York, *Justice Denied*, June 14, 2017

Matter of Nonhuman Rights Project, Inc. *v Lavery*, 2017 NY Slip Op 04574 (NY Supreme Ct., Appellate Division, First Department, 6-8-2017) (Unanimous 5-0 decision affirming trial court's denial of habeas petitions for Kiko and Tommy on the basis they were successive petitions that didn't present new claims.)

Elephants cont. from p. 18

the U.S. -- the Bailey Circus established in 1806 -- had an elephant named "Old Bet" as its major attraction.)

On November 13, 2017 the NhRP filed a petition in Litchfield Superior Court that asserted the Commerford Zoo has owned Karen since 1984 (Born in 1981); Minnie since 1989 (Born in 1972); and Beulah since 1973 (Born in 1967). The petition claimed elephants are not "things" and Connecticut's common law of habeas corpus should be extended to consider them "legal persons." The petition demanded that Commerford Zoo "justify the denial of liberty, detention and imprisonment of Beulah, Minnie, and Karen, three illegally confined elephants..." The petition requested the court "order the immediate release of Beulah, Minnie, and Karen from such illegal confinement." It is believed to be the first habeas corpus petition ever filed in the United States on behalf of elephants.

The essence of the NhRP's argument is that since Karen, Minnie and Beulah haven't been convicted of a crime they are the victims of unlawful confinement and should be freed.

The habeas corpus petition was not filed under a statute, but Connecticut common law, which the NhRP asserted is "broad, flexible, and adaptable."

Commerford Zoo opposed the petition.

Superior Court Judge James Bentivegna **denied NhRP's petition** on December 26, 2017. His "Memorandum of Decision" stated:

> "The issue is whether the court should grant the petition for writ of habeas corpus because the elephants are "persons" entitled to liberty and equality for the purposes of habeas corpus. The court denies the petition on the ground that the court lacks subject matter jurisdiction and the petition is wholly frivolous on its face in legal terms."

Commerford Zoo animal

Beulah the elephant (Commerford Zoo)

Regarding the court's lack of subject matter jurisdiction, **Bentivegna wrote**:

> "Although for persons confined as a result of a criminal conviction, § 52-466 (a) (2) provides that an application for a writ of habeas corpus may be "made by or on behalf of an inmate," § 52-466 (a) (1) does *not* provide language regarding a petition being made "on behalf of the person whose noncriminal custody is in question."[4]

Regarding the petition being filed by the NhRP on behalf of the elephants, **Bentivegna wrote**:

> "The elephants, naturally, lack the competence and accessibility to bring an action for habeas on their own behalf. What is at issue here is whether the petitioner is "truly dedicated to the best interests of the [elephants]" []; and whether it has "some significant relationship with the [elephants]." Because the petitioner has failed to allege that it possesses *any* relationship with the elephants, the petitioner lacks standing. Thus the court need not reflect over the second prong.
>
> For the foregoing reasons, the court dismisses the petition for writ of habeas."[9]

In addition to ruling he lacked jurisdiction to consider the petition's claims on their merit, and the NhRP lacked standing to bring the petition on the elephants behalf, Bentivegna ruled: "The petition is wholly frivolous on its face" because it lacks the "possibility or probability of victory."[9] **Bentivegna wrote**:

> "Habeas corpus has been called "the great writ of liberty." [] Does the petitioner's theory that an elephant is a legal person entitled to those same liberties extended to you and I have a possibility or probability of victory? The petitioner is unable to point to any authority which has held so, but instead relies on basic *human* rights of freedom and equality, and points to expert averments of similarities between elephants and human beings as evidence that this court must forge new law. Based on the law as it stands today, this court cannot so find."
>
> For the foregoing reasons, the court dismisses the petition for writ of habeas, and points the petitioner to this state's laws prohibiting cruelty to animals; see §§ 22-329a and 53-247; as a potential alternative method of ensuring the well-being of any animal."[12]

The NhRP's petition presented no evidence any of the elephants are or have ever been treated with cruelty by the Commerford Zoo. In fact, Steven M. Wise, president and founder of the NhRP, **issued a statement** when the petition was filed: "This is not an animal welfare case. We do not claim the Commerford Zoo is violating any animal welfare statutes."

On February 27, 2018 a "Motion To Reargue And Leave To Amend" the petition **was denied by** Bentivegna on the basis the NhRP didn't present any "controlling principle of law" contrary to his decision, and the proposed amendments did not alter that the petition was "wholly frivolous on its face in legal terms."

The NhRP's appeal of Judge Bentivegna's rulings is pending in the Appellate Court of Connecticut.

On June 11, 2018 the **NhRP filed a** second habeas corpus petition in Connecticut on behalf of Karen, Minnie, and Beulah against Commerford Zoo. However, the second petition was filed in Rockville Superior Court. That petition made the same claims as the petition denied in Litchfield SC. The new information it did include was based on the New York Court of Appeals **refusal on** May 8, 2018 to grant leave for the NhRP to appeal the denial of a habeas corpus petition they had filed to free chimpanzees Kiko and Tommy from alleged unlawful detention. In that case Justice Eugene Fahey wrote a six-page concurring opinion in which **he stated**:

Elephants cont. on p. 20

Elephants cont. from p. 19

> "Although I concur in the Court's decision to deny leave to appeal now, *I continue to question whether the Court was right to deny leave in the first instance*. The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a "person," there is no doubt that it is not merely a thing." [6-7] (Underlining added.)

The NhRP second petition relies on Justice Fahey's statement to support that their habeas petition on behalf of the elephants is "not frivolous." The petition also includes an Affidavit by Connecticut attorney and legal ethics expert Mark A. Dubois **that states** regarding the NhRP's case:

> "In my professional opinion, this action is not frivolous, in whole or in part. Rather, as explained below, applying the relevant legal ethical standards, the case is supported by facts and an objectively reasonable argument for the expansion of the existing law."

Commerford Zoo is located within the judicial district of the Litchfield Superior Court where the NhRP filed its first petition that was denied and is now on appeal. Nevertheless, the NhRP asserts the Rockville Superior Court has jurisdiction over a second petition that is based on the same claims because the elephants "are owned by, and in the custody of, the Connecticut Respondents upon whom service of process will be delivered in Connecticut ...."

As of June 18, 2018 the Commerford Zoo has not responded to the second petition.

The Nonhuman Rights Project, Inc. has been in existence for more than 20 years. It was formed in 1995 and in April 1996 it was granted approval by the IRS as a 501(c)(3) non-profit "Organization to Prevent Cruelty to Animals." Since 2013 its activities have kicked into high gear according to the NhRP's Form 990's filed with the IRS. For example, in 2012 the NhRP had revenue of $17,544 and President Steven Wise received compensation of $0.00 for an average of 40 hours of work weekly. In 2013 the NhRP had revenue of $468,684 and Wise received compensation of $45,000 for an average of 60 hours of work weekly. In 2014 the NhRP had revenue of $458,294 and Wise received total compensation of $93,159 for an average of 60 hours of work weekly. In 2015 the NhRP had revenue of $824,640 and Wise was received total compensation of $194,544 for an average of 60 hours of work weekly. In 2016 the NhRP had revenue of $1,019,725 and Wise was received compensation of $184,100 for an average of 60 hours of work weekly. The NhRP does not disclose its contributors on its IRS Form 990, listing them as "RESTRICTED."

Previous *Justice Denied* articles regarding the effort to extend habeas corpus to nonhumans are:

April 17, 2017 article "Cecilia Becomes First Non-Human Person Freed By Habeas Corpus From Illegal Imprisonment" can be read at http://justicedenied.org/wordpress/archives/3609 . Cecilia was a chimpanzee in Argentina whose writ of habeas corpus was granted, and she became the first non-human in the world freed from unlawful detention in a zoo when in April 2017 she was moved to a Sanctuary of Large Apes in Sorocaba, Brazil.

June 14, 2017 article "Chimps Kiko And Tommy Denied Habeas Corpus Relief In New York" can be read at, **http://justicedenied.org/wordpress/archives/3701**. The article is about New York County Supreme Court Justice Barbara Jaffe's denial of chimpanzees Tommy and Kiko's habeas petitions to be freed from alleged unlawful detention.

May 11, 2018 article "Chimps Kiko And Tommy Will Not Be Freed — Appeals Court Refuses To Consider Denial of Habeas Corpus Petition" can be read at, **http://justicedenied.org/wordpress/archives/4299**.

Endnote:

[1] The annual revenue of Commerford Zoo is reported as $630,000 per year and it is employs about ten people. [Source: **https://www.manta.com/c/mm46q9l/r-w-commerfordson-inc**] The "Average annual sales for McDonald's franchises as of May 2014 is $2,600,000." [Source: **https://www.credibly.com/incredibly/business-loans-index/industries/mcdonalds-franchises/**]

Sources:

Beulah v commerford (litchfield jd) memorandum of decision - 12-26-2017

Elephants beulah, minnie & karen v commerford zoo, litchfield jud. dist sup ct. - habeas corpus petition - 11-13-17

Elephants beulah, minnie & karen v commerford zoo, litchfield jud. dist sup ct. - habeas corpus memorandum of law - 11-13-17

Elephants beulah, minnie & karen v commerford zoo, Rockville, CT jud. dist sup ct. - 2nd habeas corpus petition - filed 6-11-18

Elephants beulah, minnie & karen v commerford zoo, Rockville, CT jud. dist sup ct. - habeas corpus memorandum of law - 6-11-18

Affidavit of Mark A. Dubois, Nonhuman Rights Project, Inc. on behalf of Beulah, Minnie and Karen v. R.W. Commerford & Sons, Inc., No. TTD-CV-18-5010280-S, May 23, 2018

Nonhuman Rights Blog, **https://www.nonhumanrights.org/blog/category/cases/**.

First-Ever Nonhuman Rights Lawsuit Filed On Behalf Of Captive Elephants, Demanding Recognition Of Their Right To Bodily Liberty, Press Release, Nonhuman Rights Project, November 13, 2017

Commerford Zoo, **http://commerfordzoo.com**.

Roadside Zoos and Traveling Menageries, PETA, **https://www.peta.org/issues/animals-in-entertainment/zoos-pseudo-sanctuaries/factsheets-zoo-exhibitors/**

Nonhuman Rights Project, **https://www.nonhumanrights.org/**.

Elephants beulah, minnie & karen v commerford zoo, litchfield jud. dist sup ct. - lli-cv17-5009822-s - docket thru 6-12-2018.

Elephants beulah, minnie & karen v commerford zoo, rockville jud. dist sup ct. - ttd-cv18-5010280-s - docket thru 6-12-2018.

New York Governor Andrew Cuomo And State Lawmakers Agree To Suspend Creation Of Prosecutorial Misconduct Commission

New York Governor Andrew Cuomo and state lawmakers have agreed to suspend creation of the Prosecutorial Misconduct Commission that was authorized by a bill the state legislature passed in June 2018. Cuomo signed the bill into law in August 2018.

The Commission was empowered to investigate allegations of wrongdoing by prosecutors in New York. Prosecutors found to have committed wrongdoing could be punished with an admonishment or censure, or a recommendation of removal by the Governor.

It was to have been created on January 1, 2019.

The suspension was in response to a lawsuit filed in October 2018 against Cuomo and leaders of the New York State Senate and Assembly, by the New York State District Attorney's Association. The lawsuit challenged the constitutionality of numerous provisions of the law creating the Commission. The lawsuit sought a temporary restraining order to bar creation of the Commission until the lawsuit was resolved.

The Commission was to be comprised of eleven members: two each appointed by the governor, the assembly speaker and the senate majority leader; one each by the assembly minority leader and the senate minority leader; and three by the chief judge of the Court of Appeals.


New York Governor Andrew Cuomo

After Cuomo and lawmakers agreed to make a "chapter amendment" change in 2019 to the bill creating the Commission, the DA's Association agreed to stay the lawsuit pending passage and evaluation of those changes.

A Stipulation between the DA's Association and Cuomo and Senate and Assembly leaders was filed on December 7, 2018. Cuomo and the legislative leaders agreed they would not appoint any members to the Commission until the "chapter amendment" to the bill authorizing the Commission was passed and approved by the governor. The Stipulation stalled creation of the Commission since appointment of the members is the first step to it becoming operational.

The DA's Association remains opposed to creation of the Commission.

Read the Stipulation in *David Soares and District Attorney's Association of the State of New York v. The State of New York; Andrew M. Cuomo, et. al*, Index No. 906409-18 (Supreme Ct of NY, Albany County), (Stipulation, filed 12-7-2018) at, **https://drive.google.com/file/d/1BsltZ5sNtxPijmZAY3cxllj7vpI5uJmT/view**.

The following are articles Justice Denied has published about the New York Prosecutorial Misconduct Bill:

** Prosecutorial Misconduct Commission Bill Passed By New York Legislature And Sent To Governor For Signature, Justice Denied, June 25, 2018. Online at, **http://justicedenied.org/wordpress/archives/4395**.

** District Attorney's Urge New York Governor Cuomo To Veto Prosecutorial Misconduct Commission Bill, Justice Denied, July 23, 2018. Online at, **http://justicedenied.org/wordpress/archives/4437**.

** Eliminating Absolute Immunity Is Real Solution To Prosecutor Misconduct, Gov. Cuomo Should Veto Misconduct Commission Bill, Justice Denied Editorial, July 25, 2018. Online at, **http://justicedenied.org/wordpress/archives/4441**.

Sources:

David Soares and District Attorney's Association of the State of New York *v. The State of New York; Andrew M. Cuomo, et. al*, Index No. 906409-18 (Supreme Ct of NY, Albany County), (Verified Complaint For Declaratory And Injunctive Relief, filed 10-17-2018).

David Soares and District Attorney's Association of the State of New York *v. The State of New York; Andrew M. Cuomo, et. al*, Index No. 906409-18 (Supreme Ct of NY, Albany County), (Stipulation, filed 12-7-2018).

"**Cuomo, Lawmakers Agree to Pause Prosecutorial Conduct Watchdog**: The agreement prohibits Cuomo and lawmakers from making any immediate appointments to the commission when the enacting statute takes effect at the beginning of January, which will effectively delay its formation indefinitely," By Dan M. Clark, *New York Law Journal*, December 10, 2018.

"**DAs File Constitutional Challenge To Prosecutorial Conduct Commission**," By Dan M. Clark, *New York Law Journal*, October 17, 2018.

"**Prosecutorial Misconduct Commission Bill Passed** By New York Legislature And Sent To Governor For Signature," By Hans Sherrer, *Justice Denied*, June 25, 2018.

"**District Attorney's Urge New York Governor Cuomo** To Veto Prosecutorial Misconduct Commission Bill," By Hans Sherrer, *Justice Denied*, July 23, 2018.

"**Eliminating Absolute Immunity Is Real Solution** To Prosecutor Misconduct, Gov. Cuomo Should Veto Misconduct Commission Bill," Justice Denied Editorial, *Justice Denied*, July 25, 2018.

The following JD Editorial was published online prior to the agreement in December 2018 to suspend creation of the Prosecutor Misconduct Commission The agreement didn't diminish the editorial's importance.

Eliminating Absolute Immunity Is Real Solution To Prosecutor Misconduct, Gov. Cuomo Should Veto Misconduct Commission Bill

Justice Denied Editorial

Justice Denied supports New York Governor Andrew Cuomo vetoing Senate Bill 2412 that would create a Prosecutorial Misconduct Commission. The Bill was passed in June 2018 by both the NY Senate and Assembly, and sent to Cuomo to either sign into law or veto.

Senate Bill 2412 is a feel good band-aid that doesn't meaningfully deal with the very real problem of dishonest, power drunk, or just plain negligent prosecutors.

The Bill authorizes creation of a $5.5 million a year government bureaucracy to investigate and evaluate an allegation of misconduct made against a prosecutor. If after completion of the process the prosecutor is found to have committed misconduct the Commission's three possible punishment recommendations are: admonishment; censure; or that the governor remove the prosecutor from office for cause. A prosecutor can appeal the Commission's factual and legal findings, and recommended punishment to the Court of Appeals.

Admonishment and censure are meaningless slaps on the hand: "You naughty boy (or girl), don't do that again." Removal from office would likely need to involve

Editorial cont. on p. 22

Editorial cont. from p. 21

serious criminal activity such as election fraud, theft of money and/or property, abuse of authority, etc. A prosecutor would likely be criminally indicted and voluntarily resign or be forcibly removed by existing procedures, for any conduct that would warrant the Commission recommending removal by the governor.

That is borne out by Suffolk County District Attorney Thomas Spota announcing his resignation the day after he was federally indicted in October 2017 for allegedly attempting to cover-up the assault of a prisoner by former Suffolk County police commissioner James Burke, and intimidating witnesses to sweep the prisoner's assault under the rug.

Thus, the Commission can expect to deal with alleged misconduct that if proven would result in a slap on the hand: admonishment or censure.

A recent *Justice Denied* article detailed that in the last ten years there have been 41 known exonerations in New York that involved some form of prosecutor misconduct.[1] None of those cases involved alleged misconduct that would have resulted in a recommendation of removal.[2]

So the Bill would create a new state bureaucracy costing many millions a year that after a one to two year investigation and deliberation process, can *at most* be expected to scold a prosecutor for being naughty. (The Bill designates no source of funding for the Commission's operation.)

The Prosecutorial Misconduct Commission Bill should be vetoed by Gov. Cuomo.

Proponents of the Bill who say that something ... anything ... even the crumbs it offers are better than nothing are gravely mistaken.

Eliminating absolute prosecutor immunity as a defense from *state* civil lawsuits is a viable way to hold *state* prosecutors *personally financially accountable* for seriously wayward conduct that does not saddle taxpayers with the exorbitant cost of paying for a new bureaucracy that may slap the hand of naughty prosecutors. The existing court system is designed to handle lawsuits.

Dirty prosecutors don't deserve a bureaucratic slap on the hand, but a legal round-house punch that sends them financially reeling.

A prosecutor's absolute immunity for any action taken in a case in the course of the judicial process is a judge constructed protection. The U.S. Supreme Court made that very clear in its primary case on prosecutor misconduct: *Imbler v. Pachtman*, 424 U.S. 409 (1976). The Supreme Court ruled the doctrine of absolute immunity protects a prosecutor from a *federal civil rights lawsuit under 42 U.S.C. 1983* for conduct that is an "integral part of the judicial process." (430) To be successful a federal civil rights lawsuit must prove the violation of a person's constitutional right(s) by a non-immunized state or federal agent.

Our legal system is wildly skewed. A minimum-wage convenience store clerk who doesn't have a high school diploma is personally liable for their work-place actions that cause harm to someone. Yet, a highly paid prosecutor who is both a college and a law school graduate is given absolute immunity for their deliberate or negligent harmful actions that at worst can lead to an innocent person spending decades in prison, or even being executed.

The absurdity of absolute immunity is illustrated by the fact that Jeff Bezos and Bill Gates are the two wealthiest men in the world, with a bulls-eye on their back for every ambulance chaser in the world, and they have absolutely zero immunity from being sued by anyone they personally harm.

Absolute prosecutor immunity is why prosecutor offices across the United States are infested with lawyers who are horrible human beings attracted to a job where they can routinely inflict pain on others with no meaningful accountability.

New York can enact a *state* law specifically permitting prosecutors to be sued in *state* court and making them *personally financially liable for a judgment* based on harm to a person caused by their actions that include: malicious prosecution; deliberately concealing evidence; suborning perjury; threatening or coercing witnesses; lying to a grand jury, judge, jury, defendant, and/or defense attorney; etc. No alleged violation of a constitutional right would be necessary. The issue wouldn't be a violation of a person's constitutional right, but that the prosecutor caused them harm by engaging in the alleged untoward conduct. Just like a person can be sued for damages caused by punching someone in the face and breaking their nose, or a person can be sued for causing *non-physical harm* through defamation, slander, or libel.

If New York had such a law, a number of the 41 people exonerated in the last ten years whose case involved prosecutor misconduct could have filed a lawsuit seeking money damages from the prosecutors involved in their case. Not just the wrongly convicted, but other victims of recalcitrant prosecutors also could pursue a lawsuit.

Justice Denied will support a bill in New York state, or any other state, that specifically strips that state's prosecutors of absolute immunity and makes them personally financially liable for a judgment in a state court lawsuit based on their indefensible actions causing harm to an individual.

Endnotes:

[1] "District Attorney's Urge New York Governor Cuomo To Veto Prosecutorial Misconduct Commission Bill," Justice Denied, July 23, 2018, **http://tinyurl.com/y85y8qpa**

[2] See, Innocents Database, **http://forejustice.org/exonerations.htm**

Sources:

"District Attorney's Urge New York Governor Cuomo To Veto Prosecutorial Misconduct Commission Bill," Justice Denied, July 23, 2018, **http://tinyurl.com/y85y8qpa**.

Innocents Database of Exonerated Persons, **http://forejustice.org/exonerations.htm**

Visit Justice Denied's Facebook Page

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

Visit Justice Denied's Website

www.justicedenied.org

Back issues of *Justice: Denied* can be read, there are links to wrongful conviction websites, and other information related to wrongful convictions is available. JD's online Bookshop includes more than 70 wrongful conviction books, and JD's Videoshop includes many dozens of wrongful conviction movies and documentaries.

129,610 Cases Now In Innocents Database

The Innocents Database now includes 129,610 cases: 27,303 from the U.S., and 102,307 from 119 other countries. The database includes 26,389 U.S. cases from 2018 to 1989, when the first DNA exoneration occurred.

The **Innocents Database** is the world's largest database of exonerated persons, and it includes all identifiable exonerations in the United States, as well as internationally. The Innocents Database includes:

- 605 innocent people sentenced to death.
- 1,101 innocent people sentenced to life in prison.
- 2,324 innocent people convicted of a homicide related crime.
- 1,153 innocent people convicted of a sexual assault related crime.
- 839 innocent people were convicted after a false confession by him or herself or a co-defendant.
- 124,314 innocent people were convicted of a crime that never occurred.
- 233 innocent people were posthumously exonerated by a court or a pardon.
- 90 people were convicted of a crime when they were in another city, state or country from where the crime occurred.
- 2,068 innocent people had 1 or more co-defendants. The most innocent co-defendants in any one case was 36, and 25 cases had 10 or more co-defendants.
- 12% of wrongly convicted persons are women.
- The average for all exonerated persons is 7-1/8 years imprisonment before their release.
- 31 is the average age when a person is wrongly imprisoned.
- Cases of innocent people convicted in 120 countries are in the database.
- 27,303 cases involve a person convicted in the United States.
- 102,307 cases involve a person convicted in a country other than the U.S.

Click here to go to the Innocents Database at www.forejustice.org/exonerations.htm.

All the cases are supported by public sources for research. Those sources include court rulings, newspaper and magazine articles, and books. The database is linked to from **Justice Denied's** website.

User defined searches, and user defined sorts of any combination of more than 100 columns of data can be made for:
U. S. cases from 1989 to 2017;
U. S. cases prior to 1989;
and, **International cases up to 2017**

The database can now be sorted on a Compensation column to find such information as: the compensation awarded to persons for any year or state, or the compensation awarded in a particular type of case, such as those involving DNA or a false confession, etc.

The Innocents Database is an ongoing project that began more than 20 years ago, and now contains millions of bytes of data related to exonerations. The accessibility and usefulness of that data to the public and researchers is improved by the ability to search and sort for specific information.

Email a question, correction, or suggested addition to the Innocents Database to: **innocents@forejustice.org**.

Visit the Innocents Database

Includes details about more than 129,000 wrongly convicted people from the U.S. and other countries.
www.forejustice.org/exonerations.htm

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**

3rd Revised and Updated Edition of "Kirstin Blaise Lobato's Unreasonable Conviction" Online!

The third revised and updated edition of ***Kirstin Blaise Lobato's Unreasonable Conviction*** — *Possibility of Guilt Replaces Proof Beyond A Reasonable Doubt* is available in PDF format to be read or downloaded at no charge for personal use from **Justice Denied's** website.*

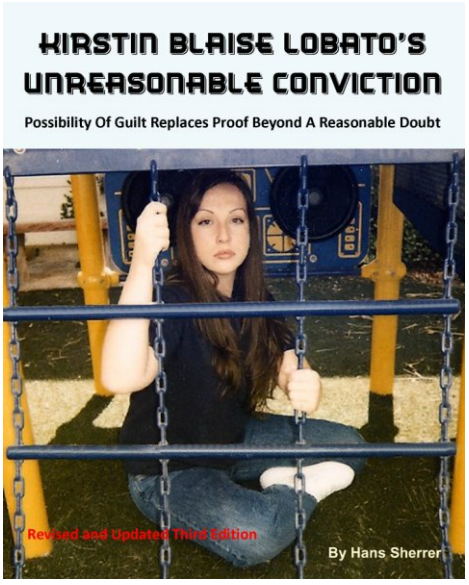
The book details how Kirstin Lobato has twice been convicted of a July 8, 2001 Las Vegas homicide when the prosecution doesn't deny it has no physical, forensic, eyewitness, confession, informant, surveillance video or documentary evidence she was in Las Vegas at any time on the day of the crime. The prosecution also concedes she was at her home 165 miles from Las Vegas at the time new forensic entomology and forensic pathology evidence conclusively proves the man died between 8 p.m. and 10 p.m. The book also details that in 2001 the 18-year-old Ms. Lobato was prosecuted even though the Las Vegas Metropolitan Police Department and the Clark County District Attorney's Office obtained evidence three days after her arrest she is innocent.

The 3rd revised edition has 57 pages of new information, that includes:

* An updated Timeline of Ms. Lobato's case from 2001 to the present, that begins on p. 10.

* Six new sub-chapters in the Appendix that begin on page 150. Those include a Power Point presentation of Ms. Lobato's case and the new evidence in her habeas corpus petition currently under review by the Nevada Supreme Court. Ms. Lobato's petition includes new evidence her jury didn't hear by more than two dozen expert, alibi, and third-party culprit witnesses that supports her actual innocence.

The 232-page book written by *Justice Denied's* editor and publisher Hans Sherrer is supported by 427 source endnotes. In documents filed in the Nevada Supreme Court, the Clark County District Attorney's Office and the State of Nevada don't assert there is a single factual error in the book.



Click here to download at no charge *Kirstin Blaise Lobato's Unreasonable Conviction* in PDF format from **www.justicedenied.org/kbl.htm**.

Justice Denied's webpage with information about the Kirstin Lobato case is **www.justicedenied.org/kbl.htm**.

* The book can be printed at no charge for non-commercial use only.

High Fence Foodie Cookbook Now Available!

High Fence Foodie is **a new cookbook** by Texas prisoner Celeste Johnson that was recently published by The Justice Institute.

High Fence Foodie has more than two hundred easy to prepare recipes for meals, soups, snacks, desserts, and beverages. These recipes can be made from basic items a prisoner can purchase from their unit's commissary, or people on the outside can purchase from a convenience or grocery store. They are written by Celeste Johnson, a woman imprisoned in Texas who loves to cook and try out new combinations of the simple food ingredients available to her.

High Fence Foodie's all new recipes are a follow-up to the more than 200 recipes in *From The Big House To Your House* that was written by Celeste Johnson and five fellow prisoners at the Mountain View Unit, a woman's prison in Gatesville, Texas.

From The Big House To Your House received rave reviews on Amazon.com, with 75% of reviewers giving it 4 or 5 stars! Some of the comments are:

"A lot of the recipes are very imaginative, and fun to make. Well worth the money." J.C.

"I loved the food and was inspired by the can-do attitude of the ladies involved with this project." Dan

"My daughter got this for her husband for father's day. He loves using it!!" J.H.

"I am a college student making a limited income and these recipes are great and fulfilling for people like me who don'thave a ton of $ to spend on groceries." Alicia

"I sent this to my daughter. She absolutely loves this little cookbook!" D. G.

High Fence Foodie continues the high standard of *From The Big House To Your House*! Celeste hopes her recipes will ignite a reader's taste buds as well as spark their imagination to explore unlimited creations of their own! She encourages substitutions to a reader's individual tastes or availability of ingredients. She is confident users of her recipes will enjoy creating a home-felt comfort whether behind the High Fence, or at Your House!

Celeste Johnson does not financially profit from sales of *High Fence Foodie*. All profits from the book's sale are donated to **The Justice Institute** Justice Denied to contribute to its work on behalf of wrongly convicted persons.

$14.95

116 pages, softcover

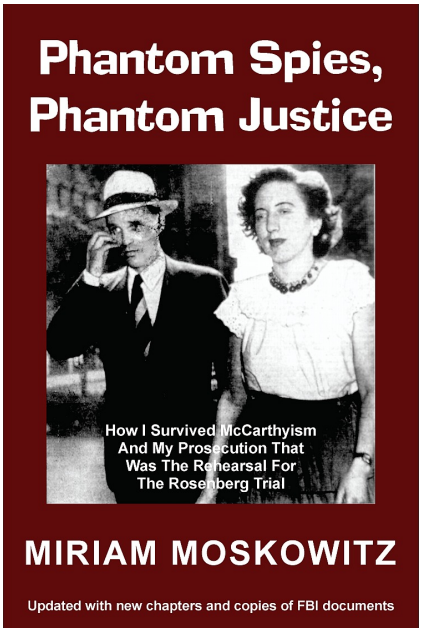
Order from Amazon.com at,

http://tinyurl.com/y8lgylwo

Phantom Spies, Phantom Justice

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, allegedly 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.

$19.95

302 pages, softcover

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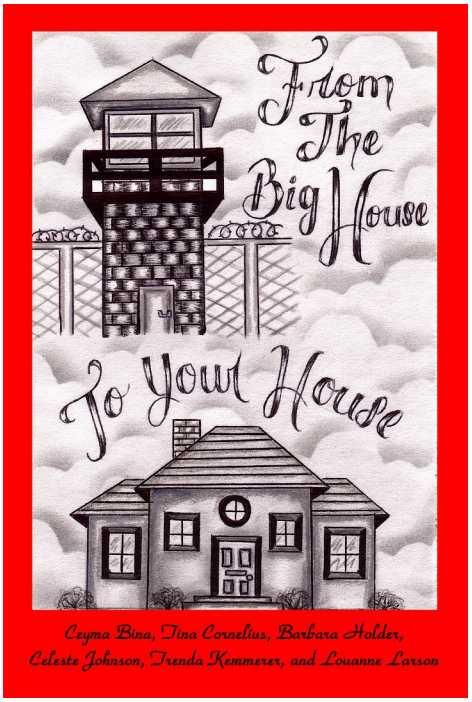

FROM THE BIG HOUSE TO YOUR HOUSE

Cooking in prison

With

Ceyma Bina, Tina Cornelius, Barbara Holder, Celeste Johnson, Trenda Kemmerer, and Louanne Larson

From The Big House To Your House has two hundred easy to prepare recipes for meals, snacks and desserts. Written by six women imprisoned in Texas, the recipes can be made from basic items a prisoner can purchase from their commissary, or people on the outside can purchase from a convenience or grocery store.

From The Big House To Your House is the result of the cooking experiences of six women while confined at the Mountain View Unit, a woman's prison in Gatesville, Texas. They met and bonded in the G-3 dorm housing only prisoners with a sentence in excess of 50 years. While there isn't much freedom to be found when incarcerated, using the commissary to cook what YOU want offers a wonderful avenue for creativity and enjoyment! They hope these recipes will ignite your taste buds as well as spark your imagination to explore unlimited creations of your own! They encourage you to make substitutions to your individual tastes and/or availability of ingredients. They are confident you will enjoy the liberty found in creating a home-felt comfort whether you are in the Big House, or Your House!

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Edwin M. Borchard – Convicting The Innocent

Edwin M. Borchard – Convicting The Innocent and State Indemnity For Errors Of Criminal Justice has been published by The Justice Institute/Justice Denied.

Yale University Law School Professor Edwin Borchard was an early pioneer in exposing the causes of wrongful convictions and the inadequacy of compensation for exonerated persons in the United States. So it is important that it be remembered his works laid the foundation for today's advocates for wrongly convicted persons, and the encouragement of public policies that may prevent wrongful convictions and ensure adequate indemnification when they occur.

This 358-page book includes Borchard's key works *European Systems Of State Indemnity For Errors of Criminal Justice*, and *Convicting The Innocent: Sixty-Five Actual Errors of Criminal Justice*. The Table of Contents is:

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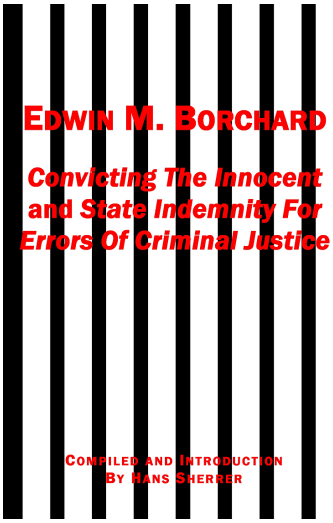

Convicting the Innocent (Chapter 4) has not lost its luster as one of the most insightful books published on the topic of wrongful convictions. Seventy-one years after its publication the multitude of causes underlying the cases of injustice it details not only continue to plague the legal system in the United States, but they are arguably more prevalent today than when the book was published, with the exception of confessions extracted by physical violence.

Compensating exonerated persons is as topical a subject as it was one hundred years after Borchard's article about indemnifying wrongly convicted persons. Borchard article (Chapter 3) makes it clear that many European countries were more advanced in providing indemnification 100 years and more ago, than is the norm in the United States in 2015.

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***Justice:Denied* Disclaimer**

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

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Prison Legal News is a monthly magazine reporting on prisoner rights and prison conditions of confinement issues. Send $3 for sample issue or request an info packet. Write: PLN, PO Box 1151,1013 Lucerne Ave., Lake Worth, FL 33460.

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Dehumanization Is Not An Option

An Inquiry Into Law Enforcement and Prison Behavior

By Hans Sherrer

This compilation of essays and reviews explains that the dehumanization characteristic of institutionalized law enforcement processes is as predictable as it is inevitable. The beginning point of thinking about alternatives to the dehumanizing aspects of law enforcement systems is understanding their causes. The essays include:

- *Quiet Rage*: The Stanford Prison Experiment
- Obedience To Authority Is Endemic
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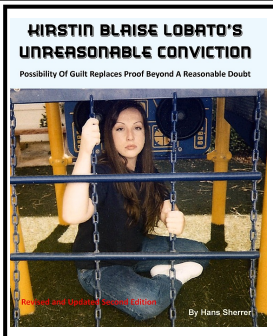

This is the story of Kirstin Lobato, who was 18 when charged in 2001 with the murder of a homeless man in Las Vegas. She was convicted of voluntary manslaughter and other charges in 2006 and she is currently serving a sentence of 13-35 years in Nevada. *Kirstin Blaise Lobato's Unreasonable Conviction* documents:

- She had never met the homeless man and had never been to where he was killed.
- No physical forensic, eyewitness or confession evidence ties her to his death.
- At the time of his death she was 170 miles north of Las Vegas in the small rural town of Panaca, Nevada where she lived with her parents.

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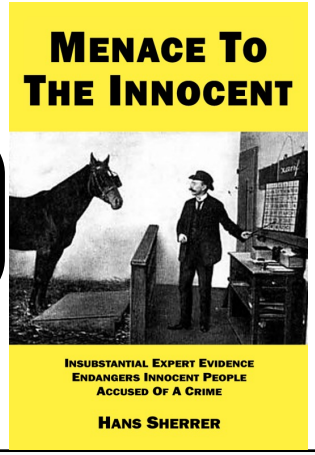
See page 11 for details!



Menace To The Innocent:

Insubstantial Expert Evidence Endangers Innocent People Accused Of A Crime

By Hans Sherrer, *Justice Denied's* Editor & Publisher
Read about the book with order information from Amazon.com on page 12.

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Read back issues, there are links to wrongful conviction websites and JD's Blog and Facebook pages, and other information related to wrongful convictions is available. *JD's* online BookShop includes almost 100 wrongful conviction books, and *JD's* VideoShop includes dozens of wrongful conviction movies and documentaries.

In 1895 the U.S. Supreme Court formally entered the concept of "presumption of innocence" into American jurisprudence in the case of *Coffin vs. United States*, 156 U.S. 432 (1895): "The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumptio juris*, demonstrates that it is evidence in favor of the accused."

JUSTICE DENIED

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20,000 NYC Marijuana Convictions Could Be Overturned

More than 20,000 misdemeanor marijuana convictions could be vacated in Brooklyn, New York under a program approved by the Kings County DA's Office. People with convictions for "violent felonies and sex offenses" are not be eligible to have their misdemeanor marijuana conviction(s) vacated under the program.

See pgs. 8

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.