

JUSTICE DENIED



The Magazine for the
Wrongly Convicted

The Innocent are Crippled by Inadequate Legal Representation - see p. 11



Orlando Sentinel

Alan Yurko

Conviction of murdering his infant son vacated and released in August 2004 after 7 years of wrongful imprisonment.

See page 9



The Virginian-Pilot

Arthur Whitfield

Convictions of raping two women vacated and released in August 2004 after 22 years of wrongful imprisonment.

See page 4

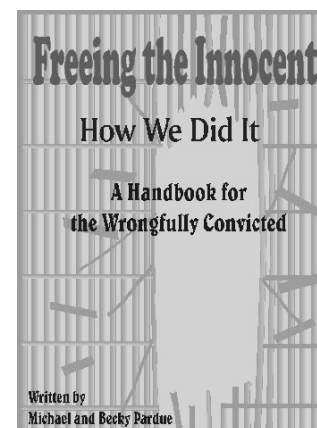


Florida DOC website

Kevin Coleman

Murder conviction vacated and released in September 2004 after 13 years of wrongful imprisonment.

See page 9



Freeing the Innocent

By Michael and Becky Pardue
The most important self-help manual ever written for the wrongly convicted.

See review on page 7

NOW AVAILABLE
From Justice:Denied
See page 27

In This Issue

Was Donald McDonald Convicted by an Impossible Crime Theory?

Johnnie Savory - Coerced into a False Confession at 14 years old?

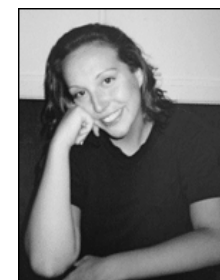
Is Alex Popov an Innocent Man Marked for Deportation?

Did Mark Kirk Start a Deadly Fire With an Unburnable Substance?

FL Judges Allow Prosecutors to Extract Pleas From the Innocent

Ken Marsh Exonerated of Murder After 21 Years Imprisonment

Washington Judges Conceal Right To Counsel From Defendants



Free Kirstin website

Kirstin Lobato

Conviction of murdering a man when she was 170 miles from the crime scene vacated in September 2004. Retrial ordered by NV Supreme Ct.

See page 5

Issue 26
Fall 2004

Justice:Denied - Issue 26, Fall 2004

Table of Contents

Impossible Prosecution Theory of a Woman's Disappearance - The Donald McDonald Story _____	3
"I am free!" - Arthur Whitfield Exonerated After 22 Years Imprisonment _____	4
Journey For Justice - The Johnnie Lee Savory Story _____	4
Las Vegas Police and Prosecutors Frame Woman 170 Miles From Murder Scene - Kirstin Lobato's "Very Peculiar Story" _____	5
"Legal" Immigrants Not Convicted of Any Crime Are Being Deported By Homeland Security As Criminals _____	6
An Innocent Alex Popov Is Trapped in a Homeland Security Bureaucratic Nightmare _____	6
Freeing The Innocent: How We Did It - Review of Michael and Becky Pardue's self-help manual _____	7
Convicted of Starting Deadly Fire with Unburnable Substance - The Mark Kirk Story _____	8
Florida Prosecutors Permitted To Extract Pleas From Innocent Defendants Granted A New Trial _____	9
Alan Yurko's Murder Conviction is Vacated! _____	9
Kevin Coleman's Murder Conviction Tossed After 13 Years Imprisonment _____	9
Ken Marsh Exonerated of Murder on September 3, 2004 _____	10
Inadequate Legal Representation Hurts the Innocent Most of All _____	11
Gideon Unfulfilled - The Failure of Indigent Defense _____	11
WA Judges Conceal Right to Counsel From Defendants _____	11
The High Cost of Free Defense _____	12
"Bad Lawyering" - How Defense Attorneys Help Convict the Innocent _____	12
The Complicity of Judges In Wrongful Convictions _____	24
Article Submission Guidelines and Prisoner Mail Team _____	26
In the Next Issue of Justice:Denied _____	27

Message From The Editor

Welcome to a new edition of *Justice:Denied* magazine,

Justice Denied is an all-volunteer organization, so everyone involved in it has to carve time from the many everyday demands in their life to handle their JD tasks. That is one reason we emphasize that all prisoner mail and stories go to the JD team member handling mail for the state where the prisoner is located. A list of that information is on page 26, and it is also on JD's website at, <http://justicedenied.org>. However I must confess I'm frustrated by people who have continued to send prisoner mail and stories to JD's Coquille address. When that happens the time has to be taken to forward it to the correct mail team member. This isn't a minor problem for JD.

It will help us get a handle on the mail sent to our Coquille address if somewhere on an envelope you put a M for a membership (or even spell it out), a D for a donation, an I for an info request, a S for a sponsorship (advertising), etc.

To inmates: Please do share your JD with others, but please point out to these people that there is a list of addresses where the right address may be found for each area of the country. Also, if any of you have friends on the outside, tell them to go to our web site for more information.

Thank you for your understanding,

This is the last JD issue for 2004. So please remember us for a year-end donation. We have a notice about that on the last page. Keep in mind that we must prove each year that we have public support.

Thank you for your continuing support of the unique effort that is Justice Denied.

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

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

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



Information About Justice:Denied

A six issue membership to *Justice:Denied* magazine cost \$10 for prisoners and \$20 for all other people and organizations. (See note below) Prisoners can pay with stamps and pre-stamped envelopes. A sample issue costs \$2. An information packet will be sent with requests that include a 37¢ stamp or a pre-stamped envelope (Please write INFO on the envelope). Write: Justice Denied - Info, PO Box 881, Coquille, OR 97423

DO NOT SEND JUSTICE:DENIED ANY LEGAL WORK!

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

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

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

The Justice Institute
PO Box 881
Coquille, OR 97423

Note: A membership does not confer any rights or responsibilities on any person or organization: It only entitles a donor to the receipt of a given number of *Justice:Denied* issues.

Justice:Denied staff persons editing or writing articles in this issue:

Clara A.T. Boggs, Editor in Chief and Co-publisher
Natalie Smith Parra, Editor
Sheila Howard, Editor
Karyse Philips, Editor
Lana Nielsen, Volunteer Coordinator
Melissa Sanders-Rivera, Information Requests
Hans Sherrer, Co-publisher (Contact: PO Box 66291, Seattle, WA 98166)

Impossible Prosecution Theory of a Woman's Disappearance The Donald McDonald Story

By Donald McDonald

Edited by Natalie Smith Parra, JD Editor

My name is Donald Charles McDonald, but my nickname since childhood has been Mac. I have been wrongly imprisoned in the state of Alaska for over 18 years for a murder I did not commit.

I lived on Kodiak Island in 1986. That is where I was arrested along with James (Jim) John Kerwin and Jack Anton Ibach, in the disappearance of Jack's ex-wife Laura Lee Ibach (Henderson) on March 28, 1986. I met Jim Kerwin in 1985 and we became casual friends. Laura Ibach was a woman friend of mine who was the ex-wife of Jack Ibach, who I had seen several times around Kodiak, but didn't know.

As you will see, the prosecution's case hinged on the supposition that Laura and I were strangers who hadn't met prior to about 3 p.m. on March 28, 1986. However our friendship was attested to at my trial (in Anchorage) by at least two witnesses, Laura's friend Debbie Lesser, and my friend Jack Buckalew. They both testified that Laura and I had been introduced to each other prior to March 28th and that Laura, several of her friends, and I, had socialized at Kodiak bars on multiple occasions.

The Events of March 28, 1986

On the day of Laura's disappearance, I went to see her at the Kodiak Women's Resource Center (KWRCC) around 3 p.m. That is where Laura worked, and I asked her if she would be my date at a street dance I was co-hosting the next day, to raise money for Kodiak's Hope House (a drug and alcohol rehabilitation facility) where I was residing. Laura politely declined my invitation, but said she might see me there. While I was at the KWRCC, Laura asked me if I could find her some cocaine. She then told me she would be on Shelikof Street to meet some people around 9 p.m., and asked me if I could come by and let her know whether or not I could find her the drugs. I had been out of the world of illegal drugs for quite some time so I never intended to look for any cocaine for Laura. Since I had been clean and sober for months I wasn't going to find her any drugs, but I didn't tell her that outright because I didn't want to tick her off. Although it was the reason for me to see Laura for what would be the last time, and it may have had something to do with her disappearance, the judge barred any mention of Laura's drug use at both my trial, and my retrial.

On the evening of March 28, 1986, Jim and I ate dinner at Reentry Dorms, and then went to McDonald's restaurant for dessert. The housemother where I lived, Gladys Baldwin, accompanied us. We drove around for a short time and then took Gladys back to Reentry Dorms because she was tired. Jim and I decided to continue our Friday night cruise around the town of Kodiak. We drove south on Shelikof Street to its southern terminus city dock. I must guess it was about 9 p.m., since I did not have a clock in my van. Laura came up to my van and got in. However she left after five minutes at the most, when I told her I wasn't going to find her any cocaine. When she exited my van, Laura must have walked toward the B&B Bar, opposite of the way my van was parked. I never saw her again. After Laura left my van, Jim and I remained parked for several minutes while I started the engine and warmed it up before leaving. It was a Friday night and we cruised around town some more before I went home around 10:00 p.m. I told Jim he could sleep in my van.

Matthew (Matt) D. Jamin was Laura's divorce lawyer. Jack

Ibach and Laura Henderson, due to the bifurcated divorce, shared custody of the couple's daughters and Jack approved of that arrangement. However Laura was seeking full custody so she and the children could move to Oregon with her parents. With shared custody she would be unable to move the children out of state. Albert (Al) Huff Ruble was a private investigator who worked with Jamin on cases such as Laura's custody dispute.

Although Laura said nothing to me about it when I saw her that afternoon, two of Laura's co-workers later told the police that she told them she was planning to meet "Matt" at 9 p.m. near the B&B Bar on Shelikof Street, down by the harbor. The B&B Bar and the small boat harbor are about 20 yards apart at the opposite end of the road from the King Crab Cannery. Suzanne Hinson, one of Laura's co-workers, wrote in her March 29th Kodiak Police Department (KPD) statement that Laura told her "Matt had a tape." There has never been an adequate explanation about the 9 p.m. meeting that Hinson said Laura was to have with Matt - after she left my van - at what happened to be her last known whereabouts. The contents of the mysterious tape - or if it ever existed - is likewise unknown.

Another one of Laura's co-workers told a little different version of Laura's planned meeting. She said Laura told her that Ruble and Matt Jamin would be "watching on" at 9 p.m. on Shelikof Street, because she never met and didn't know the man who was supposedly going to give her a tape to use against her ex-husband in their custody dispute.

The national television program Inside Edition did a segment on my case. They recreated the prosecution's scenario at the cliff where Laura was allegedly tossed into the ocean, with the same result - it is impossible for two men the size of Jim Kerwin and me to toss a bag with a 150 pound body far enough away from the face of the cliff to reach the high tide line at Monashka Bay.

Although some of Laura's actions and words after 3 p.m. on March 28th are open for interpretation, one thing is certain: It is impossible that Laura was referring to me, because I not only knew Laura, but I had seen and talked with her for 10-15 minutes at the KWRCC that very afternoon, and there were witnesses to verify it. Yet after Laura's disappearance, the police and prosecutors choose this as the version they wanted to accept as true, perhaps because the other version directly implicated Matt Jamin and Al Ruble in Laura's disappearance. However the only way I could be implicated as the mysterious stranger was for the police and prosecutors to claim that I had never met her - which is exactly what they did.

Jamin's version of the events of March 28th, is that he met with Laura at his office around 4 p.m. He says she told him she was going to meet "this fellow" later that evening to get information to use against her ex-husband. Jamin said he called Ruble to get his opinion on the situation, and that they decided Ruble would conduct surveillance of Laura that night.

Ruble testified he was alone on Shelikof Street, and even

though he was supposedly there to conduct surveillance, he doesn't have a photo log of the events around 9 p.m. He says that around 9:08 p.m. he drove north on Shelikof since Laura was late, and he noticed Laura sitting in a white van. Ruble claims he continued on about 100 yards, parked, and then walked toward the van before turning and going around a building. Ruble says that when he emerged from behind the north side of the Cannery dorm building the white van was gone, and although the car she had been driving was parked there, he didn't see Laura.

Jamin and Ruble both testified that at around 9:20 p.m. they simultaneously reached the parking lot of Jamin's law office building for an arranged 9:30 meeting with Laura. (To demonstrate how contrived this story is, ask yourself, when was the last time *your* lawyer met you at *his* office to discuss business at 9:30 on a Friday night - likely never.) Their story is that Ruble told Jamin what had happened. Yet it wasn't until about 10 p.m., around an hour or more after Ruble alleged he saw Laura in my van and 40 minutes after they said they met, that Ruble and Jamin began informing her family members and friends that she was missing. They provided them with a description of me and my van. Laura's stepfather Gib Munro said that around 11:30 p.m. he saw my white van in the parking lot of my residence. Yet even though it had been parked there for 1-1/2 hours, Ruble and Jamin, both so terribly concerned about Laura, hadn't bothered to drive by Hope House, even though later that night they told the police they knew my van was the last place Ruble saw her! However it has been established that my van was at Hope House by at least 10:30 p.m., because that is when it was seen in the parking lot by Barbara Yara, the managing supervisor of the facility.

Ruble was at the KPD during the midnight shift change and convinced Cpl. Michael H. Andre to drive to my address. Shortly after midnight Andre arrived at my residence and documented that he saw my parked van. When he looked inside he could see the outline of a person, who he learned was Jim sleeping when he investigated.

Search of McDonald's 1966 Dodge van turns up zip

My 1966 white Dodge window van with side cargo doors was seized the next morning, March 29th, and transported to the KPD's secure impound garage. The next day two KPD detectives spent 12 man-hours conducting a minute criminal inspection of my van to collect any and all possible evidence that might indicate a connection between the van and Laura's disappearance. One of those detectives was William A. Walton, who said in a 1999 interview, that his conclusion after the search was that *nothing of a violent nature took place in my van*. No incriminating blood, skin, hair or fingerprints were found. The fingerprints of 59 people were found in my van, but not the prints of either Laura or Jack. Neither was there any indication that a struggle or violence had occurred in my van.

One feather was found on the floor of the passenger side and there was a cracked window on one of the side cargo doors. The Kodiak Police Department called for FBI expertise. The examination of the feather was inconclusive. While it was not excluded as originating from feather filled items I had in my van, including a blanket, a sleeping bag and a jacket, neither was it excluded as being consistent with the filling in the coat Laura allegedly wore the night of her disappearance. However even if it did come from her coat, it doesn't mean anything, because she *was* in my van for about five minutes that night.

Although the prosecution speculated that my van's window was cracked during a struggle about 12 hours

Donald McDonald continued on page 16

Journey For Justice - The Johnnie Lee Savory Story

By Johnnie Lee Savory, II

Edited by Natalie Smith Parra, JD Editor

I was fourteen years old on January 18, 1977. At approximately 4:30 pm on that day my friend, 14-year-old James Scopy Robinson, Jr. and his 19-year-old sister Connie Cooper were found murdered in their home at 3033 W. Garden St., Peoria, Illinois. They were found by their step-dad William Peter Ellis Douglas and their mother Noyla Robinson.

On January 25, 1977, at approx. 3:00 pm, I arrived at Late Afternoon High School. I was on my way to class when I was stopped by the school principal Mr. Sam Richardson. Mr. Richardson took me to the teachers' lounge where two men who introduced themselves as detectives from the Peoria Police Department were waiting. They asked me if I knew James Robinson, and I said yes. They asked me if I could tell them anything helpful about the case and I said no, that I didn't want to talk to them. Somehow they persuaded me to come to the station with them.

The next thing I knew I was sitting in a 5 by 9 interrogation room. The detectives questioned me and showed me photos of parts of the crime scene. The interrogation lasted for a couple of hours, and then they asked me if I was hungry. I said yes. They gave me a root beer and a candy bar. I asked if I could go home but they didn't respond.

The interrogation continued until about 9:30 pm, at which time they allowed me to speak with my probation officer, Percy Baker, Jr. The Detectives came back into the interrogation room and asked me would I agree to take a polygraph test. I said yes. I asked again if I would be allowed to go home and they still gave no response.

At approximately 10:05 p.m., Detective Charles Cannon, Percy Baker, a couple of other detectives and I left the Peoria Police Department. They drove me downtown to the polygraph examiner's office. They introduced me to the polygraph examiner Mr. Jenkins and he questioned me for about an hour. On completion of the examination Mr. Jenkins stepped out of the room. A few minutes passed. When Mr. Jenkins returned, the detectives and my probation officer accompanied him. One of the Detectives read me my rights according to law. Once again I asked if I could go home. One of the detectives said that they were going to keep me overnight at the Gift Avenue Detention Center. I was finally processed in a little after 12 a.m.

At 8:00 the next morning an officer from the Peoria Police Department arrived to take me to the station and within ten minutes of arriving at the station interrogation began again and lasted until about 10 a.m. I was allowed to see my dad, but he was so angry that neither of us could communicate. The interrogation resumed at 10:30 a.m. A few minutes into the interrogation I was asked to give up the clothes I had on. I was escorted into the men's room where the forensic officer was waiting. He asked me to strip all the way down. The forensic officer placed my clothing in a bag, and then he said he was going to take a few hair samples. Although I was nervous, I allowed him to pluck hairs from all over my body with a pair of tweezers. When

he was finished he gave me a jumpsuit to wear. At around 12 pm, they brought me some new clothes. They asked me if I was hungry and I said yes. They brought me some food.

The interrogation resumed at approximately 1 p.m. and lasted until about 5:30 p.m., at which time I asked the Detectives when could I go home. Once again they did not answer. They asked me if I would be willing to take another polygraph test and I said yes, if I can go home afterward. They said, "We'll see." At 6:00 or 6:30 pm, I was taken to the polygraph examiner's office and this time I was introduced to a different polygraph examiner. The examination lasted 10 or 15 minutes. The examiner Mr. Bowers began calling me a liar and a murderer. As the tears were rolling down my face, I asked to see Officer Brown. When she came in, I turned to her and said, "Okay, I did it." Officer Brown asked me how I did it and I said I didn't know, so she began to guide me as to which words to use and I agreed with whatever she said. Then I said, "I've done what you've asked of me, now can I go home because I haven't killed anyone?" Officer Brown said, "You're back tracking." The detectives read me my Rights and returned me to the police station. At the station the detectives asked me to give a signed statement. I refused and said that I hadn't done anything, that I didn't do it.

Because I was 14 years old, they brought me before a juvenile judge. That judge decided that I should be tried as an adult. My attorney was Richard Burgess.

At my preliminary hearing my attorney Mr. Burgess kept trying to bring to the court's attention, that the evidence in this case strongly pointed to the victim's step-dad William

Johnnie Savory continued on page 18



Arthur Whitfield

"I am free!" declared Arthur Whitfield on August 23, 2004, as he walked out of Virginia's Lawrenceville Correctional Facility after 22 years of imprisonment for a crime he did not commit.

In 1982, Arthur Whitfield was charged with rape, sodomy and robbery after being identified by two victims as their assailant.

In August 1981, two women in Ghent, Virginia were raped in separate incidences, but under similar circumstances. The perpetrator attacked the first victim at night, as she was exiting her car. With the threat of a knife, he robbed her, demanded she undress and then raped her. After reporting the rape, the police asked the victim to scan photographs of possible assailants; she picked out seven photographs. One was Whitfield's. She later identified him in a line up, explaining that she was able to recognize him from the attack because the light from a nearby house had illuminated his face.

The second rape also involved a perpetrator with a knife that attacked a woman as she exited her car. She also identified Whitfield as the rapist.

After the trial for the first rape, the jury returned a verdict of guilty and sentenced him to 45 years in prison, despite evidence supporting Whitfield's innocence. The jury disregarded testimony by the family asserting that he was at a birthday party at a neighbor's house the night of the attacks. They also ignored the two victims' description of their rapist as clean-shaven, while Whitfield was bearded.

Whitfield pled guilty to the second rape in return for a lighter sentence. He was afraid the next jury would also make an erroneous decision and return with another lengthy sentence. His plea gave him 18 years for the second rape, to be run consecutively, totaling 63 years behind bars.

"I am free!" Arthur Whitfield Exonerated After 22 Years Imprisonment

By Alexis Isadora, JD correspondent

While always asserting his innocence, Whitfield wrote to the judge following the sentencing and explained that there must have been a mistake. The judge did not respond.

His expected release date was 2015, and in 1991 he was up for parole, but it was denied.

During his stay in prison, Whitfield earned his GED and learned vocational skills such as brick masonry and commercial cleaning. He thought if he kept busy it would distract him from the atrocity that had occurred.

Virginia enacted a statute in 2001 that allowed for the introduction of exculpatory DNA evidence after expiration of the state's 21-day rule for the use of "new" evidence. Whitfield filed a pro-se motion under that law, but was told that the state had lost all of the evidence pertaining to his case. However, serologist Jane Burton had defied state protocol and saved samples of evidence from all the cases she had worked on, one of which was Whitfield's case.

The DNA of the rapist and Whitfield were tested, and found to be inconsistent. Following the exclusionary DNA test, the Virginia's Attorney General petitioned the state parole board for Whitfield's release. In August of 2004, at the age of 49, Arthur Whitfield was freed from prison.

The DNA samples Burton saved have also exonerated at least four other innocent people, including Marvin Anderson in 2001 and Julius Ruffin in 2003. An interesting twist is that Ruffin and Whitfield share the same arresting

officer. Ruffin's attorney, Gordon Zedd, plans to petition the state for the release of all of Burton's evidence under Virginia's Freedom of Information Act, in hopes of finding evidence to exonerate additional people.

Under Virginia law, Whitfield can sue the state for 90% of the income he lost for a maximum of 20 years. Upon his release he told reporters, "I'm not thinking about that now, I'm just happy to be free."

Neither the victims nor the lawyers have commented on Whitfield's release, "It would be nice for them to say they made a mistake. It takes a big person to say they made a mistake," explained Whitfield. However an apology will not replace the 22 years that have been stolen from his life.

His prolonged incarceration caused his relationships with people on the outside to deteriorate. The girlfriend he had 22 years ago has long since moved on. Upon reuniting with his 70 year old mother and the rest of his family, he commented, "My family became strangers to me, in a way." Despite their elation that they had him back, Whitfield still felt distanced from them, even uncomfortable to ask for a special dish at a family meal.

Now Whitfield plans to spend as much time as possible with his family, and try to re-acclimate to an environment that has changed so much in the two decades he lived secluded from the world.

However Whitfield is approaching his reentry into the outside world with a positive 'don't look back' attitude, "I can't forget, but I can forgive. It's over with now, I just can't keep focusing on that. I've got to try to move ahead now and make a life for myself"

Sources:

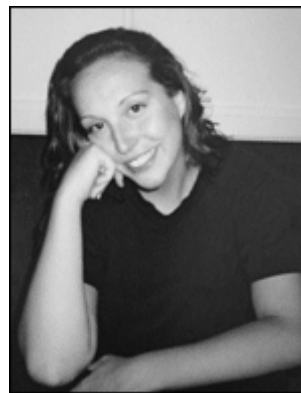
Wrongful imprisonment takes away years and family, Michelle Washington, *The Virginian-Pilot*, August 25, 2004. Man Wrongly Convicted of Rape Freed After 22 Years in Virginia Prison, AP Story, *Tampa Bay Tribune*, August 24, 2004.

Las Vegas Police and Prosecutors Frame Woman 170 Miles From Murder Scene - Kirstin Lobato's "Very Peculiar Story"

By Hans Sherrer

Edited by Natalie Smith Parra, JD Editor

Nineteen year-old Kirstin Lobato was convicted in May 2002 of murdering a homeless Las Vegas man who was beaten, stabbed and sexually mutilated on July 8, 2001. She was sentenced to a minimum of 40 years in prison. Yet multiple witnesses confirm that on the day of the man's death Kirstin was in Panaca, Nevada, 170 miles from Las Vegas. Her presence in Panaca is consistent with crime scene evidence that positively excludes her from having anything to do with his death, and that there is no evidence she had ever met the man. In a masterful frame-up that may be marveled at for decades as a text book case of how the three branches of the legal system interact to ensure a wrongful conviction, prosecutors worked hand-in-glove with the police to orchestrate, in the courtroom of an overtly compliant judge, the conviction of a plainly innocent young woman.



Kirstin Lobato in 2003

The Attempted Rape of Kirstin Lobato on May 25, 2001

In the early morning hours of May 25, 2001, a man "bum-rushed" 18-year-old Kirstin Lobato as she got out of her car in the parking lot of the Budget Suites motel near the intersection of Boulder Highway and S. Nellis Boulevard in east Las Vegas. ¹ As she "started to cry" and said "No" the man slapped her and told her to "Shut up, bitch." ² She said later that "Nobody helped me," even though there were "a bunch of doped out people walking on the street." ³ Her father had taught her basic self-defense techniques and given her a "butterfly knife" for self-protection. ⁴ So with no one coming to her aid, she was able to fend off the sexual assault by stabbing at the man's exposed groin area with the knife. ⁵ When she left in her car the man was laying in the parking lot "crying." ⁶

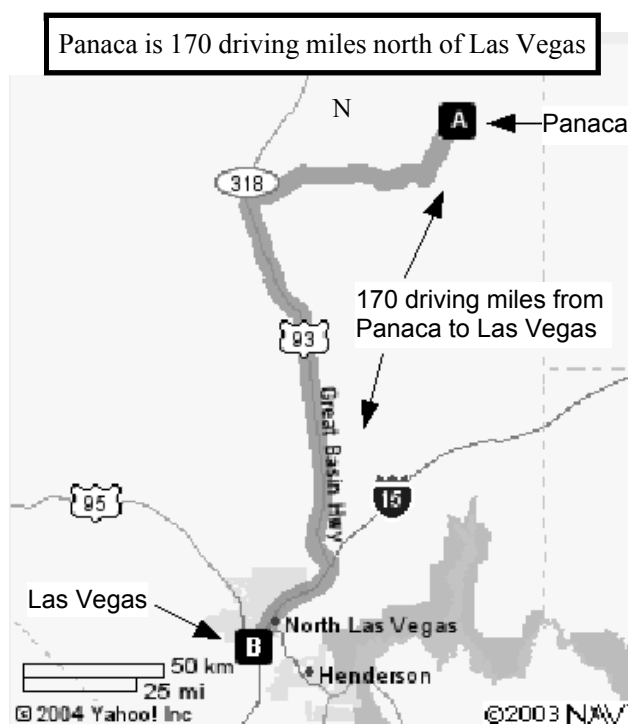
Kirstin did not immediately report the attack to the police. She explained later that she had reported previous sexual assaults and the police "basically blew me off. It's been my experience that it doesn't do any good." ⁷ She may have also been reluctant to report the attack because she had been up for three straight days high on methamphetamines. When she first talked to police about the attack seven weeks after it occurred, the 5'-6" Kirstin described her assailant as a "really big" older black man who "seemed like a giant compared to me." ⁸ It is known he didn't die, because the Las Vegas police didn't report the death of a man during the later part of May or early June who fits Kirstin's description of her attacker. It is also likely he wasn't hurt enough to bleed significantly, because even though he was above her, later inspection of her car didn't turn up any blood residue that could have rubbed off her skin or clothes. The absence of any indication her attacker bled is consistent with Kirstin's July 20, 2001 police statement about the attack, during which she did not make a single mention of her attacker bleeding, or that any blood was on her or her clothes.

Kirstin told family members and friends about the attack, and after she moved to Panaca in early July she told several other people. One of the people she told in Panaca was Lincoln County adult education teacher Dixie Tienken. ⁹ Told by Kirstin that she had not reported the assault to the police, in mid-July Tienken took it upon herself to report it to a Lincoln County juvenile probation officer she knew, who then relayed the information to the Las Vegas Metropolitan Police Department (LVMPD)

Kirstin Lobato Was in Panaca, NV from July 2-9, 2001 ¹⁰

On July 2, 2001, about five weeks after the attack, Kirstin moved back to her parent's home in Panaca, Nevada. Panaca is a high desert town of less than 700 people that is 170 driving miles north of Las Vegas. Located in sparsely populated Lincoln County, Panaca is perhaps best known as an off-road cycling/four-wheeling haven. Kirstin returned to Panaca to get away from the drug lifestyle she had become immersed in while living in Las Vegas after graduating in 2000 from Lincoln County High School in Panaca.

On Thursday, July 5th, Kirstin's mother, Becky Lobato, became concerned enough about her daughter's lethargy and lack of energy that she took her to a doctor. The doctor ordered a blood test that was taken that day. He additionally instructed the collection of urine samples from Kirstin, that were subsequently collected on July 6th and the morning of the 7th. The blood and urine samples all tested negative for an identifiable illness or methamphetamines. On Friday, Becky took the day off from work to stay home with Kirstin, who continued to not feel well.



Kirstin was feeling better the next day, Saturday, July 7th. Numerous people saw Kirstin in Panaca from the early morning until late that night when she went to sleep. Her father, Larry Lobato, saw her sleeping on the living room davenport when he returned home from work at 12:30 a.m. When her mother got up at 5:45 a.m. to get ready for work, she also saw Kirstin asleep. Later that morning, the 8th, a neighbor saw Kirstin four-wheeling, and other people saw her in and around Panaca throughout the day.

Since arriving in Panaca on the 2nd, Kirstin had been talking on the phone with Douglas Twining, her boyfriend in Las Vegas. After he convinced her on Sunday the 8th, that he was kicking drugs and wanted to help her to do so, she agreed to move back to the city. So about midnight on Sunday, Doug left Las Vegas for Panaca to pick-up Kirstin. Since Doug didn't know the Panaca area, he had to call Kirstin several times in the early morning hours of July 9th to get directions to her parents home. Later that Monday morning the two drove to Las Vegas. Kirstin had spent exactly a week in Panaca.

Four days after returning to Las Vegas, Kirstin realized Doug wasn't serious about quitting drugs. She called her parents and told them she wanted to come back to Panaca. So on July 13th her father drove to Las Vegas and picked her up.

Duran Bailey's Murder in Las Vegas on July 8, 2001

At 10:30 p.m. on Sunday July 8, 2001, 44-year-old Duran Bailey was found dead behind a trash bin in a parking lot on Las Vegas's west side. The parking lot is near The Palms Casino Resort, by the intersection of West Flamingo Road and Wynn Road. Bailey had been stabbed, beaten and sexually mutilated. The coroner established his time of death as "ten to eighteen hours" prior to discovery of his body. ¹¹ So Bailey died sometime during the 8-hour period from 4:30 a.m. to 12:30 p.m. on July 8th. Bailey was a 5'-10" tall black man who weighed about 135 pounds. He lived in the trash bin, and a woman who knew Bailey described him as a crack-smoker who dealt drugs.

Bailey's injuries were remarkable for their extent and the ferocity of the sustained attack against him. According to the coroner's report, his injuries included: stab wounds on the back left side, left front, and front of his neck; scrapes and bruises on the left and right side of his face; a bloody nose; stab wound on his forehead; scrapes and gouges around both eyes; multiple fractures on both his upper and lower jaw; wounds on his left chest and left shoulder; four stab wounds in his lower rib cage area; a stab wound to his scrotum; multiple wounds to his lower left and right arm and hand; a fractured skull; and six of his teeth were knocked out. ¹² Also after Bailey was dead, his penis was severed and his anus area was stabbed and sliced in a ritualistic like fashion. ¹³ The sustained ferocity of the attack on Bailey suggests it was carried out by a man. Consistent with that was the crime scene's physical evidence that a man's size 10 shoe-print was imprinted in blood around Bailey's body, leading away from it, and on a piece of cardboard that covered his face. ¹⁴ The shoe-print of no other person was found around Bailey's body.

The brutality of Bailey's death was not unexpected considering that he was a part of the drug underworld, and he was the sort of man who made enemies likely to bear a grudge. A week before his death a woman acquaintance of his, Diann Parker, reported to police that after she told him she no longer wanted anything to do with him, he forced his way into her apartment, beat her, and then raped her at knifepoint. ¹⁵ At the time of Bailey's death, Parker said the police had told her they were investigating her report. ¹⁶ Oddly, neither Parker nor any of her Las Vegas acquaintances who had the motive, opportunity and means to kill Bailey, were investigated as suspects in his death. That failure to investigate is

Kirstin Lobato continued on page 19

“Legal” Immigrants Not Convicted of Any Crime Are Being Deported By Homeland Security As Criminals

by Sheila Howard, JD Staff Member

Edited by Karyse Philips, JD Editor

The Homeland Security Act of 2002 was passed by the U.S. Congress and signed into law by President Bush as a response to the events of September 11, 2001. The Act created a behemoth federal agency - The Department of Homeland Security (DHS) - that consolidated the operations of a number of existing federal agencies. Among the many agencies swallowed up by the DHS was Customs, the Coast Guard, and the Immigration and Naturalization Service (INS).

In 2003, its first full year of operation, the DHS deported 905,000 people from the United States. Many of those deportees were classified as alien “criminals.” So on the surface it appears the DHS is increasing our safety by ridding us of non-citizens dangerous to our society. However the reality of the situation is far different. The DHS considers the term “criminal” to include immigrants who are “out of status” as well as anyone who exhibits “moral turpitude.” There are good reasons to question the DHS’ broad interpretation of guidelines for classifying a person as a criminal, since most of our non-native born forefathers would not have been allowed to remain in this country under the DHS’ application of immigration law. They would have been hunted down, captured, and deported back to their country of origin.

Thus while Americans assume persons arrested under Homeland Security’s authority are here illegally or are undocumented aliens, many of them are actually, or by accusation what is known as “out of status.” If a case, for example, is “pending renewal,” or if there is an address change and DHS is not notified within 10 days, the visa holder is out of status.

If a visa holder under an order of deportation is released on their own recognizance and found in this country, he or she is then classified as a “criminal.” If a visa holder is pulled over for a traffic violation and cannot furnish a current green card, he or she is at risk of being detained, classified as a “criminal,” and slated for deportation. The visa holder is entitled to an administrative hearing within 48 hours, but if a determination is made that there is a possible immigration violation, the person can then be held for up to 90 days while their case is investigated.

A person held on suspicion of an immigration violation has the right to an attorney, the right of access to legal materials before their hearing, and depending on their personal circumstances, he or she may qualify to be released on bond. If after being taken into custody the detained person continues to have a business or stable income that is “at 125% of poverty level,” and if his or her employer has granted a 90 day leave of absence, then and only then might a person qualify for release and become classified as “pending status.”

The DHS’ highhanded tactic of designating people as “criminals” for deportation purposes who are not criminals, was dealt its first blow on November 9, 2004 by the U.S. Supreme Court. In *Leocal v. Ashcroft*, No. 03-583, the Court ruled that a person convicted solely of drunken driving can’t be deported as a person convicted of a “crime of violence,” since the immigration statutes requires the intent to cause harm - not mere negligence. Time will tell if future court rulings will bar the DHS’ designation of people for deportation as a “criminal” who have not been convicted of any crime.

An Innocent Alex Popov Is Trapped in a Homeland Security Bureaucratic Nightmare

by Sheila Howard, JD Staff Member

Edited by Karyse Philips, JD Editor

Alex Popov is one of many immigrants being detained by DHS for administrative reasons. He has not been convicted of a crime and is in this country legally. Yet he has been wrongly classified as a criminal detainee and is being held in a private prison in San Diego that has a contract with the DHS to warehouse immigrants pending deportation proceedings. That prison has been “home” to Alex Popov for over 1-1/2 years.

Alex and his wife, Ina, came to the United States in 1992 on an “H-B-2 visitor visa.” In 1993, Alex applied for a “re-adjustment of status” which was accepted and converted to an “L-1 business visa.” In 1994 Alex and his wife applied for and were granted an extension of his L-1 business visa until April 1996, and at the same time filed for permanent residence (I-140), which was also approved. Since his application for permanent residence had been approved, in 1995 Popov filed for Adjustment of Status (I-485) and had an interview related to his request. He had a second Adjustment of Status interview two years later, in 1997. While his form I-485 was pending Popov’s status remained “pending” until he was detained near San Diego in April of 2003.

On April 6, 2003 Popov was arrested and denied bond “pending removal proceedings.” Bond was denied Popov because he was deemed a flight risk, even though he has established ties in this country since immigrating here 11 years ago, he had a good job in the computer industry, he has lived in Reno Nevada for several years, and his two daughters are U.S. citizens and honor-roll students.

Although Popov legally entered the country in 1992 and received the necessary approvals to continue living here, the DHS said it was unable to locate his “A” file, which contains the critical paperwork that would establish he was not “out of status.” He is not the only member of the Popov family with a DHS problem: The agency claims it has been unable to locate his wife Ina’s file as well. However she has not been arrested and has thus been able to care for the couple’s two children.

In June 2003, Popov was found to be “deportable.” He appealed the ruling, but in September 2003 a “Notice of Intent to Revoke” was issued by the DHS. His attorney failed to file rebuttal by the 30-day deadline, and a decision to revoke the I-140 (permanent residency) petition was granted. This is same I-140 “pending” when Popov was found deportable on the ground that he could not prove was pending, because his “A” file was couldn’t be located by DHS. However, the DHS’ September 2003 filing provides proof positive that his application for permanent residency was “pending”: Since only a “pending” application can be revoked. That means Alex Popov and his family were not “out of status” at the time of his arrest. It is also proof that the June 2003 hearing finding him deportable should now be admitted to be in error and he should be classified as *not* deportable.

However, that is not how the system works. The procedure is Popov must file a motion with the DHS to reopen his case, then file a petition for review of the DHS’s June 2003 ruling he was “deportable.” If the DHS’ administrative proceedings are denied, Popov would then have the opportunity to appeal the federal courts. However as these processes take place, he

is not eligible for a bond hearing because he has been found “deportable.” Since that ruling is very one he is contesting, he is caught in a Catch-22 preventing him from being bailed out.

Thus Alex Popov is caught in a Kafkaesque DHS bureaucratic nightmare. He is currently filing a motion to reopen his case on grounds of ineffective assistance of counsel. In spite of his circumstances, Alex has been able to prove his permanent residency status was pending at the time he was detained in April 2003. But the DHS fights dirty. With proof that he was not legally detained, the DHS is now trying to justify its actions by making new accusations unrelated to the agencies June 2003 finding he was “deportable.” The DHS is doing this by the tactic of trying to show the initial visa issued Popov in 1992 should not have been granted. They are arguing “fraud” based on an unnamed investigator who at an undisclosed date and unknown time called a number listed on Popov’s visa application of 12 years ago - and no person at that number recalls him or the company for which he worked. Another unnamed investigator arrived at the address he listed in Russia and inquired about Popov and the company, and nobody could recall him by name. A lot of turmoil has gone on in Russia during the past 12 years - heck, the “collapse” of communism was so new when Popov left that the KGB had not yet disbanded. Nonetheless, the DHS considers it reasonable that an apartment in a country half-way around the world should keep records of a tenant who lived there 12 years ago. The absurdity of the DHS’ position is there is no such requirement for an apartment manager in this country.

However the DHS’ claim of fraud as a way to avoid a reversal of Popov’s “deportable” order is now a routine tactic. Detaining immigrants for administrative reasons, that include inadequate documents and accusations of possible fraud, comprise over 30% of the total number of denials.

During Popov’s detainment, his wife and children have had a very hard time keeping a roof over their heads, and they have lost many of their personal effects. Yet under those trying circumstances Popov is expected to provide all past documentation of addresses, employment, etc., in order to counteract the DHS’s allegations on appeal. He will not be able to apply for reinstatement of his visa unless he wins his case, and he remains guilty until he proves himself innocent.

Alex Popov, if granted a “cancellation of removal,” will have to re-file an adjustment of status and show that he can support his family at 125% of poverty level. He can be expected to remain in prison for at least another year while he jumps through the DHS’ procedural hoops. Many detainees remain imprisoned for years while they exhaust their appeals. Many of those people are in a situation similar to Popov: They committed no crime and became ensnared through no fault of their own, in the DHS’ bureaucracy.

The DHS also erred in disregarding the extreme hardship that deportation would create for his family. That error was caused in part by his first attorney stating that Popov’s wife and daughters would remain in the United States if he were deported: So no consideration was given for him to remain in this country based on the extreme hardship exception. Popov’s wife Ina is not a citizen and her case is currently in “pending” status. Her DHS file remains missing, and what happens with her depends on the outcome of Alex’s case. Although the couple’s children are both U.S. citizens, they will not have the right to remain in this country until they reach 18 years of age.

The hardship that would be caused if the family were deported are many and severe. Though Russia has changed over the years, anti-American sentiment is still a reality. The Popov’s two school age daughters have been raised since birth as Americans. They neither speak Russian nor know anything about Russian culture. Contained within the

Alex Popov continued on page 10

Freeing The Innocent: How We Did It

By Michael and Becky Pardue

The Justice Institute, 2004, \$18

Review by Hans Sherrer

In February 2001 Michael Pardue walked out of an Alabama state prison after 28 years of wrongful imprisonment. He had been in prison since 1973, when at the age of 17 he was convicted of three murders he did not commit, and was sentenced to life in prison.

Instrumental in Michael's exonerations and eventual release was his wife Becky. They had begun corresponding in 1983 and she became convinced of his innocence. When they married in 1988, Michael's prospects for not dying in prison looked bleak. However they vowed to try. Working initially as a two person team, and later aided by a growing array of supporters in this and other countries, all three murder convictions were successfully vacated, and the way was paved for Michael's release after years of effort. What made Michael's release all the more remarkable is he wasn't exonerated the easy way by having DNA evidence exclude him - because there wasn't any DNA testable evidence in his case. So he had to be exonerated the old fashioned way: Plain hard work was necessary to dig for evidence in the trenches of court and newspaper files and interviewing people.

The injustice of Michael's bogus murder convictions and imprisonment was publicized by newspapers and magazines and television programs, so people around the world knew of his plight. When he was released, that notoriety contributed to the Pardue's inundation with requests for help by people claiming innocence, or their family members or friends. Lacking the resources or time to help with individual cases of wrongful conviction, the Pardue's decided to write a handbook to help give guidance to the wrongly convicted and his or her supporters. The handbook would explain the tactics and strategies that accomplished what at one time looked as daunting a task as climbing Mount Everest did to Sir Edmund Hillary in 1952: Reversing *three* false murder convictions and winning Michael's release.

The result of Michael and Becky's brainstorming is *Freeing The Innocent: How We Did It*. They have written an industrial strength no nonsense one of kind book aimed at accomplishing one objective - helping a wrongly convicted person out of his or her horrific predicament. On page 76 they write:

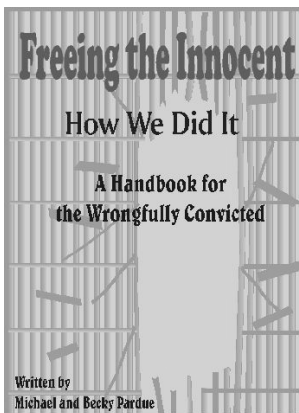
"There are few things worse than being wrongfully imprisoned. Once you are caught inside the mindless and slowly grinding machine of the judiciary you will have a most difficult time getting out. That is the simple and sad truth. The good news is that there are many options for winning your freedom. Not a single one of them is fast, but they worked for us."

In their more than 50,000 word book, the Pardue's cover what worked for them in four broad areas.

- Part I covers what Becky and others did "On the Outside" to help free Michael.
- Part II covers what Michael did "On the Inside" to help free himself.

- Part III covers how the efforts of Michael's outside supporters coalesced with what he did on the inside to help in "Fighting the System and Winning."
- The Appendix is titled "Legal Research," and it covers many of the legal aspects of working to undo a wrongful conviction.

Part I, among other things, has many valuable insights on how and where to search for new evidence, as well as where to look for clues about how it might be located. It also explains the important role of publicity, ways of generating it, the right and wrong times to seek it, and that contrary to the popular adage - all publicity isn't necessarily good as long as the names are spelled right. It also gives sound suggestions on when to use a lawyer and/or a private investigator, and some guidelines to selecting one to minimize the possibility of throwing one's money away on a shyster.



Part II, among other things, sets out Michael's many insights for people on the inside on how he stayed focused - through the many dark days (even with Becky in his life) - on the goal of striving for his exoneration and release from prison. Among Michael's many valuable pieces of advice for an innocent person, is to avoid the temptation to "admit" guilt for a crime he or she didn't

commit, in an effort to be released on parole or via some other early release program. That is because if the person's conviction is later vacated, that admission will be used by the authorities to try and foreclose the possibility of collecting damages. This caution is expanded on in Part III.

Part III, among other things, provides suggestions on many legal aspects of a wrongfully convicted person's case. It discusses for example, such things as the use of jailhouse lawyers, what to expect from lower courts, and negotiating with prosecutors, etc. Part II's caution about succumbing to the temptation of falsely admitting guilt in an effort to secure an early release is expanded on by explaining what happened to John Duval. Wrongly convicted - along with his innocent co-defendant Betty Tyson - in New York state of murder in 1973, Duval twice falsely admitted guilt for the murder during parole board proceedings. Ironically, he was denied parole both times so the false confessions didn't do him any good. In the mid-1990s, a newspaper investigation into their case uncovered evidence of their innocence. After Duval's conviction was vacated in 1998 based on the new evidence, he was retried on the basis of his multiple admissions of guilt to the parole board. The prosecution's primary evidence was those admissions, and in acquitting him, his jurors apparently understood the despair that drove him to make them. However in spite of his acquittal and release from prison, Duval's ill-advised admissions of guilt precluded him from collecting compensation for his wrongful imprisonment. In contrast, Duval's co-defendant Tyson had maintained her innocence from the time of her arrest in 1973. After her conviction was vacated based on the new evidence, the prosecution dropped the charges and she was released in 1998. She subsequently settled her wrongful imprisonment lawsuit for \$1.25 million.


The Appendix provides useful nuts and bolts legal related information, such as how to identify the important issues in a case and how to structure legal arguments in support of those issues to preserve them for review by state appellate

and federal courts, the ins-and-outs of the appeal process, and some commonsense ideas for prisoners, such as getting used to neatly handwriting all legal paperwork, so that all court deadlines can be met, regardless of being without a typewriter, such as when in segregation or during transportation.

The Pardue's know what they are writing about, and *Freeing The Innocent* is an invaluable guide for an innocent person and his or her supporters seeking sound guidance on how to go about undoing a wrongful conviction. The experience of Alan and Francine Yurko provides independent confirmation of the common sense value of *Freeing The Innocent*. Michael Pardue was still in prison when the Yurko's began working as a team to overturn Alan's wrongful conviction in 1998 of murdering his infant son. However, they intuitively employed many of the tactics and strategies outlined in the Pardue's book. Those efforts paid off when Alan's first degree murder conviction was vacated on August 27, 2004, after almost 7 years of wrongful imprisonment. (See: *Alan Yurko's Murder Conviction is Vacated!*, on page 10 of this issue of *Justice:Denied*, Issue 26, Fall 2004)

Michael and Becky Pardue have generously given Justice:Denied permission to distribute *Freeing The Innocent* so it can reach its intended audience. It is 100 pages in length, and can be downloaded at no charge from Justice:Denied's website at, <http://justicedenied.org>. It can then be printed on regular 8-1/2" x 11" paper. Several thousand copies of *Freeing The Innocent* were downloaded from Justice:Denied's website during the first two months that it was made available.

A bound soft-cover version of *Freeing The Innocent* is available for people without Internet access, or who want a permanent copy. The cost is \$18. See the order form on page 27, or send a check, m/o, or new US postage stamps (prisoners) with the complete mailing address where the book is to be sent, to: Justice:Denied-FTI
PO Box 881
Coquille, OR 97423.

or,
Use a Visa, MasterCard, Discover or American Express card to order the book from Justice:Denied's website at <http://justicedenied.org>. 

WA DNA Law Expires 12-31-04

A Washington state law requiring that authorities preserve DNA evidence expires December 31, 2004. Unless part of an active case, DNA evidence in Washington can be legally destroyed as of January 1, 2005. In 2004 the WA legislature failed to vote on a bill extending the post-conviction DNA testing law. Supporters of DNA testing are hopeful the legislature will quickly act to extend the law when it reconvenes in January 2005. For info about how to support a new WA DNA law, or preserve evidence under the existing law, contact, Jackie McMurtrie, Director, Innocence Project NW, ipnw@u.washington.edu.

Source: DNA Evidence Could be Destroyed after Dec. 31, Seattle Post-Intelligencer, October 28, 2004.

Justice For All Act of 2004

On November 1, 2004 President Bush signed the Justice For All Act of 2004. It includes authorization of \$775 million in grants over five years to fund the DNA testing of 350,000 rape evidence kits. The JFAA incorporates the Innocence Protection Act that authorizes \$350 million over five years to pay for legal representation in death penalty cases. JD Issue 27 will analyze the JFAA. Source: \$1 Billion Program to Speed DNA Testing, Washington, DC, Seattle Times, November 2, 2004.

Convicted of Starting Deadly Fire with Unburnable Substance - The Mark Kirk Story

By Mark Kirk

Edited by Clara A.T. Boggs, JD Editor in Chief

My story begins in about the last week of, November 1996. I came home from work one day and my girlfriend, Darlene, told me that one of the burners on the stove had caught on fire that day. It was the right front burner. So I took a look at it. It was saturated with grease. I raised the stove-top and discovered that the entire underside was a literal grease pit. I cleaned the element as best I could, and replaced the aluminum foil on the drip pan. There was grease residue inside the receptacle where the element plugged in, that I couldn't get to. So we decided not to use that burner until the maintenance man from upstairs, Steve Rivera could take a look at it. Darlene informed her kids, Jason (16) and Brandon (10), not to use that burner also.

A week or so later, On December 4, 1996, Darlene and I went out drinking in the afternoon. We met up with two friends of mine at the bar, Joey Ortiz and Tom Garrett. Later that evening, the four of us left the bar and went to visit a friend of Joey's. Tom bought a half pint of Captain Morgan Spiced Rum to take along. We stayed at the friend's house for about an hour or so and then went back to the bar.

We stayed at the bar for another hour or so and then the four of us went back to our apartment. Once there, I made a trip to the liquor store and bought a twelve pack of beer and a pint of Capt. Morgan.

Later, during the course of partying, Darlene and I got into a heated argument. She had been flirting with Tom. So Tom and Joey left while Darlene and I continued to argue. We were both admittedly pretty intoxicated that night. We had been drinking since earlier that day.

The next thing I remember is waking up and the room was full of smoke. I heard Darlene and Jason shouting in the kitchen. I was still in kind of a stupor, but remember going through the dining room and seeing that the stove was on fire. The heat was intense and the smoke thick and black. I went out the front door into the hallway and heard Jason screaming about his cat. So I tried to go back in to find the cat. I burnt my hand on the metal door when I pushed it open. By then the heat was too intense to get back inside. So I turned and ran out the front door of the building. Darlene was already there.

Once outside, Darlene, the kids and I were attended to by paramedics. It is now the early morning of December 5. At 6 a.m. and the four of us were taken to police headquarters and questioned about the fire until 3:30 p.m. We were informed that three people died in the fire. I was ordered to return the following day to submit to a polygraph test.

I arrived at police headquarters on December 6, at 9 a.m. I took a lie detector test conducted like an interrogation. After the polygraph I was taken to another room and interrogated for several more hours. After several hours of being threatened with a death sentence and other psychological manipulation I confessed to pouring rum on the electric stove burner.

The Confession

When I received a copy of the transcripts of the interrogation from my public defender, several months later, I noticed some distinct discrepancies in them. For one, during the interrogation I had requested a lawyer. My

request was nowhere in the transcripts. I brought this to the attention of my attorney and the fact that there were unexplainable and abrupt changes in the flow of conversation recorded in the transcripts. It was as if the transcripts had been edited and it left distinct incongruities to the flow of conversation in certain parts.

So I asked my lawyer if we could get the confession suppressed. He said it would be better strategy to put up the appearance of trying to suppress it, but to let it in, thus committing the State to their case-in-chief. So he put up a weak argument at the suppression hearing, after which the judge duly denied our motion to suppress. Our strategy was to prove the 70-proof Captain Morgan Rum wouldn't burn on an electric stove. You can torch something like tequila or Bacardi 151 because they are "pure," and not a blended alcohol. Captain Morgan is blended with flavors and water, that retards it from burning.

A bench trial was commenced in October of 1997. I was swiftly convicted and sentenced to three life terms, no parole, plus 23 years. A weak appeal by my lawyer netted an affirmation from the Delaware Supreme Court.

During the trial key evidence was presented by the State that contradicted the statement I had given police. Darlene, Jason and Tom all testified that they saw the rum had been drank prior to the fire. Jason even went so far as to say that he specifically saw Tom take the last drink and later saw the empty bottle lying in the living room. They all testified that there had only been one bottle that night. Receipts from the liquor store even confirmed this. Joey confirmed it, while testifying for the defense. All of them said that Capt. Morgan was Tom's drink of choice not mine. Against all that evidence the State said there simply must have been more than one bottle. The judge mysteriously concluded that there might have been as many as three bottles present that night.

Dr. Broskey provided my attorney with videotape where he makes several attempts to ignite Capt. Morgan Rum on an electric stove burner. His tests were controlled and recorded. He could not get the rum to ignite.

In my confession, I had supposedly stood outside on the patio and watched the fire while everyone fled the building. For the State, Newcastle County Police patrolman Wagonhoff testified that upon arriving at the scene, he saw Darlene and me exiting the building together. I can't think of a better witness than that. The man is, after all, a trained professional who was alert and sober at the time.

Also, the bottle presented at trial was found outside away from the building. My fingerprints were not on it.

Interesting also is the fact that, interrogators had first asserted every facet of my statement. Every one. I was threatened with the death penalty numerous times and the State sought it at trial. I was told that my refusing to give a statement was making me look guilty and that this could be used against me. One Fire Marshall even said that he could make the whole thing look anyway he wanted and that if I didn't admit to starting the fire he was going to make it look like I was a cold blooded killer who burnt these people up on purpose. It's all in the transcripts.

Also in the transcripts are the two times I told them I didn't want to talk to them any more, but they kept right on interrogating me. During the suppression phase several officers testified I was escorted out for smoke and bathroom breaks. In the transcripts there's even a spot where an officer reminds me of this. Nowhere in the transcripts or the tape of the interrogation presented at trial is there mention of me leaving or returning. Nowhere in the videotapes am I seen leaving or returning. So what happened to those por-

tions of tape and transcripts? The videotape even shows me attempting to leave three times where I'm told I have to remain in the room. Now I can say quite honestly there's no way I would have gone several hours without having to use the bathroom and have a cigarette. Those portions of tape had to be edited out along with my request for an attorney.

70-Proof Rum Won't Burn

Prior to trial, I constantly told my lawyer that there is no way that 70-proof rum will burn, let alone on an electric stove. I told him I wanted someone to perform a test that would demonstrate this fact. He kept refusing my request. Finally, after a slew of phone calls from friends and family to the chief of the public defender's office they relented. My lawyer informed me that he had retained the services of Dr. Stanley Broskey, a forensic chemist who had 19-years experience with the New Jersey State Police Crime Lab.

Dr. Broskey provided my attorney with videotape where he makes several attempts to ignite Capt. Morgan Rum on an electric stove burner. His tests were controlled and recorded. He could not get the rum to ignite. A few days later my lawyer came and apologized for not believing me. Subsequently, a few days before trial fire marshals suddenly announced that they too had a test burn tape to present. Both tapes were presented at trial.

In the Fire Marshals tape a half-full, fifth bottle is first shown to the camera. Then the screen goes blank and we next see someone standing about twenty feet away with an almost full bottle. They are standing next to a stove in someone's backyard. The burner element on the stove is glowing, white-hot. As soon as the first trickle of the substance from the bottle hits the burner it erupts into this violent flame that shoots two or three feet into the air.

My attorney asked the Fire Marshal on the witness stand why the bottle is at first only half full. He even played the tape back a couple of times. The Fire Marshal, Willard Preston III, while looking right at the screen said that the bottle was full. He was caught in a blatant lie. He also testified that the rum would have required a pooling effect in the drip pan in order to ignite. This; however was belied by his own tape.

After viewing the State's tape, Dr. Broskey said that there was no way that the element should have been glowing white-hot. He concluded it must have been tampered with.

Dr. Broskey's tape was shown to the court while he explained the procedure step-by-step. He explained that because the rum in question was only 70-proof it was actually two-thirds water. It simply did not have enough alcohol content to combust as the Fire Marshals implied. He also said that he couldn't even get the rum to burn with an open flame.

However after Dr. Broskey finished testifying the prosecutor ridiculed him. He even went so far as to call him a quack. Unfortunately, it appeared as though Dr. Broskey might have at one time suffered a stroke or something, and this didn't help matters much. It still doesn't change the fact that 70-proof rum isn't going to burn on an electric stove.

There was photographic evidence of the stove shown at trial. In one photo it can be clearly seen that the underside of the stove-top was covered with a heavy residue (grease) and that there had been substantial burning there. This confirms the grease pit described by Darlene. When the Fire Marshal was asked if any testing had been done on that portion of the stove he replied that, "there had, but no one knew what happened to the results." (convenient, huh)?

I would like to point out that there were some political ramifications attached to this case. At the time these apartments, Beaver Brook were built there was a scandal un-

Mark Kirk continued on page 10

Florida Prosecutors Permitted To Extract Pleas From Innocent Defendants Granted A New Trial

by Hans Sherrer

In separate Florida state cases, Alan Yurko and Kevin Coleman were granted a re-trial in the fall of 2004 based on "new" evidence that undermined the fundamental fairness of their trial, and supported their innocence. However in both cases the prosecutors used the stick of threatening to contest the judge's order that could result in the men spending more years behind bars before their possible release, to entice each man to bite at the carrot of an immediate release by pleading no-contest to a crime neither man committed.

Although not an admission of guilt, a no-contest (*nolo contendere*) plea is a defendant's acknowledgment that there is sufficient prosecution evidence to support the reasonable likelihood that a jury would find him or her guilty after a trial. Furthermore, a no-contest plea has all the legal implications for a defendant as a conviction after a guilty plea. A judicial analysis of the prosecution's evidence can determine that it supports the reasonable likelihood of the defendant's acquittal, or that it supports the reasonable likelihood of the defendant's conviction - even if by only a factor of 51% to 49% one way or the other - however it cannot support both positions at the same time. Consequently, it seems logically insupportable for a judge to accept a no-contest plea from a defendant to whom the judge had granted a new trial, after determining the reasonable likelihood a jury would have acquitted the person if it had considered the "new" evidence undermining the prosecution's ability to prove his or her guilt beyond a reasonable doubt.

Furthermore, a no-contest plea has the profound consequence for an innocent defendant of forestalling the collecting of damages for his or her wrongful imprisonment - whether such a payment is statutorily authorized, awarded as a result of a civil suit, or both.

Yet after ordering a re-trial based on compelling defense favorable evidence, the judge in both the Yurko and Coleman cases took the "logically insupportable" step of accepting a no-contest plea, sentencing the men to time served, and then ordering their immediate release.

Apart from the questionable ethics of a judge's acceptance of a no-contest plea under such dubious circumstances, it is not a secret why the prosecution wanted a no-contest plea from the men instead of simply dropping the charges: The negative publicity of having convicted an innocent person is squelched, and the government agencies and personnel financially vulnerable for their involvement in the wrongful conviction of Yurko and Coleman have a measure of protection from possible liability for paying compensation.

However by accepting a suspect no-contest plea when the weight of the evidence supported the acquittal of Yurko and Coleman, the judges involved allowed the prosecution to misuse the officiousness of the court to ensure a wrongly convicted person will forever have the undeserved stain of a felony conviction on his record, and provided a barrier to their collection of compensation for years of wrongful imprisonment.

Alan Yurko's Murder Conviction is Vacated!

After a week-long evidentiary hearing, on August 27, 2004, Circuit Judge C. Alan Lawson vacated Alan Yurko's 1998 first-degree murder conviction of shaking his ten-week old son to death in November 1997, for which he was sentenced to life in prison. (See: *The Yurko Project: Triumph Over Tragedy*, Justice:Denied, Issue 23, Winter 2004, p. 10) An array of experts assembled on behalf of Yurko painted a picture of medical negligence by his son's doctors that compounded baby Alan's poor health, and an autopsy report by Orange-Osceola Medical Examiner Sashi Gore so rife with errors that it was of no value in determining his cause of death.

Earlier in 2004, the Florida State Medical Examiners Commission reviewed Gore's conduct in the Yurko case. The Commission determined his conduct was so deficient that it barred from performing autopsies until his June 2004 retirement.

Facing a re-trial with their "star" forensic witness' professional reputation in shreds, Alan's prosecutors offered him a deal within hours of Judge Lawson's ruling: Plead no-contest to the manslaughter death of his son and be sentenced to time served - 6 years and 125 days. The alternative for Alan was to most likely spend several more years in prison while the prosecution appealed the judge's ruling.



Alan Yurko the day of his release

An important consideration for Alan, was that by pleading no-contest to manslaughter, he would be abandoning any opportunity to seek compensation for his 6-1/2 years of wrongful imprisonment. However the desire to get out of prison immediately and to be reunited with his wife Francine and his step-daughter won out. Alan accepted the deal and after pleading no-contest to manslaughter at an afternoon court session, he was sentenced to time served and released about 8 p.m. on August 27th. When he entered his plea, Alan denied ever physically harming his son, but he accepted parental responsibility for not having conducted research into the dangerous vaccines his ill-son's doctor's prescribed and administered to him.

Alan's wife Francine, who steadfastly stood by him during his ordeal and was the person most responsible for amassing the new evidence of his innocence, had mixed emotions about the plea deal: "By him taking a plea, he gets to come home. But we're still victims of the system. We've still spent seven years of our lives to prove his innocence and restore the name of our family. A plea ... regardless of no contest, that's not a victory to me. We know he's innocent, and I guess when it comes down to it, that's all that really matters."

The irony of Alan's plea deal, is that prior to his trial he was offered and turned down, a deal under which he would have served less than the time he was actually imprisoned. More than six years of wrongful imprisonment gave him a new perspective on the inner workings of the legal system. It is unlikely that Judge Lawson's acceptance of Alan's plea to something the judge knows he didn't do increased his already shaken faith that the system's interest is in protecting the innocent, and not to cater to the prosecution's goal of obtaining a conviction at all costs.

Source: Dad freed from life sentence in son's death, Anthony Colarossi and Pamela J. Johnson, *Orlando Sentinel*, August 28, 2004.

Kevin Coleman's Murder Conviction Tossed After 13 Years Imprisonment

Prior to Kevin Coleman's 1992 trial for the first degree murder of Bobby Roddy outside a Palm Beach, Florida nightclub, his prosecutors offered him a plea deal: Plead guilty to manslaughter and walk, after being sentenced to the 13 months he had been jailed awaiting trial. Proclaiming his innocence, and believing he would get a fair shake during his trial, Coleman turned down the deal.

Although there was no physical evidence linking him to the murder and eight witnesses said he was somewhere else at the time it occurred, he was found guilty on the basis of two prosecution witnesses who said he was the killer. After being found guilty, he was sentenced to life in prison. Coleman's direct appeal was denied, and in December 2002 his trial judge denied his motion for a new trial. The motion was based on the discovery that the prosecution had concealed exculpatory witness statements from his trial lawyer.

Soon thereafter, Coleman's trial judge retired. Judge Lucy Brown was assigned to Coleman's case. After reviewing his new evidence, Judge Brown arrived at a different conclusion than her predecessor about its importance. She ordered an evidentiary hearing to assess whether it was sufficient to support a new trial. At the August 2004 hearing several witnesses - known to the prosecution at the time of Coleman's trial - testified he wasn't involved in the shooting. One witness identified Darrien DeJuan Early as the shooter, and that was corroborated by Early's former girlfriend, who testified he told her he was the gunman and Coleman wasn't involved. It was a form of poetic justice in June 2000, Early himself was shot to death outside a nightclub.

At the conclusion of the hearing, Judge Brown ordered a new trial, and expressed harsh criticism of the prosecution's handling of Coleman's case. She said the prosecutor's conduct was "shameful," and that his conviction was "a stain on the record of this court."

The prosecutors appealed Judge Brown's ruling. However after doing so they offered Coleman a deal: Plead no-contest to second degree murder and be released immediately after being sentenced to time served.



Kevin Coleman

Jaded after 13 years of imprisonment, Coleman was no longer willing to gamble on the possibility of gaining his freedom some years down the road after a retrial, versus the sure thing of a plea deal. He accepted the prosecutions offer. However at his plea hearing, Judge Brown expressed reservations about accepting the deal since Coleman was still claiming his innocence. She relented based on her understanding that he knew what he was doing. On September 22, 2004, Kevin Coleman was released and greeted by his wife Annette, who he had married two years before, and other family members and friends.

He was also greeted for the first time on the outside by the person most responsible for his released from a life sentence, his lawyer Donnie Murrell, who had worked for years without pay to help free him.

Although he was freed on the prosecution's terms that protects them from being accused of prosecuting a "legally" innocent man, an innocent Kevin Coleman's 13 years of wrongful imprisonment did come to an end.

Source: Prisoner who maintained innocence pleads no contest to manslaughter in exchange for freedom, P. Franceschina and A. Johnson, *Sun-Sentinel*, Palm Beach, FL, September 23, 2004.



Ken Marsh Exonerated of Murder on September 3, 2004

In 1983 Ken Marsh was convicted of murdering Phillip Buell, his girlfriend's 2-year-old son, and sentenced to life in prison. The prosecution's case relied on doctors at Children's Hospital in San Diego who examined Phillip, and testified his head injuries were caused by abuse. Marsh claimed he had never harmed Phillip, and that he found him injured after he had fallen onto the fireplace hearth from the back of a couch. (See, *Toddler's Accidental Death Ends With Babysitter's Murder Conviction - The Ken Marsh Story*, Justice:Denied, Issue 25, Summer 2004, p. 4)

By 2002 Marsh had been imprisoned for 19 years and his direct appeal and a petition for post-conviction relief had long since been denied.

However Phillip's mother, Brenda Buell-Warter, had professed her belief in Marsh's innocence from the time of his arrest. She continued working on his behalf after his conviction and imprisonment. Over a period of many years she was able to amass forensic medical evidence from nationally renowned experts proving - contrary to the testimony of the doctors - that her son's injuries were consistent with those that could be expected from his head striking the fireplace after falling from the back of the couch. That is exactly what Marsh told police investigating the child's death. Furthermore, those medical findings were consistent with the original investigation by the San Diego Police Department. In somewhat of an oddity, Marsh was prosecuted for Phillip's murder based on the findings of the hospital's doctors, even though the police investigation determined his death was accidental.

Escondido attorney Tracy Emblem worked for a number of years pro bono on behalf of Marsh. In October 2002, Emblem, in conjunction with the California Innocence Project at the California Western School of Law in San Diego, filed a 185 page Petition For Writ of Habeas Corpus with the California Court of Appeal. The Petition included the declarations of seven experts whose analysis of various aspects of Ken's case supported his innocence. The petition also included a declaration by San Diego Homicide Detective Armijo - who originally investigated Phillip's death - that he believed Marsh to be innocent.

On August 4, 2004, San Diego DA Bonnie Dumanis announced that she agreed Ken Marsh's habeas corpus petition for a new trial should be granted. Dumanis made the decision based on an independent evaluation of the medical evidence by a Florida forensic pathologist who was "unable to conclude beyond a reasonable doubt or to a reasonable degree of medical certainty that [Phillip Buell] was a victim of child abuse." After 21 years of imprisonment, Ken Marsh's conviction was reversed on August 10th, and he was released that same day on his own recognizance pending a retrial.

On September 3, 2004, DA Dumanis announced she was dropping the charges against Marsh. In a court hearing that afternoon lasting about one minute, San Diego Superior Court Judge Deddeh granted the DA's dismissal motion.

In 1983 Ken Marsh was sentenced at the age of 28 to spend his natural life in prison. That is likely to have happened without the continuous efforts of Brenda Buell-Warter for almost a quarter of a century to clear him of murdering her young son. Six days after Marsh's release, the two announced to the world while being interviewed on Larry King Live that they would marry on October 30, 2004.

Source: Charges are dismissed in 1983 death, John Wilkens, *San Diego Union-Tribune*, September 4, 2004.

For extensive details about Ken Marsh's case, see, *Toddler's Accidental Death Ends With Babysitter's Murder Conviction - The Ken Marsh Story*, Justice:Denied, Issue 25, Summer 2004, p. 4.

Alex Popov continued from page 6

many pages of Alex's motion is a statement from a professional who specializes in early childhood development. He wrote in reference to Alex's daughters: "Developmentally, these children are at a very vulnerable emotional, psychological and educational ages. They are also much too young to effectively deal on a cognitive basis with such a radical and abrupt change. Such a move would likely cause them to experience developmental regression, with serious depression and anxiety. Due to language and social barriers, they can also be expected to suffer significantly in their education, currently reported as well above average."

Another issue for the family is that in order to move within Russia an annually renewed "malapropism" is required, It is also used for employment purposes. After the Popov's left Russia their residency documents expired. Thus it is likely they would be forced to live elsewhere in Russia for at least several years waiting for permission to live in Moscow.

Employment and Popov's ability to support a family of four in the "new" Russia could be a serious problem. Alex's degree is in nuclear physics, although he also has an interest in computer technology. Nuclear physics was what was chosen for him when attending school in what was then the Soviet Union. The "new" Russia is impoverished compared to when Popov and his wife left, and so might their Americanized family be if forced to move there.

Hundreds of thousands, if not millions of people, are to one degree or another in the same situation as the Popov family. Immigration does not recognize each spouse as an individual, but groups the family together as one case. Many of these families remain in limbo, ineligible for work permits while their spouse's cases are "pending," ineligible for benefits because they are not citizens, failing to report crimes against them to police for fear of being taken into custody, and often working for substandard wages for the same reason. States are systematically removing their ability to send their children to public school, and now we are proposing to track them through their use of library services. We require welfare services to report applications at mandatory 45 day increments. The vast majority of these children are legal US citizens and yet the U.S. government is setting them up to be impoverished as children and disillusioned as adults.

Popov has a proven track record of being employable in this country, and he has an education level well above the majority of detainees. He has demonstrated his good moral character as represented by statements from friends and actions throughout his life. Popov is now representing himself *pro se*. He and his family have been unable to raise funds for an attorney, so he is making the best of his situation and educating himself in Immigration Law.

Alex Popov is an unconvicted innocent person condemned to serve what is in effect an indeterminate prison term because he insists on his right to be heard. How many years must his family be split apart in a limbo state?

The DHS' treatment of people such as the Popov family is intolerable for a country that professes to be the land of the free. The broad bureaucratic powers of the DHS are being routinely misused without adequate oversight by federal judges. One can only hope that in the Popov's case the right thing is ultimately done by the federal government - and that the family is allowed to be reunited and remain in this country.

You may contact Alex at his current residence by mail:
Alexander Popov A #96194-809
San Diego Correctional Facility (CCA)
PO Box 439049
San Diego, CA 92143

Outside Contact: Sheila Howard at: SheilaCE@aol.com

Mark Kirk continued from page 8

covered in the building inspector's office. It seems that building inspectors were taking bribes from builders to pass the inspection on buildings that weren't meeting State codes and requirements. The same was discovered for the neighborhood I grew up in, Brookmont Farms. According to the papers at the time a couple of people were prosecuted or dismissed, but nothing really came of it; until now.

The day after the fire the local newspaper ran a feature article raising questions about why the building had burnt so quickly and severely, why there had been no sprinklers installed and whether the building met building requirements.

A corrections officer at Gander Hill Prison pulled me aside one day and told me that he was a volunteer fireman and was at that fire. He said in his twenty years of fire fighting, he had never seen a building burn so fast or hot. It was his conclusion that the buildings hadn't been built with the proper fire brakes between the individual units. This, of course was told to me strictly off the record. He said he had to think of his family.

After the paper ran its article I became the focus of an investigation. It was like they needed to draw the public's attention away from the information revealed in the paper. The scheme worked perfectly for everyone and the media now had an instant monster to focus all their anger towards.

Consider if you will what would have happened if the truth had prevailed. Everyone living in that building, plus the families of the deceased would have had a multi-million dollar lawsuit. Now they have nothing but their hatred for me.

Since my conviction in December of 1997, there have been more than 40 fires at that same apartment complex. That's not counting the fires at the sister complex, built at the same time. I make it a point to check the newspaper everyday. I have also been informed that Beaver Brook Apts. had been doing major renovations during the past couple of years. They've been completely gutting and rebuilding each building one at a time. I've been trying to obtain building records and permits for the past two years, but because I'm incarcerated I'm not entitled to that information.

On February 26, 2004, my third motion for post-conviction relief motion was granted by Superior Court Judge Ableman. His ruling was based on the Delaware Supreme Court's decision in *Williams v. State*, 818 A.2d 906 (Del. 2003), that Felony Murder in the First Degree "cannot attach unless the murder is a consequence of the felony and is intended to help the felony progress." Since the state had not proved that at my trial, Judge Ableman ordered that my first-degree murder and assault in the first-degree convictions be vacated. He further ordered that based on the findings of my trial judge, that three manslaughter and two second-degree convictions be substituted. The prosecution recommended a sentence of 44 years be substituted for my life sentence. Quite a comedown from the death penalty they sought after my conviction.

I had filed m successful motion *pro se*, since my family no longer has the funds to afford an attorney. While it is a step in the right direction, I am innocent and so I must carry on to win my exoneration.

My deepest thanks to you for reading about my case. Sincerely,

Mark Kirk #291259
Delaware Correctional Center
1181 Paddock Rd
Smyrna, DE 19977

My mother is my outside contact:
Virginia Kirk
156 Flamingo Dr.
Newark, DE 19702

In 1963 the U.S. Supreme Court recognized the right to counsel is so important that it unanimously ruled in *Gideon v. Wainwright* that a person charged with an imprisonable crime is constitutionally entitled to court appointed counsel. However there have been problems with meaningful implementation of the principle enunciated in that decision. Consequently, 41 years after *Gideon* there is substantial evidence that across the length and breadth of this country a defendant unable to afford private counsel is generally provided with inadequate legal representation.

An obvious, but largely ignored question related to deficient representation by a court appointed lawyer is not why it so pervasive - because the problem has been widely known within the legal system for decades. The question is: Why is it tolerated as the status quo? A clue to that question's answer may be found by reading between the lines of the article accompanying this that reports on the widespread failure of Washington State judges to inform defendants of their panoply of due process rights - including their right to a court appointed lawyer - and what rights they are waiving by pleading guilty. That judicial attitude toward a defendant indicates a belief by the judge involved that the defendant doesn't need to know his or her rights. Why? Because the defendant doesn't need to exercise those rights. Why? Because the judge considers the defendant to be guilty! If a person is guilty then there is no need for him or her to exercise their "right" to a trial or be provided with a publicly paid lawyer, since a guilty plea is the correct outcome for their prosecution. Judges sharing that attitude consider a trial as a way a guilty person may escape punishment by the "legal technicality" of an acquittal. Moreover the failure of judges to be meaningfully sanctioned for treating a defendant as presumed to be guilty, indicates the degree to which that idea is shared within the judicial community.

Gideon Unfulfilled - The Failure of Indigent Defense

by C. C. Simmons, JD Correspondent

In 2002 while she was struggling to keep 295 accused teenagers out of jail and simultaneously defending the parents in 276 child neglect cases, attorney Lisa Tabbut was handling 16 separate felony conviction appeals.

In March 2003, unable to serve her 500+ clients effectively, Tabbut resigned. "Enough is enough," she said as she ended her Juvenile Court contract with Cowlitz County in southwestern Washington state. That contract paid Tabbut about \$86,000 per year - less than \$150 per client - but didn't limit the number of indigent defendant cases assigned to her.

Tabbut's job had become a legal triage. "You decide who you can help and who's not going to get help. It's malpractice, It's insane," she said.

In jurisdictions all over the U.S., Tabbut's predicament is repeated. Public defenders and court-appointed attorneys with limited experience and scant resources struggle to represent indigent defendants who are accused of crimes ranging from misdemeanor shoplifting to capital murder.

In 1963, the U.S. Supreme Court unanimously ruled that every defendant facing prison is entitled to be represented by counsel, irrespective of his or her ability to pay for it. (See *Gideon vs Wainwright*, 372 U.S. 355 (1963)) Today, *Gideon's* promise is largely unfulfilled.

In 2000, the U.S. Department of Justice declared that public defense in the U.S. is in a "chronic state or crisis." Nation-

Furthermore, that attitude isn't isolated to state judges. Several years ago an experienced defense lawyer told me there are federal judges who believe only guilty people are indicted. However instead of openly failing to recognize a defendant's due process rights, a state or federal judge with that mind-set generally provides the bare minimum of what is required: Which includes appointing a lawyer who may be sincere, but is typically overworked, underpaid, and has available a fraction of the prosecution's investigative resources. The title of a 1971 legal article aptly describes *today's* situation, *Did You Have A Lawyer When You Went to Court? No, I Had A Public Defender*.¹ It is not accidental, but by design, that 96% of convictions nationwide are by a guilty plea that is typically brokered by a court appointed lawyer.

However each issue of *Justice:Denied* spotlights the fundamental flaw in the thinking of judges and others who believe skipping meaningful due process is acceptable: A significant number of the people accused of criminal wrongdoing are innocent. Prosecutors invariably file charges based on a public agencies report(s). The practical purpose of a defendant's due process rights is to put the veracity of those allegations to a public (courtroom) test. Thus the *only* way an innocent person without substantial financial resources can be protected from a false allegation is for the public that lavishly finances his or her prosecution, to adequately finance the person's defense. Otherwise an innocent person faces the grave danger of being convicted. The following four articles hint at how inadequate court appointed legal counsel can be. That deficiency is a significant reason why the innocent are systematically being wrongly convicted in state and federal courts throughout this country. *Hans Sherrer*

1. Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender, Jonathan D. Casper, *Yale Review of Law and Social Action* 1:4-9 (1971).

wide, indigent defense services are failing their clients. Inadequate staffing, overwhelming caseloads, substandard compensation, flat-fee contracts, and legislative disdain to appropriate scarce resources to benefit those accused of murder, rape, robbery, and child molestation, all combine to create a near-insuperable task for those who represent indigent defendants. Consider the following discouraging news:

- Early in 2004, the Minnesota State Board of Public Defense announced that one-quarter of the state's public defenders would be laid off due to budget shortages.
- In Lake Charles, Louisiana, the Public Defender's Office had only two investigators for 2,550 felony and 4,000 misdemeanor cases.
- In Bucks County (northern Philadelphia), Pennsylvania, the Public Defender's Office handled 4,173 cases in 1980. Twenty years later with the same number of attorneys on staff, the office handled an estimated 8,000 cases.
- The Committee for Public Counsel Services in Massachusetts handles more than 200,000 cases involving indigent defendants each year - with only 110 staff lawyers. That is an average of over 1,800 cases per lawyer.
- In San Diego County, California, the 1987 budget for the District Attorney's office was \$20 million while the Public Defender's Office was funded at \$19 million. In 2004, the DA's budget had climbed to \$100 million but the Public Defender's Office received only \$37 million.
- In Wisconsin, defendants with an annual income of \$3,000 or more may not be eligible for a state-funded public defender. As a result, more than 11,000 Wisconsin defendants go unrepresented each year.
- In Louisiana where the vast majority of indigent defense is funded by revenue from traffic tickets, the accused

Gideon Unfulfilled cont. on page 25

WA Judges Conceal Right to Counsel From Defendants

By Hans Sherrer

The presumption of innocence is considered the bedrock of American criminal law. From it flows the principle of due process that includes trial by jury, confrontation of accusers, assistance of counsel, and the government's burden of proving guilt beyond a reasonable doubt.

However the presumption of innocence is so meaningless to some King County, Washington (Seattle metro area) judges, that for years they have not told defendants of their right to counsel and other due process rights. Consequently those state judges have accepted guilty pleas from defendants and sentenced them to jail without ever telling them they will be provided a lawyer at no charge, and that they can demand a trial and confront their accuser.

On June 18, 2004 the Washington Commission on Judicial Conduct (WCJC) censured one of those judges, King County District Court Judge Mary Ann Ottinger - for her "years-long practice of failing to tell defendants they had a right to counsel."¹ A judge for 12 years, Ottinger's conduct attracted attention after she sentenced to a year in jail, a girl with no prior record who pled guilty to being a minor in possession of alcohol.² State law requires a judge to publicly and on the record advise a defendant of all his or her rights and the consequences of a guilty plea. However Ottinger did not inform the girl of that information before accepting her guilty plea. After the girl was jailed for two months, defense lawyers heard of her plight and persuaded another judge to issue a writ ordering her release. The WCJC found "the nature of the violations cannot be overstated," and noted Ottinger's mistreatment of the girl was a "routine" practice.³

After Ottinger's censure, several defense lawyers commented that the failure of a judge to inform a defendant of his or her rights was not unusual. In summarizing a year-long study of the problem by the Defender Association in Seattle, Director Robert C. Boruchowitz reported, "It's very common. They [judges] figure people will plead guilty and get it over with."⁴ Public defender Christine Taylor said at least three defendants in Seattle have recently been released from jail after defense lawyers learned their judge had not advised them of their rights.⁵

Ottinger was also censured for secretly aiding the city of Issaquah in a lawsuit the Seattle suburb has against her employer - King County. Ottinger's covert services to Issaquah included providing legal advice and ghost writing correspondence.

The same day Ottinger's censure was made public, Municipal Judge Patrick Burns was reprimanded by the WCJC "for writing "NTG" on the bottom of hundreds of defendants' court paperwork."⁶ Defense lawyers had complained the initials stood for "Nail This Guy," and the WCJC agreed it created the appearance Judge Burns was prejudiced against a defendant whose file he marked with the label.

The conduct of Ottinger and Burns was not considered serious enough to warrant removal from office or a suspension. However, they were required to take judicial ethics training to prevent a reoccurrence of their lapses in judgment.

Source:

1. District Court judge censured: Defendants not told of right to counsel, Maureen O'Hagan, *Seattle Times*, June 19, 2004, p. B1-2.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*



The High Cost of Free Defense

by C. C. Simmons, JD Correspondent

In 1961 in a coastal town on Florida's panhandle, police arrested Clarence Earl Gideon, a 50-year-old drifter, and found \$25.28 in coins in his pockets. To the police, the coins confirmed a tipster's earlier claim that Gideon had burglarized a pool hall and stolen coins from vending machines.

Too poor to hire a lawyer, Gideon asked the court to provide one. The judge refused. Gideon was left to defend himself at trial. He was found guilty and sentenced to 5 years in prison.

In a penciled plea from prison to the U.S. Supreme Court, Gideon demanded his right to an attorney, irrespective of his ability to pay. In a unanimous 1963 ruling, the Supreme Court agreed with Gideon, and the landmark ruling in the case of *Gideon v. Wainwright*, 372 U.S. 355 (1963) became the law of the land.

On retrial, Gideon was provided with a lawyer. He was acquitted and set free. Gideon's legacy lives on: The Sixth Amendment right to counsel entitles indigent defendants to an attorney at public expense.

Fixed-Fee Contracts

Today, in many jurisdictions, *Gideon's* legacy is hollow. As the number of indigent defendants increases nationwide, and state budgets are pinched by declining revenues, most state governments have handed off the costly burden of indigent defense to the counties. In response, local government officials have turned to fixed-fee contracts to control rising indigent defense costs.

In practice, a fixed-fee contract works like this. A county solicits competitive bids from private attorneys and law firms. The selected (usually the low) bidder is paid a fixed fee to defend accused indigents. The fee stays the same no matter how many cases are filed or how complex they may be. If a case goes to trial and requires 100 hours of an attorney's time, it pays the same as a case that is settled by a plea bargain that was arranged after only two hours negotiation. Most fixed-fee contracts are renegotiated annually.

Under the terms of most fixed-fee contracts, the attorneys are allowed to continue their private practice. This arrangement puts the indigent clients at a disadvantage because the more time attorneys spend with their indigent clients, the less time they have for their hourly-fee-producing private practice clients.

Critics say the fixed-fee indigent defense contracts carry no financial motivation for attorneys to provide zealous representation of their clients. Contract attorneys are usually overworked, take fewer cases to trial, and their clients fare less well than those who have retained and paid private counsel.

In 1973, ten years after *Gideon*, the Washington State Bar conducted a study of flat-fee contract public defender systems. The study concluded that such systems should be eliminated. When the bar issued its report, six of Washington's 39 counties used the contract system. Today, 31 years later, 26 of the state's counties use contract systems.

As more and more counties adopt the contract system, the criticism increases. Legislative committees, bar groups, and independent researchers have condemned the contract approach. One judge referred to the contract system as "Burger King justice," where lawyers "just have to keep the cases moving, moving, moving."

High Cost of Free Defense cont. on page 15

"Bad Lawyering" How Defense Attorneys Help Convict the Innocent ¹

by Sheila Martin Berry ²

"To 'know thyself' must mean to know the malignancy of one's own instincts and to know, as well, one's power to deflect it." - Karl A. Menninger, M.D. (1893-1990)

Introduction

At least one-fourth of the innocent people convicted of crimes they did not commit - including crimes that never occurred in the first place - know what "bad lawyering" is, because it put them where they are today - in prison, even on death row. Yet those of us who advocate for the wrongfully accused and convicted often fail to recognize our own roles in "bad lawyering," perpetuating the problem and its tragic consequences.

"Bad lawyering" is generally understood to mean "ineffective assistance of counsel," a relatively new concept arising from the Sixth Amendment right of a criminal defendant to "have the Assistance of Counsel for his defense." Guaranteeing persons charged with crime the right to representation was, in its time, a bold leap forward over English common law, even if counsel proved to be little more than a warm body with "Esquire" behind its name.

The quality of this assistance was not examined until 1932, when the U.S. Supreme Court reversed the convictions of the "Scottsboro Boys." The reversal was based on Fourteenth Amendment due process violations, but the Court noted the right to be represented "is not discharged by an assignment (of counsel) at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." Twenty-three years later, the U.S. Supreme Court held the right to effective assistance is a constitutional due process right that must be recognized by all the states.

Finally, in 1970, the right to effective counsel was explicitly recognized as a part of the Sixth Amendment's guarantee of the right to counsel in *McMann v. Richardson*, when the Court noted "[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel."

The Duty of the Defense

In theory, the prosecution's duty is to seek the truth, and the duty of the defense is to do nothing. The defendant is not required to testify, call any witnesses or present any evidence. He can rely on the fact he is presumed innocent and on the prosecution's burden of proving the charges beyond a reasonable doubt.

The realities stand in stark contrast to theory. While jurors give lip service to the presumption of innocence, most believe the defendant "must have done something" or the state would not have brought its substantial resources to bear on him. Witnesses in uniforms and lab coats whose job it is to protect the public are much easier to believe than someone who has already been stigmatized simply by being charged. Instructions reminding the jury that the defendant is not required to testify do little to overcome the impression that his or her silence is an indicator of guilt.

Reasonable doubt is the most demanding standard, and the least understood. Jurors are told it is such doubt as would cause a reasonable person to hesitate before acting in a matter of importance. What does that mean? Is it the hesitation experienced when you buy a used car "as is"? Or is it the doubt you feel when your child says he'll walk and feed the dog every day if you'll let him keep it? How

does a juror decide when there is no clear understanding of the standard by which evidence is to be measured?

With all these strikes against a defendant, doing nothing leads directly to doing time. In practice, that is exactly what happens in too many instances. "Bad lawyering" accounted for 23% of wrongful convictions among the first 70 DNA exonerations. Examples of the "bad lawyering" in these cases include but certainly are not limited to:

- Failure to communicate with the client or communicating in a dismissive, callous or hurried manner;
- Perfunctory or no attempt at discovery;
- Narrow, shallow or no investigation;
- Failure to retain needed experts and/or test physical evidence;
- Minimal preparation, weak trial advocacy and superficial or tentative cross-examination.

These failures don't exist in isolation from each other. The criminal defense attorney who puts a block on his phone to keep prisoner-clients from calling is the same attorney who doesn't bother to review the discovery evidence turned over by the state (if a discovery order is even sought), and waits until the deadline for identifying witnesses to begin looking for experts.

Assembly-Line Justice

Small wonder, then, that with trial approaching, these inadequate advocates urge their clients to plead to the charge in exchange for whatever deal the prosecutor is willing to offer. Professionals estimate that in somewhere between 90% and 99% of these cases, the client is guilty and almost any deal is a good deal. But, if true, in 1% to as many as 10% of criminal convictions, the defendant then is factually innocent. In 1998, the most recent year for which figures are available, almost 928,000 adults were convicted of felonies in state courts. That means at least 9,280 and as many as 92,800 innocent people were convicted of crimes they did not commit. Those are the figures for just one year, for felonies only, and does not include similar convictions in federal courts. And 90% of those innocent people pled guilty.

The Georgia Court of Appeals recently vacated the conviction of Richard Anthony Heath and issued a ruling condemning what it called "assembly-line" justice. Heath had pled guilty to charges of driving drunk and causing a crash that injured three people. In over 400 criminal representations, Heath's lawyer had never taken a case to trial. His representation "was so deficient that it effectively equaled no assistance at all," Judge G. Alan Blackburn wrote in a decision in which the full court joined.

The Georgia decision is unusual. In most states, a knowing and voluntary guilty plea waives all non-jurisdictional errors. Ineffective assistance claims - usually the only appellate route available in cases where the defendant says he was misled or tricked into changing his plea - are met with the judicial equivalent of rolled eyes and barely stifled yawns. The procedural bar is raised, and any innocence claims are stifled.

Bad Lawyering cont. on page 13

Bad Lawyering cont. from page 12

Factually innocent defendants who reject plea agreement offers but are convicted thanks, at least in part, to incompetent trial counsel seldom fare better when raising the issue on appeal. As F. Lee Bailey observed,

“Appellate courts have only one function, and that is to correct legal mistakes of a serious nature made by a judge at a lower level. Should a jury have erred by believing a lying witness, or by drawing an attractive but misleading inference, there is nothing to appeal.”

Eyes roll and yawns are stifled as appellate judges consider the ineffective assistance claims of appellants convicted by juries. The decisions generally begin with a recitation of what the appellant must prove - that counsel's performance was deficient, and that such deficient performance prejudiced the defendant. This is followed by a warning that the trial court's findings of what trial counsel did or did not do will be upheld unless clearly in error, and that the appellate court proceeds on an assumption that while trial counsel's performance may not have been ideal, it was nonetheless satisfactory. The appellant must prove trial counsel's performance was so lacking that it deprived him of a fair trial and calls the verdict into question. A few paragraphs later, the court concludes that the appellant was not denied effective assistance of trial counsel. Judgment and order affirmed.

In Texas, Calvin Burdine's lawyer slept through substantial portions of his client's 1984 capital murder trial, including the questioning of witnesses. He repeatedly referred to homosexuals - including his client - as “queers” and “fairies.” In 1999, the U.S. District Court for the Southern District of Texas granted Burdine's writ of habeas, finding that a sleeping lawyer is the equivalent of no lawyer. But the next year, a three-judge panel of the 5th U.S. Circuit Court of Appeals disagreed, reversing the lower court and reinstating Burdine's conviction and death sentence. None of the evidence, the appellate panel decided, supported a presumption of prejudice against Burdine. They warned that “[t]here are real dangers in presuming prejudice merely from a lack of alertness.”

In 2001, the same facts were viewed differently by the same court sitting en banc. The District Court's grant of habeas was affirmed. Judge Benavides wrote for the majority:

“When a state court finds on the basis of credible evidence that defense counsel repeatedly slept as evidence was being introduced against a defendant, that defendant has been denied counsel at a critical stage of his trial. In such circumstances, the Supreme Court's Sixth Amendment jurisprudence compels the presumption that counsel's unconsciousness prejudiced the defendant.”

States of Denial

In one respect, Calvin Burdine was fortunate. By the time his *habeas* was heard, his trial attorney was dead. Had Burdine's lawyer been living, it is likely he would have vehemently denied any deficiency in his performance. The *en banc* decision could well have mirrored that of the 3-judge panel had Burdine's counsel been there to insist he was just resting his eyes when observers thought he was sleeping, and that he used pejorative terms to describe his client as a *strategy*, to ensure jurors understood his references.

Despite the jokes about defense attorneys who appeal convictions based on their own ineffective assistance, intractable denial is the norm. Examples abound. In North Carolina, a state commission established a regional Office of Capital Defender to help reduce the number of murder defendants being sentenced to death in the Forsyth County area, which accounts for 14 of the state's current death row inmates.

Robert Hurley, the state's capital defender, assured the public that establishment of the office was not a comment on the Forsyth County Bar, but local lawyers didn't see it that way.

John Barrow, the president of the Forsyth County Criminal Defense Trial Lawyers Association, said he was outraged by Hurley's comments. “He has demeaned the criminal-defense bar in Forsyth County who handle capital cases,” Barrow said. “He's wrong.”

Michael Grace, a local criminal-defense lawyer, said that several factors cause Forsyth to lead the state in death-penalty convictions. Jurors in Forsyth tend to be conservative and favor death sentences for some convicted killers, he said, an opinion that Hurley and Mike Klinkosum, a newly hired assistant capital defender, agree with. Forsyth prosecutors have much experience in capital-murder cases, and have won many death-penalty convictions, all three men said. “People have not been put on death row because of incompetent counsel,” Grace said.

The Texas Defender Service examined the state *habeas* appeals of nearly all death row inmates since 1995. The study, “Lethal Indifference,” found those inmates had a 1-in-3 chance of being executed without their cases being adequately investigated or argued by a competent appeals attorney.

The study cited as an example the case of Leonard Rojas, executed on December 4, 2002 for the murder of his wife and brother. Rojas' state *habeas* lawyer was assigned by the Texas Court of Criminal Appeals, despite the fact he had been disciplined three times by the state bar and given two probated suspensions. He caught another suspension a few weeks after undertaking Rojas' case. It isn't surprising that the attorney's writ was woefully inadequate - he ignored issues of competency of defense and prosecutorial misconduct - and he failed to preserve Rojas' right to file a federal *habeas*.

But the *habeas* attorney doesn't see it that way. He says his representation was not as bad as the Texas Defender Service makes it out to be. His only concession is his failure to preserve Rojas' right to federal *habeas*. “I didn't make sure it got into federal court,” he said. “That's the thing I did not do.”

Exonerations of shocking numbers of innocent death row inmates - 25 innocent people have been exonerated from Florida's death row since 1976 and the national number of wrongfully convicted death row inmates is more than 100 - have focused the re-examination of the quality of defense counsel on capital cases. The stakes are highest in these cases, literally a matter of life and death. There is no reason to believe bad lawyering plays any lesser role in non-capital cases, from mandatory life felonies to 30-day misdemeanors.

Free vs. Fee

Truth in Justice, the educational non-profit I direct, receives a steady stream of correspondence from relatives and friends of prison inmates with innocence claims who cite bad lawyering for the conviction. More often than not they begin, “He couldn't afford a real lawyer, so he had a public defender.”

Public defenders are often blamed for bad lawyering in criminal cases because they are commonly underpaid and overworked. It is widely acknowledged that the resources available to public defenders' offices (money and staff) are dwarfed by the resources of prosecutors. It is equally well understood that many private practice attorneys who are appointed to represent indigent defendants seek such appointments because their skills are so poor, it's the only way they can make a living.

But there is as much bad lawyering in the private sector

as in indigent defense. In many parts of the country, the challenge has changed from finding a highly competent criminal defense attorney to finding a criminal defense attorney at all. The criminal defendant who can afford to pay has far fewer choices and less information on which to base those choices than he would if he needed a real estate lawyer to handle a closing.

People who don't expect to need the services of a criminal defense lawyer know next to nothing about how to find one. Shame and disgrace keep many of them from asking friends and neighbors for referrals. They may simply dial the number of someone they've heard of, whether the press was good or bad. Increasingly, people turn to the Internet to find lawyers, either directly or indirectly. It's no less a crap shoot than the yellow pages.

I was surprised recently to see a particular Milwaukee, Wisconsin lawyer listed as a referral attorney at the website of a multidisciplinary practice specializing in defending false allegations of child abuse, domestic abuse and sexual harassment. His bio compared him to “Clarence Darrow and other legendary barristers.” But when *Milwaukee Magazine* rated 189 Wisconsin lawyers in 13 disciplines, the same lawyer topped two categories, “Vastly Overrated” and “Least Integrity.” Comments included, “Clients erroneously believe that obnoxious lawyers are effective lawyers,” and “A disgrace to the legal profession in particular and the human race in general.” The comments are supported by his disciplinary history:

- 1970: Suspended for one year for harassing and threatening a local judge until the judge committed suicide.
- 1988: Suspended for two years for, among other breaches, cutting a media rights deal based on his client's case prior to trial.
- 1991: Reinstatement denied.
- 1993: Reinstatement denied.
- 1994: Reinstated
- 1996: Public reprimand
- 2002: Complaint pending; case will be heard by Wisconsin Supreme Court in 2003

Once the unwary have put all their assets into a high-priced but unethical and ineffective defense lawyer, they are as stuck as any indigent forced to take whatever the court gives him. The warning signs may be clear - calls unanswered, evidence untested, witnesses never interviewed, experts not consulted, and the most glaring warning sign, questions met with temperamental outbursts and threats of abandonment.

By the time they figure out they've got a lemon, there's no money left to retain another lawyer. When the lemon lawyer offers them a plea deal on the eve of trial, they're likely to take it - even though they are innocent. Those who go to trial find themselves represented by counsel who is unprepared, unmotivated and whose incompetence has the effect of adding another prosecutor to the state's team.

Caveat Emptor

A Georgia woman wrote me about the attorneys she had retained for her sons, Cecil and James Simmons, convicted in Florida on the uncorroborated testimony of a retarded man of abducting, raping and murdering a Kentucky woman who was traveling through the area:

“Since the arrest and conviction of my sons - two different trials, two different lawyers - we are left with the lingering question: *Is there really honesty within the system?* Post-conviction, I began my own investigations of the [attorneys] who represented them [at trial]. [The] lawyer of first son - his foster son was

Bad Lawyering cont. on page 14

Bad Lawyering continued from page 13

incarcerated for bludgeoning a local man to death. His foster son was convicted and given 7 years for his confessed crime. [There] also [were] sexual [assault] charges against the lawyer that represented our other son. Two weeks prior to [younger] son's trial, sexual [assault] charges were dropped against him due to 'unavailability' of claimant who was his prior secretary. [This] information was sent to me by the Bar Association [after sons were convicted]"

But her story only gets worse.

"... we retained two more lawyers. (We have had to retain two separate lawyers all during Appeals). Our youngest son's lawyer we paid \$11,000.00 plus \$1,000.00 up front to review the transcript, which we paid for (\$2.50 per page, over 1,800 pages of trial alone). Two weeks later this lawyer wrote us a letter and had me to do the research work, which involved driving over 400 miles one way, and go to the venue of trials and gather information for him. This I did. After this we heard no more from him [Over a year later], I called his office to see if the Appeals were nearing completion and to see if he had filed for habeas corpus; this had to be done by the middle of Nov. that year [because] Florida has a two year time frame from the date of direct appeal denial. To make this short, my calls were not answered. After days of trying to locate this man - now bear in mind his office was 11 hours from our home - on the fourth day I was told he no longer practiced in that county, and his whereabouts were in question. This lawyer took our money and left town, along with all the documents I had sent to him - documents I would never be able to acquire as another lawyer had secretly supplied them to me. After I filed a complaint with the Bar Association and 3 years later, they found our case worthy of \$2,500 refundable. They disbarred him, but only by my investigations were they able to locate him for papers to be served. He had moved to another state and become a real estate broker."

These parents have been through a total of eleven lawyers. Substantive Brady issues raised in the state habeas, including undisclosed evidence that points toward state employees as the perpetrators, were deemed insufficient to undermine the certainty of the jury's verdict. The second son expects similar findings in his state habeas.

Some instances of incompetent assistance are so conspicuous that a reasonable person must question whether they are deliberate. The same Georgia mother quoted above wrote me about the conduct of her elder son's trial attorney:

"Pretrial, Cecil's lawyer called me at home. He asked me to go over the [key witness'] deposition and present to him questions I feel should be clarified by [the key witness], on the stand. I did. I spent long hours, days, doing just this. In the course of [the key witness'] testimony for the prosecution, the prosecutor made a point to be silent while he returned to his table, knowing all eyes were on him, even mine. [The prosecutor] picked up a piece of yellow legal paper and returned to the podium which was within 3 ft. of me. [The prosecutor] began to ask [the key witness] questions. [They were] the questions I had sent to the Defense Attorney, my legal paper, my handwriting. The Defense attorney was in front of me. I tapped him on the shoulders [and] asked him what is going on. He jerked his shoulder from me [and] gave me a nasty look. At the next recess, I confronted him with this. He asked me did I think I was the only one able to obtain yellow paper, and did I really think they would be stupid enough to carry out such an act?"

"He also sat right there and let the prosecutor, during his closing, signal for the cameras to roll (all local television station were allowed in court), turn around to the jurors, and state loudly in dramatization: "*Even James Simmons admitted how they handcuffed Kristi and repeatedly raped and killed her.*" Before I could tap him again, Cecil had leaned over to him and asked him wasn't he going to OBJECT - this was untrue. He told Cecil, the jurors knew this was an *inadvertent* statement, the jurors are not as emotionally involved as you and the family. Well, you know and I know those jurors went into deliberations thinking they had a *confession* from the brother. You know as well as I know, these actions also tainted all possibility of James receiving an unbiased trial, in that small little county. Defense did not preserve this, so it could not be used for [appeal] purposes. When I brought this to the attention of other lawyers, they said the same - it was just an inadvertent statement, the jurors did not comprehend this as the defendant and family would."

The Deal Makers

One of the most insidious forms of bad lawyering leading to the conviction of innocent people falls outside Sixth Amendment review. Cutting leniency deals with the prosecution in exchange for testimony against another criminal defendant occurs outside the courtroom and off the record, and it is passed off - rationalized - as effective advocacy on behalf of a client. But when the client is a "snitch" willing to sell an innocent person down the river to save his own skin, the defense attorney who brokers the deal becomes party to the very miscarriage of justice against which his profession is intended to guard.

What role do informant/snitch testimony and false witness testimony play in wrongful convictions? These were a significant factor in one-fourth of the convictions of the first 70 DNA exonerations - interestingly, the same proportion as bad lawyering. Examples of the devastating effects of this business-as-usual collusion between defender and prosecutor can be found across the country. In the Chicago, Illinois case of the Ford Heights Four - Dennis Williams, Kenny Adams, Willie Raigne and Verneal Jimerson - Dave Protes and Rob Warden investigated a snitch who had been put up to his incriminating lie by the brother of a man who turned out to be one of the real murderers.

In Crewe, Virginia in 1996, Sheila Barbour Stokes provided the key - and only - evidence linking Larry Fowlkes to the robbery and murder of a Nottoway County woman. In exchange for her testimony, Stokes avoided prosecution for her fourth felony offense. Fowlkes was convicted with no physical evidence linking him to the crime, and despite a solid alibi. Stokes has since recanted, reaffirmed, and again recanted her testimony, while Fowlkes serves a 45-year prison sentence.

Behind each leniency-for-testimony deal, there is a defense attorney bartering the most favorable terms he can get for his client. Just as the overwhelming majority of prosecutors who obtain convictions of innocent people know or should know the defendant is probably not guilty, so too do defense attorneys know or should know when the deals they cut will result in convicting the innocent.

Often there is no pretense that anything less than framing an innocent person lies at the heart of the agreement. A Wisconsin inmate serving a life sentence for murder - for which he has compelling innocence claims of his own - received a phone call from his defense attorney with a "get out of prison" offer from the same District Attorney who had prosecuted him. All he had to do was help frame an innocent man by falsely testifying the target had solicited him for a "hit contract" on the District Attorney.

The DA had obtained a conviction against a police officer for murder, arson and mutilating a corpse in the death of the cop's estranged wife. But it was a precarious conviction, dependent on the continued concealment of evidence that no crimes had been committed in the first place, and the DA was worried his hard work would fall apart on appeal. Fresh charges against the police officer would give the DA a bargaining chip - if the cop would drop his appeal, the DA would drop the new charges.

The inmate's initial, vehement rejection of the offer was followed by a written reiteration of his refusal. His attorney wrote him, urging him to reconsider.

"I have not struck any deal with [the District Attorney] concerning a re-sentencing and/or amendment of charges to a 30-year prison sentence. However, I thought that I should pass that information on to you so that you could consider the same and what the State wants of you in the event we reach a point where your motions are denied and/or later appeal is denied and you find yourself once again in the same position you are currently in, life in prison without parole. Hence, please think about the potential offer and agreement which the State might be willing to enter into and what would be required of you."

The inmate had no problem grasping the inherently unlawful and unethical nature of the offer. When the District Attorney who proffered the deal was unanimously endorsed by Wisconsin's Federal Nominating Committee for presidential appointment as U.S. Attorney, the inmate forwarded documentation of the offer to Senators Herb Kohl and Russ Feingold. They "got it." Ten days later, the Senators removed the District Attorney from the list of nominees forwarded to President Bush.

The only one, apparently, who didn't "get it" was the defense attorney who urged his client to "think about the potential offer . . . and what would be required of you." When Jeanne Anthony of WHBY Radio reported the deal in a documentary that re-examined the conviction of the District Attorney's target, she opted not to name the inmate or his lawyer. Ms. Anthony was stunned, following the first broadcast of the program, to receive an irate call from the inmate's lawyer complaining because he wasn't identified!

Conclusion

We have come a long way in acknowledging that, in the words of retired Florida Supreme Court Justice Gerald Kogen, "innocent people are convicted every day." And we have responded. At this writing, there are 40 innocence projects in the United States. Increasing numbers of lawyers and law firms are undertaking *pro bono* and reduced fee representations of the wrongfully convicted.

But we still have a long way to go. Innocent people continue to be convicted every day, and bad lawyering in every form facilitates many of these convictions. How can we be part of the solution rather than part of the problem? More regulations and laws are not the answer. Bad lawyering is already unethical and often unlawful.

The resolution is close at hand. It lies within each of us. Examine your own conduct honestly rather than defensively. Assess yourself from the viewpoint of the innocent person charged with a crime someone else committed, or a crime that never happened in the first place. From that perspective, are slap-dash explanations of law and procedure good enough? When the rest of your life is on the line, is it okay that your lawyer doesn't have time to subpoena or even interview alibi witnesses? After you've sold all your possessions to pay legal fees, do you mind that your lawyer fails to retain experts who could clear you in order to maxi-

Bad Lawyering cont. on page 25

Indigent Defense in Grant County

Grant County in central Washington state covers an area of almost 2,700 square miles, about the same as the state of Delaware. The county boasts a population of about 80,000 citizens with 16,000 of them in Moses Lake, the county's largest town. The indigent defense system in Grant County is not much different than the system in other towns and cities across the nation. What happens in Grant County likely happens in other counties in other states every day.

In the early 1990s, Thomas J. Earl worked as a fixed-fee contract attorney for indigent clients in Grant County. Tom was no paragon of virtue as the case of Patrick Hurley will attest.

In 1993, Hurley was arrested and charged with a sex crime. On the first day of his trial, Hurley sat at the defense table with Tom Earl, his court-appointed public defender.

"There was nothing but a blank piece of paper at the table," Hurley recalled. When he demanded an explanation for the seeming lack of pre-trial preparation, Tom took Hurley aside and told him he could avoid prison time if he could come up with \$10,000.

Outraged, Hurley asked the court to appoint another attorney to defend him. The judge refused. Hurley pleaded not guilty, he was convicted and sentenced to 9-1/2 years in prison.

Three years later, Hurley's new lawyer appealed. The victim admitted she had fabricated the allegations, the conviction was vacated, and Hurley was released. The high cost of Hurley's free defense? Three years in prison.

Consider now the tattered career of Guillermo Romero, an unremarkable attorney in the Pacific Northwest. Born in 1948, Romero attended Gonzaga University in Spokane. After graduating in 1984, he sat for the state bar exams in Idaho and Washington but failed to pass either on five separate attempts. In November 1988, persistence paid off and he passed the Washington State Bar exam. At age 40, Romero became a licensed attorney.

In 1994, following an unsuccessful attempt at private practice, Romero accepted employment as a fixed-fee contract public defender in Grant County. There, for almost 10 years, he represented hundreds of indigent defendants. By any measure, his performance was dismal. The harm done to his indigent clients is incalculable.

Romero's clients' guilty plea rate is 88 percent. The last time Romero won a trial in Grant County was in 1997. Since then, his record is zero for 23. His understanding of the law is shallow. He once filed a motion in a rape case asking for "D and A testing" - when it should have asked for "DNA testing." From his clients' point of view, the cost of free defense in Grant County is very high. They pay with lengthy sentences in state prisons.

Grant County, Tom Earl, and Guillermo Romero are not exceptions, but rather all-too-common examples of the woeful state of indigent defense across the United States today. Although the Gideon ruling required the individual states to provide, at their expense, an attorney for indigent defendants facing time in state prison, Gideon did not provide the money to pay for those attorneys nor the means to raise it. As a consequence, indigent defendants are often provided with less-than-effective counsel who do a poor job of representing their clients.

By comparison, Dallas County, Texas, with a population of 2.3 million, uses a hybrid system. Indigent defense is handled

by a combination of public defenders and private, court-appointed defense attorneys. The system is, however, far out of balance. While the county district attorney's office has over 210 attorneys on staff, the county public defender's office has only 65, and they must share only four secretaries and one administrative assistant among them. Moreover, salaries for the public defenders are markedly lower than those of their counterparts in the district attorney's office according to a recent report by the Spangenberg Group.

Romero for the Defense

In 1994, John Luke McKean held a contract to handle half of Grant County's indigent felony defense cases. For doing so, McKean was paid a flat annual fee of \$120,000. That year, Romero arrived in town and McKean hired him. "I didn't know anything about him," McKean said, "And I should have been more careful."

McKean paid Romero \$2,675 per month and a second attorney received \$3,200 per month. These two attorneys handled all of McKean's indigent defense cases and left him about \$50,000 per year as gross profit on the contract.

"He was obviously making money off of me," Romero said later. "I didn't care because I wanted to start a practice in Grant County."

Early on, McKean began to wonder about Romero's work. He didn't prepare memos or trial briefs. He "didn't seem to have a clue" how to do legal research, McKean said. "I was scared to death." Romero's employment with McKean ended after a year when, in 1995, the Grant County public defender contract went to the law firm of Earl and Earl. Doug Earl, Tom's brother, was the contract administrator and he hired Romero. The 5-year contract paid an annual fee of \$390,000.

Tom Earl, the unscrupulous attorney from the Pat Hurley case, handled 40 percent of the cases and was paid \$156,000 per year, 40 percent of the contract fee. Doug Earl assigned 20 percent of the cases to Romero but rather than receiving \$78,000 per year, 20 percent of the annual contract fee, he was paid only \$54,000. \$6,000 of that was deducted as the annual rental charge for his office space at Earl and Earl, so his net pay was \$48,000.

The last time Romero won a trial in Grant County was in 1997. ... His understanding of the law is shallow. He once filed a motion in a rape case asking for "D and A testing" - when it should have asked for "DNA testing."

Doug Earl kept Romero on the payroll through 2000 despite a growing volume of complaints and a state bar investigation of misconduct. Doug referred to his contract attorneys as "knotheads" who worked independently. "They did whatever they did." He said it was "up to the judges to tell us if these people are bozos or not."

Romero's clients' complained incessantly and bitterly that he had failed them. He didn't interview defense witnesses, investigate the state's case, or challenge the admissibility of the prosecution's evidence, they said.

Garth Dano, a local attorney, reviewed more than 200 of Romero's cases. Dano found little evidence of pre-trial preparation, discovery motions, suppression motions, legal briefs, or memoranda. Last year, a U.S. District Court judge reviewed a 1997 case involving Donald Lambert, a 15-year-old boy accused of murder. Romero had been appointed to defend the boy.

The judge found that Romero had conducted an insuffi-

cient investigation, failed to advise Lambert about the consequences of a guilty plea, and barely prepared the boy for a hearing that would determine if he would be tried as a juvenile or as an adult. The judge also found that: Romero didn't interview Lambert's father, teachers, or friends; he didn't obtain records about the boy's school performance or his suicide attempts; and he didn't pursue the possibility that Lambert might suffer from fetal alcohol syndrome.

Unprepared, feckless Romero and his young client appeared at the 1997 hearing. There, the boy fatefully agreed to be tried as an adult, pled guilty, and was sentenced to life in prison without the possibility of parole.

... in November 2002, the state bar presented its case against Romero. The evidence showed that in at least three cases, Romero had improperly solicited money from court-appointed clients or their families. ... On July 22, 2004, the state Supreme Court ... ordered Guillermo Romero's immediate disbarment.

Following his review of the case, the U.S. District Court judge vacated Lambert's guilty plea. The state has appealed the judge's ruling.

Romero's Troubles Grow

As his personal troubles mounted, Romero continued to handle cases on the Earl's indigent defense contract. Romero didn't pay his bills. Five creditors won judgments against him. A Yakima, Washington judge ordered Romero arrested for dodging efforts to collect a debt. After he was arrested on a contempt-of-court warrant, he posted bail, was released, and two weeks later a second warrant was issued.

In 1998, Romero's law license was suspended for a month because he failed to complete the required continuing legal education courses. In Romero's defense, Doug Earl maintained that Romero was able to handle the indigent defense work. Later, however, Doug acknowledged that he had observed Romero's clients' frustrations firsthand. "I'd be in court, and they'd come into court, and they'd be screaming at him, so it wasn't hard to figure out," Doug said.

When the state bar again threatened to suspend Romero's license, Grant County prosecutors and police - his adversaries in the criminal justice system - wrote testimonials defending him. And why not? With Romero for the defense, the prosecutors and police were all but assured of victory.

Grant County prosecutor John Knodell wrote of Romero, "I can assure you, on the basis of my knowledge of the man, his continued practice of law will in no way be detrimental to the integrity of the standing of the bar and the administration of justice or contrary to the public interest." And so the feckless Romero remained on the job, an easy adversary for the police and prosecutors.

The Beginning of the End

In 2001, the Grant County indigent defense contract was awarded to Tom Earl. The new contract, which was to run through 2005, provided a \$500,000 annual payment. Despite Romero's checkered past, Tom Earl hired him.

Romero said that Tom Earl paid him \$93,000 a year to handle 20 percent of the cases. By 2002, Romero was being assigned 29 percent of the appointments but still receiving less than 20 percent of the contract fee. By early 2003, Romero's share had risen to 32 percent of the indigent felony cases. It wasn't until later that Romero discovered the gap between his pay and his workload. "I was

High Cost of Free Defense cont. from page 25

Donald McDonald continued from page 3

before the van was impounded, there was no tissue or blood residue, or any other evidence that a human body part had cracked the window. The truth is the window was cracked months before by a sliding tool box.

There was an issue of hair samples recovered from my van; however, KPD declined to submit any hair samples for comparison. Their explanation was that there was no way they could know which hairs recovered from Laura's apartment would be hers for certain, so trying to compare hairs found at the apartment to the ones they sucked up in their police vacuuming of my van would be a futile effort. However that is contradicted by the record of a Kodiak police investigator entering Laura's apartment after March 30, for the purpose of recovering hair samples from Laura's comb, and a bandana that she wore when she played racquetball. A question that has not been answered is did the KPD attempt, but fail to match hairs found in my van with hair from Laura's comb and bandana?

Although testing of cigarette butts found in my van's ashtray were deemed inconclusive as to whether they could be linked to Laura, there is no record that any of her brand of cigarettes was found in the van.

The police also compared soil samples from the place they said I drove that night with Laura, with soil samples from all over the van, including under the frame, in the tire grooves, under the bumpers, and inside the van. Although none of soil matched, that fact was not brought up at the trial.

On Monday, March 31, 1986, my van had been thoroughly gone through by KPD with a fine toothed comb. There was nothing found in it to indicate I had anything to do with Laura's disappearance. On March 31, two days after my arrest, records show that my van was released and towed to a Kodiak wrecking yard owned by Bruce St. Pierre. The yard had a covered Quonset-style warehouse and Kodiak contracted with Bruce to retain vehicles. However unlike the KPD's secure impound yard, where my van was stored at Bruce's wrecking yard is not secure, and Bruce St. Pierre testified to that fact at my trial. That lack of security became an important issue in my case.

Oops! Someone put a Band-Aid in the wrong pink shoe!

Laura's mother mentioned to KPD investigator William E. Rhodes that she was wearing designer jeans, a belt with a heart shaped buckle, a mauve down-filled coat, pinkish tennis shoes, and white porcelain earrings with a purple flower painted on them. Clothing items consistent with her description were later found over a period of months along a two mile stretch of Monashka Bay below the cliff from which the prosecution alleged Jim and I tossed Laura into the water. However Kitty Munro also mentioned Laura was wearing a type and color of shirt that was never recovered, and she didn't mention a purse that was recovered. Considering the discrepancies between Kitty Munro's description of Laura's attire and what was and wasn't found, it is possible that none of the recovered items were Laura's, particularly since none of the items were positively identified as hers. However the purse did have something in it that is rather curious - Laura's *old* identification, and it is also curious that nothing in the purse indicated she had it the night of her disappearance. The questions raised by the clothing found on the beach were compounded by the bizarre circumstance of how a "pinkish tennis shoe" was discovered, and what was found inside of it.

One of the most interesting details that Kitty described was the shoes. In the latter pages of the April 3, 1986 KPD Rhodes interview, Kitty describes them as women's size 9, pinkish suede with gray swatch reinforcements. She says

they were Velcro tie tennis shoes. Without being asked Kitty volunteers that Laura had planter wart surgery and wore Band-Aids until her wounds healed. No one asked or determined from which foot the warts had been removed.

On April 13, 1986, a beachcomber, Dennis Pederson, was wandering the shores of Monashka Bay near Pillar Point. He noticed a tennis shoe in the tidal wash and felt that it might be significant. It was sodden pink and had a Band-Aid in it. He threw the shoe into an area above the high tide line. Kitty Munro learned of the shoe and on Sunday, April 21, 1986 she and her friend went to the location where Dennis had thrown it. The Band-Aid was still in it. Kitty and her friend picked up the shoe and drove to KPD to report their find. KPD Timothy Lowry took the report. All agreed that the shoe is consistent with footwear that Laura left home wearing on March 28. However, there are a couple of questions that were neither asked nor answered. It was proven at the trial that the shoe was to be worn on the left foot. All agreed that it was a left shoe and that it was remarkably similar to shoes that Laura was wearing. There is a glitch however. After my trial records were received from Laura's podiatrist stating that *Laura's wart surgery was on her right foot, not her left*. In either case, it leaves the question of how the sock disappeared, leaving a Band-Aid in the wrong shoe. It is beyond ridiculous to seriously consider waves and currents did it - since it was something only possible by human intervention. The obvious planting of the shoe as evidence to support the prosecution's theory that Laura died by being tossed off a cliff into the ocean was so badly bungled that it would be laughable if the bogus evidence hadn't been used to help convince the jury to convict me.

Another obvious but unanswered question is how did the various items of clothing that Laura supposedly wore that night happened to be removed from her body after she was allegedly tossed into the water?

Truly magical psychic evidence discovered in McDonald's van

In August 1986, five months after my arrest and two months before my first trial began in October 1986, KPD Cpl. Andre said he saw in a police associated magazine an advertisement for a Chicago area psychic, William Ward. Andre called him on an "urge." The psychic told him to "look for something in the van."

To see if the previous fine tooth comb searches of the van had missed some piece of evidence, KPD Cpl. Paris went *alone* to inspect my unsecured van at Bruce's wrecking yard. He did this on October 19, 1986, just nine days before the start of my trial. He testified at my trial that he looked through the driver's side window and saw something glistening in plain sight near the gas pedal. Officer Paris then called his subordinates, detectives Rhodes and Walton on their day off. He instructed the two detectives to take another look in my van. While visually inspecting the van KPD Rhodes and KPD Walton spotted the object. Laying in plain sight on the van's floor near the gas pedal was a white porcelain earring front with a purple flower painted on it. This earring was *magically* discovered in plain sight after all the months of the van being searched, torn apart, illuminated throughout for blood, and available for public inspection. Detective Rhodes took a triangulation of photos to accurately determine the earring's position.

With the fortuitous finding days before my trial of an earring consistent with the one described by Laura's mom, the prosecution could at least argue there was something tangible indicating Laura was in my van, and she may have encountered violence sufficient to cause an earring to "fall off" her ear.

The spotting of the earring in plain sight was not the only thing suspicious about the October 19th search of my van: It was conducted under the very unusual circumstance of being the first time during Bruce St. Pierre's ownership of the wrecking yard that he or an employee was *not* allowed to be present - which was a stipulation of his contract with Kodiak - while the search of a vehicle took place.

The KPD's reliance on a psychic vision as justification for their third search of my van is as ridiculous as their official explanation of why the earring front wasn't found in previous searches: The KPD had my van towed to a gas station to see how much gas was needed to fill it to determine how far the van had been driven. That is a farcical explanation, because the KPD didn't know if my van was full of gas around 9 p.m. on March 28, or if I might have had a gas can to add gas, or if my van's gas tank had been siphoned. The earring front, according to the prosecution speculation, had been knocked off an ear violently and gone down the front window defroster slot. They then speculated the jarring motion of towing the van enabled the earring to fall through the heater/defroster system to the floor. It was never investigated, much less proven, that such a journey could occur through my heater/defroster system.

The earring found on the floor of my van during its *third* search was the prosecution's only alleged evidence tying Laura Ibach to a possible struggle in the van. Thus I am including for your consideration an abbreviated version of a report by an investigator who has worked on my case.

I have analyzed the issue concerning the earring found on the floor of Mr. McDonald's (Mac's) 1966 Dodge van on October 19, 1986, and the possibility it travelled completely through the van's Heater/Defroster/Fresh Air (flow) system. The prosecution did not present any evidence or otherwise speculate at Mac's trial as to whether the earring went down the defroster vent on the driver or the passenger side of the van. If the earring went down either defroster vent the next thing to account for would be its return to the driver's side heating delivery system. A flap closes, opens, or mixes the warmed air that is delivered to either the heater or defroster. Even granting that the earring could have passed by the defroster/heater flap, the blower motor powers a fan that conducts the air in the flow system. It is undetermined how many blades that fan has, or the position the blades were stopped at in the blower motor housing when the van was impounded. In addition it is unknown if Mac's van was started after it was impounded, if the defroster/heater motor was turned on or off, or if any of the defroster or heater control settings were changed after it was impounded.

However it is clear from KPD photographs of the van and the heater on/off pull knob, that the heater, and not the defroster, was on when Mac was last in his van. If the earring rolled right or left and down past the heater/defroster diverter flap, it would descend into the electrically motorized fan system. It does appear that an earring, by passing all the other blocks and variables, could end up on the floor of the heater housing delivery system. There it would likely rest, since there are 1/4 inch high lips that the earring would have to somehow jump over to end up on the floor of the van.

While there is a fresh air system integrated in Mac's van model, an earring would have to make a very long and highly improbable, if not impossible trip, to end up on the floor of the van where it was found. It appears to me that there would have to be much more than violent travel over brick roads and railroad tracks to cause such an occurrence. It appears to me that the van would have had to be critically angled to one side or the other for

Donald McDonald continued on page 17

Donald McDonald continued from page 16

an earring to fall into the heating system after having entered the defroster system. There is no evidence that such an event occurred, and the prosecution did not contend that it did. The most likely scenario is that the earring was placed at the location it was found during the search of the van by a person or person's unknown.

The prosecution's theory of Laura Ibach's disappearance

The prosecution's theory of Laura's disappearance was Jim Kerwin and I allegedly killed her in my van, drove to the other end of Kodiak Island and threw her dead body off a cliff into Monashka Bay, and that she was washed away, never to be seen again. When I knew Laura she weighed about 150 pounds. It is impossible that Jim Kerwin and I could toss a 150 pound body, dead or alive, over 50 feet straight out to clear the rock outcroppings below so it would reach the high tide line. That not only did not happen - it can not be done. In an attempt to prove the impossibility of the prosecution's theory, prior to my trial my attorney arranged for two men to toss a sack filled with 150 pounds of material off the cliff where Laura was allegedly tossed. They were unable to even remotely come close to reaching the high tide line. However my trial judge ruled testimony related to the demonstration was inadmissible - so my jury heard nothing about it. Yet the crucial relevance of that testimony was confirmed years later when the national television program *Inside Edition* did a segment on my case. They recreated the prosecution's scenario at the cliff where Laura was allegedly tossed into the ocean, with the same result - it is *impossible* for two men the size of Jim Kerwin and me to toss a bag with a 150 pound body far enough away from the face of the cliff to reach the high tide line at Monashka Bay.

Yet the prosecution's case substantiating that preposterous "theory" wasn't what I would call circumstantial - it was more like pure fabrication. No dead body was ever produced. No means nor motive for me to have killed my friend Laura was proven. No weapon was proven to have been used, nor was *any* method of Laura's alleged death proven, precisely because it was unknown if she was in fact dead. No fingerprints, no hair, no blood, no skin, no physical evidence of any kind was found to prove that any crime was committed by me (or anyone else) related to Laura's disappearance.

Prosecutors said that Jack Ibach hired Jim Kerwin and me to do away with Laura. There was no testimony by anyone showing, much less proving, that I was involved in any such scheme. For almost two decades, I have steadfastly maintained that I had nothing to do with, nor was I aware of any plans for Laura's disappearance.

The prosecution's speculation that a man I only knew only on sight talked Jim Kerwin and me into killing his ex-wife for no financial gain is ludicrous. Jim Kerwin didn't know Laura, while I considered her to be a friend. Yet the prosecution contended that Laura did not know me, and had never seen me before. Only one prosecution witness, Al Ruble, testified we did not know each other. As I explained previously, he is one of two people (along with Matt Jamin) who are likely to know what actually happened to Laura. My frame-up consisted of the prosecution's creation of so-called "facts and evidence" to fit a fairytale scenario neatly closing the book on Laura's mysterious disappearance.

Two trials in Anchorage

The trial's venue was changed to Anchorage from Kodiak. The three of us were tried on kidnapping and murder charges in the same courtroom before the same judge and jury. Our trial began on October 27, 1986 in the courtroom of Superior Court Judge Edmund Burke.

Although we were seated next to each other, we were legally considered to be "tried separately, but together, before the same courtroom in the interest of judicial economy." The legal reasoning was that a judge and jury could keep all the testimony regarding each defendant separate, and that the jury would not infer damaging testimony regarding one individual against the other two. Common sense says that is impossible.

Jack retained an attorney to represent him, and Jim and I had court-appointed attorneys. Acting on advice from our attorneys, all three of us elected not to testify at trial. The result of the trial was Jim Kerwin's complete acquittal, Jack Ibach received a hung jury on both charges, and I received a hung jury on the murder charge but was found guilty of kidnapping Laura. Jack Ibach and I remained in jail, and the Kodiak prosecutor decided to re-try us.

The second trial, again in Anchorage, began after mid-April, 1987 in Judge Mark Rowland's courtroom. Jack and I were tried together but separately, just as before. My trial attorney, Louise Ma, was no longer able to represent me through the public defender's system; so, Pam Cravaz acted as my counsel for the second trial. Scott Dattan was appointed as Jack's attorney.

My experience at the second trial was worse than at the first. Pam Cravaz was inexperienced and outmatched. Just as in the first trial, there was no cooperation between Jack's attorney and mine and the legal march toward my wrongful conviction continued. I was convicted of Laura's murder and sentenced to life in prison.

At both trials there was much uncorroborated and unchallenged testimony. The "Exceptions to Barring Hearsay" rules, one of which is "Excited Utterance" allowed five prosecution witnesses to make all sorts of statements to the jury that went beyond Laura's apparently very "excited utterance" to a co-worker Suzanne Hinson around 3:20 p.m. on the day she disappeared. If the prosecution's case is to be believed, Laura was emitting "excited utterances" over a period of 1-1/2 hours and at two different locations about a mile apart. In spite of the hearsay exceptions rule and limits on the exception about ignoring what was said, and in spite of the judge's explanation that the jury should only use any "excited utterance" statements to perceive Laura's intention, the attorneys asked numerous questions of each of the five witnesses. The questioning went to the particulars of what Laura said.

Conclusion

After 18 years my state and federal appeals were exhausted in the spring of 2004 when the U.S. Supreme Court denied my writ of certiorari.

However there is some hope, because the person or persons responsible for Laura's disappearance are still "out there," and one or more people may have critical information about the circumstances of her disappearance, and who may have seen her after 9 p.m. on March 28, 1986.

One important lead that is still hanging, is that given the statements by Laura's friends, and that I know she walked away from my van that night, to the best of my knowledge two people who likely saw Laura Ibach before her disappearance are Albert Ruble and Matthew Jamin. Although they are the most likely people to have vital information regarding the fate of Laura, they were never considered as suspects in her disappearance, or investigated for their contacts with her on March 28, 1986.

Another possible lead is that after my arrest I learned Laura was a sometimes drug dealer in Kodiak who was a police

informant. If one or more of Kodiak's key drug dealers learned that Laura was feeding the police information, that certainly would be a motive for them to make her disappear.

The only certain thing about Laura's disappearance, is that no one has come forth to say they have seen her since she left my van at approximately 9 p.m. on March 28, 1986. If she is alive she must have had a very good reason to keep herself successfully hidden for 18 years. More than anyone else in the world I want to know what happened to Laura - because that is the very information that will set me free.

I am thankful for my sister, Katha McDonald, who has remained steadfast through my ordeal and for the small group of people she has been able to alert and keep focused on my predicament. I also thank you for reading about my plight.

I can be contacted at:
Don McDonald #112338
Spring Creek Correctional Center
PO Box 5001
Seward, AK 99664

My outside contact is my sister:
Katha McDonald
6730 Bayview Dr. N.W.
Marysville, WA 98271
Email: katham@netos.com



JURIES: Conscience of the Community by Mara Taub

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

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

"A unique glimpse into the mind of a juror who dared to judge a criminal justice system that discriminates against people of color and the poor. Must reading for potential jurors."

To ORDER, send \$19, check, money order, cash or new stamps, with your address to:

C.P.R. Books
PO Box 1911
Santa Fe, NM 87504

180 pages * Softcover * Postage paid

Justice:Denied is an all-volunteer organization that depends on people across the country who are dedicated to publicizing cases of wrongful conviction.

Sheila Howard is one of those dedicated volunteers. She has handled JD's mail from prisoners in California for several years, and she was instrumental in obtaining the grant that paid for *Justice:Denied's* Special Edition in 2001. She has also edited and written articles, including two in this issue about how innocent immigrants are menaced by Department of Homeland Security policies (see page 6). All of JD's readers can be thankful that people such as Sheila are willing to donate their time and energy to raise the awareness that miscarriages of justice are more common than anyone in the law enforcement system dares admit.

Johnnie Savory continued from page 4

Peter Ellis Douglas. The Court asked Mr. Burgess to stick to the matter at hand because Mr. Douglas was not on trial. My attorney continued to ignore the court's warnings and finally Judge Stephen J. Covey held Mr. Burgess in contempt of court. He was taken into custody. The Judge asked me to rise. He told me I would have to get myself another attorney or that the court would appoint one for me. I had no idea what the Judge was talking about. I was taken back to Gift Avenue Detention Center and placed in solitary confinement.

I received a visit from Mrs. Octavia Burchett and Mrs. Bernice Lawton, two mothers from my community. They told me not to worry, that they were going to raise the money to hire an attorney to help me. They hired Attorney Jack C. Vieley. A few weeks later I received a visit from Ms. Sloan Jordan, Mr. Vieley's secretary and investigator.

Around April or May of 1977 my attorney and the state began picking the jury from a pool of about 300 whites.

The state presented the following evidence in the first trial to support their "theory" that I murdered my friend James while practicing martial arts, then blanked out and killed his sister.

State's evidence in the first trial

1. My illegal confession.
2. A pair of bloodstained pants belonging to my dad. The state alleged that the blood on the pants matched the victim Connie Cooper's blood.
3. A three-inch pocketknife from my dad, with possible blood on it.

Defense evidence

1. Testimony from Albert and Georgia Smolley that I was at their home on January 18, 1977, the morning of the murder until 9 a.m. when I left with Mr. Smolley to go look at a new car he was considering buying. We returned to their home at approximately 10 a.m.
2. No fingerprints of mine were found in the victim's home, on anything.
3. Hairs were found in both victims' hands and the hairs did not belong to me or to the victims, according to the testimony of state's witness Robert F. Gonowski, Criminologist.
4. Motion to suppress the confession was filed with the Clerk of the Tenth Judicial Circuit Court because I was illegally interrogated for nearly 20 hours after I told the detectives that I did not want to talk with them. I wasn't allowed to leave even though I wasn't a suspect.

In July of 1977, the jury deliberated for about two hours before returning a verdict of guilty. I was sentenced in August of 1977 to 50-100 years in prison.

While in maximum security for juveniles, located in Joliet, Illinois, I received a visit from the Head of the State Appellate Defender's Office, Mr. Theodore A. Gottfried. Mr. Gottfried assured me that I would get a new trial.

In April of 1980, the Third District Appellate Court, ruled unanimously that the confession was illegal, my case was reversed and remanded back to the 10th Judicial Circuit of Peoria County, Illinois. The State appealed, and the Illinois Supreme Court and the United States Supreme Court agreed with the Appellate Court's decision.

Michael Mihms, former State's Attorney of Peoria County in 1977, now Chief Justice of the United States Central District Court, located in Peoria, Illinois said, "...Without the confes-

sion its impossible to retry Johnnie Savory, so that's it, he won't be retried." Peoria Journal Star News Paper (1981)

John Barra, State's Attorney of Peoria County in 1981 was quoted: "...Without the confession, there is no evidence to tie Savory to the crime, or the scene of the crime." Peoria Journal Star News Paper (1981)

In February 1981, I was brought back to Peoria, Illinois to stand trial or be freed. Moreover, there was no evidence and no witnesses to testify. Approximately 6 weeks after my return, the state produced three witnesses from the same family. Ella, Tina and Frankie Ivy, all claimed that I made admissions to each of them regarding the deaths of the victims on separate occasions on the day of the murder (January 18, 1977).

A few weeks before my scheduled trial was to begin, my appellate counsel and friend Mr. Gottfried sent an appellate defender investigator down to assist my trial attorney Mr. Vieley. Investigator Charlie Peters was able to interview Frankie Ivy and at that interview Frankie agreed to allow Mr. Peters to tape the interview. Frankie told Mr. Peters that he had lied to the police regarding my making admissions to him about the murder.

About two before my trial was scheduled to begin, another of the Ivy brothers, James Ivy, contacted my attorney from the Peoria County Jail and stated that the Peoria Police were willing to make him a deal if he would testify against me. My attorney did nothing.

The second or third week in April of 1981, my second trial began. Once again, my attorney and the state picked a jury from a pool of 50 whites. This time because of a change of venue the trial was held in Waukegan, Illinois.

State's evidence in the second trial

1. The bloodstained pants belonging to my dad, allegedly with the victims' blood on them.
2. The Ivy's testimony claiming that I made admissions to each of them on separate occasions about the murder of the victims on January 18, 1977.
3. The testimony of Robert F. Gonowski, Criminologist, who testified that blood on the pants matched the victim Connie Cooper's blood.
4. Testimony from Dr. Phillip Immesoete, Coroner's Physician of Peoria County, IL, who testified that both victims died an hour and half after eating and that both victims had the *same food content in their upper stomachs*. The actual report shows that Dr. Immesoete committed perjury during my second trial.

Defense evidence in the second trial

1. The Court gave my trial attorney Mr. Vieley permission to play the tape recorded statement of state's witness Frankie Ivy. The court heard the tape, and then asked my attorney to lay the foundation for the jury to hear the tape so it could be admitted into evidence. My attorney shocked the court and everyone in it when he refused to lay the foundation by calling Investigator Charles Peter to testify.

On May 1, 1981, after 5 hours of deliberation, the jury returned a verdict of guilty. I was returned to the Peoria County Jail. About a week later my attorney filed a Motion for a New Trial. My attorney called former Assistant State's Attorney Joseph Gibson to testify. Mr. Gibson testified that the reason they did not call the Ivys' to testify in the first trial is because it was determined after interviewing them in 1977 that their testimony had no evidentiary value. The Court denied the motion and sentenced me to 40-80 years imprisonment.

Post-trial proceedings

All my state and federal appeals were denied. However, in *Savory v. Lane*, 832 F.2d 1011 (7th Cir. 1987) Id. at 1019, the United States 7th Circuit Court of Appeal said,

"...In sum, the record does not support the assertion that the defendant admitted to three witnesses that he had stabbed the victims and they were dead before the bodies had been discovered, or that he gave detailed description of the wounds before that discovery.

Neither do they support the statement that he admitted his presence and complicity in the killings.

The Ivy's testimony thus had less probative force than the Appellate Court's summary suggest.

Accordingly, we cannot accord a presumption of correctness to that Court's finding.

... However, even independently reviewing the harmless error question and recognizing the problem with the Ivy's testimony, we believe the errors were harmless beyond reasonable doubt."

In 1997, then the Honorable Jim Edger, Governor of the State of Illinois signed into law (725 ILCS 5/116-3) authorizing DNA Testing for all who had maintained their innocence, even though they had been convicted with eyewitnesses and other circumstantial evidence. This new law would only be afforded to those who did not have access to DNA Technology at the time of their trial. On January 1, 1998, the new DNA testing Law took effect. Shortly thereafter, my attorney Professor Richard S. Kling, from Kent College School of Law, filed a Motion requesting DNA Testing on a pair of bloodstained pants belonging to my dad, the pants that the prosecution had claimed had the victim Connie Cooper's blood on them. He also requested fingernails scrapings for hairs and other materials from both victims.

Also, attached to the Motion were affidavits from Frankie and Tina Ivy recanting their second trial testimony, admitting that they had lied.

I believe on June 9, 1998, Judge Robert A. Barnes, denied my motion for DNA testing, citing other overwhelming evidence; however, Judge Barnes never mentioned what the overwhelming evidence was. After this, my attorney Mr. Kling abandoned the case. I then prepared my Motion For Reconsideration and Judge Barnes denied that motion citing the previous ruling. I filed for a Notice of Appeal and Mr. Theodore A. Gottfried, State Appellate Defender, took my case. He filed my appeal in the Third District Appellate Court. That appeal was denied in December of 2000. Moreover, the Honorable Justice William Holdridge, wrote a dissenting opinion, in which he says that his colleagues were wrong, that I was entitled to DNA testing on the bloodstained pants and the fingernail scrapings.

My case was then appealed to the Illinois Supreme Court. On May 24, 2001, my appeal was denied. Justice Mary Ann McMorrow, wrote the opinion, citing other overwhelming evidence, the Ivy's testimony, the testimony of Dr. Immesoete, the testimony of Robert F. Gonsowski, and my alleged knowledge of the crime scene before the bodies were discovered according to the Ivys'.

My trial attorney Jack C. Vieley, failed to present the following indisputable evidence at my second trial.

Johnnie Savory continued from page 25

Kirstin Lobato continued from page 5

particularly questionable considering the nature of Bailey's injuries suggests that whoever killed him intended for him to suffer serious pain and agony before dying.

Las Vegas Police Detectives Interrogate Kirstin On July 20, 2001

Las Vegas homicide detectives investigating Bailey's murder came across the report about the sexual assault on Kirstin. It attracted their attention for two reasons: It was received after July 8th; and it referred to Kirstin stabbing at her attacker's groin area.

On July 20th, two detectives, Thomas Thowsen and Jim LaRochelle, made the three hour plus drive to Panaca to interrogate Kirstin at her parent's home.¹⁷ The detectives began the tape recorded portion of their interrogation by indicating Kirstin had read her rights before the recorder was turned on.¹⁸ Although the detectives informed Kirstin they were investigating a man's death, they did not inform her it occurred on July 8th. So unbeknownst to her the event the detectives were investigating - Bailey's death 12 days previously - was a different event than the one she was talking about - the rape attempt she fended off in May. During her interrogation, and without knowing she was doing so, Kirstin provided information about at least four key details excluding her from consideration for involvement in Bailey's death.

The attack on Kirstin and Bailey's death involved different struggles

That the detectives and Kirstin were talking about two different events is obvious from her description of the attack on her that involved a much *different struggle* than the one resulting in Bailey's death:

Question (Thowsen) After you got done struggling with him, was he on the ground or standing up?

Answer (Kirstin) He was on the ground.

Q. Was he making any noise at that point?

A. He was, he was crying.

Q. And what did you do next?

A. I left.¹⁹

Kirstin's account of an intense but brief assault against her after which she left her attacker very much alive, is starkly contrasted with Clark County's Chief Medical Examiner Lary Simms's determination the day after Bailey died, that extensive injuries had been inflicted on him from a violent pummeling and stabbing all about his upper body, and that *after* he was dead, he was sexually mutilated.²⁰ In the spring of 2001, Kirstin was a very slender, slightly built young woman - 5'-6" and about 100 pounds - definitely not the sort of muscular woman who might be able to physically manhandle a taller and heavier man.

The attack on Kirstin was by a man much taller and heavier than Bailey

That the sexual assault on Kirstin was by a man with a much *different physique* than Bailey - who was 5'-10" and weighed about 135 pounds - was evident from her description of her attacker:

Question (Thowsen) And what did the person look like?
Answer (Kirstin) He was a black man, older.

Q. Okay, you remember how tall he was?

A. He was really big, that's, and he seemed like a giant compared to me.

Q. Okay, how tall are you?

A. I'm 5'-6"

Q. How much do you weigh?

A. I weigh like a 120 pounds. I probably weighed a close - closer to a 100 then.²⁵

A man such as Bailey, who was 4" taller and weighed about 35 pounds more than Kirstin is not describable as "really big" and a "giant compared" to her. Consistent with that initial description, Kirstin later described her attacker as over 6' tall and weighing over 200 pounds.

The attack on Kirstin and Bailey's death were at different locations

That the attack on Kirstin, and the altercation resulting in Bailey's death occurred at *different locations* is obvious from her description of the area around the Budget Suites' parking lot:

Question (LaRochelle) And when you said this struggled occurred, where did it first happen at, in the proximity of the parking lot?

Answer (Kirstin) Um, from Boulder Highway, if you're looking at it from Boulder Highway, like from where the shopping center is across the street say, right over here in the parking lot.

Q. (Both talking at once)

A. Like right around from the fountain, it's right in front there.

Q. And you're pointing to the left of the fountain?

A. Yeah, on the side...

Q. As you're facing it from Boulder Highway?

A. Yeah if you're facing it, the fountain's right here, it's right over here, 'cause the, the thing goes in the, in the spot like that.²¹

Kirstin's description is of the area around the Budget Suites, on Las Vegas's east side, that is almost eight miles from the scene of Bailey's death near The Palms Casino Resort on the city's west side.

The attack on Kirstin and Bailey's death were on different dates

That the attack on Kirstin was on a *different date* than Bailey's death was made evident from Kirstin's statement to the detectives that *after* the assault against her, and "*over a month*" *before* the detectives interrogation, she met a woman known as Mumbina who had also been sexually assaulted in Las Vegas.²² Thus she inadvertently made the detectives aware - *without knowing* that the detectives were investigating the death of Bailey on July 8th - that the assault on her occurred *more than* two weeks prior to the violent struggle that resulted in Bailey's death:²³

Question (Thowsen) Okay and did this person say anything about something happening to her or did she just seem upset?

Answer (Kirstin) She said that she had been hurt and that she couldn't believe that something like that happened and she just kept saying it over and over.

Q. And how soon was it that you talked to her before you were attacked?

A. It was afterwards already.

Q. After you'd been attacked?

A. Yea, this has already been over a month ago.²⁴

Detective Thowsen's response indicates his surprise at Kirstin's response that the attack on her occurred weeks *prior* to Bailey's death. Yet neither Detectives Thowsen nor LaRochelle asked a single follow-up question to get additional details. If the detectives had bothered to ask, she would have directly informed them it happened in late May - six weeks before Bailey's death. Somewhat curiously, the detectives asked Kirstin only one more unrelated non-descript question before abruptly terminating the interrogation.

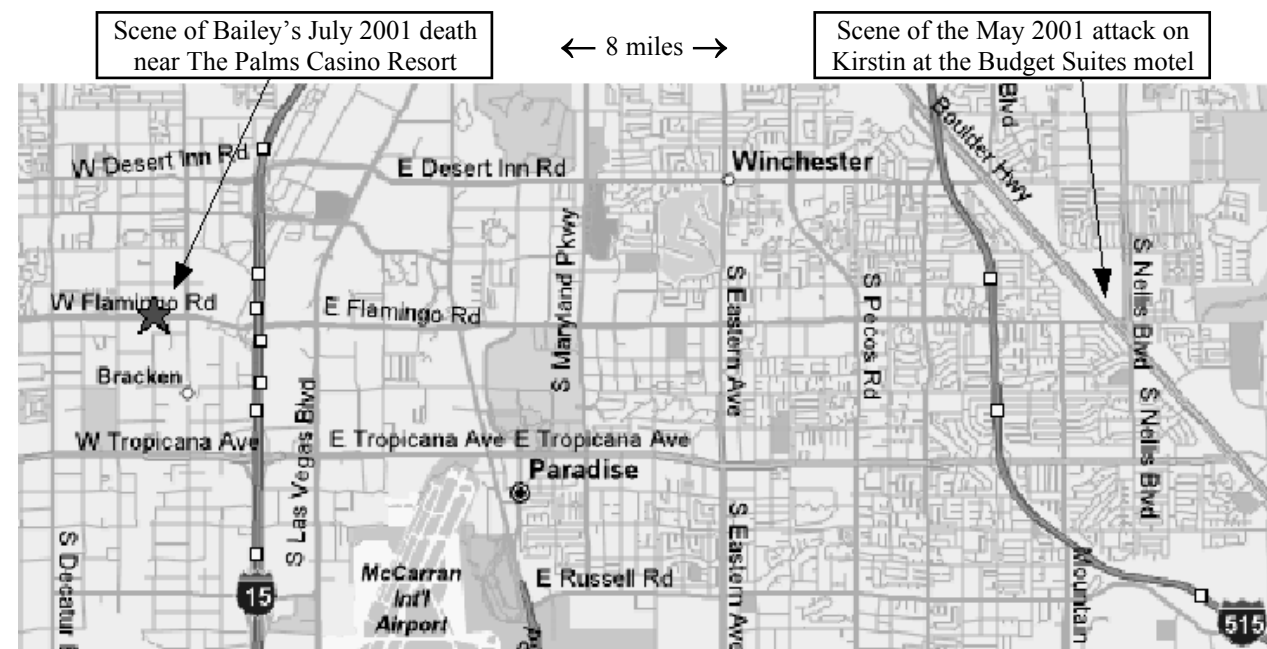
Two other key facts distinguish the attack on Kirstin from Bailey's death

Two other important facts substantiating the inability of Kirstin to have been the survivor of the violent altercation that resulted in Bailey's death would have been known to Detectives Thowsen and LaRochelle if they had taken a few hours to conduct a cursory investigation.

- Kirstin did not have any visible physical injuries or bruises that would be associated with a woman of her physique involved in a violent, extremely physical altercation with a man only 12 days earlier.²⁶ Furthermore, after poking around Panaca for less than an hour and making a few phone calls to Las Vegas, the detectives would have learned Kirstin did not visit a doctor or emergency room in Las Vegas or Panaca from July 8th to July 20th for the treatment of any injury.
- Kirstin described that "from about a week before" the attack "till about a week afterwards I was out of my mind on drugs."²⁷ She also said she went without sleep while high on meth during the three days prior to the attack:

Kirstin Lobato continued on page 20

Map showing the location of Duran Bailey's July 8, 2001 death near The Palms Casino Resort on Las Vegas' west side, and where almost eight miles away, Kirstin Lobato was sexually assaulted six weeks earlier in the parking lot of the Budget Suites motel on Vegas' east side.



Kirstin Lobato continued from page 19

Question (Thowsen): So that [the attack] was the end of the third day of being up straight?

Answer (Kirstin): Yeah.

Q. Doing meth?

A. Yeah.²⁸

Kirstin also told the detectives, “I just had all my, um, urine and everything like analyzed a couple weeks ago.”²⁹ She also mentioned that her “urine and everything” was “being checked out by the [my] doctors right now.”³⁰ Thus the detectives knew Kirstin had seen a doctor about the time of Bailey’s death, a “couple weeks” before the interrogation. If they had checked with her doctor in Panaca they would have learned that tests of either her blood or urine on the three consecutive days prior to July 8th didn’t detect the presence of methamphetamines. That would have also served to empirically support many other details Kirstin provided in her statement, such as meeting Mumblina over a month prior to the interrogation, which made it inescapably obvious that the assault upon Kirstin occurred weeks prior to Bailey’s death.

What the LVMPD detectives learned from Kirstin’s July 20th interrogation

Thus Detectives Thowsen and LaRochelle learned during Kirstin’s interrogation:

- The *location* of the attack on Kirstin was in a different area of Las Vegas many miles from where Bailey died.
- The *physique* of Kirstin’s attacker was much different than Bailey’s.
- The *type* of attack against Kirstin was radically different than the vicious pummeling of Bailey and the bloody carnage at the scene of his death.
- The *date* of Bailey’s death was weeks after the attack on Kirstin.

Those exclusionary facts were supported by two other facts the detectives could have easily confirmed in an hour or so by checking in Panaca and making several phone calls to Las Vegas:

- Kirstin had not been treated for any injuries in the days *after* July 8th.
- Kirstin had not used methamphetamines during the three days immediately *preceding* July 8th.

What happened in the wake of Kirstin’s interrogation?

In spite of the exculpatory nature of Kirstin’s interrogation, and that detectives Thowsen and LaRochelle had learned the attack on her had preceded Bailey’s death by many weeks, when it was over they did not thank her for her time, vow to track down her attacker, and bid her a good day. Instead they handcuffed Kirstin, arrested her on suspicion of murdering Bailey, and transported her to the Clark County Detention Center (CCDC) in Las Vegas.

Multiple key facts related to the May 2001 assault against Kirstin are noticeably disparate from the facts related to Bailey’s brutal beating, stabbing, and ritualistic like sexual mutilation six weeks later in a different area of Las Vegas: So how was Kirstin tagged with his murder?

Detectives Thowsen and LaRochelle appear to have pulled a ‘sleight of hand’ by superimposing the different facts related to the two unique events onto each other and then claiming they were the *same event*. That technique was a ‘quick and

dirty’ way for the detectives to claim Bailey’s murder was solved and stamp “Investigation Closed” on his case file.

On paper, the detective’s justification of Kirstin’s arrest based on their superimposition of the two completely unrelated events into one manufactured event was so clumsy and inelegant that it seems reasonable to think the prosecutor for Las Vegas - the Clark County District Attorney (DA) - would have seen through it within minutes. All the DA needed to do to arrive at the conclusion there was no substantial evidence to tag Kirstin for Bailey’s murder, was to make a cursory comparison of her statement with the plainly different facts known about Bailey’s death.

However that isn’t what happened. Relying on the detectives report, within days of her arrest the DA charged Kirstin with the first-degree murder of Duran Bailey, and the sexual penetration of his dead body.

Kirstin’s May 2002 Trial

Kirstin’s trial began on May 8, 2002 in the courtroom of District Court Judge Valorie Vega. When it began the jurors, reporters and the public were unaware of a critical fact: Facing a minimum of 40 years in prison if convicted after a trial, Kirstin turned down the prosecution’s offer of a plea bargain to manslaughter that would have resulted in a three year prison sentence.³¹ Kirstin rejected the deal, saying she was innocent and wouldn’t plead guilty to something she didn’t do.

The prosecution’s case relied on at least six prongs. After an explanation of each prong, an analysis undermining its value to implicate Kirstin in Bailey’s death is explained.

Prosecution Prong One

Kirstin acknowledged during her July 20, 2001 interrogation that she fought off a sexual assault by stabbing at her attacker’s groin with a knife. Her prosecutors claimed that since Kirstin did not report the attack to the police, she actually described her use of a knife to stab Bailey. They implied it was too coincidental that a knife would be used to stab at a man’s groin in two separate incidents in Las Vegas six weeks apart.

Prong One Rebuttal

Kirstin’s description of the sexual assault included details about the parking lot of the Budget Suites motel where it occurred, including the closest roadway (“...looking at it from the Boulder Highway...”); identifying landmarks (“...right around from the fountain.”); and nearby buildings (“...the shopping center is across the street...”).³² The scene of the attack she described is on Las Vegas’s east side, 7.7 miles from the scene of Bailey’s death on the west side of the city.³³

Kirstin explained during her interrogation that she didn’t report the assault because she had reported previous sexual assaults and the police “basically blew me off. It’s been my experience that it doesn’t do any good.”³⁴ In addition to not thinking the police would do anything to pursue her attacker, Kirstin didn’t have a reason to report the assault because her assailant was alive when she left. Most importantly, since she stopped his assault without inflicting a serious injury, he couldn’t have been Bailey.

It is with good reason that Las Vegas is known as Sin City. Furthermore the city doesn’t discourage that image, but it promotes it as a reason for people to visit. An example of that is a national advertising campaign during the summer of 2004 that emphasized being naughty is OK, because “What Happens in Vegas, Stays in Vegas.” Consistent with that advertising theme touting the city as a modern day

Sodom and Gomorrah, is that sexual assaults are commonplace in Las Vegas. According to the FBI’s 2001 Uniform Crime Report (UCR), Las Vegas had one of the highest rates of rape in the country: *30% above* the national average.³⁵ Las Vegas may be one of the most dangerous cities in the country for a young single woman like Kirstin, for the very reason that she said she didn’t report the May 2001 assault against her: the police would have simply ignored it. That is also indicated by the way the Las Vegas police blew off Diann Parker’s official report that Bailey raped her.

Another twist on Kirstin’s case related to the tolerance of sexual assault in Las Vegas, is if the police had taken Parker’s report of being raped by Bailey seriously and acted on it, he couldn’t have been killed on July 8th if he had been arrested and was unable to make bail.³⁶

In addition to being a sexual assault center, murder was also commonplace in Las Vegas in 2001: Its murder rate was *double* the national average.³⁷ Thus Bailey’s death was not unusual in the sense that there was an average of almost three murders per week in Las Vegas during 2001.

So it is known that Las Vegas was a crime haven in 2001. Considering the “Wild West” crime atmosphere that prevailed in Las Vegas behind the glitzy “fun time” facade of the Strip, it is anything but coincidental that a knife could be involved in two different and unrelated incidents six weeks apart – one involving a sexual assault and the other a murder.

Furthermore, the area around the Budget Suites motel remains dangerous for a single woman. According to the LVMPD’s website, in the 60 days prior to November 4, 2004, there were 102 serious crimes *reported* within a one-half mile radius of the motel, and 44 of those were assaults.³⁸ During the same period of time, there were 157 serious crimes *reported* within a one-half mile radius of Bailey’s death, and 58 of those were assaults.³⁹ So in the fall of 2004 within a one-half mile radius of the two areas, there were an average of *over six* serious crimes - and almost two assaults - *reported every day*.

Consequently, it would not be unusual for Kirstin to be sexually assaulted in late May 2001 in east Las Vegas, and six weeks later for Bailey to be murdered eight miles away in west Las Vegas. Considering the details in her statement of July 20, 2001 that bear no relationship to Bailey’s crime scene, but matches the area around the Budget Suites motel and is consistent with what was going on in her life in May 2001 - but not July - there is no reason to doubt for a single second that Kirstin was attacked as she described.

So it seems strange that the response of Las Vegas’s law enforcement community to Kirstin’s report of being criminally sexually assaulted wasn’t to launch an investigation to find her attacker, but to charge her - the victim - with an unrelated murder that occurred six weeks after the attack.

Prosecution Prong Two

Kirstin acknowledged during her July 20, 2001 interrogation that she had been on a week long meth binge up to the time of the assault on her. Her prosecutors speculated that desperate for drugs to continue her binge, Kirstin agreed to exchange sex with Bailey for meth. They further speculated that she stabbed him when he refused to fulfill his end of the bargain.⁴⁰ Thus the prosecution speculated Bailey’s stabbing death was the result of a drug deal gone bad.

Prong Two Rebuttal

A sample of Kirstin’s blood was drawn and analyzed when her mother took her to the doctor in Panaca on Thursday, July 5th. Kirstin then provided a urine sample on the next two days

Kirstin Lobato continued on page 21

Kirstin Lobato continued from page 20

as a follow up to help her doctor determine what was ailing her. The blood and urine samples all tested negative for the presence of meth. That establishes Kirstin was not on a meth run in the days preceding Bailey's death. That fact, combined with multiple eyewitnesses, phone records, etc., corroborates that she was in Panaca at the time of Bailey's death.

The prosecution's claim that Bailey's stabbing death resulted from a drug deal gone bad is undermined by the FBI's 2001 Uniform Crime Reports (UCR), that documents there were only 15 people murdered nationwide by a knife during a drug dispute, out of 13,752 total murders.⁴¹ So a drug related knife murder is so rare that they only occurred slightly more than once a month in a nation of almost 290,000,000 people. Furthermore, almost 100 times more people were killed by a knife in 2001 during a non-drug related dispute than one involving drugs.⁴² Consequently, it is much more likely than not, that Bailey's knifing during the course of being savagely beaten was related to a reason other than a drug dispute. Thus the nature and extent of Bailey's many injuries is consistent with his death being connected to a non-drug related reason.

Prosecution Prong Three

Korinda Martin claimed that after meeting Kirstin at the Clark County Detention Center on July 23, 2001 (three days after Kirstin's arrest), Kirstin loudly boasted on multiple occasions about killing Bailey.⁴³ Martin also claimed that Kirstin told the women "graphic descriptions of how she killed and mutilated" him, and that Martin kept a log of Kirstin's alleged boasts.⁴⁴

Prong Three Rebuttal

Newspaper and television reports conveyed all the accurate details about Bailey's death that Korinda Martin testified

A Woman's Mutilation of a Dead Man is as Rare as a Dodo Bird

Kirstin Lobato's exclusion as Duran Bailey's killer is also supported by an analysis of his mutilation. Although it isn't direct "evidence" of her innocence, it is anecdotal evidence that it has been difficult to find a single known instance in this country of a woman's use of a knife to sexually mutilate a man's dead body.

Clark County Medical Examiner Simms testified that of over 4,000 autopsies he had performed, about 12 involved mutilation of a man's body by another man – but none by a woman.⁸² Furthermore, his testimony that based on his experience a male is only sexually mutilated by another male, is supported by what is reported among pathologists, "I've never read about or been involved in a case where this kind of injury pattern was done by a female."⁸³

ME Simms' experience is also supported by the observation of Dr. Michael Welner, a forensic psychiatrist in New York. At the time of Kirstin's arrest, he said the only case he could recall of a woman mutilating a man's body was Lorena Bobbitt's severing of her living husband's penis – and she was found not guilty by reason of insanity.⁸⁴

Dr. Welner also made a prophetic observation about Kirstin's case considering all that is now known about it, "This is a very peculiar story. It is the kind of thing that just happens in the movies."⁸⁵

Kirstin told anyone who would listen at the CCDC. Specifically, the accurate details testified to by Martin were included in a *Las Vegas Review-Journal* newspaper article published on July 25, 2001 - two days after Martin said she met Kirstin.⁴⁵ Martin also testified about "details" of the murder that weren't publicized in the media. However those were inconsistent with the crime scene, which tends to indicate Martin contrived them.⁴⁶ She claimed e.g., that Kirstin boasted she "amputated" Bailey's penis and stuck it "down his throat."⁴⁷ Bailey's penis was actually found laying under some trash near his body. In addition, Martin didn't produce in court the log she claimed to have kept of Kirstin's alleged boasts.

Further undermining the truthfulness of Martin's testimony, is that the prosecution didn't produce a single other prisoner who claimed to have heard on a single occasion, Kirstin's alleged loud jailhouse braggadocio.

The prosecution had to ignore the suspect nature of Martin's testimony because it was absolutely critical to their case against Kirstin. None of the forensic evidence collected from the murder scene - that included blood, hair, chewing gum, tire tracks, etc. - or Bailey's body, or Kirstin's car, or personal items seized by the police, found any evidentiary link between Kirstin and Bailey's death. Since Martin's claim of hearing Kirstin's boasts was the prosecution's only "evidence" that she was at the scene of Bailey's death, and everything else about their case speculatively associated her with it, Martin was the prosecution's "star witness."

As a jailhouse snitch whose testimony was the lynchpin of the prosecution's case, an obvious question to ask is if Martin's testimony was contrived so she that could benefit from helping the prosecution out of its evidentiary "jam" of not having any direct evidence linking Kirstin with Bailey's death.

At the time of Kirstin's arrest, Martin was a certified nursing assistant being held at the CCDC awaiting sentencing for her guilty pleas to robbing and coercing one of her patients.⁴⁸ Prior to Martin testifying at Kirstin's trial, several handwritten letters were sent to a former co-prisoner of Martin's, Brenda Self, requesting that she mail the letters to Martin's sentencing judge. The letters, worded as if they were written by Self, suggested that Martin should be given a lenient sentence so she could be released to care for the wheel-chair bound Self. Copies of those letters, that had been sent to Self in an envelope bearing the CCDC's return address and Martin's prisoner ID number, were provided to Kirstin's court appointed lawyers prior to her trial. Although the prosecution denied it had made a specific deal with Martin for her testimony, out of the presence of the jury one of Kirstin's lawyers questioned Martin about whether she wrote the letters. If she answered in the affirmative, it would tend to show she was hoping to get a tangible benefit from her testimony against Kirstin. However Martin denied under oath that she wrote or mailed the letters:

Question (Kirstin's lawyer Kohn) I'm going to show you an item marked Defense Exhibit G. Do you recognize that?

Answer (Martin) No.

Q. No?

A. No.

Q. You didn't send that?

A. No, sir.⁴⁹

The prosecutors argued the letters should be excluded as evidence and testimony about them barred from the jury, because the letters were "extrinsic," since they had nothing directly to do with the question of Kirstin's guilt or innocence.⁵⁰ Judge Vega agreed, so the jury wasn't made aware of the letters.⁵¹ The true significance of those letters in undermining Martin's credibility was discovered after Kirstin's trial. That is when a Las Vegas police document examiner compared the letter writer's handwriting with that

of Martin. In September 2004 the Nevada Supreme Court wrote, "The LVMPD expert concluded that Martin probably authored the first letter and definitely the second."⁵²

When Martin's perjurious testimony was brought to the attention of Clark County prosecutors, they ignored the evidence and refused to prosecute her.

Martin's letters are significant because they show she viewed her testimony against Kirstin as self-serving by possibly contributing to shortening her sentence.⁵³ Kirstin's lawyer Gloria Navarro observed, "Clearly, she would say anything to help herself; she would even commit perjury."⁵⁴ Supporting that more than just Martin's testimony about not writing the letters was perjurious, is that no one corroborated her claim that Kirstin had made incriminating boasts at the CCDC related to Bailey's death.

In a possible effort to enhance her credibility to Kirstin's jurors, Martin also may have perjured herself by falsely testifying she is a nurse. Martin was not a registered nurse according to the Nevada State Board of Nursing, and her certification as a *nursing assistant* expired on September 21, 2001.⁵⁵ So at the time of Kirstin's trial in May 2002, Martin had no nursing related credentials whatsoever.

Martin continued her criminal career while serving her sentence for robbery and coercion. It is a felony in Nevada for a staff member and a prisoner to engage in any sexual activity. In January 2004 Martin gave birth to a baby fathered by a prison guard, and Martin and the guard were both indicted on March 16, 2004, of "one count of voluntary sexual conduct."⁵⁶

Prosecution Prong Four

Kirstin was portrayed as a person of low moral character based on her living in the sticks of Lincoln County, and her onetime lifestyle as an illegal drug user who on two occasions engaged in amateur exotic dancing. Her prosecutors thus speculated it was not only plausible that Kirstin would associate with a homeless person like Duran Bailey, but agree to trade sex with him to obtain drugs, and then kill him for spite when he reneged.

Prong Four Rebuttal

There was no testimony during Kirstin's trial that supported the prosecution's speculation that because of her upbringing or lifestyle she would trade sex for drugs, that she had ever done so, or that she would ever harm anyone except in self-defense. However the success of the prosecution's tactic of smearing Kirstin as a bad person - in part because she was from Panaca - who would do anything, was demonstrated when several jurors sent the judge notes that they were afraid of Kirstin's family seated in the courtroom - who lived in the sticks of Lincoln County.⁵⁷

Prosecution Prong Five

To explain how Bailey's extensive injuries could have been inflicted by a person of Kirstin's slender physique, the prosecutors speculated that after she stabbed him, he fell to the ground, and she then repeatedly hit him with an aluminum baseball bat that she kept in the back seat of her car for self-protection.

Prong Five Rebuttal

Lary Simms, Clark County's Chief Medical Examiner, testified that among Bailey's serious injuries (Bailey had at least 33 identifiable injuries), he suffered several bludgeoning type injuries, including "multiple fractures on both upper and lower jaws," "six teeth knocked out," and "skull fractures."⁵⁸

Kirstin Lobato continued on page 22

Kirstin Lobato continued from page 21

However, ME Simms's testimony didn't support the prosecution's speculation that Bailey's injuries were inflicted with Kirstin's baseball bat. ME Simms testified Bailey, "didn't have any skull fractures that were depressed like, you know, a bat would depress somebody." ⁵⁹ On cross-examination he also testified that the skull fractures and the accompanying bleeding were consistent with his head striking the concrete where his body was found. ⁶⁰

Supporting Simms conclusion that Bailey's injuries were inconsistent with those caused by a bat was the testimony of Thomas Wahl, a technician with the LVMPD crime lab: "There was no blood, hairs or tissue recovered from the aluminum baseball bat or detected on that item." ⁶¹ If Bailey's blood had been washed off the bat, sophisticated blood detection techniques could have been expected to detect trace residue.

The separate exclusionary analysis of the bat evidence by MD Simms and lab technician Wahl was supported by the expert retained by Kirstin's lawyers to analyze the prosecution's physical evidence. The defense's expert was George Schiro, a forensic scientist of national repute. Schiro was not only associated with the Louisiana State Police Crime Laboratory, but in 2004 he is serving as the Chairperson of the national Association of Forensic DNA Analysts and Administrators. ⁶² Schiro's background with a police crime lab might influence critical observers to consider his conclusions as more objective than those of some defense retained experts: His objectivity is also indicated by the fact that Kirstin's case was only the *fourth* one in which he testified as an expert for a defendant, while he had been an expert for the prosecution in *over 100* cases. ⁶³ Considering his background, there is no reasonable basis on which to challenge Schiro's professional integrity or credentials, or characterize his analysis of the prosecution's evidence in Kirstin's case as biased. He documented his findings in a Forensic Science Report. ⁶⁴

Since it is known that Bailey bled profusely from his many wounds, and the prosecution speculated Kirstin knifed him first, he would have been bleeding heavily at the time she allegedly hit him with the bat. However, Schiro's analysis of the crime scene 'blood cast off' evidence didn't support that speculation. He wrote in his report:

"When a person is bleeding and repeatedly beaten with a long object, such as a baseball bat or tire iron, or is repeatedly stabbed using an arcing motion, then cast-off blood spatters corresponding to the arc of the swing are produced ... The confined space of the crime scene enclosures and the lack of cast-off indicate that a baseball bat was not used to beat Mr. Bailey. The beating was more likely due to a pounding or punching type motion." ⁶⁵

Thus, Bailey was not struck with a bat or other long object, but likely by a person's fist. Considering the pounding inflicted on Bailey, his assailant's fists would likely have suffered some sort of visible wound(s) or bruises. Kirstin neither had any such injuries, nor did she have – at 100 pounds - the physique necessary for her to have pummeled Bailey. Schiro's analysis of the 'blood splatter patterns' also tended to exclude Kirstin:

"The photographs demonstrate numerous blood spatter patterns. There is no documentation of blood spatter above a height of 12 inches on any of the surrounding crime scene surfaces. This indicates that Mr. Bailey received his beating injuries while lying on the ground. The photographs of his pants also do not indicate the presence of any vertically dripped blood. This indicates that he did not receive any bleeding injuries while in a standing position." ⁶⁶

Schiro's 'blood splatter' analysis that Bailey was stabbed while lying down undermines the prosecution's speculation that Kirstin stabbed Bailey while he was standing up. Kirstin's said in her statement that she "was laying down" when she stabbed up at her assailant as he hovered above her with his pants down. That means if he bled, blood would have dripped *down* onto his pants - but Schiro found there was no "presence of any vertically dripped blood." Thus his 'blood splatter' analysis is consistent with the conclusion that the incident Kirstin described in her statement was different than the one during which Bailey died.

So ME Simms' testimony that Bailey's skull fracture was consistent with his head striking concrete indicated that Bailey fell after being shoved or punched by a physically larger and stronger person. Lab technician Wahl's testimony indicated that Kirstin's bat was not used to strike any person. While forensic expert Schiro's analysis complimented both their conclusions by determining Bailey was not struck with a bat or other long object, and his injuries that bled were inflicted from him being beaten and stabbed while he was in a prone position. Unfortunately for Kirstin, Judge Vega did not allow the jury to hear Schiro's exculpatory blood 'cast off' and 'blood splatter pattern' testimony. The prosecution objected that they had not been provided with proper notice of his testimony by her lawyers, and Judge Vega agreed. ⁶⁷

Prosecution Prong Six

To fit their claim that for the three days prior to Bailey's death Kirstin was awake on a meth binge, her prosecutors claimed she was in Las Vegas from at least July 5th until July 13th, when her father picked her up and took her back to Panaca.

Prong Six Rebuttal

Kirstin stated during her July 20, 2001 interrogation that she had been on a non-stop meth binge for a week prior to, and a week after the assault against her. Bailey was killed on July 8th, which means that if the attack she referred to was by Bailey, then from July 1st to July 15th she would have been high on meth, going for days at a time without sleep, and that she was in Las Vegas during the time of his death – between 4:30 a.m. and 12:30 p.m. Yet on Monday, July 2nd, Kirstin moved from Las Vegas to live at her parents home in Panaca, and multiple people attest to seeing Kirstin in and around Panaca at various times from July 2nd to July 9th – including the early morning, late morning, afternoon and evening of the 8th. Furthermore, not a single one of those people has reported she was high on meth, which is consistent with the results of the blood sample taken at her Panaca doctor's office on July 5th, and the urine samples she provided on July 6th and 7th – that all tested negative for meth.

Although she was not allowed to testify about it, Kirstin's mother, Becky, passed a lie detector test that included questions concerning Kirstin's presence in Panaca from the 2nd through the 9th, and specifically, that she saw Kirstin sleeping on the living room davenport at 5:45 a.m. on July 8th. Kirstin also testified to being in Panaca from the 2nd to the 9th, and although she wasn't allowed by the judge to tell the jury, she took and passed *three separate* lie detector tests that included questions concerning her presence in Panaca on July 8th, the day that Duran Bailey was murdered 170 miles away in Las Vegas.

Phone records corroborate that Kirstin's boyfriend at the time, Doug Twinning, called her from Las Vegas numer-

ous times during the week she was in Panaca, including several times during the early hours of July 9th when he needed directions to her parents house as he drove up from Las Vegas to pick her up and take her to Las Vegas.

The most critical time for the prosecution to establish Kirstin was in Las Vegas was Bailey's time of death, between 4:30 a.m. and 12:30 p.m. on July 8th. 68 Sunrise that day was 5:30 a.m. ⁶⁹ Apart from the numerous witnesses placing Kirstin in Panaca on July 8th, she twice told the detectives on July 20th that she was attacked in the Budget Suites' parking lot at night – which makes sense, considering many people would likely have been around in the daytime willing to help her, after seeing the attack or hearing the commotion. Her mother saw her asleep at 5:45 a.m. So it is physically impossible for Kirstin to have been present in Las Vegas at the time of Bailey's death: Since if she had left for Las Vegas at say 6 a.m., when it was already daylight, she couldn't have been involved in an altercation at night. Furthermore, she couldn't have driven the six plus hour round-trip between Panaca and Las Vegas, in addition to taking the time to do her business in Vegas, and return in time for a neighbor to see her four-wheeling later *that morning*.

However the jury was unaware of some of the exculpatory evidence and testimony corroborating Kirstin's presence in Panaca from July 2nd through July 9th. Citing inadequate notice to the prosecutors, Judge Vega barred the jury from being exposed to that exculpatory alibi information.

The prosecution's case didn't implicate Kirstin in Bailey's death

"There is no evidence to tie Ms. Lobato to the crime scene. I feel the evidence is even exclusionary on her behalf." George Schiro, forensic scientist of national repute formerly with the Louisiana State Police Crime Laboratory and 2004 Chairperson of the national Association of Forensic DNA Analysts and Administrators. Judge Vega barred Kirstin's jury from hearing Schiro's testimony concerning evidence excluding her as Bailey's assailant.

Consequently, none of those six prosecution prongs infer, much less substantively support identifying Kirstin as Bailey's killer. That absence of inculpatory evidence is consistent with the exculpatory testimony of forensic expert Schiro that Judge Vega did not allow the jury to hear.

- Regarding the uninjured condition of Kirstin's hands after Bailey's death: "No cuts, abrasions, broken fingernails, or healing bruises can be seen in the photographs of Ms. Lobato's hands." ⁷⁰
- Regarding that Bailey wasn't beaten with a bat or other long object: "The confined space of the crime scene enclosures and the lack of cast-off indicate that a baseball bat was not used to beat Mr. Bailey. The beating was more likely due to a pounding or punching type motion." ⁷¹
- Regarding that Bailey was stabbed while lying down, and did not receive any bleeding injuries while standing: "There is no documentation of blood spatter above a height of 12 inches on any of the surrounding crime scene surfaces. This indicates that he [Bailey] did not receive any bleeding injuries while in a standing position." ⁷²
- Regarding that no hairs matching Kirstin's were among those collected from the scene of Bailey's death.
- Perhaps most importantly, regarding the man's size 10 shoe-prints imprinted in blood around and leading away from Bailey's body, and a print of which was clearly imprinted on a piece of cardboard found covering his head: "There is no information to indicate that any shoes in Ms. Lobato's possession were size 10 or that they matched the shoeprint found at the scene." ⁷³ In contrast with the killer wearing a man's size 10 shoe, Kirstin wears a woman's size 7 shoe.

Kirstin Lobato continued on page 23

Kirstin Lobato continued from page 22

After giving his very limited testimony, Schiro, who had spent the overwhelming majority of his career as a prosecution witness identifying crime scene evidence that inculpated an accused person, told reporters in the courthouse hallway what Judge Vega barred him from telling Kirstin's jurors: "There is no evidence to tie Ms. Lobato to the crime scene. I feel the evidence is even exclusionary on her behalf."⁷⁴

Indicative of the patently false assumptions and general incoherence that underlay the prosecution's case, was the detectives who interrogated Kirstin on July 20, 2001, conducted an investigation that was so sloppy and incomplete that they didn't even discover how to spell her name right before hastily arresting her for first-degree murder. In her statement they spelled her name Kirsten - not Kirstin.

Conclusion of Kirstin's Trial

After more than a week of testimony, the closing arguments were made by the prosecution and Kirstin's lawyer on the afternoon of Friday, May 18, 2002. Chief Deputy District Attorney William Kephart centered his argument on the July 20, 2001 interrogation in which Kirstin acknowledged stabbing at a man's groin area during a sexual assault. He claimed that constituted a confession to Bailey's murder.

Kirstin's lawyer, public defender Philip Kohn, a former law school professor who had never handled a criminal case before, emphasized that the detectives did not identify the date of the man's stabbing they were talking about when they interrogated Kirstin on July 20th. Furthermore, he pointed out that the detectives and prosecutors were wrongly assuming she was talking about Bailey, when none of the details of the stabbing she described matched his death. Kohn told the jury, "Two people talking about two different incidents."⁷⁵ Kohn compared the prosecution of Kirstin to the Salem Witch Trials, during which many innocent women were put to death, "Women who were different, who were odd and who said stupid things."⁷⁶

Judge Vega finished reading the jury instructions at 9 p.m., and she gave the jurors the option of beginning deliberations on Monday morning, or immediately. They choose to begin deliberating immediately, and after five hours announced they had arrived at a verdict. At 3 a.m. their verdicts of guilty to both counts were read in court, and Kirstin, who had been free on \$50,000 bond, was taken into custody.

Her lawyer, Gloria Navarro told reporters, "She placed her belief in the justice system, and she ended up being convicted of a crime that she did not commit."⁷⁷

On July 2, 2002, Kirstin was sentenced to a minimum of 20 years in prison for her conviction of Bailey's murder, and a 5 year concurrent sentence for her conviction of sexual penetration of a dead body. Judge Vega then added a 20 year sentence to be served consecutively, based on her determination that since Bailey was stabbed with a knife the deadly weapon enhancement applied. So Kirstin's sentence was to serve a minimum of 40 years before becoming eligible for parole, at the age of 59.

Kirstin's Conviction Reversed by Nevada Supreme Court on September 3, 2004

On September 3, 2004 the Nevada Supreme Court reversed Kirstin's conviction and remanded her case for a new trial. The reversal was based on Judge Vega's failure to allow Kirstin's lawyers to cross-examine Korinda Martin about the letters suggesting leniency that she wanted sent to her sentencing judge.⁷⁸ The Supreme Court characterized "Martin as the State's "star witness," and noted, "The proffered letters and extrinsic evidence relating to them con-

firmed Martin's desperation to obtain an early release from incarceration and her willingness to adopt a fraudulent course of action to achieve that goal."⁷⁹ The Court also ruled that it was prejudicial error for Judge Vega to bar Kirstin's lawyers from examining Brenda Self about the letters, as well as introducing the letters themselves.⁸⁰ Having found sufficient grounds to reverse Kirstin's conviction, the Court didn't rule on the issues of Judge Vega's barring of exculpatory expert and alibi testimony. The Court implied any such errors could be cured during Kirstin's retrial.⁸¹

A bail hearing was held on October 28, 2004, to determine if Kirstin could be released on bail pending her retrial. Judge Vega set her bail at \$500,000 in cash or equivalent assets. Although the reversal of Kirstin's conviction means she is once again shielded by the presumption of innocence, that bail is *ten times* her \$50,000 pre-trial bail.

Since Kirstin's family is not one of means, she continues to be held in custody as this issue of *Justice: Denied* goes to press in mid-November 2004. Her retrial is scheduled for February 2005.

It is worth noting that while Kirstin waits for the legal system to right her wrongful prosecution and imprisonment for a crime she did not have anything to do with, she is pursuing a much different path than the one taken by Korinda Martin, the jailhouse snitch who was the prosecution's "star witness" against Kirstin. In March 2004 Martin was indicted for her criminal activity while imprisoned at a Nevada women's prison. In contrast, during the several years since she was imprisoned as a 19-year-old teenager, Kirstin has evolved into an articulate, mature, focused young woman. She practices yoga daily, she is a vegetarian, she is enrolled in a correspondence paralegal course and she has taken college courses.

Kirstin can be written at:

Kirstin Lobato 74201
SNWCF
4370 Smiley Road
Las Vegas, NV 89115

Kirstin's outside contact is:

Michelle Ravell
PO Box 36442
Las Vegas, NV 89144
Email: Justice4kirstin@cox.net

The Free Kirstin's Website, <http://www.justice4Kirstin.com>

If you are a lawyer, private investigator or forensic analyst willing to aid Kirstin, you can contact her public defender, Gloria Navarro at: 702-455-6265

Contact Hans Sherrer at: hsherrer@forejustice.org

Endnotes

1. 'Sensitive' Defendant Denies Mutilation Slaying Charge, Glenn Puit, Las Vegas Review-Journal, May 16, 2002. Kirstin told police in her statement of July 20, 2001, that after the assault she drove her car to the house of her ex-boyfriend, Jeremy Davis. She said he wasn't home and she left it there. See, Statement to Las Vegas Metropolitan Police Department by Kirstin Blaise Lobato, Event #010708-2410, July 20, 2001, p. 8 (hereinafter, Statement to LVMPD). In his statement to the police, Jeremy Davis said Kirstin left her car at his house on Friday, May 25, 2001, the day before the beginning of the Memorial Day weekend. During Kirstin's trial Davis testified she left her car at his house on May 24 or May 25, 2001. For purposes of this article, it will be assumed that Mr. Davis initial statement of May 25, 2001 was correct, since it was closest to when the event occurred.
2. 'Sensitive' Defendant Denies Mutilation Slaying Charge, *supra*.
3. Statement to LVMPD, at 7.
4. 'Sensitive' Defendant Denies Mutilation Slaying Charge, *supra*.
5. *Id.*
6. Statement to LVMPD, at 7.
7. 'Sensitive' Defendant Denies Mutilation Slaying Charge, *supra*.
8. Statement to LVMPD, at 5.
9. Mutilation Slaying Trial: Attack Reconstructed in Court Testimony, Glenn Puit (staff), Las Vegas Review-Journal, May 10, 2002.
10. A timeline of Kirstin in Panaca on July 6, 7, and 8, 2001 is at: http://www.angelfire.com/stars4/justiceforkirstin/Time_Line/time_line.html. Additional info, including Kirstin's father picking her up in Las Vegas on July 13, 2001, is at: http://www.angelfire.com/stars4/justiceforkirstin/Kirstin_s_Story/kirstin_s_story.html
11. *Lobato v. State*, 96 P.3d 765 (Nev. 09/03/2004); 2004.NV.0000064 ¶16 <<http://www.versuslaw.com>>
12. Reasonable Doubts - Part 6, 10-21-2003, <http://www.justice4Kirstin.com/rd6.html>
13. *Id.*

14. Reasonable Doubt - Part 3, 10-7-2003, <http://www.justice4Kirstin.com/rd3.html>
15. *Murder Trial: Witness: Man Raped Her Week Before His Slaying*, Las Vegas Review-Journal, Glenn Puit, May 15, 2002.
16. *Id.*
17. The LVMPD central headquarters are at 400 Stewart Avenue, Las Vegas. <http://Yahoo!> estimates the driving time from 400 Stewart Avenue to Kirstin's parents home in Panaca as 3 hours and 31 minutes.
18. Statement to LVMPD, at 2. It is odd to the point of being suspicious that Detective Thowsen said at the beginning of the taped interrogation that *Kirstin* had read her rights *prior* to the recorder being turned on, and he made no mention that he or Detective LaRoche had read Kirstin her rights or verified that she understood them. It would have been so easy, if in fact Kirstin had read, or been read her rights, and understood what they were, for that colloquy to have taken place after the tape recorder was turned on so there would be a verifiable record.
19. *Id.* at 7.
20. *Lobato v. State*, 96 P.3d 765 (Nev. 09/03/2004); 2004.NV.0000064 ¶16 <<http://www.versuslaw.com>>
21. Statement to LVMPD, at 20.
22. *Id.* at 27. Kirstin said she was called Mumbolina because she mumbled a lot.
23. A month before the interrogation would have been June 20th, which was more than two weeks before Bailey's death on July 8th.
24. Statement to LVMPD, at 27 (emphasis added).
25. *Id.* at 4-5.
26. Reasonable Doubt - Part 3, 10-7-2003, *supra*, ("No cuts, abrasions, broken fingernails, or healing bruises can be seen in the photographs of Ms. Lobato's hands.")
27. Statement to LVMPD, at 3.
28. *Id.* at 24.
29. *Id.* at 16.
30. *Id.* at 16.
31. Convicted Killer Turned Down Plea Deal, Glenn Puit, Las Vegas Review-Journal, May 29, 2002.
32. Statement to LVMPD, at 20.
33. This distance was returned by Yahoo! Maps, at maps.yahoo.com, using the address of S. Nellis Blvd and Boulder Hwy, Las Vegas, NV near the Budget Suites Hotel, and the address of The Palms Casino Resort at 4321 W Flamingo Rd, Las Vegas, NV.
34. 'Sensitive' Defendant Denies Mutilation Slaying Charge, *supra*.
35. Crime in the United States 2001, Uniform Crime Reports, Federal Bureau of Investigation, U.S. Department of Justice, Washington D.C., Table 6, Index of Crime (There were 447 reported rapes in Las Vegas in 2001.)
36. Although it is not known if Mumbolina reported her assault, considering the cavalier attitude of the LVMPD toward rape and attempted rape, it would be understandable if she didn't do so.
37. Crime in the United States 2001, *supra*, at Table 6, Index of Crime (There were 133 identifiable murders in Las Vegas in 2001).
38. Las Vegas Metropolitan Police Department Website, Crime View Community at, <http://www.lvmpd.com/website/LasVegasMetroCVC/wizard.asp>. The reported crimes were, Assault/Battery, Burglary, Robbery, and Stolen Motor Vehicle.
39. *Id.*
40. *Jurors Deliberate Severed Penis Slaying*, Glen Puit, Las Vegas Review-Journal, May 17, 2002.
41. Crime in the United States 2001, *supra*, at Table 2.13, Murder Circumstances.
42. *Id.*
43. *Informant: Lobato Boasted; Inmate Kept log of her conversations with murder suspect*, Las Vegas Review-Journal, May 11, 2002, ("She was boasting about it.")
44. *Id.*
45. Cut Result of Attack, Teen Says, Peter O'Connell, Las Vegas Review-Journal, July 25, 2001.
46. Reasonable Doubt - Part 4, 10-13-2003, <http://www.justice4Kirstin.com/rd4.html>
47. *Lobato v. State*, 96 P.3d 765 (Nev. 09/03/2004); 2004.NV.0000064 ¶21 <<http://www.versuslaw.com>>
48. Convicted Killer Turned Down Plea Deal, *supra*.
49. Reasonable Doubt - Part 4, *supra*.
50. *Id.*
51. *Id.*
52. *Lobato v. State*, 96 P.3d 765 (Nev. 09/03/2004); 2004.NV.0000064 ¶28 quote in note 7 <<http://www.versuslaw.com>>
53. See e.g., *Lobato v. State*, 96 P.3d 765 ¶23-24 (Nev. 09/03/2004); see also, Convicted Killer Turned Down Plea Deal, *supra*.
54. Convicted Killer Turned Down Plea Deal, *supra*.
55. The NV State Board of Nursing's website has an online lookup function. Martin was a certified nursing assistant whose certification lapsed/expired on 9/21/2001. See, <http://www.nursingboard.state.nv.us/> (last visited November 4, 2004).
56. Nevada Department of Corrections, April 3, 2004, at, <http://www.flpba.org/private/nevada.htm>
57. Convicted Killer Turned Down Plea Deal, *supra*.
58. Reasonable Doubt - Part 6, *supra*.
59. *Id.*
60. *Id.*
61. Reasonable Doubt - Part 8, 11-6-2003, <http://www.justice4Kirstin.com/rd8.html>
62. See the AFDA website at, <http://www.afdaa.org/index.html> (last visited November 4, 2004).
63. Reasonable Doubt - Part 3, *supra*.
64. *Id.*
65. *Id.* (not allowed at trial)
66. *Id.* (not allowed at trial)
67. See e.g., Expert's Testimony Limited, Las Vegas Review-Journal, May 17, 2002.
68. *Lobato v. State*, 96 P.3d 765 (Nev. 09/03/2004); 2004.NV.0000064 ¶16 <<http://www.versuslaw.com>> (Time of death was 10 to 18 hours prior to discovery of Bailey's body at 10:30pm on July 8th)
69. Las Vegas, NV data from the Miami Herald website, <http://weather1.herald.com/auto/miamiherald/history/airport/KLAS/2001/7/8/DailyHistory.html> (last visited October 29, 2004)
70. Reasonable Doubt - Part 3, *supra*.
71. *Id.*
72. *Id.*
73. *Id.*
74. Expert's Testimony Limited, *supra* (emphasis added)
75. *Jurors Deliberate Severed Penis Slaying*, Glenn Puit, Las Vegas Review-Journal, May 17, 2002.
76. *Id.*
77. Convicted Killer Turned Down Plea Deal, *supra*.
78. *Lobato v. State*, 96 P.3d 765 (Nev. 09/03/2004); 2004.NV.0000064 ¶¶38, 40 <<http://www.versuslaw.com>>; see also, Convicted Killer Turned Down Plea Deal, *supra*.
79. *Lobato v. State*, 96 P.3d 765 (Nev. 09/03/2004); 2004.NV.0000064 ¶38 <<http://www.versuslaw.com>>
80. *Lobato v. State*, 96 P.3d 765 (Nev. 09/03/2004); 2004.NV.0000064 ¶38 <<http://www.versuslaw.com>> ("the extrinsic evidence from the experts and Brenda Self would have supported a very important inference that Martin's cooperation was simply part of a continuum of deceptions taken to secure her freedom. We conclude that the extrinsic evidence concerning the letters demonstrated her strong interest in assisting the State in Lobato's trial.")
81. *Lobato v. State*, 96 P.3d 765 (Nev. 09/03/2004); 2004.NV.0000064 ¶44 <<http://www.versuslaw.com>>
82. Reasonable Doubt - Part 6, *supra*.
83. *Id.* The broad cross-section of knowledgeable people who hold this opinion is indicated by a conversation the author had with a medical professional in November 2004, who said she had no knowledge a woman sexually mutilating a dead man's body.
84. Cut Result of Attack, Teen Says, *supra*.
85. *Id.*



Editors Note:

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

The Complicity of Judges In The Generation of Wrongful Convictions

by Hans Sherrer

PART III of a 5 part serialization

III.

THE VIOLENCE OF JUDGES

An extreme danger inherent in the political nature of federal and state judges is the awesome violence available at their beck and call. In his essay, *Violence and the Word*, Yale Law Professor Robert Cover explained that every word a judge utters takes place on a field of pain, violence, and even death. Judges are, in fact, among the most violent of all federal and state government employees. The violence judges routinely engage in makes the carnage of serial killers seem insignificant in comparison. Attorney Gerry Spence echoed Professor Cover's observation when he wrote, "Courtrooms are frightening places. Nothing grows in a courtroom – no pretty pansies, no little children laughing and playing. A courtroom is a deadly place. People die in courtrooms, killed by words."

The very position of being a judge is literally defined by their ability to engender violence by the utterance of words from their lofty perch. Furthermore, the more violence a judge can command, or the more people they can elicit obedience from in carrying out their orders, the more respected judges are considered to be. State Supreme Court justices can direct more people to carry out the violence implicit in their directives than a county judge can, and they are consequently accorded more deference and respect. Similarly, U.S. Supreme Court justices can direct and countenance the commission of more violence than a federal circuit court judge, a federal district court judge, or any state judge, and they also have a more exalted public persona.

The violence under the control of judges takes many forms. In one of its more innocuous expressions, a state judge can direct a person convicted of driving while intoxicated to spend a certain number of weekends in jail and pay a fine. The police or sheriffs under the direction of the judge will physically seize and drag the defendant to jail if he or she declines to comply with either judicial command. In much the same way, a federal judge can issue a command that federal law enforcement officers will physically force compliance with, if it isn't voluntarily complied with. As Gerry Spence noted in *From Freedom To Slavery*, "One judge has more power than all the people put together, for no matter how the people weep and wail, no matter how desperate, how deprecated and deprived, a single judge wielding only the law, can stand them off. Judges are keenly aware of their power, and power . . . longs to be exercised."

Yet, in spite of the regularity with which the violence of judges is exercised, their "iron fist in the velvet glove" is effectively hidden by the shield of having *others* actually commit the violence embodied in their oral and written words. Judge Patricia Wald recognized this phenomena in *Violence under the Law*, in which she noted how the relationship between judges and the violence they are a part of is obscured by paperwork and procedures: "Often by the time the most controversial and violence-fraught disputes reach the courts, they have been sanitized into doctrinal debates, dry legal arguments, discussions of precedents and constitutional or statutory texts, arcane questions of whether the right procedural route has been followed so that we can get to the merits at all." Hence, the violence inflicted on a defendant by a judge is masked as just another detail amidst the legalese that dominates every aspect of a criminal case.

The public veneer of civility concealing the inner workings of the judicial process serves vital deceptive purposes. Two of the most important of those are: (1) hiding the political nature of all judicial decisions, and (2) masking the inherent violence seething underneath the pomp and ceremony of judicial proceedings and a judge's officious pronouncements. Diversion of the public's attention away from the violence carried out under the direction of a judge also provides a self-serving illusion of dignity for the judge's themselves, by presenting a facade of scholarliness that conceals the violent dirty work they are intimately involved in.

The finely honed skill of a judge in the art of creating false images that is evident by their concealment of the violence permeating everything they do, is further displayed by their manner of recording the controversies they are involved in. That was implied by Judge Wald in *Violence Under the Law*, "A historian would do poorly to gauge the flavor of our society by reading its legal tomes." The sanitized version of the passionate life and death struggles presided over by judges and the violence they trigger with a flick of their pen or a stroke of their gavel is not accurately represented in the bureaucratic paperwork they produce. This is by design. U.S. Supreme Court Justice Hugo Black, for example, told his fellow Justice Harry Blackmun to "never show the agony" he felt about a case in his written decisions. That attitude exemplifies one way judges are complicit in concealing from the public's view or conscious awareness, the awful life-destroying violence inflicted on people by their written and oral words.

The aura of officialdom surrounding judicial proceedings is a primary reason why the attention of the general public has successfully been diverted for so long from the true nature of the horrific violence occurring every minute of every day in state and federal courthouses nationwide. There is no greater expression of that violence than when it is committed against a person that has his/her life utterly destroyed by being wrongly branded as a criminal and then is treated as such while imprisoned as well as after his/her release. The magnitude of that violence is hinted at by the human toll manufactured by an average of *at least one innocent man or woman being sentenced to prison every minute that courts are in regular session in the United States*. That amounts to well over 100,000 innocent people sentenced to prison every year for something they did not do. The blood of that nearly incomprehensible wave of violence is on the hands of every judge that presides over the proceedings that falsely condemn any one of those innocent people, and it further stains the hands of every judge reviewing those proceedings who does not do everything in his or her power to rectify the wrong.

IV.

The Judicial Irrelevance of Innocence

Americans are taught to think that the awesome, latent physical violence at the beck-and-call of judges is restrained by strict controls that prevent their abusive use of it.

This is particularly important for people to believe because one of the most heinous and tragic ways a judge's power can be used is to contribute to the prosecution, conviction, imprisonment, and possible execution of an innocent person.

However, the over 1.3 million men and women enmeshed at any given time in the law enforcement system that are not guilty provides ample proof that the internal checks restraining the exercise of judicially instigated violence against the innocent are inadequate. This is not an accidental or happenstantial occurrence. On the contrary, it is a predictable consequence of the manner in which judges preside over the law enforcement process. In *Dead Wrong*, lawyer and law professor Michael Mello pointed out to lay readers what is well known in legal circles: "In federal court, innocence is irrelevant. The Supreme Court says so, and the lower [courts] listen – as they're required to do." Not only do lower federal courts listen to Supreme Court decisions such as *Herrera v. Collins*, in which the Court downplayed the relevance of a defendant's innocence, but state courts do as well. In a subsequent book, *The Wrong Man*, Professor Mello documented how federal and Florida state courts ignored the relevance of death row prisoner Joe Spaziano's innocence for over 20 years.

Of course, the ultimate injustice that can be committed by a judge is to countenance the execution of an innocent person.

Make no mistake about it, even though their role is protected from the glare of the spotlight, as surely as if they were doing it in person, the velvet-gloved fist of the trial and appellate judges involved is on the switch, lever, trigger, or syringe plunger used to snuff out the life of someone that is innocent. Considering the large number of judges involved in any given case, it is reasonable to think that cumulatively more than a thousand state and federal judges may have been involved in the dozens of known executions of innocent people in this century alone.

A person's innocence is discounted by judges for the simple reason that it is not a constitutional issue. The Constitution has been judicially interpreted to provide the innocent no more procedural protection than the guilty. This is consistent with the Supreme Court's holding in *Herrera v. Collins* that "a claim of 'actual innocence' is not itself a constitutional claim." The Constitution only guarantees that procedural formalities are to be followed, it does not guarantee that the outcome of those procedures will be correct or fair. As the Supreme Court has made crystal clear in *Herrera* and its progeny, neither does the Constitution assure that a defendant's innocence will be considered any more relevant to the outcome than his/her sex, age or the city of birth.

The shock to a person who first learns of the irrelevance of his/her innocence *after* being wrongly convicted *and* then losing on appeal(s) is compounded when he/she files a federal habeas corpus petition. Although it may be common for people to think that a federal judge will intervene to protect an apparently innocent person when no one else will – such a thought is far more of a romantic fantasy than a belief grounded in reality. That fantasy is fed by movies such as *The Hurricane*, in which Federal District Court Judge Lee Sarokin is shown granting Rubin "Hurricane" Carter's habeas corpus petition in 1985 after he had been imprisoned for almost 20 years for a triple murder he did not commit. What is not revealed is that Judge Sarokin may have been the only federal judge in the country that would have granted that writ under the circumstances of Carter's case, and to this day he is castigated for having done so. So it is only by sheer luck that "Hurricane" Carter and his co-defendant John Artis are free men today instead of still caged in a New Jersey prison. But people see and believe the Hollywood myth instead of the reality facing innocent people squarely in the face.

Complicity of Judges continued on next page

Complicity of Judges continued from pg 25

Professors James S. Liebman and Randy Hertz, authors of the authoritative *Federal Habeas Corpus Practice and Procedure*, explain the legal predicament that hamstrings factually innocent people such as "Hurricane" Carter: "Habeas corpus is not a means of curing factually erroneous convictions." Yet, a habeas corpus petition is the only way a state prisoner can challenge his or her conviction in federal court and it is one of only two ways a federal prisoner can challenge his or her conviction. In the absence of a defendant's demonstrable claim of being denied a recognized constitutional protection, the mere allegation of innocence is, quite literally, irrelevant to judges in this country.

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

Reprinted with permission of NKLR.



Bad Lawyering continued from page 14

mize his profits? How about the lawyer who represents the guy you never even met, the state's star witness against you? Do you feel satisfaction that he's gotten his client a sweet-heart deal in exchange for testifying against you?

Start with yourself. If you don't want to be the client in these scenarios, don't be the lawyer in them. Don't turn a blind eye to the bad lawyering going on around you, either. Challenge yourself and your colleagues to be what you claim to be, advocates for the innocent. Take the advice offered nearly 2,500 years ago by the Greek philosopher, Socrates: "The greatest way to live with honor in this world is to be who we pretend to be."

Endnotes:

1. This reprint excludes the more than 100 footnotes in the article's published version that originally appeared in the Northern Kentucky Law Review, Vol. 30, No. 4, Symposium Issue. That volume also includes *The Complicity of Judges in the Generation of Wrongful Convictions*, that is serialized in this issue of *Justice:Denied* on page 25. Both of these articles can be obtained by sending \$10 (check or m/o) with a request for - **Vol. 30, No. 4, Symposium Issue** to: Northern Kentucky Law Review; Salmon P. Chase College of Law; Nunn Hall - Room 402; Highland Heights, KY 41099.

2. Sheila Martin Berry is director of Truth in Justice, an educational non-profit organization whose website is at: <http://truthinjustice.org>.



High Cost of Free Defense cont. from page 15

appalled, man. This is outrageous," he said.

Meanwhile, persistent rumors of wrongdoing swirled through the Grant County halls of justice. Those rumors accused Romero and Tom Earl of hitting up indigent defendants for money. The rumors brought a state bar investigation and, in November 2002, the state bar presented its case against Romero. The evidence showed that in at least three cases, Romero had improperly solicited money from court-appointed clients or their families. It also found that Romero had failed to file timely federal tax returns and owed back taxes and penalties of about \$140,000. The recommended sanction: disbarment. In May 2003, the state Supreme Court ruled that Romero could keep his license pending their decision on disbarment. (In Washington, only the state Supreme Court has the authority to remove a lawyer's license.)

In Grant County, oblivious to his own impending fate, Tom Earl was busily reassigning Romero's cases. Romero's last day as a public defender was May 19, 2003. In March 2004,

Gideon Unfulfilled continued from page 11

gets an average of 11 minutes of a defense lawyer's time.

- The salary for a public defender in Massachusetts starts at \$35,000 annually while court-appointed defenders are paid as little as \$30 per hour to represent an indigent client - the third lowest rate in the nation.
- In Lake County, California, just north of San Francisco, a flat-fee system is used for indigent defense. Lawyers in private practice are paid a flat fee to represent a client. There is no economic incentive for vigorous representation of the accused but rather a tendency to negotiate a guilty plea bargain and send the client to his fate.

Despite the Constitution's Sixth Amendment mandate for assistance of counsel, the nation's indigent defense system is failing. "The incompetent representation of the criminally accused - particularly indigents - is truly a scandal," said Monroe Freedman, a legal ethics scholar at Hofstra University School of Law at Hempstead, New York.

The problem has become so great that, late in June 2004, the National Committee on the Right to Counsel launched a nationwide review of indigent defense services. The Committee includes law enforcement officials, prosecutors, defense attorneys, and former judges. The Committee was formed by the Constitution Project and the National Legal Aid and Defender Association of Washington, D.C. The Committee has undertaken a comprehensive 18-month study of indigent defense systems and the people they are meant to serve. Seven jurisdictions from around the U.S. will be selected for on-site reviews.

A Committee spokesman explained it this way: Even though state and local governments are responsible for ensuring adequate counsel for defendants who cannot afford to hire their own lawyers, many people are nonetheless still convicted and imprisoned each year without any legal representation or with an inadequate one.

"The balance is tipped too heavily in favor of the government when it comes to prosecution of persons without means who can't afford private counsel," said Timothy T. Lewis who served a decade on the U.S. Court of Appeals for the Third Circuit. Lewis added, "We really need to take a look at that. Who are we as people if we are not giving adequate and equal representation to those who can't afford a lawyer?" Lewis is co-chair of the Committee.

Sources: The Boston Herald, the Los Angeles Times, The National Law Journal, The Seattle Times.



Romero was hired by his former adversary, prosecutor John Knodell, as Grant County's victim-witness coordinator.

In the meantime, the investigation of Romero's former employer, Tom Earl, was continuing. After hearing evidence that Tom, too, was soliciting and accepting money from court-assigned indigent clients, Tom's license was suspended in February 2004. On May 6, 2004, the Washington Supreme Court ordered Thomas J. Earl disbarred.

On July 22, 2004, the state Supreme Court upheld the bar disciplinary board's ruling and ordered Guillermo Romero's immediate disbarment. Following the high court's order, Romero was unavailable for comment. He had nothing to say. There can be little doubt, however, that the hundreds of former clients whose lives were left in shambles by a "free defense" and Romero's inept representation would have plenty to say. But that's another story.

Sources: The Dallas Morning News,- Seattle Post-Intelligencer, The Seattle Times, The World Almanac.



Johnnie Savory continued from page 18

This evidence could have proved my innocence and impeached all the state's key witnesses:

1. Obtain affidavits from Percy Baker, Jr., Sherman Jones, Officer Glen Perkins, Ken Falls and Jerry Ceisler; all would have testified that I was with each of them when the Ivy's testified under oath that I was with them on the day of the murder; the facts and the records will clearly show the Ivy's committed perjury.
2. Trial attorney failed to introduce evidence of my dad's blood group and type, even though he had it in his possession at the second trial. Mr. Vieley subpoenaed Methodist Hospital in Peoria, Illinois to release my dad's blood group and type and the hospital complied.
3. Trial attorney failed to introduce evidence at my second trial of the victims' actual blood grouping and types.
4. Trial attorney failed to introduce copies of the original autopsy reports to impeach Dr. Phillip Immesoete's second trial testimony regarding the death of the victims.
5. Trial attorney failed to request the court to order forensic testing of hair samples taken from the victims' parents, even though the step-dad was the first suspect in this case; moreover, both Officer Vogle and the mother noticed welts under William Peter Ellis Douglas's eye the day of the murder.

Moreover, my innocence could have been proven beyond all doubt with "one" single piece of evidence: The victims' family dog was that evidence. The victims' family dog was a full-grown German shepherd (Trouble Man). This dog was known for his protectiveness of the entire family, especially James, Connie and the baby, according to the testimony of both parents and friends of the family. I had only been to the victims' home one time, the day before the murder on January 17, 1977. Both parents gave statements to the police and testified under oath in both trials that the dog was at large in the house when they arrived home on January 18, 1977, the day of the murder, their home was a one story flat.

As of November 2004 I have a Petition For Executive Clemency pending before Illinois Governor Rod Blagojevich based on the indisputable evidence of my innocence. This petition includes new affidavits in which Frankie and Tina Ivy state they lied during my second trial under pressure by Detective Charles Cannon and Peoria police officers. Among the many people who have sent the Governor letters in support of my petition are: Rubin Hurricane Carter, Exec. Dir., Assoc. in Defence of the Wrongly Convicted; Kate Germond, Asst. Dir., Centurion Ministries; Colin Starger, Staff Attorney, Innocence Project at Cardozo School of Law; and Prentice H. Marshall, attorney and former U.S. District Court Judge. If you want to send a letter supporting my clemency petition, it must be mailed directly to:

Governor Rod Blagojevich
207 State House
Springfield, IL 62706

In closing, I thank you in advance for the opportunity to share my story with you. I assure you that all the facts I have expressed herein are true, and I have the documents to support those facts. God Bless.

My attorney's are with the firm of Jenner & Block: Christopher Tompkins (312) 840-8686 & Matthew Neumeier (312) 840-7749.

Key outside supporters are:
Beverly Vilberg, Treasurer, CCCJ, (309) 676-1123
Ted A. Gottfried, Attorney, State Appellate Defender, (217) 782-7203

Ms. Win Wahrer, Exec. Asst., Assoc. in Defence of the Wrongly Convicted (416) 504-7500.

The Free Johnny Lee Savory website is at:
<http://friends.peoria.lib.il.us/community/freejohnny.html>



Article Submission Guidelines

PLEASE READ CAREFULLY!

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

2. NO COMMUNICATION WITH JUSTICE: DENIED IS PROTECTED BY ATTORNEY-CLIENT PRIVILEGE! Only tell *Justice:Denied* what you want the entire world to know!

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

4. Anyone may submit a case account of a wrongful conviction for consideration by *Justice: Denied.* However, only accounts following the *Justice:Denied's* guidelines can be considered. Your account should be **no more than 3,000 words in length. Short accounts are more likely to attract people to your story. A typed account is nice, but it is *not* necessary. If you hand write your account, make sure it is legible and that there are at least ½" margins to the edge of the paper. If *Justice:Denied* needs more information, it will be requested. *Justice:Denied* reserves the right to edit all material submitted. It will help to read an issue of the magazine for examples of how a case account should be written. A sample copy is available for \$3.**

Take your reader into your story step by step in the order it happened. Give dates, names, times, places of events. Be clear. Write your story with a beginning, middle and end. Tell exactly what facts point to your innocence, and include crucial mistakes the defense lawyers made. Do not soft-pedal the truth: Explain if needed, but don't leave it out or it may come back to haunt you. However, don't treat

your story as a "true confession" and **only include information either in the public record or that the prosecutor already has.** Do not repeat yourself. Cover the "motive" angle: why didn't you have a motive? If the prosecutor said you had one, disclose what that was. Spare nothing. Do not complain about the system or the injustice to you: let the facts speak for you. (Raging about the system is OUR job!) At the end tell what the present status of the case is, and provide the prisoner's *complete* mailing address. Also provide *Justice:Denied* with any independent sources necessary to verify the account.

Please provide the name and email address and/or phone number of an outside person *Justice:Denied* can contact to clarify any questions. This can speed acceptance of your case. All accounts submitted to *Justice: Denied* must pass a review process. **If *Justice:Denied's* case reviewers are not convinced beyond a reasonable doubt of your innocence your case will not be published.** Accounts are published on a first-come, first-served basis. If your account is accepted, all *Justice:Denied* will do is publish it, and hope it attracts the attention of the media, activists, and/or legal aid that can help you win exoneration.

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

5. Mail or email your account to the Prisoner Mail Team Member for your state listed in the following list. To ensure your story is considered, please do not send it to anyone else listed unless specifically requested to do so by a *Justice:Denied* staff member.

Justice:Denied is committed to ending injustices and the entire *Justice:Denied* staff stands with you if you are innocent, or if you are the Champion of an innocent person.

Prisoner Mail Team

If you have Internet access, please check JD's website to see if the Mail Team person has changed for your state: <http://justicedenied.org/submita.htm>

T. Smith, JD Mail Team
12737 30th Ave NE #5
Seattle, WA 98125
Email: tsmith@justicedenied.org
Indiana and Kansas mail

G. Grigsby
717 Cherry St Apt 303
Evansville, IN 47713
Email: ggrigsby@justicedenied.org
Missouri, Nebraska and Tennessee mail

J. Palmer, JD Mail Team
21450 Naumann Ave.
Euclid, OH 44123
Email: jpalmer@justicedenied.org
Delaware, Georgia and Michigan mail

M. Graham, JD Mail Team
5010 Courtney Lane
Joplin, MO 64804
Email: mgraham@justicedenied.org
Arkansas, Louisiana and Utah mail

T. Houle, JD Mail Team
P.O. Box 3515
Carson City, NV 89702
Email: thoule@justicedenied.org
New Jersey, New Mexico, New York and Pennsylvania mail

A. Davis, JD Mail Team
105 Stone Haven Court
Salisbury, NC 28146
Email: adavis@justicedenied.org
Idaho and Minnesota mail

M. Sanders-Rivera, JD Mail Team
P.O. Box 708
Waukegan, IL 60079
Email: msanders-rivera@justicedenied.org
Illinois, Iowa, Kentucky and Wisconsin

D. Todd, JD Mail Team
4716 Blackwell Den
Warm Springs, AR 72478-9070
Email: dtodd@justicedenied.org
Mississippi mail

S. Sims, JD Mail Team
1733 N. Johnson St.
Southbend, IN 46628
Email: ssims@justicedenied.org
Alabama, Maryland, North Dakota, Ohio, South Dakota and Virginia mail

D. Caron, JD Mail Team
57 Boswell Ave.
Norwich, CT 06360
Email: dcaron@justicedenied.org
Connecticut, New Hampshire, Massachusetts, Rhode Island and West Virginia mail

K. McDonald, JD Mail Team
6730 Bayview Dr. NW
Marysville, WA 98271
Email: kmcdonald@justicedenied.org
Nevada mail

S. Howard, JD Mail Team
3803 Patricia Lane
Reno, NV 89512-1115
Email: showard@justicedenied.org
California mail

A. Brauda, JD Mail Team
3536 University Blvd. N. #135
Jacksonville, FL 32277-2422
Email: abrauda@justicedenied.org
Arizona and Colorado mail

B. Brabham, JD Mail Team
P.O. Box 273
Adamsville, AL 35005
Email: bbrabham@justicedenied.org
South Carolina and North Carolina mail

L. Nielsen, JD Mail Team
PO Box 13721
Sacramento, CA 95853-3721
Email: lnielsen@justicedenied.org
District of Columbia, Florida, Hawaii, Maine, Montana, Oregon, Texas, Vermont, Washington and Wyoming mail

J. McIntyre, JD Mail Team
103 Robert Circle
Red Oak, TX 75154
Email: jmcintyre@justicedenied.org
Alaska and Oklahoma mail

***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.

REMEMBER!

Please notify *Justice:Denied* promptly of a Change of Address!
Write:
Justice Denied - COA
PO Box 881
Coquille, OR 97423

Want to Promote Your Product or Service in *Justice:Denied*?

For a brochure of sizes and rates, write:

Justice Denied - Promo

PO Box 881

Coquille, OR 97423

Or email: promo@justicedenied.org

Or see the rates and sizes on JD's website:

<http://justicedenied.org/jdpromo.pdf>

Bulk Issues of *Justice:Denied* are available at steep discounts!

Justice:Denied can provide mail bulk quantities of the current issue (or an available back issue) that can be:

- ✓ Distributed at seminars, meetings, or conferences.
- ✓ Distributed to be sold by bookstores and newsstands in your city, and you keep the profits! (Newsstands typically split magazine revenue either 50-50 or 60% (you) - 40% (them). JD's nominal cover price is \$3, but you can charge what the market will bear.
- ✓ Use your imagination!

The cost? *Very Reasonable!* (includes shipping)

- 5 issues \$ 9 (\$1.80 each)
- 10 issues \$15 (\$1.50 each)
- 20 issues \$25 (\$1.25 each)
- 50 issues \$50 (\$1.00 each)
- 51-100 issues 90¢ each (e.g., 70 issues x 90¢ = \$63)
- Over 100 issues 80¢ each

Send a check or money order and specify the issue wanted to:

Justice Denied - Bulk Issues

PO Box 881

Coquille, OR 97423

In the Next Issue of *Justice: Denied*

- Iva Toguri d'Aquino was wrongly convicted of being the traitorous Tokyo Rose after one of the greatest "show" trials in U.S. history!
- Over \$40 million in damages awarded exonerated men & women in 2003-2004!
- Jeffrey Moldowan and Michael Cristini's prosecutor indicted for bribery after the men were wrongly imprisoned for than 11 years!
- *Conscience of the Community* by Mara Taub - book review by C.C. Simmons!
- Derek Tice is one of the "Navy's Forgotten Four" - update on his case!
- Legal system OK by Michigan study that downplays wrongful convictions in the U.S.!
- The prosecution's timeline show Timothy Thompson can't be guilty of murder!
- PLUS Much More!

"Talk is cheap. It's the way we organize and use our lives every day that tells what we believe in."

-- Cesar E. Chavez

Make the difference on a winnable issue by supporting an organization with a proven track record. Check us out. Come do an internship. Bring our speakers (murder victim family members, death row survivors, and experienced organizers) to your community. Or make a financial contribution to help others take action on your behalf.

Together we will make the difference!

Educate. Activate. Change!

Citizens United for Alternatives to the Death Penalty (CUADP)
PMB 335, 2603 NW 13th St. (Dr. MLK Jr. Hwy)
Gainesville, FL 32609

800-973-6548 www.CUADP.org

Visit the Innocents Database

<http://forejustice.org>

Info about more than 1,400 wrongly convicted people in 20 countries is available.

Criminal Justice Services for all NY inmates

Parole Specialists! Send SASE

Prisoner Assistance Center, Box 6891, Albany, NY 12208.

Lots of info on the web at: <http://prisonerassistance.org>

Mail Newspaper and Magazine Stories

of Prosecutor, Judicial, Crime Lab, and Police misconduct to: Hans Sherrer - JD, PO Box 66291, Seattle, WA 98166.

The Match is a magazine with a conscience that regularly reports on many issues of injustice in American society, including prosecutorial, police and judicial misconduct, and wrongful convictions. Send \$3 for current issue to: The Match, PO Box 3012, Tucson, AZ 85072. Stamps OK.

Prison Legal News is a monthly magazine reporting on prisoner rights and prison conditions of confinement issues. Send \$2 for sample issue or 37¢ for info packet. Write: PLN, 2400 NW 80th St. #148, Seattle, WA 98117

On the Net? Visit - <http://justicedenied.org>

You can use a credit card to sign-up to be mailed *Justice Denied*, you can read back issues, change your mailing address, and much more!

Want to Volunteer for *Justice:Denied*?

Justice:Denied is an all volunteer not-for-profit organization. If you are interested in volunteering, write to find out what areas need help. Email: info@justicedenied.org Or write: Justice Denied Volunteer P.O. Box 881 Coquille, OR 97423



Freeing The Innocent

A Handbook for the Wrongfully Convicted

By Michael and Becky Pardue

108 page self-help manual jam packed with hands-on - 'You Too Can Do It' - advice explaining how Michael Pardue was freed in 2001 after 28 years of wrongful imprisonment. See review on page 7. To order a soft-cover printed and bound copy send \$18 (check, money order, or stamps) for each copy to:

Justice Denied - FTI

PO Box 881

Coquille, OR 97423

Mail to:

Name: _____

ID No. _____

Suite/Cell _____

Agency/Inst _____

Address : _____

City: _____

State/Zip _____

Freeing The Innocent - ___ copies at \$18 = _____

Prisoners 6 issues of JD (\$10) _____

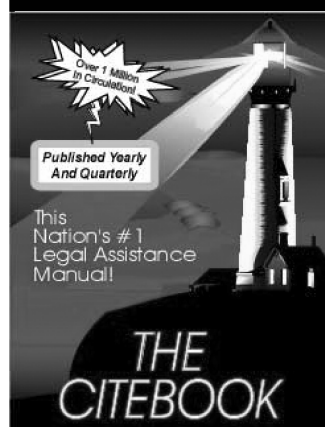
Prisoners 12 issues of JD (\$20) _____

Non-prisoner - 6 issues of JD (\$20) _____

Non-prisoner - 12 issues of JD (\$40) _____

Total Amt. Enclosed: _____

An ENTIRE law library in one book?



The CiteBook does the work for you. Literally millions of case "cites" have been sifted through to select the ones which are positive in nature, i.e., "cites that give you a right, not take one away. They are then listed in alphabetical categories for easy inclusion into your legal brief. The CiteBook gives you the tools necessary to achieve your legal goals.

Over 1 Million In Circulation!
Published Yearly And Quarterly
This Nation's #1 Legal Assistance Manual!

Send To: Starlite Inc. Dept. JD PO Box 20004 St. Petersburg, FL 33742 Orders 800-577-2929 www.citebook.com

CiteBooks at \$35.95 each
4 Quarterly Updates \$139.80
Postage at \$6 each
FL residents add 7% sales tax
Total of Order
Please Write Dept. JD on your Order!
We Accept All Major Credit Cards!

LEGAL NOTICE

INNOCENT PROJECT OF EXPRESS LEGAL SERVICES IS ACCEPTING CRIMINAL CASES FOR REVIEW

- Are you innocent of the crime for which you were convicted?
- Were you rendered ineffective assistance of counsel that resulted in being convicted?

If you answer YES to either of the above questions, send a SASE for a free assessment form.

EXPRESS LEGAL SERVICES

Executive Center

1088 Bishop Street, Ste 903

Honolulu, HI 96813

email: innocencehawaii2002@yahoo.com

**Check Your Mailing Label
For Your Renewal Date**

If your mailing label says **Issue 26**, this is your **LAST ISSUE**. If your label says Issue 27 you have **ONE ISSUE** remaining. Please renew promptly to ensure that you don't miss a single issue!

Change of Address

Please notify *Justice:Denied* of your change of address promptly. The U.S. Postal Service charges *J:D* 70¢ for each returned issue. *Justice:Denied* can only accept responsibility for sending an issue to the address provided at the time an issue is mailed!

**JUSTICE
DENIED**

**P.O. Box 881
Coquille, OR 97423**

CHANGE SERVICE REQUESTED

Non-Profit Org.
U.S. Postage
PAID
Coquille, OR
Permit No. 16

**The Magazine for the
Wrongly Convicted**

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

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

Great Year-End Gift Idea!

Donate to Justice:Denied!

The end of the year will be quickly upon us - and you can show your support for *Justice:Denied* by adding it to your gift list! *JD* depends on donations because the money received for prisoner and non-prisoner memberships does not cover *JD*'s publishing, mailing and website expenses.

Justice:Denied is an all-volunteer organization that has no paid staff, so 100% of your donation will go towards paying expenses directly associated with publishing the magazine and maintaining *JD*'s website.

Donations of any amount are welcome. You can mail a donation by check, money order or stamps (prisoners) to: **Justice Denied
PO Box 881
Coquille, OR 97423**

If you prefer, you can make a donation on *Justice:Denied*'s website with your Visa, MasterCard, Discover or American Express card. Go to: <http://justicedenied.org> and click on the **Donate to JD!** Button.

P.S. *Justice:Denied* is a 501(c)(3) non-profit, so your *JD* donation may be deductible in accordance with the tax laws.

We thank all of *Justice:Denied*'s supporters. In January 2005 we will be marking our 6th year of publicizing cases of wrongful conviction, and reporting on the pervasive law enforcement practices and judicial shortcomings that contribute to their occurrence.

Don't Miss Any Issues of *Justice: Denied!*

Six issue of *Justice: Denied* only cost \$10 for prisoners and \$20 for all others. *JD* welcomes sponsors for indigent prisoners.

Checks and Money Orders accepted. Prisoners can pay with stamps or pre-stamped envelopes. Write: **Justice Denied
P.O. Box 881
Coquille, OR 97423**

Or use your credit card online at: <http://justicedenied.org>

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

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

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

New York Judge John Collins

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