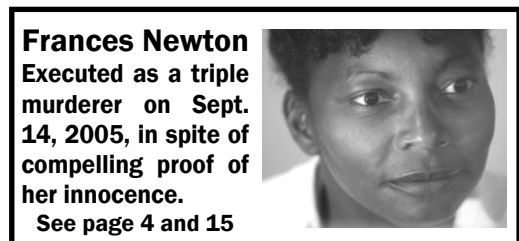
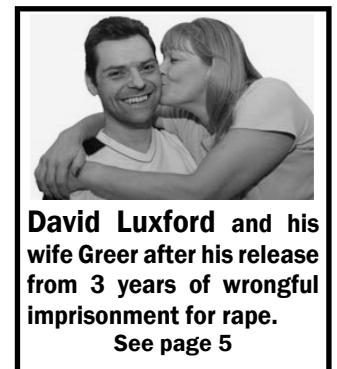
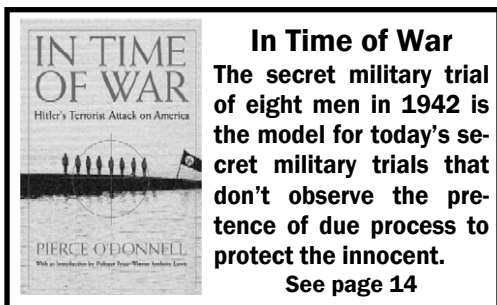
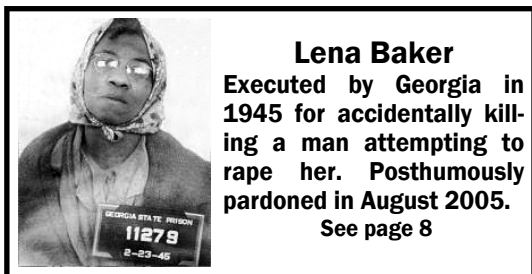


JUSTICE DENIED

The Magazine for the
Wrongly Convicted

GUANTANAMO BAY TRIALS RIGGED AGAINST THE INNOCENT SEE P. 14



In This Issue

Were Nancy Smith And Joseph Allen Convicted Of A Non-Existent Crime?

Michael Short Remains Imprisoned When DNA Evidence Proves His Innocence!

Psychological Effect On Wrongly Imprisoned Similar To Being in War Zone!

Exonerated Man Awarded \$6.5 Million For Ineffective Assistance of Counsel!

Wife "Blinded By Love" Spends \$200,000 Proving Husband's Innocence of Rape!

Was Frederick Weichel Wrongly Convicted Of A Mob Murder?

**Issue 29
Summer 2005**

Justice:Denied - Issue 29, Summer 2005

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Message From The Publisher

The Innocents Bookshop is now available on *JD's* website. The IB is a work in progress, so the initial selection of books, movies and documentaries related to wrongful convictions will be added to as time goes on. It is at, <http://justicedenied.org/books.htm>

As you have noticed the physical size of the magazine has been changed to 8-1/2" x 11", and it is now bound. Practical benefits of this change are it reduces *JD's* mailing expense, and makes it easier for readers to store *JD* for future reference.

Although people in the U.S. may be generally unaware of it, wrongful convictions are a world-wide problem. The existence of that situation is reflected in the emails *JD* receives from people all over the world. One thing that is apparent from reviewing "foreign" cases is there are common threads to wrongful convictions regardless of where they occur. Since the injustice of an innocent person's conviction knows no borders, *JD* has begun including more information about cases outside the U.S. This issue includes articles about cases in Canada, Kuwait, Hungary, Bulgaria and England. Change the name of the location to *any city in any state, USA*, and the name of the defendant is the most likely way a person might guess that a given case did not occur in the U.S.

Justice:Denied's volunteers appreciate your continuing support, and we welcome any thoughts or suggestions you may have about the magazine.

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



Information About Justice:Denied

Six issues of *Justice:Denied* magazine costs \$10 for prisoners and \$20 for all other people and organizations. Prisoners can pay with stamps and pre-stamped envelopes. A sample issue costs \$3. See order form on page 47. An information packet will be sent with requests that include a 37¢ stamp or a pre-stamped envelope. Write: Justice Denied, PO Box 68911, Seattle, WA 98168.

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

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Margie Grover¹ brought her 4-year-old daughter Nicole to a Lorain, Ohio hospital on May 7, 1993. She claimed that her daughter, who attended the Lorain Head Start had come home and said, "We didn't go to school today." Furthermore the anxious mother said that Nicole told her that the bus driver, Nancy Smith, had taken the children to see a man named "Joseph," who tied her up, taped her eyes, and molested her with a stick.

Grover said she found a piece of a branch in the girl's clothing. Officers attending at the hospital noted that most of the information was provided by the mother and the attending nurse, not by the little girl herself. The officers reported that Nicole was physically unharmed.

The case was assigned to Detective Tom Cantu of Lorain's Youth and Gang unit. Cantu, a 20+ year veteran of the Lorain PD and an ex-Marine, was named 1992's Ohio "Policemen of the Year" by the Veterans of Foreign Wars. When Cantu started the investigation, he had an accused person, her unknown accomplice by the name of "Joseph," an unknown crime scene location, and a definite date.

It was clear to Cantu that the incident couldn't have happened as Nicole (or was it her mother?) described. Smith's bus log and the odometer readings confirmed that she had driven her usual route on May 7, and Nicole's teacher had marked Nicole "present." Sherry Hagerman, the aide on Smith's bus that week, confirmed that nothing had happened. At the time of the incident Smith had gone to her second job, driving for the YMCA Meals-on-Wheels program. Her supervisor confirmed that Smith was a reliable driver and she had shown up for work as usual that day.

Cantu spoke to Smith's co-workers, neighbors, and friends. They scoffed at the idea that Smith was a child molester. She was a single mother with four teenage children and she had three part-time jobs that often kept her working for 12 hours a day.

Cantu interviewed Nicole on May 13, but most of the information came from her mother, who insisted that her daughter was telling her a lot of details at home. In front of Cantu, however, Nicole hesitated, saying, "I forgot," "I don't remember that," and "Can we go home now?" After repeated questioning she finally agreed that she had seen "'Joseph's" pee pee."

Cantu went to the Head Start school on May 25 and questioned 11 children, aged 3 to 5 who were on Smith's bus route. His police report for that day notes, "The children

The Shame Of Lorain, Ohio - Nancy Smith And Joseph Allen Convicted Of Non-Existent Crimes

By Lona Manning

were questioned if Nancy had ever touched them in a bad way, or in any way which would hurt, or upset them, and each one stated that she has never touched them. The children were asked if they knew anyone named "Joseph," and they all indicated that they did not. All of the children stated that they liked Nancy and that she was nice."

Nicole's mother had been spreading alarm to other Head Start parents who then questioned their children. Had they heard of "Joseph"? Had they been taken to "Joseph's" house?

Cantu said that from the jumbled descriptions of "Joseph," he couldn't tell "if the guy was white, black, or a white guy with black

After the accusations became public, police investigator Cantu took Smith for a lie detector test, which showed "she didn't do that crime any more than me or the guy that gave the test." Cantu concluded that there was no case against Smith, "There is no proof that a male suspect named "Joseph" exists.... all of the victims in the case have been interviewed with much inconsistency and lack of good evidence."

spots, or a white guy with black spots" One child said "Joseph" was a white man who painted his head and hands black. Several others said "Joseph" had blue eyes. Cantu suspected that parents heavily influenced the children's testimony. "One day they tell you one story, then they go home, and all of a sudden they have the same story."

Cantu recalled, "I took the kids to different houses where they said this thing happened and none of it panned out. The kids gave descriptions of the interior of the house and different pictures that might have been in the house, [but] any house we went into, nothing matched anything the children stated." He canvassed the neighborhood and asked if anyone had seen a bright yellow school bus parked there all afternoon. No one had.

Less than two weeks into the investigation the mayor summoned Cantu to his office and when he arrived Grover was already there complaining that no arrest had been made. Cantu got "into a tiff" with her, but he recommended proper police procedure. "I even told the mayor, 'just because somebody accuses, they say Nancy Smith did it, I have to prove she did it, I can't arrest her on your say-so.'"

Cantu concluded, "There is no proof that a

male suspect named "Joseph" exists at the present."

The Head Start semester ended on May 27 with a picnic in the park. The day afterwards, Grover, who had her identity concealed, appeared on a local newscast with the dramatic claim that a molester was stalking the Head Start kids — and nobody was doing anything about it. She said she wanted, "someone to do something about this case and get the ball rolling." She named a suspect, a white man her daughter had pointed out when he was cutting the grass outside his house. (He was soon cleared.)

After the accusations became public, Cantu took Smith for a lie detector test, which showed "she didn't do that crime any more than me or the guy that gave the test." Cantu concluded that there was no case against Smith, "There is no proof that a male suspect named "Joseph" exists.... all of the victims in the case have been interviewed with much inconsistency and lack of good evidence."

Shortly after Cantu made his recommendation that the investigation against Smith be concluded, he was promoted to sergeant and transferred out of the Youth/Gang unit. The Lorain PD then assigned five officers to a special Head Start task force. The questioning of the children began again.

One of those police reports states, "Amy was asked, did Joseph make you touch him? Amy stated, 'No.'"

When Child Protective Services interviewed Nicole in May, she denied that anyone had touched her. After several months and more interviews, she agreed with detective Eladio Andujar that Nancy and "Joseph" had molested her.

Preschooler Johnny Givens got involved in the case at the end of May. His mother had seen the news reports and she remembered that her son had complained of a sore bottom the previous winter. The police report states, "[Johnny] was questioned if Nancy ever did anything to him, or if she had ever touched him, or ever touched his penis... [Johnny] stated that she had never done anything to him, and had never touched him in any way..."

Two weeks after Grover appeared on the local news, 4-year-old Jason Andrews's mother reported that her son had told her he'd been molested right on the bus by someone named Alan. The police report notes:

"He also stated that Alan looked like

Shame continued on page 40

Woman Wrongly Convicted By Mistaken Identity Sues Police

By JD Staff

On April 15, 2002, a security guard at a Sears store in the Detroit suburb of Lincoln Park was severely bitten by a young woman he had stopped to question after observing she was leaving the store with unpaid merchandise — which turned out to be \$1,300 worth of clothes.

The city police were called and the suspect was taken to a police station. When questioned, she told them her address, that she was 15, and that she was Dominique Brim. She was then allowed to leave on her own without being booked — so the police had no fingerprints, photograph, or writing sample from her signing her name.

Two months later the 15 year-old Brim was charged in juvenile court with retail fraud and felony assault with the intent to do great bodily harm less than murder. Because she was being prosecuted as a minor, she faced a maximum sentence of being incarcerated for six years — until she turned twenty-one.

Brim, however, didn't just claim that she had

never attempted to steal from Sears and that she didn't bite the security guard, but that she had not been at the store on April 15 and that she had not been arrested by the police. Her family was so convinced of her innocence that they didn't rely on a public defender — they hired an attorney to defend her

The judge discounted Brim's defense that she had been mistaken for another person, because several Sears employees, including the security guard, positively identified her in court as the person who was apprehended and who bit the guard. She was found guilty of both counts.

However, the vehemence with which Brim claimed she was the wrong person impressed Sears officials enough that they did something they didn't do before her trial: They viewed the store's security tape of the April 15 incident. They discovered that Brim wasn't the person stopped by the guard and who attacked him. After the prosecutor and Brim's lawyer were contacted, the charges were dropped and the judge vacated her conviction before she was sentenced.

The woman in the tape was subsequently identified as Chalaunda Latham — who wasn't 15, but 25. Latham was able to pass herself off as Brim to the police by giving them Brim's name, address and phone number, because she was a friend of Brim's sister. Yet that doesn't explain how the

police mistook her for a 15-year-old.

However due to the odd circumstances of Brim's case, Latham got off scot-free. Prosecutors decided she couldn't be charged because the Sears employees had already positively identified Brim in court as being responsible for the theft and security guard attack. It is unknown if the prosecutors considered filing charges against Latham related to her misuse of Brim's identity for a criminal purpose.

Brim's family hired a lawyer, Gary Blumberg, who filed a civil suit against Sears. That suit was settled in 2004 for an undisclosed amount. On August 4, 2005, Brim filed a lawsuit in Wayne County Circuit Court that named the city of Lincoln Park and four of its police officers as defendants. Among other claims, the suit alleges the city and the police officers were negligent for failing to properly investigate the case, and for failing to properly identify the person on April 15, 2002, who was held in custody for the alleged crimes.

Edward Zelenak, Lincoln Park's city attorney, described Brim's lawsuit as a nuisance suit. He doesn't think Brim, now 19, deserves compensation for being wrongly convicted of two felonies, since her "inconvenience was minimal."

Source: Wrongly Convicted Woman Now Sues Officers, Jason Alley, *The News-Herald* (Southgate, MI), August 21, 2005.



New Evidence of Frances Newton's Innocence Ignored By Courts And TX Governor

Frances Newton was executed by Texas on September 14, 2005. She had been convicted of murdering her husband and two children in 1987. In spite of compelling new evidence casting substantial doubt on her guilt, Newton's pro bono legal team was unable to get any state or federal court to look at that evidence, and Governor Perry failed to either commute her sentence, or grant a stay so her lawyers could continue their efforts to win a new trial that would put the new evidence in front of a jury for the first time.

Two days after Newton's execution, her attorney David Dow, head of the Texas Innocence Network at the University of Houston Law Center, told *Justice: Denied* that the denials of her habeas petition by state and federal courts was based on the procedural ground that it was barred by the rule limiting review of a successive habeas petition to, as Dow put it, "facts that could not have been known at the time of the first petition." Dow was frustrated with the court rulings because some of the facts supporting her petition were plainly "new," since they were not discovered until this year. The Harris County (Houston) DA was fiercely opposed to granting Newton a

new trial, and his spin on the case prevailed.

Dow said the prosecution's case for Newton's guilt was based on three issues: financial motive, gun powder residue on her skirt, and she hid the murder weapon.

Frances Newton told the *Houston Chronicle* during an interview, "For a long time I believed in the death penalty. But now I know that the system can't be trusted to be right. I've been wrongly accused, wrongly convicted."

However, Dow told *Justice: Denied* that none of those issues has any substance as an indicator of Newton's guilt, and the truth about them exculpates her from involvement in the murders.

- The alleged financial motive was a life insurance policy on her family - that a bank employee talked her into purchasing when she went to the bank to open a saving account.
- The alleged gun powder residue on her skirt was actually garden fertilizer.
- The hidden gun was not the murder weapon, but a gun she hid from her husband prior to the murders. Although the Harris County DA ada-

manly denies that a second gun was involved, Dow said, "There were multiple guns involved, and the state mixed-up — or deliberately switched — the murder weapon with the gun that she hid prior to the crime. That accounts for the gun they alleged she had matching the bullets recovered from the victims." Not only did an assistant DA admit to a Dutch reporter during a videotaped interview that more than one gun was involved, but Dow said that the case was originally investigated as a murder of the children by Newton's husband, who police believed then committed suicide by shooting himself. That indicates the investigating officers found a gun either in his hand, or very near his body. Which supports Newton's assertion that the gun she hid couldn't have been used in the crime. Dow said the only crime scene photos he has seen were taken after the bodies — and the gun that would have been laying near the body of Newton's husband — were removed.

Dow also said, "Two weeks after the crime officers told Newton's father that the ballistic tests of the bullets that killed the members of her family didn't match Newton's

Newton continued on next page

In January 2000 a woman in her mid-20s accused a family friend, David Luxford, of raping her on several occasions in 1988 when she was 13 years old. A month later the 33-year-old Luxford was arrested and charged with raping the woman 12 years earlier.

During his July 2000 trial, the woman testified that Luxford, then twenty-one, raped her on the couch of her family's home in Kent, U.K., and also forced her to perform oral sex. The prosecution neither presented any physical or medical evidence, nor any family or medical witnesses that corroborated her claim of having been sexually assaulted. The prosecution's entire case was the woman's testimony. Luxford protested his innocence and testified he had never touched the girl.

Faced with a "he said - she said" case, the jury sided with the woman. By an 11-1 vote Luxford was found guilty of two counts of rape and one count of indecent assault. He was subsequently sentenced to 18 years in prison.

In May 2001 the Court of Appeals quashed Luxford's conviction and ordered his retrial. So ten months after his imprisonment he was released on bail pending his retrial. After a carbon copy retrial in November 2001, Luxford was found guilty a second time. His bail was revoked and he was again sentenced to prison.

In spite of having her husband public branded as a rapist, Greer Luxford believed in his innocence. She gained a valuable ally after the local newspaper, the *News Shopper* published an account of her husband's second trial written from the prosecution's perspective. Greer contacted Deputy Editor Jean May and offered to provide evidence of his innocence. Knowing that two juries had found Luxford guilty, May was initially skeptical, thinking that Greer was a naïve wife blinded by love to the truth about her husband. However she agreed to read the transcript of Luxford's first trial. She later wrote that it caused her to have an epiphany, "By the time I finished it at 2 a.m., I was convinced David Luxford had suffered

Wife 'Blinded by Love' Spends \$200,000 Proving Husband Innocent of Rape

By Hans Sherrer

two miscarriages of justice."¹ May then visited Luxford in prison, wrote an article about the injustice of his case, and contacted Michael Mansfield, a well-known attorney who had handled other cases of wrongful conviction. She speculated that Luxford's convictions were due to a "paedophilia witch-hunt" that followed the murder of a local girl.²

Knowing her husband's freedom depended on finding proof that his accuser's claims were untrue, in May 2002 Greer hired a private investigation firm that specialized in miscarriages of justice and false allegations. The investigators learned right off the bat that in spite of Luxford's two convictions, the police did not conduct an investigation into the woman's allegations (although neither did his lawyer). They proceeded to rectify the lack of an investigation by interviewing everyone — including Luxford's co-workers, and family members and acquaintances of him and his accuser — who could aid in reconstructing the alleged crime scene depicted by his accuser. After four months they had accumulated enough information to use a computer program to compare what they had learned about Luxford and his accuser's whereabouts and behavior, with her scenario of how and when the alleged attacks occurred. They determined the evidence proved the alleged rapes could not have happened.

The investigator's fee of about \$200,000 (£100,000) was paid by a loan obtained by Greer, dozens of fund raising events she organized, and donations from about 250 people who believed in Luxford's innocence.

Luxford appealed based on the new evidence. The U.K.'s Court of Appeals unanimously quashed his convictions on November 5, 2003. It also barred his retrial and ordered his immediate release. The Court stated, "The fresh evidence leads us to conclude these

convictions are not safe and they should be quashed."³

At 4 o'clock on the afternoon of November 5, David Luxford was permanently released after 34 months of wrongful imprisonment. He readily acknowledged that his exoneration was due to his wife's determination and the many people who supported her efforts. Greer said their relationship had been severely tested, but "Our love for each other has deepened and that is something no one can take away from us."⁴



A happy David Luxford and his wife Greer after his release from 3 years of wrongful imprisonment.
(News Shopper)

Although there was talk of seeking perjury charges against Luxford's accuser, she was not prosecuted. Consequently, even though she fabricated the accusations against Luxford, under the U.K.'s sexual victim identity shield, she enjoys lifetime immunity from having her identity publicly disclosed.

The lead investigator for the firm — legalappeal.co.uk — that found the evidence substantiating Luxford's innocence said after his release, "I'm so glad we won this for him. It couldn't have happened to a nicer man. To say David was taken to the lowest depths is an understatement. He had his life taken away." The investigator continued, "Is it right that the police should allow things like this to go ahead? These false allegations have got to stop."⁵

End notes:

1 Dad Wrongly Jailed For Rape Is Freed, Richard Simcox, *News Shopper*, November 19, 2003,

2 *Id.*

3 Mum Blasts 'Rape' Woman As Selfish, *Croydon Guardian*, November 21, 2004.

4 Dad Wrongly Jailed For Rape Is Free, *World Association of Professional Investigators*, Nov. 21, 2003

5 *Id.*

JD Note: In Sept. 2005 *Justice:Denied* was unsuccessful in contacting legalappeal.co.uk. It is not known if its business name has changed or if it is no longer in operation.

gun [that she had hidden]."

If the case had been anywhere else but Harris County, Dow thinks Newton would have had a good chance of being granted a new trial. In response to the question of why they would want to execute a woman who in all likelihood was innocent, Dow relied, "They are eager to get on with it in every case."

Dow said he would like to continue developing evidence of Newton's innocence, but he can't get into court representing a dead client.



John Spirko Update

John Spirko's story of being on Ohio's death row when there is evidence he was over 100 miles from the scene of the crime was in *Justice Denied*, Winter 2005, Issue 27.

Spirko's execution scheduled for September 20, 2005, was stayed by Ohio Gov. Bob Taft until November 15, 2005, who also ordered a second clemency hearing to be held on October 12, 2005. The governor acted after Ohio newspapers reported that Senior Deputy AG Tim Prichard grossly misrepresented evi-

dence that casts doubt on Spirko's guilt during Spirko's clemency hearing on August 23.

Paul Hartman is the US postal inspector who provided key testimony against Spirko. Days after the execution was stayed, one of his former co-workers cast doubt on Hartman's integrity and professionalism. In a Sept. 2005 letter to superiors the co-worker said Hartman had been forced to retire early, and his conduct was "bordering on criminal." The co-worker wrote in regards to Spirko, "it appears an individual who did not commit the crime is going to be executed."

Not So Solved - The Bruce Lisker Story

By Amy Fisher

Bruce Lisker was 19 when he was convicted in 1985 of killing his mother Dorka Lisker, on March 10, 1983.

Police theorized that Lisker had broken into his parents' home when he thought they weren't there, looking to steal money to support his drug habit. When his mother surprised him, he picked up his Little League trophy and struck her. They believed Dorka Lisker was able to get up and confront her son. It is at that point police assumed Bruce fatally plunged two steak knives, obtained from the kitchen, into his mother's back. Of course, this was only their theory, yet it was compelling enough to be believed by a jury, and ultimately landed Lisker behind bars.

For 20 years, Lisker has languished in a California prison for the murder of his mother.

Lisker initially denied murdering his mother. During a plea negotiation for which he would have received seven years, he told psychiatrists that he did, in fact, kill her. The plea was rejected by the judge when psychiatric reports stated he lacked remorse and couldn't be rehabilitated by age 25, the maximum age he could have been held by the California Youth Authority.

Lisker, once again, resurrected his innocence and went to trial. A jury found him guilty of second degree murder and he was sentenced to life in prison. He changed his mind again in 1992 when he told the parole board that could have set him free that he had killed his mother, blaming his behavior on drugs and alcohol. The parole board denied his request and Lisker again changed his tune, asserting that he was an innocent man. He chose not to appear at his next three parole hearings.

Today Lisker sits in Mule Creek State Prison near Sacramento, proclaiming his innocence and saying he will no longer take responsibility for a murder he did not commit just to try to gain his freedom. Lisker may be guilty and have just come to the realization that it doesn't much matter what he says to a parole board. After all, by his own admission, California's Board of Prison Terms (BPT) is "little more than a rubber-stamp denier of paroles," and "I knew I would die an old man in prison before this BPT ever granted me a parole date." Or he could very well be another innocent man caught up in the quagmire that is the legal justice system.

Bruce Lisker started out in the world with all the trappings that tend to lead one toward a promising future. His father, Bob, was a successful attorney in Los Angeles. His mother quit her job to be there for him throughout his childhood. Bruce played sports and was a Cub Scout. He was just a regular kid — "that is, until he started to experiment with drugs when he was about 11. First it was just pot, but within a few years he gravitated toward hardcore substances like cocaine and LSD. Bruce wasn't doing odd jobs around the neighborhood or delivering newspapers to support his habit. Instead, he would steal money from his parents.

Bruce's parents contacted the California Youth Authority and he was placed in a group home for troubled teens. Two years passed, and, probably hoping their son's troubles were behind him, they brought him home and enrolled him at the local high school. Bruce didn't adjust and was sent to several continuation schools, alternative education options in California offering such things as counseling and guidance with academics. Lisker dropped out of high school at 16, opting instead to continue his drug use and carefree existence.

A child of privilege, Bruce was able to talk his parents into renting him an apartment, buying him a Mustang and giving him

FBI Lab Confirms Shoe Print Not Lisker's

The FBI's crime lab determined in August 2005 that Bruce Lisker's shoes do not match a bloody crime scene shoe print relied on by prosecutors to convict him of murdering his mother in 1983.

The lab also determined Lisker's shoes were not the source of a shoe impression found behind his mother's right ear.

The FBI's findings were consistent with the LAPD crime lab's conclusions in the spring of 2005 about the shoe print evidence.

In light of the new evidence of Lisker's innocence, the outgoing president of the civilian LA Police Commission thinks the LAPD should re-open its investigation into Dorka Lisker's murder, "I absolutely think it warrants further investigation."

Another commission said, "On its face, it's very disturbing to think that an innocent man might be in prison."

Source: Shoe Print at Crime Scene Not Lisker's, FBI Confirms, by Scott Glover and Matt Lait, *Los Angeles Times*, August 18, 2005.

spending money, which he subsequently used on drugs. He did whatever he wanted on his parents' dime. For some extra cash, he decided to let a friend he met in drug counseling, Mike Ryan Jr., sleep on his couch in exchange for half the rent.

Bruce was 17 and running wild. He was arrested for what we today would call road rage. He threw a screwdriver at a passing motorist he believed had cut him off. Though the charge would later be reduced to vandalism and wasn't considered a major offense, police and prosecutors would later use this to show Lisker was a violent individual capable of losing control, which could result in murder.

Lisker's Mother Murdered

March 10, 1983, became the day that changed Bruce Lisker's life forever. At 11:26 that morning, he called the police to report that his mother had been stabbed. As an ambulance was taking his mother to the hospital where she would die only moments after her arrival, police were taking Bruce to the Van Nuys police station for questioning.

Detective Andrew Monsue was one of the first who arrived at the Lisker home to take a look at the crime scene. He surmised early on that Dorka Lisker was attacked and left for dead, the motive being robbery. He observed bloody footprints in the house that helped guide him through the murderous events that had just taken place. Bob Lisker informed the detective that the day before that, he had given his wife around \$150; that money was not found in Dorka's purse. Monsue's most viable suspect quickly became Bruce, the Lisker's rebellious drug-addicted son.

During the police interrogation, Bruce walked Monsue through his version of events. Lisker's reason for going to his parents' home that morning was that he needed to borrow a jack to work on his car. He went on to explain that his mother did not answer the door and since her car was visible in the garage, he assumed she had to be home. He went around the house, peering in windows, when he thought he saw his mother lying on the floor. He ran to his car to retrieve a pair of red-handled pliers, which he would use to remove the screen on the kitchen window before carefully removing the panes of glass. Discovering his mother had been attacked, he called for help. In a panic, he pulled the two steak knives from his mother's back and removed a braided yellow cord wrapped around her throat.

Detectives interrogated Bruce Lisker for hours, and although he remained obstinate that he was not the one who killed his mother,

Lisker continued on page 38

On February 5, 1996, I was arrested in Dallas County, Texas, by U.S. Marshalls on a fugitive warrant for walking away from a California halfway house 11 days from my release date. A marshall asked "What's up with this girl in Houston?" Thinking he was talking about Leann, a young woman I knew in Houston, I stated that I asked her if she had wanted to smoke a joint and later we had consensual sex. He then asked if he could search my home for a video that might show me killing my wife in California. I consented, telling him that "my ex wife is alive and well and is going to get a kick out of being dead." The marshall told me detectives in Houston were alleging I had killed my wife. They took all my VHS videos. I was booked into Dallas County jail on the California warrant. The videos were returned after they didn't find anything about my ex-wife in them.

While at the jail I was questioned by two detectives. One claimed to be a DEA agent, and the other claimed to be an ATF agent. They said they wanted "information" so they

Exonerating DNA Test Cancelled Before Trial - The Michael Short Story

By Michael E. Short

could help me with my case. They also asked me, "What's with this girl in Houston?" I repeated the same thing I told the marshall. A few days later I was taken from my cell at about 5 a.m. and brought down stairs and put in a holding cell with some other guys. Finally I asked someone what was going on? And he stated that they were there to do a line-up. After talking we figured out it was me who was probably the intended suspect.

When a female and male detective came to bring us out, I asked if the line up had to do with me. When the female detective said "yes," I told her I had a lawyer in Houston, and I wanted him present during any line-up or questioning. The male detective then said in front of all the participants, "You don't have the right to have an attorney present. If you don't do the line-up now it will be used against you in court to show your guilt." So I did the line-up. The participants on either side of me, when it was their turn to step forward, bowed their arms and flexed their muscles like body builders. Many months later I found out that the main identifier the victim described about her attacker

was a spider web tattoo on his elbow. I was the only participant with a spider web tattoo. This would be critical in any identification.

When I first called my lawyer, I explained about Leaan. I thought she was whom it was all about, so I told him I did it. I was being up front because it was no big deal. I knew Leaan was pissed at me. I had left her in her van in the parking lot of the Turtle Club because we had fallen asleep. I left without waking her. Later cops cruising the parking lot woke her up. That embarrassed her. Needless to say all her fury was directed at me. I did not find out until 2 to 3 months later when I received the indictment, that the complainant was not Leaan, but someone I did not even know — a 16-year-old girl named Celeste P. She alleged that I had sexually assaulted her in a tow truck. I immediately called my lawyer's office, left a message, and then wrote him a follow up letter.

I paid my lawyer \$20,000 raised from the sale of my prized possession, a custom Harley show bike, and some other items. My lawyer was supposed to fly to Dallas to see me in jail soon after he was paid, but he didn't come to see me until 30 days before my trial. He was supposed to hire an identification expert, a DNA expert, and a private investigator. He didn't. When I called his home, his wife told me he was fighting cancer, he had two high profile cases on top of his regular case load, and he was stretched too thin.

Under those circumstances he never should

Short continued on page 31

Innocence Project Accepts Michael Short's Case!

Days before this issue of *Justice:Denied* went to the printer a letter was received from Michael Short with the news that the Innocence Project in New York had accepted his case.

Justice:Denied contacted the Innocence Project and staff paralegal Andre Vital confirmed they have accepted Mr. Short's case. He also said a somewhat unusual aspect of Mr. Short's case is an exculpatory DNA test has already been performed.

Phantom Phone Record Leads to Tossed Conviction

By Hans Sherrer

Justin Kirkwood was convicted in 2003 of robbing \$170 from a craft store in New Castle, Pennsylvania. The robbery occurred at 7pm on August 14, 2002, in the city of 26,000 people located 40 miles northwest of Pittsburgh.

The jurors relied on the eyewitness testimony of two store clerks who identified Kirkwood in court as the man who robbed them at knifepoint. In their police statements, both clerks described the robber as a 20ish white man wearing a dark short-sleeve polo shirt, khaki shorts, a light-colored baseball cap pulled down near his eyes, and who didn't have any distinguishing marks - no tattoos or scars. The clerk who stood in front of the robber said he had brown eyes and was 5'-4" tall - one inch taller than her 5'-3" height. The other clerk, who was 15' away from the robber, said she couldn't see his eyes.

The clerks made their initial identification of Kirkwood from a facial police mugshot of Kirkwood. After looking through hundreds of photos, one clerk said she wasn't positive that Kirkwood was the robber, but he "strongly resembled" him. The next day the other clerk identified Kirkwood as the robber after looking through an unknown number of photos. What is known is she only spent 15 minutes at the police station.

Kirkwood had no criminal record, but his mugshot had been taken months prior to the robbery when a dispute between him and his ex-girlfriend over a cell phone bill led to her obtaining a protection order against him. Although the dispute was resolved, the photo and fingerprints taken by the police after the order was issued remained in their files.

Kirkwood was arrested and charged with the robbery. Prosecutors offered him a deal of a short jail sentence if he would plead guilty. He refused, telling them he was innocent.

There was no physical evidence tying Kirk-



Justin Kirkwood is surprised by his parents, David and Debbie

upon his release from prison. (V.W.H. Campbell, Post-Gazette)

wood to the robbery — he hadn't been linked to the baseball cap, the knife, the khaki shorts, the short-sleeved polo shirt, or the money. So the prosecutions sole evidence was the testimony of the two eyewitnesses.

The 23-year-old Kirkwood relied on a mistaken identity defense based on two prongs. The first prong was that he didn't match the description of the robber provided to the police by the eyewitnesses. Kirkwood has blue eyes, not brown; he is 5'-7" tall, not 5'-4"; and he has a very visible dragon tattoo on his leg, and Japanese tattoos on both arms, while the two eyewitnesses told police

Kirkwood continued on page 32

Execution In A Small Town - The Lena Baker Story

By Lela Bond Phillips

In 1996 while doing some research about 1940s Cuthbert, Georgia, I ran across some information about Lena Baker. At that time, the ordeal and execution of Lena Baker was one of the best kept secrets in town. After reading the Superior Court Minutes of her trial, I knew that Lena needed a voice. Almost sixty years after her tragic death, I knew her story cried out to be told and I was going to tell it.

Lena Baker had at least four strikes against her when she was born at the turn of the century in Randolph County, Georgia. She was from a small, rural southern town; she was a woman; she was poor; and she was black. Lena was born in a former slave cabin, about five miles southwest of Cuthbert. At the age of forty-four in 1944, Lena had never known anything except hard work and the pangs of poverty and despair. She chopped cotton, cleaned houses, and took in laundry to help support her mother and her three children.

When Ernest B. Knight, a local gristmill owner, hired her to care for him while he recovered from a broken leg, it must have, at first, seemed like a windfall. Knight, a white man, was twenty-three years Baker's senior. It was well known in Cuthbert that Knight was heavy drinker and that he often carried a pistol strapped to his shoulder. It wasn't long before a sexual relationship developed between Knight and Baker. When she attempted to extricate herself from this relationship, Knight locked her in his gristmill for several days at a time, and as a nearby newspaper reported after her execution, kept her there as his "slave woman."

At her trial, Lena explained how Knight approached her house and forced her to go with him on that Saturday evening of April 29. Baker had been warned by the county sheriff to stay away from Knight or that she was going to be thrown in jail; too, she was afraid of physical abuse by Knight (and once even Knight's son had given her a terrible beating with a warning to stay away from his father). Therefore, as soon as she could, Baker gave Knight the slip and spent the night sleeping in the woods near the convict camp. On her way back into Cuthbert the next morning, Knight cornered her again and this time took her to the mill house and locked her in while he went to a "singing" (a form of religious celebration in the South) with his son. Lena soon became fed up with spending the sweltering day lying on an old bed in the gristmill. When Knight returned, she informed him that she was leaving. They, in



Lena Baker's Georgia DOC mug shot. This is the only known photo of her.

Lena's words "tussled over the pistol."

At her trial when asked who pulled the trigger, she replied, "I don't know." She also explained the Knight was brandishing an iron bar that was used to secure the door to the gristmill and that she was afraid for her life.

Under the jurisdiction of Judge Charles William "Two Gun" Worrill, who presided at court with two pistols on the bench, the trial didn't last even a full court day, taking a little over four hours. [The trial transcript is 10 pages long.] A former "lawman" out West, Worrill boasted of gunfights with twelve men, seven of whom died. Later he was appointed to the Georgia State Supreme Court by Governor Herman Talmadge, who later became a vehemently segregationist senator. The jury consisted of twelve white men (not unusual for 1944), but many of the jurors were good friends who attended the same small churches, socialized with each other's families at card parties, and shared morning coffee at a local cafe.

In less than one-half hour the jury came back with a guilty verdict and Worrill sentenced Baker to death in Georgia's electric chair, nicknamed "Old Sparky." Her lawyer immediately asked for a new trial to be scheduled because "the verdict was contrary to the evidence and without evidence to support it ... and the verdict was contrary to law and the principles of justice and equity." He then just as immediately resigned as her lawyer. Later Lena was granted a sixty-day reprieve by then Governor Arnall, but the Board of Pardons and Parole denied clemency when they heard the case. Lena's execution date was scheduled for March 5, 1945. On February 23 she was signed into one of the worst prisons in the United States, Reidsville State Prison, where she was housed in the men's section until just a few days before her execution when she was moved to a solitary cell just a few feet from the execution chamber itself.

Lena went to her death calmly. Her last words were, "What I done, I did in self-defense, or I would have been killed myself ... I am ready to meet my God." Witnesses stated that it took six minutes and several shocks before the prison doctor pronounced her dead. Although Ernest B. Knight's death had not made the headlines in the *Cuthbert Times*, Lena's did. The paper crassly reported, "Baker Burns."

In 1998, the congregation of the church Lena

Baker Posthumously Pardoned on August 30, 2005

Lena Baker was posthumously pardoned by the Georgia Board of Pardons and Paroles on August 30, 2005.

Instrumental in the pardon was John Cole Vodicka, director of the Prison & Jail Project — an Americus, Georgia based prisoner rights group. During a 1998 visit to Randolph County's courthouse, the Court Clerk asked Vodicka if he wanted to look into Lena Baker's case. The clerk gave him the court file, which included the 10-page trial transcript.

Baker cont. on page 20

Baker Is Georgia's Fourth Posthumous Pardon

Lena Baker's posthumous pardon is the fourth granted by the Georgia Board of Pardons and Paroles in its 62-year history.

Missionaries Samuel Austin Worcestor and Elihu Butler were pardoned in 1992. The men were imprisoned for four years after their 1831 conviction for protesting the removal of Cherokees from North Georgia.

Leo Frank was pardoned in 1986. He was the manager of an Atlanta pencil factory convicted in 1913 of murdering a 13-year-old employee. Two years later, after Frank's death sentence was commuted to life in prison, he was lynched by a mob that stormed the state prison and kidnapped him. There is considerable evidence that Frank was innocent. He is listed in, *In Spite of Innocence: Erroneous Convictions in Capital Cases* (Northeastern Press 1994) by Hugo Adam Bedau, Michael Radelet, and C. Putnam, as having been wrongly convicted.

attended as a young woman raised \$250 for a slab and marker for her grave. Her relatives, now scattered from New Jersey to Florida, met on March 5, 2003, the 58th anniversary of her death, to place a wreath on her grave.

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Lela Bond Phillips is an English professor at Andrew College in Cuthbert, Georgia. She is author of, *The Lena Baker Story* (Wings Publishers 2001). Available from *Justice: Denied's* Innocents Bookshop, <http://justicedenied.org/books.htm>.



Justice:Denied has published several articles related to the wrongful murder convictions of four innocent men in Boston based on the perjured testimony of one of the actual murderers – a mob hitman who was an FBI informant protected from prosecution by that agency. (See, FBI's Legacy of Shame, *Justice:Denied*, Winter 2005, Issue 27, p. 24.)

Compelling evidence supports that Frederick Weichel is another innocent victim of the FBI's intimate alliance with Boston mobsters. On the basis of one suspect eyewitness, Weichel was convicted in 1981 of a murder that Thomas Barrett later confessed to in a letter and during conversations. Barrett has been directly linked to James "Whitey" Bulger – a notorious Boston mobster protected from prosecution for many years by the FBI. (See article on p. 34 of this issue.)

As of September 2005 Weichel remains imprisoned, as he has been for 24 years. Weichel wrote *Justice:Denied* a one page letter that was accompanied by a Boston judge's October 2004 decision vacating his conviction and ordering a new trial. The state appealed to the Massachusetts's Supreme Court, where briefing will be completed in October 2005. Weichel told *Justice:Denied* the judge's decision "says it all." He is right. So *Justice:Denied* is letting his story be told by way of the judge's decision. Due to space considerations, redundancies, extraneous information and most case citations have been edited out. The full Weichel decision is available on JD's website at <http://justicedenied.org/legal/weichel1004.pdf>.

COMMONWEALTH OF MASSACHUSETTS
Norfolk ss.
Superior Court Case No. 77144
Commonwealth v. Frederick Weichel

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL

1: INTRODUCTION

On August 20, 1981, a jury convicted defendant Frederick Weichel ("Weichel") of first degree murder in the Superior Court, Norfolk County, Barton, J., presiding. The Supreme Judicial Court ("SJC") affirmed his conviction on September 2, 1983. See *Commonwealth v. Weichel*. 390 Mass. 62 (1983). In August 1991, the defendant filed a motion for a new trial pursuant to Mass. R. Crim. P. 30(b) arguing ineffective assistance of counsel. Barton J. denied the motion in a margin decision, and the defendant did not appeal. Weichel now moves for a new trial pursuant to Mass. R. Crim. P. 30(b) on the grounds of newly discovered evidence and ineffective assis-

Convicted of Murder Committed By FBI Protected Mobster The Frederick Weichel Story

tance of counsel. On December 20, 2002, I granted the defendant's motion for an evidentiary hearing based solely upon the claim of newly discovered evidence and denied the motion on all of the other grounds asserted.

During the evidentiary hearing on July 22, 23, 31, August 7, September 15, and October 23, 2003, the defendant presented testimony regarding two forms of evidence to support his newly discovered evidence claim: (1) an allegedly exculpatory letter dated March 19, 1982, sent on or about that time, to the defendant's now deceased mother, Gloria Weichel, and (2) Thomas Barrett's alleged confession to killing Robert LaMonica to Sherri Robb, a social worker with whom Barrett lived with periodically in the 1980's. The defendant contends that this evidence would have been admissible at his trial, that it casts real doubt on the justice of his conviction, and that justice requires a new trial so that he can admit this evidence and a jury should have the benefit of considering it, together with all the other evidence.

II. BACKGROUND

Robert LaMonica ("LaMonica") was shot and killed near his apartment building after parking his car shortly after midnight on May 19, 1980. At the time of the shooting, four youths were gathered across the street at Faxon Park. These four eyewitnesses heard four shots and saw a man run from the direction of the shots, past the park, and into the passenger side of a parked car, which quickly left the area. None of the witnesses saw a driver.

That night and into the morning, the prosecution's key eyewitness, John Foley, worked with police to put together a composite drawing of a man strongly resembling Weichel. The next day, Foley chose the defendant's photo from an array at the police

station. About ten days to two weeks later, Foley again identified Weichel as the shooter by selecting the defendant's picture in a photo array with the police present. On June 12, 1980, during a police-escorted drive with the victim's two brothers, Foley drove around the streets of South Boston in a van and again identified Weichel as the man he saw run by Faxon Park on the night of the shooting.

At trial and on appeal, Anthony M. Cardinale ("Cardinale"), Weichel's trial and appellate counsel, presented alibi and misidentification theories, with Cardinale raising the issue of misidentification and other errors on appeal. Only one of the four youths gathered in Faxon Park on the night of the shooting, Foley, could describe the man he observed running in the distance. On cross-examination, Cardinale challenged Foley about his identification of Weichel and surrounding circumstances in an attempt to inject some degree of doubt into the jury's mind as to the accuracy of Foley's composite drawing and identification of the defendant. Foley's trial testimony revealed that he observed the man running for approximately seven seconds, *just one second of which he viewed the runner's full face*. In addition, Foley and his three companions in Faxon Park admitted to *consuming alcoholic beverages* prior to arriving at the park.

After reviewing the transcript of the defendant's trial and 1983 appeal, it is clear that the case against Weichel was not one of overwhelming guilt.

III. FINDINGS OF FACT

BARRETT'S MURDER CONFESSION LETTER

Weichel continued on p. 34

From Wrongful Murder Conviction To Multi- Millionaire In Five Years

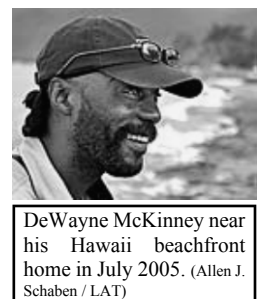
By Hans Sherrer

Five years ago, *Justice:Denied* reported on DeWayne McKinney's exoneration of robbery and murder convictions and his release after more than 19 years of wrongful imprisonment. See, "The 19-Year Ordeal of Dwayne McKinney: Injured and on Crutches 30 Miles Away From a Murder Is Finally Recognized as an Alibi," *Justice:Denied*, Vol. 1, Issue 11. This is an update about what Mr.

McKinney has experienced since his release.

DeWayne McKinney was convicted in 1982 of murdering the night manager of an Orange, California Burger King during the robbery of \$2,500 from the restaurant.

McKinney was first implicated in the crime when one of the restaurant workers saw his



DeWayne McKinney near his Hawaii beachfront home in July 2005. (Allen J. Schaben / LAT)

McKinney continued on page 26

Between A Rock And A Hard Place

By Ronald Dalton

The Association In Defence of the Wrongly Convicted (AIDWYC) is a non-profit Canadian organization devoted to investigating cases of alleged wrongful conviction throughout all of Canada. AIDWYC is based in Canada's largest city, Toronto, and it has been involved in the exoneration of numerous people.

In June 2005 AIDWYC hosted a conference on wrongful convictions in St. John's, the capital of Newfoundland and Labrador. St. John's was chosen for the conference because a Public Inquiry is just now completing a two-year investigation of three wrongful murder convictions that occurred in its jurisdiction within a recent five-year time span.


The conference's title — "Wrongful Convictions: Between a Rock and a Hard Place" — reflected the reality of dealing with wrongful convictions and incorporated the unofficial nickname of the Province of Newfoundland and Labrador, known affectionately as "THE ROCK." The conference agenda included several panels dealing with the all too pervasive causes of wrongful convictions. Many of the panellists were drawn from the ranks of AIDWYC'S talented Board of Directors with an interspersing of local jurists, lawyers, media representatives, law enforcement officials, and wrongly convicted individuals and members of their families. The conference was well attended by individuals interested in the issue of wrongful conviction and included such diverse interests as academics, jurists, police officers (including a sizable contingent of cadets in training), journalists, government attorneys, and members of the general public.

In addition to the formal agenda of the conference, AIDWYC hosted a fundraising concert with local and nationally recognized musical and other talent donated to further the ongoing work of the group. Another fundraising banquet featured a keynote address delivered by AIDWYC director James Lockyer. The theme of Lockyer's talk was that while there is the need to accept the inevitability of serious errors in any justice system operated by fallible human beings, there is also the necessity of remaining vigilant in order to minimize those errors and to try and correct them.

As one of the local wrongly convicted individuals I was pleased to be invited to participate in the conference and was

particularly impressed with the paper presented by recently retired Justice William Marshall. He acknowledged the fallibility of our justice system and called for needed improvements. I consider it a privilege to have shared the conference stage with other wrongly convicted individuals, each and every one truly dignified men of exceptional character. I was equally impressed with the emotional sharing of painful experiences presented by members of our immediate families, those people who shared our suffering and continue to share our recovering lives.

JD Note: Ronald Dalton was wrongly convicted in 1989 of strangling his wife Brenda. Relying on a prosecution "expert" witness — a hospital pathologist whose knowledge of forensic pathology consisted of having taken a three-month course — the jury rejected Dalton's defense that she choked while eating dry cereal as they were watching television. The "expert" attributed bruises on her face and neck area to manual strangulation.

Dalton was sentenced to life in prison. After 8-½ years of imprisonment Dalton's conviction was overturned by the Newfoundland Court of Appeal and a new trial was ordered. He was released on bail. At his retrial in 2000, five renowned forensic pathologists testified that all the evidence indicated Brenda had in fact choked to death. Testimony established that cereal was suctioned from her throat and her bruises were consistent with those that would have been caused during the hospital personnel's frantic efforts — described as "organized pandemonium" — to revive her. Two forensic psychologists testified that Dalton's initial lack of candor with police about what happened and his failure to disclose that he had recently been involved in an extramarital affair was attributable to his state of mind, and "that at the time of his wife's death Mr. Dalton suffered from acute stress disorder, which was brought on by watching his wife die before his eyes. At the time he made the false statements, therefore, Mr. Dalton's judgment was severely impaired." Dalton was acquitted in June 2000. He 

Ohio Gov. Alludes To Innocence After Graft Conviction

By JD Staff


Ohio Governor Bob Taft was convicted on August 18, 2005, of four counts of failing to file state reports documenting the dollar value of golf outings, hockey tickets, meals and other gifts provided to him by several dozen influential Ohio corporate executives, lobbyists and politically powerful attorneys.

Ohio state law requires that all public officials, including the governor, must file an annual ethics report documenting the source and value of all gifts worth \$75 or more.

Taft was convicted after pleading no contest to failing to report about \$3,500 in gifts from 2001 to 2004. The charges were misdemeanors and Franklin County Municipal Judge Mark Froehlich fined Taft the maximum of \$1,000 for each count — a total of \$4,000. He also sentenced Taft to distribute an apology throughout Ohio. Judge Froehlich didn't sentence Taft to jail or probation, explaining that although it "would have been the popular thing to do," Taft seemed genuinely remorseful so it wouldn't have served any purpose.

After the hearing, Taft claimed he had no intent to violate the law, because he only became aware in the summer of 2005 that he had a legal obligation to report the source and value of the gifts. He took an *Alford* plea because it didn't involve admitting guilt for something that he made clear he considered a technical violation of the law. Taft characterized the unreported meals, and golf and hockey outings as "social events with friends."

After becoming Ohio's first sitting governor to be convicted of a crime, Taft said he would not resign. His current term ends in 2007.

Sources:
Taft Convicted, Fined, Sandy Theis and T.C. Brown, *The Plain-Dealer*, Cleveland, OH, August 19, 2005. 

Timothy Fonseca Update

Timothy Fonseca has proclaimed his innocence since his arrest in 1995 by Los Angeles police in connection with the shooting death of Arthur Mayer. After being found guilty by a jury he was sentenced to 35 years to life. (See, Two Victims From One Bullet - The Timothy Fonseca Story, *Justice:Denied*, Issue 27, Winter 2005, p. 12) Fonseca contends he was poorly represented by an attor-

ney with no experience in criminal cases, and whose specialty was civil and family law.

Dr. Louis Rovner is a nationally respected polygraph expert based in Woodland Hills, California. In the summer of 2005 Dr. Rovner conducted an intensive two-hour examination of Fonseca at Pleasant Valley State Prison in Coalinga, California. After analyzing the results, Dr. Rovner concluded,

Fonseca continued on page 44

Wrongly Convicted Man Crippled By Police Awarded \$6.5 Million

By JD Staff

Javier Francisco Ovando was shot by two Los Angeles police officers on October 12, 1996, as he walked unarmed into a vacant apartment that they were using as an observation post to monitor gang activity.

The two officers, Rafael Perez and Nino Durden, then planted a rifle on Ovando and claimed they shot him in self-defense. The 19-year-old Ovando was paralyzed from the waist down from the shooting.

Ovando was prosecuted for assaulting the officers. He repeatedly insisted to his lawyer, Deputy Public Defender Tamar Toister, that the officers planted the rifle after shooting him unprovoked. She didn't investigate his claims, and Perez and Durden's testimony at Ovando's 1997 trial that they fired to protect themselves went unchallenged. Ovando was convicted and sentenced to 23 years and four months in prison.

About a year later, Perez was prosecuted for stealing \$1 million worth of cocaine from the LAPD evidence room. In exchange for prosecutors agreeing to recommend a lighter sentence, Perez told them about widespread corruption in the LAPD's Ramparts gang unit that he and Durden were assigned to. Among other things he told prosecutors that unprovoked beatings and shootings, and planting of drugs on suspected gang members was common. He also told them that he and Durden had shot an unarmed Ovando, and to cover it up, they planted the rifle on him.

Perez's revelations led to what is known as the LAPD's Ramparts scandal, that resulted in the overturning of more than 100 convictions. One of those was Ovando's. In September 1999 he was released after serving 2-1/2 years of his prison sentence.

Perez was sentenced to two years in prison after being prosecuted and convicted for

violating Ovando's civil rights. He was also sentenced to three years in prison for the cocaine theft. Durden was convicted of crimes that he and Perez had committed. He was sentenced to five years in prison.

In 2000 the California State Supreme Court lifted a broad grant of immunity to state-appointed counsel from civil liability. Ovando subsequently filed a suit in Los Angeles Superior Court against Deputy PD Toister and her employer, Los Angeles County, for ineffective assistance of counsel related to his wrongful conviction in 1997.

Ovando claimed Toister was negligent for failing to "check the personnel files of the officers, interview witnesses who would have contradicted their stories and explore inconsistencies in the officers' statements."

One of Ovando's witnesses was Perez. He testified in detail how he and Durden shot Ovando, planted the rifle on him, and then fabricated police reports and perjured themselves during Ovando's trial that they shot him in response to his assault.

Ovando's attorney, Gregory W. Moreno, argued to the jury that his client's wrongful conviction could have been prevented if Toister and LA County had simply performed their legal responsibility to vigorously defend him.

On May 25, 2005, the jury returned a verdict that found Toister and LA County 100% liable for compensatory damages to Ovando. The damages: \$6,500,000.

After the verdict, LA County Chief Deputy PD Robert Kaluniian said, "We're shocked at the verdict and do not believe that Ms. Toister committed malpractice or was negligent."

In response Moreno said, "How could so many people be victimized by dirty cops? The reason is because the legal protections in the system failed them. They are supposed to catch the lies. They were supposed to be the firewall." Yet instead of doing that, Ovando's lawyer, Toister, assumed he was lying that the police had planted the rifle to frame him for a crime he didn't commit.

Ovando, now 28 and wheel-chair bound for life, had previously been awarded \$15 million in damages from the city of Los Angeles for the conduct of Perez and Durden. Altogether, Los Angeles has paid out more than \$70 million in settlements for the lawless actions of the LAPD's Ramparts anti-gang unit.

Sources: Jury Awards \$6.5 Million in Frame-Up, Andrew Blankstein, *Los Angeles Times*, May 26, 2005. Disgraced Officer Testifies For Victim, Paul Chavez (AP), *Inland Valley Daily Bulletin*, May 2005.

Charges Dropped Against Man Who Falsely Confessed To Kidnap and Murder Of 10-Year-Old Girl

Murder charges were dropped on May 20, 2005, against a 21-year-old man who falsely confessed to being involved in the death of 10-year-old Katlyn "Katie" Colman on January 25, 2005. Charles Hickman confessed that Katie was abducted by several other people to scare her into not talking about a methamphetamine lab that she accidentally discovered. He told police that her abductors took her to a creek 15 miles north of her Crothersville, Indiana, home, and that while he was watching her she accidentally fell into the creek and drowned. Hickman was charged with Katie's murder on February 2, eight days after her disappearance.

However a cigarette butt found at the creek was linked to another man — Anthony Stockelman. Then DNA tests of semen found on Katie's body excluded Hickman as her attacker. Those same tests implicated Stockelman, who had been arrested on April 6 for allegedly molesting Katie about the time of her death. Based on the test results, all charges were dropped against Hickman. Stockelman was then charged with murdering Katie after abducting her while she was running an after-school errand near her home. Prosecutors also filed a motion that they will seek the death penalty against Stockelman.

Jackson County prosecutor Stephen Pierson expressed bafflement as to why Hickman confessed to an elaborate scenario of non-existent events when he was innocent of any involvement in Katie's death. Pierson said, "It is unusual for persons to confess to a murder they did not commit, but certainly not unheard of."¹ Pierson also said he was considering filing a "false-informing charge against Hickman" for misleading law enforcement authorities with his false confession.²

Sources: Charges Dropped In Child Murder Case, *The Seattle Times*, May 21, 2005, p. A4. Murder Charge Switched in Crothersville Girl's Death, (AP and Staff), *The Courier-Journal*, May 20, 2005.

1 Murder Charge Switched in Crothersville Girl's Death, *The Courier-Journal*, May 20, 2005. 2 *Id.*

JD Note: Prosecutor Pierson is incorrect that "It is unusual for persons to confess to a murder they did not commit." It was explained in a series of articles in *Justice Denied* Issue 27 that standard law enforcement interrogation techniques predictably result in the false confession to heinous crimes by innocent men and women. What was unusual in Charles Hickman's case is that unlike most of the people who falsely confess, he was saved by an exclusionary DNA test from being wrongly convicted and sentenced to a very long prison term that could have resulted in him

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On January 23, 1997, Paige TenBrook was strangled in the Pueblo West, Colorado apartment she shared with a friend, Su Jin Kim. Paige's estranged husband Scott had moved to Medford, Oregon in December, and he learned that Paige was seeing other men two weeks before her death. Although he was trying to pick-up women in Medford area bars, Scott angrily called Paige and threatened, "You're dead, bitch."

Scott was an insurance salesman, and he told friends Paige was worth more dead than alive. After her murder he collected a substantial life insurance death benefit. Just days before Paige's murder, Scott made a pass at Ellen Husel, and two weeks after the funeral began spending nights with her. He told her he was "almost a millionaire." In addition to insurance proceeds, property worth \$600,00 that Paige's father had given her was now his. In May, Scott bragged to Ellen's son Jacob Husel, that he had Paige killed. Jacob reported Scott's admission to the police. Jacob's contact with the Medford Police Department is recorded in a May 21, 1997, "Incident Report" that states in part,

"During conversation at Le Dolls [a Medford night spot] TenBrook told Husel that he'd paid a guy to have his wife killed. TenBrook said that this act was accomplished. Husel learned that TenBrook's wife had a \$130,000 life insurance bond on her. Also, she had wanted a divorce and was seeing someone else."

... I asked Husel if he would be willing to give me a taped statement. He said he would. I drove Husel to the Medford P.D. where he gave me a taped statement.

Fall Guy for Murder Of Woman That Husband Admits Committing - The Leonard Baldauf Story

By Leonard Baldauf¹

Husel's mother, Ellen called me. Ellen said that Husel told her everything TenBrook told him.

... TenBrook said that he and his wife Paige TenBrook were separated. She was seeing someone else. He felt a divorce was eminent. [sic]

Within the time that Ellen and TenBrook first dated Paige was found strangled to death in her bedroom in Colorado Springs, Colorado.

... Ellen said that TenBrook would talk about the case almost daily. She saw the newspaper clippings on the case.

Ellen said that TenBrook mentioned that Paige had a life insurance policy on her ... If she had divorced TenBrook he wouldn't have gotten anything. Since she died TenBrook [also] inherited the \$600,000. TenBrook mentioned that he was almost a millionaire. ...

On one occasion TenBrook was intoxicated and depressed. He made a statement, "Do you think God wants me dead?" "Why has God let me live?" "My wife was such a good person." "I am such a wicked, evil person!"

Ellen's not convinced that TenBrook

did pay to have Paige killed, but she's not convinced he didn't either."

Ellen also said that the prosecuting attorney on Paige's case [in Colorado] has called several times and talked with TenBrook on Ellen's home phone. It seems that the prosecuting attorney, Scott Dingle, and TenBrook are old friends.

Ellen said she thought to talk with Dingle about what she's heard. However, because of the bond between Dingle and TenBrook ... she doesn't know what to do." (Medford Police Department, Incident Report, Case No. 97-16156, May 21, 1997.)

In spite of Scott's admission that he had his wife killed for her life insurance and other assets he would have lost if they divorced, he was not prosecuted. As documented in Jacob and Ellen's statement to the Medford police, Scott and the prosecutor in Colorado Springs where Paige was murdered were "old friends," and they talked frequently. So instead, Leonard Baldauf was prosecuted for Paige's murder that he had nothing to do with, and he has been unjustly incarcerated since January 25, 1997.

Baldauf Met Paige in Pueblo

Baldauf is the founder of a craft brewing company that he and a chef formed in Tucson after Baldauf opened a brewery for a New Mexico restaurant. While they sought a location, Baldauf discovered an opportunity for a brewpub in Pueblo, Colorado, and began development work there as his partner monitored the availability of a site in Tucson. Baldauf was

Baldauf continued on page 27

The child abuse hysteria wave in this country during the 1980s and 1990s produced a number of ill-advised investigations and wrongful convictions. (See page 3 of this issue of *Justice: Denied* for the Lorain, Ohio case of Nancy Smith and Joseph Allen). The granddaddy of all those cases was the Wenatchee, Washington "sex-ring" investigation that began in 1994.

It resulted in the arrest of forty-four adults in 1994 and 1995 on 29,726 charges of sexually abusing 60 children.

Before the media reported the lurid allegations all over the world, Wenatchee was a sleepy central Washington city best known as the 'Apple Capital of the World.'

Guilty jury verdicts and plea bargains piled up until 19 people had been convicted of child rape and other charges. Some of those defendants were sentenced to decades in prison.

\$20 Million Wenatchee "Sex-Ring" Suit Back On Track

By JD Staff

However a strange anomaly became apparent as the cases wound their way through the pre-trial and trial process: At the same time those 19 defendants were successfully being prosecuted — nine defendants were either acquitted or the charges against them were dropped. That was happening even though the "evidence" against the defendants who were convicted and those who weren't was virtually identical - often involving the same prosecution witnesses.

There was, however, one starkly visible denominator between the defendants walking out the courtroom's backdoor to prison, and those who were walking out the front door to freedom. The convicted defendants

all relied on a public defender, while those who were winning their case through acquittal or dismissal had retained an attorney.

It wasn't that the private defense lawyers were the second coming of Gerry Spence - but what they did that the public defenders didn't, was put the prosecution's evidence and witnesses to a veracity test. The prosecution's evidence was simply unable to prevail when even minimally challenged.

The truth eventually seeped out that the "sex-ring" cases weren't based on any event identifiable as having actually occurred - much less 29,726 events. It also became known that the lead investigator - Wenatchee police detective Bob Perez - was the foster father of the girls who supposedly provided him with the initial allegations of abuse that snowballed into the investigation of an elaborate

Wenatchee continued on page 30

Wrongfully Convicted Suffer Long-Term Psychological Effects

By Theresa Torricellas,
JD Correspondent

According to an innovative study of post release personality changes in the wrongfully convicted by Dr. Adrian Grounds, forensic psychiatrist and lecturer at the University of Cambridge, the long term psychological effects of wrongful convictions and imprisonment include the kind of trauma experienced by victims of war crimes, with a high incidence of enduring personality changes.

While concluding the symptoms were different than those of post-traumatic stress disorder, "I think the closest analogy is to Vietnam vets coming home," Grounds said.

After examining 17 cases of the wrongly convicted, all but two convicted of murder, Grounds research showed there were changes to the wrongly convicted's personality frequently noticed by family members. These were described as chronically moody, irritable, bitter, suspicious of other people and uncommunicative to the point of being unable to carry on a conversation. The British, Irish and Canadian subjects of the study, all men, agreed to speak with Grounds on condition of anonymity.

Grounds research found the wrongly convicted experience a sense of being "frozen in time" as a result of significant personal losses in prison, including their most productive years and the death of loved ones. Some felt guilty for missing a whole generation of family life, while many reported feeling the same age they were when entering prison. Even though the subjects of the

study were not generally persons who suffered from psychiatric disorders in the past, many displayed symptoms of anxiety, panic disorders and paranoia.

During an interview with the *Toronto Star*, Grounds noted that some of the marriages which held together during years of imprisonment broke up after the men's release. Prison visits had centered on offering support, with both spouses focused on winning the husband's release. While in prison, the family was shielded from how much the wrongly convicted had changed, while at home, wives warned their children not to burden their father with their problems.

Grounds found the wrongly convicted were frequently unprepared for their release and lacked assistance to help them reintegrate, unlike longterm prisoners carefully groomed for release. While financial compensation was an important concern for the men, most were more interested in a public declaration of their innocence and an apology from the State. Some had well grounded fears for their own safety, and a sense that others, especially police, did not accept their innocence and were whispering behind their back,

While "not everyone is terribly affected and disabled" said Grounds, the majority had "very significant difficulties. Nobody was completely free of problems. But some were doing better than others." Grounds concluded that victims of a wrongful conviction should be offered long-term clinical support from doctors knowledgeable of the effects of trauma and imprisonment. Also, they could benefit from peer counseling from other wrongfully convicted persons, since "those who have been through it themselves are the best teachers and advisors."

Source: Once wrongly convicted, men are forever changed, Tracey Tyler (Legal Affairs Reporter), *Toronto Star*, November 15, 2002.



Stop Prisoner Rape seeks Stories from Inside

When Chance Martin walked into a party in an Indiana hotel room he was a high-school student expecting only to have a good time with his girlfriend. He had no idea that he would soon be on his way to jail because another guest dropped drugs in the lobby. Or that while jailed he would be brutally raped.

Unfortunately, his experience is far from unusual. Often unfamiliar with jail or prison life, nonviolent drug offenders are among

those at highest risk for prisoner rape.

Stop Prisoner Rape (SPR), a national human rights organization dedicated to eliminating sexual violence against men, women, and youth behind bars, is working on a project that will feature voices rarely heard in the debate over state and federal drug policy – those of the prisoners themselves.

Stories from Inside will give first-hand accounts of nonviolent drug offenders who have endured sexual abuse in custody. By telling their stories, prisoner rape survivors will challenge stereotypes about prisoner rape and the public's perception that drug offenders "get what they deserve" while incarcerated.

Tough "To Pick Up The Pieces" After 25 Years of Wrongful Imprisonment

In 1978, 15-year-old Paul Blackburn's protestations of innocence of murdering a 9-year-old boy in Warrington, Cheshire, England were drowned out by what police claimed was his written confession. In 2003, after 25 years of imprisonment, Blackburn was released on bond, and in May 2005 his conviction was quashed by the U.K.'s Court of Appeals based on state of the art linguistic evidence that the police had actually dictated his alleged confession. After two years of freedom, Blackburn told reporters, "I haven't been able to pick up the pieces and I don't know if I ever will."

Source: Man Wrongly Accused of Murder Hits Out at Police, Cathy Gordon, *The Scotsman*, Glasgow, Scotland, May 26, 2005.



Man Left With PTS After 11 Years Wrongful Imprisonment

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

Six years after his release from prison, O'Brien continues to experience after-effects from his ordeal. He has been diagnosed as suffering from "irreversible, persistent and disabling post-traumatic stress syndrome."

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



By telling their stories, survivors will help the public to see the human cost of the war on drugs – people like Chance Martin, once a college-bound teenager, whose life has been punctuated by mental institutions, drug abuse, and homelessness because of the abuse he endured behind bars.

For more information about participating in *Stories from Inside*, contact: Andrea Cavanaugh, SPR 3325 Wilshire Blvd. Ste 340 Los Angeles CA 90010 Or email, acavanaugh@spr.org Website, <http://spr.org>



Three Prosecutors Reassigned After Protesting Rigged Guantanamo Trials

By Hans Sherrer

At least three military prosecutors have been relieved as prosecutors of Guantanamo Bay detainees after they expressed concerns to superiors that the trial process was rigged to ensure convictions.

The revelations are in emails turned over in late July 2005 to defense lawyers for detainees by a whistleblower, Air Force Colonel Will Gunn. Gunn had access to the emails because he was the retiring head of the Defense Department's office that provides legal counsel to individuals charged under the military commission (tribunal) system authorized by President Bush in 2001. The Defense Department has confirmed the authenticity of the emails.

One of the prosecutors, Air Force Major Robert Preston, who was nominated for the Air Forces' outstanding judge advocate award in 2004, wrote to his superior:

"I consider the insistence on pressing ahead with cases that would be mar-

ginal even if properly prepared to be a severe threat to the reputation of the military justice system and even a fraud on the American people."¹

He also wrote, "Surely they don't expect that this fairly half-assed effort is all that we have been able to put together after all this time." In relaying to his superior that he found it intolerable to work in a situation that he found professionally, ethically and morally reprehensible, Maj. Preston wrote, "I lie awake worrying about this every night. I find it almost impossible to focus on my part of the mission. After all, writing a motion saying that the process will be full and fair when you don't really believe it is kind of hard, particularly when you want to call yourself an officer and lawyer."²

Less than a month after writing the March 15, 2004, email, Maj. Preston was transferred, and he is currently an instructor at the Air Force Judge Advocate General's School at Maxwell Air Force Base in Montgomery, Alabama.

A second prosecutor, Air Force Captain John Carr, wrote to his superior:

"When I volunteered to assist with this process and was assigned to this of-

Guantanamo cont. on page 37

In Time of War: Hitler's Terrorism Attack on America

By Pierce O'Donnell

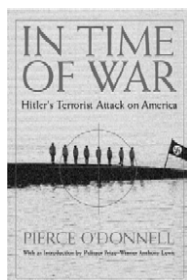
The New Press, 2005, 449 pgs (hardcover)

Review by Hans Sherrer

Books are worth reading for various reasons. Some because they are humorous, others because they are gripping dramas, still others because they have useful self-help information.

In Time of War is worth reading because it is important: It puts the extra-legal treatment of people captured and designated by the United States as "enemy combatants" since 2001 in historical perspective, by casting light on the similar proceedings used in 1942 to railroad the conviction of eight alleged German saboteurs.

In mid-June 1942 eight men, six German citizens and two U.S. citizens of German descent, were transported to the U.S. in a German U-boat. They were all arrested



within two weeks after their leader informed the FBI they were allegedly planning acts of sabotage in the United States.

Five days after the last man's arrest on June 27, President Roosevelt issued Proclamation 2561: "Denying Certain Enemies Access to the Courts of the United States." O'Donnell writes:

"Under the decree, the Germans "shall be subject to the law of war and to the jurisdiction of military tribunals" and would not be "privileged" to seek relief from confinement in any court by means of a writ of habeas corpus or any other judicial remedy."

"[U.S. Attorney General Frances] Biddle had recommended that the president close the civil courts to enemy saboteurs as a class rather than naming the specific [eight] defendants. Curiously, he advised the president that this phrasing of his proclamation would have the effect of denying these Germans access to the courts *without suspending habeas corpus*." (p. 129)

In Time continued on page 29

Ex-Guantanamo Prisoner Acquitted of Terrorism Charges

By JD Staff

Nasser al-Mutairi was imprisoned for three years without charges by the United States military at Guantanamo Bay, Cuba. The U.S. claimed al-Mutairi, a Kuwaiti citizen, was an alleged terrorist who worked with the Taliban "as a kind of mediator." Al-Mutairi denied the accusation.

After being in U.S. custody since his capture in Afghanistan in late 2001, al-Mutairi was released from Gitmo and sent to Kuwait in January 2005. He was arrested upon his arrival in Kuwait and charged with terrorism related crimes. After being in custody for three months, Al-Mutairi was released on bail by Kuwait's Criminal Court released on April 14, 2005. His trial began shortly thereafter.

Al-Mutairi's lawyer, Mubarak al-Shimmiri, made a pretrial challenge to the jurisdiction of a Kuwaiti court to try al-Mutairi for what he was accused of: Joining foreign military forces without permission; harming Kuwait by serving the interest of a "foreign country;" and undergoing illegal weapons training. Al-Shimmiri unsuccessfully argued that the charges should be dismissed because none of al-Mutairi's alleged acts occurred in Kuwait, and they weren't considered crimes in Afghanistan when they were allegedly committed.

Al-Mutairi is a devout Muslim, and at trial his defense was he went to Afghanistan in 2000 for humanitarian work – long before the United States' invasion of that country in the fall of 2001. He also claimed that he did not work with or aid any of the forces fighting in Afghanistan. Al-Mutairi asserted that the U.S. military manufactured alleged "interrogation records" that he admitted working on the front line of fighting in Afghanistan. Prior to al-Mutairi's release into Kuwaiti custody for prosecution, that interrogation "evidence" was used by military prosecutors before a military panel to justify al-Mutairi's continued indefinite imprisonment.

The charges against al-Mutairi were based on the U.S. military's interrogation records. However, there was no independent corroboration of his alleged incriminating admissions. Most particularly, there were no witnesses who confirmed his alleged involvement with fighting in Afghanistan.

On June 29, 2005, al-Mutairi was acquitted of all the charges. His lawyer, al-Shimmiri, said

Ex-Gitmo cont. on page 30

Without Evidence: Executing Frances Newton

Another Texas death row case
marked by official carelessness,
negligence, and intransigence

By Jordan Smith

Unless the Texas Board of Pardons and Paroles and Gov. Rick Perry act to stop it, on Sept. 14 Frances Newton will become only the third woman executed by the state of Texas since 1982, and the first black woman executed since the Civil War.

Unique in that historical sense, in other ways the Frances Newton case is painfully unexceptional. For there is no incontrovertible evidence against Newton, and the paltry evidence that does exist has been completely compromised. Moreover, her story is one more in a long line of Texas death row cases in which the prosecutions were sloppy or dishonest, the defenses incompetent or negligent, and the constitutional guarantee of a fair trial was honored only in name.

As Harris Co. prosecutors tell the story, the now 40-year-old Newton is a cold-blooded killer who murdered her husband and two young children inside the family's apartment outside Houston on April 7, 1987, by shooting each of them, execution-style, in order to collect life insurance. Newton had the opportunity, they argued during her 1988 trial, and a motive – a troubled relationship with her husband, Adrian, and the promise of \$100,000 in insurance money from policies she'd recently taken out on his life and on the life of their 21-month-old daughter Farrah. And she had the means, they say: a .25-caliber Raven Arms pistol she had allegedly stolen from a boyfriend's house.

To the state, it is a simple, open-and-shut case, which requires no further review. "Her case has been reviewed by every possible court," Harris Co. Assistant District Attorney Roe Wilson told the Los Angeles Times in November. "She killed her two children and her husband. There is very, very strong evidence of that."

Yet despite Wilson's insistence, Newton's case isn't simple at all – and such "evidence" as there is, is far from strong. "The State's theory is simple, and it is superficially compelling," attorney David Dow, head of the Texas Innocence Network at the University of Houston Law Center, argued in Newton's clemency petition, currently pending before the Board of Pardons and Paroles. "As we will see, however, appearances can be misleading."



From the beginning, Frances Newton has maintained her innocence. She has also offered a plausible alternative theory of the crime – a theory

that neither police, prosecutors, nor Newton's own trial attorney, the infamous and now suspended Ronald Mock, have ever investigated. Newton and her defenders contend that Adrian, Farrah, and 7-year-old Alton were likely murdered by someone connected to a drug dealer to whom Adrian owed \$1,500. The alternative theory has much to say for it – among other things, it explains the lack of physical evidence connecting Newton to the bloody murders.

Lingering questions about the physical evidence against Newton prompted the Texas Board of Pardons and Paroles (BPP) to recommend, and Gov. Rick Perry to grant, a 120-day reprieve for Newton on Dec. 1, 2004 – the day she was last scheduled for execution. Although Perry said he saw no "evidence of innocence" – legally, an oxymoron – he granted the four-month stay to allow for re-testing of evidence contested by Newton's defense, including nitrite residue on the hem of her skirt and gun ballistics evidence.

There are serious questions about the prosecutors' timeline, which would have required Newton somehow to murder her family, clean herself of any and all blood traces and gunshot residue, and drive to her cousin's house – all in less than 30 minutes.

But testing on the skirt proved impossible, because the 1987 tests had destroyed the nitrite particles, and Harris Co. court officials had stored the skirt by sealing it inside a bag together with items of the victims' bloody clothing – thereby rendering it worthless as evidence. The second round of ballistics testing, on the other hand, supposedly confirmed a match between the gun prosecutors say Newton used and the bullets that killed her family. However, that match may be fundamentally undermined – because there is no certain connection between the gun and Newton. According to Dow, it appears that police actually recovered at least two, and perhaps three, .25-caliber Raven Arms pistols during their investigation of the murders – conflicting evidence that neither the police nor the prosecutors ever revealed to Newton's defense. Dow argues that it is virtually impossible to know whether prosecutors have been truthful in claiming that the gun that Newton admits to hiding on April 7, 1987, was the murder weapon. "How many firearms were recovered and investigated in this case and

who owned them?" Dow asks in a supplemental petition filed with the BPP on Aug. 25. "How many records have been withheld from Newton's attorneys throughout this case?"

In short, there is now even more doubt about Newton's guilt than there was when she was granted the stay – distressing Newton's many defenders, among them Adrian's parents, two former prison officials, and at least one of the jurors who heard Newton's case. "We never wanted to see Frances get executed," Adrian's parents Tom and Virginia Louis wrote to the BPP on Aug. 25. "When the trial occurred, nobody from the DA's Office ever asked ... our opinion. We were willing to testify on Frances' behalf, but Frances' defense lawyer never approached us," they continued. "We do not wish to suffer the loss of another family member."

A Bloody Crime

In the months before the murders, Frances and Adrian Newton were having marital problems. They were each involved in extramarital relationships, and Adrian was using drugs. In an Aug. 30 Gatesville prison interview, Newton told me that in addition to smoking marijuana, Adrian had developed a cocaine habit. "He had told me he was using cocaine, but I'd never seen that, but I saw the effects of it," she recalled. "He was home later, he was irritable, less responsible."

But she and Adrian had been together since she was a girl, and she was determined to work things out. That was on her mind on the afternoon of April 7, 1987, when she and Adrian sat down and talked. "We had decided that we were going to get through this together," she said. Adrian insisted that he wasn't using anymore, so when they were done talking and Adrian went into the living room "to watch TV ... I decided to be nosy and see if he was being honest," she recalled. Quietly, she opened the cabinet where he kept his stash.

"That's when I found the gun," she said. Newton said she immediately recalled a conversation she'd heard earlier that day, between Adrian and his brother, Sterling, who'd been staying with the family. "I couldn't hear real close, but it sounded like they'd been in some trouble," she said. "I thought I'd better take [the gun] out of there because I didn't want it to be in the house ... I didn't want him to get into any trouble." She removed the gun, placed it in a duffel bag and took it with her when she left the apartment around 6pm to run some errands, she says.

Newton says it was the last time she saw her family alive.

At 7 p.m., after a couple of errands, Newton arrived at her cousin Sondra Nelms' house,

Newton continued on page 24

Streamlined Procedures Act of 2005

The implications of the Streamlined Procedures Act of 2005, introduced in the U.S. Senate by Sen. Jon Kyl (R. AZ) on May 19, 2005, and in the U.S. House by Rep. Daniel Lungren (R. CA) on June 22, 2005, are so profound for restricting access to federal court by state prisoners, that the following two articles are being published to provide an overview of how extensive those effects will be.

The courts of many, if not most states, have maintained the appearance of providing a source of relief from an unjust conviction, while in practice they have effectively ceased to do so. In California, e.g., the reversal rate is about 1%. Consequently, federal courts can be a safety value for blatant miscarriages of justice. The SPA will alter that situation by severely limiting access to federal court for those defendants who are not now shut out by failing to meet a procedural requirement, such as missing a filing deadline. The current one-year rule is so overly restrictive that two of the stories in this issue of *Justice:Denied* involve defendants who missed that deadline — Nancy Smith and Joseph Allen, and Bruce Lisker.

The SPA was on the fast track to be voted on by both the House and Senate when it hit the speed bump of a firestorm of opposition from a broad coalition of concerned individuals and activist groups. Some of the SPA's opponents supported enactment of the Anti-Terrorism and Effective Death Penalty Act in 1996, but they recognize that while the AEDPA limited state prisoner access to federal court — the SPA is intended to all but close the door.

A striking feature of the SPA's provisions is not just that they are so one-sided in limiting the situations in which a federal judge will be able to review a state criminal conviction and/or sentence — but that they are so expertly written to accomplish that objective. It was obviously written by lawyers intimately familiar with how best to subvert state prisoner access to federal court review while preserving the appearance that that access is still available. In an effort to find out the genesis of the SPA and who wrote it, *Justice:Denied* contacted Senator Kyl's office in Washington D.C. The Senator's press spokesperson said the SPA was a collaborative effort, but he was unable to identify who any of the collaborators were. *Justice:Denied* then contacted Representative Lungren's office in Washington D.C. The Representatives press spokesperson was very adamant that Lungren was the sole author of the SPA, pointing out that he is the former Attorney General of California. That is true, but it is unreasonable to believe that Lungren single-handedly wrote the SPA — or even a single word or it — since the bill he introduced in the House was identical to the bill introduced *more than a month earlier* in the Senate. Additionally, being California's AG didn't provide Lungren with the precise knowledge of federal habeas law possessed by the SPA's author(s).

The U.S. Department of Justice is a much more likely source of the SPA, since it is written with the same precision and in the same manner as the Patriot Act and the Homeland Security Act — both of which were written by DOJ attorneys. Since the SPA has DOJ fingerprints all over it, *Justice:Denied* has filed a Freedom of Information Act request for all DOJ documents related to the participation of DOJ personnel in any capacity during any stage of the SPA's creation.

The SPA is on *Justice:Denied*'s website at, <http://justicedenied.org/streamlined.htm>. It can be read, downloaded, or printed out.

Streamlining Injustice

By Vivian Berger

The deceptively titled Streamlined Procedures Act of 2005 (SPA), now pending in Congress (S. 1088, H.R. 3035), would codify the wish list of radical habeas haters-whose appetite for "reform" of the writ remains unslaked even after enactment of the draconian Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Neither streamlined nor truly procedural, the SPA threatens to make the dauntingly complicated area of post-conviction litigation more complex and dilatory, while de-

priving prisoners of the means to enforce their substantive constitutional rights.

Derailing it will take more courage than legislators typically display on criminal justice matters. Indeed, the Senate version, offered by Senator Arlen Specter, R-Pa., and awaiting markup by the Senate Judiciary Committee, is almost as noxious as the earlier version, which is before the House. (In any case, it may eventually lose to the House bill in conference.) Only continued strong lobbying by opponents—who have included many former judges and prosecutors—can succeed in thwarting its passage this fall.

Streamlining cont. on page 44

All Aboard For The Death Penalty Express

Bill In Congress Will All But Kill State Prisoner Appeals To Federal Court

By Jordan Smith

If a contingent of congressional Republicans have their way, federal law governing criminal appeals by state prisoners to federal court will be gutted — opening up an express lane to the Texas death chamber and making it inevitable that an innocent person will be executed. The proposed legislation, the Streamlined Procedures Act of 2005 (HR 3035 and S 1088), would eliminate federal court jurisdiction over the vast majority of habeas corpus appeals — through which state defendants challenge the constitutionality of their convictions in federal court, a process that is at the heart of the growing number of exonerations nationwide — leaving state courts of appeal as the final arbiters of justice.



Illustration by Doug Potter,
The Austin Chronicle

In Texas, the proposed legislation would leave decisions of life or death in the hands of the Court of Criminal Appeals — a court whose death penalty rulings have come under attack not only by reformers and advocates but also by the U.S. Supreme Court. If the draconian legislation becomes law, "it would end federal habeas corpus in Texas," says Jim Marcus, executive director of the nonprofit Texas Defender Service.

At issue are congressional limits on criminal appeals to the federal courts — where, for example, questions of ineffective counsel and claims of prosecutorial misconduct are adjudicated, and, more often than not, lay the groundwork for claims of innocence, new evidence testing, or the granting of a new trial. The rules governing the process were last modified nearly a decade ago with the passage of the Antiterrorism and Effective Death Penalty Act of 1996 — a notoriously complex scheme of statutory hoops through which inmates and their attorneys must jump in order to have their cases heard in federal court. The complexity of the process — which can toss a case back and forth between federal and state courts — is often lengthy, a circumstance that, ostensibly, prompted Sen. Jon Kyl, R-Arizona, to introduce the SPA in the Senate this spring. "Many federal habeas corpus cases require 10, 15, or even 20 years to complete,"

All Aboard cont. on page 45

In September 1997, 16-year-old Denise Lockett gave birth to a baby boy while sitting on the toilet in her mother's Bacon-ton, Georgia apartment. The baby was either born dead or died within minutes of falling into the toilet bowl. Denise, who has an IQ of 61, was charged with murder, encouraged to plead guilty to manslaughter by her court appointed lawyer, and sentenced to serve 20 years in prison. Her plea and sentencing hearing lasted no more than 15 minutes. Denise never had a chance.

Denise hid her pregnancy from everyone. She was a sophomore in the Mitchell-Baker high school in Camilla, Georgia. No one — not her special ed teachers, her mother, her siblings — knew that Denise was with child. She did not seek prenatal care.

Then on September 21, 1997, Denise woke up in the middle of the night and went to the bathroom in her mother's housing project apartment. As Denise later told a police investigator, she thought she had to "make a boo-boo." Instead of a bowel movement though, a full-term baby boy was born, falling into the toilet. Denise, probably in shock, returned to her bedroom and passed out. Her 10-year-old sister called 911. Police arrived and Denise was charged with felony murder. She was placed in a sheriff's car and brought not to a hospital, but to a Mitchell County jail cell.

A lawyer was appointed to represent Denise on the murder charge. Over the span of three months, this attorney spent less than one hour with his mentally retarded client. The last few minutes the lawyer spent with Denise were in Judge Wallace Cato's chambers in the Mitchell County jail courtroom, when he persuaded the youngster to waive her rights to a jury trial and plead guilty to manslaughter. Denise says the lawyer promised her the judge would not keep her locked up if she admitted her guilt. Denise initialed the waiver form and signed the document just as the lawyer had hoped she would. Judge Cato held a short hearing — the transcript is 19 pages long! — which consisted mostly of a local detective's testimony. Denise did not testify, nor did her attorney introduce the autopsy report that stated the baby's cause of death "could not be determined." Judge Cato ordered that Denise spend the next 20 years behind bars.

I first learned about Denise's ordeal a few months after she was sent off to prison. Rosa Ward, who was then a school nurse, called me late one night at home to tell me what happened to Denise and pleaded with me to help. The Prison & Jail Project (P&JP), of which I am the director, got immediately involved. We met with Denise's mother in Bacon-ton, with her special education teach-

16-Year-Old Railroaded After Baby's Accidental Death – The Denise Lockett Story

By John Cole Vodicka

ers in Camilla, and with members of a Bacon-ton church that had been reaching out to the Lockett family since the death of Denise's baby. I took statements from a dozen different people who knew Denise through her childhood, knew her limitations. I was able to gather together Denise's school records, the baby boy's autopsy report and other information that would have been essential to any lawyer worth his or her salt. I also secured a copy of the plea transcript. And I began visiting Denise in prison.

We were then able to convince our lawyer friend and P&JP board member, Clyde Royals, to file a habeas corpus petition on Denise's behalf in an attempt to get her case back into court. We also brought in a psychologist to interview Denise in prison and confirm that her retardation limited her ability to understand the legal process or to assist her lawyer. Later, Jim Bonner, another lawyer friend, filed an appeal with the Georgia Supreme Court. Despite all this, our efforts to win a new trial for Denise were unsuccessful: three years ago (2002) the State Supreme Court let her conviction stand.


Since that time we've attempted to secure a parole hearing for Denise. It's been difficult, because until recently in Georgia, if someone was convicted of a crime of violence (and manslaughter is a violent offense) the parole board required that person to serve at least 90% of their sentence before it would even entertain parole. This meant that Denise would have to serve 18 years of her 20 year-sentence before even being eligible for parole. Last December, however, we received the hopeful news that the parole board has decided to consider granting Denise parole in 2010. The P&JP now plans to petition the parole board further in an effort to convince the board that it serves absolutely no purpose to keep this young African-American woman in prison any longer. Denise did not kill her baby boy. She had no intentions of harming her child. She is not — and has never been — a threat to anyone.

Denise is now twenty-four years-old. She's spent eight years in confinement since that September night in 1997 when she birthed her baby boy and the infant died. Denise is presently caged in the women's penitentiary in Hawkinsville (Pulaski County), Georgia. If she serves all 20 years of her

sentence she'll be 37-years-old when she finally leaves her prison cell.

"I'm ready to get out of these folks' prison," Denise told me recently during a visit at the prison. "I'm about to lose my mind here. Tell everybody to keep praying for me that I'll be home soon."

Denise can be written at,
Denise Lockett 955807
Pulaski State Prison
P.O. Box 839
Hawkinsville, GA 31036

Reprinted with permission. Originally published in *FreedomWays*, Issue 76, March/April 2005. John Cole Vodicka is director of the Prison & Jail Project in Americus, GA. The P&JP limits its activity to monitoring jail and prison conditions, and courtroom and law enforcement behavior in a 33-county region of southwest Georgia. They have a 33 page booklet - *Rule of Law: Citizens' Rights in a Georgia Court of Law* that is available at no charge for Georgia prisoners ONLY. All others please enclose at least a \$1 donation (stamps OK). Write: Rule of Law, P&JP, PO Box 6749,  Americus, GA 31709.

Sutton's Pardon Not Enough For Compensation

By C.C. Simmons, JD Correspondent

In October 1998, Josiah Sutton, then 16. I was arrested and charged with the rape of a Houston woman. The victim had been taken from her apartment at gunpoint and left in a field by her attacker.

In January 1999 a Houston Police Department (HPD) Crime Lab analyst testified Sutton's DNA "definitely" matched the perpetrator's DNA recovered from the victim. Sutton was convicted and sentenced to 25 years in prison.

Four years later in March 2003, the HPD Crime Lab retested a sample of the evidence used to convict Sutton. The DNA profiles of two men were found in that sample. However neither matched Sutton.

The 2003 retesting of the evidence used to convict Sutton was an example of the faulty conclusions HPD Crime Lab analysts were testifying to in Houston area cases at the time of his trial. The police lab was later shut down after auditors found unsound techniques and contamination of evidence. Sutton's case was

Sutton cont. on page 25

The Shameful State of Indigent Defense

By C.C. Simmons, JD Correspondent

In April 2005, relying on the state Constitution's provision that defense lawyers must be provided to defendants who were too poor to pay for counsel, the Louisiana Supreme Court ruled that judges can halt the prosecution of defendants until money is available to pay for their defense.¹

In a similar action, the Supreme Judicial Court of Massachusetts ruled in 2004 that an indigent criminal defendant must be released from custody within 7 days and the charges dismissed within 45 days if an attorney is not available to represent the defendant.²

These recent actions by the Louisiana and Massachusetts high courts illuminate the shameful and deteriorating state of our nation's indigent defense system. Today, thousands of persons charged with a criminal offense are processed through our state and federal courts with no lawyer at all or with a lawyer who lacks the time, resources, and/or inclination to provide effective criminal defense counsel.

Forty years ago, the U.S. Supreme Court handed down its landmark decision in *Gideon v. Wainwright*,³ a ruling which established the right to counsel in state court proceedings for indigent defendants accused of any crime. The high court explained that persons cannot be deprived of their liberty in state criminal or juvenile courts unless counsel has represented them or unless they have knowingly and intelligently waived their right to legal representation. The lower courts that have interpreted *Gideon* have held that if a person charged with a crime lacked the resources to retain counsel, it was incumbent upon the charging jurisdiction to appoint and pay for defense counsel. Alas, if only it were so.

Last year, the American Bar Association (ABA)⁴ held a series of public hearings to determine if the right embodied in *Gideon* was being evenly and fairly applied among indigent defendants who were caught up in our criminal justice system. The ABA heard extensive testimony from thirty-two expert witnesses, analyzed data from twenty-two large and small states, and compiled hundreds of pages of transcripts which described the delivery (or lack) of indigent defense services in multiple jurisdictions across this nation. The ABA concluded that our nation's indigent defense system is in shambles and in need of immediate and extensive repair.

The flood of wrongfully convicted defendants over the past decade stands as damning evidence of the failure of our indigent defense system, said the ABA. There is little doubt that one of the most effective barriers against wrongful convictions is the availability of effective, experienced, and well-trained defense attorneys who will vigorously represent their clients without regard for their ability to pay.

The ABA found that barrier is in tatters. The indigent defense system in almost all U.S. jurisdictions is hampered by a lack of funds. Those funds are necessary to attract and compensate attorneys, to pay for training of counsel, to hire and pay for experts, to pay for investigators and other support services, to increase attorney-client contact, and to reduce increasingly burdensome caseloads. Specifically the ABA found:

- Funding for indigent defense services is woefully inadequate.
- Some lawyers who represent indigent defendants violate their professional duties by failing to provide competent representation.
- Prosecutors too often seek waivers of counsel and guilty pleas from unrepresented defendants.
- Judges knowingly accept and sometimes encourage waivers of counsel that are not knowing, voluntary, intelligent, and on the record.
- State and county bar associations often fail to provide leadership of indigent defense services.
- The uneven availability of effective indigent defense programs across our nation yields a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.
- Judges, politicians, and elected officials often exercise undue influence over indigent defense attorneys.

There is no "quick fix" for the shameful state of our country's indigent defense system. While the ABA put forth numerous recommendations for improvement, each and every recommendation will cost money to implement, and it failed to identify the source of funds needed to make the improvements. Nevertheless, among the most critical and urgently needed repairs are:

- Funding for indigent systems should be at par with funding for the prosecution systems in the same jurisdiction.
- State and local bar associations should become vigorously involved with efforts to ensure an effective indigent system exists in their community.
- Indigent defense programs should refuse to accept new cases when, to do so, would

create a workload so excessive that effective representation would be impaired.

- State governments should establish oversight organizations to ensure a high quality of indigent defense services.
- Judges should be encouraged to report defense lawyers who violate their ethical duties to their clients.
- Judges should also be encouraged to report prosecutors who encourage unrepresented defendants to waive their right to counsel and to enter uncounseled guilty pleas.

While noble in spirit, and virtuous in intent, the ABA's recommendations ring hollow without a source and continuing supply of money and independent oversight to ensure they are being faithfully implemented. Until adequate funding is available, the shameful state of our indigent defense system will only worsen until it becomes an indelible blot on the legacy of *Gideon* and a mockery to the Constitution's guarantee to legal counsel.

Endnotes:

1. *Louisiana v. Adrian Citizen*, 2004-KA-1841.
2. *Lavalee v. Justices of the Hampden Superior Court*, 812 NE2d 895 (Mass 2004).
3. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963).
4. The American Bar Association Standing Committee on Legal Aid and Indigent Defendants, 321 North Clark Street, Chicago, Illinois 60610; 312 988 5765. www.indigentdefense.org

JD Note: The full ABA report is available on Justice Denied's website at, http://justicedenied.org/legal/aba_indigent.htm



Indigent Defense in the Land of Compassionate Conservatism

By C.C. Simmons, JD Correspondent

Texas - home of the nation's busiest death chamber - scores embarrassingly low on the national raking of indigent defense systems.

During its public hearings in 2004, the American Bar Association (ABA) heard testimony from witnesses who described the indigent defense system in the Lone Star state. Some excerpts:

- There is no provision for formal, systematic training of indigent defense attorneys or their support staff.
- Only seven of the 254 counties in Texas have either a partial or a full-time public defender office. The other counties rely on an

Indigent continued on page 19

Veronica Mars

UPN Television Network
Weekly Series 2004-2005
Starring Kristen Bell as Veronica Mars

Review by Hans Sherrer

Veronica Mars is a one-hour weekly series that premiered in the fall of 2004 on the UPN television network. It is also the name of the lead character. Veronica is a spunky, hyper-inquisitive, resourceful and persistent student at Neptune High School located in a trendy Southern California beach town. Need it be said that she is blond?

In her spare time Veronica helps her dad with his one-man private investigation firm. She also conducts her own investigations, solving situations involving classmates and other people she knows ranging from the theft of thousands of dollars during a friendly poker game, to the electronic rigging of the student elections, to threats to bomb Neptune High, to finding her missing next-door neighbor.

As she goes about solving mysteries in her everyday life, Veronica is on the look-out for information to solve a big mystery: What were the circumstances of the death the pre-

vious year of her best friend, Lilly Kane? A former business partner of Lilly's father was convicted and sentenced to death after confessing to her murder. Veronica, however, has assembled enough facts to become convinced the man didn't kill Lilly. Among other things, she learns he has an airtight alibi that wasn't disclosed at his trial: He was with his girlfriend far from the crime scene at the time of Lilly's death.

The challenge Veronica has set for herself is to find proof of who killed Lilly. Her pursuit of the truth about her friend's death is personal for another reason: Her dad lost his job as sheriff after refusing to rule-out Lilly's wealthy and politically powerful dad as a suspect.

While it may sound improbable that a high school student could keep her grades up, work on the school newspaper, and be a super-sleuth in her spare time, the program works. It is somewhat believable because Veronica, played by Kristen Bell, primarily gathers information to solve a mystery by relying on her wits and hands-on techniques that include taking photographs, examining records, and interviewing people. Veronica is a cross between Sherlock Holmes and Erin Brockovich.

A person who has done something wrong or is involved in something nefarious most definitely doesn't want Veronica methodically tracking him or her like a bloodhound. Especially because she has a finely-tuned sense of handling things herself. At the end of one episode, for example, a young thief gleefully made his getaway with his girlfriend and what he thought was a bag of stolen steroids. However his mood most likely changed after discovering that Veronica switched his bag of steroids for one containing lots of saltwater taffy. Heh, the gal's got a sense of humor to go with being an ace investigator.


The episode broadcast on April 12, 2005 is an example of how Veronica solves puzzling situations. While working on an article for the school newspaper about an unusual number of fire drills - Veronica discovers they are actually being triggered by bomb threats phoned into the school. Veronica starts snooping around and discovers that a loner male Neptune High student appears to be tied to a website that has a clock counting down to an apocalyptic event predicted to occur in a few days. After Veronica sees the loner with another student who looks like a thug, she tails the thuggish guy to a store. Using a tele-photo lens, she takes pictures of him loading four bags of fertilizer in his trunk, in which a semi-automatic rifle is also visible. Veron-

ica soon finds out the "thug" is a BATF undercover agent who brags to her about his high number of arrests. A day or so later, as the website's clock is winding down to zero, a Swat team descends on the loner in Neptune High's parking lot. When the Swat team opens his trunk, Veronica sees and photographs the fertilizer and rifle that she had seen and photographed the day before in the BATF agent's trunk!

With photographic proof the loner had been framed as a terrorist bomber by the BATF, Veronica wrote an article for the school paper. The article generated enough negative publicity about the government's mishandling of the loner's case that all the charges were dropped against him. It is left for the viewer to infer that the BATF agent built his impressive arrest record by planting evidence - such as the fake apocalyptic website, fertilizer and weapons - against innocent people who were "frameable" because they could be considered on the fringe of society.


Veronica solved the mystery of Lilly's murder in the season finale. After figuring out where Lilly hid her personal items, Veronica found three sexually explicit video tapes showing Lilly in bed with a middle-aged movie actor. Lilly took the tapes, and when she told the man she was going to turn them over to a TV tabloid program he hit her in anger. Falling from the blow, she was killed when her head hit a concrete pool deck. The killer found out the hard way that his desperate efforts to conceal the truth of Lilly's death were no match for Veronica's sleuthing and survival skills. By solving her friend's murder, Veronica also sprung an innocent man from death row who police, prosecutors, judges, jurors and the press had all mistakenly been convinced was Lilly's killer.

Veronica Mars is a fresh and bold program featuring a smart and earnest young woman who gains the respect of her peers and adults because of her investigative skills, and also because she is willing to put herself on the line to rectify a wrong or help a person in need.

The second season of *Veronica Mars* begins on September 28 on the UPN television network. It is not known if it will continue with the first season's themes of innocent people being framed and imprisoned, but it will be worth checking out to see how the writers follow up on the first season's success. 

Indigent continued from page 18

- assigned counsel system controlled by judges.
- As to why 247 Texas counties don't use a public defender office, a witness testified, "We have to overcome judicial fear about their loss of control over attorneys [and] we have to overcome the private defense lawyers' fear that a public defender office will result in a loss of business."
 - In a substantial number of Texas counties, defendants who are released on bond are presumed not to be indigent and either are denied appointed counsel or strenuously pressured to retain counsel in direct violation of state law. "In some cases, appointed counsel is withdrawn once a defendant posts bond," said one witness.
 - Witnesses testified that "judges in Texas sometimes improperly encourage prosecutors to seek waivers of counsel and subsequent pleas of guilty from unrepresented indigent defendants."

In 2000, the Texas Fair Defense Coalition issued a comprehensive report about indigent defense in Texas and made 48 recommendations for change. Very few of those recommendations have been implemented and compliance has been spotty at best. 

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Confession By Assaults' Perpetrator Doesn't Stop Wrongful Conviction

By JD Staff

Eighteen year-old Liverpool, England, soccer fan Michael Shields traveled to Bulgaria in May 2005 to watch his team play in the final of the European Champions League. He stayed at the Golden Sands Resort in the port city of Varna, and the match was played across the border in neighboring Turkey.

Liverpool won the May 30 game on a penalty kick. Shields phoned his dad and told him it was the best day of his life. After returning to the Golden Sands, Shields celebrated with other Liverpool fan until he went to bed at 2:30 a.m. He was woken the next morning by police who took him to the police station. There was a shortage of cells, so he was handcuffed to a radiator.

Shield's soon learned that sometime after he went to bed, a local man, Martin Georgief, had been hit in the head with a paving brick thrown by a person believed to be one of the visitors from Liverpool. Shields participated in an "identity parade" in front of the victim, a twenty-five year-old bartender, who selected Shield's as his attacker.

Since Georgief suffered a fractured skull, and possible brain damage. Shields was charged with attempted murder.

Protesting his innocence and claiming he was mistaken for the attacker, Shields was transferred to a detention center to await his trial. He later told reporters that while there he was kicked and slapped by police and bullied by other prisoners.

About a week before Shields' July 24, 2005, trial, an English paper, *The Echo*, ran a story linking 20-year-old Graham Sankey to the assault. Sankey had not only been in Varna to attend the soccer match, but he had also been arrested. However he was released without participating in an "identity parade" after the victim selected Shields. Sankey and Shields are not only about the same age, but they are similar in appearance - both very large young men. It would be possible for the two to be confused by a person who experienced the trauma of a physical assault at night on a poorly lit street.

Shortly after the news report of his involvement, Sankey publicly confessed to the attack in a statement released through his lawyer. However he refused to sign a confession or travel to Bulgaria to testify in Shields' defense.

Shields was tried, convicted primarily on Georgief's eyewitness testimony, and sentenced to 15 years in prison. Afterwards, at a meeting with newspaper reporters, Shields' said, "They got completely, 100 percent, the wrong person."¹

Four days after Shield's trial, Sankey signed a written confession that his lawyer faxed to Bulgarian judicial authorities.

In his confession Sankey explained that he had been drinking beer the day of the soccer match, and after also drinking vodka that night, he was "very, very drunk." He said that after seeing three men running toward him with bottles and bricks, "I panicked and stupidly picked up a brick and threw it in the direction of the men running towards me. I saw the brick hit one of them. I panicked and I turned and ran away and returned to the hotel. I did not know at that time that Mr. Martin Georgief had been injured."² Sankey also said that he denied being involved when he was arrested in Bulgaria, because he was "utterly terrified."³ Sankey added, "I accept that I must have caused the serious injury to Mr. Georgief. My conscience has been tormenting me ever since I read in the papers about Michael Shields' trial, and I felt that I could not let an innocent man take the blame for what I had done. So I instructed my Solicitor, Mr. David Kirwan to make public my acceptance of responsibility and my willingness to accept fully the consequences of my actions. I expected that the Bulgarian Court would accept my admission and free Mr. Shields. I was horrified that the Court has refused to do this, so I am making this signed confession in the hope that an innocent man will no longer have to take responsibility for what I admit I did."⁴

Shields is hoping that the Varna Court of Appeals will consider the new evidence of Sankey's confession.

As of early September 2005, Sankey has refused to voluntarily return to Bulgaria. That leaves the option for Bulgarian authorities to seek his extradition, based on his written confession.

Shields' family has been waging a very public campaign in England to drum up public and media support for his release. The Bulgarian judiciary has responded very defensively. In a letter to Bulgaria's British Counsel, the Bulgarian Union of Judges claimed the international publicity about the case was "an interference in a court's work," and "an insult to the dignity of the Bulgarian nation." A Union spokesman said, "It must be absolutely clear that the court can never be told how to decide a case. Convicted Shields was given a fast and just trial before

an independent and unbiased court, in conformity with all international standards of human rights protection."⁵

The Shields family has refused to back down in their support of Michael. His uncle, Joey Graney said, "A judge is there to decide and make sure a case is fair, not to moan when people make justified complaints. ... People make mistakes, even judges make mistakes and in this case the judge got it wrong."⁶

Although several members of Parliament have expressed support for rectifying Shields' wrongful conviction, the British government is officially neutral in the case. A Foreign Office spokesperson said, "We are unable to interfere in the judicial process of another country."⁷ It is possible however, that behind the scenes political maneuvering is going on to resolve the situation.

As of September 2005 Shields remains in a Bulgarian jail awaiting the outcome of his appeal.

Endnotes and sources:

1 Briton jailed in Bulgaria tells of ordeal, Daily Mail (London), July 30, 2005.

2 Family Visit 'Innocent' Liverpool Fan, Daily Mail (London), July 29, 2005

3 *Id.*

4 *Id.*

5 Criticism Angers Bulgarian Judges, Daily Mail (London UK), August 2, 2005.

6 *Id.*

7 *Id.*



Baker cont. From page 8

Vodicka came into contact with Baker's great-nephew Roosevelt Curry, and in 2003 helped in the filing of a pardon application with the Georgia Board of Pardons and Paroles.

Vodicka doesn't take a tentative view toward Baker's case, "I'm confident almost any lawyer could have pled Lena Baker not guilty by reason of self-defense."¹

However he was pleased with the Board's decision, "It's not often in our work we get to see something bear fruit. If you step forward and speak up and challenge the system for fairness, it can work. Maybe it will give hope to others that wrongs can be righted."² He also said, "Although in some ways it's 60 years too late, it's gratifying to see that this blatant instance of injustice has finally been recognized for what it was - a legal lynching."³

Endnotes and sources:

1 Executed Woman to be honored on anniversary of her death, AP, *The Daily Mississippian*, March 4, 2005.

2 Georgia Pardon's Woman 60 years After Execution, *Atlanta Journal-Constitution*, August 16, 2005.

3 Pardon Set For Black Woman Executed in '45, Elliott Minor (AP), *King County Journal*,



Father And Son Cleared Of Robbery And Murder After Six Years Imprisonment

By JD Staff

A father and son were exonerated of robbery and murder on July 9, 2005, after six years of wrongful imprisonment.

Ferenc Burka Sr. and his son, Ferenc Burka Jr. were arrested on March 5, 1998, and jailed without bond on suspicion of robbing and murdering a man the previous day in the Hungarian village of Újszentmargita.

More than three years later the men – both Romani Gypsies – were tried and convicted. There was no physical evidence against the men, so the prosecution relied on the testimony of several witnesses. One was a bartender who testified that on the day of the crime the Burka's and the victim were in the bar at the same time – and that they saw he had a large amount of cash. Another witness testified he saw the Burka's walking in the direction of the house where the murder took place. A policeman testified that after learning about the murder, "I immediately thought of Ferenc Burka. It was intuition. I thought he was probably the perpetrator."

The prosecution stated the men were guilty because the son had burnt and buried his father's boots, which he argued was "a common perpetratoral behaviour of Gypsies when they commit a murder and robbery."

Yet no burned boots were found buried, and in fact the father's boots were found in his house. Neither was any of the victim's money found in the Burka's possession.

After the Burka's were convicted, they were sentenced on April 2, 2002: the father to 15 years in prison and the son to 13 years.

The men's appeal was based on a challenge to the insufficiency of the evidence, and new evidence of their innocence. After their trial the men discovered that the prosecution had not disclosed that a red hair that could be presumed to be from the perpetrator – had been found in the victim's hand. Both the Burka's have black hair. Their appeal pointed out that the physical evidence of the red hair excluding them was consistent with the absence of any trial testimony actually implicating them in the crime. Additionally, several witnesses came forward who identified another man as having stated he committed the crime because he thought the victim had stolen some tools from him.

In September 2003 the Szeged Judicial

In January 1991, nineteen-year-old Greg Parsons found the lifeless and bloody body of his mother Catherine in the family's home in Newfoundland, Canada.

Investigators focused on Parsons as the prime suspect, and in 1994 he was convicted of second-degree murder.

Parsons was sentenced to life in prison. However after six weeks imprisonment his attorney successfully argued that the evidence of his guilt was so weak that his release pending appeal was justified.

During the appeal process the police continuously harassed Parsons. He was arrested several times, and a police dog's attack on him during one of those arrests required 38 stitches to close the wound.

A new trial was ordered by the Newfoundland Court of Appeals in 1996. Parsons was excluded as his mother's killer in 1998 by a DNA test, and the Newfoundland Supreme Court entered a verdict of acquittal. In November 2002, Parsons' childhood friend, Brian Doyle pled guilty to the second-degree murder of Parsons' mother.

The Newfoundland government held an inquiry in 2004 into the conviction of Parsons and two other men wrongly convicted of murder in separate cases. During her testimony, Parsons prosecutor, Cathy Knox, tried to deflect blame from her for prosecuting an innocent man, by asserting that he and his lawyer were at fault for not having done more to prevent the conviction. She said,

"Had he chosen to testify at the trial and make the jury aware of the information he has been bringing forward in the last number of years in the public forum, I believe it would have made a difference."

Court quashed the Burka's convictions and ordered their retrial. In March 2005 the two men were ordered released on house arrest while awaiting trial. Upon their release they had spent exactly 2,100 days in custody.

Four months later the Burka's were acquitted after their retrial.

The Hungarian media suggested that prejudice against Gypsies was the reason the prosecutors overlooked proof of the men's innocence – and relied on speculation about their guilt to prosecute them and obtain their conviction.

Source: Hungarian Court Acquits Two Romani Men after 2100 Days in Prison, Romsky Informacni Servis, Budapest, August 1, 2005.

\$1.3 Million Awarded For Wrongful Conviction Of Murdering Mother

By JD Staff

Parsons responded angrily to Knox's testimony, "Everything I said in my defence when I spoke to the police ... was used against me and turned around."

In March 2002 Parsons was awarded \$650,000 in financial compensation by Newfoundland's government. On September 1, 2005 – seven years after his exoneration – Newfoundland's provincial Justice Minister Tom Marshall announced that Parsons would be awarded an additional \$650,000, for total compensation of \$1.3 million (\$Canadian). Marshall said, "We feel this is within the scope of packages received by wrongfully convicted persons in Canada."

When told of the compensation decision, Parsons said, "Everything is finally done and over with. My biggest goal now is to live a private life with my family, and just go on and be as normal as we can be."

JD Note: The two other men whose wrongful conviction were the subject of Newfoundland's inquiry in 2004 were: Ronald Dalton, wrongly convicted in 1989 of his wife's murder and who spent 8-1/2 years wrongly imprisoned before it was medically proven she choked to death on food she was eating, and had not been strangled. (See page 10 of this Issue of *Justice: Denied*); and Randy Druken, wrongly convicted in 1995 of murdering his girlfriend and imprisoned for five years before the prosecution's star witness, a jailhouse informant, recanted his testimony as fabricated.

Source: Award doubled for wrongful conviction, *Edmonton Sun*, September 2, 2005.

Parsons could have helped his own case: Crown attorney, St. Johns, Newfoundland, *CBC News*, May 12, 2004.



Visit the Innocents Database

http://forejustice.org/search_idb.htm

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Back issues of *Justice: Denied* can be read, along with other information related to wrongful convictions.

JD Note:

This is Part V 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 5 of a 7 part serialization

VI.

Appellate Courts Cover-up the Errors of Trial Judges

There are two significant and complementary ways the political nature of judges contributes to victimization of the innocent. The first method is the use of the harmless error rule to dismiss the grounds upon which a wrongful conviction or prosecution is challenged. The second method is the use of unpublished opinions to minimize attention given to an appeal and to conceal the details of the appeal's resolution.

A. The Harmless Error Rule

The harmless error rule is a relatively recent development in this country, having been adopted federally in 1919. It is codified in the *Federal Rules of Criminal Procedure* as Rule 52 and it states that a harmless error is, "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The states followed the federal government's lead and adopted a variation of the harmless error rule applicable in their courts.

Prior to adoption of the harmless error rule, structural omissions or errors in an indictment, search warrant or jury instructions, and a trial judge's judgmental errors in such matters as evidentiary rulings, limiting witness testimony, or motions for a judgment of acquittal that were related to essential facts of a case, were presumed to prejudice a defendant, and thus constituted grounds for automatic reversal of a conviction and a retrial or possi-

ble dismissal of the charges. That was consistent with the common law rule that review of a conviction did not involve any re-examination of the facts, which was the sole province of the jury, and that was the law applied to Americans at the time the Constitution was written and the federal judiciary was created.

Before codification of the harmless error doctrine, it was recognized that structural errors in documents such as an indictment or search warrant could be due to the possible inability of the prosecution to correct them, and defects that could be cured by the prosecution would be. Trial and appellate judges did not interpose their opinion about the relative strength or weakness of the government's pleadings, but merely ascertained if it met the legal standard for sufficiency and summarily rejected those that did not. The harmless error rule turned that common sense standard on its head by allowing a judge to determine if errors or omissions that made a pleading, document, or jury instructions insufficient were irrelevant, if in the judge's opinion it had no effect on the proceedings. In other words, the harmless error rule elevated the expression 'good enough for government work,' which means conduct and work that is third-rate, shoddy, and not worthy of praise, to the sub-standard by which all legal pleadings in a criminal case affecting a person's life and liberty are judged.

Before the harmless error rule, the jury was considered to be the sole arbiter of a case's facts and any failure by jurors to consider essential facts of a case or to consider the impact of facts on essential elements of an offense, was assumed to have impaired their judgment, and thus, constituted the deprivation of a fair trial to a defendant and warranted reversal of the conviction. Prior to 1919, there was effectively a presumption that trial level errors could prejudice a defendant to a judge and jurors exposed to them, since the State's painting of a person as a criminal carries with it a strong de facto presumption of guilt. Thus, the State must be bound to follow the proper procedures to ensure that an innocent person is not erroneously colored by that de facto presumption of guilt. Consequently, trial level errors embody the presumption that they are prejudicial, some in ways that may remain unseen to anyone outside of the jury: so recognition of their prejudicial effect on a defendant's right to a fair trial and their possible contribution to an adverse verdict is essential to preserve not just the integrity of the judicial process, but the appearance of the system's integrity.

The automatic reversal of a conviction acted as an important shield of protection for innocent defendants from the structural and judg-

mental errors of a judge, prosecutors and police. Its obliteration began in 1919, and nine decades later is virtually complete: only a hollow pretense of judicial concern for determining the soundness of any conviction remains.

The harmless error rule is defended in a criminal context as contributing to judicial economy by allowing a judge to avoid ruling in a defendant's favor when reasonable grounds can be stated that in the judge's opinion, an error by the police, prosecutors or a judge in a case did not alter the outcome of the issue being considered. The Supreme Court has extended that rationale to encompass the most serious violations of a defendant's express protections under the Bill of Rights. The end result of that rationale was expressed in *Arizona v. Fulminate*, 499 U.S. 279 (1991), a case involving a confession obtained in violation of the defendant's Fifth Amendment right against self-incrimination. The Court has not only continued to apply the rationale that a constitutional violation does not mandate a conviction's automatic reversal, but it has extended it in subsequent cases to encompass indictments and jury instructions that fail to include essential elements of a defendant's alleged criminal offense. Thus, the assessment of a case's facts and deficient prosecution documents and pleadings by a judge who owes his position to the same political establishment to which the prosecutor belongs, has effectively replaced the jury that symbolically represents the community, as the final arbiter of the weight to be given to those facts that the judge cannot possibly view from a disinterested perspective.

It was predictable in 1919 that the 'harmless error rule' would result in less attention to critical details at every stage of a criminal investigation, prosecution and review of a conviction, given the overtly political nature of the state and federal judiciaries, and the panoply of political considerations that are the overriding criteria used to fill those positions and that affect the decisions of judges. So even though details are the life blood of a criminal prosecution and the protection of all criminal defendants is shielded by the presumption of innocence, the liberal application of the 'harmless error rule' has enshrined 'close enough for government work' as the motto that most accurately expresses the standard applicable to misdeeds, errors and constitutional violations committed during the course of a case by judges, prosecutors and the police.

The grave danger posed to the innocent by the Supreme Court's extension of the 'harmless error' principle to an every increasing panoply of prosecution related errors was conclusively proven by the aftermath of its ruling in *Arizona v. Youngblood*, 488 U.S. 51 (1988). Convicted of the 1983 kidnapping and sexual

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assault of a 10 year-old boy based solely on the victim's testimony, the Arizona Court of Appeals reversed Larry Youngblood's conviction in 1986 on the ground that the failure of the police to preserve semen samples from the victim's body and clothing that there was substantive reason to believe could have exonerated him, violated his Due Process right to a fair trial. In 1988 the Supreme Court reversed, holding that such destruction of material evidence by the prosecution must be done in "bad faith" to constitute a Due Process violation. The Court's majority acknowledged that although the actions of the police in Youngblood's case could be "described as negligent," they didn't act in "bad faith."

However, in 2000 a preserved rectal swab sample taken from the victim containing the attackers semen was discovered. When subjected to state of the art DNA testing unavailable at the time of his trial, Mr. Youngblood was excluded as the assailant. Mr. Youngblood's exoneration, *after* he had served his prison term, vindicated Justice Blackmun's concern that the Court was using his case to erroneously expand when destruction of material evidence by the prosecution was constitutionally permissible:

The Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial. Respondent here, by what may have been nothing more than police ineptitude, was denied the opportunity to present a full defense. That ineptitude, however, deprived respondent of his guaranteed right to due process of law.

...
The evidence in this case was far from conclusive, and the possibility that the evidence denied to respondent would have exonerated him was not remote. The result is that he was denied a fair trial by the actions of the State, and consequently was denied due process of law.

Yet in spite of Mr. Youngblood's actual innocence being later proven and Justice Blackmun's correct analysis of why the Court should have affirmed the Arizona Court's reversal, the Court's decision continues to be the controlling authority insofar as whether the prosecution's destruction of material evidence violates Due Process or is merely 'harmless.' It is reasonable to surmise that the Court erred as egregiously in other applications of the harmless error principle to possible Constitutional violations as it did in its as yet uncorrected *Youngblood* ruling.

One logical consequence of the ever more liberal use the 'harmless error rule' is the two

pronged evil of a nationwide acceptance of wrongful convictions as the norm, and the failure of appellate courts to reverse convictions that it would have unhesitatingly declared as unsafe mere decades ago. Thus, adoption of the 'harmless error rule' is a largely unseen factor that has evolved into being one of the keys necessary to trigger and sustain what has become nothing less than a tsunami of wrongful convictions in the United States.

B. Unpublished Opinions and the Creation of an Unprecedented Body of Law

The replacement of a written opinion explaining the rationale underlying an appellate court decision, with an unpublished opinion or one line or one word orders has become a pervasive phenomenon in the last three decades. As recently as 1950, a written opinion was issued in all federal appeals as a right. Today, however, over 85% of all federal circuit court opinions are unpublished. The increased use of unpublished opinions since the late 1960s and early 1970s somewhat parallels the growth in the number of people imprisoned since then. It is common for both federal and state appellate courts to use an unpublished opinion to dismiss a defendant's challenges to a conviction based on misconduct, errors and omissions by a judge, prosecutor and the police, as constituting 'harmless error.'

The authors of *Elitism, Expediency, and the New Certiorari*, recognize the negative consequences of the trend toward less public disclosure of the reasons underlying a judicial decision:

The implications of these changes are enormous. Federal appellate courts are treating litigants differently, a difference that generally turns on a litigant's ability to mobilize substantial private legal assistance. As a result, judicial procedures no longer permit judges to fulfill their oath of office and 'administer justice without respect to persons, and do equal right to the poor and to the rich.' In short, those without power receive *less (and different)* justice.

Given the political nature of the judiciary, it is to be expected that the expanded use of unpublished opinions is disproportionate in cases involving people that are politically powerless and who do not have substantial financial resources. Their deficient political and financial circumstances have a significant impact on the outcome of their case by putting them on a "different track" than more well-heeled and connected defendants.

Even less well known to all but legal insiders is the minimal amount of first hand knowledge

an appellate judge has about the merits of the majority of the cases he or she makes a decision about. That lack of attention to the details of an appeal is disproportionately weighted towards cases involving defendant's from the lower strata of society. Such defendants are not only involved in the majority of criminal appeals, but they are the ones most likely to have been the subject of a shoddy police investigation, coercive questioning, threatening or intimidation of witnesses, prosecutorial misconduct, or judicial inattention to crucial details involving witnesses, procedures and evidence. Those are the cases that require the most intense scrutiny on appeal because they involve the greatest human cost and the greatest likelihood of an injustice, yet in an Alice in Wonderland type twist of reality, they receive the least personal attention by an appellate judge.

It is unsurprising that the politically and financially powerless, rather than the powerful, suffer the harmful effects of judicial shortcuts exemplified by the issuing of an unpublished decision, given that judges owe their position to the latter and not the former. There are at least four significant ways the different judicial tracks of justice are manifested.

First, the issuance of an unpublished decision by a state or federal circuit court panel is the kiss of death to a defendant, because it effectively ends the appeal process in all but name. An unpublished decision sends a powerful signal to any further reviewing court that the issues involved are too insignificant to bother with explaining, and thus they are not important enough to warrant careful review by any other court. A one line or one word order sends the same message even more powerfully.

Second, an unpublished opinion typically goes hand-in-hand with non-citability of the decision. In *Anastasoff v. U.S.*, 223 F.3d 895 (8th Cir. 2000). Circuit Judge Richard S. Arnold clearly explained that since the days of Blackstone over 200 years ago, the doctrine of precedent has been recognized as one of the few checks on the arbitrary exercise of judicial power, and that all judicial opinions are precedential, not just those that are published. Consequently, the ability of a court to ignore a previous court's opinion regarding a factually and legally similar case removes the only bar preventing judges from substituting their personal opinions for what the law has been declared to be in those circumstances. Thus, the non-citability of an opinion breeds and ensconces judicial lawlessness by allowing judges to avoid any accountability to abide by any precedents applicable to a case. It allows imposition of de facto judicial ex post facto pronouncements. That underscores the all too likely possibility that a person

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whose case is resolved by an unpublished opinion did not have it determined according to established precedents, but by the personal preferences of the judges involved. Those preferences are likely to be different than those of a defendant from a different social and economic place in society than the judges.

The Supreme Court recognized in *Hutto v. Davis*, 454 U.S. 370 (1982), that judicial anarchy is the result of lower courts choosing which precedents they want to follow. The Court stated, "Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." (375)

The danger posed to a defendant by an unpublished opinion's non-citability is compounded by the fact that few people other than lawyers have ready access to unpublished opinions. Whatever check on judicial lawlessness that may exist from the public notice of a precedentially contrary opinion is, therefore, effectively eliminated. The injustice embodied in the non-cited opinion is not buried in legal books sitting on dusty shelves – it is as if the opinion never existed in the first place – other than its effect on the hapless appellant victimized by it.

In an uncommon display of judicial courage, an Eighth Circuit three judge panel ruled in *Anastoff* that the circuit rule on the non-citability of an unpublished opinion is unconstitutional. The panel declared the non-citability rule "expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decision will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional." All of the federal circuits and most, if not all, of the states have rules resembling the one declared unconstitutional in *Anastoff*.

Third, a case resolved by an unpublished decision typically receives little or no personal attention from the judges involved. The judges only invest the minimal amount of time and energy necessary to process the final order or decision that is prepared, and that may in fact have been determined to be the appropriate resolution by the judge's support staff. In such cases the judge functions as more of an administrative bureaucrat removed from dealing with a case's details. That is in sharp contrast to what is traditionally thought of as a judge's hands-on role in all aspects of deciding a case. This routine hands-off role by judges raises serious Constitutional issues about the administration of justice in this country, because unseen and unknown bureaucratic functionaries are sur-

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where the two chatted and decided to return to Newton's apartment. As Newton backed out of the drive, she saw the duffel on the back seat and realized she needed to hide it. With Nelms watching, Newton retrieved the bag and walked next door into a burned and abandoned house owned by her parents, and there (as both women later confirmed), she left the bag.

The women arrived at the apartment around 8pm, and didn't immediately realize that anything was wrong. Newton thought Adrian was napping – until she saw the blood. "As Frances walked around the couch and saw his upper torso, she immediately screamed and bolted to the children's bedroom," Nelms said in an affidavit. "Frances began to frantically scream uncontrollably. I could not calm her down enough to elicit the apartment's address."

Newton says she was shocked and dazed, but gave police as much information as possible – including the fact that she'd just removed a gun from the house. She told police about Adrian's drug habit, and that he owed some money to a dealer – which Adrian's brother, Terrence, corroborated, telling police he knew where the dealer lived. Police never pursued the lead. "To your knowledge, was the alleged drug dealer ever interviewed by anyone in connection with this case?" Newton's attorney asked Sheriff's Officer Frank Pratt at trial. "No," Pratt replied.

A bullet remained lodged in Adrian's head, meaning that the blood and brain matter would have blown back onto the gun and shooter – confirmed by a trail of blood found in the hallway. Police found no trace of residual nitrites (gunshot residue) on Newton's hands, nor on the long sleeves of the sweater she was wearing. They collected the clothing

repeatedly making judicial decisions that affect litigants and the public without any constitutional authority to do so, and without the litigants or the public being informed of their shadow participation as de facto judges.

Fourth, the quality of unpublished decisions is of significantly lower quality than published decisions. As Professors Richman and Reynolds noted, "The primary cause lies in the absence of accountability and responsibility; their absence breeds sloth and indifference." There has been fourteen additional years for the quality of unpublished decisions to deteriorate since Fourth Circuit Chief Judge Markey described them in 1989 as "junk" opinions.

The serious deficiencies inherent in unpublished decisions are indicative of the presumption that exists in every case resolved by an

she'd worn that day. There was no blood, nor any trace of blood, on any of the items.

Which Gun?

The next day, April 8, according to trial records, police supposedly confirmed that the gun they had retrieved from Newton's duffel bag in the abandoned building – at her direction – matched the murder bullets. Yet Newton was not arrested until more than two weeks later. Newton says that Harris Co. Sheriff's Sgt. J.J. Freeze told her that police had actually recovered two guns; in a sworn affidavit, Newton's father Bee Henry Nelms says Freeze told him the same thing and added that Newton would "eventually be released." Nonetheless, Newton was arrested two weeks later – after she filed a claim on Adrian and Farrah's life insurance policies – and charged with the capital murder of her 21-month-old daughter.

The state's primary evidence against her was elementary: Newton had filed for insurance benefits, and the Department of Public Safety forensic technicians had detected nitrite traces near the hem of Newton's long skirt – although they couldn't say with certainty that the nitrites were not her father's garden fertilizer transferred earlier that day from the hands of her toddler daughter. For physical evidence, the state relied primarily on the supposed ballistics match to the gun Newton had hidden.

Yet in court Freeze was somewhat vague: "I believe we talked about two pistols," he testified. "I know of one for sure, and there was mention of a second one that Ms. Newton had purchased earlier."

There are serious questions about the prosecutors' timeline, which would have required New-

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unpublished opinion that consideration of the defendant's issues was given short shrift. Implicit in that presumption is that the decision may have, in fact, been incorrectly decided. In a criminal case it means the possibility that an innocent person was victimized by a wrongful affirmation and forced to suffer an unjust punishment, up to and including execution.

Part 6 will be in the next issue of *Justice Denied*. To order the complete 27,000 word article, mail \$10 (check or money order with a request for - **Vol. 30, No. 4, Symposium Issue** to:

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ton somehow to murder her family, clean herself of any and all blood traces and gunshot residue, and drive to her cousin's house – all in less than 30 minutes. And since her 1988 conviction, the question of a second gun has haunted Newton's case. The ballistics evidence was increasingly suspect in any case because of the recent history of the Houston PD crime lab, which has been repeatedly charged with incompetent, shoddy work, resulting in a number of exonerations and the wholesale discrediting of the lab, which remains under investigation. The lab's clouded reputation was one factor that prompted Gov. Perry to accept the BPP's recommendation to grant Newton a reprieve last winter.

Although subsequent testing supposedly confirmed the ballistics match, the search for the second gun continued. And in June, Dow argued in Newton's clemency petition, the truth finally began to leak out, and from the most unlikely place: the Harris Co. District Attorney's Office. During a brief videotaped interview with a Dutch reporter, Assistant DA Roe Wilson inadvertently confirmed the existence of a second gun. "Police recovered a gun from the apartment that belonged to the husband," Wilson acknowledged. "[It] had not been fired, it had not been involved in the offense," she continued. "It was simply a gun [Adrian] had there; so there is no second-gun theory."

Wilson and her boss, DA Chuck Rosenthal, quickly retracted her admission. Wilson told the *Houston Chronicle* that she'd simply "misspoken," and Rosenthal accused Dow of fabricating the idea of a second gun "out of whole cloth." "I'm very clear," Rosenthal told *The New York Times*. "One gun was recovered in the case." On Aug. 24, the Court of Criminal Appeals agreed, dismissing Newton's most recent appeal. "The evidence in this case was more than sufficient to establish [Newton's] guilt," Judge Cathy Cochran wrote. "The various details that [Newton] suggests her trial counsel should have investigated in greater detail do not detract ... from the single crucial piece of evidence that concerns her: she disposed of the murder weapon immediately after the killing."

Dow and his University of Houston law students persisted, and late last month may have succeeded. In August, Harris Co. investigators provided testimony that police may have recovered at least two identical .25-caliber Raven Arms pistols. In separate affidavits, two police investigators recall tracing firearms recovered in connection with the murders. Officer Frank Pratt told one of Dow's students that he was assigned a gun found in the abandoned house, which he traced to a purchase by Newton's

boyfriend's cousin at a local Montgomery Ward. He also discovered, he told student Frances Zeon, that the purchaser had also bought a "second, identical gun"; but he didn't follow up on the second gun, because "he felt there was no need to do so." Pratt said he'd written up a report on the gun – a report Newton's attorneys have never seen.

However, Newton's attorneys do have a police report written by Detective M. Parinello, who reported he had traced yet another firearm recovered in connection with the case to a purchase from Rebel Distributors in Humble, Texas, which he said also ended up with Newton's boyfriend. "The question arises: what recovered firearm was ... Pratt investigating?" asks the clemency petition. "Counsel does not have access to the Harris Co. Sheriff's Department's records in this case. A request made directly to that institution for all records in connection to its investigation of this offense was rejected."

From all this conflicting yet incomplete gun evidence, it seems reasonable to surmise that there is no way to know which gun was in fact the murder weapon, or which gun was delivered for ballistics tests in 1987 or this year. Since the prosecution relied so heavily on a weapon that Newton herself had delivered to them, the new evidence discovered by her attorneys completely undermines her conviction.

At press time, Harris Co. Sheriff's Office spokesman Lt. John Martin was not able to reach Parinello or Pratt for comment but said that a captain who worked the Newton case had said there was only one gun recovered during the investigation. Harris Co. DA Chuck Rosenthal reiterated that, "as far as I know" there was only one gun recovered in the case. However, he said that even if investigators had recovered multiple firearms, and even if each were the same brand and caliber, the fact remains that the weapon investigators recovered from the abandoned house, which was immediately "tagged" and "tested," matched the bullets recovered from the victims. "Let's say, for conjecture's sake, that you ran down 50 or 100 guns, all associated with the case," he said. "The fact [is] that only one fired the bullets and that we know where that gun came from."

Lack of Effective Criminal Defense

As in many Texas capital cases, a large part of the problem with Newton's appeals is that her court-appointed trial attorney, Ron Mock, never actually investigated her case. If he had, perhaps he would've followed up the drug dealer lead or Freeze's reported comments about a second gun. Newton and her parents implored the trial judge to allow her to change attorneys, and Mock admitted to

the judge that he hadn't talked to any prosecution witnesses, nor had he subpoenaed any defense witness. The judge granted the motion to remove Mock but he declined a continuance, leaving Newton little choice but to go to trial with Mock. "It was stunning," she told me. "[Mock gets on the stand and] says, 'I don't know anything,' and for the judge to just dismiss it ... it was stunning." Mock has since been brought before the State Bar's disciplinary board at least five times on various charges of professional misconduct, for which he has been fined and sometimes suspended; he is currently suspended from practicing law until late 2007.

The Harris Co. prosecutors' defense of the conviction has also worn thin, especially given Roe Wilson's supposed "misstatement" about the second gun. To Newton's mother, Jewel Nelms, Wilson's admission is no mistake. "I've known all the time that there was a second gun," she told Houston's KPFT radio last month. "So I want to say again, to Roe Wilson, I thank you ... very much for letting us know, indeed, that there's somebody down there that knows about the second gun and was willing to talk about it – even though I know it wasn't her intention to do it."

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but one of hundreds of convictions to come under scrutiny because of doubts about the methods and quality of handling crime scene evidence by the Houston PD.

"The HPD Crime Lab has produced evidence instrumental in convicting thousands of people," explained Bob Wicoff, Sutton's attorney. For some, the lab's shoddy work may have helped prosecutors send innocent people to prison or to death row. "Josiah has served 4-1/2 years in prison for nothing," said Wicoff.

In mid-2003, Sutton was released from prison after the retesting of the DNA positively excluded him as a suspect in the assault. The Texas Board of Pardons and Paroles then pondered Sutton's case for 11 months before finally recommending a pardon. In May 2004, Texas Governor Rick Perry granted Sutton a pardon on the basis of his innocence. His story does not end there. Although he is now free, Sutton is a convicted rapist with a governor's pardon in his pocket. Under Texas law, a pardon does not erase a conviction from a person's record; only a new trial and a verdict of acquittal can

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mugshot and thought he looked similar to the gunman. The three other eyewitnesses — all restaurant workers — then identified McKinney when shown his photo. Police had a file on the 20-year-old McKinney because he had been in trouble with the law as a juvenile — most seriously when he was sent to the California Youth Authority for attempted robbery.

During his trial, the prosecution relied on the testimony of the four eyewitnesses identification of him as the killer. The prosecutor — Orange County Asst. DA Tony Rackauckas — said about the eyewitness testimony, “About the only way to bring in better evidence is if we had a movie of it.”

In convicting McKinney, the jury rejected his defense that at the time of the robbery he was home in Ontario, 30 miles from the Burger King. McKinney’s alibi was supported by several people who testified they were with him. The jury also rejected the fact that McKinney is several inches shorter than the shooter as described by eyewitnesses, and at the time of the crime he was using crutches to walk because of a leg injury — while the shooter walked without a limp or artificial aid.

McKinney was sentenced to life in prison without parole after the jury deadlocked on the death sentence sought by Rackauckas.

As the years passed, McKinney earned his high school equivalency degree, became religious, read avidly, and on the dark side — he was stabbed on two occasions, contracted tuberculosis, and attempted suicide.

Then, in 1997, a prison inmate wrote a letter to the Orange County public defender. He explained that he knew who had been involved in the Burger King robbery and murder, and that McKinney had nothing to do with it. The letter named the two men involved in the crime — the getaway car driver and the shooter.

The public defenders office began an investigation that lasted more than two years. They reconstructed the crime and re-interviewed all surviving witnesses. In addition to the new evidence of the getaway drivers’ admissions, two of the eyewitnesses recanted their identification of McKinney as the killer.

Based on the new evidence that McKinney didn’t receive a fair trial, but that he was innocent, in September 1999 the public defenders’ office filed a motion for a new trial. After Orange County DA Rackauckas — who as an assistant DA had been McKinney’s trial prosecutor and sought his execution — conducted his own investigation, he owned up to his error and agreed not to oppose the

motion. In January 2000 McKinney’s conviction was vacated and the charges dismissed.

McKinney was released from the state prison in Lancaster on January 28, 2000. From the time of his arrest he had been incarcerated for more than 19 years. He was forty years old, and he didn’t have a Social Security number, a change of clothes, or even a toothbrush.

After his release, McKinney filed a lawsuit against the City of Orange and the detective who constructed the case against him. The suit was settled in the summer of 2002 for \$1.7 million. He received a check for about \$1 million after deductions for attorneys fees and expenses.

Having heard horror stories of how money was squandered by lottery winners and other people who suddenly came into wealth, McKinney put the money in the bank as he scouted around for a place to invest it.

McKinney always had a head for business, he said recently, “I was working and selling since I was a kid. Selling papers. Washing dishes. Bagging groceries. Selling candy. Cut people’s grass. Everything I wanted, I worked and saved for all my life.”



DeWayne McKinney at one of his ATM machines in Hawaii.

His first investment was when he bought half-a-dozen condominiums in La Mirada — a Los Angeles suburb.

He then learned that it was possible for an individual to buy and operate automated teller machines (ATM). The ATM’s owner would be paid a commission on each transaction. After meeting a man whose company sold and installed ATMs, McKinney recruited two acquaintances to work on commission to find locations. His first machine was installed at a Unocal station in Santa Ana. Within a few months McKinney had 20 ATMs around Southern California.

However he felt uncomfortable in So Cal. He said recently, “In California, it was a nervous feeling. LA to me is almost like being in prison. The nervous energy, it never ceased.”

When McKinney and his wife went to Hawaii after their wedding, he found he liked the pace

of life there. So in 2003 he sold his ATMs in So Cal and bought a beachfront five-unit fixer upper apartment near Oahu’s North Shore. They lived in one unit and rented the rest.

McKinney dug right in finding good locations for an ATM. He paid a generous finders fee to anyone who gave him a tip on a location where he was able to install a machine, and he soon had ATMs all over Oahu.

In 2004 McKinney and his wife divorced. They split the ATMs in the family business. Within a year McKinney built his business back up to the 20 machines he had before the divorce.

After the divorce McKinney sold for \$2.7 million, the five-unit apartment he bought for \$740,000 in 2003. He used the money to buy real estate on Oahu, including a beachfront home in Honolulu.

Although he didn’t go to college and had no job skills when he was released from prison, McKinney credits much of his success to a skill that he honed in prison — making the most of his connections. In prison you need to know the right person, and treat that person right to obtain a hard to get item or to get something done. That is called networking in the business world, and McKinney has proven since his release it is a skill he has in spades.

Less than six years after his release from 19 years of wrongful imprisonment, McKinney is a multi-millionaire living a life that most people only dream about. In July 2005 he told a Los Angeles Times reporter, “I finally found my place. I enjoy being able to breathe the fresh air, feel the wind on my face and know I’m free. I enjoy watching the sun set and the sun rise. I lay in my house with the doors open, feeling the breeze.”

Source: From Prison to a Paradise for ATMs, Stuart Pfeifer, *Los Angeles Times*, July 19, 2005.



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do that. Once pardoned, however, a person loses “standing” to petition the state for a new trial. Thus, a pardon permanently closes the principal avenue to clearing a wrongly convicted person’s record.

“I continue to be surprised at how much easier it is to convict someone who is innocent than to correct a wrongful conviction,” said David Dow of the Houston Innocence Network. “It should be simple to correct these things. It shouldn’t be a bureaucratic nightmare.”

In 2001, the Texas legislature enacted a law that allows exonerated prisoners to

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surveying bar owners in Pueblo when a woman asked what he was doing. Her name was Paige TenBrook. She invited him to join her and Su Jin Kim at a country-western dance club.

Paige told Baldauf that her marriage had been over for months, and her husband was soon moving out. She began visiting Baldauf at his “bill paying” job as a bartender in nearby Florence, and soon initiated an intimate relationship.

Baldauf was staying 30 miles from Pueblo in Florence. To pay his bills as he continued development on the brewpub, Baldauf used a personnel agency to be hired by McDonnell-Douglas to work on its Delta III rockets in Pueblo.

In Medford, Scott heard of Paige’s activities from a Pueblo friend, and on January 8 began threatening her, calling as many as 30 times over the next few days. Paige was afraid of Scott and what he might do. She was nervous about being watched, so she asked Baldauf to begin parking down the street. On January 15, Scott left her a message in a resigned tone, asking her to show a friend coming into town some property.

On January 17, one of the Delta rockets exploded shortly after liftoff. That postponed Baldauf’s start at McDonnell-Douglas and the personnel agency offered him a few days of temporary construction work. He dismantled concrete forms for 8 hours on the 23rd, then stopped by Paige’s office before she left work. He went ahead to her apartment while she drove the receptionist home. Paige arrived, then talked on the phone to her sister and mother in Georgia as Baldauf made dinner. Paige’s fearful glance out the window when they hugged prompted Baldauf to offer her a .22 caliber pistol for her peace of mind. He left around 9:30 p.m. After arriving he found the pistol but no cartridges for it. He had stored a shotgun in his friend Rob Frickey’s gun safe, so he went on to Frickey’s home in Canon City. Frickey was asleep, so his son Bean retrieved the shotgun. Baldauf told him of Paige’s worries.

Paige’s Body Found By Baldauf

Baldauf returned at approximately 11:45 p.m. to find Paige dead with a belt around her neck. His immediate reaction was to call 911, but he found there was no dial tone. He then shifted his focus to the killer, who could still have been in the apartment or nearby. Baldauf headed for the neighbors to use their phone, but saw an SUV enter the lot and park. Thinking someone might have come to pick-up the killer, Baldauf hung back to watch the vehicle. He was in suspense for 30-40 minutes, uncertain whether to risk losing sight of it to call police. Eventually, its doors opened... and

Kim emerged with her date. Her appearance broke the tension, leaving Baldauf drained. He started after her, then stopped. His next action he finds difficult to explain: instead of apprising Kim of the situation, he turned away. Two blocks down the road, he started to go into a convenience store, then changed his mind. Kim could handle it – he wanted no part of it. In a daze, he drove to the house in Canon City where he was staying.

Baldauf explains: “It wasn’t like me at all, but that’s how I reacted. On another day I would have done differently. I was stunned by finding Paige dead. I was overtired — I’d been up over 20 hours, and had put in a full day of strenuous physical labor in an unfamiliar job. When I saw Kim, the adrenaline quit and I just crashed. The whole thing was repellent — I just wanted someone else to deal with it. Subconsciously, I was also probably avoiding Kim. I knew she was resentful of the time Paige had been spending with me instead of her.

I wasn’t thinking things over, just reacting: CALL 911! The phones dead – get out! Find another phone! Waiting – that SUV isn’t right – watch it! Then I saw Kim, and just felt wiped out, sick. Someone else was there now, let her handle it.”

Baldauf himself says he would not have predicted his reaction. His actions were not heroic, or what he should have done in retrospect, but neither do they justify a murder conviction. [JD note: See p. 10 of this issue for the explanation of two forensic psychologists of why Ronald Dalton did inexplicable things after his wife choked to death on dry cereal that contributed to his wrongful conviction of murdering her.]

When he got home it occurred to Baldauf that he, too, may have been – and still might be – a target. It was the middle of the night and he was alone. He was new to the area with no family near, and his only close friend was Frickey. He needed to be near friends and family, but that was in Tucson. Early the next morning he headed to Tucson. During the 12-hour drive, Baldauf, who has battled depression much of his life, became severely depressed. That night he commiserated with a friend, Jo Verdudzo, and described finding Paige.

Baldauf’s Arrest

Meanwhile, Kim told police that Baldauf had killed Paige. She had no basis to say that except for her dislike of him. From that point, the police never seriously investigated anyone else. Police looking for Baldauf woke Frickey at 3 a.m. on January 25. Hours later, Baldauf called Frickey (who has hearing damage) to tell him about Paige. Frickey said the police were looking for him. Several hours after the call, Frickey called the police,

claiming Baldauf confessed killing Paige. However, he later told coworkers Baldauf had confessed at his home. Police did not immediately disclose the contradictory statements, which cast serious doubt on Frickey’s credibility until well after the preliminary hearing in which Baldauf was charged with first-degree murder based on Frickey’s testimony. That evening, Tucson police arrested Baldauf.

After he was in custody, Baldauf freely answered questions for over an hour. He was willing to talk about the night of Paige’s murder, but asked to have a lawyer present. The lawyer he called advised him to end the interview.

The police began releasing information they knew to be false to the media to poison public opinion. They said Baldauf had fled out a back door; he had prior felonies; he was living out of his car; he was stalking, not dating, Paige; he wanted to negotiate with the prosecutor; and that he had only a business relationship with Paige – all false.

Four months after Baldauf’s arrest, Medford police informed investigator Teschner in Colorado Springs of the statement by the Husels that Scott admitted hiring Paige’s killer with the motive of collecting her life insurance money and other assets. Teschner’s follow-up after learning that critical information consisted of interviewing the Husels, which he began by stating that Scott was already cleared of wrongdoing.

The Colorado Bureau of Investigation (CBI) did not conduct a DNA analysis of evidence related to Paige’s murder until just three weeks before Baldauf’s trial. His attorneys had the lab report suppressed on the basis the CBI waited too long, leaving no time to find defense experts. They told Baldauf the evidence could only hurt, because a spot of blood on Paige’s sleeve had been proved his. Baldauf explained that the blood was merely from a finger he’d gouged on a nail at work. The spot of blood probably got on her sleeve when he touched the sleeve. His attorneys, however, wanted to avoid the entire issue, in spite of the obvious implications: if his finger was leaving blood traces, why was there no blood on Paige’s neck, on the belt used to strangle her, or elsewhere? Baldauf didn’t see the CBI report and his attorneys failed to inform him of an important finding by the crime lab that supported Paige’s murder by an intruder. Baldauf didn’t discover the existence of that evidence until more than six years after his trial.

Throughout his 20 months in jail awaiting trial, Baldauf refused to even listen to plea offers, insisting on the trial he believed would free him.

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Baldauf's Trial

The prosecution began its case with a ploy to prejudice the jury, using Paige's small dog as a second victim. However, the dog was likely killed because it was barking, which is contributory evidence of an intruder the dog was unfamiliar with. The dog knew Baldauf, so it didn't bark when he was around. The DA also displayed Baldauf's shotgun to inflame any anti-gun sentiment among the jurors, although it was not part of the crime. One prosecution witness placed Baldauf and Paige at her office from 5:30 to 6:00 p.m. the day of her murder. Another witness put them at a bar at the same time. The prosecution devoted much of its case to showing that Baldauf had recently been in Paige's apartment, a fact he had never disputed. A CBI expert testified a pubic hair found among Paige's was not Baldauf's, and prints on the phone, the cord to which had been severed, were unmatched to anyone. Hairs found in the bathtub were excluded by microscopic examination from matching Baldauf or Paige.

Instead of assessing the evidence with an open mind, prosecution proceeded from the premise of Baldauf's guilt. That led to them "cherry picking" evidence supporting their theory of the crime, and ignoring the evidence that didn't. For example, in spite of a letter from Baldauf to Paige encouraging her to see others, prosecutors persisted in painting him as jealous and possessive. They resorted to character assassination and used two vindictive former girlfriends to help create a bogus history. Although Colorado law prohibits such unduly prejudicial character evidence, Judge Cole — who had no murder trial experience — allowed its introduction.

Cross examination showed errors in the medical examiner's report. Police attempted to add details to reports to comport with the statement of a witness. The money taken from Baldauf on arrest was later stolen from the evidence room. Teschner defied Judge Cole's repeated warnings against prejudicial references to Baldauf arrest — grounds for mistrial, but Cole denied that motion. Key witness Frickey did not appear as scheduled, after hospitalization for severe allergic reaction.

Acquittal seemed likely; and the defense's case hadn't even begun. Baldauf's lawyers had found friends or acquaintances of Scott who would testify to his threats, his remark that Paige was worth more dead than alive, his focus on collecting insurance proceeds and her property, his callous behavior after her murder (such as showing off a new Rolex and joking, "Look what my wife bought me"), and his boast of having Paige killed. Ties to a local organized-crime figure surfaced, suggesting Scott had Paige killed to

settle his debts using insurance benefits. However, jurors never heard any of that evidence. Under state subpoena, Baldauf's Tucson friend Verduzco arrived and told the DA on the eve of his appearance that he was changing his story again. The resulting furor wound up ending the trial and Baldauf's expectation of long-overdue freedom.

Verduzco's fourth version of events included "new" details incriminating Baldauf — details that were not what Baldauf had told him. Verduzco was clearly stressed, at times in tears. It appears that he had been pressured to augment his testimony to suit police: Judge Cole noted how strange it was that although Tucson was a large city, the same police sergeant who had arrested Baldauf had been sent to serve Verduzco's subpoena. Baldauf's lawyers objected to Verduzco's altered testimony and requested that Judge Cole bar the jury from hearing it. Cole granted the request, and the DA announced he would immediately file an interlocutory appeal of the ruling.

Surprisingly, Baldauf's lawyers, two experienced Denver attorneys who had replaced the public defender nine months earlier, wanted to ask for a plea offer. Baldauf would not consent. That afternoon, his lawyers came to see Baldauf, bringing his brother John with them. They urged him to accept a 24-year sentence and argued that a mistrial would be a bad result. Baldauf refused, but was shaken by their apparent defection. His brother encouraged him to accept, saying his family wanted to see him free "some day." Baldauf finally gave in to his family's wishes, with the proviso that he would not falsely admit to murder. An *Alford* plea allows a defendant who claims innocence to be convicted. Two hours later — before Baldauf could reconsider his ill-advised capitulation under the pressure of the trial — Cole accepted an *Alford* plea from him. He received no credit for his 20 months in jail, and under the plea had no right to appeal.

The following morning Baldauf wanted to withdraw the plea, but his lawyers and brother talked him out of it.

Baldauf Obtains CBI Crime Report in January 2005

In January 2005, Baldauf finally obtained copies of the CBI's DNA reports of the tests performed in August 1998. His lawyers had not informed him that the blood in the tub had been DNA tested, and did not belong to Paige or Baldauf.² Had he known, he would not have allowed its exclusion or entered an *Alford* plea. Baldauf is working on a motion to withdraw his plea on that basis. If a retrial is granted, more evidence is needed. The August 1998 CBI report also discloses that a pubic hair found in the bathtub excluded as being

from either Baldauf or Paige had been microscopically examined, but not DNA tested. Baldauf filed a motion for DNA testing under a Colorado statute enacted in 2003, so it could be matched through the FBI's DNA database. However Judge Cole refused to even grant a hearing. The appeal of Cole's denial is pending.

Baldauf is incredulous that the state continued to prosecute him after learning of Scott's boast, that was supported by the DNA proof that the blood in the bathtub wasn't Baldauf's — which indicated an intruder could have been in Paige's apartment at the time of her murder. In order to believe that Baldauf is guilty, one must also believe that before he returned that night someone unknown got into Paige's apartment merely to bleed in the tub, transfer his hair to her, sever the phone line without killing her, and that she didn't call 911 to report the intruder. That is ridiculous — but it is the theory the prosecution relied on in prosecuting Baldauf. His incarceration is yet another consequence of police and prosecutors who put winning a conviction above all else, heedless of whether the real perpetrator is convicted — who Baldauf believes the evidence indicates was hired by the buddy of Baldauf's prosecutor.

Baldauf believes an effective weapon against official wrongdoing may be public pressure resulting from exposure in the media. Letters to the Editor of the following newspapers may help: *The Pueblo Chieftain*, 825 W. 6th St., Pueblo, CO 81003; and the *Denver Post*, 1560 Broadway, Denver, CO 80202. Pueblo's new DA may be willing to re-examine the case if he thinks public opinion supports it. Write, District Attorney Bill Thiebaut, 201 W. 8th St. #801, Pueblo, CO 81003.

Baldauf hopes to identify the actual killer by comparing the DNA profile of the blood in the tub, (and if it can be obtained - the pubic hair's DNA profile) with DNA databases which did not exist in 1998, on the theory that a hired killer is likely to be a known criminal and may have DNA on file. Baldauf needs help in setting up a web site as a means of finding more witnesses. If you think you can be of assistance, you can write Baldauf at:

Leonard Baldauf 98415
AVCF
PO Box 1000
Crowley, CO 81034-1000

His outside contact is his brother:

Ken Baldauf
PO Box 31933
Tucson, AZ 85751

Email: footnotes@webtv.net

Endnotes:

1 Mr. Baldauf submitted his story in the third person, and JD retained that format.

2 The Colorado Bureau of Investigation Laboratory Report dated August 12, 1998, states:

"The DNA profile developed from Exhibit #6 did not match Tenbrook or Baldauf."

"Exhibit #6 - Bloodstain from bathtub"



In Time continued from page 14

Biddle recommended the proclamation's wording because he didn't think the President had the authority to suspend habeas corpus under the Supreme Court's ruling in, *Ex Parte Milligan*, 71 US 2 (1866). A secret military trial was scheduled to start in Washington D.C. within weeks of the men's capture. The charges against the men included entering the U.S. "for the purpose of committing acts of sabotage, espionage, and other hostile acts," "lurking or acting as spies," and criminal conspiracy.¹

Only two days before the trial began, two Army lawyers were assigned to defend seven of the men. Those lawyers were Army Col. Kenneth Royall and Army Col. Cassius Dowell. A separate lawyer was assigned to the man who had informed to the FBI. Royall and Dowell didn't just think Roosevelt's executive order denying the men due process protections — including trial by jury — was unconstitutional, but that it was intended to railroad their clients. O'Donnell writes about their first meeting with the seven defendants, "As the two lawyers left their clients, Royall pondered their predicament. *This whole thing is a publicity stunt. All they want is to make a show of this trial and I am just an actor in this spectacle.*" (p. 138)

The secret military trial was to be presided over by seven generals and a 2/3 vote was necessary to recommend a verdict and sentence to Roosevelt, whose judgement — even though he wouldn't attend any of the proceedings — would be final since no appeal to either the military or civilian legal system would be permitted.

After the trial began the worst fears of the lawyers about the unfairness of the proceedings was confirmed. They decided to file a habeas corpus petition challenging the legality of Roosevelt's proclamation denying the defendants any civilian or military due process protections. Knowing that filing a petition that was likely to be denied by the federal District Court would be futile unless the Supreme Court would agree to review the case, Royall met with Sup. Ct. Justice Hugo Black to see if he would support certiorari. Black told him he didn't want anything to do with the "spies" case. Royall then approached Justice Owen Roberts, who was agreeable to reviewing the case. After contacting the other justices (including Black), Justice Roberts informed Royall the Supreme Court would agree to hear the case.

Royall and Dowell immediately filed the habeas petition. After the writ was swiftly denied, they appealed directly to the Supreme Court. The trial was adjourned pending the outcome in the Supreme Court. The

oral arguments on July 29 and 30, 1942, lasted more than nine hours, and are among the longest in Supreme Court history.

Yet unbeknownst to the defense lawyers, the hearing was rigged in all but name. O'Donnell writes, e.g., that three of the justices had "disqualifying conflicts, either in the actual development of the case, advising the Roosevelt Administration, or serving in the military. ... This kind of presidential pressure on the Supreme Court made a mockery of impartial justice. Royall was walking into a set trap and everyone knew it except him." (p. 213) Justice Murphy recused himself because he had enlisted in the Army, however he remained secretly involved, and even sat behind a curtain separating him from the justices hearing the case. Justice Felix Frankfurter, however, didn't recuse himself, even though he had secretly advised Roosevelt to try the men with a military tribunal, and he "secretly advised the president's men on how to structure the military tribunal in anticipation of a Supreme Court challenge." (p. 213) Justice James Byrnes, O'Donnell writes, "had been serving as a de facto member of the Roosevelt Administration for the previous seven months, working closely with Roosevelt and Biddle on the war effort. Byrnes offered advice on a range of issues, including drafting executive orders, war powers legislation, and other presidential initiatives." (p. 213)

The day after the oral arguments ended, the Court orally announced its unanimous decision denying the habeas petition. (see, *Ex Parte Quirin*, 317 U.S. 1 (1942)). O'Donnell sets out a compelling case that the justices didn't accept the case to honestly review its merits, but to put on the show of appearing to do so in order to have the opportunity to judicially endorse Roosevelt's authority to suspend constitutional due process protections for selected classes of people in the name of national security.

On August 1, the day after the Supreme Court's decision, the trial ended with the tribunal's recommendation that Roosevelt find all the men guilty and sentence them to death. Roosevelt agreed with the guilty verdicts and the death sentence for six of the men — including the two U.S. citizens. However, based on the recommendation of administration officials, Roosevelt ordered sentences of life in prison and 30 years in prison for the two men who cooperated. The man sentenced to 30 years, George Dasch, was double-crossed by FBI Director J. Edgar Hoover and A.G. Biddle, who had promised him a six month sentence and a full presidential pardon for his cooperation.

On August 8, just seven days after the trial concluded, the death sentences were carried

out when the six men were electrocuted. Only seven weeks had passed from the first man's arrest on June 17 to the carrying out of the death sentences — and that included time-out for the Supreme Court's review! There was so much secrecy surrounding the case that the executions weren't publicly reported until several weeks after they were carried out.

Royall bluntly described the entire process of the men's prosecution under Roosevelt's proclamation as a "legal lynching." (p. 268) He had argued to the tribunal that the men hadn't actually done anything except illegally enter the country, and there was no proof the men — who were all amateurs — would have been able to carry out any acts of sabotage. He told the tribunal, "A man who had a pistol 'with intent to kill' would be fined no more than \$50 in most jurisdictions."² O'Donnell's opinion of the proceedings legality is summed up in his title for the chapter about the trial, "Kangaroo Court" (chapter 14).

The general shadiness of the entire process used to prosecute the eight men is indicated by the fact the Supreme Court's written decision in *Ex Parte Quirin* is officially dated July 31, 1942 — the date the oral decision was announced, and eight days before the six condemned to death were executed. However the decision wasn't actually issued until October 29, 1942 — 82 days after the executions.

So no one knew the reasons the Supreme Court rejected the men's habeas petition until they had been dead for almost three months. Justice Black's law clerk was so disturbed by the way the case was handled that he said, "If the judges are to run a court of law and not a butcher shop, the reasons for killing a man should be expressed before he is dead; otherwise the proceedings are purely military and not for courts at all."³

In Time of War also explores in depth another major denial of due process rights in the U.S. during WWII — Roosevelt's February 1942 Executive Order 9066 — which enabled the military's summary imprisonment of almost 120,000 Japanese-Americans without the indictment, trial, conviction or sentencing of a single one of them. (See, *In Memoriam - Fred Korematsu 1919-2005*, *Justice Denied*, Spring 2005, Issue 28, p. 5)

To demonstrate that we are now experiencing a déjà vu like repetition of events, O'Donnell explains at length the similarities between the justification for, and implementation of Roosevelt's Proclamation 2561, and President Bush's November 13, 2001, "Order concerning the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Ter-

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rorism (66 Fed. Reg. 57,833). Just as the purpose of Roosevelt's proclamation was to circumvent fundamental due process principles of American and military law to ensure that defendants prosecuted under it would be convicted, substantial evidence has come to light since O'Donnell's book was published in June 2005, that Bush's order is intended to serve the same purpose. (See, Guantanamo Trials Rigged – Claim Three Prosecutors, on page 14 of this issue of *Justice:Denied*.) Quite frankly, the only reason to deny a person the ability to effectively defend him or herself is to ensure the person's conviction.

In 1942, defense attorney Royall considered the entire military tribunal process to be "an undeclared war on the rule of law." (p. 149) O'Donnell thinks we are experiencing the same thing today. However he is hopeful the eventual result will be different, and "that the federal judiciary will eventually force the total dismantling of President Bush's "black hole" at Guantanamo Bay. In its place the United States should resort to the highly regarded Uniform Code of Military Justice. Then – and only then will America be able to begin to reclaim its leadership role as a champion of human rights and the rule of law." (p. 365)

In Time of War is a very readable book written to be clearly understandable by lay people interested in history and current events, as well as readers curious about the legal cases it discusses. Befitting O'Donnell's status as a distinguished lawyer, the book is replete with many hundreds of footnotes for people wanting to verify his sources or who want to do further research.

In Time of War is available for purchase from *Justice:Denied's* Innocents Bookshop at, <http://justicedenied.org/books.htm>.

Endnotes:

1. *Saboteurs: The Nazi Raid on America*, Michael Dobbs (Vintage 2004). *Saboteurs* focuses on the details of the events surrounding the eight men prior to and after their entry into the U.S., and what happened to the two who weren't executed.)

2. *Id.*

3. *Id.* at 264-265.



Ex-Gitmo cont. from page 14

after his trial, "He was acquitted because nothing could be proven against him."

As of the summer of 2005, eleven Kuwaitis remain imprisoned indefinitely without charges at Guantanamo Bay.

Source: Ex-Gitmo Inmate Acquitted of All Charges, Diana Elias, *Associated Press*, June 29, 2005. Ex-Guantanamo prisoner didn't know of 9/11, *China Daily*, April 15, 2004.



Wenatchee cont. From page 12

and extensive "sex-ring." Perez was provided critical aid by the Washington Department of Human Services — which duly removed the children of accused and convicted parents from their home. Local prosecutors also aided Perez by uncritically examining the evidence of alleged child abuse by dozens of people prior to pursuing criminal charges against those people.

In 1998 the *Seattle Post-Intelligencer* published a week-long series of 12 articles about the cases titled "The Power to Harm." The articles documented that the abuse that occurred in Wenatchee wasn't by the accused parents against their own and other children - but by the city of Wenatchee and Chelan and Douglas counties in prosecuting the people for fictitious crimes, with the support of the Washington DHS. The articles had titles that included, "With every step, rights were trampled," "Lies, lies and more lies," says jailed man," "Lives ruined because lessons ignored." "The Power to Harm" series can be read on the *Post-Intelligencer's* website at, <http://seattlepi.com>.

Throughout the years from the first arrests through the appeals of convictions, city, county and state authorities defended their actions as appropriate, even as the insubstantial legal basis for the prosecutions was publicly laid bare.

Five of the defendants served the full-term of their sentence, several were released after their convictions were vacated, and several others who didn't want to sit in prison for the years that their appeal might last, agreed to plead guilty to a lesser charge in exchange for their immediate release. The last "sex-ring" defendant was released in December 2000 after his conviction was reversed. He had been wrongly imprisoned for six years.

In 1998 members of three families that had either been acquitted or had "sex-ring" charges dismissed, filed a \$20 million lawsuit in state court seeking compensation related to having been falsely accused of being serial child abusers and rapists. Two of the acquitted defendants who sued were Reverend Robert Roberson and his wife Connie. The Roberson's were targeted for their wrongful prosecution after they publicly questioned the truthfulness of the charges filed against the alleged "sex-ring" members, many of whom attended their East Wenatchee church.

In addition to the city of Wenatchee and Chelan County, the suit named Wenatchee Det. Bob Perez and police Chief Ken Badgley as defendants. Prior to the trial held in

Seattle in 1998, the judge ordered the removal of Perez and Badgley as defendants, and Wenatchee didn't provide the plaintiffs with Perez's employment records. The plaintiffs lost at trial and appealed on multiple grounds, including that the judge erred by removing Perez and Badgley as defendants, and that Wenatchee had improperly withheld Perez's employment records.

In November 2002 Spokane County Superior Court Judge Michael Donohue ruled that Perez and Badgley had been improperly removed as defendants, and that Wenatchee had deliberately withheld Perez's employment records from the plaintiffs and the trial court. The judge also ruled that since those records were key evidence that Wenatchee knew could have changed the trial's outcome, he ordered the city to pay a fine of \$718,000.

It is now known why Wenatchee didn't want to disclose Perez's employment records: "*they show he was suffering from a serious mental disability at the time he conducted the investigations.*"¹ Perez's employment file also documents that at the time he was involved in the "sex-ring" investigations, "*police officials expressed concerns about Perez's fitness for duty.*"²

In August 2005 the state Court of Appeals upheld Judge Donohue's decision, and in September 2005 the Washington Supreme Court declined to review the decision.

After the Supreme Court announced it was letting the lower court decision stand, Tyler Firkins, one of the plaintiff's attorneys said, "They are really excited about the possibility to get some justice."³

Wenatchee's lawyer, Patrick McMahon, said, "We're exploring what our options are."⁴

The case will now be scheduled for a retrial with Perez and Badgley as defendants, and Perez's employment records as evidence. Unless a settlement can be agreed to, the case will be retried with the jury's exposure to Perez's unfavorable employment records, and intense questioning of Perez and Badgley about presently undisclosed details about how and why the "sex-ring" investigations spun out of control instead of being shelved before the first person was prosecuted.

Endnotes and sources:

1. High Court Declines To Consider Judgment Against The City of Wenatchee, AP, *Seattle Post-Intelligencer*, September 10, 2005.

2. *Id.*

3. Sex-ring ruling may cost Wenatchee \$1 million, Mike Barber, *Seattle Post-Intelligencer*, September 10, 2005, p. B1, B4.

4. *Id.*



Short continued from page 7

have taken on my complex Aggravated Sexual Assault and Kidnapping case. During our only private conversation my lawyer told me, "We have nothing, they have everything." He refused to listen to me telling him that I did not do this crime. He said, "Do not try to change your story at this stage of the game." I explained that I called his wife and I wrote him two letters about my case months ago. He told me he received them. I knew after talking with my attorney that he was not defending me. He had not even begun preparing for my trial. At the end of our 30-minute meeting he told me he was going to get the case postponed because of flaws in the indictment.

On the morning of my trial – which my lawyer told me would be postponed – the bailiff pushed a black ball of clothes through the bars of the holding cell I was in, and told me to get dressed because, "you are picking a jury." I said "no, according to my lawyer we are getting a postponement." The bailiff then told me, "your lawyer is in the court room – get dressed." The suit my girlfriend bought me did not fit. It was too short and I had put on weight so the waist was too small. The bailiff refused my black socks so it had to be bright white socks in pants 5 inches too short.

When my lawyer finally came to the holding cell — that had 15 prisoners in it — two prisoners were at the cell doors talking to their lawyer. My lawyer called out my name and said, "You have a one-time offer of 20 years, you have 15 minutes to decide the fate of the rest of your life." One of the lawyers by the cell door looked at my lawyer and walked away. I moved up and said, "What are you talking about? What about the DNA evidence? It will prove I did not do this." He told me the assistant district attorney said the DNA test came back inconclusive, and she would use the percentages to convince the jury that inconclusive meant the physical evidence "could have" come from me. He also stated the prosecution had 32 witnesses waiting in the courthouse hallway. I told him I had just walked through the hallway and I only saw three people. He then said, "They are in the court room then." I told him that I looked into the courtroom as I walked by and I saw three or four people. To which he yelled: "They're in the jury room then!" He looked at his watch and said, "you have 10 minutes left," and walked away. All the inmates in the holding tank started saying all sorts of things like, "That dude is selling you out." They were all shocked when I told them I paid him \$20,000.

When my lawyer came back, the holding cell became quiet. He told me, "You have 5 minutes left." He said that if I took the plea I

would only do 5 years, 6 years max, and be out. But if I didn't take it I would get a life sentence and die in prison. I would never hold my son as a young boy, never go fishing or even attend a birthday party. He ended with, "You will die in prison." I replied, "I did not do this crime." He responded, "Just chalk it up to one of the crimes you got away with." He again told me the prosecution had 32 witnesses, and "they have everything and we have nothing." I realized he had done absolutely nothing. He was going to let me go to trial completely unprepared.

Although I wasn't charged with killing my ex-wife, the prosecution was alleging that I had done so. Yet my lawyer didn't even contact my ex-wife so she could appear and testify that she was not dead. He also didn't bother to do a background check on any of the prosecution witnesses. Not even the witnesses whose testimony was intended to provide evidence for the State of an extraneous offense. Just being arrested of something but not convicted, or a statement made by an extreme alcoholic or a drug dealer about something unrelated to what I was charged with, was going to be presented as fact at my trial. I have to believe that a first year law student would have prepared to impeach that testimony and those statements. But my lawyer did absolutely nothing.

At the time of my prosecution the Court ordered that the physical evidence be tested for the presence of my DNA, and my lawyer told me the results of those tests were inconclusive. I found that was a grotesque lie. The DNA tests were never performed. Someone canceled the tests.

Knowing my lawyer's ineptitude and lack of preparation, I knew he was telling the truth that I was going to lose if I went to trial — and that I was likely to get life. So I caved and took the deal for 20 years.

That was in 1996. Several years ago I filed a *pro se* motion under Texas' DNA law to have the physical evidence in the assault of Celeste P. tested for the presence of my DNA. As a result of filing the motion I learned something absolutely shocking. At the time of my prosecution the Court ordered that the physical evidence be tested for the presence of my DNA, and my lawyer told me the results of those tests were inconclusive. I found that was a grotesque lie. *The DNA tests were never performed. Someone canceled the tests.*

After a year of battling the DA's office opposition to my motion, it was granted. The tests were performed by the Texas Department of Public Safety's Crime Laboratory, and their report dated June 10, 2004 plainly states:

Evidence Submitted: Pubic combings from victim's sexual assault evidence collection kit

Requested Analysis: Five hairs were present in the pubic hair combings.

Conclusion: Michael Short is excluded as the contributor of the hairs. (See crime lab report on page 32.)

I also discovered that I was taller, heavier, and my hair was a different color than the perpetrator described by the victim. The victim also told the police that the tow truck in which she was assaulted was orange – while mine was black and red! Celeste P. also said the alleged crime occurred during the daytime while she sat in the passenger seat. I have three unmistakable deformities on my penis that were not described by her, even though they would have been clearly visible in daylight from the right side where she said she sat. I didn't learn about Celeste P.'s description of her assailant and his vehicle – neither of which matched me (just as my DNA didn't match her attacker) – until after I had been imprisoned.

Relying on all the new evidence, and about 25 prongs of error and 55 designated issues to be resolved, I filed a *pro se* state writ of habeas corpus alleging constitutionally ineffective assistance of counsel. I also claimed constitutionally impermissible cruel and unusual punishment related to medical malpractice, medical neglect, and deliberate indifference to my terminal lung cancer condition. My nickname in the oncology hospital is "Lucky Dog," because my cancer is currently in remission after I was told 3-1/2 years ago that I had six months to live.

The District Attorney's office conceded that I had some valid issues in my writ. The judge also agreed and ordered the resolving of designated issues.

I had temporary help from a free world paralegal volunteer and a good jailhouse lawyer, that due to new prison rules, I can no longer correspond with for help. I have been writing to some innocence projects, but I know it is a long shot because there are so many innocent people that need help. I have been locked up since February 5, 1996 for a crime I didn't commit. If you think you can help me, or would like more information, you can write me at:

Michael Short 774048
Ramsey III Unit
1300 FM 655
Rosharon, TX 77583



TEXAS DEPARTMENT OF PUBLIC SAFETY CRIME LABORATORY Report Dated June 10, 2004 is on Page 32.

Kirkwood cont. from page 7

on the night of the robbery that the robber had no distinguishing marks.

The second prong was that at the time of the robbery he was at home in Shenango, 20 driving minutes across town from the store. Kirkwood lived with his parents, and his sister's wedding was scheduled for the upcoming Saturday, August 18. Six family members and friends who were gathered at the family home testified that Kirkwood was home at 7 p.m. on the evening of the robbery. The witnesses included his parents, sister, and family friends. Another alibi wit-

ness was Bill Fitts, owner of the oldest and largest car dealership in New Castle.

Fitts testified that on the day of the robbery he called the Kirkwood home to tell them that he had arranged for the family to use a Lincoln Town Car for the wedding. Justin Kirkwood's dad worked at Fitts' Ford dealership, so Fitts knew the members of the family. Fitts testified that Justin answered the phone and took the message about the car. He also testified he was certain the call was at 7 p.m., because immediately after the conversation he watched the 7 p.m. lottery picks on television.

During her cross-examination, Lawrence County District Attorney Birgitta Tolvanen denigrated the testimony of the witnesses who testified that at the time of the robbery they were with Kirkwood at the family's home. She even intimated that Kirkwood's sister — who had no criminal record — was lying to conceal that she was the robbery getaway driver.

Tolvanen didn't spare Fitts — a highly respected member of the community — from her vitriolic cross-examination technique. During her cross-examination, she waved a sheaf of his phone records in his face and asked him,

"Would you also be surprised, sir, that it shows ... no record of a telephone call being made to the Kirkwood residence on that day?"

Fitts response was, "I would be very surprised, because ... I did make the phone call." ¹

Although Kirkwood's attorney complained that the phone records hadn't been turned over to him during pre-trial discovery, he didn't move for a mistrial, object to their use, or request that he be given an opportunity to inspect them so he could re-direct his questioning of Fitts. Tolvanen didn't introduce the phone records into evidence, which she also re-

ferred to in her closing argument as undermining Fitts' credibility.

After 3-1/2 hours of deliberations the jury found Kirkwood guilty of armed robbery. He was perplexed at the verdict because of the complete dissimilarity between the eyewitness' police statements and their identification of him in court. He said, "They couldn't even describe me. [Its] not even right." ² Kirkwood was sentenced to 3-1/2 to 7 years in prison.

Although Kirkwood appealed his conviction, his family also contacted the Innocence Institute of Park Point University in Pittsburgh, which is a partnership between the University's Journalism Department and the *Pittsburgh Post-Gazette*.

The Innocence Institute accepted Kirkwood's case. Journalism students gathered information casting suspicion on the reliability of the prosecution's reliance on a mugshot to obtain the initial eyewitness identifications of Kirkwood as the robber. For example, "U.S. Department of Justice guidelines on eyewitness identification methods say mug books should be used only when other reliable sources of evidence have been exhausted, and the results should be evaluated with caution." ³ In contrast with those cautionary guidelines, Kirkwood was arrested after he was identified from his mugshot.

They also found that after Kirkwood was jailed, a series of similar robberies were committed in the area of the craft store by a robber who matched the clerk's original description of the craft store robber. He also used a long knife and fled on foot as did the craft store's robber. After his capture, that 20-year-old man — who lived blocks from the craft store — confessed to several armed robberies in New Castle before he hung himself at the Lawrence County jail.

Another 20-year-old white man generally matching the craft store robbers description is currently imprisoned after he confessed to five New Castle robberies, including twice robbing the convenience store across the street from the craft center. That man didn't respond to a letter sent to him by the Innocence Institute.

The students also obtained the phone records Tolvanen used to undermine Fitts' alibi testimony. They confirmed that Fitts' phone call to the Kirkwood residence wasn't on the phone bill. However they discovered it was missing because local calls were free calls and not listed. Yet Tolvanen's argument to the jury implied local calls were listed on Fitts' bill, and that his alleged call at 7 p.m. on August 14, 2002 was not among them.

Kirkwood continued on page 33

Michael Short's Crime Lab Report (excerpt showing DNA test result)

TEXAS DEPARTMENT OF PUBLIC SAFETY CRIME LABORATORY 12230 WEST ROAD HOUSTON, TEXAS 77065-4523

June 10, 2004

Larry Winkelmann
Harris County District Attorney
1201 Franklin, Suite 600
Houston, Texas 77002-1923

Laboratory Case No.	Agency Case No.	Offense Date
L2H-141831	54614695	05/15/95

Suspect(s)	Victim(s)
Short, Michael	P., Celeste

Offense: Sexual Assault
County of Offense: Harris (101)

Evidence Submitted

On December 11, 2003 in person by Larry Winkelmann:

1. Pubic combings from victim's sexual assault evidence collection kit
2. Blood sample from victim's sexual assault evidence collection kit
3. Blood sample from the suspect

Requested Analysis

Five hairs were present in the pubic hair combings.

The blood tube from the victim was swabbed. A blood stain card was made from the suspect's know blood sample.

Portions of the five hairs from the pubic hair combings were extracted by a method that yields DNA from tissue. A portion of the victim's blood tube swab and the suspect's blood card were extracted by a method that yields DNA from blood. The isolated DNA was subjected to the Polymerase Chain Reaction.

No DNA profile was obtained from hair #1 and the victim's blood tube swab.

The DNA profile from hair #2, hair #3, hair #4, and hair #5 is not consistent with the DNA profile of the suspect. **Michael Short is excluded as the contributor of the hairs.**

Kirkwood cont. from page 32

The trial judge denied a post-conviction motion for a new trial based on the new evidence. Kirkwood appealed to the Pennsylvania Superior Court. During oral arguments about the appeal's merits, Tolvanen "admitted she tricked Fitts with the telephone records she waved in front of him. She acknowledged that she knew the telephone records didn't contain local calls and that she had misled the jury."⁴

After she made that admission, Superior Court Judge John Bender responded, "Did you just say, 'It really doesn't show anything. I was just trying to trick him?'" She answered "yes."⁵

The Superior Court decided to send the case back to the trial court for an evidentiary hearing.

On August 10, 2005, Common Pleas Judge Dominick Motto — who presided over Kirkwood's trial — vacated Kirkwood's conviction and ordered a new trial. In his 24-page opinion the judge ruled that Assistant DA Tolvanen's use of the telephone record to trick defense witness Fitts and mislead the jury denied Kirkwood's right to a fair trial. He wrote,

"The question was clearly a ruse designed to confuse the witness by suggesting that the telephone record disputed his testimony, when in fact it did not. Although it is entirely proper to test the credibility of a witness, it is not proper to test the credibility of a witness by misrepresenting evidence."⁶

Judge Motto also ruled that Kirkwood's trial lawyer was ineffective for failing to object to Tolvanen's use of the records she waived in the air and failing to request to examine them. If he had done that, "the implication made by the prosecutor would have been clearly refuted."⁷ The judge ordered a retrial instead of dismissing the charges because he said Tolvanen's misconduct undermined the credibility of the witness, and not the court's credibility.

At the same time Judge Motto announced his ruling, he granted Kirkwood bail pending his retrial. He also ordered the Lawrence County sheriff to transport him back to New Castle from SCI Laurel Highlands in Somerset. However a day and a half later the sheriff hadn't dispatched a deputy to transport Kirkwood back to New Castle. So Kirkwood's lawyer persuaded the judge to allow his parents to pick him up. Kirkwood didn't know until he walked out of the prison that his parents, and not the sheriff, would be taking him back home.

As of mid-September 2005, the Lawrence County DA hasn't announced whether Kirk

Prosecutor Accused Of Using Fraud To Win Kirkwood's Conviction

By JD Staff

A complaint filed with the Pennsylvania Disciplinary Board of the state Supreme Court accuses Lawrence County Asst. D.A. Birgitta Tolvanen of committing fraud during Justin Kirkwood's 2003 armed robbery trial in New Castle, Pennsylvania.

Jonathan Solomon, president of the Lawrence County Bar Association, filed the complaint in May 2005 — three months before Kirkwood's conviction was vacated on August 10, 2005, and a new trial ordered on the same misconduct by Tolvanen that Solomon described in his complaint.

During Kirkwood's trial, Bill Fitts' — the owner of New Castle's largest and oldest car dealership — testified that he called Kirkwood's home and talked with him at the exact time the robbery was being committed 20 minutes across town. In an effort to undermine Fitts' credibility, during her cross-examination of him, Tolvanen waved a sheaf of his phone records in his face during her cross-examination, and asked,

"Would you also be surprised, sir, that it shows ... no record of a telephone call being made to the Kirkwood residence on that day?"

Fitts response was, "I would be very surprised, because ... I did make the phone call."¹

It was later discovered that Tolvanen deceived the jury, the judge, and Fitts, because his phone records only listed long distance calls, and a call from Fitts' house to Kirkwood's house is a local call.

Solomon wrote in his complaint, "the testimony of the witness impeached by Ms. Tolvanen was crucial to the defense, in light

wood will be retried or the charges dropped. Although they have spent most of their life savings paying for their son's lawyers, his parents have vowed to help him until he is exonerated. After he was released on bond his dad David said, "He's innocent. He's wrongly accused. We'll fight this thing to the end. He had a very unfair trial."⁸ His mother Debbie said, "I know he didn't do it. He was sitting in that kitchen with me and there's no way I'm giving up, no way."⁹

of the weakness of [other] evidence connecting the defendant to the crime.

"The district attorney's office has committed a fraud, not only upon the accused but also upon the court and upon the cause of justice. It is also an embarrassment to the legal profession."²

During the Pennsylvania Superior Court's October 2004 hearing of Kirkwood's appeal, Tolvanen admitted she deceived Fitts and misled the jury when she waved the phone records in his face and implied that if he had made the call to Kirkwood's home it would be listed on the bill.

When she made that admission, Superior Court Judge John Bender said, "Did you just say, 'It really doesn't show anything. I was just trying to trick him?'" She said yes.³

After the Superior Court sent the case back to the trial court for an evidentiary hearing, Kirkwood's conviction was vacated on the basis of Tolvanen's deception, and a new trial ordered. Kirkwood was released on bond after two years imprisonment.

Solomon's complaint also requested investigation of the Lawrence County district attorney's office for its failure to disclose to Kirkwood's attorney that the New Castle police officer who showed Kirkwood's photo to the eyewitnesses was under suspension for misconduct when he testified at Kirkwood's trial.

Solomon's complaint further requested investigation of allegations that a man who resembled Kirkwood and admitted committing other robberies near the craft store before he committed suicide at the Lawrence County Jail, may have confessed to the robbery Kirkwood was convicted of committing.

Endnotes and Sources:

1 Lawrence County Prosecutor Accused of Trial Misconduct, Bill Moushey, *Pittsburgh Post-Gazette*, May 24, 2005.

2 *Id.*

3 Kirkwood Robbery Case Brings Witnesses' Memories Into Question, Bill Moushey, *Pittsburgh Post-Gazette*, May 8, 2005.



Endnotes (Sources the same):

1 Kirkwood Robbery case brings witnesses' memories into question, by Bill Moushey and Nathan Crabbe, *Pittsburgh Post-Gazette*, May 8, 2005.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 New Castle Conviction Tossed Out, Bill Moushey, *Pittsburgh Post-Gazette*, August 11, 2005.

7 *Id.*

8 Convicted Man Gets New Trial, Debbie Wachter Morris, *New Castle News*, August 11, 2005.

9 New Castle Man Released From Prison After Judge Tosses Out 2003 Robbery Conviction, Bill Moushey, *Pittsburgh Post-Gazette*, August 13, 2005.



Weichel continued from page 9

During her lifetime, Gloria Weichel spoke periodically with her sister, the defendant's aunt, Lorrie Doddie ("Doddie") of Garden City, Michigan. Doddie testified credibly as to a telephone conversation that occurred during a twelve to twenty-four month period in 1982 and 1983, in which Gloria Weichel read Doddie a letter she had received appearing to be from a friend of the defendant. As Doddie recalled, the letter stated that the declarant was sorry and had not meant to hurt the defendant, but that the writer had killed the man for whom the defendant was convicted of murdering. Doddie further recalled her sister telling her that the letter appeared to have originated in California. During this same conversation, Gloria Weichel also told Doddie that two men she did not know had come to her South Boston home asking for the letter but that she did not give it to them. Based upon Doddie's credible testimony, I find that the defendant's mother expressed fear to her sister about the letter and the two men who came to her door.

Sometime around 1990, Gloria Weichel entrusted the alleged confession letter purportedly authored by Barrett to Frances Hurley ("Hurley"), an attorney and acquaintance of the defendant's family. Hurley testified that he first kept the letter, contents unknown to him, in a safe and later in a locked desk drawer in his professional office until some time after the death of Weichel's mother. Hurley testified credibly that it was his practice to hold letters and other documents for people he knew, often without being aware of the contents, as was the case with this letter. Hurley also testified that the defendant's friend, Don Lewis ("Lewis") contacted him in or around 2001-2002. Hurley stated that he did not learn the contents of the letter until after he received the defendant's permission to provide copies to Lewis and Jonathan Wells ("Wells"), a reporter from the Bos-

ton Herald. Additionally, Hurley testified that he delivered the original letter in its envelope to Carol Fitzsimmons, co-defense counsel for Weichel on this motion, around August of 2001.

Lewis, a family friend paying at least a portion of the defendant's legal fees, testified that he learned that Hurley was holding a letter for the then-deceased Gloria Weichel around the year 2002. Lewis recalled that Weichel had also been speaking with Wells and told Lewis that the letter "may have information to convince Wells that Weichel was innocent." At the direction of the defendant's counsel, Lewis held to original envelope and letter in his custody briefly before turning it over to Alan Robillard, the handwriting expert retained by the defendant.

Barrett's mother and siblings, Veronice, Anne Marie, and Paul Barrett, respectively, testified that Barrett moved to California, either Mill Valley or Sausalito, subsequent to the defendant's trial and conviction. Veronice Barrett recalled that her son wrote and called occasionally and was living with Weichel's friend, Sherry.

Weichel testified that Whitey Bulger ("Bulger") and Stephen "The Rifleman" Flemmi ("Flemmi") approached him approximately four times prior to his arrest and once after his arrest while he was released on bail and awaiting trial for LaMonica's murder. At the first meeting, which took place in Bulger's motor vehicle in front of Weichel's residence, Weichel testified that Bulger told him, "*I do not want you to bring up Tommy Barrett's name ever.*" Weichel further testified that *Bulger threatened to harm him or his family should the defendant disregard Bulger's warning.* Weichel understood that the visit was a warning to ensure that he never spoke of Barrett.

The positions of Bulger and Flemmi when they met with the defendant are relevant here; they were leaders of gangs that operated largely in South Boston during the 1970s and 1990s. Bulger and Flemmi operated gambling rackets and trafficked in narcotics and weapons. *Neither party disputes that Bulger and Flemmi were ruthless killers who used fear, intimidation, coercion, threats, and murder to hold the community of South Boston hostage. Their gangs worked with virtual impunity as the FBI protected and even aided Bulger, a confidential informant for the FBI.* In the mid-1990's Bulger fled authorities and remains at-large. Bulger has previously sat atop the FBI's most wanted list and remains on it currently. Flemmi is incarcerated and has assisted investigators in locating the bodies of people that he, Bulger, and their associates murdered.

Around 1982, the defendant claims that Gloria Weichel informed him that she had re-

ceived a letter from Barrett that year declaring the defendant's innocence. However, given Bulger's threats, the defendant stopped his mother before she could divulge the actual contents of the letter. Weichel made no further inquiry into the alleged letter until after his mother's death and Bulger's flight from law enforcement. Weichel indicated that he refused to confront the contents of the letter because of Bulger's threats. Weichel testified that it was not until 2001, after his mother's death and at which point Bulger was a "fugitive from justice," that he finally inquired and learned the contents of the letter in Hurley's possession.

On July 22, 2003, Barrett, who allegedly wrote the letter at issue in this case, took the witness stand and invoked his Fifth Amendment privilege against self-incrimination.

The defense presented a handwriting expert, Alan Robillard ("Robillard"), a former FBI agent specially trained in the field of Questioned Documents with a Masters Degree in Forensic Science from George Washington University, to testify as to his opinion about whether Barrett wrote the alleged confession letter and the envelope containing it. Robillard based his opinion on the examination and comparison of two questioned documents, the letter dated March 19, 1982, allegedly received by Gloria Weichel as well as the envelope containing it from Mill Valley, California. After examining, testing, and comparing the two questioned documents with five known documents, including: two letters (one dated April 16, 1982), three envelopes that Barrett sent to Weichel after the defendant's incarceration, and two photocopied applications for a boxing license in California purportedly signed by Barrett, Robillard opined that it was highly probable that Barrett signed the questioned documents. Robillard's testimony was credible and believable; I find that Barrett wrote the letter and envelope at issue in this motion for a new trial.

BARRETT'S MURDER CONFESSION TO ROBB

Robb, a social worker from Glendale, California, testified on July 31 and September 15, 2003. Robb stated that she worked in and around the South Boston area in the early to mid-1970's. At that time, Robb testified that she knew the defendant and was familiar with Barrett. For a period of time while still in Boston and before she moved to Sausalito, California in the late 1970's or early 1980's. Robb and Weichel had a romantic relationship. In the summer or early fall of 1980, the defendant called Robb in Sausalito and told her that Barrett was in trouble: the defendant did not elaborate. The defendant asked Robb if Barrett could stay with her because Barrett had

Weichel continued on page 35

"Whitey" Bulger On Run For 11 Years

In December 1994, Boston mobster James "Whitey" Bulger, whose illegal activities had been protected for decades by the FBI, was tipped off by an FBI agent that he was about to be federally indicted for 21 murders and assorted other charges.

Bulger has eluded capture for almost 11 years, even though he is on the FBI's Most Wanted list and there is a \$1 million dollar reward on his head — and he isn't traveling light, since he is reportedly accompanied by his long-time girlfriend.

In August 2005 it was reported that Bulger has repeatedly been tipped off when close to capture. That indicates FBI personnel are continuing to protect him. Considering Bulger's willingness to use violence and the umbrella of protection provided by his well-connected friends, Frederick Weichel had good reason to heed his warnings to remain silent.

Source: Rat: Tips foiled feds' efforts to nab Whitey, *Boston Herald*, August 23, 2005.
10 years, six continents, still no 'Whitey', *Baltimore Sun*, August 28, 2005.

Weichel continued from page 34

to get out of South Boston. Robb agreed and Barrett arrived at her home shortly thereafter.

Barrett stay with Robb and her roommate continuously over the next two or three months. About a year or a year and a half later, Barrett stayed with Robb again, this time in Mill Valley, California, for a two or three week period. She remained in contact with Barrett through the 1980's and even lived with him for six months in a house that Barrett's mother and Robb owned in Larchmont, California. When their co-habitation terminated in Larchmont, Robb never saw or heard from Barrett again.

Over the course of many face-to-face and telephone conversations, *Barrett told Robb that he "wanted to kill himself because someone was taking the rap for something that he did."* Barrett further told Robb that it was Weichel who was wrongly accused and in prison and that Barrett had in fact killed someone. Robb testified that she "pieced it together," that Barrett had committed the crime for which the defendant was convicted and incarcerated. Robb stated that she urged Barrett to "do the right thing," but that she never discussed Barrett's claims with his family or anyone else. Robb testified that the only time she referenced Barrett's statements to Weichel was during a conversation they had after the defendant had been in prison for "awhile" when she asked, "how could a friend not come forth?" According to Robb, that was the extent of their conversation about Barrett's statements to her. I find Robb's testimony to be credible.

I find the defendant's testimony that he was unaware of the contents of the letter to be credible. Although the defendant knew of the letter's existence for over twenty years prior to his filing a motion for a new trial, he did not know the letter's import. The backdrop of South Boston provides the context which buttresses Weichel's credibility. *The defendant was accused of murder and received five visits from Bulger and Flemmi. During those visits, Bulger made it abundantly clear that Tommy Barrett was a name that Weichel was not to utter. The forch behind Bulger's admonition derived from his reputation for ruthlessness and violence earned by terrorizing the South Boston community. Bulger's threats were not empty.*

When Gloria Weichel approached her son with news of a letter written by Barrett, Weichel did not want to discuss it. It is fair to infer that at the time Gloria Weichel told her son about the letter, Bulger's threats to him were fresh; Weichel had been convicted of murder just months earlier. Bulger's words would have been at the peak of their potency, given that Weichel had only been incarcerated for a few months. It is credible that Weichel would not have inquired

about the contents of the letter at that point, and that he did not do so until 2001.

A. NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE

"A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of conviction." Evidence is newly discovered if it is unknown to the defendant and not reasonably discoverable by the defendant at the time of trial or at an earlier motion for a new trial. Evidence casts real doubt on the justice of the conviction if there is "a substantial risk that the jury would have reached a different result if the evidence had been admitted a trial."

1. The Letter

In considering the defendant's motion for a new trial, the court must determine whether Weichel knew or reasonably could have discovered the exculpatory content within Barrett's March 19, 1982 letter. In assessing whether evidence is "newly discovered", the court should consider whether the defendant has proved that the evidence could not have been discovered with reasonable diligence.

This is not a case where the defendant knew about the evidence prior to trial. Some time after his trial, Weichel did learn about the existence of a letter from Barrett to his mother, however, the court finds and rules that Weichel did not know the letter's contents. Still, whether the defendant could have reasonably discovered the exculpatory content of the letter, requires more analysis.

In this case, the effects of Bulger's threats, the undisputed and widely known reputation earned by Whitey Bulger, reasonably and readily prevented Weichel from learning about and making use of the exculpatory evidence contained in Barrett's letter. Bulger's iron grip on the South Boston community in the 1970s and 1980s is without doubt. Bulger personally appeared at the defendant's home five times to threaten not only the defendant's life but the lives of his family as well. In addition, two unidentified men paid a visit to Weichel's mother at her home seeking the letter. Even if the defendant had the opportunity to discover the contents of Barrett's letter, his and his mother's reasonable fear provide strong support for his ignorance. Given the intense fear and intimidation the defendant faced at the hands of Bulger and Flemmi, it was reasonable for Weichel to be afraid for himself and especially for his family and decide not to uncover the content contained in Barrett's letter.

2. Barrett's Oral Confession To Robb

Barrett's confession to Robb that he killed LaMonica also constitutes newly-discovered evidence. Weichel's council on his motion for a new trial did not discover that Robb had information relating to the defendant's case until after the evidentiary hearing had begun, and there is no evidence that Weichel had any reason to believe that Robb possessed exculpatory evidence.

B. ADMISSIBILITY OF THE EVIDENCE

Though newly discovered and material, both Barrett's March 19, 1982, letter and his statements to Robb are hearsay, and as such, their admissibility must be established under the statement against penal interest exception to the hearsay rule.

Hearsay evidence is admissible as a statement against penal interest if three elements are met: "(1) [T]he declarant's testimony must be unavailable; (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable man in his position would not have made the statement unless he believed it to be true; and (3) the statement, if offered to exculpate the accused, must be corroborated by circumstances clearly indicating its trustworthiness. These requirements provide "strong safeguards" against "the hazards of fabrication or unreliability with respect to" statements against a declarant's penal interest.

In this case, the first element to the statement against penal interest exception to the hearsay rule is satisfied because Barrett's invocation of his constitutional right against self-incrimination at the hearing on the defendant's motion for a new trial renders Barrett's testimony unavailable. Regarding the second element, the court must consider not only whether Barrett's oral and written statements were against his interest but also whether Barrett was aware that they were against his interest, since it is the knowing risk of likely harm to the declarant that makes statements against interest inherently reliable.

Barrett's March 19, 1982, letter was clearly against his interest. In the letter, written just months after Weichel's conviction, Barrett directly inculcates himself in LaMonica's murder. Detective Sprague questioned Barrett in the aftermath of LaMonica's murder and even produced a composite drawing of Barrett. So Barrett was clearly aware that he was a suspect in the case. Still, the extent to which Barrett believed that sending a letter to Gloria Weichel after Weichel's conviction would subject him to criminal liability presents a separate question.

I find that Barrett reasonably believed that the defendant's mother could and would alert the police to his letter.

Weichel continued on page 36

Weichel continued from page 35

Barrett's statement to Robb about LaMonica's murder were also against his interest. Barrett could have reasonably believed that Robb would inform the police of Barrett's confession, thereby subjecting him to criminal liability. Robb had dated the defendant and maintained a platonic relationship with him after she left Boston. In fact, Weichel was the person who arranged for Barrett to stay with Robb in California. I would have been clear to Barrett that Robb's loyalty was likely to have been with Weichel and not with him.

Consequently, since the defendant offers Barrett's oral and written statements to exculpate himself and inculpate Barrett, the central question for this court on the issue of admissibility is whether the defendant has shown the Barrett's statements are sufficiently corroborated "by circumstances clearly indicating (their) trustworthiness." Such inquiry ensures that fabricated exculpatory evidence is not introduced.

In assessing whether corroborating circumstances indicate the trustworthiness of an out-of-court statement, a judge should not attempt to determine whether the statement is true, but rather, "whether, in light of the other evidence already adduced or to be adduced, there is some reasonable likelihood that the statement could be true".

Finally, a judge should consider: whether the statement was made spontaneously; whether other people heard the out-of-court statement; whether there is any apparent motive for the declarant to misrepresent the matter; and whether and in what circumstances the statement was repeated"

Massachusetts courts have used these factors numerous times to determine the admissibility of hearsay declarations. In *Commonwealth v. Galloway*, 404 Mass. 204, 208-209 (1989), the SJC held that the trial judge should have allowed three witnesses to testify at trial about the declarant's statement that he committed the crime for which his cousin was being tried. 404 Mass. at 209.

The Massachusetts Appeals Court also found sufficient corroboration to merit the admissibility of a confession under the statement against penal interest exception to the hearsay rule. In *Commonwealth v. Fiore*, 53 Mass. App. Ct. 785, 791 (2002), the Appeals Court found that the admission by the defendant's husband that he may have started the fire for which she was convicted of arson was admissible as a statement against penal interest. In reversing the defendant's conviction, the Appeals Court concluded that the Commonwealth's failure to present evidence that an accelerant was used, its failure to place the defendant at the source of

the fire, and testimony placing the declarant at the source of the fire shortly before it was discovered, sufficiently corroborated the husband's statement. *Id.* at 791-792.

Federal courts have identified three additional factors consider in-determining whether adequate corroboration supports a hearsay statement's admissibility: (1) the closeness of the relationships between the parties involved; (2) whether the declarant made the statement after Miranda warnings were given; and (3) whether the declarant made the statement to curry favor with authorities.

In applying these factors to this case, the circumstances in which Barrett confessed to LaMonica's murder indicate their trustworthiness. Barrett clearly had reason to believe that he was both a suspect and co-suspect in the LaMonica homicide. Barrett was also familiar with the law; Detective Sprague detailed Barrett's legal rights for him. Furthermore, Barrett's inculpatory statements came shortly after Weichel's conviction and without currying favor with anyone. Consequently, the fact that Barrett's oral and written confessions occurred after he had fled to California and amidst a homicide case that was still relatively fresh, makes it unlikely that Barrett would expose himself to criminal liability by lying about his involvement in LaMonica's murder.

Further enhancing their reliability, Barrett's confessions were repeated; Barrett's essentially identical statements to Gloria Weichel and Robb corroborate each other. Moreover, Barrett's retelling of the story indicates his awareness of his actions and supports the contention that Barrett's confession to Robb stemmed from his grief and guilt over the fact that Weichel was serving what should have been Barrett's time in prison.

In carefully applying the factors set forth above to the evidence as presented through witness testimony, exhibits, arguments by counsel during the hearing on the defendant's motion for a new trial, as well as the trial transcript, I find and rule that both Barrett's written and oral confessions would be admissible at trial. The totality of the circumstances of this case, clearly show that Barrett had little to gain and much to lose by confessing to the murder of Robert LaMonica. Given the unlikelihood that Barrett would fabricate a story and risk criminal liability by twice repeating it to two people who were loyal to the defendant. I find that sufficient corroboration merits the admissibility of Barrett's confessions.

C. WHETHER THE NEWLY DISCOVERED EVIDENCE CASTS REAL DOUBT ON THE JUSTICE OF WEICHEL'S CONVICTION

In addition to showing that the evidence is newly discovered, a defendant seeking a new trial based on newly discovered evidence must also show that the evidence casts real doubt on the justice of the conviction. A defendant meets this burden by demonstrating that the purported newly discovered evidence is both credible, material, and carries "a measure of strength in support of the defendant's position." In assessing whether newly discovered evidence casts doubt on the defendant's conviction, the determination for the court is "not whether the verdict would have been different, but rather, whether the new evidence would probably have been a real factor in the jury's deliberations." Consequently, the strength of the case supporting the defendant's conviction at trial is relevant in assessing the materiality of the evidence.

The case against [Weichel] was not one of overwhelming evidence of guilt; it was an identification case in which only one of four eyewitnesses on the scene, Foley, was able to identify the defendant, and with *only seconds*, late at night, to make the observations. Beyond that, however, the evidence of guilty was thin. A gun was found nearby that was consistent with bullets that shot the victim but nothing linked the defendant to that weapon. There was no other evidence; no weapon, fingerprints, or vehicle identification connecting the defendant to the crime.

Both Barrett's written and oral confessions cast real doubt on the justice of Weichel's conviction, especially since the conviction was not based on overwhelming evidence of guilt. The exculpatory evidence contained in Barrett's letter to the defendant's mother and in his confession to Robb were not available at trial. Since Weichel did not have the opportunity to present this exculpatory evidence to the jury, he is entitled to that opportunity now, in order to receive a fair trial, and because the newly discovered evidence casts doubt on the conviction.

The court notes that *either Barrett's letter or his statements to Robb*, taken alone, are enough to merit a new trial in this case. All of the evidence together provides particular strength to its weight.

The court ORDERS that the defendant's motion for a new trial is ALLOWED.

Isaac Borenstein
Justice of the Superior Court
Dated: October 25, 2004

Frederick Weichel can be written at,

Frederick Weichel W38409
MCI Shirley
PO Box 1218
Shirley, MA 01464



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fice, I expected there would at least be a minimal effort to establish a fair process and diligently prepare cases against significant accused. Instead, I find a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged. You have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees and that we only needed to worry about building a record for the review panel.”³

Capt. Carr also wrote that “an environment of secrecy, deceit and dishonesty” pervaded the Guantanamo prosecutors office, and that defendants weren’t provided with exculpatory evidence that was in documents conveniently withheld from disclosure for national security reasons by the Central Intelligence Agency.

Capt. Carr suggested that prosecutors had been advised to avoid making a written record of sensitive comments and concerns, and that prosecutors were advising the “appointing authority” that was overseeing the trials, and which might rule on defense motions and requests. He wrote that practice created “a potential appearance of partiality.”⁴

Capt. Carr furthermore stressed that notes by military staff and statements by detainees concerning torture and abuse disappeared. He wrote that an FBI agent, “related last week that he called and spoke to Cmdr. Lang about the *systemic destruction of statements by detainees*, and Cmdr. Lang said that did not raise any issues.”⁵

In summarizing his concerns to his superior, Capt. Carr wrote that the actions in the prosecutors office “may constitute dereliction of duty, false official statements or other criminal conduct.”⁶

After being transferred soon after his March 11, 2004, email, Captain Carr was promoted to Major. He now handles civil litigation at the Pentagon.

A third prosecutor, Air Force Captain Carrie Wolf shared the concerns about the unfairness of the Guantanamo Bay trial process expressed by Maj. Preston and Capt. Carr. She was also transferred to a different assignment.

In a memo he distributed around the Guantanamo prosecutors office, the chief prosecutor, Army Colonel Frederick Borch, described the allegations of the three prosecutors as “monstrous lies.”⁷ After conducting an internal investigation, the Pentagon determined no evi-

dence supported the officers claims of criminal misconduct and ethical violations. As of early September 2005, that report has not been made public. A month after the prosecutors made their concerns known, and after they were forwarded to the Pentagon, Col. Borch was reassigned to the Army’s Judge Advocate General’s School in Charlottesville, VA. Soon thereafter he retired from the military. He is currently employed as the Clerk of the Court for the U.S. District Court in Raleigh, N.C.

Although denied by the Pentagon, many of the allegations in the emails of the concerned prosecutors — who stood to be virtually guaranteed of garnering convictions by the tactics they exposed — were similar to those expressed by defense lawyers for the detainees and groups like Amnesty International, Human Rights Watch, and even the American Bar Association. The ACLU issued a statement, “Clearly the concerns raised by these two confirm what we’ve been saying from the beginning: (the Pentagon) rigged the system to render the result the Bush administration wants, which is conviction of these first accused, at any cost.”⁸

The rules for the terrorism tribunals constitute a body of law that is distinct from military and civilian law. Among other things, they allow witnesses to anonymously testify for the prosecution, and information is admissible as evidence if the presiding judge determines it is “probative to a reasonable person.” Under that minimal standard, e.g., hearsay evidence that is inadmissible under military or civilian law will be admissible. As of September 2005 it is in a gray zone as to whether a confession or other admissions obtained through coercion or torture will be admissible.

Four detainee trials began in August 2004 at Guantanamo Bay. One of those men, Salim Ahmed Hamdan, filed a habeas corpus petition challenging the legality of his prosecution. He claimed the proceedings violated Constitutional due process protections and U.S. treaty obligations under the Geneva Conventions. The trials were halted in November 2004 when a federal judge granted Hamdan’s habeas petition. The government appealed, and in July 2005 a three-judge panel of the D.C. Circuit Court of Appeals unanimously reversed the lower courts ruling. That panel, which included Supreme Court Chief Justice nominee John Roberts, ruled, “... the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court.”⁹ The *Hamdan* decision relies in part on the Supreme Court’s 1942 ruling in *Ex Parte Quirin* 317 U.S. 1 (1942), in which the Court ruled eight men arrested in the U.S., including two U.S. citizens, could be tried by a secret military tribunal in Washington D.C. under rules that

included depriving them of a public trial by jury, or any means of appealing their conviction or sentence. Six of the eight men were executed in Washington D.C., days after their conviction. (See, *In Time of War*, on page 14 of this issue of *Justice:Denied*.)

Since Hamdan cannot enforce the Geneva Convention’s mandates of prisoner treatment, under the Circuit Court’s ruling there is no bar to the conducting of his trial, and that of other U.S. detainees at Guantanamo and elsewhere, in a manner that violates the letter and the spirit of the Convention’s due process protections. Hamdan has appealed the ruling to the Supreme Court, but as of mid-September 2005 it hasn’t been announced if it will review the decision.

As of early September 2005 the Pentagon has not announced when the trials will resume.

Australian David Hicks is one of the four detainees whose trial was stopped. He was arrested in Afghanistan allegedly aiding the Taliban. After the prosecutor’s emails were made public, his defense lawyer said, “For the first time, we’re seeing that concerns about the fairness of the military commissions extend to the heart of the process.”¹⁰ Hicks’ father said, These commissions weren’t set up to release people. These commissions were set up to make sure they were prosecuted and get the time that they give them, and the other thing we’ve said all along, that we believe that this system has been rigged as they call it.”¹¹

Endnotes:

- 1 Leaked Emails Claim Guantanamo Trials Rigged, Leigh Sales, *Australian Broadcast Corporation*, August 1, 2005.
- 2 *Id.*
- 3 *Id.*
- 4 Two Prosecutors At Guantanamo Quit in Protest, Jess Bravin, *Wall Street Journal*, August 1, 2005, p. B1.
- 5 *Id.*
- 6 Two Prosecutors Faulted Trials for Detainees, Neil A. Lewis, *New York Times*, August 1, 2005.
- 7 *Id.*
- 8 Ex-Military Prosecutors Fault Gitmo Trials, AP, *New York Times*, August 2, 2005.
- 9 *Hamdan v. Rumsfeld*, No. 04-5393 (D.C.Cir. 07/15/2005); 2005.CDC.0000166, ¶58 <<http://www.versuslaw.com>>
- 10 Leaked Emails Claim Guantanamo Trials Rigged, *supra*.
- 11 *Id.*

Other Source: Third Prosecutor Critical of Guantanamo Trials, Leigh Sales, *Australian Broadcast Corporation*, August 3, 2005.



Justice:Denied Disclaimer

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

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they were convinced of his guilt. An intruder killed his mother, he protested, to no avail.

Lisker's efforts to convince the Van Nuys police that he was simply the person who found his mother after she was attacked proved futile. The detectives, especially Monsue, thought there were too many holes in Lisker's story. Detectives noted that "at the conclusion of the interview there were numerous discrepancies in what Bruce Lisker told detectives" as well as what they believed to be lies. Why didn't he just smash the glass to gain entry into the house? Police said that Lisker could not have seen his mother lying on the floor through the windows at the rear of the house due to the glare of the morning sun. Besides, furniture and a planter would have obstructed the view.

Police had Lisker remove his clothing and took his shoe impressions, clipped his fingernails and booked him for murder. He was put into a police car and driven to Sylmar Juvenile Hall in the north San Fernando Valley. Bruce Lisker knew he was in trouble; he just didn't know how much.

The next morning he woke up alone in a small room with a guard sitting in the doorway to make sure he didn't commit suicide. He was placed on medication to counteract his drug addiction. His every move monitored, he couldn't even use the bathroom without being watched.

Lisker had a lot of idle time to think about who could have killed his mother. That first weekend, his dad came to visit him at juvenile hall, and together they believed they figured out who had killed Dorka Lisker.

Bob Lisker, Bruce's father, was visiting his son at juvenile hall just after the boy was booked for murder. Bob recalled a conversation he had with his wife, Dorka, the night before the murder. Dorka told Bob one of Bruce's friends, Mike Ryan, had come over, asking if he could do any odd jobs around the house in exchange for money. Bruce often did these odd jobs around his parent's home in Sherman Oaks, California, for money, and sometimes brought Ryan along so he could earn a few dollars as well. That particular day, Ryan showed up alone, and Dorka told him she had nothing for him to do.

Like Bruce, Ryan was also a drug addict going nowhere fast. The two had struck up a friendship while attending meetings for drug addiction rehabilitation in 1982. They shared a common bond: getting high. Ryan, also 17, was homeless and jobless. For half the rent, Lisker let his new friend sleep on his couch. The friendship ended after only a few months, when Ryan didn't pay his share of the rent as agreed and Lisker kicked him out. Ryan went to Mississippi.

Three weeks after the murder, ironically, on April Fools' Day, Van Nuys Police Detective Andrew Monsue paid a visit to Lisker at Sylmar Juvenile Hall. Lisker was desperate for the police to investigate Ryan for the murder; he had no evidence of his former friend's guilt, just a nagging suspicion. Bruce told the detective that Ryan had an unusual fascination with knives. Monsue said he would look into the whereabouts of Ryan on the morning of the murder. It was later determined that the detective did interview Ryan, but only so he could say he had cleared Ryan as a suspect so the prosecution of Lisker would not be derailed.

Ryan had been in Los Angeles for several days prior to the attack. He told Monsue that at the time Dorka Lisker was being beaten and stabbed to death, he was 12 miles away, in a knife fight with an unknown black male. He claimed to have stabbed the man in the shoulder. Ryan told the detective he had checked into a nearby motel that morning and hopped on a bus headed back to Mississippi the next morning. Monsue discovered that Ryan had checked in that afternoon, but had used the alias "Mark Smith." Unbelievably, Monsue never bothered to verify the alleged knife fight. The detective did do a records search on Ryan, but used the wrong birthdate. Had Monsue used the correct date, he would have found Ryan's conviction for a knife-point robbery, committed 10 months before Dorka Lisker's murder.

Monsue never shared the contents of his interview and investigation of Ryan's story with the prosecutor assigned to the Lisker case, Phillip Rabichow. Subsequently, this information was never given to Lisker's attorney, Dennis Mulcahy, who could have possibly used it to free his client.

Lisker Convicted of Mom's Murder

Mulcahy was not permitted to argue at Lisker's trial that Ryan was the real killer. No evidence had been presented to suggest that Ryan was even a suspect. The judge didn't believe there was a good-faith basis to allow the defense to pursue this theory. Alas, the jury never even heard the name Mike Ryan.

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Federal Magistrate Orders Hearing In Lisker Case

In July 2005 a U.S. Magistrate Judge in Los Angeles ordered an evidentiary hearing after reviewing Bruce Lisker's federal habeas corpus petition. Magistrate Ralph Zarefsky ruled that Lisker's petition makes a persuasive "preliminary" case that "he is innocent of the crime for which he has been convicted." The hearing was scheduled for October 2005.

Lisker will be presenting evidence that his trial jury didn't consider in convicting him.

Among that new evidence is the conclusion of both the LAPD crime lab and the FBI crime lab that a bloody shoe print found at the scene of his mother's murder was not made by Lisker's shoes. There is also new evidence about another suspect, and that a jailhouse informant was effectively working for the prosecution at the time he claimed that Lisker confessed to him.

The weight of the evidence

supporting Lisker's innocence is strong enough that his trial prosecutor recently told the *Los Angeles Times* that he has a "reasonable doubt" about Lisker's guilt.

The new evidence is also persuasive enough that at least seven jurors have told the *LA Times* that if they had known the information during his 1985 trial, they would have acquitted him.

Lisker is using the "actual innocence" exception to the filing deadline for a federal habeas petition. Since Lisker missed the deadline by seven years, he must convince Zarefsky of his innocence to qualify for a waiver of the deadline. If Zarefsky agrees with Lisker, then he will make a recommendation to a federal judge that the waiver be granted.

If the "actual innocence" exception to filing the petition is granted, then Lisker will

argue that his federally protected rights to due process, a fair trial, and effective assistance of counsel were denied.

The California Attorney General's office is opposing Lisker's petition, arguing that even if he presents a persuasive case that he is innocent, he is not entitled to an exception to the filing deadline.

Laurie Levenson, a professor at Loyola Law School in Los Angeles, said of the evidentiary hearing, "It's a first step. But I think his chances just went up dramatically. Somebody is going to hear him out. This gives him his shot."

A *LA Times* investigation that was reported on in the paper in May 2005, was instrumental in discovering some of the new evidence upon which Lisker's habeas petition is based.

Source: The man convicted in his mother's 1983 death will be able to present new evidence in the case, by Scott Glover and Matt Lait, *Los Angeles Times*, July 13, 2005

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During Lisker's trial, prosecutor Rabichow relied heavily on the evidence given to him by investigators, in particular Monsue. Rabichow convincingly relayed to the jury that the bloody footprints at the scene "resembled quite closely" those of Lisker. He explained to the jury how it would have been impossible for Lisker to see his mother lying on the floor simply by looking in the window, as he had claimed. Conveniently, there was a jailhouse snitch who came forward to testify that Lisker confessed to him; but that was just icing on the cake. Rabichow truly believed Lisker killed his mother, and the prosecutor would see that justice was served. When the jury came back with a verdict of guilty, Rabichow considered his job done.

Bob Lisker passed away in 1995. Bruce described his father as "a loving father and tireless supporter." Bruce writes on his website, www.freebruce.org, "My dad's memory fueled the next several years of progress towards justice in my mother's murder."

Lisker immersed himself in every legal document surrounding his case. In 2000, he discovered a 1998 letter to the parole board written by Monsue. In the letter, Monsue stated that the \$150 missing from Dorka Lisker's purse — money that had allegedly been taken during the attack — had been discovered in the attic above Bruce Lisker's old bedroom. Lisker hired a private investigator, Paul Ingels, who contacted the homeowners. They stated they had never found any money and had never even heard of Monsue, much less spoken to him. Two years ago, Lisker filed a petition claiming wrongful conviction and lodged a complaint with the internal affairs division of the Los Angeles Police Department, along with an epilogue of his case to date.

LAPD Cold Case Investigator Uncovers Exculpatory Evidence

Sgt. Jim Gavin was assigned in 2003 to look into Lisker's allegations. Gavin started from the beginning and attempted to reexamine all of the remaining evidence in the Lisker case.

He confirmed what private investigator Ingels had discovered: that the current owners of the Lisker residence had never found any money, and that Monsue had lied in his 1998 letter to the parole board. Once Gavin knew that Monsue had gone to such lengths to keep Lisker in prison, he started to question other facets of the case.

What Gavin uncovered was startling.

In 2003, 20 years after a jury found Bruce Lisker guilty of murder, Los Angeles Police Department (LAPD) Sgt. Jim Gavin was as-

signed to investigate allegations of wrongful conviction and a complaint against the department filed by Bruce in 2001. Bruce believed that Van Nuys Police Detective Andrew Monsue, who provided much of the evidence that helped convict him, had lied about key aspects of his case. From prison, Bruce immersed himself in research and hired a private investigator to verify Monsue's deception. Then Bruce filed his petition.

In reexamining the case, Gavin uncovered troubling errors. In the file were crime-scene photographs of bloody shoe prints, which had never been examined yet were attributed to Bruce at trial during Monsue's testimony. Gavin sent the prints for analysis and was informed that there was no way they were Bruce's. Then there was a phone call, made from the Lisker home in Sherman Oaks, Calif., around the time of the murder. The call was placed to a phone number that differed by only one digit from that of the mother of Mike Ryan, Bruce's former friend. Monsue later said he did not know about the phone call.

Bruce had met Ryan when they were both 17 and being treated for drug addiction. Ryan was jobless and homeless and Bruce had taken him in, but Bruce ended the friendship after a few months, because Ryan didn't pay his rent.

Bruce's mother had been beaten and stabbed to death; Bruce had told Monsue that Ryan had a fascination with knives. After the murder, Monsue interviewed Ryan, but his alibi was shaky. Reporters later found that Monsue had checked Ryan's criminal record, but had mistakenly searched on the wrong birthdate, so he did not learn that Ryan had been convicted for a knifepoint robbery just 10 months before Dorka Lisker's murder.

Ryan committed suicide in 1996, taking with him any chance Gavin would have of finding out if he really was the killer.

LAPD Stops Cold Case Investigation

In 2004, just as Gavin was digging deep, his superiors told him to end his reinvestigation of the case. Bruce Lisker was sent a letter by internal affairs stating his allegations were unsubstantiated and lacked merit. Monsue's supervisor, LAPD Capt. James Rupert, determined that an investigation into Monsue's alleged misconduct was "unfounded." Another investigation is ongoing to determine why Gavin was pulled off the investigation.

The mystery of whatever happened to \$150 that police had said was missing from Dorka Lisker's purse after the attack was finally solved, after twenty-two years. The *Los Angeles Times* found the inventory list detailing the contents of Dorka's purse, before the

purse had been placed in storage for more than two decades. The list, prepared in 1985 after Bruce's trial, included \$120 in cash. Because the money had actually never been stolen, the motive that drove Bruce to murder his mother, according to the prosecution, did not exist.

During Bruce's trial, prosecutor Phillip Rabichow insisted that the teen had lied when he said he went to his mother's home and saw her lying on the floor through the windows at the rear of the house. But Rabichow began to have second thoughts. He had relied so completely on Monsue's version of events that he had never actually visited the crime scene himself. Rabichow, now retired, recently took a ride over to the old Lisker residence and looked through the rear windows: The view was clear as day.

Much has changed since 1983. Rupert, Monsue's supervisor, who called Bruce's allegations of misconduct "unfounded," announced that he would retire. Monsue, now a supervisor of LAPD detectives, retires in early July.

Bruce Lisker is no longer a misguided teen. He is a self-described writer and poet. He is a member of Inmate.com, a dating site for those in prison. On the site, he calls himself "an early-1980s, hard-partying fool, now reformed and with years of recovery." He craves doing what we all do. He says, "I'd like to meet a woman with high self-esteem, who considers herself smart, emotionally available, enlightened, romantic, moral, artistic, health conscious and progressive."

He realizes the enormity of the ordeal he went through as a 17-year-old. After 22 years, he doesn't want to live with the shame and stigma attached to a convicted murderer. He is a man who knows his chances of ever being paroled are slim. Knowing he was spoiled and drug-addicted, it is not a stretch to imagine that he killed his mother in a fit of rage," and it is easy to see how a jury reached this conclusion, with no evidence to the contrary.

It is more likely, however, that Bruce Lisker is, in fact, an innocent man — a victim of sloppy police work by a detective with tunnel vision.

Only Bruce Lisker knows the truth. At the very least there is reasonable doubt, though it has come to light decades too late. The common theory is that Ryan killed Dorka Lisker; at the very least, he is the most viable suspect. A decision by the justice system, though, isn't always as clear-cut as the opinion of a layman. In all likelihood, the courts will construe the new evidence to mean that someone else, maybe Ryan, was at the crime scene with Bruce. After all, they were friends and drug

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Al, a neighbor... who is a Hispanic male. This officer attempted to speak with Jason who was very shy and had to be coaxed to reply to questions. Jason related that Alan rides the bus sometimes and helps out the driver."

Police couldn't find a Head Start employee or volunteer who matched this description. They questioned Elizabeth "Angel" Powell, a 25-year-old bus aide, because another child, Amy Williams, named her, not Nancy, as being the one who took the children to "Joseph's" house. However, no charges were brought against Powell on the basis of the little girl's accusation.

Joseph Allen Walks into the Case

In October of 1993, six months after the investigation began, Joseph Allen walked into the Lorain police station to report a stolen vehicle.

Allen had pled guilty in 1985 to sexual battery on a young girl and served a 3-year prison sentence. He claims the girl's mother falsely accused him because she was angry with him for breaking off their relationship. Lorain County assistant prosecutor Jonathan Rosenbaum handled that case. There was no medical or physical evidence against Allen in the case, since the girl refused to submit to a medical exam. Allen says he is innocent and only pled "guilty" on his lawyer's advice: "I only know my attorney had me sign some papers because he told me cases like them was hard to win."

Allen was an unskilled laborer who lived in public housing and spent a lot of his time at

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users. Evidence of another person at the scene is not an automatic exoneration of guilt.

Giving up seems to not be an option for Bruce Lisker. Perhaps he says it best, as he quotes Shakespeare: "Corruption wins not more than honesty. Still in thy right hand carry gentle peace, to silence envious tongues. Be just, and fear not."

Reprinted with permission. Originally published in *The Long Island Press* as a three-part series in June 2005. Amy Fisher is a columnist for *The Long Island Press*. She was 17 when convicted in 1992 of 'first degree assault,' after non-fatally shooting her "boyfriend's" wife. After seven years imprisonment, she was released on parole in 1999, and her sentence was completed in 2003. Her book, *If I Knew Then...* was published in October 2004. Available from *Justice:Denied's* Innocents Bookshop, at <http://justicedenied.org/books.htm>.



the nearby Catholic Charities. He says, "I didn't have any problem with the law until my car was stolen by these teenage run-aways. From that moment on everything started going down hill. The police started following me everywhere I went."

Detective Joel Miller remembered the little boy who'd said someone named Alan had molested him. What if he was talking about Joseph Allen? Miller discarded the other details in the police report — that Alan looked Hispanic and rode on the busses.

Allen was arrested on Nov. 3. "They told me that I was being charged [by] the teenager that had stolen my car."

Allen agreed to let the police search his home, a small cottage with no second floor and no basement, which didn't match the children's descriptions. They described going upstairs in "Joseph's" house or down to the basement. The police found items that they thought no bachelor should have — sheets decorated with cartoon characters, and toy cars and trucks. (Allen later explained, "I got those things from Catholic Community Services," for the children of his friends.)

The Lorain task force prepared a photo lineup that included Allen and pictures of five other black men. Their first stop was Grover's house, where Nicole failed to select Allen as "Joseph." In fact, of the 10 children shown the photos, nine children either picked no one or picked someone else.

A few days later Grover phoned. Andujar and told him that Nicole really had recognized "Joseph" in the photo lineup. Nicole and her mother had initially described "Joseph" as being white, and previously had even pointed out a white man as a suspect. Joseph Allen could never be mistaken for a white man, but Grover brought Nicole into the station to positively identify Allen as being "Joseph."

Lineup

Seven children were asked to come to the police station for a lineup including Allen and four other black men, even though some of the children had described "Joseph" as white.

One of those was William Oliphant. He made three separate visits to the lineup room. On William's first visit, Allen was in the No. 2 spot. William picked No.1 and No. 3. After being asked several times, "Are you sure?", the session ended. On William's second trip, Allen was in the No. 4 position, and he picked No. 2. On William's third visit, Allen was in the No. 3 spot and he picked No. 4. In spite of the bad line-up results, the police decided they

had found "Joseph." Their notes explained away the mixed identification results by asserting that the children who did not pick Allen exhibited signs of fear or avoidance.

Nancy Smith was arrested on Nov. 5 at her home and taken away in handcuffs in front of her four children and her parents. At her arraignment a few days later, Head Start parents and Smith's supporters packed the courtroom and watched a weeping Smith enter a plea of "not guilty." "Child rapist!" came the cry from the parents' side of the courtroom. "You'll rot in hell!" one of Smith's relatives shot back.

Grover was present to tell the journalists some new allegations: Smith had picked her child up early and dropped her off late. Her daughter had come home with needle marks on her leg. "My daughter will have to go to counseling for the rest of her life!" she complained, and accused the school of marking her daughter "present" when she was really absent. At Allen's arraignment, Grover yelled and cursed at Allen until the judge ordered her out of the courtroom. "Everybody's going to pay for what they did," Grover warned. It was suspected — correctly as it turned out — that Grover was paving the way to file a civil suit against the school.

In the months leading up to the trial, two more children were brought to the police station by their mothers to report that Nancy and "Joseph" had victimized them. The children's stories matched what the other children had been saying, and what the newspapers and television stations had been reporting: They'd been taken to "Joseph's" house by Nancy. However, the police determined they weren't telling the truth because one child did not attend Head Start when Nancy worked there, and the other had a different bus driver.

Those children gave the police and prosecutors in Lorain a first-hand demonstration of how children could say and believe things that were not true, and how parents could suggest false scenarios and encourage their children to come forward as "Joseph's" victims — but apparently that didn't give them second thoughts about their case against Smith and Allen.

The Trial

Smith's relatives and friends raised money for her defense and hired Jack W. Bradley — the same lawyer who had counseled Joseph Allen to plead "guilty" to sexual abuse. Allen was assigned a court appointed lawyer, Joseph R. Grunda. Judge Lynett McGough refused Bradley's motion to try Allen separately from Smith, who had no criminal record, saying that it would be wrong to put the children

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through the ordeal of testifying twice.

Smith and Allen's trial began on July 25, 1994. Bradley was incensed that the prosecution, counter to the law, hadn't turned over its witness lists or other records until the last minute. The *Morning Journal* reported "high emotions" between Bradley and Rosenbaum as they "argued, interrupted each other and raised their voices during testimony."

When interviewed seven years later, the incredulity and anger remained in Bradley's voice as he described the prosecution scenario:

"Nancy supposedly would keep about five kids on the bus, not let them go to the school, and take them to this Joseph Allen's house during the afternoon, she and Joseph Allen would sexually abuse these kids, all afternoon — tie a kid up in the front yard to a tree, poke them with needles, urinate on him, and get them all dressed and cleaned up and take them home — drop them off at their parents."

He knows it was completely impossible.

Four Head Start children testified in court that "Joseph" and Nancy had molested them. A fifth child, Amy, was part of the investigation and participated in the lineup. She didn't testify for the prosecution because she claimed that Angel Powell took her to "Joseph's" house, not Nancy. Inexplicably, Smith's lawyer didn't subpoena Amy or any of the other children who rode the bus, or any of the parents who could have provided testimony supporting Smith's innocence.

Antonio Pena testified that he went to Allen's house three times, with three other children, where he was anally raped. He said that when he refused to drink a cup of urine, Allen tied him to a tree and hit him with a rope. It is significant that the prosecution didn't introduce *any* medical evidence at trial supporting that *any* of the alleged sexual or physical abuse had occurred.

When first questioned by Cantu, Johnny Givens had described Nancy's "boyfriend" as white. He initially denied that anyone had touched him or stuck a stick up his bottom, but at trial he testified had been sexually assaulted. He claimed that when Smith and Allen were finished with the children they were taken back to school, where he told his teacher he'd been playing with toys, and Nancy would then select other children to take to "Joseph."

"When I cross-examined the children," Allen's attorney Grunda later recalled, "I was able to get every child who took the stand to change their stories." Smith's attorney also

found it easy to get the children to agree to whatever he suggested. Nicole testified she was driven to Allen's house in a car, then when cross-examined by Bradley, said she went in a bus. She also shook her head "no" when Bradley asked her if either Smith or Allen had ever touched her. Johnny agreed on cross-examination that it was actually a different Head Start employee, not Smith, who took him to "Joseph's" house.

Under Ohio's rules of evidence, Bradley and Grunda weren't allowed to hear the tapes of the children's interviews until the cross-examination began. Staying up most of the night listening to the tapes, they realized the children had all changed their stories significantly over the course of the investigation. They made a motion to play the tapes in court for the jury. Judge McGough denied the motion. So the jury didn't know what the judge, police, prosecutors, and the defendants and their lawyers knew: The children's courtroom testimony was significantly different than what it was when questioned by Cantu — who was not called as a defense witness by either lawyer.

Several years after the trial, two experts in the field of child suggestibility agreed that the police had manipulated the children into making allegations against Smith and Allen. In the words of Melvin Guyer, a University of Michigan professor and one of the experts, "All of the interviews are outrageous, horrible, terrible.... There is a high incidence of suggestibility and inappropriate questioning. It's outrageous."

Remember that most of the children failed to pick Allen from the men in the live lineup and only one of the ten picked him out of the original photo lineup. At trial, Rosenbaum sabotaged this evidence by using the ridiculous logic that the children's *failure* to identify Allen was in fact proof that Allen was "Joseph." He said that the reason some of the children hadn't picked Allen was because they were afraid of him. He got the jury to believe that Allen had been selected by all of the children, even those who named someone else. When William participated in the lineup, he was still being regarded as being one of "Joseph's" victims. However he didn't testify as a victim because the prosecution couldn't explain how Smith had managed to sneak him away to "Joseph's" when William *did not ride on her bus*.

Linking Smith with Allen

A crucial part of the prosecution's case was to link Smith with Allen, since they had never met prior to being charged as co-defendants, let alone conspired to hurt children.

"Just say yes, this is the guy you saw in the picture, and if I ask you to point him out, can

you do that?" Rosenbaum hissed at the startled witness outside the courtroom. Kathy Cole, a Head Start employee, had just told him that she was not really certain if Allen was the same black man she had seen at the Head Start schoolyard. According to affidavits later filed by Cole and another woman who witnessed Rosenbaum's intimidation tactics, Rosenbaum added: "God damn it, you will answer the way I want you to answer. Is that understood?" Cole told the truth anyway — she couldn't be certain that the strange man she'd seen at the schoolyard was Joseph Allen.

Rosenbaum called Elizabeth "Angel" Powell to the stand. Powell testified that she'd been working on Smith's bus one day when she parked the vehicle to run into a store to get a soda. She testified that Allen muttered "Nancy, Nancy" under his breath as he tried to climb on board. She claimed that after she chased Allen off with a tire iron she saw him go into the store and emerge arm-in-arm with Smith. As Powell delivered this testimony, it was reported that Smith's jaw dropped in horror and disbelief.

The next day, a Head Start parent contacted the defense team and was put on the stand as a rebuttal witness to Powell. He testified that he recognized the incident Powell had described in court and it was he, not Allen, whom Powell had chased off the bus. He had boarded the bus to talk to his son, but apparently had startled Powell, who shooed him away. He had then sought out Smith to explain and apologize for alarming Powell.

To further undermine Powell's testimony, Smith's lawyer got her to admit that she, too, had failed to pick Allen out of a police lineup. However, Powell stuck to her identification of Allen, saying, "Today, when I saw him, I was sure of it. I would stake my life on it."

William's mother also testified that she had seen Allen at the bus stop by the school.

The Defense's Turn

Nancy Smith took the stand in her own defense. Her anguish was apparent as she sobbed, "I have never touched any of those children in a sexual manner at all.... this has ruined my life... and to be accused of this is terrible, because I am a mother."

Her lawyer argued that a molester parking a school bus where it shouldn't be would have been reported: "She's going to take a bunch of kids in a plainly marked bus — and *nobody* ever said, 'Oh yeah, we would see the school bus parked by Joseph Allen's' house. Not one person came in and ever said they'd ever seen any kids getting out of any

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bus, going over to Joseph Allen's house."

The prosecution argued that Smith and Allen's secret molesting hideout must have been somewhere else and not in Allen's home. Children were driven around the neighborhood of the Head Start school and they pointed out various homes during the investigation, but in the end, police were not able to find a home that matched the various conflicting descriptions.

Smith's lawyer also called Head Start officials to testify as to their safety procedures. According to their testimony, Head Start officials ran a safety-conscious school. Bus arrival and departures and odometer readings were logged each day. The bus drivers logged themselves in and out with punch cards. Most of the time there was an aide on the bus. Attendance was taken daily and families were phoned if a child was absent. Furthermore, a would-be molester could never count on being alone with a child — parents were encouraged to ride the bus at any time and to drop in on classes unannounced. The children were always escorted on and off the bus, and to classrooms.

One of Smith's bus aides filed an affidavit confirming that she was with Smith on her bus route every day from January to March and only missed one day of work, that nothing unusual had happened, and that she never saw Allen. However, she wasn't called to testify. Neither did the defense call an expert to testify about how a child's testimony can be contaminated by suggestive questions. Smith and Allen had the impossible task of proving they had never met one another. How could they prove a negative? Excepting May 7, 1993, there were no dates given when the abuse allegedly occurred, so they could not establish alibis. Furthermore, Rosenbaum didn't attempt to prove, though he suggested:

- That the Head Start bus supervisor didn't know where his buses were all the time.
- That it was possible for Nancy Smith to repeatedly sneak multiple children away in a large yellow school bus and park for hours in front of a neighborhood house without anyone in Lorain — including the police patrolling the streets — noticing.
- That Head Start officials tried to cover Smith's crimes by altering attendance and bus mileage records.
- That Head Start officials lied about what they knew and altered records to avoid being sued for millions by angry parents.

Undermining Rosenbaum's insinuations is that no Head Start official was charged for their alleged involvement in an elaborate criminal conspiracy.

Allen didn't take the witness stand because the prosecution could have then used his prior conviction against him. He was in the bizarre situation of having been arrested for reporting his car stolen, while Smith had her presumption of innocence undermined by the prosecution's opportunity to use Allen's record against him if he testified.

Rosenbaum described Allen as a "jackal" who preyed on innocent children. He asked the jury to discount any inconsistencies or contradictions in the children's testimony: "What you saw was humiliated and scarred children, who sometimes told the truth and sometimes lied, but you can tell the difference."

The Verdict

On Aug. 4, 1994, after six-and-a-half hours of deliberation, the jury returned with guilty verdicts. "I have never met this man," Smith wailed as the jury was polled to confirm that their verdict against her was unanimous. "I have never seen this man. I never touched those children. Ever! I didn't touch those children and [Rosenbaum] knows I didn't touch those children..."

Bradley reflected, "I felt that we had shot down every single allegation and the kids did not come off very well on the witness stand and yet, the jury came back guilty." One juror explained later, "I don't think [the children] could have gone into detail like that if they were lying."

Allen was sentenced to five consecutive life sentences. Smith was sentenced to 15 to 90 years in prison and was ordered to pay the costs of her prosecution. Each of her four children swore an affidavit for her appeal. Her oldest daughter wrote, "Like my siblings, I believe the only children abused by the events leading to my mother's conviction were her own four children. We love her, miss her and need her in our lives."

Raymond Kandt's Post-Trial Observations

The trial and the harsh sentences caught the attention of retired Lorain resident Raymond Kandt. After the trial he wrote a number of letters to the local paper that exposed holes in prosecutor Rosenbaum's case. He wrote, e.g., that Rosenbaum used innuendo, not facts, to cast doubt on the reliability of Head Start's records.

"During and after that trial, prosecutor Rosenbaum implied that the personnel of Head Start not only lied in their testimony but that they altered the attendance records of the children involved as well as the records of bus driver Nancy Smith's itinerary...these would be serious

charges, if any charges had been made..."

Kandt pointed out that no Head Start official was charged with falsifying records. Why not? "If Rosenbaum had charged the people at Head Start with these crimes he would have had to prove these charges."

Kandt added that if the attendance records and the bus mileage records were reliable, then the case against Smith evaporated. "The school records showed that the children were not absent from school on the same day, even though they testified to going to 'Joseph's' house together on several occasions."

Kandt was scornful of the idea that a molester would have revealed his identity to the children. "Picture this. Nancy stops her bus in front of the mysterious residence of Joseph and hustles three or four children inside. Joseph greets them — 'Hello, kiddies. My name is Joseph Allen and I will be your abuser for today.' Ridiculous!"

Rosenbaum Sues Reporter

Two years after Smith and Allen went to prison, Paul Facinelli, a columnist for *The Chronicle-Telegram* newspaper, decided to take another look at the case. There was something about the whole thing that bothered him. He recalls, "To believe that this happened, you have to believe that Nancy picked up 25 kids, dropped off 21 of them at the Head Start and somehow got these other four kids in a 30-foot-long yellow school bus to a site undetermined, where she and Joseph Allen did unspeakable things to them without anybody seeing them over a six-month period. Despite all this horrendous abuse that was alleged, no parents, to my knowledge saw anything — there was no bruising, no blood in the panties or anything. The kids told the police about how 'Joseph' peed on them and they had to eat urine laced cookies, but there were no reports of any nausea, no foul odors, nothing."

When Facinelli asked Rosenbaum about Cantu's conclusions that there was no case against Smith and that "Joseph" appeared to be imaginary, Rosenbaum disparaged Cantu's work, saying that he wasn't "the brightest guy around." Facinelli then obtained Cantu's evaluations for 1992 and 1993, and reported that Cantu had received "exceptional" job performance ratings "from three different evaluators."

Facinelli also obtained videotape and the written police reports of the police lineup with Allen and the children. He realized that what was going on in the videotape didn't match the police reports, such as the fact

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that contrary to his mother's trial testimony, William did not appear terrified.

According to the police reports, Nicole was also "frightened" while looking at the lineup, but after reassurance, she identified Allen as "Joseph." What the police report does not say, but the videotape reveals, wrote Facinelli, is that Nicole was "given numerous chances" to choose Allen. "Detectives coaxed and prodded her." Nicole chose Allen in the No. 2 position after the detective asked if there was anyone she wanted to get a closer look at, and her mother, who was holding Nicole in her arms at the time, said "No. 2." Facinelli also found that Grover "herself pointed to Allen, corrected her daughter in order to draw the child's attention toward Allen, and took her daughter's wrist and directed the child's extended index finger."

None of this is mentioned in the police report.

Facinelli also discovered that in the months leading up to the trial, the Lorain Drug Task Force was investigating a dentist for writing illegal prescriptions for painkillers. The woman he was writing them for was one of Rosenbaum's primary witnesses – William's mother Emily. After Smith and Allen's trial was concluded, the dentist was arrested. Oliphant herself was never charged with anything and moved to Idaho with her family. She claimed that she only met with Rosenbaum to discuss the illegal drugs after the Smith trial, not before. But her law breaking made her susceptible to the prosecutor's manipulation as a witness for the state. Her drug use may also have impaired her judgment.

Lorain County Prosecutor Greg White complained that the Facinelli's articles unfairly targeted him and deputy prosecutor Rosenbaum in the middle of his re-election campaign. (In spite of *The Chronicle Telegram*'s controversial investigation, White was elected to a fifth term as prosecutor.)

Rosenbaum responded to Facinelli's hard-hitting investigative bombshells by filing a libel suit. The lawsuit was dismissed in 2001. Judge Richard M. Markus ruled that Rosenbaum had not even specified what, if anything, was incorrect about Facinelli's work. Judge Markus wrote, "Despite the court's repeated requests, [Rosenbaum] persistently declined to quote the exact language in each publication that he claimed is defamatory."

The Appeal

Smith and Allen's November 1995 appeal concentrated on the way the children had been repeatedly and suggestively questioned. They cited the Kelly Michaels' case that had recently been decided in New Jersey. Michaels

was a young daycare worker whose child molestation conviction was overturned because of the way the children had been badgered, coaxed, and cajoled to say that she had done bad things to them. (See, <http://crimemagazine.com/daycare.htm>) The Ohio Supreme Court ruled, in effect, that New Jersey could do as it pleased — but New Jersey had nothing to do with the course of justice in the Buckeye State — appeal denied.

The Civil Suit

The parents of Grover, Williams, Givens, and Pena sued the Head Start school for \$20 million in damages after the convictions. It has been reported that the case was settled by the Head Start agency agreeing to pay each child involved \$1.5 million.

A positive result of the lawsuit is lawyers for Head Start discovered exculpatory evidence that undermines the credibility of Angel Powell, the prosecution witness who provided the critical link between Allen and Smith. The attorneys obtained a police tape recording of an interview with Angel Powell, made before the trial, that proves she was aware the man who boarded the bus was not Allen — but a Head Start parent.

Rosenbaum Resigns

In the years that followed, Rosenbaum was embroiled in further controversy in sex related cases. He was involved in the prosecution of a woman for taking photos of her young daughter in the bathtub. That case dissolved after drawing national notoriety. In another case, a doctor accused of sexual misconduct won a dismissal of the charges when it was discovered the patients who accused him had their memories of the alleged abuse "recovered" in dreams. The doctor's attorney filed a formal complaint against Rosenbaum for withholding that crucial exculpatory evidence from the defense. However Rosenbaum was cleared of wrongdoing.

In February 2000, Rosenbaum resigned from the prosecutor's office, but later returned to work part time. Two years later, prosecutor White suddenly demanded Rosenbaum's resignation. The reason for White's action is unknown.

Legal Limbo

For Smith, the devastating heartache continued when her appeal lawyer missed a crucial filing deadline for appealing her case to federal court. Smith says that she repeatedly called him to confirm he was filing the appeal and that he had assured her everything was taken care of, but she said he never responded to her requests for a copy of the legal papers. At her request, Martin Yant, a

Columbus, Ohio, journalist and private investigator, checked with the court registry and discovered that no appeal had been filed. When Smith confronted her lawyer, he denied that he had ever agreed to represent her and produced a copy of a letter saying as much, which he claimed to have sent to her.

Smith and Allen's case represents one of the most blatant miscarriages of justice that the sexual-abuse hysteria of the 1980s and 1990s produced. Two people who didn't know each other before being prosecuted have been incarcerated for the remainder of their natural lives for crimes that never occurred.

There is some faint hope. Smith and Allen's story was dramatized in an episode of the Discovery Channel's "Guilty or Innocent?" program that was broadcast nationally four times in 2005. Also, the Ohio Innocence Project (at the University of Cincinnati law school) has accepted Smith and Allen's case. Law student Rhett Johnson wrote, "We are rigorously pursuing her case and firmly believe she is innocent." It is also promising that private investigator Martin Yant was notified in August 2005 that The National Center for Reason and Justice will financially support his investigation into Smith and Allen's case. He will be working with the Ohio Innocence Project to uncover new evidence in order to file a petition for a retrial.

After being imprisoned for 12 years, Nancy remains defiant and recently told *The Chronicle-Telegram*, "I will never give up until my last breath — I will fight to clear my name." Joseph Allen recently wrote the author that "I'm 100% innocent, and I'm sure this whole case will be proven some day. God willing, it will be."

Write Nancy Smith and Joseph Allen at:

Nancy Smith W-034304
Ohio Reformatory For Women
1479 Collins Avenue
Marysville, OH 43040

Joseph Allen A 293486
Mansfield Correctional Institution
P. O. Box 788
Mansfield, OH 44901

Anyone with information that may be of assistance to Nancy Smith and Joseph Allen can contact Martin Yant at:

Martin Yant Investigations
1000 Urlin Ave. #1821
Columbus, OH 43212
Email: martinyant@aol.com

JD Note: To protect the privacy of the children referred to in this article, their names and those of their parents have been changed. Condensed, reprinted, and edited with permission from the original article, published on the Internet at, www.crimemagazine.com.



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"To be considered truthful Mr. Fonseca's overall score would have to equal or exceed 6 points. His score for the test was 13. It is my professional opinion that Mr. Fonseca was telling the truth when he stated that he did not shoot Arthur Mayer."

Dr. Rovner, who has a Ph.D in Psychology, claims that when a polygraph examination is conducted properly by a highly trained and skilled examiner using state of the art computerized instruments, the results are accurate 96% of the time. He thinks that with today's sophisticated equipment, virtually no one can "beat" a test.

Fonseca is considering his options in light of the new evidence of Dr. Rovner's finding. Fonseca was assisted in arranging Dr. Rovner's exam by INNOCENT!, a Michigan-based non-profit organization that works with families and friends of the wrongly convicted. Meanwhile, Fonseca remains behind bars. Contact INNOCENT! at, INNOCENT!

20 W. Muskegon Avenue
Muskegon, MI 49440

Or email, thedouger@chartermi.net

Dr. Rovner's email address is: rovner@polygraph-west.com. His website is, <http://polygraph-west.com>

JD Note: Contrary to popular mythology fueled by television programs and movies, there is not a blanket exclusion of polygraph results as evidence in state and federal courts. The U.S. Supreme Court has never directly ruled on the admissibility of polygraph test results, and their admissibility in federal circuits varies. Many states allow the introduction of polygraph examination results under different circumstances. In California, where Timothy Fonseca is located, polygraph results are admissible in a pre-trial, trial or post-conviction proceeding if both parties stipulate to its admissibility. Cal. Evidence Code § 351.1. (a) states:

Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and *post conviction motions and hearings*, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, *unless all parties stipulate to the admission of such results*.



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Almost a decade ago, AEDPA severely cut back on habeas protections that decisions by the Supreme Court over the previous 20 years had already trimmed substantially. Among other things, AEDPA imposed a novel statute of limitations (ordinarily, one year from final judgment); abolished "same-claim" successive petitions; greatly restricted successors containing claims omitted from an earlier application (usually requiring that the underlying facts strongly demonstrate actual innocence); and barred relief for any claim adjudicated on the merits in state court unless such adjudication "resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court ... or ... was based on an unreasonable determination of the facts." Moreover, chapter 154 of AEDPA gave the benefit of even more favorable provisions in capital habeas cases to states that opted to put in place mechanisms for appointing and paying competent counsel to represent death-sentenced defendants in state post-conviction proceedings.

Impossible standards for review

The SPA goes even further toward rendering illusory federal protection of defendants' rights. Overruling a long line of Supreme Court precedent, it removes jurisdiction from habeas courts to consider claims that a state court refused to hear on the ground of some procedural error committed by the prisoner or his lawyer—even if the lawyer's inadequate assistance caused the default or the state court's action was unreasonable. To overcome this global barrier to review, a petitioner would generally have to show that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and ... the facts underlying the claim ... would be sufficient to establish ... that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense." The proverbial camel could have navigated the needle's eye more easily than a prisoner will be able to satisfy this provision.

Other sections direct dismissal with prejudice of claims not exhausted in state court, where many defendants lack the aid of counsel in collaterally attacking their judgments, and severely restrict the right to amend habeas petitions. Again, the only escape hatch is the "mission impossible" innocence exception. Additional provisions would alter current tolling provisions, so as to trap unwary litigants into breaching the one-year statute of limitations, and impose rigid timetables on the processing of habeas appeals.

Finally, the House bill zeroes in on capital cases in further jurisdiction-stripping sections. It bars federal courts from hearing almost all claims of sentencing error that a state court has found to be harmless, and subject to the innocence "out"-all claims by death row inmates, if the U.S. attorney general certifies that a state's system for furnishing counsel in post-conviction proceedings fulfills statutory standards. Significantly, existing law leaves the certification decision to the judiciary, not to a potentially biased executive official, and does not wholly deny the applicant a hearing in "opt-in" states.

Fueled by baseless hostility toward prisoners and federal judges, the SPA threatens to put habeas courts out of the business of safeguarding constitutional rights. It would reverse the results of decisions granting relief for such violations as ineffective assistance of counsel and racial bias in jury selection and place innocent lives at risk. Ironically, too, it would not lessen delays: The courts will have to interpret and review challenges to its provisions. The bill deserves capital punishment and quick burial.

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Vivian Berger is a professor emerita at Columbia Law School.



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receive compensation. The law provides that people who were wrongly convicted can collect \$25,000 per year of incarceration up to a maximum of \$500,000 if they: (a) Served all or part of their sentence; (b) Received a pardon based on their innocence or relief from a court based on their innocence; and (c) Can document the amount of time served. Under the law Sutton is eligible for over \$100,000.

However, when Sutton applied for compensation, his claim was denied. Unbeknown to the law's original author, State Senator Rodney Ellis (D-Houston), someone changed the law he introduced prior to its enactment by the legislator in 2003. The added provision requires that people claiming compensation for wrongful imprisonment must first obtain a letter from the district attorney whose office prosecuted them. The letter must certify the claimant's "actual innocence."

Ellis said he was never consulted about the change to the law. "Someone has slipped

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he told colleagues on May 19. "These delays burden the courts and deny justice to defendants with meritorious claims. They are also deeply unfair to victims of serious, violent crime." Although the AEDPA (passed by a Republican-controlled Congress) itself curtailed federal judicial oversight in order to speed the process along, its restrictions are apparently not enough for Kyl, his co-sponsors (first among them Texas Sen. John Cornyn), and his House colleague Rep. Dan Lungren, R-Calif. [who introduced the SPA in the House in June], who have seemingly decided the remedy to this sort of delayed justice is to eliminate the judicial process altogether.

Under the SPA, the only criminal cases that would earn any federal habeas review are those in which a defendant can show three things: one, that there are "new facts" in the case that were never brought to light through the "due diligence" of attorneys; two, that those facts establish the defendant's innocence by "clear and convincing evidence"; and, three, that "but for a constitutional violation, the defendant wouldn't have been convicted," Marcus says. "You should really think of it as three bells that all have to be rung." The problem, say Marcus and others, is it is nearly impossible to ring all three bells without first successfully ringing an underlying chord – such as a claim that the reason the new information was unidentified was the result of a prosecutor hiding evidence from the defense (as was the case with Texas death row inmate Delma Banks, whose case was ultimately remanded to state district court), or because the defendant's attorney was ineffective. Under the SPA, those claims would need vetting in state court – in Texas that means the CCA, a court whose record on such issues is abominable. It was the CCA that infamously opined in Calvin Burdine's death case that Burdine's lawyer sleeping intermittently through his trial did not necessarily mean his counsel was ineffective. (During a Senate Judiciary Committee meeting late last month, Cornyn told members that he believes the law "provides for a lawyer who is awake and fully functioning," and said the fact that Burdine's case was reversed shows "that the system can and does work." But if those kinds of claims aren't raised during state appeals or in a direct appeal to federal courts, Cornyn argues, a defendant should not be able to raise a claim for the first time, years later, during federal habeas appeals.)

'We Don't Really Care'

Neither Marcus nor fellow TDS attorney Greg Wiercioch can recall a single case won on the basis of "actual innocence" during a habeas appeal that was not predicated upon one of those apparently lesser claims. "If the

state system is shoddy," says Wiercioch, under the SPA "you're never going to get an opportunity in federal court to get better counsel, or to investigate what may be a claim of actual innocence. Unless you can meet the really high standard ... They're screwed." The legislation's message, say the TDS attorneys, "is that if [the defendant is not 100%] innocent, we don't really care," Wiercioch said. Even defendants who have been exonerated by DNA would likely not get a federal review. Take the case of an inmate convicted before the advent of modern DNA technology. Although the defendant may be able to pass through the SPA's first two hurdles – new evidence, clear and convincing evidence of innocence – any attorney would be hard-pressed to find a constitutional claim that hinges on the right to access modern technology. As such, the defendant would likely be barred from proving "actual innocence" in court.

According to Cornyn, all the hype over the possibility of denying justice to criminal defendants is, apparently, just hysteria. "What we are talking about here is not denying people access to reasonable review of their case, but we're talking about abuse of the habeas process in federal court," he told the committee on July 28. The "fact is" that habeas review "has become rife with gamesmanship" and is used to delay the imposition of a fair sentence. "In my state, from the time ... the most hardened criminals are convicted of the most heinous crimes ... their case is reviewed by not only a jury of 12 of their peers but up to 23 different judges ... perhaps even more."

Just because a number of people have reviewed the case, however, doesn't mean it has been justly resolved, points out SPA opponent John Whitehead, president of the conservative civil liberties organization the Rutherford Institute. "State court judges – who are often elected – are susceptible to pressures that life-tenure federal judges may find less compelling," he wrote in a July 27 memo to the committee. The SPA is "radical legislation" that would "likely result in the execution of citizens who have been wrongly convicted and sentenced to death." Whitehead isn't the only conservative critic of the legislation. The ranks of opposition are swollen with critics of all political stripes – including former Rep. Bob Barr, R-Georgia, the National Association of Criminal Defense Lawyers, former FBI director William Sessions, and the American Bar Association. This widespread criticism has apparently halted the SPA's progress. Sen. Arlen Specter, R-Penn., chair of the judiciary committee, recently tabled the measure until some time next month. If it passes, the measure will likely be challenged in court – at least in

part on questions of whether Congress actually has the power to encroach on the jurisdiction of the judicial branch. "It is a constitutional issue, taking so much power away from the courts," Wiercioch says.

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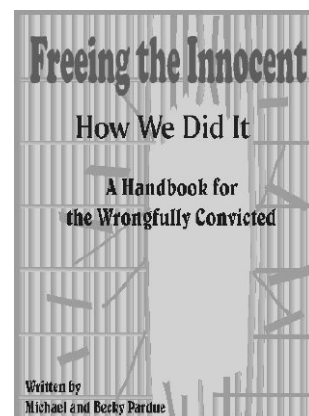
into state law in the dark of night a provision that says - even if you have a pardon - you have to have a letter from the district attorney saying you are actually innocent," Ellis said. "It's ridiculous. This is a fundamental change to the law that makes it harder for people to get what is owed to them. I want to see it changed."

Harris County (Houston) District Attorney Chuck Rosenthal said he will not send the necessary letter, "If I knew he was innocent, I would. But I don't know that now." Rosenthal discounted the pardon received by Sutton in May 2004, "If you give me some good reason to believe [the victim] was mistaken, I will probably send the letter."

"Even if he secures all the paperwork, which is unlikely, it might be 18 months before [Sutton] gets the money," said David Dow whose network continues to represent Sutton.

Ellis said he plans to introduce amendments to the compensation law in the 2005 legislative session. He wants the law changed to eliminate the "actual, innocence" letter requirement. He also wants to increase the amount of money exonerated people can receive to \$40,000 per year of imprisonment. He said, "It takes \$40,000 a year to incarcerate someone. We should be giving them at least that."

Source: *The Houston Chronicle*



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Take your reader into your story step by step in the order it happened. Provide dates, names, times, and the location of events. Be clear. Write your story with a beginning, middle and end. Tell exactly what facts point to your innocence, and include crucial mistakes the defense lawyers made. Do not soft-pedal the truth: Explain what the judge or jury relied on to convict you.

However, don't treat your story as a "true confession" and **only include information either in the public record or that the prosecutor already has.** Do not repeat yourself. Remember: the people reading your account know nothing about your case except what you tell them. Do not complain about the system or the injustice you have experienced: let the facts speak for you. At the end tell what the present status of the case is, and provide your complete mailing address. Include the name and contact info for the person you want listed as an outside contact. Also provide Justice:Denied with the name and email address and/or phone number of any independent sources necessary to verify the account or who can clarify questions. This can speed acceptance of your story, since if Justice:Denied needs more information, it can readily be requested.

Among the basic elements a story should include are:

Who was the victim, who witnessed the crime, and who was charged?

What happened to the victim. What is the alibi of the person the story is about and who

can corroborate that alibi? What was the person charged with? What was the prosecution's theory of the crime? What evidence did the prosecution rely on to convict you?

Where did the crime happen (address or neighborhood, city and state).

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

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

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

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

Mix-Up in Identities Leads to Robbery Conviction

By Jimm Parzuze

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

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

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

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

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

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

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

I lost my direct appeal. The appeals court said there was no substantive reason to doubt the clerk's ID of me. A private investigator is needed to search for possible witnesses to the robbery who could clear me, and to try and locate the "missing" surveillance tape. If you think you can help me, I can be written at,

Jimm Parzuze #zzzzzz

Any Prison

Anytown, Anystate

My sister Emily is my outside contact. Email her at, Aaaa@bbbb.com

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

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JD, FL Death Row Prisoner, August 2005

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

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

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New York Judge John Collins

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

John Spirko's Execution Stayed!

Second clemency hearing ordered by Ohio Gov. Taft after public disclosure the Assistant State Attorney General misstated key facts supporting Spirko's innocence during Clemency Board hearing on August 23, 2005.

See Page 5

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