

## CHAPTER NINE

### A Bitter Harvest

*As far as I'm concerned, there has not been one innocent person executed since I've been governor.*

Texas Governor George W. Bush<sup>1</sup>

*We've had such an enormous amount of executions that it's difficult to believe that the system worked flawlessly in all of those cases. I don't share Governor Bush's confidence in the judicial system. When I was on the court, I saw a lot of faulty trials from a lot of overzealous prosecutors and police officers. . . .*

Former Texas Court of Criminal Appeals Judge  
Charles Baird<sup>2</sup>

*Until I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate. Disbarred lawyers, jailhouse informants – those kinds of problems are in the system, and we've got to get them out.*

Illinois Governor George Ryan, declaring a  
moratorium on executions in that state<sup>3</sup>

In this chapter, we profile the cases of six men executed by the State of Texas despite substantial and troubling doubts about their guilt. These cases represent the bitter harvest of the practices examined earlier: the widespread use of fabricated snitch testimony and junk science that led to the execution of David Wayne Spence; the single-mindedness that led police and prosecutors to press their case against Odell Barnes, even as the case against him crumbled and the evidence pointing to other suspects mounted; the failure to disclose exculpatory evidence to the lawyers for Robert Drew and David Stoker; the pathetic spectacle of police extracting a confession from Richard Jones, a borderline mentally retarded man with an I.Q. of 75, interrogated for 21 hours before he finally provided a “confession” at odds with other known proof; and the refusal by the federal courts to consider the evidence of Gary Graham’s innocence.

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<sup>1</sup> See Christopher Lee, *Majority Think Innocent Have Been Executed*, DALLAS MORNING NEWS, June 22, 2000.

<sup>2</sup> See *id.*

<sup>3</sup> See Ken Armstrong and Steve Mills, *Ryan: 'Until I Can Be Sure': Illinois is First State to Suspend Death Penalty*, CHICAGO TRIBUNE, February 1, 2000. In reaching this decision, Governor Ryan pointed to evidence of systemic misconduct, bias, and incompetence.

In these cases, the truth did not emerge until long after the trials were over – long after it had been suppressed by the State, ignored by the defense, or dismissed by the Courts. In these cases, the truth came too late.

## David Wayne Spence

*I do not think David Spence committed this offense.*

Lt. Marvin Horton, supervisor of the Waco Police Department's investigation into the Lake Waco murders, during sworn testimony in 1993.

*I have really never been convinced [of David Spence's guilt].*

Larry Scott, Waco Chief of Police at the time of the Lake Waco murder investigation, during sworn testimony in 1993.

In separate trials conducted in 1984 and 1985, David Spence was convicted of kidnaping and murdering 16-year-old Jill Montgomery, and Kenneth Franks, age 17. Montgomery and Franks, together with a third teenager, Raylene Rice, were stabbed to death July 13, 1982, in Waco, Texas.

The State's case against Spence was rife with official misconduct. The prosecution failed to disclose exculpatory evidence that contradicted the testimony of its key witnesses, implicated another suspect in the crimes, and exonerated Spence. Several jail inmates, as well as two of Spence's co-defendants, were induced to testify falsely against Spence in exchange for leniency in their own cases and extraordinary jailhouse privileges, including conjugal visits with their wives and girlfriends. Finally, the State relied on suspect "forensic odontology" evidence that has since been discredited.

### I. Key Facts

- A. The physical evidence failed to link Spence to the murders. The FBI compared pubic hairs and head hairs (found on the victims' clothing and bindings) with samples from Spence and his co-defendants, with negative results. Palm prints and fingerprints taken from the victims' car also did not come from Spence or his co-defendants.
- B. The prosecution failed to disclose information that strongly incriminated Terry Harper, a convicted felon with a lengthy history of violence, in the triple homicide. Several independent groups of witnesses told police that Harper had bragged about the crimes *before the bodies had been found or news stories of the crimes had publicly aired on television or radio*. Harper's boasts included highly specific details

about the murders that were unknown even to law enforcement officials at the time, including the fact that one of the victim's nipples had been severed during the attack.

- C. According to police reports hidden from Spence's attorneys until after his second trial, as many as 20 witnesses saw either the victims or their car in Koehne Park, where the victims were last seen alive. None of these witnesses saw anyone resembling David Spence or his co-defendants; yet several people *had* seen Harper together with the victims.
- D. To counter the evidence implicating Harper, the State later claimed he had an airtight alibi for the night of the murder, but failed to specify what it was. Deposed by Spence's lawyers in 1993, Harper said he had been watching "Dynasty" on television. "Dynasty" did not air that night. The State also said Harper's criminal history did not suggest he could have committed such a brutal murder. In fact, in the eighteen years preceding the Lake Waco murders, Harper had been arrested and charged twenty-five times for assaultive offenses, including assault with intent to murder and assault on a minor child. In sworn post-trial testimony, a local deputy recalled that Harper liked to "cut people," and "had a reputation" for "us[ing] the knife." Harper committed suicide in 1994 when police came to arrest him for the fatal stabbing of an elderly man during a robbery.

## II. The Crime

The victims were last seen alive on the evening of July 13, 1982, driving into Koehne Park, a small public park on Lake Waco; Raylene Rice's orange Pinto was found abandoned there the next morning. Later that day, their bodies were found in a brushy, somewhat wooded area of Speegleville Park, another public park located directly across Lake Waco from Koehne Park. The girls apparently had been sexually assaulted; all three victims had been bound and gagged, and had been stabbed repeatedly in the chest and neck.

Despite an early and vigorous investigation that developed substantial evidence implicating several suspects, including Harper, in the murders, the Waco police proved unable to close the case. After the investigation was formally declared "inactive," Truman Simons, a patrol officer who previously had not been involved in the investigation, persuaded the police chief to assign him to the case, boasting that he could solve the murders in a week. Assigned to do a "follow-up investigation" on Friday, September 11, 1982, Simons declared *the next morning* that he had already "developed [a] possible suspect." That "suspect" was Muneer Deeb, a foreign national who owned a local convenience store.

Simons arrested Deeb three days later and charged him with the triple murder. Other police officers were gravely concerned that Simons had acted too quickly, and on too little evidence. Deeb had no prior criminal record and adamantly denied any involvement in the crimes. Six days later, Deeb exhibited "no deception at all" and passed a three-hour polygraph examination administered by police. The Chief of Police ordered Deeb released from custody that same day. The following

week, Simons resigned from the police department.

Within two weeks, Simons had accepted a job as a deputy sheriff and resumed his investigation into the case. Reasoning that Deeb was incapable of committing the triple homicide alone, Simons focused his attention on Deeb's acquaintance David Spence, who, together with Gilbert Melendez, recently had been arrested in connection with another charge. After numerous meetings with Spence's cellmates, Simons eventually secured a series of statements from inmates who claimed Spence had told them he committed the murders.

### **III. The Trials**

#### **McLennan County Trial: June, 1984**

In Spence's first trial, the State's case depended on two types of evidence: the testimony of jail inmates, who claimed Spence confessed while in custody awaiting trial; and the testimony of a forensic odontologist, who claimed that Spence's teeth matched marks on the victims' bodies.

The testimony of the jail inmates was vague, internally inconsistent, and inherently incredible. One inmate, for example, testified that Spence chose Speegleville Park as the place to deposit the victims' bodies because he knew the area "like the back of his hand;" a second inmate, however, testified that Speegleville was chosen "because none of them ever went out there, so nobody would suspect them." Yet another inmate claimed to have talked to Spence in jail before Spence had even been taken into custody. After Spence was convicted, three inmates admitted they had fabricated their testimony against Spence with the help and encouragement of Truman Simons, and that they had testified in return for favors or promises of favorable treatment in their own cases.

As for the State's bitemark evidence, after trial, a "blind panel" of five nationally eminent forensic odontologists conducted their own examination of the evidence. To guarantee the credibility of the panel's findings, no member of Spence's legal defense team had any contact with the experts, who were not told the purpose of their study. After reviewing the evidence and comparing it with dental models of five unidentified persons (including Spence), all five experts independently concluded that no reliable identification of any of the dental models could be made and that, most importantly, Spence's teeth were not even minimally consistent with the bite marks on the victims' bodies.

#### **Brazos County Trial: October, 1985**

By the time of Spence's second trial, the prosecution had managed to extract cooperation from Gilbert and Tony Melendez, each of whom had other serious felony charges – in addition to the capital murders – pending against him. Taking full advantage of the co-defendants' determination to avoid the death penalty, the prosecution induced each co-defendant to give a self-incriminating statement in exchange for leniency on all pending charges. Both co-defendants' statements, however, were promptly recognized as fabrications, containing accounts of the crimes that were indisputably inconsistent with objective facts. Tony Melendez's brief statement, for

example, claimed that the victims were killed in Koehne Park and that the defendants left them there; it entirely failed to account for the fact that the victims' bodies were found in Speegleville Park. Similarly, Gilbert Melendez's original statement claimed that the victims' bodies had been loaded in the back of Spence's "white old model station wagon," a vehicle that Spence did not own until several weeks after the murders. Rather than reject the Melendezes' statements as outright fabrications, however, Simons simply collaborated with each of them to amend the statements by removing the inconsistencies and transparent factual errors.

Further, the State concealed critical information that would have explained why the co-defendants falsely incriminated themselves, as well as Spence, in the crimes. For example, the State never disclosed the extraordinary fact that Gilbert Melendez originally incriminated himself and Spence in the crimes only because he had been promised complete immunity from prosecution if he did so, a promise the State subsequently retracted after Melendez provided the prosecution with the self-incriminating statement. Similarly, the State concealed a handwritten note on the trial prosecutors' official stationery which indicated that Gilbert Melendez had told another inmate "he did not know anything [about the triple homicide] but was going to make up a story to get off of [the] sexual abuse case."

Both Gilbert and Tony Melendez later recanted their testimony against Spence, even though they knew that by doing so they exposed themselves to prosecution for the death penalty for charges related to the death of Raylene Rice. (In his own post-trial testimony, Truman Simons acknowledged that these charges were intentionally left open by the prosecution as an "insurance policy" against recantations by either of the co-defendants.) As Gilbert Melendez testified, subject to cross-examination by the State: "I didn't commit these crimes and anything I said about anybody else [is] just a lie. I can't say that because I wasn't there." Tony Melendez gave a similar sworn statement renouncing his testimony: "I did not murder Jill Montgomery, Kenneth Franks or Raylene Rice. I do not know who killed them. . . . I was not present during the crimes. The statements and testimony that I gave in the past that implicated me, David Spence, and Gilbert were not true."

#### **IV. The Appeals**

Spence's state post-conviction proceedings were conducted under the pressure of an imminent execution date, which the courts refused to modify to permit his new attorneys to review the thousands of pages of relevant documents they recently had obtained. Not only did the state courts refuse to conduct an evidentiary hearing on any of Spence's substantial claims of state misconduct, but each trial court adopted the State's responsive pleading as its own "findings" in the case, without changing so much as a comma. The Court of Criminal Appeals refused to grant Spence a stay of execution and denied habeas corpus relief in a perfunctory, one-page order. The state habeas proceedings in Spence's case lasted fewer than 60 days.

The federal district court initially denied relief without even requiring the State to file a response to Spence's petition. Although it subsequently permitted Spence to depose witnesses and present documentary evidence, it ultimately reaffirmed its original denial of relief in a one-page

order, without addressing the significance of the new evidence Spence had developed. The Fifth Circuit affirmed in an opinion that uncritically accepted the State's evidence at trial. Shortly before Spence's execution, he asked the state courts to consider his extensively documented claim of factual innocence. The state courts refused to do so, dismissing the petition in a summary one-page order.

## V. Conclusion

The only credible physical evidence at the crime scene not only failed to link David Spence to the Lake Waco murders, it strongly suggested that someone else was responsible for the crimes. The prosecution concealed extensive evidence of its own misconduct, suppressed extensive evidence that strongly pointed to someone other than Spence, and manufactured evidence against Spence by cultivating jailhouse snitches.

The State of Texas executed David Wayne Spence on April 3, 1997.

*For more information about Mr. Spence's case, see Sara Rimer and Raymond Bonner, Bush Candidacy Puts Focus on Executions, New York Times, May 14, 2000, at A1; Alan Berlow, The Hanging Governor, Salon.com, May 11, 2000, at <http://www.salon.com/politics2000/feature/2000/05/11/bush/index1.html>; and the court files in: Ex parte Spence, (CCA No. 15,346-03); and Spence v. Scott (5<sup>th</sup> Cir. Nos. 94-20212 & 94-20213).*

## Robert Nelson Drew

Robert Drew was convicted of robbing and murdering Jeffrey Mays. Of the two other people present when Mays was murdered, one testified at Drew's trial and the other, who also faced capital murder charges, did not. The witness who testified, Bee Landrum, had earlier given a statement to police that was diametrically opposed to his trial testimony. The police, however, hid the existence of this pretrial statement, which did not surface until long after Drew's trial. The other man facing charges, Ernest Puralewski, later pled guilty to Mays's murder; before doing so, however, he admitted to several people that he alone had murdered Mays, and that Drew was simply a terrified bystander.

### I. Key Facts

- A. When Ernest Puralewski first met Landrum, Mays, and Drew, he bragged that he was an ex-con who had been in prison with Charles Manson, and that he wanted a reputation like Manson's.
- B. Ernest Puralewski's buck knife, according to the State's expert, definitely inflicted the stab wounds that killed Jeffrey Mays and could have inflicted the non-lethal cuts on Mays's neck.
- C. None of Mays's blood was found on Drew's tiny pocketknife.
- D. Prior to trial, Bee Landrum told police in an audiotaped statement that he had not seen what happened during the murder, and passed a polygraph exam about that statement. The statement was never turned over to Drew's lawyers; at Drew's trial, Landrum claimed to have seen Drew slashing Mays's neck.
- E. Before he pled guilty to murdering Jeffrey Mays, Ernest Puralewski told at least three other people that he acted alone in killing Mays, and that Drew had been present but did not assist him or participate in any way. According to Puralewski, Drew feared for his own life.
- F. After he pleaded guilty to murdering Jeffrey Mays, Puralewski admitted in a sworn statement that he alone had killed Mays and that Drew was innocent.

### II. The Crime

Robert Drew, then 24, was hitchhiking from Florida to Oklahoma in early 1983 when he was picked up in Louisiana by teenage runaways Jeffrey Mays and Bee Landrum. Mays promised to take Drew to Houston in return for gas money. The trio picked up a second hitchhiker, Ernest



Puralewski, and the four young men drove westward together, drinking heavily and smoking marijuana in what was later described as "a rolling party."

The group continued driving west toward Houston. Everyone but Mays was armed: Puralewski had a large, heavy "buck" knife with a blade longer than three inches; Landrum had a martial arts throwing star; and Drew had a tiny, one-sided pocket knife with a blade less than two inches long and about 1/3 inch wide. At some point, Mays angered the others by deciding he wanted to return to Alabama, and Drew protested that he had paid Mays for a lift to Houston. Some time later, Landrum pulled the car to the shoulder and Mays, Puralewski, and Drew all got out. It was nighttime. Outside the car in the darkness, Mays was stabbed to death. A few minutes after getting out of the car, Puralewski and Drew got back into the car and the trio drove on to Houston. Drew and Landrum were arrested there a day or so later for traffic violations; Puralewski was arrested several days later in Lake Charles, Louisiana, still in possession of the murder weapon.

### **III. The Trial**

At Drew's trial, only Landrum testified about the events immediately surrounding Mays's murder. Puralewski, awaiting trial for capital murder, refused to testify. Landrum testified that Drew held a knife on Mays in the car, calling him a liar and a punk. Landrum further stated that Puralewski then said if they "were going to do it, get everything he has got so he won't have no identification." According to Landrum, Drew then took Mays's wallet and watch. Landrum pulled the car over to the side of the road, and Puralewski, Mays and Drew got out. According to Landrum's trial testimony, he could see all three men after they left the vehicle. Mays stood with Drew behind him, and Puralewski beside him. Landrum testified he saw Drew pull Mays's head back and make slashing motions across his throat. After Mays was down, testified Landrum, he saw both Drew and Puralewski making "up and down" motions with their arms toward Mays.

The medical evidence showed that Mays died from three stab wounds to the chest, all of which were inflicted by Puralewski's buck knife. It was undisputed that Drew's tiny pocketknife could not have caused the fatal wounds. Mays also had six small "superficial" wounds on his neck that could have been caused by either knife, according to the State's expert.

### **IV. The Appeals**

After Puralewski pled guilty, Drew's attorneys learned that before doing so, Puralewski had admitted to two people in different conversations that he alone had murdered Mays. Drew's attorneys obtained an affidavit from Puralewski in which he confirmed that Drew was innocent and had simply stood by, terrified, while Puralewski stabbed Mays. Drew's attorneys sought a new trial in 1984 based on this information, but their motion was denied because it had been filed after the statutory deadline. That decision was affirmed on appeal.

Landrum, interviewed by Drew's lawyers in 1988 after their appeal was denied, admitted he had been "unable to see who did the actual killing," since he was inside the car and "never looked

back” at what was happening outside. He also indicated he had told police the same thing prior to Drew’s trial. Confronted with this information, the State produced the tape, which confirmed that Landrum had originally told police he did not actually see the killing take place, because he “shut [his] eyes and turned away.” The existence of this tape had never been previously disclosed to Drew’s lawyers, nor had the fact that Landrum passed a polygraph concerning his account shortly after making the tape-recorded statement.

Although Landrum later disavowed these admissions in yet *another* affidavit, signed in 1993 at the request of the prosecutors seeking Drew’s execution, no court ever conducted a live evidentiary hearing at which Drew’s attorneys could confront and impeach Landrum on his widely disparate statements and meaningfully test Puralewski’s claim that Drew was innocent.

## V. Conclusion

Bee Landrum gave multiple, impossibly inconsistent stories about what, if anything, he saw on the night of Jeffrey Mays’s murder. In jail prior to pleading guilty to murder, Ernest Puralewski, whose knife indisputably inflicted the fatal stab wounds, told several people and signed an affidavit confirming that he acted alone in killing Mays. Robert Drew, Puralewski confirmed, had simply been a terrified bystander who feared for his own life. No court ever conducted an evidentiary hearing on these allegations. Puralewski received a 60-year sentence for his role in the murder, while Drew was put to death.

The State of Texas executed Robert Nelson Drew on August 2, 1994.

*For further information about Mr. Drew’s case, see the court files in: Ex parte Drew, (CCA No. 374913-C); Drew v. Scott, (S.D. Tex. 94-2607); Drew v. Scott (5<sup>th</sup> Cir. 94-20553).*

## Gary Graham (Shaka Sankofa)

Over the two decades since his 1981 conviction for the murder of Bobby Lambert, grave doubts have surfaced and grown over the guilt of Gary Graham. No court held an evidentiary hearing to consider the most compelling evidence of his innocence – even though Graham and his attorneys repeatedly requested a hearing on this disturbing new material in state and federal habeas proceedings beginning in 1993.

### I. Key Facts

- A. The .22 caliber pistol taken from Gary Graham at the time of his arrest was tested by the police crime lab and was determined *not* to have been the weapon that fired the fatal bullet. This evidence was not presented at trial.
- B. The State's primary evidence against Mr. Graham was the testimony of a single eyewitness. Defense counsel failed to cross-examine this witness, or any other witness, to bring out the extremely suggestive police identification techniques used with the sole identifying witness. The jury never learned that the police used a photo array in which Graham's photo was the only one that came close to meeting the description of the shooter. The jury also was not told that, even after viewing this suggestive photospread, the sole eyewitness did not positively identify Graham as the perpetrator. That identification came only after the eyewitness was given a second chance to identify Graham, in a live lineup. After making this identification, the eyewitness commented to a police officer that she recognized Graham from the photo lineup she viewed the night before.
- C. Defense counsel failed to interview any of the other eyewitnesses to the crime, all of whom had made observations of the shooter that were more reliable than the identifying eyewitness: two of these eyewitnesses, both grocery store employees, saw the shooter prior to the shooting in a well-lit area just outside the store and both were certain the shooter was someone other than Graham.

### II. The Crime

In May 1981, Bobby Lambert was fatally shot in a grocery store parking lot. He was killed with a .22 caliber pistol by a lone assailant. Several eyewitnesses saw the shooter in well-lit areas before the crime. A single eyewitness claimed to have seen the actual shooting.

### III. The Trial

The question of Graham's innocence was raised by the very evidence used to convict him. The *only* evidence that he was involved in the murder was a single witness who identified him. The trial lawyers failed to present forensic evidence that exonerated Graham, failed to investigate the reliability of the identification made by the key witness, and failed to interview other witnesses to the crime – none of whom identified Graham as the gunman.

Prosecutors bolstered their case in the penalty phase by presenting two unrelated pieces of evidence to suggest that Mr. Graham was in possession of the murder weapon at the time of his arrest. During the guilt phase of the trial, the medical examiner testified that the fatal bullet was consistent with a .22 caliber slug. In the penalty phase, the state established that Mr. Graham had a .22 caliber revolver in his possession at the time of his arrest. The misleading inference created by this information went unchallenged despite the fact that shortly after Mr. Graham's arrest, a firearms examiner concluded that the fatal bullet "was not fired" by Mr. Graham's gun. This evidence was never presented to the jury at trial. Mr. Graham was sentenced to death in October 1981.

### IV. The Aftermath

In 1993, Mr. Graham's attorneys uncovered existing evidence that called the eyewitness's identification into serious question. The only witness to the shooting had made her identification of Graham based on highly suggestive and improper police techniques. The police first showed the witness a photo array in which Graham's photo was the only one that came close to meeting the description of the shooter. In her pre-lineup statement, the eyewitness told police that the perpetrator had no facial hair and a "short compact afro." The police photo lineup that included Gary Graham's picture consisted of five photographs; three depicted persons with facial hair and of the remaining two, only Mr. Graham had a "short compact afro." The other person without facial hair had an extremely loose, bushy afro. Thus composed, the photo arrays inevitably directed the state's witness toward Graham's photograph. Nevertheless, this witness *could not identify him* as the gunman because of some other differences between Graham and the gunman: She told police that Graham looked like the suspect except the complexion of the assailant was darker and his face was thinner. The next day, the eyewitness viewed a live lineup in which Graham was the only person repeated from the photo array. Not surprisingly, she picked Graham out of the lineup, commenting to a police officer that she recognized Graham as being in the photo lineup the night before.

The additional evidence that would have pointed to a suspect who bore no physical resemblance to Mr. Graham was never presented at trial, not because it was unavailable, but because of the incompetence of his trial attorneys. The defense investigator later summed up the problem in an affidavit: "because we assumed Gary was guilty from the start we did not give the case the same attention we would routinely give a case."

Two of these other eyewitnesses, both grocery store employees, saw the assailant prior to the shooting in a well-lit area just outside the store – one face-to-face as he walked by him and spoke, the other for nearly twenty minutes as she eyed him with interest from about 10-15 feet away. Both

witnesses determined the shooter was approximately 5'3" to 5'5" tall, based on their experience with family members whose height was similar. Graham was 5'10" at the time. They were certain Graham was not the shooter. Indeed, one of these witnesses saw the same lineup as the identifying eyewitness and told the police the shooter was not there.

By contrast, the single identifying witness saw the face of the shooter nearly 40 feet away in a dimly lit parking lot, for only two to three seconds during the 90-second shooting incident. She estimated the shooter's height at 5'10" to 6'0", without being asked to compare his height to someone whose height she knew. Neither of the more reliable eyewitnesses was called to testify.

The federal district court refused to consider this evidence in 1993. The United States Court of Appeals for the Fifth Circuit said this was improper, and returned the case to the state courts for a hearing. Yet when Mr. Graham returned to federal court after again being denied a hearing by the state courts, the federal courts found themselves barred from hearing his claims by the added provisions of the 1996 Antiterrorism and Effective Death Penalty Act. Under this new federal law, evidence of actual innocence had to be "newly discovered" in order to be considered in federal court. Mr. Graham's evidence of innocence did not meet the criteria for being newly discovered – because it should have been discovered by his attorneys before 1993.

## V. Conclusion

Graham's case demonstrates convincingly that the appellate courts care first and last about finality. Shortly before Graham's final appeal was denied, several of the original trial jurors came forward to state they would not have convicted him had they heard the testimony of the other witnesses. In the face of worldwide protests and growing concerns that Texas was poised to execute an innocent man, officials with the State of Texas simply tallied the number of courts that had reviewed the case, rather than considering the substance of that review.

The State of Texas executed Gary Graham (Shaka Sankofa) on June 22, 2000.

*For further information concerning Mr. Graham's case, see Steven Mills, Texas Case Highlights Defense Gap: for Many on Death Row, Skilled Lawyers Arrive Only after Conviction, Chicago, Tribune, June 19, 2000; Alan Berlow, The Hanging Governor, Salon.com, May 11, 2000, at <http://www.salon.com/politics2000/feature/2000/05/11/bush/index1.html>; and the court files in: Graham v. State (CCA No. 68,916); Ex Parte Graham (CCA No. 17,568); Graham v. Lynaugh (5<sup>th</sup> Cir. No. 88-2168).*

## **Odell Barnes, Jr.**

Odell Barnes was convicted and sentenced to death for the 1989 murder of Helen Bass in Wichita Falls. From the beginning, Barnes insisted he was innocent. His trial attorneys, however, had little experience with capital cases and conducted virtually no investigation into his innocence claim. Years after the trial, experienced capital litigators reinvestigated the trial evidence and testimony, attacking and discrediting each element of the prosecution's case. New evidence uncovered by the defense clearly implicated other suspects and cast serious doubt on the reliability of the results obtained from the original crime scene investigation.

### **I. Key Facts**

- A. The investigation by the Wichita Falls Police Department focused exclusively on Barnes. Although the police found a number of unknown fingerprints at the scene, they made no attempt to check these prints against the witnesses who implicated Barnes.
- B. Eyewitness testimony used at trial to place Barnes at the scene of the crime on the night of the murder was misinterpreted: the witness actually saw Barnes 90 minutes before the victim arrived home, not at the time of the crime.
- C. Barnes told his trial lawyer that he and the victim had been having a consensual sexual relationship, a fact later confirmed by other witnesses. His lawyer failed to develop this evidence, which contradicted the prosecution's theory of the crime and explained the physical evidence found at the crime scene.
- D. Witnesses claimed at trial that Barnes had given them a gun similar to one owned by the victim. Years later, a number of people swore these same witnesses had confessed to the crime.
- E. The key physical evidence against Barnes was later found to have been adulterated or misinterpreted. Stains of the victim's blood found on Barnes's clothes contained a forensic preservative, leading one expert to conclude that the blood had been planted on the clothing. Retesting of samples of Barnes's semen that had been taken from the victim revealed that the semen most likely had been deposited between one to two days prior to the crime.

### **II. The Crime**

The physical evidence indicated that Helen Bass had been stabbed twice, shot in the head, and struck in the head with a blunt object. The crime scene was horrific: blood was spattered on the ceiling, floor, and three walls of the bedroom where the victim was killed, and there were blood

transfer patterns throughout the home. Semen was later recovered from the victim's vagina.

### **III. The Trial**

In many respects, Odell Barnes appeared to be the perfect suspect. Barnes lived in the same area as Helen Bass, and an eyewitness testified he saw the defendant jumping the fence behind the victim's home on the night of the murder. Police testified they had recovered Barnes's fingerprint from the base of a bedroom lamp; the prosecution claimed Ms. Bass had acquired the lamp only shortly before her death and that Barnes had used it to strike her. Police also told the jury they had recovered a pistol from other witnesses who claimed they got it from Barnes; the pistol was similar to one owned by the victim. Prosecutors produced a pair of Barnes's coveralls with two small blood stains on the sleeves, matching the blood of the victim. Semen found in her vagina also matched Barnes. The jury convicted Barnes and sentenced him to death.

### **IV. The Appeals**

The Texas Court of Criminal Appeals affirmed Barnes's conviction and sentence. The same court later denied the petition for post-conviction relief prepared by the Wichita Falls Public Defender – an organization with virtually no experience in capital post-conviction litigation.

Only years later, when experienced capital litigators took over the appeal, did the truth begin to emerge. These lawyers learned from the victim's son that the lamp, which the prosecution claimed had been acquired only recently, had in fact been in the victim's home for many years. They reinvestigated the eyewitness and established that he had seen Barnes approximately 90 minutes before the victim arrived home from work. In other words, when the witness saw Barnes in the vicinity of the victim's home, Helen Bass was still alive.

But what of the blood stains on Barnes's coveralls? The appellate lawyers sent them to a nationally known chemist, who made a shocking discovery. One of the stains contained a citric acid blood preservative, of the type typically found in forensic or medical laboratories. According to this expert, the stains either were accidentally or deliberately planted on the pants at some time other than the commission of the crime and were not legitimate crime scene evidence.

Barnes had informed his trial attorney that he and the victim had a consensual sexual relationship – a fact confirmed by other witnesses. In one of the great tragedies of the case, however, his original lawyer failed to develop this crucial evidence, which challenged the entire prosecution theory of the crime and shed an entirely new light on the physical evidence. Experts retained by the new defense team performed special protein testing of the semen sample. The testing revealed that the sperm most likely had been deposited 24 to 48 hours prior to the victim's death.

Barnes's post-conviction team also retained crime scene investigation experts who reviewed the credibility and reliability of the original investigation conducted by the Wichita Falls Police

Department. These experts concluded that the investigation protocol used by the police was so poor that it called into question any resulting findings. For example, although the police found a number of unknown fingerprints at the scene, they made no attempt to check these prints against other potential suspects, including the witnesses who implicated Barnes.

The defense team also investigated the credibility of the witnesses who claimed that Barnes had given them a gun allegedly taken from the victim's home. Their inquiries produced sworn statements from several people who had heard those same witnesses confess to the murder. The only fingerprint found on the pistol given to the police came from one of the witnesses who alleged that Barnes had given it to him. In addition, one of these incriminating witnesses had pending criminal charges for drug possession and delivery. Although the Wichita County prosecutors had a written policy forbidding probation plea offers in drug cases, this witness received ten years probation on both cases after he testified against Barnes.

None of this compelling new evidence moved the appellate courts to intervene.

## V. Conclusion

The case against Odell Barnes is a classic example of prosecutorial tunnel vision. Faced with crime scene evidence that seemed to implicate one person, police and prosecutors excluded all other possibilities and went after Barnes. His trial attorney failed to investigate and develop his client's protestation of innocence – and the jury drew mistaken inferences from what appeared to be undisputed evidence of guilt. Even though the case against Barnes was thoroughly discredited by careful reinvestigation years later, neither the courts, the Texas Board of Pardons and Paroles, nor Governor Bush saw any need to halt his execution.

The State of Texas executed Odell Barnes, Jr. on March 1, 2000.

*For further review of Mr. Barnes's case, see Bob Burton, Killing Time, Houston Post, , January 27, 2000; Sara Rimer & Raymond Bonner, Bush Candidacy Puts Focus on Executions, New York Times, May 14, 2000, at A1; and the court files in: Barnes v. State (CCA No. 70,858); Barnes v. State (CCA No. 71,291); Ex Parte Barnes (CCA No. 30,357); Barnes v. Johnson (5<sup>th</sup> Cir. 98-20504).*



## Richard Wayne Jones

Richard Jones, a borderline mentally retarded ex-convict with an I.Q. of 75, apparently confessed to a murder he did not commit to conceal his sister's involvement in the same offense. On the night of the murder, Jones's sister Brenda told him that she and Walt Sellers had committed the crime and begged Jones to help her conceal it. Jones set the field on fire where the body lay. Arrested in possession of some of the victim's property, Jones initially told the police Walt Sellers had given it to him. Once the police threatened to prosecute his girlfriend for capital murder if he did not confess, Jones changed his story and claimed sole responsibility for the crime.

### I. Key Facts

- A. Jones originally told police he had obtained the victim's car, credit cards, and checks from Walt Sellers, an ex-convict with prior convictions for stealing the same kind of property. Three other witnesses made sworn statements prior to Jones's trial that Sellers had items belonging to the victim and was trying to get rid of them before Jones was arrested with that same property in his possession. These witnesses did not testify at Jones's trial. After the trial, two other witnesses gave sworn statements that they heard Sellers implicate himself in the murder.
- B. Jones had an I.Q. of 75 and was borderline retarded. He was uniquely devoted to his sister Brenda, because she had been his sole ally and confidante in the violently abusive household in which he was raised.
- C. Three eyewitnesses, a mother and her two daughters, saw the victim abducted. The mother's description of the assailant did not match Jones, and her teenage daughter did not identify Jones in a lineup. Police intentionally omitted this fact from their report concerning the lineup.
- D. Jones's pregnant teenage girlfriend, Yelena Comalander, was arrested the night after the murder trying to cash the victim's checks. She was interrogated for hours and threatened with prosecution for capital murder before signing two statements implicating Jones. She later said police changed things she said when writing them down.
- E. Jones was arrested the same evening and interrogated for 12 hours. He was allowed no food or sleep. His interrogators threatened that he and his girlfriend would go to death row and their baby would be taken from them if he did not confess. After 21 hours of interrogation, including a trip to the crime scene, more threats, retrieval of his denim jeans and brown plaid shirt, Jones signed a confession. He had second thoughts about doing so but was told that his girlfriend would be released if he signed.

- F. Jones's "confession" claimed he took the victim straight from the abduction to the field, a distance easily driven in just a few minutes, and killed her immediately. A witness who lived next to the field, however, heard screams coming from the field more than two hours after the abduction. That fact was not known to the police at the time they extracted Jones's "confession."
- G. Two tiny spots of blood were found below the knee on Jones's jeans. The crime lab found no blood whatsoever on his shirt. The victim had bled to death after being stabbed nineteen times in the upper body, one of the wounds severing her carotid artery.
- H. DNA testing of previously untested evidence from the crime scene and the victim's vehicle was requested prior to execution and denied by the courts and by Governor George W. Bush.

## **II. The Crime**

The badly burned body of Tammy Livingston, abducted earlier in the day in her own vehicle from a department-store parking lot, was found on the night of February 19, 1986. She had been stabbed 19 times before the field where her body lay was set on fire. The next day, nineteen-year-old Yelena Comalander was arrested while trying to cash checks belonging to the victim. After police interrogated and threatened her, Ms. Comalander eventually said she had obtained them from Richard Jones. Jones was arrested that evening and was subjected to a long and threatening interrogation until he signed a confession.

## **III. The Trial**

The adult eyewitness originally gave a description of the parking-lot assailant that differed from her testimony at Jones's trial. Although her teenage daughter did not pick Jones out of the same lineup, that information originally was concealed by the police and the daughter was never brought before the trial jury. The circumstances of Jones's confession were suspect; one of the interrogating officers even admitted in pre-trial testimony that Jones had been threatened, but retracted that testimony after an overnight recess during which he consulted with the prosecutor. The police never investigated Walt Sellers as a suspect, despite the fact that Jones originally gave them his name and that Sellers had convictions from 1985-87 for stealing the same kind of property. Police arrested Sellers one month after the murder with a dagger in his possession, but destroyed the dagger without subjecting it to forensic testing.

The physical evidence tended to corroborate Jones's initial assertion of innocence, since there were only tiny traces of the victim's blood on the clothes Jones had been wearing that night. Three witnesses, unavailable at the time of trial, stated under oath that Sellers had the victim's property before Jones did. Though a substantial amount of physical evidence was collected from both the interior of the victim's car and the field where she was murdered, much of it was not

subjected to any forensic testing at all, even the less sophisticated testing available in 1986. In fact, crime lab documents reflect that a number of planned tests were foregone on the direct orders of the investigating detective who had obtained Jones's confession. Largely on the basis of his confession, Richard Jones was convicted and sentenced to death.

#### **IV. Appeals**

Jones's trial attorney originally represented him in his post-conviction appeals. When subsequent counsel sought to challenge trial counsel's performance at trial, the original lawyer sided with the State, filing an affidavit so unbelievable that even the Fifth Circuit later remarked that it was impossible to reconcile his claims with undisputed facts on the trial record. The trial court refused to grant a hearing on whether trial counsel had performed properly, instead adopting wholesale a set of "findings" penned by the prosecutor. No federal court agreed to hear evidence, despite the fact that while the case was pending in federal court, two witnesses came forward to state under oath that they had heard Walt Sellers implicate himself in the murder. Both the courts and Governor Bush refused to authorize DNA testing that could have confirmed Sellers's involvement in the crime.

#### **V. Conclusion**

Richard Jones was executed on the basis of a coerced confession that was inconsistent with the physical evidence and the time line of events following the victim's abduction. The jury that condemned him never heard that three other witnesses had given sworn testimony corroborating Jones's claim that he received the victim's property from Sellers in the first place, or that one of the eyewitnesses to the abduction did not believe Jones was the assailant or identify him as such. After trial, despite the existence of additional sworn testimony implicating Walt Sellers as the killer, the courts and the Governor refused to permit DNA testing – which did not exist in 1986, at the time of the original investigation – of available evidence which could have corroborated Sellers's involvement in the murder.

The State of Texas executed Richard Jones on August 22, 2000.

*For more information on Mr. Jones's case, see Dan Malone, A Question of Guilt, Dallas Morning News, Aug. 3, 2000; and the court files in: Jones v. State (CCA No. 69,894); Ex parte Jones (CCA No. 25,990); Jones v. State No. 05-91-00997 (Tex. App.-Dallas, 1992).*

## David Stoker

David Stoker was convicted and sentenced to death in 1987 for the robbery and murder of a convenience store clerk in Hale Center, Texas. His conviction was based entirely on the testimony of three witnesses and a bullet seized from Stoker's car. None of the witnesses claimed to have first-hand knowledge of the murder, but each testified Stoker had confessed to them. Following his conviction, new evidence came to light that undermined the credibility and motives of the witnesses and demonstrated that local officials had perjured themselves to conceal the weakness of their case.

### I. Key Facts

- A. During post-conviction proceedings, a key prosecution witness recanted his testimony. He stated he had testified against Stoker because the prosecutor had threatened him with a perjury conviction and because his wife had told him that Stoker had raped her, an allegation he no longer believed by the time of the trial.
- B. Prosecutors dismissed charges against their key witness in exchange for his testimony against Stoker, and then concealed the plea arrangement from the defense and the jury. The witness had instigated the prosecution of Stoker by providing police with the murder weapon.
- C. Local officials obstructed the investigation into the payment of reward money to two of their witnesses. They initially testified that no such payments had been made, but changed their testimony after Stoker's post-conviction counsel subpoenaed the cancelled check.

### II. The Crime

Early on the morning of November 9, 1986, someone robbed Allsup's convenience store in Hale Center, Texas. During the robbery, store clerk David Manrique was fatally shot with a .22 caliber pistol. Several months after the crime, police acted on an informant's tip and arrested David Stoker, a local man known to the authorities as a drug dealer.

### III. The Trial

The prosecution's case against Stoker rested almost entirely on the testimony of three witnesses: Carey Todd, Ronnie Thompson, and Debbie Thompson. Todd testified that Stoker had given him the murder weapon, which Todd had then given to the police. The police said they recovered a bullet from Stoker's car that matched the murder weapon and found his fingerprint on the gun. Todd denied under oath that the prosecution had offered him any incentives for his testimony. Both Ronnie Thompson and his wife Debbie swore that Stoker had confessed to the

murder. Debbie Thompson also provided additional evidence of a motive: Stoker needed money for a drug debt. The local police chief and a prosecution investigator denied that any reward had been paid to the witnesses for their testimony. Although the case against him was largely circumstantial and rested on testimony from witnesses of questionable character, David Stoker was convicted and sentenced to death.

#### IV. The Appeals

During post-conviction proceedings, Ronnie Thompson completely recanted his trial testimony. He stated he had testified against Stoker only because the prosecutor had threatened him with a perjury charge if he did not testify consistent with a statement he had signed earlier. That statement was drafted by his wife, Debbie Thompson, and Ronnie Thompson insisted he had not read it before he signed it. He originally had agreed to testify falsely against Stoker because his wife had told him Stoker had raped her. By the time of the trial, he no longer believed that allegation.

Although she never recanted her testimony, Debbie Thompson was an even less reliable witness than her husband. According to acquaintances, Debbie was a "methamphetamine whore," sleeping with anyone who had drugs to share. Moreover, during the proceedings against Stoker, she had left Ronnie Thompson and moved in with Carey Todd, the man who instigated the prosecution against Stoker and became the primary witness against him. She and Todd then split the Crimestoppers reward in the case, the existence of which local officials had denied.

Carey Todd was critical to the State's case. First, Todd told a local police investigator that Stoker had killed the clerk with a .22 Ruger pistol. Todd gave the gun to the officer, and Stoker's fingerprint was found on the trigger. But witnesses familiar with Stoker, Todd, and the Thompsons told Stoker's investigators that the pistol, like other guns, was regularly traded among these people for drugs. It also was regularly used by a number of people for target shooting. Todd himself was seen by two witnesses in possession of the pistol around the time of the murder. Moreover, Stoker's brother said that Todd gave Stoker the pistol so that he could fix the trigger, which Stoker did.

At the time of Stoker's trial, Carey Todd had a pending drug charge in a neighboring county. Those charges were dismissed after Todd testified against Stoker. At Stoker's trial, the State denied that Todd would receive anything in exchange for his testimony. During the post-conviction proceedings, Stoker's lawyers discovered a note in the prosecutor's file from Todd's drug case stating that the charges against Todd had been dismissed after Todd provided assistance against Stoker. Both the prosecutor and the investigator revealed that the file had contained a phone message slip stating that the prosecutor in the Stoker case had called to say that Todd had provided the required cooperation.

In addition, officials connected with the murder investigation obstructed fact-finding into the payment of the Crimestoppers reward money to Todd, which he had split with Debbie Thompson. Hale Center's police chief, Richard Cordell, initially testified there was no local Crimestoppers group, but was forced to acknowledge on the witness stand that he was, in fact, one of the group's founders. And Riley Rogers, an investigator for the district attorney's office, took the stand and

denied any knowledge of the \$1,000 payment. Bank records were later uncovered that linked him to the \$1,000 payment. Even then, they denied that Todd had been promised this reward.

Carey Todd figures at each critical juncture in the case against David Stoker. And at each of these points, Todd was in a position to manipulate the evidence to implicate Stoker. There is a substantial indication that he did just that.

## V. Conclusion

The State's case against Mr. Stoker was entirely dependent on Carey Todd, a drug dealer who was in a position to set Stoker up, whose drug charges were dismissed in exchange for his testimony against Stoker, and who received a cash payment for his efforts. Neither Stoker's trial attorney nor the jury were aware of Todd's ulterior motives or those of the other prosecution witnesses. As one federal court of appeals judge noted during oral argument, in the final analysis it is just as likely that Carey Todd committed the crime as it is that David Stoker did.

The State of Texas executed David Stoker on June 16, 1997. After Stoker's execution, a member of the Texas Board of Pardons and Paroles sent one of Stoker's family members a heartfelt letter informing her that his vote to grant Stoker a commutation mistakenly had been recorded as a vote to deny all relief. The Board member said he had voted for Stoker because he doubted Stoker's guilt.

*For more information on Mr. Stoker's case, see Steve Mills, Ken Armstrong & Douglas Holt, Flawed Trials Lead to Death Chamber: Bush Confident in System Rife with Problems, Chicago Tribune, June 11, 2000; and the case files in: Stoker v. State (CCA No. 70,031); Stoker v. Collins (N.D. Tex. 5:92-CV-148); Stoker v. Scott (5<sup>th</sup> Cir. No. 94-11089).*

