INNOCENCE PROJECT

Jimmy Ray Bromgard

Incident Date: 3/20/87
Jurisdiction: MT
Charge: Sexual Intercourse w/o Consent
Conviction: Sexual Intercourse w/o Consent (3 cts.)
Sentence: 40 Years

Year of Conviction: 1987
Exoneration Date: 10/1/02
Sentence Served: 14.5. Years
Real perpetrator found? Not Yet
Contributing Causes: Eyewitness Misidentification, Unreliable/Limited Science, Forensic Science Misconduct, Bad Lawyering
Compensation? Not Yet

Understand The Causes: Eyewitness Misidentification

Understand The Causes: Unreliable and Limited Science

Understand The Causes: Forensic Science Misconduct

Understand The Causes: Bad Lawyering

On October 1, 2002, Jimmy Ray Bromgard became the 111th person in the United States to be exonerated by postconviction DNA testing. Bromgard spent fourteen and a half years in a Montana prison for a crime he did not commit - the rape of an eight-year-old girl.

On March 20, 1987, a young girl was attacked in her Billings home by an intruder who had broken in through a window. She was raped vaginally, anally, and orally. The perpetrator fled after stealing a purse and jacket. The victim was examined the same day. Police collected her underwear and the bed sheets upon which the crime was committed. Semen was identified on the underwear and several hairs were collected from the bed sheets.

Based on the victim's recollection, police produced a composite sketch of the intruder. An officer familiar with him thought Jimmy Ray Bromgard resembled the composite sketch. Bromgard eventually agreed to participate in a lineup, which was also videotaped. In the live proceedings, the victim picked out Bromgard but was not sure if he was the right man. After the victim was shown the videotaped footage of Bromgard, she said she was "60%, 65% sure." When asked at trial to rate her confidence in the identification without percentages, she replied, "I am not too sure." Still, she was allowed to identify Bromgard in court as her assailant. Bromgard's assigned counsel never objected to the in court identification.

At trial, the prosecution's case revolved around the identification and the misleading testimony of the state's forensic expert. The semen found on the victim's underwear could not be typed, so the forensic case against Bromgard came down to the hairs found on the bed sheets. The forensic expert testified that the head and pubic hairs found on the sheets were indistinguishable from Bromgard's hair samples. He further testified that there was less than a one in ten thousand (1/10,000) chance that the hairs did not belong to Bromgard. This damning testimony was also fraudulent: there has never been a standard by which to statistically match hairs through microscopic inspection. The criminalist took the impressive numbers out of thin air.

Bromgard's defense counsel was woefully inadequate. Other than the forensic evidence, the only other physical "evidence" was a checkbook from the victim's purse that was found on the same street where Bromgard lived. His attorney did no investigation, hired no expert to debunk the state's forensic expert, filed no motions to suppress the identification of a young girl who was, according to her testimony, at best only 65% certain , gave no opening statement, did not prepare a closing statement, and failed to file an appeal after Bromgard's conviction.

Bromgard testified that he was at home and asleep when the crime occurred. None of his fingerprints were found in the house, nor were any found on the checkbook that was discovered on his street. Nevertheless, Bromgard was convicted in December 1987 of three counts of sexual intercourse without consent and sentenced to three 40 year terms in prison, to be served concurrently.

The Innocence Project began working on Bromgard's case in 2000, the same year Bromgard was turned down by the parole board, in part because he refused to participate in the sex offenders program in prison. Students located the evidence and worked with Bromgard's postconviction attorney to have it released for testing. Prosecutors consented to testing and had the victim's underwear sent to a private laboratory for testing. The results indicated that Bromgard could not have been the contributor of spermatozoa found on the victim's underwear.

Jimmy Ray Bromgard was eighteen years old when he was convicted of this brutal crime. He spent fourteen and a half years in prison before DNA testing proved his innocence.

The causes of Bromgard's wrongful conviction should have serious ramifications for the Montana criminal justice system. Fraudulent science and incompetent lawyering, both avoidable, were the major causes and must be redressed. The ACLU has already filed a class action lawsuit against the indigent defender system in seven Montana counties for not providing adequate counsel for indigent clients (see our Bad Lawyering section).

The forensic scientist that testified fraudulently against Bromgard was, at the time, the director of the Montana Department of Justice - Forensic Science Division. He testified in hundreds of other cases in Montana and later in Washington. A report by a peer review committee of top forensic scientists was issued which characterized the statistical evidence as junk science and urged the Montana Attorney General to conduct an audit of the witness's work in other cases. Read more about forensic science misconduct as cause of wrongful conviction.

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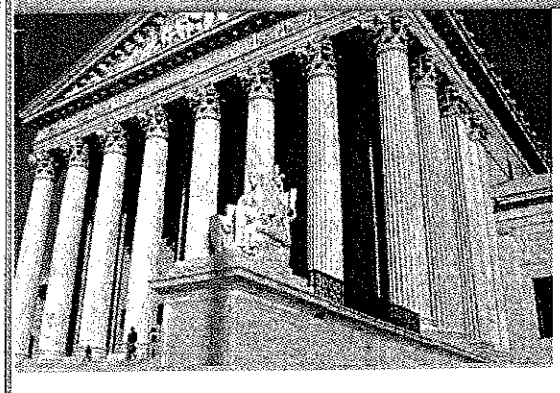

CHALLENGES IN THE STATES

GIDEON'S PROMISE AND THE INNOCENT DEFENDANT

BY BARRY C. SCHECK AND SARAH L. TOFTE

In America today you are better off being rich, white, and guilty than poor, black, and innocent. —Conventional wisdom, 2003

On March 18, 1963 the Supreme Court in *Gideon v. Wainwright* promised the "guiding hand of counsel" for the poor as well as the rich, for people of color as well as those who are white, and for the guilty as well as the innocent. The holding was simple: Indigents in felony cases who cannot afford a lawyer must be provided one. The broad and powerful rationale supporting the decision went back to first principles. Effective counsel is a fundamental right because it ensures all the other rights the Constitution affords an individual dragged into the dock to face accusers and the awesome power of the state. It not only protects the innocent from wrongful conviction, but promotes the integrity and efficient operation of the entire system by making sure law enforcement cannot cheat or cut corners when prosecuting the guilty.

Gideon's simple holding, the promise of a "guiding hand," has not been fulfilled for an equally simple reason: No one wants to pay for it. The last 40 years have been marked by litigation protesting the knowing, persistent and perverse refusal of state and local governments to provide adequate funding for indigent defense counsel. There is no shortage of examples from which to choose, but to be fair about it, we will cite our own state. New York, including the City of New York with its notoriously high cost of living, pays court appointed counsel in felony cases $25 an hour out of court and $40 an hour in court. We rank 49th in the country. No responsible person in our legal system even pretends this level of compensation is fair or sensible. Our chief judge has recommended, based on a commission finding three years ago, the rates be raised to $75 an hour. The state has recently appealed a trial court ruling pegging the rate at $90 an hour. It is estimated such relief would cost $60 million a year of additional funding and there is no great optimism, in this era of ballooning deficits, that help is on the way soon.

What price is paid for such knowing neglect? One easy measure is conviction of the innocent. Nothing more surely guarantees the conviction of innocent defendants than an incompetent, underfunded, or ineffective lawyer. *Newsday* recently proved this point convincingly in a four-part series. The paper assigned a team of reporters to study a striking development: In the last two years, 13 New York defendants had their convictions for murder vacated after their innocence was proven by newly discovered evidence. Only one of these cases involved post-conviction DNA testing. But 10 of the 13 defendants had court appointed lawyers compensated at scandalously low rates, and two of those lawyers had been subsequently suspended for commingling client funds. New Yorkers are indeed fortunate that during the period these defendants were convicted New York did not have capital punishment. Illinois, as everyone knows, was not so lucky.

The sad figures that led Illinois Gov. George Ryan to declare a moratorium in 2000 on the death penalty and, ultimately, a commutation to life without parole for all on death row, were 17 innocent men sentenced to death versus 12 executed since the reinstatement of capital punishment, and the fact that a third of the lawyers for all death row inmates were subsequently suspended or disbarred. Whether or not one supports Gov. Ryan's "blanket" commutation, whether or not one favors capital punishment, no one could plausibly quarrel with the Governor's complaint that the "demon of error" had infected the capital punishment system in Illinois, error in the determination of guilt or innocence, error in the determining who gets life and who gets death. *Gideon's* unfulfilled promise created that demon and undermined public confidence in the entire system.

When criminal defense lawyers cannot vigorously perform their critical function to put the state to its proof, especially when representing the guilty (which, if the constitutional requirement of probable cause is being respected, ought to be most of the time) it has, ironically enough, a corrosive effect on law enforcement — junk and fraudulent forensic science fester unexposed; police perjury, corruption, and brutality swell unchallenged; and prosecutorial misconduct spreads, uncontested and barely noticed. Inevitably, these effects of weak defense counsel severely impair the capability of law enforcement to apprehend the guilty, much less protect the innocent. Indeed, it must never be forgotten that every time an innocent person is arrested, convicted, or worst of all, sentenced to death, the real assailant is at liberty to commit more crimes.

No better body of proof can be found to support these contentions than the running tally kept by the Innocence Project of post-conviction DNA exonerations which currently stands at 123 (see the Website at *http://www.innocencepro-*

ject.org for case histories and an updated total). Our most recent exonerations are instructive. Five teenagers gave false confessions to a vicious assault and rape in the "Central Park jogger" case when the attack was really committed by Matias Reyes, a serial offender who had committed a rape two days earlier, two blocks away from where the jogger was found, and who went on to commit three other rape/robberies and a rape/murder. The five teenagers were represented by court appointed counsel and a number of those lawyers simply did an abysmal job, thereby hurting all the defendants in both trials. Eddie Joe Lloyd was convicted of murder in Detroit after giving a false confession from a mental institution. His court-appointed lawyer took the case with only six days notice and complained publicly that Lloyd, who always maintained his innocence, would not go with an insanity defense. The trial judge, Leonard Townsend, told Lloyd when sentencing him to life, he regretted Michigan did not have a death penalty so Lloyd could be "terminated by extreme constriction," or hanging. Even more chilling, the same judge and the same court-appointed lawyer were featured in an exposé issue 10 years ago by *The American Lawyer* magazine documenting the unfulfilled promise of *Gideon.*

But for a clear object lesson in the systemic costs society pays for short-changing defense counsel, consider the matter of Jimmy Ray Bromgard, just released from prison in Montana in 2002 after fifteen hard years of imprisonment. On March 20, 1987, an intruder attacked an 8-year-old girl in her Billings, Montana home. She was raped vaginally, anally, and orally. The perpetrator fled after stealing a purse and jacket. The victim was examined the same day. Police collected her underwear, where semen was identified, and hairs were collected from bed sheets upon which the crime was committed. Based on the victim's recollection, police produced a composite sketch of the intruder and an officer thought Bromgard, an 18-year-old who lived

NACDL'S NATIONAL EFFORTS TO HELP THE INDIGENT

BY KATE JONES

NACDL has made it a priority to help improve ailing indigent defense systems across the country. Its efforts have combined coalition-building, support for legislative initiatives, and systemic litigation. Led in these activities by an energetic Indigent Defense Committee, NACDL continues to devote significant resources to state and local reform campaigns.

The Indigent Defense Litigation Subcommittee and staff identify jurisdictions where the indigent defense system is underfunded, work with local attorneys and community leaders to determine an appropriate reform strategy, find experts to conduct research and issues reports, recruit large law firms to pursue systemic litigation, and work with other national organizations in helping shape the new system to reflect best practices from around the country.

For example, in cooperation with the National and Greater Pittsburgh offices of the ACLU, NACDL has fought for improvements in the Venango County, Pennsylvania, public defender office. Since NACDL and the ACLU got involved by releasing a study report and threatening a lawsuit in 2001, new staff and additional resources for training and technology have been added to the office. NACDL will continue to push for additional attorney staff and resources until the office is adequately funded. The efforts of NACDL and the ACLU have been highlighted in the Venango County and Pittsburgh press, as well as in the cover story of the December 2001 edition of the *ABA Journal.*

In Detroit, NACDL is supporting a lawsuit filed by the Criminal Defense Attorneys of Michigan (an NACDL affiliate) and the Wayne County Criminal Defense Bar Association. On November 12, 2002, these two bar associations filed an original action in the Michigan Supreme Court, alleging that Wayne County's fees for assigned counsel violate the Michigan "reasonable fee" statute and the U.S. Constitution. NACDL recruited the Chicago office of Kirkland & Ellis to handle the lawsuit *pro bono* and NACDL Treasurer Marty Pinales has represented the association in negotiations with Wayne County's two chief judges.

NACDL is also pursuing reform in Virginia (see sidebar on page 52 about the Virginia Indigent Defense Coalition), Louisiana, and Ohio.

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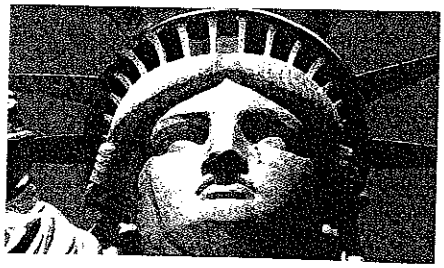

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- **Threatened with contempt**
- **Hit with an improper motion to disqualify you from a case**

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BARRY C. SCHECK & SARAH TOFTE

near the scene of the crime, resembled the composite sketch. The victim picked out Jimmy Ray as resembling her attacker but was not sure if he was the right man. She was subsequently shown videotaped footage of Bromgard, but was still just "60 percent, 65 percent sure." When asked at trial to rate her confidence in the identification without percentages, she replied, "I am not too sure." Nonetheless, she was allowed to identify Bromgard in court as her assailant, and Bromgard's assigned counsel, not so affectionately known as "Jailhouse John" Adams, never objected to the in-court identification, never filed a motion to suppress, did no investigation, gave no opening statement, did not prepare a closing statement, and failed to file an appeal after Bromgard's conviction. But it gets worse.

Semen found on the victim's underwear did not yield usable serology results, so the whole case against Bromgard, given the extremely weak identification evidence, came down to the hairs found on the bed sheets. The state's forensic expert, Arnold Melnikoff, who for a decade *headed* the Montana crime laboratory, testified that a scalp hair and a pubic hair found on the sheets were not just indistinguishable from Bromgard's hair samples, but he gave numbers: Since there was a one in ten thousand (1/10,000) chance that the head hair did not belong to Bromgard, and a 1/10,000 chance the pubic hair didn't belong to Bromgard, Melnikoff claimed the odds of both hairs not belonging to Bromgard were 1/100,000. These breathtakingly absurd statistics (there is no scientific basis for hair experts calculate frequencies much less such low frequencies that come from thin air) went uncontested. Jimmy Ray Bromgard was sentenced to 40 years in prison.

On October 1, 2002, Peter Neufeld walked Bromgard out of prison after post-conviction DNA testing on semen from the victim's underwear, performed with the consent of the prosecution, exonerated him. More cases were then discovered where Melnikoff had testified to these bogus hair statistics, including matters approved by the Montana Supreme Court; one was a death penalty conviction. Montana's current Attorney General Mike McGrath rightly recognized that failure to expose Melnikoff's proclivity to engage in junk or fraudulent forensic science — by Melnikoff's own estimate he had testified in more than 200 Montana cases — necessarily raised serious questions about all the work of the state crime laboratory produced for more than a decade. McGrath has ordered an audit of past cases, involving not just in hair comparisons, but other forensic disciplines, such as arson and toxicology. One can only hope that former Montana Governor and Attorney General Mark Racicot, now Chairman of the Republican National Committee, will share McGrath's concerns, particularly since Racicot, by virtue of the offices he held, placed great reliance on Melnikoff's testimony and professional competence. Before the Bromgard exoneration, Melnikoff had already moved on to a state crime laboratory in the State of Washington where it is estimated he has testified 180 times. An audit of his work in Washington is being planned by laboratory officials and professors from the Innocence Project Northwest at the University of Washington Law School.

When Jimmy Ray Bromgard was tried, the county in which the trial was held had a "contract" system for assigned counsel that failed to establish and enforce adequate standards of performance for the delivery of defense services. Judges tightly controlled money for investigators and experts. "Jailhouse John" Adams was paid a paltry fixed amount each month and he received the same compensation whether he expended 10 hours or 100 hours on a case. This payment structure provided little incentive for court appointed counsel to spend time on assigned cases as opposed to private practice.

Bromgard's exoneration adds fuel to a lawsuit filed by the American Civil Liberties Union earlier this year against the state of Montana and seven counties. The suit alleges that Montana's indigent defense services are constitutionally deficient and calls for an overhaul of the system that would set competency standards and provide greater resources for public defense attorneys. In the last few years, advocates in other states, including Connecticut, Pennsylvania, New York, Georgia, and Mississippi, have filed similar suits to remedy indigent defense deficiencies. While some of these suits are ongoing, at least two — Connecticut and Pennsylvania — have resulted in successful settlements, increasing the funding available for indigent defense and improving administration of indigent defense programs.

As NACDL tries to build constituencies for reform in individual states there is now a fairly powerful practical economic argument emerging: Which costs more, adequate funding for defense counsel or the audits, the civil suits, and the damage done to victims by assailants who were at large because of the shoddy work by the likes of Arnold Melnikoff and other forensic frauds?

Forty years after *Gideon*, and 123 post conviction DNA exonerations later, the role attorney incompetence played in the wrongful convictions of a majority of our clients, like Jimmy Bromgard, demands that we mark the anniversary of *Gideon* not with celebration, but with a renewed call for adequate funding and training for indigent defense lawyers. Only then will we be able to honestly say that *Gideon* has begun to fulfill its potential to protect both innocent defendants and the integrity of our criminal justice system from the devastating effects of wrongful convictions.

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