

IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 103 EM 2018 and 102 EM 2018

KEVIN MARINELLI and JERMONT COX,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

BRIEF OF *AMICI CURIAE* THE INNOCENCE NETWORK AND
WITNESS TO INNOCENCE

ON PETITION FOR EXTRAORDINARY RELIEF UNDER KING'S BENCH JURISDICTION

Caroline Heller
Keith Hammeran
Greenberg Traurig, LLP
MetLife Building
200 Park Avenue
New York, NY 10166
Telephone: 212.801.2165
Facsimile: 212.805.9488

Brian T. Feeney (Pa. I.D. No. 78574)
Greenberg Traurig, LLP
2700 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
Telephone: 215.988.7812
Facsimile: (215) 717-5265

Elliot H. Scherker
Greenberg Traurig, P.A.
333 Southeast Second Avenue,
Suite 4400
Miami, Florida 33131
Telephone: 305.579.0500
Facsimile: 305.579.0717

Counsel for Amici Curiae The Innocence Network and Witness to Innocence

TABLE OF CONTENTS

TABLE OF CITATIONS	ii
STATEMENT OF INTEREST OF AMICI CURIAE.....	1
ARGUMENT	2
I. CAPITAL PUNISHMENT AND ACTUAL INNOCENCE.....	2
II. THE EXONERATED	5
A. Nicholas Yarris	5
B. Thomas Kimbell.....	11
C. Neil Ferber	16
D. William Nieves	24
CONCLUSION.....	29
WORD COUNT CERTIFICATION	30
PROOF OF SERVICE.....	31
APPENDIX A (Statement of Nicholas James Yarris)	
APPENDIX B (Excerpts of Citations Not Readily Available)	

TABLE OF CITATIONS

	Page(s)
Cases	
<i>Commonwealth v. Kimbell</i> , 759 A.2d 1273 (Pa. 2000).....	11, 12, 13, 14
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<i>Commonwealth v. Nieves</i> , 746 A.2d 1102 (Pa. 2000).....	25, 26
<i>Commonwealth v. Yarris</i> , 549 A.2d 513 (Pa. 1988).....	6, 7
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<i>Ferber v. City of Philadelphia</i> , 661 A.2d 470 (Pa. Commwl. Ct. 1995)	16, 18, 22, 23
<i>Herrera v. Collins</i> , 506 U.S. 390 (1993).....	4
<i>Jordan v. Mississippi</i> , 138 S.Ct. 2567 (2018).....	3
<i>Yarris v. County of Delaware</i> , 456 F.3d 129 (3d Cir. 2006)	8, 9, 10
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Philadelphia Inquirer, June 9, 198118

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Innocence Network (the Network) is an association of independent organizations dedicated to providing pro bono legal and investigative services to prisoners for whom evidence discovered after conviction can provide conclusive proof of innocence. The 68 current members of the Network represent hundreds of prisoners with innocence claims in all 50 states, the District of Columbia, and Puerto Rico, as well as in 10 other countries. The Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system. Drawing on lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the system's truth-seeking functions system to ensure that wrongful convictions are prevented.

Witness to Innocence (WTI) is a non-profit organization of exonerated death row survivors and their loved ones. Through public speaking, testifying in state legislatures, media work, and active participation in the nation's cultural life, its members educate the public about wrongful convictions. WTI also provides an essential network of peer support for the exonerated, most of whom received no post-release compensation or access to reentry services. WTI can offer a unique perspective on the death penalty in Pennsylvania and America, and particularly the phenomenon of sentencing innocent people to death, because its members have been personally impacted by the failures of the criminal justice system.¹

¹ No person or entity other than counsel for *amici* has been paid, either in whole or in part, for preparation of this brief, which has been authored by *amici*'s counsel.

ARGUMENT

I. CAPITAL PUNISHMENT AND ACTUAL INNOCENCE

The headline on Page A20 of the January 25, 2019 *New York Times* reads: “Son Who Served Full Sentence Is Finally Cleared in Mother’s Murder.” Jan Ransom, *Son Who Served Full Sentence Is Finally Cleared in Mother’s Murder*, N.Y. Times, Jan. 25, 2019, at A20, <https://www.nytimes.com/2019/01/24/nyregion/huwe-burton-exoneration-bronx-murder.html> (last visited Feb. 14, 2019). The article tells the story of Huwe Burton, who was convicted in 1989 for his mother’s murder after three detectives manipulated the then 16-year-old into making a false confession. Mr. Burton served nearly 20 years in prison before being paroled in 2009. In 2019, with the assistance of the Innocence Project, affiliated with the Benjamin N. Cardozo School of Law, the Center on Wrongful Convictions at Northwestern Law, Rutgers Law School Criminal and Youth Justice Clinic, and the Bronx District Attorney’s Conviction Integrity Unit, Mr. Burton was declared innocent, and his conviction was vacated.

Mr. Burton lost 20 years of his life. Nothing within the criminal justice system that wrongfully convicted him can restore those years or compensate him for unjust incarceration. But Mr. Burton had the opportunity, even after completing his sentence, to seek exoneration. A death-sentenced defendant who “completes” his or her sentence—by being executed—has *no* such opportunity.

As of January 2019, 164 death-sentenced individuals have been exonerated. Death Penalty Information Center, *The Death Penalty in 2018: Year End Report* (2018), <https://deathpenaltyinfo.org/documents/2018YrEnd.pdf> (last visited Jan. 28,

2019). That amounts to one exoneration for approximately every nine executions, *id.*, and a “conservative estimate of the proportion of false conviction among death sentences in the United States” is “at least 4.1%.” Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PNAS 7230, 7230 (May 20, 2014), <http://www.pnas.org/content/pnas/111/20/7230.full.pdf> (last visited Feb. 14, 2019) (hereinafter, *False Conviction*).

As Justice Breyer noted in 2018, evidence “has accumulated suggesting that the death penalty as it is applied today lacks requisite reliability,” *Jordan v. Mississippi*, 138 S.Ct. 2567, 2571 (2018) (Breyer, J., dissenting), citing examples:

Four hours before Willie Manning was slated to die by lethal injection, the Mississippi Supreme Court stayed his execution and on April 21, 2015, he became the fourth person on Mississippi’s death row to be exonerated. Since January 2017, six death row inmates have been exonerated. Among them are Rodricus Crawford, Rickey Dale Newman, Gabriel Solache, and Vicente Benavides Figueroa, whose exonerations were based upon evidence of actual innocence.

Id. (citation omitted).

“With an error rate at trial over 4%, it is all but certain that several of the 1,320 defendants executed since 1977 were innocent.” *False Conviction* at 7235. The June 2018 report of the General Assembly’s Joint State Government Commission found that “several executions have been carried out . . . despite significant evidence of innocence[,]” which—considered “along with the number of exonerations”—demonstrates that “states have failed to put into place procedural safeguards that can guarantee with 100% certainty that innocent individuals will not be sentenced to death and executed.” Joint State Government Commission, *Capital Punishment in*

Pennsylvania: The Report of the Task Force and Advisory Committee 172 (June 2018) (hereinafter, *Report*), [http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2018-06-25%20SR6%20\(Capital%20Punishment%20in%20PA\)%20FINAL%20REPORT%20June%2025%202018.pdf](http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2018-06-25%20SR6%20(Capital%20Punishment%20in%20PA)%20FINAL%20REPORT%20June%2025%202018.pdf) (last visited Feb. 15, 2019). The lead author of *False Conviction* notes that “a large number” of innocent persons have been sentenced to death, “and despite our best efforts some of them have undoubtedly been executed.” *Id.* at 173 (footnote omitted).

While Pennsylvania has not “recently had . . . [a] controversial execution”—because “[a]ll three individuals executed by the Commonwealth in the modern death penalty era were . . . volunteers with serious mental health issues, whom courts found to have waived their rights to an appeals process”—there is “no reason to believe that the absence of controversial executions in the Commonwealth is the result of its systematic superiority.” *Id.* at 172 & n.1186. The *Report* found that evidence “suggests that there are wrongfully convicted inmates on the Commonwealth’s death row”—and “[t]here is no way to put procedural safeguards in place that will guarantee with 100% certainty that the Commonwealth will not execute an innocent person.” *Id.* at 171, 173.

It is “crystal clear that the execution of an innocent person is ‘at odds with contemporary standards of fairness and decency.’” *Herrera v. Collins*, 506 U.S. 390, 431 (1993) (Blackman, J., dissenting). “[T]he most fundamental principle of American jurisprudence is that an innocent man not be punished for the crimes of another,” *Report* at 174 (citation omitted)—particularly with a sentence of death. Because “no process of removing potentially innocent defendants from the execution

queue can be foolproof[,]” *False Conviction* at 7235, there is only one way to ensure that innocents are not put to death in Pennsylvania: to strike down the death penalty in the Commonwealth.

II. THE EXONERATED

This section will tell the stories of four innocent men sentenced to death in the Commonwealth, all of whom were awaiting their likely execution—until, with the assistance of volunteer lawyers and organizations such as those affiliated with the Network, their convictions were overturned and their lives spared.

A. Nicholas Yarris

Nicholas Yarris is the first Pennsylvania death row inmate to be exonerated by DNA testing—but only after 21 years of imprisonment. The Innocence Project, *Nicholas Yarris*, <https://www.innocenceproject.org/cases/nicholas/yarris> (last visited Feb. 15, 2019). Exoneration culminated his long battle to prove his innocence.

In December 1981, Mr. Yarris, a 20-year-old man who had turned to drugs and alcohol in a “downward spiral” caused by the trauma of a sexual assault in his youth, was stopped by police for a traffic violation. Mario Cacciottolo, *Nick Yarris: ‘How I Survived 22 Years on Death Row’* BBC.com (Nov. 16, 2016), <https://www.bbc.com/news/world-us-canada-37974904> (last visited Feb. 15, 2019). The stop led to a confrontation and Mr. Yarris’s arrest for attempted murder (of which he was ultimately acquitted). *Id.*

Four days before Mr. Yarris’s arrest, the police discovered the body of Linda Mae Craig, a young woman who had been raped and murdered. *Id.*; The Innocence

Project, *supra*. Mr. Yarris, who now describes himself as a “desperate . . . drug-addicted kid who didn’t know what to do to get out of jail,” had read about the murder in the newspaper and, in an effort to gain his freedom, told the police that his former roommate had committed the crime. Mario Cacciottolo, *supra*; National Registry of Exonerations, *Nicholas Yarris*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3771> (last visited Feb. 15, 2019) (hereinafter, *Nicholas Yarris*). Mr. Yarris believed that the man he accused was dead. He was not. Mr. Yarris then became the prime suspect. Cacciottolo, *supra*.

Serological testing did not exclude Mr. Yarris as the perpetrator. *Nicholas Yarris, supra*. Prosecutors presented testimony from a jailhouse informant and another witness who said that Mr. Yarris had been seen by the victim’s co-workers harassing her sometime before the murder. *Id.* Mr. Yarris was convicted on July 1, 1982 and sentenced to death. *Commonwealth v. Yarris*, 549 A.2d 513, 518 (Pa. 1988).

On appeal, this Court held the conviction “was supported by scientific evidence linking [Mr. Yarris] to the rape of the victim, testimony regarding [Mr. Yarris’s] behavior toward the victim in the week preceding the crime, and numerous incriminating statements[,]” which were “more than sufficient” to prove guilt. *Id.* at 587. The Court also upheld the death sentence. *Id.* at 531.

“During his imprisonment in Pennsylvania jails, Nick’s only possessions were . . . legal materials, some novels, toiletries and a small radio.” Cacciottolo, *supra*. This is one of the cells in which he was confined:



“He was only allowed to exercise for 30 minutes on weekdays in a small cage[,]” and “[h]e would spend 14 years, from 1989 to 2003, without being touched by another human being.” *Id.* To ease the deprivation of human contact, Mr. Yarris “would lie on his arm until it went numb and then use it to rub his face, as though it were someone else.” *Id.*

In March 1988, Mr. Yarris successfully petitioned the trial court to allow DNA testing of the evidence, but the single slide that was produced was insufficient for testing. *Yarris v. Ryan*, C.A. No. 89-0328, 1989 WL 8073, at *1 (E.D. Pa. Jan. 31, 1989). There followed “years of heartbreaking delays and churning frustrations, such as when a vital package containing DNA samples burst open” en route to a laboratory. *Cacciottolo, supra*. “Successive rounds of DNA testing . . . followed throughout the 1990’s,” but “failed to produce conclusive results.” *Nicholas Yarris, supra*.

Mr. Yarris continued to challenge his conviction, but without success. *E.g.*, *Commonwealth v. Yarris*, 731 A.2d 581 (Pa. 1999). On October 26, 1999, Mr. Yarris, now represented by the Federal Community Defender Organization for the Eastern District of Pennsylvania and Peter Goldberger, a veteran criminal defense lawyer, filed a habeas corpus petition in the Eastern District of Pennsylvania. *Yarris v. Horn*, 230 F.Supp. 2d 577, 579 (E.D. Pa. 2002). After three years of litigation, the district court ruled that there were no procedural bars to hearing the merits of Mr. Yarris's case. *Id.* at 591-92.

By 2002, according to Mr. Yarris, "I was ready to be executed and I asked to drop my legal appeals." Cacciottolo, *supra*. But, in April 2003, enhanced DNA testing produced findings that excluded Mr. Yarris absolutely as the perpetrator. *Yarris v. County of Delaware*, 456 F.3d 129, 133 (3d Cir. 2006). After the DNA results were filed with the federal court in July 2003, the court, on August 19, 2003, ordered that Mr. Yarris be granted a new trial or released. *Id.* On August 26, 2003, prosecutors and Mr. Yarris's counsel filed a joint petition to vacate the conviction, and the trial court did so on September 3, 2003. *Id.* The Commonwealth dropped all charges on December 9, 2003, and Mr. Yarris was released from prison on January 16, 2004. *Id.*

Mr. Yarris was the 13th death-row DNA exoneration and the 140th person nationwide to be exonerated by post-conviction DNA testing. *Nicholas Yarris, supra*. He described a post-release conversation with his mother: "[She] set me down and said that I had to be a polite and kind man from now on . . . otherwise it was a waste of coming home. . . . I began creating positive passages in my brain

that changed my thoughts for the better.” Cacciottolo, *supra*.

Mr. Yarris is now a father and lives in England, where he campaigns for abolition of the death penalty. *Id.* He “has spoken in front of officials at both the United Nations and the European Union and has given around 300 talks in schools.” *Id.*

At the request of the Network’s counsel, Mr. Yarris has provided a personal statement to this Court, a copy of which is attached to this brief as an appendix (hereinafter, “A”). Upon his release, Mr. Yarris “was handed \$5.07 of my own money . . . and told that I was not entitled to health care, housing, job training, or any sort of help from the state.” (A:2). Mr. Yarris “was not offered counseling . . . for having lived on Death Row for decades.” *Id.*²

After his release, Mr. Yarris explains he “forgave everyone,” and refused to succumb to bitterness or rage:

I knew I had to show myself worthy of the efforts by Peter Goldberger and others that I was purposeful in my life personally as well. I have thus in the past 15 years of freedom tried to show both piousness and a polite manner each day. I do so hoping that in the future that I represent how a person sentenced to die can come back and be a contributing member of society. I take this utterly seriously because what else can this court go by? You are tasked with the thought that men once sentenced to the lowest feelings of worthlessness can somehow revert to being a non threat to either prison or open society.

Id.

² One of the three Pennsylvania execution volunteers, Keith Zettlemyer, who was Mr Yarris’s friend in prison, “asked to be executed only because his physical pain caused from being shoved down a flight of stairs by a prison guard in Huntingdon made him give in.” (A:1).

He wants this Court to know that “I am deeply sorry that I was not a good person throughout my life. I hold no grudge and I beg Pennsylvania to forgive one of its loving sons.” *Id.*

As it happened, counsel’s request for a statement arrived on his now-deceased mother’s birthday. The statement concludes:

All I know is I was shown what it is like to live on the gallows. I was given very little to work with, but I saw how I could be of use. By being a good man in my life each day, humbled for what’s been done, I pray to God that you can grant this same grace as being possible for the others on death row be they guilty or not.

I did my part in this. I took my own share and I have shown myself willing to try and make things better. Can you now try and show that we are compassionate? Can you please show America once again how the Pennsylvania State Supreme Court is one of the finest institutions of our nation? If what I went through helps bring about this change, then I offer this day of my mother’s birth to be grateful for each broken bone, damaged limb, or scar left upon me.

With the utmost respect, thank you for allowing my words to be part of the record within this state. . . .

Thank you,

Nick Yarris.

(A:3).



Sunday People, *Karen and Nick Yarris with their daughter Lara Rebecca*,
<https://www.mirror.co.uk/news/world-news/incredible-courage-innocent-man-death-9340951> (last visited Feb. 15, 2019).

B. Thomas Kimbell

On June 15, 1994, Bonnie Dryfuse, her daughters Jacqueline and Heather (ages seven and four), and her niece Stephanie Herko (five), were stabbed to death in their Pulaski Township mobile home. *Commonwealth v. Kimbell*, 759 A.2d 1273,

1274 (Pa. 2000). Around 3:00 PM that day, police received a 911 call from Bonnie's husband, Tom (a/k/a Jake) Dryfuse, after he reportedly arrived home and discovered the bodies. *Id.*; Laure Cioffi, *Dryfuse Slayings Expert Points Finger at a Family Member*, *The Vindicator* (Apr. 12, 2002, 12:00 AM), <http://www.vindy.com/news/2002/apr/12/dryfuse-slayings-expert-points-finger-at-a-family/>; *Killing of Four Detailed in Trial*, *Pittsburgh Post-Gazette*, Apr. 28, 1998, at B1 (B.1).³

Tom Dryfuse was found to have blood on his hand. *Kimbell*, 759 A.2d at 1275; Henry Weinstein, *Pa. Death Row Inmate Acquitted at Retrial, Freed*, *LA Times* (May 7, 2002), <http://articles.latimes.com/2002/may/07/nation/na-acquit7> (last visited Feb. 15, 2019). In addition, Stephanie Herko's mother told police that she had spoken to Bonnie Dryfuse around 2:00 PM on the day of the homicides, and that Bonnie had ended the call by stating "that she had to go because Jake (Tom Dryfuse) had just pulled in." *Kimbell*, 759 A.2d at 1275 (parentheses in original). But Tom Dryfuse was never charged with the murders.

Thomas Kimbell, a former drug addict, was arrested for stealing a bicycle near the Dryfuse trailer on the day of the murders. While in custody, he was questioned about the homicides, and the police took DNA samples. National Registry of Exonerations, *Thomas Kimbell*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3349> (last updated Feb. 10, 2019) (hereinafter, *Thomas Kimbell*). Mr. Kimbell was known to police, "mostly for petty misdemeanors If someone asked for the 'usual suspects,' he would come to mind." Heidi Boghosian, Review of *The Death Penalty on Trial: Crisis in American*

³ Citations to "B._" refer to Appendix B, annexed hereto.

Justice, N.Y. Law Journal, vol. 231, pg. 1, col. 3 (Jan. 4, 2005) (B.2).

A physical examination of Mr. Kimbell's body one day after the crime revealed no bruises or scratches. *Schnader Lawyer Helps Free Former Death Row Inmate*, The Legal Intelligencer (June 24, 2002 12:00 AM), <https://www.law.com/almID/1202435384663/> (last visited Feb. 15, 2019). A search of his trailer revealed no evidence. J. Kenneth Evans, *Killer of Four Remains at Large*, Pittsburgh Post-Gazette, June 20, 1994, at D1 (B.3). Police even drained a nearby swamp, to no avail. *Draining of Swamp Continues*, Pittsburgh Post-Gazette, Feb. 9, 1998, A12 (B.4).

It was not until two-and-a-half years later that the Commonwealth charged Mr. Kimbell with the homicides. No eyewitnesses or physical evidence connected him to the crime. Mr. Kimbell's mother and sister testified that he was home at the time of the murders. As she made her way from the witness stand, Mr. Kimbell's distraught mother had an emotional outburst, earning a threat of contempt from the trial judge, who warned her that "[e]veryone has acted perfectly until you came here this afternoon[.]" and "[i]f you think you can take advantage of my sympathy, you've got another think coming[.]" Rena A. Koontz, *Defendant Was Home, Mother, Sister Testify*, Pittsburgh Post-Gazette, May 5, 1998, at A16 (B.5). The only new evidence presented by the prosecution were statements from three jailhouse informants, including Mr. Kimbell's former cellmate, that Mr. Kimbell had confessed to the crimes. Weinstein, *supra*; *Thomas Kimbell*, *supra*.

Tom Dryfuse testified that he was with his father on the day of the murders until he returned at 3:00 PM to find the bodies. *Kimbell*, 729 A.2d at 1274. He also

testified that he had touched his daughter Heather upon finding the bodies (potentially explaining the blood on his hand), but that was inconsistent with the opinion of one of the Commonwealth's experts that the blood "was a genetic match for that of his daughter Jacqueline, not his other daughter Heather." *Id.*

Mary Herko, called in Mr. Kimbell's case, testified that Bonnie Dryfuse had ended their call by saying, "I got to go, somebody just pulled up in the driveway." *Id.* at 1275. The trial court precluded the defense's attempts to question Ms. Herko about this inconsistency with her statement to the police. *Id.* Mr. Kimbell was convicted and sentenced to death. On appeal, this Court held that precluding cross-examination of Ms. Herko regarding her prior statement had "deprived [him] of an opportunity to establish that Tom Dryfuse was at the scene of the murders during the time that he had claimed to be elsewhere, as well as an opportunity to offer an explanation for the presence of the blood of [Jacqueline], whose body he had denied touching, on Dryfuse's hand," required a new trial. *Id.* at 1280.

In advance of the retrial, a new forensic examination of the evidence revealed that DNA on a bloody washcloth found near the children's bodies was consistent with that of Tom Dryfuse. The defense also discovered that Mr. Kimbell was a hemophiliac. According to the defense's expert, "[f]or a 120-pound man [Mr. Kimbell], stabbing a 250-pound woman [Bonnie] and to inflict stab wounds on children so brutal that they fractured the skulls and not sustain a single bruise, it's not feasible." Cioffi, *supra*.

The second trial began in April 2002. The jury heard Mary Herko's initial statement to police. The defense attacked Tom Dryfuse's alibi by establishing that

the mechanic's shop he allegedly visited with his father on the day of the murders had no record of any visit. Of the jailhouse informants, Mr. Kimbell's former cellmate had died, the second informant invoked his constitutional privilege against self-incrimination, and the third recanted.

Mr. Kimbell's resulting acquittal gave him the dubious honor of being the 101st person nationwide since 1973 to be released from death row after exoneration. Weinstein, *supra*; Thomas Kimbell, *supra*. His post-release life as a free man was all too short, however. On October 3, 2018, at the age of 56, Mr. Kimbell was found dead near railroad tracks in New Castle. Jennifer Rodriguez, *New Castle Man Exonerated of 4 Murders Found Dead Tuesday*, WKBN 27 (Oct. 2, 2018 8:22 PM), <https://www.wkbn.com/news/local-news/new-castle-man-exonerated-of-4-murders-found-dead-tuesday/1493448416> (last visited Feb. 15, 2019). His obituary states that he was survived by four sisters and several nieces and nephews, and that he "enjoyed fishing, cutting grass and had a love of animals. He was also known to help anyone that needed anything." Ed & Don DeCarbo Funeral Home & Crematory, Inc., *Obituary for Thomas "Hank" Kimbell Jr.*, <https://www.decarbofuneralhome.com/book-of-memories/3623506/kimbell-thomas/service-details.php> (last visited Feb. 1, 2019).



Harvey Finkle, *Thomas Kimbell*, <https://www.aclupa.org/files/6813/1404/6698/CaseofThomasKimbell.pdf> (last visited Feb. 15, 2019)

C. Neil Ferber

“Factually, this case presents a Kafkaesque nightmare of the sort which we normally would characterize as being representative of the so-called justice system of a totalitarian state. Unfortunately, and shamefully, as the trial evidence showed, it happened here in Philadelphia.” *Ferber v. City of Philadelphia*, 28 Phila. Co. Rptr. 269, 272 (Pa. Ct. Com.Pl. Oct. 3, 1994), *aff’d in part and rev’d in part*, *Ferber v. City of Philadelphia*, 661 A.2d 470 (Pa. Commwl. Ct. 1995) (*Ferber II*). That is how the Court of Common Pleas described the wrongful conviction of Neil Ferber, a married furniture salesman with two children who, when he was 36 years old, was arrested, convicted and sentenced to death for a crime he did not commit. *Id.* at 273;

Frederic N. Tulskey, *Murderer of Reputed Crime Figure Sentenced to Death*, *The Philadelphia Inquirer*, May 4, 1982, at B1 (B.6); Dave Racher & Kathy Sheehan, *Booras' Hit Man Joins 23 on Death Row*, *Philadelphia Daily News*, May 4, 1982, at 4, 29 (B.7).

The court described Mr. Ferber's case in such stark terms because his wrongful conviction and sentence were the direct results of egregious police misconduct. According to the court:

a variety of Philadelphia police officers manipulated the unsuspecting [witnesses], withheld important information, tampered with identification evidence, and misled judicial officers, all for the singular purpose of obtaining Ferber's arrest and subsequent conviction on first degree murder charges.

Ferber, 28 Phila. Co. Rptr. at 273.

On the evening of May 27, 1981, Steven Bouras, a reputed organized crime leader, was having dinner in South Philadelphia with friends when two masked gunmen entered the restaurant and fired four shots into his head. *Id.* at 272. A dinner companion was also killed. *Id.* at 272-73.

Witnesses provided little identification information to the police, but recounted that the two attackers were stocky and weighed approximately 185-200 pounds. *Id.* at 273. A witness also described one gunman as 5'9" tall. *Id.*

From the very outset, the detectives assigned to the murders "acted in reliance on information received from an informant" whose identity was never revealed, who allegedly implicated Mr. Ferber in the killings. *Id.* From that point onward, the detectives sought to pin the crime on Mr. Ferber. *Id.*

Subsequently, evidence submitted at a civil trial against the City of Philadelphia showed that, in addition to fabricating a tip from an informant, to focus the investigation on Mr. Ferber, the police:

- manipulat[ed] witnesses in order to produce a sketch that was almost identical to a mug shot taken of [Mr. Ferber];
- manipulate[ed] witnesses to get a suspect identification by telling them they had other evidence of [Mr. Ferber's] guilt and making disparaging remarks about him;
- misrepresent[ed] a witness' statement as "positive identification";
- suborn[ed] perjury about a confession from a prisoner by offering favorable treatment of pending charges and allowing him to visit his girlfriend, and;
- misrepresent[ed] the polygraph test taken by the prisoner in order to admit his testimony about a confession in the criminal trial.

Ferber II, 661 A.2d at 473.

Mr. Ferber was arrested on June 8, 1981. Frederick Cusick, *Suspect Held in Double Slaying at Restaurant*, Philadelphia Inquirer, June 9, 1981, at B3 (B.8). On May 1, 1982, Mr. Ferber was convicted of two counts of first-degree murder. Dave Racher & Gloria Campisi, *Hit Man's Family Ousted from Trial*, Philadelphia Daily News, May 3, 1982, at 5 (B.9). At Mr. Ferber's sentencing hearing a few days later, his mother pleaded with the jury to "have mercy, ... He didn't do this." Tulsky, *supra*. She "asked a court officer for a Bible, and said she was taking 'an oath: May my children, my grandchildren, that we die—all of us—if my child did this.'" Tulsky, *supra*.

Mr. Ferber's sister also testified, stating that Mr. Ferber "was 'relentlessly crying' during the 10 months before the trial," and that "he frequently told her: 'I'll never 'til the day I die, 'til I go to my grave, stop trying to find out who really committed this crime. I'm innocent. I'm innocent.'" Racher & Sheehan *supra* at 29. Both Mr. Ferber's mother and sister wept uncontrollably while testifying. Racher & Campisi, *supra*. Mr. Ferber's family was so distraught that they were ordered to leave the courtroom after Mr. Ferber's mother stood and screamed: "They'll find the right one; everyone will see he's innocent. I swear on the life of my family, my grandchild.'" *Id.*

On May 3, 1982, after deliberating for just two-and-a-half hours, the jury sentenced Mr. Ferber to death. Tulsy, *supra*. Mr. Ferber stated to the court: "The only thing I'll say is that I'm innocent.'" Henry Goldman, *Death Sentence Given in Bouras Killing*, Philadelphia Inquirer, Oct. 3, 1984, at B2 (B.10). After sentencing, Mr. Ferber's brother Jay affirmed, "Neil's innocent. We'll prove that he's innocent." Racher & Sheehan, *supra*.

Mr. Ferber might have been executed had it not been for the intrepid work of police inspector Frank Friel. In 1984, Mr. Friel became the commanding officer of a joint federal and state task force investigating organized crime in Philadelphia. *Ferber*, 28 Phila. Co. Rptr. at 279. He learned from informants that Mr. Ferber was innocent of the murders. *Id.* at 280. Mr. Friel then began to uncover troubling facts, such as dramatic discrepancies in descriptions of height and weight between witnesses' descriptions of the gunmen and Mr. Ferber's physical appearance. *Id.* Mr. Friel began exploring alternative theories of the crime, eventually meeting with

and interviewing Mr. Ferber in prison. Christopher Hepp, *Officer Tracks Evidence of Innocence for Convicted Man*, Philadelphia Inquirer, Jan. 13, 1986, at A1 (B.11).

Mr. Friel took his information to then District Attorney Edward Rendell, who, after months of consideration, ordered a re-polygraph of a jailhouse snitch, Jerry Jordan, who had testified at trial that Mr. Ferber had confessed to the killings. *Id.* Mr. Jordan failed the polygraph test and admitted he lied. *Id.* On Mr. Rendell's final day in office, he recommended a new trial for Mr. Ferber. *Id.*

Mr. Ferber was granted a new trial and released from prison on January 4, 1986. John Guinther & Francis Friel, *Breaking the Mob* 341 (2d. ed. 2000) (B.12).

Mr. Friel describes that day as follows:

Jay Ferber arrived at Graterford State Prison. A guard opened the door. Neil Ferber stepped out. He looked at his brother uncertainly and then fell into his embrace. His arm around his older brother's shoulders, Jay led Neil to his car. Neil took short, uncertain steps, his features blank. Jay drove him from the prison... [and] Neil spotted a restaurant and asked if they could stop there. Thinking he wanted something to eat, Jay agreed. When they got inside, however, Neil excused himself to go to the bathroom... Worried [after waiting fifteen minutes], Jay followed his brother to the men's room. He saw Neil stripped to the waist, covered with the pink suds from the soap dispenser, wiping at himself with paper towels. He turned to Jay. "I smell, I smell," he said. "I can't have my mother seeing me smelling like this." Gently, Jay cleaned him off, helping him get dressed, and they continued on home.

Guinther & Friel, *supra* at 341-42.

On March 7, 1986, the District Attorney asked the court to drop all charges against Mr. Ferber. Henry Goldman, *D.A. Drops Charges in Slaying of Bouras*, Philadelphia Inquirer, Mar. 8, 1986, at B1 (B.13). Months after his release, Mr. Ferber testified about his experience on death row during a civil trial in a lawsuit

filed by inmates contending that conditions on Pennsylvania's death row constituted cruel and unusual punishment: "“You lose all emotion . . . and there are times you just really think you're going to explode inside, just going to crack up.”” John Woestendiek, *Living on Death Row a 'Nightmare,' Ex-Inmate Testifies*, Philadelphia Inquirer, June 17, 1986, at B5 (B.14). The effect of death row on Mr. Ferber is also described by Mr. Friel:

Ferber admitted himself to a mental hospital, suffering from acute depression and bleeding ulcers; he remained there for several weeks. Over the next three-and-a-half years, her frequently called me, asking for advice... He held a number of jobs, had long periods of unemployment, was on welfare, had subsequent bouts of depression and ulcer attacks. He and his wife, who had suffered great emotional devastation from his death sentence, were not able to put their marriage back together. Late in 1988, Ferber's 21-year-old daughter, who, while still in high school, had undergone agonies of humiliation at the hands of her classmates when they taunted her for having a murderer as a father, died of a drug overdose.

Guinther & Friel, *supra* at 342; *see also* Goldman, *supra*.

Mr. Ferber was diagnosed with post-traumatic stress disorder resulting from his confinement on death row. John Woestendiek, *Official Defends Individual Cells on Pa. Death Row*, Philadelphia Inquirer, July 29, 1986, at B06 (B.15). He also suffered from bleeding ulcers and heart disease. Amy S. Rosenberg, *False-Imprisonment Award is Thrown Out*, Philadelphia Inquirer, Oct. 14, 1994, at B3 (B.16). “[Mr. Ferber] never got it out of his mind how [his mother] had to beg for his life at his sentencing.” Sally A. Downey, *Neil Ferber, wrongly jailed in '84*, Philadelphia Inquirer, Dec. 23, 2008, at B6 (B.17).

In 1989, Mr. Ferber was arrested, and eventually convicted, for attempting to

possess P2P. Kathy Brennan, *Time on Death Row Not in Vain*, Philadelphia Daily News, Apr. 26, 1991, at 83 (B.18). Judge Thomas O’Neil imposed a sentence of 25 months, far below the federal sentencing guidelines, and gave him credit for the 45 months he spent on death row. *Id.* Judge O’Neil “said that he did not believe the federal commission ever considered a case as ‘rare’ as [Mr. Ferber’s] when it drafted sentencing guidelines. ‘I’m still suffering,’ [Mr. Ferber] interjected.” *Id.*

Mr. Ferber and his wife sued the City of Philadelphia and law enforcement officers for malicious prosecution, civil conspiracy, abuse of process, intentional infliction of emotional distress, loss of consortium and for punitive damages. *Ferber*, 28 Phila. Co. Rptr. at 269. The jury awarded the Ferbers \$4.5 million, including punitive damages. *Id.* “The facts led to a conclusion by the jury that the police officers conspired to convict [Mr. Ferber] by misusing their positions as police officers.” *Ferber II*, 661 A.2d at 473.

“Many of the eight jurors embraced a dazed [Mr. Ferber] after being excused. . . . One cried in the arms on [his] elderly mother . . . who also sobbed after being told of the award.” Kathy Sheehan, *\$4.5M Awarded in Police Misconduct Case*, Philadelphia Daily News, Sept. 29, 1993, at 5 (B.19). But the verdict and the award could neither assuage Mr. Ferber’s pain nor compensate for the lost years. “‘There’s no celebration in something like this,’ Neil said with an occasional twitch in an otherwise unemotional face. ‘It’s a day I looked forward to coming. The truth came out and they said I was innocent. But I haven’t won. No one could give me back all the years I lost.’” *Id.*; Our View Editorials, *Justice Barely in Time*, Asbury Park Press, Oct. 5, 1993, at A18 (B.20).

While describing Mr. Ferber’s ordeal as “Kafkaesque”, the Common Pleas Court overturned the verdict based upon a technical change in state liability law, a decision that was affirmed in part and reversed in part. *Ferber II*, 661 A.2d at 479. The Ferbers and the City eventually agreed to settle the case for \$1.9 million. Mark Fazlollah, *City Will Pay \$1.9 Million to Man Over Unjust Jailing*, Philadelphia Inquirer, Aug. 15, 1996, at A-1 (B.21).

Mr. Ferber died of a heart attack on December 20, 2008. Downey, *supra*. He was survived by a brother, a sister, a son, two grandchildren and two former wives. *Id.* Mr. Ferber was only 63-years-old. *Id.*



Philadelphia Inquirer, Dec. 23, 2008, at B6 (B.17).

D. William Nieves

“We can’t continue to patch up a system that’s unpatchable. . . . It has too many holes and not enough can be done to make it perfect. It’s an irreversible punishment.” Johnna A. Pro, *Freed Death Row Inmates Want Death Penalty Ban*, Post-gazette.com (Oct. 18, 2002), <http://old.post-gazette.com/localnews/20021018innocencep2.asp> (last visited Feb. 15, 2019.) This observation was made about the death penalty by William Nieves, who understood first-hand the deficiencies of the system. On July 26, 1994, Mr. Nieves was sentenced to death for first-degree murder. Six years later, his conviction was overturned, and a jury acquitted him on retrial.

On December 22, 1992, Eric McAliley, a 20-year-old drug dealer, was fatally shot outside his home. Dana DiFilippo, *He Lived to Fight It: Death Row Survivor Crusades Against Penalty*, Philadelphia Daily News, Apr. 25, 2001, at 7 (B.22). When Philadelphia police began investigating his murder, witnesses, including Dawn Newman, told police the shooter and his accomplice were tall, thin, African-American men in a Cadillac. *Id.* at 8; Metropolitan Area News in Brief, *Death-Row Inmate from Phila. is Acquitted in Second Trial*, Philadelphia Inquirer, Oct. 22, 2000, at B2 (B.23). Mr. Nieves was a light-skinned Puerto Rican who, at the time of the shooting, was 225 pounds and drove a blue Jeep. DiFilippo, Apr. 25, 2001, *supra*.

Nine months after the murder, Ms. Newman picked Mr. Nieves as the killer from a photo line-up, even though his appearance differed dramatically from her description of the perpetrators soon after the murder. *Id.* Mr. Nieves was arrested

in September 1993 and could not provide an alibi for the night of the shooting. *Id.* Mr. Nieves had previously met Mr. McAliley in early 1992, but swore that he did not commit the murder. *Id.*

Mr. Nieves was represented by a divorce lawyer with no criminal trial experience whose fee was limited to \$2,500. Thomas Fitzgerald, *A Case for Center to Aid Defense Lawyers*, *The Philadelphia Inquirer*, Nov. 22, 2000, at B3 (B.24) (hereinafter, Fitzgerald). The star witness was Ms. Newman, who testified that Mr. Nieves shot Mr. McAliley. *Metropolitan Area News in Brief, supra*. The original witness accounts of tall, thin, African-American men in a Cadillac were not disclosed to the defense and did not come to light during the trial. Fitzgerald, *supra*. Mr. Nieves's lawyer advised him not to testify because the prosecution would be able to question him about his criminal record *Commonwealth v. Nieves*, 746 A.2d 1102, 1103 (Pa. 2000). The trial lasted two days. Mr. Nieves was convicted and sentenced to death in July 1994. Fitzgerald, *supra*.

Determined to prove his innocence, Mr. Nieves studied his case file. Dana DiFilippo, *Death-Row Years Proved Fatal*, *Philadelphia Daily News*, Oct. 28, 2005, at 8 (B.25). His mother sold his car and took out a loan to hire a new lawyer. DiFilippo, Apr. 25, 2001, *supra*.

On appeal, Mr. Nieves's new attorney argued that his "trial counsel deprived him of his right to testify at trial by misinforming him that if he testified, the Commonwealth could impeach him with his prior convictions, none of which were *crimen falsi*." *Nieves*, 746 A.2d at 1103. This Court "remanded the case to the common pleas court for an evidentiary hearing on the issue of ineffective assistance

of counsel, retaining jurisdiction over the matter.” *Id.* (citing *Commonwealth v. Nieves*, 669 A.2d 338 (Pa. 1995)). Ultimately, this Court held that “trial counsel’s advice was so unreasonable as to vitiate [Mr. Nieves’s] knowing and intelligent decision not to testify” and ordered a retrial. *Id.* at 1106.

Before the retrial, Mr. Nieves’s counsel learned that there were witnesses who had given police a description of the perpetrators that did not match Mr. Nieves. Nancy Phillips, *Mistakes in Life and Death Cases*, Philadelphia Inquirer, Oct. 23, 2011, at A1 (B.26). These witnesses testified at the new trial, which lasted three weeks. *Id.*; Julia Martinez, *Former Death-Row Inmate Shares Trials with Legislators*, Denver Post, July 9, 2002, at A6 (B.27). On October 20, 2000, the jury acquitted Mr. Nieves. Metropolitan Area News in Brief, *supra*. His was the third instance of an overturned verdict in a Pennsylvania capital case in the previous 14 years. Fitzgerald, *supra*. After over five years on death row, Mr. Nieves was a free man. He was the 89th person to be freed from death row. Jeff Gammage, *Free Man Talking*, Philadelphia Inquirer Magazine, Apr. 15, 2001, at 14 (B.28).

Following his retrial, Mr. Nieves was told by a prosecutor that “the system works.” Kathy Lauer-Williams, *Ex-Inmate on Death Row Decries Capital Sentences: He Urges Students at Freedom High School to Support a Moratorium*, Morning Call, Mar. 23, 2001, at B4 (B.29). Those words were cold comfort for Mr. Nieves: “‘Tell that to my now 10-year-old daughter, my father who had three heart attacks and my mother had a nervous breakdown,’ he said.” *Id.* Indeed, the time away from his daughter during her formative years was, undoubtedly, one of the most horrific consequences of Mr. Nieves’s wrongful death conviction.

Reconnecting with her post acquittal was extremely difficult. Alison C. Kistler, *Former Death Row Inmate Shares Experience*, Daily Collegian (Jan. 31, 2001), https://www.collegian.psu.edu/archives/article_a09db162-89d4-50dc-814a-7d225077f1bb.html (last visited Feb. 15, 2019). When Mr. Nieves spoke to Colorado lawmakers about his experience, he told them about trying to reacquaint himself with his daughter: “‘How can I make up for the years I lost while in prison?’ he asked lawmakers. Replied Republican Rep. Shawn Mitchell..., ‘Nothing can make up for it.’” Martinez, *supra*.

Mr. Nieves’s wrongful conviction and incarceration also resulted in serious medical consequences. Lauer-Williams, *supra*; DiFilippo, Apr. 25, 2001, *supra*. He had long suffered from gallstones and required gall bladder surgery, which he did not receive while in prison. Lauer-Williams, *supra* “[I]n a 2001 interview, [Mr. Nieves stated] ‘The guards just laughed at me and told me to act like a man. I needed gall-bladder surgery, but they didn’t want to do surgery on a death-row inmate. So, I was in pain for years.’” See DiFilippo, Oct. 28, 2005, *supra*. Moreover, in 1998, after sneaking a peek at his prison files during a medical exam, Mr. Nieves learned that prison medical staff had diagnosed him with Hepatitis C as early as 1993, but had neither informed him nor treated him for the disease. *Id.*

Mr. Nieves became a passionate anti-death-penalty crusader, traveling to Europe as an example of how innocent individuals can be sentenced to death under the current system. DiFilippo, Apr. 25, 2001, *supra*. He worked as a community organizer for Pennsylvania Abolitionists United Against the Death Penalty. *Id.* He stated: “‘I’m doing this so other people don’t have to go through what I did

Death penalty law does not guarantee against the innocent being executed.”” *Id.*

Possibly the worst consequence of Mr. Nieves’s wrongful conviction is that his life as a free man was cut tragically short, likely as a direct result of his incarceration. On October 8, 2005, less than five years after his release from prison, William died from complications of Hepatitis C, for which he was never properly treated while in prison. DiFilippo, Oct. 28, 2005, *supra*. Mr. Nieves was just 39 years old at the time of his death. *Id.*



Fitzgerald, *supra* (Brad C. Bower, photographer).

CONCLUSION

The Network and WTI urge the Court to consider the plight of innocents who have been sentenced to death in this Commonwealth when it passes judgment on the constitutionality of the death penalty. Through a combination of good fortune and dedicated volunteer assistance, the men whose stories are told here escaped the ultimate punishment, but all of them suffered from their wrongful imprisonment, some fatally so. A system that allows for errors of this magnitude cannot pass basic constitutional muster.

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Caroline Heller
Keith Hammeran
Greenberg Traurig, LLP
MetLife Building
200 Park Avenue
New York, NY 10166
Telephone: 212.801.2165
Facsimile: 212.805.9488

Elliot H. Scherker
Greenberg Traurig, P.A.
333 Southeast Second Avenue,
Suite 4400
Miami, Florida 33131
Telephone: 305.579.0500
Facsimile: 305.579.0717

Respectfully submitted,

Brian T. Feeney (Pa. I.D. No. 78574)
Greenberg Traurig, LLP
2700 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
Telephone: 215.988.7812
Facsimile: (215) 717-5265

By: /s/ Brian T. Feeney
Brian T. Feeney

Counsel for Amici Curiae The Innocence Network and Witness to Innocence

WORD COUNT CERTIFICATION

Pursuant to Pa. R.A.P. 2135(d), this is to certify that the Brief for *Amici Curiae* The Innocence Network and Witness to Innocence complies with the word count limit set forth in Pa. R.A.P. 2135(a)(1). The word count of the word processing system used to prepare this brief states that those sections that shall be included in the word count under Rule 2135(b) contain 6,883 words.

Dated: February 22, 2019

/s/ Brian T. Feeney
Brian T. Feeney

PROOF OF SERVICE

I hereby certify that on February 22, 2019, I caused a copy of the foregoing Brief for *Amici Curiae* The Innocence Network and Witness to Innocence and accompanying appendices to be served upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121, and will within 7 days file a paper copy with the Pennsylvania Supreme Court:

**Service by submission of the electronic filing
via PACFile, including upon:**

Helen A. Marino
First Assistant Federal Defender
Stuart B. Lev
Assistant Federal Defender
Federal Community Defender Office
For the Eastern District of Pennsylvania
Suite 545 West – The Curtis Center
Independence Square West
Philadelphia, PA 19106
Stuart_lev@fd.org

Josh Shapiro
Attorney General
William Stoycos
Senior Deputy Attorney General
Office of the Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120
wstoycos@attorneygeneral.gov

/s/ Brian T. Feeney
Brian T. Feeney

APPENDIX A

Statement of Nicholas James Yarris, January 24th 2019

My name is Nick Yarris, I was born and raised in Philadelphia Pennsylvania. On January 24th 1983, Judge Robert F. Kelly of Delaware Penna. Sentenced me to Death and added an addition 60 years of sentences for the Rape and murder of Linda Mae Craig, a woman whom I never met in my life.

Here on this 24th day of January 2019, I present to this court my words for the exact point of my being alive now shows of the total folly that the death penalty is today.

I was the very first man in the USA to seek DNA testing to prove my innocence from Death Row on Feb. 24th 1988. I watched in agony as over 100 men were set free before me using DNA testing successfully. Meanwhile, I watched as all of the evidence was abused and an undertaking to thwart or deny the DNA testing began. One that eventually forced me to ask to be executed for a crime I did not commit.

At this point nothing else related to me has relevance here. Nor does what happened to me in the course of 23 years of solitary confinement in Penna. Prisons matter now, because this issue is about the use of Capital punishment.

I understand this on a level few can. I sat next to Walter Ograd and fought to help him as much as I did for Ernest Simmons. I set aside my own torment to offer men whom I believed to be innocent any help that I could. My close friend Keith Zettlemyer asked to be executed only because his physical pain caused from being shoved down a flight of stairs by a prison guard in Huntingdon made him give in. I was the one who told Keith he had the right to be executed and it was I who told him that while he was in Pittsburgh Penitentiary with me how I understood why he could not endure daily assaults or abuse he had to witness there. Keith killed his childhood friend and the mother of his friend begged Pennsylvania not to execute Keith. When I saw the pointless and cowardly way in which his death played out, I lost all faith in justice.

At one point Pennsylvania Supreme Court was hailed as being one of the best courts in America. The many landmark historic points of law set here have been socially important to many. The most distinguishing one is yet to be set. You see, we forget.

We forget that as a society here in the USA, we executed humans for crimes before a Penitentiary system began. In fact, our founding fathers came up with a barter for society to agree to:

We would stop executing humans who break laws and instead create prison. Why? Because every crime was punishable by death. Theft, Rape, Murder, Adultery, all lead to death. So we made a deal. Prison, not execution.

But some where along the way we forgot. We forgot that we chose to be better than that. We forgot that we were so ignorant for what we did, that we did away with it to

have better.

Are we better today? Why does Walter Ogrod suffer on and on when DNA testing was available in his case BEFORE I got out?

When I was set free, I forgave everyone while I asked for the same. I was handed \$5.07 of my own money upon release and told that I was not entitled to health care, housing, job training, or any sort of help from the state. I was not offered counseling or trauma assistance for having lived on Death Row for decades.

When I saw that I was merely part of a failed effort and that I was to be treated coldly in its aftermath, I chose to use the education given to me in prison to find a way to heal. Initially, I had to go get a bull horn and stand in front of Delaware county courthouse each week and demand that the very same DNA used to free me be used to try and catch the real murderer.

I then went to Europe and presented economic embargo efforts against Pennsylvania with their largest foreign investors. I asked England to move Smith Kline Glaxo's billion dollar offices from Philadelphia. I sought the Swedish Government's efforts to squash the new ship yard deal in Philadelphia that was underway. I asked the Italian and French Governments to take away billions of trade deals Pennsylvania benefits from until they gave up killing humans.

When I returned from my trip to Europe only 10 months after being in a level-5 cell back in October 2004, I knew I had to show myself worthy of the efforts by Peter Goldberger and others that I was purposeful in my life personally as well. I have thus in the past 15 years of freedom tried to show both piousness and a polite manner each day. I do so hoping that in the future that I represent how a person sentenced to die can come back and be a contributing member of society. I take this utterly seriously because what else can this court go by? You are tasked with the thought that men once sentenced to the lowest feelings of worthlessness can somehow revert to being a non threat to either prison or open society.

I did my part. I used my time in prison for penitence. Just as it was meant to be. I allowed the prison officers to help me educate myself from age 20, to age 42. My autodidact nature propelled me to become a gifted writer and speaker, and despite what others feel, I tried to simply take from my experience only the good. I am grateful that the staff gave me a chance to heal and provided me the tools to have an education. I am deeply sorry that I was not a good person throughout my life. I hold no grudge and I beg Pennsylvania to forgive one of it's loving sons.

I actually feel empathy for every member of this court. It is the hardest of choices that make us who we are. I chose to be a good man. As such, I can do only what I know is right. For you, that enormous burden goes well beyond your life and your own good deeds. It goes to the protection of our families and loved ones. It goes to every good police officer trying to do their job fairly.

With this in mind, I simply say, please never forget that we have prisons today only

because we agreed long before how much madness it was to just kill as punishment.

In closing I will simply add one point.

Harriett Jayne Yarris was born on January 24th. On her 50th Birthday she stood behind me as I was sentenced to die by Judge Kelly. She came to visit me at Graterford Prison later that day.

She said the one thing she felt badly for is that all her life she was raised to believe in good. That she was taught fairness was in the system. She said that was stolen from her, but she was not going to let people calling her the “mother of a monster” or other horrible social acts stop her from being kind. She said no one would take that from her.

I guess that is what the Supreme Court has to decide. Do you give back to those who believe in justice the notion that we are better than simply killing others, or do we give back to those who seek vengeance their need to feel the system gives them their pound of flesh?

All I know is I was shown what it is like live on the gallows. I was given very little to work with, but I saw how I could be of use. By being a good man in my life each day, humbled for what's been done, I pray to God that you can grant this same grace as being possible for the others on death row be they guilty or not.

I did my part in this. I took my own share and I have shown myself willing to try and make things better. Can you now try and show that we are compassionate? Can you please show America once again how the Pennsylvania State Supreme Court is one of the finest institutions of our nation? If what I went through helps bring about this change, then I offer this day of my mother's birth to be grateful for each broken bone, damaged limb, or scar left upon me.

With the utmost respect, thank you for allowing my words to be part of the record within this state. I love Pennsylvania and I want nothing but good for its many fine people. Thank you to Eliot Sherker and to everyone else who has allowed me this moment. I wish you all well and I hope some day we can look upon this moment to see what we held ourselves to be today.

Thank you, Nick Yarris

APPENDIX B.1

KILLING OF FOUR DETAILED IN TRIAL

Pittsburgh Post-Gazette (Pennsylvania)

April 28, 1998, Tuesday,, SOONER EDITION

Copyright 1998 P.G. Publishing Co.

Section: STATE,

Length: 534 words

Byline: FROM LOCAL AND WIRE REPORTS

Body

The first thing that caught Thomas Dryfuse's attention when he walked into his Pulaski home that day was the ceiling molding.

During a struggle inside the mobile home, the molding had come loose and was hanging from the kitchen ceiling.

Seconds later, he found his 34-year-old wife, Bonnie, lying dead on the kitchen floor.

He knelt down to touch his wife's bloodied arm.

She wasn't moving.

Then it dawned on him that he didn't hear the girls - his two daughters, Jacqueline, 7, and Heather, 4, and his niece, Stephanie Herko, 5, who had spent the night with the family.

So he ran to the rear of the trailer, first checking one bedroom and then another.

Then he checked the bathroom.

"What did you see?" Deputy state Attorney General Anthony Krastek J. Krastek, asked Dryfuse.

Dryfuse struggled to find his voice.

"Three dead babies on the floor," he said. "There was blood everywhere."

Dryfuse's testimony yesterday marked the first day of the trial against Thomas Kimbell Jr., who is accused of killing of Bonnie Dryfuse and the three children.

In a calm yet halting voice, Thomas Dryfuse recounted his steps in the mobile home that June 15, 1994. Not once did he look in the direction of Kimbell, who sat at the defense table in a dark suit, a white shirt and tie.

After calling 911 that day, Dryfuse said he went back to the bathroom and thought he saw Heather's eyelids flicker.

"I reached for her arm and told her to hold on. Help was coming," Dryfuse recalled.

But the four, said Krastek, had been savagely killed.

Bonnie Dryfuse fought feverishly to defend herself before bleeding to death, Krastek said.

KILLING OF FOUR DETAILED IN TRIAL

Her hand was badly cut from defensive wounds, and a bent kitchen chair indicated she had swung it at her attacker, Krastek said.

Kimbell, 35, of Ellwood City, also slashed the girls before stacking their bodies in the mobile home's bathroom, Krastek said.

Herko's head was nearly severed from her neck, Krastek said.

And each victim was slashed across the throat.

Bonnie Dryfuse was stabbed 28 times, Jacqueline 14 times, Heather, 16 times and Stephanie six times, Krastek said.

"In that bathroom were those three girls, dressed in their bathing suits. And ladies and gentlemen, this is not too harsh a word, perhaps - they were slaughtered," the prosecutor said.

If Kimbell is convicted, Krastek wants him put to death.

Kimbell's defense lawyer, Thomas Leslie, conceded that his client was near the Dryfuse's Pulaski Township trailer home on the day of the killings.

That's because Kimbell lived a mile away in his mother's trailer, Leslie said.

Kimbell was arrested 30 months after the killings, in part because police linked him with a bicycle stolen that day near the scene of the slaying.

Krastek said the jury would hear Dryfuse's calls to 911, and testimony from people who said Kimbell confessed.

Krastek is prosecuting the case because Lawrence County District Attorney Matthew Mangino had represented Kimbell when Mangino was a public defender.

The trial continues today before Common Pleas Judge Glenn McCracken.

Rena A. Koontz, a free-lance writer, and The Associated Press contributed to this report.

Load-Date: April 28, 1998

APPENDIX B.2

LAWYER'S BOOKSHELF; The Death Penalty on Trial: Crisis in American Justice; News

New York Law Journal
January 4, 2005 Tuesday

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New York Law Journal

Section: Pg. 1, (col. 3); Vol. 231

Length: 1145 words

Byline: Reviewed by Heidi Boghosian

Body

News

The Death Penalty on Trial: Crisis in American Justice

Muckrakers performed an invaluable civil service in the early 1900s by exposing corruption and enlightening the public. Although the muckraking movement eventually waned in popularity, current-day investigative reporting requires the same dogged determination to uncover injustices, usually of politicians, corporations, and government. Bill Kurtis ---- whose name is synonymous with investigative journalism ---- takes his truth-quest one step further in *The Death Penalty on Trial: Crisis in American Justice*. In a refreshing departure from traditional death penalty analysis, he digs into the U.S. capital justice system, muckraker style.

Mr. Kurtis was for years a staunch proponent of the death penalty. He received a law degree and was about to work for a litigation firm when the excitement of live reporting (while covering a tornado) sidetracked him into journalism. As a news reporter and anchor with CBS television for three decades and host of A&E's *Cold Case Files* and *American Justice*, he found his legal education useful when covering such high-profile trials as those of Charles Manson and Richard Speck. Mr. Kurtis writes that he applauded these men's death penalty sentences and was disappointed when both were overturned in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972).

In this, his second book, Mr. Kurtis writes that when the 13th exoneration of an Illinois death row inmate was announced in 2003 ---- what he calls a turning point in American justice ---- he was shaken into realizing that his own strongly held beliefs about the death penalty were wrong. He writes:

There is only one thing that would overturn my desire to rid the world of such monsters and that is the fear of convicting and executing an innocent person. When the thirteenth exoneration was announced from Illinois' death row I was shaken. ... The Greek term is *peripeteia*, that moment when you realize that all you have believed is wrong.

If these death row verdicts were wrong, how reliable was the system? ... I found lawyers and police friends avoiding the subject as if the legal establishment was pulling a blanket of silence over the matter. For young attorneys there was too much career risk in becoming a whistleblower.

LAWYER'S BOOKSHELF; The Death Penalty on Trial: Crisis in American Justice; News

Mr. Kurtis lifts the blanket of silence cloaking the system's reliability. He pays homage to Justice Thurgood Marshall's claim in his *Gregg v. Georgia* dissent (428 US 153 (1976)), that if the American people knew the workings of the capital punishment system they would be against it. Rather than revisiting traditional arguments about deterrence, cost effectiveness and just desserts, Mr. Kurtis examines two capital cases so that readers can judge the system's reliability. Disarming in approach, its fast-paced, gripping style seems more suited to thriller bestsellers than to the grim subject of state-sanctioned death. Because of this, and to its credit, the book should have wider appeal than the sometimes dry, academic (albeit important) writings on the subject. As Kurtis told *Media Life Magazine* in 2000: Whenever you oversaturate a market, people get tired of it. A lot of the techniques that we were using early on, you keep seeing them and I find them now to be cliché. We have to find new ways of telling a story.

The *Death Penalty on Trial* offers a new way of presenting a much-written subject by bringing readers to the crime scene and into the courts.

Two accounts of men sentenced to death, and later exonerated, provide an existential glimpse of how a vulnerable justice system goes awry. Mr. Kurtis intentionally picked cases in which everything should have gone right: Defense and prosecution attorneys, and judges, were well-known and competent, and law enforcement had sufficient evidence to support the prosecution. Nonetheless, several violations occurred in each case ---- prosecutorial failure to disclose exculpatory evidence, incompetent counsel and inaccurate science admitted as forensic evidence.

Even hard-boiled death penalty proponents should question the manner in which forensic evidence was used to sentence Ray Krone to death. After the stabbing of Kim Ancona, a cocktail waitress in Arizona, the community wanted resolution and police looked for fast leads. Mr. Kurtis notes that tunnel vision is perhaps the most common problem with criminal investigations; a single person becomes the focus and detectives do not look into all potential suspects. The search was virtually shut down so investigators could concentrate on gathering evidence for trial. None stopped to ask, 'Do we have the right man?'

It took another trial to unearth the forensic mishaps. As it turned out, in trying to show that Ray Krone's teeth imprint matched bite marks on Kim Ancona's neck, investigators actually left an indentation by taking a teeth cast and pressing it into the dead body to show they matched. When used later in trial or in the video, placing the dentist's mold on top of the indentations would not be matching Ray's teeth with the bite marks on Kim's body; they would be matching their own indentations. Additionally, no DNA evidence was introduced in the first trial; had it been, it would have eliminated Ray Krone. Such errors would be farcical were the results not so tragic.

Lack of investigatory common sense also factored into sentencing Thomas Kimbell to death for the killings of Bonnie Dryfuse, her two children with Thomas Jake Dryfuse, and Thomas's niece. After the prosecution failed to make a case against Jake Dryfuse, focus shifted to neighbor Mr. Kimbell, a knock-around drug user who was always in the sights of the police, mostly for petty misdemeanors ... one of those members of the community who always seemed to be underfoot. If someone asked for the 'usual suspects,' he would come to mind.

Because of a procedural error, the case was reversed and remanded for a new trial. Only then did a forensic pathologist ask why no one had admitted crime scene photographs of the husband's hands bearing cuts and fresh blood under the nails. Further evidence revealed that the 120-pound Mr. Kimbell was a moderate hemophiliac, suggesting that he could not have assaulted Bonnie Dryfuse, who weighed 250 pounds, without sustaining any injuries.

Bill Kurtis has dedicated his life to uncovering secreted injustices. In *The Death Penalty on Trial* he praises the moral courage of Governor George Ryan ---- also a former proponent of capital punishment ---- for declaring a moratorium on Illinois executions. Here, Mr. Kurtis offers his own courageous act in crafting a persuasive book, significant for its potential to educate a wide audience. Had the lawyer Bill Kurtis argued this case in court, the verdict would likely be a resounding guilty for the entire capital punishment system.

Heidi Boghosian is executive director of the National Lawyers Guild.

Load-Date: August 7, 2011

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APPENDIX B.3

KILLER OF FOUR REMAINS AT LARGE

Pittsburgh Post-Gazette (Pennsylvania)

JUNE 20, 1994, MONDAY,, SOONER EDITION

Copyright 1994 P.G. Publishing Co.

Section: STATE,

Length: 282 words

Byline: J. KENNETH EVANS, POST-GAZETTE STAFF WRITER

Body

State police spent seven hours this weekend searching a man's home in Pulaski, Lawrence County, looking for something that might help them solve the killings of a neighbor, her two children and a cousin last week.

The search of Thomas Kimbell's residence in a nearby trailer court began at 5 p.m. Saturday and ended near midnight.

Yesterday, state police would not discuss what they had found in the house. "We don't know if it will be positive or negative," Lt. John Lechner said.

They also would not say how Kimbell might be related to the killings.

"We had reason to believe there were things in the house that could help us solve (the case)," Lechner said.

Police still have no motive in the killings, but Lechner said the investigation so far has eliminated several people as suspects.

On Saturday, the victims -- Bonnie Lou Dryfuse, 34, her two daughters, Jackie, 7, and Heather, 4, and a cousin, Stephanie Herko, 5 -- were buried.

Their bodies were found Wednesday in the secluded mobile home where Dryfuse lived. Her husband, Tom Dryfuse, discovered the bodies when he came home from work at 3:05 p.m. Autopsies revealed that each had died of stab wounds.

Lechner said yesterday that the investigation had revealed that a knife with a blade about five inches long was used in the killings. It has not been recovered.

Tom Dryfuse, a truck driver, told police he found the bodies when he returned from a trip. His wife was lying in the kitchen and the three girls, each wearing a swimsuit, were in the bathtub.

A man who lives about a half mile away said he saw the children playing in the pool at 2:15 p.m., less than an hour before they were found dead.

Load-Date: September 15, 1994

KILLER OF FOUR REMAINS AT LARGE

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APPENDIX B.4

DRAINING OF SWAMP CONTINUES

Pittsburgh Post-Gazette (Pennsylvania)

February 9, 1998, Monday,, SOONER EDITION

Copyright 1998 P.G. Publishing Co.

Section: LOCAL,; NORTH NEIGHBORHOODS

Length: 254 words

Body

Police continued draining a large swamp behind Cascade Park yesterday as they searched for clues to a 1994 quadruple slaying.

Since Wednesday, pumper trucks from the Shenango Township Volunteer Fire Department and one portable pump from Carlson Mining have lowered the swamp by about 3 feet.

It is between 8 and 15 feet in depth.

The search began the same day District Attorney Matthew T. Mangino announced that he had turned over the case against Thomas Kimbell to the state attorney general's office because of his past dealings with Kimbell.

Attorney General D. Michael Fisher has appointed Senior Deputy Attorney General Anthony Krastek to prosecute Kimbell, Mangino said.

Yesterday police closed the road to traffic. A flat-bottomed boat has been brought to the scene to take part in the search, which is expected to resume today.

Police would still not say exactly what they were looking for.

Kimbell, 35, who is charged with killing the four people, was raised in the rural neighborhood near the swamp.

Kimbell is charged with killing Bonnie L. Dryfuse, 34, and her two daughters, Heather, 4, and Jacqueline, 7, all of Pulaski, and their cousin, Stephanie Herko, 5, of New Castle, on June 15, 1994.

The knife that police say was used in the slayings has never been found.

Since Wednesday, neighbors have gathered at the swamp to watch as the search unfolds.

"This is a nice quiet area, and we like it here," one man said, pointing to the many houses surrounded by pine trees.

NEW CASTLE

Load-Date: February 9, 1998

APPENDIX B.5

DEFENDANT WAS HOME, MOTHER, SISTER TESTIFY

Pittsburgh Post-Gazette (Pennsylvania)
May 5, 1998, Tuesday,, SOONER EDITION

Copyright 1998 P.G. Publishing Co.

Section: STATE,

Length: 484 words

Byline: RENA A. KOONTZ

Body

Thomas "Hank" Kimbell's mother and sister both testified yesterday that he was home at the time a Pulaski woman and three children were slain.

But the day was marked by an outburst from Kimbell's mother, Shirley Kimbell, who cried and sobbed as she made her way from the witness stand to the back of the courtroom.

"I wish I could tell them what they did to me," she said.

It was not clear what she meant by her statement, but Common Pleas Judge Glenn McCracken Jr., who had just called a recess, had to tell the jurors to disregard the comment.

Thomas Kimbell, 36, of Ellwood City, became visibly angered at his mother's anguish and began swearing at state Deputy Attorney General Anthony J. Krastek, who is prosecuting the case.

Deputies had to remove him from the courtroom until he calmed down.

Kimbell is on trial in the stabbing deaths of Bonnie L. Dryfuse, 34; her two daughters Jacqueline, 7, and Heather, 4; and Dryfuse's niece, Stephanie Herko, 5.

Investigators estimate that someone slashed and stabbed the four to death sometime between 2 p.m. and 3 p.m. on June 15, 1994.

Yesterday, Shirley Kimbell testified that her son was at home that day from about 2 p.m. until about 5:15 p.m.

Shirley Kimbell said her daughter, Ruth Brenner, phoned that day about 2 p.m.

Brenner said yesterday that her brother was at home and answered the phone when she called.

After Shirley Kimbell's outburst, the judge admonished her from the bench as she wiped tears from her face.

"I'm quite sympathetic toward you," the judge said as he pointed at Kimbell. "But I'm not going to have this trial disrupted.

"I've been quite happy with the way things have gone," he said of the trial. "Everyone has acted perfectly until you came in here this afternoon.

"If you think you can take advantage of my sympathy, you've got another think coming," the judge concluded.

DEFENDANT WAS HOME, MOTHER, SISTER TESTIFY

After the trial, he will hold a contempt-of-court hearing for Shirley Kimbell.

Also yesterday, William Mikell, a convicted murderer, discounted the testimony of another convicted murderer, who said last week that Kimbell told him he killed the four.

Mikell said Peter Michael Karenbauer told him he was lying.

Mikell and Karenbauer were in the State Correctional Institution Greene together.

Kimbell's wife, Connie, also took the stand on her husband's behalf.

She disputed a statement made last week by Anthony Daniel DeFonde, who lived with the Kimbells for about five months in 1996.

DeFonde, who said he was in a car with the Kimbells, testified that Thomas Kimbell said, "That's where I killed them people" as they drove past the Dryfuse trailer.

Connie Kimbell said her husband said, "That's the trailer where those murders happened."

If convicted of the slayings, Thomas Kimbell faces the death penalty.

The trial continues today.

Rena A. Koontz is a free-lance writer.

Load-Date: May 6, 1998

APPENDIX B.6

PHILADELPHIA Inquirer Staff Writer

Philadelphia Inquirer

Murderer of reputed crime figure sentenced to death

By Fredric N. Dusky

Neil Ferber was sentenced yesterday to die in the electric chair for the murders of reputed organized-crime figure Steve Booras and a woman companion at a table in a South Philadelphia restaurant last May.

The late of Ferber, 36, of the 8800 block of Manchester Street, was declared by the same Philadelphia Common Pleas Court jury that on Saturday found him guilty of the murders of Booras, 50, and Janette Curro, 54, both were shot by two masked gunmen who burst into the Meiers Restaurant on Bighth Street near Bankers' Bridge Street on May 27.

Booras, a Northeast Philadelphia resident who law enforcement authorities had identified as the leader in a network that smuggled cocaine from Greece, was hit four times and Ms. Curro once, apparently by a stray bullet.

Assistant District Attorney Guy Sciolia portrayed the shootings to the jury as a contract killing. Jerry Jordan, a former inmate at the Detention Center, had testified that Ferber told him after having been arrested that he had been paid \$20,000 for the murder.

Seven others in Pennsylvania have been sentenced to death under the state's new death-penalty statute, according to testimony at the trial.

The jury decided on the death penalty only after an emotional hearing throughout the morning at which Ferber's mother and other family members tearfully protested that he was innocent and that his life should be spared.

Three times, Judge Robert A. Latrone had to interrupt the hearing and send the jury out of the room because of the family's pleas. At one point, he temporarily ordered the entire Ferber family out of the courtroom.

On several occasions, Daniel J. DiGiacomo, the defense attorney, protested Latrone's rulings. Once,

when the judge closely questioned a criminologist who was testifying against the death penalty, DiGiacomo accused the judge of "practically directing" the jury to sentence Ferber to the electric chair.

"He wouldn't hurt a fly, he never did hurt a fly," Blanche Ferber testified in her son's behalf. "Please, have mercy," she begged the jury. "He didn't do this."

She asked a court officer for a Bible and said she was taking "an oath: May my children, my grandchildren, that we die — all of us — if my child did this."

Latrone halted Mrs. Ferber's testimony and ordered the jury from the room when she continued to protest his innocence. "You're running the trial," the judge told Mrs. Ferber. "I'm supposed to be running the trial." Under state law, the testimony at sentencing hearings is limited to the issue of any circumstances that might lead to sparing a defendant's life.

Mrs. Ferber, who lives in far Northeast Philadelphia, testified that she has been a widow for 21 years, running a used-furniture store at which her son Neil worked.

Also taking the stand on Ferber's behalf was his brother, Jay, his sister Shirley Zwanetz, and his adopted daughter, Jilly Ferber, 14.

Mrs. Zwanetz repeatedly told the jury, despite Latrone's warnings that Booras, wife, who was not present yesterday, had been hospitalized about a month ago after an attempted suicide. Ultimately, he again sent the jury from the room while he warned her that such testimony was improper.

Assistant District Attorney Sciolia, however, later argued to jury members that they should not consider the pain felt by the Ferber family, pointing to Chytras Panetta, Booras' sister who had set through the entire trial, Sciolia argued that more families than just the Ferbers had been touched by the incident.

213

APPENDIX B.7

Booras' Hit Man Joins 23 on Death Row

By DAVE RACHER and KATHY SHEEHAN

After deliberating just 2½ hours, a jury yesterday sentenced Neil Ferber to die in the electric chair for the murders of reputed mobster Chel-sai "Steve" Booras and a dining companion.

Ferber, 36, of Manchester Street near Maxwell in the Northeast, showed no emotion when the sentence was read, but appeared to slump in his chair as each jury member was polled on the verdict.

The Common Pleas Court jury pronounced two death sentences, one for each of the murders.

Ferber's lawyer, Daniel J. DiGiulio, citing what he called "errors" in the trial, said he would file motions for a new trial within 10 days.

IN THE MEANTIME, Ferber joins 23 others on Pennsylvania's death row, most of whom are appealing their sentences.

The Commonwealth, however, has not enforced the death penalty since April 1962 when Elmo Smith of Philadelphia died in the electric chair for the rape and murder of a schoolgirl.

The oak chair at Rockview State Penitentiary in central Pennsylvania has since been dismantled.

"I feel justice has been done," said Chrysalis Flammetta, Booras' sister, who was the only Booras relative in the courtroom late yesterday afternoon.

"Maybe more justice is to come," she added. "I am sure there was more than one person involved."

The same jury had convicted Ferber on Saturday of the double murder last May 27 of Booras and Janette Curro as they dined in a South Philadelphia restaurant.

POLICE HAVE SAID TWO men were involved in the shooting, but the second man has never been found.

Assistant District Attorney Guy Sciolla said he was satisfied with the verdict and with the sentence, both of which indicated "the rest of the city is tired of a group of people" who are committing gangland-style murders, he said.

Sciolla had pleaded with the jury, "Have no mercy for Neil Ferber who extinguished life unmercifully and quickly ... for which he should pay equally."

"He's a common murderer. He did this job for \$20,000, and he got caught."

Sciolla had produced a Detention Center inmate who testified during the trial that Ferber told him in prison that he was paid \$20,000 for the murder.

THE WITNESS, Jerry Jordan, said Ferber told him the other gunman had been acquitted of three other killings and now is in jail on a gun charge in upstate New York.

Ferber's brother, Jay, however, insisted even after the sentencing, "Neil's innocent. We'll prove that he's innocent."

The rest of Ferber's family, including his mother and 14-year-old adopted daughter, were removed from the courtroom earlier in the day after repeatedly interrupting the proceedings.

Most of them cried while testifying on Ferber's behalf. Judge Robert A. Latrone ordered the family removed after Ferber's mother, Blanche, stood and screamed: "They'll find the right one; everyone will see he's innocent. I swear on the life of my family, my grandchild."

Continued on Page 29



Neil Ferber, got 20G for hit?

20G Killer To Appeal

Continued from Page 4

MRS. FERBER HAD begged the jury to "spare my child ... If I knew my child did this, I would have no mercy ... He wouldn't hurt a fly. He never hurt a fly."

Ferber's sister, Shirley Zwanetz, said in her testimony that Ferber was "relentlessly crying" during the 10 months before the trial. She said he frequently told her: "I'll never 'til the day I die, 'til I go to my grave, stop trying to find out who really committed this crime. I'm innocent. I'm innocent."

DiGIACOMO, IN ALSO pleading with the jury to spare his client's life, motioned to the prosecutor's table, saying, "They begged you for his life, and I beg you for his life ... There's a life here worth saving."

Later DiGiacomo said he was disappointed with the verdict. "I disagree with the verdict. I feel he will win a new trial," he said.

Booras' sister said she had been hoping the jury would vote on the death penalty so that Ferber would



"Steve" Booras, gunned down

have a "motive" to identify the second gunman. "A person who's fighting for his life will have a lot more will to come out and talk," Fiammetta said.

Fiammetta claimed that someone else dining with her brother the night of his murder "set him up."

"I know who he is," she said. Fiammetta added that one of the diners removed Booras' ring and watch after he was shot.

APPENDIX B.8

Suspect held in double slaying at restaurant

By Frederick Cusick
Inquirer Staff Writer

A Philadelphia furniture salesman was arrested yesterday on murder charges in the slayings of a reputed organized crime figure and a woman companion on May 27 at a South Philadelphia restaurant.

Neil Ferber, 36, of the 8800 block of Manchester Street, was charged with killing Chelsais "Steve" Bouras and Jannette Curro.

Bouras, 50, who was identified by the Pennsylvania Crime Commission as a member of the so-called Greek mob, and Mrs. Curro, 54, a South Philadelphia housewife, were shot to death by two masked men as the

couple dined at the Meletis restaurant in the 700 block of South Eighth Street.

Ferber was picked up near his home early yesterday by homicide detectives. He was arraigned on two counts of murder and on weapons and conspiracy charges.

Police yesterday linked Ferber and the killing of Bouras to the slaying last month of another reputed Greek mob member, Harry Peetros.

Police said Ferber is a friend of Harry Saltzburg, one of the two men charged with killing Peetros. They theorized that the killing of Bouras was an effort to keep him from taking revenge on Peetros' killers.

Police also believe that the shooting of Mrs. Curro, who was sitting next to Bouras at the dinner table, was unintentional.

The body of Peetros, 53, identified by police as a longtime Delaware County loan shark, was found stuffed in the trunk of his car in East Lansdowne, Delaware County, on May 26, the day before Bouras and Mrs. Curro were killed.

Saltzburg, 35, of Beechcourt Road in Yardley, who police said was a member of a burglary and robbery ring, and Martin Sarkisian, 49, of Victory Road in Upper Darby, were arrested Friday on charges of killing Peetros. Police said Peetros was shot

while Saltzburg and Sarkisian were robbing him at an Upper Darby auto body shop on May 24.

At the arraignment, Ferber's attorney, David Zwanetz, suggested that the police case against his client was "smoke." Municipal Court Judge Michael Bednarek rejected a defense request for bail and ordered Ferber held without bail for a hearing June 17.

Zwanetz said he had discussed with police the possibility of having his client take a lie-detector test, but the idea was dropped when police refused to guarantee that Ferber would be discharged if he passed the test.

APPENDIX B.9

Hit Man's Family Ousted from Trial

By DAVE RACHER
and GLORIA CAMPISI

The mother, sister and five other relatives of convicted murderer Neil Ferber were ordered from the courtroom today as a jury heard testimony and arguments on whether Ferber should be executed for the slaying of reputed mobster Chelsais "Steve" Booras.

The mother and sister both wept continually while testifying on Ferber's behalf and they and other members of the family frequently interrupted the proceedings. Finally, Common Pleas Judge Robert A. Latrone ordered the entire family removed from the courtroom.

Judge Latrone acted after Ferber's mother, Blanche, stood and screamed: "They'll find the right one; everyone will see he's innocent. I swear on the life of my family, my grandchild."

THE JURY FOUND Ferber guilty of first-degree murder Saturday after less than four hours' deliberation. They heard emotional and clinical testimony today before retiring around 1 p.m. to decide whether he should get a life prison term or go to the electric chair.

Booras and a woman sitting next to him were shot to death by two masked gunmen in a South Philadelphia restaurant last May 27. Ferber, 36, of Manchester Street near Maxwell in the Northeast, is the only one so far accused of the crime.

Judge Latrone ordered the jury removed from the courtroom three times this morning while he tried to quiet Ferber's relatives, all seated in the first row. All, including an aunt and Ferber's adopted 14-year-old daughter, had taken the stand to beg for Ferber's life. Most of them cried while testifying.

ONCE, Judge Latrone explained to Ferber's brother, Jay, that it was the judge's obligation to keep control in the courtroom.

"You don't have to do it with a smile," Jay Ferber retorted.

Ferber's sister, Shirley Zwanetz,



Booras



Ferber

said in her testimony that Ferber had spent 10 months with her while free in \$200,000 bail awaiting trial. She said he was "relentlessly crying" during that period and said he frequently told her: "I'll never 'til the day I die, 'til I go to my grave, stop trying to find out who really committed this crime. I'm innocent, I'm innocent..."

Ferber and his wife, Annette, who was not in court today, were involved in another outbreak Saturday. Waiting in a corridor for the jury to return, Annette tongue-lashed Assistant District Attorney Guy Sciolla.

"This is the last day of your life," she told him. "I hope you never sleep another night."

WHEN SHE finished, Ferber, who had been free in bail until the jury returned its guilty verdict, attempted to punch Sciolla, but was stopped by his attorney, Daniel J. DiGiacamo.

DiGiacamo moved unsuccessfully for a retrial today after Judge Latrone had frequently interrupted testimony by Dr. Paul E. Tracy Jr., a criminologist testifying for the defense. Latrone denied Tracy's suggestion that the death penalty was unconstitutional and not a deterrent to crime.

Latron rejected DiGiacamo's argument that the judge had "practically told the jury to return the death penalty."

Sciolla, asking for the death penalty, told the jury Ferber "took two lives in cold and calculating fashion" and got paid \$20,000 for doing it. He

Continued on Page 45

Hit Man's Kin Ousted from Court

Continued from Page 5

said the jury should not be influenced by the beliefs of Ferber's family.

Authorities said at the time of his death that Booras, 50, of Magee Avenue near Bustleton, was believed to control a network of cocaine dealers receiving the drug from Greece through the port of Philadelphia.

Sciolla said the death of Janette Curro, 54, of Fernon Street near 8th, the second victim, probably was accidental. She was shot once and Booras four times.

CURRO WAS WITH a dining party Booras had invited to his table, including reputed crime figure Raymond "Long John" Martorano and his wife, who were family friends, police said. Curro did not know Booras, they said.

DiGiacomo presented two alibi witnesses during the trial who testified that at 9:30 p.m., the time of the killings, Ferber was at an apartment in Bensalem, Bucks County, celebrating a birthday.

Prosecution witness Jerry Jordan, a Detention Center inmate, however, testified that Ferber told him in prison that he was paid \$20,000 for the murders. He said Ferber told him the other gunman had been acquitted of three other killings and now is in jail on a gun charge in upstate New York.

AND ARCHITECT John Joseph Egan, another prosecution witness, testified he was sitting in a car across from the restaurant and saw Ferber pull off a mask as he fled.

Expert: Coke Goes Better With Spinach as Booster

FARMINGTON, Conn. (UPI) — Drug dealers have allegedly come up with an unlikely use for spinach — they use it to help peddle cocaine.

Adding pulverized spinach to cocaine makes the drug seem more potent when it is tasted by a prospective customer, said Dennis Crean,

assistant director of the Connecticut Poison Center. He said street dealers heat the greens, reducing them to a fine yellow-white ash that is mixed with the powdery cocaine.

The greens are replacing such common diluting agents as talcum and confectioner's sugar, Crean said.

APPENDIX B.10

Death sentence given in Bouras killing

By Henry Goldman
Inquirer Staff Writer

Neil Ferber, who has steadfastly denied that he was one of two gunmen who killed reputed mobster and cocaine-trafficker Chelsais "Steve" Bouras and Bouras' woman companion, has been sentenced to the electric chair.

Common Pleas Court Judge Robert A. Latrone told Ferber on Monday that he was bound by law to sentence him to die.

Ferber, of Northeast Philadelphia, was convicted in April 1982 of the

May 27, 1981, shotgun slayings of Bouras, 50, and Janette Curro, 54, as they dined at the Meletis Restaurant in South Philadelphia with seven others, including Raymond Martorano. Martorano has since been convicted of murder for hiring Willard Moran to kill Roofers Union Local 30 president John McCullough.

The second gunman never was caught, but Ferber was convicted on the testimony of Jerry Jordan, a former prison cellmate.

In 1983, Ferber's attorney, Dennis Cogan, requested a new trial, chal-

lenging Jordan's testimony and producing new evidence that Moran had accused Martorano of masterminding Bouras' murder. If true, Cogan contended, the evidence would contradict a police theory that had first made Ferber a suspect.

Latrone rejected Cogan's pleas for a new trial last week and on Monday sentenced Ferber to two death sentences for each 1982 conviction, telling him he was bound by the jury's finding to impose the death penalty.

Ferber replied: "The only thing I'll say is that I'm innocent."

APPENDIX B.11

Officer tracks evidence of innocence for convicted man

By Christopher Hepp

Lehigh Valley Times

Almost from the start of his investigation into who ordered the killing of reputed mobster Chelsais "Steve" Bouras, Lt. Francis P. Friel began hearing something from his underworld informants that disturbed him.

"You hear something enough times and you start to believe it," Friel recalled last week. "Every time it was said it left a bad taste in my mouth."

What he was being told — what he was coming slowly to believe — was,

to many in the Philadelphia Police Department and the district attorney's office, hearsy.

"They would say, almost incidentally, 'You know you've got the wrong guy in the Bouras case,'" Friel quoted his informants as telling him.

Neil Ferber, 40, the man convicted and sentenced to die in the killing of Bouras and Janette Curro on May 27, 1981, was not guilty, they claimed. The "wrong guy," they said, was sitting on death row.

Ferber, they said, was not one of

the two men who burst into a South Philadelphia restaurant and gunned down Bouras and his dining companion in front of seven others at their table.

So it was that Friel, who has spent 25 years gathering evidence to convince to overturn a conviction of a man he came to see as innocent.

Less than two weeks ago, Friel's pursuit of the truth paid off for Ferber. Common Pleas Court Judge Robert A. Lattone, who presided at Ferber's 1982 trial, overturned Ferber's

conviction and granted him a new trial. It is now up to the new district attorney, Ronald D. Castille, to decide whether to drop the charges or to bring Ferber to trial again.

Lattone issued his ruling after reviewing new evidence in the case, including a polygraph test that indicated a former prison cellmate of Ferber's had lied when he testified that Ferber had confessed to him.

The polygraph test had been ordered in December by former District Attorney Edward G. Rendell, who acted, in part, after Friel had

urged him for months to reconsider the case.

Rendell said in a recent interview that strong evidence had to be assembled before his office could take steps to undo a verdict. "A jury had spoken on this," Rendell said. "Legally and morally, it put it in a different light."

Rendell was not alone in his reluctance to act on Ferber's behalf. Sources in the law enforcement community said last week.

Friel, they said, found neither his superiors in the Police Department

nor officials in the district attorney's office very interested in investigating whether they had convicted the wrong man.

"Friel was the only one in this case who did not worry about the implications" of proving that the criminal justice system had convicted the wrong man, Dennis J. Cogan, Ferber's attorney said last week. "Friel was concerned about the possibility that a mistake had been made. It is a credit to the Police Department that" (See FRIEL on 4-A)

Raising new doubt about a conviction

FRIEL, from 1-A

they allowed him to operate in this fashion."

"There are good police and there are bad police," Ferber said. "Frank Friel is one of the good ones. He just went all the way through and did what he had to do. He really went up against the system."

Friel, 43, who is head of a joint FBI and Philadelphia police task force on organized crime, began looking into the Bouras murder case two years ago. He started with the assumption that a 1982 jury had been correct when it convicted Ferber of the crime. His interest, initially, was in finding Ferber's two accomplices and whoever contracted them to commit the murder.

The direction of his investigation changed, however, as Friel grew convinced that police had been wrong in their original theory as to why Bouras was killed. If that original theory was faulty, he realized, there was little reason to link Ferber to the case at all.

"We began to see there was no way Ferber fit," Friel said. "We began to conclude he had no business to be" part of the killing.

The original police theory was that the killing was related to the murder of an associate of Bouras', Harry M. Peetros, whose body was found a week before Bouras was killed.

Police believed that Peetros had been killed during a robbery by Barry A. Saltzburg, a longtime friend of Ferber's. They theorized that Saltzburg — who was convicted of robbery in October 1981 but acquitted of Peetros' murder — feared that Bouras would seek to revenge his friend's death. To avoid Bouras' wrath, police believed, Saltzburg hatched a plan to murder him while he dined with friends at a restaurant in South Philadelphia.

Based on that theory, investigators showed witnesses for Bouras pictures of Saltzburg. When none could identify him as one of the three people involved in the shooting — two gunmen and a getaway driver — they were shown photographs of Ferber, who had once been arrested with Saltzburg on weapons charges.

Ferber was identified eventually as one of the gunmen by Philadelphia architect John Joseph Egan, who was sitting in a car near the restaurant when the gunmen fled. Egan's wife, who also was a witness, could not identify Ferber.

The case against Ferber was strengthened when Jerry Jordan, a cellmate of Ferber's while he awaited trial, claimed that Ferber had told him he and a second man had committed the killings for \$20,000.

However, as Friel and his investigators tried to build a case against Ferber's alleged accomplices, they found they were repeatedly being told by their informants that Ferber was not guilty.

"I have an informant I trust implicitly, who has never given me bad



The Philadelphia Inquirer / GREG LANIER

Neil Ferber (right) with his attorney, Dennis J. Cogan, after Ferber's release from prison

information," Friel said. "He came to me and explained why Ferber could not have done it."

Although Friel declined to discuss specific details, he said the informant provided what he believed to be an airtight alibi for the man identified as Ferber's accomplice.

Friel's doubts about Ferber's involvement grew further as he came to believe that Bouras' murder had nothing to do with the Peetros killing, but with a dispute over illegal drugs.

Investigators are now looking into the possibility that Bouras was ordered murdered by Raymond Martorano, a reputed organized-crime figure who was among those eating with Bouras the night he was slain.

Martorano is serving a life sentence for ordering the December 1980 contract killing of John McCullough, president of Roofers Union Local 30.

Willard Moran, the man convicted of shooting McCullough, had told investigators after his 1982 conviction that Martorano offered him a contract to kill Bouras, but that someone else committed the murder before he had a chance.

Friel declined to discuss whether he believed that Martorano was behind the killing, but he said he became convinced that the slaying involved an underworld faction with which Ferber would not have had any contact.

Following his instincts, Friel met with Ferber about a year ago at Graterford Prison. One of the first things he asked was whether Ferber would submit to a polygraph test, Friel said.

Friel said he never planned to give such a test to Ferber; he just wanted to see how he would respond to the

request.

"When he said he would take the test, it was one of the things that tended to make me believe the guy did not fear the truth," Friel said.

Then Friel dug into Ferber's background.

"I went through the course of his day and looked at the things he did the day of the killing," Friel said. "He had a job interview and psychological counseling. Now, it is not the behavior of someone who is about to commit a contract killing to spend the day looking for a job... There is a certain predictable manner in which a contract murderer behaves. He has to build up to it. He often spends his day drinking or doing drugs to build up courage. [Ferber] went through a normal poor soul's day."

Early last year, as his doubts grew, Friel took his information to Rendell, who, sources said, was initially reluctant to consider that his office might have successfully prosecuted an innocent man.

"It was not a question of whether Ferber was guilty or not," said a source familiar with how prosecutors viewed the case. "It was the system that was not to be tampered with. A jury of his peers had convicted Ferber of the killing, and the best legal advice in the D.A.'s office was not to get involved with it."

Rendell said Friel had not been able, until December, to bring to the district attorney what Rendell thought was "concrete evidence" that suggested Ferber's innocence.

"My gut [feeling] was basically the same as Friel's," Rendell said. "Deep down I wanted to find something irrefutable that Ferber did not do it. I never found it."

Rendell said that although Friel

was able to raise questions about Ferber's guilt, the fact that Ferber had been tried and convicted by a jury made him much more cautious.

Over the months, however, as Friel continued to gather evidence pointing to Ferber's innocence, he sent it to Rendell for review. Finally, Rendell chose to give a polygraph test to Jordan — who failed and admitted to the polygrapher that he had lied about Ferber's confession. At that point, Rendell decided to urge Judge Latrone to order a new trial for Ferber.

While Rendell is still not sure of Ferber's innocence, the fact that Jordan failed the polygraph raised enough doubt that he felt Ferber deserved at least a new trial.

Ferber still faces the possibility of a retrial. Castille, who took office last week as district attorney, has said he wants to review the case before deciding whether to prosecute Ferber.

Castille's decision could be made easy if Friel can achieve his next goal — gathering enough evidence to arrest and prosecute those he believes are guilty of the Bouras murders.

Friel declined to discuss whom he suspects, but said he expected to make a case against them in the next several months.

If he can do that and free Ferber in the process, he said he would consider it his squad's "greatest accomplishment."

"Our system of justice is predicated on the belief that it is better to have 10 guilty people go free than to have one innocent person in jail," he said. "When you put a man in jail, you want it to be the right person. When it is not the right person, you want to use the entire power of the system to get him out again."

APPENDIX B.12

The Gripping True Story of a Dedicated Cop
Who Led the Fight that Put an Entire Mafia Family out of Business

John Guinther

Francis Friel

Breaking the Mob

FRANK FRIE & JOHN GUNTHER

OTHER BOOKS BY JOHN GUNTHER

Moralists and Managers: Public Interest

Movements in America

The Malpractioners

Winning Your Personal Injury Suit

Philadelphia: A Dream for the Keeping

The Jury in America

Brotherhood of Murder (with Thomas Martinez)

BREAKING THE MOB

toExcel

San Jose New York Lincoln Shanghai

as truthful, but his only evident reaction, spoken in his usual upbeat way, was that he was glad we had finally reached an answer with Jordan. He was going to do the right thing, too, he told me, and he did. On Friday, his last day in office, a letter was transmitted to Judge Latrone. In it, Rendell stated: ". . . I believe these test results when combined with other questions that have been raised by the work of law enforcement officials and considered in light of the obvious weight that Jordan's testimony had upon the jury, require . . . that given the standards this office has operated under for the past eight years we must recommend to you that the interests of justice require granting of a new trial."

Rendell's call had come in the midst of a conversation I was having with an FBI agent in my office. When I hung up, I was aware that she was staring at me. "What's happened, Lieutenant?" she asked. "You look so—so exhilarated."

Perhaps exhilaration is a good word for what I was feeling, but coupled with it, acting in happy concert with it, was a sense of utter and total relaxation and relief, the kind that suffuses you when a source of tension is removed that has been part of you for such a long time that you are no longer consciously aware how much it has been draining you. It was this tension that had produced my sleepless nights: the tension brought about by facing, day after day, the very real possibility that at best, this man would spend the rest of his life locked up for a crime he hadn't committed. It was over. It was all over, I was positive. There would never be a second trial. They had nothing left. We had won.

It turned out I was right in my conjectures, but I came close to being wrong. When Dennis Cogan and Eric Henson, armed with Rendell's letter, went before Judge Latrone on that Friday afternoon—Rendell's last in office—Latrone, as Dennis recalled it, was unwilling to accept Rendell's recommendation. He opined there should be another hearing before he made a decision. At that, Dennis erupted with the

pent-up fury he had been developing toward the system over the past four years. Another hearing? he asked Latrone. That would mean another year, at best, before the new DA would be ready to act, and two years before there'd be that other hearing. And all that time an innocent man would remain on death row. You don't believe the district attorney about Jordan? Cogan asked. Then call Emily Wimberly.

Latrone agreed to call her. She was reached by phone and her answers were made part of the court record. When Latrone hung up from the call, he stared at Cogan for a moment and then said, "All right, all right. We'll give you a new trial."

Dennis pressed forward. "I want my client released immediately on the bail that's already posted, Judge," he said. (Looking forward to this day, Dennis had convinced the Ferber family to let the bail money stand rather than recovering it after the trial.)

Latrone replied, "You got it."

On the following morning, Saturday, January 4, 1986, a cold and sunlit day, Jay Ferber arrived at Graterford State Prison. A guard opened the door. Neil Ferber stepped out. He looked at his brother uncertainly and then fell into his embrace.

His arm around his older brother's shoulders, Jay led Neil to his car. Neil took short, uncertain steps, his features blank. Jay drove him from the prison and his sixteen-month home on its death row. They had gone about twenty minutes when Neil spotted a restaurant and asked if they could stop there. Thinking he wanted something to eat, Jay agreed. When they got inside, however, Neil excused himself to go to the bathroom, walking with the tiny steps that may have become habitual pacing his cell. At the counter, Jay waited for him. Five minutes went by, then ten, fifteen. Worried, Jay followed his brother to the men's room. He saw Neil stripped to the waist, covered with the pink suds from the

soap dispenser, wiping at himself with paper towels. He turned to Jay, "I smell, I smell," he said. "I can't have my mother seeing me smelling like this." Gently, Jay cleaned him off, helped him get dressed, and they continued on home.

Almost another two months went by before the new DA's office reached the inevitable conclusion. On Friday, March 2, 1986, Neil Ferber, accompanied by his family and Dennis Cogan, appeared before Judge Charles Durham. Based on Arnie Gordon's recommendation, the new DA in charge of the Homicide Unit asked that all charges be dropped in the case of "this possibly innocent man."

That evening, one of the television stations tracked down Jerry Jordan. He was interviewed with his back to the camera. When asked if Neil Ferber had ever told him he killed Steve Booras, Jordan came up with his latest version: "Not in so many words," he said.

A few days later, Ferber admitted himself to a mental hospital, suffering from acute depression and bleeding ulcers; he remained there for several weeks. Over the next three-and-a-half years, he frequently called me, asking for my advice. Over and over again, he promised me he would remain straight. He held a number of jobs, had long periods of unemployment, was on welfare, had subsequent bouts of depression and ulcer attacks. He and his wife, who had suffered great emotional devastation from his death sentence, were not able to put their marriage back together. Late in 1988, Ferber's 21-year-old daughter, who, while still in high school, had undergone agonies of humiliation at the hands of her classmates when they taunted her for having a murderer as a father, died of a drug overdose.

After that tragedy, I heard from Neil less frequently. At one point, he was picked up for shoplifting. Although the charges were dropped, that was the signal he was drifting back to his loser's world. He found it again in the fall of 1989 when he was arrested on a felony charge involving

the sale of P2P, set up for the bust by an undercover informant wearing a body wire.

Which sadly, but not unpedicably—if I were writing fiction, I could have told a happier tale—marked the end of the not-for-nothin' Victor Deluca offered me back in the summer of 1984.

APPENDIX B.13

D.A. drops charges in slaying of Bouras

By Henry Goldman
Inquirer Staff Writer

The District Attorney's Office yesterday formally dropped murder charges against Neil Ferber, who was convicted in 1982 of killing mobster Chelsais "Steve" Bouras and his female companion in a South Philadelphia restaurant five years ago.

Assistant District Attorney Mark Gottlieb, chief of the office's homicide unit, told Common Pleas Court Judge Charles L. Durham that prosecutors had concluded Ferber could not be convicted on the basis of the remaining evidence against him. A prison inmate who had testified against Ferber in 1982 recanted his testimony and later failed a lie-detector test.

Gottlieb said that murder charges could be filed again if investigators developed new evidence against Ferber.

Defense attorney Dennis J. Cogan reacted bitterly to Gottlieb's refusal to clear Ferber absolutely. No charges remain against Ferber in connection with the case.

"Instead of coming into court and apologizing to this man, who has lived every day of his life for the past 1½ years thinking he would die in the electric chair, the district attor-

ney came to court and said we can't proclaim he is innocent," Cogan said. "It's just one more harpoon in the belly of that family."

Cogan said Ferber suffered a nervous breakdown during his 14 months on death row, and has been hospitalized in a private mental hospital since Jan. 3, when he won a new trial and his release from prison.

For 4½ years, prosecutors contended that Ferber was one of two gunmen who walked into the Meletis Restaurant, in the 700 block of South Eighth Street, on the night of May 27, 1981, and shot to death Bouras, 50, and Jeanette Curro, 54. The two were at a table with seven other people, including Raymond Martorano, who was later convicted of murder for hiring Willard Moran to kill Roofers Union Local 30 president John McCullough in 1980. No second gunman was arrested.

After Moran was convicted in 1982, he told investigators that Martorano had offered him a contract to kill Bouras, but that someone else committed the murder before he had the opportunity.

Ferber, 39, of Northeast Philadelphia, was arrested in June 1981, after a couple told police they had seen a man dash out of the restaurant, pull



Neil Ferber
Conviction was overturned

a ski mask off his head, and run down the street.

The woman picked a police photograph of Ferber as one resembling the fleeing suspect. At a subsequent lineup, however, the woman was certain that Ferber was not the man she saw, although her husband identified Ferber.

Ferber was convicted mainly on the testimony of Jerry Jordan, a convict with a record of 26 arrests, who said Ferber had confessed to the slayings while the two were in jail together.

Last year, Cogan uncovered a 1981 Philadelphia police lie-detector ex-

(See CHARGES on 3-B)

D.A. drops murder charges

CHARGES, from 1-B

amination that had not been disclosed to the defense before Ferber's trial, indicating that Jordan had lied to police before the trial. Jordan later recanted his testimony. A second lie-detector examination, conducted by the District Attorney's Office Dec. 26, also indicated that Jordan had lied at Ferber's trial.

After Jordan's testimony was discredited, Edward G. Rendell, then the Philadelphia district attorney, asked the state Supreme Court to order a hearing to determine whether Ferber should be granted a new trial.

On Jan. 3, Common Pleas Court Judge Robert A. Latrone, who presided over Ferber's 1982 trial and imposed the death penalty, overturned the conviction, paving the way for another trial, if the District Attorney's Office wanted one.

APPENDIX B.14

Living on death row a 'nightmare,' ex-inmate testifies

By John Woestendiek
Inquirer Staff Writer

LIVING ON death row for 14 months was a "nightmare" that is still recurring despite his release from prison six months ago, Neil Ferber testified yesterday in federal court in Philadelphia.

"You lose all emotion... and there are times you just really think you're going to explode inside, just going to crack up," said Ferber, whose 1982 murder convictions in the killing of reputed mobster Chelsus "Steve" Bouras and a companion were overturned Jan. 3.

Ferber's testimony came during the first day of a civil nonjury trial before U.S. District Judge Joseph L. McGlynn Jr. The trial stems from a

lawsuit filed by inmates contending that conditions on Pennsylvania's death row constitute cruel and unusual punishment.

Ferber, who said he was hospitalized for psychiatric treatment after his release from prison, testified that he still hears the noises of death row and sometimes sees "a blank wall" before him.

"The noise didn't even seem to stop after I got out," said Ferber, 41. As his wife and two children sat in the courtroom, Ferber described the cells on death row at the state prison in Graterford, Montgomery County, as poorly ventilated, saying they got so hot in the summer "that you couldn't lay down on the bed" and so cold in the winter that "you just

didn't want to get out from under the covers."

Death row inmates at Graterford spend 22 hours a day in their cells. Ferber said that he was allowed three showers, one visit (from as many as four people) and two phone calls a week. He said that, weather permitting, the inmates get two hours of exercise a day in individual fenced enclosures. "I call it a dog cage," he said.

He added that, since all inmates must return to their cells if one inmate needs to go to the bathroom, "you have to go outside... right on the grass."

Under cross-examination by Maria Parisi Vickers of the attorney general's office, Ferber was repeatedly

asked whether he had complained about the conditions. Generally, he said, he had not, for fear of losing privileges.

"You didn't want to do that or you wouldn't get a light for your cigarette," he said. Inmates on death row are not allowed matches and rely on corrections officers to come by their cells and light their cigarettes.

Vickers, in her opening statement, said that state corrections officials were "doing all that can be done with this very dangerous class of inmate.... Their cautious attitude is one they must be allowed to practice."

Stelan Presser, an American Civil Liberties Union attorney representing the inmates, said in his opening

statement that Pennsylvania, by segregating inmates who are sentenced to die, is unnecessarily inflicting pain on inmates.

Ferber testified that, although he was allowed to have a television and radio and to write letters and have books delivered from the prison library, "the restricted housing unit is there for punishment, and it really is punishment." The restricted housing unit is separate unit at Graterford where death row cells are located.

The class-action lawsuit was filed in January 1983 by 10 inmates at Graterford who contended that the restrictive conditions on death row violate the U.S. Constitution. Late in 1982, the state, citing a need to better monitor inmates who are sentenced

to die moved them all into restricted housing units at the state's three maximum-security prisons — Graterford, Huntingdon and Pitsburgh.

No one has been executed in Pennsylvania since 1962. John Lesko, 27, convicted in the 1980 slaying of an Apollo, Pa., police officer, was scheduled to be executed today, but last week he received a stay from a U.S. District Court judge in Pittsburgh.

Yesterday, the U.S. Supreme Court also granted Lesko a stay pending its decision on whether to hear his appeal.

Four death-row inmates are expected to testify in a later portion of the trial that will be held in a classroom at the state prison in Graterford.

APPENDIX B.15



The Philadelphia Inquirer / GERALD S. WILLIAMS
The expressway rebuilding projected to two or three lanes in each direction on Market and Vine Street.

Official defends individual cells on Pa. death row

By John Woestendiek
Inquirer Staff Writer

Allowing death-row inmates to mingle — with other prisoners or each other — could cause "severe problems" in Pennsylvania's prisons, Charles H. Zimmerman, the superintendent of Graterford Prison, said yesterday in federal court.

"We're dealing with an individual who comes to the institution with the ultimate penalty. . . . As such, there is nothing to deter him from committing the act [murder] again," Zimmerman testified as a trial over conditions on death row continued after a month-long recess.

Death-row inmates, in a class-action suit before U.S. District Judge Joseph L. McGlynn Jr., contend that restrictive conditions on Pennsylvania's death rows — at Graterford and Huntingdon state prisons — are unconstitutional.

The lawsuit was filed by inmates in January 1983, shortly after the state Department of Corrections moved inmates sentenced to death from the general prison population into restricted housing units, where they spend 22 hours a day in their cells and two hours in individual fenced exercise yards.

State officials have said that in the wake of the death penalty's reinstatement in Pennsylvania, the new policy was needed to better monitor capital punishment cases.

Although death-row inmates are occasionally allowed to exercise two at a time — and although seven of the approximately 20 death-row inmates at Graterford have received no prison misconducts since being confined on death row — Zimmerman said yesterday that permitting groups of more than two death-sentenced inmates could be dangerous.

"The more of this type of individual you put together with one another, the greater the chances of problems occurring," he said. "The security risks increase geometrically."

Asked how he would go about choosing four inmates to exercise together, Zimmerman, superintendent at Graterford since 1983, said, "I don't think I could responsibly make a decision like that."

If death-sentenced inmates were allowed to live with the prison's general population, Zimmerman said, the signing of their death warrants and the publicity that would generate could lead to unrest among inmates they had befriended.

Inmates on death row in Pennsylvania are allowed out of their cells daily for two hours of exercise, once a week for non-contact visits, three times a week for showers, and for medical treatment as needed.

Whenever they leave their cells, they are met by three correctional officers, strip searched and shackled, and then escorted to their destination by at least two officers, Lt. Donald W. Flanigan, supervisor of the restricted housing unit at Graterford, testified yesterday.

Flanigan said improvements were planned in the individual chain link fence exercise yards at Graterford. Tables will be installed in four of the yards, where inmates — two at a time — will be able to play board games or discuss legal work, he said. A basketball goal is being installed in the large yard, where inmates are now occasionally allowed to play handball, said Flanigan.

Also testifying for the state yesterday were two psychiatrists. Joaquin Canals, a Graterford prison psychologist, said that he did not believe any psychiatric problems among death row inmates were caused by their conditions of confinement.

Irving Kitchner, a Veterans Administration psychiatrist, disputed a claim by two other psychiatrists that conditions on death row had caused Neil Ferber, a death-row inmate freed from Graterford after his murder conviction was overturned this year, to suffer post-traumatic stress disorder.

Officer kills man firing gun on road

United Press International

READING — A Berks County man found shooting wildly on a suburban Reading road was shot and killed by a police officer.

State police said few details had been released because the investigation into the Sunday night incident was continuing. Police identified the dead man as Chris Adamski, about 30, of Reading.

Police said Adamski was armed with a pistol and shooting at random along Old Friedensburg Road in Lower Alsace Township. He was shot and killed about 8 p.m. by Lower Alsace Patrolman Anthony Garipoli, who had been sent to investigate.

d to 4.9%

to maintain its credit position on Wall Street. Opponents are expected to contend that PGW can live with a lower level of revenues without damaging its ability to borrow money for capital improvements.

Vignola agreed that the company's debt position will be "the big issue" in the PGW hearings, adding that PGW's rates will probably become an issue in next year's mayoral race. He said several potential contenders for the mayoralty already have indicated they will testify during the hearings, which are scheduled to be held daily in the Council chamber of City Hall for the next three weeks.

Vignola also said the commission plans to hold hearings around the city during September, at which time members of the general public will be invited to testify. He said the commission plans to give its final decision in the case in October.

APPENDIX B.16

False-imprisonment award is thrown out

A jury had given Neil Ferber \$4.5 million. The judge said a new edict warrants a retrial on that point.

By Amy S. Rosenberg
INQUIRER STAFF WRITER

A Common Pleas Court judge has thrown out a \$4.5 million jury award to Neil Ferber, the man who spent nearly four years in prison for a double murder he did not commit, an ordeal the judge characterized as "a Kafkaesque nightmare."

Judge John W. Herron ordered a new trial only on the question of damages against two individual police officers, former Homicide Sgt. Daniel Rosenstein and police sketch artist Dominic Frontino, both of whom the judge said "engaged in conduct of a criminal nature."

He said the jury was correct last year in finding the officers liable for the wrongful arrest and conviction of Ferber for the 1981 murder of mobster Chelsals "Stevie" Bouras and Bouras' dinner companion, Jeanette Curro.

He called the police investigation "a malevolent charade" in which the officers conducted themselves in the manner of "the so-called justice system of a totalitarian state."

"Unfortunately, and shamefully, as the trial evidence showed, it happened here in Philadelphia," Herron wrote.

But the judge also ruled that the city itself could no longer be considered a valid defendant in the lawsuit, because of a recent state Supreme Court ruling that municipalities in Pennsylvania cannot be sued because of the conduct of employees and officials.

"Fundamental fairness to the verdict winners must be balanced against the harsh reality that, as a matter of law, the City of Philadelphia simply cannot be held accountable for the criminal conduct of the individual police officers which caused the plaintiffs' injuries," Herron wrote.

The Supreme Court's ruling would generally not apply to federal cases involving police misconduct and civil rights violations that extend to conduct or negligence by the city itself.

The judge found that a new trial on damages is necessary because the jury was improperly informed that the city would be responsible for any damages. That knowledge may have

inflated their award, the judge concluded in a 42-page opinion filed Oct. 3.

Dennis Cogan, the attorney for Ferber, has filed a motion asking the judge to reconsider his ruling. The motion points out that the jury instructions applied to compensatory damages and not to punitive damages.

The jury awarded \$2 million in compensatory damages and \$2.5 million in punitive damages. Cogan asked the judge to reinstate the \$2.5 million award.

Ferber, who has been in and out of hospitals in recent years for bleeding ulcers and heart disease, could not be reached for comment.

Rosenstein, who is now in charge of the Philadelphia Housing Authority's drug elimination unit, said yesterday that "everything stated in that opinion with respect to my conduct is 100 percent wrong."

"I did not even consider doing what is alleged in that opinion," Rosenstein said. "I gave that case my full head and my full heart. It is shattering to me that after 29 years as a police officer, I can be referred to as a criminal, when I've given them every ounce of my heart."

Although the ruling frees taxpayers from a \$4.5 million award temporarily, the city could ultimately wind up paying any future monetary damages found against the individual officers in a retrial anyway.

A city ordinance requires the city to pay any damages against employees who were acting in the scope of their duties. At trial, the city agreed the officers were doing just that. However, in his opinion, the judge questions "whether criminal acts can ever be deemed acts performed within the scope of an employee's duties."

City Solicitor Joseph Dworetzky said yesterday that he felt the judge should have gone further and ordered a new trial on the merits of the case, in addition to damages. "Our position is the whole case needs to be retried," he said.

He said he could not discuss whether the city would still be held responsible for damages found against the individual officers, even if it is not a named defendant. "It's probably better not to get into that," he said.

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APPENDIX B.17

OBITUARIES

Neil Ferber, wrongly jailed in '84

By Sally A. Downey
INQUIRER STAFF WRITER

Neil Ferber, 63, who spent 14 months on death row in a mob-related murder he did not commit, died of a heart attack Saturday at his home in Northeast Philadelphia.

In 1981, Mr. Ferber was arrested in the murder of the mobster and cocaine trafficker Chelsais "Steve" Bouras and his dinner guest, Jeanette Curro. They were shot by two men while dining at the Meletis Restaurant in South Philadelphia.

Police initially suspected Mr. Ferber, a self-described con man who was friendly with a member of the so-called Greek mob, which Bouras led. They believed the killer had been hired in a battle for power among the mob's leaders. Mr. Ferber was arrested after a witness identified him from a composite sketch.

Mr. Ferber was convicted principally on the testimony of Gerald Jordan, a former cellmate at the Philadelphia Detention Center. Jordan said that Mr. Ferber told him he had been hired to kill Bouras.

When he was sentenced to death for the two killings in October 1984, Mr. Ferber told Judge Robert A. Latrone, "The only thing I'll say is that I'm innocent."

Mr. Ferber's family hired attorney Dennis J. Cogan to handle post-trial motions. Cogan said he believed Mr. Ferber was innocent but "had no idea" it would take years to prove. A break came, he said, when he got a call from Lt. Francis P. Friel, head of the Organized Crime Task Force in Philadelphia. Friel's mob informants had told him that the wrong man had been arrested in the Bouras case,



Inquirer file photograph

Neil Ferber in 1986, after his conviction was overturned.

and Friel began seeking evidence.

He discovered that police had given a polygraph test to Jordan, the jailhouse informant. Jordan failed the test but police never passed on the information to the District Attorney's Office. A new polygraph test was ordered by District Attorney Edward G. Rendell at Friel's urging, and Jordan again failed.

Cogan discovered other problems with the police investigation. According to findings made known at a later civil trial, a Police Department sketch artist and another officer conspired to frame Mr. Ferber by using a police mug shot of him to develop the sketch identified by the witness. The two officers denied wrongdoing.

On his last day as a district attorney, Rendell requested a

new trial for Mr. Ferber. The same day, Latrone overturned the conviction. Mr. Ferber was freed the next day.

In 1996 the city agreed to pay \$1.9 million to close the civil suit filed by Mr. Ferber. A jury had awarded \$4.5 million for what Judge John W. Herron called Mr. Ferber's "Kafkaesque nightmare." The award was later overturned because of technical changes in the state's liability laws.

No one was ever charged in the case, but authorities came to believe that Bouras' killing was ordered by mob boss Nicodemo "Little Nicky" Scarfo, and set up by mobster Raymond "Long John" Martorano, because Bouras controlled a multimillion-dollar methamphetamine distribution ring that the Scarfo organization wanted to take over.

Mr. Ferber contended that he had suffered bleeding ulcers and a nervous breakdown because of his unjust imprisonment. "It will leave a scar on me for life," he told a reporter when he was re-

leased from jail in 1986. "It's inhumane. It's impossible to help yourself. The noise — they're screaming back and forth. My nerves are shot. It just feels great to be able to take a hot bath, shave when you want, and light your own cigarettes again." After his release, Mr. Ferber's case was aired on CBS's *60 Minutes*.

Mr. Ferber grew up in Northeast Philadelphia. After graduating from Northeast High School, he went to work for his father, Martin, who owned a furniture store in North Philadelphia. He eventually took over the store and relocated to Kensington. He was still operating the business when he was arrested.

After his release, he ran a heart monitoring business for several years.

Five years ago, Mr. Ferber moved from Bensalem back to his family's home in Northeast Philadelphia to care for his mother, Blanche. She died in July.

"He felt bad about what he put her through," said his brother, Jay. She had to go through the trauma of visiting her son in chains at Graterford Prison, his brother said, and "Neil never got it out of his mind how she had to beg for his life at his sentencing."

Mr. Ferber was a meticulous dresser and enjoyed watching old movies and documentaries. He walked five or six miles a day. "He said it cleared his mind," his brother said.

In addition to his brother, Mr. Ferber is survived by a son, Ronald Feiner; a sister, Shirley Zwanetz; two grandchildren; and his former wives, Kathy Shore and Annette Ferber.

A graveside service was yesterday at Mount Sharon Cemetery, Springfield, Delaware County.

Contact staff writer Sally A. Downey at 215-854-2913 or sdowney@phillynews.com.



The sketch used to connect Ferber to the mob slaying.

APPENDIX B.18

Time on death row not in vain

by **Kathy Brennan**

Daily News Staff Writer

A small-time hood who spent four years on death row for a mob hit he didn't commit was sentenced yesterday to 25 months in jail on a drug rap.

Neil Ferber, bracing for the worst, gripped a courtroom lectern as U.S. District Judge Thomas O'Neill imposed a sentence far below federal sentencing guidelines. He gave Ferber credit for the 45 months spent on death row.

O'Neill said he did not believe the federal commission ever considered a case as "rare" as Ferber's when it drafted sentencing guidelines.

"I'm still suffering," Ferber interjected.

Friends and relatives of Ferber's embraced one another as the judge indicated he would issue a lenient sentence.

Ferber, 46, was convicted last June of attempting to possess P2P, a key ingredient in making speed. He has been free awaiting sentencing. Federal guidelines suggest a sentence of 70 to 87 months for that crime.

But Ferber's attorney, Thomas C. Carroll, argued his client should be given credit for the time he spent contemplating the electric chair.

Ferber was falsely convicted of killing reputed mobster and cocaine-trafficker Chelsais "Steve" Booras and his dinner companion, Janette Curro, 54, in a South Philadelphia restaurant in 1981. The conviction came after a witness lied during the trial and identified Ferber as the hit man.

He was freed from death row in December 1985 after winning a new trial.

Ferber has six prior convictions for crimes including burglary and possession of a firearm.

In 1989 he was arrested after taking a quart of P2P from an acquaintance, Gerald Richardson, a paroled

murderer, drug dealer and stickup man. Richardson, 52, became an informant against Ferber after the U.S. Drug Enforcement Administration caught him trafficking in drugs.

WHO SAID NEWSPAPERS CAN'T FLY?

Come make the Daily News soar at the Daily News Newspaper Kite Competition. This event is just part of the two-day Philadelphia Kite Festival, and we're looking for creative souls who can make the best kite out of Philly's favorite paper, the Daily News. Helpful hints will run in Friday's Timeout section on April 26.

DAILY NEWS NEWSPAPER KITE COMPETITION

Time: 1:00 p.m.

Day: Saturday, April 27

Place: Belmont Plateau in Fairmount Park

Cost: Free

Besides being a whole lot of fun, the Philadelphia Kite Festival, April 27 & 28, benefits the Hospice Program of Pennsylvania Hospital and the Fairmount Park Commission. There are activities and games for the whole family, including free face painting, a food bazaar, stunt kite demonstrations, battle kite competitions and more.

But, of course, the Daily News Newspaper Kite Competition will be the most fun. You might even win a prize. So start making your kite now and get ready to go fly a kite!

DIRECTIONS:

From Montgomery Drive exit, off route 76 West, take left turn after exit and travel 1/4 mile to Belmont Plateau.



APPENDIX B.19

\$4.5M awarded in police misconduct case

by **Kathy Sheehan**

Daily News Staff Writer

Neil Ferber's 45 months on death row for a 1981 mob-related don-ble murder he didn't commit will cost the city \$4.5 million.

A Common Pleas jury yesterday blamed the Police Department, and two officers in particular, with wrongful prosecution of Ferber as one of two gunmen who blew away reputed mobster Chelsans "Steve" Booras and a dining companion at the Meletis Restaurant at 8th Street near Catharine.

The jurors' award included \$2.5 million in punitive damages, \$750,000 for intentionally inflicting emotional distress, and



Ferber

\$500,000 for the suffering of Ferber's ex-wife, Annette.

It was believed to be one of the largest awards for police misconduct in the city's history.

Many of the eight jurors embraced a dazed Ferber after being excused by Judge John W. Herron. One cried in the arms of Ferber's elderly mother, Blanche, who also sobbed after being told of the award.

"Someone has to pay," juror Bernice Peters said later, citing Ferber's imprisonment for nearly four years. "And I'm a Philadelphia taxpayer and I'm willing to pay."

The case against the city centered on the actions of two police officers, former homicide Sgt. Daniel Rosenstein and sketch artist Dominic Frontino.

The jury found that Rosenstein and Frontino had conspired to frame Ferber for the May 27, 1981, murders that resulted in Ferber's being sentenced to the

electric chair.

"There's no celebration in something like this," Ferber said with an occasional twitch in an otherwise unemotional face. "It's a day I looked forward to coming. The truth came out and they said I was innocent."

"But I haven't won. No one could give me back all the years I lost."

During the week-long trial Ferber's attorney, Dennis Cogan, repeatedly suggested that Frontino's sketch of a man seen running from the Meletis restaurant the night of the murder was fabricated from an old police mug shot of Ferber rather than from an eyewitness description of the gunman.

Assistant City Solicitor James B. Jordan defended the officers, stating in closing arguments yesterday that Rosenstein had been responsible for Ferber's New Year's Eve prison release in 1985 after learning a key witness against Ferber had recanted his story.

The city opted not to retry Ferber after the witness failed a lie-detector test, which Jordan suggested was further evidence that the city held no malice toward Ferber.

Ferber, 48, who left death row only to go on to suffer a nervous breakdown and to serve more jail time on a June 1990 drug conviction, said he was still under a doctor's care.

His attorney said he owed \$55,000 in medical bills, mostly for treatment of bleeding ulcers and psychiatric stress.

Ferber said he still has terrible flashbacks about his 12-year ordeal and hoped the jury award would teach the city a lesson.

Mayor Rendell's chief of staff, David L. Cohen, said the city would vigorously pursue the appeal process.

"We don't believe the verdict is at all supported by the evidence," Cohen said. ■

APPENDIX B.20

Justice barely in time

Condemned man was framed by the police

A Philadelphia jury has decided that the misguided over-zealousness of the police in the City of Brotherly Love will cost the city \$4.5 million, and the amount does not seem excessive, especially from Neil Ferber's point of view. Ferber spent 45 months on Pennsylvania's death row for a 1981 double murder he did not commit. Philadelphia is lucky the truth came out while it still could reasonably atone. Ferber, whose life was on the line, was luckier still.

His case is another compelling argument against the irrevocable finality of capital punishment. A Common Pleas jury reached its verdict Tuesday after Ferber's lawyers suggested that two former city police officers, one a detective and the other a sketch artist, fabricated a drawing of a man seen running from the murder scene, basing it on an old police mug shot of Ferber instead of an eyewitness description. Ferber had been sentenced to die in the electric chair.

The jury's award includes \$2.5 million in punitive damages, and the total award is believed to be one of the highest for police misconduct in the city's history. But Ferber was not feeling any flush of victory — and no wonder. "I haven't won," he said after the verdict was announced in court. "No one could give me back all the years I lost." Or compensate him for the mental anguish of facing death for a crime he hadn't committed. It's hard to describe what he must have felt without becoming melodramatic.

The jury's finding — that these two cops conspired to frame an innocent man — should give pause to all who argue that the courts should be authorized to extract an eye for an eye and a tooth for a tooth. Putting that doctrine into practice makes grossly inadequate allowances for human error — or worse.

What matters most:

Pennsylvania was lucky the truth came out before Neil Ferber was executed.

Ferber's ordeal did not end with his release from jail on New Year's Eve 1985. He told the court this week he still has terrible flashbacks about it. His marriage ended in divorce. He suffered a nervous breakdown and served more jail time for a 1990 drug conviction. His lawyer told the court Ferber owes about \$55,000 worth of medical bills, mostly for treatment of psychiatric stress and bleeding ulcers.

Ferber was released from death row because a key witness against him recanted his trial testimony four years later. The city decided not to retry Ferber because that witness later failed a lie-detector test. The truth about the police rigging a case against Ferber did not come out until still later.

In legal terms, Ferber's ordeal is over. In personal terms, it may not end as long as he lives. If there is any way the city can prosecute the two rogue policemen who robbed Ferber of his liberty and nearly sent him to his death, it should do so. A jail sentence equal to every day Ferber spent in jail would be appropriate. And all Pennsylvanians should be thankful that this wrongfully convicted man beat the odds by bringing out the truth before it was too late to make amends to him.

States that continue taking lives of convicted criminals run the risk of killing the innocent along with the guilty, and leaving themselves unable to make amends that matter. It's a grave moral risk, one that people should be unwilling to take.

APPENDIX B.21

City will pay \$1.9 million to man over unjust jailing

Neil Ferber spent 3½ years in prison for a 1981 double murder that someone else committed.

By Mark Fazlollah
INQUIRER STAFF WRITER

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The city has agreed to pay \$1.9 million to close a civil suit brought by Neil Ferber, a Northeast Philadelphia furniture-store salesman who spent 14 months on death row for a double murder he did not commit.

The agreement ends a battle that dragged on for 14 years, bringing criticism down on the Police Department and then-District Attorney Edward G. Rendell, who rejected evidence of Ferber's

innocence until his last day in office as the city's chief prosecutor.

Ferber, 50, who spent 3½ years in prison before he was set free in January 1986, declined comment.

The settlement was disclosed in a city document obtained by The Inquirer. Rendell, through a spokesman, confirmed the settlement agreement last night and said it was "fair and appropriate, and a fraction of what a jury would have awarded."

Rendell has always said he acted correctly in the Ferber case. In its settlement with Ferber, the city

does not acknowledge any impropriety in its handling of the case.

"But for [Rendell's] decision to seek a new trial for Ferber, not only would Mr. Ferber not be getting a settlement, but he would still be in jail . . . or dead," Rendell spokesman Kevin Feeley said last night.

Ferber was arrested in the May 27, 1981, murder of mobster Chelsais "Steve" Bouras and his dinner guest, Jeanette Curro. They were shot while dining at the Meletis Restaurant in South Philadelphia. Fer-

See **FERBER** on A13



Neil Ferber
sat on death row for 14 months.

City agrees to pay \$1.9 million to Ferber over unjust jailing

FERBER from A1
Ferber was convicted principally on the testimony of Gerald Jordan, a former cellmate of Ferber's at the Philadelphia Detention Center. Jordan had spent much of his adult life in jail for petty crimes.

In Ferber's 1982 criminal trial, Jordan told the jury that Ferber had confessed in jail to being one of two gunmen who shot Bouras and Curro. Ferber was convicted and sentenced to death.

Jordan later recanted his testimony. On Jan. 3, 1986, his last day as Philadelphia's district attorney, Rendell asked Common Pleas Judge Robert A. Latrone to grant Ferber a new trial. The same day, Latrone overturned Ferber's conviction — leaving the District Attorney's Office to decide whether there should be a new trial.

Ferber was freed the next day. Rendell's successor as district attorney, Ronald D. Castille, now a state Supreme Court justice, declined to seek a new trial.

After he was freed, Ferber sued the city, contending that he had suffered bleeding ulcers and a nervous breakdown because of his unjust imprisonment.

In 1993 a Common Pleas Court jury awarded him \$4.5 million. That jury found that former Homicide Sgt. Daniel Rosenstein and a police sketch artist, Dominic Frontino, conspired to frame Ferber.

The \$4.5 verdict was overturned in 1994 by Common Pleas Judge John Herron because of technical changes in state liability laws. But Herron said the police handling of the murder case was "a Kafkaesque nightmare... a malevolent charade... the so-called justice system of a totalitarian state."

Herron said police manipulated witnesses, "withheld important information, tampered with identification evidence, and misled judicial officers."

"Unfortunately, and shamefully, as the trial evidence showed, it happened here in Philadelphia," the judge wrote.

After Herron overturned the \$4.5

million award, Ferber vowed to continue fighting for damages. Herron sent clear signals that Ferber could seek redress in federal court, but the new suit was never filed because negotiations for a settlement began soon afterward.

Sources familiar with the settlement, signed July 22, said Ferber has agreed to take no further action against police involved in the murder case.

During the 1993 civil trial against the city, Ferber's attorney, Dennis J. Cogan, contended that Frontino may have used a police mug shot of Ferber to fabricate a sketch of a suspect seen at the shooting.

The city strongly defended the actions of Frontino, still with the police department, and Rosenstein, now a captain in the Philadelphia Housing Authority Police.

Frontino declined comment yesterday. Rosenstein, who served 29 years on the department, could not be reached. In the past, he has denied wrongdoing.

The case has been a source of repeated embarrassment for Rendell.

In November 1986 the CBS television news program *60 Minutes* focused on the Ferber case. It said Rendell took three years to reopen the case, despite concerns expressed by a police detective who believed Ferber was not involved in the killings. It also suggested that Rendell pressed the case against Ferber "because Rendell's office had a poor record in convicting gangland killers" during his tenure as district attorney from 1978 to 1986.

In the 1987 mayoral primary, then-Mayor W. Wilson Goode's campaign aired an ad charging that Rendell sent an innocent man to death row. It ended by asking the question: "If he can't handle the keys to the jail, how can he handle the key to the city?"

The actions by Rendell and police in the Ferber case also were criticized in the 1990 book *Breaking the Mob*, by Frank Friel and John Guinther. As a Philadelphia police detective in the mid-1980s, Friel

worked to free Ferber. In 1989, Friel became chief of police in Bensalem — where Ferber now lives.

Cogan, who had worked under Rendell at the District Attorney's Office, has become a harsh critic of the mayor's because of the Ferber case.

In an interview last fall, Cogan said Rendell was more interested in his political career than in justice. He accused Rendell of being willing to send Ferber to the electric chair on evidence that he knew was fabricated. He also criticized Rendell for not prosecuting any police involved in the case.

Rendell's chief of staff, David L. Cohen, said in 1987 that Rendell did all that was possible to free Ferber as soon as possible.

"As soon as evidence was brought to Ed about the innocence of Neil Ferber, he fought hard to have Neil Ferber released," Cohen said when the case became a campaign issue in 1987.

The 1981 double murder in Meletis Restaurant remains unsolved to this day. No new arrests were ever made in the case.

The \$1.9 million agreement caps an expensive run of civil-suit settlements involving allegations of misconduct in the city's police department.

In the last month, the city has agreed to pay about \$6 million to settle some 50 cases of alleged police abuse.

Last week, the city agreed to pay \$1.1 million to the family of Anthony DiDonato, 62, a mental patient from Southwest Philadelphia who died after police allegedly beat him with a nightstick, dragged him down steps, and threw his body on the ground.

Most of the other cases involved the city's current police corruption scandal, in which six former 39th District officers have already gone to prison and four others from the 25th District and an elite Highway Patrol unit are under indictment. Common Pleas judges have overturned more than 160 of their arrests because the former officers are not considered credible.

Inquirer staff writers Mark Bowden and Richard Jones contributed to this article.



Ed Rendell as D.A. rejected evidence of Ferber's innocence.

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APPENDIX B.22

He lived to fight it

Death row survivor crusades against penalty

by **Dana DiFilippo**

Daily News Staff Writer

William Nieves used to spend his days with serial killers and murderous rapists.

He lived in a prison cell barely bigger than a walk-in closet. He was allowed to emerge an hour a day, five days a week, to see the sky from a rooftop cage. When gallstones gave him pains that felt like a knife twisting in his belly, the guards laughed and admonished him to act like a man.

Now, nine years since the drug-dealing and addictions that led him to trouble, Nieves is trying to be the biggest man he can.

After spending nearly eight years in prison — including six on death row — for a 1992 drug slaying, Nieves was freed in October when a jury acquitted him in a new trial ordered by the state Supreme Court.

He has become an ardent anti-death-penalty crusader, traveling as far as Denmark and Italy as a living example of how wrongful convictions can place innocent people on the lethal-injection gurney. He has rubbed elbows with like-minded ideologues, from actress Susan Sarandon to “Dead Man Walking” author Sister Helen Prejean.

He works as a community organizer for Pennsylvania Abolitionists United Against the Death Penalty.

And he resoundingly rejects the lawlessness that drew police attention his way.

“I’m doing this so other people don’t have to go through what I did,” said Nieves, now 35 and living with his mother in her Feltonville row-house. “Death penalty law does not guarantee against the innocent being executed. Why is it so difficult for America to say: Let’s approve funding for DNA testing let’s provide adequate funds for poor defendants, let’s put safeguards in place so innocent people aren’t executed?”

William Nieves dreamed of being a Marine. Growing up in Logan Nieves

See **CRUSADER** Next Page



SAVVY READER.

A guide for teachers, students and their parents

- Compiled by Vera DaVinci

Q. William Nieves is turning his life around and is working to help improve our legal system. What events and people aided him in this turnaround? What skills and information should he learn to facilitate his plan to “help others who are facing injustice”? ■

CRUSADER

Continued from Preceding Page

was the youngest of six children raised by a single mother on welfare.

After graduating from Frankford High School in 1983, he enlisted in the Marines.

His stay was short. He was discharged after three months, he says, for sticking up for a recruit beaten by his superiors. Back home, he hooked up with a bad crowd. He drank and smoked marijuana and started selling drugs to support his addiction.

"Eventually, I started using more than I was selling," said Nieves, who also abused cocaine, heroin and PCP. He lost his job as an insurance processor and was convicted for drunk driving and drug possession.

At age 27, Nieves signed up for math and English classes at the Community College of Philadelphia in an effort to right his life. But on Sept. 27, 1993, his plans for the future folded.

City homicide detectives wanted to know his whereabouts on Dec. 22, 1992. He didn't know.

"They wanted an alibi, and I didn't have an alibi," he said. So he was charged with killing Eric McAilley, 20, who was shot several times in the back on a clear, cold night outside his Hunting Park home.

Prosecutors said Nieves had shot McAilley, who they said sold drugs for him, because McAilley owed him money from past deals. Nieves knew McAilley. He was a dealer Nieves met in rehab in early 1992. But Nieves maintains today — as he has since his arrest — that he didn't kill McAilley nor employ him as a dealer.

Witnesses initially told police the shooter and his accomplice were tall, thin black men who fled in a maroon-and-white Cadillac with a tire on the back.

Nieves is a light-skinned Puerto Rican who, at the time of the shooting, was 225 pounds and drove a blue Jeep. But police found a witness who, nearly a year after the murder, picked Nieves as the killer in a photo lineup, contradicting her earlier statements to police that two black men had shot McAilley. The woman — an admitted prostitute and crackhead — became prosecutors' star witness. The initial witness descriptions didn't emerge at the first trial.

"I couldn't believe it when I got convicted," Nieves said.

After her son went to death row, Angela Nieves sold his Jeep and got a bank loan to hire defense attorney Jack McMahon to fight the conviction. "I know my son better than anyone else," the 64-year-old said. "I always knew he was innocent."

McMahon convinced the State Supreme Court to reverse Nieves' conviction, saying his first trial attorney had wrongly advised him not to testify. That lawyer mistakenly believed such testimony would allow prosecutors to unveil Nieves' prior drug convictions, McMahon said, and the court agreed.

A jury found Nieves not guilty in an October retrial.

Homicide investigators and prosecutors declined to talk about the case.

Prison forced Nieves to kick his drug addiction for good.

Prison left him with debilitating medical problems. "I needed gall bladder surgery, but they didn't want to do surgery on a death-row inmate," Nieves said. "So I was in pain for years. And I still have problems."

Nieves is considering suing the city for his lost years. He also plans to pursue college. But for now, he's busy fighting for prisoners' rights and crusading against capital punishment.

"My faith has given me the strength that can carry me through these storms in my life," he said. "I want to help others who are facing injustice because of incompetency of counsel, their poverty and race, a psychiatric past and other issues." ■

Send e-mail to dfrink@phillynews.com

Rev. Leon S

by Will Bunch
and Ron Goldwyn

Daily News Staff Writers

The Rev. Leon Sullivan, the legendary "Lion of Zion" and crusader for civil rights from the streets of Philadelphia to the settlements of South Africa, is gravely ill with leukemia, his family announced last night.

"My father is very ill right now and we are asking for all of your prayers in our time of need," Hope Sullivan Rose, daughter of the 78-year-old minister and activist, said in a statement from Scottsdale, Ariz., where he has lived since 1988.

Sullivan was listed last night in critical condition at the Scottsdale Healthcare Osborn Hospital, where he was taken last week. His wife, Grace, had also been treated there for chest pains, but she was released on Monday.

Word of Sullivan's illness was first announced on Sunday morning at Zion Baptist Church, the North Philadelphia congregation where Sullivan preached for 38 years and is listed as pastor emeritus.

The Rev. William Glenn, Sullivan's friend for four decades and Zion's interim pastor, said Sullivan didn't



The Rev. Leon Sullivan

sound like the boom of "Lion of Zion" when last month to celebrate his 80th birthday.

"He wasn't bubbling with energy like he was tired and old."

Sullivan has been a champion for civil rights and economic opportunity starting in Philadelphia.

Bullets from nowhere

The night sky yields the cold, steel litter of city life: a bullet out of nowhere.

As common as rain, an errant bullet sears through the South Philadelphia darkness and Nafes Johnson is in its path.

Unknowingly,

He avoided these dangers all of his life.

He was a young man who defied the gravity of poverty and "beat the odds" to become a minister, a local pastor said.

But bullets inhabit the air in this city, fired in fun or in fury,

fired by accident or intent. And no amount of determination can deflect them.

This bullet struck Nafes Johnson in the head.

Is there anything more ironic and infuriating than a missile of destruction that kills inadvertently?

Better to be shot by a robber; it's more personal, less inexplicable.

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JILL PORTER

APPENDIX B.23

Death-row inmate from Phila. is acquitted in second trial

A Philadelphia man who spent nearly 5½ years under a death sentence for a drug-related murder was acquitted Friday in a new trial and was expected to go home this weekend.

William Nieves, 34, had been convicted in the 1992 shooting death of Eric McAiley, an associate who prosecutors said sold drugs for Nieves. A former prostitute, Dawn Newman, testified at both trials that she saw Nieves shoot McAiley in the back three times as the men got out of a car on Old York Road in Philadelphia, John McMahon Jr., Nieves' lawyer, said.

The case is at least the third instance of an overturned verdict in a Pennsylvania capital case in the last 14 years. The retrial, which took two weeks, was ordered by the state Supreme Court. That court found in February that Nieves had inadequate representation during his first trial in 1994.

APPENDIX B.24

A case for center to aid defense lawyers

Freed from Pa. death row, a Philadelphia man testifies how poor legal aid at his trial nearly cost him his life.

By Thomas Fitzgerald
INQUIRER HARRISBURG BUREAU

HARRISBURG — William Nieves of Philadelphia told state legislators yesterday about spending six years on Pennsylvania's death row for a murder he didn't commit.

"I thought a lot about my daughter, how her mother would have to explain that I was executed," he said.

Arguing that his lawyer had failed to represent him adequately, Nieves eventually won the right to a new trial. His new lawyer, using evidence that prosecutors had withheld, won an acquittal last month.

Nieves' harrowing tale was Exhibit A in a bipartisan effort to establish a state-funded center to train lawyers to better defend clients accused of capital murder.

The center would be created under a bill pushed by Sen. Edward Helfrick, a conservative Republican from Columbia County who opposes the death penalty on moral grounds. The Capital Representation Resource Center would provide expert witnesses and assistance to lawyers handling capital trials and appeals, and would establish a panel of defense lawyers trained in the intricacies of such cases.

Supporters call the proposal a modest reform to help ensure that the death penalty is carried out fairly in Pennsylvania. A Columbia University team recently found that 65 percent of 4,578 death-penalty appeals it studied nationwide were marred by either poor defense representation or prosecutorial misconduct.

The bill is an outgrowth of the debate last February over a Helfrick bill to establish a moratorium on executions for two years while a commission studied how fairly the death penalty is applied in Pennsylvania. That measure failed, but crit-

ics of the death penalty vowed to press for piecemeal reforms in the legislature.

"Maybe I'm too emotional, but I've been struck deeply in my heart by what I've just heard," Helfrick said after Nieves told his story yesterday. "I'm more determined to do anything I can to get the public on our side."

A co-sponsor of the bill, Sen. Alan Kukovich (D., Westmoreland), said Nieves' case refuted the main argument that death-penalty supporters raised during the moratorium hearings.

"Those who oppose reform would rather blithely respond that ... we don't have a problem in Pennsylvania," Kukovich said. "They'd say, 'Show us an innocent person on death row.'" Kukovich said.

The Nieves case is at least the third instance of an overturned verdict in a Pennsylvania capital case in the last 14 years.

Nieves, 34, was on death row for the 1992 shooting death of Eric McAiley, described by prosecutors as an associate who sold drugs for Nieves.

At his first trial, in 1994, Nieves was represented by a divorce lawyer with no criminal-trial experience whose fee was limited to \$2,500. The trial lasted two days, and Nieves was sentenced to death.

After his family raised \$10,000 to pay a second lawyer, Jack McMahon of Philadelphia, Nieves won a new trial in February from the state Supreme Court, which ruled that he had had ineffective counsel. McMahon found contradictory witnesses who had been withheld from the defense in the first trial, and a Common Pleas Court jury acquitted Nieves in October.

"I stand here today in hopes and prayer that we would support allocating funds to a capital-case defense throughout the state," Nieves



BRAD C. BOWER / Associated Press

William Nieves, freed from death row, speaks in Harrisburg in favor of a bill to establish a center to aid lawyers defending a client accused of murder.

said. "Many sit on Pennsylvania death row innocent, without the money to prove their innocence."

Cathie Abookire, a spokeswoman for the Philadelphia District Attorney's Office, declined to comment on the case.

Tim Reeves, a spokesman for Gov. Ridge, said the administration believes that available legal representation is adequate for capital cases.

While Ridge has signed 208 death

warrants since he took office in 1995, only three prisoners were executed after appeals — and those inmates expressed the desire to die, Reeves said.

"It is an inarguable fact that in every instance where a convicted murderer wanted to thwart the death penalty, they were able to," he said.

Thomas Fitzgerald's e-mail address is tfitzgerald@phillynews.com

APPENDIX B.25

Death-row years proved fatal

Hep C kills activist William Nieves

By **DANA DIFILIPPO**
difilip@phillynews.com

After spending six years on death row for a murder he swore he didn't commit, William Nieves became an ardent crusader against capital punishment, traveling the globe to call for an end to the death penalty.

But though he dodged execution by lethal injection, he left prison five years ago this week with another death sentence that was meted out this month.

Nieves, 39, of Feltonville, died Oct. 8 from complications of hepatitis C, liver disease and other problems — first diagnosed, but never properly treated, while he was in prison, supporter says.

Nieves' death extinguishes a powerful and eloquent voice against the death penalty, and raises questions about the adequacy of medical care in state prisons, friends and observers say.

"He put a human face on the issue of the death penalty and innocent people on death row and the

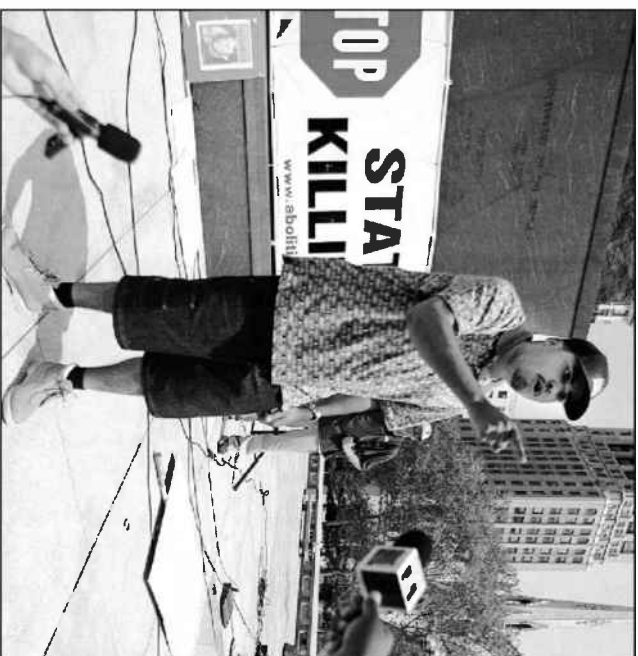
need for a moratorium on executions," said Jeff Garris, a former executive director of Pennsylvania Abolitionists United Against the Death Penalty, who hired Nieves as a community organizer after his 2000 prison release.

The state Department of Corrections defended prison policies of treating sick prisoners, and a spokesperson said it was unlikely that Nieves would have been denied treatment.

The group staged a vigil yesterday outside District Attorney Lynne Abraham's office to re-member Nieves and to protest the death penalty.

Nieves' trip to death row started with drugs. He was an addict who began selling drugs to support his addiction, he said in a 2001 interview.

In September 1993, he drew scrutiny from city homicide detectives who believed that he had fatally shot Eric McAlliey on Dec. 22, 1992, outside McAlliey's Hunting Park home. Detectives blamed a dispute over drugs and money.



William Nieves speaks at anti-death-penalty rally in August 2001. Inquirer file photo

Nieves could not remember his whereabouts on the night in question. He admitted that he had known McAlliey, 20, but denied any role in the murder. He was tried and convicted and sent to death row.

Once imprisoned, he began researching his case and won a new trial based on ineffective legal counsel.

"His attorney, who had never handled a capital case and was paid a total of \$2,500, presented no witnesses and gave virtually

no defense in the sentencing phase," said Jamie Graham, a board member of the abolitionists group.

A new lawyer uncovered witnesses describing two black men as the killers, which led to Nieves' exoneration at a 2000 retrial. Supporter's accuse prosecutors of deliberately hiding exculpatory evidence, a charge that Abraham's spokeswoman denies.

"The case was handled properly," D.A. spokeswoman Cathie Abokdré said. "He was convicted

in the first trial. He was granted a new trial because he claimed he never got a chance to testify. Yet in the second trial, he never testified."

At his retrial, prosecutor's called witnesses who fingered Nieves as the killer and introduced incriminating evidence. Still, Nieves was acquitted.

During his imprisonment, Nieves suffered from gallstones and other pains for which he sought medical treatment.

Instead, he said in a 2001 interview, "The guards just laughed at me and told me to act like a man. I needed gall-bladder surgery, but they didn't want to do surgery on a death-row inmate. So, I was in pain for years."

Graham said Nieves learned in 1998, after sneaking a peek at his prison files during a medical exam, that prison medical staff had diagnosed him with hepatitis C as early as 1993 but had never informed him or treated him for his ailment.

Sheila Moore, spokeswoman for the state Department of Corrections, said she found the scenario unlikely.

"They can sign up for sick call every day if they want," Moore said.

Prisons policy requires inmates to be medically screened within 14 days of entering the system, Moore said. Afterward, they receive regular checkups every one to three years, depending on their age.

Moore declined to comment on Nieves' case, citing medical confidentiality laws. ★

APPENDIX B.26

Mistakes in life and death cases

Scores of capital murder convictions in Pa. have been reversed or sent back because of errors by defenders, whose low pay can take a high cost.

By Nancy Phillips
INQUIRER STAFF WRITER

Willie Cooper, convicted of strangling his brother's girlfriend to death in a Germantown apartment, was awaiting a jury's decision on whether he should be sentenced to death, when his lawyer rose to speak on his behalf.

Citing the biblical passage "an eye for an eye," the lawyer told jurors that the ancient edict called for the death penalty only in the killing of a pregnant woman.

Cooper had killed a pregnant woman.

Inexplicably, his lawyer had forgotten that.

The jury voted to impose the death penalty.

Cooper's case is among more than 125 capital murder trials in Pennsylvania — 69 in Philadelphia alone — that state and federal appeals courts have reversed or sent back for new hearings because mistakes by defense lawyers deprived the accused of a fair trial.

That amounts to nearly one-third of the 391 capital convictions in Pennsylvania since the modern death penalty took effect in 1978.

An Inquirer review of death-penalty appeals spanning three decades found that de-



Willie Cooper. At sentencing, his lawyer mistakenly gave an argument for his execution.

fense lawyers in these high-stakes cases failed their clients in ways large and small.

Lawyers fighting for defendants' very lives often spend little time preparing their cases and put on only the barest defense. They neglect basic steps, such as interviewing defendants, seeking out witnesses, and investigating a defendant's background.

The problem is particularly acute in Philadelphia, where legal experts say the lawyers who handle such cases — typically at taxpayers' expense because defendants are indigent — are often overworked

See **DEATH** on A16

**"I wind up making
about \$10 an hour,
and I'm trying to
save your life."**

F. Michael Medway
Defense attorney

DEATH FROM A1
and underpaid.

Court-appointed lawyers get \$2,000 for trial preparation and \$400 a day in court to handle cases that a veteran defense attorney said required a minimum outlay of \$35,000 to \$40,000.

"The number of reversals on these cases is staggering," said Ronald L. Greenblatt, chairman of the Philadelphia chapter of the Pennsylvania Association of Criminal Defense Lawyers. "The attorneys who are doing this work, because of the low pay, are not doing it the right way. We really need it to stop."

The price of replaying such proceedings is costly. Death-penalty appeals consume hundreds of hours of work by dozens of lawyers, judges, police officers, and witnesses, and, even by modest estimates, cost taxpayers hundreds of thousands of dollars.

They take a toll on victims' families, who must revisit painful memories at multiple court hearings and often wait years for justice. And in rare instances, they force defendants to languish on death row, only to later be acquitted.

"There are systemic problems in indigent defense," said Robert Brett Dunham, an assistant federal defender, who handles death-penalty appeals and has tracked the outcomes of capital cases across the state.

Practically everyone in the legal system agrees, including Ronald D. Castille, the chief justice of the state Supreme Court. Last month, he ordered a review of one aspect of the problem: Philadelphia's pay rates for court-appointed lawyers in capital cases.

Critics say the fees, the lowest in the state, are a good reason lawyers and lead inevitably to reversals.

Castille described "intolerable" errors by defense lawyers and some "idiotic" appellate briefs, all but guaranteeing delays and new court hearings that can prolong cases for years and make justice seem elusive.

"That's why we want to be sure that these cases are done right," he said. "We want to be sure that these capital cases get decent representation, so we get it right the first time."

In many cases, mistakes by defense lawyers are so clear that prosecutors do not even contest the appeals and instead agree to new hearings or new trials.

The reversals have a high bar. In Pennsylvania, a defendant must prove not only that his lawyer erred but also that the mistake was severe enough to have prejudiced the case and potentially changed the outcome. In addition to the more than 125 cases reversed for ineffective assistance of counsel, The Inquirer review found dozens more in which courts ruled that lawyers clearly erred but that the mistake did not reach the threshold of prejudice.

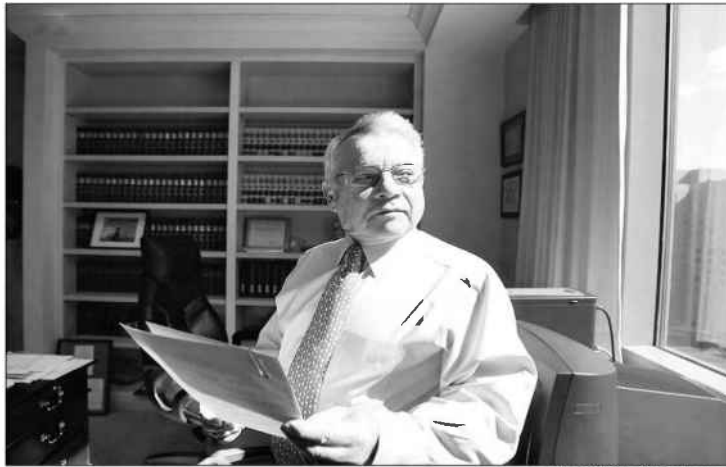
To be sure, many lawyers who handle such cases do a fine job, say judges, prosecutors, and legal experts. Those who don't fuel an appellate process that can stretch on for years or even decades, clogging an already overburdened court system and leaving defendants and victims alike in a painful kind of limbo.

Every death-penalty conviction in Pennsylvania is automatically appealed to the state Supreme Court, which reviews each case and has the power to overturn the guilty finding or set aside the sentence. That rarely happens. Most cases go through several layers of appeal, beginning with the trial court, then state and federal appeals courts, all of which can send the matter back for new proceedings.

The state cases — most of which involve resentencing — pour back into a court system already struggling to keep up with fresh murder cases. There were 258 homicides in Philadelphia in 2010 and 271 so far this year.

Philadelphia's homicide docket is so crowded that such cases can take two years or more to reach trial, a length of time that defense lawyers, prosecutors, and judges agree is far too long.

A case in point is the pro-



"It's simply a matter of constitutional law that if you want to sentence someone to death, that person has the right to have their life story told in the most sympathetic way to a jury. There's no denying that's what the law requires, and it requires it in every state in the United States."

Common Pleas Court Judge Benjamin Lerner, who will lead the state high court's study

secution of the men charged with murder in the highly publicized dual slaying at the Piazza at Schmidts in June 2009. The District Attorney's Office is seeking the death penalty at trial, which has yet to take place, more than two years after the crime.

Cases sent back following appeals also present difficulties for prosecutors, faced with putting on evidence of crimes that took place long ago. The passage of time fades memories. Witnesses die. They move away. They decide not to cooperate.

Edward McCann, the first assistant district attorney, said the lengthy appeals taxed prosecutors and prolonged the pain of victims' families.

"The length of time is unconscionable," he said. "To have to make phone calls to people 20 years after the fact and tell them: 'By the way, you know that death sentence you thought was final 20 years ago? We've got to talk to you about that. I think it's unconscionable to put people through that.'"

Concern about the quality of legal work in capital cases has led Philadelphia judges to seek stricter standards on qualifications for lawyers who take on this high-stakes work, going beyond the current state rule that sets a minimum of five years' experience as a criminal defense lawyer.

Yet the pool of lawyers willing to take on court appointments in capital cases is small — fewer than 30 in a city of 13,000 lawyers.

Perhaps as a consequence, lawyers found to have provided ineffective assistance of counsel are routinely appointed to new cases. At least two lawyers whose work on death-penalty cases was labeled ineffective, in court opinions, now serve as Common Pleas Court judges: Willis W. Berry Jr. and William Austin Meehan Jr.

A legal challenge from defense lawyers pending before the state Supreme Court says the "absurdly low" fees for defense lawyers create a "presumption of ineffectiveness."

"No one could possibly do a competent job with those resources," said Marc Bookman, a former assistant public defender, who challenged the fees on behalf of four defendants now facing the death penalty. "It's not an accident that so many cases are being reversed."

The lengthy appeals notwithstanding, executions generally are not carried out in Pennsylvania. In the last three decades, only three people have been executed, and all had dropped their appeals and volunteered to be put to death. The state's last execution, of torture-murderer Gary

Heidnik, was in 1999.

Of appellate cases returned to court for new hearings, most were sent back because of failings in the penalty phase. In arguing for the death penalty, prosecutors present evidence of so-called aggravating factors, such as a history of violent crime or committing a crime in a manner that puts bystanders at risk.

Defense lawyers aim to blunt those factors by pointing to mitigating evidence — the absence of a criminal record, a defendant's tender age, or a history of mental illness or childhood abuse that might argue against harsh punishment.

Yet this critical aspect of defense work is often given little attention. The Inquirer's review found:

Consider:

- As a jury weighed whether to sentence Brian Thomas to death for the rape, torture, and murder of a West Philadelphia woman, his lawyer did not call a single witness in a bid to spare his life.

Instead, Lawrence R. Watson 2d delivered a brief but wandering closing argument, after which the jury pronounced a sentence of death.

Getting confused by his own syntax, Watson actually said at one point: "On behalf of Brian Thomas, I would ask that you consider very strongly, in your decision, to consider the impos-

sition of the death penalty. Thank you, ladies and gentlemen — the non-imposition of the death penalty, and bring back a verdict or a sentence of life imprisonment."

A federal appeals court later said Watson's "inept" performance and "incoherent" closing argument had "gravely prejudiced" his client. He "wholly failed in his duty to Thomas," the court said.

Thomas was convicted in 1986.

Twenty-five years later, after appeals that stretched all the way to the highest court in the land, he is poised to return to court for a hearing on whether his lawyer's deficient performance helped land him on death row.

Prosecutors, citing the brutality of Thomas' crime, appealed all the way to the U.S. Supreme Court in an effort to uphold his death sentence. The high court declined to hear the case, leaving in place the appellate court's call for a new hearing.

Verbal miscues aside, prosecutors say Watson did an adequate job. His decision not to mention Thomas' long history of mental illness may have been calculated, they said.

Thomas' mental-health records included reports that he was a "sexual deviate with sadistic tendencies" who had previously committed "horri-

ble" violent acts, including attacks on animals and assaults on two young children.

Such evidence "would have painted Thomas in the worst possible light," wrote Assistant District Attorney Thomas W. Dolgenos in an appeal to the Supreme Court.

Thomas' appellate lawyers at the Federal Defenders Office countered that evidence of his "severe mental disturbance" might have convinced jurors



Brian Thomas. His lawyer in 1986, according to an appeals court, "wholly failed in his duty to Thomas."

that he was ill rather than "evil" and did not deserve to be put to death.

In an interview, Watson said he did not remember the case.

A Jesse Bond, convicted of killing a North Philadelphia deli manager during a 1991 robbery, was sentenced to death after his lawyer, who later said he was "exhausted" and surprised by the guilty verdict, yielded the crucial sentencing phase of the trial to his uncounsel, a lawyer who had never handled a capital case.

That lawyer, Dean Owens, later testified that he was ill-prepared and spent "no more than 15 minutes" marshaling an argument against the death penalty.

This phase of the trial was all the more critical in Bond's case because he had a prior murder conviction for a fatal shooting during a robbery at a fast-food restaurant. Prosecutors planned to present this evidence in support of their argument that Bond should be sentenced to death.

By his own admission, Owens did little to delve into Bond's history of childhood abuse and mental-health problems, including a head injury that doctors said had caused brain damage, all things that could have been cited as factors arguing against the death penalty.

A federal appellate court later ruled that Owens and Bond's lead lawyer, James Bruno, were "patently ineffective" for failing to raise those issues, which the court said "might well have persuaded the jury" not to impose the

death penalty.

While Bruno said that the earlier murder conviction presented a hurdle, he acknowledged that he and Owens could have done more in their bid to spare Bond's life.

"It's as a result of cases like Bond that we now have all-day training where you sit for six hours and go through how to do this," he said. "It's different now. Back then, you just put on man and deal" to ask the jury to spare the defendant's life.

Bond is to return to court for a new penalty hearing.

Sloppy legal work at the sentencing stage of a capital case almost certainly dooms the verdict, said Judge Benjamin Lerner, who presides over homicide cases in Common Pleas Court and who will lead the high court's study.

"It's simply a matter of constitutional law that if you want to sentence someone to death, that person has the right to have their life story told in the most sympathetic way to a jury," he said. "There's no denying that's what the law requires, and it requires it in every state in the United States."

In Willis Cooper's case, his lawyer, Norman Scott, led the jury to turn to the book of Exodus, Chapter 21, Verse 24. There, he said, the Bible states, "If there is an assault on a man and that woman is pregnant, and that woman loses the child, and there is damage beyond that to the woman, then an eye for an eye and a tooth for a tooth."

The woman Cooper killed was pregnant.

Scott later said he made the biblical argument "out of habit" because he routinely used it to discourage jurors from sentencing defendants to death. In his case, he said, he realized he had made "a terrible error."

A judge later ruled that by citing the biblical passage, Scott "was effectively telling the jury that the Bible commanded them to sentence [the] defendant to death" and that the Bible "sanctioned death as the just punishment."

Calling Scott's remarks "a breakdown in the adversary system," Common Pleas Court Judge James Cutler Greenspan ruled that he had been ineffective in his client's defense. She overturned Cooper's death sentence, and in April 2009 a jury resentenced him to life in prison.

In rare cases, The Inquirer's review found, a lawyer's mistakes can put a defendant behind bars who later wins acquittal.

Harold Wilson spent 17 years in prison, most of it on death row, for a triple ax murder that a jury later said he did not commit.

At Wilson's first trial, in 1969, a jury found him guilty of backing three people to death in a South Philadelphia crack house and sentenced him to death.

After years of appeals, a judge ruled that his deli manager during a 1991 robbery, was sentenced to death after his lawyer, who later said he was "exhausted" and surprised by the guilty verdict, yielded the crucial sentencing phase of the trial to his uncounsel, a lawyer who had never handled a capital case.

That lawyer, Dean Owens, later testified that he was ill-prepared and spent "no more than 15 minutes" marshaling an argument against the death penalty.

Wilson had a history of psychotic behavior, grew up in an abusive household, and suffered a head injury when, as a child, he was hit with a bat. Termin faulted Berry for not telling any of that to the jury as it weighed whether to sentence him to death. She also said Berry was remiss for not emphasizing that Wilson had "no significant history of prior convictions," which might have argued against a death sentence.

In awarding Wilson a new trial, Termin lamented Berry's "sloppiness" and his "paucity of preparation and presentation."

"The record is replete with evidence of counsel's ineffectiveness," she wrote. In particular, she criticized Berry for not arguing against a death sentence that one of the three victims was a drug dealer and arguing that, by committing the crime, Wilson had rid society of a scoundrel.

"Many people may look to See DEATH on A17

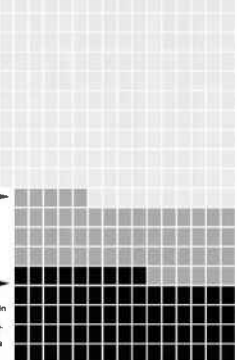
Defense Lawyer Mistakes In Death Penalty Convictions

Out of 391 capital convictions in Pennsylvania ...

... at least 125 statewide have been reversed or sent back for new court hearings because of ineffective assistance of counsel ...

... of those 125 cases, 69 were originally tried in Philadelphia courts.

*Includes all capital convictions in Pennsylvania since the modern death penalty took effect in 1976. Does not account for cases that were reversed before defendants reached state custody.



SOURCES: Pennsylvania Department of Corrections; Federal Defenders Office
JOHN TERNO / STAFF ANSA



At a rally on Independence Mall in 2007, Philadelphian Harold Wilson (left) denounces the death penalty. He was acquitted of a triple ax murder in a 2005 retrial. MATT ROUJKE / Associated Press

A high price for paying little

DEATH from A16 my client as a sort of hero — and I don't know if that's a morbid way of looking at things," said Berry, "but to clean up the city and do something that nobody else had done — a lot of people would look at this and say they deserved every little [bit] they got and no more."

Termin said Berry's remarks "could only have shocked and disgusted the jurors and hardened their hearts against the defendant." She said his comments "served no strategic purpose and were extremely prejudicial."

Wilson went on to two new trials. The second ended in a mistrial. At his third trial, in 2005, he was acquitted.

The verdict came after DNA testing that was not available at the time of the first trial. It showed that blood on a jacket prosecutors said belonged to the killer contained DNA from each of the three victims and a fourth person — not Wilson — suggesting the presence of another person.

"That's reasonable doubt," said Robert Brett Dunham, the assistant federal defender, who handled Wilson's appeal, clearing the way for a new trial at which Wilson was represented by Marc Bookman, then an assistant public defender. "If you're innocent, that's the result that you would get."

Now 53 and living in coastal Virginia, Wilson laments that it took so many years to be vindicated, but says he's not bitter. "I could not survive with anger," he said.

Wilson said he had misgivings about Berry, his first lawyer, from the earliest moments of the trial.

"Willis Berry was scary," he said. "It was all new to me, but I knew he wasn't doing what he needed to do."

When Wilson made suggestions on trial strategy, he said Berry told him, "If you're so damn smart, Harold, represent your damn self."

Berry declined to be interviewed. Through his lawyer, Samuel C. Stretton, he said he had handled the case "appropriately."

After he became a judge, Berry ran a real estate business out of his judicial chambers for more than a decade, using his taxpayer-paid secretary to collect rent on a string of ramshackle apartments he owned in North Philadelphia. In 2009, the state Judicial Conduct Board handed him a four-month suspension after ruling that he had violated judicial canons and brought "disrepute" to the bench. Berry was briefly transferred to the civil division but later returned to hearing criminal cases in Common Pleas Court.

Wilson has sued the city, the District Attorney's Office, and

the police officers who arrested him, alleging wrongful conviction.

"I was innocent from the start, and they failed to protect my rights," he said in an interview. "I'm a living witness. If you don't have the money, you're not going to get quality representation at trial."

"In death-penalty cases, by law, you should be represented by the best-quality lawyer — the quality that only comes from experience in litigating death-penalty cases," Wilson said. "You're not talking about purse-snatching or parking-meter vandalism; you're talking about the state putting you through a process to put you to death."

Despite the verdict, prosecutors continue to maintain that Wilson committed the crime — a position that galls him.

"The evidence of his guilt was overwhelming," said Edward McMann of the District Attorney's Office. "The fact that we had to try the case 16 years later, that's an unbelievably difficult proposition. Trying to resurrect a case of that age and try it and put it before a jury is so difficult. I don't think the result was just."

William Nieves, too, was sentenced to death for a crime a jury later said he did not commit. Nieves spent six years on death row after he was convicted of shooting a man to death in Hunting Park in 1992 in what prosecutors said was a dispute over drugs.

At trial, Nieves was represented by a divorce lawyer with no criminal-trial experience who was paid \$2,500 to handle his case. The lawyer, Thomas Ciccione, prevented Nieves from taking the stand in his own defense by telling him — wrongly — that this would allow prosecutors to introduce evidence of his prior drug convictions.

"It was just not true. That's like Law School 101," said Jack McMahon, who represented Nieves at retrial after a judge ruled that Ciccione had been ineffective.

McMahon learned from the court file that witnesses had given police a description of the killers that bore no resemblance to Nieves. They described the two shooters as tall, thin black men. Nieves, a light-skinned Hispanic, weighed 225 pounds.

Ciccione, who is now de-



Willis W. Berry Jr. A judge now, his work as a capital defense lawyer was ruled ineffective.

ceased, had not called the witnesses to testify.

McMahon put the witnesses on the stand at Nieves' second trial in 2000, and he was acquitted.

After his release from death row, Nieves spent years crusading against the death penalty. In 2005, he died at age 39 from complications of hepatitis C that he had contracted in prison.

McMahon, a prominent defense lawyer and former homicide prosecutor, said the Nieves case illustrated the need for the courts to appoint quality lawyers in death-penalty cases — and to pay them accordingly.

"The government gives people a constitutional right to an attorney, but by lowering the [lawyers'] fees to pauper's level, they have severely hindered that right," he said. "To me, that's inexcusable, particularly in a homicide case, where the government is either seeking to kill you or put you in jail for the rest of your natural life."

McMahon, who estimated the minimum cost to defend a death-penalty case at \$35,000 to \$40,000, said the courts' practice of paying low wages and, thus, attracting some less-than-capable lawyers, was shortsighted.

"To me, it's just unconscionable," he said. "For not paying on the front end, you're paying on the back end," with years of appeals.

Shortcomings in legal representation are not limited to the trial itself, The Inquirer review found.

In some cases, deficient legal work extends to appellate cases, where the very lawyers hired to correct the errors of

others themselves prove ineffective.

Appellate lawyers sometimes file legal challenges that make only the most meager arguments in their clients' defense. They cite little or no case law, mangle grammar, and miss key filing deadlines.

Consider the case of James Melvin Smith. In 1985, Smith was convicted of the revenge killing of a West Oak Lane woman he suspected of killing a friend. Appeals in his case dragged on for more than two decades before prosecutors agreed to a new sentencing hearing in 2009, saying Smith's trial lawyer had been ineffective.

That result came only after years of delays and mistakes by a series of court-appointed appellate lawyers.

Jeremy Gelb, the lawyer initially appointed to represent Smith on appeal, continued the proceedings 19 times and did not file any documents, so a Common Pleas Court judge dismissed Smith's initial challenge to the verdict.

Smith, acting without a lawyer, later filed an appeal on his own behalf, and the court appointed a new lawyer, Richard Hoy. Hoy, in turn, failed to file documents, defying a judge's order to do so, and did not appear for key court hearings, according to court records.

In an interview, Hoy, a Philadelphia lawyer, said he only vaguely remembered the case. One of the problems, he said, was finding time to travel the nearly four hours to see his client on death row at the state correctional institution in Waynesburg, Greene County, in Western Pennsylvania.

"Unless I want to go to the Creamery [ice cream shop] up in Penn State, I'm not going to be up there, so unless you can get them [capital defendants] down here, your hands are tied. And it's not easy to do that. The whole system is laid out with obstacles and roadblocks."

The court dismissed Hoy and appointed new counsel. After additional appeals, the state Supreme Court granted Smith a new sentencing hearing earlier this year. He awaits that hearing.

Justice Thomas G. Saylor decried the quality of the legal work on Smith's behalf.

"Several attorneys who have represented [Smith] on post-

conviction did very little or nothing to advance the case," Saylor wrote in a March 2011 opinion. He said the case was emblematic of the "unconscionable delay, disarray, and inconsistencies" in death-penalty appeals in general. "This case, and many others like it, demonstrates the need for immediate reform."

When lawyers working on capital cases make mistakes or have their cases overturned on appeal, The Inquirer's review found, they are rarely sanctioned.

In fact, two ascended to the Common Pleas Court bench.

William Austin Meehan Jr. was the defense lawyer for Sa-

harris Rollins, who was convicted of killing a North Philadelphia man in a drug-related shooting in 1987 and sentenced to death. Meehan later told a judge he did not begin to prepare for the penalty phase of the trial until the day before sentencing. He did little investigation of his client's background, did not prepare the few witnesses he called to testify on Rollins' behalf, and did not have Rollins tested by a psychologist to examine his mental health.

Last year, a federal appeals court said Meehan's performance had prejudiced Rollins, and it ordered a new sentencing hearing. Meehan did not return phone calls seeking comment on the case.

"The dirty little secret is these lawyers are perfectly respectable members of the bar," said Dolgenos of the District Attorney's Office. "It's not a black mark."

"They never get disciplined," agreed Deputy District Attorney Ronald Eisenberg, the office's chief of appeals.

In the rare cases where lawyers who do shoddy work are punished by the state disciplinary board, that is no bar to future court-appointed work. Nor is a criminal conviction.

In 2009, lawyer Bernard L. Siegel was publicly censured by the Disciplinary Board of the Supreme Court of Pennsylvania for repeatedly failing to comply with a judge's orders to file briefs on behalf of two clients

whose cases he handled on appeal. In both cases, Siegel ignored those orders and did not file the required documents.

The disciplinary board said he violated the rules of professional conduct for lawyers by failing to act with "reasonable diligence and promptness in representing a client" and by engaging in conduct that was "prejudicial to the administration of justice."

Yet Siegel continued to receive court-appointed work in Philadelphia, handling several capital cases until earlier this year, when he was diagnosed with inoperable cancer.

Thomas McGill was publicly censured by the state disciplinary board in 1995 after a federal conviction for tax evasion. That did not keep him from receiving court appointments to represent clients in death-penalty cases.

McGill was found guilty of failing to pay taxes for three years in the mid-1980s. In the same case, he was acquitted of charges that he conspired with a Philadelphia judge to fix an embezzlement case. McGill told the jury he paid \$1,000 to Common Pleas Court Judge Kenneth S. Harris, but said the payment was one in a series of about 10 "referral fees" he paid the judge for sending him clients.

One of McGill's recent clients, Lionel Campfield, said he had no idea his lawyer was a felon.

"They should have told me that," said Campfield, who was facing the death penalty for his role in a drug-related shooting that killed two people, including an 11-year-old boy, when McGill was appointed to represent him in 2009.

Campfield said McGill and his counsel, Gary Server, paid little attention to the case. With his life on the line, Campfield said, he was frustrated that his lawyers barely spoke to him and asked few questions about the 2005 shooting that led to his arrest.

In fact, it was not until about two weeks before trial that they realized he had been 16 at the time of the shooting and, thus, not eligible for the death penalty.

This elementary mistake cost Campfield and his family two years of anxiety while the specter of the death penalty loomed.

"I went to sleep every night thinking about it, whether I would live through this," Campfield said in an interview from prison, where he is serving a life sentence. "They were supposed to be fighting for my life, and they didn't even come to see me until like two weeks before the trial."

McGill could not be reached for comment.

Although Campfield's date of birth, as listed on his arrest report, put him at 16 on the day of the crime, Server said other documents contained conflicting information about Campfield's birth date.

Server said he and McGill worked hard on the case and filed a motion to bar the death penalty as soon as they had confirmed Campfield's age.

"It was really of no consequence that he shouldn't have

See **DEATH** on A18



Saharris Rollins' lawyer, called ineffective, now is a judge.



"To have to make phone calls to people 20 years after the fact and tell them: 'By the way, you know that death sentence you thought was final 20 years ago? We've got to talk to you about that.' I think it's unconscionable to put people through that."

Edward McCann, first assistant district attorney

APPENDIX B.27

NewsRoom

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July 9, 2002

Section: A

Former death-row inmate shares trials with legislators

Julia C. Martinez Denver Post Capitol Bureau

William Nieves would have been 30 days away from execution had he lost his death sentence appeal.

Nieves told Colorado lawmakers Monday that he won an appeal from the Pennsylvania Supreme Court but lost eight years of his life in prison, six years on death row, on a wrongful conviction due to police and prosecutorial misconduct and an ineffective lawyer.

Nieves, 36, came to Colorado this week to urge lawmakers to abolish the death penalty.

"If my conviction had been affirmed on appeal, the governor would have had 30 days to sign a warrant," Nieves said. "It was very close."

Nieves said he was found guilty based on his lack of an alibi and sentenced to be executed for the 1992 shooting death of 21-year-old Eric McAiley.

A divorce lawyer with no criminal trial experience represented him at his capital murder trial in Philadelphia, which took two days. His retrial six years later with a competent lawyer lasted three weeks.

Because Nieves said he had two DUIs in his past and a misdemeanor conviction for possession of marijuana, his lawyer barred him from testifying at trial. His past run-ins with the law are what landed him in a photo lineup from which a supposed eyewitness identified him in the first place, he said. He was wrongly identified even though police said there were two killers, both black, and he's not black.

At the retrial, evidence was presented that proved police and prosecutors had withheld crucial evidence, including the testimony of two eyewitnesses to the shooting death.

Nieves told lawmakers no death penalty system is foolproof and he is one of 101 people freed from death row throughout the United States since 1972, when the U.S. Supreme Court invalidated the death penalty. The court reinstated capital punishment in 1977.

Nieves also testified that he conducted his own legal research behind bars while his family raised \$10,000 for his appeal. Many other death row inmates might not have the education, the determination or the money to fight for their lives, he said.

Nieves said he is now speaking across the country against the death penalty and is on the board of a national group working to abolish capital punishment. Coloradans Against the Death Penalty sponsored his visit, said Maureen Kane of the Colorado

Criminal Defense Bar.

He also is working to reacquaint himself with his family and his 11-year-old daughter, who was 2 when he was arrested.

"How can I make up for the years I lost while in prison?" he asked lawmakers.

Replied Republican Rep. Shawn Mitchell of Broomfield, "Nothing can make up for it."

---- **Index References** ----

News Subject: (Crime (1CR87); Criminal Law (1CR79); Death Penalty (1DE04); Judicial Cases & Rulings (1JU36); Legal (1LE33); Murder & Manslaughter (1MU48); Social Issues (1SO05); Violent Crime (1VI27))

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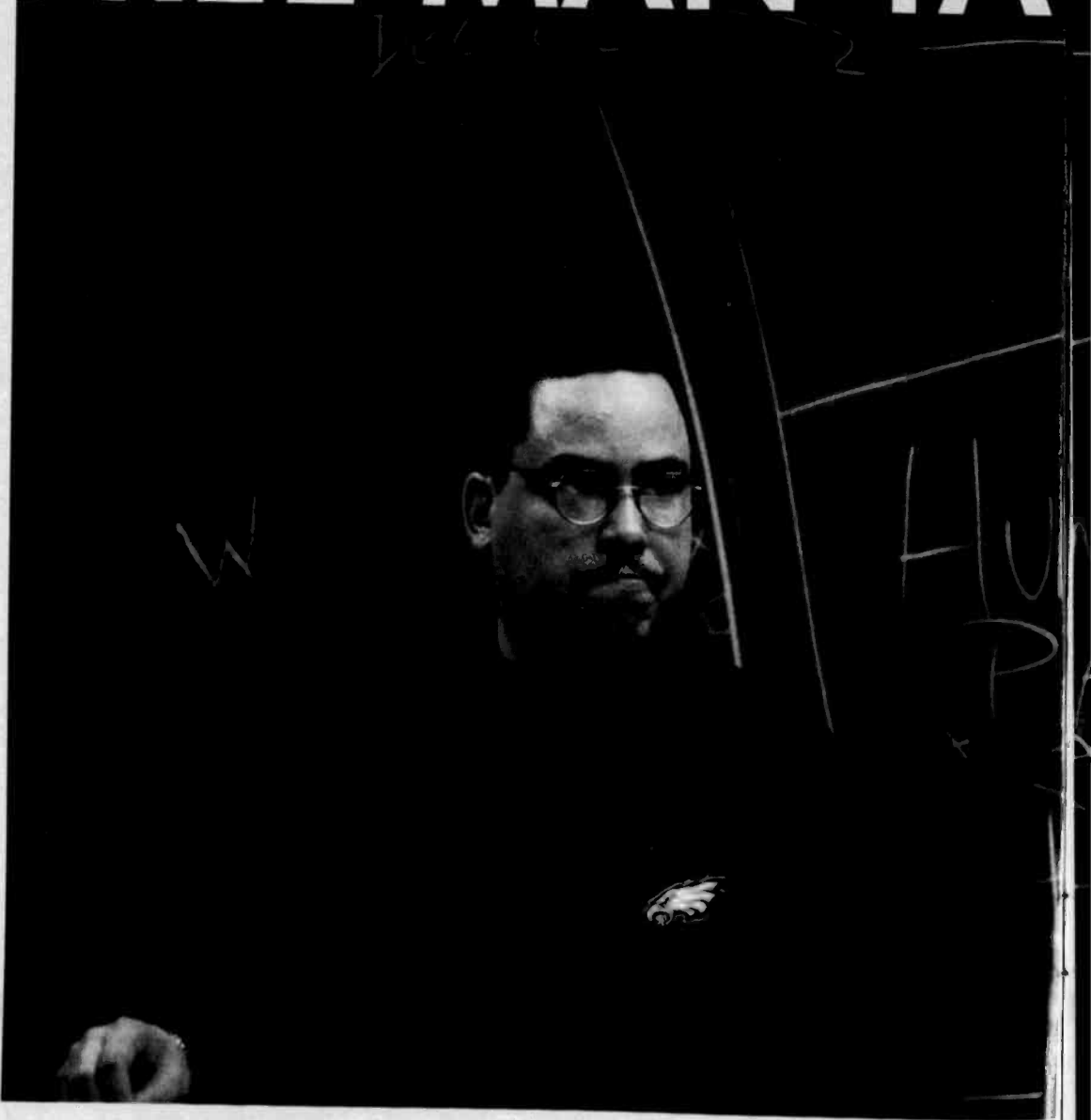
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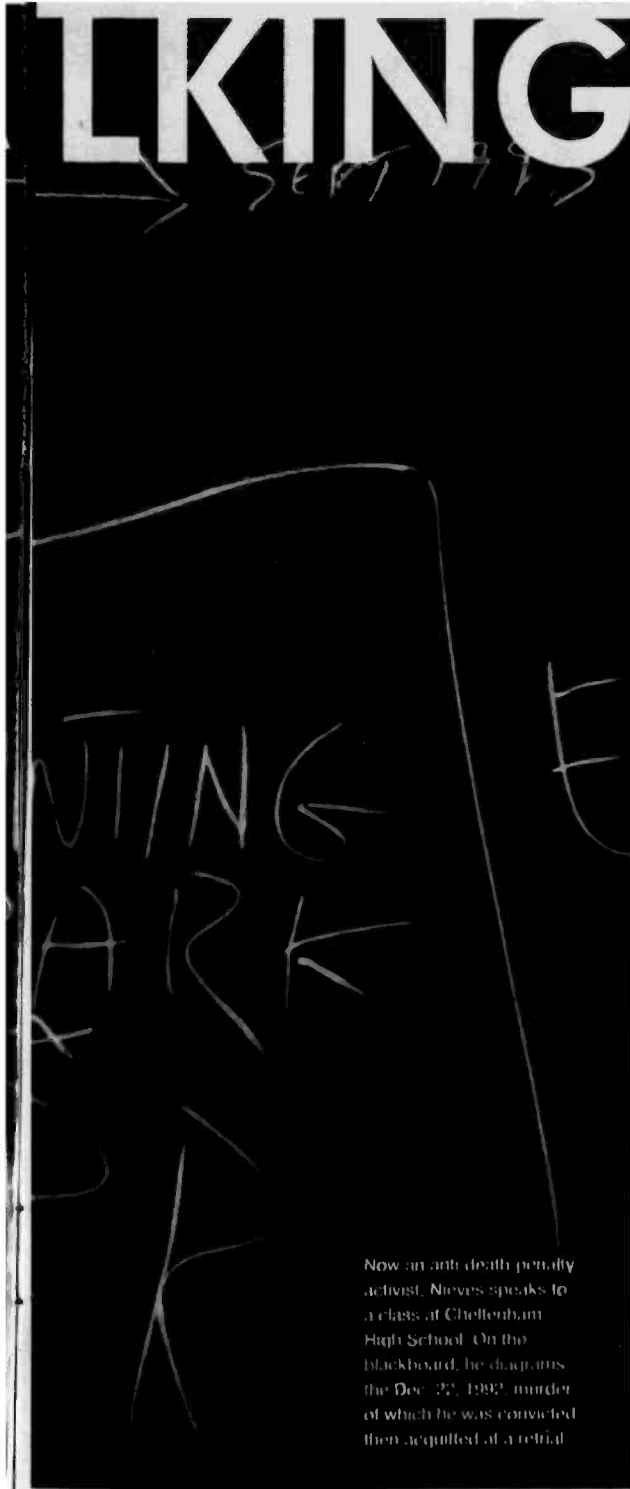
NewsRoom

APPENDIX B.28

FREE MANTA



WILLIAM NIEVES SPENT SIX YEARS ON DEATH ROW. IN A SENSE, HE'S STILL THERE



Now an anti-death penalty activist, Nieves speaks to a class at Cheltenham High School. On the blackboard, he diagrams the Dec. 27, 1992, murder of which he was convicted then acquitted at a retrial.

WILLIAM NIEVES SPENT SIX YEARS ON DEATH ROW. IN A SENSE, HE'S STILL THERE

W

William Nieves paces the sidewalk on 15th Street, a cell

phone in one hand and a cooling cup of coffee in the other, trying to keep everything on schedule.

In the street beside him, a long white tour bus is blocking traffic outside the Friends Center, its luggage-bay doors open. Young women and gray-haired men hustle aboard, their breath visible on this freezing February morning.

Nieves, 35, is the unlikely organizer of this 10-wheeled western expedition, carrying both a seating chart and a certain lingering sadness, the aura of someone who has been places the rest of us will never go.

"I'm kind of nervous," he confides.

He should be. This bus that glitters in the winter sunshine is headed to a very dark place. For Nieves, it's a journey that will take him 332 miles across Pennsylvania and back to another life.

He and the others are headed to a prison — not just any prison, but SCI Greene, a maximum-security institution in faraway Waynesburg. Once there they won't be visiting in the infirmary or praying in the chapel. They'll be seeing men who occupy the most intense and controlled environs in the entire Pennsylvania penal system: death row.

Nieves knows its domination.

He spent six years on death row, condemned for a 1992 Philadelphia murder that the courts ultimately determined he did not commit.

In October, when a Common Pleas Court jury acquitted him at a retrial, Nieves became the 89th person in America to be freed from death row after evidence of their innocence was discovered. Six more have been

continued on next page

**BY
JEFF
GAMMAGE**

Jeff Gammage is a magazine staff writer.

DEATH ROW

continued from previous page

released since then. That diaspora has provoked the most vigorous national debate over the death penalty in the last 25 years, with Illinois imposing a moratorium on executions and other states, including Pennsylvania, debating whether to follow.

As a free man, Nieves could engross himself in celebration or mourning. He's done neither. Instead, he has essentially resented himself to death row, devoting himself to helping the men and women there and fighting to abolish capital punishment. A month after he walked out, Nieves took a job as community organizer of the Philadelphia-based Pennsylvania Abolitionists United Against the Death Penalty. His duties include setting up bus trips such as this one for the friends and family members of death-row prisoners.

"William is extraordinary," says Robert Dunham, former director of the Center for Education, Advocacy & Defense Assistance, a legal-services center for death-row inmates. "He has every right to be bitter and angry, and instead he looks at this as having been given a second chance. He has handled this with tremendous grace and with great dignity."

The jolt of freedom has at times been as disorienting as exhilarating.

For six years Nieves was locked in a cell 23 hours a day, eating meals pushed through a slot in the door. He was just another murderer, waiting to get an executioner's needle stuck in his arm. No one outside his family cared if he lived or died.

Nieves was no model citizen even before the murder conviction, arrested more than a dozen times, pleading guilty to gun and narcotics offenses. He'd sold drugs and used them. In fact, he says, the night of the killing he was so strung out he couldn't remember where he was.

Now, almost overnight, people want to meet him and shake his hand.

Within the cosmos of death-penalty activists, Nieves is a rising star, the living proof of the system's malevolence, his opinion sought on television shows and his presence demanded at rallies here and around the world. In December, he spoke at a conference in Rome, then hurried to New York to join movie stars Susan Sarandon and Tim Robbins at a United Nations protest. He has testified before the Pennsylvania

legislature and the New York City Council, lectured to Temple University law students. In March he was back in Europe, this time Denmark.

It's dizzying for a man not yet used to being able to see the stars at night. One day he's waiting for the governor to sign his death warrant. The next, he's talking protest strategy with Sister Helen Prejean, the author of the book *Dead Man Walking*.

People see only the outside, the neatly dressed man with the thin mustache who's intelligent, organized and friendly. They don't see the person who's uncomfortable in crowds, who feels safest inside his home office, its 10-by-10-foot confines roughly the same small space he occupied on death row.

Nieves is helping to lead the nascent movement for a moratorium in Pennsylvania. The Pennsylvania Prison Society wants to make him an "Official Visitor," giving Nieves the authority to visit any prison at any time, the same power conferred on the governor. He has thrust himself into Philadelphia politics, working to oust District Attorney Lynne M. Abraham. Nieves accuses her prosecutors of deliberately concealing crucial evidence at his trial, insisting they preferred to send an innocent man to death row rather than risk losing the case.

"False, baseless," retorts Cathie Abookire, spokeswoman for the district attorney. All exculpatory material was turned over, she says. And as far as Nieves' acquittal is concerned, "I don't think we have any doubt we had the right person."

At Greene prison, Nieves is scheduled to visit Anthony Reid, formerly an enforcer for the Junior Black Mafia. Reid carries two death sentences, one for killing a 16-year-old who threw a snowball at his car.

"I don't get into innocence or guilt," Nieves says. "But he's entitled to a fair trial, and he didn't get it."

At 10 a.m., the bus is nearly full. Nieves pulls himself into the doorway, glancing back at the street. "We're ready to go," he says to no one in particular. The bus lurches forward into southbound traffic. A few people stare out the windows. Nobody waves.

Nieves leans back in the chair as a makeup artist dabs his face with a soft sponge.

"Look down," she says.

She darkens his eyebrows, then spritzes him with hair spray.



Before the bus leaves, Nieves laughs with Brenda Kemp, who was going to visit a relative in the maximum-security prison at Waynesburg, Pa.

Taping starts in minutes, but Nieves isn't nervous. He's been on TV a lot. Nieves is in demand, by producers seeking to balance a panel debate and by death-penalty opponents for whom his presence is both a personal validation and a lure for media attention.

"It's one thing for me to say we don't need the death penalty," says Jeff Garis, director of the Pennsylvania Abolitionists and Nieves' boss. "But it's something very different when somebody like William Nieves can get up and talk about what it was like."

Nieves takes a seat on the set of *Smart Talk*, produced by WTTG television in Harrisburg, ready to argue for a moratorium. To his left sits former Attorney General Ernie Preate, a support-

er-turned-foe of capital punishment, to his right, news reporter Robert Lang and Cumberland County District Attorney Skip Ebert.

"If there's even a remote chance that an innocent person could be put to death," host Brad Christman begins, "why not take a close look, why not have a moratorium?"

"We are taking a close look," Ebert answers. "Every possible appeal is given."

Preate spars back — state courts have speeded up their reviews, so death-penalty cases actually get less scrutiny than ever. He and Ebert joust, and the mood grows as hot as the TV lights.

"How would the Pennsylvania Supreme Court have saved my life," Nieves demands, "if they didn't know



evidence, crucial evidence, was withheld in my first trial?"

Ebert concedes nothing. "Acquitted means the commonwealth failed to meet its burden of proof. Only God and Mr. Nieves know the real answer."

Lang jumps in: "You're not saying Mr. Nieves is getting away with murder here, are you?"

Ebert grimaces. He wants to answer but doesn't.

Nieves shoves himself forward in his seat, pressing his face close to Ebert. It's "exonerated when a crucial eyewitness is withheld from the defense," he insists.

The debate swirls onward, touching on DNA, O.J. and Timothy McVeigh, but Nieves says little else.

TalkTV is a poor forum for explaining the intricacies of a complicated capital murder case. He can't reduce six years of legal rulings to a 20-second sound bite. The discussion winds to a close, marked by one subtle but important distinction. At the end, host Brad Christman is no longer describing Nieves as having been "exonerated." He refers to him as having been only "acquitted at a second trial."

Nieves trudges outside after the taping, his frustration evident. He's never free of it, always accused, by Ebert this time, by somebody else the next, as if he somehow tricked the legal system into letting him go.

"It's not technicality — it's evidence!" Nieves says. "The jury acquitted me. How do you explain?"

Three days before Christmas in 1992, 22-year-old Eric McAliley stepped out of a car in front of his Hunting Park home. He never made it inside.

Three bullets hit him, in the back, side and arm, and he died at a hospital 90 minutes later.

Nieves was arrested nine months later by authorities who believed the shooting turned on two common denominators of big-city homicide: drugs and money. McAliley worked for Nieves as a dealer, the prosecution charged, and when he came up \$500 short, the boss decided he could do with one less employee.

"Nieves committed this murder to send a message of how tough he is," Assistant District Attorney Roger King told the jury at the 1994 trial. "This was his way of gaining respect."

The main witness was a prostitute who told the jury she'd seen Nieves get out of the car behind McAliley and shoot him in the back. The trial lasted two days, and the jury took only one more to impose the death penalty.

Nieves' family believed him innocent. They scraped together \$10,000 to hire Philadelphia attorney Jack McMahon to appeal. McMahon argued that Nieves had wanted to testify, to tell his side of the story, but that his attorney had advised against it.

In February 2000, 5½ years after Nieves' conviction, the state Supreme Court ruled in his favor, saying the right to testify was so important that the only remedy was a new trial.

The events of that October retrial, and of the legal discovery process that led up to it, are a subject of harsh dispute: Nieves insists that prosecutors should be disciplined or even face criminal charges for withholding evidence. The District Attorney's Office says that no one withheld anything — and that were it not for an inexplicable jury verdict, Nieves would still be in jail.

In an interview, McMahon says that in preparing the appeal he discovered investigative reports that prosecutors never provided to Nieves' first attorney. The prostitute, Dawn Newman, had made more than one statement to police.

The night of the shooting, McMahon says, she approached a police officer at the scene and told him the killers were two black men. Then she wandered away. Hours later, she returned, this time speaking to a female officer and telling her, too, that the shooters were two black men. When she later

spoke to police detectives, McMahon says, her story had changed. She described not two shooters but one, not black but Hispanic.

McMahon says he also obtained a copy of a police log that mentioned another witness. At trial, that witness, Harold Arnold, testified that he had gotten a good look at the shooter — and it wasn't Nieves, who is Hispanic.

Prosecutor Karen Brancheau, who handled the appeal for the district attorney, says any allegation that evidence was withheld is just plain wrong. "We turned over what we had almost the moment we had it," she says.

Specifically, she says, Dawn Newman made two statements to police, and both were given to the defense before the first trial. One of those statements does indeed quote Newman as describing the killers as two black males, though Newman would later deny having said that.

"The critical thing is the piece of information, the defense had it — some officer had written down that Dawn reported the killers to be two black males," she says.

Brancheau says the statement of Harold Arnold — who said Nieves wasn't the killer — was never withheld because the prosecution didn't have it. Authorities had tried to find and interview Arnold, she says, but he wasn't located until the start of the second trial. Further, she says, there's evidence that Arnold never actually saw the shooting.

McMahon says Arnold had no reason to lie. "He didn't know Nieves from a can of paint." And he's adamant that evidence wasn't turned over. "Was it intentional or was it a mistake?" he asks. "I can only say it should have been turned over. Particularly in a death penalty case. This wasn't auto theft."

Whatever the particulars, the outcome is indisputable. When the jury said "not guilty," Nieves broke down in sobs.

Pennsylvania was an early and enthusiastic supporter of the death penalty, carrying out public hangings almost since the first colonists arrived in the late 1600s. Today it maintains the nation's fourth-largest death row, confining 241 men and women, behind only California, Texas and Florida.

Between 1915 and 1962 the state executed 348 men and two women, an average of seven a year. Only three have been put to death in the 39 years since

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DEATH ROW

continued from previous page

then. Three, including Nieves, have been freed by the courts.

"My first three years on death row I was angry," Nieves says. "But I realized I could do more without anger. I'll be damned if I'm going to live my life with anger."

Nieves was held at SCI Pittsburgh, before the bulk of death row was moved to Greene prison.

Every day the cell lights flashed to full power at 5:30 a.m. One second it was dark, the next it was daylight. Among the hundreds of freedoms that Nieves lost, that one stood out. He couldn't turn his lights on and off.

Once the lights came up, breakfast trays would begin arriving. The prisoners had 20 minutes to eat. Monday, Wednesday and Friday

were shower days. That was followed by outdoor recreation, an hour in a chain-link cage "like you would see in the SPCA," Nieves says. Lunch trays arrived at 9:30 a.m. If you were lucky, you had a visitor or a trip to the law library to break up the afternoon. Dinner started at 4:30 p.m.

Nieves filled the time by immersing himself in law books, studying his case and those of other prisoners. Before he left, he was the jailhouse lawyer for 15 men. He misses it. The other guys tried to help him, too. When he was sick with gallstones, they looked in on him and made sure he ate.

"The love was enormous," he says.

Nieves speaks of death row's prisoners the way someone else might speak of old Army buddies, as if the years were spent in an overseas barracks, not a concrete cellblock.

"It would be unreasonable for me to say everyone on

death row is innocent," Nieves says. But some are, he says. The larger question is fairness, the right to be judged at an impartial trial where all evidence is considered.

Nieves corresponds with the inmates because it's his job and because they're his friends, telling them to keep battling and letting them know he's fighting on their behalf.

"I made a promise," he says. "I promised I would

"not guilty" have not erased doubts, leading death-penalty supporters to claim that killers were let go on technicalities.

None have returned home to marching bands or golden keys to the city. Their years on death row did not cure them of the afflictions that helped put them there: Illiteracy. Mental Illness. Poverty. Some went back to prison. One killed his wife and then himself. Many live angry and bitter.



Nieves looks at his picture in a Danish newspaper.

come out, and I would be their voice. I wouldn't forget about them, the way society has forgotten about them."

If William Nieves is the exception, Kirk Bloodworth is the norm.

Freed from Maryland's death row in 1993, Bloodworth ended up living in his truck, unable to get work. People knew his face from the evening news, and they focused on his conviction for the rape and murder of a 9-year-old girl, not the DNA evidence that proved his innocence. Eventually, he suffered a nervous breakdown.

Since 1973, roughly 95 people have been released from death rows across the United States, half of them freed in the last six years. The debate over their innocence is as constant as the pace of their departure. Some have been exonerated by science, one after serving 17 years. For others, verdicts of

Nieves' re-entry to society has been far less traumatic, for several reasons.

He wasn't accused of a particularly gruesome murder, so his picture wasn't beamed atop the television news or posted in the morning newspapers. If people recognize him now, it's as the guy who was wrongly convicted. Just as important, Nieves had a place to live when he got out. He didn't move into a halfway house, but to his mom's pin-neat row-house in Feltonville.

"One thing William has going for him is faith. And a loving family," Dunham, of the Center for Education and Advocacy, says. "And that's not something everyone coming off death row has. I don't want to say he's lucky. But that support is indispensable."

Nieves immediately found a job, one where he doesn't have to explain the six-year gap on his resume. His abolitionist

continued on Page 24

DEATH ROW

continued from Page 18

coworkers take his innocence for granted.

Yet death row is always with him. Nieves' daughter was 2 when he went away — she doesn't know him now. He lives in fear that he'll be wrongly arrested and put back in prison again. He calls his mother constantly when he goes out, telling her where he is, who he's with, when he'll be home.

On New Year's Eve, two months out of prison, he traveled to Delaware for a big family celebration. Everyone was excited to see him. But at 10:30

Nieves' heart began racing and he struggled to breathe, seized by a panic attack. He insisted that his brother drive him back to Feltonville, where he locked himself in his home office.

"I wasn't used to it anymore, to be around a lot of people," Nieves says. "They were mad at me for a while about that. Some understood. Some didn't. Some are still mad."

The pews are empty at the Celestial Zion Baptist Church in the city's Tioga section.

No services are scheduled this February morning, a Thursday. But 16 men and

women take seats at a long table near the altar.

"This is a powerhouse group," whispers death-penalty opponent Russ Hill, who has accompanied Nieves to the church.

Seated up front are leaders of the Black Clergy of Philadelphia and Vicinity, representing 400 pastors who oversee many of the city's largest and most influential churches. The Black Clergy is a fractious, politically potent organization that could help decide the race for district attorney and, through that, the way Pennsylvania administers the death penalty.

Some preachers say it's

time for a change. Days after they gather, City Commissioner Alexander Talmadge Jr. will announce his candidacy to oppose Abraham in the May 15 Democratic primary.

Abraham appears unbeatable, supported by Mayor Street and the Democratic leadership. But about 60 percent of primary voters are black or Hispanic, potential support for a minority candidate who is credible and well-financed. The Black Clergy can help Talmadge attain both assets.

Nieves is no seasoned political campaigner. But that hasn't stopped him from opposing Abraham.

Philadelphia County has about 12 percent of the state's population, but has sentenced 56 percent of the inmates on death row. By comparison, Allegheny County, which includes Pittsburgh, has about 10 percent of the population and 4 percent of death-row prisoners. More than 80 percent of the Philadelphians sentenced to death are black.

To Nieves, those numbers prove Abraham's bias — an allegation the district attorney vociferously denies.

Nieves steps to the side of the table, forcing several clergymen to crane their necks to see him. He starts to speak but can't be heard. "What?" come the calls. "Speak up!"

Nieves finds a microphone and faces the assembly. The sound system emits a piercing whine, forcing him to stop and begin a third time. "People of color are targeted the most for the death penalty in Philadelphia," he says.

Nieves is neither polished nor coached. He is no motivational speaker manipulating the audience, jerking tears with one sentence and laughs with the next. He is simply a man attempting to relate a life-altering experience. But what should be compelling drama bogs down in details of witnesses and attorneys and costs. He tells his story matter-of-factly, as if the six years on death row were served by someone else.

After five minutes, one preacher cuts him off: What are you asking us to do?

"What I'm asking you to

do is take into consideration . . ." Nieves pauses. "Last year the Philadelphia City Council passed a resolution asking for a moratorium on the death penalty." He stops, his frustration finally giving force to his words.

"What you need to know is Lynne Abraham not only targets people of color, but she allows the prosecutors to do whatever they want to do to get a conviction," Nieves says. "It needs to be corrected. And the only way to do that is to get her out of office."

There is silence. Then somebody asks him to put it in writing. With good wishes and a quick prayer, Nieves is out the door, where an empty beer bottle rolls across the parking lot in the wind.

In a way it's almost funny. All those years spent trying to get off death row. Now he can't get on.

When Nieves arrives at SCI Greene, having journeyed across Pennsylvania, the prison authorities won't let him past the waiting room. They say former inmates may not visit without special approval.

In essence, the prison system holds him responsible for a crime the courts say he did not commit.

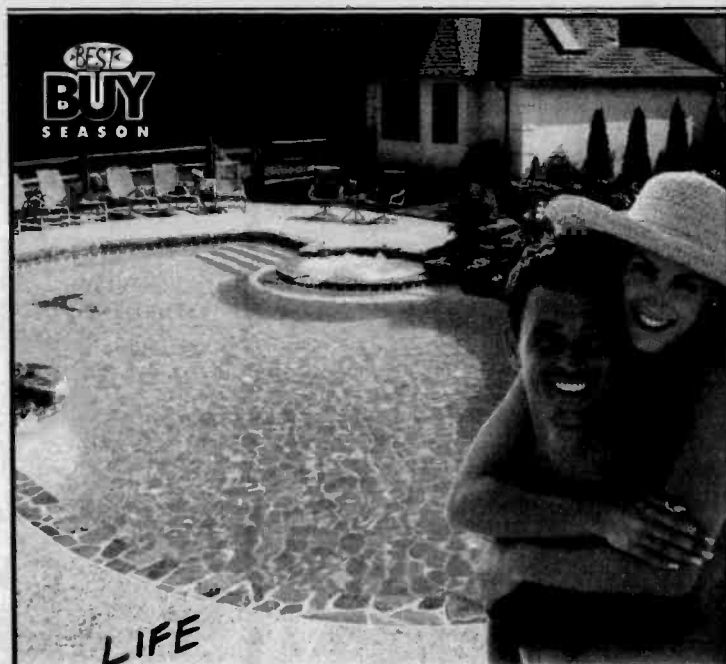
"It's game-playing," Nieves says later.

He's not surprised. The government that spent millions of dollars trying to kill him has offered not a dime in reparations, not an hour of counseling to ease his adjustment. No one has so much as apologized.

Nieves has hired an attorney to sue for damages, though no money can restore the lost years. He's trying to move on. He wants to write a book. He wants to become a paralegal and help people who are wrongly imprisoned.

"I was very scared when I came out," Nieves says. "It's going to take a long time to get over it. And there's the potential you won't get over it. But I feel it is important I do these things. I believe in what I'm doing." ●

Jeff Gammage's e-mail address is ggammage@phillynews.com



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APPENDIX B.29

Ex-inmate on death row decries capital sentences

■ He urges students at Freedom High School to support a moratorium.

By **KATHY LAUER-WILLIAMS**
Of The Morning Call

The death penalty is racist and discriminates against the poor, a Philadelphia man who spent nearly five years on death row before being acquitted in October told students at Freedom High School in Bethlehem Township on Thursday.

Speaking to student members of Amnesty International, William Nieves asserted that there are other innocent people on death row who were convicted because of prosecutorial or police misconduct. Nieves charged prosecutors seek the death penalty to appear tough on crime for political reasons.

"They violate the rights of innocent people to advance their careers," he said.

Nieves urged the students to support a two-year moratorium on executions in Pennsylvania. He and members of Pennsylvania Abolitionists United Against the Death Penalty will attend a rally in support of the moratorium on Tuesday in Harrisburg.

Nieves, 35, related how he came to be convicted of the 1992 shooting death of Eric McAiley in Philadelphia.

He said a key witness told four policemen at the time of the murder that she had seen two black males shoot McAiley. But during police questioning nine months later she changed her story and plucked Nieves' photo out of a lineup.

"Identification evidence is the most unreliable evidence there is because of human error," he said.

When police questioned Nieves, he said they told him "you either cooperate or you go to death row.



DOUGLAS BENEDICT / The Morning Call

Former death row inmate William Nieves speaks to students at Freedom High School in Bethlehem Township on Thursday.

"I was already convicted and prejudged," he said. "I was speechless."

Nieves said he was unable to afford an attorney and the court-appointed defender advised him not to testify because of prior convictions on drug and gun possessions. He said no witnesses were presented in his defense at his trial, including three of the police who talked to the witness.

Nieves, who maintained his innocence, refused to plea bargain and in 1994 he was sentenced to die by lethal injection after being found guilty.

In February 2000, he was awarded a new trial. In October, Nieves was acquitted and released. His was the third case of an overturned verdict in a Pennsylvania capital case because of inadequate representation.

Nieves talked about his time on death row at the Western Penitentiary in Pittsburgh where he said he was kept in a cell 23 hours a

day, not allowed to touch his 2-year-old daughter and suffered from gall stones for two years before having his gallbladder removed because of a lack of medical care.

"Because I was on death row, I was worth nothing to the state," he said. "They wouldn't spend money for surgery on someone condemned to die. It was a very horrible place."

He said he was told by the prosecutor after his trial, "the system works."

"Tell that to my now 10-year-old daughter, my father who had three heart attacks and my mother had a nervous breakdown," he said.

According to the group, 243 people are on death row in Pennsylvania, 68 percent of whom are minorities and 95 percent of whom couldn't afford legal counsel.

■ **Kathy Lauer-Williams**
610-861-3627
kathy.lauer@mcall.com