THE EXECUTION OF THE INNOCENT: THE TRAGEDY OF THE HAUPTMANN-LINDBERGH AND BIGELOW CASES*

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INTRODUCTION

Nothing shocks the conscience more than the thought of an innocent person being executed. Americans are appalled when they learn of people unjustly tried and hurriedly executed in other countries.[1] People have great difficulty fathoming a government coldly taking the life of a blameless person. Such a spectacle is petrifying even to those strongly favoring capital punishment. In short, it is viewed as un-American and an affront to a civilized society to punish a person who is innocent, particularly with the ultimate sanction of execution.

There is a general misconception in the United States today that, with the rights afforded to the accused, innocent people are not executed. It is thought that even if mistakes occur at the trial level, the flaws will be discovered and

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* This Article is dedicated to Paul D. Anderson, J.D., the Author's investigator and best friend, who was killed April 1, 1991, in an airplane crash in Belize, Central America.

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This Article is based upon his experiences as counsel in two capital murder cases in which he uncovered proof that the government's evidence was false, and that the seemingly guilty defendants were in fact innocent. The author currently represents Anna Hauptmann, the 93 year-old widow of Richard Hauptmann, the man executed in 1936 for the murder of Charles A. Lindbergh, Jr. *See Ex parte* Hauptmann, 297 U.S. 693 (1936); State v. Hauptmann, 115 N.J.L. 412, 180 A. 809, *cert. denied*, 296 U.S. 649 (1935). Through a wide ranging investigation including the discovery of suppressed governmental files, the author has established that the authorities knowingly executed an innocent man. Another client, Jerry D. Bigelow, made 10 confessions, yet the jury returned a verdict of acquittal after the author proved that the murder was committed by another person. People v. Bigelow, No. CR 12701 (Monterey Super. Ct. May 9, 1988), *review denied sub nom.* Bigelow v. Superior Court of Monterey County, 208 Cal. App. 3d 1127, 256 Cal. Rptr. 528 (Ct. App. 1989); People v. Bigelow, 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 328 (1984).

Many of the sources cited in this Article are documents obtained by the author in his investigation and preparation of these cases.

1. For an overview of the use of capital punishment throughout the world, see, e.g., AMNESTY INT'L, WHEN THE STATE KILLS . . . THE DEATH PENALTY: A HUMAN RIGHTS ISSUE (1989).

cured through appellate and other post-conviction remedies before an execution can occur. This myth causes the public to believe that injustices involving life and death simply do not happen. It is always "they," those in other parts of the world, not "we," who do such things.

In reality, mistakes can and do often occur in our own capital punishment process.[2] The inevitable result is that innocent people die at the hands of the state, regardless of available remedies.[3] The legal system is composed of

2. For example, a study published in 1987 chronicled 350 cases of innocent people who were convicted of capital crimes between 1900 and 1985. Twenty-three were executed. Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

3. *See* P. AVRICH, THE HAYMARKET TRAGEDY (1984) (providing a definitive history of the 1886 Haymarket Riot in Chicago, which led to eight men being convicted of murder, four of whom were hanged, a fifth took his own life; the three survivors later were pardoned by the governor who believed that they were innocent); E. BLOCK, WHEN MEN PLAY GOD: THE FALLACY OF CAPITAL PUNISHMENT 55-75 (1983) (a historical overview of cases of innocent persons condemned to death in the United States who were saved "by a miracle of fate, with a last minute commutation, a court order or some other unexpected circumstance"); R. CORTNER, A SCOTTSBORO CASE IN MISSISSIPPI: THE SUPREME COURT AND *Brown v. Mississippi* (1986) (case study of three black tenant farmers who were convicted and sentenced to death for the murder of a white planter by an all-white jury in Mississippi); L. KENNEDY, TEN RILLINGTON PLACE (1961) (concerning John Reginald Christie, who committed a murder in England in 1949 for which an innocent man, Timothy John Evans, was erroneously executed and posthumously pardoned); F. STRAUSS, WHERE DID THE JUSTICE GO? THE STORY OF THE GILES-JOHNSON CASE (1970) (describing a miscarriage of justice in Maryland in 1961 which resulted in the sentencing to death of three innocent men: James Giles, Joseph Giles, and Joe Johnson); V. TEMPLEWOOD, THE SHADOW OF THE GALLOWS (1951) (examining the history of capital punishment in England, Scotland, and India); B. WOFFINDEN, MISCARRIAGES OF JUSTICE (1987) (an in-depth examination of several post-World War II erroneous convictions in England and Ireland); I. ZIMMERMAN, PUNISHMENT WITHOUT A CRIME (1964) (autobiography of a New York man who came within two hours of being executed, then spent 24 years in prison for a crime he did not commit; shortly before his death in 1983, Zimmerman was awarded a one million dollar indemnity for the erroneous conviction); Bedau, *Miscarriage of Justice and the Death Penalty*, in THE DEATH PENALTY IN AMERICA (3d ed. 1982) (summarizing study which found 74 capital cases in which miscarriages of justice occurred); Bedau, *Witness to a Persecution: The Death Penalty and the Dawson Five*, 8 BLACK L.J. 7 (1983) (a case study of the legal proceedings in the case of five blacks indicted for the robbery-murder of a white in Georgia in 1977, against whom the charges were later dropped when the illegally obtained confession, which was the only evidence in the case, was suppressed); Davis, *Is the Death Penalty Irrevocable?*, 10 SOC. THEORY & PRAC. 143 (1984) (discussing the death penalty using principles of philosophy and formal logic, and arguing that irrevocability is not one of the differences between death and imprisonment); *The Death Penalty: Invitation to a Real Dialogue*, in THE DEFENDER, July-Aug. 1986, at 1; Ehrmann, *For Whom the Chair Waits*, 26 FED. PROBATION 14 (1962) (an overview of risks of executing the innocent and the insane); Espy, *The Historical Perspective*, in SLOW COMING DARK: INTERVIEWS ON DEATH ROW 163 (D. Magee ed. 1980) (testimony before the Alabama State Senate in 1979 of Watt Espy, an independent researcher in Tuscaloosa, Alabama who has made it his life's work to chronicle all the executions that have taken place in the United States); Huff, Rattner & Sagarin, *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQ. 518 (1986) (summarizing evidence of wrongful convictions from a database of five hundred such cases, interviews with criminal justice officials, and extant literature on the subject); Kaplan, *Administering Capital Punishment*, 36 U. FLA. L. REV. 177 (1984) (arguing that inefficiency and unfairness is inherent in the application of the death penalty); Radelet & Bedau, *Fallibility and Finality: Type II Errors and Capital Punishment*, in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES (K. Haas & J. Incardi eds. 1988) (summarizing study which attempted to compile cases of all those wrongfully sentenced to death in the United States); Satre,

people, and people err. It is a long-recognized fact that to be human is to make mistakes.[4]

No cases better demonstrate the part human fallibility plays in the capital conviction of the innocent than those of Richard Hauptmann and Jerry D. Bigelow. Fifty-five years ago, Richard Hauptmann went to the death chamber maintaining his innocence of the kidnapping and murder of Charles A. Lindbergh, Jr., dubbed the "Crime of the Century." Surrounded by a hostile atmosphere, the proceedings featured mistakes, fraud, concealment of evidence, witness intimidation, and false testimony. Additionally, Mr. Hauptmann, a German immigrant, was tried during the World War II era, when there was great public prejudice against Germans and German-Americans. Jerry D. Bigelow, a young Canadian, was convicted and spent nearly five years on death row in California, during which time he twice attempted suicide. At the beginning of the case, the legal representation of Mr. Bigelow was grossly ineffective. The conviction was later reversed on what many would view as a technicality, and upon retrial in 1988, Bigelow was found not guilty by the jury. Incredibly, however, the trial judge rejected the jury's verdict, and entered a contrary finding of his own. Through aggressive appellate litigation, the controversial jury decision was finally accepted a year later. The penniless defendant had experienced a lifetime of victimization beginning with severe abuse by a violent father and nearly ending in his execution.

There are common denominators in these two cases, as with so many of those who languish on death row today: poverty; abysmal representation; overzealous prosecutors guided more by political ambition than a search for the truth; an arbitrary legal system; and trials often held in atmospheres of great prejudice.

Evidence against each defendant was quite strong and both appeared

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The Irrationality of Capital Punishment, 6 SW. L.J. 75 (Summer 1975) (providing a philosophical critique of capital punishment); Sebba, *Communication on Capital Punishment: A Comment*, 17 IS. L. REV. 391 (1982) (maintaining that the principle of proportionality and the possibility of error should preclude use of the death penalty); Tysoe, *And If We Hanged the Wrong Man?*, 65 NEW SOC'Y 11 (1983) (arguing against the death penalty, with a British focus, primarily on grounds of witness error and the possibility of executing the innocent).

4. "Mistakes are the inevitable lot of mankind." *Re* Taylor's Estate, 22 Ch. D. 495, 503 (1882); "I beseech ye, in the bowels of Christ, think it possible ye may be mistaken." Letter from Oliver Cromwell to the General Assembly of the Church of Scotland (Aug. 3, 1650), *reprinted in* DICTIONARY OF QUOTATIONS 456 (1978); ("I should like to have [those words of Cromwell] written over the portals of every church, every school, and every court house, and, may I say, of every legislative body in the United States." I. DILLIARD, THE SPIRIT OF LIBERTY (1960), *reprinted in* THE QUOTABLE LAWYER (D. Shrager & E. Frost eds. 1986) (quoting Judge Learned Hand));

> Error (Ignorance being her inseparable twin) doth in her proceeding so infinitely multiply herself, produceth such monstrous and strange chimaeras, floateth in such and so many uncertainties and sucketh down the poison from the contagious breath of Ignorance, as all such into whom she infuseth any of her poisoned breath, she dangerously infects or intoxicates.

5 COKE, *Preface*, *reprinted in* 2,000 FAMOUS LEGAL QUOTATIONS 199 (M. McNamara ed. 1967).

clearly guilty. The prosecution wove a web of damning circumstantial evidence against Mr. Hauptmann. Mr. Bigelow boasted on ten separate occasions that he had committed the execution-style murder, and, when arrested, he possessed the automobile and other property of the deceased. However, each man was innocent, despite the apparent strength of the prosecution's evidence.

This is the story of two men victimized by a system which misfired. Richard Hauptmann died by that system. Today, his family continues to suffer from the tragedy which took place so long ago. With some fortunate breaks, Jerry Bigelow survived, but not before enduring years of agony. The scars will be there for life.

I.
THE "TRIAL OF THE CENTURY"

Few crimes have captured the attention of the world more than the kidnapping and alleged murder of Charles A. Lindbergh, Jr. Through the years, it has been the subject of numerous books, articles, and media programs.[5] The trial remains today the biggest and most infamous in American history. On March 1, 1932, the twenty month-old child of Charles A. Lindbergh and Anne Morrow Lindbergh was taken from their home near Hopewell, New Jersey. The abduction became front page headlines around the world[6] and was known as the "Crime of the Century." At the time, Charles Lindbergh was truly a living legend, having become renowned in May 1927 as the first person to fly solo across the Atlantic. Anne Lindbergh came from one of the more prominent families in America, and was destined to become an accomplished author. Her father had been a partner of J.P. Morgan, United States Senator from New Jersey, and an Ambassador to Mexico. The Lindberghs

5. *See, e.g.*, J. BRANT & E. RENAUD, TRUE STORY OF THE LINDBERGH KIDNAPPING (1932); J. CONDON, JAFSIE TELLS ALL (1936); A. DUTCH, HYSTERIA (1975); L. KENNEDY, THE AIRMAN AND THE CARPENTER: THE LINDBERGH KIDNAPPING AND THE FRAMING OF RICHARD HAUPTMANN (1985); J. FISHER, THE LINDBERGH CASE (1987); A. SCADUTO, SCAPEGOAT: THE LONESOME DEATH OF RICHARD HAUPTMANN (1976); D. SHOENFELD, THE CRIME AND THE CRIMINAL (1936); G. WALLER, KIDNAP: THE STORY OF THE LINDBERGH CASE (1961); S. WHIPPLE, THE LINDBERGH CRIME (1935) [hereinafter THE LINDBERGH CRIME]; S. WHIPPLE, THE TRIAL OF BRUNO RICHARD HAUPTMANN (1937); *Anna Hauptmann — Lindbergh Kidnap's Final Victim*, U.S. NEWS & WORLD REP., Nov. 4, 1985, at 11; Danielsson, *War Der Morder Das Einzige Opfer?*, BUNTE ÖSTERREICH, Oct. 7, 1982, at 82; Fischer, *Warum Müsste Hauptmann Sterben?*, STERN, Mar. 1982, at 74; Lavin, *Widow's Mission: Clearing Husband in Lindbergh Case*, Chicago Trib., Aug. 29, 1982, § 12, at 1; *Na Kan Jeg Bevise At Richard Var Uskyldig!*, NORSK UKEBLA, July 13, 1982, at 14; Zito, *Did the Evidence Fit the Crime?*, LIFE, Mar. 1982, at 41.

6. *See, e.g.*, N.Y. Daily News, Mar. 2, 1932, § 1, at 1; N.Y. Times, Mar. 2, 1932, § 1, at 1; *see also* THE LINDBERGH CRIME, *supra* note 5 ("The kidnapping . . . had aroused the nation to a pitch of hysteria and horror comparable only to the wave of anger that followed the assassination of Abraham Lincoln. The world dropped its business, that day, to discuss in horrified and angry accents the most revolting crime of the century. . . . Millions of mothers sat constantly by the radios, straining to hear the wearisome repetition of the story, with prayers in their hearts that the next bulletin would bring glad news.").

were greatly loved and admired throughout the world.[7]

There was a month of negotiations with the kidnapper for payment of money in exchange for the return of the Lindbergh child. On April 2, 1932, a $50,000 ransom was paid to the kidnapper in St. Raymond's Cemetery in the Bronx, New York. However, the infant was not returned. Finally, on May 12, 1932, the badly decomposed remains of a small child[8] were found in a shallow grave five miles from the scene of the kidnapping. The authorities promptly announced that it was the Lindbergh baby. The body was hastily identified by Charles Lindbergh and the nursemaid, Betty Gow. No autopsy was performed, and the remains were quickly cremated on Lindbergh's orders. To this day, questions linger as to the identity of the body.

The hunt for the kidnapper continued for the next two and one-half years. Although this was the largest investigation in history, involving law enforcement agencies from throughout the world, it was largely unsuccessful. The New Jersey State Police, New York City Police, and the Federal Bureau of Investigation, the principal investigative agencies, began to look foolish in the eyes of the public, for they could not solve the crime which rocked the nation. Their image took on "Keystone Cop" overtones.

Finally on September 19, 1934, Richard Hauptmann, a German Immigrant living in the Bronx with his wife[9] and their infant son, was arrested. Since he possessed a portion of the ransom money, approximately $14,600, the police immediately jumped to the conclusion that they had captured the kidnapper and murderer of the Lindbergh child. Their extensive search was over. The police were vindicated, and ceased being the target of public ridicule and pressure. It was announced to the world that the "Crime of the Century" had been solved. Mr. Hauptmann's protestations of innocence were to no avail. At last the authorities had a suspect around whom they could mold a case of guilt. Mr. Hauptmann's explanation that the money had been left with him for safekeeping by a friend and business associate, who went to Germany for a

7. *See generally* L. MOSLEY, LINDBERGH (1976); W. ROSS, THE LAST HERO: CHARLES A. LINDBERGH (1976).

8. An inspection of the body by the Mercer County physician, who was not a pathologist, revealed: "Sex undetermined due to marked decomposition . . . . Left leg missing. Left hand missing. Right forearm missing. Abdominal organs except liver missing. Thoracic organs except heart missing." Report by Dr. Charles H. Mitchell (May 12, 1932). The Lindbergh's pediatrician, who last saw the child several weeks before the kidnapping and was very familiar with the child, could not identify the body. Statement of Dr. Van Ingen to Robert Peacock, New Jersey Assistant Attorney General & Captain John J. Lamb, New Jersey State Police (Nov. 21, 1934). The lack of an adequate pathological examination was severely criticized by prominent forensic pathologists. As expressed by Alexander O. Gettler, M.D., head toxicologist in New York City and professor of chemistry at Washington Square College, in a lecture: "Even a doctor of medicine is not fitted for this specialized type of work. A county physician may be a very good doctor, but he is seldom a trained pathologist or toxicologist. The authorities do not know today how the Lindbergh baby died. The medical testimony in the Hauptmann case was terrible, and it was only mob psychology that convicted Hauptmann." *Medical Testimony at Hauptmann Trial Scored* (on file with author.)

9. Mrs. Anna Hauptmann, 93 years of age, now lives in Pennsylvania and is represented by the Author.

family visit and then died,[10] did not dissuade police.

The "Trial of the Century" began January 2, 1935, in the sleepy little town of Flemington, New Jersey. For the next six weeks, the attention of the world seemed focused upon one thing: the fate of a little-known German immigrant in a rustic courthouse. The center of the universe seemed to shift to that obscure area of New Jersey. The amount of attention paid to the Hauptmann case was incredible, even by present-day standards. H.L. Mencken referred to it as the greatest story since the Resurrection. Many of the top journalists and writers of the day covered the trial: Damon Runyon, Dorothy Kilgallen and her father James Kilgallen, Ford Maddox Ford, Heywood Broun, Arthur Brisbane, Fannie Hurst, Kathleen Norris, Edna Ferber, Walter Winchell, Alexander Woollcott, Adela Rogers St. Johns, Gabriel Heatter, and Boake Carter. The Hearst papers sent over fifty employees to the trial. In all, there were three hundred news reporters, and over a hundred camera people. Forty-five direct lines ran from a room above the court and a special teletype machine was connected directly to places such as London, Berlin, Paris, Melbourne, and Buenos Aires. The coverage far exceeded anything in American history; over a half million words were written daily. The celebrities in attendance at various times included: Jack Benny, Lowell Thomas, Ginger Rogers, Jack Dempsey, Clifton Webb, Lynn Fontanne, and Moss Hart. There was even an airfield created near Flemington so that film could be flown daily to New York for developing.[11]

The trial occurred in an atmosphere of mass hysteria in which strong anti-German feelings prevailed. The chief defense counsel was caught up in vying for center stage with the media. The courtroom was so crowded that people were jammed in the aisles and window sills. On one day over twenty thousand people tried to gain entrance to the courtroom, with its maximum seating capacity of 260. The population of Flemington was only 2500. In court, cameras rolled and flashed with people crowding as if to a sporting event. Outside souvenir ladders[12] were sold, and the Sheriff was busy signing

10. The friend and business associate, Isidor Fisch, died from tuberculosis March 29, 1934 in Leipzig, Germany. Letter from Detective Arthur C. Johnson, New York City Police Department, to Chief Inspector John Sullivan, New York City Police Department (Nov. 15, 1934).

11. *See generally* L. KENNEDY, *supra* note 5; G. WALLER, *supra* note 5; *Carter Broadcast Trial Dispatch*, THE PRINCETON RECOLLECTOR, Spring 1977, at 12, 15-16. Oscar Hallam, a former Minnesota Supreme Court justice, led the American Bar Association Special Committee on Publicity in Criminal Trials, which undertook an exhaustive study of the Hauptmann trial publicity and ultimately offered several recommendations affecting the activities of the press. The Executive Committee of the ABA published the conclusions and recommendations of the report but, incredibly, withheld the report itself while Hauptmann was alive and under sentence of death. *See* Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453 (1940); Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, (June-July 1979); *Report of Special Committee on Publicity in Criminal Trials*, A.B.A. SEC. CRIM. L. REP. (Feb. 1, 1936).

12. References to the ladder evidence became infamous. It was believed that the kidnapper had entered the child's room with the assistance of a ladder.

autographs. The gathering was more akin to a circus or rodeo than a trial in which a man's life literally hung in the balance.

The lead attorney for the defense was Edward J. "Death House" Reilly of Brooklyn. A prominent journalist described him in unforgettable terms: "Within seven seconds I knew Reilly was a fool, a blundering wet-brained egomaniac."[13] An alcoholic, he was shortly thereafter placed in an asylum for the insane as a result of tertiary syphilis. One of the jurors afterwards complained that "[f]rom the start Reilly did all he could to show his contempt for us."[14] Another observed that Reilly "probably did the defendant more harm than good."[15] Unbeknownst to his client, Reilly had been hired by the Hearst newspaper chain, which was on a crusade to make an example out of the accused child kidnapper. Prior to trial, the lawyer even prepared special stationary with a vivid red ink ladder in the margin, bearing the words across the top: "The Lindbergh-Hauptmann Trial . . . Office of Edward Jay Reilly, Chief Defense Counsel." There were local lawyers assisting,[16] but "Death House" dominated the defense. He spent little time with his client outside of court,[17] and on those few brief occasions reeked of alcohol.[18] Mr. Hauptmann vigorously asserted his innocence. Yet, during a trial recess Reilly made the incredible statement to an FBI agent "that he knew Hauptmann was guilty, didn't like him, and was anxious to see him get the chair."[19]

The prosecutor was David T. Wilentz, Attorney General of New Jersey. In the ensuing decades he became legendary in New Jersey politics as a power broker and king-maker.[20] As was true of many others, he used the trial as a career-maker.[21]

The evidence presented against Mr. Hauptmann was most convincing.

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13. A.R. ST. JOHNS, THE HONEYCOMB 323 (1969).

14. *The Crime — The Case — The Challenge*, Liberty, Apr. 16, 1938, at 56 (quoting jury foreman Charles Walton).

15. Mack, *Hauptmann Juror Curious About New 'Evidence'*, The Democrat, Mar. 18, 1982, at 1 (quoting juror Ethel Stockton).

16. Associate counsel were C. Lloyd Fisher, Egbert Rosencrans, and Frederick Pope, all of New Jersey.

17. The relationship with Edward J. Reilly was later described by Richard Hauptmann: "I had an opportunity to explain my case to him [for] only five minutes. He simply did not come to me, or if he came for three to five minutes, he was often drunk. How could I [then] talk with him?" *Warden Had Lindbergh Case Letter*, The Birmingham News, Mar. 28, 1977, at 20.

The author's investigation has revealed that the defense attorney spent less than an hour out of court in interviews with his client during the six week trial.

18. A.R. ST. JOHNS, *supra* note 13, at 303 (observing that Reilly was passed out drunk in the early morning hours of the day the trial began).

19. FBI Memorandum (Jan. 22, 1936).

20. For example, Robert N. Wilentz, son of the former Attorney General, is today the chief justice of the New Jersey Supreme Court. *See* O'Reilly, *Honor Thy Father: When Robert Wilentz Becomes Chief Justice Later this Month, One of the Heavy Names in State Politics Ascends the Bench with Him*, N.J. MONTHLY, Aug. 1979. at 14; Rothenberg, *Superlawyers, Supertimes*, N.J. MONTHLY, Sept. 1981, at 78.

21. *See Political Elite Bid a Farewell to Wilentz*, Newark Star Ledger, July 8, 1988, at 1; *David T. Wilentz, 93, Dies; Was Prosecutor For Hauptmann Trial*, Courier News, July 7, 1988, at A-1; *David T. Wilentz, 93, Hauptmann Prosecutor*, Jersey Journal, July 7, 1988 (Obituaries);

At times, it seemed to fit together almost too well: handwriting experts testified that the series of ransom notes were written by Mr. Hauptmann; a wood expert explained that a side piece of the ladder allegedly used in the kidnapping, known as Rail 16, was cut from the attic of the Hauptmann home; a taxi driver identified Mr. Hauptmann as the person who handed him a ransom note for delivery; Dr. John F. Condon, who met with the kidnapper twice as an intermediary for the Lindbergh family during the ransom negotiations, identified Mr. Hauptmann as that person; and Charles Lindbergh identified the voice of Mr. Hauptmann as the voice he had heard the night the ransom was paid, nearly three years earlier from seventy to a hundred yards away, holler to Dr. Condon: "Hey, Doctor!".[22]

At 10:20 p.m. on the night of February 13, 1935, the courthouse bell began tolling, announcing a verdict. Outside the crowd continued shouting, "Kill Hauptmann! Kill Hauptmann!". The courtroom became very quiet as Mr. Hauptmann was led in, and only the sound of the crowd outside was heard. The jury then entered, and the foreman announced the verdict: guilty of murder in the first degree. Since there was no recommendation for mercy, Mr. Hauptmann was promptly sentenced to death.

For the next fourteen months, the three local attorneys unsuccessfully pursued appellate and habeas corpus remedies.[23] "Death House" had dropped out, and actually sued his former client. Sitting on death row in the New Jersey State Prison in Trenton, Mr. Hauptmann vigorously maintained his innocence in the face of unbelievable pressure to "confess." There was an offer that, if he only admitted being involved in the Lindbergh kidnapping, his life would be spared.[24] To the overture, Mr. Hauptmann responded essentially that he would rather die than live with a lie. He also spurned an offer of an enormous sum of money for his wife and infant child, if he would give an

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David Wilentz, 93, The Prosecutor in Lindbergh Kidnapping, is Dead, N.Y. Times, July 7, 1988 (Obituaries); *D. Wilentz, Prosecuted Hauptmann*, Phila. Inquirer, July 7, 1988 (Obituaries).

22. Earlier Lindbergh told the authorities under oath that the kidnapper said, "Hey Doc!". Grand Jury Testimony of Charles A. Lindbergh, Sept. 26, 1934, State v. Hauptmann, 115 N.J.L. 412, 180 A. 809, *cert. denied*, 296 U.S. 649 (1935) [hereinafter Testimony of Charles A. Lindbergh].

23. State v. Hauptmann, 115 N.J.L. 412, 180 A. 809, *cert. denied*, 296 U.S. 649 (1935); *Ex parte* Hauptmann, 297 U.S. 693 (1936).

24. Governor Harold G. Hoffman did not alone have the power to commute the death sentence. That could be done only by the Court of Pardons, an executive board over which he presided. It denied a commutation January 11, 1936. *N.J. Executive Sees Prisoner in Death Cell*, Phila. Rec., Dec. 6, 1935, at 1. However, during a meeting of Hoffman and Attorney General Wilentz in the New Yorker Hotel on the night of January 15, 1936, it was agreed that if Mr. Hauptmann made a statement admitting involvement in the Lindbergh crime, they would jointly recommend to the Court of Pardons that the death sentence be commuted to life imprisonment. The following day Hoffman met with Mrs. Hauptmann in the Stacy Trent Hotel in Trenton, and explained how her husband's life could be spared. She agreed to ask her husband if he would talk to Wilentz and Governor Hoffman. After conveying this message to her husband, she reported his response that he would be glad to see anybody, but that his account remained the same. A. SCADUTO, *supra* note 5, at 416-20.

"exclusive" to a newspaper.[25]

On the day of the scheduled execution, March 31, 1936, Richard Hauptmann realized that the end was imminent. That evening, with a pencil and paper provided by a guard, he wrote a farewell letter to the Governor, which also contained remarks for the Attorney General:

> My writing is not in fear of losing my life, this is in the hands of God, it is his will. I will go gladly, it means the end of my tremendous suffering. Only in thinking of my dear wife and my little boy, that is breaking my heart. I know until this terrible crime is solvet [sic], they will have to suffer unter [sic] the weight of my unfair conviction.
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> For passing away, I assure your Excellence that I am not guilty of this crime. Over and over again I was trying to convince the prosecution that they murder an innocent man. I offert [sic] myself to any test what science may offer — but I was begging in vain. I did this, not to force the prosecution to put me free, but only to convince the world that I am innocent.
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> . . . .
>
> May I ask fair thinking people — would I have been convicted of this crime without the circumstantial evidence, and them [sic] false witnesses — No! Never and Never. Why did people say on the witness stand that they saw me near Hopewell[?] The motive can only be money and to play an important part in the Lindbergh case. Up to the present day I have no idea where the Lindbergh house in Hopewell is located.
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> . . . .
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> . . . My God, my God, I hardly can't believe on all that what happened by my trial. But it was necessary to convict me and so close the books on the case.
>
> Mr. Wilentz, with my dying breath, I swear by God, that you convicted an annocent [sic] man. Once you will stand before the same Judge to whom I go in a few hours. You know you have done wrong on me, you will not only take my life but also the happiness of my family. God will be judge between me and you.
>
> I beg you, Attorney General, believe at least a dying man. Please investigate, because this case is not solvet [sic], it only adds another dead to the Lindbergh case.
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> Your Excellence, I see this as my duty, before this state takes my life, to thank you for what you have done for me. I write this

25. The Hearst Papers offered to pay $100,000 into a trust fund for Mr. Hauptmann's son, if he would give them a full confession to the crime, to be published following the execution. A.R. ST. JOHNS, *supra* note 13, at 341.

with tears in my eyes. If ever prayer will reach you, they will come me, from my dear wife, and my little boy.

In all your effort to save my life and see that justice is done, I assure your Excellence, that your effort was spent to an innocent man. I thank you your Excellence, from the bottom of my heart.

And may God bless you.[26]

At 8:00 p.m. on March 31, 1936, the time fixed for the execution, Mr. Hauptmann was informed that a forty-eight-hour stay had been granted.[27] His head was already shaved, and he was about to enter the death chamber.

Finally, on April 3, 1936, Richard Hauptmann, accompanied by two ministers praying and reading from the Bible, was led to the electric chair. The crown of his head had been shaved. His face was pale, his eyes expressionless, and his lips trembled. Outwardly he appeared to be a shadow of the person he had been. Yet he defied the demands that he admit culpability in order for his life to be spared. Guards held the doomed man's arms as if he were an unruly child. They moved in on him like dogs harrying a cornered animal. One instant, he was on his feet. The next, he was shoved into the chair, bound in its repulsive arms with broad leather straps. About fifty witnesses, including thirty news reporters, watched the silent ritual. The executioner then stepped forward and fitted a leather cap with its electrode, dipped in brine, over his head. A second electrode was placed through a slit of the trousers to his leg.

At 8:44 p.m. a current of electricity shot through the man, from a starting point of seven hundred to a maximum of two thousand volts. For three and a half minutes the current crackled and sputtered, while the clergymen intoned the rites of the dying. Mr. Hauptmann's shrunken frame snapped violently. His tightly closed lips burst open in a silent scream. His clenched fist pounded against the arms of the chair. Then, the current was turned on a second time, sending the victim slamming back against the chair. After a third time of turning the voltage up to two thousand volts, it was over. A plume of smoke rose from his neck, and another from his leg where the trouser had been slit. At 8:47:30, the doctors proclaimed Richard Hauptmann dead.[28]

Interestingly, shortly before the execution, a minister handed to a defense attorney a note containing Mr. Hauptmann's final statement:

I am glad that my life in a world which has not understood me has ended. Soon I will be at home with my Lord, for I am dying an innocent man. Should, however, my death serve for the purpose of abolishing capital punishment — such a punishment being arrived

26. Letter from Richard Hauptmann to Governor Harold J. Hoffman (Mar. 31, 1936) (on file with author).

27. That afternoon the Governor granted a two-day stay, pending a grand jury investigation into a "confession" to the kidnapping by Paul H. Wendel.

28. *See Hauptmann Put to Death for Killing Lindbergh Baby: Remains Silent to the End*, N.Y. Times, Apr. 4, 1936, at 1.

> only by circumstantial evidence — I feel that my death has not been in vain. I am at peace with God. I repeat, I protest my innocence of a crime for which I was convicted. However, I die with no malice or hatred in my heart. The love of Christ has filled my soul and I am happy in Him.[29]

Forty-five years later I began representing Mrs. Anna Hauptmann, the widow of Mr. Hauptmann. In 1981, she asked me to undertake her cause, to find the facts necessary to prove what she already knew: that her husband was innocent.

My investigation unearthed a vast array of evidence from previously supressed state and federal governmental files which establish the innocence of Richard Hauptmann.[30] The quintessence of my discoveries was that the trial had been misnamed, for it was more aptly the "Fraud of the Century." At the time of the 1935 trial, not only did the prosecution know that its most persuasive evidence was not credible, but more importantly, it possessed and concealed information proving Mr. Hauptmann's innocence. Even with the prejudice permeating the atmosphere in the court, it is doubtful that he would have been convicted had the suppressed evidence been presented.

My goal from the beginning has been to secure official recognition that a grave miscarriage of justice occurred, and that Richard Hauptmann was innocent. First, I sued the state of New Jersey in order to gain access to government records. Then, I pursued litigation against the state and former officials for the wrongful death of Richard Hauptmann. At two different points in time, on the basis of newly discovered evidence, civil suit was brought in the United States District Court for the District of New Jersey. But both actions were dismissed for various technical reasons. Finally, the San Francisco Court of Historical Review and Appeals provided the first and only credible forum in 50 years for examining the evidence of the "Trial of the Century." Then I appealed to the New Jersey State legislature, urging them to form a special investigative commission. The legislature refused to act, so I finally turned my attention to the executive branch, the Governor of New Jersey.

Our early efforts were directed toward the judiciary. The initial litigation was filed September 30, 1981, in the Hunterdon County Courthouse, where Mr. Hauptmann had been tried nearly fifty years earlier.[31] By that date, I

29. G. WALLER, *supra* note 5, at 587 (quoting note Hauptmann had given to Reverend John Matthiesen, just before he was led from the death cell to the execution chamber).

30. *See* Bedau & Radelet, *supra* note 2, at 124-25 (Hauptmann included in list of 350 innocent defendants capitally convicted in this century). The authors' description of the case is most poignant: "Hauptmann was the victim of over zealous prosecutors intent on solving the most notorious crime of the decade. . . . There is no doubt that the conviction rested in part on corrupt prosecutorial practices, suppression of evidence, intimidation of witnesses, perjured testimony, and Hauptmann's prior record." *Id.*

31. Complaint in Lieu of Prerogative Writ, Hauptmann v. Byrne, No. L582581 PW (Hunterdon Super. Ct. filed Sept. 30, 1981). Participating with me as local counsel was Seymour S. Weinblatt of Flemington, New Jersey.

possessed over 34,000 pages of pertinent FBI material which would have established his innocence. Yet, I wanted to review the 180,000 pages of New Jersey State Police material concerning the events leading to the execution of Richard Hauptmann. The state had previously withheld the documents, claiming they were privileged.[32] They made the absurd assertion that concealing the truth was in the public interest. Our litigation, seeking to force the state to release the material, resulted in an avalanche of media and public attention.[33]

Reacting to public pressure, Governor Brendan Byrne ordered that the records be opened.[34] That and other material I discovered through the years demonstrated that Mr. Hauptmann been deprived of a fair trial. Reading through the files, one gets an impression of the absurd conduct of the New Jersey Police and the distinct feeling that Mr. Hauptmann was set up as the perfect scapegoat so desperately needed by police officials.[35]

The concealed evidence in governmental files relating to the innocence of Richard Hauptmann ranged from the testimony of Charles Lindbergh to the opinions of wood, handwriting, and fingerprint[36] experts.[37] It was a smorgasbord of fraud. A review of only a relatively small portion of the material is required to appreciate the nature and significance of the exculpatory evidence. The following are selected examples.

- A private investigator formerly employed by the State of New York, worked for the first defense attorney[38] during the early stages of the case. He

32. *See* Letter from Colonel Clinton L. Pagano, Superintendent, New Jersey State Police, to Robert R. Bryan (Aug. 3, 1981) (denying request to inspect records pertaining to the Hauptmann-Lindbergh case) (on file with author).

33. *See, e.g.*, Kihss, *Byrne Urges Jersey to Open Files in Kidnapping of Lindbergh Baby*, N.Y. Times, Oct. 1, 1981, at B2; *Lindy Kidnap Secrets Come Out At Last*, N.Y. Post, Oct. 1, 1981, at 12; McLaughlin, *Paging '30s Lindbergh Case — Killer's Widow Seeks Secret Documents To Clear Him*, N.Y. Daily News, Oct. 1, 1981, at 8.

34. Exec. Order No. 110 (Gov. Byrne, Oct. 4, 1981). The Governor recognized that since "the Lindbergh case was and continues to be of extraordinary interest to the legal community and the public at large," the records would be made public. *Id.*; *see also* Geist, *Mrs. Hauptmann's Cause — The Fight to Reopen 'The Trial of the Century'*, N.Y. Times, Oct. 20, 1981, at B2; *Byrne Order Unlocks Secret Files on Hauptmann*, Courier-Post, Oct. 16, 1981, at 8A.

35. The review of the New Jersey State Police material relating to the Hauptmann-Lindbergh case began November 23, 1981. The author was assisted by James P. Kelly, Jr. and Thomas J. Kelly, deceased, historical researchers who had worked on the case for three decades. Their commitment to the project was a tremendous asset.

36. The author possesses copies of the fingerprints of the kidnapper, lifted from various kidnap ransom notes. They do not match the prints of Mr. Hauptmann.

37. Through an extensive investigation which included a number of sources beyond the 200,000 pages of governmental documents, the author has uncovered substantial evidence which resolves the unanswered questions regarding the Lindbergh abduction. That includes the motive of the kidnapping, and those actually involved. That is not discussed in the present Article, but will be disclosed when the author's ongoing investigation is completed.

38. James M. Fawcett represented Mr. Hauptmann in the New York extradition proceedings.

later recalled being bribed by both the prosecutor and a member of the New Jersey State Police:

> In other words, if we would cease our activities as investigators for Hauptmann and keep quiet, the Attorney General would pay our bill out of state funds thru [Captain John Lamb] of the [New Jersey] State Police .... That during the interview with Wilentz in his office at Perth Amboy, N.J., the latter stated that he confirmed the statement made by James M. Fawcett, Esq., that he, Wilentz, would have Capt. Lamb pay the $1,475.00 as soon 'as the case was all over', which your deponent understood meant as soon as Hauptmann was executed.[39]

• Charles A. Lindbergh testified that the voice he heard two and one-half years earlier on the night the ransom was paid was that of Richard Hauptmann. However, unknown to the court and jury, months earlier he had heard Mr. Hauptmann's voice in the police station, and explained to the authorities that an identification would be impossible. He testified similarly before the Bronx County grand jury.[40] A state investigator later reported to an official:

> The truth of the matter is that Lindbergh privately saw Hauptmann and heard his voice two days after his arrest, about Sept. 19 or 20. Week later he appeared before a Grand Jury and said he could not make identification by voice. Next day he was publicly presented to Hauptmann and made identification.[41]

A FBI official observed: "I am somewhat skeptical of some of the evidence now being produced in New Jersey, particularly some of the identifications and the testimony of Lindbergh relative to recognizing the voice, etc. . . . ."[42]

• A taxi driver, testified that on the evening of March 12, 1932, he was given an envelope containing a ransom note by a person he identified as Mr. Hauptmann, which he delivered to the intermediary, Dr. Condon. However, the prosecution withheld the fact that the identification was not credible.[43] Several months after the kidnapping, the cab driver stated in sworn testimony to New York officials that he "didn't pay any attention to anything" regarding the man, and would not be able to make an identification.[44] The court never knew that members of the New Jersey State Police had instructed him to identify Mr. Hauptmann: "Joe, we got the right man at last. There isn't a man in this room who isn't convinced he is the man who kidnapped the baby. . . .

39. Affidavit of the investigator (Jan. 17, 1936).

40. Testimony of Charles A. Lindbergh, *supra* note 22.

41. Investigative report (1936) (emphasis in original).

42. FBI memorandum (Oct. 9, 1934).

43. FBI memorandum (June 23, 1934).

44. Grand Jury Testimony, May 17, 1932, State v. Hauptmann, 115 N.J.L. 412, 180 A. 809, *cert. denied* 296 U.S. 649 (1935).

Now we're depending on you, Joe."[45] The prospective witness was led into a room where he viewed the suspect in a line-up with detectives. It was observed that a police official "practically coerced [the witness] into identifying Hauptmann."[46]

- The prosecution concealed the fact that Dr. John F. Condon, the intermediary during the ransom negotiations, who met with the abductor twice, told police officials on various occasions that Mr. Hauptmann was not the kidnapper. "He [Condon] remarked on one occasion that Hauptmann is not the man because he appears to be much heavier, has different eyes, different hair, etc. . . ."[47]

- Contrary to his trial testimony, a leading handwriting expert, Albert D. Osborn,[48] explained to police officials after comparing the kidnapper's writing to that of Mr. Hauptmann that "[Hauptmann] did not write the ransom notes."[49] It was only after he and his father, Albert S. Osborn, also a handwriting expert, learned that the authorities had found a portion of the ransom money in the possession of Mr. Hauptmann that his opinion changed.

> Within an hour [after being told by police officials that the suspect possessed some of the ransom money], Mr. Osborn called the Undercover Squad Headquarters . . . and advised that he and his son had positively decided that Hauptmann wrote the ransom letters . . . . After the final opinion by Mr. Osborn, Sr., there was . . . laughing [among police officers present] as to the ability of handwriting experts, it being pointed out that the Osborns did not make the identification until after the money was found.[50]

Interestingly, ten months after Mr. Hauptmann was convicted, the authorities were still trying to identify the writer of the ransom notes.[51]

- The prosecution's use of bribery and intimidation in order to secure testimony against Mr. Hauptmann was widespread. A handwriting expert, Julia Farr, explained that and other prospective witnesses were offered money by Assistant Attorney General Joseph Lanigan. After the bribe failed, the prosecutor resorted to threats: "He tells us we can have anything we want, — money is plentiful. Finding that flattery does not influence us, he begins to threaten each one of us."[52]

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45. FBI Report (Oct. 27, 1934) (by Special Agent T.H. Sisk).
46. FBI Memorandum (Nov. 5, 1934) (for Assistant Whitley).
47. FBI Memorandum (Sept. 21, 1934) (Re: Bruno Richard Hauptmann).
48. The expertise and credibility of Albert D. Osborn did not improve with age. In 1971, he was one of the experts who concluded there was not "the slightest question" that Clifford Irving's forgery of Howard Hughes' handwriting had been written by Hughes. Osborn said it was "impossible as a practicable matter, based on our years of experience . . . that anyone other than" Hughes could have written the letters. In fact, the letter was written by Irving. S. FAY, THE INSIDE STORY OF THE HOWARD HUGHES-CLIFFORD IRVING AFFAIR (1972).
49. FBI Memorandum (Oct. 28, 1934).
50. *Id.*
51. FBI Report (Dec. 27, 1935) (RE: Bruno Richard Hauptmann).
52. Affidavit of Julia Farr (1935) (handwriting expert).

> Her affidavit shows that there is a real basis for the oft repeated charge that the Prosecution resorted to intimidations to win its case. Not only in this matter but [also] in the case of many witnesses for the Defense. The Kloppenburg[53] affidavit . . . will show where the prosecution even resorted to attempted bribery to influence a witness for the Defense to either change testimony . . . or refuse to testify.[54]

Another report showed that one of the only two witnesses who placed Mr. Hauptmann near the scene of the crime had also been bribed.

> Millard Whited testified to having seen Richard Hauptmann in the vicinity of the Lindbergh Estate, and regularly identified Richard Hauptmann as the man he had seen prowling near the estate. Millard Whited has a very evil reputation in this county. His own brother testified on the stand that his brother Millard was the biggest liar in the county and that he was with him on that date and Millard was no where near the Lindbergh Estate.
>
> . . . . Whited said that "I testified only to what they told me. They promised me $300 but only gave me $30." Whited indicated very clearly that the Prosecution had rehearsed him on his testimony innumerable times before he appeared on the stand.[55]

- The authorities concealed the existence of a witness who would have testified that she rode on a subway with Mr. Hauptmann from Manhattan to the Bronx on the evening of the Lindbergh kidnapping in New Jersey. He was going home from work, and stopped to give her directions. This would have verified not only that Richard Hauptmann was in New York on the night of the kidnapping, but also that he had worked that day in New York. In an affidavit she recalled, in part: "The deponent when seeing the picture of Bruno Richard Hauptmann in the papers recollected his face immediately as the man that helped her in the subway . . . ."[56]
- Amandus Hockmuth, eighty-seven years of age at the time of the trial falsely identified Mr. Hauptmann as the individual he observed the morning of the kidnapping driving a vehicle which turned onto the lane going to the Lindbergh home. It was discovered that the man was essentially coerced and improperly influenced by the prosecution into identifying Richard Hauptmann. A New Jersey official explained in a letter:

I am convinced, just as you are, that Amandus Hockmuth did com-

53. Hans Kloppenburg was the best friend of Richard Hauptmann. In many lengthy discussions with the Author, it was disclosed that the prosecution resorted to threats and bribery attempts in an effort to influence his testimony. For example, Mr. Kloppenburg was told that he would be charged with murder as an accessory if he fully revealed on the witness stand everything he recalled. The testimony would have totally exonerated Mr. Hauptmann. (on file with author).

54. Investigative Report (Jan. 6, 1936) (to Governor Harold G. Hoffman).

55. Investigative Report (Jan. 10, 1936) (to Governor Harold G. Hoffman).

56. Affidavit (Jan. 10, 1936).

> mit perjury at Flemington. He, like Whited, had practically been promised some of the reward.
>
> A lot of obstacles were thrown in the way of a real investigation of the Hauptmann matter as those were connected with the prosecution seemed determined to place every obstacle in the way of ascertaining the real truth.[57]

Following the success of my initial litigation, I filed a civil rights action for the wrongful death of Richard Hauptmann in the United States District Court for the District of New Jersey in Newark. The suit was on behalf of Mrs. Hauptmann against the former New Jersey Attorney General, David T. Wilentz, various police officers, and others responsible for the fraud that resulted in the conviction and execution of Richard Hauptmann.[58] After extensive litigation,[59] the action was dismissed on August 11, 1983. The court determined that, regardless of the strength of the newly discovered evidence, a jury trial would not be permitted because, *inter alia*, the prosecutor had absolute immunity to charges that he used false, perjured, or misleading testimony and concealed exculpatory evidence, and the claims were time barred by the applicable statutes of limitations.[60] Appellate relief was subsequently sought and denied.[61]

In late 1985, I discovered an additional 23,000 pages of previously unknown material which had been included in the personal effects of the late Harold G. Hoffman, former Governor of New Jersey. Based upon the newly discovered evidence, a new Complaint and Demand for Jury Trial was filed on June 18, 1986 in the United States District Court for the District of New Jersey in Trenton.[62] The action asserted that the newly discovered material established that Mr. Hauptmann

> was innocent, did not receive a fair trial due to wrongful conduct of the defendants, that the defendants procured witnesses to give false

57. Letter to Mr. W.H. Thomas (Apr. 20, 1936) (on file with author).

58. *See* Complaint and Demand for Jury Trial (filed Oct. 14, 1981); Amended Complaint and Demand for Jury Trial (filed Nov. 23, 1981); Hauptmann v. Wilentz, No. 81-3177 (D.N.J. 1981).

59. *See also* Second Amended Complaint (filed Feb. 25, 1982); Third Amended Complaint (filed May 7, 1982); Fourth Amended Complaint and Demand for Jury Trial (filed Mar. 7, 1983); Fifth Amended Complaint and Demand for Jury Trial (filed Oct. 26, 1983). For general descriptions of the litigation through its various stages, see, *e.g.*, Interviews of Mrs. Anna Hauptmann and the Author, on *Good Morning America* (ABC televised broadcast) and *The Today Show* (NBC televised broadcast) (Oct. 19, 1981); Lavin, *Widow's Mission: Clearing Husband in Lindbergh Case*, Chi. Tribune, Aug. 29, 1982, § 12, at 1; Hogrefe, *Hauptmann's 'Lost' Footprint & Files*, Wash. Post, July 20, 1982, Style, at 1; Geist, *Mrs. Hauptmann's Cause; The Fight to Reopen 'The Trial of the Century,'* N.Y. Times, Oct. 20, 1981, at B2; Zito, *The Sorrows of Anna Hauptmann*, Wash. Post, Oct. 15, 1981, at C1.

60. Hauptmann v. Wilentz, 570 F. Supp. 351 (D.N.J. 1983).

61. Hauptmann v. Wilentz, 770 F.2d 1070 (3d Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986).

62. Complaint and Demand for Jury Trial, Hauptmann v. Bornmann, No. 86-2426 (D.N.J. filed June 18, 1986).

> testimony and deliberately suppressed exculpatory evidence, that the defendant Wilentz engaged in illegal conduct including efforts to bribe witnesses and others in order to subvert the truth, and the New Jersey authorities . . . allowed an individual to be executed whom they had factual reason to believe was not guilty of the kidnapping and the alleged homicide of Charles A. Lindbergh, Jr.[63]

The action was ultimately dismissed under the doctrine of res judicata, prosecutorial immunity, and the running of the statute of limitations.[64] The decision was appealed without success.[65] Thus, the fact that I could establish the innocence of Richard Hauptmann and prove that his execution was the product of prosecutorial fraud, was to no avail. The state had committed a more premeditated murder than any carried out by a common criminal. Yet, the misconduct would go unchecked. Procedural rules guaranteed that the terrible wrong would not be righted in the courts. I would have to look elsewhere.

The San Francisco Court of Historical Review and Appeals,[66] a prestigious but unofficial body, reconsidered the "Trial of the Century" on November 19, 1986, in the largest courtroom in the San Francisco City Hall. The scene had some striking similarities to that trial which occurred so long ago in New Jersey. Making my way into the court and then to the counsel table required considerable effort, for the place was completely packed with news reporters, cameras, microphones, and spectators. A number of people were left in the hallway because the courtroom was overflowing.

Hans Kloppenburg, the best friend of Richard Hauptmann, described the prosecutor's threats and intimidation prior to testifying in 1935. He vividly recalled opening the door of the Hauptmann home one evening in December 1933. In walked Isidor Fisch,[67] carrying a box of important papers which he asked Richard Hauptmann to store for safekeeping. A short time later Fisch departed for Germany to visit his family. He died before returning to the United States. Several months before being arrested, Mr. Hauptmann discovered the long forgotten papers which consisted of nearly $15,000 in cash.[68] Mr. Hauptmann naively spent a small portion of that money, leading to his arrest on September 19, 1934.

The high point of the trial was the testimony of Mrs. Hauptmann. The

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63. *Id.* para. 18.

64. Hauptmann v. Bornmann, Cir. No. 86-2426, slip. op. at 14-18.

65. Hauptmann v. Bornmann, 856 F.2d 183 (3rd Cir. 1988).

66. The concept of the San Francisco Court of Historical Review and Appeals reconsidering the "Trial of the Century," originated with Noah Griffin, a Harvard Law School graduate and preeminent San Francisco writer and newscaster. The trial was planned by the late Bernard Averbuch, a noted author and journalist, and Carolyn Diamond. The prosecution was represented by Joseph B. Williams, a prominent San Francisco attorney. The author presented evidence and argued on behalf of Richard Hauptmann.

67. *See supra* note 10 and accompanying text.

68. Fifty thousand dollars in ransom had been paid to the kidnapper in 1932.

courtroom came alive as she took us all back to that night so long ago, when she and her husband were together far away from the Lindbergh kidnapping. She seemed to relive Richard coming to pick her up at the bakery in the Bronx, that cold, wet, and windy night of March 1, 1932. As with most of the world, it was not until the next day that the Hauptmanns learned the sad news of the Lindbergh kidnapping.

Judge George T. Choppelas concluded the trial, ruling:

> This issue before this court is whether from a historical point of view there is a need to re-open and publicly re-examine this case.
>
> . . . One cannot ignore the fact that in the past nine years [thousands of] pages of documents and notes have been uncovered, the content of which were never made available to the defense, the court, or the jury. It would seem that some governmental body, preferably the New Jersey Legislature, should create and appoint a fact finding committee, similar to the Warren Commission which investigated the Kennedy assassination, to review all of the recently discovered documents, and conduct a public hearing so as to once and for all air the *complete* facts presently available in this case. It is therefore the decision of this court that *there is* a historical need and reason to re-open and publicly re-examine this case.[69]

Having exhausted judicial means of redress, the next step was to contact the legislature. Several months prior to the San Francisco Court of Historical Review and Appeals proceeding, I had individually written each member of the New Jersey legislature. Each letter said in part:

> Our goal is to officially right this terrible wrong while my 87 year old client is still alive. I will continue pursuing the quest for justice, until official recognition of this error is achieved. As expressed by Richard Hauptmann just before the end: "They think when I die the case will die. They think it will be like a book I close. But the book, it will never close."
>
> . . . .
>
> It is requested that Mrs. Hauptmann and I be permitted to address the Senate, or appropriate committee. I am prepared to present credible evidence pertaining to the massive fraud spanning the entire spectrum of the case, perpetuated by New Jersey officials,

69. Files of San Francisco Court of Historical Review and Appeals, B. Averbuch, Pres., Case No. 43; *see also Lindbergh Doubts*, Kansas City Times, Nov. 24, 1986, at A-10; *Unofficial Court Wants Lindbergh Kidnapping Case Reopened*, St. Louis Post-Dispatch, Nov. 21, 1986, at 8B; Avery, *Famous Verdict Revised — 1936 "Lindbergh Trial Tainted," 'Court' Says*, San Francisco Examiner, Nov. 20, 1986, at B-1; *Historical Review Court Seeks Reopening of Lindbergh Case*, San Diego Evening Tribune, Nov. 20, 1986, at A10; *Lindbergh Kidnap Review Backed*, Pittsburgh Press, Nov. 20, 1986, at A-24, col. 1; *Panel Seeks to Reopen the Lindbergh Case*, Kansas City Times, Nov. 20, 1986, at C-3; *Reopening of Hauptmann Case Urged*, Atlanta Journal, Nov. 20, 1986, at C-3.

which proves the unfairness of the trial and Mr. Hauptmann's lack of culpability.

. . . .

My interest is not in embarrassing the State of New Jersey. Rather, it is to see that justice is done.[70]

Even though there were some very positive responses, both houses opined that the matter was not appropriate for the legislature.[71] After we were rebuffed in 1988 of any chance of a full trial,[72] it became clear that our efforts must be directed to the executive branch of government.

The goal remains for the state to recognize that Mr. Hauptmann did not receive a fair trial and was innocent. In the spring of 1990, I wrote to New Jersey Governor James J. Florio, requesting he meet with Mrs. Hauptmann. I said, in part:

This letter is written in behalf of Mrs. Anna Hauptmann, the 91 year old widow of Richard Hauptmann who was executed in 1936 by the State of New Jersey for the alleged murder of Charles A. Lindbergh, Jr. Newly discovered evidence demonstrates Mr. Hauptmann was not involved in the crime and that a mistake of outrageous proportions occurred. It is requested that you agree to a meeting with Mrs. Hauptmann. She requests the granting of this courtesy before she dies.

. . . .

Fifty-four years have passed since Mr. Hauptmann was executed. New Jersey should not fear exposure of the truth, for present governmental leaders are not to blame for any wrongdoing of their predecessors. However, the continued denial of the truth by the State is reprehensible, and in essence visits the wrongs of the past upon the present. Citizens want and deserve better.

We only want to see that justice is done. Your recognition of this tragedy would be a credit to your administration, New Jersey, and the cause of justice.[73]

My letter was referred to the Attorney General, who saw no need to grant the request. Mrs. Hauptmann then wrote the Governor: "I am ninety-one years old and haven't much time left on this earth. . . . If you believe in honesty and fairness, you will meet with me. . . . Please do not turn me

70. Letter from Robert R. Bryan to members of the Senate and General Assembly of the State of New Jersey (Sept. 6, 1986) (on file with author).

71. Letter from Bradley S. Brewster, Executive Director and Chief Counsel, Assembly Majority Office, to Robert R. Bryan (Oct. 6, 1986) (on file with author); Letter from John F. Russo, Senate President, to Robert R. Bryan (Sept. 11, 1986) (on file with author).

72. *See supra* note 65.

73. Letter from Robert R. Bryan to James J. Florio, Governor of New Jersey (Mar. 19, 1990) (on file with author).

down."[74] After the Governor's refusal to even meet with Mrs. Hauptmann, on June 12, 1990, we made a public appeal at a press conference in Trenton, New Jersey.[75]

Governor Florio suggested that I write him again, specifying the remedy sought. So I explained in another letter that we were seeking a remedy well within his power as chief executive of the state of New Jersey. I wrote in part:

> [T]he goal is seeing the name of Mrs. Hauptmann's late husband, Richard Hauptmann, cleared while she is alive. A proclamation would be for the purpose of removing any stigma and disgrace from Mr. Hauptmann, his family and descendants, and the state of New Jersey. I would like for you to review the evidence I possess establishing the innocence of Mr. Hauptmann.
>
> If you will not even meet briefly with my client, then it would be absurd to hope that you would fairly consider the exculpatory evidence I have amassed. Specifically, you should recognize by proclamation or executive order that, based upon newly discovered evidence from governmental files, Mr. Hauptmann did not receive a fair trial and was innocent. Only the executive branch of government can act, since Mr. Hauptmann's death and the passage of so much time foreclosed the availability of the judiciary.

Next, I explained the nature of the evidence that I had discovered throughout my investigation. I then wrote:

> It should be understood that we are not asking you to function in any capacity other than that as the chief executive official of the State of New Jersey. There is no other appropriate forum. You are empowered to issue executive orders and proclamations. We are not seeking a pardon, because that could be construed as carrying "an imputation of guilt."[76] Since Mr. Hauptmann is dead the present situation raises neither the direct nor collateral consequences of a conviction, but rather the more general social implications. It has been said that "[e]verybody knows that the word 'pardon' naturally

74. Letter from Mrs. Anna Hauptmann to James Florio, Governor of New Jersey (May 21, 1990) (on file with author).

75. Mrs. Hauptmann explained at the press conference that "I wanted to talk to [the Governor]. I wanted to tell him the truth. He knows the truth already. They all know the truth. That my husband Richard was innocent. . . . Why are they all so afraid in New Jersey? They can ask me any questions they want. I'm not afraid. It's the truth, and that makes me strong. . . . And that's why God keeps me in this world. To fight. The [G]overnor has no time for Anna Hauptmann. Why not? Is he afraid? I know why. They are afraid of the truth." *See* Vitez, *Hauptmann Widow Turns to Florio to Clear Her Husband's Name*, Phila. Inquirer, June 13, 1990, at 1-E; *see also Hauptmann Widow Pleads to See Florio*, N.Y. Times, June 13, 1990, at B3; Perkiss, *Hauptmann Widow's Plea: Asks Meeting with Florio*, Trenton Times, June 13, 1990, at A1; *Widow Won't Give Up*, USA Today, June 13, 1990, at 2A.

76. Burdick v. United States, 236 U.S. 79, 94 (1915) (A pardon "carries an imputation of guilt; acceptance a confession of it.").

connotes guilt as a matter of English."[77] Consequently, to grant Mr. Hauptmann a "pardon" would not only not have the desired consequences, but would in fact be taken to be an expression of a sentiment precisely contrary to that sought.

. . . .

That pardoning appears not to be the appropriate remedy for this situation does not mean that the State of New Jersey is without power to take any action. Since Mr. Hauptmann suffered the supreme legal punishment, there is no lingering legal consequence of his conviction. The only thing that can be done is to attempt to remove the stigma placed on him by the conviction and execution. It is, however, of great importance that this be done both as a simple matter of justice, and, equally important, as a matter of clearing the record of New Jersey insofar as that is possible. . . .[78]

The governor is the supreme executive magistrate of the State of New Jersey.[79] As such you may take the lead in voicing the position of the State on matters of great public moment. New Jersey governors have long issued proclamations to call public attention to important matters and occasions.[80]

The government has still not admitted its error in this case. However, the public,[81] prominent scholars,[82] and writers[83] have all recognized that an injustice of outrageous proportions has occurred. Even at the age of ninety-three,

77. Williston, *Does Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647, 648 (1915); Wehofen, *The Effect of a Pardon*, 88 U. PA. L. REV. 177 (1939).

78. There is a trend in the direction of a dignified closing of unfortunate incidents of history. The pardon of Tokyo Rose and the restoration of citizenship to Robert E. Lee and Jefferson Davis represent this trend for the nation. In Massachusetts, the legislature has resolved that "no disgrace or cause for distress" exists for Ann Pudeator, executed in 1692 for witchcraft, and her descendants, c. 145, Resolves of 1957; and the Massachusetts governor on August 25, 1976, issued a proclamation which revoked the 1637 banishment of Anne Marbury Hutchinson.

79. "The executive power shall be vested in the Governor." N.J. CONST. art. V, § 1.

80. For example, on October 9, 1981 Governor Brendan T. Byrne issued Executive Order No. 110, directing "[t]he Superintendent of the State Police to make the investigative files, records and exhibits within his custody relating to the investigation of the Lindbergh kidnapping available to the public . . ." That was in response to an action filed September 14, 1981 by Mrs. Hauptmann seeking access to the subject material. Hauptmann v. Byrne, No. L 582581 PW, Hunterdon Super. Ct. Also, in 1977, the Governor of Massachusetts issued a proclamation regarding the prosecution and execution August 23, 1927 of Nicola Sacco and Bartolomeo Vanzetti. It outlined the circumstances surrounding the trial, noted the mob hysteria and questionable conduct of the officials involved in the case, and declared that all stigma and disgrace be removed from Sacco and Vanzetti. Proclamation of Michael S. Dukakis, Governor of Massachusetts, July 19, 1977.

81. In the past ten years, the Author has received thousands of letters and telephone calls from people throughout the world. With rare exception, they have been extremely supportive of the effort to posthumously exonerate Richard Hauptmann.

82. *See, e.g.*, Bedau & Radelet, *supra* note 2, at 124-25.

83. *See, e.g.*, L. KENNEDY, *supra* note 5; A. SCADUTO, *supra* note 5.

the resolve of Mrs. Hauptmann to see the name of her late husband cleared has not diminished. Her unshakable enthusiasm is an impetus to my efforts.

We continue to press the executive branch of government to admit the wrong which occurred in this case. This has included my meeting with a member of Governor Florio's legal staff on April 6, 1991. Pursuant to an agreement with that office, I later forwarded a thirty six page memorandum outlining highlights of exculpatory evidence discovered in government files. Unfortunately they were unresponsive to our pleas.

On October 4, 1991, Mrs. Hauptmann returned to Flemington, New Jersey, the scene of that awful trial in which a court said her husband must die. It had been fifty-six years since she was last there and heard the mob rejoicing that the Lindbergh crime had been "solved." Across the street from the courthouse in the Union Hotel, where the jury and the press had stayed in 1935, we again pled for the governor to meet with Mrs. Hauptmann and publicly acknowledge this miscarriage of justice.[84]

Miscarriages of justice certainly are not new to our legal system. Yet, history continues to repeat itself with often tragic results.[85] What happened to Richard Hauptmann can and does happen in current times. A few innocent condemned are lucky enough, however, to eventually escape the executioner.

II.
THE MAN WHO WANTED TO DIE

On May 8, 1981, Jerry D. Bigelow was convicted of murder and sentenced to death in Merced County, California.[86] The jury found him guilty of first degree murder, with the special circumstances of having committed the

84. *See, e.g.*, McDonald, *Hauptmann Widow, 92, Seeks Reprieve in Lindbergh Case*, Courier-News (Bridgewater, N.J.), Oct. 5, 1991, at A1; Roth, *Hauptmann's Widow Returns With Appeal to Clear Husband*, The Express (Easton, Pa.), Oct. 5, 1991, at A1; King, *Defiant Widow Seeks to Reopen Lindbergh Case—Mrs. Hauptmann Pleads to Reopen at Site of 1935 Trial*, N.Y. Times, Oct. 5, 1991, at L24; Ackermann, *Hauptmann's Widow Begs Florio for Justice*, The Press (Atlantic City, N.J.), Oct. 5, 1991, at A4; Zegart, *Widow Presses Hauptmann Claim — She Rips N.J.'s Stance in Case*, The Times (Trenton, N.J.), Oct. 6, 1991, at A1.

85. *See* Bedau & Radelet, *supra* note 2, at 72-75. It is now known that at least 23 people have been executed in this century who were actually innocent. *See also* CONVICTING THE INNOCENT, WRONGFUL NEW YORK STATE HOMICIDE CONVICTIONS 1965-1988, A PRELIMINARY REPORT (1989); H. EHRMANN, THE CASE THAT WILL NOT DIE: COMMONWEALTH VS. SACCO AND VANZETTI (1969); J. FRANK & B. FRANK, NOT GUILTY (1957); GARDNER, THE COURT OF LAST RESORT (1952) (an account of an investigation into cases of men who claimed they had been wrongfully convicted of murder); I. GRAY & M. STANLEY, A PUNISHMENT IN SEARCH OF A CRIME (1989); D. KILGALEN, MURDER ONE: WHEN JUSTICE TOOK THE DAY OFF (1967); A. KOESTLER, REFLECTIONS ON HANGING 105-34 (1957); J. POLLACK, DR. SAM — AN AMERICAN TRAGEDY (1972); E. RADLIN, THE INNOCENTS (1964); S. SHEPPARD, ENDURE AND CONQUER (1966) (the story of the author's wrongful conviction for the murder of his wife, and his later acquittal); Donnelly, *Unconvicting the Innocent*, 6 VAND. L. REV. 20 (1952); Ehrman, *supra* note 3, at 17-19; Gardner, *Helping the Innocent*, 17 UCLA L. REV. 535 (1970); Gardner, *The Court of Last Resort*, 44 CORNELL L.Q. 27 (1958); Hirschbert, *Wrongful Convictions*, 13 ROCKY MTN. L. REV. 20 (1940); MacNamara, *Convicting the Innocent*, 15 CRIME & DELINQ. 57 (1969); Pollak, *The Errors of Justice*, 284 ANNALS 115 (1952).

86. Following jury verdicts of guilty and finding the existence of special circumstances, the

murder for the purpose of avoiding or preventing a lawful arrest, and while engaged in the commission of a robbery and kidnapping.[87] Jerry had confessed ten times that he had committed the particularly brutal execution-style murder. Throughout the appellate proceedings, Jerry flooded the California Supreme Court with motions, petitions, and briefs seeking dismissal of the appeal and demanding to be executed.[88] After the conviction was reversed,[89] Jerry filed more pleadings asking for reinstatement of the death judgement. He insisted that it was his right to be executed.[90] He had even twice attempted suicide.

During the four years on death row in San Quentin Prison, Jerry gave a number of interviews in which he bragged of having committed the execution-style murder. He even wrote a prominent San Francisco newscaster boasting of his responsibility for the homicide and making the taunting observation that the authorities would never kill him.[91] To ensure that the letter received proper recognition, he sent a copy of the letter to the Attorney General of California.

Back in Merced County for retrial, Jerry went through a series of defense attorneys. The musical chair-like drama added to his already well earned reputation as a difficult client, who could not get along with lawyers. The court was becoming increasingly exasperated over its inability to find suitable counsel for the accused.

In the summer of 1985, almost six months after his return to Merced County, Jerry called my office requesting I represent him. My initial reaction was that it must be a joke. Jerry's reputation as a man who wanted to die was widely known. He was a lawyer's nightmare, and seemed to be a walking argument for the death penalty. His case was used by death penalty propo-

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defendant was sentenced to death May 8, 1981. People v. Bigelow, No. 10395 (Merced Super. Ct. 1981).

87. People v. Bigelow, 37 Cal.3d 731, 741, 691 P.2d 994, 999, 209 Cal. Rptr. 328, 333 (1984).

88. *See, e.g.*, Petition for Writ of Habeas Corpus at 2, *Bigelow*, 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 320 (Crim. No. 22018) ("[P]etitioner hereby waives any claim or right to said automatic appeal and asserts his unequivocal right to have the judgement of death enforced forthwith."); Motion for Speedy Appeal at 1-2 ("[A]ppellant hereby moves the Court to . . . [d]ismiss the appeal; and . . . affirm the conviction and execute the judgment of death.").

89. The conviction was reversed on December 27, 1984, due to the failure of the trial court to consider appointing advisory counsel for the indigent defendant, who was functioning in propria persona. *Bigelow*, 37 Cal. 3d at 744, 691 P.2d at 1001, 209 Cal. Rptr. at 335. Justice J. Broussard observed that "[w]hat we know from the record is that Bigelow, representing himself, proved totally incompetent as a defense attorney, and that this trial of a capital case could rightly be described as 'farce or a shame.' " *Id.* at 745, 691 P.2d at 1002, 209 Cal. Rptr. at 336 (quoting People v. Ibarra, 60 Cal. 2d 460, 464, 386 P.2d 487, 490, 34 Cal. Rptr. 863, 866 (1963).

90. *See, e.g.*, Declaration of Jerry Douglas Bigelow in support of Motion to Reinstate the Judgement of Death Vacated as a Result of an Automatic Appeal at 1, *id.* ("It is my desire that said judgment, which constitutes a sentence of death, . . . be reinstated."); Memorandum In Support of Motion and Declaration at 7 ("[A]ppellant . . . hereby moves the Court to vacate its judgment and reinstate the judgment of death. . . . [and] to issue the remittitur and transmit it forthwith . . . so that a date for appellant's execution can be set.").

91. *See infra* note 105 and accompanying text.

nents as an example of why society must have more conservative courts which would facilitate more and speedier executions.[92]

In spite of all this, I decided to meet with Jerry. My intention was to convince him that there were reasons to fight the case and live. I intended to make a referral to good counsel in the Merced area of California.

The meeting was not what I had expected. Jerry was a soft-spoken man who simply wanted high calibre representation. He could not understand why the poor could not have the best possible counsel as the rich do. He just wanted help in what appeared to be an impossible case to win.

During the drive back to San Francisco I gave a young lawyer from my office all the reasons why we should not take the case. I was too busy, no one could make the slightest difference, the guy had destroyed any chance of success with his statements, and for years he had fought all lawyers in a quest to die. Finally the associate turned to me, smiling, and said, "You're taking the case aren't you?" And so I became Jerry Bigelow's lawyer.

Based upon the evidence known at the time, it was a foregone conclusion that Jerry committed the homicide. If the many confessions were not enough, the evidence from other witnesses overwhelmingly indicated guilt. Without question, he had committed armed robberies both before and after the killing. Jerry was even driving the dead man's car when arrested in Arizona. This followed a robbery in which the clerk had been placed in a walk-in refrigerator. There was no factual defense, and little sign of remorse which could be used at a penalty phase. Clearly, it would take a miracle just to keep Jerry Bigelow out of the gas chamber.

The initial strategy was to ascertain not so much what occurred, but rather why it happened. What motivated my client to execute a defenseless human being in cold blood? Was there any reason for the commission of such a senseless act? Seeking answers involved procedures we employ in all capital cases, regardless of the intended defense: conducting an in-depth psychiatric and psychological evaluation of the client and a comprehensive background investigation. My approach was geared towards psychological defenses, such as diminished capacity or insanity, and the development of mitigating evidence. The entire factual inquiry related to who Jerry Bigelow was, not what

92. *See The Case Against the Bird Court — Jerry Bigelow*, Citizens for Truth Newsletter, Nov. 5, 1985, at 4; *Defiance on Death Row*, Campaign to Defeat Rose Bird News Update, at 2 (includes a copy of Bigelow's letter to a newscaster in which he claims responsibility for the murder and taunts society to execute him). California Chief Justice Rose Bird, Justice Cruz Reynoso, and Justice Joseph Grodin were removed from office in the Nov. 4, 1986 judicial retention election. Pro-capital punishment advocacy organizations in the campaign to unseat the judges focused on the high reversal rate of the court in death penalty cases. Their successful argument was that the targeted justices were not enforcing the law, but rather were adhering to their own personal view regarding capital punishment when they reversed cases. Grodin, *Judicial Elections: The California Experience*, 70 JUDICATURE 365 (1967); Poulos, *Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California*, 23 U.C. DAVIS L. REV. 157, 208-20 (1990); Wold & Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987).

he had done. I was searching for evidence which might mitigate the punishment, feeling that the best we could hope for would be to save his life.[93]

The probe into the client's mind was progressing well. The elements of a viable psychiatric defense were beginning to surface — but something was missing. Maybe it was a sixth sense coming from years of representing many capitally charged clients, but I was starting to feel that Jerry was innocent. When I even hinted at this prospect, associates recoiled in dismay and shock. But the nagging feeling, a hunch, persisted.

Finally I decided to cast aside all preconceived notions about Jerry's guilt or innocence. I would investigate the homicide from the beginning as if it just occurred, with little information other than what was known from the crime scene. I called associate counsel Gayle A. Gutekunst to tell her about the new strategy. She listened, humored me, and politely said goodbye. No one at this early point seemed to share my suspicion of Jerry's innocence.

In the ensuing months, I found myself absorbed in the investigation.[94] It led to bodies buried in the Gila Bend Wilderness of Arizona, a drug killing near New Orleans, the murder of a prostitute in Florida, a shoot-out in a back street of Sacramento, the inner workings of a drug cartel which involved a Damon Runyon assortment of characters, interviews spanning this country and Canada, and even the participation of a priest to help me get the truth out of a prisoner in Colorado. But an interview with a former gun runner in Texas was the first big break. He revealed the true identity of the killer. I called an associate from the airport. My excited message was simple: "He's innocent, he didn't do it." The impossible was becoming reality. A man who appeared guilty from every angle, was innocent.

Our work was far from over. But now I was armed with the knowledge that my client was innocent. Building a convincing defense, which would result in a jury understanding and believing that an innocent man would brag of committing a heinous murder, would be an enormous task. This was a man who did in fact commit a series of violent crimes both before and after the murder. Even some of our staff, who were quite fond of Jerry, found it nearly too much to swallow. I had to find a way to reach the hearts and minds of the jury, to make them realize that sometimes truth is stranger than fiction. The key seemed to lay in their coming to understand my client's background and mind, and the motivation of the actual killer.

The second trial of Jerry Bigelow began February 20, 1988 in the Monterey Superior Court.[95] The evidence presented by the prosecution was even

93. In California, if one is convicted of first degree murder with a special circumstance, the jury must decide whether she will be sentenced to death or life imprisonment without any possibility of parole. CAL. PENAL CODE § 190.1-.3 (Deering 1989).

94. My late investigator, Paul D. Anderson, Esq., shouldered the bulk of the work. Patrick M. Buckman and Linda M. Cassell also made invaluable contributions to the success of the investigation during the early phase.

95. The case was transferred to Monterey County for trial pursuant to a change of venue. It had been determined that the accused could not receive a fair trial in Merced County due to

stronger than the already overwhelming case presented during the first trial in 1981. In the seven years between trials, the evidence against Jerry had grown immensely. Now there were not just a few confessions, but ten. The arguments against him were simple. He was an admitted robber and killer and should be exterminated. Absent what I had uncovered, few would probably disagree with his culpability.

Most of the salient facts were not in dispute. In 1980, Jerry Bigelow was serving a sentence for robbery in the Calgary Correctional Institution. That summer he and another convict, Michael R. Ramadanovic, escaped from the prison. After being driven across the Canadian border by female friends, they hitchhiked across the Northwest. The two embarked on a crime spree which included robbery, burglary, and the use of stolen credit cards. By the end of July, they had reached Sacramento, California.

Ramadanovic was finally arrested after using a stolen credit card to purchase clothing in a department store. Jerry eluded identification and made his way to Los Angeles. Responding to pleas for help, the girlfriends made the long journey from Canada to Sacramento. One bailed Ramadanovic out of jail by leaving her automobile as collateral.

Jerry eventually rejoined Ramadanovic in Sacramento, and the two resumed their crime binge. They burglarized an apartment and stole a variety of items including a .38 caliber revolver. They used that weapon to rob an elderly woman operating a Sacramento dry cleaning store. According to later statements to a detective, my client took the woman to the back of the store at gunpoint and forced her to lie down. A few days later they broke into a car and took a wallet containing money and credit cards.

According to the prosecution, on August 24, 1980, the two young men decided to hitchhike, with the goal of robbing the driver of his car and money. John Cherry, traveling with his dog from northern California to Modesto, picked them up in Sacramento. Upon reaching Modesto, a revolver was pulled and he was instructed to drive to Los Angeles. After passing through Merced, the driver was told to pull off of the highway. They drove about a mile through farmland and then pulled into a cornfield. Cherry was taken out of the car and escorted deep into the field, where he knelt or laid down. As he was begging for his life, one shot was fired into his head. Death was probably instantaneous.

The men then returned to Sacramento in the dead man's car, taking his dog with them. After picking up their female companions, they drove to Los Angeles. Later one of the women testified that Jerry said to Ramadanovic, "I don't see why you're so upset, I shot him, not you."[96] He claimed to have sent

prejudice. The orders for the venue change were rendered March 20 and April 7, 1987, by the Honorable Donald R. Fretz, Merced. People v. Bigelow, No. CR12701 (Monterey Super. Ct. 1988).

96. Reporter's Transcript of Proceedings at 2559, People v. Bigelow, No. CR 12701 (Monterey Super. Ct. 1988) [hereinafter Trial Transcript] (testimony of Karen Lynn Heddle).

Ramadanovic back to the car to get rope, and then fired the fatal shot.[97]

Eventually the four drove into Arizona where they split up. Ramadanovic left on foot, taking the dog. One of the women took a bus back to Sacramento. On August 29, 1980, Jerry robbed a grocery store at knifepoint in Seligman, Arizona.[98] After taking 160 dollars, he placed the female proprietor in a walk-in refrigerator. A short time later he was arrested by the Arizona Highway Patrol, still driving the dead man's automobile.[99]

The body of John Cherry was discovered by a farmer in the Merced County corn field on October 9, 1980.[100] The autopsy determined that the cause of death was a single shot above the right ear[101] which could have come from the .38 caliber revolver taken during one of the burglaries committed by the Canadian escapees.[102]

The prosecutor urged the jury to take my client's confessions at face value. In the opening argument, he looked at the dead man's sister, who was sitting in the front row of the courtroom, and reminded the jury that justice was at stake. He told of the body finally being discovered, after being hidden in tall rows of corn. Dramatically pointing to my client, the prosecutor said that there sat the one who fired the fatal shot and then fled in the dead man's vehicle. He put his left hand on his forehead, palm forward, to demonstrate how Cherry lay with his hand under his head in the corn field. "He was forced to lie down and he was executed. . . . Why was John Cherry's life terminated at the age of 26? Because the defendant and his buddy needed a car."[103] Large charts listing the various confessions were displayed to the jury.

As I rose to respond, my task of saving Jerry seemed nearly impossible. The jurors appeared entranced by the confessions. They continued to stare at the prosecution exhibit cataloging the admissions. Compounding the problem were inescapable reminders that this was a retrial, that Jerry had already been adjudged guilty by another jury.

It was clear that for the jurors to keep an open mind they had to glean some insight into Jerry Bigelow as a person. It was essential for them to feel some of the pain that led to this young man sitting there on trial for his life.

The jurors were told of the horror of his youth. They learned of the pain which followed him into adulthood. I laid out Jerry's history. Their eyes were directed to a scar on his neck, where Jerry once slashed glass into his

97. *Id.* at 2562-63 (testimony of Karen Lynn Heddle).

98. *Id.* at 2772-78 (testimony of Mary Allen Giles).

99. *Id.* at 2261-63 (testimony of Roy Olson, former Arizona Department of Public Safety Highway Patrolman).

100. *Id.* at 2435-36, 2442-43 (testimony of John Harris, Merced County Deputy Sheriff).

101. *Id.* at 2289 (testimony of Dr. Grant P. Carmichael).

102. *Id.* at 2427-28 (testimony of Stephen John O'Clair, Criminalist, California Department of Justice).

103. *Id.* at 2113 (prosecution opening statement).

throat in an effort to escape the hell of death row.[104] They learned of the ordeal he went through, seven years earlier in the first trial, because he had no money to hire a good lawyer. Broken in spirit, he saw the death penalty as an escape from pain. The gas chamber was a way out.

Jerry had arrived on death row lonely and frightened. Death seemed more attractive than the torture of many years on death row.[105] He did just about everything possible to stop the pain.[106] When his pleas to the California Supreme Court to dismiss the appeal and allow the execution to proceed did not work, he began a concentrated effort to antagonize the authorities into capitulating to his death demands. To a San Francisco reporter Jerry candidly revealed why he really wanted to die:

> You know, it's like a father and son. The boy does something wrong and the father says go into the room and wait for me. The boy goes into the room and waits and waits. It's better to get the whipping than to wait, not knowing what's going to happen. Only here, it's not a whipping, but death. But really, the terror is the same.
>
> Part of me is being killed bit by bit in an agonizingly slow torture.
>
> . . . .
>
> I was just thinking last night of the time machine concept. When I came to California and ended up in prison, it was like going back in time a long way, long way. To an inhuman time in history.[107]

He spoke to television and newspaper reporters, boasting of having committed the murder. There was a Hustler magazine interview.[108] To one reporter, he said that he committed the murder so there would not be a witness to later make an identification.[109] He bragged to the media that he wanted to see how it felt to take a life.[110] He wrote to a prominent newscaster, tauntingly claiming responsibility for the killing and daring officials to execute him:

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104. *See* Written statement of Jerry D. Bigelow (July 15, 1982) (detailing two of his numerous suicide attempts).

105. *See, e.g.*, Letter from Jerry D. Bigelow to Chief Justice Rose Bird, California Supreme Court (Dec. 14, 1981) ("I also hereby elect to forego and dismiss the automatic appeal and have the judgment of the superior court enforced forthwith: death in the gas chamber. I have no desire or inclination to spend many years on death row . . . .").

106. A suicide note, dated February 14, was found on Bigelow's bunk after he was admitted to the prison hospital for an overdose of an unknown substance. "Well, I will now say bye-bye." *See* Calif. Dept. of Corrections Classification Reports, March 4, 1982, March 2, 1982.

107. Carlsen, *Two Death Row Killers Demanding to Die*, San Francisco Chronicle, May 31, 1983, at 1; *see also* M. Conway, *Killer Wants It 'Over And Done With'*, Merced Sun, June 1, 1983, at 1.

108. Hunter, *Condemned to Die — The Hell of Death Row*, Hustler, Aug. 1983, at 50.

109. Leydecker, *Waiting For a Date with Death*, Independent Journal, July 9, 1984, at 1 ("I realized that the cops would be looking for his car . . . I thought I'd best shoot him.").

110. *See* Beasley, *Killer Seeks Freedom — San Quentin Hellhole Changed Man's Life*, Calgary Sun, Apr. 16, 1985, at 5 ("I told the media I did it because I wanted to know what it was like to kill someone. But it was just circumstances.").

> I am writing this in the hope that with it you will fan the fire of controversy that now surrounds California's (unused) "Death Penalty".
>
> To start with, I am guilty of everything that I have been charged with; and yet, even though this would have traditionally led me to San Quentin's green "Gas Chamber", it won't now, because today's society only wants to know if I ate "twinkies" before I did the killing, or if I am "normal", which I would not be if I am a killer.
>
> Or they will place all importance on "procedural errors" (of which there are many in my case; this I know, as I put them there while representing myself). Yet, time and again, they cry that no one is being killed in their green "Gas Chamber".
>
> Well, I do not like to sit on "Death Row" year after year with a bunch of undecisive people in control of my future, so I have decided to call your bluff. If you think that you can kill one who is completely guilty (me) then go on and try. I think that even though I am guilty, you will not be able to kill me legally.
>
> My suggestion to you is that you all go back to playing your little games and that you quit trying to act big by trying to kill people when you know you can't.[111]

Even in the period between reversal and my entrance into the case, there was a television interview. Off camera, but within ear shot of a police official, he said to a news reporter, "Yes I killed him, I don't know the reason, but I did."[112]

I told the jurors that the earlier jury could not be faulted for returning a guilty verdict. They really had no choice, since no defense was presented. Now, for the first time, the entire truth would be revealed. My investigation established that Jerry did not fire the fatal shot. He had been dominated by the older and larger Ramadanovic, and because this dominance resonated with patterns established early in his life, he was easily led into taking blame which properly fell to the other man. Ramadanovic, after making a deal with the prosecution for a life sentence, had a good laugh when Jerry was sentenced to die.

The defense actually began during the presentation of the prosecution's evidence. As witnesses were paraded into court, my cross-examinations established that there were reasons Jerry made such outlandish claims which had nothing to do with being guilty.[113] Jerry Bigelow was considered the runt of

111. Letter from Jerry D. Bigelow to Wendy Tokuda, KPIX TV-5 television station, San Francisco, with copy to Roger E. Venturi, Deputy Attorney General of California (Oct. 6, 1983) (on file with author).

112. *See* Report of T. Roark, Merced County Marshall's Office (Aug. 12, 1985) (reporting conversation he heard between Jerry Bigelow and a television news reporter).

113. Later we demonstrated that the codefendant, Michael Ramadanovic, plead guilty,

the family, an unwanted child upon whom a disturbed father's frustrations and aggressions were released. When things were amiss, such as a small amount of money disappearing from a dresser, Jerry was invariably the child accused of being the culprit. His father then inflicted beatings, demanding admissions of guilt. Jerry was regularly punished from a young age. As punishment, he was frequently tied and whipped with a leather strap so severely that his screams became guttural moans. There were brutal episodes so emotionally wrenching that his mother and the other children would run out into the snow to escape the agonizing cries and sounds of leather cutting into flesh. Later, his mother would console her wounded and suffering child by giving him drugs to alleviate the pain.

Jerry learned at an early age that a confession, even when he was blameless, resulted in a lessening of the severity and duration of the beatings. A pattern developed in his life which taught that the best way to deal with accusations and pain was to admit responsibility, irrespective of culpability. This pattern was well ingrained in the child's behavior as he grew into adulthood.

Fred Rosenthal, a forensic psychiatrist, explained at trial that "Jerry's childhood, I think, ranks among the worst you can imagine." He described Jerry's many claims of having committed the murder as a continuation of the pattern established years earlier at home.[114] Moreover, it was revealed by Anne Evans, a clinical psychologist, that "if everyone around you is punishing you . . . and parents are telling you that you're bad, what happens is that the child begins to believe, yes, I must be bad. . . . I simply do not put a lot of stock in the statements he made. . . . He said he did things which he never did. It's something that he learned to do since he was a little child."[115]

While still quite young, Jerry fled his "home" seeking a better life. The predictable result was continual trouble with the Canadian legal system. Every time there was a criminal charge, he made a prompt confession of guilt. Interestingly, he did not commit every crime for which there followed confession and punishment. Finally in 1980, Jerry was placed in a Calgary prison for robbery.[116]

Throughout the murder trial, despite indications that Jerry's confessions to the Cherry murder were not reliable, there was still an abundance of independent evidence indicating his guilt. For instance, when arrested, Jerry had been driving the automobile of the deceased. In addition, he and Ramadanovic were together at the time of the homicide; he had possessed the murder weapon; and there was the pattern of crimes both before and after the shooting.

Yet, despite these circumstances, our new evidence established that the

inter alia, to the murder on July 27, 1981. He was sentenced to life without possibility of parole. People v. Ramadanovic, No. 10662 (Merced Super. Ct. 1981).

114. Trial Transcript, *supra* note 96, at 3274, 3277, 3280.

115. *Id.* at 3416, 3572, 3576.

116. In the Calgary Correctional Institution he met Michael Ramadanovic. They escaped together on July 18, 1980. Calgary Correctional Institution Incident Report, July 18, 1980.

murder was actually committed by Ramadanovic. At the time, Jerry was unconscious in the back of the car, having overindulged in beer and marijuana. My initial discovery in Texas, over a year prior to the retrial, revealed that Ramadanovic discussed having committed the murder with many people, mostly prison inmates, over a seven-year period. The statements of the inmates were quite astounding because the descriptions given were nearly identical to the circumstances surrounding the homicide, fitting it like a glove.

We located a witness in the Colorado State Prison, seven in the Florida Penal System, as well as one from Texas. These witnesses revealed that Ramadanovic fired the fatal shot, and that Jerry was totally oblivious to the happenings around him at the time. The killing apparently resulted from a drug transaction between Ramadanovic and Cherry. Cherry was a drug runner, and Ramadanovic quickly recognized their meeting as an opportunity ripe for exploitation. Money and drugs were the primary subject discussed as the car proceeded south, with Jerry and the dog asleep in the back seat. Not only did Ramadanovic later describe the murder in detail, he expressed regret at not having killed Jerry. Ramadanovic remembered Jerry as being a wimpy type, who upon learning of the homicide became tearful. This was in stark contrast to the image being presented by the prosecution.

As one prisoner[117] explained the story Ramadanovic told regarding the crime:

> Q. Did he seem to enjoy talking about it?
>
> A. Yes, sir.
>
> Q. Where did he say Jerry Bigelow was, if he did, at the time this shooting happened?
>
> A. He said he was passed out in the back seat of the car, on a high.
>
> Q. Now, did he tell you whether or not he stole — he, Ramadanovic, stole anything, took anything that belonged to the guy he killed execution style?
>
> A. Well, he told me that was the reason that he was taking him out here and putting the gun on him, trying to find out where his stash was, because he thought the guy had some dope and some money.
>
> Q. Did he tell you why he thought the guy might have some dope and some money?
>
> A. Because they were talking about it the whole time that he was riding in the car with him.
>
> Q. He and this guy were talking about it?
>
> A. Yeah, in the front seat.

117. The Author has not identified the prisoners referred to in this Article in order to protect their privacy, as all are still incarcerated.

Q. And where did he say Jerry was when he and that guy were talking about dope and money?

A. Passed out in the back seat.

Q. Did he say why Jerry was passed out in the back seat?

A. That he was — he had a good high going.

Q. What does "good high" mean?

A. He said he was drunk and smoking reefers, pretty blasted, you know.[118]

Another inmate recalled:

Q. Then what did he say happened? They are going down the highway, smoking dope and drinking?

A. Yes. They was riding down the highway and then during some point in time during their journey, conversation came up about purchase of some drugs.

Q. Who was talking about the purchase of the drugs?

A. Mike said that the driver approached him and asked him was he interested in buying a limited quantity of marijuana and cocaine.

Q. And what did Mike say when the person who was killed, the driver, asked him if he was interested in buying these drugs? What did Mike say happened then between the two of them?

A. Well, they got to talking about the price and how much. And at one point in time they pulled over to the highway at this corn patch, cornfield, whatever you call it. And that's when they got out to talk about and look at the drugs which was in the trunk of the car.

Q. And did he say he — Mike Ramadanovic and the driver got out to look at the drugs?

A. Yes, he did.

Q. Now, where did he say Jerry was, if he did say, during this time?

A. He said that he was knocked out in the car, asleep or something.

Q. What did he say, if he did say, Jerry had been doing to knock him out or put him to sleep?

A. Well, during the journey in the car they had all been smoking marijuana and drinking the beer.

Q. All right. So the person who was killed — his name is Mr. Cherry, so I will call him Mr. Cherry. Mr. Cherry and Ramadanovic got out of the car to check on some dope in the trunk. And then what did Ramadanovic say happened after that?

A. He conspired at that time to rob the guy and he pulled out

118. Trial Transcript, *supra* note 96, at 3764-65.

his pistol or whatever weapon he had. He had a gun. And he told the guy — Mr. Cherry, I guess you say the name is?

Q. Right, Cherry.

A. That he was robbing him and he ordered him to go out into this corn patch, I guess you call it, with him.

Q. Right. And when Ramadanovic got Mr. Cherry out in the corn patch, what did he say happened then out there? What did Ramadanovic do?

A. He told him that he was thinking about just tying him up and leaving him there, but he didn't want to go through all that trouble of having to get the rope and do it hisself [sic], because he thought the guy he might have took the gun from him. So he just shot him on the ear, in the head, and left him there in the cornfield.[119]

It was revealed that after leaving my client in Arizona, Ramadanovic crossed the country committing a variety of crimes. These included stealing guns in Arizona, Missouri, Mississippi, and Florida; car thefts; and burglaries. Shortly before being arrested in Florida, he possessed nineteen sticks of dynamite, a .25 caliber automatic pistol, a .357 caliber revolver, a .22 caliber revolver, boxes of bullets, a twelve gauge sawed-off shotgun, numerous drugs, and a variety of stolen items including watches, a bag from the First National Bank of Nevada, stolen credit cards, rolled coins, and money from Mexico and Peru.[120]

I insisted that not only was Jerry Bigelow innocent, but also that prosecuting officials had refused to investigate the real culprit. Ramadanovic was a Rambo type, an aggressive figure, who armed himself with loaded guns and dynamite as if planning to take on an army. Jerry was a victim, as was the man killed in the corn field. The difference between the two victims was that Jerry's suffering did not cease in an instant, but lasted for years. He was a follower dominated by a stronger and more assertive individual, Ramadanovic, the true killer of John Cherry.

My final argument to the jury summed up the extensive evidence supporting my client's innocence:

Jerry's background is important because it explains a lot of things that result in his being here today. . . . [O]bviously his father did not want him, and his mother was not too overly joyed [sic] about this little bundle that came into their lives. We know that Jerry from a small age was beaten by his father. There's no dispute about that, whatsoever, as with much of this evidence. . . . His father would literally tie him and beat him so severely that other members of his

119. *Id.* at 3908-10.

120. Florida Department of Corrections Presentence Investigation Report at 2, Florida v. Ramadanovic, Court Volusia Cir. No. 80-2970-XX (1980).

family would go out in the snow to get away from hearing the leather or the cord hitting his bare skin, and his moans and his cries. And we know that these beatings weren't just something that happened every six months, every year, but they're things that happened very regularly.

And Jerry was accused of things that he didn't do. He was accused of things he did do. And Jerry learned to admit to whatever they accused [him] of. If the beatings are bad, at least they won't be as bad if I admit it. And they'll be worse if I don't admit it. And you've heard from his sister Kim, she said she was a bad child, she used to steal a lot of things. And she used to take things and Jerry would get the blame for them . . . he admitted them. He was always admitting to things I did and the other kids did. He took the blame.

And what happened in this case, is not only did Jerry admit constantly to doing things he didn't do, but then Jerry started doing some things to get some attention. So at least, hey, even if it's bad, bad attention is better than none. At least it's not a big fat zero. At least people recognize that I exist, I'm here. I occupy space on this earth. That I'm somebody.

And he started getting into trouble. And it doesn't justify what he did. Jerry for a moment doesn't say, oh, it was okay because I was beaten. He's not saying that, Mr. Prosecutor. And you misunderstood if that's what you think we're saying. And that's not what Dr. Anne Evans said. It's not what Dr. Rosenthal said. It's not what Dr. Sam Picciotto[121] said, sitting there who has been working with him, the psychologist. It's not what any of them say. It's not what Jerry says. It's not what I say. It's not what [Associate Counsel] Gayle [Gutekunst] says. What we say is, these are the facts which are important in understanding maybe why some of this happened, why he got involved with a character like Ramadanovic. And why we have these statements which go up and down and around, this variety of statements. . . .

And the prosecutor had the audacity . . . in his vigor, his zeal to win this case, to stand before you this morning and suggest to you that, well, little Jerry makes excuses. Little Jerry. Everybody makes excuses. Who, Mr. Prosecutor, would make excuses for him when he was raped in San Quentin for a murder he didn't commit? I would like to know who was making excuses for him when he tried to commit suicide with an older prisoner at San Quentin, at a place he shouldn't have been in the first place. And I want to know who

121. Sam Picciotto, a forensic psychologist, along with Vincent Schiraldi, Western Regional Director of the National Center on Institutions and Alternatives, made enormous contributions to the defense in preparing the case for trial.

was making excuses for him for four years — four, count them, one, two, three, four years on California's death row . . . the hell.

And to say that . . . Jerry, is asking for — making excuses for himself, he's pled guilty to everything he's ever been accused of except for this. And he finally gave up on this and said, okay, I did it. Just stop the pain. And we heard this from Dr. Evans. We heard some of this from Dr. Rosenthal. But Jerry, when he was on death row, maybe his father at that point became the system. Stop the pain, I don't want to keep living on death row, it's not worth it.

. . . .

And what part do these beatings have, this pattern that developed for year after year after year after year of his formative years as a child of being beaten and admitting to whatever he was accused of? And when he tried to do something different, when he tried to stand up on his own little two feet in 1981, without a lawyer, when that lawyer let him down and he finally ended up fending for himself, instead of the lawyer who was originally appointed for him, he went through thinking, for once in my life, I'll stand up and I'll fight for what's right. And he got slammed really hard. They hit him with a sledge hammer. Well, here we are, back to good old dad. All right, I shot him.

That's not good enough, I submit, ladies and gentlemen of the jury, to put somebody away and do to Jerry what the prosecution is asking you to do with him. It's not — it's just not good enough.

. . . .

Now, Jerry was a perfect person for Ramadanovic. I mean, here's this big guy. You say [sic] him early [sic] in the trial when we had him identified. And Ramadanovic, maybe it's wrong, it would not be appropriate for us, but put yourself in Jerry's shoes back at that time. Here's a guy who was somebody, he was exciting. And he gave Jerry some attention. He said, come on, go with me, I've blown this place before, I'm going to do it again. Come on and go with me. Oh, yeah, he recognized Jerry. He recognized Jerry as a human being, somebody who existed. And Jerry soaked it up like a dry sponge, soaking up water.

. . . .

. . . I was reviewing the other night . . . *Les Miserables* by Victor Hugo,[122] and it was a story about a man who went to prison for stealing a loaf of bread. And eventually he tried to escape. And that was wrong, that was against the law, and they gave him more years. And then he tried to escape again, and they gave him more years. And if there was a hell on earth, the man really lived it there in the

122. V. HUGO, LES MISERABLES (1862).

> dungeons of France. And it was the law, it was the proper thing to do. But it was wrong, it was unjust, what happened to that man. There are a lot of circumstances that put him in the situation of stealing that loaf of bread which resulted in his spending over 20 years in prison. . . . [A]t the very beginning Victor Hugo said something that I think has some application to this case. [W]hat Hugo said was that as long as there are laws which create hell in our civilization — hell for people like Jerry Bigelow — he said that as long as men are degraded, women abused, children afraid, he said as long as there's poverty, ignorance and wretchedness, stories like this must be told. And I think the story of Jerry's background had to be told to you on the jury to help give some understanding as to Jerry's circumstances in this case and what brought it about. . . . And again, we don't want your sympathy, we only want your understanding.
>
> . . . .
>
> And what we want out of this trial is one thing, and that is justice. We don't want any more, but we certainly do not want any less. And we don't expect any less. And we ask you to let Jerry walk out of here the way he walked in, and that's still shrouded in that cloak of innocence.[123]

Jury deliberations began on the afternoon of May 2, 1988. On May 9, 1988, not guilty verdicts for murder and the weapons-related charges were returned.[124] Still, the ordeal for Jerry was not over. In an action virtually unprecedented, the judge rejected the acquittal over my vigorous objections.[125] The jury had found that the murder occurred while my client was engaged in or an accomplice to a robbery and kidnapping. This confused the judge, since the case was being tried under the felony-murder rule,[126] which provides that if there is a murder and one helps commit the underlying felony, he or she is as responsible for the murder as the actual killer. The judge rejected the verdicts and sent the jury back into deliberations explaining that the acquittal verdicts were "not consistent."[127] The jury was told in effect that the not guilty decision was wrong. Two days after the rejection, the jury amazingly still had not yielded to the pressure. The foreperson sent a note to the court

123. Trial Transcript, *supra* note 96, at 4555-66.

124. Verdict of the Jury, People v. Bigelow, No. CR 12701 (Ca. Super. Ct. May 9, 1988).

125. Trial Transcript, *supra* note 96, at 4670.

126. The California Penal Code provides in pertinent part: "All murder . . . which is committed in the perpetration of, or attempt to perpetrate . . . robbery . . . is murder of the first degree. . . ." CAL. PENAL CODE § 189 (West 1988). In section 190.2 "[t]he penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found . . . to be true: (17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit. . . . [r]obbery. . . . [k]idnapping. . . ." CAL. PENAL CODE § 190.2 (West 1988).

127. Trial Transcript, *supra* note 96, at 4670.

requesting that the original verdict of acquittal be received: "Can we go with our original not guilty verdict?"[128] One hour and forty minutes after the judge suggested to the jury that it might be deadlocked,[129] the jury indicated it was in fact "hopelessly deadlocked."[130] Over continual objections, a mistrial was declared.[131] We moved that the court accept the murder acquittal verdicts rendered two days earlier. This resulted in a threat of contempt.

The jurors were outraged that their not guilty verdicts were rebuffed. Shortly after being discharged from jury duty, ten jurors submitted declarations to the defense expressing outrage over their decision being ignored.[132] Their frustration was succinctly expressed by a juror:

> [T]hrough the whole trial, on a *daily* basis, we were instructed that *we* were the judges. Yet when we rendered a verdict of *not guilty*, no matter how confusing our signals to the court were, we were *second guessed* and the verdict was not accepted. Why were we here? Why were we put through all of this? It's all for nothing if our first verdict does not stand on its own.[133]

The jury foreperson explained the unanimity of the verdicts:

> On May 2, 1988, we were issued copies of all instructions given by the Court, and verdict forms. We retired to the jury room to begin our deliberations.
>
> On May 9, 1988, we returned a unanimous verdict of "not guilty" as to the charge of murder. All jurors by secret ballot found the defendant, Jerry D. Bigelow, "not guilty" of murder. There was not enough evidence to convict the defendant of murder.
>
> Because Judge Paik instructed us to vote on each charge separately, we considered the robbery and kidnapping charges separately and returned guilty verdicts even though we agreed the defendant had nothing to do with the murder. The other jurors and I considered the robbery and kidnapping separate from the murder, so we saw no inconsistency in the verdicts. We also unanimously acquitted the defendant of all firearm possession and use charges.
>
> The two special circumstance paragraphs in the first verdict

128. *Id.* at 4748.

129. *Id.* at 4745.

130. *Id.* at 4752.

131. *Id.* at 4794. Even though it rejected the not guilty verdicts, the court accepted the verdicts as to Counts II and III originally returned on May 9, 1988 (the day the murder acquittal was first returned). The defendant was found guilty of robbery and kidnapping, but acquitted of being armed and using a firearm in connection with those charges and the murder. *Id.* at 4795-4804.

132. Appellee's Petition for Writ of Mandate or Prohibition at exhibits B-K, Bigelow v. Superior Court of Monterey County, No. HO04787 (Ca. Ct. App., 6th App. Dist. filed June 7, 1988) [hereinafter Appellee's Petition] (Juror Declarations).

133. *Id.* at Exhibit C (Declaration of Darrell Bunse, juror, June 1, 1988) (emphasis in original).

> form would not have been answered, if the Court had instructed us that those were not to be completed if there was an acquittal of murder. But the judge specifically instructed us to vote on each charge separately, so we followed his orders. Those paragraphs were not inconsistent as worded, since they simply said that the murder occurred while the defendant was engaged in a robbery and kidnapping. They did not state that he committed the murder, so there was no inconsistency.
>
> During the course of deliberations, I and the other jurors determined that the defendant had nothing to do with the murder of John Cherry. There was not enough evidence to convict the defendant of the murder. Yet, when Judge Paik rejected our unanimous "not guilty" verdict and gave us additional verdict forms, the other jurors and I became totally confused because we felt the defendant's guilt of the robbery and kidnapping had no relation or bearing upon his lack of involvement in the murder and we had simply followed the judge's instructions. That confusion became more apparent when the judge gave us a third verdict form.
>
> If there is another trial, the murder and weapons charges should be dismissed.[134]

Another juror summed up the feelings of the entire jury:

> I strongly feel that our first and original decision of not guilty by all 12 jurors should be law. We had all agreed in the jury room to this by secret vote.
>
> I also felt that if Judge Paik had given clearer instructions the not guilty decision would have been reached much sooner by all of us.[135]

After motions seeking reinstatement of the verdict were denied by the trial court,[136] we sought a writ of mandate from the California Court of Appeals.[137] During the January 19, 1989 oral argument, I pointed out to the justices that the rejection of the acquittal verdict was unprecedented. A deputy attorney general[138] contended the verdict was ambiguous, to which one justice retorted, "How can the words 'not guilty' be ambiguous?" Another queried, "What evidence do you need other than 12 jurors and a signed ver-

134. *Id.* at Exhibit E (Declaration of Paul E. Dickie, jury foreperson, May 31, 1988) (referring to instructions by the Hon. Harkjoon Paik, Monterey Sup. Ct.).

135. *Id.* at Exhibit J (Declaration of Gail Manteufel, juror, May 31, 1988).

136. *See, e.g., id.* at Exhibit M (Motion to Receive and Record Verdict of Acquittal to Murder Under Count I of Information); *id.* at Exhibit N (Notice of Motion to Record Verdict of Acquittal to Murder Under Count I of the Information, Or In the Alternative to Dismiss Count I); *id.* at Exhibit O (Amendment to Motion to Record Verdict of Acquittal to Murder, and Juror Declarations). The pleadings were heard and denied June 7, 1988. Trial Transcript, supra note 96, at 4816-63.

137. *See generally* Appellee's Petition, *supra* note 138.

138. Ronald Matthias, Deputy Attorney General.

dict?"[139] Finally on March 20, 1989 relief was granted.[140] The Court said: "We conclude that defendant is entitled to entry of a judgement of acquittal on the murder charge because under the circumstances presented here the trial court impermissibly mandated reconsideration of a verdict of acquittal."[141] It was recognized that the rebuffed acquittals sent a clear message to the jury:

> Further, the court twice rejected the verdict. This conduct greatly increased the probability of the jury's concluding that a verdict of acquittal was unacceptable and that it was under a mandate to convict. . . . The point is that a day and one-half after submission of the original acquittal, which purported to be unanimous, some jurors were still inquiring whether the verdict would be acceptable. The court essentially told the jury that it was not. Under the circumstances presented here, the eventual hung jury can only be viewed as the product of trial court conduct which the jury understood as rejection of its verdict.[142]

The decision attracted considerable attention, since it reaffirmed the sanctity of jury acquittals. Moreover, it paved the way for a victimized young man in a most unusual case to go home. As a respected San Francisco legal newspaper began its account of the decision: "Jerry Bigelow, who once confessed to being a killer, is on the verge of taking a rare walk from death row to freedom."[143]

After the state was denied review by the California Supreme Court,[144] the trial court was finally compelled to accept the jury verdict: "IT IS HEREBY ORDERED a verdict of the jury acquitting the defendant, Jerry D. Bigelow, of the crime of first degree murder, Penal Code Section 187 be entered into the above entitled matter."[145]

Ironically, Jerry sat on death row for over a year after being acquitted. Of the several thousand on death rows in the United States, he was the only one who had been acquitted of the murder which placed him in that position. Fortunately there were no more suicide attempts or outrageous statements.[146] On July 5, 1989 Jerry walked away from the shadow of the gas chamber and San Quentin.[147] A few days later he was deported to Canada.[148]

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139. Mintz, *Justices Question Trial Judge Decision to Declare Mistrial*, The Recorder, United Press Int'l. (Jan. 20, 1989).

140. Bigelow v. Superior Court, 208 Cal. App. 3d 1127, 256 Cal. Rptr. 528 (1989).

141. *Id.* at 1139, 256 Cal. Rptr. at 536.

142. *Id.* at 1137, 256 Cal. Rptr. at 535.

143. Mintz, *Sixth District Upholds Disputed Murder Acquittal*, The Recorder, March 21, 1989, at 1.

144. Bigelow v. Monterey County Sup. Ct., pet. for review denied (Cal. Sup. Ct., filed June 22, 1989).

145. Order of Jury Acquittal by J. Paik, 208 Cal. App. 3d 1127, 256 Cal. Rptr. 528 (June 28, 1989).

146. For an excellent description of the ordeal of Jerry Bigelow, see, Smith, *Not Guilty*, San Francisco Examiner, Image Mag., Oct. 30, 1988, at 21.

147. Mofina, *Bigelow Was Victim of Brutal Child Abuse*, Calgary Herald, July 9, 1989, at

Today Jerry Bigelow is free, living and working in Canada. He is seizing the opportunity given by the acquittal to reconstruct his life, put the past behind, and live as a contributing member of society.

CONCLUSION

Tragically, innocent people are executed. No one knows the frequency of such occurrences, or how many of the thousands of men and women sitting on death rows across America today are innocent. We just know it happens.[149] Since the dawn of human existence, those in authority have executed innocent people. Each gross injustice strikes at the heart of our nation and civilization.

A byproduct of a criminal justice system which allows executions is that, inevitably, innocent lives will be taken. The public sometimes learns the truth, but all too often, as with Richard Hauptmann, it is too late. There are many we will never know of who have been victims of the same type of errors, which plagued the Hauptmann and Bigelow cases. Usually the defendants are not famous, do not attract high calibre counsel, or are just unlucky.

Trials are human affairs, and thus imperfect. The loss of even one innocent life is a horrendous price to pay for maintaining a punitive system that is more expensive than the alternative of imprisonment, discriminates against the poor and people of color, and does not deter crime. Regardless of what improvements could be implemented in the judicial system, it will never be possible to guarantee that all who are innocent will be safe from the death

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A1; Morain, *Inmate Walks Away From Death Row After His Acquittal*, L.A. Times, July 6, 1989, at 3 ("Although the state Supreme Court has reversed 88 death sentences since capital punishment was reinstated in California 12 years ago, Bigelow is the only man once condemned to die who won a reversal from the high court and then was acquitted."); *Calgarian Freed From San Quentin's Death Row*, Montreal Gazette, July 6, 1989, at B-7, col. 2; *There Is Life After 'Death'*, The Province (Vancouver), July 6, 1989, at 20; Neary, *Bigelow Freed From Prison, Heads For Home*, The Salinas Californian (Monterey), July 6, 1989, at 1-C; Carlsen, *Confessed Murderer May Go Free Soon — Jury Found Him Not Guilty*, San Francisco Chronicle, June 24, 1989, at A-7; Morain, *Death Row Prisoner May Gain Freedom By Appeal Court's Ruling*, L.A. Times, Mar. 21, 1989, at I-3; Mintz, *Sixth District Upholds Disputed Murder Acquittal*, The Recorder, Mar. 21, 1989, at 1.

148. *Man Acquitted in Death Faces Deportation*, San Jose Mercury News, July 6, 1989, at 1C.

149. On September 26, 1991, just as this article was going to press, Warren McCleskey was executed by the State of Georgia. He admitted being one of the four men involved in a 1978 Atlanta robbery in which a police officer was killed, but strongly denied firing the fatal shots. Only Mr. McCleskey was sentenced to death. The evidence against him came from a jail informant who received a lighter sentence in exchange for his testimony, and an accomplice. Two jurors told the Georgia Board of Pardons and Paroles shortly before the execution that they would not have voted for death had they known of the deal made by the prosecution. As explained by Robert Burnette, a juror: "I believe if you take a life, death is the right punishment. But when you take that person's life you have to be sure beyond a shadow of a doubt that person committed the crime, and I don't feel that way about this case. If we knew more [about the informant], his credibility would have been shot to hell." *Inmate Whose Appeals Shock System Faces Execution*, N.Y. Times, Sept. 24, 1991 at A20, col. 1; see also *Warren McCleskey Is Dead*, N.Y. Times, Sept. 29, 1991 Sec. 4, at 16, col. 1 (Editorials); *Georgia Inmate Is Executed After 'Chaotic' Legal Move*, N.Y. Times, Sept. 26, 1991 at A18, col. 1; McCleskey v. Zant, 111 S.Ct. 1454 (1991); McCleskey v. Kemp, 481 U.S. 279 (1987).

chamber. The inescapable solution is that capital punishment must be abolished. It is not a question of being for or against the death penalty: rather, it is a question of doing what is civilized and right. Otherwise some innocents will continue to die at the hands of the state. Even one is too many.