"IT'S GOOD TO BE FREE"
AN ESSAY ABOUT THE EXONERATION OF ALBERT BURRELL

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I. INTRODUCTION

On January 2, 2001, Albert Burrell walked out of the Louisiana State Penitentiary at Angola as a free man after spending thirteen years on death row for a crime he did not commit. With tears of joy and relief welling up in his eyes, and clutching a memo he had received from the prison indicating that he was being released "by virtue of court order," Albert was met at Angola's front gate by his sister, who greeted him with a warm, emotional embrace. Also present were newspaper and television reporters, all eagerly clamoring with questions. Albert was clearly overwhelmed and had little to say. As he stepped into his sister's truck, he paused, and in response to the oft-repeated question from the reporters of how he felt, Albert simply said: "It's good to be free."

Truer words could not have been spoken, and few can know the meaning of those words quite like Albert. I felt proud and privileged to be with him on that day.

II. THE MURDER OF WILLIAM DELTON FROST AND CALLIE MAUDE FROST

In 1986, over Labor Day weekend, William Delton Frost and Callie Maude Frost were murdered in their home near Downsville, Louisiana. Downsville is a very small town in rural northern Louisiana, located not far from the Arkansas border. It is part of Union Parish. The parish seat, as well as the courthouse, are in nearby Farmerville, Louisiana.

The Frosts were a poor, elderly couple. They had no children and lived alone in what newspaper reports termed a "modest home"—really nothing more than a two-room shack. It was the house where Mr. Frost had been raised. Mrs. Frost was disabled and reportedly "had to be carried everywhere" by her husband. The Frosts subsisted on social security and on money Mr. Frost made as a "peddler of watermelons."[1]

1. Molly May, *Downsville Couple Found Murdered in Living Room*, NEWS-STAR-WORLD, Sept. 3, 1986, at 1A; Rhonda Smith, *Couple's Murder Shocks Rural Community*, NEWS-STAR-WORLD (Monroe, La.), Sept. 4, 1986, at 1A.

Union Parish deputies discovered the murder on Monday afternoon, September 1, 1986, Labor Day, after a neighbor notified the sheriff's office that he was concerned about not having seen Mr. Frost. Mr. Frost's body was found lying on the floor near the front door of the Frosts' house. He had been shot once in the head. The police found Mrs. Frost's body seated in a chair with a gunshot wound to her face. The police believed that each of the victims was killed by a single shot from a .22-caliber weapon, probably a rifle, fired through a window from outside the house. The police further believed that robbery was the motive for the killings. Apparently, the Frosts kept what little money they had in a suitcase under their bed. The police were unable to locate such a suitcase after the murder.

The investigation went badly from the very beginning. The police found almost no evidence at the scene of the crime. They could not detect any fingerprints or fiber evidence. They ruined the only footprint found while attempting to make a plaster cast of it. Several police cameras broke after only a few pictures were taken of the scene. In general, the only physical evidence obtained was some blood found on a door molding. The police theorized that after killing the Frosts from outside the house, the murderers broke in, one cutting himself in the process, and robbed the Frosts.

Weeks went by, but the police were unable to solve the murders, which were big news in northern Louisiana. The community was shocked by the crime, and concerned that the police had been unable to make any arrests.[2] Although they questioned a number of people, they had no solid leads and no suspects. The FBI offered its assistance, but Union Parish Sheriff Larry Averitt turned it down.

III. THE CONVICTIONS OF ALBERT BURRELL AND MICHAEL GRAHAM

On Sunday, October 12, 1986, six weeks after the murders, police investigators received what they thought was their first real lead when Janet Burrell called Sheriff Averitt at home. Janet Burrell was the ex-wife of Albert Burrell and had been in a bitter dispute with Albert over the custody of their son. Albert had been awarded custody, and he and his son lived with Albert's mother, Gladys, in Choudrant, Louisiana. Janet Burrell was remarried to

2. Christopher Baughman and Tom Guarisco, *Justice for None*, BATON ROUGE ADVOCATE, March 18, 2001, at 1A (first article in a three-part series).

Albert's brother, James Burrell.

Janet told the sheriff that she met Albert twice on Sunday night, August 31st, to talk about their son. According to Janet's description, she and Albert had arranged to meet at a designated spot on a rural road around 8:30 p.m. At the 8:30 meeting, Albert allegedly said that he could not stay and asked Janet to come back at 11:00 p.m. Janet claimed that she returned at 11:00 p.m., but Albert did not arrive until 11:30. Janet said that when Albert showed up, she got in his car, moved some clothes out of the way and found a wallet. Janet claimed that the wallet contained Delton Frost's driver's license and social security card. Janet further claimed that Albert then counted out twenty-seven $100 bills and said that he had taken the money from Mr. Frost. Janet said that Albert claimed to have shot into the Frosts' house, busted open their door, and taken Mr. Frost's wallet. She also said that she saw blood on Albert's boots. Based upon Janet's statement, Albert was arrested later that day.

Following Albert Burrell's arrest, the police investigation implicated Michael Graham in the murders. This implication was based upon statements they received from Kenneth St. Clair, who himself had at one time been a suspect, other members of the St. Clair family, and a teenage girl, Amy Opal, who had been a houseguest of the St. Clairs. All claimed that Graham and Burrell had been seen together the night of the murders at the St. Clair home, that they had been counting money out of a suitcase, and that Graham had blood on his arm and shirt.

Based on this evidence, Albert and Michael were indicted by a grand jury for murdering the Frosts. Almost immediately following the indictment, a prisoner housed in the same cell with Michael Graham at the Union Parish Jail, Olan Wayne Brantley, told the sheriff's office that Michael had admitted that he and Burrell had killed and robbed the Frosts. With this jailhouse snitch testimony, the district attorney's office took Michael to trial in May of 1987. He was found guilty and sentenced to death.

After Michael's conviction, Olan Wayne Brantley again came forward—this time with information allegedly implicating Albert. Brantley claimed that he had a conversation with Albert on July 26, 1987 in which Albert said that he and Michael had committed the murders and asked Brantley to contact the district attorney's office to make a deal on Albert's behalf.

With this new jailhouse snitch testimony against Albert, as well

as Janet's testimony, the district attorney's office took Albert to trial. He was convicted of first degree murder on August 17, 1987, and was subsequently sentenced to death. Albert filed two motions for new trial, both of which were rejected by the trial court. He then appealed his conviction and sentence to the Louisiana Supreme Court, which unanimously rejected his claims.[3] The United States Supreme Court denied Albert's petition for a writ of certiorari.[4] Having exhausted his direct appeal, Albert became eligible for execution. This was the status of Albert's case when we began representing him in January of 1992.

IV. LINDQUIST & VENNUM TAKES ALBERT BURRELL'S CASE

I worked on a death penalty case as an associate at the law firm of Shearman & Sterling in New York, and when I returned to Minneapolis to practice law at Lindquist & Vennum, I wanted to handle another one. As it turned out, Minnesota Advocates for Human Rights[5] sponsored a talk by Nick Trenticosta,[6] a Louisiana death penalty lawyer, in the fall of 1991. Nick came to Minnesota to recruit attorneys from private law firms to handle post-conviction death penalty cases on a pro bono basis.[7] I spoke with a number of

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3. State v. Burrell, 561 So. 2d 692 (La. 1990), *cert. denied*, 498 U.S. 1074 (1991).

4. Burrell v. Louisiana, 498 U.S. 1074 (1991).

5. At that time, Minnesota Advocates was known as Minnesota Lawyers International Human Rights Committee.

6. I had met Nick once before, at a capital punishment conference in Virginia in 1987. At that time he was doing death penalty work in Florida with the Office of the Capital Collateral Representative. Nick is one of the most accomplished and committed anti-death penalty lawyers in the country. He was the executive director of the Loyola Death Penalty Resource Center, a community federal defender organization for the State of Louisiana. After Congress cut off funding for death penalty resource centers, Nick established, and continues to run, the Center for Equal Justice in New Orleans.

7. I once asked a death penalty lawyer at the NAACP Legal Defense Fund why he recruited commercial lawyers to handle post-conviction death penalty cases since such lawyers are usually inexperienced in this challenging field. His explanation was that commercial lawyers were capable and could learn what they needed to know. More importantly, if they did not take these cases, death row inmates would have no lawyers at post-conviction. It remains true today that there is a glaring need for post-conviction representation—anti-death penalty advocates, including groups within the American Bar Association, continue to turn to the private bar in an attempt to fill this need. In fact, the need may be greater than ever with the loss of federal funding for death penalty resource centers and changes in federal habeas corpus laws that threaten to quicken the pace of executions. At the same time, there is increasing evidence that a significant

lawyers at Lindquist & Vennum about my interest in taking on a death penalty case; several others expressed interest as well. We met with Nick and decided that we would like to take a case from him.

Our idea of taking a death penalty case still had to win approval from our law firm. It would be a major commitment of pro bono attorney time, and would likely entail substantial costs. Tom Fabel, a highly respected partner at the firm, shepherded the idea through the management committee, which approved it. Lindquist & Vennum has a long and deep tradition of community service. The firm's willingness to take on the challenging task of handling a post-conviction death penalty case was emblematic of that tradition.[8]

After considering a couple of cases, Nick decided to give us Albert Burrell's case. We, of course, had no idea what would happen. Nick explained that Albert had completed his direct appeal, and was in position to have a death warrant signed against him. However, no one in the Union Parish District Attorney's Office seemed to be paying much attention to Albert's case. Nick thought that this was because the assistant district attorney who had prosecuted Albert was no longer working out of Union Parish and thus no one was keeping watch of the case in order to alert the trial judge to set an execution date. Additionally, Nick said that he thought there may even be some general feeling among Union Parish officials that Albert was innocent. He had learned that the assistant district attorney had apparently not wanted to try the case, and in fact, had been surprised by the verdict and sentence. The message that we got from Nick and his staff was clear—we should begin investigating and evaluating Albert's case but keep a low profile and not stir things up, lest someone take notice and proceed with a death warrant against Albert. The last thing anyone wanted was a group of Minnesota lawyers coming to Louisiana and causing a ruckus.

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number of innocent people have been wrongfully convicted and/or sentenced to death row, and undoubtedly some have been executed. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2053 (2000); Crystal Nix Hines, *Lack of Lawyers Hinders Appeals in Capital Cases*, N.Y. TIMES, July 5, 2001, at A1.

8. In addition to Chuck Lloyd, Tom Fabel, and I, other Lindquist & Vennum attorneys who worked on Albert's case include Keith Ellison, Candee Goodman, Helen Mary Hughesdon, Ann Kennedy, Joe Maternowski, Pete Michaud, Reuben Mjaanes, Steve Quam, David Sasseville, Loren Thacker, and Jessica Ware.

With this caution in mind, we began reviewing the trial court file, developing a social history and mental health history of Albert, investigating multiple facts and issues, interviewing witnesses, and developing our legal theories. At first, we focused on the sentencing phase of Albert's trial. Albert's trial lawyers made no investigation of Albert's background and presented absolutely no mitigating evidence to the jury to try to prevent the imposition of a death sentence.[9] We felt confident that because Albert's significant mental health problems had not been presented as mitigation evidence at the sentencing phase of his trial, we could at least obtain a re-sentencing. There did not seem to be any way that the court could write off the failures of Albert's lawyers as "trial strategy."[10]

In many post-conviction death penalty cases, the fight revolves around sentencing phase issues, and the defense lawyer's goal is to obtain a re-sentencing hearing. Our case was different. Albert repeatedly and consistently expressed his innocence of the crimes. Over and over again, in every conversation, Albert said, "I didn't have nothing to do with them two old people. I didn't kill anyone." Moreover, our investigation began to show that the principal witnesses against Albert at trial had no credibility and had repeatedly lied for their own personal motives. Also, it became clear that the prosecution and police presented false and highly misleading evidence at trial, and failed to disclose a significant amount of exculpatory evidence to defense counsel, in violation of their obligations under *Brady*.[11] Finally, the completely ineffective

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9. In fact, Albert's own lawyer falsely told the jury that there were no mental health mitigating circumstances in Albert's case. State of Louisiana v. Albert Ronnie Burrell, Crim. Docket No. 28,734A (Third Judicial Dist. Ct., Union Parish, La.) (Trial Record at 1794).

10. Our confidence was shaken along the way, however, by certain court decisions, such as Williams v. Cain, 125 F.3d 269 (5th Cir. 1997). In the *Williams* case, the Fifth Circuit reversed the district court by holding that the failure to present any mitigating evidence at the sentencing phase of Williams' capital trial (despite his long history of mental health problems) was not ineffective assistance of counsel. *Id.* at 276-80. The Court concluded that Williams was not prejudiced by his lawyer's actions, which the Court described as tactical and "quite arguably a wise choice." *Id.* at 279.

Dobie Gillis Williams was on death row at Angola with Albert. On January 8, 1999, Williams was executed. Sister Helen Prejean was Williams' spiritual advisor. Of Williams, Sister Prejean said, "For the first time, I believe I befriended a truly innocent man on death row." Lane Nelson, *Death Watch: Dobie Gillis Williams*, THE ANGOLITE, vol. 24, no. 1, January/February 1999 at 10, 14.

11. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the prosecution's

and incompetent performance of Albert's trial lawyers effectively denied him his right to counsel.[12] In sum, the jury was not given all of the facts and was purposely misled about certain important facts, such that it was made to reach an incorrect verdict. Our job was not merely to get a re-sentencing, but to win a new trial for Albert and exonerate him.[13]

V. ALBERT BURRELL'S UNTOLD STORY OF MENTAL RETARDATION AND MENTAL ILLNESS

Over and above the evidence of Albert's innocence and the improper conduct of the police and prosecutors, Albert's personal condition cast a dark shadow over the fairness of every aspect of the proceedings against him. Albert has a lifelong history of mental retardation and mental illness that always significantly impaired his functioning. That history, including the fact that Burrell had been found incompetent in a prior court proceeding, was totally ignored, and in fact, covered up by the prosecutor at the time of Albert's murder trial.

We came to know Albert as a gentle, confused soul who could not comprehend what had happened to him. It was always very difficult to communicate with Albert. He cannot speak nor think clearly, and was incapable of helping himself with this ordeal. Although he did not fully understand what was going on around him, he always knew that he was innocent.

We learned that Albert's significant mental impairments had been apparent even at a very early age.[14] In 1961, when Albert was six, he entered first grade at the Calhoun Elementary School in Choudrant, Louisiana. His teacher soon believed that Albert was "severely retarded," and because he was "such a problem," asked

suppression of evidence favorable to an accused upon request violates due process where evidence is material to guilt or punishment).

12. *See* Strickland v. Washington, 466 U.S. 668 (1984) (setting forth standard for ineffective assistance of counsel claim).

13. Several times over the years we turned down offers to commute Albert's sentence to life imprisonment in exchange for giving up our efforts to obtain a new trial. This was agonizing because if we had been wrong about the strength of our case Albert would have been executed.

14. All of the reports, records, and documents discussed herein, including the expert psychiatrist and psychologist reports, are on file in State of Louisiana v. Albert Ronnie Burrell, Crim. Docket No. 28,734A (Third Judicial District Court, Union Parish, Louisiana).

Albert's mother to keep him out of school, which she did.[15] On November 11, 1961, Burrell was evaluated for special education classes by psychologist Tom C. Pennell and social worker Neil R. Covington, who were both with the Northeast Special Education Center in Monroe, Louisiana. Their report notes that:

> Mrs. Burrell is convinced that Ronnie is a retarded child. She attributes his retardation to factors incidental to his birth, specifically, she believes she was given too much anesthetic. She described Ronnie as not generally as alert as her other children. When he failed to profit by the school experiences thus far she is satisfied it is because he cannot learn any better. She has a sister (now grown and married) who is retarded and she feels Ronnie demonstrates symptoms similar to her sister when she was a child.[16]

Albert was unable to complete any of the psychological tests Dr. Pennell attempted to run, and in fact, was unable to communicate with the evaluators at all. Dr. Pennell's and Mr. Covington's preliminary conclusion was that Albert suffered from a "mental deficiency." They advised Mrs. Burrell that it would be in Albert's "best interest from an educational standpoint" to be in special education classes, and even advised her to consider "institutional placement." Mrs. Burrell replied that her family was too poor to be able to afford to move to a location where special education classes were offered.[17]

Mrs. Burrell kept her son out of school until the fall of 1962, when he again returned to Calhoun Elementary for first grade. Albert failed all of his classes and was institutionalized. Albert was placed in the Cooley Hospital for Retarded Citizens, a year-round facility, with very few services at that time. Albert apparently resided at Cooley until approximately 1970. His parents occasionally visited him on the weekends. After leaving Cooley, Albert briefly attended special education classes at Calhoun Elementary School. In 1971, he left school at the age of 16. Albert never learned how to read and write, and is still severely intellectually impaired.

The jury in Albert's capital trial heard nothing about his institutionalization and the early evidence of his mental retardation

15. Northeast Special Education Center Evaluation Report at 1.
16. *Id.*
17. *Id.* at 2.

and severe impairment. The jury also did not hear that eleven years before the murder trial, in neighboring Lincoln Parish, Judge Fred W. Jones found that Albert "does not have the mental capacity to proceed" on arson charges against him, and accordingly committed Albert to the Central Louisiana State Mental Hospital "for custody, care and treatment."[18] Judge Jones' determination that Albert was mentally incompetent was based on reports from a court-appointed Sanity Commission and from Dr. Paul B. Ware, a psychiatrist from Shreveport. The July 11, 1976 report of Dr. Ware concluded:

> The patient's intelligence is extremely limited. . . . Clinically, I would estimate his I.Q. to be between 50-60. His overall judgment and comprehension is extremely limited. He talked openly about both his visual and auditory hallucinations. When left alone, he continues to look around and is probably at present continuing to have some hallucinatory activity.[19]

Dr. Ware diagnosed Albert as suffering from mental retardation and schizophrenia. He concluded that Albert was psychotic and incompetent to stand trial. Dr. Ware stated:

> I certainly do not feel the patient is able to assist in his defense at this time. He remains psychotic and is recovering from an overt psychotic episode. . . . I question his ability to assist in his defense even when he is not psychotic. His extremely limited intelligence and limited comprehension makes it difficult for him to evaluate what is going on around him.[20]

Although Albert was released from the state hospital in August of 1976, there was never a judicial determination that he had been restored to competency. Albert was never prosecuted on the arson charges and they were dismissed on August 10, 1982.[21]

Astoundingly, no evidence concerning Albert's mental retardation, his mental illness or the prior determination that he was incompetent, was presented at his murder trial—not one word.

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18. State of Louisiana v. Ronnie Burrell, Court File No. 24043 (Third Judicial Dist. Ct., Lincoln Parish, La. July 15, 1976) (Order of Commitment).

19. Report of Dr. Paul B. Ware 2 (July 15, 1976) (filed in Third Judicial District Court, Lincoln Parish, La. in Criminal Suit No. 24043).

20. *Id.* at 2-3.

21. State of Louisiana v. Thomas Burrell and Ronnie Burrell, Court File No. 24043 (Third Judicial Dist. Ct., Lincoln Parish, La. August 10, 1982) (Release Order and Dismissal of Prosecution).

The prosecutor knew of Albert's incompetence for at least two reasons: (1) he personally signed the release order and dismissal of prosecution in the arson proceeding against Albert, and (2) he obtained certified copies of the prior incompetency adjudication from the clerk of court just before Albert's murder trial. Yet, he said nothing to the court about the issue so that the court could undertake a competency determination. The prosecution had a duty to raise that issue but remained silent.[22] Moreover, the prosecutor affirmatively misled the court and the jury by stating that he had "seen no evidence of mental disease or defect" in Albert.[23] As the prior dismissal order and the certified copies from his files showed, that was a lie. Albert could not, consistent with due process, have been put on trial while incompetent to assist in his own defense or unable to understand the proceedings against him.[24]

It was a violation of due process for the prosecutor to mislead the court and the jury concerning Albert's competence, and to fail to raise the issue so that a competency determination could have been made. The United States Supreme Court has long recognized that proceeding to try a defendant who is incompetent and therefore unable to assist in his own defense is a due process violation and requires a new trial.[25] Specifically, the Court wrote:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial . . . [T]he prohibition is fundamental to an adversary system of justice.[26]

On this ground alone, Albert was entitled to a new trial.

We arranged to have Albert examined by a psychologist and a psychiatrist and both concluded that, given Albert's history of mental retardation and mental illness dating back to early childhood, he was not competent at the time of his trial. Dr. Eric S.

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22. *See* LA. CODE CRIM. PROC. ANN. art. 642 (West 1997) (stating defendant's mental capacity to proceed may be raised at any time by the defense, the district attorney, or the court).

23. *State of Louisiana v. Albert Ronnie Burrell*, Crim. Docket No. 28,734A (Third Judicial Dist. Ct., Union Parish, La.) (Trial Record at 1800).

24. *See* Drope v. Missouri, 420 U.S. 162, 171-73 (1975).

25. *Id.*

26. *Id.* at 171-72. *See also* Pate v. Robinson, 383 U.S. 375, 385-86 (1966).

Engum, a forensic psychologist, conducted a clinical interview and formal psychological evaluation of Albert, which included extensive psychological testing. Dr. Engum summarized his opinions about Albert as follows:

> It is more likely than not that Mr. Burrell was incompetent to stand trial in 1987. . . . Mr. Burrell suffers from multiple psychological/psychiatric disabilities which substantially impair his functioning and his ability to relate to those around him. In this examiner's opinion, Mr. Burrell suffers from psychosis emanating from chronic undifferentiated schizophrenia, mild mental retardation, underlying organic brain damage, and severe academic deficiencies. Moreover, a review of Mr. Burrell's past academic and mental health records and of this examiner's previous psychological evaluation of Mr. Burrell, reveals that Mr. Burrell has suffered from severe and consistent mental health problems for most, if not all, of his life. Based upon comprehensive psychological and neuropsychological assessment, it is this examiner's opinion that Mr. Burrell: 1) is unable to consult effectively and meaningfully with counsel; 2) lacks the capacity to understand fully the proceedings against him; and 3) is therefore incompetent to stand trial. Furthermore, it is this examiner's opinion within a reasonable degree of psychological certainty that Mr. Burrell suffered from chronic undifferentiated schizophrenia, mild mental retardation, organic brain damage, and severe academic deficiencies at the time of the original trial proceedings from 1986 through 1987.[27]

Dr. Sarah DeLand, a psychiatrist (and the former director of competency restoration at the state hospital in Jackson, Louisiana), also examined Albert twice and reached conclusions similar to Dr. Engum. Dr. DeLand diagnosed Albert as suffering from undifferentiated schizophrenia, mild mental retardation, a cognitive disorder and a phonological disorder. Dr. DeLand also found that Albert was not competent. Her conclusion was:

> It is also my opinion, with reasonable medical certainty, that Mr. Burrell does not meet the Bennett Criteria and is therefore not competent to proceed, for the reasons outlined above. Further, I am in agreement with Dr. Engum, that the long history and chronicity of these

27. Report of Dr. Eric S. Engum at 2-3 (Aug. 25, 1997).

> disorders make it very unlikely that Mr. Burrell was ever competent to proceed. This opinion is based upon the documentation that Mr. Burrell had significant intellectual limitations from a very young age. His need for special education was recognized in the first grade, and he attended special schools for mentally retarded individuals. In 1976, he was found to be not competent to proceed because of psychosis and moderate mental retardation. Psychological testing has consistently confirmed intellectual limitations. While psychotic symptoms can wax and wane, mental retardation does not. It is my opinion, with reasonable medical certainty, that even if Mr. Burrell's psychotic symptoms were under control at the time of his original charges, his significant mental retardation, alone, would render him incompetent to proceed.[28]

Both Dr. DeLand and Dr. Engum concluded that Albert's mental retardation and mental illness rendered him unable to work effectively and meaningfully with his attorneys. Albert could not communicate relevant information to his attorneys, evaluate his attorneys' advice or make rational and appropriate decisions regarding the exercise of his legal rights. Albert's thinking was so disorganized and confused that he could not aid his attorneys in examining witnesses, listen to or understand the testimony of potential witnesses, or inform his attorneys of any distortions or misstatements of witnesses or the prosecutor. Albert was on trial for murder, facing the death penalty, and because of his mental retardation and mental illness, was incapable of providing his attorneys with any meaningful or useful information to assist in his defense. Albert was unable even to inform his attorneys of his mental retardation and mental illness, and the prior judicial determination that he was incompetent, thus allowing the prosecutor's lies about Albert's mental health to go unchallenged.

VI. THE WRONGFUL CONVICTION OF ALBERT BURRELL

The evidence against Albert presented by the State was extraordinarily weak by any measure. A conviction was possible only because the credibility of the witnesses against Albert (i.e., his ex-wife Janet Burrell, the St. Clairs/Amy Opal, and Olan Wayne Brantley) was incompetently challenged at trial. Our investigation

28. Report of Dr. Sarah DeLand at 5 (Feb. 13, 1998).

uncovered new evidence that clearly established the absolute unreliability of all these witnesses, and proved Albert's innocence. This new evidence included credible statements by both Janet Burrell and Amy Opal that they had lied at trial, inconsistent prior statements by the St. Clairs and Ms. Opal that the police and prosecution failed to disclose, and exculpatory police investigative reports that were not disclosed. It also included evidence of Brantley's serious mental illness, his documented propensity for telling incredible "fantastic stories," and evidence of the plea bargain he received for testifying.

A. *Dan Grady's Affidavit*

Early in our investigation we spoke with Dan Grady, the assistant district attorney who prosecuted both Albert and Michael. He eventually gave us an affidavit in which he disclosed that he recommended against even presenting the cases to the grand jury in 1986 because:

> The evidence at that time, in my opinion, was too weak and too dependent upon witnesses of questionable credibility to support a prosecution. This assessment was reflected in my case evaluation memorandum to the district attorney. Notwithstanding my advice, the district attorney directed me to present the cases to the grand jury and to try them to avoid embarrassment to the sheriff.[29]

Grady then provided his explanation of the potential "embarrassment to the sheriff" resulting from a case in which no arrests were made for over six weeks following the killings:

> I believe that the Union Parish Sheriff was under substantial pressure at the time the charging decision against Graham and Burrell was being made, in part because he had refused FBI assistance for the investigation of the case, and in part because the local press and public were anxious for action on a double homicide which occurred six weeks before any arrests.[30]

Grady did not mention an additional factor that may have been weighing heavily upon Sheriff Averitt in October of 1986. We learned that during this time, Averitt engaged in conduct which ultimately resulted in a federal indictment alleging that he

29. Affidavit of Dan J. Grady, III at ¶ 4 (April 17, 1995) [hereinafter Grady Aff.].

30. *Id.* at ¶ 5.

conspired to defraud Union Parish and a plea of guilty to mail fraud.[31]

Grady's disclosures of improper motivation for the prosecution of Albert were significant for many reasons. First, the information revealed a law enforcement climate in which the pursuit of truth apparently had taken a back seat to the protection of a sheriff's reputation. This fact took on added significance in light of Janet Burrell's assertion that her trial testimony was the product of coercion by the sheriff's office, along with corroborating new evidence that improper coercion had often been employed by the sheriff's office. Second, the affidavit from Grady revealed that the prosecution was well aware of, in Grady's words, the "questionable credibility" of its key witnesses soon after Janet Burrell and the St. Clair/Opal evidence first came to light.[32]

Finally, Grady's affidavit raised profound additional questions about the jailhouse confessions reported by Olan Wayne Brantley. It deserves note that Brantley's first report of a confession in this case came only three days after the grand jury indictment—that is, *after* Grady expressed his opinion that the cases should not be charged, because the evidence which existed at that time was simply too weak.[33] Was it a mere happy coincidence for Sheriff Averitt that a mentally ill prisoner emerged from his jail with the tale of a confession at just that time? Coincidence or not, the Brantley testimony was viewed by prosecutor Grady as having "played a major role in both convictions."[34]

B. The Completely Unreliable Trial Testimony of Janet Burrell

As previously noted, Janet Burrell was one of the primary reasons why Albert was convicted. Her story of meeting Albert on the night of the murders and finding Delton Frost's wallet, first shared with the police six weeks after the Frost murders, was the linchpin of the prosecution's case.

Janet Burrell's testimony apparently was accepted by the jury despite the evidence that a wallet containing Delton Frost's driver's license, social security card, some papers, and six one dollar bills was found by police at the Frosts' home at the time the bodies were

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31. *See* United States v. Hatch and Averitt, 926 F.2d 387 (5th Cir. 1991).
32. Grady Aff. at ¶ 4.
33. *Id.* at ¶¶ 4-6.
34. *Id.* at ¶ 7.

discovered. The wallet and its contents (minus the six one dollar bills) were introduced at Albert's trial. The wallet, however, was a different color than the one described by Janet and was found on the Frosts' bed *under* the contents of some paper sacks which had been dumped out on the bed. The jury was told only that the wallet was found at the scene, which the State attempted to explain by theorizing that Burrell returned to the scene after meeting with Janet and tossed the wallet through an open window and onto the bed. The actual location of the wallet, described in an investigation report prepared by Deputy Elmer Hearron, but not disclosed by the prosecution in discovery, was never presented to the jury. Moreover, when Deputy Monty Forbess was asked on cross-examination whether his notes reflected the location of the wallet when found on the bed, he responded that they did not. The prosecution allowed this misleading testimony to be presented, knowing that the undisclosed report of Deputy Hearron describing the wallet's location contradicted the State's theory.

If this undisclosed evidence, as well as the available impeachment evidence had been introduced, no reasonable juror would ever have believed the testimony of Janet Burrell. As it happened, Albert's defense lawyer[35] was so incompetent that he was able to introduce only a small amount of the impeaching evidence. For example, he failed to lay the proper foundation and failed to ask the right questions, thereby precluding the jury from hearing about Janet's reputation for being untruthful. Similarly, he failed to lay the proper foundation to impeach James Burrell, Janet's second husband, regarding Janet's whereabouts on the night of the Frost murders. Even worse was his failure to contrast Janet's trial account of Albert's supposed description of the Frost shootings with her grand jury testimony, where she reported that Albert told her nothing about the killings.

Considering these problems with Janet's trial testimony, it is not surprising that shortly after the trial she recanted her testimony, saying that she had lied to get her ex-husband in trouble so that she could gain custody of their child. When asked to repeat

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35. Albert's defense lawyer, Keith Mullins, was convicted of narcotics offenses in 1993, which led to his disbarment from the practice of law in the State of Louisiana. *See In Re* J. Keith Mullins, 655 So. 2d 323 (La. 1995). Defense co-counsel Roderick Gibson was also disbarred. Mr. Gibson's disbarment was based upon numerous instances of dishonesty, fraud and deceit. *See In Re* Roderick P. Gibson, 639 So. 2d 212 (La. 1994).

the recantation at a motion for a new trial, however, Janet refused and again adopted her trial account.

While such flip-flopping does little to instill confidence in anything said by a witness, Janet Burrell provided us with an account which explained her conduct. In an affidavit, Janet said:

> 5. Several weeks after the murders of Delton and Callie Frost, I contacted the Union Parish Sheriff's office to tell them that on the night the Frosts were killed, I had seen my ex-husband, Albert Ronnie Burrell, with a lot of money and a wallet that belonged to Mr. Frost. I said this because I wanted to get my ex-husband in trouble with the police so that I could get my son back into my custody.
>
> 6. What I told the police was not true. I did not see Albert Ronnie Burrell at all on the night that the Frosts were killed. I never did see him with Mr. Frost's wallet and I did not see him with a lot of money on the night the Frost's [sic] were killed. At the time I told the police that I had seen those things, I believed that the police would ask Albert Ronnie Burrell questions about what I had told them but I did not believe that they would accuse him of murder.
>
> 7. After I first told the police about the wallet and the money, when I found out that Albert Ronnie Burrell was in a lot of trouble for what I had said, I tried to tell the police that what I said was not true. When I told the sheriff's deputies that what I said was not true, they threatened me. They told me if I had provided them information that was not true and changed my story, they could take my son away from me forever and put me in jail. They told me these things a lot as the trials of Michael Graham and Albert Ronnie Burrell got closer. The deputies scared me. As a result, I believed I had to continue to lie in order to try to get my son back. That is why I told the lies that I did at the trials of Michael Graham and Albert Ronnie Burrell.[36]

Janet's recantation was matched by a recantation from her husband, James Burrell. James concurred in the truthfulness of Janet's affidavit and said the following:

> 4. On the night that the Frosts were killed, my wife Janet was with me the entire evening. She did not leave at any time that night to go and meet with my brother Albert

36. Affidavit of Janet Burrell at ¶¶ 5-7 (March 16, 1998).

> Ronnie Burrell.
>
> 5. I did not tell the truth at the time I testified at trial because of the threats that had been made to my wife by the sheriff's deputies.[37]

Adding significant weight to these recantations by Janet and James Burrell was new evidence provided by George Cothran, a former chief of the Farmerville Police Department. In an affidavit given to Michael Graham's lawyer, Mr. Cothran testified that Monty Forbess, a deputy with the Union Parish Sheriff's office who worked on Albert's and Michael's cases, "had an established practice of threatening to have the children of female witnesses taken away from them when the female witnesses would not provide the testimony he sought."[38]

C. "Lying" Wayne Brantley

The second component of the prosecution's case against Albert and Michael was the testimony of Olan Wayne Brantley. Brantley was a prisoner in the Union Parish jail who came forward, following prosecutor Dan Grady's recommendation that the cases were too weak to support prosecution, with a supposed jailhouse "confession" from Michael Graham. Following Graham's conviction, Brantley emerged with another alleged jailhouse "confession," this time from Albert. Grady viewed Brantley a "credible witness" and believed that Brantley's "testimony played a major role in both convictions."[39]

Our investigation, and the investigation by Graham's lawyers, uncovered substantial new evidence about Brantley's mental illness, his prior adjudications of incompetency and insanity, his undisclosed plea agreements, and his propensity for receiving "confessions." We learned that Brantley was a seriously ill man who suffered from delusions, had a grandiosity complex, and had significant difficulty distinguishing truth from falsity.

Since at least 1979, Brantley has repeatedly been in trouble for passing bad checks.[40] On February 19, 1981—five and a half years before the confession stories in Albert's and Michael's cases—Brantley was found not guilty of criminal charges in Ouachita

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37. Affidavit of James P. Burrell at ¶¶ 4-5 (March 16, 1998).
38. Affidavit of George Cothran at ¶ 4 (August 11, 1997).
39. Grady Aff. at ¶¶ 6-7.
40. *See* State v. Brantley, 514 So. 2d 747, 748 (La. App. 2 Cir. 1987)

Parish for issuing a worthless check by reason of insanity and was ordered by the court to be committed to the Central Louisiana State Hospital. Notwithstanding the hospital's decision to discharge Brantley in April of that year, the court apparently ordered that Brantley continue to be confined. He was ultimately discharged on July 27, 1981. In November, 1982, Brantley was found incompetent to proceed on criminal charges then pending and was again committed by the Ouachita Parish District Court to the state hospital. Records from the court file demonstrate that Brantley had been hospitalized repeatedly beginning in 1979 at Louisiana State University Medical Center, Brentwood Hospital and Central Louisiana State Hospital.[41]

In 1986, Brantley was in trouble for writing worthless checks in Morehouse Parish, and again raised an insanity defense. This time Brantley was not found insane, but he did present witnesses who testified that during his hyperactive phases, "he was talkative, 'fractious,' and able to tell fantastic stories."[42]

Although Brantley testified on direct examination during Albert's trial that he was taking medication, the full extent of his mental illness and his various hospitalizations was never presented to the jury; nor was the jury told that Brantley had claimed to be insane shortly before he supposedly heard the confessions which put him at the center of this case. Unfortunately, the jury also never was told that Brantley himself claimed, through witnesses, that he was able to tell fantastic stories. The State never disclosed to the defense information it had concerning the true nature of Brantley's mental status, which was highly exculpatory because "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. . . ."[43] If the jury had been given all of the information concerning Brantley's mental status, the credibility of his testimony would have been completely undermined.

Moreover, the State presented false and highly misleading evidence when it allowed Brantley to testify that he could not have received any deals in exchange for his testimony against Michael and Albert. In fact, Brantley was originally charged in Union Parish with two counts of forgery, which carried a maximum

41. *Id.* at 748-50.
42. *Id.* at 749.
43. *See* Napue v. Illinois, 360 U.S. 264, 269 (1959).

sentence of ten years.[44] On January 9, 1987, after Brantley came forward with Michael's alleged confession, but before Michael's trial, the district attorney's office reduced the charges against Brantley to two counts of issuing worthless checks of less than $500, which carried a maximum sentence of not more than two years. In addition, Brantley's Union Parish sentence ran concurrently with a six year no parole sentence he had received in Morehouse Parish.[45] The State failed to correct the record and inform the jury that the Union Parish charges against Brantley were reduced after he came forward with his alleged evidence, that Brantley would not serve (and did not serve) any additional time for pleading guilty to the Union Parish charges, and that Brantley had other convictions in other parishes for which he would not serve one day more in jail. The State's presentation of this false and highly misleading evidence in and of itself warranted a new trial.

In addition, we discovered that Brantley has shown a bizarre and unbelievable pattern of claiming that capital murder defendants confess to him when he gets into legal trouble in an attempt to plead his way out. Since Albert's and Michael's trials, Brantley, incredibly, has claimed that two other capital murder defendants in two separate capital murder cases in Florida confessed to him. In Fort Lauderdale, Florida, Brantley, going by the name of Terry Manning, claimed that one Jesse Adams confessed guilt to him concerning a murder charge. In a deposition given in that matter,[46] Brantley wove a remarkable tale in which he claimed to be working for the Gambino organized crime family and that he was friends with now jailed mobster John Gotti. He also claimed that former Louisiana Governor Edwin Edwards' attorney, Camille Gravel, was his lawyer.

In 1996, Brantley was jailed in Jacksonville, Florida, using the alias J. D. Gaylord and claiming to be a member of the Gaylord family, the family that owns the Grand Ole Opry in Nashville, Tennessee. Brantley was arrested for writing bad checks and attempting to run a scam in which he tried to convince a Jacksonville law firm to write him a check out of its client trust

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44. *See* LA. REV. STAT. ANN. § 14:72 (West 1997).

45. Brantley sentenced to six years on felony count and six months on misdemeanor count, to run concurrently; Brantley could have been sentenced to ten years.

46. *See* State of Florida v. Jessie Adams, No. 92-17125CF10B (Fort Lauderdale, Broward County, Florida (1994)).

account for $800,000. While in jail, Brantley again claimed that another capital murder defendant had confessed to him—and again no one else was privy to the confession. At a deposition in that case,[47] Brantley was asked about Albert's and Michael's cases, and testified that Albert and Michael had confessed to him at the same time while the three of them were standing around the courthouse, that others were present, and that Albert was not incarcerated at the time. Obviously, this sworn testimony differed in all material respects from the sworn testimony Brantley gave at Albert's and Michael's trials.

According to reports of Brantley's activities in Jacksonville, he was claiming that he was a country western music promoter; that he owned a Jaguar automobile; that among his attorneys was F. Lee Bailey; that he was dating singer Tanya Tucker; that his sister was a member of the United States House of Representatives; that he owned a record company; that he was a member of the Gambino crime family; and that his family owned the San Antonio Spurs of the National Basketball Association and the Houston Oilers of the National Football League.[48]

Clearly, Brantley has a propensity for telling "fantastic stories." Indeed, at the hearing on Michael Graham's motion for a new trial, the current sheriff of Union Parish testified that Olan Wayne Brantley is referred to in the community as "Lying" Wayne Brantley.[49] Nevertheless, Brantley was the prosecution's star witness against both Albert and Michael.

D. *Undisclosed Prior Inconsistent Statements of the St. Clairs and Amy Opal, and Opal's Recantation*

The third part of the case against Albert was the testimony of five people who put Albert at the home of the St. Clair family, along with Michael Graham, on the night of the Frost murders. Some said the men had a suitcase with money and that Michael Graham had blood on him. The witnesses were four members of

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47. *See* State of Florida v. David Hadaway, No. 94004207CFA (Duval County, Florida (1996)).

48. *Id.* (see investigative reports).

49. State of Louisiana v. Michael Ray Graham, Jr., Crim. Docket No. 28,734B at p. 24, n.1 (Third Judicial Dist. Ct., Union Parish, La. March 3, 2000). A retired Union Parish jailer recently said with respect to Brantley: "If his lips moved, he was lying." Christopher Baughman and Tom Guarisco, *Justice for None*, BATON ROUGE ADVOCATE, March 18, 2001, at 1A (first article in a three-part series).

the St. Clair family and Amy Opal, a teenage friend of the St. Clair daughter. Kenneth St. Clair had been a suspect in the Frost case prior to the arrest of Albert and Michael.

In our investigation we discovered pretrial statements made by the St. Clairs that the prosecution failed to disclose to Albert's and Michael's defense lawyers. These statements differed significantly from the St. Clairs' testimony at trial, and thus could have been used for impeachment purposes. For example, in one of the statements the St. Clairs said that Albert and Michael were at their home on Saturday night, August 30. They said they were sure it was Saturday night because they were watching wrestling, which was only televised on Saturdays. The murders, however, happened on Sunday night, August 31. The pretrial statements also differed from trial testimony on other critical factors, such as the amount of money Albert allegedly had and whether Michael had blood on him.

In addition, Amy Opal (now named Hutto) gave an affidavit to Michael's lawyer in which she recanted her trial testimony. In her affidavit, Ms. Hutto said that the St. Clairs influenced her testimony. Ms. Hutto said that Jackie St. Clair told her, "say this, say that. Don't tell about my brother."[50] In the affidavit, Ms. Hutto further stated that it was Kenneth St. Clair who she saw with blood on him.[51] She also said that she kept this information to herself all these years because she was, and still is, afraid of the St. Clairs.[52]

VII. A DEATH WARRANT IS SIGNED AGAINST ALBERT

In June of 1996, the unthinkable happened. Judge James Dozier, who had presided at Albert's trial, signed a death warrant against Albert. The death warrant was a two page document formally entitled: "Warrant for Execution of Person Condemned to Die." Written in cold legalese, it sketched out the fact that Albert had been convicted of first degree murder and sentenced to death. Its ultimate paragraph read as follows:

> NOW, THEREFORE, I, James M. Dozier, Jr., Judge of the Third Judicial District Court, being the Court of original jurisdiction, and in accordance with La. R. S. 15:567, do hereby direct and command you to cause the execution of

50. Affidavit of Amy Hutto at ¶ 3 (October 18, 1996).
51. *Id.* at ¶ 4.
52. *Id.* at ¶ 5.

> ALBERT RONNIE BURRELL, the condemned in this case, in the manner provided by law. You shall cause the condemned, ALBERT RONNIE BURRELL, to be put to death on August 29, 1996, between the hours of 12:00 Midnight and 3:00 o'clock A.M., and you shall follow all of the requirements and requisites of the law in carrying out this execution.[53]

This was an absolutely stunning and frightening turn in the case. Albert's death warrant meant that our careful investigation had to come to an end. Instead, we were forced to put the information we had gathered to use immediately in an effort to obtain a stay of execution. Rather than filing a standard stay brief, we decided to prepare more thorough papers showing that Albert had not received a fair trial and was innocent of the crimes of which he was convicted. In addition to asking for a stay, we decided to ask for investigative funds and expert witness funds. The expert funds would provide, among other things, for a psychologist and psychiatrist to develop evidence pertaining to Albert's competency and a legal expert to opine on defense counsel's total failure to meet the minimum level of practice expected of attorneys in Louisiana in a capital murder trial. We never learned why a death warrant was signed at that time, although it seemed more than just coincidence that Judge Dozier was up for re-election in the fall.

After submitting our papers, we were able to obtain a stay seventeen days before Albert's scheduled execution in a telephone conference with Judge Dozier. We suggested that perhaps he would prefer not to hear our motion for funds until after his re-election. He readily agreed.

VIII. The Motion for Funds

A. Judge Woodard is Elected

What happened next was the first real bit of luck, or perhaps grace if you choose to think of it that way, that happened for Albert in this ordeal. We were led to believe that Judge Dozier would handily win re-election. He was a fixture in Union Parish, having

53. State of Louisiana v. Albert Ronnie Burrell, Crim. Docket No. 28,734A at 2 (Third Judicial Dist. Ct., Union Parish, La. June 17, 1996).

served on the bench for many years. His opponent was Cynthia Woodard, a lawyer from neighboring Lincoln Parish. There are courthouses in both Union Parish and Lincoln Parish and the judgeship covers both of them. We had talked to a number of people who said that all they saw were campaign signs for Judge Dozier and they did not think that Ms. Woodard had much of a presence in the campaign. We did not realize that our intelligence was coming from Union Parish and that Ms. Woodard's strength was largely in Lincoln Parish. As it turned out, Ms. Woodard won the election.

B. Hearing on Our Motion for Funds

After Judge Woodard's election, we arranged for our motion for funds to be heard in March of 1997. Chuck and I traveled to Farmerville not knowing what to expect from the new judge. We had not asked for specific dollar amounts in our motion papers, so we sat in our hotel room the night before and brainstormed. We decided on a figure of $12,500, but realized that it was in all likelihood an exercise in fantasy. Nick had told us that the state trial judges rarely awarded funds at post-conviction in capital cases. He said that he thought $500 was the most anyone had received, and that we could likely get more by taking a writ to the Louisiana Supreme Court, but even then the amount would be limited to a few thousand dollars.

We showed up for court and were met by a judge who was bright, courteous, and clearly interested in our case. Judge Woodard allowed us to take nearly an hour to present our motion as Chuck and I alternated arguing parts of the case. During our argument, Judge Woodard took copious notes and asked an occasional thoughtful question. We were opposed by Assistant District Attorney Shawn Alford. It may have been my imagination, but it seemed that Ms. Alford was taken aback by Judge Woodard's approach, perhaps being more used to Judge Dozier's style which I assumed was far less accommodating to defense lawyers. A local lawyer confirmed as much, when he said that Judge Dozier "probably would not have given [us] the time of day" and would have denied our motion from the bench. Judge Woodard took our motion under advisement.

C. *Albert's Courthouse Visit with His Mother*

We had arranged to have Albert transported from Angola to the courthouse in Farmerville for the hearing, as was his right. He left the prison that morning escorted by several guards. Albert was dressed in a prison jumpsuit and shackled with leg irons and handcuffs attached to a chain around his waist. Albert's mother came to the hearing along with his sister Estell and several other family members. Prior to the hearing we asked the guards if Albert might be able to spend some time with his mother. The guards said that perhaps he could, if he behaved himself during the hearing. Albert sat by my side at counsel table with his head bowed, rocking slightly throughout the hearing. He seemed to listen, but clearly understood little of what was going on. After the hearing, the guards were satisfied and let Albert sit with his mother in the jury room adjacent to the courtroom. Of course he was supervised and chained at all times. Nevertheless, Albert's mother got to touch him and hold him and be with him outside of prison walls for the first time in almost ten years. There were tears all around. I wanted to take a picture, but the guards would not permit it.

We returned to Minnesota the next day to await Judge Woodard's ruling. Four days later we received a telephone call and learned that Gladys Burrell, Albert's mother, had suffered a heart attack during the night and passed away. Albert had lost the one person who had loved and supported him, and indeed cared for him for his entire life. I was grateful that, at the very least, we had been able to give Albert and his mother a brief period of time together outside of the prison prior to Mrs. Burrell's death.

D. *Judge Woodard Grants Our Motion for Funds*

On July 8, 1997, Judge Woodard granted our motion for funds to assist Albert in the preparation of his petition for post-conviction relief. Judge Woodard stated that we had made a compelling case and that the relief we requested was justified and required under existing federal and state law. She then proceeded to grant us every dollar we asked for: $12,500. Our understanding is that this was the largest sum ever awarded for experts in a case involving a claim for post-conviction relief in the history of the State of Louisiana.

IX. MICHAEL GRAHAM'S MOTION FOR A NEW TRIAL

A. Negotiations Fail—The Hearing on Michael's Motion

Throughout our representation of Albert, we worked very closely with Michael Graham's lawyer, John Holdridge. John had given up a career at a Wall Street law firm to work full-time on capital cases in Louisiana and Mississippi. He is a brilliant, crusading capital defense lawyer. We shared the information and materials that we had obtained with John, which he used, along with the results of his own investigation, to prepare an amended motion for new trial for Michael. John's motion papers skillfully laid out the constitutional errors committed by the police and prosecution in Michael's case, and compellingly argued that Michael was entitled to a new trial. Despite having been tried in 1987, Michael's case was still on direct appeal, and his initial motion for new trial had never been heard. That hearing was finally scheduled for March, 1998.

Chuck and I traveled to Farmerville to appear at the hearing. It was preceded by a lengthy conference between Judge Woodard and all the lawyers that were involved. By this time, the Union Parish District Attorney's Office had bowed out of both cases and passed them on to the Louisiana Attorney General's Office. Apparently, after hearing our presentation of Albert's case in connection with the funds motion, the District Attorney's Office wanted nothing to do with these cases. Serious negotiations took place that day to attempt to resolve Michael's case. In addition, the lawyers from the Attorney General's Office acknowledged that Albert's case was virtually the same as Michael's case and indicated that they would treat it the same way. In the end, however, no agreement was reached. As we learned throughout our experience, death penalty cases in Louisiana are highly political[54] and the Attorney General's Office was unwilling on this day to agree to any relief for Michael and Albert. Instead, it wanted Judge

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54. Denise LeBoeuf, who was recently appointed to head a new Louisiana capital defense agency, has said, "Capital cases are so political that winning becomes far more important for the average D.A. We're not talking about being competitive. We're talking about winning at all costs. Deliberately deceiving the court. Withholding favorable evidence. Arguing things they know aren't true. Harassing defense witnesses. Concealing deals they make with their witnesses. Winning means getting a death sentence. They are out to win." *Dead Teen Walking*, TIME MAGAZINE, Jan. 19, 1998.

Woodard to rule on Michael's motion.

B. *Louisiana State Penitentiary at Angola*

During this trip to Louisiana, we also visited Albert at Angola. If you think of Louisiana as shaped like an "L," Angola is located in the elbow of the L. It is fifty-nine miles northwest of Baton Rouge. Angola does not resemble a prison as we ordinarily think of one in that it is not simply a secure, walled building. Instead, it consists of 18,000 acres of what is often described as "the finest farmland in the south." Angola is located in a rural area surrounded on three sides by the Mississippi River and on the fourth side by the rugged, almost jungle-like, Tunica Hills. It is an old slave plantation. Some people refer to the prison, which bears the initials L.S.P., as the "last slave plantation."

There are six separate fenced areas at Angola; the remaining acreage is a large farm, whose primary crops are corn and soybeans. There are approximately 5,100 inmates at Angola, and over 1,500 correctional officers are employed to supervise and maintain control and custody of them. Many of the general custody inmates are put to work tending and harvesting the crops. Death row inmates, such as Albert, are housed in a small cinder block building not far from the prison's front entrance, which is enclosed by two high chain-link fences that are topped with razor wire. The building is known as the Reception Center or "RC," and, except for a brief period, it has been the site of Louisiana's death row since 1957.[55]

We visited with Albert in an area termed the "bullpen," which was reserved for attorney-client visits. We explained what was going on in his case and discussed Michael's motion for a new trial. After our meeting, I decided to ask the guards if we could see Albert's cell. I knew that this was an unusual request that would most likely be refused, but thought that if I was polite enough, and acted naive, perhaps the guards would allow it. As I suspected, my request was met with some amusement. The guard who was with us said that his supervisor was nearby and he would ask. He

55. In the spring of 1998, death row inmates were moved to cells in the Main Prison Extended Lockdown, a building approximately a mile and a half inside the prison grounds. In early 1999, however, they were moved back to the RC. *See* Wilbert Rideau, *Switching Places*, THE ANGOLITE, vol. 23, no. 4, July/August 1998 at 14; Vicki Ferstel, *3 More Angola Officers on Leave After Escape*, BATON ROUGE ADVOCATE, November 10, 1999, at 18C.

proceeded to shout through the bars to an adjacent part of the building: "These lawyers from Minnesota want to see Albert's cell!" The supervisor responded, "There's not much to see; they all look alike." I said that yes, I knew that, but still would like to see it. The supervisor replied, "Well, I guess I don't see any harm in that," and off we went.

At the prison, as you move further into each building, you have to go through a series of barred gates. The guards stationed in each separately barred area only have the key required to allow you to proceed further into the building, and do not have the key necessary to let you out of their area. That is, to be allowed out, a series of gates have to be opened for you, in each case by a guard stationed outside of the gate.

The death row inmates are housed on tiers consisting of an upper and lower row of cells, with fifteen individual cells per row. They are continuously locked down, meaning that they are in their cells twenty-three hours per day. Each inmate is allowed only one hour per day out of his cell, during which time he can take a shower or walk on the tier. Three days a week an inmate may use his hour to go to an outdoor fenced exercise area, which is akin to a dog run. Each inmate's cell measures approximately six feet by nine feet and contains a metal slab with a thin mattress for a bed, a squat, steel toilet and sink.

C. *"I'd let you walk him right out of here today."*

When we got to the tier on which Albert was housed, there was another inmate out on the row. He had to be placed back into his cell before we were allowed in. As we walked onto the row, there was a noticeable hush and then a murmur of comments such as: "Albert's got somebody with him," and "Who's that with Albert?" Some of the inmates even stuck small mirror-like objects out of their cells in an attempt to get a look at us. When we got to Albert's cell, the bars were opened electronically, he was directed in, we were motioned to step back, and then the bars were again closed shut. As we were leaving, we struck up a conversation with one of the death row guards, Sergeant Henry. Sergeant Henry told us that he had been working at the prison ever since Albert arrived, had spoken with him and had even looked at some of his legal papers. Sergeant Henry said that he did not believe that Albert had killed anyone, and that if it was up to him, "I'd let you walk him right out of here today." This was an extraordinary statement

coming from a veteran death row guard. The experience of seeing Albert in his cell, and hearing Sergeant Henry's comments, was gut-wrenching. We knew Albert was innocent and we had to get him out.

D. Judge Woodard Grants Michael's Motion for a New Trial

We waited nearly two years for Judge Woodard to rule on Michael's new trial motion. During this time we continued our investigation, further developed our legal theories, completed mental health evaluations of Albert and worked on our petition for post-conviction relief. We needed to be very careful with our petition because any claim that we failed to raise in the petition would likely be waived and could not be raised in further proceedings. This was particularly a concern with the new federal habeas corpus provisions. Because Michael's case was in a better procedural posture than Albert's, and because the Court's ruling on Michael's new trial motion could have a direct impact on Albert's case, we concluded that it was best to hold off filing Albert's petition.

On March 3, 2000, Judge Woodard granted Michael's motion and ordered a new trial.[56] She made extensive and detailed findings concerning the misconduct committed by the police and the prosecution in failing to turn over to the defense exculpatory and impeachment evidence, and regarding the discovery of new evidence favorable to Michael. Most of Judge Woodard's findings applied equally to Albert. Judge Woodard concluded that the jury had been misled and had not been given all the facts concerning the case. She found that the withheld exculpatory and impeachment evidence and the new evidence was material, and if it had been properly disclosed to the jury, there was a reasonable probability that the outcome of the case would have been different.[57] Judge Woodard said, "This jury had a right to make its decision based on complete, correct facts and the correct law; however, this jury was misled about certain areas of the law and many of the facts of this case such that we could have no confidence in the outcome of this trial."[58] The State chose not to

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56. State of Louisiana v. Michael Ray Graham, Jr., Crim. Docket No. 28,734B (Third Judicial Dist. Ct., Union Parish, La. March 3, 2000) (granting motion for new trial).

57. *Id.* at 36-37.

58. *Id.* at 38.

appeal Judge Woodard's order. Thus it was left with the decision of whether or not to retry Michael, and accordingly began an extensive investigation of the murders in an attempt to develop evidence for such a trial.

We analyzed Judge Woodard's decision and concluded that at least fifteen of the grounds that she found justified a new trial for Michael were also present in Albert's case. We wrote to the State, explaining our position in detail and also pointing out that there were several additional issues that required a new trial for Albert. These issues included the due process violation inherent in the failure to determine whether Albert was even competent to stand trial at the time he was tried in 1987, the grossly ineffective assistance that Albert received from his defense counsel, and additional evidence showing that the prosecutor knowingly allowed Olan Wayne Brantley to lie at trial and covered up the lie in front of the jury. Chuck called the assistant attorney general whom we had met with at the hearing on Michael's new trial motion and reminded him that the two cases, although tried separately, were so similar that they should be treated in the same manner. He agreed and said that any decision he made on Michael's case would be applied to Albert's case as well .

X. THE STATE DISMISSES THE MURDER CHARGES

A. The Written Reasons for Dismissal

On December 11, 2000, the State announced to Judge Woodard that it had decided not to retry Michael and would dismiss the murder charges against him. Judge Woodard insisted that the State prepare written reasons explaining its decision. We again contacted the assistant attorney general and he told us that he agreed that the cases against Albert and Michael were indivisible and that the State would dismiss the charges against Albert as well. Once the State filed its written reasons for dismissal, Michael could be released from Angola.

However, Albert was in a different position. He had not been granted a new trial by the court and the judgment of guilt and sentence of death had not been vacated. Fortunately, Nick had an idea. He believed that we could simply prepare a stipulation and joint motion for new trial that both us and the State would sign, and then ask Judge Woodard to grant the joint motion. The State

agreed to this procedure. We began to think that everything now would go smoothly and we could have a pre-Christmas release of both Michael and Albert. That was not to be. The State was either unable or unwilling to complete the written dismissal papers requested by Judge Woodard prior to Christmas. We never knew for sure, but it seemed to be another example of the politics of the death penalty. It was as if someone had decided that it would not look right to release two death row inmates right before Christmas, even if they were innocent.

Finally, on December 27, 2000, the State issued its written reasons for dismissal.[59] The State noted that the "cases against defendants Graham and Burrell are as closely related as to be virtually identical. Therefore, the State of Louisiana has joined defendant, Burrell, in moving for a new trial."[60] The State concluded that there was "a total lack of credible evidence linking Graham and/or Burrell to the crime," and said that it would be "a breach of ethics" for the prosecutors to proceed to trial against them.[61] The State announced that it was reopening the investigation of the murders and dismissing the charges against Michael and Albert.[62]

B. An Unexpected Problem

Meanwhile, in conjunction with the Attorney General's Office, we filed a joint motion for a new trial in Albert's case. We expected that the court would grant the motion, thereby permitting Albert to be released at the same time as Michael. In fact, that afternoon we became so sure that the release was imminent that we immediately headed to the airport to travel to Louisiana. Just before we left our office, however, we received a call from the judge's clerk indicating that the judge was not going to sign our papers that day and wanted to have a conference call on Thursday.

We had the conference call from Nick's office in New Orleans on Thursday morning, December 28. Judge Woodard told us that she understood that the Attorney General's Office had joined with us in requesting that Albert's conviction be vacated and that he be

59. Written Reasons for Dismissal in *State of Louisiana v. Michael Ray Graham, Jr. and Albert Ronnie Burrell,* Crim. Docket Nos. 28,734B and 28,734A (Third Judicial Dist. Ct., Union Parish, La.) (filed December 28, 2000).

60. *Id.* at 1.

61. *Id.* at 2.

62. *Id.* at 3.

granted a new trial. She asserted that even though both sides agreed Albert ought to be released, that did not necessarily mean that she had to agree. This was a shocking moment. I thought that Nick was going to leap out of his chair and go right through the ceiling. Judge Woodard insisted upon having a hearing in open court before granting any motion regarding Albert's case. Judge Woodard said that she would have to consider the matter very carefully before making any decision. She did agree, however, to expedite the hearing and it was scheduled for Tuesday, January 2 at 9:00 a.m. in her courtroom in Farmerville.

C. Michael is Released, Albert is Not

Judge Woodard's decision to hold a hearing in Albert's case did not effect Michael's case. Later that day, Thursday, December 28, Michael walked out of Angola, was driven to Baton Rouge by one of his lawyers, Michele Fournet, got on a bus and rode straight to his mother's home in Virginia. We were left having to explain to Albert why Michael was released that day and he was not. We tried to do this over the telephone from Nick's office, but Albert was virtually incoherent. He did not seem to understand, or perhaps even hear, what we were saying. By this time, news of the state's dismissal of the charges against Michael and Albert had been on the radio and in the papers and had certainly spread throughout the prison. Nick talked to officials he knew at the prison and strongly expressed his concern that perhaps certain guards or other inmates were harassing Albert by saying things such as: "If you're really supposed to get out, how come no one has come to get you?"

Chuck and I decided that we had to visit Albert and explain why Michael was being released and he was not. We were worried that it would be confusing and painful for Albert if we went to see him, but could not take him out with us. Nonetheless, on Friday, December 29, Chuck and I visited Albert at Angola. It went much better than we had expected. There was a palpable buzz about the place over Michael's release the previous day. Warden Burl Cain had told the newspapers that he could not recall another time when an inmate had been released from death row directly "onto the streets."[63] We talked briefly with the guard working in the small

63. Duane M. Baillio, *Freed Men Won't Be Retried*, RUSTON DAILY LEADER, December 31, 2000, at 1A. THE ANGOLITE, which is the prisoner-published news magazine of the Louisiana State Penitentiary, also reported that "Graham and

office just inside the RC (the building that houses death row). She, as everyone, wanted to know when Albert would be getting out. Posted on one wall in her office was a large white, erasable board that listed all the death row inmates organized by the tier where they were housed. There was a blank spot where Michael's name had been—I could only faintly make out his name.

We met with Albert in the visiting room. He, of course, was shackled and in a prison jump suit, but seemed much different than when we had previously visited him. He was excited and genuinely smiling, something I had never seen before. He had trouble sitting still and bounced around in his chair as we talked. The distress that had been so apparent during the previous day's telephone call was gone.[64] We explained that we had to appear in court on Tuesday for a hearing in his case. We assured Albert that we were doing everything we could to get him released as soon as possible, but cautioned him to be patient. Albert clearly believed he would be released on Tuesday after the hearing, but Chuck and I had no way of knowing if that would be true. Albert said he was saving a clean pair of blue jeans to wear when he was released.

Albert told us that he had heard news reports on his radio about the charges being dismissed against he and Michael and about them being released. Amazingly, he had also witnessed Michael walking out of the prison on the television that was affixed to the wall across from his cell on death row. I could not imagine how Albert must have felt to see Michael leave while he remained in his cell.

Following our visit with Albert, Chuck and I stopped by one of the more curious features at Angola, the Louisiana State Penitentiary Museum which is housed in a building just outside Angola's front gate.[65] It contains historical displays and mementos, exhibits about Angola's depiction in movies and books, inmate art work, and various other things. Oh yes, you can also buy souvenirs.

Burrell were the first in anyone's memory to walk straight off death row into the light of freedom." *Lane Nelson, Death Watch: Breaking the Death Grip*, THE ANGOLITE, vol. 26, no. 2, March/April/May 2001, at 18 (discussing Michael's and Albert's release from death row).

64. I later learned that Michael, before leaving prison, wrote Albert a letter reassuring him that everything would be okay and that he would be released too. Apparently the letter eventually made its way through the prison to Albert and was read to him. Perhaps this act of humanity by Michael was what had helped relieve Albert's distress. Perhaps our visit helped as well.

65. *See* www.angolamuseum.org.

The person staffing the museum was quite friendly (we were the only visitors) and eager to show us the museum's exhibit of the old electric chair. It was on display in a special room painted to look like the death chamber with various items used in the execution process on hand. On the wall were mugshot photos of every inmate who had been executed. It was all rather macabre.

The museum staff person told us that there had been quite a lot of excitement at the prison the day before because of an inmate's release off of death row. We told her that we knew, and that we were there because of his co-defendant. She said, "Well, if they are innocent, they should be released." I cannot count the number of times that I have heard this statement in connection with Albert's case. It is such an obvious truism that it always strikes me as a rather odd thing to say. I have thought from time to time of calling the Angola museum and suggesting they put together an exhibit picturing Michael and Albert.

XI. ALBERT'S RELEASE—JANUARY 2, 2001

On January 2, 2001, Chuck and I appeared in Judge Woodard's courtroom in Farmerville for the hearing on Albert's new trial motion. At the hearing, the State was asked to explain why it had agreed that Albert's case was virtually identical to Michael's and had dismissed the charges against Albert. Chuck and I then presented additional evidence for setting aside the conviction that were unique to Albert's case. I discussed the due process issue of the prosecutor's knowing failure to raise the issue of Albert's competency prior to trial and failure to disclose the prior judicial determination of incompetency, and his affirmative misleading of the jury by falsely stating that he knew of "no mental disease or defect" suffered by Albert. Chuck presented further evidence that the prosecutor lied to the jury by knowingly permitting Olan Wayne Brantley to testify falsely, by covering up Brantley's falsehood, and then by making an outrageous argument in closing on Brantley's truthfulness. Judge Woodard also asked if there were any relatives of the victims present in court. The only person there was a cousin of Callie Frost's whom we had known for a long time and had asked to come. He told Judge Woodard that he believed Albert and Michael had not killed the Frosts.

Judge Woodard was concerned about whether she could grant a new trial in Albert's case considering its procedural posture—that is, the case was at the post-conviction stage and Albert's earlier

motions for new trial had been denied. Judge Woodard noted that the Louisiana Code of Criminal Procedure ("Criminal Code") states that a motion for new trial based upon new and material evidence has to be filed within one year after the verdict or judgment of the trial court.[66] We were, of course, far beyond that time limit. In our motion, however, we relied upon Article 851(5) of the Criminal Code, which provides that the court may grant a new trial whenever: "The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right."[67]

The commentary to the Criminal Code indicates that this section gives plenary authority to the judge to order a new trial to do justice, even if a motion for a new trial is not based on a strict legal ground.[68] Moreover, the commentary indicates that this section replaced the provision in the prior code which gave the court authority to grant a new trial with the consent of the prosecutor even if the defendant did not have a valid legal reason for a new trial.[69] Judge Woodard, however, did not seem satisfied and wanted case law support for our position. We gave her a case that Nick had suggested: *State v. Crockett*.[70] In that case, the court held that it was proper to waive the one-year requirement for a motion for a new trial based on newly discovered evidence to insure that justice was served.[71]

After hearing all of the arguments, Judge Woodard recessed to her chambers to consider our motion. After a brief time, which seemed like much longer, she returned to the bench and granted our motion. I noted that the time was 9:39 a.m. For me this was a moment of jubilation and great relief, all of which, of course, had to be kept inside as a matter of professional decorum. Moreover, we had to quickly gather up our materials as the court clerk began immediately calling the day's calendar of misdemeanor matters—a remarkable contrast.

Chuck and I then began the over four-hour drive to Angola to get Albert out. The drive took us through back roads of both

66. LA. CODE CRIM. PROC. ANN. art. 853 (West 1997).
67. LA. CODE CRIM. PROC. ANN. art. 851(5) (West 1997).
68. LA. CODE CRIM. PROC. ANN. art. 851 (Official Revision Comment) (West 1997).
69. *Id.*
70. 537 So. 2d 242 (La. Ct. 4 App.1996).
71. *Id.* at 244.

Louisiana and Mississippi. It was certainly our best trip ever to the prison. Meanwhile, Nick was in New Orleans working the telephones with corrections officials and the Attorney General's Office to finalize Albert's release.

When we arrived at the prison, word of Albert's release had already spread and there were newspaper and television reporters there to meet us. In addition, we were met by a public relations person from the Department of Corrections and the prison's lawyer, Bruce Dodd. Mr. Dodd told us that Albert was ready and that we could meet with him. He escorted us back to death row. For the first time, I was entering the prison without having relinquished my wallet and being patted down. When I mentioned this to Mr. Dodd, he said, "Well, I assume you guys don't have any weapons on you today." We were met at the front office of the death row building by several guards and Assistant Warden Lee.[72]

Albert was waiting for us in the same visiting room where we had met with him the previous Friday. He was, true to his word, dressed in a crisp, clean pair of blue jeans and had a broad smile. Even though he was about to be released, Albert surprisingly still was shackled. Mr. Dodd explained that prison rules required the chains to remain on until Albert completed all the paperwork necessary for his release. At our request the guards allowed a handcuff to be undone so that Albert could sign the papers. Mr. Dodd went through all of the paperwork, of course having to read it and explain it all to Albert. Albert was asked to sign papers indicating that he had received all of his belongings from the prison, and agreeing that if anything had been left behind it could be destroyed. He was also asked to sign papers acknowledging that the prison had given him a check for $10, which, unbelievable as it sounds, was Albert's only compensation from the State of Louisiana for being wrongfully convicted and spending over thirteen years on death row.[73]

In addition, Albert received a memo from Warden Cain which was directed to "all concerned" and dated January 2, 2001. It stated: "the above-referenced inmate [Albert] is being released from the Louisiana State Penitentiary by virtue of court order effective January 2, 2001. This will serve as your authority to release

72. Warden Cain was not available as we were told he had left that day to go to New Orleans for the Sugar Bowl.

73. To be fair, the State also gave Albert a denim jacket, which was several sizes too big.

this offender from LSP count." This was a piece of paper that Albert could show to anyone indicating that he had been officially released. He clutched it as tightly as he could, as you might imagine. Only after all of the papers had been signed did the guards release Albert's chains. To see them come off one by one was extraordinary.

We then sat with Albert, the prison lawyer, and a number of guards awaiting Nick's arrival at the prison. Chuck asked one of the guards if he could arrange to have Sergeant Henry come by, and he did. I first saw Sergeant Henry approaching in the hallway outside the visiting room. I asked if he remembered me, and he replied that he did. It apparently was not a typical experience for a couple of Minnesota lawyers to be on a death row tier at Angola. Sergeant Henry told me that he was happy about what we had done for Albert. He again said that he had known Albert the entire time Albert had been at Angola, and did not think that he "did it." Sergeant Henry then gave Albert a warm farewell and wished him well.

At one point, one of the guards began asking Albert who his friends were in prison. This same guard had earlier, rather sternly and almost sneeringly, told Albert to take care of himself and not get into any more trouble on the outside. Albert said that Feltus had been his closest friend because Feltus had read to him. The room was quiet for a moment as nobody said anything because everyone knew that Feltus Taylor had been executed in June of 2000. Then, the guard who had been questioning Albert simply said, "Feltus was a good convict."[74]

All the while we were waiting, the walkie talkies that the guards were carrying crackled with various reports, many of which were in a prison language that was hard for us to understand. On one occasion, however, the announcement came over: "count clear." A guard mentioned this to Albert, saying that it was a good thing that the count had been called "clear" even though Albert was not in his cell, because otherwise the guards would be coming to look for him. In other words, as the release memo indicated, Albert was no longer part of the count at Angola.

Shortly before 5:00 p.m., Albert walked out of Angola clutching his release memo. He was asked to sign the ledger at the

74. *See* Lane Nelson, *Death Watch: Dying to Please*, THE ANGOLITE, vol. 25, no. 3, May/June 2000 at 22 (discussing Feltus Taylor and his execution on June 6, 2000).

front gate, and then was greeted by his sister Estell, his brother Larry, Nick, Nick's twelve year-old son, Miles, Chuck, and I. I will always remember Nick exhorting over and over again to Albert that he was now in "the free world" and touching the "free ground."

After meeting briefly with the press, we drove to a nearby roadside restaurant for dinner. For his first meal in freedom, Albert ordered catfish fillets, french fries, Texas toast and a salad. After dinner, as we left the restaurant, Albert could finally look up and see the stars—just one of many things he had missed during all those years he was wrongfully imprisoned.

Truly, "It's good to be free."