

## **2007 AALS Workshop on Clinical Legal Education**

### **The Power of Innocence: Challenging Assumptions on Law and Clinical Pedagogy**

Concurrent Session, May 5, 2007, 3:45-5:00

Presenters: Meredith Ross, Jackie McMurtrie, Steve Drizin, and Keith Findley

#### **Instructions for session participants:**

- ✚ At the beginning of the session, you will be divided into small groups.
- ✚ Each small group participant will have 25 minutes to read and discuss the attached case study. As you read and talk about the case study, please consider the questions listed below.
- ✚ Using the case study as a focal point, we'll reconvene, so that all participants can discuss the challenges and opportunities of innocence cases with the session presenters.

#### **Questions to consider as you read and discuss the case study:**

With regard to the education of law students, what assumptions does a case like this challenge about the following? What educational opportunities does it present?

- ✚ clinic design and case selection?
- ✚ the relative roles of law students and clinical instructor?
- ✚ the “lawyering tasks” students learn?
- ✚ the “lawyering values” students learn?
- ✚ the role of non-law students?
- ✚ ethical issues?
- ✚ what constitutes an “innocence” case?.
- ✚ Anything else?

With regard to the criminal justice system, what assumptions does a case like this challenge about the following? What opportunities does it present to improve the system and/or educate law students?

- ✚ the role of police, prosecutor, defense attorney, judge?
- ✚ the reliability of evidence, witnesses, etc.?
- ✚ race?
- ✚ other possible biases in the legal system?
- ✚ the limits of the law?
- ✚ the possibility of achieving individual justice and/or systemic reform?
- ✚ anything else?

**Innocence Project Case Study: Maurice Carter**  
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In 1998, the Wisconsin Innocence Project received a request for assistance from Maurice Carter, a Michigan prisoner who had been in prison for 23 years at that time, following his conviction for assault with intent to commit murder. Mr. Carter, an indigent black man, had been convicted of shooting a white, off-duty police officer, as the officer shopped with his wife for Christmas gifts on December 20, 1973, in Benton Harbor, Michigan. The story Mr. Carter told in his request for assistance gave us great concerns about the fairness and reliability of his conviction. There was no apparent source of DNA evidence, but considerable other bases to doubt the conviction.

At the time of the shooting, the only people present in the store, aside from the officer and his wife—Tom and Ruth Schadler—were the store clerk (Gwen Baird), and an unidentified black man. Within minutes after the Schadlers entered the Benton Harbor Wig and Record Shop, the black man pulled out a small .22 caliber handgun and shot Officer Schadler in the head and neck five to six times from behind. The gunman then walked out of the store and headed east on Main Street. Officer Schadler got up, followed the man out of the store, slipped on the ice, got up again, and fired his .38 caliber service revolver at the fleeing man. Schadler survived the shooting.

For more than two years, police arrested no one for the shooting. Eventually, on November 1975, Wilbur Gillespie, a one-time acquaintance of Maurice Carter's, was arrested on unrelated charges of delivery of heroin. As a repeat offender, Mr. Gillespie faced a potential life sentence. According to Mr. Gillespie, police offered him a deal: identify Mr. Carter as the man who shot Officer Schadler, and they would drop the heroin charges. After initially refusing to cooperate, Mr. Gillespie ultimately signed a statement implicating Mr. Carter in the shooting. Subsequently, at Mr. Carter's trial, Mr. Gillespie recanted that statement, admitting that he had made up his allegations against Mr. Carter in order to avoid a life sentence. The State subsequently convicted Mr. Gillespie of perjury for having falsely accused Mr. Carter, and sentenced him to 15-30 years for that offense. Nonetheless, the State never faltered in its continued prosecution of Mr. Carter, and the jury convicted him.

After Mr. Gillespie identified Mr. Carter as the gunman, police arrested Mr. Carter. The local newspaper published Mr. Carter's picture on the front page, announcing the arrest of Officer Schadler's shooter. The following week, in January 1976, police conducted a lineup that included Mr. Carter. Three witnesses were invited to the lineup—Thomas Schadler, Ruth Schadler, and Nancy Butzbach. Ms. Butzbach, who was then working in the prosecutor's office, claimed that from a second-floor window, diagonally across a busy intersection from the shop where the shooting occurred, she saw the gunman fleeing from the shop. For the first time—more than two years after the shooting—these witnesses, all white, picked Mr. Carter as the gunman. At trial, the State's case rested entirely on eyewitness testimony from these and two additional witnesses, which raised red flags for us, because eyewitness error is the leading cause of wrongful convictions.

There was no other evidence of guilt. There was no physical evidence—no fingerprints, no gunshot residue, no bloodstains, no fibers, no hairs—linking Mr. Carter to the scene. There was no confession. And Mr. Carter had no motive.

Against this evidence, three witnesses were certain that Mr. Carter was not the gunman: Gwen Baird, the black woman who had waited on the gunman for approximately 12 minutes before the shooting began, testified that Mr. Carter was not the gunman. Connie Allen, another black woman who had been in the shop with the gunman, but left before the shooting began, testified that Mr. Carter was not the gunman. And Wilbur Gillespie (also black) testified that he was with Mr. Carter at the time and knew he was not the gunman. Mr. Carter also testified and denied involvement in the shooting.

We also learned that Mr. Carter's jury had been all white, and that the court had eliminated the only black jurors from the pool before jury selection began, based upon disputed evidence that their employers had told the court that they could not afford to release them from work for the duration of the trial. Through prior counsel, Mr. Carter had already litigated, and lost, claims that the elimination of all blacks from his jury pool was unconstitutional.

Based on this evidentiary and procedural picture, we became concerned that Mr. Carter might in fact be innocent, and we agreed to investigate the case. Without DNA evidence, the case would require considerable on-the-scene investigation. Several innocence projects, from several law schools and a journalism school, joined together to work on the case. Literally hundreds, if not thousands, of hours were spent reviewing physical evidence, searching for and reviewing documents, and interviewing dozens of witnesses. The investigation continued for over four years, until a postconviction motion was filed in November 2002.

As an initial step after agreeing to take the case, students and clinical faculty in the case met with local community and religious leaders in the basement of a local African American Baptist Church in Benton Harbor. We quickly learned that the Benton Harbor/St. Joseph, Michigan, community is sharply divided along class and race lines, and that the Black community harbored tremendous anger about the way African Americans had been treated in the criminal justice system. Although Mr. Carter had been convicted almost three decades earlier, and almost no one in the community knew him, his case was a symbol to the Black community of the many injustices that had been visited upon them for years. Out of that initial meeting in that church basement grew a local Citizens Committee for the Release of Maurice Carter, comprised of members of both the black and white communities in Southwestern Michigan, who would work closely with us over the next few years. The Committee helped both to locate new evidence and generate community support for Mr. Carter through letters to the editor, public protests (attracting national personalities such as Ruben "Hurricane" Carter), billboards, a symposium at a local college on the problems with eyewitness identification evidence, considerable media attention, and local government and church resolutions calling for a new trial.

The new evidence that we developed included:

New records, never presented at trial (either because they had not been disclosed or

because defense counsel had simply overlooked them), showed that, while Officer Schadler testified at trial that he was “certain” Mr. Carter was his assailant, in his initial statements to police after the shooting he had repeatedly told them that he did not get a good look at the gunman and could not provide a description of him. Schadler also had been unable to identify Mr. Carter from a photo array he viewed within two weeks after the shooting.

Like Officer Schadler, Mrs. Schadler made numerous statements to the police on the day of the shooting, about which the jury never heard (largely because trial counsel had failed to present them), indicating that she did not get a good look at the perpetrator. She too had been unable to identify Mr. Carter from a photo array two weeks after the shooting. The jury also did not hear that on the day of the shooting, Mrs. Schadler told police that the shooter “had the gun in his left hand.” Mr. Carter was right-handed. In addition, new evidence showed that Mrs. Schadler had initially described the assailant as having a “dark” complexion, but her report was subsequently altered to indicate a “medium” complexion. Mr. Carter’s complexion was light or medium, not dark.

The third key eyewitness offered by the State—Nancy Butzbach—had testified that when she heard shots she moved to a window and saw Mr. Carter fleeing from the shop from her vantage point on the second floor of a building across a busy intersection. Our students, however, discovered police reports, about which the jury never knew, indicating that Ms. Butzbach initially told police after the shooting that all she had been able to see was “the shadow of a black man” running away from the shop. The students also found records indicating that Ms. Butzbach had repeatedly seen photographs of several individuals, including Mr. Carter, but never identified Mr. Carter as the gunman from those photographs. They also found records indicating that, when Ms. Butzbach finally picked Mr. Carter out of the lineup conducted after Mr. Carter’s arrest (after his picture appeared on the front page of the newspaper), she identified him only as someone she had seen “at the scene before the shooting.”

Ms. Butzbach had testified that she saw the gunman from a distance of less than 100 feet. But students measured the actual distance and found that Ms. Butzbach could have been no closer than 140 feet, and almost certainly was much farther away than that; and they obtained evidence from a visual perception expert establishing that human beings are incapable of distinguishing facial features from that distance.

Students and faculty also worked with Benton Harbor Police to conduct an experiment to test whether Ms. Butzbach could have heard the gunshots as they claimed. Police blocked off the entire block of downtown Benton Harbor, and then fired a .22 caliber handgun into a barrel of sand while an audiologist evaluated what could be heard from Ms. Butzbach’s office. That audiologist concluded that Ms. Butzbach could not have heard the shots from the small .22 caliber handgun used to shoot Officer Schadler.

A fourth eyewitness—Victor Miller—who did not attend the lineup, but who testified at trial that Mr. Carter was probably the man he saw running past him on the street right after the shooting, admitted to students that he had actually told police right after the shooting that, in fact, “he didn’t recall anyone running by him prior to the shots being

heard nor after the shots.”

A fifth and final eyewitness—Grayling Love—who also did not attend the lineup, claimed at trial that he was outside the Wig and Record Shop at the time of the shooting and saw the fleeing gunman. He testified that Mr. Carter looked like that man. But our students found Mr. Love, and he admitted to them that in fact he had been unable to identify Mr. Carter from his mug photo. He also said that he had eventually identified Mr. Carter as looking like the gunman when police made it very clear to him that they wanted him to say Mr. Carter was that man, and because the prosecutor had coached him about how to testify. Students also learned that Mr. Love was himself facing criminal prosecution on unrelated charges at the time he agreed to testify for the State. Mr. Love signed an affidavit swearing that in fact he could not identify Mr. Carter as the gunman, and had significant doubts about his guilt.

In addition to the defense witnesses who testified at trial that Mr. Carter could not have been the gunman, students after trial found other new witnesses who would have testified that Mr. Carter was not the gunman. Another pedestrian, Lucy Hodder, signed an affidavit swearing that the man she saw fleeing the scene had a very dark complexion and could not have been Mr. Carter.

Similarly, students found another man—Johnnie Williams—who encountered a man fleeing down an alley in the vicinity immediately after the shooting, who had a very dark complexion and could not have been Mr. Carter.

Finally, students and community members located the person they believed to be the true perpetrator. That man had been convicted of violent crimes in the area, fit the physical description given by eyewitnesses, and had been heard by family and friends boasting about having shot Officer Schadler. A family member even secretly recorded other family members talking about how that man had told them about how he shot Officer Schadler.

Students and clinical faculty presented all of this information to the trial court in a lengthy and complex postconviction motion, seeking a new trial. With much media attention, accompanied by a public rally sponsored by the Citizens Committee, students hand-delivered and filed the motion and supporting brief in the circuit court.

While the motion was pending, Mr. Carter’s team learned that he had been diagnosed with Hepatitis C and end-stage liver disease. He was not expected to live, unless he received a prompt liver transplant. But as long as he remained in prison, he was ineligible to be considered for a transplant. As a consequence, after hearing nothing from the circuit court for several months, the team formally asked the court to expedite consideration of the postconviction motion, so that relief could be granted in time to save Mr. Carter’s life.

The court denied an evidentiary hearing, and instead scheduled the case for oral argument on the pleadings. Given the complexity of the case, and the magnitude of the stakes, we decided to have the lead attorney on the case argue the case. The students played

no role at the hearing. In sum, on this case students investigated the case extensively, drafted pleadings and briefs, and worked with the local community groups, but made no appearances as counsel for Mr. Carter in any hearings.

At the conclusion of the postconviction hearing, the court adjourned for 15 minutes, and then returned to read a type-written, 20-page decision into the record denying the motion.

We then turned our attention to two fronts. Simultaneously, students initiated an appeal and drafted an appellate brief, while they also drafted a petition for clemency that was filed with the Governor. The clemency petition focused primarily on Mr. Carter's medical condition, but also raised his strong claim of actual innocence. After a hearing before the Governor's Clemency Board, and after more media attention—including favorable editorials in major newspapers across the state—the Governor granted clemency, based solely on Mr. Carter's medical condition. The court of appeals then denied discretionary review of the case, without explanation.

Three months after his release from prison Maurice Carter died of liver failure. He had been too ill by the time he was released to be a viable candidate for a liver transplant.