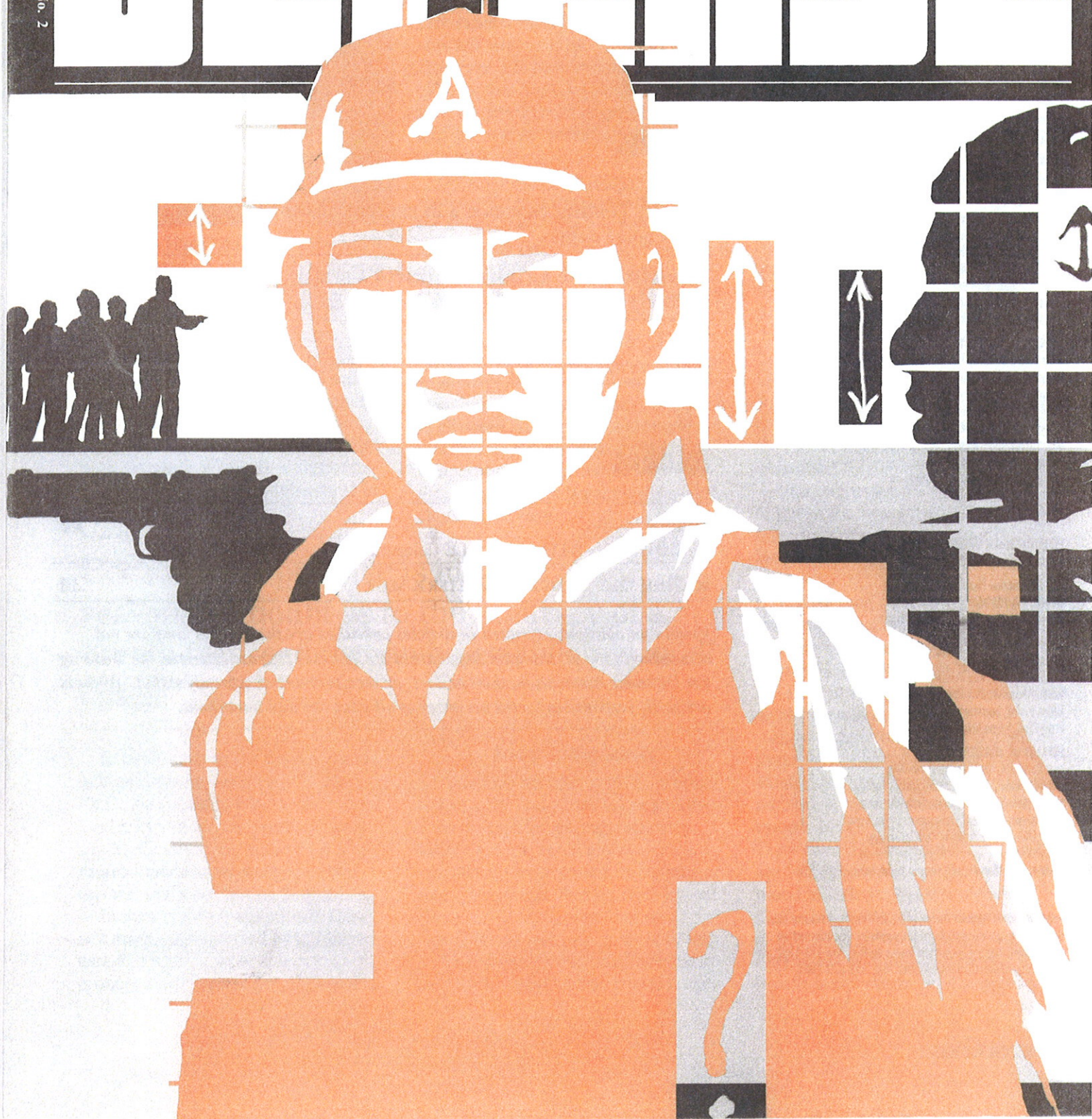


CONFRONTATION • FAULTY ID • BREATH TESTING

WASHINGTON CRIMINAL

May, 2009 Volume 23 No. 2

DEFENSE



Tales from the Criminal Courts

Faulty eyewitness ID, cranial measurements, and dismissal of a murder charge.

BY MARK W. PROTHERO



“Would you want to co-counsel a murder case with me? Judge Gain ordered a second attorney and I was wondering if you would be interested.” The

question was posed by Diane Zumwalt; I had worked with her few years ago when we were public defenders at Associated Counsel for the Accused. “It’s court-appointed so it would be at the OPD rate.” I had done a few conflict cases for OPD so I knew that meant \$70/hour.

After I read a copy of the Certification for Determination of Probable Cause, Diane gave me her version. She made a compelling case that her client was innocent. I didn’t have to think too long before I knew I wanted to get involved and agreed to be co-counsel for Glenn Proctor.

The Crime

The homicide occurred at the Federal Way Transit Center at around 7:00 PM on January 18, 2008, when Glenn and his cousin Frankie Stewart ran into “Li’l Crucial” (aka Jean Somnerville). They had a prior beef with Li’l Crucial, an incident several months earlier that involved Li’l Crucial stealing Ipods and credit cards from Glenn, Frankie, and others while at a party. When Li’l Crucial got caught, Glenn and Frankie participated in beating him up, much to his embarrassment.

Li’l Crucial felt he had been jumped and held it against Glenn in particular.

When they encountered each other at the transit center on January 18, Li’l Crucial and Glenn discussed having a fight to “squash the beef.” But things broke up when Li’l Crucial got a cell phone call from his big brother, who was known as “Crucial.” Crucial told Li’l Crucial not to do anything until he got there.

Glenn and Frankie went to a nearby Wendy’s for awhile. Frankie didn’t really want to go back to the transit center but Glenn wanted to return and

one-on-one fight he had in mind, so Glenn waved his hand at Crucial as if to say, “Yeah, right”— thinking it was just a big bluff — and then turned to walk away. Frankie did the same and, as he turned, saw Sweet reach into his pants, withdraw something, and extend his arms towards the Crucials. Glenn saw this too. They didn’t wait to see what happened next. As they started to run, they heard two shots. They ran off to the southwest, towards 320th and Pacific Highway South, Glenn in front and Frankie close behind. Sweet had apparently run off in some other

They didn’t wait to see what happened next. As they started to run, they heard two shots.

deal with Li’l Crucial once and for all in a square fight, one on one. Then, Glenn figured, Li’l Crucial would have to stop whining about getting jumped at the party several months ago.

When they returned, many of the young people congregating at the transit center gathered around in anticipation of the fight between Glenn and Li’l Crucial. By this time, Crucial had arrived; he was standing next to Li’l Crucial. A third young, black male, known only as “Sweet,” joined Glenn and Frankie as they approached the brothers. Words were exchanged. According to Frankie and Glenn, Crucial opened his jacket a bit to display a gun in his waistband and said something like, “Hey Cuz, it’s murder season.”

This was not going to be the fair,

direction. Crucial and Li’l Crucial ran off, heading in the opposite direction. Left mortally wounded from one of the shots, lying on the pavement in the middle of the crosswalk, was Darrell Miller, a woman who just happened to be there. An innocent bystander.

Glenn and Frankie soon met up with Rachel, Glenn’s girlfriend and caught a bus back to Lakewood. Frankie realized he had dropped his cell phone at the scene. Glenn learned from another friend that a woman had been shot and killed at the transit center.

Meanwhile, the police were scouring the area looking for suspects or people who might have seen something. Less than ten minutes after the shooting, two Federal Way Police

Department officers encountered Crucial, Li'l Crucial, and two of their friends near the Wendy's fast food place that Glenn and Frankie had been at earlier. The officers asked if they knew anything about the transit center shooting. Oh no, officers. We don't know anything about that. They were

two sets of six photos, one with Glenn in it and one with Frankie in it. Crucial didn't make any picks. Li'l Crucial identified Glenn as the guy whom he had the prior beef with and who shot at him at the transit center. He identified Frankie (whom he also knew from the party) as someone who was pres-

Crucial's statement (well, at least his *second* statement) and photo identification (of a guy he knew and had a grudge against ... and by the way, I forgot to mention Li'l Crucial's criminal history full of ER 609 admissible convictions).

Upon learning of the warrant for his arrest, Glenn turned himself in. He was innocent. He wasn't going to run. He wasn't going to hide. And he wanted to avoid the risk of some type of violent confrontation that might occur when the police came to arrest him.

He revealed that Li'l Crucial and Crucial were there and were the likely targets of the shooting.

calm. Their demeanor was appropriate. They were free to go.

Frankie's dropped cell phone was recovered by a witness and turned over to the authorities. This led the police to Frankie, who was living with Glenn. The two had previously been in trouble for drinking at the transit center so the police now had two named suspects, or at least persons of interest, along with a third unidentified young, black male.

As the investigation progressed over the next several days, one of the witnesses at the transit center was identified, tracked down and questioned. He revealed that Li'l Crucial and Crucial were there and were the likely targets of the shooting. Obviously, the cops now needed to talk to these two (again). Li'l Crucial's probation officer was contacted and, on February 8, she brought both Crucials in to talk to the police. They admitted to being at the transit center. Li'l Crucial told police about the assault at the party several months earlier, the potential fight at the transit center, and the confrontation and shooting. They also gave police the name of the person they thought was the as-yet-unidentified third guy.

They were each separately shown

ent. The police now believed they had their man and issued an arrest warrant for Glenn Proctor.

In the meantime, right after the shooting, Glenn had told his dad what happened. Of course, after finding Frankie's phone, it wasn't too long before the police were attempting to speak to Frankie and Glenn. Glenn's

Procedural Background

Glenn was charged with Murder Second Degree (intentional and felony murder based on Assault 2) on February 8, 2008. He pled not guilty at his arraignment on February 25. Upon an initial review of the discovery, his assigned public defender recognized that not only did her agency have a conflict but all of the defender agencies in

In a classic case of the tail wagging the dog, the jail refused to alter their stance.

father had several phone conversations with detectives, making arrangements for Glenn to go in and speak with them. While Glenn knew he was innocent and believed the surveillance videos would prove that, he was reluctant to turn himself over to the police. He was afraid they might falsely accuse him of the murder and lock him up.

Glenn's dad eventually retained John Henry Browne, who communicated to the investigating detective that Glenn was innocent and that it was the third party who was the shooter. Unconvinced, the police issued an arrest warrant for Glenn based on Li'l

King County had conflicts of interest because many of the witnesses at the transit center had been represented by one or another of the agencies at some point in time. The King County Office of Public Defense went to its conflicts list and, on March 3, assigned the case to Diane Zumwalt. The case scheduling hearing was continued a couple of times, until early June, for Diane to review the discovery, get an investigator appointed, and begin to mount a defense.

From the beginning, Diane's preparation was slowed by the jail's policy of not allowing her investigator, Benito Cervantes, to bring discovery

into the jail to review with Glenn face-to-face without an attorney present. Diane brought this to the attention of Criminal Presiding Judge Gain, who attempted to intervene with the jail. In a classic case of the tail wagging the dog, the jail refused to alter their stance. Judge Gain said fine, then I'll have to appoint another attorney so the defense can adequately prepare in a timely fashion. Which brings me back to Diane's invitation to co-counsel the case that first week of June 2008.

I needed some time to get up to speed. It's fair to say that, like a good

wine, I don't like to try a case before its time. But seriously, there was a lot to catch up on and quite a bit of our own investigation to complete. By agreement with the deputy prosecutor, Don Raz, case scheduling was kicked again, this time until August, so I could catch up and we could get prepared.

Investigation & Discovery

Glenn, Diane, and Benito already knew — and it didn't take me too long to figure out — that a key would be what evidence we could find on the surveillance videos from the transit

center. Diane prepared and Benito served subpoenas for all the potential video evidence. Diane continued to organize our investigation while I reviewed the discovery and familiarized myself with everything.

That included spending time with our young client who kept repeating that phrase often heard by criminal defense attorneys: "I didn't do it!" Granted, this was consistent with what John Henry Browne had told the detectives on Glenn and Frankie's behalf the day before Glenn turned himself in. But I had heard it before, so I took it for what it was worth. Many clients have taken that position when we initially meet. It isn't as if the attorney-client privilege automatically makes accused people trust their lawyers and tell the whole truth and nothing but the truth when they first meet. Some people want to develop a level of trust before they tell the whole truth to someone, even their lawyer.

And frankly, it didn't matter whether he told me he was guilty or innocent. We needed to review the state's evidence against him, do our own investigation, and see whether or not the state could prove it. If it looked like they had a strong case against Glenn, I wanted Glenn to be able to trust us and allow us to negotiate a good plea bargain on his behalf. Or, if we were going to trial, I needed to get to know how he would present to a jury if he needed or chose to testify.

As I simultaneously got up to speed on the discovery and got more acquainted with Glenn, I began to sense the fact that he had been telling the truth from the beginning and was, indeed, innocent. There was something about his naiveté and lack of sophistication, some "ring of truth" to what he said and how he said it. Diane had sensed it as well, but I'm a bit more cynical and couldn't just take her word for it.



We wanted to move expeditiously but we also wanted to be well-prepared for trial. Benito contacted Glenn's girlfriend and obtained the coat and hat she knew he was wearing the night of the incident, which were clearly visible in the video. Glenn's coat was black with white and red stripes across it and white material under the arms. His hat was an Atlanta Braves baseball cap, red and navy blue with a distinctive "A" on the front.

Rachel also had a couple of pictures on her cell phone. One was of Frankie and Glenn at a bus stop about three weeks before the incident. It was helpful because Glenn was in his black coat with white and red stripes and Atlanta Braves baseball cap.

The second picture was taken when they were on the bus back to Lakewood the night of the shooting.

inward, but even more twisted inward. On the video, it was quite apparent which guy was Frankie, not because you could see any faces but because of the hitch in his gait. (In our witness interviews, one of the cops said they recognized Frankie from his walk and had previously given Frankie the derisive nickname "Crip" which gave us the potential for some interesting cross-exam.)

Geoff Loftus

We continued to prepare for the trial in the event the video evidence turned out to be ambiguous or non-determinative. Given that the state's case rested on a single eyewitness, we sought the expert services of Dr. Geoffrey Loftus, a psychologist and nationally-recognized expert in eyewitness identification from the University of

we obtained OPD authorization to retain Thomas Sandor, who conveniently works out of Renton.

Tom Sandor is a colorful character, with a thick Hungarian accent and a passion for what he does. He has the Hungarian equivalent of a doctorate in electrical engineering. He is also a very patient man, willing to listen to and answer many rudimentary questions, sometimes over and over again. Of course, as with most experts, we had to remind him from time to time that he was dealing with lay persons and he would need to "dumb down" his explanations so we could understand. Obviously, this would be a necessity in front of the jury as well.

He was also very patient in guiding us through requesting the right stuff and insisting on getting the best, most useable stuff we could. Much of the problem was that the materials we were receiving from Sound Transit and their security contractor were inferior quality, badly compressed for storage purposes, wrong format, etc., etc. Nothing that was useable for our expert's purposes.

The videos we received from the state had similar problems when it came to Dr. Sandor attempting to clarify or enhance the images. Eventually, Diane, Dr. Sandor, and I met with a couple of detectives, a guy from Sound Transit, and one of the video/computer guys from the security contractor who owned, installed, and maintained the surveillance equipment at the transit center. Dr. Sandor copied files onto a portable hard drive from their hard drive. Still didn't work. Turned out those were stored and compressed files as well.

We all went out to the Federal Way Police Department to view what they had on their equipment. Although we still had some problems doing what we needed to do, we were getting much closer. For comparison purposes,

The difference was enough for Dr. Sandor to objectively conclude Glenn Proctor was not the shooter.

Frankie was wearing Glenn's Braves cap in the picture, but Glenn was wearing his coat with the white and red stripes. This picture was even more helpful as it was date and time stamped "JAN 18, 2008 7:58pm"

Benito also made contact with Frankie, who had returned to Cleveland right before Glenn turned himself in. Frankie was more than willing to return and testify for Glenn if needed. Once we received some decent video from the transit center, Benito went to Cleveland to have Frankie look at it and get a statement from him. While there, Benito noticed that Frankie walked with a slight gait. His left foot turned inward. Not just pigeon-toed

Washington. We wanted to make sure the jury understood the fallibility of uncorroborated eyewitness identification testimony in the event they didn't think Li'l Crucial was flat-out lying. *We thought* he was lying but wanted to also explain how he could have simply been mistaken. Dr. Loftus was very helpful focusing our approach to this issue.

Tom Sandor

We also knew that we would need an expert in the media and video technology issues that would be necessary in Glenn's defense. Benito had a couple possible experts and, after checking into their work, on August 8

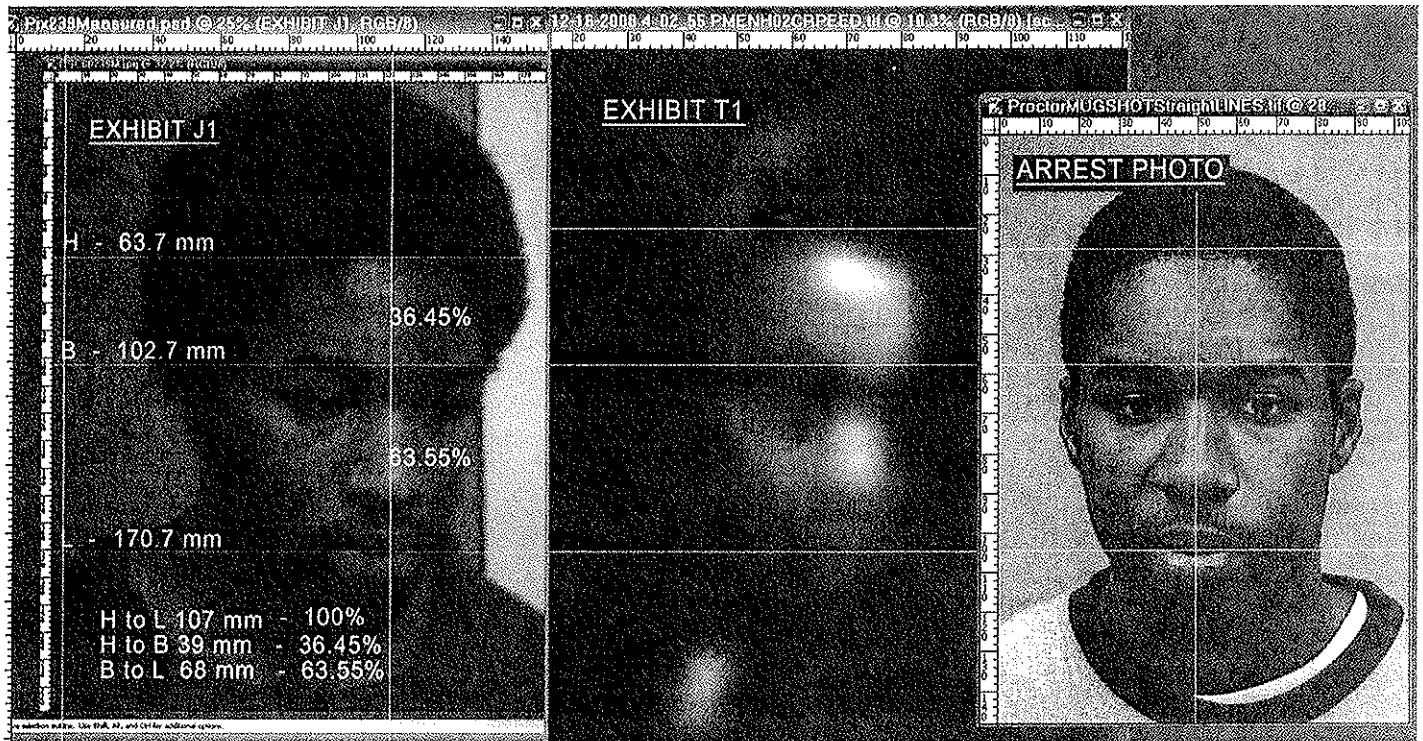


Exhibit A

Dr. Sandor needed a good picture of Glenn's face. The prosecutor and lead detective were being cooperative and accommodating, taking the ethically correct high road. I sensed the prosecutor was warming to the possibility they had charged the wrong guy, which was making the process somewhat easier.

First, we had to go into the RJC jail to take pictures of Glenn's face. Deputy Prosecutor Don Raz and I exchanged a few emails and got an agreed order signed to get the detective and his camera into the jail with me to take photos of Glenn.

After getting the photos of Glenn, Detective Wells took his hard drive to Dr. Sandor's office/lab. The detective spent nearly four hours with our expert to make sure we got the best quality they could give us. He directly hooked up into Dr. Sandor's equipment and Dr. Sandor was finally able

to have a copy of everything that was compatible, not compressed, and good enough for him to clarify and enhance.

All of us — defense, prosecutor, and detective — had been able to see the shooter; we agreed on what the shooter was wearing so we all knew which guy the shooter was in the various video shots we had. In one of the clips, the shooter's face becomes somewhat apparent. Dr. Sandor was able to isolate this frame, then clarify and enhance it to the point he could work with it. There wasn't a similar frame of Glenn's face but we knew he was the guy with the striped coat and Atlanta Braves baseball cap.

Dr. Sandor then did what he termed "cranial relative measurements" comparing fixed points on the facial structure of the shooter's face with Glenn's face. It involved measuring the *percentage* of face that goes from the hairline (H) to the browline (B)

and the percentage of the face that is from the browline to the lipline (L). It is a "relative" measurement in percentages so it doesn't matter if the photos are the same size or from the same distance. (See exhibit A)

Dr. Sandor was very conservative so that any of his calculations would favor the state's theory. Even so, no matter where he drew the line, his conclusion was the same: Glenn Proctor was *not* the shooter. Essentially, the shooter's face was 42% hairline to browline and 58% from browline to lipline. Glenn's face was 37% and 63% respectively. The difference was enough for Dr. Sandor to objectively conclude Glenn Proctor was not the shooter.

The Prosecutor's Reaction

Diane and I met with Don Raz on December 10. We gave him what we had: the coat and baseball cap, the



cellphone photos, Rachel, Frankie, and the work of Tom Sandor. We also gave him our own personal opinions that our client was innocent. Don was realizing that his case, based on a single eyewitness, could not be proven beyond a reasonable doubt. And he didn't want to try to convict the wrong guy. Detective Wells didn't want to try to convict the wrong guy either, nor did he want the real culprit get away with it. They both worked with us to give us access to what we needed in the search for the truth. They could have been difficult. They were not. For that, they deserve credit. I know from experience that there are other prosecutors out there who would say, "Leave it to the jury. You do your job and I'll do mine." Fortunately, Don Raz is an honorable and ethical prosecutor who recognized that his primary duty is to do justice and to do the right thing.

Don couldn't just dismiss a murder

case without scrutinizing everything we had. Fair enough. They took a long, hard look at Dr. Sandor's work. We arranged an interview with Rachel on December 26. There was some delay in getting Frankie here, with the holidays and the weather. However, the state picked up the bill and brought him out here on January 11, which was as soon as the arrangements could be made.

After Frankie was interviewed, the prosecutor re-interviewed Li'l Crucial. Then he met with the victim's family to let them know about his decision to dismiss the case against Glenn.

Dismissal

Don had to write up and file an "exception" with his front office to get approval to dismiss the murder charge. He asked his bosses to expedite their review. The dismissal was approved the morning of January 15. I saw Glenn in jail. I told him he would

be getting out.

"I'm getting out?... I'm getting out?... I can't believe it... Thank you." he said with his huge smile. But, he had to say — really, to ask — again, "I'm getting out?"

"Yeah Glenn, you should be out sometime later today."

By 1:15, we were before Judge Gain, the case was dismissed, and Glenn was released. Diane and Benito were there waiting with Glenn's dad when Glenn was finally processed out a few hours later.

The Search for the Truth

It's a great feeling to have your client's innocence established. Happiness, relief, and a good measure of vindication make for a nice natural high. And while we wished we could have gotten him out sooner, we had to be fully prepared for the murder trial we expected to have. We had to do it right.

Eyewitness identification evidence can be wrong, mistaken or otherwise, and carries too much weight with jurors. It requires extra scrutiny and extra effort to defend against. Be creative and do everything you can think of to demonstrate the fallibility of eyewitness testimony. Fortunately, in this case, we had video evidence and the right, highly qualified expert to help us prove the inaccuracy of the eyewitness testimony.

It was great working with Dr. Loftus, Dr. Sandor, Benito Cervantes, and Diane Zumwalt and to be a part of this team effort. Thanks to Diane for asking me to join in the defense of Glenn Proctor. To experience the release of an innocent client, especially a 21-year-old facing a murder charge, was a powerful reinforcement of why I'm a defense lawyer and something for which I will be forever grateful. ■

Mark Prothero is in private practice in Kent, with the firm Hanis Irvine Prothero, and a member of the WACD Board of Governors.