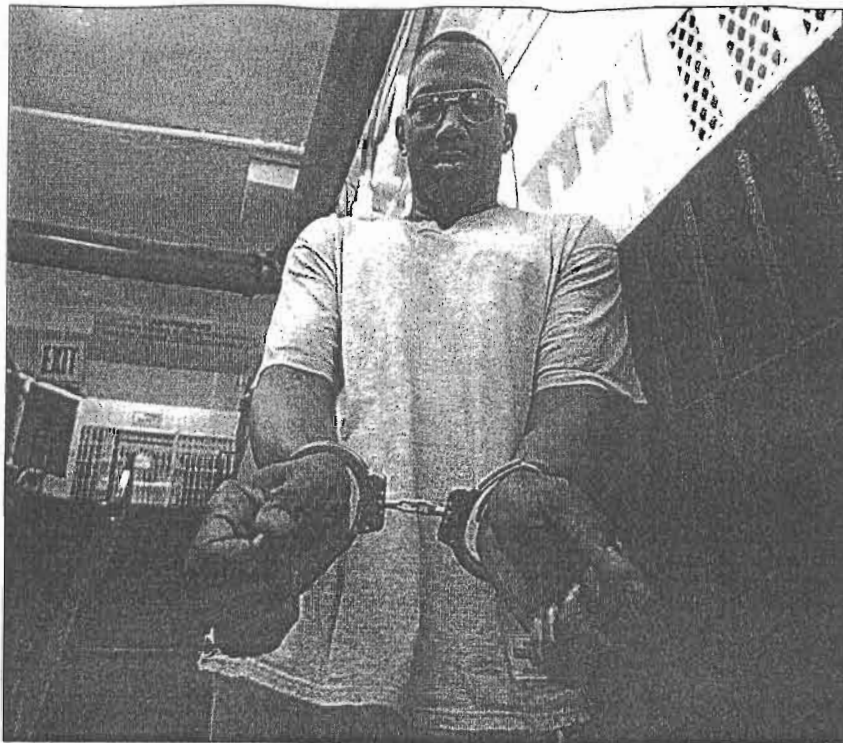


|||||

Michael Austin is serving a life sentence for murder. But the case against him was based on false testimony and flawed evidence.



JED KIRSCHBAUM/SUNSTAFF

**Convicted:** Michael Austin says of his day in court: "The farthest thing from my mind was that I was going to be convicted. I was working that day."

# After 26 years, justice overdue

By TODD RICHISSIN  
SUNSTAFF

**M**ichael Austin, as far as the state of Maryland is concerned, is a killer. He's the one who walked into a Baltimore convenience store, fired a bullet into a security guard, shot the guy dead for a few lousy bucks.

That's why Austin got life in prison, why he's growing old in the Maryland House of Correction. He was in there when his nieces and nephews were born. He was in there when his mother died.

That's 26 years — and counting. Those who want him freed say that is a shame — more of a tragedy, really — because in a case clouded by serious doubt and demonstrable lies, one thing is clear: Not a single piece of credible evidence links Austin to the crime.

And that has led to support for his release from a growing list of people, including an advocacy group for the innocent, the 72-year-old widow of the man killed — and the prosecutor who sent Austin to prison.

"Had I known then what I know now, I would have never prosecuted the case," said the assistant state's attorney, Joseph Wase, now retired.

Wase presented jurors with only



SUN FILE: 1989

*"Had I known then what I know now, I would have never prosecuted the case."*

**Joseph Wase**, former Baltimore assistant state's attorney

two pieces of evidence: the testimony of an eyewitness, and a business card, supposedly found in Austin's wallet, with the name of the man alleged to be his accomplice written on it.

The witness had originally told police the killer was a light-skinned man, about 5-foot-8. Austin, a dark-skinned man, is 6-foot-5.

Wase said he had discounted the disparity in descriptions because, as far as he knew, the witness was a diligent college student testifying as his civic duty. But the witness' family has since come forward to expose him as a drug dealer and drug user who had been in trouble with the law just before he changed his description of the killer.

The supposed [See Austin, 14a]

# Flawed evidence, life sentence

[Austin, from Page 1A]

college student, in fact, was a high-school dropout.

And the business card — presented at trial as the equivalent of a smoking gun — in no way implicated Austin in the crime.

The Sun reviewed his case at the urging of Centurion Ministries, a Princeton, N.J., group that tries to free prisoners it believes are innocent, not just wrongly convicted because of procedural errors. Since 1983, Centurion has won the freedom of 28 prisoners.

Centurion plans to file papers asking a Baltimore judge to re-examine Austin's case. Prosecutors have declined to join the request.

The Sun interviewed key players in the case, reviewed more than 900 pages of court transcripts and investigative files and found that not only was Austin convicted on faulty evidence but also that information potentially clearing him was withheld from defense attorneys.

Police reports kept from the defense, for example, show detectives had at least eight other suspects, but there are no records that they were even questioned.

Austin still sits behind bars, blinks behind eyeglasses, rubs a chin that shows whiskers that have gone gray during the time he has been locked up. He began doing his time when he was 26. Now he's 52.

"A lot of things have changed since I've been in here," Austin says, and his voice trails off, and then he shares a wish, one that tells more than numbers just how long he's been put away.

"What I'd like to do," he says, "is see that new Harborplace thing they built."

## The crime

Roy Kellam was a good man. The afternoon of April 29, 1974, he arrived at the Crown Food Market at East Preston Street and Harford Road after working his other job, driving a city garbage truck. The day was a scorcher, 93 degrees, humidity near 70 percent.

His wife, Alveria, worked in the shipping department of Sekulow Bros., sending out handbags and gloves. They had two children, 18-year-old Michael and 15-year-old Tavoria, which was why Roy Kellam, 52, moonlighted as a security guard at Crown, near Green Mount Cemetery.

About 5:20 that day, two men entered the store. They saw the security guard, gun on his right hip. One of the men pulled a .32-caliber Smith & Wesson revolver. He pointed it at Kellam.

Kellam backed up. The gunman fired.

A bullet pierced Kellam's heart. The gunman and his accomplice fled with \$3,970.

A short time later, Alveria Kellam had a window seat on the No. 19 bus as she rode from her factory job to her home a few blocks from Crown. She noticed police cars.

"I was wondering, 'Now what's going on there?'" she remembers. "Well, I got home and someone — one of the neighbors — said that someone robbed Crown and your husband got shot. My daughter called the store, and the man who answered it, he says, 'Homicide.'"

Roy Kellam was dead.

Eric Komitzky, the 22-year-old nephew of the store owner, was working one cash register at the time; a 23-year-old clerk named Jackie Robinson worked the other. Police got almost identical descriptions of the gunman. A light-skinned, black, guy, 5-foot-8 to 5-foot-10, kind of skinny.

It took nearly a month for a composite drawing to be released. A week after that, according to police reports, a tipster said that Austin and a guy named Horrace Herbert had robbed Crown. A detective grabbed about a half-dozen mug shots, including those of the two new suspects.

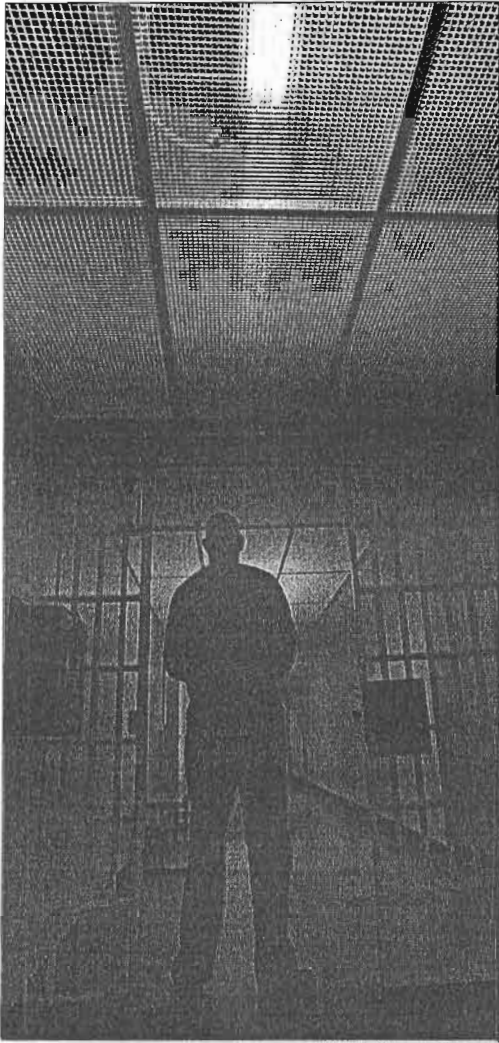
Komitzky scanned the pictures but recognized nobody. Robinson picked out Austin as the killer, Herbert as the accomplice.

On June 3, police arrested Austin, charging him with murder. Herbert was charged but couldn't be found. Komitzky looked at a police lineup. He didn't recognize Austin. It's unclear whether Robinson viewed the lineup.

Austin was no stranger to trouble. Eight years earlier, when he was 18, he robbed a man on a Baltimore street and did more than two years for it. He was charged with burglary in 1971 and served time for it until 1974.

And when he was out on bail in the Crown case, he was charged with the death of his girlfriend's toddler for which he has adamantly denied responsibility. The child's mother swore that Austin had been trying to help the baby after an accidental fall. She stood by him, and, after the Crown conviction, the charge was dropped.

Austin makes no excuses for his earlier crimes. But his job at a foundry had been going well for four months, and, just maybe, he



JEB KIRCHBAUM/SUN STAFF

**Long days, nights:** Michael Austin, who was moved to the Maryland House of Correction in 1985, says of his prison time: "A lot of things have changed since I've been in here. What I'd like to do is see that new Harborplace thing they built."

was beginning to mature.

"I was no choirboy," Austin said in an interview. "But I was no devil either. I had a job and things were getting together when I got hit with this."

## The trial

When Michael Austin arrived at Baltimore City Circuit Court the day of his trial, he was nervous but had every reason to believe he would be acquitted.

His lawyer, James McAllister, was not an overworked public defender but a private attorney hired by his family. Austin believed him when he said they couldn't lose.

For one thing, they thought the prosecution's entire case hinged on the eyewitness testimony of one man, Jackie Robinson. Surely McAllister could plant doubt in the minds of jurors about his identification of Austin.

Besides, Austin had an alibi — he had been working the day of the killing and had his timecard to prove it.

The trial began with John S. Ellwood, a Baltimore police detective, testifying that Austin was arrested based on a photo identification by Robinson.

But, McAllister asked, hadn't the detective distributed a flier describing the killer as about 5-foot-8, 5-foot-10, about 130 to 150 pounds?

And wasn't that description from Robinson seriously at odds with Austin's 6-foot-5, 210-pound frame? And Robinson had said the gunman was light-skinned, not dark, correct?

True, Ellwood responded. But he said Robinson once also identified the killer as taller than 6 feet. Ellwood had no paperwork to back up that contention, but then Robinson took the stand and said he was sure Austin was guilty.



K. LAM/SUN STAFF

**New lawyer:** Larry Nathans, hired by Centurion Ministries, will seek to reopen Austin's case.



K. LAM/SUN STAFF

**Came forward:** John Robinson's information cast doubt on testimony of his brother, an eyewitness.

"I said the description that I give, I give the wrong description," he testified about Austin's height. "I know his face."

There was no forensic evidence, no fingerprints, nobody else who could identify the killer. No gun was ever found.

"The farthest thing from my mind was that I was going to be convicted," Austin recalled. "I was working that day. I had my timecard, my pay stub, witnesses."

On the witness stand, Austin described his work pouring iron at Flynn & Emrich Co., in Southeast Baltimore about six miles from Crown. The day of the killing, his shift ended about 5 o'clock, he said, and, as usual, he showered at the plant after punching out. Given that, he testified, he could not have been at the store when the shooting took place, about 5:20.

Because he was arrested more than a month after the killing, nobody at Flynn & Emrich could remember for sure whether he worked that day.

Both the prosecutor and the defense attorney had a photocopy of Austin's timecard, which showed he had indeed been punched in the day of the killing. Unfortunately for him, his attorney hadn't subpoenaed anybody from the plant to decipher when he was punched out.

Wase finished with Austin. The judge recessed the trial for lunch. Things didn't look too grim for the man facing the murder charge.

But when court resumed, Wase recalled Austin to the stand.

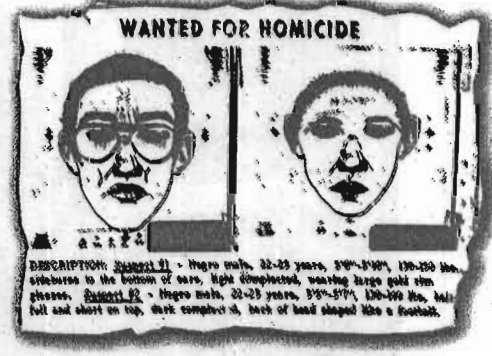
"Mr. Austin, do you know Horrace Elton Herbert?" Wase asked.

"No, I don't," Austin replied. Wase repeated the question in various forms three more times. Each time, Austin replied he did



BARBARA HADDOCK TAYLOR/SUN STAFF

**Happier times:** Alveria Kellam holds a wedding photo taken in 1955 of her and her husband, Roy, who was killed in 1974 while moonlighting as a security guard at Crown Food Market.



**Contrast:** Composite of men sought in Roy Kellam's slaying describes a Suspect 1 as 5-foot-8 to 5-foot-10 and "light complected." Michael Austin is a dark-skinned man, 8-foot-5.

not know Herbert, and the prosecutor again was through with him.

Seeing no damage to Austin's defense, his lawyer rested his case. Unexpectedly, though, the prosecutor called the detective back to the stand.

And then came one of those Perry Mason moments rarely seen in real courtrooms.

Wase produced a business card, and Ellwood testified that, yes, he recognized it, that it was in Austin's wallet when he was arrested. Handwritten on the card was a name: Horrace Herbert.

McAllister objected vehemently. The defense attorney — as he is entitled to in a court process known as discovery — had asked the prosecution for any evidence that could be used against Austin. He never got the card.

In the judge's chambers, Wase said the detective told him about the card at lunch. Ellwood said he had looked through an envelope that morning containing Austin's eyeglasses, which were confiscated when he was arrested, and noticed the card.

After fierce debate, Judge Shirley B. Jones allowed the card into evidence. It was a double-barreled shot through Austin's case. Not only did it bolster the credibility of Robinson, but it turned the defendant into a liar.

On May 5, 1975, Austin's jury deliberated two hours, 10 minutes. Austin stood, faced them.

Guilty, the foreman said. Murder in the first degree.

## The problems

There is no question that Austin's defense could have been more vigorous. His attorney, who died in 1989, failed to subpoena anyone and was wholly unprepared for the trial. According to court transcripts, McAllister got his dates mixed up and discovered only the morning of the trial that he would defend a murder charge that day.

But his preparation was hindered for another reason: The prosecution withheld evidence that might have helped his client.

Just as they never produced the card or police reports about other suspects prior to trial, they failed to tell Austin's attorney that four other witnesses had provided descriptions of the gunman as 5-foot-8 to 5-foot-10 — and his accomplice as even shorter.

Instead, the only eyewitness presented at trial was Robinson, described by Wase as "a fine young man" attending college on scholarship in Virginia.

But Robinson was nothing like he was portrayed, according to his sister, Cheryl Valentine, and a

brother, John Robinson.

The state's star witness never attended college as he testified, his family said. The day of the robbery, in fact, Robinson himself had told police he never finished high school. City school records show that he dropped out after ninth grade.

Beyond that, Jackie Robinson was involved with drugs, his relatives said, using and selling marijuana while at Crown. Some of his supply came from a police officer, a childhood friend from East Baltimore, Valentine said.

(The policeman resigned at age 41 in 1994 while under investigation by the department for alcohol abuse and being in the company of a drug user, according to police records. He died in 1997.)

Robinson's family believes he might have been pressured to testify against Austin because he'd been in trouble with the law. Before the trial, police raided Robinson's house and found an ounce of marijuana. He was taken to the Northern District police station. According to his family, he made a phone call and was released.

In the years after the trial, Robinson struggled with harder drugs and was charged with drug offenses several times. In June 1997, he was found dead of a heroin overdose in his North Calvert Street apartment. He was 46.

After Jackie Robinson's death, a Centurion investigator found his brother, Harry Robinson. According to an affidavit filed by the investigator, an interview with Harry yielded this: Jackie had confided that he had helped convict the wrong man.

Harry Robinson's current whereabouts are unknown, and he could not be interviewed for this story.

If Jackie Robinson's testimony was questionable, the business card with Herbert's name has been proved to be utterly irrelevant.

Here is what no court has ever heard: Herbert was found and tried months after Austin's conviction. Herbert was not merely acquitted. After the case got under way, Jackie Robinson, again the state's chief witness, said Herbert was not the accomplice.

Prosecutors did something almost unheard-of once a trial is under way. They told the judge that not only did they lack enough evidence to convict Herbert, but that they were convinced they had the wrong man. Herbert had nothing to do with the Crown killing, they admitted.

So Austin had no reason to lie about knowing Herbert or the card with his name on it, suddenly pro-

duced during trial by Ellwood, the detective. Now living in Marion, Ohio, he declined to comment for this article.

## The prospects

Michael Austin arrived at the Maryland Penitentiary, the oldest operating prison in the country, the day of his conviction, 27 years ago this May. When he arrived, he sat on a bunk, he recalls, with his head in his hands.

"All you heard was echoes," he said. "It's people yelling, voices all the time, 2 o'clock, 3 o'clock in the morning. Some guy might be singing, another guy might be crying, and there's another guy telling them both to shut up."

Prison officials moved Austin to the Maryland House of Correction in Jessup in 1985, where he has been a model prisoner. His file includes a high school equivalency diploma, certificates of his success in vocational and music theory classes. He leads a jazz band and teaches other inmates music.

Austin has had several appeals, all handled by public defenders. But this time, he thinks, Centurion and the attorney it hired, Larry Nathans of Baltimore, will get him freed.

In papers expected to be filed this week in Baltimore City Circuit Court, Nathans will seek to reopen the case, offering new evidence, including the information about Jackie Robinson and the outcome of the trial of Horrace Herbert, the accomplice who wasn't.

"I don't keep a sense of hope, that's it," Austin says. "I'm done." Eric Komitzky, who was in Crown the day it was robbed, has signed an affidavit stating he is certain Austin is the wrong man. Nobody called him to the stand in 1975.

Wase said he believes Austin should be freed because of the revelations about Robinson, the prosecutors' admission that Herbert was innocent and Komitzky's statements.

"Look, I want him out of there," Wase said in an interview. "Yes, I presume him innocent."

Alveria Kellam, sitting on the couch in the same Northeast Baltimore rowhouse she shared with her husband, said in a recent interview that she isn't certain but believes Austin is innocent — and wants him freed regardless.

"Keeping him locked up isn't bringing back my husband," she said.

James C. McCloskey, the president of Centurion, said Austin's conviction is one of the most obvious cases of injustice among the thousands his group has examined.

"I am absolutely convinced of his innocence," McCloskey said. "It is quite obvious to me that Jackie Robinson — at minimum — made an egregious error, a misidentification of Michael Austin."

Patricia C. Jessamy, the Baltimore City state's attorney, will decide how vigorously to oppose his release, if at all.

Deputy State's Attorney Sharon A. H. May, speaking on behalf of Jessamy, said their office was contacted by Centurion more than a year ago. She said in a statement that decisions on Austin's case will be made after his court papers are reviewed. She would not agree to be interviewed.

Austin's most recent filing — called a motion to reopen post conviction — could free him in a matter of months. If he falls with that motion, he could appeal to the Maryland Court of Special Appeals.

His last chance at freedom would be with the federal courts. That could take years.