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Cleared by accusers, kept jailed by Pa. law

Milton Scarborough's appeal in a '76 triple murder points to recanting witnesses — but too late under a disputed statute.

By William K. Marimow
INQUIRER STAFF WRITER

By all accounts, the murders in the tiny town of Muncy on Aug. 6, 1976, were among the most horrific in the annals of north-central Pennsylvania crime: a mother, her little girl, and her toddler son shot to

death in what appeared to be a home break-in gone tragically bad.

For more than seven months, state troopers investigating the case seemed stumped until a 14-year-old girl confided to two friends that a drug dealer named Colin Brown had told her he knew

who the killers were.

In November 1977, three men were convicted of the murders based primarily on the testimony of Brown and two other young men with extensive histories of drug abuse and crime. Now, more than 33 years later, all three of those prosecution witnesses have said under oath that they lied when they accused one defendant — Milton Scarborough, a town handyman

and sawmill worker — of taking part in the murders.

But a Pennsylvania law requires that new evidence of factual innocence other than DNA must be presented to the court within 60 days of discovery.

That law — one of the most stringent in the nation — has led state courts to deny Scarborough's appeals, most recently in October, and many others.

State Sen. Stewart J. Greenleaf, who helped draft the statute in 1995, said it was being interpreted too rigidly. It was never intended "to prevent serious appeals," he said, adding that Scarborough should get his day in court.

Investigators for Centurion Ministries in Princeton, who painstakingly assembled the case for Scarborough's innocence, say a case in

See **EVIDENCE** on A18

CLEARED BY ACCUSERS, NOT BY LAW

Witnesses recant in 1976 killings ...

EVIDENCE from A1 which all the key prosecution witnesses recant is highly unusual. Moreover, they have affidavits from two witnesses who say another man, now living in Florida, tearfully confessed to participating in the crime.

At Scarborough's trial, Brown and Ricky Snyder testified that they had been partying at a shack on Snyder's family property when two brothers, Robert and David Hubble, arrived and described the killings in gory detail.

The third prosecution witness, John Shafer — clearly the most important — testified that he had accompanied the Hubbles and Scarborough to the crime scene, had stayed in the car while the others barged into the house, and had seen Robert Hubble pass a gun to his brother after they drove away.

The victims were Claire Kepner, 30, and her children, 10-year-old Tammy and 18-month-old Tommy. Kepner was a longtime resident of Muncy, a town of 2,600 not far from Williamsport, the Lycoming County seat and home since 1947 of the Little League World Series.

All three prosecution witnesses — Brown, Snyder, and Shafer — said that in exchange for their testimony, state police had promised them they would be treated leniently for outstanding criminal charges and, most important, would not be charged with murder.

Snyder was the first to recant, and he did so in open court in 1980 despite a stern warning from the prosecutor that he could be charged with perjury; Brown and Shafer recanted in sworn statements to Centurion.

Sarah Harer, the teenager who gave police their first break, also stated in a sworn affidavit that she had lied to authorities and that, in truth, she knew nothing about the Kepner homicides.

If their four statements are to be believed, they would dismantle the case against Scarborough, who has already served more than the minimum of his 30- to 60-year sentence for three counts of third-degree murder.

Brown and Snyder have died since their recantations, but their accounts are memorialized in notes of testimony and Brown's sworn affidavit.

Scarborough, now a frail 71-year-old with wisps of white hair and long white sideburns, remains hopeful that Centurion's efforts will extricate him from his prison cell at Laurel Highlands, a state facility in Somerset, Pa., just a few miles from the Pennsylvania Turnpike.

He peers intently at a visitor through large, black-rimmed glasses and proclaims the laser surgery he recently had on his left eye a complete success. The trip to the eye doctor was one of the rare opportunities he's had to leave Laurel Highlands. He's looking forward to the same surgery on his right eye.

When Centurion agreed to take his case, Scarborough said in an April 15 interview, "boy, was I ever happy." Although his formal education ended in sixth grade, Scarborough said that he was "pretty good at reading and writing," but that his writing in recent years had been limited by "that damn arthritis in my shoulder." For the last two years, he has used a wheelchair, usually guided by a prison guard, to navigate the corridors of Laurel Highlands.

As for the Kepner case, he declared — without a hint of bitterness or rancor — what he has said for more than 33 years and testified to at his trial: He is an innocent man.

Even when his attorney told him he could avoid prison by cooperating with the prosecution, he fired back: "No, I'm not going to take that deal for something I didn't do. No deal."

In Scarborough's latest appeal, filed in 2008, his attorney attached sworn statements from the two men who identified a Florida man named Larry Nogle as having participated in the murders. Those men reviewed their statements with The Inquirer, confirmed their accounts, and said they were prepared to testify about Nogle's confession under oath. Both of them — Arthur "Rick" Smith Jr. and Ronald D. Gray — testified for the prosecution in a 1990 drug case against Nogle.

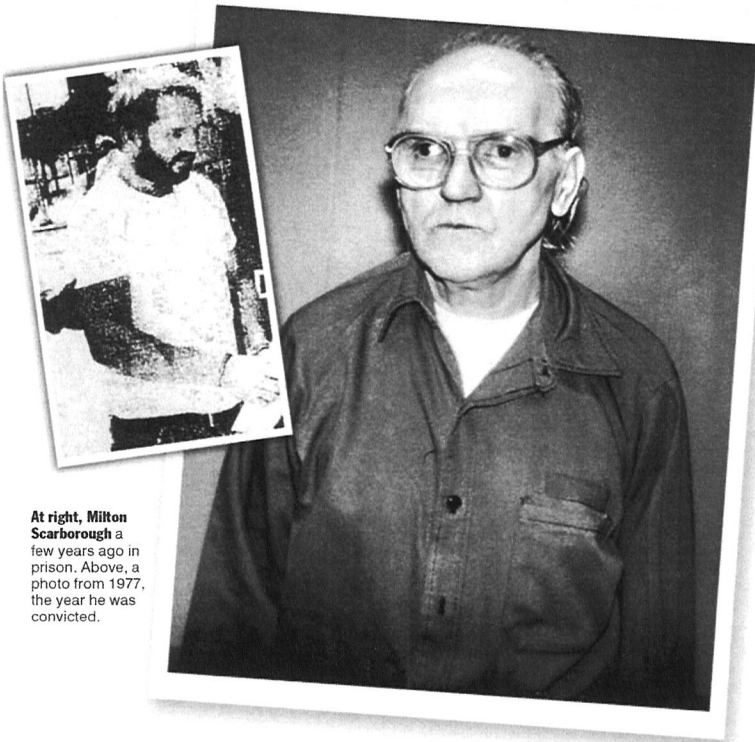
Nogle, according to Smith's sworn statement, told him he had driven the Hubble brothers to Kepner's house in his black Pontiac Firebird and had picked them up as they were running down the road.

"When they got in the car," Smith recalled Nogle's saying, the Hubbles "told him that the robbery had gone bad and that a woman in the house had been killed."

After Smith told his story to Centurion, two state troopers went to his home, and he gave them permission to tape-record his account.

"They were interrogating me," Smith said. "I told them, 'It's not my story. This is what I heard him say.'"

Efforts to reach Nogle were unsuccessful. The Inquirer called his



At right, Milton Scarborough a few years ago in prison. Above, a photo from 1977, the year he was convicted.



The 60-day rule for presenting new evidence is unrealistic, says James C. McCloskey of Centurion Ministries, going over photos in the Scarborough case. State Sen. Stewart J. Greenleaf, who helped draft the law, also sees a problem.

This is the house in Muncy, Pa., where Claire Kepner, and her two young children were shot dead. Scarborough was tried and convicted with Robert Hubble. Hubble's brother, David, was convicted separately.



home, left him a detailed message, and sent him a letter requesting an interview.

James C. McCloskey, Centurion's founder and executive director, said he met Nogle last spring at the Florida trailer park where he lives and does maintenance work. Nogle, he said, was traversing the property in a golf cart.

In the interview, McCloskey said, Nogle told him he didn't know Claire Kepner. When McCloskey informed him that two former associates had "implicated him" in the killings, Nogle, according to McCloskey, replied: "I don't know what they're talking about."

Veteran prosecutors and defense lawyers say it is extremely rare for all prosecution witnesses in a case to recant their testimony and for other witnesses to come forward to implicate — under oath — someone else in the same homicide case. But the 60-day rule creates a formidable roadblock for Centurion and Scarborough's attorneys.

In rejecting Scarborough's latest petition to review the new evidence in October, Common Pleas Court Judge Robert E. Dalton Jr. wrote that Centurion had violated the 60-day rule by analyzing "the entire case, reviewing each morsel of information, and then compiling one comprehensive petition."

In recent weeks, Scarborough has retained two new lawyers with extensive experience in cases involving false convictions — David Rudovsky and Leonard N. Sosnov — to explore a new challenge to surmount the 60-day hurdle.

From Centurion's point of view, Dalton's ruling means that each

time its investigators unearthed a piece of exculpatory evidence — however minuscule — Scarborough's lawyers would have had to file a separate petition with the court.

McCloskey asserted that the 60-day rule imposed an unrealistic burden on investigators who often work for years to build a convincing case that a person has been falsely convicted.

By requiring the courts to receive every piece of new evidence as it's unearthed, McCloskey said, the law deprives investigators of the opportunity to develop a case to the point where they can intelligently assess its solidity.

McCloskey appears to have a formidable ally in his interpretation of the law in Greenleaf (R., Montgomery), chairman of the Senate Judiciary Committee.

The primary purpose of the 60-day rule, Greenleaf said, was "to avoid frivolous appeals, which we were flooded with." The state attorney general, he said, requested the timetable.

Greenleaf, a lawyer himself, said that in a case like Scarborough's, in which attorneys have amassed significant evidence of factual innocence, "there should be an exception made. This is not what the legislature intended. We did not want to prevent serious appeals."

Given the recantations of the key witnesses and the sworn affidavits recounting Nogle's alleged confession, Greenleaf said, "This is something that the courts should look at."

The Pennsylvania law, said Paul Casteleiro, a New Jersey lawyer

who has specialized in cases of wrongful convictions, presents a very "high hurdle" for defense lawyers.

"Fragments [of evidence] do not make a valid claim," Casteleiro said. "If you don't have all the pieces, you probably shouldn't bring the action. If I do bring the action, I'm bringing a bad action."

Other states grant more leeway, Casteleiro said. In New Jersey, for example, defense attorneys in a case like Scarborough's would have one year to bring newly discovered evidence to the attention of the courts. Florida provides a two-year window, and in New York there is no specific time limit.

There are strong legal and humanistic rationales for imposing a timetable for presenting post-conviction evidence: One reason is to preserve the finality of a verdict and have an efficiently run court system. Beyond that is the belief among many in the criminal justice system that endless appeals are unfair to victims and their families.

The Scarborough case, said his trial lawyer, John M. Humphrey, "is a case that haunts me. It's one that I think about continually."

Like Humphrey, John Shafer — the prosecution's only eyewitness — has been deeply troubled by his role in the Kepner case. Having turned 53 in March and suffered a stroke, Shafer said, "I don't want to be dying with this on my head. I tried to tell the truth before, and they threatened to put me in prison."

"I've been thinking about this for years and years and years," said Shafer, who was 19 at the time of his interrogation. "They literally set me

up." The state police, he said, convinced his mother that he was a participant in the Kepner murders, and it alienated them for decades.

My mother kept saying, "John, just go along with it. Just do it. They're going to help you."

In fact, the day after Shafer agreed to cooperate, prosecutors dropped robbery charges against him, and he was released on bail.

Shafer, like Rick Smith, said Pennsylvania troopers had interviewed him in recent months, at his home in Seneca Falls, N.Y. When the troopers arrived, he said, "they said they were investigating Larry Nogle."

State Police Cpl. Richard Bramhall Jr. confirmed that he had interviewed Shafer, but said he could not discuss the case unless the Lycoming County District Attorney's Office authorized him to. As of last week, he said, he had not received permission.

Humphrey said that before the case went to trial, Scarborough could have avoided serving time if he had agreed to testify for the state. Then-District Attorney William S. Kieser, Humphrey said, strongly suggested "that if Milt assisted in the prosecution, he would be treated quite leniently — that he would not be serving any jail time."

Kieser, now a senior judge, said in a telephone interview that he had "no specific recollection — one way or the other — of discussing any treatment of Mr. Scarborough in any particular manner."

As Humphrey recalled, he explained the offer to Scarborough and counseled him that if he knew anything about the Kepner murders, it would be in his best interest to cooperate because there was a strong possibility that he could be convicted.

"Milt's reaction," Humphrey said, "was 'I'd be a complete fool if I didn't take that deal if I knew anything, but I don't. I would have to lie in order to do that.'"

Set against Humphrey's ardent belief in Scarborough's innocence and the evidence gathered by Centurion is the view of Lycoming County District Attorney Eric R. Linhardt. In an interview in his Williamsport office, he said that "as district attorneys, we have an ethical responsibility to seek the truth." In the Scarborough case, he said, he is convinced that "justice has been done and that Mr. Scarborough is exactly where he deserves to be — state prison."

Linhardt said he based his conclusion on three critical factors:

- The fact that David Hubble twice confessed to state police that he and Scarborough had been present when his brother Robert killed the Kepners.

David Hubble, who was tried separately — Scarborough and Robert Hubble were tried together — repudiated his statements before his trial and testified that he had confessed only because the state police promised to release him from custody if he admitted his role in the murders.

David Hubble's lawyer, Robert Elion, recalled the case vividly and said he believed that Hubble had falsely confessed because of the "immediate gratification" of being released from custody and the end of a grueling interrogation.

In Scarborough's case, he said, the evidence was clearly "shaky going in." Had Scarborough been tried by himself, "he would have been acquitted," Elion said.

- That over 33 years, appellate courts have reviewed Scarborough's conviction and found neither evidence of his innocence nor a reason to grant him a new trial.

- That Scarborough was represented by some of the most highly skilled defense lawyers in Lycoming County, including Humphrey and Ronald C. Travis, who represented Scarborough in his latest appeal.

The appeal filed by Travis, dated June 3, 2008, contained as exhibits the recantations of Harer and the three key prosecution witnesses, along with Gray's and Smith's sworn statements implicating Nogle.

One ancillary issue Travis raised that is still on appeal is a request to have a light fixture from the Kepner home that was ripped from the ceiling tested for palm prints and DNA evidence.

Travis asserted that if skin cells were still on the fixture and DNA tests showed that Scarborough had not left them, the case would have to be reopened. The Lycoming County prosecutor opposes the tests, but state courts have thus far approved them.

The questions about DNA evidence are a relatively recent development, and Rudovsky — Scarborough's new lawyer — said he and Sosnov would continue to pursue that course.

A senior fellow at the University of Pennsylvania Law School, Rudovsky received a MacArthur Foundation "genius" grant in 1986 for his work in civil rights law. Sosnov, a law professor at the Widener University School of Law, has worked with Centurion to free innocent people and disprove evidence of their direct

CLEARED BY ACCUSERS, NOT BY LAW

... but Pa. statute blocks an appeal

EVIDENCE from A18 sentenced to life prison terms or death.

The first questions about Scarborough's conviction to be raised in open court date to February 1980, when Ricky Snyder took the stand in a posttrial hearing.

On Feb. 13, Snyder, then 19, testified that his trial testimony had been a complete fabrication. On the night of the murders, he said, there had been no party at the shack on his family's property.

The troopers, he said, "kept trying to feed this story into my head, and they said they'd help me out if I'd go along with it." At the time of the interrogation, Snyder was in jail in Altoona, Pa., for a school robbery.

On cross-examination, Assistant District Attorney Robert F. Banks asked Snyder pointedly: "And do you realize that you're laying yourself wide open for a multitude of perjury charges, felonies, for what you're saying?"

Snyder replied that he understood and testified that he had lied at the trial in 1977.

At that same hearing, John Shafer, the only prosecution witness who claimed to have been at the Kepner house on the night of the murders, testified that his original trial testimony was the truth.

For the next seven years, the Scarborough appeal wove its way through Pennsylvania and federal district courts. In 1987, a second posttrial hearing was held in state court. By then, Shafer said in an interview, he was finally ready to tell the truth.

"I'd been thinking about it for years and years," he said. "What I did was wrong. It was wrong, wrong, wrong."

But just before he took the stand, Shafer said, one of the troopers who had investigated the case said "they would put me in prison for the rest of my life" if he recanted. "They said I wouldn't make it out of the courthouse." With his wife nearby, Shafer decided to stick to his original story.

Throughout the 1990s, Scarborough's attorneys filed additional appeals, all to no avail. Hearing about the work of Centurion, Scarborough wrote to McCloskey, imploring the organization to investigate his case. In 2002, McCloskey said, the case was assigned to Bill Raynor, a retired General Electric human-resources manager who graduated from Bucknell University in 1964 and belonged to the same fraternity as McCloskey.

Raynor later teamed up with Centurion investigator Paul Henderson, a onetime reporter for the Seattle Times and recipient of the 1982 Pulitzer Prize for investigative reporting. Together they began interviewing some of the key witnesses.

One of their first breakthroughs, Raynor recalled, was their interview with Harer, who had led the troopers to Colin Brown.

As Harer explained it to Centurion, she "invented the Colin Brown story as a means of securing notoriety" to bolster her "low self-esteem and desire for recognition."

When questioned by state police about her story, Harer said in the affidavit, "I was too fearful to admit that the story was false." She said she had found Trooper John J. Shimko, the primary state police investigator, "to be scary and intimidating, and I was concerned about what would happen to me for having made up this false story."

Shimko is dead, and opinions about his skill in handling the investigation of the Kepner homicide vary: Linhardt, the district attorney, said that talking with troopers who knew him, one would discover that he was "highly respected."

Humphrey, Scarborough's trial lawyer, is far more skeptical: "Shimko created a case. I think he believed in it. This was a very frustrating case for the police. It was his case."

Shimko, according to Harer, took her to the Montoursville state police barracks, where she was put in a room with Brown. Much to her amazement, she said, Brown — rather than debunking her account — "went along with my story."

Harer said in her affidavit and at trial that she had never identified Scarborough as one of the participants in the killings.

Like Snyder and Shafer, Brown told Centurion that when state police had first confronted him, he had said he "had no factual knowledge of the Kepner murders and no information to provide them. This was the truth then, and it is the truth now."

The police response, he said, was to accuse him of lying and to threaten him with murder charges and the prospect of life in prison.

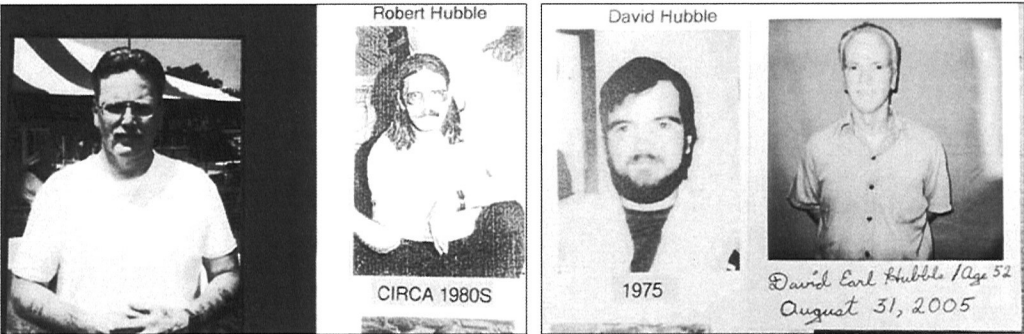
Given the options, Brown said, he cooperated with the prosecution, and that meant lying. He remembered telling the police that he said, "Tell me what you want me to say, and I will say it."



LAURENCE KESTERSON / Staff Photographer

"I don't want to be dying with this on my head. I tried to tell the truth before, and they threatened to put me in prison. I've been thinking about this for years and years and years. They literally set me up."

John Shafer



The Hubble brothers — Robert, left, in photos from a few years ago and the 1980s, and David, in photos from 1975 and 2005 — are serving prison terms.

Key Figures in the Case

The homicide victims

- Claire Kepner, 30.
- Tammy Kepner, 10, Kepner's daughter.
- Tommy Kepner, 18 months, Kepner's son.

The defendants

- Robert Hubble, the alleged shooter: convicted.
- David Hubble, Robert's younger brother: convicted.
- Milton Scarborough: convicted.

The recanting prosecution witnesses

- Ricky Snyder: testified that he had been at a party where the Hubbles described the botched break-in.
- Colin Brown: testified that he, too, had heard the Hubbles' description of the break-in.
- John Shafer: testified that he had accompanied the Hubbles and Scarborough to the Kepner home.
- Sarah Harer: at age 14, confided in friends that Colin Brown had told her who killed the Kepners.

The new witnesses

- Arthur "Rick" Smith Jr.: said in a sworn affidavit to Centurion that another man, now living in Florida, had confessed his role in the Kepner murders to him and said Scarborough had not been involved.
- Ronald D. Gray: gave a sworn affidavit saying the Florida man also confessed to him.

The investigators

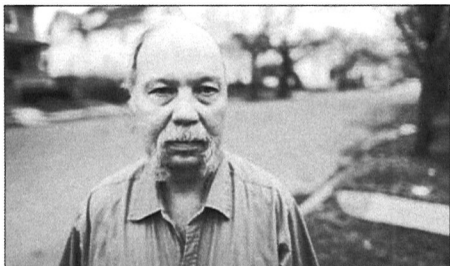
- James C. McCloskey, founder and executive director of Centurion Ministries, an organization in Princeton that champions the causes of falsely convicted inmates.
- Bill Raynor, a Centurion investigator who has worked on the Scarborough case for nine years.
- Paul Henderson, a Pulitzer Prize-winning newspaper reporter who worked closely with Raynor.

The prosecutors

- Eric R. Linhardt, Lycoming County district attorney: said justice had been done in the Scarborough case.
- William S. Kieser, former Lycoming County district attorney: offered Scarborough a deal, according to Scarborough's trial lawyer.

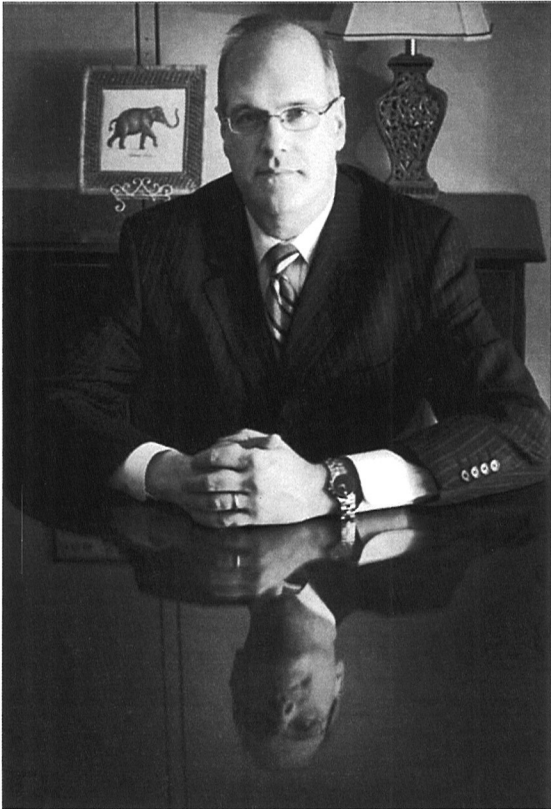
The defense lawyers

- John M. Humphrey: defended Scarborough at trial and said the case had "haunted" him ever since.
- Ronald C. Travis, one of Humphrey's partners: filed Scarborough's latest appeal.
- Robert Elion: defended David Hubble at trial and said evidence against Scarborough was "shaky."



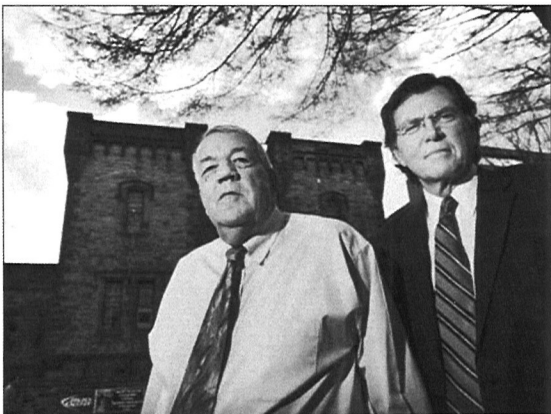
LAURENCE KESTERSON / Staff Photographer

Ronald D. Gray, in Williamsport, Pa., and another man say a Florida man told them that he had driven the Hubbles to the Kepner house.



LAURENCE KESTERSON / Staff Photographer

The current Lycoming County district attorney, Eric R. Linhardt, says he remains convinced that "justice has been done" in the Scarborough case.



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Scarborough lawyers Ronald C. Travis (left), who is handling the latest appeal, and John M. Humphrey, who worked the trial, outside Lycoming County Prison.

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