



FOR 12 YEARS, KALVIN SMITH HAS BEEN IMPRISONED FOR A BRUTAL CRIME THAT HE SAYS — AND MANY BELIEVE — HE DID NOT COMMIT. A DEDICATED TEAM OF ADVOCATES, ALL MEMBERS OF THE DUKE LAW COMMUNITY, ARE WAGING AN UPHILL BATTLE TO WIN HIS FREEDOM.

IT TAKES A VILLAGE TO WORK FOR JUSTICE



BY PHOEBE ZERWICK

AUTHOR'S NOTE:

KALVIN MICHAEL SMITH IS INCARCERATED at the Albemarle Correctional Institution, a medium-security prison in Stanly County, N.C., where he works in the barbershop, reads, and writes letters. Now 38, Smith is serving a 23- to 29-year sentence for the brutal 1995 beating of a young, pregnant store clerk in Winston-Salem, a crime he says he didn't commit.

In January 2009, Smith lost a motion for a new trial. His advocates at the hearing all firmly believe he is innocent and is a likely victim of prosecutorial misconduct, false testimony, and incompetent trial counsel. All are members of the Duke Law School community: David Pishko '77, Clinical Professor Theresa Newman '88, and David Bernstein '06. They plan to stay on his case through the appeal process, still hopeful that justice will, someday, be done. Professor James Coleman Jr. supervised the students who investigated the case for the Duke Innocence Project and assisted the lawyers who represented Smith.

I met Smith and Coleman in 2004 when I was looking into Smith's case as an investigative reporter for the Winston-Salem Journal. By then Coleman had been reviewing evidence in the case for a year. He and I worked more closely than I would have

normally worked with a source, each of us understanding the tenuous trust between a lawyer and a journalist. After the newspaper published my series of articles that raised doubts about Smith's guilt in November 2004, I moved on to other stories, but Coleman, Newman, and a dedicated group of Duke Law students involved in Duke Law School's Innocence Project, including Bernstein, pressed on.

When I first met him, Smith was clearly frustrated by the slow progress of his innocence claim. When I visit him following his failed hearing, he is disappointed, but seems more patient, clearly trusting the members of his legal team to do their jobs. "I've gotten to the point where I love Mr. Coleman," Smith tells me, adding that he calls Coleman often — at work, at home, on his cell phone.

Sometimes he feels as though he's a burden to his advocates. But they tell him not to worry.

As Smith heads back to his cellblock at the end of our hour-long visit, he calls back with a question.

"Are you going to be talking to Coleman today?" Smith asks. "Tell him I'll call him tonight. About 7:30. I need to talk to him." — Phoebe Zerwick

KALVIN SMITH DRESSED for his court hearing last January in a new suit and shoes his father bought him for the occasion. He hadn't worn anything but prison-issued khakis and work shirts since a jury in Forsyth County, N.C., had convicted him in 1997 of the near-fatal beating of Jill Marker.

In those 12 years Smith hadn't really felt human. The new clothes helped. He was looking forward to testifying for the first time, and telling a judge that he was not the one who had beaten Marker and left her for dead.

His lawyers projected confidence. But Smith felt he couldn't trust the justice system that had sent him away in the first place.

"I really, deep down inside didn't look for them to do the right thing," he says a few days after the January hearing.

His lawyers had gathered over the weekend in Winston-Salem to prepare for the hearing. James Coleman Jr., Duke's John S. Bradway Professor of the Practice of Law and co-director of the Wrongful Convictions Clinic, knew Smith's case inside out, although he was not representing Smith as his lawyer. He had been investigating the case since 2003, and spent a good part of the weekend tracking down witnesses to make sure they would show up for court.

David Pishko '77, a partner at Elliot Pishko Morgan in Winston-Salem who had taken the case pro-bono, would question witnesses and make the oral arguments. Clinical Professor Theresa Newman '88, who co-directs the Wrongful Convictions Clinic, would be co-counsel. David Bernstein '06, who worked on Smith's case as a

OPPOSITE PAGE, TOP: KALVIN SMITH; BOTTOM, L-R: JAMES COLEMAN JR., DAVID PISHKO '77, THERESA NEWMAN '88, DAVID BERNSTEIN '06, JOE DAVIS '07

“HIS STORY SOUNDED CREDIBLE. HE TOLD THE STORY IN A WAY THAT DIDN'T SEEM DESIGNED TO CONVINCE ME HE WAS INNOCENT,” SAYS JAMES COLEMAN OF HIS FIRST MEETING WITH SMITH.



student Innocence Project volunteer, flew in from New York where he was an associate at Fried, Frank, Harris, Shriver & Jacobs. He had conducted legal research for the motion with assistance from other associates through the firm's pro-bono program.



SMITH'S THREE LAWYERS AND COLEMAN felt they had strong legal grounds for a new trial. First, there was evidence of incompetence by Smith's trial lawyer, who had spent only 59 hours on the case prior to trial and had allowed the brain-damaged victim to identify Smith without a challenge. They also had evidence that prosecutors had failed to produce evidence, in violation of the Supreme Court's 1963 ruling in *Brady v. Maryland*. And the two witnesses who testified against Smith at his trial had since recanted and would testify that police had pressured them for their testimony.

“It was clearly the strongest post-conviction claim I ever had,” says Pishko.

But there was more than the law driving them as they worked into the night preparing for court. They all had taken the leap of faith lawyers rarely make: they believed their client was innocent.

PROVING INNOCENCE: AN UPHILL CLIMB

INNOCENCE IS NOT PART of the normal legal lexicon. Juries find defendants guilty or not guilty, never innocent. Lawyers defend their clients regardless of their guilt or innocence. And while we are all presumed innocent under the law, innocence is not a legal claim.

That's changing with the growing number of convicted felons who have been exonerated in the last 17 years by DNA evidence. To date, 232 defendants convicted of rape, murder, and other heinous crimes have been found not simply “not guilty,” but innocent, establishing innocence work as a new area of law.

Duke Law started its Innocence Project in 2000 as one of the founding projects of the N.C. Center on Actual Innocence, a loose network of university-based organizations where faculty and students work together in a quest for justice. Coleman and Newman serve as faculty advisers.

Smith wrote to the center in 2003, and his case was referred to Coleman for review.

Today students can earn course credit for some of their work through the Wrongful Convictions Clinic, but not so in 2003. Coleman and a core group of students, Emily Coward '06, Joe Davis '07, and Bernstein, read through hundreds of pages of trial record, police reports, and transcripts from interviews with witnesses — enough to tell them that the case against Smith didn't hold up.

Smith says his first meeting with Coleman, in the spring of 2004, changed his life.

“The first thing Mr. Coleman said to me was, ‘We believe you're innocent,’” Smith says. “To hear that coming from someone other than my family, that just took a load off my back. It was like I could breathe again.”

By then, Smith had been in prison for seven years and had good reason for despair. After conviction, the burden of proof shifts from the prosecution to the defense. No longer presumed innocent, it was now up to Smith to prove that he deserved a new trial.



THE DEC. 9, 1995, attack against Jill Marker had been big news in Winston-Salem.

She was beaten as she was getting ready to close up the Silk Plant Forest, an artificial plant store in a busy shopping center that was stocked that week with Christmas trees and decorations.

The beating left her in a coma with a fractured skull. The local media closely followed the investigation and the progress of her limited recovery, reporting on the birth of her infant son while she was in the coma and her transfer to a nursing home close to her parents' Ohio home, but the crime remained unsolved.

At first police focused their investigation on a 46-year-old white man named Ken Lamoureux. He had a history of domestic violence and psychiatric problems and met Marker when she taught at his children's day-care center. At least two witnesses saw Lamoureux in the store the night of the attack. But the investigation ran cold, and he was dropped as a suspect.

SMITH'S LAWYERS AND COLEMAN FELT THEY HAD STRONG LEGAL GROUNDS FOR A NEW TRIAL. FIRST, THERE WAS EVIDENCE OF INCOMPETENCE BY SMITH'S TRIAL LAWYER. THEY ALSO HAD EVIDENCE THAT PROSECUTORS HAD FAILED TO PRODUCE EVIDENCE, AND THE TWO WITNESSES WHO TESTIFIED AGAINST SMITH AT HIS TRIAL HAD SINCE RECALLED.

"IT WAS CLEARLY THE STRONGEST POST-CONVICTION CLAIM I EVER HAD."
— DAVID PISHKO '77



KALVIN SMITH AND DAVID PISHKO AT SMITH'S JANUARY 2009 HEARING, WHERE SMITH PETITIONED FOR A NEW TRIAL.

Photo: David Rolfe (*Winston-Salem Journal*)

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Smith first came to police attention in June 1996, after a jilted girlfriend reported him. He also was dropped as a suspect after he passed a polygraph test. But in January 1997, another jilted girlfriend reported him to police. After an interrogation, Smith signed a statement, putting himself at the crime scene. He was arrested immediately.

The case against him fell into place quickly. One friend told police he had been at the plant store with Smith. Another told police that she heard Smith brag about the beating. And three months before the trial, Marker purportedly identified him from a photo lineup.

Still unable to speak or walk and nearly blind, she made a dramatic witness at his trial. Prosecutors wheeled her in and she pointed to Smith as her attacker.

After deliberating for two days, the jury convicted Smith of assault with intent to kill and armed robbery.

BUILDING THE CASE

COLEMAN IS A DELIBERATE MAN. During his long career in private practice, including 12 years as a partner at Wilmer Cutler Pickering Hale & Dorr in Washington, D.C., he routinely took on capital collateral cases on a pro bono basis; he joined the Duke Law faculty after defending serial murderer Ted Bundy in his petitions for post-conviction relief from his Florida convictions and death sentences.

As Coleman and the students reviewed Smith's case, several questions stood out.

They couldn't understand why the police had aborted their investigation of Lamoureux, the first suspect in the case. It seemed clear to them, too, that witness statements against Smith were coerced.

Smith's conduct also made little sense. Why, for example, had he gone to the police station and given a statement to implicate himself?

In his initial meeting with Smith, Coleman watched him closely, listening for lies.

"His story sounded credible. He was emotional, but that wasn't what convinced me," Coleman says. "He told the story in a way that didn't seem designed to convince me he was innocent."

Two years after Coleman took on Smith's case, Duke University found itself at the center of a media storm with its own case of wrongful arrest when three white lacrosse players were charged with sexual assault.

The national press descended on the campus to tell the story of students at the elite school who had gotten what was coming to them. That story quickly blew up, as evidence of a false accusation emerged. Eventually the state attorney general intervened, charges against the students were dropped, and the prosecutor who had treated them unfairly was forced to resign in disgrace.

After leading an internal review of the lacrosse team's conduct on campus, Coleman was one of the first to suggest there was misconduct by the local police and prosecutor.

He can't help but compare Smith's case to that of the three lacrosse players who had the best lawyers in the state defending them. He notes the roles that race and resources play in the outcome of such cases and the importance of the attorney general and bar officials being concerned about the injustice. Coleman points to comments made by Reade Seligmann, one of the exonerated lacrosse players, after charges against him were dropped.

"This entire experience has opened my eyes up to a tragic world of injustice I never knew existed," Seligmann said. "If it is possible for law enforcement officials to systematically railroad us with no evidence whatsoever, it is frightening to think what they could do to those who do not have the resources to defend themselves."

"ADVOCATES OF THE TRUTH, FIRST AND FOREMOST"

INNOCENCE CASES BEGIN as fact-finding efforts. Finding a legal defense is not the goal — getting to the truth is. The lawyers and students working the cases tell clients they must tell the entire truth. If they uncover convincing evidence of guilt during their investigation, they close the case. "We are their advocates," Newman points out. "But they know we are advocates of the truth, first and foremost."

The work gives students practical experience with court records, police reports, and witnesses, and also teaches them the limits of the law they have been taught to uphold, she adds.



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As students, Davis and Coward visited Smith several times in prison, always leaving with a sense of guilt that they could return to school while Smith went back to a prison cell for a crime they believed he did not commit.

“This was Calvin’s life every day,” says Davis, who just finished clerking for Judge Henry Coke Morgan Jr. of the U.S. District Court for the Eastern District of Virginia. “That, at times, made me feel really guilty — that we weren’t doing more or moving faster.”

Bernstein, who started working on Smith’s case as a 2L, juggled his work on Smith’s case with a busy commercial litigation practice. “[Litigation] takes on new meaning when it’s to help get someone out of jail who you know is innocent,” he says, adding that he can imagine himself in Smith’s place. He keeps a photograph on his desk of Smith’s supporters marching through Winston-Salem on Martin Luther King Jr. Day last year.

Newman and Coleman see innocence work as a way to break down the traditional adversarial relationship between prosecutors and defense attorneys. Since the work is not about legal maneuverings, why not find a way for prosecutors and advocates to cooperate?

Coleman took this approach with Tom Keith, the district attorney in Forsyth County, having reason to believe that Keith would be open to Smith’s claim of innocence because of an earlier wrongful conviction in the county.



IN 2003, DNA EVIDENCE exonerated Darryl Hunt, who had served almost 19 years in prison for the rape and murder of a young copy editor in Winston-Salem. Keith had opposed Hunt’s bid for new trial, but when DNA evidence identified the real killer in the case, Keith joined defense attorneys in asking for the charges against Hunt to be dismissed.

Coleman praises Keith’s initial cooperation. Keith signed a voluntary consent order giving the Duke Innocence Project access to the prosecutor’s files in Smith’s case and encouraged the police to make their evidence available.

The police files contained a video of an interview with Marker in October 1996, three months before Smith’s arrest. Coleman had

read about the interview in the police reports, and he suspected that Marker had been shown a photo lineup that included Smith’s picture, but he had never seen the video.

It showed Marker reviewing three photo spreads, two of black men and one of white men. Because she could not speak, police asked her to nod her head ‘yes,’ or shake her head ‘no,’ in answer to their questions. Marker was unable to identify any of the black men, and appeared to identify a man in the lineup of white men.

The video forms the crux of Smith’s argument for a new trial. The police reports say nothing about the photo lineups or whose pictures she saw, and the photos were never shared with the defense before trial, as they should have been. Yet at the January hearing, the lead detective in the case testified that one of the lineups included Smith’s picture and another included a photo of Lamoureux.

If Marker could not identify Smith as her attacker in October 1996, how was it that she identified him a year later at his trial, asked Coleman? And if Smith’s trial lawyer had seen the video, why had he not used it to challenge her testimony? If he had not seen it, then the prosecutors were guilty of misconduct.

Coleman says that once he brought his questions to Keith, the district attorney stopped returning his phone calls and emails. Still, Coleman pressed Keith to work with him on Smith’s release long after his students urged him to give up, hoping to change the way prosecutors and defense advocates work on such cases.

But by late 2007, with no movement from the prosecutor’s office, Coleman and Newman decided it was time to go back to the adversarial model and file a motion for a new trial. That meant they needed to find a trial lawyer in Winston-Salem to argue the case. They were referred to Pishko through Hunt’s attorney.

A REWARDING CASE — “EVEN WHEN YOU LOSE”

PISHKO STARTED OUT IN CORPORATE law after his graduation from Duke, but says he “missed working for the underdog.” He and his partners at the law firm they launched in 1988 specialize in professional malpractice, labor and employment, workers’ compensation, and civil rights, among other areas.



**"LITIGATION TAKES ON NEW MEANING
WHEN IT'S TO HELP SOMEONE OUT OF
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— DAVID BERNSTEIN '06**

**"I TOLD [KALVIN] IT WAS ROUND ONE
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Photo: David Rolfe (Winston-Salem Journal)

Pishko has done post-conviction work for death-row inmates. But he says this is the first time he has ever represented someone he believes to be innocent.

"There's nothing more rewarding than representing someone like Calvin Smith, even when you lose," he says.

Smith changed into a new suit for his January hearing, but jailers insisted he keep the shackles on his ankles as he sat at the defense table beside Pishko. Newman sat behind them.

Smith's father, mother, brother, and sister were in the gallery, along with Coleman and Bernstein. His youngest son, who was an infant when he went to prison, came to see him for the first time. And the benches were filled with community activists who have rallied behind him, including Hunt, a sharp contrast to his 1997 trial where his only supporters were members of his immediate family.

While Smith's testimony was not needed for the legal claims, his lawyers knew that he needed the chance to tell his story.

Smith looked directly at the judge as he spoke, but with constant objections from the state he didn't feel he was being heard. When he wasn't on the stand, Smith kept up a constant flow of questions for Pishko.

"I know I got on Pishko's nerves because I was writing so much down and sending him notes," Smith says later. "Ask him that. Ask him that. I wanted every little detail to come out."

The lawyers believed they had the law on their side. But they also knew the pressures on the judge. Marker is blind and the state's witnesses have all recanted. Giving Smith a new trial would have amounted to setting him free.

For the last day of the hearing the bailiffs cleared the first two rows. Smith took that as a bad sign; court officials would want a buffer zone if he lost, to maintain order in the courtroom.

That morning, after hearing argument from the lawyers for both sides, Judge Richard Doughton denied the motion without comment and instructed the state to draft an order.

In the days leading up to the hearing, his lawyers had done their best to boost Smith's confidence and at the same time help him prepare for a loss. They knew the odds, but the loss was harder than they expected.

"I told him it was round one of a 15-rounder," Pishko recalls of trying to console Smith. "I told him we were going to keep fighting and he needed to keep his hopes up and stick with us."

Newman found herself holding back tears.

"I never thought it was hopeless, because the law was on our side," she says. "We really did win on the law."

All members of Smith's legal team say they laid solid groundwork for an appeal, either in state or federal court. And Coleman is confident that some day they'll find evidence that points to the real attacker. He is already working to track down a woman he believes was talking to Marker on the phone shortly before the attack. Maybe she knows who was in the store that night.

"I think we'll get him out of prison by getting his conviction overturned," Coleman says.

But that won't be enough. Coleman wants to prove his innocence. To do that, he believes he will need to solve the crime. ♡

POSTSCRIPT:

On March 17, a citizen's committee reviewing the police investigation of the case on behalf of the Winston-Salem City Council sent a resolution to the Council saying they had found no credible evidence that Calvin Michael Smith was at the Silk-Plant Forest on the day or at the time of the assault on Jill Marker.



Phoebe Zerwick is a freelance writer in Winston-Salem, N.C.