

# Pro Bono Client Released from Prison without Retrial

## Publications

May 12, 2021

On May 6, our client Kenneth “Ken” Smith was released from state prison after serving 19 years for a murder and robbery that he did not commit.

The firm first took Ken’s case in 2006 after a state appeals court reversed and remanded his conviction for murder and 67-year sentence for a new trial. Since that time, various teams led by Partner David Jimenez-Ekman have represented the client through a second trial, a direct appeal, a third trial, another direct appeal, and a federal habeas petition.

Following appeals of his habeas petition, the Seventh Circuit sent an order calling for Ken’s immediate release without conditions at the end of April. This means that he is free from prison and will not be required to report to parole or a probation officer.

“We are grateful that, at long last, the justice system recognizes Ken Smith’s innocence, ending his almost two-decade nightmare,” Mr. Jimenez-Ekman told the *Northwest Herald* upon our client’s release. “The evidence of Ken’s innocence is overwhelming, and it is a tragedy it took so long for the justice system to acknowledge that. Ken looks forward to the hard and bittersweet task of rebuilding his life.”

The charges against Ken stemmed from a botched armed robbery. In March 2001, the owner of a strip mall burrito shop in McHenry, Illinois, was shot to death after he chased two armed, masked robbers out of his store carrying a knife. The state had no physical evidence linking Ken to the crime. There were no fingerprints from Ken at the scene, no DNA evidence, and no blood that could be linked to him. Instead, Ken was convicted based on a “confession” of an alleged co-conspirator, which was (a) procured after police falsely told him that his friends had already confessed and implicated him, (b) riddled with major inaccuracies that demonstrated he had no knowledge of the crime, and (c) force-fed through leading questions that supplied the only correct information in the entire statement. When the firm first took Ken’s case, the Illinois Second District Appellate Court had reversed and remanded his conviction for a new trial on the basis of a blatant Confrontation Clause violation.

Ken’s second trial occurred in 2008, and resulted in a second conviction that was overturned in 2010, when the Illinois Appellate Court held that the trial court had improperly excluded evidence

implicating a completely separate group of perpetrators and exonerating Ken.

Indeed, in the years Ken's case had been pending to that point, compelling evidence emerged showing that the crime was committed by three individuals completely unrelated to our client and his friends. At Ken's third trial in 2012, the team put on evidence that those other individuals confessed – unprompted – numerous times to friends, family members, and police; they knew details about the crime that had never been made public; and there was physical evidence corroborating those other individuals' confessions. The other individuals were seen with cuts and scrapes in the days after the crime; they were connected with a gun that matched the characteristics of the bullets recovered from the victim and found at the scene; and they were riding around in a car on the night of the crime that later was found burned in a field with the help of an accelerant. However, the court excluded important evidence implicating the other group, including compelling evidence of their motive to commit the crime, and also limited the defendant's ability to cross-examine the only eyewitness to the crime. After three days of deliberation, the jury, still only having heard part of the story, convicted Ken again.

After Ken's direct appeal was denied in January 2015, the firm filed a federal habeas petition for Ken that was assigned to Judge Andrea Wood of the Northern District of Illinois.

In March 2020, Judge Wood granted the habeas petition and vacated Ken's conviction and sentence, ruling that evidentiary errors violated his constitutional rights. The court found that the Illinois Appellate Court improperly affirmed evidentiary exclusions that violated his right to present a complete defense and his right to engage in effective cross-examination.

The court wrote that “[g]iven the weaknesses of the State’s case,” the evidentiary errors had a “highly significant effect” on the trial result. The court wrote that “the evidence of the [other group’s] involvement is highly compelling if not conclusive,” that the court was “confounded as to how [the] evidence could not give a rational jury reasonable doubt as to [Ken’s] guilt,” and that, “[e]specially in combination with the exceedingly thin evidence supporting [his] convictions, the court is concerned that a miscarriage of justice has occurred here.” The court granted Ken a new trial, which would have been his fourth on the same charges.

Though the court's habeas decision was a significant victory, the battle to secure Ken's freedom was far from over. The State appealed Ken's habeas victory, and Ken cross-appealed, asking for a ruling that the evidence was insufficient to support his conviction and that he should be released without possibility of retrial. Mr. Jimenez-Ekman and Partner Katharine R. Ciliberti, presented oral argument on the appeal and cross-appeal in November 2020, at which point the panel of Seventh Circuit judges expressed strong skepticism about the constitutionality of the conviction. Chief Judge Diane Wood commented during the argument that “it [was] hard to imagine a case with thinner evidence” than what was presented against Ken.

On April 29, 2021, the Seventh Circuit went even further than the district court, holding that the evidence was constitutionally insufficient to sustain Ken’s conviction. The Seventh Circuit opinion, which reflects a caustic rebuke of the state appellate court’s decision affirming Ken’s third conviction, notes that the evidence implicating the separate group of perpetrators “casts a powerful reasonable doubt on the theory that Smith and Houghtaling were the robbers that night. . . . With such a serious possibility of a third party’s guilt, we are convinced as an objective matter that no rational trier of fact could have found Smith guilty beyond a reasonable doubt.” The Seventh Circuit concluded that “the trial evidence failed to support Smith’s conviction beyond a reasonable doubt and that the Illinois Appellate Court was not just wrong, but unreasonable, in holding otherwise.” The Seventh Circuit remanded the case to the district court, with instructions to grant the petition for a writ of habeas corpus unconditionally, and ordered Ken’s immediate release from state custody—a tremendous victory for our client after nearly two decades of trying to prove his innocence.

On Thursday, May 6, 2021, Ken Smith walked out of Lawrence Correctional Center as a free man. In the days since, he has been spending time with his family and starting the long process of adjusting to life on the outside.

Several media outlets covered Ken’s release, including *Law & Crime*.

In addition to Mr. Jimenez-Ekman and Ms. Ciliberti, Associate Elena M. Olivieri, and former associate Emma O’Connor. The past trial teams included Partners John R. Storino and Gregory M. Boyle, and Paralegal Chris Ward.

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