

# Proving Innocence – Eugene Gilyard, Part 1: Convicting an Innocent Man

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Next month, we will present final arguments to a Philadelphia judge urging her to grant our client Eugene Gilyard's petition for a new trial. We thought this a good time to explain how we investigated Eugene's claims of innocence, found evidence that supports him, and what barriers we faced in getting him in to court. It's a long story, and will take several posts to tell. But for those who support our work and believe in justice, understanding the arduous journey that innocent people face in winning their freedom cannot be more important.

## ***Thomas Keal's Murder and Eugene's Conviction***

The picture of Eugene's conviction has always been hazy. Thomas Keal was murdered as he closed his store around 2 am on August 31, 1995. Mr. Keal's daughter lived across the street, on the 2nd floor. Woken by her father's voice outside, Ms. Keal got to the window in time to see her father engage with 2 men wearing bandanas and brandishing guns. The men shot her father then turned and ran away. She saw this from her 2nd floor window, looking down on the scene through a box fan in her window. Of course, it was dark of night.



Array Shown December 31, 1997  
(Eugene is 2nd from Right on bottom)

Two years after her father's murder, police showed Ms. Keal a photo array. This array also included Eugene's picture, but the photo used in the array was of Eugene as he appeared then at age 18, not as he looked 2 years earlier as a 16-year-old boy. Ms. Keal hesitantly identified Eugene as having been involved.

At trial, the only evidence presented to convict Eugene was the testimony of Ms. Keal. A witness who told police she saw two other men – "Rolex" and "Tizz" – running away from the murder was not called by the defense. On December 10, 1998, at age 18, Eugene was convicted of murder and sentenced to life in prison without the chance of parole.

## ***Eugene Appeals, but is Turned Away***

Eugene appealed his conviction, but the Superior Court refused him. The Supreme Court of Pennsylvania denied his request for review in 2003. In 2004, Eugene filed an appeal under the Post Conviction Relief Act ("PCRA"), challenging the stewardship of his trial by defense counsel. Among other claims, Eugene tried to argue that he was innocent and had nothing to do with the murder of which he was convicted. Again, his appeals were denied. Having

exhausted his allowed appeals and without any resources to hire lawyers or investigators, Eugene had nowhere to turn.

### ***Pennsylvania Denies Counsel After Convictions are Affirmed***

Under Pennsylvania law, inmates have a right to file 2 appeals after conviction. The first, referred to as a “direct appeal,” can challenge any legal or procedural errors that occurred during the trial. Issues such as whether a court improperly denied a motion to suppress evidence due to constitutional violations or whether a court improperly instructed a jury are common claims on direct appeal. The second level of appeal, called a “collateral appeal”, is allowed so inmates can challenge the effectiveness of their trial counsel, and where counsel was deficient, have a new trial ordered. Once those appeals have been filed, there are no other avenues for inmates to appeal their sentences. Courts provide access to counsel for these 2 levels of appeal, but nothing afterward. Inmates without money or resources to hire a lawyer or, even more importantly, an investigator, are on their own.

The law in our state in terms of the limits on appeals is both strict and virtually unyielding. There are only 3 exceptions to this limitation: if the Supreme Court of the United States declares a new criminal rule, if the government “interfered” with the ability to bring an appeal earlier, or if the inmate comes across “new facts” which he didn’t know about at trial and could not have known about even if he acted diligently. On top of those requirements, inmates in Pennsylvania have only 60 days to file a petition raising one of these exceptions from the time “the claim could have been brought.” That is one of the strictest timeframes in our nation. Sixty days. And because the courts have interpreted that to mean that they do not have the power (properly called “jurisdiction”) to hear a claim unless it was filed within 60 days of the time the claim could have been brought, inmates who have no resources often find themselves unable to have their claims heard at all.

After his appeals were denied, Eugene had nowhere to turn. He had no money. His family, who staunchly believed in his innocence, had no money. He knew he had nothing to do with Mr. Keal’s murder but he had no way to prove it to a skeptical court that had already branded him “murderer.” In 2009, when the Pennsylvania Innocence Project opened, he finally got what he’d lost when he was convicted: hope.

## **Eugene Gilyard, Part 2: Investigations Take Time**

*Posted on [September 26, 2013](#) by [innocencepa](#)*

We first heard from Eugene before we even started operating, in early 2009. Law student volunteers began reviewing the materials in his case, and learning about his conviction. What struck us all is exactly what the judge now hearing Eugene’s petition has observed: the paucity of evidence used to convict two men of murder. Because his conviction was so old, just getting his trial file alone took several weeks of effort. And even then, as is usually the case, the file was woefully incomplete. It contained notes of testimony and most of the briefs and opinions from the appeals Eugene had filed soon after his conviction. But there was no “discovery” – materials provided by the prosecution to a defendant before trial, usually including police records, identification information, witness statements, and the like.

As an indigent inmate in a faraway prison, Eugene had run out of options in trying to prove his innocence. Although he had been represented by lawyers at trial and on an appeal, none appeared to take his claim of innocence seriously. Indeed, one prior lawyer treated Eugene’s situation so badly he filed a letter with the court asking to be relieved from representing Eugene because the lawyer saw “no merit” in any appeal issue. At no point did any lawyer tell the court that Eugene was an innocent man, convicted of another man’s murder. Yet he soldiered on, hoping someone would listen.

### ***A Break: “Rolex” Says He is “Willing to Help” Then Confesses to Murder***

After Eugene first wrote to the Project asking for help, the biggest development since his arrest took place. Eugene’s mother received a letter in the mail from a man who claimed he could help Eugene in his case. That letter, sent by Ricky “Rolex” Welborn, said only that he would be willing to help. Eugene acted as quickly as he could, finally securing enough money to hire someone to go interview Welborn in prison where he was serving a life sentence for murdering another man.

That interview, on March 18, 2011, yielded a full confession. A confession from Rolex that he, and not Eugene Gilyard, murdered Thomas Keal. As soon as he received that confession, Eugene did what he had to do under Pennsylvania law: he filed a petition under the Post Conviction Relief Act (“PCRA”) asking the court to vacate his conviction and grant him a new trial, where the jury could hear Rolex’ confession and judge for themselves whether Eugene was involved in the murder or not.

In June, 2011, the investigator from the Pennsylvania Innocence Project met with Rolex and did a longer, more extensive interview. During that interview, Rolex again admitted that he not Eugene – was responsible for Mr. Keal’s untimely death. Indeed, Rolex admitted to another shooting that took place earlier the same day, where he used the same gun (a crime for which he had never been prosecuted as the victim refused to identify Rolex to police).

In his confession, Rolex admitted that he and another man (whom he refused to name, even 20 years later) decided to commit an armed robbery for cash. They chose Mr. Keal as the target as he was believed to carry cash from his store when he closed at night. In August, 1995, Rolex and his co-hort approached Mr. Keal on the street, demanded money from him, and threatened him with his gun – a double-barreled sawed-off shotgun. When Mr. Keal pulled out his own gun in self-defense, Rolex said he shot Mr. Keal in the leg. While Mr. Keal was on the ground, Rolex’ co-hort shot him in the head 3 or 4 times with his own gun, a .22 revolver.

The victim dead, Rolex and the other man ran from the scene. They got into a car, driven by “Rob” and drove to West Philadelphia. (Although he initially named Rob by name, Rolex refused to sign the statement unless Rob’s name was crossed out.) Rolex admitted that he kept the victim’s gun for himself and later sold it to a man he referred to as “Chink.” He used the same sawed-off shotgun in another robbery in November, 1995.

Rolex admitted his guilt knowing full well that he, himself, could be prosecuted for Mr. Keal’s murder. During the interview, he was alert, forthright, and non-hesitant in describing what he did that night. His only hesitations were in identifying, by name, the man he was with, and including “Rob’s” name in his signed certification. To this day, Rolex refuses to provide his co-hort’s name.

### ***Asking the Commonwealth for Help***

On August 8, 2011, we wrote to the Philadelphia District Attorney’s Office and asked them to investigate the murder of Thomas Keal. The letter was co-signed by Mr. Keal’s daughter, the very person who identified Eugene as having been the one who killed her father. While not stating that she was wrong, Ms. Keal wanted to know the truth about her father’s murder.

In the letter to the District Attorney, we pointed to other evidence that showed Rolex was telling the truth – that he killed Thomas Keal and that Eugene Gilyard had no involvement. Several eyewitnesses who were present at the time of the murder saw Rolex and a man they called “Tizz” walk toward Mr. Keal’s store. After hearing gunshots, the witnesses say they saw Rolex and Tizz run away and get into a car. Rolex’ confession corroborates Ms. Keal’s account of what she saw the night her father was murdered. Including that Mr. Keal was shot in the head while he was on the ground.

After sending the letter, the Pennsylvania Innocence Project continued to investigate Eugene’s case. Because our mission is to learn the truth about a crime, we do not stop our investigation until we have reviewed all of the evidence, spoken to all the witnesses we can. And our investigation yielded even more evidence that Rolex and not Eugene was guilty of murder. Significantly, the Project found and interviewed Anthony Stokes – the man Rolex said he had shot earlier that day. Mr. Stokes confirmed that Rolex did, indeed, shoot him that same day and that he used a “sawed-off shotgun” to do it. Mr. Stokes said he did not identify Rolex as the shooter, preferring to get his own justice later. Mr. Stokes agreed to allow the Project to obtain his medical records from the shooting which, again, confirmed his account.

And yet, we never heard from the Commonwealth. Until they filed a Motion to Dismiss Eugene’s case.

## **Eugene Gilyard, Part 3: Asking for Justice**

*Posted on [October 1, 2013](#) by [innocencepa](#)*

The laws in Pennsylvania are among the strictest in the nation for the convicted innocent trying to prove their innocence and secure their freedom. Under the Post Conviction Relief Act (“PCRA”), those convicted of crimes must file any petition asking for a new trial within one year of the time their conviction became final – generally, a year after their appeals are completed. After that, any petition filed must meet extremely strict requirements:

- the petition has to show that a “manifest injustice” occurred and that the petition has to be granted to fix it; or
- the petition has to show either that the government “interfered” with the defendant’s ability to present the claims in the petition earlier; or
- that the defendant has discovered new “facts” which were “unknown” to him and “could not have been ascertained by the exercise of due diligence; and
- he has to file his petition within 60 days of “the date the claim could have been presented.”

If the defendant gets over those barriers, only then can he ask the court to review the real substance of his claim. And those claims have to fit within the limits of the PCRA itself. A court can only grant relief if it finds that the defendant’s conviction was the result of:

- a constitutional violation which “so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place”;
- ineffective assistance of counsel which “so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place”; or
- new, exculpatory, evidence which was not available at the time of the defendant’s trial and which “would have changed the outcome of the trial if it had been introduced.”

The standard is, obviously, very high. And, of course, it should be high. It should not be easy to overturn a criminal conviction. But Eugene’s case and dozens more like it raise the question of how hard should it be. If the evidence of innocence is strong enough, should it matter how “diligently” the defendant pursued it, or if he filed within 60 days of learning of the evidence? Those questions clearly troubled the judge, even on our first day of hearings.

### ***Eugene’s Petitions and the D.A. Response***

We have previously posted in this blog about the substance of Eugene’s claims, and how the District Attorney’s Office responded. Those posts, which you can access [here](#), include links to the actual petitions and filings. Essentially, the Commonwealth’s response to Eugene’s evidence that Rolex’ confession entitles him to a new trial was that he had failed to show he acted “diligently” in getting Rolex to confess. As a result, the District Attorney’s Office asked the Court to dismiss Eugene’s petitions. The Court decided that she would hear Eugene’s evidence and make a determination about his diligence at the same time.

### ***A Wrinkle: Rolex Takes the Fifth***

Because Rolex was now admitting to having participated in a murder for which he had never been arrested, he needed his own legal counsel. In Pennsylvania, there is no statute of limitations for murder. That means that for murder, unlike any other crime, there is no specific time in which the Commonwealth has to act to arrest and prosecute the perpetrator. Because of that, Rolex could still be arrested and prosecuted for Thomas Keal’s murder. So he needed a lawyer to see whether he was willing to come to court to tell the judge directly what he had told numerous other people: that he had gotten away with murder.

Quickly the word came back: Rolex was refusing to testify. He intended to exercise his constitutionally protected right to remain silent. No-one doubted that he had a legitimate right to invoke that right.

The question now became, could Eugene call the Project investigator to tell the judge what Rolex had confessed to? The District Attorney’s position was no: the statement to the investigator took place outside of court and was therefore inadmissible as “hearsay” and unreliable. Our position was that the law has exceptions to that rule, such as when someone admits to criminal activity that could get them prosecuted and convicted of a crime they weren’t otherwise under suspicion for. The judge agreed with Eugene: Rolex’ confession would be admitted.

## Eugene Gilyard, Part 4: Eugene Finally Gets His Days in Court

Posted on October 3, 2013 by innocencepa

The Court set hearings for Eugene and his co-defendant, Lance Felder, for the week of July 15. The weeks before, our summer interns were all involved in trying to make sure everything would be ready: legal arguments were honed, documents marked and copied, every witness statement was reviewed and reviewed again.

### ***From the Start, Witnesses Said it was Rolex and Tizz***

On the first day of hearings, the judge asked the Commonwealth whether they would argue that Eugene had not been diligent (and should therefore be denied relief) even if the evidence showed he did not commit the murder. The DA responded they will have to “see where it goes.” And so the tone was set.

During the next few days, we presented multiple witnesses who testified to the same thing: they were outside the evening Mr. Keal was murdered, hanging around a store on Venango Street. Eugene and Lance, both teenagers at the time, were there too. Some of them, including Eugene and Lance, were selling drugs. It was where they always sold drugs, directed by Lance’s older brother Rob. Rolex and Tizz were known as Rob’s “enforcers” – the men who would go after anyone who threatened the drug operation.

At some point, Rolex and Tizz came up and talked about robbing the bar on the corner. The people outside objected, saying it would “draw” police to the area. The two men left, saying they would go up the street. Eugene and Lance stayed right where they were.

The witnesses heard gun shots, then saw Rolex and Tizz running away from the scene. Some saw them get into a car driven by Rob Felder. The three men drove off. When police came to the scene, only one witness was willing to say she saw anything. She told police it was Rolex and Tizz. There was no other information given to police. Everyone else had scattered or would not talk.

And, finally, through our staff investigator, we heard Rolex’ confession. His chilling admission to not only Mr. Keal’s murder but to other assaults and robberies committed with the same gun, brought everyone in the courtroom to silence. Some highlights:

*In August of 1995 I robbed and shot a man on 17<sup>th</sup> Street in between Erie and Venango. Around 2 or 3 p.m. the day of the shooting I shot a man named Anthony Stokes around 58<sup>th</sup> and Christian with the same gun I used to shoot the man on 17<sup>th</sup> Street. After I shot Mr. Stokes I went to N. Philly with a friend. My friend knew a man named “Rob” who lived in N. Philly.*

*We were hanging out with Rob and his friends at the Chinese store on 17<sup>th</sup> in between Venango and Tioga. Sometime between midnight and 2 a.m. my friend and I approached the man as he left a bar and was crossing the street. I approached the man from the front (he was on the sidewalk) and my friend approached him from the back.*

*I had a double-barrel sawed-off shotgun. My friend had a .22 revolver, silver with tape around the handle.*

*My friend held the .22 to the back of the man’s head. The man had a chrome revolver with a black grip-it was a chrome .357. The man pulled out his gun and said “I ain’t giving you shit.” I shot the man in the leg and he fell.*

*My friend stood over him and shot him in the head. I think my friend fired 3-4 shots.*

*I took the man's gun – I had to pry it out of his hands.*

*After my friend shot the man on 17<sup>th</sup> Street I said "What the fuck did you do that for?" He said, "Man, you shoot everybody, I want to shoot somebody too."*

*No one has promised me or given me anything to get me to make this statement. No one has threatened me. Eugene Gilyard had nothing to do with the murder of the man on 17<sup>th</sup> Street.*

Never would Rolex name his "friend," protecting him even in coming clean himself. Nor did he want "Rob" (Rob Felder) to be identified in the statement. And, of course, the words came through our investigator, not Rolex. But as they were to be considered for their truth – that is that Rolex did, in fact, kill Thomas Keal – Eugene hoped it would be strong enough.

### ***Did Eugene and Lance Act Diligently?***

A recurring theme in the questions the District Attorney asked the witnesses was whether Eugene or Lance could have gotten the information about Rolex and Tizz earlier. These questions were asked because, as the DA said, "They have to do everything in their power to pursue their cases." Sadly, this is simply untrue. The law does not require a convicted innocent person to do "everything in his power" to prove his innocence; he only has to show he acted with "due diligence" – in other words, that he did what would reasonably be expected.

What became clear from the witnesses was that all of those involved knew that Eugene and Lance were innocent, and that Rolex, Tizz, and Rob were the ones responsible. But, as Philadelphia Inquirer reporter Joe Slobodzian pointed out [in an article about the hearings](#), Rob had made it clear no-one should talk to police about the murder; even if it meant his own brother went to prison for something he didn't do. The "code of the streets" protected Rolex and Tizz, but sent Eugene and Lance to prison as teenagers. Eugene's freedom depended upon getting Rolex, Tizz, or Rob to finally come forward and credibly admit the truth. Only once Rolex did that could Eugene hope to gain his freedom.

### ***Another Twist: Follow the Money?***

On what was supposed to be the final day of the hearing, the District Attorneys had a surprise: they had subpoenaed Rolex' financial records from prison. In 2011, after he met with the investigator Eugene's family hired to speak with him, there was a \$500 deposit on his books made by a woman. The deposit appeared to be larger than ones regularly made by the same person, but it appeared only one time. The prosecutors wanted time to get all of Rolex' phone calls that he made while in prison (all inmate calls are recorded going into and coming out of the prison) and all of his financial records.

Although she remarked that "\$500 isn't a lot of money to admit to a murder," the judge allowed the prosecutors time to gather their evidence. But not much. What was uncovered during the next few weeks could show either an interrupted promise of payment for confessing, or a confessed murderer's weak and failed attempt to get himself out of a murder arrest.

## Eugene Gilyard, Part 5: Evidence is Closed – Finally

Posted on October 7, 2013 by innocencepa

A few days before we returned to court, the District Attorney's Office provided us with the evidence they'd gathered which they felt showed that Rolex' confession to the murder of Thomas Keal was not genuine, but orchestrated by some unknown person. In addition to providing financial records of all of Rolex' money transactions in prison – times when people put money into his account for him, and times when he made withdrawals from his account for postage or personal purchases – prosecutors handed over 6 compact disc recordings of hundreds of phone calls made by Rolex, Eugene, and Lance. On the discs for Rolex' calls alone there were over 500 calls, each one about 15 minutes long. They also gave us a partial transcript from one of the calls – dated July 31, 2013 – from Rolex to his "wife" saying that he just did what "they" told him, that "they" gave him the money, then he talked to "their" investigator.

With the recordings, prosecutors handed over two handwritten letters which had been intercepted by prison officials before they went out. One was written to a name no-one recognized at an unknown address, the other to Lance's brother at an equally unknown address. In the letters, Rolex spoke of "the deal," claiming that he was owed "\$10,000" for doing what he did. He threatened to "tell the DA" about it unless he received his money.

The volunteers and staff of the Pennsylvania Innocence Project went into overdrive. Literally around the clock, volunteers listened to every minute of the Rolex calls to find out whether there really was a deal, and if so who with. Our investigator went out to the addresses on the letters, to speak with those folks to see what they knew about Rolex and his claimed "deal." And what we found out made one thing very clear: there was no "deal" and never had been. In fact, what we learned showed only one logical conclusion: fearing prosecution for Thomas Keal's murder, Rolex tried to get out of his detailed confession by claiming it was the product of a deal. Here are just some of the things we learned:

- The address on the envelope addressed to Lance's brother was an abandoned house, uninhabited for over 35 years (in fact, our own blank enveloped sent to "Occupant" at that address came back stamped "VACANT");
- The person at the other address had no idea who any of these people are, and had no knowledge of any of the events at issue;
- Rolex' 'wife' had been a virtual stranger to him only 2 months before the transcribed call – he had to ask a friend for her name to put on his visiting log;
- Rolex had repeatedly lied to his new wife, hiding from her that he was serving a life sentence (he had told her he would be paroled soon);
- While Rolex often talked about money on the tapes of his calls, it was always to complain that he had none, and to ask that others put money on his books – there was no talk of the situation being temporary, or allusions to a future payout;
- The day before the call presented by the prosecutors, Rolex told his wife that he didn't know what to do, that he couldn't discuss anything on the phone or write anything to her in a letter;
- Rolex knew that his mail was being opened by prison officials before it went out;
- Under prison rules, inmates know that sending letters containing threats or extortion is prohibited and any such letters are subject to confiscation;
- While outgoing mail may or may not get read by officials, all incoming mail – even for mail that had to be returned for a bad address – would be opened before forwarding to the inmate.

In the final day of testimony, prosecutors played the one phone call for the judge and gave her the letters intercepted at the prison. Refusing to accept a stipulation to the testimony, the District Attorney called a live witness – the head of Intelligence for Rolex' home prison. He confirmed that Rolex' mail was being opened before going out, that of over 50

letters sent out only these 3 had been confiscated, and that if an inmate uses another inmate's name and institutional number in the return address he can avoid having his mail read altogether. Indeed, the prison official even talked of "boomerang" letters where inmates bounce correspondence to each other using other inmate names and numbers. Finally, we also played excerpts of Rolex' calls for the court. The judge heard for herself Rolex admitting

- he was "trying to do the right thing";
- that if he was in "those boys" situation, he hoped someone would do what he was doing; and
- that "the boys" didn't have anything to do with "the situation" and that people get locked up for "stuff they didn't even do."

After the last call was played, prosecutors again asked for more time. The judge denied it, saying "You're done. You're done" and listed the case for final arguments on October 8, 2013.

As we write this, that date is one day away. Eugene is holding together well, hopeful but not making any predictions. His family – particularly his mother – speaks to him as often as possible, keeping his spirits up. And we are readying our final arguments, anxious to convince the court that a gross injustice has been done, and that she has the power to make it right.