WHAT JUSTICE TAKES

Edwin Matthews, Jr.*

This is what you shall do: Love the earth and sun and the animals, despise riches, give alms to everyone that asks, stand up for the stupid and crazy, donate your income and labor to others, hate tyrants, argue not concerning God, have patience and indulgence towards people, take off your hat to nothing known or unknown or to any man or number of men, go freely with powerful uneducated persons ..., re-examine all you have been told at school or church or in any book, dismiss whatever insults your own soul ...”

A. An Outlaw Biker on Death Row

By an irony of ironies, his name is Paradis(e). Born 1947 in Fall River, Massachusetts. Adopted. In trouble from an early age. Twenty-nine prior convictions: theft, drugs, assault, concealed weapon, reckless driving, trespass,

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* Of counsel in the New York office of Coudert Brothers LLP.

1. WALT WHITMAN, Preface to the First Edition of Leaves of Grass (1855). I found these words in 1995 hand written on the wall of a phone booth at the Flying M Cafe in Boise, Idaho. In 1855, when Walt Whitman wrote these words and LEAVES OF GRASS first went on sale at Fowler and Wells on lower Broadway in Manhattan, down the street three young lawyers called Coudert were busy starting my law firm, which they called Coudert Brothers.


I am his new lawyer. It is 1985. I am waiting in a windowless, white-walled, locked room at the Idaho prison to meet my client for the first time. In bursts Paradis, 300 pounds, gasping for breath, shackled with handcuffs and leg irons, struggling not to lose his grip on a large, decomposing box of files all tangled up in a scraggly three foot pony tail and chains. Looking away and without ceremony, he passes me a lose, sweaty paw. He speaks aggressively in foul words. On his arm he bears a tattoo of a raised middle finger and the words “Fuck You!” He feigns command of his desperate plight. He endlessly argues. The world is against him. His fellow bikers betrayed him with their crime. The cops were out to get him because he was a biker. The prosecutor and the judge hated him. He didn’t want the lawyer appointed to defend him; he was brainless and inept. The list goes on and on. I listen, but do not know how to believe him. I am not going to like this man.

I am a New York lawyer and generally not a litigator. I have never been near a death penalty case. I had volunteered to take the Paradis case for no fee because I believed in the principles of due process that I first learned in law school. The execution by Texas and other states of condemned prisoners who did not even have lawyers, much less an adequate defense, had shocked these beliefs. But to Don Paradis, I was just another lawyer who would sell him out, only this time it looked like a naive, ivy league neophyte was going to do the selling. I told myself that I did not have to like this man and had to take him as I found him. However, even though I had never tried to navigate the labyrinth of habeas corpus jurisprudence, I was his last chance. I did not then suspect that in the process of defending Don Paradis over 16 years this angry man would enrich my life and become my friend.

Whatever my impression of Don Paradis, I felt the dreadful apprehension of losing a capital case and watching powerless while my client was put to death. This fear visited in odd moments: in a New York subway crowd, while walking in Central Park, during a dinner in the Connecticut country-side with friends, during late night negotiations for a corporate acquisition, and early mornings in the shower. As Don lost in one court after another and his execution got closer and more probable, my own conviction that our legal system aims to serve justice was shaken. I even wondered if my defense of this man only served to enable the State of Idaho to use the legal system to kill him and if my client might not be better off without my inadequate efforts. Perhaps the outrage of executing Don Paradis without a lawyer might be too embarrassing for even the State of Idaho to go ahead. It was as if, in taking this case, I was now implicated, although legally and with professional blessing, in another killing.

My firm, Coudert Brothers, is a large international law firm. Most of my corporate practice in the New York office was about money or property, not human life. The firm was initially opposed to my taking a pro bono death penalty case. Indeed, my partners reacted with unconcealed disbelief to my proposal that we take a death penalty case: “You are not a criminal lawyer.” “Our firm doesn’t represent murderers.” “We should bill more hours and make the firm more profitable, and then we might afford to take a case like this.” “What are we doing in Idaho?”
“Why not a death penalty case in New York?” I answered that our firm does defend criminals, at least the white-shirted variety. Allow us to give purpose to our labors, and we will love being lawyers and work harder, I added. If we are to be a great firm, let us be great in all ways, including the pro bono defense of indigent defendants. Anyway, what I do with my extra time is my business. The arguments continued. I almost gave up.

Then, to my surprise, without prompting, the Chairman of our Executive Committee called me one day to say that the Committee, after reconsidering my proposal, had decided that I should take the case. He said the Committee and the firm had only one request: “Win!”

From 1985 until the case was over in 2001, we never looked back. I quickly came to appreciate that I could not handle Don’s case alone. Over 16 years, many lawyers at Coudert Brothers, who had become concerned by Don Paradis’ (and read my) plight, worked thousands of hours on the case, giving up nights and weekends to meet one deadline after another. Year after year, significant disbursements were willingly written off. Without the silent, unsparing help of other lawyers in my firm, as well as those lawyers working with the NAACP Legal Defense Fund, which had referred the Paradis case to us, Don Paradis would have been executed. He would now be dead.

We even received help in Idaho. Early in the case, I had realized that I would get nowhere without the help of an Idaho lawyer. On one of those early days, when I was filing papers in the Idaho Supreme Court—I was after all from Idaho— I boldly called upon one of the Justices, who, after a polite chat, invited me to lunch. I asked him to recommend a local lawyer to help in my case, and luckily he recommended Bill Mauk, a trial lawyer in Boise. When I first called Bill I told him I needed help filing papers in a pro bono death case. With open reluctance, after some persuasion, he agreed to be just a mailbox, reminding me that he was not taking any responsibility for the case and would not agree to be part of a last ditch, eleventh hour effort to stop an execution. Bill filed papers for us and continued to file more papers and more papers and, before the case was over, handled hearings beautifully and gave Don decisive assistance. Over the years Bill Mauk more than assumed the responsibility he was careful initially to decline. Without Bill Mauk, Don Paradis would have been executed. He would be dead.

Turning first to the transcript of the original trial, I began to work on Don’s case without realizing that the struggle would last 16 years and that it would be a life-defining experience. The transcript revealed that in 1980 Don Paradis was charged with having strangled a young woman, Kimberly Palmer, along a remote mountain stream in North Idaho. By a strange coincidence, I grew up in that very country and in college had worked summers in a sawmill near the stream site, which was to prove useful in ways I could never have predicted. Hopefully, I said to myself as I started to read the transcript, my years of international corporate practice hadn’t totally erased what I learned of Constitutional law. I did not then suspect that the case, as with the administration of the death penalty throughout our country, would

3. Of course, forgetting entirely that in 1985 New York had not had a death penalty for over twenty years.

be more about politics than the law and that politics, not the legal system, would save Don's life.

The transcript further revealed that Kimberly Palmer was killed because she had been a witness to the murder of her boyfriend, Scott Currier. The Currier murder occurred earlier the same night at Don Paradis' house in Spokane, Washington. Don Paradis and two others, all wired, dirty-haired, smelly-shirted, unkempt, fearsome bikers, had driven from Spokane to Idaho with Currier's mutilated body and Palmer allegedly alive. Currier's body was left in the woods nearby and then, the prosecution claimed, the men chased the escaping Palmer through the woods to the stream where she was strangled and left to die. The State's hired pathologist, Dr. William Brady from Portland, testified that Palmer's lungs were about 500 grams too heavy and wet, that she had inhaled water from the stream when she was alive (accounting for her heavy, wet lungs) and she therefore had died in the Idaho stream where her body was found, not in Spokane. A witness established that the men were present at the stream site for less than thirty minutes. Don and the two other men were identified near the site by a policeman who took their driver's license numbers. One of the other three bikers, Thomas Gibson, was tried before Don. Both Gibson and Paradis were found guilty and the trial judge sentenced them both to death. The third, Larry Evans, went into hiding for five years.

The trial judge assigned William Brown to represent Don. Like many counsel assigned to defend death penalty cases in this country, Brown was abundantly inadequate to the task. Only six months out of law school, he had never tried a jury case. He did not know how to introduce evidence during the trial or how to object to the prosecutor. The jury laughed at him. He barely investigated the facts, and the court allowed him only a small budget to do so. I don't believe he ever understood the evidence. For instance, even though the police identification irrefutably placed Don near the scene, Brown challenged that Don was present by having one of Don's girl friends testify to his "alibi." Her testimony was obviously false and easily discredited by the prosecutor. Despite his inadequacies, even more shocking is that while he was Don's lawyer, Brown was also a policeman in the same county where the trial occurred.

Although the Fifth Amendment guarantees defendants effective assistance of counsel, I was disillusioned when the Idaho Supreme Court later found Brown's shameful defense "superb." The Federal Courts also found Brown to be constitutionally "effective" and were untroubled by Brown's conflict of interest as a policeman. From this, it is clear that the standards for effective assistance of counsel in death penalty cases are shamefully low, to say the least. No court in any commercial matter would appoint counsel with such a conflict or tolerate such incompetency. These court holdings on Brown are examples of court assisted homicide in America.
When I first read the transcript and thought about the State pathologist’s testimony about aspiration of water, I was at home for Christmas. I happened to have a 500 cc jam jar, which I filled with 500 grams of water. As I stared at the glass, I could not imagine how someone could inhale that much water. This was my first doubt that Kimberly Palmer had died in that stream.

We later noticed another curious and significant fact that Brown had not mention to the jury. Dr. Brady’s autopsy report, which Brown failed to try to introduce into evidence until too late, recorded a 1 ½” long cut in the victim’s genitals “with no evident vital reaction.” These words, we later learned from Dr. Brady himself, meant that this wound did not bleed. But, Dr. Brady explained further, had such a wound been inflicted even within an hour or more after the victim’s death, it would have bled profusely. Had Palmer died in the stream as the prosecution argued? Or had she died much earlier and then her body dumped in the stream? Since the men were at the stream site for less than thirty minutes, at the time I simply wondered how this cut, which was in a highly vascular area of the body and apparently did not bleed, could be reconciled with the prosecution’s case.

Next, I went to Coeur d’Alene, Idaho to look at the physical evidence in the case. I went because one must be thorough, not because I expected to find anything. I remember sifting through a box of gruesome artifacts, blood soaked towels, and graphic pictures of the two corpses. When I picked up the jeans Kimberly Palmer had been wearing in the stream, I noticed they had a dramatic cut exactly in the place of her genital wound and that the cloth, which must have covered the wound when it was inflicted, was soft and unstained, showing no trace of blood. Before really thinking about the significance of what I had found, I felt a cold shiver go up my spine. Something didn’t fit. It took me a while to understand what was wrong. The absence of blood stains in the jeans proved that the wound did not bleed, and if the wound did not bleed, it had to have been inflicted some time after death, in which case, because the men were at the site for only a few minutes, Palmer must have been killed with Currier in Spokane and been dead a long time before her body was placed in the stream. These facts were not presented to the Paradis jury.

My intellectual understanding of the significance of the absence of blood came slowly. However, my involuntary shiver came from my realization at that moment that my client might very well be innocent. The case was no longer about abstract principles. I was now responsible for saving the life of someone who was not guilty. If we did not win this case, another innocent human being would be killed. The stakes had shot up immeasurably. I was scared!

In the course of the following years, we obtained a fuller understanding of the significance of the unexplained absence of blood, as well as other forensic evidence available in the case, none of which had been presented to the jury. We found five people who had seen Kimberly Palmer dead in Don’s house in Spokane, Washington (and not Idaho). More importantly, they also claimed that Don was not home when Palmer and Currier were killed. We learned that, in the middle of the night, Currier and Palmer had turned up at Don’s house in Spokane, accusing the drunken and doped up bikers of stealing Currier’s guns. As the confrontation intensified, Currier drew a gun and a terrible fight began. Then Don left, angry at

10. Paradis XV, 240 F.3d at 1175.
the lot for trashing his house. While Don was away, the fight resumed, and Currier was beaten to death. Because she was a witness to the Currier murder, it appeared that Thomas Gibson then strangled Palmer in the house. When Don returned home later, he found everyone departing, leaving him with two dead bodies. Paniciking, Don, Gibson, and Evans then drove the bodies from Spokane, Washington to the Idaho stream site.

For thirteen years we presented these facts and the rest of Don’s case to over a dozen courts and two dozen judges, in both state post conviction petitions and in two federal habeas petitions. Our petitions were based upon a dozen claims that Don Paradis had not received a fair trial and that his death sentence was unconstitutional. Our legal claims relating to Don’s conviction included insufficient evidence to find him guilty, Brown’s incompetence and conflict of interest, jury bias, prejudicial small-town publicity, prosecutorial misconduct, and the improper introduction of evidence of Currier’s murder (which Don had previously been acquitted in the State of Washington). We also argued that Idaho’s death penalty statute was unconstitutional on several fronts: it allowed the judge, not a jury of the defendant’s peers, to make the factual findings required to impose the death sentence and that the aggravating circumstance found in Don’s case was vague. The federal courts up through the U.S. Supreme Court were not sympathetic to our claim that the Constitution requires that the factual findings required for a death sentence be imposed by a jury. As was our duty as counsel, we included every credible claim we could think of. In each filing, in each argument, at every opportunity, however, we explained in the clearest possible terms why Don could not possibly be guilty of Palmer’s murder. To my repeated disbelief, all of our claims were denied. No court seemed to be interested in the execution of an innocent man. Don’s execution got closer and closer.

We faced another obstacle. Under Idaho law, a defendant must raise all challenges to a conviction or sentence, including new evidence, within 42 days after judgment, unless the claims were not known and reasonably could not have been known within this time period. In 1996, the Idaho Supreme Court held, even though this law was adopted four years after the Paradis conviction and although Paradis could not have complied with the law, that Idaho’s 42 day rule barred consideration of his claims.

Federal law provided no reprieve from the 42 day rule since federal courts in habeas corpus matters accord a presumption of correctness to state court findings of fact, unless the state court finding is rebutted by clear and convincing evidence. If the state courts made no finding of fact or the state court finding resulted from unfair procedures or is plainly wrong, the federal court must make its own finding. This demanding standard appeared to be have been established in our case. We

11. This past year the Supreme Court held that the Constitution so required, thus, invalidating all Idaho’s death sentences which had not yet been carried out. Ring v. Arizona, 536 U.S. 584 (2002).
learned in Paradis, however, that even if a Federal court has plenty of room to overturn state court findings, federal courts are extremely reluctant to do so.

The legal side of our journey, marked by relentless attacks in numerous courts with clearly exonerating evidence, highlighted an unfortunate reality in death penalty law: both state and federal courts are more concerned about limiting their review of lower court decisions than about doing justice or about not killing innocent death row inmates. This approach and our consistent courtroom failures, to me, seemed counterintuitive. Call me idealistic, but before I became involved in death penalty law, I would have thought, in the face of a strong showing of innocence as in Don’s case, any judge, state or federal, would find some way to do justice rather than, as if this were a Kafka novel, allow the state to kill an innocent human being based upon its interpretation of some formal rule. After all is held and written, the law should be about doing justice. Sadly, when it comes to the death penalty, it is not. The state and federal rulings here are illustrative of this fact because, effectively, they condoned Brown’s failure to develop the evidence of Don’s innocence.

B. The Human Side of Our Journey

As we suffered one failure after another in court, Don became increasingly angry at the judges, at the state, and at me. I could not explain to him, in rational, human terms, why the courts turned a deaf ear to his claims of innocence. He often took my intense frustration as my disbelief in his case and in him. His anger and frustration consumed him and many of our conversations. When we talked, he always argued his case. He had too much time to think about his case. I had too little. He could not understand, with his life at stake, why a court of appeals would not question obviously erroneous findings of fact by lower courts or why court imposed deadlines had to be arbitrary, or why there was a page limit to briefs that paled for his life. When the third biker, Larry Evans, was caught and tried with the same evidence introduced against him, but who, with a good defense lawyer, was acquitted, Don could not understand why his case was not reopened. Nor could I.

Several times his frustration led him to fire me. But each time, I refused to go.

16. Despite these courtroom failures, at one point, we were able to convince the Ninth Circuit Court of Appeals to declare unconstitutional the sole aggravating circumstance under the Idaho statute which the sentencing judge had found in order to impose Don’s death penalty. Paradis VI, 954 F.2d at 1495. This aggravator was that in the commission of the murder, the defendant had “exhibited utter disregard for human life.” Id. We argued that one could not commit first degree murder, which under the law must be willful, deliberate and premeditated, without utter disregard for human life and, therefore, “utter disregard” did not, as required by Supreme Court decisions, permit a principled distinction between those convicted of first degree murder that deserved the death penalty and those that did not. Id. The Ninth Circuit Court of Appeals agreed, and Don was released from solitary confinement into “general population.” He organized bible classes for other prisoners, got his high school diploma, and in prison had the semblance of a life. Id. Then one day when he was playing softball, a posse of guards came onto the field, put him back in chains and marched him to his cell. The U.S. Supreme Court had split semantic hairs to find that “utter disregard” was not vague and meant killing “without feeling or sympathy.” Paradis VII, 507 U.S. at 1026; Arave v. Creech, 507 U.S. 463 (1993). Who kills with feeling and sympathy for the victim? Worse than empty abstractions, these words play mind games with lives.
While I could understand his frustration with the courtroom failures, the frustration and emptiness he felt from his daily life was unimaginable. On Death Row, he was confined to his six by twelve foot cell alone all day and night, year after year. He was only permitted a weekly visit to the law library, a shower, and opportunities to exercise. However, during each of these activities he was either shackled down or placed in an iron cage. Meals were passed to him through a narrow spy slot in the door. Human contact was limited to weekly calls, usually to me 2,000 miles away, and visits from his pastor separated by thick glass and whatever conversation could be had with other death row inmates at night through ventilation ducts. Several times Don called upset to tell me that he could not stand the torture of his confinement and impending execution anymore, instructing me to withdraw his appeals and get it over with. Of course, each time I refused.

Despite these horrific living conditions and a life filled with disappointments, Don did, at times, show signs of humanity. On occasion, we would talk of other things, of our hopes and feelings about the world. Sometimes Don would even joke. “I have to hang up now, Don.” “No Death Row jokes,” he would reply.

His humanity, I eventually learned, was not merely a facade; it was genuine. One day, to my amazement, after Don had been on Death Row for fifteen years and I had known him for ten, a sheaf of papers from the prison tied with a plain white string appeared on my desk. It was a book of poems he had written, entitled “From Within.” I had not known he wrote anything. As I read his words, I realized that I had little understood this condemned man. Don had been writing these while all alone for 5,000 nights trapped in a warehouse for the damned waiting for others to decide what day he would die. As I read his poems, I realized that anger was but one small dimension of Don Paradis. I saw that in his ultimately alien world a smile came to his tear-filled eyes. He wrote of mounting the wind to fly. Prison, he wrote, is just a house. Your spirit can still fly the universe, ride solar flares to the other side of the sun, swim with dolphins off Easter Island, hear the forest orchestra, and smell small flowers along a mountain stream. In his cell he could see a butterfly floating in the breeze of a mountain meadow, and he could fly from his tiger cage.

Don’s spirit, explained through his poems, reminded me that life is always worth the trouble. That despair is a sin. That we are often our own jailers. That there is magic all around. For Don, Death Row was a time for terrible enduring, but it was also a time for strength and searching and even peace. With these poems that fell on my desk, ironically this Gypsy Joker gave me hope. He told me never, never to give up!

One of the turning points for Don’s life came when he was partially reunited with his birth mother. Don never really had the quintessential American childhood. He was adopted and had never known his birth mother or father. His adoptive setting was no better. His adoptive mother cruelly criticized him. He left home early for reform school, angry with his life. Being aware of all of this, one day, my wife, decided to try to find his real parents. Through friendly moles in the open adoption network, she was able to gain access to his birth records in Massachusetts. From this search, Don learned that his real name was Fortado, not Paradis. More importantly, his birth mother was found, and, after several months of waiting, Don sent her a letter. He told her where he was. She called. She told him that a day had
never passed in her life when she didn’t think of him. She went on to sing him the
song she sang every year to herself on his birthday.

After Don spoke with his mother, he called me and cried. His mother was old and
very sick, and she died soon after. Don never saw her. However, his discovery was
evidently transformative. It was as if he had found himself. We noticed his anger
began to quiet. His clenched fists seemed gradually to relax. There was more and
more humor and thoughtfulness in his person. More often, I looked forward to his
weekly calls.

Strangely, in retrospect, I realized that “anger” was not solely a feeling that Don
and I shared throughout our journey. Anger permeates the entire process. We had
worked on Don’s case in the face of great anger; the anger that drives the death
penalty in America. Of course, the death penalty expresses society’s anger against
the worse of crimes and its thirst for retribution. This I had expected. But at every
stage, I found the judges angry, the lawyers for the State angry, the prison officials
angry. Much of that anger was directed at me, not just my client. Before I took
Don’s case, I had naively thought I would be thanked for serving justice. I had even
supposed that once I explained the facts of Don’s innocence to the Idaho Attorney
General, the state would at least agree to drop his death sentence. Instead, the
judges resented the complicating issues we raised. The Idaho Attorney General’s
office was bitter because they could not kill Don Paradis quickly without judicial
ceremony.

I would like to believe that all this anger comes from the reaction of human
beings to killing their own. But, I now believe that the judges and the state want
simply to prevail and that legal issues, whenever introduced by petitioner’s counsel,
frustrate their exercise of power. In our adversary system, a marginal, alienated,
indigent biker has little chance to be judged fairly. Indeed, capital defendants are
confronted by an angry, desensitized, almost single-minded juggernaut, with a thirst
for victory and a seeming blindness to justice. The only thing standing between this
Machiavellian goliath and Don’s death was my law firm. We represented his last
chance and we were, in light
explained above, becoming desperate. At
one point, getting nowhere in court and facing a reinstated death sentence, Bill
and I went to see Al Lance, Idaho’s Attorney General. As we painstakingly went
through the evidence of Don’s innocence, Lance appeared careful not to reveal any
sign of human emotion. In my own innocence, I told the Attorney General that I
was sure that the State of Idaho would want no part of the execution of an innocent
man. Indeed, at the concluding of our meeting, Lance promised he would ask one
of his aides, a retired Army general who he said was tough, to come to meet
with us and review the evidence in detail. We were hopeful. But we never heard
from the general or saw anyone else from the Attorney General’s office. We were
out of options. Therefore, we turned to the only remaining venue: the public. Don
and the public turned out to be strange bedfellows.

C. The Politics of Justice

With the exception of a dogged, but lone, reporter in North Idaho, Don had
absolutely no public support. The newspapers all clamored for enough of our
appeals on technicalities and for his quick execution. But, in 1995, after more than
ten years of failure, Don’s execution was looming. At this moment, I turned to my wife, Patricia.17 As a television news and political campaign producer, she appreciated, as a lawyer I did not, that public opinion can determine the course of human events, including court decisions. With her experience, Patricia saw clearly that we had two tasks. One was to change the public view of the Paradis case. The other was to get State of Idaho officials, who were fighting to execute Don as fast as they could, to look at the evidence of his innocence. Patricia was fundamental in saving his life.

Patricia understood that we had to lay the groundwork in the public forum for any relief, something for which she had a strategy. Since the Idaho newspapers were openly hostile, we began close to home. The way to get the folks in Idaho to look objectively into the Paradis case was to draw national attention to the case. We used all of our resources and spoke about the case to everyone we knew. We wrote memos and letters and releases about the injustice of Don’s conviction. We contacted television producers, journalists, and writers. Some were interested for a while, but then backed out. Don’s involvement in hiding the bodies and his biker connections confused them. This was not a black and white story. Many declined straight away, saying they “had already done a death penalty story.”

Finally, the media took the bait. In March 1995, ABC’s news magazine show, Day One, agreed to run a fifteen minute profile of the case.18 That month, the New Yorker Magazine also published a long article, A Night at the Beast House, on the case.19 Before that, a courageous reporter in a Spokane television station, one of the many whom Patricia had contacted, did her own local story, which gave us something to show prospective reporters.20 And an article appeared in the Boise Weekly—“Paradis Lost: Is Idaho preparing to kill an innocent man?”21 All of this coverage raised serious questions about Don’s guilt, pointing to his unfair trial and the inconsistencies in the State’s case.

This awakened the interest of the leading Idaho press and led to dramatic local media attention. The Idaho Statesman, Idaho’s principal newspaper, which had been urging Don’s execution, was brought to inquire into this case by the national attention. It assigned a diligent, smart reporter to look into the merits, and we opened our files to him. The paper published a several part analysis of the case—Death and Doubt22—which pointed to a possible grave mistake of justice. The paper changed its editorial policy to urge serious review of the case. From this, other newspaper coverage questioning the state’s case followed.

However, still having nightmares about what Don’s execution would do to her husband, as well as Don Paradis, Patricia did not stop. She contacted others who would listen. We endlessly sent summaries of the evidence to local media and political figures. Some contacts backfired. For instance, one prominent actor she

17. Through the years, at close range, she could not escape my intense frustration, and she shared with me the dreadful apprehension of Don’s execution.
22. Marty Trillhaase, Death and Doubt, IDAHO STATESMAN, Apr. 28, 1996, at 4A.
contacted obligingly wrote Idaho’s new Attorney General, whose office then promptly accused us publicly as New Yorkers trying to sabotage Idaho’s death penalty.

But other contacts were fruitful. Another well known actor, as well as local political figures, wrote Idaho’s governor, Cecil Andrus, with whom Bill Mauk and I were able to schedule a one hour meeting. Not just another trip to Boise.

Early in the meeting I told the governor I had grown up in North Idaho. We spoke of fly fishing on North Idaho rivers for nearly the full hour. As we were running out of time, I offered to meet further with the Governor or his staff to review the evidence of innocence in addition to the written material sent him. After pleading on behalf of Don to deaf ears for years and years, I could not believe his answer: “That will not be necessary, Mr. Matthews. I will see what I can do and call you tomorrow.” Unfortunately, Andrus was to end his term shortly and had no legal power to grant any relief. But he did call, explaining that he had written Idaho’s Clemency Commission (which must recommend clemency before the governor can act) recommending a hearing in Don’s case. Thankfully, the outgoing Governor did not stop there. He also appeared on local television the next day to announce his letter and say that the case was disturbing. Cecil Andrus’ intervention may also have saved Don’s life. In May of 1996 we got a clemency hearing.

With this victory, we remained relentless. We also sought out radio support. Patricia contacted Johnny Duane, the soft talking, down home host of Idaho Today, Boise’s leading talk show. Johnny Duane began regularly to interview Bill Mauk and me, who he cast as an “Idaho boy,” on his morning show. I would call in to the show from my office in New York and patch in Don when he called me from the prison, and the two of us would answer questions from listeners. One day, Idaho’s Solicitor General made the mistake of calling the show and found himself in a voice to voice debate with Don Paradis from Death Row. Don held his own very well. The Solicitor General did not risk calling again to be confronted by a condemned inmate.23

Right up to the clemency hearing, we kept reaching out. We contacted every religious leader in Idaho. Don’s pastor, Tom Blackburn, had knelt in prayer in open court at Don’s hearings and, according to the Episcopal Bishop of Idaho, had “carried Don’s heart in his heart for 12 years.” With Blackburn’s good work and reputation in the community, thirteen churches signed on to hold an ecumenical service for Don. The church members were moved by the fact that religion was an important part of Don’s life in prison. Before the clemency hearing, the Idaho Statesman published on its first page under a large Paradis headline a color picture of Blackburn, his eyes closed and arms raised, praying for Don.24 The Methodist minister declared: “We call out to those whose hearts can still hear, whose heart and mind is still open, let Donald Manual Paradis be heard.”25 This was a great way to begin the clemency hearing.

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23. After that, the Idaho prison prohibited patching in an inmate. When you now call the prison, a recording says that if you try, you will be cut off.


25. Id. (quoting Jon Brown, First United Methodist Church associate pastor).
D. The Turning Point: The Clemency Hearing

Bill Mauk and I prepared for the clemency hearing as if it were a trial for Don’s life, because it was. We wrote up the evidence before the hearing and presented it to a focus group in Boise to be sure it was convincing. To show what had never been considered by the jury or by any court, we constructed and presented charts of all the exculpatory evidence and detailed summaries of the trial transcript.

While preparation was important, witness selection was also crucial. First, we needed someone to testify that there was no scientific basis for Dr. Brady’s testimony regarding inhaling of water. We convinced four recognized medical examiners from around the country to come without fee to Boise to testify about the forensic evidence. Their testimony directly controverted Dr. Brady’s. All four testified that strangulation victims, not drowning victims, exhibited heavy, wet lungs, and that the wound on the victim’s body was post-mortem and inconsistent with her death in Idaho.

In addition to medical testimony, we needed an expert who could explain to the commission the ramifications that our previous legal defeats should have on its decision. For this, we recruited a retired justice of the Idaho Supreme Court, who had ruled on Don’s appeal. He opened our hearing by explaining to the commission that it was not bound by any prior court decision. The Justice continued, that, had he known then what he knew now, he would not have voted to uphold Don’s conviction.

We buttressed our case with live eyewitness accounts of what took place. First, although scared to death, Don told the commission his story of the fateful night. Second, we obtained testimony from independent parties to substantiate Don’s story. We brought a former Gypsy Joker to the hearing, who I had sought out one early morning in Salem, Oregon as he got out of jail and before he got to the nearest bar. He had since cleaned up his life. This former biker explained how he had walked into Don’s house in Spokane that night and seen two bodies on the floor which he knew were dead because he “knew them when he saw them cause [he] was in the business.” And there was another witness in the house who testified, but only after Don’s trial, that she saw Thomas Gibson strangle Kimberly Palmer in the Spokane house when Don was not home. Most importantly, Thomas Gibson read a statement accepting responsibility for Palmer’s murder and exonerating Don.26

The State did not back down. It displayed pictures throughout the room taken nearly twenty years before of Don Paradis and other bikers looking like gorillas. It stationed Kimberly Palmer’s bereaved family in the first row, staring at the commission, urging his execution. The State countered our medical testimony. The Solicitor General had Dr. Brady show volumes of his prior testimony and repeat stale generalities. Another pathologist for the state testified that the blood could have washed out of Palmer’s jeans. (The state had previously argued at different times that the wound was caused by the police when they recovered her body or by sticks falling in the night!) Through all this and while the State’s Solicitor General ranted, Bill was impressively reserved and convincing.

26. The letter he read was consistent with a letter he had sent without effect to the judge before Don’s trial.
We had in reserve Dr. John Thornton, one of the world’s best known blood detection experts. On minutes notice, John Thornton flew overnight to Boise to rebut the State’s new expert. Thornton explained that it was impossible for blood to have washed out of the jeans and that the test for blood used on the jeans could detect a shot glass of blood in a tank car of water. His testimony was damaging to the State’s case. In fact, after Thornton’s unexpected testimony, the State’s expert asked to return to the stand to correct his statements, because, he acknowledged, Thornton was the expert.

In the early morning hours after the close of the hearing, Bill Mauk banged loudly on our hotel room door to tell us that the commission had voted 3-to-2 to recommend clemency to the governor. After so many desperate losing years, this seemed an unbelievable dream. The next week, this dream became a reality after presenting our evidence again to Idaho’s new Governor, who commuted his death sentence to life without parole.27

But our victory was not truly apparent until I called Don. When I told him the news, there was a painfully long silence and barely audiable sobs, both his and mine. He then said: “Thanks.” We hung up. When I sat on my porch the next morning, I became aware of a strange relief and realized that after twelve years my own sentence had also been lifted.

E. The Surprise Package: A Legal Claim

As glorious as avoiding the death sentence was, in 1996, after 14 years on Death Row, Don was still in prison for life without any chance of ever getting out. His initial habeas petition had been finally dismissed after years of litigation.28 His successor petition had also been dismissed by the state and federal courts.29 Successor petitions are viewed with great hostility by the courts, and I didn’t expect much from ours. However, our work was not finished.

The successor petition raised several legal claims that we were never able to include in the initial federal habeas petition because, when we got Don’s case, they had not been considered by the state courts, which under rules of comity they must be. These claims happened to include a claim under Brady v. Maryland30 that the prosecution had failed to preserve and disclose to defense counsel before the trial evidence favorable to the defense. While I thought this claim weak at the time, fortuitously it was the claim that gave us a legal vessel for new facts we were about to discover.

In early 1996, fifteen years after Don’s arrest, another surprise package of papers had appeared on my desk. A lawyer for Thomas Gibson, whose appeals were years behind Don’s, had visited the North Idaho prosecutor’s office and had been allowed

27. This is quite an achievement since Governor Batt was a tough talking former onion farmer who, it was said, was “not known for his mercy.” See Bob Herbert, In America: What If You’re Not Guilty?, N.Y. TIMES, Apr. 16, 2001, at A19.
28. Paradis V, 667 F. Supp. at 1396; Paradis VI, 954 F.2d at 1495; Paradis VII, 507 U.S. at 1026; Paradis VIII, 20 F.3d at 960, cert. denied, Paradis IX, 513 U.S. at 1117.
29. Paradis X, No. SP977037, at 5; Paradis XI, 912 P.2d at 114; Paradis XII, No. CV-95-00446-S-EJL, at 2; Paradis XIII, 130 F.3d at 400.
to copy their files. These were files that I had subpoenaed ten years before, but, knowing full well what they would disclose, the Solicitor General had objected on the ground that the files were confidential “work product.” The federal judge agreed with the state and quashed our subpoena. To our astonishment, in these papers we found copies of notes taken by the prosecutor before Don’s trial containing statements from Dr. Brady to the effect that, contrary to his testimony at trial, Kimberly Palmer was dead when her body was placed in the stream. When I told Professor Tony Amsterdam at NYU Law School, who had generously advised us, that we had received the prosecutor’s notes, he said that he would want me as part of any death penalty defense team, because there was always room for someone who was lucky.

We again entered the state and federal courtrooms that had once before ignored our pleas. When we presented this new exculpatory evidence to the Idaho Supreme Court before clemency, however, it angrily denied relief. “How many trials do you want. Two, Three ... when will this end.”31 The U.S. District Court was no more sympathetic, denying our claim based upon the notes.32 Consequently, we appealed to the Ninth Circuit,33 which was a problem because under the court of appeals rules, subsequent petitions in death penalty cases always go before the same judges that considered the first petition. These judges had already ruled against us and had even found, based upon an egregious misreading of the evidence, that blood could have washed out of the victim’s jeans. But thankfully, as a result of the clemency, Don’s case was no longer a death penalty case. We moved to disqualify the previous panel. Our motion was granted and we got new judges. Because Don had received clemency, the rules of justice had changed.

In an opinion that showed that they had finally understood the evidence, in 1997 this new panel of the Ninth Circuit held that the district court had abused its discretion, reversed its dismissal of our petition and ordered a hearing on the withheld notes which it found contradicted Dr. Brady’s testimony given at trial.34 The court also found, after all our years of failure to get any court to pay attention to Don’s claim of innocence, that there was exceedingly strong medical evidence that Kimberly Palmer was dead before her body was placed in the stream and there was no evidence that she died in Idaho.35 The court noted that there appeared to be no rational explanation for how the victim’s wound could have been inflicted before or around death and leave no trace of blood in the victim’s jeans or body.36 Therefore, the court further reasoned that she would have to have been dead before the three men brought her to the Idaho stream site.37

I have no explanation as to why it took seventeen years and over a dozen proceedings to get a court to appreciate our evidence of innocence except that, because judges care more about limiting review of jury findings and other judges’

31. This exchange occurred at a hearing before the Idaho Supreme Court. It issued its decision at Paradis XI, 912 P.2d at 110.
33. Paradis XIII, 130 P.3d at 385.
34. Id. at 400.
35. Id. at 398-99.
36. Id.
37. Id. at 399.
decisions than they do about doing justice, they are willing to turn a blind eye to the claims of those on Death Row. It seemed that only when Don was no longer on Death Row and his execution was no longer being delayed by our appeals, that the courts took seriously the evidence of his innocence. Although the withholding of the notes by the prosecutor violated our client’s constitutional rights to a fair trial and would have been highly useful to his defense, the notes provided no essential information beyond what we had been shouting and crying for years.

Back in the federal district court, we learned further in discovery that a police officer, and not Dr. Brady, came up with the inhaling of water theory and that Dr. Brady had actually found in his autopsy that the victim’s lungs contained only a small amount of water, i.e., were not especially wet. Following our hearing, the same federal district judge who had previously denied all relief and had been willing to allow Don to be executed, found that the work product doctrine did not protect the notes from disclosure and that the suppression of the notes prejudiced the defense and undermined confidence in Don’s conviction. The judge ordered that Don be retried within 60 days or released.

Determined to the end to deny justice to Don Paradis, the State of Idaho again appealed. In 2001, after more briefing and argument and state maneuvers to delay the proceedings further while Don waited and began his twenty-first year in prison, the Court of Appeals finally affirmed the order for his release or retrial.

Bill Mauk and I then began negotiations with a new North Idaho prosecutor who had replaced the prosecutor who had withheld the notes. It was the new prosecutor who had made the principled decision to allow Gibson’s lawyer to copy the notes. Initially, he asked that Don plead guilty to second degree murder and serve some additional time. To Bill and me this offer seemed tempting, because, as we explained to Don, as he was convicted once in a small town in North Idaho there was a risk, albeit small, that in that small town he could again be convicted and sentenced to death. However, contrary to our advice, Don Paradis, no less principled than the current prosecutor, told us that he would never plead guilty to anything he did not do.

With Don’s instructions in mind, we argued to the prosecutor how his principal witness, Dr. Brady, was discredited, that we were eager to retry the case and how expensive for the county a retrial would be. The prosecutor was convinced. He agreed to Don’s immediate release as long as he would plead guilty to concealing evidence of a crime, for which Don willingly accepted responsibility, with credit for time served. To his credit, the prosecutor recognized and stated publicly that there was not sufficient evidence to justify a retrial.

F. Our Client Released

On April 10, 2001 in Coeur d’Alene, Idaho, the same North Idaho judge who had sentenced Don Paradis to death twenty years earlier pronounced his release. Don,
Bill Mauk, and I walked out of that courtroom together. Don no longer wore his orange prison suit. He wore a tweed jacket I had brought him from New York, which didn’t fit. When outside, Don first reached down and hugged my brother’s Labrador which gave Don the usual canine wet tongue greeting. We then drove to the cabin on Coeur d’Alene Lake where I had grown up. There Don and I slowly walked together along the lakeshore where I had towed model boats over fifty years before. We just stared at the gray-green water, not quite believing that we were there.

Later we had a small dinner for Don in Boise at a modest, old Basque shepherders’ restaurant. An Idaho newspaper publisher, who for years had given us loyal support, came with two dozen red roses. Don’s pastor who had visited him every week for twenty years, was there with his family.

That next week, the New York Times ran two op-ed pieces on Don’s extraordinary case. One, What If You’re Not Guilty, was on the high cost to get the innocent off Death Row.42 The other, Death Row Survivor, focused on Don’s wrongful conviction.43 Sometime later, 60 Minutes II covered the story.44 But the end of our ordeal still seemed unreal until I learned, some time later, that Don had bought a horse named Blessing and that they went swimming together in the Boise River.

Don insisted on coming right away to New York to thank our law firm. During the sixteen years that we had fought for his life, almost everyone at Coudert Brothers had come to know of Don Paradis. His death sentence had shocked our souls. Scores of us had shared in his nearly endless struggle: secretaries had typed his briefs late into the night, telephone operators had fielded his frantic collect calls, paralegals had organized and bound thousands of pages of exhibits, messengers had rushed motions to court, and dozens of lawyers, old and young, had labored many thousands of hours trying to make our legal system work. When Don finally arrived in our office at Midtown Manhattan, screams of joy and recognition greeted him as he walked through the office, and he was hugged and hugged. Through our desperate fight to save his life, his struggle, his agony had in part been ours, and in a way we had become his improbable family.

We had a celebration for him that day and toasted this former outlaw Gypsy Joker with fine champagne. After years and years of heartbreaking defeat and desperation and fear of losing him forever, his life had been saved from the failing administration of the death penalty. Don stood before us that afternoon quite alive, but he seemed almost an unbelievable mirage. Although in the course of the atrocity of his death sentence and confinement for life, much of Don’s life had been lost, he had ennobled ours. As Don Paradis graciously thanked us all, his humanity and the miracle of his survival moved to happy tears two hundred people in a New York City law office that extraordinary day.

42. Herbert, supra note 27, at A19.
44. 60 Minutes II (CBS television broadcast, June 5, 2002).