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Dead reckoning

By Dusty Rhodes

Brandon Overton was leaving the country with his girlfriend, their baby, and new pal J.D. Bagley when police stopped them in Michigan, just shy of the Canadian border. Intending to buy milk for the fussy infant, Overton eased into a gas station without thinking twice about the cop pulling in behind him. The next thing he knew, a half-dozen police cruisers were swarming around him and his friends, ordering them to hit the ground.

At the Jackson, Mich., jail, Overton appeared surprised to hear that his best friend, Marshall Irvin, had been killed back home in Du Quoin and positively stunned at being accused of committing the murder. But law enforcement officers in southern Illinois had the goods on him: Footprints found at the scene, plus statements from two eyewitnesses, corroborated by phone records, all implicated Overton in the crime.

And what a gruesome murder it was. Irvin, just 19, had apparently been hanged from a rafter by a wire and tortured. The ceiling above the noose appeared to be speckled with Irvin's blood, probably sprayed as Irvin was stabbed with a scissor blade and beaten with a hammer. His battered corpse was left wrapped in carpet and hidden under a table.

All it takes for a crime to become a capital offense is the judgment that it is "exceptionally brutal or heinous." By that standard, Irvin's murder fairly cried out for the death penalty.

And that's where Brandon Overton got lucky.

One of the legacies of Illinois death penalty reforms is a multimillion-dollar fund established to ensure adequate representation for people facing execution. State law requires that every capital defendant get a pair of private attorneys, and the Capital Litigation Trust Fund pays each of these lawyers as much as \$135.68 an hour. With the court's approval, which is almost routinely granted, the attorneys can tap the fund to hire licensed private investigators and expert witnesses, as well as cover incidental costs such as travel, transcript services, and photocopying. Illinois taxpayers have been underwriting this service for accused capital criminals since 2000.

Providing what looks like a deluxe defense team to people suspected of committing horrendous crimes makes the CLTF a target of scrutiny. And indeed, over the past couple of years, one notorious defendant billed the fund for more than \$2 million. Cecil Sutherland, now twice convicted of the rape and murder of a 10-year-old neighbor, got Minnesota lawyer John Paul Carroll appointed to his case. Carroll filed imprecise "block bills" claiming he frequently devoted as much as 15 hours a day to the case -- years before it was set for trial.

Even the staunchest defenders of the CLTF admit that Carroll's handling of the Sutherland case is outrageous.

"Obviously this should not be just an open checkbook. If one or two players take an exorbitant amount out of the fund, then other guys doing more conservative billing get jammed up," says Steve Baker, a lawyer with the Cook County public defender's office. "But for every John Paul Carroll out there, there are 10 examples where most people would agree it was properly used."

Statistics provided by Nadine Jakubowski, who administers the capital-litigation program for the State Treasurer's office, show that the Sutherland case is unique, exponentially more expensive than any other case that has accessed the fund. Since 2000, CLTF has subsidized defense teams in 145 cases for a little more than \$9.6 million (these figures do not include Cook County). Among those 145 cases, Sutherland's is the glaring exception -- almost five times more costly than the next



Cover photo by Nick Steinkamp

most expensive case, that of serial killer Andrew Urdiales. Urdiales's defense team billed almost \$300,000 to the fund; prosecutors got more than \$190,000.

Brandon Overton's defense cost the fund \$72,462.

Overton says his arrest was the first he learned of Irvin's murder. In his jail cell, the thought crossed his mind that he was the victim of some elaborate hoax.

"For a second, I was kind of feeling like 'Where's the hidden camera?' I couldn't believe it. I didn't understand it," he says. "It wasn't funny. I sat in jail for two weeks before I believed it."

Much of the case against Overton was based on the word of Mindy Creekpau. Creekpau, 30, was the girlfriend of 20-year-old Bagley, who had blown into Du Quoin from Texas less than two years earlier. Overton and his girlfriend had joined Creekpau and Bagley to play pool, eat hamburgers, and rent a movie on Friday, Sept. 5, 2003, the last night Irvin was seen alive.

But Overton told authorities he had dropped the other couple off at a MotoMart and didn't see Bagley again until noon on Saturday. By the time Irvin's corpse was discovered on Sunday, Overton and Bagley were close to Canada, but Creekpau had been going in and out of Bagley's place for two days.

The first time police interviewed her, she claimed to have no knowledge of the murder. Hours later, she gave a longer statement implicating both Bagley and Overton. Later, under intense questioning by police, Bagley also implicated Overton.

Perry County State's Attorney David Stanton believed he had a solid case against Overton -- Creekpau's statement, which matched the crime scene, backed up by Bagley's statement, plus a 57-second phone call from Bagley's phone to Overton's apartment placed just before the murder.

"We felt like her statement was corroborated in all accounts," Stanton says.

Overton had a different version. His mother lives in Ontario, just north of Michigan. She had been asking him to come visit, and Bagley knew that. So when he showed up at Overton's apartment on Sept. 6 with a pocketful of cash, offering to pay for a road trip north, Overton was happy to go along.

Which version was true? Was Overton on the run from the law? Or was he just trying to go see his mother?

Thanks to the CLTF, Overton -- a then-20-year-old unemployed fry cook -- was given a crack defense team to work on his behalf. Headed by Belleville law partners James Stern and Cory Easton, the team also included two experienced private investigators, Alva Busch and Kevin W. McClain. Busch is a former Illinois State Police crime-scene investigator whose expertise is in forensics; McClain is a former retail manager and radio journalist, with a reputation for thoroughness and a knack for getting people to talk. They requested immediate access to the crime scene.

"We figured it was going to be a forensics case," Stern says, "and since it was private property, we knew it was going to be secured for only a brief period of time. So we raced down there to get at it."

Bagley's dwelling gave new meaning to the term "garage apartment" (the *Du Quoin Evening Call* deftly described it as "more garage than apartment"). The ceiling was unfinished, with exposed beams bracing paper packets of pink fiberglass insulation.

Right away, Busch spotted problems in the prosecution's theory. When he looked at the rafter from which 160-pound Irvin had supposedly been hanged, he could find no mark where the wire had bitten into the wood. When he looked at the "blood spatter," he noticed that all of it appeared to have come straight up, at an angle perfectly perpendicular to the floor--uniformly, across the entire ceiling.

"Blood can fall 90 degrees. That's pretty easy," Busch says, "but it's got a real hard time falling 90 degrees straight up.

"The other thing is, it cannot go up, go around a beam, cut back over the top of the beam, then straight up, and present itself at 90 degrees. That, I would say, is impossible."

Busch had his own theory about the red splotches. He believed they weren't blood at all but dye. Each insulation packet had been machine stamped, somewhat crudely, with a logo and text in red ink.

"As the stamp lifts up to move to the next packet, the excess red dye is falling off, giving you what you thought was a blood spatter," Busch says.

He did find a large blood pattern, covered by a rug, and part of a pair of scissors that was either the blade used to stab Irvin or the other half of that weapon. These discoveries meant that Busch had to stop his investigation and allow the state to send police back in to document evidence they had missed.

"The scene was definitely not read properly," Busch says.

Another bit of evidence overlooked was a disposable camera in the car used for the "getaway" to Canada. Busch asked the state to process the film. Most of the pictures had been taken by Overton's girlfriend, beginning days before the murder. She had taken snapshots of Overton and baby Adrianas they played in the park on Sept. 5. Another candid, taken on Sept. 6, showed Overton and Adrian sitting on the hood of the car, eating a Subway sandwich.

In all of these pictures, Overton is wearing the same T-shirt he had on when he was arrested -- plain white except for a logo, "PIMPOLOGY 101." If he had helped beat Irvin to death, the shirt would surely have been spotted with blood. It wasn't.

McClain, meanwhile, pored over phone records and police reports, concentrating on witnesses whose statements were never recorded by police.

"I've always found that anybody they talk to and don't take a statement from, hey, must not be anything favorable to their side," McClain says. "Nine times out of 10, I've always found something good from those people."

In this case, it was Overton's landlord who proved most valuable. He showed McClain that Overton, who lived next door, didn't really have his own phone but instead used a second line on the landlord's phone, one digit different. Bagley hadn't dialed Overton; he had dialed the landlord. A close reading of the phone records also showed that although it took 57 seconds for the call to go through, the actual connection time was only 13 seconds.

Prosecutor Stanton says that this 44-second discrepancy dealt a major blow to his case. "It took out a huge piece of my puzzle," he says.

He was about to lose a few more.

By mid-December, lab results were starting to come in on evidence gathered at the crime scene. Overton had left a few footprints in Bagley's apartment, but because none was in Irvin's blood, they could be explained away by the fact that he had visited Bagley many times in the weeks before the murder.

Forensic tests on a marijuana-leaf-print bandana Bagley was wearing at the time of his arrest revealed that it was spotted with tiny droplets of Irvin's blood (a snapshot from that disposable camera Busch found showed Bagley sitting in the backseat of the car, wearing this headwrap while looking at a map upside down).

Furthermore, tests on the alleged noose showed no flesh, no blood, no DNA -- nothing to indicate that Irvin's body had dangled from it. Likewise, the autopsy revealed that Irvin's neck bones were intact. Stanton says he realized that Creekpaum had not told the truth:

"We started thinking: If she's lying about hanging, what else is she lying about?"

With no physical evidence tying Overton to the crime, Stanton couldn't imagine how he would convince a jury.

"I was pretty certain we couldn't prove our case," he says. "There was more evidence that Brandon wasn't there than that he was. All we had was the statements of two liars, and one of those was a murderer."

In early January, the attorneys on both sides of Overton's case made an unusual agreement: Stanton, Stern, and Easton decided to share all evidence. The meeting, which included Busch and McClain, lasted more than three hours.

Stern says such a roundtable was possible only because of Stanton's reputation as a reasonable guy. "It depends on the relationship you have with the state's attorney. Sometimes it's so hostile, you don't even bother talking, but Stanton's not that way," Stern says. "He's a very honest guy, and he'll hear you out. If we thought they were no-how, no-way going to drop the case, we would have never met with them and showed our cards."

In addition to physical evidence and rebuttal witness statements, the defense team offered one other bit of evidence: Overton took a polygraph and passed. It was something he had been asking to do since the night of his arrest.

Days later, the attorneys together asked the court to reduce Overton's bail and release their client to the custody of his grandmother. He would await trial confined to her home and wearing an electronic monitoring device.

Within a few weeks, all charges against Overton were dismissed. Bagley eventually pleaded guilty to first-degree murder and was sentenced to 50 years in prison. Creekpaum pleaded guilty to aggravated robbery, concealment of a homicide, and obstruction of justice. She was sentenced to seven years in prison.

For these two cases, the defense teams collected just over \$74,000; the state's attorney's office invoiced the fund for another \$4,000. But the CLTF saved Perry County the expense of at least one capital murder trial, and maybe two.

There's no way to predict the cost of such a trial, but DeWitt County officials, facing the prospect of trying Amanda Hamm and Maurice Lagrone Jr. for capital murder, estimated those trials would cost as much as \$1 million.

In Overton's case, the attorneys' agreement to dismiss a capital-murder case before going to trial may have set a precedent. Both sides attribute this efficient justice to the fund.

"There's no doubt in my mind that because of the Capital Litigation Fund, these two attorneys were able to work on this case more than [public defenders] would have been able to," Stanton says. "The fact that they could hire investigators was crucial. There's no doubt in my mind that it worked."

Stern says that getting Busch to the crime scene while it was still secure, for example, would not have been possible without the fund.

"I cannot envision that happening on a normal case," he says. "You'd have to petition the court, set it for a hearing. Here, you can just meet with the judge and they can approve it like that."

In short, this fund gives the defense the type of streamlined access previously available only to the prosecution, which has lawyers and investigators already on the payroll. The fund has accomplished its creators' goal -- to "level the playing field" between the state and capital defendants.

Some defense lawyers claim that the fund has worked so well that it has generated a backlash. They say prosecutors accustomed to facing overworked public defenders don't relish the thought of going to court against court-appointed private lawyers who can hire investigators and expert witnesses. Instead of pursuing the death penalty, these prosecutors instead seek long prison terms. The defense lawyers have even coined a phrase for this strategy: "de-deathing" a case.

The state has a similar fund for noncapital cases, but it's much smaller and stringently regulated. Established about the same time as the CLTF, the Rural Public Defense Services grant is administered by the Office of the State Appellate Defender and financed by the Illinois Criminal Justice Information Authority at the rate of about \$250,000 per year. This fund is available only to indigent defendants charged in counties with fewer than 200,000 residents. Public defenders and court-appointed attorneys can request funds to hire approved investigators or expert witnesses at strictly limited pay scales, but this fund cannot be used to pay the attorneys.

Although no one claims to have planned it this way, this smaller fund has evolved into something of a safety net for cases that get de-deathed, for whatever reason.

Brian Harris benefited from both these funds. In July 2003, in the tiny southern Illinois town of Wolf Lake, Harris, a 34-year-old barge worker, was charged with the arson death of ex-girlfriend Tammy Smith. Smith's body was discovered in the trailer where Smith and Harris had lived together up until a few days before her death.

They had argued, someone had called the Union County sheriff's department, and Harris had left the neighborhood. A few nights later, the trailer was engulfed in a fire so intense, authorities had to wait for DNA results to identify Smith's corpse. Smith had traces of gasoline in her hair, and her skull was split open, leading sheriff's deputies to theorize that the fire had been set to conceal a homicide.

Harris, stopped for questioning, had traces of gasoline on his clothes. He made statements indicating that he had gone back to the trailer and seen Smith dead. He was arrested and charged with capital murder.

Brian Lewis was assigned to defend Harris, and over the next few months, the case was downgraded from a capital crime to arson to something more like an accidental tragedy.

The gasoline on Harris' clothing was explained away by the fact that Harris had just taken a lawnmower to be repaired; Smith, a convenience store clerk, could have deposited trace amounts in her hair if she had simply touched her head after gassing up her car. Furthermore, there was no evidence that the trailer fire had been fueled by gasoline.

A forensic pathologist hired through the CLDF determined that Smith had been alive when the fire started and that she had died of smoke inhalation. As for the broken skull, the pathologist said that the bones had separated along the skull's natural sutures in a pattern consistent with exposure to intense heat.

Harris's incriminating statement indicating that he was at the trailer that night could never be corroborated. A psychological evaluation showed him to be borderline retarded.

"Sometimes people will say things because they think that's what other people want to hear," Lewis says. "Who knows why he said it?"

Along the way, Lewis stopped receiving CLTF money, and the case lagged while he waited for new funding from Rural Public Defense.

"When they de-deathed it, we were back to square one," he says. "We lost all our expert witnesses, all our investigators; the only one working on the case was me. I had their statements, but I couldn't pay them for any more work."

With about \$7,500 from Rural Public Defense, he rehired key experts -- a pathologist, two investigators, and a DNA lab.

Finally, the state's attorney released Harris "*nolle prosequi*" -- a decision not to prosecute that left open the possibility that the state would reinstate charges later. Harris has moved to Florida, where he's gotten a job working on barges. Altogether, his defense cost a tad more than \$50,000.

Lewis says that these funds probably saved Harris' life.

"You're supposed to be innocent until proven guilty," he says, "but the reality is, the jury thinks police aren't going to go out and arrest innocent people. The reality is, you have to convince people you're innocent."

Without the CLTF, Lewis would have had to convince the court to ask the county to pay for pathologists and investigators to prove Harris' innocence -- a tough sell in a county so broke that it was cutting budgets and laying off its own employees.

"Getting money approved by the court, I would've had to fight for every dollar, justify every nickel," he says. "Down here, [this fund] can make all the difference in the world. It really can."

Alva Busch worked on Brian Harris's case, as well as Brandon Overton's, and he has done CSI work for both prosecution and defense. He believes the equalizing effect of these two funds is most crucial for truly innocent people, who are often caught flat-footed by an accusation.

"This is the scary factor," he says. "For some reason, innocent people have the belief that their innocence will set them free. They don't get too excited at first, because they think the system will work. [They think] this is so far-fetched, it's going to take a couple of weeks and they'll get this all straightened out."

"Well, three or four years later, they're going, 'What happened? What do you mean I've got to stay in this place where they're getting ready to execute me?'"

Nobody knows the value of the CLTF better than Brandon Overton. Without it, he says, "I would've probably been a statistic and wound up in prison."

His initial reaction to the charge was shock and grief over the death of his best friend. Marshall Irvin, it turns out, had turned up at Bagley's apartment, looking for a place to crash for the night, and must have mentioned that he had just cashed his college tuition check. Bagley waited until Irvin dozed off and then attacked him with a sledgehammer.

When you consider how much evidence Overton's defense team gathered and the depth of the fund underwriting their salaries, it's obvious that they could have declined that meeting with Stanton, surprised him with their best stuff at trial, and

ended up with fatter paychecks.

"Whoa, you better believe it! It would be 60 hours a week on a trial, easy . . ." James Stern says, starting to do some quick math in his head.

But he dismisses the notion before finishing the calculation.

"See, Brandon would've been sitting in jail that whole time," he says.

Even though he's free, the experience of being accused of capital murder has left Overton so stressed that he's now losing his hair at the age of 21. He's left Du Quoin and moved to Taylorville, where he's working long shifts for Meadowbrook Meat Co.

"It still is blowing my mind," he says.

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