

# A Travesty of Justice in Madras

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About this time last year, a Madras resident -- fresh off his service on a Jefferson County grand jury -- was flipping through the local paper when he stumbled upon a curious story:

In a negotiated plea bargain, David Lee Simmons, 18, had entered guilty pleas on two counts -- third-degree rape and third-degree sodomy. Simmons originally faced six felony charges for having sex with a 14-year-old girl, his girlfriend at the time, the story continued. He was sentenced to 30 days in jail and required to register as a sex offender.

Because he'd served on the grand jury that heard the evidence against Simmons, this Madras reader was fascinated by the newspaper account. He called Steven Leriche, the deputy district attorney, and asked what in the world was going on.

"Didn't you read the indictment?" he asked, or words to that effect. "We didn't indict the kid."

Bingo. The grand jury carefully considered the evidence and decided there wasn't enough to charge Simmons with a crime. James Green, the jury foreperson, checked off "Not a True Bill" on the indictment and returned it to Leriche.

And Leriche never noticed.

The arraigning judge, the Honorable Daniel Ahern, never noticed.

Simmons' defense attorney, Jennifer Kimble, never noticed.

Finally, the presiding judge at Simmons' Oct. 19, 2006, sentencing, the Honorable George Neilson, also failed to make a careful read of the court papers and to realize the grand jury refused to indict the defendant.

No one, in other words, caught the mistake and intervened as Simmons

was maneuvered into a plea agreement and returned to jail.

Only because one grand juror read a newspaper -- and only after Simmons had completed that 30-day jail sentence -- did all these bumblers frantically get together for damage control. That's when Neilson announced, "What transpired here in essence is a nullity. It will be treated as if it never happened in the sense of the law."

That was last Halloween.

And guess what? A year later, the state of Oregon and the Jefferson County district attorney are still trying to prosecute Simmons in what his new defense attorney calls a blatant move to duck responsibility for "how badly they screwed up."

"This was a failure on the part of the prosecutor, the judge and the defense attorney," Steven Richkind said. "It was a failure to do the most fundamental thing, to read the charging instrument."

And the state is compounding that negligence, Richkind argues, with a cynical tactical move: "Once he's convicted, their argument in the civil case will be, 'He spent 30 days in jail but, ladies and gentlemen, he has no damages because he would have served 30 days anyway.' They're using the criminal proceeding to minimize their liability in a civil action.

"Every citizen in the state should be outraged."

No one is disputing the raw facts in this case. On Oct. 5, 2006, Leriche received the indictment back from the grand jury and signed his name one inch below the line marked, "Not a True Bill."

His signature was only necessary if the grand jury checked the line reading "A True Bill," meaning it accepted the prosecutor's pitch and believed a crime occurred.

Instead of sending the indictment to a closed file, that signature sent Simmons cascading through the Jefferson County justice system.

"I assumed -- and that was my error in this case -- that because it had gone through the district attorney, and he'd signed it, and gone through the

judge, that someone would have looked at it, or the grand jury would have mentioned, 'By the way, we didn't indict this person,' " Kimble said.

"But in this young man's case, none of that happened."

Kimble, then Simmons' court-appointed attorney, realized the mistake was so egregious that she wrote the following to her client on Oct. 31:

"I would like to make sure you understand you may have a potential claim against me for not catching the 'True Bill' error, resulting in you spending additional days in jail, when you should have been released on Oct. 5, 2006. In addition, you may have a cause of action against the District Attorney's Office, the judge, the court, and the Jefferson County Jail."

Apparently convinced the best defense was to go on the offensive, the Jefferson County DA filed six new charges against Simmons at the end of November -- four counts of contributing to the sexual delinquency of a minor and two counts of third-degree sexual abuse.

Those are misdemeanors, not felonies, and Leriche acknowledged Monday that the charges were filed to avoid "the issue of being barred by a grand jury not-true bill."

Richkind insists this is double jeopardy and took that argument to the Oregon Supreme Court: "They punished him once by putting him in jail for 30 days. The constitution says you punish him once and you're done."

Oregon's attorney general argues otherwise. In a 19-page June opinion, Hardy Myers and his staff claimed that all previous proceedings -- including, I suppose, that jail stint -- were "a legal nullity . . . because they occurred after the grand jury returned a 'not true bill.' "

In the absence of a legitimate indictment, Simmons hadn't really been convicted, they argued, so he was vulnerable to face charges again.

The AG opinion proceeds to transform that nullity into a travesty when it insists the defendant, now 19, is culpable in this mess:

"Although he blames the prosecutor and the trial court for failing to notice that the indictment was not a true bill, the record shows that neither he nor

his attorney noticed that defect either. Thus, he is equally responsible for the fallout."

Those are my italics . . . and the state's perverse logic.

So it comes to pass that when Simmons goes back on trial in January on misdemeanor charges of high school sex, charges demanded by the girl's angry parents, the prosecutor will be Stephanie Tuttle from the AG's office.

Deputy AG Peter Shepherd said the state is involved at the request of the county. He notes the courts have so far rejected Richkind's theories about double jeopardy.

Asked if the state is indeed trying to minimize its liability in a civil action, as Richkind contends, Shepherd said, "That's not true." But he concedes prosecutors are anxious to convict Simmons one way or another.

"There has been no conviction of record," Shepherd said. "One function of criminal law is to affix responsibility in an authoritative way. That hasn't happened yet in this proceeding."

On that telling point -- the need to step up and accept responsibility -- state prosecutors and the defense attorney agree.

"That's the part that's most disturbing," Richkind said. "When the ones who point the fingers have the finger pointed at them, they duck their responsibility. They can't live by their own standards. And that goes to the highest level, to the Oregon attorney general and the state Supreme Court."

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