



Profile

By Mark Risk

Some Measure of Pathos

Now, after the stunning eleventh-hour proof of John Thompson's actual innocence, Michael Banks and his Morgan Lewis & Bockius partner Gordon Cooney are universally congratulated for their outstanding work. During the 14 years that Thompson was on death row, however, some friends and acquaintances didn't understand why

years leading up to this day and could not have imagined the incredible events that were to follow.

In 1985 Thompson, then a 22-year-old father of two with a minor record of petty crime, was sentenced to death in New Orleans for the murder of a prominent businessman. Shortly before the 1985 murder trial, he also had been con-

he could remember.

There was powerful evidence against Thompson in the record from the original murder trial, including eyewitness identification and possession of the gun used to commit the murder. The Morgan Lewis team began to review the trial record for legal arguments. In the early stages they had little con-

being in ways you can't imagine."

When they started the representation, they knew it would take years to exhaust the appeals and habeas corpus proceedings. As they started to lose, however, they felt increasing futility in their efforts to save the life of a man whom they were growing to know and to like.

They filed appeals based on the prosecutor's exclusion of African-Americans from the jury, and the prosecutor's hiding the fact that some of the testifying witnesses had been paid reward money. The trial judge had berated the lone holdout juror into voting for death, without which vote Thompson would have been sentenced to life in prison. "We had great, solid issues on appeal, but we had to face the reality that we had failed."

Though the execution was stayed when the first post-conviction petition was filed in state court in 1989, three years later they received a decision rejecting their appeal, and the execution was rescheduled. It was stayed again, however, when the Louisiana Supreme Court ordered a hearing on the issue of whether the promise of a reward had tainted the trial testimony.

The hearing went well, but several months later they received yet another adverse decision. Additional appeals were also unavailing. When the U.S. Court of Appeals for the Fifth Circuit rejected their habeas corpus petition in 1999, and the U.S. Supreme Court declined to review the matter, a new execution date was set, and Banks and Cooney traveled to Angola to tell Thompson the grim news.

Thompson was stoic when Banks and Cooney informed him of his scheduled execution. The scheduled date was one day after his son's high school graduation. Thompson was proud that his son was the first person in his family to

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John Thompson was 22 at the time of his arrest.



Eighteen years after his murder conviction, Thompson, flanked by lawyers Gordon Cooney (left) and Michael Banks (right), displays *The Times-Picayune* of New Orleans headline that announced his acquittal of all charges.

Banks was spending so much time and energy representing him.

"A few of them made sarcastic remarks," Banks said, "or they asked whether we knew if the guy was really guilty."

"John was someone they couldn't relate to, and people's views are too often shaped by a lack of empathy and pathos. But isn't he entitled to some measure of pathos before he is judged as innocent?"

In April of 1999, Banks and Cooney traveled to the state prison at Angola, Louisiana, to advise Thompson that the U.S. Supreme Court had denied certiorari, all avenues were exhausted, and his execution by lethal injection would occur in May. Banks had not anticipated the friendship that had formed between them over the 11

victed in a separate carjacking case. Prosecutors tried the carjacking case first so that Thompson's record would include a felony conviction, increasing the likelihood that a death sentence would be issued if he were convicted in the murder case. Thompson had written to 200 lawyers seeking help, including the Loyola Capital Defense Project.

Meanwhile Banks, then a labor and employment associate at Morgan Lewis in Philadelphia, asked to take on a death penalty case with three fellow associates. That Thompson had been found guilty of murder was not Banks's concern. He wanted to take on a matter to give voice to his principled opposition to the death penalty, which he had held as far back as

tact with Thompson, and little rapport. Thompson's New Orleans street slang was difficult for Banks even to understand.

"John's mother and his young son were dirt poor and could not afford to travel to visit him in prison or to call." But he was permitted to call his lawyers collect from jail, and Banks and Cooney became his main link to the outside world.

Banks, whose own young son was the same age as Thompson's, began to notice Thompson's devotion to his son from prison. In 1999, Thompson sold his only possessions, a typewriter and a boom box, to pay for a school trip. "I thought about what it means to be a father, as I witnessed his dedication under excruciating circumstances. It shapes you as a human

Crystal Ball Gazing

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not receive a great deal of attention unless and until they reach a critical stage. That stage has been reached with defined benefit plans and the exploding deficit at the Pension Benefit Guaranty Corporation. However, Congress must address those issues as they are beyond the reach of regulatory adjustments. ■

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Sarbanes-Oxley

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securities violations. The SEC's SOX regulations require a company's counsel to make such reports up the corporate ladder—a mandate Scalia called “extraordinarily significant.” Jenkins noted, however, that the SEC is still reconsidering its original proposal to require those lawyers to also report fraud to the SEC, as well as an alternative proposal under which lawyers would have to tell the SEC that they were withdrawing from the representation.

As a result, an attorney who learns of potential fraud should “check your local disciplinary rules, because the SEC claims that

it preempts [them],” said Jenkins. The Model Rules of Professional Conduct permit a lawyer to withdraw from representing an organization if the lawyer knows that someone associated with it is about to commit an act that would substantially injure the client. The Model Rules do not permit the lawyer to go public with that withdrawal, however. (The ABA has recommended that this rule remain as is.)

Because the SEC's regulations are still unclear, Jenkins warned, “As a lawyer, you go public [with a fraud accusation] at your peril. . . . I don't see anything in SOX or the

regulations which would protect your license.” Because the SEC's proposed regulations cover a very broad swath of lawyers who are deemed to “appear and practice” before the agency, even an employment lawyer investigating a SOX complaint would be required to report a violation up the corporate ladder.

The moral for employment lawyers: Get to know SOX before it gets to know you. ■

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graduate from high school. “Help me with my son,” he said, asking Banks and Cooney to attend the graduation ceremony. Banks and Cooney met with Thompson's mother and son in New Orleans. “These were the most devastating moments of my life,” Banks said.

While they were in New Orleans, however, an investigator they had hired in a desperate attempt to find anything that might forestall the execution made a startling discovery. A 14-year-old memo found in police archives indicated that the blood evidence at the scene of the carjacking was not Thompson's blood type. Further investigation revealed that prosecutors had hidden the blood evidence at the trial of that case. Banks and Cooney confronted New Orleans District Attorney Harry Connick, who agreed to join them in requesting a stay of the execution and wiping out of the carjacking conviction.

With a growing sense that Thompson actually was innocent of all of the crimes, Banks and Cooney hired another investigator to review the murder case. She found new eyewitnesses whose description of the fleeing murderer

clearly did not fit Thompson. All this fit with what Thompson had been telling them for years—that he wasn't there, and that he had the gun because he had purchased it from the murderer. Though the trial judge agreed that Thompson would not be returned to death row, it took yet another state court appeal before a new trial was ordered in the murder case.

In May 2003, the jury returned a not guilty verdict after just 35 minutes. Banks had made the closing argument. Thompson's son, now 22 years old, was seated behind his father in the courtroom.

Strong arguments alone could not save John Thompson. “We presented compelling issues of Constitutional dimension on which we were right. But until we had evidence of actual innocence, we couldn't get an audience.”

“Prosecutors are mostly good people,” Banks says now, “but there is an inherent mismatch of resources. Prosecutors have staggering resources compared to the vast majority of criminal defendants.”

Banks credits the commitment of Morgan Lewis, which brought in its own resources. “Once we came forward and said ‘we want to do

this,’ the firm devoted every resource and expected that we would represent John like we represent any other client.” Banks and Cooney hired investigators and made trips to New Orleans as the case required. More than 70 Morgan Lewis attorneys, paralegals, and summer associates made some contribution to the case over its 14-year life.

The firm counted the thousands of hours spent by Banks and others on the team as billable hours, which was crucial. Banks and Cooney were associates and then new partners during much of the representation.

Banks takes some comfort in the commitment of many law firms to pro bono work but is concerned about young lawyers. “I see a lot less empathy among young lawyers and in society generally. My firm's commitment is there, and we will continue to count on associates to say ‘here is something I want to do.’ But will the next generation of lawyers step up, or will they think more about their tax rates and mutual fund portfolios? Anyone who doesn't embrace some level of service is losing an opportunity.” ■

Ver Beek Honored

Section leader Carl Ver Beek of Varnum, Riddering, Schmidt and Howlett LLP in Grand Rapids has been selected to receive the State Bar of Michigan Labor and Employment Law Section's Distinguished Service Award for 2004.

The award is given each year to a Michigan attorney who exemplifies outstanding service and professionalism in the practice of labor and employment law. In addition to the award, the Section will donate \$1,000 toward a scholarship established in Ver Beek's name at the Detroit College of Law—Michigan State University, where he has served as an adjunct professor.

Ver Beek has focused on labor and employment relations at the Varnum law firm for 42 years. Throughout that time, he has remained actively involved in the State Bar of Michigan. He is a frequent speaker at its Institute for Continuing Legal Education. Recently, Ver Beek was reappointed chair of the Attorney Grievance Commission for the State of Michigan, the prosecution arm of the supreme court on lawyer discipline. He is a long-time leader of our Section and a member of the Section Council.