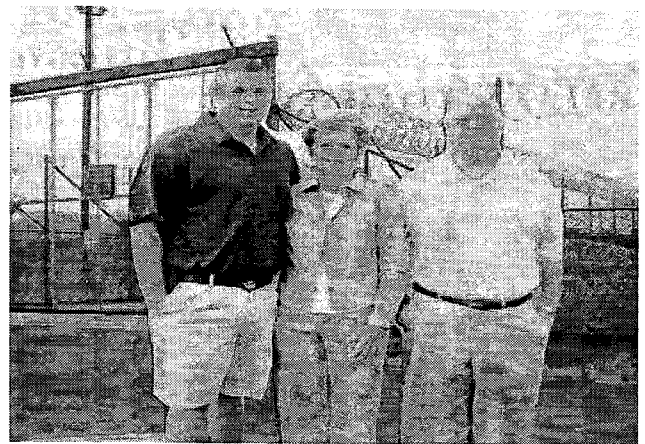


The 6th Amendment Confrontation Clause is Alive and Well and Now is Retroactive in Cabarrus County

BY LOCKE T. CLIFFORD

David "Boot" Isenberg was tried and convicted on five counts of indecent liberties and one count of first degree sex offense with a minor child in Cabarrus Superior Court. The alleged victim, a 6-year-old child, refused to speak during the in camera competency hearing and thus was found to be "unavailable" by the court for purposes of hearsay admissibility. Therefore the state's case was based entirely on hearsay testimony by various family members and child-abuse professionals. Although the child was



in court, sitting on her mother's lap, in full view of the jury, she was never called as a state's witness and was thus never subjected to cross examination.

Notwithstanding the excellent work of defense counsel Steven A. Grossman of Concord who tried the case well and preserved the record of his hearsay objections, the Court of Appeals affirmed Boot's conviction and sentence. *State v. Isenberg*, 148 N.C.App 29 (2001).

A dramatic change may have taken place in North Carolina criminal evidence law, precipitated by a 2008 Supreme Court decision, has reversed his conviction and set him free.

In May 2000, Boot began serving a 16 - 20 year prison sentence. He was 47 years old.

Warren D. "Boot" Isenberg, free at last, stands with his wife Karen and his son David outside the Albemarle Correctional Institute after his release by Judge Erwin W. Spainhour. (See attached Memorandum of Order, Nov. 6, 2008.)

Boot had been an exemplary employee for 28 years at Merita Bakeries where he had risen to regional sales manager for the Charlotte plant. He was a devoted husband and father and had no criminal record and no history of any accusations of sexual misconduct.

In August 1999, Boot was confronted by the police with the child's accusations. He immediately agreed to be polygraphed. A relatively inexperienced examiner conducted a polygraph examination and concluded that Boot's answers indicated deception. After the trial and appeal, Boot's wife, Karen Isenberg, employed Joseph A. Kenny, who has long been recognized for his expertise as an FBI polygraph examiner, to review the original

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police polygraph examination record. Kenny's expert opinion was that the original polygrapher had misinterpreted the records and that the records did not indicate any deception. Kenny gave Boot a second polygraph at the Nash Correctional Institute, where he was incarcerated in close custody. He passed with flying colors.

Karen and their son David, then age 8, spent every weekend for eight years driving across North Carolina for a 2 hour visit behind bars with Boot.

Boot had served four years in 2004 when the Supreme Court of the United States handed down the landmark opinion in **Crawford v. Washington**, overruling **Ohio v. Roberts**, and eliminating testimonial hearsay exceptions. Unfortunately, **Crawford** did not address the question of whether its ruling should or could be applied retroactively in state cases that had been finally decided.

Karen Isenberg came to the Greensboro firm of Clifford Clendenin O'Hale & Jones, LLP and employed Walt Jones to do an MAR based on **Crawford**. Jones filed the MAR on April 18, 2005, confident that if the court would apply **Crawford** retroactively, the court would grant the MAR and Boot would get a new trial. Because Jones had a scheduling conflict, the author of this article took over the case and argued on the MAR shortly thereafter before Judge Spainhour, with ADA Ashley Shanlie representing the State.

Boot had been incarcerated for five years in May 2005 when Judge Erwin Spainhour heard arguments on the **Crawford** issues and took the MAR under advisement. In May 2006, he entered an interim order to hold the case in abeyance, pending a decision by the Supreme Court of the United States on **Crawford's** retroactivity, after the court issued a *writ of certiorari* in **Wharton v. Bockting**.

In February 2007, the Supreme Court held in **Wharton v. Bockting** that **Crawford** was not retroactive on the theory that the new rule in **Crawford** was not a "watershed rule" under **Teague v. Lane**. In the **Teague** case the Supreme Court had held that **Batson v. Kentucky** did not apply retroactively in the context of a federal habeas petition. In accord with **Wharton v. Bockting**, Judge Spainhour denied Isenberg's MAR in March 2007.

Karen and Boot would not give up – nor would they allow Boot's lawyers to give up. We began preparing a Petition for

Pardon/Commutation of Sentence for Governor Easley, including videotaped interviews with Boot, Joe Kenny, Karen and David.

The Supreme Court, on Feb. 20, 2008, handed down its decision in **Danforth v. Minnesota**, holding that the **Wharton v. Bockting** rule of non-retroactivity in **Crawford** was limited to federal *habeas* cases, specifically stating that each state is free to determine whether **Crawford** is retroactive in its jurisdiction.

We filed a Motion to Reconsider and on June 12, 2008, Judge Spainhour held that **Crawford** applied retroactively and ordered a new trial. We told Boot that he was entitled to be released, that he might have to post another bond, and that the child is now 14-years-old and might now be ready to testify. The prosecutor offered Boot a plea to one count of indecent liberties with credit for time served in exchange for a dismissal of the other cases. Boot took his lawyers' advice, entered an *Alford* plea, and Judge Spainhour sentenced him to time served. He was released from custody the following day and his ordeal was finally over – except for having register as a sex offender. Maybe we could have held out and gotten a dismissal. Maybe not. We will never know.

Boot's minister and church family provided support throughout his time of his incarceration. Their "Welcome Home Boot" celebration at the church included testimonials on the Christian virtues of faith, hope, love and perseverance.

Judge Spainhour's order and Memorandum of Order and the citations to

the cases discussed above may be accessed by a link at the Criminal Justice Section's Web site at <http://criminaljustice.ncbar.org>. Every defense attorney and prosecutor is encouraged to read Judge Spainhour's order and the cases involved as these are complicated issues that may impact all of us as attorneys within the criminal justice system. ■

The author thanks the people listed below for their support and assistance in this marathon effort: Melanie Crenshaw, 3L at Elon University School of Law; retired NC Chief Justice James G. Exum of Smith Moore Leatherwood, Greensboro; MDNC Federal Public Defender Tom Cochran; Harold Bender of Charlotte who did the appeal; Rick Rosen at the Center for Innocence; Boot's friends and family who filled the courtroom; Karen Isenberg, a paragon of persistence whose faith in her husband's innocence never faltered; David Isenberg, who, for half of his life, suffered through his father's unjust incarceration and nevertheless became an Eagle Scout in the process. Most of all we thank Boot Isenberg, a model client whose only chief complaints were that he had to miss David's Eagle ceremony and his mother's funeral.

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