

## **Gang Slaying Verdict Is Challenged; Defense Raises Procedural Issue, Seeks to Present New Evidence in 1997 Killing**

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James R. Merry was having dinner with friends at a Popeyes fried chicken restaurant in Springfield when he stepped outside for a cigarette. A moment later, the 18-year-old was dead -- beaten with a baseball bat by one of several young men who thought he was a member of a rival gang.

Three of Merry's friends later told a Fairfax County jury that Mario A. Bustillo, then 19, wielded the bat in December 1997. Based on the eyewitness testimony, Bustillo was convicted of first-degree murder and sentenced to 30 years in prison.

From his prison cell, Bustillo argues that he has compelling evidence -- including a videotaped confession from another man -- that shows he didn't do it. Bustillo's attorney, John C. Kiyonaga, is scheduled to appear today in Fairfax County Circuit Court to argue that Bustillo should be granted a new trial.

"There's just no question that a mistake, a very bad one, happened here," Kiyonaga said.

But the judge is not likely to examine or review Bustillo's evidence of innocence. Rather, he will consider only evidence bearing on whether law enforcement authorities failed to share information that might have helped Bustillo's defense.

The tape has not yet been considered by the court because Virginia's toughest-in-the-nation deadline does not allow nonscientific evidence to be admitted more than 21 days after a defendant is sentenced. And unlike recent high-profile cases in which Virginia inmates have been exonerated through DNA evidence, there is no such smoking gun. No DNA or fingerprints were found at the scene. As with most criminal cases, the jury relied on witness testimony and circumstantial evidence.

So Bustillo's defense team has no recourse other than to try to prove a procedural error at trial.

The state Supreme Court is considering loosening the 21-day rule to allow certain defendants to present new evidence "within a reasonable time after the discovery of the evidence." The Judicial Council, made up of judges, legislators and lawyers, is scheduled to meet Monday to make a recommendation to the court.

Fairfax prosecutors would not discuss details of the case but said they stand by the jury's verdict. "We are confident in [Bustillo's] guilt," said Deputy Commonwealth's Attorney Raymond F. Morrogh. "The evidence was more than sufficient for the conviction."

Although many inmates claim innocence, Bustillo's case stands apart because a Fairfax judge has allowed him unusual latitude to argue his case long after a conviction. The trial court is reexamining Bustillo's case even after the Virginia Court of Appeals and Virginia Supreme Court upheld Bustillo's conviction and the U.S. Supreme Court declined to consider it.

Most interesting, Kiyonaga said, is the video of a man named Julio Cesar Osorto admitting that he struck Merry. A police report that was not turned over to Bustillo's trial attorney shows that Osorto was stopped by officers near the scene of the attack with red stains on his shirt, Kiyonaga said.

At Bustillo's 1998 trial, prosecutors said Bustillo was one of several members of the Commerce Street Locos gang who showed up at Popeyes. They said Bustillo mistook Merry for a member of a rival gang and delivered a single blow that shattered Merry's skull.

Bustillo maintained that he wasn't at the restaurant. One witness testified that a man he knew only as Sirena swung the bat, and another said she saw Sirena on a plane to Honduras the day after Merry died.

The defense was not able to learn Sirena's full name, and the prosecutor dismissed him as the "so-called Sirena."

But Kiyonaga says he has gathered a "mountain of evidence" showing that Osorto uses the nickname Sirena and that

Osorto was the killer. The videotape was recorded in Honduras in 1998 by Reinery Espinoza, an acquaintance of the Bustillo family.

The tape shows Espinoza and Osorto chatting in Spanish as they sit in the living room of a small house. The two men talk about clothes, women and the night at Popeyes.

On the videotape, Osorto recalls that he became angry because Merry was "throwing [gang] signs," according to a translation. "Bad news, man. And there, in our hood," Osorto says. "I shoved it down with one whack. . . . Man, that was loud."

Osorto then describes calmly walking away, buying a six-pack of beer at a CVS and hanging out behind a school until things quieted down. "I got a hold of myself and started off slowly," he says. "The police were all over. . . . Everybody and his brother was running, one over here, another over there."

At today's hearing Bustillo's lawyers will argue that he did not receive a fair trial because authorities didn't give his attorney information about Osorto. Authorities, acting on a judge's order, only recently turned over the police report and a photo of Osorto.

According to the police report, officers who stopped Osorto in the neighborhood after the attack spotted "what appeared to be ketchup on his pant legs and a little on his shirt" and smelled alcohol on him. The officers noted that Osorto said he had not been at Popeyes that night but offered two explanations of where he had been.

Kiyonaga also has argued that police rushed to identify Bustillo as the assailant and intimidated witnesses by threatening to deport them. Prosecutors have countered that Bustillo's friends tried to intimidate a witness into changing her story.

Officials from the Virginia attorney general's office, which is handling the case now, have declined to comment. But in court documents, they dismiss Bustillo's version of the case as "a nightmarish scenario of governmental oppression worthy of a novel by George Orwell."

Jean Johnson, Merry's mother, said she dreads the thought of reliving her son's murder through another trial. She watched the testimony in 1998 and is convinced the right man was convicted.

"The witnesses saw him up close, face to face," Johnson said.

Johnson also said she doubts the videotaped confession.

"I think this guy's lying to protect [Bustillo]," Johnson said.

For Bustillo, the hearing represents his greatest hope since he was arrested in his high school classroom five years ago.

During an interview at the Augusta Correctional Center, Bustillo said he keeps busy writing letters to his family and his father. He also has earned his GED and works at a shoemaking shop

"For this to happen to me is not fair," Bustillo said. "I have the proof that I didn't do this. Every time I get up in the morning I think about what I can't do. They robbed my freedom. They robbed my dreams."

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