

## **SPECIAL REPORT Doubts Spur Retrial in Coin Shop Killings O.C. justice: Ex-Marine imprisoned for life as holdup shooter is innocent, witness and lawyers say.**

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### **Document Text**

For three years, former Marine Lance Cpl. Thomas R. Merrill has insisted from behind bars that he is innocent of a double murder and robbery at a coin shop in Newport Beach in 1989.

Today, the store's owner, who was shot four times at close range, believes Merrill is innocent and was "railroaded" into prison. A team of high-powered lawyers is fighting for his freedom. And the judge who handed him two life sentences at least agrees that Merrill wasn't given a fair shake by Orange County's criminal justice system.

In a rare move, the judge has thrown out Merrill's convictions, setting the stage for a retrial in which the outcome is anything but certain.

The renewed case provides a rare glimpse of how a man was sentenced to two life terms without parole with only circumstantial evidence against him—no fingerprints, no stolen goods, no murder weapon.

The lawyers who have taken over Merrill's defense successfully argued in court that Jeffrey L. Robinson, the deputy district attorney who prosecuted Merrill, withheld evidence that, if properly disclosed, could have led to Merrill's acquittal.

Moreover, they maintained, defense attorney Gary M. Pohlsen—appointed by the court to represent Merrill and paid \$75,000 by taxpayers—performed so poorly that Merrill was denied his constitutional right to adequate legal representation.

Robinson, who has been scolded by appeals justices for overzealous conduct in another murder trial, denies any wrongdoing. And Pohlsen, who becomes president-elect of the Orange County Bar Assn. next year, rejects the idea that he failed Merrill. He believes his client is innocent and didn't get a fair trial, but he blames the prosecutor and the co-defendant's lawyer.

After five days of hearings, Superior Court Commissioner Richard M. Aronson, who presided over the case as a judge pro tem, ruled June 28 that the arguments presented by Merrill's new lawyers have merit. He has ordered a new trial—a trial that prosecutors vow to win again, and defense attorneys are confident will set Merrill free.

Senior Deputy Dist. Atty. Eric W. Snethen, who led the fight against a new trial, said "I am absolutely certain there's enough for another jury to say this guy is guilty."

In legal papers, Merrill's lead attorney, former USC law professor William J. Genego, argued: "There was absolutely no tangible evidence connecting Mr. Merrill with the crime in any way. The evidence against Mr. Merrill was not only circumstantial; much of it was unreliable and inadmissible."

### **The Shootings**

From more than a thousand pages of court records emerges the story of a case rife with contradictions, shifting testimony and developments that are not fully explained; a case in which the spotlight of blame moved from the first suspect, Marine Lance Cpl. Eric Jon Wick, to Merrill, his bunkmate at the Tustin Marine Corps Air Station, who wasn't arrested until 20 months after Wick.

The complicated case began about 5:30 p.m. on March 14, 1989, with a robbery and two murders at the Newport Coin Exchange, a firm that sold precious metals and coins from a location on MacArthur Boulevard near John Wayne Airport. After responding to an electronic alarm, police arrived to find shop owner William D. King shot four times, twice in the head. His wife, Renee, and good friend Clyde Oatts lay dead inside the store.

While the robbery was taking place, Oatts' wife, Marlynn, who had come to pick up her husband, peered directly into the shop's front door. She told police she saw a light-complexioned stranger behind the display case, and the barrel of a shotgun being held by someone just out of sight to her left.

Sensing that a robbery was taking place, Oatts fled. About 20 feet away, she ran into two Victorville lawyers, Gregory

Zumbrunn and James Minton, who looked into the coin exchange and saw someone with a weapon.

The three ran to a nearby Coko's restaurant to call 911, hearing gunshots in their wake. Zumbrunn told police he re-emerged, stood behind a planter about 200 feet from the shop, and watched for a few more moments. He saw a man kick out a glass panel next to the front door and walk away.

About this time, in a parking lot behind the shop, Finn Olsen, a commercial baker from Huntington Beach, saw two white men trying to get into a two-door bronze car. One had his back to Olsen. He described the other as being in his early 20s, with short-cropped brown hair, pale skin, a stocky build and a one-day growth of beard.

But the eyewitnesses did not provide the most telling clues. Inside the shop, police found a receipt bearing the name Eric Watt and the phone number of a Tustin Marine base barracks, as well as a Tires-R-Us warranty bearing the name and home address in Reno, Nev., of Wick's father, FBI agent Bruce Wick.

When police asked the critically wounded King how many suspects there were, he said two, about 35 years old, and that one was black and the other white.

Both Merrill and Wick are white, although Merrill, who is half Pakistani, is olive-skinned and has close-cropped black hair.

King was also heard addressing a man named Fred, although no such man was present. A short while later, in the ambulance on the way to the hospital, police asked King who shot him. "Tom shot me," he said.

Nearly three months after the shootings, police following up on crime scene clues began questioning Marines at Tustin. Within two days, a visibly nervous Wick went absent without leave. He was arrested by Reno police and FBI agents as he arrived at his family's home in Nevada.

In Wick's two-door 1977 Chevrolet Nova, freshly repainted from bronze to white, police found a 9-millimeter Sig Sauer pistol that later proved to be the murder weapon, as well as three Australian platinum coins and a gold coin, presumably taken in the coin store robbery.

Taken under arrest to Newport Beach, Wick confessed on June 15 to Police Sgt. Richard T. Long that he alone committed the crimes. Wick recalled standing behind the glass display case in the store. "I did the shooting" because shop owner King "pulled a shotgun out and I had to defend myself," he said, adding that he killed Renee King out of fear of leaving a witness.

#### New Suspect Emerges

Around this time, Merrill told police that he and Wick shared an off-base storage locker, where he and another Marine, John Brady, moved Wick's guns when police began poking around the base. Wick had been in trouble before for having an unauthorized AK-47 on the base, and Merrill said the locker had been rented in February as a place to store the weapons.

Police took note of Merrill's and Brady's involvement, but neither was arrested.

For 20 months after Wick's arrest, he was the only person held in connection with the robbery-murders. Then, long after Wick had been ordered to stand trial alone, facing a possible death penalty on capital murder charges, Merrill was arrested.

At that point, everything changed. The most intense heat of the accusations fell upon Merrill. Looking back, there are those who find that shift hard to explain.

"I kept thinking there must be something more and there wasn't," said Virginia Kirkmeyer, a former Huntington Beach police officer-turned private investigator who worked for Merrill's lawyer on the case. "They took little things and made them into evidence.

"If someone told me someone would be convicted with no evidence, I would have laughed. This makes me cry."

Police and prosecutors don't find it at all mysterious that the path led to Merrill, although they offer little explanation why it took so long to get there. In the fall of 1990, about 15 months after they had last questioned them, police began re-interviewing Merrill and Brady, the two who moved Wick's weapons into the storage locker.

Under questioning, Brady admitted to police on Nov. 6, 1990, that Wick told him, during a July, 1989, jail visit, that he was going to "fry" for the robbery-murders, because "I was there. I did it."

It was not until he was being interrogated the next day that Brady volunteered an additional detail. Wick reportedly said he carried out the crimes with a slightly older friend from Reno who knew martial arts.

Brady told police Merrill could have been involved, but that he had nothing solid to back that up. Brady agreed to

tape-record conversations with Merrill for police, but Merrill said nothing incriminating.

Nevertheless, Merrill was arrested on Nov. 20, 1990.

At Wick's and Merrill's joint trial in June, 1991, the evidence against Wick included parts of his confessions to police and Brady, the murder weapon and coins found in his car, and the fact that his fingerprints and personal papers were discovered at the scene of the crime.

There was also evidence that Wick, using the alias Eric Watt, had come into the business the week before and ordered \$45,000 in coins to be ready for pickup the day the crime occurred.

Zumbrunn and Minton testified they saw a man they identified as Wick in the store with a shotgun. But Zumbrunn acknowledged that his recollection of the scene may have been influenced by seeing the shotgun on the shop's floor when he entered to assist King after the armed intruder fled. He also added, for the first time, that he saw a second man resembling Merrill kick out the glass in the front of the store.

King, since recovered from his wounds, identified Wick from the witness stand as the gunman, and said there was only one assailant that evening.

But the prosecutor discounted King's testimony about a lone assailant, arguing that King had suffered brain damage. Instead, he built his case on the things King said while still in shock, minutes after the shooting: That there were two assailants and that "Tom shot me." Until he saw him in a courtroom, King was insisting he had never seen Merrill-before, during or since the robbery.

Also used to incriminate Merrill was Wick's confession to Brady about doing the crimes with an older friend from Reno who knew martial arts, which the prosecution said was a veiled description of Merrill, who is four years older than Wick and had studied judo and aikido.

Both the prosecutor, Robinson, and Wick's lawyer, Deputy Public Defender Tim B. Severin, had a common goal: to point the finger at Merrill as the one who did the shooting.

#### Merrill's Testimony

Wick's entire defense hinged on his attorney's argument that Wick grabbed King's shotgun and held it on Merrill to try to stop Merrill from killing everyone in the store.

Severin told the jury that Wick was so frightened of Merrill that he never implicated him in his confessions. The evidence to support a portrayal of a dominating Merrill-the prep school-educated stepson of an Episcopal priest-was that he was older than Wick, more schooled and that he knew martial arts.

Then there was the testimony of Merrill himself, who could never account for his whereabouts on the day of the crime. Many of those involved in the case agree that Merrill was his own worst enemy on the witness stand. In two days of testimony, he was hesitant, slow to answer and was caught in numerous contradictions about his involvement with Wick.

"This was a circumstantial evidence case," Robinson said. "There was no smoking gun. But if you add up all the pieces, the aggregate of the evidence points to Tom Merrill. In fact, the strongest piece of evidence in the case is Mr. Merrill. He was dishonest throughout his testimony."

But some who know the case still believe that the evidence against Merrill wasn't enough to arrest, let alone convict him. There was no tangible evidence linking Merrill to the crime, and eyewitness accounts and identifications were rife with contradictions.

Many of these concerns are spelled out in a habeas corpus petition, which Genego, Merrill's new lawyer, filed in February to get Merrill's convictions invalidated. The document attacks the underpinnings of the prosecution's case, saying that the circumstantial evidence was weak and that eyewitness testimony placing Merrill at the scene was unreliable.

But the heart of his argument was that the prosecution improperly withheld evidence and that Pohlon, Merrill's defense attorney, wasn't properly prepared for trial and then allowed some dubious testimony against his client to go unchallenged.

For instance, Zumbrunn first swore that he saw only one man in the coin shop: a man resembling Wick who held a short rifle or a gun. Zumbrunn, who has trouble seeing distances and initially told police he wouldn't be much help because everything happened so fast, later testified that he saw a second man resembling Merrill coming out of the store, although he was unable to pick Merrill out of a lineup.

Genego, armed with the declarations of medical specialists, argued that King's remarks moments after the shooting-that there were two assailants and that "Tom shot me"-were unreliable because his wounds might have made him delusional.

Genego suggested that perhaps King was describing the two victims, a black man and a white woman, and not the suspects.

King told The Times that prosecutors treated him "like a blithering idiot," and dismissed his contention that Wick was the only shooter because they seemed to want to bring Merrill into the case.

"I had told them as far as I was concerned, there was only one guy there," King said, explaining his reluctance to even attend a lineup including a second suspect. "And they said, 'Well, come on down and try to identify someone you may have seen before.'

"I told them, 'You guys are crazy. Wick was in my store setting the whole thing up the previous week.' When everything started to shift to Merrill, that's when I started to feel uncomfortable." King believes Merrill is innocent and that he was "railroaded."

Another key witness was Olsen, the baker who saw two people in the parking lot behind the coin exchange that evening. Though Olsen picked Merrill's picture out of an early photo lineup, saying he resembled one of the men he had seen, he did not pick Merrill out of a physical lineup, and later insisted—as he does today—that Merrill was not one of the two men he saw.

But since Olsen was never asked to testify to that, Merrill's defense went without a key piece of evidence pointing to his innocence.

In a sworn declaration filed with Genego's petition, Olsen says that Merrill was not one of the men he saw, and that he repeatedly said so to prosecutor Robinson and his investigator, Gerald C. Teplansky. Teplansky essentially confirmed Olsen's contention during court hearings in June, establishing that this information was withheld from Merrill's attorney.

Further, Olsen claims, Robinson told him not to volunteer his view to the jury unless he was specifically asked to do so.

Robinson, who has since quit the district attorney's office to go into private practice, denies any impropriety, saying Olsen only told him that he could not identify anyone in the parking lot, not that Merrill wasn't either man. Teplansky testified in June that his recollection of Olsen's statements differed markedly from Robinson's, but he declined to comment for this story.

Genego accuses Robinson of twisting Olsen's testimony by telling jurors, in his final argument, that Wick and Merrill were the two men Olsen saw, knowing that Olsen had never identified Merrill.

#### Attorneys Criticized

The allegations of prosecutorial misconduct echo criticisms leveled against Robinson by justices of the state 4th District Court of Appeal in an August, 1992, decision upholding the conviction of computer executive David Brown for tricking his daughter, Cinnamon, into killing his wife.

The court lashed Robinson for misusing evidence in the case. "This prosecutor makes a habit of trying cases in this manner from our experience," wrote Justice Thomas F. Crosby Jr. "It is unfortunate that his superiors apparently condone this behavior. We do not."

In the Merrill case, Genego's criticism is not just aimed at the prosecution. He accuses defense attorney Pohlson of 17 instances of incompetence, saying that among other things, he failed to discover evidence that would help his client.

For example, Genego found bank records showing that at 5:01 p.m. on the day of the crime, Merrill withdrew \$20 from his account at the credit union on the Tustin Marine base. Genego says that strongly suggests Merrill was not at the coin shop because it would be very difficult to drive the four miles in rush-hour traffic to make it there by its 5:30 p.m. closing, when Wick had already been seen inside.

Prosecutors countered that this did not provide an alibi for Merrill, since it was easy to make that drive in the allotted time. Their own investigator did it in nine and a half minutes.

Pohlson also failed to interview or call as witnesses several other people who could have helped Merrill's case, Genego argued. Eyewitness Marlynn Oatts told police that the man behind the counter, in the shooter's position, had a light complexion. Wick has a lighter complexion than does Merrill. A sergeant at the Marine base was never called to testify that Wick seemed nervous when investigators questioned him, but Merrill did not.

Perhaps more significantly, Genego claims that Merrill was harmed by the fact that only part of Wick's confession to police was admitted at trial, through an agreement endorsed by Merrill's attorney. Jurors heard the part in which Wick admitted doing the shootings, but never heard Wick's contention that he did so because King was holding a shotgun on him.

If jurors had heard that King was wielding the shotgun, Wick's attorney would have had difficulty arguing that the shotgun was being used by Wick to restrain Merrill.

To buttress his argument that Pohlson acted incompetently, Genego hired two prominent criminal defense lawyers who submitted lengthy declarations condemning Pohlson's handling of the case. Gerald Chaleff of Santa Monica and Jack M. Earley of Irvine both concluded that Pohlson did not put on an adequate defense or properly investigate leads potentially favorable to his client.

"The combined effect of the attorney's errors was devastating to Merrill's case," Chaleff wrote.

Genego criticized Pohlson for allowing Wick's lawyer to get away with tactics that further damaged Merrill. Severin repeatedly said that Wick feared Merrill, so much so that he never implicated him when confessing to the crime. But he never put Wick on the stand to say that, or subject him to cross-examination.

Court papers say that Severin later admitted that Wick never told him what happened in the coin exchange, a revelation Genego claims raises serious questions about Severin's conduct.

"Wick's fear of Tom Merrill was a product of his lawyer's creation and not the evidence," Genego wrote in court papers.

Severin, for his part, told *The Times*, "It is not my responsibility, if the other attorneys don't object to my questions. . . . I have every right to defend my client. . . . I feel I had enough (evidence) to make a plausible argument" that Wick held the shotgun and feared Merrill.

A key error made by Pohlson, Genego said in court papers-and Chaleff and Earley agreed-was his failure to ask that Merrill receive a separate trial from Wick, especially after Severin made it clear in his opening statement that Wick's defense hinged on the theory that Merrill was the mastermind and gunman.

"I was surprised that Pohlson never asked for a severance," Severin said. "It was an absolute benefit to have Merrill tried along with my client (Wick). Tactically, I could try to paint the second person as the triggerman."

Pohlson told *The Times* that he made a careful, sound decision not to have his client tried separately. He said he believed that Wick's confession would have greater "impact" on a jury if both men were present in the courtroom in a joint trial. He disagrees with all of Genego's characterizations of his performance, but he is glad Merrill is getting a new trial because he believes that Robinson's and Severin's tactics denied him a fair trial.

In the end, Merrill's portrayal at trial dictated his fate. Aronson gave Wick 37 years to life in prison, a lighter sentence than Merrill's, saying he was convinced Merrill had pulled the trigger in "some sort of Marine macho fantasy."

Still, some involved in the case are nagged by unanswered questions. To this day, Wick has never disclosed-at least to anyone willing to say so-what went on in the coin shop.

"We still don't know how many people were in there," said Newport Beach Police Sgt. John Desmond, who was one of the investigators on the case. "No one ever told us. I'd love to have Wick call and tell me what happened, just to finally hear it."

#### Revisiting a Murder Case

Former Marine Cpl. Thomas R. Merrill and Lance Cpl. Eric Jon Wick were both found guilty of a March 14, 1989, double murder and robbery at the Newport Coin Exchange. After hearing arguments that an Orange County prosecutor improperly withheld evidence that would have exonerated Merrill, and that his defense attorney was so incompetent that his constitutional right to an adequate defense had been violated, the judge who sentenced Merrill to life in prison has taken the rare step of throwing out his conviction. He has also ordered a new trial, whose outcome is uncertain. The following is a series of circumstances, events and confessions as related by prosecutors and law enforcement officials:

#### WEIGHING THE EVIDENCE

Strong physical evidence implicated Wick. The evidence against Merrill was circumstantial, and defense attorneys say it was not strong enough to convict him of the crime.

#### Evidence against Wick

- \* Found in Wick's car: 9-millimeter handgun used in the killings and several coins from the shop
- \* Found in coin exchange: Wick's fingerprints and a palm print; a coin shop receipt bearing Wick's alias and phone number; a receipt from Tires R Us bearing Wick's father's name and address.
- \* Survivor's statement: Coin exchange owner, William King, who at first had said "two" when police asked him how many

suspects there were, later insisted repeatedly that Wick shot him and was alone.

\* Eyewitnesses: Two witnesses say they saw a man resembling Wick holding a weapon in the coin exchange.

\* Two confessions: Wick confessed twice, once to police, saying he did the crimes alone, and once to a friend, saying he did the crimes with a friend from Reno, Nev.

\* Before the crime: Wick went to the coin exchange the week before the crime to place a \$45,000 order for coins to be on hand when he returned for the robbery.

\* After the crime: Wick repainted his car a month after the crime.

\* Wick's behavior: He acted nervous when questioned about the crime by investigators; fled Tustin Marine Corps Air Station for his family home in Reno the day after being questioned.

\* Conversing with friends: Wick talked with Merrill and fellow Marine John Brady about robbing crack houses and killing the drug dealers inside.

#### Evidence against Merrill

\* Before the crime: Merrill rented a storage locker for himself and Wick three weeks before the crime.

\* Merrill's admission: He admitted helping move Wick's weapons into the storage locker the day after Wick was questioned about the crime by authorities.

\* Found in Merrill's car: The same type of ammunition used in the killings.

\* Survivor's statement: Coin exchange owner King, minutes after being shot in the head, said, "Tom shot me." Asked by a police officer how many suspects there were, he said, "Two." King later said that Merrill was never in his store.

\* Eyewitness testimony: A witness, who originally testified he saw only one man in the shop, changed his story later to say he also saw a man resembling Merrill exiting the shop.

\* Wick's confession: A portion of Wick's second confession states he did the crimes with a slightly older friend from Reno who knew martial arts.

\* Conversing with friends: He talked with Wick and Brady about robbing crack houses and killing drug dealers inside.

\* Cross-examination: Merrill was caught in contradictions during a cross-examination by then-Deputy Dist. Atty. Jeffrey L. Robinson, who painted the defendant as a liar.

#### KEY EVENTS

Feb. 21, 1989: After Wick gets into trouble for having an unauthorized AK-47 on the Tustin Marine Corps base, fellow Marine Merrill rents a storage unit at Self-Lock Storage in Tustin for him and Wick.

March 8: Wick goes alone into the Newport Coin Exchange to arrange the purchase of \$45,000 in exotic coins. He tells the shop owner he has inherited a substantial amount.

March 14: Two people are killed and another gravely wounded in the robbery of the Newport Coin Exchange. Within minutes of the crime, someone visits Self-Lock Storage. Police think two robbers may have been involved, and evidence linking Wick to the crime is found at the scene.

June 6: Police and military investigators begin interviewing Marines at the Tustin Marine Corps Air Station. Wick is nervous. That afternoon, Merrill and fellow Marine John Brady move all of Wick's civilian firearms, including the 9-millimeter Sig Sauer pistol used in the crime, from the barracks to the off-base storage facility.

June 8: A day after authorities question him, Wick is absent without leave and is arrested when he arrives at his family's home in Reno. Police find the Sig Sauer pistol used in the shooting and several valuable coins presumably from the coin exchange in Wick's car.

June 15: Wick confesses to Newport Beach Police Sgt. Richard Long. He says he acted alone and began firing in a panic when the store owner confronted him with a shotgun, a confession that dovetails with the description of events of a surviving shooting victim.

Nov. 6: Police learn from Brady that Wick told him during a jail visit in July 1989: "I was there, I did it." The next day, Brady tells police Wick also claimed to have had an accomplice whom Wick described as an unnamed and somewhat older friend

from Reno. Under questioning, Brady said he had no information to support it, but thought that Merrill might be involved.

Nov. 20, 1990: More than 20 months after the slayings, Merrill is arrested. He tells police, "Your case . . . looks good on paper, but it isn't going to fly."

March, 1991: A preliminary hearing for both Wick and Merrill determines that there is enough evidence to try them on murder charges.

July 1: After weeks of trial, Wick and Merrill are convicted of two murders, conspiracy, attempted murder, robbery, burglary and various charges related to the use of a firearm. Eventually, Wick, who was cast as an unwitting accomplice in the crime, is sentenced to 37 years to life in prison. Merrill, now pegged as the triggerman, gets a life sentence without possibility of parole.

June 28, 1993: Court Commissioner Richard M. Aronson overturns Merrill's convictions and orders a new trial after siding with his new attorneys who argued that prosecutors had withheld evidence that would have helped Merrill, and his court-appointed defense attorney had performed incompetently.

#### CONFESSIONS TO A CRIME

Wick made two confessions, one to a Newport Beach police sergeant and one to a friend and fellow Marine.

\* Confession to police: On June 15, 1989, a week after his arrest, Wick gave a detailed account of the double murder robbery to Police Sgt. Long and told him that he had acted alone. In an account that dovetails with that of the lone surviving victim of the attack, Wick told Long that originally he was in the store by himself with only one of the victims, Renee King, wife of the coin exchange owner. Coin exchange owner William King entered the store sometime later with his friend, Clyde Oatts, Wick said. "I did the shooting because he (King) pulled a shotgun out and I had to defend myself," Wick said.

\* Confessing to a friend: On Nov. 6, 1990, Marine John Brady told Detective Michael P. McDermott that while visiting Wick in the Orange County Jail in July, 1989, Wick broke down and said, "They are going to fry me. I was there. I did it." After a lie detector test indicated Brady was untruthful about his knowledge of the crime, he admitted more to authorities, including Wick's statement that he carried out the crimes with an older friend from Reno who knew martial arts. Wick told Brady that the friend had ties to organized crime and wanted to get back some property stolen from him by a person at the Coin Exchange.

Source: Orange County Superior Court, Newport Beach Police Department

Researched by DAN WEIKEL and CATHERINE GEWERTZ / Los Angeles Times

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