

Oswald's attorney blasts state prosecutors

Petition for rehearing in new trial falls short, he says

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Waukesha - State prosecutors asking for a rehearing over a federal appeals court decision granting Ted Oswald a new trial did not satisfy the narrow requirements established for the rare proceeding, according to an attorney representing the convicted bank robber and killer.

Jerome F. Buting said in an answer to prosecutors' request of the 7th Circuit U.S. Court of Appeals in Chicago that the "state's petition amounts to nothing more than its belief the panel erred in its decision, which falls woefully short of the requirements for the extraordinary procedure."

"Nowhere in the petition does the state claim that the panel decision conflicts with any other decision of the 7th Circuit Court of Appeals or that consideration by the full court is necessary to secure and maintain uniformity in this circuit," Buting contends in the answer, which he filed this week. "Neither does the state's petition ever claim that this case presents a question of exceptional importance for any reason whatsoever."

Buting's answer was requested by the appellate court after lawyers from the state attorney general's office earlier this month asked that the full court reconsider the June 29 decision of a three-judge panel ordering the new trial. The request seeking the rehearing is one of two options available to prosecutors hoping to avoid a retrial. The other would be asking the U.S. Supreme Court to consider the case.

Oswald, 28, was 19 when he and his father, James Oswald, now 59, were convicted of a crime spree that involved a bank robbery, two carjackings, the taking of a hostage, police shootouts and the murder of a police captain.

U.S. District Judge Lynn Adelman overturned the younger Oswald's convictions and life imprisonment sentence in March 2003, ordering that he be freed or receive a new trial because of juror bias. Adelman's decision was upheld June 29 by a 2-1 ruling of the federal appeals court.

Both federal court decisions relied primarily on the conclusion that Waukesha County Circuit Judge Lee Dreyfus, Jr., who presided over the case, and, later, the Wisconsin Court of Appeals wrongly overlooked evidence that during four days of jury selection, jurors improperly discussed the case and exchanged views that the trial would be a waste of time because Ted Oswald was clearly guilty.

In their petition for a rehearing, prosecutors contended that the federal panel misconstrued federal law in granting a new trial. The panel also wrongly concluded that the decisions by Dreyfus and the state appellate court about juror bias were unreasonable, so it improperly substituted its judgment when it should have given deference to the state courts' decisions, according to prosecutors.

Buting says such deference would be improper in light of the circumstances. "Apparently, in the state's view, a federal court must defer to a state court's decision to conduct only a nominal investigation, however inadequate it is in relation to the evidence of juror bias," Buting argues.

Buting notes that for a rehearing to be granted, a panel's decision must conflict with prior decisions of the U.S. Supreme Court or the appellate court in Chicago or it must involve issues of "exceptional importance" on which the panel's decision conflicts with the "decisions of every other United States Court of Appeals that has addressed the same issue."

"The decision was simply an application of the law to the peculiar facts presented in this case," Buting said of the June 29 order for a new trial. "The three-judge panel was certainly competent to do that."

A decision on the rehearing request is expected in the next few weeks.