

Larry Mayes Awarded \$9 Million For 19 Years Wrongful Imprisonment

By James F. Love

An 18-year-old gas station attendant was robbed, abducted and raped in Hammond, Indiana on October 5, 1980. Two men, James Hill Jr. and Larry Mayes, were arrested for the crime and prosecuted as co-defendants. Both were convicted, with Hill sentenced to 80 years in prison and Mayes to 108 years.

In 2001 Mayes was excluded as the rapist by DNA testing unavailable at the time of his conviction. His conviction was overturned and he was released after a total of 21 years imprisonment. Hill had been released on parole in 1999 after serving 19 years, and his



Photo by Jennifer Linzer

petition to overturn his conviction is pending as of late 2006.

Mayes filed a federal civil rights lawsuit in 2003 seeking \$19 million in damages for his more than two decades of false imprisonment. The defendants included the Hammond Police Department and several officers. Among the lawsuits' allegations were that the officers failed to take any notes during the investigations first six-weeks, and they withheld from Mayes' trial counsel the exculpatory evidence that they pulled the victim off to the side and asked her to reconsider her identification of another person during a suspect line-up that did not include Mayes; and they used hypnosis techniques to "enhance" the victim's memory before she selected Mayes from a photo lineup that included multiple photos of him.

Mayes' burden of proof in the civil suit was extremely high. He had to show that the police department's overall procedures constituted a systemic failure resulting in negligent conduct towards the constitutional rights of suspects.

In a 106-page decision issued in July 7, 2006, U.S. District Judge Paul Cherry ruled against the defendant's summary judgment motion, and allowed the case to proceed to trial. He ruled that Mayes had met his burden of showing there were material issues of fact requiring a jury's determination in regards to whether or not the Hammond Police Department had failed to provide even the most basic oversight and training for the detectives in Mayes' case.

Mayes' civil attorneys were Cochran, Neufeld and Scheck of New York City, the private for profit law firm of Peter Neufeld and Barry Scheck, co-directors of the non-profit Inno-

Mayes cont. on page 9

Perez cont. from p. 7

the prosecutor is the representative of the Government in a criminal prosecution, his role is more than a mere adversary; he is charged with ensuring that an accused receive due process—that is, a fair trial.”⁵

The Supreme Court has, therefore, established that it is a violation of the accused's constitutional right to due process for the Government, in good faith or in bad faith, to withhold any material, exculpatory evidence whether or not the defendant explicitly requests this evidence. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).⁶

The prosecutor, moreover, is obligated to disclose any material, exculpatory information that is in its constructive possession—that is, any information that is in the possession of an “arm of the prosecution.” ... Thus, the Court may impute, to the prosecutor, the knowledge of any exculpatory evidence that is known to any government agent or agency involved in the prosecution of a criminal case.”⁷

As the Government's representative, the prosecutor has the responsibility to be aware of all information in the possession of the Government and ensure that this information, if favorable to the defendant, is disclosed to the defense. Otherwise, government agents and agencies would be encouraged to withhold exculpatory evidence from the prosecutor in order to avoid disclosing such information to the defense. Such a system would be manifestly unjust since exculpatory information possessed solely by a government agent or agency

would never come to light. Innocent defendants could face conviction since such defendants would not have access to the information that would exonerate them.⁸

No competent defense attorney would advise his client to plead guilty to a charge on which the Government would be unable to convict the accused. Therefore, if the prosecution's failure to disclose evidence could have, with reasonable probability, resulted in an inability to convict the accused, that is grounds for vacating a conviction pursuant to 28 U.S.C. § 2255.⁹

... [T]he evidence supporting the fact that Petitioner is a United States citizen, if improperly withheld, is material.¹⁰

The Government had constructive knowledge of the fact that Petitioner was a United States citizen when he was prosecuted pursuant to 8 U.S.C. § 1326. In 2000, when the Government prosecuted Petitioner for illegal reentry, the INS was the government agency that handled legal and illegal immigration and naturalization. ...¹¹

The INS's knowledge of Petitioner's citizenship status may be imputed to the prosecutor because the INS acted as a part of the prosecution team. ...¹²

In sum, the Government was obligated to disclose to Petitioner that he was a United States citizen because (1) that information was in the constructive possession of the prosecutor and (2) that information was material. Because the Government did not disclose the material, exculpatory information

to him, Petitioner suffered a constitutional due process violation. ...¹³

... To deny a United States citizen the privilege to reenter and remain in the United States, and the immunity from being convicted for doing so, would be “repugnant to the Constitution.” ...¹⁴

In the present case, because Petitioner has established that he is a United States citizen, it is a constitutional violation to convict him for reentering the United States. As a result, the Court finds that Petitioner's conviction and, in turn, his sentence should be vacated pursuant to 28 U.S.C. § 2255.¹⁵

The vacating of Perez's conviction may aid his position in a federal civil rights lawsuit for wrongful imprisonment he filed. The defendants include the federal BOP, the DOJ, and the Legal Aid Society in Albany, New York that represented him on the illegal reentry charge in 2000. That lawsuit is pending as of December 2006.

Endnotes:

- 1 *Perez v. United States*, No. 1:05-CV-1294 (N.D.N.Y. 08/15/2006); 2006.NNY.0000291 ¶13 <<http://www.versuslaw.com>>
- 2 *Id.* at ¶¶24-26.
- 3 *Id.* at ¶¶28, 30-31.
- 4 *Id.* at ¶¶34-35.
- 5 *Id.* at ¶¶37-38.
- 6 *Id.* at ¶39.
- 7 *Id.* at ¶40.
- 8 *Id.* at ¶42.
- 9 *Id.* at ¶44.
- 10 *Id.* at ¶45.
- 11 *Id.* at ¶46.
- 12 *Id.* at ¶47.
- 13 *Id.* at ¶48.
- 14 *Id.* at ¶49.
- 15 *Id.* at ¶50.

Mayes cont. from page 8

cence Project that aided in having the DNA tests conducted that led to Mayes' release.¹ They presented evidence that when Frank Dupey was appointed police chief in 1976, he was a former patrolman without any experience in supervising police or investigating crimes. He had been a clerk for Hammond City Judge Ed Raskosky, and when Raskosky was elected mayor, he had asked Dupey to head the department of 200 employees. Knowing he had no experience, Dupey passed his responsibilities to oversee the department down the line to a captain, also without experience, who then passed the responsibilities down to Detective (Lieutenant) Mike Solan. Solan had been in charge of the investigation into the crimes Mayes was convicted of committing.

None of the detectives involved in the rape and robbery investigation, had any training in identification procedures to be used in a rape case. In a lawsuit deposition given by Solan, he stated in response to a question by Mayes' counsel, "Identification procedure is so common. I mean, its not something that I

Baseball cont. from p. 4

will not be taken of such scientific facts and matters, however, unless they are of such universal notoriety and so generally understood that they may be regarded as forming part of the common knowledge of every person."

Although Mendez's argument that it is scientifically impossible for him to have thrown the firecracker relied on the understanding of physics pioneered by Sir Isaac Newton in 1679, the Court decided that because Mendez relied on a scientific formula beyond a layperson's expected knowledge, "we decline to take judicial notice. Consequently, Mendez's first assigned error is overruled."¹ In November 2004 the Ohio Supreme Court declined review of Mendez's conviction.

Oliver is so convinced of Mendez's innocence that after the jury awarded him \$1 million, Oliver said he was going to use the money to hire an attorney for his friend's fight to exonerate himself. Oliver said of Mendez, "I swear on my life he didn't do it," he said, "No, I take that back - I swear on my Marine reputation."

Endnote and Sources:

1 (*State v. Mendez*, 2004 -Ohio- 3107 (Ohio App. Dist.8 06/17/2004); 2004-ohio-3107, 2004.OH.0002907 ¶¶43-45 <<http://www.versuslaw.com>>)

"Two win Jacobs Field bomb suit. Jury awards each \$1 million for false accusation," By James F. McCarty, *Cleveland Plain Dealer*, November 10, 2006.

"Jury Awards Fan \$1 Million," by Matt Suman, *Cleveland Morning Journal*, November 11, 2006.

have to sit there and tell my detectives, you know, get six pictures that are similar and make sure they're all the same race. I mean, we don't have to go to 101 academics here. They know this stuff counselor."

Yet the procedure Solan defended was that the witness was asked to reconsider identifying a person in a regular line-up who wasn't Mayes, and the witness was then hypnotized before finally identifying Mayes in a six-picture photo-lineup that included several pictures of him. So contrary to Solan's claim that the detectives involved in the investigation did not need a course in "101 academics," Mayes' misidentification was predictable because the procedures used by the detectives are well known to result in an unreliable identification. In spite of the shady identification procedures used in Mayes' case, there use wasn't disclosed to him until his conviction was overturned in 2001 - 19 years after his trial.

Prior to the start of Mayes' civil trial, lawyers for the city of Hammond unsuccessfully attempted to call into question the certainty of the DNA evidence that freed him. They suggested that before the DNA testing in 2001, the evidence may have been compromised while stored in the court evidence vault. It is not well known to the general public, but police and prosecutors who are only too eager to use DNA evidence to convict a criminal suspect, have for the past 15 years attempted to call that same certainty of DNA evidence into question when it exonerates a person convicted by non-DNA evidence.

Jury selection for Mayes' civil trial began on August 7, 2006. The potential jurors were asked if they would have any difficulty awarding millions of dollars in damages to an African-American who had been wrongfully imprisoned for several decades.

Mayes took the stand on August 16. He described what it was like to be confined for 19 years in a maximum security prison convicted of a rape and robbery he had not committed - which had followed him being jailed for two years awaiting trial. The jurors were not permitted to hear evidence that Mayes had a prior conviction for rape and robbery. That prior unrelated conviction was why Mayes was targeted by police for the crimes against the gas station attendant that he didn't commit.

Two weeks after the trial began, the case was submitted to the jury on August 22. After only 4-½ hours of deliberation the jury returned a verdict against the city of Hammond and retired Detective Solan. They awarded Mayes \$9 million.

Hammond's attorney announced the city would appeal the jury's decision based on the exclusion of evidence about Mayes' prior convictions.

In the years since Mayes' conviction Solan has been promoted from lieutenant to captain in Hammond's Police Department. Before the civil trial the city of Hammond told Solan they would pay any damages awarded against him, and they paid for his attorney during the trial. After the jury's verdict they reneged and said they would only pay the first \$300,000 of his portion of the award. Solan's lawyer Nick Brustin said of the city, "They have never disciplined him, never investigated him (for misconduct in Mayes' case). Now, rather than pay Larry Mayes, they are going to force (Solan) into bankruptcy."

On December 8, 2006, a hearing was held in the U.S. District Court to determine how much of the \$9 million award Solan was liable to pay. Solan testified his assets were very modest. After the hearing Hammond's mayor, Thomas McDermott Jr., said the city would have to sell municipal bonds to pay their portion of the award, which would be levied as a small tax on city residents. In addition to the judgment, the city's legal fees continue to mount. They totaled more than \$788,000 before their appeal was filed. Although it is unknown if they will be successful, Mayes' attorneys are likely to request that their legal fees and expenses be added to the money he was awarded. If granted, that would add an additional \$3.6 million plus to the award. Otherwise the legal fees will be paid out Mayes' \$9 million.

After the jury returned the \$9 million award, the 57-year-old Mayes said that he still remembers Solan taunting him 25 years ago, telling him that he "would be an old man before he ever saw the outside again." Mayes told reporters, "I just want to let him know: 'How you like me now?'"

Sources:

"Hypnotism, withheld evidence highlighted in \$21M lawsuit," by Joe Carlson, *The Times* (Munster, IN), July 17, 2006.
"Hammond defends police practices," by Joe Carlson, *The Times* (Munster, IN), August 9, 2006.

"Defense firm fights to include DNA evidence in Hammond trial," by Joe Carlson, *The Times* (Munster, IN), August 10, 2006.

"Mayes takes stand in suit against copes," by Susan Brown, *The Times* (Munster, Indiana), August 17, 2006.

"Jury says city must pay \$9 million in wrongful conviction suit," by Joe Carlson, *The Times* (Munster, IN), August 23, 2006.

"Police officer faces paying part of \$9 million lawsuit," By Andy Grimm, *Post-Tribune* (Merrillville, IN), December 9, 2006.

1 Scheck and Neufeld publicize themselves as co-directors of The Innocence Project at the Benjamin N. Cardozo School of Law at Yeshiva University, but The Innocence Project's IRS Form 990 (2005) doesn't list them as having any official association with the organization.