

Duarnis Perez was deported to the Dominican Republic in 1996 after a felony drug conviction. At the time the 23-year-old Perez had lived in the United States for more than a dozen years.

Perez was arrested four years later at a New York border checkpoint while trying to enter the U.S. from Canada. Perez pled guilty to one count of illegal reentry after deportation (8 U.S.C. 1326). He was sentenced to 57-months federal imprisonment to be followed by three years of supervised release. After serving his prison sentence Perez was released from the federal Bureau of Prison's custody on April 9, 2004.

He met the next day with an Immigration and Customs Enforcement (ICE) officer, because he was being held in custody on an immigration detainer. The ICE officer told Perez he couldn't be deported because he was a U.S. citizen. Unbeknownst to Perez, his mother, or his lawyers in 1996 or 2000, he automatically became a U.S. citizen at the age of 15, when his mother was naturalized in 1988. Released from ICE custody, Perez was subsequently issued a Certificate of Citizenship dated July 2, 2004.

Based on the new evidence that he had been a U.S. citizen since 1988, in January 2005 Perez filed a writ of error *coram nobis* to vacate his conviction for illegal reentry. Due to his supervised release status that subjected him to the custody of the federal government, the U.S. District "Court ordered that Perez recharacterize his application as one for a writ of habeas corpus, pursuant to 28 U.S.C. § 2255." ¹

In October 2005 Perez filed a § 2255 petition requesting that his conviction be vacated and his supervised release terminated. His petition relied on the argument that as a U.S. citizen he had been wrongfully deported in 1996, and thereafter wrongfully convicted of illegal reentry in 2000.

The U.S. Department of Justice (DOJ) responded to Perez's habeas corpus petition by claiming his conviction should stand, because it was his responsibility to know his citizenship status, not the federal governments. The DOJ also asserted that Perez could have discovered he was a U.S. citizen if he had exercised "due diligence," so they contended he was procedurally barred from filing his habeas petition, because the one-year time period began tolling after his sentencing in 2000.

Perez countered that neither he nor his mother, nor his lawyers knew he automatically became a U.S. citizen in 1988 when his mother

U.S. Citizen's Conviction For Reentering The U.S. Vacated

By Hans Sherrer

was naturalized, because he was a minor under the age of 16 living legally in the U.S. under her sole custody. His mother had even erroneously told him he wasn't a U.S. citizen. Since he didn't know of his correct citizenship status until an officer of the federal government (ICE) informed him of that fact on April 10, 2004, Perez contended the one-year filing period began tolling on that date under the "new evidence" exception to the deadline imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

"The Government is arguing that an innocent man who was wrongly convicted should not be released from the custody of the United States. ... Because 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."

U.S. District Court Judge Lawrence Kohn

The DOJ also contended that since Perez had pled guilty he was barred from challenging (collaterally attacking) his conviction. Perez countered that an exception to that rule is when a petitioner presents newly discovered evidence that establishes his or her actual innocence of the crime. He argued that being informed by an officer of the federal government after he pled guilty, that he was a U.S. citizen, satisfied the "newly discovered evidence" exception.

A third contention by the DOJ was that Perez was procedurally barred from attacking his conviction by a habeas petition, because his direct appeal only challenged his sentence. Perez countered that the miscarriage-of-justice exception to procedurally defaulting on a defense claim applied to his case, because at the time he filed his direct appeal he did not know he was a U.S. citizen.

On August 15, 2006, U.S. District Court Judge Lawrence Kahn issued his ruling on Perez's habeas petition.

In regards to the DOJ's first argument, that Perez's petition was time barred, Judge Kahn wrote: "The Court ... finds that it was not unreasonable for Petitioner, once he had already been deported [in 1996], to assume that

he was not a United States citizen. ... Deportation is, in effect, notice, by the Government, to the deportee that he is not a United States citizen. ... The Court finds that the statute of limitations did not begin until Petitioner was informed of his citizenship status by the ICE agent on April 10, 2004. As a result, the instant petition, which was filed on January 13, 2005, is timely." ²

In regards to the DOJ's second argument, that Perez couldn't collaterally attack his conviction by a guilty plea, Judge Kahn ruled: "In sum, a petitioner may challenge his guilty plea if, in light of all new evidence provided by both the petitioner and the Government, the petitioner can show that a reasonable juror would have a reasonable doubt as to his guilt. ... In support of his actual innocence claim, Petitioner advances his Certificate of Citizenship as newly discovered evidence to prove that he is, in fact, a United States citizen. ... [T]he Court finds that Petitioner's Certificate of Citizenship properly serves as new evidence to support his actual innocence claim. ... Petitioner may advance a § 2255 petition to challenge his guilty plea." ³

In regards to the DOJ's third argument, that Perez had procedurally defaulted on his defense that he was a U.S. citizen charged with an offense reserved for non-citizens, Judge Kahn ruled, "The Supreme Court has, however, recognized a miscarriage-of-justice exception to the general bar. *Murray v. Carrier*, 477 U.S. 478, 495 (1986). ... [T]he Court may review the petition on its merits because Petitioner has established his actual innocence, as the Court previously noted, based on newly discovered evidence." ⁴

Having determined that he could consider Perez's petition on its merits, Kahn wrote:

"A federal prisoner may move the court that sentenced him to vacate his conviction and sentence when imposed in violation of the Constitution or laws of the United States. ... The criminal justice system of the United States fundamentally serves to ensure that "the guilty be convicted and the innocent go free." Yet, ... the Government opposes the § 2255 petition while simultaneously conceding that Petitioner is a United States citizen and, therefore, could not be properly prosecuted pursuant to 8 U.S.C. § 1326. ... In effect, the Government is arguing that an innocent man who was wrongly convicted should not be released from the custody of the United States. Moreover, the Government, in opposing a petition that would correct the wrongful conviction of an innocent man, has wasted limited judicial and prosecutorial resources. Because

Perez cont. on p. 8

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-

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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.