Lee Long Awarded $900,000 In Attorney Malpractice Suit For Botched Compensation Claim

By Hans Sherrer

Lee Long was convicted of rape, robbery and sexual abuse by a New York city jury in April 1995. His convictions were based on the eyewitness testimony of the victim, who identified Long as the perpetrator of the 1994 attack. In convicting him, the jury rejected Long's alibi that he was with his girlfriend the entire night that the rape occurred.

The 35-year-old Long was sentenced to two concurrent terms of 8 to 24 years imprisonment. His convictions were affirmed on direct appeal in 1997.

Long filed a post-conviction motion for a new trial, and during an interview with a Queens Legal Aid Society (Legal Aid) lawyer, he reiterated his alibi. He also said a NYPD officer had called his girlfriend before his trial, and verified his alibi. Legal Aid investigated his claim by tracking down the officer – who confirmed what Long said. The prosecution had concealed that information during Long's trial by neither having the officer testify, nor turning over his report to Long's lawyer.

Based on the "new evidence," Legal Aid filed a motion in March 2000 to set aside Long's conviction on three grounds: violation of his constitutional rights, newly discovered evidence, and dismissal in furtherance of justice. On June 23, 2000, Justice Joseph Golia issued an Order vacating Long's conviction and dismissing his indictment. Three days later, on June 26, Golia issued a written Memorandum in which he wrote, "the defendant's motion to set aside the judgment of conviction, pursuant to CPL 440.10, is granted, and the indictment is dismissed, in the interests of justice in accordance with CPL section 210.40."

Long was released after six years of wrongful imprisonment.

After his release Long contracted with the New York based for-profit law firm of Cochran, Neufeld and Scheck to pursue compensation for his experience. Barry Scheck – co-founder of the Innocence Project at Cardozo School of Law – subsequently filed on Long's behalf, a federal civil rights lawsuit against the City of New York and the NYPD.

On May 16, 2002, almost two years after Long's indictment had been dismissed, Scheck filed a motion to vacate Long's conviction on the ground of "newly discovered evidence," which Justice Golia did not do in June 2000. In an Order dated, May 28, 2002, Justice Golia wrote that "...defendant's convictions must be vacated" pursuant to CPL 440.10(g) [newly discovered evidence], and the indictment is dismissed in the interests of justice." The indictment's dismissal was a reiteration of the Justice's order of June 26, 2000.

Scheck then prepared a claim for state compensation with the New York Court of Claims. The claim was verified by Scheck and filed on June 26, 2002, two years to the day after Justice Golia issued his written

Long cont. on page 14

Goldstein cont. from p. 12

ceedings." … Unlike the removal of a deputy attorney from a particular case, which falls "within the District Attorney's prosecutorial function" because it is "intimately associated with the judicial phase of the criminal process," we determined that these challenged actions were "personnel decisions" falling "squarely within the District Attorney's administrative function." …

[33] Neither the Supreme Court nor this Court has considered whether claims regarding failure to train, failure to supervise, or failure to develop an office-wide policy regarding a constitutional obligation, like the one set forth in *Giglio*, are subject to absolute immunity. …

…

[35] … Goldstein does not contend that Van De Kamp and Livesay are liable because they knew about, condoned, or directed any specific trial decisions made by the deputy district attorneys prosecuting Goldstein's criminal case. Goldstein does not, for instance, assert that Van De Kamp and Livesay knew that Fink had been granted immunity for perjured testimony in Goldstein's particular case, or that they condoned withholding such information from Goldstein's criminal defense attorney. Instead, Goldstein rests his theory of liability on Van De Kamp and Livesay's alleged failure to develop a policy of sharing information regarding jailhouse informants within the District Attorney's Office and on their alleged failure to provide adequate training and supervision on this issue.

…

[38] In this case, Van De Kamp and Livesay contend that the challenged conduct was prosecutorial in function even if it may have been administrative in form. We disagree. In the context of determining whether absolute immunity applies, "prosecutorial" refers only to conduct that is "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. Thus, an act is not "prosecutorial" simply because it has some connection with the judicial process or may have some impact at the trial level. Were that the rule, then prosecutors would be absolutely immune from any suit because all actions taken by prosecutors arguably have some connection to the judicial process – even those, such as personnel decisions, that we have explicitly held fall outside the protections of absolute immunity. … As the Supreme Court has cautioned, "[a]lmost any action by a prosecutor, including his or her direct participation in a purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive." *Burns v. Reed*, 500 U.S. 478, 495 (1990).

[39] … we conclude that Goldstein's allegations are administrative and not prosecutorial in function. … Van De Kamp and Livesay have failed to demonstrate the required "close association . . . [with] the judicial phase of [Goldstein's] criminal trial," … Administrative work cannot be "retroactively transform[ed]" into the prosecutorial simply because "the evidence this work produced" might affect whether a prosecutor decides to bring a case or, if a case is brought, how the evidence is presented at trial. *Buckley*, 509 U.S. at 275-76. The allegations against Van De Kamp and Livesay, which involve their failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject, bear a close connection only to how the District Attorney's Office was managed, not to whether or how to prosecute a particular case or even a particular category of cases. Consequently, the challenged conduct is not prosecutorial in function and does not warrant the protections of absolute immunity.

[40] IV. Conclusion

[41] For the above reasons, we hold that the district court correctly determined that Goldstein's allegations against Van De Kamp and Livesay describe conduct in furtherance of an administrative rather than prosecutorial function. … Accordingly, the decision of the district court is AFFIRMED.

"I'm not dead" — Man Proclaims After NV Woman Arrested For His Murder

Krystal Yvette Warbington, a 22-year-old resident of Elko, Nevada was arrested on August 24, 2006, for the first-degree murder of David Scott in Navajo County, Arizona.

The fugitive warrant executed by the Elko police alleged that on June 3, 2006, Warbington murdered Scott by pushing him out of her car and running over him. Her bail was set at $250,000. The next day the *Elko Daily Free Press* published a front-page story titled, "Elko woman arrested in Arizona killing."

Several days later the newspaper received a phone call from Scott during which he informed a reporter, "I'm not dead." Scott had learned of the news report that Warbington had been arrested for his murder, and he wanted to set the record straight that there had been a major mix-up.

When contacted, the Navajo County Attorney's Office said that the warrant was erroneous, and Warbington was actually charged with attempted murder.

Sources:
Elko woman arrested in Arizona killing, by Marianne Kobak, *Elko Daily Free Press*, August 25, 2006.
'Murder victim' not dead; calls newspaper, by Marianne Kobak, *Elko Daily Free Press*, August 30, 2006.

Conviction Of Barking At Dogs Tossed

Kyle Little, 19, of Newcastle, England was arrested in August 2006 and charged with violating the public order when two policemen saw him barking and growling at two barking dogs.

At Little's trial the officers testified they thought he was causing the dog's owner distress. Convicted of causing harassment, alarm or distress, Little was fined $100 (£50) and ordered to pay court costs of $300 (£150).

Little appealed, and the Court quashed his conviction, stating, "growling or barking at a dog does not amount to an ... Offence." Little's lawyer Chris Mitford quipped, "I think the police were barking up the wrong tree."

There was public outrage that while the police complain about a money shortage, $16,000 (£8,000) was spent on Little's prosecution.

Source: He might be barking, but he's not breaking the law, by Michael Horsnell, *The Times* (London, UK), April 28, 2007.

Long cont. from page 13

Memorandum related to Long's vacated conviction and dismissed indictment.

On August 18, 2003, the New York State Court of Claims granted the State's motion to dismiss Long's claim on three grounds:

- The statute requires that a claim must personally be verified by the claimant, and not his or her attorney – as Scheck had done. ("... the claim must be personally verified and that an attorney's verification for an out-of-county claimant is fatally defective.") *Long v. State*, 2 Misc.3d 390, 768 N.Y.S.2d 552 (N.Y.Ct.Cl. 08/18/2003) 2003.NY.0010213 ¶43 <www.versuslaw.com>.
- The statute of limitations for filing a claim is within two years after dismissal, and Long's indictment was dismissed on June 23, 2000 – so Scheck filed Long's claim three days late when he did so on June 26, 2002. ("... the statute of limitations had run before the claim was filed …") *Id.* at ¶43.
- Verification of the claim by Long five months after it was filed could not cure Scheck's defective verification, because the statute of limitations had expired. (Long verified the claim in a letter dated November 20, 2002) ("… a corrected verification could not replace the defective one.") *Id.* at ¶43.

Scheck appealed the ruling on Long's behalf.

The New York Supreme Court, Appellate Division unanimously (5-0) denied Long's appeal, but they ruled in favor of the State on a ground different than had the Court of Claims. In their decision of June 20, 2005, the Court ruled that Long's indictment was dismissed in the "interests of justice," when the compensation statute requires that a claim must state the dismissal is based on "newly discovered evidence." Therefore Long did not make a viable claim. ("... both the decision dated June 26, 2000, and the order dated May 28, 2002, specifically indicated that the court was dismissing the indictment in the interests of justice. ... Accordingly, ... the claimant failed to make out a viable Court of Claims Act § 8-b claim...") *Long v. State*, No. 2003-09245 (N.Y.App.Div. 06/20/2005) 2005.NY.0006427 ¶21 <www.versuslaw.com>.

Prior to the state Supreme Court's issuance of its decision, Long fired Scheck and his firm, and hired NYC attorney Joel Berger.

In May 2005 Berger filed an attorney malpractice suit in federal court against Scheck. Long sued Scheck for $3 million in compensatory and punitive damages, plus treble damages and attorney fees. In October 2005, a federal judge denied Scheck's motion for summary judgment, paving the way for Long's suit to go to trial. [1]

Berger also took over as the attorney of record for Long's federal civil rights lawsuit against New York City and the NYPD.

After the state Supreme Court's adverse decision in June 2005, Long appealed to the New York Court of Appeal.

On July 5, 2006, the Court of Appeal issued a unanimous (6-0) decision against Long. The Court ruled that Scheck's verification of the claim was fatal, because the statute requires it to be verified by the claimant only. ("... claimant's failure to verify his claim in compliance with the statute mandates its dismissal.") *Long v. State*, No. 90 (N.Y. 07/05/2006) 2006.NY.0006809 ¶30 <www.versuslaw.com>. The Court also awarded the State "costs."

Although the Court's published decision went against Long, it did clarify several issues that may be of benefit to future litigants seeking compensation in New York state.

- The court ruled that the statute of limitations began tolling when the dismissal of the charges against Long was actually filed by the court clerk on June 28, 2000, not when the judge ordered the dismissal on the 23rd, or when he issued his Memorandum on the 26th. That means Long's claim was timely filed on June 26, 2002.
- The Court also ruled that the statute (Court of Claims Act § 8-b) only requires that a conviction be vacated on one of the designated specified grounds – regardless of the basis upon which the indictment is dismissed. That means Long's claim was valid since his conviction was vacated on the basis of "newly discovered evidence." Which is one of the statute's designated grounds for compensation.

Although Long's claim for state compensation was denied, on November 20, 2006, he agreed to a settlement of the malpractice suit against Scheck and his firm for $900,000. Long also agreed to settle his lawsuit against New York City and the NYPD for $50,000. [2]

The 47-year-old Long now lives in Alabama.

Endnotes:
1 Brooklyn: Case Against Lawyer To Go Ahead, *New York Times*, Metro Briefing, October 12, 2005.
2 Innocence Project Co-Founder Settles Malpractice Claim, by Tom Perrotta, *New York Law Journal*, November 21, 2006.