

Leroy McGee Seeks Florida Compensation

By Jon Burstein



Leroy McGee spent three years and seven months in prison for a robbery he didn't commit. His pleas of innocence were ignored by Broward County, Florida jurors, who convicted him. They

went unheeded until one of his many letters to the outside landed on the desk of someone who believed he might be telling the truth.

That someone was the same judge who sent McGee to prison. Broward Circuit Judge Paul Backman eventually overturned McGee's conviction. The victory, though, came a year after McGee finished serving his prison sentence.

McGee, 41, is now seeking compensation from the state for his lost years — time in which he lost his marriage, his job and the chance to watch his children grow up. He is the first person to apply for reparations under the state's Victims of Wrongful Incarceration Compensation Act passed last year. He could be eligible for \$50,000 for every year he spent in prison.

"This was an innocent man who hired the wrong lawyer and ended up paying the price," Judge Backman told the *Sun Sentinel*.

McGee, a soft-spoken carpenter's apprentice for the Broward County School District, said the money isn't as important as what it represents: total vindication. And while the Fort Lauderdale father of five says he has no definite plans for the money, he says it will be used to provide a better life for his children, who range in age from 5 to 22.

"I talk to a lot of people and they say, 'You aren't bitter? I can't see you not being bitter,'" McGee said. "But there's no need for me to be like that. ... I lost everything, but coming back now, I'm getting back double of what I lost."

His legal odyssey began in August 1990 when he walked into a Fort Lauderdale gas station to buy \$3 of gas. The clerk was convinced McGee, then 23, was the gunman who robbed him three weeks earlier of \$463. Police arrested McGee a few weeks later.

McGee, who had no prior record, thought it would be easy to prove his innocence. He had been at work as a custodian at Fort

Lauderdale High School when the July 31, 1990, robbery occurred. His boss could testify to that. He had a time card. His car had been at a garage for maintenance that day.

McGee said his attorney, Theota McClaine, assured him he was going to win. But when it came to the two-day April 1991 trial, the attorney was woefully unprepared, failing to take depositions or know what his defense witnesses would say, according to court records. McClaine failed to raise a single objection during the trial. He didn't tell jurors how the clerk's original description of the gunman as skinny with a mustache didn't match McGee, who is stocky and didn't have facial hair. The attorney tried to enter into evidence a time card for the pay period ending July 25, 1990—five days before the robbery.

"It was absolutely the worst performance in the courtroom I've ever seen," said Backman, who as a judge is limited to ruling on the issues presented to him. He's prevented from entering evidence or arguments on the record himself. He said he made suggestions to McClaine that went unheeded. McClaine, who was disbarred in 1993 for mishandling clients' money, could not be reached for comment.

A jury convicted McGee of robbery. Under mandatory sentencing guidelines, Backman had no choice but to give him a 4 1/2-year prison term. "I went blank after they said I was guilty," McGee said. "Until I got back to that cell, I was blank. I thought, 'How? How could I be innocent and get charged with a crime that I didn't do?'"

Prison changed him—patience was a luxury he didn't have because he didn't want to be seen as soft. Violence surrounded him. One time he was on the phone with his mother when an inmate collapsed near him. He had been stabbed in the chest.

McGee never wavered about his innocence. He wrote letters to anyone he could, from President Bill Clinton to the NAACP. When Backman received a letter, he took it as a legal motion by McGee challenging his attorney's effectiveness. That allowed him to appoint another lawyer, Michael Wrubel, to examine whether he had received adequate representation.

Wrubel argued McGee was in prison because his attorney was ineffective. In August 1995, Backman agreed, throwing out the conviction and ordering a new trial. "In over 1,200 jury trials this court has never witnessed a more tragic set of circumstances," Backman wrote. "While it is unquestioned that the armed robbery took place, it is also clear that the defendant was not the

individual who perpetrated the act."

The Broward State Attorney's Office dropped the robbery charge. And McGee, with the quiet lobbying of the judge, was able to get his job back with the Broward School District.

Thirteen years after his conviction was overturned, McGee said he learned of the Victims of Wrongful Incarceration Compensation Act. Fort Lauderdale attorney David Comras filed paperwork in August asking Broward Circuit Judge Michele Towbin Singer to declare McGee eligible.

In December 2008, Towbin Singer signed an order that McGee had established his innocence by "clear and convincing evidence." The state Attorney General's Office said that McGee's application for compensation is under review.

McGee said it's been hard explaining what's happened to his children. He tries not to focus on the negatives, but on what the future holds. He enjoys taking his 5-year-old daughter Le-Sharria to the park. He's a regular churchgoer. He's ready to finish his carpenter's apprenticeship in December 2009 and become a carpenter for the school district. "I just want the American Dream," he said.

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Bruce Lisker's Murder Conviction Tossed After 26 Years Imprisonment

Seventeen-year-old Bruce Lisker discovered his mother dead in the family's Los Angeles, California home on March 10, 1983. Charged as an adult and convicted of her murder by circumstantial evidence, Lisker was sentenced to 16-years to life in prison. The California Supreme Court denied his post-conviction petition in 1989. Lisker did not file a federal habeas petition.

Lisker filed a second state post-conviction petition in March 2003 based on new evidence of his innocence. After it was denied by the California Supreme Court, Lisker filed his time-barred federal habeas petition under the AEDPA's miscarriage of justice exception. After U.S. Magistrate Ralph Zarefsky's May 2006 Report and Recommendation that Lisker's petition be accepted for review on its merits, it was returned to the California Supreme Court for litigation

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Javier Ovando in 1998

Public Defender Malpractice Lawsuit Settled For \$750,000

Javier Ovando was 19 in October 1996 when he walked into a vacant apartment where two Los Angeles Police Department officers were conducting gang surveillance. The officers opened fire on Ovando, hitting him in his head, shoulder and hip. Ovando was unarmed, so the officers, Rafael Pérez and Nino Durden, planted a throwaway rifle near Ovando and concocted a story. They told investigators that Ovando burst into the apartment pointing the rifle at them, so they fired on him in self-defense. Ovando was paralyzed from the waist down.

During Ovando's 1997 trial he told the jury he was unarmed when the two officers gunned him down. However, Ovando was a

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of several new claims. After it was again denied by the state court, Lisker's petition was returned to federal court for a reconsideration that included the new claims.

Magistrate Zarefsky recommended for a second time in March 2009 that Lisker's petition be accepted for consideration on its merits, since he had established that "more likely than not that no reasonable juror would have convicted him in the light of the new evidence," and thus his conviction was a miscarriage of justice under the standard established by *Schlup v. Delo*, 513 U.S. 298 (1995). Zarefsky cited that Lisker had been convicted on the basis of "false evidence," his trial lawyer's failure to adequately represent him, and the cumulative effect of constitutional violations. *Lisker v Knowles*, No. CV-04-02687 (USDC CDCA, 03-02-2009).

U.S. District Judge Virginia A. Phillips agreed with the Magistrate's Second Report and Recommendation, and on August 6, 2009 granted Lisker's petition. With his conviction overturned, Lisker was released on bond seven days later, after 26 years and 5 months of incarceration. The Los Angeles DA's Office announced on September 21 that it would not retry Lisker and his indictment was dismissed.

For a copy of Lisker's 82-page California habeas petition send \$6 (stamps OK). For a copy of Magistrate Zarefsky's 69-page Report and Recommendation of March 2009 send \$6 (stamps OK). Mail request to: Justice Denied; PO Box 68911; Seattle, WA 98168

former gang member, so it was easy for the jurors to believe the testimony of Pérez and Durden that they acted in self-defense. Ovando was convicted of attempted murder and sentenced to 23 years in prison.

Ovando would have served out his sentence as just another innocent person waiting to deaf ears if it hadn't been for Pérez's greed. In August 1998 Pérez was identified as the person who checked out six pounds of cocaine from a LAPD evidence room using the name of another officer. The cocaine was not recovered. LAPD investigators believed that Pérez used his girlfriend to sell the cocaine for \$800,000. Pérez was charged with possession of cocaine with intent to sell, grand theft and forgery. After five days of deliberations a mistrial was declared with the jury deadlocked 8-4 in favor of conviction.

While preparing for Pérez's retrial, investigators identified eleven additional cocaine thefts he had masterminded. In those cases Pérez ordered cocaine from a police evidence room for transfer to another police station. He then switched Bisquick for the cocaine before checking it in at the other evidence room.



Rafael Pérez after his release from state prison in July 2001.

Facing a likely conviction with the new evidence, on September 8, 1999 Pérez agreed to a deal: In exchange for a five-year prison sentence and immunity from further prosecution, he provided information about two "bad" shootings and wrongdoing by three other officers who were members along with Pérez and Durden in the LAPD's Rampart Division – which covered eight square miles west of downtown LA. One of the "bad" shootings Pérez described was how he and Durden had framed Ovando. Based on Pérez's affidavit recanting his arrest report and trial testimony, the LA District Attorney's Office filed a writ of habeas corpus and Ovando was released on September 16, after 2-1/2 years in prison.

The initial information Pérez provided about Rampart Division corruption ultimately resulted in more than 100 convictions being overturned. Those convictions were identified as being based on bogus or unsubstantiated evidence. More than 70 Rampart Division officers were implicated in wrongdoing, and almost two dozen officers were either fired or resigned. The officers wrongdoing included: unprovoked beatings and shootings, framing suspects by planting evidence and writing inaccurate reports, stealing and dealing narcotics, bank robbery, perjury, and covering up

evidence of the officer's crimes. (See, "The Beat Goes On: The Lessons of O.J. Continue To Be Ignored," *JD* Issue 11.)

In late 1999 Ovando filed a federal civil rights lawsuit against the City of Los Angeles, the LAPD, and several police officers. On November 21, 2000 the suit was settled for \$15 million.

Pérez was released from state prison in July 2001. In December 2001 he was indicted by a federal grand jury for conspiracy to violate Ovando's civil rights and possessing a firearm with an obliterated serial number (the planted rifle). He pled guilty in 2002 and was sentenced to five years in federal prison. After his release, in 2006 Pérez legally changed his name to Ray Lopez.

In June 2002 Durden pled guilty in federal court to violating Pérez's civil rights and possessing a firearm with an obliterated serial number. He was sentenced to three years in federal prison and ordered to pay \$281,010 in restitution.

Ovando also filed a lawsuit in Los Angeles Superior Court against Los Angeles County and his appointed county public defender. Ovando alleged legal malpractice by his public defender. Among Ovando's claims was that his public defender knew Rampart Division officers had a pattern of planting evidence and falsifying reports – but he did not use that information in his defense of Ovando. The lawsuit went to trial, and in May 2005 a jury awarded Ovando \$6.5 million. In August 2005 the trial judge overturned the verdict on the basis of misconduct by one juror who lied during *voir dire* that she did not know anything about the Rampart scandal. Ovando lost his appeal of that ruling. Two weeks before the case set for retrial, it was announced on July 7, 2009 that Ovando agreed to settle the lawsuit for \$750,000.

More than 140 civil lawsuits were filed against the City of Los Angeles as a result of the Rampart scandal. It is estimated the city has paid at least \$125 million to settle the lawsuits.

The FX cable network series *The Shield*, was modeled after the Rampart Division scandal. The series about a corrupt LAPD police division was proposed to FX with the title *Rampart*. However, before being broadcast the name was changed for legal reasons. The series ran from 2002 to November 2008.

Sources:
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