



Jeff Deskovic

A Wrongfully Convicted Prisoner Currently Incarcerated in Sing-Sing Prison

Some time ago I wrote an article entitled *Jeffrey Deskovic Goes Back To Prison*, in which I chronicled my experience of going back to Sing Sing, which is a prison in Ossining New York at which I spent my last 28 days prior to being cleared.

As I reported at that time, I found it bizarre that people who were on the streets immediately around the prison went about their daily lives catching buses, going to school and work, totally oblivious to what was going on in their midst at the prison. This was so even though a mere few feet of the concrete prison walls separated life in the prison from the free world and the sidewalk of State Street, which is a public street in Ossining that people walk down and cars pass over every day.

The objectionable activities going on in the prison as a general order of the day included violations of everyday human rights, basic human dignity, and in some instances being forced to serve excessive sentences. Being wrongfully incarcerated there is also a possibility.

Those of us in Westchester who monitor the news, even moderately, know that there have been a number of wrongful convictions in our County that have been overturned. Therefore, innocent people being wrongfully convicted in Westchester is nothing new. But the housing of a prisoner in Sing Sing, who is manifestly innocent, going from the mere possibility mentioned above to an actuality, is much more dramatic and in your face.

For the reasons which I will set forth in this article, Fernando Bermudez, prisoner #92A8325, is such a man, having been wrongfully convicted of murder. To date, he has served 19 years, and has had

10 appeals thus far denied. His 11th, in the form of a post conviction motion, is currently being evaluated by a judge.

Expert Opinions

His case has received media attention from *The New York Times* both in 2007 and in 2009, *The Huffington Post*, *Court TV*, and the website *New York Lawyer*. All of those publications have questioned his conviction. His case has also been featured in the book *"Innocent"*, written by noted wrongful conviction expert Scott Christianson. To date, about half of the cases written about in Christianson's book have later been overturned by courts.

Other prominent people who are convinced of his innocence include attorney Kaufman, who used to be chief of the Criminal Division of the Southern District U.S. Attorney's Office; William Hellerstein who used to run Brooklyn Law School's "Second Look Program" before it ran out of money, and former prosecutor and legal commentator Bennet Gershman, who is also a law professor at Pace Law School.

Here is a small smattering of statements they have made. Taken from the online publication *New York Lawyer*:

"How can any prosecutor, reading the information in this brief, think [Mr. Bermudez] ought to be spending one more day in jail?" asked Mr. Kaufman. 'Any reasonable prosecutor,' he added, 'would have to be persuaded that there's been a manifest injustice in this case. I don't think that's too strong a statement. It's every prosecutor's nightmare to convict an innocent person.'"

Also, according to *New York Lawyer*, William Hellerstein, who

unsuccessfully represented Bermudez during federal appeals, said *"It's one of the biggest disappointments in my professional career. Of all the people I've represented, he's as innocent as I've ever encountered. There's hardly a day that goes by that I don't think of him."*

The *New York Times* quoted Bennett L. Gershman as saying *"The evidence powerfully shows that Bermudez is innocent."*

The Crime

Fernando Bermudez was convicted of shooting a 16-year-old youth, Raymond Blount, in 1992, in Greenwich Village in Manhattan. The following facts of the case are taken from *The New York Times*, and are not in dispute. *"On a dance floor at the Marc Ballroom on Union Square West, Mr. Blount punched another teenager, Efrain Lopez, apparently after he caught the youth looking at him the wrong way. Angry and embarrassed, Mr. Lopez later testified, he approached a man in the club whom he knew from his neighborhood and told him what had happened. Later, at 3 a.m. outside the club, Mr. Lopez and his friends again encountered Mr. Blount and his friends. People broke bottles, ready to fight. The man from the neighborhood asked Mr. Lopez to point out the puncher. Mr. Lopez pointed at Mr. Blount. With that, the man jogged up and fired one .25-caliber bullet into Mr. Blount's abdomen, severing an artery. He died at a hospital later that morning."*

Lopez identified Bermudez, saying that he knew him from the neighborhood, and four other witnesses identified him. Following a trial, Bermudez was convicted.

Evidence Of Innocence

There is a mountain of power-

ful evidence of his innocence. Efrain Lopez, who is the only witness who said that he knew Bermudez before the crime, has admitted, and prosecutor's acknowledge, that he committed perjury throughout his testimony. He had been questioned for 27 hours, eventually admitting that he knew the gunman. What's more is that he was afraid that the police would charge him with the crime, since they threatened him with that since he had pointed out the victim to the gunman.

He gave a description of a local drug dealer whose street name was "Wool Lou", known as such because in street lingo crack cocaine is known as "wools", despite knowing that Bermudez was not "Wool Lou". He said that the police, in possession of a mug shot of Bermudez from a marijuana possession charge and separate charge that he had tried to sell 165 grams of cocaine to an undercover agent. The police encouraged him to pick Bermudez. He clung to the false identification at the trial, but has admitted since then that he knew that Bermudez was not "Wool Lou".

The descriptions that he gave of "Wool Lou" do not match Bermudez in a number of ways. He said that "Lou" was 5' 11" and 165 pounds; Bermudez is 6'1 and weighed 205 pounds. He said that he knew Lou from high school and knew him to be a light skinned Puerto Rican; Bermudez is Dominican and darker. The school he said that Lou went to was P.S. 84; Bermudez had never attended that school. Bermudez had never been called "Wool Lou".

The real "Wool Lou" has been identified as Luis Munoz. His street name "Wool Lou" was known to the police because of his arrest record.



There is a facial resemblance between Munoz and Bermudez.

There are problems with the identifications made by four other people. Firstly, in violation of established protocols designed to prevent witnesses from influencing each other, the police allowed the witnesses to converse with each other. Speaking to the damage that such a violation in procedure could cause to the reliability of the identification, Federal Magistrate Fox said, despite upholding the conviction, according to *The New York Times*, "The police never should have allowed witnesses to discuss the mug shot as a group, a blunder he called "impermissibly suggestive and conducive to irreparable misidentification."

Secondly, all of the witness' have since recanted their testimony, saying that they had been manipulated by police and prosecutors, doing so even while risking being charged with perjury.

But that wasn't the extent of the prosecutorial misconduct. According to *The New York Times*, "In 2002, Federal Magistrate Kevin Nathaniel Fox concluded that the prosecutor's summation had included improper remarks."

Bermudez also had alibis. According to *The New York Times*, "Bermudez told the detective and a prosecutor, that he and three of his buddies had spent the night of the shooting driving around Manhattan looking for girls. At 2 a.m. they ate at a restaurant a few blocks from the shooting, he acknowledged. But he said they had left the area by 2:30, a half-hour before the shooting, and were back in Inwood by 3 a.m."

Bermudez also did not have an adequate defense. The prosecutor did not turn over his file until the last business day before the trial. *The New York Times* stated that "with only a weekend to study thousands of pages of witness statements, autopsy reports and grainy videotape of Mr. Lopez's statement, Mr. Kenyon did little to challenge the credibility of the five witnesses. Four of the five, it turned out, had arrest or conviction records. One, Michael Thompson,

had a gun possession charge that was dropped by the district attorney just before trial. That fact was never presented to the jury."

A Pending Decision

So why is he still in jail? For one thing, courts are skeptical of witness recantations, fearing that witnesses may be coerced or bribed, or for some other motivation are now lying. Another is that judges who are reviewing challenges to a conviction often *rubber stamp deny* decisions, as opposed to carefully looking at each case and tackling, head-on, the issues that the defendant raises and determining if the challenges have merit or not when weighed objectively.

Here are a few of the decisions that Bermudez has received: Bermudez's trial judge who turned down one of his attempts to overturn the conviction without a hearing, stating that he was troubled by the number of recantations, saying, according to *The New York Times*, "It strains credibility to believe that five unshaken trial witnesses would suddenly claim that they had testified falsely under oath," he wrote in a 1995 decision. Had Mr. Bermudez presented fewer than five, he said, it would have been more believable."

Federal Magistrate Fox discounted the recantations as unbelievable. He rejected the account of one witness because, he said, her testimony reflected a more precise recollection of events than she had exhibited at trial. On Judge Fox's recommendation, a judge in Federal District Court, Loretta A. Preska, turned down Bermudez's appeal, despite saying that there were improper prosecutorial comments and the police allowing the witnesses to impermissibly talk to discuss the mug shot.

All told, Bermudez has unsuccessfully appealed his case 10 times.

In his 11th try, he may have his best chance of freedom. In the first week of August of this year, according to *The New York Times*, State Supreme Court Justice Cataldo said in a 13-page decision that the 2004 magistrate's finding that witnesses

had conferred before collectively picking Mr. Bermudez's mug shot "cannot be ignored." and that if he comes to the same conclusion as the magistrate, Justice Cataldo wrote, state law would require a reversal of the conviction and a new trial.

He further said that "The People's only trial witness who testified to having known the shooter prior to the night of the crime, is now conceded by the People to have committed perjury throughout his trial testimony"

The prosecution has conceded that if the conviction is reversed, they have no evidence with which to take Bermudez back to trial. Therefore, they have vowed to vigorously appeal any ruling that favors Bermudez.

Commentary

This case is one of an obvious wrongful conviction. There are all of the discrepancies between Lopez's description of "Wool Lou" and that of Bermudez. There is the violated safety protocol regarding witness discussions of mug shots that automatically renders any identification unreliable. Further more, the witnesses have all recanted.

Then there was the police having a file on the real "Wool Lou". When that fact is coupled with the fact that the witnesses who recanted said that the police and prosecutors manipulated them into making the misidentification, it is obvious that witnesses are telling the truth. Why else would they not have investigated Munoz right then and there? The answer seems obvious: that as the witnesses said, they wanted to arrest Bermudez.

Courts *rubber stamp denying* appeals is nothing new, and continues to be an issue. In terms of witness recantations, I don't believe that they should, in general, and certainly not in this case, be viewed with suspicion.

Instead, I believe that they should be objectively considered, the same as any other post-conviction piece of evidence would be.

Each case should be looked at on a case-by-case basis, rather than some set-in-stone formulaic judicial policy.

Furthermore, unless there is some piece of evidence indicating a reason to disbelieve a recanting witness, I believe that should be enough to overturn a conviction, in order to be safe. The saying by Voltaire comes to mind [paraphrased] "it is better for ten guilty people to be let go than to wrongfully imprison one innocent man to be convicted."

I still continue to be shocked, although it is nothing that I haven't seen before, that identifications that contain height and weight discrepancies continue to be the basis for convicting someone and upholding convictions.

The prosecutor's stubbornness is a familiar pattern that we have seen before by prosecutors not wanting to admit to an error. I think that Bermudez will obtain relief in his latest appeal. But I would hope that the new Manhattan D.A. Cy Vance will consider, once he takes office, dropping the case against Bermudez, and/or that the Attorney General will intervene, in order to end the wrongful imprisonment of this manifestly innocent defendant. ■



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