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Judge Says Murder Defendant Jailed for 18 Years Is Innocent

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A judge in Manhattan yesterday dismissed a 1991 murder indictment "with prejudice," finding an inmate jailed for 18 years to be "actually innocent."

Acting Supreme Court Justice John A. Cataldo ([See Profile](#)) found that the conviction of Fernando Bermudez to have been undermined by flawed identification procedures and the submission of testimony that the prosecution should have known to be false.

"All of the credible evidence," Justice Cataldo wrote, points to a person other than Mr. Bermudez as the killer of a teenager outside a Greenwich Village night club nearly two decades ago.

Taken together, all of the flaws identified by a team of pro bono lawyers representing Mr. Bermudez established his innocence by "clear and convincing evidence," Justice Cataldo concluded.

He announced his decisions at a court session attended by Mr. Bermudez, his wife, parents and other relatives.

Justice Cataldo apologized to Mr. Bermudez, saying, "This court wishes to express its profound regret over the past 18 years. I hope for you a better future."

With his family members sobbing and applauding, Mr. Bermudez was led away. The 40-year-old still faces an unrelated drug-sale conviction.

In grounding his ruling on actual innocence and dismissing the indictment, Justice Cataldo barred the prosecution from retrying Mr. Bermudez.

Alicia Maxey-Greene, a spokeswoman at the Manhattan District Attorney's Office, said the

office "strongly disagrees" with the ruling and is considering an appeal.

Justice Cataldo wrote that "our State Constitution provides a state prisoner alleging actual innocence with greater protection than the federal constitution, by enabling a freestanding claim of actual innocence to be raised by post-conviction motion."

Justice Cataldo is the third trial judge in New York to recognize "actual innocence" as an independent ground for habeas relief.

No New York appellate court has reached the issue, according to Alan R. Kaufman, a partner at Kelley Drye & Warren, one of Mr. Bermudez's pro bono attorneys. The Supreme Courts of Illinois, New Mexico and Missouri, however, have all recognized such claims under their constitutions.

In 1993, the U.S. Supreme Court reached the opposite conclusion with respect to the federal Constitution in *Herrera v. Collins*, 506 U.S. 390.

Mr. Bermudez had been serving a term of 23 years to life for the 1991 murder. He is not eligible to be released, however, because he was also sentenced on federal narcotics charges to 27 months, to be served consecutively after he completes the state murder sentence.

Mr. Kaufman vowed to bring legal proceedings in the Southern District to secure Mr. Bermudez's release as soon as possible.

"It would be horribly inequitable for him to serve another 27 months on the federal sentence when we now all know that he should never have served 18 years for the murder," Mr. Kaufman said.

All five eyewitnesses to the slaying had recanted their 1992 trial testimony, and no forensic evidence tied Mr. Bermudez to the crime ([NYLJ, Aug. 10](#)).

Each side accused the other of pressuring the witnesses to recant. Four of the witnesses were friends of the slain teen, Raymond Blount. The fifth, Efraim Lopez, also a teen, had been involved in a fight with Mr. Blount over a girl.

Parsing three written statements that Mr. Lopez had given the police, Justice Cataldo concluded in *People v. Bermudez*, 8759/91, that the prosecutor in the 1992 trial, Assistant District Attorney James Rodriguez, "knew or, should have known, that Efraim Lopez gave materially false evidence at trial."

Justice Cataldo called Mr. Lopez's testimony "blatantly false." Mr. Lopez testified under a cooperation agreement that allowed him to avoid prosecution.

Ms. Maxey-Greene, the Manhattan district attorney's spokeswoman, said Mr. Rodriguez "did not believe any testimony was false at the time."

Mr. Rodriguez no longer works at the office, but Ms. Maxey-Greene declined to comment further.

Critically, the district attorney's office conceded during a six-day hearing in September that Mr. Lopez's identification of Mr. Bermudez as the shooter was false.

"For the first time," during the habeas hearing, Justice Cataldo wrote, the prosecution "affirmatively conceded" facts that "unquestionably demonstrate" that Mr. Lopez's testimony was false. That false testimony, he found, was "material, substantial and persuasive."

Assistant District Attorney Peter Casolero handled the habeas hearing for the prosecution.

The four other witnesses were with Mr. Blount at the Romper Room on East 13th Street at the time he was shot.

Their identifications were fatally flawed, Justice Cataldo found, because they had been allowed to discuss the photographs they had been shown in identifying Mr. Bermudez. That procedure was unduly suggestive, he concluded.

Also representing Mr. Bermudez pro bono were Barry Pollack of Miller & Chevalier in Washington, D.C. and Lesley C. Risinger of Kearney, N.J.

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