

STOLEN HAPPINESS

FERNANDO BERMUDEZ

The wrongful arrest and conviction of Fernando Bermudez demonstrates the American criminal justice system being forced to correct itself, despite public faith in jury trials, because Mr. Bermudez fought to exonerate himself after losing ten appeals. Mr. Bermudez's essay entails his over eighteen-year wrongful incarceration in New York until proven "actually innocent" in 2009. This essay urges reform and accountability of mistaken eyewitness identification, perjured testimony, and police and prosecutorial misconduct as factors that began Mr. Bermudez's ordeal in 1991. In particular, this essay examines how race, rushed judgment, and profit may have contributed to Mr. Bermudez's ordeal while aiming to prevent the overall public safety and human rights problem of the innocent in prison and mass incarceration.

Introduction

How is it that I lost over eighteen years in prison and forced the American criminal justice system to prove my "actual innocence" despite public faith in jury trials? It has been legally proven that mistaken eyewitness identification, false testimony, illegal identification procedures, and police and prosecutorial misconduct directly caused my ordeal that urges legislative reform and accountability. However, there are, I believe, factors related to race, rushed judgment, and profit that may have also contributed to my preventable ordeal. Together, these factors may have cooperated to help steal my happiness as part of America's continuing problem with the innocent in prison and mass incarceration, now shared as hard-won insight from observations during and after my wrongful incarceration.

School of Hard Knocks

My crash course in thwarted due process began the morning of August 6, 1991, on the heels of Rodney King's videotaped beating by Los Angeles police officers and as South African Apartheid approached its end. Race, rushed judgment, and profit seeking contributed to my unjust incarceration. Amid my mother's screams, detectives arrested me in front of my Washington Heights home in Upper Manhattan, New York City, which I shared with my parents and four younger siblings. After holding guns to my temple and pat-frisking me, detectives squeezed me between two detectives in a squad car with handcuffs as tight as tourniquets. A burly detective jokingly apologized for cutting my night short while his partner, in utter seriousness, remarks in a Boston accent, "Let's move this cah!"

As our caravan sped off, my mind whirled in shock and disbelief, unaware of the murder charge against me. Hours later, I was fingerprinted and photographed in Manhattan's Sixth Precinct. In response to questions about my whereabouts on August 3 and 4, 1991, I explained that I had just taken a college placement test and planned to enter the medical profession. I was twenty-two and enjoying the happiest time of my life. I had been driving around with friends in my father's car, which had been repaired earlier that afternoon. Bewildered, I emphasized that I had nothing to do with any violence, let alone violence at the Marc Ballroom where teenagers crowded to party that evening.

The Shooting

I was arrested for fatally shooting Raymond Blount as he left a crowded party at the Marc Ballroom. According to police, Raymond Blount had punched Efrain “Shorty” Lopez. Seeking revenge, Lopez identified Blount to his neighborhood friend, street-named “Woolu,” who law enforcement admits ignoring. As bottles and fists flew, Woolu emerged from a large group of Latino youths and shot Blount dead.

Despite the aligning information obtained from my friends in separate interviews, rookie homicide detective Daniel Massanova and veteran prosecutor James Rodriguez rejected my alibi. At the police precinct, Blount’s best friends, along with four other teenaged witnesses, illegally discussed and shared mug shots, and Blount’s best friends correctly identified Lopez as the shooter’s accomplice. When questioned by police on August 5, 1991, Lopez repeatedly identified the killer in his videotaped interrogation to Det. Massanova and prosecutor Rodriguez as “Woolu,” “Lou,” and “Luis.”¹ Police reports described the shooter as 5’10” tall, 165 pounds. I am 6’2” tall, 215 pounds, and my street name was “Most.” I do not match the description of the shooter that Lopez revealed. These exonerating facts should have logically prevented this case from hurling into the twilight zone.

Descent into Madness

Instead, Murphy's law continued, from illegal photo identification procedures to an unfair seated lineup with plainclothes detectives that hid my true height and weight. Then, after waiting for hours in hot, crowded jail cells to plead innocent before a judge where a stench of sweat, vomit, and urine hung with my fate like humidity in the air, I entered Rikers Island. Rikers Island is the largest penal colony in America. It still serves as a detention center for those arrested in New York City awaiting resolution of charges. Grey, desolate, and foreboding, this urban gulag archipelago was a hotbed of violence for over 14,000 prisoners after a bloody riot in the summer of 1990. When I arrived in 1991, violent incidents numbered 2,500,² nearly the average annual homicide rate in New York City since 1989,³ which caused the *New York Times* to dub Rikers Island a place where there is a “bloody struggle for control.”⁴

Stripped naked in crowded jail cells, my hands as fig leaves while waiting inspection by prison guards, I await my criminal trial. During my fourteen-month incarceration, Rikers Island was a human tinderbox; emergency response alarms blared daily to quell violence. I witnessed many inmates hurting each other with crude weapons called “shanks” for control of inmate phones and illegal drugs amid delusional mandates for respect. I, too, was physically assaulted. Besides razors and even a gun that inmates smuggle to shoot each other with, shanks come from metal in hospital casts, broken fans, radiators and toothbrush plastic, sharpened on concrete, at times dipped in feces for added skin infection in bloody conflicts. Rikers created a fear-driven urge in me to survive knowing I could die in prison, which worsened as my wrongful arrest and imprisonment continued.

Disbelief to Disillusion

In January 1992, I sat incredulous during my trial, overcome as if having an out-of-body experience. Five teenage witnesses had paraded a chicanery of lies, confusion, and deceit before the

¹ *People v. Bermudez*, No. 8759/91, 2009 WL 3823270, at *4, *6 (N.Y. Sup. Ct. Nov. 9, 2009).

² Tim Golden, *Inside Rikers Island: A Bloody Struggle for Control*, N.Y. TIMES (Sept. 1, 1990), <http://www.nytimes.com/1990/09/01/nyregion/inside-rikers-island-a-bloody-struggle-for-control.html>.

³ Kenneth Tardiff et al., *Homicide in New York City: Cocaine Use and Firearms*, 272 J. AM. MED. ASS'N 43, 45 (1994) (“Cocaine was found in 31% of the 4, 298 people murdered in New York City in 1990 and 1991.”).

⁴ Golden, *supra* note 2.

judge and jury. One witness, testifying under a false name, admitted to being drunk the night of the shooting.⁵ Two other witnesses, arrested because they refused to testify, had their unrelated criminal charges dismissed before my trial, which they later revealed encouraged their cooperation.⁶ It does not matter that three of Blount's best friends testified in my defense, or that my alibi witnesses and I took the stand, placing me miles away from the shooting. It does not matter that I passed a lie detector test and there is no physical or forensic evidence linking me to the crime. Nor does it matter that the prosecutor hid from the jury other Latino suspects that witnesses had identified and had systematically eliminated all Latinos from the jury to bias them against me. The jury nevertheless found me guilty of second-degree murder.

Hope Springs Eternal?

Despite these horrible facts, it seems that this unfair verdict may be overturned because of new evidence of my innocence and other prosecutorial improprieties against my defense revealed before and since my trial. In March 1992, my private investigator, Michael Gaynor, had discovered "Woolu's" real identity, location, friendly relationship to Lopez, and the fact that he left New York after the murder—which Detective Massanova promised to investigate, but ignored.⁷ At this point, the presiding judge at my trial, Justice John A. K. Bradley, could have stopped my sentencing in light of my defense's disadvantage from the late disclosure of evidence by the prosecution. He also could have reviewed additional evidence discovered after my trial, such as Lopez's recantation affirming his perjurious testimony. Yet Judge Bradley refused, ordering me to stand in his courtroom as court officers surrounded me on September 18, 1992. Standing before him, I exclaimed:

I never did this. I had no reason to do this. Never, never. I would never wish bodily harm on anybody. . . . [S]omething is wrong here. If something wasn't wrong it would have been a senseless thing, but something is wrong. You can tell something is wrong. People are lying, people are wrong. I'm not Wooloo. I never killed anybody or ever will. . . . Justice has not been done here. I only wish God could come as my witness and . . . make justice for real . . .⁸

Wobbly, I almost dropped into my chair when I was sentenced to life in prison, but handcuffs lifted me away. Judge Bradley's denial of my attorney's review of exonerating evidence hidden by the prosecutor until jury selection had hurt my defense—the jury did not hear Lopez's unredacted videotaped interrogation naming the alleged real perpetrator as a drug dealer from his West 90s Manhattan neighborhood named "Woolu," "Lou," or "Luis." This gave Lopez, the prosecution's star witness, the chance to enter into a cooperation agreement that dismissed his accomplice-to-murder charge, and allowed him to commit perjury against me without the jury's knowledge.

The Spark of Education

Convicted of murder, my head was shaved bald by the New York State Department of Corrections (DOCS). They replaced my civilian clothing with green prison uniforms and identification numbers that challenged my humanity. They also strip-searched me naked each time I saw my family six hours away. To find judicial relief, I must prove that the jury was deceived and that I was deprived of

⁵ People v. Bermudez, No. 8759/91, 2009 WL 3823270, at *30 (N.Y. Sup. Ct. Nov. 9, 2009).

⁶ *Id.* at *32.

⁷ *Id.* at *15–16.

⁸ Trial Tr. 1739–40.

due process. Unfortunately, appeals take time, their odds of success remote, and my mind battles to become either my worst enemy or best friend!

Consequently, while doing time in prison instead of, as the saying goes, “letting time do me,” I exercise to relieve stress and clear my thinking. I resumed my college vision from city streets early in my incarceration by educating myself at every opportunity. In doing so, I avoided the idleness, gossip, and rumors that dominate the dangerous prison environments, as well as television, the Department of Correction’s modern equivalent of the Roman Empire’s bread and circuses, used to pacify its ancient population.

Seeking Truth

As my educational efforts continued, my father continued his quest for justice. In 1993, he secured pro bono attorney MaryAnn DiBari. DiBari and private investigator Michael Gaynor investigated post-trial evidence, including Lopez’s 1992 recantation and claims that threats by Detective Massanova and prosecutor Rodriguez coerced him into falsely identifying me. Thankfully, DiBari and Gaynor replaced my parents, who had been investigating and searching for leads in the West 90s neighborhood with my then 8-year-old diabetic sister in tow. During one of these precarious undertakings, my father encountered a shady character who invited him into a dark building to receive an investigative lead. Fortunately, my father declined, suspecting insincerity to expose the truth. So, too, with law enforcement’s admitted neglect to investigate this neighborhood after my father shared developing leads with its local police precinct in vain.

Still, my parents do not quit. My mother created gift basket raffle sales and cleaned apartments to pay transcript and attorney fees for appeals before and after Judge Bradley, which proved unsuccessful year after year despite pro bono help from MaryAnn. They conducted media interviews to get my case re-opened, which encouraged my dad to re-focus against alcohol’s empty promises. They hoped again and again that injustice would not dash their American dreams.

Persistence Pays

Continuous reading helped me ace a legal research course, obtain my first college degree in 1997, and a teaching certificate to help teach Latin American history in prison. This refined my writing and communication skills to obtain more pro bono attorneys in 2007 after losing ten appeals through the benefits of solitude amid my involuntary servitude. Solitude, unlike possible mental torture from isolation, set me apart from the prison population “not on their job,” as it were. Through solitude my cell became a window to the world, a laboratory bubbling with knowledge where I envisioned myself vindicated to help society prevent the horror of wrongful convictions. Here, I listened to my radio for current events when not researching, writing, or typing in the prison law library. Solitude also helped me envision a business plan to re-sell clothes in prison purchased wholesale, which helped my wife and three children survive poverty and near homelessness as I struggled to survive twenty-four hours a day in prison that seemed like forty-eight.

By 2007, expanded efforts distinguished me from over two million American inmates, allowing me to avoid becoming unproductive and incessantly miserable. Inspired by the Dreyfus Affair and the way its champions corrected anti-Semitic military injustice in the late nineteenth century,⁹ I formed a freedom committee: “Fernando Bermudez is Innocent,” or FBII. The committee established my case on Court TV, now TruTV, aired in late 2005, which inspired rallies in lower Manhattan. This pushed my

⁹ Douglas Porch, *The Dreyfus Nightmare*, 25 MILITARY HIST. 40, 42 (2008).

case into the national spotlight again, after NBC Nightly News coverage in 1996 and the 2003 release of Dr. Scott Christian's book featuring my plight, entitled *Innocent*.¹⁰ And an FBII-created DVD compiling my case's extensive media coverage and featuring attorney MaryAnn DiBari discussing the exculpatory legal documents and evidence inspired more help.¹¹

Shuffling the Deck

Consequently, fate deals my case favorable cards in 2007 as I began completing my bachelor's degree in behavioral science at Sing Sing state prison. A new pro bono attorney, Leslie Risinger, strategized that accumulated evidence of my innocence, including a federal judge's ruling in 2004 that my identification procedures were tainted, could launch a new state court proceeding. She recruited her Seton Hall law professor husband, Michael Risinger, along with lead counsel, Barry Pollack, from Miller & Chevalier in Washington D.C., who involved Alan Kaufman, a former chief federal prosecutor and attorney at Kelly Drye & Warren, LLP, New York. Together with amicus briefs by Centurion Ministries in New Jersey, New York's Innocence Project, and Davis Polk & Wardwell, LLP, we entered New York State Supreme Court in 2008, hopeful that our CPL 440.10 motion would succeed in overturning my conviction on actual innocence grounds.

A new State Supreme Court judge, Justice John Cataldo, granted the prosecution's request to investigate our claims. In August 2009, he ordered an evidentiary hearing on my CPL 440.10 motion. He then ordered an evidentiary hearing in August 2009 after my attorney, Lesley Risinger, obtained undisclosed documents inside the prosecutor's office that proved my innocence further. This newly discovered evidence included not only failure to disclose exculpatory evidence from the prosecution's secret investigation in 2006 involving an interview of Luis Munoz, aka Woolu, whose 1991 alibi proved false; it also forced the prosecution to admit that its star witness, Efraim Lopez, gave false testimony at my trial, and that Woolu has been arrested several times in other states under the alias, Luis Alonzo, since leaving New York after the murder.

Justice Cataldo's evidentiary hearing order on "clear and convincing" evidence of my actual innocence began in September 2009. Eighteen years after my original trial, he criticized the prosecution's efforts to investigate my case. Days before the hearing, my family and I had rejected the prosecution's offer for me to accept time served in Alford Plea form to manslaughter instead of my second-degree homicide conviction. Rejecting this Faustian bargain, of course, meant that if I lost this appeal, a parole board could deny my freedom for many years beyond my scheduled 2014 appearance, especially if I would not admit guilt or express remorse before them. Still, my wife and I prayed, cried, and hugged our children during our last conjugal visit that summer, having faith in God that the Mark of Cain against me would vanish and bring me home to address several problems, including my eldest daughter having then been hit by a car.

Our hopes and prayers proved true in November 2009, after eleven appeals, eleven defense witnesses, and an eleventh hour appeal! Justice Cataldo silenced a packed courtroom to rapt attention as reporters scribbled furiously and cameras rolled. Everyone braced themselves, sighs of relief punctuating the courtroom as Justice Cataldo proclaimed:

¹⁰ See Paul von Zielbauer, *Accusers Recant, but Hope Still Fade in Sing Sing*, N.Y. TIMES (April 13, 2007), http://www.nytimes.com/2007/04/13/nyregion/13appeal.html?pagewanted=1&_r=3&sq&st=nyt&scp=7&

¹¹ One of these sources of help was journalist Claude Solnik, who joined my defense in 1991 and always urged the Manhattan District attorney's office to investigate my case.

Defendant's motion to vacate his conviction upon the ground of newly discovered evidence, pursuant to CPL 440.10(1)(g), is granted. Further, defendant's motion to vacate his conviction upon the ground that material evidence adduced at trial was false, or should have been known by the prosecutor to be false, is granted. CPL 440.10(1)(c). Defendant's motion to vacate his conviction upon the ground that unduly suggestive procedures took place which violated defendant's rights under the constitution of this state and the federal constitution is granted. CPL 440.10(1)(h). Pursuant to CPL 440.10(1)(c)(g) & (h), a new trial is the appropriate remedy. However, I find by clear and convincing evidence, that the defendant has demonstrated his actual innocence. Accordingly, defendant's motion to vacate his conviction is granted and the indictment is dismissed with prejudice.¹²

At this point I neither heard Justice John Cataldo's entire decision nor his apology on behalf of New York State and "hope for a much better future"¹³ for me because I was crying in joyful relief, oblivious, while hugging my attorneys. Indeed, to paraphrase the late Justice Louis Brandeis, the sunlight of truth had become the best disinfectant against rotten lies, an anemic investigation, and the machinations of an adversarial system that seemed to take it personally because my immigrant parents loved me and would not quit until their son returned home.

A new beginning had dawned, rays of hope evident, and in the streets outside Justice Cataldo's courtroom, away from the few remaining IN GOD WE TRUST symbols in American courtrooms, my supporters danced, wearing FBII T-shirts. My wife tearfully thanked Jesus before an ABC news microphone, my mother cried how "happy, happy, happy" she felt, and attorney Barry Pollack explains our legal victory. From a cave in Israel, MaryAnn DiBari, having beaten malignant breast cancer which had incapacitated her between 2002 and 2005, praised God for justice with fellow worshippers, renegotiating with God, she said, to grant her life beyond our legal victory as spring in the winter of my life has finally arrived!

A New Beginning

Soon, huge metal prison doors cracked open as if a medieval fortress, allowing my wife and I to first pick up our three children from our Connecticut home¹⁴ and her parents visiting from Oklahoma. That night, we returned to Washington Heights, New York City. En route, I ate my first Big Mac, which delighted a New York Times reporter accompanying us on this different caravan enjoying freedom.¹⁵ My old neighborhood, drastically changed, gave me a hero's welcome as residents banged pots and pans, cheered from windows and a crowded street with reporters amid reverberating chants in Spanish of "Libertad, Verdad, Justicia!" or Freedom, Truth, Justice. My parents' home never felt better and an invigorating first run in my childhood stomping ground, Inwood Park, marked the finishing line from prison yards where I ran to ease my anxiety to a happier life with my beautiful three children and my wife's superb cooking.

¹² People v. Bermudez, No. 8759/91, 2009 WL 3823270, at *36 (N.Y. Sup. Ct. Nov. 9, 2009).

¹³ John Eligon, *Man Jailed for '91 Murder Is Cleared by Judge*, N.Y. TIMES, Nov. 13, 2009, at A23, available at <http://www.nytimes.com/2009/11/13/nyregion/13freed.html>.

¹⁴ John Eligon, *After 18 Years, Freed to a World With Cellphones*, N.Y. TIMES, Nov. 21, 2009, at A17, available at <http://www.nytimes.com/2009/11/21/nyregion/21released.html>.

¹⁵ *Id.*

Adjusting and Giving Back

The Manhattan District Attorney's office declined to appeal Justice John Cataldo's decision in a letter dated January 27, 2010. In 2012, I helped Connecticut legislators abolish its death penalty¹⁶ while completing my bachelor's degree in behavioral science (*Summa cum Laude*). Unsurprisingly, Post Traumatic Stress Disorder affects my life through anxiety, depression, hyper-vigilance, nightmares, waking up as if incarcerated, obsessive-compulsive behavior, and fear of being wrongfully arrested again. However, my psychologist, church, and wife are helping me adjust to society, which urges my public speaking to prevent my ordeal from happening to others. Consequently, I have lectured at over 200 venues since my release. These venues include top-notch universities, colleges, high schools, elementary schools, law firms, faith-based institutions, non-profit organizations, and even courtrooms per invite by federal judges as I consider law school and Ph.D. degree offers while also lecturing throughout countries like Italy, Germany, Japan, and France. Yet my efforts have only begun because freedom allows countless possibilities, right?

For this reason, I first thank God for helping me to survive my legal nightmare because I am a Dominican-American male entrusted to address criminal justice system strengths and imperfections. While compensation can neither return my lost youth in prison nor make amends, I strive with my wife and children to encourage others to appreciate life and not take it for granted. My higher calling, I believe, shares my experiences as a responsibility and cautionary tale for audiences to avoid the perils of arrest while encouraging them to overcome adversity through faith, hope, and determination.

To this end, law students set on becoming prosecutors have revealed that my story encourages them to be extra careful. I've had an 80-year-old lady kiss my forehead at her grandson's high school. I've had university dinners with students and professors where our Q&A sessions continue long after food. People in churches have pressed money in my hand to say thanks for sharing. Moreover, to help the innocent in prison, I've raised charitable contributions for New York's Innocence Project after its supporters were inspired by my case.¹⁷ In short, I teach people to follow their dreams and never quit because I never did!

Discussing the Problem through Observations

Sharing my ordeal and accomplishments now offers an occasion to discuss how racism, rushed judgment and profit seeking contributed to my unjust conviction, and continues contributing to mass incarceration in America. Accordingly, I first contextualize my life. I was born and raised in the Inwood section of Washington Heights, a predominantly Dominican, middle-class neighborhood that tempered the mystical optimism of hard-working immigrants seeking better lives against the allure of illegal money. As such, I regret my marijuana arrest, which resulted in the mug shot that led to my misidentification and civil rights violations against me. My Dominican parents worked hard—my father a garage attendant, and my mother a devoted housewife—to send my siblings and me to private schools until our high school graduations, which gave me confidence that I could accomplish anything. Few reasons exist, therefore, aside from greed and impatience, for me yielding to the temptation, discouragement, and materialistic peer pressure of urban streets when multiple jobs I applied for did not call. However, in accepting responsibility for my mistakes I also believe that my ignorance, lack of positive role models,

¹⁶ Fernando Bermudez, Testimony in Support of SB 280, March 2012, <http://www.cga.ct.gov/2012/JUDdata/Tmy/2012SB-00280-R000314-Fernando%20Bermudez%20-TMY.PDF>.

¹⁷ THE INNOCENCE PROJECT, ANNUAL REPORT 23 (2010), <http://www.innocenceproject.org/docs/2010InnocenceProjectAnnualReport.pdf>.

and lack of educational ambition within my community hindered my potential for which I sought personal change and atonement by enrolling in college in 1991. But a murder charge?

The Effects of Racism and Arrest

According to Merriam-Webster's dictionary, racism is a "belief that race is the primary determinant of human traits and capacities" that also involves "discrimination."¹⁸ By extension, my Dominican race and past arrest supports that racism led to my unjust conviction because proof exists that authorities considered me a worthless criminal, who society would not miss. I believe that arrest records may also desensitize law enforcement's responsibility for truth and justice in unrelated cases, especially for people of color like me who may be distinguished as a class of society's undesirables, and thus discriminated against, due to a past arrest. This class of people may be considered disposable, and then grouped into prejudicial stereotypes with the following syllogism: "Fernando Bermudez is a young Dominican man; all young Dominican men are drug dealers; therefore, Fernando Bermudez is a drug dealer."

A March 1992 recorded conversation between my private investigator, Mike Gaynor, and Detective Massanova regarding Gaynor's new evidence of the true perpetrator's identity and location is telling. Besides ignoring Gaynor's post-trial leads, Massanova calls Lopez a "piece of garbage," not a "credible upstanding citizen." Massanova concludes that my past is "why witnesses might feel intimidated" and that "[if] it not for this [homicide conviction], Bermudez would be in jail anyway." This raises the question of what, exactly, did authorities unethically tell witnesses to discriminate and prejudice me?

Consider my alibi witness, Leonard Macaluso, who in 1991 was working for Columbia University, and chauffeured Columbia University's top academic staff. In our recent interview, he repeated Det. Massanova's racist remarks against me, namely, that Det. Massanova asked him why he was "hanging with spics" and that if he did not come clean, despite their mutual Italian heritage, Macaluso himself would be charged with a crime.¹⁹ Then there are the five prosecution witnesses who finally shared their 1993 recantations at my 2002 Writ of Habeas Corpus evidentiary hearing before a federal judge, unlike Judge Bradley who repeatedly denied me.

Prosecution witnesses Opka Iyesi and Jaime Velasquez testified that despite doubts, their false identifications against me at trial continued because prosecutor Rodriguez and Detective Massanova referred to me as a dangerous drug dealer, whom they should fear. Their testimony supports a recorded interview of another alibi witness, Nelson Aquavivas, during which prosecutor Rodriguez calls me a drug dealer who must have owned a gun. It also supports his closing arguments at my trial, deemed prejudicial and discriminatory by the federal evidentiary hearing judge, because prosecutor Rodriguez belittled my cultural upbringing as a spoiled Latino brat, as well as a thief.

This unethical behavior at my trial, as if implying most Dominican mothers pamper their boys, supports my mother's complaint that prosecutor Rodriguez accused her of lying about my physical appearance on August 3 and 4, 1991. His threats that I could expect life in prison seemed spoken with such self-hatred as if to deny what might be his half-Latino ethnicity. To date, my mother's plea for justice, she says, made her feel as if prosecutor Rodriguez thought her powerless for being a poor,

¹⁸ *Racism*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/racism> (last visited April 30, 2013).

¹⁹ Interview with Leonard Macaluso (Feb. 12, 2013).

uneducated, immigrant woman. And because my family lacked resources to hire a decent lawyer, prosecutor Rodriguez also played the race card: he eliminated all Latino jurors knowing that with a Black murder victim attacked by Latino males, Black jurors would side against me—and they did. As such, this case used all Black and Latino teenage witnesses against me as cards in a manipulated, cheating card game to secure an unjust conviction without regard for our human value and the inevitable scars that our involvement would bear. But this is how racism works because it is the belief that members of a certain race share certain attributes which make that group as a whole less desirable, more desirable, inferior, or superior since every prosecution witness involved also had arrest records.

Effects of Racism toward Rushed Judgment

Racism's corrupting effects, in my view, cloud thinking because they involve negative emotions like hate and anger from prejudice that hinders good judgment while promoting what cognitive psychologists call "tunnel vision." That Detective Massanova and prosecutor Rodriguez testified to ignoring Lopez's key leads in 1991 proves their laziness, indifference, and narrow-mindedness to investigate. It also suggests that had I been white and wealthy, authorities may not have closed my case in less than forty-eight hours. Such rushed judgment occurred before at the same sixth precinct that arrested me with murder charges against a homeless Black man, William Emerson, accused of killing a white, wealthy advertising executive named John Reisenbach until charges were dropped because he was proven innocent.²⁰

Years later, the Duke lacrosse rape case involving three white athletes falsely accused of raping a Black female poses a legal contradiction. Because these white athletes came from wealthy families, the corrupt prosecutor lost his job in unprecedented fashion.²¹ This would not have likely happened if the three falsely accused male athletes had been Black and their female accuser white, considering the 1939 Scottsboro case where a white woman lied about getting raped by nine Black youths, incarcerating all of them.²² While this proves that families of color, like my family and Raymond Blount's, deserved better, the effects of racism and rushed judgment invariably sent me to prison as well where I realized that certain ethnic groups were disproportionately represented and profited from.

Profits from Rushed Judgment and Racism

In my over eighteen years of struggling for justice in seven different maximum security prisons, including battling thoughts of suicide, I was only one of the mostly Black and Latino men suffering from unjust convictions and mass incarceration. In fact, Blacks and Latinos comprised 85% of all 73,960 New York State prison inmates in 1999.²³ By analogy, such mass incarceration in New York flooded prisons like a bottomless bathtub that absorbed more than it drained from what critics called "draconian" Rockefeller drug laws from the late 1970s and "get tough on crime" politics against crack cocaine in the late 1980s. Such laws kept this bottomless bathtub clogged, as it were, via mass incarceration of mostly inner city men and women from New York with mandatory life prison sentences for possession of small quantities of drugs until recently revised disparate sentencing laws on both state and federal levels began reducing prison populations. However, the disparity of people of color getting locked up in greater

²⁰ Ronald Sullivan, *Murder Case in the Village is Crumbling*, N.Y. TIMES (March 22, 1991), <http://query.nytimes.com/gst/fullpage.html?res=9D0CE2D6123FF931A15750C0A967958260>.

²¹ Anne Blythe, *US Appeals Court Dismisses Bulk of Duke Lacrosse Case*, THE NEWS & OBSERVER (Dec. 17, 2012), <http://www.newsobserver.com/2012/12/17/2551360/us-appeals-court-dismisses-bulk.html>.

²² JAMES R. ACKER, SCOTTSBORO AND ITS LEGACY: THE CASES THAT CHALLENGED AMERICAN LEGAL AND SOCIAL JUSTICE 2–5 (2007).

²³ George Coppola, *New York State Prison Population Figures*, OLR RESEARCH REP. (Jan. 21, 2003), <http://www.cga.ct.gov/2003/rpt/2003-R-0094.htm>.

numbers with longer sentences than whites continues, as evidenced by federal prison sentences of black men who receive nearly 20% longer sentences than those of white men for similar crimes, according to an analysis by the U.S. Sentencing Commission, and it's hard to overlook racism and rushed judgment as motivating factors.²⁴

Collect Calls: Ka-Ching, Ka-Ching

In this connection, profit seeking institutions and corporations cater to industry stakeholders—those who own stocks and reap profits and dividends, etc., who benefit from unjust convictions and mass incarceration of mostly Blacks and Latinos, myself included. Consider: at one point, every thirty minute collect prison call cost my family \$10.00, plus tax, as part of \$365 million per year in gross annual revenue for phone companies nationwide. Forty-two percent of that total, or \$152 million is kicked back in commission to correctional facilities overall.²⁵ MCI, for example, was a phone company whose profit rights and monopoly the New York State Department of Corrections (DOCS) shared from 1996–2007 with over \$20 million in kickbacks to DOCS in 2000 alone.²⁶ Now, do the math in my case for about eighteen years and you'll see that crime does pay for those benefiting from mass incarceration.

Old McDonald Had a Farm

Another profit aspect is that economically deprived rural economies are revitalized with prisons built or maintained in their upstate New York communities. Prisons replacing unemployment and lagging farm industries offer job security with correctional jobs, construction work, and area retailers who benefit from employees and visitors to about seventy New York State prisons. Moreover, despite reduced prison populations due to budget cutbacks and reduced crime, upstate prison economies still benefit from existing cheap inmate labor via a New York State DOCS industry called Corcraft. Corcraft pays inmates sixteen to sixty-five cents an hour to manufacture cleaning products, clothing, and furniture resold at significant markup in a \$55 million industry with no pricing “oversight,” except by DOCS itself as a “preferred source” vendor to state agencies and public entities.²⁷ Small wonder, then, that prison-related businesses such as the Correctional Corporations of America (CCA) are listed on the New York Stock Exchange. It profits from about sixty privatized prisons and detention centers,²⁸ with a clause for cheap labor grounded in the 13th Amendment of the U.S. Constitution that shamefully supports prison expansion.²⁹

Next, consider “prison-based gerrymandering,” another profit-from-prison motive. Until recently prohibited by court order, this long-held practice benefited upstate Republican politicians who jostled rural votes from mostly white residents to expand their district infrastructures. By total census

²⁴ Marc Hansen, *Black Prisoners Are Given Longer Sentences than Whites, Study Says*, ABA JOURNAL (Feb. 15, 2013), http://www.abajournal.com/news/article/black_prisoners_tend_to_serve_longer_sentences_than_whites.

²⁵ John E. Dannenberg, *Nationwide PLN Survey Examines Prison Phone Contracts, Kickbacks*, 22 PRISON LEGAL NEWS 1, 4–5 (2011), available at https://www.prisonlegalnews.org/includes/_public/_issues/pln_2011/04pln11.pdf.

²⁶ *Id.* (“By 2000, the commission rates for prison phone contracts had soared to new heights, with California at 44%, Georgia 46%, South Carolina 48%, Illinois, Ohio and Pennsylvania at 50%, Indiana 53%, Florida 57%, and a national high in New York at 60% (reduced in 2001 to 57.5%). Ten states were raking in \$10 million or more per year from prisoner calls, with California, New York and the federal Bureau of Prisons leading the way with over \$20 million each in annual kickbacks. Such patterns were broadly if unevenly replicated at the local level, with city and county jails entering into similar commission-based phone contracts.”).

²⁷ Dave McKinley, *New York Spending Policies*, WGRZ.COM (May 13, 2010), <http://www.wgrz.com/news/local/story.aspx?storyid=76845>.

²⁸ Kopin Tan, *Private Prison Companies Have a Lock on the Business*, WALL ST. J. (Oct. 25, 2009), <http://online.wsj.com/article/SB125641692049506073.html>.

²⁹ U.S. CONST. amend. XIII, § 1.

count, these rural, upstate communities received extra government money because New York prison inmates were counted as residents of these rural populations from a misrepresented census.³⁰ Thus connected to dollars and no fair sense, one could say, these upstate New York communities and profit-seekers that benefited from mass incarceration ate steak, unlike mostly inner New York City communities like The Bronx, Manhattan, Brooklyn, Queens, and Staten Island who ate crumbs. Accordingly, it's time to switch dinner plates and redistribute the many millions involved back to inner city communities to improve their social and educational infrastructures as a cheaper, more effective means against incarceration, judging by the fact that it costs about \$20,000-\$60,000 per year to incarcerate a person³¹ versus an average \$3,000 per year to educate individuals in community colleges.³²

Fair Benefits Now and Beyond

The benefits of shifting many millions from unfair criminal justice practices would reduce social problems like functional illiteracy, single-headed households, poverty, and drug and alcohol abuse that increases incarceration risk via racism and rushed judgment and profit-seekers benefiting from mass incarceration and unjust convictions like mine. These arrest and prison vulnerabilities weaken more than family unity; they remove voting rights to address community needs that arise. Inner city vulnerabilities also increase unemployment and the risk of re-arrest, including for wrongful convictions, especially because the 700,000 or so American inmates released every year have greater stigma against them by virtue of their past.³³ As such, fairness means we should ask, "Where do we go from here?" in the face of failed mass incarceration and prison release programs. One answer is that all Americans should voice concern when the human rights and public safety issues discussed in this Essay occur. History unfortunately does repeat itself.

What Can the Legal Community Do?

Lawyers, police, correctional officers, professors, judges, and law students can promote honest justice for all human beings through training that emphasizes principles over paychecks and to avoid seeing people as commodities, or means to ends, such as police making arrests to simply meet quotas. The legal community should also engage in honest, public discourse by inviting victims of police brutality, racial profiling, discrimination, and unjust convictions to better evaluate their impact in contributing to mass incarceration beyond learning from case studies. Such public education is important because these social problems hurt human lives while eroding public trust and confidence in considering, for example, what happened in my home state.

On or about January 26, 2012, the FBI arrested four East Haven, Connecticut police officers on charges of racial profiling under media headlines, "Bullies with Badges." The arrests, stemming from civil rights abuse against Latino males in East Haven, added insult to injury when East Haven's mayor, Joe Maturo, said, "I might have Tacos," in response to the problem. Community outrage resulted in the mayor receiving offers of at least 500 Tacos so that he could apparently eat his words, which he publicly

³⁰ Dan Rosenblum, *Hakeem Jeffries gives the prison-gerrymander presentation at his old law school*, CAPITAL NEW YORK, (Jan. 24, 2012), <http://www.capitalnewyork.com/article/politics/2012/01/5116858/hakeem-jeffries-gives-prison-gerrymander-presentation-his-old-law-s>.

³¹ *The Cost of a Nation of Incarceration*, CBS NEWS (Apr. 22, 2012), http://www.cbsnews.com/8301-3445_162-57418495/the-cost-of-a-nation-of-incarceration.

³² Aaron, *What Are the Average Community College Costs Per Year?*, CHRISTIAN PERSONAL FINANCE (Nov. 26, 2012), <http://christianpf.com/what-are-the-average-community-college-costs-per-year>.

³³ Eve Tahmincioglu, *Unable To Get Jobs, Freed Inmates Return to Jail*, NBC NEWS (Feb. 17, 2010 9:02 A.M.), <http://www.nbcnews.com/id/35263313/ns/business-careers/t/unable-get-jobs-freed-inmates-return-jail>.

apologized for in a feeble damage control attempt.³⁴ Connecticut's Governor Dan Malloy called the comments "repugnant," causing East Haven's Police Commissioner, Leonard Gallo, to retire under fire.³⁵ In light of this recent racial profiling incident, my efforts have only begun, for after winning my freedom I find no better way to treasure it in both word and deed than working toward racial equality and justice for everyone.

One final, glaring example of continued injustice is key. To date, the law enforcement has not sought to apprehend the actual perpetrator in my unjust conviction case, despite proof of my actual innocence, and Justice Cataldo's ruling that police and prosecutor know the real perpetrator's identity. This neglect for all victims of this case wastes taxpayer dollars and endangers society each time the innocent land in prison because real criminals remain free to commit more crimes. Such neglect suggests that when crimes involve people of color, either the wrong person may be arrested or the truth may not matter at all. The scourge of over 305 DNA-based exonerations in America, with many non-DNA exonerations like mine, proves our imperfect system, made worse, needless to say, when true perpetrators go unpunished and corrupt prosecutors avoid accountability amid millions of dollars that states pay as attempts to compensate innocent men and women released from prison. To date, this pains me because while other New York State entities are being held accountable for my ordeal as an innocent man, prosecutor James Rodriguez enjoys civil immunity for it as do most corrupt prosecutors in America.³⁶

Is this why America's eloquent, yet contradictory Founding Father, Thomas Jefferson, wrote that the true price of freedom is eternal vigilance?³⁷ I think so, which is why I often say that justice is possible for those who hope and for those who fight. It is also why amid my stolen happiness I seek to return a higher good than myself to society since what I lost is gone forever.

³⁴ Peter Applebome, *After Charges of Latino Abuse, Anger Shifts to a Mayor for His 'Taco' Remark*, N.Y. TIMES, Jan. 25, 2012, at A23, available at <http://www.nytimes.com/2012/01/26/nyregion/on-latino-abuse-mayor-says-i-might-have-tacos.html>.

³⁵ Diane Orson, *Embattled East Haven, Conn., Police Chief To Retire*, NPR (Jan. 30, 2012 3:00 P.M.), <http://www.npr.org/2012/01/30/146099695/embattled-conn-police-chief-to-retire>.

³⁶ In fact, he should have been fired like the Duke Lacrosse prosecutor, if not arrested like the prosecutor-turned-Judge charged with hiding evidence in Michael Morton's case. Morton was exonerated after 25 years in prison. See *Texas: Ex-Prosecutor Charged With Hiding Evidence*, N.Y. TIMES, Apr. 19, 2013, at A13, available at <http://www.nytimes.com/2013/04/20/us/texas-ex-prosecutor-charged-with-hiding-evidence.html>

³⁷ Larry Walker, *Informed Vigilance, the Price of True Freedom*, UNITED CHURCH OF GOD, (Sept. 30, 2007), <http://www.ucg.org/commentary/informed-vigilance-price-true-freedom>. "The price of freedom is eternal vigilance." Former U.S. president Thomas Jefferson's advice certainly rings true today, especially with the ever-present danger of innocent citizens landing in prison for crimes they did not commit.