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COMMENTARY

## Exoneree Rightly Gets Opportunity to Pursue Civil Claim

It is regrettable that in deciding civil rights claims by persons innocent of a crime, judges need to be bold to do the right thing.

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By Law Journal Editorial Board

It is rare that people who are convicted and imprisoned for crimes when they are actually innocent are exonerated. Currently there are only 12 people who have been exonerated in the past decade listed on the National Registry of Exonerees. Thirty five states and the District of Columbia provide for compensation to an exoneree who served time in prison before exoneration. The potential payment in New Jersey is \$50,000 per year. If an exoneree successfully brings a claim for monetary damages against law enforcement personnel or their employer for violations of constitutional rights that result in a conviction, the award is subject to a set off of the money that was previously paid by the state. Because of substantial hurdles and problems of proof, and the defense of qualified immunity available to the police, public officials and public employers, there are few successful claims. Court decisions have shielded wrongdoers from liability.

On Oct. 19, 2006, Emmanuel Mervilus, then 20 years old, was arrested for allegedly robbing and stabbing an individual, and was held in the Union County jail. The allegations were untrue, and he continually

professed his innocence. In March 2007, he was indicted for robbery, aggravated assault and possession of a weapon. Two months later, he agreed to take a polygraph test because he was innocent. A lieutenant of the Union County Prosecutor's Office told him that the test was 95% accurate or better, that the machine is classified as a cold scientific evidence, and that he was not aware of any error in any of the hundreds of polygraph examinations that he performed. Mervilus took the test after stipulating the admissibility of the results in subsequent court proceedings. The lieutenant's training as an examiner was in 1998 at a polygraph school that was unaccredited because of a finding of bias against innocent test subjects, and the device had not been inspected since it was purchased in 2001. His employer, Union County, did not provide any supervision, training or discipline. His superiors never checked the quality of his work or had his quality checked by outside experts. On at least one other occasion, the Supreme Court affirmed an appellate decision that reversed a conviction because it found that the lieutenant's polygraph testimony was not reliable. Although the polygraph test report concluded that Mervilus was deceptive, there were questions remaining as to whether he actually committed the offense. Prior to trial, Mervilus did not agree to a plea bargain because he did not want to acknowledge guilt for something he did not do. He was convicted at a trial in February 2008. The lieutenant's testimony was designed to persuade the jury that the polygraph exam was infallible and that it proved that the defendant was guilty. The only eye witness to the crime could not identify Mervilus at trial. The witness identified a Black man sitting in the gallery observing the proceedings instead of Mervilus. The lieutenant stated to the jury that people who are guilty fail the polygraph and innocent people will pass. In March 2008, Mervilus was sentenced to

11 years in prison with a period of parole ineligibility of 85% of the term. Part of the reason for the severity of the sentence was the court's conclusion that there was a lack of remorse when Mervilus stated that he cannot be remorseful for a crime that he did not commit. The length of the sentence could have been reduced if he falsely admitted his guilt to obtain a plea agreement for a lesser penalty or obtain a lesser sentence by the sentencing judge if he admitted his guilt and stated that he was remorseful. In February 2011, the Appellate Division reversed the conviction because of the admission of the polygraph evidence and the testimony of the lieutenant polygraph examiner, found to be improper and prejudicial. The prosecutor declined to dismiss the charges. The second trial was in June of 2013. The prosecutor decided not to introduce the testimony of the lieutenant or the faulty results of the polygraph examination. The eye witness was again unable to identify the defendant as the assailant. The jury entered a finding of not guilty on all charges after 30 minutes of deliberation. He had served 1,454 days behind bars.

At the time Mervilus took the polygraph exam, the lieutenant had performed nearly 600 polygraph examinations. Each subject claimed to be innocent. He found approximately one-third were evasive and untruthful. There remains a question of how many of the individuals who were said to have failed the exam were actually innocent.

In November 2014, Mervilus filed suit against the lieutenant and Union County for violations of his civil rights, wrongful conviction and incarceration. In order to prevail, it was necessary to prove that the lieutenant knowingly, willfully and in bad faith fabricated evidence, and that there was no basis to avoid the qualified immunity defense from

civil actions against police. The U.S. District Court in the case of *Mervilus v. Union County* felt bound by existing Third Circuit law that stated it would be an unusual case where a police officer could not obtain a summary judgment in a civil action because of the standards required to prove polygraph evidence was fabricated. It was an insurmountable bar to prove that the lieutenant's testimony was consciously wrong and dishonest. Because the district court granted summary judgment for the lieutenant, it found it unnecessary to address Union County's liability or its defense of qualified immunity.

Mervilus appealed to the U.S. Court of Appeals for the Third Circuit, and in January 2013, the summary judgment dismissing the case against the lieutenant was reversed. The judges were troubled by the facts and ruled that the legal standard to prove fabrication of evidence should be modified. Now to prove fabrication of evidence, a plaintiff only has to prove that a police officer's alleged conduct was in bad faith or in reckless disregard of the truth, as opposed to knowing, willful and in bad faith. The circuit court precedent has interpreted the defense of qualified immunity to frequently protect wrongdoers from liability. Here the court atypically in a few brief paragraphs stated that the lieutenant could be liable if a jury found that the polygraph report and testimony was fabricated, and the county could be independently liable on the failure to supervise the lieutenant. The decision was exceptional and uncommon. It is regrettable that in deciding civil rights claims by persons innocent of a crime, judges need to be bold to do the right thing. Seventeen years after Mervilus was wrongfully arrested, he may now have the opportunity to ask a jury to hear his claims and award him compensation for the ordeal he suffered.