

### Eight Years of Pro Bono Ends in Acquittal in Palladium Case

BY THOMAS ADCOCK

**A** MAN WHO served 14 years in prison for a murder he did not commit said a tearful farewell to New York City last week after a jury acquitted him at a second trial, during which his pro bono lawyers pulled off what they called a “Perry Mason moment” with a confession by the real killer in open court.

Four attorneys for defendant David Lemus, 39, who left for Florida soon after hearing the words “not guilty” on Dec. 6, spoke with passion in an interview Tuesday about what they consider a travesty of criminal justice by the Manhattan District Attorney’s Office.

In a tone of controlled exasperation, Dickstein Shapiro litigation partner Daniel J. Horwitz, himself a former assistant prosecutor in Manhattan, complained of efficacy problems beginning with the police investigation of the Thanksgiving 1990 murder at issue, in which a bouncer was fatally shot outside the old Palladium nightclub on East 14th Street.

“This isn’t Mississippi in the 1960s,” said Mr. Horwitz. “This is Manhattan in the 21st century.”

With reference to Victoria Garcia, a plainclothes rookie at the time of the fatal shooting, Mr. Horwitz added, “Yet here we have a detective who says that as a matter of practice she did not record information that would be helpful to the defense, out of concern that it would compromise the [prosecution’s] case. She said this several times to the jury.”

According to a police report dated only a few days after the 1990 murder, a tip was provided to Detective Garcia that provided the Bronx addresses of “Joey” and “Spanky,” the street names of gang members who turned out to be the real killers. The detective testified that she declined to pursue the tip because arrests had already been made,

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NYLJ PHOTO/RICK KOPSTEIN

**David Lemus’ legal team, from left, included Daniel K. Roque, an associate at Dickstein Shapiro; Kathleen Cassidy, an associate at Cooley Godward Kronish; Jonathan P. Bach, a partner at Cooley Godward Kronish; and Daniel J. Horwitz, a partner at Dickstein Shapiro.**

albeit of the wrong two men—Mr. Lemus and Olmedo Hidalgo.

Lead defense attorney Jonathan P. Bach, a litigation partner at Cooley Godward Kronish, said that the “whole record needs to be looked at for the clear mistakes” made because “no one wants to have institutional considerations take precedence over the question of an innocent man going to jail.”

Messrs. Bach and Horwitz devoted eight years of pro bono effort to the matter. Mr. Bach was assisted by Cooley partner Lori Ploeger and associates Jeffrey Lang and Kathleen Cassidy. Dickstein associate Daniel K. Roque assisted Mr. Horwitz.

Chief Assistant Manhattan District Attorney James Kindler declined to comment on the

history of the Palladium case. He confined himself to last week’s acquittal of Mr. Lemus in saying, “The jury has spoken and we respect their decision.”

Mr. Bach said his client is “weighing options” of a civil lawsuit for wrongful conviction and that Cooley would decline to handle such litigation in the interest of providing Mr. Lemus with specialized civil counsel.

#### An ‘Imperfect System’

Michael I. Verde, a former police officer who is now a partner in the New York office of Katten Muchin Rosenman, followed the national media reportage of the Palladium case.

“When you deal with one of these shooting cases, it’s hard to filter out what’s real and what’s [not],” he said. “Now, this came to an obviously bad result. Why? I could give you a colorful quote, but the short answer is that we have an extremely imperfect system.”

Clearing Messrs. Hidalgo and Lemus, he added, amounts to “sort of the way the system is supposed to work.”



PHOTO BY MARC HERMANN/DAILY NEWS

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Mr. Horwitz said there was a “sadness” and a “lingering disappointment” at the conclusion of the Lemus case.

“Sure, we went out and celebrated,” said Mr. Horwitz. “But in a few hours of celebrating, how do you explain away the 17 years it took for justice to be done?”

He added, “There are lessons to be learned here. People ought to be talking about it.”

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## Anatomy of an Acquittal

**The Lemus case spans two distinct eras of city history: the apex of New York’s homicide rate in early 1990s, when some 2,000 murders a year occurred, versus an overall crime rate today approximating that of Provo, Utah, according to FBI statistics. Accordingly, the case abounds with complexities, such as:**

- Mr. Lemus and his co-defendant, Mr. Hidalgo, were convicted of second-degree murder in 1992 in a jury trial before Manhattan Supreme Court Justice Jay Gold, despite the fact that the defendants spoke no common language and never laid eyes on one another until their arrests in 1991 for the murder of Palladium bouncer Marcus Peterson.
- In a rare move involving reversal of a jury conviction, Manhattan Supreme Court Justice Roger S. Hayes ordered new trials in 2004 on the basis of new evidence discovered by Stephen M. Cohen, then an assistant prosecutor with the Southern District U.S. Attorney’s Office.

While investigating a Bronx drug gang, Mr. Cohen discovered Mr. Peterson’s true assailants and turned over the information to District Attorney Robert M. Morgenthau. Mr. Cohen subsequently became a litigation partner at Cooley Godward Kronish LLP and brought his firm the pro bono case. Currently, Mr. Cohen

is chief of staff for New York Attorney General Andrew M. Cuomo.

- Former Bronx homicide detectives Bobby Addolorato and John Schwartz, working in conjunction with Mr. Cohen’s federal investigation, uncovered solid evidence implicating Thomas “Spanky” Morales and Joseph “Joey” Pillot, members of the C&C drug gang in the Bronx, as the real killers.
  - In 2004, the District Attorney’s Office filed a report to the New York State Division of Criminal Justice Services in which it was stated, “[S]ignificant evidence indicates that Lemus and Hidalgo were not involved in the homicide” at the Palladium.
  - In 2005, Mr. Morgenthau dropped charges against Mr. Hidalgo, who was deported to the Dominican Republic on an unrelated gun charge. However, he decided again to try Mr. Lemus.
- Mr. Hidalgo’s wrongful imprisonment lawsuit, in which he seeks \$50 million, is pending before Southern District Judge Leonard Sand.
- Sharply conflicting witness testimony was heard at each trial, including differing interpretations of a “confession” made by Mr.

Lemus during a telephone conversation with a girlfriend who recorded his calls for the police.

At the time, Mr. Lemus was a self-described 22-year-old “knucklehead” trying to impress a girlfriend several years his senior whom he believed to be enamored of the gangster lifestyle. In addition to the false claim that he shot the bouncer, according to court papers, Mr. Lemus claimed he lived in a swanky Manhattan condo when, in fact, he lived with his mother, and that he drove a Nissan Maxima when he got around town by bus.

- During the second trial, Manhattan Supreme Court Justice Bonnie G. Witner closed the courtroom to the public and the press during testimony by Mr. Morales, who feared for his life. He told jurors that he and Mr. Pillot killed the bouncer.

In the process of providing information to Mr. Cohen and other federal prosecutors, Mr. Pillot’s attorney negotiated immunity from state prosecution. Mr. Morales was prosecuted in 2005, but is effectively immune from prosecution today because Justice Witner threw out the case against him on the grounds that the district attorney had waited too long to bring charges and that the defendant, therefore, could no longer receive a fair trial.

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