

GERRY L. SPENCE, PC
KENT W. SPENCE, PC
ROBERT A. KRAUSE, PC
R. DANIEL FLECK, PC
G. BRYAN ULMER, III, PC
MEL C. ORCHARD, III, PC
EMILY R. RANKIN, PC

OF COUNSEL
J. DOUGLAS McCALLA, PC
ROY A. JACOBSON, JR., PC

THE
SPENCE LAW FIRM

LARISSA A. McCALLA
M. KRISTEEN HAND
TYSON E. LOGAN
MARK L. ARONOWITZ
GRANT H. LAWSON
ELIZABETH A. RICHARDS

FOR IMMEDIATE RELEASE TO THE PRESS

For information, please contact:

J. Douglas McCalla, Esq.
THE SPENCE LAW FIRM, LLC
15 South Jackson Street
Post Office Box 548
Jackson, Wyoming 83001
307-733-7290 telephone
mccalla@spencelawyers.com

GERRY SPENCE'S WYOMING LAW FIRM SETTLES MULTI-MILLION
DOLLAR CIVIL RIGHTS LAWSUIT

Jackson, Wyoming

The Spence Law Firm, LLC settled a civil rights lawsuit on behalf of a Nebraska man, Terry J. Harrington, that alleged his constitutional rights were violated for the nearly 26 years he spent in prison for a crime he did not commit.

Pottawattamie County, Iowa and former prosecutors, Joseph Hrvol and David Richter, settled Harrington's case and Curtis W. McGhee, Jr.'s similar case, for a combined \$12 million while the cases were awaiting a decision from the United States Supreme Court.

Harrington's attorneys, noted trial lawyers Gerry L. Spence, J. Douglas McCalla, Mel C. Orchard, III, Larissa A. McCalla all from Jackson, Wyoming and Thomas P. Frerichs from Waterloo, Iowa lauded the settlement. Doug McCalla stated: "Cases like Terry's make it very clear that we need the powerful remedies provided by this country's civil rights statutes." McCalla further stated: "Terry Harrington deserves this after his unwavering patience and perseverance as to his innocence."

THE SPENCE LAW FIRM, LLC

15 SOUTH JACKSON STREET • POST OFFICE BOX 548 • JACKSON, WY 83001 • 307-733-7290 • FAX 307-733-5248 • www.spencelawyers.com

Paul D. Clement of King & Spalding, LLP briefed, then argued on November 4, 2009, the case before the United States Supreme Court, case number 08-1065, which prompted renewed settlement negotiations between the parties.

The settlement marks the beginning of the end of a very long journey for Terry J. Harrington. The civil rights case against Pottawattamie County, Iowa and the prosecutors reached the United States Supreme Court this fall after surviving well over four years' worth of summary judgment and appellate proceedings.

The civil rights case against the police officers and the City of Council Bluffs, Iowa remains, but has not yet been set for trial in the District Court for the Southern District of Iowa before Chief Judge Robert W. Pratt – Docket No. 4:05-cv-00178-RP-TJS. The district court explained the facts of this pending suit in detail in its 2007 opinion on record at 475 F.Supp.2d 862 (2007). Harrington's counsel, The Spence Law Firm, LLC, anticipates going to trial in 2010 against the city and police on the remaining claims.

At Harrington's trial, where he was tried as an adult, the all-white jury returned a guilty verdict against Harrington who was then sentenced to life in prison at hard labor with no possibility of parole. Harrington's post-conviction review process lasted decades and proceeded through many courts before the Iowa Supreme Court vacated his conviction, which allowed his ultimate release from prison. *Harrington v. State*, 659 N.W.2d 509, 518 (Iowa 2003)).

Harrington suffered imprisonment for almost 26 years: from November 16, 1977 until April 17, 2003, spending from age 17 until age 43 in prison. The 18-year-old Terry Harrington testified at his own sentencing hearing after the 1978 trial:

I just want you to know that no matter what happens, I know I'm innocent, and as long as, you know, I feel that inside, then I'm going to keep on fighting because I know I can't see myself locked up for the rest of my life for something I didn't do I feel I was judged by the color of my skin and not the content of my character, and I'll always feel that way until I get, you know, the kind of verdict the testimony shows, and that's innocent or not guilty as they would say in the courtroom.

He had no idea just how many years that fight would last and in how many courtrooms it would proceed, but he steadfastly maintained his innocence and unrelentingly fought to challenge his conviction and denial of liberty:

- After his conviction as a teenager for first-degree murder, he directly appealed the conviction, but the Iowa Supreme Court affirmed it on October 17, 1979.
- He filed an application for post-conviction relief that the Iowa District Court ultimately denied on July 13, 1988
- The Iowa Court of Appeals affirmed the denial on January 25, 1990.
- He petitioned for a writ of habeas corpus, which the United States District Court for the District of Iowa denied on November 25, 1991.
- The Eighth Circuit Court of Appeals affirmed the denial on January 8, 1993 in *Harrington v. Nix*, 983 F.2d 872 (8th Cir. 1993).
- He filed a pro se Application for Post Conviction Relief on July 24, 1997, and filed an Amended and Substituted Post Conviction Petition on March 3, 2000, which the Iowa District Court denied on March 5, 2001.
- He appealed this denial, and the Iowa Supreme Court finally reversed his conviction and remanded his case for new trial based on *Brady v. Maryland*, 373 U.S. 83 (1963) due process violations as a result of newly-discovered but previously withheld evidence relating to an alternate suspect, in *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003), which ordered his conviction vacated and remanded the case to the Iowa District Court for new trial.
- The State of Iowa timely filed a Petition for Rehearing, which by court rule caused the Iowa Supreme Court not to issue its Writ of *Mittimus*.
- The Governor of Iowa, the Honorable Thomas Vilsack, on April 17, 2003, granted Harrington a reprieve and Terry was released from prison until such time as the Iowa Supreme Court ruled on the petition for rehearing.
- The Iowa Supreme Court, on April 18, 2003, ruled on the petition for rehearing and thereafter issued its Writ of *Mittimus* to the Iowa District Court to vacate Harrington's conviction and to grant him a new trial.
- Because the Governor's Reprieve expired on the Iowa Supreme Court's issuance of its Writ of *Mittimus*, on April 30, 2003, Harrington voluntarily surrendered himself to the Pottawattamie County Sheriff.
- The Iowa District Court for Pottawattamie County on April 30, 2003 ordered Harrington's 1978 conviction and Sentencing Order vacated and released him from custody on bond and supervision.
- On October 24, 2003, without prejudice to its later re-filing the charge, the State of Iowa dismissed the murder charge against Harrington.

On March 25, 2005, Harrington filed his civil rights case under 42 U.S.C. sections 1983 and 1985 against both the police and prosecutors. The district court granted summary judgment for the county prosecutor defendants on some claims

because they were absolutely immune for actions taken in their prosecutorial functions, but the district court denied summary judgment on other claims against the prosecutor defendants because they had merely qualified immunity for actions taken in their investigatory functions; and for this, the prosecutors and county who employed them appealed before trial. The current county attorney, Matthew D. Wilber also did not seek an interlocutory appeal on immunity issues relating to Harrington's separate cause of action against him (*Harrington v. Wilber*, 353 F.Supp.2d 1033 (S.D. Iowa 2005) (denying prosecutor summary judgment)), but later renewed his summary judgment motion, which Harrington appealed, but then dismissed due to this settlement.

The Eighth Circuit Court of Appeals decision in *McGhee v. Pottawattamie County, Iowa*, 547 F.3d 922 (2008), based on Supreme Court precedent laid down in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) and *Imbler v. Pachtman*, 424 U.S. 409 (1976), reiterated that plaintiffs could bring suit against prosecutors under the civil rights statutes for violations that arise from investigatory acts and omissions and not from prosecutorial functions. The opinion noted that courts fundamentally agree that "[i]mmunity is absolute only when the prosecutor performs distinctively prosecutorial functions." 547 F.3d at 933 (citation omitted). The Eighth Circuit held:

We find immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not "a distinctly prosecutorial function." The district court was correct in denying qualified immunity to Hrvol and Richter for their acts before the filing of formal charges.

547 F.3d 922, 933 (8th Cir. 2008). Thus, the Court acknowledged that, in certain instances, the prosecutors acted outside their prosecutorial functions as alleged in Harrington's complaint. The prosecutors and the County that employed them appealed the Eighth Circuit's decision to the United States Supreme Court.

The settlement disposed of the county's and prosecutors' interlocutory appeal of the partial summary judgment denial of absolute immunity on violations of

Harrington's First, Fourth, Fifth, Sixth, and Fourteenth Amendment rights actionable under 42 U.S.C. sections 1983 and 1985 (2006) and the threat of trial. Harrington carefully described clearly established constitutional rights. He pleaded: freedom of association under the First Amendment; his right to due process, a fair trial and equal protection guaranteed to him by the Fourth, Fifth, Sixth, and Fourteenth Amendments in addition to his rights against unreasonable seizures of his body guaranteed to him by the Fourth Amendment as well as a distinct conspiracy claim. "The touchstone of due process is protection of the individual against arbitrary action of government." *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

~ END ~