



# DNA Expansion Proposal Considered by State Assembly Had Provisions Inconsistent With Justice

## Part 2



by Jeffrey Deskovic

### Issues Which The Assembly Requested be Addressed

The Assembly wanted to know what the primary causes of wrongful convictions were. I weighed in on this subject. Because I have written extensively in previous issues of *The Guardian*, I will not go overly in depth on these points, but instead will summarize:

(Note: All statistics utilized are in reference to DNA-based exonerations, and do not factor in exonerations achieved by other means, such as discovery of suppressed evidence, and witness recantations, real perpetrators coming forward to confess.)

a) False confessions were responsible for 25% of the wrongful convictions as established by DNA. Videotaping interrogations, while not a cure-all, could help cut down the rate by providing an objective recount of who said, and did what, when, and in what context. This requirement would prevent police from leaving out details that they would rather the world did not know they engaged in, and it would simultaneously protect police from false claims of coercion.

b) Misidentification caused 75% of all wrongful convictions.

c) Deficient Representation by Public Defenders. The skill level of those who represent the public as opposed to those that the rich can afford, is like night and day. Additionally, even those who are not worn down and jaded by the system, have built-in handicaps, such as an uneven economic playing field. Wherein the prosecution has an almost unlimited budget, the public

defender has a very limited budget and often must resort to asking for discretionary funding from a judge, the granting of which is risky. Another problem confronting legal aid attorneys is the representation of too many cases at once. Stephani Bench, of the New York State Defenders Association, echoed the sentiment that the state of public defense is in shambles, and advocated for a centralized state-wide system which would lend itself to more oversight. As reinforcement, she referenced the Spangenberg Group's Report, a study commissioned by Chief Judge Judith Kaye, whose findings were that the state of public defense in New York was, indeed, in shambles. Bench advocated for the centralization of public defense, wherein all public defense would be done on a state-wide basis, as part of one big organization, allowing for more oversight and review.

d) Incentivized Witnessing was involved in 25% of the wrongful convictions, wherein people are given a reward for testifying, sometimes literally in the form of cash, "for information leading to the arrest and conviction of" a perpetrator of a crime. And then there is the incentive offered to those in a desperate legal position to make deals to have charges dropped against them or to receive a lighter sentence for information. Such individuals, when lacking legitimate information, often resort to making up stories consistent with what prosecutors are looking for.

The Assembly Committee persons asked whether the present procedures for the collection, cataloguing, and preservation of evidence

are sufficient. Alan Newton, who served 21 years for a rape he did not commit, weighed in on this subject, explaining clearly how the present system is not sufficient, detailing the struggle he endured, in which for 12 of the 21 years he served, the police claimed that they could not find the evidence, which, when located, proved through DNA that he had been innocent all along.

They asked whether the current compensation statute on the books was sufficient. I explained that it was deficient in two ways:

Firstly, that in order to receive compensation one must litigate, which is a process that takes between 2-7 years, and that the exonerated are released with simply the clothes on their backs, and that the remedy for this would be to immediately award \$15,000 for every year of wrongful imprisonment in order to cover such basics as cost of housing, cost of living, mental health services, and educational pursuits, and that this should be in addition to a lawsuit.

Secondly, there is bad case law on the books, which states that if one contributes to their own wrongful conviction, they are entitled to nothing. For example, it will be the state's claim that I contributed to my wrongful conviction by falsely confessing, whereas it is my position that I did not contribute because the confession was coerced and involuntary. In any event, it is absurd that anybody should have to overcome such an obstacle in receiving financial compensation, because the idea that someone will purposely get themselves arrested and wrongfully convicted, to then exonerate them-

selves to then be in a position to sue for compensation, is ridiculous.

### Other Noteworthy Things Discussed At The Hearing

Prof. Ben Gershman recounted, both with nostalgia and wistfulness, a time gone by when he worked as a prosecutor, when a defendant was found not guilty, the District Attorney would call a meeting and want to know whether or not the office had prosecuted an innocent man, because his office had no business prosecuting the innocent, and how far away the system had come from that. After he said that, I sadly wished that this attitude had been the case in all jurisdictions, never to have fallen out of practice, and that it had been the case during all of the years in which I had fought to establish my innocence during my appeals process, and when I was requesting further DNA testing, with DA Jeanine Pirro fighting tooth and nail against me, which wound up costing me all of those years.

Prof. Gershman also advocated for an internal review program within the District Attorney's office itself, in which cases would be reexamined voluntarily, as something wholly apart from litigation, to ensure that only the guilty were in prison. I thought that this was a great idea, and would further shore up the idea that it is not the job of the prosecutor to do everything possible to win a conviction and then doggedly fight to preserve it, no matter what, but instead to be a true seeker of truth as a court officer, dedicated to protecting the public, of whom innocent defendants are a part.

Lonnie Soury, of Soury Com-



munications, spoke at length of the corruption going on in the Marty Tankleff case, in which Marty is currently serving a 50 year prison sentence based on a false confession obtained from him under circumstances very similar to mine. And, how the discovery by a retired police detective, of 25 witnesses, all putting the puzzle together, proved who really committed the murder, as well as a host of improprieties by Suffolk County District Attorney Thomas Spota, such as previously representing people involved in the Tankleff murder while still prosecuting the case and representing the detective who was found by a commission of investigation to have perjured himself in a prior murder case; still has not proven to be enough for the prosecutor or the courts to either acknowledge that a wrongful conviction occurred or at the very least to grant Marty a new trial.

The topic of having an Office of Wrongful Convictions was also discussed. Its purpose would be to study wrongful convictions, determining what went wrong, and what lessons might be learned in order to prevent reoccurrence. The discussion centered on whether it should be within the Governor's cabinet or outside of it. One of the Assemblymen mentioned that the Governor would like it to be within his office. William Hellerstein gave the point of view that the office should be outside of the Governor's office in order to keep the office objective and free from influence. His point was that since the Governor has a background of being a prosecutor and attorney general, an in-house office would lend itself to more access and inclination to prosecutors and police than to defense counsel, and that relationships and trust that naturally form over time could impact upon objectivity.

Scott Christianson, Ph.D, author of the book *Innocent: Inside New York Wrongful Convictions*, which is the only book dedicated specifically to the subject, includes some cases wherein the defendant was still incarcerated at the time but would go on to be cleared after the book's publication. He recounted how one of the problems with wrongful convictions and the difficulty of undoing them is the unwillingness of those in power to acknowledge when a miscarriage of justice had taken place. He mentioned how an unnamed official once bragged about how, in their county, there was a 100% conviction rate, and that there were no wrongful convictions in New York.

All in all, I was pleased that everybody who spoke was against the one-year time limit for the bringing of 440.10 appeals, and that so many people were concerned enough that they came. I was disappointed, however, that there was not similar universal support for the expansion of the DNA Databank. I had hoped for the expansion of the databank, and the adoption of other changes spoken of and long-championed by The Innocence Project.

I came away with the sense that the one-year time limit, changed on the hearing day to three years, would not pass because the Assemblymen and women realized the lack of wisdom inherent in such a law, and how it ignores the hard-learned lessons of history about such matters, gleaned on the backs and sufferings of those who had been wrongly convicted and served lengthy prison sentences. ■

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