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How Often Do Prosecutors Knowingly Fight Against Innocent Defendants?

In a ***New York Times*** article dated June 23, 2008, entitled *Doubting Case, a Prosecutor Helped The Defense*, by Benjamin Weiser, the story came out about a prosecutor who was ordered by his superior to try to preserve the conviction of two men who were on appeal who he believed were innocent. Here are the facts, as presented in the ***Times*** article.

The Palladium case certainly looked open and shut in 1992, when Mr. Lemus and Mr. Hidalgo were each sentenced to 25 years to life. Several bouncers identified them as the men they scuffled with outside the Palladium, an East Village nightclub and Mr. Lemus's ex-girlfriend said he had claimed to have shot a bouncer there.

But the next decade brought a string of nagging contradictions. A former member of a Bronx drug gang confessed that he and a friend had done the shooting. That spurred new examinations by the Manhattan District Attorney's Office, federal prosecutors, defense lawyers, police and the press.

When Manhattan District Attorney Robert Morgenthau was asked to take another look, ADA Bibb said his supervisors gave him carte blanche. "It really was, leave no stone unturned," he said. Over 21 months, starting in 2003, Bibb and two detectives conducted more than 50 interviews in more than a dozen states, ferreting out witnesses the police had somehow missed or ignored.

ADA Bibb, a 21 year veteran, spent nearly two years re investigating the killing, and wound up believing that the two imprisoned men were not guilty, and that their convictions should be overturned. Bibb said he shared his growing doubts with his superiors, and at a meeting in early 2005, he recalled, after defense lawyers won court approval for a hearing into the new evidence, he urged that the convictions be set aside.

"I made what I considered to be my strongest pitch," Bibb said. Instead, he said, he was ordered to go to the hearing, present the government's case and let a judge decide; a strategy that violated his sense of a prosecutor's duty. "I had always been taught that we made the decisions, that we made the tough calls, that we didn't take things and throw them up against the wall for a judge or jury to sort out," he said. He went on, "If the evidence doesn't convince me, then I'm never going to be able to convince a jury."

Still, Mr. Bibb said, he worried that if he did not take the case, another prosecutor would, and would win. In a recent interview, Mr. Bibb made a startling admission: He revealed that he threw the case.

Unwilling to do what his bosses ordered, he said he deliberately helped the other side win. He tracked down hard-to-find or reluctant witnesses who pointed to other suspects, and prepared them to testify for the defense. He talked strategy with defense lawyers. And, when they veered from his coaching, he cornered them in the hallway and corrected them.

"I did the best I could," he said. "To lose. I was angry that I was being put in a position to defend convictions that I didn't believe in," Bibb remarked. Defense lawyers said he plunged in. In long phone conversations, he helped them sort through the new evidence he had gathered.

"If I make a mistake in my interpretation of what he said, he'll correct me," said Gordon Mehler, who represented Mr. Lemus. "If there's a piece of evidence that bears on another piece of evidence I'm talking about, he'll remind me of it. That's not something that a prosecutor typically does."

As the defense decided which witnesses to call, he again hunted them down — sometimes in prison or witness protection — and, when necessary, persuaded them to testify in State Supreme Court in Manhattan. "I made sure all of their witnesses were going to testify in a manner that would have the greatest impact, certainly consistent with the truth," Mr. Bibb said. "I wasn't telling anybody to make anything up." He told them what questions to expect, both from the defense and his own cross-examination — which he admitted felt "a little bit weird." Defense lawyers say they first met some of their witnesses on the day of testimony, outside the courtroom.

During breaks, Mr. Bibb confronted the lawyers when he felt they were not asking the right questions. "Don't you understand?" One lawyer recalled him saying. "I'm your best friend in that courtroom."

Cross-examining the witnesses, Mr. Bibb took pains not to damage their credibility. Facing a former gang member who had pleaded guilty to six murders, he asked only a few perfunctory questions about the man's record.

Daniel J. Horwitz, the other defense lawyer, said the help was invaluable. "Did Dan play a useful role in making sure that justice prevailed in that courtroom? The answer is unequivocally yes."

Today, the two men are free. At the end of the hearing, which stretched over six weeks, his superiors agreed to ask a judge to drop the conviction of one, Olmedo Hidalgo. The judge granted a new trial to the other, David Lemus, who was acquitted in December.

Steven M. Cohen, a former federal prosecutor who pushed Mr. Morgenthau's office to reinvestigate, said that while Mr. Bibb should have refused to present the case, his bosses should not have pressed him "If Bibb is to be believed, he was essentially asked to choose between his conscience and his job," Mr. Cohen said. "Whether he made the right choice is irrelevant; that he was asked to make that choice is chilling."

I have thought about what lines of reasoning prosecutors, who knowingly fight innocent people, might adopt. There are a multitude of potential answers. Some may have a deferential attitude, as when someone is new in the office or is the low person on the totem pole in terms of experience, and thus rationalizes it that way. Others may engage in blind obedience to authority. Some may be willing to sell their souls for a paycheck. Others may have a desire to move up in authority and are thus willing to play ball. Still others may aspire to have a political career,

and thus make the conscious decision to sacrifice someone who is innocent upon the pyre of their career.

A type of cognitive dissonance could be occurring as well, in which a prosecutor overlooks the role that they are playing and instead distances themselves from the morality of it by saying that whatever role they play in it, it is really the responsibility of the person who ordered them.

I want to make it clear, in no uncertain terms, that although these various lines of reasoning are paths that people in such dilemmas go down mentally, there are, in the end, various ways of trying to justify what can never be made right: The attempt to knowingly imprison those who are innocent.

I would like honest prosecutors, and the public in general, to know that there are plenty of options to choose from if, and when, they are ordered to prosecute or defend the conviction of someone that is innocent. Such individuals may go to their supervisor's supervisor and, if necessary, to the next higher up individual in authority, going all the way to the District Attorney him, or herself. If, having reached the top, there is still nothing done, they should then go to the Attorney General. After that, if necessary, they can go to the United States Attorney.

If all of the above should fail, then they should go to the press.

All of these steps are better than either sending or keeping someone in prison who is innocent. If they suffer retaliation, they have legal recourse. They can file complaints, and/or lawsuits. Worse case scenario, they can get another job. At least they would have been true to themselves, and to society.

Having wrestled with what makes some prosecutors knowingly fight against innocent defendants, the next most relevant question is: How often does it happen?

From the annals of the wrongful conviction literature that I have read, along with my own personal experience, I would have to say that it happens a lot more often than any of us realize.

In Dallas, Texas, for example former District Attorney Bill Hill's office regularly successfully fought against defendants getting DNA tests. Since Craig Watkins has become the District Attorney, his office has been in cooperation with the Texas Innocence Project, reviewing old cases in which requests for DNA testing had been opposed. Four hundred prisoners requesting the testing had been denied. Thus far, there have been six men who have been proven innocent. Therefore, it is well established that Bill Hill had a policy of fighting against requests for DNA testing. But Hill, himself, personally, was not litigating the cases. Instead, his assistant district attorneys were doing his bidding in filing briefs against DNA requests.

As lawyers, all of those assistant district attorney's realized what the value of DNA was in determining guilt or innocence. They knew very well that they could be preventing innocent people from proving their innocence. Yet they argued against the testing anyway.

Alabama has no law allowing prisoners the right to DNA testing. Darrell Grayson had been convicted of murder and sentenced to death. There was ample biological evidence which could have been subjected to DNA testing. Yet prosecutors fought against all of his appeals seeking to have the testing, and ultimately Alabama Gov. Riley signed the execution warrant authorizing his execution. He was executed without benefit of the testing. Did they not know what they were doing? Common sense says "yes".

Now that same state has Thomas Arthur scheduled for execution July 31, 2008, again without allowing Arthur to have the testing he seeks. Prosecutors have successfully fought every step of the way to prevent the testing, and every court he as litigated in, including the United States Supreme Court, has sided with those prosecutors.

In Mississippi, it was recently exonerated Brewer and Brooks.

In New York, Lenny Lato helped keep Marty Tankleff in prison for seventeen years by fighting against every single one of his appeals, despite knowing that the circumstances under which the "confession" was obtained made it unreliable, and that evidence of Tankleff's innocence was mounting.

In my own case, Assistant District Attorney George Bolen insisted on prosecuted me despite knowing that DNA evidence proved that I was innocent fully eight months before my trial. Then, under Jeanine Pirro, Assistant DAs John Sergei and Steven Bender filed brief after brief against me despite knowing that there was a DNA Test which had proved my innocence.

In conclusion, I realize that not every wrongful conviction is done intentionally, and that therefore every instance does not constitute a prosecutor knowingly fighting against an innocent defendant. Still, the above-mentioned examples demonstrate that it happens a lot more often than most of us realize.

I believe that Daniel Bibb is only the tip of the iceberg, and that others simply have not, as yet, come forward, and perhaps will never come forward to admit that they were ordered to preserve a conviction at all costs. Though his means may have been unorthodox, I personally salute Bibb for not betraying his conscience, and for taking action. He deserves additional credit for coming forward afterwards. How many more simply fight against the innocent with little to no qualms about it?

I am not anti-law enforcement. In the last issue of ***The Guardian***, I called for honest police officers to take back the police force from the corrupt ones. In this issue, I call for prosecutors everywhere to maintain their personal integrity and the integrity of their office, by blowing the whistle on each and every instance where either they, or someone they know, were ordered to fight against a defendant that they knew is innocent.

In terms of knowing the actual number of incidents, there is no real way to know how often such prosecutions occur, because the true number of wrongful convictions is unknowable, due to DNA only being available in 10% of all serious felony cases, and that obtaining quality legal assistance paired with investigative work- which is needed to find new non DNA evidence of innocence, is even more elusive.

Can it be reasonably said that in the above-mentioned examples that nobody ever knew what they were doing, and that they were simply good faith errors?

Absolutely not. Prosecutors have to familiarize themselves with the facts of a case, and therefore are aware of evidence of innocence when they fight against claims of innocence, just as they are of the probative value of DNA as a means of proving, definitively, guilt or innocence. Each time they fight against a DNA test, or argue against a claim of innocence being heard on procedural grounds, or oppose an issue of law despite realizing that a claim is meritorious and actually impacted upon the fairness of a trial, thus speaking to the reliability of the verdict, they know what they are doing. I would like to point out that prosecutors have a law degree and are paid to analyze the facts and the law.

If anyone would like to try to prevent Thomas Arthur's execution, please send an email to Gov. Riley. Use the following URL to get to the page:

https://secure2.convio.net/ip/site/Advocacy?JServSessionIdr009=1gl65d8911.app8a&cmd=display&page=UserAction&id=108

If we all make our voices heard, at least we will let Governor Riley know that we, as citizens of the United States, find what he is intending to do to be morally unacceptable, just as the knowing fight against innocence is unacceptable. Indifference or failure to act, can sometimes be as culpable, or close, to the unjust actors themselves. ■