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We Need Second Look Programs In The Prosecutor's Office, Part 2

Last week, in Part 1 of this two-part report, we examined both the office of Bronx District Attorney Robert Johnson, and the Office of Manhattan District Attorney, Robert Morgenthau, with respect to any programs that might constitute a "Conviction Integrity Unit," an affirmative attempt to avoid, and to rectify, wrongful convictions. Part 2 now looks at Westchester District Attorney Janet DiFiore's office.

The Westchester DA's Office

Westchester has had problems with wrongful convictions; Terry Chalmers of Mount Vernon, Charles Dabbs of Peekskill, and my own case, to name a few.

Charles Dabbs, a resident of Peekskill, served seven years for rape before being proven innocent by DNA. The facts of his case are taken from The Innocence Project's website:

"Charles Dabbs was convicted in 1984 of First Degree Rape. The victim had been assaulted from behind, dragged into an alley, and forced down a flight of stairs. She lost consciousness, awaking to find two other men with her assailant. One man held her arms, the other her legs, and a third raped her.

She identified only one person - the rapist. Based on this identification, Dabbs was convicted and sentenced to twelve and a half to twenty years in prison.

At trial, the victim's testimony was bolstered by the fact that she and Dabbs are distant cousins and that the assailant had distinctive clothes that were similar to Dabbs'. He could not be ruled out as a contributor of the semen stain on the victim's pants by methods of conventional serology.

In 1990, Dabbs gained access to the evidence for DNA testing. Though testing on the victim's pants was inconclusive, DNA was successfully extracted from a

cutting of the victim's underwear. Dabbs was excluded and his conviction was vacated. Based on this exclusion, the prosecution dismissed the indictment, seven years after Dabbs was convicted."

Terry Chalmers served seven and a half years for Rape before being proven innocent by DNA. The facts of the Chalmers case, as follows, are taken from The Innocence Project's Website:

"On August 18, 1986, a woman was approached and pushed into her car, which was parked at the train station in Mount Vernon, New York. While the assailant drove, the victim was forced to remove her clothes and perform sexual acts with the man.

They arrived at Wilson Woods Park, where the assailant threw her on the ground and raped her. He then left, taking her jewelry, handbag, and car. The victim was unable to positively identify the perpetrator from six photographs the next day. She finally made a positive identification of Terry Chalmers after viewing a second lineup forty-six days after the crime, and Chalmers' picture was the only one that was used in previous photo lineups.

No other evidence was introduced other than the victim's in-court identification, and on June 9, 1987, Chalmers was convicted of Rape, Sodomy, Robbery, and two counts of Grand Larceny.

He was sentenced to twelve to twenty-four years in prison. Chalmers filed an appeal, claiming that the police did not properly conduct the photo lineups and were suggestive in the identification process.

On July 18, 1990, the New York Supreme Court affirmed the conviction, ruling that even if the lineup was not properly conducted, the in-court identification was enough to convict Chalmers. He later discovered that the Westchester Department of Laboratories and Research had

retained the rape kit and items of clothing which were used as evidence at trial and he petitioned for DNA testing with the help of the Innocence Project.

Forensic Science Associates performed PCR based DNA testing on the vaginal and cervical swabs from the rape kit. In a report dated July 8, 1994, it was determined that the victim could not be the source of DNA in the sperm fraction from the swabs. A second report on July 26, 1994, determined that Chalmers could be eliminated as the source of the spermatozoa from the vaginal and cervical swabs. The conviction was subsequently vacated and charges were dismissed on January 31, 1995. Chalmers had spent seven and a half years in prison."

I served sixteen years in prison for murder and rape which DNA both proved me innocent of and identified the perpetrator. I was convicted based upon a coerced, false confession, and the fabrication of other evidence. That conviction took place despite a pretrial DNA test which showed that semen found in the victim did not match me.

To explain away the DNA, prosecutor George Bolen, without a shred of evidence, concocted a story that the fifteen year old victim had a consensual sexual encounter close enough to her rape and murder as to explain away the DNA.

All of my appeals were exhausted, and I was fought against every step of the way by then-Westchester DA Jeanine Pirro. In 2006, approached by The Innocence Project, who had recently decided to take on my case, District Attorney DiFiore allowed more sophisticated DNA testing to go forward that Pirro would not. When the DNA was run through the databank, it matched the real perpetrator, and the charges were dismissed based upon ac-

tual innocence, with the agreement of the prosecution.

In preparation for this report, I called upon the Westchester DA's office, asking for specifics regarding what District Attorney DiFiore has referred to several times publicly as her "Second Look Program". Lucian Chalfen, DiFiore's spokesperson, when contacted by me asking for details, told me that although it is not personal and is no reflection of a lack of affinity towards me personally, that if this article was in connection with *The Guardian*, that there was no comment. If I was writing for another publication, then I could get an interview. When I made clear that I wanted no interview and instead simply wanted details of the Second Look Program, I again hit a dead end.

Analysis Of The Response

Before getting into the response that I received from the Westchester District Attorney's Office, I feel that I need to clarify a few issues for readers.

I appreciate the fact that District Attorney DiFiore did not oppose my request for further DNA testing as was done by her predecessor, Jeanine Pirro, and that her office joined the Defense motion to overturn my conviction when the results matched the real perpetrator.

Her actions kept me from having to litigate to get the testing, and to get the conviction overturned, once the results matched Steven Cunningham; a process that would certainly have cost me further time in prison.

While it is unclear as to how much time the subsequent litigation might have taken, or how many more court proceedings might have been involved, I am certain that at some point Barry Scheck and The Innocence Project would have won the right to the testing



and to the exoneration.

That having been said, over time, I have been advocating and speaking out against wrongful convictions and lobbying for changes in the law. In the process, I have helped build up public support for the cause. Results have been predicated upon my telling it like it is, no matter who it involves.

Only by remaining objective and being beholden to nobody can I maintain public trust and remain true to myself. I intend to continue in that mode, even as pertains to the Westchester District Attorney's Office on any issue of concern as pertains to wrongful convictions or other criminal justice issues.

I want to make clear that my concern is to prevent wrongful convictions, and to right the ones that already exist.

The Westchester Guardian is a publication which has been willing to publish my works. Additionally, the content of my articles is mine, and whatever view I espouse is likewise mine.

I do not feel that I would be true to myself, or to my readers, if I were to review the response of the Westchester District Attorney's Office to my inquiry any differently than I would any other District Attorney's Office.

Here is my analysis of the response I received: I was not looking for an interview. I was looking for details about a program whose specifics should be public. Furthermore, the details of the program should have been made public a long time ago if such a program exists, just as it is no secret who the heads of various departments are.

I believe in transparency in government and I like to see things, not have vague references. Anyone can simply claim things. I will renew my call in public for details. If there is such a program; a Second Look Program, who works in it? What are their titles? What does work in that department consist of regularly? Who has been freed as a result of it?

The lack of details, save for a couple of public statements about its existence, leave me with the same inescapable conclusion that I would have if it came from any other District Attorney; essentially that there is no such program, and nobody is working in it, despite all of the wrongful convictions in West-

chester County that have occurred.

Conclusion

I would like to point out that simply because all of the aforementioned district attorney's offices have tried to make it appear as though they operate such programs, trying to hedge a bit on the language they used, stating that they "take claims of innocence seriously" and that they investigate claims of innocence, and that they have such a program yet not releasing specifics, it is clear that none of them have a proactive program in which the prosecutors themselves are poring over old cases looking for colorable claims of innocence, irrespective of whether the convicted individual has an attorney or not, and whether that attorney has requested an investigation or not.

Anybody can pay lip service or hedge words. Instead, real proof is to be found in action. History has shown that when people who are in positions of authority are asked questions, and they wish to use subterfuge or smoke screens, they give blanket type answers, while giving no details; stonewalling, making excuses, and expecting everyone to just accept it by giving them the benefit of the doubt.

However, when it comes to a subject as serious as this, there should be no benefit of the doubt. Instead, this is more akin to a situation where the person who is making the claim must prove their assertion, otherwise there is no such proof that such a program exists. Governmental agencies often have the burden of proof, and I see no reason why this should not be the case here.

Looking at actions, District Attorney Morgenthau knew very well about the weakness of the 'confessions' of the Central Park Jogger defendants long before the DNA showed Matias Reyes' guilt, corroborated by the DNA. He did not reinvestigate that case on his own. It was only when evidence was brought to him that he acted.

Similarly, Bronx DA Robert Johnson did not examine the troubling aspects of Allan Newton's conviction, nor the ignoring of his alibi evidence. When he was asking for the evidence and wanting the testing, that did not trigger some kind of internal investigation within the office into the accuracy of the verdict. It did not

lead to a meticulous, nonstop search for the evidence. Indeed, when the evidence was located, it was right where the evidence voucher said that it would be.

Similarly, DA DiFiore, for all of her laudable non-opposition to me, did not have people in her office reviewing old cases, looking for wrongful convictions. It wasn't as though one day they came across my case and decide to open it up, thus determining that something was wrong, and proceeding to reinvestigate and clear me. Instead, Barry Scheck and The Innocence Project brought the case directly to her. There is a big difference between that approach and what is being done by District Attorney Craig Watkins, in Dallas, TX.

Accordingly, it can safely be said that none of the above three District Attorney's Offices have a Second Look Program; not the Bronx, nor Manhattan, nor Westchester County. If they did, the details would have long ago been forthcoming. Not only do concerned citizens have a right to know, but a District Attorney would be proud of such a pro-active, pro-justice, smart-on-crime initiative and therefore would be sure that the public knew about it.

If any of the above-named offices can legitimately take issue with what I have said, and do, in fact, have a Second Look Program, I challenge them to come forward to the public and present the details, I would love to be proven wrong about this and would be only too happy to say that I was wrong.

The Way Forward

It has been long established that wrongful convictions, with the current state of the criminal justice system, has

become a fact of life. Over 218 DNA exonerations have occurred, and no one knows how many continue to occur because too many legislatures across the country will not pass reforms requiring interrogations to be videotaped, and tactics which are linked to false confessions continue to be allowed. Misidentifications continue to be a issue; poor citizens continue to receive poor representation, and there are still no standardized evidence preservation systems in many states, including NY. DNA testing is not as yet established as a right under all circumstances; evidence withholding continues with no incarcerative and financial penalties to police and prosecutors; witnesses are still allowed to cut deals getting less prison time in exchange for testifying against others even though that has caused wrongful convictions in 15% of the 218 DNA-proven wrongful convictions. Our state legislatures, along with Congress, as a whole, continue to avoid rising to the challenge of stopping wrongful convictions.

Conviction Integrity Units are necessary in every prosecutor's office, both state and federal.

As a concerned citizen of both New York, and the United States, I want to know why District Attorney's Offices are not adopting the practice. As someone who lost 16 years to the system as it presently constructed, I know all too well how justice can go awry, and about the strong need to prevent them. I do not wish others to suffer the same fate, and, therefore, I am sounding the alarm. Not enough people in elected office are responding, as yet, to make a difference. ■

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