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New York State Bar Holds Hearing On Wrongful Convictions

Westchester DA Janet DiFiore Present As Panelist

In my last two columns I reviewed the Preliminary Report of the New York State Bar Association pertaining to wrongful convictions. On Feb. 13, 2009, a public hearing was held for the purpose of inviting public comment. This article will deal with that hearing.

There was a panel consisting of several members of the task force that had written the report. Each speaker was allowed five minutes to present, followed by two or three minutes of questioning. Although the hearing was open to the public, testimony was limited to invitation only.

Upon arrival, I noticed some familiar faces; individuals engaged in dealing with the phenomenon of wrongful conviction, including Lonnie Soury, Eric Friedman, and Bruce Barket, who had helped clear Marty Tankleff. Barkett had done the legal work, Soury the public relations, and Friedman had designed and updated the website.

I was surprised to discover that Janet DiFiore was on the panel. Her presence would make my testimony somewhat awkward, because in arguing the necessity for legislation criminalizing intentional prosecutorial misconduct, a reform that the report failed to include, I would be referencing several Westchester cases, some of which pre-dated her becoming District Attorney but which she, nevertheless, chose to defend, thus attempting to perpetuate several wrongful convictions, much the same way Jeanine Pirro had fought against all seven of my appeals though I had originally been prosecuted under her predecessor Carl Vergari.

Although DiFiore has given lip service to being a part of the *anti-wrongful conviction movement* and has hastened to add her name to any number of reports advocating reforms intended to make the criminal justice system more accurate, all too often hers, and her Office's, actions have run contrary to that position. In the below-mentioned cases, her office attempted to perpetuate wrongful convictions against defendants who had previously been wrongfully convicted under Jeanine Pirro, to say nothing of her own shameful prosecution of police brutality victim Irma Marquez, which resulted in an acquittal.

Furthermore, DiFiore has issued fraudulent statements about having a Second Look Program which supposedly pro-actively searches for wrongful conviction cases, when in fact no such program exists. No information about such a program has been made available to the public and is unknown by assistant DAs in her Appeals Bureau, as well as by her chief of staff. From my standpoint, proof lies in the actual actions and conduct of her Office, and not in the words that she has uttered.

Upon spotting me, she greeted me cordially, and we exchanged pleasantries while my resolve to give the testimony I had come to present remained unchanged. Interestingly, during the entire proceedings, Janet DiFiore asked no questions of any witness nor did she offer any comments. In fact, she left the hearing about 90 minutes before it concluded.

Queens District Attorney Richard Brown stated that wrongful convictions were extremely rare on his watch. He stated that when his Office is approached, pre-trial, with an actual claim of innocence, corroborated with credible evidence, they undertake an investigation. He went on to claim that when a post-conviction claim of innocence is made, a senior prosecutor is assigned to look into it. He said that in light of guilty defendants bringing baseless allegations of innocence that there needed to be some limitation on the opportunity to endlessly reopen criminal cases.

Brown made a point of stating that prosecutors in his Office understand that it is their job to bring about justice, and that they are expected to observe high ethical and professional standards. Furthering pursuing that theme, he declared that prosectors, "Must maintain a high state of alert to any indication of corruption or misconduct and root it out immediately." He went on to enumerate many educational programs available to prosecutors.

With all due respect, District Attorney Richard Brown is just another individual who says one thing while doing another. His Office's record is one of the worst with respect to prosecutorial misconduct. Furthermore, amongst all of the New York exonerations, a responsible position to take would have been that there needs to be more review of allegations of actual innocence whenever a colorable claim of innocence can be made, not fewer.

Staten Island District Attorney Donavan, also the President of the District Attorney's Association Of New York State, stated that it is a prosecutor's worst nightmare to convict an innocent person. He expressed concern about pre-trial detention of innocent defendants. He vocalized support of pre-trial DNA testing, and he offered to provide support to other district attorneys' offices if requested in reinvestigating a case. He went on to say that while he was in favor of legislative changes, he did not want to place at risk the "extraordinary success" they have enjoyed in making New York the safest large state. Asked the crucial question by a panel member, "Why won't the District Attorneys Association support mandatory videotaping of interrogations?" he took a dodge, citing costs.

Objectively speaking, I would ask, "Who would consider 52 wrongful convictions 'extraordinary success?'" One must consider, too, that those exonerations are but a tip of the iceberg and that New York State is third in the country with respect to the number of DNA-proven wrongful convictions.

Barry Scheck, co-founder of the Innocence Project, started out by stating that in jurisdictions where videotaping interrogations is performed, it has not proven costly. He added that the risk of wrongful convictions by not doing so was very costly. Addressing the notion that some defendants would not agree to talk if they knew they were being videotaped, Scheck stated that cameras could be hidden and simply turned on without permission. Turning to misidentifications, Scheck then suggested "The Great Compromise". He pointed out that live lineups cost more money than photo arrays while offering no greater reliability, but that they are done anyway because police fear that if a photo array is not allowed into evidence they might be left with no case; whereas if they conduct a lineup, they would at least have that evidence.

The compromise Scheck suggested was that police might stop doing lineups to save money, and that even if a photo array does not meet the new standards, they should be admitted into evidence anyway and considered by a jury, which also would be given an instruction by a judge as to the fact that array was not conducted according to best practices.

Peter Neufeld spoke next, emphasizing the need for videotaping of interrogations. Neufeld was asked about when videotaping would begin, out of concern about the circumstances which take place in a police car and at a precinct prior to the camera being turned on.

With all due respect to Barry Scheck, who has been in the front

lines in the battle against wrongful convictions since 1993, I disagree with his position. Many defendants' lives have been wrecked, as well as their families, as a result of misidentifications, that have caused many to spend decades in prison wrongfully.

It is time to stop pussyfooting around. Either police officers use the best practices when conducting lineups and photo arrays or else the evidence should not be admitted. As for those expressing concerns that the guilty might get away under such stringent conditions, my response is to put the onus back on the police to conduct such procedures in the most reliable way possible, as the cost of not doing so is far too great.

Ezekial Edwards works in the Policy Department of The Innocence Project, which is the section of the organization that has been focusing on bringing about legislative changes. Edwards told the panel that the reforms that The Innocence Project advocates are grounded in empirical data obtained through social science. He stated that misidentifications cause the police to focus on an innocent person, and away from the real perpetrator. He stated that multiple identifications made using unreliable methods did not increase accuracy. He pointed to Luis Diaz who served 25 years in Florida after being misidentified by eight people; Brandon Moon who served 17 years after being misidentified by five people; Kirk Bloodsworth, who was sentenced to death after being misidentified by five people.

Edwards advocated for blind administration, where the officers doing the lineup or photo array don't know who the suspect is. He further advocated for instructing the eyewitness that the perpetrator may or may not be in the lineup or in the photo array, and that the investigation will continue if no one is picked. He advocated for proper composition of lineups, ensuring that fillers are picked based upon the description of the victim rather than people who look like a suspect, while not allowing a suspect to unduly stick out. Additionally, only one suspect at a time should be in a lineup.

Edwards also advocated the need to obtain confidence statements, asking victims and witnesses to state, on a scale of one to ten, how confident they actually are of their selections.

Finally, Edwards stressed the importance of documenting the lineup procedure by recording it, and the preservation of the photos that were used as well as sequential presentation; the showing to a victim of one person or one photo at a time, rather than everybody at once. Edwards said "show ups" are inherently unreliable and far too suggestive to be continued.

Alan Newton, a well-known New York City exoneree, spoke of serving 21 years in prison based on a misidentification. He described how, for 13 of his 21 years, police authorities kept stating that they could not find the DNA evidence. He expressed his support for a standardized evidence preservation system mentioned in the Report.

In offering my own testimony, as an exoneree who spent 16 years in prison for a capital crime that the police and district attorney's office clearly knew I was innocent of, I was respectful, but not deferential. I stated that I thought I could be most helpful by pointing out issues that the Report had omitted. I stated that it was a fallacy to believe, as had been suggested by the Report and the dialogue between the panel and prior witnesses, that all of the withholding of evidence of innocence and other prosecutorial misconduct were "good faith errors", and that "nobody was ever doing anything intentional". I pointed out that Queens DA Brown had successfully been sued by attorney Joel Ruden on behalf of Shih-Wei Su, who served 13 years in prison based upon prosecutorial misconduct. In that lawsuit, Attorney Ruden managed to uncover 80 cases of prosecutorial misconduct in Brown's office, firmly establishing wrongful patterns and practices.

I then stated that it is essential to criminalize intentional prosecutorial misconduct; intentionally withholding evidence, suborning perjury, failing to correcting witnesses who commit perjury, working with medical examiners and other expert witnesses in an effort to work backwards; "Tell me what you want to prove and I will prove it."

I referenced:

• The 52 boxes of evidence and 376 pages of exculpatory material withheld from Anthony DiSimone's attorney, resulting in his incarcertion for seven years prior to that conviction being overturned, and pointing to the guilt of a third party;

• Ex-police officer Richard DiGuglielmo's conviction being overturned after 11 years, following a judge's finding that information had been withheld from the defense that the only three eyewitnesses to the incident had been hauled into the police station four times each and treated as suspects in order to get them to change their accounts from a self defense killing to one that was racially motivated;

• Marci Stein, a former school teacher, who served three years of a 12-year sentence for allegedly sexually assaulting three high school boys. Assistant Westchester District Attorney, Laura Murphy, had lied to the jury claiming that two victim witnesses did not stand to receive financial rewards based upon their allegations, when, in fact, she was well aware that they had filed Notice of Claim in Federal Court with the school district. Fortunately the Appellate Division reversed because of Murphy's misconduct. But she remains employed under Janet DiFiore.

In my own wrongful conviction, I am suing the former Medical Examiner, Louis Roh, for working backwards with the District Attorney's Office. His conduct, in my case, as it turns out, was not isolated.

Switching gears, I pointed out that while the report references that police interrogation tactics that are coercive, the report does not take the next logical step and recommend banning them. After all, we live in America and our Constitution contains the Fifth Amendment and therefore psychologically coercive tactics should not be allowed, such as _prolonged interrogations, often lasting for many hours, because they wear suspects down. I cited the exoneration cases of John Kogut, who served 16 years, and was interrogated for 18 hours; Douglas Warney, who served nine years and was interrogated for 12 hours. On the day of my false confession the interrogation ran for 7 ½ hours, most of which I was plugged into a polygraph machine.

I spoke out against lying to suspects by police claiming to have evidence they do not because false confession experts have determined that such tactics convey the message to suspects that, "No matter what, you are going to be charged, and it is only a matter of whether you're were going to make things more difficult on yourself". I described how I was lied to regarding my polygraph test results, and that Marty Tankleff was lied to by the cops who claimed that his father had come to and identified him, thus causing him to momentarily doubt himself.

I explained the abuse of polygraph testing which is linked to many false confessions while having no scientific validity. I criticized the interrogation of the mentally ill or retarded suspects in the absence of an attorney because it is well known that such individuals frequently compensate for their weakness by being compliant to authority. I referenced the Warney case, because he had an I.Q. of 68 and a history of mental illness and only an 8th grade education.

I concluded my testimony stating that there needed to be a limit on the caseloads of public defenders, because it is not unusual in jurisdictions like The Bronx for one public defender to simultaneously represent 120 clients.

Scott Fappiano spoke of serving 21 years in New York for the rape of a cop's wife based upon a misidentification before being exonerated by DNA.

Glenn Garber stated that he had been an attorney for over 20 years, and had founded the not-for-profit group Exoneration Intitiative, which focuses on clearing wrongfully convicted prisoners in non-DNA cases. He estimated that 2-1/2 to 5 percent of individuals are wrongfully convicted.

He stated that prosecutors need to be well-versed on the causes of wrongful convictions, and that when approached with an actual innocence claim, they should focus on justice and not on exploiting legal impediments that can stand in the way of exoneration.

Bruce Barket spoke of all of the work that it took to clear Marty Tankleff after 18 years of wrongful incarceration, and the fact that it was five years after they had unearthed the mountain of evidence which showed the guilt of another person before he was released. He reminded the gathering that prosecutors had fought to the bitter end against appeals and pleas of innocence, and that courts had chillingly allowed finality to trump truth.

Finally, Scott Golan spoke of the importance of raising public awareness with respect to wrongful convictions. He mentioned a public awareness event that he had helped to put together, entitled "The Art Of Innocence," a program involving three exonerees telling their story. In the hallway after his testimony, he confided to me that in all of the discussion about changes in the law, we were forgetting that it is the jurors who are voting guilty. He said, speaking of jurors, "If they know more about wrongful convictions, they will be more careful in reaching verdicts." ■