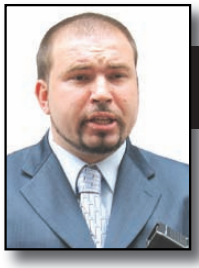

Jeff Deskovic

The Truth About Judge Sotomayor

U.S. Supreme Court nominee Sonia Sotomayor has an impressive background. Growing up in the South Bronx here in New York, she worked hard to get where she is.

In a career that took her from a Bronx housing project to Princeton University, Yale Law School, and ultimately the Second Circuit Court of Appeals, she has said that she tries to keep in mind the real life implications of her rulings when meting out justice. Such a high-minded moral standard is what we, as a society, should expect and seek from all of our judges, especially a United States Supreme Court Justice. But considering that we are talking about a lifetime appointment to the Nation's highest court, we should examine her record to see if in practice her rulings reflect her operating philosophy. A review of her record in ***my*** case shows something different.

As readers are well aware, at 17 years of age, I was wrongfully convicted of Murder and Rape, despite a negative DNA test and hair found on the body of the victim which did not match me. My conviction was based upon a coerced false confession, the fabrication of other evidence, prosecutorial misconduct, fraud by the medical examiner, and other prosecutorial malfeasance.

I was cleared 16 years later, almost three years ago, when further DNA testing reaffirmed my innocence while, at the same time, identifying the real perpetrator, who subsequently confessed, was arrested and pled guilty, and was sentenced to an additional 20 years beyond the time he was already serving for a subsequent Rape and Murder.

The Westchester District Attorney's office assigned four experts to study my case, and though the study in some ways was flawed, they did say that the System failed on every level, including judicially. Every single one of my appeals, seven in total, had been turned down. Two of them, along the way, made stops in Judge Sotomayor's courtroom.

I had filed a *Habeas Corpus* Petition in the court below hers, arguing my innocence based upon the DNA, and the fact that my Fifth Amendment rights had been violated by the manner in which the police had interrogated me. The court clerk gave my attorney inaccurate advice regarding the filing procedure, and as a result my petition arrived four days late.

Then Westchester District Attorney Jeanine Pirro's Office argued that those four days were somehow prejudicial to the People and that the Court should simply rule that I was late without even looking at my issues. The Court sided with the DA, and my claim of innocence was never considered. That meant that I would no longer be able to argue my issues directly, but instead was relegated to arguing that the procedural ruling against me should be overturned in order to then have my case sent back to the lower federal court to have my issues adjudicated on the merits.

Judge Sonia Sotomayor

I appealed that procedural ruling to Sotomayor's court, arguing that: 1) in light of the evidence of my innocence in the form of the negative DNA test, to uphold such a ruling would be to cause a miscarriage of justice to continue; 2) that overturning the procedural ruling against me would open the door to more sophisticated DNA testing; 3) that the error was not of my doing.

Judge Sotomayor and Judge Rosemary Pooler upheld the refusal to consider my case, writing, "*The alleged reliance of Deskovic's attorney on verbal misinformation from the court clerk constitutes excusable neglect that does not rise to the level of an extraordinary circumstance. Similarly, we are unpersuaded that equitable tolling is appropriate based upon Deskovic's contentions that the four day delay did not prejudice respondent, petitioner himself did not create the delay, his situation is unique, and his petition has substantive merit.*"

A second appeal to her court, asking them to reconsider their ruling, was turned down, and the United States Supreme Court refused to hear my case. As a result, I remained in prison for six more years, with no appeals left, before miraculously I obtained legal representation and got lucky that the real perpetrator's DNA was in the databank.

Despite Sotomayor's rhetoric, her ruling in my case shows that she did not consider the real life implications of her rulings. If she did, how could that be squared with her ruling in my case? Let me point out, initially, that the law did not compel her to rule that way. Additionally, could any objective observer say that her ruling was fair, consistent with administering justice, and could square with common sense?

I don't see how. But without even thinking twice, she cold-heartedly dismissed my case, no matter that I was raising the issue of innocence or that her ruling meant that I was very likely to remain in prison for the rest of my life for a crime that I did not commit. Given a chance to reconsider, correct her mistake, and step forward for justice by agreeing to reconsider my case and then reverse the procedural ruling, she declined to even give me permission to reargue the case in front of her.

There is yet another angle to this, putting aside the question of legality and assuming for a second that there were laws which she could cite to dismiss the case, such a ruling would demonstrate that she favors procedure over innocence, and finality of conviction over accuracy.

But I am sure that my case is not the only one in which she perpetuated wrongful convictions. New York has had 24 DNA-proven wrongful convictions. In almost all of them, the wrongfully convicted had long since had their appeals exhausted. How many of those cases came across her desk in which she ruled against meritorious claims and thus perpetuated the wrongful convictions?

At this point in time, though not of the DNA variety, I am aware of at least one other wrongful conviction case that she was involved in, Paul Cote. As has been reported in ***The Guardian***, Cote's conviction was overturned by the trial judge, who found that the weight of the evidence showed that the injuries were inflicted by the Prosecution's star witness, who received a plea bargain and was never tried, and not by Cote.

When the prosecution appealed the Judge Charles L. Brieant's reversal of the conviction to the Second Circuit, to a three-judge panel on which Judge Sotomayor was sitting, they reinstated the conviction.

Based upon my life's experience and all of my writings, I think that everybody knows that I am against corrupt police officers and abusive correction officers. But I am against injustice and wrongful convictions, no matter who the defendant may be or what their occupation is, and I am by no means against honest law enforcement personnel or guards who are professional. Cote received a raw deal.

But even in cases where the principle issue is not guilt or innocence, but instead whether a trial was fair, and hence, whether the verdict is reliable, everybody is entitled to an accurate ruling on whether their trial was fair. If a trial is not fair, then the verdict cannot be relied upon, because one does not know how a case would turn out but for the errors.

In ***Herrera v Senkowski***, the defendant was convicted of murder and robbery. Herrera challenged his conviction, alleging that he was denied *due process* when the prosecutor argued in summation that Herrera's earlier statement to him during an interrogation that Herrera was present during the robbery should be believed, and when the prosecutor stated during summation that a witness to the robbery did not have a gun and thus could not have been the person who shot the victim.

Here is Sotomayor's decision: "*We cannot say that the state court's implicit determination that neither comment was so prejudicial as to render the trial fundamentally unfair was contrary to, or an unreasonable application of, clearly established federal law. Even assuming both statements were improper, both were harmless.*"

Analysis: It is established law that a prosecutor may not act as an unsworn witness, speaking on issues directly as a type of witness rather than arguing a case based upon the evidence, because, among other things, he is not subject to cross examination, and places the jury in a position that in order to acquit they would have to disbelieve the prosecutor as a person, as opposed to rejecting the arguments that he makes about the evidence.

This trial was unfair and thus the outcome should have been reversed. Yet she voted to uphold it. Turning to her harmless error analysis, as I have stated before, if an improper tactic was harmless then a prosecutor would not have bothered to engage in it. Beyond that, the fact that two acts of prosecutorial misconduct occurred, surely it could not be said that both acts, when viewed cumulatively, had no impact upon the verdict.

In ***United States Of America v Heredia***, the defendant was convicted of possession of a firearm. He appealed his case to Sotomayor's court. As summed up by Sotomayor's court:

"*The district court erred by admitting into evidence, over hearsay objections, a command log entry purportedly written by a non-testifying desk officer. The command log entry, written at the police station, purported to reflect an arresting officer's statement that the appellant was charged with gun possession and that two other individuals arrested at the same time were charged only with disorderly conduct.*

The defense theory at trial was that the arresting officers did not know which of these three individuals owned the discarded gun, but quickly decided 'on the scene' to attribute the gun to the appellant, whom the officers recognized from a prior arrest. The command log entry was admitted into evidence, over a defense objection, apparently on the theory that it contained a prior consistent statement by an arresting officer.

As an exception to the hearsay rule, a prior consistent statement of a witness may be admitted into substantive evidence if it is 'consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.' Fed. R. Evid. 801(d)(1)(B).

However, to be admissible under this rule, the consistent statement must have been made before the alleged motive to fabricate arose Accordingly, the appellant argues that because the defense's trial theory was that 'the decision to attribute the gun to appellant had been made before they reached the precinct,' the command log entry, written at the precinct, contained statements made after the alleged motive to fabricate arose.

Thus, according to the appellant, the log entry was not admissible as a prior consistent statement. The appellant also argues that the command log contained inadmissible hearsay by the desk officer. The argument is well put. However, we need not decide whether the log entry was admissible under Rule 801(d)(1)(B), or whether it contained inadmissible hearsay by a non-testifying desk officer, because any error in admitting the entry was necessarily harmless."

Turning to his next argument: "*The appellant next argues that admission of the log entry, written by a non-testifying desk officer, violated the Confrontation Clause. Because the appellant did not raise this objection to the trial court, his Confrontation Clause challenge is reviewed for plain error. See* ***United States v. Bruno****, 383 F.3d 65, 78 (2d Cir. 2004). As stated above, any error in admitting the entry was harmless; a fortiori, the putative error was not plain.*"

Turning to a third argument which was raised: "*The appellant finally argues that the prosecutor committed several reversible errors during summation. The appellant principally objects to the prosecutor's statement during rebuttal summation, in which the prosecutor drew a comparison between an errant omission in a stipulation signed by both counsel and an omission in the arresting officers' memo books. The officers' memo books, apparently written at the scene of arrest, contained no indication that the officers intended to charge the gun exclusively to the appellant. The prosecutor seemed to use this ill-considered analogy to suggest that mistakes and omissions in paperwork are commonplace.*

'To warrant reversal, the prosecutorial misconduct must cause the defendant substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process.' ***United States v. Parkes****, 497 F.3d 220, 233 (2d Cir. 2007) (internal quotation marks omitted). 'In assessing the alleged misconduct, we consider the severity of the misconduct, the measures adopted to cure it, and the certainty of conviction in the absence of the misconduct.' Id. (internal quotation marks omitted). It is clear that the prosecutor's statement was inappropriate. In drawing the analogy, the prosecutor attempted to use defense counsel as a witness by asking the jury to draw an inference from defense counsel's signature to the stipulation; the statement falsely suggested that the defense attorney shared in the prosecutor's responsibility for the errant omission in the stipulation; and the statement may have subtly misrepresented the testimony of the police officers, who testified that it was not by error, but by common practice, that the lesser charges were not included in the memo book. And yet, the error did not result in the high level of prejudice required to reverse a conviction.*"

She gives several reasons why not; first, that the statement was isolated; second, the comment was a poorly worded attempt to appeal to the jury's common sense intuition that omissions in paperwork are frequent; third, the curative instruction given by the judge to the jury. Significantly, this comment was made in response to defense counsel's attack on the credibility of prosecution witnesses.

Analysis: In this case, incredibly, even three errors that occurred were not sufficient, in Sotomayor's mind, to render a trial unfair. Firstly, when it comes to laws which state that under certain conditions evidence is not admissible, there is a good reason why it is not. There usually is an element of unfairness to it or the fact that it would impact the accuracy of a verdict.

When the laws state that something is not admissible, those are the rules by which the trial must be conducted. If a trial judge does not follow them, they should be reversed, for that is the only way to ensure both that trial judges follow the rules and that trials are fair.

Secondly, it is error to admit evidence from a non-testifying officer because there is virtually no way for a defense attorney to challenge it, as there is no way to conduct a cross examination.

Thirdly, if a prosecutor makes an improper statement during summation, which Sotomayor conceded happened, it is not harmless, or the prosecutor would not have bothered to do it. It does not matter whether the statement was 'isolated' or not, nor does the motivation of the prosecutor matter. Additionally, to believe that a jury can put something out of its collective mind, merely because the judge directed it to, is simply not reality.

I find it incredible that none of the errors which the defendant raised, which Judge Sotomayor agreed were errors, warranted reversal. Apparently, in her courtroom, there is very little, if anything at all, which would warrant reversal. With that type of judicial mindset reviewing judges, there is very little to hold back prosecutors from engaging in misconduct or doing things that imbalance what is supposed to be a fair trail, for they know that they will not have the conviction reversed.

It also tells defendants that their rights will not be protected. Similarly, these types of rulings do little to make trial judges careful to ensure that they make the right rulings; for again, they know that there is a small chance that they will be reversed.

Lastly, apparently there is no such thing as the cumulative effect of errors combining to make a trial unfair in the mind of Judge Sotomayor.

We are living in an age where the reality of wrongful convictions is well established. We face the prospect that Troy Davis, an innocent man on Death Row in Georgia, faces imminent execution absent intervention by the High Court or by President Obama, or US Attorney General Holder.

We are living in an age when some prosecutors are out of control and wish to win no matter what. We are living in an age where judges cease to see themselves as neutral arbiters of the law but instead as a quasi-type of law enforcement whose job it is to protect the public by upholding convictions however and whenever possible, no matter whether the defendant is innocent, or if a trial was fair or not, and thus the verdict can therefore be considered to be more reliable.

We need a U.S. Supreme Court Justice who understands the problem of wrongful convictions and is ready to correct them wherever the facts deem it necessary. We also need somebody who will overturn convictions when a trial is not conducted according to Constitutional law. We need somebody who has, and will continue to live up to the word "Justice".

In my case, and in others, Judge Sotomayor has shown she is not that person. If her ruling is considered to be reflective of 'empathy', a key requirement of President Obama in making his selection, then God help us all, especially those who are wrongfully convicted, and possibly sentenced to death.

Innocence can never be ruled out of order in a court of law. ■