

A NEW STRATEGY FOR PREVENTING WRONGFUL CONVICTIONS

After seven and a half hours in police custody, including a several hour polygraph test over three sessions that police informed him he was failing, 16 year old high school sophomore Jeff Deskovic confessed to the rape and murder of a classmate. Questioned without his parents, terrified and tired and only given coffee to drink with no food, he ended the interrogation distraught beneath the interrogation table. Seventeen years later, when the DNA from the scene was finally run through a national database, a match was discovered with someone who was already in prison. Jeff was released in 2006 at the age of 33. While he was in prison, the actual perpetrator remained free, committing another murder.

Wrongfully convicted of a Bronx rape, assault and robbery at the age of 24, Alan Newton spent nearly half of his life in an upstate prison. Despite Mr. Newton's alibi – he was at his then-fiancée's apartment in Queens at the time of the crime – a Bronx store clerk identified Mr. Newton in a lineup as the customer who followed the victim out of the store. The victim, who also identified Mr. Newton but only by using a 5 year old police photo of him, told prosecutors just before trial that she was not certain he was the perpetrator. Still, Mr. Newton was convicted and sentenced to 13 to 40 years in prison. Throughout this time, he steadfastly maintained his innocence, missing several chances at parole because he refused to admit to a crime he did not commit. After serving 9 years, he made his first motion for DNA testing, which was denied because police could not locate the evidence. Twelve years later, the evidence was located. Upon testing, Mr. Newton was found to be innocent and released. Today, the injustice continues as he awaits the outcome of the lawsuit for damages he filed three years ago against the city and state.

Unfortunately, these stories are not extraordinary. Since 1964, there have been 53 people exonerated in New York State. While rare, these wrongful convictions have had devastating effects on the lives of the convicted and their families. Imprisoned for years, these innocent individuals frequently lose their jobs, their homes, their reputations and sometimes those that matter most to them - their spouses and partners, friends, children and other family members. They are released from prison after years or decades, often just with the shirts on their back.

Moreover, the conviction of an innocent individual – while the actual offender goes free – erodes both public safety and confidence in the criminal justice system. An Innocence Project study of New York's 24 DNA exoneration cases since 1991 found that, in 9 of the 10 cases where the actual perpetrator was later identified, the real perpetrators had committed five murders, seven rapes, two serious assaults and one robbery at gunpoint while the innocent person was in prison. Distrust of the system is particularly high in communities of color: members of minority groups represent 70% of those exonerated by DNA testing.

Finally, wrongful convictions have cost taxpayers millions of dollars. The average cost of incarcerating a wrongfully convicted person is \$648,000. Significant costs also accrue through the original criminal proceeding and subsequent appeals. In addition to these costs to the district attorney's office, public defender system and the courts, wrongfully convicted individuals who are exonerated are able to file a court action for damages. Some of these cases have resulted in awards ranging up to several million dollars.

Clearly, nobody is served by wrongful convictions. While prosecutors strive every day to convict the guilty and protect the innocent, errors still occur. The District Attorney's office under Richard Aborn will provide every prosecutor with more tools and training to minimize wrongful convictions, and Assistant DAs will be encouraged to come forward if they think they have the wrong person. Every case will start with the question – do I have the right person? All cases of prosecutorial misconduct (which, although rare, are incredibly serious) will also be investigated quickly and fully.

Richard Aborn has been a long-time leader in efforts to prevent wrongful convictions. As a member of the New York State Bar Association's Task Force on Wrongful Convictions, he worked with other expert members of the Bar and Judiciary to craft a roadmap for New York to reduce the likelihood of wrongful convictions. As Manhattan District Attorney, Richard Aborn will continue this involvement, while adopting progressive and effective policies and programs designed to reduce the likelihood of wrongful convictions in New York County:

- **Create a new office of professional responsibility**
- **Strengthen suspect identification**
- **Reduce false confessions**
- **Improve the use of forensic evidence**
- **Provide support for exonerated individuals**

PROFESSIONAL RESPONSIBILITY AND ACCOUNTABILITY IN THE DA'S OFFICE

Preventing wrongful convictions must start with a new effort to reduce governmental error and prevent prosecutorial misconduct. The April 2009 study by the New York State Bar Association Task Force on Wrongful Convictions found that errors by police or prosecutors contributed to more than half of the wrongful conviction cases reviewed by the panel. In nearly three-quarters of those cases, prosecutorial errors included suppression of evidence in violation of the constitutional command recognized by the Supreme Court decades ago in *Brady v. Maryland*: that prosecutors disclose favorable or exculpatory information to the defense.

The vast majority of errors by prosecutors are not intentional. But they point to the need for training and oversight to prevent wrongful convictions from occurring.

As District Attorney, Richard Aborn will create an Office of Responsibility (OPR) in the Manhattan District Attorney's office.

Like the United States Department of Justice's Office of Professional Responsibility, this office will collect and investigate allegations of prosecutor misconduct. It will also conduct proactive reviews of cases and be a liaison with the Appellate Division Disciplinary Committees. But OPR will go further, working with the Training Director to organize trainings, create clearer

guidelines, and put in place safeguards to prevent errors from occurring in the first place. Moreover, because “sunlight is the best of disinfectants,” OPR will increase the transparency and accountability of the District Attorney’s office by publishing regular reports on its actions on the District Attorney’s website.

- *First year and ongoing training for all prosecutors on professional responsibility and prosecutorial ethics:* OPR’s first and most important role will be to provide training and assistance to line prosecutors and bureau chiefs to ensure that assistant district attorneys follow the law and seek justice. Training will focus on specific steps to improve the exercise of prosecutorial discretion, avoid wrongful prosecutions, and assure compliance with professional ethics. OPR will review cases of wrongful convictions – both in New York County and nationally -- to identify lessons to be learned and best practices: these regular case reviews will be provided along with annual training to all assistant district attorneys. OPR will make case reviews available to the Police Department as well.
- *Identifying and acting on prosecutorial error and misconduct:* OPR will track convictions, acquittals, dismissals and exonerations, flag any government error that occurred, and identify instances of prosecutorial error and/or misconduct. Where prosecutorial error is involved, OPR will meet with the assistant and their bureau chief to determine an action plan designed to avoid future error: this may include additional training or increased supervision. Where the error was willful and rises to the level of prosecutorial misconduct, OPR and the assistant’s bureau chief will make recommendations to the District Attorney for possible internal and external disciplinary action. OPR will also identify cases of police error and regularly report incidents to the District Attorney, relevant commanders within the Police Department and other appropriate authorities.
- *Review complaints by members of the public against prosecutors and other Manhattan District Attorney employees.* In addition to conducting its own internal review of prosecutorial conduct, OPR will also oversee the office’s review of all complaints against prosecutors and employees by members of the public. The OPR website will contain clear information on how members of the public can file complaints or provide information regarding misconduct. OPR will regularly publish reports on complaint reviews and post them on the OPR website as well.

STRENGTHEN SUSPECT IDENTIFICATIONS

Nationwide, witness misidentification has been a factor in three of every four wrongful convictions. Here in New York State, the State Bar Association Task Force concluded that misidentifications are responsible for more wrongful convictions than any other factor. Several factors contribute to misidentification. With repeated questioning, witnesses tend to grow more confident in the accuracy of their identification. Finally, administrators may intentionally or unintentionally influence the results of a line-up through unconscious bias or interpersonal cues. While cross-examinations and other measures have been put in place to protect against purposeful misidentifications, more safeguards are needed to address prosecutorial reliance on unintentional misidentifications.

As District Attorney, Richard Aborn will put in place policies to strengthen suspect identification.

- *Improve the integrity of identification procedures by using double-blind, sequential administration.* In double-blind administration of line-ups and photo arrays, the administrator does not know the identity of the suspect. Sequential administration means that each stand-in is brought to the window one-by-one for viewing by the witness. Both of these procedures have been shown to help improve the reliability of identifications.
- *Require administrators to provide standard cautionary instructions to witnesses.* Witnesses should clearly understand that the administrator of the line-up or photo array does not know who the suspect is, that the perpetrator may not be included in the line-up or photo array, that the witness is not required to make an identification and that the investigation can still continue even if an identification is not made.

REDUCE FALSE CONFESSIONS

In New York City, half of the cases where individuals have been exonerated by DNA evidence since 2000 involved defendant confessions. Most confessions are truthful and are important and persuasive evidence in criminal cases. But in the pursuit of justice, police and prosecutors need to recognize that even absent coercion some defendants may falsely confess.

In some cases, false statements are intentional – where, for example, one individual seeks to protect the identity of another. In other cases, certain persons – such as mentally ill and mentally disabled and juveniles – are particularly susceptible to aggressive interrogation techniques and, therefore, more likely to provide false information. According to the Innocence Project, in over one third of the false confession or admission cases, the defendant was younger than 18 or developmentally disabled.

As District Attorney, Richard Aborn will work to reduce the likelihood of false confessions.

- *Require videotaping of the custodial interrogations of all suspects accused of violent felonies.* In most cases, videotapes of the interrogation will strengthen the prosecution’s case against defendants who confess. It will also, however, allow prosecutors to fully review the circumstances around a confession and to weigh its validity.
- *Develop training on recognizing false confession.* There are often signs that a confession may be false but, absent proper training and vigilance, these signs may go unnoticed. Police and prosecutors must be aware of and sensitive to these factors.

IMPROVE THE USE OF FORENSIC EVIDENCE

Scientific advancements have led to the increased use of forensic evidence, particularly DNA, to exonerate wrongfully convicted individuals. But law enforcement has not always kept up with the advances of science. According to the State Bar Association report, police officers sometimes fail to collect evidence or transfer key evidence for testing. And, because no effective cataloging system for evidence exists, key evidence can be lost or destroyed, as documented in a 2008 audit

by the New York City Comptroller which found that nearly one-third of handguns and rifles turned into the police could not be immediately accounted for in a Manhattan property clerk's office.

As District Attorney, Richard Aborn will lead the effort to make New York State and New York County model jurisdictions in the use of forensic evidence in criminal proceedings.

- *Increase access to DNA.* The Legislature should change state law to allow individuals reasonably claiming wrongful conviction to have access to DNA tests, regardless of whether the conviction was a result of a trial verdict or guilty plea. Such an expansion would reflect the reality that innocent suspects sometimes make false statements and confessions and should not be barred from exoneration because of this.
- *Give judges explicit authority to direct that crime scene evidence be compared with existing forensic databases.* Upon reasonable request of an accused or convicted person, courts should have the power to order a comparison of DNA test results or other forensic evidence to existing samples. Doing so will help acquit the accused or exonerate the wrongfully convicted, and possibly identify the actual perpetrator.
- *Support funding to develop a comprehensive catalog of forensic evidence with state-of-the-art technology.* A comprehensive cataloging and retrieval system for forensic evidence, utilizing bar-coding or other state-of-the art technology, is needed. Such a system will allow police and prosecutors to more readily access evidence and prevent its loss.
- *Develop training modules regarding the handling and storage of evidence.* The District Attorney's office, working with the police and outside experts, will develop training modules to aid prosecutors in assessing the reliability of evidence.

<p>PROVIDE SUPPORT TO THE EXONERATED TO ALLOW SUCCESSFUL RETURN TO THE COMMUNITY</p>

Tragically, the great injustice suffered by the wrongfully convicted continues long after their release from prison. While inmates leaving prison and returning to the community benefit from a range of support services upon release from prison, little help is available for the wrongfully convicted. With few exceptions, exonerated individuals do not get assistance obtaining affordable housing, job training, education and health care, nor do they receive immediate funds to purchase everyday necessities. Presently, the sole remedy for the wrongfully convicted is to file a claim for damages against the State in the Court of Claims, a process which can take months or years and has resulted in uneven judgments for similarly-situated individuals.

As District Attorney, Richard Aborn will strongly support policies and programs to provide assistance to the exonerated.

- *Provide immediate financial assistance upon exoneration.* When an exonerated individual walks out of prison, they should be eligible for a standard financial assistance program to enable them to successfully return to the community. The amount of

financial assistance should depend on the amount of time that the individual was wrongfully incarcerated.

- *Offer immediate support services to innocent persons upon release from prison.* In addition to compensation, exonerated individuals should be eligible for the same post-release services for which individuals on parole are eligible, including housing, health, mental health, job training & other services.
- *Expunge criminal records related to wrongful convictions.* Once proceedings concerning wrongful convictions have been concluded, criminal records related to the wrongful conviction, including those concerning any wrongful arrest, conviction and sentencing should be expunged, while still being made available to the defense and law enforcement.

It is important to note that, while this report focuses on the government's role in wrongful convictions and how it can be improved, justice cannot be ensured unless a defendant has adequate legal counsel. To this end, Richard Aborn will continue to work with the Task Force on Wrongful Convictions to advocate for a strengthened, adequately-funded defense system, as is laid out in our April 2009 Final Report and the Kaye Commission report on The Future of Indigent Defense Services.