THE CLOCK DOES NOT EXPIRE ON DOING THE RIGHT THING

THE PROSECUTOR'S DUTY TO REMEDY THE CONVICTION OF A DEMONSTRABLY INNOCENT PERSON

By David Richman

Has the Philadelphia District Attorney drawn any lessons from the dramatic rejections on Aug. 23, 2016, of his office's long, wrongheaded defense of two deeply flawed murder convictions? In a striking coincidence of timing, Tony Wright and Jimmy Dennis, two men imprisoned for 25 years, Dennis on death row, obtained some long-denied justice on the very same day—over the implacable and inexplicable opposition of the District Attorney's Office.

In Wright's case, the jury needed hardly any time at all to acquit him on Aug. 23 of the rape-murder of 77-year-old Louise Talley following a more-than-two-week retrial. In the jury's eyes, DNA testing results exposed the falsity of the confession that homicide detectives supposedly extracted from Wright and the falsity of additional police testimony manufactured to corroborate the confession.

In Dennis's case, the U.S. Court of Appeals for the Third Circuit, sitting en banc, affirmed on Aug. 23 the district court's grant of a new trial on charges of robbery and murder. The Court of Appeals upheld the determination that Dennis was severely prejudiced by the failure of the District Attorney's office to disclose before trial multiple items of exculpatory evidence, including, among other things, a time-stamped Philadelphia Department of Public Works receipt that would have corroborated Dennis's alibi, and the statement of the Commonwealth's chief eyewitness to a relative shortly after the killing that she recognized the killers from Olney High School, that excluded Dennis as the perpetrator.

In both of these cases, the District Attorney's Office fought to preserve a conviction even after it learned of new evidence that made it highly likely that the defendants were

"actually innocent." That is, no reasonable juror, apprised of the new evidence, would have found Wright or Dennis guilty. In Wright's case, the District Attorney's office fought for years against a petition for post-conviction relief that sought merely to have the rape kit in the case subjected to DNA testing. Ultimately, the Supreme Court of Pennsylvania cleared the way for the testing, revealing to the satisfaction of all parties that semen found in the decedent contained DNA that matched the DNA profile on the FBI's national database of the DNA profiles of convicted felons of one person only, a Ronnie Byrd. In 1991, Byrd was a habitual crack user with a history of crime who was squatting in an abandoned house near Talley's home. Unmoved by the new evidence, and apparently without reinvestigating the case, the District Attorney fought to convict Wright a second time with police testimony that the DNA findings had discredited.

In Dennis's case, the District Attorney's office has never wavered in its efforts to have Dennis put to death even after the withheld DPW time-stamped receipt came to the defendant's attention at the time of the direct appeal in the case, and even after that evidence was augmented 10 years later with the additional exculpatory evidence that had been withheld.

The District Attorney's actions in those two cases raise the question of the obligation of a prosecutor to do justice *after conviction*. Before trial, the prosecutor's duty is uncontroversial. Prosecutors should not knowingly prosecute demonstrably innocent people. Thus, if no credible evidence points to the person's guilt, or if slender evidence of guilt is

swamped by affirmative evidence of the person's innocence, right-minded prosecutors will refrain from pressing or prosecuting charges. Why, after all, would a prosecutor seek the conviction of such a person, except for some improper motive?

Suppose, for example, police arrest someone for committing a gunpoint holdup, and the charge is based on a single eyewitness identification that was the product of a suggestive lineup and the witness's brief glimpse of the robber's masked face. Before trial, defense counsel comes forward with five unimpeachable alibi witnesses whose testimony is corroborated by a video that documents the defendant's presence in another state when the holdup occurred. It is unimaginable, isn't it, that a prosecutor would pursue such a case? It would be foolish to do so— a waste of scarce resources and a blot on the prosecutor's credibility.

It would also be wrong by any norm—legal, moral, ethical and political. According to the Comments to Rule 3.8 of the Pennsylvania Rules of Professional Conduct, the rule specifying the responsibilities unique to prosecutors, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." As a minister of justice who is commanded by Rule 3.8(a) to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause," the prosecutor in our hypothetical case would be duty-bound to drop the charges.

But what about *after* conviction? What duty, if any, does the prosecutor owe to a demonstrably innocent person who has been convicted and imprisoned as the result of a good-faith but, it turns out, ill-founded prosecution? Does prosecutorial discretion, broad as it is, stretch as far as defending the conviction of a demonstrably innocent person, simply because the evidence demonstrating innocence came to light too late to affect the outcome of the trial?

These questions were largely academic and seldom vexed prosecutors before the advent of DNA testing technology and the innocence movement that developed in its wake. Now it is a common occurrence for a conviction to be challenged by compelling and often irrefutable evidence of innocence—and not just DNA evidence. Just how common is indicated by the reports of The National Registry of Exonerations maintained by the University of Michigan Law School. The Registry has documented more than 1,900 exonerations of inmates nationally since 1989, 59 in Pennsylvania.

To qualify for inclusion on the Registry, one must have been convicted of a crime and later officially declared innocent of that crime, or relieved of all legal consequences of the conviction because evidence of innocence that was not presented at trial required reconsideration of the case. While the application of the Registry's criteria has possibly resulted in a few guilty individuals being mistakenly granted exoneree status, those numbers are almost certainly exceeded by the number of factually innocent individuals who were coerced into pleading guilty or no contest to avoid prolonged incarceration after a judge granted a new trial based on evidence of innocence, to say nothing of those factually innocent persons for whom affirmative evidence of innocence has not or cannot be found.

Our intuitive sense of justice is surely offended by the continued punishment of someone for a wrong that we come to find out the person did not commit. For desserts to be just, the inmate must be actually guilty, not just to have been once found guilty. Take away guilt, which is to say the evidence of guilt, and punishment becomes arbitrary and intolerable. Pennsylvania law comports with this intuition.

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The Pennsylvania Post-Conviction Relief Act was enacted to afford a means to relief for "persons convicted of crimes they did not commit." 42 Pa.C.S. § 9542. For persons convicted of crimes they did not commit who are still undergoing a sentence, relief is available on a showing, among other things, of new exculpatory evidence that would likely have changed the outcome of the trial if it had been available and introduced at trial. § 9543 (a)(2)(vi).

The American Bar Association's Model Rules of Professional Conduct have come to incorporate this same intuition of justice in their expansion of the special responsibilities of prosecutors. The point of departure for the expansion was the revelation that came from the DNA-based exonerations: that innocent people are frequently convicted and that it is often possible to establish their innocence through advances in science or the discovery of new evidence that thoroughly impeaches the proof of guilt or convincingly demonstrates innocence. So enlightened, the ABA amended Model Rule 3.8 in 2008 to make it explicit that the prosecutor's responsibility as a minister of justice does not end with the judgment of sentence. As amended, Model Rule 3.8 now decrees, in so many words, that the prosecutor who learns *after* conviction of new, credible, and material evidence of a defendant's likely innocence, is not privileged to sit on it but must disclose the evidence to the defendant, conduct an investigation into the defendant's factual guilt, and seek

to correct the conviction when clear and convincing evidence establishes the defendant's innocence.

When the Pennsylvania Bar Association adopted a resolution in 2010 calling for the adoption of the amendments to Rule 3.8—something that 16 states have now done in one form or another— the Disciplinary Board of the Supreme Court of Pennsylvania solicited comments. Tellingly, the Pennsylvania District Attorneys Association submitted comments that opposed adoption. To its credit, the PDAA acknowledged that Pennsylvania prosecutors are duty-bound "'to seek justice, not only convictions,'" and that the duty to do justice extends beyond conviction to those who are shown by new reliable evidence to be actually innocent. Yet it shrank from supporting a rule change that would spell out for prosecutors their obligation to seek justice *after* conviction on being presented with reliable evidence of likely innocence. In the view of the PDAA, the proposed amendments were not appropriate for Pennsylvania given its "strong history of prosecutorial ethics."

Actual history does not justify the PDAA's self-praise. Of Pennsylvania's 59 exonerations since 1989, official misconduct by police or prosecutors was a contributing factor in 26, including Wright's. Wright's case is, if anything, the case that proves the need for a clear declaration by the Supreme Court of Pennsylvania, via the Rules of Professional Conduct, of the prosecutor's post-conviction duty to do justice when presented with new evidence that establishes the defendant's actual innocence.

Wright was convicted at his 1991 trial on the testimony of Philadelphia homicide detectives that he gave them a signed confession to the murder and rape, and that they retrieved his blood-stained clothing from under the mattress of his bed just where he told them the clothing could be found. Decades later, DNA testing results, concurred in by Philadelphia's own chief DNA analyst, not only identified the true perpetrator from semen samples that excluded Wright, but also showed that the clothing supposedly retrieved from underneath his mattress had only been worn by the decedent, never by Wright.

Armed with these test results and a host of other evidence that shredded the prosecution's case, defense counsel beseeched the District Attorney to drop the charges against Wright and end the nightmare of his long imprisonment. The District Attorney refused. Seemingly without investigating the probity of the detectives responsible for the DNA-discredited confession and physical evidence, the District Attorney forged ahead with a retrial on a startling new theory revealed only in the final minutes of the prosecutor's closing argument: that Wright murdered Louise Talley in her bedroom and Ronnie Byrd came by later and raped her corpse. Is it to be wondered that the jury's verdict—reached within minutes of entering the jury deliberation room—set what must be a record for the fastest jury acquittal in history after a multi-week murder trial?

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The Wright facts illustrate vividly the need for the adoption of the proposed amendments to Rule 3.8 so that prosecutors will have some ethical counterweight to whatever institutional or other factors now lead them at the post-conviction stage to defend or pursue a conviction even when the reliable evidence screams the defendant's innocence. What, you may now be asking, came of the proposed amendments after the Disciplinary Board solicited comments in 2010? Upon consideration of several sets of comments, including those of this writer on behalf of the Pennsylvania Innocence Project, the Disciplinary Board recommended the amendments' adoption. That recommendation has languished for the past five years. Both the Pennsylvania Bar Association and the Pennsylvania Innocence Project have urged the Court in recent submissions to take up and adopt the proposed amendments in the interest of justice.

The proposed amendments to Rule 3.8 are one tangible manifestation of the recognition of the prosecutor's post-conviction obligation to seek justice for the likely or demonstrably innocent. Another is the establishment within some prosecutors' offices around the country of conviction review units dedicated to examining substantial post-conviction innocence claims. Some of these units, most notably in Brooklyn and Dallas, have undertaken to scrutinize, on their own initiative, certain past convictions where the integrity of the law enforcement officers responsible for the conviction has come to be doubted or where other factors, such as systematic laboratory error, call into question the accuracy of the conviction.

More than a year ago, the District Attorney's office announced with some fanfare the creation of its own conviction review unit. Regrettably, neither its staff of one, nor its activities to date, reflect a genuine commitment to the mission of correcting false convictions let alone ferreting them out. Philadelphia is currently in the rearguard when it comes to implementing the prosecutor's post-conviction duty to seek justice, but the path to the vanguard is wide open to the prosecutor who stands for justice for the innocent no less than for the guilty. ■

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