

Judiciary Examines Causes of Wrongful Convictions

New York State Task Force Issues Report

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When I announced the creation of the New York State Justice Task Force on May 1, 2009—Law Day—I had two goals in mind: (1) to strengthen the justice system by learning from our mistakes, and (2) to see the judiciary bear greater responsibility in preventing wrongful convictions.

As chief judge of New York State, I and my task force cochairs, Theodore T. Jones of the Court of Appeals, and Westchester County District Attorney Janet DiFiore, oversee a permanent, independent group of prosecutors, defense attorneys, lawmakers, police officials, scientists, judges, academics, and others who are dedicated to analyzing the causes of wrongful convictions and developing systemic remedies to make the criminal justice system more effective. The task force reviews documented exonerations in order to identify the factors that contribute to the conviction of innocent persons. Based on its findings, the task force recommends specific measures to guard against the recurrence of wrongful convictions in the future.

New York State historically has been a national leader in using forensic science to prevent injustice. New York was the first state to pass a law allowing prisoners to use DNA testing to prove their innocence, and was among the first states to actually exonerate innocent prisoners through DNA evidence. It was also the first state to establish a forensic science commission dedicated to ensuring the quality and integrity of forensic evidence. Despite these accomplishments, New York has not been sufficiently vigilant in addressing weaknesses in its criminal justice system that can lead to unjust convictions. Since DNA was first used here in 1991 to exonerate an innocent person, 27 convictions have been overturned

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based on DNA evidence (out of 266 nationwide), with 21 of those occurring just since 2000 (Stephen Saloom, Op-Ed, *Prevent Wrongful Convictions*, ALBANY TIMES-UNION, May 19, 2011). This high exoneration rate, which does not take into account dozens of convictions overturned based on traditional, non-DNA evidence, demonstrates that our criminal justice processes need reexamination.

The good news is that there is a large and growing body of research that points the way to how we can minimize unjust convictions through basic policy reforms; changes in police and court procedures; enhanced training for lawyers, judges, and law enforcement personnel; and other measures.

First of Its Kind in the Country

A small number of states around the country have by statute or gubernatorial action established commissions dedicated to the study and reform of wrongful convictions, and the New York State Bar Association and other bar groups nationwide are increasingly focusing on this serious problem (see FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS (April 4, 2009), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=31576&Template=/CM/ContentDisplay.cfm>). Many nonprofit organizations are doing extraordinary work in overturning unjust convictions in court and serving as policy advocates for systemic change, most notably the Innocence Project at Cardozo Law School. Prosecutorial offices have also begun to look internally at ways to prevent erroneous convictions. In March 2010, New York County (Manhattan) District Attorney Cyrus R. Vance, Jr., established the Conviction Integrity Program consisting of the Integrity Committee of senior staff who review internal practices and policies—training, investigation, disclosure obligations, etc.—in an effort to minimize potential errors; an integrity chief who chairs the committee and leads all reinvestigations of claims of actual innocence; and an outside advisory panel of leading criminal justice experts who advise the office on this issue.

The New York State Justice Task Force is a unique addition to these efforts. It is the only judicially-created body in the country devoted to addressing the problem of wrongful convictions on a permanent, ongoing basis. To be clear, the task force does not review pending criminal cases or investigate individual claims of innocence; it carefully reviews only those cases in which the courts and/or prosecutors officially determined that there was a wrongful conviction. The members closely examine the court record in those cases to ascertain exactly how and why the system failed, and they extrapolate the les-

sons learned to formulate remedies designed to prevent the recurrence of similar mistakes. In the process, members evaluate the practices of investigators, lawyers, and courts; consult with experts; review scientific research; hold hearings; and issue public reports and recommendations. A critical aspect of the task force's mission is to monitor issues related to wrongful conviction on a continuing basis to determine the impact of reforms and developments as well as the need for further action.

What were my reasons for putting the New York judiciary out front and center on this troubling and complex issue that involves so many different policy considerations and institutional participants? I established the Justice Task Force for two reasons. First, the criminal justice process, just like the human beings who make it work, will never be perfect. The unfortunate reality is that every year innocent people are convicted and imprisoned for crimes they did not commit. Every one of these cases is a terrible tragedy, but also a valuable opportunity to learn what went wrong. What misled police and prosecutors? What caused juries and courts to find an innocent person guilty beyond a reasonable doubt? What patterns keep repeating? We may never be able to make the criminal justice system perfect, but we can and must learn from our mistakes and use that knowledge to strengthen the system.

My second reason for creating the Justice Task Force is my belief that the courts must assume greater responsibility on this most critical of issues. Whether it is fair to us or not, when there is a miscarriage of justice the courts bear the ultimate responsibility, both in perception and reality, because it is within the framework of the judicial process and through our rulings that questions of guilt and innocence are determined. Every wrongful conviction is a stain on the reputation of the courts, eroding public trust and confidence in the legitimacy of our institutional status and the fairness and accuracy of our decisions. This only underscores why the judiciary, the focal point of the entire justice system, is absolutely duty-bound to lead the way in making sure that the criminal justice process is as fair and accurate as humanly possible. What institution is better prepared to comment knowledgeably and dispassionately on measures to improve the administration of justice than the judiciary? Whatever the challenges may be—drug-related crime and recidivism, domestic violence, child abuse and neglect, mortgage foreclosures, the crisis in civil representation for the poor, understanding the causes of wrongful convictions—it makes all the sense in the world to get the input of judges who confront these difficult issues on an everyday basis and who ultimately must carry out the solutions in their courtrooms.

The Justice Task Force was not created to be another

think tank or body of experts that periodically releases studies and reports that receive passing attention and then fade away without results. Research and studies are essential of course, but ultimately they are of limited value unless they spur policy makers to take concrete action to correct identified problems. Too often there is an unacceptable lag between what we know must be done and actually getting it done. The Justice Task Force helps to bridge this gap in New York.

Collaboration Key to Systemic Reform

While the judiciary is in a position to make valuable contributions to law reform efforts, it cannot act alone. Success in avoiding wrongful convictions can only occur through a process of genuine collaboration among the three branches of government and among the many different constituencies involved in investigating, prosecuting, defending, and convicting accused persons. The kind of systemic change the task force is charged with promoting—modification of existing standards and practices, enactment of new laws and rules—af-

This is a cause that should absolutely unite us all. No one ever wants to see an innocent person punished for a crime that he or she did not commit. When that happens, we all fail, and the consequences are felt far beyond the individuals immediately involved. When law enforcement and the courts are focused on the wrong party, the guilty person remains free to commit additional crimes that could have been prevented. When victims and families learn that a mistake was made they end up having to relive a terrible nightmare—often years after coming to believe that justice was done and the guilty party safely locked away.

There is simply no way to exaggerate how much our efforts to maximize accuracy in criminal convictions affect the preservation of public safety. Of New York's 27 postconviction DNA exonerations, the actual perpetrators were eventually identified in 11 cases. We have learned that five of those perpetrators were convicted of committing 10 subsequent violent crimes, including five murders and three rapes. Each one of those crimes compounded what was already a terrible tragedy, and each

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fects a broad range of public and private actors at the state and local levels. Progress is unlikely unless these critical stakeholders first come together and establish a dialogue that moves beyond parochial perspectives and finger-pointing and produces constructive working relationships. And there is certainly fertile ground for cooperation in this area, because every part of the justice system—police, prosecutors, defense counsel, judges, forensic scientists who provide evidence, legislators who make the laws, social scientists who evaluate behavior, and academics who study the law—has a major stake in ensuring accuracy in matters of guilt and innocence.

One of the great strengths of the Justice Task Force is its membership, which reflects the full spectrum of New York's criminal justice community. The combination of so many different institutional perspectives means that each issue and recommendation is subjected to thorough consideration and rigorous debate. The reputations and expertise of the task force members, many of whom occupy influential leadership positions in their respective fields, greatly increase the credibility of its findings and recommendations and the likelihood that reform proposals will be acted upon by policy makers and executive decision makers.

could have been avoided if the right person had been arrested and convicted in the first place.

Eyewitness Identifications a First Priority

The Justice Task Force commences its work with the benefit of a very substantial body of research that is shining light on the many factors that lead to wrongful convictions. In its first two years, the task force and its subcommittees have exhaustively reviewed the research literature, met with scores of experts, conducted field trips throughout the state, and dissected the records of more than 50 exonerations in New York. The key issues under examination include misidentifications by victims and witnesses, unreliable forensic and expert evidence, false confessions by the accused, perjured witness testimony, law enforcement practices, adequacy of defense counsel, and training for judges, lawyers, and law enforcement personnel.

The task force decided that its first priority would be eyewitness identifications, the leading cause of erroneous convictions. As part of its research on this issue, the group reviewed legislation, best practice guidelines, and reports from other jurisdictions, as well as recommendations from the Department of Justice's National In-

stitute for Justice, and conducted a statewide survey of current identification practices.

In February 2011, the task force issued a report setting forth comprehensive best practices to improve the accuracy and reliability of eyewitness identifications in New York. (See NEW YORK STATE JUSTICE TASK FORCE,

be implemented shortly, was to amend New York's pattern criminal jury instructions to include an instruction on cross-racial identifications in recognition of the established difficulty that many people have in accurately identifying members of a different race.

Where the judiciary can implement these and other

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RECOMMENDATIONS FOR IMPROVING EYEWITNESS IDENTIFICATIONS (2011) at www.nyjusticetaskforce.com.) While misidentifications occur for many reasons, the task force decided to concentrate on how the identification process is administered by law enforcement personnel, with an emphasis on five main areas: instructions to witnesses, witness confidence statements, documentation of identification procedures, photo arrays, and live lineups. Highlights of the 30 best practices include:

- Advising witnesses orally or in writing about the details of the identification procedure before it begins, and that the person who committed the crime may or may not be in the photo array or lineup.
- Eliciting a statement of the witness's confidence in the identification.
- Documenting the lineup with a color photograph of the lineup as the witness viewed it, and documenting the logistics of the identification procedure, including date, time, location, persons present, etc.
- Urging that lineups and photo arrays be conducted "double-blind" whenever practicable, i.e., administered by persons unaware of the accused's identity.

While the task force did not achieve unanimity on all 30 best practices, it is important to point out that many of these practices originated with representatives of New York's law enforcement community in the first place, and the great majority garnered that community's approval.

The task force also recommended amendments to New York's Criminal Procedure Law sections 60.25 and 60.30 to allow photo identifications to be admissible at trial in response to technical advances that render such identifications fair and reliable, and to provide that photo arrays be administered double-blind, where practicable. The final recommendation, which should

task force recommendations through our rule-making and administrative powers, we will do so; and where legislation or action by other entities is required, we will urge action by the relevant bodies when appropriate. In this regard, I am mindful, particularly where substantive policy choices are concerned, of the judiciary's constitutional role as the neutral adjudicator of society's disputes.

Forensic Science and Practices: DNA Issues

The other early priority area for the task force is forensic science and practices. A forensics subcommittee has been meeting on a biweekly basis, touring forensic and research laboratories and medical examiners' offices, and meeting with forensic scientists, including the American Society of Criminal Laboratory Directors. The subcommittee is focusing on the regulation and accreditation of forensic laboratories; certification of expert witnesses; the collection, preservation, and retention of forensic evidence; and DNA-related issues, including defendants' access to DNA testing at the pretrial and postconviction stages.

In February, based on its initial research and fact-finding, the task force made recommendations that demonstrate its willingness to tackle the toughest issues in the service of its mission, as evidenced by its proposal to expand the New York State DNA databank (see RECOMMENDATIONS REGARDING FORENSICS AND EXPANSION OF THE NEW YORK STATE DNA DATABANK (2011) at www.nyjusticetaskforce.com.) Under New York law, DNA samples currently are collected from persons convicted of all felonies or one of 35 specified misdemeanors. As a result, DNA samples are provided in approximately 46 percent of all penal law convictions, with the New York State Police each year processing DNA samples for about 54,000 offenders. As of December 31, 2010, the state's DNA databank contained 381,783 DNA profiles, and 34,548 crime scene samples.

The task force studied the extent to which the availability of DNA samples has led to exonerations and the prevention of additional crimes in New York and around the country. As of October 31, 2010, the data-

bank had aided 11,039 investigations by either linking crime scenes together or linking a crime scene sample to a particular suspect. In addition, persons convicted of crimes that were added as qualifying offenses in 2006, the last time the legislature expanded this list, have since provided DNA samples that were linked to samples collected in 2,532 other cases (as of December 31, 2010). The task force concluded from this and other data that many more unjust convictions could be avoided and overturned in the future by collecting DNA samples from persons convicted of *all* penal law misdemeanors in New York. According to the task force, an expanded DNA databank would help direct more criminal investigations toward the actual perpetrators and increase the number of erroneously accused and convicted individuals who could prove their innocence through databank hits implicating other persons.

This recommendation generated robust debate and dialogue within the task force. While unanimity was not achieved, there was a painstaking effort to appropriately balance important, competing policy interests in a way that is consistent with the group's fundamental mission of preventing unjust convictions and promoting public safety. Meanwhile, research continues on additional forensic science issues, including expanding the availability of post-conviction DNA testing and improving procedures for the collection and preservation of forensic evidence.

In February, the task force also helped present the first phase of a forensic training curriculum for New York State judges, essentially implementing its own recommendation that judges and criminal justice professionals stay abreast of and improve their knowledge of the highly technical, nuanced DNA and forensic science issues that are increasingly becoming critical to criminal investigations and prosecutions. This kind of ongoing, hands-on involvement is part of what makes the Justice Task Force unique.

Conclusion

Later this year, the task force expects to release another report addressing the phenomenon of false confessions

and proposing corrective measures that are currently being debated, such as the videotaping of interrogations. The members will continue to closely examine new exonerations to ascertain how and why the criminal justice system failed, and to identify recurring patterns and practices that may be contributing to erroneous convictions.

Going forward, I am extremely optimistic about the task force's potential to foster positive change in our state. I believe the Justice Task Force can also serve as a model for other states in terms of how it is galvanizing the criminal justice community around this critical challenge in New York, bringing the key stakeholders together in a holistic way that fosters input and involvement by all, and elevating the discussion beyond parochial perspectives in the search for system-wide solutions. The composition of the membership, and the careful, collaborative methodology by which the group is going about its business, is intended to provide New York with an effective, credible reform mechanism for criminal justice policy as it relates to acquitting the innocent and convicting the guilty—a mechanism that is so necessary in New York and elsewhere around the country.

Everyone who has a significant role in the justice system—police, prosecutors, defense counsel, judges, legislators, forensic scientists, social scientists, and academics—also has a major stake in preventing wrongful convictions. This is a mission that every single one of us can dedicate ourselves to without the slightest reservation, because none of us can afford the luxury of being wrong when it means imprisoning someone for a crime he or she did not commit. Such mistakes cannot be tolerated in a society that is founded on the rule of law and prides itself on protecting human rights and public safety. It is my hope that the work of the Justice Task Force will put New York State at the forefront of national efforts to prevent wrongful convictions. The New York State judiciary is certainly committed to that end, as are our many outstanding partners in the criminal justice community and in state and local government. ■