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Untouchable: The problem of prosecutorial misconduct



On Law

By Dan Lawton

Tim Atkins is an African-American man from Los Angeles. He is humble, gentle and well-spoken. He is 47 years old today and a free man. For 20 years, he lived in state prison because a jury convicted him of murdering Vicente Gonzalez in 1987. Atkins was innocent. The California Innocence Project, working pro bono, proved it in February 2007.

Judge Michael Tynan of the Los Angeles Superior Court so found, on the record, declaring Atkins "factually innocent." Tynan apologized to Atkins in open court before ordering him released from custody.

The prosecutor whose office had ruined Atkins' life for two decades was less courteous. He arrived an hour late for the hearing. He offered no apology, either for being tardy or for his office wrongfully prosecuting Atkins. In fact, he told the court, his office still thought Atkins was guilty and was doing Atkins a favor by not insisting on a retrial.

No lawyer I know doubts most prosecutors are ethical. But the reality is there is prosecutorial wrongdoing aplenty today and next to nothing is ever done about it.

"Stacking" charges; withholding exculpatory evidence; allowing perjurers to testify; relying on "junk science;" and not reporting prosecutor misconduct when it is discovered are examples. The expanding body of research shows that such practices have branded thousands of innocent Americans as criminals and sent them to prison in recent years.

Some 43 percent of wrongful convictions are attributable to official misconduct, according to the National Registry of Exonerations at the University of Michigan. A 2003 study by the Center for Public Integrity found more than 2,000 appellate cases in

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which prosecutorial misconduct led to dismissals, sentence reductions or reversals. Another study analyzing cases from 1973 to 1995 showed that in one of six cases where appellate courts reversed capital convictions, there had been court findings of prosecutorial suppression of evidence that the defendant was innocent or didn't deserve the death penalty.

The lack of accountability

State courts penalize civil trial lawyers with monetary sanctions for all manner of sins, from arriving late to court to filing a tardy answer. In patent infringement cases, federal courts sometimes order losing attorneys to pay huge attorneys' fees awards in cases found to be "exceptional."

In both systems, judges fine lawyers for bringing frivolous cases or abusing the discovery process. These offenses pale in comparison to ruining a man's life by convicting him based on perjured testimony or suppressing exculpatory material that might aid his defense.

And yet study after study has shown that a prosecutor who is found to have done those things almost never suffers even the slightest penalty or liability. Alone among lawyers, they are untouchable, and for the worst kind of misconduct.

Why should we care?

Let us forget for a moment the human and moral costs of wrongful incarceration of innocent and falsely convicted defendants.

Instead, let's focus on the fiscal cost of incarcerating them.

Atkins' 20-year incarceration cost California taxpayers more than \$1 million. In Texas, 45 wrongful convictions cost taxpayers there \$8.6 million. Some 85 wrongful convictions in Illinois resulted in 926 years worth of incarceration of innocent people at a cost to state taxpayers of \$214 million.

Those numbers should give even the most cold-hearted bureaucrat reason to want to curb prosecutorial misconduct, if only to realize monetary savings.

There are other costs. They are harder to measure, but undeniable and insidious. One is the poor message the courts send by looking the other way at prosecutorial wrongdoing. That message is: "You'll probably get away with it." And so repeated violations are endorsed, thus perpetuating the problem by inviting its chronic renewal.

Another is the government's loss of credibility in the eyes of its citizens. People become evermore cynical about the justice system each time an episode of prosecutorial wrongdoing results in the freeing of an innocent defendant.

Ending unaccountability

Professor Silas Wasserstrom of Georgetown University Law Center says judges can "out" offending prosecutors, creating a stigma for wrongful conduct. "Courts could do more in terms of embarrassing prosecutors — name the offending prosecutors," he said.

Alex Kozinski of the 9th Circuit has done this very thing, in *United States v. Kojayan*, in which a federal prosecutor deceived the court and jury about a key witness's cooperation agreement.

Kozinski's decision called out the deceiving prosecutor by name. Prosecutors hate that.

Perhaps if judges did it more often, prosecutors would be less inclined to commit misconduct and avoid the public shaming Kozinski inflicted in *Kojayan*.

The State Bar could do more by requiring mandatory judicial reporting of prosecutorial misconduct. Automatic judicial reporting would trigger investigations that don't happen now because of the natural reluctance of defense attorneys, whose clients' futures the prosecutors often control, to report prosecutorial wrongdoing.

"The bar can do whatever it wants, and should be doing a lot more at least in states where there seems to be a lot of misbehavior," Wasserstrom said.

And, last, there is this. In the rare cases in which courts exonerate and free innocent defendants, prosecutors could learn to say these words: "I'm sorry." Atkins appreciated Judge Tynan's apology in 2007. "His apology was sincere," he said. "It helped me a lot, because I needed to hear that."

As for his prosecutor's classless lack of an apology on the joyous day Tynan freed Atkins, make no mistake. It hurt Atkins. I asked him how he would have felt had the prosecutor managed to muster an "I'm sorry" that day.

"It wouldn't have changed the situation, because my life was already taken," he replied. "But it would have made me feel a little better. You let me out of jail, you don't acknowledge that you did wrong to me. That's the worst thing ever."

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