Testimony of
Queens District Attorney Richard A. Brown*

* * *

New York State Bar Association
Task Force on Wrongful Convictions

Association of the Bar
of the City of New York
New York, New York

February 13, 2009

____

***In addition to having served for the past almost eighteen years as the District Attorney of Queens County, Judge Brown is the Chair of the New York Prosecutors Training Institute.**

All of us, I think it is fair to say, share the same goal -- to do everything within our power to insure that the innocent are not wrongly convicted of crimes that they did not in fact commit.

As you know, however, as good as it is -- and as many checks and balances as it has built into it -- our criminal justice system is not perfect. But it does have built into it a number of ways in which weak or flawed cases are identified and eliminated -- and by which wrongful convictions are prevented from taking place.

Every day, for example, the police screen out suspects. Every day prosecutors decline to prosecute cases where the evidence simply does not meet their standards. Those cases that get by still have to survive grand jury presentations, pre-trial challenges and trial by jury. And, of course, post-conviction there are a number of review procedures available on both the state and federal levels to make sure we get it right.

And we do get it right in the overwhelming number of cases that we, as prosecutors, handle. Wrongful convictions are extremely rare -- although, clearly, one wrongful conviction is one too many and we must continue to do everything that we can to prevent them -- and to set them aside when they are found to have occurred.

*** * * ***

In the limited time available, what I'd like to do is tell you about some of the things that we do in my office -- and at the New York Prosecutors Training Institute -- to prevent wrongful convictions in the first place -- and how we respond to post conviction allegations that we have convicted the wrong man. And finally, I want to share some thoughts with you about what it is that we can do that we are not perhaps now doing.

*** * * ***

At the outset, let me say that I believe that early involvement and

aggressive screening by prosecutors is critical to making correct determinations. Wrongful convictions are seldom the result of intentional misconduct -- they are more likely the result of inadvertent mistakes. Police and prosecutors rely on the credible accounts of civilian victims and witnesses as to how the crime was committed and who committed it. And sometimes those victims and witnesses make mistakes. To prevent these mistakes -- most of which , as I say, are honest mistakes -- from having tragic consequences, at the outset we do a number of things.

Firstly, no criminal case brought to us by the police may proceed until it is screened by our Intake Bureau. The bureau is staffed with veteran prosecutors who carefully review every case for legal sufficiency. These are smart, savvy, street-wise attorneys who use their experience and common sense to assess the strength and credibility of the evidence before them. They are not afraid to challenge police officers and complainants, to reject cases if they do not meet our standards, to direct further investigation or to decline to prosecute them at all.

Secondly, we try to get our assistants involved in cases as early as possible. To this end, I have in place in my office a "riding" program which puts my assistants at virtually every major crime scene where they speak to arresting officers, take statements from victims and witnesses, supervise lineups and try, from the very earliest point, to determine the true facts of each case.

Thirdly, a year ago last July we began a program in Queens in which we conduct videotaped interrogations of defendants awaiting arraignment on felony charges. The interrogations are conducted by investigators from our office or by assistant district attorneys in a room in Central Booking. The entire interrogation is videotaped from beginning to end -- and the defendant decides whether to speak to us knowing that the interrogation is being videotaped. A copy of the videotape is given to defense counsel at arraignment. The results of the program -- in which over 3,000 interviews have been conducted so far -- have been very positive. The information produced during these interviews has, in some cases, quickly confirmed our

assessment of the case, in others led to a modification of the charges and in still others to promptly exonerate individuals who have been mistakenly arrested.

In addition, we make every effort to instill in our assistants the need to keep an open mind throughout the life of a case and to examine and re-examine every aspect to make certain that every witness account makes sense, every piece of forensic evidence fits, every investigative lead has been adequately pursued. I have regularly scheduled 8 a.m. bureau meetings at least three mornings a week at which pending cases and investigations are reviewed and discussed with me and my senior staff. Our truth seeking function never ends and that means that we must continue to ask questions and be secure enough to admit that we can be wrong sometimes.

We have also been moving more and more toward vertical prosecution so that the same assistant who rides the case puts the case into the grand jury and also brings the case to trial. That helps to insure that the trial assistant has the best understanding of all the facts and circumstances rather than having to rely on another assistant's investigation or analysis.

Also extraordinarily helpful is our office's plea policy -- which severely limits post indictment plea bargaining. The requirement for rapid grand jury presentment puts pressure on prosecutors to move so quickly that often small problems and inconsistencies in the evidence are overlooked or resolution of those problems is put off until after indictment. Our plea policy helps to remove this pressure to indict swiftly or risk the release of the defendant on bail. In the overwhelming majority of cases, defendants in Queens County choose to waive the provisions of C.P.L. 180.80 in order to engage in discussions with us. This gives us more time to thoroughly investigate and review cases before they are indicted. We also use this pre-indictment time to investigate alibi defenses, speak with additional witnesses or examine other evidence that defense counsel asks us to examine. The extra time also allows us to wait for the completion of scientific or other tests. In a number of cases, this time has enabled us to

explore a claim of innocence and ultimately exonerate the accused promptly, before indictment.

We all benefit when we uncover problems early and resolve them one way or the other rather than indicting problem cases with the hope that we can sort it all out later. And if we have focused on the wrong man, we are not searching for the right man -- and public safety is endangered.

We urge defense counsel to come in early and tell us about any evidence that they might possess that raises concerns about a defendant's guilt. We do not receive claims of innocence every day. So when we are approached by a defense attorney who says that he or she has a genuine concern that his or her client is actually innocent -- and backs up that claim with corroborative evidence or investigative leads that can be checked out -- our response is to immediately undertake a thorough investigation into that claim and the evidence supporting it.

*** * * ***

While we strongly encourage defense counsel to approach us immediately, we treat wrong man allegations with the seriousness they deserve whenever they are made. We are always ready to listen to claims of innocence. When a credible claim is raised post-conviction, a senior prosecutor is assigned to review it. In a number of cases, we have devoted a team of attorneys and investigators to conduct a complete re-investigation of the case even years after the conviction. Our office has earned a reputation for fairness because we are not afraid to take a hard look at a case after a conviction to make sure that justice has been done.

You may only hear about the cases that result in dismissals, but there are many other cases that have been extensively investigated where the reinvestigation confirms that the defendant is in fact guilty. It is a long, difficult and time consuming effort to re-examine cases -- particularly many years later when witnesses' recollections may have dimmed and physical evidence and records may no longer be available.

We undertake this effort readily, however, when any real issue is presented as to a defendant's guilt, even if it does not ultimately result in the defendant's exoneration. It is the needless reinvestigations of cases involving clearly guilty defendants where no real issue of innocence is presented that drive prosecutors' concerns about finality in judgments. Since there is enormous incentive for a guilty defendant to bring such an application and no sanction for bringing a meritless one, there needs to be some limit on the opportunity to endlessly reopen criminal cases.

* * * *

What else can we do?

Firstly, we must insure that the criminal justice system itself receives sufficient funding. We need resources to reduce the pressure of volume in the courts, insure manageable caseloads for every attorney handling criminal cases and maintain sufficient investigative and support staff. We need to make certain that every case receives the time and attention that it deserves since thorough and painstaking trial preparation is one of the most effective ways to expose previously unidentified weaknesses in a case. There must be adequate funding for training of police, prosecutors, defense attorneys and judges to keep them sensitized to these issues and alert to identify and respond to cases raising red flags.

We must also insure that we have prompt and comprehensive access to technology, such as DNA, that can definitively establish defendant's guilt or innocence. We have learned that DNA is a powerful tool to exonerate those who have been wrongly convicted. And yet we have moved far too slowly in expanding our DNA database and still do not take samples from all convicted offenders. Consequently, we have missed many opportunities to promptly and correctly solve crimes. And, although we have invested substantial resources and made considerable progress, it still may take several weeks to get test results that can free a person who has been wrongly charged and lead us directly to the person who actually committed the crime. Few changes in our criminal justice system would have as direct

and important an effect on preventing wrongful convictions as early access to DNA test results from an expanded database.

We must also help change attitudes and work habits that foster an atmosphere in which mistakes can go unnoticed. The participants in the criminal justice system rely too often on others to do their part to insure that justice is done. Prosecutors rely on the police to investigate fully and thoroughly. Police rely on prosecutors to test the legal sufficiency of their cases and the strength and credibility of the evidence. Prosecutors rely on defense attorneys to present a vigorous and professional defense and to aggressively test the prosecution case at trial. When any component of the system fails to perform its role adequately, the potential exists for error. We must begin to instill in every participant, through training and encouragement, a sense of individual and personal responsibility for obtaining a just result.

And finally, we must demand the highest ethical and professional standards of all participants in the criminal justice system. Prosecutors, especially, must be held to a higher standard of conduct. They must refrain from improper conduct and at all times act in a manner consistent with the highest ethical standards. In my office, I take every opportunity to send the clearest message to my assistants that our paramount goal is to do justice. Indeed they are literally told on the day they arrive that their responsibility for as long as they work for us is to do justice.

***   *   *   ***

One of the most important means by which a District Attorney can send a clear and unequivocal message to his or her assistants regarding their professional responsibilities is training. Our office, for example, has a full time Director of Training. Assistants in my office receive intensive and repeated instruction throughout their careers on both substantive and procedural law and ethical responsibilities. The training that we provide is supplemented by regional and statewide training programs.

The New York State District Attorneys Association has a training committee that conducts day long regional training programs. And NYPTI -- the New York Prosecutors Training Institute -- of which I am the Chair and which serves as the full time training arm of the District Attorneys Association, makes sure that assistants in offices large and small, in every area of the State, have access to free, quality programs.

NYPTI was established in 1995 to provide comprehensive professional continuing legal education and assistance to New York's prosecutors. It is now staffed by eight full time attorneys and a dozen or so support staff -- professionals who prosecutors around the State routinely rely upon for training, advice and assistance.

NYPTI provides New York prosecutors with legal and technical assistance both in and out of the courtroom. We now have available at our desks on line a wealth of legal memoranda and briefs -- and all of NYPTI's training programs.

NYPTI offers continuing legal education programs on a broad spectrum of legal and ethical issues. Last year NYPTI presented a record number -- of training conferences across the State -- training conferences in not just substantive and procedural law, but also with respect to a host of legal and ethical issues including discovery and Brady obligations, the special responsibilities of prosecutors, new developments in technical and forensic sciences and many other areas.

And each year we do a day long training conference here in New York City -- which is attended by close to 450 prosecutors and law enforcement personnel -- and a summer college at Syracuse University which offers training to over 1000 prosecutors over a two-week period.

We also send our assistants on a regular basis to the National District Attorneys Association's National Advocacy Center in South Carolina and to other training programs across the country.

*   *   *   *

We must also guard against moral exhaustion and cynicism. We must refuse to tolerate laziness, incompetence and negligence in ourselves, our colleagues and our adversaries. We must maintain a high state of alert to any indication of corruption or misconduct and root it out immediately. We must trust each other more and eschew gamesmanship for better communication and cooperation in areas where we have a common, vital interest.

Judges have a particularly critical role to play. For it is the judiciary to whom we look to insure fairness, to hold both sides to the highest standards of professionalism and to keep a watchful eye out for the slightest indication that justice is not being served.

*   *   *   *

But most of all, it is essential that each of the components of the criminal justice system work together to strengthen the safeguards against wrongful convictions and erroneous identifications. For as I said at the outset, there is one thing upon which we can all agree -- one conviction of an innocent person is one too many.

#