

## ***“When in Doubt, Speak Out”***

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All too frequently those who have committed crimes in cases where innocent people have been wrongfully convicted include the police and prosecutors who knowingly and maliciously convicted them.

No self-respecting juror should ever consent to becoming an accomplice in those crimes! ***When in doubt speak out!*** Demand honesty and accuracy.



### ***Battling Wrongful Convictions***

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## **THE THINKING JUROR'S -HANDBOOK-**

You have the legal right under the United States Constitution, and the New York State Constitution, to receive and possess this handbook. You have been given a very serious responsibility to determine the course of the rest of another person's life. Please give that responsibility the care and thought you would expect if you were the defendant.

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**The Deskovic Foundation**

## WHY THE THINKING JUROR'S HANDBOOK?



My name is **Jeffrey Deskovic**, and I served more than 16 years of my life, beginning at age 17, in state prison, a victim of police and prosecutorial misconduct. I was wrongfully prosecuted, convicted, and imprisoned for the rape and murder of a 15-year-old female schoolmate, despite the fact that many months before bringing me to trial police and prosecutors knew that DNA testing by the FBI had proven that bodily material recovered from in and on her body were not mine. There wasn't a scintilla of evidence connecting me to the crime, merely a coerced false confession. Unfortunately, any confession, no matter how coerced or inaccurate, tends to have a compelling impact on most jurors.

This tragic injustice did not occur in some back ward, some uninformed, unsophisticated jurisdiction, but in Westchester County, New York. As difficult as that may be to accept, consider too that all of my many state and federal court appeals, supposedly designed to protect *actually innocent* individuals from such an injustice, failed, as appellate court after court rubber-stamped my conviction, justifying their failures with words such as, “*overwhelming evidence.*”

When I emerged from prison in September, 2006 at age 33, I had spent fully half of my life behind bars in maximum security adult prisons. Sentenced to 15 Years-To-Life, I had already gone before the Parole Board and been denied because, as they put it, I had “refused to accept responsibility for my crime, and showed no remorse.” I realized after that denial that I could spend the rest of my life in prison if I relied upon parole, because I would never stop proclaiming my innocence. But for the *Innocence Project's* decision to take on my case I would likely still be languishing in prison.

That decision by a program dealing exclusively with DNA-provable cases did not come easily. After all, the fact that my DNA did not match the semen, nor, my hair the hair follicles of the perpetrator, was known at the

time of trial; and, thus would not constitute “new evidence.” In my case it would not be sufficient merely to demonstrate my negative DNA test outcome. The jury had already known that, but got tricked into convicting me all the same by a prosecutor and medical examiner who conspired to overcome the DNA evidence of my obvious innocence by falsely claiming medical evidence that the victim, a sheltered, innocent young girl, was, in fact, a sexually active slut.

In my case it would not be enough to exonerate me that my DNA did not match. We would need to produce a match in the State DNA Database. We were betting that the evil perpetrator who had violated and taken the life of my 15-year-old schoolmate in 1989 could likely have committed another felony in the 17 years that followed for which his DNA might be on file.

Tragically, but, fortunately for me, we were right! Little more than 3 years after I was wrongfully convicted and imprisoned a crack-head named Steven Cunningham struck again in the same community of fewer than 25,000 residents, my hometown. This time he took the life of his girlfriend's sister, a schoolteacher and mother of two young children. Significantly, the same police department that apprehended him, had arrested me, and the same assistant district attorney whose prosecutorial misconduct had convicted me, handled Cunningham's plea-bargained conviction.

Despite knowing they had sent away a 17-year-old who's DNA did not match the rapist/killer, neither the police, nor the district attorney's office ever bothered to compare that DNA material with Cunningham's. “*Why disturb a conviction when we can let an innocent kid rot in prison.*”

What was done to me can happen to anyone, particularly to everyday ordinary citizens who lack either the financial resources or political clout to fight overzealous prosecutors and police. While in prison I vowed that if I ever regained my freedom I would work to help others similarly victimized, and do everything in my power to prevent further wrongful convictions. From that vow has come **The Deskovic Foundation**, and this handbook.

# Factors Frequently Contributing To Wrongful Convictions

## *Ineffective Assistance of Counsel*

This phenomenon may occur as readily with privately retained, well-paid representation as with Legal Aid, though the underlying causes may be quite different.

In the situation involving Legal Aid, sometimes known as a public defender, often the root cause of inept representation will be found in the attorney's overly large caseload of clients, affording too little time to devote to the preparation and trying of cases, not to mention the lack of financial resources necessary to employ competent investigators and knowledgeable expert witnesses.

As a result, *actually innocent* defendants often fall victim to pressure from their counsel to plea-bargain with prosecutors for fear that going to trial would likely result in conviction, and a much stiffer prison sentence. Often adding to that fear has been the defendant's pre-trial hearing experience, involving being shuffled from one Legal Aid lawyer to another, and still another, in court appearance after court appearance; each time having to introduce himself and totally re-explain his innocence, and the circumstances by which he finds himself wrongfully charged with the crime.

Given all of the above, and the common practice of most prosecutors' offices, both state and federal, to overcharge and withhold exculpatory evidence, it is little wonder that in most jurisdictions more than 90 percent of criminal indictments are disposed of by plea-bargain, a process in which the defendant's Constitutionally guaranteed right to fact-finding by a body of his peers, a jury, is, in fact, nullified. In effect, indictment has become tantamount to conviction.

Under that reality a defendant who would insist upon going to trial may very well be innocent.

## *Police and Prosecutorial Misconduct*

The old expression that goes "*This one lies, and, that one swears to it,*" is perhaps the most fitting description of what often happens in cases of wrongful conviction knowingly perpetrated by police and prosecutors against *actually innocent* individuals. And, while we prefer to believe that such malicious activity is far from the rule, in current criminal procedures, it certainly is not rare, particularly in cases that defendants insist upon bringing to trial.

It is fair to say that wrongful conviction, and the misconduct by law enforcement that brings it about, are pervasive within our criminal justice system. Given that reality the Thinking Juror must accept the fact that the conscientious carrying out of their sworn duty as fact-finders is really all that stands between an *actually innocent* defendant and a life behind bars.

## The Not-So-Grand Jury System

The *grand jury* is so named because in Common Law it consisted of no fewer than 12, and, as many as 23, jurors, obviously larger than a *petit*, or trial jury which usually consists of 12 or fewer members. The grand jury's principal function consists of determining whether there is *probable cause* to believe a crime has been committed, based upon charges and information presented by state or federal prosecutors, and, whether an indictment, a formal accusation, should be returned for prosecution. Such an instrument of indictment is referred to as a *True Bill*.

As originally conceived, in a *perfect world*, the grand jury would essentially serve as a screen, or safety net, in effect, protecting innocent citizens from vindictive or over-zealous prosecutors who might bring false charges against them for political or personal gain. However, this is far from a perfect world, and the same must be said of our criminal justice systems, both state and federal, where the grand jury can hardly be thought of as a *level playing field*.

For one thing, unlike petit, or trial juries, prosecutors who have failed to get an indictment against a particular accused from one grand jury, may empanel another, and another, until they succeed, without constraint by the Fifth Amendment prohibition against *Double Jeopardy*. A good example of that phenomenon was displayed by Westchester District Attorney Jeanine Pirro, who, early in her 12-year control of the Office, for both political and personal reasons, chose to pass up a confessed brutal murderer whose ethnicity did not suit her self-promotional purposes, instead convening four successive grand jury panels, the last of which, a "*Special Grand Jury*," gave her the indictment of a totally innocent, but ethnically more suitable defendant. What made such

blatantly unjustified abuse of the grand jury process so disturbing was heightened by the fact that the United States Attorney's Office attempted to remind DA Pirro that she had allowed the actual killer to run away. Nevertheless, she went forward with the harassment and prosecution of someone she clearly knew was innocent, wrongfully convicting him by employing every prosecutorial misconduct imaginable, because she could, having virtually unlimited funds to do so, as does every DA and United States Attorney.

That type of manipulation and abuse of the grand jury is so common in virtually all state and federal jurisdictions it is a particular cause for concern in light of the fact that more than 90% of all felony indictments are disposed of by plea-bargain, without trial, in the absence of a fact-finder jury of the accused person's peers to scrutinize, and to determine guilt or innocence. The process has deteriorated over many decades to where the old saying, "*The DA can indict a ham sandwich*," has become the reality. And, as a consequence, many innocent, accused individuals have pleaded guilty to lesser charges for fear of wrongful conviction and harsher punishment.

It is important to realize that many district attorneys and U.S. Attorneys not only exercise the power to wrongfully convict the innocent, but also to wrongfully protect the guilty. Of course, it should be obvious that such prosecutors as will knowingly and maliciously send an innocent person to prison surely know that they have left a guilty perpetrator, often a murderer, on the street to strike again, as was the case when Jeffrey Deskovic was wrongfully convicted and sent to prison.

## **An Adversarial System of Criminal Justice**

### ***But is it a level playing field?***

Jurors are the finder of fact and must not allow themselves to be manipulated by prosecutors. They must not be fooled into believing that the criminal justice system is balanced. That notion exists only in theory as defendants; especially those without significant financial and/or political resources are at a decided disadvantage against prosecutors with unlimited taxpayer funds for investigation and expert witnesses.

In many instances, particularly in state courts, judges presiding over criminal cases were once prosecutors themselves, and share the courthouse with, and daily see prosecutors who will appear before them. In a criminal justice system where more than 90 percent of indictments are disposed of by plea-bargain, it stands to reason, given the *deals* prosecutors are willing to cut not to have to try a case, that an accused who insists on going to trial may well be innocent.

In reality, jurors may be the only screen between an innocent defendant and a wrongful conviction. And, while there are many defense attorneys committed to providing the strongest possible defense for their clients, there are just as many whose indifference, incompetence, or both, are the greatest contributors to their innocent client's wrongful conviction and imprisonment.

**In New York State there is clearly no parity between the salary of Legal Aid Attorneys and Assistant District Attorneys. In some instances ADA's with comparable experience are earning \$40,000 to \$50,000 more per year than their Legal Aid counterparts.**

## **When We Send An Innocent Person To Prison We Send Their Entire Family**

### ***It seldom happens honestly, accidentally.***

In fact, producing a wrongful conviction *takes a village*; overzealous, self-serving police, medical examiners, forensic experts, incentivized false witnesses and, most importantly, "*the engineers in the boiler room*," the wrong-headed prosecutors who have forsaken their duty to protect the innocent.

As a juror you have a solemn duty not only to the accused and his, or her loved ones to get it right, but also to yourself and your loved ones. **Consider this:** approximately 70 percent of all wrongful convictions involve a homicide. For each and every one of thousands of wrongfully convicted persons locked up in our state's prisons there is a murderer roaming our streets in 7 out of 10 such cases, free to kill again as in Jeffrey Deskovic's tragic wrongful conviction.

In Jeffrey's case had the police and the prosecutors properly acknowledged his negative DNA test result from the FBI seven months before wrongfully bringing him to trial, and, instead directed their energy and intelligence toward finding the actual rapist/murderer of 15-year-old Angela Correa, in a city of fewer than 25,000 people, they might well have come up with Steven Cunningham, the local crack-head who would go on to kill again three years after Jeffrey was sent to prison.

Some experts estimate wrongful convictions at as few as 5 percent of all those sent to prison. Still others claim 15 percent or more. But even if we strike a middle estimate of 10 percent in a state such as New York with approximately 60,000 inmates, some 6,000 wrongfully convicted, still more than 4,000 of those convictions left a murderer free to strike again.

## Some Final Thoughts...



When you are called to jury duty it is not a summons to judge a popularity contest. Do not get caught up in your feelings, whether pro or con, about the elected district attorney, or in Federal court, the presidentially appointed United States Attorney. And, by all means, be wary if that individual makes a personal appearance at the trial, or the case you are sitting on has been sensationalized in the press and/or media by them personally, or a spokesperson for their office.

Remain mindful of your duty and responsibility as a citizen and a caring individual. When summoned to court, fairly and thoughtfully observe and listen to the evidence presented by both the prosecution and the defense, and the testimony of their witnesses. Do not automatically grant any more weight or credibility to the testimony of police officers or other public employees as they are just as likely to be untruthful as any other witness.

With respect to the defendant, do not draw an inference regarding innocence or guilt from the fact that he, or she, may not be called to testify by their attorney. Often, totally innocent defendants are not called by their attorney to testify in their own defense, despite wanting to, because their attorney believes that the prosecution's case is very weak, and, "the burden of proof is on the prosecution," given the ***Presumption of Innocence*** fundamental to our system of criminal justice. Of course, when defense counsel chooses to operate under such a strategy it places a stronger responsibility upon counsel to make their position crystal clear to the jury in both their opening and closing arguments.

It is important to keep in mind throughout the course of the trial that you are there to determine the facts of the case based on the information, the physical evidence and testimony, presented before

you, using your intelligence, life's experiences, and common sense. You are there, together with your fellow jurors, to jointly come to a single unanimous conclusion of guilt, or innocence, with respect to **each and every element of each and every charge** of criminal activity leveled by the prosecution, and endorsed by a grand jury's indictment.

Your task as an individual juror and the task of the combined jury is not a casual one. Your verdict, should you be able to reach one, must be based upon each and every one of the jurors having been persuaded that an accused individual did, or did not, engage in a specific unlawful activity without justification, beyond a reasonable doubt. ***If you remain in doubt, you must speak out!***

Finally, do not come to your decision regarding the defendant's innocence or guilt unless you are firmly convinced of your position. Do not be persuaded to vote one way, or another, for any of the following reasons:

- To come to a quick verdict to avoid being sequestered or involved in prolonged deliberations;
- To go along with the apparent majority in order to avoid confrontation;
- To avoid being pressured by one or more dominant jurors, or even all of the other jurors, if you genuinely differ with their opinion after deliberation.

**Remember, if you allow yourself to be stampeded, or even pushed one way or another, without being fully persuaded, you may have to live with that fact for many years, particularly if you later learn that the person you sent to prison was *actually innocent*, and the victim of police and prosecutorial misconduct.**

– Richard Blassberg, JD