

10-2008

Prosecutors' New Ethical Duty Relating to Wrongful Convictions

Niki Kuckes

Roger Williams University School of Law

Follow this and additional works at: http://docs.rwu.edu/law_fac_fs

 Part of the [Criminal Procedure Commons](#), [Evidence Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

57 RIBJ 37

This Article is brought to you for free and open access by the Law Faculty Scholarship at DOCS@RWU. It has been accepted for inclusion in Law Faculty Scholarship by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.



Prosecutors' New Ethical Duty Relating to Wrongful Convictions

NIKI KUCKES, ESQ.¹

Associate Professor of Law at the Roger Williams University Law School,

Criminal prosecutions are inevitably marked by ambiguities, surprises and turn-about in the evidence. Prosecutors have all experienced such events: A key eyewitness recants her identification of the alleged perpetrator. New evidence calls into question the complaining witness's motives. Fingerprint analyses or DNA test results match a suspect other than the defendant. A different suspect confesses. If a prosecutor learns of such information before or at the trial, the prosecutor's ethical duty is clear – the prosecutor must disclose to the defense. However, it might surprise a layperson to learn that, until recently, outside of the trial context, a prosecutor, holding evidence suggesting a defendant may not be guilty, was not ethically required to share that evidence.

Traditionally, under American Bar Association (ABA) Model Rule of Professional Conduct 3.8(d),² adopted verbatim in Rhode Island's ethical rules,³ a prosecutor who knows of so-called "exculpatory evidence" – defined as information that "negates the guilt of the accused or mitigates the offense" – has an ethical duty to make "timely" disclosure to the defendant (usually, in advance of trial).⁴ This duty also extends to the sentencing process.⁵ This ethical standard is not as significant as it might be, however, since the law imposes almost the same duty. Constitutional due process requires a prosecutor, prior to trial, to give the defendant evidence that tends to negate guilt or mitigate the gravity of the offense.⁶ Thus, a prosecutor who learns of exculpatory evidence before trial is both ethically and legally bound to turn it over to the defense. If the exculpatory evidence does not simply call the defendant's guilt into question but actually establishes his innocence, the prosecutor is ethically bound to dismiss the charges.⁷

The prosecutor's duty to disclose exculpatory evidence before trial is scarcely

surprising, and indeed, is an essential aspect of the criminal system, in which the prosecutor is not merely an adversary, but also represents a government whose interest in criminal prosecution is "not that it shall win a case, but that justice shall be done."⁸ Fairness alone suggests justice is not done by forcing citizens to defend criminal charges without access to exonerating evidence held by the prosecutor. The prosecutor's duty with respect to evidence helpful to the suspect is particularly sensitive, because the prosecutor alone has exclusive control over compulsory process during an investigation – the power to use the police to question and gather evidence and to cause the issuance of grand jury subpoenas. This gives the prosecutor superior access to the evidence which may often be contradictory or ambiguous. The prosecutor's duty to share with the defense, not simply the evidence that points to guilt, but also the evidence that calls guilt into question, is a key test of our commitment to the rule of law. The question remains, however, how far this commitment extends.

What if exculpatory evidence comes to light after a criminal conviction suggesting a convicted defendant was not guilty? Should a prosecutor have a duty to seek reversal of wrongful convictions? What about the prosecutor's obligations in initiating prosecution? Should a prosecutor, in seeking approval for criminal charges, be required to tell the grand jury of evidence favorable to the defendant? What about plea negotiations? Should a defendant have the right to receive exculpatory evidence before agreeing to plead guilty to an offense? Supreme Court decisions have not required prosecutors to disclose exculpatory information outside of the trial process as a legal matter,⁹ and, until recently, the ethics rules were silent about whether prosecutors should have higher duties as an ethical matter.

However, a critical recent development has changed the ethical landscape for prosecutors, at least at the end of the criminal process, with respect to post-conviction evidence. At its meeting in February 2008, the ABA amended Rule 3.8 to impose new ethical duties on a prosecutor who discovers evidence of a wrongful conviction.¹⁰ New Rules 3.8(g) and (h) create a two-tiered ethical duty: First, if a prosecutor learns of "new, credible and material" evidence that creates a "reasonable likelihood" that a convicted defendant did not commit the crime, the prosecutor must inform the court and, if the conviction was in the prosecutor's jurisdiction, must both inform the defendant and investigate further. Second, a prosecutor has a greater ethical duty if the information consists of "clear and convincing" evidence establishing that a convicted defendant in the prosecutor's jurisdiction did not commit the offense. In this case, he or she must "seek to remedy the conviction."

The prosecutor's ethical duty to remedy wrongful convictions is a natural extension of the existing rule and is entirely consistent with the prosecutor's role as a "minister of justice."¹¹ A prosecutor is more than merely a lawyer with no ethical obligations but to act as an adversary in her own open cases. The prosecutor's duty to do justice should also reasonably imply some ethical duty to reverse known miscarriages of justice. As important, most often evidence of a wrongful conviction will come to light in a criminal investigation, and this evidence is far more likely to be uncovered by prosecutors than by defense counsel.

While the new ethical duty will undoubtedly invoke opposition among some prosecutors, the rule is an important addition to Rule 3.8. The amendment is carefully drafted to limit the duty to "known" evidence, and sets a significant



LAPLANTE SOWA GOLDMAN
ATTORNEYS AT LAW

proudly announces that

Rhode Island Certified Assessor

JOHN A. PAGLIARINI, JR., ESQ.

has become Of Counsel to the firm.

Mr. Pagliarini's practice is focused in the areas of property taxation, zoning, planning and land use law, with a particular and unique concentration in commercial/industrial property tax appeals before all municipal and state regulatory, administrative, and judicial bodies.

401.273.0200 x109

jpag@lsglaw.com

TITLE CLEARING - QUIETING TITLE ACTIONS

Roger C. Ross

Blais Cunningham & Crowe Chester, LLP

150 Main Street Pawtucket RI 02860

TELEPHONE: (401) 723-1122

FAX: (401) 726-6140

EMAIL: rross@blaislaw.com

OFFICE SPACE AVAILABLE

Rooms in modern law office for rent. Brick building in beautiful office park. First floor with ample, at-door parking. Conference room, secretarial station, utilities included. Easy access to Kent County Court House, Routes 95 and 295.

CENTERVILLE COMMONS

875 Centerville Road, Warwick, Rhode Island

Call: 828-0800

bar for the type of evidence that creates a duty to disclose. Commentary emphasizes that a prosecutor who makes a good faith judgment that evidence does not trigger disclosure obligations under the rule is protected from ethical sanctions.¹² As important, the rule provides specific guidance in the steps a prosecutor must take when faced with convincing evidence that justice may have been denied a convicted defendant. A clear answer as to when disclosure of post-conviction exculpatory evidence is (and is not) called for should be welcome to ethical prosecutors.

Given its very recent vintage, neither Rhode Island nor any other state has yet adopted the amendment, but the ABA's new Rules 3.8(g) and (h) are likely to influence the ethical debate both here and nationwide. While these new rules do not cover the waterfront with respect to the complex and important problem of a prosecutor's duties concerning evidence that suggests a defendant's lack of guilt, they are a positive first step toward one such modern ethical challenge - the prosecutor's responsibility to help remedy wrongful convictions.

Seeking 2009 Annual Meeting Seminar Proposals

While it may seem a bit early to think about the June 11-12, 2009 Rhode Island Bar Association Annual Meeting, the fact is, seminar planning is already underway. Since the Meeting's success depends on the content and range of the Meeting's Continuing Legal Education (CLE) seminars, the 2009 Annual Meeting Planning Committee, chaired by J. Robert Weisberger, Jr. Esq., is seeking Annual Meeting seminar proposals from all interested members of the Rhode Island Bar Association.

Please note, the deadline for submitting a 2009 Annual Meeting seminar proposal is NOVEMBER 10, 2008. For more information on the proposal process and to secure a 2009 Annual Workshop Proposal form, please contact the Bar's CLE Department at 401-421-5740.