2016

In Memory of Monroe Freedman: The Hardest Question for a Prosecutor

Bennett L. Gershman

Pace University School of Law, bgershman@law.pace.edu

Follow this and additional works at: http://digitalcommons.pace.edu/lawfaculty

Part of the Criminal Law Commons, Criminal Procedure Commons, and the Legal Ethics and Professional Responsibility Commons

Recommended Citation


This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.
In Memory of Monroe Freedman: The Hardest Question for a Prosecutor

Bennett L. Gersham

I’ve chosen to honor Monroe Freedman’s iconic essay on the hardest questions for a criminal defense attorney by posing the same question for prosecutors. What is the hardest question for a prosecutor? This itself is a hard question. The thousands of federal, state, and local prosecutors in the country would likely give widely varying responses – discretionary charging, immunity grants, bargained pleas, unreliable witnesses, police testimony, and disclosure duties, for starters. Too, prosecutors are not a generic group. Just as some defense lawyers might recoil or be indifferent to Freedman’s provocative thesis, so might many prosecutors reject or be indifferent to what I propose is the hardest question for them.

For prosecutors, the hardest question they face is whether the person they are prosecuting is actually innocent. Nobody except the accused really knows the answer to that question, certainly not the prosecutor, however strongly he may believe in the defendant’s guilt and the credibility of the proof. I don’t suggest that prosecutors bring people to trial they do not believe are guilty. Indeed, the notion that a prosecutor should not prosecute a person whom the prosecutor believes to be innocent seems so obvious that incorporating this precept into an ethical rule – as the ABA Criminal Justice Standards do1 – seems not only gratuitous but arguably insulting. No prosecutor would ever acknowledge prosecuting a person who he or she believed was innocent, although some prosecutors might joke about it.2 Indeed, despite the increasing numbers of exonerations,3 many prosecutors would proclaim that they never prosecuted an innocent person, and that claims of innocence, as Judge Learned

---

1 ABA CRIMINAL JUSTICE STANDARDS, THE PROSECUTION FUNCTION, Standard 3-4.3(d) (4th ed. 2015)(“A prosecutor’s office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence.”).
2 See transcript, The Thin Blue Line (Third Floor Productions, Inc. 1988), at 40 (according to defense attorney Melvyn Bruder, “Prosecutors in Dallas have said for years, ‘Any prosecutor can convict a guilty man. It takes a great prosecutor to convict an innocent man.’”).
3 See Mike McPhate, Record Number of False Convictions Overturned in 2015, N.Y. TIMES, Feb. 4, 2016, at A13.
Hand famously remarked, are a mirage. To these prosecutors my question is not very hard. Indeed, once committed to prosecuting a case, many prosecutors would consider the question of a defendant’s innocence irrelevant and distracting.

Of course, judging by the number of exonerations, there must be prosecutors who know they prosecuted a defendant they believed to be guilty only to discover years later that they were wrong. Some of these prosecutors, even after an exoneration, might perversely refuse to believe in the defendant’s innocence. Of course, it stands to reason that if these prosecutors by their misconduct contributed to the defendant’s wrongful conviction, they would insist on the defendant’s guilt. There is of course no way to know how many of these prosecutors who brought about the conviction of an innocent person may have harbored some doubt about the defendant’s guilt at the time they prosecuted the case. It is unusual – even remarkable - that a prosecutor may actually come forward years later to apologize to the person he wrongfully prosecuted, as in the case of Shreveport, Louisiana prosecutor Marty Stroud, who sent Glenn Ford to Death Row. In one of the most extraordinary confessions ever by a prosecutor, Stroud publicly apologized to Ford, who spent thirty years in prison, for the misery he caused Ford and his family. Stroud described himself as a young prosecutor who was “arrogant, judgmental, narcissistic and very full of myself.” He conceded that he was not alert to the existence of exculpatory evidence that would have freed Ford, but took no action to locate that proof. “I was not as interested in justice as I was in winning.” He concluded: I end with the hope that providence

---

4 United States v. Garson, 291 F. 646, 649 (S.D.N.Y. 1923)(“Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”).
5 See Jon Herskovitz, Former Texas Prosecutor Disbarred For Sending Innocent Man To Death Row, Huffington Post, Feb. 9, 2016 (Charles Sebesta, the disbarred prosecutor, said he was being unfairly treated and the defendant was justly convicted of an arson that killed 6 people; Sebesta was disbarred for failing to disclose evidence to the defense that another individual admitted to him that he committed the crime and that he acted alone); Michael Powell, A Prosecutor Loath to Say “Not Guilty,” N.Y. TIMES, Jan. 28, 2013(notwithstanding exonerations, Brooklyn District Attorney Charles Hynes insisted defendants were guilty).
6 See “Marty” Stroud III, State Should Give Ford Real Justice, SHREVEPORT TIMES, Mar. 8, 2015, at 6D.
7 Id.
8 Id.
will have more mercy for me than I showed Glenn Ford. But, I am also sobered by the realization that I certainly am not deserving of it.  

I omit from this discussion those prosecutors who deliberately or recklessly violate the rules to win a conviction. These prosecutors, in their zeal to convict, have little regard for the integrity of the system of justice and their own professional responsibilities. They arrogate to themselves, without any real accountability, the awesome power to decide whether an individual should be charged, tried, and punished, and in some instances whether he should live or die. To these prosecutors, my question probably would be greeted with derision. These prosecutors would contend that claims of misconduct are exaggerated – that even the term “misconduct” is a misnomer - and that such conduct is nothing more than inadvertent error. Moreover, although a substantial number of false convictions are attributable to the prosecutor’s misconduct, the more prevalent behavior in my opinion involves bad judgment, an overarching desire to win, and an indifference to the truth. These prosecutors would not find my question a hard one.

How many prosecutors would accept responsibility for causing an innocent man to spend more than half his life in jail? The conventional argument by prosecutors after a wrongful conviction is to point to the adversary system, the prosecutor’s role to present evidence of guilt, and defense counsel’s role to challenge that evidence.  With a judge umpiring the contest, the jury picks the winner. For those prosecutors who try to rationalize their prosecution this way, my question is not hard. Their moral conscience is clear, even if throughout the investigation and prosecution they were unwilling or unable to keep an open mind, to be suspicious of their proof, to pose hard questions to the police, and to be alert to the possibility that notwithstanding the evidence of guilt, the person they were prosecuting may in fact be innocent.

9 Id.
10 See Jim Yardley, Man is Cleared in Murder Case After Eight Years, N.Y. TIMES, Oct. 29, 1998, at B1 (prosecutor defends handling of case, stating “We live by an adversary system. Our job is to present evidence we believe is credible. The defense’s job is to poke holes in it. In a sense, the system worked, although it took some time.”).
Who are those prosecutors who would find my question hard? Those prosecutors who would find my question difficult view their role differently. They probably do not rely exclusively on the adversary system to produce justice. They focus less on winning convictions than on doing justice. In contrast to the arrogant and egotistical prosecutor—Marty Stroud’s description of himself—these prosecutors probably seek to pursue justice zealously with humility, courage, and integrity. These are the same qualities that Monroe Freedman would identify in describing good lawyers. Prosecutors committed to doing justice should make moral judgments about the defendant’s guilt and the quality of the evidence. Prosecutors who would find my question hard probably embody the same qualities that Supreme Court Justice Robert Jackson identified in his famous essay in which he sought to capture the “elusive” characteristics of the “good prosecutor.” The “good prosecutor,” in Justice Jackson’s contemplation, “tempers zeal with human kindness, seeks truth and not victims, serves the law and not factional purposes, and approaches his task with humility.”

I hope that those of us who were privileged to serve as prosecutors and continue to study the conduct of prosecutors would concur with Justice Jackson’s description. We might even be inclined to see a difference between those persons we regard as good prosecutors, and other prosecutors who view their role in a narrower, more adversarial, manner. As I see it, the goal of the prosecutor is to win; the goal of the good prosecutor is to do justice. The prosecutor asks a jury to convict if the evidence is legally sufficient; the good prosecutor will not force a defendant to trial unless he or she is morally convinced of the truthfulness of the proof and the defendant’s guilt. A prosecutor will not search for evidence of innocence; a good prosecutor will.

---

12 Not all critics believe that prosecutors can be virtuous people. I believe that Abbe Smith, Monroe Freedman’s longtime collaborator, probably would not share my argument. She would maintain, as she does in her provocative essay, that prosecutors may be incapable of making moral judgments about the possibility that a defendant may be innocent. See Abbe Smith, Can You Be a Good Person and a Good Prosecutor?, 14 GEO. J. LEGAL ETHICS 355, 396 (2001).
14 Id.
Why is my question for prosecutors the hardest question of all? For any prosecutor there exist powerful pressures that interfere with the ability or willingness to consider the possibility that the defendant may be innocent. Any prosecutor preparing for trial almost certainly believes the defendant is guilty and has assembled sufficient proof of his guilt. Leaving aside the familiar label about a prosecutor’s “conviction psychology,” even those prosecutors who try to maintain an open mind may overestimate the strength of their case and ignore or overlook evidence that might contradict their theory and be relevant to the defendant’s innocence. Moreover, any prosecutor would find it much more difficult to consider the possibility of a defendant’s innocence when prosecuting a vicious crime of violence upon a victim who has been seriously, even fatally, harmed, than a victimless crime. The nature of the crime has to weigh heavily on any rational prosecutor who understandably is outraged at the offense and feels compelled to vindicate the victim’s harm and protect the community. Prosecutors who promote themselves as the victim’s “avenger” would be far less likely to consider the possibility that they may be prosecuting an innocent person. But even for prosecutors who try to maintain a more balanced and objective attitude, the pressure to convict always weighs heavily. Nor can one overlook institutional pressures that may interfere with a prosecutor willingness to look closely at a defendant’s possible innocence. Under scrutiny by their elected boss, the media, co-workers, the police, and victims, some prosecutors more likely will see their effectiveness measured by conviction rates than on being fair.

One could reasonably believe that the question of a defendant’s innocence would inescapably confront any rational and fair-minded prosecutor in any prosecution, especially one based on tenuous proof. Assume a case in which a defendant has been charged with murder based entirely on the testimony of one eyewitness. There is no corroboration. The witness identified the defendant in the

---

15 See JEANINE PIRRO, TO PUNISH AND PROTECT (2003), at 1 (according to this prosecutor, “We can be the avengers”).
courtroom but picked out a different person at a line-up. The defendant has an alibi, and there is evidence that someone else committed the crime. Prosecutors know that one-witness identification cases are notorious for mistakes, and that most of the official exonerations based on DNA evidence are attributable to eyewitness errors. The defendant protests his innocence. What does the good prosecutor do? There are several options – dismissal, trial, and guilty plea. If the defendant refuses to plead guilty, the prosecutor must either dismiss the case or present the evidence to a jury. How confidently should the evidence be presented? How aggressively should the prosecutor sum up the case? What we know about the psychology of jury decision-making suggests that the more inflammatory the prosecutor’s behavior, the more likely the jury will convict.

Other examples of dubious witnesses and questionable proof make the prosecutor’s dilemma palpable. Professor Ellen Yaroshefsky’s discussion of the credibility of cooperating witnesses depicts these witnesses as self-interested, devious, and even incapable of understanding the difference between truth and fiction. Prosecutors surely are aware of this phenomenon and, without any corroborative proof, face a difficult decision in relying on such witnesses. Negotiating a plea may be a safe harbor for the prosecutor. And the vast majority of defendants do in fact plead guilty, even though some of these defendants may in fact be innocent. But again, if a defendant refuses to plead, what recourse does a prosecutor have except to bring the case to trial or dismiss it? And without really

17 See Innocence Project, Eyewitness Misidentification, http://www.innocenceproject.org/causes-wrongful-conviction/eyewitness-misidentification (Eyewitness misidentification cited as greatest contributing factor to wrongful convictions proven by DNA testing, playing a role in more than 70% of convictions overturned through DNA testing nationwide).
18 The extent to which a prosecutor as an ethical matter may seek a guilty plea from a defendant the prosecutor believes may be innocent is unclear. See Jovanovic v. City of New York, 2006 WL 2411541 (S.D.N.Y.)(describing prosecutor’s generous plea offer to defendant who maintains his innocence, and after defendant refuses to plead, prosecutor dismisses case).
21 See Alex Kozinski, Criminal Law 2.0, 44 GEO. J. ANN. REV. CRIM. PROC. iii, xi (2015).
knowing whether the cooperating witness is telling the truth, how far should the prosecutor go in endorsing his credibility?

Prosecutors faced with evidence of a confession to police, without corroboration, have an additional burden in analyzing the truth of the confession, especially when there is a claim that the police used coercive tactics. There is an increasing body of documented cases showing that innocent persons confess. 22 How willing is a prosecutor to challenge the veracity of his police witnesses? Assuming further investigation is unavailing, that the defendant refuses to plead guilty, that the defendant has an alibi, and that the defendant passed a polygraph test, and that there is a plausible theory that a different person may be the perpetrator: does the prosecutor dismiss the case or let a jury decide? We know juries usually side with prosecutors. 23 We also know juries make mistakes. 24

How far should prosecutors go to investigate claims of innocence? How far should they go in looking for evidence that would impair the credibility of their witnesses? As the Supreme Court has noted, “The jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of a defendant’s guilt or innocence.” 25 Some prosecutors deliberately avoid learning facts that might impair their chances of winning. 26 And if the prosecutor has no direct knowledge of these exculpatory facts, and the information is in the possession of an agency that is not part of the “prosecution team,” then the prosecutor has no legal duty to look for the information, however ethically repugnant the prosecutor’s conduct might be. So, in a case that hinges on the credibility of a cooperating witness, the failure of the prosecutor to seek out reports about the witness’s troubled past, including his drug addiction and mental illness, may enhance the prosecutor’s chances of getting a

22 See BRANDON GARRETT, CONVICTING THE INNOCENT (2011), at 14-44.
23 See United States v. Young, 470 U.S. 1, 18-19 (1985)(“prosecutor’s opinion carries with it the imprimatur of the Government and may induced the jury to trust the Government’s judgment rather than its own view of the evidence.”).
24 See DAN SIMON, IN DOUBT (2012).
conviction, even the conviction of an innocent person. By burying his head in the sand the prosecutor thereby avoids the hardest question.

Those prosecutors who do not believe they have a duty to search for evidence of innocence will not find my question especially difficult. By the same token, there are many cases in which prosecutors, even in the face of compelling evidence of innocence, not only do not question the defendant’s guilt but even make outlandish arguments to convict. An example: a murder prosecution that hinged on the uncorroborated testimony of an eyewitness, a crack addict who claimed to have seen the defendant kill the victim late at night from her window 400 feet away.27 Pending criminal charges against this witness were dismissed shortly after she made her identification. The defendant had a powerful alibi; he was at Disneyworld in Orlando Florida at the time of the murder, as his family and hotel employees confirmed. He even had a phone receipt of a call he made from the Orlando motel five hours before the time of the killing. Explaining away this proof, the prosecutor argued to the jury, apparently with a straight face, that even if the defendant was in Florida, he could have flown to New York, shot the deceased, and then flown back to Florida.

The legal and ethical framework reinforces the “hardness” of my question. The standard for bringing charges is probable cause,28 a standard for charging that is so low that criminal charges almost always will override suspicions of innocence. Under this standard a prosecutor does not even need to think about the defendant’s innocence. Of course, many prosecutors will demand a higher standard for bringing and maintaining charges. Maintaining charges also demands very little from prosecutors – a prosecutor must continue to reasonably believe that probable cause exists and admissible evidence will be sufficient to support the conviction.29 Every situation discussed above would allow the prosecutor as an ethical matter to prosecute the case even if the prosecutor entertained doubts about the guilt of the

27 Bennett L. Gershman, Don’t Let the Prosecutor Off the Hook, Huffington Post, June 10, 2014.
28 See United States v. Armstrong, 517 U.S. 456, 464 (2006); ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8(a); ABA CRIMINAL JUSTICE STANDARDS, Standard 3-4.3(a).
29 ABA STANDARDS, Standard 3-4.3(b).
defendant. Thus, if there is sufficient evidence of guilt – assuming more than the minimum proof needed legally and ethically to bring charges - the hydraulic pressures to continue the prosecution, as noted above, may strongly outweigh the countervailing pressures to examine closely the defendant’s claim of innocence. And, as noted above, there is always the readily available means to avoid even addressing the question – the negotiated guilty plea. Once the centrifugal forces of prosecution take over, the case gains a momentum in which the need for closure – either by plea or trial – is the prosecutor’s only realistic recourse, and the question of a defendant’s innocence does not get resolved.

There is no easy or magical way for a prosecutor to determine whether a defendant is innocent. But a good prosecutor at least has to ask the question and to struggle with it. A prosecutor has to be willing to keep an open mind, exercise sound judgment, master the facts, be skeptical, show courage, be humble, and use intuition gained from experience. Certain types of witnesses should be viewed with suspicion: eyewitnesses, cooperating witnesses, and young children are especially difficult to rely on, much more so in the absence of corroborating proof. Prosecutors know that using these witnesses always risks corruption of the truth, either willfully or innocently. Corroboration should be sought. Prosecutors need to challenge police who interviewed these witnesses for inconsistencies. Prosecutors have to resist the “tunnel vision” that assumes that the evidence is credible, and that being overly inquisitive will make the case more complicated. Good prosecutors will make no such assumptions. They will engage in a moral struggle and approach the case with a healthy skepticism. A good prosecutor will carefully evaluate the quality of the investigation. A good prosecutor will reasonably have more confidence in an investigation that has employed specialized resources, involves close and ongoing supervision, includes investigators with considerable experience, and significant oversight by prosecutors.

A good prosecutor must examine carefully any prior encounters between witnesses and law enforcement to ascertain the existence of any improper influence. Suggestive interviewing techniques
by police can harden a witness’s story, and a prosecutor may not even know about, or be able to expose any improprieties. A prosecutor should be willing to take an active role in confirming the theory of guilt and investigating contradictory theories. Any experienced prosecutor knows where evidentiary deficiencies exist and should make an effort to uncover them. There are of course cases in which no firm conclusion can be reached, especially without corroborating evidence. Thus, no prosecutor can be sure that an eyewitness is reliable, that a cooperating witness is not embellishing, that an alibi witness is telling the truth, or that the police are not fabricating. If at the end of his investigation the prosecutor has a significant doubt as to the guilt of the defendant, a prosecutor has to have the moral courage to either decline to prosecute or at least seek guidance from supervisors.  

Prosecutors are not, and are not required to be, clairvoyant. They do not know the truth about a case, especially the truth about a defendant’s guilt. The most that anyone can expect from prosecutors is that they use their immense powers prudently and responsibly. The hardest question they face is whether the defendant is actually innocent. For a good prosecutor, facing up to this question requires an intense moral and intellectual struggle. That means at the very least that the good prosecutor will have carefully investigated the case, vetted the evidence carefully, have confidence that the witnesses are telling the truth and are not mistaken, and be morally certain that the defendant is guilty. No more than this can be asked of any prosecutor.

30 See ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 3-4.3(c) (“If a prosecutor has significant doubt about the guilt of the accused or the quality, truthfulness, or sufficiency of the evidence im any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to supervisory staff. The prosecutor’s office should then determine whether it is appropriate to proceed with the case.”). But See Benjamin Weiser, Doubting Case, a Prosecutor Helped the Defense, N.Y. TIMES, June 23, 2008, at A1 (after supervisors ordered him to defend a case in which he believed the defendants were innocent, prosecutor threw the hearing by assisting the defense in tracking down witnesses, prepping them, and ensuring their credibility).