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What have we learned?

In addition to releasing Shawn Drumgold from prison, Suffolk County district attorney Dan Conley should be investigating the shoddy police and prosecutorial work that put him there

BY HARVEY A. SILVERGLATE
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THE DRAMATIC RELEASE from prison last week of Shawn Drumgold, who was wrongfully convicted in the 1988 fatal shooting of 12-year-old Darlene Tiffany Moore and served 14 years of a life sentence for it, was filled with a sense of déjà vu. The only thing about Drumgold's case that's different from most other exonerations of wrongly (and often *falsely*) convicted defendants in Massachusetts courts in recent decades is that this time the prosecutor assigned to deal with the defendant's motion for a new trial and his boss, the district attorney, conceded that the defendant had not had a fair trial. And even here, Suffolk County district attorney Dan Conley's confession of error doesn't begin to address how and why yet another citizen nearly spent his life in prison because he was, essentially, railroaded by the state.

Police misconduct like that seen in the Drumgold fiasco, after all, seems par for the course in the Massachusetts justice system. Over the past 25 years, many other victims of our corrupt and broken justice system have come to light. They include Albert Lewin (in 1989, the Supreme Judicial Court refused to dismiss Lewin's criminal indictment, even though the high court scolded the Boston police for their "perjurious and fraudulent conduct"); Christopher Harding (convicted in 1990 as a cop killer on the basis of perjured police testimony and not released until 1995); Donnell Johnson (released in 2000 after serving five years on the basis of "mistaken" eyewitness testimony, in a case marred by police misconduct); Kenneth Waters (exonerated by DNA evidence in 2001 after serving 18 years for a murder conviction obtained through false testimony); and the four victims (Henry Tameleo, Louis Greco, Peter Limone, and Joseph Salvati) of a misguided state prosecution aided by unscrupulous FBI agents. The four men were imprisoned for the 1965 murder of Edward Deegan on the testimony of the infamous homicidal liar-turned-informant Joseph "the Animal" Barboza (see "Why Does the FBI Believe Flemmi?", This Just In, October 24). Tameleo and Greco died in prison, while Limone and Salvati lived to taste vindication and were released earlier this year. And this hardly exhausts the list of

the wrongly convicted who were exonerated, much less those still rotting in prison because the scandals in their cases have not yet been uncovered.

If Drumgold's 14 years in prison for a crime he almost certainly did not commit are not to be in vain, then the time is long past for the governor, the legislature, or the state Supreme Judicial Court to set up a commission to recommend reforms that would minimize such miscarriages of justice in the future — miscarriages that otherwise are virtually certain to occur again and again. So far, however, the political will necessary to taking those steps has been tragically lacking.

FIVE MONTHS AGO, *Boston Globe* investigative reporter Dick Lehr dropped the bombshell that eventually led to Conley's admission of error: a page-one story bearing the understated headline DOUBT CAST OVER TIFFANY MOORE VERDICT. The Drumgold prosecution, Lehr reported, had been "marred by faulty assumptions, questionable tactics, and possible wrongdoing at each stage of the high-profile case." Lehr concluded not only that Drumgold did not get a fair trial, but that he was not Moore's killer, since Drumgold was several blocks from the crime scene when a gang member's bullet — apparently intended for a rival gang member — killed the young girl. Lehr reported that two witnesses recanted their trial testimony and now alleged that police had bullied them into providing false evidence. Other witnesses also described a "pattern of intimidation" by police aimed at securing Drumgold's conviction. Once frightened of testifying, these witnesses were now willing to come forward to exculpate Drumgold. The fact that a crucial witness, after he agreed to incriminate Drumgold, was rewarded with more favorable treatment in a slew of his own pending criminal cases was never disclosed to the judge, the jury, or Drumgold's trial lawyer; this violated a key constitutional requirement that police and prosecutors disclose all potentially "exculpatory" evidence — that is, evidence tending to show the defendant's innocence — that comes to their attention before, during, or even after a trial. And, finally, Lehr reported that another crucial eyewitness, who testified at trial that she saw Drumgold leaving the murder scene, was at the time suffering from brain cancer, which likely affected her perception and recall of events.

Within a day after Lehr's initial story, Conley ordered his chief homicide prosecutor, David E. Meier (who did not direct the original Drumgold investigation and prosecution, which was tried by now-retired assistant district attorney Philip T. Beauchesne) to review Lehr's findings and any other new evidence. Conley's assigning the review to Meier — a homicide prosecutor who is respected and trusted by people on both sides of the criminal-justice system, as well as by judges — makes it clear that the district attorney was compelled by Lehr's powerful, fact-laden attack not to sweep the truth under the rug.

That said, however, limitations appear to have been placed on Meier's assignment. In the November 3 legal memorandum Meier submitted to the court after a six-day witness hearing held this past summer, he admitted that Drumgold had not had a fair trial and was entitled to have his conviction thrown out. However, in deciding on which grounds the guilty verdict might be thrown out, Meier followed a clear pattern: he assiduously avoided stating that any individual prosecutor or police officer may have obstructed justice or lied.

In order to accomplish this high-wire act, Meier engaged in a form of studied ambiguity that left the defendant in limbo — not guilty, but also not innocent. Certain conflicts in the evidence were not resolved by Meier's memorandum, especially where their clarification would have entailed deciding whether members of the prosecution team had indeed framed an innocent defendant. Meier focused on what Drumgold's trial lawyer, the judge, and the jury did not know, rather than on who was responsible for keeping them in the dark.

"Evidence introduced at the motion hearing did not exonerate the defendant; it did establish that he did not receive a fair trial," wrote Meier in his report. Conley made the same point in a more in-your-face press conference held after the final court hearing at which the judge released Drumgold: "What I owed Shawn Drumgold, he got," Conley said in explaining why he would not apologize to Drumgold. "And that was my fairness and objectivity."

Reasonable people might disagree over whether the DA's Office owed Drumgold an apology; it was, after all, under one of Conley's predecessors in that office, Newman Flanagan, that this case arose. However, one failing that must be laid at Conley's feet is not so easy to ignore: his decision not to investigate further whether any police officer or prosecutor responsible for Drumgold's plight had committed criminal misconduct. Both the evidence uncovered by the *Globe*'s Lehr and the testimony during the six days of court hearings that followed surely suggest police and prosecutorial misconduct sufficiently egregious to warrant an investigation — and, if necessary, the prosecution of those who may have broken the law in pursuing Drumgold as Moore's murderer. That, however, is clearly not on Conley's agenda, and as a result, Meier, who is the most qualified person in the DA's Office to conduct such an investigation were he given a green light to do so, appears unlikely to pursue the matter.

Instead, Meier's memorandum is a study in artful avoidance. In deciding which categories of evidence would require the DA's Office to throw out Drumgold's conviction, Meier was careful to hang his hat on only two. One covered the discovery that key prosecution witness Mary Alexander was suffering from a brain tumor at the time she testified against Drumgold, a finding Meier designated as "newly discovered evidence" that Drumgold's trial lawyer had not known. Meier observed that she had been a "critical witness for the Commonwealth" and that it was possible that her illness might have "affected Ms. Alexander's visual or cognitive

abilities." He did not, however, dwell on the question of whether police and prosecutors were at the time of trial aware of the witness's condition, despite Lehr's report that the now-deceased witness's condition may have been known to the police. "They didn't care she had cancer," Lola Alexander, the witness's mother, told Lehr. "That had nothing to do with her mouth." Trial prosecutor Beauchesne denied any such knowledge. Meier noted that the testimony was in conflict, but he didn't bother to do what trial lawyers do every day: attempt to draw conclusions, on the basis of evidence, as to who is lying.

Meier identified one other category of evidence that would justify vacating the guilty verdict, namely the matter of undisclosed "promises, rewards, or inducements." Both Lehr and, in court, Drumgold's appellate attorney Rosemary Scapicchio claimed that one Ricky Evans, an important prosecution witness, had been promised by Boston police that if he cooperated in giving testimony against Drumgold, free housing and meals at a local hotel would be made available to him, an outstanding arrest warrant would be quashed, and police would recommend that prosecutors and judges go easy in certain criminal cases pending against him. (In fact, all these things subsequently happened.) Meier admitted that the Constitution required the disclosure of such witness favors so that jurors could weigh them in assessing witnesses' credibility. Nonetheless, Meier refused to take the step of implicating the trial prosecutor in *knowing* whether any such promises were made: "There was ... conflicting testimony at the motion hearing about what, if anything, the trial prosecutor (and others within the district attorney's office) knew about any such arrangements or communication," wrote Meier. And, he continued, there was conflicting testimony "among and between police officers, prosecutors, trial defense counsel, and the witness himself" as to the precise nature of the arrangements and promises. "Whether the trial prosecutor knew, or should have known, or did not know is not controlling here," wrote Meier. "What is compelling is that the witness knew of the arrangements and communications — and defense counsel (and the jury charged with assessing [the witness's] credibility) did not."

In fact, it is not quite true that the question of whether a prosecutor knows a witness is lying is irrelevant to whether the defendant should be granted a new trial. The degree of prosecutorial blameworthiness for suppression of exculpatory evidence is one relevant factor, along with the importance of the promise, the materiality of the witness's trial testimony, and the degree of likelihood that the suppressed information about the witness might have affected the verdict. Meier was not, however, going to get into this. Instead, he conceded that Drumgold's defense counsel should have been told, while avoiding drawing any potentially embarrassing conclusions about what the trial prosecutor knew. Even the police got a free ride from Meier: "There was also conflicting testimony at the motion hearing regarding the purpose, extent, and duration of such an arrangement, as well as which law-enforcement agency — the police, the

district attorney's office, or a combination of the two — devised the arrangement and bore the financial cost." Rather than look further into who on the prosecution side made promises to the witness and then failed to disclose them — and perhaps lied about them at the motion hearing — Meier's memorandum conveniently deemed the issue of placing blame irrelevant.

With respect to the three recanting witnesses who said they lied due to pressure and threats from the police, Meier disposed of them simply by claiming that none is now credible, despite the fact that the prosecution had relied on their testimony at trial. This finding forestalls further investigation into how the police treated these witnesses and whether the police testified truthfully at this summer's hearing. Surely there is something odd about crediting witnesses when they testify that a defendant is guilty, and then dismissing their recantations as "not credible" — even when several witnesses describe police pressuring them in essentially the same way. Surely such an exercise suggests that further investigation is warranted.

MEIER'S APPROACH sufficed to free Drumgold, but it suggests that the DA's Office is not serious about taking on the institutional problems of police and prosecutorial misconduct, even though those problems lead, time and again, to the conviction of innocent defendants.

The problem is illustrated dramatically by the 1989 drug prosecution of one Charles Cornish. The state appeals court concurred in the trial judge's decision to toss out Cornish's conviction because Boston police officer Trent W. Holland, who made the arrest and was the main prosecution witness, had likely committed perjury. Holland had described from the witness stand how he had positioned himself to conduct surveillance "with the aid of binoculars" to observe the café in front of which Cornish was allegedly selling drugs to arriving customers. After Holland finished testifying, defense counsel asked the judge to take the jury to view the alleged crime scene. The appeals-court opinion describes what the jury found: "It became apparent on the view that there were buildings situated on the land that Holland had previously described as an empty field. Hence, a viewer could seriously question whether Holland in fact could see the Station Café from his vantage point on the bridge."

Rather than terminate the trial and investigate Holland's apparent perjury, the prosecutor put Holland back on the witness stand to testify that he had been "standing on stanchions that were about two and a half feet in height" — stanchions he'd never before mentioned — and hence could see over the buildings he previously denied existed. The trial judge and the appeals court were neither convinced nor amused. The case was thrown out. The trial judge, Elizabeth A. Porada, to her credit requested that then–Suffolk DA Newman Flanagan investigate Holland. Some months later, and to almost no one's surprise, Flanagan's office announced that it was declining to charge the cop.

In fact, Holland continued to advance in the Boston Police Department. The same year he testified about standing on stanchions for the Cornish prosecution, Holland was also investigating the infamous murder of Carol DiMaiti Stuart. By 1991, when a federal probe of police misconduct in the Stuart case concluded that Holland had falsely planted cocaine in the house of Stuart-murder suspect William Bennett, Officer Holland had been promoted to Detective Holland.

In the Drumgold case, Superior Court judge Barbara J. Rouse has not suggested that Conley or anyone else conduct an investigation of those points glossed over by Meier's memorandum. Chances are the matter will end here, and no lessons will be learned to prevent yet another Drumgold case. Rather, the long chain of exonerations of innocent defendants in Massachusetts passes on to police and prosecutors the lesson that trying to frame a defendant comes with few risks.

Recently, Governor Mitt Romney announced that he was appointing a blue-ribbon panel to investigate the feasibility of constructing a death penalty in which one could determine with "scientific certainty" that a defendant committed a crime before executing him or her (see "Blinded with Science," News and Features, October 10). Rather than tilt at windmills — it is perfectly obvious that there can be no such certainty in human affairs, much less in the criminal-justice system — the governor would do well to establish a commission to look into what can be done to minimize police and prosecutorial frame-ups of innocent defendants. That's no mere windmill.

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