

NATIONAL DISTRICT ATTORNEYS ASSOCIATION
ADDRESSES EXONERATIONS

In May [2012], with much fanfare, the National Registry of Exonerations (NRE, a joint project of two law schools) issued its first report. In it, they announced the existence of the Registry (accessible online), with information on “exonerations,” now totaling 1,010, reaching back to 1989. The media releases, press coverage, and the report itself portrayed these as only a fraction of the “false convictions” that actually exist, the tip of some massive iceberg.

In fact, just the opposite is true. From 1989 through 2012, there were approximately **24 million felony convictions in the U.S.**¹ The 1000+ exonerations would amount to roughly **.00004 (or .004%)** of that many convictions (one out of 25,000 felony convictions). The actual percentage must be even lower – while the Registry lists exonerations made as far back as 1989, the convictions that led to the exonerations go back to 1959, increasing the base number of convictions for which the exonerations are a fraction.

The National District Attorneys Association has a natural interest in the topic. NDAA is the largest and primary professional association of prosecuting attorneys in the United States. We are actively committed to the integrity of the criminal justice system. As the U.S. Supreme Court observed, prosecutors have a special responsibility in the justice system, a duty to be impartial – not trying to win a case, but to see that justice is done.²

We, as prosecutors, have no interest in convicting the innocent. A wrongful conviction is an injustice to the person convicted, and leaves the true criminal free, unpunished and able to commit more crimes. Our worst nightmare is convicting an innocent person. That is why we screen cases, test alternative theories, share exculpatory evidence with the defense, educate police, provide training on issues like false confessions and the pitfalls of eyewitness identifications, and, simply put, strive to do the right thing.

We accept that our job is hard – to convince twelve strangers, beyond a reasonable doubt (the highest standard of proof in the law), that someone is guilty of a crime. We do not ask for shortcuts, or “help” with tainted evidence. A prosecutor may “exonerate” more people in a month than a defense lawyer will in a lifetime, by rejecting cases with insufficient evidence, and dismissing cases when the evidence falls short, or when new evidence points to a defendant’s innocence. We are often partners in post-conviction exonerations. The prosecutor speaks not just for a victim, or the police, but for all the People.

In recent years, advances in forensic science (notably DNA), in technology (such as surveillance cameras, which can help identify suspects) as well the adoption of new practices by police and prosecutors (revised lineup procedures, recording confessions and witness statements, etc.) have reduced the risk of wrongful conviction. The Registry’s own records confirm the rate

¹ Estimate based on U.S. Dept. of Justice, Bureau of Justice Statistics figures

² *Berger v. United States* (1935) 295 U.S. 78, 88.

of false convictions has declined. For convictions that occurred during the 1980's and 90's, Registry exonerations average 38 per year. For convictions since 2000, exonerations have averaged 17 per year, less than half the earlier rate.

Still, no system designed and run by human beings is perfect. Wrongful convictions can occur. But when the public is told of "exonerations," prosecutors ask – and fairness requires – that they have some relationship to what really happened. The National Registry of Exonerations includes guilty defendants who escaped justice due to witness intimidation, false recantations, inability to reproduce a new trial years later, or some other reason from a long list unrelated to the simple question – *did this person commit the crime?*

An example is the case of Dr. Jay Smith. Dr. Smith was a high school principal. He had a nefarious relationship with William Bradford, an English teacher. Bradford and Smith were accused of the murder of Susan Reinert, also an English teacher, and her two children. To make a sordid story short, Bradford and Reinert were having an affair. Bradford wanted to get rid of her, and benefit from her life insurance (she hoped to marry Bradford, and had made him her insurance beneficiary). Bradford and Smith conspired to commit the murder. Smith received three death sentences for the triple murder. The Pennsylvania Supreme Court reversed his convictions, and barred his retrial based on double jeopardy, because some evidence was deemed inadmissible, an informant's testimony unreliable, and police and the prosecutors wrongly failed to notify the defense of some evidence. Set free, Smith sued the police and prosecutors, claiming a violation of his civil rights. At the civil trial, the jury found *against* Smith, concluding that aside from the questioned evidence, the other proof of his guilt was so strong that Smith had suffered no improper damage. The Federal Court of Appeals affirmed the verdict in unusually strong language, saying, "...our confidence in Smith's convictions is not diminished in the least. We remain firmly convinced of the integrity of those guilty verdicts." *Smith v. Holtz*, 210 F.3d 186, at 198 (3rd Cir. 2000); Supreme Court certiorari denied, 531 U.S. 880.³

In short, Jay Smith got off because of mistakes by the police and the prosecutors. But he was still factually guilty, so found by a civil jury, and affirmed on appeal. Yet Jay Smith is listed in the National Registry of Exonerations.

If the NRE is designed to raise "awareness" about wrongful convictions and promote the integrity of the criminal justice system, it should at least keep an honest list. The public has a right to know when a publication that trumpets "exonerated" defendants includes the likes of Jay Smith and others who are factually guilty. This response by NDAA is an effort by America's prosecutors to put the Registry in its proper light.

³ The Smith case is far more complicated, both factually and in its legal history, than space permits here. The Federal District Court opinion at *Smith v. Holtz*, 30 F.Supp.2d 468 (M.D.Penn. 1998) collects some, but not all of the history.