Originally published in

New York Law Journal

March 7, 2019

When a Prosecutor Must Make the Hard Decision to Dismiss or Downgrade

By Joel Cohen

Imagine being the DA here—a high-profile case, a key witness with changing stories and some #MeToo advocates never too far in the background.

In many ways, it's a far tougher road to be a state prosecutor than a federal prosecutor. Federal prosecutors, more often than not, bring cases only if they want to—if they feel there's sufficient evidence to indict and the case is worthy of the time and effort needed to prosecute.

Typically, on the federal side, there is no dead body, no victim claiming she's been raped, no one who claims he was assaulted or robbed. Not so on the state side. State prosecutors, other than in white-collar cases, rarely have the luxury of simply declining prosecution because the evidence might not be strong enough (unless of course statute or case law make clear that the case would be legally insufficient). State prosecutors typically have a greater duty to proceed – and they have an obligation to their constituency, often when the evidence might be seen as weak. Think about Manhattan District Attorney Cyrus Vance and his decision not to prosecute Harvey Weinstein in 2015. When Vance's decision to not charge Weinstein was made public three years later, Vance was hounded in the press (until Weinstein was finally indicted).

There are times when a prosecutor must go for the gusto, even though there's a chance (perhaps a good chance) that the case will be dismissed or result in an acquittal. But when it appears, after a charge is brought, that the case has fallen apart—a witness declines to testify or is seriously impaired because of changing stories—it may become the affirmative duty of the prosecutor to bite the bullet, go to court and acknowledge that the case or a significant portion of it should be dismissed, however unpopular it might be to do so. Given the sheer number of cases that local prosecutors must bring, it is impossible to avoid these situations. Few who are truly conversant with the way the courts of criminal jurisdiction operate will disagree.

The state Supreme Court in Brooklyn has been faced in recent months with an extremely troubling and controversial case. In People v. Martins & Hall, two police officers were charged in a 50-count indictment with raping an 18-year-old girl who was in their custody, receiving a bribe and other related offenses. The case is a very big deal, for a number of reasons. To start, while the officers haven't said so in their papers, reading between the lines their story is basically that any sexual contact with the defendant was consensual. Not necessarily a particularly appealing defense given that the accuser was in the custody of the police. Still, you've got to go with what you have. But here is the real thing—while there is DNA evidence taken from the accuser's rape kit linking the defendants, there seems to be little doubt that the accuser has extremely serious credibility problems. Imagine being the DA here—a high-profile case, a key witness with changing stories and some #MeToo advocates never too far in the background.

So what is a prosecutor to do? Well, the prosecutor tried to take the path of least resistance by asking that the case be turned over to a special prosecutor. As an aside, the defense made the same request, although that's largely beside the point here. For their part, the defense said, in effect, that the DA knows, having disclosed it, that the accuser has repeatedly lied; that a special prosecutor should be assigned to decide whether to prosecute the accuser for perjury; and that there is a conflict of interest because the accuser publicly has alleged that the DA is corrupt and actually working to protect the police defendants.

But let's turn to the District Attorney's office. While opposing the defense application, it claimed that a special prosecutor was required—first, because an ADA who had nothing to do with the case (and had been walled off from the case) has had a romantic relationship with one of the defendants. This argument is a complete throwaway—so let's throw it away. Second, the accuser distrusts the DA's office, has said so in the press and social media and the relationship is so bad that the accuser, herself, publicly asked for a special prosecutor. Finally, the DA believed that, ethically, the office cannot call the accuser as a witness given her changing stories. Basically, reading between the lines inasmuch as the prosecutors didn't say this at all, "How can we call a witness that we don't believe?" Perhaps more to the point, the DA argued that if the office dropped certain counts based on the accuser's lack of credibility, because of the circumstances here, it "fears" that the public may perceive such an action as "unfairly disfavoring [the accuser] and favoring the defendants." That's quite a statement.

Faced with dueling motions for a special prosecutor, the Honorable Matthew J. D'Emic denied both—and pertinent here, the District Attorney's. Wasn't he right? Essentially, the court said, the office simply never addressed the reality that, if the accuser lacks credibility so that it may be ethically difficult, if not impossible, for it to call her as a witness inasmuch as they have come to not believe her, the identical difficulty or impossibility will likely (although, admittedly, not necessarily) exist for a substitute prosecutor. If she is a liar, however, she will be a liar in the hands of any prosecutor, special or not, who will necessarily learn of her inconsistent statements. If the District Attorney's office would face an ethical dilemma in calling her as a witness, its successor would likewise probably face that problem!

But here's the real issue. The District Attorney has been elected to handle cases in his jurisdiction, whether strong or weak. Sometimes, prosecutors need to make clear to the court and the public that an indictment, or at least certain portions or theories, simply cannot be pursued—i.e., that a case will fail at trial or, perhaps, that certain counts shouldn't be pursued as a pure matter of prosecutorial discretion. And this decision should be made in an effort to do justice, not to satisfy the public's or an accuser's lust for conviction. Asking to be relieved from a case by asking the court to appoint a relief pitcher may make the prosecutor look better in the public eye and keep his win/loss record intact, but it does a serious disservice to his duty as a prosecutor.

There are indeed cases when a special prosecutor should be appointed, where there is an actual conflict or an appearance of one. The Martins case, as Judge D'Emic held, is not one of them. As he said, the District Attorney's office actually carried out its ethical responsibilities regarding the vulnerabilities of the witness by telling the defense about them. Yes, he said—the public may be critical of the prosecutor's search for justice, but fear of public criticism is not the issue. Reading between the lines, wasn't the judge saying, hard decisions are why the DA "gets the big bucks"? You know, if the heat's too hot…

Finally now, though, to its credit, the District Attorney's office has now taken the bull by the horns and done what prosecutors are obligated to do—decide on the merits what case it ultimately is truly in a position to bring to trial. In short, in a superseding indictment filed on March 6, the District Attorney re-indicted the case and omitted 43 of the original 50 counts, leaving out of the indictment the far more difficult to establish rape-related counts, which presumably means the accuser will not have to testify.

At the end of the day, we in the cheap seats currently have no idea whether the defendants are actually guilty or innocent of the rape (or any of the charges). The prosecutors themselves must, as is always the case, decide for themselves if the defendants are actually guilty (and shouldn't proceed without making that decision). And, more pertinent here, they must decide whether the prosecutors are actually in a position to prove it to a trial jury, and accordingly how best the case should be pursued. That's often a tough job and not one that prosecutors should properly shrink from.

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