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Forum

Repairing Lives of the Wrongfully Accused Is No Simple Task

By Frank J. Polek

In a criminal case, a prosecutor must prove guilt beyond a reasonable doubt. The jury or judge decides whether a defendant is guilty or not guilty. Note that "innocent" is not an option. Either the government proved guilt, or it did not. An acquittal does not mean that the defendant is innocent. Rather, acquittal means that the government did not prove guilt. Although most defendants charged with a crime are actually guilty and many prosecutors make charging decisions carefully, too often prosecutors will proceed with a case with little investigation beyond the initial police report. The innocent can get dragged into the criminal justice system because of a lack of diligence. This is wrong.

A wrongful prosecution — even if resulting in an acquittal — can have long-lasting effects. Reputations can be ruined, along with family relationships and finances. Worse, an innocent defendant may be behind bars for years before a conviction is reversed and he is ultimately set free. Identity theft is another example of how actual innocence can be important. If a thief steals your identity and then commits a crime, you could be arrested and charged for the misdeeds of your involuntary alter ego.

What can be done to help repair the life of the wrongfully accused? A pardon from the governor or president is



extremely rare. Statistics on pardons are hard to come by. Gov. Schwarzenegger has issued only three or six pardons, depending on the source. As of mid-2007, President Bush had granted only 113 pardons (not counting Thanksgiving turkeys). And, like an acquittal, a pardon does not necessarily mean innocence. Typically it only decrees that a defendant will not be prosecuted or further punished for a crime. Pardons can, but seldom do, attest that the accused is actually innocent.

There are a few options available to those who want to prove their innocence. In the context of identity theft, California has a procedure for victims to help clear their names. Penal Code Section 530.6 sets up simple steps for victims of identity theft to obtain an expedited judicial declaration of "factual innocence." If

successful, pertinent court records can be deleted, sealed or otherwise noted to indicate that the identity used was stolen.

California has another procedure for a determination of factual innocence in other cases not necessarily related to identity theft. Penal Code Section 851.8 allows a wrongfully accused defendant, or even someone arrested but never charged, to petition for a finding of factual innocence. The exact procedures vary depending on whether the person was formally charged with a crime. If the person was arrested but never charged, the petition goes to the arresting agency. If the police deny the petition or fail to act within 60 days, the accused may petition the court. Similarly, if someone is actually charged but later acquitted or the charges are later dismissed, the defendant can petition the court for a finding of innocence. Even better, if the prosecutor concurs, the determination can be made by the court at the same time as the dismissal or acquittal. Without the consent of the prosecutor, the accused must file formal petition papers and submit evidence. This procedure is not available for infractions, such as traffic tickets.

Successfully obtaining a determination of factual innocence is no easy task. The evidence submitted must show that "no person of ordinary care and prudence [would] believe or conscientiously entertain any honest and strong suspicion that the person arrested

[or acquitted] is guilty." This is a very high standard to meet. The evidence submitted must be very, very convincing.

Although the concurrence of the prosecutor is not a prerequisite to obtaining a determination of factual innocence, as a practical matter, it is often needed. Although a court cannot deny such a petition without an evidentiary hearing, holding a hearing means that a prosecutor will be allowed to present evidence in opposition to show that, at a minimum, there was probable cause for an arrest and/or charge. This is generally an easy task for any prosecutor.

If granted, the result is terrific for the accused. All records relating to the arrest and/or charges are sealed for three years and subsequently destroyed. The case is deemed to never have occurred.

Note that these procedures are not the same as what is commonly known as expungement. With expungement, a defendant has been convicted of a crime and a term of probation has been completed successfully. If all conditions are met, the court can vacate the conviction, the defendant will withdraw a plea of guilty or no contest if

one was made, and the case is dismissed. The defendant can then say, such as on an employment application, that he or she has never been convicted of a crime. But, the conviction still "exists" for purposes of employment as a peace officer or in public office, an application for a state license or contracting with the California lottery. Not all convictions can be expunged. Many sex offenses, for instance, are not expunge-worthy. Neither are most traffic offenses.

In the federal system, the procedure and result is different. A person wrongfully prosecuted and actually imprisoned can sue the federal government for damages. A mere arrest and/or charge does not qualify. He must have been acquitted, or his conviction must have been set aside, because an appellate court reversed and the defendant was acquitted on a retrial or was pardoned on the ground of actual innocence. If the court issues a certificate of innocence (which is so rare it is almost unheard of), or if a pardon specifies that it is granted because of actual innocence, the defendant may sue the government for \$50,000 for each 12-month period he was incarcerated. The amount is double for any 12-month period spent while sentenced to death.

The lawsuit goes to the relatively obscure U.S. Court of Federal Claims.

Juvenile records are typically easier to deal with. When the defendant reaches age 38, or earlier in some cases, juvenile court records generally must be destroyed. Before that, for all but the most serious offenses, the defendant can file a simple petition to seal the juvenile court records. The petition can be filed the earlier of five years after termination of juvenile court jurisdiction or age 18. There must be no intervening convictions and no pending civil litigation. Once sealed, "the proceedings ... shall be deemed never to have occurred and the person may properly reply accordingly to any inquiry."

Clearing one's name and eliminating the stigma of a criminal accusation can be difficult, but procedures do exist for those rare cases where factual innocence can be proven convincingly, as well as for the more common situation where guilt is not in doubt. Of course, the better way to avoid this entirely is for prosecutors to take more care in their charging decisions.

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