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JUSTICE FOR ALL MEANS OPENING THE FILES

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RALEIGH--Two months ago, I watched over Alan Gell's shoulder as he was freed after spending nearly nine years incarcerated for a murder he did not commit, five of those years on death row. Until then, working on Gell's defense was about nothing more than doing the right thing for him. But in those moments after the verdict, I began to appreciate what had just happened on a scale grander than one man's life. From a systemic standpoint, his case represented a nightmare scenario most of us usually dismiss as only happening in movies or books.

Two teenage girls participated in a Bertie County murder and then pointed their fingers at Gell, a petty criminal and drug dealer, an easy target. But no physical evidence linked him to the crime, and 17 witnesses told police in the weeks following the murder that they saw the victim alive after the last point in time when Gell could have killed him. The girls were secretly recorded talking about making up a story and lying to the police in the investigation. But their final story was believed, and Gell was charged with capital murder.

For years, he sat in jail, awaiting trial and facing the death penalty. Despite a pretrial duty placed on prosecutors by ethical rules, constitutional law and a court order in the case to turn over evidence pointing toward Gell's innocence ("exculpatory" evidence), his prosecutors failed to disclose the 17 witness statements or the tape of the girls' conversation.

The day the trial started, a defense lawyer showed the judge a newspaper article from the previous day which stated that three witnesses had seen the victim alive after Gell could have killed him. Again, the defense lawyer asked for exculpatory evidence. Again, the court ordered the prosecution to disclose it.

This time, the prosecution responded that there might be "as many as five or six" such statements and ended up disclosing eight. The witnesses whose statements were disclosed had been re-interviewed, months after their initial statements, and acknowledged they might have been wrong about the last time they had seen the victim alive; but the other nine witnesses, whose names appeared on the prosecution's pretrial witness list but whose statements were not disclosed, had never been re-interviewed or formally expressed reservations about their memories. The prosecution

also again failed to turn over the recorded conversation in which the girls discussed lying to the police. Gell was convicted and sentenced to die.

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While he sat on death row, the state Supreme Court upheld his conviction. He was assigned lawyers for one last appeal before his execution. Thanks to a relatively new law requiring open file discovery in final appeals for death row inmates, Gell received a copy of his entire prosecutorial case file.

Only then were the remaining nine exculpatory witness statements and the secretly recorded conversation discovered. When Gell's lawyers asked for a new trial, the Attorney General's Office opposed the request, but a judge found that the evidence was exculpatory and ordered a new, fair trial. A year later, the only jury that ever got the full truth in the case heard from many of the 17 witnesses and focused in deliberations on the secretly recorded tape. They spent under three hours deciding Gell was not guilty.

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The question I am asked most by people who know I worked on Gell's case is, "What's going to happen to those prosecutors?" I tell them the State Bar is considering the matter, and I trust the bar will do the right thing and give those prosecutors the due process that was denied Alan Gell. And the prosecutors may not be the only law enforcement professionals whose conduct should be reviewed. Two of the re-interviewed witnesses testified in Gell's second trial about feeling harassed or pressured by law enforcement to modify their prior statements about the last time they saw the victim alive.

Whatever happens to any individual involved in the unjust effort to execute Gell, individual accountability alone is not enough to fix the problem. People will always be in charge of the system, and people are inherently fallible. While we cannot make people less fallible, we can certainly make the system less fallible.

And when government seeks to take a person's life or freedom, or just to make him a convicted criminal with all the stigma and lost opportunities that flow from that status, there is no room for error that can be avoided by intelligent changes in the system.

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The first change should be open file discovery in all criminal matters. Simply put, open file discovery would allow a criminal defendant to receive a copy of all information gathered or produced by law enforcement in the case against him. Under current state discovery laws, defendants are entitled to only a limited amount of that information, not even the names or statements of witnesses. Some prosecutors rightly choose to share the information anyway, but many do not.

The Constitution further requires pretrial production of exculpatory evidence. However,

prosecutors alone are responsible for reviewing their files and making the inherently conflicted decision, from an adversarial position, of whether the information would help a defendant and should therefore be turned over.

Again, people are fallible. Whatever Gell's first prosecutors might say about their culpability in the failure to produce evidence of his innocence, they cannot deny that their failure resulted in an unfair trial that ended with a man being sentenced to die. Even assuming their conduct was negligent, that means they either failed to review their file and locate the exculpatory evidence, or they reviewed the 17 witness statements and secretly recorded conversation but erroneously decided it was not exculpatory. Miscarriages of justice from such "inexcusable neglect," as Attorney General Roy Cooper has called it, would not exist with open file discovery.

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Granted, information gathered in a criminal investigation may be so sensitive that prosecutors might rightly seek to withhold it from a defendant under exceptional circumstances. In fact, current discovery laws allow a prosecutor to ask the court to keep such information secret. In that scenario, a neutral judge -- rather than one of the adversarial parties -- determines whether information should be disclosed.

Others suggest that open file discovery should, if adopted, go both ways, i.e., defendants should have to give the prosecution their entire files as well. That suggestion exhibits an abandonment of core principles of our justice system: the prosecution has the burden of proof, and a defendant has the right to remain silent and should not be compelled to help the prosecution convict him. It also seems to equate a private citizen's defense team, whose ethical and legal duty is to zealously defend the accused individual, with law enforcement and prosecutors, whose ethical and legal duty is to serve the entire public by seeking justice and the truth, not simply a conviction of the person they determined to be guilty.

Open file discovery should be the rule. In tough budget days, it would save untold taxpayer dollars spent on appeals and successive investigations and prosecutions, and it would avoid the imprisonment or execution of innocent people based on the negligence of prosecutors.

What happened to Alan Gell has shattered many people's faith in our system of justice. Open file discovery is the proper first step in restoring that faith, especially in light of this equally chilling thought: if Gell's first jury had not sentenced him to die, he would not have been entitled to see the open file of his prosecution, and he would have spent the rest of his natural life in North Carolina's prisons: an innocent man.