DAVID ONEK: Welcome to the Criminal Justice Conversations Podcast, a coproduction of Berkeley Law School and the Berkeley School of Journalism. I’m your host, David Onek. The podcast, recorded in the Berkeley School of Journalism studios, features in depth interviews with a wide range of criminal justice leaders: law enforcement officials, policymakers, advocates, service providers, academics and others. The program gets behind the sound bites that far too often dominate the public dialog about criminal justice to have detailed, nuanced conversations about criminal justice policy.

Today’s guest is Santa Clara County District Attorney, Jeffrey Rosen. Rosen was elected District Attorney in June 2010 and began his term in January of this year. He ran on a platform dedicated to raising ethical standards within the DA’s office and to restoring integrity and public trust. Rosen joined the office in 1995 and was honored as Misdemeanor Trial Attorney of the year in 1996. He graduated summa cum laude and Phi Beta
Kappa from UCLA and received his law degree from right here at Berkeley Law School. Rosen has taught trial advocacy at Santa Clara University Law School and was a guest lecturer at Santa Clara University and San Jose State University. He has been an active community member, serving as president of his local synagogue and he joins us in studio this morning. Jeff Rosen, welcome back to Berkeley and welcome to the program.

JEFFREY ROSEN: Thank you. It’s nice to be here, David.

ONEK: Jeff, one of the main themes in your recent campaign was ethics. You said, at your swearing in, our mission is not only to prosecute the guilty because the law mandates it but, when necessary, to exonerate the innocent because justice demands it. One of your first acts as DA was to create a new conviction integrity unit. Can you tell us why you thought it was essential to create this unit and explain how it operates?

ROSEN: The reason it’s so important for a District Attorney’s office to have a conviction integrity unit is sometimes there’s mistakes made in the criminal justice system. It’s a system made up of human beings, from police officers to witnesses to prosecutors, defense lawyers, and judges and, sometimes, there
are mistakes and I think that it’s very important that, just because a mistake may have been made five or ten years ago, and someone, perhaps, was wrongfully convicted or received a sentence that they should not have received, we should go back and fix that. So, I think it’s part of having an ethic in the office of continuous quality improvement.

ONEK: So, the unit, then, looks back at old cases to see if there may have been mistakes. How do cases get referred for possible examination and how do you keep that from being a floodgate of so many people wanting their cases to be reexamined with the resources that you have?

ROSEN: Sure. Part of what the Conviction Integrity Unit does is reactive in how you’ve described it. So, we look at old cases and the way that we are notified of old cases to look at comes in a few ways. One is defense attorneys that had represented this defendant or they get a new lawyer and they say, you know, I think there’s new evidence, there’s DNA that could have been tested, there’s other witnesses that have come forward, and then when those requests are made from defense attorneys, I refer those to the head of our Conviction Integrity Unit, David Angel, and David reviews and investigates those
claims and determines if there’s further action we need to take. Another way is people write me letters from jail and prison and I haven’t gotten a letter yet from jail or prison where someone admits that they were guilty and they deserve their sentence but I tend to get a lot of letters where somebody says that they didn’t do it and there’s additional evidence and I refer those to David as well.

ONEK: And, as you alluded to earlier, in the reactive part, you’re not only looking at guilt and innocent questions but you’ll also look at sentencing issues?

ROSEN: Yes, and that’s something that we’re really in the process of formulating right now. I get a lot of requests from people saying they should be let out of jail or prison for many different reasons but, a few months ago, one letter came across my desk for someone that has been convicted of a third strike offense and the third strike was a nonviolent offense and this person’s case, I thought, merited consideration and so, it’s something that I reviewed and I referred to David Angel and we’re looking at what we might do, not only on this person’s case but what our policy might be, in general, about these issues because we don’t want to open a floodgate here but there
may be a few cases where it would be in the interest of justice to revisit those sentences.

ONEK: And, actually, a few episodes ago on this program, we had Michael Romano, my friend and colleague who runs the Stanford Three Strikes Clinic, on the program, talking about just those types of cases and the mountains and mountains of letters they get but where there are nonviolent third strikes that are both unjust and, obviously, we’re all paying to put those folks behind bars for long periods of time who don’t need to be there.

ROSEN: Yeah. No, I think that’s right and it’s something that I want to be thoughtful about in terms of under what circumstances we would intervene. It’s a little bit tricky, legally, but I think it’s something that we could do to bring the person back from state prison and bring them back to our local facility and resentence. So, maybe it’s something that we’ll have worked out in the next few months but the basis from which I start is this looked to me like a sentence that was much too long and this person would have been treated much, much differently today. So, we’re going to address it.

ONEK: Right. Now, another part of what you’re doing in
that new unit is proactive in terms of training police officers, training prosecutors, in the best, most cutting-edge, progressive techniques, really in what works. Could you talk a little bit about what some of those areas of training that you are focusing on and that you plan to focus on in the future to try to make sure that there are fewer and fewer wrongful convictions in the future?

ROSEN: Sure. So, in terms of training our prosecutors, we do a lot of focused training about ethics, about discovery obligations, and we’re trying to use situations that have happened in the past either, in our office, or in other District Attorney’s offices where there were discovery violations or allegations of prosecutorial misconduct or something happened that a case was overturned and we try to learn from it. So, it’s a little bit like in a hospital, when someone dies in the hospital, there’s always a death review that’s done by the hospital staff and that’s sort of what we’re trying to do and we’re trying to change people’s mindset that we want to learn from bad things that have happened in the past and not just concern ourselves with who’s to blame for that. So, that’s something that we do internally in the office. In terms of our external training to police departments, they really look to our
office to set standards for investigations and, just last week, we did a training for police officers on taking statements from suspects and how to make sure that the statements are voluntary and we did this because if an officer uses too much, force isn’t the right work because this isn’t physical force, but if an officer does an interrogation that is unlawful because it is too prolonged or too accusatory, that statement may not come into court then and somebody who really did something wrong and admitted it, we couldn’t use that statement against them. So, that’s a situation where somebody who’s really guilty might get off. On the other hand, if you press somebody too hard in an interrogation, they may confess to something that they did not do. That doesn’t happen very often. It’s rare --

ONEK: And that seems very counterintuitive to our average listener but the studies show that that does, in fact, happen.

ROSEN: It does happen and, particularly when the person being interviewed, the suspect, is a minor or has mental difficulties. At some point, people just think, well, this is what the officers want to hear and I’ll just say it so this interrogation ends and, as I say, that’s something that happens rarely but it does happen and so, that’s why we want to be really careful
about how we teach police officers to interrogate suspects because, on the one hand, we want the suspects to confess if they really committed the crime and we want to be able to use that statement and, on the other hand, we want to minimize the chances of individuals confessing to things they didn’t do.

ONEK: Now, you mentioned discovery a little bit and a major change you’ve made involves how your office handles discovery which is the evidence the prosecutors must turn over to defense attorneys. Under California law, prosecutors must turn over any material evidence that may be helpful to the defense at least 30 days before trial but you have stated that you believe in disclosing that information as soon as feasible. Why do you believe in going beyond what the law requires?

ROSEN: For a few reasons. Number one, there’s just a practical reason. If we sit on discovery and wait until exactly 30 days before a trial to turn it over, often this will require the defense to do more investigation and the defense will ask for a continuance and the continuance will be granted. For the prosecution, it’s in our interest to get cases to trial as soon as possible. Cases don’t get better when they get old. It’s the opposite of wine. They get stale. Witnesses forget.
Witnesses leave. It’s harder to find them and, for the victims involved in these cases, the victim’s families, justice delayed is bad and it’s better for society when justice is swift, both for the victims and for the defendants so they feel, very quickly, the consequences of their actions. So, one reason to turn the discovery over as soon as possible is practical because we want the cases to go to trial. Secondly, if we have a situation where we’re holding on to discovery for two or three years, it may be that, once we turn that discovery over, witnesses that the defense would like to interview may no longer be around and that, then, leads to serious problems where a case may have to be dismissed because of some of these problems and, finally, when we wait very long to turn over discovery, sometimes conflicts arise between new witnesses and the lawyers that are representing the defendants and this results in more delays. So, I think that the penal code sets a minimum standard. The penal code says we have to turn discovery over at least 30 days before a trial. It doesn’t say to wait until 30 days before a trial. It says at least 30 days before a trial and one thing about having integrity is acting with a high moral code and the penal code sets a minimum standard for what prosecutors should do but not the maximum standard and, certainly, as prosecutors, when we get discovery that’s very
close to the date of trial, that often puts us in a situation where we might need a continuance and we’re not just another litigant in court. We are the government. We are the sovereign and we’re trying to raise standards of conduct throughout the profession and we want the public to have confidence in the criminal justice system and to know that the prosecutors, who wield enormous power, are playing responsibly and fairly.

ONEK: Can you talk a little bit about the specific changes you made that go beyond what the law requires, what you’re beginning to implement in your office and, also, whether you’re involving defense attorneys in those discussions of how discovery process can be improved?

ROSEN: So, the amount of discovery that is available in criminal cases now is really exploded in the last 15 or 20 years and the reason for that is, when I started as a prosecutor in 1995, there were police reports and photos. Now, many statements are audio- and videotaped, which creates additional amounts of discovery. The number of photos that are taken at crime scenes are well into the hundreds and, sometimes, thousands and, once statements are taken, transcripts are done of those statements. This creates thousands and thousands
of more pages and so just the sheer volume of discovery is enormous. We’re in the process, in the Santa Clara County District Attorney’s Office, of revamping the way we do discovery so that, number one, we’re able to track the discovery that we’re turning over to the defense because one problem that we’ve had, as other prosecutor’s offices have had in the past, is knowing whether we’ve turned something over because there’s simply so many pages of discovery. In addition, we’re trying to streamline this process. We’re doing more things with web-based software and using the internet and different kinds of digital evidence storage procedures to try to streamline this process. As part of this, we invited in a number of defense attorneys, both public defenders and private criminal defense attorneys, to ask them, what is it about the way that we provide discovery now that is working OK and what is it about the way that we’re providing discovery now that’s not and how could we improve that and so we’ve taken part of their suggestions, part of suggestions from talking with police officers, and part of suggestions, of course, with talking with our own prosecutors and support staff as to how to improve that.

ONEK: Now, you also talked about learning from mistakes that have been made in the past and there have been recent press
reports about your decision to pull a prosecutor off a high-profile gang case because he failed to provide timely discovery, just what we’re talking about. Your move won applause from many quarters, including the San Jose Mercury News which wrote that, “Rosen is the real deal, a prosecutor who values justice above conviction rates.” Now, I know you can’t talk, on the record, about a personnel issue, but I’m wondering if you can talk about, again, how you handle these issues, generally, when someone is not following the guidelines that you’ve put forth or even thought the law puts forth.

ROSEN: I think that, within every District Attorney’s office, there are at least two problems and we have a very, very good District Attorney’s office in Santa Clara County but there’re often two problems in a prosecutor’s office. One is prosecutors who are lazy, who don’t want to take cases to trial because going to trial is a lot of work and so they settle their cases for less than their worth, meaning that the rape case that the person should’ve gotten 10 or 15 years in prison, the rapist only gets two or three years in prison and that’s an injustice. If people think that it’s an injustice when someone is sent to prison for “too long,” it’s also an injustice when someone isn’t sent to prison for long enough. So, one issue is lazy
prosecutors. Another issue is prosecutors who are overzealous, who believe that every case is worth the maximum and who view defense attorneys, not simply as adversaries, but as enemies and who view the defendants that they’re prosecuting as so bad that they’re not worthy of the Constitutional rights that they are given. So, these are two problems that every office has and we have a little bit of both in our office and we’re really trying to instill in our prosecutors the idea that it’s not just getting the conviction, although the conviction is very important to get, but it’s how we get that conviction. What was the process? Were we respectful with the defense attorneys, even when the defense attorneys are not respectful to us? And that often happens and defense attorneys call us names and they say it’s prosecutorial misconduct and they say, you’re racist, and that hurts the feelings of a lot of our prosecutors because we went into this because we’re really trying to get justice and do the right thing. Nonetheless, it’s our responsibility as prosecutors to treat everybody professionally and respectfully and to protect defendant’s Constitutional rights, even as we vigorously prosecute them. So, there has been a little bit of a shift in the office and the vast majority of our prosecutors fulfill their discovery obligations every day and, sometimes, we just have a problem with a few prosecutors that see things
a little bit differently but, ultimately, it’s my name on the pleadings and the prosecutors in our office, the individual prosecutors authority to prosecute cases flows from the elected District Attorney and so, it’s very important for me to set that tone and people get it.

ONEK: Let’s shift gears and talk about medical marijuana policy, kind of a hot-button topic in many counties these days in California. Your office recently created new guidelines for medical marijuana dispensaries that differ from your predecessors. What changes have you made in this area?

ROSEN: I think that what the voters in California have said is they favor medical marijuana. They want people who are truly sick, who might benefit in some way, their suffering might be eased by having marijuana, they want those sick people to be able to get marijuana. However, the voters also said, we’re not legalizing marijuana, and they voted down a measure to legalize marijuana. So, the issue for law enforcement, for prosecutors, and for police officers is how to effectuate the voters’ will in wanting sick people to get marijuana but not legalizing it for everyone. In San Jose, at one time, there were over 100 medical marijuana dispensaries and it was unclear under what
circumstances or arrangements they could operate and, normally, the District Attorney’s office does not issue advisory opinions but I was getting so many calls from different police chiefs and different community leaders and different city councils about what kinds of cases we would prosecute, what kinds of dispensaries we would prosecute, that we created guidelines for both law enforcement and dispensaries and they’re basically the same guidelines. I mean, we’re trying to tell police officers, when you investigate dispensaries, this is what we’re looking for in terms of what conduct would be illegal and we’re saying the same thing to the dispensaries. If you do these things, you’re going to be prosecuted. If you don’t do these things, you won’t be prosecuted and that’s really what we came out with and the point person on this in my office was Jim Sibley who did just a tremendous amount of research and work as to what the different statutes mean, what the case law means, and the different practices of dispensaries around the bay area to find dispensaries and to find models that were in compliance with the law and to try to highlight those kinds of dispensaries so that people in San Jose and Santa Clara County will know what will be prosecuted and what won’t be.

ONEK: What has the reaction been from both the medical
ROSEN: The medical marijuana community has been very receptive to what we’ve done. In many of the conversations that I’ve had with groups like NORML or Americans for Safe Access, they’ve said, look, we’re the true believers in this, we really think marijuana can help people who are sick and that’s what we want to do, we just want to help sick people, we’re not in this to make money, we’re just trying to do this because we believe this is compassionate, and they don’t like people that come in and think they’re going to make a lot of money by selling marijuana and trying to make a profit out of it. So, we really have an ally in those who truly believe in the medicinal value of marijuana and I have no opinion one way or another about marijuana’s medicinal value. Now, in terms of law enforcement, it’s somewhat mixed. On the one hand, law enforcement is appreciative of having the guidelines, of OK this is what’s going to be prosecuted, this isn’t going to be prosecuted, and it allows police chiefs and police departments to know how to deploy their resources accordingly and not waste scarce resources. Now, I would be remiss if I didn’t say to you that there are some in law enforcement who just view marijuana as,
of course, it’s illegal under federal law and who view it as a tremendous evil which corrupts our youth and creates all kinds of social problems and they’re just very negative towards anything that might allow marijuana to be given to anyone and so there is some, I wouldn’t say resistance because law enforcement officers follow the law, but there’s some difference of opinion about that. I expect that the Attorney General, Kamala Harris, will be coming out with the state’s guidelines on medical marijuana dispensaries and I believe that her guidelines will be very similar to ours.

ONEK: Another change you’ve brought to the office is the way you investigate officer-involved shooting cases. Can you tell us what the policy was before you took office and what changes you’ve made since you took over?

ROSEN: Previously, when an officer shot and killed someone in the line of duty, so the officer’s in uniform, is on duty, and someone’s just robbed a bank and the officers have stopped the person and something happens and then the officers shoot and kill the person, those cases, previously, the agency involved investigated it. The District Attorney’s office, we have investigators who shadow the investigation, those reports came
to the DA’s office and then we sent a prosecutor to the grand jury and, behind closed doors, presented the evidence of what happened at the shooting to the grand jury and sort of let the grand jury decide whether to indict or not and the reason I say, sort of, is sometimes when the prosecutor went to the grand jury, the prosecutor, behind closed doors said, we don’t think you should indict the officer, it was a lawful and justified shooting, and then the grand jurors didn’t indict the officer and then, when we were asked, well, how come the DA’s office isn’t prosecuting the officer, we would say, well, the grand jury didn’t indict the officer but we wouldn’t tell people that we told the grand jury not to indict the officer and we should have told the grand jury that. I’m not, in any way, suggesting that the shooting was not justified. It’s rare when a police officer shooting is not justified. We have very professional, highly ethical police officers in this country and so that’s not a surprise. It’s just this process of doing it behind closed doors creates conspiracy theories in the public. So, what we’re doing now is, when there’s an officer-involved shooting, and there are three on my desk right now that happened in 2010, and what we do is, again, the agency involved investigates. The DA’s office shadows the investigation. The reports come to the DA’s office. They’re reviewed by senior prosecutors. I, then,
review the reports. If we think that the officer did something criminal, we just file charges. However, that’s extremely rare. That’s happened once in Santa Clara County in the 15 years that I’ve been a prosecutor. So, on the vast majority of cases where we’re not going to be filing charges, what we then do is we write a very detailed report, anywhere from four to ten pages, depending on the complexity of the situation. We explain the fact, what happened, what the applicable law is, and why we didn’t file charges against the officer and all the police chiefs agreed that they would get the reports of their investigations to the DA’s office within three months of the incident, of the shooting incident, and then we, in the DA’s office, within another three months, will issue our report if we’re not filing charges and so, either this week or next week, we’ll be issuing our first three reports in this matter and the advantage here is it gets the information to the public much faster than under the previous system which could take a year or longer and the public gets all the information that went into my decision-making process of whether to file charges so that people in the public, some may disagree with my decision not to charge the officer, there will always be a small segment of the community that just wants police officers charged every time they shoot someone but, for the vast majority of citizens, they
will understand what we did and everybody’s entitled to know what the facts are. You can have different opinions in this democracy but I think one of the things that government owes its citizens is the information that went into their elected officials’ decision-making process.

ONEK: Your predecessor was widely criticized for what were viewed as ethical lapses involving conflict of interest issues. One of those lapses you discovered, yourself, in the course of a case you were prosecuting. Can you explain what happened?

ROSEN: Yes, I was prosecuting a murder case. There was a convenience store owner that was murdered by several men after he returned from the bank to get a large amount of cash to put into the convenience store’s ATM for, it was a three-day weekend, it may have been Memorial Day weekend, I can’t quite remember now, and in the course of prosecuting this case, we filed charges against several individuals that were involved. It was tremendous resources invested in this case, between the police department and the DA’s office and this is public now, in terms of wiretaps that were done, extensive surveillance that was done on individuals involved. Now, what I found out is that, in the midst of this investigation, the district
attorney’s husband was working for the victim’s family. The victim’s family had filed a lawsuit against the bank, seeking damages for poor security and the District Attorney’s husband was hired by the victim’s lawyer to work in some capacity and, when I learned about this, I was very surprised and troubled and disappointed because of a number of reasons. It gave the appearance that, perhaps, we were investing so many resources in this case. Wiretaps are very expensive. In this case, with the wiretaps, most of the individuals were speaking in Spanish which requires additional interpretative expenses and I was concerned that it looked like this was something that we were engaging in in our office because the District Attorney’s husband was getting paid by the victim’s family and, of course, if the District Attorney’s husband is getting paid by the victim’s family, it’s like the District Attorney is getting paid by the victim’s family. California is a community-property state. So, that concerned me greatly. I was also deeply troubled when I learned that, when one of the wiretaps was signed, and a wiretap has to be signed by the District Attorney, the Chief of Police, the presiding judge. The requirements to get a wiretap are very strenuous and, when I learned that one of the wiretaps was signed at the District Attorney’s house, in the presence of the District Attorney’s husband, who at the time was working for
the victim’s family, but the police officers didn’t know that, that really raised some serious concerns and that led to our office recusing itself from prosecuting that murder case because of that conflict of interest and that is extremely unusual for our office to recuse itself because, in a murder case, because somehow the District Attorney could be seen as getting paid by the victim’s family.

ONEK: I would say it’s highly unusual. It’s almost and unbelievable [fact set?]. If someone had told you that, you almost wouldn’t believe it.

ROSEN: Yeah, I couldn’t believe it but it was true and I was very bothered by that and, as more information came to light, when I learned that the DA’s husband had also called the police department where he used to work, he was a retired police officer, asking about this case and if there were suspects or asking, generally, about the case, I knew that there was a huge problem and I also knew that there was something that was more problematic within our office in that this was something that the DA had done and no one around the DA had, either, told her not to do this or stood up to her and, when you have the leader of an organization that is not adhering to the highest ethical
standards, that has a corrosive effect on the organization and it’s really difficult to tell prosecutors, oh yeah, if you’d had a conflict of interest like that, you would have been disciplined but, if you’re the DA, nothing happens to you. So, that was a major factor that led me to run for DA.

ONEK: And, it not only has a corrosive effect on people in the office, it has a corrosive effect on how the DA’s office, how law enforcement, generally, is viewed by the community as more and more of these stories came out. As you’re coming into a situation where the credibility of the DA’s office has taken a bunch of hits, how have you gone about restoring that credibility with the community since you came on board?

ROSEN: Sure, so there’s a number of things. One is, I created a Conviction Integrity Unit because that’s about looking at the things that our office does with a critical eye and, while it’s very important for me to compliment our prosecutors when they do a good job, which is almost always, almost always, it’s also important to hold people accountable when they make mistakes, whether intentional or unintentional, sometimes there are consequences to our actions as prosecutors and that’s not something that I can paper-over, because I have one foot in the
office and one foot in the community and the perception that the community has of the DA’s office directly affects our ability to get justice, to put criminals away, to protect people’s rights, to give people confidence in what police officers and prosecutors are doing. So, one thing is I created a Conviction Integrity Unit. The second thing is the different approach on officer-involved shootings will be more transparent so that citizens don’t think these decisions about whether to charge officers are just made behind closed doors to a closed grand jury and they can never know what happens. Third, in terms of our discovery, again, we’re inviting in defense attorneys to help us model and create the best practices in discovery and our commitment to minimizing mistakes and minimizing misconduct really extends to even reaching out to the Northern California Innocence Project which is often very critical of prosecutor’s offices and trying to work with them where we can. I think that it’s very important to sit down and talk with people, even if you don’t agree with them or agree with their point of view. The Northern California Innocence Project, they believe that what they’re doing is improving the criminal justice system. Now, I don’t share most of their political views but I do share the desire to improve the criminal justice system and to not convict people that are innocent or let people that are guilty
go or have police officers violating people’s rights. I share those goals with them. Now, how we go about them and how they characterize the problem, we differ but I think it’s important to work with them and so David Angel, who heads our Conviction Integrity Unit, was teaching a class this last semester. He was team-teaching it with Cookie Ridolfi at Santa Clara Law School. Cookie Ridolfi is the director of the Innocence Project and so they team-taught a class about the criminal justice system and about prosecutorial misconduct. I think that, even when there’s people you disagree with, there may be something that they say that’s helpful and so you shouldn’t not talk with them just because you’re not going to agree with a lot of what they have to say. Sometimes, during the conversation and the dialogue, there’s something that they say that you hadn’t thought of before and that can help your office and I want to help our office be as outstanding as it can. It is a very, very good DA’s office but we can be better and, if getting better is taking a suggestion that came from the Innocence Project or from the police department or from the Bureau of Narcotics Enforcement or from a citizen who calls me up, why wouldn’t I do that? The goal is for the department to serve the citizens as best as possible.
ONEK: Jeff Rosen, thanks so much for joining us.

ROSEN: It’s my pleasure. Thank you for having me.

ONEK: Please tune in next week when we’ll be joined by David Muhammad, Alameda County Chief Probation Officer. Thank you for listening to the Criminal Justice Conversations Podcast. You can find this episode of the program, and all prior episodes, on our website at www.law.berkeley.edu/cjconversations, on NPR KALW’s website, and on iTunes. You can also become a fan of Criminal Justice Conversations on Facebook, and you can follow us on Twitter on CJ Conversations. The podcast was engineered and edited today by Callie Shanafelt, a program intern [at Sheridan Block?], and our research interns are [Katie Henderson?] and [Corrine Copper?]. I’m David Onek. Thanks for listening.