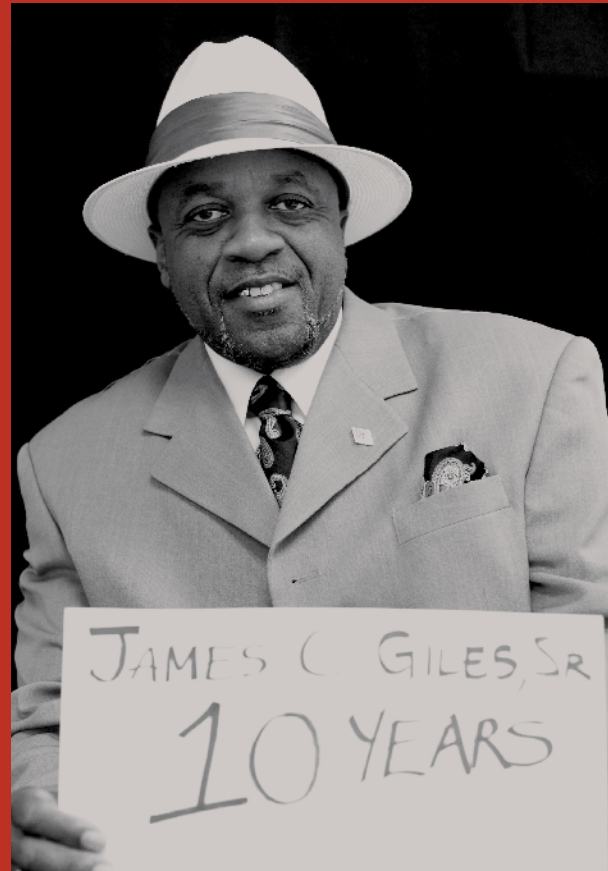
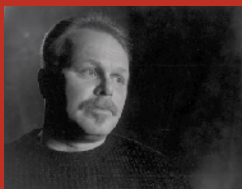


# Prosecutorial Oversight: A National Dialogue in the Wake of *Connick v. Thompson*



The Innocence Project would like to acknowledge and thank the following individuals who contributed to this report and its success: Lawanna Kimbro, Liz Jansky, Emily West, Stephen Saloom, Cookie Ridolfi and Ellen Yaroshefsky.

### **Resurrection After Exoneration**

Resurrection After Exoneration (RAE) was founded in 2007 by exonerees to promote and sustain a network of support among formerly wrongfully incarcerated individuals in the South. RAE works to reconnect exonerees to their communities and provide access to those opportunities of which they were robbed.

### **Innocence Project New Orleans**

Innocence Project New Orleans (IPNO) is a nonprofit law office that represents innocent prisoners serving life sentences in Louisiana and Mississippi at no cost to them or their loved ones, and assists them with their transition into the free world upon their release. IPNO uses its cases to explain how wrongful convictions happen and what we can all do to prevent them. Since its inception in 2001, IPNO has freed or exonerated 27 innocent men. We devote the majority of our time and resources to freeing poor people who will otherwise die in prison for crimes they did not commit.

### **Veritas Initiative at Santa Clara University School of Law**

The Veritas Initiative is dedicated to advancing the integrity of our justice system by researching and providing critical data that shines a light on such crucial issues as the misconduct of public prosecutors.

The report *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009* marks the launch of the Veritas Initiative. By shining a light on issues like prosecutorial misconduct, the Veritas Initiative and the studies it publishes will serve as a catalyst for reform.

### **Innocence Project**

The Innocence Project was founded in 1992 by Barry C. Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law at Yeshiva University to assist prisoners who could be proven innocent through DNA testing. To date, more than 300 people in the United States have been exonerated by DNA testing, including 20 who served time on death row. The Innocence Project was involved in 177 of the DNA exonerations. Others were helped by Innocence Network organizations, private attorneys and by pro se defendants in a few instances.

The Innocence Project's full-time staff attorneys and Cardozo clinic students provide direct representation or critical assistance in most of these cases. The Innocence Project's groundbreaking use of DNA technology to free innocent people has provided irrefutable proof that wrongful convictions are not isolated or rare events but instead arise from systemic defects. Now an independent nonprofit organization closely affiliated with Cardozo School of Law at Yeshiva University, the Innocence Project's mission is nothing less than to free the staggering numbers of innocent people who remain incarcerated and to bring substantive reform to the system responsible for their unjust imprisonment.

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# THE INNOCENCE NETWORK

March 29, 2011

The Honorable Eric H. Holder, Jr.  
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United States Department of Justice  
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Dear Sirs,

Today the U.S. Supreme Court in *Connick v. Thompson* took away most of the only remaining means those of us who have been wrongfully convicted of a crime had for holding prosecutors liable for their misconduct. Although all other professionals, from doctors to airline pilots to clergy, can be held liable for their misconduct, the Supreme Court has effectively given prosecutors complete immunity for their actions. We, the undersigned and our families, have suffered profound harm at the hands of careless, overzealous and unethical prosecutors. Unfortunately, today's ruling only threatens to further embolden those prosecutors who are willing to abandon their responsibility to seek justice in their zeal to win convictions.

Now that the wrongfully convicted have virtually no meaningful access to the courts to hold prosecutors liable for their misdeeds, we demand to know what you intend to do to put a check on the otherwise unchecked and enormous power that prosecutors wield over the justice system.

Former United States Attorney General and Supreme Court Justice Robert H. Jackson once said, "The prosecutor has more power over life, liberty, and reputation than any other person in America." Unfortunately recent reports have shown that prosecutors are abusing this power at alarming rates and are facing no consequences for their actions. According to *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*, prosecutors were guilty of misconduct 707 times from 1997 to 2009, yet were disciplined only seven times. A *USA Today* investigation by Brad Heath and Kevin McCoy that was published on Sept. 23, 2010, documented 201 instances where federal prosecutors violated laws or ethics rules since 1997 and noted that only one of those prosecutors was suspended from practicing law—and that was only for one year.

In many of our wrongful conviction cases prosecutorial misconduct was found but later declared "harmless" by the courts. Nothing could be further from the truth. In our cases, each act had profoundly harmful effects on our lives. Together we represent hundreds of years in prison, separated from our wives, husbands, children, parents, brothers, sisters, grandparents and other loved ones, who suffered their own shame and wasted hundreds of thousands of dollars

on lawyers and spent countless sleepless nights worrying about our well being. The misconduct contributed to nearly unbearable depression and unhappiness, loss of jobs and career opportunities, the derailing of educations and forever destroyed hopes and dreams. Each of us has worked long and hard to repair what has happened to us, but we will never regain the lives we had before we were wrongfully convicted at the hands of careless or deceitful prosecutors.

According to the friend-of-the-court briefs submitted in recent Supreme Court cases dealing with prosecutorial misconduct the National District Attorneys Association, the National Association of Assistant United States Attorneys' Attorney Generals and the Solicitor General claim that there are already plenty of systems in place to cure the problems of misconduct, including: internal disciplinary systems, state bar disciplinary systems, monitoring by the courts and, in extreme cases, criminal prosecution. These systems didn't do a thing to prevent prosecutorial misconduct in our cases. As far as we can tell, none of these systems were brought to bear on the prosecutors in our cases. Our sense is that they do nothing at all.

We demand to know what you are doing to stop these abuses. What has happened to the prosecutors whose knowing acts contributed to our suffering? What have you done to make them understand that they cannot do it again? How have the systems been fixed to prevent future misconduct and errors? What makes you think these solutions have worked when so many people continue to be wrongfully convicted?

The power to charge and prosecute someone with a crime comes with grave responsibility. Now that the Supreme Court has said that prosecutors cannot be held civilly liable for their actions, it's up to you to make sure that prosecutors take that responsibility as seriously as the job demands. As you consider the significance of today's decision, please know that those of us who have been the victims of prosecutorial misconduct are eager to hear what you intend to do to ensure that others don't suffer injustice as we have.

Sincerely,

Kennedy Brewer  
*Noxubee County, MS*

Dennis Fritz  
*Pontotoc County, OK*

Ray Krone  
*Maricopa County, AZ*

Roy Brown  
*Cayuga County, NY*

James Giles  
*Dallas County, TX*

Curtis McCarty  
*Oklahoma County, OK*

Darryl Burton  
*Saint Louis, MO*

Bruce Godschalk  
*Montgomery County, PA*

Gene and Elizabeth Sodersten,  
parents on behalf of Mark Sodersten,  
who died in prison  
*Tulare County, CA*

Kirk Bloodsworth  
*Baltimore County, MD*

Thomas Goldstein  
*Los Angeles County, CA*

John Thompson  
*Orleans Parrish, LA*

Algie Crivens  
*Cook County, IL*

Michael Green  
*Cuyahoga County, OH*

Keith Turner  
*Dallas County, TX*

Clarence Elkins  
*Summit County, OH*

Lesly Jean  
*Onslow County, NC*

Michael Evans  
*Cook County, IL*

Joshua Kezer  
*Cole County, MO*



# SECTION I: INTRODUCTION

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“The prosecutor has more control over life, liberty and reputation than any other person in America.”<sup>1</sup>

- Former United States Attorney General and Supreme Court Justice Robert H. Jackson

The 19 people who signed the letter beginning this report were each imprisoned for a crime they did not commit that was secured in whole or in part by prosecutorial misconduct. Notably, not one of the prosecutors involved in these cases was sanctioned for their role in contributing to the wrongful conviction. The United States Supreme Court in *Connick v. Thompson*<sup>2</sup> faced with a particularly egregious case of deliberate misconduct by a prosecutor found that existing oversight systems are adequate to respond to and prevent future prosecutorial error and misconduct in overturning an award of monetary damages that the wrongly convicted man received for the misconduct that nearly led to his execution. What explains this contradiction? Did the court get it wrong? Why did these systems fail to hold any of these prosecutors accountable despite clear evidence of misconduct and such significant harm?

This report is the culmination of an inquiry into these questions—whether existing oversight systems are adequate to respond to and prevent prosecutorial error and misconduct—and concludes that the court was wrong. There are almost no adequate systems in place to keep prosecutorial error and misconduct in check and, in fact, prosecutors are rarely held accountable even for intentional misconduct. There is a critical need for a national dialogue on the importance of prosecutorial accountability and the implementation of functioning systems that will prevent and address prosecutorial error and misconduct when it occurs. This report is intended to spark meaningful conversations and action among key criminal justice leaders and policymakers about the need for greater oversight and accountability for prosecutors. To help those audiences develop more efficient systems, the report includes a list of recommendations that, if implemented, could help achieve those goals.

## The Case of John Thompson

In 1984, John Thompson, a 22-year-old father of two, was wrongfully convicted of two separate crimes—an armed robbery and a murder—at two separate trials. He was prosecuted and convicted first for the robbery. By obtaining a felony conviction for the armed robbery, prosecutors were then able to charge Thompson with capital murder and seek the death penalty. Thompson was found guilty and sent to death row to await his execution.

With less than a month before Thompson’s seventh scheduled execution date, a private investigator hired by his appellate attorneys discovered scientific evidence of Thompson’s innocence from the robbery case that had been concealed for 15 years by the Orleans Parish District Attorney’s Office. The new evidence showed that prior to Thompson’s armed robbery trial, the prosecution ordered blood type testing of bloodstains on the victim’s pant leg and shoe. The blood test results, which excluded Thompson, were never disclosed to the defense and the samples themselves were withdrawn from the evidence locker and destroyed by one of the assistant district attorneys prosecuting the armed robbery case. Further investigation revealed additional undisclosed *Brady* information, including a payment to the primary informant in Thompson’s murder case that had not been disclosed to Thompson or his attorneys before the murder trial.

Thompson was eventually exonerated of both crimes and filed a civil law suit against the district attorney’s office for the violations of his civil rights that resulted in his wrongful conviction and near-execution. In order to hold the Orleans Parish District Attorney’s Office—a municipal entity—liable under 42 U.S.C. § 1983, Thompson was required to show that the district attorney’s failure to train employees on their legal obligations to avoid constitutional violations of defendants’ rights was so persistent and widespread in the office as to amount to a “deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.”<sup>3</sup> “[D]eliberate indifference” must amount to a disregard of the “known or obvious consequence[s]” that such a failure to institute a training program on prosecutors’ legal duties to disclose exculpatory evidence would result in district attorneys’ violation of defendants’ due process rights. A pattern of similar constitutional violations committed by the untrained employees is sufficient evidence of such deliberate indifference.<sup>4</sup>

In a jury trial, Thompson prevailed and was awarded \$14 million—\$1 million for every year he spent on death row. The award was affirmed by the U.S. Court of Appeals for the Fifth Circuit and reaffirmed in an en banc rehearing of the case. However, in a controversial 5-4 decision, the U.S. Supreme Court overturned the jury’s award,<sup>5</sup> finding that the Orleans Parish District Attorney’s Office’s could not be held civilly liable based on a “failure to train” theory of liability for what the court concluded was a single *Brady* violation perpetuated by one prosecutor’s actions.<sup>6</sup> In the majority

opinion that reversed the jury verdict, the Supreme Court appeared to find persuasive an argument outlined in an amicus brief by the National District Attorneys Association (NDAA).

The brief argued that the combination of legal education, professional ethics, on-the-job supervision and training and existing lawyer oversight systems are sufficient to ensure that prosecutors will act within the bounds of the law, and that the courts should not “punish” the district attorney’s office “for not having a formal *Brady* training program” in light of the “very scarce resources” available to prosecutors.<sup>7</sup>

The court’s majority agreed, ruling that because of what it described as well-established systems and training procedures in the legal profession as a whole, prosecutors’ offices could not be held constitutionally liable for a single act of misconduct by an employee, no matter how egregious the misconduct in question.<sup>8</sup> The court went on to find that the record in *Thompson*’s case was insufficient to show a pattern and practice of *Brady* violations sufficient to hold the prosecutor’s office liable under Section 1983.

By contrast, Justice Ginsburg and her fellow dissenters found compelling evidence in the record developed at *Thompson*’s civil trial that “inattention to *Brady* was standard operating procedure at the district attorney’s office” over many years.<sup>9</sup> Because even the egregious violations in *Thompson* were held insufficient to support a verdict against the district attorney’s office, the decision effectively eliminated virtually any avenue for holding prosecutors civilly liable, even for intentional misconduct.<sup>10</sup>

## Formation of Prosecutorial Oversight Coalition

After the controversial decision in *Thompson*, several members of the Innocence Network formed the Prosecutorial Oversight Coalition. The coalition was formed to investigate the absence of accountability for prosecutorial misconduct and error, and to propose policy reforms dedicated to prosecutorial accountability, with an aim of reducing both the deliberate misconduct and the preventable errors that have contributed to innocent people spending decades in prison for crimes they did not commit.

Given the number of wrongful convictions caused, at least in part, by prosecutorial error and misconduct, the Prosecutorial Oversight Coalition felt that it was important to investigate the Supreme Court’s conclusion that existing oversight systems are adequate to respond to and prevent prosecutorial error and misconduct. The coalition reviewed the existing literature and research on prosecutorial misconduct. It conducted independent research to try to quantify the prevalence of prosecutorial error and misconduct in the United States and held forums in six states across the country to determine what systems are currently in place to prevent prosecutorial misconduct and error, what we know about the effectiveness of these systems and what can be done to improve them.

Contrary to the Supreme Court’s assertions, the coalition’s investigation has found that there are almost no adequate systems in place to keep prosecutorial error and misconduct in check and, in fact, prosecutors are rarely

### LESLEY JEAN

#### LESLEY JEAN WAS WRONGFULLY CONVICTED OF RAPE IN JACKSONVILLE, NORTH CAROLINA, IN 1982.



Shortly after the victim was sexually assaulted, a Jacksonville police officer stopped a man who seemed to fit the victim’s description of her assailant. The man fled on foot. The chief detective of the Jacksonville Police Department decided that the officer should be hypnotized in order to more accurately recall the description of the man he stopped; after the hypnotization, the officer’s description of the man changed dramatically.

Soon after, Jean was arrested when an officer saw him in a local Dunkin’ Donuts and thought that he matched the suspect’s description. The officer radioed the original officer, who arrived on the scene and confirmed that Jean was the same man he approached on the street. Jean was placed under arrest. After the victim twice failed to identify Jean as the perpetrator during a photo lineup, she was also hypnotized to “improve her memory,” which ultimately resulted in her positive identification of Jean’s photograph. The critical fact that hypnosis was an integral part of the identification process for both witnesses was never disclosed to the defense. This *Brady* violation led to the reversal of Jean’s conviction in 1991 and his release from prison. *Jean v. Rice*, 945 F.2d 82, 87 (4th Cir. 1991). He was officially exonerated in 2001 after DNA testing proved his innocence and he was pardoned. No action was taken to examine the prosecutor’s conduct.

held accountable even for intentional misconduct. This mirrors the experiences and opinions of many legal and advocacy organizations, scholars and researchers who have previously explored the efficacy of prosecutorial accountability systems.<sup>11</sup> It also conforms with the experiences of the 19 signatories to the opening letter to this report, all former prisoners whose wrongful convictions were secured in whole or in part through prosecutorial misconduct. Significantly, based on public records, none of the prosecutors involved in these cases—each of which later resulted in an exoneration—had their conduct subject to any kind of meaningful review, much less any type of sanction.

The Supreme Court decision in *Thompson* and the findings of this coalition, make clear that there is a critical need for a national dialogue on the importance of prosecutorial accountability and the implementation of functioning systems that will prevent and address prosecutorial error and misconduct when it occurs. This report hopes to spark meaningful conversations and action among key criminal justice leaders and policymakers about the need for greater oversight and accountability for prosecutors. In an effort to help those audiences develop more efficient systems for stemming prosecutorial error and misconduct, this report provides a list of recommendations for how that may be accomplished.

## The Need for Greater Prosecutorial Accountability

Most prosecutors do not act with intent to conceal exculpatory evidence. Indeed, the vast majority of prosecutors perform their duties in good faith with the aim to fulfill their constitutional and legal obligations. This good faith intention does not, however, eliminate the need for systems that address both intentional misconduct and error when it occurs.

Like the rest of us, prosecutors are susceptible to the stress of their very demanding jobs, cognitive biases and a host of other human realities.<sup>12</sup> Mistakes are bound to occur, no matter how experienced or thorough a prosecutor may be. And in some rare cases, prosecutors' eagerness to secure convictions has led them to commit deliberate violations of the law, leading to wrongful convictions and even death sentences of persons we now know were factually innocent.

Moreover, in a substantial number of wrongful conviction cases, the exculpatory material that prosecutors did not disclose at trial would have provided important leads to the true perpetrator of the crime.<sup>13</sup> As a result, justice was denied to the crime victims in these cases, not just the wrongfully convicted defendants, and public safety was compromised.

The need for a vigorous accountability system is, of course, not specific to prosecutors, and this report is offered in the

context of a larger, national conversation about heightened accountability in all areas of the criminal justice system. We have previously reported on the problem of ineffective assistance of the defense as a contributing factor in wrongful convictions and believe these lawyers should also be held accountable and subject to appropriate discipline.<sup>14</sup> But as we discovered through the research for this report, inadequate accountability for prosecutors is unique among the other actors in the criminal justice system.

Legal ethics scholars have been calling for increased accountability for prosecutors for some time.<sup>15</sup> Prosecutors are the most powerful figures in the American criminal justice system.<sup>16</sup> They exercise significant discretion, and their decisions are not subject to external review.<sup>17</sup> Prosecutors decide how to investigate a case, what charges to bring, what plea bargains to offer, what penalties to seek and what evidence to turn over to the defense. These decisions have an enormous impact on defendants, victims, their families and the public at large.<sup>18</sup>

Yet, very few prosecutor offices have any internal review policies, and following the *Thompson* decision, prosecutors enjoy almost complete immunity from civil liability.

Given their broad powers, it is critical that effective systems of accountability are implemented to incentivize prosecutors to act within their ethical and legal bounds. Efforts to bring greater accountability to government actors as well as a host of other industries—from healthcare, aviation, construction, to the food industry—offer effective approaches for prosecutorial accountability.

Instead of looking at errors through a single-cause lens, where the focus of the search is to identify the one mistake or “bad apple” that caused the problem, experts advocate for a more systemic approach for reviewing errors. This process avoids simply blaming individuals and instead concentrates on understanding the organizational factors that contribute to errors.<sup>19</sup>

Using this systems-based approach, every mistake is evaluated from the premise that examining and understanding errors can lead to improvements in practice. In fact, this approach is being advanced for improving policing,<sup>20</sup> the indigent defense system and the judicial system and it is in that spirit that we offer this report.<sup>21</sup>

Given the number of innocent people who have suffered injustice as a result of prosecutorial error and misconduct, the members of the coalition have a unique perspective to offer on this issue. We offer this perspective and suggestions for reform without pointing blame, but with the hope of developing greater systems of accountability for prosecutors. The coalition's national tour, multi-state surveys of court decisions and this report are part of an effort to generate and contribute to a growing conversation that is focused on improvement, looking specifically at the



current prosecutorial oversight systems and assessing how we can make them better. We also view this report as a call to policymakers to more closely review their systems of oversight and enact the changes necessary to ensure that these systems maintain the highest standards of professional integrity and promote the interest of justice and public safety.

## What is Prosecutorial Misconduct?

As defined by courts, prosecutorial misconduct includes any conduct by a prosecutor that violates a defendant's rights, regardless of whether that conduct was known or should have been known to be improper by the prosecutor, or whether the prosecutor intended to violate legal requirements.<sup>22</sup>

While intentional misconduct and unintentional error are different, and suggest the need for different kinds of oversight mechanisms, both can result in injustice and must be addressed. This report examines systems of oversight for both extreme acts of intentional behavior and less extreme, but also important, instances where prosecutors commit errors or mistakes. A prosecutor's failure to turn over a piece of exculpatory evidence can have a devastating effect regardless of whether the nondisclosure was intentional or a genuine oversight by the prosecutor.

Further, as we heard from many of the panelists at the forums, solely focusing on the minority of cases that contain outrageous, unethical, and illegal acts by a prosecutor will not address the full scope of the problem and is unlikely to lead to any productive, systemic reform. It is precisely the opposite of the "learning from error" approach that experts recommend and that has become the standard that we demand of other professions.<sup>23</sup> By looking at prosecutorial error and misconduct in its entirety, we will be able to create a range of mechanisms sensitive enough to recognize the difference between this wide range of actions and flexible enough to move towards more significant responses when necessary.

Since the legal definition could lead policymakers into focusing solely on instances of intentional misconduct, we will use the term "prosecutorial error and misconduct" to include any type of prosecutorial action that falls outside of the profession's legal and ethical guidelines, regardless of intent or knowledge of wrongdoing. We view each of these actions as opportunities to learn where there is a need for more training, supervision, and in certain cases, sanction.

Prosecutorial error and misconduct can occur at any stage of a criminal proceeding, although the behaviors generally recognized are those that occur during trial. This encompasses a wide range of behaviors but the following are the most common:<sup>24</sup>

- improper arguments or examination at trial
- inflammatory comments in the presence of the jury
- mischaracterizing evidence
- allowing false testimony to stand uncorrected
- failure to disclose evidence favorable to the accused, which includes evidence that tends to negate a defendant's guilt, that would provide grounds to mitigate or reduce a defendant's potential sentence, or evidence going to the credibility of a witness (known, respectively, as "exculpatory evidence" or "impeachment evidence"), which generally occurs prior to or during trial.<sup>25</sup>

## Difficulties Identifying the Scope of the Problem

Defining the universe of prosecutorial error and misconduct is difficult, if not impossible. Because of the challenges in discovering and recording prosecutorial actions, many instances of prosecutorial misconduct and error never reach public view, suggesting that the problem is much more widespread than the number of reported judicial findings of prosecutorial misconduct would indicate. Although the occurrence of prosecutorial error and misconduct is universally acknowledged, there is considerable disagreement about how widespread a problem it is. One federal chief judge called it "epidemic" in a blistering and often-cited dissent.<sup>26</sup> But whether epidemic or episodic, a problem that results in the conviction of innocent people must be addressed.

Being unable to document the extent of the problem illustrates one of the biggest hurdles to greater accountability for prosecutors. In order to prevent error and misconduct from happening, we need to know when and how often it occurs.

There are currently only three data sources for investigating the scope of prosecutorial error and misconduct: the media, written public court decisions and disciplinary decisions of the individual state bars. As discussed in greater detail in the sections below, these are inadequate mechanisms for identifying the prevalence of error and misconduct.

While attempts to document the extent of the problem have proven difficult, one common theme remains: even when prosecutorial error and misconduct are discovered, the actions are rarely addressed in a meaningful way, regardless of whether the conduct was intentional or merely error. This tells us that generally the prosecutorial oversight systems that currently exist are not adequate and that both the federal government and individual states must explore other steps to ensure meaningful and constructive oversight.

# SECTION II: SCOPE OF THIS REPORT

## Coalition Partners

This report was a collaborative effort by several organizations that oversaw the design and implementations of the research process. The organizations primarily responsible were the Innocence Project, the Veritas Initiative at Santa Clara University School of Law, Innocence Project New Orleans and Resurrection After Exoneration.

A number of additional organizations also provided support in hosting and presenting the prosecutorial oversight forums. These included the Arizona Justice Project, the Pennsylvania Innocence Project and the Actual Innocence Clinic at the University of Texas School of Law.

## Questions Explored

The three following fundamental questions informed and guided the tour and this report:

1. What systems are in place, inside and outside of prosecutors' offices, to identify and address prosecutorial error and misconduct and ensure accountability?
2. What do we know from research and experience about how well these internal and external systems are working?
3. What improvements must be made to these systems, and what are the associated hurdles to overcome, to ensure that prosecutors act within their legal and ethical guidelines, deter error and misconduct and maintain public confidence in the integrity of the criminal justice system?

## Methods Used

In exploring these questions, coalition investigators drew from both previously conducted research on prosecutorial misconduct from other sources and new research conducted by the coalition and expert opinions generated through panel discussions from the prosecutorial oversight forums.

**1. Literature Review:** The coalition examined pre-existing studies and investigative journalism pieces on prosecutorial misconduct and error, and the oversight systems currently in place. These studies were conducted by a variety of news organizations and research centers, including the Center for Public Integrity, ProPublica, *Chicago Tribune*, *USA Today*, the Veritas Initiative and Yale University. The findings from the literature review are presented in Section III of this report.

**2. Judicial Case Review:** In preparation for the prosecutorial oversight forums, the Veritas Initiative, with support from the Innocence Project, conducted independent research into judicial findings of prosecutorial misconduct and error. Cases from five states of the tour were reviewed.<sup>27</sup> Researchers examined public, federal and state judicial rulings that address prosecutorial error and misconduct from 2004 to 2008. Public disciplinary decisions associated with the reviewed cases were also examined.<sup>28</sup> Westlaw was used to search for public judicial rulings.<sup>29</sup> Public disciplinary decisions were obtained through state grievance websites.<sup>30</sup>

Researchers looked at all cases that captured any acknowledgment by the courts of prosecutorial error or misconduct, not only cases where the most egregious misconduct occurred.<sup>31</sup> As a result, the range of error and misconduct represents a full spectrum—from simple error, such as a prosecutor who made an isolated inappropriate comment, to serious misconduct, such as a prosecutor who knowingly allowed a witness to lie on the stand. Results from these reviews were analyzed and presented at each forum during the prosecutorial oversight tour.<sup>32</sup> The results of this analysis are presented in Section IV of this report.

**3. Prosecutorial Oversight Forums:** In 2012, coalition partners conducted a national prosecutorial oversight tour to begin a conversation in the wake of the *Thompson* decision. From January to October of that year, coalition partners conducted forums in five geographically diverse states: Arizona, California, Pennsylvania, New York and Texas. The aim was to bring together panelists with backgrounds from all aspects of the criminal justice system to spark a meaningful dialogue about the problem and recommendations for greater prosecutorial accountability. Each stop of the tour explored a variety of expert perspectives on prosecutorial accountability issues, including those of current and former prosecutors, ethics professors, members of state bar disciplinary committees, defense counsel and judges.<sup>33</sup> Following the tour, the discussions from each forum were transcribed, coded and analyzed for overarching themes. The results from this analysis are presented in Section V of this report.

# SECTION III: REVIEW OF EXISTING RESEARCH ON PROSECUTORIAL MISCONDUCT

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“We’re not only dealing with willful and intentional misconduct or unavoidable instances where a prosecutor’s error is inadvertent, but with a level of recklessness by prosecutors who practice dangerously close to the ethical line.”

– Prof. Kathleen (Cookie) Ridolfi, Director of the Veritas Initiative and California panelist

Multiple organizations and journalists have investigated the prevalence of prosecutorial error and misconduct in the United States and how it is handled. They vary in geographic focus, sample size and research methodology, but every study arrived at the same conclusion: though allegations of prosecutorial error or misconduct are widespread, few prosecutors are formally disciplined for their actions, even in cases of egregious intentional misconduct. Further, in the rare case in which a prosecutor is sanctioned, consequences are insignificant.<sup>34</sup> Some of the more noteworthy investigations include the following:

- The Veritas Initiative’s report *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*, looked at more than 4,000 California state and federal appellate decisions and identified 707 cases in which courts found prosecutorial misconduct. Of those cases, 67 prosecutors were found to have committed prosecutorial misconduct in multiple cases. A total of seven prosecutors were disciplined formally.<sup>35</sup>
- *USA Today* documented 201 instances between 1997 and 2010 where federal prosecutors were found by a judge to have violated a law or an ethical rule.<sup>36</sup> In many of these cases, the misconduct was so severe that defendants’ convictions were overturned and some prosecutors were reprimanded for their misconduct. However, only one prosecutor was sanctioned and he received a one-year suspension from practicing law.
- In a multi-part series for the *Chicago Tribune*, “Trial and Error,” Ken Armstrong and Maurice Possley reviewed more than 11,000 homicide cases across the country involving prosecutorial misconduct between 1963 and 1999. Qualifying their results as “only a fraction of how often prosecutors commit such deception—which is by design hidden and can take extraordinary efforts to uncover,” they found that courts reversed homicide convictions against at least 381 defendants because prosecutors either concealed exculpatory information or presented false evidence.<sup>37</sup> Of the 381 defendants, 67 had been sentenced to death.<sup>38</sup> Despite the hundreds of cases involving substantiated prosecutorial misconduct and error, not a single state disciplinary agency publicly sanctioned any of the prosecutors.

One district attorney’s office fired a prosecutor who was reinstated with back pay after successfully appealing the termination. In a second case, the district attorney’s office imposed a 30-day in-house suspension. A third prosecutor received a 59-day suspension from practicing law, but only because of other misconduct that occurred in the case. Two others were indicted but the charges were dismissed before trial.<sup>39</sup>

- The Liman Prosecutorial Misconduct Research Project at Yale University surveyed the ethical rules and disciplinary practices of all 50 states and the District of Columbia. The investigators concluded that, in general, the ethical rules that govern prosecutorial behavior fail to adequately mitigate most forms of prosecutorial error and misconduct. The study found that disciplinary systems are largely inadequate, most state bar disciplinary authorities are not designed to address prosecutorial misconduct, and many discourage complaints through procedural barriers, and these authorities have tremendous discretion and often choose not to investigate prosecutors.<sup>40</sup>

The study also noted that judges, prosecutors and defense attorneys—those most likely to discover prosecutorial misconduct—often fail to report it for myriad reasons, including a culture that does not support reporting, poor administrative processes and professional disincentives.<sup>41</sup>

- In the 2011 *Fordham Law Review* article, “The Supreme Court Assumes Errant Prosecutors Will be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong,” New York attorney Joel Rudin provided case studies from the Bronx, Queens and Brooklyn showing that misconduct by prosecutors in those boroughs is almost never disciplined. Citing deposition testimony and other discovery from civil litigation relating to the misconduct, he revealed that the three district attorney offices “have no codes of conduct, no formal disciplinary rules or procedures, and no history of imposing sanctions or any other negative consequences on prosecutors who violate *Brady* and related due process rules intended to guarantee defendants the right to a fair trial.”<sup>42</sup>

# SECTION IV: JUDICIAL CASE LAW REVIEW OF PROSECUTORIAL MISCONDUCT

“They [prosecutors] need to understand that it isn’t all about wins and losses, how many convictions did I get; it’s how many meritorious convictions did I get? And until we get over that, we’ll never really see the kind of justice system we want.”<sup>43</sup>

– Texas panelist Robert Schuwerk, professor, University of Houston Law Center, author of leading treatise on Texas rules of professional conduct

In addition to reviewing existing research, the coalition conducted independent research in each of the states where forums were held.<sup>44</sup> This review, conducted in 2011 in advance of the tour, included publically available court decisions addressing allegations of prosecutorial misconduct in Arizona, California, Pennsylvania, New York and Texas and any publicly reported sanctions of prosecutors that occurred during the same time frame.<sup>45</sup>

The research relied exclusively on reported court decisions addressing findings of prosecutorial misconduct employing a methodology with significant inherent limitations. There are undoubtedly other instances of misconduct, including findings by courts that are not published. For example, in many cases handled by members of the Innocence Network, prosecutors’ offices have agreed to vacate and dismiss old convictions in the interests of justice based on credible evidence of prior misconduct, but because the parties agreed to the dismissal, there is typically no published appeal or even a published order by the court that details the misconduct.

Additionally, the overwhelming majority of criminal prosecutions are resolved by guilty pleas and even innocent defendants pled guilty in nearly 10% of the cases later overturned by DNA evidence. These cases are rarely subject to meaningful judicial review so it is impossible to know how frequently prosecutorial error or misconduct occurred even recognizing the different standard for review established by the Supreme Court.<sup>46</sup>

Nearly 10% of the wrongful convictions later overturned by DNA were people who entered guilty pleas, many of whom took the pleas on the strong recommendation of their lawyers. Had their lawyers been privy to undisclosed evidence pointing to innocence, it is entirely possible that those lawyers would not have recommended pleading guilty.

## Absence of Disciplinary Action in the Wake of Prosecutorial Misconduct

Results from our review revealed patterns similar to those identified in earlier research. The coalition’s researchers identified 660 criminal cases where courts confirmed prosecutorial misconduct across the five forum states (133 leading to reversals), and **only one prosecutor from these cases was disciplined** (see infographic: Confirmed Cases of Prosecutorial Misconduct, 2004-2008).<sup>47</sup>

While many of these cases may not have merited suspensions, public censure, disbarment or criminal charges, any instance that gives rise to a judicial finding of error or misconduct deserves internal review at a minimum, so that prosecutors’ offices can learn from past mistakes and better train staff to prevent future misconduct. In each of the states researched there were at least a handful of findings of prosecutorial misconduct that were serious enough to merit some form of disciplinary action.

It is troubling that the systems that the public should have been able to rely upon to properly identify, review and

### CONFIRMED CASES OF PROSECUTORIAL MISCONDUCT, 2004-2008





address those misbehaviors were not equipped to handle that responsibility. But perhaps the most troubling aspect of all is that when our systems of prosecutorial oversight of error and misconduct are not working, we miss valuable opportunities to constructively review these actions, and where necessary, prevent their reoccurrence or address them to ensure a better response the next time.

**Types of Crimes:** Prosecutorial misconduct was acknowledged most often in murder and sexual assault cases (35% and 14%, respectively). Violent crime cases made up the bulk (>75%) of the sample, however, violent crime cases were less likely to lead to reversals than non-violent crime cases (18% and 28%, respectively).

**Types of Errors:** The specific problems that were acknowledged by courts varied widely, including improper arguments/comments; improper witness examination; *Batson* violations (the improper exclusion of a potential juror on the basis of race or gender);<sup>48</sup> *Brady* violations (suppression of exculpatory evidence) and violations of a defendant's Fifth Amendment right not to testify, such as improper commentary by the prosecutor as to the defendant's failure to take the stand.

Improper argument was the most common error found by the courts, but it was the least likely to lead to reversal (39 of 371). While the failure to disclose exculpatory evidence (*Brady* violations) was found less frequently, when confirmed, courts were more likely to reverse (find the misconduct harmful) compared to any other category (38 of 66), with the exception of *Batson* violations, which, if found, require automatic reversal.<sup>49</sup>

The following are a few examples of the wide-ranging error or misconduct findings (as mentioned above, not one of the prosecutors in these cases was publicly sanctioned):

1. In *Willis v. Cockrell*,<sup>50</sup> the prosecutor failed to disclose to defense attorneys a pretrial psychological report that concluded there was no evidence to support a conclusion that the defendant posed a "future danger" for the purposes of the Texas capital sentencing statute. Despite these findings, prosecutors charged the defendant with capital crimes and obtained a death sentence. On appeal, the court found the nondisclosure both unlawful and material and ordered a stay of Willis' execution. His conviction was vacated later that year because of ineffective assistance of counsel. The district attorney reinvestigated the arson murder, and new fire investigators concluded that the testimony of the fire investigator who claimed that Willis intentionally set the fire that killed two people was based on outdated arson science.
2. In *People v. Spruill*,<sup>51</sup> the defendant was charged with attempted sexual abuse. During summation, the prosecutor asked the jury five times "if they would want their own children in the place of the complainant."<sup>52</sup>

The court found that the references to the jurors' children, which had a natural tendency to stir up "emotional turmoil . . . cloud[ing] the mind and interfer[ing] with the jury's function to weigh and evaluate the evidence objectively," were decidedly "inappropriate." However, the court concluded that the other evidence against the defendant was so strong that there was no reasonable likelihood that the prosecutor's improper comments substantially influenced the outcome of the trial.

3. In *U.S. v. Rivas*,<sup>53</sup> a narcotics smuggling case, federal prosecutors failed to disclose that their chief witness, the defendant's fellow seaman, had told the government that he, not the defendant, had brought the package of drugs on board the vessel in question. The U.S. Court of Appeals for the Second Circuit reversed the conviction based on the *Brady* violation, and Rivas was exonerated in 2004 after the government dismissed his indictment.<sup>54</sup>

While it is impossible to know the full extent of the problem, it is clear that even among cases where serious misconduct has been documented, the overwhelming majority of prosecutors involved in those cases did not face substantial discipline, if any at all.

The prosecutorial oversight system is clearly not as strong and efficient as the Supreme Court in *Thompson* assumed it to be. Like the research conducted by other organizations and journalists, our investigation revealed a severely inadequate, essentially non-functioning external disciplinary process and a problematic lack of transparency. There is a need to shift the criminal justice culture from a place of secrecy and disregard for errors to a place where errors are viewed as a deep reservoir of useful information that can greatly improve not just individual prosecutorial work but the system as a whole.

Panelist Jim Leitner, a former first assistant district attorney in Texas, relayed a story from his time as a defense attorney that exemplifies how even an unintentional error can have a major impact on a case: "I had a case, and it was fixing to go to trial, and got a great offer, took it to my client, the client took the offer, and afterwards, I sat down with the prosecutor and asked him why he did that. He told me some fault in the case that was obviously *Brady*. And I said, 'Why didn't you tell me that?' And his response was, 'Well, I didn't believe it. And if I didn't believe it, it would be perjury, so therefore it is not *Brady*.'" The fact that the prosecutor believed that, since he did not find the evidence favorable to the defendant reliable, he was under no obligation to disclose it to the defense, exemplifies much of the confusion regarding *Brady* and the lack of training that contributes to the prevalence of error and misconduct.<sup>55</sup>



# SECTION V: CONCLUSIONS DRAWN FROM FINDINGS AND FORUMS

At the forum events in the five states, the panelists' comments mirrored the conclusions that can be drawn from the research: their states' systems of prosecutorial oversight were weak and/or had significant gaps, and these shortcomings made it highly unlikely that prosecutorial error and misconduct would be properly identified, addressed and prevented.

There is not one particular issue that causes this failure to properly address prosecutorial error and misconduct. Arizona panelist Paul Charlton, a former U.S. attorney, stressed: "By and large, prosecutors go to work within the system of justice because they want to do what's right. They are men and women of good faith. But they can go wrong."<sup>56</sup>

## Culture of Underreporting

Despite ethical requirements to report attorney misconduct in most jurisdictions,<sup>57</sup> the criminal justice system's culture is not conducive to reporting misconduct and error. Judges, fellow prosecutors and defense attorneys are reluctant to report their colleagues out of fear of retribution, being stigmatized as whistleblowers, and hurting relationships with individuals who they work with on a daily basis.

Defense attorneys, in particular, have strong reason to be fearful of alienating prosecutors who exercise such enormous, unilateral discretion when it comes to plea offers and sentencing recommendations for their clients. Most actors in the justice system do not see reporting as a means of improving the system and learning from mistakes; on the contrary, panelists identified many reasons, even patent disincentives, for lawyers and judges to choose not to report instances of prosecutorial misconduct and error.

New York panelist Ellen Yaroshesky said: "We had judges talk about why they don't do it. And part of it is that these are people they deal with every single day. They don't want them to lose their licenses. They don't want them to lose their livelihoods."<sup>58</sup>

She also detailed the issues defense lawyers face when contemplating reporting prosecutorial misconduct, stating that, "defense lawyers are fearful of reporting a prosecutor because they feel that in the next case, their client will suffer."

Arizona panelist Judge Colin Campbell added, "If you as a judge try to impose the rules of criminal procedure, the attorneys will kill you. And they kill you in a thousand different ways."<sup>59</sup>

State disciplinary systems that require a formal complaint to be made before reviewing a prosecutor's actions—as opposed to counting on prosecutors and bar oversight entities to note problems as they occur—are therefore, as a practical matter, a barrier to oversight. For example, in Texas, the state disciplinary system is very much complaint-driven. Therefore, in order to investigate prosecutorial error or misconduct, the disciplinary commission must receive an actual complaint.

Panelist Betty Blackwell, former Chair of the Texas Commission for Lawyer Discipline, explained: "One of the biggest drawbacks is people don't file complaints. Judges don't particularly want to file complaints on prosecutors who they're going to see every day in their court. [Defense] lawyers don't particularly want to file complaints on prosecutors if [they] have to go back to that same prosecutor on another day, on another case."<sup>60</sup>

In most jurisdictions, trial and appellate judges are not required to report prosecutorial misconduct and error. Yet, even in jurisdictions where there is a requirement to report, judges are failing to do so.<sup>61</sup>

California panelist Cookie Ridolfi explained that in the 10-year period reviewed by the Veritas Initiative, there was not one case where the court had actually reported misconduct, even though state law requires them to do so.<sup>62</sup> California panelist Judge James Emerson added: "I know very few judges who report to the state bar. And the issues that are mandatory reportable, such as contempt—contempt is rarely found by a court. As a matter of fact, in training we're almost advised against finding attorneys in contempt."<sup>63</sup>

The failure of stakeholders to report prosecutorial misconduct and error allows even the most egregious acts of misconduct to remain unaddressed. It creates a false sense that there is not a problem, prevents prosecutors who repeatedly abuse their power from being identified and sanctioned and does not allow for prosecutors' offices to use these mistakes as opportunities to educate and prevent future harm.

At the Texas forum, panelist Bob Perkins, a former district court judge from Travis County, noted the reluctance judges have in reporting prosecutors for misconduct, saying: “I’ve only taken one case to the grievance committee—a lawyer that lied to the court and lied on the record. I took that to the grievance committee here in Austin, and they found that it was not an act of professional misconduct. So, I never took anything more to the grievance committee after that.”<sup>64</sup>

## Impractical Reliance upon Bar Disciplinary Committees

The panelists’ views on their respective states concur with the research that states’ bar disciplinary committees (or their counterparts) rarely investigate prosecutorial error or misconduct. In the handful of situations where an investigation is launched, the committees generally failed to properly discipline the prosecutor who committed the misconduct. The panelists described disciplinary systems that lack adequate resources, are far more focused on allegations directed at private attorneys who represent civil clients, and are largely hidden from public scrutiny.

State bar disciplinary bodies typically possess the power to sanction prosecutors professionally through censure (both private and public), license suspension and disbarment. Although the process varies from state to state, complaints are typically received by a central intake office, which determines whether there is a colorable claim worthy of further investigation. In most jurisdictions, the majority of complaints are dismissed at this stage.

The complaints that survive are forwarded to an administrator for further investigation. The attorney against whom the complaint was made is notified and given an opportunity to respond before a formal complaint is filed. If no formal complaint is filed, the proceedings and complaint remain confidential. Additionally, there is no way to know how many prosecutors received non-public sanctions because most state bar disciplinary committees (or their counterparts) do not provide this information.<sup>65</sup>

State bar disciplinary committees (or their counterparts) have historically paid little attention to allegations of misconduct by prosecutors.<sup>66</sup> Many states have unnecessary barriers, such as time limitations on filing and requirements that documents be notarized, that discourage people from filing grievances.<sup>67</sup> Typically, state bar disciplinary or grievance counsel websites provide instructions on how individual citizens can file grievances against their lawyer but fail to outline procedures for those who wish to report prosecutorial error and misconduct.<sup>68</sup>

Bar disciplinary committee officials also described how, due to limited resources, it is difficult to investigate instances of extensive prosecutorial misconduct and error. According to panelist Tom Wilkinson, president of the Pennsylvania Bar Association and former chair and co-chair of its Legal Ethics and Legal Responsibility Committees: “The disciplinary council has very limited resources to plow through what may be a very extensive record, going back a number of years, involving a conviction . . . . They really don’t have the resources to delve into what may be thousands of pages of transcripts and other materials.”<sup>69</sup>

Panelist Joanne Hamilton, former secretary to the Committee of Character and Fitness and former employee at the Department Disciplinary Committee for the First Department in New York, reported a lack of emphasis on investigating egregious prosecutorial misconduct. “It’s my experience that no one in the grievance and disciplinary committee is assigned specific authority to root out prosecutorial misconduct, cases or complaints. No one that I’m aware of in any of the departments is the prosecutor of prosecutors,” said Hamilton.<sup>70</sup>

The lack of transparency in disciplinary proceedings is another element of the oversight system that undermines the ability to document the extent to which allegations of serious misconduct by prosecutors are being properly addressed.<sup>71</sup> For example, in New York, a statute requires confidentiality with respect to the disciplinary committee information, including documents, complaints and procedures.<sup>72</sup>

“We don’t have any data. We have spent years trying to gather data about New York’s disciplinary system, just general data—how many people, without names, are ever brought before a disciplinary committee for allegations of prosecutorial misconduct? How many of those people are ever disciplined? That data is unavailable,” explained New York panelist Ellen Yaroshefsky.<sup>73</sup>

The lack of transparency or meaningful access to the state bar disciplinary committees’ process and decisions makes it virtually impossible for the public to assess the level of protection it actually receives from such committees.

## Appellate Review: Harmless Error Doctrine Greatly Minimizes Problem of Misconduct

Appellate courts use harmless error analysis to determine whether an error that occurred in a lower court proceeding is serious enough to require reversal of a criminal conviction.<sup>74</sup> If prosecutorial error or misconduct violates a defendant’s constitutional right to a fair trial, a defendant’s conviction must be overturned on appeal.<sup>75</sup> However, reversals are limited because the harmless error doctrine

generally precludes relief when the court finds that the prosecutor's actions did not fundamentally prejudice the defendant.

The data shows that the majority of prosecutorial misconduct findings by courts are ruled harmless, meaning that a court has concluded that it would not have changed the outcome of the case had the error or misconduct not been committed. Such rulings inherently minimize the problem of prosecutorial misconduct and error, effectively signaling to prosecutors that error or misconduct is acceptable—completely disregarding that an ethical violation has likely occurred—as long as it would not have altered the case's result.

This is troubling, particularly because research has shown that misconduct in harmful error cases and misconduct in harmless error cases is comparable—the harmless/harmful distinction is not based on the prosecutor's conduct but on the perceived strength of the evidence against the defendant.<sup>76</sup> Without any real consequences, these findings represent wasted, precious opportunities to address the behavior that prompted the underlying finding of prosecutorial misconduct.

Having a case reversed on appeal may be perceived as a sanction for prosecutors because the state must re-try the case or lose the conviction, but many argue that it does little to effectively deter misconduct.<sup>77</sup> Some argue that reversals for misconduct punish the criminal justice system but not the individual who is causing the problem. Because of that, judges are often reluctant to find misconduct even though they might see it and would want it correctly addressed.<sup>78</sup>

As New York Supreme Court Judge and former Queens Assistant District Attorney Richard Butcher—a New York panelist—explained: “The problem here is that what we're really doing is punishing the people ... and the prosecutor is only punished collaterally because it is the case that's damaged and not him or her personally.”<sup>79</sup>

Further, as mentioned earlier, courts rarely publish the names of prosecutors (or defense lawyers) at the center of misconduct decisions, so any deterrence that might develop because prosecutors do not want their names publicly attached to cases where error and misconduct has been established is lost.<sup>80</sup>

## Civil Remedies Impossible to Obtain

Civil lawsuits have proven equally ineffective as remedies for prosecutorial error and misconduct. Prosecutors are granted immunity from civil suits, even if their conduct at trial is unlawful and malicious, or causes serious harm to defendants.

Prior to *Thompson*, the Supreme Court established a broad rule of absolute immunity from civil liability for prosecutors in *Imbler v. Pachtman*.<sup>81</sup> The *Imbler* rule provides a state prosecuting attorney who acts within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the state's case absolute immunity from a civil suit for damages under the Civil Rights Act of 1871.<sup>82</sup>

In the majority opinion, the court expressed concern that prosecutors might be deterred from zealously pursuing their law enforcement responsibilities if they faced the possibility of civil liability and suggested that prosecutorial error and misconduct should be referred to state attorney disciplinary authorities.<sup>83</sup>

## JOSHUA KEZER

### JOSHUA KEZER WAS WRONGFULLY CONVICTED OF MURDER IN BENTON, MISSOURI, IN 1994.

In November 1992, the body of the victim, a female college student, was discovered by Mark Abbott, who claimed that while attempting to report the crime from a pay phone at a gas station, he saw a white hatchback drive into the station. Four months later, three inmates at the local jail told authorities that Joshua Kezer confessed to committing the murder. In a fifth interview with police, Abbott altered his story and for the first time identified Kezer from a photo lineup as the driver of the hatchback. Before trial, two of the informants recanted to Kezer's attorney, but then later retracted their recantations. No physical evidence connected Kezer to the crime. The state's case was centered on the testimony of the jailhouse informants and Abbott's identification. Kezer was convicted of second degree murder in 1994.

A 2006 reinvestigation of the case revealed that the state failed to disclose key documents which demonstrated that Abbott had made a statement to police 10 days after the murder that described and identified another man as the individual he saw near the crime scene. Additionally, police notes that prosecutors said were destroyed later emerged, revealing that Abbott, the eyewitness, had originally been a suspect in the murder. These *Brady* violations, and subsequent DNA testing that excluded Kezer as the source of blood found under the victim's fingernails, prompted a court to overturn his conviction. Kezer was ultimately released and the murder charge dismissed in 2009. *Kezer v. Dormire*, Findings of Fact, Conclusions of Law, and Judgment, Cause No. 08AC-CC00293, (Circuit Ct. Cole Cty, Feb. 17, 2009). No action was taken to examine the prosecutor's conduct.

The court went even farther in *Thompson*, holding that individual prosecutors and the offices that employ them will be largely beyond civil legal scrutiny when they err—or even when they commit serious misconduct.

The court has distinguished prosecutors from many other actors doing critical and difficult work in our society, including doctors, other lawyers and police. Consequently, victims of wrongful convictions in which prosecutorial misconduct played a key role can almost never sue the individual prosecutors responsible, or even the office that failed to train or supervise the prosecutor in question.

In fact, in a recent letter to the editor of the *New York Times*, retired Supreme Court Justice John Paul Stevens advocated that the most effective means of avoiding future injustices caused by prosecutors' concealment of evidence is through "[t]he rule of respondent superior—which requires employers to pay damages for torts committed by their employees in the ordinary course of business . . ." The rule, he said, "should apply to state law enforcement agencies."<sup>84</sup>

## Death of Criminal Sanctions

If state bar authorities are hesitant to bring disciplinary actions against prosecutors, it is not surprising that judges are equally reluctant.<sup>85</sup> Laws providing criminal sanctions for intentional prosecutorial misconduct do exist in a number of states, but in reality, prosecutions are rarely sanctioned under such statutes, even in the most egregious cases.<sup>86</sup>

The Michael Morton case was an extremely rare instance where a prosecutor was criminally charged and convicted for his misconduct. The prosecution was possible only because the record showed that the prosecutor made a false statement on the record when, in response to a direct question from the trial court, he claimed that he had nothing favorable to disclose to the defense. Twenty-five years later, Morton's attorneys discovered that the prosecutor possessed, but did not disclose, a highly detailed and exculpatory statement from a child eyewitness to the murder.

The trial court also ordered the prosecutor to submit the lead investigator's reports for *in camera* review under *Brady*, yet the prosecutor failed to include the key eyewitness

statement in his submission. Such direct questioning by the court and order for *in camera* review are not common and, in Morton's case, only came about because the original defense attorneys became suspicious when the prosecution announced that it would not be calling its lead investigator to testify.<sup>87</sup>

The handling of grave prosecutorial misconduct in the prosecution of former Alaska Senator Ted Stevens is a much more typical example. In that case, the special prosecutor charged with investigating possible misconduct found that the Justice Department lawyers committed ethics violations by the deliberate and "systematic" withholding of critical evidence pointing to Stevens' innocence. However, the court concluded it was unable to punish them because there was no prior, express court order directing the government to turn over the evidence.<sup>88</sup>

As these two cases illustrate, criminal prosecution of prosecutors is complicated. Some panelists expressed the view that prosecutors enjoy an unfair advantage when the allegations of misconduct turn on the parties' respective credibility—for example, the lawyers' conflicting claims as to whether *Brady* material was disclosed or not.

As Arizona panelist Karen Clark, a principal with Adams & Clark who represents lawyers in disciplinary proceedings, said: "The judges believe the prosecutors and they don't believe the defense attorneys. And why is that? Because three-quarters of the judges were prosecutors themselves."<sup>89</sup>

Further, in most instances there is an inherent conflict of interest because the prosecutor's office is responsible for initiating criminal proceedings against one of its own.<sup>90</sup> The individuals charged with investigating and indicting the prosecutor are usually current or former coworkers of the offending prosecutor.<sup>91</sup> Such a proceeding also generates negative publicity and scrutiny for the office, which is a huge disincentive, especially when one considers that most district attorneys are elected to office. This conflict of interest was on display in the *Thompson* case, as the only prosecutor who was ever actually disciplined in the case—a grand jury was convened to prosecute others but subsequently disbanded without indictments—was a former prosecutor who took proactive steps to prevent the execution of an innocent man.<sup>92</sup>



# SECTION VI: RECOMMENDATIONS TO IMPROVE SYSTEMS OF PROSECUTORIAL OVERSIGHT

The following is a list of recommended mechanisms that could improve systems of oversight and accountability by addressing the problems identified by the research and panelists who spoke at the forums. This list does not exhaustively discuss or comment on each of the ideas but instead aims to identify a range of solutions policymakers and practitioners can consider when designing or enhancing current oversight systems.

Different stakeholders across the system, including prosecutors, the local bar and the judiciary would be responsible for implementing these system improvements. Some are hardly controversial, calling for better internal supervision and management within local prosecutors' offices. Others suggest strengthening existing structures like bar and judicial disciplinary powers. Still others go even further, recommending newly created independent external oversight entities or legislative clarification of liability for the most egregious intentional acts.

## Prosecutors

- 1. Formal Written Policies:** Prosecutors' offices should be required to provide written guidelines and tools that are updated and provided to all prosecutors annually to help prosecutors make decisions about discovery and other matters that implicate defendants' fundamental rights fairly, ethically, equitably and effectively. These policies would need to be enforced through internal supervision.<sup>93</sup>
- 2. Enhanced Training:** Prosecutors should be required to conduct training both at the outset of employment and periodically throughout their tenure in ethical obligations and specific discovery practices. Prosecutors could be encouraged to collaborate with defender organizations on training where possible to ensure mutual understanding of rules and obligations. These training programs could be specifically designed to address repeated mistakes identified by internal supervision and courts—whether considered harmless or harmful.
- 3. Increased Transparency:** Prosecutors' offices should be required to increase transparency through annual reporting on office performance including, among other indicators, those that show identified error, misconduct and response.<sup>94</sup>
- 4. Internal Review:** Prosecutors' offices should be required to develop internal review systems to review findings of prosecutorial misconduct and other transgressions of prosecutorial ethics rules. Offices should also incorporate reports of error and misconduct (internal or judicial),

the prosecutor's corrective actions and resulting history into performance reviews, compensation reviews and promotions.

On the flip side, prosecutors' offices should ensure that compliance with *Brady* and other fundamental ethical obligations is recognized and rewarded. Supervisors should ensure, for example, that a prosecutor who discloses exculpatory evidence that leads to a favorable outcome for a defendant or elects to dismiss a case because of concerns about the reliability of the evidence, is appropriately commended for his or her actions; hence, securing a conviction at trial or a plea to serious charges are not the only "wins" on the prosecutor's docket that are singled out for internal recognition.

## Courts

- 1. Pretrial Order to Comply with Model Rule 3.8 (*Brady* Order):** Judges should be encouraged to convene a conference with the prosecutor and the defense attorney—at a reasonable time prior to trial—and issue a specific order directing prosecutors to produce all evidence that "tends to negate the guilt of the accused or mitigate the offense," as required by the American Bar Association's ethics rules. This should include the requirement that prosecutors certify that they have contacted the relevant law enforcement personnel to ensure that they are made aware of any favorable evidence in the possession of other agencies (as is required by *Brady* and its progeny) and make certain all such evidence is disclosed as soon as possible.<sup>95</sup>
- 2. Mandatory Reporting:** In jurisdictions that do not already have reporting requirements, judges should be required to routinely report findings of error or misconduct, regardless of the impact on the case, to state entities with oversight responsibility. Procedures for reporting should not be burdensome thereby discouraging compliance.
- 3. State Supreme Court Monitoring:** State supreme courts should be charged with actively monitoring compliance with requirements of judicial reporting and notification of attorneys. Annual reports could be made available to the public.
- 4. Documentation of Agreements and Potential Benefits:** Courts should be required to make prosecutors produce documentation (or otherwise notify the defense) as to all agreements they have made with witnesses and jailhouse



informants, particularly ones concerning conferment of benefits of any kind. This disclosure requirement should also include notice of any discussions they may have had with such witnesses regarding potential benefits that may result from the witnesses' cooperation, even if no formal "agreement" has been reached.

## Bar Oversight Entities

**1. Streamline Grievance Procedures:** Grievance procedures should be improved to ensure that they are more accessible to potential claimants who have colorable claims of misconduct and ineffective assistance of counsel. Procedures should not have unnecessary barriers such as time limitations for filing and notary requirements.

**2. Automatic Filing:** Disciplinary committees should be required to institute automatic filing of ethics complaints that are triggered whenever a court finds (whether on direct appeal, collateral review or otherwise) that a prosecutor has behaved unethically. At a minimum, disciplinary committees should be required to create a system listing the names of prosecutors where there has been a court finding of misconduct so that the disciplinary committee will know if a prosecutor has a history of committing misconduct if and when a complaint is filed against that individual.

**3. Modify Statute of Limitations:** State bar disciplinary committees should lengthen their statutes of limitations and provide for tolling in cases where the misconduct has been found to be intentional.

**4. Transparency/Public Records:** All grievance decisions should be made available to the public and easily searchable on an online database, which would serve to inform interested parties of grievance dispositions. (At a minimum, disciplinary committees could be required to provide summary data on the number of complaints that are filed and reviewed, the nature of the complaints, and the outcomes of each investigation.)

**5. Capacity to investigate:** State bar disciplinary committees should have adequate resources to investigate complaints of prosecutorial error or misconduct. Similarly, staff should be trained to identify and understand the issues raised in these complaints, different from the complaints made against private lawyers in civil proceedings, and have access to transcripts and records as needed.

## Legislative Action

**1. Open File Discovery:** To address concerns regarding the disclosure of exculpatory material, states should require open file discovery. One model is the North Carolina statute which requires prosecutors to provide to the defense before trial the complete investigative files, including any material obtained by law enforcement, investigators' notes, the required recordation of all oral statements and any other information obtained during the investigation. In 2013, Texas passed a similar law that includes protections sought by prosecutors to ensure that witness privacy and safety is not jeopardized by disclosure of such information. The rules should provide for work product privileges to protect the prosecuting attorney's mental process while allowing the defendant access to factual information collected by the state.<sup>96</sup>

**2. Independent Oversight:** Prosecutorial oversight should be vested in an independent state agency or within an existing state agency (inspector general or attorney general—except where the attorney general supervises the prosecutor who is the subject of the investigation) with the authority and resources to investigate allegations of prosecutorial misconduct and impose remedies and/or sanctions.<sup>97</sup>

**3. Enact a Law Limiting Immunity for Prosecutors:** States should define the immunity for prosecutors by statute. As retired Justice John Paul Stevens has powerfully argued in the wake of the *Thompson* decision, prosecutorial immunity is a federal judge-made rule of law that can and should be overturned or modified by Congress through an amendment to Section 1983 of the Civil Rights Act.<sup>98</sup>

## Law Schools

**1. Ethics Training:** Law schools should be required to ensure that all students receive training in *Brady* and other leading prosecutorial ethics rules as part of their standard professional responsibility curriculum.

## SECTION VII: CONCLUSION

Despite the Supreme Court's assertion in *Thompson* that the public can rely on numerous systems of prosecutorial oversight to ensure that prosecutors will act within ethical and legal bounds, it is abundantly clear that, across the country, our systems of prosecutorial oversight are either failing or nonexistent.

No prosecutor begins his or her career with the intention of imprisoning innocent people, and the vast majority of prosecutors work hard every day to ensure that justice is served. However, like other people, prosecutors are susceptible to cognitive biases that distort perception and like other human beings, tend to look at information in a way that fits with their already constructed mindsets. There is also a small, but important, minority of prosecutors who commit intentional and egregious misconduct.

Regardless of the extent of error or misconduct committed by a prosecutor—from the simplest of mistakes to the intentional withholding of exculpatory evidence—these actions undermine the accuracy of criminal trials and threaten to create wrongful convictions at unacceptably high rates. The courts, prosecutors' offices, defense attorneys, legislators and state bar disciplinary authorities must work together to develop a comprehensive system of prosecutorial oversight to ensure the quality of prosecutorial behavior.

This system must include training for all prosecutors throughout their careers; effective internal systems at prosecutors offices to identify, review and address error and misconduct; improved bar oversight to enable and handle

legitimate claims regarding prosecutorial misbehavior; and civil and criminal remedies in response to the most serious and unconscionable abuses of prosecutorial power.

Given the magnitude of power granted to prosecutors and the legal system's reliance on their discretion to act in the interests of justice, states across the nation must ensure that there are effective systems in place to ensure the appropriateness of prosecutorial action. The federal government and every state in the nation should convene experts from across their criminal justice and legal communities to examine their state's oversight systems and develop action plans to initiate effective reforms.

The leadership for such a convening may come from the judicial, executive or legislative branch leadership in any state. However, any effort would be wise to include members from all three branches, because the development and maintenance of effective systems of prosecutorial oversight will require the participation and support of everyone.

If such systems are established and properly supported and administered, the quality of prosecutorial action—and therefore criminal justice—will be much more reliably dispensed. If such actions are given lip service only, then we can expect the same for the quality of justice. Given the importance of the problem and the impotence of prosecutorial oversight systems in virtually every state in the nation, the creation of effective systems of prosecutorial oversight is a fundamental and necessary first step in restoring public confidence in the justice system.

### KEITH TURNER

#### KEITH TURNER WAS WRONGFULLY CONVICTED OF AGGRAVATED SEXUAL ASSAULT IN TEXAS IN 1983.



Turner, who worked at the same company as the victim, became the suspect after the victim misidentified him both visually and by voice as the perpetrator. At his trial, the prosecutor commented on Turner's silence post-arrest, and repeatedly questioned Turner on the stand as to whether or not he immediately protested his innocence or offered an alibi at the time of his arrest.

An intermediate appellate court found that the prosecutor committed error by questioning Turner about his post-arrest silence and remanded the case for a new trial. The Texas Court of Criminal Appeals reversed the intermediate court's decision, finding that any error committed by the prosecutor's questioning was harmless, as the jury had been instructed to disregard the questions that infringed upon Turner's constitutional rights. *Turner v. State*, 719 S.W.2d 190 (Tex. Crim. App. 1986) *rev'd* 690 S.W. 2d 66, 68 (Tex. Ct. App. 1985).

Turner was released on parole in 1989, but still fought to prove his innocence. In May 2004, he obtained DNA testing which exonerated him. Two days before Christmas 2005, Turner received a full pardon. No action was taken to examine the prosecutor's conduct.

# APPENDIX A

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## Sources for State by State Search of Public Disciplinary Decisions

### Arizona

<http://www.azcourts.gov/attorneydiscipline/Home.aspx>

### California

Veritas Initiative reviewed public disciplinary records to see if prosecutors were sanctioned for their error and misconduct.

### New York

<http://www.nycourts.gov/reporter>

### Pennsylvania

Searched Pennsylvania online disciplinary decisions tracking attorney discipline for the period 2004-2010 to see whether any prosecutors were publicly sanctioned.

### Texas

Searched Texas online disciplinary decisions between 2004 and November 2011 to determine how many prosecutors have been publicly disciplined.

# APPENDIX B

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## Prosecutorial Accountability Tour List of Panelists

### New York

**Honorable Richard Buchter:** New York Supreme Court Judge and former Queens Assistant District Attorney.

**Maddy deLone** (Moderator): Executive Director of the Innocence Project.

**Ross E. Firsenbaum** and **Shauna Friedman:** Senior Associates at Wilmer Hale, who represented Arthur Ashe Courage Award Winner Dewey Bozella, who was wrongly convicted of murder due to police and prosecutorial misconduct and was exonerated after serving 26 years in New York prisons.

**Sarah Jo Hamilton:** Principal at Scalise & Hamilton, LLP, and a former trial counsel and first deputy chief counsel to the Departmental Disciplinary Committee for New York's First Judicial Department.

**Honorable Elisa Koenderman:** New York Supreme Court Judge and former Bronx Assistant District Attorney.

\***John Thompson:** Exoneree whose \$14 million civil award for the prosecutorial misconduct that caused him to spend 14 years on death row was overturned by the U.S. Supreme Court, Founder and Director of Resurrection After Exoneration and Voices of Innocence.

\*\***Emily West:** Research Director of Innocence Project.

**Ellen Yaroshesky:** Clinical Professor of Law and Director, Jacob Burns Center for Ethics in the Practice of Law at Cardozo School of Law.

### Texas

**Betty Blackwell:** Former Chair of the Texas Commission for Lawyer Discipline.

**Jennifer Laurin** (Moderator): Assistant professor at the University of Texas School of Law.

**Jim Leitner:** Harris County First Assistant District Attorney in Austin Texas.

**Michael Morton:** After spending nearly 25 years in prison for the murder of his wife, Michael Morton was exonerated in 2011.

**Honorable Robert Perkins:** Former district court judge in the 331st District Court in Travis County.

**Robert Schuwerk:** Professor at the University of Houston Law Center.

### Arizona

**Jim Belanger:** Defense Attorney currently working at Coppersmith Schermer & Brockelman PLC.

**Hon. Colin Campbell:** Former Judge of the Maricopa County Superior Court.

**Paul Charlton:** Former prosecutor and former United States Attorney. He is currently a partner at the Phoenix, Ariz., law firm Gallagher & Kennedy.

**Karen Clark:** Former ethics counsel for the state bar of Arizona.

\* Panelist presented at all panels.

\*\* Panelist presented at the Texas and Pennsylvania panels.

**Lindsay Herf** (Moderator): Co-director of the Arizona Justice Project.

**Ray Krone:** Exoneree who spent more than a decade in prison, some of it on death row, before DNA testing cleared his name.

**Kathy Mayer:** Former Deputy Pima County Attorney.

**Keith Swisher:** Associate Dean of Faculty Development and Associate Professor at the Phoenix School of Law.

**Kathleen “Cookie” Ridolfi:** Law professor at Santa Clara University School of Law and the Director of the Veritas Initiative.

**John Todd:** Special Assistant Attorney General at Arizona Attorney General’s Office.

## Pennsylvania

**Anne Bowen Poulin** (Moderator): Professor of Law, Villanova University School of Law.

**Greg Rowe:** Legislative Liaison for the Pennsylvania District Attorneys Association.

**Honorable William R. Carpenter:** Court of Common Pleas, Montgomery County

**Thomas G. Wilkinson, Jr.:** President of the Pennsylvania Bar Association and Partner at Cozen O’Connor.

## California

**David Angel:** Special Assistant District Attorney, and Director of the Conviction Integrity Unit in Santa Clara County.

**Obie Anthony III:** Exonerated after spending 17 years behind bars for a crime he did not commit.

**Robin Brune:** Senior Trial Counsel for the California State Bar.

**Honorable James Emerson:** Former Santa Clara County Superior Court judge.

**Rachel Myrow** (Moderator): Host of *The California Report* for KQED Public Radio in San Francisco.

**Tom Nolan:** Defense attorney of Nolan, Armstrong and Barton.

**Kathleen “Cookie” Ridolfi:** Law professor at Santa Clara University School of Law and the Director of the Veritas Initiative.

**Jeff Rosen:** District Attorney for Santa Clara County.



## ENDNOTES

1 On April 1, 1940, then-Attorney General Robert Jackson gave a speech to the United States attorneys who then were serving in each Federal Judicial District across the country. In the speech, Jackson, who had been attorney general for only three months, offered his views on what constituted proper, ethical conduct by federal prosecutors. Attorney General Robert H. Jackson, the Federal Prosecutor, Remarks at the Second Annual Conference of United States Attorneys, United States Department of Justice, Washington, D.C. (Apr. 1, 1940) published in 31 J. OF CRIM. L. & CRIMINOLOGY 3-6 (1940).

2 *Connick v. Thompson*, 131 S. Ct. 1350 (2011)

3 *Connick*, 131 S. Ct. 1350, 1353 (2011) (holding that a single *Brady* violation committed by one attorney in the New Orleans County District Attorney's office was insufficient to place the district attorney on notice of the need for further training and therefore the office was not civilly liable based on a failure-to-train theory of municipal liability).

4 *Id.* at 1358-66.

5 *Id.*

6 *Id.* at 1375 (Ginsburg, J., dissenting). All of the facts regarding the failure of prosecutors to disclose are stated in the Supreme Court's majority opinion or in Justice Ginsburg's dissenting opinion.

7 Brief for Harry Connick et al. as Amici Curiae Brief of the National District Attorneys Association and the California District Attorneys Association in Support of Petitioners, *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (No. 09-571) 2010 WL 2394353.

8 *Connick*, 131 S. Ct. at 1365-66.

9 *Id.* at 1370 (Ginsburg, J., dissenting).

10 See David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011), available at [http://www.yalelawjournal.org/pdf/1018\\_hpkw93.pdf](http://www.yalelawjournal.org/pdf/1018_hpkw93.pdf) [hereinafter *Yale Study*].

11 See Section V.

12 See Mary Nicole Bowman, *Mitigating Foul Blows*, GA. L. REV. (forthcoming 2015).

13 See James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1632 (2012).

14 Emily M. West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases*, Innocence Project (September 2010), available at [http://www.innocenceproject.org/files/Innocence\\_Project\\_IAC\\_Report.pdf](http://www.innocenceproject.org/files/Innocence_Project_IAC_Report.pdf).

15 In 2009, the Jacob Burns Ethics Center at Cardozo School of Law hosted a conference with leading experts and scholars on *Brady* and other disclosure obligations. In advance of the conference, the 75 participants were split into six working groups, and during the conference, the groups met to develop best practices on various issues related to disclosure obligations, including systems for information management, training on disclosure and oversight systems for accountability. The recommendations of the six groups were published in a law review article for the Cardozo Law Review. *New Perspectives on Brady and Other Disclosure Obligations*, 31 CARDOZO L. REV. 1943 (2010).

16 See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 718 (1996) ("In the past thirty years . . . power has increasingly come to rest in the office of the prosecutor. Developments in the areas of charging, plea bargaining, and sentencing have made the prosecutor the preeminent actor in the system."); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522 (1981) ("There is a broad and rather casual acceptance of the fact that prosecutors often exercise greater control over the administration of criminal justice than do other officials.").

17 See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 125 (2007) ("Prosecutors make the most important of these discretionary decisions behind closed doors and answer only to other prosecutors. Even elected prosecutors, who presumably answer to the electorate, escape accountability, in part because their most important responsibilities—particularly the charging and plea bargaining decisions—are

shielded from public view."). See also Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 862 (1995) ("The prosecutor's charging discretion is, for the most part, unreviewable.").

18 See Brandon K. Crase, *When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475, 477 (2007) ("The discretion afforded to prosecutors extends from the finest detail of the case to the questions of whether to investigate, grant immunity, or even whether to bring the charges at all."). See also, *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

19 James M. Doyle, *Learning about Learning from Error*, 14 IDEAS IN AMERICAN POLICING 7-13 (May 2012), available at <http://www.policefoundation.org/sites/g/files/g798246/f/Doyle%20%282012%29%20-%20Learning%20About%20Learning%20From%20Error.pdf>.

20 In October 2013, the U.S. Attorney for the Southern District of California filed a motion to reverse and vacate the conviction of a defendant upon reviewing the videotape of an oral argument which revealed that the prosecutor had made an improper argument. Notably, the U.S. Attorney's office stated that it planned to use the video as a training tool for its Assistant U.S. attorneys. *U.S. v. Maloney*, Motion to Summarily Reverse the Conviction, Vacate the Sentence, and Remand to the D. Ct., C.A. No. 11-50311 (9th Cir. Oct. 7, 2013).

21 John Hollway, "A Systems Approach to Error Reduction in Criminal Justice" (2014). *Faculty Scholarship*. Paper 976.

22 Criminal Justice Section, *Report to the House of Delegates*, AMERICAN BAR ASSOCIATION at 1 (Aug. 2009) (accepted by the House of Delegates Aug. 9-10, 2009), available at <http://apps.americanbar.org/yld/annual10/100B.pdf>.

23 See Anthony Batts, Maddy DeLone & Darrel Stephens, "Policing and Wrongful Convictions," *New Perspectives in Policing Bulletin*, U.S. Department of Justice, National Institute of Justice 15-17 (2014), available at <https://ncjrs.gov/pdffiles1/nij/246328.pdf> (advocating for an organization accident model which encourages police department to review errors as system wide weaknesses instead of single-cause mistakes).

24 Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 277 (2007) ("Prosecutorial misconduct encompasses a wide range of behaviors, including courtroom misconduct (such as making inflammatory comments in the presence of the jury, mischaracterizing evidence, or making improper closing arguments), mishandling physical evidence (destroying evidence or case files), threatening witnesses, bringing a vindictive or selective prosecution, and withholding exculpatory evidence.").

25 See *Smith v. Cain*, 132 S. Ct. 627(2011). For a discussion of the case law governing prosecutorial misconduct, see *infra* Section IV.

26 *United States v. Olsen*, 737 F.3d 625, 632 (9th Cir. Dec. 10, 2013) (ord. denying reh'g *en banc*), (C.J. Kozinski, dissenting).

27 In the forum states, to the knowledge, prosecutors did not routinely keep records of sanctions against prosecutors. Presumably, such records would be a reliable source of data, but to our knowledge this is not systematically done.

28 Schulte, Roth and Zabel provided invaluable assistance in the data analysis and research for prosecutorial misconduct in New York.

29 The search criteria included:

"prosecut! misconduct" & da(aft 12/31/2003 & bef 1/1/2009); "*Brady v. Maryland*" & da(aft 12/31/2003 & bef 1/1/2009) % "prosecut! misconduct"; "*Batson v. Kentucky*" & da(aft 12/31/2003 & bef 1/1/2009) % "prosecut! misconduct"; "*Doyle v. Ohio*" & da(aft 12/31/2003 & bef 1/1/2009) % "prosecut! misconduct"; "*Griffin v. California*" & da(aft 12/31/2003 & bef 1/1/2009) % "prosecut! misconduct"; "improper argument" & da(aft 12/31/2003 & bef 1/1/2009) % "prosecut! misconduct"; "improp! cross!" & da(aft 12/31/2003 & bef 1/1/2009) % "prosecut! misconduct"; "improp! question!" & da(aft 12/31/2003 & bef 1/1/2009) % "prosecut! misconduct" % "improp! cross!"; "failure to correct" & da(aft 12/31/2003 & bef 1/1/2009) % "prosecut! misconduct"

30 See Appendix A for state-by-state source information.

31 It is important to provide some context about how courts rule on issues relating to prosecutorial misconduct. When a defendant brings a claim of prosecutorial misconduct, the courts examine the claim and generally rule in one of the following ways:

1. The claim is rejected—the claim is without merit and the prosecutor acted within his or her professional bounds.
2. The claim is waived due to the defense's failure to make a proper objection; the trial court correcting any possible error by sustaining objections and/or jury instructions; or the claim is untimely.
3. The claim is deemed harmless—the court offers language which acknowledges the error or misconduct, but concludes that the conduct did not fundamentally affect the fairness of the trial.
4. The claim is deemed harmful—the court acknowledges the error or misconduct and believes that the conduct unduly affected the outcome of the trial, leading the court to set aside a conviction or sentence; declare a mistrial; bar evidence from court.

32 *The Issue*, Prosecutorial Oversight, <http://www.prosecutorialoversight.org/about-the-issue> (last visited Apr. 13, 2015).

33 See Appendix B for a list of panelists who participated in each state forum.

34 Kathleen Ridolfi & Maurice Possley, N. Cal. Innocence Project, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*, (2010); Ken Armstrong & Maurice Possley, *Verdict: Dishonor*, CHI.TRIB., Jan. 10, 1999, available at <http://www.chicagotribune.com/news/watchdog/chi-020103trial1-story.html#page=1/>.

35 Ridolfi & Possley, *supra* note 31 at 3.

36 Brad Heath & Kevin McCoy, "Prosecuting Offices' Immunity Tested," *USA Today*, Oct. 6, 2010, available at [http://usatoday30.usatoday.com/news/washington/judicial/2010-10-05-federal-prosecutor-immunity\\_N.htm](http://usatoday30.usatoday.com/news/washington/judicial/2010-10-05-federal-prosecutor-immunity_N.htm).

37 Armstrong & Possley, *supra* note 31.

38 *Id.*

39 *Id.*

40 Yale Study, *supra* note 9 at 234.

41 Yale Study, *supra* note 9 at 234-40. The Yale Study's findings were developed from the following pieces of comparative data for each state: rules of professional conduct, rules of lawyer disciplinary procedure, information from each state's disciplinary authority website, telephone interviews with bar personnel, and supplemental statistical data compiled by the American Bar Association (ABA) as part of its 2009 Survey on Lawyer Disciplinary Systems.

42 Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined By Their Offices or The Bar: Three Case Studies That Prove That Assumption Wrong*, 80 *Fordham L. Rev.* 537, 539-41 (2011).

43 Robert Schuwert, Professor of Law, University of Houston Law Center, Prosecutorial Oversight Forum at the University of Texas Law School (Mar. 29, 2012).

44 The coalition looked at the published trial and appellate court decisions addressing allegations of prosecutorial misconduct between 2004-2008. In order to give the states' bar disciplinary committees sufficient time to investigate and decide whether or not to take action against a prosecutor, the groups looked at disciplinary records from 2004 through 2010 for Arizona and Pennsylvania and 2011 for California, New York and Texas.

45 In the forum states, prosecutors did not routinely keep records of sanctions against prosecutors. Presumably, such records would be a reliable source of data, but to our knowledge this is not systematically done.

46 *United States v. Ruiz*, 122 S.Ct. 2450 (2002).

47 From 2004 to November 2011, 15 prosecutors across these five states were publicly disciplined for prosecutorial misconduct, but none for conduct relating to the cases in our sample. However, after the research for this report was concluded, at least one prosecutor was disciplined for acts of misconduct that had occurred during the time frame studied here. In that case, Burlison and Washington County Texas District Attorney Charles Sebesta was disbarred for his misconduct in the wrongful capital murder conviction of Anthony Graves,

whose conviction was reversed in 2006 by the United States Court of Appeals for the Fifth Circuit because the prosecution failed to turn over evidence pointing to Graves' innocence. After wrongly serving 18 years (including 12 on death row), Graves was exonerated in 2011. After the Texas legislature passed a law amending the statute of limitation to allow exonerees to file a grievance four years after their release from prison, Graves did so in 2015. In June 2015, after a rare four-day disciplinary hearing, a panel of the State Bar determined that Sebesta withheld evidence and used false testimony in securing Graves' capital murder conviction and stripped him of his law license. The disbarment was rendered final in February 2016, when the Board of Disciplinary Appeals upheld the State Bar of Texas's findings and recommendation.

48 In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that the Equal Protection Clause prohibits the use of a peremptory strike during voir dire solely on the basis of the potential juror's race. In *J.E.B. v. Alabama*, 511 U.S. 127 (1994) extended the *Batson* rule to prohibit gender-based peremptory challenges. In order to prove a *Batson* violation, the party making the objection must establish by evidence a prima facie case of purposeful discrimination, at which point the other party has the burden of providing a neutral explanation for the use of the peremptory strike.

49 See Kathleen Ridolfi, Tiffany M. Joslyn & Todd Fries, National Association of Criminal Defense Lawyers, *Material Indifference: How Courts Are Impeding Fair Disclosure In Criminal Cases* (2014) (concluding based on its review of federal *Brady* claims that late disclosure or complete nondisclosure of favorable information is rarely found to violate *Brady*).

50 No. P-01-CA-20, 2004 WL 1812698 (W.D. Tex. Aug. 9, 2004).

51 5 A.D.3d 318 (N.Y. App. Div. 2004).

52 *Id.* at 320.

53 *U.S. v. Rivas*, 2004 WL 1658368.

54 <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3580>.

55 Jim Leitner, First Assistant District Attorney, Harris County, Texas, Prosecutorial Oversight Forum at the University of Texas Law School (Mar. 29, 2012).

56 Paul Charlton, former United States Attorney for the District of Arizona, Prosecutorial Oversight Forum at the Phoenix School of Law (Apr. 26, 2012).

57 See Hon. William M. Hoeveler, *Ethics and the Prosecutor*, 29 *STETSON L. REV.* 195, 195 (1999).

58 Ellen Yaroshfsky, clinical professor of law, Benjamin N. Cardozo School of Law, Prosecutorial Oversight Forum at the Benjamin N. Cardozo School of Law (Feb. 6, 2012).

59 The Honorable Colin Campbell, Judge (Ret.), Maricopa County Superior Court, Prosecutorial Oversight Forum at the Phoenix School of Law (Apr. 26, 2012).

60 Betty Blackwell, former chair, Texas Commission for Lawyer Discipline, Prosecutorial Oversight Forum at the University of Texas Law School (Mar. 29, 2012).

61 Final report, California Commission on the Fair Administration of Justice at 71, available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>.

62 Kathleen "Cookie" Ridolfi, former director, Northern California Innocence Project, Prosecutorial Oversight Forum at Santa Clara University School of Law (Oct. 1, 2012).

63 The Honorable James Emerson, Judge (ret.), Santa Clara County Superior Court, Prosecutorial Oversight Forum at Santa Clara University School of Law (Oct. 1, 2012).

64 The Honorable Robert Perkins, District Court Judge (ret.), 331st District Court, Travis County, Tex., Prosecutorial Oversight Forum at the University of Texas Law School (Mar. 29, 2012).

65 See Yale Study, *supra* note 9 at 235.

66 Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 *SW. L.J.* 965, 966 (1984) (noting "both scholars and bar grievance committees have paid scant attention to prosecutorial ethicality, and consequently, prosecutors may have developed a sense of insulation from the ethical standards of other lawyers").

- 67 See Yale Study, *supra* note 9 at 234.
- 68 *Id.* at 243.
- 69 Thomas G. Wilkinson, Jr., president, Pennsylvania Bar Association, Prosecutorial Oversight Forum, Philadelphia, PA. (Oct. 1, 2012).
- 70 Sarah Jo Hamilton, former trial counsel and deputy chief counsel, Departmental Disciplinary Committee for New York's First Judicial Department, Prosecutorial Oversight Forum at the Benjamin N. Cardozo School of Law (Feb. 6, 2012).
- 71 *Id.* at 245 (“To varying degrees in the states surveyed, bar disciplinary investigations are largely confidential. When a grievance committee dismisses charges before a public hearing, there is no record or published opinion.”).
- 72 See N.Y. JUD. LAW § 90(10) (2013).
- 73 Ellen Yaroshefsky, clinical professor of law, Benjamin N. Cardozo School of Law, Prosecutorial Oversight Forum at the Benjamin N. Cardozo School of Law (Feb. 6, 2012).
- 74 See generally, Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?* 70 NYU L. REV. 1167 (1995) (discussing the flaws of Harmless Error Doctrine).
- 75 *Id.*
- 76 Ridolfi & Possley, *supra* note 31 at 19-23.
- 77 *Id.* at 71.
- 78 *Id.* at 50.
- 79 The Honorable Richard Butcher, judge, New York Supreme Court, Queens County, N.Y., and former assistant district attorney, Queens County, New York, Prosecutorial Oversight Forum at the Benjamin N. Cardozo School of Law (Feb. 6, 2012).
- 80 Ridolfi & Possley, *supra* note 31 at 50.
- 81 424 U.S. 409 (1976).
- 82 *Id.* at 423-26.
- 83 *Id.* at 422-26.
- 84 John Paul Stevens, “Letter to the Editor,” *New York Times*, Feb. 18, 2015, available at <http://www.nytimes.com/2015/02/18/opinion/prosecutors-misconduct.html>.
- 85 See Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 NYU Ann. Surv. AM. L. 45, 84 (2005) (“[E]ven where a knowing deprivation is proven, many judges and juries are hesitant to impose criminal sanctions for ‘technical’ constitutional violations . . . . Even in the context of extreme prosecutorial abuse, however, judges may prefer to use a less severe, quasi-criminal remedy available to sanction the misconduct, such as the contempt power.”).
- 86 *Id.* at 85.
- 87 *In re Honorable Ken Anderson* (A Court of Inquiry), Probable Cause Order and Findings of Fact and Conclusions of Law, Cause No. 12-0420-K26, (26th Dist. Ct., Williamson Cty., Tex.) (Apr. 19, 2013) (Sturns, J.), available at <http://www.lrl.state.tx.us/scanned/archive/2013/20981.pdf>.
- 88 *United States v. Theodore F. Stevens*, Order, Crim. No. 1:08-cr-00231-EGS (D.D.C. 2009)(Nov. 21, 2011)(Sullivan, J.).
- 89 Karen Clark, former ethics counsel, State Bar of Arizona, Prosecutorial Oversight Forum at the Phoenix School of Law (Apr. 26, 2012).
- 90 See generally, Heather Schoenfeld, *Violated Trust: Conceptualizing Prosecutorial Misconduct*, 21 J. CONTEMP. CRIM. JUST. 250 (2005); Barbara O’Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 Mo. L. Rev. 999 (2009); Bennett L. Gershman, *Why Prosecutors Misbehave*, 22 CRIM. L. BULL. 131 (1986).
- 91 See Angela Davis, *Prosecutors Who Intentionally Break the Law*, 1 AM. U. CRIM. L. BRIEF 16 (2006) (describing the reasons for the criminal justice system’s seemingly deferential posture toward prosecutors).
- 92 *In re Riehlmann*, 891 So. 2d 1239 (La. 2005) (regarding formal charges filed against respondent by the Office of Disciplinary Counsel).
- 93 The ABA Standing Committee on Ethics and Professional Responsibility in a recently issued formal opinion stated that Model Rules 5.1 and 5.3 require prosecutors with managerial authority and supervisory lawyers to make “reasonable efforts to ensure” that all lawyers and non-lawyers in their offices conform to the Model Rules, including 3.8. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 467 (2014).
- 94 Rachel Barkow, *Organizational Guidelines for the Prosecutor’s Office*, 31 CARDOZO L. REV. 2089, 2116 (2010) (recommending an office culture that emphasizes compliance will improve prosecutors’ behavior).
- 95 Barry Scheck & Nancy Gertner, *Combating Brady Violations With An “Ethical Rule” Order for the Disclosure of Favorable Evidence*, NACDL, 37 CHAMPION 40 (May 2013).
- 96 In response to the prosecutorial misconduct that led to Michael Morton’s wrongful conviction, Texas passed the Michael Morton Act, which established a more extensive open file discovery process. Michael Morton Act, S.B.1611, 83rd Leg., 1st Sess. (Tex. 2013).
- 97 Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. Rev. 275 (2004)
- 98 John Paul Stevens, retired associate justice, United States Supreme Court, Remarks at the Equal Justice Initiative Dinner Honoring Justice Stevens 10-12 (May 2, 2011) (transcript available at <http://www.eji.org/files/Justice%20Stevens%20Remarks.pdf>).





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