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PROSECUTORS WHO INTENTIONALLY BREAK THE LAW

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Editors' Note: The following article is an excerpt from Arbitrary Justice: The Power of the American Prosecutor *(forthcoming, Oxford University Press 2006) by Angela J. Davis.*

Brian was a fifteen-year-old African-American boy charged in the District of Columbia Juvenile Court with assault with intent to kill, burglary, and related charges. The government claimed that Brian and two adult men had severely beaten an older man during a burglary of his home. Brian's adult co-defendants were charged with the same offenses and faced up to life in prison in adult court, where the Office of the United States Attorney for the District of Columbia prosecuted them.[1] As a juvenile, the Office of the Corporation Counsel prosecuted Brian[2] and he faced a maximum punishment of two years in the juvenile correctional facility upon conviction. The Juvenile Court rules protected his anonymity and offered the possibility of rehabilitative treatment if needed.

The Supreme Court bears much of the responsibility for fostering a culture in which prosecutors feel free to engage in misconduct.

The Assistant U.S. Attorney handling the case against the adult co-defendants sought Brian's assistance in their prosecution. He contacted the assistant corporation counsel in charge of Brian's case and Brian's court-appointed attorney to arrange an "off-the-record conversation." The prosecutor hoped to secure Brian's cooperation in the prosecution of the adults in exchange for lenient treatment, including possible dismissal of Brian's case. During the meeting, the prosecutor questioned Brian about the events surrounding the assault and burglary. Brian's attorney and mother were present during the meeting. Brian denied that either he or the adult codefendants had participated in the crimes.

The prosecutor expressed his displeasure with Brian's denials and pressured him to testify that the adults were involved. When Brian refused to submit to pressure, the prosecutor threatened to charge Brian as an adult if he declined to testify against the codefendants, warning him that he could receive a life sentence in an adult prison if convicted in adult court. Brian maintained that he knew nothing about the offenses and the meeting ended without a deal. Soon thereafter, the prosecutor made good on his threats. The juvenile case was dismissed, and Brian was charged as an adult.

I was appointed to represent Brian in adult court. He immediately told me about the meeting with the prosecutor. I interviewed his mother, who verified the prosecutor's threats and expressed her shock and dismay at what the prosecutor had done. "Can he get away with that?" she asked. I agreed that his behavior was unscrupulous, and after consulting with other lawyers at the Public Defender Service, I decided to file a motion to dismiss the indictment for prosecutorial vindictiveness.

The judge assigned to Brian's case scheduled a hearing, and Brian's mother testified. She described the prosecutor's threats in great detail, explaining how he had yelled at Brian and had promised to charge Brian as an adult if he did not corroborate the government's story that he had helped the two adults beat and rob the complainant. The prosecutor representing the government at the hearing was not the same prosecutor who had threatened Brian. To my surprise, he declined to cross-examine Brian's mother. Instead, he began to argue, in a very dismissive manner, that Brian's mother was lying and that the threats were never made. The judge interrupted the prosecutor's argument and asked whether he planned to present any evidence. The prosecutor appeared surprised and informed the judge that he would just "make representations" as an officer of the court. This prosecutor apparently believed that he was not required to present testimony under oath and that the judge should simply accept his word to rebut the testimony of Brian's mother. When it became clear that the judge planned to follow the rules of evidence and only consider the undisputed testimony of Brian's mother, the prosecutor asked if he might have additional time to locate the prosecutor and present his testimony. The judge declined his request.

The hearing ended late on a Friday afternoon, and Brian's trial was scheduled to begin the following Monday morning. The judge declined to rule on the motion, indicating that she would take the matter under advisement. I warned my

client and his mother that they should not get their hopes up, that these motions were rarely granted, and that we should prepare to start the trial on Monday.

On the following Monday morning, the case was called and my client and I joined the adult co-defendants and their lawyers at counsel table. The case had been assigned to another judge. He looked in my client's court file and announced, "Ms. Davis, your client's case has been dismissed. There is an order issued by Judge Williams granting your motion to dismiss the indictment for prosecutorial vindictiveness." I was shocked. Although I had challenged prosecutorial misconduct on many occasions during my years as a public defender, this was the only time a judge had granted the relief I had requested.

The prosecutorial vindictiveness in Brian's case is just one of the many forms of prosecutorial misconduct and is by no means the most common. Such misconduct may take many forms, including:

- Courtroom misconduct (making inappropriate or inflammatory comments in the presence of the jury; introducing or attempting to introduce inadmissible, inappropriate or inflammatory evidence; mischaracterizing the evidence or the facts of the case to the court or jury; committing violations pertaining to the selection of the jury; or making improper closing arguments);
- Mishandling of physical evidence (hiding, destroying or tampering with evidence, case files or court records);
- Failing to disclose exculpatory evidence;
- Threatening, badgering or tampering with witnesses;
- Using false or misleading evidence;
- Harassing, displaying bias toward, or having a vendetta against the defendant or defendant's counsel (including *selective* or *vindictive prosecution*, which includes instances of denial of a speedy trial); and
- Improper behavior during grand jury proceedings.[3]

Numerous articles and books have been written about the many forms of prosecutorial misconduct.[4]

I do not attempt to present a comprehensive discussion of prosecutorial misconduct in this one article, as such a task would be impossible in light of the breadth of the problem. Instead, I attempt to demonstrate that the line between legal prosecutorial behavior and illegal prosecutorial misconduct is a thin one, and that a number of factors, including the Supreme Court's jurisprudence and the prosecutorial culture of power and lack of accountability, create a climate that fosters misconduct. I focus on *Brady* violations – the most common form of misconduct – and explore how and why prosecutors continue to engage in illegal behavior with impunity.

The Breadth of the Problem

Much of what passes for legal behavior might in fact be illegal, but because prosecutorial practices are so rarely challenged, it is difficult to define the universe of prosecutorial misconduct. Being so difficult to discover, much prosecutorial misconduct goes unchallenged, suggesting that the problem is much more widespread than the many reported cases of prosecutorial misconduct would indicate. In fact, it would be almost impossible to determine the extent of prosecutorial misconduct. As one editorial described the problem, "It would be like trying to count drivers who speed; the problem is larger than the number of tickets would indicate."[5]

Much has been written on prosecutorial misconduct in recent years, but one of the most comprehensive studies was completed in 2003 by the Center for Public Integrity, a nonpartisan organization that conducts investigative research on public policy issues. A team of twenty-one researchers and writers studied the problem for three years and examined 11,452 cases in which charges of prosecutorial misconduct were reviewed by appellate court judges. In the majority of cases, the alleged misconduct was ruled harmless error or was not addressed by the appellate judges. The Center discovered that judges found prosecutorial misconduct in over 2,000 cases, in which they dismissed charges, reversed convictions, or reduced sentences.[6] In hundreds of additional cases, judges believed that the prosecutorial behavior was inappropriate, but affirmed the convictions under the "harmless error" doctrine.[7]

The cases investigated by the Center for Public Integrity only scratch the surface of the issue, the cases in which prosecutorial misconduct was discovered and litigated. However, there are many opportunities for prosecutors to engage in misconduct that are nearly impossible to discover. Most of the prosecutorial practices that occur behind closed doors, such as charging and plea bargaining decisions and grand jury practices, are never revealed to the public. Even after cases are indicted, defense attorneys are not entitled to discover what occurred behind the scenes. In the rare cases in which practices that appear to be illegal are discovered, it is often impractical to challenge them in light of the Supreme Court's pro-prosecution decisions on prosecutorial misconduct. Of course, there is no opportunity to challenge any misconduct that may have occurred in the over 95% of all

criminal cases which result in a guilty plea since defendants give up most of their appellate rights when they plead guilty.

Why is prosecutorial misconduct so widespread and how did it reach this stage? The Supreme Court bears much of the responsibility for fostering a culture in which prosecutors feel free to engage in misconduct. The Court has shielded prosecutors from scrutiny in a series of cases that have narrowly defined the universe of behaviors that constitute prosecutorial misconduct and the circumstances under which victims of such behaviors are entitled to relief. These cases have emboldened prosecutors to engage in misconduct, since they know that even if their behavior is discovered and challenged, courts will most likely find the behavior to be "harmless error."

The Supreme Court—Fostering a Culture of Misconduct

The Supreme Court is largely responsible for hiding prosecutorial misconduct from the public by establishing nearly impossible standards for obtaining the necessary discovery to seek judicial review.[8] Many of the most damaging forms of misconduct occur behind closed doors. Inappropriate or unethical charging decisions, intimidating conversations with witnesses, selective and vindictive prosecutions, and grand jury abuse all occur in the privacy of prosecution offices – away from the public and the parties whose cases are affected by the harmful behavior. As a result of the Supreme Court's rulings, prosecutors know that it is highly unlikely that any of these behaviors will be discovered by defense attorneys or anyone who might challenge them.[9]

On the rare occasion when such misconduct is discovered, judicial review is extremely limited. Under the harmless error rule, appellate courts affirm convictions if the evidence supports the defendant's guilt, even if she did not receive a fair trial.[10] This rule permits, perhaps even unintentionally encourages, prosecutors to engage in misconduct during trial with the assurance that so long as the evidence of the defendant's guilt is clear, the conviction will be affirmed.

In addition to its constitutional power to reverse lower court convictions, the Supreme Court's supervisory authority to oversee the implementation of criminal justice grants the Court powers to regulate lower court procedures. For example, in *McNabb v. United States*,[11] the Court concluded that when determining the admissibility of evidence, it obeys the Constitution, and, under its power of judicial supervision, formulates "civilized standards of procedure and evidence."[12] These standards are to be applied in federal criminal prosecutions, in an effort to deter governmental misconduct and preserve judicial integrity. The Court's standards are satisfied by more than simple adherence to due process laws and are derived from considerations of "evidentiary relevance" and justice.[13]

In *United States v. Russell*,[14] however, the Supreme Court drastically curtailed the supervisory power doctrine by reversing a lower court's use of the power in a case involving questionable law enforcement tactics. The Court invoked the separation of powers doctrine as it warned lower courts not to meddle in the business of law enforcement. In a further effort to limit the reach of a federal court's supervisory power, in *United States v. Hasting*,[15] the Court held that judges may not use the supervisory power doctrine to reverse convictions because of prosecutorial misconduct in cases involving harmless error.

Civil lawsuits have proven equally ineffective as remedies for prosecutorial misconduct. The Supreme Court established a broad rule of absolute immunity from civil liability for prosecutors in *Imbler v. Pachtman*.[16] This rule immunizes prosecutors from liability for acts "intimately associated with the judicial phase of the criminal process."[17] 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 misconduct should be referred to state attorney disciplinary authorities.

The Supreme Court's decision to avoid the problem and pass it on to state bar authorities has proven totally ineffective.[18] All attorneys, including prosecutors, must abide by their state's Code of Professional Responsibility. Attorneys who violate the Code are subject to various forms of discipline, including disbarment. However, the Center for Public Integrity found only 44 cases since 1970 in which prosecutors faced disciplinary proceedings for misconduct that infringed upon the constitutional rights of criminal defendants. Examples of such misconduct include:

- discovery violations;
- improper contact with witnesses, defendants, judges or jurors;
- improper behavior during hearings or trials;
- prosecuting cases not supported by probable cause;
- harassing or threatening defendants, defendants' lawyers or witnesses;
- using improper, false or misleading evidence;
- displaying a lack of diligence or thoroughness in prosecution; and
- making improper public statements about a pending criminal matter.[19]

Out of the 44 attorney disciplinary cases:

- In 7, the court dismissed the complaint or did not impose a punishment.
  In 20, the court imposed a public or private reprimand or censure.
- In 12, the prosecutor's license to practice law was suspended.
- In 2, the prosecutor was disbarred.
- In 1, a period of probation was imposed in lieu of a harsher punishment.
- In 24, the prosecutor was assessed the costs of the disciplinary proceedings.
- In 3, the court remanded the case for further proceedings.[20]

For many years, federal prosecutors refused to abide by state disciplinary rules. In 1989, former Attorney General Richard Thornburgh issued a memorandum declaring that federal prosecutors would abide by internal Justice Department rules rather than the ethical rules of the state in which they practiced.[21] Although this memorandum was overturned by the Citizens Protection Act of 1998,[22] the Act simply returned prosecutors to the status quo, which has proven highly ineffective in deterring or punishing misconduct.

It is not surprising that very few prosecutors are referred to state disciplinary authorities. In many ways, the phenomenon brings to mind the old saying, "If you shoot at the king, you'd better kill him." Defense attorneys are hesitant to refer prosecutors to disciplinary authorities because of the power they wield. Since over 95% of criminal cases result in guilty pleas,[23] every defense attorney knows that her future clients are at the mercy of the prosecutor, whose unfettered discretion determines what plea offers will be made and to whom. Challenging the bar license of an official who holds all the cards is risky business, especially given the odds of prevailing. Prosecutors are powerful and often popular, political figures. Even when referrals are made, bar authorities frequently decline to recommend serious punishment, as the statistics from the Center for Public Integrity indicate.[24] Thus, referring prosecutors to state bar authorities has proven to be a dismal failure.

The Court's rulings have sent a very clear message to prosecutors – we will protect your practices from discovery; when they are discovered, we will make it extremely difficult for challengers to prevail; and as long as you mount overwhelming evidence against defendants, we will not reverse their convictions if you engage in misconduct at trial. Prosecutors are well aware of these facts, and although they may not always intentionally set out to engage in misconduct, the Supreme Court has provided them with a comfort zone that fosters and perhaps even encourages a culture of wrongdoing.

Brady Violations: Withholding Exculpatory Evidence

The obligation of a prosecutor to reveal favorable, exculpatory information about a criminal defendant is not only fair; it is a constitutional requirement. In *Brady v. Maryland*,[25] the Supreme Court held that a prosecutor's failure to disclose evidence favorable to the defendant violated due process rights when the defendant had requested such information. The Court expanded this rule in *United States v. Agurs*,[26] and required prosecutors to turn over exculpatory information to the defense even in the absence of a request. Professional ethical and disciplinary rules in each state and the District of Columbia reiterate and reinforce the duty to turn over information. The obligation to reveal *Brady* information is ongoing and is not excused even if the prosecutor acts in good faith.

Brady violations are among the most common forms of prosecutorial misconduct. Because the obligation is expansive, continuing, and not limited by the good faith efforts of the prosecutor, great potential for wrongdoing exists. The failure to provide *Brady* information can have dire consequences for the defendant. In capital cases, Brady violations have resulted in the execution of arguably innocent persons. At the very least, withholding *Brady* information can determine the outcome of a trial.

Ken Armstrong and Maurice Possley, staff writers for the Chicago Tribune conducted a national study of 11,000 cases involving prosecutorial misconduct between the *Brady* decision in 1963 and 1999.[27] The study revealed widespread, almost routine, violations of the *Brady* doctrine by prosecutors across the country.[28] They discovered that since 1963 courts dismissed homicide convictions against at least 381 defendants because prosecutors either concealed exculpatory information or presented false evidence.[29] Of the 381 defendants, 67 had been sentenced to death.[30] Courts eventually freed approximately 30 of the 67 death row inmates, including two defendants who were exonerated by DNA tests.[31] One innocent defendant served 26 years before a court reversed his conviction.[32] Armstrong and Possley suggest that this number represents only a fraction of cases involving this type of prosecutorial misconduct since the study only considered cases where courts convicted the defendant of killing another individual.[33] They also reported that the prosecutors, who engaged in the reported misconduct, were neither convicted of a crime nor barred from practicing law.[34]

Another study by Bill Moushey of the Pittsburgh Post-Gazette found similar results.[35] In his examination of over 1500 cases throughout the nation, Moushey discovered that "prosecutors routinely withhold evidence that might help prove a defendant innocent."[36] He found that prosecutors intentionally withheld evidence in hundreds of cases during

the past decade, but that courts overturned verdicts in only the most extreme cases.[37]

Few defense attorneys have the time, resources, or expertise to conduct massive investigations of prosecution officials. Nor should the discovery of prosecutorial misconduct depend on investigative reporting. However, the current law and practices result in the random and infrequent discovery of *Brady* violations. Even when discovered, remedies for the accused and punishment of the offending prosecutor are rare and inadequate.

Misconduct that Leads to a Death Sentence

Prosecutorial misconduct in any case is reprehensible and can lead to the wrongful conviction of the innocent. When misconduct occurs in a capital case, however, the stakes are the highest because an innocent person might be sentenced to death. In fact, prosecutorial misconduct has been discovered in an extraordinary number of capital cases.[38] Although various types of misconduct have been reported in capital cases, a high percentage of these cases, 16 - 19%,[39] involve *Brady* violations. Delma Banks' case is one example.[40] The misconduct in Banks' case was so egregious that even the United States Supreme Court, which had been unreceptive to claims of prosecutorial misconduct in the past, provided relief.[41]

In 1980, Texas authorities charged Delma Banks with the death of 16-year-old Richard Whitehead. Prior to Banks' trial, the prosecutor informed Banks' defense attorney that he had turned over all discoverable information.[42] In fact, the prosecutor failed to reveal key exculpatory information about two of its primary witnesses – Charles Cook and Robert Farr. During the trial, Cook testified that Banks had confessed to killing Whitehead and that he saw Banks with blood on his leg and in possession of a gun soon after Whitehead's death.[43] On cross-examination, Cook denied that he rehearsed his testimony with law enforcement officials.[44] Farr testified during the trial as well, and corroborated key aspects of Cook's testimony.[45] During Farr's cross-examination, he denied that law enforcement officials promised him anything in exchange for his testimony.[46] Farr also testified during the penalty phase of Banks' trial in support of his death sentence.[47] Banks was sentenced to death.[48]

Banks filed several post-conviction motions in Texas state courts.[49] The Court denied the first two motions on grounds unrelated to alleged *Brady* violations, but the third motion alleged that the prosecutor failed to reveal exculpatory information about Cook and Farr.[50] The third motion was denied, but Banks raised the allegations of *Brady* violations again in 1996 in a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Texas.[51] Prior to an evidentiary hearing on Banks' motion, the magistrate judge ordered the prosecutor to turn over the prosecutor's trial files.[52] Information in the prosecutor's files, affidavits signed by Cook and the deputy Sheriff, and evidence uncovered at the hearing proved extraordinary and egregious prosecutorial misconduct.[53]

Hidden in the prosecutor's file was a 74-page transcript of Cook's interrogation by law enforcement officers and prosecutors.[54] During this interrogation, Cook was coached repeatedly on what to say at trial and how to reconcile his many inconsistent statements.[55] In his affidavit, Cook stated that he was warned that if he did not conform his testimony to the state's evidence, he would "spend the rest of his life in prison."[56] The deputy sheriff testified at the hearing, and revealed, for the first time, that Farr, the other witness, was a paid police informant who received $200 for his assistance in Banks' case.[57]

It is not surprising that very few prosecutors are referred to state disciplinary authorities. In many ways, the phenomenon brings to mind the old saying, "If you shoot at the king, you'd better kill him."

The prosecutor obviously knew that Cook's testimony had been coached, even scripted, and that Farr was a paid informant. These facts were clearly exculpatory and should have been revealed to the defense prior to trial. Furthermore, the prosecutor knew that Cook and Farr committed perjury when they denied these facts under oath during the trial, yet he allowed these lies to become part of the record and even based part of his closing argument on the credibility of both witnesses.[58]

The magistrate judge granted partial relief after the evidentiary hearing, recommending a writ of habeas corpus as to the death sentence, but not the guilty verdict.[59] The District Court adopted the magistrate's recommendation, but the Court of Appeals for the Fifth Circuit reversed the District Court's grant of partial relief to. Banks.[60] In March 2003, just ten minutes before Banks' scheduled execution by lethal injection and after he had been strapped to the gurney, the Supreme Court issued a stay of execution while it decided whether to review Banks' case.

The Court ultimately decided to hear Banks' claims and overturned his death sentence on February 24, 2004, by a 7-2 vote.[61] In reversing the Fifth Circuit's decision, the Supreme Court held that Banks had demonstrated all three elements of a *Brady* prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[62]

The Court used particularly harsh language in criticizing the prosecutor's conduct:

> "The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to ... discover the evidence."[. . .]A rule thus declaring '"prosecutor may hide, defendant must seek,'" is not tenable in a system constitutionally bound to accord defendants due process." [63]

The grave injustices in Delma Banks' case were, unfortunately, not unusual. *Brady* violations are very common in prosecutors' offices, even violations as egregious as those in Banks' case.[64] The Supreme Court and lower courts have affirmed convictions in cases involving similar violations.[65] So why did the Court provide relief for Delma Banks? There are a number of possible explanations.

First, Banks faced death at the hands of the state in a case where prosecutors deliberately withheld evidence. The Court has always noted that "death is different"[66] and has provided more protections for defendants facing death than for others.[67] The Supreme Court undoubtedly has been affected by the growing evidence of innocent people being freed from death row as a result of DNA evidence and investigative reporting.[68] Its death penalty jurisprudence in recent years reflects more sensitivity to the rights of death row inmates.[69]

Second, the Banks case garnered widespread national attention and support for Banks from an unusual combination of groups and individuals. One of the amicus briefs for Delma Banks was submitted by a group of former federal judges, prosecutors, and public officials, including federal judges John Gibbons, Timothy Lewis and William Sessions. Sessions is also a former director of the Federal Bureau of Investigation. Thomas Sullivan, a former United States Attorney for the Northern District of Illinois, also joined this brief, and the American Bar Association filed an amicus brief on behalf of Mr. Banks.

Third, some have speculated that the Supreme Court has taken umbrage in what it perceives as defiance of its jurisprudence by the Court of Appeals for the Fifth Circuit.[70] There is certainly language in *Banks* that lends some credence to this theory. In *Banks*, the Court cites and relies upon its holding in *Strickler v. Greene* and chides the Fifth Circuit for ignoring it: "Surprisingly, the Court of Appeals' *per curiam* opinion did not refer to *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), the controlling precedent on the issue of 'cause.'"[71]

Regardless of its reasons, the Court's holding in *Banks* is a welcome departure from its usual deference to prosecutors. It remains to be seen whether *Banks* is the beginning of a trend towards holding the fire to prosecutors' feet or an anomaly attributable to Banks' death row status at a time when the death penalty is under particular scrutiny. The latter characterization is more likely in light of the large body of Supreme Court jurisprudence that defers to prosecutorial power and discretion.

Why Prosecutors Escape Punishment

Prosecutors are rarely punished for misconduct, even when the misconduct causes tremendous harm to its victims. Unfortunately, Delma Banks' experience is not uncommon. The Center for Public Integrity examined over 11,000 cases involving claims of prosecutorial misconduct during a three-year period, and these were only the cases that were reviewed by an appellate court.[72] The courts found prosecutorial misconduct in thousands of theses cases, but affirmed the convictions based on a finding of "harmless error."[73] In more than 2,000 cases in which convictions were reversed, charges ultimately dismissed, or sentences reduced, most of the prosecutors suffered no consequences and were not held accountable or even reprimanded for their behavior.[74]

Ken Armstrong and Maurice Possley found the same lack of punishment and accountability in their 1999 study:

> With impunity, prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious of cases. . . . They have prosecuted black men, hiding evidence the real killers were white. They have prosecuted a wife, hiding evidence her husband committed suicide. They have prosecuted parents, hiding evidence their daughter was killed by wild dogs.
>
> They do it to win.
>
> They do it because they won't get punished.[75]

Armstrong and Possley found that a number of the prosecutors not only totally escaped punishment or even a reprimand, but advanced in their careers.[76] In the 381 cases they examined in which appellate courts reversed convictions based on either Brady violations or prosecutors knowingly allowing lying witnesses to testify, the courts described the behavior in terms such as "unforgivable," "intolerable," "beyond reprehension," and "illegal, improper and dishonest."[77] Yet, of those cases:

> One was fired, but appealed and was reinstated with back pay. Another received an in-house suspension of 30 days. A third

> prosecutor's law license was suspended for 59 days, but because of other misconduct in the case. [. . .] Not one received any kind of public sanction from a state lawyer disciplinary agency or was convicted of any crime for hiding evidence or presenting false evidence, the Tribune found. Two were indicted, but the charges were dismissed before trial.[78]

None of the prosecutors were publicly sanctioned or charged with a crime. It is unclear whether any were sanctioned by state bar authorities because these proceedings are not a matter of public record if the sanction was minor. Several of the offending prosecutors advanced significantly in their careers:

> In Georgia, George "Buddy" Darden became a congressman after a court concluded that he withheld evidence in a case where seven men, later exonerated, were convicted of murder and one was sentenced to death. In New Mexico, Virginia Ferrara failed to disclose evidence of another suspect in a murder case. By the time the conviction was reversed she had become chief disciplinary counsel for the New Mexico agency that polices lawyers for misconduct.[79]

If state bar authorities are hesitant to bring disciplinary actions against prosecutors, it is not surprising that criminal charges are even more infrequent. Yet, much of prosecutorial misconduct is criminal behavior. When prosecutors knowingly put witnesses on the stand to testify falsely, they suborn perjury. Subornation of perjury is a felony in all fifty states.[80] Many *Brady* violations constitute obstruction of justice, which is also a felony in some jurisdictions.[81] Prosecutors are not above the law or immune from prosecution. In fact, as the chief law enforcement officers, they should be held to the highest standard of conduct. Yet despite overwhelming evidence that prosecutors routinely break the law, they are not punished.

One of the rare prosecutions for prosecutorial misconduct occurred in 1999 in DuPage County, Illinois.[82] Three former prosecutors and four sheriff's deputies were indicted and tried for various criminal offenses, including obstruction of justice and subornation of perjury.[83] The charges grew out of allegations that the prosecutors hid exculpatory evidence and knowingly put witnesses on the stand to lie under oath in the trial of Rolando Cruz.[84] Cruz, Alejandro Hernandez and Stephen Buckley faced the death penalty for the abduction, sexual assault and murder of a 10-year-old girl.[85] The facts of the case were particularly gruesome, and there was much pressure to find and convict the perpetrators.

The prosecutors' behavior in the Cruz case was particularly egregious. They hid exculpatory evidence from defense counsel, including a confession to the crime by a convicted murderer and forensic reports from several experts demonstrating that the shoe print in the victim's home did not belong to any of the defendants.[86] Additionally, the deputies involved in the case allegedly fabricated an incriminating statement that they claimed Mr. Cruz made while in jail.[87] In fact, two DuPage sheriff's investigators and an assistant Illinois Attorney General were so convinced of wrongdoing by the prosecutors and deputies that they resigned rather than support the prosecution of Mr. Cruz.[88] Charges against Buckley were ultimately dismissed, but Cruz and Hernandez were tried and convicted.[89] Their convictions were overturned and they were tried and convicted a second time, only to have their convictions reversed again.[90] Neither reversal was based on allegations of prosecutorial misconduct.[91] At Cruz's third trial, there was overwhelming evidence of perjury by the sheriff's deputies, and Cruz was acquitted.[92]

After Cruz's acquittal, the Chief Judge of the DuPage County Circuit Court appointed a special prosecutor to investigate the sheriff's deputies.[93] The special prosecutor expanded his investigation to include the prosecutors and ultimately returned the indictment that led to their trial.[94] The trial received relatively little national coverage, despite its historic significance. According to Armstrong and Possley, only six prosecutors in this century have been prosecuted for the type of misconduct alleged against the Cruz prosecutors.[95] Two were convicted of minor misdemeanors and fined $500, two were acquitted, and charges against the other two were dismissed before trial.[96]

All seven of the defendants – the prosecutors and the sheriff's deputies – were acquitted of all charges.[97] A number of the jurors spent the better part of the evening of the acquittal celebrating with the defendants in a local steakhouse.[98] The former prosecutors – Patrick King, Thomas Knight, and Robert Kilander – went on to pursue successful legal careers. Patrick King is an assistant United States Attorney in the Northern District of Illinois.[99] Thomas Knight practices law in the private sector; and Robert Kilander is a judge in the very court where he faced criminal charges. Thomas Knight eventually filed a lawsuit against Armstrong, Possley and the Chicago Tribune.[100]

Most prosecutors that engage in misconduct not only escape punishment, but advance in their careers. Paul Howes, a former United States Attorney in the District of Columbia, was accused of prosecutorial misconduct on several occasions. After a two-year investigation of Howes' behavior, the Justice

Department's Office of Professional Responsibility concluded that Howes had abused the witness stipend system by doling out excessive payments to cooperating witnesses and their family and friends, who were not witnesses. Acknowledging that Howes' behavior constituted criminal conduct, investigators declined to prosecute him, instead agreeing to drastically reduce the sentences of the defendants convicted in the cases in which misconduct was found.[101] Howes is now a partner at the San Diego firm Lerach, Coughlin, Stoia, Geller, Rudman & Robbins.

Howes' experience is typical. Cook County, Illinois prosecutors Carol Pearce McCarthy, Kenneth Wadas, and Patrick Quinn were all scathingly criticized in appellate opinions for misconduct during trial. All three were promoted to supervisor positions, and all three became judges.[102]

Why do prosecutors escape punishment for prosecutorial misconduct? The responses of the Supreme Court, state and federal disciplinary authorities, and the general public provide some insight. The Supreme Court's deference to prosecutors and the harmless error doctrine might be attributable to the fact that the remedy generally sought is reversal of a criminal case. The Court's hesitancy to reverse criminal convictions when there is substantial evidence of a defendant's guilt indicates that it places a higher premium on affirming convictions than in punishing prosecutors who do wrong. In addition, some might argue that reversing a criminal conviction does not directly or sufficiently punish prosecutors for wrongdoing.

When misconduct is neither acknowledged nor punished, the line between acceptable behavior and misconduct begins to blur.

State and federal bar authorities rarely punish prosecutors for the reasons previously mentioned. First, they seldom receive formal complaints about prosecutors, because the people most likely to discover the misconduct – defense attorneys – fear retaliation from prosecution offices that will continue to wield power and exercise considerable discretion in their clients' cases. Second, even when complaints are made, the punishment is light – perhaps because of the deference and respect prosecutors generally receive from the legal profession.

But what about the general public? On the rare occasions that the public has been informed about prosecutorial misconduct, there has not been public outcry, nor have prosecutors been voted out of office for their behavior. The Chicago Tribune and Pittsburgh Post-Gazette articles reported egregious behavior by local prosecutors, yet these articles did not result in the public taking action against the offending prosecutors. There are a number of possible reasons for the lack of response. Perhaps members of the general public did not read the articles. Or they may have read about the misconduct but dismissed or excused it, indicating a disturbing support of ignoring the rule of law in the interest of catching criminals. On the other hand, the public may not endorse prosecutorial misconduct, but may not know how to take action to stop it.[103] Even if the prosecutor is an elected official who may be voted out of office, the next election may be years away when the prosecutorial misconduct may be long forgotten.

The public may certainly punish prosecutorial misconduct if the offending prosecutor is charged and exercises his/her right to trial. But these prosecutions are extremely rare, and the few in this century have not resulted in serious punishment. It would be unwise to draw any broad conclusions about the general public's reaction to prosecutorial misconduct from these few prosecutions, primarily because there have been too few prosecutions from which to draw a conclusion, and also because the public did not play a role in the outcome of most of the cases since most of them never went to trial. The acquittal of the Cruz prosecutors seems to indicate an acceptance of prosecutorial wrongdoing, at least by the jurors who acquitted them. But because there are so many factors that affect a jury verdict, in the absence of first-hand information from the jurors themselves, one cannot know with certainty what factors or issues led them to acquit.

An informal poll conducted by the Chicago Tribune after the publication of its series on prosecutorial misconduct may offer some guidance on the public's view of prosecutorial misconduct. The Tribune posted the following question: "An investigation by the Chicago Tribune found that prosecutor misconduct is commonplace in felony cases brought in Cook County. But Chicago is not alone. Scores of murder convictions have been thrown out around the country because of dishonest prosecutions. What do you think should be done to remedy this situation?" Readers responded as follows: "[Prosecutors] should be prosecuted for their crimes;" "We need more effective checks and balances on the unfettered discretion about what and whom to charge. We also need a more certain sanction for those prosecutors found guilty of fudging or hiding the evidence;" "The first thing to do is eliminate the immunity that they and our prosecutors, judges, and other bureaucrats do not deserve . . . At a minimum we need to raise the standard of proof in order to execute someone accused of murder . . . Last, but not least, prosecutors need to be prevented from buying testimony from criminals to help prosecute others.;" "We need institutional reform;" "Our judicial system as a whole, needs to be overhauled."[104]

These responses may suggest that, even in cases involving serious criminal behavior, the American public

ultimately wants the laws to be enforced fairly. The poll also suggests that the lack of public outrage over prosecutorial misconduct may be a result of lack of information about what prosecutors do and how they behave.

The Thin Line

Prosecutors wield incredible power and exercise broad discretion in the important decisions they make every day – especially charging and plea-bargaining decisions. Their decision-making is often arbitrary, hasty, and impulsive, sometimes resulting in great disparities among similarly-situated defendants and crime victims. Because prosecutors make these decisions in private without meaningful supervision or accountability, they are rarely punished when they engage in misconduct. In fact, they are often rewarded with promotions and career advancement as long as their conviction rates remain high. This system produces a cycle of misconduct that is continually reinforced. It is easier for prosecutors to secure a conviction when they withhold exculpatory evidence, and since they suffer no consequences for withholding it and are rewarded for securing convictions, they continue the misconduct.

When misconduct is neither acknowledged nor punished, the line between acceptable behavior and misconduct begins to blur. Some prosecutors may not actually realize the illegality of their behavior, especially inexperienced prosecutors in offices that foster a culture of winning at any cost. If a prosecution office does not train its prosecutors to reveal *Brady* information and otherwise play by the rules, these prosecutors may unknowingly cross the line from acceptable to illegal behavior. Even when prosecutors know their behavior is illegal, the harmless error doctrine and the absence of meaningful oversight by bar disciplinary authorities serve to encourage the offending behavior.

Conclusion

When the law is broken by the very people the public trusts to enforce the law, meaningful action must be taken. Prosecutorial misconduct is widespread and unchecked, and it is unlikely that either the courts or the general public will take action to eliminate it. Prosecutors certainly have not policed themselves. Thus, the legal profession must take the lead in instituting meaningful reform that will assure oversight and strict accountability when prosecutors break the law. Although criminal lawyers in individual cases may not have the ability to affect meaningful reform, other lawyers, through local and national bar associations, should advocate for legislation and binding professional rules that will be enforced against wrongdoers. Lawyers have a vested interest in improving the reputation of the profession and in the fair administration of justice for everyone. They also have the expertise to institute reforms and the responsibility to eliminate what has become a shameful epidemic of misconduct among prosecutors.

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[1] In the District of Columbia, adult criminal defendants (in both the federal and local District of Columbia courts) are prosecuted by the U. S. Attorney's Office

[2] *See* http://occ.dc.gov (describing the Attorney General's duties, which include prosecuting juvenile criminal cases). The Corporation Counsel's office is now known as the Office of the Attorney General. *Id.*

[3] STEVEN WEINBERG, CENTER FOR PUBLIC INTEGRITY, BREAKING THE RULES: WHO SUFFERS WHEN A PROSECUTOR IS CITED FOR MISCONDUCT (2003), *available at* http://www.publicintegrity.org/pm/printer-friendly.aspx?aid=25.

[4] *See e.g.*, JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT (Lexis Nexis 2003), SCOTT CHRISTIANSON, INNOCENT, INSIDE WRONGFUL CONVICTION CASES (New York University Press 2004), BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (Westgroup 1999), Casey P. McFadden, *Prosecutorial Misconduct*, 14 GEO. J. LEGAL ETHICS 1211 (2001), Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999), Rick A. Bierschbach, *One Bite at the Apple: Reversals of Convictions Tainted by Prosecutorial Misconduct and the Ban on Double Jeapordy*, 94 MICH. L. REV. 1346 (1996).

[5] Editorial, *Policing Prosecutors,* ST. PETERSBURG TIMES, July 12, 2003 at 16A.

[6] *See* WEINBERG, *supra* note 3.

[7] *See generally*, Chapman v. United States, 386 U.S. 18 (1967) (adopting the harmless error rule and deciding that some constitutional errors are not significant or harmful and therefore do not require an automatic reversal of the conviction). The Court went on to state that, when determining whether the error was harmless, the question is whether the evidence might have contributed to the conviction. *Id*. at 23

[8] *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 414 (2001).

[9] *See* discussion of *Armstrong v. United States*, 517 U.S. 456 (1996) in Chapter Six.

[10] See *Rose v. Clark*, 478 U.S. 570, 580 (1986) (holding that the harmless error standard dictates that courts should not set aside convictions if the error was harmless beyond a reasonable doubt).

[11] 318 U.S. 332 (1943).

[12] *Id.* at 340.

[13] *Id. at 341*.
[14] 411 U.S. 423 (1973).
[15] 461 U.S. 499 (1983).
[16] 424 U.S. 409 (1976).
[17] *Id.* at 430.
[18] *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors For Brady Violations; A Paper Tiger*, 65 N.C. L. Rev. 693 (1987).
[19] NEIL GORDON, CENTER FOR PUBLIC INTEGRITY, MISCONDUCT AND PUNISHMENT: STATE DISCIPLINARY AUTHORITIES INVESTIGATE PROSECUTORS ACCUSED OF MISCONDUCT (2003) *available at* http://www.publicintegrity.org/pm/printer-friendly.aspx?aid=39.
[20] *Id.*
[21] *See* Memorandum from Richard Thornburgh (June 8, 1989), reprinted in In re Doe, 801 F. Supp. 478, 489 (D.N.M. 1992); *see also* discussion of the Thornburgh memo in Chapter Six.
[22] 28 U.S.C. §530B (Supp. IV 1998).
[23] *See* DEP'T OF JUSTICE, BUREAU OF STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES IN 2000 28 (Dec. 2003) *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc00.pdf.
[24] *See* Infra n. 19.
[25] 373 U.S 83 (1963).
[26] 427 U.S. 97 (1976).
[27]Ken Armstrong & Maurice Possley, *Verdict: Dishonor*, CHI. TRIB., January 10, 1999, *available at*, http://www.chicagotribune.com/news/nationworld/chi-020102trial1,1,1548798.story?ctrack=2&cset=true
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *See* Armstrong & Possely, *supra* note 25.
[33] *Id.*
[34] *Id.*
[35] *See* Bill Moushy, *Win at all Costs*, PITTSBURG POST-GAZETTE, *available at*,http:///www.post-gazette.com/win/default/asp (summarizing the entire 10-part series).
[36] *Id.*
[37] *Id.*
[38] Stephen Garvey, *Is it Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1326 n.27 (2004) (noting that 19% of the reversals of capital convictions or sentences in state court and 18% of those in federal court were due to prosecutorial failure to disclose exculpatory evidence or other forms of prosecutorial misconduct) (citing James Liebman, Jeffrey Fagen & Valerie West, *Broken System: Error Rates in Capital Cases, 1973-1995 , available at* http://justice.policy.net/cjedfund/jpreport/liebman2.pdf); James Liebman et al., *Capital Attrition: Error Rates in Capital Case*, 78 TEX. L. REV. 1839, 1850 (2000).
[39] *See* Liebman, *supra* note 36 , at 1850.
[40] Banks v. Dretke, 540 U.S.668 (2004).
[41] *Id.* at 705-06.
[42] *Id*. at 675.
[43] *Id.*
[44] *Id.* at 677.
[45] *Banks*, 540 U.S. at 677.
[46] *Id.* at 678.
[47] *Id.*
[48] *Id.* at 680.
[49] *Id.* at 682.
[50] *Banks*, 540 U.S. at 682,
[51] *Id.*
[52] *Id.* at 683
[53] *Id.* at 685.
[54] *Id.*
[55] *Banks*, 540 U.S. at 685.
[56] *Id.* at 684
[57] *Id.* at 685.
[58] *Id.* at 686.
[59] *Id.*
[60] *Banks*, 540 U.S. at 686-87.
[61] *Id.* at 689
[62] *Id.* at 691(citing Strickler v. Greene, 527 U.S. 263, 281-282 (1999)).
[63]*Id.* at 696.
[64] Carrissa Hessick, *Prosecutorial Subornation of Perjury: Is the Fair Justice Agency the Solution We Have Been Looking For?*, 47 S.D. L. REV. 255, 256 (2002).
[65] *See* Shih Wei Su v. Filion, 335 F.3d 119, 121, 130 (2d Cir. 2003) (affirming the conviction of Shih Wei Su, even though Judge Calabresi acknowledged that "the prosecution knowingly elicited false testimony from a crucial witness."). Judge Calabresi reasoned that the prejudice suffered by Shih Wei Su did not meet the legal standard that would require a dismissal. *Id. See* Editorial, *The Dedge Debacle*, FLORIDA TODAY, *available at* 2004 WLNR 16357164 (asserting that Wilton Dedge was wrongfully imprisoned for twenty-two years before he was finally exonerated by DNA evidence). Prosecutors allegedly suborned perjury when they knowingly encouraged the false testimony of a jailhouse snitch in order to win a conviction, and despite numerous appeals and re-trials, no court ever reversed Mr. Dedge's conviction. *Id. See New York Man Receives $5 Million Settlement for Wrongful Conviction in Child Abuse Case*, NPR: ALL THINGS CONSIDERED, 2003 WL 65514148 (December 16, 2003) (stating that Alberto Ramos spent seven years in prison for rape he did not commit, because the Bronx District Attorney's Office in New York withheld documents, including medical evidence, proving Mr. Ramos' innocence). The only reason this prosecutorial misconduct even came to light was that an insurance company investigator for the victim came across the documents during his investigation.*Id.*
[66] *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976) (recognizing that the "penalty of death is different in kind from any other punishment imposed under our system of criminal justice"); Ford v. Wainwright, 477 U.S. 399, 411 (1986)(paying careful attention to the adequacy of capital proceedings generally as "a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different"); Schiro v. Farley, 510 U.S. 222, 238 (1994) (noting that the unique

nature of capital sentencing procedures derives from the fundamental principle that "death is different").

[67] *See* Ring v. Arizona, 536 U.S. 584, 606 (2002) (recognizing that states have developed complicated sentencing procedures in death cases, because of constraints the Court has held the Eight Amendment imposes), *see also* Maynard v. Cartwright, 486 U.S. 356, 362 (1988) ("Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."); Apprendi v. New Jersey, 530 U.S. 466, 522-523 (Thomas, J., concurring) (stating "[I]n the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment--we have restricted the legislature's ability to define crimes.").

[68] *See* The Innocence Project, http://www.innocenceproject.org/case/display_cases.php?sort=year_exoneration&start=1&end=20(last visited January 25, 2004) (citing 154 Innocence Project exonerations since 1989). In 1999, Steve Mills and Ken Armstrong, of the Chicago Tribune, conducted a multi-part investigative series on the status of Illinois' death penalty. They examined over 285 capital cases since 1977. After conducting the study, Mills and Armstrong concluded, "Capital punishment in Illinois is a system so riddled with faulty evidence, unscrupulous trial tactics and legal incompetence that justice has been forsaken." Steve Mills and Ken Armstrong, *Death Row Justice Derailed*, CHICAGO TRIBUNE, November 14, 1999, http://www.chicagotribune.com/news/nationworld/chi-dpdpillinois-special,1,2049367.special?ctrack=1&cset=true (conducting a multi-part investigative series on the status of Illinois' death penalty, examining 285 capital cases since 1977). Mills and Armstrong concluded, "Capital punishment in Illinois is a system riddled with faulty evidence, unscrupulous tactics and legal incompetence that justice has been forsaked." *Id.*

[69] *See generally*, Ring v. Arizona, 536 U.S. 584 (2002)(holding that the Sixth Amendment requires a jury, not a judge, to determine the presence or absence of aggravating factors in a capital sentencing proceeding); Atkins v. Virginia, 536 U.S. 304 (2002)(determining that executing mentally retarded individuals violates the Eighth Amendment's ban on cruel and unusual punishment); Roper v. Simmons, 125 S.Ct. 1183 (2005)(holding that it is unconstitutional to execute persons who were under the age of 18 at the time of their capital crimes).

[70] See Adam Liptak and Ralph Blumenthal, *Death Sentences in Texas Cases Try Supreme Court's Patience*, THE NEW YORK TIMES (December 5, 2004), *available at* 2004 WLNR 13102712 (suggesting that the Supreme Court's Texas death penalty jurisprudence has been driven, in part, by its growing impatience with the United States Court of Appeals for the Fifth Circuit).

[71] Banks v. Dretke, 540 U.S. 668, 692 n.12 (2000)

[72] *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, THE CENTER FOR PUBLIC INTEGRITY, http://www.publicintegrity.org/pm/

[73] *Id.*

[74] *Id.*

[75] Ken Armstrong & Maurice Possley, *Verdict: Dishonor*, THE CHICAGO TRIBUNE (January 10, 1999) at C1.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *E.g.*, Cal. Penal Code §127 (West 1997) (stating "[a]ny person who willfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured."); Cal Penal Code § 126 (West 1997) (defining perjury as a felony in California, punishable by two, three, or four years in state prison, and thus, subornation of perjury is also punishable by two, three, or four years in state prison); Mich. Comp. Laws. Ann. §750.425 (West 2004)(stating "[a]ny person who shall endeavor to incite or procure any person to commit the crime of perjury, though no perjury be committed, shall be guilty of a felony, punishable by imprisonment in the state prison not more than five years."); Va. Code Ann. §18.2-436 (1975)(explaining that subornation of perjury occurs "if any person procure or induce another to commit perjury or to give false testimony under oath…"); Va. Code. Ann. § 18.2-434 (defining subornation of perjury as a Class 5 Felony).

[81] *E.g.*, D.C. Stat. §22-722 (1981) (stating that obstruction of justice is a Class A felony, requiring that:

(a) A person commits the offense of obstruction of justice if that person:

(1) Knowingly uses intimidation or physical force, threatens or corruptly persuades another person, or by threatening letter or communication, endeavors to influence, intimidate, or impede a juror in the discharge of the juror's official duties;

(2) Knowingly uses intimidating or physical force, threatens or corruptly persuades another person, or by threatening letter or communication, endeavors to influence, intimidate, or impede a witness or officer in any official proceeding, with intent to:

(A) Influence, delay, or prevent the truthful testimony of the person in an official proceeding;

(B) Cause or induce the person to withhold truthful testimony or a record, document, or other object from an official proceeding;

(C) Evade a legal process that summons the person to appear as a witness or produce a document in an official proceeding; or

(D) Cause or induce the person to be absent from a legal official proceeding to which the person has been summoned by legal process;

(3) Harasses another person with the intent to hinder, delay, prevent, or dissuade the person from:

(A) Attending or testifying truthfully in an official proceeding;

(B) Reporting to a law enforcement officer the commission of, or any information concerning, a criminal offense;

(C) Arresting or seeking the arrest of another person in connection with the commission of a criminal offense; or

(D) Causing a criminal prosecution or a parole or probation revocation proceeding to be sought or instituted, or assisting in a prosecution or other official proceeding;

(4) Injures any person or his or her property on account of the person or any other person giving to a criminal investigator in the course of any criminal investigation information related to a violation of any criminal statute in effect in the District of Columbia;

(5) Injures any person or his or her property on account of the person or any other person performing his official duty as a juror, witness, or officer in any court in the District of Columbia; or

(6) Corruptly, or by threats of force, any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding.

(b) Any person convicted of obstruction of justice shall be sentenced to a maximum period of incarceration of not less than 3 years and not more than 30 years, or shall be fined not more than $10,000, or both. For purposes of imprisonment following revocation of release authorized by § 24-403.01, obstruction of justice is a Class A felony); 720 Ill. Comp. Stat. Ann. §5/31-4 (2004) (stating that the obstruction of justice is also a felony. The statute determines that:

A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he knowingly commits any of the following acts:

(a) Destroys, alters, conceals or disguises physical evidence, plants false evidence, furnishes false information; or

(b) Induces a witness having knowledge material to the subject at issue to leave the State or conceal himself; or

(c) Possessing knowledge material to the subject at issue, he leaves the State or conceals himself.

(d) Sentence.

(1) Obstructing justice is a Class 4 felony, except as provided in paragraph (2) of this subsection (d).

(2) Obstructing justice in furtherance of streetgang related or gang-related activity, as defined in Section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act is a Class 3 felony).

[82] Ken Armstrong & Maurice Possley, *Prosecution on Trial in DuPage*, THE CHICAGO TRIBUNE, January 12, 1999, at N1.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *See* Armstrong & Possley, *supra* note 80.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *See* Armstrong & Possley, *supra* note 80.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *See* Armstrong & Possley, *supra* note 80.
[97] *Id.*
[98] Alden Long, *Illinois Prosecutors and Police Acquitted Despite Evidence They Framed Defendant*,June 16, 1999, *at* http://www.wsws.org/articles/1999/jun1999/dupa-j16.shtml
[99] *See Law Enforcers Put on Trial*, Associated Press (Wheaton, Illinois), at http://www.angelfire.com/ny2/bluewall/link6.html (last visited January 28, 2005).
[100] *See Death Penalty News, at* http://venus.soci.niu.edu/~archives/ABOLISH/rick-halperin/jan00/01]01.html (last visited January 28, 2005). [As of February 21, 2004, no trial date had been set in the case, but the judge in the case denied the Tribune's motion to dismiss the case and ruled that it could not appeal that ruling. *Suit Against Tribune Closer to Trial*, CHICAGO TRIBUNE (February 21, 2004), at 2004 WL 69250065. On December 10, 2004, there was an ex parte issuance of a subpoena in the case. Topeka Capital Journal, at 2004 WL 93597414. Based on this information it appears that the lawsuit is ongoing, and there is no resolution at this time.
[101] *See* Henri E. Cauvin, *Misconduct Probe Cuts Sentences in D.C. Case*, THE WASHINGTON POST, December 24, 2004, at B1. .
[102] *See* Armstrong & Possley, *supra* note 80.
[103] *See, e.g., Punish Prosecutors Who Cross the Line*, 1/27/2004 N.Y.L.J. 2 (January 27, 2004)(describing two citizens' frustration at the misconduct of prosecutors who contributed to the conviction of an innocent man).
[104] *See Trial & Error*, Chi. Trib. Internet Edition, at http://wellengaged.com/engaged/discussion.cgi?c=nation&f=0&t=192 (last visited Mar. 6, 2000) (listing Tribune reader responses to the Chicago Tribune's five-part series on prosecutorial misconduct on a bulletin board at the newspaper's website).

Prosecutorial Misconduct*

Based on a study conducted by the Innocent Project, evaluating the first 100 cases that were overturned based upon post-conviction evidence, of the first 70 cases reversed:

- Over 30 of them involved prosecutorial misconduct.
- Over 30 of them involved police misconduct which led to wrongful convictions.
- Approximately 15 of them involved false witness testimony.
- 34% of the police misconduct cases involved suppression of exculpatory evidence. 11% involved evidence fabrication.
- 37% of the prosecutorial misconduct cases involved suppression of exculpatory evidence. 25% involved knowing use of false testimony.

*Innocence Project, *at* http://www.caught.net/innoc.htm.