

CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

PROSECUTORIAL MISCONDUCT: A SYSTEMIC REVIEW

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PRELIMINARY REPORT

July 11, 2007

Review and analysis of the burgeoning number of DNA exoneration cases have called into question deeply rooted assumptions about the justice system and prompted inquiry by many state legislatures. In 2004, the California Senate created the California Commission on the Fair Administration of Justice to examine the causes of wrongful conviction in California and recommend reforms to improve the administration of criminal justice in the State.<sup>1</sup>

The following report was prepared to assist the Commission as it considers the extent to which prosecutorial misconduct may be a factor in California wrongful convictions.

*“[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore...is not that [he] shall win a case, but that justice shall be done... He may prosecute with earnestness and vigor indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.”*

*Berger v. United States* (1935)<sup>2</sup>

INTRODUCTION

Our objective in conducting this study was to determine the type and extent of prosecutorial misconduct in California and to better understand California’s system for regulating and disciplining lawyers and effectiveness in addressing prosecutorial misconduct.<sup>3</sup> In this preliminary report, we detail our review of California appellate

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<sup>1</sup>California Commission on the Fair Administration of Justice, *Welcome* (2006)

<http://www.ccfaj.org/>

<sup>2</sup> 295 U.S. 78, 88

<sup>3</sup> Throughout our investigation, we received generous support from Scott Drexel, Chief Trial Counsel to the State Bar of California.

court opinions that raised the issue of prosecutorial misconduct, *Brady* error and *Batson/Wheeler* error as well as the rules and systems in place meant to address issues of prosecutorial misconduct.<sup>4</sup> Through the course of our investigation, we found that, consistent with the findings of the national studies, prosecutorial misconduct occurs with some frequency in this state and that prosecutors are rarely disciplined for their misconduct.

## PROSECUTORIAL MISCONDUCT: A PROVEN CAUSE OF WRONGFUL CONVICTION

### NATIONAL STUDIES

At least four major studies in recent years have identified prosecutorial misconduct as a significant factor in the conviction of innocent people. These studies also uniformly reported lack of accountability as an obstacle to addressing the problem.

In 2000, Columbia University published *A Broken System: Errors in Capital Cases 1973-1995*, a major study conducted by Professor James S. Liebman of Columbia University School of Law, Professor Jeffrey Fagen of Joseph Mailman School of Public Health, and Valerie West, a doctoral candidate in the Department of Sociology at New York University. This groundbreaking study examined 5,760 capital cases for the period 1973 to 1995 and found the overall rate of prejudicial error to be 68% - nearly seven out of every ten cases. Of the people whose cases were overturned, “7% were (later) found to be innocent of the capital crime.” The authors cited (1) incompetent defense lawyers and (2) police or prosecutors’ suppression of evidence as the most common reasons for error. They noted a dramatic lack of prosecutorial accountability for acts of misconduct.

Referring to professional discipline of prosecutors, Professor Liebman said:

The slap is merely an order to “try the defendant again” or to give him a new sentencing hearing. Bar discipline is almost nonexistent; prosecution for malfeasance is all-but-unheard-of and always unsuccessful in the rare instances in which it occurs; and even more rare are investigations by police or prosecuting agencies themselves to find out why the mistakes that led to reversals and even to the release of innocent condemned prisoners were made.<sup>5</sup>

In 2003, the Center for Public Integrity, a nonpartisan “educational organization created so that important national issues can be investigated and analyzed,” published a

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<sup>4</sup> Add cites

<sup>5</sup> James S. Liebman, *The Overproduction Of Death*, 2030 Columbia L. Rev. 2031, 2121-2122 (2000) (discussing lack of prosecutorial discipline).

major report on prosecutorial misconduct.<sup>6</sup> Center researchers reviewed appellate opinions, trial court rulings and state bar disciplinary throughout the United States for the period from 1970 to 2003. They found that in 2,012 cases, prejudice caused by prosecutors so severe as to warrant “indictments, convictions or sentences” to be reversed. Seventy-five were California cases. In 478 cases, 41 in California, a dissenting or concurring justice voted to reverse the case, and in 45 other California cases, judges criticized the prosecutors.<sup>7</sup> In more than 8,000 cases, courts found misconduct but ruled it harmless; 461 were California cases. Center researchers also found 54 cases that were wrongful convictions, some for serious crimes including murder, rape and kidnapping, and in some, the defendant had been sentenced to death. Of the 2,012 cases reversed because of prosecutorial misconduct, prosecutors were disciplined in just 44 cases, and none were criminally prosecuted.<sup>8</sup>

In a five part series running from January 10<sup>th</sup> through January 14<sup>th</sup>, 1999, the *Chicago Tribune* published the findings of another major study on prosecutorial misconduct.<sup>9</sup> Investigative reporters Ken Armstrong and Maurice Possley reviewed court records, appellate rulings, and lawyer disciplinary records in cases across the country and found that between 1963 and 1999 at least 381 defendants had a homicide conviction overturned because prosecutors concealed evidence of innocence or presented evidence they knew to be false.<sup>10</sup>

Seeking an explanation for why there was so much and such significant misconduct, Armstrong and Possley interviewed judges, prosecutors, defense attorneys, and legal scholars. The two most common explanations given were (1) prosecutors are trained to win, convictions are a measure of success, and justice is sometimes lost in the process, and (2) there is a lack of incentive to adhere to rules of professional conduct when there is general knowledge that prosecutors are rarely held to answer for it.<sup>11</sup>

Armstrong and Possley did not find a single prosecutor disbarred for engaging in misconduct in connection with the prosecution of a criminal case but did find multiple examples of prosecutors who had been found by appellate courts to have committed misconduct and then later being appointed to the bench.

In a California study published in January of 2006, the *San Jose Mercury News* reported the results of a three-year investigation of the justice system in Santa Clara

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<sup>6</sup> The Center for Public Integrity, *Harmful Error: Investigating America’s Local Prosecutors 2*, (*The Center for Public Integrity 2003*) (2003)

<sup>7</sup> The Center for Public Integrity, *supra.*, app. at 108.

<sup>8</sup> *Id.* at 81-90.

<sup>9</sup> Ken Armstrong and Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win* (Pt. 1 - 5), CHI. TRIB. Jan. 10, 1999, at 1C – Jan. 14, 1999, at 1N.

<sup>10</sup> See Ken Armstrong and Maurice Possley, *The Verdict: Dishonor; Trial & Error: How Prosecutors Sacrifice Justice to Win* (Pt. 1), CHI. TRIB., Jan. 10, 1999, at 1C.

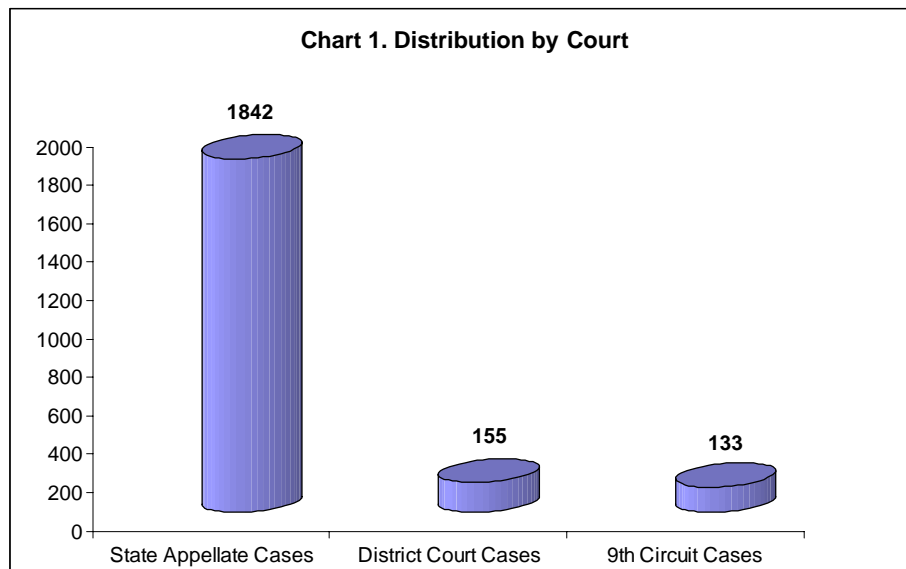
<sup>11</sup> *Id.*

County.<sup>12</sup> *San Jose Mercury News* reporter Fredric Tulsy reviewed 727 published and 200 unpublished cases decided between 1997 and 2002 by the Sixth District Court of Appeal.<sup>13</sup> Tulsy reported finding grave problems with prosecutors, defense attorneys, and appellate courts including several cases of prosecutors withholding evidence from the defense, which was only discovered later, after the defendant’s conviction.<sup>14</sup>

#### CALIFORNIA FINDINGS AND ANALYSIS

In our study, we examined California appellate court opinions that raised the issue of prosecutorial misconduct, Brady error and Batson/Wheeler error.<sup>15</sup> We began by reviewing the cases that considered prosecutorial misconduct.

Using the search term “prosecutorial misconduct,” and the Westlaw database, we reviewed every case decided between January 1, 1996, and December 31, 2007—a period of ten years.<sup>16</sup> We found 2,130 relevant published and unpublished opinions.<sup>17</sup> Of the 2,130 cases, 1,842 California state court cases, 155 federal district court cases, and 133 Ninth Circuit cases. See Chart 1.



<sup>12</sup> See Frederic N. Tulsy, *Tainted Trials, Stolen Justice* (Pt. 1), SAN JOSE MERCURY NEWS, Jan. 22, 2006.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

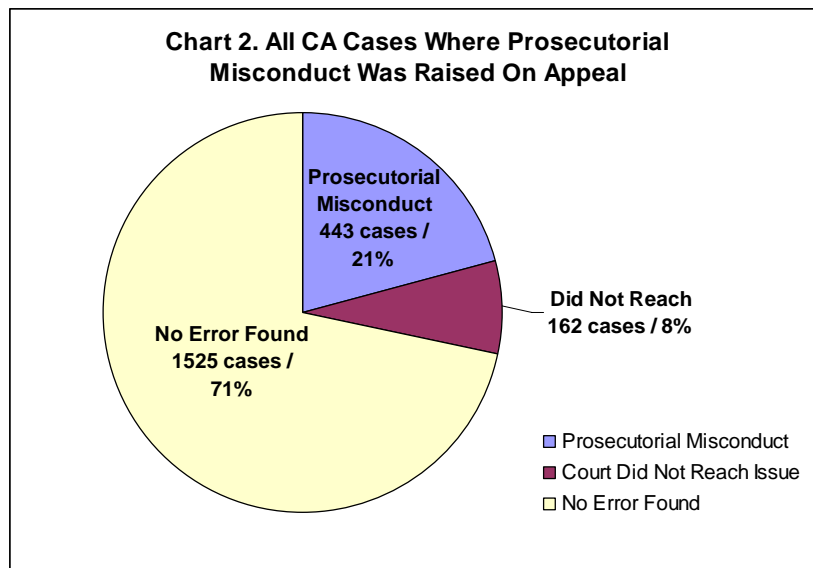
<sup>15</sup> Add cites [and explanation that brady batson report preliminary](#)

<sup>16</sup> The methodology used in this research is explained fully in Appendix A of this report.

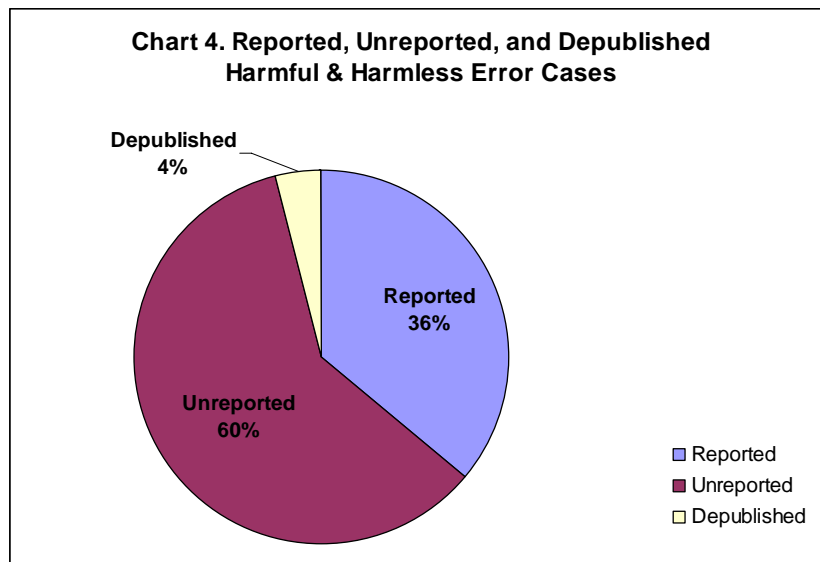
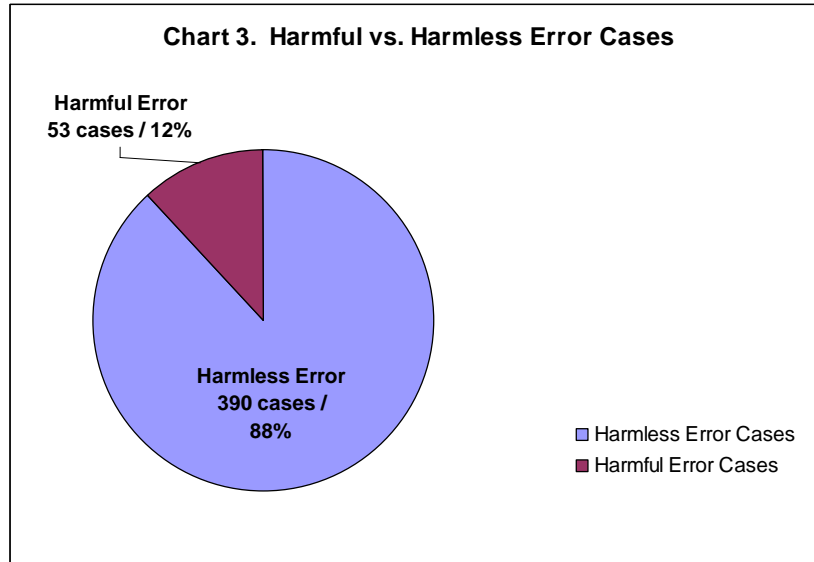
<sup>17</sup> Our initial search generated 2,312 cases, 182 of which bore no relevance to the questions being studied, leaving our relevant database with 2,130 cases.

Of the 2,130 cases in which prosecutorial misconduct was raised on appeal, courts found misconduct in 443 cases. In 1,525 cases, the court found no error; in 162 cases, the court did not make a determination about whether misconduct occurred. See Chart 2.

The reasons cited for not reaching the issue included: waiver (court held that defendant waived the issue on appeal by failing to make specific objections and requests for admonitions at trial); the case was remanded or reversed based on other issues raised by the appeal; or the court declined to make a decision about the complained of behavior by finding that the defendant had suffered no prejudice. In a handful of cases, the court gave no explanation at all for failing to address the claim. [In reading the facts presented in the opinions, there is no question that misconduct occurred in at least some of the 160 undecided cases. However, because the courts did not make clear determinations in these instances, we did not include those cases in our data.]



Of the 443 error cases, Courts found the error harmful in 53 of the cases and harmless in 390. Almost 2/3 of the cases were either not published or depublished. See Charts 3 and 4.



### NATURE AND SCOPE OF PROSECUTORIAL MISCONDUCT

The duties of prosecutors extend beyond the courtroom to include charging, investigation, plea negotiations, and decisions about what evidence is discoverable, whether it is exculpatory, and, if so, when to make it available to the defense. Prosecutors have great influence in sentencing and sole discretion to decide whether the defendant will face the death penalty. In each of these areas, there is a risk of misconduct that may lead to a wrongful conviction.

#### Zacharias Model

In a 2001 law review article, Professor Fred C. Zacharias created a model for understanding the range and nature of prosecutorial misconduct. Zacharias describes prosecutorial misconduct as typically occurring at five stages or “broad areas of activity: abuse of office in the charging stages; abuses in investigating crimes, including misuse of grand

juries; pretrial misconduct (particularly misconduct in discovery); trial misconduct; and miscellaneous other activity.”<sup>18</sup>

Within each stage of his model, Professor Zacharias created subcategories of the activities most likely to result in a finding of prosecutorial misconduct. During investigation, prosecutors may (1) improperly examine suspects, (2) authorize others to do so, (3) make misrepresentations to witnesses or defendants or (4) put their own interests above their ethical obligations.<sup>19</sup> In charging prosecutors may (1) overcharge for bargaining purposes or (2) file charges without sufficient evidence. In the pretrial stage, prosecutors may (1) withhold exculpatory evidence or (2) interfere with defense access to witnesses. For the trial stage, Zacharias created three categories to represent the three broad categories of activities that make up prosecutorial misconduct at trial: (1) use of false evidence/improper examination of witnesses; (2) improper argument; and (3) vouching for witnesses or expressing personal opinions. “Miscellaneous other activity” includes: (1) improper public statements and (2) failure to report misconduct/ineffective assistance of other lawyers. In this study, we tracked the types of misconduct we found by the stage in which it occurred.

## Types & Stages of Misconduct

Investigation	Charging	Pretrial	Trial
Examining suspects improperly	Charging without sufficient evidence	Failing to disclose exculpatory evidence	Use of false evidence/improper examination of witnesses
Authorizing improper contact with represented persons	Overcharging for bargaining purposes	Interfering with defendants' access to witnesses	Improper argument
Making misrepresentations to witnesses or defendants			Vouching
Conflicts with the prosecutors own interests			

### CA CASE DISTRIBUTION BY STAGES

In the California appellate cases we reviewed, we found three cases of error in the investigation stage, all involving prosecutors who examined suspects improperly. We found no cases in the charging stage.

<sup>18</sup> Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C.L. Rev. 721, 731 (2001).

<sup>19</sup> See *Quiroz v. Licalsi*, 2005 U.S. Dist. LEXIS 30182 (2005)

In the pretrial stage, we found three cases of prosecutors interfering with defense access to witnesses and 129 examples of prosecutors withholding exculpatory evidence in violation of *Brady v. Maryland*.<sup>20</sup> Given the odds against a defendant overcoming the obstacles in the way of proving a “*Brady*” violation, the 129 cases in our sample by no means reflect the extent of the problem. A defendant attempting to prove a *Brady* violation faces a “Catch-22.” --- To prove the evidence is being withheld, she has to first prove it exists – which she cannot prove because the evidence she needs to prove it is the evidence being withheld.

Barry Scheck, a recognized expert on wrongful convictions, pointed to the difficulty of proving *Brady* violations within the limitations of current criminal discovery rules,

Prosecutorial misconduct, just like egregious failures by defense attorneys, plays a large role in the conviction of the innocent. It’s not been possible so far to get a precise assessment on the extent of the problem because the most frequent offense is suppression of *Brady* material, and it is often difficult without full blown civil litigation to ascertain whether the “*Brady*” violation was committed by police alone, prosecutors alone, or both. It is clear, however, that the bar does little or nothing to discipline or deter misconduct by prosecutors or unethically deficient or improper performance by defense counsel. Given the great difficulties attendant to bringing civil rights claims, there must be much greater vigilance by the bar through disciplinary proceedings to deal with attorney misconduct prosecutorial overreaching and defender ineptitude.<sup>21</sup>

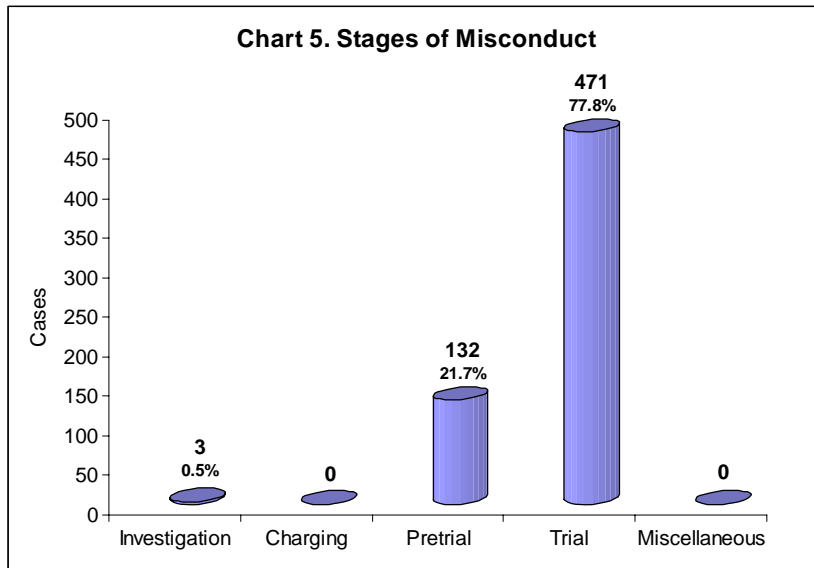
Because appellate cases overwhelmingly review trial proceedings, predictably, we found that the greatest number of misconduct cases reviewed by the appellate courts involved trial misconduct, accounting for 77.8% of the total. Of those, we found 242 cases where prosecutors used false or misleading evidence or improperly examined witnesses, 187 cases of improper argument, and 22 cases where prosecutors vouched for the credibility of witnesses or otherwise inappropriately expressed their personal opinions. Separately, we searched for cases involving improper jury selection during the same time period and discovered 20 *Batson/Wheeler* violations that resulted in reversals or remands.<sup>22</sup> See Chart 5 and Table 1

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<sup>20</sup> Because we knew the term “prosecutorial misconduct” usually refers to a specific kind of behavior in front of a jury and may not fully reflect all prosecutorial misdeeds, we later searched separately for cases involving *Brady* violations and found an additional 129 examples of prosecutors withholding exculpatory evidence. Our research into California *Brady* violations is ongoing and will be published in a future report.

<sup>21</sup> Email from Barry Scheck, Co-Founder and Co-Director of the Innocence Project at Benjamin N. Cardozo School of Law, to Kathleen Ridolfi, Professor of Law, Santa Clara University School of Law (Jul. 6, 2007, 11:21 am PST) (on file with author).

<sup>22</sup> Seventeen of the 20 cases (85%) involved improper exclusion of African-American jurors.



Stage	Type of Misconduct	# of Cases
Investigation	Examining suspects improperly	2
	Authorizing improper contact with represented persons	1
	Making misrepresentations to witnesses or defendants	0
	Conflicts with the prosecutors own interests	0
	<b>Total Instances of Misconduct During Investigation</b>	<b>3</b>
Charging	Charging without sufficient evidence	0
	Overcharging for bargaining purposes	0
	<b>Total Instances of Misconduct During Charging</b>	<b>0</b>
Pretrial	Failing to disclose exculpatory evidence	129
	Interfering with defendants' access to witnesses	3
	<b>Total Instances of Misconduct During Pretrial</b>	<b>132</b>
Trial	Use of false evidence/improper examination of witnesses	242
	Improper argument	187
	Vouching	22
	Improper jury selection ( <i>Batson/Wheeler</i> error)	20
	<b>Total Instances of Misconduct During Trial</b>	<b>471</b>
Misc.	Improper public statements	0
	Failure to report misconduct/IAC of other lawyers	0
	<b>Total Instances of Miscellaneous Misconduct</b>	<b>0</b>

## BEYOND THE TRIAL TRANSCRIPTS: WHERE MISCONDUCT MAY HIDE

Looking beyond the appellate cases, there are numerous other examples of misconduct committed by California prosecutors. These cases involve some of the most extreme examples of misconduct and are the cases often most difficult to find because the egregious nature of the misconduct leads to dismissal of the case or a significantly more favorable plea bargain for the defendant.<sup>23</sup> Without a trial record, there is no appeal and no ready way to track them.

In its series examining prosecutorial misconduct nationally, the *Chicago Tribune* emphasized how difficult it was to even find data on the issue, stating, “Wrongdoing by prosecutors remains largely undetectable, with puzzle pieces scattered in warehoused trial transcripts and in court rulings that are hard to find or connect.”<sup>24</sup> The Tribune found many of its case studies in traditionally unrecorded sources such as rulings by trial judges and unpublished appellate court opinions.<sup>25</sup> This included eight instances where a sentence of death was reversed due to prosecutorial misconduct.<sup>26</sup> In 2006, The *San Jose Mercury News* reported similar difficulty locating information about prosecutorial misconduct in Santa Clara County. Nearly 30% of their case studies were found by reviewing files other than published opinions and by directly interviewing criminal attorneys.

A few case examples outside the appellate record—gleaned from news reports and civil lawsuits—are listed in Appendix E. Because these cases did not result in convictions following trial, they are not among the cases we reviewed. Moreover, it is also difficult for anyone else to file a complaint of prosecutorial misconduct.<sup>27</sup> Few civil actions are brought because prosecutorial immunity largely precludes recovery and prosecutors have no direct client who will complain. Likewise, few stories of prosecutorial misconduct are sensational enough to make it into the news. Thus news sources provide just examples of the kind of misconduct occurring in California cases.

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<sup>23</sup> Many cases of prosecutorial misconduct are not revealed on the face of the trial record. Issues such as failure to provide discovery, exculpatory evidence, or backroom deals with witnesses do not get revealed until after the conviction. The misconduct is then presented, if at all, by way of petition for writ of habeas corpus, generally in the trial court. Verification of such misconduct and relief to the defendant granted by the trial court are not published matters.

<sup>24</sup> Ken Armstrong and Maurice Possley, *The Verdict: Dishonor; Trial & Error: How Prosecutors Sacrifice Justice to Win* (Pt. 1), CHI. TRIB., Jan. 10, 1999, at 1C.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> See Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 Sw. L.J. 965, 982-88 (1984) (proposing the establishment of a “Prosecutors’ Grievance Council”).

And, since California judges do not report errant prosecutors as required by law, the State Bar does not have a record either.<sup>28</sup>

There is also substantial evidence to show that misconduct by prosecutors is not limited to the trial stage and since the vast majority of cases are disposed of through plea agreements, it is impossible to estimate how often unreviewable prosecutorial misconduct occurs.<sup>29</sup> Prosecutors who overcharge place unfair pressure on a defendant to plead guilty, and prosecutors who fail to disclose exculpatory evidence before a plea may pressure a defendant to plead guilty, when, had he known about the evidence, he would not have agreed. The Ramparts cases provide nearly 100 examples of people who plead guilty to crimes they did not commit because of the threat of long prison sentences. This kind of misconduct is nearly impossible to prove and almost entirely evades review.<sup>30</sup>

#### PROFESSIONAL DISCIPLINE OF PROSECUTORS: THE FAILURE OF SELF-REGULATION

In the 1976 case of *Imbler v Pachtman*, the U.S. Supreme Court held that prosecutors have absolute immunity from civil judgment because they are already subject to professional discipline for any misconduct. As the Court explained, “a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.”<sup>31</sup> Recent studies however, show that the Supreme Court’s reliance on the states to discipline its prosecutors is unfounded. Our findings confirm this finding for California.

In February, 2006, the *San Jose Mercury News* reported that after reviewing 1,464 lawyer discipline cases published in the *California Bar Journal* between 2001 and 2005, they found just one case where disciplinary action was taken against a *prosecutor* for misconduct.<sup>32</sup> Scott Drexel, Chief Trial Counsel for the California State Bar disagreed with the *Mercury News* findings, citing *three* cases where

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<sup>28</sup> See *infra* pp. See also, Ken Armstrong and Maurice Possley, *The Flip Side of a Fair Trial; Trial & Error: How Prosecutors Sacrifice Justice to Win* (Pt. 2), CHI. TRIB., Jan. 11, 1999, at 1N.

<sup>29</sup> See Chart 6 *supra*.

<sup>30</sup> Pressure to plead guilty also comes from defense attorneys and judges. In the James Ochoa case, also one of California’s 10 DNA exoneration cases, the judge who presided over the trial threatened to sentence Mr. Ochoa to life in prison if he did not accept a plea bargain before trial. He had been charged with one count of carjacking and two counts of robbery – both with gang enhancements. He was facing 50 years in prison.

Three days into the jury trial, with the threat of life in prison hanging over him, James Ochoa pled guilty to one count of robbery and admitted the street gang enhancement in exchange for two years in prison and the dismissal of the remaining charges. DNA testing later proved his innocence. The evidence that was used to prosecute Mr. Ochoa was very weak, consisting of two equivocal and suggestive eyewitness identifications and dog scent evidence that was likely contaminated. Moreover the prosecutor had strong evidence of third party liability.

<sup>31</sup> *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

<sup>32</sup> Mike Zapler, *State Bar Ignores Errant Lawyers*, SAN JOSE MERCURY NEWS, Feb. 12, 2006.

sanctions were imposed for prosecutorial misconduct.<sup>33</sup> At a rate of less than one a year, these findings demonstrate that California prosecutors are rarely made to answer for misconduct.

While appellate courts seldom mention the names of prosecutors, we were able to identify 347 of the prosecutors who committed misconduct - only eight had been disciplined. Six had been suspended for failure to pay bar fees, and one for MCLE non-compliance. Just three were discipline for misconduct committed in connection with the prosecution of a criminal case.

Thirty were repeat offenders – two committed misconduct in three different cases. Two-thirds of the repeat offenders committed the exact same misconduct in multiple trials. See Table:

### RECIDIVIST PROSECUTORS

County & Pros. ID	Misconduct & Finding	State Bar Action Taken
Alameda	P.1 Evidence (HF)	None
	Appealing to Juror Emotion or Religious Beliefs (HL)	None
	P.2 Evidence and Denigrating/ Impugning Defense (HL)	None
	Improper Cross-Examination of Defense Witness (DNR) <sup>34</sup>	None
	Denigrating/Impugning Defense (HL)	None
Fresno	P.3 Improper Cross-Examination of Defense Witness (DNR)	None
	P.4 Improper Cross-Examination of Defense Witness (HL)	None
Kings	Evidence (HL)	None
	P.1 Misstating Law and Case (HL)	None
Kern	P.1 Appealing to Juror Emotion or Religious Beliefs (HL)	None
	P.1 Denigrating/Impugning Defense (HL)	None
	P.1 Denigrating/Impugning Defense and Evidence (HL)	None
Los Angeles	P.1 Evidence (HF)	None
	Denigrating/Impugning Defense (HL)	None
	P.2 Denigrating/ Impugning Defense (HL)	None
	P.2 Denigrating/ Impugning Defense and Appeal to Juror Emotion or Religious Beliefs (HL)	None
Los Angeles	P.3 Evidence (HL)	None
	Appealing to Juror Emotion or Religious Beliefs (DNR)	None
	P.1 Discovery/Exculpatory and Denigrating/Impugning Defense (HL)	None
Los Angeles	Denigrating/Impugning Defense (HL)	None
	P.2 Improper Cross Examination of Defense Witness and Evidence (HL)	None

<sup>33</sup> Scott Drexel, *Headlines Aside, State Bar Does Discipline Bad Lawyers*, SAN JOSE MERCURY NEWS.

<sup>34</sup> DNR is the abbreviation for “did not reach.” This abbreviation is used when the court did not comment on the prosecutor’s improper conduct.

County & Pros. ID	Misconduct & Finding	State Bar Action Taken
County & Pros. ID	Improper Cross-Examination of Defense Witness and Evidence (HL)	None
	Evidence (HL)	None
	P.3 Improper Cross-Examination of Defense Witness (HL)	None
	Denigrating/ Impugning Defense (HL)	None
	P.4 Denigrating/ Impugning Defense (HL)	None
	Denigrating/Impugning Defense (HL)	None
	P.5 Evidence and Improper Cross-Examination of Defense Witness (HL)	None
	Evidence (DNR)	None
	P.6 Denigrating/Impugning Defense and Improper Cross-Examination of Defense Witness (HL)	None
	Denigrating/Impugning Defense and Improper Cross-Examination of Defense Witness (DNR)	None
P.7 Appealing to Juror Emotion or Religious Belief (HL)	None	
Misstating Law (HL)	None	
P.8 Improper Cross-Examination of Defense Witness (HL)	None	
Evidence (DNR)	None	
P.9 Evidence (DNR)	None	
Improper Cross-Examination of Defense Witness (DNR)	None	
	<b>Misconduct &amp; Finding</b>	<b>State Bar Action Taken</b>
	Evidence (HL)	MCLE non-compliance - Admin
P.1		Inactive - Not eligible
	Evidence (HL)	9/3/2002 - 1/17/2003 - Currently active
Orange	P.2 Denigrating/Impugning Defense Case (HL)	None
	Appealing to Juror Emotion or Religious Beliefs (HL)	None
	Improper Cross-Examination of Witness and Denigrating/Impugning Defense (HL)	None
	P.3 Denigrating/Impugning Defense (HL)	None
	Denigrating/ Impugning Defense (HL)	None
P.4 Evidence (HL)	None	
Appealing to Juror Emotion or Religious Beliefs (DNR)	None	
P.5 Constitutional Violation (DNR)	None	
Evidence (HL)	None	
Riverside	P.1 Denigrating/Impugning Defense (HL)	None
	Evidence and Appealing to Juror Emotion or Religious Beliefs (HL)	None
San Mateo	P.1 Appealing to Juror Emotion or Religious Beliefs (HL)	None
	Denigrating/Impugning Defense (DNR)	None
	Misstating Law (DNR)	None
P.2 Appealing to Juror Emotion or Religious Beliefs and Denigrating or Impugning Defense (DNR)	None	
Sacramento	P.1 Misstating Law, Evidence and Denigrating/Impugning Defense (HL)	None

	Misstating the Law <b>(DNR)</b>	None
<b>Santa Clara</b>	<b>P.1</b> Evidence <b>(HL)</b>	None
	Evidence and Discovery/Exculpatory <b>(HL)</b>	None
	<b>P.2</b> Denigrating/Impugning Defense and Appealing to Juror Emotion or Religious Beliefs <b>(HL)</b>	None
	Court did not discuss prosecutorial misconduct <b>(DNR)</b>	None
	<b>P.3</b> Improper Cross-Examination of Defense Witness <b>(HL)</b>	None
	Evidence <b>(DNR)</b>	None

Failure to discipline California prosecutors is not the fault of the State Bar.<sup>35</sup> The California rules for reporting prosecutorial misconduct are inadequate, and the rules that do exist are unenforced. Under California Business and Professions Code section 6086.7(a)(2), judges are required to notify the State Bar “whenever modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney” – this provision is inadequate. By limiting a judge’s duty to report only cases in which the judgment has been “modified or reversed,” the rule prevents reporting of the vast majority of misconduct cases.

There is no meaningful difference between the conduct of the prosecutors in the cases “modified or reversed” from the actions of prosecutors in the harmless error cases. There are multiple examples of the striking similarities in the cases we reviewed. (See, Appendix D)

These findings are not surprising since decisions that concern a finding harmless error depend on the overall strength of the evidence, factors unrelated to what the prosecutor did. A 2007 Court of Appeal opinion illustrates the point well. In *People v. Zurinaga*, 148 Cal. App. 4<sup>th</sup> 1248 (2007), the defendant was on trial for a home invasion robbery of 10 students in their college dormitory. One of the defense arguments was that Mr. Zurinaga and his co-defendant alone could not have held 10 people hostage for an extended period of time. To rebut this argument, the prosecutor in closing analogized the experiences of the dorm students with the experiences of the victims of September 11 killed on the hijacked airplanes and in the World Trade Center.<sup>36</sup> For emphasis, the prosecutor projected a chart listing the airlines, flight numbers, time of departure, and the number of passengers and crew on each of the planes involved in the infamous terrorist attacks. In finding the prosecutor committed misconduct, the court said,

We consider it naïve at best - and disingenuous at worst – to suggest, as the prosecutor did, that the mere mention of 9/11 does not continue

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<sup>35</sup> According to Drexel, every complaint made against a lawyer and every report of misconduct made to the State Bar is reviewed. In some cases, the State Bar initiates an investigation to determine whether disciplinary action is warranted.

<sup>36</sup> See *People v. Zurinaga*, 148 Cal. App. 4<sup>th</sup> 1248 (2007).

to invoke fear, dread and anger in the listener. As defense counsel aptly noted, “I don’t think it would be possible to come up with a more emotional topic or example or circumstance for the jury pool and also something that’s more universal to the American people and the jury pool that was present here than the 9-11-01 incident.”<sup>37</sup>

(*Id.* at 1260). But despite the egregiousness of the prosecutor’s conduct, the *Zurinaga* court found no prejudice and upheld the conviction. In our review of ten years of prosecutorial misconduct cases in California, only 12% were declared harmful.

California’s rules for reporting prosecutorial misconduct need reform. By this state’s demonstrated concern for “modifications and reversals” over the misconduct of prosecutors, the California Business and Professions Code does not discourage misconduct; if anything, it sends the message that it does not matter what a prosecutor does, provided withstands appellate scrutiny. Moreover, even in its present weak formulation, the rule is not enforced. Despite regular notice to judges of their obligation to report, compliance is extremely poor.<sup>38</sup> In short, California’s current reporting rules are wholly inadequate.

The absence of oversight of this State’s prosecutors comports with the results of national studies and the many commentators who have raised serious concerns about lack of prosecutorial accountability.<sup>39</sup> Professor Bennett Gershman, an expert who has written extensively on the subject, said that discipline of prosecutors is so rare as to make its “use virtually a nullity.” Our research confirms that Professor Gershman’s statement is true in California.

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<sup>37</sup> *Id.* at 1259-1260.

<sup>38</sup> Drexel, *supra*.

<sup>39</sup> See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C.L. Rev. 721, 722 n.3 and n.4 (2001).

## APPENDIX A: METHODOLOGY

Over eight months, the research team examined published and unpublished California appellate cases from the ten-year period between January 1, 1997, and December 31, 2006. For each of the ten years reviewed, we first searched for the phrase “prosecutorial misconduct” in Westlaw case headnotes in Westlaw’s CA-CS database, using the following search statement: HE(PROSECUTORIAL /2 MISCONDUCT) & DA(AFT 12/31/1996 & BEF 1/1/2007). When we removed the Headnotes limitation from our search, we found that the number of cases containing the term “prosecutorial misconduct” increased tenfold. Because headnotes are editorial interpretations of issues being discussed in a case but not an official part of the court’s decision, we decided not to rely on headnotes to identify our cases to review. Our revised search parameters returned 2,091 appellate case opinions from the California Courts of Appeal and the California Supreme Court.

We next performed an identical search in Westlaw’s DCTCA database to find cases from United States District Courts in California and found 222 cases. Finally, we performed a similar search in Westlaw’s CTA9 database to find cases from the United States Court of Appeals, Ninth Circuit, but added “& CA” to our search statement in an attempt to limit our results to cases originating in California courts. That search returned 150 cases.

We divided the 2,463 cases into batches of 50 or 100 and distributed them to student researchers for analysis. An Excel spreadsheet template and accompanying protocol guide were developed to provide a standardized mechanism for students to document the results of their case analyses. For the cases reviewed by state courts, the template included the following fields: case name and citation; date; crime convicted of; procedural posture; county; appellate district; name of appellate judge writing the opinion; whether or not there was a concurring or dissenting opinion regarding the allegation of prosecutorial misconduct; the name of the prosecutor; the specific allegations of misconduct; the court’s finding vis-à-vis the alleged misconduct; the analysis used by the court to determine whether misconduct had occurred; the opinion’s publication status; whether the court found that the issue of prosecutorial misconduct had been waived; and an open field for additional comments. Nearly identical templates and accompanying protocol guides were developed to record data for the cases from the federal courts, with columns added to accommodate federal district court information and the standard of review for prosecutorial misconduct under federal law.

Once the cases were analyzed and their data recorded, the individual spreadsheets were assembled into a combined master file and key data formats were standardized for sorting purposes. Our first step was to review and discard cases where the term “prosecutorial misconduct” appeared somewhere in the text of an opinion but was not actually a case in which prosecutorial misconduct was alleged (our search returned some cases where the term “prosecutorial misconduct” appeared out of context). We also removed duplicate cases. After performing these steps, we were left with 2,132 cases.

Our next step was to re-examine all the cases where error—both harmful and harmless—was found. This review enabled us to verify the accuracy of the data recorded. Among the cases where the prosecutorial misconduct was found to be harmless, we examined the rationale given by each court in making its determination of harmlessness. Finally, we looked at the nature of the misconduct found and identified the category of bad behavior into which it fell.

### **Other Forms of Prosecutorial Misconduct**

As noted in the Center for Public Integrity’s “Harmful Error” study, the term “prosecutorial misconduct” usually refers to a specific kind of behavior in front of a jury and may not fully reflect all prosecutorial misdeeds. Examples of acts that might not be classified specifically as “prosecutorial misconduct” include *Brady* violations<sup>40</sup> and *Batson/Wheeler* error.<sup>41</sup>

### **Brady Violations**

We once again searched the Westlaw CA-CS database, this time to locate cases where *Brady* violations were specifically alleged, but excluding cases that also contained the phrase “prosecutorial misconduct.” Our search string in Westlaw’s CA-CS database was: (BRADY /10 ERROR VIOLATION) & DA(AFT 12/31/1996 & BEF 1/1/2007) % (PROSECUTORIAL /2 MISCONDUCT). This search returned 154 cases. The same search in the DCTCA database yielded 42 cases; from the CTA9 database, the search yielded 146 cases.

Our preliminary analysis of these results involves only the 154 cases identified from the CA-CS database search. Although limited, these initial results are presented below. In performing our analysis, we again began by reviewing and discarding from our results those cases where our search terms were found in the opinions, but not in a relevant context. Again, we also removed duplicates. Ultimately, we ended up with 136 cases.

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<sup>40</sup> In *Brady v. Maryland*, 373 U.S. 83, the United States Supreme Court held that suppression by the prosecution of evidence favorable to a defendant who has requested it violates due process. Following *Brady*, the prosecutor must disclose materially exculpatory evidence to the defense. Evidence that would serve to reduce the defendant’s sentence must also be disclosed by the prosecution.

<sup>41</sup> In *Batson v. Kentucky*, 476 U.S. 79, the United States Supreme Court ruled that a prosecutor’s use of peremptory challenges may not be used to exclude jurors based solely on their race. The court ruled that this practice violated the Equal Protection Clause of the Fourteenth Amendment. In *People v. Wheeler*, 22 Cal.3d 258, the California Supreme Court held that the right to an impartial jury, as guaranteed by the California Constitution, prohibits the use of peremptory challenges to exclude prospective jurors simply because of their membership in a “cognizable group.” In California, a “*Batson/Wheeler* motion” is used to question whether a particular prospective juror has been the subject of peremptory challenge based on group bias.

	# Cases	Error Found, "Material"	Error Found, "Not Material"	No Error Found	Rate of Material Error	Rate of Not Material Error	Total Rate of Error
CA-CS	136	16	113	7	11.8%	83.1%	94.9%

We plan to submit a report on our complete *Brady* research at a future date.

### **Batson/Wheeler Error**

Commissioner Michael Laurence of the Habeas Corpus Resource Center performed a search of all California appellate court opinions and all federal district court and Ninth Circuit decisions, published and unpublished, decided between January 1, 1997, and December 31, 2006. Using the Westlaw CA-CS, DCTCA, and CTA9 databases, the search string “BATSON V. KENTUCKY” & DA(AFT 12/31/1996 & BEF 1/1/2007), recovered 586 published and unpublished decisions involving *Batson/Wheeler* error. Of these, error was found in 20 cases that resulted in remands or outright reversals. Seventeen of those 20 cases (85%) involved the improper exclusion of African-American jurors.

## APPENDIX B: HARMFUL ERROR CASES

Alexander, 2006 WL 1431195  
Alvarado, 141 Cal.App.4th 1577  
Alvarado, 2006 WL 3487005  
Alves, 2003 WL 502762  
Anzalone, 29 Cal.Rptr.3d 689  
Barrett, 2003 WL 22272309  
Blueford, 312 F.3d 962  
Butler, 1999 WL 33601521  
Cheadle, 2002 WL 31223538  
Combs, 379 F.3d 564  
Contreras, 78 Cal.Rptr.2d 349  
Cooper, 314 F.Supp.2d 967  
Cumberworth, 2006 WL 3549939  
Deal, 2003 WL 22094433  
Delomba, 2003 WL 257916  
Douglas, 2006 WL 2361884  
Dustin, 99 Cal.App.4th 1311  
Gaines, 54 Cal.App.4th 821  
Gantt, 389 F.3d 908  
Garcia, 2005 WL 2387474  
Gomez, 2006 WL 1991740  
Guzman, 2002 WL 819255  
Hall, 82 Cal.App.4th 813  
Hayes, 399 F.3d 972  
Hill, 72 Cal.Rptr.2d 656  
Humphrey, 2004 WL 2896929  
Humphrey, 2005 WL 1620515  
Kasim, 56 Cal.App.4th 1360  
Laviene, 2003 WL 22285604  
Le, 2006 WL 2949021  
Leung, 351 F.Supp.2d 992  
Leyva, 2003 WL 1605777  
Lopez, 41 Cal.Rptr.3d 585  
McCombs, 2002 WL 31863511  
Parham, 2002 WL 176430  
Payton, 299 F.3d 815  
Perlaza, 439 F.3d 1149  
R.T.P., 43 Cal.Rptr.3d 536  
Racimo, 2006 WL 3365860  
Rangel, 2002 WL 31009418  
Rodrigues, 159 F.3d 439  
Roquemoire, 2006 WL 636805  
Sakarias, 25 Cal.Rptr.3d 265  
Salazar, 2004 WL 957701  
Sampson, 2002 WL 462279  
Shazier, 42 Cal.Rptr.3d 570  
Stanley, 2006 WL 1523128  
Tolliver, 2002 WL 498168  
Townsend, 2005 WL 665572  
Urie, 2006 WL 1525832  
Westfall, 2004 WL 171654  
Woods, 2006 WL 3438603  
Young, 2002 WL 31175909

## APPENDIX C: HARMLESS ERROR CASES

Abarquez, 2002 WL 31677173  
Acosta, 84 Cal.Rptr.2d 370  
Aguilar, 2001 WL 1530898  
Aguilar, 2006 WL 2556927  
Aguirre, 2004 WL 473800  
Ahumada, 2006 WL 2349170  
Albert, WL 657117  
Allen, 366 F.3d 823  
Almanza, 2006 WL 3034964  
Alonso, 2003 WL 42556  
Alvarado, 2003 WL 22312098  
Alvarado, 2006 WL 366953  
Anderson, 2003 WL 21278870  
Anthony Ray, 2003 WL 327471  
Archer, 2004 WL 103354  
Arcila, 2003 WL 194948  
Arellano, 97 Fed.Appx. 84  
Austin, 2006 WL 2076846  
Avelino, 2004 WL 247099  
Ayala, 23 Cal. 4th 225  
Baday, 2004 WL 49715  
Badillo, 2003 WL 22311264  
Baires, 2003 WL 150021  
Baker, 2002 WL 3176409  
Ballesteros, 2006 WL 772005  
Barboza, 2003 WL 21310573  
Baskerville, 2003 WL 429501  
Beardslee, 358 F.3d 560  
Bechtel, 2003 WL 253924  
Belden, 2002 WL 90992  
Belei, 99 Fed.Appx. 813  
Bell, 2006 WL 181677  
Bell, 2006 WL 367346  
Benn, 2006 WL 2382918  
Berry, 2006 WL 1633841  
Bland, 2006 WL 217968  
Blaze, 2006 WL 2350006  
Bodnar, 2004 WL 1172980  
Bonds  
Bowie, 2006 WL 205272  
Boyette, 29 Cal.4th 381  
Braddock, 2001 WL 1566430  
Bradford, 15 Cal.4th 1229  
Brooks, 2004 WL 1771388  
Broussard, 2006 WL 2528454  
Brown, 158 F.Supp.2d 1050  
Brown, 2001 WL 1340764  
Brown, 2004 WL 2029759  
Brown, 2006 WL 1062095  
Brown, 31 Cal.4th 518  
Bryden, 73 Cal.Rptr.2d 554  
Burgener, 29 Cal.4th 833  
Burleson, 2003 WL 1233132  
Busby  
Butler, 2002 WL 1038853  
Byrd, 2006 WL 1493795  
Caico, 2006 WL 3191135  
Cain, 2005 WL 2105247  
Calderon, 2006 WL 306920  
Canning, 2006 WL 3317941  
Canody, 2002 WL 1732781  
Canody, 2006 WL 3437914  
Cantabrana, 2006 WL 3423267  
Cardenas, 2003 WL 40812  
Cardona, 2006 WL 2413655  
Carr, 2006 WL 515479  
Carrillo, 2006 WL 1933367  
Castillo, 2006 WL 1493749  
Castro, 2004 WL 1576438  
Castro, 2005 WL 3196596  
Chachagua, 2004 WL 440924  
Chapman, 2006 WL 2338226  
Chism, 2003 WL 353487  
Cisneros, 2006 WL 1769596  
Clark, 2004 WL 2326373  
Claude, 2006 WL 1493732  
Clay, 2002 WL 1473116  
Contreras, 2002 WL 1797487  
Contreras, 2004 WL 1303654  
Cortez, 2003 WL 21781141  
Cousins, 2002 WL 31450103  
Cox, 30 Cal.4th 916  
Craft, 2006 WL 1778901  
Craver, 2006 WL 878325  
Crawford, 2006 WL 3493046  
Crespo, 2002 WL 18318  
Cruz, 2003 WL 141472  
Cruzata, 2003 WL 22093914

Cuevas, 82 Fed.Appx. 546  
Culler v. Rocha WL 68511  
Dancy, 2002 WL 343389  
Davidson, 2002 WL 682803  
Davis v. Woodford, 333 F.3d 982  
Davis v. Woodford, 384 F.3d 628  
Davis, 2006 WL 2497590  
Davis, 36 Cal.4th 510  
Davis, 91 Cal.Rptr.2d 179  
Del Pozo, 2004 WL 2106575  
Delgado, 2004 WL 1535640  
Dellums, 1998 WL 525792  
DeLong, 2002 WL 569406  
Derian, 2003 WL 21311245 (Ct. App. 2003)  
Diaz, 2006 WL 2555922  
Dietz, 2006 WL 189289  
Doran, 2003 WL 21246597  
Dow, 2004 WL 2367997  
Drayden, 1998 WL 398157  
Duarte, 2006 WL 2076847  
Duran, 2001 WL 1656607  
Earley, 18 Cal.Rptr.3d 694  
Edwards, 2003 WL 21241212  
Ellard, 2003 WL 22183671  
Ellington, 2004 WL 649577  
Enciso, 2006 WL 3004204  
Erickson, 57 Cal.App.4th 1391  
Ervin, 22 Cal.4th 48  
Evers WL 3095769  
Faltisco, 2004 WL 1798067  
Feathers, 2006 WL 2199495  
Fields, 309 F.3d 1095  
Fitzgerald, 2003 WL 1343268  
Flores, 2002 WL 66151  
Flores, 2003 WL 1522005  
Flores, 2006 WL 414815  
Foster, 2003 WL 1460006  
Foster, 2006 WL 3412538  
Frierson, 2006 WL 2637658  
Frye, 77 Cal.Rptr.2d 25  
Gallegos, 2002 WL 595053  
Galloway, 2002 WL 368648  
Garcia, 2004 WL 1682775  
Gatewood, 2002 WL 31667940  
Gaylord, 2003 WL 21403797  
George, 2003 WL 22384884  
Gerwald, 2003 WL 21324399  
Gibson, 2006 WL 1163270  
Glaros, 2002 WL 570908  
Gomez, 2006 WL 2329420  
Gonzalez, 2006 WL 1314029  
Gonzalez, 2006 WL 711100  
Gospel, 2006 WL 1413545  
Grandy, 50 Cal.Rptr.3d 189  
Gray, 2003 WL 21224779  
Gray, 2006 WL 1000385  
Gray, 2006 WL 2025023  
Greenwood, 2004 WL 473643  
Gutierrez, 2001 WL 1230731  
Gutierrez, 28 Cal.4th 1083  
Guzman, 2004 WL 552973  
Guzman, 2005 WL 435452  
Hagenno, 2001 WL 1486786  
Hall, WL 495991  
Hall, 2001 WL 1383161  
Hall, 2003 WL 22238960  
Hamilton, 2003 WL 22079585  
Hamiltonhausey, WL 182295  
Harris, 2004 WL 1879894  
Harrison 2005 WL 2298687  
Harrison, 2002 WL 467715  
Hasley, 2005 WL 3100718  
Hawkins, 2005 WL 1554028  
Hayes, 301 F.3d 1054  
Hayes, 39 Cal.Rptr.3d 747  
Hayes, 2003 WL 22391150  
Hermanek, 289 F.3d 1076  
Hernandez, 2001 WL 1510616  
Hernandez, 2002 WL 1375998  
Hernandez, 2006 WL 1670193  
Hernandez-Miranda, 2006 WL 2990125  
Hess, 2003 WL 2008287  
Hilton, 2006 WL 1125233  
Hines, 15 Cal. 4th 997  
Hinton, 37 Cal.4th 839  
Hodge, 2005 WL 3484197  
Hogg, 2006 WL 1620458  
Holland, 2005 WL 1799429  
Hosea, 2004 WL 198360  
Hovey, 458 F.3d 892  
Howard, 2003 WL 21518843

Howell, 2002 WL 596477  
 Huggins, 38 Cal.4th 175  
 Hughes, 2002 WL 725133  
 Hundal, 2006 WL 1652117  
 Hutson, 2002 WL 397724  
 Irias, 2003 WL 205163  
 Jackson, 2005 WL 3605143  
 Jackson, 2006 WL 1737193  
 Jacobs, 2004 WL 1842553  
 Jacome, 2005 WL 1189036  
 Jacques, 2002 WL 31862703  
 Jake, 2006 WL 862944  
 Jaramillo, 2006 WL 178628  
 Johnson, 135 Cal.Rptr.2d 848  
 Johnson, 2003 WL 1309091  
 Jones, 15 Cal.4th 119  
 Jones, 2005 WL 1539262  
 Jordan, 2002 WL 50594  
 Jordan, 2003 WL 21277267  
 Juniel, 2006 WL 350371  
 Karis, 283 F.3d 1117  
 Kazozian, 2006 WL 1991779  
 Kelly, 2004 WL 60712  
 Kephart, 2006 WL 2000035  
 Kernes, 2002 WL 1486379  
 Kipp, 26 Cal.4th 1100  
 Lagera, 2002 WL 1354406  
 Lang, 2003 WL 122783  
 Latysheva, 2006 WL 44782  
 Lee, 2003 WL 21795746  
 Lee, 2006 WL 2329431  
 Lenart, 32 Cal.4th 1107  
 Lewis, 2003 WL 147772  
 Littlejohn, 2002 WL 922946  
 Lo, 2003 WL 21958558  
 Lopez, 2002 WL 459123  
 Lopez, 2006 WL 1727313  
 Lopez, 469 F.3d 1241  
 Loseman, 2004 WL 689259  
 Loyd, 83 Cal.App.4th 1166  
 Lucas, 2002 WL 1473114  
 Lungberg, 2006 WL 1087110  
 Lute, 2006 WL 620781  
 Lynott, 2006 WL 3210024  
 Madero, 2003 WL 22119892  
 Maes, 2006 WL 1281847  
 Marshall, 2006 WL 2468864  
 Martin, 2002 WL 89720  
 Martin, 2003 WL 1919424  
 Martin, 2006 WL 1067286  
 Martin, 2006 WL 1095789  
 Martinez, 2002 WL 418136  
 Matlock WL 306902  
 Matos, 2006 WL 763057  
 McBride, 2002 WL 22361  
 McCaffery, 1999 WL 1097989  
 McCall, 2001 WL 1382746  
 McCombs, 2002 WL 31097693  
 McCoy, 2002 WL 864283  
 McCoy, 90 Fed.Appx. 201  
 McFadden, 2006 2913313  
 McIntosh, 2002 WL 1004092  
 McLaughlin, 2004 WL 1859796  
 McNeil, 2002 WL 454303  
 McReynolds, 2003 WL 943782  
 Medina, 2002 WL 1046023  
 Melara, 2006 WL 164989  
 Mendiola, 2006 WL 1064220  
 Metoyer, 2002 WL 205496  
 Miller, 2004 WL 2668253  
 Millwee, 74 Cal.Rptr.2d 418  
 Miranda, 2002 WL 59672  
 Montana, 2002 WL 551081  
 Montes, 2003 WL 21357552  
 Morales, 2006 WL 459348  
 Moran, 2006 WL 205196  
 Morgande, 2006 WL 1454792  
 Murphy, 2004 WL 1903486  
 Najera, 41 Cal.Rptr.3d 244  
 Navarro, 2004 WL 1753184  
 Nichols, 1999 WL 459362  
 Noel, 28 Cal.Rptr.3d 369  
 Ochoa, 79 Cal.Rptr.2d 408  
 Ortiz, 2005 WL 3471784  
 Osorio, 2003 WL 21967705  
 Pacheco, 2004 WL 1053654  
 Palmer, 2004 WL 621710  
 Parker, 2002 WL 57317  
 Parks, 285 F.3d 1133  
 Parra, 2003 WL 22064473  
 Payton, 299 F.3d 815  
 Payton, 2003 WL 22040421

Peralta, 2003 WL 21538115  
Perez-Zazueta, 2006 WL 1316976  
Perruso, 2006 WL 3293759  
Phaphonh, 2005 WL 3494952  
Pigage, 6 Cal.Rptr.3d 88  
Pimentel, 2001 WL 1571468  
Pimentel, 2006 WL 772895  
Pinola, 2002 WL 1457764  
Presley, 2006 WL 416204  
Quintero, 2004 WL 1730279  
Ramirez Lopez, 315 F.3d 1143  
Ramirez, 2003 WL 1071170  
Ramirez, 2006 WL 3086277  
Ratsavongsy, 135 Fed.Appx. 10  
Reeda, 2004 WL 35810  
Remsen, 2004 WL 2137809  
Reyes, 2002 WL 1046033  
Richardson, 2001 WL 1297500  
Riel, 22 Cal. 4th 1153  
Riffel, 2004 WL 187601  
Riggs Cal Rptr.2d  
Roblee, 2004 WL 473982  
Robles, 2001 WL 1250110  
Rodriguez, 2002 WL 869933  
Rodriguez, 2003 WL 23446  
Rodriguez, 2004 WL 237985  
Rodriguez, 2006 WL 619340  
Rogers WL 3560588  
Roldan, 35 Cal.4th 646  
Romero, 2003 WL 21299916  
Romero, 2004 WL 608281  
Rosales, 2006 WL 574408  
Ross, 2005 WL 2297568  
Ross, 372 F.3d 1097  
Roybal, 79 Cal.Rptr.2d 487  
Ruiz WL 3020122  
Ruiz, 2002 WL 244816  
Runnels, 2005 WL 1901559  
Salazar, 2006 WL 177247  
Samson, 2006 WL 2942925  
Sanders, 2006 WL 587795  
Sandoval, 2003 WL 257908  
Sasson, 2002 WL 18314  
Saul, 2004 WL 2668055  
Savidge, 2003 WL 1908062  
Scharf, 2006 WL 1064479  
Schmidt, 2004 WL 246023  
Schwerin, 2005 WL 3477562  
Scott, 2003 WL 1605763  
Sears, 2006 WL 1085877  
Sengpadychith, 2002 WL 120558  
Shaw, 380 F.3d 473  
Shin, 2003 WL 104842  
Sibley, 2006 WL 3462109  
Silva, 25 Cal.4th 345  
Sims, 2006 WL 3222508  
Sirizzotti, 2004 WL 1879879  
Slaughter, 120 Cal.Rptr.2d 477  
Slocum, 2002 WL 31648751  
Smith, 2003 WL 22133959  
Smithey, 86 Cal.Rptr.2d 243  
Sosa, 2002 WL 922716  
Staggs, 2005 WL 1400266  
Stephens, 2002 WL 1010115  
Stephens, 2002 WL 323531  
Stitely, 35 Cal.4th 514  
Strain, 2006 WL 2246355  
Stull, 2002 WL 1801776  
Sundquist, 2003 WL 22884021  
Sutton, 2003 WL 932524  
Swank v. Ingle WL 285130  
Tatum, 2004 WL 36212  
Terry, 2006 WL 75346  
Thomas, 2001 WL 1261942  
Thomas, 2002 WL 126960  
Thomas, 2003 WL 68261  
Thomas, 2006 WL 2699033  
Tomasian, 2001 WL 1545502  
Tran, 2002 WL 1042324  
Tran, 2002 WL 57368  
Tran, 2003 WL 21061575  
Turner, 34 Cal.4th 406  
Ubina, 2004 WL 1381213  
Valdez, 2006 WL 1401742  
Vanderberg, 2006 WL 2223795  
Vang, 2004 WL 551431  
Vargas, 2004 WL 2030234  
Varney, 2006 WL 3325442  
Vasquez, 2006 WL 3378260  
Vega, 2005 WL 3146833  
Velasquez, 2006 WL 2128661  
Victor, 2006 WL 13470

Victoria, 2006 WL 3361974  
Vieira, 35 Cal.4th 264  
Vigil, 2006 WL 1686127  
Villa, 2003 WL 21652294  
Villarel, 2003 WL 21504493  
Viray, 36 Cal.Rptr.3d 693  
Vu, 2005 WL 3387732  
Vuocolo, 2002 WL 800982  
Waggoner, 2003 WL 42561  
Wallace, 2006 WL 951307  
Walters, 2003 WL 122561  
Warren, 2001 WL 1502548  
Washington, 2004 WL 1626205  
Washington, 262 F.3d 1124

Welch, 2006 WL 401694  
Welch, 85 Cal.Rptr.2d 203  
Weston, 2006 WL 1467040  
Wiley, 2005 WL 361709  
Wilkerson, 2002 WL 66150  
Williams, 2006 WL 1778879  
Woods, 2001 WL 1649216  
Wriden, 2006 WL 2790433  
Wright  
York, 2003 WL 122288  
Young, 34 Cal.4th 1149  
Younger, 398 F.3d 1179  
Zambrano, 124 Cal.App.4th 228

## APPENDIX D: HARMFUL VS. HARMLESS ERROR

### Harmful Error

*Alvarado, 141 Cal.App.4th 1577*

Prosecutor vouched for the integrity of her office and the victim when she argued that D was the perpetrator because he was the one charged.

*Perlaza, 439 F.3d 1149*

In rebuttal, prosecutor said: “[I]n a short period of time, the case will be handed to you. You’re going to go back into that deliberation room and that presumption of innocence, that presumption of innocence that these men have all been cloaked with for the last year, the last year while we’ve litigated motions-you’ve heard about all the motions that have been held beforehand. That’s why it’s taken so long to get here. ***That presumption, when you go back in the room right behind you, is going to vanish when you start deliberating. And that’s when the presumption of guilt is going to take over you...***”

*Combs, 379 F.3d 564*

On cross-examination, compelling defendant to call a testifying government agent a liar

*Urie, 2006 WL 1525832*

On cross-examination, compelling defendant to give his opinion regarding the veracity of a law enforcement officer’s testimony

*Leung, 351 F.Supp.2d 992*

Prosecutor interfered with defendant’s access to witnesses

*Roquemore, 2006 WL 636805*

Prosecutor misstated standard of proof, equating “beyond a reasonable doubt” with “what makes sense”

*Hill, 72 Cal.Rptr.2d 656*

Misstated or mischaracterized evidence; referred to facts not in evidence; misstated

### Harmless Error

*Woods, 2001 WL 1649216*

Prosecutor expressed opinion about defendant's guilt during closing by stating that District Attorneys “do not prosecute anybody whom we personally do not believe to be guilty beyond a reasonable doubt.”

*Alvarado, 2006 WL 366953*

In rebuttal, prosecutor said, “Walk into the jury deliberation room. ***When you walk in, that presumption of innocence is over. This trial is done. You are no longer presumed innocent.***”

*Dancy, 2002 WL 343389*

Prosecutor asked questions that forced defendant to assert that police officers were liars

*Lucas, 2002 WL 1473114*

Prosecutor repeatedly asked defendant if police were lying when they testified

*Karis v. Calderon, 283 F.3d 1117*

Prevented defense counsel from interviewing witness

*Lee, 2006 WL 2329431*

Prosecutor misstated standard of proof, equating reasonable doubt standard with “gut feelings” about defendant’s guilt

*Hinton, 37 Cal.4th 839*

In opening statement, prosecutor improperly referred to inadmissible

the law before the jury; engaged in derisive action or made derogatory comments directed at defense counsel; intimidated defense witness; asked jury to consider biblical teachings when deliberating on penalty

*Sakarias, 25 Cal.Rptr.3d 265*

Prosecutor used inconsistent and irreconcilable theories to obtain convictions in separate trials of two defendants by attributing to each a culpable act that only one could have committed

statements, misstated what evidence would show, and was unduly argumentative. During cross-exam of defendant, the prosecutor asked objectionable questions, misstated evidence, and attempted to introduce inadmissible evidence.

Additionally, the prosecutor commented on defendant invoking Miranda rights. Trial court sustained 34 defense objections, admonished prosecutor 10 times, struck witness response 5 times, and held 9 sidebars.

*Shaw v. Terhune, 380 F.3d 473*

D.A. offered factually inconsistent interpretations of the same evidence in separate trials of two defendants

## APPENDIX E: ADDITIONAL EXAMPLES OF PROSECUTORIAL MISCONDUCT

### Civil Cases Raising Prosecutorial Misconduct<sup>42</sup>

- *Lewis v. Franklin*, 2007 U.S. Dist. LEXIS 148 (2007 – Northern Dist. Cal.)  
The defendant in the underlying criminal case was a corrections officer, on trial for wrongfully shooting an inmate who was involved in a fight with another inmate. The prosecutor told a key witness to perjure and deny the existence of a weapon found on the other inmate at the scene of the fight.<sup>43</sup> The district attorney specifically told the witness, who was an inmate at the time, that he did not have to “say anything about that razor” that the victim was holding during the fight.<sup>44</sup> The District Court granted the prosecutor’s motion for summary judgment on immunity grounds. The Court held that this conduct was within the prosecution’s protected action of preparing a witness for trial.

- *Slade v. Gates*, 2002 U.S. Dist. LEXIS 20401 (2002 – Central Dist. Cal.)  
In the underlying criminal case, Los Angeles Police officers “planted illegal drug evidence” on the Slade and then “arrested him on false drug charges.”<sup>45</sup> The district attorney then “prosecuted [him] on false charges.”<sup>46</sup> These officials also engaged in acts of extortion and coercion against Slade, in order to induce him to “give up their actual and prospective business relations.”<sup>47</sup> The Court denied immunity for false testimony given by the officers before Slade was arrested, but granted the prosecutor’s claim of immunity. The City of Los Angeles ultimately settled the case in 2004.

- *Quiroz v. Licalsi*, 2005 U.S. Dist. LEXIS 30182 (2005 – Eastern Dist. Cal.)  
In the County of Madera, the son of the prosecutor/defendant in this case was involved in a car accident with the plaintiff. The plaintiff gave the son false ID and insurance information at the scene of the accident, then left. The prosecutor heard of the accident and discovered the true identity of the plaintiff through the license number of his car. He then asked government investigators to find the plaintiff and bring him to the District Attorney’s Office in order for the prosecutor to obtain money to fix his son’s car. The plaintiff was found by the police at the prosecutor’s request, and brought into the office allegedly for driving with expired license plate tags and a broken rear taillight. While being questioned in custody, the district attorney implied that there would be no criminal charges pressed (the initial hit and run, driving without a license, possibly statutory rape) if the plaintiff would pay a sum of money to the prosecutor (\$500, the

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<sup>42</sup> Most of the following decisions reflect the court’s ruling on a motion for summary judgment. In such motions, the facts of the cases are not disputed.

<sup>43</sup> *Lewis v. Franklin*, 2007 U.S. Dist. LEXIS 148, 5 (2007).

<sup>44</sup> *Id.*

<sup>45</sup> *Slade v. Gates*, 2002 U.S. Dist. LEXIS 20401, 2 (2002).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 21.

amount of his deductible) for the expenses caused by the car accident with his son.<sup>48</sup> The plaintiff was finally released when he agreed, but said he needed time to gather the funds.<sup>49</sup> The Court denied immunity to the prosecutor and the case settled with an award of \$162,500 to plaintiff.

- *Faulkner v. County of Kern*, 2006 U.S. Dist. LEXIS 44151 (2006 – Eastern Dist. Cal.)

The defendant in the underlying criminal case was charged with multiple counts of kidnapping children and other crimes. The prosecutor had been warned by the children's grandmother both before and after the criminal trial that the children and key witnesses had a history of false accusations.<sup>50</sup> In fact, two of the children had previously falsely accused their parents of abuse, had been removed from their custody, but were eventually returned when the accusations were admitted to be false.<sup>51</sup> The prosecutor allegedly prompted the children to answer with incriminating statements during questioning sessions and trained the children to recite the stories of kidnapping.<sup>52</sup> The Court found the prosecutor immune, concluding that the conduct was protected as part of the prosecutor's legal strategy, in his role of advocate.<sup>53</sup>

- *Milstein v. Cooley*, 69 Fed. Appx. 849 (9th Cir. 2003), 257 F.3d 1004 (9th Cir. 2001).

Plaintiff Milstein was a defense attorney who successfully defended a client against two charges of homicide. The prosecutor believed that he had suborned perjury from his client at the trials. The prosecutor induced an inmate who had been a witness in Milstein's client's trial to testify falsely in order to subsequently charge Milstein with other, lesser crimes such as suborning perjury and solicitation of bribery.<sup>54</sup> The resulting indictment against Milstein was dismissed by the California Superior Court. The prosecutor then instructed a subordinate to sign a false criminal complaint, which resulted in an arrest warrant for Milstein.<sup>55</sup> The prosecutor successfully opposed the re-appointment of Milstein's prior counsel who had obtained the dismissal of the prior grand jury indictment. Milstein was convicted but the conviction was later reversed for insufficiency of evidence.<sup>56</sup> The District Court granted qualified immunity to the prosecutor and the Ninth Circuit affirmed in 2003.

- *Butler v. San Diego DA's Office*, 2006 U.S. Dist. LEXIS 78600 (2006 – Southern Dist. Cal.); 2007 U.S. Dist. LEXIS 14027.

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<sup>48</sup> See *Quiroz v. Licalsi*, 2005 U.S. Dist. LEXIS 30182, 25 (2005).

<sup>49</sup> *Id.* at 27-29.

<sup>50</sup> *Faulkner v. County of Kern*, 2006 U.S. Dist. LEXIS 44151, 10-12 (2006).

<sup>51</sup> *Id.* at 10.

<sup>52</sup> *Id.* at 13-14.

<sup>53</sup> *Id.* at 70.

<sup>54</sup> *Milstein v. Cooley*, 257 F.3d 1004, 1006 (2003).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1012.

An infamous case in which the district attorney and investigator let a cooperating witness, who was currently in prison for an unrelated crime, use the District Attorney's office and camera equipment to have sex with various women and record it.<sup>57</sup> The plaintiffs were five persons originally charged and convicted of conspiracy to commit murder and murder. A few years later, a news article was written describing the conduct of prosecution official, including an account of the favors given to the cooperating witness. The plaintiffs then filed habeas petitions, which included allegations that the prosecution was guilty of planting evidence (weapons) and suppressing exculpatory evidence.<sup>58</sup> The convictions were overturned and remanded. The new prosecutorial team at the Attorney General's Office agreed that defendants would be able to plea to manslaughter in exchange for time served. The Court found most of the defendants immune.

- *Genzler v. Longanbach*, 410 F. 3d 630 (9<sup>th</sup> Cir. 2005)

In the underlying criminal case, Genzler charged with murder for the death of a man he stabbed during a fight. During the criminal trial, the prosecutor successfully sought to recuse the defendant's attorney by falsely claiming the attorney would be a witness, even though the prosecutor had no intention of actually calling him.<sup>59</sup> The prosecutor also told a witness that "in order to secure a conviction, she needed to lie about what she saw on the night of the incident and about [the victim's] violent past."<sup>60</sup> Genzler was ultimately acquitted on self-defense. In the subsequent civil suit, the Court denied immunity to the prosecutor and the case settled with an award to plaintiff of \$415,000.

- *Auguste v. Alderden*, 2005 U.S. Dist. LEXIS 37326 (10<sup>th</sup> Cir. 2005)

While Auguste's nephew was on trial for rape, the prosecutor used false representations to obtain search warrants for her house in an effort to "intimidate and harass" her to stop her efforts at freeing her nephew.<sup>61</sup> The search warrants of Auguste's house and the homes of other family members were obtained in direct violation of a court order by the 9th Circuit Court of Appeals.<sup>62</sup> She is currently suing for Fourth Amendment violations. This case is pending in Colorado, but both the underlying criminal case and the prosecutor involved are from Santa Clara County. The nephew's criminal conviction was later overturned because the prosecutor failed to turn over exculpatory evidence, including DNA reports, to the defense.<sup>63</sup>

### **Other Examples of Prosecutorial Misconduct, Without Subsequent Civil Case**

- *People v. Leighton*, 2006 Cal. App. Unpub. LEXIS 5628 (2006)

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<sup>57</sup> *Butler v. San Diego DA's Office*, 2006 U.S. Dist. LEXIS 78600, 9-10 (2006).

<sup>58</sup> *Id.* at 8.

<sup>59</sup> See prior history, *Genzler v. Loganbach*, 384 F. 3d 1092, 1094 (2004).

<sup>60</sup> *Id.* at 1096.

<sup>61</sup> See Tim Locke, *Auguste Finds Justice in Long Fight to Free her Nephew*, Denver Business Journal, Jul. 9, 2004, available at

<http://denver.bizjournals.com/denver/stories/2004/07/12/story7.html>.

<sup>62</sup> *Auguste v. Alderden*, 2007 U.S. App. LEXIS 12091, 4 (2007).

<sup>63</sup> See *supra* note 30.

In this case, two defendants were tried together for one murder and the prosecution sought the death penalty against one defendant. Towards the end of the trial, the prosecutor's law clerk told her supervisors that the prosecutor had altered material evidence: the prosecutor had asked the law clerk to interview a witness and then the prosecutor had altered her notes, giving only the altered version to the defense. On disclosure, the judge declared a mistrial and the prosecution dropped its pursuit of the death penalty in subsequent re-trial. The prosecutor reported himself to the State Bar and was fined \$1,000 by the trial judge.

- *People v. Drane*, 2002 Cal. App. Unpub. LEXIS 11241 (2002)

The district attorney twice imprisoned Lori Krems because she was an uncooperative witness in a criminal case against her husband. Even after a judge ordered her released, the prosecutor continued to have Krems held for two days, and in the second incident, held her for eight days without a judge's approval. Krems was released only after her husband pled guilty. She subsequently filed a law suit for false imprisonment against the County of Santa Clara and the prosecutor for emotional distress and negligence. Santa Clara County settled the case with an award to Krems of \$125,000.

ENDNOTES