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## Prosecutorial Accountability: The Epidemic of Prosecutorial Misconduct in America

Brei'a Womack

Society has placed a great amount of trust in the prosecutorial system to pursue criminal charges against offenders, and keep citizens safe.<sup>1</sup> Prosecutors have been entrusted with this great deal of power and are able to work directly with the police to gather evidence to build a case, take the case to court, and are tasked with the job of convincing a jury of the defendant's guilt.<sup>2</sup> Ironically, prosecutors, who have a duty to uphold justice, have often violated a law or a code of professional ethics in the course of prosecuting offenders.<sup>3</sup> Over time, prosecutors have been allowed to disregard ethical and legal boundaries in the course of prosecution, sometimes subjecting innocent defendants to undeserved sentences, collateral consequences, and loss of freedom.<sup>4</sup>

### ROLE OF PROSECUTORS

Prosecutorial misconduct occurs when a prosecutor breaks a law or a code of professional ethics in the course of prosecution.<sup>5</sup> For a full understanding of how prosecutorial misconduct occurs, citizens should know that a prosecutor must both seek justice and present the judge and jury with facts and legal arguments that result in the conviction of the guilty defendant.<sup>6</sup> Since prosecutors are charged with presenting the truth, the prosecution is obligated to turn over all exculpatory evidence to the defense.<sup>7</sup> If prosecutors do not disclose potentially important evidence to defense lawyers, tolerate false testimony or commit other abuse, innocent defendants can be convicted.<sup>8</sup>

Some prosecutors may commit misconduct by making arguments or statements which draw attention to irrelevant issues with the intent of confusing

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<sup>1</sup> Barney & Hourihane, LLP, *Establishing Prosecutorial Misconduct in Illinois*, BARNEY & HOURIHANE, LLP (May 6, 2016), <http://www.barneyhourihane.com/blog/establishing-prosecutorial-misconduct-in-illinois>.

<sup>2</sup> *Prosecutorial Misconduct*, CALIFORNIA INNOCENCE PROJECT, <https://californiainnocenceproject.org/issues-we-face/prosecutorial-misconduct/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Why Prosecutors Don't Face Consequences for Being Overly Aggressive*, WOLF & STEC (March 1, 2019), <https://www.wolfeandstec.com/prosecutors-consequences/>.

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

the jury, appealing to emotion rather than logic, misstating expert testimony or improperly questioning an expert's reputation, failing to examine whether they charged the correct culprit, even if there is new information pointing to innocence, falsely accusing defense counsel or trying to confuse the jury or acting unethically.<sup>9</sup> These tactics that violate laws or professional codes of conduct are grounds for seeking appeal of a conviction.<sup>10</sup> If a case can be appealed on grounds of prosecutorial misconduct, one would think that a prosecutor could be penalized for committing such heinous acts, but prosecutors are seldomly prosecuted for their abuse of authority.<sup>11</sup>

A former prosecutor turned criminal defense attorney, Valerie Schramm, offered anecdotal evidence of this unfortunate truth in an interview for this paper. Ms. Schramm explained that she had a case in which she believed that the state's attorney should have dismissed the case against her client, but the prosecutor did not do so because there was animosity between her and the prosecutor.<sup>12</sup> Additionally, regarding the same case, Ms. Schramm stated that "the state's attorney had interviewed a witness that the state planned to call at trial, and the state's attorney, the day of trial, gave me a summary of what the witness was expected to testify."<sup>13</sup> Ms. Schramm further explained that although she could have asked the presiding judge for a continuance to review the new testimony with her client, she did not because she already knew what the witness was going to testify on the day of trial.<sup>14</sup> Although this information may have not been material to the defendant's outcome, the prosecutor withheld information until the day of trial.<sup>15</sup> Prosecutors have the duty to uphold justice and the obligation to disclose potentially important evidence to defense lawyers.<sup>16</sup> If they do not, innocent victims can be convicted.<sup>17</sup> In this particular case, the defendant was found guilty.<sup>18</sup> Prosecutors should be held accountable throughout every phase of the criminal justice system, or innocent individuals' due process rights will continued to be violated.

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<sup>9</sup> *Id.*

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

<sup>11</sup> Barney & Hourihane, LLP, *supra* note 1.

<sup>12</sup> Telephone Interview with Valerie Schramm Former Prosecutor & Current Criminal Defense Attorney, Law Offices of Valerie Schramm (April 3, 2019).

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

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

<sup>15</sup> *Id.*

<sup>16</sup> *Why Prosecutors Don't Face Consequences for Being Overly Aggressive*, *supra* note 7.

<sup>17</sup> *Id.*

<sup>18</sup> Schramm Interview, *supra* note 12.

## BRADY VIOLATION

Prosecutorial misconduct occurs everywhere in America.<sup>19</sup> In the wake of this reality, The Innocence Project has played a major role in overturning wrongful convictions.<sup>20</sup> A study found that appellate courts examining misconduct allegations do not overturn convictions as they believe that the misconduct did not decide the outcome of the case.<sup>21</sup> This practice allows prosecutorial misconduct to worsen and has a negative effect on the entire criminal system, which is in fact against the law.<sup>22</sup>

Prosecutors are required to prove the guilt of a defendant beyond a reasonable doubt in order to secure a conviction, but there are limits on how far they can go to prove a case.<sup>23</sup> In the case of *Brady v. Maryland*, 373 U.S. 83 (1963), the United State Supreme Court held that the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.<sup>24</sup> This is known as the Brady rule, and it means prosecutors must disclose any evidence that is material to either the guilt of the defendant or the severity of the alleged crime, including information that is favorable to the defendant.<sup>25</sup> Unfortunately, sometimes prosecutors do not adhere to this standard.<sup>26</sup>

## CODE OF PROFESSIONAL RESPONSIBILITY

The various codes of professional responsibility aptly put prosecutors on notice of the permissible boundaries of conduct.<sup>27</sup> The most comprehensive promulgation relating to prosecutorial courtroom conduct is the American Bar Association's Criminal Justice Standards.<sup>28</sup> In addition, the American Bar Association's Model Rules of Professional Conduct provide a source of ethical

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<sup>19</sup> *Prosecutorial Misconduct*, *supra* note 3.

<sup>20</sup> *Id.*

<sup>21</sup> *Why Prosecutors Don't Face Consequences for Being Overly Aggressive*, *supra* note 7.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Edward Genson and Marc Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is it Time to start Prosecuting the Prosecutors?*, 39, 41(1987), <https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1822&context=luclj>.

<sup>28</sup> *Id.*

guidelines for prosecutors.<sup>29</sup> Finally, the Illinois Code of Professional Responsibility, modeled after the American Bar Association's Code of Professional Responsibility, provides binding ethical guidelines for Illinois prosecutors.<sup>30</sup>

Nonetheless, it seems that disciplinary authorities have condoned courtroom misconduct.<sup>31</sup> It should be noted, however, that the Illinois Attorney Registration and Disciplinary Commission ("ARDC") has not been entirely lax in investigating prosecutorial misconduct.<sup>32</sup> The ARDC will investigate any and all allegations of prosecutorial misconduct that come to its attention.<sup>33</sup> Disciplinary proceedings against prosecutors for courtroom misconduct might prove to be an effective solution to the problem.<sup>34</sup> However, the ARDC disciplinary proceedings do not serve a punitive purpose; they function only to safeguard the public and maintain the integrity of the profession.<sup>35</sup> Because the ARDC fails to take punitive measures, people like Leroy Orange are subject to a life of imprisonment where the criminal justice system has followed the adversarial system in reverse order, "guilty until proven innocent."<sup>36</sup>

#### WRONGFULLY CONVICTED: LEROY ORANGE

In Illinois, Leroy Orange, a 34-year-old African-American man, was convicted and sentenced to death for four murders that his half-brother, Leonard Kidd, testified he alone committed without Orange's participation or knowledge.<sup>37</sup> The conviction rested primarily on Orange's confession, which was extracted by beating, suffocation, and electroshock at the hands of the Chicago Police Lieutenant Jon Burge and other officers at Area 2 police headquarters on the city's Southside.<sup>38</sup> Leroy confessed to a murder after police placed a plastic bag over his head and applied electric shocks to his testicles.<sup>39</sup> Orange only confessed to the murders after twelve hours of interrogations and torture at the

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Center on Wrongful Convictions, *Leroy Orange*, NORTHWESTERN PRITZKER SCHOOL OF LAW BLUHM LEGAL CLINIC, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/leroy-orange.html>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

hand of the Chicago Police Lieutenant Jon Burge.<sup>40</sup> The confession consisted of answers to leading questions based on Kidd's initial story.<sup>41</sup> Orange promptly told virtually everyone with whom he came into contact that he had been tortured.<sup>42</sup>

At Orange's 1985 trial, his confession was virtually the entirety of the prosecution's case.<sup>43</sup> Orange took the stand in his own defense, claiming innocence.<sup>44</sup> Orange's half-brother, Kidd, then took the stand testifying, against the advice of the public defenders appointed to represent him, that he alone committed the murders after Orange left the apartment.<sup>45</sup> In rebuttal, the prosecution called Area 2 officers, who denied torturing either man.<sup>46</sup> A jail physician, who examined Orange two days after the alleged torture, testified she observed no signs that he had been mistreated.<sup>47</sup> Despite the fact that the Orange consistently claimed his innocence and told multiple people that he was tortured in order to confess, the jury found Orange guilty and sentenced him to the death penalty.<sup>48</sup>

After Orange's conviction and death sentence were affirmed on direct appeal, *People v. Orange*, 121 Ill. 2d 364 (1988), he filed a pro se petition for post-conviction relief in the trial court.<sup>49</sup> The Bluhm Legal Clinic, at Northwestern Pritzker School of Law, entered the case and filed an amended petition alleging that Orange's defense attorney's failure to investigate the torture allegation and to present evidence in mitigation constituted ineffective assistance of counsel.<sup>50</sup> The presiding judge denied the petition without an evidentiary hearing.<sup>51</sup> On appeal, the Supreme Court reversed judgment, ordered an evidentiary hearing, vacated Orange's death sentence, and ordered a new sentencing hearing.<sup>52</sup> The Bluhm Legal Clinic filed a successor petition for post-conviction relief based on new evidence supporting the torture claim.<sup>53</sup> The

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

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

<sup>45</sup> *Id.*

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

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

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

<sup>52</sup> *Id.*

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

hearing was pending.<sup>54</sup> On January 10, 2003, Governor George Ryan granted Orange a full pardon based on innocence, criticizing prosecutors and the judiciary for relying on “procedural technicalities at the exclusion of the quest for truth” throughout the case.<sup>55</sup> Governor Ryan said, “I can see how rogue cops, 20 years ago can run wild. I can see how, in a different time, they perhaps were able to manipulate the system. What I can’t understand is why the courts can’t find a way to act in the interest of justice.”<sup>56</sup>

As a result of a faulty criminal justice system, lack of disciplinary proceedings against prosecutors and police officers, the inevitable reality of collateral consequences caused Leroy Orange to be subsequently arrested for attempting to sell crack cocaine to an undercover police officer after his exoneration.<sup>57</sup> Prosecutorial misconduct does not only affect innocent citizens at the outset, but the amount of time to prove a wrongful conviction while sitting in jail causes collateral consequences that are almost irreversible.<sup>58</sup> The wrongfully convicted who win their freedom only to find that they are penniless, unemployable, and dependent on others, experience family friction, poverty, and depression.<sup>59</sup> This combination is a recipe for disaster, resulting in homelessness, self-medicating with drugs and alcohol, and societal alienation.<sup>60</sup> Many suffer from mental health symptoms that resemble those suffered by veterans of war and torture survivors; these symptoms stem directly from wrongful conviction and incarceration.<sup>61</sup>

### CONCLUSION

The problem of prosecutorial misconduct is prevalent in Illinois and must be rectified.<sup>62</sup> Judges and lawyers are the forefront of the criminal justice system and it is incumbent upon the office of the prosecutor to implement mandatory continuing education programs designed to educate its attorneys

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<sup>54</sup> *Id.*

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

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

<sup>57</sup> *Id.*

<sup>58</sup> Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 427, 435 (2009), <https://www.bu.edu/pilr/files/2015/09/18-2WeigandSymposium.pdf>.

<sup>59</sup> *Id.*

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

<sup>61</sup> *Id.*

<sup>62</sup> Genson & Martin, *supra* note 27 at 40.

about prosecutorial misconduct.<sup>63</sup> Prosecutor offices also could invoke formal intra-office investigatory and disciplinary procedures.

The Office of the Cook County State's Attorney currently does not have programs to combat prosecutorial misconduct.<sup>64</sup> Under current procedures, when an instance of serious misconduct arises and comes to the attention of a supervisor, the case might be investigated.<sup>65</sup> In most cases, however, it appears that the office has found the charges to be unfounded.<sup>66</sup> Obviously, because of the repeated occurrences of misconduct, the current internal office practices of prosecutors' offices are inadequate, and a more rigid internal disciplinary structure is needed.<sup>67</sup> Because the Illinois Attorney Registration and Disciplinary Commission fails to take punitive measures in prosecutorial misconduct cases, prosecutors will continue heinous techniques that subject innocent citizens to a life of imprisonment, collateral consequences, and loss of freedom.<sup>68</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*