Crossing the Line: Responding to Prosecutorial Misconduct

INTRODUCTION

Among lawyers, a prosecutor is in a unique position. Normally a lawyer is free to—indeed, expected to—zealously advocate on behalf of his or her client. Prosecutors, however, are not simply advocates for the government. They are also ministers of justice whose aim is not to "win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). As such, "[i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*; *see generally* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 Geo. J. Legal Ethics 309 (2001).

By now, the actions of Michael Nifong, the former District Attorney of Durham County, North Carolina, that led to his disbarment are well known. *See generally* Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice"*, 76 Fordham L. Rev. 1337 (2007). Some argue that the situation involving Nifong is an isolated case. Yet prosecutorial overreaching has been an issue well before this headline-grabbing case came along.

A recent report issued by the California Commission on the Fair Administration of Justice referred to a study that reviewed 2,130 California appellate cases in which a claim of prosecutorial misconduct was raised. Cal. Comm'n on the Fair Admin. of Justice, *Report and Recommendations on Professional Responsibility and Accountability of Prosecutors and Defense Lawyers* (2007), *available at* http://www.ccfaj.org/documents/reports/prosecutorial/official/official report on reporting misconduct.pdf. Of those 2,130 cases, 443 resulted in findings that prosecutorial misconduct actually occurred. In 53 of the 443 cases, a reversal of conviction was the result—the rest concluding that the misconduct was harmless error. Perhaps the most disturbing statistic is that a follow-up study looking at half of the cases resulting in a reversed conviction concluded that the prosecutor was not referred to the California State Bar for discipline, which is required under California law. If there is a positive aspect to the Duke Lacrosse saga, it is that Nifong's actions and ultimate disbarment have served to highlight the important issue of prosecutorial misconduct and the need for effective remedies.

Few would claim that any prosecutor intentionally sets out to seek the conviction of an innocent person. Rather, it is argued that prosecutorial misconduct stems from a "win at all cost" mentality underlying the desire to further a career, or a firm belief in the defendant's guilt notwithstanding admissible evidence. *See* Joseph F. Lawless, *Prosecutorial Misconduct* § 1:06, at 1-15 (3d ed. 2003). Regardless of the causes, the effects of prosecutorial misconduct are distressing. Two different studies of persons exonerated by DNA evidence have shown that prosecutorial misconduct played a role in convicting an innocent person nearly half of the time. *See* Peter A. Joy, *The Relationship Between*

Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System, 2006 Wis. L. Rev. 399, 403 (2006). Moreover, assuming that the defendant is factually culpable, a conviction secured through the improper actions of a prosecutor could be unconstitutional and, thus, subject to reversal. The result is that the innocent are convicted and the guilty go free, which can only exacerbate the public's loss of trust in the integrity of the criminal justice system.

PROSECUTORIAL GUIDELINES

In performing their duties to seek justice, prosecutors are bound by constitutional standards, case law governing trial conduct, and various ethics rules and standards pertaining to the prosecutorial function. Rule 3.8 of the ABA Model Rules of Professional Conduct ("Model Rules") specifically covers the actions and responsibilities of prosecutors. All state jurisdictions have an ethics rule imposing special responsibilities on prosecutors, most based on Model Rule 3.8. Prosecutors are also guided by standards found in the *ABA Standards for Criminal Justice Prosecution Function and Defense Function* (3d ed. 1993) ("ABA Standards") and the *National District Attorneys Association Prosecution Standards* (2d ed. 1991) ("NDAA Standards"). In assessing the conduct of prosecutors, courts have oftentimes looked to the ABA Standards for guidance. *See, e.g.*, *Miller v. North Carolina*, 583 F.2d 701, 706 n.6 (4th Cir. 1978).

For years, the U.S. Department of Justice ("DOJ") took the position that Assistant United States Attorneys ("AUSAs") were exempt from state ethics rules. The McDade Amendment in 1999 laid to rest this argument. The amendment, attached as a rider to an appropriations bill, provides:

> *An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.*

28 U.S.C. § 530B(a). The Professional Responsibility Advisory Office within the DOJ provides advice to AUSAs regarding ethical issues and choice-of-law matters.

EXAMPLES OF PROSECUTORIAL MISCONDUCT

"Like the Hydra slain by Hercules, prosecutorial misconduct has many heads." *United States v. Williams*, 504 U.S. 36, 60 (1992) (Stevens, J., dissenting); *see also* Joy, *supra*, at 402 (listing numerous forms of prosecutorial misconduct). This article focuses on five categories: (1) suppression of evidence, (2) misuse of the media, (3) misconduct involving witnesses, (4) investigative misconduct, and (5) trial misconduct. Any specific act of prosecutorial misconduct may fall into more than one category. For example, knowingly presenting perjured testimony would be misconduct involving a witness, as well as a violation of the duty to disclose exculpatory evidence.

Suppression of Evidence

> *[V]iolations of* Brady *are the most recurring and pervasive of all constitutional procedural violations, with disastrous consequences: innocent people are wrongfully*

> *convicted; the reputation of U.S. prosecutors suffer; and the absence of meaningful legal and ethical enforcement and accountability has a corrosive effect on the public's perception of a justice system that often appears to be arbitrary, unjust, and simply unreliable.*

Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 Case W. Res. L. Rev. 13, 15 (2007) [hereinafter Gershman, *Litigating*].

The key holding of *Brady v. Maryland* is that "the suppression by the prosecution 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." 373 U.S. 83, 87 (1963). Arguably, because a *Brady* violation may occur even when the prosecutor acts in good faith, the term "prosecutorial misconduct" in the suppression of evidence context should be used only when the prosecutor intentionally withholds exculpatory material.

In *United States v. Agurs*, the Supreme Court explained that a prosecutor has a "constitutional duty of disclosure" when he or she is in possession of evidence that would deny a defendant a fair trial if that evidence were not disclosed. *See* 427 U.S. 97, 108 (1976). The Court has stressed that because a prosecutor is in a different position to determine the materiality of a piece of evidence than is an appellate court, "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.*

The Supreme Court has clarified that the constitutional requirement that a prosecutor disclose evidence that is favorable and material exists regardless of whether the defendant makes a request for a specific piece of evidence, a general request for favorable evidence, or no request at all. *United States v. Bagley*, 473 U.S. 667, 682 (1985). When considering the issue retrospectively, appellate courts conclude that the duty existed when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* Moreover, a "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Finally, there is no constitutional significance between impeachment evidence and evidence that is directly exculpatory. The key to a *Brady* violation is the materiality of the withheld evidence. *See Bagley*, 473 U.S. at 676–78.

Ethical rules require more than the constitutional minimum of *Brady*. Although the NDAA Standards seem to require only slightly more than the constitutional minimum, *see* NDAA Standard 25.4 ("The prosecutor should disclose the existence or nature of exculpatory evidence pertinent to the defense."), the Model Rules and ABA Standards go further. Model Rule 3.8(d) provides that a prosecutor must:

> *make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.*

Likewise ABA Standard 3-3.11(a) provides:

> *A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.*

The commentary to ABA Standard 3-3.11 notes that this provision "is virtually identical to that imposed by ABA model ethical codes, [and] goes beyond the corollary duty imposed upon prosecutors by constitutional law." (Footnote omitted.) *See also Kyles*, 514 U.S. at 437 (noting that *Brady* "requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate"). Finally, ABA Standard 3-3.11(c) warns that "[a] prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused."

Nifong suppressed exculpatory evidence when he did not tell the defense team that DNA from numerous males, none of it from any of the lacrosse players, was found in items obtained from the complainant during her medical examination. This evidence was inconsistent with the complainant's allegations that she was raped by several of the team members. It also contradicted her claims that she had not had sex with anyone in over a week prior to the alleged incident. *See generally* Stuart Taylor, Jr. & KC Johnson, *Until Proven Innocent* (2007).

One of the most egregious cases of a prosecutor failing to disclose impeachment evidence occurred in the small town of Tulia, Texas. In 1999, 38 people (36 of them black) were arrested on drug charges and later convicted. The only evidence used to secure their convictions was the uncorroborated testimony of one undercover officer with severe credibility problems. At a hearing several years later, a judge determined that the prosecutor had failed to turn over evidence impeaching the officer's credibility, and stood silent when he knew the officer was committing perjury. All of the defendants were either pardoned or had their convictions overturned. *See* Laura Parker, *Court Cases Raise Conduct Concerns*, USA Today, June 26, 2003, at 3A. A more thorough discussion of how prosecutors may evade their responsibility to disclose exculpatory evidence may be found in Gershman, *Litigating*, *supra*.

Misuse of the Media

Ethical rules prohibit all lawyers involved in litigation or investigations from making statements to the media that would prejudice the matter. Model Rule 3.6(a) provides:

> *A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.*

Model Rule 3.8(f), which applies specifically to prosecutors and is meant to protect a defendant's Sixth Amendment right to a fair trial, is worded similarly to Model Rule 3.6(a). It also imposes a duty

on a prosecutor to take reasonable steps to prevent the entire prosecutorial team from making prejudicial statements:

> *[E]xcept for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, [a prosecutor shall] refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.*

Standard 3-1.4 of the ABA Standards is basically an amalgam of Model Rules 3.6(a) and 3.8(f). The full text of Standard 3-1.4 follows:

> *(a) A prosecutor should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the prosecutor knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.*
>
> *(b) A prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under this Standard.*

The DOJ has promulgated regulations governing the release of information in criminal cases. 28 C.F.R. § 50.2(a)–(b). The regulations provide that very general information about the defendant, charging instrument, investigating agency, and circumstances of arrest may be released. § 50.2(b)(3). Importantly, "[d]isclosures should include only incontrovertible, factual matters, and should not include subjective observations." § 50.2(b)(3)(iv). The regulations clearly prohibit dissemination of "any information concerning a defendant's prior criminal record," § 50.2(b)(4), and also list numerous types of information or opinions that a prosecutor "should refrain from making available." § 50.2(b)(6). The United States Attorney Manual ("USAM") contains guidelines to implement the regulations, but cautions that they "do not create any rights enforceable in law or otherwise in any party." USAM § 1-7.001.

Improper extra-judicial statements include: releasing grand jury material, commenting on the bad character of a defendant, referring to the crime as heinous or reprehensible, disclosing a defendant's confession, disclosing a defendant's criminal record, discussing trial strategy, opining on the defendant's guilt, claiming that the government's case is strong, and commenting on the defendant's lack of cooperation. *See* Bennett L. Gershman, *Prosecutorial Misconduct* §§ 6:3–:10 (2d ed. 2007) [hereinafter Gershman, *Misconduct*]. *But see* 28 C.F.R. § 50.2(b)(6) (providing that a prosecutor "should refrain" from giving an opinion as to the defendant's guilt and referring to the defendant's character or confession).

The Disciplinary Hearing Commission of the North Carolina State Bar determined that Nifong had violated Rule 3.6(a) and 3.8(f) of North Carolina's Revised Rules of Professional Conduct on at least 30 different occasions. A small sampling of the statements include:

- "[O]ne would wonder why one needs an attorney if one was not charged and had not done anything wrong."
- "The contempt that was shown for the victim, based on her race was totally abhorrent. It adds another layer of reprehensibleness to a crime that is already reprehensible."
- "I would not be surprised if condoms were used. Probably an exotic dancer would not be your first choice for unprotected sex."
- "I'm not going to let Durham's view in the minds of the world to be a bunch of lacrosse players from Duke raping a black girl in Durham."
- "What happened here was one of the worst things that's happened since I have become district attorney."
- "They don't want to admit the enormity of what they have done."

Nat'l Org. of Bar Counsel, *Case of the Month* (June 2007), http://www.nobc.org/cases/0607.asp. Nifong's numerous statements inflamed the public, the pool from which the jury would have been drawn had the case gone to trial.

Misconduct Involving Witnesses

It should go without saying that a prosecutor acts unethically when he or she suborns perjury. Such conduct undermines the integrity of our adversarial system and, at a minimum, violates Model Rule 3.3(a)(3), which prohibits any lawyer from knowingly offering false evidence. Similar to the Model Rule, ABA Standard 3-5.6(a) succinctly states: "A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity."

Beyond the ethics of presenting perjured testimony, the knowing use of such testimony "involve[s] a corruption of the truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104. "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is *any* reasonable likelihood that the false testimony *could have* affected the judgment of the jury." *Id.* at 103 (emphases added) (footnote omitted). This rule equally applies when a prosecutor, "although not soliciting false evidence, allows it to go uncorrected when it appears," even when the uncorrected testimony goes to the credibility of the witness. *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

In addition to the Tulia case discussed above, another well-known case of a prosecutor using perjured testimony in order to obtain a conviction occurred in the Detroit "Sleeper Cell" terrorism trial. Although the case was riddled with various forms of prosecutorial misconduct, perjury played a key role.

Central to the prosecution's case in *United States v. Koubriti*, No. 01-80778 (E.D. Mich.), was a sketch recovered from the defendants' apartment containing the words "Queen Alia" and "Hashemite Kingdom of Jordan" written in Arabic. Indictment, *United States v. Convertino*, No.06-cr-20173, at 3

(E.D. Mich. Mar. 29, 2006). The government presented testimony through a Department of State Special Agent that he had traveled to the Queen Alia Military Hospital in Jordan and concluded that the sketch was almost an exact representation of the facility. Among the agent's assertions was that a "very large dead tree" corresponded with a marking on the sketch and provided certainty that the drawing depicted the hospital. *See* Bennett L. Gershman, *How Juries Get It Wrong—Anatomy of the Detroit Terror Case*, 44 Washburn L.J. 327, 332–33 (2005). Both on direct and on cross, the agent claimed that he had not taken any photographs of the facility because of security restrictions.

According to the DOJ, however, the truth was that the agent had taken numerous aerial photographs of the facility at the request of the prosecutor, Richard Convertino. Although it appears Convertino never received these specific photographs taken, he did obtain photographs of the Queen Alia Military Hospital taken by the agent's replacement. Not only did Convertino elicit perjury from the agent during his direct testimony (and allow it to stand during cross-examination), Convertino never disclosed to the defense the photographs he eventually did receive. Indictment, *United States v. Convertino*, No.06-cr-20173, at 3–4. In an unprecedented case, the DOJ's Public Integrity Section charged and tried Smith and Convertino with obstruction of justice, perjury, and conspiracy. *Id.* Both were acquitted.

Witness coaching can also be a form of prosecutorial misconduct. *See generally* Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 Cardozo L. Rev. 829 (2002). Although witness coaching has received scant attention from courts, a recent case may cause jurists to more closely scrutinize this issue. A Virginia lawyer, Leslie Smith, represented William Jones, the co-defendant of Daryl Atkins. Based on Jones's testimony, Atkins received the sentence of death for the murder of Eric Nesbitt. Atkins's case went all the way to the Supreme Court, where the Court ruled that the U.S. Constitution bars the execution of those with mental retardation. *See Atkins v. Virginia*, 536 U.S. 304 (2002). As of early 2008, however, Virginia was still trying to put Atkins to death, arguing that Atkins was not mentally retarded.

Recently, Smith came forward and revealed that in 1997 prosecutors had coached his client, William Jones, into providing testimony that more closely aligned with their theory that Atkins, and not Jones, was the triggerman. Soon after the coaching had occurred, Smith went to the Virginia State Bar's ethics counsel, but was told that he could not disclose information about the coaching since it would be detrimental to his client. Approximately ten years later, Smith finally came forward after getting the green light from the Virginia State Bar because Jones's case is now final. Because of Smith's account, a court in January 2008 commuted Atkins's death sentence to life imprisonment. *See* Adam Liptak, *Lawyer Reveals Secret, Toppling Death Sentence*, N.Y. Times, Jan. 19, 2008, at A1.

Investigative Misconduct

Pressure to solve a crime might lead a prosecutor to get intimately involved in the pre-trial investigation of a matter. *See* ABA Standard 3-3.1 ("[T]he prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies."). Although the line between investigating a crime and prosecuting a crime can be fuzzy, suffice it to say that a prosecutor acts in an investigative capacity when gathering facts such as staging an undercover operation or engaging in wiretapping. *See generally* Gershman, *Misconduct*, *supra*, § 1.

Nifong committed investigative misconduct in devising the photo array that led to the arrest of the three lacrosse players. The accuser in the case, Crystal Mangum, had been shown two photo arrays—one on March 16, 2006 and another on March 21, 2006—that did not contain any "fillers." Every single picture, 36 in total, that Mangum looked at was a lacrosse player. Mangum was unable to identify any of her alleged attackers. Then, on March 31, 2006, Nifong suggested to the police that Mangum be shown photographs of all 46 white members of the team at the same time. *See* Mosteller, *supra*, at 1398. During this procedure, which occurred on April 4, 2006, Mangum, at the direction of Nifong, was told that the police had reason to believe that all of the men she was looking at were at the party where she was allegedly raped. Again, the array contained no "fillers." In essence, Mangum was told that she could not make a wrong choice. It was at this time that Mangum identified the players who were later charged. The direct consequence of this investigative misconduct was the indictment of three innocent people.

Trial Misconduct

Prosecutorial misconduct during the course of trial covers a broad spectrum. For example, a prosecutor may improperly: introduce evidence, assassinate the character of a defendant, refer to the fact that a defendant did not talk to the police or take the stand in his or her defense, make inflammatory statements during closing argument, or attempt to bolster the credibility of a prosecution witness. *See generally*, Lawless, *supra*, §§ 9–10; Gershman, *Misconduct*, *supra*, §§ 10–11.

ABA Standard 3-5.8 and NDAA Standard 85.1 govern the scope of closing arguments. The NDAA Standard simply states: "Closing arguments should be characterized by fairness, accuracy, rationality, and a reliance upon the evidence or reasonable inferences drawn therefrom." NDAA Standard 85.1. The ABA Standard goes further and specifically states that a prosecutor should not express his or her personal belief as to the veracity of any evidence or guilt of the defendant. The ABA Standard also provides that a prosecutor should not appeal to the prejudices of the jury. *See* ABA Standard 3-5.8(b)–(c).

Case law is filled with innumerable instances of improper trial conduct—most of which is deemed harmless. One prosecutor who repeatedly went over the line according to appellate courts is Robert H. Macy, the former District Attorney of Oklahoma County, Oklahoma. *See* Ken Armstrong, *"Cowboy Bob" Ropes Wins—But at Considerable Cost*, Chi. Trib., Jan. 10, 1999, at 13. Called a "true patriot" by former Attorney General William Barr and honored as "America's prosecutor" by the Oklahoma Senate upon his retirement in 2001, Macy left behind a string of cases commenting unfavorably on his trial conduct. *Paxton v. Ward*, 199 F.3d 1197 (10th Cir. 1999); *Washington v. State*, 989 P.2d 960 (Okla. Crim. App. 1999); *Ochoa v. State*, 963 P.2d 583 (Okla. Crim. App. 1998); *Torres v. State*, 962 P.2d 3 (Okla. Crim. App. 1998); *Le v. State*, 947 P.2d 535 (Okla. Crim. App. 1997); *Duckett v. State*, 919 P.2d 7 (Okla. Crim. App. 1995); *Robinson v. State*, 900 P.2d 389 (Okla. Crim. App. 1995); *Hawkins v. State*, 891 P.2d 586 (Okla. Crim. App. 1995); *Hooker v. State*, 887 P.2d 1351 (Okla. Crim. App. 1994); *Howell v. State*, 882 P.2d 1086 (Okla. Crim. App. 1994); *McCarty v. State*, 765 P.2d 1215 (Okla. Crim. App. 1985); *Cantrell v. State*, 697 P.2d 968 (Okla. Crim. App. 1985) (Parks, J., dissenting). The rebukes seem not to have had any effect on his conduct.

The introduction of misleading (or patently false) forensic evidence has been publicized recently. As Professor Gershman discusses in a law review article, "[t]he records of contemporary criminal trials

are replete with instances of so-called 'junk science' finding its way into courtrooms, and championed by prosecutors to win convictions." Bennett L. Gershman, *Misuse of Scientific Evidence by Prosecutors*, 28 Okla. City U. L. Rev. 17, 30 (2003). Examples include tendering evidence of sloppy or outright faulty lab work of otherwise reliable forensic tests, or the presentation of "scientific" evidence of dubious quality such as bite-mark and hair analysis. *See id.* One example of faulty forensic evidence is the FBI's use of "compative-bullet lead analysis." The procedure supposedly allowed the FBI to match fired bullets found at a crime scene with unfired bullets in the possession of a suspect. The FBI used the procedure for decades, but stopped doing so in 2005 after finally acknowledging that the technique is unreliable and misleading. It is estimated that comparative bullet-lead analysis played a role in convicting over 2,500 people. *See* John Solomon, *FBI's Forensic Test Full of Holes*, Wash. Post, Nov. 18, 2007, at A1.

REMEDIES

To date, prosecutorial misconduct—even the most egregious—has largely gone unchecked. *See* Gershman, *Misconduct*, *supra*, at vi ("Relatively few judicial or constitutional sanctions exist to penalize or deter misconduct; the available sanctions are sparingly used and even when used have not proved effective."). In January 1999, the *Chicago Tribune* published a five-part series titled: *Trial & Error: How Prosecutors Sacrifice Justice to Win*. Analyzing thousands of cases, the newspaper found that since 1963 at least 381 defendants had their convictions reversed either because prosecutors suppressed exculpatory evidence or suborned perjury. Alarmingly, of those 381 cases, "not one of those prosecutors was convicted of a crime. Not one was barred from practicing law. Instead, many saw their careers advance, becoming judges or district attorneys. One became a congressman." Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, Chi. Trib., Jan. 10, 1999, at 1.

Criminal Prosecutions

The criminal prosecution of a prosecutor is extremely rare. According to the *Chicago Tribune* series, "[f]ew prosecutors nationally have been indicted, and they were acquitted or, at worst, convicted of a misdemeanor and fined." Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, Chi. Trib., Jan. 14, 1999, at 1 [hereinafter Armstrong & Possley, *Break Rules*]. This statistic seems not to have changed in the last nine years. Subsequent to the *Tribune* series, two separate cases were brought against prosecutors for acts committed in their official capacity; neither resulted in convictions.

The first occurred in mid-1999—a case in which three former Illinois state prosecutors were charged with conspiring to frame a man by the name of Rolando Cruz for murder. Cruz spent nearly 10 years on Death Row before it became clear that the prosecution had suppressed evidence that another person had committed the crime and that prosecutors had conspired with police officers to introduce a "dream statement" of Cruz's into evidence at his original trial and two re-trials. A judge dismissed charges against two of the prosecutors for insufficient evidence. (One later became an Illinois judge—the other, an AUSA.) A jury acquitted the third after a 28-day trial. *See* Andrew Bluth, *Prosecutor and 4 Sheriff's Deputies Are Acquitted of Wrongfully Accusing a Man of Murder*, N.Y. Times, June 5, 1999, at A9.

The second such prosecution of a prosecutor is the Convertino case discussed above. Convertino led the U.S. government's case in convicting two men on terrorism-related charges in 2003. Then-Attorney General John Ashcroft asserted that the convictions sent a "clear message" that the DOJ would "work diligently to detect, disrupt and dismantle the activities of terrorist cells in the United States and abroad." Danny Hakim, *U.S. Asks for Dismissal of Terrorism Convictions*, N.Y. Times, Sept. 1, 2004, at A17. A little over a year later, however, the federal government asked the court to throw out the convictions due, in part, to prosecutorial misconduct committed by the lead prosecutor, Richard Convertino.

The DOJ's Public Integrity Section eventually charged Richard Convertino with perjury, obstruction of justice, and conspiracy in what may be the only time that the DOJ has ever charged an AUSA for acts committed in his or her official capacity. Convertino was acquitted by a jury in October 2007 and is now seeking reimbursement for attorney fees, alleging that the government's prosecution of him was vexatious, frivolous or in bad faith. Ironically, Convertino is in essence asserting that the prosecution against him was itself an act of prosecutorial misconduct.

Disciplinary Actions

Each state bar has a mechanism in place for the discipline of misconduct by attorneys licensed in that state. Separately, federal courts may discipline attorneys who appear before them, which may result in the suspension or disbarment of attorneys from that particular court. *See, e.g.*, *In re Kramer*, 282 F.3d 721 (9th Cir. 2002). Further, the DOJ's Office of Professional Responsibility ("OPR") has responsibility for investigating allegations of misconduct committed by AUSAs. It appears that these procedures are rarely effective in dealing with prosecutorial misconduct.

The disciplinary action against Nifong is unusual in that not only did it result in disbarment, but because it was initiated while charges against the Duke students were still pending. Recently, the Center for Public Integrity conducted a study that found only 44 instances of disciplinary actions against prosecutors since 1970. Of those 44:

- in 7, the court dismissed the complaint or did not impose punishment;
- in 3, the court remanded the case for further proceedings;
- in 24, the court assessed the costs of the proceedings against the prosecutor;
- in 20, the court imposed a public or private reprimand or censure;
- in 1, the prosecutor was placed on probation;
- in 12, the prosecutor's license was suspended;
- in 2, the prosecutor was disbarred.

Neil Gordon, *Misconduct and Punishment: State Disciplinary Authorities Investigate Prosecutors Accused of Misconduct* (2007), http://www.publicintegrity.org/pm/default.aspx?act=sidebarsb&aid=39; *see generally* Steve Weinberg et al., Ctr. for Pub. Integrity, *Harmful Error: Investigating America's Local Prosecutors* (2003). A follow-up to the Tulia case discussed above revealed that the prosecutor, whose subornation of perjury and *Brady* violations led to the wrongful convictions of scores of people, received two years of probation. *See Disciplinary Actions*, 68 Tex. B.J. 753, 758 (2005).

The OPR has the authority to determine whether an AUSA committed "professional misconduct in the exercise of his or her authority to investigate, litigate or provide legal advice." U.S. Dep't of Justice Office of Prof'l Responsibility, *Analytical Framework* (rev. 2005), *available at* http://www.usdoj.gov/opr/framework.pdf. Professional misconduct is defined as the intentional or reckless disregard "of an obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy." *Id.* If the OPR determines that an AUSA committed professional misconduct, it recommends a certain sanction to the attorney's supervisor. Available sanctions range from a written reprimand to removal. The OPR may also refer the matter to the bar disciplinary authority in the jurisdiction in which the attorney is licensed. *See* U.S. Dep't of Justice Office of Prof'l Responsibility, *Policies & Procedures*, *available at* http://www.usdoj.gov/opr/polandproc.htm.

In 2001, a General Accounting Office report concluded that the OPR was ineffective in dealing with prosecutorial misconduct. *See* News Advisory, U.S. House of Representatives, Committee on the Judiciary, *GAO Report Finds Significant Problems with Justice Department's Office of Professional Responsibility* (Feb. 20, 2001), *available at* http://www.judiciary.house.gov/legacy/news0220.htm. A recent highly-publicized case illustrates the problem.

Chief Judge Mark Wolf of the U.S. District Court, District of Massachusetts found "extraordinary misconduct by the Department of Justice in its investigation and prosecution of members of the Patriarca Family of La Cosa Nostra." *Ferrara v. United States*, 384 F. Supp. 2d 384, 387 (D. Mass. 2005), *aff'd*, 456 F.3d 278 (1st Cir. 2006). Chief Judge Wolf found that AUSA "Jeffrey Auerhahn, violated [his] clearly established constitutional duty to disclose . . . before trial, important exculpatory information that directly negated [Vincent Ferrara's and Pasquale Barone's] guilt on" murder charges. *Id.* The suppression of the evidence was intentional according to Chief Judge Wolf. *See id.* at 393–98. The First Circuit agreed, stating: "[T]he government's actions in this case . . . paint a grim picture of blatant misconduct. The record virtually compels the conclusion that this feckless course of conduct . . . constituted a deliberate and serious breach of its promise to provide exculpatory evidence." *Ferrara v. United States*, 456 F.3d 278, 293 (1st Cir. 2006) (footnote omitted).

The OPR investigated Auerhahn and concluded that he had acted in reckless disregard of his duty to disclose exculpatory evidence. The sanction was a private written reprimand. Not satisfied, Chief Judge Wolf initiated his own disciplinary action against Auerhahn and wrote then-Attorney General Alberto Gonzales a letter on June 29, 2007 criticizing the OPR. Associate Deputy Attorney General David Margolis replied by letter to Chief Judge Wolf, asserting that "the discipline imposed by the Department was consistent with, correlated to, and proportional with the findings that resulted from OPR's investigation." Letter from David Margolis to The Honorable Mark L. Wolf (Oct. 2, 2007). Still not satisfied, Chief Judge Wolf wrote Attorney General Michael Mukasey. In this letter, Chief Judge Wolf noted that he assisted in the establishment of OPR, but now has "serious questions about whether judges should continue to rely upon the Department to investigate and sanction misconduct by federal prosecutors." Letter from The Honorable Mark L. Wolf to The Honorable Michael B. Mukasey (Jan. 2, 2008). The letters may be found in the court files of *Barone v. United States*, No. 98-11104 (D. Mass. 1998) and *Ferrara v. United States*, No. 00-11693 (D. Mass. 2000).

Contempt

A court could exercise its contempt powers to curb prosecutorial misconduct that occurs in the courtroom. However, "[a]lthough contempt is frequently used to punish defense counsel for misconduct, it is rarely used to punish prosecutors." Gershman, *Misconduct*, *supra*, § 14:9 (footnote omitted). Even when a trial court imposes contempt on a prosecutor, appellate courts rarely sustain the charge. *See id.*; Lawless, *supra*, § 13.35.

Appellate Court Action

If prosecutorial misconduct violates a defendant's constitutional rights to a fair trial, the defendant's conviction might be overturned on appeal. Reversals of convictions, however, are limited by the harmless-error doctrine, which generally precludes relief when the court finds that the defendant was not fundamentally prejudiced by the prosecutorial misconduct. *See Rose v. Clark*, 478 U.S. 570 (1986). The Center for Public Integrity looked at 11,452 appellate cases since 1970 where prosecutorial misconduct was an issue raised by the defendant. The study revealed that in 2,012 cases the prosecutor's misconduct was so serious that a dismissal of the charges, a reversal of conviction, or a reduction in the imposed sentence was warranted. In thousands of others, prosecutorial misconduct was found to have occurred, but was deemed to be harmless. Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor Is Cited for Misconduct?* (2007), http://www.publicintegrity.org/pm/default.aspx?act =main; *see generally* Weinberg et al., *supra*.

One should ask whether a reversal of a conviction adequately sanctions a prosecutor for misconduct since the focus is on the defendant, rather than the prosecutor. Moreover, many have questioned whether prosecutorial misconduct is adequately deterred when the harmless-error doctrine is consistently applied. For example, one commentator has asserted that application of the rule is "tantamount to saying that if one is obviously guilty as charged, he has no fundamental right to be tried fairly." Note, *Prosecutor Indiscretion: A Result of Political Influence*, 34 Ind. L.J. 477, 486 (1959); *see also Rose*, 478 U.S. at 588–89 (Stevens, J., concurring) ("An automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case.").

Another way appellate courts can address prosecutorial misconduct is by public rebuke. In *Bank of Nova Scotia v. United States*, the Supreme Court stated that defendants should not be given a "windfall" when they are not prejudiced by prosecutorial misconduct. 487 U.S. 250, 263 (1988). One way to deal with prosecutorial misconduct when the defendant's rights are not violated, according to the Court, is for an appellate court to "chastise the prosecutor in a published opinion." *Id.* The effectiveness of this remedy has been questioned as well. An article in the *Chicago Tribune* series noted that even when the prosecutor's actions are criticized in appellate opinions, the courts usually do not call out the prosecutors by name. According to the article, "[t]he granting of anonymity isn't mandated anywhere, but instead stems from tradition and professional courtesy." Armstrong & Possley, *Break Rules*, *supra*. Moreover, even when prosecutors are named in appellate opinions, there is little evidence that it adversely impacts that person's career or future conduct. *See id.*; *supra* Part III.E (discussing the chastising of Robert H. Macy).

Civil Liability

When being sued under federal civil rights laws, prosecutors often assert they are immune from liability. The law is nuanced in this area, but prosecutors can be found liable. For example, a man by the name of John Thompson spent 14 years on Death Row after an assistant district attorney destroyed exculpatory evidence. A jury in the Eastern District of Louisiana awarded Thompson $14 million after finding that the district attorney "was deliberately indifferent to the need to train, monitor, and supervise his prosecutors to comply with the constitutional requirements concerning production of evidence favorable to an accused." *Thompson v. Connick*, No. 03-2045, 2007 WL 1200826, at *1 (E.D. La. April 23, 2007). The availability for redress under state tort law (e.g., malicious prosecution) varies from jurisdiction to jurisdiction.

One avenue of relief for those wrongly prosecuted by the federal government is a Hyde Amendment claim. *See* Department of Commerce, Justice, and State, the Judiciary and Related Appropriations Act of 1998, Pub. L. No. 105-119, § 617, 111 Stat. 2440 (codified at 18 U.S.C. § 3006A Note). This law provides for the recovery of attorney fees for prosecutions by the U.S. government that were "vexatious, frivolous, or in bad faith." To recover attorney fees, the defendant must be a "prevailing party." To determine whether a defendant is a prevailing party, courts look to the totality of the circumstances. *See, e.g.*, *United States v. Campbell*, 134 F. Supp. 2d 1104, 1107 (C.D. Cal. 2001), *aff'd*, 291 F.3d 1169 (9th Cir. 2002). Generally, a defendant prevails when he or she "was completely exonerated through voluntary dismissal of all charges without sanction, dismissal by way of a motion of judgment for acquittal or dispositive motion, or through acquittal." *Id.* at 1108. Moreover, a defendant is a prevailing party when the government dismisses the case with prejudice, and may or may not be considered as such when the case is dismissed without prejudice. *See United States v. Gardner*, 23 F. Supp. 2d 1283, 1292 (N.D. Okla. 1998).

CONCLUSION

The Nifong / Duke Lacrosse saga brought to the public's awareness the sad and disturbing nature of prosecutorial overreaching. While Nifong's actions may have been particularly egregious, it is clear that the problem of prosecutorial misconduct is nothing new—it has simply taken place outside of public view for the most part. It is also clear that, to date, there has not been an effective remedy to this systemic problem. Hopefully something good can come out of the tragedy of the Duke case—public awareness of the need to hold prosecutors accountable for misconduct, and a newfound willingness of the courts, bar associations, and the DOJ to impose harsher sanctions on wayward prosecutors.