

Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009

by
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and
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A **VERITAS** Initiative Report

Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009

by

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LAWYERS WHO LEAD

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Veritas Initiative™

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We dedicate this report to
Father Paul Locatelli, S.J.
as a tribute to
his compassion and commitment
to justice for all.

Foreword

The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.

– *American Bar Association*

The majority of California prosecutors successfully discharge the obligations requisite in their two roles: acting both as advocates in seeking convictions and as ministers of justice, charged with using only fair methods to prosecute those they believe are guilty. But, as this report shows, some prosecutors have let their advocacy role prevail to the extent of using deceptive and unfair tactics to secure convictions.

This study of prosecutorial misconduct was undertaken to further understand the scope of the problem, and is a long overdue step in trying to address the issue. In 2004, the California Senate established the California Commission on the Fair Administration of Justice (CCFAJ) to examine the causes of wrongful conviction and recommend reforms to improve the administration of justice. It was my honor to serve on that Commission and to work under the extraordinary leadership of its chairman, former California Attorney General John Van de Kamp and its executive director, Santa Clara University School of Law professor and former dean Gerald Uelmen.

As a Commissioner, I was asked to assist the Commission in understanding the extent to which prosecutorial misconduct is a factor in the conviction of innocent people in the state. Until that point, very little systematic research had been done on this problem of prosecutorial misconduct in California or on its effects on the conviction of innocent people.

Early on in my work, I came across a ground-breaking study published in 1999 in the Chicago Tribune. It was conducted by reporters Maurice Possley and Ken Armstrong, and published in a five-part series. The series, “Trial & Error: How Prosecutors Sacrifice Justice to Win,” focused particularly on prosecutorial misconduct since the Supreme Court’s 1963 decision

in *Brady v. Maryland*. It was a terrific piece of work and I wanted to know more about it, so I called the Tribune and reached Possley. In our brief conversation, I told him what I was doing, he described their work, wished me good luck and we said goodbye. Two years later, in a Commission hearing in 2007, I reported my findings, which were later published in the CCFAJ Final Report.

Intrigued by what I had learned from my work for CCFAJ, I continued the research to expand upon the findings. In 2009, in the midst of the expanded project, Possley, who had left the Tribune in 2008 after winning a Pulitzer Prize for investigative reporting, joined me in the research. His work was essential to this report and I am deeply grateful to him.

I have many others to thank.

Thank you to Santa Clara University and in particular Santa Clara University School of Law Dean Donald Polden for unwavering support of this project. A million thanks go to Sarah Perez and Jessica Seargeant for their countless hours, intelligence, friendship, humor and support of every kind that they gave to us and to this project; to Jessica Marz whose critical role in the research and data analysis of the earlier CCFAJ study was invaluable to me; and to the staff of the Northern California Innocence Project, all of whom in some way have contributed to this work.

We are incredibly grateful for the support and friendship of the extraordinary Northern California Innocence Project Advisory Board, who with remarkable intellectual power and generosity invested hours in meetings to discuss the importance of this research and to strategize about how best to share our findings. I want to particularly thank Jim Anderson for carrying the flag for policy and reform from the beginning and Andy Ludwick who helped us crystallize our vision of this project - always with humor, encouragement and wise counsel. And, most especially, I want to thank Frank Quattrone who always encouraged excellence and has been supportive through the years it took to complete this project.

I am grateful to all of our generous donors, in particular, the remarkable man and anonymous donor whose commitment launched us into the final stretch, to the Frank and Denise

Quattrone Foundation for bringing this project home, and to the law firm of Howard Rice Nemerovski Canady Falk & Rabkin for the exceptional pro bono support they gave us to complete this project. We are especially grateful to Denise Foderaro (Quattrone), whose critical eye for detail and knowledge of the subject proved invaluable, and to Barbara Winters who brought her extraordinary editing skills to this project.

Thanks to the many Santa Clara University Law students who assisted in this research over the last five years, my heroes (you know who you are), the countless people who helped us identify the names of the prosecutors and to the colleagues who reviewed drafts and gave us invaluable feedback and guidance including: Madeline deLone, Cathy Dreyfuss, Barbara Fargo, Keith Findley, Brandon Garrett, Bennett Gershman, Daniel Medwed, Theresa Newman, Carol Sanger, Gerald Uelmen, John Van de Kamp and Ellen Yaroshefsky.

Enormous thanks go to my Associate Director Lee Raney, whose persistence and faith drove this project to completion, and our one-woman marketing department, Audrey Redmond, who managed to wrestle the pages out of our hands and out the door.

And to Maurice Possley, who in just over a year has been transformed from a person I respected and whose work I admired to someone I count on every day for his professional advice, friendship and wit.

Not least, Maurice and I want to thank our families for their patience and support during the many hours we spent away from them to bring this report to fruition. And to my partner Linda Starr, whose professional judgment and personal support make everything possible.

And to the prosecutors and members of the California State Bar who have helped and supported us in this work. You have our gratitude and highest respect.



*Cookie Ridolfi
October 2010*

ABOUT PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009

Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009 is the most comprehensive, up-to-date, quantitative and actionable study on the extent of prosecutorial misconduct in California, how the justice system identifies and addresses it, and its cost and consequences, including the wrongful conviction of innocent people. By shining a light on prosecutorial conduct, this groundbreaking research, the work of leading experts in the field from the highly respected legal resource, NCIP, will serve as a catalyst for reform.

ABOUT VERITAS INITIATIVE

Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009 marks the launch of the Veritas Initiative, NCIP’s investigative watchdog devoted to advancing the integrity of our justice system through research and data-driven reform, using the work of our preeminent experts in the field.

ABOUT THE NORTHERN CALIFORNIA INNOCENCE PROJECT

The Northern California Innocence Project (NCIP) at Santa Clara University School of Law operates as a pro bono legal clinical program, where law students, clinical fellows, attorneys, pro bono counsel, and volunteers work to identify and provide legal representation to wrongfully convicted prisoners.

NCIP educates future attorneys, exonerates the innocent, and is dedicated to raising public awareness about the prevalence and causes of wrongful conviction. With its Veritas Initiative, NCIP promotes substantive legislative and policy reform through data-driven research and policy recommendations aimed at ensuring the integrity of our justice system.

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Introduction and Executive Summary

Introduction and Executive Summary

Seventy-five years ago, in reversing a conviction because of prosecutorial misconduct, the United States Supreme Court specified the paramount obligation of a prosecutor: “[A] prosecutor has a duty to refrain from improper methods calculated to produce a wrongful conviction¹... [While he] may strike hard blows, he is not at liberty to strike foul ones.”² The Court emphasized the critical role the prosecutor plays in a judicial system like ours that is aimed at justice, not simply conviction: the prosecutor “is the representative... of a sovereignty whose... interest in a criminal prosecution is not that it shall win a case, but that justice shall be done.”³ Because the prosecutor had misstated evidence, bullied witnesses, put words into the mouth of a witness and intimated facts he knew were false, the Court overturned the conviction.

The problem of prosecutorial misconduct is even more critical today. Scores of academic articles and books, as well as the media, have documented the extent to which some prosecutors continue to use the very tactics the Supreme Court decried, as well as others, to obtain convictions.⁴

To more fully document the scope of the problem, the Northern California Innocence Project (NCIP) engaged in a comprehensive analysis of publicly available cases of prosecutorial misconduct in California, reviewing more than 4,000 state and federal appellate rulings, as well as scores of media reports and trial court decisions, covering the period 1997 through 2009. This study—the “Misconduct Study”—is the most in-depth statewide review of prosecutorial misconduct in the United States.

NCIP’s examination revealed 707 cases in which courts explicitly found that prosecutors committed misconduct. In about 3,000 of the 4,000 cases, the courts rejected the prosecutorial misconduct allegations, and in another 282, the courts did not decide whether prosecutors’ actions were improper, finding that the trials were nonetheless fair.

Identifying 707 cases in which prosecutorial misconduct was found—on average, about one case a week—undoubtedly understates the total number of such cases. These 707 are just

the cases identified in review of appellate cases and a handful of others found through media searches and other means. About 97 percent of felony criminal cases are resolved without trial, almost all through guilty pleas.⁵ Moreover, findings of misconduct at the trial court level that are not reflected in appellate opinions cannot be systematically reviewed without searching every case file in every courthouse in the state. And of course, the number cannot capture cases of prosecutorial misconduct that were never discovered (for example, failure to disclose exculpatory evidence) or appealed (due, for example, to lack of resources or ineffective counsel).

The Misconduct Study's findings as to the results in these 707 cases were as follows: In the vast majority—548 of the 707 cases—courts found misconduct but nevertheless upheld the convictions, ruling that the misconduct was harmless—that the defendants received fair trials notwithstanding the prosecutor's conduct. Only in 159 of the 707 cases—about 20 percent—did the courts find that the misconduct was harmful; in these cases they either set aside the conviction or sentence, declared a mistrial or barred evidence.

The Misconduct Study shows that those empowered to address the problem—California state and federal courts, prosecutors and the California State Bar—repeatedly fail to take meaningful action. Courts fail to report prosecutorial misconduct (despite having a statutory obligation to do so), prosecutors deny that it occurred, and the California State Bar almost never disciplines it.

Significantly, of the 4,741 public disciplinary actions reported in the *California State Bar Journal* from January 1997 to September 2009, only 10 involved prosecutors, and only six of these were for conduct in the handling of a criminal case. *That means that the State Bar publicly disciplined only one percent of the prosecutors in the 600 cases in which the courts found prosecutorial misconduct and NCIP researchers identified the prosecutor.*

Further, some prosecutors have committed misconduct repeatedly. In the subset of the 707 cases in which NCIP was able to identify the prosecutor involved (600 cases), 67 prosecutors—11.2 percent—committed misconduct in more than one case. Three prosecutors committed misconduct in four cases, and two did so in five.

The failure of judges, prosecutors and the California State Bar to live up to their responsibilities to report, monitor and discipline prosecutorial misconduct fosters misconduct, undercuts public trust and casts a cloud over those prosecutors who do their jobs properly. The problem is critical.

Prosecutorial misconduct is an important issue for us as a society, regardless of the guilt or innocence of the criminal defendants involved in the individual cases. Prosecutorial misconduct fundamentally perverts the course of justice and costs taxpayers millions of dollars in protracted litigation. It undermines our trust in the reliability of the justice system and subverts the notion that we are a fair society.

Prosecutorial misconduct is an important issue for us as a society, regardless of the guilt or innocence of the criminal defendants involved in the individual cases.

At its worst, the guilty go free and the innocent are convicted. An especially stark example is the death penalty prosecution of Mark Sodersten, a man who spent 22 years behind bars convicted of a murder that the appellate court said he most likely did not commit.

In 2007, a California Court of Appeal found that the deputy district attorney who prosecuted Sodersten, Phillip Cline, had improperly withheld from the defense audiotapes of his interviews with a key witness.⁶ After reviewing the tapes, the justices found they contained dramatic evidence pointing to Sodersten's innocence. Based on this finding, the court vacated his conviction, emphasizing: "This case raises the one issue that is the most feared aspect of our system—that an innocent man might be convicted."⁷

For Sodersten, the ruling in his case came too late: he had died in prison six months earlier. Even though the defendant's death ordinarily ends the case, the court took the unusual step of issuing a ruling anyway because of the importance of the issue:

"[W]hat happened in this case has such an impact upon the integrity and fairness that are the cornerstones of our criminal justice system that continued public confidence in that system requires us to address the validity of [Sodersten's] conviction despite the fact we can no longer provide a remedy for petitioner himself."⁸

The court concluded:

“To do otherwise would be a disservice to the legitimate public expectation that judges will enforce justice. It would be a disservice to justice. Most of all, it would be a disservice to [Sodersten] who maintained his innocence despite a system that failed him.”⁹

The prosecutor was never disciplined. Sodersten’s attorney filed a formal complaint with the California State Bar, arguing that the prosecutor “asked a jury to kill a man based on a conviction he perverted.”¹⁰ But in April 2010, the State Bar closed the investigation, because “this office has concluded that we could not prove culpability by clear and convincing evidence”—even though the tapes the prosecutor wrongfully withheld included interviews with a key witness conducted by the prosecutor himself.¹¹

The prosecutor, Phillip Cline, has never been held responsible for his actions, and it is virtually certain that he never will. He has absolute immunity from any civil liability for his conduct as a prosecutor. Cline was elected District Attorney for Tulare County in 1992 and remains in that position today.

In short, as the Misconduct Study concludes, prosecutors continue to engage in misconduct, sometimes multiple times, almost always without consequence. And the courts’ reluctance to report prosecutorial misconduct and the State Bar’s failure to discipline it empowers prosecutors to continue to commit misconduct. While the majority of California prosecutors do their jobs with integrity, the findings of the Misconduct Study demonstrate that the scope and persistence of the problem is alarming. Reform is critical.

The failure of judges, prosecutors and the California State Bar to live up to their responsibilities to report, monitor and discipline prosecutorial misconduct fosters misconduct, undercuts public trust and casts a cloud over those prosecutors who do their jobs properly. The problem is critical.

The authors recommend a number of reforms as first steps toward the goal of eliminating attorney misconduct in criminal cases, including:

- Court-related reforms, such as expanding the existing judicial reporting requirement to mandate reporting of any finding of egregious prosecutorial misconduct, as well as any constitutional violation, even if deemed harmless; identifying in opinions the full names of prosecutors found to have committed misconduct; California Supreme Court monitoring of compliance with judicial reporting and notice obligations and making public the records of compliance; and replacing prosecutors' current absolute immunity from civil liability with a form of qualified immunity;
- Remedies for the California State Bar, such as adopting revised ethical rules concerning special responsibilities of prosecutors (modeled on the American Bar Association's Model Rule 3.8)¹², expanding discipline for prosecutorial misconduct and increasing the transparency of the State Bar disciplinary process; and
- Attorney-related reforms, such as ethical training for prosecutors and criminal defense attorneys, establishing internal misconduct procedures and developing exculpatory evidence policies.

Prosecutorial misconduct is wrong. It is not excusable as a means to convict the guilty, and it is abhorrent in the conviction of the innocent. It has no place in a criminal justice system that strives to be fair, to accurately convict the guilty and to protect the innocent. It undercuts the public trust and impugns the reputations of the majority of prosecutors, who uphold the law and live up to their obligation to seek justice.

By casting a blind eye to prosecutors who place their thumbs on the scale of justice, judges, prosecutors and the California State Bar are failing to live up to their responsibilities, fostering misconduct and opening the door to the inevitable—the conviction of the innocent and the release of the guilty. It is time to acknowledge the problem and take needed action.

Organizational Summary

The organizational structure of this report is as follows: it describes the methodology the Misconduct Study employed (Part I); provides an overview of the Study’s findings (Part II); reviews the cases finding misconduct and those declining to decide the issue (Part III); discusses the role of the prosecutors (Part IV), the courts (Part V) and the California State Bar (Part VI) in addressing prosecutorial misconduct; examines the costs and consequences of prosecutorial misconduct (Part VII); shows how absolute immunity allows prosecutors to escape accountability (Part VIII) and makes recommendations for dealing with the problem (Part IX).

Recommendations

The California State Bar, in conjunction with the California District Attorneys Association, California Public Defenders Association and California Attorneys for Criminal Justice, should develop a course specifically designed to address ethical issues that commonly arise in criminal cases.

District Attorney offices should adopt internal policies that do not tolerate misconduct, including establishing internal reviews of error.

District Attorney offices and law enforcement agencies should adopt written administrative exculpatory evidence policies to govern *Brady* compliance.

The reporting statute should be expanded to require judicial reporting of any finding of “egregious” misconduct as defined by the California Commission on the Fair Administration of Justice (CCFAJ), as well as any constitutional violation by a prosecutor or defense attorney, regardless of whether it resulted in modification or reversal of the judgment, including violations of ethical rules.

Judges should be required to list attorneys’ full names in opinions finding misconduct.

(continued)

Recommendations (continued)

The California Supreme Court should actively monitor compliance with the requirements of judicial reporting and notification of attorneys mandated by Business and Professions Code section 6086.7. Records of compliance—a list of cases reported to the State Bar by the court—should be publicly available.

Prosecutors should be entitled at best to qualified immunity.

California should adopt American Bar Association’s Model Rule 3.8.

The State Bar should expand discipline for prosecutorial misconduct and increase disciplinary transparency.

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