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PROSECUTORIAL MISCONDUCT IN DEATH PENALTY CASES

NATASHA MINSKER*

OVERVIEW

Professional responsibility by both defense attorneys and prosecutors is critical in every criminal case. But when the state seeks the ultimate punishment of death, attorneys on both sides should be expected to adhere strictly to the highest standards of professional conduct. Unfortunately, in death penalty cases in California, all too often both prosecutors and defense attorneys fall far below this ideal with little consequence.¹ Indeed, our research reveals that even in the most egregious case in which prosecutorial misconduct led to the reversal of a death sentence in California, the prosecutor has never been publicly disciplined. Further, we identified the prosecutors in six out of eight death penalty cases that were reversed for prosecutorial

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Daniel Ballon contributed invaluable assistance to the research and writing of this article. This article was first submitted to the California Commission on the Fair Administration of Justice in conjunction with its investigation into prosecutorial misconduct in California. See <http://www.ccfaj.org/documents/reports/prosecutorial/expert/ACLU%20Letter.pdf>.

1. Indeed, two of the cases of actual execution discussed at length in this article involve both prosecutorial misconduct and ineffective assistance of counsel. *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997); *People v. Babbitt*, 755 P.2d 253 (Cal. 1988). Thus, although this article focuses on the role of prosecutorial misconduct in death penalty cases, it is important to consider both misconduct and ineffective assistance of counsel together as they are often both present in cases that result in questionable death sentences.

misconduct. Five have “no public record of discipline,” and one is a sitting judge.²

Too frequently, prosecutors bend and even break the rules in an effort to secure not just a conviction but a sentence of death. Because of the high stakes involved in a death penalty trial, prosecutors are under even more pressure than in a typical murder case. In some cases, this pressure may make prosecutors cross more ethical lines than in a lower profile case. In addition, because of the nature of the decision the jury is asked to make, misconduct by prosecutors that might be “harmless” as to the question of guilt can have a significant impact in the penalty phase, producing what may be termed “wrongful death sentences.”³ Improper comments by prosecutors, failure to disclose mitigating evidence, and intentional disclosure of excluded aggravating evidence are the kinds of misconduct by prosecutors that may subtly, or not so subtly, cause a jury to vote for death in a case that would have resulted in a life verdict if the prosecutor had “played by the rules.” Thus, misconduct in death penalty cases has a greater impact than in non-death cases.

In this article, we describe the prosecutorial misconduct that occurred in cases of actual execution in California. We also review the death penalty cases where prosecutorial misconduct actually resulted in or contributed to a reversal of the death sentence or conviction. From this analysis we conclude that: a) whether the case is reversed or the misconduct is deemed “harmless,” there is often little difference between the types of misconduct; b) the Rules of Professional Responsibility are currently too vague to provide meaningful guidance to prosecutors regarding their conduct in death penalty cases; and c) current remedies for misconduct in death penalty cases are insufficient.

REVIEW OF CASE HISTORIES: MISCONDUCT IN CALIFORNIA EXECUTION CASES

We reviewed all thirteen cases that have resulted in actual execution in California to determine whether prosecutorial misconduct

2. See text accompanying notes 48, 103-04, 111, 117, and 133.

3. Craig Haney, *Exoneration and Wrongful Condemnation: Expanding the Zone of Perceived Injustice in Death Penalty Cases*, 37 *GOLDEN GATE U.L. REV.* 131, 132-35 (2006).

was an issue in any of these cases and, if so, how substantial that misconduct was. We chose this sample of cases for several reasons. First, we wished to determine whether prosecutorial misconduct resulted in or contributed to any “wrongful executions,” that is, the execution of a defendant that was not supported by law or was premised on incorrect facts. Second, we wished to determine whether subsequent review by state and federal courts effectively identified death penalty cases with substantial misconduct, preventing wrongful execution and providing a meaningful remedy for any identified misconduct. Third, we wished to compare the type of misconduct that occurred in these cases that did not result in reversal with the type of misconduct that occurred in cases that were reversed.

Our review of the cases of actual execution demonstrates that prosecutorial misconduct has directly resulted in the execution of one person who may not have been legally eligible for death and has contributed significantly to the execution of another individual suffering from severe mental illness who may not have been an appropriate individual to execute. These two cases are the most troubling of the California executions and present the most likely cases of wrongful execution.

Moreover, of the thirteen executions which have taken place in California since the death penalty was reinstated in 1977, prosecutorial misconduct has been raised as a significant issue in seven—more than half.⁴ In four of the seven cases, or thirty-one percent, one or more reviewing courts explicitly found some of the behavior to be “misconduct,” “improper,” or “error,”⁵ while in two cases the courts failed to even address that critical issue, finding the conduct “harmless” or “non-prejudicial” even if it was misconduct.⁶ In

4. Our review was limited to the published opinions in these cases. Thus, we consider only those cases where the allegation of prosecutorial misconduct was deemed significant enough for one or more reviewing courts to address, but may not include all cases that might have raised this as an issue in the pleadings.

5. *Allen v. Woodford*, 395 F.3d 979, 997 (9th Cir. 2005); *Thompson*, 120 F.3d at 1055; *People v. Rich*, 755 P.2d 960 (Cal. 1988); *Babbitt*, 755 P.2d 253. Prosecutorial misconduct has been defined as “improper” conduct. See ROGER M. GOLDMAN & MARK J. KADISH, 6-8 CRIMINAL LAW ADVOCACY § 8.01 (Matthew Bender & Co., Inc. (2008)). It has also been defined as “prosecutorial error.” See *People v. Hill*, 952 P.2d 673, 684 n.1 (Cal. 1998).

6. *People v. Mason*, 802 P.2d 950 (Cal. 1991); *People v. Bonin*, 758 P.2d 1217 (Cal. 1988).

only one of the seven cases did the reviewing courts explicitly conclude that there was insufficient evidence to establish misconduct, but even in that case there was a forceful dissent.⁷ Indeed, the cases of actual execution in California demonstrate that subsequent review by the state and federal courts largely fails to address prosecutorial misconduct in death penalty cases, with the courts sometimes failing to even assess whether misconduct has occurred. In addition, a comparison of the cases in which prosecutorial misconduct resulted in or contributed to a reversal demonstrates that the misconduct involved is similar, even at times identical, regardless of whether the case was reversed.

THE CASE OF THOMAS THOMPSON

The case of Thomas Thompson presents the most disturbing example of prosecutorial misconduct in an actual execution case in California.⁸ It is likely that Thompson did not commit a crime that would have made him eligible for execution and that he would not have been sentenced to death but for the misconduct of the trial prosecutor. Moreover, the prosecutor's misconduct appears to have been motivated solely by a desire to secure a death sentence, not merely a conviction.

In September of 1981, Thomas Thompson and his roommate, David Leitch, were arrested and tried for the rape and murder of Ginger Fleischli. Leitch successfully moved to sever his trial from Thompson's and the two men were tried separately. The prosecution chose to try Thompson first.⁹

At Thompson's trial, the prosecutor argued that Thompson alone had raped Fleischli in the apartment and "then killed her in order to prevent her from reporting the rape," all before Leitch returned home that night.¹⁰ To support this theory, the prosecution called two jailhouse informants, Edward Fink and John Del Frate, to testify.¹¹ On

7. *Williams v. Woodford*, 396 F.3d 1059 (9th Cir. 2005) (Rawlinson, J., dissenting).

8. *Thompson*, 120 F.3d at 1045.

9. *Thompson*, 120 F.3d at 1055-56.

10. *Id.* at 1056.

11. *Id.* At Thompson's trial, the prosecutor argued that the informants' testimony was very reliable because they had "no reason whatsoever [to] lie." *Id.*

direct examination Fink testified that Thompson had confessed to him that he had raped and murdered Fleischli; that Leitch only learned of the murder when he returned home; and that Leitch “merely assisted Thompson in disposing of the body.”¹² Del Frate testified that Thompson alone stabbed Fleischli, causing her death.¹³ The testimony of Fink and Del Frate was the only direct evidence that Thompson personally raped and killed Fleischli.¹⁴ Without this testimony, Thompson would not have been eligible for the death penalty.

The jury found Thompson guilty of rape and first degree murder, and found true the special circumstance of a murder committed during a rape. The jury subsequently voted to sentence Thompson to death.¹⁵

Months later, at Leitch’s trial, the prosecution presented an entirely different theory of the crime. At the second trial, the prosecutor argued that Leitch and Fleischli had been dating; that Leitch wanted Fleischli dead because she was interfering with his attempts to reconcile with his ex-wife; that Leitch was the only person with a motive to kill Fleischli; that Leitch had recruited Thompson to help kill her; and that both men were directly involved in the killing, though it was unclear who had actually stabbed Fleischli causing her death.¹⁶

The prosecutor did not call either Fink or Del Frate at Leitch’s trial. Instead he called three other jailhouse informants.¹⁷ All three had been *defense* witnesses at Thompson’s trial where the prosecutor objected to their testimony.¹⁸ Yet, as the witnesses left the stand in Thompson’s trial, the prosecutor subpoenaed them for Leitch’s trial.¹⁹ The prosecutor relied heavily on these witnesses to establish Leitch’s previous threats toward Fleischli, his violent disposition, and that

However, shortly after Fink incriminated Thompson his parole hold was dropped and he was released from jail on the basis of favorable information provided by law enforcement officials to the parole board. *Id.*

12. *Id.*

13. *Id.* at 1054.

14. *Id.* at 1056.

15. *People v. Thompson*, 45 Cal. 3d 86, 96 (1988).

16. *Thompson*, 120 F.3d at 1055-57.

17. *Id.* at 1056.

18. *Id.* at 1056.

19. *Id.*

Leitch was “*the only one with any motive*” for killing Fleischli.²⁰ The jury found Leitch guilty only of second degree murder, and the judge sentenced him to fifteen years to life.²¹

In April of 1988, the California Supreme Court affirmed Thompson’s conviction and sentence.²² The Court did not address the prosecutor’s use of inconsistent factual theories as a form of misconduct. Thompson then sought habeas relief in federal court. Based on Thompson’s claim that his trial counsel was ineffective, the U.S. District Court for the Central District of California granted relief on the rape conviction and on the rape special circumstance, invalidating the death sentence.²³ In response to Thompson’s claim that he had been prejudiced by the prosecution’s use of inconsistent theories at his and Leitch’s trials, the District Court found that “the trials differed mainly in emphasis” and any error did not require reversal.²⁴ A Ninth Circuit panel then reversed the District Court’s ruling on ineffective assistance of counsel, reinstating the rape conviction and death sentence.²⁵ The panel also denied Thompson’s petition for rehearing and his suggestion for a hearing en banc.²⁶ In regards to the issue of prosecutorial misconduct, the panel agreed with the District Court that the prosecutor had not used inconsistent theories, only theories with differing emphases.²⁷

The U.S. Supreme Court then denied Thompson’s petition for certiorari in June 1997, and shortly thereafter the Ninth Circuit issued a mandate denying all habeas relief.²⁸ The State of California then set a date for Thompson’s execution for August 5, 1997.²⁹

20. *Id.* at 1056-57. This is a direct quote from the prosecutor’s closing argument in Leitch’s trial. *Id.*

21. *Calderon v. Thompson*, 523 U.S. 538, 544 (1998). Leitch’s sentence is reported in the slip opinion from his habeas case. *Leitch v. Marshall*, 2008 WL 2001941 at *1 (C.D. Cal. May 7, 2008).

22. *People v. Thompson*, 753 P.2d 37 (Cal. 1988).

23. *See Thompson*, 523 U.S. at 545.

24. *Id.*

25. *Thompson v. Calderon*, 109 F.3d 1358, 1364-71 (9th Cir. 1996).

26. *Id.*

27. *Id.*

28. *Thompson v. Calderon*, 520 U.S. 1259 (1997); *Thompson v. Calderon*, 122 F.3d 28, 30 (9th Cir. 1997).

29. *Thompson v. Calderon*, 120 F.3d 1045, 1047 (9th Cir. 1997).

On August 3, 1997, two days before the execution, the Ninth Circuit acting en banc recalled its previous mandate denying habeas relief and reversed Thompson's rape conviction, the rape special circumstances, and death sentence.³⁰ The court explained that because of a procedural misunderstanding within the court, no en banc call had been made or voted on before the mandate was issued.³¹ A majority of the en banc court then held that the prosecution's pursuit of fundamentally inconsistent theories in the separate trials of Thompson and Leitch violated Thompson's due process rights and that Thompson's death sentence, based on these inconsistent theories, could not stand.³²

Within hours of the Ninth Circuit order, the State of California filed a petition for certiorari with the U.S. Supreme Court. The petition was granted, and on April 29, 1998, the Supreme Court reversed the decision of the Ninth Circuit.³³ The Supreme Court held that the Ninth Circuit did not have jurisdiction to recall its mandate on a clerical error, thus precluding the court from considering the underlying issues of prosecutorial misconduct and ineffective assistance of counsel.³⁴ Thomas Thompson was subsequently executed on July 14, 1998.³⁵

Despite Thompson's execution, the Ninth Circuit en banc opinion in the *Thompson* case established the proposition that a prosecutor's use of inconsistent factual theories may present a due process

30. *Id.* at 1059.

31. *Id.* at 1049.

32. *Id.* at 1055. The en banc court also reinstated the District Court's finding of ineffective assistance of counsel. *Id.* at 1054. In this decision to recall the mandate at the last minute, the Ninth Circuit emphasized that Thompson was in no way responsible for the "lateness of the hour." *Id.* at 1049. The court had noticed its clerical error some time before the execution was scheduled, but in the interest of comity had delayed acting until Thompson's state-court proceedings had concluded. *Id.* The court stated in its opinion, "[a]lthough, in the interest of comity, we delayed acting . . . we act now because we have sua sponte concluded that the interests of justice require us to afford Thompson the en banc process we should have initiated immediately after the panel's decision." *Id.* at 1049.

33. *Calderon v. Thompson*, 523 U.S. 538, 549 (1998).

34. *Id.* at 566.

35. Eric Bailey, *California and the West: Inmate Said Goodbyes, then Died*, L.A. TIMES, July 15, 1998, at A-3.

violation.³⁶ In the recent case of *In re Sakarias*, under this same principle, the California Supreme Court overturned Sakarias' death sentence.³⁷ This case must be considered alongside the *Thompson* case to appreciate the gravity of allowing Thompson's execution to proceed despite the substantial misconduct involved.

Peter Sakarias and Tauno Waidla were jointly charged with the murder of Viivi Piirisild.³⁸ After Sakarias was found incompetent to stand trial, their trials were severed and Waidla was tried first.³⁹ At his trial, the prosecutor presented evidence to support his theory that Waidla was the dominant figure in the attack and that he was the one who delivered the "death blow" to the victim with a hatchet.⁴⁰ The jury convicted Waidla and voted for death.⁴¹

Months later, at Sakarias' trial, the prosecutor presented a different theory of the crime. This time he argued that Sakarias had acted independently and co-equally in perpetrating the crime and that it was Sakarias who had ultimately killed Piirisild with the hatchet blade, not Waidla. Sakarias, like Waidla, was convicted and sentenced to death.⁴²

On automatic appeal, the California Supreme Court affirmed the convictions and the sentences, but issued an Order to Show Cause in response to Sakarias' and Waidla's claims of prosecutorial misconduct. In response, the Attorney General acknowledged that the prosecutor had argued inconsistent theories, but denied that he had done so intentionally or knowingly, contending that the death sentences should stand despite the inconsistent theories.⁴³

The California Supreme Court ultimately concluded that the prosecutor had intentionally presented factually inconsistent theories of the crime at the separate trials and that he had deliberately manipulated the evidence introduced at each trial to match the theory

36. See *In re Sakarias*, 106 P.3d 931, 942 (Cal. 2005).

37. *Id.* at 947-48.

38. *Id.* at 936.

39. *Id.*

40. *Id.*

41. *Id.* at 934.

42. *Id.*

43. *Id.* at 937.

being presented.⁴⁴ Citing the en banc Ninth Circuit opinion in *Thompson*, the California Supreme Court found this action to be a due process violation requiring the reversal of Sakarias' death sentence. The Court stated:

the prosecutor's unjustified use of inconsistent and irreconcilable factual theories to convict two people of a crime only one could have committed, *or to obtain harsher sentences* for both on the basis of an act only one could have committed, violates due process because in those circumstances the state has necessarily convicted or sentenced a person on a false factual basis.⁴⁵

Interestingly, while the Court found the prosecutor's actions to have been "intentional" and "in bad faith,"⁴⁶ the Court never explicitly labeled them as "misconduct." Moreover, even after reversing the death sentence of Sakarias, the Court upheld Waidla's conviction and death sentence, ruling that the prosecutor's use of inconsistent theories had not prejudiced the result of his trial given the "great weight of evidence available" against him.⁴⁷ In sum, the Court concluded that the evidence more strongly supported the theory that Waidla was the actual killer, not Sakarias. In addition, it appears the prosecutor in this case has never been disciplined for the misconduct. Using publicly available records, we were able to identify the prosecutor in the *Sakarias* case. An on-line search of the State Bar records reveals that he has "no public record of discipline" though he was suspended for six months for failure to pay his Bar dues.⁴⁸

The California Supreme Court's ruling in *In re Sakarias* dramatically highlights the injustice of allowing the execution of Thompson to proceed despite the serious misconduct in the case. The prosecutor in the *Thompson* case, as in the *Sakarias* case, manipulated the evidence presented to the jury, utterly distorting the fact finding

44. *Id.* at 944-50.

45. *Id.* at 947 (emphasis added).

46. *Id.* at 944.

47. *Id.* at 950.

48. Member records may be searched at the State Bar of California website. State Bar of California, Attorney Search, <http://members.calbar.ca.gov/search/member.aspx>. This search was conducted on July 10, 2007. We have not included in this article the names of prosecutors that were not publicly identified by the court.

process and undermining the legitimacy of the entire proceeding. Indeed, as a result of the prosecutor's intentional manipulation of the evidence, the State of California may very well have executed an individual who legally should not have been sentenced to death.

Moreover, in both the *Thompson* case and the cases of *Sakarias* and *Waidla*, it appears that the misconduct was motivated specifically by the prosecutor's desire to secure a death sentence, not just a conviction. In all three cases, the prosecutor could have secured a conviction without manipulating the evidence and misleading the jury. Securing a death sentence, however, was another matter. In each case, by presenting evidence that pointed to the defendant as the person who actually committed the killing, each prosecutor greatly increased the likelihood that the jury would ultimately vote for death. These cases thus illustrate both the unique pressures on prosecutors in death penalty cases that may lead to misconduct and the unique risks, as prosecutors may easily manipulate the evidence to increase the chances of a death sentence. Further, the contrasting results—execution of *Thompson*, relief for *Sakarias*, and a finding of “harmless error” for *Waidla*—demonstrate that the same type of misconduct leads to dramatically different results.

THE CASE OF MANNY BABBITT

Often, though, it is not evidence that prosecutors manipulate but the fears and emotions of the jury. The *Babbitt* case is one example.⁴⁹ There is no doubt that Manuel (“Manny”) Babbitt was responsible for the death of Leah Schendel. There is also no doubt that Babbitt suffered from severe mental illness. As a result of both prosecutorial misconduct and ineffective assistance of counsel, the jury may have been substantially misled about the nature of this illness and its legal consequences. Thus, doubt remains as to whether the execution of Manny Babbitt was appropriate.

Manny Babbitt was a Vietnam War veteran who suffered from post-traumatic stress disorder.⁵⁰ On December 18, 1980, he broke into the home of seventy-eight-year-old Leah Schendel.⁵¹ Surprised by

49. *People v. Babbitt*, 45 Cal. 3d 660 (1988).

50. *Id.* at 678-79.

51. *Id.* at 676-77, 724.

Schendel, Babbitt struck her, causing her to fall to the ground. Schendel suffered from coronary heart disease, and, according to a pathologist, died after falling as a result of a heart attack brought on by fright.⁵² The pathologist noted the physical blows she received would not themselves have proven fatal and that it was only because of the heart attack that she died.⁵³

Manny Babbitt's own brother, Bill Babbitt, turned him in to the police, telling them that his brother was mentally ill and needed help.⁵⁴ The police assured Bill that Manny would receive treatment. Instead, he was sentenced to death and ultimately executed on May 4, 1999.⁵⁵

Babbitt's trial focused almost exclusively on his severe mental illness and whether that illness should preclude execution. His attorney called family members and two expert witnesses to describe his behavior and explain his mental illness to the jury.

In closing arguments during the sanity phase of the trial, the prosecutor made "unflattering" remarks about Babbitt's expert witness, inveighed against the use of psychiatric defenses generally, and stated or implied to the jury that a finding of insanity would result in Babbitt going free.⁵⁶ The prosecutor's comments included:

"We are letting justice be decided on the basis of how well a psychiatrist can sell their bag of tricks," and, "they [psychiatrists] are so vain as to think they are capable of all these magical, mystical things they say they are capable of . . ."⁵⁷

"[W]e have a social cancer in our community now, and it is this very process of allowing psychiatrists to come in and make their

52. *Id.* at 677.

53. *Id.*

54. Linda Grace-Kobas, Death Penalty Offers Families No Closure, Law School Speakers Say, Cornell Chronicle, Mar 30, 2003, available at http://www.news.cornell.edu/Chronicle/03/3.20.03/death_penalty_forum.html (viewed Feb 12, 2009). See also Bill Babbitt profile at <http://www.mvfhr.org/> (viewed Feb 12, 2009).

55. Maria La Ganga, *Babbitt is Executed After Appeals Fail*, L.A. TIMES, May 4, 1999, at A-1.

56. *People v. Babbitt*, 45 Cal. 3d at 696-97.

57. *Id.* at 697.

moral pronouncements disguised as medical opinion in the hopes of persuading jurors to let people off the hook”⁵⁸

“I’m going to find this guy crazy and let him go home”⁵⁹

[Psychiatrists] are perfectly willing to come to court and absolve an individual such as Manuel Babbitt of all criminal responsibility. . . .⁶⁰

[E]very time somebody gets mad, they are free to commit any crime they want, and they can be found not guilty by reason of insanity.⁶¹

On direct appeal, the California Supreme Court held that even though most of the prosecutor’s remarks *approached* misconduct and were “skirting the edge of propriety” they were “clearly non-prejudicial.”⁶² Indeed, though the Court explicitly identified one comment as “improper,”⁶³ the Court concluded that “any error in the prosecutor’s single improper remark . . . was nonprejudicial.”⁶⁴

To reach these conclusions the Court took three analytic steps: first, the Court held that, when viewed in light of the testimony of the prosecution’s expert witness, the prosecutor’s statements disparaging the defense experts were based on the evidence. The Court thus held that the prosecutor’s statements went to the weight of the defense witnesses’ testimony, not to its admissibility.⁶⁵ Second, the Court adopted a very narrow interpretation of the prosecutor’s closing argument. The Court focused on isolated clauses to reach the conclusion that the prosecutor was not urging the jury to remove the “social cancer” from the courtroom, but rather that he meant to argue that the jury could *not* do so.⁶⁶ Finally, the Court held that the

58. *Id.* at 699.

59. *Id.* at 703.

60. *Id.* at 702.

61. *Id.* at 703.

62. *Id.* at 700.

63. *Id.* at 704.

64. *Id.* at 705.

65. *Id.* at 699.

66. *Id.* at 700.

prosecutor's statements about letting the defendant "off the hook" were not a form of misconduct because, when understood properly, they did not refer to a physical freedom from confinement, but to a freedom from criminal responsibility that follows a finding of insanity. Ultimately, the Court found that, regardless, the statements were non-prejudicial because the jury had heard testimony that a finding of insanity would result in Babbitt being sent to a mental institution for "an indefinite period of time."⁶⁷

The Court did conclude that the prosecutor's statement, "I'm going to find this guy crazy and *let him go home*,"⁶⁸ was improper "to the extent the prosecutor was suggesting that when an accused is found insane he is let free."⁶⁹ However, the Court found that this statement alone did not deprive Babbitt of a fair hearing and was thus non-prejudicial.⁷⁰

Research from the Capital Jury Project has shown that a juror's beliefs about whether the defendant will ever be eligible for release is critical to whether that juror is likely to vote for life or death.⁷¹ The *Babbitt* prosecutor misled the jury about the consequences of finding Babbitt legally insane, manipulating their fears, in order to secure a finding that Babbitt was eligible for death and, ultimately a death sentence. From the outset of the trial, there was no doubt that Babbitt would not "go free." The only question was whether he would be sent to a state mental hospital, given a sentence of permanent imprisonment, or sentenced to death. But the prosecutor's comments were intended to, and likely did, make the jury believe that whether Babbitt would "go free" depended on them, making it much more likely that the jury would vote for death.

Further, the California Supreme Court's decision demonstrates that, in fact, the Court is failing to provide meaningful review of this type of misconduct. Rather than clearly articulate what is and is not appropriate conduct for a prosecutor in this type of case, the Court

67. *Id.* at 706.

68. *Id.* at 703 (emphasis in original).

69. *Id.* at 704.

70. *Id.* at 705.

71. See SCOTT SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* (Palgrave MacMillan) (2005) (describing years of research by the Capital Jury Project).

goes to lengths to minimize the impact of the conduct, parsing the prosecutor's statements into isolated bits without considering the total impact on the jury. The result is that the Court's decision likely encourages prosecutors to continue "skirting the edge of propriety"⁷² in death penalty cases. The Court is thus sending exactly the wrong message to prosecutors. The Court, and the legal profession in general, should demand that prosecutors maintain the highest ethical standards in death penalty cases, and not encourage them, implicitly or explicitly, to get away with as much as possible.

OTHER EXECUTION CASES RAISING SUBSTANTIAL MISCONDUCT

The cases of Thomas Thompson and Manny Babbitt are the two cases of actual execution in California where prosecutorial misconduct had a significant impact on the outcome and where the appropriateness of the execution is most in doubt. But prosecutorial misconduct is an issue in a significant number of death penalty cases. Of the thirteen executions which have taken place in California since the death penalty was reinstated in 1977, prosecutorial misconduct has been raised as a significant issue in seven—more than half.⁷³ Moreover, in many of these cases we see the courts, particularly the California Supreme Court, simply side-step the misconduct and minimize its effect on the outcome of the trial rather than addressing directly the appropriateness of the behavior. Consider the following examples:

David Mason (executed August 24, 1993)—During Mason's murder trial the prosecution improperly elicited information from witnesses, including Mason himself. For example, on cross-examination, the prosecutor asked Mason about evidence (firearms in his possession at the time of arrest) that the court had specifically excluded.⁷⁴ The prosecutor also improperly elicited testimony from witnesses regarding Mason's violence and threats of violence towards inmates in the prison as well as information about other crimes Mason

72. *People v. Babbitt*, 45 Cal. 3d at 700.

73. For the full list of inmates executed in California from 1978 through 2008, see http://www.cdcr.ca.gov/Reports_Research/Inmates_Executed.html (last visited Feb. 12, 2009).

74. *People v. Mason*, 52 Cal. 3d 909, 947 (1991).

had committed in the past.⁷⁵ Notwithstanding; the California Supreme Court failed to address whether these actions constituted misconduct, concluding that the conduct was “non-prejudicial.”⁷⁶

William George Bonin (executed February 23, 1996)—The prosecutor elicited inadmissible evidence from a witness to the effect that Bonin had admitted to other murders in addition to the four for which he was on trial.⁷⁷ The California Supreme Court observed that it appeared that the prosecutor had elicited the testimony intentionally, and that “the prosecutor must have known that the testimony he elicited . . . was inadmissible: that evidence was plainly irrelevant to the issues material to the question of guilt, and had been ruled such by the court.”⁷⁸ However, the Supreme Court held that it need not resolve the question of whether the prosecutor’s actions were misconduct because “we have come to the conclusion that the conduct . . . could not be deemed prejudicial.”⁷⁹

Further, in closing arguments, the prosecutor made arguments based on an erroneous understanding of the law, arguing that the absence of evidence in mitigation was itself an aggravating factor. The prosecutor made this argument to the jury at least six different times during his closing argument. The California Supreme Court stated that the prosecutor’s remarks were clearly a misstatement of the law, but held that “defendant’s claim of prosecutorial misconduct must be rejected at the threshold” because a timely objection had not been raised by defense counsel at trial.⁸⁰ The court also held that the prosecutor’s statements, though erroneous, could not be characterized as misconduct because they were not made in “bad faith.” Finally, the court concluded the comments were non-prejudicial given the weight

75. *Id.* at 948-49.

76. *Id.* at 941. After the California Supreme Court decision, Mason waived further appeals and volunteered for execution. *Mason v. Vasquez*, 5 F.3d 1220, 1222 (9th Cir. 1993). Thus, his case was not reviewed by any federal courts. It is possible that such a review might have reached a different conclusion about whether the prosecutorial misconduct was prejudicial.

77. *People v. Bonin*, 46 Cal. 3d. 659, 680 (1988).

78. *Id.* at 689.

79. *Id.* at 690.

80. *Id.* at 701.

of aggravating evidence against Bonin and the fact that the court had instructed the jurors properly.⁸¹

Darrell Keith Rich (executed March 15, 2000)—In closing arguments, the prosecutor urged the jury to consider the “strong evidence” that two of the victims had been raped during their murder as an aggravating factor.⁸² The prosecutor made this argument even though earlier the same jury had found that the victims were not murdered during the commission of a rape.⁸³ In essence, the prosecutor urged the jury to consider something as an aggravating factor when he had not previously been able to prove the conduct occurred. On appeal, the Attorney General’s office admitted that this conduct was “error,” but argued that it was “harmless.”⁸⁴ The California Supreme Court agreed, concluding that “the improper argument was harmless.”⁸⁵

Stanley Williams (executed December 13, 2005)—Williams claimed that the prosecutor “impermissibly exercised peremptory challenges” in a racially discriminatory manner, excluding three African-Americans from the jury “in violation of the Equal Protection Clause.”⁸⁶ The Ninth Circuit Court of Appeals dismissed this claim, concluding that even though “a pattern of strikes against African-Americans provides support for an inference of discrimination,” Williams’ pleadings were factually insufficient because they did not include the proportion of African-Americans excluded.⁸⁷ On en banc review by the Ninth Circuit, thirteen judges dissented from the denial of relief, finding sufficient evidence to warrant further review of the claim that the prosecutor had dismissed jurors based on racial bias.⁸⁸

Clarence Ray Allen (executed January 19, 2006)—The prosecution failed to disclose evidence that would have impeached the credibility of two of the prosecution’s key witnesses.⁸⁹ For example,

81. *Id.* at 702.

82. *People v. Rich*, 45 Cal. 3d 1036, 1122 (1988).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Williams v. Woodford*, 384 F.3d 567, 583 (9th Cir. 2004).

87. *Id.* at 584.

88. *Williams v. Woodford*, 396 F.3d 1059, 1066 (9th Cir. 2005).

89. *Allen v. Woodford*, 395 F.3d 979, 997 (9th Cir. 2003).

the prosecution failed to disclose a letter written by one witness' wife instructing him how to change his testimony at a separate trial.⁹⁰ The Ninth Circuit Court of Appeals held that the prosecutor's actions were not in violation of *Brady v. Maryland* because they did not deprive Allen of a fair trial or undermine confidence in the outcome of the trial given that "the testimony of [the witnesses] was substantially impeached" through other available evidence.⁹¹

In closing arguments, the prosecutor described to the jury what he thought Allen's victims would "say from beyond the grave."⁹² The prosecutor also compared Allen to Adolf Hitler and accused him of conspiring with his counsel to retaliate against one of the trial witnesses.⁹³ The Ninth Circuit held that this last statement was undoubtedly misconduct,⁹⁴ however, the court minimized the importance or effect of the statements, concluding that the statements were non-prejudicial.⁹⁵

COMPARISON WITH DEATH PENALTY CASES REVERSED FOR MISCONDUCT

It is useful to compare these cases of actual execution—in which substantial prosecutorial misconduct was raised but relief denied—with those death penalty cases in which relief was granted in whole or in part because of misconduct.⁹⁶ The sharp contrast in outcomes between the cases of *Thompson*, *Sakarias*, and *Waidla* has already been addressed.⁹⁷ In particular, the difference in outcomes between

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1016.

94. *Id.* at 997-98.

95. *Id.*

96. We do not consider cases where the court found misconduct, but reversed the conviction or death sentence for other reasons such as incorrect jury instructions. See, e.g., *People v. Davenport*, 41 Cal. 3d 247, 287-88 (1985).

97. Compare *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997), with *In re Sakarias*, 35 Cal. 4th 140 (2005) (showing that despite the same finding by courts that the prosecutors committed misconduct by arguing inconsistent theories of culpability to different juries in cases with co-defendants tried separately, one defendant was executed, one had his death sentence reversed, while a third remains on death row).

Sakarias (conviction and death sentence reversed) and *Waidla* (death sentence affirmed), despite the fact that the cases involved the identical intentional misconduct by the prosecutor, illustrates that the results of post-conviction review have little correlation to the severity of the misconduct. Indeed, the difference in results in these two cases appears to reflect nothing more than the California Supreme Court's own belief about who the real killer was.⁹⁸ Apart from cases reversed because of racial bias during jury selection and one unique case, *People v. Hill*,⁹⁹ the other cases in which death sentences were reversed also appear to have rested on the courts' assessments of the strength of the evidence.

Two California death sentences have been reversed because of racial bias in jury selection, *People v. Silva*,¹⁰⁰ and *People v. Fuentes*.¹⁰¹ Unlike other claims of prosecutorial misconduct, harmless error analysis does not apply to claims of racial bias in jury selection and prejudice need not be established for the behavior to be considered misconduct. As the Court observed in *Silva*, "[t]he exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal."¹⁰² This appears to be the only type of prosecutorial misconduct that results in reversal without requiring any showing of an impact on the outcome of the case.

Using publicly available records, we were able to identify the prosecutor in the *Silva* case.¹⁰³ An on-line search of the State Bar records reveals that he has "no public record of discipline."¹⁰⁴ We were not able to identify the bar record for the prosecutor in the *Fuentes* case because the name listed for the prosecutor is too common.

98. *Sakarias*, 35 Cal. 4th at 168.

99. *People v. Hill*, 17 Cal. 4th 800 (1998).

100. *People v. Silva*, 25 Cal. 4th 345, 385-386 (2001).

101. *People v. Fuentes*, 54 Cal. 3d 707, 711 (1991).

102. *See Silva*, 25 Cal. 4th at 386.

103. The names of the prosecutors for each case are available in public records of the trial including transcripts and minute orders.

104. State Bar of California, Attorney Search, <http://members.calbar.ca.gov/search/member.aspx>. This search was performed on July 10, 2007.

Turning to the other cases of misconduct, the case of *People v. Hill* stands out.¹⁰⁵ As the California Supreme Court ultimately concluded, the prosecutor in *Hill* “committed serious, blatant and continuous misconduct at both the guilt and penalty phases of trial.”¹⁰⁶ The Court described the “most egregious” examples of misconduct during guilt phase as “(i) her patent misstatements of the facts in closing argument . . . ; (ii) her improper references to alleged facts outside the record . . . ; (iii) her misstatements of the law; and (iv) her threat to charge a defense witness with perjury should he testify for the defense.”¹⁰⁷

Elsewhere, the Court described the prosecutor’s conduct as “constant and outrageous misconduct,” amounting to a “pervasive campaign to mislead the jury on key legal points,” including “unceasing denigration of defense counsel before the jury”¹⁰⁸ The Court then stated, “[a]lthough we might conclude any single instance of misconduct was harmless standing alone, we cannot ignore the overall prejudice to defendant’s fair trial rights caused by [the prosecutor’s behavior].”¹⁰⁹ Moreover, the Court noted that three Court of Appeal decisions found this same prosecutor to have committed misconduct in other cases.¹¹⁰

The *Hill* case stands out both because of the egregious and pervasive nature of the prosecutor’s misconduct but also because the California Supreme Court reversed the conviction largely because of this misconduct. It also appears to be the only case in which the Court takes “judicial notice” of prior acts of misconduct, over the objection of the Attorney General. Yet, a search of the State Bar records reveals that the prosecutor still has “no public record of discipline.”¹¹¹

105. *People v. Hill*, 17 Cal. 4th 800 (1998).

106. *Id.* at 844.

107. *Id.* at 836.

108. *Id.* at 845.

109. *Id.*

110. *Id.* at 847.

111. The California Supreme Court identified the prosecutor in *Hill* as Rosalie Morton. A search of member records performed July 9, 2007, shows that Rosalie L. Morton State Bar number 36924, of Sherman Oaks, has “no public record of discipline.” State Bar of California, Attorney Search, <http://members.calbar.ca.gov/search/member.aspx>.

Apart from the cases reversed because of racial bias in jury selection, *Hill* and *Sakarias*, the California Supreme Court has reversed only one other death penalty case because of prosecutorial misconduct since reinstatement of the death penalty in 1977: *People v. Quartermain*.¹¹² In *Quartermain*, the defendant agreed to a pre-trial interview with the prosecutor under the condition that his statements would not be used during trial.¹¹³ When the defendant testified, the prosecutor used his pre-trial statement to impeach him.¹¹⁴ The California Supreme Court found this to be a violation of due process.¹¹⁵ The Court concluded that this was not harmless error because the evidence against the defendant was largely circumstantial, making his credibility critical to the outcome of the case.¹¹⁶ We were able to identify the prosecutor in this case and he also has “no public record of discipline.”¹¹⁷

Three other California death penalty cases have been reversed by the Ninth Circuit as a result of prosecutorial misconduct: *Sandoval v. Woodford*,¹¹⁸ *Hayes v. Brown*,¹¹⁹ and *Silva v. Brown*.¹²⁰ In *Sandoval*, the prosecutor’s penalty phase closing argument quoted biblical passages which exhorted jurors to follow the “higher authority” of God, encouraging them to disregard the legal requirements for finding in favor of death.¹²¹ The California Supreme Court found this to be error but harmless.¹²² The Ninth Circuit concluded that the misconduct was prejudicial given that “this [was] not a case where the evidence

112. *People v. Quartermain*, 941 P.2d 788, 797-98 (Cal. 1997). *See also* *People v. Purvis*, 384 P.2d 424, 443-44 (Cal. 1963); *People v. Love*, 366 P.2d 33, 40 (Cal. 1961) (death penalty cases reversed for prosecutorial misconduct under prior death penalty statute).

113. *Quartermain*, 941 P.2d at 797.

114. *Id.*

115. *Id.* at 799.

116. *Id.* at 800.

117. *See supra* note 48.

118. *Sandoval v. Calderon*, 241 F.3d 765, 776-77 (9th Cir. 2000), *cert. denied*, 534 U.S. 943 (2001).

119. *Hayes v. Brown*, 399 F.3d 972, 978-80 (9th Cir. 2004).

120. *Silva v. Brown*, 416 F.3d 980, 992 (9th Cir. 2005).

121. *Sandoval*, 241 F.3d at 776-77.

122. *People v. Sandoval*, 841 P.2d 862, 882 (Cal. 1992).

overwhelmingly supported the jury's [death] verdict."¹²³ The Court noted the length of jury deliberations (three days), the lack of overwhelming guilt evidence, the considerable amount of mitigating evidence, and that the jury reported itself deadlocked six to six shortly before finding in favor of death.¹²⁴ We could not identify the prosecutor in this case and thus do not know if discipline was imposed.

In *Hayes*, the prosecutor and the attorney representing a witness who testified against Hayes reached an agreement prior to trial that the witness' pending felony charges would be dismissed as a result of his testimony. This deal was not disclosed to the defense attorney, judge, or jury, and the prosecutor allowed the witness to falsely testify that he was receiving no such benefit.¹²⁵ The District Court concluded that the prosecutor "knowingly presented false evidence to the jury and made false representations to the trial judge," but found the error harmless.¹²⁶ The Ninth Circuit found the error prejudicial because the witness' testimony was critical to the special circumstance finding that made Hayes eligible for the death penalty and thus reversed.¹²⁷ The prosecutor in the *Hayes* case is now a judge. His State Bar discipline record is not available and an on-line search of the California Commission on Judicial Performance does not list him among those judges who have been disciplined.¹²⁸

In *Silva*, the prosecution also entered into a secret plea agreement with its star witness, agreeing that the witness would not have to undergo a psychiatric examination until after he testified.¹²⁹ The prosecutor failed to disclose this deal to the defense, the judge or the jury, nor was the jury informed that the witness might not have been competent to testify. The district court concluded that this conduct did not violate *Brady* because the information was not "material."¹³⁰ The

123. *Sandoval*, 241 F.3d at 778.

124. *Id.* at 779.

125. *Hayes*, 399 F.3d at 978-80.

126. *Id.* at 978.

127. *Id.* at 986.

128. Search performed July 10, 2007. Records of the California Commission on Judicial Performance may be searched at <http://cjp.ca.gov/index.php?id=9>.

129. *Silva*, 416 F.3d at 986. The witness, who was directly involved in the charged murders, had suffered severe brain damage years earlier.

130. *Id.* at 985.

Ninth Circuit found the hidden deal to be material because the witness's testimony "was crucial to the State's prosecution of Silva for murder," as he was "the only witness [who] identified Silva as [the] killer."¹³¹ The Ninth Circuit thus reversed the conviction, having previously reversed the death sentence because of ineffective assistance of counsel.¹³² We were able to identify the prosecutor in the *Silva* case and he too, like all others identified, has "no public record of discipline."¹³³

With the exception of *Hill* and the cases reversed for racial bias, the outcome in all of these cases where prosecutorial misconduct led to actual reversal of either the conviction or death sentence appears to depend solely on the court's assessment of the strength of the evidence. In all five cases—*Quartermain*, *Sakarias*, *Sandoval*, *Hayes*, and *Silva*—the reversing courts cite either the lack of evidence or the closeness of the case as the reason the misconduct was prejudicial. The nature, severity or intentionality of the conduct does not appear relevant. Indeed, the misconduct shown in some of these cases of reversal is arguably less significant than the misconduct in some of the actual execution cases. For example, the prosecutor's argument in *Babbitt*—encouraging jurors to believe that their verdict might result in Babbitt going free—arguably is more prejudicial than the Biblical passages quoted by the prosecutor in *Sandoval*. Likewise, the intentional manipulation of evidence in the *Thompson* case is arguably more prejudicial than in the *Sakarias* case; in the latter, the defendant would still be eligible for death under either of the prosecution's theories,¹³⁴ whereas in the former, the defendant was not eligible for death under the prosecutor's theory at the co-defendant's trial. Such inconsistent results in the most serious of cases—cases where the defendant's life literally hangs in the balance—demonstrate the urgent need for reform.

131. *Id.* at 987.

132. *Id.* at 992.

133. *See supra* note 49.

134. *Sakarias*, 35 Cal. 4th at 171-79 (Baxter, J., dissenting) (arguing that despite the prosecutor's use of inconsistent factual theories, the evidence on the record would still have justified Sakarias' death sentence given his involvement in the gruesome murder of Viivi Piirisild).

LESSONS TO BE DRAWN

We draw five lessons from this review of prosecutorial misconduct in actual execution cases and death penalty cases that resulted in reversal because of misconduct:

- 1) There are particular forms of misconduct that are likely to occur in death penalty cases;
- 2) Death penalty cases present unique risks because of the pressures to engage in misconduct to secure the death sentence and not just the conviction;
- 3) There is a unique risk in these cases that misconduct will influence the jury on the issue of sentence;
- 4) Post-conviction review largely fails to address the problem of misconduct in death penalty cases; and
- 5) Currently, there are no remedies, sanctions, or institutional efforts that will effectively maintain the professional responsibility of prosecutors in death penalty cases.

First, there are particular forms of misconduct that are likely to occur in death penalty cases. As in non-death penalty cases, prosecutorial misconduct in death penalty cases frequently takes the form of racial bias in jury selection,¹³⁵ improperly eliciting facts or information that have been or should have been excluded,¹³⁶ and failure to disclose exculpatory evidence to the defense.¹³⁷ But additionally, three forms of misconduct appear particularly likely to occur in death penalty cases:

- a) Manipulating the evidence and theory of the case to make the defendant the more culpable party;¹³⁸
- b) Misstating the law in order to mislead jurors about the legal requirements for finding the defendant deserves death or

135. See text accompanying and discussion of *Williams*, *supra* note 86; *Silva*, *supra* note 100; *Fuentes*, *supra* note 101.

136. See text accompanying and discussion of *Mason*, *supra* note 74; *Bonin*, *supra* note 77; *Quartermain*, *supra* note 112.

137. See text accompanying and discussion of *Allen*, *supra* note 89; *Hayes*, *supra* note 125; *Benjamin Silva*, *supra* note 129.

138. See text accompanying and discussion of *Thompson*, *Sakarias*, and *Waidla*, *supra* notes 8-48.

about the consequences of voting for a sentence less than death;¹³⁹ and

c) Inflaming the passions of the jurors to make them more likely to vote for death.¹⁴⁰

These forms of misconduct illustrate point number two above: all are directed specifically to increasing the chances that the jury will vote for death, not merely that the jury will convict the defendant. Prosecutors in death penalty cases face intense pressure not just to secure a conviction but also to secure a death sentence. Generally, these are high profile cases with close public scrutiny. In addition, every prosecutor is aware that his or her office has devoted substantial resources specifically to attaining a death sentence, not just a conviction. The role of the prosecutor in a death penalty case goes far beyond merely presenting the evidence to the jurors and allowing them to choose the appropriate sentence. Rather, prosecutors *advocate* for death. Thus, prosecutors generally consider it a “loss” if the jury votes for life and a “win” if the jury chooses death.¹⁴¹

Moreover, this kind of misconduct is particularly pernicious in the context of death penalty cases. In most criminal trials, the jury must decide only what the facts are and whether the facts demonstrate the crime charged. But in death penalty cases, jurors must make the utterly subjective decision whether an individual should live or die. Jurors’ answers to this question will undoubtedly be affected by inflammatory evidence and emotional appeals, regardless of any curative instructions from the court. In addition, research shows that the majority of jurors do not understand the instructions in death penalty cases.¹⁴² Inaccurate legal arguments are likely to substantially mislead the jury about its role and/or the consequences of its choices.

139. See text accompanying and discussion of *Babbitt*, *supra* note 50-72; *Bonin*, *supra* note 77; *Sandoval*, *supra* note 121.

140. See text accompanying and discussion of *Rich*, *supra* note 82; *Allen*, *supra* note 89; *Sandoval*, *supra* note 121.

141. Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning On Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941, 947 (1994) (“When a prosecutor touts the number of defendants she has sent to death row, the prosecutor is saying the same thing: that it is something to take pride in and it is something that the prosecutor had a hand in, not something she was handed.”).

142. See SUNDBY, *supra* note 71.

Thus, death penalty cases present unique risks for prosecutorial misconduct.

Further, our analysis of the execution cases in California also demonstrates that post-conviction review largely fails to address the problem of prosecutorial misconduct in death penalty cases (point four). In particular, the application of “harmless error” analysis to prosecutorial misconduct in death penalty cases means that, almost universally, the courts only reverse the judgment if the evidence is weak. With the single exception of the *Hill* case, even egregious and intentional misconduct does not necessarily result in reversal, even when the prosecutor’s conduct substantially distorted that fact finding process, as in *Thompson* and *Waidla*.

Moreover, courts sometimes fail to even address whether misconduct has occurred, using “harmless error” analysis to avoid the question or finding the issue waived because defense counsel failed to object.¹⁴³ Indeed, some highly questionable behavior by prosecutors is not legally considered “misconduct” unless prejudice is shown.¹⁴⁴ This creates a legal system where prosecutors can engage in virtually any behavior, despite the ethical concerns raised by that behavior, as long as the reviewing judges feel there was enough evidence to justify the conviction or the defense fails to object. In practice, this failure to even address whether misconduct has occurred can only encourage prosecutors to “skirt the edge of propriety.”¹⁴⁵ This is particularly inappropriate in death penalty cases, both because of the high stakes and because the sentencing decision can be so easily influenced by misconduct.

143. See *People v. Mason*, 52 Cal. 3d 909 at 947 (1991); *People v. Bonin*, 46 Cal. 3d 659, 688-89 (1988); *People v. Cudjo*, 6 Cal. 4th 585, 625-26 (1993), *cert. denied*, 513 U.S. 850 (1994) (holding the argument “improper” but harmless); *People v. Carter*, 36 Cal. 4th 1114 (2005) (holding misconduct harmless). See also Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1181-83 (1995) (noting the increasing tendency of courts to use the harmless error rule to avoid reaching difficult issues in a case, including prosecutorial error, by evading the issue and stating that any error that may have occurred was harmless).

144. *People v. Stevens*, 41 Cal. 4th 182, 208, 211 (2007) (holding there was no “misconduct” because the argument did not in fact “mislead” the jury and therefore no prejudice was shown).

145. *People v. Babbitt*, 45 Cal. 3d 660, 700 (1988).

Finally, there currently are no remedies for misconduct or institutional efforts that will effectively maintain the professional responsibility of prosecutors in death penalty cases (point five). Only reversal of judgment results in mandatory reporting of prosecutors to the State Bar for misconduct.¹⁴⁶ As a result, almost no prosecutors are even reported for misconduct in death penalty cases, even when the conduct was intentional. Even those cases that fall under the mandatory reporting rule do not seem to result in sanctions. Indeed, we were able to verify that, out of eight death penalty cases reversed for prosecutorial misconduct, five prosecutors have “no public record of discipline,” and one prosecutor is a sitting judge. The *Hill* case is particularly troubling because the prosecutor in that case was allowed to try a death penalty case even after reviewing courts found that she committed misconduct in three other cases. Even more shocking, she has never been publicly disciplined, despite having committed misconduct in four cases, including a death penalty case, and despite severe reprimand by the California Supreme Court in its decision.

Civil lawsuits against prosecutors for misconduct are also an ineffective remedy. Immunity protects prosecutors in most cases, even when their conduct is intentional and egregious.¹⁴⁷ Indeed, Professor Margaret Z. Johns has criticized the doctrine of prosecutorial immunity, stating, “[t]he justification for absolute immunity is that civil rights litigation will chill the prosecutorial function and unduly burden the government. But the evidence of prosecutorial misconduct resulting in wrongful convictions suggests that we have sacrificed the integrity of our criminal justice system for the sake of efficiency.”¹⁴⁸

Moreover, there are no visible institutional efforts to encourage prosecutors to adhere to ethical standards in death penalty cases. Rather than simply relying on sanctions, the Judicial Council and/or the State Bar could take proactive steps to encourage ethical conduct. The legal profession as a whole has an ethical duty to promote professional responsibility, particularly in death penalty cases—a duty that has been largely ignored.

146. Cal. Bus. & Prof. Code § 6068 (West 2007).

147. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 82 (2005).

148. *Id.* at 125 (footnote omitted).

RECOMMENDATIONS

This article considers only a small sample of death penalty cases. It does not address the allegations of prosecutorial misconduct in any of the more than 600 death penalty cases in California where post-conviction review is not final.¹⁴⁹ Nor does it consider the death penalty cases where prosecutorial misconduct was discovered before trial, resulting in a sentence less than death.¹⁵⁰ Even this small sample, however, demonstrates the need for reform.

First and foremost, the “harmless error” analysis simply should not be applied to evaluate misconduct in death penalty cases. When the prosecution seeks the ultimate sanction of death, it should be expected to follow the rules scrupulously. Further, because the assessment of whether death is appropriate is so subjective, it is simply unrealistic to believe that a reviewing court can determine whether the outcome would have been the same without the misconduct. Currently, meaningful review is limited to those cases where the court believes the evidence was weak.¹⁵¹ But when it comes to life or death decisions, every defendant deserves a fair trial, even the guilty.

We note, however, that the harmless error rule is mandated by the California State Constitution and federal law.¹⁵² In practice, the application of the rule is determined by case law emanating from the California Supreme Court and the U.S. Supreme Court. Thus, the

149. The total number of death row inmates in California may be found on the website of the California Department of Corrections and Rehabilitation at http://www.cdcr.ca.gov/Reports_Research/docs/CondemnedInmateSummary.pdf (last visited Jan. 26, 2008).

150. In one death penalty case from Los Angeles, a prosecutor altered the notes of an interview and gave only the altered notes to defense counsel. Caitlin Liu, *Prosecutor Admits Altering Evidence in Murder Case*, L.A. TIMES at A4 (Feb. 14, 2002). Once the misconduct was discovered, the judge declared a mistrial and the prosecution dropped its pursuit of the death penalty. *Id.* In another case from Alameda County, the prosecutor used racial slurs to describe the defendant. As a result, the prosecutor was removed from the case which ended in a verdict of life without parole. Information provided by Assistant Public Defender Charles Denton.

151. See discussion *infra* note 41, and 95-108.

152. See CAL. CONST. art. VI, § 13; *Chapman v. California*, 386 U.S. 18, 24 (1967).

harmless error rule is unlikely to change anytime soon. We turn, therefore, to three more promising areas of reform.

The California Rules of Professional Conduct should be amended to specify the ethical standards that apply to the prosecution of death penalty cases.

It is odd that while medical professionals have debated the ethics of doctor involvement in executions for more than twenty years,¹⁵³ the legal profession has never addressed the unique ethical issues that arise in death penalty cases. A search of the canons of professional responsibility reveals no specific rules addressing death penalty cases for either the defense or the prosecution.¹⁵⁴ Further, a search of scholarly articles reveals only one article even remotely related to the issue of prosecutorial ethics in death penalty cases.¹⁵⁵ This article addresses whether or not candidates for office may ethically “tout” their records of securing death sentences.¹⁵⁶ This near failure of the legal community to discuss the ethical issues raised by death penalty cases is unacceptable.

The Rules of Professional Responsibility should address, at a minimum, these areas:

153. CODE OF MED. ETHICS § E-2.06 (American Med. Ass’n 1980), available at <http://www.ama-assn.org/ama/pub/category/8419.html>.

154. See, e.g., CAL. RULES OF PROF’L RESPONSIBILITY; MODEL CODE OF PROF’L RESPONSIBILITY (1983); RONALD D. ROTUNDA & SCOTT S. DZIENKOWSKI, THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY (2007) (none make mention of the ethical issues that arise in prosecuting death penalty cases); see also Natasha Minsker, *Death-Penalty Work Tests Lawyers’ Ethics*, DAILY JOURNAL, Oct. 24, 2006, available at https://ww.aclunc.org/news/opinion/death-penalty_work_tests_lawyers%27_ethics.shtml.

155. Bresler, *supra* note 141. Almost the only ethical issue related to the death penalty addressed in law reviews or secondary sources is whether a defense attorney should continue to represent a defendant who wishes to volunteer for execution. See, e.g., Richard W. Garnett, *Sectarian Reflections on Lawyers’ Ethics and Death Row Volunteers*, 77 NOTRE DAME L. REV. 795 (2002); C. Lee Harrington, *Mental Competence and End-of-Life Decision Making: Death Row Volunteering and Euthanasia*, 29 J. HEALTH POL. POL’Y & L. 1109 (2004); J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147 (2006). One article also discusses what constitutes ethical conduct in defending a death penalty case. See Victor L. Streib, *Would You Lie to Save Your Client’s Life? Ethics and Effectiveness in Defending Against Death*, 42 BRANDEIS L.J. 405 (2004).

156. Bresler, *supra* note 141.

The Decision to Charge Death

- Prosecutors should not charge death for the purpose of securing a plea bargain to a lesser sentence.
- Prosecutors should not let race, gender, or economic status of either the defendant or the victim influence the decision of whether to seek death.

Pre-trial Conduct

- Prosecutors should provide open-file discovery and scrupulously disclose to the defense any and all information that might be beneficial to the defense, either during the guilt or the penalty phase.
- Prosecutors should not interfere with efforts by the defense team to speak to the family members of the victim or any potential witnesses, including law enforcement.
- Prosecutors should keep an open mind throughout the process and be willing to reconsider the decision to seek death.

Trial Conduct

- Prosecutors should never manipulate the evidence or the theory of the case for the purpose of securing a finding that the defendant is eligible for death or to secure a death sentence.
- Prosecutors should not seek to mislead the jury about the legal requirements for finding in favor of death or about the legal consequences of their decision not to find for death.
- Prosecutors should not inflame the passions or fear of the jury to secure a death sentence.
- Prosecutors should scrupulously follow the general ethical rules regarding conduct in trial, including rules against inappropriate disclosure of evidence and against disparaging the defense.

Post-trial Conduct

- Prosecutors should provide open-file discovery to post-conviction defense counsel in death penalty cases.

Behavior in Public

- Prosecutors should refrain from public comments that could prejudice the defendant in a death penalty case.

- Prosecutors should not tout death sentences as “wins.”

On a more fundamental level, we should encourage a conversation within the legal community about whether it is appropriate for prosecutors to “advocate” for death. Given the unique power of attorneys in our society, and of prosecutors in particular, we as a legal community should ask whether this is appropriate. Prosecutors should view their role in death penalty prosecutions more as neutral conveyors to the jury, presenting the facts for the jury’s assessment, without investing themselves in the outcome. This could help eliminate the pressure to win that often drives prosecutors to bend and break the rules. More broadly, we should ask whether this sort of change would better reflect the values and ethics of the professional legal community. These are just some of the issues that attorneys and ethicists should consider. Regardless of the outcome, the conversation is long overdue.

The California Business and Professions Code section 6086.7 should be modified to require a court to notify the State Bar whenever misconduct has occurred in a death penalty case, regardless of whether the judgment is impacted.

As has already been addressed at length in this article, the current rule largely prevents effective enforcement of the ethical requirements in death penalty cases. Every misconduct should have a consequence, regardless of how guilty the defendant appears to be to the reviewing court. In addition, the California Supreme Court should always address whether the prosecutor’s actions constitute misconduct, even if the defense failed to object or the error is deemed harmless. By failing to even address whether the behavior constitutes misconduct, the Court abdicates its responsibility to provide guidance to attorneys about what is appropriate and even encourages prosecutors to continue to push the rules to the limits.

But more fundamentally, we should consider whether discipline of prosecutors should continue to be the responsibility of the State Bar or whether a new mechanism is needed. As should be more than evident from our review, even when egregious misconduct results in reversal, discipline does not always ensue. Professor Bennett Gershman, a former prosecutor and leading expert on prosecutorial misconduct, has recommended removing oversight of prosecutors from the State Bar and vesting it instead in a quasi-judicial agency similar to the Commission on Judicial Performance which investigates

allegations of judicial misconduct.¹⁵⁷ We agree with Professor Gershman.

Finally, the state of the law on prosecutorial misconduct is itself confusing and may even prevent implementation of the reform recommended here. As noted, some forms of questionable, unethical behavior by prosecutors are not legally labeled as “misconduct” unless there was prejudice to the defendant. As a result, in some cases, behavior is not considered misconduct because of “overwhelming evidence of guilt,” or because the jury was “not misled,” whereas in other cases the exact same behavior may be labeled misconduct. Thus, there is also a need to clarify what is and is not ethical behavior by prosecutors, regardless of its impact on the trial.

Existing discovery policies and procedures must be modified to ensure compliance with the requirements of the Constitution.

Open-file discovery should be the norm in death penalty cases. When the state seeks death, it should never have anything to hide. The prosecution’s failure to provide full discovery results in questionable death sentences, and ultimately, years and years of additional litigation. Open-file discovery rules would provide full protection, ensuring both the rights of the defendant and the integrity of the process. Legislation should be adopted making this mandatory, rather than allowing individual offices or even individual prosecutors to establish their own policies.

CONCLUSION

This article has focused on the examples of misconduct in death penalty cases; we have not attempted to address whether this misconduct is “rampant,” “common,” or “rare.” Such labels are beside the point. As the Ninth Circuit observed,

Our criminal justice system depends on the integrity of the attorneys who present their cases to the jury. When even a single conviction is obtained through perjurious or deceptive means, the entire foundation of our system of justice is weakened.¹⁵⁸

157. Bennett L. Gershman, *The New Prosecutors*, 55 U. PITT. L. REV. 393, 454-55 (1992) (advocating the creation of a “prosecutorial conduct commission”).

158. *Hayes v. Brown*, 399 F.3d 972, 988 (Cal. Ct. App. 2005).

This is even more true in the context of the death penalty. As the Third Circuit has stated,

The sentencing phase of a death penalty trial is one of the most critical proceedings in our criminal justice system Because of the surpassing importance of the jury's penalty determination, a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices.¹⁵⁹

Even one execution tainted by prosecutorial misconduct casts a shadow over the integrity of California's criminal justice system. Our review indicates that the problem of prosecutorial misconduct in death penalty cases cannot be marginalized to "isolated cases." Systemic problems exist and systemic solutions are needed. If the State of California is to continue executing people in the name of the People, then we must hold our public officers, the prosecutors, to the highest standards.

159. *Lesko v. Lehman*, 925 F.2d 1527, 1541 (3d Cir. 1991), *cert. denied*, 502 U.S. 898 (1991).