VIGILANTE JUSTICE: PROSECUTOR MISCONDUCT IN CAPITAL CASES

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The authors thank Arthur S. Friedman, Esq. for his contributions to the development of this Article. The authors thank Eliyahu Federman, Erik Nilsson, and Natacha Thompson for research assistance. The authors thank members of the New York City Bar Association Committee on Capital Punishment for assistance in developing this Article and for comments on earlier drafts. The authors also thank Greg Camp, Professor Eric Freedman, Jack Hoffinger, Russell Neufeld, Ron Tabak, members of the New York City Bar Association Committee on Professional Responsibility, and members of the Council on Criminal Justice for comments on earlier drafts.

I. INTRODUCTION: THE CONCERN OF MISCONDUCT IN CAPITAL CASES

> *It is [the prosecutor's] duty to see that the legal rights of the accused, as well as those of the commonwealth, are fully protected; to prosecute and not persecute; to conduct [oneself] with due regard to the proprieties of the office. [A prosecutor] represents the people of the state, and in a degree should look after the rights of a person accused of a crime by endeavoring to protect the innocent and seeing that truth and right shall prevail.*[1]

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1. Bennett v. Commonwealth, 28 S.W.2d 24, 26 (Ky. Ct. App. 1930) (citations omitted).

Prosecutors bear a heavy responsibility in capital cases, and codes of professional responsibility recognize the core role of prosecutors. The Model Code of Professional Responsibility and the Model Rules of Professional Conduct note the important obligation prosecutors have to seek justice and not just to act as advocates.[2] The Supreme Court has emphasized that the interest of the government "in a criminal prosecution is not that it shall win a case, but that justice shall be done."[3] Fortunately, most prosecutors take their special legal, ethical, and moral obligations as to seek justice seriously,[4] "which is most certainly a difficult duty to be carried out carefully and cautiously."[5]

Ethical lawyers are concerned about any type of lawyer misconduct in criminal cases.[6] When the participants in the criminal justice system—

2. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980) (indicating that the duty of the public prosecutor "is to seek justice, not merely to convict"); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). *See also* STANDARDS FOR CRIMINAL JUSTICE § 3-1.2(c) (1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); NATIONAL DISTRICT ATTORNEYS ASSOCIATION PROSECUTION STANDARDS § 1.1 ("The primary responsibility of prosecution is to see that justice is accomplished.").

3. Berger v. United States, 295 U.S. 78, 88 (1935) ("It is as much his [or her] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."). *See also* Georgia v. McCollum, 505 U.S. 42, 68 (1992) (noting that in criminal trials "we have held the prosecution to uniquely high standards of conduct"); Donnelly v. DeChristoforo, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting) ("The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.").

4. *See, e.g.*, Warren Diepraam, *Prosecutorial Misconduct: It Is Not the Prosecutor's Way*, 47 S. TEX. L. REV. 773 (2006) (stating that "hiding exculpatory evidence is not the way of the professional prosecutor").

5. Jeschke v. State, 642 P.2d 1298, 1303 (Wyo. 1982) (citing Valerio v. State, 527 P.2d 154, 157 (1974)) (holding that prosecutor's impermissible comments to jury did not constitute plain error requiring reversal). For a discussion of the development of the role of public prosecutors and of prosecutor ethics, see Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 409-16 (2006) (discussing studies of persons exonerated by DNA evidence).

6. *See, e.g.*, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS (Report of the Center for Public Integrity) (2003) (finding reversals on prosecutor misconduct grounds in more than 2000 cases since 1970 and finding improper prosecutor conduct that is harmless in thousands more during the same time period). Responsible lawyers often are concerned about how to address a culture that may focus on winning rather than on fairness and justice. Such a goal-oriented focus can create bad examples for all types of lawyers. Prosecutors, however, face special responsibilities to serve justice, so when a rogue prosecutor violates her or his ethical duties to achieve a conviction and death sentence, such actions create numerous problems. This concern is of special significance during a time when the public, politicians, and lawyers have become

whether they are incompetent defense counsel, biased judges, or overzealous prosecutors—fail to serve their important roles, the system breaks down.[7] As one judge noted, when a prosecutor, "with enormous resources at his or her disposal, abuses this power and ignores ethical standards, he or she not only undermines the public trust, but inflicts damage beyond calculation to our system of justice."[8] All lawyers should be troubled by any type of misconduct that affects basic notions of fairness, due process issues, and ethical concerns. Thus, lawyers must act responsibly to ensure that the participants are fulfilling their roles.

Further, in capital cases where the stakes are so high, there exists a special concern when prosecutors abuse this trust.[9] The prosecutor's role is especially important in death penalty cases because the prosecutor is a determining force in the decision of whether a human being lives or dies.[10] The U.S. Court of Appeals for the Third Circuit has noted that "[t]he sentencing phase of a death penalty trial is one of the most critical proceedings in our criminal justice system,"[11] so a capital "prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices."[12]

Yet, instances of prosecutor misconduct occur in capital cases around the country.[13] Although there are limited national studies on

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increasingly troubled about the use of the death penalty in the United States. *See, e.g.*, Julie Cart, *Impending Execution Trends*, L.A. TIMES, Nov. 4, 2001, at A1 (noting that Gallup polls showed a drop in support for the death penalty from eighty percent in 1994 to sixty-five percent in 2000); Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 39-43 (2002).

7. "When prosecutors betray their solemn obligations and abuse the immense power they hold, the fairness of our entire system of justice is called into doubt and public confidence in it is undermined." Silva v. Brown, 416 F.3d 980, 991 (9th Cir. 2005) (finding constitutional violation where prosecutor did not reveal details of a deal made with testifying co-defendant).

8. *In re* Doe, 801 F. Supp. 478, 480 (D. N.M. 1992) (finding that prosecutor was not entitled to prosecutorial immunity in state bar disciplinary action).

9. *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (noting in capital case that because "death is a different kind of punishment from any other" there must be special efforts to ensure the death penalty is imposed fairly).

10. "The prosecutor has a great deal of discretion, and in many areas a prosecutor exercises this discretion with little or no oversight or transparency." Joy, *supra* note 5, at 421.

11. Lesko v. Lehman, 925 F.2d 1527, 1541 (3d Cir. 1991).

12. *Id.*

13. *See, e.g.*, Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851, 890 (1995) ("Prosecutor misconduct is readily apparent to any lawyer who keeps abreast of appellate review of criminal convictions. Case after case demonstrates the

exactly how often prosecutor misconduct occurs in capital cases compared to other cases,[14] a percentage of capital cases do involve serious misconduct.[15] In 1999, the Chicago Tribune did a study of 381 murder convictions that were reversed because of prosecutor misconduct since 1963, and sixty-seven of those cases involved defendants who had been sentenced to death.[16] In 2000, the *Cincinnati Enquirer* published an article about fourteen local capital cases involving evidence of prosecutor misconduct.[17] Other studies have found that prosecutor misconduct has contributed to innocent defendants being sentenced to death.[18]

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persistent reoccurrence of misconduct, such as forensic misconduct and prosecutorial disclosure violations.").

14. Rachel E. Leonard, *Seven Who Are No Longer on Death Row*, SPARTANBURG HERALD JOURNAL (SC), Sept. 3, 2006, *available at* http://www.goupstate.com/article-/20060903/NEWS/-609030337 (noting that "[s]tatistics on the average number of death penalty cases overturned because of misconduct by prosecutors are hard to come by").

15. Although most prosecutors do act ethically, any instances of prosecutor misconduct where life is at stake are too many instances. *See* James S. Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, app. at C-2 to C-4 (2000). The study found that prosecutor suppression of evidence accounted for sixteen percent of reversals, and other prosecutor and law enforcement misconduct accounted for an additional three percent. *Id.* at C-4. Ineffective assistance of defense counsel accounted for thirty-seven percent of reversals. *Id.* There continue to be reports of "major instances of misconduct by government lawyers in death penalty cases." Kim Wherry Toryanksi, *No Ordinary Party: Prosecutorial Ethics and Errors in Death Penalty Cases*, 54 FED. LAWYER 45 (2007). Of course, the actual number of instances of prosecutor misconduct occurring during the last few years is unknown, because most allegations of prosecutor misconduct in capital cases are not discovered or resolved until after a large number of years of investigation and litigation through state post-conviction and federal habeas corpus review. For example, in the case of *Miller-El v. Dretke*, 545 U.S. 231 (2005), it took nearly twenty years between the time of the acts of misconduct and the time that litigation on the issue was resolved by the U.S. Supreme Court. In the Kevin Peasley case discussed later in this Article, it took nearly ten years between the egregious misconduct and the time that Mr. Peasley was disbarred. *See In re* Peasley, 90 P.3d 764, 767 (Ariz. 2004).

16. Anthony Brian Bush, Note, *Capital Punishment: Advocates' Deadly Combination of Inadequacy and Misconduct*, 12 JONES L. REV. 197, 216 (2008) (citing Ken Armstrong & Maurice Possley, *Trial & Error; How Prosecutors Sacrifice Justice to Win; The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, §1, at 1).

17. *See* Spencer Hunt, *Clouded Cases*, CINCINNATI ENQUIRER, Sept. 10, 2000, at A1.

18. *Id.* at 216 (citing Center for Public Integrity, *Harmful Error: Investigating America's Local Prosecutors*, 45-47, at 92-107 (2003); BARRY SCHECK, ET AL, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED, app. 2 at xiv (2000)). *See id.* at 218 (discussing role of prosecutor misconduct leading to execution of possibly innocent defendants Carlos DeLuna and Larry Griffin). *See also* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 481 (1996) (discussing prosecutor misconduct and wrongful convictions in capital cases). Considering all

In some death penalty cases extra scrutiny may lower the risk of intentional misconduct, while in other cases there may be more community pressure on the attorneys to bend the rules to achieve a conviction and a death sentence for a heinous crime.[19] One review of capital cases in California found that capital cases "present unique risks because of the pressures to engage in misconduct in death penalty cases."[20] One state supreme court justice was puzzled about the reasons for prosecutor misconduct in capital cases, stating, "Why we see a continuing pattern of prosecutorial misconduct in capital cases is beyond me."[21] Whatever the cause, it is the duty of all ethical lawyers in the bar to work to do everything they can to limit instances of egregious misconduct in every single case where lives are at stake.

Although commentators have and continue to address the problem of prosecutor misconduct in criminal cases, relatively little has been written that focuses specifically on prosecutor misconduct in capital cases.[22] This Article examines some of the common types of prosecutor misconduct that may occur in capital cases,[23] and the main focus is on how to address

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criminal cases, "prosecutorial misconduct has proven to be one of the most common factors that causes or contributes to wrongful convictions." Joy, *supra* note 5, at 403 (discussing studies of persons exonerated by DNA evidence).

19. Professor Alafair Burke has written about how various cognitive phenomena may affect prosecutors in a way that impairs their ability to see certain evidence. Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512, 513 (2007) (noting that "[b]ecause confirmation bias leads individuals to seek out and prefer information that tends to confirm whatever hypothesis they are testing, a prosecutor reviewing a file to determine a suspect's guilt would be inclined to look only for evidence that supports a theory of guilt").

20. Natasha Minsker, *Prosecutorial Misconduct in Death Penalty Cases*, 45 CAL. W. L. REV. 373, 400 (2009) (noting that "[t]here is a unique risk in these cases that misconduct will influence the jury on the issue of sentence"). *See also* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2129 (2000) (discussing that prosecutors have strong incentives to seek death sentences); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 388-89 (2001) (explaining institutional pressures on prosecutors).

21. State v. Lorraine, 613 N.E.2d 212, 224 (Ohio 1993) (Wright, J., concurring).

22. One commentator has noted the dearth of scholarly articles about prosecutorial ethics in capital cases. Minsker, *supra* note 20, at 400. *See, e.g.*, Edward C. Brewer, III, *Let's Play Jeopardy: Where the Question Comes After the Answer for Stopping Prosecutorial Misconduct in Death-Penalty Cases*, 28 N. KY. L. REV. 34 (2000).

23. There are, of course, other types of misconduct by attorneys that jurisdictions should consider. *See, e.g.*, Symposium, *Judging Justly? Judicial Responsibility for Addressing Incompetent Counsel and Prosecutorial Misconduct in Death Penalty Cases*, 20 T.M. COOLEY L. REV. 21 (2003) (discussing different types of misconduct by prosecutors and defense attorneys); Welsh White, *Curbing Prosecutorial Misconduct in Capital Cases: Imposing Prohibitions on Improper Penalty Trial Arguments*, 39 AM. CRIM. L. REV. 1147, 1149 (2002) (discussing use of improper closing arguments); Michael B. Shortnacy, *Guilty and Gay, A Recipe for Execution in American Courtrooms:*

egregious misconduct, not mere attorney errors.[24] The Article considers four areas of prosecutor misconduct, and in each of these sections, we briefly discuss the law regarding that type of misconduct, and then discuss specific examples of that type of misconduct in capital cases.

Instances of prosecutor misconduct may occur prior to trial during discovery, during jury selection, and during trial and post-trial.[25] In Part I, we discuss situations where prosecutors withhold exculpatory evidence from defendants in capital cases. This type of misconduct often rises to the level of constitutional violations under *Brady v. Maryland*.[26] In Part II, we discuss the problem where prosecutors improperly use pretrial publicity to achieve convictions and death sentences in capital cases. Misconduct also may occur during jury selection, and in Part III we examine situations where some prosecutors have improperly used peremptory challenges to exclude prospective jurors based upon race. Under *Batson v. Kentucky*,[27] this type of prosecutor misconduct also may rise to constitutional significance. Next, in Part IV, we consider the trial itself and discuss situations where capital prosecutors improperly use false evidence or statements.

In Part V, we address methods for deterring and remedying prosecutor misconduct in capital cases. We consider three different categories of solutions: (1) institutional and systemic methods of preventing prosecutor misconduct; (2) punishment of individual prosecutors responsible for egregious misconduct; and (3) remedies for defendants who are victims of misconduct. In each category, we discuss suggestions that have been made by various commentators. The Article

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Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases, 51 AM. U. L. REV. 309, 317 (2001) (noting that use of jury arguments that stereotype and degrade homosexuals "are all too common occurrences in death penalty cases in the United States").

24. Some of the suggested remedies, such as improved training, could also be used to prevent attorney errors. But the main focus here is on the concern of egregious misconduct. Recently, the American Bar Association Criminal Justice section recently passed a recommendation to urge "courts to distinguish between attorney misconduct and attorney error." *American Bar Association Criminal Justice Section Report to the House of Delegates, Recommendation*, at 1 (August 2009), *available at* http://www.abanet.org-/leadership/2009/annual/summary_of_recommendations/One_Hundred_Eleven_A.DOC (last visited Jan. 20, 2010).

25. The Supreme Court has defined "prosecutorial misconduct" as when a prosecutor "oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." Berger v. United States, 295 U.S. 78, 84 (1935).

26. 373 U.S. 83 (1963).

27. 476 U.S. 79 (1986).

concludes with five specific proposals for taking steps toward addressing prosecutor misconduct in capital cases.

II. *BRADY v. MARYLAND* AND THE FAILURE TO DISCLOSE EXCULPATORY EVIDENCE IN CAPITAL CASES

One type of misconduct occurs when prosecutors withhold exculpatory evidence in capital cases. The Supreme Court has held that it violates the constitution when prosecutors withhold evidence that exculpates or reduces the penalty for a defendant because such action by a prosecutor "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice."[28] These types of violations are among the most common of all constitutional criminal procedural violations.[29] Below, this Article discusses the legal and ethical standards regarding exculpatory evidence. Then, it gives several examples of capital cases where exculpatory evidence was withheld in capital cases.

A. Legal and Ethical Standards Regarding Exculpatory Evidence

When the powerful government, with all of its resources, withholds helpful evidence from an individual defendant, it creates an unfair trial and may rise to the level of a constitutional violation.[30] In the capital case of *Brady v. Maryland*,[31] the United States Supreme Court held that when a defendant requests favorable evidence, a prosecutor's failure to turn over such evidence violates the due process clause of the Fourteenth Amendment.[32] Later cases explain that even if the defendant does not request such information, a prosecutor's failure to turn over material exculpatory evidence violates due process.[33] Further, in capital cases, *Brady* applies to evidence that is material "either to guilt or to punishment," and thus in capital cases *Brady* evidence includes a broad

28. *Brady*, 373 U.S. at 88.

29. *See* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, CASE W. RES. L. REV. 531, 533 (2007).

30. *See Brady*, 373 U.S. at 87.

31. *Id.*

32. *Id.*

33. *See* United States v. Bagley, 473 U.S. 667, 674 (1985); United States v. Agurs, 427 U.S. 97, 110-11 (1976) (holding that there is a duty to disclose exculpatory information even if defense does not make specific request).

range of mitigating evidence and other capital sentencing phase evidence.[34]

There are some hurdles for defendants to gain relief in cases involving *Brady* violations. In the non-capital cases *Smith v. Phillips*[35] and *United States v. Valenzuela-Bernal*,[36] the Court clarified that it would not articulate specific standards for responsible prosecutor conduct when it declined to consider prosecutors' motives in the constitutional analysis of *Brady* violations.[37]

Further, in *United States v. Bagley*,[38] the Court held that there is not a remedy for a prosecutor's intentional failure to disclose requested information unless there is a "reasonable probability" that had the evidence been disclosed, the outcome of the criminal proceeding would have been different.[39] In the capital case of *Kyles v. Whitley*,[40] the Court explained that materiality is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[41] Thus, under the Federal Constitution, even if an appellate court holds that a prosecutor did not disclose certain exculpatory evidence at trial, the case may not be

34. *See* Banks v. Dretke, 540 U.S. 668, 691 (2004). *Brady* also applies to impeachment evidence. *Bagley*, 473 U.S. 667. An individual prosecutor also has a duty to learn of favorable evidence known to police and others acting on the government's behalf in the case. *See* Kyles v. Whitley, 514 U.S. 419 (1995).

35. 455 U.S. 209, 219 (1982).

36. 458 U.S. 858, 873 (1982).

37. *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 436-37 (1992). In limited situations, the prosecutor's bad faith in withholding evidence may be legally relevant, but the Court's standard makes it difficult to prove. *Id.* at 439-40.

38. 473 U.S. at 682. The crimes in *Bagley* involved charges of violating federal narcotics and firearms laws. *Id.* at 669.

39. *Id.* Once *Brady* material is discovered after conviction, assuming a court is not procedurally barred from reviewing the issue, "a court addressing the merits of a *Brady* claim must answer three questions: (1) Did the prosecutor suppress evidence? (2) Was the evidence favorable to the accused? (3) Was the suppression prejudicial to the accused?" Gershman, *Litigating Brady v. Maryland, supra* note 29, at 537. Similarly, in *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999), the Court stated the three elements of a *Brady* prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *See also Dretke*, 540 U.S. at 691 (quoting *Strickler*, 527 U.S. at 281-82).

40. 514 U.S. 419 (1995).

41. *Id.* at 434-35 (explaining that "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence"). *See also Dretke*, 540 U.S. at 698-99 (granting certificate of appealability in capital defendant's habeas corpus case based upon a *Brady* claim).

reversed, despite the ethics violation, because the exculpatory evidence was not "material."[42]

States, however, may provide more protection to defendants under state constitutions. For example, the New York Court of Appeals has interpreted the New York State Constitution to reject the *Bagley* standard and apply a more protective standard for *Brady* violations where there was a specific request for the material.[43]

In addition to constitutional requirements, the duty of prosecutors to turn over exculpatory evidence is emphasized in professional ethical and disciplinary rules in each state and the District of Columbia.[44] Similarly, the Model Code of Professional Responsibility and the Model Rules of Professional Conduct require a prosecutor to turn over exculpatory evidence.[45] Further, the American Bar Association Standing Committee on Ethics and Professional Responsibility has concluded that Rule 3.8 of

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42. This additional hurdle for capital defendants, that they must show materiality, results in prosecutors "increasingly 'play[ing] the odds' that their suppression of important items of evidence will be viewed retrospectively by a reviewing court as not material and therefore not a violation of *Brady*." Gershman, *Litigating Brady v. Maryland*, *supra* note 29, at 550. Another commentator has argued that "the caveat in Brady that prosecutors must disclose exculpatory evidence only when it is 'material either to guilt or to punishment' has hindered defendants' access to the kind of exculpatory evidence whose disclosure Brady held to be fundamental to due process." Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 483 (2009).

43. *See* People v. Vilardi, 555 N.E.2d 915 (N.Y. 1990) (applying the standard set out in *Agurs*, 427 U.S. at 110-11); Gershman, *The New Prosecutors*, *supra* note 37, at 437-38; People v. Cesar G, 584 N.Y.S.2d 383 (Crim. Ct. 1991); People v. Cabon, 560 N.Y.S.2d 370 (Crim. Ct. 1990).

44. *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 430-31 (2001); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 693-94 (1987).

45. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (2004); MODEL RULES OF PROF'L CONDUCT R. 3.8 (2004):

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

Id. See also ABA CRIMINAL JUSTICE STANDARDS: PROSECUTION FUNCTION § 3-3.11(a) (1993); Lisa Kurcias, Note, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1206 (2000); Casey P. McFaden, *Current Developments 2000-2001: Prosecutorial Misconduct*, 14 GEO. J. LEGAL ETHICS 1211, 1224-28 (2001); Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1462-68 (2000) (discussing disclosure rules for prosecutors).

the Model Rules creates a more demanding obligation on prosecutors than the constitutional obligations of *Brady*.[46]

B. Examples of Capital Cases Where Exculpatory Evidence Was Withheld

Despite these cases and rules, "*Brady* violations are among the most common forms of prosecutorial misconduct."[47] Professor Bennett Gershman has written that "[p]rosecutors have violated [*Brady's*] principles so often that it stands more as a landmark to prosecutorial indifference and abuse than a hallmark of justice."[48]

One study estimates that *Brady* violations are responsible for approximately sixteen percent of reversals in capital cases.[49] Because *Brady* obligations cover mitigating evidence in capital cases, as well as guilt-phase evidence, a number of reversals occur due to suppression of mitigating evidence as well as suppression of exculpatory evidence.[50] There are several explanations for the occurrence of *Brady* violations in capital cases,[51] and it should be noted that some nondisclosures are inadvertent rather than intentional egregious misconduct.

Still, prosecutors who do not disclose evidence face a low risk of being penalized. Studies have shown that prosecutors are rarely

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46. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009). *See* Eileen Libby, *A Higher Law*, ABA JOURNAL, Oct. 2009, *available at* http://www.abajournal.com/magazine/article/a_higher_law/.

47. Davis, *supra* note 44, at 431. *See also* Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 869 (1997) ("For every one of these cases, we have every reason to suspect that there are many more in which the prosecutor's refusal to disclose the exculpatory evidence was never discovered by the defendant or his attorney."). Recently, the *New York Times* featured a story about a third North Carolina death row inmate being released in six months in capital cases involving prosecutors or investigators withholding exculpatory evidence. *See also* Shaila Dewan, *Executions Resume, As Do Questions of Fairness*, N.Y. TIMES, May 7, 2008, at A1.

48. Gershman, *Litigating* Brady v. Maryland, *supra* note 29, at 531.

49. James S. Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, app. at C-2 to C-4 (2000).

50. *See* James S. Liebman, et al., *A Broken System Part II: Why There Is So Much Error in Capital Cases and What Can Be Done About It*, Feb. 11, 2002, *available at* http://www2.law.columbia.edu/brokensystem2/index2.html (concluding that nineteen percent of reversals occurred because of prosecutor suppression of mitigating and exculpatory evidence).

51. One commentator has noted that the *Brady* rule is unusual in that "[i]t requires a prosecutor to balance competing and contradictory objectives, and is so malleable that it affords prosecutors an extremely broad opportunity to exercise discretion in ways that impede – rather than promote – the search for truth." Gershman, *Litigating* Brady v. Maryland, *supra* note 29, at 533.

disciplined for such violations, and when they are punished, the punishment is minor.[52] Additionally, even when *Brady* violations are discovered, they do not necessarily hurt a violator's career. For example, a former Georgia prosecutor became a Congressman after he had withheld evidence in the successful prosecution of seven men who were later exonerated.[53] Also, a former New Mexico prosecutor cited for failing to disclose evidence in a capital case was later named chief counsel for the state's lawyer disciplinary board.[54] Misconduct has not harmed the careers of a number of other prosecutors.[55]

On the other hand, in capital cases the consequences to innocent defendants of prosecutors withholding evidence are high.[56] Joseph Brown, who went by the name of Shabaka Sundiata Waglini, came

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52. *See, e.g.,* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 720-29 (1987); Weeks, *supra* note 47, at 844-71; *see also* Kurcias, *supra* note 44, at 1219:

> Even if the prosecutor's failure to disclose exculpatory evidence is discovered, the worst-case scenario for the prosecutor is that the conviction will be overturned on appeal and the defendant will be granted a new trial, which is an unlikely result. On the other hand, the prosecutor may fear that she will not win a conviction if she does disclose the evidence."

Id. (footnotes omitted).

53. Penny J. White, *Errors and Ethics: Dilemmas in Death*, 29 HOFSTRA L. REV. 1265, 1280 (2001).

54. *Id.*

55. Another prosecutor who knowingly presented false evidence in a death penalty case became a judge. *See* Minsker, *supra* note 20, at 393. In another case, the U.S. Court of Appeals for the Eleventh Circuit noted that a prosecutor played "fast and loose" with her ethical duties for failing to turn over exculpatory evidence in a murder case. Stephens v. Hall, 407 F.3d 1195, 1206 (11th Cir. 2005) (affirming conviction under a deferential federal habeas corpus review standard despite the ethical concerns). The prosecutor in *Stephens*, Nancy Grace, now has her own national television show. *See* CNN webpage, http://www.cnn.com/CNN/Programs/nancy.grace (last visited Jan. 23, 2010). Nancy Grace's ethics as a prosecutor were questioned in other court opinions too. In *Bell v. State*, the Georgia Supreme Court granted the defendant a mistrial because Nancy Grace's statements in closing argument exceeded the scope of proper argument in that heroin trafficking case. Bell v. State, 439 S.E.2d 480, 481 (Ga. 1994) ("By referring to such extraneous and prejudicially inflammatory material in her closing argument, the prosecutor exceeded the wide latitude of closing argument, to the detriment of the accused and to the detriment of the fair administration of justice."). *See also* Carr v. State, 482 S.E.2d 314, 322 (Ga. 1997) ("[T]he conduct of the prosecuting attorney . . . demonstrated her disregard of the notions of due process and fairness, and was inexcusable."). According to the Brief and Enumerations of Error in *Carr*, "the prosecuting attorney engaged in an extensive pattern of inappropriate and, in some cases, illegal conduct in the course of the trial." Brief and Enumerations of Error, Carr v. State, 1996 WL 33482455, at *152-64 (July 24, 1996) (detailing Grace's role in the trial).

56. *See* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 688 (2006).

within fifteen hours of being executed before his conviction was reversed by the Court of Appeals for the Eleventh Circuit.[57] In *Brown v. Wainwright*,[58] the court concluded that the prosecutor "knowingly allowed material false testimony to be introduced at trial, failed to step forward and make the falsity known, and knowingly exploited the false testimony in its closing argument to the jury."[59] Before a new trial could begin, the original witness admitted he had lied at the previous trial.[60] "Florida, sensing it had no case, abandoned its prosecution, and Shabaka left jail a free man, his only possessions being the clothes on his back and his legal papers. Between the ages of 23 and 37, he had spent the rich marrow of his youth on death row."[61]

It may take more than a decade to prove misconduct. Randall Dale Adams was convicted of murder and sentenced to death in the state of Texas.[62] At Adams' trial, the prosecutor suppressed information about a secret deal made with a witness, as well as that witness's lengthy criminal record.[63] Ultimately, that witness was convicted of the murder.[64] The prosecutor also withheld exculpatory information about two other witnesses.[65] Twelve years after the trial, the Texas Court of Criminal Appeals found that the prosecutor "knowingly used perjured testimony [and] . . . knowingly suppressed evidence," and Adams was freed.[66]

A special area of concern regarding *Brady* violations is the government's use of informants.[67] In such cases, a prosecutor may be

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57. *See* Gershman, *The New Prosecutors*, *supra* note 37, at 452; William Styron, *Death Row*, N.Y. TIMES, Sept. 30, 1990, at 4A.

58. 785 F.2d 1457 (11th Cir. 1986).

59. *Id.* at 1458.

60. *See* Styron, *supra* note 55, at 4A.

61. *Id.* at.

62. Gershman, *The New Prosecutors*, *supra* note 37, at 451.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See id.*; *Ex Parte* Adams, 768 S.W.2d 281, 291-93 (Tex. Crim. App. 1989). Mr. Adams' case was the subject of the documentary film by Errol Morris. *See* THE THIN BLUE LINE (Miramax Films 1988).

67. *See, e.g.*, Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002) (reversing conviction and death sentence where prosecutors failed to disclose a substantial amount of information about the lack of credibility of an informant who was a key witness). In *Benn*, the court concluded:

> [H]ere, the state failed to take *any* measures to safeguard the system against treachery. To the contrary, the state suppressed material exculpatory and impeachment evidence that would have destroyed the credibility of its principal witness, severely undermined its theory of motive, and left it without substantial evidence of premeditation or an aggravating circumstance.

Id. at 1062.

faced with a number of complicated issues.[68] *Cook v. State*[69] is an example of government misuse of an informant in a capital case. According to the appellate court, eighteen years after Kerry Cook's conviction for capital murder, the state concealed evidence that implicated other suspects, pressured a fingerprint expert to commit perjury, and employed a jailhouse informant to testify falsely. Cook spent three trials and twenty years on death row before he was released.[70]

There are examples of *Brady* violations in capital cases from across the country.[71] In 2006 in the capital case of *Graves v. Dretke*,[72] the

68. There is a strong tension between ethics and practical considerations in the area of the government's use of informers, particularly when the issue is the disclosure of the identity of the person who has provided valuable incriminating evidence. Scholarly articles and court opinions note the importance of truth-finding in the judicial process. *See, e.g.*, Estes v. Texas, 381 U.S. 532, 540 (1965) ("Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial."); *see also* Douglas W. Henkin, *Judicial Estoppel – Beating Shields into Swords and Back Again*, 139 U. PENN. L REV. 1711, 1730 n.124 (1991) (quoting *Estes*, 381 U.S. at 540). Judges, however, realize that sometimes the truth-seeking process must give way to more practical considerations. Despite the clear inclination for the informer to make cases, a prosecutor may be reluctant to disclose either the existence or the identity of such people for fear of jeopardizing the safety of the informer. Moreover, if the judicial process uniformly disclosed the identity of informers, law enforcement would soon be left with no one willing to risk life and limb.

69. 940 S.W.2d 623 (Texas Crim. App. 1996). *See also infra* Section IV.

70. *Id.* Cook pleaded no contest to a time-served sentence to avoid a fourth trial, although he continued to argue he was innocent. *See generally* James S. Liebman, *The New Death Penalty Debate: What's DNA Got to Do With It?*, 33 COLUM. HUM. RTS. L. REV. 527, n.47 (2002); Evan Moore, *Cloud of Doubt*, HOUSTON CHRON., Sept. 12, 1999, at A18. In another case, after Clarence Brandley had been on death row for nine years, the Texas Court of Criminal Appeals reversed his conviction finding that the prosecution had suppressed evidence and had improperly investigated the case. *Ex Parte* Brandley, 781 S.W.2d 886 (Tex. Crim. App. 1989). After holding a hearing upon Brandley's habeas petition, the trial court observed: "The litany of events graphically described by the witnesses, some of it chilling and shocking, leads me to the conclusion the pervasive shadow of darkness has obscured the light of fundamental decency and human rights. I can only sadly state justice has been on trial here, but of more significance, injustice has been on trial." *Id.* at 887. *See also In re* Womack, 541 So. 2d 47, 62 (Ala. 1988) (finding in a capital case that district attorney's office had failed to disclose exculpatory evidence that it had a plea bargain with a critical prosecution witness).

71. *See, e.g.*, Reasonover v. Washington, 60 F. Supp. 2d 937, 981 (E.D. Mo. 1999) (vacating conviction for capital murder where prosecutor failed to turn over tapes of contradicting conversations made by witnesses and to disclose that witnesses received deals to testify); Conyers v. State, 790 A.2d 15, 41 (Md. 2002) (remanding for a new trial where the state failed to disclose information about a favorable plea agreement deal made with a key witness in the capital case); Dewan, *supra* note 47, at A1 (discussing three North Carolina death row inmates recently being released in cases involving prosecutors withholding evidence).

United States Court of Appeals for the Fifth Circuit found that a prosecutor who did not disclose statements by a key witness violated *Brady*.[73] In 2005 in *Silva v. Brown*,[74] another capital case, the United States Court of Appeals for the Ninth Circuit found that the prosecution violated *Brady* for not revealing the full details of a deal with a testifying co-defendant.[75] In addition to federal court decisions, in recent years, several state courts have found *Brady* violations in capital cases.[76] For example, in 2001, a Florida circuit court judge overturned Rudolph Holton's capital conviction because prosecutors withheld police reports and other evidence favorable to Holton.[77] Holton was released from prison in 2003 after spending sixteen years on death row.[78]

In areas involving government suppression of exculpatory evidence, prosecutors are faced with a number of conflicting pressures that may lead to injustices in some capital cases. In addition to situations where prosecutors make errors, prosecutors face pressures and incentives to obtain convictions and death sentences against defendants who appear to be guilty of heinous crimes. Ethical prosecutors, those who train

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72. Graves v. Dretke, 442 F.3d 334, 344-45 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 374 (2006).

73. *Id.*

74. 416 F.3d 980, 991 (9th Cir. 2005).

75. *Id.*

76. *See* Riddle v. Ozmint, 631 S.E.2d 70 (S.C. 2006) (finding *Brady* violation in capital case where prosecution failed to disclose inconsistent statement from the key witness and failed to disclose that officers took the key witness to the scene of the murder for a reenactment); Simpson v. Moore, 627 S.E.2d 701 (S.C. 2006) (finding *Brady* violation in capital case based upon a robbery-murder where prosecution failed to disclose that a bag of money was found behind a convenience store counter); Schofield v. Palmer, 621 S.E.2d 726 (Ga. 2005) (finding violation in a capital case where the prosecution suppressed evidence that the Georgia Bureau of Investigation paid a witness for providing information against the petitioner); Tillman v. State, 128 P.3d 1123 (Utah 2005) (reversing death sentence where the State had represented that witness interviews had not been recorded and then, following federal habeas corpus proceedings, the petition discovered partial transcripts of pre-trial interviews with the State's key witness); Floyd v. State, 902 So. 2d 775 (Fla. 2005) (finding *Brady* violation in a capital case where prosecution suppressed statements of a witness); Mordenti v. State, 894 So. 2d 161 (Fla. 2004) (finding *Brady* violation in capital case where prosecution failed to turn over a date book that contradicted part of key witness's testimony).

77. *See* David Karp, *Off Death Row After 16 Years*, ST. PETERSBURG (FLORIDA) TIMES, Jan. 28, 2003, at 1B.

78. *Id.* In New York, the non-capital murder conviction of Eric Jackson was vacated because the prosecutor had concealed evidence that the deadly fire was caused by an electrical malfunction. People v. Jackson, 538 N.Y.S.2d 677 (Sup. Ct. 1988). If New York had the death penalty statute at the time like other states that allow the death penalty for felony murder, Jackson might have ended up on death row. Gershman, *The New Prosecutors*, *supra* note 37, at 452-53.

prosecutors, the courts, and legislatures must consider ways to help the lawyers balance these pressures, avoid mistakes, and preserve the goals of justice. The remedies section discusses some suggestions for addressing this problem.

III. PUBLICITY AND CAPITAL TRIALS

Legal experts and psychologists have long recognized the potential effects of pretrial publicity on jurors,[79] and so attorneys have special responsibilities to mitigate these effects. The ABA Standards provide that a prosecutor should not make or authorize statements outside the courtroom that will be publicly disseminated "if the prosecutor knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding."[80] The standard also gives prosecutors the responsibility to make sure that such statements are not made by investigators and law enforcement personnel.[81] Below is a discussion of the legal standards involving pretrial publicity and a discussion of two recent murder trials that featured extensive media coverage.

A. Supreme Court Decisions and Ethical Rules About Pretrial Publicity

Publicity may affect jurors and the fairness of trials. As the Supreme Court has noted, "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."[82] The Court has insisted that no one be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power."[83]

A leading United States Supreme Court case on the prejudicial effect of pretrial publicity is *Sheppard v. Maxwell*.[84] The defendant in *Maxwell*, Dr. Sam Sheppard, became the quintessential tabloid villain and the basis for the long-running television show[85] and a movie.[86] Although Sheppard

79. *See, e.g.*, Simon A. Cole & Rachel Dioso-Villa, *Investigating the 'CSI Effect' Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1336-37 (2009); Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity: The Media, the Law and Common Sense*, 3 PSYCHOL. PUB. POL'Y & L. 428, 433 (1997); Amy L. Otto et al., *The Biasing Impact of Pretrial Publicity on Juror Judgments*, 18 LAW & HUM. BEHAV. 453, 454 (1994).

80. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, § 3-1.4(a), 12-13 (3d ed. 1993).

81. *Id.* at 3-1.4(b).

82. Bridges v. California, 314 U.S. 252, 271 (1941).

83. Chambers v. Florida, 309 U.S 227, 236-37 (1940).

84. 384 U.S. 333, 354 (1966).

85. THE FUGITIVE (ABC Television; Quinn Martin Productions 1963-1967)

ultimately was not sentenced to death following his first trial and conviction, the public's attention on the trial led the Supreme Court to note that the trial involved a "notorious case" with "virulent publicity."[87] Not only was "[t]he inquest . . . televised from a high school gymnasium, but the prosecutor and the judge in the trial were involved in elections for judgeships at the time.[88] The Supreme Court detailed the abuses and their potential effects: "The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the 'evidence' disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when news media make it available to the public."[89]

In asserting that due process requires that the accused receive a fair trial by a jury free from improper influences, the Supreme Court reversed the conviction, placing blame on numerous parties.[90] The Court noted that "[h]ad the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom -- not pieced together from extrajudicial statements."[91]

In determining whether misconduct and pretrial publicity have deprived the defendant of the constitutional right to a fair trial before an impartial jury, courts usually consider whether the defendant can make a showing that the jurors who tried the case were actually prejudiced against the defendant and whether the defendant used sufficient means of requesting relief at the trial level.[92] Courts may find prejudice,

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86. THE FUGITIVE (Warner Bros. Pictures 1993).

87. *Maxwell*, 384 U.S. at 354.

88. *Id.*

89. *Id.* at 360. The Court explained that the "report that there was a 'bombshell witness on tap' who would testify as to Sheppard's 'fiery temper' could only have emanated from the prosecution." *Id.* at 361.

90. *Id.* at 361-62. "The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action." *Id.* at 361 (citing Stroble v. California, 343 U.S. 181, 201 (1952) (Frankfurter, J., dissenting)).

91. *Id.* at 362. Although the judicial system could remove Sam Sheppard's conviction, it could not remove the stigma which, unlike in the television and movie fictions, caused Sheppard's life to fall apart. *See, e.g., Sam Reese Sheppard: Seeking the Truth, available at* http://www.samreesesheppard.org/ (last visited Jan. 23, 2010).

92. Jane C. Avery, *Federal Prosecutor's Pretrial Statements as Affecting Defendant's Right to Fair Trial*, 22 A.L.R. FED. 556, 559 (2004) (discussing various cases and the facts that have been considered in establishing prejudice and whether defendants were denied fair trials because of pretrial publicity).

> when the trial is conducted in a circus-like atmosphere, where the actual jurors possess fixed opinions that prevent them from judging impartially the guilt or innocence of the defendant, where inflammatory publicity so saturates a community that it is almost impossible to draw an impartial jury, or where so many jurors admit to a disqualifying prejudice that the trial court may legitimately doubt the avowals of impartiality by the remaining jurors.[93]

In rare situations, a court may presume prejudice.[94] In the capital case of *Chapman v. California*, the Supreme Court discussed harmless error analysis in another context but noted, "[t]o try a defendant in a community that has been exposed to publicity highly adverse to the defendant is per se ground for reversal of his conviction; no showing need be made that the jurors were in fact prejudiced against him."[95]

But in most cases of prosecutor misconduct, courts require the defendant to show that there was prejudice before receiving a remedy.[96] One recent case noted that the Supreme Court has not found a case of presumed prejudice since 1966.[97] In another case, a district court judge stated that to reverse decisions without a showing of prejudice would give defendants a "'windfall' by dismissing the indictment simply because some unidentified and possibly low-level member of the prosecutor's office failed to adhere to his duty."[98]

Ethics rules also address the concerns of pretrial publicity. Rule 3.6 of the *Model Rules of Professional Conduct* applies to all lawyers involved in a case and prohibits a lawyer from making an extrajudicial

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93. 21A AM. JUR. 2D *Criminal Law* § 932 (2009).

94. *See Thirty-Sixth Annual Review of Criminal Procedure, Influences on the Jury*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 560, n.1734 (2007).

95. Chapman v. California, 386 U.S. 18, 43-44 (1967) (Stewart, J., concurring) (discussing harmless error review for claims of federal constitutional error) (citing *Maxwell*, 384 U.S. at 351-52).

96. *See, e.g.*, United States v. Myers, 510 F. Supp. 323, 326-27 (E.D.N.Y. 1980) (quoting United States v. Stanford, 589 F.2d 285, 299 (7th Cir. 1978)). The court explained:

> [T]he defendants' allegation that the generation of publicity was intentional misconduct, even if true, does not merit a dismissal of these indictments. The purpose of the Sixth Amendment is to secure a fair trial for the accused. To dismiss the indictments here in the absence of any showing of prejudice would not further this purpose, but rather would constitute a "punishment of society for misdeeds of a prosecutor."

Id. at 327.

97. United States v. McVeigh, 153 F.3d 1166, 1182 (10th Cir. 1998).

98. *Myers*, 510 F. Supp. at 326.

public statement "that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[99] Rule 3.6 lists some topics that are likely to have a prejudicial effect if discussed publicly prior to trial, such as credibility of witnesses, the possibility of a plea, test results, opinion as to guilt, and inadmissible evidence.[100]

Other ethical rules specifically focus on prosecutors and pretrial publicity. Model Rule 3.8(g) restricts prosecutors from making extrajudicial statements except for statements that are necessary to inform the public and that serve a "legitimate law enforcement purpose."[101] Model Rule 3.8(e) requires prosecutors to "exercise reasonable care" to make sure that people who work with the prosecutor, such as investigators, also do not make extrajudicial statements that the prosecutor could not make.[102] In the *Model Code of Professional Responsibility*, Model Code DR 7-107 puts similar limitations on attorneys in criminal cases.[103]

Because of the difficulty in establishing prejudice after the trial, the best strategy for courts dealing with the issue is to try to lessen the impact of pretrial publicity through the jury selection process.[104] If an unbiased panel cannot be found, a change of venue becomes the accused's remedy. But *Sheppard* took place in a different information era. Cable news, the Internet, and 24-hour instantaneous availability of information did not exist. For example, one recent study has found that today "Americans spend '40 percent of all hours, including sleep time,'" with access to media.[105] Thus, potential jurors and witnesses may have an almost constant access to information outside the courthouse about a

99. MODEL RULES OF PROF'L CONDUCT R. 3.6(a). Rule 3.6 lists some information that may be released, and it also has an exception where the information is released in response to other prejudicial information. *See id.* R. 3.6(c).

100. *See id.* R. 3.6.

101. MODEL RULES OF PROF'L CONDUCT R. 3.8(f).

102. *Id.*

103. MODEL CODE OF PROF'L RESPONSIBILITY DR. 7-107.

104. *See, e.g.*, Susan Hanley Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 34 OHIO N.U. L. REV. 755, 767 (2008) ("One of the primary and preferred remedies for pretrial publicity remains the process of voir dire."). Professor Duncan, however, notes that studies "call into question whether voir dire actually accomplishes its objectives." *Id.*

105. James R. Devine, *The Duke Lacrosse Matter as a Case Study of the Right to Reply to Prejudicial Pretrial Extrajudicial Publicity Under Rule 3.6(C)*, 15 VILL. SPORTS & ENT. L. J. 175, 217 (2008) (quoting Jessica Marsden, *Media Consumers Finally Saying, "Enough!,"* HARTFORD COURANT, Aug. 8, 2007, at A1).

case, and society should be increasingly concerned about attorney misconduct that involves the use of pretrial publicity.

B. Two Recent Murder Cases With Significant Pretrial Publicity

Two recent high-profile murder cases are discussed below, one that resulted in a prison sentence and one that resulted in an execution. Although ultimately courts did not find legally significant misconduct in these two cases, the cases illustrate how pretrial publicity may surround major cases and serve as a warning about how attorneys and courts should be vigilant in addressing pretrial publicity.

1. United States v. Kaczynski

A recent murder case that raised concerns about pretrial publicity was the case involving Theodore Kaczynski, the "Unabomber."[106] Although the defendant in the case ultimately avoided the death penalty with a plea,[107] the district court noted it was a case "with intense public interest"[108] and explained, "[w]hen there is a collision between the rights of the Defendant and the right of the public to know (particularly, as interpreted by the press) it is important to analyze the extent of those respective rights and to reach some balance between these important interests."[109]

Kaczynski moved to have his indictment dismissed, claiming the government "deliberately leaked information regarding its investigation," thereby violating his rights to an unbiased grand jury and a fair trial.[110] Kaczynski's attorneys acknowledged that the accused had the burden of proof to demonstrate any unfairness, and they moved for an evidentiary hearing "to prove that the government is in fact responsible for the 'media blitz' that followed the execution of the search warrant."[111] The trial court held that the accused was required to show actual prejudice.[112]

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106. United States v. Kaczynski, 923 F. Supp. 161, 163-64 (D. Mont. 1996).

107. Ted Kaczynski's brother, David, had aided federal agents in apprehending Ted as the agents led him to believe that in return for his help prosecutors would not seek the death penalty. *See* William Glaberson, *The Death Penalty as a Personal Thing*, NY TIMES, Oct. 18, 2004, *available at* http://www.nytimes.com/2004/10/18-/nyregion/18brother.html?_r=1.

108. *Kaczynski*, 923 F. Supp. at 163-64.

109. *Id.*

110. *Id.* at 161.

111. *Id.* at 162.

112. *Id.* at 163.

Regarding the potential remedy, the court refused to dismiss the indictment and noted that "[e]ven if [the accused] were to show prejudice, however, it is doubtful whether the proper course would be to dismiss the indictment."[113] Further, "'[i]f a grand jury is prejudiced by outside sources when in fact there is insufficient evidence to indict, the greatest safeguard to the liberty of the accused is the petit jury and the rules governing its determination of a defendant's guilt or innocence.'"[114]

2. United States v. McVeigh

The Oklahoma City bombing on April 19, 1995 and its investigation generated considerable media coverage. After Timothy McVeigh's arrest for the capital crimes, the media informed the public of details of his personal history, including McVeigh's belief that during his tour in the Gulf War the government had placed a microchip in his buttocks.[115]

McVeigh's attorney challenged his conviction in part because "the jury pool was flooded with negative pre-trial publicity, especially media reports that he had confessed to his lawyers."[116] The U.S. Court of Appeals noted the problem of changing venue due to the pre-trial publicity because of the national attention the case received.[117] The appeals court further considered that the district court had concluded that McVeigh could not receive a fair trial in Oklahoma when it decided to move the trial to Denver.[118] The court apparently recognized the venue change did not completely eliminate the prejudice caused by the pre-trial publicity.[119]

Prior to McVeigh's trial, during jury selection, the *Dallas Morning News* published an article on its internet page claiming that it was in possession of "internal, confidential defense documents that revealed McVeigh had confessed to his own lawyers that he had indeed bombed the Murrah Building in Oklahoma City . . . . This story was picked up and reported by both the national and Denver news media" and contained

113. *Id.*

114. *Kaczynski*, 923 F. Supp. at 163 (quoting Silverthorne v. United States, 400 F.2d 627, 684 (9th Cir. 1968)).

115. *See* Ron K. Unz, *Big Brother, Meet Big Sister Immigration: Sen. Feinstein Wants Everyone to Carry an Encrypted Database Linked National Identity Card*, L.A. TIMES, June 12, 1995, at 5; Sally Jacobs, *McVeigh Lived Apart, Rooted in Weapons*, BOSTON GLOBE, May 10, 1995, at 1.

116. United States v. McVeigh, 153 F.3d 1166, 1179 (10th Cir. 1998).

117. *Id.*

118. *Id.* at 1179-80. Denver was seen as a large metropolitan area where a "large jury pool is available." *Id.* at 1179.

119. *Id.* at 1180. The court concluded that the citizens of Denver were less "intensely affected" by the horrific criminal acts alleged. *Id.*

other information about his plans and motivations.[120] Two weeks later, another similar article appeared on the *Playboy* website.[121] Four of the seated jurors acknowledged that they were aware of the reports of McVeigh's alleged confession.[122]

The Circuit Court of Appeals rejected McVeigh's argument that the court should presume prejudice because of the coverage, and noted that such a presumption is "rarely invoked and only in extreme situations."[123] Referring to *Sheppard,* the court held that "[i]n order for the reviewing court to reach a presumption that inflammatory pretrial publicity so permeated the community as to render impossible the seating of an impartial jury, the court must find that the publicity in essence displaced the judicial process, thereby denying the defendant his constitutional right to a fair trial."[124] The court admitted that the accused's burden in this regard will rarely be satisfied because the presumptive prejudice standard is only used in extreme situations and the defendant bears a heavy burden to show that the trial was unfair.[125] The court observed that "despite the proliferation of the news media and its technology, the Supreme Court has not found a single case of presumed prejudice in this Country since the watershed case of *Sheppard.*"[126]

After rejecting the defendant's argument for a presumed prejudice standard, the court addressed whether or not there was actual prejudice. The court noted that the standard gives deference to the trial judge: "In reviewing for actual prejudice, we examine the circumstances of the publicity and the voir dire, and merely determine 'whether the judge had a reasonable basis for concluding that the jurors selected could be impartial.'"[127] Applying that standard, the court of appeals found that the district court did not abuse its discretion in finding that the jury could disregard the adverse pretrial publicity and deliver an impartial verdict.[128] The court upheld McVeigh's conviction.[129]

120. *McVeigh*, 153 F.3d at 1179.
121. *Id.*
122. *Id.* at 1181.
123. *Id.* (quoting United States v. Abello-Silva, 948 F.2d 1168, 1177 (10th Cir. 1991)).
124. *Id.*
125. *Id.* at 1182.
126. *McVeigh*, 153 F.3d at 1182.
127. *Id.* at 1183 (quoting *Abello-Silva*, 948 F.2d at 1177-78).
128. *Id.* at 1183-84.
129. *Id.* at 1222.

3. Pretrial Publicity and Capital Cases

The *McVeigh* case illustrates the point that some capital cases inherently will have extensive pretrial publicity.[130] Since capital cases by their nature involve horrendous crimes, they will attract attention. Even without any misconduct, the natural reporting of news may result in biased juries. Thus, prosecutors should be cautious about unnecessary disclosures to the media.[131]

But as the *McVeigh* and *Kaczinski* cases show, it is not easy for defendants to win on claims regarding pretrial publicity.[132] In the *McVeigh* case, although the defendant could show there was pretrial publicity, the defendant could not show prejudice. Similarly, in the *Kaczinski* case, the defendant was unable to convince the court that claims about prosecutor leaks in the case warranted relief. Kaczynski ultimately avoided the death penalty by pleading guilty and he is currently serving a sentence of life in prison without the possibility of parole.[133] McVeigh was executed on June 11, 2001 at the U.S. Federal Penitentiary in Terre Haute, Indiana.[134]

IV. PEREMPTORY CHALLENGES AND *BATSON v. KENTUCKY* ISSUES DURING JURY SELECTION IN CAPITAL CASES.

In addition to misconduct that may occur during discovery and contacts with the media, prosecutor misconduct may occur during the jury selection process. The discussion below addresses the situation

130. An upcoming capital case that will feature a large amount of publicity will be the New York City trial of Khalid Shaikh Mohammed for his role in the Sept. 11 attacks. *See, e.g.*, Charlie Savage, *Accused 9/11 Mastermind to Face Civilian Trial in N.Y.*, NY TIMES, Nov. 13, 2009, *available at* http://www.nytimes.com/2009/11/14/us/14terror.html.

131. *See* Laurie L. Levenson, *High-Profile Prosecutors & High-Profile Conflicts*, 39 LOY. L.A. L. REV. 1237, 1254 (2006) ("Unnecessary disclosures [by prosecutors] may prejudice pending investigations, taint the potential jury pool, compromise government informants, and even endanger the lives, safety and reputation of others.").

132. Some capital cases have been reversed, based at least in part on pretrial publicity. In *Woods v. Dugger*, 923 F.2d 1454, 1459-60 (11th Cir. 1991), the U.S. Court of Appeals for the Eleventh Circuit considered the combination of pretrial publicity and an inherently prejudicial courtroom atmosphere and found that a capital defendant had been denied a fair trial. In that case involving a defendant charged with killing a prison guard, the court reasoned that the presence of prison guards in full uniform in the courtroom, along with the extensive pretrial publicity, sent a message that the officers wanted the death penalty. *Id.* at 1460.

133. William Glaberson, *Life Without Parole For the Unabomber*, N.Y. TIMES, Jan. 25, 1998, at 42.

134. Pam Belluck, *The McVeigh Execution: The Scene; Calm at Execution Site and Silence by McVeigh Prove Unsettling for Some*, N.Y. TIMES, June 12, 2001, at A27.

where there may be instances of a prosecutor who improperly uses peremptory challenges.

A. Legal Standard for Defendants to Make Batson *Challenges to Convictions*

In *Batson v. Kentucky*, the Supreme Court held that racially based peremptory challenges by prosecutors in criminal trials violate the equal protection clause.[135] Later Supreme Court decisions extended the *Batson* rule to other "suspect" groups,[136] to civil trials,[137] and to criminal defendants.[138]

There are three steps to a *Batson* claim. A defendant who makes a *Batson* objection must first make a showing that, based on the totality of facts, an inference can be drawn that the peremptory challenge was made for a discriminatory purpose.[139] Second, to overcome a showing of a prima facie *Batson* violation, the prosecutor must proffer, in an adversarial proceeding outside the jury's presence, a neutral explanation for the challenge that demonstrates an absence of discriminatory intent. Third, the trial court must determine whether the defendant has proved purposeful discrimination.[140]

When the court evaluates the explanations, bare denials of a discriminatory motive or claims of good faith will not suffice,[141] particularly, one may suppose, in capital cases. The Supreme Court, however, has held that a neutral explanation by the prosecutor may be sufficient to overcome a *Batson* objection even if the explanation seems "implausible."[142] Also, a peremptory challenge will be sustained, even if influenced by discriminatory motives, so long as a lawful and neutral reason for the challenge also exists.[143]

The *Batson* standard is of special concern in death penalty cases, where several studies have concluded that race plays a significant factor

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135. 476 U.S. at 82. The petitioner in *Batson* was indicted for second-degree burglary and receipt of stolen goods. *Id.*

136. *See* Hernandez v. New York, 500 U.S. 352 (1991) (ethnicity); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) (gender); United States v. Somerstein, 959 F. Supp. 592 (E.D. N.Y. 1997) (religious affiliation).

137. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

138. *See* Georgia v. McCollum, 505 U.S. 42 (1992); People v. Kern, 554 N.E.2d 1235 (N.Y. 1990).

139. *Batson*, 476 U.S. at 93-94.

140. *Id.* at 98.

141. *Id.*

142. Purkett v. Elem, 514 U.S. 765 (1995) (per curiam).

143. Howard v. Senkowski, 986 F.2d 24, 25 (2d Cir. 1993).

in capital sentencing.[144] A number of legal commentators argue that *Batson* has failed to ensure that invidious discrimination, particularly racial discrimination, does not taint the jury selection process.[145] This failure is, in large part, due to procedures and standards established by the Supreme Court for identifying, evaluating, and, if required, rejecting peremptory challenges based on constitutionally impermissible factors that allow lawyers, including prosecutors, to easily evade *Batson's* mandate. Thus, commentators note that today, as in the past, unethical prosecutors may use their peremptory challenges for impermissible purposes.[146]

Similarly, some state appellate courts have expressed their views on the futility of relying on *Batson* to prevent the discriminatory use of peremptories. An Illinois appellate court referred to "the charade that has become the *Batson* process,"[147] noting that the State may use "pat race-neutral reasons for exercise of peremptory challenges."[148]

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144. *See, e.g.*, Amnesty International, *United States of America: Death By Discrimination – The Continuing Role of Race in Capital Cases* (April 23, 2003), *available at* http://www.amnesty.org/en/library/info/AMR51/046/2003 (outlining recent studies on juror racism and the effects of the race of the victim in capital sentencing); Richard C. Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides* (Report of the Death Penalty Information Center) (June 1998), *available at* http://www.deathpenaltyinfo.org/article.php?scid=45&did=539; Adam Liptak, *New Look at Death Sentences and Race*, N.Y. TIMES, April 29, 2008, at A10 (discussing new study about the effects of a capital defendant's race in sentencing).

145. Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 545 (citing *People v. Bolling*, 591 N.E.2d 1136, 1145 (N.Y. 1992) (Bellacossa, J., concurring)) ("The *Batson* doctrine has been rendered so ineffective a tool against racism or sexism that one jurist has been led to note that *Batson* and its progeny have proven to be less an obstacle to discrimination than a roadmap to it.").

146. As one observer has noted: "Once defense counsel has made the [*Batson*] objection and established a prima facie showing, prosecutorial tendering and judicial acceptance of 'racially neutral' explanations . . . has become nearly pro forma." Andrea D. Lyon, *Naming The Dragon: Litigating Race Issues During a Death Penalty Trial*, 53 DEPAUL L. REV. 1647, 1655 (2004).

147. People v. Randall, 671 N.E.2d 60, 65 (Ill. App. Ct. 1996). The court speculated that the *Batson* "rule would be imposed only where the prosecutor states that he does not care to have an African-American on the jury." *Id.* at 66.

148. *Id.* at 65. Chief Judge Kaye of the Court of Appeals of New York has raised more general concerns with the use of peremptory challenges during jury selection in arguing that "[t]he intense focus on factors such as skin color, accent and surname in jury selection is wholly at odds with our societal goal of dealing with people as individuals, on their personal qualities." People v. Brown, 769 N.E.2d 1266, 1272-73 (N.Y. 2002) (Kayne, C.J., concurring). She concluded: "My nearly 16-year experience with *Batson* persuades me that, if peremptories are not entirely eliminated (as many have urged), they should be very significantly reduced." *Id.* at 1273. Additionally, Chief Justice Kaye noted that in New York, "we have both an exceedingly, perhaps uniquely, high number of

In the non-capital case of *Purkett v. Elem*, the Supreme Court reviewed peremptory challenges by the prosecution to two black jury panel members.[149] Responding to a *Batson* objection, the prosecution offered as a neutral explanation the fact that the two were challenged because they had long, curly, unkempt hair, and mustaches and goatees, and "look[ed] suspicious."[150] The Supreme Court held that there was no *Batson* violation, setting a low standard of plausibility for evaluating the credibility of a neutral explanation.[151] The Court stated: "This [*Batson*] process [of offering a race-neutral reason in response to a *Batson* motion] does not demand an explanation that is persuasive, or even plausible . . . the issue is the facial validity [of the explanation].[152] After *Purkett*, one commentator concluded that *Purkett* "marked the final demise of the *Batson* doctrine into the rule of useless symbolism."[153]

One might argue that when a trial judge concludes there is no constitutional *Batson* violation, such a holding establishes that there was no misconduct. But that argument misses the point. The fact that, in practice, current *Batson* jurisprudence allows the intent of *Batson* to be thwarted with ease and depressing frequency, encourages prosecutors who might be inclined to strike jurors on impermissible grounds to do so, since in most cases they will succeed and, in any event, there is no downside to trying.[154] If courts and attorneys acknowledge that attempting an impermissible strike is misconduct, even if the attempt is unsuccessful, such acknowledgement will discourage such practices and therefore better serve the intent and purpose of the *Batson* rule. In cases where an impermissible strike is allowed to stand and the verdict is then reversed on appeal on that ground, the fact that the trial judge reviewed

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peremptory challenges, and a requirement that all peremptories be exhausted in order to preserve a claim of error. The opportunity for mischief – let alone the huge, expensive waste of juror time – therefore abounds." *Id.*

149. *Purkett*, 514 U.S. at 766 (noting that the respondent in the case had been convicted of second-degree robbery).

150. *Id.*

151. *Id.* at 767.

152. *Id*, at 768. Even an explanation that is implausible may pass the pretextual test. *Id.* Before *Purkett,* it was noted: "[The] lethal problem for *Batson*, however, is that prosecutors have had little difficulty coming up with race-neutral explanations for their peremptory strikes of minority jurors." Tanya Coke, *Lady Justice May Be Blind, But Is She a Soul-Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 377 (1994). *See also* Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson*, 27 U. MICH. J. L. REFORM. 229, 237-66 (1993) (documenting sparse enforcement of *Batson* at trial).

153. Cavise, *supra* note 145, at 528.

154. *See generally id., passim.*

and wrongly allowed the strike should have no bearing on a finding that the prosecutor acted wrongly.

B. Batson *Violations in Capital Cases*

Several statistical studies have shown that the success rate of *Batson* claims by criminal defendants is quite low.[155] As these studies and observations indicate, the potential for an unethical prosecutor to commit misconduct by striking jurors for prohibited reasons while concealing that intent with neutral reasons is significant, given the extraordinary range of "neutral" reasons that have been found acceptable.[156]

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155. *See* Joshua E. Swift, Note, *Batson's Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336 (1993) (analyzing seventy-six federal cases where the reason offered by the prosecutor for the strike was rejected only three times by the trial court); *see also* Kenneth J. Melilli, *Batson in Practice: What Have We Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996). In the group of cases analyzed by Prof. Melilli—all published decisions with *Batson* challenges from April 30, 1986 [the date of the *Batson* decision] through December 31, 1993—22% of the challenges made by criminal defendants were successful. *Id.* Prof. Melilli also demonstrated that *Batson* challenges based on claimed discrimination against blacks and Hispanics had a lower rate of success than challenges based on claimed discrimination against other targeted groups. *Id.* at 463. The same study showed that of 191 lawyers found to have violated the *Batson* rules, 165, or over 86%, were prosecutors, a statistic the author characterized as "a dismal report card" on a prosecutor's ethical obligation to uphold the law and seek justice. *Id.*

156. *See, e.g.*, Lockett v. State, 517 So. 2d 1346 (Miss. 1987) (concerns about sequestration); United States v. Terrazas-Carrasco, 861 F.2d 93 (5th Cir. 1988) (particular surname); United States v. Briscoe, 896 F.2d 1476 (7th Cir. 1990) (residence); United States v. Ruiz, 894 F.2d 501 (2d Cir. 1990) (recently completed jury services); People v. Thomas, 559 N.E.2d 262 (2d Dist. 1990) (marital status); United States v. Ferguson, 935 F.2d 862 (7th Cir. 1991) (personal encounters with the criminal justice system); United States v. Johnson, 941 F.2d 1102 (10th Cir. 1991) (family member's encounter with the criminal justice system); United States v. Johnson, 4 F.3d 904 (10th Cir. 1993) (juror's occupation); Pemberthy v. Beyer, 19 F.3d 857 (3d Cir. 1994) (language fluency); *Purkett*, 514 U.S. 765 (physical characteristics); United States v. Fike, 82 F.3d 1315 (5th Cir. 1996) (distrust of the justice system), *overruled on other grounds by* United States v. Brown, 161 F.3d 256 (5th Cir. 1998) *and abrogated on other grounds by* United States v. Cantu, 230 F.3d 148 (5th Cir. 2000); United States v. Kelley, 140 F.3d 596 (5th Cir. 1998) (juror's health); United States v. McCoy, 848 F.2d 1476 (6th Cir. 1998) (residence); Stubbs v. Gomez, 189 F.3d 1099 (9th Cir. 1999) (juror's employment status and also physical gestures). Other subjective reasons also passed muster: Cudjoe v. Com., 475 S.E.2d 821 (Va. Ct. App. 1996) (the juror did not seem sincere); United States v. Walton, 217 F.3d 443 (7th Cir. 2000) (seemed "inattentive"); United States v. Hunter, 86 F.3d 679 (7th Cir. 1996) (there was a "gut feeling"); Wallace v. Morrison, 87 F.3d 1271, 1273 (11th Cir. 1996) ("the way they answer questions was disturbing," as was the "body language"); United States v. Hinton, 94 F.3d 397 (7th Cir. 1996); United States v. Bentley-Smith, 2 F.3d 1368 (5th Cir. 1993) (the unquantifiable "hunch").

In capital cases, there are motivations for lawyers to use peremptory challenges against certain categories of potential jurors.[157] Studies have found "conspicuous evidence of racial influence in sentencing in critical black-defendant/white-victim cases" and that both white male and female jurors are more likely to return a death sentence than African-American jurors in cases where the defendant is African-American and the victim is white.[158] Other studies indicate that certain ethnic groups may be less likely to return a death sentence, and also demonstrate a history of disproportionate challenges against minorities by some prosecutors.[159]

Prosecutors in capital cases have used race in the attempt to obtain death sentences.[160] For example, in 2006, in *State v. McFadden*, the Missouri Supreme Court found that prosecutors used peremptory challenges to remove five of six black potential jurors.[161] The court reversed the conviction and the death sentence.[162]

But because of the type of evidence needed for *Batson* violations, such constitutional claims are difficult to establish. In the 2003 capital

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157. Some prosecutors may believe that minorities harbor a distrust of the State and police. *See* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1640 (1985).

158. William J. Bowers, Marla Sandys and Thomas W. Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1497, 1501, 1532-33 (2004). *See also* Johnson, *supra* note 151, at 1619-24 (discussing data that show a tendency among white jurors to convict black defendants more readily than white defendants).

159. Johnson, *supra* note 157, at 1640. *See also* CATHY E. BENNETT & ROBERT HIRSCHHORN, BENNETT'S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS IN CIVIL AND CRIMINAL LITIGATION, 324 (1993) (noting stereotypes among lawyers that African-American and Hispanic jurors favor criminal defendants more than whites and that Asians are more likely to convict than other ethnic groups); Charles L Lindner, *Lessons of the King Case: The Risk of Shuttle Justice,* L.A.TIMES, Apr. 25, 1993 at M1, M6 (noting that white juries are more prone to convict a black or Latino defendant than integrated juries); HIROSHI FUKURAI, ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE, 70 (1993) (noting that prosecutors are more likely than defense attorneys to direct peremptory challenges at minorities); Dean E. Murphy, *Case Stirs Fight on Jews, Juries and Execution*, N.Y. TIMES, March 16, 2005, at A1 (discussing the striking of Jewish panel members in California).

160. "Between 1997 and 2007, courts reversed or strongly suggested that reversal was appropriate on remand in fifteen death penalty cases due to *Batson* violations." Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutor Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1081-82 (2009). Although that number may seem low, it reflects the hurdles to establishing a *Batson* violation and that *Batson* violations may be procedurally defaulted in other cases. *Id.* at n.129; *see also* Holloway v. Horn, 355 F.3d 707, 713-18 (3d Cir. 2004) (rejecting argument by government that the defendant had procedurally defaulted a *Batson* claim).

161. 191 S.W.3d 648, 657 (Mo. 2006).

162. *Id.*

case of *Miller-El v. Cockrell*,[163] evidence revealed a formal policy in the Harris County District Attorney's office to exclude minorities from jury service in capital cases. The evidence included a manual used by prosecutors entitled "Jury Selection in a Criminal Case" that contained an article by a former prosecutor outlining the reasons for excluding minorities from jury service.[164] Also, some prosecutors in Texas used a procedure known as the "jury shuffle" to rearrange the order in which members of a jury panel were examined, increasing the likelihood that "visually preferable" venire members would be moved forward and empanelled.[165]

The history of the *Miller-El* capital case demonstrates how courts may fail to remedy clear evidence of prosecutorial misconduct in *Batson* capital cases, and how, if there is an ultimate remedy, it may take years of litigation. Miller-El's capital trial was held before *Batson* was decided, and at trial, the State removed ten of eleven prospective African-American jurors with peremptory strikes.[166] Also, the prosecution twice requested "shuffles" when there were a predominant number of African-Americans in the front of the panel.[167] At a hearing held by the trial court after *Batson* was decided, Miller-El introduced the historical evidence of racial discrimination in jury selection and use of challenges practiced by the District Attorney's office, including the use of jury shuffles, along with substantial other evidence supporting a prima facie case of discrimination.[168] But despite that showing, the trial court ruled against Miller-El, the Texas Court of Criminal Appeals upheld the trial court, and subsequently the U.S. Court of Appeals for the Fifth Circuit upheld the federal district court's denial of a Certificate of Appealability. Then, in an eight-to-one decision, the Supreme Court reversed the Fifth Circuit, holding that the lower court had used an overly stringent standard for the granting of a Certificate of Appealability.[169]

The Supreme Court, however, would have to intervene again. On remand, the Fifth Circuit Court of Appeals upheld the district court's

163. 537 U.S. 322, 344 (2003).

164. *Id.* A circular used by the District Attorney's office directed prosecutors to strike "Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury." *Id.*

165. *Id.* at 333, 334. The "jury shuffle" has long been used in Texas to circumvent the non-discriminatory intent of *Batson*. *See, e.g.*, Michael M. Gallagher, *Abolishing the Texas Jury Shuffle*, 35 ST. MARY'S L.J. 303, 308 (2004) ("[P]arties facing a *Batson* challenge can easily defeat a *Batson* challenge. Removing the jury shuffle. . . . will ensure greater fairness and justice for Texas litigants.").

166. *Miller-El*, 537 U.S. at 331.

167. *Id.* at 333-34.

168. *Id.* at 334-35.

169. *Id.* at 341 (Thomas, J., dissenting).

denial of the writ.[170] Once again the Supreme Court granted certiorari. After reviewing not only the prosecutors' actions in the case itself but also the historical record of racial discrimination practiced by the Harris County District Attorney's office in capital cases, the Court reversed, holding that Miller-El was entitled to prevail on his habeas corpus claim.[171] As Justice Breyer noted in his concurring opinion: "despite the strength of his claim, Miller-El's challenge has resulted in 17 years of largely unsuccessful and protracted litigation . . . including 23 judges, of whom 6 found the *Batson* standard violated and 16 the contrary."[172]

For the very reason that *Batson* violations are easier to hide, they are, in a sense, more pernicious than other, more blatant, types of misconduct. As Chief Judge Kaye of the New York Court of Appeals noted in *People v. Brown*, because of the way peremptory challenges work, "[t]he opportunity for mischief abounds."[173] Of course, the potential for mischief is a much greater concern in capital cases where life is at stake.[174]

V. PROSECUTOR USE OF FALSE EVIDENCE AND STATEMENTS IN CAPITAL CASES

Unjust capital convictions may result from perjury, the use of false testimony, the use of false evidence, the use of illegally obtained evidence, the use of false statements in closing arguments, and the non-disclosure of use of inadmissible evidence.[175] The Supreme Court has recognized the problem, noting that "deliberate deception of a court and

170. Miller-El v. Dretke, 361 F.3d 849 (5th Cir. 2004). The court relied in large part upon Justice Thomas's dissenting opinion. *Id.*

171. Miller-El v. Dretke, 545 U.S. 231 (2005).

172. *Id.* at 267 (Breyer, J., concurring).

173. *Brown*, 769 N.E.2d at 73.

174. See the following death penalty cases finding *Batson* violations: Holloway v. Horn, 355 F.3d 707, 710-11 (3d Cir. 2004); Bui v. Haley, 321 F.3d 1304, 1307 (11th Cir. 2003); Riley v. Taylor, 277 F.3d 261, 273 (3d Cir. 2001); Hardcastle v. Horn, 521 F. Supp. 2d 388, 423 (E.D. Pa. 2007); Lark v. Beard, 495 F. Supp. 2d 488, 503 (E.D. Pa. 2007); Yancey v. State, 813 So. 2d 1, 2 (Ala. Crim. App. 2001); People v. Silva, 21 P.3d 769, 798 (Cal. 2001); State v. Coleman, 970 So. 2d 511, 516-17 (La. 2007); State v. Harris, 820 So. 2d 471, 477 (La. 2002); Flowers v. State, 947 So. 2d 910, 939 (Miss. 2007); State v. McFadden, 216 S.W.3d 673, 674 (Mo. 2007); State v. McFadden, 191 S.W.3d 648, 650 (Mo. 2006). *See also* Mahaffey v. Page, 162 F.3d 481, 486 (7th Cir. 1998) (finding Batson violation and remanding).

175. False evidence may also be inaccurate expert testimony based upon "junk science." *See, e.g.*, Craig Cooley, *Forensic Science and Capital Punishment Reform: An "Intellectually Honest" Assessment*, 17 GEO. MASON U. CIV. RTS. L.J. 299 359 n.304 (2007) (discussing use of ridiculous claims made by experts regarding hair analysis and bullet-lead analysis).

jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'"[176] Similarly, several ethical rules prohibit attorneys from using false evidence.[177]

The duties of prosecutors include the responsibility "'to see that nothing but competent evidence is submitted to the jury.'"[178] Recent additions to the American Bar Association Criminal Justice Standards discuss the special responsibilities that prosecutors have regarding such evidence.[179]

This section addresses the prosecutorial use of false evidence in capital cases. First, this section discusses Supreme Court decisions on the issue, and then we discuss specific instances of the use of false evidence in capital cases.

A. Supreme Court Case Law on the Use of False Evidence and Illegally Obtained Evidence

The Supreme Court has long been concerned about the use of false evidence. In 1957 in *Alcorta v. Texas*,[180] the Supreme Court reversed a

176. Giglio v. United States, 405 U.S. 150, 153 (1972) (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935). *See also* Pyle v. Kansas, 317 U.S. 213 (1942). Also, in 1935, the Court noted the importance of the prosecutor's role in a criminal case, stating that the prosecution's "interest . . . in a criminal prosecution is not that it shall win case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935) (holding that a prosecutor has a duty to refrain from using improper methods to obtain a wrongful conviction).

177. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (stating that lawyers cannot assist witnesses in testifying falsely); MODEL RULES OF PROF'L CONDUCT R. 3.4(b); ABA CRIMINAL JUSTICE STANDARDS: THE PROSECUTION FUNCTION, § 3-5.6(a) (3d ed. 1993); ABA CRIMINAL JUSTICE STANDARDS: THE DEFENSE FUNCTION, § 4-7.5(a).

178. Adams v. State, 30 So. 2d 593, 596 (Miss. 1947) (quoting 42 AM. JUR. § 20, at 255) (reversing conviction of unlawful possession of intoxicating liquor). In *Adams*, the court noted "'it is the duty of the prosecuting attorney, who represents all the people and has no responsibility except fairly to discharge his duty, to hold himself under proper restraint and avoid violent partisanship, partiality, and misconduct which may tend to deprive the defendant of the fair trial to which he is entitled." *Id.*

179. The standards include statements on the use of undercover agents, confidential informants, and illegally obtained evidence. *See, e.g.*, CRIMINAL JUSTICE STANDARDS §§ 2.3, 2.4 & 3.5 (1993). Section 3.5 on illegally obtained evidence states: "The prosecutor should take appropriate steps to limit the taint, if any, from the illegally obtained evidence and determine if the evidence may still be lawfully used." *Id.* at §3.5(b). The ABA House of Delegates passed the *Standards on Prosecutorial Investigations* in February 2008. *See* Criminal Justice Section Standards, American Bar Association Website, http://www.abanet.org/crimjust/standards/ (last visited Jan. 23, 2010).

180. 355 U.S. 28 (1957).

murder conviction based on false testimony.[181] The *Alcorta* Court focused on the false impression left with the jury after false testimony was entered and considered the manner in which the prosecution elicited the perjury.[182]

Two governing prosecutorial misconduct cases are *Giglio v. United States*,[183] and *Napue v. United States*.[184] In *Giglio,* at trial the defense attorney asked the cooperating witness if any plea agreements were offered for his testimony, and the witness denied the existence of any cooperation agreements.[185] The prosecution re-affirmed to the jury that no promises were made, at which point defense counsel made a motion for a mistrial based on the failure of the prosecution to alert the defense to the cooperating witness' status.[186] The Supreme Court reversed the state court conviction, finding that due process was violated by the use of the testimony.[187] The Court held that it was necessary to have a new trial regardless of whether the use of such testimony was by "negligence or design."[188]

In *Napue*, the Supreme Court remanded for a new murder trial because the conviction had been obtained through the introduction of false testimony without correction by the prosecution.[189] *Napue* involved a cooperation agreement that was discovered by the defendant's research and raised in his appeal *coram nobis* even though the cooperating witness had initially denied the existence of such an agreement.[190] The *Napue* Court reasoned that "[t]he principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness."[191] The Court continued, "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as

181. In *Alcorta,* the jury rejected the heat of passion justification defense after the eyewitness to the crime denied any sexual relations with defendant's wife only to later admit at the habeas corpus hearing that they had sex five or six times. *See id.* at 30-31.

182. *Id. at 31.*

183. *Giglio*, 405 U.S. at 154. The petitioner in *Giglio* had been convicted of passing forged money orders. *Id.* at 150.

184. 360 U.S. 264 (1959). *Napue* had been convicted of murder. *Id.* at 266.

185. *See Giglio*, 405 U.S. at 151.

186. *Id.* at 152.

187. *Id.* at 154-55.

188. *Id.* at 154.

189. *See Napue*, 360 U.S. at 267-72.

190. *Id.* at 267.

191. *Id.* at 269.

the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."[192]

False evidence that ultimately leads to a state conviction is only reversed on appeal if the defendant establishes that there was a due process violation.[193] A due process violation occurs when a prosecutor actively solicits false testimony or allows false testimony to go uncorrected.[194] The overarching question regarding false testimony is whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[195]

In the context of capital cases, intentional use of false evidence to obtain a conviction and death sentence becomes much more egregious because a life is at stake. The use of this type of evidence, in any of its myriad forms, raises two main issues. The first is determining the role of the prosecutor in the illegality and the second is whether that evidence had enough of an adverse effect on the defendant's trial.[196]

B. Capital and Murder Cases Involving the Use of False Evidence

There are a range of capital cases where prosecutors used false evidence. An unethical prosecutor may present or use false evidence in different ways. For example, first, in some capital cases, prosecutors have presented false physical evidence and made references to the false physical evidence during trial.[197] Second, some prosecutors have used

192. *Id.* In *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974), the prosecutor made prejudicial comments in his closing to the jury. The trial court gave curative instructions to the jury, and comments were not deemed to be a due process violation. No violation occurred due to the trial court eliminating any jury reliance on the prosecutor's comments. *Id.* at 641-42.

193. *Berger*, 295 U.S. at 88-89.

194. *Bagley*, 473 U.S. at 680; *Napue*, 360 U.S. at 269.

195. *Agurs*, 427 U.S. at 103.

196. *Id.* at 103-04.

197. *See, e.g.*, South Carolina v. Gathers, 490 U.S. 805, 820-23 (1989) (finding in capital case that prosecutor's continual references to a tract and prayer card found on victim which prosecutor knew to be false was a violation of due process); Miller v. Pate, 386 U.S. 1, 6-7 (1967) (holding that the prosecutor's continual mention of the "blood" linking the shorts to the victim, when in fact the "blood" was paint, was not harmless in capital case); Moore v. Illinois, 408 U.S. 786, 801, 810 (1972) (reversing capital case on other grounds where a prosecutor got a different shotgun admitted than was found on defendant). *See also* People v. Hill, 952 P.2d 673, 679 (Cal. 1998); Gershowitz, *supra* note 160, at 1073 (discussing that Hill's conviction was reversed partly because the prosecutor "mischaracterized evidence, referred to facts not in evidence, and misstated the law").

prosecution witnesses who have given false testimony. [198] A third area of prosecutor misuse of evidence is where a prosecutor makes prejudicial comments to the jury.[199] A fourth way that a prosecutor may misuse evidence in capital cases is by using false convictions or bad acts in support of aggravating factors.[200] A fifth way that a capital prosecutor may misuse evidence is by using false confessions or statements by capital defendants.[201]

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198. *See, e.g.*, Gershman, *Litigating* Brady v. Maryland, *supra* note 29, at 553 ("There are many instances . . . of a prosecutor's failure to disclose evidence showing that the testimony of the prosecutor's scientific expert was either false or misleading."); Bennett L. Gershman, *Misuse of Scientific Evidence by Prosecutors*, 28 OKLA. CITY U. L. REV. 17, 21-28 (2003); Mills v. Scully, 826 F.2d 1192, 1195-97 (2d Cir. 1987) (finding no prejudice to defendant when prosecutor did not exploit or use the complainant's recanting of testifying to the grand jury); Toryanski, *supra* note 15, at 47-48 (discussing allegations of use of false testimony in California case). In *Nash v. Illinois*, 389 U.S. 906, 906-07 (1967), the defendant argued that the prosecutor knowingly allowed a cooperating witness to testify falsely that there was no cooperation agreement. In subsequent proceedings, the petitioner called the prosecutor and the cooperating witness to the stand where both admitted there was a cooperation agreement. *Id.* The petition for writ of certiorari was denied, but in a dissenting opinion to the Supreme Court's denial of certiorari, Justice Fortas, joined by the Chief Justice and Justice Douglas, reasoned that the jury's minds were poisoned by the initial denial of the cooperation agreement. *Id. See also* Ellen Yaroshefsky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999) (discussing study of relationship between prosecutors and cooperating witnesses); MICHAEL L. RADELET, HUGO ADAM BEDAU, & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE, 288, 290, 345, 347 (1992) (discussing cases of exonerated death row inmates Clarence Gilmore Boggie, Joseph Green Brown, Terry Seaton, and Charles Smith, all who had claims that prosecutors used perjured testimony).

199. *See, e.g.*, Caldwell v. Mississippi, 472 U.S. 320, 341, 344 (1985). A related area of prosecutor misconduct occurs where prosecutors use a defendant's sexual orientation in the state's strategy for seeking a conviction and death sentence. *See* Shortnacy, *supra* note 23, at 317-18, 350-54 (arguing that the federal standard of review of state cases for prosecutor misconduct in capital cases does not protect homosexual criminal defendants); Ruthann Robson, *Lesbianism and the Death Penalty, A "Hard Core" Case*, 32 WOMEN'S STUD. QUARTERLY 181 (2004).

200. *See, e.g.*, Evans v. Virginia, 471 U.S. 1025, 1026-28 (1985) (Marshall, J., dissenting from denial of petition for writ of certiorari) (noting prosecutor used two false convictions to present to the sentencing jury on the issue of future dangerousness, and the jury considered the evidence important enough to give the defendant the death penalty).

201. *See, e.g.*, Jacobs v. Scott, 513 U.S. 1067 (1995) (Stevens, J., dissenting from denial of petition for writ of certiorari). In *Jacobs*, a false confession was used by the prosecution as almost the entire basis for the defendant's guilt resulting in a conviction and the death penalty. *Id.* The prosecution later repudiated that same confession commenting on its utter unreliability and the prosecution admitted having knowledge that there was a different shooter. *Id.* But that same prosecutor's office later recanted on the defendant's appeal and reaffirmed the strength and reliability of the conviction. *Id.*

Caldwell v. Mississippi[202] is one example of a capital case involving a prosecutor making prejudicial comments to the jury. In that case, the Supreme Court vacated a death sentence after the prosecutor made comments to the jurors that minimized the importance of their role in determining whether the death penalty should apply.[203] The Court considered the requirement of heightened reliability in Eighth Amendment death penalty cases.[204] At trial during closing arguments, the prosecutor discussed the automatic appeal rights of the defendant, stressing that the jury is not completely responsible for a death sentence because the courts review such decisions.[205]

The Supreme Court found that the remarks by that prosecutor were inaccurate and misleading.[206] Most problematic, the jury had been led to believe that the responsibility for the death sentence fell on other people not sitting on the trial jury.[207] Thus, because "the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death," the Court reversed the death sentence.[208]

Similarly, in a 2008 case from the United States Court of Appeals for the Ninth Circuit, the court considered a prosecutor's repeated misstatements implying that a capital defendant could be released if the jury sentenced him to life without the possibility of parole.[209] The court

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202. *Cadwell*, 472 U.S. at 324-25. In another capital case in 2005, the U.S. Court of Appeals for the Seventh Circuit found that a prosecutor's comments violated a defendant's Fifth Amendment privilege against self-incrimination. Ben-Yisrayl v. Davis, 431 F.3d 1043, 1052-53 (7th Cir. 2005). In that case, the prosecutor had stated to the jury, "Let the Defendant tell you why somebody would freely and voluntarily confess." *Id.* at 1049. The court found that the prosecutor asked the jurors to make an adverse inference from the defendant's failure to testify, violating the Fifth Amendment. *Id.* at 1051-53.

203. *Cadwell*, 472 U.S. at 324-25.

204. *Id.* at 341.

205. *Id* at 325. The prosecutor stated:

> Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know - - they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it.

Id.

206. *Id.* at 322.

207. *Id.* at 328-29.

208. *Cadwell*, 472 U.S. at 341. The Court also considered the trial court's instructions to the jury that were not curative but agreed with the misstatement of law by the prosecutor, stressing that the case was reviewable. *Id* at 322-25. These remarks by the trial court judge only further created the incorrect impression that the jury had less actual responsibility than they did. *Id.* at 325.

209. Sechrest v. Ignacio, 54 F.3d 789, 808 (9th Cir. 2008). Among the statements, the prosecutor referenced the sentence of life without parole and stated: "'You don't die in

found that the prosecutor's false, inflammatory statements violated the capital defendant's right to fair trial.[210] In another recent case, the United States Court of Appeals for the Eighth Circuit found a due process violation when the prosecutor asserted his belief in the death penalty and claimed that executing the defendant was necessary to further the war on drugs.[211]

In *Jenkins v. Artuz*,[212] a 2002 non-capital murder case, the United States Court of Appeals for the Second Circuit held that a state prosecutor's conduct violated a defendant's due process rights.[213] Although at trial the prosecutor was supposed to bring up a cooperation plea agreement on direct examination of that witness, she did not bring it up, and upon hearing the witness deny the existence of any agreement, she followed up with re-direct that suggested there was no agreement.[214]

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prison of old age. People get out. Now, are you prepared to risk the life of some other person or child by giving him the opportunity to get out?'" *Id.* at 809. The prosecutor also "inflamed the passions of the jury by calling the defense a 'fraud,' and telling the jury that if they '[fell] for that fraud,' they would be 'risk[ing] the life of some other person or child.'" *Id.* at 811.

210. *Id.* at 809. *See also* Coleman v. Calderon, 210 F.3d 1047, 1050 (9th Cir. 2000) (finding due process violation where prosecutor asked jurors to impose capital punishment to protect society along with misleading jury instruction on parole).

211. Weaver v. Bowersox, 438 F.3d 832, 840-41 (8th Cir. 2006). *See also* Cargle v. Mullin, 317 F.3d 1196, 1218 (10th Cir. 2003) (finding due process violation where prosecutor asserted to the jury that his office only prosecuted guilty people); Romine v. Head 253 F.3d 1349, 1368-71 (11th Cir. 2001) (finding due process violation where prosecutor referred to scripture from Bible requiring the death penalty for individuals who murder their parents); Bates v. Bell, 402 F.3d 635, 648-49 (6th Cir. 2005) (finding due process violation where prosecutor told jurors that failure to impose the death penalty would be like putting a gun in the hand of the defendant). *Cf.* Billings v. Polk, 441 F.3d 238, 250-51 (4th Cir. 2006) (holding that there was no due process violation where prosecutor invoked the Bible to justify the state's death penalty statute); Ries v. Quarterman, 522 F.3d 517, 529-30 (5th Cir. 2008) (holding that due process was not violated where prosecutor asserted that the capital defendant deserved to die).

212. 294 F.3d. 284, 287-90, 293-97 (2d Cir. 2002).

213. *Id.* at 286. Even though the court was applying a deferential habeas standard of review to a state court's decision upholding the conviction, the federal court found that the state violated due process by using false testimony against the defendant. *Id.*

214. *Id.* at 293-94. The *Jenkins* court also considered the prosecutor's closing argument in which she stressed that there was no agreement and made the suggestion that her witness had no motive to lie. *Id.* at 294-95. The court, however, did not reach a conclusion on whether the summation independently violated the defendant's due process rights. *Id.* Professor Gershman has noted, "One of the most insidious prosecutorial schemes to subvert *Brady* is the orchestration of a plan whereby a key prosecution witness, who ordinarily would have a motive to lie by virtue of having made a deal with the government, testifies that no deal was made." Gershman, *Litigating* Brady v. Maryland, *supra* note 29, at 538. *See* Hayes v. Brown, 399 F.3d 972, 979-86 (9th Cir.

The overarching prosecutorial misconduct due process inquiry was whether the continued knowing use of the false testimony could reasonably have affected the trial's outcome.[215] The court concluded that there was a reasonable likelihood that the false testimony affected the jury's verdict,[216] and in finding the constitutional violation, the court noted "the heightened opportunity for prejudice where the prosecutor, by action or inaction, is complicit in the untruthful testimony."[217] The court also quoted the New York Code of Professional responsibility regarding the prosecutor's duty to seek justice and, "[i]n particular, 'a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.'"[218]

Finally, one particularly egregious recent example of a capital prosecutor using false testimony is from Pima County in Arizona. By the early 1990s, Kenneth Peasley had conducted approximately sixty death penalty trials.[219] He won national awards and twice won the Arizona prosecutor-of-the-year award while being "personally responsible for a tenth of the prisoners on Arizona's death row."[220] Then he took a triple-murder to trial with less than sterling evidence, and in that case he and his detective used false testimony of a jailhouse informant to obtain convictions and death sentences for all three defendants.[221] His use of the false testimony did not come to light until five years after the trial when an attorney for one of the co-defendants listened to the interrogation tapes of the informant and the informant referred to a previous interrogation session.[222] After hearing the informant state at trial that the

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2005) (en banc) (vacating conviction in murder case where prosecutor had asserted in open court that there was no deal with a witness when in fact there was a deal).

215. *Jenkins*, 294 F.3d. at 293. In establishing the factors necessary to set aside a conviction that is based on potential prosecutorial misconduct, the *Jenkins* court noted that a prosecutor's words alone may be enough for a due process violation. *Id.* at 294-95. "Standing alone, a prosecutor's comments upon summation can 'so infect [a] trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* at 294 (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting *Donnelly*, 416 U.S. at 643) (internal quotation marks omitted)).

216. *Id.* at 295-96. The court focused on how the jury was affected by the defense counsel's examination of the state's cooperating witness, by the subsequent cross-examination, and by the closing remarks of the prosecutor. *Id* at 293-95. The court stressed that the reviewing courts should examine the weight of all of the evidence, including whether or not without the false testimony and reinforcing remarks by the State, the jury might not have convicted. *Id.* at 293

217. *Id.* at 295 (citations omitted).

218. *Id.* at 296 n.2 (quoting N.Y. CODE OF PROF'L RESPONSIBILITY, EC 7-13 (1981)).

219. *See In re* Peasley, 90 P.3d 764, 767 (Ariz. 2004).

220. Jeffrey Toobin, *Killer Instincts*, THE NEW YORKER, Jan. 17, 2005, at 54.

221. *Peasley*, 90 P.3d. at 766.

222. *Id.* at 766-69.

first time he ever talked to the detective was at the recorded interrogation, the assigned defense counsel knew that there was more to the story and got his client acquitted.[223]

Later, the same assigned counsel filed a bar complaint against Kenneth Peasley, and that complaint ultimately resulted in Peasley's disbarment in 2004.[224] The Supreme Court of Arizona, en banc, referred to the *American Bar Association Standards for Imposing Lawyer Sanctions* in deciding that disbarment was the appropriate sanction.[225]

Most capital prosecutors realize that these tactics are unethical and a violation of the law, and several ethical provisions cover the use of false evidence.[226] But as the *Mille-El* and *Peasley* examples illustrate, it can take more than a decade for instances of misconduct to be discovered and addressed. Thus, ethical lawyers are still faced with the problem of what should be done to prevent wrongful capital convictions and to deter unethical prosecutors from seeking vigilante justice by misusing evidence.[227]

VI. VARIOUS PROPOSALS TO ADDRESS PROSECUTOR MISCONDUCT IN CAPITAL CASES

Prosecutors, other lawyers, and scholars have considered various ways to prevent and deter prosecutor misconduct in criminal cases. The proposals may be divided in three general categories of approaches to limit instances of prosecutor misconduct in capital cases: (1) institutional and systemic methods, besides penalizing individual prosecutors, to deter

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223. *Id.* at 768-69.

224. *See id.* at 764; *see also* Toobin, *supra* note 220, at 59.

225. *Peasley*, 90 P.3d at 769. The court referred, specifically, to *Standard 6.11*, which states: "Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding." STANDARDS FOR IMPOSING LAWYER SANCTIONS § 6.1 (1992).

226. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (1983) (stating that lawyers cannot assist witnesses in testifying falsely); MODEL RULES OF PROF'L CONDUCT R. 3.4(b); STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 3-5.6(a) (1993); STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 4-7.5(a) (1993).

227. *See also* White, *supra* note 53, at 1266-86; Stephen Saltzburg, *Symposium: Perjury and False Testimony: Should the Difference Matter so Much?*, 68 FORDHAM L. REV. 1537 (2000); Monroe Freedman, *Essay: Professional Discipline of Professional Prosecutors: A Response to Professor Zacharias*, 30 HOFSTRA L. REV. 121 (2001); Holly Piehler Rockwell, *Prejudicial Effect of Statement by Prosecutor that Verdict, Recommendation of Punishment, or Other Finding by Jury is Subject to Review or Correction by Other Authorities*, 10 A.L.R. 700 (1993); Toobin, *supra* note 220, at 58.

misconduct generally; (2) penalties by prosecutor offices, bar organizations, and/or courts for individual misbehaving prosecutors; and (3) court remedies given to defendants in cases where there was prosecutor misconduct. The following subsections discuss various alternative solutions that prosecutor offices, bar organizations, and courts might consider to address prosecutor misconduct in capital cases. In the Conclusion, this Article lists five suggestions that should have priority for first steps toward preventing future misconduct in capital cases.

A. Institutional and Systemic Methods of Preventing Violations

The best way to address the problem of prosecutor misconduct in capital cases is to prevent the violation from occurring at all. Ethical prosecutors, perhaps, are in the best position to prevent egregious misconduct by other attorneys.[228] Thus, prosecutor offices can evaluate methods of training and supervising lawyers, and when a violation occurs in a specific office, that office should reassess its training.

The ABA Standards note the importance of prosecutor office training "for new personnel and for continuing education of the staff."[229] One writer has noted that some well-intentioned prosecutors may still have a bias toward guilt, so some training strategies, such as the practice of having prosecutors generate defense arguments and having prosecutors become involved in Innocence Projects, may help prosecutors maintain a balanced sense of justice.[230]

Prosecutor misconduct resulting from the use of false evidence and misuse of publicity may be addressed by further training. For example, prosecutor offices should examine how they train new prosecutors and whether they retrain veteran prosecutors on the subject of dealing with high profile cases. In the heat of a trial, it is easy for both defense attorneys and prosecutors to forget the ill effects of the misuse of publicity, so every reminder of ethical obligations is useful.

Excellent training is essential for addressing the more complex legal areas of *Brady* and *Batson* violations. Capital prosecutors must be trained to request all materials from agencies involved in investigating the case because a *Brady* violation occurs even if the information is in the hands

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228. "Locally, chief prosecutors can and should play a prominent role in reducing the harm caused by prosecutorial misconduct, and they can do so by implementing and monitoring clearer guidelines within their offices and disciplining those prosecutors who do not live up to those obligations." Joy, *supra* note 5, at 428.

229. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, § 3-2.6 (1993).

230. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1613-26 (2006).

of police officials and the prosecutor never sees it.[231] Because of the specialized training received by prosecutors, they can play an important role in helping investigative agencies to follow the dictates of *Brady*.

Further, another method to ensure compliance with *Brady* would be for each office to have a written policy requiring the full discovery required by law and addressing what internal disciplinary penalties will be. A jurisdiction should consider having such policies and having them reviewed by the Attorney General's office. A written policy would emphasize the importance of disclosing exculpatory evidence as an important part of the role of the prosecutor beyond the goals to obtain convictions.[232]

In addition to actions by individual prosecutor offices, courts and legislatures similarly may help prevent *Brady* violations in capital cases by adopting a rule or statute that, in addition to existing ethical rules, offers guidance to prosecutors in evaluating whether evidence is exculpatory.[233] Recently, after two years of research and study, the

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231. *See Whitley*, 514 U.S. at 437-38.

232. Certainly, better training and supervision in prosecutor offices are necessary to teach prosecutors to disclose evidence, but the problem may be deeper. Some commentators have noted that one problem with the prosecution system in America is that, unlike in Great Britain, America's adversary system inherently makes prosecutors and defense attorneys have a narrow view of the system, seeing the only goal to be winning. In Great Britain, cases are prosecuted by barristers who are not professional full-time prosecutors. Gershman, *The New Prosecutors*, *supra* note 37, at 455-57. Thus, they view themselves as professional attorneys, whose goal is to seek justice.

Most commentators do not propose dismantling our American adversary system of justice, but we can learn from other countries. One commentator has suggested we make more use of a system where private attorneys help out in prosecutor offices as part of special programs. "Such programs are laudable for several reasons. They allow private attorneys to engage in public service, they enhance the public interest by helping to more expeditiously process criminal cases, and they introduce into prosecution attorneys who do not have a vested interest in winning convictions." *Id.* at 457. Adding this new structure to prosecutors' offices may help to undermine the system of overzealous prosecutions more effectively than merely better training and supervision.

Also, a former judge has suggested that "[p]rosecutors who try capital cases should be required to prepare and argue their own appeals." White, *supra* note 53, at 1297. Forcing the prosecutors to defend their own unprofessional or unconstitutional conduct before concerned appellate judges would certainly be a deterrent to prosecutorial misconduct at trial. One drawback to this proposal is that the use of a different prosecutor on an appeal provides another check on the trial prosecutors because the ethical appellate prosecutor might be more likely to discover and reveal the error of the undisclosed *Brady* material.

233. The Model Rules of Professional Conduct also helps reinforce the responsibility of prosecutors regarding evidence of innocence. MODEL RULES OF PROF'L CONDUCT R. 3.8 (1983). Section 3.8(d) provides:

> The prosecutor in a criminal case shall: . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to

Illinois panel appointed by the governor issued the *Report of the Governor's Commission on Capital Punishment*,[234] recommending eighty-five reforms to the criminal justice system to address concerns about executing innocent persons.[235] One of the panel's recommendations was that the state supreme court should adopt a rule defining "exculpatory evidence."[236] The definition would not change the responsibilities imposed by *Brady*, but it would "remind counsel of the basic requirements for disclosure of exculpatory evidence by way of example."[237] The unanimous panel recommended language for the proposal, based upon the Local Criminal Rules for the Federal District Court in Massachusetts.[238] The proposed Illinois language should be considered by death penalty jurisdictions.[239] A further step, recommended by some commentators, is for state supreme courts or legislatures to broaden discovery requirements to require prosecutors to have open-file discovery in all capital cases (or in all criminal cases).[240]

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

Id.

234. Report of the Governor's Commission on Capital Punishment, State of Illinois, April 15, 2002, *available at* http://www.idoc.state.il.us/ccp/index.html [hereinafter Report of the Governor's Commission].

235. *Id.*

236. *Id.* at 120.

237. *Id.* at 120.

238. *See* D. Mass R. 116.2, *available at* http://www.mad.uscourts.gov/general/pdf/-combined01.pdf.

239. The Commission recommended the following definition of "exculpatory evidence:"

> Exculpatory information includes, but may not be limited to, all information that is material and favorable to the defendant because it tends to:
>
> a. Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;
>
> b. Cast doubt on the admissibility of evidence that the state anticipates offering in its case-in-chief that might be subject to a motion to suppress or exclude;
>
> c. Cast doubt on the credibility or accuracy of any evidence that the state anticipates offering in its case-in-chief; or
>
> d. Diminish the degree of the defendant's culpability or mitigate the defendant's potential sentence.

Report of the Governor's Commission, *supra* note 234, at 119.

240. Some commentators have suggested that states go a step further and that "[o]pen-file discovery should be the norm in death penalty cases" and that legislatures should make it mandatory. Minsker, *supra* note 20, at 403. *See also* Burke, *Revisiting Prosecutorial Disclosure*, *supra* note 42, at 481; Joy, *supra* note 5, at 425.

Another unanimous proposal made by the Illinois Commission on Capital Punishment is that state law should require "that any discussions with a witness or the representative of a witness concerning benefits, potential benefits or detriments conferred on a witness by any prosecutor, police official, corrections official or anyone else, should be reduced to writing, and should be disclosed to the defense in advance of trial."[241] Noting a number of death penalty cases where convictions have been reversed because of questions about whether defense counsel had been fully informed of deals with witnesses, the panel concluded that such a rule would help address that problem.[242]

A final suggestion to address *Brady* violations is that prosecutors should be trained to overcome biases that may develop in prosecuting a capital case and to recognize exculpatory evidence. A growing area of cognitive research reveals that human decision-makers such as prosecutors—as well as judges and jurors—function with cognitive biases, "rendering them neither perfectly rational information processors, nor wholly random or irrational decision makers."[243] For example,

241. Report of the Governor's Commission, *supra* note 234, at 120.

242. *Id.* at 120-21. Similarly, courts make *Brady* a more effective protection against executing innocent defendants when they clarify that *Brady* obligations continue even after a capital trial ends. *See, e.g.*, High v. Head, 209 F.3d 1257, 1265 n.8 (11th Cir. 2000) (noting that the state's duty to disclose exculpatory material is ongoing); Smith v. Roberts, 115 F.3d 818, 820 (10th Cir. 1997) ("We also agree, and the State concedes, that the duty to disclose is ongoing and extends to all stages of the judicial process."); Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992) ("We do not refer to the state's past duty to turn over exculpatory evidence at trial, but to its present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding."); State v. Bennett, 81 P.3d 1, 9 (Nev. 2003) (stating that the state's affirmative duty to disclose exculpatory material "exists regardless of whether the State uncovers the evidence before trial, during trial, or after the defendant has been convicted"). *See also* Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987); Imbler v. Pachtman, 424 U.S. 409, 427 n. 25 (1976) (noting in a Section 1983 action that "after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction").

243. Burke, *Improving Prosecutorial Decision Making, supra* note 230, at 1591. Four aspects of cognitive bias are: "confirmation bias, selective information processing, belief perseverance, and the avoidance of cognitive dissonance." *Id.* at 1593. Prof Burke explained these terms:

> Confirmation bias is the tendency to seek to confirm, rather than disconfirm, any hypothesis under study. Selective information processing causes people to overvalue information that is consistent with their preexisting theories and to undervalue information that challenges those theories. Belief perseverance refers to the human tendency to continue to adhere to a theory, even after the evidence underlying the theory is disproved. Finally, the desire to avoid cognitive dissonance can cause people to adjust their beliefs to maintain existing self-perceptions.

Id. at 1593-94.

because of confirmation bias, a person tends to seek to confirm a theory, thus an individual prosecutor may be biased toward evidence confirming guilt and may overlook exculpatory evidence.[244] There are various ways of addressing these cognitive bias problems, including the suggestion that a "method of improving prosecutorial decision making is to train prosecutors and future prosecutors about the sources of cognitive bias and the potential effects of cognitive bias upon rational decision making."[245] Other suggestions include encouraging prosecutors to practice switching sides to see the arguments from the defense perspective,[246] involving unbiased decision makers in the choices made by prosecutors,[247] and encouraging prosecutorial involvement in innocence projects and groups concerned with providing quality criminal defense services.[248]

Batson violations also may be addressed by further training within prosecutor offices. Similarly, additional training about use of publicity and evidence may help prevent other types of violations. Certainly, many, if not all, prosecutor offices already provide effective training in these areas. But because violations still occur in capital cases, offices should reassess their training, and offices where violations have occurred should do an extensive evaluation of their training methods. In addition to training sessions for new attorneys, experienced attorneys should also have to attend training sessions in these areas.

Finally, one way each prosecutor office may provide guidance to its lawyers is to have written guidelines, and these guidelines should generally be available to the public. Unfortunately, "a relatively small number of the more than 23000 prosecutors' offices that try felony cases in state court of general jurisdictions have manuals or written standards, or, if they do, those manuals or standards are not available to the public."[249] Both the American Bar Association Prosecution Function Standards and the National District Attorneys Association recommend that each office have written policies and procedures that guide prosecutorial discretion and that these policies generally be available to the public.[250]

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244. *See id.*

245. *Id.* at 1616. For other suggestions, *see generally id.*

246. *Id.* at 1618-20.

247. *Id.* at 1621-24.

248. *Burke, Improving Prosecutorial Decision Making*, *supra* note 230, at 1624-26.

249. Joy, *supra* note 5, at 422.

250. *See id.*; STANDARDS FOR CRIMINAL JUSTICE § 3-2.5(b) (1993); NATIONAL PROSECUTION STANDARDS § 10.3, at 39-40 (Nat'l Dist. Att'y Ass'n 1991).

B. Methods That Address Individual Unethical Prosecutors Who Commit Egregious Misconduct

Unethical prosecutors are rarely sanctioned for prosecutorial misconduct.[251] Of course, each case must be considered individually, and every case does not deserve sanctions. In some instances, attorney errors may occur through inadvertence or negligence, and those instances may be addressed in a different manner than instances of intentional misconduct. But in individual cases involving egregious prosecutor misconduct, the problem should be addressed by: (1) bar and ethics organizations; (2) courts; and (3) prosecutor offices.

1. Bar and Ethics Organizations

Bar organizations must be more active in policing prosecutorial misconduct. Sanctions ranging from fines to disbarment, in the most serious cases, should be used. One former judge has written about the importance of enforcing ethical rules against attorneys in capital cases. "If the police or the prosecutor fabricates evidence, improves testimony, fails to disclose the required information, or makes inappropriate arguments to the jury, they should be publicly sanctioned. The possible sanctions should include suspension from the duties of their public offices."[252] The former judge explained, "Only if the actors know that real consequences will follow their acts will they attempt to correct them."[253]

Commentators, however, have noted that "in practice, prosecutors rarely have been disciplined for their violations."[254] If the state bar ethics

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251. *See infra* notes 47-52 and accompanying text; Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, 23 CRIM. JUSTICE 24, 37 (noting study that found in most cases of misconduct "prosecutors suffered no consequences and were not held accountable or even reprimanded for their behavior"); Natasha Minsker, *supra* note 20, at 373-74 (noting that research of California death penalty cases and of six named prosecutors in cases reversed for prosecutorial misconduct, "[f]ive [of which have] 'no public record of discipline,' and one is a sitting judge"). *See also* Adam Liptak, *Prosecutor Becomes Prosecuted*, N.Y. TIMES, June 24, 2007, at 4. For example, a *Chicago Tribune* article found that not one prosecutor was convicted of a crime or disbarred in 381 murder cases where the conviction was reversed due to prosecutor misconduct. *Id.* Similarly, prosecutor penalties are rare in capital cases where defendants are exonerated. *Id.*

252. White, *supra* note 53, at 1297.

253. *Id.*

254. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 769 (2001). *See also* Minsker, *supra* note 20, at 398 (noting that in California,

boards are unable to deal with the specialized area of prosecutorial misconduct in capital cases, other methods should be considered.[255] One suggestion for dealing with prosecutorial misconduct is to create a specialized disciplinary organization that is only for prosecutors, like judicial conduct organizations that currently exist.[256] A state could pass a statute that would create a committee to investigate, permit a hearing examiner to oversee grievance proceedings, and permit disciplinary sanctions such as removal, admonitions, and fines.[257] Such a committee could also act as a repository for complaints.[258]

As for other prosecutor misconduct violations, disciplinary proceedings should be considered for egregious violations of the ethical rules regarding pretrial publicity. Professional responsibility remedies are especially important in the area of pretrial publicity, even more than in most other categories of prosecutor misconduct. Courts seem unlikely to provide judicial remedies to defendants based on pretrial publicity grounds because prejudice is difficult to show and the remedy of dismissing an indictment is an extreme remedy.

"almost no prosecutors are even reported for misconduct in death penalty cases, even when the conduct was intentional").

255. In an example of how a bar might even hinder investigation of prosecutor misconduct, in one recent death penalty case a Virginia defense lawyer was advised by the Virginia State Bar to remain quiet about his knowledge of prosecutor misconduct. After he eventually revealed his information about prosecutors coaching a witness and hiding it from a defense, the information about prosecutor misconduct resulted in a commutation for the defendant. Adam Liptak, *Lawyer Reveals Secret, Toppling Death Sentence*, N.Y. TIMES, Jan. 19, 2008, at A1.

256. *See* Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 S.W. L.J. 965 (1984); Gershman, *The New Prosecutors*, *supra* note 37, at 454. *See also* BARRY SCHECK, ET AL., ACTUAL INNOCENCE 355 (2001) (suggesting the creation of "blue ribbon disciplinary committees to deal exclusively with misconduct by criminal defense attorneys and prosecutors"). "As a quasi-judicial officer functioning under special ethical standards, the prosecutor, like the judge, is an appropriate subject for regulation and enforcement of discipline." Gershman, *The New Prosecutors*, *supra* note 37, at 454.

257. *See* Catherine Greene Burnett, *Prosecutor Ethics Symposium*, 47 S. TEX. L. REV. 677, 681-83 (2006) (noting Professor Shelby A.D. Moore's argument that failing to impose a criminal sanction for willful and intentional misconduct by prosecutors results "in a system that will continue to be burdened by the damage caused by unethical prosecutors: unjust convictions and sometimes, imposition of society's ultimate punishment – the death penalty").

258. One commentator has suggested that a group should have the responsibility to identify prosecutors who have committed serious misconduct to shame the prosecutors and encourage courts to monitor the attorneys in the future. *See* Gershowitz, *supra* note 160, at 1059.

2. Court Sanctions for Individual Prosecutors

As a possible remedy to deter egregious misconduct in capital cases, one might consider lawsuits against individual prosecutors who intentionally violate the law.[259] In civil suit cases, there are immunity issues that may prevent such remedies.[260] In *Imbler v. Pachtman*,[261] the Supreme Court held that a defendant cannot sue a prosecutor under 42 U.S.C. § 1983 for withholding exculpatory evidence because prosecutors have absolute immunity for advocacy activities.[262] A § 1983 action might, however, be a remedy for some non-*Brady* prosecutorial misconduct because prosecutors only have qualified immunity for investigative and administrative activities.[263]

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259. Criminal prosecution for egregious misconduct is an unlikely sanction because, among other reasons, courts seem reluctant to allow such extreme remedies. In 1999 in Illinois, prosecutors were charged with an alleged plot to frame a capital defendant for murder. Pam Belluck, *Officials Face Trial in Alleged Plot to Frame a Man for Murder*, N.Y. TIMES, March 9, 1999, at A19. At the time, the *Chicago Tribune* noted it could only find six other examples nationally in which prosecutors faced criminal charges for misconduct. *Id.* "Of those prosecutors, two were convicted of misdemeanors and fined $500. Two were acquitted, and charges against the other two were dropped before trial." *Id.* New York has a misdemeanor statute for official misconduct, a misdemeanor that could arguably apply to prosecutor misconduct by its language. N.Y. PENAL LAW § 195.00 (McKinney 2006). Although the statute has not been applied to prosecutors thus far, the New York Court of Appeals has stated that the Rules of Judicial Conduct may be used as a basis for prosecution for violating official duties under the New York criminal statutes. *See* People v. Garson, 848 N.E.2d 1264, 1265 (N.Y. 2006) (finding basis for prosecuting a judge who was accused of accepting a bribe as violating his duty as a public servant).

260. Some commentators have criticized the application of the immunity doctrine to prosecutors responsible for misconduct. *See* Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1 (2009); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 125 (2005).

261. 424 U.S. 409 (1976).

262. *Id.* at 430-31.

263. *See* Burns v. Reed, 500 U.S. 478 (1991) (stating that a prosecutor may be sued for actions during the investigative stage of a case); Kalina v. Fletcher, 522 U.S. 118 (1997) (finding no absolute immunity where prosecutor acted as a witness in signing a certificate that charging documents were accurate). Additionally, a prosecutor might not receive absolute immunity regarding advice given to police officers. *See* Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992) (holding that allegations that a prosecutor was deliberately indifferent to police questions about exculpatory evidence and that the prosecutor failed to train and supervise police provided a basis for municipal liability); BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT 14-25 through 14-30 (2d ed. 1999). For further examples, prosecutors may not be immune from lawsuits if they use threats to force a confession, if they engage in illegal searches, if they participate in illegal wiretapping, or if they make false comments to the press. *Id.*; *see, e.g.*, Buckley v. Fitzsimmons, 509 U.S. 259 (1993) (holding that false statements made by prosecutors to

Thus, for the most part, courts must look for other types of sanctions for prosecutor misconduct in capital cases besides monetary damages. In capital cases, where an individual prosecutor has intentionally withheld exculpatory evidence, the court should deem that the prosecutor cannot act as an agent of justice and remove that prosecutor from any further involvement with the case. Further, in egregious capital cases, an individual prosecutor should not be allowed to participate in any future death penalty cases.[264]

One method for dealing with prosecutor misconduct is for courts to hold capital prosecutors in contempt when they intentionally withhold exculpatory evidence, misuse publicity, misuse peremptory challenges, or use illegally obtained evidence.[265] "Contempt can be easily administered, interferes only marginally with the criminal proceeding, punishes the prosecutor rather than society, and can be adjusted according to the severity of the misconduct."[266] Currently, though, contempt is rarely used to punish prosecutors for courtroom misbehavior.[267]

3. Prosecutor Office Sanctions for Individual Prosecutors

Because of a tendency by bars and by courts to be reluctant to impose sanctions upon individual unethical prosecutors, much of the responsibility for addressing misconduct problems ultimately falls on individual prosecutor offices. When necessary, prosecutor offices may impose sanctions that affect salaries and promotions in order to deter prosecutorial misconduct.[268] One commentator has argued, possibly

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the press only received qualified immunity); McSurley v. McClellan, 697 F.2d 309 (D.C. Cir. 1982) (allowing damages where suing prosecutor for engaging in illegal search). The Supreme Court may be ready to reevaluate issues about prosecutor immunity. In *Pottawattamie County v. McGhee*, No. 08-1065, the Supreme Court recently granted a petition for certiorari and heard arguments to review prosecutor immunity for actions prior to trial, but the case was dismissed after the parties reached a settlement. *Case Over Iowa Prosecutor's Conduct is Settled*, N.Y. TIMES, Jan. 4, 2010, *available at* http://www.nytimes.com/aponline/2010/01/04/us/AP-US-Supreme-Court-Prosecutors.html.

264. "A court has the power to remove or disqualify a prosecutor from office on grounds of misconduct or conflict of interest." GERSHMAN, *supra* note 263, at 14-7.

265. *Id.* at 14-14. *See* Brostoff v. Berkman, 170 A.D.2d 364, 566 N.Y.S.2d 927 (1st Dep't 1991).

266. GERSHMAN, *supra* note 263, at 14-14.

267. *Id.* at 14-14 through 14-15.

268. *See, e.g.*, Brian Rogers, *Prosecutors Disciplined in Jury Flap: Pay Docked, Assignment Charged After Blacks Rejected for Panel*, HOUSTON CHRON., March 27, 2000. Harris County (TX) District Attorney Pat Lykos docked the pay of two prosecutors and removed them from trial work for removing all African-Americans from the jury in a

because enforcement of regulations within a prosecutor's office is discretionary, that such regulations are ineffective and prosecutors cannot punish themselves.[269] An alternative would be for sanctions to come from professionals outside an individual office.[270]

Another way that responsible prosecutor offices may deter future misconduct is to ensure that vigilante prosecutors who commit intentional misconduct in a capital case do not prosecute further capital cases.[271] Such a decision would prevent that prosecutor from committing serious misconduct in the future and would send a strong message.

Of course, a more extreme remedy is for prosecutor offices to fire attorneys responsible for egregious misconduct in capital cases. For example, in a recent Kentucky case, one office forced a prosecutor to resign because of allegations that in a capital case she had withheld information from defense attorneys and had lied to a judge about a deal that was made with an informant.[272]

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murder trial of a black defendant. *Id.* Some commentators, however, said that such a move by a supervising prosecutor was rare, with the president of the Harris County Criminal Lawyers Association stating, "I can't think of a case under previous administrations where prosecutors were disciplined for doing something that hurt or could have hurt the rights of the accused." *Id.*

269. GERSHMAN, *supra* note 263, at 14-2 (noting that the Office of Professional Responsibility of the U.S. Justice Department "absolves prosecutors of wrongdoing in most of the cases, and discipline seems woefully inadequate"). *See also* Rogers, *supra* note 268.

270. One suggestion is to use "a system of highly regarded professionals independent of prosecutors' offices" that is "one of peer review by experienced criminal justice professionals with the power to sanction prosecutors who engage in misconduct." Ellen Yarashefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 U. D.C. L. REV. 275, 297-98 (2004). At least one author has proposed that a carrot, in addition to a stick, might help. Professor Janet Hoeffel has suggested that prosecutors might act more ethically if they were financially rewarded for convictions that make it through the appeals process without a finding of error. Janet C. Hoeffel, *Prosecutor Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN. ST. L. REV. 1133, 1151-53 (2005). One concern, however, for such a remedy might be that it would also provide an added incentive for misconduct through the appeals process.

271. *See, e.g.*, Kelly Gier, Note, *Prosecuting Injustice: Consequences of Misconduct*, 33 AM. J. CRIM. L. 191, 208 (2006).

272. Jason Riley, *Prosecutor Steps Down After Allegations*, COURIER JOURNAL (LOUISVILLE, KY), June 12, 2009. Jefferson County Commonwealth's Attorney David Stengel stated that he would have fired the attorney had she not resigned because "we have substantiated a level of inattention and thoughtlessness . . . that cannot be tolerated." *Id.*

C. Remedies for the Defendant in Cases Involving Misconduct

As commentators have noted, a reversal on appeal is "a significant penalty for misconduct" because a reversal will require a retrial and may affect a prosecutor's career, thus offering a deterrent effect to prosecutors.[273] For example, at least in certain circumstances, an indictment may be dismissed or a conviction may be reversed where the prosecutor has withheld exculpatory evidence.[274]

Yet, courts do not reverse convictions in many cases where misconduct violations actually occurred.[275] Defendants who show misconduct by prosecutors still have a heavy burden in order to obtain a reversal.[276] In most cases involving withheld exculpatory evidence, misuse of pretrial publicity, and the use of false evidence, the defendant must also show prejudice to obtain a reversal.[277] In *Batson* cases, courts are likely to accept a broad range of explanations from prosecutors. Thus, "reversal for prosecutorial misconduct is relatively infrequent."[278]

One remedy for this problem would be to remove the prejudice requirement or at least alter it. Commentators have suggested that a

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273. GERSHMAN, *supra* note 263, at 14-13.

274. *See, e.g.*, United States v. Chapman, 524 F.3d 1013, 1085-88 (9th Cir. 2008) (upholding, in a non-capital case, a district court's decision to dismiss an indictment because of flagrant prosecutor misconduct in withholding evidence). A court "'may dismiss an indictment on the ground of outrageous government conduct if the conduct amounts to a due process violation.'" *Id.* at 1084 (quoting United States v. Barrera-Moreno, 951 F.2d 1089, 1091 (9th Cir. 1991)). Additionally, "'[i]f the conduct does not rise to the level of a due process violation, the court may nonetheless dismiss under its supervisory powers.'" *Id.*

275. *See generally* Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 SETON HALL L. REV. 335 (2007). "Decades of court decisions have proved that judges will rarely grant a defendant's request for mistrial no matter how blatant or harmful the prosecutor's misconduct. . . . This use of judicial discretion consistently permits, and in fact encourages, even the most flagrant forms of prosecutorial misconduct." *Id.* at 336.

276. *See* Minsker, *supra* note 20, at 397 (concluding from analysis of California capital cases that "post-conviction review largely fails to address the problem of prosecutorial misconduct in death penalty cases").

277. *See id.* at 397 (noting that "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" and therefore some cases with prosecutor misconduct that distort the truth-finding process are not reversed).

278. GERSHMAN, *supra* note 263, at 14-4. ("Several legal doctrines account for this infrequency: the harmless error rule, the preservation of error requirement, curative instructions by the judge, and the invited error rule."). *Id.* at 14-3; *see also* Minsker, *supra* note 20, at 397.

reversal should be granted in misconduct cases if the misconduct had any impact on the case.[279]

Often, potential harm from pretrial publicity may be addressed at trial through change of venue, the voir dire process, and sequestration of the jury.[280] Courts, as in *McVeigh*, are reluctant to dismiss indictments because of pretrial publicity.[281] But in more egregious situations, or where proper measures are not taken at trial, an appeals court must reverse a conviction. In *Rideau v. Louisiana*,[282] the Supreme Court considered a murder case where the defendant's videotaped confession was played on television prior to trial. The Court reversed the conviction, noting that the extreme nature of the violation made it unnecessary to consider what occurred at voir dire.[283] Similarly, if a judge's cautionary instructions at trial would be useless, a mistrial might be the appropriate remedy.[284]

Where a defendant has been prosecuted for a capital crime and the state has sought the death penalty, courts and legislatures must be extra vigilant in enforcing the policies behind *Brady* and in deterring other types of prosecutor misconduct. As discussed earlier, the risk to an unethical prosecutor that withholding evidence will result in a reversal is low. At worst, there is a small chance they may have to try the case again.

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279. *See* Bush, *supra* note 16, at 225; Gershman, *The New Prosecutors*, *supra* note 37, at 424-32.

280. *See* Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); Sheppard v. Maxwell, 384 U.S. 333 (1966); United States v. Coast of Me. Lobster Co., Inc., 538 F.2d 899 (1st Cir. 1976).

281. *McVeigh*, 153 F.3d at 1166.

282. *Rideau*, 373 U.S. at 724.

283. *Id.* at 726-27.

284. Finally, a prosecutor who violates these ethical obligations might be subject to civil rights suits or slander suits, as prosecutors only have qualified immunity, not absolute immunity, for statements made to the press outside the courtroom. *Buckley*, 509 U.S. at 259; Gobel v. Maricopa County, 867 F.2d 1201 (9th Cir. 1989); Marx v. Gumbinner, 855 F.2d 783 (11th Cir. 1988), *abrogated on other grounds by* Burns v. Reed, 500 U.S. 478 (1991); Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980); Stephanian v. Addis, 699 F.2d 1046 (11th Cir. 1983); Williams v. Gorton, 529 F.2d 668 (9th Cir. 1976); Walker v. Cahalan, 542 F.2d 681 (6th Cir. 1976). *See also* Peter J. Boyer, *Civil Liability for Prejudicial Pre-Trial Statements by Prosecutors*, 15 AMER. L. REV. 231, 243-44 (1978). "Qualified immunity means that the prosecutor performing a discretionary function (talking to the press) can avoid liability for civil damages as long as his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." H. Morley Swingle, *Prosecutors Beware: Pretrial Publicity May Be Hazardous to Your Career*, PROSECUTOR 29, 32 (Sept./Oct. 2001).

In cases where a prosecutor commits egregious misconduct in a capital case, courts need to: (1) provide greater deterrence to prosecutors from committing similar types of misconduct; (2) consider the impact on the defendant to have to go through repeated capital trials and sentencing hearings; and (3) prevent the individual prosecutor from committing such misconduct again. As an example, in a number of cases the U.S. Court of Appeals addressed repeated prosecutor misconduct by the same Oklahoma County District Attorney over and over again for fifteen years.[285] Although two cases were reversed based on the prosecutor's misconduct,[286] several other cases found misconduct but did not reverse because of harmless error analysis.[287] So the misconduct continued.[288]

To deter misconduct in capital cases and to consider the traumatic experience of innocent defendants prosecuted for capital crimes, once a prosecutor has withheld exculpatory evidence or committed egregious misconduct, the case should no longer be a death penalty case.[289] If the case is retried, the prosecutor may seek any available punishment except the death penalty. To ensure this process is followed, states should pass laws mandating that the death penalty may not be sought a second time against a defendant when a prosecutor committed egregious misconduct in the defendant's previous capital trial, such as where the prosecutor intentionally withheld exculpatory evidence in prosecuting the case.[290]

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285. *See* Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 423 (April 2007) (discussing cases prosecuted by Oklahoma County District Attorney Robert H. Macy). "In capital case after capital case, Macy uttered litanies of prejudicial remarks to the jury, mocked the defendant, misstated the law and referred to evidence not in the record, introduced surprise theories at trial, compared a defendant to Charles Manson, and engaged in misconduct that was both 'juvenile' and 'intentional and calculated.'" *Id.* (citations omitted). *See also* Le v. Mullin, 311 F.3d 1002, 1029-30 (10th Cir. 2002) (Henry, J., concurring) (expressing concern with Macy's misconduct "over the last fifteen years").

286. *See* Garrett, *supra* note 285, at 423 (citing Paxton v. Ward, 199 F.3d 1197, 1216, 1218 (10th Cir. 1999); McCarty v. Oklahoma, 765 P.2d 1215, 1221-22 (Okla. Crim. App. 1988)).

287. *See* Hooks v. Oklahoma, 19 P.3d 294, 314 (Okla. Crim. App. 2001); Duckett v. Oklahoma, 919 P.2d 7, 19 (Okla. Crim. App. 1995).

288. *See* Garrett, *supra* note 285, at 423.

289. *See, e.g.*, Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509 (2009) (arguing that courts may be more willing to impose sentence reductions as a sanction for misconduct instead of dismissing charges, resulting in more effective deterrence of misconduct). Recently, the Ninth Circuit upheld a more extreme remedy in a non-capital case of dismissing an indictment. *See Chapman*, 524 F.3d at 1079-1090 (upholding district court's dismissal of sixty-four-count indictment where prosecutor violated *Brady* by not disclosing 650 pages of documents including rap sheets, plea agreements, and cooperation agreements with witnesses).

290. Defendants are permitted to "attack . . . the thoroughness and even good faith of the investigation." *Kyles*, 514 U.S. at 445. Therefore, another remedy that might be

D. Additional Considerations for Batson *Violations*

Identifying appropriate remedies or sanctions for deliberate violations of *Batson* by unethical capital prosecutors is in some ways more difficult than doing so for other sorts of prosecutorial misconduct, such as *Brady* violations. Determining whether a prosecutor deliberately used her or his peremptory challenges to strike potential jurors for prohibited reasons, such as race, is inherently a more subjective determination than, say, discovering undelivered *Brady* material in the possession of the prosecutor. In most cases, given the range of neutral reasons that a potential juror might be struck, it is relatively easy for a dishonest prosecutor to identify acceptable reasons for the strike that have surface plausibility.

Further, the pretrial timing of *Batson* challenges makes it less likely that such challenges will result in disciplinary action or other sanctions at a later date. *Batson* challenges are raised prior to trial and are subject to immediate review by the trial judge. So, if the challenge is upheld, the outcome of the trial will not be affected by the prosecutor's violation of *Batson*, and thus there is less reason to pursue disciplinary action or sanctions at a later date.[291]

Ethical remedies have been suggested by some commentators, such as adding a rule to the ABA's *Model Rules of Professional Conduct* that prohibits discrimination on the basis of race, sex, religion or national origin against a member of the venire during jury selection.[292] Some

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considered by judges, depending on the case, is for judges to give a jury instruction during the capital sentencing hearing or capital trial to inform the jurors that the prosecution previously withheld evidence in the case. Such an instruction would be most valuable in egregious intentional misconduct cases because a policy of such instructions would provide an added deterrent to intentional misconduct and would also inform the jury that there are circumstances that indicate the possibility that other evidence was withheld. *See* United States v. Schyllon, 10 F.3d 1, 3 (D.C. Cir. 1993) (noting that intimidation of a single potential witness permits an inference that other witnesses were also intimidated). *Cf.* State v. Fulminante, 975 P.2d 75, 93 (Ariz. 1999) (stating that no bad faith is required for instruction regarding state's destruction of exculpatory evidence).

291. Even if the challenge is not upheld, the trial court's rejection of the challenge would make it more difficult, to prove that the prosecutor deliberately acted in violation of *Batson* even after a contrary finding by an appellate court.

292. Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 STAN. L. REV. 9, 59-63 (1997) (arguing against personal sanctions for *Batson* violations, other than in cases of "flagrantly improper conduct," on the grounds, inter alia, that it would be difficult to fairly prove the "subjective intent" to discriminate, absent a formal trial of some sort with full procedural protections, and that the threat of sanction could "dampen ardent advocacy"). *See also* Andrew G. Gordon, Note, *Beyond Batson v. Kentucky: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 FORDHAM L. REV. 685, 713-14 (1993).

commentators have proposed that the exercise of a discriminatory peremptory challenge be tied to the ethical rules of the jurisdiction, so that a pretextual explanation could be cited as a false statement or misrepresentation to a court.[293] The efficacy of any such remedy would, of course, depend on enforcement of the sanctions by disciplinary bodies which, as we have noted elsewhere, is problematic at best.

Given that disciplinary action for *Batson* violations would be more difficult to achieve than in other misconduct cases, reliance must be placed on other possible remedies. For one, trial and appellate courts must be more vigilant in investigating *Batson* challenges and more discerning and skeptical in evaluating prosecutors' assertions regarding neutral reasons for exercising peremptory challenges. The record of the trial and appellate courts in *Miller-El* amply illustrates the failure of some judges adequately to address *Batson* claims.[294]

Another possible method for addressing *Batson* problems that is embraced by several commentators is affirmative jury selection.[295] Under this procedure, after all challenges for cause, both sides have the right to include, rather than exclude, jurors on a peremptory basis.[296] The judge seats jurors who were on both lists and, if needed, selects additional jurors alternatively from the two lists.[297] The essential feature of affirmative jury selection is "the fundamental principle of deciding who should be on, rather than who should be off, the jury"[298] and results in seating as jurors "persons [the defendant] believes would be able to understand and give effect to his evidence and arguments of mitigation. They would be a jury of his peers as well as his victim's peers."[299]

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293. Charlow, *supra* note 292, at 12-14. *See also* Cavise, *supra* note145, at 549. There are two concerns about such a proposal: (1) such a policy might not work well because the factual determination necessary for an ethical violation differs from the factual findings for the pretext finding; and (2) such a policy might discourage judges from finding a *Batson* violation for the defendant if they are hesitant to impose professional consequences on the lawyers.

294. One way to address this failure in the courts would be for Congress to use its powers under Section 5 of the Fourteenth Amendment to impose a robust *Batson* rule on all state and federal capital prosecutions.

295. *See, e.g.*, Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL. F. 161, 173-74 (1998); Clem Turner, *What's The Story?: An Analysis of Juror Discrimination and a Plea for Affirmative Jury Selection*, 34 AM. CRIM. L. REV. 289, 291-92 (1996); Hans Zeisel, *Affirmative Peremptory Juror Selection*, 39 STAN. L. REV. 1165 (1987).

296. Bowers, et al., *supra* note 158, at 1534-35.

297. *Id.*

298. *Id.* at 1535.

299. *Id.*

Some have suggested a more extreme approach to addressing various problems with peremptory challenges. In *People v. Brown*, a non-capital case, Chief Judge Kaye cited Justice Thurgood Marshall to suggest the elimination or severe reduction in number of peremptory challenges.[300] The rationale she offered included concerns about "the opportunity for mischief" that peremptory challenges allow.[301] While Justice Marshall and Judge Kaye were not necessarily concerned with deliberate violations of *Batson* by prosecutors, their suggestion could address some misconduct concerns because such violations are relatively easy to conceal, especially when one considers the often lax enforcement of *Batson* by lower courts.[302] But such a drastic remedy should be treated with skepticism, and we do not endorse this remedy to address the *Batson* problems because such a change would have broader implications affecting a defendant's right to a jury trial.

A somewhat similar but less drastic approach has been used by a few courts as a remedy for specific *Batson* violations. Some courts have held that when a party uses a peremptory strike in violation of *Batson* and that strike is disallowed under *Batson*, that party forfeits that peremptory challenge.[303] Such a sanction for purposeful discrimination would deter attorneys from discriminatory use of peremptory challenges and further the goal of *Batson* to eliminate racial discrimination in jury selection.[304] One concern, however, with such an approach is that if applied to violations by all attorneys, a defendant may be punished for misconduct by her or his attorney.

Finally, other remedies suggested in this Article in regard to other types of misconduct, such as barring an offending prosecutor from

300. *Brown*, 769 N.E.2d at 1272.

301. *Id.* at 1273.

302. Justice Breyer in *Miller-El v. Dretke* suggested that the history of that case and the general failure of *Batson* to curtail the unconstitutional use of peremptory challenges indicated the need to confront the choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, and that the peremptory challenge system as a whole should be reconsidered. *Miller-El*, 545 U.S. at 240 *et seq.* *See also* Rice v. Collins, 546 U.S. 333, 344 (2006) (Breyer, J., concurring). For similar reasons, other commentators have also suggested the elimination of peremptory challenges. *See* Melilli, *supra* note 155, at 503.

303. *See, e.g.*, United States v. Aleman, 246 Fed. Appx. 731, 734-35 (2d Cir. 2007); Peetz v. State, 180 S.W.3d 755, 761 (Tex. Ct. App. 2005); People v. Johnson, 765 N.Y.S.2d 199, 201 (N.Y. Sup. Ct. 2003). *Cf.* People v. Luciano, 44 A.D.3d 123, 123 (N.Y. App. Div. 2007) (holding that forfeiture of improperly used peremptory strikes should not have been used as a penalty for *Batson* violations), *appeal pending*, 878 N.E.2d 615 (N.Y. 2007).

304. "Since the goal of *Batson* is the elimination of racial discrimination in jury selection, it is counterproductive to fail to sanction purposeful discrimination in jury selection by forfeiting the disputed challenge." *Johnson*, 765 N.Y.S.2d at 201.

further involvement in the case, holding prosecutors in contempt, and precluding the use of the death penalty if the case is retried, should also be considered as means to deter deliberate violations of *Batson* in capital cases. Additionally, as for other types of misconduct, stopping individual instances of *Batson* violations is a goal of all ethical prosecutors, so prosecutor offices should consider specialized training beyond what they already do in this area.

VII. CONCLUSION: FIVE PROPOSALS TOWARD PREVENTING AND REMEDYING PROSECUTOR MISCONDUCT IN CAPITAL CASES

> *[A prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . It is as much [the] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*[305]

Our adversarial system of justice depends on the competency and responsibility of the lawyers on both sides of criminal cases. Thus, responsible prosecutors, courts, and bar organizations must target ways to deter and prevent instances of misconduct from occurring in capital cases where the stakes are so high.

The number of prosecutor misconduct cases can be limited by an added emphasis on training and systemic methods of teaching prosecutors to deal with the conflicting pressures of handling complex and emotional capital cases. Lawyers become prosecutors to enforce the law, not to abuse it, so thorough training is essential.[306] But where the system breaks down due to misconduct by an individual prosecutor, there needs to be ways of preventing future violations through the courts and through the bar.

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305. *Berger*, 295 U.S. at 88.

306. *See* Lindsey v. State, 725 P.2d 649, 659 (Wyo. 1986) (Urbigkit, J., dissenting):

> The prosecutor . . . enters a courtroom to speak for the People and not just some of the People. The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of "The People" includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name.

Id. (quoting *On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537-539 (1986)).

The easiest way for jurisdictions to eliminate the problem of prosecutor misconduct in capital cases would be to abolish the death penalty.[307] But if a jurisdiction maintains a death penalty, at a minimum, we suggest, as a starting point, that every jurisdiction with a death penalty consider the following five proposals to work to deter further prosecutor misconduct in capital cases.[308]

These five proposals are not the only ways to address prosecutor misconduct in capital cases, and they will not eliminate prosecutor misconduct. As discussed in the previous section, a number of lawyers and scholars have made a range of excellent suggestions over the years for preventing and remedying prosecutor misconduct in criminal cases generally, and all of those suggestions should be considered. But these five proposals are presented here as first steps that will be effective in starting to address some of the major problems in capital cases without a drastic overhaul of the current legal and disciplinary system.

The five proposals fit in three categories. Because the majority of prosecutors want to prevent members of their profession from committing misconduct, the first three proposals recommend that prosecutors play an essential leadership role in working to further prevent misconduct by rogue lawyers. The fourth recommendation provides a deterrent for misconduct in capital cases, and the final general recommendation encourages courts to address a specific problem.

The first proposal is that prosecutor offices should reevaluate their training programs for new and long-time capital attorneys regarding ethics in capital cases and how to deal with pressures to achieve convictions and death sentences. Offices should do this reevaluation periodically, and an office should reexamine training procedures

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307. *See, e.g.*, John Connor, *Death Penalty Drains Justice System Resources*, BILLINGS (Mont.) GAZETTE, March 22, 2009, *available at* http://www.deathpenaltyinfo.org/new-voices-montana-prosecutor-says-death-penalty-doesnt-keep-correctional-officers-safe (arguing in article by former chief special prosecutor of Montana that the state should abolish the death penalty); Jennifer Emily, *Prosecutor in One of Dallas County's DNA Exonerations No Longer Supports Death Penalty*, DALLAS (TX) MORNING NEWS.COM, Oct. 3, 2008, *available at* http://crimeblog.dallasnews.com/archives/2008/10/prosecutor-in-one-of-the-dna-e.html (discussing Dallas County prosecutor James A. Fry, a former supporter of the death penalty who is now against the death penalty because of problems in the criminal justice system); Kirchmeier, *supra* note 6 (discussing New York prosecutors critical of the state legislature's decision to pass a death penalty bill).

308. Of course, ethical lawyers are concerned about lawyer misconduct in any type of case, and some of these proposals might also be considered for non-capital cases. But the purpose of this Article is to consider ways to prevent and deter instances of egregious misconduct in capital cases. *See supra* note 23 and accompanying text.

whenever misconduct occurs in the office. As noted above, the ideal solution is to prevent misconduct from occurring in the first place.[309]

Second, as discussed above, prosecutor offices should responsibly evaluate their methods for internal sanctioning of lawyers who behave improperly in capital cases. Prosecutor offices are uniquely situated for evaluating misconduct by individual prosecutors in each office.[310] Offices may set up their evaluations in different ways, but one approach would be to have a special committee made up of a chief ethics officer, a division head, and a senior prosecutor selected to evaluate the sanctioning process and to make recommendations for any changes.

Third, courts, prosecutor offices, and ethics committees should together ensure that prosecutors who egregiously violate ethics rules in capital cases are not allowed to act as counsel in further capital cases. Because of the high pressures and high stakes in death penalty cases, someone who egregiously and intentionally violated ethical rules in a previous case should not be trusted in another capital case.[311]

Fourth, states should pass laws mandating that the death penalty may not be sought a second time against a defendant when a prosecutor previously committed egregious misconduct such as intentionally withholding exculpatory evidence. There are two reasons for such a law. First, such a law would be the best deterrent against egregious misconduct because it largely would remove an incentive to withhold evidence or to commit other types of misconduct. Second, in cases where there is exculpatory evidence withheld or another type of egregious misconduct, it would be unfair to subject such a defendant to a second capital trial after the government misbehaved in the first trial. In such situations with withheld evidence or egregious misconduct, the defendant may be not guilty, but even if the defendant is guilty, other severe punishments, such as life in prison, are available. For the same reasons, even in the absence of legislative action, courts should be reluctant to

309. *See* CRIMINAL JUSTICE STANDARDS, § 3-2.6 (1993). The standard states: "Training programs should be established within the prosecutor's office for new personnel and for continuing education of the staff. Continuing education programs for prosecutors should be substantially expanded and public funds should be provided to enable prosecutors to attend such programs." *Id.*

310. In creating methods for internal sanctions, though, offices should consider how to filter out baseless complaints by defendants and defense attorneys. One way to limit the complaints would be to begin with a focus on the most egregious instances of misconduct.

311. As throughout this Article, the focus here is not on good faith or negligent errors by attorneys. The concern is that in the occasional instances that involve egregious intentional misconduct, courts and attorneys need to impose more serious sanctions.

allow the imposition of death sentences in cases where a prosecutor previously committed egregious misconduct.

The fifth proposal is that judges should work harder to limit *Batson* violations, and courts should experiment with different approaches for jury selection in capital cases. Because of our country's poor history in addressing issues of race,[312] *Batson* violations not only create the risk of unfair trials but also contribute to broader societal problems.[313] As discussed earlier, courts and scholars have made several suggestions for addressing *Batson* violations and courts should be more open to trying new procedures to ensure that capital jurors are not dismissed based upon discriminatory motives. At a minimum, courts need to work to be vigilant in guarding the promises made by the *Batson* decision.

In the American system of justice, the ethical prosecutor plays a special role as "shepherd of justice"[314] who acts "in the search for truth in criminal trials."[315] Beginning with the decision of whether to seek the death penalty, capital prosecutors play a powerful role in the capital punishment system and make life and death decisions. Because some lawyers are not good shepherds and because of the high stakes when a prosecutor seeks death, there exists a heightened need to stand vigil against misconduct in capital cases.

Fortunately, most prosecutors take their legal, ethical, and moral obligations seriously and they do not strike "foul blows."[316] But our legal system must be better prepared to remedy the situation where a rogue or vigilante lawyer pursues a death sentence in a way that circumvents constitutional and ethical rules.[317] Hopefully, this Article raises awareness about the complex issues surrounding prosecutor misconduct in capital cases. And hopefully courts, bar organizations, prosecutor offices, ethical prosecutors, and other lawyers will embrace the five

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312. *See, e.g.*, FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. and Austin Sarat eds., 2006) [hereinafter FROM LYNCH MOBS TO THE KILLING STATE]; Kirchmeier, *supra* note 6, at 89-100.

313. For example, "[d]ecisions made by all-white juries do not receive the respect of other racial groups that were denied participation." FROM LYNCH MOBS TO THE KILLING STATE, *supra* note 312, at 225-26.

314. Doe, 801 F. Supp. 478, 480 (D.N.M. 1992).

315. *Banks*, 540 U.S. at 696. *See* Hurd v. People, 25 Mich. 405, 416 (1872) (noting that a prosecutor's "object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success").

316. "But while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones." *Berger*, 295 U.S. at 88.

317. *See* Hoeffel, *supra* note 270, 1140-41 (arguing that the adversarial system often encourages prosecutors to focus on winning the case for the prosecution rather than seeking justice and also ensuring defendants' rights are protected).

proposals here as a starting remedy and then continue to work to prevent and address instances of vigilante misconduct in capital cases.