DETERRING PROSECUTORS FROM ABUSIVE BEHAVIOR: A FORMER FEDERAL PROSECUTOR'S VIEW

Brett L. Tolman[*]

I. INTRODUCTION

Many have written on the role of prosecutors in today's criminal justice system and the need for meaningful reform and greater accountability in order to more properly deal with misconduct.[1] Some argue for limiting or even abolishing prosecutorial immunity.[2] Others argue for creating new rules of professional responsibility to address the increase in prosecutorial misconduct or, at the very least, revamping existing rules.[3] Indeed, the issue of deterring prosecutorial misconduct has led reformers to propose a variety of creative solutions. One author, with compelling logic, argues for appellate courts publicly naming and shaming those prosecutors found to have committed significant misconduct that results reversal of the underlying conviction.[4]

However, among the breadth of writings on prosecutorial misconduct, there is a noticeable lack of authorship by practitioners of criminal law.

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[*] The author served as the U.S. Attorney for the District of Utah, 2006–2009. He also served as Chief Counsel over Crime and Terrorism in the United States Senate Judiciary Committee, 2003–2009. In 2018 he founded The Tolman Group, which focuses on government reform and public policy. This Article expresses the author's own perspective and not that of the Offices of the United States Attorneys. Many statements in this Article are drawn from the author's experience working in the criminal justice system and his recollections regarding specific cases in which he served as counsel.

[1] *E.g.*, Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 51 (2016); Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS L. REV. 623 (2017); Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573 (2017); Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 Geo. L.J. 1509 (2009).

[2] *See, e.g.*, 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 (2005).

[3] *See, e.g.*, Samuel J. Levine, *Disciplinary Regulation of Prosecutorial Discretion: What Would a Rule Look Like?*, 16 OHIO STATE J. CRIM. L. 347 (2019); Walter W. Steele Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965 (1984).

[4] *See* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059 (2009).

Former prosecutors and defense attorneys currently engaged in the trenches of federal and state criminal justice systems have valuable perspectives for enhancing the fabric of needed reforms. It is from this perspective, shaped in large part by actual cases in which this author has participated, that this article seeks to outline a more practical view of the scope of the problem of prosecutorial abuse, and proposes greater accountability through ensuring real consequences for prosecutorial misconduct.[5]

II. NATURE OF THE PROBLEM

It is universally accepted that a prosecutor stands unique in the law, burdened with the responsibility to enforce the criminal code and the power to deprive a defendant of his most valuable civil liberties.[6] The Supreme Court has routinely emphasized, in frequently quoted and lofty language, this unique status of the prosecutor.[7] For decades, and consistent with the tone and treatment by the Supreme Court in its *Berger* decision, the assumption seemed to be that prosecutorial misconduct was the exception and rarely occurred.[8] The image of a prosecutor, ethical and faithfully analyzing evidence—determining to not bring a case nearly as often as bringing one—endured largely because of the rarity with which reports of misconduct occurred. The Supreme Court was not naïve to some forms of potential abuse, which it stated occurred when a prosecutor "overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[9] In fact, in *Berger*, the Court found that the prosecutor in question had (1) misrepresented the facts in cross-examining a witness, (2) put words in the mouths of witnesses which were not uttered, (3) misrepresented aspects of the facts through the language of questions used during direct and cross-examination, and (4) behaved improperly by bullying and arguing with witnesses.[10] In addition, the prosecutor made "undignified and intemperate" arguments to the jury, which contained inappropriate "insinuations and assertions calculated to mislead

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[5] The author's experiences arise out of over twenty years in the criminal justice system—roughly ten years as a federal prosecutor and ten years as a criminal defense attorney. Additionally, the author has worked for nearly a decade on criminal justice reforms—drafting legislation, lobbying, and coalition building in an attempt to fix what many argue is a broken criminal justice system in this country.

[6] *See* H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 57 (2013).

[7] *See, e.g.*, Berger v. United States, 295 U.S. 78 (1935).

[8] *See* Green & Yaroshefsky, *supra* note 1, at 51–52.

[9] *See Berger*, 295 U.S. at 84.

[10] *See id.* at 84–85.

the jury."[11] This list of abuses, however, almost promulgates the stereotype that misconduct is rare and largely does not rise to conduct which shocks the conscience or suggests a systemic and serious problem. Were this an accurate depiction of the full scope of abuses, it would continue to serve as justification for the strong protections of immunity and the rarity of reported discipline against such prosecutors. The conviction could be reversed, the prosecutor admonished—humiliated in defeat—and the public free to maintain its confidence in bestowing such largely unchecked power in the hands of a prosecutor. However, the depiction is not accurate.

In the years since the *Berger* decision, courts have had occasion to identify a modestly growing list of more serious offenses committed by prosecutors.[12] The growing list includes knowingly withholding exculpatory evidence which may have resulted in an acquittal,[13] purposely misstating the law to a jury in order to secure a conviction,[14] and knowingly using and soliciting perjury from witnesses.[15] More recently, the infamous findings in *United States v. Ted Stevens* showed that prosecutors (1) conspired to hide a favorable witness for the defense and (2) had purposely removed from documents, or otherwise hidden from the defense, critical exculpatory evidence.[16]

Notwithstanding these examples, the prevailing thought has been that prosecutorial abuse, while increasing in occurrence, is still somewhat rare. This is unless you actually practice criminal law and have been either a prosecutor, a defense attorney, or both.

A. A Prosecutor's Perspective

In this author's ten years as a federal prosecutor, the number of instances of observing misconduct is at first blurry, if not partially hidden, due to the environment and culture of the office. Some have written of this culture as a "win at all costs" environment,[17] with built-in incentives which reward the aggressive prosecutor willing to charge a lot of cases and secure long prison

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[11] *See id.* at 85.

[12] *See* Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L. Q. 713, 720 (1999).

[13] *See* Brady v. Maryland, 373 U.S. 83 (1963).

[14] *See* Caldwell v. Mississippi, 472 U.S. 320 (1985).

[15] *See* Rose v. Bartle, 871 F.2d 331 (3d Cir. 1989).

[16] Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES (Apr. 8, 2009), https://www.nytimes.com/2009/04/08/us/politics/08stevens.html.

[17] *See* Brink, *supra* note 2, at 16.

terms.[18] Such culture is a far cry from the Supreme Court's laudatory language on the role of the prosecutor:

> [The 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 show interest, therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[19]

Sadly, this culture of aggressive prosecution and "win at all costs" mentality is accurate and has produced a new measurement for success: the number of convictions and the lengths of sentences.[20] The results of such an environment are cases and decisions which, in hindsight, reveal prosecutorial abuse and misconduct that is otherwise not discernible without someone within the culture to eventually reveal it.

One example of subtle abuse produced in such an environment is found in *United States v. Angelos*.[21] This case is now somewhat notorious due to the outrageous fifty-five-year mandatory minimum sentence imposed against a "dime-bag" dealer of marijuana who did not commit an act of violence and did not have an extensive criminal history.[22] While much has been made in the media about the extraordinary length of Mr. Angelos' sentence in relation to his relatively minor criminal conduct,[23] few know of the behind-the-scenes wrangling and abuse which ultimately led to the lengthy sentence.

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[18] *See id.* at 16–18.

[19] *See* Berger v. United States, 295 U.S. 78, 88 (1935). Ironically, this powerful language in *Berger* is often used, as it was by this author, in the swearing in ceremonies of new U.S. Attorneys and incorporated into the mantra of motivational speeches given to assure judges and the public that prosecutors are a cut above other lawyers and focus merely on fairness rather than convictions.

[20] Brink, *supra* note 2, at 16–17. Indeed, I was given a very prestigious award during my first couple of years as a federal prosecutor by Attorney General John Ashcroft. I was flown to Washington, D.C. and received, in essence, the Rookie of the Year award, with a nice accompanying stipend, for the considerable number of firearms cases I presented to the grand jury and successfully prosecuted to conviction. My experience is not unique.

[21] 345 F. Supp. 2d 1227 (D. Utah 2004).

[22] *See id.*

[23] *See, e.g.*, Gillian Friedman, *How a Salt Lake City Drug Dealer's 55-Year Sentence Inspired Utah Sen. Mike Lee to Change America's Criminal Justice System*, DESERET NEWS (Jan. 8, 2019), https://www.deseret.com/2019/1/9/20662910/how-a-salt-lake-city-drug-dealer-s-55-year-sentence-

To begin with, during the investigative stage authorized by prosecutors and executed by Drug Enforcement Administration (DEA) agents, multiple undercover buys of marijuana from Angelos took place.[24] At first glance, this hardly seems problematic. However, knowing that the first undercover buy would result in a five-year mandatory minimum, but a second or any subsequent drug transaction with agents would add additional consecutive twenty-five-year mandatory minimum sentences, it is clear that government agents purposefully conducted three undercover buys from Angelos before arresting him in order to manipulate the minimum sentencing range.[25] A prosecutor determined to not strike "foul" blows, and committed to refraining "from any improper method," would have exercised control over the agents, stopped the investigation after the first undercover buy, and charged the defendant then.[26]

Making matters worse, it is clear that the prosecution's manipulation to secure the three chargeable offenses was a strategic one aimed at exercising leverage over the defendant and his inability to defend himself.[27] The Assistant United States Attorney (AUSA), charging only some of the available counts initially, offered Angelos a deal wherein he would plead to a fifteen-year mandatory minimum sentence and the government would forgo charging additional counts which carried mandatory minimum sentences.[28] When Angelos exercised his constitutional right to trial, the AUSA—without hesitation or a supervisor's oversight—went back to the grand jury and secured a superseding indictment charging additional counts which carried

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[24] *Angelos*, 345 F. Supp. 2d at 1231.

[25] *See* Sasha Abramsky, *Why Has Obama Pardoned So Few Prisoners?*, NATION (Jan. 9, 2013), https://www.thenation.com/article/archive/why-has-obama-pardoned-so-few-prisoners/ ("Angelos had been ensnared by an informant in a series of undercover marijuana purchases that reeked of entrapment. What might have been a two-bit state pot case became a high-stakes federal case. When Angelos—who denied carrying a gun when dealing—refused to enter a guilty plea, the feds played hardball, piling more indictments onto the original charge."). Because Mr. Angelos was known to carry on his person or in his car a firearm for personal protection, any drug distribution with a firearm would subject him to the punitive section of the United States Code referred to as 924(c). *See Angelos*, 345 F. Supp. 2d at 1230; 18 U.S.C. 924(c) (2012). At the time of the investigation, prosecutors could "stack" 924(c) counts and get outrageous sentences as the code dictated a five, seven, or ten-year mandatory minimum for a first count but a twenty-five-year mandatory minimum for a second or subsequent count. *See* Jason Pye, *"Unjust, Cruel, and Even Irrational": Stacking Charges Under 924(c)*, FREEDOMWORKS (Jan 29, 2018), https://www.freedomworks.org/content/"unjust-cruel-and-even-irrational"-stacking-charges-under-924c. The outrage over the Angelos case and the practice of stacking to secure life sentences against low level drug users and dealers served as a leading reason for the practice to be eliminated with the passage of the First Step Act in 2019. *See* Friedman, *supra* note 23.

[26] *See* Berger v. United States, 295 U.S. 78, 88 (1935).

[27] *See* Abramsky, *supra* note 25.

[28] *Angelos*, 345 F. Supp. 2d at 1231.

consecutive minimum mandatory sentences pursuant to 18 U.S.C. § 924(c).[29] Outside of the prosecutorial culture, it can hardly be argued this was anything other than a vindictive prosecution aimed at retaliating for Angelos refusing the prosecutor's "generosity" in the initial offer of an agreed-upon sentence of fifteen years. Exercising constitutional rights has consequences in the federal criminal justice system.[30] Shockingly, the attitude among prosecutors in such a circumstance is largely one of justification for their actions. "The defendant forced my hand" or "I had no choice but to add the additional charges" are frequent refrains used to deflect abusive decisions onto the defendant. In this author's experience, not a single prosecutor, aware of the "behind the scenes" decisions in *Angelos*, expressed a critical word or concern over the vindictive nature of the decisions.[31]

In *United States v. Rubashkin*, seeking to punish the defendant for not pleading guilty early in the case, the prosecution returned to the grand jury seven times to add over one hundred new counts in superseding indictments.[32] This type of vindictive prosecutorial abuse is not uncommon—nor is it viewed with disdain among prosecutors or even judges.[33] In the end, Rabbi Rubashkin was sentenced to twenty-seven years in federal prison for a crime he was not even originally charged with committing and in which the alleged victim suffered no actual loss at the hand of Rubashkin.[34]

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[29] United States v. Angelos, 433 F.3d 738, 742 (10th Cir. 2006).

[30] *See Angelos*, 345 F. Supp. 2d at 1231–32

[31] To his credit, the AUSA assigned to the *Angelos* case—over a decade into Angelos serving his 55-year sentence—would have a dramatic change of heart on the case. *See* Jacob Sullum, *Weldon Angelos Is Free, Thanks to a Prosecutor, Not a President*, REASON (June 6, 2016), https://reason.com/2016/06/06/weldon-angelos-is-free-thanks-to-a-prose/. He visited Angelos in prison, apologized for how the case was handled, and worked to ultimately secure an early release for Angelos. While the public outcry and media attention certainly played a part in the AUSA's perception of the case, great credit should be given to the prosecutor's ability to grasp the prosecutorial abuse which so subtly unfolded in the case and resulted in both an unfair prosecution and an unjust sentence.

[32] *See* United States v. Rubashkin, 655 F.3d 849, 854–855 (8th Cir. 2011).

[33] *See id.* Rabbi Rubashkin was the owner of one of the largest kosher meat packing plants in a small town in Iowa. Vicky Ward, *The Inside Story of How a Kosher Meat Kingpin Won Clemency Under Trump*, CNN (Aug. 9, 2019), https://www.cnn.com/2019/08/09/politics/kushner-rubashkin-trump-clemency/index.html. After self-reporting immigration issues in his company, Rubashkin was charged with violating immigration laws. *Id.* When Rubashkin refused to plead guilty, prosecutors tore his company financials apart and strained to allege and then charge bank fraud based upon the theory that Rubashkin had overstated his company's worth and therefore secured larger lines of credit from the bank than appropriate. Ultimately, Rubashkin would be tried on the bank fraud and not the immigration violations. In the federal system, sentences in fraud cases are calculated not based solely on actual loss but also through "intended" loss. Since the line of credit at issue was over $30 million, the resulting sentencing guidelines range for Rubashkin was nearly 30 years. *See* Sentencing Memorandum at 20, United States v. Rubashkin, 718 F. Supp. 2d 953 (N. D. Iowa 2010) (No. 08-CR-1324-LRR).

[34] *See Rubashkin*, 655 F.3d at 853; Sentencing Memorandum at 51, *Rubashkin*, 718 F. Supp. 2d 953 (No. 08-CR-1324-LRR).

B. A Former Prosecutor's and Defense Attorney's Perspective

The culture surrounding a prosecutor is an important thing. It is not surprising that more prosecutors do not come forward to reveal misconduct. Prosecutors, much like investigators, have a sense of righteous purpose—a common goal and focus to "put bad guys in jail."[35] Nearly all interactions and communications have to do with how to catch and prove the guilt of a given target. Rarely is a prosecutor focused on whether the target actually committed the crime in question. That a crime was committed by the target is a given—the only real question on most prosecutor's minds is how to generate enough evidence to secure an indictment, conviction, and lengthy sentence.[36] By the time the prosecutor is presented the case by federal agents or law enforcement officers, the ability to fairly assess whether the target committed the crimes he is accused of is long past. The conviction rate alone (including pleas) serves to bolster the prosecutor's conviction and the correctness of her judgment.[37]

During this author's tenure as an AUSA for the District of Utah and then later as the U.S. Attorney, the reaction by the office and individual prosecutors to disappointment or failure underscores the mindset that prevents prosecutors from honest evaluation of the system and the appropriateness of their investigative and prosecutorial decisions. If a grand jury fails to return an indictment[38] then it is often assumed by prosecutors to be the fault of one or more of the misguided jurors or of the witness who failed to do a better job in offering testimony. If a judge dismisses a case, then the perception is almost universally that the judge is hostile towards the government and did not see the evidence or circumstances correctly. If a jury fails to convict then prosecutors routinely believe it is because it was a bad jury or single problematic juror, or that the judge's rulings prevented the

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[35] *See* Teresa W. Carns et al., *Therapeutic Justice in Alaska's Courts*, 19 Alaska L. Rev. 1, 13 (2002).

[36] *See* Alafair S. Burke, Neuroscience, Cognitive Psychology, and the Criminal Justice System: Prosecutorial Agnosticism, 8 Ohio St. J. Crim. L. 79, 91–92 (2010) ("[T]he prosecutor's role as a first and constant supreme juror may lead to cascading effects in other prosecutors, judges, and jurors, who might assume that the defendant must be guilty or would not have been charged.").

[37] In the federal system, the conviction rate, including pleas, is over ninety percent. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RES. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

[38] Such an occurrence is so rare that I am only aware, in my ten years as an AUSA and then U.S. Attorney, of a single occurrence of a Grand Jury failing to return an indictment on one count of a multiple count indictment. The adage that a prosecutor could get a Grand Jury to indict a "ham sandwich" is accurate. *See* PAUL BERGMAN & SARA J. BERMAN, THE CRIMINAL LAW HANDBOOK 143 (2020) ("In part because there's no one on the 'other side' to contest the prosecutor's evidence, grand juries almost always return an indictment as requested by the prosecutor.").

jurors from properly viewing or seeing all the evidence.[39] But what prosecutors rarely, if ever, consider—is that the defendant might actually be innocent of the conduct alleged. Given this environment, it is not surprising that prosecutors are unable to view misconduct in an objective manner and, instead, feel as though the ends truly justify the means—the defendant was convicted so the aggressive tactics, abusive measures, and "foul" blows are insignificant.[40] Consequently, defense attorneys and former prosecutors are those best positioned to shine an accurate light on prosecutorial abuse and misconduct. Highlighting a few cases in which this author was lead counsel or counsel for the defendant can serve to illustrate the range of misconduct and abuse[41]—from troubling and unfair to outright violative of the defendant's constitutional protections and rights.

1. *United States v. Strong*

In the case of *United States v. Strong*,[42] the defendant was accused of embezzling several hundred thousand dollars from a business partner.[43] The defendant maintained his innocence for nearly the entirety of the case. The defendant had previously been sued by his business partner, and in his earlier deposition related to the civil action, the defendant maintained the consistent position that the monies he was accused of stealing were reimbursements owed to him. During the pendency of the criminal case, the AUSA was informed that there were certain witnesses and documents in the hands of third parties which could exonerate the defendant. The AUSA indicated on multiple occasions that he did not believe the defendant, but would look into the matter.

Despite doing what he could, the defendant did not have the resources to do what was necessary to secure the exculpatory documents or to track down and interview all necessary witnesses. However, the defendant's stepson worked at the company, had vivid recollection of events, and provided sufficient exculpatory testimony to cast considerable doubt on the validity of

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[39] *See* Judith Heinz, Note, *Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada*, 16 LOY. L.A. INT'L & COMP. L.J. 201, 215–16 (1993).

[40] *See Allegations of Selective Prosecution: The Erosion of Public Confidence in Our Federal Justice System Before the H. Comm. on the Judiciary*, 110th Cong. 288 (2007).

[41] In the discussions of the cases that follow, the author relies on his own recollections and notes. Citations are made to court documents or news articles when possible.

[42] United States v. Strong, No. 2:16-cr-00359 (D. Utah Jan. 26, 2018).

[43] *See* Pamela Manson, *Utah Man Who Lived a Lavish Lifestyle While Embezzling Nearly $1M from His Employer Is Headed to Prison*, SALT LAKE TRIB. (Jan. 25, 2018), https://www.sltrib.com/news/2018/01/25/utah-man-who-lived-a-lavish-lifestyle-while-embezzling-nearly-1m-from-his-employer-is-headed-to-prison/.

the government's theory of the case. In the stepson's initial interview with government investigators, it was apparent that investigators were avoiding important areas of questioning and dismissive of responses which helped the defendant. Indeed, the stepson expressed that his interview with government agents was hostile and that the agents' confrontational tone did not indicate that they really wanted to get to the truth if it disrupted the government's established theory of the case. In the defense's follow up discussion with the stepson, the additional facts and important, exculpatory statements came out.

Upon learning of the additional declarations of the stepson, the AUSA immediately called the stepson to appear before the grand jury.[44] After finally being able to get the transcript—a difficult thing to secure—of the grand jury proceeding, the purpose for putting the stepson before the grand jury became immediately apparent. The AUSA wanted to be able to aggressively cross examine the stepson while under oath. The questions were aimed at trying to suggest inconsistencies in what he had earlier told the investigators, and to confuse the witness on minor details and insignificant dates along the timeline of the defendant's assertions. The stepson would later report that he felt intimidated and that the AUSA seemed to be coming after him. Later, in discussions with the AUSA, it was intimated that, as a basis to secure the defendant's guilty plea, the government may prosecute the stepson for lying to a federal agent, or for lying under oath before the grand jury, or both if the stepson were to testify at trial or other hearings on the defendant's behalf.

In the end, the defendant chose to plead guilty and engaged with the AUSA on reaching the most favorable agreement possible. The AUSA, expressing the need to teach the defendant and the defense attorney a lesson to plead earlier, and before the prosecutor has had to invest time into the case, refused to give even the standard plea agreements generally offered by his office. Despite such hostility from the AUSA, the defendant was determined to plead guilty.[45] The AUSA vindictively refused to give the defendant full acceptance of responsibility—a factor which can reduce the defendant's sentence and which is within the discretion of the AUSA handling the case[46]—and even went so far as to seek obstruction of justice against the

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[44] It must be emphasized how unusual it is to put a witness before a grand jury on a case that has already been indicted when the objective is not to seek a superseding indictment against the defendant. This was the first and only instance this author has observed such a tactic.

[45] The motivations for a defendant to plead guilty are many—the cost of litigation, the emotional strain on the family and loved ones, the fear of a longer sentence if the case goes all the way to trial are all common reasons. In Strong's case it appeared to be all of the above. *See* Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 GA. ST. U.L. REV. 239, 258 (2011) (discussing the "inherent institutional benefits of pleading guilty").

[46] *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2018).

defendant because he did not admit to the crimes in his earlier civil deposition, which occurred years prior to the criminal case. Mr. Strong is still in prison today—but his stepson is not.[47]

2. *United States v. Zobrist*[48]

Prior to his odyssey into the criminal justice system, Mr. Zobrist enjoyed a successful small civil practice in Las Vegas, Nevada. An active member of the Church of Jesus Christ of Latter-day Saints, Mr. Zobrist's religion and church membership is very important to him and his wife. In the early 2000s, exhausted with the practice of law, Mr. Zobrist agreed to join two friends in a mortgage lending business as an equal partner. Zobrist handled the contractual and corporate legal issues for the company. Zobrist was neither the salesman nor the realtor and rarely interacted with clients outside of securing the contract. After the massive housing and mortgage crisis occurred and the market crashed, the small company in Las Vegas—an area of the country particularly affected by the housing bubble—was no longer able to remain viable. The sudden fall in home values caused Mr. Zobrist, his partners, and many clients to lose considerable, if not all, resources. In the aftermath, two of the three partners in the company fled. Mr. Zobrist was the only one in the company who stayed with the company, responded to frustrated clients, and even, in several instances, used personal resources to help pay back or otherwise assist the victims of the crash.[49]

As the case proceeded, the AUSA on the case met with defense counsel to attempt to persuade them to push their client into cooperating with the government and providing all the information the defendant knew about multiple other targets for prosecution. In exchange, the government promised it would give considerable credit to Mr. Zobrist and argue for a much shorter sentence. Based upon this representation, Mr. Zobrist agreed to be debriefed by the AUSAs and FBI investigators regarding multiple other targets and

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[47] *See* Judgment as to Bruce McKean Strong at 3, United States v. Strong, No. 2:16-cr-00359 (D. Utah Jan. 26, 2018) (sentencing Mr. Strong to 72 months imprisonment). While incarcerated, Mr. Strong saved the life of a prison guard. The prison guard has expressed that he would like Mr. Strong to receive a reduction in his sentence for his heroism.

[48] United States v. Zobrist, 2:12-CR-0460-JCM-GWF (D. Nev. Feb. 10, 2014).

[49] In addition to using his own resources, Zobrist also provided pro bono legal work for those in need. To this day, the Zobrist sentencing is unique among sentences this author has participated in, as it was the only sentencing in which victims of the alleged fraud showed up to speak on behalf of the defendant and urged the court to be lenient. Not a single alleged victim of the fraud who was angry with Zobrist appeared to address the court. The prosecutor would twist this fact to argue that it showed how manipulative the defendant could be. *See* Response to Defendant's Sentencing Memorandum and Supplemental Sentencing Memorandum at 21, United States v. Gerry Zobrist, No. 2:12-cr-0460-JCM-GWF (D. Nev. Aug. 29, 2013).

alleged schemes in the mortgage and other industries. Mr. Zobrist met multiple times with the AUSAs and FBI and other investigators and provided substantial and significant information about other individuals and other alleged fraudulent schemes. Zobrist did so despite his genuine concern that some of those he was cooperating against had the potential to be violent or otherwise retaliate. The AUSA would dismiss this concern as exaggeration. As a result of Mr. Zobrist's cooperation, additional evidence against codefendants was secured and led to guilty pleas as well as significant leads into other schemes in the mortgage industry and other industries. Additional targets for investigation were identified and became the subject of federal and state investigations.

Notwithstanding the earlier representations on rewarding cooperation, the AUSA refused to give Zobrist credit for his substantial assistance in the case or other investigations.[50] The AUSA would ultimately confide to several individuals that he was a member of the same church and congregation as the defendant, and that he saw his responsibility as needing to humble Mr. Zobrist, as he was personally offended to see Mr. Zobrist's hypocrisy when observing him attending the temple or otherwise worshipping. The AUSA emphasized that he felt justified in being tougher on Mr. Zobrist than he might otherwise because "he should know better," given his religious training and background.

3. *United States v. Kilgore*[51]

Mr. Kilgore was investigated and prosecuted based on his company's sales representative's falsification of medical records in relation to claims made to the federal government for Medicare coverage for the power wheelchairs his company distributed.[52] Such healthcare fraud cases can be complex and document intensive.[53] Thousands of pages of documents have to be reviewed and can become the most significant burden in both

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[50] *See* Sentencing Memorandum and Objection to Presentence Report at 8, United States v. Zobrist, No. 2:12-cr-0460 (D. Nev. Aug. 9, 2013). Efforts of defense counsel, arguing that the AUSA was unethically going back on an agreement, led to securing from the prosecutor a token agreement for cooperation which, for many reasons, was more offensive to the defendant than not having to cooperate against others and not receiving any credit.

[51] United States v. Kilgore, 2:13-cr-00711 (D. Utah Apr. 15, 2016).

[52] *See* Press Release, United States Attorney's Office for the District of Nevada, Kilgore Pleads Guiltily to Three Counts of Conspiracy to Commit Health Care Fraud (Nov. 3, 2015), https://www.justice.gov/usao-ut/pr/kilgore-pleads-guilty-three-counts-conspiracy-commit-health-care-fraud.

[53] *See* Joan H. Krause, *A Conceptual Model of Health Care Fraud Enforcement*, 12 J.L. & POL'Y 55, 111 (2003).

prosecuting and defending such cases. Typically, as was the case here, the government uses search warrants to seize computers, hard drives, and email accounts from the defendant and the company.[54] The government will eventually return computers and hard drives but not until it has secured all the information contained on them.[55] As part of its discovery obligations, the government is required to give to the defendant and his counsel copies of the seized documents.[56] It is not uncommon, especially in white-collar fraud investigations, for the government to seize historical communications between the defendant or others in the company and lawyers.[57] In theory, when such communications are seized, the government is to appoint a special review team not connected to the case or investigation to review communications and to remove the attorney-client communications, which are privileged, from being reviewed by the investigative and prosecutorial team assigned to the actual case.[58]

Given the ethical and legal constraints placed upon the government to avoid even seeing privileged communications, imagine the surprise of the defendant and his attorneys when reviewing the documents produced to them in discovery by the government to find hundreds of pages of attorney-client communications. Even worse, imagine how shocking it was for the defense team to discover that, among the discovery, communications between the defendant and his current defense attorneys regarding the very case for which he was being investigated and prosecuted were also found. Especially concerning and puzzling was the fact that the government produced emails from the defendant's new email account, which was created, upon instruction by his attorneys, for the express and only purpose of communicating with his defense counsel. These included communications regarding the strengths and weaknesses of the facts of the case, legal questions and issues at play, strategies for each stage of the investigation and prosecution, witnesses, and potential trial strategies.

Upon seeing their attorney-client privileged emails scattered throughout the government's discovery documents, Mr. Kilgore's defense attorneys reacted immediately and requested a meeting with the AUSA to figure out what had happened. The AUSAs and investigators were asked whether they reviewed the privileged communications. They denied they had reviewed

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[54] *See* Paige Bartholomew, *Seize First, Search Later: The Hunt for Digital Evidence*, 30 TOURO L. REV. 1027, 1028 (2014).

[55] *Id.*

[56] *Id.*

[57] *See, e.g.*, United States v. Snyder, No. 2:16-CR-160 JVB, 2018 U.S. Dist. LEXIS 166231 at *2-3 (N.D. Ind. Sep. 27, 2018).

[58] *See id.* at *17–18.

them. They were asked whether a separate team had been used in reviewing the documents. The government asserted they had failed to use a separate team for such a review and that they would immediately do so. The government was otherwise dismissive of the notion that this was any real issue and even indicated that the defense was out of line for making such a big deal about it. Given that there were indicators, such as all of the documents being Bates stamped,[59] suggesting that the government may have reviewed the privileged communications, the defense team prepared a scathing motion to highlight the misconduct and requested the court either disqualify the prosecutorial team or dismiss the case altogether based on the violation of the sacrosanct right to counsel.

Prior to filing the motion, as a professional courtesy, Mr. Kilgore's defense team sent an advance copy of the motion to the AUSA and gave the prosecutor an opportunity to address the issue before having to involve the court in the dispute. The response by the U.S. Attorney's Office was more than troubling. The head of the criminal division, supervisor to the AUSA, confronted defense counsel and urged that the motion not be filed because it could potentially lead to an ethics investigation by the Department of Justice (DOJ) and would be unfair to the AUSA on the case. The U.S. Attorney at the time also confronted the defense and indicated that the motion was unfounded—although the U.S. Attorney had not personally participated in the case in any fashion to that point—and that he viewed the motion as a personal attack on the agents and prosecutors in the case who, as he stated, were "good people." The presidentially-appointed U.S. Attorney also not so subtly stated that the motion would necessitate his appearance at the hearing—in an otherwise fairly routine case being handled by the AUSA—and that he would be present at counsel table to show how he and his office had been affected by the defense's motion. In his view, it was inappropriate to file a public document and have a public hearing on the alleged misconduct. The motion was filed and the hearing was scheduled.[60]

At the hearing, as promised, the U.S. Attorney personally appeared at counsel table alongside the myriad of government attorneys actually handling the matter, a rare if not singular appearance, and had instructed that the courtroom be filled with virtually the entire U.S. Attorney's Office in support

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[59] *Bates stamp*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (desk ed. 2012) ("A numbered stamp on paper, produced in sequence by a machine").

[60] *See* Emergency Motion to Disqualify Counsel, United States v. Kilgore, 2:13-cr-00711 (D. Utah Sept. 24, 2015). Despite the motion being filed and the hearing which ensued, the prosecutorial pressure may have had some effect to temper the efforts of the lead defense counsel on the case. He softened the tone and nature of the motion and he refused to handle the hearing personally and had another ill-suited attorney argue the motion.

of the AUSA on the case, and likely to send an intimidating message to the judge who was hearing the motion.[61] During the hearing, the government eventually revealed that its team had indeed reviewed privileged communications.[62] However, some investigators and members of the USAO appeared to have not just superficially reviewed but reviewed with intent to marshal the evidence of the case.

Following the arguments of counsel, the court, obviously troubled by the circumstances, confessed it was not exactly certain as to what remedy it had at its disposal to address the government's misconduct. The court admonished that, were the government a private litigant in a civil case, it would have imposed sanctions for the misconduct.[63] However, not believing it had any remedy other than suppression of evidence derived from the emails (which, of course, the government conceded it would not use), the court basically did nothing. The court did not dismiss the case. The court did not disqualify any members of the investigative or prosecutorial team. Aside for a brief admonishment to the prosecutors about improving their practice of storing and reviewing evidence, the court did not sanction the government. The defendant was ultimately convicted and sentenced to federal prison.[64]

4. *Utah County v. Turley*

Mr. Turley was an elected official in Utah County[65]—the second largest county by population in the state[66]—and a tenacious and successful real estate developer. Mr. Turley had political opponents and adversaries who despised

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[61] Several AUSAs and other employees would later, on condition of anonymity, reveal the efforts of the U.S. Attorney and AUSA on the case to put pressure on the judge and to intimidate the lead defense attorney on the case.

[62] Transcript of Motion Hearing at 56, United States v. Kilgore, 2:13-cr-00711 (D. Utah Oct. 8, 2015) ("[I]n this case, we have the admission of [agents] Mortensen and Thompson that they viewed, though they say they don't recall, the investigative report that would have contained attorney-client information.").

[63] *Id.*; *see* also Tom Harvey, *Judge: Federal Prosecutors Did Not Intentionally Intrude into Utahn's Confidential Emails*, SALT LAKE TRIB. (Oct. 8, 2015), https://archive.sltrib.com/article.php?id=3043557&itype=CMSID.

[64] *See* U.S. Attorney's Office District of Utah, *Kilgore Sentenced to 60 Months in Prison after Pleading Guilty to Three Counts of Conspiracy to Commit Health Care Fraud*, DEP'T OF JUST. (Apr. 21, 2016), https://www.justice.gov/usao-ut/pr/kilgore-sentenced-60-months-prison-after-pleading-guilty-three-counts-conspiracy-commit.

[65] *See* Heidi Toth, *Provo Councilman Steve Turley Charged with Felonies*, DAILY HERALD (July 27, 2011), https://www.heraldextra.com/special-section/news/provo-councilman-steve-turley-charged-with-felonies/article_341120bc-b8a7-11e0-a5e9-001cc4c03286.html.

[66] *Population of Counties in Utah (2020)*, WORLD POPULATION REV., https://worldpopulationreview.com/us-counties/ut/ (last visited May 31, 2020).

his political and business success.[67] Mr. Turley often utilized very reputable attorneys to enforce contracts and to secure real estate opportunities. When Mr. Turley first became aware that an investigator for the Utah County Attorney's office was asking questions about some of his business deals, he was already involved in several lawsuits as the plaintiff seeking to enforce real estate contracts against parties who had breached the agreement. The investigator from the county was friends with one of Mr. Turley's political adversaries. The government investigator was also friends with one of the attorneys representing a client being sued by Mr. Turley for breach of contract. Upon learning of a possible criminal investigation, Mr. Turley hired defense counsel who immediately reached out to the Utah County Attorney and inquired about whether the office was, in fact, pursing a criminal investigation of his client. The county attorney responded that the case had been referred by the above-referenced civil attorney, who represented a client adverse to Mr. Turley in the contract litigation, that the criminal case seemed flimsy, and that charges would likely not be pursued. The defense attorney requested notice if the investigation was pursued, and the county attorney agreed to provide such notice. Based on the county attorney's representations, Mr. Turley and his defense team relaxed and pushed pause on defense efforts.

Yet the county continued its investigation of Mr. Turley and gave no indication to defense counsel that such investigation into Mr. Turley was still active. Individuals with whom the county investigator had met and interviewed were reaching out to Mr. Turley and reporting to him about the interviews. Several interviewees reported the same tactic used by the investigator: the investigator would tell the person that while he did not believe any individual fact or incident was sufficient evidence of criminal conduct on the part of Mr. Turley, adding all of the conduct together could possibly show a pattern of criminal behavior. One potential witness, interviewed twice by the investigator, revealed that she provided exculpatory evidence.[68]

In response to the information received, Mr. Turley's defense team reached out to the county attorney's office for explanation. They responded that they were engaged in an investigation of Mr. Turley and, while they were uncertain whether they intended to bring any charges, they did have a draft of a potential criminal complaint, which was forwarded to the defense. In an

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[67] *See* Toth, *supra* note 65.

[68] Heidi Toth, *Attorney Argues Recording Violated Turley's Rights*, HERALD EXTRA (July 10, 2013), https://www.heraldextra.com/news/local/attorney-argues-recording-violated-turley-s-rights/article_aeba1434-c42a-588c-a687-3bb69451be80.html.

effort to address the concerns of the investigator and to convince the county attorney to decline bringing a case, the defense and the county agreed to have a "queen for a day" meeting where the county could ask Mr. Turley questions about the various investigative issues with the commitment to not use Mr. Turley's responses against him through a limited immunity agreement. Consequently, Mr. Turley and his defense team met with the investigator in a room inside the county attorney's office. The meeting was largely uneventful for several hours, as Mr. Turley answered questions and gave explanations which appeared to successfully exonerate himself. Halfway through the interview, however, through a slip-up by the investigator, it was revealed that the county attorney's office had been secretly recording the meeting through a hidden video recorder in the room. The recording was also being watched in real-time by other investigators and attorneys in the office. Further, the undisclosed recorder was running during instances where Mr. Turley and his defense counsel requested to be alone in the room in order to have attorney-client privileged discussions. These protected conversations were recorded and observed in real-time in the adjacent office.[69]

Mr. Turley was eventually charged with ten felonies.[70] Several of the felonies were statutorily prohibited, as the statute of limitations had already run. Disturbingly, there were many counts which mirrored allegations made by Mr. Turley's opponents in civil litigation regarding business matters. Many of the counts, even when viewed in the light most favorable to the government, failed to identify any facts showing criminal intent or criminal conduct of Mr. Turley. The defense attorneys pointed out the statute of limitations issues and the lack of facts sufficient to show even reasonable suspicion of a crime, let alone probable cause. The response of the government was, rather than acknowledging and dismissing such counts, that they preferred to let the court decide.

The defense, having been made aware of interviews conducted by the government which resulted in exculpatory evidence, filed multiple motions for the government to disclose such exculpatory evidence to the defendant.[71] Arguments were made to the court to (1) dismiss the case based upon the illegal recording which violated the defendant's constitutional rights, (2)

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[69] *Id.*

[70] *See* Jessica Miller, *Who Punishes a Prosecutor? In Utah, Probably No One*, SALT LAKE TRIB. (Dec. 26, 2017), https://www.sltrib.com/news/courts/2017/06/06/who-punishes-a-prosecutor-in-utah-probably-no-one/.

[71] *See* Toth, *supra* note 68; Kurt Hanson, *Former Provo Councilman Files Suit Against Utah County Attorney's Office*, DAILY HERALD (Feb. 3, 2017), https://www.heraldextra.com/news/local/crime-and-courts/former-provo-councilman-files-suit-against-utah-county-attorneys-office/article_7bef9301-7267-5a4b-989d-8ce502846897.html.

dismiss those counts barred by the statute of limitations, (3) dismiss counts where the government refused to turn over exculpatory evidence, and (4) dismiss the remaining counts based upon the absence of any evidence arising to probable cause that a crime occurred. During lengthy and expensive hearings, the government fought hard to keep all counts. On the issue of the illegal recordings, the government argued harmless mistake. With respect to the interview of the key witness with exculpatory evidence, the government denied the interviews took place and refused to turn over any recordings, notes, or transcript of the interview. The government maintained this position even after the sworn declaration and testimony of the woman who was interviewed.[72]

In ruling on the various issues raised, the court immediately dismissed the counts barred by the statute of limitations—but did so without sanctioning or even admonishing the county attorney for bringing charges for which they had clearly understood were time-barred well before filing the charges. On the issue of the alleged illegal recording, the court found that Mr. Turley's constitutional rights had been violated.[73] The court even opined that the county attorney's office may have violated the criminal statute against illegal wiretapping.[74] However, the court struggled on the issue of the appropriate remedy for the violation.[75] Denying the request to dismiss the case, the court suggested such a result seemed too drastic.[76]

Ultimately, the court did nothing, despite finding that the constitutional rights of the defendant had been violated.[77] On the issue of lying about not having interviewed a key witness, on deleting relevant documents, and on the refusal to turn over other exculpatory evidence, the court avoided having to grapple with appropriate remedies by dismissing the remaining counts for failure of the prosecution to produce sufficient evidence amounting to probable cause that a crime occurred.[78] In the end, all counts were either dismissed or dropped against Mr. Turley.[79] Mr. Turley subsequently filed a

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[72] Additional exculpatory documents were withheld from the defense based upon the fact that the investigator had been using his personal email account to communicate with some potential witnesses and that the investigator had accidentally deleted most of these emails.

[73] Miller, *supra* note 70.

[74] *Id.*

[75] *See id.*

[76] *See id.*

[77] *Id.*

[78] *See* McKenzie Romero, *'Nightmare' for Ex-Provo Councilman Ends as Fraud Charges Dismissed*, KSL (Feb. 4, 2015), https://www.ksl.com/article/33358859/nightmare-for-ex-provo-councilman-ends-as-fraud-charges-dismissed.

[79] *Id.* While the dismissal of the case against Mr. Turley was a tremendous result, the impact of the case was personally devastating to the defendant and his family. Mr. Turley was forced to resign from his political office. He was kicked out of BYU, where he was pursuing his MBA. His wife's health

lawsuit against the investigator and the county attorney's office.[80] The civil case, unable to overcome the significant hurdles of immunity, was eventually dismissed.[81]

III. THE NEED FOR MORE MEANINGFUL CONSEQUENCES

As the above cases illustrate, prosecutorial misconduct and abuse can range from overly aggressive tactics, vindictive decision-making, and efforts to intimidate and to deceive, withholding or illegal gathering of evidence, and outright violations of constitutional protections. Similarly, few will argue with the assertion that the frequency of such abuses and misconduct is increasing in number and egregiousness.[82] A common theme, however, is the struggle judges experience when trying to fashion appropriate remedies for such misconduct or abuse. Even when constitutional violations occur, judges have difficulty in determining an appropriate remedy.

As many others have asserted, the existence of absolute and qualified immunity and the lack of meaningful bar or ethics investigations and discipline have resulted in prosecutors fearing no real consequence for a broad range of misconduct, thus undeterred from engaging in it.[83] In the federal system, the DOJ's Office of Professional Responsibility (OPR) is tasked with investigating alleged ethical violations by prosecutors.[84] Unfortunately, an OPR investigation is rare and kept confidential within the DOJ.[85] Additionally, federal prosecutors are not subject to disciplinary actions by the state bar associations where they practice.[86] Consequently,

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deteriorated during the multi-year battle with the government. His financial stability suffered greatly under the burden of over $300,000 in legal fees and a slowing real estate business. He also suffered debilitating stigma in his church and his community.

[80] Romero, *supra* note 78.

[81] Annie Knox, *Judge Tosses Ex-Provo Councilman's 'Malicious' Prosecution Suit*, KSL (Mar. 20, 2019), https://www.ksl.com/article/46514159/judge-tosses-ex-provo-councilmans-malicious-prosecution-suit.

[82] *See* Malia Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 18–19 (2009) (arguing that misconduct is "more common and more flagrant" than ever before).

[83] *See* Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 144–45 (2016); *see also* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 754–56 (2001).

[84] *Office of Professional Responsibility*, U.S. DEP'T JUST., https://www.justice.gov/opr (last visited Mar. 12, 2020).

[85] Brooke Williams et al., *How the Secretive "Discipline" Process for Federal Prosecutors Buries Misconduct Cases*, INTERCEPT (Oct. 10, 2019), https://theintercept.com/2019/10/10/justice-department-federal-prosecutors-accountability/.

[86] Ralph W. Tarr, *State Bar Disciplinary Rules as Applied to Federal Government Attorneys*, U.S.

AUSAs have an additional level of confidence that any misconduct will rarely be discovered, let alone disciplined.[87] While theoretically possible, criminal cases brought against a prosecutor for outrageous and willful misconduct are virtually nonexistent.[88]

Given the increase in both the amount and seriousness of prosecutorial misconduct, a major overhaul of the protections afforded prosecutors is warranted. Until a prosecutor has a genuine fear of the consequences for misconduct, we will continue to see more and more instances of significant abuse and constitutional violations. The dangerous combination of an environment where success is measured by the number of convictions and a sense of security developed from the absence of meaningful consequences has resulted in an immediate need for reform. The criminal justice system must change in order to protect the integrity of the presumption of innocence[89] and vital constitutional protections[90] afforded those accused of criminal conduct. Until a prosecutor is personally at risk for purposeful misconduct and abuse, he will not be deterred from giving in to the pressures and environment of winning a conviction at all costs. A combination of reforms is required.

First, absolute immunity needs to be eliminated and qualified immunity needs to be narrowed. This would enable a wrongfully charged or convicted individual to have a fair opportunity to expose a prosecutor's misconduct or abuse through a civil suit. Second, federal and state prosecutors need to be subject to discipline by the state bar in which they practice and choose to bring cases. Included in this proposal is the need to expand the rules of professional responsibility to capture the uniqueness of the prosecutor and his role. Third, criminal liability needs to be a real possibility in instances

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DEP'T OF JUST., https://www.justice.gov/olc/opinion/state-bar-disciplinary-rules-applied-federal-government-attorneys (updated July 9, 2014).

[87] There are notable exceptions where courageous judges have bucked the trend and sanctioned or otherwise sought to discipline misconduct. *See, e.g.*, United States v. Shaygan, 661 F. Supp. 2d 1289 (S.D. Fla. 2009) (ruling that a public reprimand would be entered against the United States Attorney's Office and awarding attorney's fees and costs in the amount of $601,795.88 to the defendant).

[88] *See* Brandon Buskey, Opinion, *How to Prosecute Abusive Prosecutors*, N.Y. Times (Nov. 27, 2015), https://www.nytimes.com/2015/11/27/opinion/how-to-prosecute-abusive-prosecutors.html ("Federal law . . . provides a mechanism to prosecute judges and district attorneys as criminals when they willfully deprive people of their civil rights: Title 18, Section 242, of the federal code. . . . [However,] [t]he federal government has not in recent memory pursued a judge under Section 242, and it has only rarely enforced this law against prosecutors.").

[89] Jeff Adachi & Peter Calloway, *One Simple Way to Hold Bad Prosecutors Accountable*, APPEAL (Mar. 21, 2019), https://theappeal.org/prosecutorial-misconduct-jeff-adachi-commentary/.

[90] McKenzie Romero, *Ex-Provo Councilman Sues for 'Malicious Prosecution' in Dismissed Case*, DESERET NEWS (Feb. 5, 2017), https://www.deseret.com/2017/2/5/20605530/ex-provo-councilman-sues-for-malicious-prosecution-in-dismissed-case.

where the misconduct includes (1) knowingly hiding, destroying, or withholding clearly exculpatory evidence or (2) knowingly fabricating or creating false evidence or witness testimony against the defendant. Such prosecutions should be for obstruction of justice and investigated by an outside agency.

IV. CONCLUSION

There is no question that prosecutors serve a vital role in helping to secure community safety and administer justice to those committing crime and for those victimized by such crime. However, the longstanding protections afforded prosecutors and aimed at preserving their "independence of judgment required by his public trust"[91] have created an environment where misconduct and abuse can run rampant without meaningful restraint. In order to sufficiently deter a prosecutor from misconduct—including vindictive decision-making, overly-aggressive tactics, and outright violations of constitutional rights—a prosecutor needs a healthy fear of personal exposure and discipline. Reforming immunity laws, improving the efficacy of ethics and bar discipline measures, and increasing the use of criminal prosecutions of prosecutors who knowingly cheat in order to secure a conviction are reforms which would serve as a meaningful deterrence to prosecutorial abuse and misconduct.

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[91] *See* Imbler v. Pachtman, 424 U.S. 409, 423 (1976).