Wrongful Convictions: Prosecutorial Misconduct and Its Contribution to Miscarriages of Justice*

Richard Kim

Law School of Yeungnam University

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I. Introduction

The term "miscarriages of justice" refers to situations where the criminal justice has failed and produced wrongful convictions. Despite various safeguards such as the presumption of innocence, the high conviction standard to prove a case beyond a reasonable doubt, and an exhaustive appeals process, there are several cases every year where people are

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wrongfully convicted of crimes. In the past few decades legal scholars and administrators in the criminal law field have worked in tandem to identify and correct the causes of such grave mistakes. One of the causes identified is prosecutorial misconduct. Although the term suggest foul play, malicious misconduct is not the only source. The truth is that prosecutors are entrusted with the duty of bringing criminals to justice and there are times when even prosecutors with the highest moral and ethical standards take actions because they have a good-faith belief that the defendant is guilty and make understandable mistakes. Other times there are a few "bad apples" that abuse their position of power to cut corners in fulfilling their duties, believing the ends justify the means. This paper will examine cases of prosecutorial misconduct, identify the causes, and suggest systemic reform to provide safeguards so both good-faith and bad-faith mistakes are curtailed.

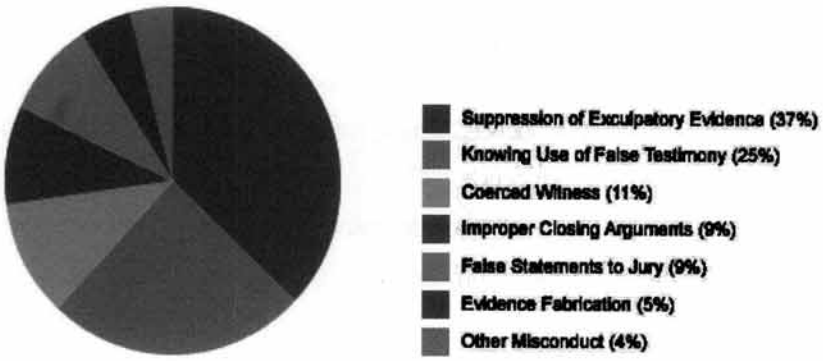
Ⅱ. The Problem of Prosecutorial Misconduct

"[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 whose interest, therefore…is not that [he] shall win a case, but that justice shall be done…. He may prosecute with earnestness and vigor… But, while he may strike hard blows, he is not at liberty to strike foul ones."

This concept of the dual role of the prosecutor as a minister of justice runs contrary to our adversarial system. Prosecutors have wide discretion as to how they fulfill their duties. They decide who becomes the subject of a criminal prosecution and who may be offered a plea bargain. There is little to provide a checks and balances system to limit abuse prosecutorial power. This paper will expose the problems associated with prosecutorial misconduct and the need for drastic reform. Discussion will be based mainly on these reforms.

The issue of wrongful convictions has been referred to as the new civil rights movement. Although the center of debate is not race, the "movement" does have race implications. The main issue is the inadequacy of the criminal justice system to address certain problems that have been brought to light by the string of DNA exonerations accomplished by the Innocence Project. Although eyewitness misidentification is the leading cause of wrongful convictions (75% of wrongful convictions are based on an eye[1] witness misidentification), prosecutorial misconduct is not that far behind.

Prosecutorial Misconduct (a factor in 33 of the first 74 DNA exonerations)



According to the Innocence Project, 33 out of the first 74 exonerations had elements of prosecutorial misconduct.[2] The reason prosecutorial misconduct is so crucial to the issue of the wrongful convictions is the role prosecutors play in the criminal justice system. Prosecutors work closely with police in the investigatory phase. They have prosecutorial discretion with regard to who is prosecuted and who isn't. Prosecutors rely mainly on police investigation to accurately produce a suspect. After the police hand over a

1) Berger v. United States, 295 U.S. 78,88 (1935).

2) *Innocence Project.* http://www.innocenceproject.org/understand/Government-Misconduct.php(lastvisitedMay23,2008).

suspect there is little second-guessing. They have "their man" and it's time to get a conviction. Although most of the landmark misconduct cases contain egregious miscarriages of justice, which would shock even the most politically conservative, most violations are not made by "bad apple" prosecutors. The combination of deficiencies in the system works to provide disincentives to ferreting out the innocent. Among these are tunnel vision, prosecutorial office culture, and the needle-in-a-hay-stack problem.

Ⅲ. Causes of Prosecutorial Misconduct

Tunnel vision refers to the psychological tendency of people to filter information through a biased lens. When a person has a theory, there is a strong tendency to favor evidence, which supports the theory and to quickly disregard disconfirming evidence. The problem is that in a criminal proceeding the theory is that the defendant is guilty. The defendant is presumed guilty by the police officers and prosecutors. There is a strong tendency to ignore exculpatory evidence and focus on facts, which are probative of guilt. Often, prosecutors go after suspects that do not fit the witness description. Witnesses described a clean-shaven perpetrator and the suspect has a full beard. Witnesses have described perpetrators significantly taller or shorter than the suspect. Tunnel vision is largely due to the training lawyers receive in law school. They are taught to support their arguments with as much evidence as possible and to either defeat counter arguments deflect weaknesses in their argument.

Office culture is also another cause of prosecutorial misconduct. A prosecutor's success is judged mainly based on conviction rates. This is how prosecutors retain their jobs and how they are evaluated for promotion. Convictions are celebrated while all other judicial conclusions are considered personal losses. This provides a powerful incentive to obtain convictions. It

is inadequate and incorrect to say that prosecutors respond to this incentive directly by disregarding the liberty interests of defendants for their own personal benefit. With the exception of a few bad apples, prosecutors are normal people and normal people respond to incentives and disincentives whether consciously or unconsciously. Much of the reforms in this paper are centered around providing clear disincentives to prosecutorial misconduct to offset all the incentives for obtaining convictions.

Finally, along with the incentives to obtain convictions coupled with tunnel vision, there is the fact that a case of having a truly innocent defendant is extremely rare. Prosecutors are in a unique position where they are privy to all the facts surrounding a criminal proceeding. Criminal discovery is rather limited and arguably ineffective. Public defenders have a long docket of cases they are required to get through and often times the arraignment is the defendant's first opportunity to consult with an attorney. In a system with inadequate resources to give full discretion to each individual case, the presumption of guilt, no matter how contrary it is to the ideals of our system, is the norm. The fact that innocent defendants are rare is a large contributing factor to tunnel vision, because their good faith belief that the defendant is guilty is reasonable given the circumstances.

Ⅳ. Types of Misconduct

The problem of prosecutorial misconduct has been separated into systemic and episodic cases. Episodic cases are the bad-apple prosecutors that clearly act in bad faith even in the face of clear exculpatory evidence. Although this is a huge problem due to the protective cloak of immunity that most prosecutors enjoy, it isn't the most significant. Although this paper will discuss reforms designed to prevent these recidivist prosecutors most of the reforms focus on targeting systemic problems which lead diligent prosecutors to cross the line and breach their duties as ministers of justice. Both

systemic and episodic problems must be addressed. First, I will discuss reforms designed to catch recidivist prosecutors, then I will address systemic reforms.

Specific forms of misconduct include knowingly using false evidence, attempting to introduce inadmissible evidence, tampering with evidence by altering or hiding it altogether, and failure to disclose exculpatory evidence.

V. Two-Tiered Approach to the Prosecutorial Misconduct Problem

A. Providing More Access to Civil Remedies

A law is only as good as its enforcement. Without adequate deterrents in place, people will make the decisions that are economically sound. Cost-benefit analysis is a basic economic concept. Here if the benefit is a possible conviction and the cost is measure as possibly getting caught and punished then the consistency and magnitude of punishment are key factors in whether a law can be successfully administered. Critics may argue that the imposition of criminal sanctions is too harsh. For the less egregious cases a civil remedy should be offered to those that suffer harm because of a prosecutor's misconduct.

The harm to victims of misconduct is undeniable, yet there are insufficient remedies for victims to receive adequate restitution. Even criminal defendants who are later acquitted suffer harm. Indigent defendants cannot post bail therefore remain in jail while they await trial. The current landscape of the system is inadequate to deal with proper redress because prosecutors operate with impunity because of immunity over most of their actions. The statute through which victims of misconduct obtain a civil remedy is:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia"[3]

This statute was Section 1983 of The Civil Rights Act. The Civil Rights Act was primarily enacted to provide a civil remedy for those whose Post-Civil War amendments were violated. Today it is used to punish government officials that deprive someone of their constitutional rights. The problem is not proving the elements of the statute, but the fact that most civil actions go without redress because prosecutors are shielded by immunity.

Imbler v. Pachtman[4] was the landmark case that granted prosecutors with immunity. The current system provides prosecutors with absolute immunity for acts conducted in their roles as advocates and qualified immunity for actions conducted in an investigatory or administrative capacity. Absolute immunity completely protects prosecutors for even willful and malicious misconduct. Qualified immunity protects prosecutors unless they violate a clearly established law, which a reasonable prosecutor would be aware. Immunity for prosecutors was borrowed from judicial immunity and the same public policy rationale was used in affording prosecutors with this protection. The concern was that a prosecutor's fulfillment of acting as a zealous

3) 42 U.S.C. § 1983 (2000).

4) Imblerv. Pachtman 424 U.S. 409(1976).

advocate of the state would be hindered if she had to conduct her affairs will the possibility of civil actions looming over her head. Although this may make sense generally, absurd results occur when we face the problem of a recidivist prosecutor and Brady violations.

Nels Moss Jr., a well-known St. Louis prosecutor, is a poster-child for the need for reform. During his 33-year career, his conduct was challenged in at least 24 cases.[5] In seven of those cases convictions were reversed or a mistrial was declared. While many of these defendants went back to their cell to receive a fair trial, Moss went back to his office, free to continue his misconduct A judge writing an opinion on a reversa lof one of Moss' convictions stated, "the record discloses a patent effort to deprive a defendant of a fair trial…"[6] Moss was well-known to be an aggressive prosecutor and his tactics were expected by defense counsel. The fact that misconduct is to be expected by some combined with the lack of strong consequences

B. Criminal Sanction as a Deterrent

The most effective deterrent is attaching criminal penalties to prosecutorial misconduct. Egregious acts such as knowingly using false evidence or withholding evidence, which clearly exculpates the defendant, should carry a severe penalty. Not only are the wrongfully convicted deprived of their freedom but have much difficulty adjusting to the "outside" world after having to survive in a world they are ill-prepared to handle. Permanent emotional and psychological harm effectively destroy the lives of most exonerees after a significant period of incarceration. Since prosecutorial misconduct carries such immense potential harm, harsh criminal penalties should arise from destroying someone's life. In a 2006 South Texas Law

5) The Center for Public Integrity, *Harmful Error: Investigating America's Local Prosecutors* 1, Washington, D.C.: The Center for Public Integrity (2003).

6) Id. at 2.

Review article, the author, Shelby Moore, discusses the current in effectiveness of criminal sanctions.[7] The current statute provides criminal sanctions for any government official that under color of authority willfully deprives another's constitutional rights. The problem with this is that it is very difficult to proveintent to deprive someone of constitutional rights.[8] A prosecutor would have to prove that the criminally liable defendant prosecutor "violated a defendant's rights and that he did so knowing that it would result in a deprivation of these rights."[9]

The Federal Obstruction of Justice statute is governed by 18 U.S.C. § 1501 to § 1520. Under the statute:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge…in the discharge of his dut y…or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished…."[10]

The elements of the offense are as follows. The first element is the prosecution must prove that there was a pending judicial proceeding and that the defendant had knowledge of the pending proceeding.

This statute is broad and although there is an intent element it is much easier to prove than § 242. The intent element is to act with a "corrupt purpose"[11] to obstruct aproceeding. Courts have held that the intent element

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7) *Who is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?* 47 S. Tex. L. Rev. 801 (2006).

8) 18 U.S.C. 242 (2000).

9) *Who is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?* 47 S. Tex. L. Rev. 801, 827 (2006).

10) 18 U.S.C. § 1503 (2000).

11) *Who is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?* 47 S. Tex. L. Rev. 801, 837 (2006).

is met if the prosecution can prove the defendant had "knowledge or notice that the actor's 'success… would have likely resulted in an obstruction of justice,…'"[12] This mens rea element is proven if the defendant received notice from the "reasonable foreseeability of the natural and probable consequences of one's acts."[13] Proving the intent element is considerably easier. § 242 requires proof of a specific intent to deprive someone of a constitutional right. An objective standard is much easier to prove versus a subjective standard. Among the acts, which are prohibited by this statute are the altering, concealment, or destruction of evidence. This covers many of the usual Brady violations. There is a need for severe criminal penalties because Brady violations are difficult to discover and a harsh penalty is needed to provide an adequate deterrent.

VI. Harmless Error Doctrine

513 cases across 2,341 jurisdictions judges wrote concurring and dissenting opinions that stated the level of misconduct rose to a sufficient level warranting reversal of a conviction.[14] Thousands of cases have been dismissed due to the application of the "harmless error" doctrine. A reversal of a conviction based on a finding of prosecutorial misconduct must affect substantially effect a defendant's rights. The judge has wide discretion. In addition to the difficulty of uncovering misconduct there is the added hurdle of proving the misconduct rose to a level sufficient to prevent a fair trial. This seems like a peculiar concept. Judges do not make their findings based on a record of what has occurred, but are asked to predict what would have happened had the misconduct not occurred. This requires a judge to delve

12) Id. at 838.

13) Id.

14) *The Center for Public Integrity, Harmful Error: Investigating America's Local Prosecutors* 2, 3, Washington, D.C.: The Center for Public Integrity (2003).

into the mind of the jury. The fact of the matter is no one knows how or why a verdict is returned a certain way. Even jurors themselves might be unaware of the true motivation behind the conclusions they reach. They are only human and we are all susceptible to the pitfalls of misleading evidence. When a prosecutor bends the rules and introduces the nature of a criminal defendant's prior crimes, it is difficult for a juror to disregard that fact and make a truly unbiased finding of guilt. People are used to making those jumps in logic jurors are not supposed to make when following jury instructions.

In order to overturn a judge's application of the harmless error doctrine, the moving party would have a high burden of proof. In only the most glaringly obvious instances of police misconduct are punished.

It is fairly obvious that many prosecutors bend the rules due to the combination of a low probability in getting caught coupled with the petty consequences upon a finding of a sufficiently egregious violation. I propose the courts remove the harmless error doctrine. This suggested reform is admittedly radical and would only be implemented up on a finding that other attempts to provide effective deterrents such as harsher criminal sanctions and more widespread enforcement.

My argument parallels the rationale behind the exclusionary rule as an effective deterrent to police misconduct. The exclusionary rule makes inadmissible any evidence obtained in an illegal fashion. Most commonly these are Fourth Amendment rights violations. The Fourth Amendment provides the right to be free from an unreasonable search or seizure. Often times the results are to let a clearly guilty defendant off the hook due to police misconduct regardless of intent. This may shock the conscience. For example if there is a videotape where the suspect is clearly identifiable showing the perpetration of the crime for which he is being tried, the presiding judge can prevent the jury from ever seeing the tape if the recording was done in an illegal fashion or the tape was recovered illegally. This drastic piece of reform was controversial but deemed necessary to

effectively deter police misconduct.

The situation a police officer faces is similar to that of a prosecutor. An officer has a strong incentive to obtain evidence against criminals they arrest while a prosecutor has a strong incentive to obtain a conviction. Indictment of officers for improper conduct is rare and the severity of the punishment is often paltry when compared to the extent of harm caused by police misconduct. The exclusionary rule takes away the fruits of a tainted investigation. Here the elimination of the harmless error doctrine would accomplish the same goal. As mentioned before, prosecutors are judged based on conviction rates. The reward for an effective prosecution is a conviction. If you take away the conviction for prosecutions that are unjustly conducted, prosecutors will be significantly less likely to illegally bend the rules if they know there is a high probability the fruits of all their hard work will be stripped away from them.

As a matter of public policy the courts should punish any form of misconduct to deter future misconduct. If civil or criminal penalties are inadequate, which seems to be the case currently, a more direct approach is needed.

Ⅶ. Double Jeopardy Attaches After an Appellate Finding of Prosecutorial Misconduct

A 2006 Cardozo Law Review article written by Adam Harris discusses the possibility of attaching double jeopardy after an appellate finding of prosecutorial misconduct.[15] Double jeopardy is a doctrine that prevents a criminal defendant from being tried for the same crime twice on the same set of facts. Adefendant that has been acquitted of the crime or convicted earlier may plead this procedural defense. Normally when there is a finding

15) *Two Constitutional Wrongs Do Not Make a Right: Double Jeopardy and Prosecutorial Misconduct Under the Brady Doctrine.* 28 Cardozo L. Rev. 931 (2006).

of prosecutorial misconduct the conviction is overturned and the prosecution may seek to retry the case. During the time it takes to retry the case the defendant is sent back to jail to await retrial. In the usual case where a criminal defendant has limited resources to procure an adequate defense, this is not always the blessing it seems. Presumably, the defendant receives a fresh star and the prosecution bears the burden of proving their case without the benefits of any battles won during the first case. The defendant on the other hand does not receive a truly fresh start. Retaining a defense is expensive It is common knowledge that, for the most part, the discrepancy between receiving a court-appointed attorney and having private counsel is large. A high premium is placed on good lawyers and they can be the difference between a convictionand acquittal. This is clearly evidenced by the high wages attorneys command. Although in theory everyone has a right to effective representation, few actually receive one when the court must appoint an attorney.

There is much scholarship on the lack of adequate representation with court-appoint public defenders. Public defenders have an incentive to get through their docket of cases as efficiently as possible. The way this is most commonly accomplished is through a plea bargain. Many have said the right to counsel is in practice not much more than the right to have an attorney stand next to you while you plead guilty. Public defenders simply do not have the resources needed to conduct further independent investigation.

In a game where the biggest and best weapon is information, public defenders are at a significant disadvantage. The prosecution has the advantage of being able to coordinate with police investigation that is friendly to their interests. Prosecutors have access to information such as how an investigation was conducted and the specific circumstances under which interrogations are conducted. They have access to information about other possible leads the investigation might have had. Private criminal defense have enough time and resources to conduct independent

investigations and follow up on alternate leads. In short a situation where a criminal defendant uses up his resources in the first trial essentially gets robbed of the ability to receive the best defense at his disposal. A retrial with a public defender is materially different from a retrial with a private attorney.

Along with the unfairness described above is the emotional harm from having to go through another trial. The implication for the wrongfully convicted is great because the emotional distress of enduring a criminal proceeding for a crime he didn't commit puts a great strain on a defendant's psychological health. Many defendants enter into a plea bargain because they want to avoid the stress of a criminal trial and the public embarrassment associated with it.

When a mistrial is declared or a conviction is reversed, double jeopardy does not apply because the conviction never occurred. Double jeopardy should attach upon a reversal of a conviction upon a finding of prosecutorial misconduct. It is logically inconsistent to allow a prosecutor that has been found guilty of misconduct to have the option to try the case again. A prosecutor that is found guilty of misconduct does not suddenly have an epiphany that they have wronged a defendant and should make a concerted effort to provide the defendant with a fairer prosecution the second time around. Many prosecutors take an acquittal or reversal of a conviction as a personal defeat. Most are probably bitter when guilty of misconduct and if they are forced to retry a case have some sort of personal goal in mind of wiping their slate clean of their "defeat". Attaching double jeopardy upon a finding of misconduct would send a clear message to prosecutors. The message would be that prosecutors have one shot at conducting an honest prosecution, and if a conviction is obtained by breaking the rules, then the prosecutor will not be given a second chance.

Ⅷ. Recording Requirements and Full Disclosure of Investigation

A large part of an effective defense is the ability to discredit the prosecution's evidence. Evidence is often times in the form of witness testimony. The prosecution often relies on expert witness testimony to link physical evidence to the defendant. In the U.S. Supreme Court case of Buckley v. itzsimmons[16], an expert witness was retained to match a boot print found at the scene of the crime to the defendant. Rolando Cruz and Alejandro Hernandez were indicted along with Buckley for the highly publicized murder of an eleven-year-oldgirl. Several experts, including those from the county and state crimel absand experts from the Kansas Bureau of Identification were unable to identify Buckley as th source of the boot print. Despite the inability of publicly retained experts to match the print, prosecutors went shopping for an expert witness that would be willing to test if in accordance with the prosecution's theory. A detective that resigned because he believed the defendants were wrongfully charged described the process by which the prosecution came about retaining Louise Robbins as an expert witness.

"The first lab guy says it's not the boot…. We don't like that answer, so there's no paper [report]. We go to a second guy who used to do our lab. He says yes. So we write a report on Mr. Yes. Then Louise Robbins arrives. This is the boot, she says. That'll be $10,000. So now we have evidence."[17] The jury only sees the report by the expert witness. The defense is not privy to the circumstances surrounding the unsuccessful attempts by the prosecution to procure a witness. The fact that the

16) Buckley v. Fitzsimmons, 509 U.S. 259(1993).

17) *Prosecutors, Ethics, and Expert Witnesses.* 76 Fordham L. Rev. 1493, 1496 (2007).

prosecution did not record the failed attempts is a material fact, which goes to the credibility of the expert witness. Surely, in the Buckley case, there would be much reasonable doubt case upon the expert witness given the circumstances under which his services were retained. Rolando Cruz and Alejandro Hernandez spent more than ten years on death row before they were exonerated by DNA evidence.

Recording the process by which an investigation is conducted would provide a more level playing field and afford the criminal defendant an opportunity to use those facts to cast reasonable doubt upon a prosecution's witness.

It is understandable that the prosecution not be required to "play with their cards face up". A prosecutor's notes should be protected during the course of a trial the same way an attorney's notes are protected by the work-product doctrine. The work-product doctrine protects tangible material obtained in preparation for trial from discovery.

In addition to better records another reform should be to make protected material subject to full disclosure upon a conviction to ensure an honest prosecution is conducted. Prosecutors are much more likely to conduct good-faith investigations lest they jeopardize the conviction if they know their actions are subject to review.

Ⅸ. Independent Review Board

The effectiveness of many of the reforms is contingent upon the creation of an independent review board. Currently, prosecutors police themselves. A prosecutor reviews his own work or that of another prosecutor of equal rank within the same office. This is inherently unfair. Post-conviction motions should not be reviewed by the same group of people that were responsible for putting the defendant behind bars. It is well documented that prosecutors

are unwilling to accept the possibility that they have made a mistake and it has cost someone their freedom.

There have been many cases where the true perpetrator of a crime has stepped forward and confessed to committing a crime for which someone was wrongfully convicted. Often, prosecutors are reluctant to believe these types of confessions. They believe the person giving the confession has ulterior motives, such as helping out another criminal by taking the blame because the additional sentence is negligible in the face of the crime he is currently caught for. Despite the fact that prosecutors often rely on the testimony of jailhouse snitches to build a case against a criminal defendant, prosecutors are very reluctant to believe the "snitch" when they are on the other side of the field.

The motive to lie is much stronger in the case of a jailhouse snitch in comparison to a true perpetrator's confession. When a true perpetrator confesses he does not have an expectation of putting himself in a better position, but when a jailhouse snitch offers testimony it is usually accompanied by a deal from the prosecutor in the form of lighter sentencing. Even in the face of virtually incontrovertible DNA evidence exculpating the defendant, prosecutors are reluctant to entertain the conclusion that the person they worked hard to put behind bars is actually innocent. During interviews of prosecutors asked to comment upon whether they made a mistake, in light of an exoneration, most have the same story. "I didn't do anything wrong." Where is the sense in allowing prosecutors that are so reluctant to admit they made a mistake in reviewing their own work.

Another problem is the judges that rule on the post-conviction motions. As evidenced by the harmless error doctrine, judges have wide discretion in finding a prosecutor guilty of misconduct. Most judges were former prosecutors and it is well known that many of them are slanted toward the prosecution. In many other areas of the law it is widely recognized that when there is a motive or high likelihood for bias, there is a need for a disinterested review board.

Some have suggested the creation of internal divisions within the District Attorney's Office assigned to review post-conviction claims. This is a necessary reform. Current procedural safeguards and punishment for misconduct is grossly inadequate. Clearly, the law has failed in deterring prosecutorial misconduct because prosecutors are, in effect, not accountable to anyone. Even when there are documented instances of seemingly egregious misconduct, prosecutors rarely get punished. In fact it is just the opposite. It is similar to the performance enhancing drug situation in baseball. It was common knowledge that many baseball players engaged in taking performance-enhancing drugs. Although drug testing has been around for a long time, enforcement was a huge problem. Drug companies were creating drugs designed to avoid detection by current drug testing procedures. It was only until management in baseball decided to step in and crack down on drug use that the true gravity of the problem was brought to the public's attention. The criminal justice system is much the same way. It was not too long ago that many people grossly overestimated the efficacy of our criminal justice system. The error rate is much higher than the common man would believe.

X. The Need for Education

Widespread reform is unlikely unless the public can be made aware of the true nature and extent of the problem of wrongful convictions. Public awareness about the wrongful convictions movement itself must be raised. The problem is that often the victims of the system do not have a voice or an audience that would readily accept them. Most people sitting in the comfort of their homes don't think that they could be wrongfully convicted.

It was not long ago that police misconduct was rampant. The "Chicago treatment" was how insiders in the system referred to the police brutality

that occurred in Chicago precincts when obtaining a confession. Illegal beatings were common. It was not until the explosive Rodney King case that the public became aware of the extent of police brutality. Police misconduct mainly affects the poor in the worst ways. It is much easier to abuse those that do not have a voice. It is common knowledge within that socio-economic class that police misconduct is a common occurrence. Knowledge about wrongful convictions would slowly begin turning the reform wheels.

Prosecutorial misconduct is very similar. Many prosecutors themselves are ignorant to the gravity of the problem of wrongful convictions. As mentioned earlier most of the cases of prosecutorial misconduct are not willful or malicious. If better education for these prosecutors were provided before they began working in their respective offices, awareness would be raised as to the possible dangers in overzealous advocacy. Prosecutors might think twice before bending their rules if they are better educated.

XI. Conclusion

Prosecutors are supposed to be ministers of justice. The idea is a pleasant one, but not a realistic one given the way the system is designed. The adversarial process in and of itself is counterintuitive to the minister of justice principle. It is unrealistic to give such strong incentives to obtain convictions and then expect this group of people to act in the interest of justice. Prosecutors are not morally reprehensible people. On the contrary many prosecutors believe in good faith they are doing justice by putting the guilty behind bars. They are protecting the public from future harm. Prosecutors are human beings. Human beings respond to incentives. The prosecutors that do stand up to the misconduct of their fellow colleagues and peers do not get a medal for fulfilling their duties. They often get fired for

not being a "team player". Further evidence of this is that most prosecutors that disagree with the practices of their office resign. Large sacrifices are often required when blowing the whistle on prosecutorial misconduct.

This is why there is a need for widespread reform. Stronger disincentives to misconduct must be put in place as a deterrent and the fruits of misconduct must be taken away if the system expects significant improvement. Stronger criminal sanctions are needed along with access to civil remedies for victims whose lives are destroyed by spending years in incarceration subject to the worst conditions imaginable in this country. Education in the form of training of new, incoming prosecutors, and the institution of more wrongful convictions classes are needed. People in a position to effectuate change need to be made aware the gravity of the situation. The people that have the most accurate information about the extent of the problem are the victims and the system actors that profit from the status quo.

Most prosecutors will be reluctant to support reform. Their job in obtaining convictions becomes harder and the possibility that they might be held accountable for their actions through criminal sanctions is a scary prospect. Someone else needs to step in and institute reforms. Some of the reforms suggested may seem radical, but some of the most effective safeguards in place today were viewed by many as radical for their times. The bottom line is that the reforms make sense. They would lower the frequency of instances of prosecutorial misconduct, but at what cost. The cost is letting the guilty free to continue harming the public. Most people are strongly opposed to that because they are much more likely to be a victim of a crime than a victim of the system. Worse is that the people that have the power to change things are virtually immune to the dangers of prosecutorial misconduct. They can afford excellent criminal defense teams.

The statistics are only a tip of the iceberg. Although DNA exonerations have proven that over 200 people were wrongfully convicted, the actual number of those that have been wrongfully convicted is substantially higher.

The exonerations were for crimes that involved capital crimes such as rape and murder for which there was testable DNA evidence. Most crimes do not have the luxury of using DNA testing simply because there is no DNA evidence at the scene of a crime. An even smaller percentage of people were lucky to have the DNA evidence in their case preserved not through ordinary practices of the police in holding onto the evidence, but a stroke of good fortune. "Katherine Goldwasser, a law professor at Washington University in St. Louis who served as a prosecutor in Chicago before joining academia, suggested that misconduct often occurs out of sight, especially in cases that never go to trial."[18] Roughly 95% of all criminal cases end in some sort of plea bargain so the contents of the case are shielded from the public. The need for reform is staggering and the wrongful convictions movement is only in its infant stage of development. Hopefully, increased awareness and participation will ensure that miscarriages of justice become a distant memory in this country's history.

18) *The Center for Public Integrity, Harmful Error: Investigating America's Local Prosecutors* 4, Washington, D.C.: The Center for Public Integrity (2003).

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[국문초록]

잘못된 판결(오심): 검찰의 직권남용과 그것의 오심에 대한 영향

리차드 김
영남대학교 법학전문대학원

오심 (miscarriage of justice)' 이라는 용어는 형사 사법 시스템 상의 문제로 인하여 부당하게 유죄 판결이 내려진 경우를 일컫는 말이다. 무죄 추정의 원칙 (the presumption of innocence), '합리적인 의심의 여지를 넘어서는' (beyond a reasonable doubt) 수준의 검찰의 입증 책임, 여러 단계에 걸친 항소와 상고 절차 (appeals process) 등, 오심을 방지하기 위한 각종 보호 장치가 있음에도 불구하고 매년 여러 건의 오심이 발생하고 있는 것이 현실이다. 학계와 사법계는 상호 공조 하에 수십 년 동안 이러한 중대한 실수의 원인을 밝혀내고 이를 방지하기 위한 해결책을 제시하기 위해 노력해 왔다. 밝혀진 원인 중 한 가지는 형사 소추 상의 부정 행위(prosecutorial misconduct)이다. 부정 행위라는 용어가 의도적이라는 느낌을 줄 수도 있지만, 이는 고의적 부정 행위에만 한정되는 것은 아니다. 문제는, 검찰이 범법자들에게 법의 심판을 내린다는 국민으로부터 위임 받은 임무를 수행함에 있어, 높은 도덕과 윤리 수준을 갖춘 검사들조차도 때로는 실수를 범할 수 있다는 점이다. 피고가 유죄라는 선의의 믿음으로 인해 이해할 수 있는 수준의 실수(understandable mistakes)를 범하는 경우가 바로 그것이다. 또 다른 경우로는 몇몇 부정한 법조인들이 목적이 수단을 정당화한다는 잘못된 믿음 하에 우월적 지위를 남용하여 안이하게 일을 처리하는 경우이다. 본 논문에서는 형사 소추 상의 부정 행위에 관한 몇 가지 실례를 살펴보고 그 원인을 밝힘과 함께, 사법 시스템 개혁을 통해 선의(good faith)의 부정 행위와 악의(bad faith)의 부정 행위 모두를 방지할 수 있는 보호 장치를 마련하는 방법을 제안하고자 한다.

1~2절에서는 형사 소추 상의 부정 행위의 문제점과 그 원인을 밝히고 설명할 것이다. 3절에서는 부정 행위의 종류를 집중적으로 다룰 것이다. 4절에서는 형사 소추 상의 부정 행위를 해결하기 위한 2단계 접근법, 즉 민사 소송을 통한 피해자 구제와 부정한 검사들에 대한 형사적 제재에 대해 논할 것이다. 5~7절에서는 형사 소추 상의 부정 행위를 악화시키는 시스템 상의 문제를 다룰 것이다. 8~9절에서는 부정 행위의 결과로 야기되는 부당한 유죄 판결을 해결하기 위한 두 가지 최종 제안, 즉 검찰을 감독하는 독립적인 재심리 기관(review board)의 필요성과 공무원들의 부정 행위에 대한 대국민 교육의 필요성을 논할 것이다.