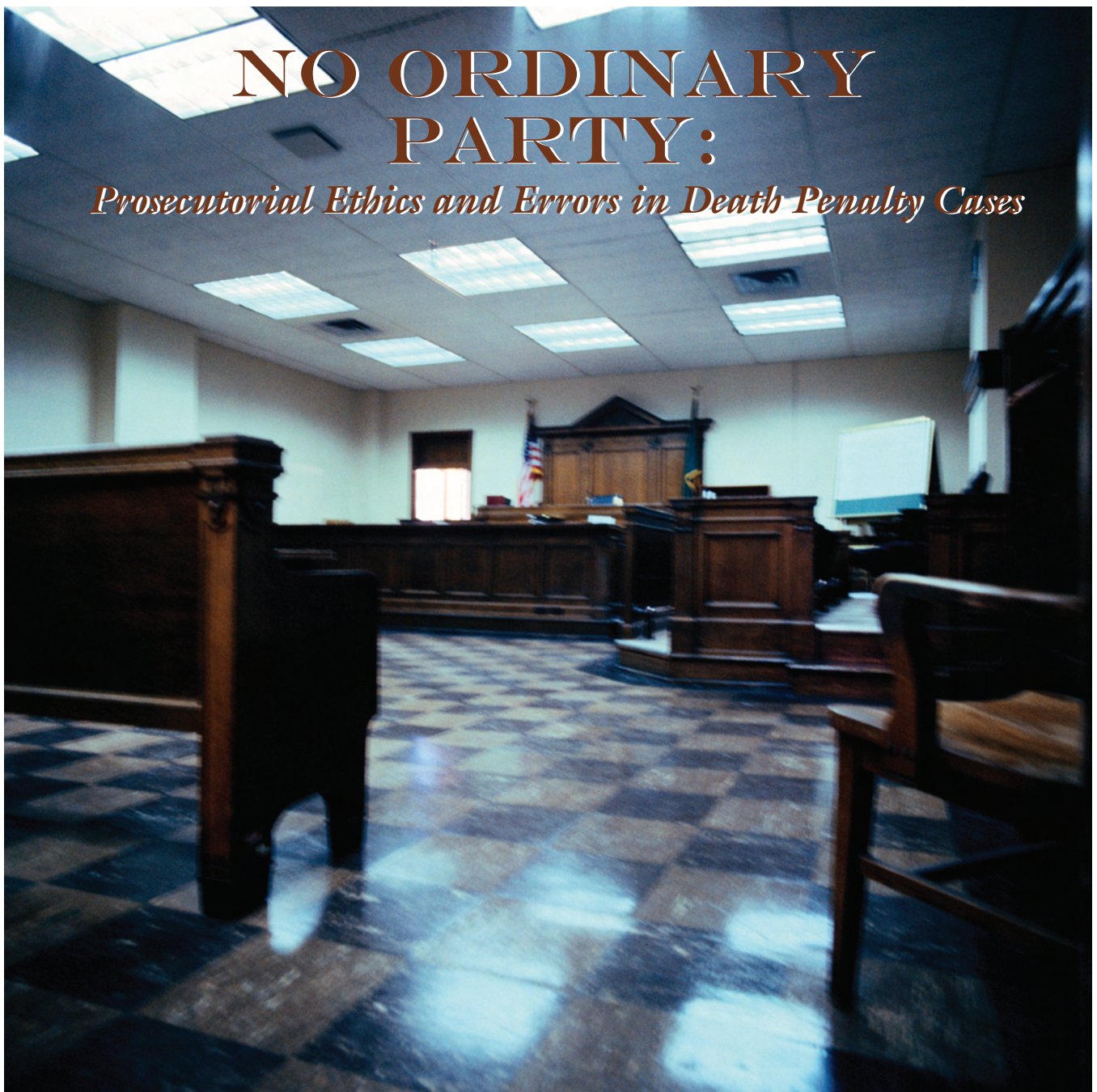


# NO ORDINARY PARTY:

## *Prosecutorial Ethics and Errors in Death Penalty Cases*



*Ethical lapses by prosecutors can have a dramatic impact on the outcome of their cases, and also affect the way the public views the integrity of our legal system. Two death penalty cases in the news last year illustrate recurring ethical problems faced in the courts.*

**BY KIM WHERRY  
TORYANSKI**

In 2006, the press reported major instances of misconduct by government lawyers in death penalty cases. One series of reports concerned a highly publicized federal case that was in the sentencing stage.<sup>45</sup> Another report concerned a case that is now before the California Supreme Court on habeas review and involves a 1982 capital murder conviction that state prosecutors won in Los Angeles.<sup>45</sup>

Readers may wonder how some of the most experienced, seasoned lawyers, skilled enough to be assigned a role in a death penalty prosecution, could inadvertently, ignorantly, or callously stumble into so much trouble and compromise or taint the integrity of their cases. While prosecutors' offices often invest significant resources to bring capital cases to trial, prosecutors can undermine their costly, but necessary, efforts by paying insufficient attention to

their ethical obligations. This article discusses the government's important responsibilities in the context of these news-making capital cases, analyzes federal case precedent reminding prosecutors that their highest obligation is to the rule of law—concentrating on principle and process instead of the person—and reviews the American Bar Association's specific ABA Model Rule of Professional Conduct that addresses prosecutors' special ethical obligations.

### The Special Ethical Obligations of a Prosecutor and ABA Model Rule 3.8

The U.S. Supreme Court has long observed that a prosecutor's role is unique. The guiding principle for ethical prosecutorial behavior emanates from a case that was heard before World War II: *Berger v. United States*.<sup>46</sup> Writing for the Court, Justice George Sutherland emphasized that a prosecutor's role is unique because that individual is—

... the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. 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, nor 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.

Justice Sutherland's call in 1935 for reasonableness and restraint is echoed in the ABA Model Rules of Professional Conduct, which contain a special provision regarding the ethical obligations of a prosecutor. The provision, which is printed below, goes above and beyond what is required of all lawyers.

#### *ABA Model Rule 3.8: Special Responsibilities of a Prosecutor*

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with

sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - (1) the information sought is not protected from disclosure by any applicable privilege;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

The commentary to Model Rule 3.8 characterizes a prosecutor as having responsibilities of a "minister of justice and not simply that of an advocate."<sup>46</sup> But at least one legal scholar has noted that the existing provisions of Rule 3.8 do not adequately cover the full range of troubling prosecutorial conduct.<sup>46</sup>

Rule 3.8 is silent regarding expectations or manner of decorum between the prosecutor and witnesses expected to testify in their cases; nor does the rule define behavior that is improper or inappropriate. Even though ABA Model Rule 8.4(c) states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 8.4(d) further prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice, the commentary indicates that matters relating to the personal morality of an attorney would be of concern if there was a connection to fitness for the practice of law or if the attorney's conduct indicates an "indifference to legal obligation."<sup>46</sup> However, where those relationship lines are drawn, in terms of manipulating witness testimony or influencing witness behavior seems to be unclear to some government lawyers who have been assigned a role in securing a sentence of death.

### Most Important: The Integrity of the Criminal Justice System in America

### ***United States v. Moussaoui***<sup>47</sup>

Covered widely in the media this year was the sentencing trial of Zacarias Moussaoui in the Eastern District of Virginia. Moussaoui pled guilty to the charge of conspiring with terrorists to fly airplanes into U.S. buildings. At his sentencing, the U.S. government sought the death penalty, but the government's case erupted into an ethics tailspin when the lead prosecutor became aware of and disclosed to U.S. District Judge Leonie Brinkema that one of the lawyers preparing the government's case had committed misconduct by coaching witnesses who were expected to testify during the sentencing phase.

The offender, an attorney with the Transportation Safety Administration (TSA), had directly violated Judge Brinkema's pretrial order barring witnesses from exposure to opening statements and trial testimony. Approximately four days into the sentencing trial, the TSA attorney had been caught relaying information to seven upcoming witnesses from her agency; the information included an e-mailed transcript of the proceedings from the first day of the trial. In addition to the transcript, the TSA attorney also e-mailed to the witnesses commentary about the earlier witness' testimony and suggestions regarding the kind of testimony that was needed to enhance or bolster the government's case for the death penalty.<sup>47a</sup>

The TSA attorney's misdeeds were caught by members of the prosecution team, not by the defense. The lead prosecutors came forward and alerted the trial judge and defense counsel that, much to their dismay, a serious problem had arisen. Prosecutors also sent a separate letter to defense counsel, providing some details of the TSA lawyer's improper communications. In their letter to the judge, the assistant U.S. attorneys admitted that they found the TSA lawyer's conduct "reprehensible," stating that they "frankly cannot fathom why she engaged in such conduct. As soon as we learned of her conduct, we contacted her supervisors and engaged in an investigation..." The prosecutors also reported that the TSA lawyer had been removed from the case.

Judge Brinkema's forceful response was instructive to all prosecutors and litigation practitioners. The judge informed jurors that a TSA attorney had "egregiously breached" her pretrial sequestration order prohibiting witnesses from hearing testimony in advance. The judge temporarily suspended the trial in order to hold a special hearing to determine whether the prospective witnesses had been tainted by the TSA lawyer's improper coaching. Outside the presence of the jury, the judge told lawyers that the rule against witnesses hearing testimony in advance is an important protection of the truth-seeking process. She rebuked the prosecution and noted that it was the government's second significant error affecting the constitutional rights of this defendant and "more importantly the integrity of the criminal justice system of the United States in the context of a death case." Reflecting on her experience covering all her years on the bench, the judge said that she had never seen such an egregious violation of a rule related to witnesses.<sup>47b</sup>

As a consequence of this significant error, the judge

initially issued an order prohibiting the government from introducing evidence related to aviation, including witness testimony and exhibits. That order was later reconsidered, and the judge allowed the government to call untainted aviation witnesses and to otherwise produce evidence that had not been tainted by the TSA lawyer. The trial resumed several days later, and the jury eventually returned a verdict of life imprisonment for Moussaoui—they did not sentence him to death.

### ***In re Miranda***

Making news in 2006 on the opposite side of the country is a capital murder conviction under habeas review by the California Supreme Court. The appeal alleges errors that the prosecution had made at the sentencing phase of a trial; the errors occurred as a result of the government's presentation of unreliable or untrue witness testimony. The state's problems were compounded by the government's concealment of a handwritten letter containing contradictory facts that could refute the testimony of the government's pivotal witness. But problems in that case do not end there. In addition to the hidden letter, the media reported new information that may propel the defense to also challenge the fairness of the guilt phase of the trial. It is now known—and apparently admitted by members of the prosecutor's office—that the lead prosecutor had a secret, three-year romantic relationship with one of the key trial witnesses—the only "eyewitness" to have seen the defendant at the murder scene at the time of the crime.<sup>47c</sup>

In 1982, the appellant, Adam Miranda, had been convicted of murdering a convenience store clerk during a robbery. To obtain the death penalty, prosecutors alleged a "special circumstance": that Miranda had committed another murder—he had stabbed a drug dealer to death over a \$10 dispute—two weeks prior to killing the store clerk in 1980. Prosecutors made this allegation, even though a charge against Miranda for the drug dealer's death had previously been dismissed after a preliminary hearing because of lack of evidence. During the penalty phase of the trial, the only prosecution witness who could testify about the stabbing death of the drug dealer was Miranda's alleged accomplice, Joseph Saucedo. Saucedo told the jury that Miranda had killed the drug dealer, and Miranda was convicted and sentenced to death.<sup>47d</sup>

However, earlier, Saucedo had given a completely different account of the killing to a jail inmate, Larry Montez. Saucedo told Montez that he, not Miranda, had stabbed the drug dealer, and Montez wrote a letter containing the information that Saucedo had given him. Montez wrote that Saucedo told him that he had stabbed the victim, threw the knife into the Los Angeles River, and arranged for his girlfriend to tell police that he had been with her at a movie. One of the jailers gave Montez's handwritten letter to a Los Angeles police detective, who forwarded the letter to prosecutors.

Once prosecutors received Montez's letter, they took action, gathering statements from other inmates who corroborated the letter and implicated Saucedo in the drug dealer's death. Miranda's appellate lawyers assert that the

government never disclosed Montez's letter to Miranda's trial lawyers, never disclosed the names of the other inmates corroborating Saucedo's jailhouse account, and never provided statements from the other inmates who had confirmed Saucedo's admission and corroborated Montez's statements.<sup>48<sup>12</sup></sup>

The letter finally came to light 18 years after Miranda had been sent to death row, when Miranda's appellate attorneys discovered its existence. Now, in his fifth habeas appeal, Miranda argues that this letter from Montez, which had been hidden during the trial, had the potential of being used by the defense to discredit Saucedo's trial testimony and would have given the jury the requisite doubt needed to sentence Miranda to life without parole, instead of death.

The media spotlight on Miranda's capital murder conviction continues to revolve around nondisclosure of relevant evidence. This time, it is alleged that the lead prosecutor had an ongoing intimate relationship with a key trial witness, and this information, like the Montez letter, had been concealed by the prosecutor's office for a long time. The key witness, a stripper, was the only trial witness who could place the appellant at the crime scene, a convenience store, near the time of the murder. The stripper testified that she was coming home from work one night in 1980 and happened upon the convenience store where the clerk was murdered. She said she recognized Miranda, her former junior high school classmate, who was leaving the store at the time of the crime with a gun in his hand.

Miranda's lawyers are currently conducting an investigation in order to determine when the intimacy between the prosecutor and the witness began in relation to the trial or post-conviction proceedings. Already, it is apparently undisputed that their relationship existed and that the witness bore the prosecutor's child in the 1980s. Because their investigation is still under way, it is too early to tell whether the appellant's counsel will move to amend the habeas petition. Reportedly, Miranda's lawyers are currently investigating other issues that have the potential to overturn the decision, such as witness tampering and undue influence resulting from the relationship between the prosecutor and the key witness. Commentators in the media have speculated that the revelation of this affair may have the potential of bringing down the death penalty conviction.

#### **A Prosecutor's Duty: More than Disclosure**

In Adam Miranda's case, the California prosecutors' misconduct—their influence over witnesses and failure to disclose the inmate's jailhouse letter—bears certain similarities to the prosecution's influence with witnesses in a first-degree murder conviction overturned by the Ninth Circuit in 2001. In *Commonwealth of Northern Mariana Islands v. Bowie*,<sup>48<sup>13</sup></sup> prosecutors had also obtained a potentially exculpatory jailhouse letter that indicated that a co-defendant had committed the murder in question. In that case, however, prosecutors had turned the letter over to the defense before the trial commenced. Nevertheless, the case presented serious constitutional flaws because the prosecutors had done absolutely nothing to investigate or

explore the veracity of the jailhouse letter after obtaining it. To make matters worse, at trial the prosecution used a cooperating accomplice witness who conspired to testify falsely against the appellant. Also highly problematic was the manner in which the prosecutor had discredited defense attempts to demonstrate that the jailhouse letter was authentic and exculpatory.

The Ninth Circuit's 2001 opinion should be significant to criminal law practitioners, because it was authored by Hon. Steven Trott, a judge who speaks with great authority on the topic of prosecutorial ethics. Judge Trott has a distinguished background as a prosecutor, having previously served in Washington, D.C., as associate attorney general, the third highest position in the U.S. Justice Department, and as a federal prosecutor in the Southern District of California. Judge Trott and the Ninth Circuit unanimously condemned the Mariana Islands prosecutors' lack of initiative to guard against violations of Bowie's due process rights caused by false testimony and their failure to collect evidence that could exonerate him. In overturning Bowie's murder conviction, the Ninth Circuit recited an impressive compilation of U.S. Supreme Court and circuit court precedent relevant to a prosecutor's duties.

#### **Botched Murder Investigation in the Northern Mariana Islands**

The Northern Mariana Islands are a U.S. territory located in the Pacific Ocean south of Japan and far to the west of the state of Hawaii. In this distant location, two Filipinos, Elaudio Laude and his friend Nilo Rivera, were driving drunk on a November night in 1992 and narrowly avoided an accident with a car driven by two other drunk men, Joseph Bowie and Efrain Reyes. The four drunk men became embroiled in a dispute, and Bowie and Efrain, pretending to be police officers, tricked the drunken Rivera and Laude to go with them to the home of Efrain's brother, Mario Reyes. Once in the house, Rivera and Laude were savagely beaten by an array of Chamorros, natives of the Northern Marianas, including the Reyes brothers and Bowie's friends. The attackers then bound their victims' wrists and deposited them in the trunk of Laude's car. After drinking more beer and talking about how to kill their captives, two of the assailants, Lucas Manglona and Bruce Lee Manglona, drove the car from the area, followed closely by Bowie, who was driving a van owned by a local employer. Mario Reyes was with Bowie in the van. Rivera somehow escaped, but Laude was killed. His mangled and dead body was found the next morning along the side of a road, and his abandoned and burned car was recovered at another location.

The local police arrested six individuals believed to be involved in the abduction and murder, including the appellant Joseph Bowie, Efrain and Mario Reyes, John Villagomez, Bruce Lee Manglona, and Lucas Manglona. As the case approached trial, most of the perpetrators and accomplices received favorable plea agreements in exchange for promising their full cooperation and truthful testimony against Bowie and Mario Reyes.

At the jail, shortly after Mario Reyes' arrest, a sergeant

who routinely checked on prisoners saw Mario in his cell, holding a piece of yellow writing paper in his hand. When Mario realized the sergeant was watching him, the prisoner crumpled the paper and put it in the trash. The sergeant eventually retrieved the paper and turned it over to one of the chief investigators in the homicide investigation. The sergeant had not seen Mario writing the letter, nor had he seen Mario receiving it from another person. The letter, which was unsigned, read precisely as follows:

Hey brod I want you to help me please for this problem that were facing right now because if they know that Im the one that did this theyre gonna put me in jail for life. I tried this before. Brah this Is what we gonna do listen carefully okay if we go to court on Thursday and they ask us questions how the murder happens and who kill the philipino just say J.J. because i already talk to John and Brasslley before I was arrested but anyway don't worry about Lucas because I talk to Lucas that don't tell the detectives that Im the one that did this things.  
You know what brah, dont worry about this case because well win this just imagine four against one. I even lied to my lawyer about the incedent.

The chief investigator took the letter to the local island prosecutor, Assistant Attorney General Ron Hammett, who told the chief investigator to do nothing with the letter—to just keep it until the prosecution needed it. The chief investigator did as instructed. The prosecution never investigated the source of the letter; none of the cooperating co-defendants were asked anything about the letter; and Mario was never confronted about a possible frame-up of appellant Bowie or about a cover-up in favor of Mario.

The letter was eventually turned over to the defense before trial. Bowie and Mario Reyes were tried jointly, and the chief investigator who had reported the letter to the prosecution was called as a witness. He testified that Efrain Reyes was Mario's brother; that the brothers were both in jail on Nov. 17, 1992, the day the letter was found; and that both the deceased and Rivera were Filipino. The chief investigator also testified that his department had intentionally not conducted an investigation as to who wrote the letter; that the letter had not been submitted to a handwriting expert for analysis; that no one outside the focus of the investigation had been consulted about the letter; and that no other experts had been consulted to determine the authorship. The chief investigator opined that Mario Reyes had been involved in the case like the others but decided to put the blame on Bowie. The witness also testified that, once the letter was turned over to the attorney general's office, the decision regarding what to do with it remained there.

Four cooperating co-defendants testified against Bowie, but much of the prosecution's other evidence failed to corroborate their stories. Bowie's attorney introduced the jailhouse letter and fought against Mario Reyes' attempt to establish that he was not the author. Mario's attorney tried to introduce handwriting evidence showing that Mario had

not written the letter but the government objected, notwithstanding the prosecution's lack of handwriting analysis or expert opinion. The defense counsel had no handwriting analysis either, calculating that the inference already weighed heavily in his favor that Mario had written the letter. The trial judge recognized that the letter suggested possible perjured testimony by accomplices and questioned the prosecutor about the possibility. During closing argument, the prosecutor insinuated that Bowie had written the letter. Bowie's defense efforts failed, and Bowie was convicted of first-degree murder, as charged.

### **Nonwaivable Due Process Obligations of the Prosecutor**

On appeal, Joseph Bowie asserted that the government had deprived him of his liberty without due process of law by its inexcusable lack of attention to and investigation of the jailhouse letter. The Ninth Circuit agreed that the prosecutor's lack of diligence resulted in a profound miscarriage of justice. The court determined that the prosecutor's first error had been its failure to conduct a prompt pretrial investigation of the integrity of the government's evidence before the witnesses were called to the stand. At the appeal, the government urged that the error could be cured by remanding the case to the trial court to conduct an evidentiary hearing regarding the extent of the taint. The Ninth Circuit rejected that argument, saying that a "tardy evidentiary hearing after the fact, such as might occur in a post-conviction proceeding" could not satisfy the constitutional requirement. The court reasoned that the prosecution had had leverage before trial to get to the truth with its witnesses, and afterward it was likely that the Fifth Amendment would shield witnesses from the inquiry the prosecution wished to launch. As a result of the government's actions that committed its witnesses under oath to a certain story, a subsequent admission of "untruthfulness might well unveil a crime."

The government's second error occurred at trial, when the prosecution objected to Mario's attorney's efforts to introduce handwriting evidence to establish that Mario had not written the letter. The attorney general's representative blocked evidence on a crucial part of the issue that the government now says it wants to examine. Overall, the record established "bad faith" on the part of the representative of the Mariana Islands attorney general's office prior to and during the trial—that is, a knowing violation of its ethical obligations.

The attorney general's office argued in vain that Bowie had waived his right to appeal based on errors that had occurred at trial, errors that included the appellant's failure to obtain and introduce his own handwriting analysis. The Ninth Circuit disagreed and held the prosecution had a nonwaivable duty to protect the trial process against fraud. The court ruled that even though a person accused of a crime has certain constitutional rights that can be waived or forfeited, an individual cannot waive the "freestanding ethical and constitutional obligation of the prosecutor as a representative of the government to protect the integrity of the court and the criminal justice system." As the ruling related to Bowie, the government "shirked this duty."

Bowie's conviction was reversed on grounds much more serious than a trial error; the conviction was overturned because of the prosecutor's fatal error: failure to ensure the defendant's due process rights—an error that “contaminated everything that followed.”

### **A Prosecutor's Knowing Use of False Witness Testimony**

The problems faced by the government in Bowie's trial were the direct result of the prosecutor's failure to protect the defendant's constitutional rights: to guard against improbity in the trial process, a failure that rendered the trial itself patently unfair as far as due process was concerned. Without taking any preventive measures, the prosecution saw fit “to call to the stand witnesses whom it had a clear reason to believe may have conspired to lie under oath.” The manner in which the trial unfolded left the court “with the definite conviction that the process itself lacked fundamental fairness and delivered a palpably unreliable result.” In reversing Bowie's murder conviction, the Ninth Circuit sought not to punish society for the misdeeds of the prosecutor, but to vindicate the rule of law—“principle and process instead of person.”

The Ninth Circuit's analysis of the prosecutor's unethical actions related the case brought in the Commonwealth of the Northern Mariana Islands to a case in Texas, where the prosecutor had acted improperly when, on direct examination, he had knowingly allowed a witness to create a false impression of his disputed relationship with the defendant's murdered wife. The defendant was convicted of capital murder, but the conviction was overturned by the U.S. Supreme Court in *Alcorta v. Texas*.<sup>1450</sup> Because the prosecutor had known before trial that his witness had engaged in sex with the defendant's wife reportedly five or six times, his testimony, if true, would have corroborated the defendant's reason for stabbing and killing his wife and may have supported Alcorta's bid for a manslaughter conviction, rather than the charge of premeditated first-degree murder.

The Texas prosecutor had instructed the witness not to volunteer any information about his sexual history with the decedent and then sat quietly by while his witness lied under oath, claiming that his relationship with the defendant's wife had been just a “casual friendship.” Influenced by the false testimony, the jurors rejected Alcorta's bid for a manslaughter conviction and found him guilty of capital murder. The Supreme Court held that the false impression that the state had left with the jury violated the defendant's right to due process; therefore, the Court granted Alcorta's petition for a writ of habeas corpus.

The commonality shared by each of the cases described in this article is the taint caused by the prosecutor's actions and influence over witness testimony. In the case of Joseph Bowie, the Ninth Circuit was concerned about taint caused by a number of actions on the part of the prosecutor: having knowledge of facts indicating that another person had confessed to the murder, failing to investigate possible exculpatory evidence, influencing witnesses, and sponsoring the false testimony by accomplices who had been offered deals for their cooperation. In *Alcorta*, the Supreme Court

was concerned about the prosecutor's knowledge of facts and influence over the witness who had given false and misleading testimony. In the case of Zacarias Moussaoui, the court voiced concern over the taint caused by the TSA lawyer's efforts to improperly attempt to influence witnesses by coaching their testimony. In Adam Miranda's case, the California Supreme Court may be concerned about taint stemming several sources: the prosecutor's influence over a key witness who may have falsified information to support the state's sentencing enhancement allegation; the prosecutor's failure to disclose letter by another witness, which would have refuted the key witness' testimony at the sentencing phase; and the prosecutor's influence over a trial witness with whom a romantic relationship was developing or had already developed. As it stands now, ABA Model Rule 3.8 offers prosecutors no specific guidance that addresses a prosecutor's behavior with witnesses, nor does the rule suggest measures that should be taken to avoid tainting or compromising highly sensitive cases.

### **Precedent Reversing the Death Sentence Because of the Prosecutor's Failure to Disclose Evidence**

Nondisclosure of exculpatory evidence is currently a critical issue in Adam Miranda's habeas appeal pending before the California Supreme Court. Miranda is arguing strenuously that prosecutorial errors in his case are as bad as those that occurred in *Brady v. Maryland*,<sup>5015</sup> a case in which the U.S. Supreme Court affirmed the lower court's remand of a death sentence on grounds that the government had committed misconduct by its failure to disclose potentially exculpatory evidence. The facts in *Brady* arose in Anne Arundel County, Md., not long after the Supreme Court's decision in *Alcorta*. In a neighborhood not far from our nation's capital region, a murder suspect confessed to authorities and admitted his responsibility for the crime. The prosecution charged that perpetrator with murder, but they also charged another man, withheld the perpetrator's confession from the other man, and went on to obtain first-degree murder convictions and death sentences against both individuals.

The appellant in the Maryland case was John Leo Brady, a 25-year-old who had a very troubled life, including abandonment by his parents as a baby, involuntary discharge from the Air Force after enlisting, and incapacity to hold down one menial job after another. In 1958, Brady was broke and his girlfriend was pregnant; Brady decided to steal a new car owned by a long-time acquaintance, William Brooks. He planned the theft with Donald Boblit, the developmentally disabled brother of his pregnant girlfriend. The evidence suggested that Brady had no intention of killing Brooks, who had treated him generously in the past. The evidence also suggested that Boblit panicked during the car theft, beating Brooks and then strangling him to death. After their arrests, Brady and Boblit told conflicting stories to the police. Among his various versions, Boblit confessed to authorities that he, not Brady, was responsible for the homicide.<sup>5016</sup>

The Anne Arundel County prosecutor did not tell Brady's defense lawyer about Boblit's confession. Both Brady and

Boblit were convicted of first-degree murder and ended up on death row. A prison chaplain who believed Brady's account that Brooks had died at the hands of Boblit, convinced attorney E. Clinton Bamberger Jr., a former student of his, to consider helping with an appeal. Bamberger, a former prosecutor with the Maryland attorney general's office, had come to believe in a level playing field while working for the government.

Bamberger obtained the transcripts from the separate trials of Brady and Boblit. The transcript of Brady's trial yielded no grounds for appeal, but the transcript of Boblit's trial contained a vague reference to a confession made on July 9, 1958, and referred to as the "fifth statement." Examining the exhibits attached to the transcript, Bamberger found four statements, but not the July 9 document. When he obtained that document, which included Boblit's confession, he used it as the basis for John Brady's appeal. In post-conviction proceedings, the Maryland Court of Appeals remanded the case for a new trial on the question of punishment, but affirmed the underlying conviction for first-degree murder. When the case ultimately reached the Supreme Court in 1963, Justice William O. Douglas wrote the majority opinion in *Brady v. Maryland*. In affirming the decision by the Maryland Court of Appeals, the Court held that

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. ... Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.

The California prosecutor's failure to disclose to Adam Miranda's lawyers the jailhouse letter written by Montez is strikingly similar to the Maryland prosecutor's failure to disclose the co-defendant's confession in *Brady v. Maryland*. Both pieces of withheld evidence mostly serve to undermine the death sentence rather than negate the underlying guilt in the charged murder offense. The length of time the prosecutors withheld this evidence from Adam Miranda, however, is potentially a more serious issue than the non-disclosure was in *Brady*. The Montez letter was finally disclosed to Miranda 18 years into his isolation on death row, and Miranda's fate is still unknown.

Certain facts in Adam Miranda's case are similar to facts regarding the jailhouse letter in the *Commonwealth of Northern Mariana Islands v. Bowie* case, which involved due process. California prosecutors are arguing that the jailhouse letter constitutes double hearsay and is therefore inadmissible—an obstacle that Mariana Islands prosecutors had strategically sidestepped regarding the letter found in Mario Reyes' cell when they prosecuted Bowie. Prosecutors in California, like those in the Northern Mariana Islands, seemingly are placing the onus on defense lawyers to prove who wrote the letter and whether this information would constitute admissible, impeaching evidence. However, as

the Ninth Circuit emphasized when it overturned Bowie's murder conviction, prosecutors have their own constitutional duty to investigate the source of the letter, not just attack the defense theory of its origination.

Finally, Adam Miranda's appellate attorneys claim that there is evidence of prosecutorial misconduct to warrant a reversal of their client's death sentence. Defense attorneys argue that the state paid an informant to testify against Miranda and then allowed the witness to lie on the stand when asked if he had been compensated. Attorneys say they have a receipt showing that Saucedo was paid for his testimony and they maintain that, when he was asked on cross-examination whether he was paid, Saucedo said no, which was a lie. Defense attorneys say the prosecutor just stood there and said nothing during Saucedo's testimony.<sup>51</sup> It is yet to be determined whether such evidence equates with the prosecutor's deception and silence while his witness testified falsely, as was done *Alcorta v. Texas*.

## Conclusion

American society has high expectations for the country's prosecutors. As Judge Leonie Brinkema recently stressed in the trial of Zacarias Moussaoui, when lawyers on the prosecution's team fail to adhere to high ethical standards, their failure affects not just an individual's constitutional rights, but—more importantly—the integrity of the criminal justice system in the United States. Justice demands that prosecutors seek the truth and act fairly, particularly when they ask a jury of citizens to make the gut-wrenching decision regarding life or death.

Prosecutors and all government lawyers are representatives of a sovereign. As such, they deserve the highest measure of ethical guidance and training. Indisputably, earnestness and vigor are highly prized prosecutorial qualities. But prosecutors should also be trained and sensitized to avoid potential ethical dilemmas and lauded for resisting the temptation to strike foul blows. Fairness in trials, particularly in cases involving the death penalty, serves all interests. As many esteemed jurists have earnestly asserted over the decades, fairness makes society the ultimate winner. **TFL**

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*Kim Wherry Toryanski, a former state and federal prosecutor, maintains a litigation practice in Boise, Idaho. She has prosecuted capital cases and recently defended the first capital case tried before a death-qualified jury in Idaho State Court. She is a member of the FBA Idaho Chapter.*

## Endnotes

<sup>51</sup>Government Fights to Preserve Death Penalty for Moussaoui, [www.msnbc.com](http://www.msnbc.com), March 14, 2006; Government Case in Moussaoui Trial Hurt, [www.msnbc.com](http://www.msnbc.com), March 14, 2006.

<sup>51</sup>Jeffrey Anderson, *Sex, Justice and the D.A.'s Office: Could a Prosecutor's Affair with a Stripper Bring Down a Death-Penalty Conviction and Steve Cooley?* [www.laweekly.com](http://www.laweekly.com), Aug. 16,



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<sup>52</sup>*Berger v. United States*, 259 U.S. 78 (1935).

<sup>52</sup>American Bar Association, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8 cmt. (2006).

<sup>52</sup>Bruce A. Green, *Prosecutorial Ethics as Usual*, 5 U.ILL.L.REV. 1573, 1575 (2003).

<sup>52</sup>“Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving ‘moral turpitude.’ That concept can be construed to include offenses concerning some matters of personal morality, such as the adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate a lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.” ABA, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 8.4 cmt. (2006).

<sup>52</sup>*U.S. v. Zacarias Moussaoui*, Crim. No. 01-455-A (LMB) (E.D. Va.).

<sup>52</sup>Assistant U.S. Attorney David J. Novak, Letter to U.S. District Judge Leonie M. Brinkema (March 13, 2006), which reads: “Dear Judge Brinkema: We write *ex parte* to inform the Court of a possible violation of the sequestration order as it relates to FAA witnesses. Late in the afternoon on Friday, March 10, 2006, we learned that Carla Martin, an attorney for the Transportation Safety Administration, provided a copy of the transcript from the first day of trial to one of the witnesses from the FAA, Lynne Osmus. Ms. Osmus did not read the transcript. We then investigated Ms. Martin’s contact with other current/past employees of FAA, whom Ms. Martin represented in this case (she has since been replaced). ...”

<sup>52</sup>*Government Fights to Preserve Death Penalty for Moussaoui*, *supra*, at 1.

<sup>52</sup>Jeffrey Anderson, *Sex, Justice and the D.A.’s Office*, *supra*, at 2. (The article states that the spokeswoman for the Los Angeles district attorney’s office, Sandi Gibbons, said that the prosecutor never hid the three-year relationship from his superiors and that he never hid the fact that the relationship led to the birth of his son. Ms. Gibbons is quoted as saying that the relationship began after the trial, and that the prosecutor raised the child on his own.)

<sup>52</sup>*Death Penalty News*, California, April 26, 2002. The murder charges against Miranda for the drug dealer’s death were later re-filed after the prosecutor met with Saucedo and struck a deal. In exchange for Saucedo’s testimony against Miranda in the drug dealer’s death, murder charges against Saucedo would be reduced to assault with a deadly weapon and a sentence of probation.

<sup>52</sup>*In re Adam Miranda on Habeas Corpus*, CDC Number S058528. According to the court’s docket, on June 27,

2001, the California Supreme Court ordered that a referee be selected to take evidence and make findings of fact on the question of whether Miranda’s trial counsel actually received the Montez letter in either case involving the store clerk’s murder or the drug dealer’s murder. On June 25, 2003, the court expanded the questions for the referee to take evidence, including whether Larry Montez had signed his letter, whether Montez would have been available as a witness to the defense at trial and what he would have said, and what Saucedo told jail inmates Jimmie Barnes, Marvin Sanchez, and Steven McDonald about his role in the drug dealer’s killing.

<sup>52</sup>*Commonwealth of Northern Mariana Islands v. Bowie*, 243 F.3d 1109, *amended*, 236 F.3d 1083 (9th Cir. 2001).

<sup>52</sup>*Alcorta v. Texas*, 355 U.S. 28 (1957).

<sup>52</sup>*Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>52</sup>Steve Weinberg, *Anatomy of Misconduct: There’s Much to Learn When a Trial Goes Terribly Wrong*, Report of the Center for Public Integrity, Washington, D.C., June 26, 2003, [www.publicintegrity.org](http://www.publicintegrity.org).

<sup>52</sup>Jeffrey Anderson, *A Death Row Inmate Pushes His Claim That L.A. Prosecutors Suppressed Crucial Information*, DAILY JOURNAL, July 25, 2002. (One of Miranda’s appellate attorneys, George Hedges, a partner at Quinn, Emanuel, Urquhart, Oliver & Hedges, was appointed to the case in 1988.)