

SUNDAYREVIEW | EDITORIAL

Rampant Prosecutorial Misconduct

By THE EDITORIAL BOARD JAN. 4, 2014

In the justice system, prosecutors have the power to decide what criminal charges to bring, and since 97 percent of cases are resolved without a trial, those decisions are almost always the most important factor in the outcome. That is why it is so important for prosecutors to play fair, not just to win. This obligation is embodied in the Supreme Court's 1963 holding in *Brady v. Maryland*, which required prosecutors to provide the defense with any exculpatory evidence that could materially affect a verdict or sentence.

Yet far too often, state and federal prosecutors fail to fulfill that constitutional duty, and far too rarely do courts hold them accountable. Last month, Alex Kozinski, the chief judge of the United States Court of Appeals for the Ninth Circuit, issued the most stinging indictment of this systemic failure in recent memory. "There is an epidemic of *Brady* violations abroad in the land," Judge Kozinski wrote in dissent from a ruling against a man who argued that prosecutors had withheld crucial evidence in his case. "Only judges can put a stop to it."

The defendant, Kenneth Olsen, was convicted of producing ricin, a toxic poison, for use as a weapon. Federal prosecutors knew — but did not tell his lawyers or the court — that an investigation of the government's forensic scientist, whose lab tests were critical to the case, had revealed multiple instances of sloppy work that had led to wrongful convictions in earlier cases. A state court found the scientist was "incompetent and committed gross misconduct."

Yet the majority of the federal appeals court panel ruled that the

overall evidence of Mr. Olsen's guilt — including websites he visited and books he bought — was so overwhelming that the failure to disclose the scientist's firing would not have changed the outcome.

This is the all-too-common response by courts confronted with Brady violations. Judge Kozinski was right to castigate the majority for letting the prosecution refuse to turn over evidence “so long as it's *possible* the defendant would've been convicted anyway,” as the judge wrote. This creates a “serious moral hazard,” he added, particularly since prosecutors are virtually never punished for misconduct. According to the Center for Prosecutor Integrity, multiple studies over the past 50 years show that courts punished prosecutorial misconduct in less than 2 percent of cases where it occurred. And that rarely amounted to more than a slap on the wrist, such as making the prosecutor pay for the cost of the disciplinary hearing.

Brady violations are, by their nature, hard to detect, but Judge Kozinski had no trouble coming up with more than two dozen examples from federal and state courts just in the last few years, and those are surely the tip of the iceberg. According to the National Registry of Exonerations, 43 percent of wrongful convictions are the result of official misconduct.

The Brady problem is in many ways structural. Prosecutors have the task of deciding when a piece of evidence would be helpful to the defense. But since it is their job to believe in the defendant's guilt, they have little incentive to turn over, say, a single piece of exculpatory evidence when they are sitting on what they see as a mountain of evidence proving guilt. The lack of professional consequences for failing to disclose exculpatory evidence only makes the breach of duty more likely. As Judge Kozinski wrote, “Some prosecutors don't care about Brady because courts don't *make* them care.”

Courts should heed Judge Kozinski's call, but it will take more than judges to fix the problem. Prosecutors' offices should adopt a standard “open file” policy, which would involve turning over all exculpatory evidence as a rule, thus reducing the potential for error.

Fighting prosecutorial misconduct is not only about protecting the innocent. It is, as Judge Kozinski wrote, about preserving “the public’s trust in our justice system,” and the foundation of the rule of law.

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