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POLICING PROSECUTORS: WHAT ROLE CAN APPELLATE COURTS PLAY?

*Hon. D. Brooks Smith**

Thank you for the opportunity to participate in Hofstra's seventh legal ethics conference. I consider it a privilege to be invited. The goals of this conference are impressive and ambitious, but let me confess that mine is a frustrating topic. After some back and forth with Professor Simon, we agreed upon the topic that appears in the program: the role of appellate courts in policing prosecutorial conduct. As Professor Simon noted to me, it "probably has not gotten much attention." He was right. Canvassing academic literature on the subject took little more than a nanosecond. And being forced, if you will, to think long and hard on this topic took me back to my days as a trial judge—and to think wistfully, even longingly, about the times when I confronted trial issues head-on. The trial court is where issues of prosecutorial misconduct really play out. As the Eleventh Circuit has so accurately put it: "On the matter of professional misconduct of prosecutors, the realities require that we defer to our colleagues on the district courts to take the lead. District courts are in a better position to ensure that a prosecutor properly fulfills the duties and obligations of his office."¹

My pondering in recent weeks over what it is we appellate judges do, and how we do it, has brought home to me just how limited our powers are to actively reach out and redress certain wrongs—and in a way that seems proportionate to the wrong itself.

Having served eighteen years on the bench of trial courts, first as a Pennsylvania Court of Common Pleas judge and then as a United States District judge, I have dealt with my share of allegations of prosecutorial misconduct. Prior to my consignment to the judicial monastery where I now serve, my role in addressing such allegations was exercised at the time, or shortly after, they arose. Those of us who have labored in the

* Judge, United States Court of Appeals for the Third Circuit. Remarks at Hofstra University School of Law (Oct. 18, 2009).

1. *United States v. Wilson*, 149 F.3d 1298, 1303 (11th Cir. 1998).

criminal courts have seen up close the most widely-recognized forms of prosecutorial wrongdoing: *Brady* violations;² *Batson* violations;³ improper and inflammatory jury argument;⁴ and misconduct in presenting evidence or cross-examining a defendant.⁵ And there are even more egregious examples. In my preparation for today, I catalogued at length the various types of prosecutorial wrongdoing that have been addressed by appellate courts, just as a kind of reminder to myself. It was a sobering exercise, akin to listening to a full-throated sermon about original sin.⁶

None of us needs to be reminded that the pressure to win—and the pressure to satisfy a demanding public—can lead good people to exercise poor professional judgment. And it can lead people in authority to commit unethical and sometimes illegal acts in the name of pursuing justice. But no judge wants to think that the process unfolding before her or him has been infected, in any way, with ethical abuse or illegality. Trial judges are well-positioned to address the specter of prosecutorial wrongdoing or abuse. But my presentation is supposed to be about the appellate role, so let me focus on that. At the risk of explicating, at length, the obvious, let me describe the options that we appellate judges have when confronting allegations of prosecutorial wrongdoing. The harmless error doctrine is the elephant in the room, so I will begin by acknowledging it.

2. *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the Supreme Court concluded that a prosecutor's withholding evidence that is favorable to a defendant and is "material either to guilt or to punishment" violates that defendant's due process rights. *Id.* at 87.

3. *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, the Supreme Court ruled that a prosecutor may not peremptorily challenge "potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89.

4. *See, e.g.*, *United States v. Gainey*, 111 F.3d 834, 836 (11th Cir. 1997) (prosecutor's comments in a drug possession case were inflammatory where he told the jury that the defendant had the "tools of the drug trade" and that his residence was a "drug den"); *United States v. Casel*, 995 F.2d 1299, 1309-10 (5th Cir. 1993) (prosecutor's closing argument suggested that defendants physically threatened the government's witnesses).

5. *See, e.g.*, *United States v. Sanchez*, 176 F.3d 1214, 1219-25 (9th Cir. 1999) (prosecutor engaged in prosecutorial misconduct by "forc[ing the] defendant to call a United States marshal a liar" during cross-examination, and in eliciting a government witness's opinion on the credibility of the defendant's extra-judicial statements).

6. Examples of prosecutorial misconduct are not uncommon. There have been federal prosecutors instructing agents to file a false criminal complaint and affidavit, and to lie to a grand jury. *See United States v. Archer*, 486 F.2d 670, 672-74 (2d Cir. 1973). There have been allegations that a federal prosecutor authorized government agents to kidnap and torture a defendant. *See United States v. Toscanino*, 500 F.2d 267, 268-70 (2d Cir. 1974). A prosecutor has even misled a grand jury so that members believed, incorrectly, that they could not call certain witnesses, that other witnesses were unavailable, and that they were under abbreviated time constraints. *See United States v. Breslin*, 916 F. Supp. 438, 440, 442-45 (E.D. Pa. 1996). The list is, unfortunately, lengthy.

One of the leading cases on the doctrine of harmless error is *United States v. Hastings*,⁷ decided in 1983. The Supreme Court had granted certiorari “to review the reversal [by the Seventh Circuit] of respondents’ convictions because of prosecutorial allusion to their failure to rebut the Government’s evidence.”⁸

The underlying crimes were “particularly heinous.” I point that out only because the opinion authored by Chief Justice Burger used precisely that term in its own application of harmless error after reviewing the record, a review that Burger emphasized the Court engaged in “sparingly.”⁹ Essentially the facts involved five men who forcibly removed three women from a car, then raped them and committed other brutal sexual acts.¹⁰ In the pantheon of improper prosecutorial comments, the prosecutor’s argument, while improper, was far from the worst I’ve heard. Here is what he said:

The defendants at no time ever challenged any of the rapes, whether or not that occurred, any of the sodomies. They didn’t challenge the kidnapping, the fact that the girls were in East St. Louis and they were taken across to St. Louis. They never challenged the transportation of the victims from East St. Louis, Illinois to St. Louis, Missouri, and they never challenged the location or whereabouts of the defendants at all the relevant times. They want you to focus your attention on all of the events that were before all of the crucial events of that evening. They want to pull your focus away from the beginning of the incident in East St. Louis after they were bumped, and then the proceeding events. They want you to focus to the events prior to that. And you can use your common sense and still see what that tells you.¹¹

A motion for mistrial was denied and all five men were found guilty.

The Seventh Circuit reversed and remanded for retrial in a “terse”¹² per curiam opinion.¹³ In doing so, that court relied on *Griffin v. California*, which proscribes prosecutorial comment on a defendant’s election not to testify.¹⁴ It also cited its own precedent, which held that a *Griffin* error can occur even without a prosecutor commenting on the failure of a defendant to take the stand when the “prosecutor refers to

7. 461 U.S. 499 (1983).

8. *Id.* at 500.

9. *Id.* at 507, 510.

10. *Id.* at 501.

11. *Id.* at 502.

12. *Id.* at 503.

13. *United States v. Hastings*, 660 F.2d 301 (7th Cir. 1981), *rev’d and remanded sub nom. United States v. Hastings*, 461 U.S. 499 (1983).

14. 380 U.S. 609, 615 (1965).

testimony as uncontradicted where the defendant has elected not to testify and when he is the only person able to dispute the testimony.”¹⁵

Here is what the Seventh Circuit declared in the penultimate sentence of a very brief opinion: “Despite the magnitude of the crimes committed and the clear evidence of guilt, an application of the doctrine of harmless error would impermissibly compromise the clear constitutional violation of the defendants’ Fifth Amendment rights.”¹⁶

Curiously, the Seventh Circuit did not cite *Chapman v. California*, a decision that had, after all, come along several years after *Griffin* and which also involved prosecutorial comment on a defendant’s failure to testify in a trial.¹⁷ In *Chapman*, the Court rejected a per se rule that would have required reversal where such prosecutorial comment takes place.¹⁸

Hasting is important on two levels. First, it reaffirmed the robustness of the doctrine of harmless error even where a constitutional violation of the *Griffin* variety has occurred. In doing so, it reminded courts of appeals, in no uncertain terms, that “[t]he question a reviewing court must ask is this: absent the prosecutor’s allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?”¹⁹

Second, what is every bit as important in the Supreme Court’s decision was its “assumption” that the Seventh Circuit, *sub silentio*, “was exercising its supervisory powers to discipline the prosecutors of its jurisdiction.”²⁰ The Supreme Court therefore posed the question of “whether, on this record, in a purported exercise of supervisory powers, a reviewing court may ignore the harmless error analysis of *Chapman*.”²¹ The Court answered the question by holding that the harmless error rule of *Chapman* “may not be avoided by an assertion of supervisory power, simply to justify a reversal of these criminal convictions.”²² The Court’s reasoning was three-pronged:

Supervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted

15. *Hastings*, 660 F.2d at 303 (quoting *United States v. Buege*, 578 F.2d 187, 188 (7th Cir. 1978)).

16. *Id.*

17. 386 U.S. 18, 19 (1967).

18. *Id.* at 21-22.

19. *Hasting*, 461 U.S. at 510-11.

20. *Id.* at 505.

21. *Id.*

22. *Id.*

error. Further, in this context, the integrity of the process carries less weight, for it is the essence of the harmless-error doctrine that a judgment may stand only when there is no “reasonable possibility that the [practice] complained of might have contributed to the conviction.”²³

And finally, the Court emphasized that “deterrence is an inappropriate basis for reversal where, as here, the prosecutor’s remark is at most an attenuated violation of *Griffin* and where means more narrowly tailored to deter objectionable prosecutorial conduct are available.”²⁴

The nature of harmless error review and concomitant limitations on our supervisory authority profoundly limit the reach of a court of appeals when it confronts most claims of prosecutorial misconduct. But we as court of appeals judges do have a role to play in policing the work of prosecutors. And it is not an insignificant one.

Last year, a panel of my own court reversed and remanded a case where “the government’s repeated injection of prejudicial drug evidence into the trial testimony constituted prosecutorial misconduct resulting in a denial of due process.”²⁵ Notwithstanding the lack of objection, we concluded that the district court had indeed committed plain error by allowing the introduction of prejudicial drug evidence.²⁶

The opinion described the Government’s trial conduct as having “repeatedly exceeded its pretrial proffer, [by] systematically injecting inadmissible drug evidence into the . . . trial.”²⁷ The Government, on numerous occasions, introduced prejudicial drug evidence with no proper purpose under Rule of Evidence 404(b).²⁸ The district court issued at least five warnings, but failed to prevent what the panel opinion referred to as “the rampant injection of inadmissible evidence into the trial.”²⁹ Indeed, the district court provided only a single limiting instruction that was simply not enough to cure the prejudice.³⁰

Ultimately, Judge Aldisert’s opinion held that the Government’s evidence against the defendant “was not sufficient to overcome the prejudice resulting from the prosecutor’s misconduct.”³¹ And he put a

23. *Id.* at 506 (alteration in original) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

24. *Id.* (footnote omitted).

25. *United States v. Morena*, 547 F.3d 191, 193 (3d Cir. 2008).

26. *Id.*

27. *Id.* at 194.

28. *Id.*

29. *Id.*

30. *Id.* at 194-95.

31. *Id.* at 196.

gloss on harmless error review that is important for our purposes. Relying on a prior Third Circuit decision,³² Judge Aldisert explained that “even ‘finding the evidence more than sufficient for conviction does not necessarily end the constitutional inquiry.’ The reviewing court must always factor the prejudicial effect of the prosecutor’s impropriety into the jury’s finding of guilt and then assess its impact.”³³

The simple lesson from *Morena* is, of course, that harmless error is not such an insurmountable hurdle as to doom all efforts of defendants to demonstrate that prosecutorial misconduct “so infected the trial with unfairness as to make the resulting conviction a denial of due process.”³⁴

To be sure, not every instance of prosecutorial misconduct is subject to harmless error review. *Brady* violations are not, because they require a showing of materiality.³⁵ Evidence is material if there is a reasonable probability that pretrial disclosure would have produced a different result at trial.³⁶ But here again, courts have said that “weighing of the evidence merits deference from the Court of Appeals, especially given the difficulty inherent in measuring the effect of a non-disclosure on the course of a lengthy trial covering many witnesses and exhibits.”³⁷

But if harmless error review effectively limits the range of sanctioning options for prosecutorial misconduct in most cases, what other sanctions are available to courts of appeals? After all, state prosecutors acting within the scope of their authority in initiating and pursuing a criminal prosecution are immune from liability in suits under section 1983.³⁸ In upholding that immunity in *Imbler v. Pachtman*, the Supreme Court hastened to assure the public that it was not “powerless to deter misconduct or to punish that which occurs.”³⁹ Justice Powell’s opinion for the Court included the reminder that “[e]ven judges” can be punished for the willful deprivation of constitutional rights under 18 U.S.C. § 242, and that prosecutors “would fare no better.”⁴⁰ But this seems small comfort to an appeals court that confronts prosecutorial wrongdoing, the lion’s share of which does not rise to the level of a criminal offense.

32. *Moore v. Morton*, 255 F.3d 95, 112 (3d Cir. 2001).

33. *Morena*, 547 F.3d at 197 (quoting *Moore*, 255 F.3d at 112 (citation omitted)).

34. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

35. *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006).

36. *See id.*

37. *United States v. Thornton*, 1 F.3d 149, 158 (3d Cir. 1993) (quoting *United States v. Pflaumer*, 774 F.2d 1224, 1230 (3d Cir. 1984) (citation omitted)).

38. *Id.* at 429.

39. *Id.* at 429.

40. *Id.*

The Supreme Court has had occasion to remind us since its 1983 *Hasting* decision that federal courts may not exercise their supervisory authority to dismiss an indictment for errors in a grand jury proceeding. In *Bank of Nova Scotia v. United States*,⁴¹ the Court concluded that even where the Government committed multiple violations of Rule 6 and had engaged in inappropriate conduct at other points during the grand jury trial, such “isolated episodes in the course of a 20-month investigation . . . d[id] not, even when considered cumulatively, raise a substantial question, much less a grave doubt, as to whether they had a substantial effect on the grand jury’s decision to charge.”⁴²

However, the Court did suggest that there were other means of remedying this sort of wrongdoing. It pointed to language in Rule 6 providing for holding an individual in contempt of court and also instructed that a court “may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him.”⁴³ The opinion also recommended chastising prosecutors in written opinions.⁴⁴

Indeed, one of my colleagues from the First Circuit, Judge Selya, reminds us in one of his opinions that “[c]ourts have many other weapons in their armamentarium.”⁴⁵ This is good news (although I must confess that I had never heard of an “armamentarium” until reading his opinion). The First Circuit in *United States v. Horn*⁴⁶ was called upon to decide if “principles of sovereign immunity bar a federal district court, exercising its supervisory power, from assessing attorneys’ fees and costs against the federal government in a criminal case.”⁴⁷ The Court held that sovereign immunity trumped supervisory authority, thereby striking down a district court order directing the government to pay fees and costs incurred in litigating the misconduct issue presented by a prosecutor’s “unpardonable misconduct,” as Judge Selya characterized it.⁴⁸ But the opinion otherwise approved the District Court’s order which had directed “the removal and quarantine of the lead prosecutor, the suppression of tainted documents, and the advance disclosure of the government’s trial strategy.”⁴⁹ The First Circuit also noted approvingly

41. 487 U.S. 250 (1988).

42. *Id.* at 263.

43. *Id.*

44. *Id.*

45. *United States v. Horn*, 29 F.3d 754, 766 (1st Cir. 1994).

46. 29 F.3d 754 (1st Cir. 1994).

47. *Id.* at 757.

48. *Id.*

49. *Id.* at 766.

that the District Court had referred the lead prosecutor to the disciplinary committees of her two bar associations.⁵⁰

If you are of the view that a remedy short of reversal is an inadequate response to egregious prosecutorial misconduct, then you will regard a court's decision to criticize by name an errant prosecutor in a published opinion as a mere slap on the wrist. It is, nonetheless, one option available to an appellate court. Perhaps I am naïve, but I believe that the overwhelming majority of prosecutors would recoil at the notion of her or his name being publicly linked to what is, quite plainly, legal wrong-doing. Judicial opprobrium directed against a lawyer on ethical grounds is not the stuff of which successful careers are normally built—at least not in the prosecutorial realm.

One interesting footnote to the First Circuit's *Horn* opinion: the district court deliberately deleted the prosecutor's name from its order prior to publication so as not to cause the prosecutor public humiliation.⁵¹ Judge Selya wrote: "Although we, if writing on a pristine page, might not be so solicitous, we honor the district court's exercise of its discretion, mindful that its choice has substantive implications."⁵²

On occasion—and fortunately they are rare—we are confronted with prosecutorial misconduct which is committed during the course of an appeal. In *United States v. Williams*,⁵³ the defendant-appellant was challenging the sufficiency of the evidence in a drug and firearm prosecution.⁵⁴ The D.C. Circuit was presented with a Government brief which contained "five material misstatements of the record."⁵⁵ In a per curiam opinion which affirmed the conviction, the Court condemned the misstatements as "irresponsibly careless at best or deliberately misleading at worst."⁵⁶ And underscoring the obligations of the U.S. Attorney as "the representative not of an ordinary party to a controversy, but of a sovereignty,"⁵⁷ the Court lamented: "That the Government made these misstatements renders the conduct here even more egregious."⁵⁸

That is as far as it went. While acknowledging that the Federal Rules of Appellate Procedure authorize the imposition of sanctions, the D.C. Circuit refused to pull the trigger: "We do not wish to penalize the

50. *Id.* at 759.

51. *Id.* at 758 n.1.

52. *Id.*

53. 952 F.2d 418 (D.C. Cir. 1991).

54. *Id.* at 419.

55. *Id.* at 421.

56. *Id.*

57. *Id.* (quoting *Young v. United States*, 481 U.S. 787, 803 (1987)).

58. *Id.*

inexperienced author of the misstatements, beyond this public reprimand, in view of the factual complexity of the case and the failure of the U.S. Attorney's Office adequately to involve trial counsel in the supervision of the case on appeal."⁵⁹

Recently, a panel on which I sat tried to make sense of the submissions from a state prosecutor in a habeas action that was before us.⁶⁰ The petitioner was one of three original defendants charged in a double homicide that arose out of a drug deal.⁶¹ The alleged role of the petitioner in the underlying crimes was significantly different from the other two defendants, and this was of enormous importance to us in that the only real issue before us was sufficiency of the evidence.⁶² But the prosecution, in its brief and citations to the record, continually referenced the three actors together as "defendants."⁶³ Indeed, several of the references pertained only to the other two defendants.⁶⁴ In our opinion, we included a footnote which denounced the state's references as "both unhelpful and misleading," and we further castigated counsel by declaring that they had "consistently either misunderstood or ignored the limitations and propriety of including such . . . [references in] responding to [the petitioner's] appeal."⁶⁵ Whatever sting may come from that language may have seemed minor, though, even to the prosecutors, because the state lost on the merits and habeas relief was granted.

* * *

Before I conclude these remarks, let me leave the fertile field of actual misconduct by prosecutors and stray into the realm of policy. After all, "Policing Prosecutors" is billed as my topic. I am no etymologist, but even a beginning Latin student would recognize that "police" and "policy" share the same root. Is it ever the role of an appellate judge to question the exercise of prosecutorial discretion? I do not suggest by the inquiry that it is our role to intrude upon such exercise by judicial fiat. But is it ever appropriate for an appellate court, or an appellate judge writing a separate opinion, to opine on or criticize a prosecutorial action that is policy-based but not legally infirm?

In 2004, the case of *United States v. Bonner*⁶⁶ was decided by a panel of which I was a part. Bonner had fled from police after the car in

59. *Id.* at 422.

60. *Kamienski v. Hendricks*, 332 F. App'x 740, 740 (3d Cir. 2009).

61. *See id.* at 741.

62. *See id.* at 742-43 (describing Kamienski's role in the crimes).

63. *Id.* at 744 n.9.

64. *Id.*

65. *Id.*

66. 363 F.3d 213 (3d Cir. 2004).

which he was a passenger was subject to a routine traffic stop.⁶⁷ The police chased him, and upon apprehending him, discovered crack cocaine in his possession.⁶⁸ Although I concurred in upholding the stop and the search that followed, I joined my colleague Judge McKee in the last section of his dissent which described what he called a “troubling aspect of this case.”⁶⁹ You see, a prosecution against Bonner on drug charges was first filed in state court.⁷⁰ In the Pennsylvania trial court, he moved to suppress the physical evidence seized from him upon arrest.⁷¹ After a hearing, the state court judge agreed with Bonner that the police lacked reasonable suspicion, basing that ruling upon the Pennsylvania Constitution.⁷² State prosecutors appealed, but apparently they were not content to wait for a ruling because Bonner was soon indicted by a federal grand jury on federal charges.⁷³ The state court appeal was withdrawn, federal prosecutors took over, and the rest is history.

As Judge McKee conceded: “[W]e have jurisdiction here and must exercise it”⁷⁴ But both he and I felt impelled to write separately, on a non-merits issue—some might say “gratuitously”—to express our concern “for the appearance of fairness.”⁷⁵

Here is what I wrote, in a separate opinion in *Bonner*:

It should be a rare occasion when judges criticize, and thereby intrude into, a legitimate exercise of prosecutorial discretion. Nor should we routinely question in our opinions the policy decisions of Congress to federalize what has traditionally been state law street crime. Our institutional role as judges is limited by our jurisdiction and by the comity and respect we owe to coordinate branches of government.

That being said, the instant case presents a series of events which the dissent characterizes as a prosecutorial “switcheroo.” I cannot disagree with that characterization, and I share the “concern for the appearance of fairness” expressed by Judge McKee. It is one thing for the government to assume an investigation initiated by state law enforcement officials, or even to adopt a prosecution commenced by

67. *Id.* at 215.

68. *Id.*

69. *Id.* at 228 (McKee, J., dissenting).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 229.

75. *Id.*; see also *In re Murchison*, 349 U.S. 133, 136 (1955) (“But to perform its high function in the best way, ‘justice must satisfy the appearance of justice.’” (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954))).

state prosecutors. It is quite another to seek a federal indictment where the federal interest in the case is recognized only after state prosecutors have given the case their best shot in the state courts and lost on an issue of state law. Not only does such a tactic offend fundamental notions of fairness, it is contrary to traditional notions of our federalism.⁷⁶

Was this a proper exercise of our role? Was it any of our business? I hope that in the discussion that follows you will tell me. One of my former law clerks, then in the U.S. Attorney's office, let me know his views—in a satirical poem he composed and read a few years later at a gathering of my former clerks. The relevant verse goes like this:

His opinions are crisp, and his language precise.
His logic is stunning, his word choice concise.
His decisions are praised with a steadfast recurrence,
with just one exception, that *Bonner* concurrence.

My thanks to Professor Simon and Hofstra University School of Law for the invitation, and to all of you for your attention.

76. *Id.* at 219-20 (Smith, J., concurring).
