"Power and Greed and the Corruptible Seed": Mental Disability, Prosecutorial Misconduct, and the Death Penalty

Michael L. Perlin, JD

J Am Acad Psychiatry Law 43:266–72, 2015

The Supreme Court's death penalty jurisprudence is based in large part on the assumption that jurors can be counted on to apply the law in this area conscientiously and fairly. All our criminal procedure jurisprudence is also based in large part on the assumption that prosecutors and judges will act fairly. These assumptions are based on nothing more than wishful thinking, and the record of death penalty litigation in the 39 years since the modern death penalty was approved in *Gregg v. Georgia*[1] gives the lie to them.

I focus solely on the role of prosecutors in this process and the extent to which prosecutorial misconduct has contaminated the entire death penalty process, especially in cases involving defendants with mental disabilities. This reality is known well to all those who represent such defendants in death penalty cases, but there is startlingly little literature on the topic. It is misconduct that is largely hidden and ignored. I begin with some brief background on questions that relate to the treatment of persons with mental disabilities in the criminal justice system in general. I then discuss prosecutorial misconduct and its outcomes, with special attention to a cohort of appellate decisions in unheralded and rarely (if ever) discussed published cases that, in almost every instance, sanction such misconduct. I demonstrate how some prosecutors purposefully flaunt the canon of ethics in the prosecution of defendants with mental disabilities in death penalty cases. I discuss some solutions raised by scholars to (at least, partially) cure these problems, and conclude with some modest suggestions of my own.

The title comes, in part, from what in my view is perhaps Bob Dylan's greatest song, *Blind Willie McTell*, an homage to the blues and to one of the greatest blues singers in history.[2] Another verse of the song includes these lines, which set out Dylan's thoughts on the tragedy that is so much of American history, a tragedy not unrelated on at least one basic level: the significance of race to any justice system inquiry,[3] such as the one that is the topic of this article:

See them big plantations burning
Hear the cracking of the whips
Smell that sweet magnolia blooming
See the ghosts of slavery ships.
I can hear them tribes a-moaning
Hear that undertaker's bell
Nobody can sing the blues
Like Blind Willie McTell.[4]

Persons with Mental Disabilities in the Criminal Justice System

The death penalty is disproportionately imposed in cases involving defendants with mental disabilities

Dr. Perlin is Professor Emeritus of Law, and Founding Director, International Mental Disability Law Reform Project, New York Law School, New York, New York. Portions of the section headed "Persons with mental disabilities in the criminal justice system" are adapted from Michael L. Perlin: *Mental Disability, Factual Innocence and the Death Penalty, in Contemporary Trends in Asian Criminal Justice: Paving the Way for the Future.* Edited by I. Kim and J. Liu. Korean Institute of Criminology, 2014:21–46. Portions of the section headed "Prosecutorial misconduct" are adapted from Michael L. Perlin, *Mental Disability and the Death Penalty: The Shame of the States.* Lanham, MD: Rowman & Littlefield, 2013:118–22. Address correspondence to: Michael L. Perlin, Professor Emeritus of Law, Founding Director, International Mental Disability Law Reform Project, New York Law School, 185 West Broadway, New York, NY 10013. E-mail: michael.perlin@nyls.edu or mlperlin@mdlpa.net.

Disclosures of financial or other potential conflicts of interest: None.

(referring both to those with mental illness and those with intellectual disabilities). Persons with mental disabilities are significantly overrepresented at every level of the criminal justice system (Ref. 5, p 212). Estimates of those with intellectual disabilities in the justice system range from 10 to 30 percent[6,7] and of those with mental illness, from 10 to 70 percent.[8]

Intellectual disability is a significant confounding factor at every stage of the criminal justice system: from precontact, to initial contact, to intake and interrogation, to prosecution and disposition, to incarceration (Ref. 5, pp 214–17). In the context of capital punishment, these coalesce most vividly in the context of the false confession.[9] There are many reasons that persons with intellectual disabilities are sentenced to death for murders they did not commit and other reasons that they are sentenced to death in cases in which individuals without such disabilities might have been spared the death penalty. Of the first 130 exonerations that the New York-based Innocence Project obtained via DNA evidence, 85 involved people convicted after making false confessions (Ref. 10, p 230, n 68). Mental impairment is a commonly recognized risk factor for false confessions (Ref. 11, p 398). There is no disputing that false confessors have been found to score higher on measures of anxiety, depression, and psychoticism and are more likely to have seen a mental health professional or to have taken psychiatric medications in the prior year.[12–14]

Defendants with an intellectual disability "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" (Ref. 15, pp 318–19). A scan of websites of the various Innocence Projects reveals that, in nearly every instance, mental impairment is listed as a major reason that innocent persons confess to crimes they did not commit.[16–19]

Prosecutorial Misconduct

In general, there is great political incentive for prosecutors to seek the death penalty and for trial judges to impose it and an even greater incentive in jurisdictions in which prosecutors are elected (Ref. 20, p 947). Professor James Liebman makes this crystal clear:

> In all capital-sentencing jurisdictions, but particularly in ones where the political rewards of capital punishment are high and direct (for example, where elections for district attorney and trial judge are frequent and partisan and where voters favor the death penalty) and in ones that believe themselves to be under siege from violent crime, such offenses create incentives to move swiftly and surely from arrest to conviction to capital verdict [Ref. 21, p 322].

Liebman quoted a newspaper article about Philadelphia district attorney Lynne Abraham's self-confessed "passionate" commitment to capital punishment. Abraham's commitment has remained "passionate," notwithstanding her doubts about whether it deters crime. She has acknowledged, nevertheless, that she used it more often per homicide than any other prosecutor in the nation, because it gave citizens "the feeling of control demanded by a city in decay" so that "[w]e feel our lives are not in our own hands . . . . This is Bosnia." (Ref. 21, p 322, n 36). Elsewhere, Liebman noted how the imposition of the death penalty varies county by county, resulting in the anomaly that, over a 22-year period, 66 American counties accounted for 2,569 of the 5,131 death sentences imposed (Ref. 22, p 264–65, nn 40 and 265). He underscores how "police, prosecutors, judges, and juries operate with strong incentives to generate as many death sentences as they can—reaping robust psychic, political, and professional rewards—while displacing the costs of their many consequent mistakes onto capital prisoners, posttrial review courts, victims, and the public" (Ref. 23, p 2032). Professor J. Amy Dillard is clear: "Prosecutors abuse their discretion when they choose to seek death to seat a death-disposed jury" (Ref. 24, p 1005).

There is often "acute (and ever intensifying) political pressure" on prosecutors "to seek the death penalty" (Ref. 25, p 709 and 709, n 2). And there is no reason whatsoever to think that this pressure is somehow diminished in the case of a defendant with mental illness, precisely the sort of defendant—"the most despised and feared group in society"—that most engages a community's fears (Ref. 26, p 982). Of course, because some prosecutors "reap political benefits from being tough on crime but do not typically have to pay for expensive appeals, they have an incentive to seek the death penalty in marginal cases that may be hard to defend on appeal" (Ref. 27, pp 347–8). So, some prosecutors adopt what scholars have called a "conviction psychology," one that presumes guilt in all cases (Ref. 28, p 1010, n 208). Consider the saga of former Oklahoma City District Attorney Robert Macy who, according to journalistic accounts, "lied, . . . bullied [and] spurned the rules of a fair trial, concealing evidence, misrepresenting ev-

idence," yet consistently won re-election with more than 70 percent of the votes (Ref. 29, p 553).

All of these phenomena potentially have a negative impact in cases involving defendants with serious mental disabilities.

Outcomes of Misconduct

Reginald Brooks was sentenced to death for the murder of his three sons.[30] Some 18 years after Mr. Brooks was found guilty, a trial judge found that he was competent to be executed,[31] noting, however, that the defendant had paranoid schizophrenia, with "persecutory delusions that he has been framed for a crime that occurred while he was leaving town."[32] During the litigation process, Mr. Brooks' appellate counsel obtained documents, apparently from the trial prosecutor's file, pointing to evidence that in the period leading up to the killings, Mr. Brooks had displayed bizarre, aberrant, and paranoid behavior indicative of deteriorating mental health. Mr. Brooks' trial lawyer said that none of the documents was disclosed to the defense and that this "secretion of the witness statements totally prevented me from properly and competently representing Mr. Brooks."[32] Mr. Brooks was executed on November 15, 2011.[33]

In a study of the 13 executions that have taken place in California since the death penalty was reinstated in 1977, prosecutorial misconduct was raised as a significant concern in 7 of the cases (Ref. 34, pp. 375–6). This cohort of cases includes at least one case in which the prosecutor was less than truthful with the jury about the consequences if a "not guilty by reason of insanity" verdict were to be entered (Ref. 34, pp 382–7). These untruths were deemed by the California Supreme Court to be "harmless error" (Ref. 35, p 705).

Other cases from other jurisdictions show this same judicial sanctioning of lies on the consequences of a successful insanity plea.[36,37] In only one jurisdiction have such convictions been reversed, the reviewing court in one case noting that "the prosecution cannot suggest to the jury that an acquittal would result in the defendant's release from an asylum in just a few months" (Ref. 38, p 1354; and 39, p 816).

Often, even where appellate courts find error based on prosecutorial misconduct in cases involving defendants with mental disabilities, they find such errors to be harmless, not of constitutional magnitude,[40,41] or improperly preserved.[42] Nearly 70 years ago, Judge Jerome Frank charged that "Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules" (Ref. 43, p 661). Little has changed since.

Convictions in cases replete with serious prosecutorial misconduct are regularly affirmed in cases in which the insanity defense is proffered[36,51,52] in which the incompetency status is raised,[37,44,53] where extreme emotional disturbance is alleged,[54] and where mitigation is sought at the penalty phase.[55–57] This misconduct is based on, *inter alia*, inflammatory statements to jurors in closing arguments,[44–46] failure to turn over documentary evidence,[47,48] mischaracterization of expert testimony on mental state,[49,50] and mischaracterization of the prevailing insanity defense legal standard (Ref. 51, p 1055). Although there are some instances of reversals (usually on the grounds of ineffective assistance of counsel) (Refs. 48, 57), in this cohort they are a distinct minority, with courts in most cases finding no error.[58–60] Courts simply say that the role of the reviewing court is "to act only as a kind of constitutional backstop to ensure that trial errors do not so infect the trial as to render it fundamentally unfair" (Ref. 51, p 1053). What has mostly escaped attention is the way that prosecutorial misconduct festers in the trial of cases involving this cohort of defendants; in the words of Dr. Saby Ghoshray, "the deadly cocktail of racial disparity, inadequate counsel, and prosecutorial misconduct continues to interject lethal consequences for mentally incapacitated prisoners" (Ref. 61, p 617).

There is little incentive for prosecutors to reform their ways. There is often absolutely no accountability.[62] In some jurisdictions, convictions are rarely reversed on the basis of prosecutorial misconduct; by way of example, of 150 reported cases in Louisiana in which prosecutorial misconduct was found, convictions were reversed in only 20 (Ref. 63, pp 353–4). For those in jurisdictions where prosecutors are elected, convictions enhance re-electability (Ref. 64, p 405). Even if the misconduct is noticed, the defendant's conviction is still likely to stand. There is no stigma to the miscreant prosecutors, since they are virtually never mentioned by name in any subsequent appellate opinion (Ref. 63, pp 357–8). Sanctions are nearly nonexistent; a *Chicago Tribune* article found that not one prosecutor was convicted of a crime or disbarred in 381 murder cases where the conviction was reversed due to prosecutorial mis-

conduct (Ref. 65, p 1370, n 251). Although scholars have written frequently and persuasively about ethics breaches in such cases (and the need to monitor such breaches), their words are generally met with overwhelming indifference.

Who Is to Blame?

The revelations thus far lead to a further inquiry: to what extent are prosecutors in the aggregate to blame for this state of affairs? I believe that several global charges can be leveled against members of the prosecutoriate with regard to the specific question of the misuse or exploitation of evidence of mental disability in death penalty cases. First, some prosecutors consciously misuse mental disability evidence to play on the fears of jurors, to scare them, and to exploit their ignorance. As I have already indicated, prosecutors may distort the truth and lie with impunity, as to the likely *denouement* of an insanity acquittal. Further, Stephen Bright has noted, in the death penalty context, how "most prosecutors and other public officials exploit the victims of crime and the death penalty for political gain by stirring up and pandering to fears of crime" (Ref. 66, p 1076). A report by Amnesty International focuses on the questions under consideration in this editorial by concluding that "U.S. prosecutors can exploit public ignorance or fear regarding mental illness by arguing that the 'flat' or 'unremorseful' demeanor of mentally ill defendants should be considered further grounds for imposing death sentences."[67] Professor Evan Mandery has pointed out how prosecutors have systematically opposed legislation that would exclude persons with serious mental illness from being eligible for the death penalty (Ref. 68, pp 981–92, n 7).

Consider Jamie Fellner's discussion of prosecutorial conduct in the trials of defendants with mental retardation, noting her criticism of the ways that prosecutors frequently "vigorously challenge the existence of mental retardation, minimize its significance, and suggest that although a capital defendant may 'technically' be considered retarded, he nonetheless has 'street smarts'—and hence should receive the highest penalty" (Ref. 69, p 12). More recently, in 2014, *Hall v. Florida*[70] held that Florida's bright-line test of a 70 IQ as the gold standard for executability was unconstitutional, as it created an "unacceptable risk" that persons with intellectual disabilities would be executed (Ref. 70, p 1990) and was contrary to all professional judgment. In support of the majority's views, Justice Kennedy noted that neither Florida nor its supporting *amici* could "point to a single medical professional who supports this cutoff," and that Florida's rule "goes against unanimous professional consensus" (Ref. 70, p 2000). Dissenting, Justice Alito dismissed this universal position of experts as not reflecting the position of the American people but, "at best, represent[ing] the views of a small professional elite" (Ref. 70, p 2005). So, there is certainly some support in the U.S. Supreme Court for this position that Fellner ably and appropriately decries.[71,72]

Second, some prosecutors consciously seek out expert witnesses who will testify, with total certainty, to a defendant's alleged future dangerousness, knowing that such testimony is baseless. The "worthless and baseless testimony" (Ref. 73, p 121) of Dr. James Grigson on questions of future dangerousness and how that testimony led inexorably to the inappropriate executions of defendants with mental disabilities is well known (Ref. 73, pp 19–28). He was expelled by the American Psychiatric Association and the Texas Society of Psychiatric Physicians in 1995 (Ref. 74, p 556, n 6), but he continued to testify in death penalty proceedings for years after that (Refs. 75, p 257, n 331, and 76, p 20). A simple Westlaw search (<("dr. james grigson") (james +2 grigson) & da(aft 1995 & bef 2004)>(ALLSTATES database); conducted September 3, 2014) revealed 57 such cases from 1995 until his death in 2004. To the best of my knowledge, there have been no sanctions brought against any of the prosecutors who retained him to testify in this cohort of cases.

Finally, some prosecutors suppress exculpatory psychiatric evidence. In *Brady v. Maryland*, the Supreme Court ruled 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" (Ref. 77, p 87). The goal advanced by imposing meaningful sanctions for *Brady* violations is "not merely to punish the individual prosecutor but to ensure that the government does not feel empowered to violate constitutional mandates with impunity" (Ref. 78, p 442).

Over the years, there have been multiple examples of cases in which prosecutors have concealed psychiatric evidence that may have made trial impossible, that may have cast doubt on the veracity of state's witnesses, that created doubt as to the voluntariness of the state's witnesses and as to the voluntariness of

the defendant's confession (Refs. 79, p 701, n 42, and 80, pp 32–3). This cohort includes cases involving prosecutorial suppression of evidence that defendants were legally incompetent to stand trial,[81] that key witnesses had multiple psychiatric hospitalizations,[82] and that there were psychiatric reports as to the extent of a defendant's mental illness.[83]

Judicial Response

Judicial sanction rarely occurs. In a study of 707 cases in which California courts explicitly found prosecutorial misconduct, the offending prosecutors were "almost never discipline[d]" (Refs. 84, p 399, n 12, and Ref. 85). In exhaustive independent studies of cases involving prosecutorial misconduct in jury argument, Professors Bennett Gershman (a former prosecutor) and Christopher Slobogin were able to find only one decision in which such conduct resulted in discipline (Refs. 80, p 33, and 86, p 445). Another study of 318 cases involving homicide defendants who received new trials because of prosecutorial misconduct found that one prosecutor was fired (but was reinstated on appeal), another received a 30-day in-house suspension, and a third's license was suspended for 30 days for other misconduct in the case; not one of the 315 others received any kind of sanction from a state disciplinary agency (Ref. 29, pp 553–4).

Recommendations from Legal Scholars

Thoughtful critics have crafted careful potentially ameliorative recommendations, but there has been no response from organized prosecutors' associations. Professor Jeffrey Kirchmeier and his colleagues suggest, *inter alia*, that prosecutor offices should reevaluate their training programs for new and longtime capital attorneys regarding ethics in capital cases and how to deal with pressures to achieve convictions and death sentences; that such offices should responsibly evaluate their methods for internal sanctioning of lawyers who behave improperly in capital cases; that courts, prosecutor offices, and ethics committees should together ensure that prosecutors who egregiously violate ethics rules in capital cases are not allowed to act as counsel in further capital cases; and that states should pass laws mandating that the death penalty may not be sought a second time against a defendant when a prosecutor previously committed egregious misconduct such as intentionally withholding exculpatory evidence (Ref. 65, pp 1382–4). Natasha Minsker focuses on trial practice and evidentiary rules, concluding that the "harmless error" analysis should not be applied to evaluate misconduct in death penalty cases; that prosecutors should not pursue the death sentence for the purpose of securing a plea bargain to a lesser sentence; that they should provide open-file discovery and scrupulously disclose to the defense any and all information that might be beneficial to the defense, either during the guilt or the penalty phase; that they should not seek to mislead the jury about the legal requirements for finding in favor of death or about the legal consequences of their decision not to find for death; and that they should refrain from public comments that could prejudice the defendant in a death penalty case (Ref. 34, pp 399–402). Slobogin recommends that prosecutors be reported to the bar to be sanctioned (by reprimand, suspension or disbarment, depending on the circumstances of the case) (Ref. 80, p 35). Myrna Raeder concludes that prosecutorial offices should be required to adopt written policies governing the introduction of forensic and other expert testimony, and that, at a minimum, prosecutors presenting specific expertise would be required to obtain specialized training (Ref. 87, pp 1450–1). But again, there have been few actions voluntarily taken by prosecutors to implement any of these suggestions.

I believe that mandatory training, certifications, sanctions, and written policies are important and necessary predicates to any potentially ameliorative change in this area. Given the woeful track record of sanctioning administrative agencies discussed in this article, I do not believe such sanctions are enough. Trial courts must be ready to apply meaningful judicial sanctions in the cohort of cases that I have discussed. The weight should be on the shoulders of organized associations of prosecutors to confess error and to demand change on a local level. Defense counsel need to be more vigilant in making contemporaneous at-trial objections to this behavior, so that the points in question would be well preserved for appeal.

At this time, prosecutors have virtually *carte blanche* to misinform jurors, to play to irrational fears, and to employ experts, and few voices are raised in opposition.

Conclusion

We are faced with the reality that some prosecutors in this cohort of cases violate the law and the codes of ethics with impunity and are often

rewarded for it. To return to the article's title, the "ghost of the slavery ships" in Dylan's song are never far from the surface. My hope is—again, borrowing from the song's lyrics—that this is "not all there is."[4]

Acknowledgments

The author thanks Katherine Davies for invaluable research assistance.

References

1. Gregg v. Georgia, 428 U.S. 153 (1976)
2. Trager O: Keys to the Rain: The Definitive Bob Dylan Encyclopedia. New York: Billboard Books, 2004
3. Lyon A: Setting the record straight: a proposal for handling prosecutorial appeals to racial, ethnic or gender prejudice during trial. Mich J Race L 6:319–38, 2001
4. Dylan B: Blind Willie McTell. Available at http://www.bobdylan.com/us/songs/blind-willie-mctell. Accessed October 25, 2014
5. Polloway EA, Patton JR, Smith T, *et al*: Special challenges for persons with disabilities in the criminal justice system: introduction to the special issue. Exceptionality 19:211–18, 2011
6. Perlin ML: "Life Is in mirrors, death disappears": giving life to Atkins. N M L Rev 33:315–48, 2003
7. Slobogin C: What Atkins could mean for people with mental illness. N M L Rev 33:293–313, 2003
8. Cantor JD: Of pills and needles: involuntarily medicating the psychotic inmate when execution looms. Ind Health L Rev 2:117–70, 2005
9. Leo R, Ofshe R: The consequences of false confessions: deprivations of liberty and miscarriages of justice in the age of psychological interrogation. J Crim Law Criminol 88:429–96, 1998
10. Maclin T: A criminal procedure regime based on instrumental values. Const Comment 22:197–239, 2005
11. Redlich AD: Comparing true and false confessions among persons with serious mental illness. Psychol Pub Policy Law 17:394–418, 2011
12. Gudjonsson G, Sigurdsson JF, Asgeirsdottir BB, *et al*: Custodial interrogation, false confession, and individual differences: a national study among Icelandic youth. Pers Indiv Diff 41:49–59, 2006
13. Gudjonsson G, Sigurdsson JF, Bragason OO, *et al*: Confessions and denials and the relationship with personality. Legal Crim Psychol 9:121–33, 2004
14. Gudjonsson G, Sigurdsson JF, Sigfusdottir ID: Interrogation and false confession among adolescents in seven European countries: what background and psychological variables best discriminate between false confessors and non-false confessors? Psychol Crime Law 15:711–28, 2009
15. Atkins v. Virginia, 536 U.S. 304: 318–19 (2002)
16. Mid-Atlantic Innocence Project. Available at http://www.exonerate.org. Accessed October 25, 2014
17. FalseConfessions.Org. Available at http://www.falseconfessions.org. Accessed October 25, 2014
18. The Midwest Innocence Project. Available at http://themip.org/. Accessed October 25, 2014
19. Innocence Project New Orleans. Available at http://www.ipno.org. Accessed October 25, 2014
20. Bresler K: Seeking justice, seeking election, and seeking the death penalty: the ethics of prosecutorial candidates' campaigning on capital convictions. Geo J Legal Ethics 7:941–58, 1994
21. Liebman JS: Opting for real death penalty reform. Ohio St L J 63:315–42, 2002
22. Liebman JS, Clarke P: Minority practice, majority's burden: the death penalty today. Ohio St J Crim L 9:255–351, 2011
23. Liebman J: The overproduction of death. Colum L Rev 100: 2030–156, 2000
24. Dillard JA: And death shall have no dominion: how to achieve the categorical exemption of mentally retarded defendants from execution. U Rich L Rev 45:961–1008, 2011
25. Vander Pol BL: Relevance and reconciliation: a proposal regarding the admissibility of mercy opinions in capital sentencing. Iowa L Rev 88:707–30, 2003
26. Scott DC, Zonana HV, Getz MA: Monitoring insanity acquittees: Connecticut's psychiatric security review board. Hosp Community Psychiatry 41:980–4,1990
27. Gershowitz AM: Statewide capital punishment: the case for eliminating counties' role in the death penalty. Vand L Rev 63:307–59, 2010
28. Bibas S: Prosecutorial regulation versus prosecutorial accountability. U Pa L Rev 157:959–1016, 2009
29. Coyne R, Entzeroth L: Capital Punishment and the Judicial Process (ed 4). Durham, NC: Carolina Academic Press, 2012
30. State v. Brooks, 1985 WL 8589 Ohio App (Ohio Ct. App. 1985)
31. State v. Brooks, 2011 WL 5517300 Ohio App. 8 Dist. (Ohio Ct. App. 2011)
32. Execution of Mentally Ill Man Imminent. Available at http://www.amnesty.org.uk/press-releases/ohio-usa-mentally-ill-66-year-old-man-facing-execution-days. Accessed July 22, 2015
33. Death Sentences and Executions. Available at http://www.amnesty.org/en/library/asset/ACT50/001/2012/en/241a8301-05b4-41c0-bfd9-2fe72899cda4/act500012012en.pdf. Accessed October 25, 2014
34. Minsker N: Prosecutorial misconduct in death penalty cases. Cal W L Rev 45:373–404, 2009
35. People v. Babbitt, 755 P.2d 253 (Cal. 1988)
36. Lautner v. Berghuis, 694 F. Supp. 2d 698 (W.D. Mich. 2010)
37. McGregor v. Gibson, 219 F.3d 1245 (10th Cir. 2000), overruled *en banc on other grounds by* 248 F.3d 946 (10th Cir. 2001)
38. Nowitzke v. State, 572 So.2d 1346, 1354 (Fla. 1990)
39. Johnson v. State, 408 So.2d 813, 816 (Fla. Dist. Ct. App. 1982)
40. Coe v. Bell, 161 F.3d 320 (6th Cir. 1998)
41. Morris v. Hedgpath, 2011 U.S. Dist. LEXIS 98088 (C.D. Cal. 2011)
42. People v. Cruz, 162 Cal. Rptr. 1 (Cal. 1980)
43. United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir. 1946) (Frank J., dissenting)
44. U.S. *ex rel.* Tenner v. Gilmore, 1998 U.S. Dist. LEXIS 16188 (N.D. Ill. 1998)
45. Dunigan v. Yarborough, 2009 WL 6824504 (C.D. Cal. 2009)
46. Commonwealth v. Keaton, 45 A.3d 1050 (Pa. 2012)
47. Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003)
48. Coleman v. Mitchell, 268 F.3d 417 (6th Cir 2001), reh'g & suggestion for reh'g en banc den. (2001) (reversed on the basis of Supreme Court's effectiveness-of-counsel standard established in Strickland v. Washington, 466 U.S. 668 (1984)
49. People v. Smith, 25 Cal. Rptr. 3d 554 (Cal. 2005)
50. People v. Blacksher, 130 Cal. Rptr. 3d 191 (Cal. 2011)
51. Fleenor v. Farley, 47 F. Supp. 2d 1021, 1055 (S.D. Ind. 1998)
52. Bertoletti v. Dugger, 883 F.2d 1503 (11th Cir. 1989)
53. State v. Neyland, 12 N.E. 3d 1112 (Ohio 2014)
54. Bowling v. Commonwealth, 873 S.W.2d 175 (Ky. 1993)
55. People v. Smithey, 86 Cal. Rptr. 2d 243 (Cal. 1999)
56. Berry v. Epps, 2006 U.S. Dist. LEXIS 72879 (N.D. Miss. 2006)
57. Lang v, Cullen, 725 F. Supp. 2d 925 (C.D. Cal. 2010) (also reversed on a Strickland violation)

58. Walker v. Gibson, 228 F.3d 1217 (10th Cir. 2000), *cert. den.*, 533 U.S. 933 (2001)
59. Sneed v. Johnson, 2007 U.S. Dist. LEXIS 15067 (N.D. Ohio 2007)
60. Hamilton v. Ayers, 458 F. Supp. 2d 1075 (E.D. Cal. 2006)
61. Ghoshray S: Tracing the moral contours of the evolving standards of decency: the supreme court's capital jurisprudence post-Roper. J Cath Legal Stud 45:561–629, 2006
62. Keenan D, Cooper CJ, Lebowitz D, *et al*: The myth of prosecutorial accountability after Connick v. Thompson: why existing professional responsibility measures cannot protect against prosecutorial misconduct. Yale L J 121:203–65, 2012
63. Ghetti M, Killebrew P: With impunity: the lack of accountability of a criminal prosecutor. Loy J Pub Int L 13:349–99, 2012
64. Joy PA: The relationship between prosecutorial misconduct and wrongful convictions: shaping remedies for a broken system. Wis L Rev 2006:399–429, 2006
65. Kirchmeier JL, Greenwald SR, Reynolds H, *et al*: Vigilante justice: prosecutor misconduct in capital cases. Wayne L Rev 55: 1327–85, 2009
66. Bright S: The death penalty as the answer to crime: costly, counterproductive and corrupting. Santa Clara L Rev 36:1069–96, 1996
67. Amnesty International UK Press Releases 2012. Available at http://www.amnesty.org.uk/press-releases/usa-new-report-execution-mentally-ill-prisoners. Accessed July 22, 2015
68. Mandery EJ: Executing the insane, retribution, and temporal justice. Crim L Bull 43:981–85, 2007
69. Fellner J: Beyond reason: executing persons with mental retardation. Hum Right 28:9–13, 2002
70. Hall v. Florida, 134 S. Ct. 1986 (2014)
71. Perlin ML, Cucolo HE: Mental Disability Law: Civil and Criminal. Newark, NJ: Lexis Law Publishing, § 12-4.2c (Cum. Supp.), 2014
72. Slobogin C: Scientizing culpability: the implications of Hall v. Florida and the possibility of a "scientific stare decisis." Wm & Mary Bill Rts J 23:415, 2014
73. Perlin ML: Mental Disability and the Death Penalty: The Shame of the States. Lanham, MD: Rowman & Littlefield, 2013
74. Gardner v. Johnson, 247 F.3d 551, 556 n. 6 (5th Cir. 2001)
75. Covey RD: Exorcizing Wechsler's ghost: the influence of the Model Penal Code on death penalty sentencing jurisprudence. Hastings Const L Q 31:189–268, 2004
76. Sterling v. Cockrell, No. Civ.A. 3:01-CV-2280, 2003 WL 21488632, at 20 (N.D. Tex. 2003) (noting that state offered to make Dr. Grigson available as forensic psychiatric expert)
77. Brady v. Maryland, 373 U.S. 83, 87 (1963)
78. Jones C: A reason to doubt: the suppression of evidence and the inference of innocence. J Crim L Criminol 100:415–74, 2010
79. Rosen RA: Disciplinary sanctions against prosecutors for Brady violations: a paper tiger. N C L Rev 65:693–744, 1987
80. Slobogin C: The death penalty in Florida. Elon L Rev 1:17–63, 2009
81. Ashly v. Texas, 319 F.2d 80 (5th Cir. 1963)
82. Powell v. Wiman, 287 F.2d 275 (5th Cir. 1961)
83. Wallace v. State, 501 P.2d 1036 (Nev. 1972)
84. Bazelon L: Hard lessons: the role of law schools in addressing prosecutorial misconduct. Berkeley J Crim L 16:391–441, 2011
85. Ridolfi K, Possley M: Preventable error: a report on prosecutorial misconduct in California, 1997–2009. Santa Clara, CA: Northern California Innocence Project Publication, Santa Clara School of Law, 2010
86. Gershman BL: The new prosecutors. U Pitt L Rev 53:393–448, 1992
87. Raeder M: See no evil: wrongful convictions and the prosecutorial ethics of offering testimony by jailhouse informants and dishonest experts. Fordham L Rev 76:1413–52, 2007