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Volume 44  
Number 0 *Special Issue: Rethinking the Death  
Penalty in California*

Article 2

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2-1-2011

## Essay: Post-Conviction Death Penalty Investigations: The Need for Independent Investigators

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### Recommended Citation

Laurie L. Levenson, *Essay: Post-Conviction Death Penalty Investigations: The Need for Independent Investigators*, 44 Loy. L.A. L. Rev. S225 (2011).

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**ESSAY: POST-CONVICTION  
DEATH PENALTY INVESTIGATIONS:  
THE NEED FOR INDEPENDENT  
INVESTIGATORS**

*Laurie L. Levenson\**

*Currently, no standards guide the police or prosecutors on when they should appoint new investigators to conduct post-conviction investigations. One would hope that common sense would lead them to use independent investigators—as opposed to those with conflicts of interest—without a formal rule dictating that they had to do so. Evidence, however, suggests otherwise. This Essay discusses why it is essential to institute more formal guidelines to maintain the fairness and integrity of the justice system.*

*In addition to the condemned inmates whose cases are often the focus of such post-conviction investigations, 140,000 inmates are currently serving sentences of life imprisonment. There is a tremendous need to ensure that everyone in prison—not just those sentenced to be executed—has been afforded a fair trial. This Essay suggests that new investigators should be assigned to all nonfrivolous claims of police or prosecutorial misconduct. The criminal justice system needs a conflict-of-interest standard to ensure that only the guilty remain convicted.*

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\* David W. Burcham Chair in Ethical Advocacy, Loyola Law School Los Angeles. I am grateful to the work of my Research Assistant Kate Kaso and the helpful commentary by faculty at the University of Kansas Law School. This Essay was inspired by current efforts to revise the ABA Standards Relating to the Administration of Criminal Justice. In a recent work, *Conflicts over Conflicts: Challenges in Redrafting the ABA Standards for Criminal Justice on Conflicts of Interest*, 38 HASTINGS CONST. L.Q. 879 (2011), available at <http://ssrn.com/abstract=1746848>, I discussed the forty most pressing questions to be considered when redrafting the ethical standards governing prosecutors and defense lawyers' conflicts of interests. *Id.* at 881. One of those essential questions is: "Should prosecutors be responsible for conflicts of interest among law enforcement personnel?" *Id.* at 897.

I am deeply honored to contribute to this special issue of the *Loyola of Los Angeles Law Review*. This issue honors the work and career of an extraordinary jurist and mentor, the Honorable Arthur L. Alarcón. Judge Alarcón has committed his life to helping others. Thankfully, I have been one of the many beneficiaries of his wisdom and generosity. He is a man of integrity, courage, and truth. He has worked tirelessly to improve the American justice system. Judge Alarcón makes us ask the hard questions. More importantly, he helps us answer them.

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*“The basis of effective government is public confidence, and that confidence is endangered when ethical standards falter or appear to falter.”*

—Special Message to Congress on Conflict-of-Interest Legislation and on Problems of Ethics in Government, PUB. PAPERS 326 (Apr. 27, 1961)<sup>1</sup>

### I. INTRODUCTION

As the public and criminal justice system contemplates how to proceed with the death penalty in America, one issue demands everyone’s attention: Who should conduct post-conviction investigations? Generally, prosecutors use the same officers who handled the original investigation in a case investigating a defendant’s post-conviction claims. The reason for this is obvious. The original investigating officers are most familiar with the facts of the case and using them can save time and costs in the post-conviction investigation.

But there is a danger in using the original investigating officers to conduct post-conviction investigations, especially when the cases involve claims of prosecutorial misconduct or failures to disclose exculpatory evidence. In such situations, officers are put in the situation of investigating their own alleged misconduct or that of their partners. A natural conflict of interest arises that may skew that investigation and will certainly undermine confidence in it.

Currently, no standards guide the police or prosecutors on when they should appoint individual investigators to conduct particular post-conviction investigations. Officers are left to investigate cases in which they have already secured convictions, knowing that if a defendant’s challenges are proved true, it will jeopardize an officer’s own reputation and credibility. While some progress has been made in the civil rights area to assign independent officers to investigate allegations of police misconduct, the same is not true for investigations of post-conviction petitions for writ of habeas corpus.

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1. The need for effective conflict-of-interest rules, especially for public employees, was highlighted by the U.S. Supreme Court in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961): “[Conflict-of-interest laws are] directed at an evil which endangers the fabric of a democratic society, for democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.” *Id.* at 562.

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Both the courts and prosecutors have a duty to adopt rules regarding the conduct of post-conviction investigations so that prosecutors continue to pursue the goal of finding the truth, rather than just rebutting defense allegations.

This Essay examines why there is a need for standards to guide prosecutors and law enforcement in post-conviction investigations. It also suggests what those standards should be. This issue affects more than just death penalty cases. With over 140,000 Americans serving life imprisonment,<sup>2</sup> there is a tremendous need to ensure that everyone in prison—not just those sentenced to be executed—has been afforded a fair trial. As post-conviction challenges soar,<sup>3</sup> so does the concern that innocent persons have been wrongfully convicted.

Reliable post-conviction investigations help prosecutors decide how to respond to claims of wrongful conviction. Most petitioners for habeas corpus never receive a hearing.<sup>4</sup> For many petitioners, informal negotiations offer the best hope for a remedy. If the defense can get the prosecutor to admit flaws in the original proceedings, which they only do when their own investigators verify the defense's allegations, then there is hope for a retrial or even exoneration. However, if the prosecution's investigators dig in their heels and refuse to give a fresh look at the case, the defendant's task becomes Herculean.

As this Essay suggests, prosecutors can take at least one immediate step to ensure that post-conviction reviews are not stalled. When a nonfrivolous post-conviction challenge claims police or prosecutorial misconduct—especially if there are allegations of faulty identification and interviewing procedures—then new investigators should be assigned to evaluate those claims. Trial investigators have too much invested to fairly and objectively evaluate their own work. The criminal justice system needs a conflict-of-interest standard to ensure that only the guilty remain convicted.

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2. Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27–32 (2010).

3. In 2010 alone, more than 17,000 habeas corpus petitions were filed in federal court. See Joseph L. Hoffman & Nancy J. King, *Justice, Too Much and Too Expensive*, N.Y. TIMES, Apr. 16, 2011, at WK8.

4. *Id.*

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## II. THE PROBLEM

To understand the problem with conflicted investigators, it is helpful to look at the issue both from the perspective of what happens in an individual case and from the broader perspective of how many cases are being impacted by wrongful investigative procedures. As described in the next two sections of this Essay, an officer's conflict of interest can derail justice in the most serious of cases, including those involving defendants in capital cases.

### A. *A Case Study: People v. Reggie Cole & Obie Anthony*<sup>5</sup>

To understand the impact of investigators' conflicts of interest, consider the case of *People v. Reggie Cole & Obie Anthony*. Sixteen years ago, Reggie Cole and Obie Anthony were convicted of murder. They both claimed that they were wrongfully convicted, and they each filed a petition for writ of habeas corpus. Cole's petition was recently granted, and he has been released from custody; Anthony, however, still awaits his day in court.

In his petition for writ of habeas corpus, Anthony claimed that his conviction was based on misidentifications and false testimony secured by the police detectives. As too often happens, the prosecutor evaluating Anthony's post-conviction claims of innocence and investigative misconduct asked the same investigator originally assigned to his case, and now accused of misconduct, to do the post-conviction investigation. This same detective was sent back to ask witnesses questions such as: "Did I unfairly pressure or trick you into making your identification?" "Did I tap on photographs when you were asked to make your investigations, like the defense now claims?" Not surprisingly, her post-conviction investigation cleared her of all wrongdoing and returned the prosecution's witnesses to their original positions. But there is good reason to doubt her findings.

To understand why, consider the facts of the case: Anthony and Cole were convicted in 1995 of the murder and attempted robbery of Felipe Gonzales at 11:30 p.m. on March 27, 1994. The shooting took place in front of a warehouse in South-Central Los Angeles, an area plagued with gangs, crack houses, and nearly daily murders.<sup>6</sup> There

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5. *People v. Cole & Anthony*, No. BA097736 (L.A. County Super. Ct. 1995).

6. These facts are based on the Petition for Writ of Habeas Corpus filed by Anthony and

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was no evidence that Cole or Anthony had ever been to the location before, nor did any physical evidence link Cole or Anthony to the crime. Shoeprints and fingerprints found at the scene matched neither Anthony nor Cole. Eyewitness descriptions of the attackers did not match the suspects, other than that the shooters were African American and so are Anthony and Cole. Security videotapes from the location, used by the pimp to monitor visitors to his girls, were seized by the police but lost before trial. An anonymous suspect was brought to the station that night, but there are no police records of who it was and the suspect was evidently released. The only possible eyewitnesses to the crime were two children, the pimp's young daughters, who lived at their father's "business" establishment. Seven and nine years old at the time, they were looking out the window at the time of the shooting and ran to tell their parents what had happened. Seeking to shield them from having to testify, their father, John Jones, designated himself an "eyewitness" to the crime and became the star witness for the prosecution at trial. As one might expect, Jones's own background was less than sterling. He had a lengthy record of drug, gun, and vice violations. He was also convicted of fatally shooting his girlfriend while she held her baby.

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Cole, including its supporting exhibits, as well as the court record from the trial.

According to that record, on March 27, 1994, at approximately 11:30 p.m., Felipe Gonzales, Victor Trejo, and Luis Jimenez drove to a building at the corner of Figueroa and 49th Streets in Los Angeles so that Gonzales could see his "friend," a female named either Melinda or Melissa. John Jones managed the building on the corner and rented rooms for \$10 a day to prostitutes and transients. There, Gonzales got out of the car while Trejo and Jimenez stayed inside to clean up a beer Gonzales had spilled. Trejo then turned the car around and pulled up alongside Gonzales, who was chatting with someone in front of the building.

As Gonzales walked toward the car, three African American males surrounded him. One of the men grabbed Gonzales by the neck, pushed him up against Trejo's car and hit him in the face with a gun. One of the other men yelled, "Stop the fucking car," opened the passenger door, and said to Trejo and Jimenez, "Give me the money." He had a silver automatic gun tucked in his pants. As he grabbed Jimenez by the hair, Trejo claimed to have seen his face, although the man did not even partially enter the car. Trejo grabbed the man's hand, telling him there would not be a problem. The man then shot both Trejo and Jimenez numerous times, and Trejo drove off. As he was driving away, Trejo saw Gonzales being pushed and trying to run, then he heard more shots but did not see anything further.

When the paramedics arrived at the crime scene, they found Gonzales lying in the street on his stomach. They pronounced him dead on arrival at 11:41 p.m. The medical examiner testified that Gonzales died of a through-and-through gunshot wound to the back.

When Detective Marcella Winn arrived at the scene at about 1:30 a.m., she found no witnesses. At 4:00 a.m., as she was standing on the corner of 49th and Figueroa, John Jones leaned out a second-floor window, said, "Pssst, officer, they ran that-a-way," and pointed eastward on 49th Street. After a few requests, Jones came downstairs and spoke with Winn for about five minutes. No other witnesses came forward.

But he was on excellent terms with the Los Angeles Police Department (LAPD) officers because, among other things, he allegedly made his employees' services available to officers who wished to use them.

On the night of the murder, Detective Marcella Winn responded to the scene after midnight, accompanied by her partner, veteran Detective Pete "Raz" Razankas. It was Winn's first investigation, and she had a journalist and book author, Miles Corwin, tagging along to chronicle her investigation. Corwin was planning to write a book about the carnage on the streets of Los Angeles and the great work of LAPD homicide detectives. Ultimately, Corwin did write that book, *The Killing Season*, and it begins as follows:

Homicide detectives in South-Central Los Angeles usually do not wait long for a murder. On Detective Marcella Winn's first weekend on call, she spends an edgy Friday evening at home, waiting for the call of death. She watches a video of the movie *Tombstone* and munches on popcorn, but cannot keep her mind on the plot. She keeps waiting for the phone to ring. Before going to sleep, she lays out her gold linen blazer, beige blouse and green rayon slacks; she does not want to have to fumble through her closet in the middle of the night looking for the right color combination. Winn has been in the homicide bureau only two weeks and this will be her first murder investigation.<sup>7</sup>

Winn and her partner became the book's stars as Corwin spent scores of pages regaling the reader with the step-by-step account of how they had solved the murder. He recalled how the case went cold early because the police had no suspects on the night of the shooting. Corwin then shared how he regularly checked in with Winn, but she had reported that she was having no luck finding the shooters. Then, Winn's luck turned one month after the murder when she allegedly received an anonymous call<sup>8</sup> that "Baby Day from Five Deuce Avalon Crips made a move on 49th Street<sup>9</sup> with two guys, and it

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7. MILES CORWIN, *THE KILLING SEASON* 25 (1st ed. 1997).

8. There is neither a record of this call in the police logs nor any recording of it, although Winn listed it in her reports. Defense counsel suspected that Winn herself may have been the source of this call.

9. If Winn had checked, she would have learned that no such gang ever existed in Los Angeles. See STEVEN R. CURETON, *HOOVER CRIPS: WHEN CRIPIN' BECOMES A WAY OF LIFE* 7 (2008).

went wrong.” Winn pulled the gang files for a “Baby Day” and found that fourteen individuals were registered as having a similar gang moniker. In particular, “Baby Day Day” belonged to an associate of Obie Anthony, Michael Miller, and Obie Anthony had the moniker of “Little Day Day.” When Winn learned that Michael Miller, Obie Anthony, and Obie’s friend Reggie Cole had recently been arrested for a carjacking and robbery, she believed that she had the right suspects for the Gonzales killing and started to build the case against them.

There were early signs that Winn might have been on the wrong track, but she ignored them. For example, the carjacking case against Anthony and Cole was dismissed when the police determined that the carjacking had never occurred. Also, “Baby Day” and “Little Day Day” are two distinctively different gang monikers.<sup>10</sup> Finally, when asked to identify Anthony and Cole in live lineups and from photospreads, none of Gonzales’s companions could do so.

Yet, Winn continued to build her case; to do so, she turned to the so-called eyewitness, John Jones, the pimp at the whorehouse. On the night of the murder when Jones was interviewed, he said that he had heard a commotion outside of his place and that his young daughters had come running to his wife about the disturbance. Later during the investigation, Jones told Winn that he would be the “eyewitness” because he wanted to keep the young girls out of it. Jones also told Winn that he could identify at least one of the shooters because when the shooting began, a so-called good citizen (i.e., Jones), started to shoot at the fleeing suspects as they ran away from the building.<sup>11</sup> The good citizen, who had been a sharpshooter

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10. Importantly, as an expert in the post-conviction proceedings eventually testified, “Baby Day Day” and “Little Day Day” are not the same moniker. In fact, they are different generations of gang members. “Little Day Day” would be senior to “Baby Day Day,” making “Baby Day Day” the protégé of “Little Day Day.” See Declaration of Alex Alonso, Petition for Writ of Habeas Corpus, Exhibit 7.

11. Jones’s remarks to the police were reported in *THE KILLING SEASON* as follows:

[John Jones] studies his rings and says softly, “You should look into whether one of the suspects got shot.”

“Why?” Razanskas asks.

“Just a hunch.”

Razanskas and Winn look puzzled. Then they suddenly realize that the shots from the third gun on the tape were not fired *by* the suspects, but were fired *at* the suspects. . . .

in the military, hit one of the suspects in the leg.<sup>12</sup> If Winn could catch a guy with a bullet wound, Jones could identify him as the shooter.

Winn returned to Jones and told him that they had caught the shooters.<sup>13</sup> She told him that Cole had a bullet wound in his leg and that Anthony went by the name “Baby Day Day,” the same name the anonymous caller had used to name the suspects.<sup>14</sup> She failed to mention that Cole’s bullet wound was eight years old, not four weeks old, and that Anthony’s moniker was “Little Day Day,” not “Baby Day Day.”<sup>15</sup> Winn told Jones that both suspects were black and members of a gang.<sup>16</sup> She also said that they had committed carjackings in the area.<sup>17</sup> She then asked Jones to identify the suspects from photospreads.<sup>18</sup> Although he had never seen the suspects’ faces, Jones identified Cole and Anthony from the photospreads.<sup>19</sup> Later, in

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“You know,” Razanskas tells Jones, “we have no problem with this guy firing a few shots.”

“What if he’s an ex-felon with a gun?” Jones asks.

“We still have no problem.” Razanskas leans forward and says earnestly, “I’m going to be up front with you. I look at this guy as a fucking hero I’d like to give him a medal. Let’s just call him an ‘unknown citizen’ We’ll leave it at that.”

Jones stares into his coffee cup. He tells Razanskas he trusts him. He knows the hooker Razanskas talked to the night of the murder. He talked to her yesterday, and she told him, “Raz is straight.”

“All right,” Jones says. “The unknown citizen,” he says, smiling amused at the phrase, “capped off six rounds.”

The unknown citizen fired the shots as the suspects ran down the street toward the alley, Jones says. One shot hit the suspect wearing the long coat in the leg. . . .

. . . .

Winn and Razanskas do not want to push too hard to determine who the unknown citizen was. They have a good witness, a rare commodity these days in South Bureau Homicide. They do not want to do anything to scare him off.

CORWIN, *supra* note 7, at 41–42.

12. Jones claimed to have been a sharpshooter when he was in the Army. *Id.*

13. *Id.* at 45.

14. *Id.*

15. *See id.*

16. *Id.*

17. *See id.*

18. *Id.*

19. *Id.* Winn used nearly every technique likely to lead to unreliable identifications. *See generally* Robert A. Wise et al., *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CONN. L. REV. 435 (2009) (identifying several reasons why eyewitness testimony can be unreliable: (a) the nature of human memory, (b) eyewitness bias, (c) misinformation effect, (d) source monitoring errors, (e) hindsight bias, (f) eyewitness overconfidence in the accuracy of his or her perceptions and memory and the malleability of

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the post-conviction litigation, Jones said he had made those identifications because Winn tapped on the photographs of the people she wanted him to identify.

As can easily happen, once Winn was convinced that she had the right suspects, she set about making sure that the evidence at trial matched her theory. Witnesses who could make no identifications the night of the murder were told that the police had caught “the right guys” and that it would be helpful if the witnesses would come to court for trial. At trial, Victor Trejos, who had been with Gonzales that night, identified Cole and Anthony.<sup>20</sup> He had previously stated that he could not identify the attackers and had actually picked a different individual at an earlier identification. Yet, after his conversation with Winn, he testified at the preliminary hearing that he saw Anthony’s face in a dream and was sure that he was one of the attackers. Another one of Gonzales’s companions, Luis Jiminez, was not subpoenaed for trial. In the post-conviction investigation, Luis described the attackers as much taller and older than Cole and Anthony.

Winn’s investigative techniques and the exonerating witnesses’ statements were not revealed at the time of trial. Cole and Anthony were convicted on Jones’s and Trejos’s testimony. Winn was championed for her work on the case. Corwin published an article in the *Los Angeles Times* titled *Murder on 49th Street: Felipe Gonzales Angeles’ Shooting Was Typical of Most of the 836 Homicides in Los Angeles Last Year: No Press Coverage, Few Leads, the Victim Quickly Forgotten. What It Did Have Was a Couple of Cops Driven to Find His Killer*<sup>21</sup> and ended *The Killing Season* with the following

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eyewitness confidence, and (g) actions by officers to draw the eyewitness’s attention to the suspect). Nearly every factor that is likely to lead to an unreliable eyewitness investigation applied to Jones’s situation. First, Jones had his own bias. He was strongly motivated to assist the LAPD because he knew his own operations were in jeopardy if he did not assist them. One phone call could shut down his operations. Moreover, there was some possibility that he had actually shot the victim, Gonzales, as he shot randomly at suspects running from the scene. Second, Jones was given erroneous information about the apprehended suspects’ backgrounds. Third, Jones was told that he had identified the correct suspects. Fourth, Winn used means—such as the tap on the defendants’ photos—to draw Jones’s attention to the suspects. Since Jones did not reveal these problems in the identification procedures until the habeas investigation, the defendant was unable to use it in the cross-examination of Jones at trial.

20. Interestingly, in all of their statements, neither Jones nor Trejo ever recalled that the assailants had any distinctive marks on their faces. However, Obie Anthony has a large tear-drop scar on his eye as the result of having been hit by a car three years earlier.

21. Miles Corwin, *Murder on 49th Street: Felipe Gonzales Angeles’ Shooting Was Typical*

statement: “Obie Anthony and Reggie Cole, the two suspects in Winn’s first homicide case, were both convicted of first-degree murder. They were sentenced to life imprisonment without parole (LWOP), which the detectives call El-Wop.”<sup>22</sup>

It was not until twelve years later, when Cole faced additional charges for his conduct in prison, and another judge started looking into the case, that the defense discovered how Winn had put together the original case. Defense investigators reinterviewed witnesses, pulled Cole’s medical records for the old gunshot injury, and conducted additional searches for information regarding Jones, the prosecution’s key witness.<sup>23</sup> In talking with Jones, the defense investigators learned that Winn had never told Jones that Cole’s bullet wound was an old injury.<sup>24</sup> Had she done so, Jones said he would never have identified Cole or Anthony at trial.<sup>25</sup>

Based on these new revelations, Cole petitioned for a writ of habeas corpus.<sup>26</sup> His petition was granted and his case dismissed.<sup>27</sup> The court held that it was ineffective assistance of counsel for Cole’s lawyer not to introduce the records of Cole’s prior gunshot injury.<sup>28</sup> Even after the dismissal, Winn’s personal investment was apparent: “‘This guy did this murder, and there’s no doubt in my mind and in other witnesses’ minds,’ she said. ‘Mr. Cole is not innocent.’”<sup>29</sup>

Obie Anthony, however, stays in jail. His evidentiary hearing is pending.<sup>30</sup> His conviction was also based on Jones’s testimony, but, unlike his co-defendant, Anthony lacks the record of an old gunshot

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*of Most of the 836 Homicides in Los Angeles Last Year: No Press Coverage, Few Leads, the Victim Quickly Forgotten. What It Did Have Was a Couple of Cops Driven to Find His Killer*, L.A. TIMES MAG., Mar. 26, 1995, at 22.

22. CORWIN, *supra* note 7, at 327.

23. Petition for Writ of Habeas Corpus at 12, *Cole v. Smalls* (2008) (No. BA097736).

24. *Id.*

25. Petition for Writ of Habeas Corpus, Exhibit 3, Declaration of John Henry Jones, *In re Obie Steven Anthony III* (2010).

26. Petition for Writ of Habeas Corpus at 12, *Cole v. Smalls* (2008) (No. BA097736).

27. Order Vacating Judgment, *Cole v. Smalls* (2010) (No. BA097736).

28. *Id.*

29. Hector Becerra, *After 14 Years, Charges Dismissed Against Man Convicted of Murder*, L.A. TIMES, July 4, 2009, at A4.

30. As with federal habeas corpus claims, state judges traditionally have broad discretion to decide whether to hold an evidentiary hearing. *See, e.g.*, 28 U.S.C. § 2254(e)(2); *see also* *United States v. Hayman*, 342 U.S. 205, 219–20 (1952) (discussing prisoners’ rights in habeas corpus hearings). The petitioner bears the burden of proof beyond a preponderance of the evidence in an evidentiary hearing. *In re Visciotti*, 926 P2d 987, 1002–03 (Cal. 1996).

injury that might automatically exonerate him. In order to exonerate Anthony, his counsel<sup>31</sup> will have to do what most habeas petitioners must do—demonstrate by a complete reinvestigation of the case why he was wrongfully convicted.

In his habeas petition, Anthony reveals additional evidence obtained in a post-conviction investigation. For example, the petition's exhibits show that Jones had a prior conviction for shooting his girlfriend in the head as she held her baby.<sup>32</sup> He received only a year in jail on a manslaughter charge for that killing.<sup>33</sup> More importantly, notes in the prosecutor's files of John Jones's pandering and prostitution cases indicate that the police and prosecution were repaying his cooperation in Anthony's case by arguing leniency for Jones.<sup>34</sup> These notes were never revealed to the defense during the original murder trial.

These *Brady* violations<sup>35</sup> lie at the heart of Anthony's habeas petition and rest on a key declaration signed by Jones. However, equally important is recently discovered information that Winn used improper identification techniques when getting Jones to identify Cole and Anthony as the shooters in their murder case. According to a declaration signed by Jones during the defense's post-conviction investigation, had he known that Cole's injury was an old one—and not caused by the "good citizen's" shot—and had Winn never tapped on the photospreads during the identification procedures, he would never have identified Anthony or Cole as the shooters.<sup>36</sup> In other

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31. The Northern California Innocence Project represents Obie Anthony, assisted by students in Loyola Law School Los Angeles's Project for the Innocent and supervised by this Author. The Loyola Project for the Innocent is a clinic within the Loyola Law School Los Angeles Alarcón Advocacy Center.

32. Petition for Writ of Habeas Corpus, Exhibit 17, New Documents from District Attorney re: Favorable Treatment of John Jones, *In re* Obie Steven Anthony III (2010).

33. Probation Officer's Report, *People v. Jones*, No. A-380176, 1-366939 (Apr. 25, 1983).

34. The officers and prosecutors were obligated to share this information with the defense. *See Santobello v. New York*, 404 U.S. 257, 262 (1971) ("The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done").

35. *Brady v. Maryland*, 373 U.S. 83 (1963). A *Brady* violation consists of three elements. First, the evidence at issue must be favorable to the defendant, either because it is impeaching or because it is exculpatory. Second, the State must have suppressed the evidence, either willfully or unintentionally. Finally, the failure to disclose the evidence must have resulted in prejudice.

36. If believed by the court, Jones's declaration would form the basis for a due process challenge to Anthony's conviction. *Miller v. Pate*, 386 U.S. 1, 7 (1967) ("More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. There has been no deviation from this established principle."). "A defendant has a due process right to a fair trial. Government agents may not

words, Jones not only retracted his trial testimony but also accused Winn of using improper procedures to obtain eyewitness identifications.

In preparation for filing its response, the prosecution decided to conduct its own investigation. Instead of using an independent investigator, prosecutors asked Winn to do the follow-up. Winn was then sent on a mission to investigate her own alleged misconduct.

Apparently, Winn's first step in conducting her post-conviction investigation was to talk to Jones again. She can be heard on an audiotape of that interview prodding Jones to recant his recantation. She offered Jones other "valid" reasons he selected Anthony and suggested that he be more confident in his original identifications. She further asked Jones to confirm that she never did anything to influence his testimony, including affirming that his parole status was not a factor in deciding to help the detectives in their case against Anthony and Cole.

Post-conviction investigations like Winn's put prosecutors in a very difficult situation. Because Winn is invested in validating her original investigative work, the prosecutors are in the unenviable position of assessing the defendant's post-conviction claims by relying on information from a biased investigator. Politically, it is difficult for the prosecution to attack its star investigator—who has built her career on this highly visible case—and who now supervises a team of detectives who handle the prosecutors' homicide cases.<sup>37</sup> Additionally, the prosecutors would have the practical problem of finding resources to fund an independent investigator to reinvestigate

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manufacture evidence and offer it against a criminal defendant." *Doswell v. City of Pittsburgh*, No. 07-0761, 2009 U.S. Dist. LEXIS 51435, at \*24 (W.D. Pa. June 16, 2009) (quoting *Stepp v. Mangold*, No. 94-2108, 1998 U.S. Dist. LEXIS 8633, 1998 WL 309921, at \*7 (E.D. Pa. June 10, 1998)). Under California law, like that of many other jurisdictions, a claim of perjured testimony or a claim of the prosecution presenting false evidence must show that the falsity was not apparent to the trier of fact from the trial record and that the defendant had no opportunity at trial to show the evidence was false (usually because the prosecution suppressed evidence). *In re Waltreus*, 397 P.2d 1001, 1002-03 (Cal. 1965).

37. Few prosecutors take the step of notifying their superiors, let alone the court, that indeed they may be facing a situation of tainted police work. Cf. Melanie D. Wilson, *Finding a Happy and Ethical Medium Between a Prosecutor Who Believes the Defendant Didn't Do It and the Boss Who Says That He Did*, 103 NW. U. L. REV. COLLOQUY 65 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/30/LRColl2008n30Wilson.pdf> (recommending that prosecutors alert courts to their doubts about cases that their supervisors insist they pursue).

the case.<sup>38</sup>

As this case demonstrates, the conflicts of interest borne by investigators may severely compromise the search for justice. Without an independent investigation, it will be difficult to convince prosecutors that their nationally touted detective was responsible for wrongful convictions in a celebrated murder case. While the court may eventually make that finding, the prosecution will continue to present to the court tainted testimony in the post-conviction proceedings.

### B. The Bigger Picture

Although the case of *People v. Cole & Anthony* gives a helpful close-up of the problems inherent in using investigators with conflicts, this problem is more widespread. The number of wrongfully convicted defendants in America is alarming. According to an early study by the director of the Criminal Justice Research Center and the School of Public Policy and Management at Ohio State University, close to 10,000 people in the United States may be wrongfully convicted of serious crimes every year.<sup>39</sup> But that is just an estimate based on studies of other wrongful convictions.

We know for sure that DNA testing has exonerated over 280 defendants, 77 percent of whom had convictions based on eyewitness identifications.<sup>40</sup> Many of those also included allegations of law enforcement misconduct in obtaining the identifications, including

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38. However, to their credit, the Los Angeles County District Attorney's Office, Appellate Section, has recently agreed to relieve Winn of her investigative responsibilities and use investigators from the District Attorney's Office to do the follow-up investigation. Memorandum (on file with author).

39. See C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY (1996).

40. THE INNOCENCE PROJECT, <http://www.innocenceproject.org> (last visited Feb. 21, 2011). See generally Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 62 (2008) (studying a few known innocence cases as a microcosm of larger issues); Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 174-76 (2008) (discussing the far-reaching effects of some recent exonerations); Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542 (2005) (discussing some "basic patterns" that have led to false convictions); Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595 (2009) (suggesting procedures to reform witness identification); Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Un corroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487 (2008) (arguing that reform to remedy witness misidentification aimed solely at police procedures is insufficient and effective reform requires corroborated evidence).

some of the methods allegedly used by Winn.<sup>41</sup>

There is a compelling interest in having post-conviction investigations that will ferret out misidentifications and investigator misconduct. Unlike the inquisitorial system, used in European countries, where the court directly supervises a case's investigation and post-conviction review is readily available,<sup>42</sup> the American model takes a very limited approach to affording post-conviction relief. The integrity of the evidence presented to the court depends in large part on the integrity of the prosecutors and police in the adversarial process. The need for independent investigators is heightened by the fact that most habeas petitions are handled pro se by petitioners unschooled in the law and without resources to conduct any investigation while they remain in custody.<sup>43</sup> At most, they can bring some simple facts to the court and hope that the court will grant an evidentiary hearing or appoint an investigator to assist with the habeas petition.<sup>44</sup>

In her article *An Exclusionary Rule for Police Lies*,<sup>45</sup> Professor Melanie D. Wilson notes that

[i]f the police honestly, but incorrectly, believe X committed the crime, they will not look for Y, the real

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41. See *supra* note 19.

42. See generally Paul J. Saguil, *Improving Wrongful Conviction Review: Lessons from a Comparative Analysis of Continental Criminal Procedure*, 45 ALBERTA L. REV. 117 (2007). For example, France allows post-conviction review whenever there is a showing of new facts or evidence that the defendant was convicted on false testimony. *Id.* at 125. A commission of five judges sits as a sort of examining magistrate to review and call for further investigation. *Id.* at 124. The French courts are not bound by technical or inflexible rules of evidence and its duty is "to search for the objective truth and not merely admissible evidence." *Id.* at 125. Other countries have adopted different models to investigate allegations of miscarriages of justice, including independent commissions that review and investigate such claims. See Criminal Cases Review Commission, <http://www.crc.gov.uk/> (last visited June 11, 2011).

43. See Anna R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 MD L. REV. 545, 597 (2009).

44. Petitioners are also hampered by the fact that most jurisdictions do not afford the right to post-conviction motions for police files that may disclose other acts of misconduct by the investigating officers. See, e.g., CAL. EVID. CODE § 1043 (2011) (stating that *Pitchess* motions to discover police agency record concerning an officer must be filed pretrial); *Pitchess v. Superior Court*, 522 P.2d 305 (Cal. 1974) (holding that defendant was entitled to discover prior citizen complaints against officers alleging misconduct). Post-conviction discovery is limited to capital cases. CAL. PENAL CODE § 1054.9; *People v. Gonzalez*, 800 P.2d 1159, 1203 (Cal. 1990) (holding that trial court has no jurisdiction to entertain a motion for postjudgment discovery after the judgment has become final).

45. See Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1 (2010).

culprit. In addition, they will become myopic in analyzing evidence and interviewing witnesses, viewing every detail they uncover from the perspective of an officer who believes that he [or she] knows “who did it.”<sup>46</sup>

Just as troubling, “[i]f police lie about the evidence and the validity of the case—especially if they tell the lies because of their own belief in the defendant’s guilt—then prosecutors may become entrenched in the police’s beliefs that the defendant did it.”<sup>47</sup> Once there has been a conviction, it is extremely difficult to convince prosecutors and officers that the convicted person is actually innocent.<sup>48</sup> The officers are far too invested in the case, and their role in it, to capitulate to new challenges by the defendant.<sup>49</sup>

In recent years, there has been growing attention to the problem of having law enforcement officers investigate their own alleged misconduct.<sup>50</sup> Celebrated police scandals, such as the Rodney King beating incident<sup>51</sup> and the Rampart scandal in Los Angeles,<sup>52</sup> have demonstrated the dangers of having police departments that are

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46. *Id.* at 17.

47. *Id.* at 18.

48. For example, after the Cole dismissal, Winn affirmatively stated that “[i]t was a good case 13, 14 years ago, and it’s a good case now.” Becerra, *supra* note 29.

49. There are fewer options in the post-conviction scenario for remedying police lies or misconduct. First, the misconduct and lies are less likely to be revealed because there is no guarantee of a hearing on the matter where the petitioner will have an opportunity to cross-examine the investigating officer. Second, proposals to use incentives such as the exclusionary rule will not work at that stage. The case has already been tried and a jury has already heard the tainted evidence.

50. See generally Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 15, 22–24 (2001) (arguing that addressing police misconduct requires a multi-faceted approach that involves both public and political powers).

51. See Laurie L. Levenson, *The Future of State and Federal Civil Rights Cases: The Lessons of the Rodney King Trial*, 41 U.C.L.A. L. REV. 509, 516–33 (1994).

52. See Erwin Chemerinsky, *Symposium: The Rampart Scandal: Policing the Criminal Justice System: An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L. A. L. REV. 545, 553–75 (2001) (describing causes and responses to scandal in which LAPD gang officers framed and shot innocent suspects and detailing dangers that occur when police are allowed to investigate alleged misconduct against their own officers); Levenson, *supra* note 50, at 37–39 (advocating for independent investigators in prosecution offices to investigate claims of police misconduct); see also Carol Chase, *Rampart: A Crying Need to Restore Police Accountability*, 34 LOY. L.A. L. REV. 767, 774–75 (2001) (stating that restoring police accountability requires implementing rules that permit direct punishment for officers who violate the law); Samuel H. Pillsbury, *Police Abuse: Outsiders May Be the Best Judges*, L.A. TIMES, Oct. 29, 2000, at M1 (arguing that reform with respect to police misconduct requires police and prosecutors at all ranks to recognize that the release of relevant but negative information will help to further justice rather than to subvert crime fighting).

allowed to decide for themselves whether there has been improper police conduct. At least in dealing with police abuse cases there has been a positive move toward using independent investigators and prosecutorial units to investigate and prosecute such cases. Experts have recognized that it is just too difficult for prosecutors and officers to question and undermine the work of those they depend on with their daily work.<sup>53</sup>

We are at the point where we should come to a similar conclusion with regard to post-conviction investigations in habeas corpus cases. If the allegations in a habeas petition are that an officer misled witnesses into providing identifications or engaged in other misconduct then that officer should be recused from conducting the post-conviction investigation.<sup>54</sup>

### III. SEARCHING FOR CONFLICT RULES FOR INVESTIGATORS

Currently, no court rules or ethical codes govern the assignment of investigators to post-conviction cases. Out of habit, prosecutors routinely use the same agent who originally investigated the criminal charge, even when the post-conviction allegations involve claims of police misconduct and misleading identification procedures.<sup>55</sup> Prosecutors turn to the original investigating officers because they are the ones most familiar with the cases and have the most at stake should the convictions be overturned. Strapped for resources, prosecutors can avoid the considerable start-up costs of assigning a new officer by reassigning the original officer on the case.

The problem with this approach is that it ignores basic conflict-of-interest principles. It is impossible for an investigating agent to investigate his or her own alleged misconduct. One cannot

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53. “Given the important and pervasive role of police departments, the value of independent internal investigations with respect to police functions enhances public confidence in this significant public service. Therefore, in order to preserve both credibility and legitimacy, internal investigations into police conduct must be independent of the police themselves . . . .” William K. Slate II, *Institutional Fact-Finding? Getting Started—Where to Go?*, 16 METRO. CORP. COUNS. 18 (Jan. 2008) (quoting Eileen Luna & Samuel Walker, *IX. Alternative Models of Police Oversight*, in A REPORT ON THE OVERSIGHT MECHANISMS OF THE ALBUQUERQUE POLICE DEPARTMENT (1997), available at <http://www.cabq.gov/council/abqrpt9.html>).

54. At this point, the original investigating officer is likely to be a witness in future evidentiary hearings and, for that reason as well, it is better that another officer investigate the allegations of misconduct. *Cf.* MODEL RULES OF PROF’L CONDUCT R 3.7 (2002) (discussing lawyers as witnesses).

55. Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 494 (2009).

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realistically expect an officer to step back after a successful prosecution and admit the flaws she made in the case. The officer's personal investment in the outcome of the case will inevitably interfere with the constitutional duty to exonerate the innocent.

Unlike prosecutors and defense lawyers, law enforcement officers are not subject to specific conflict-of-interest rules that govern whether they can be assigned to a specific investigation. Rather, they are assigned as their superiors and prosecutors see fit based upon their own evaluations of interests in the case.<sup>56</sup> While some prosecutors are quick to spot the conflict arising from having law enforcement officers conduct post-conviction investigations of their own cases, other prosecutors are not. Many have a natural instinct to dispatch the original investigating officer to determine if a recanting witness should now be believed or whether mistakes were made in the original investigation. This is true even when the recanting witness claims to have been misled or intimidated by the original investigating officer.

It has long been recognized that a lawyer cannot serve two masters.<sup>57</sup> By definition, conflicts of interest are "some particular incentive that threatens to impair an attorney's functioning."<sup>58</sup> The incentive may be to help another client or to help the lawyer herself. However, the competing interest impairs the lawyer's ability to be a zealous advocate for the client.

Conflict-of-interest principles for government lawyers, especially prosecutors, are different. Because a prosecutor represents the community-at-large, not one individual such as the victim or investigating agent, the prosecutor must at all times focus on securing an honest and just outcome to a case. A prosecutor's official duties require safeguarding the defendant's constitutional rights. As set forth in the latest draft of the ABA Standards for Criminal

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56. While governing rules would be helpful, this is but one of many situations in which prosecutors must make decisions that are not directly governed by procedural or ethical standards. In fact, some of the most important decisions prosecutors make are not directly governed by rules. See Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553 (1999).

57. Beth Nolan, *Regulating Government Ethics: When It's Not Enough to Just Say No*, 58 GEO. WASH. L. REV. 405, 414 (1990).

58. Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 831 (1992). For an excellent article on the history and operation of conflict of interest rules, see Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541 (1997).

Justice,

The prosecutor is an administrator of justice, an advocate, an officer of the court . . . . The primary duty of the prosecutor is to seek justice within the bounds of the law. The prosecutor's client is the public . . . . The prosecutor serves the public interest and must act to protect the innocent, convict the guilty, and consider the interests of the victims.<sup>59</sup>

But a prosecutor does not work alone. Prosecutors must rely on their law enforcement investigators to secure the evidence in their cases. Ultimately, prosecutors are responsible for the actions of those investigators, but the investigator's ethical duties, including prohibitions against conflicts of interest, are not covered by prosecutorial codes of ethics.<sup>60</sup> They are left to the law enforcement departments' integrity and administration.

*A. The Gaping Hole in Conflict-of-Interest Codes for Investigators*

No national code governs conflict-of-interest standards for law enforcement officials. Each law enforcement agency is free to adopt standards governing its officers' actions, so long as those standards comply with other requirements for public servants in that jurisdiction. Thus, for example, the LAPD's policies on conflicts of interest fall within the purview of the Los Angeles City Ethics Commission, which sets forth general prohibitions on conflicts of interest. As is typical for most jurisdictions, these conflict-of-interest regulations focus solely on financial conflicts of interests,<sup>61</sup> with no guidance as to dealing with conflicts of interest that may arise when an officer is asked to investigate his or her own behavior.

For the last two decades, periodic articles written by law

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59. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-1.2(a)–(b) (Draft 2010).

60. At most, the ethical codes make clear that the prosecutor "should strive to keep law enforcement personnel informed of relevant legal and ethical issues" and that prosecutors should use "independent judgment when interacting with law enforcement personnel." STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-3.2(a)–(b) (3d ed. 1993) [hereinafter STANDARDS FOR CRIMINAL JUSTICE].

61. See L.A. CITY ETHICS COMM'N, LOS ANGELES POLICE DEPARTMENT CONFLICT OF INTEREST CODE (2001), available at [http://ethics.lacity.org/PDF/COI\\_Web/LAPD\\_COI.pdf](http://ethics.lacity.org/PDF/COI_Web/LAPD_COI.pdf). Although the conflict-of-interest provisions of the code dedicate fourteen pages to prohibited financial relationships, there is not one word regarding an officer's personal conflict with an investigation.

enforcement officials have called for greater guidance on a wider range of ethical issues. In 1993, FBI Special Agent Dennis M. Payne proposed that police managers be more aggressive in their efforts to develop ethical codes for their departments. Without identifying what these codes should state, Payne noted that “[i]nstitutionalizing ethics . . . means integrating ethics into daily decisionmaking and work practices.”<sup>62</sup> Police regulations must cover a wide range of police behavior to effectively guide officers’ most important decisions.

Most departments, however, did not adopt far-reaching ethical codes. Fearing that such codes would lead to increased administrative sanctions of officers, law enforcement departments set additional aspirational goals for their officers.<sup>63</sup> Yet, even these aspirational codes do not alert officers to the personal conflicts they may have in conducting post-conviction investigations. Rather, they encourage officers to use their “moral compasses” in ensuring that they are engaged in acceptable behavior.<sup>64</sup>

Law enforcement ethical codes typically opt for “vague guidelines [to] provide flexibility for individual interpretations and for unique circumstances.”<sup>65</sup> Even the Model Policy on Standards of

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62. Dennis M. Payne, *Ethics in Police Decisionmaking*, FBI L. ENFORCEMENT BULL. (Aug. 1993).

63. John R. Schafer, *Making Ethical Decisions: A Practical Model*, FBI L. ENFORCEMENT BULL. 14 (May 2002), available at <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2002-pdfs/may02.pdf>.

64. *Id.*

65. *Id.* (quoting Todd S. Smith et al., *Clinical Ethical Decision Making: An Investigation of the Rationales Used to Justify Doing Less Than One Believes One Should*, 22 PROF. PSYCHOL.: RES. & PRAC. 235 (June 1991)); Int’l Ass’n of Chiefs of Police, *The Evolution of the Law Enforcement Code of Ethics*, 59 POLICE CHIEF 14 (Jan. 1992). In fact, the Internet teems with individual “Law Enforcement Codes of Ethics” written to inspire, not bind, police officers. For example, one such Code provides:

As a Law Enforcement Officer, my fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all men to liberty, equality and justice.

I will keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided in me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

I will never act officiously or permit personal feelings, prejudices, animosities or friendships to influence my decisions. With no compromise for crime and the relentless

Conduct<sup>66</sup> drafted by the International Association of Chiefs of Police speaks in general terms of “obedience to laws” and avoiding “conduct unbecoming an officer,”<sup>67</sup> rather than specifically dictating that officers should not conduct investigations in cases where the defense alleges that the police have improperly influenced a witness. This is not because the code fails to touch on specific prohibitions on police conduct. At thirty pages, it covers a wide range of topics from prohibiting officers from using tobacco products on duty to prohibiting them from accepting unsolicited gifts. It specifies in detail the nature of statements officers may make to the public, of prohibited endorsements, of limits on political activities, and of rules respecting privacy. However, it does not provide one word on when an officer’s investigative responsibilities may constitute a conflict of interest.<sup>68</sup>

The lack of police regulations on officers’ investigatory authority may be due, in part, to the belief that prosecutors will help direct officers in their investigative duties. Given that prosecutors will ultimately be responsible for presenting the evidence in court, they must be alert to the conflicts that officers may have in their investigations. But like police codes, the ethical standards governing prosecutors also do not yet address the problem of post-conviction conflicts of interest for law enforcement officers.<sup>69</sup>

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prosecution of criminals, I will enforce the law courteously and appropriately without fear of favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of the public service. I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession . . . law enforcement.

Officer Code of Ethics, L.A. CNTY. SHERIFF’S DEP’T, <http://la-sheriff.org/divisions/leadership-training-div/assets/ethicsstatement.pdf> (last visited June 11, 2011).

66. *Model Policy on Standards of Conduct*, INT’L ASS’N OF CHIEFS OF POLICE (2010), <http://www.theiacp.org/PoliceServices/ExecutiveServices/ProfessionalAssistance/Ethics/ModelPolicyonStandardsOfConduct/tabid/196/Default.aspx#ModelPolicy>.

67. *See id.*

68. In fact, it is remarkable how even the main reforms proposed for law enforcement following the Rodney King and Rampart police scandals did not articulate conflict-of-interest rules to apply to officers in conducting post-conviction investigations of their own cases. *See, e.g.*, Kami Chavis Simmons, *New Governance and the ‘New Paradigm’ of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373 (2010).

69. Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 178, 185 (2005). There is a recent proposal to add a new standard to the ABA Prosecution Standards. Proposed Standard 3-7.1 would provide: “The prosecutor should conduct a fair evaluation of post-trial motions, determine their merit, and respond accordingly. The

In creating ethical standards to apply to assigning post-conviction investigations to investigators, prosecutors may turn to the rules governing their own conflicts of interests.<sup>70</sup> Since prosecutors have the ultimate responsibility of ensuring that defendants' due process rights are respected, they also have the ultimate duty to ensure that the officers they use operate free from self-interest. If the goal is to ensure that only the justly convicted remain in prison, the first step must be to ensure that fair and objective post-conviction investigations are conducted.

### *B. Conflict-of-Interest Rules for Prosecutors*

Prosecutors are governed by a variety of ethical codes. Each state has its standards of conduct. Most are patterned on national model codes of conduct. In particular, the ABA Model Code of Professional Responsibility and ABA Standards Relating to the Administration of Criminal Justice have been particularly influential in the drafting of ethical standards for prosecutors.<sup>71</sup> To a lesser extent, one can look at the general conflict-of-interest rules

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prosecutor should not oppose motions that the prosecutor believes are correct, or solely for the purpose of preserving a conviction." For further discussion, *see* Part IV, *infra*.

70. *See* MODEL RULES OF PROF'L CONDUCT (2002); STANDARDS FOR CRIMINAL JUSTICE, *supra* note 60. While there are general federal regulations regarding financial conflicts of interest for executive officers, see 5 C.F.R. § 2635, there are no general conflict-of-interest rules for law enforcement officers. The Office of Government Ethics (OGE), charged with educating federal employees on their ethical duties, sets forth regulations governing financial conflicts of interest. There is no specific guidance on how to evaluate personal interests that conflict with a particular assignment, other than the following General Principles:

Public trust and the American people have a right to expect that all employees will place loyalty to the Constitution, laws, regulations, and ethical principles above private gain. Employees fulfill that trust by adhering to general principles of ethical conduct, as well as specific ethical standards.

EXECUTIVE ORDER 12674 issued by President George H.W. Bush in 1989, and modified in 1990 by EXECUTIVE ORDER 12731 sets forth 14 general principles that broadly define the obligations of public service. Underlying these 14 principles are two core concepts—

- employees shall not use public office for private gain, and
- employees shall act impartially and not give preferential treatment to any private organization or individual.

*In addition, employees must strive to avoid any action that would create the appearance that they are violating the law or ethical standards.*

Exec. Order No. 11,222, 30 Fed. Reg. 6469 (May 8, 1965); Exec. Order No. 12,674, 54 Fed. Reg. 15159 (Apr. 12, 1989) (modified by Exec. Order No. 12,731, 5 C.F.R. § 2635.101 (1992), *reprinted as amended* in 18 U.S.C. § 202 (2006)).

71. John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 546–47 (1994).

governing officers of the executive branch (which includes federal investigators) for guidance. However, the conflict-of-interest regulations focus only on financial conflicts and familial relationships.<sup>72</sup> Otherwise, the regulations only set forth a general admonition against engaging in activities that “may raise a question regarding the employee’s impartiality.”<sup>73</sup>

The ABA Model Code of Professional Responsibility is directed at lawyers and does not provide any specific guidance on conflict-of-interest rules for investigators. At most, Comment [1] to Rule 3.8 provides that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”<sup>74</sup>

There may be more hope under the newly proposed ABA Standards Relating to the Administration of Criminal Justice. While these standards also focus on the prosecutors’, not the police officers’, ethical duties when there are conflicts of interest,<sup>75</sup> the

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72. 5 C.F.R. § 2635.402, .502 (2010).

73. 5 C.F.R. §§ 2635.501–503 (1997).

74. MODEL RULES OF PROF’L CONDUCT R 3.8 cmt. 1 (2003).

75. Laurie L. Levenson, *Conflicts over Conflicts: Challenges in Redrafting the ABA Standards for Criminal Justice on Conflicts of Interest*, 38 HASTINGS CONST. L.Q. 879 (2011), available at <http://ssrn.com/abstract=1746848>. The ABA Task Force has proposed the following revised standards. As listed below, the key changes are identified by italics.

A prosecutor should avoid conflicts of interest with respect to his or her official duties, *unless an appropriate waiver is obtained. The prosecutor should know and abide by the ethical rules regarding conflicts of interest that apply in his or her jurisdiction. A prosecutor should make appropriate disclosures regarding conflicts of interest, to supervisors, courts, or defense counsel, when appropriate. When a conflict is apparent, the prosecutor should recuse or decline to go forward until a non-conflicted prosecutor is in place.*

A prosecutor should not represent a defendant in criminal proceedings in a jurisdiction where he or she is also employed as a prosecutor.

A prosecutor should not, except as law may otherwise expressly permit, participate in a matter in which the prosecutor personally and substantially participated while in private practice or nongovernmental employment, *unless those prior interests were substantially parallel to the current prosecutorial interests and there is no conflict of interest, or unless under applicable law no one is, or by lawful delegation may be, authorized to act in the prosecutor’s stead in the matter.*

A prosecutor who has formerly represented a client should not use information obtained from that representation to the disadvantage of the former client unless the rules of attorney-client confidentiality do not apply or the information has become generally known.

A prosecutor should not, except as law may otherwise expressly permit, negotiate

proposed language at least recognizes that when a prosecutor's own conduct is at issue, that prosecutor should ordinarily be recused from continuing with that case if the accusations are not frivolous. Presumably, the new language is being added in recognition that it is folly to expect that a person will objectively investigate and confess his or her own misconduct.

### C. Judicial Input

Similar to the paucity of language regarding law enforcement officers' conflicts of interest in ethical codes, very few judicial decisions deal with that issue. Some courts seem to assume that prosecutors will not use an investigator whose conduct has been challenged. For example, in *People v. Merritt*,<sup>76</sup> the defendant

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for private employment with any person who is involved as an accused or as an attorney or agent for an accused in a matter in which the prosecutor is participating personally and substantially.

A prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's *personal*, political, financial, business, property, or other interests or relationships. A prosecutor should disclose to appropriate supervisory personnel any such interests that could reasonably be viewed as raising a potential conflict of interest. If it is determined that the prosecutor should nevertheless continue to act in the matter, the prosecutor and supervisors should consider whether any disclosures to outside persons should be made, and make such disclosures if appropriate.

A prosecutor whose current relationship to another lawyer is parent, child, sibling, spouse or intimate sexual partner should not participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer. A prosecutor who has a significant personal or financial relationship with another lawyer should not participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer, unless the relationship is disclosed to the prosecutor's supervisor [and the person's defense counsel] and supervisory approval is given, or unless there is no other prosecutor authorized to act in the prosecutor's stead.

A prosecutor should not recommend the services of particular defense counsel to accused persons or witnesses unless requested by the accused person or witness to make such a recommendation, and should not make a referral that is likely to create a conflict of interest. A prosecutor should not comment upon the reputation or abilities of defense counsel to an accused person or witness who is seeking or may seek such counsel's services unless requested by such person.

A prosecutor whose own conduct is the subject of an official investigation of a nonfrivolous allegation should ordinarily be recused from acting as prosecutor in the matter in which the challenged conduct originated. However, a mere allegation of misconduct is generally not a sufficient basis for such recusal, absent a judicial or supervisory evaluation that the allegation warrants serious review. Neither should an unfounded allegation of misconduct deter a prosecutor from fair pursuit of any matter. Nevertheless, a prosecutor should report to a supervisor any misconduct allegation made against him or her, in order to obtain a second opinion of its merits.

76. 24 Cal.Rptr.2d 177 (Ct. App. 1993).

claimed that the district attorney investigator had a conflict of interest because the investigator had suggested that one of the witnesses committed perjury and concealed facts.<sup>77</sup> The defendant moved to recuse the entire district attorney's office. The court denied the motion to recuse the office but found that the investigator had engaged in inappropriate actions and obviously could not continue to work on the case. Once the investigator "was removed and totally insulated from all further decisions and investigation in respondent's case," there was no need for further action against the office.<sup>78</sup> Nothing in the record demonstrated that the "district attorney's office ha[d] any interest or motive other than to present evidence in a fair manner, or that the insulating of [the investigator] was based upon anything other than a desire to handle respondent's case in the most proper way."<sup>79</sup> Accordingly, while the investigator would be recused, the prosecutor did not need to be sanctioned for the investigator's actions.<sup>80</sup>

Other courts simply focus on whether the facts of the case indicate that the prosecutor and his or her team has acted with "hostility" toward the defendant.<sup>81</sup> Yet, even with such hostility, the courts are not necessarily ready to grant habeas relief to a defendant. The U.S. Supreme Court has not decided whether there is a general due process right to a conflict-free prosecutor,<sup>82</sup> although there is dictum in the Court's decision in *Marshall v. Jerrico, Inc.*<sup>83</sup> suggesting that a prosecutor's personal interest in a case may raise serious constitutional issues.<sup>84</sup> Ultimately, the issue is whether the defendant can show prejudice from any bias that the prosecution team demonstrated against him.<sup>85</sup>

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77. *Id.* at 179.

78. *Id.* at 181.

79. *Id.*

80. *Id.* at 182.

81. *Johnson v. Horel*, No. C 07-4483, 2010 U.S. Dist. LEXIS 125005 (N.D. Cal. Nov. 12, 2010).

82. *See People v. Vasquez*, 137 P.3d 199, 207 (Cal. 2006) ("Neither this court nor the United States Supreme Court has delineated the limitations due process places on prosecutorial conflicts of interest."), *cert. denied*, 549 U.S. 1214 (2007).

83. 446 U.S. 238 (1980).

84. *Id.* at 248-50.

85. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (holding that error is harmless and cannot support habeas relief unless it had a substantial and injurious effect or influence in determining jury's verdict); *see also State ex rel. Hilbig v. McDonald*, 877 S.W.2d 469 (Tex.

For defendants seeking post-conviction relief, the requirement that the defendant show prejudice in order to obtain a neutral investigator for the post-conviction claims poses a catch-22 situation. In order to obtain a neutral investigator, the defendant must show that using the old investigator will taint the investigation. But the original investigator must be used to determine whether there has been prejudice.

#### IV. A MODEST PROPOSAL FOR REFORM

There is a simple way to avoid travesties that may result from having a tainted investigator conduct a post-conviction investigation. Jurisdictions should adopt specific rules that disqualify a police officer from conducting a post-conviction investigation of a case in which the officer has a direct conflict of interest. As with the proposed rule for prosecutors, the disqualification provision would be triggered when a defendant raises a nonfrivolous allegation of misconduct against the investigating officer.<sup>86</sup> Thus, the proposed rule would provide:

*An investigating officer whose conduct is the subject of nonfrivolous allegations in a petition for post-conviction relief should be recused from acting as the investigator in the post-conviction proceedings. It is the responsibility of the prosecutor to ensure that an investigator charged with misconduct not participate in the investigation of his or her own alleged misconduct.*

The types of allegations that would trigger the recusal rule would include a prima facie showing that the investigator had tampered with eyewitness identifications or had failed to disclose exculpatory evidence to the prosecutor and the court, regardless of whether the defendant has demonstrated prejudice from this conduct. Only by using an independent investigator can it actually be determined what, if any, prejudice was caused by the original investigator's misconduct.<sup>87</sup>

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App. 1994) (holding that mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules do not suffice).

86. Ultimately, the court would have to decide what constitutes a "nonfrivolous" allegation of misconduct. A mere allegation that an investigator is too committed to a case would be insufficient. Rather, there must be evidence that the officer made a specific error during an investigation and that the error likely prejudiced the outcome of the proceedings.

87. The standard for prejudice is the same as that recognized for *Brady* violations, *Brady v. Maryland*, 373 U.S. 83 (1963), claims of ineffective assistance of counsel, *Strickland v.*

Adoption of this new standard would work to support the new proposal for the ABA Prosecution Standards for Prosecutors, Standard 3-7.1, which would require that prosecutors “conduct a fair evaluation of post-trial motions . . . and not oppose motions that the prosecutor believes are correct, or solely for the purpose of preserving a conviction.”<sup>88</sup>

Police reforms are frequently difficult to implement, and one can anticipate objections to this one as well. First, the claim will be made that appointing another investigator is too time-consuming and costly. Indeed, there may be some additional expense if a new investigator evaluates a case. On the other hand, the costs of a wrongful conviction are immeasurable. Moreover, because the defendant has targeted the problems in the conviction by filing a petition, the cost of reinvestigating a case does not match the amount spent by the prosecution on the original search to secure a conviction.

Second, law enforcement agents will likely complain that a defense investigator can too easily influence prosecution witnesses to change their testimony after trial in an effort to overturn a conviction. But if that is the case, then an independent investigator should be able to determine whether a witness’s retraction is legitimate or the result of harassment by the defense. Nothing prevents the independent investigator from consulting with the officers who conducted the initial investigation. Their insights might be valuable in the reinterview of the witness. However, ultimately, the post-conviction investigation should be conducted by someone whose own investigative work is not the subject of the habeas claim.

Third, law enforcement and prosecutors might complain that it is the role of the court, not the prosecutor, to evaluate the investigating officers’ conduct in the case. Therefore, the original investigating officer should be permitted to conduct the post-conviction review, and any biases in doing so will be revealed at an evidentiary hearing on the habeas claim. The problem with this approach is that very few habeas petitioners are granted evidentiary hearings. Rather, judges

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*Washington*, 466 U.S. 668 (1984), and even allegations of false testimony or prosecutorial or police misconduct. *See generally* *Chapman v. California*, 386 U.S. 18, 24 (1967) (setting forth harmless error standard and requirement of prejudice for post-conviction challenges).

88. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-7.1 (Draft 2010).

typically decide the petitions on the pleadings and declarations that both sides file.<sup>89</sup> An officer with a vested interest in ensuring that a conviction is not reversed may slant the government's submission in a manner such that a court will never test the validity of the post-conviction investigation.

Fourth, there can be the problem of evaluating whether a habeas claim—especially one prepared by a pro se petitioner—is alleging police misconduct or simply insufficient evidence or problems with witnesses. It is true that some judgment calls will have to be made. However, the most egregious cases—such as those where an investigator's reputation rides on preserving the testimony of a witness who now claims that the officer improperly tapped on a picture to obtain an identification—will at least have the chance of a proper investigation.

Fifth, there are the questions of how and when the court should get involved in the assignment of investigators. Once a defendant files a petition for writ of habeas corpus, the court has jurisdiction in the matter. It is at that point that prosecutors should certify for the court that they have analyzed the petition and have determined

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89. This is even truer under the standards of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (2006), which affords a presumption that state court factual findings were accurate, regardless of whether the state court held a full evidentiary hearing to establish those facts. See Larry W. Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. 135 (1996); Nancy J. King et al., *Executive Summary: Habeas Litigation in the U.S. District Courts* (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 07-21, 2007), available at <http://ssrn.com/abstract=999389>. Thirteen percent of non-capital habeas petitions claiming false, lost, or undisclosed evidence are afforded evidentiary hearings. King et al., *supra*, at 5.

As 28 U.S.C. § 2254(e) provides:

- (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
- (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
  - (A) the claim relies on—
    - (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
    - (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
  - (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

whether their investigator had an impermissible conflict of interest in handling the post-conviction investigation.

Finally, there is the issue of what remedy, if any, should there be if an investigator with a conflict of interest continues to handle a case. There is no simple answer. An investigator who is driven to preserve a wrongful conviction can continue to taint a case by, for example, intimidating witnesses in the post-conviction evidentiary hearings. But separation of powers cautions against having judges designate which investigators prosecutors must use. Thus, the courts should use the powers they already have to prevent a conflicted investigator from tainting a case. This may include not allowing the investigator to be present at other witnesses' testimony during the evidentiary hearing or allowing extensive examination regarding the investigator's conduct during the post-conviction investigation. It may also include asking prosecutors to certify that they have considered an investigator's possible conflict of interest in assigning that investigator to a case's post-conviction investigation.

One would hope that common sense would lead prosecutors to use independent investigators—as opposed to those with conflicts of interest—without a formal rule dictating that they must do so.<sup>90</sup> However, the evidence suggests otherwise.<sup>91</sup> Prosecutors commonly see themselves in a partnership with their investigating agents. Sometimes, it may be the investigator who appears to be the dominating partner. Under these conditions, it is difficult for a prosecutor to replace the investigator without creating the appearance that the prosecutor questions the officer's integrity as well. The answer to this dilemma may be to provide prosecutors with ethical standards that will help them justify reassigning investigators and convey to others, including the police, that the prosecutor serves the public and the Constitution. “The prosecutor does not represent the victim of a crime, the police, or any individual. Instead, the prosecutor represents society as a whole. His goal is truth and the achievement of a just result.”<sup>92</sup>

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90. See Levenson, *supra* note 56, at 560–61.

91. Unfortunately, there are no studies yet on how often prosecutors use independent counsel for post-conviction investigations. A research study on that issue will be conducted in the summer of 2011.

92. Carol A. Corrigan, *Commentary: On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537, 537–38 (1986) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

## IV. CONCLUSION

Ethical issues can arise at any stage of a criminal proceeding. Most of the focus by the courts has been on ethical issues arising before or during trial. The system seems to breathe a sigh of relief once a conviction is affirmed and the burden shifts to the defendant to seek relief through a habeas corpus petition.

However, we cannot be complacent. With the extraordinary number of wrongful convictions, prosecutors and police must also be zealous at the post-conviction stage to ensure that only those justly convicted remain in custody. A prosecutor's responsibilities do not end with a trial verdict. Rather, as the new ethical standards recognize, a prosecutor has the responsibility to fairly and objectively study and evaluate post-conviction motions.<sup>93</sup>

Much more is at stake than an individual investigator or prosecutor's fame or fortune. In *The Killing Season*, Corwin wrote how Detective Winn thought the case looked like a "loser" from the start, having "no decent witnesses and . . . no solid evidence."<sup>94</sup> He described how she was increasingly frustrated as a month passed without any leads, how she was extremely nervous by late April, and how "[e]very morning, [when she] pores over the case at her desk and mutters to herself 'I hope this trail hasn't gone cold.'"<sup>95</sup> She "has to prove she belongs in homicide,"<sup>96</sup> that she has what it takes. Confronted with this unsolved murder, police focused on Obie Anthony and Reggie Cole because they were identified as perpetrators in another case—that was dismissed when the victim admitted he had lied to police and had never been carjacked or kidnapped. Winn relied on the only witness she could—Jones—who admitted in a declaration filed with Anthony's petition that he had testified falsely.

Winn, like many of her colleagues, is undoubtedly a zealous and dedicated officer. However, reliable investigative techniques require more. They require that an independent officer—not the officer whose findings and investigative techniques are being questioned—conduct the post-conviction investigation. If prosecutors are not

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93. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 60, Standard 3-7.1.

94. CORWIN, *supra* note 7, at 31.

95. *Id.* at 44.

96. *Id.* at 22.

doing this, then a rule should be adopted mandating that they do so. This new ethical provision would allow prosecutors to reassign investigations without antagonizing the original investigators because the “code” requires the reassignments.

Conflict-of-interest rules are nothing new. What is new is that they need to be applied to officers’ personal conflicts, not just their financial or familial ones. It is time that such a rule be adopted. Fair and objective investigations depend on it.