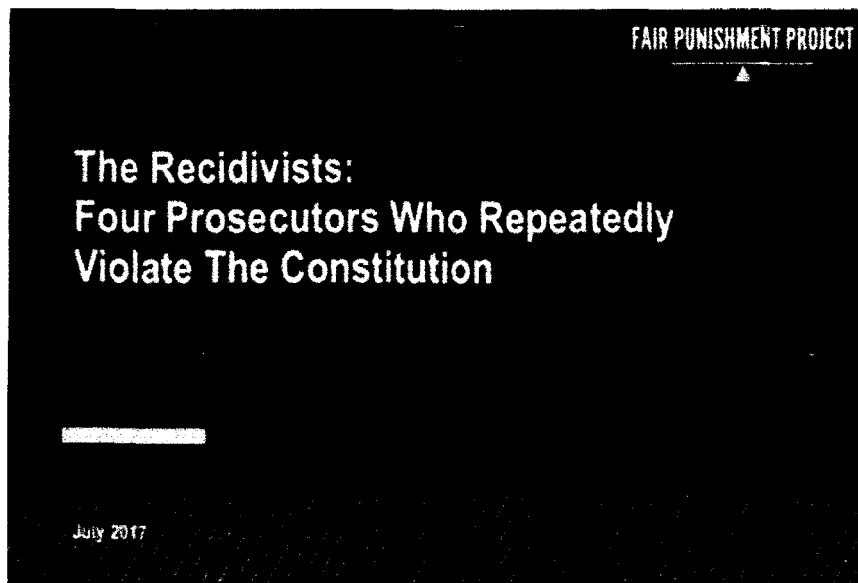


NEW REPORT ON RATES OF PROSECUTORIAL MISCONDUCT

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Introduction

Prosecutors wield extraordinary power in the criminal legal system. How they exercise their power can be the difference between fairness and inequality, justice and corruption, and a community with faith in its justice system or one that feels betrayed by it. Recently, newspapers across the country have featured elected prosecutors who have failed to use this authority ethically, and in many cases, have even engaged in illegal behavior in order to win convictions. In New Orleans, elected District Attorney Leon Cannizzaro issued fake subpoenas, repeatedly hid evidence showing that his office had made deals with informant witnesses, and failed to turn over crucial materials to defense lawyers in a timely manner—jeopardizing convictions, public safety, and the trust of voters. In Orange County, California, elected District Attorney Tony Rackauckas has led an office embroiled in scandals involving a secret jailhouse informant program, the suppression of evidence, and falsified testimony. Last year, then elected City of St. Louis prosecutor, Jennifer Joyce, defended a prosecutor in her office who had no fewer than 25 misconduct allegations. Earlier this year in Memphis, Shelby County District Attorney Amy Weirich faced formal disciplinary proceedings after the Tennessee Supreme Court concluded that she withheld key evidence from the defense in a murder trial and made improper arguments during her closing statement. This kind of misconduct has devastating results on people's lives.

These disturbing stories and news reports came from diverse jurisdictions across the country. We decided it was important to investigate whether this behavior was isolated to these places and people—or even just to a few incidents—or whether it was part of pattern and practice of misconduct that runs



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through these offices and states. Our researchers conducted an exhaustive review of every available state appellate court opinion dealing with allegations of prosecutorial misconduct published in California, Louisiana, Missouri, and Tennessee from January 1, 2010 to December 31, 2015. We reviewed these opinions to determine whether the Court made a finding of prosecutorial misconduct, whether it found such misconduct to be harmful to the defendant, and whether the court reversed the conviction or provided some other form of relief. This data provides critical insight into whether elected prosecutors in New Orleans, Memphis, Orange County, and the City of Saint Louis engage in, or oversee offices that engage in, more misconduct than other offices throughout their states.

What we found is noteworthy – these four prosecutors, and the people who work with them, have repeatedly violated their constitutional and ethical duties, shattering the lives of the defendants and their families. This report examines some of this misconduct and compares the rate at which it occurred with the rate that it occurred in other jurisdictions in these states. We measured the total number of misconduct findings for each jurisdiction in these four states, the total number of reversals, the total number of misconduct finding per capita*, and the total number of reversals per capita*. All of these jurisdictions ranked first in their respective state on at least one of these four metrics, and all of them ranked in the top five for at least two out of four of the metrics, making them distinct outliers in their states.



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1. **Amy Weirich, Shelby County, Tennessee (2011 – Current)**

Misconduct Rank	#1 out of 95 counties
Reversal Rank	#1 out of 95 counties
Misconduct Rank Per Capita*	#10 out of 95 counties
Reversal Rank Per Capita*	#6 out of 95 counties

Amy Weirich has been a prosecutor in the Shelby County District Attorney General's office since 1991.[1] and she has been the Shelby County District Attorney since 2011.[2] In the time period we reviewed, the Shelby County District Attorney General's Office had the highest number of misconduct findings—with more than a dozen—and the most reversals in Tennessee. Adjusted for population, out of the 95 counties in Tennessee, 89 percent had fewer misconduct findings per capita than Shelby, and 94 percent of counties had fewer misconduct-based reversals per capita. Leaders set the tone for an organization, and a look into Amy Weirich's own record of misconduct, illustrates why Memphis cannot shake its misconduct problem.

The scope of misconduct in the office has included offenses such as failing to disclose relevant evidence to the defense, known as a *Brady* violation, as well as inappropriate conduct and statements during trial.

Weirich committed two different types of misconduct in a case involving a defendant named Noura Jackson, who was accused of killing her mother.[3] The misconduct was so egregious that the Tennessee Supreme Court overturned Jackson's conviction in 2014, and chided Weirich for attempting to sway the jury by making inflammatory comments about Jackson's constitutionally protected decision not to testify.

Given that the impropriety of any comment upon a defendant's exercise of the Fifth Amendment right not to testify is so well settled as to require little discussion, it is not at all clear why any prosecutor would venture into this forbidden territory.[4]

Unfortunately, that was not the only misconduct that occurred during the case. Under the Fourteenth Amendment, the government has an ironclad duty to disclose exculpatory material – known as *Brady* evidence – to the defense prior to trial. Despite numerous defense requests for that material, the government withheld an inconsistent statement by its star witness which suggested that he had fabricated key pieces of his testimony – namely, his testimony placing Jackson at the crime scene during the time the murder occurred. This was particularly damaging given the witness's status as an alternative suspect in the murder and the government's lack of any direct evidence implicating Jackson.[5]

In December 2015, the Board of Professional Responsibility recommended that the Tennessee Supreme Court issue a public censure against Weirich.[6] The Tennessee Board of Professional Responsibility also filed a supplemental petition for discipline based on the *Brady* violation and Weirich's failure to exercise appropriate diligence in reviewing statements and making disclosures to the defense team. [7] In March of this year, the Board dismissed the disciplinary petition and issued a private reprimand.[8]

Jackson's case was not the first time Weirich had been warned about making inappropriate and inflammatory comments during trial. In a 2004 capital murder trial, Weirich utilized her opening statement to repeatedly call the co-defendants "greed and evil," using that phrase a total of 21 times in the opening and closing arguments. The Tennessee Court of Criminal Appeals reminded

Weirich that "[i]t is improper for the prosecutor to use epithets to characterize a defendant," referring to her argument as "unseemly." [9] And yet after the court granted one of the two co-defendants a new trial, Weirich *again* engaged in an "improper" argument, blaming the defendant for requiring jurors to expend "time and trouble" on the trial – a comment meant to bias the jury against the defendant. [10]

In 2004, in a separate case, Weirich accused a man named Vern Braswell of killing his wife. Braswell claimed he choked his wife during kinky, consensual sex but that she was alive, although not feeling well, when it was over and eventually died that night while in the tub. As the prosecutor and defense attorney delved through Weirich's files while preparing for the post-conviction case, they made a troubling discovery – a suspicious sealed manila envelope with a sticky note on it containing the phrase "Do not show defense," initialed "A.P.W." [11] The original prosecutor on the case was none other than Amy P. Weirich. The post-conviction prosecutor then asked Weirich for permission to open the manila envelope. Some time later, the envelope disappeared. The defense has requested a new trial. In 2014, during a hearing on the matter, Weirich claimed both ignorance and lack of memory, "[i]f there were such an envelope and there were such a notation, no, I don't recall doing that and that was not and is not my practice." [12] The case is still pending. [13]

In yet another case, the Sixth Circuit Court of Appeals reversed a conviction in a death penalty case after Weirich failed to disclose that one of the main witnesses was paid for her cooperation in the companion federal case. [14] Although Weirich claimed she did not know about the payment, under the Constitution Weirich had a duty to discover and disclose this information prior to trial. [15]

2. Leon Cannizzaro, Orleans Parish, Louisiana (2008 – Current)

Misconduct Rank	#1 out of 64 parishes
Reversal Rank	#1 out of 64 parishes
Misconduct Rank Per Capita*	#1 out of 64 parishes
Reversal Rank Per Capita*	#2 out of 64 parishes

Leon Cannizzaro, Jr., was first elected in 2008 as the Orleans Parish District Attorney. He won reelection in 2014 and his current term expires in 2020.

Cannizzaro also spent five years as an Assistant District Attorney. Cannizzaro's tenure as DA has been marked by major controversies, especially constitutional violations in a number of serious and high profile cases. Based on our research, Orleans Parish ranks number one in the state of Louisiana for total number of misconduct findings, for total number of reversals, and for the total number of misconduct findings per capita. It comes in second for total number of reversals per capita.

Orleans has long been a hotbed for prosecutorial misconduct. Several famous U.S. Supreme Court cases have addressed misconduct, particularly *Brady* violations, by Orleans Parish prosecutors, including *Kyles v. Whitley*, *Connick v. Thompson*, and *Smith v. Cain*.

Unfortunately, under Cannizzaro's leadership, the office has carried on in that tradition. Our research turned up 20 instances of misconduct, ranging from hiding the existence of plea deals with witnesses to

the systemic practice of disclosing information in an untimely manner.

In 2010, a judge overturned a capital murder conviction after Orleans Parish prosecutors failed to disclose at trial "a videotaped interview with prosecutors in which the state's central witness contradicts her testimony on significant points." [16] The prosecutors also withheld evidence about a plea deal it struck with one of the testifying jailhouse informants. The informant's plea deal was characterized by the judge as "the deal of the century," because the state had dropped the informant's armed robbery charge even though he previously pled guilty to it and received a 15 year sentence.[17]

The Orleans Parish District Attorney's Office continued its pattern of withholding plea deals in Jamaal Tucker's murder trial. The government's first two attempts at conviction ended in mistrials, one after a judge blasted the DA's office for "playing games" and spurning a court order to disclose a state's witness's rap sheet.[18] The State secured a conviction in the third trial, but the parties eventually agreed to dismiss it after it became clear that the government did not disclose plea deals for two eyewitnesses. Worse yet, one witness had told the jury that he was testifying "out of the goodness of [his] heart" and that the "Orleans district attorney can't do nothing for me" – a claim that rang false when a Lafayette Parish prosecutor allowed him to "withdraw his guilty plea to an armed robbery, citing phone conversations that the prosecutor had with Orleans Parish District Attorney Leon Cannizzaro." [19] The other witness "had drug possession charges reduced" and "ended up receiving 80 days of jail time rather than a potential sentence of 40 years in prison." [20] On the day Cannizzaro was scheduled to testify at a post-trial hearing about the phone call with the Lafayette Parish prosecutor, his office joined the defense's

request for a new trial.[21] When asked why Cannizzaro confessed error, the trial prosecutor Eusi Phillips stated, "I think he was going to be in an awful position trying to explain why he made that [phone] call." [22]

In yet another case, this one involving an attempted murder charge against Henry Bruer, Cannizzaro's office waited until mid-trial to disclose that the only eyewitness had made a deal with the State. When asked to explain the delay, Cannizzaro blamed the defense: "The defense attorney has to request [information on the existence of a deal], and if he doesn't, we're not obligated to give it to him." [23] Cannizzaro's comments reflect either a total misunderstanding of the law or an intentional attempt to obfuscate. A prosecutor has a duty to turn over *Brady* material in a timely manner irrespective of whether the defense asks for it.[24] The jury acquitted Bruer.

Shortly after that, the U.S. Supreme Court overturned Juan Smith's conviction because of *Brady* violations committed by the office.[25] Cannizzaro's office inherited Smith's case from an earlier administration and defended Smith's conviction throughout the appellate process even though Orleans prosecutors suppressed evidence that the single eyewitness had told investigators before trial that he could not identify the shooter. During the oral argument at the U.S. Supreme Court, the justices took the arguing prosecutor "to the woodshed," [26] with Justice Elena Kagan asking whether Cannizzaro's office "ever consider[ed] just confessing error in this case." [27]

3. Tony Rackauckas, Orange County, California (1998 – Current)

Misconduct Rank	#3 out of 58 counties
Reversal Rank	#2 out of 58 counties
Misconduct Rank Per Capita*	#5 out of 58 counties
Reversal Rank Per Capita*	#1 out of 58 counties

Tony Rackauckas was elected in 1998 as the District Attorney of Orange County, California. Previously, he served for ten years in that office as a prosecutor. If he runs for reelection in 2018, he will have to face questions about the 58 allegations of misconduct launched against his office between 1997 and 2009.”[28] Those allegations have continued in the last several years, during which his office has been embroiled in numerous scandals. The Orange County District Attorney’s office ranked in the top five among all California counties for the total number of misconduct findings (3rd), the total number of reversals (2nd), and for the most misconduct findings per capita (5th), and it ranked first for the most reversals per capita. The scope of the misconduct has been wide-ranging.

In 2015, a judge removed the entire Orange County District Attorney’s office from a capital murder case involving defendant Scott Dekraai after finding that Rackauckas knew that “Orange County Sheriff’s Department deputies violated the rights of in-custody defendants by collecting illegally obtained confessions with the use of dubious informants, hid exculpatory evidence to aid prosecutors and lied under oath when questioned about the tactics.”[29] “After a period of what can at best be described as benign neglect concerning the actions of his law-enforcement partners,” the judge wrote “the district attorney cannot or will not in this case comply with the discovery orders of this court and the related constitutional and statutory mandates

that guarantee this defendant's right to due process and a fair trial." [30] Rackauckas claimed his office had no knowledge of the informant program, but Orange County Sheriff Sandra Hutchens called that into doubt, telling reporters that, "There's no secret about it. Certainly, the District Attorney's office has known about it for years." [31]

That same year, in *People v. Henry Rodriguez*, the same judge again slammed the office, expressing "no doubt" that Rackauckas' team "conspired against Rodriguez's fair trial rights" when prosecutors were "'instructed' to 'refrain' from giving defense lawyers records of [] snitch rewards." [32]

In November 2015, a group of legal experts, respected professors, and former prosecutors wrote a letter asking then U.S. Attorney General Loretta Lynch to investigate the Orange County District Attorney's office, writing "it is fair to say that the criminal justice system in Orange County is in a state of crisis: charges in extremely serious cases have been reduced or dismissed; violent crimes—including murders—have gone entirely uninvestigated; to date, four law enforcement officers have refused to testify in pending criminal matters, citing their Fifth Amendment privilege against self-incrimination; and at least one prosecutor has been found by a court to have given 'incredible' testimony under oath. More troubling still, this all appears to be the tip of the iceberg." [33]

In December of 2016, the Department of Justice announced that it had opened a civil rights investigation of the office that, among other things, "will seek to determine whether the district attorney's office committed systematic violations of defendants' Fourteenth Amendment due process rights under *Brady v. Maryland* by failing to disclose promises of leniency that would have substantially undermined the credibility of the informants' trial testimony." [34]

In December 2015, a Rackauckas-appointed panel of five legal experts issued a report which found that "in many ways, the OCDA's Office functions as a ship without a rudder,"[35] underscored that some prosecutors in the office had developed "a win at all costs mentality,"[36] and emphasized that under Rackauckas "a certain ambivalence has developed about making suggestions or expressing concerns because, often times, 'nothing ever happens or changes.'"[37]

4. Jennifer Joyce, City of St. Louis, Missouri (2000 – 2016)

Misconduct Rank	#1 out of 115 jurisdictions
Reversal Rank	#1 out of 115 jurisdictions
Misconduct Rank Per Capita*	#2 out of 115 jurisdictions
Reversal Rank Per Capita*	#4 out of 115 jurisdictions

Jennifer Joyce joined the City of St. Louis Circuit Attorney's Office as an Assistant Circuit Attorney in 1994 and was elected as Circuit Attorney in 2000. She did not seek re-election in 2016,[38] and in 2017 Kim Gardner became the Circuit Attorney. Gardner, who previously worked as a prosecutor under Joyce from 2005 to 2010, won the election in part by pledging to pursue significant reforms.[39] Joyce's tenure was marred by serious misconduct. The jurisdiction ranked first in the state for total number of misconduct findings and reversals and had the second highest rate of misconduct findings when adjusted for population size. It is too soon to know whether Gardner will allow this rate of

misconduct to continue, or institute serious reforms as promised.

While in office, Joyce both personally engaged in misconduct and regularly defended misconduct committed by prosecutors who had worked in the office before her tenure. Our research found six instances of misconduct between 2010 and 2015, ranging from hiding evidence from the defense to grossly inappropriate behavior aimed at illegally influencing a jury.

In 2013, the Missouri Court of Appeals chastised Joyce personally for making highly inappropriate statements on Twitter about a defendant in a rape trial, saying that the behavior threatened to "taint the jury and result in reversal of the verdict." [40] The court was "especially troubled by Joyce's timing because broadcasting such statements immediately before and during trial greatly magnifies the risk that a jury will be tainted by undue extrajudicial influences." [41] Joyce expressed no regret about her behavior, remaining "unrepentant and even buoyed by the court of appeals' ruling." [42]

There is also significant evidence that Joyce repeatedly broke a Missouri law that requires prosecutors to disclose to defense counsel the contact information for the State's witnesses that will testify at a hearing or at trial. [43] According to the Missouri Court of Appeals, Joyce "has a long-standing practice, dating back some ten years, of deleting this [contact] information from police reports . . . before providing the reports to defense counsel." [44] The Missouri Court of Appeals called Joyce's defense of the practice "completely devoid of any facts whatsoever," [45] and ordered her to "stop immediately." [46]

In addition to misconduct committed under her watch, Joyce's office repeatedly defended misconduct and unethical behavior committed by

long-time line prosecutor Nels Moss, Jr.[47] In 1993, Moss prosecuted Reginald Clemons and put him on death row for the 1991 murders of Robin and Julie Kerry. Clemons came within two weeks of an execution date in 2009. [48] but eventually won a reversal of his conviction because prosecutors had suppressed evidence supporting Clemons's claim that the police had coerced his confession by violently beating him. Moss also allegedly counseled police officers to "omit" several observations initially included in the police report.[49] Despite evidence of this egregious misconduct, Joyce fought to uphold the tainted conviction, and then pledged to aggressively re-prosecute Clemons and seek the death penalty once again [50] A new trial is scheduled to begin in January of next year, unless Kim Gardner pursues a different outcome.[51]

Conclusion

The prosecutors in these jurisdictions, all of whom are elected officials, are imbued with the public's trust. And each and every one of them has violated it, not just on one or two occasions, but repeatedly. They have illegally concealed important evidence from the defense, made highly unethical statements and arguments, and committed other types of misconduct that undermines the integrity of criminal convictions in serious cases, and of the justice system itself. Prosecutors are tasked not just with seeking convictions, but also with seeing justice done.[52] Our research shows that these prosecutors are failing in this task in very serious ways. They have some of highest rates of misconduct and reversals in their respective states. It is clear that the mechanisms for accountability are currently insufficient when a prosecutor breaks the law. A robust discussion about how to improve accountability and to address these injustices is sorely needed.

Methodology *

Our researchers conducted an exhaustive review of every available state appellate court opinion dealing with allegations of prosecutorial misconduct published in California, Louisiana, Missouri, and Tennessee from January 1, 2010 to December 31, 2015 that was publicly available on Westlaw. We reviewed these opinions to determine whether the Court made a finding of prosecutorial misconduct, whether it found such misconduct to be harmful to the defendant, and whether the court reversed the conviction or provided some other form of relief. We measured the total number of misconduct findings for each jurisdiction in these four states, the total number of reversals, the total number of misconduct finding per capita*, and the total number of reversals per capita.* (*Our per capita calculation is weighted to take into account several related factors, including total population size, population disparities across jurisdictions, and the rarity of judicial findings of misconduct in general.) Our rankings are accurate to the best of our knowledge based on available data.

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About the Fair Punishment Project

The Fair Punishment Project is helping to create a fair and accountable justice system through legal action, public discourse, and educational initiatives. The Project is a joint initiative of Harvard Law School's Charles Hamilton Houston Institute for Race & Justice and its Criminal Justice Institute. The Accountable Justice Collaborative (at The Advocacy

Fund), and The Bronx Defenders. A number of individual and institutional donors support our work, including Open Philanthropy Project and Vital Projects Fund.

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[42] John G. Browning, *Prosecutorial Misconduct in the Digital Age*, 77 Alb. L. Rev. 881, 909 (2014).

[43] Mo. Sup. Ct. R. 25.03 (There is one exception to this law, and that is when there is a protective order in effect.)

[44] *State ex rel. Joyce v. Mullen*, No. ED 104226, 2016 WL 6750530, at *1 (Mo. Ct. App. Nov. 15, 2016), *available at* http://www.stltoday.com/online/appellate-court-decision-on-providing-names-of-crime-victims-and/pdf_88b67632-0f9f-5989-b28a-fc05d245fed4.html.

[45] *Id.* at *4.

[46] *Id.* at *5.

[47] Jennifer M. Joyce, *Nels C. Moss, Jr., A Dedicated Prosecutor and Advocate for Justice*, [circuitattorney.org](http://www.circuitattorney.org) (Feb. 13, 2015), <http://www.circuitattorney.org/Article.aspx?ArticleID=743>.

[48] *See* Jennifer Mann, *Hearing for Reginald Clemons in 1991 Chain of Rocks Murder Case is Delayed*, *St. Louis Post-Dispatch* (Sept. 18, 2012), http://www.stltoday.com/news/local/crime-and-courts/hearing-for-reginald-clemons-in-chain-of-rocks-murder-case/article_a873b7e8-0d04-562f-99d9-39104d943337.html

[49] See, e.g., *Prosecutor Nels Moss Sweated on the Witness Stand*, St. Louis American (Sept. 20, 2012), http://www.stlamerican.com/news/political_eye/prosecutor-nels-moss-sweated-on-witness-stand/article_91c3f412-02c7-11e2-b1d3-0019bb2963f4.html.

[50] Joel Currier, *Reginald Clemons Transferred to St. Louis Jail to Await Retrial in 1991 Chain of Rocks Bridge Murders*, St. Louis Post-Dispatch (July 18, 2016), http://www.stltoday.com/news/local/crime-and-courts/reginald-clemons-transferred-to-st-louis-jail-to-await-retrial/article_ccebb7b5-0bd4-5805-aa62-d1e6d987d4d0.html.

[51] Joel Currier, *Reginald Clemons Murder Trial Pushed Back Over Claims State Violated Attorney-Client Privilege*, St. Louis Post-Dispatch (July 23, 2017), http://www.stltoday.com/news/local/crime-and-courts/reginald-clemons-murder-trial-pushed-back-over-claims-state-violated/article_e2d5c01c-9068-56ed-b080-c97075e02668.html.

[52] *Berger v. United States*, 295 U.S. 78 (1935).

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