

Locating a Conflict of Interest in Local Prosecution of Prison Officials

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I. INTRODUCTION

On June 23, 2012, an inmate at the Dade Correctional Institute in Miami, Florida was found dead, locked in a shower room by prison corrections officers.¹ The inmate, Darren Rainey, suffered from schizophrenia,² and had been taken to the shower to wash off after he allegedly smeared feces on his cell wall and on his own body.³ This particular shower was unlike the other showers in the prison – the water could only be operated from a janitorial closet outside of the shower cell, and could not be turned on or off within the actual cell, nor could water temperature be controlled from within the cell.⁴ After approximately two hours in the shower, an officer found Rainey lying face-up, completely unresponsive, and Rainey was

¹ Kyra Gurney, *On anniversary of inmate's death, prison reform supporters rally*, THE MIAMI HERALD, June 23, 2016, <http://www.miamiherald.com/news/state/article85515502.html>.

² See Laurel Wamsley, *After Inmate With Schizophrenia Dies in Shower, Fla. Prosecutor Finds no Wrongdoing*, NPR, Mar. 19, 2017, <http://www.npr.org/sections/thetwo-way/2017/03/19/520743255/after-schizophrenic-inmate-dies-in-a-shower-florida-prosecutor-finds-no-wrongdoi> (describing the often dangerous conditions that exist for individuals with a mental illness who reside in Florida's prisons). Wamsley cites an article published in THE NEW YORKER that found "between 1996 and 2014, the number of Florida prisoners with mental disabilities grew by [one] hundred and fifty-three per cent." *Id.* For an extended discussion of the prevalence of mental illness in Florida prisons, see Eyal Press, *Madness*, THE NEW YORKER, May 2, 2016, <http://www.newyorker.com/magazine/2016/05/02/the-torturing-of-mentally-ill-prisoners>.

³ Julie K. Brown, *Florida prosecutor won't charge corrections officers who allegedly tortured black schizophrenic inmate*, RAW STORY, Mar. 18, 2017, <http://www.rawstory.com/2017/03/florida-prosecutor-wont-charge-corrections-officers-who-allegedly-tortured-black-schizophrenic-inmate/>.

⁴ The memorandum issued by the State's Attorneys Office for Miami-Dade County noted, "This shower's on/off hand fixture located inside the shower room was inoperable." Instead, an adjacent janitor's closet controlled the flow and temperature of the water entering the shower cell." The memorandum reported that the dimensions of the shower room were approximately three feet by eight and one half feet. Kathleen Hoague & Johnette Hardiman, INTEROFFICE MEMORANDUM, IN CUSTODY DEATH INVESTIGATION CLOSE-OUT MEMO, DARREN RAINEY (Mar. 17, 2017) [hereinafter MEMORANDUM].

pronounced dead on arrival by the time he reached the hospital - observers immediately suspected foul play.⁵

Throughout the investigation of Rainey's death, the State's Attorney's Office for Miami-Dade County received conflicting and alarming reports of officer misconduct. For instance, in its report, the Office noted that various witnesses recounted seeing burns on Rainey's body, presumably from extremely high water temperatures, which Rainey could not control from the shower room.⁶ Other witnesses observed that when officers and medical assistance found him, his skin appeared to be falling off, an indication of severe burns.⁷ The State's autopsy report took years to compile, and dubiously listed Rainey's cause of death as "schizophrenia, atherosclerotic heart disease and confinement inside the shower room," and ultimately found his death to be accidental.⁸ The State, in its Memorandum closing the case, acknowledged the conflicting accounts of the incident, including several inmates' statements that officers often used segregation in the shower to punish misbehaving inmates.⁹ The State refuted other witness accounts that the witnesses heard screaming coming from the shower cell.¹⁰ Ultimately, in spite of the evidence of officer misconduct, the State declined to bring charges against the officers

⁵ *Id.* See also Michael Putney, *No justice for inmate Darren Rainey*, THE MIAMI HERALD, Mar. 21, 2017, <http://www.miamiherald.com/opinion/op-ed/article140015793.html> (arguing that Rainey's death appeared to be the product of torture on the part of the corrections officers).

⁶ MEMORANDUM, *supra* note 4. Lieutenant Alexander Lopez, a Fire Fighter and Paramedic who arrived on the scene, provided a sworn statement to the State's Attorney's Office, stating that there "were no signs of trauma on Rainey's body except what appeared to be burns and/or skin slippage on certain parts of his body." *Id.*

⁷ See *id.* (detailing the many witness accounts of skin slippage from Rainey's body).

⁸ *Id.* However, Dr. Emma Lew, who conducted the autopsy, noted that the significance of confinement in the shower to the cause of death resulted from the prolonged exposure to the high heat and humidity. *Id.*

⁹ For instance, one inmate alleged that corrections officers had punished other inmates in the same manner as Rainey, but that none of the other inmates had suffered injuries. *Id.*

¹⁰ See *id.* (describing the account of one witness who "said he did hear Rainey screaming that the water was too hot for about 30 minutes" until the screaming suddenly stopped).

involved, finding that they did not mean to harm Rainey and that the death was unfortunate, but accidental.¹¹

The public response to the State's failure to bring charges - after years of investigation - was reminiscent of the outrage expressed in the aftermath of the Michael Brown shooting.¹² Many criticized the lack of accountability for the corrections officers and prison personnel who are tasked with keeping inmates safe.¹³ Others voiced distrust with the justice system generally and anger towards the State's Attorney's Office that seemed to disregard or minimize important pieces of evidence establishing guilt.¹⁴ Many questioned the motives of the State's Attorney's Office generally and felt that it had a stake in covering up the actions of the prison personnel.¹⁵ Critics of the Miami-Dade State Attorney, Katherine Fernandez Rundle, have noted that, in the

¹¹ *Id.*

¹² See Monica Davey, *Protests Flare After Ferguson Police Officer is Not Indicted*, THE NEW YORK TIMES, Nov. 24, 2014, <https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> (noting the rioting that occurred after a grand jury failed to bring criminal charges against Officer Darren Wilson, who fatally shot Michael Brown in Ferguson, Missouri).

¹³ See, e.g., Kelly Macias, *Inmate boiled to death in shower in Florida and yet no one is responsible*, DAILY KOS, Mar. 28, 2017, <http://www.dailykos.com/story/2017/3/28/1648010/-Inmate-boiled-to-death-in-shower-in-Florida-and-yet-no-one-is-responsible> (questioning how "someone mysteriously dies in a corrections facility and yet no one is responsible? . . . Do we even care about the people in these facilities?").

¹⁴ See *id.* Macias argues that, based on investigation by the Huffington Post, the State's Attorney's Office deliberately omitted key information from its extensive report. One such piece of evidence includes an emergency room record from the Florida Department of Corrections that observed substantial burns on Rainey's body. See also Matt Ferner, *Officials Ruled Inmate's 'Boiling' Death an Accident. But Documents Show They Omitted Key Details*, THE HUFFINGTON POST, Mar. 28, 2017, http://www.huffingtonpost.com/entry/darren-rainey-inmate-death-dade-correctional-institution_us_58d94c9fe4b03692bea82e1b?hjrqp6dnwi885mi.

¹⁵ See Macias, *supra* note 13 (suggesting that the State's report "does not contain the whole story" and that such omissions "should have us questioning the motives of the prosecutor in this case"); Jerry Iannelli, *Protestors to Demand Rundle's Resignation Today Over Darren Rainey's Death*, MIAMI NEW TIMES, Mar. 28, 2017, <http://www.miaminewtimes.com/news/darrenrainey-darren-rainey-protesters-to-demand-justice-rundles-resignation-today-9228377> (describing one prison-employed therapist's opinion that the State attempted to cover up details of Rainey's "murder").

twenty-four years she has held her position, she has not once charged a law enforcement officer for an on-duty killing,¹⁶ nor has she brought charges against prison guards or officials.¹⁷ While this essay does not consider the merits of the decision to decline bringing charges against the Dade Correctional Institute officers, the incident in Miami does shed light on an often-overlooked potential problem: local prosecution of prison administrators or other personnel.

Little scholarship has focused on potential conflicts of interest for local prosecutors bringing charges against police officers, and virtually none has discerned whether a conflict exists in considering charges against prison guards or officials, a much more attenuated relationship.¹⁸ Even though prosecutors generally interact with prison officials in a more limited capacity than with police officers, many of the same issues exist, suggesting a conflict of interest for local prosecutors.¹⁹ These types of conflicts often result in a failure to prosecute, or extraordinarily light plea deals for prison officials. This essay describes how conflicts of interest have been described in police misconduct cases, and uses this framework to identify a conflict of interest in the prosecution of prison personnel.

II. PROSECUTING PRISONS: CURRENT PRACTICES

A. An Overview of How Charges Are Brought Against Prison Guards or Officials

¹⁶ Iannelli, *supra* note 15.

¹⁷ See Jerry Iannelli, *Katherine Fernandez Rundle, Miami's Top Prosecutor, Is a Disgrace*, MIAMI NEW TIMES, Mar. 20, 2017, <http://www.miaminewtimes.com/news/katherine-fernandez-rundle-miami-dade-county-state-attorney-is-a-disgrace-9213209>.

¹⁸ Only as recently as 2016 has a scholar substantively addressed structural conflicts of interest in the prosecution of police misconduct. For an analysis of potential conflicts arising from the relationship between prosecutors and law enforcement misconduct cases, see Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV 1447, 1450 (2016).

¹⁹ See Editorial Board, *Bringing Prison Guards to Justice*, THE NEW YORK TIMES, Sept. 27, 2016, <https://www.nytimes.com/2016/09/27/opinion/bringing-prison-guards-to-justice.html> (describing political pressures faced by district attorneys in smaller communities whose economies are driven by the presence of prisons).

Although procedures for reporting and addressing prison personnel misconduct vary by state, many prisons utilize a grievance policy that allows prisoners to file complaints against the prison or individual employees.²⁰ Grievances may encompass misconduct ranging from excessive use of force, to sexual abuse, to lack of due process.²¹ However, such policies are inherently problematic, as complaints are usually handled internally and are investigated by other prison staff.²² For example, in Maryland, the “Internal Investigative Division” of the Department of Public Safety and Correctional Services is the entity that conducts investigations into allegations of serious misconduct in prisons.²³ For the most part, prison officials have the discretion whether to refer a case to the local prosecutor’s office, leading to inconsistency of outcome in similar cases. Critics of this setup have noted that allowing prisons to handle complaints internally leads to few convictions.²⁴ In a 2014 study conducted by the Bureau of Justice

²⁰ See generally *Prison and Jail Grievance Policies: Lessons from a Fifty-State Survey*, MICHIGAN LAW PRISON INFORMATION PROJECT, Oct. 18, 2015, <https://www.law.umich.edu/special/polyclearinghouse/Site%20Documents/FOIAReport10.18.15.2.pdf> (comparing prison grievance policies across the United States and identifying best practices for prison officials in implementing procedures and safeguarding inmate rights).

²¹ *Id.*

²² See Paige St. John, *Prison misconduct cases are detailed by state inspector general*, LOS ANGELES TIMES, Apr. 4, 2013, <http://articles.latimes.com/2013/apr/04/local/la-me-pc-ff-inspector-general-prison-misconduct-20130403> (noting that a report issued by the independent Office of the Inspector General after investigating California state prisons detailed rampant misconduct that was swept under the rug by prison officials). The report described how heinous allegations against prison employees, which included arranging inmate assaults and drug smuggling, were ignored – “cases were dismissed, or handled only administratively, others were turned over to county prosecutors.” *Id.* For a critique of the grievance system in California, see Jean Casella & James Ridgeway, *Prisoner Grievances: “The System for Going up Against the System,”* SOLITARY WATCH, Mar. 24, 2011, <http://solitarywatch.com/2011/03/24/prisoner-grievances-the-system-for-going-up-against-the-system/>. The authors note the procedural obstacles for inmate relief, particularly the fact that “complaints against prison administration are handled by none other than the prison administration.” *Id.*

²³ MD. CODE ANN., CORR. SERVS. § 11-1005 (2017).

²⁴ See Liz Fields, *Half of Sexual Abuse Claims in American Prisons Involve Guards, Study Says*, ABC NEWS, Jan. 26, 2014, <http://abcnews.go.com/US/half-sexual-abuse-claims-american-prisons-involve-guards/story?id=21892170> (arguing that studies such as that from the

Statistics, even though allegations of sexual assault are rising in both federal and state prisons, extraordinarily few cases are being referred for local prosecution.²⁵ The study found that only 10% of sexual abuse claims nationwide were investigated and substantiated by prison officials.²⁶ Worse, of the substantiated claims, “more than three-quarters of those officers were fired or resigned, while 45 percent were referred for prosecution and only 1 percent were actually convicted of a crime.”²⁷ Statistics like this are common in the United States, and individual reporters have painstakingly gathered stories of inmates who suffered at the hands of prison guards, but whose cases were declined by prosecutors.²⁸ In Washington State prisons, for instance, critics note that few cases ever make it to a prosecutor’s office, and charges are often not pursued.²⁹ The inability or refusal of local prosecutors to bring charges against prison officials and employees has resulted in other entities stepping in to fill this void, including the Department of Justice Civil Rights Division.

B. The Rise and Fall of DOJ Investigations into Prison Conditions

Department of Justice increase accountability in prisons and will raise awareness of harassment occurring in prisons across the United States).

²⁵ Allen J. Beck et al., *Sexual Victimization Reported by Adult Correctional Authorities, 2009-11*, Bureau of Justice Statistics, DEPARTMENT OF JUSTICE, Jan. 2014, <https://www.bjs.gov/content/pub/pdf/svraca0911.pdf>.

²⁶ *Id.*

²⁷ *See* Fields, *supra* note 24.

²⁸ *See* Andrew Mannix, *Prison sex-abuse cases grow, but prosecutions are rare*, SEATTLE TIMES, Aug. 2, 2015, <http://www.seattletimes.com/seattle-news/prison-sex-abuse-cases-grow-but-prosecutions-are-rare/>.

²⁹ “[I]t’s rare for cases to even make it to a prosecutor’s office . . . commonly, the cases are ruled unfounded . . . of the 58 cases found to have merit, 24 were referred to law enforcement – 41 percent of the substantiated cases, records show. Of the 24 referrals, police or prosecutors declined 12, (and) two defendant pleaded to lesser charges.” *Id.*

The role of the Department of Justice in investigating corrupt and unconstitutional practices in prisons and police departments has waxed and waned throughout various administrations.³⁰ However, the Obama administration is credited with reinvigorated the role of the Special Litigation Section in the Civil Rights Division of the DOJ to address systemic problems through investigations of, and consent decrees with, offending institutions.³¹ Those who noted the lack of local prosecution for prison officials have lauded the DOJ for stepping into this role³² pursuant to its authority under the Civil Rights of Institutionalized Persons Act.³³ Consent decrees and memorandums of agreement, enforced by the DOJ, are uniquely positioned to target police and prison misconduct by allowing discussion and negotiation between the DOJ and the offending institution, to identify realistic reform.³⁴ Consent decrees also allow the possibility of public

³⁰ See Charlie Savage, *Report Examines Civil Rights During Bush Years*, THE NEW YORK TIMES, Dec. 2, 2009, <http://www.nytimes.com/2009/12/03/us/politics/03rights.html> (examining the activity of the Civil Rights Division during the Bush administration and concluding that, in comparison to Division activity during the Clinton administration, there was a “significant drop in the enforcement of several major antidiscrimination and voting rights laws.”).

³¹ The Special Litigation Section has a successful history of protecting the civil rights “of people in state or local institutions, including: jails, prisons, juvenile detention facilities, and health care facilities for persons with disabilities.” *Special Litigation Section*, DEPARTMENT OF JUSTICE, <https://www.justice.gov/crt/special-litigation-section>. For a discussion of increased use of consent decrees and agreements with police departments to combat patterns or practices of abuse by law enforcement, see Sunita Patel, *Toward Democratic Police Reform: A Vision For “Community Engagement” Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793 (2016).

³² See Editorial Board, *supra* note 19.

³³ 42 U.S.C. § 1997 (2016).

³⁴ See Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 Minn. L. Rev. 1343, 1421-22 (2015) (arguing that empirical evidence suggests that structural reform litigation “has been an effective tool for reducing misconduct in several police agencies” but questions the sustainability of consent decrees and agreements once federal monitoring of the offending institutions ceases). *But see* Perry Chiaramonte, *Activist use of ‘consent decrees’ to police law enforcement likely to end under Trump Sessions*, FOX NEWS, Dec. 22, 2016, <http://www.foxnews.com/us/2016/12/22/activist-use-consent-decrees-to-police-law-enforcement-likely-to-end-under-trump-sessions.html> (arguing that the consent decree process is not consensual and that the DOJ “effectively force[s] the law enforcement groups to settle the

engagement and civilian oversight to increase public trust in local government entities.³⁵

Recently, in October of 2016, the DOJ announced that it would investigate claims of excessive force and abuse by corrections officers, in addition to claims of unsanitary living conditions, in Alabama's state prisons for men.³⁶ The president of the Southern Poverty Law Center commented that the investigation was long overdue, and that "only the most egregious of conditions would prompt the federal government to open a major investigation into the state's prison system."³⁷ In other words, some large-scale prison violations necessitate the use of the expansive authority of the Department of Justice to remedy criminal conduct by prison officials, particularly in the absence of any local prosecution. Currently, the Civil Rights Division is enforcing twenty-three settlement agreements with state governments regarding prison conditions, thirteen of which are court-enforceable.³⁸

However, proponents of DOJ suits against local governments worry that under the new administration, the number and efficacy of investigations into corrupt institutions will be a thing

cases and undergo a change to their culture to a degree deemed sufficient by the court and the DOJ.”).

³⁵ See generally Patel, *supra* note 31 at 796 (acknowledging that despite the successes of DOJ consent decrees to curb police abuses, the need still exists for stakeholder and community participation, particularly in the monitoring process).

³⁶ See *Justice Department Announces Statewide Investigation into Conditions in Alabama's Prisons for Men*, Office of Public Affairs, DEPARTMENT OF JUSTICE, Oct. 6, 2016, <https://www.justice.gov/opa/pr/justice-department-announces-statewide-investigation-conditions-alabama-s-prisons-men> (noting that the department possesses the authority to investigate potential violations of inmate rights that result from a 'pattern or practice' of unconstitutional conduct by prison officials).

³⁷ Nika Knight, *DOJ Launches Unprecedented Investigation into Alabama Prisons*, COMMON DREAMS, Oct. 7, 2016, <http://www.commondreams.org/news/2016/10/07/doj-launches-unprecedented-investigation-alabama-prisons>.

³⁸ *Department of Justice Civil Rights Reforms in Jails and Prisons*, DEPARTMENT OF JUSTICE, [HTTPS://WWW.JUSTICE.GOV/OPA/FILE/705496/DOWNLOAD](https://www.justice.gov/opa/file/705496/download). The Department of Justice notes that because of these settlement agreements with state and local governments, "tens of thousands of institutionalized persons who were confined to dire, often life-threatening, conditions now receive adequate care and services because of this work." *Id.*

of the past. The Trump administration released a budget proposal that suggests funding to the Department of Justice would be reallocated according to division, while certainly investing more in immigration enforcement.³⁹ Advocates are concerned that the Civil Rights Division would likely bear the burden of the budget cut and “civil rights cases and other focuses of the Obama administration are likely to get less attention under Trump and U.S. Attorney General Jeff Sessions.”⁴⁰ Community stakeholders are additionally nervous at the prospect of continued oversight and enforcement of existing agreements.⁴¹ Consent decrees have been heralded as one of, if not the most, important mechanisms through which the federal government can hold local governments accountable for unconstitutional practices, and have motivated localities to preemptively adjust their policies before DOJ intervention.⁴² Some cities have even independently requested the assistance of the DOJ in reform efforts.⁴³ If this mechanism is

³⁹ Michael Macagnone, *Congress Braces for Fight Over Trump’s First Budget*, LAW 360, <https://www.law360.com/articles/902425/congress-braces-for-fight-over-trump-s-first-budget>.

⁴⁰ Evan Weinberger, *Trump’s Proposed DOJ Budget Could Cut Civil Rights Funding*, LAW 360, Mar. 16, 2017, <https://www.law360.com/articles/902836/trump-s-proposed-doj-budget-could-cut-civil-rights-funding>.

⁴¹ See Christian Bryant, *What Will Happen to Consent Decrees Under President Trump*, NBC NEWS, Jan. 18, 2017, <http://www.nbc26.com/newsy/what-will-happen-to-consent-decrees-under-president-trump> (noting that during his Senate hearing, Jeff Sessions implied that instead of assisting police departments and institutions with better policies and training, consent decrees unduly targeted them).

⁴² The Los Angeles consent decree has been regarded as one of the most significant contributions to reformation of police departments to date. Chuck Wexler, the executive director of the Police Executive Research Forum, stated that “Los Angeles is a different place today because of the consent decree and the leadership of the department.” Shaila Dewan & Richard A. Oppel, Jr., *Efforts to Curb Police Abuses Have Mixed Record, and Uncertain Future*, THE NEW YORK TIMES, Jan. 14, 2017, <https://www.nytimes.com/2017/01/14/us/chicago-police-consent-decree.html>. Many cities under consent decrees have observed lower crime rates, fewer complaints of excessive force, and better community policing. See *id.*; Rushin, *supra* note 34 at 1359-1360.

⁴³ See, e.g., *Justice Department Announces Findings of Investigation into Baltimore Police Department*, Office of Public Affairs, DEPARTMENT OF JUSTICE, Aug. 10, 2016, <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore->

severely constrained by the Trump administration’s budget, oversight and investigation of state prisons and inmate complaints will once again fall largely to the local prosecutors. That is why it is essential that prosecutors, particularly in certain jurisdictions, are aware of potential conflicts of interest that could arise in the prosecution of prison employees.

III. CURRENT FRAMEWORK FOR ADDRESSING PROSECUTORIAL CONFLICTS OF INTEREST

The ABA Model Rules of Professional Conduct contemplate when a potential conflict of interest might arise, but do not consider special conflicts that prosecutors might face. Moreover, the Rules that specifically apply to prosecutors appear to primarily address a prosecutor’s duties to defendants and courts.⁴⁴ However, the Criminal Justice Section of the ABA has created ethical standards that prosecutors should generally adhere to.⁴⁵ Standard 3-1.3 specifies that the role of the prosecutor is to serve the public interest, and states that a prosecutor does not serve any particular government agency, law enforcement officer, or unit,” and that such personnel are *not* the prosecutor’s clients.⁴⁶ Similarly, the Standards provide: “The prosecutor should not permit the prosecutor’s professional judgment or obligations to be affected by the prosecutor’s personal, political, financial, professional, business, property, or other interests or relationships. A prosecutor should not allow interests in personal advancement or aggrandizement to affect

police-department. The Mayor of Baltimore, Stephanie Rawlings-Blake, sought assistance from the Civil Rights Division in conducting an investigation into the Baltimore police department.

⁴⁴ See MODEL RULES OF PROF’L CONDUCT R. 3.8.

⁴⁵ Standard 3-1.3 The Client of the Prosecutor, ABA Standards for Criminal Justice 3-1.3. The Standards are qualified as being a mere “guide to professional conduct and performance” and are not binding.

⁴⁶ *Id.* However, the Supreme Court has noted that a prosecutor is not required to possess complete neutrality in a proceeding, and that the “legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process.” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248-49 (1980).

judgments regarding what is in the best interests of justice in any case.”⁴⁷ States have largely adopted some variation of the above standards.⁴⁸

Unfortunately, even these guidelines are problematic. One pervasive issue with the specific requirement that a prosecutor remain politically disinterested in any given matter is that the job requires conscious or subconscious political decisions to be made daily.⁴⁹ Most chief prosecutors are elected,⁵⁰ and they campaign on specific visions and agendas for a prosecutor’s office.⁵¹ In theory, striving to represent the ideologies of the constituency that elected them should be a laudable goal for prosecutors. However, there is a thin line between making informed decisions about whether to pursue or dismiss a case, and regularly declining to file charges against a specific group based on either political expediency or discomfort.

Ronald Wright has observed that, unlike other branches of the government, there is much less of a check on individual state attorneys, and that “the legal profession regulates its own members,” resulting in few limits on prosecutorial discretion and establishment of conflicts of

⁴⁷ Standard 3-1.7 Conflicts of Interest, ABA Standards for Criminal Justice 3-1.7. If a prosecutor reasonably believes that any facts could be interpreted as raising a conflict of interest, the prosecutor is required to disclose the conflict to the “appropriate supervisory personnel.” *Id.*

⁴⁸ *See, e.g.*, § 19:43 Prosecutorial conflict of interest, 30A Mass. Prac., Criminal Practice & Procedure § 19:43 (4th ed.). The corresponding Massachusetts statute requires that “a prosecutor be disinterested in the matter that he or she is prosecuting, in the sense that the prosecutor must not be nor appear to be influenced in his or her exercise of discretion, either by his or her personal interest or by a person or entity the prosecution of the criminal case may or will bring significant benefits.” *Id.*

⁴⁹ *See* 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). Levenson notes that any given prosecutor’s reputation, “and any political ambitions they may have,” will be enhanced by winning a case – particularly high profile cases. *Id.* at 878.

⁵⁰ George Coppola, *States that elect their chief prosecutors*, OLR RESEARCH REPORT, [HTTPS://WWW.CGA.CT.GOV/2003/RPT/2003-R-0231.HTM](https://www.cga.ct.gov/2003/rpt/2003-R-0231.htm).

⁵¹ *See* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. OF CRIM. L. 581 (2009) (arguing that elections of prosecutors disincentivize prosecutors from campaigning for election on the basis of criminal justice values and discourage them from explaining their goals and priorities).

interest.⁵² Wright notes that the Model Rules or the chosen rules of professional responsibility of any state as enforced by the state licensing authorities appear to be one of the few mechanisms for discerning when a prosecutor possesses a conflict of interest in a given case.⁵³ However, few prosecutors have actually been disciplined, and local district and state attorneys are often not held accountable for engaging in cases that should disqualify them based on a conflict of interest.⁵⁴

Wright argues that one factor that incentivizes political-based decision-making on the part of prosecutors but also provides a check on prosecutorial misconduct is the localized nature of elections. Most district attorneys in the United States “answer to small, localized constituencies.”⁵⁵ While Wright argues that direct accountability to voters, particularly in tight-knit communities can encourage district attorneys to run their offices ethically, it can also make them uncomfortable in bringing charges. These kinds of communities are ripe for potential conflicts of interests.

IV. APPLYING CONFLICT OF INTEREST ANALYSIS TO THE PROSECUTION OF PRISON EMPLOYEES

While some scholars and critics have argued that consistent failure to discipline or bring charges against police presents a conflict of interest for local prosecutors involved in the case,⁵⁶ little attention has been paid to a prosecutor’s interest in declining to bring charges against prison

⁵² *Id.* at 578.

⁵³ *Id.*

⁵⁴ *Id.* at 579.

⁵⁵ *Id.* at 589-591 (noting that in smaller communities, issues tend to be much more concentrated but fewer in number, and that such issues are often more important to the local voters).

⁵⁶ See Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 IOWA L. REV. 1447 (2016) (arguing that local prosecutors should be categorically removed from the prosecution of police officers due to the nature of the relationship between law enforcement and prosecutors and the resulting conflict of interest that results).

employees. Levine’s article, which represented one of the first scholarly attempts to identify a general conflict of interest in local prosecution of police, discusses the varied ways in which prosecutors make concessions in the face of actual and perceived conflict.⁵⁷ Many of these same issues exist when prosecutors must decide whether to pursue charges for prison officials.

Levine focuses largely on the notion that law enforcement officers and prosecutors are allies and work toward the same goal – the administration of justice.⁵⁸ Prosecutors must depend on police officers to get convictions, and as a result, they work closely with them throughout the duration of a case.⁵⁹ The notion of law enforcement as allies is perhaps especially strong in smaller communities, in which fewer numbers of prosecutors work with fewer numbers of police officers.⁶⁰ Generally, prosecutors are encouraged to provide police officers with “best practices” and guidance on what constitutes unconstitutional police conduct.⁶¹

Interestingly, prosecutors are encouraged to provide the same input to prison officials.⁶² The National District Attorneys Association through its *National Prosecution Standards* offers

⁵⁷ See *id.* at 1464.

⁵⁸ See *id.* at 1467-68. See also Letitia James, *Prosecutors and police: The inherent conflict in our courts*, MSNBC, Dec. 5, 2014, <http://www.msnbc.com/msnbc/prosecutors-police-inherent-conflict-our-courts> (observing that not only do police officers work with prosecutors on a daily basis, but that prosecutors seek police officer union support when seeking reelection).

⁵⁹ See Levine, *supra* note 56 at 1467-68.

⁶⁰ See Rebecca McCray, *This is What Justice Looks Like in Many Small Towns Across America*, TAKE PART, Aug. 14, 2015, <http://www.takepart.com/feature/2015/08/14/indigent-courts-right-attorney> (“The officers [in small towns] often double as prosecutor and witness, appearing before the judge to describe the incident in which they wrote a ticket for or made the arrest of the defendant standing beside them”).

⁶¹ See *National Prosecution Standards*, National District Attorney’s Association, <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>. The standards suggest that prosecutors should assist law enforcement with training, classes on updates in the law and criminal procedure, should develop good communication between the prosecutor’s office and law enforcement agencies, provide periodic case status updates, etc.

⁶² See *id.*

many suggestions for improving relationships between district attorney's offices and prisons.⁶³ The Standards suggest that prosecutors should be available as a resource for prison officials.⁶⁴ Additionally, the guide encourages prosecutors to work with prisons to improve conditions in the prisons and jails in their jurisdictions.⁶⁵ Moreover, there should be improved communication between the prison and the prosecutor's office in order to facilitate transfers, inmate information, and victim notice requirements.⁶⁶ Thus, although prosecutors tend to work with prison personnel on a more limited basis, the prison simply represents the end of the chain of intertwining working relationships: police officers arrest alleged offenders, prosecutors decide whether to bring charges against the defendants, and the prison ensures that the defendant serves the time he or she gets.

Levine additionally notes that local prosecutors could see prosecuting police as politically unwise.⁶⁷ For instance, a prosecutor might depend on the police union for support. Alternatively, the prosecutor might require the assistance of the police in putting forth a certain image to the public, i.e., an increased focus on fighting gang-related activity. However, that same pressure exists in the context of prosecution of prison employees. In many small prison-towns, prisons often provide the entire voting base with jobs. Charging one prison employee could be seen as an affront to all prison employees, who could potentially be less likely to vote for the prosecutor in the future.

Although it is impossible to have a full understanding of the relationship between prosecutors and prison officials, it is clear that at least in many cases involving prison official

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Specifically, the Standards advise prosecutors to work with prisons to prevent overcrowding, limited programming, and outdated facilities. *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

misconduct, a local prosecutor will have a considerable conflict of interest in the case. Conflicts of interest for prosecutors in prison cases not only lead to inconsistent and unjust outcomes, but erode public confidence in the criminal justice system generally. It is therefore essential to identify such conflict of interests and allow prosecutors to recuse themselves from these cases.