The Washington Post Print

Sorry about your time on death row, pal. Nothing we can do.

By Radley Balko, Updated: April 2 at 12:00 pm

There was an opinion from the U.S. Court of Appeals for the Sixth Circuit last week that demonstrates just how far Congress and the courts have shielded prosecutors from any possible consequences for misconduct.

Before we get to the case itself, here's a quick review of the law:

If you've been wrongly convicted through prosecutorial misconduct, there are a few ways you can try to hold the government accountable. The most obvious way would be to sue the prosecutor himself. This is just short of impossible. Anything a prosecutor does in his official capacity is protected by *absolute immunity* — a mighty, nearly impenetrable shield created by the Supreme Court in the 1970s. Your best hope is if your prosecutor committed the misconduct while acting as an investigator — that is, while performing tasks more associated with policing than with prosecuting. If so, your prosecutor would then be protected "only" by the *qualified immunity* the courts have given to police. But even that is still a pretty high bar to clear.

You could also try to sue the municipality that employs your prosecutor. It's called a *Monell* claim. But this, too, is difficult. You'll have to show that not only did your prosecutor commit misconduct that violated your constitutional rights but there's also a system-wide pattern or practice of misconduct in that particular jurisdiction. It isn't enough merely to show that your prosecutor did this to you. You'll likely to need to show that other prosecutors in the same office did similar things to other people.

Since judges and prosecutors probably aren't going to open the files of other cases for you, winning a claim like this is likely to happen only once other people have already shown misconduct from the same office and, presumably, hadn't yet found enough examples to establish a pattern. If the misconduct is bad and persistent enough, presumably at some point — a point that isn't really clear but appears to be wholly up to the subjective interpretation of whatever federal judge happen to hear your case — enough people will have shown enough misconduct to establish a pattern. Provided you include them all in your claim. But no matter how many cases come after, those people who filed first, and lost, probably won't get to have their cases heard again.

All of that out of the way, let's get to the case of Joe D'Ambrosio. Here's what the Sixth Circuit panel says happened to him:

D'Ambrosio was convicted in 1989 in Ohio state court of murdering Anthony Klann and was subsequently sentenced to death. In 2008, a panel of this court affirmed the district court's grant of a conditional writ of habeas corpus based on the prosecution's failure to disclose

material exculpatory evidence to D'Ambrosio . . .

The conditional writ required the state either to set aside D'Ambrosio's conviction and sentence or retry him . . . The state attempted to reprosecute D'Ambrosio through mid-2009, but it continued to fail to disclose exculpatory evidence and failed to alert D'Ambrosio or the state court that its key witness had died in the interim. Ultimately, the district court granted an unconditional writ of habeas corpus, citing the "extraordinary circumstances" of the case and barring Ohio from reprosecuting D'Ambrosio.

D'Ambrosio then sued. Because former Cuyahoga County prosecutor Carmen Marino is protected by absolute immunity, D'Ambrosio filed a *Monell* claim against Cuyahoga County, alleging that the county had an established pattern or practice of prosecutor misconduct. He also personally sued Cleveland Police Detective Leo Allen and filed another *Monell* claim against the city of Cleveland, Allen's employer, again alleging a pattern of abuse.

He lost on all three claims. The decision explicitly acknowledged that "there is no question that the individual prosecutors involved in D'Ambrosio's case violated rights secured to him by the Constitution." But no one will be held accountable for it. And D'Ambrosio is just out of luck.

The judges first addressed the claim against Cuyahoga County. But before we get to that, remember that, under a *Monell* claim, D'Ambrosio would need to show that not only did Carmen Marino violate his rights but also that Marino's doing so was part of a policy, explicitly or otherwise, in Cuyahoga County. As it turns out, Marino was the *chief* prosecutor in Cuyahoga County and worked there for three decades. He *set* the policies. And those policies were pretty awful.

Here's Cleveland Plain Dealer columnist Regina Brett writing about Marino in 2006:

According to appeals court decisions, at least three men could be on death row because former star prosecutor Carmen Marino hid evidence.

Three others had murder convictions set aside, one because of what an appeals court called Marino's "highly improper and highly prejudicial" conduct. The others, because he hid key evidence or lied about secret deals with jailed witnesses.

Marino won seven death sentences in the 1980s. He says he never lied or hid evidence. But Cuyahoga County Common Pleas Judge Daniel Gaul said Marino should be criminally prosecuted for the abuses.

"It's nothing but one deceitful act after another," Gaul said. "To permit anyone to be put to death after being prosecuted by Carmen Marino would be so ethically inappropriate you'd almost be culpable yourself."

She wrote about Marino again in 2008:

Marino isn't a prosecutor whose integrity you want to celebrate . . .

Marino once offered a witness immunity in exchange for testimony, then allowed the witness to lie about that offer under oath. Because of that, a judge recently granted a new trial to Robert Brown.

Rasheem Matthew will get a new trial because Marino struck plea deals with two key witnesses that the jury never got to hear about.

That column was about a "prosecutor of the year" award given out by Cuyahoga County. Up until 2008, the award had been named after Carmen Marino.

In a 2003 report, the Center for Public Integrity found five other cases in which Ohio courts overturned convictions due to Marino's misconduct. In his 2008 book "The Legal Matrix," William Dawson writes of other examples:

In 1982, the Ohio Supreme Court reversed Chester Liberatore's arson conviction due to Marino's "prosecutorial blunders." In the Court's opinion, Justice Clifford Brown said Marino "presented a textbook example of what a closing argument should not be."

"That's all interpretation," Marino said. "You just get up and give a good closing argument —whoever argues best last wins."

In another case, judges reversed George Kelly's conviction because Marino "purposely" offered him a chance to plead guilty to murder "in order to avoid a possible successful appeal."

In May 2002, the state's Eight Circuit Appeals Court upheld Gregory Lott's murder conviction, rejecting evidence suggesting that Marino withheld exculpatory evidence from the defense, namely the victim's initial description of the attacker.

In another two cases, dissenting judges would have reversed the defendants' convictions because of Marino's behavior.

Marino said it's not difficult to win convictions in Ohio, as jurors are predisposed to find defendants guilty because they trust police and prosecutors.

"If the person doesn't take the stand, the jury knows he is guilty," Marino said. "That's my experience."

More than a decade after Marino retired, the problems in the Cuyahoga County prosecutor's office persist. Last year, an assistant prosecutor was fired for creating a fake Facebook identity to chat with defense witnesses online. In an editorial about the firing, the Plain Dealer argued that the office had never really cleaned up its act.

His actions have called into question, yet again, the culture of a Prosecutor's Office that has often been accused — and sometimes convicted — of being more zealous about winning cases than about seeing justice done.

He has opened the door to questions about the conduct of previous cases in which he was involved, just as revelations of misconduct by Carmen Marino, the star of the Prosecutor's Office in the 1980s and '90s, led to a string of retrials and appeals.

This certainly seems like a culture and pattern of misconduct. If Cuyahoga County doesn't qualify, it's hard to imagine one would.

Yet all of that wasn't enough for the Sixth Circuit. Here's what the court said of

D'Ambrosio's claim:

D'Ambrosio claims that the county had sufficient notice of an office-wide practice of persistent unconstitutional conduct by virtue of only one other *Brady* violation and nine other non-*Brady* instances of prosecutorial misconduct — all of which were committed by Marino over two decades. Of these ten cited examples of misconduct, only three had been ruled as improper by the courts prior to D'Ambrosio's conviction in 1989 . . .

D'Ambrosio's complaint amounts to an attempt to hold the county liable for what Marino and his colleagues did wrong. And this is insufficient to state a claim under *Monell*. A municipality may not be held liable under § 1983 on a respondeat superior theory—in other words, "solely because it employs a tortfeasor."

Instead, a municipality is liable under § 1983 only where, "through its deliberate conduct," it was "the 'moving force' behind the injury alleged." By focusing almost exclusively on the conduct of Marino, D'Ambrosio's complaint is improperly attempting to impose liability upon the county "simply because the municipality hired one 'bad apple.'"

Of course, that one "bad apple" was the county's *chief prosecutor.* Again, the guy making the policy. And though the county may have known of only a few violations prior to D'Ambrosio's conviction in 1989, as the county officials became aware of of many more incidents over the next 20 years, they still continued to fight to preserve D'Ambrosio's conviction and to keep the man on death row.

Note, too, just how difficult a *Monell* claim can be. If you're the first, third, fifth, or perhaps even tenth victim of misconduct, you're probably out of luck. There is no "pattern" yet. You must show that there was a pattern *and* that the city or county had been made aware of the problem *and* refused to take steps to correct it. Oddly, this means that with long-serving prosecutors like Marino, the victims of misconduct who have spent the longest time in prison are also the victims least likely to get their lawsuits in front of a jury.

So what about the claim against Detective Allen, the cop who also withheld evidence pointing to D'Ambrosio's innocence? The court ruled that the requirement to turn over exculpatory evidence, known as the *Brady* rule, applies differently to police than it does to prosecutors. (I have omitted the case citations for the sake of clarity.)

[W]hile a police officer's concealment of material exculpatory information may ultimately result in a *Brady* violation, the role that a police officer plays in carrying out the prosecution's *Brady* obligations is distinct from that of a prosecutor. Police officers do not disclose evidence to criminal defendants directly. Instead, police officers fulfill their *Brady* obligations as long as they "inform the prosecutor about evidence that undermine[s] the state's preferred theory of the crime."

The prosecutor, by contrast, is the member of the prosecution team that bears the responsibility for actually disclosing exculpatory information to the defense. The fact that *Brady* may require disclosure of evidence known only to the police and not to the prosecutor means only that it "imposes upon prosecutors a duty to learn of any favorable evidence known to the others acting on the government's behalf[,] including the police." It does not mean that a police officer must disclose any sort of information — even information known only to the officer — directly to the defense.

Because *Brady* obliges a police officer to disclose material exculpatory evidence only to the prosecutor rather than directly to the defense, "prosecutors and police officers are capable of breaching [the prosecution team's *Brady* obligations] in factually different ways." And here, that distinction matters. D'Ambrosio's allegations that Detective Allen "was privy to" exculpatory evidence but withheld it "from the defense" and failed to disclose it "to D'Ambrosio" are beside the point. Detective Allen was never required to do otherwise.

D'Ambrosio is correct that Detective Allen bore a "'*Brady*-derived' responsibility to turn over potentially exculpatory evidence to the prosecutor's office." But this disclosure obligation is limited: *Brady* requires a police officer to disclose evidence to the prosecutor only when its exculpatory value is "apparent" to the officer; that is, when the officer is aware that the evidence "could form a basis for exonerating the defendant." Because an officer's "destruction or concealment" of obviously exculpatory evidence "can never be done in good faith and in accord with [the officer's] normal practice," this rule is "the functional equivalent" of a requirement that the officer act in bad faith.

Although D'Ambrosio argues that his complaint sufficiently alleges that Detective Allen failed to disclose to the prosecution evidence of an obviously exculpatory nature, that is not what his complaint says. Instead, the complaint alleges only that Detective Allen "was privy to" several pieces of evidence, including some that clearly were incompatible with the prosecution's theory of the case. The complaint does not allege that Detective Allen withheld any of this information from the prosecutor, that the prosecutor was ignorant of any of this evidence, or anything other than that Detective Allen failed to disclose this evidence to D'Ambrosio himself. Again, for D'Ambrosio's complaint to state a claim against Detective Allen, he must plausibly allege that Detective Allen failed to carry out his "*Brady*-derived responsibility to turn over potentially exculpatory evidence to the prosecutor's office."

Yet the complaint fails to do so: there is no allegation that Detective Allen knew about any obviously exculpatory evidence of which the prosecutors were ignorant and failed to apprise them of it. Instead, the complaint faults Detective Allen for being "privy to" exculpatory information that he did not pass along to D'Ambrosio. But disclosing this information to the defense was, as Moldowan made clear, the responsibility of the prosecutors, not Detective Allen.

See what they did there? If Allen knew the evidence was exculpatory and withheld it from the prosecutor, D'Ambrosio would have to show that Allen did so out of bad faith. That's very, very difficult to prove. If Allen *did* turn over the evidence to the prosecutor, that's where his obligation as a cop ends. He is under no obligation to be sure that the defense attorneys are aware of the evidence. If he sees the prosecutor proceeding with the case in a way that contradicts exculpatory evidence that he knows he has already given the prosecutor, he is under no obligation to tell the court or the defense what's going on. The responsibility for turning over such evidence lies entirely with the prosecutor. And the prosecutor is protected by absolute immunity.

It works out rather handily that way. The person solely responsible for turning exculpatory evidence over to defense attorneys is also the person who has completely immunity from liability, should defense attorneys never actually see that evidence.

It's also worth noting that it can be difficult for the wrongly convicted to establish where the

obligation to disclose broke down — whether it was between the police and prosecutor, or between the prosecutor and the defense. If you're dealing with parties who have already established that they're willing to withholding evidence, they're probably not going to be particularly helpful in helping you establish who did the actual withholding, especially if they know that keeping it all ambiguous will make it more difficult for you to win your case.

As for the *Monell* claim against Cleveland for Allen's actions, the court found that because D'Ambrosio couldn't establish that Allen had violated his rights, he certainly couldn't show that the city had permitted a pattern or practice of such conduct.

The point here is not that the court got the law wrong. My impression is that, though there may be a few quibbles with the opinion, the court largely got it right. And that makes this all the worse. Police and prosecutors can break the rules to the point where they've committed grievous constitutional violations. They can do this in a *death penalty* case. They can do it over and over, in lots of cases, sending who knows how many people to prison for a decade or more — or possibly to their deaths. And even when the misconduct is abundantly clear, and the courts acknowledge as much, those same courts also say that under the law, *no one is to be held accountable.*

That's the law. And that's why, to borrow from Mr. Bumble, the law can be a real ass.