

Federal judges see an 'epidemic' of misconduct by prosecutors in California.

BY MAURA DOLAN

The hearing seemed largely routine until a state prosecutor approached the lectern.

Deputy Atty. Gen. Kevin R. Vienna was there to urge three judges on the U.S. 9th Circuit Court of Appeals to uphold murder conviction against Johnny Baca for two 1995 killings in Riverside County. Other courts had already determined that prosecutors had presented false evidence in Baca's trial but Vienna had barely started his argument when the pummeling began.

Judge Alex Kozinski asked Vienna if his boss, Atty. Gen. Kamala D. Harris wanted to defend a conviction "obtained by lying prosecutors." If Harris did not back off the case, Kozinski warned, the court would "name names" in a ruling that would not be "very pretty."

Judge Kim Wardlaw wanted to know why Riverside County prosecutor presented a murder-for-hire case against the killer but did not charge the man he said had arranged the killings.

"It looks terrible," said Judge William Fletcher. The January hearing in Pasadena, posted online under new 9th Circuit policies, provided a rare critical examination of murder case in which prosecutors presented false evidence but were never investigated or disciplined.

The low-profile case probably would have gone unnoticed if not for the video, which attorneys emailed to other attorneys and debated on blogs.

In a series of searches [See Misconduct, B

PANEL CALLS

OUT STATE COURTS

Epidemic of prosecutorial misconduct

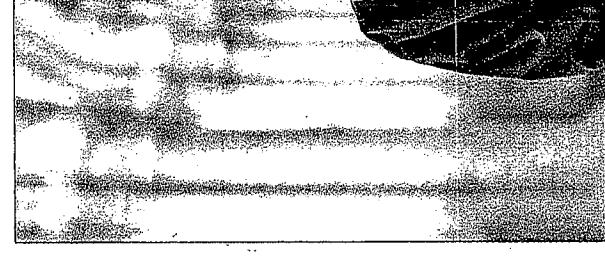
Misconduct, from Bl... questions, the three judges expressed frustration and anger that California state judges were not cracking down on prosecutorial misconduct. By law, federal judges are supposed to defer to the decisions of state court judges.

Prosecutors "got caught his time but they are going to keep doing it because they have state judges who are willing to look the other way," Kozinski said.

Santa Clara University law professor Gerald Veilmen said the judges' questions and tone showed they had lost patience with California courts. State judges are supposed to refer errant lawyers, including prosecutors, to the state bar for discipline, but they rarely do, Veilmen said.

"It is a cumulative type thing," Veilmen said. "The 9th Circuit keeps seeing this misconduct over and over again. This is one way they can really call attention to it."

A 2010 report by the Northern California Innocence Project cited 707 cases in which state courts found prosecutorial misconduct over 11 years. Only six of the prosecutors were disciplined, and the courts upheld 80% of the convictions in spite of the improprieties,



GINA FERAZZI Los Angeles Times

JUDGE ALEX KOZINSKI warned that the federal court would take action if California's attorney general defended a ruling "obtained by lying prosecutors."

adopted son, was working as a houseboy for the couple. The A jailhouse informant testified that Baca had confided the son planned the killing. The two were going to split Adair's inheritance, the informant said. Other witnesses testified that Adair was planning to disinherit his son, who was never charged in the case.

Baca was tried twice and found guilty both times. A state appeals court overturned the first verdict. The

testified he had asked for and received no favors. The prosecutor falsely corroborated that on the stand, Baca was sentenced to 70 years to life.

Patrick J. Hennessey Jr., who has represented Baca on appeal for nearly two decades, said he had never seen such an "egregious" case of prosecutorial misconduct.

"That is what bothered me," Hennessey said. "There was never a fair discussion of

no longer practices law could not be reached for comment.

Vinegrad also said he believed in the murder-for-hire case he presented, but that there was not enough evidence to charge the son. The informant's testimony against the son would not have been admissible under legal rules at the time, Vinegrad said.

Kozinski, who in the past has spoken out about an "epidemic" of prosecutorial misconduct, asked Vienna whether Harris was aware of the case. Vienna indicated she probably was not. Kozinski told him to get her attention within 48 hours. Harris would need to take action, her office wanted to avoid an embarrassing ruling, Kozinski said.

"Make sure she understands the gravity of the situation," Kozinski said, adding that the case "speaks very poorly for the attorney general's office."

Harris, a candidate for U.S. Senate, changed course. Her office decided last week not to oppose Baca's challenge.

Mike Hestrin, Riverside County's newly elected district attorney, did not concede that the prosecutors "misconduct" was intentional, but said his office would investigate the pro-

misconduct by upholding verdicts, a rare public criticism of her fellow judges. She suggested that state judges, who must be approved by voters, fear inciting the public's wrath. Federal judges are appointed for life.

"I understand why they do that," Wardlaw said. "They are elected judges. They are not going to be reversing these things."

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Vienna said he was not involved in the case at the time, but named others in the office.

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