

**EXPERT REPORT OF JUDGE MICHAEL D. MARCUS (RET.)**

I offer the following as an expert witness in the matter of *David Johns Bryson v. Robert H. Macy, et al.* in the United States District Court for the Western District of Oklahoma.

I am a retired Judge of the California State Bar Court and have been licensed to practice law in the State of California since January 1968. I was employed as a deputy district attorney in Los Angeles County, California from April 1968 until January 1985. During that time, besides trying misdemeanors and felonies throughout Los Angeles County, I was, inter alia, the deputy-in-charge of the Organized Crime Section (1976-1978), the deputy-in-charge of the Beverly Hills Area Office (1978-1981) and the deputy-in-charge of the Consumer Fraud Section (1982-1985). From February 1985 through October 1995, I was in the private practice of law in Los Angeles, emphasizing civil and criminal litigation. I was appointed by the California Supreme Court to the State Bar Court in July 1995 and took the oath of office for that position in November 1995. The California State Bar Court has original jurisdiction over all attorney discipline and regulation in the state. In 1999, I became the Supervising Judge of the State Bar Court's Hearing Department. I retired from the court in December 2001. I have been a mediator and arbitrator since January 2002. During the last thirty-eight years, I have also been involved as a teacher, lecturer, writer and professor of criminal law and procedure, including having taught and lectured for the National College of District Attorneys, the California District Attorneys Association, the Los Angeles District Attorney, the San Diego County District Attorney, the University of Southern California Law Center and Southwestern University School of Law. (My resume is attached to this report.)

The following are my publications for the last ten years:

*Trial Preparation for Prosecutors, 2<sup>nd</sup> Edit.*, Lexis Publications, copyright 2002 and 2004 supplement. I am writing a third edition for Lexis at this time.

"Mediation Messages" and "Arbitration Insights," monthly comments and analysis of relevant issues and law as to mediations and arbitrations, 2003 - present.

"Opposition to Permanent Disbarment," *Lawyer* (Orange County Bar Association Magazine), June 2006, vol. 48, no. 6.

"Mediation: Why It Works and How to Use It Effectively," *Cruise and Carrier Legal Update* (a publication of Kaye, Rose & Partners), July 2005.

"Ethical Issues in Mediation and Arbitration," Los Angeles County Bar Ethics Seminar, November 2004.

"Behavior Modification," *Los Angeles Lawyer*, September 2004, vol. 27, no. 6.

"*Rojas*: Writings Prepared for Mediations are Confidential," Los Angeles County

Bar Update, September 2004, vol. 24, no. 8.

"17 Ways to Jeopardize Your Bar License," Los Angeles Association of Consumer Lawyers, Las Vegas, August 2004.

"Courtroom Conduct: the Do's and Don'ts of Litigation," Association of Southern California Defense Counsel, Los Angeles, January 2004.

"Understanding the Written Mediation Agreement," *Advocate* (Consumer Attorneys Association of Los Angeles), January 2004.

"The Use of Experts and Consultants at Mediation," The American Board of Trial Advocates, Universal City, California; December 2003.

"Pre-Trial Motions," Los Angeles County Bar Association's "The Nuts and Bolts of Criminal Law Practice," Los Angeles February 2001.

"What Attorneys Can and Cannot Do in the Courtroom," 1998 Continuing Education of the Bar (CEB) programs in San Francisco, Sacramento, Los Angeles, Costa Mesa and San Diego.

In the last four years, I have testified as an expert in *Lyman Garden Apartments, et al. v. Coudert Brothers, et al.* (Los Angeles County Superior Court.)

I have been retained by Mark Barrett, Esq., at an hourly rate of \$425.00, to provide expert testimony in *Bryson v. Macy, et al.*, regarding the need for written policies and procedures by a prosecution office; the training a prosecution office should provide its attorneys in general and specifically regarding the use of forensic evidence at trial; a prosecutor's obligation to provide a defendant with exculpatory material; the duty of a prosecutor not to interfere with a defendant's testing of physical evidence; the duty of a prosecutor to proceed expeditiously when considering whether or not to retry a defendant when that person's conviction has been reversed and the relationship between a prosecution office and experts where the prosecutor is partially financing that expert entity.

I have considered the following writings in forming my opinions in this matter: the complaint; Robert Macy's four volumes of deposition testimony in this matter; the 1983 trial testimony of Joyce Gilchrist in the trial of Mr. Bryson; the final arguments of the prosecutor and defense counsel in that trial; vol. 3 of Gilchrist's deposition in this matter; the April 22, 1997 and March 6, 2003 SERI reports by Brian Wraxall; Joyce Gilchrist's June 6, 1988 and September 6, 1996 notes; the April 4, 2001 FBI report as to Gilchrist; Brian Boshell's January 16, 2001 memorandum; Brian Boshell's February 2008 deposition in this matter; 1980 ABA Prosecution Function Standard 3-3.11; 1993 ABA Prosecution Function Standard 3-3.11; ABA Model Rule 3.8 re a prosecutor's special responsibilities; selected portions of the National Prosecution Standards, 2<sup>nd</sup> Edition; Bill Ciity's September 21, 2001 report re Gilchrist; the deposition of Bill Weaver in the *Pierce v. Gilchrist, et al.* matter; the National District Attorneys Association's 1977 National Prosecution Standards; the National District Attorneys Association's "Handbook

for the Rural and Small Office Prosecutor" and appellate cases, including *Berger v. United States* (1935) 295 U.S. 78.

In forming my opinions about the issues for which I have been retained, I have considered that the Oklahoma County, Oklahoma District Attorney's Office, at the time of Mr. Bryson's arrest and prosecution, consisted of one office located in Oklahoma City; that Mr. Macy was the elected District Attorney at all relevant times; that other than an informal mentor system, there was no organized training program of prosecutors; that the only training for prosecutors in Mr. Macy's office was provided twice a year by a State of Oklahoma prosecution association and occasional visits by some prosecutors to courses conducted by the National College of District Attorneys; that prosecutors in Mr. Macy's office were occasionally advised by superiors when an appellate decision was critical of the manner in which a case was prosecuted but that was no system for providing the prosecutors of all applicable decisions issued by the United States Supreme Court, the 10<sup>th</sup> Circuit Court of Appeals, the United States District Court for the Western District of Oklahoma, the Oklahoma Supreme Court and the Oklahoma appellate courts; that Mr. Macy's office did not have any written procedures, policies or standards regarding the operation of his office, including the providing of exculpatory material to the defense, the use of expert witnesses and the manner in which trials shall be conducted; that Joyce Gilchrist was employed by the Oklahoma City Police Department as a forensic chemist; that she appeared regularly as an expert for Mr. Macy's office concerning the identification of hair evidence in homicide and rape cases; that prosecutors in Mr. Macy's office knew at the time that they used hair evidence at trial that it should be used only to exclude rather than identify a suspect; that Barry Albert, a senior prosecutor in Mr. Macy's office who prosecuted Mr. Bryson, knew or should have known of the status of hair evidence; that Mr. Macy's office provided funding to the laboratory in which Joyce Gilchrist worked; that, after Mr. Bryson's conviction, Mr. Macy's office obstructed his efforts to test through the DNA process some of the physical evidence used against him in his trial and that, after a DNA examination of the evidence excluded Mr. Bryson as the perpetrator and the Appellate Court ordered Mr. Macy and his office to decide whether or not to retry Mr. Bryson, that Mr. Macy unnecessarily delayed in deciding not to retry Mr. Bryson.

Based upon all of the above, it is my opinion that:

The District Attorney's administration under Mr. Macy was derelict in its failure to have and maintain written rules and procedures as to the management of his office, including the trial of criminal cases and its relationship with experts with which it had a financial relationship and that, because of this failure, the prosecutors in that office had no formal, established standards regarding the use and application of their prosecutorial powers, including the requirement that they provide, without request, all matter which might tend to exonerate a defendant or lead to a lesser punishment. Additionally, because that office had a financial interest in the Oklahoma City Police Department's crime laboratory, it had a vested interest in the opinions produced by that entity and that this fact should have been provided to Mr. Bryson.

Mr. Macy's administration did not have a reliable system of training its prosecutors and that, because of this failure, the prosecutors had to rely on an informal mentoring

system and occasional outside courses offered by the state prosecution association and the National College of District Attorneys.


The training and ongoing education of the prosecutors should have included a prosecutor's ethical obligations, including providing, without request, all material favorable to the accused as to guilt or punishment, the use of and evaluation of forensic evidence and the use and preparation of expert witnesses. The necessary training and education of prosecutors assures that they comply with established case law and ethical standards, which impose a heavy burden on them to make certain that they approach their cases with the viewpoint, to paraphrase *Berger v. United States*, that justice is achieved rather than they just win their cases.

The lack of training and the failure to not have written rules and procedures resulted in prosecutors in that office not being sufficiently aware of their responsibility to see that defendants received due process of law.

That although Mr. Macy's office had no jurisdiction of Mr. Bryson's case after the latter had been sentenced for the rape conviction, it continued to have an ethical obligation to make certain that Mr. Bryson was accorded justice. Accordingly, when Mr. Bryson sought to test the physical evidence in his trial, Mr. Macy's office should have accommodated rather than thwarted that request. Additionally, after DNA testing exonerated Mr. Bryson, Mr. Macy had an obligation to decide expeditiously whether or not it was going to fight Mr. Bryson's release from prison.

I reserve the right to modify my opinions in the event I am provided any new material in this case.

Date: December 4, 2008



Michael D. Marcus